



2026:AHC:136634-DB

A.F.R.
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HIGH COURT OF JUDICATURE AT ALLAHABAD

WRIT - C No. - 4559 of 2025

Tata Projects Limited

.....Petitioner(s)

Versus

Union of India and 2 others

.....Respondent(s)

Counsel for Petitioner(s) : Varad Nath
Counsel for Respondent(s) : Aushim Luthra, A.S.G.I., Pragya
Pandey, Pranjal Mehrotra

Court No. – 1

HON'BLE AJIT KUMAR, J.
HON'BLE SWARUPAMA CHATURVEDI, J.

For convenience, this judgment is structured as per the following index for proper consideration of facts, controversy involved, law points that arise for consideration in this petition.

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1. FACTS

1. Briefly stated facts of the case are that respondent- National Highway Authority (hereinafter referred to as 'Authority') issued a Request For Proposals (hereinafter referred to as 'RFP') on 11th December, 2018 for widening and strengthening for improvement and up-gradation of NH-709A, Garhmukteshwar (Chainage-83+200 of NH-24) to Meerut (Chainage 9+860 of NH-235) including connector to NH-119 Package XII in the State of Uttar Pradesh. The contract of the Highway was for a stretch of 50.254 Km at the cost of Rs.940.68 Crores.

2. The petitioner upon being successfully selected as a bidder, was issued with a Letter of Acceptance (for short 'LOA') on 12th March, 2021 for the development of the above section of NH-709A.

3. With the issuance of letter of acceptance and signing of EPC agreement between the authority and the contractor with declaration of the appointed day as 10th October, 2021 prescribing the dead line for completion of project as 10th October, 2023, the petitioner submitted work programme by way of Narrative Statement on 2nd December, 2021 as per Article 10(iii)-b. This narrative statement of programme had project overview, objective of the document qua methodology and assumption made by which the works programme have been developed, eight points scope of work, scheduling of methodology with key dates of projects with reference to Milestone-1, Milestone-2 and Milestone-3 totaling 730 days from the appointed day. It also referred to the land handover as per Article 3 & 8, utility shifting, submissions of approval of drawing, execution of work.

4. The MSE International link, the Authority's Engineer forwarded the above narrative statement of programme to the authority namely the Project Director, National Highways vide letter dated 20th December, 2021.

5. Under the contract while the NHAI was to provide absolute possession of the entire stretch of the highway area free from encumbrances/ hindrances to facilitate the work, which according to the respondent No.- 2, was provided to the petitioner as per the acknowledgment by the petitioner himself under his letter dated 26th August, 2021. Petitioner repeatedly raised a plea of not providing hindrance free 5 kms contiguous stretch at a time to carry out the work which delayed the project work getting completed within the time schedule. Ultimately, a curative notice was issued to the petitioner on 11th October, 2024 to which petitioner submitted a detailed reply on 19th November, 2024 raising the issue of not providing free stretch of land as per the agreement within 150 days which resulted in delay in completion of project. Petitioner thereafter also repeatedly made applications vide different replies but according to him, all remained unaddressed and ultimately a show cause notice was issued to him to which he also submitted a reply. However, contract was terminated mid-term vide order dated 25th November, 2024 by the respondent No.- 2 citing various provisions contained under various clauses of the agreement for low maintenance and also not completing the project within time. It is this order terminating the contract which is impugned in this petition and so also the consequential actions by the concerned respondent.

2. Record of Proceedings

6. In order to put the record straight we reproduce the record of proceedings in following manner:

(i). This petition after adjournment being granted on 18th February, 2025 while came up for admission as a fresh, a preliminary objection was raised as to the maintainability of this petition, however, on 6th March, 2025 an adjournment was granted and then the petition was entertained on merits and interim relief was also granted. The order dated 18th March, 2025 is reproduced hereunder:

“Heard Sri Shashi Nandan and Sri Amit Saxena, learned Senior counsels assisted by Sri Varad Nath, for the petitioner and Sri Makrand Adkar and Ms. Pragya Pandey, learned counsel for the respondents.

The petitioner was awarded a contract on 26.8.2021 for construction of a patch of national highway. The work itself was to be completed by 10.10.2023. By the impugned action the contract has been cancelled on the ground that though the period for completion of work has expired yet, physical completion of work is to the extent of 51.05%, whereas financial progress is only to the extent of 48.37%. Various documents and reports have been relied upon to contend that in fact the land on which road was to be constructed was not made available to the petitioner on account of various protests and disputes raised by the tenure holders and there was thus no failure on part of the petitioner to comply with the contract. It is also submitted that the respondents themselves have acknowledged such facts and have extended the term of contract thrice.

Learned Senior counsel for the petitioner then argues that 91% of the land for road construction has been made available only by December, 2024 and, therefore, the respondents having failed to provide the land cannot allege any failure on part of the petitioner in complying with the contract. It is also submitted that a fresh tender is now floated, wherein 15 months time is allowed for completion of work and the cost of project is assessed at Rs.873.31 crores which would result in additional financial losses to the State of several hundred crores. The petitioner further contends that they undertake to complete the work by December, 2025 itself.

On behalf of the petitioner, it is submitted that the overwhelming public interest requires this Court to intervene in the matter as not only the project would be completed in a shorter time but there would be substantial saving for the NHAI if the petitioner is allowed to complete the contract.

The petition is opposed by Sri Makrand Adkar, learned counsel for the respondents primarily on the ground that there is an arbitration clause and, therefore the remedy of the petitioner would be to approach the arbitrator once the contract is cancelled. It is also submitted that the authorities themselves have adopted a generous approach towards the petitioner and various extensions have been granted as there has been substantial failure on part of the petitioner in concluding the contract, as such the authorities are left with no option but to terminate the contract and issue fresh bids.

Learned counsel for the respondents also submits that the allegation that there was a failure on part of NHAI in offering land for road construction is factually incorrect.

We have heard learned counsel for the parties and have perused the materials on record.

Ordinarily this Court would not entertain a writ where there exists an arbitration clause and the allegation in the writ pertains to violation of various clauses of contract. However, in the facts of the present case, we are proceeding to examine the cause primarily for two reasons. The issue as to whether land for the project was made available earlier or is made available only in December, 2024, as is alleged in the petition, can be examined if a reply is received from the respondents on this aspect. Firstly, we find that by issuing re-tender the road will now be completed within 15

months which would expire some time in June, 2026, whereas the petitioner undertakes to complete the work by December, 2025. Secondly, there is a substantial enhancement of cost. In such circumstances, we are of the prima facie view that the core issue of contest between the parties can be examined for the limited purposes, by this Court, so as to ascertain as to whether predominant public interest warrants exercise of writ jurisdiction by this Court in the facts of the present case, or not?

Learned counsel for the respondents fairly submits that the NHAI shall file an affidavit, within a week, specifying the dates when the possession of the land was given to the petitioner. A fair stand is also taken that till such affidavit is filed the respondents shall not award any fresh contract. In view of the fair stand taken by the respondents, we adjourn the matter to 25.3.2025. An advance copy of the affidavit proposed to be filed by NHAI will be served upon the counsel for the petitioner by 25.3.2025.

Post as fresh once again on 25.3.2025.”

(emphasis added)

(ii). Thus, the Court granted interim relief to the effect that no fresh contract shall be awarded in favour of a third party until such affidavit as required was filed. Thereafter certain dates were fixed in the matter and interim order was made to continue and the Court was compelled to make strict observations on 26th November, 2025 that if the order dated 18th March, 2025 was not complied with by the next date, the Court shall be at liberty to exercise its extraordinary power under Article 215 of the Constitution. The order dated 26th November, 2025 is reproduced hereunder:

“1. Heard Sri Varad Nath, learned counsel for the petitioner and Sri Rakesh Pandey, learned Senior Advocate assisted by Sri Pranjal Mehrotra, for respondents no. 2 and 3.

2. At the very outset, learned counsel for the petitioner has drawn the attention of this Court to the last paragraph of the order dated 18.03.2025, where there was a specific direction to the NHAI which is unequivocal, unambiguous and incapable of multiple interpretations. The said direction was to file an affidavit within a week of the said order specifying the dates when the possession of the land was given to the petitioner. The said order admittedly has not been complied with till date. The Court takes note of this conduct on the part of the respondents as contumacious. An order that is passed by the Court which is absolutely categorically clear, had to be complied with.

3. This was subsequently reiterated in the order by this Court on 16.09.2025 in paragraph '1' where it is stated that the affidavit which was required to be filed by the respondent specifying the dates when the possession of the land was handed over to the petitioner and the work was

to be executed, has not been disclosed by the NHAI in any of the affidavit filed by it so far.

4. Learned counsel for the respondent NHAI submits that they have filed another affidavit, however, the disclosure required by this Court was not there in the said affidavit.

5. This Court takes serious note of the conduct of the respondent no. 2. However, by way of a last opportunity, ten days' time is granted to the respondents to comply with the order dated 18.03.2025 on or before the next date of hearing, failing which this Court shall be at liberty to exercise its jurisdiction under Article 215 of the Constitution and proceed to initiate contempt proceedings against the Chief General Manager of the National Highway Authority of India on the next date of hearing.

6. The advance copy be supplied to learned counsel for the petitioner and thereafter, three days' time is granted to petitioner to file any response, if any, to it.

7. Put up this matter on 09.12.2025 in daily cause list.”

(emphasis added)

(iii). It is after the above order was passed that a supplementary affidavit came to be filed bringing on record the ‘Handover Memorandum’ on 30th November, 2025. Thereafter the matter was heard on certain dates and finally it was reserved on 9th February, 2026. Seeking certain clarification as to whether the document brought on record was really a ‘Handover Memorandum’ within the meaning of Article 8.2 of EPC Agreement, the matter was listed for further hearing on 24th April, 2026. Learned Senior Advocate for NHAI sought time to bring the entire document and with further averments clarifying its stand regarding Handover Memorandum and 11th May, 2026 was fixed. The document namely Handover Memorandum came to be filed stating clearly that it was document acknowledging handing over possession of more than 90% of land initially. On 15th May, 2026 the matter was finally heard and judgment was reserved.

3. Arguments Advanced on behalf of of Petitioner

7. Assailing the order terminating the contract following arguments have been advanced by learned Senior Advocate :

(I). First party to the contract was under an obligation to procure the site and provide the same as an unencumbered land with a 'Right of Way' to the contractor as per the schedule 'A' of the bid document in terms of its Article 8.1 and 8.2 and liability of the contractor for the termination of contract mid-term would only be in the event of default as per the Article 23 of the agreement.

(II). With the appointment of Authority's Engineer as an interface between the first party and the second party to agreement, duties were assigned under Article 18.2 to the Authority's Engineer regarding assessment of performance of work under the contract and to take an appropriate action with the approval of the authorities before determining time extension, additional cost, if any to be paid, termination payment, if any, issuance of completion certificate and any other allied matter that was not specified and which may have created financial liability on either party. It was argued that delegation of power under the agreement by the first party to its engineer was to not only to ensure that second party carried out the work under the contract as per terms and conditions laid therein but also to impress upon the authority to facilitate delivery of possession of hindrance free land. So there was to be a coordinated effort between the Authority's Engineer and the contractor to get the task accomplished as per the agreement. However, Authority Engineer's crucial reports submitted time to time for extension of time, were not paid any heed.

(III). Despite letter written to the Authority's Engineer on 7th July, 2022 citing reasons for delays due to obstructions/ impediments, the details of which were given in the letter and request being made for extension of 248 days and further, despite the fact that Authority's own Engineer had recommended for 130 days extension earlier, the respondent authorities provided only 42 days extension vide their letter dated 8th August, 2022 and that too without providing hindrance free stretch of land to carry out work. Inasmuch as, the highway authority always failed to discharge its

duty to provide 5 kms long stretch free land at a time to facilitate the smooth and hurdle-free working.

(IV). The respondents' own admission in their letter dated 16th October, 2023 written to the Sub-Divisional Magistrate that plot No. 303 in village Sisoli, Plot No.- 220 in village Bhagwanpur Chattawan and plot No.- 281 in village Mau Khas were not provided, the project got delayed.

(V). The acquisition notice under the National Highways Act, 1956 published on 5th February, 2024 for a stretch of 12.13 km land on Gardmukteshwar to Meerut section published on 5th February, 2024 is an admission of the respondents highway authority, the first party to contract, to the effect that 12 kms land was still not available for which they were proceeding for acquisition. The documents sufficiently demonstrated that possession of the entire stretch or at least 90% of total land was still not available to the National Highway to be handed over to the petitioner so as to carry out the work and thus, petitioner could not have been saddled with the liability of delay in work in the absence of available land free from encumbrances and hindrances in terms of Article 9.2 of the agreement.

(VI). The manner and method in which impugned order has been passed showed lack of application of mind by the authority as none of the facts pleaded in reply nor, the relevant material available with the respondent, was taken into account.

(VII). Although the petitioner had submitted a detailed reply to the show cause notice and also letter of Authority's Engineer raising issues *qua* availability of land with the respondents and yet the respondents failed to consider any of such letters nor, even referred to reply submitted by the petitioner while arriving at a conclusion that the contractor, namely second party to the contract was chiefly responsible for the delay in completion project for having carried out the work at a very slow pace. Thus, this finding arrived at under the order impugned, according to the

learned counsel for the petitioner, was perverse. Thus lack of application of mind by the authorities, has vitiated the order impugned and as such it was rendered unsustainable.

(VIII). The National Highway Authority was very much State within the meaning of Article 12 of the Constitution and, therefore, any act even in the realm of contract, if was a result of arbitrary exercise of power, as the case in hand was, it stood hit by Article 14 of the Constitution and hence deserved to be interfered with by even a writ Court.

