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

Judgment reserved on: 18.03.2025
Judgment pronounced on: 01.07.2025

\+ **O.M.P. (COMM) 125/2025 & I.A. 6896/2025, I.A. 6897/2025, I.A. 6898/2025**

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

versus

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

\+ **O.M.P. (COMM) 126/2025 & I.A. 6926/2025, I.A. 6927/2025, I.A.6928/2025**

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

versus

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

For Petitioners: Mr. Sudhir Nandrajog, Sr. Adv. with Mr. Nishant Awana, Ms. Rini Badoni, Ms. Rebecca Mishra, Ms. Parul Yadav, Advs.

For Respondents: Mr. Sandeep Sethi, Sr. Adv. with Mr. Krishna Vijay Singh, Mr. Manish Dembla, Mr. Pradyuman Sewar, Ms. Vaishnavi Chitneni, Mr. Shubham Kaushik, Advs.

CORAM:
HON'BLE MR. JUSTICE JASMEET SINGH

J U D G M E N T

1. These are petitions filed under section 34 of Arbitration and Conciliation Act, 1996 (***"1996 Act"***) seeking setting aside of the Arbitral Award dated 13.11.2024 passed by the Arbitral Tribunal (***"AT"***).

2. Since both the petitions were heard together and the submissions of the learned counsel for the parties are identical in both the petitions, the said petitions are decided by this common judgment.

3. The only difference between O.M.P. (COMM) 125/2025 and O.M.P. (COMM) 126/2025 is that in O.M.P. (COMM) 125/2025, the parties entered into an agreement for construction of Dindigul-Theni Section and Theni-Kumili Section in the State of Tamil Nadu. In O.M.P. (COMM) 126/2025, the parties entered into an agreement for construction of Trichy - Karaikudi Road section including the Trichy bypass in the State of Tamil Nadu.

FACTUAL BACKGROUND

4. In the present case, the petitioner is the National Highways Authority of India, the respondent No. 1 is a Bank being the claimant in the arbitration proceedings and the respondent No. 2 is the Concessionaire.

5. The petitioner and the respondent No. 2 entered into a Concession

Agreement dated 12.07.2010 (***"Concession Agreement"***) for the "Two-laning with paved shoulder of Dindigul-Theni Section from Km 2.750 to Km 73.400 of NH-45 (Extn.) and Theni-Kumili Section of NH-220 from Km 215.500 to Km 273.600 in the State of Tamil Nadu under NHDP Phase - III on a Design, Build, Finance, Operate and Transfer (***"DBFOT"***) Annuity basis" (***"Project Highway"***). The construction of the Project Highway was to be completed within 24 months from the appointed date. The appointed date was declared as 01.09.2011, and accordingly the Scheduled Two Laning Completion Date (***"SCOD"***) was 31.08.2013.

6. On 08.01.2011, the respondent No. 1 and respondent No. 2 entered into a Common Loan Agreement to tune of Rs. 198 crores. It is pertinent to note that South Indian Bank Limited (***"SIB"***) executed the Common Loan Agreement as a lender, Lenders' Agent and Security Agent and disbursed a sum of Rs 100 crores in the Escrow Account while Union Bank of India signed the said agreement as a lender and disbursed a sum of Rs 98 crores in the Escrow Account. The petitioner stipulated certain modifications in the Common Loan Agreement, which were incorporated through the Supplementary Common Loan Agreement dated 15.04.2011.On 04.05.2011, an Escrow Agreement (***"EA"***) was executed between the parties herein. A Tripartite Substitution Agreement dated 31.05.2013 (***"SA"***) was also executed between the parties herein in the format provided in Schedule-V to the Concession Agreement.

7. During the execution of work, several events took place which

affected the progress of work and resulted in delays. On 22.09.2014, respondent No. 2 wrote to the Independent Engineer (***"IE"***) appointed under the Concession Agreement requesting for grant of Provisional Completion Certificate (***"PCC"***) under the Concession Agreement by stating that it had completed all works in the land handed over by the petitioner within 90 days from the appointed date.

8. The IE *vide* its letter dated 07.11.2014 addressed to the Project Director of the petitioner stated that there had been major problems in handing over the "Right of Way" and "Right to Access" for construction of the highway right from the beginning of the Project Highway by the petitioner. Further, the respondent No. 2 had more or less completed the works in the length of the hindrance-free Project Highway available to it. Relying on Article 14.2 of the Concession Agreement, IE further stated that a Completion Certificate has to be issued by IE on completion of construction works once tests are successful and that the issue of PCC once requested by the Concessionaire i.e respondent No. 2 cannot be withheld, if the reasons for the delay in completion of the whole stretch of the Project Highway is attributable to the petitioner for delay in handing over of land and State Government Authorities in the case of delay in shifting of utilities as per Articles 10.3.5, 14.3.1 and 11.2 of the Concession Agreement. The IE also stated that the respondent No. 2 was entitled to Annuity Payment of Rs. 20.5 crores as per Article 27.1.1 of the Concession Agreement since the delay in completion of the Project within the SCOD i.e. 31.08.2013 was due to the delay in handing over

of encumbrance free and vacant access to the respondent No. 2 by the petitioner.

9. On 10.06.2015, the petitioner issued a Cure Period Notice calling upon respondent No. 2 to cure the alleged defaults within 60 days from the date of receipt of the notice. Respondent No. 2 *vide* its reply dated 16.07.2015, amongst other reasons, stated that (i) land acquisition and consequent non availability of land, (ii) delay in finalization of the utility shifting estimates and iii) problem of borrow earth areas in Tamil Nadu and non- cooperation of State Government in issuing permits for procurement of the same lead to the delay and further disputed that 100% of the land had been handed over to respondent No. 2.

10. The petitioner issued a Notice of Intention to Terminate the Concession Agreement under Article 37.1.2 of the Concession Agreement. Respondent No. 2 *vide* its reply dated 26.08.2015 denied the alleged breach on its part, and reiterated that the reasons for delays caused in the Project Highway were solely attributable to the petitioner.

11. On 27.08.2015, Respondent No. 2 and SIB entered into a Second Supplementary Common Loan Agreement to bring on record the factum of the delay in the Project, extension of commercial operations, anticipation of provisional commercial operations being accepted by the petitioner among others. On 28.09.2015, the petitioner agreed to keep the 'Notice of Intention to Terminate' dated 13.08.2015 in abeyance for a period of 90 days subject to certain

conditions.

12. Accordingly, the respondent No. 2 submitted the revised work program alongwith Extension of Time (***"EOT"***) proposal for completion of balance work *vide* letter dated16.10.2015 and infused Rs. 6.80 Cr from its own sources. Thereafter, several Supplementary Common Loan Agreements were executed.

13. The IE *vide* its letter dated 30.09.2016 recommended that since majority of work had been completed by respondent No. 2 and respondent No. 2 had executed an undertaking for completion of the balance works, the PCC should not be withheld and must be issued at the earliest for the completed portion of the project.

14. After inspection carried by the Chief General Manager (Tech) & Regional Officer, Chennai, the petitioner also confirmed its concurrence with IE's recommendation to award PCC and conveyed the petitioner's recommendation for issuance of PCC. Thereafter, PCC was granted on 08.12.2016.IE *vide* its letter dated 17.12.2016 to the respondent No. 2 informed that the PCC had been kept in abeyance until the completion of the Theni Bypass, as was agreed by the respondent No. 2 qua the Supplementary Agreement.

