

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

Judgment Reserved on: November 27, 2014

% *Judgment Delivered on: January 06, 2015*

+ **FAO (OS) 489/2014**

JAINTIA HIGHWAY PRIVATE LIMITED Appellant

Represented by: Mr.Sandeep Sethi, Sr.Advocate and
Mr.Kirti Uppal, Sr.Advocate
instructed by Mr.Rakesh Sinha,
Mr.Sourav Ghosh and Mr.Samrat
Sengupta, Advocates

versus

**NATIONAL HIGHWAY AUTHORITY
OF INDIA**

..... Respondent

Represented by: Mr.Pradeep K.Bakshi, Advocate with
Ms.Prachi V.Sharma and Kushagra
Pandit, Advocates

CORAM:

HON'BLE MR. JUSTICE PARDEEP NANDRAJOG

HON'BLE MS. JUSTICE MUKTA GUPTA

PARDEEP NANDRAJOG, J.

1. Petition filed by the appellant under Section 9 of the Arbitration and Conciliation Act, 1996 seeking a restraint order against the respondent to invoke Performance Bank Guarantee No.11640100001232 dated December 01, 2012 in sum of ₹19,58,00,000/- (Rupees Nineteen Crores Fifty Eight Lacs only) has been dismissed by the learned Single Judge vide impugned order dated November 19, 2014.

2. It may be stated at the outset that when the petition was filed before the learned Single Judge the bank guarantee in question had not been invoked and it is apparent that the petition was filed in anticipation. Thus, there are no pleadings concerning the issue whether the invocation of the

bank guarantee is in terms of the guarantee. After the learned Single Judge dismissed the petition and before the appeal was filed, the bank guarantee has been invoked and the issuing bank has paid the money to the respondent. Pithily stated, the pleadings in the petition would be that since, as per the contract, the construction period did not commence, which was the condition precedent for the obligation of the appellant to comply with its obligations under the contract, the performance guarantee could not be invoked for the reason default could be attributed to the appellant only when the construction period commenced. The plea of fraudulent invocation, as noted by the learned Single Judge, was sought to be weaved with aforementioned submission, being that, if the construction period did not commence, the respondents would have no right to invoke and thereupon encash the bank guarantee and any invocation thereof would be an act of fraud.

3. Article 4, Article 6, Article 9 and Article 10 of the Agreement dated June 05, 2012, which fell for consideration before the learned Single Judge, have been noted by the learned Single Judge, and the finding has been returned against the appellant. In a nut shell the finding returned is that the trigger of date called the Appointed date by which date 80% access of the Right of Way, which as per the appellant had not come into being, was a plea based on highly disputed question of fact and since under the terms of the bank guarantee NHAI was the sole Judge, no case was made out to grant the interim injunction prayed for.

4. Since same contentions which were advanced before the learned Single Judge were urged before us in appeal, we would begin our journey by noting relevant sub- Articles of Articles 4, 9 and 10 of the Agreement as also the definition of the Appointed date.

5. Article 4, under the caption ‘Condition Precedent’ reads as under:-

“4.1 Conditions Precedent

4.1.1 Save and except as expressly provided in Articles 4, 9, 10, 24, 34, 44 and 47, or unless the context otherwise requires, the respective rights and obligations of the Parties under this Agreement shall be subject to the satisfaction in full of the conditions precedent specified in this Clause 4.1 (the “Conditions Precedent”).

4.1.2 The Concessionaire may, upon providing the Performance Security to the Authority in accordance with Article 9, at any time after 90 (ninety) days from the date of this Agreement or on an earlier day acceptable to the Authority, by notice require the Authority to satisfy any or all of the Conditions Precedent set forth in this Clause 4.1.2 within a period of 30 (thirty) days of the notice, or such longer period not exceeding 60 (sixty) days as may be specified therein, and the Conditions Precedent required to be satisfied by the Authority shall be deemed to have been fulfilled when the Authority shall have:

(a) procured for the Concessionaire the Right of Way to the Site in accordance with the provisions of Clause 10.3.1;

(b) issued the Fee Notification;

