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

% **Reserved on: 26th March, 2021**

Pronounced on: 13th April, 2021

\+ **FAO(OS) (COMM) 55/2021 & C.M.Nos.11596-11597/2021**

NATIONAL HIGHWAYS AUTHORITY OF INDIA

.....Appellant

Through: Mr. Tushar Mehta, SGI with Ms. Madhu Sweta and Ms. Shivangi Khanna, Advocates

versus

PANIPAT JALANDHAR NH-I TOLLWAY PVT. LTD

.....Respondent

Through: Dr. Abhishek Manu Singhvi and Mr. Harish Malhotra, Senior Advocates with Mr. Dhirendra Negi, Ms. Pragya Chauhan and Mr. Amit Bhandari, Advocates

CORAM:
HON'BLE MR. JUSTICE MANMOHAN
HON'BLE MS. JUSTICE ASHA MENON

J U D G M E N T

ASHA MENON, J:

1. The following observations by the learned Single Judge in the order dated 12th March, 2021 passed in O.M.P.(I) (COMM.) 98/2021 has brought the appellant/National Highways Authority of India ("NHAI", for short) before us: -

"21. Mr. Mehta has laid much emphasis on the intent of the

language used in Clause 37.1.2 which begins with the words "without prejudice to any other rights or remedies". There is no doubt that the Respondent could take recourse to the aforesaid provision without prejudice to other rights and remedies and proceed to suspend the Petitioner and accord it an opportunity to cure the defects. However, that does not mean that in case the Respondent has elected to exercise this remedy, it could simultaneously also proceed to terminate under Clause 37.1.2 on the basis of same set of facts. Since the Respondent has elected to go down the path of suspending the rights of the Petitioner as available under the agreement, the opportunity to cure the defects has to be necessarily given, failing which, the Clause itself would become redundant.

22. Be that as it may, we are at the stage of admission. The Petitioner has made out a prima facie case in its favour and in case no stay is granted, it will suffer an irreparable loss. The balance of convenience also lies in favour of the Petitioner and against the Respondent. The matter certainly requires consideration. Accordingly, till the next date of hearing, the termination notice dated 5th March, 2021 is directed to be kept in abeyance. The arrangement between the parties would continue as per the orders passed in O.M.P. (I) (COMM) No. 421/2020, noted above."

2. The crux of the submissions of Sh. Tushar Mehta, learned Solicitor General of India appearing for the NHAI, is that the provisions under Article 36 and Article 37 of the Concession Agreement ("CA", for short) do not operate in separate and mutually exclusive spheres but form a "composite scheme" and both options are available to the NHAI in the event there is a concessionaire default.

3. *Per contra,* Dr. Abhishek Manu Singhvi and Sh.Harish Malhotra, learned senior counsel appearing for the respondent/Panipat Jalandhar NH-I Tollway Pvt. Ltd. ("PJT", for short) contended that the two Articles are mutually exclusive and if the NHAI exercised its choice of proceeding under Article 36, it could not jump to Article 37 to terminate the CA, without allowing the entire procedure provided under Article 36 to play out.

4. At this stage, it may be appropriate to briefly refer to the facts of the present case. On 9th May, 2008, the parties entered into the CA in respect of 'Six-Laning of Panipat-Jalandhar Section of NH-1 From Km 96.00 to Km 387.10 (length of 291.10 Km) in the State of Haryana and Punjab to be executed on Built-Operate-Transfer (Toll) basis on Design-Build-Finance-Operate (DBFO) pattern under NHDP Phase-V' (hereinafter referred to as the "Project"). The CA was entered for a period of fifteen years from 11th May, 2009 till 11th May, 2024. The project was scheduled to be completed by 9th November, 2011 (in 910 days or 2.5 years). In terms of the CA, the parties had also executed an Escrow Agreement dated 6th May, 2009 with the Lenders, where State Bank of India ("SBI", for short) was the Escrow Agent for operation of the Escrow Account. The estimated cost of the project was Rs.2747.50 crores but the Capital Cost submitted by the respondent/PJT amounted to Rs.4518.17 crores. Disputes arose between the parties even before the Provisional Completion Certificate was issued by the Independent Engineer ("I.E.", for short) on 30th September, 2015. These disputes, relating to the year 2013, are before an Arbitral Tribunal.

