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

+ **FAO(OS) (COMM) 165/2017 & CM No. 31279/2017**

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Reserved on: 19th September, 2017
Pronounced on: 27th October, 2017

NATIONAL HIGHWAYS AUTHORITY OF INDIA..... Appellant

Through: Mr.Parag P. Tripathi, Sr. Advocate with
Ms.Gunjan Sinha & Mr.Rishabh Kapur, Advocates

Versus

PUNJAB NATIONAL BANK

..... Respondent

Through: Mr.Rajiv Nayar, Sr.Advocate with
Mr.Manmeet Singh, Mr.Mayank Grover and
Ms.Anjali Anchayil, Advocates.

FAO(OS) (COMM) 166/2017 & CM No. 31281/2017

NATIONAL HIGHWAYS AUTHORITY OF INDIA..... Appellant

Through: Mr.Parag P. Tripathi, Sr. Advocate with
Ms.Gunjan Sinha & Mr.Rishabh Kapur, Advocates

Versus

M/S JETPUR SOMNATH TOLLWAYS LIMITED..... Respondent

Through: Mr.Sandeep Sethi, Sr. Advocate with
Mr.Ajay Sondhi & Ms.Surbhi Mehta, Advocates

CORAM:

HON'BLE MR. JUSTICE SANJIV KHANNA

HON'BLE MR. JUSTICE NAVIN CHAWLA

SANJIV KHANNA, J.

National Highways Authority of India ('NHAI' for short) has filed these intra Court appeals impugning the common order dated 31st July, 2017 passed in OMP(I) (Comm.) No.221/2017 '*M/s.Jetpur Somnath Tollways Limited Vs. National Highways Authority of India & Anr*' and in OMP(I) (Comm.) No.227/2017 '*Punjab National Bank Vs. National Highways Authority of India & Anr*'.

2. The impugned order allows the aforestated OMPs filed by M/s.Jetpur Somnath Tollways Limited ('JSTL'/ JETPUR for short) and the Punjab National Bank ('PNB' for short) under section 9 of the Arbitration & Conciliation Act 1996 ('A&C Act' for short) with the following directions:

“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.”

3. A Concession Agreement dated 7th February, 2011 was executed between NHAI and JSTL for construction, operation and maintenance of the four laning of Jetpur-Somnath section of National Highway 8-D from k.m. 0.00 to k.m. 127.00 in the State of Gujarat. The agreement had required the Concessionaire to on toll basis design, build, finance, operate and transfer (DBFOT) the project highway under NHDP Phase -III Project for a period of 30 years commencing from the date of appointment. The agreement had also postulated construction of Junagadh bypass for length of 19.80 k.m.

4. The concessionaire JSTL, in other words, had to incur entire costs, expenses and arrange for finances to construct the highway and operate, maintain, and manage the same. In turn the Concessionaire had the right to regulate its use by third parties, demand and collect an appropriate fees from vehicles and users for using the project highway or any part thereof, and refuse entry of any vehicle if fee due was not paid.

5. The Concession Agreement had mandated as a condition precedent that JSTL would have to open an escrow account with a bank, prior to the appointed date. For this purpose the Concessionaire was required to execute an escrow agreement with the bank. All deposits, inflows, and receipts of funds constituting the financial package of fees and other revenues, from or in respect of the project highway including rental deposits or capital receipts or insurance cover were to be deposited in the said account. Similarly, all payments towards expenditure on construction, maintenance, taxes, etc. including payment to NHAI after deducting cancellation fees, if any, were to be debited and paid from the said account. For the sake of convenience, we

are reproducing clause 31.1 relating to escrow account, clause 31.2 relating to deposit into escrow account, clause 31.3 relating to Withdrawal during Concession Period and clause 31.4 relating to Withdrawals upon Termination as stipulated in the Article 31 of the Concessionaire Agreement, which read as under:

“31.1 Escrow Account

31.1.1 The Concessionaire shall, prior to the Appointed Date, open and establish an Escrow Account with a Bank (the “Escrow Bank”) in accordance with this Agreement read with the Escrow Agreement.

31.1.2 The nature and scope of the Escrow Account are fully described in the agreement (the “Escrow Agreement”) to be entered into amongst the Concessionaire, the Authority, the Escrow Bank and the Senior Lenders through the Lenders’ Representative, which shall be substantially in the form set forth in Schedule-S.

