AFR

HIGH COURT OF CHHATTISGARH, BILASPUR

Writ Appeal No.342 of 2021

(*Arising out of order dated 28-9-2021 passed by the learned Single Judge in W.P.(C)No.2989/2021*)

Order reserved on: 5-4-2022

Order delivered on: 12-5-2022

Ultratech Cement Limited, A Company registered under the provisions of Companies Act, 1956 and having its registered office at 'B' Wing, Ahura Centre, 2nd Floor, Mahakali Caves Road, Andheri (East), Mumbai – 400 093 (Maharashtra) and its Cement Plant/Unit at Rawan Cement Works, P.O. Grasim Vihar, Village Rawan, District Baloda Bazar-Bhatapara (C.G.) and Hirmi Cement Works, Post Hirmi – 493 195, Village Hirmi, District Baloda Bazar-Bhatapara (C.G.) through its authorized representative.

(Petitioner)
---- Appellant

Versus

1. Union of India, through the Secretary, Ministry of Railways, Government of India, Rail Bhavan, New Delhi (India)

2. Chairman, Railway Board, Rail Bhawan, Raisina Road, New Delhi – 110 001

3. South East Central Railway, Zonal Office, Bilaspur, through its General Manager, Bilaspur.

4. Senior Divisional Operational Manager, South East Central Railway. Divisional Office, Raipur (C.G.)

5. Shree Cement Limited, Bangur Nagar, Post Box No.33, Beawar, Rajasthan – 305 901

(Respondents)
---- Respondents

For Appellant: Dr. Abhishek Manu Singhvi and Mr. Ashish Shrivastava, Senior Advocates with Mr. Ashish Prasad, Ms. Mukta Dutta, Mr. Abhishek Shivpuri, Mr. Aman Pandey and Mr. Aman Saxena, Advocates.

For Respondents No.1 to 4 / Railways: -
Mr. Ramakant Mishra, Assistant Solicitor General of India.

For Respondent No.5: -
Mr. C. Aryama Sundaram and Mr. Abhishek Sinha, Senior Advocates with Mr. Ujjwal Rana, Mr. Himanshu Mehta and Mr. Aditya Pandey, Advocates.

Hon'ble Shri Sanjay K. Agrawal and
Hon'ble Smt. Rajani Dubey, JJ.

C.A.V. Order

Sanjay K. Agrawal, J.

1. Invoking the jurisdiction of this Court under Section 2(1) of the Chhattisgarh High Court (Appeal to Division Bench) Act, 2006 (for short, 'the Act of 2006'), this writ appeal has been preferred questioning legality, validity and correctness of order dated 28-9-2021 passed by the learned Single Judge in W.P.(C)No.2989/2021, by which the learned Single Judge has declined to grant interim order in favour of the appellant herein and allowed the official respondents herein to finalize the project of putting up a freight terminal at the risk and cost of respondent No.5.

Maintainability of Writ Appeal

2. When the writ appeal was taken-up for hearing on 29-10-2021, preliminary objection was raised on behalf of respondent No.5 / private respondent herein that the impugned order dated 28-9-2021 is a pure and simple interlocutory order and writ appeal would be barred and is not maintainable. This Court by its order dated 16-11-2021, overruled the preliminary objection holding that the writ appeal as framed and filed is maintainable. The order of this Court holding the writ appeal to be maintainable, dated 16-11-2021 was assailed unsuccessfully by respondent No.5 in Special Leave to Appeal (C) No.19814/2021 (M/s Shree Cement Limited v. Ultratech Cement Limited and others) before the Supreme Court of India, however, their Lordships of the Supreme Court by order dated 28-2-2022 were pleased to request the Chief Justice of this Court to post the writ

appeal for hearing before the Division Bench and further pleased to direct that the matter should be taken on priority basis to decide the appeal within four weeks and this is how the matter came-up before us for hearing.

Submissions of Parties

3. Dr. Abhishek Manu Singhvi, learned Senior Counsel appearing on behalf of the appellant, would submit as under: -

    1. The learned Single Judge has patently erred in holding that the purported Green Field Private Freight Terminal (PFT) project is at a nascent stage as respondent No.5 has submitted the Detailed Project Report (DPR) which has been approved by the Railways and thereafter respondent No.5 has even submitted the Engineering Scale Plan (ESP) to the Railways and timelines for construction of the PFT.

    2. The learned Single Judge failed to appreciate that the vested rights of the appellant herein / writ petitioner under the Private Siding Agreement could not have been taken away as the single-line Hathband Private Siding has been constructed by the appellant at its cost and expenses and is being operated and maintained by the appellant at its own cost as per the Private Siding Agreement entered into under the Private Siding Policy. The Private Siding Agreements have been entered into on 1-2-2008 and 10-8-2010 for Hirmi plant and Rawan plant, respectively.

    3. The 2020 PFT Policy does not take away its vested rights and in fact explicitly saves such rights. The 2020 PFT Policy introduced by way of circular cannot take away the vested right

of the appellant accrued under the Private Siding Policy and the Private Siding Agreement, such a right cannot even be taken away by a statute. The appellant's right to exclusive use of its private siding granted and earned by it under the Private Siding Policy and the Private Siding Agreement has sought to be taken away by grant of the impugned IPA under a subsequent policy i.e. the 2020 PFT Policy.

