

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

%

Judgment reserved on: 28th July, 2017

Judgment delivered on: 31st July, 2017

+ **O.M.P. (I) (COMM.) 221/2017**

JETPUR SOMNATH TOLLWAYS LIMITED

..... Petitioner

Versus

NATIONAL HIGHWAYS AUTHORITY OF INDIA Respondent

AND

+ **O.M.P. (I) (COMM.) 227/2017**

PUNJAB NATIONAL BANK

..... Petitioner

Versus

NATIONAL HIGHWAYS AUTHORITY
OF INDIA & ANR.

..... Respondents

Advocates who appeared in OMP(I) (COMM.) 221/2017

For the Petitioner : Mr Kapil Sibal, Senior Advocate and Mr. Sandeep Sethi,
Senior Advocate with Mr.Ajay Sondhi and Mr. Abhinav
Dhingra, Advocates.

For the Respondent : Mr Prag P.Tripathi, Senior Advocate with Ms Gunjan Sinha
Jain, Mr Mukesh Kumar, Mr Rishabh Kapur and Ms Bhavana
Duhoon, Advocates for NHAI/R-1.

Advocates who appeared in OMP(I) (COMM.) 227/2017

For the Petitioner : Mr. Rajiv Nayyar, Senior Advocate with Mr Mayank Grover,
Ms Isha J. Kumar, Advocates.

For the Respondent : Mr Prag P.Tripathi, Senior Advocate with Ms Gunjan Sinha
Jain, Mr Mukesh Kumar, Mr Rishabh Kapur and Ms Bhavana
Duhoon, Advocates for NHAI/R-1.
Mr Kapil Sibal, Senior Advocate and Mr. Sandeep Sethi,
Senior Advocate Mr. Ajay Sondhi and Mr. Abhinav Dhingra,
Advocates for R-2.

**CORAM:-
HON'BLE MR. JUSTICE SANJEEV SACHDEVA**

**JUDGMENT
31.07.2017**

SANJEEV SACHDEVA, J. (ORAL)

O.M.P. (I) (COMM.) 221/2017 & O.M.P. (I) (COMM.) 227/2017

1. These are petitions filed under section 9 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the Act).
2. The petitioner, in OMP (I) (COMM.) 221/2017, JETPUR Somnath Tollways Limited (hereinafter referred to as 'JETPUR' for short) seeks a direction against respondent No.1 - National Highways Authority of India (hereinafter referred to as NHAI for short) to deposit a sum of Rs. 359.19 crores being the balance part of the minimum Termination Payment into the Escrow Account.
3. The petitioner in OMP (I) (COMM.) 227/2017, Punjab National Bank (hereinafter referred to as 'PNB' for short) seeks a direction to NHAI to pay Rs. 374.51 crores into the Escrow Account for appropriation by the Lenders.
4. NHAI had invited proposals for construction, operation and maintenance of Four Laning of JETPUR-Somnath Section of NH-8D for 127 kilometres in the State of Gujarat.
5. Consortium comprising of IDFC Projects Limited and Expressways Berhad with IDFC Projects Limited as its lead member

submitted its bid. The bid was accepted. On 13.09.2010, a letter of award was issued to the Consortium. The Consortium subsequently incorporated JETPUR for the purposes of undertaking the project.

6. On 07.02.2011, a Concession Agreement was executed between JETPUR and NHAI.

7. On 16.08.2011, PNB acting as the Lender's Representative and also being the Escrow Bank executed a Tripartite Escrow Agreement with JETPUR and NHAI. PNB, JETPUR and NHAI also executed a Substitution Agreement on 16.08.2011 providing for securing of the interest of Lenders through assignment, transfer, substitution of the concession to a nominated Company to be selected by PNB.

8. On 19.08.2011, PNB along with the Consortium of Bank/Financial Institutions extended a term loan facility of Rs. 712 crores to the JETPUR. The total project cost was stated to be Rs. 981 crores. The amount in excess of the term loan was to be financed by JETPUR by raising equity from its shareholders.

9. JETPUR thereafter commenced execution of the project. Disputes subsequently arose between NHAI and JETPUR with regard to the execution of the work of a particular stretch of land concerning *inter alia* the time period, the reasons for delay, the default and the cost overrun for execution of the work.

10. On 13.05.2016, JETPUR issued a *Cure Period Notice for*

Authority Default and requested NHAI to cure the defaults mentioned in their notice.

11. On 10.08.2016, NHAI sent a notice of *Intention to issue Termination Notice*.

12. On 05.09.2016, joint meeting between JETPUR, NHAI and Senior Lenders was held. As per JETPUR and PNB, in the said meeting, NHAI had represented that the Termination Payment to be made to the Escrow Account would be upwards of Rs.550 crores.

13. JETPUR claims that on 26.09.2016 it confirmed that the debt outstanding to the Senior Lenders was Rs. 640.86 crores.

14. On 18.10.2016, PNB convened a meeting of the Consortium of Lenders with JETPUR wherein all the Lenders agreed not to exercise their substitution rights on account of the commitment by NHAI to pay upwards of Rs. 550 crores as Termination Payment being 90% of the Debt Due.

15. The Minutes of Meeting dated 05.09.2016 circulated by NHAI did not mention the figure of Rs. 550 crores as the minimum payment that NHAI had agreed to pay into the Escrow Account. Both JETPUR and PNB issued communications to NHAI contending that a representation had been made by NHAI that they shall be depositing upwards of Rs. 550 crores into the Escrow Account.

16. On 10.11.2016, NHAI issued the Termination Notice under

Clause 37.1.2 of the Concession Agreement and took possession and control of the project forthwith.

17. Subsequent to the termination, on 11.11.2016, PNB called upon NHAI to confirm the Termination Amount before taking over the project.