31.2 Deposits into Escrow Account

The Concessionaire shall deposit or cause to be deposited the following inflows and receipts into the Escrow Account:

- (a) all funds constituting the Financial Package;
- (b) all Fee and any other revenues from or in respect of the Project Highway, including the proceeds of any rentals, deposits, capital receipts or insurance claims; and
- (c) all payments by the Authority, after deduction of any outstanding Concession Fee:

Provided that the Senior Lenders may make direct disbursements to the EPC Contractor in accordance with the express provisions contained in this behalf in the Financing Agreements.

31.3 Withdrawals during Concession Period

31.3.1 The Concessionaire shall, at the time of opening the Escrow Account, give irrevocable instructions, by way of an Escrow Agreement, to the Escrow Bank instructing, inter alia, that deposits in the Escrow Account shall be appropriated in the following order every month, or at shorter interval as necessary, and if not due in a month then appropriated proportionately in such month and retained in the Escrow Account and paid out therefrom in the month when due:

- (a) all taxes due and payable by the Concessionaire for and in respect of the Project Highway;
- (b) all payments relating to construction of the Project Highway, subject to and in accordance with the conditions, if any, set forth in the Financing Agreements;
- (c) O&M Expenses, subject to the ceiling, if any, set forth in the Financing Agreement;
- (d) O & M Expenses and other costs and expenses incurred by the Authority in accordance with the provisions of this Agreement, and certified by the Authority as due and payable to it;
- (e) Concession fee due and payable to the Authority;
- (f) monthly proportionate provision of Debt Service due in an Accounting Year;
- (g) all payments and Damages certified by the Authority as due and payable to it by the Concessionaire, including repayment of Revenue Shortfall Loan;
- (h) Monthly proportionate provision of debt service payments due in an Accounting Year in respect of Subordinated Debt;
- (i) any reserve requirements set forth in the Financing Agreements; and

- (j) balance, if any, in accordance with the instructions of the Concessionaire.

31.3.2 The Concessionaire shall not in any manner modify the order of payment specified in Clause 31.3.1, except with the prior written approval of the Authority.

31.4 Withdrawals upon Termination

31.4.1 Notwithstanding anything to the contrary contained in this Agreement, all amounts standing to the credit of the Escrow Account shall, upon Termination, be appropriated 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, including Premium and repayment of Revenue Shortfall Loan;
- (e) retention and payments relating to the liability for defects and deficiencies set forth in Article 39;
- (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 this Agreement; and
- (j) balance, if any, in accordance with the instructions of the Concessionaire:

Provided that no appropriations shall be made under Sub-clause (j) of this Clause 31.4.1 until a Vesting Certificate has been issued by the Authority under the provisions of Article 38.

31.4.2 The provisions of this Article 31 and the instructions contained in the Escrow Agreement shall remain in full force and effect until the obligations set forth in Clause 31.4.1 have been discharged.”

6. There was also a stipulation in the Concession Agreement that the Concessionaire, upon occurrence of Financial Close, was to notify the NHAI forthwith and was to provide to the NHAI, at least two days prior to the Financial Close, three true copies of the Financial Package and the Financial Model, duly attested by a Director of the Concessionaire, along with three soft copies of the Financial Model, which was acceptable to the Senior Lenders. Senior Lenders could make direct disbursement to the specified contractor in accordance with the express provisions regarding such payments in the Finance Agreement.

7. In terms of the aforesaid agreement JSTL opened an escrow account with PNB, vide an Escrow Agreement dated 16th August, 2011, which was jointly executed and signed amongst PNB, JSTL, and NHAI. The Escrow Agreement under heading Clause 3 had prescribed deposits required to be made in the escrow account by JSTL, NHAI, and the Senior Lenders represented by PNB. Clause 4 was in relation to and regulated withdrawals from the escrow account during the period of Concession Agreement as well as withdrawal upon termination. Thus Escrow Agreement records and affirms that the Senior Lenders had agreed to finance the project in accordance with the terms and conditions set forth in the Financial Agreement. Again for clarity and convenience we reproduce, clauses 3.2 and 4.2 of the tripartite Escrow Agreement which 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:

Grant and any other monies disbursed by the Authority to the Concessionaire;

- (a) Revenue Shortfall Loan;
- (b) all Fee collected by the Authority in exercise of its rights under the Concession Agreement; and
- (c) 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."

