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IN THE HIGH COURT OF DELHI AT NEW DELHI

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CNR No. DLHC010802372025

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ARB. A. (COMM.) 60/2025 & I.A. 26239/2025

MORTH THROUGH EE NH DIVISION AURANGABAD

.....Petitioner

Through: Mr. A.P. Singh, Mr. Naman
Saraswat, Mr. Vikas Soni, Advs.

versus

M S STATE CONSTRUCTION INTEGRATED WORKS
GANGAMAI INDUSTRIES AND CONSTRUCTIONS LTD
JOINT VENTURE

.....Respondent

Through: Mr. Kaustubh Sinha, Mr. Bishva
bandhu Kumar, Ms. Surbhi
Mehta, Advs.**CORAM:****HON'BLE MR. JUSTICE OM PRAKASH SHUKLA****JUDGMENT(ORAL)**

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17.09.2026

1. The present appeal arises from the Arbitral Tribunal's order dated 08.08.2025 restraining the Appellant from invoking Performance Bank Guarantee and from acting upon its notice of intention to terminate dated 13.06.2025 issued under Article 23.1.2 of the EPC (Engineering, Procurement, and Construction) Agreement¹ dated 09.05.2018.

2. Apparently, the present dispute arises out of a EPC contract concerning rehabilitation/upgradation of approximately 31.918 km of NH-752H for a contract price of about Rs.153.59 crore, floated by the Appellant and awarded to the Respondent, wherein the appointed date under the contract was 30.06.2018 and the Scheduled Completion Date

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Signing Date: 23.09.2026
14:37:07

Page 1 of 26



2026:DHC:8189



was relied upon the Respondent was 22.12.2019.

3. The Respondent has relied upon a recommendation for provisional completion dated 29.09.2021, stated to be effective from 10.08.2021, and extension of time granted on account of right of way related issues, whereas the Appellant relies upon 22 Non-Conformity Report² issued between June 2019 and April 2021 and subsequent payment investigations which identified 66 defective panels in 2024, allegedly increasing to 259 by June 2025, with defects including cracking of PQC panels.

4. Following several directions for rectification issued between December 2024 and March 2025, dispute arose when the Appellant initiated risk and cost rectification estimated at approximately Rs.20.84 crores and thereafter issued the Notice of Intention to Terminate dated 13.06.2025, leading to constituting the Arbitral Tribunal for resolution of dispute between the parties.

5. By way of the impugned order, the Tribunal has pending adjudication of rights & liabilities of the parties, restrained the Appellant from giving effect to that notice.

6. Learned Counsel for the Appellant submits that the Tribunal wrongly restrained the Notice of Intention to Terminate dated 13.06.2025 despite material showing continuing pavement defects, including an increase from 66 defective panels in 2024 to 259 by June

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Signed By: ANUBHAKAR B. A. (COMM.) 60/2025
TRIPATHI
Signing Date: 23.09.2026
14:37:07

Page 2 of 26



2026:DHC:8189



2025, and failed to appreciate that the Respondent's PCOD/EOT did not extinguish its independent obligations regarding quality, workmanship and rectification under Article 11.

7. It is submitted that the defects concern defective EPC work, and not merely routine maintenance under Article 14 and that disputed issues regarding attribution of defects, adequacy of rectification and compliance with Article 23.1.2 could not effectively be finally determined at the Section 17 stage.

8. *Per contra*, learned Counsel for the Respondent submits that the arbitration is already at its final stage, with pleadings and evidence complete and arguments on the claims concluded, and therefore the Appellant's attempt to terminate the EPC Agreement at this stage would prejudice the pending adjudication.

9. It is contended that the project was substantially completed, and about 94–95% physically and over 90% financially stands executed. Additionally, all Schedule-K tests were successfully completed, and the Authority's Engineer repeatedly recommended issuance of PCOD.

10. It is submitted that delays were attributable to Authority such as ROW, land acquisition, HT-line shifting, forest clearance and local issues, which were themselves recognised through four EOTs up to 30.09.2021.

11. According to learned Counsel for Respondent, the defects relied upon in the termination notice is a unilateral 2024 assessment

Signature Not Verified

Signed By: ANUBHAKA
TRIPATHI
Signing Date: 23.09.2026
14:37:07

Page 3 of 26



2026:DHC:8189



inconsistent with the earlier PCOD recommendation and are, in any event, matters falling within the maintenance regime under Article 14.

