



2025:DHC:424



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IN THE HIGH COURT OF DELHI AT NEW DELHI

Reserved on: 30 July 2024

Pronounced on: 16 January 2025

+ O.M.P. (COMM) 277/2024, I.A. 32883/2024

NATIONAL HIGHWAYS AUTHORITY OF INDIA

.....Petitioner

Through: Mr. Sanjay Jain, Sr. Advocate with Mr. Santosh Kumar, Ms. Bhabna Das, Ms. Nidhi Rani, Mr. Devansh Malhotra, Mr. Adithya Ramani, Mr. Yuvraj Sharma, Ms. Palak Jain, Ms. Harshita Sukhija, Mr. Nishank Tripathi and Ms. Jagriti Pandey, Advocates.

versus

YEDESHI AURANGABAD TOLLWAY LIMITED

.....Respondent

Through: Mr. Vikram Nankani, Sr. Advocate with Mr. Ritin Rai, Sr. Advocate with Mr. Karan Bharihoke, Mr. Anirudh Bakhru, Mr. Rishi, Mr. Ruchir Daulat, Ms. Teresa R. Daulat, Ms. Devika Mohan, Mr. Mohanish Patkar, Ms. Charu Shriyam Singh, Ms. Pragya Gautam, Mr. Aalam Bir Singh and Mr. H. Bir Singh, Advocates.

CORAM:

HON'BLE MR. JUSTICE C. HARI SHANKAR

JUDGMENT(ORAL)

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16.01.2025

I.A. 32883/2024 in O.M.P. (COMM) 277/2024

1. This judgment disposes of IA 32883/2024, filed by the



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petitioner under Section 36(3)¹ of the Arbitration and Conciliation Act, 1996².

2. A unanimous arbitral award rendered by a learned three-Member Arbitral Tribunal, awarding, to the respondent Yedeshi Aurangabad Tollway Ltd³ and against the petitioner National Highways Authority of India⁴, a principal amount of ₹ 1503.15 crores, along with interest on ₹ 1357.36 crores from 20 October 2022 till payment of the said amount, and further directs extension of the Concession Period, as per the Concession Agreement⁵ dated 30 May 2014 executed between NHAI and Yedeshi by a period of 689 days, stands assailed in the present OMP, filed by NHAI under Section 34 of the 1996 Act.

The law

¹ (3) Upon filing of an application under sub-section (2) for stay of the operation of the arbitral award, the court may, subject to such conditions as it may deem fit, grant stay of the operation of such award for reasons to be recorded in writing:

Provided that the court shall, while considering the application for grant of stay in the case of an arbitral award for payment of money, have due regard to the provisions for grant of stay of a money decree under the provisions of the Code of Civil Procedure, 1908 (5 of 1908):

Provided further that where the Court is satisfied that a prima facie case is made out that,—

(a) the arbitration agreement or contract which is the basis of the award; or
(b) the making of the award,

was induced or effected by fraud or corruption, it shall stay the award unconditionally pending disposal of the challenge under Section 34 to the award.

Explanation. – For the removal of doubts, it is hereby clarified that the above proviso shall apply to all court cases arising out of or in relation to arbitral proceedings, irrespective of whether the arbitral or court proceedings were commenced prior to or after the commencement of the Arbitration and Conciliation (Amendment) Act, 2015.

² “the 1996 Act” hereinafter

³ “Yedeshi” hereinafter

⁴ “NHA” hereinafter

⁵ “CA” hereinafter



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3. To my mind, after the orders passed by the Supreme Court in *Toyo Engineering Corporation v IOCL*⁶ and *Manish v Godawari Marathwada Irrigation Development Corporation*⁷, there is little latitude with a Court dealing with an application under Section 36(3) of the 1996 Act, in a challenge against a money award. Ordinarily, and nearly inexorably, the challenging petitioner would have to deposit the awarded amount with the Court as a condition for stay against execution, and the successful litigant before the Arbitral Tribunal would be entitled to withdraw the awarded amount, perhaps on terms.

4. NHA I would, however, contend that there is no watertight principle, known to law, mandating complete deposit, in every challenge to an arbitral award which allows a money claim, of the amount awarded. The argument is attractive to an extent, and it might be possible to argue that, in the case of an award which is completely arbitrary, or which, on the face of it, cannot sustain even perfunctory judicial scrutiny, the rigour of *Toyo* and *Manish* may be relaxable. It is for this reason that I have, in this judgement, examined, in some detail, the covenants of the contract between the parties, and the findings of the Arbitral Tribunal. At the same time, I am convinced that there is no scope, while adjudicating a Section 36(3) application, for the Court to embark on any examination of the vulnerability of the arbitral award to challenge, as it would while dealing with a petition under Section 34 of the 1996 Act.

⁶ 2021 SCC OnLine SC 3455

⁷ 2018 SCC OnLine SC 2863



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5. At the outset, it is necessary to note that the present order adjudicates a prayer for stay of operation of the arbitral award, and not the substantive challenge to the award. What is being decided, therefore, is not the Section 34 petition but an application referable to Section 36(3) of the 1996 Act.

6. Section 36 of the 1996 Act, as it stood prior to its amendment by Section 19 of the Arbitration and Conciliation (Amendment) Act, 2016⁸, read thus:

“36. **Enforcement.** – Where the time for making an application to set aside the arbitral award under section 34 has expired, or such application having been made, it has been refused, the award shall be enforced under the Code of Civil Procedure, 1908 (5 of 1908) in the same manner as if it were a decree of the Court.”

Thus, under the pre-amended Section 36, an Arbitral Award would be enforceable as if it were a decree of a court only where the time for challenging the award under Section 34 had expired or, if a petition under Section 34, challenging the award, had been made within time, said petition had been refused. The corollary was that, if an application under Section 34 had been filed within time, the award became *ipso facto* inexecutable. This legal position was confirmed by the Supreme Court in its judgments in *National Aluminium Company Ltd v Pressteel and Fabrications Pvt Ltd*⁹ and *National Buildings Construction Ltd v Lloyd Insulations India Ltd*¹⁰.

⁸ “the 2016 Amendment Act” hereinafter

⁹ (2004) 1 SCC 540, hereinafter referred to as “NALCO”

¹⁰ (2005) 2 SCC 367



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7. This created a situation in which, merely by filing a petition under Section 34 of the 1996 Act within time, the Arbitral Award was rendered unexecutable till the Section 34 Petition was decided. In the circumstances, no separate application, for staying the execution of the Arbitral Award was required to be filed, as the very filing of the Section 34 Petition within time effectively stayed the execution of the Arbitral Award.

8. This position was found to result in serious inequity.

9. In *NALCO*, the Supreme Court was critical of this legal position, and observed that the effective divesting, by the said provision, of the power with the court to consider whether the Arbitral Award was, or was not, required to be stayed, defeated the objective of the alternate dispute resolution system. Noting that a recommendation had been made by the Ministry to the Parliament to amend Section 34, to empower Civil Courts dealing with challenges to Arbitral Awards to pass appropriate interim orders, the Supreme Court expressed a hope that necessary steps in that regard would be taken expeditiously.

10. Taking note of the aforesaid note of disapproval expressed by the Supreme Court of the then existing Section 36 of the 1996 Act, the 246th Law Commission of India, in its meeting dated 5 August 2014, observed as under:

“43. Section 36 of the Act makes it clear that an arbitral award becomes enforceable as a decree only after the time for filing a petition under section 34 has expired or after the section 34 petition



has been dismissed. In other words, the pendency of a section 34 petition renders an arbitral award unenforceable. The Supreme Court, in *National Aluminum Co. Ltd. v Pressteel & Fabrications*, held that by virtue of section 36, it was impermissible to pass an Order directing the losing party to deposit any part of the award into Court. While this decision was in relation to the powers of the Supreme Court to pass such an order under section 42, the Bombay High Court in *Afcons Infrastructure Limited v The Board of Trustees, Port of Mumbai*¹¹ applied the same principle to the powers of a Court under section 9 of the Act as well. Admission of a section 34 petition, therefore, virtually paralyzes the process for the winning party/award creditor.

44. The Supreme Court, in *National Aluminium*, has criticized the present situation in the following words:

“However, we do notice that this automatic suspension of the execution of the award, the moment an application challenging the said award is filed under section 34 of the Act leaving no discretion in the court to put the parties on terms, in our opinion, defeats the very objective of the alternate dispute resolution system to which arbitration belongs. We do find that there is a recommendation made by the concerned Ministry to the Parliament to amend section 34 with a proposal to empower the civil court to pass suitable interim orders in such cases. In view of the urgency of such amendment, we sincerely hope that necessary steps would be taken by the authorities concerned at the earliest to bring about the required change in law.”

45. In order to rectify this mischief, certain amendments have been suggested by the Commission to section 36 of the Act, which provide that the award will not become unenforceable merely upon the making of an application under section 34.”

11. Following the above observations, para 19 of the Law Commission Report recommended thus:

“19. In section 36,

(i) add numbering as sub-section (1) before the words “where the time” and after the words “Section 34 has expired,” delete the words “or such application having been

¹¹ 2014 (1) Arb LR 512 (Bom)



made, it has been refused” and add the words “then subject to the provision of sub-section (2) hereof,”

(ii) insert sub-section “(2) Where an application to set aside the arbitral award has been filed in the court under section 34, the filing of such an application shall not by itself render the award unenforceable, unless upon a separate application made for that purpose, the court grants stay of the operation of the award in accordance with the provisions of sub-section (3) hereof;”

(iii) insert sub-section “(3) Upon filing of the separate application under sub-section (2) for stay of the operation of the award, the court may, subject to such conditions as it may deem fit, grant stay of the operation of the award for reasons to be recorded in writing.”

(iv) insert proviso “*Provided* that the court shall while considering the grant of stay, in the case of an award for money shall have due regard to the provisions for grant of stay of money decrees under the Code of Civil Procedure, 1908.”

[NOTE : This amendment is to ensure that the mere filing of an application under section 34 does not operate as an automatic stay on the enforcement of the award. The Supreme Court in *National Aluminium Co. Ltd. v Pressteel & Fabrications (P) Ltd.*, recommends that such an amendment is the need of the hour.]”

12. The presently existing Section 36 of the 1996 Act amends the pre-existing Section 36 in terms of the recommendations contained in para 19 of the 246th Law Commission Report.

13. The application of Section 36 has, therefore, to be in tune with the philosophy of the Law Commission Report, and the rationale, forthcoming therefrom, for recommending amendment of Section 36.

14. The Court, in this case, is concerned with the first proviso to the amended Section 36(3). The proviso requires a Court to, while



considering an application for stay of an arbitral money award, have due regard to the provisions for grant of stay of money decree as existing in the CPC.

15. The provision for stay of grant of a money decree in the CPC is to be found in Order XLI Rule 5¹².

16. Clause (1) of Order XLI Rule 5, which is somewhat *pari materia* with Section 36(3) of the 1996 Act, ordains that the filing of an appeal against a decree passed in a suit would not *ipso facto* operate to stay the proceedings under the decree or order, except to the extent the Appellate Court orders such stay, for sufficient cause. Clause (3) of Order XLI Rule 5 is couched in negative terms. It proscribes grant of any order for stay of execution of a decree under Order XLI Rule 5(1) or (2) – of which order XLI Rule 5(1) alone is

¹² 5. **Stay by Appellate Court.** –

(1) An appeal shall not operate as a stay of proceedings under a decree or order appealed from except so far as the Appellate Court may order, nor shall execution of a decree be stayed by reason only of an appeal having been preferred from the decree; but the Appellate Court may for sufficient cause order stay of execution of such decree.

Explanation. – An order by the Appellate Court for the stay of execution of the decree shall be effective from the date of the communication of such order to the Court of first instance, but an affidavit sworn by the appellant, based on his personal knowledge, stating that an order for the stay of execution of the decree has been made by the Appellate Court shall, pending the receipt from the Appellate Court of the order for the stay of execution or any order to the contrary, be acted upon by the Court of first instance.

(2) **Stay by Court which passed the decree.**—Where an application is made for stay of execution of an appealable decree before the expiration of the time allowed for appealing therefrom, the Court which passed the decree may on sufficient cause being shown order the execution to be stayed.

(3) No order for stay of execution shall be made under sub-rule (1) or sub-rule (2) unless the Court making it is satisfied –

(a) that substantial loss may result to the party applying for stay of execution unless the order is made;

(b) that the application has been made without unreasonable delay; and

(c) that security has been given by the applicant for the due performance of such decree or order as may ultimately be binding upon him.

(4) Subject to the provisions of sub-rule (3), the Court may make an *ex parte* order for stay of execution pending the hearing of the application.

(5) Notwithstanding anything contained in the foregoing sub-rules, where the appellant fails to make the deposit or furnish the security specified in sub-rule (3) of Rule 1, the Court shall not make an order staying the execution of the decree.



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relevant for our purpose – unless the court is satisfied that the three conditions enumerated in sub-clauses (a), (b) and (c) of Order XLI Rule 3 are satisfied. It is necessary to note that clauses (b) and (c) are separated by the word “and”, indicating that cumulative satisfaction of the conditions envisaged in Clauses (a) to (c) of Order XLI Rule 5(3) is essential for a court to order stay of execution of a decree.

17. Of these, sub-clause (a) requires satisfaction, by the Court, that, if no order of stay is passed, the stay applicant would suffer substantial loss. Sub-clause (c) requires the court to be satisfied that the stay applicant has given sufficient security for due performance of the decree or order in the event it becomes binding on him.

18. I may note that, prior to the amendment of Section 36 by the 2016 Amendment Act, some courts have expressed a view that an Arbitral Award cannot be equated with the money decree and that, therefore, the Section 34 challenger could not be directed to deposit the entire amount covered by the award as a condition for entertaining the Section 34 challenge¹³. The High Court of Himachal Pradesh, in fact, even held, in *State of Himachal Pradesh v Surinder Singh Sibia*¹⁴, that Order XLI Rules 1 and 5 of the CPC did not apply to appeals against Arbitral Awards. These decisions, obviously, cannot apply after the amendment of Section 36 by the 2016 Amendment Act, in view of the express stipulation, in the first proviso to Section 36(3) that an application for grant of stay of an arbitral money award would have to abide by the considerations for grant of stay in such

¹³ Refer *Aditya Fuels Ltd v BILT Chemicals Ltd*, AIR 2007 Guj 140

¹⁴ AIR 1995 HP 172 (DB)



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cases, as contained in the CPC, which, in turn, are to be found in Clauses (1) and (5) of Order XLI Rule 5.

19. Yogeshwar Dayal, J. (as he then was) held, in *Union Bank of India v Jagan Nath Radhey Shyam*¹⁵, that a conjoint reading of Order XLI Rule 5(3) and (5) of the CPC provided that “so long as the decretal amount is not deposited or security is not furnished the court shall not make order staying the execution of the decree”. With respect to Order XLI Rule 5(1) and (3) of the CPC, Arijit Pasayat, J. (as he then was), sitting singly as a Judge of the Orissa High Court, held thus, in *Hadibandhu Senapati v Champamani Behera*¹⁶:

“4. Rule 5 of Order 41, CPC relates to stay of proceedings and of execution. By the Amendment Act 104 of 1976 an Explanation has been added to sub-rule (1) to provide that an order for stay of execution made by the appellate Court operates only from the time it is communicated to the executing Court. After an appeal has been filed the appellate Court may order the stay of proceedings under the decree or of execution of such decree. Obviously the rule will apply only when the decree under appeal is capable of execution. The provisions of sub-rule (3) of Rule 5 are mandatory, and therefore, conditions prescribed in clauses (a), (b) and (c) thereof must be fulfilled before granting a stay. The power to grant stay of execution on sufficient cause being shown is controlled by sub-rule (3) and each of the three conditions specified therein must be satisfied before stay is granted. Execution should not be stayed unless the Court is satisfied that substantial loss may otherwise result to the judgment-debtor, and the application is made without unusual delay. The amount deposited as security under Rule 5 does not ipso facto without an order of Court, become the property of the decree-holder. Under sub-rule (3) of Rule 5 it is clear that no order for stay of execution shall be made under sub-rule (1) or sub-rule (2) unless the Court making it is satisfied about the pre-conditions stipulated therein. One of the conditions is that the security has been given by the appellant for the due performance of such decree or order as may ultimately be binding upon him. There is no force in the submission of Mr. Kar that the requirement of

¹⁵ AIR 1979 Del 36

¹⁶ AIR 1996 Ori 84



furnishing security is applicable to money decrees and not to other decrees. There is nothing in sub-rule (3) to support such a plea. The language of sub-rule (3) of Rule 5 is emphatic and imperative mandating that no order of stay of execution shall be made unless the Court is satisfied that security has been given by the applicant for the due performance of such decree or order as may ultimately be binding upon him, amongst other conditions. The provision is couched in mandatory language, and if the Court finds that no security has been furnished by the applicant no order of stay of execution can be made under sub-rule (1) or sub-rule (2).

5. Further case of the petitioners is that there is no requirement for cash security. According to Mr. Misra, the amount being relatable to arrears of rent, cash security has been rightly directed to be furnished. There can be no doubt that the Court has wide discretion in the matter of fixing the nature and mode of security. There is no statutory definition of security in CPC. Speaking generally, security is anything that makes the money more assured in its payment or more readily recoverable. It is an encumbrance. The purpose of a security is to ensure, or facilitate the fulfilment or enjoyment of some other right vested in its owner. Money paid into Court to abide the event of an action is a security to the other litigant, who, if succeeds, becomes thereby a secured creditor. In an appropriate case, the Court can certainly direct deposit of cash security, and in other cases it may direct furnishing of property security. It all depends on nature of dispute.”

20. On the aspect of “sufficient cause” within the meaning of Order XLI Rule 5(1) and “substantial loss” within the meaning of Order XLI Rule 5(3)(a), a Division Bench of the High Court of Rajasthan has, in *Bansidhar v Pribhu Dayal*¹⁷, held thus:

“5. In the present case, however, I find that the appellant has not been able to make out sufficient cause for staying the execution. The first ground namely that the appellant has no ready money and that there is a general financial stringency is very vague and unconvincing. The appellant may not be in possession of cash but he should have disclosed his assets and liabilities or he should have given a detailed account of his financial position for this court to judge whether he had other property sufficient to pay up his decretal amount without any hardship. The mere reference to present financial stringency is to my mind of no avail for staying the execution of the decree. If this ground alone is allowed to

¹⁷ AIR 1954 Raj 1



prevail then every judgment-debtor would be able to get the execution of the decree stayed in appeal without further proving that such execution would result in substantial loss to him. Under Order 41, Rule 5 “an appeal by itself does not operate as a stay of proceedings under a decree or order appealed from except so far as the Appellate Court may order and the section further lays down that execution of a decree shall not be stayed by reason only of an appeal having been preferred from the decree.” In other words *the ordinary rule is that an execution of the decree need not be stayed pending an appeal unless the appellant shows good cause and the appellate court considers it sufficient for staying the execution.* Sub-Rule 3 further provides that no order for stay of execution shall be made under sub-rule 1 of sub-rule 2 unless the court making it is satisfied that substantial loss may result to the party applying for stay of execution unless the order is made.

6. In the case of *Anandi Prashad v Govinda Babu*¹⁸ it was observed by the learned Judge Vivian Bose A.J.C. that—

“It is not enough merely to repeat the words of the Code and state that substantial loss will result; the kind of loss must be specified, details must be given, and the conscience of the Court must be satisfied, that such loss will really ensue.”

It was further observed that—

“the words “substantial loss” cannot mean the ordinary loss to which every judgment-debtor is necessarily subjected when he loses his case and is deprived of his property in consequence. That is an element which must occur in every case and since the Code expressly prohibits stay of execution as an ordinary rule, it is clear the words “substantial loss” must mean something in addition to and different from that”.

7. It is abundantly clear that the appellant is not simply to show the balance of convenience in his favour nor it is sufficient for him to say that no harm would be done to the other party if the execution is stayed. *In order to get the execution the decree stayed, the appellant must show substantial loss i.e., it should be loss more than what should ordinarily result from the execution of the decree in the normal circumstances.* The first ground is therefore, very vague. The second ground alleged by the appellant is equally vague because he has not disclosed what property he has got and why it

¹⁸ AIR 1934 Nag 160



will not fetch a fair price.

8. The last ground of the appellant that if he is arrested and sent to civil prison, he will lose his business and reputation is worth consideration, but for the present there is no material before the court to conclude that the appellant is not in a position to pay the money and that the executing court will send him to civil prison. The judgment debtor cannot be sent to civil prison at the mere request of the decree-holder.

9. Sec. 51 of the Civil Procedure Code provides that where the decree is for the payment of money, execution by detention in prison shall not be ordered unless, after giving the judgment-debtor an opportunity of showing cause why he should not be committed to prison, the Court for reasons recorded in writing, is satisfied,—

(a) that the judgment-debtor, with the object or effect of obstructing or delaying the execution of the decree,—

(i) is likely to abscond or leave the local limits of the jurisdiction of the Court, or

(ii) has, after the institution of the suit in which the decree was passed, dishonestly, transferred, concealed, or removed any part of his property, or committed any other act of bad faith in relation to his property; or

(b) that the judgment-debtor has, or has had since the date of the decree, the means to pay the amount of the decree or some substantial part thereof and refuses or neglects or has refused or neglected to pay the same.”

10. The law has thus provided safeguards to protect an honest judgment-debtor who is really unable to pay up the decree. Learned counsel for the respondent has stated that in case the executing court finds that the judgment-debtor is really not in a position to pay the decretal amount and if it still thinks of sending the appellant to civil prison, the appellant may apply for the stay of the execution and the respondent will have no objection to the stay being granted at that time. This is quite reasonable in my view. The appellant has not been able to make sufficient cause to stay the execution of the order at present and therefore, the order of this court dated 29th August, 1952 is vacated and the application is dismissed.”



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21. In *Varadaiah v Chinnapa Reddi*¹⁹, K. Subba Rao, CJ (as he then was) held that it was “an established rule of practice that ordinarily stay of money decrees will not be given unless there are special circumstances”. In *Mooka Naicker v A.K. Venkatasami Naidu*²⁰, it was noted that the appellant, in that case, obtained stay of execution of a money decree, in an appeal, on his making a deposit of the entire decretal amount, with a concomitant right granted to the respondent to withdraw the amount on furnishing security.

22. In the matter of arbitral awards for payment of money, the Supreme Court, in *Toyo Engineering*, observed and held as under:

“3. This Court repeatedly having held that Order XLI Rule 5 principles are to be followed in these cases, we find that largely because public corporations are involved, discretion continues to be exercised not on principles under Order XLI Rule 5 but only because large amounts exist and that Government Corporations have to pay these amounts under Arbitral Awards. Both these considerations are irrelevant, as has been pointed out by us earlier. As a matter of fact, the very matter referred to in the order dated 09.08.2019 and 06.03.2020, namely, O.M.P. (COMM) No. 366/2017 has resulted in a dismissal of a Section 34 petition in an award that was granted out of one of 17 other contracts arising out of the same general transaction. Mr. Sharma was at pains to point out that the Section 34 petition was dismissed in that matter on completely different grounds. Be that as it may, O.M.P. (COMM) No. 366/2017 at the highest, therefore, would be irrelevant. This O.M.P. (COMM) No. 366/2017 appears to be the main plank on which an amount of ₹ 125 Crores alone was ordered to be deposited out of an awarded amount of ₹ 662 Crores. Resultantly, we set aside both the orders and require a 100% deposit of the awarded amount to be made within a period of six weeks from today. The appellants may apply to the High Court to withdraw this amount on security.”

¹⁹ AIR 1956 AP 64

²⁰ AIR 1950 Mad 807



23. Similarly, prior to *Toyo Engineering*, the Supreme Court had expressed a similar view, in the matter of grant of stay against money awards in Arbitral Proceedings, thus, in *Manish*, in terse and unmistakable terms:

“No one appears for the respondent, even though served. The Bombay High Court has ordered 60% deposit, pending the Section 37 appeal. *We have passed orders stating that since these are money decrees there should be 100% deposit, with the respondent being entitled to withdraw the amount deposited and furnish solvent security to the satisfaction of the High Court.*”

Accordingly, we set aside the impugned orders dated 19.03.2018 and mandate a 100% deposit be made within a period of eight weeks from today.

The Special Leave Petitions are disposed of accordingly.”

(Emphasis supplied)

24. Though there are some cases in which the direction for 100% deposit, as a condition for entertaining the Section 34 Petition, as passed by the High Court, has been modified by the Supreme Court by permitting part of the amount to be secured by way of a bank guarantee, as in *Srei Infrastructure Finance Ltd v Candor Gurgaon Two Developers and Purchase Pvt Ltd*²¹, I have not come across any real departure, in any subsequent judgment or order of the Supreme Court, from the imperative requirements set out in *Manish* and *Toyo Engineering*. For the sake of the record, however, the order passed in *Srei Infrastructure* may be thus reproduced:

“Heard learned counsel on both sides.

In the circumstances of the case, we consider it appropriate, in the

²¹ MANU/SCOR/73122/2018



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interest of justice, that the following interim order shall be in force during the pendency of proceedings under Section 34 of the Arbitration and Conciliation Act, 1996:- There shall be interim stay of the award subject to the petitioner's depositing 60% of the amount of the decree. The remaining 40% of the amount shall be secured by way of bank guarantee(s) of the nationalized bank within eight weeks. The respondent shall be at liberty to withdraw the said amount on furnishing appropriate security.

The proceedings under Section 34 of the Arbitration and conciliation Act, 1966 may be decided as expeditiously as possible, not later than six months. The special leave petitions are disposed of accordingly.”

25. The resultant position appears to be that, in the matter of stay of execution of Arbitral Awards which unequivocally and unconditionally directs payment of money to the successful litigant before the Arbitral Tribunal, the entire amount awarded is required to be deposited. Even in *Srei Infrastructure*, the Supreme Court has merely mitigated the rigor of the direction for deposit by permitting part of the deposit to be made by way of bank guarantee. Even while doing so, the Supreme Court has clarified that the order was being passed “in the circumstances of the case”. It is doubtful, therefore, whether *Srei Infrastructure* can be treated as diluting the earlier decisions in *Manish* and *Toyo Engineering*, both of which are categorical and unequivocal in terms.

26. The present application would have to considered in the light of the aforesaid legal position.

27. The CA was for a project of four-laning of a stretch of NH-



211²² on BOT²³ basis. The concession period was 26 years from the Appointed Date.

28. Notice stands issued in the OMP. Arguments on the present IA, preferred under sub-sections (2) and (3) of Section 36²⁴ of the 1996 Act, seeking stay of operation of the impugned Award, were reserved. This order disposes of the IA.

29. Given the magnitude of the Award, and as the petition, with attendant annexures, runs into over 30000 pages, this order has necessarily become somewhat prolix. However, it is clarified that observations made herein are only *prima facie*, and intended to decide NHAI's prayer for stay of operation of the impugned Award and would, accordingly, be so regarded, when the OMP itself is taken up for hearing and final decision.

30. Much turns on the exchanges and correspondences that have taken place between the parties and, therefore, a recountal thereof

²² "the Project" hereinafter

²³ Build Operate Transfer

²⁴ (2) Where an application to set aside the arbitral award has been filed in the court under Section 34, the filing of such an application shall not by itself render that award unenforceable, unless the court grants an order of stay of the operation of the said arbitral award in accordance with the provisions of sub-section (3), on a separate application made for that purpose.

(3) Upon filing of an application under sub-section (2) for stay of the operation of the arbitral award, the court may, subject to such conditions as it may deem fit, grant stay of the operation of such award for reasons to be recorded in writing:

Provided that the court shall, while considering the application for grant of stay in the case of an arbitral award for payment of money, have due regard to the provisions for grant of stay of a money decree under the provisions of the Code of Civil Procedure, 1908 (5 of 1908):

Provided further that where the Court is satisfied that a *prima facie* case is made out that,—

(a) the arbitration agreement or contract which is the basis of the award; or

(b) the making of the award,

was induced or effected by fraud or corruption, it shall stay the award unconditionally pending disposal of the challenge under Section 34 to the award.

Explanation. – For the removal of doubts, it is hereby clarified that the above proviso shall apply to all court cases arising out of or in relation to arbitral proceedings, irrespective of whether the arbitral or court proceedings were commenced prior to or after the commencement of the Arbitration and Conciliation (Amendment) Act, 2015.]



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becomes necessary. Before that, however, it would be necessary to examine the legal contours within which the present application has to be decided.

Grounds for Stay urged in the IA

31. Before proceeding to the merits of the matter, it would be appropriate to reproduce the grounds for stay, which are to be found in paras 11 and 12 of the present IA filed by NHAI:

“11. In view of the above, and the detailed grounds stated in the accompanying Petition, it is submitted that the Petitioner has a good *prima facie* case in their favour as the impugned Award is patently illegal, contrary to the terms of the CA and perverse. In the event the Petitioner is compelled to pay the amount awarded in the impugned Award, it will be extremely difficult to recover the same from the Respondent. The Respondent is merely an SPV and does not have any assets or revenue apart from the toll collected from the Project highway. On the other hand, the Petitioner is a permanent statutory body which undertakes projects of a public nature, and hence the Respondent can always enforce the impugned Award in the event the present Petition is dismissed. Therefore, balance of convenience is also in favour of the Petitioner.

12. Irreparable harm and grave injury would be caused to the Petitioner if it is compelled to pay the awarded amount of approx. Rs. 1700 crores to the Respondent. The Petitioner is a statutory body and the money involved is public money. Not only will such an excessive payment put the Petitioner in extreme financial difficulty and affect payments in respect of other public projects, but this will also significantly adversely affect the State exchequer. Similarly, the Petitioner would suffer grave prejudice and economic crisis if it is required to deposit such a heavy sum or furnish security for the same as a condition for stay of the impugned Award, and the same would also be contrary to public interest.”

32. We may proceed, now to the facts.



Facts

33. In 2013-14, NHAI floated a tender for the Project. Prospective bidders were provided with a Request for Qualification²⁵, Request for Proposal²⁶ (RFP), Feasibility Report and a draft CA. The successful bidder was also required to set up a Special Purpose Vehicle²⁷ with whom NHAI would execute the CA.

