IN THE HIGH COURT OF DELHI AT NEW DELHI

O.M.P. 531/2014

Reserved on: February 20, 2015
Decision on: February 27, 2015

SOMA ISOLUX KISHANGARH BEAWAR
TOLLWAY PVT LTD ..... Petitioner

Through: Ms. Meenakshi Arora, Senior Advocate with Mr. Dharmendra Rautray, Ms. Tara Shahani and Ms. Ankit, Advocates.

versus

NATIONAL HIGHWAYS AUTHORITY OF
INDIA ..... Respondent

Through: Mr. P.P. Khurana, Senior Advocate with Ms. Tanu Priya, Mr. Mukesh Kumar, Ms. Meenakshi Sood, Advocates along with Mr. Y.B. Singh, Project Director and Mr. B.N. Sahai, General Manager, NHAI.

CORAM: JUSTICE S. MURALIDHAR

J U D G M E N T
27.02.2015

1. This is a petition under Section 9 of the Arbitration and Conciliation Act, 1996 ('Act') filed by the Petitioner, Soma Isolux Kishangarh Beawar Tollway Private Limited, seeking certain interim reliefs.

Background facts

2. The background facts are that the Petitioner entered into a Concession Agreement ('CA') with the Respondent National Highways Authority of India ('NHAI') to augment the road from km 364.125 to km 58.245 (approximately 93.56 km) on the Kishangarh – Ajmer – Beawar section of National Highway No. 8 ('NH-8) in the State of Rajasthan. The Petitioner was to undertake six-laning of NH-8 on build, operate and transfer

('BOT') basis. The Petitioner was granted a concession for a period of 18 years commencing from the appointed date. The NHAI accepted the bid of the Petitioner and issued a letter of award dated 21st April 2009. Thereafter, the CA was executed on 18th May 2009.

3. The total project cost was Rs. 1304.64 crores. Rs. 324.64 crores in the form of equity was brought in by the promoters of the Petitioner Consortium and the balance Rs. 978 crores through loans advanced by a consortium of banks with the Central Bank of India as the lead banker. According to the Petitioner, the loan amounts carry interest @ 11% from the date of initial disbursement until Commercial Operation Date ('COD'). The interest was payable by the Petitioner after a moratorium period of 7.5 months from the COD or from 31st December 2012 whichever was earlier.

4. The Petitioner was under the obligation to submit the performance security and achieve financial closure within 180 days from signing the CA. The Petitioner submitted performance security on 14th November 2009 (on 180th day after signing CA) by submitting two bank guarantees ('BGs') amounting to Rs. 19.87 crores each (valid up to 30th November 2010). The financial closure was achieved on 14th November 2009 (on 180th day after signing CA) by the Petitioner signing a Common Loan Agreement with the lenders. The performance security was required to remain in force for a period of one year from the appointed date and be released earlier upon the Petitioner expending on project construction an aggregate sum that is not less than 20% of the total project cost.

5. In terms of the CA, the Petitioner was to get the right to collect toll fee on the road only from the COD i.e., the date on which the Completion Certificate ('CC') or the Provisional Completion Certificate ('PCC') was

issued in terms of Clauses 15.1 and 27.1.1 of the CA respectively. The PCC has to be issued by the Independent Engineer ('IE") for the project, i.e., M/s. Louis Berger Group Inc. The toll fee collected was to be deposited in an escrow account. The CA specified the percentage of the toll collections that would come to the respective shares of the parties.

6. As already noted the appointed date was 14th November 2009. The Petitioner was required to complete the construction of the six lanes within 30 months from the appointed date. According to the Petitioner, it faced difficulties in commencing the construction work since NHAI failed to grant 100% right of way ('ROW') within 90 days of the appointed date as envisaged in the CA. The Petitioner states that it nevertheless completed the work of six lanes over a stretch of over 92 kms by utilizing the loan amount from the lender banks and the promoters' equity.