12. Learned Counsel for the Respondent submits that Article 23.1.2 does not make the contract freely determinable, since termination is conditional upon an established Contractor Default and compliance with the contractual notice-and-cure mechanism. Hence, as per him, when the existence of such default itself is under adjudication, the Authority cannot bypass the arbitral process by terminating the contract and invoking consequential remedies such as bank guarantees.

13. I have heard both the parties and perused the record.

14. I do not wish to burden this judgment with a detailed explanation of the scope of interference under Section 37(2)(b) of the Act. Therefore, keeping in mind the narrow scope of interference available, I shall deal with the issues which arise for consideration in this matter.

15. The dispute pertains to the termination of the EPC contract and invocation of the performance bank guarantee.

16. Thus, keeping in mind the narrow scope of interference available under Section 37(2)(b), the only issue that arises for consideration before me is whether the arbitral tribunal erred in restraining determination of the agreement and invocation of the performance bank guarantee.

17. Before commencing, it would be in the best interest to go through

Signature Not Verified

Signed By: ANUBHAK
TRIPATHI
Signing Date: 23.09.2026
14:37:07

Page 4 of 26



2026:DHC:8189



the findings of the arbitral tribunal with regard to the aforesaid issue.

18. Accordingly, the findings of the arbitral Tribunal can be summarised into following points.

- i. Appellant's Engineer had recommended PCOD on 29.09.2021 after recording compliance with contractual requirements and Schedule-K tests.
- ii. The highway had remained open to traffic for years and the Respondent had already rectified a large number of distressed panels.
- iii. Only 66 panels were initially identified as pending and even the later figure of 259 constituted about 1.5% of total panels.
- iv. No part of the road had been closed or subjected to speed restrictions and some balance works were *prima facie* affected by ROW, local obstructions and issues attributable to Appellant.
- v. The Tribunal also relied on Clause 26.3.5, which according to Tribunal keeps the Agreement and parties' rights and obligations in force pending the arbitral award.
- vi. That the Authority could still carry out repairs at the Respondent's risk and cost under Clauses 11.13.2/17.4 without terminating the contract.



2026:DHC:8189



vii. Termination and invocation of bank guarantees were considered unnecessary and potentially prejudicial to the pending arbitration, while permitting the Authority to proceed with rectification works.

19. Having recognized the findings of the arbitral tribunal, since the present dispute involves termination and invocation of the bank guarantee, it would be logical for this Court to explore the contractual procedure under the subject contract.

20. According to this Court, this would aid in identifying whether the contract is determinable and whether it permits invocation of the bank guarantee in the particular circumstances.

21. The relevant provisions of the EPC Agreement dated 09.05.2018 can be identified as follows:

“10.5 Extension of time for completion

10.5.1 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, environmental clearances or approval of railway authorities, specified in Clause 4.1.4;

(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



2026:DHC:8189



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.

10.5.2 The Contractor shall, no later than 15 (fifteen) business days from the occurrence of an event or circumstance specified in Clause 10.5.1, 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.

10.5.3 In the event of the failure of the Contractor to issue to the Authority's Engineer a notice in accordance with the provisions of Clause 10.5.2 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 10.5.3, the Authority shall be discharged from all liability in connection with the claim.

10.5.4 The Authority's Engineer shall, on receipt of the claim in accordance with the provisions of Clause 10.5.2, 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 60 (sixty) 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

Signature Not Verified

Signed By: ANUBHAKA
TRIPATHI
Signing Date: 23.09.2026
14:37:07

Page 7 of 26



2026:DHC:8189



determinations and may increase, but shall not decrease, the total Time Extension.

10.5.5 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 10.5.4 within a period of 60 (sixty) days of the receipt thereof.

ARTICLE 11

QUALITY ASSURANCE, MONITORING AND SUPERVISION

11.1 Quality of Materials and workmanship

The Contractor shall ensure that the Construction, Materials and workmanship are in accordance with the requirements specified in this Agreement, Specifications and Standards and Good Industry Practice.

11.2 Quality control system

11.2.1 The Contractor shall establish a quality control mechanism to ensure compliance with the provisions of this Agreement (the "Quality Assurance Plan" or "QAP").