15. As alleged by the petitioner that respondent No. 2 was violating the terms of the Concession Agreement, the petitioner issued 'Suspension Notice' under Article 36.1 of Concession Agreement to the respondent No. 2. Respondent No. 1 also issued a Notice of Financial Default dated 26.03.2019 to the respondent No. 2 informing about the material breach of the terms of the Common Loan Agreement. Respondent No.

2 replied to the said notice, however, the petitioner issued Termination Notice dated 22.05.2019 thereby terminating the Concession Agreement w.e.f. 09.04.2019 and informed the respondent No. 2 that it had taken over the Project Highway.

16. Consequently, respondent No. 1 wrote various letters to the petitioner to release the Termination Payment amounting to Rs. 393,49,97,509 along with the applicable interest. The petitioner denied depositing the Termination Payment into the Escrow Account *vide* its letter dated 24.06.2019 and stated that since the Commercial Operation Date (***"COD"***) for the Project could not be achieved and the Concession Agreement was terminated prior to the occurrence of COD, no Termination Payment for the Project was payable. In its letter dated 24.06.2019, the petitioner also stated that the letter dated 17.12.2016 issued by the IE keeping the PCC in abeyance had been issued under the instructions of the petitioner.

17. As the petitioner failed to deposit the said Termination Payment into the Escrow Account, respondent No. 1 filed section 9 petition before this Court being OMP (I) COMM. No. 406 of 2019.

18. In the meantime, respondent No. 1 also invoked arbitration *vide* its notice dated 28.01.2020 under Clause 10 of the EA and Clause 8 of the SA. The said clauses are extracted below:-

> ***"Clause 10 of EA***
>
> *10 DISPUTE RESOLUTION*
>
> *10.1 Dispute resolution*
>
> *10.1.1 Any dispute, difference or claim arising out of or in*

connection with this Agreement, which is not resolved amicably, shall be decided finally by reference to arbitration to a Board of Arbitrators comprising one nominee of each Party to the dispute, and where the number of such nominees is an even number, the nominees shall elect another person to such Board. Such arbitration shall be held in accordance with the Rules of Arbitration of the International Centre for Alternative Dispute Resolution, New Delhi (the "Rules") or such other roles as may be mutually agreed by the Parties, and shall be subject to the provisions of fee Arbitration and Conciliation Act, 1996"

Clause 8 of SA

8 DISPUTE RESOLUTION

8.1 Dispute resolution

8.1.1 Any dispute, difference or claim arising out of or in connection with this Agreement which is not resolved amicably shall be decided by reference to arbitration to a Board of Arbitrators comprising one nominee each of the Authority, Concessionaire and the Lenders' Representative. Such arbitration shall be held in accordance with the Rules of Arbitration of the International Centre for Alternative Dispute Resolution, New Delhi (the "Rules") or such other rules as may be mutually agreed by the Parties, and shall be subject to provisions of the Arbitration and Conciliation

Act, 1996."

19. As the respondent No. 2 failed to appoint its nominee arbitrator, respondent No. 1 filed section 11 petition being Arb (P) No. 822 of 2021 wherein this Court appointed the third arbitrator. OMP (I) COMM. No. 406 of 2019 was also disposed of with liberty to approach the AT.

20. The AT, after hearing the parties and the evidences placed on record, passed the impugned Arbitral Award dated 13.11.2024. Relevant paragraphs of the said Award are extracted below:-

"XI. Tribunal's Summary Findings

307. The Tribunal answers the issues as follows:

i. The claims with regard to the Termination Payment are not beyond the scope of Escrow Agreement and/or the Substitution Agreement but the claims with regard to Debt Due are beyond the scope of the present arbitration.

ii. The Claimant is entitled to seek deposit of the Termination Payment with interest thereon by NHAI in the Escrow Account. The Claimant is not entitled to its claim of 90% Debt Due and interest thereon from the Respondent No. 2 being (a) beyond the scope of the present arbitration and (b) premature.

iii. The issue of "Debt Due" can be termed as a "dispute" under the arbitration clause of the Escrow Agreement or the Substitution Agreement but the same does not arise in the present arbitration.

iv. The issue of "Debt Due" was not referred to arbitration in accordance with notice under Section 21 of the Arbitration and Conciliation Act, 1996.

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

vi. Respondent No. 2 is liable to deposit in the Escrow Account, i.e., account no. 0246073000005523 with the Secunderabad Branch of SIB, the Termination Payment of Rs. 229.50 crore on account of termination of the Concession Agreement.

vii. Respondent No. 2 is not liable to pay 90% of the alleged Debt Due of Rs. 2,58,13,11,357/- or any other amount to the Claimant as damages for non deposit of Termination Payment in the Escrow Account.

viii. The Claimant cannot claim damages on account of default of Respondent No. 2 in not depositing the Termination Payment. There was no such obligation of NHAI towards the Lenders (i.e., the Claimant). The obligation was to pay the Concessionaire the Termination Payment by depositing the same in the Escrow Account. The remedy for delay in making such deposit was provided in

Article 37.3.3 of the Concession Agreement by payment of interest on the Termination Payment at the rate of 3% above the Bank Rate into the Escrow Account.

ix. The Claimant is not entitled to a sum of Rs.95,21,85,647/- from Respondent No. 2 towards alleged pre-reference interest on the alleged 90% Debt Due at the alleged rate of 12% p.a. for the period from 16.04.2019 to 12.05.2022 as purported damages for non-deposit of Termination Payment in the Escrow Account.

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

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

xii. The Claimant is entitled to costs. However, as the Claimant has only partially succeeded in respect of its claims, it would be reasonable to award about half of the costs claimed. The Claimant has claimed Rs. 1,13,76,548. Accordingly, the Claimant would be entitled to Rs.

56,88,274. However, the Claimant was also directed to deposit, in terms of the Arbitration and Conciliation Act, 1996, a sum of Rs. 34,50,000 for all the arbitrators, as Respondent No. 2 had failed to deposit its full share of fees. Thus, the Claimant is entitled to a payment of Rs. 56,88,274 plus Rs. 34,50,000, i.e., Rs. 91,38,274/- towards costs from Respondent No. 2. The Claimant is also entitled to simple interest at the rate of 9% per annum on the costs, to be calculated from the date of the award till realisation.

XII. Award Final Orders

308. For the reasons provided above, the Tribunal DECIDES, DIRECTS and ORDERS as follows:

i. Respondent No. 2 is directed to deposit into the Escrow Account, by way of Termination Payment, a sum of Rs. 229.50 crore, along with interest thereon at the rate of 3% above the Bank Rate with effect from 16.4.2019 till the date of such deposit.

ii. Respondent No. 2 is directed to pay the Claimant a sum of Rs. 91,38,274/- towards costs.

iii. Respondent No. 2 is directed to pay the Claimant simple interest at the rate of 9% per annum on the costs, to be calculated from the date of the award till the date of realisation."

21. The petitioner being aggrieved by the passing of the impugned Award, approached this Court by filing the present petitions.