34. The bids received by NHAI, pursuant to the Notice Inviting Tenders²⁸, were grant-based. IRB Infrastructure Developers Pvt Ltd²⁹ was the successful bidder, and sought a financial grant from NHAI for ₹ 558 crores. Yedeshi was incorporated by IRB as a SPV. Subsequent thereto, CA dated 30 May 2014 was executed between NHAI and Yedeshi.

35. The following clauses of the CA are relevant:

“3.1 The Concession

3.1.2 Subject to and in accordance with the provisions of this Agreement, the Concession hereby granted shall oblige or entitle (as the case may be) the Concessionaire to:

- (a) Right of Way, access and licence to the Site for the purpose of and to the extent conferred by the provisions of this Agreement;

²⁵ RFQ

²⁶ RFP

²⁷ SPV

²⁸ NIT

²⁹ IRB



4.1.2 The Concessionaire may, upon providing the Performance Security to the Authority in accordance with Article 9, at any time after 90 (ninety) days from the date of this Agreement or on an earlier day acceptable to the Authority, by notice require the Authority to satisfy any or all of the Conditions Precedent set forth in this Clause 4.1.2 within a period of 30 (thirty) days of this notice, or such longer period not exceeding 60 (sixty) days as may be specified therein, and the Conditions Precedent required to be satisfied by the Authority shall be deemed to have been fulfilled when the Authority shall have:

(e) procured all Applicable Permits relating to environmental protection and conservation of the Site:

Provided that the Authority may from time to time by notice extend, for up to an aggregate of 6 (six) months, the period for procuring the approval set forth in Sub-clause (d) and/or Sub-clause (e) above and in that event the land to be covered by overbridges or the affected sections of the Project Highway, as the case may be, shall be included in the Appendix referred to in Clause 10.3 and dealt with in accordance with the provisions thereof; and provided further that upon procurement of such approval, the Concessionaire shall be entitled to a period of 12 (twelve) months therefrom for completion of the overbridges. For the avoidance of doubt, the approval specified in Sub-clause (d) and (e) above shall cease to be a Condition Precedent upon the extension of time under this Proviso.

5.1.3 Subject to the provisions of Clauses 5.1.1 and 5.1.2, the Concessionaire shall discharge its obligations in accordance with Good Industry Practice and as a reasonable and prudent person.

7.2 Representations and warranties of the Authority

The Authority represents and warrants to the Concessionaire that:

(a) it has full power and authority to execute, deliver and perform its obligations under this Agreement and to carry out the transactions contemplated herein and that it has taken all actions necessary to execute this Agreement, exercise its rights and perform its obligations, under this Agreement;



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(b) it has taken all necessary actions under the Applicable Laws to authorise the execution, delivery and performance of this Agreement;

(h) it has good and valid right to the Site, and has power and authority to grant a licence in respect thereto to the Concessionaire.

10.1 The Site

The site of the Project Highway shall comprise the real estate described in Schedule-A and in respect of which the Right of Way shall be provided and granted by the Authority to the Concessionaire as a licensee under and in accordance with this Agreement (the "Site"). For the avoidance of doubt, it is hereby acknowledged and agreed that references to the Site shall be construed as references to the real estate required for Four-Laning of the Project Highway as set forth in Schedule-A.

10.2 Licence, Access and Right of Way

10.2.1 The Authority hereby grants to the Concessionaire access to the Site for carrying out any surveys, investigations and soil tests that the Concessionaire may deem necessary during the Development Period, it being expressly agreed and understood that the Authority shall have no liability whatsoever in respect of survey, investigations and tests carried out or work undertaken by the Concessionaire on or about the Site pursuant hereto in the event of Termination or otherwise.

10.2.2 In consideration of the Concession Fee, this Agreement and the covenants and warranties on the part of the Concessionaire herein contained, the Authority, in accordance with the terms and conditions set forth herein, hereby grants to the Concessionaire, commencing from the Appointed Date, leave and licence rights in respect of all the land (along with any buildings, constructions or immovable assets, if any, thereon) comprising the Site which is described, delineated and shown in Schedule-A hereto (the "**Licensed Premises**"), on an "as is where is" basis, free of any Encumbrances, to develop, operate and maintain the said Licensed Premises, together with all and singular rights, liberties, privileges, easements and appurtenances whatsoever to the said Licensed



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Premises, hereditaments or premises or any part thereof belonging to or in any way appurtenant thereto or enjoyed therewith, for the duration of the Concession Period and, for the purposes permitted under this Agreement, and for no other purpose whatsoever.

10.3.1 Pursuant to the notice specified in Clause 4.1.2, the Authority Representative and the Concessionaire shall, on a mutually agreed date and time, inspect the Site and prepare a memorandum containing an inventory of the Site including the vacant and unencumbered land, buildings, structures, roadworks, trees and any other immovable property on or attached to the Site. Such memorandum shall have appended thereto an appendix (the "**Appendix**") specifying in reasonable detail those parts of the Site to which vacant access and Right of Way has not been granted to the Concessionaire. Signing of the memorandum, in two counterparts (each of which shall constitute an original), by the authorised representatives of the Parties shall, subject to the provisions of Clause 10.2.2, be deemed to constitute a valid licence and Right of Way to the Concessionaire for free and unrestricted use and development of the vacant and unencumbered Site during the Concession Period under and in accordance with the provisions of this Agreement and for no other purpose whatsoever. For the avoidance of doubt, it is agreed that valid licence and Right of Way with respect to the parts of the Site as set forth in the Appendix shall be deemed to have been granted to the Concessionaire upon vacant access thereto being provided by the Authority to the Concessionaire.

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 Four-Lane 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



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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.

11.2 Shifting of obstructing utilities

The Concessionaire shall, subject to Applicable Laws and with assistance of the Authority, undertake shifting of any utility including electric lines, waterpipes and telephone cables, to an appropriate location or alignment within or outside the Site if and only if such utility causes or shall cause a material adverse effect on the construction, operation or maintenance of the Project Highway. The cost of such shifting shall be borne by the Authority or by the entity owning such utility, if the Authority so directs, and in the event of any delay in shifting thereof, the Concessionaire shall be excused for failure to perform any of its obligations hereunder if such failure is a direct consequence of delay on the part of the entity owning such electric lines, water pipes or telephone cables, as the case may be.



11.4 Felling of trees

The Authority shall assist the Concessionaire in obtaining the Applicable Permits for felling of trees to be identified by the Authority for this purpose if and only if such trees cause a material adverse effect on the construction, operation or maintenance of the Project Highway. The cost of such felling shall be borne by the Authority, and in the event of any delay in felling thereof for reasons beyond the control of the Concessionaire, it shall be excused for failure to perform any of its obligations hereunder if such failure is a direct consequence of delay in the felling of trees. For the avoidance of doubt, the Parties hereto agree that the felled trees shall be deemed to be owned by the Authority and shall be disposed in such manner and subject to such conditions as the Authority may in its sole discretion deem appropriate.

12.1 Obligations prior to commencement of construction

Prior to commencement of Construction Works, the Concessionaire shall:

- (a) submit to the Authority and the Independent Engineer its detailed design, construction methodology, quality assurance procedures, and the procurement, engineering and construction time schedule for completion of the Project in accordance with the Project Completion Schedule as set forth in Schedule-G;
- (b) appoint its representative duly authorised to deal with the Authority in respect of all matters under or arising out of or relating to this Agreement;
- (c) undertake, do and perform all such acts, deeds and things as may be necessary or required before commencement of construction under and in accordance with this Agreement, the Applicable Laws and Applicable Permits; and
- (d) make its own arrangements for quarrying of materials needed for the Project Highway under and in accordance with the Applicable Laws and Applicable Permits.

12.4.2 The Concessionaire shall construct the Project Highway in



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accordance with the Project Completion Schedule set forth in Schedule-G. In the event that the Concessionaire fails to achieve any Project Milestone within a period of 90 (ninety) days from the date set forth for such Milestone in Schedule-G, unless such failure has occurred due to Force Majeure or for reasons solely attributable to the Authority, it shall pay Damages to the Authority in a sum calculated at the rate of 0.1 % (zero point one per cent) of the amount of Performance Security for delay of each day until such Milestone is achieved; provided that if any or all Project Milestones or the Scheduled Four-Laning Date are extended in accordance with the provisions of this Agreement, the dates set forth in Schedule-G shall be deemed to be modified accordingly and the provisions of this Agreement shall apply as if Schedule-G has been amended as above; provided further that in the event Project Completion Date is achieved on or before the Scheduled Four-Laning Date, the Damages paid under this Clause 12.4.2 shall be refunded by the Authority to the Concessionaire, but without any interest thereon. For the avoidance of doubt, it is agreed that recovery of Damages under this Clause 12.4.2 shall be without prejudice to the rights of the Authority under this Agreement, including the right of Termination thereof.

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

24.1 Financial Close

24.1.1 The Concessionaire hereby agrees and undertakes that it shall achieve Financial Close within 180 (one hundred and eighty)



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days from the date of this Agreement and in the event of delay, it shall be entitled to a further period not exceeding 120 (one hundred and twenty) days, subject to payment of Damages to the Authority in a sum calculated at the rate of 0.1 % (zero point one per cent) of the Performance Security for each day of delay, or for a further period not exceeding 200 (two hundred) days, subject to payment of Damages specified in Clause 4.3; provided that the Damages specified herein shall be payable every week in advance and the period beyond the said 180 (one hundred and eighty) days shall be granted only to the extent of Damages so paid; provided further that no Damages shall be payable if such delay in Financial Close has occurred solely as a result of any default or delay by the Authority in procuring satisfaction of the Conditions Precedent specified in Clause 4.1.2 or due to Force Majeure. For the avoidance of doubt, the Damages payable hereunder by the Concessionaire shall be in addition to the Damages, if any, due and payable under the provisions of Clause 4.3.

24.1.2 The Concessionaire shall, upon occurrence of Financial Close, notify the Authority forthwith, and shall have provided to the Authority, at least 2 (two) days prior to Financial Close, 3 (three) true copies of the Financial Package and the Financial Model, duly attested by a Director of the Concessionaire, along with 3 (three) soft copies of the Financial Model in MS Excel version or any substitute thereof, which is acceptable to the Senior Lenders.

31.1 Escrow Account

31.1.1 The Concessionaire shall, prior to the Appointed Date, open and establish an Escrow Account with a Bank (the "Escrow Bank") in accordance with this Agreement read with the Escrow Agreement.

31.1.2 The nature and scope of the Escrow Account are fully described in the agreement (the "Escrow Agreement") to be entered into amongst the Concessionaire, the Authority, the Escrow Bank and the Senior Lenders through the Lenders' Representative, which shall be substantially in the form set forth in Schedule-S.

34.4 Political Event

A Political Event shall mean one or more of the following acts or events by or an account of any Government Instrumentality:



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(b) compulsory acquisition in national interest or expropriation of any Project Assets or rights of the Concessionaire or of the Contractors;

34.6.2 At any time after the Appointed Date, if any Force Majeure Event occurs:

(b) after COD, whereupon the Concessionaire is unable to collect Fee despite making best efforts or it is directed by the Authority to suspend the collection thereof during the subsistence of such Force Majeure Event, the Concession Period shall be extended by a period, equal in length to the period during which the Concessionaire was prevented from collection of Fee on account thereof; provided that in the event of partial collection of Fee where the daily collection is less than 90% (ninety per cent) of the Average Daily Fee, the Authority shall extend the Concession Period in proportion to the loss of Fee on a daily basis. For the avoidance of doubt, loss of 25% (twenty-five per cent) in collection of Fee as compared to the Average Daily Fee for four days shall entitle the Concessionaire to extension of one day in the Concession Period.

34.7 Allocation of costs arising out of Force Majeure

34.7.1 Upon occurrence of any Force Majeure Event prior to the Appointed Date, the Parties shall bear their respective costs and no Party shall be required to pay to the other Party any costs thereof.

34.7.2 Upon occurrence of a Force Majeure Event after the Appointed Date, the costs incurred and attributable to such event and directly relating to the Project (the "Force Majeure Costs") shall be allocated and paid as follows:

(b) upon occurrence of an Indirect Political Event, all Force Majeure Costs attributable to such Indirect Political Event, and not exceeding the Insurance Cover for such Indirect Political Event, shall be borne by the Concessionaire, and to the extent Force Majeure Costs exceed such Insurance Cover, one half of such excess amount shall be reimbursed by the Authority to the Concessionaire; and



(c) upon occurrence of a Political Event, all Force Majeure Costs attributable to such Political Event shall be reimbursed by the Authority to the Concessionaire.

For the avoidance of doubt, Force Majeure Costs may include interest payment on debt, O&M Expenses, any increase in the cost of Construction Works on account of inflation and all other costs directly attributable to the Force Majeure Event, but shall not include loss of Fee revenues or debt repayment obligations, and for determining such costs, information contained in the Financial Package may be relied upon to the extent that such information is relevant

35.2 **Compensation for default by the Authority**

Subject to the provisions of Clause 35.6, in the event of the Authority being in material default or breach of this Agreement at any time after the Appointed Date, it shall pay to the Concessionaire by way of compensation, all direct costs suffered or incurred by the Concessionaire as a consequence of such material default or breach within 30 (thirty) days of receipt of the demand supported by necessary particulars thereof; provided that no such compensation shall be payable for any material breach or default in respect of which Damages have been expressly specified in this Agreement. For the avoidance of doubt, compensation payable may include interest payments on debt, O&M Expenses, any increase in capital costs on account of inflation and all other costs directly attributable to such material breach or default but shall not include loss of Fee revenues, debt repayment obligations or other consequential losses, and for determining such compensation, information contained in the Financial Package and the Financial Model may be relied upon to the extent it is relevant.

35.3 **Extension of Concession Period**

Subject to the provisions of Clause 35.6, in the event that a material default or breach of this Agreement set forth in Clause 35.2 causes delay in achieving COD or leads to suspension of or reduction in collection of Fee, as the case may be, the Authority shall, in addition to payment of compensation under Clause 35.2, extend the Concession Period, such extension being equal in duration to the period by which COD was delayed or the collection of Fee remained suspended on account thereof, as the case may be;



and in the event of reduction in collection of Fee where the daily collection is less than 90%(ninety per cent) of the Average Daily Fee, the Authority shall, in addition to payment of compensation under Clause 35.2, extend the Concession Period in proportion to the loss of Fee on a daily basis. For the avoidance of doubt, loss of 25% (twenty five per cent) in collection of Fee as compared to the Average Daily days shall entitle the Concessionaire to extension of one day in the Concession Period.

47.10 **Entire Agreement**

This Agreement and the Schedules together constitute a complete and exclusive statement of the terms of the agreement between the Parties on the subject hereof, and no amendment or modification hereto shall be valid and effective unless such modification or amendment is agreed to in writing by the Parties and duly executed by persons especially empowered in this behalf by the respective Parties. All prior written or oral understandings, offers or other communications of every kind pertaining to this Agreement are abrogated and withdrawn. For the avoidance of doubt, the Parties hereto agree that any obligations of the Concessionaire arising from the Request for Qualification or Request for Proposals, as the case may be, shall be deemed to form part of this Agreement and treated as such.

36. The following position emerges, from various clauses of the CA, as is also noted in the impugned Award:

(i) The Scheduled Four Laning Date, as per the CA, was 26 December 2017, whereafter Yedeshi was entitled to start collecting toll from users of the Project Highway. The concession period was for 26 years, to expire on 30 June 2041.

(ii) The CA required NHAI to acquire sufficient land for the Project and to grant encumbrance free vacant possession and



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Right Of Way³⁰ to Yedeshi to access the land, build the highway, operate and maintain it, in lieu of toll collection rights.

(iii) As per the CA, NHAI was to have acquired/procured land on or before the Appointed Date. Prior to the said date, Yedeshi was also required to have achieved financial closure with its lenders and complied with other conditions precedents such as obtaining applicable permissions and was to be in a position to commence construction. On fulfillment of these conditions precedent, the CA envisaged handing over of unencumbered land by NHAI to Yedeshi on the Appointed Date, and kicking off of the Project.

37. Yedeshi furnished performance security to NHAI on 24 November 2014 and submitted drafts of the financing agreements by 17 October 2014.

38. On 6 January 2015, Yedeshi wrote to NHAI, pointing out that various Conditions Precedents as per Clause 4.1.2 of the CA, were yet to be complied with by NHAI, which including making of ROW available to Yedeshi. It was further pointed that the process envisaged in Section 3G³¹ of the National Highways Act 1956³² had, till then, been achieved only in respect of 29.18% of the Project land.

³⁰ ROW

³¹**3-G. Determination of amount payable as compensation. –**

(1) Where any land is acquired under this Act, there shall be paid an amount which shall be determined by an order of the competent authority.

(2) Where the right of user or any right in the nature of an easement on, any land is acquired under this Act, there shall be paid an amount to the owner and any other person whose right of enjoyment in that land has been affected in any manner whatsoever by reason of such acquisition an amount calculated at ten per cent, of the amount determined under sub-section (1), for that land.



39. NHAI did not respond to this letter.

40. Yedeshi, thereafter, wrote to NHAI on 30 January 2015, reiterating the above defaults on NHAI's part and pointing out that, though the Project debt had been sanctioned by IDBI Bank Ltd., the lead banker, the Senior lenders of Yedeshi were reluctant to execute financing agreements and declare financial close till the Conditions Precedent were complied with by NHAI. As such, it was alleged that delay in achieving financial close was owing to reasons attributable to NHAI and that, therefore, no damages were payable by Yedeshi in terms of Clause 24.1 of the CA.

41. NHAI did not respond to this letter either.

42. Subsequently, financial agreements were executed by the Senior Lenders of Yedeshi and, on 16 March 2015, financial close was

(3) Before proceeding to determine the amount under sub-section (1) or sub-section (2), the competent authority shall give a public notice published in two local newspapers, one of which will be in a vernacular language inviting claims from all persons interested in the land to be acquired.

(4) Such notice shall state the particulars of the land and shall require all persons interested in such land to appear in person or by an agent or by a legal practitioner referred to in sub-section (2) of Section 3-C, before the competent authority, at a time and place and to state the nature of their respective interest in such land.

(5) If the amount determined by the competent authority under sub-section (1) or sub-section (2) is not acceptable to either of the parties, the amount shall, on an application by either of the parties, be determined by the arbitrator to be appointed by the Central Government—

(6) Subject to the provisions of this Act, the provisions of the Arbitration and Conciliation Act, 1996 (26 of 1996) shall apply to every arbitration under this Act.

(7) The competent authority or the arbitrator while determining the amount under sub-section (1) or sub-section (5), as the case may be, shall take into consideration—

(a) the market value of the land on the date of publication of the notification under Section 3-A;

(b) the damage, if any, sustained by the person interested at the time of taking possession of the land, by reason of the severing of such land from other land;

(c) the damage, if any, sustained by the person interested at the time of taking possession of the land, by reason of the acquisition injuriously affecting his other immovable property in any manner, or his earnings;

(d) if, in consequences of the acquisition of the land, the person interested is compelled to change his residence or place of business, the reasonable expenses, if any, incidental to such change.

³² “the NHAI Act”, hereinafter



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obtained, as confirmed by NHAI *vide* letter dated 19 March 2015, addressed to Yedeshi.

43. On 24 April 2015, Yedeshi wrote to NHAI, setting out the status of completion, by Yedeshi, of the Conditions Precedent and seeking declaration of an Appointed Date.

44. NHAI did not respond.

45. Thereafter, Yedeshi, *vide* letter dated 8 June 2015, addressed to NHAI, recorded the agreement, of NHAI and Yedeshi, to mutually waive off damages payable for delay in fulfilling Conditions Precedent as per Clause 4.1.2 and 4.1.3 of the CA. The request for declaration of appointed date was reiterated.

46. Pursuant thereto, NHAI, *vide* letter dated 29 June 2015, addressed to Yedeshi, communicated the approval of the competent authority for declaration of 1 July 2015 as the Appointed Date.

47. Consequent thereon, on 1 July 2015, NHAI and Yedeshi signed a Memorandum of Inventory³³ and Appendix in terms of Clause 10.3.1 of the CA, recording the status of the Project Site as on that date. As per the MOI-I, the Project Site was bifurcated into 563.859 Hectares³⁴ as the existing road and 683.99 Ha as land to be acquired, by NHAI. It was also recorded, in the MOI-I, that notification, in

³³ “the MOI-I” hereinafter

³⁴ “Ha” hereinafter



terms of Section 3-D³⁵ of the NH Act stood published in respect of 575.94 Ha, equivalent to 84.2% of the area.

48. A further MOI³⁶ was communicated by Yedeshi to NHAI, reflecting the status as on 30 September 2015, *vide* letter dated 13 October 2015. As per the MOI-II, the land, in respect of which Section 3D notification stood issued stood reduced to 953.044 Ha, equivalent to 76.37 %. The MOI-II also recorded that compensation had been paid, in terms of Section 3H³⁷ of the NHAI Act only in respect of 166.56 Ha.

49. NHAI did not dispute this memorandum contemporaneously.

³⁵ **3-D. Declaration of acquisition. –**

(1) Where no objection under sub-section (1) of Section 3-C has been made to the competent authority within the period specified therein or where the competent authority has disallowed the objection under subsection (2) of that section, the competent authority shall, as soon as may be, submit a report accordingly to the Central Government and on receipt of such report, the Central Government shall declare, by notification in the Official Gazette, that the land should be acquired for the purpose or purposes mentioned in sub-section (1) of Section 3-A.

(2) On the publication of the declaration under sub-section (1), the land shall vest absolutely in the Central Government free from all encumbrances.

(3) Where in respect of any land, a notification has been published under sub-section (1) of Section 3-A for its acquisition but no declaration under sub-section (1) has been published within a period of one year from the date of publication of that notification, the said notification shall cease to have any effect:

Provided that in computing the said period of one year, the period or periods during which any action or proceedings to be taken in pursuance of the notification issued under sub-section (1) of Section 3-A is stayed by an order of a court shall be excluded.

(4) A declaration made by the Central Government under sub-section (1) shall not be called in question in any court or by any other authority.

³⁶ “the MOI-II” hereinafter

³⁷ **3-H. Deposit and payment of amount. –**

(1) The amount determined under Section 3-G shall be deposited by the Central Government in such manner as may be laid down by rules made in this behalf by that Government, with the competent authority before taking possession of the land.

(2) As soon as may be after the amount has been deposited under sub-section (1), the competent authority shall on behalf of the Central Government pay the amount to the person or persons entitled thereto.

(3) Where several persons claim to be interested in the amount deposited under sub-section (1), the competent authority shall determine the persons who in its opinion are entitled to receive the amount payable to each of them



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50. On 23 October 2015, Yedeshi, in terms of Article 12.1 of the CA, read with Schedule G of the CA, submitted a detailed construction schedule. As per this schedule, Yedeshi intended to complete the entire construction and commence collection of toll within 24 months from the Appointed Date i.e. by 30 June 2017. The impugned Award notes that NHAI did not produce, even before the Arbitral Tribunal, any evidence to show that, even on this date, NHAI had refuted Yedeshi's request to comply with the NHAI's obligation under Article 10 of the CA, which included grant of vacant access, valid license and ROW of the Project Site to Yedeshi, or state that it had complied with the said obligation and granted vacant encumbrance free access to Yedeshi of the Project Site.

51. By 30 November 2015, Yedeshi had complied with Project Milestone 1 and had expended 10% of the total Project cost. Project Milestone 1 had been achieved before the date fixed by Article 12.4.2 of the CA, which was 180 days from the Appointed Date i.e., by 28 December 2015. The fact of achieving Project Milestone 1 before the contractual cut-off date was communicated by Yedeshi to NHAI *vide* letter dated 19 December 2015, supported by a certificate of its Statutory Auditory dated 10 December 2015.

52. NHAI did not dispute this fact and, in fact, admitted it in its Statement of Defence³⁸ before the Arbitral Tribunal.

53. A third MOI³⁹ was submitted by Yedeshi to NHAI, under letter dated 24 February 2016, consequent on expiry of 237 days from the

³⁸ "SOD" hereinafter



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Appointed Date on 22 February 2016. In the said MOI, it was pointed out that, even till that date, only 30.07% of the Project Site, corresponding to 70.22 km, in respect of which Section 3H compliance was complete, had been made available for construction. NHAI's attention was invited to its contractual obligation to hand over the entire land to Yedeshi on or before the expiry of 90 days from the Appointed Date. It was pointed out that non-availability of the unhindered/unencumbered land was adversely affecting the progress of the Project. The MOI recorded that Section 3D compliance was complete in respect of only 877.146 Ha, equivalent to 70.29 % of the Project Site, and Section 3H compliance was yet awaited in respect of 478.341 Ha equivalent to 38.33% of the Project Site.

54. No contemporaneous document or record, refuting these facts, was produced by NHAI before the Arbitral Tribunal.

55. A fourth MOI⁴⁰ was submitted by Yedeshi to NHAI on 20 May 2016, after 320 days from the Appointed Date had expired on 18 May 2016. The MOI pointed out that, even as on that date, Section 3H compliance had been completed only in respect of 44.79% of the area, corresponding to 97.63 Kms and that 20.81% of the land was still encumbered. NHAI's contractual obligations to hand over the entire land by the expiry of 90 days from the Appointed date was reiterated, and it was again submitted that, owing to non-availability of unencumbered and unhindered Project land, performance of the Project was suffering. The MOI further recorded that, as per Section

³⁹ "MOI-III" hereinafter

⁴⁰ "MOI-IV" hereinafter



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3D status, the total land available was 922.007 Ha, equivalent to 73.64% and that 813.651 Ha, equivalent to 64.99%, was Section 3H compliant.

56. NHAI did not produce any contemporaneous document or correspondence, refuting this position.

57. On 29 June 2016, i.e. on the 365th day from the Appointed Date, Yedeshi achieved Project Milestone-2, by which date 45.71% of the Project Cost, of ₹ 1452.243 crores, stood expended. Yedeshi informed NHAI accordingly on 4 July 2015. The letter also intimated NHAI that certain works could not be completed owing to reasons attributable not to Yedeshi, but either to NHAI or to third parties.

58. NHAI sought the view of the IE in this regard, *vide* letter dated 6 July 2016.

59. The IE responded to NHAI *vide* two letters dated 25 July 2016, the relevant paragraphs of which may be reproduced thus:

First letter dated 25 July 2016

“We were requested to examine/verify the details submitted by the Concessionaire to ascertain the achievement of Mile Stone-2, the Concessionaire has notified that he had achieved Project Mile Stone-2 by expanding 45.71 % of total capital cost up to 29th June 2016 against Schedule date of 29.06.2016. In this regard it is inform you that as per clause 3, Schedule-G of Concessionaire Agreement the Project Mile Stone-2 shall occur on the date falling on the 365th day from Appointed date and prior to the occurrence of Project Mile Stone-2, Concessionaire shall commenced construction of all bridges and expanded not less than of total capital cost set forth in the Financial Package. Concessionaire failing to commence the all bridges mentioned as per clause 3.2 of



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Schedule-G of CA, for this our Observations/Comments as mentioned below:

1. Commencement of construction of all Bridges:

Construction of all bridges means Major, Minor bridges and all structures should have been commenced, it means all Structures such as Underpasses (VUP,PUP,CUP),Fly Over Bridges also to be considered. The detail review of these structures with status is tabulated in Annexure-'A'.

- i) Major Bridges: Commencement of all (5 nos) Major Bridges taken place.
- ii) Minor Bridges: Out of 50(MCW) + 9(SR) nos of minor bridges, 41(MCW) + 2(SR) nos are commenced and 9(MCW) + 7(SR) nos could not be commenced due to Land Acquisition problem.
- iii) Vehicular Underpasses: Out of 15 nos of YUP, 12 nos are commenced and 3 nos could not be commenced due to Land Acquisition problem.
- iv) Pedestrian Underpass: Out of 16 nos of PUP, 8 nos are commenced and 8 nos could not be commenced due to Land Acquisition problem.
- v) Cattle Underpass: Out of 2 nos of CUP, 1 no has commenced and 1 no could not be commenced due to Land Acquisition problem.
- vi) Fly Over Bridges: Out of 5 nos of EO, 4 nos are commenced and 1 no could not be commenced due to Land Acquisition problem.

The Performance of this Mile Stone-2 is as per Original scope mentioned as per Schedule-B of CA. The Items of COS are not considered since same is not yet approved by Authority.

2. Total expenditure in Project till end of May-2016:

As per enclosed certificate of expenditure, duly certified by statutory, Auditor MIs MKPS & Associates, Mumbai. Concessionaire has expended total Rs.1,452.243 Crore which is 45.71 % of capital cost set forth in Financial Package submitted by Concessionaire.



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As Concessionaire has achieved financial Mile Stone-2 and started constructions of all bridges where ever land is available with them, Concessionaire could not started the construction of Bridges where ever there is land acquisition issues, which is beyond the control of concessionaire.

In view of above, we recommend to accept and consider achievement of Mile Stone-2 as concessionaire has full filled their obligation financially & physically where ever land available with them.”

Second letter dated 25 July 2016

“As per enclosed certificate of expenditure, duly certified by statutory, Auditor M/s MKPS & Associates, Mumbai. Concessionaire has expended total Rs.1,452.243 Crore which is 45.71 % of capital cost set f01t11 in Financial Package submitted by Concessionaire.

As Concessionaire has achieved financial Mile Stone-2 and started constructions of all bridges where ever land is available with them, Concessionaire could not started the construction of Bridges where ever there is land acquisition issues, which is beyond the control of concessionaire.”

In view of above, we recommend to accept and consider achievement of Mile Stone-2 as concessionaire has full filled their obligation financially & physically where ever land available with them.”

60. The above facts were admitted by NHAI in its SOD.

61. A fifth MOI⁴¹ was forwarded by Yedeshi to NHAI on 2 November 2016, after 472 days from the Appointed Date had expired on 15 October 2016. As per this MOI, only 55.78% of the land, corresponding to 105.5 Kms, was Section 3H compliant. The MOI again reiterated NHAI’s contractual obligation to provide the entire land to Yedeshi before the expiry of 90 days from the Appointed Date

⁴¹ “MOI-V” hereinafter



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and again submitted that, owing to non-availability of unencumbered land, the Project development was being affected. The MOI further recorded that 972.186 Ha, equivalent to 77.26% of the Project Area was Section 3D compliant and 916.124 Ha, equivalent to 72.80% of the Project Area, was Section 3H compliant. NHAI did not produce any contemporaneous document or correspondence refuting this position. The SOD of NHAI also did not deal with this communication. Nor did it clarify how much of vacant or unencumbered land had been provided to Yedeshi by that date.