5. According to the NHAI, the respondent/PJT failed to meet its O & M obligations as per the CA, in particular, relating to safety standards leading to accidents and the completion of balance work after issuance of the Provisional Completion Certificate. On 13th September, 2019, the NHAI issued a 'Cure Period Notice' under Clause 37.1.1 highlighting the several consistent defaults by the respondent/PJT, and called upon it to cure the defaults within sixty days, failing which it would exercise its rights to terminate the CA. On 28th January, 2020, a 'Notice of intention to issue termination notice' ("NIT", for short) was issued under Clauses 37.1.2 and 37.1.3 of the CA with a copy to the Senior Lenders. The respondent/PJT filed a petition being O.M.P.(I)(COMM) 40/2020 under Section 9 of the Arbitration and Conciliation Act, 1996 (the "Act", for short) seeking a stay on the NIT, which was disposed of on 10th February, 2020 on submissions made on behalf of the NHAI that no decision to terminate had yet been taken. In an appeal bearing No. FAO(OS)(COMM)34/2020, the Division Bench of this Court directed that in the event, the NHAI decided to terminate the CA, the same would be kept in abeyance for a period of seven working days to enable the respondent/PJT herein to take legal recourse.

6. The Senior Lenders represented by the SBI, being the lead Bank, had been sent a copy of the NIT dated 28th January, 2020 and it sent a reply dated 11th February, 2020 (Annexure A-7) requesting the NHAI to withhold the termination of the CA for the period of 180 days or such other period so as to compel/enable the respondent/PJT to cure the defaults within the period as contemplated under the proviso to Clauses

37.1.3 of the CA and also exercise their right to substitute the respondent/PJT/Concessionaire, if required within the said period in accordance with the Clause 3.3 of the Substitution Agreement. Again, on 24th February, 2020 (Annexure A-9), the Senior Lenders made a similar request also stating that in case the respondent/PJT failed to cure the defects within the period of 180 days, they would exercise the right to substitute the concessionaire as provided in the CA. The NHAI also intimated the Escrow Banker vide letter dated 25th September, 2020 that as the respondent/PJT had, despite an opportunity of more than 180 days from the date of issuance of the NIT, not complied with the provisions of the CA and since the Lenders/Escrow Banker had failed to substitute the respondent/PJT/Concessionaire, the NHAI was at liberty to invoke the Clause 37.1.2 i.e. termination for concessionaire's default in terms of the orders dated 10th February, 2020 passed in FAO(OS)(COMM)34/2020.

7. Then, on 4th December, 2020, the NHAI issued a 'Suspension Notice' under Clause 36.1 of the CA suspending all rights of the respondent/PJT under the CA. This was on the basis of concessionaire defaults spelt out in the said Notice. Once again, the respondent/PJT herein filed a petition under Section 9 of the Act being O.M.P.(I)(COMM) 421/2020 wherein various prayers were made, particularly in respect of the fact that the right to collect toll had been given to another Agency namely, M/s. Eagle Infra India Limited and vide order dated 15th December, 2020, the learned Single Judge directed that such collection would be deposited in an Escrow Account, without withdrawals. In the same matter, on 22nd December, 2020, a further

direction was issued by the learned Single Judge allowing the plea of the respondent/PJT herein permitting its representative to remain present at all the three toll-plazas. However, the representative was restrained from interfering, in any manner, with the toll collection, which was to remain the sole prerogative of M/s. Eagle Infra India Limited. As per order dated 3rd March, 2021, this O.M.P.(I)(COMM) No. 421/2020 is to come up for hearing on 13th April, 2021. It may be mentioned here that the Senior Lenders vide email dated 16th February, 2021 (Annexure A-19) wrote to the NHAI regarding the status of different projects, and with respect to the current project stated that if the defects were not cured by the concessionaire within the cure period, the CA may be terminated.

8. The petition under Section 9 of the Act, which has given rise to the present appeal, was filed when the NHAI issued a Termination Notice dated 5th March, 2021, seeking its stay.

RIVAL CONTENTIONS

9. By way of the present appeal, the NHAI has prayed that the impugned interim order dated 12th March, 2021 be set aside. The learned Solicitor General drew our attention to various Articles and Clauses of the CA and various communications between the parties to submit that the action taken by the NHAI was fully in accordance with the terms of the CA. He pointed out that the Article 36 relating to suspension of concessionaire's right, provided under Clause 36.1 that upon occurrence of a concessionaire default, the NHAI would be entitled *"without prejudice to its other rights and remedies under the Agreement including*

its rights of termination", to suspend all rights of the concessionaire which relate to collection of fee and other revenues and authorize itself or some other person to collect these revenues during the suspension period.

10. It was his submission that termination was not dependent on the expiry of 180 days, as under Article 37, there was no such requirement and different time limits of lesser duration have been prescribed for the removal of concessionaire defaults of different kinds. He however conceded that termination under Article 37 could be only after the expiry of the cure period, which, in the present case, was 90 days. According to him, the respondent/PJT could not have cured the defects even by the 91st day and the issuance of the Termination Notice on 5th March, 2021 was fully in consonance with the terms of the CA. He drew the Court's attention to the Clause 36.3.2 in this context, pointing out that if, within a period not exceeding 90 days from the date of suspension, the concessionaire had cured the default, the NHAI had to revoke the suspension forthwith. 180 days was the outer limit and was not the limitation period after which alone the right to terminate could be exercised.