4. The learned Single Judge failed to appreciate the challenge made by the appellant to the arbitrary and illegal act of respondents No.1 to 4 of granting In Principle Approval (IPA) dated 8-4-2021 to respondent No.5 under the Private Freight Terminal Policy, 2020 in the term mentioned in the IPA dated 8-4-2021.

5. The 2016 Private Siding Policy and the 2020 PFT Policy operate in completely different spheres and have different objectives, both the policies cannot be intertwined. The 2020 PFT policy deals with construction of PFT, which is meant for multiple users, whereas the 2016 Private Siding Policy deals with construction of private siding, which is for exclusive use of the owner of the siding. Therefore, the impugned IPA under the 2020 PFT Policy could not have been granted to respondent No.5 on the basis of clause 19 of the Private Siding Agreement which was entered into under the 2016 Private Siding Policy. The decision of the Railways to grant In Principle Approval runs contrary to the decision rendered by the Supreme Court in the matter of **Tata Cellular v. Union of India**[1] (paragraph 74).

1 (1994) 6 SCC 651

6. Respondents No.1 to 4 have exceeded their power and jurisdiction while granting the IPA allegedly under clause 19(c) of the Private Siding Agreement between the appellant and respondents No.1 to 4. Clause 19(c) of the Private Siding Agreement was in fact not invoked while granting the IPA and cannot be used to justify the same post issuance. In any case, clause 19(c) cannot be invoked to grant IPA under the 2020 PFT Policy. As such, respondents No.1 to 4 have committed an error of law, as the impugned IPA taking away the appellant's exclusive right to use its private siding could not have been granted under the 2020 PFT Policy.

7. The Private Siding Policy does not give unbridled power to the Indian Railways to create third party rights over the appellant's private siding. Even otherwise, the Private Siding Policy contemplates grant of co-user permission upon satisfaction of certain conditions precedent laid down therein.

8. The impugned IPA was granted by respondents No.1 to 4 in favour of respondent No.5 in breach of the principles of natural justice, as the appellant was informed of the impugned IPA two months after it was granted to respondent No.5. The IPA was granted on 8-4-2021 and the appellant was informed of the grant thereof on 17-6-2021 by which the appellant's exclusive right to use of its private railway siding was issued without notice to the appellant in violation of the principles of natural justice. Even no notice has been issued to the appellant till date notifying it of invocation of clause 19(c) of the Agreement which is apparent from the fact that respondents No.1 to 4 and

respondent No.5, for the first time, in their respective replies to the writ petition, have taken the ground that clause 19(c) was invoked by them. Even otherwise, power under clause 19 of the Agreement cannot be exercised arbitrarily, irrationally and whimsically by the Railways. Clause 19 has to be read in harmony with other clauses in order to understand the contours of the power of Railways under clause 19. Since cost and expense of constructing the private siding, cost of obtaining the land, cost of maintenance were to be incurred by the appellant and were incurred by the appellant and in lieu thereof the appellant has been given exclusive right to use the siding, therefore, prior to sharing of the siding under clause 19, the appellant had to be consulted for deciding the feasibility and operability of the alleged PFT on the private side infrastructure of the appellant.

9. The appellant has a strong prima facie case in its favour for restraining the official respondents and the private respondent as well from going ahead with the matter finalizing the project, as the appellant has vested right under law. The respondents herein have violated the appellant's right to notice and to be consulted before allowing a third party to use its private siding. Even otherwise, operational feasibility was not considered before grant of the impugned IPA. Balance of convenience also lies in favour of the appellant herein in continuing stay on the impugned IPA and directing time bound disposal of the writ proceedings. However, grave prejudice will be caused to the appellant in case the impugned order is not set aside as the

learned Single Judge had already allowed respondents No.1 to 4 to finalise the project.

10. The decision to allow respondent No.5 to use the appellant's private siding without prior examination of operational feasibility mandated under clause 19(c) is illegal, as disruption of the appellant's traffic on account of the arbitrary action of respondents No.1 to 4 will have immediate and severe effect on its business as the Hathband Private Siding is the lifeline of its business and no prejudice would be caused to respondent No.5 as it has no vested right whatsoever to use the appellant's private siding and it can continue with the business as it has been doing for years. As such, the impugned order be set aside and interim order be granted in favour of the appellant as was done by the learned Single Judge by order dated 26-7-2021.