18. On 17.11.2016, JETPUR issued *Notice of Termination with Authority Event of Default* under Clause 37.2 of the Concession Agreement treating the Termination Notice of NHAI dated 10.11.2016 as a repudiatory breach of the Concession Agreement.

19. By another letter dated 17.11.2016, JETPUR demanded the Termination Payment under Clause 37.3.2 of the Concession Agreement in the sum of Rs. 945.83 crores along with claims for compensation, losses, damages in the sum of Rs. 475.33 crores.

20. PNB, by its letters dated 21.01.2017, 04.03.2017 and 22.03.2017, informed NHAI that on account of non-release of the Termination Payment by NHAI; JETPUR was not able to meet debt service obligation and the account of JETPUR was likely to become a Non Performing Asset (NPA). PNB further informed that as the project had been handed over to NHAI; JETPUR was no longer receiving any toll revenue and was accordingly not in a position to service the interest amount and the account of JETPUR was classified in SMA-2 category to become a NPA.

21. On 27.03.2017, NHAI released an amount of Rs. 217.59 crores (net of TDS) in the Escrow Account of JETPUR.

22. NHAI, despite several requests from PNB and JETPUR refused to deposit any further amount in the Escrow Account leading to the filing of the present petition.

23. The contention of the learned senior counsel for the JETPUR is that the entire project had to be funded by JETPUR from its own sources by raising loans as well as equity. NHAI was not to make any contribution. The recoveries were to be made from Toll Collection over the specified period.

24. It is contended that as per the Concession Agreement, on petitioner completing at least 75% of the project, the Termination Clause with regard to Termination Payments was to get triggered.

25. It is submitted that the Termination Clause in the Concession Agreement stipulated that in case of termination on account of Authority Default (NHAI's default), NHAI was to pay the Debt Due plus 150% of the Adjusted Equity. In case termination was on account of JETPUR's Default, NHAI had to make payment of 90% of the Debt due less insurance cover.

26. It is contended that on termination, the minimum termination payment to be made by NHAI is 90% of the Debt Due (if termination is for default of JETPUR) and the maximum payment would be 100%

of the Debt Due plus 150% of the Adjusted Equity (if termination is on account of NHAI's default). It is contended that even if assuming that the termination by NHAI is for default of JETPUR, NHAI would be required to pay into the Escrow Account 90% of the Debt Due, which would amount to over Rs. 576 crores.

27. Learned senior counsel for JETPUR submits that this is so stipulated because there is no financial burden on NHAI for execution of the work and the entire project has to be executed by JETPUR from its own sources and on termination, the entire project is to be taken over by NHAI including the right to Toll Collection.

28. It is contended that if NHAI were permitted to take over the project without any payment, then NHAI would stand to benefit for the entire work already executed by JETPUR for its own sources, which would include funds sourced by borrowing from Banks and Financial Institutions. It is submitted that on termination NHAI has got the entire project, which is nearly complete, virtually free of cost and the entire cost has been borne by JETPUR from its own sources and from loans.

29. It is contended that since the Debt Due is about Rs. 640 crores, NHAI is liable to pay Rs.576.77 crores (being 90% of Debt Due of Rs.640.86 crores : reference PNB letter dated 16.11.2016). As NHAI has paid a sum of Rs.217.6 crores, NHAI is liable to pay the balance sum of Rs.359.19 crores towards minimum Termination Payment

under the Concession Agreement.

30. It is contended that NHAI has incorrectly sought to adjust recoveries from JETPUR from the Termination Payment. It is contended that NHAI is precluded from adjusting any amount as the claims are yet to be adjudicated.

31. Reliance is placed on the judgment of the Supreme Court in **INDIAN OIL CORPORATION LIMITED VERSUS SPS ENGG. LIMITED,** (2011) 3 SCC 507 to contend that disputed claims cannot be adjusted from crystallised liability.

32. It is contended that whether the breach, leading to termination, is of NHAI or of JETPUR, is an issue which would be decided in terms of the Arbitration Clause and till it is decided, no recovery or deduction can be made by NHAI. NHAI being one of the parties alleging breach on the part of JETPUR, cannot itself proceed further to decide that the breach is of JETPUR and accordingly make recoveries.

33. Reliance is placed on the decision of the Supreme Court in **J.G.ENGINEERS (P) LTD VERSUS UNION OF INDIA,** (2011) 5 SCC 758 to contend that adjudication of breach can only be by a court or a tribunal and not by the alleged aggrieved party. It is further contended that liquidated damages cannot be permitted to be deducted by NHAI at this stage and NHAI, without any demur, has to make the termination payment.

34. Learned senior counsel for JETPUR submits that pending adjudication of disputes, JETPUR is willing to be put to terms and is willing to secure the entire amount being paid by NHAI into the Escrow Account by way of an unconditional Bank Guarantee.

35. Reliance is further placed on the judgment in **FORBES FACILITY SERVICES PRIVATE LIMITED VERSUS G.B.PANT HOSPITAL** , in OMP No.129/2015 decided on 18.02.2015, **MAFATLAL INDUSTRIES LIMITED & ANOTHER VERSUS MAHANAGAR TELEPHONE NIGAM LIMITED** : 2002 (64) DRJ 94, **VALUE SOURCE MERCANTILE LIMITED VERSUS SPAN MECHNOTRONIX LIMITED** (2014) 143 DRJ 505, **SIMPLEX INFRASTRUCTURES LTD. V. NATIONAL HIGHWAYS AUTHORITY OF INDIA**, ILR (2011) Delhi 274, **AJAY SINGH VERSUS KAL AIRWAYS PRIVATE LIMITED** FAO(OS)(COMM) 62/2016 decided by the Division bench of this court dated 03.07.2017 to contend that under section 9 of the Act it is just and convenient to direct NHAI to deposit the balance termination payment in the Escrow Account.