11.2.2 The Contractor shall, within 30 (thirty) days of the Appointed Date, submit to the Authority's Engineer its Quality Assurance Plan which shall include the following:

(a) organisation, duties and responsibilities, procedures, inspections and documentation;

(b) quality control mechanism including sampling and testing of Materials, test frequencies, standards, acceptance criteria, testing facilities, reporting, recording and



2026:DHC:8189



interpretation of test results, approvals, check list for site activities, and proforma for testing and calibration in accordance with the Specifications for Road and Bridge Works issued by MORTH, relevant IRC specifications and Good Industry Practice; and

(c) internal quality audit system.

The Authority's Engineer shall convey its comments to the Contractor within a period of 21 (twenty-one) days of receipt of the QAP stating the modifications, if any, required, and the Contractor shall incorporate those in the QAP to the extent required for conforming with the provisions of this Clause 11.2.

11.2.3 The Contractor shall procure all documents, apparatus and instruments, fuel, consumables, water, electricity, labour, Materials, samples, and qualified personnel as are necessary for examining and testing the Project Assets and workmanship in accordance with the Quality Assurance Plan.

11.2.4 The cost of testing of Construction, Materials and workmanship under this Article 11 shall be borne by the Contractor.

11.3. Methodology

The Contractor shall, at least 15 (fifteen) days prior to the commencement of the construction, submit to the Authority's Engineer for review the methodology proposed to be adopted for executing the Works, giving details of equipment to be deployed, traffic management and measures for ensuring safety. The Authority's Engineer shall complete the review and convey its comments to the Contractor within a period of 10 (ten) days from the date of receipt of the proposed methodology from the Contractor.

11.4. Inspection and technical audit by the Authority

The Authority or any representative authorised by the Authority in this behalf may inspect and review the progress and quality of the construction of Project Highway and issue appropriate directions to the Authority's Engineer and the Contractor for taking remedial action in the event the Works are not in accordance with the provisions of this Agreement.

11.5 External technical audit

At any time during construction, the Authority may appoint an external technical auditor to conduct an audit of the quality of the Works. The findings of the audit, to the extent accepted by the



2026:DHC:8189



Authority, shall be notified to the Contractor and the Authority's Engineer for taking remedial action in accordance with this Agreement. The Contractor shall provide all assistance as may be required by the auditor in the conduct of its audit hereunder. Notwithstanding anything contained in this Clause 11.5, the external technical audit shall not affect any obligations of the Contractor or the Authority's Engineer under this Agreement.

11.6 Inspection of construction records

The Authority shall have the right to inspect the records of the Contractor relating to the Works.

11.7 Monthly progress reports

During the Construction Period, the Contractor shall, no later than 10 (ten) days after the close of each month, furnish. to the Authority and the Authority's Engineer a monthly report on progress of the Works and shall promptly give such other relevant information as may be required by the Authority's Engineer.

11.8 Inspection

11.8.1 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.

11.8.2 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.

11.8.3 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.



2026:DHC:8189



11.9 Samples

The Contractor shall submit the following samples of Materials and relevant information to the Authority's Engineer for pre-construction review:

- (a) manufacturer's test reports and standard samples of manufactured Materials; and*
- (b) samples of such other Materials as the Authority's Engineer may require.*

11.10 Tests

11.10.1 For determining that the Works conform to the Specifications and Standards, the Authority's Engineer shall require the Contractor to carry out or cause to be carried out tests, at such time and frequency and in such manner as specified in this Agreement, and in accordance with Good Industry Practice for quality assurance. The test checks by the Authority's Engineer shall comprise at least 20 (twenty) percent of the quantity or number of tests prescribed for each category or type of test for quality control by the Contractor.

11.10.2 In the event that results of any tests conducted under this Clause 11.10 establish any Defects or deficiencies in the Works, the Contractor shall carry out remedial measures and furnish a report to the Authority's Engineer in this behalf. The Authority's Engineer shall require the Contractor to carry out or cause to be carried out tests to determine that such remedial measures have brought the Works into compliance with the Specifications and Standards, and the procedure shall be repeated until such Works conform to the Specifications and Standards. For the avoidance of doubt, the cost of such tests and remedial measures in pursuance thereof shall be solely borne by the Contractor.

