

IN THE HIGH COURT OF JUDICATURE AT BOMBAY,
AURANGABAD BENCH, AURANGABAD

ARBITRATION APPEAL NO. 15 OF 2013

Ashoka Buildcon Ltd.,
Formerly M/s Ashoka Info Pvt. Ltd.
Merged vide Bombay High Court
Order w.e.f. 01.04.2003)
A Company incorporated and
registered under the provisions
of the Companies Act, 1956,
having registered office at
Ashoka House, Ashoka Marg,
Nashik-422011,
and unit office at E-28/29,
Ashoka Arch, Market Yard,
Gultekdi,
Pune-411 037.

...Appellant
[Orig. Applicant]

VERSUS

State of Maharashtra,
through,
The Executive Engineer,
Public Works Department,
Ahmednagar

...Respondent
[Orig. Opponent]

WITH

CIVIL APPLICATION NO. 11305 OF 2013

IN

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and unit office at E-28/29,
Ashoka Arch, Market Yard,
Gultekdi,
Pune-411 037,
through its authorized person
Mr. Popat s/o Bhimaji Nalawade,
Age 36 yerars, occ. Service

...Applicant
[Orig. Applicant]

VERSUS

State of Maharashtra,
through,
The Executive Engineer,
Public Works Department,
Ahmednagar

...Respondent
[Orig. Opponent]

.....
Shri R.N.Dhorde, Senior Counsel i/b
Smt. S.D.Tambat-Dhumal, advocate for appellant/original
applicant
Shri Rajendra S. Deshmukh, advocate for
respondent/original opponent

.....
CORAM : S.S.SHINDE, J.

DATED : 16th November, 2013.

ORAL JUDGMENT :-

1] This Arbitration Appeal is arising out of the order, dated 25.7.2013, passed by the learned Principal District Judge, Ahmednagar, in Arbitration Application No. 1 of 2013. Along with the Arbitration Appeal, the appellant has also filed Civil Application for grant of interim relief during the pendency of the appeal.

2] The facts leading for filing application under Section 9 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as, 'the said Act' for short), as summarized by the District Court, are as follows :-

“(2) The Executive Engineer, Public Works Division, Ahmednagar wanted to construct “improvements to Ahmednagar-Karmala Road, S.H. No. 141 Km. 0/0 to 80/600 Ahmednagar to District Border under Building, Operate and Transfer (in short “BOT”) Scheme (with toll rights). The scope of the work includes (1) improvements to Ahmednagar-Karmala Road as aforesaid under BOT Scheme under toll rights and (2) maintenance and renewal of the road upto end of concession period.

(3) In response to the advertisement, the applicant submitted tender and his tender was accepted as per letter of acceptance dt. 8.7.1998 and the contract came to be executed between applicant and State of Maharashtra on 19.02.1999. The work order was accordingly issued on 12.03.1999 in applicant's favour.

(4) The State of Maharashtra issued a notification dt. 24.08.1999 and authorised the applicant to collect the

toll in respect of the said facility for a period from 24.08.1999 to 04.11.2015. The concession period as per cash flow began on 05.02.1999 and it was for 16 Years 9 Months, which was to come to an end on 04.11.2015.

(5) The applicant obtained loan and made huge investment for the work. It obtained the loan at the interest rate of 23% p.a. And also completed the work in stipulated time. The Reserve Bank, vide letter dt. 03.07.2003 stopped prescribing lending rates for the loans beyond Rs. 2 Lakhs since 1994. The Government also adopted the formula in the circular, dt. 07.04.2003 for reworking the concession period. As per the provisions of contract clause 3.7.11, which says that, in case of change of lending interest rate by Reserve Bank of India, the concession period stipulated in the contract shall be reworked out with the change rates based on the cash flow statement/project statement of loan and repayment.

(6) The applicant requested Government of Maharashtra through its Secretary from time and again to give an opportunity before reworking the concession period but for no use. The Government finally issued notification dt. 09.11.2012 contending that the lending

interest rate has been changed by the Reserve Bank of India and thereby as per clause 3.7.11 of the contract, the concession period in view of the new lending rate has been worked out and period for collection of toll is bound to end before 14.11.2012. Such notification was issued on 13.05.2012, which was to take effect from 14.11.2012.