36. Learned senior counsel appearing for PNB submits that apart from the Concession Agreement, NHAI also executed Tripartite Escrow Agreement and Substitution Agreement on 16.08.20911.

37. It is submitted that NHAI is also bound by the terms of the Escrow Agreement. In terms of the Escrow Agreement, NHAI has to deposit into the Escrow Account the Termination Payment as and when it becomes due and payable. It is contended that NHAI has no

discretion in the matter and the moment termination payment becomes due and payable, the same has to be deposited in the Escrow Account.

38. It is contended that the NHAI has no discretion in the matter and cannot first adjust its claim and then make deposit. NHAI has to first deposit the amount, then raise disputes, and seeks settlement of its claims against JETPUR in accordance with the Concession Agreement.

39. It is further contended that the Substitution Agreement empowers PNB to substitute a concessionaire in case of a default. It is submitted that PNB and the Senior Lenders decided not exercise the power of substitution because in the meeting held on 05.09.2016, NHAI had assured that it shall deposit upwards of Rs. 550 crores in the Escrow Account.

40. It is contended that the Escrow Agreement specifically stipulates that upon termination of the Concession Agreement, all amounts standing to the credit of the Escrow Account are to be appropriated and adjusted in terms of Clause 4.2 of the Escrow Agreement.

41. It is submitted that withdrawal of 90% of the Debt Due is at a priority only after payment of all taxes in respect of the project and is at a higher priority to all other claims including the claim of NHAI for payments and damages due and payable to it by the Concessionaire pursuant to the Concession Agreement.

42. It is submitted that since payment of 90% of the Debt Due is at a higher priority than the claims of NHAI against JETPUR even towards damages and payments due under the Concession Agreement, NHAI cannot withhold any payment or make any recoveries from the stipulated Termination Payment.

43. It is contended that money lent for the project has been earmarked for disbursal for infrastructure project and cannot be withheld on account of any dispute between the JETPUR and NHAI. It is contended that being public money, on recovery of the same, it is to be utilized for other infrastructure projects and Bank cannot be dragged into the *inter se* disputes between the JETPUR and NHAI.

44. It is contended that a claim for damages for breach of contract is not a claim for a sum presently due and payable and NHAI cannot recover the same from the termination payment. Reliance is placed on the judgment in **GANGOTRI ENTERPRISES LTD. V. UNION OF INDIA,** (2016) 11 SCC 720.

45. It is submitted that court has inherent powers to pass orders as may appear to the court to be just and convenient to prevent the ends of justice from being defeated. Reliance is placed on the judgment in **S. HARINDER SINGH VERSU S.NIRMAL SINGH & ORS.** 2009(113) DRJ 784(DB)

46. Per contra, at the outset, learned senior counsel appearing for NHAI disputes that any assurance was given by NHAI, in the Meeting

held on 05.09.2016, that it would deposit upwards of Rs. 550/- crores.

47. It is further contended that the petitioners are seeking to enforce the terms of the Contract by way of a petition under Section 9 of the Act. It is contended that what petitioners are seeking are orders analogous to Order XII Rule 6 of the Code of Civil Procedure (CPC), i.e. passing of a judgment on admission.

48. It is contended that in a petition under Section 9 of the Act, Court cannot pass an order directing payment of even admitted amount.

49. Reliance is placed on the decision in SHIN SATELLITE PUBLIC Co. LTD. v. JAIN STUDIOS LIMITED, (2008) 153 DLT 604; NILU HANDICRAFTS VERSUS DOLPHIN MART LIMITED, 2009 SCC Online Del 2659; ORISSA MANGANESE AND MINERALS PVT. LTD. VERSUS SYNERGY ISPAT PRIVATE LIMITED, (2014) 16 SCC 654 and RADHIKA AUTOMOBILES PRIVATE LIMITED VERSUS MARUTI UDYOG LIMITED & ANOTHER, 113(2004) DLT 837.

50. It is contended that Section 9 of the Act is for the purposes of securing the subject matter of the dispute and petitioners are not seeking security but in fact are seeking execution of the Contract and an interim award, which is not permissible under Section 9 of the Act.

51. It is further contended that the Total Project Cost was stipulated as Rs. 828 crores and the cost of un-finished construction work is

Rs.106.6 crores. Accordingly, the adjusted Total Project Cost, comes to Rs. 721.4 crores. It is contended that JETPUR had to have equity contribution of 27.42% and a debt of 72.58%. It is submitted that 72.58% of Rs. 721.4 crores implies that the total Debt exposures could not be more than Rs. 523.59 crores. It is submitted that outstanding Debt Due thus becomes Rs. 522.88 crores, 90% of which comes to Rs. 470.59 crores. It is submitted that the NHAI has to make recoveries from JETPUR of Rs. 242.42 crores. The net termination payment after adjustment and recoveries comes to Rs.228.17 crores, out of which Rs. 222.03 crores have been paid by NHAI leaving a balance of Rs. 6.14 crores, which NHAI is willing to pay.

52. It is contended that the Debt equity ratio was 72.58 : 27.42%. Under the Concession Agreement, the Bank, was to finance only the debt element and not the equity contribution element and in case JETPUR had got financing for the equity then NHAI is not liable to make payment for the same. It is further submitted that since there is a dispute, it is for the Arbitrators to adjudicate the same.

53. It is submitted that though this debt equity ratio is not part of the Concession Agreement, the Financing Agreements have been specifically made part of the Concession Agreements and the Financing Agreements specifically refers to Total Project Cost as Rs.981 crores and the Project Equity Capital out of the same as Rs.269 crores and Facility as Rs. 712 crores, which shows that the

debt to equity ratio is 72.58: 27.42.