4. Mr. Ramakant Mishra, learned Assistant Solicitor General of India appearing for respondents No.1 to 4 / Railways, would submit that the learned Single Judge has rightly rejected the application for interim relief in favour of respondents No.1 to 4 / Railways, as the appellant has no exclusive right to use the private siding and respondents No.1 to 4 / Railways have reserved its private siding agreement in clause 19 to use or permit the use of siding for the traffic in shape of clause 19(a), (b) & (c) of the agreement entered into in the year 2008 with the appellant herein. He would further submit that construction of the proposed Greenfield is permitted on the basis of policy guidelines issued by the Ministry of Railways vide Master Circulars on Sidings and PFTs 2020/0 issued on 23-6-2020 wherein clause 16 provides construction and maintenance of PFT. He would also submit that as

per clause 16.1, construction and maintenance of PFT will be as per the provisions of the Private Siding Policy of the Indian Railways issued by the Ministry of Railways vide Freight Marketing Circular No.11 of 2016 and as revised / amended from time to time. He would further contend that the Railways has been given right to grant permission to third party to use the railway line laid for private siding and multiple user of such rail track as laid by the appellant is the normal feature all over the country and in Ultratech Cement Bhogasamudram, Tadapatri (A.P.), private siding of the appellant itself i.e. M/s. Prerana Cement Industries Ltd., Boyireddypalli, Kamalapadu has been given right to use its railway track. Lastly, he would contend that assigning priority to the right and interest of the appellant, sufficiently addresses the concern of the appellant, if any, and as such, the appeal deserves to be dismissed.

5. Mr. C. Aryama Sundaram, learned Senior Counsel appearing for respondent No.5, would submit that no one can claim any right to lay any railway line or track or siding and no such right can be asserted under Article 19(1)(g) of the Constitution of India, as such, the appellant has no any vested right as sought to be contended by it. He would further submit that two agreements entered into by the appellants on 1-2-2008 and 10-8-2010 with the Railways for private siding for its Hirmi and Rawan plants from Hathband Station contain specific clauses under the heading “Railway Administration Rights regarding use of the siding”. It is provided therein that in addition to any other rights, powers and liberties provided for, the Railway Administration shall have rights, powers and liberties, over and in connection with the siding or any extension or part thereof in shape of

sub-clauses (b) and (c) to use or to permit the use of siding or any extension or part thereof for the traffic if any person or persons other than the applicant and to work traffic over the siding or any extension or part thereof. As such, the appellant has accepted the terms of agreement without any protest or objection and has in fact set up the siding subject to the terms. The appellant after taking advantage of the agreement, cannot now question a part thereof and the appellant having entered into agreements cannot challenge the same. The appellant despite having entered into agreements whereunder specific clauses inter alia to permit third party to use the siding are incorporated and accepted, has now challenged the IPA by filing W.P.(C)No.2989/2021 with a view to obstruct respondent No.5's infrastructural project of a Private Freight Terminal. Since the appellant has neither challenged the policy nor the conditions incorporated in the agreements, the contentions now sought to be urged are not only lacking in good faith but are misconceived and / or untenable. Mr. Sundaram, learned Senior Counsel, would also submit that the learned Single Judge by order dated 26-7-2021 while directing the reply to be filed to the writ petition, directed that the respondents may not precipitate things pending any interim order and passed some interim order subject to supplying copy of the writ petition to counsel for respondent No.5. Respondent No.5 has filed reply on 26-8-2021 and as an abundant caution, filed application for vacation of ad interim order. On 28-9-2021, the matter was taken up by the learned Single Judge and it was only for consideration of the application for vacating the ad interim relief and on that day, the appellants also served rejoinder on the date of hearing on the said application. As such, by

order dated 28-9-2021, application for vacating the interim relief was considered bi-parte and merely because, the application for vacating stay was also taken-up for consideration, no prejudice has been caused to the appellant. Therefore, there is no violation of the principles of natural justice. Mr. Sundaram, would contend that infrastructure projects should not be interfered by interim order and no interim order should be granted by the court in respect of contract which is related to infrastructure projects in line with the legislative intent and legislative policy as provided in Section 20A read with Section 41(ha) of the Specific Relief Act, 1963 introduced in the Specific Relief Act with effect from 1-10-2018. He would rely upon the decision of the Supreme Court in the matter of **M/s. N.G. Projects Limited v. M/s. Vinod Kumar Jain and others**[2] to buttress his submission. He would further contend that scope of interference against the order of the Single Judge is extremely limited, as an appeal against exercise of discretion is said to be an appeal on principle and unless discretion has been exercised wrongly or arbitrarily, or capriciously or perversely, discretionary order should not be interfered with. He further relied upon the decision of the Supreme Court in the matter of **Wander Ltd. v. Antox India (P) Ltd.**[3] in support of his contention. He would also contend that the Single Judge has rightly modified the interim order / rejected the application for interim relief finding no prima facie case, no balance of convenience and no irreparable loss caused if no interim order is granted; it is a pure and simple interlocutory order which is liable to be maintained and the writ appeal deserves to be dismissed.

2 2022 SCC OnLine SC 336
3 1990 Supp SCC 727

6. We have heard learned counsel for the parties and considered their rival submissions made herein-above and also went through the record with utmost circumspection.