8. Thus, 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 JSTL, the Senior Lenders have the right to appropriate 90% of the Debt Due excluding Subordinate Debt. Priority of appropriation under the respective clauses is stipulated.

9. The Financing Agreement was the third agreement which was executed between PNB and JSTL on 19th August, 2011. NHAI is not a party to the Financing or Lenders Agreement, though a copy of the Lenders Agreement was furnished and given to NHAI, who as noticed above, was a party to the Escrow Agreement amongst the three parties. The Concession Agreement had stipulated in Clause 4.1.3(e) that the Concessionaire shall have executed the Financing Agreements, duly attested by the Director of the Concessionaire, as a condition precedent to be satisfied by the Concessionaire, prior to the appointed date.

10. The undisputed position is that there is an arbitration clause both in the Concession Agreement between JSTL and NHAI and in the Escrow Agreement amongst JSTL, NHAI and PNB.

11. Dispute arose between the NHAI and JSTL regarding execution of work relating to by-pass pertaining to time period, reason for delay, default and costs for execution of work.

12. On 13th May, 2016, JSTL issued a cure period notice to NHAI. NHAI in turn issued notice of termination on 10th August, 2016. On 5th September, 2016, a joint meeting was held amongst JSTL, NHAI, and Senior Lenders followed by another meeting on 18th October, 2016. The dispute persisted and could not be resolved. On 10th November, 2016, NHAI issued termination notice under clause 37.1.2 of the Concession Agreement and took possession and control over the project highway forthwith. On 17th November, 2016, JSTL issued notice of termination to NHAI under clause 37.2 of the Concession Agreement, treating the termination notice of NHAI dated 10th November, 2016 as repudiatory breach of the Concession Agreement. PNB on 11th November, 2016, called upon NHAI to confirm whether before taking over the project highway they had paid the termination amount. PNB by letters dated 21st January, 2017, 4th March, 2017, and 22nd March, 2017 informed NHAI that on account of non-release of the termination payment JSTL was unable to meet the debt service obligation and the account of JSTL was likely to become Non-Performing Asset. As the project highway had been taken over by NHAI, JSTL was no longer receiving any toll revenue and was not in a position to serve it with the debt payable by JSTL. On 27th March, 2017, NHAI released a payment of Rs.217.59 crores (net of TDS) in

the escrow account with PNB. NHAI, however, refused to deposit any further amount in the escrow account under the termination clause despite several requests from PNB and JSTL. This prompted PNB to file OMP (I) (Comm.) No.227/2017 against NHAI to direct NHAI to pay Rs. 374.51 crores into escrow account for appropriation by the lenders, relying upon clause 37.3.1 of the Concession Agreement. JSTL also filed OMP (I) (Comm.) No.221/2017 under Section 9 of the A&C Act for similar directions to NHAI to deposit Rs.359.19 crores being the balance of minimum termination payment under the Concession Agreement into the escrow account. Reliance was placed upon Clause 37.3.2. of the Concession Agreement.

13. The impugned order dated 31st July, 2017 has directed NHAI to deposit Rs.354.744 crores in the escrow account, subject to JSTL first furnishing an unconditional and irrevocable bank guarantee in favour of NHAI, undertaking to pay NHAI an amount not exceeding Rs.348.604 crores. It directs that the bank guarantee shall be subject to the final award by the Arbitral Tribunal and would be kept alive by JSTL for a period of four months after making the final award by the Arbitral Tribunal. It also directs that the parties will comply with the provisions of Section 9(2) of the A&C Act.

14. The impugned order holds that NHAI under Clause 37.3.1, relating to 'Termination Payment' on account of default by the Concessionaire, cannot make any deductions on account of NHAI's claims or that the recoveries or adjustments must be made by proportionately reducing equity component from the Total Project Cost to compute the termination payment.