7. There has been extensive correspondence between the parties regarding the demand of the Petitioner for issuance of the PCC. On 21st March 2014 a letter was written by the Deputy General Manager (Technical) of the Jaipur office of NHAI to the Chief General Manager (Technical), NHAI on the issue of recommendation for PCC and start of commercial operation for the project. One issue highlighted was regarding Change of Scope ('CoS'). Two CoS cases have been submitted by the Petitioner. For CoS-1, an in-principle approval of the NHAI for construction of 5 culverts and one PUP amounting to Rs. 3.23 crore was received. The CoS-2 was for a value of Rs.16.27 crores which was subsequently revised to Rs. 66.11 crores. The Petitioner claimed some other positive CoS amounting to Rs. 163 crores but these were stated by the NHAI to be untenable.

8. The letter dated 21st March 2014 also referred to the issue of negative

CoS and proposed the execution of a Supplementary Agreement ('SA'). The said letter also referred to Non-Compliance Project Notes ('NCPNs') issued from time to time by NHAI to the Petitioner. It was stated that one NCPN related to a remedial measure for bulging of RE wall, for which the remedial work had already been completed. As regards 11 NCPNs which related to removal of defects in drain, it was stated that it would not adversely affect the safety and reliability of the operation of project highway and could be completed within punch list items, i.e., within a period of 90 days after the issuance of the PCC or before the issuance of the CC.

9. The letter dated 21st March 2014 referred to what was stated by the Project Director (PD) regarding the completion of the Schedule I Tests as under:

> "Schedule 1 Test
> As stated in the letter by the Concessionaire, most of the Schedule 1 tests are completed. The status of Schedule 1 Test are as under:
> (i) Riding Quality test – Successful.
> (ii) Pavement Composition test – Successful
> (iii) Structural tests for all eligible – Successful (except for test on Flyover at km 83 + 118 which has been recently conducted and success of test will be ensured before issuance of PCC)
> (iv) Cross-section test – 80% done
> (v) Test Drive – 75% completed.
> It is certified that Schedule 1 Test has been witnessed by undersigned and Manager (T) posted at PIU Ajmer and found satisfactory."

10. In para 14 of the letter dated 21st March 2014, the above comments of the PD and the IE regarding Schedule 1 Test were reiterated. It was confirmed that riding quality test, pavement composition test, and structural tests were all successful. The cross-section test was 80% finished and test drive was 75% completed. In para 16 it was noted that

PD/IE had submitted that “any due rectification will not affect safe and reliable operation of the highway." It noted that the PD had recommended the proposal for issuance of the PCC. In para 17 of the letter it was stated that a draft SA had been prepared by the IE. There was loss of revenue on account of toll fee collection not having already been commenced. The letter recommended that the PCC be issued by delinking certain structures (as detailed in Annexure 3), deleting certain structures (as detailed in Annexure 5) and subject to completion of certain other steps.

11. The parties have been at loggerheads on the issue of completion of the Schedule 1 tests and issuance of the PCC as a precursor to commencing the collection of toll fee. On 9th April 2014 the NHAI had wrote to the Petitioner seeking its consent that no claim would be raised by it for delay in land acquisition and extension of project completion date. By its response dated 2nd May 2014 the Petitioner stated that the demands of NHAI were meant to pressurize the Petitioner into waiving off its rightful claims under the CA and sign a SA to waive off its claims for the delays. On its part, NHAI refers to a letter dated 8th May 2014 written by the IE to the Petitioner pointing out that during the site inspection it was observed that rutting, slippage and upheaval had occurred at many places in main carriage way and that the Petitioner should provide its rectification schedule. The Petitioner was asked to provide its schedule programme to complete the rectification so that the balance Schedule 1 Tests could be taken up. This was followed by another letter dated 28th May 2014 from the IE to the Petitioner reminding that the programme for conducting the balance Schedule 1 Tests had not been received.

12. Meanwhile, in terms of the CA, the Safety Consultant, i.e., RITES had undertaken periodic 'Safety Audit and Inspection' of the project. It issued

a detailed report for Q-11, i.e. for the period ending 1st July 2014 with photographs of the portions of the project highway stretch where repair works had to be undertaken. This was a 151 page document which indicated column-wise which of the recommendations had been complied with and those that remained to be attended to by the Petitioner.

