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Page 1 Monday, May 18, 2026
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2020 SCC OnLine Del 3710

In the High Court of Delhi at New Delhi

(BEFORE REKHA PALLI, J.)

West Haryana Highways Projects Private Limited ... Petitioner;

Versus

National Highways Authority of India and Others ... Respondents.

O.M.P.(I) (Comm.) 144/2020 & I.As. 4646/2020, 5915/2020 and O.M.P.(I) (COMM.) 263/2020 & I.A. 7652/2020[§]

Decided on October 7, 2020, [Reserved on : 24.09.2020]

Advocates who appeared in this case:

Mr. Harish Malhotra, Sr. Adv. with Mr. Apoorv Agarwal, Mr. Gurpreet Singh, Ms. Akanksha Sharma & Ms. Riya Thomas, Advs.

Ms. Gunjan Sinha Jain, Adv for R-1. Mr. N.K. Sharma, PIU Rohtak-NHAI, Mr. A.K. Tripathi, Joint Advisor Legal NHAI & Mr. Navneet, Young Professional (Legal) NHAI.

Mr. Sandeep Sethi, Sr. Adv. with Mr. Apoorv Sarvaria and Mr. RP Vats, Advs. for PNB.

Mr. Sanjeev Kakra with Ms. Shreya Vedantika Mehra, Advs. for R-5/SBI.

The Judgment of the Court was delivered by

REKHA PALLI, J.:— The present decision disposes of two petitions under Section 9 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as 'the Act'), both filed by the Concessionaire, raising disputes pertaining to the Concession Agreement dated 06.11.2007 executed with respondent no. 1.

2. In the first petition, OMP(I)(COMM.) 144/2020, the petitioner has sought the following reliefs:—

(a) Pending the adjudciation of the disputes, issue an ad interim ex-parte injunction/interim measures as contemplated under Section 9 of the Arbitration and Conciliation Act, 1996, thereby restraining the respondent from taking any action to enforce the said impugned tender i.e. NIT No. NHAI/RO/CHD/11101/PD-RTK/DLH-RTK/NH-0/O&M/R&C/RFP dated 17.04.2020 with respect to 4-6 laning of Delhi/Haryana border to Rohtak Section of NH-10 from 29.700 to Km 87.000 including Bahadurgarh and Rohtak bypasses in the State of Haryana under NHDP Phase II(A) on BOT basis - Phase-I Repair & Maintenance works from 30.000 to km 44.000 or

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Page 2 Monday, May 18, 2026
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to enter into any contract or agreement or to award the said tender;

(b) Pending the adjudciation of the disdpute, issue an ad interim ex-parte injunction/interim measures as contemplated under Section 9 of the Arbitration and Conciliation Act, 1996 thereby restraining the respondent from taking any action to enforce the said impugned tender i.e. NIT No./NHAI/RO/CHD/11101/PD-RTK/NH-10/O&M/R&C/RFP dated 05.05.2020 with respect to 4-6 laning of Delhi/Haryana border to Rohtak Section of NH-10 from Km 29.700 to Km 87.000 including Bahadurgarh and Rohtak bypasses in the State of Haryana under NHDP Phase III(A) on BOT basis - Phase - II Repair & Maintenance works from km 44.000 to Km 65.000 or to enter into any contract or agreement or to award the said tender.

(c) Pending the adjudication of the dispute, issue an ad inteirm ex-parte injunction/interim measures as contemplated under Section 9 of the Arbitration and Conciliation Act, 1996 thereby restraining the respondent from issuing any tender with regard to repair and maintenance during the validity of the concession period of 25 years and also for the extended period.

3. Now, in the second petition, i.e., OMP(I)(COMM.) 263/2020, even though no formal notice was issued, arguments therein were heard along with the first petition after obtaining the consent of all parties. The reliefs sought by the petitioner in the second petition are as follows:

(a) Pending the adjudication of the dispute, confirm the ad interim ex-parte injunction/interim measures as contemplated under Section 9 of the Arbitration and Conciliation Act, 1996, thereby restraining the Respondent No. 1 from taking any action to enforce the said impugned Notices/letters No. NHAI/PIU-RTK/BH/LTR/20-21/300 dated 27.05.2020 and letter No. No. NHAI/PIURTK/BH/LTR/20-21/339 dated 28.05.2020 for engagement of Toll Collection Agency by Respondent No. 1 as previously issued vide order dated 04.06.2020 by the Hon'ble Division Bench of this Court in WP (C) No. 3348/2020 titled as West Haryana Highway Project Private Limited *v.* NHAI.

(b) Pending the adjudication of the dispute, confirm the interim ex-parte injunction/interim measures as contemplated under Section 9 of the Arbitration and Conciliation Act, 1996, thereby restraining the Respondent from taking any action to enforce the said impugned Notice/letter No. NHAI/PIU-RTK/B-H/LTR/20-21/343 dated 28.05.2020 issued for suspension of all rights of Concessionaire, the same has been granted by the Hon'ble Division Bench of this Hon'ble Court vide order dated 04.06.2020

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Page 3 Monday, May 18, 2026
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in WP (C) No. 3348/2020 titled as West Haryana Highway Project Private Limited *v.* NHAI;

(c) Pending the adjudication of the dispute, confirm the interim ex-parte injunction/interim measures as contemplated under Section 9 of the Arbitration and Conciliation Act, 1996, thereby directing the Respondent No. 1 to restore the rights of the Petitioner to collect the toll free at Rohad Plaza of the Project Highway i.e. Delhi Haryana Border to Rohtak Section of NH-10 from KM 29.700 KM. to 92.00 KM in the state of Haryana under NHDP Phase-IIIA;

(d) Pending the adjudication of the dispute, issue an ad interim exparte injunction/interim measures as contemplated under Section 9 of the Arbitration and Conciliation Act, 1996, thereby restraining the Respondent from issuing any notice/letter with regard to repair and maintenance during the validity of the concession period of 25 years and also for the extended period.

(e) Such other interim measures or protection as this Hon'ble Court may deem fit and proper in the facts and circumstances of the present case."

4. The petitioner, a special purpose vehicle formed pursuant to a joint venture arrangement between Era Infra Engineering Limited and M/s. Karam Chand Thapar & Bros. (C.S.) Ltd., is engaged in the business of constructing, developing and maintaining highways etc. The respondent no. 1 is the National Highway Authority of India (NHAI), an autonomous statutory body responsible for development, maintenance, management, operation and toll collection of the national highways.

5. On 04.12.2006, the respondent no. 1 issued a tender inviting bids from interested parties to execute a Build Operate and Transfer (BOT) project with respect to a section of National Highway-10 (NH-10). Once the bid submitted by the consortium of Karam Chand Thaper and Bros. (C.S) Limited and Era Infra Engineering Limited was accepted by the respondent on 05.07.2007, the petitioner (West Haryana Highways) came to be incorporated on 23.08.2007. Accordingly, on 06.11.2007, the petitioner and respondent no. 1 entered into the Concession Agreement to design, engineer, finance, operate and maintain a length of approximately 63.49 km of NH-10 which has been specifically identified below.

6. As per the terms of the Concession Agreement, the project work pertained to a portion of NH-10 which extended from the Delhi-Haryana border to Rohtak between the 29.70 km chainage and 87.00 km chainage. The petitioner was required to expand this portion of the highway from a two-lane single carriageway to a six-lane dual carriageway, which included construction of the Bahadurgarh and Rohtak bypasses as well as certain major/minor bridges (hereinafter referred to as 'the project work'). As the entire cost of the project was

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Page 4 Monday, May 18, 2026
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stipulated to be borne by the petitioner in terms of Article 3.1.1 of the Concession Agreement, the petitioner was granted a concession period of 25 years during which it had the exclusive right to construct, operate and maintain the highway, as also to demand and collect appropriate fee from vehicles for utilizing the highway or any part thereof by way of toll fee.

7. As an investment of over INR 500 crores was required for the petitioner to carry out work under the Concession Agreement, the parties executed three separate agreements - the Common Loan Agreement dated 02.05.2008 and the Escrow and Substitution Agreements dated 29.09.2008.

i. By way of the Common Loan Agreement dated 02.05.2008 executed between the petitioner and its senior lenders comprising of the respondent no. 2 and four other banks, the petitioner was granted a loan for a sum of INR 410.23 crores along with a Bank Guarantee facility for a sum of INR 24.30 crores.

ii. The Escrow Agreement dated 29.09.2008 executed between all the parties herein set up a single escrow account, maintained by respondent no. 2/Punjab National Bank, who was appointed as the escrow agent/lead lender with the consent of all the other senior lender Banks. It is in this Escrow Account where the loan amounts were to be deposited for project use. The petitioner's toll collections were also required to be deposited in the escrow account.

iii. The Substitution Agreement dated 29.09.2008 was executed between all the parties herein, specifically for the purpose of granting power to respondent no. 2 to seek substitution of the petitioner as Concessionaire in the Concession Agreement if it was of the opinion that the petitioner was failing to or was unfit to perform its contractual obligations. It is pertinent to note that as the project progressed, the petitioner also borrowed certain additional sums from its subordinate lenders (a consortium of 14 lenders) by way of two Supplementary Agreements to the Common Loan Agreement. The Common Loan Agreement, the Supplementary Agreements thereto and the Escrow Agreement shall be collectively referred to as ‘financing agreements’.

8. Since the project was BOT in nature, petitioner/Concessionaire was required to bear the entire cost of constructing, operating and maintaining the highway, but as stated earlier it was entitled to collect toll from users of this entire stretch of 63.49 km of highway. For this purpose, a toll Plaza was to be set up. However, as per the terms of the Concession Agreement, toll collections could only begin once respondent no. 1 issued a Provisional Commercial Operation Date

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Page 5 Monday, May 18, 2026
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(PCOD) Certificate or a Commercial Operation Date (COD) certificate to the petitioner which was subject to the progress of construction. Now, though the Concession Agreement fixed 06.10.2010 as the date to commence commercial operations on this stretch of the highway, this date kept getting extended from time to time. Finally, the respondent issued a PCOD Certificate to the petitioner on 25.11.2015 for a limited stretch of the highway, namely 87.77% of the total stretch admeasuring 55.722 km, and by this date, 75% of the total work under the Concession Agreement stood completed. Thus, the petitioner has been, w.e.f. 26.11.2015, collecting toll on this partial stretch of the highway.

9. It is the petitioner's claim that the date for commencing operation on this stretch of the highway was postponed on account of delays occasioned by respondent no. 1 in handing over vacant, unencumbered possession of the land which also led to delayed construction. Therefore, by the time the PCOD certificate was issued, several disputes had already arisen between the parties regarding the delay. Consequently, the petitioner invoked arbitration on 31.12.2016 and a three-member arbitral Tribunal presided over the dispute and rendered its award on 29.08.2019. The learned Tribunal found in favour of the petitioner's claims; respondent no. 1 was held responsible for the delays in executing the project work and was directed to pay the petitioner a sum of INR 762.20 crores along with interest applicable thereon. Under this award, the petitioner has also been granted liberty to seek an extension of the concession period on account of the delay between 06.10.2010 to 25.11.2015, to make up for the revenue lost on account of delayed issuance of PCOD certificate. The award has been assailed by respondent no. 1 under Section 34 of the Act by way of OMP (COMM) 3/2020 (hereinafter referred to as Section 34 petition), wherein this Court, while staying the award, directed the said respondent to deposit the awarded amount. It is undisputed that respondent no. 1 has complied with this order by duly depositing the amount as directed.