15. In order to appreciate controversy and the respective contentions raised by the parties, we would first reproduce clause 37.3 of the Concession Agreement, relating to termination payment which reads 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)

Clause 37.3.2 relates to termination on account of an Authority Default, i.e. NHAI default. In such cases NHAI is to pay to the Concessionaire i.e. JSTL, by way of termination payment, an amount equal to debt due and 150% of the adjusted equity. Clause 37.3.1 on the other hand applies to termination on account of a Concessionaire Default i.e. JSTL's default, during the operation period. NHAI, thereunder, would be liable to pay JSTL, by way of termination payment, an amount of 90% of the debt due less insurance cover. Therefore, it is clear from the reading of the aforesaid clauses that NHAI is to make payment either under Clause 37.3.1 or under Clause 37.3.2 whenever the Concession Agreement is terminated. In case termination is on account of Authority/NHAI's default the amount payable is the entire debt due plus 150% of the adjusted equity, whereas if the termination is on account of Concessionaire/JSTL's default an amount equal to 90% of the debt due less insurance cover is required to be paid. The reason is that upon termination of the Concession Agreement, for whatsoever reason, NHAI is deemed to have taken possession and control of the Highway Project forthwith which includes taking over possession and control of all material, stores, implements, construction plants, and equipments etc., and the Concessionaire is restrained from entering into the site or any part of the project. As noted above, cost of operation, construction, and maintenance of the project was to be spent and undertaken by the Concessionaire i.e. JSTL, and NHAI was not required to spend money on construction,

operation, and maintenance. Intent and objective behind this clause as explained and elucidated below is to protect interest of the Senior Lenders who the financed construction of the highway project.

16. Termination payment under clause 37.3.1 is not payable to the Concessionaire for the Concessionaire's default occurring prior to COD. The expression "COD" has been defined in the definition clause of the Concessionaire Agreement as "Commercial Operation Date", which has its meaning as set forth in clause 15.1. Clause 15.1 stipulates that four-laning shall be deemed to be complete when completion certificate or provisional certificate, as the case may be, is issued under the provisions of Article/ clause 14 and accordingly the Commercial Operation Date of the project shall be the date on which such completion certificate or provisional certificate is issued. The Concessionaire is entitled to collect fee and receive payments in accordance with the Article/clause 27 of the Concessionaire Agreement after issue of COD. The NHAI in the grounds of appeal have stated and accepted that they had issued provisional certificate on 4th May, 2015 and as per Article/clause 15, the Project Highway was put to commercial use from 4th May, 2015. This aspect is important and relevant when we examine the contention of the NHAI that they are entitled to set off the alleged recoveries of Rs.242.42 Crores while making payment under clause 37.3.1.

17. The expression "debt due" has been defined in the Concession Agreement, the relevant portion of which reads as under:

“Debt Due” means the aggregate of the following sums expressed in Indian Rupees outstanding on the Transfer Date:

- (a) the principal amount of the debt provided by the Senior Lenders under the Financing Agreements for financing the Total Project Cost (the “principal”) but excluding any part of the principal that had fallen due for repayment two years prior to the Transfer Date;
- (b) all accrued interest, financing fees and charges payable under the Financing Agreements on or in respect of, the debt referred to in sub-clause (a) above until the Transfer Date but excluding (i) any interest, fees or charges that had fallen due one year prior to the Transfer Date, (ii) any penal interest or charges payable under the Financing Agreements to any Senior Lender, and (iii) any pre-payment charges in relation to accelerated repayment of debt except where such charges have arisen due to Authority Default; and
- (c) any Subordinated Debt which is included in the Financial Package and disbursed by lenders for financing the Total Project Cost;

provided that if all or any part of the Debt Due is convertible into Equity at the option of Senior Lenders and/or the Concessionaire, it shall for the purposes of this Agreement be deemed to be Debt Due even after such conversion and the principal thereof shall be dealt with as if such conversion had not been undertaken;"