11.11 Examination of work before covering up

In respect of the work which the Authority's Engineer is entitled to examine, inspect, measure and/or test before it is covered up or put out of view or any part of the work is placed thereon, the Contractor shall give notice to the Authority's Engineer whenever any such work is ready and before it is covered up. The Authority's Engineer shall then either carry out the examination, inspection or testing without unreasonable delay, or promptly give notice to the Contractor that the Authority's Engineer does not require to do so. Provided, however, that if any work is of a continuous nature where it is not possible or prudent to keep it uncovered or incomplete, the

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TRIPATHI
Signing Date: 23.09.2026
14:37:07

Page 11 of 26



2026:DHC:8189



Contractor shall notify the schedule of carrying out such work to give sufficient opportunity, not being less than 3 (three) business days' notice, to the Authority's Engineer to conduct its inspection, measurement or test while the work is continuing. Provided further that in the event the Contractor receives no response from the Authority's Engineer within a period of 3 (three) business days from the date on which the Contractor's notice hereunder is delivered to the Authority's Engineer, the Contractor shall be entitled to assume that the Authority's Engineer would not undertake the said inspection.

11.12 Rejection

If, as a result of an examination, inspection, measurement or testing, any Plant, Materials, design or workmanship is found to be defective or otherwise not in accordance with the provisions of this Agreement, the Authority's Engineer shall reject the Plant, Materials, design or workmanship by giving notice to the Contractor, with reasons. The Contractor shall then promptly make good the Defect and ensure that the rejected item complies with the requirements of this Agreement.

If the Authority's Engineer requires the Plant, Materials, design or workmanship to be retested, the tests shall be repeated under the same terms and conditions, as applicable in each case. If the rejection and retesting cause the Authority to incur any additional costs, such cost shall be recoverable by the Authority from the Contractor; and may be deducted by the Authority from any monies due to be paid to the Contractor.

11.13 Remedial work

11.13.1 Notwithstanding any previous test or certification, the Authority's Engineer may instruct the Contractor to:

- (a) remove from the Site and replace any Plant or Materials which are not in accordance with the provisions of this Agreement;
- (b) remove and re-execute any work which is not in accordance with the provisions of this Agreement and the Specification and Standards; and
- (c) execute any work which is urgently required for the safety of the Project Highway, whether because of an accident, unforeseeable event or otherwise; provided that in case of any work required on account of a Force Majeure Event, the provisions of Clause 21.6 shall apply.



2026:DHC:8189



11.13.2 If the Contractor fails to comply with the instructions issued by the Authority's Engineer under Clause 11.13.1, within the time specified in the Authority's Engineer's notice or as mutually agreed, the Authority's Engineer may advise the Authority to have the work executed by another agency. The cost so incurred by the Authority for undertaking such work shall, without prejudice to the rights of the Authority to recover Damages in accordance with the provisions of this Agreement, be recoverable from the Contractor and may be deducted by the Authority from any monies due to be paid to the Contractor.

11.14 Delays during construction

Without prejudice to the provisions of Clause 10.3.2, 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.

11.15 Quality control records and Documents

The Contractor shall hand over to the Authority's Engineer a copy of all its quality control records and documents before the Completion Certificate is issued pursuant to Clause 12.2.

11.16 Video recording

During the Construction Period, the Contractor shall provide to the Authority for every calendar quarter, a video recording, which will be compiled into a 3 (three)-hour compact disc or digital video disc, as the case may be, covering the status and progress of Works in that quarter. The video recording shall be provided to the Authority no later than 15 (fifteen) days after the close of each quarter after the Appointed Date.

11.17 Suspension of unsafe Construction Works

11.17.1 Upon recommendation of the Authority's Engineer to this effect, the Authority may by notice require the Contractor to suspend forthwith the whole or any part of the Works if, in the reasonable opinion of the Authority's Engineer, such work threatens the safety of the Users and pedestrians.