10. While arbitration was still underway, the petitioner had already run into financial troubles. Delays in completion of the project meant that it was now bearing the financial burden triggered by cost overrun. It is the petitioner's case that the respondent no. 1, in December 2016, had given an assurance that it would issue PCOD certificate for the remaining stretch of the highway, i.e., 12.23% admeasuring 7.768 km. As per the petitioner, this would have enabled it to collect toll on the entire stretch of the highway and enhance its revenues by 13 to 14%, which revenue could then facilitate further construction. In this regard, on 23.02.2018, the Independent Engineer appointed by the parties even made a recommendation to respondent no. 1, after confirming

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Page 6 Monday, May 18, 2026
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that only INR 12.7 crores' worth of work was left to be carried out, to grant petitioner PCOD certificate for the entire stretch of the highway. It is the petitioner's case that since this was not done, the petitioner has had to resign to collecting lesser toll than was projected at the time of bid, which has further limited petitioner's ability to meet its financial obligations to its lenders or mobilise the money to complete the punch list items.

11. Consequently, the respondent no. 2, acting on behalf of all the lenders, issued a notice of financial default to the petitioner on 17.09.2019 under Clause 3.2.1 of the Substitution Agreement for defaulting on repayment of the loans extended under the financing agreements. The letter stated that the petitioner's account had been declared a Non Performing Asset (NPA) w.e.f. 30.06.2019 and that the petitioner owed its senior lenders an amount of INR 764.29 crores as on 31.08.2019 and its subordinate lenders a sum of INR 67.72 crores. In furtherance thereof, on 22.11.2019, respondent no. 2 formally requested respondent no. 1 to immediately terminate the Concession Agreement with the petitioner since it had committed financial default under Clause 5.1 of the Substitution Agreement and consequently triggered an 'Event of Default' under Clause 10.1 of the Concession Agreement. The respondent no. 2 had an additional request; since Article 37.3 of the Concession Agreement entitled the petitioner to receive termination payment, i.e., 90% of the Debt Due Less Insurance Cover incurred in executing the project, from respondent no. 1, it was requested that respondent no. 1 pay this sum, which added up to INR 598,22,46,819/-, directly to respondent no. 2 to offset the petitioner's debts to its lenders. When respondent no. 1 did not reply to this correspondence, the lenders reiterated their request on 02.01.2020 and 01.02.2020.

12. However, without responding to the lenders or terminating the agreement, the respondent no. 1 on 13.01.2020 issued a cure period notice to the petitioner under Article 37.1.1 of the Concession Agreement, directing it to cure the defects in its work, as set out in the letter, within a period of 60 days, failing which the respondent would take steps to terminate or exercise its other rights under the Concession Agreement. In this letter, the respondent no. 1 admitted that the petitioner had completed 96.73% of the work under the Concession Agreement, but raised other complaints pertaining to incomplete or defective works.

13. After receiving the petitioner's reply dated 13.02.2020 whereunder it denied the allegations of defective or incomplete work, the respondent no. 1 sought the opinion of the Independent Engineer, namely M/s. L.N. Malviya Infra Projects Pvt. Ltd., on this issue. On 25.02.2020 the Independent Engineer responded to the petitioner's

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Page 7 Monday, May 18, 2026
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reply dated 13.02.2020 after duly considering the contents thereof, by stating that there were lapses on the petitioner's part in maintaining the project highway as per the standards laid out or prescribed by respondent no. 1. In this letter, although the Independent Engineer confirmed that the petitioner had completed major punch list items, it recommended respondent no. 1 to suspend the petitioner's *right to collect toll* as a remedial measure in accordance with Articles 36.1 and 36.2 of the Concession Agreement. Aggrieved by this recommendation, the petitioner, on 22.04.2020, wrote to the Independent Engineer reiterating its explanations and requesting them to re-examine their opinion, but to no avail.

14. Consequently, on 28.05.2020, the respondent no. 1 issued the letter impugned in the second petition suspending the petitioner's rights to collect toll for a period of 180 days under Article 36.1 of the Concession Agreement. However, even before suspending the petitioner's rights, the respondent no. 1 issued a tender on 17.03.2020 seeking to appoint another agency to exercise the petitioner's toll collection rights and also issued two Notices Inviting Tenders (NITs) on 17.04.2020 and 05.05.2020 from interested contractors to carry out works of repair and maintenance of the highway. Since the respondent no. 1 had proceeded to appoint a new toll collection agency on 21.05.2020, even before the petitioner's rights under the Concession Agreement had been formally suspended, the petitioner approached this Court by way of W.P(C) No. 3348/2020 seeking stay of this action as well as the order suspending toll collection rights of the petitioner.

15. On 04.06.2020, when the writ petition was taken up for consideration by a Division Bench of this Court, notice was issued and the petitioner's right to collect toll was reinstated by passing the following directions:

> *"Till the next date, operation of the impugned notices dated 27.05.2020 and 28.05.2020 issued by the respondent no. 1/NHAI shall remain stayed. It is however made clear that while collecting the toll fee, as was being done earlier, the petitioner shall continue depositing the same in the escrow account operated exclusively by the lead Bank, respondent no. 3/PNB"*

16. While the aforesaid writ petition was pending, the first petition herein being OMP(I)(COMM) 144/2020 was moved before this Court on 17.06.2020 seeking stay of the NITs. On 19.06.2020, when the petition was taken up for the first time by this Court, the parties had disclosed that the suspension orders dated 27.05.2020 and 28.05.2020 had already been stayed by the learned Division Bench. This Court then proceeded to order that status quo be maintained with respect to the operation of the impugned NITs dated 17.04.2020 and 05.05.2020 till all claims relating to repair and maintenance work was decided, which

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Page 8 Monday, May 18, 2026
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order of stay has continued to operate till date.

17. On 10.07.2020, respondent no. 1 made a submission before this Court that it had no prejudice against the petitioner and, if the petitioner was willing to execute the major repair and maintenance work as set out in the impugned NITs, it was willing to permit the petitioner to do so. In response, the petitioner had prayed for some time to obtain instructions. The order dated 10.07.2020 reads as follows:

> *"4. Today, Ms. Gunjan Sinha Jain, learned counsel for the respondent No. 1 submits that the said respondent was compelled to issue the two NITs as the petitioner despite repeated request has failed to fulfil its obligations laid down in Clause 17 (d to f) of the Concession Agreement. She further submits that even today if the petitioner is willing to discharge its obligation by completing the work set out in the two impugned NITs, the respondent is willing to withdraw the said NITs subject to the petitioner's undertaking before this Court that the said work will be done in a time bound manner.*
>
> *5. In the light of the aforesaid stand taken by learned counsel for the respondent no. 1, it has been put to the learned senior counsel for the petitioner as to whether the petitioner is willing to file an undertaking to complete the work as set out in the two impugned NITs on or before 30th November, 2020. He prays for time to obtain instructions on this aspect."*

18. Although on 15.07.2020, while conveying to this Court its willingness to carry out the repair and maintenance work, the petitioner expressed that, on account of the obstacles it faced in executing the project, it had incurred severe financial troubles. The petitioner felt aggrieved because, notwithstanding an award passed in its favour on 29.08.2019, it had still not received the awarded amount from respondent no. 1 and its precarious financial position was only worsening with time. The petitioner, therefore, couldn't immediately invest more money in the project for repair and maintenance work without receiving the awarded amount.

19. In an attempt to resolve this issue, the petitioner moved an application seeking release of the awarded amount deposited by the respondent no. 1 before this Court in the Section 34 petition, which application is pending adjudication before a Coordinate Bench. Simultaneously, the petitioner approached this Court as well by way of IA 6365/2020 in OMP(I)(COMM) 144/2020 seeking a direction to respondent no. 2/Punjab National Bank to release monies in its favour from the escrow account to facilitate the repair and maintenance work.

20. On 05.08.2020, this Court heard the parties at some length in IA 6365/2020. The Bank vehemently opposed the application on the

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Page 9 Monday, May 18, 2026
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ground that the petitioner, being a defaulter under the Loan Agreement, was not entitled to release of any monies from the escrow account and that the Bank was equally entitled to withhold release thereof and utilise these sums for outstanding repayments under the financing agreements. However, the petitioner and the respondent no. 1 contended in unison that, as per Clause 4.1.1 of the Escrow Agreement, the monies in the Escrow Account were to be utilised, on a priority basis, for carrying out maintenance and repair of the highway instead of discharging the petitioner's liabilities under the financing agreements. In those circumstances, this Court accepted the petitioner's plea and passed an interim order directing respondent no. 2 to release monies in favour of the petitioner from the Escrow Account for carrying out maintenance and repair work in accordance with the directions of respondent no. 1.

21. Though the respondent no. 2 challenged this order before a Division Bench, its appeal was dismissed on 26.08.2020. Thus, in accordance with the undertaking given, the petitioner began carrying out major repair and maintenance work on the highway with the hope that respondent no. 2 would release the monies in accordance with the directions of this Court. However, this did not happen. It appears that respondent no. 2, once its appeal was rejected on 26.08.2020, released only a sum of INR 17 lakh to the petitioner for the work it had done, against claims which were much higher. Aggrieved, the petitioner raised this issue before this Court and, on 14.09.2020, respondent no. 2 was directed to release a further sum of INR 25 lakh in the petitioner's favour. Today, the position is that the petitioner has only been given a sum of INR 42 lakh from the Escrow Account, when it claims to have carried out work worth more than INR 5.25 crores under the orders of this Court.

22. In the meanwhile, the writ petition instituted in early June 2020 was dismissed by the learned Division Bench on 20.08.2020 by granting liberty to the petitioner to institute an appropriate petition under Section 9 of the Act in respect of the impugned suspension letters dated 27.05.2020 and 28.05.2020. However, in its discretion, the learned Division Bench had continued the order of injunction on the suspension letters dated 27.05.2020 and 28.05.2020, as granted on 04.06.2020, for a further period of five days. It is in these circumstances that the second petition herein, OMP(I)(COMM) 263/2020 came to be instituted before this Court on 27.08.2020. The interim order of stay on the impugned suspension letters, as granted by the learned Division Bench, was continued by this Court and is in operation till date.

23. In support of the petitions, learned senior counsel for the petitioner Mr. Harish Malhotra submits that the project is BOT which

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Page 10 Monday, May 18, 2026
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meant that the petitioner had to singly bear the entire cost of the project and wait till toll collection could begin, to recover its costs and make any profits therefrom, over the course of the next 25 years. He submits that this makes the action of respondent no. 1 suspending the petitioner's toll collection rights and substituting a third party agency to carry out this function, after the project had been completed, malafide and baseless. He submits that from the very beginning, the respondent no. 1 has created obstacles for the petitioner from enjoying the fruits of its toil, i.e., toll collection. This is evident from the fact that it failed to deliver on the assurance it provided in December 2016 that it would issue PCOD certificate for the entire stretch of the project. Granting PCOD for the entire stretch would have meant that the toll collection could rise and create enough revenue for the petitioner to complete the punch list items. Even the suspension in question today, which also deprives the petitioner of its right to collect toll, has been explained by the respondent no. 1 on the ground that the work rendered by the petitioner was deficient, a claim it repeated all through 2019 and 2020 but does not hold ground in the light of the facts that (i) the project stood completed in 2018, which was confirmed by the Independent Engineer on 23.02.2018 (ii) the learned Tribunal found respondent no. 1 liable of having caused significant delays in completing the project highway. He submits that rather, despite the petitioner having completed the highway strictly in terms of the Concession Agreement, respondent no. 1 continues to claim otherwise owing to the fact that it remains prejudiced against the petitioner for having invoked arbitration in the first place. In fact, the complaints of respondent no. 1 against the petitioner's work crystallised rather suddenly, that too when the project became operational and the process of toll collection could begin. He has placed photographs of the stretch as it stands today to substantiate that the petitioner has duly discharged its duties under the Concession Agreement. He urges that it is in this context that the orders of 05.08.2020 and 10.07.2020 passed by this Court gain importance; Whereas on 10.07.2020, the petitioner agreed to withdraw the impugned NITs, provided the petitioner was willing to complete the work as set out therein and fulfil its obligations under Clause 17(d) to (f) of the Concession Agreement, on 05.08.2020, the respondent no. 1 even went as far as to defend the petitioner's right to access the monies in the escrow amount to carry out the remaining repair and maintenance work. He submits that were there any truth to the claims of the respondent no. 1 that the petitioner's work was unsatisfactory, it would not have acquiesced to have the petitioner carry out any further work in the project. To make matters worse, until 05.08.2020, even though the respondent no. 1 had supported the petitioner's claim that the money to carry out all repair and maintenance work ought to be