(c) Deleted

*(d) procured approval of the Railway authorities in the form of a general arrangement drawing that would enable the Concessionaire to construct road overbridges/underbridges at level crossings on the Project Highway in accordance with the Specifications and Standards and subject to the terms and conditions specified in such approval;
and*

(e) procured all Applicable Permits relating to environmental protection and conservation of the Site:

Provided that the Authority may from time to time by notice extend, for up to an aggregate of 6 (six) months, the period for procuring the approval set forth in Sub-clause (d) and/or Sub-

clause (e) above and in that event the land to be covered by overbridges or the affected sections of the Project Highway, as the case may be, shall be included in the Appendix referred to in Clause 10.3 and dealt with in accordance with the provisions thereof; and provided further than upon procurement of such approval, the Concessionaire shall be entitled to a period of 12 (twelve) months therefrom for completion of the overbridges. For the avoidance of doubt, the approval specified in Sub-clauses (d) and (e) above shall cease to be a Condition Precedent upon the extension of time under this Proviso.”

6. Article 9 of the Concession Agreement reads as under:-

“ 9.1 Performance Security

9.1.1 The Concessionaire shall, for the performance of its obligations hereunder during the Construction Period, provide to the Authority no later than 180 (one hundred and eighty) days from the date of this Agreement, an irrevocable and unconditional guarantee from a Bank for a sum equivalent to ₹19.58 crores (Rupees Nineteen Crores and Fifty Eight Lakhs only) in the form set forth in Schedule-F (the “Performance Security”). Until such time the Performance Security is provided by the Concessionaire pursuant hereto and the same comes into effect, the Bid Security shall remain in force and effect, and upon such provision of the Performance Security pursuant hereto, the Authority shall release the Bid Security to the Concessionaire.”

7. Article 10 of the Concession Agreement under the caption ‘Right of Way’, reads as under:-

“ 10.1 The Site

The Site of the Project Highway shall comprise the real estate described in Schedule-A and in respect of which the Right of Way shall be provided and granted by the Authority to the Concessionaire as a licensee under and in accordance with this Agreement (the “Site”). For the avoidance of doubt, it is hereby acknowledged and agreed that references to the Site shall be construed as references to the real estate required for Two-Laning of the Project Highway as set forth in Schedule-A.

10.3 Procurement of the Site

10.3.1 Pursuant to the notice specified in Clause 4.1.2, the Authority Representative and the Concessionaire shall, on a mutually agreed date and time, inspect the Site and prepare a memorandum containing an inventory of the Site including the vacant and unencumbered land, buildings, structures, road works, trees and any other immovable property on or attached to the Site. Such memorandum shall have appended thereto an appendix (the “Appendix”) specifying in reasonable detail those parts of the Site to which vacant access and Right of Way has not been granted to the Concessionaire. Signing of the memorandum, in two counterparts (each of which shall constitute an original), by the authorised representatives of the Parties shall, subject to the provisions of Clause 10.2.2, be deemed to constitute a valid licence and Right of Way to the Concessionaire for free and unrestricted use and development of the vacant and unencumbered Site during the Concession Period under and in accordance with the provisions of this Agreement and for no other purpose whatsoever. For the avoidance of doubt, it is agreed that valid licence and Right of Way with respect to the parts of the Site as set forth in the Appendix shall be deemed to have been granted to the Concessionaire upon vacant access thereto being provided by the Authority to the Concessionaire.

10.3.2 Without prejudice to the provisions of Clause 10.3.1, the Parties hereto agree that on or prior to the Appointed Date, the Authority shall have granted vacant access and Right of Way such that the Appendix shall not include more than 20% (twenty per cent) of the total area of the Site required and necessary for the Two-Lane Project Highway, and in the event Financial Close is delayed solely on account of delay in grant of such vacant access and Right of Way, the Authority shall be liable to payment of Damages under and in accordance with the provisions of Clause 4.2.”