8. Relying upon the Authority's Engineer's letter dated 26th September, 2022 Mr. Saxena drew the attention of the Court towards the last remark column, according to which 15.926 kms of stretch out of total 50.25 kms. i.e. 32% was hindered and work front was not available due to standing trees, land acquisition issues, building, religious structures, government structures. Further, the contractor was unable to carry out the construction work upto 3.2 km at a stretch in length since 15th July, 2022 due to Dotai villagers' agitation and Jama Masjid Eidgah Samiti' stand, who were demanding 4 times compensation *qua* their land required for shifting the Dotai Mosque Eidgaah and demand for another pass 2.392 kms. He submitted that this document had been filed as Annexure-14 to the petition and referred to in paragraph 39 of the writ petition which had not been specifically denied vide paragraph 28 of the counter affidavit.

9. Sri Saxena emphasized further that despite twice order being passed by this Court on 18th March, 2025 and 9th December, 2025, no document had been filed giving date-wise chart of handing over the available vacant land to the petitioner with 5 km contiguous stretch in terms of the agreement, and it also reflected fair admission of the pleadings raised in the writ petition with supported documents brought on record and hence petitioner could not have been blamed for delays in completion of task under the project *per* agreement.

10. It was further argued that any fresh opportunity to a new contractor would not only enhance the project cost further but also further delay in completing the formality. Further, it was argued that considering the fact that 50% of the physical work was carried out under the project by the petitioner, overwhelming public interest would be to get the project completed by the present petitioner subject to the escalation of price for the project having remained stalled over a period of more than one year.

11. Mr. Saxena lastly argued that given an opportunity, petitioner would be completing the projects in terms of the agreement in the next 14 months' time and this fact had been pleaded in paragraph 19.9 of the rejoinder affidavit.

4. Supportive Documents placed on behalf of petitioner

12. In support of his above submissions, learned Senior Advocate has taken the Court to the various documents in the nature of letter written by the Authority's Engineer to the respondent No.2 dated 20th December, 2021 and letter of the petitioner to respondent No.- 2 dated 7th July, 2022 then again letter written by the petitioner to respondent No.- 2 dated 17th August, 2022 in reply to the letter of respondent No.- 2 dated 8th August, 2022, another letter written by the petitioner to the respondent No. 2 on 30th August, 2022. Then again petitioner's letter dated 29th September, 2022, which was accompanied by the Authority's Engineer report/letter dated 26th September, 2022. Again letter of the petitioner dated 21st December, 2022 to the respondent No. 2 in reply to the letter dated 9th November, 2022, then again letter dated 21st December, 2022 subsequently letters written on 3rd January, 2023 and 6th January, 2023 and the delay analysis report prepared by the petitioner and sent vide letter dated 17th March, 2023, letter dated 10th July, 2023 then letter of Authority's Engineer dated 1st August, 2023, letter dated 12th August, 2023 and 30th September, 2023 to the respondent No.- 2, Authority's Engineer report to the respondent No.- 2 dated 21st November, 2023, 10th July, 2024, letter of the petitioner dated 17th September, 2024 to the

respondent No. 2 and then authority's engineer's letter dated 25th August, 2023 and 16th August, 2024. All these correspondences took places between the petitioner and the authority engineer, his report and respondent's authority prior to the issuance of cure period notice dated 11th October, 2024.

5. Arguments advanced on behalf of NHAI

13. Meeting the above submissions, Sri Rakesh Pande, learned Senior Advocate appearing for NHAI has raised following points:

(I). In terms of the agreement reached between the parties more than 90% of the land was made available to carry out the project and this was acknowledged by the petitioner himself under the letter of their authorized signatory dated 21st September, 2021. Thus, as on 21st September, 2021 90% of the land was made available and only 10% of the land was made to available.

(II). The contract very specifically provided vide Article 9.2 that hindered land with building structures on land, trees and any other immovable property on or attached to the site shall be referred to in the 'Handover Memorandum' will be subject to Article 8.2(iii). According to him, vacant land and encumbered land are two different things. The unencumbered land means a land regarding which there is no claim of title or possession and it is free from encumbrances. The building structure and the trees attached to the site were to be ultimately removed by the contractor as per Article 9.2 read with 9.3, 9.4 and 9.5 of the agreement to ensure that the land remains vacant for execution of work. Thus, according to Mr. Pande, the existence of utilities, structures, poles and trees would not amount to such hindrances which may have delayed the project and it was for the second party of contract to have removed them with the assistance of the authority.

14. According to Mr. Pande, status of land in possession was 94.76% and, therefore, it would be wrong to suggest even that possession was not made available.

6. Supportive documents placed on behalf of NHAI

15. In support of his above submissions Mr. Pande, learned Senior Advocate has placed reliance upon the documents namely Handover Memorandum filed as Annexure - 2 to the supplementary counter affidavit. According to him as per documents brought on record and contract petitioner had been allotted hindrance free land and sufficient time to complete the work with further extension of time which he had prayed for and, therefore, the contract was rightly terminated mid-term upon failure of petitioner to carry out necessary maintenance and also failure in completing the project within time. Fresh tender bids have been entertained and tender has been finalized and it would have been awarded but for the interim protection granted to the petitioner by this Court. He also placed before the Court arbitration clause of the agreement vide Article 26, which the petitioner, according to him, ought to have invoked as he raised pleas regarding delays at the end of the respondent authority NHAI which the NHAI seriously disputed. He argued that material brought on record by way of annexure could be better appreciated and examined to arrive at conclusion by the arbitrator instead of this Court exercising power under Article 226 of the Constitution.

16. In support of his submission regarding arbitration Mr. Pandey, has placed reliance upon the judgment of Supreme Court in the case of **Union of India and others v. Puna Hinda (2021) 10 SCC 690**.

7. Rejoinder argument advanced on behalf of the Petitioner

17. Meeting the above submissions in rejoinder, Mr. Saxena, learned Senior Advocate has again relied upon the documents filed along with counter affidavit which, according to him, demonstrate that the land was not made available as per 'Handover Memorandum' and the subsequent

acquisition notification itself showed that entire land was not available till 2024. He has placed reliance upon the letter of NHAI dated 15th March, 2024 which was sufficiently indicative of a fact that amount of compensation was being processed for the purposes of payment to the land owners in the matter of acquisition of land and the letter dated 12th July, 2024 showed that in between Garhmukteshwar and Meerut of NHA-709A, it was for non payment of compensation that project could not be carried through and farmers/ land owners protested against possession. These documents have been brought on record as Annexure - 4 to the rejoinder affidavit filed in reply to the supplementary counter affidavit.

18. Mr. Saxena had also placed reliance upon the document of respondent that showed that possession of entire land was not handed over till as late as 2023-2024 as against the claim set up through the acknowledgment letter of petitioner.

19. Meeting the submission on the point of alternative remedy by way of arbitration, invoking the relevant clause of the agreement and scope of interference by High Court in matters of contract, Sri Saxena has placed reliance firstly upon the authority of Supreme Court in the case of **ABL International Ltd and others v. Export Credit Guarantee Corporation of India Ltd and others (2024) 3 SCC 553** and **MP Power Management Company Ltd v. M/s Sky Power Southeast Solar India Pvt Ltd. and others (2023) 2 SCC 703** and **A.P. Electrical Equipment Corporation v. Tehsildar and others (2025) SCC Online SC 447**.

8. Discussion & Analysis

20. Having heard learned counsel for the respective parties and having perused the records, We find there to be a serious dispute in this case as to the real and effective transfer of unencumbered and hindrance free land to the petitioner as per the agreement at the very beginning and thereafter as well, with free 'Right of Way' and hindrances free land at a

stretch of 5 kms in contiguous parts of the total length, which made it impossible for contractor to complete the project within the time line prescribed under the agreement; and further that the respondent authority of NHAI instead of giving objective construction to the replies filed by the petitioner and ignoring reports of the Authority's own Engineer, it proceeded to rescind the contract mid term. Thus following two points arise for consideration of this Court to test the correctness of the order impugned:-

(I). Whether the terms conditions given under the agreement in handing over the possession of land site after its due procurement in terms of Article 8.1 and 8.2 of the agreement and the documents brought on record by the authority do effective factum of delivery of possession of such land site without there being any dispute whatsoever.

(II). Whether disputed questions of facts arise in this case for which the petitioner should be relegated to the remedy of arbitration invoking Article 26 of the agreement or there is a fair admission of the respondents reflected from the documents brought on record as to issue and it is all question of law regarding exercise of power to terminate the contract mid-term for being arbitrary and unlawful and paramount public interest involved in the matter to hear and decide the petition on merits.

21. In order to find answer to the above points it is necessary for us to first go through the basic terms and conditions prescribed for under the agreement called Engineering, Procurement and Construction Agreement (for short 'EPC').

22. The basic features like making available the land, free 'Right of Way' to carry out the work, terms and conditions, notice etc., force majeure and termination of contract mid-term as provided under the EPC Agreement are summarised as under:

(i). The work was to be completed within two years of the appointed day.

(ii). The authority was under obligation vide Article 3 to provide at least not less than 90% of the procured land to carry out the project, free from encumbrance within 30 days of the agreement, approval of the railways for general arrangement drawings so as to construct road over- bridges/ under-bridges at level crossings on the project highway, within 60 days of the appointed date.

(iii). Delay in the right of way by the authority (NHAI) or approval of general arrangement drawing (for short 'GAD') by the railways would entitle the contract to damages, environment, clearance certificate, prior to the date of issuance of LOA. Article 3 deals with obligations of Authority. Relevant Article 3.1(i), (ii) & (iii) are reproduced hereunder:

“3.1 Obligations of the Authority

(i) The Authority shall, at its own cost and expense, undertake, comply with and perform all its obligations set out in this Agreement or arising hereunder.

(ii) The Authority shall be responsible for the correctness of the Scope of the Project, Project Facilities, Specifications and Standards and the criteria for testing of the completed Works.

(iii) The Authority shall, upon submission of the Performance Security as per the RFP by the Contractor, shall provide to the Contractor:

(a) No less than 90% (ninety per cent) of the required Right of Way of the Construction Zone of total length of the Project Highway within a period of 30 (thirty) days from the date of this Agreement, which shall be in contiguous stretches of length not less than 5 (five) kilometre.

(b) approval of the general arrangement drawings (the "GAD") from railway authorities to enable the Contractor to construct road over-bridges/under-bridges at level crossings on the Project Highway in accordance with the Specifications and Standards, and subject to the terms and conditions specified in such approval, within a period of 60 (sixty) days from the Appointed Date, and reimbursement of all the costs and expenses paid by the Contractor to the railway authorities for and in respect of the road over-bridges/under bridges; and

(c) all environmental clearances as required under Clause 3.3 for the project Highway are not required.”

(emphasis added)

(iv). Vide Article 4 certain obligations were cast upon the contractor for carrying out the work under the contract as per the EPC Agreement

carrying out survey etc. and management and then obligations relating to the shop contracts and other agreements regarding employment of foreign nationals and contract personnel, coordination of work with the authority and clearances of site.

(v). Article 5.2 provided vide its clause (g) & (h) that authority shall be giving guarantees as to good and valid right to the site and grant of 'Right of Way' in respect thereof, to the contractor and shall have to ensure that it has procured right of way and environment clearances *qua* 90% of the total length of highway project. This clause (g) & (h) are reproduced hereunder:

“(g). It has good and valid right to the Site and has the power and authority to grant the Right of Way in respect thereof to the Contractor; and

(h). It has procured Right of Way and environment clearances such that the Contractor can commence construction forthwith on 90% (ninety per cent) of the total length of the Project Highway.”

(vi). 'Site' has been defined vide Article 8.1 and 'Right of Way' has been defined vide clause 8.2 of Article 8 and relevant sub-clauses (i), (ii) & (iii) of the said article, relevant for the purposes of the case. Article 8.1 & clauses (i), (ii) & (iii) of Article 8.2 are reproduced hereunder:

“8.1 The Site

The site of the Project Highway (the "Site") shall comprise the site described in Schedule-A in respect of which the Right of Way shall be provided by the Authority to the Contractor. The Authority shall be responsible for:

(a) acquiring and providing Right of Way on the Site in accordance with the alignment finalized by the Authority, free from all encroachments and encumbrances, and free access thereto for the execution of this Agreement; and

(b) obtaining licences and permits for environment clearance for the Project Highway.

“8.2 Procurement of the Site

(i). The Authority Representative, the Contractor and Authority's Engineer shall, within 10 (ten) days of the date of this Agreement, inspect the Site and prepare a detailed memorandum containing an inventory of the Site including the vacant and unencumbered land, buildings, structures, road works, trees and any other Immovable property on or attached to the Site (hereinafter

referred to as the "Handover Memorandum"). Subject to the provisions of Clause 8.2 (ii), the Handover Memorandum shall have appended thereto an appendix (the "Appendix") specifying in reasonable detail those parts of the Site to which vacant access and Right of Way has not been given to the Contractor along with details of hindrances in the Construction Zone. For sake of clarity the Handover Memorandum shall clearly specify the parts of Site where work can be executed. Signing of the Handover Memorandum, in three counterparts (each of which shall constitute an original), by the authorized representatives of the Authority, Contractor and Authority's Engineer shall be deemed to constitute a valid evidence of giving the Right of Way to the Contractor for discharging its obligations under and in accordance with the provisions of this Agreement and for no other purpose whatsoever.

(ii). Whenever the Authority is ready to hand over any part or parts of the Site included in the Appendix, it shall inform the Contractor, by notice, of the proposed date and time such of hand over. The Authority Representative and the Contractor shall, on the date so notified, inspect the specified parts of the Site, and prepare a memorandum containing an inventory of the vacant and unencumbered land, buildings, structures, road works, trees and any other immovable property on or attached to the Site so handed over. The signing of the memorandum, in three (3) counterparts (each of which shall constitute an original), by the authorized representatives of the Parties shall be deemed to constitute a valid evidence of giving the relevant Right of Way to the Contractor.