Proceedings before Writ Court: -

7. The appellant herein filed writ petition calling in question the In Principle Approval (IPA) dated 8-4-2021 granted by respondent No.4 for the proposed construction of Private Freight Terminal (PFT) to respondent No.5 under the Private Freight Terminal Policy dated 23-6-2020 issued by respondent No.1 with take-off from the existing private siding of the appellant herein connected from Hathband Railway Station of India Railway Network falling under South East Central Railway as *non est* and unsustainable in law. The writ petition came up for hearing on 26-7-2021 and the writ court by order dated 26-7-2021 passed following order: -

> "Heard
>
> Learned counsel for the respondents No. 2 to 4 prays for and is granted some time to file reply.
>
> Let a copy of the writ petition be served to the counsel for the respondent No. 5.
>
> Let the respondents may not precipitate further things by any order so that this petition or any interim prayer become infructuous to give rise to multiplicity of proceedings.
>
> List the case in the week commencing 23rd August, 2021.
>
> In the meanwhile, if reply is filed then learned counsel for the petitioner may file the rejoinder."

Copy of the writ petition was directed to be served to counsel for respondent No.5 therein and thereafter, it appears that copy of the writ petition with annexures was served. Meanwhile, respondents No.1 to 4 filed return on 19-8-2021, whereas the matter was listed on 23-8-

2021 and the writ court directed respondent No.5 to file its own reply which was filed on 26-8-2021 with an application for vacating stay of interim order dated 26-7-2021 and thereafter, the matter came-up for hearing on 28-9-2021 and on that day, the impugned order was passed. It is pertinent to notice that on 28-9-2021, when the matter was listed, copy of rejoinder was served by the petitioner to learned counsel for respondent No.5 and rejoinder was filed on next day i.e. 29-9-2021 and order dated 26-7-2021 was modified against which this writ appeal has been filed.

Scope of Writ Appeal / Interference against Discretionary Order: -

8. In order to decide the plea raised at the Bar, it would be appropriate firstly to consider the scope of writ appeal under sub-section (1) of Section 2 of the Act of 2006. Section 2(1) of the Act of 2006 provides as under:-

> "**2. Appeal to the Division Bench of the High Court from a judgment or order of one judge of the High Court made in exercise of original jurisdiction**.–(1) An appeal shall lie from a judgment or order passed by one Judge of the High Court in exercise of original jurisdiction under Article 226 of the Constitution of India, to a Division Bench comprising of two Judges of the same High Court:
>
> Provided that no such appeal shall lie against an interlocutory order or against an order passed in exercise of supervisory jurisdiction under Article 227 of the Constitution of India."

9. A studied perusal of sub-section (1) of Section 2 of the Act of 2006 would show that it provides an *intra court appeal* before the Bench of two or more judges of the High Court against the order of Single Judge and *intra court* appeal is continuation of original proceeding and appellate court sitting in appeal as court of correction can correct its

own order in exercise of same jurisdiction which was vested in learned Single Judge or writ court which is a court of judicial review.

10. The scope of intra court appeal by a Division Bench against the order of a Single Judge has been considered from time to time by their Lordships of the Supreme Court in umpteen number of judgments. Few of them may be noticed herein profitably and gainfully:-

10.1) Way back in the year 1974, in the matter of **Smt. Asha Devi v. Dukhi Sao and Another**[4], the Supreme Court has held as under:-

> "But there is no doubt that in an appropriate case a Letters Patent Bench hearing an appeal from a learned Single Judge of the High Court in a first appeal heard by him is entitled to review even findings of fact."

10.2) Similarly in the matter of **Baddula Lakshmaiah and others v. Sri Anjaneya Swami Temple and others**[5], the Supreme Court has again defined the nature and scope of power of a Letters Patent Bench hearing an appeal against the decision of learned Single Judge and held as under:-

> "2. … Against the orders of the trial court, first appeal lay before the High Court, both on facts as well as law. It is the internal working of the High Court which splits it into different 'Benches' and yet the court remains one. A Letters Patent appeal, as permitted under the Letters Patent, is normally an intra-court appeal whereunder the Letters Patent Bench, sitting as a Court of Correction, corrects its own orders in exercise of the same jurisdiction as was vested in the Single Bench. Such is not an appeal against an order of a subordinate court. In such appellate jurisdiction the High Court exercises the powers of a Court of Error. So understood, the appellate power under the Letters Patent is quite district, in contrast to what is ordinarily understood is procedural language. …"

---

4 (1974) 2 SCC 492
5 (1996) 3 SCC 52

10.3) In the matter of **B. Venkatamuni v. C.J. Ayodhya Ram Singh and others**[6], the Supreme Court has held that entertainment of a Letters Patent Appeal is discretionary and normally the Division Bench would not, unless there exist cogent reasons, differ from a finding of fact arrived at by the learned Single Judge. It was observed as under:-

> "11. In an intra-court appeal, the Division Bench undoubtedly may be entitled to reapprise both questions of fact and law, but the following dicta of this Court in Umabai & Anr. vs. Nilkanth Dhondiba Chavan (Dead) By Lrs. & Anr. (2005) 6 SCC 243, could not have been ignored by it, whereupon the learned counsel for Respondents relied:
>
> > "52. It may be, as has been held in Asha Devi v. Dukhi Sao (1974) 2 SCC 492 that the power of the appellate court in intra-court appeal is not exactly the same as contained in Section 100 of the Code of Civil Procedure but it is also well known that entertainment of a letters patent appeal is discretionary and normally the Division Bench would not, unless there exist cogent reasons, differ from a finding of fact arrived at by the learned Single Judge. Even as noticed hereinbefore, a court of first appeal which is the final court of appeal on fact may have to exercise some amount of restraint."