8. The Appointed date under the Concession Agreement dated June 05,

2012 is defined as under:-

“Appointed Date” means the date on which Financial Close is achieved or an earlier date that the Parties may by mutual consent determine, and shall be deemed to be the date of commencement of the Concession Period. For the avoidance of doubt, every Condition Precedent shall have been satisfied or waived prior to the Appointed Date and in the event all Conditions Precedent are not satisfied or waived, as the case may be, the Appointed Date shall be deemed to occur only when each and every Condition Precedent is either satisfied or waived, as the case may be;”

9. The term ‘Financial Close’ has been defined as under:-

“Financial Close” means the fulfilment of all conditions precedent to the initial availability of funds under the Financing Agreements,”

10. The performance guarantee dated January 12, 2012 reads as under:-

“PERFORMANCE SECURITY

*The Chairman,
National Highways Authority of India
New Delhi*

WHEREAS:

JAINTIA HIGHWAY PRIVATE LIMITED (the “Concessionaire”) and the Chairman, National Highways Authority of India (the “Authority”) have entered into Concession Agreement dated 05.06.2012 (the “Agreement”) whereby the Authority has agreed to the Concessionaire undertaking Two-Laning of the Jowai-Meghalaya/Assam Boarder section of National Highway No.44 on design, build, finance, operate and transfer (“DBFOT”) basis, subject to and in accordance with the provisions of the Agreement.

The Agreement requires the Concessionaire to furnish a Performance Security to the Authority in a sum of Rs.19.58 cr.(Rupees Nineteen Crore and Fifty eight lakhs) (the

“Guarantee Amount”) as security for due and faithful performance of its obligations, under and in accordance with the Agreement, during the construction period (as defined in the Agreement).

We, through our Branch at (the “Bank”) have agreed to furnish this Bank Guarantee by way of Performance Security.

NOW, THEREFORE, the Bank hereby, unconditionally and irrevocably, guarantees and affirms as follows:

The Bank hereby unconditionally and irrevocably guarantees the due and faithful performance of the Concessionaire’s obligations during the construction period, under and in accordance with the Agreement, and agrees and undertakes to pay to the Authority, upon its mere first written demand, and without any demur, reservation, recourse, contest or protest, and without any reference to the concessionaire, such sum or sums upto an aggregate sum of the Guarantee Amount as the Authority shall claim, without the Authority being required to prove to show grounds or reasons for its demand and/or for the sum specified therein.

A letter from the Authority, under the hand of an Officer not below the rank of General Manager in the National Highways Authority of India, that the Concessionaire has committed default in the due and faithful performance of all or any of its obligations under and in accordance with the Agreement shall be conclusive, final and binding on Bank. The Bank further agrees that the Authority shall be the sole judge as to whether the Concessionaire is in default in due and faithful performance of its obligations during the Construction Period under the Agreement and its decision that the Concessionaire is in default shall be final, and binding on the Bank, notwithstanding any differences between the Authority and the Concessionaire, or any dispute between them pending before any court, tribunal, arbitrators or any other authority or body, or by the discharge of the Concessionaire for any reason whatsoever.

In order to give effect to this Guarantee, the Authority shall be entitled to act as if the Bank were the principal debtor and any

change in the constitution of the Concessionaire and/or the Bank, whether by their absorption with any other body or corporation or otherwise, shall not in any way or manner affect the liability or obligation of the Bank under this Guarantee.

It shall not be necessary, and the Bank hereby waives any necessity, for the Authority to proceed against the Concessionaire before presenting to the Bank its demand under this Guarantee. The Authority shall have the liberty, without affecting in any manner the liability of the Bank under this Guarantee, to vary at any time, the terms and conditions of the Agreement or to extend the time or period for the compliance with, fulfillment and/or performance of all or any of the obligations of the Concessionaire contained in the Agreement or to postpone for any time, and from time to time, any of the rights and powers exercisable by the Authority against the Concessionaire, and either to enforce or forbear from enforcing any of the terms and conditions contained in the Agreement and/or the securities available to the Authority, and the Bank shall not be released from its liability and obligation under these presents by any exercise by the Authority of the liberty with reference to the matters aforesaid or by reason of time being given to the Concessionaire or any other forbearance, indulgence, act or omission on the part of the Authority or of any other matter or thing whatsoever which under any law relating to sureties and guarantors would but for this provision have the effect of releasing the Bank from its liability and obligation under this Guarantee and the Bank hereby waives all of its rights under any such law.