(7) In view of the notification, the letter was issued by Executive Engineer dt. 17.11.2012, asking the applicant to stop the toll collection and accordingly panchanama was drawn and toll collection was stopped on 17.11.2012 at 21.00 hours.

(8) According to applicant the said impugned notification, letter and panchanama whereby toll collection was stopped, are null and void and ab-initio illegal. The clause 3.7.11 of the contract provides for reworking of concession period on the cash flow statement/project statement of loan and repayment. The applicant was authorised to collect toll till 04.11.2015. However, it was stopped arbitrarily without giving any opportunity. The said act on the part of Government of Maharashtra, was challenged by the applicant by filing petition before the Hon'ble High Court of Judicature at Bombay, Bench at

Aurangabad, vide Writ Petition No. 9622 of 2012. The Hon'ble High Court vide order dt. 16.01.2013 was pleased to pass order in Writ Petition No. 9622 of 2012 as under :-

“The parties i.e. petitioner and respondent no.3 have presented a joint pursis, duly signed by them. The pursis is taken on record and marked “X” for identification. Respondent no.3 has agreed to issue notice to the petitioner calling upon the petitioner to reply the contentions raised in the notice. It is also agreed by respondent no.3 to afford personal hearing to the petitioner and thereafter to pass a speaking order in the matter. In view of the agreement arrived at between the parties, nothing survives for consideration in the petition. Writ Petition, therefore, stands disposed of.”

[Joint pursis reads as under :-

“The parties hereby agree that the respondent no.2 will issue show cause notice to the petitioner within one week. The petitioner will reply to the same within one week from the receipt of the said notice. The petitioner will be granted hearing within one week of the receipt of reply. The respondent no.2 will pass speaking order within two weeks

from date of conclusion of hearing. It is agreed that entire proceeding will be completed within four weeks.

Both the parties agree to settle all their disputes, if any, by referring the same to the Arbitral Tribunal. ”

(9) In view of the order aforesaid, the parties approached the competent authority comprising of Shri Ajit B. Pawar, Shri V.S.Karandikar and Shri S.L.Jadhav for settlement. The applicant has however, challenged order passed by said authority by invoking arbitration clause and now the dispute is pending before Arbitral Tribunal.

(10) Now the applicant, during pendency of the arbitral proceedings has filed the present application u/s. 9 of the Act for the prayers already stated.”

3] The respondents herein resisted the claim before the District Court by filing reply at Exh. 10. The District Court in para 14 of the impugned judgment framed necessary points for its determination and by reasoned order, rejected the application filed by the appellant under Section 9 of the said Act. Hence, this Arbitration Appeal by the appellant.

4] The learned Senior Counsel appearing for the appellant submitted that the letter, dated 17.11.2012, by which notification dated

9.11.2012 was served upon the appellant, thereby asking the appellant to stop the toll collection, which has been run by the appellant at Ahmednagar-Karmala road SH No. 141, is illegal, in as much as, it is based on Circular, which is not part of the contract and amends the contract unilaterally by replacing word, 'LR' with 'PLR'. It is submitted that the Circular, dated 7.4.2003 has adopted calculations for reworking cash flow, which is provided in the contract and is unilateral. The Circular is unilateral and the appellant has been denied opportunity to explain his side on it is thus denial of natural justice. It is submitted that since beginning the Government was aware of the prime lending rates of five major public sector Banks and deregulation of lending rates by R.B.I. etc., but the Government never acted on it, and therefore, the conduct of the parties is required to be seriously looked into. It is submitted that the statutory provisions cannot be used wrongly to deny justice to the injured party. The 'lease' termed as 'concession' by the respondent under the statutory contract drafted by the respondent cannot be interpreted in favour of drafter when the Government/respondent had with it as a granter huge resources. It is further submitted that the table no. 74 relied upon by the respondent for lending rates of Reserve Bank contains a note that rates in the table after 1994-95 are the prime lending rates of five major public sector Banks and are not the rates prescribed by the Reserve Bank of India in view of deregulation of lending rates by the Reserve Bank of India. It is submitted that the District Court ignored the provisions of Section 9 of the said Act and exception to Rule of compensation. It is

further submitted that the District Court proceeded on the footing that, since the matter is referred to the Arbitral Tribunal, the District Court can entertain the application only after arbitrator passes the final award. It is submitted that Section 9 of the said Act can be invoked even during the pendency of arbitration proceedings before the arbitrator.