62. A Project Review Meeting was held on 15 December 2016. The following details of the discussions during the said project meeting and the decision taken thereon are relevant:

S. No	Issues	Description	Decision Taken/Remarks
3	Land Acquisition and review of status of "Memorandum & Appendix" as per Article 10 of Concession Agreement.	1. Concessionaire conveyed that status of Memorandum Appendix at the end of October 2016 was submitted by Concessionaire on 02.11.2016. In earlier Progress Review Meeting dated 22.11.2016, it was decided that IE team shall review / verify the status submitted by Concessionaire.	1. IE to submit review report on status & "Memorandum & Appendix" at the end of October 2016, submitted by Concessionaire. 2. Concessionaire, with help of Authority, to follow up with local administration to resolve compensation dispute. 3. Authority to ensure early resolution of issues in NHAI - HQ related LA work



	<p>Review is still pending.</p> <p>2. Concessionaire further pointed out that apart from slow LA activities, there are some corridor lengths where land is acquired but locals are not allowing work citing issues in LA award/compensation. PD NHAI Conveyed that due to change in some system at NHAH-HQ, LA process is affected presently but same shall be cleared at the earliest. Also, NHAH is helping Concessionaire to get help from local Administration to clear land for which compensation is paid but there are cost dispute.</p> <p>3. Concessionaire conveyed that due to court case pending since long. land is not available for construction in</p>	<p>4. Authority. through their Counselor to expedite Court Case for land in Dhotra Village (Aurangabad end of Chausala Bypass)</p> <p>5. Concessionaire to submit details of additional land required for proper construction of toll plaza buildings.</p>
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		<p>Dhotra village, near petrol pump Concessionaire requested Authority to expedite court case for final discussion to commence construction Work there accordingly. Authority assured for necessary instruction to their advocate to expedite court case.</p> <p>4. Concessionaire conveyed that for proper construction of toll plaza building along with all required amenities, some additional land is required. NHAI suggested to detail additional land and prepare documents to initiate procurement of additional land.</p>	
6.	Consideration of work under "Change of Scope" as per Article 16 of Concession	Concessionaire requested for confirmation of "Change of Scope" as per provision in Article 16 of	1. IE to submit review on submission of Concessionaire to consider construction of 02 HP culverts at Gobindbari road crossing of Georai



	Agreement.	<p>Concession Agreement, for following works -</p> <p>1. Construction of 02 Nos. HP culvert at crossing of Gobindbari road in Georai bypass (near PUP location). Concessionaire already submitted it through letter for consideration under "Change of Scope" as same is not mentioned in Scope of work defined in Schedule - B of Concession Agreement.</p> <p>2. Construction of some siphonic culverts of irrigation Departments observed at site, construction of which are not covered in Scope of work as per Schedule B. Further, local representative of Irrigation Dept .conveyed to ensure serviceability of these siphones.</p>	<p>Bypass (near PUP) for confirmation of "Change of Scope".</p> <p>2. Construction of Irrigation siphons, not given in Schedule B, shall be considered in" Change of Scope". Concessionaire to submit further details of these siphons in confirmation to Article 16 of Concession Agreement.</p> <p>3. Concessionaire to submit estimate for relocation of entry gate of "Khazana Well" in Pali Village beyond PROW, for consideration.</p>
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		<p>3. Concessionaire conveyed that entry gate of "Khazana well" in Pali village need be relocated. Authority suggested Concessionaire to submit estimate for same for consideration.</p> <p>Authority confirms that all the above work, not covered in Schedule S&C of Concession Agreement and required to be constructed as per site condition, are covered under "Change of Scope" as per provision in Article 16 of Concession Agreement. Concessionaire is suggested to submit further details pertaining to subject.</p>	
8.	Confirmation of work under "Change of Scope" as per Article 16 of Concession Agreement.	Following work, duly recommended by IE to consider under "Change of Scope" as per	1. Authority confirmed "Change of Scope", as per provision in Article 16 of Concession Agreement, for subject work



	<p>Article 16 of Concession Agreement, was discussed and Authority confirmed execution of these work under "Change of Scope" –</p> <p>1. Additional vents in both side of VUP in Wadigodri (CA design Ch. 232+927)-</p> <p>a. Additional vent towards Aurangabad side to be given @ Km 233+031 (near School gate, as per letter No. 169 dt 06.12.2016 of IE).</p> <p>b. Additional vent towards Solapur side to be given at suitable location to avoid modification of Road Profile already reviewed by IE.</p> <p>2. Relocation of flyover in Shahgarh from Km 219+745(CA design Ch.) to Km 219+830 (CA design Ch.)</p>	<p>discussed in meeting and detailed under this point in of this minute.</p> <p>2. Concessionaire to submit financial implications for provision of additional vent both side of VUP in Wadigodri (CA design Ch. 232+927) as per Article 16 of Concession Agreement.</p> <p>3. Flyover in Shahgarh to be relocated without any change in span arrangement (as provided in CA). No financial implication shall be considered for such change in location of flyover.</p>
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		with same span arrangement as defined in CA. 13. Smaller vent of Solapur side of flyover to be placed in front of Solapur side gate of bus stand in Shagarh.	
9.	Approval of drawings submitted by Concessionaire for work under "Change of Scope"	Concessionaire submitted that it is required to execute some of the items under "Change of Scope" without waiting for financial approval of same as per directive in Article 16 of Concession Agreement, to avoid time over-run of Project Completion Mile stones. For this, drawings being submitted for work under "Change of Scope" need be approved, pending financial approval of COS, to enable Concessionaire to proceed construction activities accordingly and to avoid any	Drawings enlisted in Annexure to this MOM is approved by Authority and IE. Concessionaire to execute work accordingly.



		<p>rework on account of issues in design. Representatives of IE and Authority agreed for same.</p> <p>Concessionaire presented details of drawings submitted by Concessionaire vide various letters for works under "Change of Scope". Same is enclosed as Annexure-1 of this MOM for ready reference. IE conveyed that same are reviewed and found in line with requirement and can be approved to proceed for execution accordingly.</p> <p>Authority confirmed approval of all drawings enlisted in "Annexure-1" of this MOM and suggested Concessionaire to execute work accordingly.</p>	
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Thus, NHAI acknowledged, during the said meeting, that various issues, including acquisition of land, were still pending and that there were also delays in providing approvals for the estimates provided by Yedeshi.

63. Project Milestone 3 was achieved by Yedeshi on 31 May 2017 and communicated to NHAI on 30 June 2017, which was certified by the IE, *vide* letter dated 4 July 2017 addressed to NHAI, thus:

“6. Concessionaire has incurred 73.525% of the total capital cost as against the required of 70% as on 31.05.2017 as certified by the Statutory Auditor M/s MKPS & Associates (Copy Enclosed).

7. The Schedule Date of Milestone-III is 10.04.2017, however, Concessionaire has expended more than desired expenditure of 70% as on 31.05.2017 which is within grace period of 90 days as per Clause 12.4.2 of Concession Agreement.

8. As per detail enclosed by the Concessionaire *vide* letter no. YABOT/C&SC/NHAI/2017/581 dated 19.04.2017 work of all Project Facilities as specified in Schedule - C have been commenced.

9. In view of above, the Independent Engineer hereby opined that Project Milestone III has been achieved by the concessionaire on date 31.05.2017 as per the provision set forth in the concession Agreement.”

64. On 16 June 2017, Yedeshi wrote to NHAI, setting out the following status of acquisition of land in a tabular statement and further asserting thus:

District	Length	Land to acquire	3D completed	3G completed	3H completed	% 3H
	Kms	Area in SQM				
Osmanabad	40.7	136.39	110.66	17.66	9.61	7.02 %



District						
Beed District	78.5	317.77	260.30	80.26	38.70	12.18%
Jalna District	33.3	91.02	82.78	59.32	-	0
Aurangabad District	36.88	142.05	122.20	114.05	86.95	61.21%
Total of all district	189.38	687.23	575.94	271.28	135.26	19.68%

Post Appointed Date, the Concessionaire commenced construction activities to complete project development in accordance to Construction Plan submitted, with an expectation from the Authority for completion of land acquisition within 90 days from Appointed Date (i.e. upto 28.09.2015), as per Sub-clause 10.3.4 of the Concession Agreement, as detailed above.

However, Land acquisition is/has been delayed unexpectedly, affecting construction progress in following manner -

1. Non-availability of land for construction work as per construction plan.
2. Inadequate continuity of available construction length, affecting machinery movement and restricting road diversion etc.
3. Non-availability of land for construction of structures, including minor bridges, flyovers, underpasses and culverts.
4. Non-availability of land affecting adversely utility relocation, in turn affecting road construction activities.

We wish to notify the Authority that due to the reasons detailed above (unexpected delay in Land Acquisition), project construction activities, as planned, has been hampered to the extent that completion of balance work as on date is not possible within planned / balance duration. In view of the above, the revision of Project Four Lining Schedule is inevitable. Presently, we are evaluating the effect of delays and preparing revised construction schedule accordingly for your review and approval. The same shall be submitted in due course.”

65. NHA did not respond to this letter.



66. On 15 July 2017, Yedeshi wrote to NHAI, submitting, *inter alia*, thus:

“The Concessionaire had commenced the work at site immediately upon declaration of the Appointed Date by deploying adequate resources i.e. plants, materials, manpower, machinery & Equipment etc., with a target to complete the project much before the scheduled date of completion so as to take advantage of early tolling by a minimum period of 6 months.

When we entered at site for the execution of works immediately after appointed date, it is noticed that even in the areas, where disbursement of payment had been done for the land acquisition, many of the land losers refused to allow construction work, demanding higher compensation rates. In many cases, the compensation was not paid for the buildings / structures and other immovable properties, which were in existence in their land since the valuation of these structures was missed out by the valuer appointed by the Authority.

Apart from above, non-approval and/or delay in approval of estimates for utility shifting added to the woes of the Concessionaire. Due to this double blow, the work fronts were not available in continuation but were in bits & pieces, hence, the available resources could not be utilized to its capacity and progress of works got affected badly.

In spite of the above mentioned difficulties, the Concessionaire continued all the resources deployed i.e. plants, materials, manpower, machinery & Equipment etc. since appointed date, with a target to complete the project on the scheduled date of completion considering that the Authority would fulfill their obligations stipulated under Article 10 and other clauses of the Concession Agreement to provide entire unhindered/unencumbered land to Concessionaire within 90 days from the appointed date. But, the Authority has entirely failed to fulfil their said obligations in-spite of best efforts of Authority and all assistance given by the Concessionaire to expedite the land acquisition. Since the land acquisition and utility shifting got further delayed due to reasons NOT at all attributable to the Concessionaire, the progress as was targeted could not be achieved and hence it is essential to modify the Scheduled Four Laning Date in accordance to the stipulations of Schedule G of the Concession Agreement. Also, accordingly the concession period of the project needs to be extended.



Mentioned below are the major reasons for delay in completion of the project, which are solely attributable to the Authority, State Government and third parties etc.

1. Slow Progress of Land Acquisition and disbursement of Payment by the Authority Delays by 23 months as on end of May'2017, Still continuing

Immediately after the Appointed Date, the Concessionaire had mobilized adequate resources and commenced the construction activities at all the cleared lands made available by the Authority. Unfortunately, during the execution, most of the land losers at various stretches had virtually stopped the construction works stating that NO work/ activity would be allowed by them in their land until unless appropriate compensation is paid to them. Time and again, these incidences were reported to the Authority and Independent Engineer through letters as well as in meetings/site visits held from time to time with a request to the Authority to resolve the issues and expedite the land acquisition process and disbursement of payment.

The following reasons having adverse affect on the land acquisition process, causing exorbitant delay in Land acquisition -

- a. Constant Delays in preparation of valuations of properties i.e. structures, houses, shops, trees, water structures etc. Despite clear instructions given by the concerned Collectors& their senior officials to the personnel involved in preparation of valuations.
- b. Frequent Change of Competent Authority of Land Acquisition (CALA): CALA were transferred very often in all the Districts except Aurangabad, because of which there have been considerable delays in process of land acquisition.
- c. Additional responsibility to CALA: The respective CALA are having/had additional administrative responsibilities, because of which they are most of the time they are busy in administrative works in-spite of giving much time for Land Acquisition activities, resulted considerable delay in process of land acquisition. Also, during elections of various bodies of the state Government, these CALA were exclusively given the election duties leading to further delay in LA process.
- d. Delay in publications of 3A & 3D in Gazette notifications: Publications of many notifications ("3A" and



"3D") delayed considerably, affecting Land Acquisition Process. Further, there have been significant delays in approval of awards and deposition of compensation amount. This issues have been raised with the CALA in various meetings and requested Authority to expedite the approvals.

e. Revision in preparation of award due to enforcement of New Act: One of the main causes, which have adversely affected the process of Land Acquisition after "Appointed Date" of the Project, was introduction of new NH Act for preparation of awards. Due to enforcement of this act, Land owners to whom compensation was already made as per the old act and who handed over their land for construction activities started obstructing ongoing construction activities demanding revision in award and for receiving disbursement as per new Act. This process of revision in award took considerable time, which commenced after due clearance from NHAI through circular.

f. Change/revision in banking process for disbursement of compensation: Recently a Centralized land acquisition bank account system is introduced by NHAI for disbursement of compensation. All the amount, balance in the account of CALA for disbursement of compensation were returned and new centralized account is opened at NHAI, HQ in another bank, through which disbursement of compensation is being paid to the land losers after declaration of awards and confirmation by CALA for payment. Because of this, the disbursement of compensation is delaying badly.

Kindly refer Clause 10.3.4 of Article 10 of the Concession Agreement, which states that "the total land enlisted in the Memorandum shall be handed over by Authority within 90 days from the appointed date to Concessionaire and in the event of delay in handing over of land, the Authority shall pay to the Concessionaire damages in a sum calculated at the rate of Rs. 50(Rupees Fifty) per day for every 1000 sqm or part thereof commencing from the 91st (Ninety first) day of the appointed date and until such Right of Way is procured".

The successive memorandums, appended with the appendices, containing the availability of land, have been submitted from time to time to the Authority as well as Independent Engineer by the Concessionaire. Memorandum signed on Appointed Date and



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revised Memorandums submitted by the Concessionaire on various dates are enclosed herewith (Please refer **Annexure -1**).

All the necessary assistance has been / is being provided to the Authority by the Concessionaire in pursuant to Clause 5.1.3 of Article 5 of the Concession Agreement to expedite acquisition by providing staff to the respective land acquisition officers, who have been specially deployed for the purpose and are entirely working in accordance to the instructions given by the respective CALA/ Authority.

In-spite of all the best Efforts by the Authority as well as the Concessionaire, the disbursement of payments and land acquisition process has delayed considerably, resulting in receiving unhindered/unencumbered discontinuous land stretches. This hampered the progress significantly and ultimately resulting delay in Project completion schedule.

Even after expiry of about 23 months from the Appointed date (at the end of May'2017), the Concessionaire is encountering several issues due to Land Acquisition in various villages, which are still hampering the work progress. It is essential to resolve these issues by the Authority on TOP PRIORITY even for the Provisional Completion of the project.

Issue related to slow progress of Land Acquisition activities were conveyed / reminded to the Authority from time to time during several meetings held at all levels. The same was conveyed during the Progress Review Meeting held on dated 15.12.2016. (Copy of the Minutes of Meeting enclosed under **Annexure -2**).

Even in the lands made available in Bits & Pieces, the Concessionaire was not able to take up any work due to issues pertaining to removal of Utility lines, Court Cases etc. including resistance from land owners due to dispute in amount of award declared Le. rate of evaluation, incomplete valuation of immovable properties etc.”

The letter further submitted a revised work schedule and also intimated that extension of the Concession Period was required in such circumstances.

67. NHAH forwarded the aforesaid communication dated 15 July 2017 of Yedeshi to the IE for its comments. The IE, *vide* reply dated



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4 September 2017, confirmed the schedule of the project completion status, in terms of Schedule G to the CA:

Project Milestone	Occurrence on	Details as per Schedule G	Achievement Status	Remarks
MS-1	180 th day from Appointed Date i.e. 27.12.2015	1. Commenced construction 2. Expended not less than 10% of total capital cost	MS-1 achieved.	Letter No. YABOT/C&SC/NHAI/2015/138 dated 19.12.2015, confirming achievement of MS-1 is submitted to Authority
MS-2	365 th day from Appointed Date i.e. 29.06.2016	1. Commenced construction of all bridges wherever land acquired for construction work. 2. Expended not less than 35% of total capital cost	MS-2 achieved.	Letter No. YABOT/C&SC/NHAI/2016/315 dated 04.07.2016, confirming achievement of MS-2 is submitted to Authority. IE recommended vide letter no SAICPL-DCSPL/NHAI/IE/NH-211/2016/057 Dt. 25.07.16
MS-3	650 th day from Appointed Date i.e. 10.04.2017	1. Commenced construction of project facilities 2. Expended not less than 70% of total	MS-3 achieved within curing period	Letter No. YABOT/C&SC/NHAI/2017/622 dated 19.06.2017, confirming achievement of MS-3 is



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		capital cost		submitted to Authority. IE confirmed achievement of MS-3 vide letter No-SAICPL - DCSPL/NHA I/IE/NH-211/2017/370 dated 04.07.2017
Schedule 4-Lane date	910 th day from Appointed Date i.e. 26.12.2017	Completed 4-Laning	Under progress	Concessionaire has submitted request for Extension of Time.

The communication further clarified that, despite best efforts by NHAI and Yedeshi, the land acquisition process had been delayed, and desired physical progress could not be achieved on account of constant delays in valuation of properties despite clear instructions given to the concerned collectors and senior officials, frequent change of the Competent Authority Of Land Acquisition⁴², additional administrative responsibilities cast on the CALA, delay in publications of Section 3A and 3D notifications, revision in the manner of preparation of the awards relating to land acquisition and change/revision in the process followed by the banks for disbursement of compensation. Besides, the communication also noted that there were still hinderances available at the site and that, by the end of August 2017, compensation was yet to be disbursed in respect of 46 Kms. of the acquired land. As a result, the letter concluded that, of the total project length, 62.85 Kms. out of 189 Kms., constituting 24.34%

⁴² "CALA" hereinafter



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of the project road, was not available for construction even by the end of August 2017. It was noted that Yedeshi had, in these circumstances, sought Extension of Time⁴³ to complete the Project and had submitted a revised work programme under letter dated 15 July 2017, envisaging completion of the Project by June 2019, subject to providing of unhindered and unencumbered land by NHAI and resolution of all issues by 30 November 2017. After considering all facts and taking into account Clauses 10.3.2, 10.3.4, 10.4, 12.4.1 and 12.4.2 as well as Clause 6 of Schedule G of the CA, the IE recommended thus:

“Considering the all above, the Independent Engineer has reviewed the submission of the Concessionaire and evaluated the delay on the basis of hindered length and available length for the work with the Concessionaire on weighted average basis as explained in Annexure-B. The delay days of 458 days has been worked out at Annexure-B on weighted average basis due to delay in handing over the land. The balance works involve PUP/CUP/Major Bridges/VUP/Box Culverts and Road works along the whole stretch. Service road / Toll Plaza works, Electrical and other facilities works also to be completed.

As per NHAI policy matters Circular-Technical No. 11 04/218/2007-Admn dated 19.01.2016, **one year time period** may be considered as a reasonable period for construction of the balance activities including minor structure like PUP. The aforesaid period may be increased by another 3 months in case of Rainy season falls in the extended delay period. Accordingly, Independent Engineer is also of the opinion that one year construction may be extended for complete the balance work assuming that balance land will be handed over to the Concessionaire by 30.09.2017.

In view of above, the Independent Engineer hereby recommends for approval of Extension of Time for 365 days i.e. upto 26th Dec,2018 as per Article 12 and Schedule-G of Concession Agreement to the Concessionaire for approval by the Competent Authority of NHAI.

Accordingly the revised completion date shall be”

⁴³ “EOT” hereinafter



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Milestone	Scheduled Four-Laning date as per Scheduled-G	Delay Days	Revised completion of Four Laning date
Completion Four-Laning Date	26 th Dec, 2017	365 days	26 th Dec, 2018”

(Emphasis in original)

68. The Project Director, NHAI, *vide* letter dated 4 October 2017, addressed to its Regional Officer, with a copy marked to Yedeshi, accepted, *in toto*, the contents of the letter dated 20 July 2017 of the IE and, based thereon, recommended for approval of extension of EOT of 365 days to Yedeshi, i.e. up to 26 December 2018, as per Article 2 read with Schedule G to the CA, for approval by the Competent Authority in the NHAI.

69. However, the Deputy General Manager⁴⁴, NHAI, *vide* response dated 21 December 2017 addressed to the Project Director, approved EOT only for six months. The relevant part of the letter read thus:

“Sir,

Please refer above cited letter recommending for granting Extension for 365 days to Schedule Four laning Date in pursuant to Article 12 of Schedule G of the Concession Agreement work mentioned in the subject matter.

2. The above cited proposal has been examined in this office and following observations are brought out –

(i) The position of Land Acquisition at the time of appointed date on strip chart.

⁴⁴ “DGM” hereinafter



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(ii) Land position at the time of initiating EOT proposal on strip chart showing work affected with specific structures.

(iii) Specific comments on works affected by Land Acquisition/ flyover/VUP/ M.B./ROB affected.

(iv) The clear cut recommendation in light of provision of circular dated 19.01.2016 from IR and PD.

As per present recommendation the EOT qualifies only for 6 months.

In this regard, it is requested to furnish the proper justification / detailed comments to this office for process the proposal.”

70. The Project Director, NHAI, forwarded the aforesaid response dated 21 December 2017, of the DGM to the IE under cover of a letter dated 27 December 2017, with a copy marked to Yedeshi. Yedeshi responded *vide* letter dated 29 December 2017. This response was forwarded by NHAI to the IE under cover of a letter dated 8 January 2018. The IE, *vide* response dated 10 January 2018 addressed to the Project Director, NHAI, observed that it had already furnished its clear-cut recommendations, after accepting and confirming the stand taken by Yedeshi. The recommendation for grant of EOT for 365 days was, therefore, reiterated. Accepting this recommendation of the IE, the Project Director, NHAI, wrote to the Regional Director, NHAI, once again recommending grant of EOT of 365 days.

71. However, despite this, as no final approval for grant of EOT of 365 days was accorded by the NHAI, Yedeshi wrote to the Project Director, NHAI, on 25 July 2018, as under:



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“Dear Sir,

Further to the letters referred above, we would like to state that till date we did not receive any decision on the extension of time (EOT) for the project highway.

As Scheduled four laning date was 26.12.2017, our Board of Directors & Lenders are insisting to get the approved EOT letters of the Authority for further disbursement of payment for the project.

In view of the same, it is requested that necessary comfort letter to our Board of Directors may be issued intimating expected date & time of EOT.

Thanking you and assuring our best services.”

72. NHA I responded on the very same day, i.e. 25 July 2018, to Yedeshi, thus:

“Sirs,

This has reference to above regarding Granting 'Extension to Scheduled Four Laning Date' in pursuant to Article 12 and Schedule G of Concession Agreement for four laning of Yedeshi to Aurangabad section of NH-211. The Concessionaire has requested for a comfort letter vide letter under ref. (v) dt.25/07/2018 that is to be addressed to the Board of Directors intimating expected date & time of Extension of Time (EoT).

2. In this regard, it is to inform that, the scheduled four laning date of the project was 26/12/2017, but the completion could not be achieved on the scheduled date. The proposal for extension of time has been proposed & recommended by IE of the project which has been further endorsed & recommended by PIU & RO of NHA I for the approval of EoT of 1 Year (365 days) i.e. up to 26/12/2018 in accordance with the Policy Matter Circular Technical 1104/218/2007-Admn dated 19/01/2016. The proposal is under consideration @ NHA I HQ which is underway for scrutiny & compliance.

3. This comfort letter is issued on specific request of the Concessionaire i.e. M/s Yedshi Aurangabad Tollway Pvt. Ltd.

This is for your information.”



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73. Apparently, thereafter, the NHAI Headquarters insisted that Yedeshi submitted an undertaking that it would not raise any claim on the Project cost due to shifting of Project Milestone-4, i.e. the Scheduled Four Laning Date⁴⁵, subject to grant of EOT as sought by Yedeshi. Mr. Rajiv Ranjan Shrivastava appended his signature to the said undertaking, on behalf of Yedeshi on 27 August 2018.

74. The 359th Meeting of the Executive Committee⁴⁶ of the NHAI was convened on 5 September 2018. The minutes of the said meeting disclose the following admissions and acknowledgements, in the various agenda items for consideration:

(a) Except for the condition relating to applicable permits, which had been fulfilled in part, Yedeshi had virtually complied with all the Conditions Precedent. As against this, NHAI had not complied with any of the Conditions Precedent with which it was required to be compliant.

(b) Yedeshi had achieved Milestones 1, 2 and 3 within the scheduled period. The scheduled completion date for 4-laning of the Project Highway had been delayed owing to factors such as delays in preparation of valuation of properties, frequent change of the CALA, delays in publications of the Section 3A and Section 3D notifications in the Gazette, revision and preparation of the awards relating to acquisition of land and

⁴⁵ "SFLD" hereinafter

⁴⁶ "EC" hereinafter



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change/revision in the banking process for disbursement.

(c) The issue of grant of EOT had been discussed by the EC in its 353rd Meeting held on 24 July 2018. The Technical Division of NHAI was directed to work out the EOT based on stretches in which execution was delayed on account of NHAI's default.

(d) By 30 July 2018, 181 km alone had been made available out of 189 km. Of the aforesaid 181 km, there were hinderances or land acquisition issues in respect of at least 25 km. Thus, as per the agenda for the 353rd meeting, even as late as on 30 July 2018, by which time more than three years from the Appointed Date had lapsed, unhindered land provided to Yedeshi for construction was only around 156 km.

(e) The agenda also noted the comments of the Technical Division that, even after the lapse of the SFLD, NHAI had failed in its obligation to provide 80% land to Yedeshi, thereby entitling Yedeshi to claim compensation. The Technical Division had also recommended grant of EOT of 365 days. The comments of the Technical Division, therefore, clearly indicated that NHAI had failed to meet its contractual obligations under the CA to hand over vacant unencumbered land to Yedeshi.

75. However, the EC, while discussing the agenda and approving the proposal for grant of EOT of 365 days to Yedeshi, caveated it with



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a condition that both parties should waive off any claims attributable to delay.

76. On 6 December 2018, NHAI wrote to Yedeshi, confirming the approval of the Competent Authority for grant of EOT of 365 days in the following terms:

“Sir,

Please refer to above mentioned letters w.r.t. proposal of Extension of Time (EOT)/shifting of Scheduled Four- Laning Date Extension of Time (EQT). In this regard, it is to inform that Competent Authority has accepted the proposal of EOT for 365 days (i.e. upto 26.12.2018) for Scheduled Four – Laning Date, subject to following condition:

- (i) The Scheduled Four – Laning Date has been extended by 365 days and revised Scheduled Four- Laning Date shall be 26.12.2018.
 - (ii) Authority and the Concessionaire shall waive off all delays on both sides, whatever they be, and the same would not lead to any claims whatsoever from either side on account of EOT for Scheduled Four- Laning Date.
 - (iii) EOT for Scheduled Four – Laning Date, does not automatically lead to extension of the Concession Period by corresponding period.
2. You are requested to sign the Supplementary Agreement (Copy enclosed) in this regard.
 3. You are requested to take necessary action, accordingly.”

Annexed to the letter was a Supplementary Agreement recording the aforesaid terms.

77. The Supplementary Agreement was, however, never signed by Yedeshi.



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78. On 17 December 2018, Yedeshi again wrote to NHAI, alleging that the entire land for the Project had not yet been handed over to it, despite the period of 365 days, for which EOT had been granted, being due to expire on 26 December 2018. This, it was submitted, necessitated further revision of the Project Completion Date.

79. On 26 December 2018, Yedeshi again applied for EOT of 196 days beyond the grant of the first EOT, thereby seeking extension upto 10 July 2019 for completion of the remaining work subject to unencumbered hinderance free right of way being made available by NHAI. The following paragraphs from the said communication are relevant:

“...Vide our letter No. 1051 (at Ref- 8 above), we notified your good office that due to the issues not attributable to the Concessionaire, Project completion could not be achieved in the extended period of 365 days, i.e. latest by 26.12.2018. Major reasons, forcing further delay of the "Extended 4-Laning Date" are as below-

1. Incomplete or delayed Land procurement required for project development.
2. Intermittent disturbance to ongoing construction work in acquired land by villagers due to non-resolution of their grievances in land under acquisition.

As on 15.12.2018, Status of work completion are tabulated in Table -1 (Summary Progress of Highway Work as on 15.12.2018) and Table - 2 (Summary Progress of Structural Work as on 15.12.2018), for your perusal. Strip chart showing status of Project Construction Activities is annexed as Annexure - 1 for ready reference.

Details of locations where construction work are not completed / cannot be completed within the extended period of construction (i.e. upto 26.12.2018) are tabulated in Table - 3 (based on



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completion of DBM layer) along with reasons causing noncompletion.

From the details in the table, it is clear that the work is not completed at locations where either land procurement is not done, or delayed (giving less construction time) or hindered by locals citing their grievances towards compensation amount.”

The request for EOT of 196 days, it was clarified, was subject to NHAI ensuring that the required access, license and ROW was provided to Yedeshi latest by 30 December 2018 and an assurance that there would be no hinderances on the site.

80. The aforesaid request of Yedeshi was forwarded by NHAI to the IE. The IE, *vide* response dated 13 February 2019, opined and approved as under:

“4. Initial “Extension of Time” approved:

4.1. Envisaging that construction work can't be completed within the period as stipulated in Article 12 & Schedule G of the Concession Agreement, for the reason not attributable to the Concessionaire, *vide* letter No. 638 dated 15.07.2017, the Concessionaire had applied for "Extension of Time" of 547 days (18 Months) for completion of balance work, substantiating his application with reasons causing delay.