6. This Guarantee is in addition to and not in substitution of any other guarantee or security now or which may hereafter be held by the Authority in respect of or relating to the Agreement or for the fulfillment, compliance and/or performance of all or any of the obligations of the Concessionaire under the Agreement.

7. Notwithstanding anything contained hereinbefore, the liability of the Bank under this Guarantee is restricted to the Guarantee Amount and this Guarantee will remain in force until the earlier of the 1st (first) anniversary of the Appointed

Date or compliance of the conditions specified in paragraph 8 below and unless a demand or claim in writing is made by the Authority on the Bank under this Guarantee, no later than 6 (six) months from the date of expiry of this Guarantee, all rights of the Authority under this Guarantee shall be forfeited and the Bank shall be relieved from its liabilities hereunder.

8. *The Performance Security shall cease to be in force and effect when the Concessionaire shall have expended on Project construction an aggregate sum not less than 20% (twenty per cent) of the total Project Cost which is deemed to be Rs.78.15 Crores (Rupees Seventy eight crores and fifteen lakhs) for the purposes of this Guarantee, and provided the Concessionaire is not in breach of this Agreement. Upon request made by the concessionaire for release of the Performance Security along with the particulars required hereunder, duly certified by a statutory auditor of the Concessionaire, the Authority shall release the Performance Security forthwith.*

9. *The Bank undertakes not to revoke this Guarantee during its currency, except with the previous express consent of the Authority in writing and declares and warrants that it has the power to issue this Guarantee and the undersigned has full power to do so on behalf of the Bank.*

10. *Any notice by way of request, demand or otherwise hereunder may be sent by post addressed to the Bank at its above referred Branch, which shall be deemed to have been duly authorized to receive such notice and to affect payment thereof forthwith, and if sent by post it shall be deemed to have been given at the time when it ought to have been delivered in due course of post and in proving such notice, when given by post, it shall be sufficient to prove that the envelope containing the notice was posted and certificate signed by an officer of the Authority that the envelope was so posted shall be conclusive.*

11. *This Guarantee shall come into force with immediate effect and shall remain in force and effect for a period of one year and six months or until it is released earlier by the Authority pursuant to the provisions of the Agreement.”*

11. A company named Simplex Infrastructure Limited had submitted an offer when NHAI floated tenders for augmenting the existing road from chainage K.M. 69.2 K.M. to K.M.173.2 on the Jowai – Meghalaya Assam border on NH-44. It was declared the successful bidder and Letter of Award was issued on March 20, 2012, requiring the formation of a special purpose vehicle, and this led to the incorporation of the appellant. Thereafter the appellant and NHAI executed the Concession Agreement dated June 05, 2012, containing, inter-alia, aforementioned Articles.

12. Relevant would it be to note that under Article 9, a performance security, by way of an irrevocable and unconditional bank guarantee had to be issued in favour of NHAI and it is in pursuance of this term of the agreement that at the asking of the appellant the performance guarantee in question was issued by Axis Bank Limited. A perusal of Article 4.1.2 would reveal that once the appellant provided the performance security, it was authorized to require NHAI to satisfy the condition precedents within a period of 30 days and upon fulfilment thereof by NHAI would appellant's liability commence under the agreement. Sub-Clause (a) of Article 4.1.2 specifies one condition precedent required to be fulfilled by NHAI : to procure the Right of Way to the site as per Article 10.3.1, which would mean that in compliance with Article 10.3.1, which would embrace Article 10.3.2, NHAI was obliged to procure at least 80% of the Right of Way to the site.

13. The dispute therefore essentially centres around whether NHAI had provided at least 80% of the Right of Way to the site or not. Whereas appellant contends that NHAI did not do so, NHAI asserted to the contrary.

14. The learned Single Judge was not to decide whether NHAI had provided at least 80% of the Right of Way or not, for the reason at base the issue concerned a bank guarantee, and if it was found that this issue was a highly disputed question of fact, no injunction as prayed for could be issued.