54. It is further contended that respondents cannot rely on the admissions contained in Annexure R – 6 to the counter-affidavit in isolation. It is contended that Annexure R – 6, wherein the NHAI has stated that outstanding Debt Due is Rs. 522.88 crores and has made recoveries of Rs. 242.42 crores cannot be read in isolation and has to be read as a whole. It is submitted that the said calculation when read as a whole shows that NHAI has to make recoveries. Reference is made to the judgment in **HAJI C.H.MOHAMMAD KOYA VERSUS T.K.S.M.A.MUTHUKOYA**, (1979) 2 SCC 8.

55. To resolve the controversy, we would need to examine some of the relevant clauses of the Concession Agreement executed between NHAI and JETPUR and the tripartite Escrow Agreement and the Substitution Agreement executed between NHAI, JETPUR and PNB.

56. The relevant clauses of the Concession agreement with regard to termination payment read as under:

37.3 Termination Payment

37.3.1 Upon Termination on account of a Concessionaire Default during the Operation Period, the Authority shall pay to the Concessionaire, by way of Termination Payment, an amount equal to 90% (ninety per cent) of the Debt Due less Insurance Cover; provided that if any insurance claims forming part of the Insurance Cover are not admitted and paid, then 80% (eighty per cent) of such unpaid claims shall be included in the computation

of Debt Due. For the avoidance of doubt, the Concessionaire hereby acknowledges that no Termination Payment shall be due or payable on account of a Concessionaire Default occurring prior to COD.

37.3.2 Upon Termination on account of an Authority Default, the Authority shall pay to the Concessionaire, by way of Termination Payment, an amount equal to:

- (a) Debt Due; and*
- (b) 150% (one hundred and fifty per cent) of the Adjusted Equity.*

37.3.3 Termination Payment shall become due and payable to the Concessionaire within 15 (fifteen) days of a demand being made by the Concessionaire to the Authority with the necessary particulars, and in the event of any delay, the Authority shall pay interest at a rate equal to 3% (three per cent) above the Bank Rate on the amount of Termination Payment remaining unpaid; provided that such delay shall not exceed 90 (ninety) days. For the avoidance of doubt, it is expressly agreed that Termination Payment shall constitute full discharge by the Authority of its payment obligations in respect thereof hereunder.

37.3.4 The Concessionaire expressly agrees that Termination Payment under this Article 37 shall constitute a full and final settlement of all claims of the Concessionaire on account of Termination of this Agreement for any reason whatsoever and that the Concessionaire or any shareholder thereof shall not have any further right or claim under any law, treaty, convention, contract or otherwise.

37.4 Other rights and obligations of the Authority

Upon Termination for any reason whatsoever, the Authority shall:

(a) be deemed to have taken possession and control of the Project Highway forthwith;

(b) take possession and control of all materials, stores, implements, construction plants and equipment on or about the Site;

(c) be entitled to restrain the Concessionaire and any person claiming through or under the Concessionaire from entering upon the Site or any part of the Project;

(d) require the Concessionaire to comply with the Divestment Requirements set forth in Clause 38.1; and

(e) succeed upon election by the Authority, without the necessity of any further action by the Concessionaire, to the interests of the Concessionaire under such of the Project Agreements as the Authority may in its discretion deem appropriate, and shall upon such election be liable to the Contractors only for compensation accruing and becoming due and payable to them under the terms of their respective Project Agreements from and after the date the Authority elects to succeed to the interests of the Concessionaire. For the avoidance of doubt, the Concessionaire acknowledges and agrees that all sums claimed by such Contractors as being due and owing for works and services performed or accruing on account of any act, omission or event prior to such date shall constitute debt between the Concessionaire and such Contractors, and the Authority shall not in any manner be liable for such sums. It is further agreed that in the event the Authority elects to cure any outstanding defaults under such Project Agreements, the amount expended by the Authority for

this purpose shall be deducted from the Termination Payment.

(underlining supplied)

57. Clause 37.3 of the Concession Agreement makes it clear that upon Termination on account of JETPUR'S Default during the Operation Period, NHAI has to pay to JETPUR, by way of Termination Payment, an amount equal to 90% (ninety per cent) of the Debt Due less Insurance Cover and upon Termination on account of NHAI's default, NHAI has to pay to JETPUR, by way of Termination Payment, an amount equal to the Debt Due plus 150% of the Adjusted Equity.

58. ***“Termination Payment”*** has been defined by the Concession Agreement to mean *“the amount payable by the Authority to the Concessionaire upon Termination and may consist of payments on account of and restricted to the Debt Due and Adjusted Equity, as the case may be, which form part of the Total Project Cost in accordance with the provisions of this Agreement; provided that the amount payable in respect of any Debt Due expressed in foreign currency shall be computed at the Reference Exchange Rate for conversion into the relevant foreign currency as on the date of Termination Payment. For the avoidance of doubt, it is agreed that within a period of 60 (sixty) days from COD, the Concessionaire shall notify to the Authority, the Total Project Cost as on COD and its disaggregation between Debt Due and Equity, and only the amounts so conveyed*

shall form the basis of computing Termination Payment, and it is further agreed that in the event such disaggregation is not notified to the Authority, Equity shall be deemed to be the amount arrived at by subtracting Debt Due from Total Project Cost.”