SUBMISSIONSON BEHALF OF THE PETITIONER

22. Mr. Sudhir Nandrajog, learned Senior Counsel for the petitioner vociferously urges that the Concession Agreement did not form part either of the EA or the SA. Learned AT erred in arriving such a conclusion as the Concession Agreement was merely annexed to EA and SA as annexure and the terms of the Concession Agreement were never made "part and parcel" of EA and SA. The intention of annexing the Concession Agreement in EA and SA can be deduced from Clause 2 and 3 of the SA and Clause 2.5 and 2.6 of the EA. It is also submitted that the Concession Agreement was annexed to the EA and SA only for the reason that the non-signatory to Concession Agreement, i.e., the respondent No. 1 is aware of the terms of the Concession Agreement so as to enable the respondent No. 1 to exercise its rights under Clause 2 and 3 in the SA and Clause 2.5 and 2.6 of the EA.

23. The mere factum of the recital annexing the Concession Agreement to the EA and SA does not make the Concession Agreement part and parcel of EA and SA in the absence of a clear or specific indication that the Concession Agreement in its entirety (including the arbitration clause) was intended to be made part of the Escrow and Substitution Agreements. Reliance is placed on ***M.R. Engineers & Contractors (P) Ltd. v. Som Datt Builders Ltd., (2009) 7 SCC 696.***

24. Learned senior counsel further submits that the AT incorrectly held that the act of the IE in keeping the PCC in abeyance was *non-est, void ab-initio* and beyond the scope and powers of the IE. Learned AT

failed to consider that in terms of clause 14.3.2 of Concession Agreement, PCC could have only been issued upon completion of 75% of the total length of the Project Highway. Admittedly, the respondent No. 2 had only completed 90.671 KM (which was less than 75%) and therefore, the IE rightly corrected its mistake (of issuing PCC) by keeping the same in abeyance (*vide* its Letter dated 17.12.2016) until 75% of the total length of the Project Highway was completed. The AT failed to consider that in terms of clause 37.3.1 of the Concession Agreement, the Termination Payment shall not be due or payable on account of a respondent No. 2's default occurring prior to COD. Therefore, Termination Payment never became due and payable since admittedly the Project Highway had not achieved 75% completion and CoD. Pertinently, the issue of withholding PCC is sub judice before an AT wherein the petitioner and respondent No. 2 are parties.

25. He further submits that the learned AT has wrongly concluded that there is no requirement for the Concessionaire to demand Termination Payment from the Authority. In this regard, he states that the learned AT has given complete go-by to the categoric and unambiguous provisions of clause 37.3.3 of the Concession Agreement. This interpretation is altering the binding terms of the Concession Agreement and hence, such a finding is patently illegal. In the present case, despite the learned AT was not constituted under the Concession Agreement and the same was beyond the scope of reference, learned AT erred in altering the binding terms of the Concession Agreement.

26. Learned senior counsel further submits that Clause 5.1 of the SA nowhere assigns any right to respondent No. 1 to call upon the petitioner to deposit the Termination Payments, which have not become due and payable. Clause 5.1 of the SA only restricts to the Termination Payments which have become "due and payable". As such, Clause 5 is subject to Clause 37.3.3 of Concession Agreement. Learned AT erred in holding that calculation of Termination Payment was a "mechanical exercise" whereas the two preconditions for the Termination Payments to become "due and payable" are that there must be demand by the respondent No. 2 and the respondent No. 2 must submit necessary particulars. In the present case, both are missing.

27. The petitioner could not have been directed to deposit Termination Payments in accordance with Clause 3.2 of the EA as the same never became "due and payable". For Termination Payment to become "due and payable", the respondent No. 2 as well as the AT, were obligated to follow the procedure prescribed under clause 37.3.3 of the Concession Agreement.

28. He further submits that the Termination Payment under the Concession Agreement is not payable if termination happens due to Concessionaire's default prior to COD. Relying on several clauses of the Concession Agreement and more particularly on Article 37.3.1, it is submitted that the COD is achieved upon issuance of PCC which is issued by IE. In the present case, COD was not achieved as the PCC which was issued by IE was kept in abeyance by the IE as 75% of the

total length of the Project Highway was not completed by the respondent No. 2 in terms of clause 14.3.2 of Concession Agreement. Learned AT failed to consider the same. Therefore, issuance of PCC, achieving COD, raising a demand by the respondent No. 2 for the Termination Payment, and providing necessary particulars, all were a *sine qua non* to the claim of Termination Payment. The said objection was taken by the petitioner before the learned AT in its Statement of Defense (***"SOD"***) and the learned AT failed to consider the same and concluded that PCC cannot be kept in abeyance without considering Clause 14.5 of Concession Agreement.

29. Lastly, learned senior counsel submits that the AT, in any case, could not have arrived at the figure of Rs. 229.50 Crores as Termination Payments. Adjudication on the quantum of Termination Payments is beyond the scope of reference as there is no provision in the EA and SA which enables the AT or the parties to these agreements to calculate Termination Payment. The Termination Payment can only be adjudicated when the disputes arise out of the Concession Agreement. The AT also erred in holding that the petitioner did not dispute the calculation made by the respondent No. 1 *qua* the Termination Payment. Reliance is placed on ***Indian Oil Corporation Limited vs. Shree Ganesh Petroleum Rajgurunagar, 2022 4 SCC 463.***

SUBMISSIONS ON BEHALF OF THE RESPONDENT NO. 1

30. Mr. Sandeep Sethi, learned Senior Counsel for the respondent No. 1 submits that the petitioner's argument are effectively challenging the interpretations of the contractual scheme by the AT which cannot be

interfered with. It is settled law that the interpretation of terms of the agreements are absolutely within the domain of the AT and so long as the interpretation given to the terms of a contract by the AT is a possible or plausible one, the Court cannot substitute the AT's view with its own under Section 34 of 1996 Act.

31. Learned senior counsel further submits that the petitioner had an absolute obligation to deposit the Termination Payment in the Escrow Account in terms of Clause 3.2 of the EA read with Article 37.3 of the Concession Agreement. The contractual arrangement effectively guaranteed that the Lender Banks would be entitled to receive payments into the Escrow Account, allowing them to withdraw up to 90% of the Debt Due. Reliance is placed on ***National Highways Authority of India vs. Punjab National Bank & Ors., 2017 SCC OnLine Del 11312*** (***"PNB I"***).

32. Had the petitioner deposited the Termination Payment into the Escrow Account as required, the Lender Banks would have been able to appropriate an amount equal to at least 90% of the Debt Due from the Escrow Account, in accordance with Clause 4.2 of the Escrow Agreement which is extracted below:-

> *"4.2 Withdrawals upon Termination*
>
> *Upon Termination of the Concession Agreement, all amounts standing to the credit of the Escrow Account shall, notwithstanding anything in this Agreement, be appropriated and dealt with in the following order:*
>
> *(a) all taxes due and payable by the Concessionaire for and*

in respect of the Project Highway;

(b) 90% (ninety per cent) of Debt Due excluding Subordinated Debt;

(c) outstanding Concession Fee;

(d) all payments and Damages certified by the Authority as due and payable to it by the Concessionaire pursuant to the Concession Agreement, including {Premium,} repayment of Revenue Shortfall Loan and any claims in connection with or arising out of Termination;

(e) retention and payments arising out of, or in relation to, liability for defects and deficiencies set forth in Article 39 of the Concession Agreement;

(f) outstanding Debt Service including the balance of Debt Due;

(g) outstanding Subordinated Debt;

(h) incurred or accrued O & M Expenses;

(i) any other payments required to be made under the Concession Agreement; and

(k) balance, if any, in accordance with the instructions of the Concessionaire:

Provided that the disbursements specified in Sub-clause (j) of this Clause 4.2 shall undertaken only after the Vesting Certificate has been issued by the Authority."