To this extent the approach to the issue by the learned Single Judge is in conformity with law. The reason being that the bank guarantee makes NHAI the sole Judge of the dispute, and surely it would not be expected of the bank which had issued the bank guarantee to have decided, if found to be a highly disputed question of fact, whether NHAI had complied with said condition precedent obligation.

15. The performance guarantee in question was issued on December 01, 2012 and on the same date the appellant served a notice upon NHAI envisaged by Article 4.1.2 of the Concession Agreement to, inter-alia, comply with its condition precedent obligation under sub-Clause (a) of Article 4.1.2, i.e. make available access to at least 80% of the Right of Way. Ordinarily the notice period would have expired after 30 days, subject to a maximum of 60 days as provided in Article 10.3.2. But the appellant did not raise any issue for quite some time and from the correspondence exchanged between the parties it is apparent that their representatives jointly visited the sites on different dates. As per a Detailed Project Report submitted by an independent consultant the total land required for construction of the Highway was 141.13 hectares, out of which admittedly 132.74 hectares was available at the inception. It appears that additional 5.6 hectares of land was found to be required. As per NHAI since 132.74 hectares land was made available, even keeping in view the additional 5.6 hectares of land, more than 80% of the Right of Way was made available. Later on, due to realignments, more land was required and the dispute pertained to whether 80% area was available keeping in view the additional land required.

16. As per the appellant the total land required was about 186.02 hectares, and for which the appellant heavily relied upon a letter dated November 19, 2013 written by NHAI to it, which reads as under:-

“NHAI/BOT/11012/36/2003/77

Dated: 19.11.2013

To,
M/s Jaintia Highway Private Limited
C/O M/S Simplex Infrastructure Ltd.
Simplex House, 27-Shakespeare Sarani,
Kolkata-700017

Sub: Two laning of Jowai-Meghalaya/Assam Border section of NH-44 (km.69.200 to km.173.200) in the state of Meghalaya to be executed on BOT (Toll) project on DBFOT pattern under NHDP Phase-III project: Appointed Date regd.

Sir,

This has reference to your letter no.JHPL/CL/NHAI/Jowai/2013/001 dated 22.10.2013 addressed to RO, Guwahati.

2. RO, Guwahati has intimated that Government of Meghalaya is providing advance possession of approximately 14 hact. Of land required for 2 toll plazas, ways side amenities, Truck Lay Bys and improvement of junctions as projected vide your letter dated 22.10.2013 & 13.09.2013. RO, Guwahati in view of the above confirmed the availability of land more than 80% as under:-

S.No.	Area (hact.)	Remarks
1	132.75 ha/130 ha(available)	Confirmed by DPR Consultant/Concessionaire.
2	5.6 ha	Made available subsequently during joint inspection
3	14.00 ha	Made available by State Government for advance possession.
4	Total available : 152.35 ha (81.89% 149.60 ha (available 80.42)	

4. The status of Conditions Precedent to be fulfilled by

authority as per Article-4 as under:

<i>Sl.No</i>	<i>Conditions Precedent</i>	<i>Status</i>
<i>1</i>	<i>(a) Procured for the Concessionaire the Right of Way to the Site in accordance with the provisions of Clause 10.3.1</i>	<i>About 186.02 Ha land is required out of which 149.60 HA (i 80.42%) land available</i>
<i>2</i>	<i>(b) Issued the Fee Notification;</i>	<i>Fee notification has been published via S.O.2921 (E) dated 26.09.2013</i>
<i>3</i>	<i>(d) Procured approval of the Railway authorities in the form of a general arrangement drawing that would enable the Concessionaire to construct road over-bridges/under-bridges at level crossings on the Project Highway in accordance with the Specifications and Standards & Subject to the terms and conditions specified in such approvals;</i>	<i>N.A.</i>
<i>4</i>	<i>(e) procured all Applicable Permits relating to environmental protection and Conservation of the Site</i>	<i>Environment clearance has been accorded by MOEF vide letter No.F.No.10-35/2012-IA-iii dated 21.03.2013</i>

5. The documents submitted by concessionaire regarding financial close have been examined by Fin.Div. NHAI. The Fin.Div. vide their letter dated 06.08.2013 has raised observation to the ICICI Bank, which is to be complied by the

concessionaire, so that Fin.Div. may finalized the F.C., the compliance of the above observation is still awaited.