4.2. The application of the Concessionaire was reviewed by the Independent Engineer, and, after verifying sufficiency of the reasons of delay submitted by the Concessionaire, *vide* his letter No. 6467 dated 04.09.2017, the Independent Engineer, based on the merit of the case, had recommended for "Extension of the time" for 01 (one) year, to be increased for further 03 (three) months in case rainy season falls within the "EOT period".

4.3. Recommendation of the Independent Engineer was further reviewed by the Authority and, after satisfying with the application of the Concessionaire & review (and recommendation) of the Independent Engineer, the Authority, *vide* his letter no. 2330 dated 06.12.2018, approved an "Extension of Time" for 01 (one) year, ending on 26.12.2018



5. **Application of the Concessionaire for further "Extension of Time" beyond earlier approved "EOT" of 01 (one) years** - The initial "EOT" of 01 (one) year was based on assumption that all the land required for Project construction shall be made available to the Concessionaire latest by 30.09.2017. However, procurement of required land was / is delayed due to various reasons, not attributable to the Concessionaire, and, in spite of best efforts by the Authority and the Concessionaire, there are following various reasons due to which land acquisition process have been delayed and desired physical progress could not be achieved.

5.1. **Constant Delays in preparation of valuations of properties** i.e. structures, houses, shops, trees, water structures etc. Despite clear instructions given by the concerned Collectors & their senior officials to the personnel involved in preparation of valuations.

5.2. **Frequent Change of Competent Authority of Land Acquisition (CALA):** CALA were transferred very often in all the Districts except Aurangabad, which resulted considerable delays in process of land acquisition.

5.3. **Additional responsibility to CALA:** The respective CALA are having/had additional administrative responsibilities, keeping them most of the time busy in administrative works in spite of giving much time for Land Acquisition activities, which has resulted considerable delays in process of land acquisition. Also, during elections of various bodies of the state Government, these CALA were exclusively given the election duties leading to further delays in LA process.

5.4. **Delay in publications of 3A & 3D in Gazette notifications:** Publications of many notifications ("3A" and "3D") delayed considerably, affecting Land Acquisition Process. Further, there have been significant delays in approval of awards and deposition of compensation amount. These issues have been raised with the CALA in various meetings and requested Authority to expedite the approvals.

5.5. **Revision in preparation of awards due to enforcement of New Act:** One of the main causes, which have adversely affected the process of Land Acquisition after "Appointed Date" of the Project, was introduction of new NH Act for preparation of awards. Due to enforcement of this act, Land owners to whom compensation was already made as per the old act and who handed over their land for construction activities started obstructing



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ongoing construction activities demanding revision in award and for receiving disbursement as per new Act. This process of revision in award took considerable time, which commenced after due clearance from NHAI through circular.

5.6. Change / revision in banking process for disbursement of compensation: Recently a Centralized land acquisition bank account system is introduced by NHAI for disbursement of compensation. All the amount, balance in the account of CALA for disbursement of compensation were returned and new centralized account is opened at NHAI, HQ in another bank, through which disbursement of compensation is being paid to the land losers after declaration of awards and confirmation by CALA for payment. Because of this, the disbursement of compensation is delaying badly.

6. Based on above detailed issues, summarized details of land availability for construction work at the end of December 2018 is as below-

From the above table, it is clear that

- a) Disbursement of compensation is still balance for 64.46 Hect (2.163 Kms) out of 714.71 Hect (189.023 Kms).
- b) Due to various disputes of awards / compensation, 6.00 Kms of land for which disbursement is completed, is not available for construction work.

As per above, total project length, not available for construction at the end of December 2018 is 8.163 Kms out of 189.023 Kms of project corridor length.

8. Application of the Concessionaire for "further Extension of Time" Considering the all above facts, and envisaging that the balance work can't be completed in the "**Approved Extension of Time of 365 days**", the Concessionaire (M/s Yedeshi Aurangabad Tollways Private Limited) has requested for granting further Extension of Scheduled Completion Date in Pursuant to Article 12 and Schedule G of Concession Agreement up to 10.07.2019 vide letter No. **YABOT/EOT/NHAI/2018/1059 dated 26.12.2018**, subject to that unhindered / unencumbered land as well as all issues shall be resolved by Authority by end of 31.12.2018.



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Considering nature of balance construction work (VUP, PUP Service Roads, Main Carriageway with RE wall, RCC drains along service roads etc.), construction completion proposal of 196 days, submitted by the Concessionaire is reasonable and hence recommended for consideration. This is in line with NHAI policy matters Circular-Technical No. 1104/218/2007-Admin dated 19.01.2016.

In view of above, the Independent Engineer hereby recommends for approval of further Extension of Time for **196 days i.e. up to 10.07.2019** as per Article 12 and Schedule-G of Concession Agreement in the bona fide interest of project completion to the Concessionaire for approval by the Competent Authority of NHAI.

Accordingly the revised completion date shall be;

Milestone	Scheduled Four-Laning date as per Scheduled-G	EOT-I Already approved	EOT-II proposed Now	Revised Completion of Four Laning Date
Construction Completion – Four Laning Date	26 th Dec 2017	365 days (upto 25 th Dec-2018)	196 days	10 th July 2019

Thanking you and assuring our best attention at all times.”

In its SOD, NHAI sought to contend that the IE had recommended grant of EOT of 196 days only in the interest of timely completion of the Project and keeping in mind the fact that Yedeshi was significantly way behind schedule and was unable to utilize the land made available to it.

81. In the meanwhile, Yedeshi continued to work on the Project.



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By mid-February, it had completed more than 75% of the Project construction work. On 16 February 2019, Yedeshi applied to the IE in terms of Article 14 of the CA for grant of Provisional Completion Certificate⁴⁷ for a length of 161.72 Kms. and requested the IE to conduct the necessary tests in that regard.

82. In terms of Article 14 of the CA, the requisite tests were conducted by the IE as per Schedule I of the CA in the presence of the representatives of NHAI and Yedeshi. The conducting of the tests and the fact that the work done by Yedeshi was found to be as per the specifications and standards envisaged in the CA were confirmed by the IE *vide* letter dated 6 March 2019, the relevant paragraphs of which may be reproduced thus:

“3. The Concessionaire has already achieved Project Milestone-I, Project Milestone-II and Project Milestone-III. The details of milestone are described as below.

Mile Stone	Scheduled date	Actual/ Revised Date
Mile Stone I	27.12.2015	19.12.2015
Mile Stone II	29.06.2016	04.07.2016
Mile Stone III	10.04.2017	31.05.2017

4. The Concessionaire has already completed MCW of four laning for 161.870 Km. length out of the entire Project length of 189.023 Km except the works listed in Punch List, Appendix-III. As per scope of project as specified in Schedule -B, together with provision for Project Facilities as specified in Schedule G and in conformity with the Specification and Standards set forth in schedule-D. The completed length of 161.870 km forms 85.65% of the Total Project Length of 189.023 Km. against minimum length of 75% as specified in Clause 14.3.2 of Concession Agreement. The tests required as per Schedule-I of the Concession Agreement *have* been conducted and witnessed by the representatives of

⁴⁷ “PCC” hereinafter



Concessionaire, Authority and Independent Engineer and found meeting the Specifications and Standards, have been deliberated in the following Para.

5. **Details of Tests:**

Details of the tests conducted thereupon in accordance with Article 14, clause 14.1 sub clause 14.1.2 'Test' (Schedule-I) of the Concession Agreement, are as follows,

5.1 **Visual and Physical Test:**

The representative of NHAI, Concessionaire and Independent Engineer has carried out the visual and physical check of the Project Highway and all works and equipment, except the items mentioned in Punch List Appendix-III, are found conforming the provisions of the Concession Agreement. The results of tests are enclosed at **Appendix V, Annexure-I**.

5.2 **Test Drive:**

The representative of Independent Engineer along with the Authority's representative and Concessionaire's representative have taken the Test drive of the Project Highway stretch under consideration by a Car and a fully loaded Truck. The quality of service was found to be satisfactory and conforming to the provision of the Concession Agreement. The results of the tests are enclosed at **Appendix-V, Annexure-II**.

5.3 **Ridding Quality Test:**

Ridding Quality Test of each lane of the carriageway was jointly conducted by the representative of IE/NHAI, Independent Engineer and the Concessionaire with Bump Integrator. The unevenness index of the Pavement was found to be within Allowable Tolerance limit (1800mm/Km). the result of the Bump Integrator test are enclosed at **Appendix-V, Annexure-III**.

5.4 **Pavement Composition Test:**

The thickness and composition of the pavement layers were checked jointly by the representative of NHAI, Independent Engineer and the Concessionaire by digging pits at an interval of 5 Km in each direction of travel randomly selected in each stretch of the Project Highway i.e. 161.870 km (70nos) locations in total on various dates from 23.02.2019 to 04.03.2019. The crust thickness at test locations were to be as per Concessionaire's design proposal. The test results are enclosed at **Appendix-V, Annexure-IV**.



5.5 Cross Section Test:

The cross sections of the project Highway were checked jointly by the representative of NHAI, Independent Engineer and the Concessionaire through physical measurement of the dimensions at an interval of 1 km for the Bridge portion, one spot has been selected randomly in each span of the bridge. The measurements of all the cross sections were found to be complying with standard design requirements. The Test results are enclosed at **Appendix-V, Annexure-V**

5.6 Structural Test for Bridges:

All new bridges at different locations were tested for Ultrasonic Pulse Velocity Test and Rebound Hammers Test by the Third Party agency, M/s Concrete Structural Forensic Consultants Bangalore (NAHL approved Laboratory) in the presence of the Independent Engineer, NHAI and the Concessionaire in accordance with the procedure described in Special Report No.17:1996 of the IRC Highway Research Board on Non-destructive Testing Techniques and IS 13311 (Part 2):1992 at two spots in every span chosen randomly by the Independent Engineer. The results were found to be complying with design requirements. The test result are enclosed at **Appendix V, Annexure-VI**.

5.7 Load test of a Bridge Superstructure:

Load test over the spans of length more or equal to 15 meter length have been conducted by the Third parity agency M/s Concrete Structural Forensic Consultants Bangalore before the structures were put into operation and successfully completed along with representatives with information to the Authority, Independent Engineer is considering these Test result as part of test under Schedule-I the result were found to be complying with standard design requirements. The test results are enclosed at **Appendix V, Annexure-VII**.

5.8 Environmental Audit:

The Independent Engineer has carried out: the Environmental Audit of the Project Highway on 28/02/2019. The Independent Engineer report is attached as Appendix-VI. The Concessionaire has also submitted the Environmental Monitoring Test report vide letter No. YABOT /ENV //IE/2019/1113 dated 26.02.2019. Further, the Concessionaire has submitted undertaking vide letter no. 1119 dated 03.03.2019 that "*we have paid all the necessary royalty and mining charges for the material incorporated in*



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permanent work as per scope of work of the Concession Agreement for the captioned project. We also undertake to pay any amount outstanding on this account, if any."

Concessionaire has also submitted undertaking vide letter no. 1119 dated 03.03.2019 that *"we are paying all labour cess on our agreement works as and when it is required and there are no dues on this account."*

5.9 Safety Review

The Authority, NHAI vide letter no. NHAI/RSC/Misc/2018/4434 dated 14/02/2019 has appointed **'Road Safety Expert'; Kothi No.6, Sector-10, Dwarka, New Delhi -110075 as Safety Consultant** to conduct the Safety Audit as per requirement of Schedule -'L' for project Yedeshi (Km 100) to Aurangabad (Km 290.200) of NH-211. Accordingly Deputy Team Leader and TT Expert of "Road Safety Expert" have visited the site on 19.02.2019 and 20.02.2019 along with representative from the Authority, Independent Engineer and the Concessionaire.

Road Safety Expert has submitted the observation vide email dated 26.02.2019. Concessionaire vide letter No. *Camp-Aurangabad dated 28/02/2019* has submitted compliance report on observations made by the Road Safety Expert. The compliance report submitted by the Concessionaire is under review by the "Road Safety Expert". Final report is awaited towards the safety and reliability of the section proposed for PCOD from the "Road Safety Expert".

Audit report and its compliance by the concessionaire are enclosed as **Appendix-IX**.

However the Concessionaire has also submitted under taking vide letter no. 1119 dated 03.03.2019 that *"the Concessionaire wish to confirm our adherence to all necessary safety norms as per provision of contract Agreement required for safety and reliability of the completed stretch. The necessary third party safety audit as per the instructions of the Authority has already been conducted and we do not find any non compliance on our part. However, we wish to undertake that any outstanding issue brought to our notice will be promptly attended by us"*

5.10 Status of NCR is as per **Appendix-VII**: All NCR closed with respect to compliance submitted by Concessionaire satisfactorily.

5.11 Project Inventory for the section under consideration for Provisional Completion is attached as **Appendix-XII**.



5.12 The Concessionaire has conducted all relevant and necessary tests as provided in IRC codes, Manual and IS codes during the construction of the Project Highway and has also given an undertaking that *"all necessary obligations required for maintaining the Quality Assurance and Quality Control of Project Highway have been duly complied by us and nothing is outstanding."*

5.13 Independent Engineer solicited clarification and conducted additional tests to arrive at satisfaction level before submitting his recommendation as mentioned in above referred letters. Independent Engineer has requested the Concessionaire to submit various undertakings related to payments of royalty/cess, frequency to test/methodology and safety audit compliance. Undertaking submitted by the Concessionaire are placed at **Appendix-VIII, Annexure (1) to (6)**

6. **Punch List/Balance Work:**

Tentative list of balance works under punch list which are to be completed within 90 days from PCOD are listed in **Appendix-3, Annexure-1**, however the same shall be updated/revised at the time of issuing of PCOD.

The balance works which cannot be completed within 90 days from PCOD due to delayed handing over of the land or non-handing over of the land are listed in **Appendix-3, Annexure-2**.

7. **Change of Scope:**

Status of Change of Scope items are summarized below:

COS No.	Description of Items	Present Status/ Approval
COS-1	Construction of bridge across Bindusara river in Beed City	COS order received.
COS-2	Dismantling of Old bridge in Hirapur village at Ch. 191 +200 of Corridor	COS notice yet to be issued.
COS-3	Various additional items over and above scope of work defined in the Concession Agreement.	PIU submitted his recommendation to RO for approval.
COS-4	Construction of Bandhara @ Ch. 282+339(CA Ch. 282 + 700)	In principal approved.



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COS-5	Further to above (COS- 1 to 4), Various additional items over and above scope of work defined in the Concession Agreement	Estimate recommended by IE.
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“10. The request of the Concessionaire to issue the Provisional Certificate for the completed length of 161.870 Km of project length forming 85.63% of the Total Project Length except the works listed in Appendix-III (Punch list and balance works) may be considered. Independent Engineer intends to issue Provisional Certificate to the Concessionaire for the completed stretches.

11. As per NHAI, HQ letter No NHAI/CGM/(CMC)/2015/75902 dated 21.12.2015 Para 5(ii) Independent Engineer hereby notify his intention to issue Provisional Certificate to the Concessionaire for the subject highway except for work listed in **Appendix-III** subjected to completion of work listed in **Appendix-I, Annexure-III and** satisfactory final report by the Safety Consultant.

12. Further, it is requested to kindly inspect the Project Highway and convey your observations on the proposal of Independent Engineer to enable us to proceed with issue Provisional Completion Certificate after completion of work listed in **Appendix - I, Annexure - III.**

13. Draft Provisional Certificate is attached for your Kind perusal as **Appendix - II.**”

83. On 14 March 2019, Yedeshi wrote to the IE. In the said letter, the fact that, pursuant to the IE’s recommendation dated 6 March 2019, the Project site was visited and examined by the IE and the Project Director of NHAI was noted. After recording the status of the work completed, the letter dated 14 March 2019 sought issuance of PCC for 161.87 Kms.

84. The IE, *vide* letter dated 15 March 2019, addressed to Yedeshi, with a copy marked to NHAI, issued a PCC with effect from 15



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March 2019 for the completed length of 161.87 Kms. of the Project Highway in terms of Clause 14.3 of the CA. The letter clearly records satisfactory results of the tests as per Schedule I to the CA.

85. On 3 May 2019, Yedeshi wrote to NHAI, forwarding, with the letter, the PCC issued on 15 March 2019 as well as the fact that Yedeshi had sought extension of time till 10 July 2019 subject to resolution of issues relating to availability of the Project land on or before 30 December 2018. It was pointed out that, even till that date, various factors, not attributable to Yedeshi, were impeding progress of the Project.

86. *Vide* a subsequent letter dated 10 July 2019, addressed to the Project Director, NHAI, Yedeshi sought further extension of the SFLD till 15 November 2019. The communication once again highlighted the reasons for work not being completed as per schedule. It was pointed out that, apart from delay in procuring land for the Project and making it available, in unencumbered state, to Yedeshi, NHAI was also defaulting in making timely payments/reimbursement of expenses incurred by Yedeshi, which included loss due to rental value of the land, equipment and resources idling for long periods of time, additional interests payable for the idling periods on the finance borrowed for the work, mounting overhead expenses for the idling periods, re-working of the executed work during recommencement after the idling period and various mobilization and de-mobilization expenses. A summary of balance payments, as on 8 July 2019, was enclosed, indicating that NHAI owed, to Yedeshi, as on 8 July 2019, ₹ 62,88,76,498/-. It was also pointed out that there was scarcity of



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water in the project corridor and that the project area of Marathwada had been declared as a drought area by the Maharashtra Government.

87. Following the aforesaid communication, NHAI visited the Project Site on 4 September 2019 and instructed Yedeshi to submit a work completion plan for the balance work. A modified work completion plan was, therefore, prepared jointly by Yedeshi and the IE forwarded to NHAI, under letter dated 11 September 2019 of the IE. As per this modified work completion plan, it was estimated that the balance works would be completed by October 2019. It was clarified, however, below the proposed plan, as under:

“Note

1. Completion as per the plan can be achieved based on timely availability of fund
2. Completion of some of the work having some LA issues is based considering its redressal latest by 15.09.2019.
3. Release of payment towards the awaiting COS proposals under consideration by the Authority will facilitate achieving the target.
4. Completion as per the plan can be achieved based on timely resolution of issues pertaining to utility lines of MJP Beed, latest by 15.09.2019
5. Revised estimates of utility lines (revision for GST) be confirmed at the earliest. Target date - 20.09.2015
6. Completion plan can be achieved considering rainy period ends on or before 15.09.2019”

88. *Vide* letter dated 27 September 2019, Yedeshi updated the IE regarding the status of works as on 25 September 2019. The letter



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contained the following table:

TABLE – 1 : STATUS OF CONDITIONS FOR VIABILITY OF COMPLETION PROGRAM

Sr. No.	Conditions for viability of Construction completion program	Status of conditions as on 25.09.2019	Remarks
1.	Timely availability of fund for cash flow maintenance	Considerable delay in due payments / non-payment from Authority still persists, affecting cash flow adversely.	Details of pending payments as on date and delay in payments made are enclosed as Table - 1 & 2 for read reference.
2.	Redressal / mitigation of all LA related issues latest by 15.09.2019	LA issues still not resolved at some locations	Details of unresolved LA issues affecting completion of balance work shall be submitted separately.
3.	Release of payment towards works completed under various COS proposals	Pending approval of COS proposals, payment could not be initiated by Authority till dated for works executed under COS-III & COS-V proposal.	Details of value of completed work under COS-I, III, V & VI are enclosed as Table-3 for ready reference.
4.	Resolution of issues pertaining to utility lines of Beed MJP latest by 15.09.2019	1. Work measurement of executed work for supply line (K- 7 line) to Beed city initiated. 2. Revised estimate for water supply line (K-9 line) not	Invoice for executed work for K-7 line submitted vide our letter No. YABOT/ UTI(WAT)/IE/2 019/ 1298 dated 24/09/2019.



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		yet received.	
5.	Confirmation of revised estimates of utility lines (revision pending for GST)	Confirmation still awaited.	Details of estimates under revision were submitted vide our letter No. YABOT /UTI/NHAI/2019/1274 dated 17/08/2019.
6.	Termination of rainy season latest by 15.09.2019	Rains still continued in larger part of the project length, affecting construction of balance work.	Day wise rainfall data collected at rain gauge stations in project camps are enclosed as Table - 4A & 4B for ready reference.

This was followed by a communication dated 28 September 2019 from the IE to the Project Director, NHAI, which took stock of the contents of the aforesaid letter dated 27 September 2019 of Yedeshi and requested thus:

“To complete the project work in scheduled time. The remaining issues needs to resolved by the concerned department/authority, the earliest please.”

89. The IE, thereafter, wrote to the Project Director, NHAI, on 17 October 2019. The status of the Project was captured in the following table, contained in the said letter:

Project Milestone	Occurrence on	Details as per Schedule G	Achievement status	Remarks
MS-1	180 th day From Appointed Date i.e. 27.12.2015	1. Commenced Construction 2. Expended	MS-1 achieved	Letter No. YABOT/C&S C/NHAI/2015/138 dated 19.12.2015,



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		not less than 10% of total capital cost		confirming achievement of MS-1 is submitted to Authority
MS-2	365 th day from Appointed Date i.e. 29.06.2016	1. Commenced construction of All bridges wherever land acquired for construction work. 2. Expended not less than 35% of total capital cost	MS-2 Achieved	Letter No. YABOT/C&S C/NHAI/2016/315 dated 04.07.2016, confirming achievement of MS-2 is submitted to Authority. IE recommended vide letter no SAICPLDCSP L/NHAI /IE/NH-211/2016/057 Dt. 25.07.16
MS-3	650 th day From Appointed Date i.e. 10.04.2017	1. Commenced construction of project Facilities 2. Expended not less than 70% of total capital cost	MS-3 achieved within curing period	Letter No. YABOT/C&S C/ NHAI/2017/62 2 dated 19.06.2017, confirming achievement of MS-3 is submitted to Authority. IE confirmed achievement of MS-3 vide letter No- SAICPL - DCSPL/NHAI/ IE/NH-211/2017/370 dated 04.07.2017
Scheduled	910 th day	Completed	PCOD ⁴⁸	IE issued

⁴⁸Provisional Commercial Operation Date



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4-Lane	from Appointed Date I.e. 26.12.2017	4-Laning		provisional completion certificate vide letter No. 8821 dated 15.03.2019. Accordingly, PCOD occurred on 17.03.2019.
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After capturing the various hindrances which had been faced from time to time in proceeding with performance of the contract, and after referring to the relevant contractual provisions, the communication concluded thus:

“9. Time required for Completion of Balance Work:

Out of total balance work, critical area which shall require substantial completion time for the balance work, are as below –

Sr. No.	Location	From Ch.	To Ch.	Balance works
1	Terkheda	Km 103.000	Km 105.000	1. Service Roads 2. RE wall work 3. Main Carriageway (after completion of RE wall) 4. RCC drains.
	Pali			1. PUP 2. Minor Bridge - Reconstruction 3. Service road 4. RE wall work 5. Main Carriageway (after completion of RE wall)
2.	Shahgad &	Km 221.500	Km 228.000	6. Shahgad - a. Approaches of



	Mahakala			<p>Major Bridge Across Godavari river - nearly completed - delayed due to Kabrastan issue.</p> <p>b. RE wall work - nearly completed.</p> <p>c. Main Carriageway In progress</p> <p>d. New PUP @ Walkeshwar Road - Finalised in Dec'2018 end, constructed under COS.</p> <p>7. Mahakala -</p> <p>a. Aurangabad side Approaches (with RE wall) of VUP @ Km 226+460 - One Masjid removed in December 2018.</p>
3.	Wadigodri	Km 230.000	Km 233.500	<p>1. Osmanabad side approach of flyover @ Jalna Phata @ Km 231+337</p> <p>2. VUP in Wadigodri</p> <p>3. Service Road in Wadigodri</p> <p>4. Re wall and MainCarriageway in Wadigodri</p> <p>5. PUP in Wadigori (under</p>



				COS)
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Progress of Construction works were observed slow than required. As submitted by the Concessionaire, the reasons for slow progress during past 3 months are mainly due to;

a) Disturbance in construction activities in the available land, by the locals owing to issues in payment towards land acquisition - This disturbed /disturbs the work force causing;

a. Considerable demobilization and remobilization of resources as per site condition.

b: Issues in arrangement of work force and machineries for remobilization.

In view of above to resolve the various aforesaid issues;

There shall be no further disturbance to work force and continuity of work period shall be maintained.

Considering the above facts the recommendations /comments of the Independent Engineer are as below;

Considering the quantum of balance work and the ongoing monsoon period, further extension date of time upto 15.11.2019 for completion of balance works which couldn't completed within 90 days from provisional completion due to delayed handing over of the land or Non-handing over of the land as per Appendix-III Annexure-2 of the Punch List (Balance work).

Milestone	Scheduled Four-Laning date as per Scheduled -G	Approved Extension of time (EOT-I)	Recommendation for further extension over and above approved extension	
			Earlier recommendation	Present Revised recommendation
Construction Completion-Balance works.	26 th Dec2017	365 days (upto 26 th Dec 2018)	196 days (upto 10 th July 2019)	324 days (Upto 15 th Nov 2019)

Thanking you and assuring our best attention at all the times.”

90. Thus, in the letter dated 17 October 2019, the IE again noted that frequent EOTs had to be sought by Yedeshi owing to delays in preparation of valuation for properties, frequent change of CALA,



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delay in publications of Section 3A and Section 3D notifications in the Official Gazette, revision in preparation of awards and change/revision in the disbursement process followed by the bank, none of which were attributable to Yedeshi. It was further noted that, even as in December 2018, the entire Project land had not been handed over to Yedeshi.

91. *Vide* its further communication dated 23 October 2019 and 31 December 2019, Yedeshi sought further extension of time to complete the remaining work. These requests were forwarded by NHAI to the IE. The IE, after considering the circumstances highlighted by Yedeshi, recommended, *vide* its letter dated 8 January 2020, addressed to Yedeshi with a copy to the Project Director, NHAI, grant of EOT till 31 March 2020, subject to resolution of all remaining hindrances by January 2020. Yedeshi was also, therefore, directed to submit a revised work plan, to NHAI, for review and recommendation by IE.

92. Yedeshi, by its letter dated 15 February 2020, informed as under:

“Dear Sir,

1. Refer letter No. 8821 of the Independent Engineer, *vide* which "Provisional Certificate" for the Project was issued. Along with "Provisional Certificate", this letter was appended with followings also -

a. Annexure - 1 of Appendix-III : Punch List items to be completed within 90 days of issuance of "Provisional Certificate”

b. Annexure - 2 of Appendix-III : List of balance works which can not be completed within 90 days of issuance of "Provisional Certificate” due to delayed procurement of land required for construction.”



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2. Completion status of works under Punch List (Annexure - 1 of Appendix-III of "Provisional Certificate")

a. From time to time, the Concessionaire intimated the progress report of completion of items under "Punch list" along with issues, not attributable to the concessionaire, affecting the work progress / completion, with a request to the Authority and the Independent Engineer to resolve the issues at the earliest.

b. Pending resolution of the issues from the Authority / the independent Engineer, the Concessionaire, vide letter 1312, conveyed "Completion of the Punch List items to the extent work was / were not affected by the issues not attributable to the Concessionaire.

c. The work status (as on 13.10.2019), communicated vide letter 1312 of the Concessionaire, was further revised as on 15.01.2020, vide letter no. 1381, and the Concessionaire requested for *Closure of the Punch List & Shifting of balance work (due to the reason not attributable to the Concessionaire) from Punch List*

3. Completion status of works having delayed land procurement -.

a. Since, due to delayed land procurement, works could not be completed within approved EOT (upto 26.12.2018), the Concessionaire, vide letter No. 1059, submitted request for further extension of Scheduled Four Laning Date of the Project (EOT-2). Submission of the Concessionaire was reviewed and recommended by the Independent Engineer vide their letter No. 8636 dated 13.02.2019. The completion program was based on certain conditions to be fulfilled by the Authority.

b. Pending fulfilment of obligations of the Authority, EOT-2 proposal further requested to be revised vide letter No. 1237 of the Concessionaire. The Independent Engineer, vide their letter No. 1368, submitted revised "Work Completion Program" for the balance works in project corridor.

c. The fulfilment of obligation of the Authority is still pending, further affecting the Project completion plan. Details of the unfulfilled obligations of the Authority viz-a-



viz major balance activities affected due to unfulfilled obligations of the Authority are tabulated below-

<i>Details of unfulfilled obligations</i>	<i>Details of major affected activities (Approx quantity as on 15.02.2020)</i>
1. Delayed procurement of land.	1. Main Carriageway (with RE walls) - 6,000 Rmt
2. Delay in utility relocation	2. Service roads - 9,000 Rmt
a. Shifting of HT line in Chitte Pimplegaon	3. RCC side drains - 7,100 Rmt
b. Shifting of water utility lines pending due to non- provision of approved estimates in GST regime.	4. Footpaths - 15,125 Rmt
3. Delay in various payments due to the Concessionaire since long acutely affecting Cash Flow for balance construction works	

d. Considering the present status of fulfilment of obligations of the Authority causing issues in cash flow and utility relocation works. the "Project Completion Date" is envisaged as 31.05.2020.

e. We humbly request the Authority to provide us time line for fulfilment of their part of obligations (i.e. mitigation of LA issues, confirmation of provision of various utility estimates and release of due payments) so as to enable us to ensure adherence to "Project Completion Date" envisaged presently.

f. Considering the issues of the Authority be resolved latest by 29.02.2020, a tentative work completion program is prepared for the major balance works as on date. Work Program is enclosed herewith for the reference and record.

Thanking you and assuring our best services all the time.



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For Yedeshi Aurangabad Tollway Ltd.

The proposed Project Completion date of 31 May 2020 was, therefore, subject to resolution, by the NHAI, of all pending issues by 29 February 2020.