33. Consequently, the Lender Banks (respondent No.1) were directly impacted by NHAI's failure to deposit the Termination Payment into

the Escrow Account. The AT has rightly interpreted the contractual scheme and its interpretation of the Contracts in question i.e. EA, SA, and Concession Agreement in consonance with ***National Highways Authority of India v. Punjab National Bank, 2021 SCC OnLine Del 3413 ("PNB II").***

34. He further submits that the AT had the jurisdiction to entertain the claims. Clause 3.2 of the EA obligates the petitioner to deposit Termination Payment into the Escrow Account as and when it becomes due and payable. Respondent No.1 demanded Termination Payment from the Petitioner *vide* letter dated 01.04.2019. According to Respondent No.1, the Termination Payment became due and payable on 16.04.2019. Despite the termination of the Concession Agreement by the petitioner, the petitioner failed to deposit the Termination Payment in the Escrow Account. The petitioner's failure to deposit the same constitutes a violation of clause 3.2 of the EA and therefore the dispute clearly fell within the ambit of arbitration clause of the EA.

35. The EA is a Tripartite Agreement executed between: (i) SIB in its capacity as "Lender's Representative" as well as "Escrow Bank"; (ii) respondent No. 2; and (iii) the petitioner. Similarly, the SA is also a Tripartite Agreement executed between respondent No.1, respondent No.2, and the petitioner. Recital A of the EA and SA is identically worded and *inter alia* states that a copy of the Concession Agreement is "annexed hereto and marked as Annex – A to form part of this Agreement.". Hence, the argument that Concession Agreement is not

part and parcel is wholly incorrect. In this regard, reliance is placed on para 184 and 202 of the impugned Arbitral Award.

36. Learned senior counsel further urges that the dispute resolution clause of EA i.e. Clause 10.1 is widely worded and includes within its ambit, "*Any dispute, difference or claim arising out of or in connection with this Agreement…*". The invocation letter which specifically states that NHAI had wrongfully refused to deposit Termination Payment in the Escrow Account. The said failure on the part of the petitioner was referred to as the dispute in the invocation letter.

37. Reliance is heavily placed on the judgment passed by this Court in ***PNB II*** wherein similar issue was raised and the Award passed by the AT was upheld. The said Award was also upheld by the Hon'ble Supreme Court.

38. The argument is raised by the petitioner that quantum of Termination Payment could not have been adjudicated by the AT as it is beyond the scope of reference. The said contention was never raised before the AT and also, the petitioner did not dispute the calculation/quantum of Termination Payment. Further, the AT has rightly held that the formula for calculating Termination Payment is provided in Clause 37.3 of the Concession Agreement. In this regard, my attention is drawn to para 157 and 158 of the Arbitral Award.

39. Lastly, Mr. Sethi submits that there was no provision in the Concession Agreement to put the PCC in abeyance. Relying on several articles of the Concession Agreement, he submits that the IE could not withhold the PCC for reason of any work remaining

incomplete if the delay in completion thereof is attributable to NHAI. The IE recommended issuance of PCC in March 2014 but the recommendation was rejected by the petitioner. The IE issued the PCC through its letter dated 08.12.2016 while requiring the Concessionaire to execute a SA before 25.12.2016 and completing the balance works by 31.10.2017. Merely nine days after the issuance of the PCC, and much before the expiry of the date for execution of the SA and completion of balance works (31.10.2017), the IE suddenly issued a letter dated 17.12.2016 stating that the PCC is kept in abeyance.

40. The AT has rightly held that the Concession Agreement does not contain any provision which provides that a PCC, once issued, can be either kept in abeyance or withdrawn. Further, once the IE issued the PCC, after being satisfied that the tests were successful and the requisite portion of the highway was complete, the PCC remained validly issued and it could not be withdrawn or kept in abeyance for any reason. In this view, the decision of the IE to keep the PCC in abeyance was invalid.

ANALYSIS AND FINDINGS

41. I have heard learned senior counsel for the parties and perused the material available on record.

42. The jurisdiction of this Court under section 34 of 1996 Act has been explained through a series of judgments rendered by the Hon'ble Supreme Court and this Court. I do not want to multiply the authorities on this aspect. It has time and again been reiterated that the challenge to an Arbitral Award is only to be seen through the limited

and specific grounds provided under section 34 of 1996 Act. The Arbitral Award can be set aside on the ground, *inter alia*, being in conflict with the public policy of India, patent illegality, violation of principles of natural justice. The said grounds have been dealt by the Hon'ble Supreme Court in ***Batliboi Environmental Engineers Ltd. v. Hindustan Petroleum Corpn. Ltd., (2024) 2 SCC* 375**. Relevant paragraphs from the said judgment are extracted below:-

> *"36. Under clause (a) to sub-section (2) to Section 34 of the A&C Act, a court can set aside an award on the grounds in sub-clauses (i) to (v), namely, when a party being under some incapacity; arbitration agreement is not valid under the law for the time being in force; when the party making an application under Section 34 is not given a proper notice of appointment of the arbitrator or the arbitration proceedings, or was unable to present its case; and when the composition of the Arbitral Tribunal or the arbitral procedure was not in accordance with the agreement between the parties, unless such agreement was in conflict with the mandatory and binding non-derogable provision, or was not in accordance with Part I of the A&C Act……*
>
> *41. ……..The public policy violation should be so unfair and unreasonable as to shock the conscience of the court. Arbitrator where s/he acts contrary to or beyond the express law of contract or grants relief, such*

awards fall within the purview of Section 34 of the A&C Act. Further, what would constitute public policy is a matter dependent upon the nature of transaction and the statute. Pleadings of the party and material brought before the Court would be relevant to enable the Court to judge what is in public good or public interest, or what would otherwise be injurious to public good and interest at a relevant point. So, this must be distinguished from public policy of a particular government.

45. Referring to the third principle in Western Geco [ONGC Ltd. v. Western Geco International Ltd., (2014) 9 SCC 263 : (2014) 5 SCC (Civ) 12], it was explained that the decision would be irrational and perverse if (a) it is based on no evidence; (b) if the Arbitral Tribunal takes into account something irrelevant to the decision which it arrives at; or (c) ignores vital evidence in arriving at its decision. The standards prescribed in State of Haryana v. Gopi Nath & Sons [State of Haryana v. Gopi Nath & Sons, 1992 Supp (2) SCC 312] (for short Gopi Nath & Sons) and Kuldeep Singh v. Delhi Police [Kuldeep Singh v. Delhi Police, (1999) 2 SCC 10 : 1999 SCC (L&S) 429] should be applied and relied upon, as good working tests of perversity. In Gopi Nath & Sons [State of Haryana v. Gopi Nath & Sons, 1992 Supp (2)

SCC 312] it has been held that apart from the cases where a finding of fact is arrived at by ignoring or excluding relevant materials or taking into consideration irrelevant material, the finding is perverse and infirm in law when it outrageously defies logic as to suffer from vice of irrationality. Kuldeep Singh [Kuldeep Singh v. Delhi Police, (1999) 2 SCC 10 : 1999 SCC (L&S) 429] clarifies that a finding is perverse when it is based on no evidence or evidence which is thoroughly unreliable and no reasonable person would act upon it. If there is some evidence which can be acted and can be relied upon, however compendious it may be, the conclusion should not be treated as perverse. This Court in Associate Builders [Associate Builders v. DDA, (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204] emphasised that the public policy test to an arbitral award does not give jurisdiction to the court to act as a court of appeal and consequently errors of fact cannot be corrected. Arbitral Tribunal is the ultimate master of quality and quantity of evidence. An award based on little evidence or no evidence, which does not measure up in quality to a trained legal mind would not be held to be invalid on this score. Every arbitrator need not necessarily be a person trained in law as a Judge. At times, decisions are taken acting on equity and such decisions can be just

and fair should not be overturned under Section 34 of the A&C Act on the ground that the arbitrator's approach was arbitrary or capricious.