11. It was his submission that in the event the suspension was not revoked after the 90th day and upto the 180th day, then without any other Termination Notice, the CA would come to an automatic end. In the written submissions filed on behalf of the NHAI, it was submitted that the Articles 36 and 37 provide for a "composite scheme". The power of suspension provided under Article 36 was in addition to the power of termination under Article 37. The suspension could be revoked if the

concessionaire cured the defects within the stipulated period of 90 days. If the defaults were not cured within 90 days, the NHAI could chose to wait for 180 days but that did not mean that it was precluded from acting before the expiry of the 180 days. The discretion vested with the NHAI to proceed immediately after 90 days were over, without any action for curing the defects, except where the Senior Lenders had sought time along with the concessionaire for either extending the period for curing or allowing 180 days to substitute the concessionaire. Thus, the provisions of suspension and termination were not mutually exclusive. It was submitted that the only limitation upon the NHAI, if the suspension route was taken, was to wait for 90 days to allow the concessionaire to cure the defaults, but after the 90th day, since the Article 36 was without prejudice to its other rights and remedies including the right to termination, nothing could prevent the NHAI from acting under Article 37, particularly, since the Lenders' Representative had in fact agreed with the termination through their communication dated 16th February, 2021.

12. It was also submitted that none of the orders passed in the other proceedings referred to hereinabove, debarred the NHAI from terminating the CA in accordance with Article 37 on the ground that the default has not been cured. Thus, it was submitted that the learned Single Judge erred in observing that because the NHAI had exercised its option under Article 36 to suspend the rights of the concessionaire, it was incumbent on the NHAI to wait for 180 days before the CA stood terminated.

13. The learned Solicitor General also submitted that at best, if on

facts, the NHAI had wrongly terminated the CA, the respondent/PJT would be entitled to seek damages. The very nature of the CA was of a terminable contract and therefore, no injunction could have been issued. It was submitted that the maintenance of the highway was being consistently ignored by the respondent/PJT and several letters from third party users and organizations had been received by the NHAI highlighting a high rate of accidents occurring on the highway constructed by and under the maintenance of the respondent/PJT and despite various efforts by the NHAI, the respondent/PJT was not rectifying the defects, leading to much loss of life and limb. These letters have also been flagged. In these circumstances, the learned Solicitor General prayed that the impugned order be set aside.

14. Learned senior counsel for the respondent/PJT, Dr. Abhishek Manu Singhvi termed the entire exercise of the right to terminate under Article 37 of the CA as *mala fide*. It was his contention that out of 291 kms of the NH-1, the respondent/PJT had constructed 289 kms which was an excellent stretch of road as certified, and even as late as on 21st September, 2020, the road had been declared a pot-hole free road. The I.E. on 7th May, 2019 had also certified that the road was well-maintained. Thus, factually the claim of the NHAI was wrong. It was submitted that after having performed so well, the NHAI was wrongly depriving the respondent/PJT of reaping benefits through toll collections as the CA was to come to an end only in 2024. The respondent/PJT had invested Rs.5,689/- crores and had taken loans worth Rs.3,646/- crores from Public Sector Banks and was entitled to toll collection. It was

submitted that on an earlier occasion, the respondent/PJT had to approach the Supreme Court as great loss was being caused to the respondent/PJT by the NHAI by placing tolls at the wrong places leading to loss of revenue and the claim of over Rs.7000/- crores was pending against the NHAI before the Arbitral Tribunal. In the light of the previous action, the present Termination Notice was also a colourable exercise of the power vested with the NHAI. It was further argued that none of the orders in the previous proceedings approved of such exercise of power of termination by the NHAI. Rather, if such termination was allowed, it would render the challenge of the respondent/PJT of the suspension, infructuous. Therefore, the impugned order was just, fair and equitable and called for no interference.

15. It was also submitted that since the order was an interim order, the court should not interfere with it following the decision of the Supreme Court in ***Wander Ltd. and Anr. v. Antox India (P) Ltd.*, 1990 Suppl. SCC 727**. It was also argued, relying on the judgments reported as ***Narendra Hirawat and Co. v. Sholay Media Entertainment Pvt. Ltd. and Anr.*, 2020 SCC OnLine Bom 391** and ***Jumbo World Holdings Ltd. and Anr. v. Embassy Property Developments Private Limited and Ors.*, 2020 SCC OnLine Mad 61**, that the CA was not a contract that was determinable, as termination on account of breach was excluded from the "nature" of determinable contacts and therefore, the injunction issued by the learned Single Judge was appropriate.