93. The aforesaid request of Yedeshi was forwarded by NHAI to the IE which, by letter dated 10 April 2020, addressed to the Project Director, NHAI, again reviewed the entire status of the Project and the factors to which Yedeshi had referred in its letter dated 15 February 2020, and, after referring to the various contractual provisions, concluded thus:

“9. Time required for Completion of Balance Work:

Out of total balance work, critical area which shall require substantial completion time for the balance work are as below –

Sr. No.	Location	From Ch.	To Ch.	Balance works
1	Wadigodri	Km 230.000	Km 233.500	1. RE wall and Main Carriageway.
2	Bagpimpalgaon	Km. 213+780	Km. 216+500	1. RE Wall work. 2. Main carriageway (2.25 Km). 3. Service road.
3	Thapti Tanda	Km. 266+900	Km. 268+100	1. RE wall work 2. Main carriageway (LHS) 3. Service road. 4. RCC Drain. 5. Foot Path.
4	Chitte Pimpalgaon	Km. 281+000	Km. 282+500	1. RE wall work 2. Main carriageway. 3. Service road. 4. Foot Path.
5	Rest Area Development.	Km. 164+635	-	1. Internal roads. 2. Toilet Blocks.



		& 262+500		3. Cafeteria.
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Considering the above facts the recommendations / comments of the Independent Engineer areas below;

Considering the status of the land procurement for the project, various land issues and quantum of balance work and considering various provisions in the Concession Agreement on the subject, further extension of time upto 31.05.2020 for completion of balance works which couldn't completed due to delayed handing over of the land or Non-handing over of the land is recommended as follows;

Milestone	Scheduled Four-Laning date as per Scheduled-G	Approved Extension of time (EOT)	Recommendation for further extension over and above approved extension	
			Earlier recommendation	Present Revised recommendation
Construction Completion- Balance works.	26 th Dec2017	365 days (upto 26 th Dec 2018)	324 days (upto 15 th November 2019)	522 days (Upto 31.05.2020)

Thanking you and assuring our best attention at all the times.”

94. NHAI, however, responded to the aforesaid communication dated 10 April 2020 of the IE, apropos the request for EOT by Yedeshi *vide* its letter dated 15 February 2020, on 6 June 2020, after 31 May 2020, till which date EOT had been sought and recommended, had elapsed. Interestingly, the NHAI observed, in the said communication, that, as the recommended EOT date of 31 May 2020 had elapsed, and Project completion had not been achieved, the proposal for grant of EOT could not be submitted to the competent authority.



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95. Following this, the IE, by letter dated 11 June 2020, required Yedeshi to submit a fresh proposal for EOT.

96. As requested by the IE, Yedeshi, by letter dated 9 July 2020, submitted a fresh request for EOT till 30 September 2020. In the said letter, the Yedeshi also underscored the intervening Covid-19 pandemic, which was entitled to be treated as a *force majeure* event, as well as the consequent lockdown imposed by the Government and various guidelines issued by the Government from time-to-time enforcing restriction on movement of labour, strength of labour, working time, availability of machinery etc.

97. The aforesaid request of Yedeshi for EOT was forwarded by NHAI to the IE. The IE, vide letter dated 21 July 2020, noted the various issues raised by Yedeshi and concluded, in para 9 of the communication, thus:

“9. Present Application of the Concessionaire for revision in "further Extension of Time" beyond recommended time limit, for completion of balance work:

Since the consideration of the issues of the Authority be resolved latest by 29.02.2020 was not fulfilled and due to imposition of lockdown condition since 22 March 2020 the work could not completed within the recommended time line of 31 May 2020.

i. From the above table the status of the land procurement at the end of Feb -2020 is as follows;

a) Disbursement of compensation was still balance for 32.14 Hect. out of 714.71Hect.

b) Total length not available for construction was 2.49 Km. out of 189.023 Km.



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- ii. From the above table the status of the land procurement at the end of May -2020 is as follows;
- a) Disbursement of compensation was still balance for **32.14 Hect.** out of 714.71Hect.
- b) Total length not available for construction was **0.76 Km.** out of 189.023 Km.”
- iii. The Concessionaire vide letter at ref - 32 (Itr. No. 1482 dt.09.07.2020) above has informed that due to the effect of the pandemic and the lockdown, a major chunk of labourers have moved to their native places and there is a shortage of manpower at the site which is hampering the scheduled progress badly and also, supply chain of materials has got hampered.

The Concessionaire vide above letter submitted the revised proposal of extension of time by considering the reduced productivity due to COVID-19 situation based on the following considerations;

1. Reduced labour strength (Skilled/Semi skilled) due to migration of labour.
2. Reduced working time to comply with the norms of working during lockdown Period.
3. Reduced strength of operators.
4. Reduced working at site to maintain ‘social distancing’ while working.
5. Issues in availability of machinery spare parts for repairing of off-road/breakdown machinery.
6. The Manson in the project corridor.

Further to above, it is also submitted that Covid-19 situation has been declared Force Majeure event by the Ministry of Home Affaire and Authority vide its office memorandum no. NHAI/Covid-19/Road Map/CMD/2020 (CN 5788) dated 08/06/2020 has approved following measures for providing urgent relief to the Contractors, concessionaires, find developers of road sector in view of the prevailing situation due to Covid-19 for immediate implementation by all the concerned agencies;

(iii) Extension of Time to Contractor/Concessionaire for meeting their obligation under Contract for 03 months to up to 6 months depending on site conditions”

Further, another clarification issued by the NHAI vide NHAI/Policy Guidelines /Atmnirbhar Bharat Policy No.



18.46/2020 dated 22/06/2020, in this regard, it is submitted that the Concessionaire vide letter under ref. 20 & 21 (ltr. No. 21881 & 1419 dtd. 24.03.2020) & on regular basis has notified the Force Majeure event pursuant to clause 34.5 of the Concession Agreement to the Authority and the IE due to prevailing situation due to the Covid-19.

However, the Concessionaire requested for extension upto 30.09.2020 under present situation, in support of this, Concessionaire mentioned the non-availability of labours and the regular material supply. But, it is not seen that material supply is being regularised and labour also being returning on the works. Presently, 3 months passed since the imposition of the lockdown i.e. Since March 22, 2020. Hence, IE feels that extension of time upto 30.09.2020 is justifiable under the present circumstance.

iv. Time required for Completion of Balance Work:

The Concessionaire submitted the work Completion Program according to which the remaining works including finishing works will be completed by August -2020. Though the quantum of balance work is less considering the Present scenario due to spread of Corona Virus (COVID-19) the time of completion may extend upto 30.09.2020.

v. Considering the above facts the recommendations /comments of the Independent Engineer are as below;

In view of above the Independent Engineer hereby recommends the EOT-2 upto 30.09.2020 which is 04 months beyond the previously recommended EOT which is within the period allowed by the Authority vide above referred office Memorandum for providing urgent relief to the Concessionaires in view of the prevailing situation due to Covid-19 for immediate implementation subjected to submission of undertaking from the Contractor that will not raise any financial claim against Manpower, Machineries and other liabilities etc. for this EOT due to Covid-19 pandemic.

Milestone	Scheduled Four-Laning date as per Scheduled-G	Approved Extension of time (EOT)	Recommendation for further extension over and above approved extension	
			Earlier recommendation	Present Revised recommendation
Construction Completion-Balance works.	26 th Dec 2017	365 days (upto 26 th Dec 2018)	522 days (upto 31 st May 2020)	644 days (Upto 30.09.2020)



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Thanking you and assuring our best attention at all the times.”

98. As a substantial part of the Project Site stood completed by it, Yedeshi, by letter dated 20 August 2020, addressed to the IE, sought issuance of a Completion Certificate. It was pointed out, in the said letter, that Yedeshi had completed all constructions activities on the land which was made available to it. The main carriageway had been completed throughout the entire Project length. Balance works which remained to be completed were held up due to land procurement issues. It was also pointed out that, complete testing of the Project highway in terms of Article 14 and Schedule 1 of the CA had been completed. In the circumstances, Yedeshi sought that the said balance works be de-linked from the Project work and a Completion Certificate, in terms of Article 14 of the CA, be issued.

99. The IE, in turn, wrote to the Regional Officer, NHAI, on 9 September 2020, paras 4 to 9 of which reads thus:

“4. Now, the Concessionaire vide letter under ref. 3(v) informed that the Punch list-2/ balance works are completed except following works as listed in table-1;

Table -1

Sr. no	Item/work	Construction Chainage		Side	Length (Mts.)	Remarks
		From	To			
1.	Construction of loop and ramp for Static weigh bridge of Toll Plazas	Pargaon Tollplaza at km.133+395 on LHS				LA issue
		Maliwadi Tollplaza at km. 254+ 150 on LHS				
2.	Completion of service	201+540	201+650	RHS	110	



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	road	214+240	214+350	LHS	110	
		214+600	214+640	LHS	40	
		231+940	232+ 100	LHS	160	
			Total		420	
3.	Service Road in Rest Area	262+370	262+430	RHS	60	

Completion of above listed works depends on resolution of LA related issues/problems. The Concessionaire submitted that the works listed in Table-I above be de-linked from "Completion Certification" and further submitted undertaking that *"the works listed in Table-1 shall be completed within reasonable time as per standard industrial practice, after resolution of LA related issue/problems."*

100. The NHAI, in turn, wrote to the IE, thus, on 23 September 2020:

"NHAI/RO/ NGP/7/7/COD/Y-A-211/2020-21/1133

Date: 23.09.2020

To,

M/s SAICPL - DCSPL,
1101A, 11thFloor, Tower A-II, Corporate Park,
Plot No.7A/1, Sector - 142 Noida - 201301.
info@sainfra.com

Kind Att. Shri. Saurav Shekhar, IE

Sub: Four laning of Aurangabad-Yedeshi Section of NH-211 from Km 100.000 to Km.290.200 under NHDP Phase - IVB in the state of Maharashtra on DBFOT(Toll) Basis - **Intention to issue completion certificate under clause-14.2 of Concession Agreement -Reg.**

Ref.: IE's letter No. 12149 dated 09.09.2020.

Sir,

Please refer to the Engineer's letter dated 09.09.2020 submitting there with the Intention of Engineer to issue "Completion Certificate" in accordance with clause 14.2of Concession Agreement. Where in, it is also certified by 'Engineer'



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that all the work on available land has been completed as per CA and test have been conducted as per Concession Agreement, whose results are found satisfactory. The Safety Audit have also been carried out by Govt. Collage of Engineering, Aurangabad dated 23.08.2020,25.08.2020 & 29.08.2020 and compliance of Safety Audit Report has been submitted by Concessionaire vide letter dated 06.09.2020. The same is verified by Engineer and found in order.

2. In this regard, the project site was inspected by GM (Tech) Regional Office, Nagpur on 17.09.2020. Accordingly, the concurrence of this office to issue "Completion Certificate" for a project length of 189.023 Km, is here by conveyed as detailed in above mentioned letter of IE in conformity to the provisions of the Concession Agreement.

Yours faithfully,
(Rajeev Agrawal)
CGM (Tech) & RO Nagpur”

101. Following thus, the IE, on 24 September 2020, issued the following Completion Certificate to Yedeshi:

“1. I, M/s SA Infrastructure Consultants Pvt. Limited in association with M/s Dhruv Consultancy Services Pvt. Ltd., acting as Independent Engineer, under and in accordance with the Concession Agreement dated May 30th 2014 (the "Agreement"),for Four-Laning of the Yedeshi-Aurangabad section Km 100.000 to Km 290.200 (Total Length 189.023 km.) of National Highway No. 211 in the State of Maharashtra under NHDP Phase-IVB through Public Private Partnership (the "Project Highway")on design, build, finance, operate and transfer (DBFOT) basis, through M/s Yedeshi Aurangabad Tollway Private Limited, (Now, M/s Yedeshi Aurangabad Tollway Limited) hereby certify that the Tests specified in Article 14 and Schedule-I of the Agreement have been successfully undertaken to determine compliance of the Project Highway with the provisions of the Agreement, and I am satisfied that the Project Highway can be safely and reliably placed in commercial service of the Users thereof.

2. It is certified that, in terms of the aforesaid Agreement, all works forming part of Four-Laning have been completed, and the Project Highway is hereby declared fit for entry into commercial operation on this the 24th day of September 2020.



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SIGNED, SEALED AND DELIVERED

For and on behalf of
SA Infrastructure Consultants Pvt. Ltd.
In association with Dhruv Consultancy
Service Pvt. Ltd. by:

SAURAV SHEKHAR
Independent Engineer

Address: 1101A, 11th Floor, Tower-A2,
Corporate Park, Plot No. 7A/1,
Sector-142, Noida, UP-201301”

102. Thus, Yedeshi was entitled to collect complete toll from usage of the Project highway w.e.f. 24 September 2020.

103. On 12 March 2021, Yedeshi wrote to NHAI, submitting its entitlement to EOT, under Clause 35.3 of the CA, of 831.08 days and reimbursement of losses suffered by it, in terms of Clause 35.2 of the CA, of ₹ 1501.84 crores. A certificate of the Statutory Auditor, in terms of Article 33 of the CA, supporting these claims, was also enclosed. The justification for the aforesaid claims, as contained in the said letter, deserves to be reproduced thus:

“It is evident from the above table that the Concessionaire had complied with all the three milestones in terms of Schedule G of CA, but NHAI failed to fulfil their obligation pursuant to Article 6, 10 of the CA. While the Concessionaire continuously kept requesting for handing over of the balance encumbrance free land/ RoW in terms of Clause stipulated under Article 6, 10, 11 and other relevant clauses of the CA since this had clear and direct impact on the fulfilment of the reciprocal obligation of the Concessionaire with regard to timely completion of the construction of the Project and subsequent commencement of tolling. Even after numerous follow ups in this regard, NHAI miserably failed to acquire the RoW listed in the appendix appended to the memorandum within 90 days from the AD in terms of clause 10.3.4 of the CA. The consequent delay in



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construction on this account had adversely affected the timely completion of the Project Highway resulting in to idling and/or underutilization of resources i.e., manpower, plant & machinery's etc. deployed at Site since the inception of the Project. In accordance with Clause 10.3.5 of the CA, the Concessionaire is liable to complete the works in the vacant/ unhindered land made available to them by NHAI within 90 days from the AD. It is imperative that, in the instant case, the issuance of the Provisional/ Completion Certificate would not have been delayed as the reasons for delay in construction of the Project were solely attributable to NHAI/ Government Instrumentalities.

The inordinate delay in handing over of vacant Ro W was one of the major reason for delay in completion of construction, while there were other reasons affecting the progress such as delay in acquisition of forest land, frequent change of Competent Authority of Land Acquisition (CALA) and additional administrative responsibility al located to CALA, revisions in preparation of award due to enforcement of new NH Act for land acquisition, change/ revision in banking process for disbursement of compensation to the affected land owners, delay in approval of Change of Scope (COS) works, delay in shifting of electrical utilities, delay in relocation of HT/EHV utility lines/ water supply utility lines and the Court cases by aggrieved land owners due to which the land owners not allowing the construction. These reasons causing delay were solely attributable to NHAI/ Government Instrumentalities. In spite of the aforementioned difficulties, the Concessionaire achieved Milestone I to III as stipulated in Schedule G of the CA well within the timeframe described therein except for the Scheduled Completion Date/ Scheduled Four Laning Date for which the request of Extension of Time (EOT) was expressed vide letter cited at (42).

The Concessionaire started construction with a target to complete the project much before the Scheduled completion Date so as to take advantage of early tolling by a minimum period of 6 months. However, the construction of the Project was delayed for various reasons solely attributable to NHAI/ Government Instrumentalities. Therefore; on account of the non-fulfilment of obligation by NHAI, a material default occurred in terms of provision of CA and the Concessionaire requested for 1st EOT vide letter cited at (39) to grant extension pursuant to Article 12 and Schedule G of CA upto 26/06/2019. In addition to this, the Concessionaire also requested to extend the Concession Period by an equivalent period since the delay was solely attributable to NHAI and also in accordance with the NHAI Policy Circular no.: Policy Matter-Technical (195/2016) issued vide NHAI letter no. 11041/218/2007/ Admin, dated 19/01/2016. The said request was examined and EOT of 365 days



i.e., up to 26/12/2018 was recommended by Independent Engineer (IE) vide letter cited at (37) as per Article 12 and Schedule G of CA for approval of the Competent Authority of NHAI subject to the condition that the balance land would be handed over to the Concessionaire by 30/09/2017. The Project Director (PD), NHAI further recommended the 1st EOT upto 26/12/2018 without any financial implication vide letter cited at (36)

As recorded by IE, the project length not available for construction at the end of December'2018 was 8.163 Kms out of 189.023 Kms of the Project Highway. Upon Concessionaire's request for further extension over and above the approved 1st EOT upto 26/12/2018 and in terms of various CA provisions under Clause 10.3.2, 10.3.4, 10.4, 12.4.1, 12.4.2 & Clause 6 of Schedule G, IE further recommended 2nd EOT upto 10/07/2019 (i.e., 196 days beyond 1st EOT) vide letter cited at (23) based on the condition that all the lands need to be procured by NHAI and made available to the Concessionaire latest by 31/12/2018.

Meanwhile, the Concessionaire requested NHAI to issue the Provisional Certificate for the Project Highway since the commencement of tolling was delayed substantially resulting into huge revenue loss vide letter cited at (22). IE verified the said request of the Concessionaire and issued the Provisional Certificate with effect from 17/03/2019 in terms of Clause 14.3 of the CA for a completed length of 161.87 Km of Project Highway along with the Punch List items and thus, the Concessionaire could commence the tolling on 17/03/2019, but only for the partial length of i.e., 161.87 km section of the Project Highway. Thus, the revenue loss continued on the Project.

The balance Project length as on date of issuance of Provisional Certificate was 27.153 Km which led to substantial loss of toll revenue (since tolling could not commence on this section) and also increased capital expenditures on account of the material default of NHAI. The Concessionaire further requested for the grant of revised EOT (over and above approved 1st EOT). After examining the request of the Concessionaire, IE after considering the quantum of balance work due to delayed handing over of the land or non-handing over of the land, not attributable to the Concessionaire, revised its earlier recommendation of 2nd EOT of 196 days (i.e., up to 10/07/2019) to 324 days beyond approved 1st EOT i.e., upto 15/11/2019 (Refer letter cited at 14). However, since the default of NHAI was continuing on account of the delay in procurement of land, delay in utility shifting and delay in payments due to the Concessionaire which were attributable solely to NHAI, the Concessionaire had to further request for revised 2nd EOT vide letter no (11) for completion of the balance work of the Project. In



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response, subsequently, IE again examined the request and recommended revised 2nd EOT up to 31 /05/2020 (522 days beyond 1st EOT) to complete the balance work subject to the resolution of the issues by NHAI by 29.02.2020. (Refer letter at 9).

During this period, the Govt. of India declared the viral spread of COVID-19, a pandemic, as a Force Majeure Event vide Notification no F/18/4/2020-PPD dated 19/02/2020. Consequently, a state-wide/nationwide lockdown was imposed causing complete closure of the Project (construction, operation and maintenance activities, etc.) with effect from 22/03/2020. The Concessionaire notified the said event as the Force Majeure Event in terms of the CA vide letter cited at (10). However, under the instructions of NHAI, the work at Site resumed from 20/04/2020 but due to various social /health advisories issued by the Government and the related factors arose during the lockdown; the progress of the works at Site was severely hampered. After taking cognizance of the developments and requirements during the lockdown, Govt. of India /NHAI issued various policy guidelines (refer 7 & 5) wherein, as a relief measure, the instruction was issued to grant extension of three months of Construction Period without imposition of any cost and penalty. Accordingly, referring to the aforesaid policy guidelines and pursuant to Article 12, Schedule G and other stipulated provisions of the CA, the Concessionaire requested for final revision in 2nd EOT i.e., upto 30/09/2020 vide letter cited at (4) to complete the construction of the Project Highway. In due course, IE examined this request and recommended for final revision in 2nd EOT over and above the approved extension i.e., upto 30/09/2020 (644 days beyond 1st EOT) vide letter cited at (3).

The Concessionaire, having completed the Project construction, then requested IE for issuance of Completion Certificate in terms of Article 14 of the CA vide letter at (2). Accordingly, IE with the concurrence of NHAI, issued the "Completion Certificate" in the form set forth in Schedule-J with effect from 24/09/2020 (Refer letter cited at 1). Thus, it is evident from the above that after the delay of 1912 days from the AD and 557 days from the date of issuance of PCC, the Concessionaire could commence the tolling on entire length of the Project Highway i.e., 189.023 km with effect from 24/09/2020.

From the above, it is pertinent to note that the reasons for the resultant delays were duly examined and verified by the IE and the 1st EOT was approved by NHAI as 26/12/2018. It is evident from the various correspondences referred herein that that these delays were not attributable to the Concessionaire and were solely attributable to NHAI/Government Instrumentalities and occurrence



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of the Force Majeure Event. It is also to be noted that at the time of Scheduled Completion Date, neither the provisions of Clause 10.3.5, 14.3 of the CA nor the provisions of NHAI circularNo.11041/218/2007-Admn dated 19/01/2016 were followed for issuance of Provisional Certificate. Hence the Concessionaire had to suffer revenue losses and had to bear additional financial burden/losses by means of idling/ underutilisation of the resources such as manpower, machineries & equipment deployed at Site, extended site establishment, interest during construction, O&M expenses, overheads and escalation. As such, there has been a contractual material default by NHAI. As a consequence of this default, the Concessionaire is eligible for compensation in terms of Clause 35.2 and 35.3 of the CA with effect from 30/06/2017 i.e., the scheduled completion date as per the work programme submitted to IE/ NHAI vide letter no. (52).

Accordingly, the extension to Concession Period has been computed as 831.08 days pursuant to Clause 35.3 of CA as certified by the Statutory Auditor. The actual loss suffered by the Concessionaire due to the default of NHAI in terms of Clause 35.2 of CA has also been computed as Rs.1,501.84 Crore duly certified by the Statutory Auditor in terms of Article 33 of the CA is enclosed. The Statutory Auditor certificates and details of computations are enclosed herewith.

In view of the above, we hereby humbly request to take a fair decision on this matter and arrange to settle our claims at the earliest.

Thanking you and assuring of best of our services at all times.”

104. Yedeshi’s letter dated 12 March 2021 and 5 April 2021 were forwarded by the NHAI to the IE for review and comments.

105. The IE responded to the Project Director, NHAI, on 17 June 2021. In para 1 of the response, the IE clarified that it had reviewed NHAI’s claims “broadly particularly in respect of Concession Agreement Provisions and submission of Concessionaire’s desire document”. The letter divided the claims of the Yedeshi into Part-A, being the financial claims totaling ₹ 1501.84 crores and Part-B, being the claim for extension of concession period of 831.08 days. Referring



the claims in Part-A, the IE recommended thus:

“3.3) Concessionaire has submitted Statutory Auditor's Report/Certificate as per provision of cl.33.3 of Concession Agreement states that *"Any claim or document provided by the Concessionaire to the Authority in connection with or relating to receipts, income, payments, costs, expenses, accounts or audit, and any matter incidental thereof shall be valid and effective only if certified by its Statutory Auditors. For the avoidance of doubt, such certification shall not be required for exchange of information in the normal course of business including the submission of Monthly Fee Statements under Clause 19.5."*

Accordingly, Statutory Auditor has certify the value of the Claim of Rs. 1,501.84Cr. However in the concluding para by Statutory Auditor "M/s MKPS & Associates" state that:

i) *"The amount of Claim, as considered in Annexure-1 amounting to Rs.1,501.84Cr. is not properly extracted from the data compiled by the management and that the same is not arithmetically accurate; and*

ii) *the number of days as computed in Annexure-11of 831.08 days and the basis of their computation as stated in the annexure is not properly extracted from the relevant data and is not arithmetically correct. "*

As noted by the Statutory Auditor the data provided by the Concessionaire are not arithmetically correct, thus Independent Engineer is not in position to consider these data for their analysis /review. Thus, financial data must be reviewed again by the Statutory Auditor for its correctness.

3.4) The financial Claim submitted by the Concessionaire is not in the line with the provision of cl. 35.2, Concessionaire has to submit additional cost incurred w.r.t. the provisions kept in financial package for the project.

3.5) As per cl. 35.6 of CA, *"The Affected Party shall make all reasonable efforts to mitigate or limit the costs and damage arising out of or as a result of breach of Agreement by the other Party."*

Concessionaire is requested to submit the details of mitigation measures taken by them to reduce the additional cost for the project.



3.6) As per cl. 35.2 of CA, " that no such compensation shall be payable for any material breach or default in respect of which Damages have been expressly specified in this Agreement "

For non-handing over/hindered length provision of compensation is already given in cl.10.3.4 of Concession Agreement which states that "The Authority shall make best efforts to procure, 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 of breach of this Agreement by the Concessionaire, if 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. "

Thus, Concessionaire is requested to submit the details of land handed over and the compensation to be paid as per cl. 10.3.4.

Thus Claim raised under cl. 35.2 for delay in handing over of land/provide encumbrance free land, is not payable and can't be considered.

3.7) Furthermore, Concessionaire vide letter no. YABOT/C&SC/NHAI/2018/949 dated 27.08.2018 has submitted Undertaking stating that "We hereby undertake that we shall have no claims on the project cost due to shifting of Milestone-IV as per Schedule-G of the Concession Agreement. This undertaking is subject to the condition that Extension of Time (EOT) shall be accepted by the Authority/Independent Engineer. "Thus, Claim raised by the Concessionaire is not as per Good Industrial Practice and thus not to be considered. If Concessionaire is not in position to honor their Undertaking given to the Authority in that case Authority is also having liberty to make their counter claim like penalty /damages for delay in completion /Additional IE Fee/ Overhead of the Authority etc."

Regarding the claim for extension of the concession period in Part-B, the IE observed as under:

"4.2) Further, in the above para it is clearly mention that "in the event that a material default or breach of this Agreement set forth in Clause 35.2." which states that cl. 35.2 of CA,"... .. that no such compensation shall be payable for any material breach or default in respect of which Damages have



been expressly specified in this Agreement
.....

For non-handing over/hindered length provision of compensation is already given in cl.10.3.4 of Concession Agreement. *"The Authority shall make best efforts to procure, 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 of 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. "*

Thus, Concessionaire is requested to submit the details of land handed over and the compensation to be paid as per cl. 10.3.4.

4.3) The Claim under Force Majeure Event period shall be considered for compensation as per cl. 34.6.2 & 34.7.

4.4) Concessionaire has submitted Average Daily Fee calculation for FY 2018-19 purpose for the same is not understood.

4.5) While calculation for Average Daily Fee calculation for FY 2018-19 rate has been increased 27% for 100% Tolling Length. Calculation or methodology of increasing 27% to be submitted.

4.6) While calculation for Average Daily Fee calculation for FY 2020-21 rate has been increased by 29% for 100% Tolling Length. Calculation or methodology of increasing 29% to be submitted.

4.7) Approval letter of Extension of Time and its condition to be adhere by the Concessionaire. Copy of all Extension of Time granted by the Authority to be provided.

4.8) Delay by the Concessionaire in completion after handing over of the land w.r.t. reasonable time required /original work programme to be submitted.

4.9) Calculation for extension of Concession Period is calculated from 01.07.2017 whereas Scheduled Completion Date as per Concession Agreement is 16.12.2017. This can't be accepted.

4.10) Thus Concessionaire is requested to submit details of Force Majeure Event and period for considering revenue loss, so that allocation of cost can be determined as per cl. 34.7.”



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The IE, thus, accepted the contractual data and the dates provided by Yedeshi in its letter dated 12 March 2021 and 5 April 2021, to be matters of record. Following the aforesaid, the IE concluded, in its letter dated 17 June 2021, that Yedeshi's claim could not be accepted as submitted and opined that Yedeshi was required to be requested to submit documents or claims within the provisions of the CA.

106. In view of the aforesaid recommendation of the IE, the NHAI wrote to Yedeshi, on 22 June 2021, stating that Yedeshi's claim was not tenable and was, therefore, rejected.

107. On 23 June 2021, Yedeshi wrote to NHAI, pointing out that, as it had not received any response to the claim raised by it, a dispute had crystallized, of which it sought reference to conciliation in terms of Article 44 of the CA.

108. On receiving the communication dated 22 June 2021, issued by NHAI, Yedeshi, by letter dated 30 June 2021, pointed out that the IE had misread the concluding paragraph of the Statutory Auditor's certificate dated 3 June 2021. It was pointed out that, in fact, the Statutory Auditor had stated that nothing had come to its attention which caused it to believe that the data had not been properly extracted by Yedeshi. It was further submitted that the IE had misread Article 10.3.4 of the CA and had wrongly excluded the compensation payable under Article 35.2 thereof. The undertaking dated 27 August 2019, it was submitted, had been furnished under economic duress, as in order to obtain approval for the EOT, which was, in fact, Yedeshi's



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due contractual entitlement. It was also sought to be contended that the representative who had signed the undertaking was not authorized to do so within the meaning of Article 47.10 of the CA. His authorization was only for dealing with routine correspondence with the NHAI. The undertaking amounted to modification or amendment of the CA, in respect of which the said signatory was not authorized. A copy of Power of Attorney issued to the said signatory was also enclosed.

109. As matters had arrived at a stalemate, Yedeshi issued a notice under Section 21 of the Arbitration and Conciliation Act 1996⁴⁹, to the NHAI, on 9 March 2022 invoking the provision for arbitration contained in Article 44.3 of the CA and nominating Hon'ble Mr. Justice Pankaj Jaiswal, a retired Judge of the High Court of Allahabad, as its arbitrator. NHAI was requested to nominate its arbitrator.

110. Yedeshi followed up this communication with a further letter dated 6 June 2022.

111. In the meanwhile, the COVID-19 pandemic struck. *Vide* the OM dated 19 February 2020, the Ministry of Finance declared the Covid-19 pandemic as a *force majeure* event and permitted invocation of *force majeure* clause in contracts.

112. Following this, the Government of Maharashtra imposed a complete lockdown as a result of which Yedeshi was directed to discontinue all Project work including toll collection.