If the contractor fails to join for site inspection or disputes the parts of the site available for work, the Authority's Engineer shall decide the parts of the site where work can be executed and notify to both the parties within 3 days of the proposed date of inspection. The parties agree that such notification of the Authority's Engineer as mentioned hereinabove shall be final and binding on the parties.

(iii). The Authority shall provide the Right of Way to the Contractor in respect of all land included in the Appendix by the date specified in Schedule-A for those parts of the Site referred to therein, and in the event of delay for any reason other than Force Majeure or breach of this Agreement by the Contractor, it shall pay to the Contractor, Damages in a sum calculated in accordance with Clause 8.3. The Contractor agrees that it shall not be entitled to claim any other damages on account of any such delay by the Authority.”

(emphasis added)

(vii). Vide clauses 9.1 & 9.2 of Article 9 Utilities and Trees have come to be defined. Clause 9.1, 9.2, 9.3 & 9.4 of Article 9 being relevant are reproduced hereunder:

“9.1 Existing utilities and roads

Notwithstanding anything to the contrary contained herein, it shall be the responsibility of the Contractor to ensure that the respective entities owning the existing roads, right of way, level crossings, structures, or utilities on,

under or above the Site are enabled by it to keep them in continuous satisfactory use, if necessary, by providing suitable temporary diversions with the authority of the controlling body of that road, right of way or utility.

9.2 Shifting of obstructing utilities

The Contractor shall, in accordance with Applicable Laws and with assistance of the Authority, undertake the work of shifting of any utility (including electric lines, water pipes, gas pipelines and telephone cables) to an appropriate location or alignment, if such utility or obstruction adversely affects the execution of Works or Maintenance of the Project Highway in accordance with this Agreement. The cost of such shifting, as per estimates prepared by the entity owning the utility and approved by the Authority, shall be reimbursed by the Authority to the Contractor. The scope of work of such shifting of Utilities shall be as indicated in Schedule-B-1. In the event of any delay of such shifting on the part of the contractor, no extension of time for completion of the project and no claims, in any manner, shall be admissible on this account against the Authority.

The work of shifting of Utilities can be taken up by the Contractor any time after signing of the Agreement.

9.3 New utilities

(i) The Contractor shall allow, subject to the permission from the Authority and such conditions as the Authority may specify, access to, and use of the Site for laying telephone lines, water pipes, electricity lines/ cables or other public utilities. Where such access or use causes any financial loss to the Contractor, it may require the user of the Site to pay compensation or damages as per Applicable Laws. For the avoidance of doubt, it is agreed that use of the Site under this Clause 9.3 shall not in any manner relieve the Contractor of its obligation to construct and maintain the Project Highway in accordance with this Agreement and any damage caused by such use shall be restored forthwith at the cost of the Authority.

(ii) The Authority may, by notice, require the Contractor to connect any adjoining road to the Project Highway, and the connecting portion thereof falling within the Site shall be constructed by the Contractor at the Authority's cost in accordance with Article 10.

(iii). The Authority may by notice require the Contractor to connect, through a payed road any adjoining service station, hotel, motel or any other public facility or amenity to the Project Highway, whereupon the connecting portion thereof that falls within the Site shall be constructed by the Contractor on payment of the cost. The cost to be paid by the Authority to the Contractor shall be determined by the Authority's Engineer. For the avoidance of doubt, in the event such road is to be constructed for the benefit of any entity, the Authority may require such entity to make an advance deposit with the Contractor or the Authority, as the case may be, of an amount equal to the estimated cost as determined by the Authority's Engineer and such advance shall be adjusted against the cost of construction as determined by the Authority's Engineer hereunder.

(iv). In the event construction of any Works is affected by a new utility or works undertaken in accordance with this Clause 9.3, the Contractor shall be entitled to a reasonable Time Extension as determined by the Authority's Engineer.

9.4 Felling of trees

The Authority shall assist the Contractor in obtaining the Applicable Permits for felling of trees in non-forest area to be identified by the Authority for this purpose if, and only if, such trees cause a Material Adverse Effect on the construction or maintenance of the Project Highway. The Contractor shall fell these trees as per the Permits obtained. The cost of such felling shall be borne by the Authority and in the event of any delay in felling thereof for reasons beyond the control of the Contractor; it shall be excused for failure to perform any of its obligations hereunder if such failure is a direct consequence of delay in the felling of trees. The Parties hereto agree that the felled trees shall be deemed to be owned by the Authority and shall be disposed in such manner and subject to such conditions as the Authority may in its sole discretion deem appropriate. For the avoidance of doubt, the Parties agree that if any felling of trees hereunder is in a forest area, the Applicable Permit thereof shall be procured by the Authority within the time specified in the Agreement.”

(emphasis added)

(viii). Article 10 provides for design and construction of the project highway. Sub-clause (iv) of clause 10.3 and clause 10.5 are reproduced hereunder:

“10.3 Construction of the Project Highway

(iv). In the event that the Contractor fails to achieve the Project Completion within a period of 90 (ninety) days from the Schedule Completion Date set forth in Schedule-J, unless such failure has occurred due to Force Majeure or for reasons solely attributable to the Authority, the contractor shall be deemed to be ineligible for bidding any future projects of the Authority, both as the sole party or as one of the parties of Joint Venture/ Consortium during the period from Scheduled Completion Date to issuance of Completion Certificate. This restriction is applicable if the contract value of the delayed project is not less than Rs. 300 Crore.

10.5 Extension of time for completion

(i) Without prejudice to any other provision of this Agreement for and in respect of extension of time, the Contractor shall be entitled to extension of time in the Project Completion Schedule (the "Time Extension") to the extent that completion of any Project Milestone is or will be delayed by any of the following, namely:

(a) delay in providing the Right of Way of Construction Zone, environmental clearances or approval of railway authorities, specified in Clause 3.1 (iv);

(b) Change of Scope (unless an adjustment to the Scheduled Completion Date has been agreed under Article 13);

(c) occurrence of a Force Majeure Event;

(d) any delay, impediment or prevention caused by or attributable to the Authority, the Authority's personnel or the Authority's other contractors on the Site; and

(e) any other cause or delay which entitles the Contractor to Time Extension in accordance with the provisions of this Agreement.

(ii) The Contractor shall, no later than 15 (fifteen) business days from the occurrence of an event or circumstance specified in Clause 10.5 (i), inform the Authority's Engineer by notice in writing, with a copy to the Authority, stating in reasonable detail with supporting particulars, the event or circumstances giving rise to the claim for Time Extension in accordance with the provisions of this Agreement. Provided that the period of 15 (fifteen) business days shall be calculated from the date on which the Contractor became aware, or should have become aware, of the occurrence of such an event or circumstance.

Provided further that notwithstanding anything to the contrary contained in this Agreement, Time Extension shall be due and applicable only for the Works which are affected by the aforesaid events or circumstances and shall not in any manner affect the Project Completion Schedule for and in respect of the Works which are not affected hereunder.

(iii) On the failure of the Contractor to issue to the Authority's Engineer a notice in accordance with the provisions of Clause 10.5 (ii) within the time specified therein, the Contractor shall not be entitled to any time Extension and shall forfeit its right for any such claims in future. For the avoidance of doubt, in the event of failure of the Contractor to issue notice as specified in this clause 10.5 (iii), the Authority shall be discharged from all liability in connection with the claim.

(iv) The Authority's Engineer shall, on receipt of the claim in accordance with the provisions of Clause 10.5 (ii), examine the claim expeditiously within the time frame specified herein. In the event the Authority's Engineer requires any clarifications to examine the claim, the Authority's Engineer shall seek the same within 15 (fifteen) days from the date of receiving the claim. The Contractor shall, on receipt of the communication of the Authority's Engineer requesting for clarification, furnish the same to the Authority's Engineer within 10 (ten) days thereof. The Authority's Engineer shall, within a period of 30 (thirty) days from the date of receipt of such clarifications, forward in writing to the Contractor its determination of Time Extension.

Provided that when determining each extension of time under this Clause 10.5, the Authority's Engineer shall review previous determinations and may increase, but shall not decrease, the total Time Extension.

(v) If the event or circumstance giving rise to the notice has a continuing effect:

(a) a fully detailed claim shall be considered as interim;

(b) the Contractor shall, no later than 10 (ten) days after the close of each month, send further interim claims specifying the accumulated delay, the extension of time claimed, and such further particulars as the Authority's Engineer may reasonably require; and

(c) the Contractor shall send a final claim within 30 (thirty) days after the effect of the event or the circumstance ceases.

Upon receipt of the claim hereunder, the Authority's Engineer shall examine the same in accordance with the provisions of Clause 10.5 (iv) within a period of 30 (thirty) days of the receipt thereof.”

(emphasis added)

(ix). Vide Article 11 quality assurance by the contractor, monitoring and supervision by the Authority's Engineer has been provided for. Article 11.8 and 11.14 are relevant and are reproduced hereunder:

“11.8 Inspection

(i) The Authority's Engineer and its authorised representative shall at all reasonable times:

(a) have full access to all parts of the Site and to all places from which natural Materials are being obtained for use in the Works; and

(b) during production, manufacture and construction at the Site and at the place of production, be entitled to examine, inspect, measure and test the Materials and workmanship, and to check the progress of manufacture of Materials.

(ii) The Contractor shall give the Authority's Engineer and its authorised agents access, facilities and safety equipment for carrying out their obligations under this Agreement.

(iii) The Authority's Engineer shall submit a monthly inspection report (the "Inspection Report") to the Authority and the Contractor bringing out the results of inspections and the remedial action taken by the Contractor in respect of Defects or deficiencies. For the avoidance of doubt, such inspection or submission of Inspection Report by the Authority's Engineer shall not relieve or absolve the Contractor of its obligations and liabilities under this Agreement in any manner whatsoever.”

11.14 Delays during construction

Without prejudice to the provisions of Clause 10.3 (ii), in the event the Contractor does not achieve any of the Project Milestones or the Authority's Engineer shall have reasonably determined that the rate of progress of Works is such that Completion of the Project Highway is not likely to be achieved by the end of the Scheduled Completion Date, it shall notify the same to the Contractor, and the Contractor shall, within 15 (fifteen) days of such notice, by a communication inform the Authority's Engineer in reasonable detail

about the steps it proposes to take to expedite progress and the period within which it shall achieve the Project Completion Date.”

(emphasis added)

(x). Vide Article 18 of EPC Agreement provides for appointment and Authority’s Engineer in accordance with the terms of reference set forth in Annexure 1 of Schedule – N. For the purposes of exercise of authority by the Authority’s Engineer force majeure and termination is provided in Article 21 of Part V of EPC. Article 18.2 relevant here in this case is reproduced hereunder:

“18.2 Duties and authority of the Authority’s Engineer

(i) The Authority's Engineer shall perform the duties and exercise the authority in accordance with the provisions of this Agreement and substantially in accordance with the terms of reference ("Terms of Reference" or "TOR") set forth in Annexure-I of Schedule N, but subject to obtaining prior written approval of the Authority before determining:

(a) any Time Extension;

(b) any additional cost to be paid by the Authority to the Contractor;

(c) the Termination Payment;

d) issuance of Completion Certificate; or

(e) any other matter which is not specified in (a), (b), (c) or (d) above and which creates financial liability on either Party.”

(xi). Vide Article 23, 60 days cure period notice was prescribed for. Vide clauses (ii) & (iii) of Article 23, 15 days notice of termination was prescribed for. Vide Article 23.3 termination for Authority’s convenience is prescribed for. Clause (i), (ii) & (iii) of Article 23.1 and Article 23.2 and Article 23.3 are reproduced hereunder:

“23.1 Termination for Contractor Default

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

(a) the Contractor fails to provide, extend or replenish, as the case may be, the Performance Security in accordance with this Agreement;

(b) after the replenishment or furnishing of fresh Performance Security in accordance with Clause 7.3, the Contractor fails to cure, within a Cure Period of 30 (thirty) days, the Contractor Default for which the whole or part of the Performance Security was appropriated;

(c) the Contractor does not achieve the latest outstanding Project Milestone due in accordance with the provisions of Schedule-J, subject to any Time Extension, and continues to be in default for 45 (forty five) days;

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

(e) the Contractor fails to proceed with the Works in accordance with the provisions of Clause 10.1 or stops Works and/or the Maintenance for 30 (thirty) days without reflecting the same in the current programme and such stoppage has not been authorised by the Authority's Engineer;

(f) the Project Completion Date does not occur within the period specified in Schedule-J for the Scheduled Completion Date, or any extension thereof;

(g) the Contractor fails to rectify any Defect, the non-rectification of which shall have a Material Adverse Effect on the Project, within the time specified in this Agreement or as directed by the Authority's Engineer;

(h) the Contractor subcontracts the Works or any part thereof in violation of this Agreement or assigns any part of the Works or the Maintenance without the prior approval of the Authority;

(i) the Contractor creates any Encumbrance in breach of this Agreement;

(j) an execution levied on any of the assets of the Contractor has caused a Material Adverse Effect;

(k) the Contractor is adjudged bankrupt or insolvent, or if a trustee or receiver is appointed for the Contractor or for the whole or material part of its assets that has a material bearing on the Project;

(l) the Contractor has been, or is in the process of being liquidated, dissolved, wound-up, amalgamated or reconstituted in a manner that would cause, in the reasonable opinion of the Authority, a Material Adverse Effect;

(m) a resolution for winding up or insolvency of the Contractor is passed, or any petition for winding up or insolvency of the Contractor is admitted by a court of competent jurisdiction and a provisional liquidator or receiver or interim resolution professional, as the case may be, is appointed and such order has not been set aside within 90 (ninety) days of the date thereof or the Contractor is ordered to be wound up by court except for the purpose of amalgamation or reconstruction; provided that, as part of such amalgamation or reconstruction, the entire property, assets and undertaking of the Contractor are transferred to the amalgamated or reconstructed entity and

that the amalgamated or reconstructed entity has unconditionally assumed the obligations of the Contractor under this Agreement; and provided that:

i. the amalgamated or reconstructed entity has the capability and experience necessary for the performance of its obligations under this Agreement; and

ii. the amalgamated or reconstructed entity has the financial standing to perform its obligations under this Agreement and has a credit worthiness at least as good as that of the Contractor as at the Appointed Date;

(n) any representation or warranty of the Contractor herein contained which is, as of the date hereof, found to be false or the Contractor is at any time hereafter found to be in breach or non-compliance thereof;

(o) the Contractor submits to the Authority any statement, notice or other document, in written or electronic form, which has a material effect on the Authority's rights, obligations or interests and which is false in material particulars;

(p) the Contractor has failed to fulfill any obligation, for which failure Termination has been specified in this Agreement; or

(q) the Contractor commits a default in complying with any other provision of this Agreement if such a default causes a Material Adverse Effect on the Project or on the Authority.