13. The Petitioner replied to the IE on 14th July 2014 claiming that it was not in agreement with any deviation/variation as proposed by the IE unilaterally. It pointed out that the issuance of PCC "should not be made conditional with respect to these so-called variations/deviations." As regards the Schedule I Tests, the Petitioner claimed that they were conducted in the month of March 2013. It had complied with the observations of the RITES. The Safety Audit Checklist for issuance of PCC had also been issued by RITES. The Petitioner requested the IE to "determine/conclude the Schedule-I Tests already witnessed/ performed." It was requested that PCC be issued without further delay.

The present petition

14. The present petition was filed on 8th May 2014 and notice was issued on 12th May 2014. The interim reliefs sought in the petition were:

(i) directing the NHAI to take steps to ensure the issuance of the PCC without delay;

(ii) allowing the Petitioner to collect the toll fee and deposit it in an escrow account in terms of the CA; and

(iii) alternatively, close the newly constructed lanes and prevent its use till such time the PCC is not issued.

15. By an order dated 9th September 2014 the learned Single Judge dealt with the prayer for permitting the Petitioner "to collect the toll revenue and deposit the same in the Escrow account in terms of the CA and utilize

the same in the manner provided under the CA." The learned Single Judge noted that the toll fee could not be permitted to be collected without issuance of the PCC. Since PCC had not so far been issued, the toll fee could not be permitted to be collected. The learned Single Judge further observed that the dispute whether the PCC was illegally withheld was itself an arbitral dispute which could not be gone into at the stage of considering the application under Section 9 of the Act. It was observed that the Petitioner did not have *prima facie* case in its favour and that "the loss of revenue is not such a loss which cannot be compensated in terms of the money."

16. The above order was carried in appeal by the Petitioner before the Division Bench by filing FAO (OS) No. 434 of 2014. By an order dated 14th October 2014, the DB set aside the order dated 9th September 2014 of the learned Single Judge and held that the learned Single Judge "was obliged to look into the pleadings and the documents and decide whether *prima facie* NHAI was wrong in not issuing the provisional completion certificate."

Submissions of counsel

17. Ms. Meenakshi Arora, learned Senior counsel for the Petitioner submitted that in terms of the CA, the Petitioner was entitled to recover its investment through collection of toll fee. She pointed out that the Petitioner cannot collect the toll fee unless it is issued either a PCC or a CC in accordance with Clause 15.1 of the CA. It is claimed that as on 30th March 2014 the Petitioner had completed 95% of the work. It states that PCC could be granted even prior to 100% completion of the work. She stated that while on the one hand the IE was refusing to issue the PCC on the other hand the newly constructed lanes are being used by the public since September 2012 without any safety or quality check. It is submitted

by Ms. Arora that there is no justification for NHAI to continue withholding the PCC since over 95% of the project was already completed. She referred to the Safety Audit Reports issued by RITES (including the one recently issued in November 2014) to urge that most of the aspects pointed out had been complied with.

18. Ms. Arora submitted that in terms of the CA, the Petitioner was obliged to maintain the entire highway but could not be expected to spend money on that exercise unless it was permitted to collect the toll fee. It was further submitted that since September 2012 over 30,000 vehicles were passing over the highway on a daily basis and loss of the uncollected toll fee was around Rs. 60 lakhs per day. It is submitted that toll fee not collected thus far can never be recouped. If this situation continues, the project would be declared a non-performing asset (NPA). Ms. Arora submitted that the Petitioner was prepared for the Schedule 1 tests to be completed, but in the meanwhile toll should be permitted to be collected and deposited in an escrow account. The Petitioner was willing to undertake not to withdraw any amount from the escrow account till the repairs needed to bring the entire highway to the level at which it was in May 2013 when it was made fully operational and functional. Even if the PCC were issued, it would give the Petitioner 90 days' time thereafter to complete the repairs of those items listed in the 'punch list'. She reiterated that the Petitioner was at this stage only asking for PCC and not the CC.