⁴⁹ "the 1996 Act", hereinafter



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113. Following this, on 24 March 2020, Yedeshi wrote to the Project Director, NHAI, drawing his attention to the notifications issued by the Central Government, the declaration, by the World Health Organization⁵⁰ of the Covid-19 outbreak as a global pandemic and the invocation by the Govt. of India, of the Epidemic Diseases Act on 12 March 2020. Inasmuch as the Covid-19 pandemic was a factor beyond the control of Yedeshi, and had resulted in a material adverse effect on the operation of the project, Yedeshi, in terms of Clause 34.5 of the CA, notified the occurrence of non-political *force majeure* event w.e.f. 12 March 2020.

114. Pursuant to directions issued by the Ministry of Road Transport and Highways⁵¹, NHAI, *vide* order dated 25 March 2020, directed Yedeshi to suspend tolling operations on the Project highway w.e.f. 26 March 2020. Compliance, with the said direction, was effected and NHAI informed, accordingly, by Yedeshi, *vide* letter dated 27 March 2020.

115. To cope with the Covid-19 pandemic, a nationwide lockdown was declared till 14 April 2020, which was further extended till 3 May 2020. Pursuant thereto, Yedeshi, by e-mail dated 16 April 2020, notified the continuance of the political *force majeure* event. By a further communication dated 18 April 2020, Yedeshi submitted to NHAI that the direction to discontinue collection of toll, as issued by the Government, amounted to expropriation of Yedeshi's right,

⁵⁰WHO

⁵¹MoRTH



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thereby triggering political *force majeure* event within the meaning of Article 34.4 (b) of the CA. As a result, Yedeshi claimed to be entitled to be compensated in terms of Article 34.6.2(b) and Article 34.7.2 of the CA. It was claimed that Yedeshi was entitled to be reimbursed interest on debts taken by it and operation and maintenance costs and all other costs which were directly attributable to the COVID-19 pandemic as well as for extension of the concession period in terms of Clause 34.6.2 (b) of the CA. Even though NHAI had allowed recommencing of tolling from 20 April 2020, it was submitted that the revenue collected thereby was negligible as the state of lockdown continued and only essential goods could be moved from one place to another. Ergo, it was submitted that the impact of the political *force majeure* even continued till 3 May 2020. A claim for reimbursement/ losses aggregating ₹ 26.77 crores was, therefore, submitted along with a claim for extension of the concession period by 41.09 days with a request to NHAI to execute a supplementary agreement extending the concession period accordingly.

116. The aforesaid request of the Yedeshi was forwarded by NHAI to the IE on 30 April 2020, for review and comments.

117. *Vide* Office Memorandum dated 13 May 2020 the Government of India, while reiterating its directions that the Covid-19 pandemic be treated as *force majeure*, clarified that invocation of *force majeure* would be valid only where the parties to the contract were not in default of their contractual obligations as on 19 February 2020.

118. In terms of the various OMs issued by Central Government,



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NHAI, by policy circular dated 26 May 2020, resolved and agreed to grant extension of the concession period and proportionate reduction in premium payment to all concessionaires affected by the COVID-19 pandemic and restrictions imposed consequent thereto. The circular further provided that extension of the concession period in proportion to the loss of fee on a daily basis with loss of 25% in collection of fee, as compared to the average daily fee, for four days, entitling a concessionaire to extension of one day in the concession period. It was further clarified that invocation of the *force majeure* clause would be justified only where the parties to the contract were not in default of their contractual obligations as on 19 February 2020. The concessionaire who sought the benefit of the *force majeure* clause were also directed to comply with the conditions/provisions contained in the Model Concession Agreement.

119. On 18 July 2020, Yedeshi submitted its *force majeure* claim for extension of the concession period from 22 March 2020 to 25 March 2020 and from 26 March 2020 to 19 April 2020. Extension of the concession period by 51.54 days was, therefore, claimed. Inasmuch as the policy of NHAI entitled the claimant to a minimum extension of 90 days, Yedeshi sought three months, i.e., 90 days extension in the concession period. The Statutory Auditor's certificate, supporting the claim, was enclosed.

120. *Vide* communication dated 9 September 2020, Yedeshi submitted a further claim for extension of the concession period for 9.58 days in July and August 2020, thereby making the claim for extension for a total of 61.12 days.



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121. In and around April 2021, the second wave of the COVID-19 pandemic struck. Toll collection was again affected. The daily toll collection was less than 90% of the average daily fees. As such, Yedeshi, by its letters dated 6 April 2021 and 15 April 2021 again intimated NHAI of the occurrence of a political *force majeure* event within the meaning of Clauses 34.6.2(b) and 34.7.2(c) of the CA.

122. This was followed by the third wave of COVID-19 Pandemic, involving the Omicron variant. Immediate restrictions were imposed by the States of Maharashtra and Karnataka. Resultantly, on 24 January 2022, Yedeshi once again wrote to the NHAI notifying the occurrence of a political *force majeure* event within the meaning of Clause 34.5 of the CA.

123. The communication of Yedeshi to NHAI was forwarded by NHAI to its IE on 2 February 2022 for comments and review.

124. As no response was received from NHAI regarding Yedeshi's claims for extension of the Concession Period, Yedeshi reiterated the said claim by communication dated 7 February 2022 addressed to NHAI, for grant of approval of extension of the Concession Period by 90 days on account of the first wave of COVID-19 Pandemic.

125. On 9 February 2022, the IE opined that Yedeshi had not provided the pre-COVID average daily fees, the duration for which it was seeking the benefit of *force majeure* or the consequent losses suffered by it on account of *force majeure*. The IE expressed its



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inability to submit any comments on Yedeshi's claims till these details were provided. NHAJ communicated the said decision of the IE to Yedeshi *vide* letter dated 21 February 2022.

126. On 1 July 2022, Yedeshi submitted its claim for extension of the Concession Period on account of *force majeure* due to the second wave of COVID-19 Pandemic, in terms of Clause 34.6.2 of the CA, for the period April to September 2021 of 38.33 days. A total claim for 128.33 days' extension of time on account of the COVID-19 Pandemic was, therefore, submitted. Yedeshi also enclosed a certificate of the Statutory Auditor in support of its claims for extension of its Concession Period.

127. Yedeshi's letter dated 1 July 2022 was forwarded by NHAJ to the IE on 15 July 2022.

128. No further correspondence was on record.

Arbitral proceedings, and the impugned Award

129. An Arbitral Tribunal, to adjudicate on the disputes between the parties, came to be constituted on 1 August 2022. The said impugned award stands rendered by the Arbitral Tribunal.

130. The Arbitral Tribunal framed the following issues as arising for determination:

“(i) Whether the Claimant or the Respondent is in material breach or default of its obligations, representations and warrants



under which Terms and Concession Agreement?

(ii) Whether the Claimant is entitled for compensation under the Concession Agreement including under Article 35.2 of the Concession Agreement, as claimed under Claim No.2 for breach or default by the Respondent? If yes, what is the quantum?

(iii) Whether the Claimant is entitled for extension of Concession Period under the Concession Agreement including Article 34.6.2(b) of the Concession Agreement on account of force majeure as claimed under Claim No.5 and under Article 35.3 as claimed under Claim No.5 for the breach or default by the Respondent? If yes, what is the quantum?

(iv) Whether the Claimant is entitled to compensation under clause 34.7.2(c) towards force majeure cost, as claimed under Claim No.4? If yes, what is the quantum?

(v) Whether the Claimant is responsible for the delay caused in completion of the project of four laning of Yedeshi (km 1 00.000) to Aurangabad (km 290.200) of NH-52 (old NH-211)?

(vi) Whether Claim Nos. 2 & 5 of the Claimant towards compensation and extension of Concession Period are non-maintainable, being contrary to the terms of the Contract, including Article 35.2, 35.3 and 10.3.4 of the Concession Agreement and in view of the undertaking dated 27.08.2018 issued by the Claimant?

(vii) Whether Claim Nos. 4 & 5 of the Claimant for compensation towards force majeure cost under Article 34.7.2(c) and extension of Concession Period under Article 34.6.2(b) of the Concession Agreement made by the Claimant are non-maintainable, in view of the terms and conditions of Article 34 of the Concession Agreement?

(viii) Whether the claims raised by the Claimant are arbitrary, fictitious and devoid of any merit, and thus, liable to be rejected in entirety?

(ix) Whether the successful party is entitled for the interest and/or cost of arbitration?

(x) What relief, if any?"

131. Yedeshi let the evidence of two witnesses, i.e., Mr. Vinod Kumar Menon, its authorized representative and Mr. Narendra



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Khandal, its Statutory Auditor. NHAI let the evidence of one witness, namely, Mr. Ravindra S. Ingole, its Project Director. The witnesses were examined and cross examined. Arguments were heard at length and the impugned award came to be rendered on 27 January 2024.

132. The impugned Award of the Arbitral Tribunal may be summarized as under.

132.1 Re. Issues Nos. 1 and 5

132.1.1 Yedeshi contended that NHAI was in breach of its obligations to provide the site required for carrying out the Project.

132.1.2 Admittedly, 1 July 2015 was declared as the Appointed Date.

132.1.3 The scheme of the CA was such that, before the Appointed Date, NHAI had to grant Yedeshi valid license and vacant access to the entire site required for the Project. Articles 3.1.1 and 3.1.2 (a) entitled Yedeshi to the Right of Way, access and license to the site. "Site" was defined in Article 10.1 as the entire real estate required for Four-lanning as set out in Schedule A to the CA. Article 10.2.2 further stipulated that, commencing from the Appointed Date, NHAI granted to Yedeshi leave and license rights in respect of all the land comprising the site described in Schedule A, free of encumbrances, on "as is where is basis". Such license, concession and Right of Way had necessarily implied actual physical vacant access to site, free of encumbrances and hindrances. Article 10.3.1 also



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required NHAI to grant, to Yedeshi, a valid license, vacant access and ROW to the vacant and encumbered site.

132.1.4 Article 10.3.2 further mandatorily required NHAI to grant, on the Appointed Date, valid license, vacant access and ROW in respect of at least 80% of the site. This was an obligation which NHAI could not defer. It was a material obligation of paramount importance, as it was necessary for Yedeshi to undertake timely construction of the Project Highway.

132.1.5 Article 10.3.4 required NHAI to grant valid license and ROW in respect of the balance 20% of the site no later than 90 days from the Appointed Date.

132.1.6 Thus, on the Appointed Date, NHAI was ideally to handover the entire Project Site free of encumbrances or at the very least 80% thereof, with the balance 20% being handed over within 90 days of the Appointed Date.

132.1.7 Consequently, Article 12.4.1 required Yedeshi to commence construction and complete the entire Four-Lanning construction work of the Project within 910 days from the Appointed Date, which was the Scheduled Four-Lanning Date.

132.1.8 Admittedly, NHAI did not grant valid license, access and ROW in respect of the entire site or even of 80% thereof on the Appointed Date of 1 July 2015, free of encumbrances, despite this being a mandatory obligation of NHAI.



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132.1.9 As per the first MOI, signed by Yedeshi and NHAI, only 77.13% of the site, after including the existing site, was Section 3D compliant. NHAI was, therefore, in default of its obligation under the CA. The MOI dated 1 July 2015 was not disputed by the NHAI. Neither did NHAI dispute the assertion, in the said MOI, that Section 3D compliant access was available only in respect of 77.13% of the site. Even before the Arbitral Tribunal, NHAI did not lead any positive case to show that, on the Appointed Date, it had granted actual physical access, valid license or ROW to Yedeshi even in respect of 80% of the Project Site.

132.1.10 NHAI relies on the first MOI dated 1 July 2015 to contend that it had handed over 77.13% of the Project Site, free of encumbrances, to Yedeshi and that Section 3D notification had been published by NHAI in respect of 84.20% of the total site which was required to be acquired. Solely on the basis of the said Section 3D notification, NHAI seeks to contend that it had granted ROW to Yedeshi in respect of more than 80% of the Project Site on the Appointed Date, in accordance with the CA. NHAI's contention is that, upon publication of a Section 3D notification, the land vested in the Central Government, free of encumbrances and that, in view of Section 3F of the NHAI Act, Yedeshi could have lawfully taken possession of the Project Site. NHAI also relied on the definition of Right of Way, as contained in the CA, as constructive possession of the Project Site. Consequent on issuance of the Section 3D notification and resultant vesting of more than 80% of the Project Site in the Central Government, NHAI obtained a valid right to issue a



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license to Yedeshi which, according to NHAI, resulted in fulfilment of its obligation under the CA.

132.1.11 NHAI's contention is an afterthought. It is a matter of record that, on the Appointed Date, even 80% of the Project Site had not been handed over by NHAI to Yedeshi, let alone 100%. Even the MOI stated that the total area of the land available, considering Section 3D status, was 77.13% which was less than 80%. Moreover, in arriving at the figure 77.13%, the operation of the Project Site, with respect to which, though Section 3G compliance had been effected, the farmers had not vacated the site, was also taken into consideration. In subsequent correspondences, it was seen that the IE as well as the NHAI itself, in assessing the extent to which the Project Site had been handed over to Yedeshi, had considered availability of land in terms of Section 3H, relating to payment of compensation, which was a stage after Section 3D and Section 3G. The agenda notes relating to the 359th Meeting also excluded, from consideration, lands in which there were hindrances due to non-payment of compensation under Section 3H, physical obstructions issue to compensation disputes or even land which was subject to litigation, while assessing the extent to which the vacant access and ROW in respect of the Project Site had been handed over to Yedeshi. Thus, even as per the understanding of the IE and of NHAI, mere publication of a Section 3D notification did not result in grant of ROW to Yedeshi in accordance with the CA. What was required was actual grant of vacant access, physical possession free from encumbrances and hindrances. The obligation of NHAI under the CA was not merely publication of a Section 3D notification. The entire procedure envisaged by Section 3D, Section



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3G and Section 3H had to be completed and the land handed over to Yedeshi, in vacant and encumbrance free form, for NHAI to be said to have adhered to its contractual obligations.

132.1.12 Were the interpretation of NHAI to be accepted, Article 10 of the CA would have specifically stated that ROW would be deemed to have been granted to Yedeshi on issuance of Section 3D notification in respect of Project Site. It did not, however, say so.

132.1.13 Article 10.3.1, in fact, stated that it was only when vacant access has been granted to Yedeshi that valid license and ROW would be deemed to have been granted. As such, in addition to a valid license and ROW, grant of vacant access is also mandatory.

132.1.14 Article 48 defined “Right of Way” as “constructive possession of the site, together with all way leaves, easements, unrestricted access and other rights of way, howsoever described, necessary for construction, operation and maintenance of the Project Highway in accordance with this agreement”. Thus, constructive possession, necessary for construction, operation and maintenance, had to mean actual physical possession and access to vacant unencumbered land without hindrances and interruptions. It was absurd to expect that, without grant of free actual physical possession, Yedeshi would be able to carry out construction work on the Project Highway. The CA was a commercial contract and has to be interpreted in a commercial fashion. As such, NHAI’s contention that its contractual obligation was only to give paper possession and not actual physical possession, could not be accepted.



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132.1.15 Similarly, NHAI's contention that, once the Section 3D notification had been issued, Yedeshi could have taken possession of the site in accordance with Section 3F and that, therefore, the site was available to Yedeshi, was not acceptable. The CA required NHAI to put Yedeshi in physical possession of the site. Yedeshi was a private party, who could not forcibly enter on the site and evict persons therefrom. Section 3F itself contemplated that, once the land vested in the Central Government pursuant to the issuance of the Section 3D notification, it would be lawful for the Central Government or a person authorized by the Central Government to enter upon the land. The person authorized by the Central Government would necessarily be NHAI, and not Yedeshi, which was a private party. Accepting NHAI's contention would amount to allowing Yedeshi to take law into its own hands and forcibly enter into the Project Site. That could not be regarded as the intent either of Section 3F or of the CA.

132.1.16 Nor had NHAI shown that it had, in any manner, actually authorized Yedeshi to enter upon the Project Site or directed Yedeshi to take forceful possession of the Project Site, or even informed Yedeshi that, as the Section 3D notification had been published, Yedeshi could enter upon the site and take possession thereof. The words "grant" and "vacant access" in a commercial contract for construction could only be construed as envisaging actual physical possession or actual physical access to an unencumbered and unhindered site. The correspondences produced by NHAI also showed that, as per the accepted procedure, possession of any portion of the site under Section 3F had first to be taken by NHAI and, thereafter,



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handed over to Yedeshi after encumbrances therefrom were removed. It was only thereafter that NHAI could call upon Yedeshi to submit its work programme for carrying out construction work on such parcels of land. This procedure was also acknowledged by NHAI's witness in cross examination.

132.1.17 Within 90 days from the Appointed Date, NHAI had failed to grant vacant access, license and ROW to Yedeshi even in respect of 80% of the Project Site, free from encumbrance. As per the MOI dated 30 September 2015, even if one were to consider Section 3D compliant land, only 76.37% of the total site was covered. Thus, even within 90 days from the Appointed Date, NHAI had failed to grant vacant and unencumbered access to Yedeshi in respect of 80% of the Project Site.

132.1.18 NHAI sought to contend that the MOI dated 30 September 2015 had not been signed by NHAI, as required by Article 10.3.1 of the CA and that, therefore, the Arbitral Tribunal could not rely on the said Memorandum. Even if this were so, NHAI had not disputed the MOI. The MOI was submitted by Yedeshi to NHAI under Yedeshi's letter dated 13 October 2015. No contemporaneous document by NHAI, disputing the contents of the MOI, had been placed on record. Nor did NHAI prepare its own MOI, recording what it deemed to be correct possession of site availability. In view thereof, the mere fact that NHAI had not signed the MOI dated 30 September 2015 would not detract from its credibility or correctness.

132.1.19 The subsequent MOIs also reflected the same position.



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Even long after the Appointed Date, NHAI failed to handover and grant vacant access, to Yedeshi, of even 80% of the Project Site, free from encumbrances and hindrances. Even 322 days after the Appointed Date, i.e. on 18 May 2016, only 73.64% of the Project Site was Section 3D compliant and only 64.99% was available, considering Section 3H. Thus, even after almost half the construction period had elapsed, only 77.26% of the site was Section 3D compliant and 72.80% of the site was Section 3H compliant. These memoranda also note the submission, of Yedeshi, regarding encumbrances and hindrances on the site as a result of failure, on NHAI's part, to complete Section 3H compliance and pay compensation to the persons whose land had been acquired.

132.1.20 NHAI did not dispute these MOIs contemporaneously. Nor did NHAI lead any positive evidence to reflect the actual site availability at the relevant time or to indicate that it was more than was reflected in these memoranda.

132.1.21 Yedeshi repeatedly informed NHAI about non-availability of the land. This position was never contemporaneously disputed by NHAI. Nor did NHAI assert that it had granted valid license, vacant access and ROW as per the CA or provide any revised calculation of the land available for construction.

132.1.22 Ultimately, Yedeshi was constrained to seek 547 days' EOT, which was 18 months beyond the SFLD. Clause 12.4.1 of the CA stipulated that this would result in extension of the SFLD. The IE recommended grant of EOT of 365 days for construction with



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additional three months on account of monsoon, thereby shifting the SFLD to 26 December 2018. Most importantly, however, the IE, while so recommending, arrived at a determination that vacant land, free from encumbrances, had not been made available for construction, which resulted in delay in the Project. The IE further recorded that there were still hindrances on the Project Site. The number of days of EOT recommended was worked out on the basis of weighted average, by tabulating the month wise length of highway available for construction. The recommendation noted that, on the Appointed Date, about 156.36 km, out of total length of 189 km of the Project Highway, was unavailable for construction, which worked out to more than 50%. It further recorded that, even within 90 days from the Appointed Date, i.e. in September 2015, 151.94 km of the Project Highway was unavailable.

132.1.23 NHAI had not disputed these facts. Nor did NHAI produce, before the Arbitral Tribunal, anything to show that land, in excess of that noted by the IE, was, in fact, available for construction.

132.1.24 The IE specifically recorded that, even in August 2017, more than 24% land was not available. This fact was stood admitted by NHAI in paragraph 36 of its SOD, by the averment that “more than 75% of the total project length was made available by end of August 2017.” Thus, even after a lapse of 760 days from the Appointed Date, on which date NHAI was required contractually to provide 80% of vacant unencumbered Project Site available to Yedeshi, the said 80% of Project Site had not been made available.



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132.1.25 Given the fact that Yedeshi was required to fulfil its obligation to complete construction within 910 days of the Appointed Date, on which date 80% of the vacant unencumbered land was required to have been made available by NHAI, the default by NHAI in doing so even after 760 days from the Appointed Date, clearly constituted a material breach on its part.

132.1.26 Further, the land was handed over by NHAI in a disjointed and piecemeal manner. There were also encumbrances on the land. This affected construction. The Arbitral Tribunal agreed with the contention of Yedeshi that handing over of the land in a piecemeal and disjointed manner was bound to affect the pace of construction. NHAI was contractually bound to provide continuous parcels of land with vacant access thereto. It was in anticipation thereof that the CA fixed a timeline of 910 days from the Appointed Date for performance of the CA. The IE, too, while assessing availability of the land for construction, deducted areas where continuity in land sections was of less than 200 m.

132.1.27 Further, the recommendation of the IE, in September 2017, for grant of 365 days' EOT was expressly conditional on NHAI handing over the balance land to Yedeshi by 30 September 2017.

132.1.28 The correspondences between Yedeshi, the IE and NHAI bore out the fact that construction works had been directly affected due to absence of vacant access and ROW to the site, delay in handing over of site, non-provision of the site in continuous stretches and existence, on the site of various encumbrances and hindrances.



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Yedeshi and the IE provided a voluminous record manifesting factors which affected the construction progress, including land acquisition issues, tree cutting, utility shifting, delay in Change of Scope Orders etc. Yedeshi as well as the IE stated that, for these reasons, Yedeshi was entitled to EOT. These factors were not contemporaneously disputed by NHAI. Nor did NHAI produce, before the Arbitral Tribunal, any evidence to contradict these assertions. The Project Director of NHAI also repeatedly confirmed these facts. Even the regional office of the NHAI endorsed the recommendation of the IE and the Project Director, thereby admitting the reasons for requiring EOT to be granted and Yedeshi's entitlement to EOT. Despite this, the EC of the NHAI unreasonably kept the approval, of the Project Director, for grant of EOT on hold even after the SFLD had passed.

132.1.29 Even after the lapse of 910 days from the Appointed Date, NHAI had neither approved the first EOT of 365 days from the original Scheduled Four-Lanning Date nor handed over the entire balance encumbrance free and hindrance free site to Yedeshi. Approval of the first EOT was granted by NHAI only on 6 December 2018, communicated to Yedeshi on 11 December 2018, a mere 15 days before the SFLD of 26 December 2018. Significantly, the EOT granted was of 365 days, as recommended by the IE and the Project Director.

132.1.30 Article 12.4.2 of the CA read with Schedule Q thereto rendered the IE the sole authority to determine and grant EOT. The IE, therefore, was not required to seek the approval of the Project Director or any other authority in the NHAI for grant of EOT, and



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action of the IE in seeking such approval was beyond the CA.

132.1.31 The Arbitral Tribunal agreed with Yedeshi's contention that the CA did not empower NHAI either to grant EOT or approve the EOT granted by the IE. The IE had also not referred to any provision of the CA which required it to seek approval from the NHAI for grant of the EOT recommended by it. Nor had NHAI, before the Arbitral Tribunal, drawn attention to any such provision. Articles 47.10 and 48 of the CA clearly stated that the CA, its recitals and schedules and amendments to the CA, constituted the agreement between the parties. The NHAI, therefore, had no authority to withhold approval of EOT as recommended by IE. This withholding of approval amounted to a material breach of the CA and default, by NHAI, in complying with its obligations under the CA.

132.1.32 The minutes of the 359th Meeting of the EC of the NHAI and the agenda notes of the Technical Committee of the NHAI which followed, constituted clinching documents of admission, by the NHAI that it was in material breach and default of its obligations under the CA.

132.1.33 Significantly, the agenda notes were prepared by the CGM (T) of the NHAI on 27 August 2018, which was the same date on which Yedeshi submitted its undertaking not to claim damages. In the agenda notes, NHAI unequivocally admitted that it had been in breach of the CA since inception. The agenda also recorded that a considerable length of the Project Highway had not been handed over to Yedeshi on the Appointed Date and that, even on 30 July 2018,



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three years after the Appointed Date, 23.98 km out of the total of 181.8 km had not been made available and that 0.98 km lacked continuity. It was also admitted, by the Technical Division of the NHAI that, even till date, NHAI could not hand over the entire Project land, even after the Scheduled Four-Lanning Date had elapsed. The agenda also recorded the admission and realization by NHAI that, on account of the said failure on its part, NHAI was liable to pay damages to Yedeshi. This was a material admission on NHAI's part.

132.1.34 Para 6.2 of the agenda notes acknowledged the fact that NHAI was contractually required to provide 80% of the Project land on the Appointed Date and the remaining 20% within 90 days from the Appointed Date. Till date, NHAI had not handed over the entire land.

132.1.35 There was no allegation in the entire agenda note, by NHAI, that Yedeshi was in default at any point. Rather, para 6.3 of the agenda note recorded thus:

“It is evident that authority could not fulfil its conditions precedent, till date (i.e. even after lapse of the scheduled completion.) The concessionaire may demand the claims for the delay in future, either by way of Arbitration or request the authority to compensate the damages on account of authority's default in fulfilling its conditions precedent.”

Para 6.5 of the agenda note also recorded the IE's finding in its letter dated 5 July 2018, that the concessionaire was fulfilling its obligations under Article 5 of the CA and that there was no breach of the CA within the meaning of Article 35 thereof, till date. As NHAI had not been able to provide the entire land to Yedeshi till then, the IE



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recommended shifting of Project Milestone-IV, i.e. the Scheduled Four-Lanning Date, by 365 days, i.e. upto 26 December 2018.

132.1.36 Despite these clear admissions by its own officers and by the IE, the EC conjured up a finding, without any basis, that Yedeshi had also delayed construction.

132.1.37 Yedeshi, significantly, did not execute the supplementary agreement.

132.1.38 Thus, NHAI unreasonably delayed granting approval of the first EOT of 365 days and also failed to adhere to the requirement of handing over the entire balance land to Yedeshi by 30 September 2017. As a result, the construction period was required to be further extended. The record produced by Yedeshi and the IE's observations and reasons for recommending grant of EOT, therein, revealed that one of the main reasons for delay in completion of construction, even after the issuance of the PCC, was the delay by NHAI in handing over the Project Site free from encumbrances and hindrances and granting vacant access and ROW to Yedeshi within the stipulated time period. Even the fixation of additional time for completion of construction was conditional on NHAI ensuring that there would be no further encumbrances or hindrances affecting construction and that it would hand over the balance land within the time stipulated in the EOT applications. The record, however, revealed that NHAI could not handover the balance land within the stipulated period, resulting in further delay in completion of construction. Thus, it was evident that NHAI was in continued breach of its material obligations under the



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CA and that it was on account of the said material breach that construction was delayed.

132.1.39 These facts had not been contemporaneously disputed by NHAI. Nor had NHAI laid any evidence before the Arbitral Tribunal to contradict the status of balance land handing over or the obstructions faced by Yedeshi on account of land acquisition issues and encumbrances and hindrances on the site which affected construction, and were not attributable to Yedeshi.

132.1.40 NHAI only sought to contend, firstly, that Yedeshi had also delayed in completing the work after PCC had been issued, as observed by the IE and, secondly, the delay in acquiring land was not attributable solely to NHAI.

132.1.41 Thus, NHAI did not dispute that there was, in fact, delay in handing over the encumbrance free Project Site, resulting in delay in completion of construction. All that it sought to contend was that this entire delay could not be attributed to NHAI. An undeniable fact, however, remained that, even after almost a year from the PCC, which was of 15 March 2019, the entire encumbrance free Project Site had not been made available to Yedeshi, to the extent that, even on the date of issuance of Completion Certificate on 24 September 2020, certain works were required to be delinked as they could not be completed owing to land acquisition issues. This fact was also noted by the IE in its intimation to NHAI, conveying its intention to issue the Completion Certificate. NHAI, too, by letter dated 23 September 2020, accorded its consent, resulting in issuance of the Completion



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Certificate by the IE with effect from 24 September 2020.

132.1.42 This clearly indicates that the delay could not be attributed solely to *force majeure* in the form of the COVID-19 Pandemic.

132.1.43 NHAI also delayed in granting various approvals, which affected construction. Among these was delay caused in shifting of the utility lines. Article 11.2 of the CA required Yedeshi to shift utility lines, which caused or could cause a material adverse effect on the construction, operation or maintenance of the Project Highway, to an appropriate place within or outside the State. The Arbitral Tribunal agreed with Yedeshi's submission that, as the utilities were in the form of electrical lines, water pipelines, high tension lines, telephone lines and fixtures pertaining to other essential services, relocation of the utilities required NHAI's assistance and approval of the area to which they were to be relocated. The record produced by Yedeshi, and the testimony of CW-1 revealed that, with respect to several utility lines, particularly electrical and water utilities, NHAI delayed in approving the cost of shifting and in depositing supervision charges and approving plans for shifting of the utilities. It was evident that, without such approvals granted by NHAI and deposition, by NHAI, of the supervision charges, Yedeshi was in no possession to relocate the utilities. In several cases, the site for relocating the utilities was also not available. Inability to shift the utilities to other appropriate sites further resulted in inability in Yedeshi being able to carry out the Project work.



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132.1.44 NHAI did not deny the fact that it had delayed in granting approvals and in depositing supervision charges for relocation of the utilities. It only sought to rely on certain correspondences between NHAI and the utility owning authorities, and certain comments in the MPRs by the IE that shifting of the utilities by Yedeshi was slow.

132.1.45 Construction of the Project was further delayed because of delay on NHAI's part in obtaining forest clearance. 1.621 hectares of forest land passed through the Project corridor, in eight locations. NHAI obtained first stage approval for acquisition of the said forest land only on 11 September 2015 for Osmanabad District and on 19 November 2015 for Beed District. The compensation amount, for felling trees in the forest land, was deposited by NHAI only on 22 February 2016 and 31 March 2016. This resulted in delay in grant of approval by the Chief Conservator of Forests and consequent delay in clearing of trees from the said areas. The second stage approval for the Beed District and Osmanabad Districts were received by NHAI only on 29 November 2017 and 10 March 2019, respectively. Clearly, therefore, there was considerable delay by NHAI in obtaining the said approvals.