16. It was also submitted that the NHAI having once elected to exercise its rights under Article 36, was, by the *'Doctrine of Election'*

estopped from exercising rights under Article 37. In these circumstances, the termination could have been only as a result of the expiry of 180 days, provided there was no curing of the defects. According to learned senior counsel, the defects had in fact been cured and this question being one of fact, had to be decided in arbitration. In these circumstances, the impugned order called for no interference.

DISCUSSION

17. The learned Solicitor General has placed reliance on ***A.Venkatasubbiah Naidu v. S. Chellappan and Ors.***, **(2000) 7 SCC 695**; ***Anilbhai M. Patel and Ors. v. Suryapur Bank Agent D.B.H. Samiti and Ors.,*** **(2007) 4 SCC 83***;* ***Babu Lal and Ors. v. Vijay Solvex Ltd. and Ors.***, **(2014) 16 SCC 680***;* ***State of West Bengal and Ors. v. Banibrata Ghosh and Ors.***, **(2009) 3 SCC 250***;* ***Ratna Commercial Enterprises Ltd. & Anr. V. Vasutech Ltd.***, **2007 SCC OnLine Del 914** and ***Zila Parishad, Budaun and Ors. v. Brahma Rishi Sharma***, **1969 SCC OnLine All 237** to contend that appeals against interim orders were maintainable. There is no doubt about the maintainability of such appeals. However, learned senior counsel for the respondent/PJT urged this Court not to interfere with the interim orders by placing reliance on ***Wander Ltd. (supra); Airgate Holdings Ltd. v. Sumit Mohan Singh Gandhi & Ors.,*** *judgment dated 8th February, 2021 in FAO (OS)(COMM) 16/2021* and ***Mewa Mishri Enterprises Pvt. Ltd. v. AST Enterprises Inc.,*** *judgment dated 23rd February, 2021 in FAO (OS)(COMM) 28/2021*.

18. No doubt, in ***Wander Ltd. (supra),*** it was held as under:-

> *"14. The appeals before the Division Bench were*

against the exercise of discretion by the Single Judge. In such appeals, the appellate court will not interfere with the exercise of discretion of the court of first instance and substitute its own discretion except where the discretion has been shown to have been exercised arbitrarily, or capriciously or perversely or where the court had ignored the settled principles of law regulating grant or refusal of interlocutory injunctions……"

But it is clear that the Appellate Court is not barred from considering the merits of the decision of the Single Judge/Trial Court even if the order impugned is an interim order of injunction. The facts and the context will determine whether or not the Appellant Court will interfere or hold its hands. As will be clear a little later, this Court is of the view that the present matter requires to be considered on merits by this Court.

19. Relying on several judgments, including ***Indian Oil Corporation Ltd. v. Amritsar Gas Service and Others,*** **(1991) 1 SCC 533;** ***Jindal Steel and Power Limited v. M/s. SAP India Pvt. Ltd.,*** **2015 SCC OnLine Del 10067** and ***Inter Ads Exhibition Pvt. Ltd. v. Busworld International Cooperatieve Vennootschap Met Beperkte Anasprakelijkheid,*** judgment dated 1st May, 2020 in FAO(OS)(COMM) 23/2020, the contention on behalf of the appellant was that when the contract was determinable, no injunction against termination and enforcement of the contract could have been issued, as has been done by the learned Single Judge. Much reliance has been placed by the respondent/PJT on two cases, namely, ***Narendra Hirawat (supra)*** and ***Jumbo World Holdings (supra),*** the argument being that the CA was not in its nature "determinable" and therefore, Section 14(1)(c) and Section 41 of the Specific Relief Act, 1963 ("SRA",

for short) have no application in the present case. While the facts in both the cases were vastly different from that prevailing in the instant case, these two judgments, even otherwise, are not applicable to the instant case. A perusal of these judgments reveals that the learned Single Judges in both the cases have themselves distinguished these cases from ***Indian Oil Corporation Ltd. (supra)*** and ***Jindal Steel (supra).*** In ***Narendra Hirawat (supra)***, for instance, the court observed as under: -