……..

Further, "patent illegality" refers to three sub-heads : (a) contravention of substantive law of India, which must be restricted and limited such that the illegality must go to the root of the matter and should not be of a trivial nature. Reference in this regard was made to clause (a) to Section 28(1) of the A&C Act, which states that the dispute submitted to arbitration under Part I shall be in accordance with the substantive law for the time being in force. The second sub-head would be when the arbitrator gives no reasons in the award in contravention with Section 31(3) of the A&C Act. The third sub-head deals with contravention of Section 28(3) of the A&C Act which states that the Arbitral Tribunal shall decide all cases in accordance with the terms of the contract and shall take into account the usage of the trade applicable to the transaction. This last sub-head should be understood with a caveat that the arbitrator has the right to construe and interpret the terms of the contract in a reasonable manner. Such interpretation should not be a ground to set aside the award, as the construction of the terms of the contract is finally for the

arbitrator to decide. The award can be only set aside under this sub-head if the arbitrator construes the award in a way that no fair-minded or reasonable person would do."

Concession Agreement form part of the EA and SA

43. Learned senior counsel for the petitioner raised the first issue that the Concession Agreement does not form part and parcel of the EA and SA.

44. To my mind, the said argument is meritless.

45. It is necessary to extract the Recitals of EA and SA which read as under:-

Recital of EA

"WHEREAS:

A. The Authority has entered into a Concession Agreement dated 12th July 2010 with the Concessionaire (the "Concession Agreement") for Two – Laning with paved shoulders of the Dindigul-Theni and Theni-Kumili the Section NH 45(Extn) and NH 220 (km 2.750 to km 73.400 and from km 215.500 to km 273.600 (approx 134 km) on the Dindigul-Theni and Theni-Kumili in the State of Tamil Nadu on Design, built, Finance, operate and transfer on annuity (DBFOT Annuity) basis, and a copy of which is annexed hereto and marked as Annex-A to form part of this Agreement.

Recital of SA

"WHEREAS:

(A) The Authority has entered into a Concession Agreement dated 12th July 2010 with the Concessionaire (the "Concession Agreement") for Two – Laning with paved shoulders from km 2.750 to km 73.400 and km 215.500 to km 273.600 (approx 134 km) on the Dindigul-Theni and Theni-Kumili Section of National Highway No. 45 (Extn) and NH 220 in the State of Tamil Nadu on Design, built, Finance, operate and transfer on annuity (DBFOT Annuity) basis, and a copy of which is annexed hereto and marked as Annex-A to form part of this Agreement."

(Emphasis added)

46. On perusal of the above, the parties to the Agreements i.e. EA and SA have clearly mentioned that the Concession Agreement "forms part of this Agreement" which leaves no manner of doubt that the Concession Agreement was an integral part of these Agreements. Both EA and SA are tripartite agreements wherein all the parties herein were parties to the EA and the SA. Also, EA and SA are subsequent agreements to the Concession Agreement meaning thereby both these agreements were executed mainly for the purpose of the smooth functioning of the Project Highway.

47. The argument of the learned senior counsel for the petitioner that mere annexing does not make the Concession Agreement part and parcel of the EA and SA in the absence of a clear and unambiguous/declaration is devoid of merit as the wordings of the Recital quoted above clearly

indicates that the Concession Agreement has been made part of EA and SA which is a clear indication in itself.

48. Learned senior counsel for the petitioner has placed reliance on ***M.R. Engineers & Contractors (P) Limited (supra)*** and the operative paras of the said judgment are extracted below:-

> *"24. The scope and intent of Section 7(5) of the Act may therefore be summarised thus:*
>
> *(i) An arbitration clause in another document, would get incorporated into a contract by reference, if the following conditions are fulfilled:*
>
> *(1) the contract should contain a clear reference to the documents containing arbitration clause,*
>
> *(2) the reference to the other document should clearly indicate an intention to incorporate the arbitration clause into the contract,*
>
> *(3) the arbitration clause should be appropriate, that is capable of application in respect of disputes under the contract and should not be repugnant to any term of the contract.*
>
> *(ii) When the parties enter into a contract, making a general reference to another contract, such general reference would not have the effect of incorporating the arbitration clause from the referred document into the contract between the parties. The arbitration clause from another contract can be incorporated into the contract (where such reference is*

made), only by a specific reference to arbitration clause.

(iii) Where a contract between the parties provides that the execution or performance of that contract shall be in terms of another contract (which contains the terms and conditions relating to performance and a provision for settlement of disputes by arbitration), then, the terms of the referred contract in regard to execution/performance alone will apply, and not the arbitration agreement in the referred contract, unless there is special reference to the arbitration clause also.

(iv) Where the contract provides that the standard form of terms and conditions of an independent trade or professional institution (as for example the standard terms and conditions of a trade association or architects association) will bind them or apply to the contract, such standard form of terms and conditions including any provision for arbitration in such standard terms and conditions, shall be deemed to be incorporated by reference. Sometimes the contract may also say that the parties are familiar with those terms and conditions or that the parties have read and understood the said terms and conditions.

(v) Where the contract between the parties stipulates that the conditions of contract of one of the parties to the contract shall form a part of their contract (as for example the general conditions of contract of the Government where

the Government is a party), the arbitration clause forming part of such general conditions of contract will apply to the contract between the parties."

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

50. Relevant paragraphs dealing with the said issue from the Arbitral Award are extracted below:-

"96. There are as many as four agreements that are relevant to the present matter. The first is a Concession Agreement entered into between the Concessionaire (Respondent No. 1) and NHAI (Respondent No. 2). Next, there is a Common Loan Agreement between the lenders and the Concessionaire, whereby the lenders (the Claimant) advanced loans to the Concessionaire for the execution of

the Project. Importantly, this Common Loan Agreement was vetted / approved by NHAI. There are also Supplementary Loan Agreements. There are also two agreements between the Claimant, Respondent No. 1 and Respondent No. 2, i.e., an Escrow Agreement and a Substitution Agreement. The present arbitration is invoked under these two agreements. It is important to note that, as per the recitals of both these agreements, the parties have agreed that the Concession Agreement form part and parcel of these agreements as well. All these agreements are interlinked and define the rights and obligations of the parties, and relevant provisions from these are discussed in more detail in the following paragraphs.

xxxxxxxxxxx

126. It may be noted that as per Recital (A) of the Escrow Agreement, the Concession Agreement now forms a part of the Escrow Agreement.

xxxxxxxxxxx

132. It is noted that, as per Recital (A), it is clear that the Concession Agreement, which is annexed to this agreement, forms a part of the Substitution Agreement as well, in a manner similar to that which is provided in the Escrow Agreement.

xxxxxxxxxxx

184. Recital A of both the Escrow Agreement and

Substitution Agreement are identically worded and, among other things, states that a copy of the Concession Agreement is "annexed hereto and marked as Annex– A to form part of this Agreement." Thus, the Concession Agreement forms a part of both the Escrow Agreement and the Substitution Agreement as per the express words used in those agreements."