132.1.46 Article 4.1.2 (e) read with Schedule E of the CA required NHAI to procure all applicable permits for environmental protection and conservation of the Project Site even prior to the Appointed Date. In the present case, however, even several years after the Appointed Date, NHAI had failed to obtain the requisite permits and clearances. The Arbitral Tribunal expressed its agreement with Yedeshi that this constituted a breach of NHAI's obligations under Article 6 of the CA,



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particularly obligations (g) and (h) and also breach of NHAI's representations and warranties under Article 7.2 (a), (b) and (h).

132.1.47 Another incidence of delay on NHAI's part was with respect to felling of trees, covered by Article 11.4 of the CA. NHAI approved the estimates of tree felling only on 25 June 2015. The requisite fees for felling of trees was deposited by Yedeshi with NHAI on the very next day. Based on the instructions of the Collector, tree felling commenced on 30 November 2015. Within a month thereof, NHAI directed Yedeshi to stop tree felling and instead carry out transplantation. CW-1 clearly testified that tree transplantation was beyond the scope of work of Yedeshi in the CA. It was imperative, therefore, that the estimates in that regard be approved by NHAI. NHAI delayed in granting the said approval, which resulted in delay in tree transplantation. On the other hand, NHAI did not produce any evidence to contradict the said contention. The documents on record and the testimony of CW-1 disclosed that it was only subsequently that NHAI decided to get the transplantation work done by an independent agency. Even thereafter, despite Yedeshi repeatedly requesting NHAI to expedite the process of tree transplantation, there was gross delay on NHAI's part. NHAI did not produce, even before the Arbitral Tribunal, any evidence to contradict the material produced by Yedeshi, manifesting the said delay. The delay in tree felling and tree transplantation was also attributable, therefore, to NHAI and constituted one of the reasons for delay in completion of construction.

132.1.48 There was also delay on NHAI's part in grant of approval for Change of Scope, as well as for issuing Change of Scope Orders.



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Article 16 of the CA specifically stated that, if Yedeshi was to be made to carry out any additional work, beyond the original Scope of Work in the CA, NHAI was required to issue a Change of Scope Order. The additional works were further required to be carried out at the cost of NHAI. The documents produced by Yedeshi, and the testimony of CW-1 disclosed that NHAI delayed in approving cost estimates for such additional works and approving alignment and scope of the said works. NHAI further delayed in issuing final Change of Scope Orders. Only in principle approvals were granted, belatedly, with a request to Yedeshi to carry out the said works. The nature of these additional works and the uncertainty around finalization thereof affected several portions of main construction of the Project Highway.

132.1.49 Most importantly, NHAI was in breach of its most fundamental obligation of granting Yedeshi vacant access, valid license and ROW to the entire Project Site, in accordance with its obligations under Article 6 and representations and warranties under Article 7.2 of the CA.

132.1.50 It further transpired that NHAI did not have good or valid right to the Project Site, so as to perform its obligation under the CA and also did not possess power and authority to deliver and perform its obligations or carryout transactions under the CA. Even till the date of issuance of the Completion Certificate on 24 September 2020, NHAI was unable to grant vacant access to parts of the Site.

132.1.51 Forest clearances, for certain parts of the Site, had been



obtained as late as in 2019.

132.1.52 The Arbitral Tribunal found that Yedeshi had sufficiently established that each of these factors had affected the availability of free, vacant and unobstructed continuous stretches of land for construction of the Project Highway and had resulted in delay in completion of construction. These factors, as well as other delays by NHAI, and corroborative documents and strip charts were all analysed by the IE. To specific queries raised by the NHAI in this regard, the IE specifically enumerated all these factors as encumbrances and hindrances in completion of construction, none of which were attributable to Yedeshi.

132.2 Whether Yedeshi was in material breach or default of its obligations

132.2.1 In view of the aforesaid, the Arbitral Tribunal held that it was unable to agree with NHAI's contention that Yedeshi was responsible for delay in completion of the Project.

132.2.2 NHAI had drawn the attention of the Arbitral Tribunal to certain extracts of the MPRs for the period July 2015 to December 2017 and some observations made by IE in the said MPRs regarding slow progress of the work by Yedeshi. However, when considered in conjunction with other documentary evidence, particularly, the IE's findings at the time of recommending EOT to Yedeshi, the delays on Yedeshi's part, regarding which the IE had made observations in the MPRs, became insignificant in the entire scheme of the contract.



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What was relevant was whether the delays on Yedeshi's part resulted in extending the construction period, so as to arrive at a finding that Yedeshi was responsible for delay in construction.

132.2.3 Every document, which recommended grant of EOT and the approval by the NHAI in that regard, repeatedly emphasized that the Project work could not be completed and constructions had been delayed, on account of issues involving handing over of the Project Site or other reasons attributable to NHAI. There was no observation, in any of the said documents, regarding concurrent delay on Yedeshi's part, or that EOT was being granted because of Yedeshi's delays. Even in September 2017, when the IE recommended grant of EOT-1 of 365 days, the IE specifically found that construction was delayed on account of issues relating to handing over of the Site and other issues, none of which was attributable to Yedeshi. There was no mention of delay in construction because of Yedeshi. Nor was there any contemporaneous correspondence by NHAI, disputing this position. Rather, the record overwhelmingly reflected admission, by NHAI, of its breach.

132.2.4 In February 2019, while recommending further EOT of 196 days, the IE again recorded that delay in completion of construction was on account of issues relating to handing over of Project Site and other issues, none of which were attributable to Yedeshi. Again, there was no contemporaneous denial, by NHAI, of the said fact or any assertion that delay in construction was attributable to Yedeshi.



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132.2.5 It was true that in the MPRs, the IE had entered certain observations regarding slow progress, by Yedeshi, of certain works between March 2018 and March 2019. Even so, in its letter of intent to issue PCC, in March 2019, the IE categorically recorded that while Yedeshi had completed more than 85% of the Project work, certain works could not be completed due to issues relating to delayed handing over and non-availability of the Project Site.

132.2.6 Schedule J of the CA contained the draft of the PCC, to be issued under Clause 14.3 thereof. Para 2 of the draft PCC reads thus:

“2. Construction Works that were found to be incomplete and/or deficient have been specified in the Punch List appended hereto, and the Concessionaire has agreed and accepted that it shall complete and/or rectify all such works in the time and manner set forth in the Agreement. (Some of the incomplete works have been delayed as a result of reasons attributable to the Authority or due to Force Majeure and the Provisional Certificate cannot be withheld on this account. Though the remaining incomplete works have been delayed as a result of reasons attributable to the Concessionaire,)[@] I am satisfied that having regard to the nature and extent of such incomplete works, it would not be prudent to withhold commercial operation of the Project Highway, pending completion thereof.

3. In view of the foregoing, I am satisfied that the Project Highway can be safely and reliably placed in commercial service of the Users thereof, and in terms of the Agreement, the Project Highway is hereby provisionally declared fit for entry into commercial operation on this the day of 20

[@] Strike out if not applicable.”

When this draft PCC was compared with the final PCC issued by the IE, which was also accepted by NHAI, it was seen that the IE had, in accordance with the footnote accompanying “[@]”, struck off the



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sentence “though the remaining incomplete works have been delayed as a result of reasons attributable to the Concessionaire”. It was the draft PCC, after the striking out this sentence, which was sent to NHAI, by the IE, with its letter dated 6 March 2019, conveying the intention of the IE to issue PCC in that form. NHAI never objected to the striking off of the said sentence or disputed the assertion of the IE that Yedeshi was not in default in complying with the obligations under the CA. Nor was there any communication by NHAI, to the IE, asserting that Yedeshi was in fact in such default.

132.2.7 Further, even while approving the request for grant of EOT in October 2019 and April 2020, the IE determined that the delay in procurement of the Site, free from encumbrances, and failure on NHAI’s part to hand over the balance Site to Yedeshi within the prescribed time was the reason for delay in completion of construction, which necessitated grant of further EOT till 31 May 2020. This was specifically recorded in the recommendations of the IE contained in its letter dated 10 April 2020.

132.2.8 NHAI had not contemporaneously disputed the said determination, by the IE, of the cause of delay in completion of the construction. Neither had NHAI produced, before the Arbitral Tribunal, any compelling evidence on the basis of which it could be held that delay in completion of construction was owing to reasons attributable to Yedeshi. The observations of the IE, in the MPRs, regarding slow progress in certain works by Yedeshi, could not, therefore, be treated as a determination, by the IE, of delay on Yedeshi’s part in completion of work or as indicative of breach, by



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Yedeshi, of its obligation under the CA. In fact, at Item No. 4, under the head “status of compliance”, the IE, while recommending issuance of completion certificate, had recorded thus:

“Milestone-IV (Four-Lanning) could not be achieved due to reasons not attributable to Concessionaire and accordingly extension of time has been recommended.”

NHAI, by its letter dated 23 September 2020, consented to the grant of Completion Certificate, thereby acknowledging the correctness of the assertions contained in the letter of recommendations by the IE.

132.2.9 NHAI sought to rely, before the Arbitral Tribunal, on a table showing a comparison between the length of Project highway made available to Yedeshi on a particular date and commensurate work carried out by Yedeshi by the said date. The reliance, on the said comparison, for contending that Yedeshi was responsible for delay in completion of the Project work, was completely misplaced. The table did not take into account the break in continuity of the land parcels handed over by NHAI to Yedeshi. Nor did it take into account the hindrances faced by Yedeshi. The Arbitral Tribunal agreed with Yedeshi’s contention that the CA required that, after receiving vacant access, ROW and valid license in respect of at least 80% of the Project Site, free from encumbrances and hindrances, on the Appointed Date, and 100% of the Site within 90 days Yedeshi had, with it, 910 days from the Appointed Date for completing construction.\

132.2.10 The CA did not stipulate that Yedeshi was liable to carry out work commensurate with the land handed over to it by NHAI.



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Having failed to perform its part of the contract, NHAI could not seek performance from Yedeshi. Article 10.3.5 of the CA did not obligate Yedeshi to construct on land handed over to it by NHAI more than 90 days after the Appointed Date. Even as per the table on which NHAI sought to rely, only 47.73 Kms of the Project highway had been handed over to Yedeshi within 90 days from the Appointed Date. Yedeshi had completed the work on the said stretch even prior to the original SFLD, i.e. within 90 days from the Appointed Date. There was no way in which Yedeshi could, therefore, be held responsible for delay in completing of construction.

132.2.11 In letter dated 17 October 2019, the IE accepted that the reasons for slow progress of work was owing to disturbance to the workforce due to obstructions created by locals and landowners, owing to non-resolution of land acquisition issues, including grant of compensation, with NHAI.

132.2.12 In letter dated 8 January 2020 from the IE, while there was a stray reference that there was delay in completion of work due to non-deployment of sufficient resources, ultimately EOT was granted subject to NHAI removing all hindrances on the Project Site and handing over the balance site to Yedeshi. This indicated that the delay, on NHAI's part, in failure to remove hindrances and handing over of the hindrance and encumbrance free site to Yedeshi was far greater than any delay on Yedeshi's part in complying with its obligation. It was obvious that, in the absence of a hindrance free site, Yedeshi could not complete construction.



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132.2.13 Besides, every delay did not amount to material breach or default of the CA. Intermittent reference to slow progress by Yedeshi, or issuance of directions to Yedeshi to infuse more resources, did not reflect any material breach of the CA by Yedeshi. There was no record or pleadings on the basis of which any finding of such material breach of the CA by Yedeshi could be returned.

132.2.14 The Arbitral Tribunal was also not in agreement with NHAI's contention that Yedeshi had infringed Article 10.3.5 of the CA by not completing all works on the 77.13% of the Project Site which had been handed over to it on the Appointed Date, within the original construction period of 910 days. The Arbitral Tribunal noted that the estimation of the said 77.13 % being available on the Appointed Date was solely on the basis of Section 3D compliance. Section 3D compliance did not meet NHAI's obligation under the CA. The NHAI had itself admitted that, on the Appointed Date, it had not granted vacant access, ROW and valid license to Yedeshi of even 40% of the Project Site.

132.2.15 Article 10.3.5 of the CA could not be interpreted to mean that, whenever and howsoever land was handed over by NHAI to Yedeshi, Yedeshi was required to complete works on the said land within 910 days. Such an interpretation would be absurd. Article 10.3.5 stated that, by the SFLD, Yedeshi would complete the works on all lands handed over within 90 days of the Appointed Date. More significantly, it was an admitted position that even the lands which were handed over to Yedeshi on the Appointed Date within 90 days thereof were not free from encumbrances or hindrances. 100%



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encumbrance free site had not been handed over to Yedeshi, even by the date of the completion certificate. As such, as per Article 10.3.1 read with Article 10.2.2 and Article 3 of the CA, it could not be construed that even 40% of Project Site had been handed over to Yedeshi on the appointed date, in accordance with the CA.

132.2.16 As per NHAI's own showing, on the Appointed Date, only 36.7 Kms or 136.66 Kms of the land was available. Yedeshi had completed construction of the Project on the said land prior to the expiry of 910 days from the Appointed Date.

132.2.17 NHAI further sought to contend before the Arbitral Tribunal that Yedeshi had failed to achieve Financial Close within 180 days of execution of the CA and was, therefore, in material breach and default of its obligation under the CA. This submission was also unacceptable. The documentary evidence and oral testimony of CW-1, unshaken in cross-examination, clearly manifested that delay in achieving Financial Close, by Yedeshi, was owing to reasons attributable to NHAI. The said delay did not, therefore, amount to a breach by Yedeshi in terms of Article 24.1 of the CA. No damages would be payable by Yedeshi on that score.

132.2.18 In any event, on 16 March 2015, which was prior to the Appointed Date, Yedeshi achieved Financial Close.

132.2.19 Moreover, NHAI had not filed any counter claim seeking damages under Article 24.1 or otherwise, against Yedeshi. NHAI's contention in this regard was, therefore, irrelevant.



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132.2.20 In the circumstances, the Arbitral Tribunal agreed with Yedeshi's contention that the issue of any material breach or default of the CA by Yedeshi was irrelevant to the adjudication of the issues in controversy. While Yedeshi had claimed damages under Articles 35.2 and 35.3 of the CA, apart from the claim on the ground of *force majeure*, following the Covid-19 Pandemic, no counter claim had been filed by NHAI. The language of Articles 35.2 and 35.3 was clear.

132.2.21 Under Article 35.2, the scope of inquiry was only whether NHAI was in material breach or default of its obligations under the CA. The article did not require the Arbitral Tribunal to enquire as to whether NHAI was *solely* in material breach or default. Nor did it absolve NHAI of its liability to pay compensation on the ground that, in addition to its own default, Yedeshi was also in material breach or default of its obligations. Accepting NHAI's contention in this regard would require the Arbitral Tribunal to add the word "solely" into Articles 35.2 and 35.3 of the CA. Had the intention of the parties, while executing the CA, been that Yedeshi would not be entitled to any compensation under Articles 35.2 and 35.3 in the event of any contributory default on its part, they would have so provided.

132.2.22 In fact, Articles 31.1 of the CA specifically provided for Yedeshi's liability in the event of material breach or default on its part.

132.2.23 Similarly, the scope of inquiry under Article 35.3 of the CA was limited to examining whether there was any material breach



or default of NHAI. It did not contemplate any inquiry into whether the delay in COD or suspension or reduction in toll revenue was owing to sole material breach or default of NHAI. Once it was established out that COD was delayed on account of material breach or default of NHAI, or that, for that reason, toll revenues were suspended or reduced, NHAI was liable to extend the concession period. The liability of NHAI to extend the concession period did not stand absolved merely because there was contributory material breach or default on Yedeshi's part in delaying COD or suspension or reduction in toll revenues.

132.2.24 In fact, the CA specifically provided elsewhere for the consequences of Yedeshi's material breach or default, including the right of NHAI to terminate the CA.

132.2.25 Though, therefore, the Arbitral Tribunal was not required to enter into the issue of whether there was any material breach or default of the CA on Yedeshi's part, nonetheless, in view of the preceding discussions, it was held that there was in fact no material breach or default of the CA by Yedeshi.

132.2.26 NHAI also sought to shift the burden of the delay in land acquisition to the shoulders of the CALA. This submission was not acceptable, as it was *de hors* the terms of the CA. The CA obligated NHAI to procure and grant vacant access, valid license and ROW to Yedeshi. It did not provide for discharge of the said obligation by CALA or that any delay by CALA in that regard could be cited by NHAI as an excuse. There was no caveat, in Article 3, 6 or 10 of the



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CA, whereby NHAI's obligation to procure and hand over the Project Site, free from encumbrances, or the consequences thereof, could be executed on the ground of delay on account of CALA or for any other reason.

132.2.27 Under Article 12, Yedeshi was not liable to pay damages to NHAI in the event of failure to achieve milestones, if the delay was for reasons attributable to NHAI or because of *force majeure*. The delay by CALA in procurement of land was not a contractually envisaged *force majeure* event. Neither was any *force majeure* notice issued by NHAI in that regard.

132.2.28 Under the CA, procurement of Site, grant of license to Yedeshi to carry out the Project construction on the site and grant, to Yedeshi, of vacant access, valid license and ROW for the purpose of construction were the most material obligations of NHAI.

132.2.29 Delay on the part of the CALA could not excuse non-fulfilment, by NHAI, of its obligations under the CA. NHAI sought to rely on the cross-examination of CW1 in reply to question 30 put to him, to the effect that delays in preparation of valuation of properties, frequent change of the CALA, delay in publications of the Sections 3A and 3D Notifications etc. were attributable to the CALA and not to NHAI. The Arbitral Tribunal did not agree. In any event, the decision of whether responsibility was of the CALA or of NHAI was to be decided by the Arbitral Tribunal and could not be dependent on the statement of CW-1. It was noted that CW-1 in his testimony had in fact stated that there was no mention of the CALA in the CA and that



the obligations were to be fulfilled by NHAI.

132.2.30 The NHAI also contended that the CALA was an independent authority appointed by the Central Government under Section 3(a) of the NH Act, which did not work under the control or supervision of NHAI. The Arbitral Tribunal found this difficult to accept. Besides, the obligation to ensure that the CALA completed the land acquisition process in a timely manner, as envisaged in the CA, was of NHAI. NHAI's failure to procure such performance by the CALA was itself a material breach and default by NHAI, of Articles 6, 10 and 7.2 of the CA, which had a material adverse impact on performance of the CA.

132.2.31 NHAI further relied on Articles 5.1.4 and 10.5 of the CA to submit that facilitation of land acquisition and removal of occupations, encroachments and encumbrances from the project site was a joint obligation of Yedeshi and NHAI. The Arbitral Tribunal did not accept this contention either. The CA clearly placed the obligation to procure the site and grant to Yedeshi a valid licence, vacant access and ROW free from encumbrances, squarely on NHAI. This, in fact, was the NHAI's main obligation under the CA. Article 5.1.4 only required Yedeshi to make reasonable efforts to facilitate land acquisition. This did not *ipso facto* render the obligation to procure and hand over the vacant encumbrance free site, a joint obligation of Yedeshi and NHAI. Yedeshi could, at best, provide assistance to NHAI, when called upon to do so.

132.2.32 Besides, under the NH Act, acquisition, and its various



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facets, could not be undertaken by Yedeshi. RW-1 admitted this fact in cross-examination. He further admitted that the assistance to be provided by Yedeshi with respect to land acquisition was after payment of compensation, if the land owners did not vacate the site, by contacting such land owners. Yedeshi's further obligation was to point out any missing land parcels or khasras or any structures or obstructions which may have been left out by NHAI. NHAI did not point out any instance of failure, on the part of Yedeshi, to make reasonable efforts to facilitate acquisition. The documentary evidence led by Yedeshi showed that it had repeatedly pointed out these facts to NHAI.

132.2.33 Further, Article 10.5 applies only after NHAI granted Yedeshi vacant access and ROW to the site, free from encumbrances, as envisaged by Articles 10.2.2, 10.3.1, 10.3.2, 10.3.4 and 10.4 of the CA. Specifically, Article 10.4 stated that the project site would be made available by NHAI to Yedeshi free from all encumbrances and occupations. The obligation of Yedeshi under Article 10.5 was to protect the site from encroachment. This obligation could be performed only after the site had been handed over by NHAI to Yedeshi in the manner envisaged by article 10.2.2, 10.3.1, 10.3.2, 10.3.4 and 10.4.

132.2.34 In view of the aforesaid, the Arbitral Tribunal concluded that NHAI was in material breach and default of its obligations under the CA, and that the said material breach and default had resulted in material adverse impact on the performance, by Yedeshi, of the CA. Apart from delay in handing over of the land, the staggered manner in



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which NHAI had handed over the project site to Yedeshi, absence of contiguity in the site and existence of various encumbrances and hindrances materially contributed to delay in completion of construction.

132.2.35 Issues 1 and 5 were, therefore, answered by holding that NHAI was in material breach of default of its obligations, representations and warranties under the CA, and not Yedeshi. Yedeshi was found not responsible for the delay caused in completion of the project.

132.3 Re: Issue Nos. 2 and 6

132.3.1 The next issue which arose for consideration was whether Yedeshi was entitled to claim compensation under the CA, *inter alia*, under Article 35.2.

132.3.2 Owing to breach and default by the NHAI of its obligations under the CA, the original construction period of 910 days, contemplated in the CA, had temporarily got prolonged to 1912 days. Due to such prolongation of the construction period, Yedeshi had suffered or incurred additional costs and was deprived of commencing toll collection much beyond the originally contemplated date of said commencement.

132.3.3 In view thereof, Yedeshi raised a claim of additional costs incurred or suffered by it, under Article 35.2 of the CA.



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132.3.4 Article 35.2 rendered NHAI liable to pay compensation in the event of material breach or default of the CA having occurred at its end.

132.3.5 NHAI sought to contend that by letter dated 8 June 2015, Yedeshi had waived the damages payable for delay in fulfilment of Conditions Precedent by NHAI under Article 4.1.2 of the CA, which included the Condition Precedent of procuring ROW. NHAI, therefore, sought to contend that Yedeshi could not now seek compensation for delay in that regard. The Arbitral Tribunal did not agree. The waiver of damages for delay in fulfilment of Condition Precedent did not absolve NHAI of its liability under the CA forever. Nor did the letter dated 8 June 2015 estop Yedeshi from claiming damages under Article 35.2 for material breach or default of the CA on the part of the NHAI. What was waived by Yedeshi was the claim of damages under Article 4.2 for delay in fulfilment of Conditions Precedent under Article 4.1.2. Yedeshi's claim before the Arbitral Tribunal was not under Article 4.2 and, therefore, NHAI reliance on the letter dated 8 June 2015 was misplaced.

132.3.6 Moreover, the waiver was for the limited purpose of declaration of Appointed Date. The definition of "Appointed Date" in Article 48 of the CA included a condition that Conditions Precedent were to be fulfilled by both parties for declaring the Appointed Date, unless satisfied or waived. Thus, Article 48 itself envisaged the waiver of the Conditions Precedent for the purpose of declaration of the Appointed Date. In the letter dated 8 June 2015 after recording the mutual waiver, Yedeshi requested for declaration of the Appointed



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Date. Thus, the mutual waiver which was recorded in the letter was in the context of such declaration of the Appointed Date. It could not be interpreted to mean that the entire obligation of NHAI under the CA, with respect to handing over the project site to Yedeshi, free from encumbrances, stood waived. It was only the performance of the obligations under Article 4.1.2, as a Condition Precedent to declaration of the Appointed Date, which stood waived. This understanding was also confirmed by the testimony of CW-1 in examination, which went uncontroverted.

132.3.7 Accepting the interpretation canvassed by NHAI would mean that in the guise of waiver of damages for fulfilment of Conditions Precedent, NHAI could simply hand over 5% of the site and delay in handing over the remaining 95% and claim absolution from payment of damages. This would render the CA unperformable as handing over of the site was the most material obligation of NHAI.

132.3.8 Yedeshi relied on Article 47.6 of the CA. The reliance was apt. Article 47.6 clarified that waiver in respect of any particular obligation under the CA, could not be construed as a waiver of other obligations or of subsequent defaults. The waiver, therefore, would only be of the NHAI's obligations to perform certain acts as a Condition Precedent prior to the Appointed Date and nothing more. It did not absolve NHAI of its obligation to otherwise hand over the site on the Appointed Date, nor did it condone the defaults for the period from the Appointed Date. Nor did it absolve NHAI of its liabilities resulting from defaults in respect of other provisions of the CA.



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132.3.9 NHAI sought to contend that the waiver applied to Article 4.1.2 (a) whereunder NHAI had to procure for Yedeshi, ROW to the site in accordance with Clause 10.3.1. The Arbitral Tribunal found merit in Yedeshi's contention that clause 4.1.2 (a) did not refer to clause 10.3.2 or any other clause under Article 10 except Article 10.3.1. There was, therefore, no waiver of NHAI's obligations under Article 3 or Clause 10.2.2 to grant NHAI valid licence, vacant access and ROW to the entire site, or of NHAI's obligations under Clause 10.3.2 to grant valid licence, vacant access and ROW to at least 80% of the unencumbered site on the Appointed Date and to the balance 20% within 90 days from the Appointed Date. Nor did the waiver operate in respect of any other obligation of NHAI with respect to the project site or otherwise.

132.3.10 Yedeshi had fulfilled all its Conditions Precedent prior to the Appointed Date, except the requirement of obtaining applicable terms which was partially fulfilled. Yedeshi's contention was that the remaining applicable permits would be required only subsequently. NHAI had not disputed this contention.

132.3.11 The delay in fulfilling Conditions Precedent which were tied up with obtaining the Financial Close was also owing to reasons attributable to NHAI. The documents produced by Yedeshi and the oral testimony of CW-1 showed that, while Yedeshi had submitted the draft Financing Agreements well within time and obtained sanction of the debt for the project, the lenders were reluctant to execute the Financing Agreements owing to NHAI's delay in fulfilling its Conditions Precedent, particularly clause 4.1.2 (a). That the Financing



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Agreements could be executed only after fulfilment of its Conditions Precedent by NHAI was not disputed by NHAI.

132.3.12 Yedeshi relied on *P. Dasa Muni Reddy v Appa Rao*⁵², to contend that waiver could only be of a known right. The learned Arbitral Tribunal agreed with the contention. Yedeshi could not have conceivably predicted that NHAI would not be in a position to hand over the site for years to come. The waiver of damages for delay in fulfilling Conditions Precedent could not therefore operate as waiver of damages for all times to come in respect of delay in handing over of the site.

132.3.13 NHAI thereafter relied on the No Claim Undertaking dated 27 August 2018 furnished by Yedeshi and contended that, in view of the said undertaking, Yedeshi could not maintain any claim for damages or loss under Clauses 35.2 or 35.3 of the CA.

132.3.14 The Arbitral Tribunal noted that, in the undertaking, Yedeshi had not specifically stated that it would not raise any claim under Clause 35.2 or 35.3 of the CA for material breaches or defaults on the part of NHAI. Moreover, Schedule G to the CA, did not contain any Milestone-IV. The undertaking did not contain any specific mention to the effect that Yedeshi was waiving its claims under Clauses 35.2 and 35.3 for material breaches of the CA by NHAI. In the absence of any such specific reference to Clauses 35.2 and 35.3 in the undertaking, the undertaking could not operate as a relinquishment, by Yedeshi, of its right to claim damages or loss from

⁵² (1974) 2 SCC 735



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NHAI under the said clauses. The undertaking, therefore, appeared to be meaningless and even for that reason appeared to have been issued under economic duress.

132.3.15 The conduct of the parties also indicated that, even in NHAI's understanding, the undertaking dated 27 August 2018 had no binding effect and did not result in waiver of Yedeshi's right to claim damages under Clauses 35.2 or 35.3 or any other Clauses of the CA. This was apparent from the fact that, even after furnishing of the said undertaking, the EC of NHAI insisted on Yedeshi executing a Supplementary Agreement specifically waiving delays by NHAI and all claims against NHAI on account of shifting of the SFLD, i.e. Milestone-IV.

132.3.16 In fact, by letter dated 6 December 2018, NHAI had demanded that Yedeshi agreed to waive off delays and claims on account of EOT for the SFLD and execute a Supplementary Agreement to that effect. Prior thereto, in the internal meeting of the EC of the NHAI held on 5 September 2018, while considering the request of Yedeshi for grant of the first EOT, the EC stated that while it was willing to grant EOT, it expected a similar reciprocal response from Yedeshi. This also indicated that even in NHAI's understanding, the undertaking dated 27 August 2018 was not binding on its own and it was essential for the parties to execute a Supplementary Agreement. Undisputedly, no such Supplementary Agreement was executed between the parties. The refusal of Yedeshi to execute such a Supplementary Agreement itself indicated its intent not to be bound by the undertaking.



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132.3.17 Moreover, Clause 47.10 of the CA specifically stipulated that no modification or amendment to the terms of the CA would be valid or effective unless it was agreed to in writing by the parties and duly executed by persons specifically empowered by the parties in that regard. The requirement of a Supplementary Agreement signed by authorised representatives of the parties was underscored by this Clause. The undertaking dated 27 August 2018 did not constitute a Supplementary Agreement in terms of Clause 47.6 of the CA. In the absence of any such Supplementary Agreement, the No Claim Undertaking could not operate as an impediment to Yedeshi seeking compensation for material breach and default of the CA by NHAI.

132.3.18 Moreover, the undertaking was not conditioned by any valid consideration. There was no reason why Yedeshi would seek to give up its claim against NHAI merely to obtain EOT-I, when it was entitled to the EOT-I as also determined by the IE, even as per the terms of the CA. The IE, who was contractually, the sole authority to determine and grant EOT, had already determined that Yedeshi was entitled to EOT-I and accordingly as per the terms of the CA, the SFLD had been revised. As such, the undertaking was *ex facie* without consideration, unconscionable, void and not binding.

132.3.19 Yedeshi further contended that the undertaking had been executed under grave economic duress. NHAI submitted, *per contra*, that the plea of economic duress was taken belatedly and was unsupported by any particulars or documentary evidence.