2026:DHC:8189



11.17.2 The Contractor shall, pursuant to the notice under Clause 11.17.1, suspend the Works or any part thereof for such time and in such manner as may be specified by the Authority and thereupon carry out remedial measures to secure the safety of suspended works, the Users and pedestrians. The Contractor may by notice require the Authority's Engineer to inspect such remedial measures forthwith and make a report to the Authority recommending whether or not the suspension hereunder may be revoked. Upon receiving the recommendations of the Authority's Engineer, the Authority shall either revoke such suspension or instruct the Contractor to carry out such other and further remedial measures as may be necessary in the reasonable opinion of the Authority, and the procedure set forth in this Clause 11.17 shall be repeated until the suspension hereunder is revoked.

11.17.3 Subject to the provisions of Clause 21.6, all reasonable costs incurred for maintaining and protecting the Works or part thereof during the period of suspension (the "Preservation Costs"), shall be borne by the Contractor; provided that if the suspension has occurred as a result of any breach of this Agreement by the Authority, the Preservation Costs shall be borne by the Authority.

11.17.4 If suspension of Works is for reasons not attributable to the Contractor, the Authority's Engineer shall determine any Time Extension to which the Contractor is reasonably entitled.

Article 12 Completion Certificate

12.2 Provisional Certificate

12.2.5 No Provisional Certificate shall be issued under the provisions of this Clause 12.2 until the Contractor has submitted valid claims for payment of at least 80% (eighty per cent) of the amount arrived at after reducing the lump sum price specified in Clause 19.1.1 by the amount attributable to works which have been withdrawn under the provisions of Clause 8.3.3. For the avoidance of doubt and by way of illustration, the Parties agree that if the Contract Price specified in Clause 19.1.1 is Rs. 105 cr. (Rs. one hundred and five crore) and the works withdrawn under Clause 8.3.3 have a value of Rs. 5 cr. (Rs. five crore), a Provisional Certificate shall not be issued until valid claims for payment of an amount of Rs. 80 cr. (Rs. eighty crore) have been submitted by the Contractor in accordance with the provisions of this Agreement. It is further agreed that all price adjustments made in pursuance of Clause 19.10 shall not be reckoned for computation of the claims for

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Signed By: ANUBHAKAR B. A. (COMM.) 60/2025
TRIPATHI
Signing Date: 23.09.2026
14:37:07

Page 14 of 26



2026:DHC:8189



payments referred to in Clause 12.2.5.

ARTICLE 14-MAINTENANCE

14.1 Maintenance obligations of the Contractor

14.1.1 The Contractor shall maintain the Project Highway for a period of 4 (four) years commencing from the date of the Provisional Certificate (the "Maintenance Period"). For the performance of its Maintenance obligations, the contractor shall be paid 0.25% of the Contract Price for the first year and 0.5%, 0.75%, 1% of the Contract Price for the second, third and fourth year respectively in case of road projects. But in case of stand alone Bridge / structure work, the contractor shall be paid 0.25%, 0.5%, 0.5% and 0.5% of the Contract Price for the first, second, third and fourth year respectively. Amount shall be, inclusive of all taxes. The amount payable for maintenance shall be adjusted to reflect any increase or decrease arising out of variation in WPI to be determined in accordance with the provisions of Clause 19.12. For the avoidance of doubt, it is agreed that in the event no Provisional Certificate is issued, the Maintenance Period shall commence from the date of the Completion Certificate. It is further agreed that the Contract Price hereunder shall be reckoned with reference to the amount specified in Clause 19.1.1, which shall be adjusted to the extent of Change of Scope and the works withdrawn under the provisions of Clause 8.3.3, but shall not include any price adjustments in pursuance of Clause 19.10.

ARTICLE 17-DEFECTS LIABILITY

17.1 Defects Liability Period

17.1.1 The Contractor shall be responsible for all the Defects and deficiencies, except usual wear and tear in the Project Highway or any Section thereof, till the expiry of a period of 4 (four) years commencing from the date of Provisional Certificate (the "Defects Liability Period"). Provided that the Defects Liability Period shall in no case be less than 48 (forty eight) months from the date of Completion Certificate for and in respect of works for which Time Extension was granted. Provided further that in the event no Provisional Certificate is issued, the Defects Liability Period shall commence from the date of the Completion Certificate. For the avoidance of doubt, any repairs or restoration on account of usual wear or tear in the Project Highway or any Section thereof shall form a part of the Maintenance obligations of the Contractor as specified in Article 14.