6. It may be mentioned that as per the Article 48, "Appointed Date" means the date on which Financial Close is achieved or an earlier date that the Parties may by mutual consent determine, and shall be deemed to be the date of commencement of the Concession Period. For the avoidance of doubt every Condition Precedent shall have been satisfied or waived prior to the Appointed Date and in the event all Conditions Precedent are not satisfied or waived, as the case may be, the Appointed Date shall be deemed to occur only when each and every Condition Precedent is either satisfied or waived, as the case may be;"

7. As the all the Conditions Precedent to be fulfilled by authority as per the C.A. have been achieved as elaborated above, it is requested that the status of the Conditions Precedent to be fulfilled by concessionaire as per Article-4 of C.A. may be submitted for declaration of the Appointed Date in accordance with Article-48 urgently."

17. The correspondence exchanged between the parties, being the letters dated September 13, 2013 addressed by the appellant to NHAI, NHAI's communication dated October 08, 2013, appellant's letter dated October 27, 2013 and NHAI's letter dated November 14, 2013, would bring out that NHAI took the stand that as per the independent consultant appointed only 141.13 hectares of land was required and out of which Right of Way was available for 132.75 hectares of land and that the letter dated November 19, 2013 was written with respect to appellant's claim that for construction of the Highway 186.02 hectares land was required. As per NHAI even if it was to be treated that 186.02 hectares land was required, 152.3 hectares of land with Right of Way was available, being : 132.75 hectares as confirmed by DPR Consultant. 5.6 hectares made available subsequently joint inspection and 14 hectares made available by State Government of

18. A perusal of the letter dated November 19, 2013, heavily relied upon by the appellant would bring out aforesaid position taken by NHAI in its letter dated November 19, 2013.

20. In its letter dated December 05, 2013, the appellant, inter-alia, wrote as under:-

Project: Two laning of Jowai-Meghalaya/Assam Border Section of NH-44 (km.69.200 to Km.173.200) in the State of Meghalaya to be executed as BOT (Toll) project on DBFOT pattern under NHDP Phase III Project.

Ref:

1. Concession Agreement dated 05th June 2012.
2. Concessionaire's letter JHPL/CL/NHAI/Jowai/2013/0001 dated 22.10.2013
3. NHAI letter to M/s ICT-NHAI/PIU/SHL/2013/JOWAI-RATRACHERRA

(LA)/A2/1583 dated 29.10.2013.

4. NHAI letter NHAI/BOT/11012/36/2003/77 dated 19.11.2013.

Dear Sir,

We are in receipt of NHAI letter cited under reference 4 above, wherein details of Condition Precedent to be fulfilled by the Authority have been furnished with a conclusion that the Authority has fulfilled the Condition Precedent as per C.A. In the said communiqué, the Concessionaire has been requested for the status on Condition Precedent to be fulfilled by them to facilitate declaration of the Appointed Date on a priority basis.

In the aforesaid letter, it is mentioned that RO/Guwahati is of the view that slightly more than 80% of land is available. However, we do not agree to this view and the total land available is about 72.89% and not 80.42% as per our computation. However, we furnish hereunder our observations on the details provided by NHAI and also the facts and circumstances prevailing over the project for your kind information and necessary considerations.

<i>Sl.No.</i>	<i>Area (ha)</i>	<i>Authority's Remarks</i>	<i>Concessionaire's Remarks</i>
<i>1</i>	<i>132.75 ha/130 ha (available)</i>	<i>Confirmed by DPR Consultant/Concessionaire</i>	<i>Concessionaire confirmed the availability of 130 ha of land.</i>
<i>2</i>	<i>5.6 ha</i>	<i>Made available subsequently during joint inspection</i>	<i>The on-site verification of such available land of area 5.6 ha in totality together with corresponding coordinate recording is still presently under progress. However, the exact availability of 5.6 ha would be confirmed only upon plotting the available and in Auto CAD and computation of area thereof.</i>
<i>3</i>	<i>14.00 ha</i>	<i>Made available by State Government for advance</i>	<i>We understand from the said communiqué that State Government is providing advance possession of 14 ha of land. We do not</i>