19. Mr. P.P. Khurana, learned Senior counsel for the NHAI, submitted that the reliefs prayed for by the Petitioner were not legally tenable. No mandamus could be issued under Section 9 of the Act at the present stage to the NHAI directing that a PCC should be granted. He referred to the decisions of the Supreme Court in ***Metro Marins v. Bonus Watch Co. (P) Limited (2004) 7 SCC 478***, ***Sundaram Finance Limited v. M/s. NEPC***

India Limited AIR 1999 SC 565 and ***Firm Ashok Traders v. Gurumukh Das Saluja (2004) 3 SCC 155***. Mr. Khurana submitted that till a few days ago, the Petitioner had not even invoked the arbitration clause seeking the appointment of the Arbitral Tribunal ('AT'). In any event the reference of the disputes to the AT had to be preceded by conciliation proceeding which are already underway before the Chairman, NHAI. He placed before the Court the minutes of the Conciliation Meeting held at the NHAI Headquarters in New Delhi on 18th February 2015. The Chairman, NHAI had already called for a consolidated list of deviations from the CA to be prepared jointly by the Petitioner and the NHAI for different categories.

20. Mr. Khurana submitted that the Petitioner had failed to come forward to complete the Schedule-I Tests without which no PCC could be issued. Mr. Khurana submitted that the Petitioner had failed to fully utilize the money advanced to it and there was negative CoS to the extent of around Rs. 35 crores. According to NHAI, the Petitioner should be asked to furnish a BG for the said sum to protect the interests of NHAI. Mr. Khurana handed over a tabulated chart which showed a list of items of rectification that had to be mandatorily attended to by the Petitioner before the PCC could be issued by the IE. The 'punch list' items were separately shown and these could be attended to during the period of 90 days after the issuance of the PCC. In another column, the NHAI had indicated that those stretches of the highway for which land had not been made available to the Petitioner and therefore that could be the subject matter of arbitration. Mr. Khurana produced certain pictures of the stretches of the highway which required urgent repairs. He submitted that given the present status of the highway, the collection of toll fee could not immediately commence.

21. Mr. Khurana stated that NHAI was within its rights to insist that the Petitioner should sign the SA waiving off some of its claims so that the parties could move ahead to the stage of toll collection. He urged that since the parties were not in a position to constructively co-operate to complete the Schedule 1 tests, the Central Road Research Institute ('CRRI') should be requested to depute a senior engineer to supervise the completion of those tests in a time-bound manner.

22. In rejoinder, Ms. Arora submitted that the Petitioner was agreeable to the idea of CRRI supervising the conduct of the balance Schedule 1 tests. She submitted that the prayers in the present petition were maintainable as the Petitioner was essentially concerned with protecting the proceeds of the toll. The differences between the parties as to the positive CoS (which according to the Petitioner was to the extent of Rs. 190 crores) and negative Cos (which according to NHAI was around Rs. 35 crores) were not reconcilable at this stage. Unless resolved in the conciliation proceedings, the disputes had to necessarily be referred to arbitration.

Scope of the petition

23. The above submissions have been considered. At the outset, the Court notes that the Division Bench has in its order dated 14th October 2014 in FAO (OS) No.434 of 2014 has directed the Single Judge to "decide whether *prima facie* NHAI was wrong in not issuing the provisional completion certificate." The order of the DB having attained finality, it is not open to NHAI to now contend that the issue concerning issuance of the PCC is beyond the scope of the powers of the Court under Section 9 of the Act. The order of the DB requires this Court to decide that question.

24. Further, in terms of Section 9 (ii) (e) of the Act, the Court can grant "such other interim measure of protection as may appear to the Court to

just and convenient." The Supreme Court in ***Metro Marins*** (supra) was dealing with the question of issuance of a mandatory injunction which amounted to a pre-trial decree. It was held in that case that once the possession of the property by the Defendant was admitted, even if it was through an agent (caretaker), the mere non-use of the property was no justification to appoint a Receiver to supervise the property. The facts of the present case are quite different from those in ***Metro Marins***. That decision is distinguishable on facts, and in the considered view of the Court has no application to the case on hand. The position in regard to the decisions in ***Sundaram Finance Limited*** (supra) and ***Firm Ashok Traders*** (supra) is no different.