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132.3.20 Addressing this submission, the Arbitral Tribunal noted that it was clear that, due to material breach and default of NHAI, completion of construction was delayed and that Yedeshi was entitled to EOT. Clause 12.4.2 of the CA envisaged deemed revision of the SFLD by the period for which EOT was granted. Yedeshi's obligation under the CA was to complete the entire four laning by the SFLD. The revision of the SFLD was, therefore, essential for Yedeshi. The consequence on Yedeshi, were EOT not to be granted and the SFLD consequently not revised was, therefore, far reaching.

132.3.21 Yedeshi, therefore, had no real reason for giving the undertaking. On the other hand, NHAI sat over the request for approval for grant of EOT, made by Yedeshi, even beyond the original SFLD. Long after the expiry of the EOT-I of 365 days, which was even beyond 270 days from the original SFLD, the NHAI did not grant approval for EOT-II, despite the IE, the Project Director, the Regional Officer and the Technical Committee of NHAI holding Yedeshi to be entitled to EOT and specifically stating that delay in completion of construction was owing to delay in handing over of the site.

132.3.22 Clause 12.4.3 of the CA clearly stated that if the four laning work was not complete within 270 days of the SFLD, NHAI could terminate the CA. In the absence of grant of EOT, as the completion of actual construction would have carried on beyond 270 days, there was every possibility of NHAI terminating the CA. In these circumstances, the testimony of CW-1 that NHAI was under constant threat of termination, was believable. Termination of the CA



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at that juncture would have resulted a grave and irreparable loss of valuable rights of Yedeshi, resulting in far reaching consequences to it.

132.3.23 As per the testimony of CW-1, which was not denied by NHAI, Yedeshi had, by this juncture, already invested ₹ 3178 Crores in the project, of which ₹ 1697 Crores was in the form of Debt. Admittedly, by the stage of Milestone-III, Yedeshi had incurred an expenditure of ₹ 2335.882 Crores. This was confirmed by the IE in its letter dated 4 July 2017 and accepted by NHAI. Despite having expended such a huge amount, Yedeshi had not been able to commence toll collection owing to delay in completion of construction. Were the CA to have been terminated at that point, the entire investment of Yedeshi would have been laid to waste. As the concession period and rate of toll were fixed in the CA, delay in commencement of toll collection directly impacted the total period for which toll could be collected and, therefore, the total revenue earning capacity of the project. Additionally, Yedeshi also faced the wrath of its lenders, whose debt had to be repaid from the toll revenues. Even prior to the commencement of toll collection, therefore, Yedeshi was in a position in which there was possible termination of the CA, unless the EOT was approved by the NHAI. These factors, too, indicated that Yedeshi was under extreme economic pressure not only to speedily complete the work but to procure approval of the EOT so that performance of the CA could continue.

132.3.24 The fact that the lenders were apprehending that the CA would not be completed was also reflected by the request, by Yedeshi



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in its letter dated 25 July 2018 to NHAI, requesting that a comfort letter be issued to quell the apprehension of the lenders. This written request corroborated the oral testimony of CW-1, to the same effect. The said testimony remained unshaken in cross-examination. NHAI, by its default in granting approval for EOT-I had, therefore, placed Yedeshi in a state of extreme economic duress.

132.3.25 The comfort letter which ultimately came to be issued by NHAI evidenced that NHAI was also aware of the pressure being put by the lenders. The language of the said letter suggested that NHAI assured the lenders and Yedeshi's BOD that the EOT had already been approved and was only awaiting completion of formalities at the headquarters of the NHAI.

132.3.26 Except for such economic duress, there was no other reason for Yedeshi to give the said undertaking, waiving its claims. Nor had NHAI provided any reason for such an undertaking being given by Yedeshi. There was no prior correspondence, explaining the said undertaking.

132.3.27 In these circumstances, it was clear that NHAI, by misusing its dominant position, withheld and delayed grant of approval for EOT to Yedeshi, thereby constraining Yedeshi to execute the no claim undertaking. NHAI placed Yedeshi in a position in which it had no practical option but to give the no claim undertaking, failing which it faced termination or suspension. In these circumstances, the undertaking could not be binding on Yedeshi or act as a bar to it raising a claim against NHAI under Clauses 35.2 and 35.3 of the CA.



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132.3.28 The Arbitral Tribunal did not accept NHAI's contention that Yedeshi's letter dated 17 December 2018, read with NHAI's letter dated 6 December 2018, showed the waiver granted by the undertaking to be consensual. By the time EOT was approved by NHAI, the EOT-I of 365 days sought by Yedeshi had become meaningless, and Yedeshi required an additional EOT of 196 days. The mere fact that at that time, Yedeshi did not protest against the undertaking, would not render the undertaking consensual or divest Yedeshi of its right to seek compensation from NHAI.

132.3.29 NHAI's contention that Yedeshi had accepted the letter dated 6 December 2018 by NHAI, approving the grant of EOT subject to waiver of delays and claims by both parties, in its entirety, was also not accepted. The Tribunal found the conduct of the parties and the record to indicate that Yedeshi had not accepted the letter in its entirety. The letter envisaged waiver being executed by Yedeshi, thereafter, by way of a Supplementary Agreement. No such Supplementary Agreement was executed by Yedeshi. No protest in that regard was lodged by NHAI at any point of time.

132.3.30 In fact, Yedeshi was always entitled to be granted EOT. It was NHAI which was wrongly withholding approval. This, therefore, was not a case of the claimant electing something which was profitable to it.



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132.3.31 Besides in its EOT application itself, Yedeshi had reserved its right to claim damages. Thus, the said right could not be denied to it.

132.3.32 Both parties, particularly NHAI, treated the undertaking as not being binding and as requiring the execution of a subsequent Supplementary Agreement. In view thereof, the omission of Yedeshi to retract the undertaking, would be of no consequence, in view of its refusal to sign the Supplementary Agreement. No plea of estoppel could therefore operate against Yedeshi.

132.3.33 NHAI further sought to contend that Yedeshi had not led evidence of the author of the undertaking; no documentary evidence had been produced in support of the testimony of CW-1, regarding the meeting of the Project Director of NHAI with Mr. Shrivastava, in which purportedly the Project Director had exerted pressure on Mr. Shrivastava and that no material particulars substantiating the plea of duress were forthcoming.

132.3.34 The Arbitral Tribunal did not find these to be vitiating circumstances. It observed that, after considering all attendant facts and circumstances, the documents on record and the unshaken testimony of CW-1 regarding the existence of pressurising circumstances of Yedeshi, it had arrived at its conclusion of economic duress. In that view of the matter, the fact that Yedeshi had not led the evidence of the author of the undertaking did not make any substantial difference. The duress in the present case was not owing to anything which transpired between Mr. Shrivastava and the Project Director,



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NHAI but owing to the circumstances in which Yedeshi found itself, in which it had no choice but to provide the undertaking as sought. Substantial evidence to that effect had been led by Yedeshi.

132.3.35 Thus, the preponderance of probability clearly favoured the conclusion that the undertaking was vitiated by duress.

132.3.36 In these circumstances, the Arbitral Tribunal held that the undertaking could not debar Yedeshi from seeking compensation from NHAI under Clauses 35.2 and 35.3 of the CA.

132.3.37 Besides it was well settled that such a no claim undertaking would not bar legitimate claims arising under the contract. Reference was made to *Ambica Construction v UOI*⁵³ and *NHAI v Madhucon Project Ltd*⁵⁴.

132.3.38 In view of the aforesaid, the Tribunal held that No Claim Undertaking provided by Yedeshi did not estop it from claiming damages under Clauses 35.2 and 35.3 of the CA.

132.3.39 NHAI further sought to rely on the proviso to Clause 35.2 of the CA to contend that it proscribed a claim for compensation for any breach for which the CA expressly provided for damages. Inasmuch as Clause 10.3.4 of the CA provided for liquidated damages for delay in handing over ROW, NHAI contended that no claim for compensation would lie.

⁵³ (2006) 13 SCC 475

⁵⁴ Judgment dated 18 August 2017 in OMP (Comm) 292/2017



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132.3.40 The Arbitral Tribunal did not agree. Conjointly reading Clauses 10.3.2 and 10.3.4 of the CA, it held that Clause 10.3.4 was only referable to the Appendix to the CA which related to less than 20% of the Project Land. The damages envisaged by Clause 10.3.4, it was held, were contemplated only in the event of failure of NHAI to grant vacant access to any part of the said 20% of balance land, *de hors* the obligation to make 80% of the land available by the Appointed Date. Else, the impugned Award holds, it would be impossible for Yedeshi to ever complete 75% of the Project, which was an essential requirement for the PCC to be issued, as per Clause 14.3.2 of the CA.

132.3.41 The entitlement of Yedeshi to damages arises, as per the impugned Award, not merely under Clause 10.3.4, but under Clauses 10.3.1, 10.3.2, 10.3.4, 10.2.2, 3, 6, 7.2, 11 and 16 of the CA. These multiple breaches resulted in the construction period becoming unreasonably prolonged, resulting, further, in Yedeshi incurring additional costs obtaining the PCC much after the expiry of the SFLD.

132.3.42 Following the above discussion, the Arbitral Tribunal holds Yedeshi to be entitled for compensation as well as extension of the Concession Period.

132.3.43 The Arbitral Tribunal therefore held that a claim for damages would lie and would not stand foreclosed by Clause 10.3.4 of



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the CA. For this, the Arbitral Tribunal also relied on the judgement of this Court in *NHAI v D.S. Toll Road Ltd*⁵⁵.

132.4 Entitlement to compensation and EOT

132.4.1 The Arbitral Tribunal, thereafter, examined the quantum of compensation and EOT to which Yedeshi was entitled.

132.4.2 Clause 35.2 of the CA entitled Yedeshi to claim all direct costs suffered or incurred by it as a consequence of material breach or default, by way of compensation, from NHAI.

132.4.3 Yedeshi quantified its claim for compensation as ₹1717.08 crores, being the aggregate of principal of ₹1501.84 crores and interest of ₹215.24 crores. Thus, actual loss suffered as claimed as ₹1501.84 crores. This loss was certified and verified by the Statutory Auditor in terms of Article 33 of the CA. Besides, Yedeshi submitted a tabular statement showing summary of losses under various heads, aggregating to ₹1501.84 crores.

132.4.4 The losses claimed by Yedeshi included costs incurred by its Associate EPC Contractor Modern Road Makers Pvt. Ltd.⁵⁶, which MRMPL had claimed from Yedeshi. It was contended that MRMPL had been appointed on a fixed cost, fixed time basis, and as it had incurred additional costs on account of delayed period of construction, it had raised claims in that regard on Yedeshi by letter dated 30

⁵⁵ 2023 SCC OnLine Del 5833

⁵⁶ "MRMPL", hereinafter



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September 2020. Inasmuch as Article 35.2 allowed Yedeshi to claim all direct costs suffered or incurred by it, the amount claimed from Yedeshi by MRMPL would be part of the costs that Yedeshi incurred.

132.4.5 The Statutory Auditor's certificate was supported by over 20,000 pages of back up documents including the statements of plant and machinery deployed, extracts of MPRs, salary statements, wage slips, pay slips, bills and invoices of contractors, attendance logs of workers, details of TDS, leave and license agreements, vehicle logs, lease agreements for plants, vehicle hire invoices, bank statements, loan account statements and extracts from IE reports on the status of progress of work etc. The Statutory Auditor also confirmed, in evidence, that these documents were taken into account by it while certifying Yedeshi's claim under Article 35.2 of the CA. The Statutory Auditor also personally deposed and confirmed the contents of his certificate.

132.4.6 NHAI, per contra, submitted that Yedeshi had not placed on record, invoices, purchase orders, rental agreements, payment proofs, etc. in support of its claims.

132.4.7 It was further submitted that, based on the judgment of the Supreme Court in *State of Orissa v Samantary Construction Pvt. Ltd.*⁵⁷ that Yedeshi could not raise a claim based on working costs / hourly hire charges of plant and machinery instead of ownership cost. NHAI further contended that Yedeshi could not claim the loss incurred

⁵⁷ 2015 SCC OnLine SC 856



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by MRMPL which was not a party to the CA and could not saddle NHAI with such third-party costs.

132.4.8 It was further submitted that Yedeshi had not placed on record any invoices or proofs of payment by or to MRMPL.

132.4.9 NHAI further contended that the claim towards escalation / incremental cost was fictitious and fabricated, and that the costs of escalation was factored in the bid of Yedeshi and was not separately payable. For this purpose, NHAI relied on clause 9(b) of the EPC contract dated 19 August 2014. The rate of escalation was also disputed.

132.4.10 NHAI further contended that Yedeshi erred in claiming towards fixed overheads on the basis of a fixed monthly figure instead of a progressively declining figure as work neared completion. Further, as the said claim had not been paid by Yedeshi, it could not be claimed from NHAI. Relying on the judgment of the Bombay High Court in *Essar Procurement Services Ltd. v Paramount Constructions*⁵⁸, NHAI contended that Yedeshi could not claim overhead losses merely on the basis of Hudson's Formula unsupported by evidence. Yedeshi's claim to interest was also disputed.

132.4.11 Dealing with these submissions, the Arbitral Tribunal noted that there was no dispute about the delay of 1912 days from the Appointed Date, and of the fact that Yedeshi had in fact completed the project highway. There had, therefore, clearly been a delay in

⁵⁸ 2016 SCC OnLine Bom 9697



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completion of the project, which would have incurred costs. The Arbitral Tribunal had already found the delay to have been attributable to NHAI owing to default on its part in complying with its obligations under the CA, including handing over of the site. Despite this, Yedeshi achieved the first three Project Milestones, as well as the attendant financial targets.

132.4.12 The IE had itself confirmed, in its letter dated 4 July 2017 that, by the time it achieved Milestone 3, Yedeshi had spent amount of ₹2336 crores.

132.4.13 The delay of 1912 days would invariable have led to huge costs towards deployment and mobilisation of manpower and machinery and colossal standby charges. Yedeshi could not be expected to have retired its plant, machinery and manpower periodically after completing work on certain parts of the project and rehire them after additional land was made available.

132.4.14 Yedeshi had led voluminous evidence in support of its claim. NHAI neither dealt with it nor pointed any defects therein.

132.4.15 The Arbitral Tribunal held that Yedeshi was correct in its submission that, so long as it had incurred costs, it was entitled to be recompensed the said costs. No analysis had been made by NHAI of the 20,000 pages of data provided by Yedeshi which included all the elements noted in para 132.4.5 (supra).



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132.4.16 Insofar as the claim for costs incurred by MRMPL and claimed from Yedeshi was concerned, the Arbitral Tribunal noted that, as far as back as on 16 March 2015, Yedeshi had informed NHAI that MRMPL had been appointed as the Associate EPC Contractor. As such, NHAI was aware that MRMPL was an Associate EPC Contractor, implementing part of the project work. It could not feign ignorance of MRMPL.

132.4.17 CW-1, on behalf of Yedeshi had deposed on the methodology to compute each head of claim and explained the basis thereof. NHAI had not chosen to cross-examine CW-1 on this aspect. Nor had NHAI pleaded any alternate methodology or examined any auditor or financial witness who could discredit the methodology adopted by Yedeshi.

132.4.18 The Arbitral Tribunal also noted that the Statutory Auditor had been appointed in accordance with the provisions of the CA, from the panel maintained by NHAI. The certificates of the Statutory Auditor could not, therefore, be dislodged in the absence of substantial proof or challenge by way of evidence of an alternate financial expert. There had never been any dispute by NHAI throughout the construction period when the Statutory Auditor had certified achievement of Milestones and financial targets on the basis of the same principles. The judgment in *Samantary Construction* was found not to be applicable, as it pertained to a claim for loss of profit owing to idleness or underutilisation of machinery which had been wrongfully seized. In such a case, it had been held that the damages suffered by the person could be offset by purchasing a new machinery



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and putting it to use and had, therefore to be limited to the cost of the new machine. In the present case, Yedeshi had claimed compensation for prolongation of heir charges, as the duration for which the machines had to continue to remain hired had increased exponentially owing to NHAI's delay.

132.4.19 The Arbitral Tribunal further held that Yedeshi could not be entitled to any costs claims for the period prior to the SFLD. After deducting ₹331.83 crores towards interest during construction, from the total claim of ₹1501.84 crores, the balance remaining was ₹1170.01 crores. As this claim was for 1182 days, the costs per day worked out to ₹0.99 crores. For a period of 180 days, therefore, the compensation worked out to ₹178.20 crores. Inasmuch as the Arbitral Tribunal had held that Yedeshi was not entitled to compensation for this period of 180 days, the figure of 178.2 crores was required to be reduced from the total claim of ₹1501.84 crores, leaving ₹1323.64 crores.

132.4.20 Article 47.5 of the CA itself envisaged the rate of interest on delayed payments as Bank Rate plus 5%. The Statutory Auditor had worked out the interest rate at 9.25% to 10.65%, which was reasonable. NHAI had not disputed the bank rate plus 5% as mentioned in the Statutory Auditor's certificate which, therefore, had to be treated as correct. Interest had, therefore, to be awarded at the said rate both during and post award.

132.4.21 Thus, the Arbitral Tribunal found NHAI entitled to cost claim of ₹1323.64 crores and interest of ₹179.51 crores.



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132.5 Claim on account of *force majeure*

132.5.1 Claim towards *force majeure* was raised by Yedeshi on the basis of the COVID-19 pandemic, which commenced from March 2020 and continued till April 2022.

132.5.2 The Arbitral Tribunal found that Article 37 of the CA clearly indicated that the COVID-19 pandemic, coupled with the notifications issued by the government as a consequence thereof, amounted to a Political *Force Majeure* Event⁵⁹, though the COVID-19 pandemic by itself may have been a non Political Force Majeure Event. These circulars and notifications also amounted to a Change in Law within the meaning of the CA. Yedeshi had notified NHA I of the existence of a PFME on 24 March 2020, 6 April 2021 and 24 January 2022. NHA I did not, on any of these occasions, take a stand that the notification was wrong.

132.5.3 As a direct consequence, Yedeshi became entitled to claim costs compensation on account of the occurrence of a PFME in terms of Clause 34.7.2(c) of the CA.

132.5.4 Yedeshi had raised a claim of costs compensation towards PFME of ₹ 33.72 crores, comprising ₹ 6.83 crores towards O & M expenses and ₹ 26.89 crores towards interest on debt as cost incurred owing to the PFME. This was supported by a certificate issued by the Statutory Auditor who, in his evidence, had vouchsafed

⁵⁹ “PFME”, hereinafter



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the certificate. In his evidence, the Statutory Auditor had stated that he had quantified the claim on the basis of vouchers, invoices and bank statements which were available on record.

132.5.5 NHAI, on the other hand, had failed to fault the procedure followed by the Statutory Auditor. No other auditor or financial witness had been examined by NHAI to contradict the certificate of the Statutory Auditor.

132.5.6 In that view of the matter, the Arbitral Tribunal held that the testimony of the Statutory Auditor had gone effectively uncontroverted.

132.5.7 Yedeshi was, therefore, found to be entitled to compensation of ₹ 33.72 crores as expenses on account of the PFME.

132.5.8 As a result, the Arbitral Tribunal quantified the total amount payable to Yedeshi to be ₹ 1503.15 crores, as the sum of ₹ 1323.64 crores as principal and interest of ₹ 179.51 crores, apart from PFME costs of ₹ 33.72 crores.

133. Analysis and Observations

134. I have deemed it appropriate, at the expense of brevity, to set out the findings of the Arbitral Tribunal in some detail, for the reason that they clearly indicate that the Arbitral Tribunal has, threadbare, analyzed all aspects of the matter and has come to specific findings and reasons as to why it finds NHAI to be in material default of its



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obligations, and that there is no such default on the part of Yedeshi. While the extent to which these observations and findings can merit interference, even under Section 34 of the 1996 Act, may be arguable, I am of the opinion that, within the limited confines of Section 36(3) of the 1996 Act, NHAI cannot be said to have made out a case of any such patent infirmity in the said findings as would justify any relaxation from the rigour of the decisions of the Supreme Court in *Manish* and *Toyo Engineering*. To reiterate, the Supreme Court has, in the said decisions, held that, in the case of a money award, deposit of the entire awarded amount, inclusive of interest, is the norm. If one were to read *Manish* and *Toyo Engineering*, plainly as they have been rendered, there does not in fact appear to be any scope for relaxation from the requirement of such complete deposit.

135. Even if one were, for the sake of argument, to presume that the Section 36(3) applicant could seek a waiver from the requirement of such complete deposit, that could only be in a case where there was transparent and patent illegality in the arbitral award. The standard, in that regard, in my considered opinion, would be much higher than the standard which has to be satisfied while dealing with a Section 34 challenge. All the arguments which may be available while contesting the sustainability of the arbitral award under Section 34, would not, in my opinion, be available while arguing an application under Section 36(3), seeking a stay of the arbitral award and, for that purpose, a relaxation from the requirement of depositing the amount awarded.

136. For that reason, I do not deem it necessary or appropriate to enter on merits into all the submissions advanced by NHAI in support



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of this application, as that might amount to a preemptive judicial opinion regarding the merits of NHAI's Section 34 challenge. I may, however, note that NHAI's contentions are, primarily, that

- (i) Clause 35.2 of the CA only contemplated compensation for direct costs, suffered or incurred by the Concessionaire,
- (ii) the amount of ₹ 1323.64 crores awarded as damages to Yedeshi was based on no evidence,
- (iii) the amounts claimed pertained either to IRB or MRMPL, without any document demonstrating that Yedeshi actually paid or reimbursed these amounts to IRB or MRMPL,
- (iv) Yedeshi had failed to place on record any bank statements, receipts of payment or invoices raised upon it in support of its claims,
- (v) no idling costs could be claimed in the absence of evidence,
- (vi) the Arbitral Tribunal had failed to address the issue of whether the document of a third party would constitute proof of direct costs suffered or incurred by Yedeshi, in terms of Article 35.2 of the CA,
- (vii) in support of its claim of idling, no rent agreement, invoices, receipts or bank statements had been produced, evidencing the payment of higher charges by Yedeshi or its sub-contractors,
- (viii) Yedeshi had not produced any log books or other documents to indicate the number of working/utilized and non-working/unutilized hours of the plant and machinery,
- (ix) it could not be assumed that the entire plant and machinery mobilized was idling for the entire period from June



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2017 to September 2020, as if no ROW was available during the said period,

(x) the report of the Statutory Auditor only verified arithmetical accuracy of the statement of compensation for additional costs, escalation and interest expenditure incurred or account of delay in completion of the Project, without any proof of direct costs,

(xi) the MPRs indicated that Yedeshi was unable to fully utilize the work front available with the resources deployed by it, as a result of which there was no question of plant, machinery or manpower being idle,

(xii) the work done by Yedeshi was not commensurate with the length of Project Highway made available to it,

(xiii) Yedeshi had failed to mitigate its losses,

(xiv) Yedeshi had waived its claim for damages by its no claim undertaking dated 27 August 2018, and

(xv) Yedeshi was not entitled to any costs on account of *force majeure*, as the COVID-19 pandemic was a non-political force majeure event, and not a political *force majeure* event.

137. Insofar as the aspect of material breach and default by NHA in failure to provide vacant and unencumbered land and ROW to Yedeshi was concerned, Yedeshi contends that

- (i) ROW was defined as “constructive possession of the site”,
- (ii) “encumbrances” were defined as “mortgage, charge, pledge, lien, hypothecation, security interest, assignment,



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privilege or priority of any kind having the effect of security or other obligations.....but excluding utilities”,

(iii) Section 3D(2) of the NH Act provided that, on publication of declaration under 3D(1), the land would vest absolutely in the Central Government, free from all encumbrances,

(iv) as such, consequent to the Section 3D notification, Yedeshi could have entered the site and proceeded with construction of the highway as per Section 3F of the NH Act,

(v) NHAI had no obligation to remove any encumbrances, encroachments or interruptions, as these did not constitute “encumbrances”, and

(vi) in any event, as Yedeshi was never able to fully utilize the available land, it could not be said to have suffered any loss on account of any delay of NHAI.

138. None of these contentions, in my considered opinion, make out a case for any waiver from the requirement of deposit, by NHAI, of the awarded amount.

139. In the first place, these are all contentions which have been advanced before, and addressed by, the Arbitral Tribunal. There is not a single contention, amongst all the contentions enumerated *supra*, which has been raised and not considered by the Arbitral Tribunal. Essentially, therefore, NHAI is not pleading non-application of mind by the Arbitral Tribunal, but is faulting the findings of the Arbitral Tribunal on the contentions advanced by it.



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140. In my view, while these arguments may be available to NHAI while arguing its substantive Section 34 petition, they cannot be said to be so fatal to the impugned Arbitral Award as would justify dispensation with the requirement of deposit of the awarded amount.

141. Besides, even on merits, the submissions, at the very highest, amount to contesting the legality of the impugned award on merits, by requiring a re-appreciation of evidence or an alternate understanding of the clauses of the contract, to wit,

- (i) the Arbitral Tribunal has addressed Clause 35.2 and interpreted the expression “direct costs suffered or incurred”,
- (ii) the Arbitral Tribunal has also justified inclusion, in the costs payable to Yedeshi, of the expenses borne by MRMPL, which were claimed by MRMPL from Yedeshi,
- (iii) NHAI’s contention that Yedeshi had failed to place on record any bank statements, receipts of payment or invoices in support of its claim is clearly incorrect; rather the material produced by Yedeshi, which is also on record before this Court, includes details of MPRs, statements of plant & machinery deployed, salary statement, wage slips/pay-slips, bills and invoices of contractors, attendance logs of workers, vehicles logs, lease agreements, loan account statements and perhaps most prominently, reports of NHAI’s own Independent Engineer regarding the status of the progress of the work at the site and the costs which were, from time to time, incurred by Yedeshi,
- (iv) the certificate of the Statutory Auditor has been sought to be discredited without any reference to the evidence led by the



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Statutory Auditor in examination and cross-examination, in which he had vouchsafed the contents of the certificate,

(v) the argument that Yedeshi had not carried out work proportionate to the land which was made available to it from time to time was also not tenable as a ground under Section 36(3) of the 1996 Act, especially as the learned Arbitral Tribunal had itself found that the CA did not contain any obligation on Yedeshi to perform the work on the land which was, from time to time, made available.

(vi) the Arbitral Tribunal has dealt, in detail, with the No Claim Undertaking provided by Yedeshi and has specifically found that the undertaking could not be treated as voluntary and as having been tendered under economic duress, which, at the highest could be examined only at the stage of final argument of the Section 34 petition, and

(vii) NHAI has not advanced any substantial ground to contest the finding of the learned Arbitral Tribunal that, even if the COVID-19 pandemic by itself could be treated as a non-political force majeure event, the pandemic along with the circulars and directives issued by Government constituted a political *force majeure* event.

142. Most significantly, NHAI has, at least at this stage, not been able to deal, to any substantial extent, with the Arbitral Tribunal's finding that there was material breach and default on its part in complying with its obligations under the Agreement. *Prima facie*, it cannot be disputed that Yedeshi could not be expected to carry out construction on land which had hindrances or obstruction, even



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though NHAI has sought to advance, in this context, an involved argument based on the definition of “encumbrance”. That, in my view, would be a submission which would have to be examined only when the Section 34 petition is finally argued.

143. Besides, there is not a whisper of a defence, by NHAI, to the finding of the Arbitral Tribunal that there was clear breach, by the NHAI, of its obligation to make 80% of the Project Land available by the Appointed Date and the entire 100% of the Project Land available within 90 days from the Appointed Date. Once this breach, and the findings of the Arbitral Tribunal thereon, is not substantially contested, then, at the stage of interim relief, it cannot be said that a clear *prima facie* case has been made out by the petitioner, as would justify dispensation with the requirement of deposit of the amount awarded.

144. The Tribunal has found that the Project Land made available to Yedeshi even after 90 days from the Appointed Date was a miniscule portion of that which NHAI had to make available and that the entire project land had not been made available to Yedeshi even long after 90 days from the Appointed Date had passed. This had resulted in Yedeshi having to repeatedly ask for extension of the Project Completion date. In each case, the IE justified Yedeshi’s claim and found the delays on the part of NHAI to be the main factor which resulted in delay in the project proceeding and achieving completion. As many as 1912 days delay was occasioned in this process and, as the Arbitral Tribunal has correctly held that the delay was attributable entirely to NHAI and not to Yedeshi.



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145. On the substantive finding of breach, by NHAI, of its obligations under the CA, therefore, I am of the opinion that, at least at this stage, even a *prima facie* case has not been made out by NHAI.

146. At the very highest, the submissions of NHAI may be regarded as arguable only on the aspect of computation. Even in that regard, the Arbitral Tribunal has relied on cogent material and the Statutory Auditor's certificates along with the material in support thereof, which had been placed on record by Yedeshi. Neither before the Arbitral Tribunal, nor before this Court, has NHAI pointed out any error in the said material. There is not a single submission, with respect to any of the material that has been placed on record by Yedeshi, advanced by NHAI in the present case before this Court.

Conclusion

147. On a holistic appreciation of all the material on record and the submissions advanced by the NHAI by way of contest to the impugned arbitral award, I am of the opinion that, keeping in view the judgments of the Supreme Court in *Toyo Engineering* and *Manish*, there shall be a stay of execution of the impugned award subject to the NHAI depositing, with the learned Registrar General of this Court, the entire awarded amount within a period of six weeks from the date of uploading of this judgment on the website of this Court. In order, however, to protect the interests of NHAI, the release of the said amount to the respondent shall be subject to the respondent furnishing a bank guarantee/corporate guarantee, to the satisfaction of the learned



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Registrar General for an equivalent amount. This would also be in sync with the view expressed by the Supreme Court in *Manish*⁶⁰. On such bank guarantee/corporate guarantee being furnished, the deposited amount would be released to the respondent, subject to the outcome of the OMP.

148. The application is disposed of in the aforesaid terms.

149. Needless to say, observations in the above order are limited to deciding the prayer for interim relief and are not intended to be a final expression of opinion on the merits of the disputes between the parties.

150. The Registry is directed to e-mail a copy of this judgment to learned Counsel for all parties as soon as it is uploaded.

C. HARI SHANKAR, J.

JANUARY 16, 2025

dsn/ar/aky/yg

⁶⁰ Refer para 23 *supra*