		<i>possession</i>	<i>understand the exact meaning of “Advance Possession” and its implication. However, same can be considered as available land, only when Authority hands over to the Concessionaire as per Concession Agreement.</i>
<i>4</i>	<i>Total available</i>	<i>149.60 (available 80.42%)</i>	<i>As such, the total available land as per our computation stands at 135.6 Ha (130 HA +5.6 HA), if we consider the land area of 5.6 Ha as per authority’s statement and not 149.6 ha. Hence, the total available land is only 72.89% of the total required land.</i>

As regards to fulfilment of Condition Precedent by NHAI, we put forth our observations as under:

- a) The total available land works out to be 136.5 ha, which is approximately 72.89% of the total required land as mentioned above.*
- b) The copy of Fee Notification, published on 26.09.2013 as mentioned in your above referred letter, has not been made available to us.*
- c) The Authority claims that the applicable Permits relating to Environmental and Conservation of the Site in the form of EC has been made available by MOEF in the month of March 2013 vide their letter no.F.No.10-35/2012-IA-III dated 21.03.2013 in respect of entire stretch. However, it is pertinent to be noted here that during the joint visit, held on 20th & 21st May 2013, wherein representatives of all the parties were present, the stretch for a length of 27 KM between Ch.114.5 KM and 141.5 KM has been designated as un-classified forest, the status on requisite clearance from the concerned authority is still awaited, which we had sought through our letter Ref.No.22nd October 2013.*

From the above, it is conspicuous that the Authority has failed to fulfilling the conditions precedent even on passage of almost 18 months from the date of signing of concession agreement

which the Authority should have been complied within the time, as it is stipulated under Cl.4.1.2 of Article 4 of Concession Agreement (CA).”

21. On January 08, 2014, NHAI took the stand that the financial closer for the project has been achieved. On January 10, 2014 NHAI declared the Appointed date as the date of the letter. On January 20, 2014 NHAI required the appellant to mobilize its staff to execute the work at site. On January 30, 2014 NHAI wrote that 149.6 hectares of unencumbered land was available which included 135.97 hectares of existing Right of Way. As expected appellant took the stand in its letter dated February 05, 2014 the appellant took the stand that the minimum 80% of Right of Way, free from encumbrance was not available.

22. Admittedly the bids were required to be furnished on Design, Bill, Finance Operate and Transfer (in short DBFOT) basis. Admittedly, when tenders were floated it was indicated that as per NHAI around 141.13 hectares land was required. It appears that when the actual drawings were prepared land required got enhanced to 186.02 hectares and this envisaged enhancement did not take place at one go. It got increased from time to time. Thus, even if we were to take that the total land required would be 186.02 hectares, we find that prima-facie NHAI had made available in the very least 149.06 hectares, which would come to 80.42% of land being made available. (80% of 186.02 hectares = 148.816 hectares)

23. The learned Single Judge has, in para 11, 11.1, 11.2, 11.3 and 11.4 of the impugned decision, opined as under:-

“11. I have heard the learned counsels for the parties. What emerges from the record, is that, that a dispute has arisen between the parties herein as to whether or not the conditions precedent as prescribed in clause 4.1.2 have been fulfilled. Mr Sethi’s contention that since 80% of the ROW was not available, the condition precedent stands unfulfilled, is a

contention which is disputed by NHAI. But what clearly surfaces from the record, is that, even according to the petitioner, 135 Ha of land was available. This is stated in no uncertain terms in paragraph 34 of the petition. The relevant portion reads as follows:-

“.....34. The petitioner however refuted each and every contention of the respondent since as per the petitioner only 135.6 hectares of land has been made available by the respondent to them which was much less than 80% of the total area professed to be made available to the petitioner....”