The project as a revenue generation model

25. As far as the present case is concerned, the property in question is a highway of a stretch of 91 km which is already being used by the public. Under the CA, the highway is supposed to be operated on a BOT basis. It is meant to generate revenue. The CA is premised on the Petitioner being able to operate the stretch for about 18 years and generate sufficient revenue from such operation to enable it to earn a reasonable profit after recovering the investment. The revenue generated is to be deposited in an escrow account and utilised in the pre-determined manner to meet the liability owed to the lenders, with some percentage of the collections going to the Petitioner and NHAI. In terms of the CA more than 2% of the total collections have to go to the share of the NHAI. Over a period of time, its earnings are expected to increase significantly. It is, therefore, not as if it is only the Petitioner who is likely to benefit from the toll collection but the NHAI as well.

26. According to the Petitioner the six lane stretch of around 91 kms of NH-8 which forms the subject matter of the present case has been open to

the public and is being used since September 2012. According to the NHAI, it is being used by the public since May 2013. Be that as it may, the fact is that over 30,000 vehicles are currently passing over it on a daily basis. It is not seriously disputed that the loss of toll fee on a daily basis is around Rs. 60 lakhs. With every passing day, this loss keeps mounting with no benefit accruing to any of the parties.

27. It is only to be expected that the parties would be anxious to stem the losses and ensure that toll collections begin at the earliest. However, at least since March 2014, for nearly a year that is, the parties have exchanged a lot of correspondence but have not moved forward to complete the Schedule 1 tests and commence toll collection. On the one hand NHAI maintains that the highway stretch of 91 km is yet to be tested for safety and at the same time it has done nothing to prevent the public from using the very same stretch for over two years now. A question would certainly arise as to who will bear the responsibility for the possible consequences, which is, not only limited to exposing the users of the highway to risk but also for the loss of revenue.

28. Given the nature of the project and the disputes that have arisen, the Court is of the view that it is certainly within the scope of it powers under Section 9 of the Act to push the parties to the CA to the next logical stage and put in place a mechanism that will ensure that the toll collection does not get further delayed. The Court would like to ensure that the highway is properly maintained, the defects detected be removed and highway is rendered both safe and reliable for public use.

The PCC and the Schedule 1 tests

29. Toll collection cannot commence till a PCC is issued. For issuance of the PCC, it is necessary for the Schedule 1 tests to be successfully

completed. Article 14.3 of the CA, which concerns the issuance of the PCC reads as under:

> **"14.3 Provisional Certificate** The Independent Engineer may at the request of the Concessionaire, issue a provisional certificate of completion substantially in the form set forth in Schedule-J (the "Provisional Certificate") if the Tests are successful and the Project Highway can be safely .and reliably placed in commercial operation though certain works or things forming part thereof are outstanding and not yet complete. In such an event, the Provisional Certificate shall have appended thereto a list of outstanding items signed jointly by the Independent Engineer and the Concessionaire (the "Punch List"); provided that the Independent Engineer shall not withhold the Provisional Certificate for reason of any work remaining incomplete if the delay in completion thereof is attributable to the Authority."

30. The above clause makes it clear that the authority which has to issue the PCC is the IE. The clause does not require the IE to seek prior clearance from the NHAI or any other authority for issuance of the PCC. If the IE is satisfied that the necessary pre-conditions have been satisfied, then it should proceed to issue the PCC. The letters of the IE dated 8th and 28th May 2014 appear to suggest that certain defects pointed out therein remain to be rectified by the Petitioner. While the Petitioner disputes this position, it is necessary to factually have the position on the ground verified by an independent authority so that the parties can move forward to the stage of issuance of the PCC.