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Signed By: ANUBHAKAR B. A. (COMM.) 60/2025
TRIPATHI
Signing Date: 23.09.2026
14:37:07

Page 15 of 26



2026:DHC:8189



17.2 Remedying Defects

Save and except as provided in Clause 14.1.2, the Contractor shall repair or rectify all Defects and deficiencies observed by the Authority's Engineer during the Defects Liability Period within a period of 15 (fifteen) days from the date of notice issued by the Authority's Engineer in this behalf, or within such reasonable period as may be determined by the Authority's Engineer at the request of the Contractor, in accordance with Good Industry Practice.

17.3 Cost of remedying Defects

For the avoidance of doubt, any repair or rectification undertaken in accordance with the provisions of Clause 17.2, including any additional testing, shall be carried out by the Contractor at its own risk and cost, to the extent that such rectification or repair is attributable to:

- (a) the design of the Project;
- (b) Plant, Materials or workmanship not being in accordance with this Agreement and the Specifications and Standards;
- (c) improper maintenance during construction of the Project Highway by the Contractor; and/or
- (d) failure by the Contractor to comply with any other obligation under this Agreement.

17.4 Contractor's failure to rectify Defects

In the event that the Contractor fails to repair or rectify such Defect or deficiency within the period specified in Clause 17.2, the Authority shall be entitled to get the same repaired, rectified or remedied at the Contractor's cost so as to make the Project Highway conform to the Specifications and Standards and the provisions of this Agreement. All costs consequent thereon shall, after due consultation with the Authority and the Contractor, be determined by the Authority's Engineer. The cost so determined and an amount equal to twenty percent of the cost as Damages shall be recoverable by the Authority from the Contractor and may be deducted by the Authority from any monies due to the Contractor.

17.5 Contractor to search cause

17.5.1 The Authority's Engineer may instruct the Contractor to examine the cause of any Defect in the Works or part thereof before the expiry of the Defects Liability Period.

17.5.2 In the event any Defect identified under Clause 17.5.1 is attributable to the Contractor, the Contractor shall rectify such



2026:DHC:8189



Defect within the period specified by the Authority's Engineer, and shall bear the cost of the examination and rectification of such Defect.

17.5.3 In the event such Defect is not attributable to the Contractor, the Authority's Engineer shall, after due consultation with the Authority and the Contractor, determine the costs incurred by the Contractor on such examination and notify the same to the Contractor, with a copy to the Authority, and the Contractor shall be entitled to payment of such costs by the Authority.

17.6. Extension of Defects Liability Period

The Defects Liability Period shall be deemed to be extended till the identified Defects under Clause 17.2 have been remedied.

ARTICLE 23-TERMINATION

23.1 Termination for Contractor Default

23.1.1 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) subsequent to 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;



2026:DHC:8189



(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) failure to complete the Punch List items within the periods stipulated therefor in Clause 12.2.1;

(h) 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;

(i) 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;

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

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

(l) 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;

(m) 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;

(n) a resolution for winding up of the Contractor is passed, or any petition for winding up of the Contractor is admitted by a Court of competent jurisdiction and a provisional liquidator or receiver 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



2026:DHC:8189



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;

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

(p) 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;

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

(r) 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.

23 .1.2 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 by a notice inform the Contractor of its intention to issue such Termination Notice and grant 15 (fifteen) days to the Contractor to make a representation, and may after the

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TRIPATHI
Signing Date: 23.09.2026
14:37:07

Page 19 of 26



2026:DHC:8189



expiry of such 15 (fifteen) days, whether or not it is in receipt of such representation, issue the Termination Notice.

26.3 Arbitration

26.3.5 This Agreement and the rights and obligations of the Parties shall remain in full force and effect, pending the Award in any arbitration proceedings hereunder.”

22. Thus, it could be understood from a facial reading of the aforesaid provisions of the contract that Article 11 and Article 17 determines the Respondent's responsibility when there is defective work and also provides for the Appellant's remedies if the defective work is not rectified. Article 23 determines when the non-rectification of the defective work can justify termination of the subject agreement.

23. Article 11.13.1 applicable during execution of the work and Article 17.1.1, which is applicable for defect liability period, stipulates the Respondent's responsibility for defects and deficiencies in the project.