18. As per the said clause the "debt due" means aggregate of the sums mentioned in the clauses (a), (b) and (c) outstanding in the Indian Rupees on the transfer date. Clause (a) is the principal amount of debt provided by the Senior Lender under the Financing Agreement for financing the Total Project Cost, but it excludes any part of the principal that had fallen due for repayment two years prior to the transfer date. Thus, the principal amount financed by the Senior Lender under Clause (a) cannot exceed the Total Project Cost. Under Clause (b) all accrued interest, financing fee, and charges payable under the Financing Agreement with respect to the "debt due" referred to in Clause (a) above, till the transfer date, is to be added. However,

any interest, fees, and charges that had fallen due one year prior to the transfer debt, any penal interest, and any pre-payment charges in relation to accelerated repayment of debt except where such charges have arisen due to NHAI's default, are to be excluded. Under Clause (c) subordinated debt which is included in the financial package and disbursed by the lenders for financing of the Total Project Cost is to be added. Clause (c) like Clause (a) refers to the financing of the Total Project Cost. Proviso thereto stipulates that any debt due convertible into equity at the option of the Senior Lender or the Concessionaire shall be deemed to be debt due even after conversion, and the principal thereof shall be dealt with as if conversion had not been undertaken. It is clear from the reading of the definition that the expression the "debt due" refers to the principal amount of debt provided by the Senior lender under the Financing Agreement but excluding any part of the principal that had fallen due for repayment two years prior to the transfer date. The principal amount should be for financing the Total Project Cost. It also includes aggregate interest, financing fees, and charges which had fallen due within one year prior to the transfer date and excludes penal interest and other charges and also pre payment charges on accelerate payments. Thus, there is specific and clear-cut definition of the "debt due" which would become payable under clause 37.3.1 of the Concession Agreement.

19. The first contention of the appellant is that under Clause (a) of the definition clause defining debt due, the principal amount of debt should be for financing of the Total Project Cost. It is submitted that in the present case there was reduction of the Total Project Cost by Rs. 106.60 Crores, as Junagadh bypass was not constructed. The second submission is that the NHAI is also entitled to set off recoveries, they had to make, of Rs.242.42

Crores. Thirdly, equity contributed by the promoters other than the equity issued to the Senior Lenders has to be excluded and therefore, an adjustment is required to be made for computing the debt due which would be payable under clause 37.3.1 of the Concession Agreement.

20. In order to appreciate the controversy and the contentions it is necessary for us to reproduce the definition of the Total Project Cost in the Concession Agreement, which is as under:

“Total Project Cost” means 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;”

The expression Total Project Cost as per the aforesaid definition means the lowest amount computed under Clauses (a), (b) and (c). Clause (a) refers to the capital cost of the project less equity support as set forth in the financial package i.e. the Finance Agreement between the Concessionaire/JSTL and the Senior Lenders. As per clause (b) the Total Project Cost is the actual

capital cost of the project upon conclusion of the four laning of the project less equity support. Clause (b), therefore, refers the actual capital cost of the project upon completion. From this amount equity support has to be excluded or reduced. The distinction between Clauses (a) and (b) is that Clause (a) relates to capital cost of the project as per the Finance Agreement and Clause (b) relates to actual capital cost of the project upon conclusion. Clause (a) would therefore be applicable even when the actual cost of the project upon completion is unavailable or lower. Under the two clauses equity support is to be reduced but for clause (a) equity support to be reduced would be as set forth in the financial package and under clause (b) from the actual capital cost on completion. Clause (c) refers to the pre-determined figure of Rs. 828.00 Crores and states that Total Project Cost for the said clause would be the above figure less equity support. It is submitted by NHAI that this amount of Rs. 828.00 crores was the estimated or projected cost of the Project Highway. This is correct. Thus, the projected or estimated cost need not be the actual or financed capital cost, a facet which is recognized and accepted in Clauses (b) and (a). As per NHAI, adjustment is required to be made from this figure of Rs.828 Crores for in this case JSTL had not executed and constructed Junagadh bypass 19.80km in length, the cost of construction of which was Rs.106.60 crores. This figure of Rs.106.60 crores was included in Rs. 828 crores. We shall subsequently examine the said contention. However, at this stage, we would only record that Total Project Cost being the lowest of the amount computed under Clauses (a), (b) and (c), it is required that we compute the amount payable under Clauses (a) and (b), and also the amount under Clause (c). The lowest amount would be the Total Project Cost which would be taken into consideration for

determination and quantifying the upper limit of debt due under clause (a) of the definition of debt due, and accordingly the termination payment. Even if the actual or financed capital cost is more than Rs. 828 crores, the total project cost cannot exceed Rs. 828 crores. Under Clause (c) equity support has to be reduced or deducted. The proviso has been interpreted and examined in paragraph 26 below.