51. Hence, the AT has rightly held that the Concession Agreement forms part of the EA and SA. The conclusion of the AT calls for no interference. As a result, the said contention raised by the petitioner is rejected.

PCC cannot be kept in abeyance

52. Next submission advanced by the learned senior counsel for the petitioner is that the AT erred in holding that the PCC cannot be kept in abeyance. The sole argument of the petitioner, in this regard, is that as the Project Highway was not completed 75% of the total length in terms of clause 14.3.2 of Concession Agreement, and the PCC could not have been granted. The IE was right in keeping the PCC in abeyance. The respondent No. 2 had only completed 90.671 KM out of 133.793 being less than 75%

53. To deal with the said contention, for the sake of perusal, relevant clauses of the Concession Agreement are extracted below:-

*"**Clause 10***

10.3.2

Without prejudice to the provisions of Clause 10.3.1, the

Parties hereto agree that on or prior to the Appointed Date, the Authority shall have granted vacant access and Right of Way such that the Appendix shall not include more than 20% (twenty per cent) of the total area of the Site required and necessary for the Two- Lane with paved shoulders Project Highway, and in the event Financial Close is delayed solely on account of delay in grant of such vacant access and Right of Way, the Authority shall be liable to payment of Damages under and in accordance with the provisions of Clause 4.2.

10.3.4

The Authority shall make best efforts to procure and grant, no later than 90 (ninety) days from the Appointed Date, the Right of Way to the Concessionaire in respect of all land included in the Appendix, and in the event of delay for any reason other than Force Majeure or breach of this Agreement by the Concessionaire, it shall pay to the Concessionaire Damages in a sum calculated at the rate of Rs. 50 (Rupees fifty) per day for every 1,000 (one thousand) square metres or part thereof, commencing from the 91st (ninety first) day of the Appointed Date and until such Right of Way is procured.

10.3.5

Upon receiving Right of Way in respect of any land included in the Appendix, the Concessionaire shall complete the

Construction Works thereon within a reasonable period to be determined by the Independent Engineer in accordance with Good Industry Practice; provided that the issue of Provisional Certificate shall not be affected or delayed on account of vacant access to any part of the Site not being granted to the Concessionaire or any construction on such part of the Site remaining incomplete on the date of Tests on account of the delay or denial of such access thereto. For the avoidance of doubt, it is expressly agreed that Construction Works on all lands for which Right of Way is granted within 90 (ninety) days of the Appointed Date shall be completed before the Project Completion Date. It is further agreed that the obligation of the Concessionaire to complete the affected Construction Works shall subsist so long as the Authority continues to pay the Damages specified herein, and upon the Authority ceasing to pay such Damages after giving 60 (sixty) days' notice thereof to the Concessionaire, the obligation of the Concessionaire to complete such works on such part of the Site shall cease forthwith. It is also expressly agreed that completion of the respective Construction Works within the time determined by the Independent Engineer hereunder shall be deemed to be Project Milestones for the purposes of levy and recovery of Damages under and in accordance with the provisions of Clause 12.4.2.

Clause 14

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.

14.5 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 or 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."

(Emphasis added)

54. On conjoint reading of Clauses 10.3.2, 10.3.4 and 10.3.5, it was the sole responsibility of the Authority (in the present case, the petitioner) to provide access and vacant land as per the Appendix to the respondent No. 2 within the 90 days period from the date of Appointed Date and if there was any delay in providing the same, it was to attract damages payable to the respondent No. 2 by the

petitioner. Further, the construction work on the land provided was to be completed within 90 days and the issuance of PCC was not be delayed due to access being not granted to any part of the site. It is necessary to highlight the said clauses as in the present case as it is a case where the project site was not fully handed over by the petitioner to the respondent No. 2.

55. As per Clause 14.3.1 and 14.3.2, upon the request of the Concessionaire (in the present case, the respondent No. 2), the IE may issue PCC subject to tests being successful and if the Project Highway could be safely and reliably placed in commercial operation. Further, the IE was not to withhold the PCC if the work was incomplete due to delay attributable to the petitioner. Also, PCC was only to be issued if the 75% of the total length of the project highway was completed. Clause 14.5 states that if the IE determined that Project Highway was not in conformity with the provisions of the Concession Agreement and could not be safely placed in commercial operation, IE should forthwith send a report to the petitioner and respondent No. 2. If the petitioner was also of the same opinion, then the petitioner could direct the IE to withhold the PCC.

56. The respondent No. 2, after completion of the construction work within 90 days from the appointed date, issued a letter dated 22.09.2014 to IE requesting grant of PCC. IE responded to the said letter of the petitioner, *vide* letter dated 07.11.2014 by stating that respondent No. 2 had completed the work in the length available and there were major problems at the petitioner's end in handing over the

"Right of Way" and "Right to access" for construction meaning thereby that the respondent No. 2 was entitled to Annuity Payment as there was delay in handing over of encumbrance free and vacant access to the respondent No. 2 by the petitioner. *Vide* letter dated 17.04.2014, IE informed the respondent No. 2 that PCC request has been rejected by the petitioner on the ground that 75% of the Project Highway was not completed.

57. IE again wrote a letter dated 07.11.2014 to the petitioner by reiterating the above grounds. In the meanwhile, the petitioner issued Cure Period Notice on 10.06.2015. Again, after the additional work was completed, IE *vide* letter dated 30.09.2016 expressed its intention to issue PCC. The petitioner *vide* letter dated 24.10.2016 confirmed the request of the IE after inspecting the 90.671 km of the Project Highway. Thereafter, the IE *vide* letter dated 08.12.2016 issued PCC for the completed stretch of 90.671 KM of the Project Highway and further stated that the respondent No. 2 shall complete the Periyakulam Bypass or Theni Bypass before the first annuity payment falls due i.e. 08.05.2017 (6 months after issuance of PCC) and the remaining bypasses before 31.10.2017 and to execute SA.

58. Relevant paragraphs from the letter dated 08.12.2016 are extracted below:-

> *"24. As per the above Circular dated 07.09.2010, the Concessionaire in such cases shall be entitled to Annuity payments in full as per para 3.2 (b). However, the aspect needs to be looked in to further as 6 bypasses totaling*

43.122 Km (new construction except Theni Bypass on which about 30% work has been completed)are yet to taken up and completed. The Concessionaire should complete either Periyakulam Bypass or Theni Bypass before the first Annuity payment falls due and the remaining 5 Bypasses before 31.10.2017. The Supplementary Agreement time frame for completion of the remaining 6 Bypasses of 43.122 Km is set for 10months from the date of issue of PCC or latest by 31.10.2017.