5] In support of his contention, the learned Senior Counsel appearing for the appellant pressed into service reported judgment of the Supreme Court in the case of M/s Transmission Corporation of A.P. Ltd. Vs M/s Lanco Kondapalli Power Pvt. Ltd. [(2006) 1 SCC 540]. It is submitted that Section 9 of the said Act should be applied, so that status quo may be directed to be maintained having regard to the fact that the parties understood the workability of the agreement in a particular manner.

6] The learned Senior Counsel appearing for the appellant further pressed into service the exposition of the Supreme Court reported in the case of Adhunik Steels Ltd. Vs Orissa Manganese and Minerals Pvt. Ltd., [(2007) 7 SCC 125] and submitted that the grant of interim prohibitory injunction or an interim mandatory injunction are governed by well known Rules and it is difficult to imagine that the Legislator while enacting Section 9 of the said Act intended to make a provision which was de hors the accepted principles that governed the grant of interim

injunction.

6] The learned Senior Counsel appearing for the appellant further invited my attention to the reported judgment of this court in the case of Oberoi Constructions Pvt. Ltd. Vs Worli Shivshahi Co-op. Housing Society Ltd., [2009 (2) RAJ 467] and in particular para 8 thereof. It is submitted that this court held that under Section 9 of the said Act, the court has power to grant interim relief before or during the process of arbitration and even on conclusion of arbitral proceedings the award becomes deemed decree of the court.

7] It is submitted that the appellant is willing to maintain the accounts of collection of toll and also the names of person who have paid the toll and also to maintain the amount received by separate account, if the appellant is allowed to resume the toll collection. It is submitted that in case the appellant succeeds before the arbitrator, in that case the Arbitral Tribunal can grant the relief of further period of concession for collection of the toll tax. It is submitted that the Arbitral Tribunal cannot grant damages. It is further submitted that applying the the prime lending rates of five major public sector Banks or any other lending interest rates of of alleged Reserve Bank of India without there being any provision in the contract, amending term in the contract unilaterally and without consent of the appellant.

8] It is submitted that in some what similar fact situation, this court by interim order in Writ Petition allowed the appellant therein to collect the toll, thereby directing to maintain the separate accounts. The Senior Counsel has tendered across Bar a copy of the order passed by the court on 23.10.2009 in the case of Ashok Infrastructure Consortium (AO) Nashik vs The State of Maharashtra and another.

9] The learned Senior Counsel appearing for the appellant has also invited my attention to the grounds taken in the appeal memo, annexures thereto and the contentions raised in the application and submits that this appeal deserves to be allowed.

10] The learned Senior Counsel appearing for the appellant alternatively submits that in case this court is not inclined to entertain the appeal, the appellant may be allowed to make prayer for interim relief before the arbitrator under Section 17 of the said Act. In support of this contention, he relied upon the reported judgment of this court in the case of Kunitakara Electric Company vs Greenvalley Home Developers (P)Ltd. [2010 (1) RAJ 197 (Bom.).

11] On the other hand, learned Special counsel appearing for the respondents invited my attention to the reasons recorded by the District Court and also affidavit in reply filed by the respondents and Sur-rejoinder.

According to the learned counsel appearing for the respondents, by way of filing application under Section 9 of the said Act, the appellant is praying for mandatory injunction, which cannot be granted. It is submitted that the contract is terminated one year back and thereafter the appellant herein did file the Writ Petition before the Division Bench and said Writ Petition was heard and disposed of on the basis of minutes of order prepared by the parties. It is submitted that by filing the minutes of order in Writ Petition No. 9622 of 2012, the appellant agreed to settle all the disputes between the appellant and the respondents by referring the matter to the Arbitral Tribunal. It is submitted that the Division Bench, in view of the agreement of the parties, directed the respondent no.3 to issue notices to the parties and after hearing them, pass appropriate order, and accordingly, the Deputy Secretary of the respondent/Department has heard the parties and passed the order. It is submitted that in the said Writ Petition, there was prayer for cancellation of the order passed by the respondents and also prayer for allowing the appellant to collect the toll tax. Therefore, it is submitted that once such petition was filed and disposed of by the Division Bench, it was not appropriate on the part of the appellant to file application under Section 9 of the said Act before the District Court, Ahmednagar. Counsel invited my attention to the reasons recorded by the District Court and submits that the appeal is devoid of any merits and same may be dismissed.