21. Before we proceed further, we would like to reproduce calculation made by NHAI for making payment of the termination amount under Clause 37.3.1. Their calculation is as under:

“

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

”

22. A reading of the aforesaid table would indicate that NHAI has made a reduction in the Total Project Cost and has excluded cost of unfinished construction of Rs. 106.60 Crores. This amount has been reduced from the Total Project Cost of Rs.828 crores mentioned at Clause (c) to come at a figure of the Total Project Cost of Rs.721.40 Crores. Serial No.4 in the aforesaid table records the debt due as Rs.532.59 Crores by making adjustment and reducing the principal amount of debt to 72.58%. From the said amount Rs.71.0 lacs towards payment made by JSTL to PNB was reduced leaving a balance outstanding debt due of Rs.522.88 crores. The NHAI has excluded Rs.19.4 crores on account of aggregate interest on the ground that this was a case of willful default and therefore NHAI is not liable to make payment. Thereafter 90% of the debt due has been computed as Rs.470.59 crores and from this amount another amount of Rs.242.42 crores was deducted on account of recovery to arrive at the figure under Serial No.10, described as 'Net Termination Payment', of Rs.228.17 crores. Out of this Rs.222.03 crores was already deposited and Rs.6.14 crores has been paid by NHAI to escrow account with PNB during the pendency of the present appeal.

23. However, factual position is that outstanding debt due as on termination date was Rs.640.86 Crores i.e. 621.45 towards principal and Rs.19.4 crores towards interest. The aforesaid principal and the interest amount have been calculated in terms of the definition clause of debt due, quoted above. Ninety percent (90%) of the debt due is Rs.576.774 crores out of which an amount of Rs.222.03 crores and 6.14 crores totaling to Rs.228.17 have been deposited by NHAI in the escrow account. Thus, the balance amount payable as per JSTL and PNB is Rs.348.60 Crores. The impugned

order refers to the figure of Rs. 354.774 crores that includes Rs. 6.14 crores which now stands paid.

24. At the outset, we would have to reject the contention of the appellant, NHAI that for the purpose of Clause 37.3.1 interest component of Rs.19.4 crores or recoveries of Rs.242.42 crores can be adjusted. This is impermissible and not what is stated and permitted under Clause 37.3.1 or under expressions Debt Due or Total Project Cost. We do not, therefore, think that the appellant NHAI can make adjustment on account of the recoveries which it claims are payable by JSTL, or exclude accrued interest of Rs.19.4 crores on account of alleged willful default by JSTL. The said adjustment being impermissible and not as per the mandate of the clauses mentioned above, are unsustainable.

25. NHAI's claim for damages is yet to be adjudicated and remains a mere inchoate demand till it is determined and decided. It is not a crystalised and ascertained liability. Only after adjudication as per law, the amount qualified as payable is a liability payable or to adjusted from the dues payable to the JSTL. (See [1] Union of India Vs. Raman Iron Foundry (1974) 2 SCC 231; [2] J.G. Engineers (P) Ltd. Vs. Union of India (2011) 5 SCC 758, which holds that adjudication of breach can only be decided by a Court or a Tribunal and not by the alleged aggrieved party. No pecuniary liability arises till the determination of the claim of the party complaining of breach and entitlement to damages. [3] Gangotri Enterprises Ltd. Vs. Union of India (2016) 11, SCC 720.)

26. This leaves us with the question of adjustment of debt on account of equity. Presumably NHAI relies upon proviso to the Total Project Cost definition. The proviso, as stipulated, becomes applicable in the event of

termination but not in all cases of termination. The Total Project Cost under the proviso is deemed to be modified to the extent of variation in Wholesale Price Index or Reference Exchange Rate. However, in the present case none of the parties have raised the question of modification on account of variation in Wholesale Price Index or Reference Exchange Rate. The proviso, therefore, would not be applicable and, thus, NHAI cannot ask for modification or adjustment of equity and debt due. The aforesaid conclusion is fortified by the definition of the term "adjusted equity" under the heading "definition" Article/clause 48.1.