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Page 11 Monday, May 18, 2026
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employed from the Escrow Account, but the situation took a turn after that. The petitioner carried out the repair work as per the directions of this Court and submitted Requests for Inspection (RFIs) to respondent no. 1, to have the same inspected and certified by the respondent no. 1. By placing reliance on the RFIs placed on record, he submits that although all RFIs till 30.08.2020 were duly approved, which ensured regular release of the amounts from the escrow account, the respondent no. 1 began rejecting all repair work w.e.f. 31.08.2020 to ensure that the repair and maintenance work reaches a standstill. As a result, respondent no. 2 refused to release any further amounts from the Escrow Account for uncertified works, which implies that the petitioner has singly borne the cost of all work since then. He submits that this has only aggravated the petitioner's financial troubles manifold. However, the fact that the petitioner has always been and continues to remain willing to complete the work in accordance with the Concession Agreement is also evident from the fact that as on date, it has managed to achieve significant progress by finishing repair and maintenance work on 11.5 km of the stretch, which is being carried out under the orders of this Court. He, thus, submits that clearly, the reasons put forth by respondent no. 1 for suspension are unsustainable and unreliable.

24. Mr. Malhotra further submits that even if the petitioner's right to collect toll was suspended, Articles 36.1 of the Concession Agreement required the respondent no. 1 to collect toll on this stretch on the petitioner's behalf and deposit the same in the escrow account so that the petitioner could continue making timely payments to its lenders. However, in complete violation of this duty, the respondent no. 1 assigned the right of toll collection to a third party agency and, in a completely illegal arrangement, retained the toll collections for themselves. This implies that w.e.f. 28.05.2020 till 04.06.2020, the period during which the suspension order was in effect, the escrow account was deprived of all toll collection. He submits that these actions of respondent no. 1 are malafide and betrays its intent to unjustly enrich itself at the petitioner's cost. He then invokes Article 36.4 of the Concession Agreement to submit that the right to substitute toll collector only rested with the lenders who operated the escrow account. Thus, the decision of the respondent no. 1 to substitute a third party agency to collect toll, without even consulting the lender banks, was completely arbitrary and, being de hors the Concession Agreement, without any legal basis.

25. Mr. Malhotra finally submits that were the respondent no. 1 truly acting in public interest, it would have acted on the request of the respondent no. 2 and the lender banks to terminate the Concession Agreement with the petitioner. But if truth be told, the respondent no.

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Page 12 Monday, May 18, 2026
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1 never acted on this recommendation since Article 37.3 of the Concession Agreement requires the said respondent to pay the petitioner an amount equivalent to 90% of the petitioner's loans, less the insurance cover, which could then be used to pay off the escrow account dues. Without prejudice to his aforesaid submissions, he submits that even if some of the repair work was left to be completed, Article 17.9.1 of the Concession Agreement empowered respondent no. 1 to repair the defective stretches of the highway and recover the costs incurred from the petitioner, but it did not do so and instead is taking the extreme step of suspending all rights of the petitioner as a Concessionaire under the Agreement. He urges that in any event, the petitioner had no reason to intentionally deliver inferior/defective work since that would imply that all of it would have to be corrected by the petitioner at its own cost since it was to maintain the road for the next 25 years. He submits that these attempts of respondent no. 1 to evade the contractually stipulated process of termination and resort to arbitrary suspension of its rights as a Concessionaire, by issuing the impugned NITs and suspension letters, cannot be permitted to continue and prays that this Court be pleased to grant the reliefs sought in the two petitions.

26. Opposing the petition, Ms. Gunjan Sinha Jain, learned counsel for the respondent no. 1 at the outset submits that these petitions are not maintainable since the reliefs sought herein are in the nature of injunction and cannot be granted under Section 41 of the Specific Relief Act, 1963 since they arise out of a contract which cannot be specifically enforced. She submits that under the Concession Agreement, the petitioner was required to carry out repair and maintenance work of the highway, which needed continuous supervision and fell within the purview of Section 14(b) of the Specific Relief Act. Similarly, since the contract is terminable at the instance of either party, it is determinable and fell within the purview of Section 14(d) of the Specific Relief Act. Thus, she submits that a contract, the performance of which cannot be supervised by the Court and is determinable in nature cannot be specifically enforced. By relying on the decision of this Court in *Overnite Express Limited* v. *Delhi Metro Corporation Limited*, 2020 SCC OnLine Del 2093, she submits that the amended Section 41(e) of the Specific Relief Act, 1963, as it stands today, precludes an injunction from being granted in the case of a contract which cannot be specifically enforced. She, thus, submits that the Court, at the interim stage of a proceeding, cannot grant a party any relief which it is precluded from granting at the final stage of the proceeding. She further submits that the present case squarely qualifies under Section 20A of the Specific Relief Act, 1963 whereunder the Courts, in the case of infrastructure projects, have been especially precluded from granting injunctions in case the

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Page 13 Monday, May 18, 2026
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grant thereof is likely to cause an impediment or delay in the progress or completion of such an infrastructure project. On facts, she submits that the quality of work rendered by the petitioner was severely deficient and the project highway was overrun with cracked pavement surface and depressions at centre and shoulder side of the pavement, among several other flaws. Since the petitioner's work was required to meet certain standards as stipulated in the Concession Agreement, the respondent no. 1 issued a cure period notice on 13.01.2020, as was its right under Article 17.10.1, requesting it to cure the defaults in its work by carrying out the requisite rectification work. She submits that the repair work required to be carried out by the petitioner included milling work over the depressed, cracked and undulating pavement surfaces, repair of RCC drain covers and slip/service roads, repainting of faded road markings and kerb/RCC barriers and replacement of damaged Metal Beam Crash Barriers, damaged signages and non-functional/damaged traffic blinker signals, all of which were absolutely requisite for the safe movement of traffic on the highway and to prevent the occurrence of accidents. She draws my attention to the photographs and numerous correspondences issued by respondent no. 1 to the petitioner till 28.05.2020, complaining about the quality of work which has been substandard from the very beginning, and was further compounded by the petitioner's failure to carry out timely repair and maintenance work as per the terms of the Concession Agreement. She submits that when the petitioner failed to rectify its work despite the numerous notices, the condition of the highway was likely to worsen and at this stage, Article 17.10.2 of the Concession Agreement came into effect whereunder the respondent no. 1 could take up remedial measures for the maintenance of the project highway through a separate agency at the risk and cost of the petitioner, and to recover such cost and damages applicable. This clause also entitled respondent no. 1 to take action against the petitioner for failing to carry out the remedial works.

27. Next, Ms. Jain submits that the right of suspension, granted to the respondent no. 1 under Article 36 of the Concession Agreement, is a right conferred upon the said respondent by the contractual agreement between the parties. Once the petitioner was in default not only towards respondent no. 1 under the Concession Agreement but also towards its lenders under the financing agreements, Article 36.1 of the Concession Agreement specifically empowered respondent no. 1 to suspend all rights of the petitioner under the Concession Agreement, including its right to collect fee and other revenues pursuant hereto. Further, under Article 36.2, during this period of suspension, respondent no. 1 was entitled to act on the petitioner's behalf and collect toll from this stretch of the highway or assign a third party

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Page 14 Monday, May 18, 2026
Printed For: Mr. Rajeeve Mehra
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agency to collect the same on its behalf. In fact, under Article 36.4, the petitioner could even be substituted by the respondent no. 2 on account of the default. On being fed up with the dismal quality of work being executed by the petitioner, respondent no. 1 began to contemplate taking steps towards termination of the agreement which began with suspension, effected by way of the notice dated 28.05.2020, and was an action well within its rights under the Concession Agreement. She submits that when all the actions of respondent no. 1 have been carried out strictly in adherence of the contractual agreement between the parties, the petitioner has been unable to point out any illegality in the actions of respondent no. 1 and is not entitled to any relief under Section 9 of the Act.

28. She further submits that although the terms of the Concession Agreement required the amounts in the escrow account to be released, on a priority basis, for the purpose of maintaining the highway, a perusal of the Minutes of Meeting dated 02.08.2016 reveals an agreement between the petitioner and its lenders to release a sum of INR 71 lakh to the petitioner for routine maintenance of the highway and the toll plaza. This arrangement, made in the absence of the respondent no. 1 who was also a party to the Escrow Agreement, betrays the petitioner's disregard towards its liabilities with respect to the respondent no. 1 under the Concession Agreement. She further submits that the respondent no. 1 cannot control the decision of the respondent no. 2 to withhold release of the amounts in the escrow account in favour of the petitioner, since this decision was made independently by the Banks in the light of the petitioner's failure to repay the amounts it had borrowed from them. However, this fact in itself is not an adequate ground for the petitioner to evade its liability to carry out routine maintenance and repair work and, in effect, cost the users of the highway and the respondent no. 1. In any event, she submits that once the impugned suspension notice was issued on 28.05.2020, the disputes between the parties had reached a breaking point. These disputes, she submits, need to be decided in arbitration, and thus, there is no reason for this Court to interfere at this point by exercising its jurisdiction under Section 9 of the Act. In furtherance of this argument, she draws my attention to Section 41(a)(h) of the Specific Relief Act, 1963, to contend that in any event, keeping in view the reliefs sought hereunder, the petitioner has an equally efficacious remedy available to it under the Concession Agreement by way of the arbitration clause. Considering the fact that this stretch of the highway is being developed by the petitioner since 2008, she submits that if this Court were to grant the reliefs sought by the petitioner, it would only cause further delay in completion thereof and, essentially, inconvenience the public at large, who are the beneficiaries of this

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Page 15 Monday, May 18, 2026
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project. In these circumstances, she prays that the present petitions be dismissed with costs.

29. Mr. Sandeep Sethi, learned senior counsel appearing on behalf of the respondent no. 2 Bank, while supporting the stance of respondent no. 1, points out that in public interest, the petitioner ought not to be permitted to continue constructing the highway. He submits that most of the issues raised by the petitioner before this Court delve into the merits of the dispute, which need to be arbitrated and it does not behoove this this court to adjudicate on seriously disputes questions of fact while exercising its jurisdiction under Section 9 of the Act. By relying on the decisions in *Adhunik Steels Ltd.* v. *Orissa Manganese and Minerals Pvt. Ltd.*, (2007) 7 SCC 125, *Anand Prasad Agarwalla* v. *Tarkeshwar Prasad*, (2001) 5 SCC 568 and *Her Highness Maharani Shantidevi P. Gaikwad* v. *Savjibhai Haribhai Patel*, (2001) 5 SCC 101, he submits that this is a case where the party, if correct in its line of argument, is capable of recovering its losses by way of damages in arbitration. Therefore, as per the settled principle of law, no injunction ought to be granted in favour of such party. He, thus, submits that when the petitioner can be monetarily compensated for the issues it has agitated before this Court, these petitions ought to be dismissed and the dispute be referred for arbitration instead.