24. The most significant clause, is Article 11.13.2 and 17.4. It stipulates an express remedy for the Appellant i.e. if the Respondent fails to rectify the defect within the periods specified under clause 11.13.2 and 17.2 respectively, the Appellant can engage another agency to carry out the rectification at the Respondent's cost. However, the Appellant's engineer must determine the consequential costs after due consultation with the authority and the contractor.

25. The arbitral tribunal has also separated the Appellant's right to rectify the defects from its right to terminate the agreement.



2026:DHC:8189



26. The Supreme Court in ***K.S. Manjunath v. Moorasavirappa***³, distinguished contracts that are inherently revocable or terminable without cause from contracts terminable upon specified breach, notice and opportunity to cure.

27. Having gone through Article 23 of the EPC agreement, the present agreement is a contract terminable both for cause and for convenience. Article 23.3 stipulates “*Notwithstanding anything stated hereinabove, the Authority may terminate this Agreement for convenience.*”

28. In ***Manjunath*** (supra), the Supreme Court laid out five categories of contracts.

“64. In this backdrop, it would be useful to advert to the classification set out in *A. Murugan* (supra), wherein the Madras High Court categorised contracts into five broad classes depending on their ease of determinability. Out of those, the first two i.e., (i) contracts inherently revocable such as licences and partnerships at will, and (ii) contracts terminable unilaterally on a “without-cause” basis, were held to be determinable in nature. The remaining classes, namely, (iii) contracts terminable for cause without provision for cure, (iv) contracts terminable for cause with notice and opportunity to cure, and (v) contracts without a termination clause but terminable only for breach of a condition, were all held not determinable in nature.”

29. It is *prima facie* made out that the subject agreement has the features of both Category(ii) and (iv) as Article 23.3 provides a without cause termination right to the Appellant, while Article 23.1 provides



2026:DHC:8189



conditional termination for default.

30. Since the impugned Notice dated 13.06.2025 invokes Article 23.1.2, not Article 23.3, the Appellant cannot justify its proposed termination for Default merely by relying to its separate power to terminate for convenience.

31. As per para 17 of the impugned order, the Tribunal has recorded (i) successful completion tests, (ii) the PCOD recommendation, (iii) earlier compliance reports, (iv) substantial rectification of distressed panels and disputed technical findings.

32. The determination of Default under Article 23.1.1(h) requires examination which the tribunal has done on its level, and ruled in favor of the Respondents by preserving the rights as in the agreement pending the arbitration.

33. Even though this Court may want to substitute its finding, However, on the basis of material placed on record, the Tribunal has examined the above mentioned circumstances in para 17 and then laid out its finding.

34. Thus, the Appellant is not able to make out a *prima facie* case in his favour.

35. The second facet of the Appellant's prayer before the Learned Arbitral Tribunal was the invocation of the bank guarantee. The learned Arbitral Tribunal has restrained the invocation of the bank guarantee.

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TRIPATHI
Signing Date: 23.09.2026
14:37:07

Page 22 of 26



2026:DHC:8189



36. The law pertaining to the invocation and encashment of an unconditional bank guarantee is equally well settled.

37. An unconditional bank guarantee, no doubt, constitutes an independent contract between the bank and the beneficiary. The Supreme Court has held in multiple cases that it must be honoured according to its terms.

38. Interference with the invocation and encashment of a bank guarantee is allowed only in exceptional cases of fraud of an egregious nature or special equities in the form of irrecoverable injustice of such a kind that restitution is impossible.

39. The supreme Court in ***U.P. State Sugar Corporation v. Sumac International Ltd.***⁴ held as follows on injunctions granting invocation of unconditional bank guarantee.

“12. The law relating to invocation of such bank guarantees is by now well settled. When in the course of commercial dealings an unconditional bank guarantee is given or accepted, the beneficiary is entitled to realize such a bank guarantee in terms thereof irrespective of any pending disputes. The bank giving such a guarantee is bound to honour it as per its terms irrespective of any dispute raised by its customer. The very purpose of giving such a bank guarantee would otherwise be defeated. The courts should, therefore, be slow in granting an injunction to restrain the realization of such a bank guarantee. The courts have carved out only two exceptions. A fraud in connection with such a bank guarantee would vitiate the very foundation of such a bank guarantee. Hence if there is such a fraud of which the beneficiary seeks to take advantage, he can be restrained from doing so. The second exception relates to cases where allowing the encashment of