(r) gives or offers to give (directly or indirectly) to any person any bribe, gift, gratuity, commission or other thing of value, as an inducement or reward:

i. for doing or forbearing to do any action in relation to the Contract, or

ii. for showing or forbearing to show favour or disfavour to any person in relation to the Contract,

or if any of the Contractor's personnel, agents or subcontractors gives or offers to give (directly or indirectly) to any person any such inducement or reward as is described in this sub-paragraph (s). However, lawful inducements and rewards to Contractor's Personnel shall not entitle termination.

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

(iii) The following shall apply in respect of cure of any of the defaults and/ or breaches of the Agreement:

(a) The Cure Period shall commence from the date of the notice by the Authority to the Contractor asking the latter to cure the breach or default specified in such notice;

(b) *The Cure Period provided in the Agreement shall not relieve the Contractor from liability for Damages caused by its breach or default;*

(c) *The Cure Period shall not in any way be extended by any period of suspension under the Agreement;*

(d) *If the cure of any breach by the Contractor requires any reasonable action by the Contractor that must be approved by the Authority hereunder the applicable Cure Period (and any liability of the Contractor for damages incurred) shall be extended by the period taken by the Authority to accord its required approval.*

(iv) *After termination of this Agreement for Contractor Default, the Authority may complete the Works and/or arrange for any other entities to do so. The Authority and these entities may then use any Materials, Plant and equipment, Contractor's documents and other design documents made by or on behalf of the Contractor.*

23.2 Termination for Authority Default

(i) *In the event that any of the defaults specified below shall have occurred, and the Authority fails to cure such default within a Cure Period of 90 (ninety) days or such longer period as has been expressly provided in this Agreement, the Authority shall be deemed to be in default of this Agreement (the "Authority Default") unless the default has occurred as a result of any breach of this Agreement by the Contractor or due to Force Majeure. The defaults referred to herein shall include:*

(a) *the Authority commits a material default in complying with any of the provisions of this Agreement and such default has a Material Adverse Effect on the Contractor;*

(b) *the Authority has failed to make payment of any amount due and payable to the Contractor within the period specified in this Agreement;*

(c) *the Authority has failed to provide, within a period of 180 (one hundred and eighty) days from the Appointed Date, the environmental clearances required for construction of the Project Highway;*

(d) *the Authority becomes bankrupt or insolvent, goes into liquidation, has a receiving or administration order made against him, compounds with its creditors, or carries on business under a receiver, trustee or manager for the benefit of its creditors, or if any act is done or event occurs which (under Applicable Laws) has a similar effect;*

(e) *the Authority repudiates this Agreement or otherwise takes any action that amounts to or manifests an irrevocable intention not to be bound by this Agreement;*

(f) *the Authority's Engineer fails to issue the relevant Interim Payment Certificate within 60 (sixty) days after receiving a statement and supporting documents; or*

(g) the whole work is suspended by Authority beyond 120 (one hundred twenty) days for any reason which is not attributed to the Contractor.

(ii) Without prejudice to any other right or remedy which the Contractor may have under this Agreement, upon occurrence of an Authority Default, the Contractor shall be entitled to terminate this Agreement by issuing a Termination Notice to the Authority; provided that before issuing the Termination Notice, the Contractor shall by a notice inform the Authority of its intention to issue the Termination Notice and grant 15 (fifteen) days to the Authority to make a representation, and may after the expiry of such 15 (fifteen) days, whether or not it is in receipt of such representation, issue the Termination Notice.

If on the consideration of the Authority's representation or otherwise, the contractor does not issue the Termination Notice on such 15th (fifteenth) day and prefers to continue with the project, it is deemed that the cause of action of the Termination Notice has been condoned by the Contractor and he would be deemed to have waived any claim and forfeited any right to any other remedy on that count or in relation to such action or omission.

23.3 Termination for Authority's convenience

Notwithstanding anything stated hereinabove, the Authority may terminate this Agreement for convenience. The termination shall take effect 30 (thirty) days from the date of notice provided to the Contractor.”

(emphasis added)

(xii). Article 25 provided Liability and Indemnity and Article 26 provided for resolution of dispute between the parties including arbitration vide Article 26.3.

23. From a bare reading of the aforesaid Articles of EPC Agreement following undisputed conditions regarding availability of land under the agreement vis-a-vis the obligations and duties emerge out:

(i). The project highway site shall be procured by the authority.

(ii). The possession of the project highway site will be made available to the contractor free from all encroachments, encumbrances with further free access.

(iii). It will be authority's duty to design the site in terms of alignment of national highway road.

(iv). The authority shall provide 'Right of Way' on the site in accordance with the alignment. The right of way as defined, a site in accordance with alignment finalised by the authority free from all encroachments and encumbrances. Clause 3 provides for right of way to the contractor in respect of all land included the appendix by the dates specified in schedule – A for those parts of site referred therein and in the event delay occurs then force majeure clause of the agreement can be enforced.

(v). It will be authority's duty to obtain environment clearance and licences for the project highway.

(vi). The authority's representative, the contractor and Authority's Engineer shall inspect the site within 10 days of the agreement.

(vii). Soon after the above inspection a memorandum would be prepared containing inventory of the site *qua* vacant land and encumbered land, buildings structure, road works, trees and any other immovable property on or attached to the site. This would be a Handover Memorandum.

(viii). The Handover Memorandum shall contain Appendix regarding details of those parts of the site which are vacant having access as the land where 'Right of Way' has not been given to the contractor with further details of hindrances in the construction zone.

(ix). The site of project will be prepared as per schedule – A of the agreement.

(x). The authority is to provide right of way to the contractor in respect of all the land included in the appendix by the date specified in Schedule- A and in the event of breach of this, contractor would be entitled to damages etc.

(xi). Upon a careful reading of aforesaid clauses, we find that soon after the agreement is reached within 10 days, the Authority Engineer shall inspect the site the and prepare a detailed memorandum containing an entry of site vacant and unencumbered land, buildings, structures, trees

and other removal properties and the documents hand over memorandum would carry with the appendix specifying the vacant access, specifying the site with detail of access and where right of way and access has not been provided along with other details of hindrances in the construction zone. The hand over memorandum shall also provide clearly the part of site where work can be executed and the hand over memorandum shall have the counter parts and each shall construe as original by the authorised representatives of the authority, contractor and Authority Engineer.

(xii). The agreement defines 'Right of Way' as under:

“Right of Way” means and refers to the total land required and acquired for the project, both in its width and length, together with all way leaves, easements, unrestricted access and other rights of way, howsoever described, necessary for constructions and maintenance of the Project Highway in accordance with this Agreement.”

(xiii). 90% of the total length of project shall be handed over to the contractor prior to the appointed day.

(xiv). Conditions specified in the clauses contained in Article 8.2 shall not be waived by either of the parties.

(xv). Existing rights of way, easements, privileges, liberties and appurtenances to the site shall not be deemed to be encumbrances.

(xvi). The contractor would have to shoulder the responsibility to shift obstructing utilities like electric lines, water pipes, gas pipelines, telephone cables to appropriate location if these utilities create obstructions in the work or maintenance of project highway in accordance with law and the cost incurred in such reallocation will be borne by the authority. Such work and shifting of utilities has been indicated in Schedule – B-1 of the agreement.

(xvii). The contractor shall allow use of site for laying down new public telephone utilities like lines, electric lines, water pipelines, cables and

other new public utilities subject to permission from the authority for which the damages may be claimed.

(xviii). The authority shall be assisting the contractor in obtaining applicable permits for cutting of trees in non forest area to be identified by the authority for the purposes if such trees cause a material adverse effect on construction and maintenance of the project. Dismantling of structures would be done by the contractor to get the land free from hindrances in respect of which the compensation has already been paid by the authority to the land owners and the land was handed over to the contractor.

24. Thus, from the above, we find that agreement very comprehensively prescribed terms and conditions to ensure good time bound execution of work with a right to reserve with contractor to enforce obligations of the Authority to ensure carrying out of the project as per the agreement. It also provides for the authority to adopt measures in the event of default by contractor in carrying out the work as per the agreement within the time schedule and upon failure of contractor to complete the project denying core period to terminate contract.

25. Now, it is in the above background of conditions laid under the agreement that we proceed to examine the documents brought on record to reach out to the conclusion as answer to the points framed above by us.

26. As the pleadings raised in the writ petition demonstrate so also the documents brought on record, the reasons for delays in completion of project, which according to the petitioner, was attributable to hindrances and land issues. Petitioner had applied for the first time on 7th July, 2022 for extension of time taking recourse to the Article 10.5. The total time demanded by petitioner 248 days so as to enable him to complete the project by 15th June, 2022. However, the Authority's Engineer vide letter dated 27th July, 2022 recommended an extension of time only 39 days and resultantly the respondent No.- 2 namely the NHAI Project Director

accorded extension of only 42 days for Milestone-1 and denied any other extension for Milestone 2 & 3. Relevant para (iv) of letter dated 8th February, 2022 is reproduced hereunder:

“iv. As per clause 9.2 Article 9.2 of CA the shifting of obstructing Utilities (including electric lines, water pipes, Gs pipeline etc) & dismantling of structures is the obligation of contractor. Further, in respect of tree cutting of protect & non-protected forest, permission was obtained within 150 days (i.e upto 09.03.2022) from the Appointed Date and tree cutting by respective DLM was in progress. Further, length of 20.340 Km was considered to be hindered after 150 days as stated in the contractor’s letter/ respective MPR. Thus, length considered handed over to the contractor shall be 29.914 Km (50.254 Km – 20.340 Km). It is pertinent to mention that contractor/ AE has submitted the proposal based on land available within 150 days & delays upto 15.06.2022. Since, the project milestone-1 (21.06.2022) date has been passed, hence, effected delay days is worked out for 104 days (10.03.2022 to 21.06.2022) as (50.254-29.914)/ 50.254 x 104 days = 42.09 days or say 42 days.”

27. Petitioner raised objection to the criteria adopted by the Authority’s Engineer in evaluating time extension request. The petitioner continued to reiterate but the maximum period remained granted 42 days vide letter of the Authority dated 9th November, 2022. While the correspondence went on between the petitioner the Authority’s Engineer and the Authority, a development took place in the form of letter of Authority’s Engineer dated 21st November, 2023 acknowledging the presence of hindrances/ encumbrances of the project land which, according to the petitioner caused the delay in project and hence it recommended for further extension of time for 196 days. Authority’s Engineer’s recommendation as contained in its letter dated 21st November, 2023 is reproduced hereunder:

“9. AE’s Recommendations of Interim EOT:

Considering the aforesaid data points made available, the AE Representative is delighted to recommend the following to the Authority for grant of interim EOT to the EPC Contractor in terms of Clause 10.5 of the Contract Agreement:-

a) Since hindrances/ encumbrances are continuing on affected project stretch as per Annexure-I even on date, this recommendation of EOT is interim only.

b) Considering EPC Contractor’s letter, No TPL/GM/NHAI/FY22-23/ 709A/843, dated 17.03.2023, there is an estimated delay of 196 days up to the scheduled date of completion of 09.10.2023 for which EPC Contractor is not

liable. EPC Contractor is therefore recommended an interim EOT of 196 days (Interim EOT-2) to be granted by the Competent.”

28. While the matter lingered on, the Authority’s Engineer prepared a comprehensive report vide letter dated 10th July, 2024 addressed to the Project Director, NHAI, recording reasons for delay in carrying out the project and proposed 5th January, 2025 as revised schedule complete date. This letter of the Authority’s Engineer acquires significance and relevance year because it was based upon the survey conducted on the spot and the reasons assigned for the delay in project. The relevant extract thereof is reproduced hereunder:

“10. AE’s Recommendations of Interim EOT-3:

Considering the aforesaid data points made available, the AE Representative is delighted to recommend the following to the Authority for grant of interim EOT to the EPC Contractor in terms of Clause 10.5 of the Contract Agreement: -

a) Since hindrances/encumbrances are continuing on affected project stretch as per Annexure-I and Annexure-11 even on date, this recommendation of EOT is interim only.

b) Considering the EOT-1 of 42 days and EOT-2 of 196 days to the EPC Contractor, this interim recommendation is for an additional of 247 Days to be reckoned from Revised Scheduled Completion Date of 22/4/2024 as per EOT-2 recommendations. Considering EOT-3, the revised Scheduled Completion Date stands at 5th January 2025 for 100% completion of the Project Highways in all respects inclusive of the Change of Scope work items under consideration for approval by the Competent Authority.

c) The Revised Milestones/Scheduled Completion Date pursuant to Clause 6 of Schedule J of the Contract Agreement considering the current interim recommendation EOT-3 stand modified as follows: -

Sr. No.	Milestone	Revised Project Milestone as per Project Length handed over to the EPC Contractor on AD+90 days,	Revised Date	Status
1.	MS-I	10% x 68.615% x Rs 954.90 Cr = Rs. 65.54 Cr.	Completed on 02-Aug-22	Achieved
2.	MS-II	35% x 68.615% x 954.9	23-Dec-22	Achieved

		= Rs.229.32 Cr.		
3.	Revised MS-III	70% x 1043.07 Cr. = Rs. 730.149 Cr.	16-Sep-2024	Yet to be achieved.
4.	Revised Scheduled Completion Date	100% of effective Project Completion Cost subject to a maximum of Rs. 1043.07 Cr including amounting to Rs.88.15 Cr. Change of Scope work items considering for approval by the Competent Authority.	05-Jan-2025	Yet to be achieved.