30. Mr. Sethi has also opposed IA 6365/2020 whereunder the petitioner has sought release of amounts from the Escrow Account for carrying out major maintenance work, however these submissions shall be referred to in detail in the latter portion of the judgment, while dealing with the application.

31. I have considered the submissions of the parties and perused the record.

32. Before dealing with the rival contentions of the parties, it would be appropriate to note the undisputed factual position. The foremost fact which emerges is that the highway was indeed constructed by the petitioner and, even as per the respondent no. 1 in its Cure Period Notice, 96.73% of it stood completed as on 13.01.2020. It is an admitted position that the cost of executing the project was entirely borne by the petitioner, who borrowed heavily from lender banks under the financing agreements, and that today these lenders are seeking recovery of a sum of approximately INR 700 crores from the petitioner. It is also undisputed that the project, which was supposed to be completed on or before 01.05.2010, was ultimately made operational in 2015 once PCOD certificate for partial stretch had finally been issued by the respondent no. 1 on 26.11.2015, and the petitioner began collecting toll from this date. In view of the delays caused in executing the project, the petitioner invoked arbitration on 31.12.2016 seeking damages from respondent no. 1 for the role it played in the lag. This

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Page 16 Monday, May 18, 2026
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resulted in an award dated 29.08.2019 whereunder the respondent no. 1 has been directed to pay the petitioner a sum of INR 762.20 crores, which is presently pending the consideration of this Court in the Section 34 petition. The parties are also ad idem that for the period between 28.05.2020 and 04.06.2020, the entire amounts of toll collected were never deposited in the Escrow Account, but were instead subject to an alternative arrangement whereunder the respondent no. 1 retained a sum of INR 6 lakh from the entire toll fee with itself while entrusting the remaining amounts to a third party agency appointed for the purpose of collecting toll. Further, it is a matter of record that notwithstanding the complaint of respondent no. 1 that the petitioner's failure to repair and maintain the highway had triggered the decision to issue the impugned NITs and suspend toll collection rights, on 10.07.2020 it expressed its willingness to recall the NITs and withhold action against the petitioner if it executed repair and maintenance work to the satisfaction of the said respondent. It is also admitted that the order suspending the petitioner's right to collect toll has remained stayed w.e.f. 04.06.2020 pursuant to the orders of the learned Division Bench and this Court, from which date the petitioner has continued collecting toll and depositing the entire amount collected in the Escrow Account. Moreover, it is admitted that w.e.f. 06.08.2020 till the date this judgment was reserved, i.e. 17.09.2020, the petitioner carried out repair and maintenance work on the project highway under the orders of this Court. Finally, it is an admitted position that as on date, the Concession Agreement has not been terminated.

33. Against this factual position, the primary ground adopted by the respondent no. 1 to oppose the reliefs sought in the instant proceedings is that the petitioner is trying to seek remedies under Section 9 of the Act, which remedies are actually in the nature of specific reliefs. An ancillary ground therefrom is that the petitioner is only entitled to such reliefs if damages are not an adequate remedy, which the petitioner has failed to prove. Before dealing with this ground, it may be useful to briefly refer to some of the decisions relied upon by the parties, which illustrate the scope of the powers of this Court while passing interim measures of protection under Section 9 of the Act.

34. Even though the parameters within which a Court wields its powers under Section 9 of the Act are wide, to a point which makes it difficult to catalogue all the features of interim measures, such power is still to be exercised with great restraint in accordance with the statutory provisions pertaining to grant of injunctions as contained in the Specific Relief Act, 1963 and the well settled principles thereof. This is to prevent unrestrained judicial intervention in matters which require to be arbitrated. It may be apposite to refer to the following paragraphs

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Page 17 Monday, May 18, 2026
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in *Adhunik Steels Ltd.* v. *Orissa Manganese and Minerals (P) Ltd.*, (2007) 7 SCC 125, which is a leading judgment on this issue, and reads as under:

> *"11. It is true that Section 9 of the Act speaks of the court by way of an interim measure passing an order for protection, for the preservation, interim custody or sale of any goods, which are the subject-matter of the arbitration agreement and such interim measure of protection as may appear to the court to be just and convenient. The grant of an interim prohibitory injunction or an interim mandatory injunction are governed by well-known rules and it is difficult to imagine that the legislature while enacting Section 9 of the Act intended to make a provision which was dehors the accepted principles that governed the grant of an interim injunction. Same is the position regarding the appointment of a receiver since the section itself brings in the concept of "just and convenient" while speaking of passing any interim measure of protection. The concluding words of the section, "and the court shall have the same power for making orders as it has for the purpose and in relation to any proceedings before it" also suggest that the normal rules that govern the court in the grant of interim orders is not sought to be jettisoned by the provision. Moreover, when a party is given a right to approach an ordinary court of the country without providing a special procedure or a special set of rules in that behalf, the ordinary rules followed by that court would govern the exercise of power conferred by the Act. On that basis also, it is not possible to keep out the concept of balance of convenience, prima facie case, irreparable injury and the concept of just and convenient while passing interim measures under Section 9 of the Act."*
>
> *Xxx*
>
> *16. Injunction is a form of specific relief. It is an order of a court requiring a party either to do a specific act or acts or to refrain from doing a specific act or acts either for a limited period or without limit of time. In relation to a breach of contract, the proper remedy against a defendant who acts in breach of his obligations under a contract, is either damages or specific relief. The two principal varieties of specific relief are, decree of specific performance and the injunction (See David Bean on Injunctions). The Specific Relief Act, 1963 was intended to be "an Act to define and amend the law relating to certain kinds of specific reliefs". Specific relief is relief in specie. It is a remedy which aims at the exact fulfilment of an obligation. According to Dr. Banerjee in his Tagore Law Lectures on Specific Relief, the remedy for the non-performance of a duty are (1) compensatory, (2) specific. In the former, the court awards damages for breach of the obligation. In the latter, it directs the party in*

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Page 18 Monday, May 18, 2026
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default to do or forbear from doing the very thing, which he is bound to do or forbear from doing. The law of specific relief is said to be, in its essence, a part of the law of procedure, for, specific relief is a form of judicial redress. Thus, the Specific Relief Act, 1963 purports to define and amend the law relating to certain kinds of specific reliefs obtainable in civil courts. It does not deal with the remedies connected with compensatory reliefs except as incidental and to a limited extent. The right to relief of injunctions is contained in Part III of the Specific Relief Act. Section 36 provides that preventive relief may be granted at the discretion of the court by injunction, temporary or perpetual. Section 38 indicates when perpetual injunctions are granted and Section 39 indicates when mandatory injunctions are granted. Section 40 provides that damages may be awarded either in lieu of or in addition to injunctions. Section 41 provides for contingencies when an injunction cannot be granted. Section 42 enables, notwithstanding anything contained in Section 41, particularly Clause (e) providing that no injunction can be granted to prevent the breach of a contract the performance of which would not be specifically enforced, the granting of an injunction to perform a negative covenant. Thus, the power to grant injunctions by way of specific relief is covered by the Specific Relief Act, 1963.

Xxx

18. The approach that at the initial stage, only the existence of an arbitration clause need be considered is not justified. In Siskina (Cargo Owners) *v.* Distos Compania Navieria SA (The Siskina), *[[1979] A.C. 210 : [1977] 3 WLR 818 : [1977] 3 All ER 803 (HL)] Lord Diplock explained the position : (All ER p. 824f-g)*

> *"A right to obtain an interlocutory injunction is not a cause of action. It cannot stand on its own. It is dependant on there being a pre-existing cause of action against the defendant arising out of an invasion, actual or threatened, by him of a legal or equitable right of the plaintiff for the enforcement of which the defendant is amenable to the jurisdiction of the court. The right to obtain an interlocutory injunction is merely ancillary and incidental to the pre-existing cause of action. It is granted to preserve the status quo pending the ascertainment by the court of the rights of the parties and the grant to the plaintiff of the relief to which his cause of action entitles him, which may or may not include a final injunction."*

He concluded : (All ER p. 825a-b)

> *"To come within the sub-paragraph the injunction sought in the action must be part of the substantive relief to which the plaintiff's cause of action entitles him; and the thing that it is sought to restrain the foreign defendant from doing in England*

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Page 19 Monday, May 18, 2026
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must amount to an invasion of some legal or equitable right belonging to the plaintiff in this country and enforceable here by the final judgment for an injunction."

19. Recently, in Fourie *v.* Le Roux, *[[2007] 1 WLR 320 : 2007 UKHL 1 (HL)] the House of Lords speaking through Lord Scott of Foscote stated : (WLR p. 333, para 32)*

"An interlocutory injunction, like any other interim order, is intended to be of temporary duration, dependent on the institution and progress of some proceedings for substantive relief."

And concluded : (WLR pp. 333-34, para 33)

"33. Whenever an interlocutory injunction is applied for, the Judge, if otherwise minded to make the order, should, as a matter of good practice, pay careful attention to the substantive relief that is, or will be, sought. The interlocutory injunction in aid of the substantive relief should not place a greater burden on the respondent than is necessary. The yardstick in Section 37(1) of the 1981 Act, 'just and convenient', must be applied having regard to the interests not only of the claimant but also of the defendant."

20. No special condition is contained in Section 9 of the Act. No special procedure is indicated. In American Jurisprudence, *2nd Edn. it is stated:*

"In judicial proceedings under arbitration statutes ordinary rules of practice and procedure govern where none are specified; and even those prescribed by statute are frequently analogous to others in common use and are subject to similar interpretation by the courts."

21. It is true that the intention behind Section 9 of the Act is the issuance of an order for preservation of the subject-matter of an arbitration agreement. According to learned counsel for Adhunik Steels, the subject-matter of the arbitration agreement in the case on hand, is the mining and lifting of ore by it from the mines leased to OMM Private Limited for a period of 10 years and its attempted abrupt termination by OMM Private Limited and the dispute before the arbitrator would be the effect of the agreement and the right of OMM Private Limited to terminate it prematurely in the circumstances of the case. So viewed, it was open to the court to pass an order by way of an interim measure of protection that the existing arrangement under the contract should be continued pending the resolution of the dispute by the arbitrator. May be, there is some force in this submission made on behalf of Adhunik Steels. But, at the same time, whether an interim measure permitting

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Page 20 Monday, May 18, 2026
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Adhunik Steels to carry on the mining operations, an extraordinary measure in itself in the face of the attempted termination of the contract by OMM Private Limited or the termination of the contract by OMM Private Limited, could be granted or not, would again lead the court to a consideration of the classical rules for the grant of such an interim measure. Whether an interim mandatory injunction could be granted directing the continuance of the working of the contract, had to be considered in the light of the well-settled principles in that behalf. Similarly, whether the attempted termination could be restrained leaving the consequences thereof vague would also be a question that might have to be considered in the context of well-settled principles for the grant of an injunction. Therefore, on the whole, we feel that it would not be correct to say that the power under Section 9 of the Act is totally independent of the well-known principles governing the grant of an interim injunction that generally govern the courts in this connection. So viewed, we have necessarily to see whether the High Court was justified in refusing the interim injunction on the facts and in the circumstances of the case.