⁴ (1997) 1 SCC 568



2026:DHC:8189



an unconditional bank guarantee would result in irretrievable harm or injustice to one of the parties concerned. Since in most cases payment of money under such a bank guarantee would adversely affect the bank and its customer at whose instance the guarantee is given, the harm or injustice contemplated under this head must be of such an exceptional and irretrievable nature as would override the terms of the guarantee and the adverse effect of such an injunction on commercial dealings in the country. The two grounds are not necessarily connected, though both may coexist in some cases. In the case of *U.P. Coop. Federation Ltd. v. Singh Consultants and Engineers (P) Ltd.* [(1988) 1 SCC 174] which was the case of a works contract where the performance guarantee given under the contract was sought to be invoked, this Court, after referring extensively to English and Indian cases on the subject, said that the guarantee must be honoured in accordance with its terms. The bank which gives the guarantee is not concerned in the least with the relations between the supplier and the customer; nor with the question whether the supplier has performed his contractual obligation or not, nor with the question whether the supplier is in default or not. The bank must pay according to the tenor of its guarantee on demand without proof or condition. There are only two exceptions to this rule. The first exception is a case when there is a clear fraud of which the bank has notice. The fraud must be of an egregious nature such as to vitiate the entire underlying transaction. Explaining the kind of fraud that may absolve a bank from honouring its guarantee, this Court in the above case quoted with approval the observations of Sir John Donaldson, M.R. in *Bolivinter Oil SA v. Chase Manhattan Bank* [(1984) 1 All ER 351] (All ER at p. 352): (at SCC p. 197)

“The wholly exceptional case where an injunction may be granted is where it is proved that the bank knows that any demand for payment already made or which may thereafter be made will clearly be fraudulent. But the evidence must be clear both as to the fact of fraud and as to the bank's knowledge. It would certainly not normally be sufficient that this rests on the uncorroborated statement of the customer, for irreparable damage can be done to a bank's credit in the relatively brief time which must elapse between the granting of such an injunction and an application by the bank to have it charged.”

This Court set aside an injunction granted by the High Court to restrain the realisation of the bank guarantee.”

40. It is an admitted fact that, in the present case, no fraud, let alone one of an egregious nature, in the execution or invocation of the



2026:DHC:8189



performance bank guarantee has been pleaded by the Respondent.

41. Additionally, the nature of the bank guarantee is also undisputed here.

42. The Arbitral Tribunal in Para 7.22 holds the following:

“7.22. Termination of Contract at this stage (i) may frustrate the arbitral process where all the issues of quality of construction and for delay in execution of balance items of works leading to non-recording PCOD by the Respondent are sub-judice, and (ii) invocation of bank guarantees can be compensated in financial terms, but the Claimant will suffer irreparable reputational injury which cannot be compensated in financial terms.”

43. Thus, Tribunal expressly acknowledges that invocation of bank guarantees is financially compensable. However, its finding of irreparable injury relies on reputational damage associated with termination.

44. The only question which arises for consideration before this Court is can the arbitral tribunal justify invocation and encashment of a performance bank guarantee on the ground of irreparable reputational injury.

45. The Tribunal expressly acknowledges that invocation of bank guarantees is financially compensable. Its finding of irreparable injury concerns reputational damage associated with termination, rather than any demonstrated irretrievable harm arising specifically from encashment.



2026:DHC:8189



46. The law pertaining to irreversible justice is also clear, the Supreme Court in multiple decisions have held that the second exception applies only where the injury is exceptional, genuine, immediate and effectively irreversible, such that even if the contractor ultimately succeeds, restitution or reimbursement would be practically impossible.

47. Therefore, a mere finding that invocation of a Performance Bank Guarantee would harm the Respondent's reputation does not satisfy the test unless the Tribunal further records and justifies why such harm is incapable of being remedied or compensated subsequently or an exceptional situation is identified.

48. In the absence of such findings, the restraint is unable to sustain.

49. For the aforesaid reasons, the appeal is partly allowed to the extent that stay on invocation on performance bank guarantee is set aside.

50. The appeal stands partly allowed in the aforesaid terms.

OM PRAKASH SHUKLA, J

SEPTEMBER 17, 2026/at/pa/gunn