The EPC Contractor has to submit his resource based Revised work program with enhanced resources to achieve above mentioned milestones. In this context it is highly recommended that EPC Contractor executes the works at site in 03 parallel sections concurrently with additional mobilization of necessary and augmented as mentioned below:

- i. Grade Separated Interchanges at km 0+000, km 38+120, km 12+134;*
- ii. Change of Scope Work items including all additional underpasses, service roads etc under approval by the Authority*
- iii. Rest of the Highways/Structures/balance CD works etc including balance scope as per Schedule B of the Contract Agreement*

d) While EPC Contractor has achieved a financial progress of 36% i.e. Rs.343.76 Cr upto IPC-22, and works amounting to Rs. 297.56 Cr are continued to be delayed due to ongoing hindrances/encumbrances for which EPC Contractor is not liable, the EPC Contractor may be allowed escalation as per the rate prevailing on the original date of completion of 09.10.2023 on balance works amounting upto Rs.297.56 Cr. value of works.

e) Since there is impending delay in completion of value of works amounting to Rs.313.58 till IPC 22 due to slow progress by the EPC Contractor until interim EOT-2, necessary damages may be charged to EPC Contractor pursuant to Clause 10.3 read with Clause 10.6 of the Contract Agreement.

f) The EPC Contractor has not made any financial claim so for pursuant to Clauses 3.1, 8.3, 9.5 and any other applicable claim condition in terms of Schedule O of the EPC Contract dated 26-08-2021 and the Authority also has not abrogated applicable delay damages to the EPC Contractor in terms of Clause 10.3 of the Contract Agreement with the understanding that either party shall consider and agree exclusively vide a settlement agreement for not making any claim or charging applicable damages in acceptance of this recommendation of EOT-3 unconditionally.

g) The aforesaid recommendations of the EOT are based on the assumption that since there has been persistent slow progress by EPC Contractor, the EPC Contractor shall be accepting these recommendations unconditionally and shall not make any financial claims in future for the EOT and the Authority also will not charge any LDs to the EPC Contractor for his slow progress/non-performance up to the revised scheduled completion date of 05.01.2025.

h) Any further extension of time/escalation will be recommended by the Authority Engineer/Authority as per performance of EPC Contractor measured against the Revised work program submitted vide his email dated 09.07.2024 to achieve the revised financial Milestones as outlined in point (c) above.”

(emphasis added)

29. The annexure appended to the report/ letter also acquires significance because it refers to the length in meters which were not hindrance free even on 10th July, 2024 and the total land comes out to be as per main carriage way 7.998 km. out of total project length of 50.254 km. The letter also recorded that Handover Memorandum showed encumbrance/ hindrance free project site admeasuring 47.620 km. out of total project length 50.254 km. with necessary access and right of way handed over to the contractor but as per the joint site visit by Authority's Engineer team, the contractor and the authority dated March, 2023 a total of 15.66 km. of the project length was encumbered with various hindrances. Thus making effective available land only to the tune of 34.594 km.

30. From the perusal of the annexure to the report/ letter it is worth noticing that hindrances that accounted for 7.998 km. as recorded above, were basically for buildings, temples, mosque, boundary wall and land issues, besides the other land full of hindrances in terms of trees, electricity polls etc. so it had come in black and white in the report of Authority's Engineer dated 10th July, 2024 that till that date land issues were there, the permanent structures were there and hence the land, possession of which was required to be given as per the Article 8.1(a), 8.2(i), 8.2(ii) and 8.2 (iii) was not there.

31. It is worth noticing here that as per the EPC the work was to be completed by July, 2022 whereas even 90% land site were not available as per the agreement as on 10th July, 2024. On 17th September, 2024 the petitioner submitted a revised schedule for completion of the project appending therewith the details but the NHAI proceeded to issue a cure period notice on 11th October, 2024 in terms of Article 23.1(i) of the agreement.

32. The petitioner submitted a detailed reply to the notice on 19th November, 2024 citing that the handover of land at site of project was still not complete and land issues were there but the authority brushed aside the reply and directed the petitioner to complete the project in terms of the extended period earlier granted and to achieve the finish line at the earliest. Further time extension request and rescheduling the time line was rejected vide letter dated 11th December, 2024.

33. The contractor in his reply dated 16th December, 2024 cited the status of the site of land and hindrances still to be existing and prayed for support in the matter for the practical problem that had arisen and in the light of the earlier response of the petitioner some sympathetic consideration should be accorded, however, still the contractor assured to complete the project on agreed if extended time lines, was allowed.

34. The Authority's Engineer wrote to the petitioner on 17th December, 2024 that financial performance be submitted and also additional steps, if any, taken for the completion of project. While this letter was issued by the Authority's Engineer on 17th December, 2024, on 23rd December, 2024 the petitioner was issued with a show cause notice citing slow progress and failure to complete the project and not maintenance of project highway.

35. The petitioner again submitted reply citing the photographic evidence collected in the matter to demonstrate that maintenance activities were duly carried out and that petitioner has been prudently performing its obligation under the agreement to complete the project at

the earliest. However, the project progress got impacted for the reasons not attributable to the contractor beyond his control. Petitioner again prayed for extension of time but his request went in vein as the authority finally terminated the contract on 22nd January, 2025 the order impugned in this petition.

36. From the above discussion, it clearly comes to be established that Authority's Engineer reported to the authority itself that Handover Memorandum though referred to handing over more than 90% of the land but as a matter of fact possession of this much of land was never handed over.

37. Here it is apt to refer to the Handover Memorandum which has been basically relied upon by the NHAI and we find this Handover Memorandum dated 21st September, 2021 to be referring to delivery of possession of total length of 47.620 km out of 50.254 km. amounting to 94.76% but the appendix to the same is not as per the Article 8.2. The appendix shows hindrances in the form of electric polls, a little water pipeline, a few hand pumps but does not refer to any land issues or building structure or temple etc. that have come to be referred to in the Authority's Engineer's report dated 10th July, 2024. This report dated 10th July, 2024 has come to be referred to in paragraph 49 of the writ petition but to our utter surprise, in reply thereto vide paragraph 28 of the counter affidavit the same has remained undenied.

38. The paragraph refers to some letter/ communication of the petitioner dated 7th June, 2024 to allege that the petitioner deliberately avoided to file the same but no such letter has been annexed in support of the averments so made by respondent NHAI. Thus, the Authority's Engineer's report has remained undenied.

39. We can understand that utilities like electricity polls, trees, hand pumps, pipelines etc. are removable easily and for that contractor had the liability but the land issues cannot be taken to be within the control of the contractor. Further, appendix-2 schedule – A as per Article 8.3(i), was

to also bear the date of providing 'Right of Way' in respect of hindrances after its removal but the Handover Memorandum was so sketchy and evasive that it did not contain any such details.

40. We further notice that in the order impugned exhaustive reply submitted by the petitioner to show cause notice was not accorded due consideration and it is one of those cases where the authority instead of carrying out its own obligations, it kept on tightening the screw upon the contractor to finish the work within the extended time line. The agreement itself provides that procurement of the land is the prime duty of the authority and so long as the land issues continue to remain there as a hindrance, then no contractor can even dare to demolish the constructions without settling the land issues. There is one document filed along with the writ petition at page 948 along with the annexure- 24 that shows that compensation to the members of the Committee of Jama Masjid and Eidgah was paid on 2nd December, 2024. This document has come to be referred to in paragraph 49 of the writ petition and we have already held above how evasive the reply was there in counter affidavit. Still further, the land state can take the plea that compensation payment issue may not cause difficulty in possession but in a democratic country like ours if payment remains withheld, the farmers and land owners keep agitating and no private person can forcefully take possession challenging to a land and order situation caused on the spot by such agitation.

41. Thus, respondents having not discharged their obligations and having failed to perform duties of their part under the agreement, they were certainly not justified in asking petitioner to complete the project within the extended short timeline inasmuch as, they having failed to honour the report of their own Engineer, were absolutely unjustified in issuing show cause notice even. The contract agreement itself provides for appointment of Authority's Engineer vide Article 18.1 & 18.2(i) lays down the duties as per the terms of reference. There is nothing in the

counter affidavit to demonstrate that Authority's Engineer submitted any collusive report in favour of the petitioner to help him out.

9. Findings

42. From the discussions that we have held above referring to the various correspondences between petitioner-contractor, the Authority's Engineer and the response letters of the National Highway Authority of India, Project Director, Meerut, following undisputed fact positions emerge out:

(i). On 21st September, 2021 Handover Memorandum was signed by the contractor, National Highways Authority and Authority's Engineer, all jointly describing therein that 47.620 kms (94.76%) length of land out of total 50.254 kms. with right of way available to 45 meters and 54 meters as per schedule- B of the contract agreement. The appendix to the document showed that total land area required was 305.5 hectares with right of way 120 hectares, whereas area under 3D notification of National Highways Act, 1956 was 85.51 hectares and compensation awarded under Section 3G was 184.5 hectares. It also contained a detail regarding area under possession against 3G notification of National Highways Act, 1956 was 173.39 hectares. So, total possession were shown as 293.39 hectares and the pending length possession was shown as 2.364 kms only but the chain-wise pending possession was at different level like 13.200 kms. to 14.600 kms., 25.600 kms. to 26.500 kms., 5.200 kms. to 5.400 kms. and 12.000 kms. to 12.134 kms., in a total stretch of 50.254 kms.

(ii). The appendix-2 to Handover Memorandum dated 21st September, 2021 did show only few utilities but did not show the time line by which the utilities were expected to be removed by the contractor with the cooperation to be rendered by the authority.

(iii). The petitioner acknowledged Handover Memorandum as was given to him. This got further acknowledged with subsequent documents

signed on 22nd September, 2021 by the contractor in a letter written to the Project Director.

(iv). Soon after the project work started, Tata wrote a letter on 7th July, 2022 to the Authority's Engineer complaining of non-fulfilment of reciprocal promises by the authority and citing six reasons demanded extension of time of 248 days, which are as follows:

(a). Delay in providing encumbrance free row pursuant to Article 8.2 & 3.1 (iii) of the agreement;

(b). Delay due to tree cuttings as per Article 9.2 contract agreement;

(c). Delay due to shifting of chartered and unchartered utilities;

(d). Inordinate delay in designs and drawing approvals;

(e). Delay due to extended monsoon/ adverse weather condition and Force Majeure; and

(f). Delay due to spread of Covid -19/ omicrons/ Force Mejiure.

(v). The above letter carried annexure that referred to various constructions like mosque, houses, boundaries wall, buildings, mazars, commercial buildings, besides other utilities like electricity polls, borewells etc. covering 23.210 kms. Then land payment issues and private possessions covering 25.720 kms. The letter also details the area of land involved in handing over in different villages and also main carriage way affected by various constructions like mosque etc. and further the Garh area of 1.360 kms affected by Eidgah and temple and also referred to an area of total 12.3332 hectares of land in different villages that requires re-gazette notification in Meerut and Hapur districts.

(vi). The National Highways Authority in its letter addressed to the Regional Office, Gomti Nagar, Lucknow dated 8th August, 2022 admitted vide its (iv) as under:

*“(iv). As per clause 9.2. Article -9 of CA, the shifting of obstructing Utilities (including electric lines, water pipes, Gas pipeline etc) & dismantling of structures is the obligation of contractor. Further, in respect of tree cutting of protect & non-protected forest, permission was obtained within 150 days (i.e. upto 09.03.2022) from the Appointed date and tree cutting by respective DLM was in progress. Further, length of 20.340 Km was considered to be hindered after 150 days as stated in the contractor’s letter/ respective MPR. **Thus, length considered handed over to the contractor shall be 29.914 Km (50.254 km – 20.340 km). It is pertinent to mention that contractor/ AE has submitted the proposal based on land available within 150 days & delays upto 15.06.2022.** Since, the project milestone-1 (21.06.2022) date has been passed, hence, effected delay days is worked out for 104 days (10.03.2022 to 21.06.2022) as $(50.254-29.914)/50.254 \times 104$ days = 42.09 days or say 42 days.”*

(emphasis added)

(vii). Thus NHAI fairly admitted that only 29.914 kms was in fact handed over to the contractor and yet it only allowed 42 days extension of time.

(viii). The petitioner on 17th August, 2022 wrote for further extension of time and NHAI reiterated 42 days of extension vide letter dated 30th August, 2022.

(ix). Despite repeated letters written by the petitioner to the authority including one letter dated 29th September, 2022 citing reasons and the Authority’s Engineer also wrote to the authority on 26th September, 2022 submitting report regarding hindrances found on existing constructions and other hindrance of total length of 31.852 kms. in two laining and 15.925 kms. in four laining, the NHAI vide letter dated 9th November, 2022 only extended time for shifting Milestone-1 for 42 days upto 2nd August, 2022 keeping scheduled date of completion of other milestones unchanged.

(x). Petitioner wrote to the authority on 21st December, 2022 for necessary extension of time as per Article 10.5 of the contract. The Authority’s Engineer vide letter dated 3rd January, 2023 intimated the authority that EOT request was under preparation and yet the authority wrote to the Authority’s Engineer that request for extension of time further was not found suited to reconsider at that stage.