35. In essence, the decision in *Adhunik* (supra) sets down that while the power under Section 9 of the Act remains untrammeled by any special procedure, the exercise of such power was still required to be carried out within the general procedure governing the grant of injunctions. Considering the fact that such powers include the power to pass interim measures as may appear to be just and convenient, does this imply that these well-settled procedures, and the strict requirements thereunder if any, dominate the narrative when considering the exercise of such power? This question was considered by the Bombay High Court in its decision dated 27.02.2012 in *Nimbus Communications Limited* v. *Board of Control for Cricket in India* Appeal (Lodg.) 90 of 2012 wherein the Court, after a thorough examination of the ratio in *Adhunik Steels* (supra), observed as under:

"24. A close reading of the judgment of the Supreme Court in Adhunik Steels *would indicate that while the Court held that the basic principles governing the grant of interim injunction would stand attracted to a petition under Section 9, the Court was of the view that the power under Section 9 is not totally independent of those principles. In other words, the power which is exercised by the Court under Section 9 is guided by the underlying principles which govern the exercise of an analogous power in the Code of Civil Procedure 1908. The exercise of the power under Section 9 cannot be totally independent of those principles. At the same time, the Court when it decides a petition under Section 9 must have due regard to the underlying purpose of the conferment of the power upon the Court which is to promote the efficacy of arbitration as a*

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Page 21 Monday, May 18, 2026
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form of dispute resolution. Just as on the one hand the exercise of the power under Section 9 cannot be carried out in an uncharted territory ignoring the basic principles of procedural law contained in the Code of Civil Procedure 1908, the rigors of every procedural provision in the Code of Civil Procedure 1908 cannot be put into place to defeat the grant of relief which would subserve the paramount interests of justice. A balance has to be drawn between the two considerations in the facts of each case. The principles laid down in the Code of Civil Procedure 1908 for the grant of interlocutory remedies must furnish a guide to the Court when it determines an application under Section 9 of the Arbitration and Conciliation Act, 1996. The underlying basis of Order 38 Rule 5 therefore has to be borne in mind while deciding an application under Section 9(ii)(b).”

36. Thus, it is evident that while the well-settled principles governing grant of injunctions, as laid out under the provisions of the Specific Relief Act and Code of Civil Procedure, are to guide this Court while exercising its powers under Section 9, they do not strictly bind the course of the decision. Ultimately, the Court, after examining the facts of the case, has a duty to assess and decide which would be the most just and convenient route to take as also to prevent the ends of justice from being defeated.

37. Having noted the legal position, it would be useful to refer to the relevant terms of the Concession Agreement in order to gain a better grasp of the dispute at hand and the events leading up to it. The scope of work, as defined in Article 2 of the Concession Agreement, included construction of the project highway as also the operation and maintenance thereof. The definition reads as follows:

“2.1 Scope of the Project

The scope of the Project (the Scope of the Project) shall mean and include during the Concession Period:

(a) construction of the Project Highway on the Site set forth in Schedule A and as specified in Schedule B together with provision of Project Facilities as specified in Schedule C and in conformity with the Specifications and Standards set forth in Schedule D;

(b) Operation and maintenance of the Project Highway in accordance with the provisions of this Agreement; and

(c) performance and fulfilment of all other obligations of the Concessionaire in accordance with the provisions of this Agreement and matters incidental thereto or necessary for the performance of any or all of the obligations of the Concessionaire under this Agreement.”

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Page 22 Monday, May 18, 2026
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38. This provision required the petitioner to also carry out its obligations which are laid out exhaustively in Article 5 of the Concession Agreement titled 'Obligations of the Concessionaire' and the relevant portion thereof, namely Article 5.1.1, reads as under:

> *"5.1.1 Subject to and on the terms and conditions of this Agreement, the Concessionaire shall at its cost and expense procure finance for and undertake the design, engineering, procurement, construction, operation and maintenance of the Project Highway and observe, fulfill, comply with and perform all its obligations set out in this Agreement or arising hereunder."*

39. As the project ran into several years of delay, this issue was examined exhaustively by the learned Tribunal once arbitration was invoked on 31.12.2016. These delays contributed to several digressions from the work schedule, but ultimately, Article 14.3 of the Concession Agreement envisaged a scenario in which the project highway itself was ready for commercial operations but certain incidental works remained incomplete. In such cases, the Independent Engineer was empowered to issue a PCOD certificate in favour of the Concessionaire. This provisional certificate had the effect of permitting movement on vehicles on the highway, which would lead to toll generation on this stretch. Article 14.3 empowering the Independent Engineer to issue the provisional certificate reads as under:

> *"14.3 Provisional Certificate*
>
> *The Independent Engineer may, at the request of the Concessionaire issued a provisional certificate of completion substantially in the form set forth in Schedule J (the Provisional Certificate) if the Tests are successful and the Project Highway can be safely and reliably placed in commercial operation thought certain works or things forming part thereof are outstanding and not yet complete. In such an event, the Provisional Certificate shall have appended thereto a list of outstanding items signed jointly by the independent Engineer and the Concessionaire (the Punch List) provided that the Independent Engineer shall not withhold the Provisional Certificate for reason of any work remaining incomplete if the delay in completion thereof is attributable to the Authority."*

40. The record also shows that the petitioner had been making repeated representations seeking issuance of PCOD certificate to the Independent Engineer on the ground that all the major portions of the project highway had been constructed and only some minor work remained. Even though it had made its request as early as on 01.05.2013, the Independent Engineer recommended grant of PCOD certificate to the petitioner only on 10.10.2014. However, in this very recommendation, he also noted that 94% of the scope of the project stood completed and that the highway had already been in operation

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Page 23 Monday, May 18, 2026
Printed For: Mr. Rajeeve Mehra
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for one year, i.e. since 2013. The act of issuing the PCOD certificate in favor of the petitioner on 26.11.2015 in accordance with Article 14.3 of the Concession Agreement was an acquiescence on the part of respondent no. 1 that the highway was ready for public use and that only the punch list items remained to be completed. At this juncture, the respondent no. 1 began complaining that the petitioner was failing to carry out the punch list items. The Concession Agreement provided for such a situation as well, by way of Article 14.4.2 which empowered respondent no. 1 with the power to terminate the agreement incase the petitioner failed to carry out the punch list works. This provision of the Concession Agreement reads as under:

> *"14.4.2 Upon completion of all Punch List items, the Independent Engineer shall issue the Completion Certificate. Failure of the Concessionaire to complete all the Punch List items within the time set forth in Clause 14.4.1 for any reason, other than conditions constitution Force Majeure or for reasons solely attributable to the Authority, shall entitle the Authority to terminate this Agreement."*

41. Now that the PCOD certificate had been granted and the highway had become operational, Article 17 of the Concession Agreement dealing with Operations and Maintenance kicked into effect. To that end, Article 17.1.1 set down the petitioner's obligation to operate and maintain the project highway in accordance with the Agreement, or carry out this function through a contractor, and to carry out the requisite modifications, repairs and improvements as required, which provision of the Concession Agreement reads as under:

> *"17.1.1 During the operation period, the Concessionaire shall operate and maintain the Project Highway in accordance with this Agreement either by itself, or through the O&M Contractor and if required, modify, repair or otherwise make improvements to the Project Highway to comply with the provisions of this Agreement, Applicable Laws and Applicable Permits, and conform to Good Industry Practice. The obligations of the Concessionaire hereunder shall include;*
>
> *a. permitting safe, smooth and uninterrupted flow of traffic on the Project Highway during normal operating conditions.*
>
> *b. collecting and appropriating the fee;*
>
> *c. minimising disruption to traffic in the event of accidents or other incidents affecting the safety and use of the project highway by providing a rapid and effective response and maintaining liaison with emergency services of the States;*
>
> *d. carrying out periodic preventive maintenance of the Project Highway;*
>
> *e. undertaking routine maintenance including prompt repairs of*

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Page 24 Monday, May 18, 2026
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SCC Online Web Edition: https://www.scconline.com
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potholes, cracks, joints, drains, embankments, structures, pavement marking, lighting, road signs and other traffic control devices;

f. undertaking major maintenance such as resurfacing of pavements, repairs to structures and repairs and refurbishment of tolling system and other equipment;

g. preventing, with the assistance of concerned law enforcement agencies, any unauthorised use of the Project Highway;

h. preventing with the assistance of the concerned law enforcement agencies, any encroachments of the Project Highway; including the site.

i. protection of the environment and provision of equipment and materials therefore;

j. operation and maintenance of all communication, control and administrative systems necessary for the efficient operation of the Project Highway;

k. maintaining a public relations unit to interface with and attend to suggestions from the Users, government agencies, media and other agencies.

l. complying with safety requirements in accordance with Article 18."

42. However, were the petitioner to fail in carrying out this obligation and commence remedial works, Article 17.9.1 of the Concession Agreement bestowed respondent no. 1 with a right to carry out these remedial works and recover the costs thereof and damages, if any, from the petitioner:

"17.9.1 In the event the Concessionaire does not maintain and/or repair the Project Highway or any part thereof in conformity with the Maintenance Requirements, the Maintenance Manual or the Maintenance Programme, as the case may be, and fails to commence remedial works within 15(fifteen) days of receipt of the O & M Inspection Report or a notice in this behalf from the Authority or the Independent Engineer, as the case may be, the Authority shall, without prejudice to its rights under this Agreement including Termination thereof, be entitled to undertake such remedial measures at the risk and cost of the Concessionaire, and to recover such cost from the Concessionaire. In addition to recovery of the aforesaid cost, a sum equal to 20% (twenty per cent) of such cost shall be paid by the Concessionaire to the Authority as Damages."

43. Finally, since respondent no. 1 invoked Article 36.1 of the Concession Agreement to suspend the petitioner's rights to collect toll, it may be useful to refer to this provision as well which reads as under:

"36.1 Suspension upon concessionaire Default

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Page 25 Monday, May 18, 2026
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Upon occurrence of a Concessionaire Default, the Authority shall be entitled, without prejudice to its other rights and remedies under this agreement including its rights of termination hereunder, to (i) suspend all rights of the concessionaire under the Agreement including the Concessionaire's right to collect Fee, and other revenues pursuant hereto, and (ii) exercises such rights itself or authorize any other person to exercise the same on its behalf during such suspension (the 'Suspension'). Suspension hereunder shall be effective forthwith upon issue of notice by the Authority to the Concessionaire and may extend up to a period not exceeding 180 (one hundred and eighty) days from the date of issue of such notice; provided that upon written request from the Concessionaire and the Lenders' Representative, the Authority shall extend the aforesaid period of 180 (one hundred and eighty (days by a further period not exceeding 90 (ninety) days."

44. It is broadly within the confines of these afore-extracted contractual stipulations of the Concession Agreement that the relationship between the parties was conducted and would have been conducted till the end of the Concession period, which was for 25 years w.e.f. 02.05.2008. However, from the submissions made at the Bar, it appears that respondent no. 1 is deeply dissatisfied with the repair and maintenance work being carried out by the petitioner. At the same time, it also appears that in order to execute the project, the petitioner has spent a sum of INR 900 crores and, as on date, has received only an annual sum of INR 36 crores, w.e.f. 25.11.2015, i.e. a total of INR 180 crores as toll collections, which is far lower than the amount projected by respondent no. 1 in its revenue model. There are additional reasons for the lower toll collections, viz., the delays caused in executing the project, delay in issuing the PCOD certificate for the entire stretch, an order passed by the learned National Green Tribunal which prohibited 4XL vehicles from using the highway, all of which significantly reduced the petitioner's revenue from toll collections and adversely affected its earning capacity. As a result, it defaulted in making payments to its lenders under the financing agreements and is now being vigorously pursued by them for recovery thereof. Since this is a BOT project and the petitioner was hoping to recover its costs by continuing to operate the toll plaza till the conclusion of the Concession period, an important question which now needs to be determined is this : whether the petitioner, having spent INR 900 crores out of its own money to build the highway, which stands 96.73% completed as on 13.01.2020 even as per respondent no. 1, should be deprived of this right to collect toll at this premature stage of the dispute.