> ***"9.*** *The cases cited by learned Counsel for the defendants are clearly distinguishable on facts. In Indian Oil Corporation (supra), the contract (clause-28 of the distributorship agreement) gave right to either party to determine the agreement by giving 30 days' notice and the only relief that was permissible in such a case was award of a compensation for the period of notice, that is to say, 30 days. It is in the context of this clause that the Supreme Court held that the respondent before it (original plaintiff) was not entitled to restoration of its distributorship terminated by the appellant (original defendant), but only entitled to compensation for loss of earning for the notice period of 30 days, since such notice was not given by the defendant to the plaintiff. Likewise, in Jindal Steel and Power Ltd. (supra), the relevant clause of the contract gave right to the respondent before the Court (original defendant) to terminate the licence after giving 30 days' notice to the petitioner (original plaintiff). In pursuance of this clause, a learned Single Judge of Delhi High Court held that the contract was determinable by its very nature. In Spice Digital Ltd. (supra), the relevant contract (clause 6.2 of the agreement before the Court) gave right to either party to the contract to terminate the agreement upon a 30 days' prior written notice to the other party without assigning any reason for such termination. Once again, it is in the context of such unilateral right of termination that the Court came to a conclusion that the contract was, by its very nature,*

determinable and no specific performance could be claimed. All these cases are clearly distinguishable and do not support the defendants' case here."

20. Likewise, in ***Jumbo World Holdings Ltd. (supra),*** while the learned Single Judge has set out five categories of contracts that are determinable for the purposes of Section 14(1)(c) of the SRA, but also observed as under: -

"In my view, although the Indian Oil case referred to clause 27 thereof, which provided for termination forthwith "for cause", the decision turned on clause 28 thereof, which provided for "no fault" termination, as discussed earlier."

21. In ***Indian Oil Corporation Ltd. (supra)***, the court was dealing with the question of validity of termination of Distributorship Agreement. The learned Arbitrator had concluded that the termination was not in accordance with the Clause 27 of the Distributorship Agreement but went on to hold that the Award would not fetter the rights of the defendant/Corporation to terminate the distributorship of the plaintiff in accordance with the said Agreement, if such an occasion arises. In this context, the Supreme Court observed as below: -

"12. ……. This finding read along with the reasons given in the award clearly accepts that the distributorship could be terminated in accordance with the terms of the agreement dated April 1, 1976, which contains the aforesaid clauses 27 and 28. Having said so in the award itself, it is obvious that the arbitrator held the distributorship to be revokable in accordance with clauses 27 and 28 of the agreement. It is in this sense that the award describes the Distributorship Agreement as one for an indefinite period, that is, till

terminated in accordance with clauses 27 and 28. The finding in the award being that the Distributorship Agreement was revokable and the same being admittedly for rendering personal service, the relevant provisions of the Specific Relief Act were automatically attracted. Sub-section (1) of Section 14 of the Specific Relief Act specifies the contracts which cannot be specifically enforced, one of which is 'a contract which is in its nature determinable'. In the present case, it is not necessary to refer to the other clauses of sub-section (1) of Section 14, which also may be attracted in the present case since clause (c) clearly applies on the finding read with reasons given in the award itself that the contract by its nature is determinable. This being so granting the relief of restoration of the distributorship even on the finding that the breach was committed by the appellant-Corporation is contrary to the mandate in Section 14(1) of the Specific Relief Act and there is an error of law apparent on the face of the award which is stated to be made according to 'the law governing such cases'. The grant of this relief in the award cannot, therefore, be sustained."

22. A similar conclusion was drawn by the learned Single Judge of this court in ***Jindal Steel (supra)*** and by the Division Bench of this court in ***Inter Ads Exhibition (supra)***. Relevant observations in ***Inter Ads Exhibition (supra)*** are as under: -

"13. Whether the termination notice dated 15.03.2019, met the requirements of Article 12.4 or not and thus, whether the termination was a valid termination or not, would be questions that have to be examined and adjudicated upon by the learned Arbitrator, to be appointed by the parties to resolve their disputes. It would also be for the learned Arbitrator to reconcile Article 7.1 with the recitals in the JVA-II dated

25.10.2011, as reproduced hereinabove, limiting the agreement to four editions. Under Article 7, termination can be either mutually agreed to under Article 7.2 or at the option of either party, on the occurrence of certain events, as listed under Article 7.3, which contemplates a termination with penalty. Again, the question whether the respondent had given 30 days' time to the appellant to make good the default, duly specified in reasonable detail in the communications exchanged between the parties, is not for this court to inquire into. Suffice it is to state that in either event, the agreement was terminable and therefore, the conclusion arrived at by the learned Single Judge that specific performance of the contract could not be granted and nor could any injunction be issued restraining the respondent from giving effect to the notice dated 15.03.2019, as that would in effect amount to enforcement of the contract beyond the said date i.e. 15.03.2019, cannot be faulted.