59. **“Debt Due”** has been defined to mean the aggregate of *inter alia* the sum expressed in Indian Rupees outstanding, on the Transfer Date, of the principal amount of the debt provided by the Senior Lenders under the Financing Agreements for financing the Total Project Cost but excluding any part of the principal that had fallen due for repayment two years prior to the Transfer Date;

60. The **“Total Project Cost”** has been defined to mean *the lowest of:*

- (a) *the capital cost of the Project, less Equity Support as set forth in the Financial Package;*
- (b) *the actual capital cost of the Project upon completion of Four-Laning of the Project Highway less Equity Support; and*
- (c) *a sum of Rs. 828.00 crore (Rupees Eight Hundred and Twenty Eight crore), less Equity Support;*

provided that in the event of Termination, the Total Project Cost shall be deemed to be modified to the extent of variation in WPI or Reference Exchange Rate occurring in respect of

Adjusted Equity and Debt Due, as the case may be, in accordance with the provisions of this Agreement; provided further that in the event WPI increases, on an average, by more than 6% (six per cent) per annum for the period between the date hereof and COD, the Parties shall meet, as soon as reasonably practicable, and agree upon revision of the amount hereinbefore specified such that the effect of increase in WPI, in excess of such 6% (six per cent), is reflected in the Total Project Cost.

61. The contention of JETPUR is that the Total Project cost was subsequently increased, however for the purposes of the controversy at hand we need not examine the same and assume the total project cost to be the lowest of the three i.e. Rs. 828 Crores.

62. The Debt extended to JETPUR by PNB is over Rs. 712 Crores and the balance outstanding as of the date of termination by NHAI is Rs. 640.86 Crores.

63. Both NHAI and JETPUR have exercised their option to termination. Each alleging default of the other. If termination is on account of it is default of JETPUR then NHAI is liable to pay 90% of the Debt Due and if the termination is on account of default of NHAI, NHAI is to pay 100% of the Debt Due plus 150% of the Adjusted Equity.

64. This, to my mind, has been stipulated because, under clause

37.4 of the Concession Agreement, upon Termination for any reason whatsoever, NHAI is deemed to have taken possession and control of the Project Highway forthwith and NHAI upon its election succeeds to the interests of JETPUR under such of the Project Agreements as NHAI may in its discretion deem appropriate.

65. The sequitur of the above stipulation is that NHAI which has no financial liability for the execution of the project would come into possession of the Project Highway, which would be at least 75% complete, and also succeed to all rights of JETPUR, including Toll Collection.

66. The stipulation in the Concession Agreement is that the Concessionaire would be entitled to obtain finance facility. The Concession agreement gives a comfort to the lenders, that their debt is secured in as much as on termination for any reason whatsoever, they are assured that at least 90% of their debt outstanding would be deposited in the Escrow Account by NHAI.

67. Clauses 3.2 and 4.2 of the tripartite Escrow Agreement stipulate as under:

3.2 Deposits by the Authority

The Authority agrees and undertakes that, as and when due and payable, it shall deposit into and/or credit the Escrow Account with:

- (a) Grant and any other monies disbursed by the Authority to the Concessionaire;*

- (b) *Revenue Shortfall Loan;*
- (c) *all Fee collected by the Authority in exercise of its rights under the Concession Agreement; and*
- (d) *Termination Payments:*

Provided that, notwithstanding the provisions of Clause 4.1.1, the Authority shall be entitled to appropriate from the aforesaid amounts, any Concession Fee due and payable to it by the Concessionaire and the balance remaining shall be deposited into the Escrow Account.

4.2 Withdrawals upon Termination

Upon Termination of the Concession Agreement, all amounts standing to the credit of the Escrow Account shall, notwithstanding anything in this Agreement, be appropriated and dealt with in the following order:

- (a) *all taxes due and payable by the Concessionaire for and in respect of the Project Highway;*
- (b) *90% (ninety per cent) of Debt Due excluding Subordinated Debt;*
- (c) *outstanding Concession Fee;*
- (d) *all payments and Damages certified by the Authority as due and payable to it by the Concessionaire pursuant to the Concession Agreement, including {Premium,} repayment of Revenue Shortfall Loan and any claims in connection with or arising out of Termination;*
- (e) *retention and payments arising out of, or in relation to, liability for defects and deficiencies set forth in Article 39 of the concession Agreement;*
- (f) *outstanding Debt Service including the balance of*

Debt Due;

- (g) outstanding Subordinated Debt;*
- (h) incurred or accrued O&M Expenses;*
- (i) any other payments required to be made under the Concession Agreement; and*
- (j) balance, if any, in accordance with the instructions of the Concessionaire:*

Provided that the disbursements specified in Sub-clause (j) of this Clause 4.2 shall undertaken only after the Vesting Certificate has been issued by the Authority.

68. In terms of clause 3.2 of the Escrow Agreement, NHAI has to deposit in the Escrow Account the Termination Payment as soon as the same becomes due and payable. In terms of Clause 4.2, after payment of taxes due and payable by JETPUR, the Lenders have the right to appropriate 90% of the Debt Due excluding Subordinate Debt.

69. Clause 36.4 of the tripartite Substitution Agreement provides for ***Substitution of Concessionaire*** and stipulates that *At any time during the period of Suspension, the Lenders' Representative, on behalf of Senior Lenders, shall be entitled to substitute the Concessionaire under and in accordance with the Substitution Agreement, and upon receipt of notice there under from the Lenders' Representative, the Authority shall withhold Termination for a period not exceeding 180 (one hundred and eighty) days from the date of Suspension, and any extension thereof under Clause 36.1, for*

enabling the Lenders' Representative to exercise its rights of substitution on behalf of Senior Lenders.