(xi). Petitioner kept on writing to the Authority's Engineer on 17th March, 2023 citing the delay issues involving agitation by the farmers for almost 9-10 days and delay in approval of designs etc. by the authority and numbers of change of scope as per Article 13.5 pending consideration by the authority. Nothing progressed and the correspondence continued amongst the petitioner, Authority's Engineer and NHAI until 10th July, 2024.

(xii). On 10th July, 2024 the Authority's Engineer made recommendations for 248 days of extension of time citing reasons of land not being hindrance free that has been discussed above.

(xiii). On 17th September, 2024 petitioner submitted a revised schedule for completion of the project till 31st July, 2025 but instead of considering the above letter the authority issued a cure period notice under Article 23.1(i) on 11th October, 2024 asking the petitioner to complete the maintenance work within 60 days from the receipt of the notice. The Authority cited in its letter only non conformance in respect of certain areas in openings of national highway project.

(xiv). On 19th November, 2024 petitioner submitted a detailed reply citing such constructions and buildings with other areas involving land payment issues which could not be easily removed but the authority wrote a letter on 11th December, 2024 to expedite the prescribed work and complete the subject project at the earliest. Petitioner on 16th December, 2024 reiterated his stand.

(xv). On 17th December, 2024 the Authority's Engineer submitted report regarding delays in project attributing low pace of work and wrote to the petitioner that he should get the work completed as per the re-scheduled date proposed by him under letter dated 17th September, 2024 and to expedite the work by submitting additional steps that are proposed.

(xvi). On 23rd December, 2024 the authority issued a termination notice to the petitioner on the ground of slow progress and failure to complete

the project and non performance of project authority. On 3rd January, 2025 petitioner gave proper reply on both counts: firstly, the reply letter clearly stated that firstly the actual handing over of 90% land was made only on 31st December, 2024 whereas it was to be handed over on appointed date that was 10th October, 2021 and 150 days i.e. 9th March, 2022 but 100% possession of land was yet not handed over and complaint that delay was still continued on the site. He explained his slow progress and failure to complete the project for the reasons attributable to the authority and that the Authority's Engineer was fully aware since the inception of the project that contractor had encountered various hindrances/ impediments which were well on record and were finally informed to the authority and Authority's Engineer but no action was taken. Regarding maintenance as complained of in show cause notice petitioner replied that he did not commit any default under Article 23.1 (I) (d), (e), (f) and (q) of the agreement and since the authority/ Authority's Engineer failed to fulfil its obligation under the contract in timely handing over land site with 'Right of Way' for construction, timely approvals of designed, timely removal of trees and hindrances and timely approval of change of scope that project work got delayed. This reply was supported by various documents and photographs and details of hindrances within the right of way. The authority on 14th January, 2025 terminated the contract of the petitioner.

43. The above fact positions clearly demonstrate that the only issue between the petitioner and the authority was that, though actual physical possession of land was claimed in the Handover Memorandum as per Article 8 but was not there available on the spot and not only the hindrances were in the form of utilities like electricity lines, bore-wells etc. but there were constructed buildings like mosque, mazar, temple and other boundary walls of the private constructions involving land issues, which led to the repeated correspondence between the petitioner and authorities with no headway except granting extension of time of 42 days and with certain change of scope of work. All these were very meagre efforts taken by the Authority in comparison to what was in fact

communicated to the authority by the authority's own engineer vide letter dated 10th July, 2024. The letter dated 10th July, 2024 is undisputed document which clearly disclosed that a very large area of land was still affected by the hindrances and right of way as defined under the agreement was not available to the petitioner on the main highway land area at every stretch of 5 kms in continuation. Further the 'Handover Memorandum' though of course, referred to handing over possession of 47.62 kms. out of 50.254 kms. amounting to 94.76% with right of way available. A letter dated 8th August, 2022 vide its clause (iv) quoted above, the actual handing over possession of the land was 29.914 kms. This completely renders the handover memorandum only a paper work as no such handing over possession of 90% land ever took place until 31st October, 2024 as has come to be referred to by the petitioner to the authority in its reply to the termination notice. Thus, the argument advanced by learned counsel for the petitioner holds merit that petitioner was not handed over possession of the land as referred to in the Handover Memorandum holds merit and the authority is liable to be held guilty of non performance of contract by the authority itself as admitted fact position emerges, inasmuch as the authority was guilty in not helping out the petitioner in removing the hindrances paying the land dues in time, gaining actual physical possession of the certain part of land within time inasmuch as the possession issues were at different interval of total stretch of 50.254 kms making it difficult for the petitioner to expedite the work and perform its obligations as per the Narrative of Statement given initially after the agreement.

44. Yet another argument advanced by Mr. Saxena, learned Senior Advocate appearing for the petitioner that the respondents the first party to the contract unilaterally avoided to comply with the Article 8.2 not informing the contractor about the proposed date and time it shall hand over the hindrance free possession and the appendix attached to the Handover Memorandum did not disclose all this details inasmuch as it referred to only an electric poll and hand pump and not the constructed building area like mosque, temple and Eidgah etc. Thus it rendered the

Handover Memorandum as a misleading document with misrepresentation of facts also holds merit. If appendix-2 of the Handover Memorandum filed as Annexure-1 to the supplementary counter affidavit dated 29th April, 2026 is compared with the document, the letter of the authority itself dated 8th August, 2022 particularly clause (iv) of it as reproduced above, and the Authority's Engineer's own letter dated 10th July, 2024 and the appendix contained therewith, it would fully demonstrate that the appendix annexed to the Handover Memorandum was an eye wash and misleading in itself inasmuch as the promises made under Article 8 stood not complied with by the first party to the contract.

45. All this could have been a disputed question of fact, had there been no letter of Authority's own as referred to herein above dated 9th August, 2022 and the authority's engineer's own letter dated 10th July, 2024. This is an admitted fact position which cannot be doubted by anyone. This appears to be the reason why despite initial order passed by this Court on 18th March, 2025 regarding fair submission and stand of the authority that "NHAI shall file an affidavit, within a week specifying the dates when possession of land was given to the petitioner and yet no such affidavit was filed until 30th November, 2025 and that too only after the Court took a serious note of the conduct of the National Highway Authority in its order dated 26th November, 2025 granting 10 days' and no more time. This document was again filed when the Court directed the matter to be listed for further hearing requiring the respondent to clear the stand as to whether this document was infact Handover Memorandum as per Article 8. The next supplementary was filed on 29th April, 2026 on behalf of NHAI declaring it to be Handover Memorandum.

46. Thus, it is clear that except the document that has been brought twice on record, there is nothing more to demonstrate any Handover Memorandum was executed as per Article 8 putting the authority under obligations vide its Article 8.2(i) & 8.2(ii).

47. This is the document upon which the entire counter affidavit of the State respondents rests. It was argued by Mr. Rakesh Pande, learned Senior Advocate that once the petitioner acknowledged handing over possession of 94% land on 21st September, 2021, it could not have turned around to say that as per Article 8 handing over possession of 90% of the land did not take place and because of the land issues etc. and utilities, that project got delayed and the impugned order was bad.

48. Interestingly, in the entire counter affidavit there is nothing even suggestive of that letter of the authority dated 8th August, 2022 much after 21st September, 2021 was a mistake or that what was stated was wrong. The Authority's Engineer's own letter dated 10th July, 2024 has also not been disputed.

49. In the circumstances, therefore, in our considered view, the above argument advanced by Mr. Pande, learned Senior Advocate, does not hold any merit and deserves to be rejected.

50. What further is very interesting and is quite apparent on face of it that there has been no application of mind by the authority while passing the order impugned as both the notice of proposed termination of contract dated 23rd December, 2024 and the order impugned dated 14th January, 2025 are *verbatim* same. Paragraph 2 of the order impugned is the same word by word as paragraph 2 of the notice except reference to the dates letter of the Authority's Engineer dated 17th December, 2024 and 4th January, 2025 and reply letter of the petitioner dated 3rd January, 2025. We have already discussed above that the Authority's Engineer letter dated 17th October, 2024 was absolutely contrary to what he had submitted on 10th July, 2024 requesting for extension of time of 248 days citing reasons for the same. However, what is very surprising is that detailed reply submitted by the petitioner referring to the various progress related reports, photographs, hindrances and the issues like land issues etc. that we have already discussed above in the fact position, nothing was considered as if authority was sitting with a pre-determined mind to terminate the contract of the petitioner mid-term, whatever be

his reply. This shows that there is absolutely non-application of mind by the authority.

51. The National Highway Authority is state within the meaning of of Article 12 of the Constitution and enters contract with private body for construction of national highway, a project of public interest and importance and hence it was expected to behave reasonably in the matter of such contract. The parties to the contract are no doubt bound by the terms and conditions of the contract but burden upon the state authority lies heavily in performing its part of the contract, more especially, when the work to be executed, becomes a concern of larger public interest. Constructing the national highway involves expenditure out of the state exchequer where the public money lies. Tax-payer contribution is there which is spent on development activities by the State and the National Highway Authority is acting as a State to carry out such execution of work. Stand as defence *qua* impugned action has been taken by the National Highway Authority in throughout blaming the contractor-petitioner in not performing its part of the contract in maintaining the national highway and accomplishing the task assigned under the agreement within the prescribed period but did not introspect at least once to realise as to what it did in preparing document full of misrepresentation in the name of 'Handover Memorandum' which, of course, it did acknowledge and realise subsequently vide letter dated 8th August, 2022. This amounts to an unfair practice on part of the State. The act of a party which is State under Article 12 in this case is found to be arbitrary one against affect work of public importance and so this Court will not shirk away from its responsibility in arresting any miscarriage of justice in larger public interest. Delay in construction of national highway as a project, if caused due to reasons for the negligence and carelessness and arbitrariness on the part of the State as one of the parties of the contract, the Court is certainly justified lift the corporate veil to understand the exact reasons for such actions impugned in this petition.

10. Authorities cited on behalf of the petitioner

52. Mr. Amit Saxena, learned Senior Advocate appearing for the petitioner has placed reliance upon the authority in the case of **ABL International Ltd and others v. Export Credit Guarantee Corporation of India Ltd and others (2004) 3 SCC 553** and **MP Power Management Company Ltd v. M/s Sky Power Southeast Solar India Pvt Ltd. and others (2023) 2 SCC 703** and **A.P. Electrical Equipment Corporation v. Tehsildar and others (2025) SCC Online SC 447**.

53. Citing the authority in the case of ABL International Ltd (*supra*), learned Senior Advocate has placed reliance upon paragraphs 23, 24 and 27 of the judgment that are quoted below:

“23. It is clear from the above observations of this Court, once the State or an instrumentality of the State is a party of the contract, it has an obligation in law to act fairly, justly and reasonably which is the requirement of Article 14 of the Constitution of India. Therefore, if by the impugned repudiation of the claim of the appellants the first respondent as an instrumentality of the State has acted in contravention of the abovesaid requirement of Article 14, then we have no hesitation in holding that a writ court can issue suitable directions to set right the arbitrary actions of the first respondent. In this context, we may note that though the first respondent is a company registered under the Companies Act, it is wholly owned by the Government of India. The total subscribed share capital of this Company is 2,50,000 shares out of which 2,49,998 shares are held by the President of India while one share each is held by the Joint Secretary, Ministry of Commerce and Industry and Officer on Special Duty, Ministry of Commerce and Industry respectively. The objects enumerated in the memorandum of association of the first respondent at para 10 read:

“To undertake such functions as may be entrusted to it by the Government from time to time, including grant of credits and guarantees in foreign currency for the purpose of facilitating the import of raw materials and semi-finished goods for manufacture or processing goods for export.”

Para 11 of the said object reads thus:

“To act as agent of the Government, or with the sanction of the Government on its own account, to give the guarantees, undertake such responsibilities and discharge such functions as are considered by the Government as necessary in national interest.”

24. *It is clear from the above two objects of the Company that apart from the fact that the Company is wholly a Government-owned company, it discharges*

the functions of the Government and acts as an agent of the Government even when it gives guarantees and it has a responsibility to discharge such functions in the national interest. In this background it will be futile to contend that the actions of the first respondent impugned in the writ petition do not have a touch of public function or discharge of a public duty. Therefore, this argument of the first respondent must also fail.

27. From the above discussion of ours, the following legal principles emerge as to the maintainability of a writ petition:

(a) In an appropriate case, a writ petition as against a State or an instrumentality of a State arising out of a contractual obligation is maintainable.

(b) Merely because some disputed questions of fact arise for consideration, same cannot be a ground to refuse to entertain a writ petition in all cases as a matter of rule.

(c) A writ petition involving a consequential relief of monetary claim is also maintainable.”

54. In the case of **A. P. Electrical Equipment Corporation** (*supra*) paragraphs 47, 48, 49, 51 & 52 of the judgment that are quoted below:

“47. One stock argument available with the State in this type of cases is that the question whether the actual physical possession of the disputed land had been taken over or not is a seriously disputed question of fact, which the High Court should not adjudicate or determine in exercise of its writ jurisdiction. As a principle of law, there need not be any debate on such a proposition, but by merely submitting that it is a seriously disputed question of fact, the same, by itself, will not become a question of fact. To put it in other words, having regard to the materials on record, which falsifies the case of the State Government, then such materials should not be overlooked or ignored by the Court on the principle that the issue with regard to taking over of the actual physical possession would be a disputed question of fact.

48. Normally, the disputed questions of fact are not investigated or adjudicated by a writ court while exercising powers under Article 226 of the Constitution of India. But the mere existence of the disputed question of fact, by itself, does not take away the jurisdiction of this writ court in granting appropriate relief to the petitioner. In a case where the Court is satisfied, like the one on hand, that the facts are disputed by the State merely to create a ground for the rejection of the writ petition on the ground of disputed questions of fact, it is the duty of the writ court to reject such contention and to investigate the disputed facts and record its finding if the particular facts of the case, like the one at hand, was required in the interest of justice.