45. Now, under Article 17.1 of the Concession Agreement, it is evident that respondent no. 1 had an unconditional right to require the

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Page 26 Monday, May 18, 2026
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petitioner to operate and maintain the highway, which included periodically carrying out preventive, routine and major maintenance of the highway, in order to permit and facilitate safe, smooth and uninterrupted flow of traffic. This obligation has been chalked out in public interest so that the national highway is usable, operational and well maintained for all. It is pertinent to note that there is nothing placed on record to show that any mishaps or accidents have occurred, ever since it began operation in 2013, on account of the petitioner's work on the project highway which may invite application of Article 17.1.1(c) of the Concession Agreement as reproduced above, barring the complaint of the respondent no. 1 that the quality of repair and maintenance work is substandard. Thus, while there is no opposition to the fact that the highway has infact been constructed and is operational, the sole complaint of the respondent no. 1 is with maintenance and upkeep. This has been vehemently opposed by the petitioner which has prayed for the appointment of any Independent Engineer from one of the Indian Institutes of Technology to examine this issue in detail. Before this Court, the parties have even placed on record various photographs to substantiate their respective positions in this regard, but this Court neither possesses the expertise to assess the quality of work done nor can it delve into the merits of these claims under a Section 9 petition. Therefore, I see no reason to direct appointment of an Independent Engineer from the IITs, as prayed for by the petitioner.

46. On the other hand, I find merit in the contention of respondent no. 1 that if the petitioner, notwithstanding the protestations of respondent no. 1, were directed to carry out maintenance work, such a direction would undoubtedly involve an element of supervision from this Court, which is neither feasible nor permissible in the light of Sections 14(b) read with Section 41(e) of the Specific Relief Act. At this point, it is important to ask - then who shall carry out the repair and maintenance work under the Concession Agreement? The answer to this query lies in Article 17.9.1 of the Concession Agreement which vests respondent no. 1 with the power to carry out remedial, operation and maintenance works on the project highway at the risk and cost of the petitioner, even during the subsistence of the agreement. Evidently, the impugned NITs were issued by respondent no. 1 in pursuance of this power. Keeping in view the fact that there is a serious dispute between the parties regarding the quality of work rendered by the petitioner, any injunction granted upon these NITs could possibly impede or delay the repair and maintenance work on the highway as also have a direct impact on its safety and condition. For this reason, granting such an injunction, as rightly contended by respondent no. 1, would fall foul of Section 20A of the Specific Relief Act and operate

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Page 27 Monday, May 18, 2026
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against public interest. Thus, keeping in view the fact that the NITs dated 17.04.2020 and 05.05.2020 issued by the respondent no. 1 solely pertain to the execution of repair and maintenance works of the stretch of highway which comprise of the Delhi/Haryana border to Rohtak Section of NH-10 from Km 29.700 to Km 87.000, I find no reason to restrain these NITs. For this reason, all the reliefs sought in the first petition as also the petitioner's prayer in the second petition seeking to restrain the respondent no. 1 from issuing any notice/letter with regard to repair and maintenance, cannot be granted. However, it is made clear that this Court is not expressing any opinion on whether respondent no. 1 is justified in issuing these NITs or whether the quality of petitioner's repair and maintenance work is adequate or not; these issues can only be determined in arbitration. Therefore, it would be open for the petitioner to agitate these issues in arbitration.

47. Now, coming to the remaining prayers of the petitioner in the second petition, which calls into question the decision of the respondent no. 1 to suspend the petitioner's rights under the Concession Agreement, including its right to collect toll. The petitioner's primary contention is that in the light of the personal costs and debts it has amassed while executing the project, its right to recover these costs and repay the debts by collecting toll, granted to it under the Concession Agreement, cannot be curtailed midway or denied by the respondent no. 1 on the specious and unsubstantiated ground of ‘deficient work’, especially now that the project stands completed and the petitioner has finally started collecting toll. The petitioner has further challenged the suspension of its right to collect toll as being arbitrary and illegal, whereas the respondent no. 1 has contended that the suspension of petitioner's rights under the Concession Agreement has been carried out strictly in terms of Article 36 of the Concession Agreement, and was a direct result of the petitioner failing to effectively discharge its work, which was gravely harming public interest.

48. The respondent no. 1 has also taken several other grounds to suspend this right of the petitioner, one of which is the delay caused in executing the project and the other being that the petitioner had failed to deliver the items in the punch list and carry out repair and maintenance work on the project highway. Insofar as the claims of respondent no. 1 pertaining to delay is concerned, the same was already considered by an arbitral Tribunal which, after exhaustively considering the rival submissions of the parties, held the respondent no. 1 liable for the delay caused in construction. Although this award is pending challenge under the Section 34 petition and has not attained finality, but the fact remains that as on date there are prima facie findings against respondent no. 1 on this ground. Furthermore, any remaining lag in carrying out major repair and maintenance work,

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Page 28 Monday, May 18, 2026
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attributable to the petitioner if at all, has been sought to be explained by the petitioner as a consequence of its financial troubles, mainly owing to revenue loss attributable to delayed toll collection. The petitioner's primary argument is that when the respondent no. 1 delayed carrying out its obligations under the Concession Agreement, it also caused a delay in toll revenue generation, which was the only way for the petitioner to recover costs and repay its debts. Though the petitioner claims to have spent an enormous amount of about INR 900 crores, admittedly, it has not even recovered the initially projected cost of construction of this project, i.e., over INR 500 crores, till date. The petitioner has also claimed that it was recovering only an annual sum of INR 36 crores as toll revenue, which was also going to the Escrow Account. Undisputedly, the execution of the project was delayed considerably and this delay has had severe cost implications triggering an overrun of costs associated with *inter alia* loans, interest payable thereon, mobilization of manpower, machinery and resources, etc., all of which have been borne by the petitioner till date.

49. Another important factor is that the Concession Agreement specifically provided that the petitioner will hold a license over the project highway for a period of 25 years from the appointed date, i.e. 02.05.2008, during which time it was supposed to have completed construction, begun operations and maintenance of the highway and toll collections. Essentially, once the Agreement required the highway to be completed by 02.05.2010, the parameter of the parties' agreement was that the petitioner would recover its cost from the toll collected over the remaining concession period. Evidently, the petitioner's expectation of generating revenue from the toll collections for a period of 25 years, was what drove the parties to arrive at an Agreement. Thus, although Article 36 does grant respondent no. 1 the power to suspend the petitioner's rights under the Concession Agreement, including the crucial right to collect toll, evidently the petitioner has approached this Court to protect its right to continue collecting toll from the project highway and secure some temporary financial relief.

50. It is a matter of fact that the entire highway which is approximately 63.49 km in length, has been constructed, barring minor punch list items which are yet to be finished at the petitioner's cost. This position is evident from the Cure Period Notice issued by respondent no. 1 on 13.01.2020. Although, informally, the highway was operational since 2013, the petitioner was unable to earn the toll revenue for this period since respondent no. 1 had not issued PCOD certificate for the same. Formally, the highway has been operational since 26.11.2015, when the PCOD certificate was issued, and toll collections began on this day. A significant fact to be noted is that till

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Page 29 Monday, May 18, 2026
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date, there have been no complaints with respect to the petitioner's maintenance of the toll plaza, or fulfilling its other obligations under the contract, barring the grievances pertaining to repair and maintenance work. Even after the learned Division Bench, on 04.06.2020, had stayed the suspension letters dated 27.05.2020 and 28.05.2020, the petitioner continued maintaining the toll plaza without any complaint. No such allegations were raised against the petitioner even during the course of arguments before this Court. Evidently, the petitioner has discharged this duty without error or mishap and no aspersions have been cast on its ability to maintain the toll plaza, collect toll fee and diligently deposit the same in the Escrow Account. In contrast, the past conduct of the respondent no. 1 is such that between 28.05.2020 and 04.06.2020, once the said respondent had taken over the toll collection duties after suspending the petitioner's rights to collect toll, it violated several clauses of the Concession Agreement and the Escrow Agreements by appointing a third party for collecting toll on the highway, even before it had formally issued the suspension notice. Interestingly, the respondent no. 1 authorized this agency to retain some amounts from the toll collected and remit a fixed amount to respondent no. 1 on a daily basis, thus none of these toll collections were ever deposited in the Escrow Account. Not only was this position conceded by respondent no. 1 at the time of making submissions, it also admitted to having issued a fresh NIT on 03.09.2020 proposing to delegate the duty of toll collection to a third party agency for a period of four months. Even under this fresh NIT, respondent no. 1 proposes to give the third party agency the right to retain portions of the toll, after remitting a fixed sum to the said respondent. This is clearly a departure from the agreement signed between the parties in that it deprives the Escrow Account of these toll collections. In fact, judging from the fresh NIT dated 03.09.2020, respondent no. 1 appears to be intent on continuing this practice. This would adversely impact the petitioner's battle with its lenders, give further impetus to their claim that the petitioner is a defaulter, and deepen the petitioner's debts. Considering that it is the petitioner who has borne the complete cost of the project, borrowed enormous sums from various banks to do so, and was supposed to utilise toll collections to offset these loans, it was of utmost importance that the toll collections be deposited in the escrow account. However, the past conduct of respondent no. 1 shows that it failed to honour this requirement. Rather, the decision of respondent no. 1 to once against grant toll collection rights to a third party agency on a fixed amount basis would not only lead to cost escalation for the parties, but it would also deprive the escrow account of these toll collections. Ultimately, this would have an adverse effect on the petitioner, which is liable to its lenders for non-payment of the loans

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Page 30 Monday, May 18, 2026
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they took to execute this project and any prosecution arising therefrom.

51. The act of suspending the petitioner's right under the Concession Agreement, including its right to collect toll, needs to examined in this context. While the parties are caught in a tussle to blame the other for the deficiencies encountered in the execution of the project, I am of the view that this question also cannot be decided by this Court. They can only be decided in arbitration and it is in those very proceedings that it will be examined whether the petitioner ought to be compensated for any repair and maintenance work done at its risk and cost by respondent no. 1 in exercise of its powers under Article 17.9.1 of the Concession Agreement.

52. However, for the time being, the fact remains that the toll collections play a crucial role in discharging the enormous debts incurred by the petitioner in executing the project. Denying this right could be gravely unjust to the petitioner considering that it claims to have invested about INR 900 crore so far on the construction of a project which essentially serves public interest. In fact, as per Article 35.2 of the Concession Agreement signed between them, the petitioner is not even entitled to claim compensation for the loss of revenue from toll collections, or debt repayment obligations. This provision reads as under:

> *"35.2 Compensation for Default by the Authority*
>
> *In the event of the Authority being in material default or breach of this Agreement in 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 within 30 (thirty) days of receipt of the demand supported by necessary particulars thereof; provided that no such compensation shall be payable for any 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 default but shall not include loss of fee revenue or debt repayment obligations, 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."*

53. This provision has to be read in conjunction with Article 35.3 of the Concession Agreement which sets down that in lieu if compensation for loss of revenue in toll collection or for debt repayment obligations, the petitioner is entitled to seek extension of the concession period. Accordingly, Article 35.3 reads as under:

> *"35.3 Extension of Concession Period*
>
> *In the event that a material default or breach of this Agreement*

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Page 31 Monday, May 18, 2026
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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 hereunder, 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."

54. This provision demonstrates the importance of the concession period - it was to act as a vital remedy for the petitioner in case of losses it may have suffered on account of delays in issuance of PCOD certificate. At the cost of repetition, these losses included loss in toll collection or losses incurred on account of debt repayment obligations, which form the primary point of discussion in this decision. Permitting the suspension to continue would deprive the petitioner of this concession period and the resulting opportunity which flows therefrom, i.e., the utilization of toll collections to offset financial obligations towards its lenders. In any event, it certainly cannot be said that respondent no. 1 is without any remedy for the purpose of addressing the grievances it has against the petitioner; considering the dismissal of the first petition, respondent no. 1 is at liberty to carry out major repair and maintenance work under the impugned NITs, subject to it recovering its costs from the petitioner under Article 17.9.1 of the Concession Agreement. In fact, it cannot only invoke arbitration against the petitioner, but it can also terminate the Concession Agreement.