70. PNB in terms of clause 36.4 was entitled to substitute the Concessionaire and if this right would have been exercised, NHAI would have had to withhold Termination for a period of 180 days. PNB did not exercise this right. As per PNB, this right was not exercised because of an assurance by NHAI that it would make the Termination Payment in excess of Rs. 550 Crores. However, this is disputed by NHAI. In my view, the alleged assurance would make no difference to the rights and liabilities of the parties for the purposes of these petitions.

71. It is an admitted position that the contract has been terminated. It is terminated by both NHAI and JETPUR alleging breach of the other. There is a dispute as to who is at fault leading to the termination but that would not affect the liability of NHAI to deposit, the Debt Due in the escrow account, it would only affect the quantum of the liability of NHAI to deposit the Debt Due in the escrow account. It would range between 90% to 100% of the Debt Due.

72. Admittedly, the outstanding Debt Due on termination was 640.86 crores (i.e. 621.45 crores towards principal and balance towards interest). 90% of the Debt Due is 576.774 Crores.

73. NHAI does not dispute its liability under the agreements to deposit an amount towards the Debt Due in the Escrow account. The

dispute is with regard to the quantum. It has admittedly deposited Rs. 222.03 in the Escrow Account. As per the calculation of NHAI, balance payable is 6.14 Crores, which they have offered to deposit in the Escrow Account.

74. NHAI has explained the calculation of the outstanding amount as under:

S.No.	Particulars	Amount in INR / Crores
1.	<i>NHAI Total Project Cost (TPC)</i>	828.00
2.	<i>Less Cost of unfinished construction (details enclosed as Appendix-I)</i>	106.60
3.	<i>Adjusted TPC</i>	721.40
4.	<i>Debt (72.58% of adjusted TPC)</i>	523.59
5.	<i>Debt repaid</i>	0.71
6.	<i>Outstanding Debt Due</i>	522.88
7.	<i>Accrued Interest of Rs. 19.4 Cr (Wilful default, hence no payment)</i>	Nil
8.	<i>90% of debt due</i>	470.59
9.	<i>Less Recoveries (details enclosed as Appendix-II)</i>	242.42
10.	<i>Net Termination Payment</i>	228.17
11.	<i>Paid by NHAI to Concessionaire</i>	222.03
12.	<i>Balance to be paid</i>	6.14

75. There are three broad heads under which NHAI has made deductions. First of all, it has made an adjustment in the Total Project Cost (TPC) and excluded the alleged cost of unfinished construction (serial # 2 above). Secondly, it has made an adjustment in the Debt by taking the Debt as 72.58% of the adjusted TPC. This adjustment has

been made on account of its contention that the debt and equity ratio to be maintained by JETPUR was to be 72.58 : 27.42 (serial # 4 above). Thirdly, adjustment has been made on account of alleged recoveries to be made by NHAI from JETPUR (serial # 9 above).

76. In my view, NHAI has faulted in all the three deductions.

77. The first adjustment made is to the Total Project Cost on account of unfinished Construction. There is no stipulation in any of the clauses of the Concession agreement or the Escrow Agreement that any such adjustment could be made prior to determining the Termination Payment. The Termination Payment is correlated to the actual Debt Due. There is no stipulation that any adjustment of the said nature can be made from the Debt Due. This adjustment is clearly not warranted from the Termination Payment.

78. The second adjustment made on account of taking the Debt as 72.58% of the adjusted TPC is also unwarranted. NHAI has taken the debt and equity ratio to be maintained by JETPUR to be 72.58 : 27.42. There is no such stipulation in the Concession Agreement. The Concession Agreement does not require that JETPUR has to maintain any such debt equity ratio. NHAI has sought to rely upon the Common Loan Agreement dated 19.08.2011 between JETPUR and the Lenders and PNB.

79. Reliance is placed on Recital B to the agreement which reads as under:

“The total cost of construction and development of the Project High Way (defined hereinafter) is estimated to be Rs. 981,00,00,000 (Rupees Nine Hundred and Eighty One Crores Only), which is proposed to be funded, as follows:

<i>Particulars</i>	<i>Amount in Rupees Crores</i>
<i>Project Equity Capital</i>	269
<i>Facility</i>	712
<i>Total Project Cost</i>	981

80. Based on the above clause it is contended that the Debt to equity ratio to be maintained is 72.58 : 27.42. Accordingly, from the adjusted TPC another adjustment is made based on the above ratio. It is contended that the Concession Agreement in its definition of Project Agreements make the Financing Agreements as part of the Project Agreements.

81. There is admittedly, no such stipulation in the Termination Payment clause that any such adjustment is to be made prior to payment of the Debt Due. As per the definition of Termination Payment and Debt Due, only the actual Debt Due has to be taken into account.

82. It is not the contention of NHAI that the lenders have financed or provided finance more than what was stipulated under the agreement. As per JETPUR, the sanctioned Loan was Rs. 712 Crores but JETPUR has availed only Rs. 622 Crores. Admittedly, the project

is more than 75% complete. As per JETPUR, the project is nearly complete.

83. Third adjustment has been made on account of alleged recoveries to be made by NHAI from JETPUR. This is also contrary to the stipulations contained in the Concession Agreement with regard to Termination Payment.

84. The clause relating to Termination Payment does not contemplate any deduction being made there from. According to Clauses 3.2 and 4.2 of the Escrow Agreement and Clauses 31.2 and 31.4 of the Concession Agreement, NHAI is obliged to deposit the Termination Payment comprising of 90% of Debt Due into the Escrow Account. The lenders are entitled to appropriate the amount in priority to any claim of damages or recoveries that NHAI may have from JETPUR. The appropriation of Debt Due is only lower in priority to payment of taxes by JETPUR.

85. This stipulation, as noticed above, appears to be to protect the interest of the lenders, who are not concerned with the inter se disputes between NHAI and JETPUR. Clearly, NHAI has faulted in making the deductions from the Termination Payment.