10.4) The Supreme Court in the matter of **Commissioner of Income Tax and another v. Karnataka Planters Coffee Curing Work Private Limited**[7] has held that jurisdiction of Division Bench in a writ appeal is primarily one of adjudication of questions of law. Therefore, findings of fact recorded concurrently by the authorities and upheld by learned Single Bench are not to be lightly disturbed in intra-court appeal. It was observed succinctly as under:-

> "3. … The jurisdiction of the Division Bench in a writ appeal is primarily one of adjudication of questions of law. Findings of fact recorded concurrently by the authorities under the Act and also in the first round of the writ

6 (2006) 13 SCC 449
7 (2016) 9 SCC 538

proceedings by the learned Single Judge are not to be lightly disturbed."

10.5) In the matter of **Mani w/o Komalchand Jain v. Sub-Divisional Forest Officer-cum-Authorised Officer, Mdhow and another**[8], a Division Bench of the High Court of Madhya Pradesh has held that in intra-court appeal, the Division Bench should be slow in disturbing the order of writ Court and held as under:-

> "5. … Letters Patent Appeal is normally an intra-court appeal whereunder Letters Patent Bench corrects its own orders in exercise of same jurisdiction as vested in Single Judge – It is not an appeal against an order of a subordinate court. In the matters of Ku. Varsha Shrivastava vs. State of M.P. L.P.A.16/2000, (since reported in 2000 (1) MPLJ 615) Madhur Agrawal vs. State of M.P., L.P.A. 17/2000 and Saumi Chatterjee vs. State of M.P., L.P.A. 20/2000, the Division Bench of this court has also taken a view that the attitude of Division Bench while deciding the LPA has to be strict keeping in view the incoming flood of LPAs. The LPA is infra-court appeal. Therefore, the Division Bench should not be scanning out the order passed by the Single Bench from all corners. If the order is good enough to deal with the averments made in the matter of Writ Petition and if it is sound on legal grounds, the Division Bench should be slow in disturbing it. It is not to be dealt with as if it is first appeal. ..."

11. Thus, from the principle of law laid down in the above-noticed judgment qua scope of writ appeal / intra-court appeal, it is well settled that the appellate court will not reassess the material and seek to reach a conclusion different from the one reached by the Single Judge if the one reached by the Single Judge was reasonably possible on the material and if the discretion has been exercised by the writ court reasonably and in a judicial manner, the fact that the appellate court would have taken a different view may not justify interference with the writ court's exercise of discretion.

---

8 2000(2) MPLJ 586

12. The Supreme Court in **Wander Ltd.** (supra) has held that any appeal against the order granting or refusing temporary injunction is an appeal against exercise of discretion by the trial court and the appellate court should 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, and observed as under: -

> "13. On a consideration of the matter, we are afraid, the appellate bench fell into error on two important propositions. The first is a misdirection in regard to the very scope and nature of the appeals before it and the limitations on the powers of the appellate court to substitute its own discretion in an appeal preferred against a discretionary order. The second pertains to the infirmities in the ratiocination as to the quality of Antox's alleged user of the trademark on which the passing-off action is founded. We shall deal with these two separately.
>
> 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. An appeal against exercise of discretion is said to be an appeal on principle. Appellate court will not reassess the material and seek to reach a conclusion different from the one reached by the court below if the one reached by that court was reasonably possible on the material. The appellate court would normally not be justified in interfering with the exercise of discretion under appeal solely on the ground that if it had considered the matter at the trial stage it would have come to a contrary conclusion. If the discretion has been exercised by the trial court reasonably and in a judicial manner the fact that the appellate court would have taken a different view may not justify interference with the trial court's exercise of discretion. After referring to these

principles Gajendragadkar, J. in *Printers (Mysore) Private Ltd. v. Pothan Joseph*[9] :

> "... These principles are well established, but as has been observed by Viscount Simon in *Charles Osenton & Co. v. Jhanaton*[10] '…the law as to the reversal by a court of appeal of an order made by a judge below in the exercise of his discretion is well established, and any difficulty that arises is due only to the application of well settled principles in an individual case'."

The appellate judgment does not seem to defer to this principle."

13. The aforesaid view taken by the Supreme Court in **Wander Ltd.** (supra) has been followed subsequently in the matter of **Skyline Education Institute (India) Private Limited v. S.L. Vaswani and another**[11] and further followed in the matters of **Purshottam Vishandas Raheja and another v. Shrichand Vishandas Raheja (Dead) Through LRs. and others**[12] and **Mohd. Mehtab Khan and others v. Khushnuma Ibrahim Khan and others**[13].

14. Very recently in **M/s. N.G. Projects Limited** (supra), their Lordships of the Supreme Court taking note of the provisions contained in clause (ha) inserted in Section 41 of the Specific Relief Act, 1963 with effect from 1-10-2018 has held that infrastructural projects should not be stayed in exercise of jurisdiction under Article 226 of the Constitution of India and observed as under: -

> "21. Since the construction of road is an infrastructure project and keeping in view the intent of the legislature that infrastructure projects should not be stayed, the High Court would have been well advised to hold its hand to stay the construction of the infrastructure project. Such provision should be kept in view even by the Writ Court while

9 (1960) 3 SCR 713 : AIR 1960 SC 1156
10 1942 AC 130
11 (2010) 2 SCC 142
12 (2011) 6 SCC 73
13 (2013) 9 SCC 221

exercising its jurisdiction under Article 226 of the Constitution of India."