49. There is nothing in Article 226 of the Constitution to indicate that the High Court in the proceedings, like the one on hand, is debarred from holding such an inquiry. The proposition that a petition under Article 226 must be rejected simply on the ground that it cannot be decided without determining the disputed question of fact is not warranted by any provisions of law nor by any decision of this Court. A rigid application of such proposition or to treat such

proposition as an inflexible rule of law or of discretion will necessarily make the provisions of Article 226 wholly illusory and ineffective more particularly Section 10(5) and 10(6) of the Act, 1976 respectively. Obviously, the High Court must avoid such consequences.

51. This Court in the case of *Gunwant Kaur v. Bhatinda Municipality*, (1969) 3 SCC 769 : AIR 1970 SC 802 observed as follows:—

“The High Court observed that they will not determine disputed question of fact in a writ petition. But what facts were in dispute and what were admitted could only be determined after an affidavit in reply was filed by the State. The High Court, however, proceeded to dismiss the petition in limine. The High Court is not deprived of its jurisdiction to entertain a petition under Art. 226 merely because in considering the petitioner's right to relief questions of fact may fall to be determined. In a petition under Art. 226 the High Court has jurisdiction to try issues both of fact and law. Exercise of jurisdiction is, it is true, discretionary, but the discretion must be exercised on sound judicial principles. When the petition raises questions of fact of a complex nature, which may for their determination require oral evidence to be taken, and on that account the High Court is of the view that the dispute may not appropriately be tried in a writ petition, the High Court may decline to try a petition. Rejection of a petition in limine will normally be justified, where the High Court is of the view that the petition is frivolous or because of the nature of the claim made, dispute sought to be agitated., or that the petition against the party against whom relief is claimed is not maintainable or that the dispute raised thereby is such that it would be inappropriate to try it in the writ jurisdiction, or for analogous reasons.”

(emphasis supplied)

52. In one of the recent pronouncements of this Court in *State of U.P. v. Ehsan*, 2023 INSC 906, this Court observed that:—

“28. We are conscious of the law that existence of an alternative remedy is not an absolute bar on exercise of writ jurisdiction. More so, when a writ petition has been entertained, parties have exchanged their pleadings/affidavits and the matter has remained pending for long. In such a situation there must be a sincere effort to decide the matter on merits and not relegate the writ petitioner to the alternative remedy, unless there are compelling reasons for doing so. One such compelling reason may arise where there is a serious dispute between the parties on a question of fact and materials/evidence(s) available on record are insufficient/inconclusive to enable the Court to come to a definite conclusion.

29. Bearing the aforesaid legal principles in mind, we would have to consider whether, in the facts of the case, the High Court ought to have dismissed the third writ petition of the first respondent and relegate him to a suit as there existed a serious dispute between the parties regarding taking of possession. More so, when the High Court, in the earlier round of litigation, refrained from taking up the said issue even though it had arisen between the parties.

30. No doubt, in a writ proceeding between the State and a landholder, the Court can, on the basis of materials/evidence(s) placed on record, determine whether possession has been taken or not and while doing so, it may draw adverse inference against the State where the statutory mode of taking possession has not been followed [See State of UP v. Hari Ram (supra)]. However, where possession is stated to have been taken long ago and there is undue delay on the part of landholder in approaching the writ court, infraction of the prescribed procedure for taking possession would not be a determining factor, inasmuch as, it could be taken that the person for whose benefit the procedure existed had waived his right thereunder [See State of Assam v. Bhaskar Jyoti Sarma, (supra)]. In such an event, the factum of actual possession would have to be determined on the basis of materials/evidence(s) available on record and not merely by finding fault in the procedure adopted for taking possession from the land holder. And if the writ court finds it difficult to determine such question, either for insufficient/inconclusive materials/evidence(s) on record or because oral evidence would also be required to form a definite opinion, it may relegate the writ petitioner to a suit, if the suit is otherwise maintainable.”

(emphasis supplied)

55. In the case of M.P. Power Management Corporation Ltd. (supra), learned counsel for the petitioner has relied upon paragraphs 53, 54, 74, 75, 82.9, 82.10 & 82.11 that are quoted below:

“53. In *Radhakrishna Agarwal v. State of Bihar* [*Radhakrishna Agarwal v. State of Bihar*, (1977) 3 SCC 457] writ petitions were filed against orders of the State Government revising the rate of royalty under a lease. The contention was both against the revision of rate of royalty during the period of the lease and the cancellation of the lease on various grounds. Though an attempt was sought to draw support from the judgment of this Court in *Erusian Equipment & Chemicals Ltd. v. State of W.B.* [*Erusian Equipment & Chemicals Ltd. v. State of W.B.*, (1975) 1 SCC 70] , the Court took the view that the said case involved discrimination at the threshold or at the time of deciding as to whether the Government should enter into the contract. The Court took the view that the only question which normally arises in such cases is as to whether the action complained of was in conformity with the agreement.

54. We may notice the earlier opinions of this Court which came to be dealt with in the following statement : (*Radhakrishna Agarwal case* [*Radhakrishna Agarwal v. State of Bihar*, (1977) 3 SCC 457] , SCC p. 465, para 19)

“19. We do not think that any of these cases could assist the appellants or are at all relevant. None of these cases lays down that, when the State or its officers purport to operate within the contractual field and the only grievance of the citizen could be that the contract between the parties is broken by the action complained of, the appropriate remedy is by way of a petition under Article 226 of the Constitution and not an ordinary suit. There is a formidable array of authority against any such proposition. In *Lekhraj Sathramdas*

Lalvani v. Custodian [Lekhraj Sathramdas Lalvani v. Custodian, AIR 1966 SC 334] this Court said : (AIR p. 337, para 5)

'5. ... In our opinion any duty or obligation falling upon a public servant out of a contract entered into by him as such public servant cannot be enforced by the machinery of a writ under Article 226 of the Constitution.'

In Banchhanidhi Rath v. State of Orissa [Banchhanidhi Rath v. State of Orissa, (1972) 4 SCC 781] , this Court declared : (SCC p. 783, para 8)

'8. ... If a right is claimed in terms of a contract such a right cannot be enforced in a writ petition.'

In Har Shankar v. Excise & Taxation Commr. [Har Shankar v. Excise & Taxation Commr., (1975) 1 SCC 737] , a Constitution Bench of this Court observed : (SCC p. 747, para 21)

'21. ... The appellants have displayed ingenuity in their search for invalidating circumstances but a writ petition is not an appropriate remedy for impeaching contractual obligations.' "

74. We may notice that as to what constitutes arbitrariness fell for consideration by this Court in a case which involved cancellation of the examination held as part of a recruitment process, in East Coast Railway v. Mahadev Appa Rao [East Coast Railway v. Mahadev Appa Rao, (2010) 7 SCC 678 : (2010) 2 SCC (L&S) 483] . We notice the following passages which are apposite for this case : (SCC pp. 685-87, paras 19-20 & 23)

"19. Black's Law Dictionary describes the term "arbitrary" in the following words:

'arbitrary. adj.—1. Depending on individual discretion; specif., determined by a Judge rather than by fixed rules, procedures, or law. 2. (Of a judicial decision) founded on prejudice or preference rather than on reason or fact. This type of decision is often termed arbitrary and capricious.'

20. To the same effect is the meaning given to the expression "arbitrary" by Corpus Juris Secundum which explains the term in the following words:

'Arbitrary.—Based alone upon one's will, and not upon any course of reasoning and exercise of judgment; bound by no law; capricious; exercised according to one's own will or caprice and therefore conveying a notion of a tendency to abuse possession of power; fixed or done capriciously or at pleasure, without adequate determining principle, non-rational, or not done or acting according to reason or judgment; not based upon actuality but beyond a reasonable extent; not founded in the nature of things; not governed by any fixed rules or standard; also, in a somewhat different sense, absolute in power, despotic, or tyrannical; harsh and unforbearing. When applied to acts, "arbitrary" has been held to connote a disregard of evidence or of the proper weight thereof; to express an idea opposed to administrative, executive, judicial, or legislative discretion; and to imply at least an element of bad faith, and has been compared with "willful".'

23. Arbitrariness in the making of an order by an authority can manifest itself in different forms. Non-application of mind by the authority making the order is only one of them. Every order passed by a public authority must disclose due and proper application of mind by the person making the order. This may be evident from the order itself or the record contemporaneously maintained. Application of mind is best demonstrated by disclosure of mind by the authority making the order. And disclosure is best done by recording the reasons that led the authority to pass the order in question. Absence of reasons either in the order passed by the authority or in the record contemporaneously maintained is clearly suggestive of the order being arbitrary hence legally unsustainable.”

75. We would, therefore, sum up as to when an act is to be treated as arbitrary. The Court must carefully attend to the facts and the circumstances of the case. It should find out whether the impugned decision is based on any principle. If not, it may unerringly point to arbitrariness. If the act betrays caprice or the mere exhibition of the whim of the authority it would sufficiently bear the insignia of arbitrariness. In this regard supporting an order with a rationale which in the circumstances is found to be reasonable will go a long way to repel a challenge to State action. No doubt the reasons need not in every case be part of the order as such. If there is absence of good faith and the action is actuated with an oblique motive, it could be characterised as being arbitrary. A total non-application of mind without due regard to the rights of the parties and public interest may be a clear indicator of arbitrary action. A wholly unreasonable decision which is little different from a perverse decision under the *Wednesbury* doctrine would qualify as an arbitrary decision under Article 14. Ordinarily visiting a party with the consequences of its breach under a contract may not be an arbitrary decision.

82.9. The need to deal with disputed questions of fact, cannot be made a smokescreen to guillotine a genuine claim raised in a writ petition, when actually the resolution of a disputed question of fact is unnecessary to grant relief to a writ applicant.

82.10. The reach of Article 14 enables a writ court to deal with arbitrary State action even after a contract is entered into by the State. A wide variety of circumstances can generate causes of action for invoking Article 14. The Court's approach in dealing with the same, would be guided by, undoubtedly, the overwhelming need to obviate arbitrary State action, in cases where the writ remedy provides an effective and fair means of preventing miscarriage of justice arising from palpably unreasonable action by the State.

82.11. Termination of contract can again arise in a wide variety of situations. If for instance, a contract is terminated, by a person, who is demonstrated, without any need for any argument, to be the person, who is completely unauthorised to cancel the contract, there may not be any necessity to drive the party to the unnecessary ordeal of a prolix and avoidable round of litigation. The intervention by the High Court, in such a case, where there is no dispute to be resolved, would also be conducive in public interest, apart from ensuring the fundamental right of the petitioner under Article 14 of the Constitution of India. When it comes to a challenge to the termination of a contract by the State, which is a non-statutory body, which is acting in purported exercise of the powers/rights under such a contract, it would be

over simplifying a complex issue to lay down any inflexible rule in favour of the Court turning away the petitioner to alternate fora. Ordinarily, the cases of termination of contract by the State, acting within its contractual domain, may not lend itself for appropriate redress by the writ court. This is, undoubtedly, so if the Court is duty-bound to arrive at findings, which involve untying knots, which are presented by disputed questions of facts. Undoubtedly, in view of ABL [ABL International Ltd. v. Export Credit Guarantee Corpn. of India Ltd., (2004) 3 SCC 553] , if resolving the dispute, in a case of repudiation of a contract, involves only appreciating the true scope of documentary material in the light of pleadings, the Court may still grant relief to an applicant. We must enter a caveat. The Courts are today reeling under the weight of a docket explosion, which is truly alarming. If a case involves a large body of documents and the Court is called upon to enter upon findings of facts and involves merely the construction of the document, it may not be an unsound discretion to relegate the party to the alternate remedy. This is not to deprive the Court of its constitutional power as laid down in ABL [ABL International Ltd. v. Export Credit Guarantee Corpn. of India Ltd., (2004) 3 SCC 553] . It all depends upon the facts of each case as to whether, having regard to the scope of the dispute to be resolved, whether the Court will still entertain the petition.”

(emphasis added)

11. Authorities cited on behalf of NHAI

56. Mr. Rakesh Pande, learned Senior Advocate appearing for the respondents has placed reliance upon the judgment of Supreme Court in the case of **Union of India and others v. Puna Hinda (2021) 10 SCC 690**, and had placed before us paragraph 24 of the judgment that runs as under:

“24. Therefore, the dispute could not be raised by way of a writ petition on the disputed questions of fact. Though, the jurisdiction of the High Court is wide but in respect of pure contractual matters in the field of private law, having no statutory flavour, are better adjudicated upon by the forum agreed to by the parties. The dispute as to whether the amount is payable or not and/or how much amount is payable are disputed questions of facts. There is no admission on the part of the appellants to infer that the amount stands crystallised. Therefore, in the absence of any acceptance of joint survey report by the competent authority, no right would accrue to the writ petitioner only because measurements cannot be undertaken after passage of time. Maybe, the resurvey cannot take place but the measurement books of the work executed from time to time would form a reasonable basis for assessing the amount due and payable to the writ petitioner, but such process could be undertaken only by the agreed forum i.e. arbitration and not by the writ court as it does not have the expertise in respect of measurements or construction of roads.”

57. Considering the above authority cited from the point of view of the respondent, in the first instance, it deals with the preliminary

objection as to the maintainability of this petition. The authority in case of Puna Hinda (*supra*) has been relied upon to persuade us that in matters of commercial transaction where disputed questions of fact may arise relating to an issue for determination, this Court in exercise of its power under Article 226 of the Constitution, may not interfere, obviously for two reasons: (i). Parties in pure commercial transactions emanating from an agreement reached between the parties are bound by the principles of privity of contract and, therefore, the duties and obligations are required to be addressed by the redressal forum that is prescribed for and agreed upon by the parties; and (ii) there being no public law elementen involved writ forum may not permitted to be approved merely because a party to the contract is a state or a government authority within the meaning of Article 12 of the Constitution.