14. The learned Single Judge has rightly relied on a decision of this court in MIC Electronics Ltd. and Ors. vs. Municipal Corporation of Delhi and Ors., 2011 II AD (DEL) 625, to hold that legality of the termination and the justification of the appellant of not paying the balance due to the respondent, would have to be examined by the learned Arbitrator. Reliance was rightly placed on the following observations made in the captioned case:-

> *"12…… Therefore, the licence stood terminated, as correctly observed by the learned Single Judge, in the impugned order, and the legality or illegality of termination would be a matter to be determined in arbitration. Further, the justification given by the Appellant for not paying the licence fee will be examined in the arbitral proceedings. The case of the Appellant that, owing to the failure of the Respondent to perform obligations under the agreement, and the latter's*

refusal to decrease the number of 20 of LED screens in terms of clause 6 of-the-agreement, would also be considered by the Arbitral Tribunal. In this behalf, we, therefore, find considerable merit in the submission made on behalf of the Respondent that if the cancellation of the contract by the Respondent constitutes a breach of contract on their part, the Appellant would be entitled to damages. In other words, the questions whether the termination is wrongful or not or whether the Respondent was not justified in terminating the agreement, are yet to be decided. However, from the facts of the case there is no manner of doubt that the contract was by its very nature terminable, in terms of the contract between the parties themselves."

23. To our mind, therefore, the decisions in ***Narendra Hirawat (supra)*** and ***Jumbo World Holdings Ltd. (supra)*** will not come to the aid and assistance of the respondent/PJT.

24. The Articles and Clauses of the CA leave no manner of doubt that the CA is determinable. Just as in ***Indian Oil Corporation Ltd. (supra),*** both parties have been given a right to seek termination of the CA by issuing a notice under Article 37 and specifically, Clause 37.1.2. (NHAI's right) and Clause 37.2.2 (Concessionaire's right). Termination under Article 37 would be on account of the various concessionaire's defaults or Authority default. Various time periods ranging from 15 days to 90 days have been provided under Clause 37.1.1 and Clause 37.2 for removal of defaults by the defaulting party, and the failure to remove such defaults within the time specified would give the other party a right to issue a termination notice of 15 days.

25. If the NHAI issues the termination notice, then they have to send a copy of the same to the Senior Lenders under Clause 37.1.3 so that they could either make a representation disclosing their intention to substitute the concessionaire or procure that the default specified in the notice would be cured within a period of 180 days so that after the defaults were cured, the Authority could withdraw the notice of termination and restore all rights to the concessionaire.

26. It is also necessary to note that there is also a termination provided under Article 36. When suspension is not revoked within 180 days, then automatically there would be a "deemed termination by mutual agreement". Thus, if the NHAI suspends the right of the concessionaire and neither the concessionaire, i.e. the respondent/PJT, removes the defects within 90 days, nor the NHAI revokes the suspension within a period of 180 days, then, without anything being done by either side, i.e. curing of the defaults (Clause 36.3.2) within 90 days and revocation of suspension (Clause 36.5.2) within 180 days, the CA is automatically terminated.

27. The CA being a determinable contract, under the provisions of Section 14(1)(c) of the SRA, no injunction could have been issued for howsoever short a duration and the impugned order to the extent it directs that the termination notice dated 5th March, 2021 be kept in abeyance is against the settled law, and the principles enunciated in ***Wander Ltd. (supra)*** will not come in the way of this Court interfering with the same.

28. Much stress has been laid on behalf of the respondent/PJT on the *'Doctrine of Election'* and on the argument that the NHAI having

exercised its option under Article 36 to suspend the rights of the respondent/concessionaire, had to follow that route alone, and could not then, seek to exercise its option under Article 37 to terminate the CA on the basis of the concessionaire default. The *'Doctrine of Election'* postulates that when two remedies are available for the same relief, the aggrieved party has the option to elect either of them but not both. A party cannot be permitted to approbate and reprobate. The principle has been stated in ***White and Tudor's Leading Cases in Equity*** **Vol. 18th Edn. at p. 444** as follows:-

> *"Election is the obligation imposed upon a party by courts of equity to choose between two inconsistent or alternative rights or claims in cases where there is clear intention of the person from whom he derives one that he should not enjoy both…. That he who accepts a benefit under a deed or will must adopt the whole contents of the instrument."*

29. Similarly, in ***P.R. Deshpande v. Maruti Balaram Haibatti*****, (1998) 6 SCC 507,** it was held as under: -

> *"8. The doctrine of election is based on the rule of estoppel — the principle that one cannot approbate and reprobate inheres in it. The doctrine of estoppel by election is one of the species of estoppel in pais (or equitable estoppel) which is a rule in equity. By that rule, a person may be precluded by his actions or conduct or silence when it is his duty to speak, from asserting a right which he otherwise would have had."*

30. These cases have been referred to by the Supreme Court in ***National Insurance Co. Ltd. v. Mastan & Anr.*****, (2006) 2 SCC 641.**