86. It is clarified that the merits of the claim for deduction by NHAI and the defence of JETPUR to the same is not being examined in this petition. It would be for the arbitral tribunal to consider the same in accordance with law.

87. The Supreme Court of India in **GANGOTRI ENTERPRISES LTD.** (supra), reaffirmed the earlier decision in **UNION OF INDIA VERSUS RAMAN IRON FOUNDRY** (1974) 2 SCC 231, wherein the Supreme Court approved the proposition laid down by the Bombay High Court in **IRON AND HARDWARE (INDIA) CO. VERSUS SHAMLAL AND BROS** AIR1954 BOM 423, that “damages are the compensation which a court of law gives to a party for the injury which he has sustained. But, and this is most important to note, he does not get damages or compensation by reason of any existing obligation on the part of the person who has committed the breach. He gets compensation as a result of the fiat of the court. Therefore, no pecuniary liability arises till the court has determined that the party complaining of the breach is entitled to damages. Therefore, when damages are assessed, it would not be true to say that what the court is doing is ascertaining a pecuniary liability, which already existed. The court in the first place must decide that the defendant is liable and then it proceeds to assess what that liability is. But till that determination there is no liability at all upon the defendant.” (underlining supplied)

88. The Supreme Court of India in **INDIAN OIL CORPN. LTD.** (supra) held

“26. We may at this stage refer to one aspect of the claim for extra cost. The award amount due to the respondent under the award dated 27-10-2008 is an ascertained sum due, recoverable by executing the award as a decree. On the other hand the claim of the appellant for reimbursement of the extra cost for getting the work

completed, is a claim for damages which is yet to be adjudicated by an adjudicating forum. The appellant cannot therefore adjust the amount due by it under the award, against a mere claim for damages made by it against the respondent. The appellant will have to pay the award amount due to the respondent and if necessary modify its claim for extra cost against the respondent.”

89. Similarly, in the present case, there is no dispute that NHAI has to make the Termination Payment. NHAI has sought to make recoveries of Rs. 242.42 Crores. The recoveries are yet to be adjudicated and determined. It is yet to be determined as to who is at fault. Pending determination and adjudication, NHAI cannot be permitted to make recoveries on its own.

90. The Supreme Court in **J.G. ENGINEERS PRIVATE LIMITED** (Supra) held that *the question whether the other party committed breach cannot be decided by the party alleging breach. A contract cannot provide that one party will be the arbiter to decide whether he committed breach or the other party committed breach. That question can only be decided by only an adjudicatory forum, that is, a court or an Arbitral Tribunal. Adjudication upon the issue relating to a breach of condition of contract and adjudication of assessing damages arising out of the breach are two different and distinct concepts and the right to assess damages arising out of a breach would not include a right to adjudicate upon as to whether there was any breach at all. One of the parties to an agreement cannot reserve to himself the power to adjudicate whether the other party has committed breach.*

91. The contention of Learned Counsel for NHAI is that admission cannot be read in isolation and should be read as a whole. This submission is made on the premise that the payment of Rs. 222.03 Crores by NHAI into the escrow amount is being treated as an admission.

92. Reliance placed by Learned Senior Counsel for the NHAI on SHIN SATELLITE PUBLIC CO. LTD (supra) to contend that *powers under section 9 of the Act should not be exercised to enable the petitioner to recover the sums on account of damages in advance of the hearing even if part of the liability is undisputed and monetary award for some amount may be made*, is misplaced in the facts of the present case.

93. The claim of PNB and JETPUR is not for recovery of any sum on account of damages. The claim is for payments in terms of the Concession Agreement which stipulates the payment of a minimum amount on the happening of the event of Termination irrespective of the party at fault. On the other hand the claim of NHAI is on account of damages, which cannot be adjusted from the Termination Payment.

94. The Judgment in the case of HAJI C.H. MOHAMMAD KOYA (Supra) to contend that *admission cannot be split up and part of it used; admission must be used either as a whole or not at all*, is not applicable to the facts of the present case. Reliance placed on RADHIKA AUTOMOBILES PVT. LTD (supra) is also misplaced as in the

said case, the claim was for recovery of money disputed.

95. In the present case, the admission is not sought to be split up. When read as a whole, it is clear that there is no dispute that the Debt Due is over Rs. 640 crores. No dispute has been ever raised that the amount of loan is in excess of the sanctioned limit. There is no dispute that NHAI has to make the termination payment. NHAI is seeking to make adjustment, which as noticed above cannot be made from the Termination Payment.

96. The Termination Payment has to be made to the Lenders and inter se dispute between NHAI and JETPUR cannot affect the right of the Lenders to appropriate 90% of the Termination Payment. There is admittedly no dispute with the lenders.

97. Further, the judgment in the case of **ORISSA MANGANESE AND MINERALS LIMITED** (supra) relied upon by Learned Senior Counsel for the Respondent is also not applicable to the facts of the present case. In the said case, damages were found to be an adequate compensation for the loss, if any, to be sustained by the respondent.

98. In the present case, damages would not be an adequate compensation as on the one hand JETPUR is liable to be declared as NPA, which would have irreversible consequences and PNB and the lenders would also suffer irreparable loss and injury. On the other hand the interest of NHAI, which has taken over the Project Highway and the right of Toll Collection can be adequately protected by putting

JETPUR to terms.

99. In the present case, there was no financial outflow of NHAI for the Project Highway. The cost of the Project is upwards of Rs. 828 Crores. The entire Highway had to be constructed by JETPUR from its own sources. JETPUR has admittedly constructed more than 75% of the Highway. As per JETPUR, apart from loans, JETPUR has also made substantial equity contribution. The recovery of cost and investment by JETPUR was to be from Toll Collection. The Lenders have advanced loans of over Rs. 622 Crores. As per PNB the Debt Due, including interest, as on date of termination was over Rs. 640 Crores. On termination, the Project Highway including the right of Toll Collection has been taken over by NHAI, without any financial outflow except the liability of Termination Payment.