Discussion and analysis

15. The learned Single Judge while declining to grant interim order in favour of the appellant relying upon clause 19(c) of the Agreement has held as under: -

> "Reading of the aforesaid clause prima facie would show that the permission to use the siding or any extension or part thereof to a third party can be allowed upon payment by such person or persons to the petitioner of either such portion of the cost originally paid by the petitioner to the Railway Administration. The railway in its reply had contended that the quantum of traffic mentioned by the petitioner is exaggerated as the maximum number of rakes loaded in a month of March, 2021 was 239 and with the entire including of back loading it comes to 412 rakes. It is also stated in the reply that the train operation would be purely a technical subject and the railway administration will accommodate the petitioner's traffic if the respondent No.5 is allowed to use the line. Meaning thereby if at all respondent No.5 is allowed to use the line then in such case they will be able to handle the traffic and the traffic of the petitioner shall be given preference.
>
> After looking into the map of the railway line and the siding, it shows that after 9.3 Km apart from one existing diversion to the factory of the petitioner, Freight Terminal which is to be set up by Shree Cement is towards the left side and the existing line to the Ultratech Hirmi Plant and Rawan Plant is on the right side. The fact cannot loose sight in teeth of agreement that if with the passage of time in future if number of plants increases and freight terminals are intended to be set up from Hathband Station, it cannot be presumed that for each Freight Terminal for different plant there would be separate line. For example if 10-15 factories are established in those areas, then there cannot be 10-15 separate railway line are required to be set up and it sans all practical logic. The agreement prima facie allows the sharing of the proportion of cost in case of use of line by another which appears to be reasonable. Therefore, the balance of convenience and irreparable loss would also not cause to the petitioner when the traffic on the racks are managed by the railways read with specific undertaking of

railways that in movements of the racks the preference would be given to the petitioner. The reply filed by the railway wherein certain number of racks have been shown for the month of March nearby 412 do not appear to be exorbitant.

Under the circumstances, though the order dated 26.07.2021 has not put a bar to further proceed according to the policy to put up a Freight Terminal, in view of this, it is observed that the order dated 26.07.2021 would not be deemed to be a stay for further consideration of project for the putting up a freight terminal for which the offer is made to respondent No.5. By stalling the process it would amount to nip the process in bud as the finalization of the policy is yet to travel a long journey. Therefore, the respondents No.1 to 4 may proceed to finalize the project of putting up a freight terminal which would be at the risk and cost of respondent No.5 and subject to final adjudication of this case."

16. Thus, the learned Single Judge while declining to grant stay in favour of the writ petitioner / appellant herein recorded following findings: -

1. On the basis of clause 19(c) of the agreement entered into between the writ petitioner and respondents No.1 to 4, permission to use the siding or any extension or part thereof can be granted to a third party upon payment by such person or persons to the writ petitioner of either such portion of the cost originally paid by the petitioner to the Railway Administration.

2. The entire project sought to be established by the appellant herein is in initial / nascent stage.

3. By the impugned order, respondent No.5 would be allowed to use the railway line which is a single line.

4. The agreement prima facie allows the sharing of the proportion of cost in case of use of line by another which appears to be reasonable.

5. If respondent No.5 is allowed to use the line then in such case, the Railways have to handle the traffic and traffic of the appellant herein / writ petitioner shall be given preference in view of the specific undertaking by the Railways.

17. Laying of railway lines/tracks, plying on the railway tracks, siding, setting up of rail terminal etc. are within the exclusive domain and jurisdiction of the Railways and any such activity can be carried out in such lines / tracks / siding only with the express leave of the Railways and that too subject to terms and conditions as the Railways may deem fit to impose. Undisputedly, for that purpose, the Railways have formulated policy / scheme which has already been brought on record and entered into agreement with the appellant. The Railways have entered into two agreements dated 1-2-2008 and 10-8-2010 with the appellant for private siding for its Hirmi and Rawan plants from Hathband Station. Admittedly and undisputedly, the agreements contained terms and conditions wherein specific clauses inter alia permit third party to use the siding which has been incorporated and accepted by the appellant herein in shape of clause 19 of the agreement Annexure P-3 i.e. Private Siding Agreement. Clause 19 of the Private Siding Agreement deals with Railway Administration's Rights regarding use of the siding. It states that in addition to any other rights, powers and liberties provided for, the Railway Administration shall have the rights, powers and liberties, over and in connection with the siding or any extension or part thereof namely,

(b) To connect or allow to be connected with the siding or any extension or part thereof any other siding or sidings branching or extending therefrom which may have been constructed or which

may hereinafter be constructed by or under the authority of the Railway Administration for any other person or persons whomsoever or for the purpose of the Railway Administration and to make or allow such alterations as may be necessary to effect such connection.