Apart from the fact that the said case related to a situation where the cause of action arose under two different Statutes, namely, the Workmen's Compensation Act,1923 and the Motor Vehicles Act, 1988 and under Section 167 of the Motor Vehicles Act, it was made clear that no claimant would be entitled to file a claim under both these Statutes and the claimant had to exercise a clear option of proceeding under either of the Acts before the Forum concerned, the language of the contract between the parties, namely the CA, is unequivocal and clear that the right of suspension does not extinguish the right to terminate. Clause 36.1 may be usefully reproduced herein below:-

> *"36.1 Suspension upon Concessionaire Default*
>
> *Upon occurrence of a Concessionaire Default, the Authority shall be entitled,* ***without prejudice to its other rights and remedies under this Agreement including its rights of Termination*** *hereunder, to (i) suspend all rights of the Concessionaire under this Agreement including the Concessionaire's right to collect Fee, and other revenues pursuant hereto, and (ii) exercise such rights itself or authorise any other person to exercise the same on its behalf during such suspension (the "Suspension"). Suspension hereunder shall be effective forthwith upon issue of notice by the Authority to the Concessionaire and may extend up to a period not exceeding 180 (one hundred and eighty) days from the date of issue of such notice; provided that upon written request from the Concessionaire and the Lenders' Representative, the Authority shall extend the aforesaid period of 180 (one hundred and eighty) days by a further period not exceeding 90 (ninety) days."*

31. This Court is, therefore, of the view that the *'Doctrine of Election'*

is not attracted to the present case.

32. Nor is it possible for this Court to accept the interpretation placed on Article 36 and Article 37 by the learned senior counsel for the respondent/PJT, as being mutually exclusive, and that the NHAI was bound to wait till the expiry of 180 days before taking any steps for termination. The language used in the two Articles shows that the exercise of power under both the Articles was available to all parties, including the Senior Lenders. The period of 180 days provided under Clause 36.1 is an outer limit and must be read in conjunction with Clause 36.3 which provides for revocation of the suspension. It is clear from Clause 36.3.2 that if the concessionaire cures the concessionaire default within a period of "not exceeding 90 days" from the date of suspension, the NHAI was mandatorily required to revoke the suspension forthwith.

33. 180 days become available only if the Senior Lenders seek that period as provided under Clause 36.4 and under Clause 37.1.3. If there is a joint request by the concessionaire and the Senior Lenders, this period of 180 days could be extended up to a further period of 90 days under Clause 36.1. This is to enable the Senior Lenders to undertake two courses of action. One, is to ensure that the defaults are cured within the said period. The second, is to enable them to take steps for substituting the concessionaire. If no such request has been made on behalf of the Senior Lenders for time, then clearly the 180 days provided under Clause 36.1 is only a maximum time period for the continuation of the suspension of the rights of the concessionaire/respondent/PJT to collect revenue, etc.. It does not mean that the NHAI would not be able to terminate the CA despite the respondent/PJT having not cured the

defaults and in the absence of any request from the Senior Lenders for extended time to enable substitution. In the instant case, the Lenders had sent the letter dated 16th February, 2021 (Annexure A-19) expressing concurrence with the termination of the CA in case defaults were not cured within the 90 days granted to the concessionaire by the NHAI. In other words, the NHAI could exercise its right to terminate the CA from the 91st day onwards.

34. There is weight in the argument of the learned Solicitor General that the two Articles form a "composite scheme" leading to the termination of the contract. This is evident from the fact that even under Article 37 when a concessionaire default occurs and the NHAI issues NIT under Clause 37.1.2, it is required to send a copy to the Senior Lenders under Clause 37.1.3 granting 15 days' time to the Senior Lenders' representative to make a representation on behalf of the Senior Lenders stating their intention to substitute the concessionaire in accordance with the Substitution Agreement. On receipt of such representation on behalf of the Senior Lenders, the NHAI in its discretion, can either withhold Termination for a period not exceeding 180 days from the date of such representation or exercise its right of Suspension, as the case may be, for enabling the Lenders' Representative to exercise the Senior Lenders' right of substitution in accordance with the Substitution Agreement.

35. This makes it very clear that the right of suspension is in addition to the right to terminate and even after the Termination Notice is issued under Article 37, on request of the Senior Lenders, the NHAI could go back to Article 36 to invoke suspension. It is thus clear that Articles 36 and 37 do not work in independent silos.