31. The two main factors that have to be ensured before the PCC is issued are 'safety' and 'reliability'. In other words the IE will have to ensure that the highway in question is both safe and reliable for public use before it could grant the PCC for commencement of commercial operation. For this it has to ensure that there is substantial compliance with the Schedule I tests. The Schedule I Tests include the following:

(i) Visual and physical test

(ii) Test Drive

(iii) Riding Quality test

(iv) Pavement Composition test

(v) Cross-section test

(vi) Structural tests for bridges

(vii) Other tests

(viii) Environmental audit

(ix) Safety review

32. Further all tests stated in Schedule I are to be conducted by the "IE or such other agency or person as it may specify in consultation with the Authority." Upon successful completion of the tests, IE is expected to issue the PCC in terms of Article 14 of the CA.

33. The letter dated 21st March 2014 of the DGM (Technical) of the Jaipur office of NHAI notes that the PD has confirmed that the (i) riding quality test, (ii) the pavement composition test and (iii) the structural tests have been successfully completed. Further 80% of the cross-section test and 75% of the test drive have been completed. The DGM (Technical) observed that "Schedule I Test has been witnessed by PD Ajmer and Manager (T) posted in Ajmer PIU and found satisfactory."

34. For the last one year, the parties have been unable to carry out the balance 20% of the cross-section test and 25% of the test drive. It appears to the Court that earnest efforts were not made by them. Meanwhile, the 91 km stretch has suffered wear and tear and as the Safety Audit reports of RITES show, there are repairs required to be carried out on a regular basis on various portions of the 93.56km stretch. The Petitioner has expressed its willingness to continue to maintain the stretch of NH-8 provided that toll collections begin without delay. It has offered not to

withdraw any money from the escrow account till such time it does not carry out the rectification of defects to the satisfaction of the IE.

35. On its part, the NHAI is prepared to have the CRRI supervise the carrying out of the balance tests and also make a realistic demand of what repairs require to be carried out in the short run and those that can be rectified in the period of 90 days after the PCC is issued. The rectification works which according to NHAI require to be carried out forthwith by the Petitioner, prior to COD, are:

Sl. No.	Works to be completed before COD
1.	Truck layby including temporary toilet block
2.	Safety Consultants recommendations falling within scope of work
3.	Compliance balance vigilance observations (mainly of remedial measures for RE wall)
4.	Major/minor junction development within available land
5.	Earthen shoulder/side slope dressing/site cleaning
6.	Pavement marking
7.	Balance signage
8.	Balance kerb/crash barrier painting
9.	Median openings
10.	Balance median plantation
11.	Entry/exist ramps with separators/pavement markings/signage
12.	Balance protection works of bridges/culverts of MCW

36. It is acknowledged by the parties that since the 93.56 km highway stretch has been in use for over two years, there is a need to have the

Schedule 1 test carried over the entire stretch. At the same time, the Court would not like the issuance of the PCC to be indefinitely delayed since the revenue loss is mounting on a daily basis. The collective inability of the parties to complete the balance Schedule 1 tests should not lead to render the project being declared an NPA. The question whether the NHAI or any other party, including the Petitioner can be held responsible for the PCC not being issued till date cannot be conclusively answered at this stage as that would undoubtedly require evidence to be led and examined in detail in the arbitral proceedings. The answer to that question need not, however, preclude the issuing of appropriate interim directions so that the project serves one of the purposes for which it was conceived.

Time bound directions

37. Keeping in view the above factors the Court issues the following directions:

(i) On 5th March 2015 at 11 am, a meeting will be convened in the office of the Chairman, NHAI. Three representatives of the Petitioner, three representatives of the IE, and at least three officers of the NHAI will attend the meeting to identify the precise stretches over which the remaining 20% of cross-section tests and 25% of test drive is required to be completed.

(ii) The NHAI and the Petitioner will jointly address a letter to the Chairman, CRRI to nominate a Senior Engineer of not less than 20 years' experience to supervise the completion of the balance Schedule I Test on the above stretches. The said letter will be delivered in person to the Chairman CRRI on or before 9th March 2015. Not later than 12th March 2015, the Chairman CRRI will convey in writing to both NHAI and the Petitioner the name of the Engineer nominated by him for the task.