*11.1 The moot question then is: what is the total area against which the available land is to be squared up with. It is NHAI's case that the initial requirement, as ascertained by its consultant, was only 141.13 Ha, which subsequently got enhanced to 186.02 Ha. Undoubtedly, the petitioner's letter dated 13.09.2013, is indicative of the fact that this aspect was overlooked, and that, upon a revisit, it was found necessary to acquire another 56Ha of land for factoring in amenities and facilities. A clear indicator, qua this aspect, is found in a letter dated 28.08.2013 issued by the petitioner, which preceded its letter dated 13.09.2013. In this letter, in no uncertain terms, the petitioner stated that the: **“total available existing land, within EROW was 130 Ha, whereas total additional land required as 43.09 Ha.”** Therefore, according to the petitioner, only 75.10% of land was available, at that point in time.*

11.2 Between that date and the communication dated 13.09.2013, the petitioner realized that its requirement for land had increased from 173.09 Ha to 186.02 Ha. There has, therefore, even according to the petitioner, been a variation in what was required in terms of land area, for execution of the project.

11.3 NHAI, on the other hand, quite clearly has taken the stand that the initial proposal was for 141.13 Ha, which got enhanced to 186.02 Ha and as against that what was available was 152.35 Ha, or in the very least, 149.06 Ha. Either way, in

percentage terms, according to NHAI, the availability of ROW, varies between 80.42% to 81.89%, even if the total area is taken as 186.02 Ha.

11.4 In my view, these are disputes, which can only be agitated in a properly lodged action by the aggrieved party. This aspect, cannot be debated upon or examined by the concerned bank, which has furnished the bank guarantee in issue. The terms of the bank guarantee, clearly stipulate that the sole judge as to whether the concessionaire (i.e., the petitioner) is in default, in the due and faithful performance of its obligation during the construction period as prescribed under the CA is NHAI. Therefore, all that the concerned bank has to see, is as to whether according to NHAI, the construction period has commenced. The NHAI, before me, has at least prima facie established that at every given stage the minimum ROW, equivalent to 80%, was made available to the petitioner. The fact that the requirement of land, according to the petitioner, got enhanced, as due to oversight, land required for amenities and/or facilities was not included, does not obviate the position that conditions precedent were fulfilled. The NHAI, insists that all conditions, which includes environmental clearances etc. are in place; this is an aspect which the concerned bank cannot be called upon to examine. It, in my view, would be putting an unacceptable burden on the bank, and if permitted, would defeat the very purpose for which bank guarantees are furnished. Bank guarantees are furnished to strengthen and cement commercial dealings. Interference by a court on grounds other than a case of established fraud known to the concerned bank or irretrievable injury or failure to fulfil conditions prescribed in the bank guarantee, at the stage of invocation, would lead to collapse of trade and commerce. As to whether conditions prescribed in the bank guarantee are fulfilled, much would depend on the words and expression used. Suffice it to say, in finding out whether a condition given in the bank guarantee stand fulfilled, the concerned bank is not required to carry out a forensic analysis. It is this approach that the court has to adopt when faced with such a submission”

24. We concur with the reasoning of the learned Single Judge that the disputes can only be agitated in a properly lodged action by the aggrieved

party and cannot be debated upon or examined by the concerned bank, which has furnished the bank guarantee.

25. Before bringing the curtain formally down, we may note that after the impugned decision was pronounced, the bank guarantee was invoked by the respondents and money realized by it. CM No.19537/2014 was filed in the appeal to urge additional grounds in the appeal and a feeble attempt was made to urge that the invocation of the guarantee is not in conformity with the bank guarantee, an argument which we need to deal with for the reason there are no properly constituted pleadings before us on said aspect and secondly for the reason once the bank guarantee is invoked and money realized under the bank guarantee, the question of issuing any injunction concerning the bank guarantee would not survive. Any issue concerning the money realized after invoking the bank guarantee has to be in a properly constituted recovery proceedings, which in the instant case would be the fora of arbitration available under the contract. It would be thus open for the appellant to seek appropriate relief from the Arbitral Tribunal required to be constituted as per the contract between the parties.

26. The appeal is dismissed but without any order as to costs.

(PARDEEP NANDRAJOG)
JUDGE

(MUKTA GUPTA)
JUDGE

JANUARY 06, 2015

skb/mamta