12] It is submitted that the application under Section 9 of the said

Act would not maintainable where the contract, which, in its nature is determinable. Counsel invited my attention to the reported judgment of Delhi High Court in the case of Rajasthan Breweries Limited vs Stroh Brewery Company, [AIR 2000 DELHI 450].

13] It is submitted that while considering the application under Section 9 of the said Act, the court has to consider the provisions of Order XXXVIII Rule 5, Order XXXIX Rules 1 and 2 of the Civil Procedure Code and also Sections 14 and 41 of the Specific Relief Act. In support of this contention, learned counsel appearing for the respondents placed reliance on the reported judgment in the case of Vijay Agarwal vs Lehman Brothers Advisors Pvt. Ltd. And anr., [2009 (4) ALL MR 738].

14] Learned counsel appearing for the respondents also invited my attention to the reported judgment of the Punjab and Haryana High Court in the case of Union of India vs Bakhshi Amrik Singh, [AIR 1963 PUNJAB 104 and submitted that the courts while issuing permanent or temporary injunction, must act in a careful and conservative manner and grant relief only in situations which so clearly call for it as to make its refusal work real and serious hardship and injustice.

15] Counsel also invited my attention to the reported judgment of

the Supreme Court in the case of Adhunik Steels Ltd. Vs Orissa Manganese and Minerals Pvt.Ltd., reported in [AIR 2007 SC 2563] and submitted that the power under Section 9 of the said Act is not totally independent of the well known principles governing grant of interim injunction and relevant provisions of Specific Relief Act cannot be kept out of consideration.

16] Learned counsel appearing for the respondents relying upon the reported judgment of this court in the case of Oil and Natural Gas Corporation Ltd. Vs Streamline Shipping Co. Pvt. Ltd., M/s, [AIR 2002 BOMBAY 420] submitted that in the facts of that case, this court held that though the contract was for a period of three years, clause in contract giving right to ONGC to terminate contract after expiry of one year without assigning any reasons, cannot be said to unconstitutional or opposed to public policy and in such case no injunction can be granted to prevent breach of such contract.

17] I have given careful consideration to the submissions of the learned Senior Counsel appearing for the appellant and learned counsel for the respondents. With their able assistance, I have perused the grounds taken in the appeal memo, annexures thereto, reply filed by the respondents, rejoinder affidavit filed by the petitioner, Sur-rejoinder filed by the respondents and the judgments of various High Court and the

Supreme Court.

18] The submission made by the learned Senior Counsel appearing for the appellant during the course of arguments that, prior to approaching the arbitrator, it was not possible for the appellant to approach the District Court by way of filing application under Section 9 of the said Act, deserves no consideration. It is well settled that an application under Section 9 of the said Act can be filed even before the commencement of arbitration proceedings, as held by the Supreme Court in the case of *Sundaram Finance Ltd. Vs NEPC India Ltd.*, [(1999) 2 SCC 479]. Therefore, it was open for the appellant to approach the District Court by way of filing application under Section 9 of the said Act instead of filing Writ Petition No. 9622 of 2012 before the Division Bench of this court. It is admitted position that the appellant has stopped toll collection from the month of November, 2012. The appellant by way of filing Writ Petition No. 9622 of 2012 prayed for following reliefs :-

“A) This writ petition may kindly be allowed;

B) To hold and declare that the impugned notifications dated 07/04/2013, 09/11/2012 and impugned letter dated 17/11/2012 and impugned panchanama dated 17/11/2012 is illegal, arbitrary and violative of Articles 14, 19(i)(g) and same may kindly be quashed and set aside;

C) By issue of writ of Mandamus or any other appropriate writ, order or direction in the nature of

Mandamus, the respondents may kindly be directed to restore the toll collection facility run by the petitioner on Ahmednagar-Karmala Road, S.H. No. 141 Km. 0/0 to 80/600 forthwith;

D) Pending hearing and final disposal of this writ petition, the operation of notification dated 09.11.2012 and letter dated 17.11.2012 may kindly be stayed and the respondents may kindly be restrained from obstructing the petitioner and its staff, officers/employees, agents, etc. from collecting toll in respect of the project of improvements to Ahmednagar-Karmala Road, S.H. No. 141 Km. 0/0 to 80/600 Ahmednagar to District Border under BOT scheme (with toll rights) at the toll collection booths by using any coercive methods or otherwise either personally or through their staff, officers, servants, agents, etc.;

E) Ad-interim relief in terms of prayer clause "D" above be kindly granted;

F) Costs of the petition may kindly be awarded to the petitioner;

G) Any other relief in favour of the petitioner may kindly be granted."