25. The Provisional Completion Certificate for 90.671 Km completed stretches, duly signed by the Concessionaire and Independent Engineer, is enclosed. The checklist/guidelines for the IE regarding issue of Provisional Certificate have been complied with.

26. A Supplementary Agreement for completion of balance length of 43.122 Km of Project Highway as per Schedule "B" & "C" of Concession Agreement need to be signed between NHAI and the Concessionaire, as provided for in the NHAI Circular dated 07.09.2010, para 3.2 (b). Draft Supplementary Agreement is attached as Annexure-IV."

59. IE again issued a letter dated 17.12.2016 informing the respondent No. 2 that PCC had been kept in abeyance by stating that "*until completion of the Theni Bypass as agreed by the Concessionaire in the draft Supplementary Agreement and signing of the Supplementary Agreement as mentioned in paras 24 and 26 respectively of our*

aforesaid letter dated 08.12.2016".The operative part of letter dated 17.12.2016 is extracted below:-

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

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

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

62. Keeping the PCC in abeyance by the IE *vide* letter dated 17.12.2016

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

63. Relevant paragraphs from the Arbitral Award are extracted below:-

> *"257. The Tribunal has thoroughly examined the Concession Agreement, and is of the view that the said agreement does not contain any provision which provides that a PCC, once issued, can be either kept in abeyance or withdrawn.*
>
> *258. It is the Tribunal's considered view that once the I.E. issued the PCC, further to its letter of 08.12.2016, after being satisfied that the tests were successful, and the requisite portion of the highway was complete, the PCC remained validly issued, and it could not be withdrawn or kept in abeyance for any reason. The Tribunal also notes*

that the decision of the I.E. to keep the issuance of the PCC in abeyance on grounds mentioned in its letter of 17.12.2016 was invalid, as the PCC had already been issued. Additionally, the letter issuing the PCC of 08.12.2016 stated certain conditions that had to be met, but the Concessionaire was never given the opportunity to meet these requirements at all. In the circumstances, not only was the decision to keep the PCC in abeyance invalid, it was also contradictory to the position taken by the authority previously.

259. A case was made out that the PCC was withheld under the terms of Article 14.5 of the Concession Agreement. The Tribunal has considered the provision, and finds that several conditions need to be met in order for Article 14.5 to operate. Pertinently, the provision specifically relates to withholding of PCC, but does not apply once the PCC has been issued. Therefore, in the present case, as the PCC was already issued, this provision would not come into operation.

260. Even if one persists with examining the applicability of Article 14.5 further, it becomes clear that the facts of the case do not allow for such applicability. For Article 14.5 to apply, a series of conditions must be met. At the outset, the I.E. ought to have determined that the Project Highway or any part thereof did not conform to the provisions of the

Concession Agreement and could not be safely placed in commercial operation, and made a report to such effect. The conditions in Article 14.5 further require that upon receipt of such a report, Respondent No. 2 would inspect the Project Highway, and notify Respondent No. 1 of such defects and deficiencies in the Project Highway and direct the I.E. to withhold issuance of the PCC.

261. On the contrary, what transpired was in fact quite different. The Tribunal notes that the I.E. initially recommended issuance of PCC, stating that delays were caused due to Respondent No. 2. After a series of communications, Respondent No. 2, the I.E., the Project Director and Respondent No. 1, jointly conducted an inspection, in which it was concluded that the portion of the highway that had been completed was indeed fit for commercial operation. No report suggesting that it was not fit was made, and none of the subsequent requirements (as under Article 14.5) were met. I.E.'s letter dated 17.12.2016 which stated that the PCC was being kept in abeyance, said that this decision was to stand until completion of the Theni Bypass which was supposedly agreed by Respondent No. 1 in terms of a "draft supplementary agreement". The Tribunal notes that the earlier letter issued by the I.E., dated 08.12.2016, in which it had issued the PCC, had clearly stated that the Theni bypass was to be completed

before the first annuity payment date, i.e., 6 months after PCC date (para 24 of the letter dated 08.12.2016). The decision to keep the PCC in abeyance for reason of not completing the Theni bypass, went against the earlier decision granting the Concessionaire time to do so till 6 months thereafter. This was a clearly contradictory exercise of authority, and cannot be held to be valid.

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

263. Accordingly, Issue No. 5 is answered as follows:

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

64. I concur with the view taken by the AT and is the correct view. Even assuming remotely that the view propounded by the petitioner is valid, the view of the AT most definitely is a plausible view and does not shake the conscience of the Court. To hold otherwise would be interpreting the clauses of the Agreement as given by the AT which is not within the domain of this Court.

Jurisdiction of the AT over the disputes

65. Learned senior counsel for the petitioner contended that the AT

exceeded its jurisdiction as the issue of Termination Payment can only be adjudicated when the disputes arise out of the Concession Agreement. The respondent No. 1 initiated arbitration under the EA and SA and not under the Concession Agreement.

66. From the facts noted above, the center of the dispute is the non deposit of the Termination Payment by the petitioner into the Escrow Account which led to the invocation of the arbitration clause, filing of section 9 petition and thereafter, the reference and constitution of the AT.

67. Before going further, it is incumbent to reflect on the arbitration clause of the EA cited above. The respondent No. 1 invoked the arbitration clause of the EA which is Clause 10. On perusal of the same, it clearly indicates that "*any dispute, difference or claim arising out of or in connection with this Agreement*" shall be referred to arbitration. To my mind, it includes the disputes arising in connection with the EA which also includes the Concession Agreement. In the preceding paragraphs of this judgment, I have already observed that the Concession Agreement forms part of the EA and SA.

68. Clause 3 of the EA reads as under:-

"3 DEPOSITS INTO ESCROW ACCOUNT

3.1. Deposits by the Concessionaire

3.1.1 The Concessionaire agrees and undertakes that it shall

deposit into and/or credit the Escrow Account with:

(a) all monies received in relation to the Project from any source, including the Senior Lenders, lenders of

Subordinated Debt and the Authority;

(b) all funds received by the Concessionaire from its shareholders, in any manner or form;

(c) all Annuity received by the Concessionaire;

(d) any other revenues from or in respect of the Project Highway; and

(e) all proceeds received pursuant to any insurance claims.

3.1.2 The Concessionaire may at any time make deposits of its other funds into the Escrow Account, provided that the provisions of this Agreement shall apply to such deposits.

3.2 Deposits by the Authority

The Authority agrees and undertakes that, as and when due and payable, it shall deposit into and/or credit the Escrow Account with:

(a) Annuity and any other monies disbursed by the Authority to the Concessionaire;

(b) Deleted;

(c) Deleted and

(d) Termination Payments

Provided that the Authority shall be entitled to appropriate from the aforesaid amounts, any Concession Fee due and payable to it by the Concessionaire, and the balance remaining shall be deposited into the Escrow Account."

69. On perusal, the clauses clearly provide that as and when the Termination Payment is due and payable, the same shall be deposited

into the Escrow Account by the petitioner. It is the case of the respondent No. 1 that the petitioner refused to deposit the Termination Payment *vide* letter dated 24.06.2019 which clearly violated clause 3.2 of the EA. Hence, the respondent No. 1 was constrained to invoke the arbitration clause of the EA. I have no hesitation to hold that the AT had the jurisdiction to entertain the disputes arising out of the Escrow Agreement and more particularly non deposit of Termination Payment by the petitioner in the Escrow Account.