100. At this stage, the maximum financial outflow from NHAI would be 90% of the Debt Due i.e. 90% of Rs. 640.86 Crores (i.e. Rs.576.774 crores). With this outflow, NHAI gets the entire constructed Project Highway and the right to collect Toll. NHAI has already made the payment of Rs. 222.03 Crores. The Balance due is Rs. 354.744 Crores, out of which NHAI has offered to make the additional payment of Rs. 6.14 Crores.

101. In case, this payment is not made by NHAI, the account of JETPUR would be declared as NPA and irreparable loss and injury would be suffered. Not only would JETPUR suffer irreparable, the

Lenders including PNB would suffer grave injury. The concern is more of the public funds that have been provided by PNB and the lenders which would be embroiled in the inter se disputes between JETPUR and NHAI. Equity demands that the lenders and PNB should get their amount and the inter se disputes can be sorted out between the NHAI and JETPUR through the process of Arbitration.

102. Under section 9 of the Act, Court has the power to pass orders as appear to the court to be just and convenient to prevent ends of Justice from being defeated.¹

103. The Division bench of this court in **KAL AIRWAYS PRIVATE LIMITED** (supra) held as under:

*“26. Though apparently, there seem to be two divergent strands of thought, in judicial thinking, this court is of the opinion that the matter is one of the weight to be given to the materials on record, a fact dependent exercise, rather than of principle. That Section 9 grants wide powers to the courts in fashioning an appropriate interim order, is apparent from its text. Nevertheless, what the authorities stress is that the exercise of such power should be principled, premised on some known guidelines - therefore, the analogy of Orders 38 and 39. Equally, the court should not find itself unduly bound by the text of those provisions rather it is to follow the underlying principles. In this regard, the observations of Lord Hoffman in *Films Rover International Ltd. v. Cannon Film Sales Ltd.* (1986) 3 All ER 772 are fitting:*

“But I think it is important in this area to

¹ **S. HARINDER SINGH** (supra)

distinguish between fundamental principles and what are sometimes described as 'guidelines', i.e useful generalisations about the way to deal with the normal run of cases falling within a particular category. The principal dilemma about the grant of interlocutory injunctions, whether prohibitory or mandatory, is that there is by definition a risk that the court may make the 'wrong' decision, in the sense of granting an injunction to a party who fails to establish his right at the trial (or would fail if there was a trial) or alternatively, in failing to grant an injunction to a party who succeeds (or would succeed) at trial. A fundamental principle is therefore that the court should take whichever course appears to carry the lower risk of injustice if it should turn out to have been 'wrong' in the sense I have described. The guidelines for the grant of both kinds of interlocutory injunctions are derived from this principle."

27. It was observed later, in the same judgment that:

"The question of substance is whether the granting of the injunction would carry that higher risk of injustice which is normally associated with the grant of a mandatory injunction. The second point is that in cases in which there can be no dispute about the use of the term 'mandatory' to describe the injunction, the same question of substance will determine whether the case is 'normal' and therefore within the guideline or 'exceptional' and therefore requiring special treatment. If it appears to the court that, exceptionally, the case is one in which withholding a mandatory interlocutory injunction would in fact carry a greater risk of injustice than granting it even though the court does not feel a 'high degree of assurance' about the plaintiff's chances of establishing his right,

there cannot be any rational basis for withholding the injunction.”

(underlining supplied)

104. In exercise of powers under section 9 of the Act, several benches, Single and Division, of this court, in the facts of the case, have passed mandatory interlocutory directions, directing respondents to make payments subject to terms. (See FORBES FACILITY SERVICES PRIVATE LIMITED (supra); MAFATLAL INDUSTRIES LIMITED & ANOTHER (supra); VALUE SOURCE MERCANTILE LIMITED (supra), SIMPLEX INFRASTRUCTURES LTD.(Supra).

105. In my view the petitioners have shown strong prima facie case for grant of interim mandatory measures. Balance of convenience is in favour of PNB and JETPUR and against NHAI. As noticed hereinabove, in case interim measures are not granted, irreparable loss and injury is likely to be caused to the petitioners.

106. In view of the above,

- (i) JETPUR is directed to furnish an unconditional and irrevocable Bank Guarantee, in favour of NHAI, undertaking to pay to NHAI an amount not exceeding Rs. 348.604 Crores [i.e. 90% of 640.86 = 576.774 (minus) 222.03 {already paid} (minus) 6.14 {agreed to be payable by NHAI} = 348.604]; and
- (ii) on deposit of the Bank Guarantee, NHAI shall forthwith

deposit in the Escrow Account the sum of Rs. 354.744 Crores (i.e. 348.604 + 6.14); and

- (iii) the encashment of the Bank Guarantee shall be subject to the final award of the Arbitral Tribunal; and
- (iv) JETPUR shall keep the bank guarantee alive for unto a period of four months after the making of the final award by the Arbitration Tribunal; and
- (v) Parties shall comply with the provisions of Section 9(2) of the Act.

107. It is clarified that this court has neither considered nor expressed any opinion on the merits of the claim of NHAI and the defence of JETPUR with regard to the alleged recoveries and the issue of the unfinished project.

108. The Petitions are allowed in the above terms. There shall be no orders as to costs.

109. Copy of the Order be supplied *Dasti* to parties under signatures of Court Master.

SANJEEV SACHDEVA, J

JULY 31, 2017

Sn/HJ