19] Upon careful perusal of the prayer clause 'B' in the said Writ Petition, it is abundantly clear that by way of said prayer, the appellant herein prayed the relief to hold and declare that the impugned notifications dated 7.4.2013 and 9.11.2012 and the impugned letter, dated 17.11.2012 and panchanama, dated 17.11.2012, are illegal, arbitrary and violative of Articles 14 and 19(i)(g) of the Constitution of India. By prayer clause 'C',

the appellant i.e. petitioner in said Writ Petition, prayed for issuance of writ of mandamus or any other appropriate writ or direction in the nature of mandamus to the respondents to restore the toll collection facility run by the petitioner on Ahmednagar-Karmala road SH No. 141 Km. 0/0 to 80/160 forthwith. Therefore, the reliefs which were prayed in the said Writ Petition, appear to be given up by the appellant by way of filing minutes of order. The minutes of order in Writ Petition No. 9622 of 2012 read thus :-

“Both the parties agree to settle all their disputes, if any, by referring the same to the Arbitral Tribunal.”

20] Upon careful perusal of the minutes of the order, it is abundantly clear that both the parties agree to settle all their disputes, if any, arising out of the contract, by referring the same to the Arbitral Tribunal. Therefore, attempt of the appellant to file application under Section 9 of the said Act is contrary to the minutes of the order, which is part of the record in Writ Petition No. 9622 of 2012, passed by the Division Bench of this court on 16.1.2013.

21] In pursuant to the disposal of the said Writ Petition, it is not in dispute that the parties are heard by the Deputy Secretary of the respondents/Department and following order is passed :-

“ The contentions of the concessionaire in its written

say to get the higher interest (i.e. 23%) is not proper, reasonable and appropriate. Therefore the demand of the concessionaire is not acceptable and hence it could not be allowed. The Government Notification issued on the 09.11.2012 by the PWD to rescind the previous Notification dated 13.05.2012 regarding termination of concession period as per clause 3.7.11 in respect of the contract "Improvements to the Ahmednagar Karmala Road State High No. 141 Km. 0/00 to 80/600 Ahmednagar District border under BOT scheme is valid, proper and correct.

Hence, I hold that, the Notification issued by the Government dt. 9th November, 2012 is valid and there is no need to modify it."

22] Upon perusal of the order, passed by the Deputy Secretary, P.W.D. (Privatization), Government of Maharashtra, it is abundantly clear that the said authority has held that the Government notification issued on 9.11.2012 by P.W.D. to rescind the previous notification, dated 13.5.2012 regarding termination of concession period as per clause 3.7.11 in respect of contract in "Improvements to the Ahmednagar-Karmala road State Highway No. 141 Km. 0/0 to 80/160 Ahmednagar District border under BOT is valid and correct. Since the said order was passed in pursuance of the disposal of the Writ Petition, as observed earlier, the minutes of order, passed in the said Writ Petition, binds the parties to have solution to the dispute only before the Arbitral Tribunal. Therefore, it was open for the appellant to invoke the provisions of Section 17 of the said Act before the Tribunal. In case the appellant was aggrieved by the order passed by the Deputy Secretary, PWD (Privatization), Government of Maharashtra, it

was open for the appellant to seek appropriate remedy. However, the order passed by the said authority attained finality, and therefore, belated attempt of the appellant to file application under Section 9 of the said Act before the District Court, of which adjudication had taken place, almost about after nine months, deserves no consideration. The impugned order of the District Court refusing to grant mandatory injunction cannot be said to be unreasonable or de hors the material placed on record.

23] By way of filing application under Section 9 of the said Act, the appellant herein prayed for following reliefs :-

“(1) Toll stations at 8/00 k.m. And 55/00 k.m. On State Highway No.141 may kindly be restored to the applicant and permit the applicant to collect the toll at the toll stations forthwith.