12. Discussion and application of authorities to the present case

58. It is true that in matters of commercial disputes emanating from the contract/ agreement reached between the parties, the Court must discourage invoking its extraordinary jurisdiction under Article 226 of the Constitution, merely for the reasons that state or its officer purport to operate within the contractual field (Radha Krishna Agrawal and others Vs. State of Bihar and others [(1977) 3 SCC 457]).

59. The law as ordinarily stood earlier to Radha Krishna Agrawal's case was that a duty or obligations falling upon the public servant out of a contract, cannot be enforced by the machinery of a writ under Article 226 of the Constitution [Lekhraj Sathram Das Lalwani v. Custodian) AIR 1966 SC 334] and so also the view taken in the case of Bachhandri Rath Vs. State of Orissa (1972) 4 SCC 781, wherein it was held that a right if claimed in terms of contract, such a right cannot be enforced in writ petition, but this rigid legal principle came to be watered down for the first time by the Supreme Court in the matter of Ramanna Dayaram Shetty Vs. International Airport Authority of India (1979) 3 SCC 489, wherein relying upon a judgment of Supreme Court of United States of

America in the case of *Bitarally Vs. Seaton* (1959) SCC Online US SC 87, the Court held that procedure prescribed for, must be religiously adhered to and the principles of *Wednesbury* law of reasonableness and rule of law stand attracted to any issue of arbitrariness. Keeping this principle in mind, Supreme Court in the case of **Jagdish Mandal Vs. State of Orissa and others (2007) 14 SCC 517**, enlarged the scope of judicial review even in matters of commercial transactions where state or its officer is a party. The Court held that if the decision suffers from the vice of arbitrariness or caprice and does not pass the test of reasonableness then such decision is judicially reviewable under Article 226 of the Constitution. The Court, however, hastened to add that the judicial review will not be permitted to be invoked to protect the private interest at the cost of public interest or to decide the contractual disputes. Vide paragraph 22 the Court held thus:

“22. Judicial review of administrative action is intended to prevent arbitrariness, irrationality, unreasonableness, bias and mala fides. Its purpose is to check whether choice or decision is made “lawfully” and not to check whether choice or decision is “sound”. When the power of judicial review is invoked in matters relating to tenders or award of contracts, certain special features should be borne in mind. A contract is a commercial transaction. Evaluating tenders and awarding contracts are essentially commercial functions. Principles of equity and natural justice stay at a distance. If the decision relating to award of contract is bona fide and is in public interest, courts will not, in exercise of power of judicial review, interfere even if a procedural aberration or error in assessment or prejudice to a tenderer, is made out. The power of judicial review will not be permitted to be invoked to protect private interest at the cost of public interest, or to decide contractual disputes. The tenderer or contractor with a grievance can always seek damages in a civil court. Attempts by unsuccessful tenderers with imaginary grievances, wounded pride and business rivalry, to make mountains out of molehills of some technical/procedural violation or some prejudice to self, and persuade courts to interfere by exercising power of judicial review, should be resisted. Such interferences, either interim or final, may hold up public works for years, or delay relief and succour to thousands and millions and may increase the project cost manifold. Therefore, a court before interfering in tender or contractual matters in exercise of power of judicial review, should pose to itself the following questions:

(i) Whether the process adopted or decision made by the authority is mala fide or intended to favour someone;

OR

Whether the process adopted or decision made is so arbitrary and irrational that the court can say: “the decision is such that no responsible authority acting reasonably and in accordance with relevant law could have reached”;

(ii) Whether public interest is affected.

If the answers are in the negative, there should be no interference under Article 226. Cases involving blacklisting or imposition of penal consequences on a tenderer/contractor or distribution of State largesse (allotment of sites/shops, grant of licences, dealerships and franchises) stand on a different footing as they may require a higher degree of fairness in action.”

60. The Court in the case of **A. P. Electrical Equipment** (*supra*) has, therefore, asserted that *mere existence of disputed question of fact by itself, does not take away the jurisdiction of this Court in granting appropriate relief to the petitioner.* The Court observed that if the Court is satisfied that facts were being disputed by the state merely to create a ground for rejection of the writ petition raising the plea of disputed question of facts, the Court can go into and investigate the disputed facts vis-a-vis pleadings raised by the parties to record its own finding as to the facts of the case. Thus, unless and until there is such a complex factual issue involved in a case that needed proper adjudication for appreciation of facts and pleadings which may be in the realm of a common law remedy or otherwise referable to alternative dispute resolution fora, if the sufficient material is otherwise available on record, the Court would not shirk away from discharging its duty of judicial review under Article 226 of the Constitution.

61. The Court rightly observed that in case of termination of contract where variety of situations may arise and the state authority repudiates the contracts mid-term in purported exercise of power under the contract, if the only aspect is the interpretation of true scope of documentary material in the light of pleadings raised, the Court may still grant relief to the party approaching the Court (MP Power Management Company (*supra*)). It has been rightly observed that *disputed question of fact cannot be made a smokescreen to guillotine a genuine claim raised in the writ petition.*

62. In the matter of **Silppi Constructions Contractors Vs. Union of India and another (2020) 16 SCC 489**, the Court reiterated the principles laid down in the case of Jagdish Mandal (supra), as to when the power of judicial review should be invoked. The Court reiterated the principle that wherever there is an arbitrariness in state action then the Court being the guardian of fundamental rights, is the duty bound to interfere with arbitrariness, irrationality and *mala fide* and bias but of course, with a caution and self limitation this power to be exercised. The Court, however, emphasised upon fair play and reasonableness approach on the part of the state where it is a mere party to the contract. Vide paragraphs 19 & 20 of the judgment the Court held thus:

“19. This Court being the guardian of fundamental rights is duty-bound to interfere when there is arbitrariness, irrationality, mala fides and bias. However, this Court in all the aforesaid decisions has cautioned time and again that courts should exercise a lot of restraint while exercising their powers of judicial review in contractual or commercial matters. This Court is normally loathe to interfere in contractual matters unless a clear-cut case of arbitrariness or mala fides or bias or irrationality is made out. One must remember that today many public sector undertakings compete with the private industry. The contracts entered into between private parties are not subject to scrutiny under writ jurisdiction. No doubt, the bodies which are State within the meaning of Article 12 of the Constitution are bound to act fairly and are amenable to the writ jurisdiction of superior courts but this discretionary power must be exercised with a great deal of restraint and caution. The courts must realise their limitations and the havoc which needless interference in commercial matters can cause. In contracts involving technical issues the courts should be even more reluctant because most of us in Judges' robes do not have the necessary expertise to adjudicate upon technical issues beyond our domain. As laid down in the judgments cited above the courts should not use a magnifying glass while scanning the tenders and make every small mistake appear like a big blunder. In fact, the courts must give “fair play in the joints” to the government and public sector undertakings in matters of contract. Courts must also not interfere where such interference will cause unnecessary loss to the public exchequer.

20. The essence of the law laid down in the judgments referred to above is the exercise of restraint and caution; the need for overwhelming public interest to justify judicial intervention in matters of contract involving the State instrumentalities; the courts should give way to the opinion of the experts unless the decision is totally arbitrary or unreasonable; the court does not sit like a court of appeal over the appropriate authority; the court must realise that the authority floating the tender is the best judge of its requirements and, therefore, the court's interference should be minimal. The authority which floats the contract or tender, and has authored the tender documents is the best judge as to how the documents have to be interpreted. If two interpretations are possible then the interpretation of the author must be

accepted. The courts will only interfere to prevent arbitrariness, irrationality, bias, mala fides or perversity. With this approach in mind we shall deal with the present case.”

63. Now, applying the above judgments to the facts of the case as we have discussed above, we find there to be no quarrel about the fact that contract was to proceed and a task under the contract was to be executed provided the state, National Highway Authority, party to the contract, discharged its part of obligation in providing land as per Article 8 of the agreement by executing a ‘Handover Memorandum’. This document of ‘Handover Memorandum’ shows apparent on the face of record that it was simply an eye wash being not in terms of Article 8, inasmuch as subsequent letter of NHAI dated 8th August, 2022 fully acknowledged that the possession of land as was referred to under the Handover Memorandum was not correct in a sense that only 29.914 kms out of 50.254 kms land was provided with ‘Right of Way’. Still further, the letter of the Authority’s Engineer company dated 10th July, 2024 admitted, fairly too, that there was a lot of hindrances and land issues involved for which right of way was not available within the meaning of agreement. If the right of way was not available and there was a delay in executing and completing the project, it was attributable to laxity and casual approach on the part of the state in not performing its own obligations.

64. The impugned action has been taken purely on the basis of alleged poor maintenance and non-completion of project within time citing without giving any example and statistic details that land, as was promised under the agreement to be the part of the Memorandum of association was physically ever handed over to the petitioner, the second party to the contract to invoke the termination clause. When the first party to the contract itself failed to discharge its duties and obligations, then it cannot be said to be in a driver’s seat under an agreement to navigate through the provisions that empower to it to terminate the contract unilaterally.

65. Thus, upon legal principles emanating from judgments discussed above entire action and conduct of NHAI was really vitiated for arbitrariness.

66. We have also noticed and discussed above in the earlier finding part of this judgment that proper reply was submitted by the petitioner to the show cause notice citing places, situations where the land was full of hindrances, the delays in removal of those hindrances, non-cooperation of the authority and delay in approving the design to execute the project as per the Narrative of Statement submitted initially by the petitioner. Not a single explanation offered by the petitioner was considered while taking decision in the matter of notice of termination of contract. Merely date of reply dated 3rd January, 2025 has been referred to but no part of the reply has been discussed and the show cause termination notice as was issued to the petitioner on 23rd December, 2024 was reproduced in the order impugned dated 14th January, 2025. This act and conduct of the NHAI officials in terminating the contract cannot be approved of and such an order is certainly reviewable on the principle of law discussed above evolved in various authorities of Supreme Court of India.

67. It is also worth mentioning here that the Authority's Engineer though had earlier submitted a report demanding for a time of 247 days further to the petitioner in his recommendation letter dated 10th July, 2024 to the Project Director, National Highway Authority, PIE Meerut but surprisingly, it appears, under the pressure of the authority it blamed the petitioner for delay in project vide letter dated 17th December, 2024 directing him to accomplish the task within the extended time line earlier given.

68. What is reasonableness in approach means looking to the facts of a case and in the given scenario what a prudent man would think about and what action would he take. In the present case a National Highway Project with 50.254 kms was underway. Standing private constructions with land issue where farmer's are agitating and temple and mosque structures are such which a private party could not have removed except

with the help of State Authorities. Either the NHAI had given time schedule along with 'Handover Memorandum' that it would get the entire land procured with possession and that too with a 'Right of Way', or should have subsequently done the job writing such letters at subsequent stages meeting the objections if any. At least a prudent person would have behaved this way. However, in the present case NHAI Project Director and at his level only complained about maintenance and slow pace of work and even ignored Authority's Engineer's own letter dated 10th July, 2024 demanding extension of time of 248 days while giving cure period notice and then termination notice. This is an absolute arbitrariness, apparent on the face of record. Again the arbitrariness was so much so that while terminating contract under the order impugned petitioner's reply was not referred to by discussing the same. This is indicative of unerringly pointing to arbitrariness.

69. Thus, the points framed above are decided in favour of the petitioner and the order impugned deserves to be quashed and writ petition deserves to be allowed.

70. Now we come to the aspect as to whether any second party rights have occurred during the pendency of this petition and if not, to save time, the second party if in possession of land under construction of Highway could be given further time in larger public interest.

71. We find that throughout the hearing of the case there has been no change in the stand of NHAI that a third party right was not created pursuant to the interim order passed by this Court and no contract was awarded to a third party nor, any such statement has come up in any of the affidavits filed on behalf of NHAI.

72. It is also not the case of NHAI that possession of the land was taken from the petitioner. The petitioner's construction company the second party to the contract continued to remain there with all its articles and construction machines and materials on the spot and it is in this

background that an averment was made in paragraph 19.9 of the rejoinder affidavit that runs as under:

“19.9. That with due respect, it is now stated that even as on the date of filing the instant rejoinder affidavit, the value of the balance works is Rs. 633 Cr., out of which works amounting to Rs. 157 Cr. had already been executed by TPL but not billed. The remaining value, thus is Rs. 476 Cr. Hence, in case the balance works are awarded to TPL, the same will be done at the cost of RS. 633 Cr. inclusive of what remains to be billed and paid by NHAI within a period of 14 months [12 months + 2 months mobilisation). For the convenience of this Hon'ble Court, a copy of the chart depicting execution of balance works and the timelines is annexed herewith and marked as ANNEXURE-RA 3.”

73. The *status quo* as was there on the date of filing of the petition remained continued and the construction work though did not proceed but remained under the control of second party to the contract.

13. Order

74. Accordingly, the order dated 14th January, 2025 terminating the contract by the respondent No.- 2 and a subsequent action of forfeiting the bank guarantees and issuance of fresh tender dated 3rd February, 2025 are hereby quashed.

75. As a consequence to the above and since the construction of the highway and its maintenance project is to basically meant to serve public interest and since petitioner in affidavit has assured to complete the entire work under the contract within 14 months, we find it appropriate for the parties to conduct a joint site inspection afresh, within a month from today and taking recourse to the provisions as contained under the EPC agreement and to arrive at an agreement to conclude the project within the re-scheduled timeline taking into consideration the letter of Engineer's Authority in the light of the report dated 10th July, 2024 vis-a-vis the interim report to be obtained after joint inspection as directed above and applying the principles contained under Articles 13, 15, 16 and 17 of the EPC agreement.

76. The endeavour of the parties to the agreement, must be to complete the project as expeditiously as possible as per undertaking advanced before us by the petitioner.

77. This writ petition thus stands allowed as above with no order as to cost.

(Swarupama Chaturvedi,J.) (Ajit Kumar,J.)

July 8, 2026

Atmesh