36. Similarly, Article 36 incorporates a Clause, namely, Clause 36.5 dealing with "Termination", which reads as under: -

> *"36.5.1 At any time during the period of Suspension under this Article 36, the Concessionaire may by notice require the Authority to revoke the Suspension and issue a Termination Notice. Subject to the rights of the Lenders' Representative to undertake substitution in accordance with the provisions of this Agreement and within the period specified in Clause 36.4:the Authority shall within 15 (fifteen) 4 days of receipt of such notice, terminate this Agreement under and in accordance with Article 37.*
>
> *36.5.2 Notwithstanding anything to the contrary contained in this Agreement, in the event that Suspension is not revoked within 180 (one hundred and eighty) days from the date of Suspension hereunder or within the extended period, if any, set forth in Clause 36.1, the Concession Agreement shall, upon expiry of the aforesaid period, be deemed to have been terminated by mutual agreement of the Parties and all the provisions of this Agreement shall apply, mutatis mutandis, to such Termination as if a Termination Notice hid been issued by the Authority upon occurrence of a Concessionaire Default."*

37. It may be noticed from this Clause that during the suspension period, the concessionaire/respondent has also been given a right to seek termination of the agreement. To this end, it must give a notice asking the NHAI to revoke the suspension and issue a termination notice in accordance with Article 37. This would indicate that the invocation of the right to suspend by the NHAI does not put an end to its rights or the rights of the concessionaire/respondent/PJT to seek the termination under Article 37 during the very period of suspension. But if the termination

occurs under Clause 36.5.2, there is no need to issue a separate notice under Article 37 as upon expiry of 180 days or extended period on request of the Senior Lenders along with the concessionaire, if suspension has not been revoked, the CA is "deemed to have been terminated by mutual agreement of the parties" and all consequences would follow as if pursuant to Termination Notice issued by the NHAI upon occurrence of concessionaire default i.e. under Article 37.

38. Thus, there is no ground to hold that the two Articles are mutually exclusive and exercise of one right forecloses the right under the other Article.

39. The next question is whether even if the Articles are not mutually exclusive, whether the termination would have had to wait for the expiry of 180 days. In this regard, the only limitation that can be read in case of suspension of concessionaire rights under Article 36 is that no termination can be effected for 90 days, as the concessionaire has the right to seek revocation if the default is cured within a period not exceeding 90 days. Vide the letter dated 16th February, 2021, since the Senior Lenders had also concurred with the termination once the defects were not cured within 90 days, therefore, there was no requirement of waiting for 180 days before terminating the CA. Even otherwise, situations may arise such as, insolvency of the concessionaire or other inability on the part of the concessionaire to cure the defaults and there may be a situation when in public interest the CA may have to be terminated, much before 180 days.

40. Learned senior counsel did submit that even if the power to

terminate before the expiry of 180 days is acknowledged, since none of the extreme situations of the company being rendered insolvent or being wound up or any such cause existed in the instant case, the decision to terminate was *mala fide* and could not be justified. To this end, he referred to the communications appreciating the good maintenance of the roads by the respondent/PJT.

41. *Per contra*, the learned Solicitor General directed our attention to communications from different departments/authorities placed on the record as Annexure A-4 (Colly.) and Annexure A-10 (Colly.) highlighting the high rate of accidents and fatalities that were occurring on the highway under maintenance and operation of the respondent/PJT. The inspection reports of the I.E. dated 2nd June, 2020, 11th June, 2020, 16th June, 2020, etc., have been relied upon by the NHAI to show that the maintenance was not in order and that the respondent/PJT had caused concessionaire defaults. Of course, the respondent/PJT has relied on the letter of the I.E. dated 21st September, 2020 to claim that the highway was in a good condition.

42. While this Court would like to record that this is one of the rare cases where it has noticed that the NHAI seeks to take action for lapses in maintenance leading to accidents and public misfortune, we need to note that the question of whether the maintenance was good or bad or indifferent, is not a subject matter of a Section 9 petition and therefore, the present appeal. As rightly pointed out by the learned Solicitor General, if the termination was unwarranted, the respondent/PJT is entitled to seek damages and monetary compensation.

43. This Court is, therefore, unable to agree with the observation of the learned Single Judge that the NHAI is estopped from exercising its rights of termination under Article 37 or that even under Article 36, it is required to mandatorily await the lapse of 180 days before termination can occur or that once suspension has been invoked, the termination can only be on the efflux of 180 days. We are, therefore, unable to agree with this observation of the learned Single Judge that the Termination Notice could not have been issued by the NHAI on 5th March, 2021 or that it had to wait till June 2021.

44. For the above reasons, we allow the present appeal and set aside the impugned order dated 12th March, 2021 and vacate the stay granted by the learned Single Judge. Since the Section 9 petition being O.M.P.(I) (COMM.) 98/2021 filed by the respondent/PJT, seeks the same relief, in the light of our discussion, we hold that nothing survives in the said application, which also stands dismissed vide this order.

45. All other pending applications stand disposed of.

ASHA MENON, J

MANMOHAN, J

APRIL 13, 2021/s