(2) The opponent may kindly be prohibited by an order of injunction from obstructing the applicant and its staff from collecting toll in respect of the project of improvements to Ahmednagar-Karmala Road, S.H. 141 Km 0/0 to 80/600 Ahmednagar to District Border under BOT scheme (with toll rights), at the toll collection booths, by using any coercive methods or otherwise either personally or through their officers, servants, agents, etc. ”

24] Upon perusal of the prayers in the application, in substance, the appellant prayed before the District Court to grant reliefs which are given up before the Division Bench of this court by way of filing minutes of

order and thereby agreeing to settle the disputes arising out of the agreement/contract between the parties before the Arbitral Tribunal.

The relevant clause of the agreement, on the basis of which the period of toll collection of the appellant has been curtailed by the respondents 3.7.11, reads thus :-

“3.7.11 -- In case of change of lending interest rates by Reserve Bank of India, the concession period stipulated in the contract shall be reworked out with the changed rates based on the cash flow statement/projected statement of loan and repayment. ”

The said clause does exist in agreement, dated 27.7.1999 entered between the parties. It is not in dispute that at the relevant time when said agreement was given effect, the interest rate was 23 per cent, as it is clear from the chart at page 84 of the compilation of the appeal and it appears that the said interest rate has climbed down to 17.6 per cent. Therefore, prima facie, it appears to this court that the action taken by the respondents is in consonance with the terms of the agreement. However, since the parties are before the Arbitral Tribunal, this court refrains itself from expressing any opinion about the merits of the matter.

25] It is true that by way of filing application under Section 9 of the said Act, interim relief can be prayed and granted by the court. However, in the peculiar facts of this case, the appellant having been approached

before the Division Bench of this court by way of filing Writ Petition and by filing minutes of the order agreed to resolve disputes arising out of contract before the Arbitral Tribunal, the District Court was right in declining the relief as prayed by the appellant. The District Court is right in holding that by way of filing application under Section 9 of the said Act, in substance, the prayer which is for mandatory injunction, cannot be granted.

26] As observed earlier, it is not in dispute that in November, 2012 the appellant has stopped the collection of toll. The District Court has considered the ingredients of Order XXXIX Rules 1 and 2 of the Civil Procedure Code in the impugned judgment and held in para 27 thus :-

“27) On the conspectus of discussion in foregoing paras, it will be thus crystal clear that the application does not fall within the ambit of Sec. 9 of the Arbitration and Conciliation Act, 1996 and even otherwise the applicant has failed to make out a prima facie case in its favour and that it will suffer irreparable loss in case injunction is not granted. The balance of convenience lies in favour of people at large and in any case not in favour of applicant and therefore, on all counts, the application deserves to be rejected. I, therefore, answer the points accordingly and pass following order.

ORDER

Application stands rejected with costs. ”

27] The District Court did consider the judgment cited by the appellant and also the balance of convenience, irreparable loss and remedy available to the appellant. In case the appellant succeeds before the Arbitral Tribunal, certainly concession period can be extended from the date of such order as per terms of contract. In case, the appellant feels that he is entitled to damages, he is free to file such proceedings. The District Court has considered the submission of the respondents that if concession period is not extended and if the matter before the Arbitral Tribunal goes in appellant's favour, the person using the road for the period thereafter till the concession period will pay tax, and therefore, there is no irreparable loss to the appellant. The District Court, in paras 19, 20 and 21 held thus :-

"19) A plain reading of the said clause gives full authority to the government to rework out the schedule of concession period of collection of toll tax and accordingly in view of the change in the lending interest rates, the Government of Maharashtra has issued the notification. In view of the said notification the work of the applicant was stopped and the said act was challenged before the Hon'ble High Court. The Hon'ble High Court directed Government to give an opportunity to the applicant and accordingly an opportunity was given and the act of the State of Maharashtra was maintained and the said act is now challenged before Arbitral Tribunal and therefore, there is no question of commenting on merits of that act by this Court.

20) In such circumstances, whether the act on the part of Government to stop collection of the toll tax

was arbitrary and whether the reworking of the schedule of concession period for collection of toll tax was arbitrary?, is a matter to be decided by Arbitral Tribunal and unless this issue is decided by the competent authority, it cannot be said that the applicant has prima facie case.