(c) To use or to permit the use of the siding or any extension or part thereof for the traffic if any person or persons other than the Applicant and to work traffic over the siding or any extension or part thereof to and from any other siding or sidings or branches or extensions therefrom which may be constructed as aforesaid jointly with the traffic of the Applicant upon payment by such person or persons to the Applicant of either such portion of the cost originally paid by the Applicant to the Railway Administration, in respect of the land and sub-grade work or such tollage for such use as aforesaid as shall be decided by the General Manager for the time being of the Railway Administration or such other Officer as may be nominated by him whose decision shall be final, conclusive and binding on the Applicant as to whether a portion of the aforesaid cost shall be payable and if so, the amount thereof or whether a tollage shall be payable and if so, the amount or rate thereof.

The Railway Administration shall collect such proportionate cost on behalf of the Applicant but shall not be responsible for collection of tollage for and on behalf of the Applicant, but the Applicant may enter into agreement with the person or person who has / have permitted the use of Siding or part thereof by the Railway Administration on the payment by the

latter of tollage. The use of the Siding or any extension or thereof by the Railway Administration or by other persons shall be so conducted in such manner and to such extent as to interfere as little as possible with the free use of the siding by the Applicant whose traffic shall have precedence.

18. Clause 19(c) of the Private Siding Agreement clearly authorises the Railways to use or to permit the use of the siding or any extension or part thereof for the traffic if any person or persons other than the appellant herein and to work traffic over the siding or any extension or part thereof to and from any other siding or sidings or branches or extensions therefrom which may be constructed as aforesaid jointly with the traffic of the appellant herein upon payment by such person or persons to the appellant. It is not in dispute that the appellant has accepted the aforesaid clause contained in clause 19(b) & (c) of the Private Siding Agreement without any demur or protest and has in fact set up the railway siding subject to the aforesaid terms i.e. clause 19(b) & (c) of the agreement.

19. Similarly, on 23-8-2016, the Government of India issued a policy on Private Sidings which contained identical clauses empowering Railways in the shape of clause 19(c) which states as under: -

> "19. Railway Administration's Rights Regarding Use of the Siding:
>
> (c) To use or to permit the use of the siding or any extension or part thereof for the traffic if any person or persons other than the Applicant and to work traffic over the siding or any extension or part thereof to and from any other siding or sidings or branches or extensions therefrom which may be constructed as aforesaid jointly with the traffic of the Applicant upon payment by such person or persons to the Applicant of either such portion of the cost originally paid by the Applicant to the Railway

> Administration, in respect of the land and sub-grade work or such tollage for such use as aforesaid as shall be decided by the General Manager for the time being of the Railway Administration or such other Officer as may be nominated by him whose decision shall be final, conclusive and binding on the Applicant as to whether a portion of the aforesaid cost shall be payable and if so the amount thereof or whether a tollage shall be payable and if so the amount or rate thereof.
>
> The Railway Administration shall collect such proportionate cost on behalf of the Applicant may enter into agreement with the person or persons who has / have been permitted the use of Sidings or part thereof by the Railway Administration on the payment by the latter of tollage.
>
> The use of the Siding or any extension or part thereof by the Railway Administration or by other persons shall be so conducted in such manner and to such extent as to interfere as little as possible with the free use of the siding by the Applicant whose traffic shall have precedence."

20. Coming to the facts of the case, it is quite apparent that the appellant herein has neither challenged the policy dated 23-8-2016 nor the terms and conditions of the agreement incorporated in shape of clause 19(b) & (c) as noticed herein-above entered between it and the Railways – respondents No.1 to 4 and only on the application of respondent No.5 when respondents No.1 to 4 have granted In Principle Approval (IPA) dated 8-4-2021 to respondent No.5 by which respondent No.5 has been allowed to use the part of the appellant's siding up to certain point for the proposed construction of Green Field Private Freight Terminal (PFT) by respondent No.5 with take off from existing private siding of the appellant connected from HN Station, challenge has been made in the writ petition.

21. Reverting to the facts of the case in the light of the aforesaid discussion and analysis, it is quite vivid that clause 19(c) of the agreement entered into between the appellant and respondents No.1

to 4 for private siding of its Hirmi and Rawan plants from Hathband Station clearly permits use of siding or any extension or part thereof for the traffic if any person or persons other than the writ petitioner / appellant herein by a third party upon payment by such person or persons to the writ petitioner which the writ petitioner / appellant herein has accepted and acted upon, and the appellant has not challenged it till this date rather acting upon the agreement without demur or protest and furthermore, In Principle Approval (IPA) has been granted as it is only the first stage of other permissions required at different levels. In that view of the matter, the learned Single Judge has recorded a finding that use of siding by third party i.e. respondent No.5 is permissible under clause 19(c) of the agreement entered into between the writ petitioner / appellant herein and respondent Nos.1 to 4 and the writ petitioner's traffic would be given preference as specific undertaking has been given by the Railways, and further recorded a finding that agreement between the parties prima facie allows sharing of the proportion of cost in case of use of line by another. Furthermore, the finding of the learned Single Judge is that it would be difficult to establish various lines for different plants and thus, the learned Single Judge has allowed respondents No.1 to 4 to finalise the project of putting up a freight terminal at the risk and cost of respondent No.5 and subject to final adjudication of the writ petition. In our considered opinion, the learned Single Judge has reached to a right conclusion and has exercised the discretion strictly in accordance with law, it is neither arbitrary nor capricious or perverse in the light of the principle of law laid down by their Lordships of the Supreme Court in **Wander Ltd.** (supra) and considering the scope of