55. However, for the time being, there is an immediate necessity to protect the petitioner's rights without which it is bound to face greater hardship as compared to respondent no. 1 who has, in any event, achieved the purpose it set out for, i.e. construction and operation of the highway. Evidently, pending arbitration, withholding the rights of the petitioner under the Concession Agreement, including the right to collect toll, would cause it serious injury and expose it to greater financial vulnerability by aggravating its debts and increasing its liabilities to its lenders under the financing agreements. Thus, I find that petitioner's rights under the Concession Agreement, including its right to toll collection, ought to be protected to mitigate the risk of injustice to it during the period of uncertainty preceding the invocation of arbitration.

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Page 32 Monday, May 18, 2026
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56. Therefore, in the facts of the present case, the petitioner has not only made out a sufficient prima facie case and proved balance of convenience in its favour, it has also established that it is likely to incur irretrievable injury were it to be denied its rights under the Concession Agreement, including its right to collect toll. In these circumstances, I deem it appropriate to issue interim orders under Section 9 of the Act to protect the petitioner, till invocation of arbitration or the expiry of three months, whichever is earlier, from incurring any further injury on account of suspension of its rights under the Concession Agreement.

57. Accordingly, the suspension letters dated 27.05.2020 and 28.05.2020 issued by respondent no. 1 are liable to be stayed. It is, however, made clear that stay of the suspension order will not affect any other independent rights of the parties under the Concession Agreement, including the right of termination/substitution.

58. Even though respondent no. 2 has relied on the decisions of the Supreme Court in *Anand Prasad* (supra) and in *Her Highness* (supra), I find that these decisions only lay reiterate the established legal principle that the Court should grant injunctions by properly appreciating the well-settled principles governing the grant thereof, including those prescribed under the provisions of the Specific Relief Act. However, the facts of none of these decisions are similar to the facts of the present case where the party seeking injunction had agreed to execute a project at its own cost, on the understanding that it would recover these costs by operating the project.

59. Before parting, I would like to note that these BOT projects are crucial for infrastructure development in the country, and it is imperative for respondent no. 1 to adopt fair practices to encourage participation from private players in this sector. Technically, while undertaking projects of such nature, entities such as the petitioner are banking on the day when operations commence so that they can begin recovering the costs they incurred, repaying the debts they took and, finally, once that is ensured, begin making any profits. In the facts of the present case the highway is operational, the Independent Engineer has vouched for the quality of work rendered by the petitioner in its letter dated 23.03.2018 and confirmed that the highway stands substantially completed in its letter dated 25.02.2020. Even the learned Tribunal has found in favour of the petitioner in its well-considered award. In these circumstances, the manner in which respondent no. 1 chose to proceed against the petitioner, by appointing a third party agency even before suspending its rights under the Concession Agreement, is not only unfair, it also robs private players of their motivation to participate in any infrastructure development projects in the future and harms national interest in the long run.

60. It is now time to examine IA 6365/2020 on merits.

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Page 33 Monday, May 18, 2026
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I.A. 6365/2020

61. This application was filed by the petitioner, during the course of these proceedings, seeking a direction to respondent no. 2 to disburse amounts from the escrow account on a weekly basis, for carrying out major repair and maintenance work on the highway. The application came to be filed on 28.07.2020, after the respondent no. 1 had expressed its willingness, on 10.07.2020, to have the petitioner execute major repair and maintenance work as set out in the impugned NITs.

62. As mentioned above, in order to execute its work under the Concession Agreement, the petitioner had taken a loan from respondent no. 2 and other banks. For this purpose, it executed the financing agreements.

63. Once PCOD certificate was issued and toll operations began on the highway, the petitioner and its lenders, including respondent no. 2, agreed upon an arrangement whereunder a monthly tranche of INR 71 lakh would be released to the petitioner for the purpose of maintaining the highway and the toll plaza. This agreement was recorded in the minutes of meeting dated 02.08.2016, the relevant extract thereof read as under:

> *"Approval of Budget for Operation & Maintenance Expenses*
>
> *The company requested the consortium to consider the monthly budgets which is required for the maintenance of the Highway and for smooth generation of the revenue from the tolling on this sector. Sh. Khanna put up the details of the monthly payments to be made which includes utility services, HR & Admin expenses and Routine maintenance and as per the budget, a monthly expenditure of Rs. 71,01,559.00 (Rs. 71 Lakh - Rupees seventy one lakh-after round off) is required. The lenders were of the opinion that although the revenue generation from the tolling is on a lower side, but for the maintenance of the toll plaza, the amount of Rs. 71 lakh will be required. As such, the company was allowed for Rs. 71 lakh per month for the maintenance and the payment of the same may be allowed from the revenue generated from the tolling.*
>
> *The company requested to consider an additional amount of Rs. 57 Crore for the damages caused due to rain, which the consortium did not agree to consider."*

64. Since the petitioner, on account of delays in the project, was defaulting in its obligations to its lenders under the financing agreements, it was declared a Non Performing Asset (NPA) w.e.f. 30.06.2019, and consequently, a notice of financial default was issued by respondent no. 2 on 17.09.2019. Since default continued, respondent no. 2 also wrote to respondent no. 1, on 22.11.2019,

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Page 34 Monday, May 18, 2026
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requesting for termination of the Concession Agreement and that the 'termination payment' under Article 37.3 thereof, i.e., 90% of the Debt Due Less Insurance Cover incurred during the execution of works under the Agreement, which was approximately a sum of INR 598,22,46,819/, be paid directly to respondent no. 2 to offset the petitioner's debts under the finance agreements. Even though these requests were reiterated on 02.01.2020 and 01.02.2020, the respondent no. 1 has not terminated the Concession.

65. As noted hereinabove, during the course of these proceedings, the respondent no. 1 on 10.07.2020 expressed its willingness to withdraw the two Notices Inviting Tenders (NITs) impugned in the first petition, if the petitioner was willing to discharge the works set out therein. Notwithstanding the petitioner's readiness to execute these works, it expressed its difficulty in doing so on account of the failure of respondent no. 2 to release monies from Escrow Accounts for the repair and maintenance work. For this reason, the present application was moved and on 05.08.2020, after hearing the parties at some length, this Court issued the following interim directions:

> *"5. In the light of the aforesaid submissions made by the parties, I am of the prima facie opinion that pending the disposal of the present application pertaining to the dispute on the proper manner in which the amount in the escrow account should be used, the repair and maintenance work in the national highways should not be allowed to suffer. Therefore, in public interest, I am of the view that the respondent no. 2 ought to give priority to the repair and maintenance work of the highway, before transferring the amounts in the escrow account to any lender banks. In case the petitioner is a defaulter, it will always be open for the respondent no. 2 to recover its dues from the petitioner as per law, but the same cannot be a ground to defeat the interest of the public at large, that too when the escrow agreement specifically provides release of the amounts for this very purpose.*
>
> *6. Accordingly, the respondent no. 2 is restrained from transferring or releasing any amount from the escrow account to itself or any of the other lender Banks, in discharge of the dues, if any, payable by the petitioner. The respondent no. 2 is also directed to release the available amount in the account of the petitioner on a weekly basis who, in turn, will continue to carry out the repair work as per the directions of Mr. V.K. Sharma, Project Director, PIU Rothak. It is made clear that these directions are subject to the final adjudication of this application."*

66. After this order was unsuccessfully challenged by respondent no. 2, a sum of INR 42 lakh in total has been released to the petitioner against its claim of having carried out major repair and maintenance

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Page 35 Monday, May 18, 2026
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work worth INR 5.25 crores.

67. To begin with, Mr. Sandeep Sethi raises a preliminary objection to the maintainability of the application on the ground that the petitioner has not sought any reliefs from the Bank in these petitions and has, on the contrary, specifically mentioned that that the Bank is only a proforma party. Therefore, the very act of preferring an application seeking reliefs from a party, who is admittedly a proforma party in the petition, is unsustainable and beyond the scope of the petition itself. He urges that the application ought to have been dismissed on this ground alone. Per contra, Mr. Harish Malhotra submits that when these petitions were originally filed, they sought injunctions against the respondent no. 1 from arbitrarily suspending the petitioner's right to collect toll or inviting tenders from third party entities to carry out the repair and maintenance work entrusted to it under the Concession Agreement, without adhering to the procedure which was contractually agreed upon between the parties. Thus, at the stage of filing these petitions, the respondent no. 2 was infact a proforma party. However, pursuant to the order dated 10.07.2020, when the respondent no. 1 expressed its willingness to have the repair and maintenance work executed by the petitioner, it became necessary for the petitioner to seek a direction to respondent no. 2 to release the amounts from the escrow account. He submits that in any event, respondent no. 2 was granted sufficient opportunities to place its objections on record, and therefore no prejudice has been caused to it on this count.

68. I have considered these preliminary submissions and find no merit in the objection raised by respondent no. 2. Even though respondent no. 2 was indeed initially arraigned as a proforma party in the petition, the necessity of preferring the present application arose at a much later stage when respondent no. 1 expressed its willingness to have the petitioner to execute the major repair and maintenance work of the highway. In the light of respondent no. 2's refusal to release any amounts from the Escrow Account for this purpose, it became imperative for the petitioner to move this application seeking reliefs from respondent no. 2 who also happens to be the lead lender for the purpose of this project. Moreover, the reliefs sought hereunder are interim in nature and respondent no. 2 was given sufficient opportunity to file its reply to the application on merits. Even otherwise, it is trite law that if the circumstances so warrant, directions can be issued to even third parties in respect of issues which form the subject matter of an arbitration agreement. Therefore, when respondent no. 2 is already before this Court and has a crucial role in determining the financing of the project highway as also the core dispute between the petitioner and respondent no. 1, its mere initial arraignment as a proforma party in

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Page 36 Monday, May 18, 2026
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the petition is not an adequate reason to overlook the contents of the application itself.

69. On merits, Mr. Malhotra submits that the action of respondent no. 2 of diverting release of monies from the Escrow Account in order to offset the petitioner's loans, in complete disregard of the petitioner's obligations under the Concession Agreement, is arbitrary and completely illegal. In furtherance of this submission, he contends that the Escrow Agreement and the Concession Agreement are to be read together and the former requires respondent no. 2 to release amounts from the Escrow Account to the petitioner in order to carry out repair and maintenance works, as prescribed by respondent no. 1. Even the Concession Agreement set down that while withdrawing money from the Escrow Account, the parties ought to give priority to all payments for construction of the project highway. He submits that considering the fact that the prescribed order of precedence of the Agreements is (1) Concession Agreement, (ii) Escrow Agreement (iii) Common Loan Agreement and Substitution Agreement, even if the petitioner was declared as a NPA by the respondent no. 2 on 30.06.2019 and issued a notice of financial default on 17.09.2019, the order of precedence could not be diluted. The Banks were still required to retain all toll collections in the Escrow Account and utilise it in the agreed upon manner. He submits that the respondent no. 2, yet, in complete contravention of the specific terms of the agreement, began diverting a great portion of these monies towards discharge of the repayment instalments payable by the petitioner to its lenders. This not only violated the order of contractual precedence, but also violated the very ground for creating the Escrow Account and significantly hindered the petitioner's ability to carry out the major repair and maintenance work on account of a shortage of funds. Mr. Malhotra submits that as on date, pursuant to the interim orders passed by this Court on 05.08.2020, the petitioner has carried out major repair and maintenance work till 24.09.2020. He submits that at this stage, when the respondent no. 1 is unwilling to permit the petitioner to carry out this task any longer and wants to engage third parties for the same, this Court be pleased to issue directions to the respondent no. 2 to release monies from the Escrow Account in consideration of the major repair and maintenance work carried out by the petitioner under the orders of this Court between 06.08.2020 and 24.09.2020, which adds up to an approximate sum of INR 5.25 crores. For this purpose, it has already forwarded the requisite bills to respondent no. 1.