21) In case the applicant is not allowed to collect toll tax and it is held that the action on the part of Government stopping him from collection of toll tax is illegal, the concession period can be extended from the date of such order as per terms of contract and since it has been observed that the applicant has already recovered amount, no irreparable loss will be caused to the applicant. As against this, if the applicant is allowed to collect toll tax and if it is held that the action on the part of non-applicant stopping collection was legal, the people in general will suffer irreparable loss as they will have to pay the tax illegally. The learned counsel for the applicant submitted that the applicant is ready to keep all the amount in separate account and the said amount will not be utilized by the applicant and the same will be refunded to the persons from whom it is recovered, in case the applicant fails before Arbitral Tribunal. Countering the attack, the learned counsel for the non-applicant submitted that the user of the road will be public in general, which may be used by different persons every day and it will be very difficult to refund the amount to them. I totally agree with the submission made by the learned counsel for the non-applicant. As against, if the concession period is not extended and if the matter before Arbitral Tribunal goes in applicant's favour, the persons using the road, for the period thereafter till the concession period, will pay tax. I, therefore, find that no irreparable loss will be caused to the applicant and the balance of convenience is also in

favour of people in general who are using the road. ”

28] Upon perusal of the afore said paragraphs from the District Court judgment, it is abundantly clear that the District Court has considered the relevant clause i.e. 3.7.11 from the agreement and also prima facie case, balance of convenience and irreparable loss and declined to grant mandatory injunction.

29] It is not necessary for this court to reproduce or reiterate what has been held by the District Court, since this court is in agreement with the findings/reasons recorded by the District Court.

30] The Senior Counsel appearing for the appellant submitted that the respondents are likely to allow the other persons to collect the toll tax. However, in reply to the said argument, the counsel appearing for the respondents, relying upon the affidavit in reply, submitted that the new work is in respect of four lane road to be constructed, in which the appellant herein has also filled in the tender, and therefore, the appellant is not right in contending that for the same work the respondents have invited the tenders.

31] As held by Delhi High Court in the case of Rajasthan Breweries Limited (supra), the effect of breach of contract by a party

seeking specifically enforce the contract under the Indian law is enshrined in Section 16 (c) r/w Section 41(e) of the Specific Relief Act, 1963. Clause (e) of Section 41 of the Specific Relief Act provides that injunction cannot be granted to prevent the breach of contract, performance of which would not be specifically enforced. Clause (c) of Sub-section (1) of Section 14 of the Specific Relief Act says that a contract, which is in its nature determinable cannot be specifically enforced. In the said judgment, Delhi High Court has considered the situation in absence of specific clause authorizing and enabling either party to terminate the agreement in the event of happening of events specified therein and in para 20 it is held as under :-

“20) Even in the absence of specific clause authorising and enabling either party to terminate the agreement in the event of happening of the events specified therein, from the very nature of the agreement, which is private commercial transaction, the same could be terminated even without assigning any reason by serving a reasonable notice. At the most, in case ultimately it is found that termination was bad in law or contrary to the terms of the agreement or of any understanding between the parties or for any other reason, the remedy of the appellants would be to seek compensation for wrongful termination but not a claim for specific performance of the agreements and for that view of the matter learned Single Judge was justified in coming to the conclusion that the appellant had sought for an injunction seeking to specifically enforce the agreement. Such an injunction is statutorily prohibited with respect of a contract, which is determinable in nature. The application being under the provisions of Section 9(ii)(e) of the Arbitration and Conciliation Act, relief was not granted in view of

Section 14(i)(c) read with Section 41 of the Specific Relief Act. It was rightly held that other clauses of Section 9 of the Act shall not apply to the contract, which is otherwise determinable in respect of which the prayer is made specifically to enforce the same."

32] In the light of discussion herein above, in the facts and circumstances of this case, prima facie, it appears to this court that in view of clause 3.7.11 of the agreement between the parties, the respondents were right in reducing the period stipulated in the contract. The District Court, by well reasoned order, has declined to entertain the application under Section 9 of the said Act. No case is made out for interference.

33] The Arbitration Appeal and Civil Application stand dismissed. However, at this stage, learned Senior Counsel appearing for the appellant seeks liberty to approach the Arbitrator under Section 17 of the Arbitration and Conciliation Act, since said section enables the appellant to apply before the Tribunal. This Court has not expressed any opinion, if the appellant is entitled to apply under section 17 of the said Act, Arbitrator will take care of such prayer.

(S.S.SHINDE, J.)

dbm/aa15.13