70. Paragraphs of the Arbitral Award *qua* jurisdiction are extracted below:-

> *"201. The main contention of the Claimant is that the Termination Payment became due and payable on 16.04.2019, and Respondent No. 2 failed to deposit the same in the Escrow Account in breach of Clause 3.2 of the Escrow Agreement. The Claimant had sent various communications to Respondent No. 2 requesting it to deposit the Termination Payment in the Escrow Account. However, Respondent No. 2 neither replied to such communications nor deposited the Termination Payment.*
>
> *202. In the Tribunal's view, this is clearly a dispute arising under the Escrow Agreement. Respondent No. 2 has attempted to argue that the question as to whether Termination Payment has become due and payable is an issue which can be decided only by referring to the provisions of the Concession Agreement. However, as*

clearly provided in the language of the Escrow Agreement, the Concession Agreement forms a part of the Escrow Agreement. Therefore, the dispute clearly falls within the scope of the Escrow Agreement."

71. The above reasoning is sound, borne out of the correct interpretation of the contractual terms and consequently, I find no merit in the contention of the petitioner that the AT lacked jurisdiction over the dispute of non deposit of Termination Payment in the Escrow Account.

Contentions qua Termination Payment

72. Learned senior counsel for the petitioner has further argued that Termination Payment could become due and payable only upon the Concessionaire/respondent No. 2 raising a demand within 15 days of the termination which is not in the present case. Hence, in view of the Clause 37.3.3 of the Concession Agreement, respondent No. 1 could not demand the Termination Payment from the petitioner.

73. Clause 40 of the Concession Agreement reads as under:-

"40.3 Substitution Agreement

40.3.1 The Lenders' Representative, on behalf of Senior Lenders, may exercise the right to substitute the Concessionaire pursuant to the agreement for substitution of the Concessionaire(the "Substitution Agreement") to be entered into amongst the Concessionaire, the Authority and the Lenders' Representative, on behalf of Senior Lenders, substantially in the form set forth in Schedule – V."

74. A perusal of the said clause makes it evident that the parties herein were obligated to enter into SA. Pursuant to the said clause, the parties herein entered into the SA on 31.05.2013.

75. Clause 2 of the SA reads as under:-

> *"2. ASSIGNMENT*
>
> *2.1 Assignment of rights and title*
>
> *The Concessionaire hereby assigns the rights, title and interest in the Concession to, and in favour of, the Lenders' Representative pursuant to and in accordance with the provisions of this Agreement and the Concession Agreement by way of security in respect of financing by the Senior Lenders under the Financing Agreements."*

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

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

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

> *"36. Besides, the debt had been extended, by the lenders, led by PNB, to JST, for the project forming subject matter of the Concession Agreement. Once the Concession Agreement itself stood terminated, the loaned amount was required to be returned. The lenders, led by PNB, had no concern with the inter se disputes between NHAI and JST. It is for this reason that the Concession Agreement, rightly, made deposit by NHAI, into the Escrow Account, as well as the withdrawal, thereby, by the lenders, the inevitable sequitur to termination of the Concession Agreement. The amounts claimed by NHAI from JST were subject matter of the inter se dispute between NHAI and JST. The right of NHAI to claim these amounts from JST cannot be gainsaid. That, however, was rightly made subject matter of a separate arbitral proceeding, which is presently pending. Whatever*

be the outcome of the arbitral proceeding, the fact that the Concession Agreement stands terminated and that, thereby, NHAI became liable to deposit, into the Escrow Account, at least 90 of the Debt Due, is an undeniable, even if uncomfortable (to NHAI), contractual reality. The attempt of NHAI to "adjust", from the said figure, the amounts which, according to it, are liable to be paid by JST, amounts to taking, from Peter, what is due from Paul. NHAI and Paul may be at loggerheads in the first arbitral proceeding; that cannot delegate from the right of Peter, to the return of the debt extended by it."

(Emphasis added)

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

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

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

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

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

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

discounting factor applied being the then SBI PLR –(minus) 3%.

37.3.3 Termination Payment shall become due and payable to the Concessionaire within 15 (fifteen) days of a demand being made by the Concessionaire to the Authority with the necessary particulars, and in the event of any delay, the Authority shall pay interest at a rate equal to 3% (three per cent) above the Bank Rate on the amount of Termination Payment remaining unpaid; provided that such delay shall not exceed 90 (ninety) days. For the avoidance of doubt, it is expressly agreed that Termination Payment shall constitute full discharge by the Authority of its payment obligations in respect thereof hereunder.

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

83. On perusal, Clause 37.3.1 states that the if the Agreement is terminated on account of the Concessionaire default during the operation period then the Authority i.e. the petitioner would pay as per the clause quoted above. Further, if the Agreement terminated prior to COD on the Concessionaire default, no amount shall be due or

payable. Clause 37.3.2 and 37.3.3 states the formula to be applied for Termination Payment alongwith the interest component.

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

85. It was lastly argued that in the absence of any provision in the EA and SA to enable the parties or the AT to calculate the Termination Payment, the AT, beyond the scope of reference, adjudicated on the quantum of the Termination Payment and arrived at a figure of Rs. 229.50 crores. The issue of Termination Payment can only be adjudicated when the disputes arise out of the Concession Agreement.

86. I am unable to agree with the said argument.

87. I have already observed above that the Concession Agreement forms part of the EA and SA. Hence, there is no question that the AT exceeded its jurisdiction. Also, the calculation of the Termination Payment is a question of fact not a question of jurisdiction. The

answer to the said contention i.e. calculation of Termination Payment, clearly lies in Clause 37 of the Concession Agreement and more particularly in Clause 37.3.2 and 37.3.3. Further, the petitioner has not argued that the amount of Rs. 229.50 crores suffer from any errors or that extra amounts have been added instead of this, only a mere averment has been made without any evidence. On perusing the SOD filed by the petitioner, the calculation of Termination Payment has not been disputed.

88. The AT has dealt with the said contention in paragraph 157 which is extracted below:-

> *"157. Respondent No. 2 further argues that the quantum of Termination Payment should be determined after all additions and deductions are considered, and that this calculation exercise cannot be undertaken by the lenders alone, and that only after such calculation can the said payment be deposited. The Tribunal notes that this argument is also brought up for the first time, and is not backed by any pleadings. The Tribunal also notes that all calculations of the Termination Payment were duly provided by the Claimant, backed by documentation and evidence, and none of this was challenged at any stage by Respondent No. 2. The Tribunal further notes that Respondent No. 2 also offers no alternative calculation for the quantum of the Termination Payment itself, and merely states that this value can be determined only by all three*

parties. The Tribunal additionally notes that this question of calculation of Termination Payment is a matter of merit, and has nothing to do with the question of jurisdiction."

89. A perusal of the above paragraph shows that the AT has rightly dealt with the said contention and hence, no interference is required.

CONCLUSION

90. Keeping in mind the above principles and my discussions, I find no reasons to interfere with the Arbitral Awards dated 13.11.2024 passed by the AT. Consequently, the present petitions are dismissed.

91. Pending applications, if any, are also disposed of accordingly.

JASMEET SINGH, J

JULY 01,2025/(MSQ)