27. The expression "Total Project Cost" requires deduction of equity support and not equity provided by the Concessionaire. The expression "equity support" defined in Article/clause 48.1 has the meaning as set forth in clause 25.2.1. The clause 25.2.1 falls under the heading "Grant" under Article 25 and is deleted. Hence, the term "equity support" remains undefined. The expression "equity support" before deletion of clause 25.2.1 had referred to the Grant credited to the escrow account to be applied by the Concessionaire for meeting the Total Project Cost. It was to be restricted and not exceed 20% of the Total Project Cost. In the present case, we would only hold that there was no "equity support". Hence, deduction was not required to be made while computing the amount under clauses (a) to (c) for computing the figure of Total Project Cost.

28. The financing agreement had computed the estimated total cost on development of the highway project at Rs.981 crores instead of estimated cost of the project mentioned in Clause (c) by NHAI of Rs.828 crores. Relevant clause in the Financing Agreement reads as under:

“The total cost of construction and development of the Project Highway (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:

Particulars	Amount in Rupees Crores
Project Equity Capital	269
Facility	712
Total Project Cost	981

”

29. The Senior Lenders had agreed to provide financing facility to the extent of Rs.712 crores and the promoters were required to provide equity capital to the extent of Rs.269 crores to make up the capital cost of Rs.981 crores. NHAI, accordingly submits that the debt and equity ratio on total project cost of Rs.981 crores was 72.58 : 27.42. Applying the said formula of debt and equity ratio they have calculated adjustment what is called adjusted total project cost as 523.59 crores, after excluding Rs. 106 crores from total project costs of Rs.828 crores.

30. The aforesaid contention of NHAI, is contested by JSTL and PNB. The figure of Rs.828 Crores it is stated is taken from Clause (c) of the definition of Total Project Cost. The said figure of Rs.828 crores is not to be found or recorded in Clauses (a) and (b) and is not the capital cost of the project under the Finance Agreement and actual capital cost of the completed project. Under Clause (c) equity support has to be reduced from Rs.828 Crores. In the present case no equity support has been provided and therefore no reduction on the said account is to be made. Proviso to definition clause Total Project Cost as explained above is not applicable. Therefore the adjustment on

account of equity and principal amount is un-explainable and cannot be justified.

31. This figure of Rs. 828 crores cannot be reduced or adjusted on account of equity utilised for part financing of the capital cost of the project. Debt due does not exclude the equity funded by the Concessionaire. Debt due as defined refers to principal amount of debt, interest and subordinate debt as stipulated. We would also observe there is no specific stipulation in the Concession Agreement with regard to the equity, which must be provided on the basis of estimated project cost of Rs.828 crores. Equity capital which is to be provided by the promoters/shareholders of the Concessionaire of Rs.269 crores is with reference to Rs.981 crores, which was estimated as the project cost of the construction and development of the highways by the Senior Lenders as per the Finance Agreement. It is accepted case that JSTL had availed of loan facility to the extent of Rs.622 crores only, and not the entire amount of Rs 712 crores. As per NHAI the project is about 75% complete. As per the JSTL the project is nearly complete. Thus clearly the project equity capital of Rs.269 crores is with reference to total project cost of Rs.981 crores.

32. The next question, which arises for consideration is what would be the capital cost of project under clause (a) for determining the Total Project Cost under the definition clause. It appears to us that the capital cost of project for the purpose of clause (a) would mean the capital cost incurred on a particular date. In the context of the present case, it would mean the capital cost incurred for construction, maintenance etc. on the date of termination. On the said aspect, it appears that the factual position was that capital cost of more than Rs.640.86 Crores had already been incurred. This would be also

the figure under Clause (b), if we treat the project as complete. This figure of Rs.640.86 Crores was the debt due as on the termination date. Further, NHAI has not relied upon clauses (a) or (b) of the Total Project Cost in their computation. NHAI in their computation quoted in paragraph 20 above have applied clause (c) of the total project cost for they have referred to the figure of Rs.828 Crores.

33. The contention of NHAI is that they are entitled to reduce and exclude from Rs.828 crores, Rs.106.60 crores for the unconstructed Jungadh bypass. On the said reduction, the Total Project Cost would be Rs. 721.40 Crores. Even if we accept the said contention as correct, it would not make any difference for this figure of Rs.721.40 Crores is higher or more than the amount calculated under clauses (a) and (c), defining the expression "debt due". The accepted position is that Rs.640.86 crores i.e. Rs.621.45 crores towards principal and Rs.19.4 Crores as interest is payable under clauses (a) (or even clause (b) if we treat the project as completed) or clause (c) of the definition "debt due".