writ / intra-court appeal held in the matter of **Smt. Asha Devi** (supra), **Baddula Lakshmaiah** (supra) and **B. Venkatamuni** (supra) and furthermore, following the recent decision of the Supreme Court in **M/s. N.G. Projects Limited** (supra) in which their Lordships have clearly held that the High Court should be slow in staying the infrastructural project, as noticed herein-above.

22. It is also vehemently contended by Mr. Singhvi, learned senior counsel for the appellant, that interim order granted on 26-7-2021 has been vacated on 28-9-2021, but no opportunity to file reply has been granted, whereas, however, while replying to this submission it has been submitted by Mr. Sundaram, learned senior counsel for respondent No.5, that on 26-7-2021 only notices of writ petition were issued to respondents No.2 to 5 including respondent No.5 and copy of the writ petition was directed to be served to respondent No.5 and thereafter, only on 23-8-2021, the matter came-up for hearing, but again, the matter could not be heard and time was granted to respondent No.5 to file reply. Meanwhile, reply was filed by all the parties then only, on 28-9-2021, the matter came-up for consideration and on that day, in fact, the question of grant of stay was considered bi-parte for the first time by the learned Single Judge and by abundant precaution, application for vacating stay was filed which was noticed for consideration while considering the question of grant of interim relief to the writ petitioner, and it is not the case that no opportunity was granted to the writ petitioner / appellant herein to file reply to the application for vacating stay.

23. A careful perusal of order dated 26-7-2021 extracted herein-above (para 7) would show that on that day, writ petition was entertained,

copy of writ petition was directed to be served to counsel for respondent No.5 and the learned Single Judge while passing the order has clearly observed that “let the respondents may not precipitate further things by any order so that this petition or any interim prayer become infructuous to give rise to multiplicity of proceedings”. Thereafter, reply was filed by respondent No.5 on 26-8-2021 and the matter was taken-up for hearing on 28-9-2021. As such, for the first time, on 28-9-2021, the question of grant of interim relief was considered bi-parte by the learned Single Judge after serving copy of writ petition and filing of reply, though hearing on I.A.No.2, application for vacating stay, was mentioned in the order sheet, but the fact remains that the learned Single Judge has considered the question of grant of stay in favour of the writ petitioner after hearing all parties for the first time on 28-9-2021 and prior to that, order dated 26-7-2021 was only an order issuing notice as at that time even copy of the writ petition was not served to respondent No.5 and for the first time, on 28-9-2021, the question of interim relief to the writ petitioner / appellant herein was considered after hearing all parties to the writ petition, as on 26-7-2021, the writ petition was heard only on the question of admission and the respondents had no say on that day on any issue / question of interim relief to the writ appellant, as respondent No.5 did not have copy of writ petition. As such, the writ petitioner / appellant herein has not suffered any prejudice on account of not giving additional opportunity to file reply to the application for vacating stay, in fact on 28-9-2021, all the parties were heard on the question of grant of stay to the writ petitioner after filing reply / return, etc.. Therefore, the writ petitioner / appellant herein has not suffered

any prejudice on account of non-grant of further opportunity to file reply to the application for vacating stay, and on hearing learned counsel for the parties at length and on deeper consideration, we find no force in the submission of learned counsel for the appellant herein and we hereby reject the said submission.

24. In view of the aforesaid analysis, we are of the considered opinion that the learned Single Judge is absolutely justified in passing the impugned order declining to grant stay in favour of the writ petitioner / appellant herein allowing respondents No.1 to 4 to proceed to finalise the project of putting up a freight terminal that is at the risk and cost of respondent No.5 and subject to final adjudication of the writ petition. We do not find any merit in the writ appeal, it deserves to be and is accordingly dismissed leaving the parties to bear their own cost(s).

25. At this stage, learned counsel for the parties have fairly submitted that the learned Single Judge be directed to expedite the hearing of the writ petition. The prayer appears to be just, fair and reasonable. The learned Single Judge is requested to decide the writ petition expeditiously, in view of the issue raised and urgency shown by learned senior counsels of both the sides. Let the matter be listed for consideration before the learned Single Judge on 13-6-2022 as this Court shall remain closed for summer vacation from 16-5-2022 to 10-6-2022.

26. It is also made clear that this Court has not expressed any opinion on the merits of the matter and the observation made / finding arrived herein-above is only for the purpose of adjudicating the validity and correctness of the impugned order dated 28-9-2021 and it is open to the writ court to adjudicate the issue involved in the writ petition on its

merit and in accordance with law. All the rival contentions made on the merits of the matter herein-above are left and kept open to be urged before the writ court.

Sd/-
(Sanjay K. Agrawal)
Judge

Sd/-
(Rajani Dubey)
Judge

Soma