70. On the other hand, Mr. Sethi submits that the entire project work has been carried out from the monies of the Bank under the financing agreements, which is evident from the contents of paragraphs 19, 41, 42 of the petition. However, once the petitioner was declared as

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Page 37 Monday, May 18, 2026
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a NPA and failed to make repayment of installations, an event of default was triggered under Clause 10.1.1 of the Common Loan Agreement. Therefore, respondent no. 2, by way of Clause 10.4.3 of the Common Loan Agreement, was entitled to either suspend further drawings of the loan amount or suspend or terminate further use thereof or cancel the loan itself. By relying on Clause 11.1.1 of the Common Loan Agreement, he submits that once there was an event of default, the senior lenders were granted a right to suspend or terminate the petitioner's further access to Escrow Account.

71. Mr. Sethi further submits that as per Clause 4 of the Escrow Agreement which governed withdrawals from the Escrow Account, especially Clause 4.1.1 thereunder, set down certain purposes for which the respondent no. 2 was entitled to withdraw monies from the Escrow Account and the order of precedence thereto, for appropriating them. As per Clauses 4.1.1 (b) and (i), the amounts in the Escrow Account could be utilized for all payments relating to construction of the project highway, subject to and in accordance with the conditions, if any, *in the Financing Agreements as also debt service payments in respect of subordinated debt*. He submits that after all, these monies have been entrusted to the lenders by the public, to whom they owe a fiduciary responsibility, and releasing the same to a perpetual defaulter such as the petitioner would be unsound, cause further loss and make recovery of the loan amount even more difficult. He further submits that a Coordinate Bench of this Court, in *Transstoy Tirupati Tiruthani Chennai Tollways Private Limited* v. *Allahabad Bank*, 2019 SCC OnLine Del 9080, has already observed that the Courts cannot be seen to impede enforcement of contractual provisions by creditor-Banks unless a clear case of abuse of power, unreasonableness, and irrationality is brought forth. He submits that considering the fact that the petitioner has been completely unable to make out any case of unreasonableness and irrationality since all the acts of the respondent no. 2 have remained within the parameters of the agreements executed between the parties. In these circumstances, he prays for this application to be dismissed.

72. Having carefully perused all the agreements executed between the parties, it becomes evident that recital (A) to the Escrow Agreement makes the Concession Agreement a part of the Escrow Agreement. Furthermore, Article 1.4 of the Concession Agreement does indeed set down the order of precedence of the Agreements between the parties as follows : the Concession Agreement, followed by the Escrow Agreement, which would then be followed by all other agreements and documents forming a part of this arrangement and that would include the financing agreements. A necessary corollary thereof is that the Common Loan Agreement and the Substitution Agreement follow the Escrow Agreement in precedence. Considering

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Page 38 Monday, May 18, 2026
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the fact that respondent no. 2 is a party to the Escrow Agreement, it is, along with all the other lenders, bound by this order of precedence.

73. For the purpose of releasing monies from the escrow account, the parties are governed by the Escrow Agreement, over all other agreements. Now, Clause 4.1.1 (d) of the Escrow Agreement required respondent no. 2 to prioritize release of amounts from the Escrow Account for the purpose of operation and maintenance of the highway viz. amounts due to the lenders under the loan agreements. This provision in the Escrow Agreement reads as under:

"4. WITHDRAWALS FROM ESCROW ACCOUNT

4.1 Withdrawals during Concession Period

4.1.1 At the beginning of every month, or at such shorter intervals as the Lenders' Representative and the Concessionaire may be written instructions determine, the Escrow Bank shall withdraw amounts from the Escrow Account and appropriate them in the following order by depositing such amounts in the relevant Sub-Accounts for making due payments, and if such payments are not due in any month, then retain such monies in such Sub-Accounts and pay out therefrom on the Payment Date (s):

(a) all taxes due and payable by the Concessionaire;

(b) all payments relating to construction of the Project Highway, subject to and in accordance with the conditions, if any, set forth in the Financing Agreements;

(c) O & M Expenses, subject to the ceiling, if any, set forth in the Financing Agreements;

(d) O & M Expenses incurred by the Authority, provided it certifies to the Escrow Bank that it had incurred such expenses in accordance with the provisions of the Concession Agreement and that the amounts claimed are due to it from the Concessionaire;

(e) Concession Fee due and payable to the Authority;

(f) monthly proportionate provision of Debts Service due in an Accounting Year;

(g) Premium due and payable to the Authority;

(h) all payments and Damages certified by the Authority as due and payable to it by the Concessionaire pursuant to the Concession Agreement, including repayment of Revenue Shortfall Loan;

(i) debt service payments in respect of Subordinated Debt;

(j) any reserve requirements set forth in the Financing Agreements; and

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

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Page 39 Monday, May 18, 2026
Printed For: Mr. Rajeeve Mehra
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74. Not only the afore-extracted provision, even Article 31.3.1 (b) of the Concession Agreement stipulated that all payments relating to construction of the project highway shall attain precedence for withdrawal of the monies from the Escrow Account. The record also shows that the petitioner was indeed declared a NPA w.e.f. 30.06.2019 and that respondent no. 2 had an undeniable right to not only seek termination of the Concession Agreement but also substitution of the petitioner as the Concessionaire under the Substitution Agreement. However, considering the reliefs sought in the application and these petitions, I find that it is not necessary for this Court to venture into the issue of substitution rights of respondent no. 2. I have also considered the decision in *Transstoy* (supra) relied upon by respondent no. 2, and find it inapplicable to the facts of the present case. In that decision, the Concessionaire was found guilty of diverting toll collections from the Escrow Account, whereas the petitioner herein has not indulged in any such conduct. Furthermore, the Court in that case was not dealing with a situation like the present one whereunder the parties have agreed upon an order of precedence which gives priority to the Escrow Agreement over all other financing agreements.

75. For the time being, in the facts of the present case, the agreements collectively require respondent no. 2 to release monies from the Escrow Account for the purpose of repair and maintenance work of the highway, especially in public interest. It was the essence of this argument which had convinced this Court, on 05.08.2020, to direct respondent no. 2, on an interim basis, to release monies to the petitioner from the Escrow Account for the purpose of carrying out repair and maintenance work as directed by respondent no. 1. As a result, the petitioner had been carrying out the work and submitting a Request for Inspection (RFI) on a daily basis to respondent no. 1, to have its repair work inspected and verified. Once respondent no. 1 would signify its approval of this work, the certified RFIs would be submitted to respondent no. 2 for release of monies from the Escrow Account. From the documents placed before this Court, evidently, all the petitioner's RFIs w.e.f. 06.08.2020 till 30.08.2020 were duly approved and certified by the respondent no. 1 which ensured release of INR 17 lakh from the escrow account in favour of the petitioner, as against its claim for approximately INR 22 lakh. However, w.e.f. 31.08.2020 the respondent no. 1 has rejected all the work carried out by the petitioner, which culminated in the events of 08.09.2020 when the respondent no. 1 refused to release any further amounts in the Escrow Account to the petitioner for work which was not certified by respondent no. 1. The petitioner claims that these rejections are malafide while respondent no. 1 has argued, by drawing my attention to its own tabular summary of the RFIs, that the work submitted by the

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Page 40 Monday, May 18, 2026
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SCC Online Web Edition: https://www.scconline.com
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petitioner was inadequate which resulted in the rejection. However, during the course of arguments, it was found that the tabular summary filed by respondent no. 1 was unreliable inasmuch as it shows RFIs dated 23.08.2020 and 24.08.2020 as having been rejected when the documents placed on record show otherwise. The petitioner has also alleged that earlier, although its lenders used to assess its work through their own Engineer, this has stopped owing to the fact that the petitioner is a NPA and its lenders do not wish to incur any further expenditure on assessing the petitioner's work or certifying it. These issues, I find, also do not fall within the purview of examination of this Court. The only relevant aspect which arises out of these contentions is the admitted position that as on date, the petitioner has not been paid for any work it did, as per its undertaking before the Court, for the period between 31.08.2020 to 24.09.2020.

76. The petitioner claims that the value of the major repair and maintenance work which remains unpaid, as on date, is INR 5.25 crores, which it has borne alone by taking further loans from private lenders. Notwithstanding the fact that respondent no. 1, on 03.09.2020, filed an affidavit before this Court expressing its dissatisfaction with the works executed by the petitioner, the petitioner continued to execute the major repair and maintenance work till 24.09.2020. Admittedly, while the respondent no. 1 has only approved some of the work carried out by the petitioner during this period and not all of it, this Court cannot delve into the merits of the approval or lack thereof.

77. It will, however, be a travesty of justice to exact all of this repair and maintenance work from the petitioner, under Court orders, without compensating it for its efforts. I am of the view that the petitioner should not be deprived of its right to recover the amounts it spent, out of the toll collection deposited in the escrow account, especially in view of the admission on the part of respondent no. 1 that the petitioner has indeed carried out major repair and maintenance work of the highway, albeit not to its satisfaction. Moreover, although Clause 4.1.1 of the Escrow Agreement holds the petitioner entitled to recover the entire costs incurred in carrying out major repair and maintenance work as per the directions of respondent no. 1, but since the petitioner's bills for these works remain unverified by respondent no. 1, interest of justice demands that the petitioner ought to be reimbursed for some part of the amount it has spent on the major maintenance work.

78. The application is, therefore, liable to be partly allowed by directing respondent no. 2 to pay the petitioner, at this stage, a sum equivalent to 50% of INR 5.25 crores from the Escrow Account for the costs it claims to have incurred in carrying out major repair and maintenance work. However, this direction would be subject to any

SCC Online Web Edition, © 2026 EBC Publishing Pvt. Ltd.
Page 41 Monday, May 18, 2026
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orders passed in this regard, including any orders for restitution or further payment, in arbitration which the parties propose to invoke.

79. It is made clear that these directions would not have any bearing on the remaining inter-se rights of the parties under the Concession Agreement and the other agreements, including the arrangement between the petitioner and its lenders to release monthly tranches of INR 71 lakh to the petitioner for general maintenance of the highway and toll plaza as recorded in the Minutes dated 02.08.2016.

Directions

80. Accordingly, in view of the aforesaid discussion, these petitions are disposed of with the following directions:

i. The first petition, OMP(I)(COMM) 144/2020 seeking stay of the impugned NITs dated 17.04.2020 and 05.05.2020 is dismissed.

ii. The second petition, OMP(I)(COMM) 263/2020, is partly allowed by staying the operation of notice/letters No. NHAI/PIU-RTK/B-H/LTR/20-21/300 dated 27.05.2020 and letter No. NHAI/PIU-RTK/B-H/LTR/20-21/339 dated 28.05.2020 suspending the rights of the petitioner under the Concession Agreement. However, this direction shall only subsist for a period of three months from today, or until further orders in this regard are passed in arbitration, whichever is earlier. It is made clear that in case the petitioner fails to invoke arbitration within three months, this interim order will no longer continue to operate. Furthermore, while carrying out toll collections, the petitioner shall ensure that all sums collected are duly deposited in the escrow account, as per the stipulations of the agreements between the parties.

iii. In IA 6365/2020, the respondent no. 2 is directed to release 50% of INR 5.25 crores to the petitioner, after deducting the sum of INR 42 lakh which has already been paid to it pursuant to the orders of this Court.

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§ 2020:DHC:2946

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