(iii) The exercise of conducting the balance Schedule I Tests on the stretches identified as in (i) above will commence under the supervision of the nominated Engineer of CRRI and with the participation of the NHAI, the Petitioner and the IE, on 13th March 2015 and be completed on or before 20th March 2015. The Engineer of the CRRI shall thereafter certify in writing the completion of the balance Schedule 1 tests.

(iv) On or before 23rd March 2015 the IE will draw up a list of rectification works to be carried out by the Petitioner. The IE will also include in such list such of the rectification works pointed out by the NHAI (as noted in para 35 of this order) that according to the IE require to be carried out immediately by the Petitioner from the point of safety and reliability. Copies of such list will be simultaneously be provided to the NHAI and the Petitioner.

(v) The Petitioner shall forthwith commence carrying out the rectification works as listed out by the IE, and endeavour to complete it within four weeks, and in any event not later than 22nd April 2015.

(vi) If the works are rectified to the satisfaction of the IE, the IE shall not later than 25th April 2015 certify in writing to that effect.

(vii) The IE shall simultaneous with the certification in (vi) above, proceed to issue the PCC to the Petitioner subject to the following conditions:

> (a) within a period of one month thereafter, the Schedule 1 tests on the remaining stretch will be carried out under the supervision of the Engineer nominated by the CRRI in the presence of the Petitioner, the NHAI and the IE;

(b) the IE will draw up a further list of works noted for rectification and include them in the 'punch list'. These shall be carried out by the Petitioner to the satisfaction of the IE within a period of 90 days after the issuance of the PCC.

(c) The maintenance of the entire stretch of the project highway will be undertaken by the Petitioner in terms of the CA;

(d) The toll collection will begin immediately after the issuance of the PCC and as per the rates and the system as already agreed and set out in the CA and related documents. The COD will be in terms of the CA. The toll collected will be deposited in the escrow account in terms of the CA. The Petitioner will not be permitted to withdraw monies from the escrow account till all the rectification works pointed out are carried out to the satisfaction of the IE.

(viii) The Petitioner will be bound to carry out the repairs as pointed by RITES in its Safety Audit Reports issued from time to time. However, this will not come in the way of the PCC being issued or the toll fee being collected.

(ix) The NHAI will not insist on the Petitioner signing the Supplementary Agreement or furnishing a BG for the negative CoS as a pre-condition for issuance of the PCC or the CC.

(x) The issue of positive and negative CoS, and the liability for the delays and consequential losses, if not resolved in the conciliation proceedings, will be examined in the arbitration proceedings.

(xi) It will be open to the Petitioner to apply to the Court, or if in the meanwhile AT gets constituted, to apply to the AT, for permission to withdraw monies from the escrow account once it has successfully carried out all the repairs and rectifications as certified by the IE. If according to the Petitioner despite its completing the rectification work it is still not being issued a certificate to that effect by the IE, or not being issued the CC, is would be open to the Petitioner to approach the Court/AT for further directions.

(xii) The above directions will not come in the way of the conciliation proceedings going on before the Chairman, NHAI or all further steps being taken in terms of the CA.

(xiii) The fees of the Engineer of the CRRI for the entire work to be performed by him as directed above will be fixed by the Chairman CRRI and shall be paid to him without delay in equal halves by the Petitioner and the NHAI with liberty to each of them to claim such amount in the arbitral proceedings.

(xiv) If and when an AT is constituted, the parties can seek appropriate interim reliefs before by filing an application under Section 17 of the Act and it will be open to the AT to pass orders including variation, modification or clarification of this order.

(xv) The timelines fixed above at each of the stages can be varied by not more than a week by the parties through mutual consultations.

38. It is clarified that the Court has in this order only expressed a *prima facie* view on the basis of materials before it. This order will not come in the way of the AT taking an independent view on the merits of all the contentions of the parties which are left open to be urged in the arbitral

proceedings. The petition is disposed of in the above terms.

39. Order be given *dasti* to counsel for parties. A copy of the order be delivered to the Chairman, CRRI forthwith for compliance.

S. MURALIDHAR, J.

FEBRUARY 27, 2015
Rk