34. As held by the learned Single Judge the clause relating to termination payment is apparently to protect the interest of the lenders, who would have been reluctant to provide finance for the Highway Project without their principal and interest being secured in the event dispute arises between the NHAI and the Concessionaire, which would then become subject matter of legal proceedings. NHAI has to pay termination payment even if the concessionaire is at fault. As per the terms stipulated in Clause 37.3.1, upon termination on account of concessionaire default the interest of NHAI is also protected because upon termination they step in and are entitled to collect user fee from third parties. JSTL, it is pertinent to record, had spent and paid

the construction and maintenance costs of the project highway. NHAI is not to make the payment of equity component but pay as termination payment i.e. 90% of the "debt due" which excludes equity component and less insurance.

35. On the question of exercise of power under Section 9 of the A&C Act, we have already referred to Clauses 37.3.1 of the Concessionaire Agreement which is an express and mandatory provision when said agreement is terminated on account of concessionaire fault. We have also referred to Clauses 3.2 and 4.2 of the tripartite Escrow Agreement which refers to termination payment. To accept the plea of NHAI that section 9 of the A&C Act cannot be invoked, would negate and obliterate the aforesaid Clauses and their effect. In the aforesaid circumstances the ratio of decision of the Division Bench of this Court in *Value Source Mercantile Limited Vs. Span Mechnotronix Limited* (2014) 143 DRJ 505, is apposite, if not definite and conclusive. Referring to Section 9 of the A&C Act, this decision emphasized that the said provision uses the expression 'interim measure of protection' as distinct from the expression 'temporary injunction' used in Rules 1 and 2 of Order XXXIX of the Code of Civil Procedure, 1908. Interim injunction is one of the measures or orders prescribed in Clause (d) to Section 9 (ii) of the A&C Act, albeit a party to the arbitration agreement is entitled to apply for and seek 'interim measure of protection'. Clause (e) to Section 9(ii) is a residuary power of the court to issue or direct other "interim measures of protection". Thus, the court has the power to issue or direct other interim measures of protection as may appear to the court to be just and convenient. Section 9 encompass the power of making orders as the Civil Court has for the purpose of, and in relation to any proceedings before it. This decision

refers to Rule 10 of Order XXXIX of the aforesaid Code which empowers the Court to direct to deposit payment of the admitted amount. Therefore the court exercising power under Section 9 of the A&C Act has the same power as that of a civil court during pendency of the suit.

36. The aforesaid dictum is re-enforced and reiterated in the recent decision of another Division Bench of this Court in Ajay Singh Vs. Kal Airways Private Limited FAO(OS)(Comm.)No.62/2016 decided on 03rd July, 2017. Explaining the scope and ambit of Section 9 of the A&C Act it was 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 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)

37. The impugned order takes care of the interest of NHAI as it directs furnishing of an unconditional, irrevocable bank guarantee in favour of the NHAI for an amount not exceeding Rs.348.604 crores and only upon the said guarantee being furnished deposit of the same figure is to be made in the escrow account. The bank guarantee is subject to final award of the arbitral tribunal. The impugned order also notices the adverse impact and the consequences which JSTL would suffer in case of non-deposit of the termination payment in the escrow account, which would have the effect of

declaring the account of JSTL as non-performing asset which would amount to irreparable loss and injury. However, we are more concerned and want to protect the rights of the lenders i.e. PNB, who would suffer a grave injury and adverse consequences, which will follow in case NHAI does not make the termination payment as agreed and stipulated in Clause 37.3.1 of the Concessionaire Agreement on fault of Concessionaire read with Clauses 3.2 and 4.2 of the Tripartite Escrow Agreement which formed the basis of the finance.

38. In view of the aforesaid discussion, we do not find any reason to interfere with the impugned order dated 31st July, 2017. The appeals are accordingly dismissed and the directions issued under the impugned order are upheld. We would clarify that observations made in this order are for disposal of the appeals and would not be construed and treated as findings and observations on merit which would be binding on the arbitrator. The respondents would be entitled to costs as per High Court Rules.

-sd-

**(SANJIV KHANNA)
JUDGE**

-sd-

**(NAVIN CHAWLA)
JUDGE**

October 27th, 2017

ssn/VKR