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IN THE HIGH COURT OF DELHI AT NEW DELHI

Judgment Reserved On 30.05.2019

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Judgment Pronounced On 09.07.2019.

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OMP (I) (COMM) 456/2018

**TRANSSTROY TIRUPATI TIRUTHANI CHENNAI TOLLWAYS
PRIVATE LIMITED** Petitioner

Through Mr. Ramesh Singh, Advocate with Ms.
Bina Gupta & Mr. Kshitij Vaibhav, Advocates.

versus

ALLAHABAD BANK & ANR. Respondents

Through Mr. Sandeep Sethi, Sr. Advocate with
Ms. Ashly Cherion & Ms. Shreya Gad, Advocates
for respondent No. 1.

Mr. Rajiv Kapoor & Mr. Srikant Sharma,
Advocates for respondent No. 2.

CORAM:

HON'BLE MR. JUSTICE RAJIV SHAKDHER

RAJIV SHAKDHER, J:

1. This is a petition under Section 9 of the Arbitration and Conciliation Act, 1996 (in short "1996 Act"). The petitioner i.e. Transstroy Tirupati Tiruthani Chennai Tollways Private Limited (hereafter referred to as 'TTT') has sought the following substantive reliefs in the petition.

“(a) Grant stay of the Notice dated 30.11.2018 and restraint the Respondents from taking any further steps pursuant to the Invitation for Expression of Interest (EOI) for substitution of Concessionaire under Notice dated 30.11.2018;

(b) Pass appropriate orders and directions restraining the Respondents from taking any coercive steps pursuant to the Invitation for Expression of Interest (EOI) for substitution of Concessionaire under Notice dated 30.11.2018;”

2. This petition came up for hearing for the first time on 17.12.2018, when while issuing notice, Respondent No. 1 i.e. Allahabad Bank (hereafter referred to as ‘All. Bank’), was restrained from taking any final decision with regard to substitution of TTT. Pertinently, while issuing notice, it was observed that even according to TTT, out of the total project road length of 124 Kms., only 108 Kms. was completed. Therefore, it was observed that clearly even according to TTT, only a part of the project road length was completed.

2.1. At that point in time, counsel for TTT, *inter alia*, had submitted that Respondent No. 2 i.e. National Highways Authority of India (hereafter referred to as ‘NHAI’), had issued a suspension notice dated 10.10.2018 *qua* the project in issue and that under the Concession Agreement dated 12.07.2010 (hereafter referred to as “CA”), NHAI was required to give 180 days for curing a defect in the project which was extendable by another 90 days. The contention at that point in time made on behalf of TTT was that All. Bank had issued the impugned notice dated 30.11.2018 which was an invitation for Expression of Interest (in short “EOI”) for substituting TTT as the concessionaire in the project.

2.2. Thus, in these circumstances and based on this submission and other submissions, notice in the captioned petition was issued.

2.3. Pursuant to the issuance of the notice, All. Bank has filed its reply. Insofar as NHAI is concerned, its counsel conveyed to the court on 08.03.2019 that it does not wish to file a reply *qua* the captioned petition.

3. I must indicate herein that insofar as disputes between TTT and NHAI are concerned, which arise out of the CA, they are being adjudicated upon and stand already referred to a three-member Arbitral Tribunal. Furthermore, the Arbitral Tribunal, so constituted, in an application moved under Section 17 of the 1996 Act by TTT has stayed, I am told, the order of suspension dated 10.10.2018 as well as the communication dated 23.10.2018 issued by NHAI interdicting TTT's right to collect toll.

4. As a matter of fact, this development i.e. constitution of the Arbitral Tribunal *qua* the disputes arising between TTT and NHAI is the mainstay of TTT's argument in the instant petition — the argument being that since the disputes between TTT and All. Bank are interlinked with the CA, the disputes on merits could be referred to the same Arbitral Tribunal with a direction to deal with the instant Section 9 petition as an application under Section 17 with a caveat that till such time steps in that behalf are taken by Arbitral Tribunal, the interim order passed by this Court on 17.12.2018 would continue to operate. As expected, All. Bank has resisted this suggestion made on behalf of TTT as it is All. Bank's principal contention that though finance was given to TTT with respect to the project *qua* which CA has been executed between TTT and NHAI, the lenders' rights are independent to those of NHAI under the CA.

5. The issue, therefore, which arises for my consideration in this petition is : as to whether or not TTT has made out a case for the continuation of the interim order dated 17.12.2018.

6. In order to adjudicate upon this petition, the following broad facts are required to be noticed.

6.1. TTT and NHAI executed the CA with regard to a road project described as follows:

“...Four Laning of Tirupati- Tiruthani- Chennai Section of NH-205 from Km 274.800 to Km 341.600 in the State of Andhra Pradesh and from Km 0.00 to Km 59.600 in State of Tamil Nadu on Design, Build, Finance, Operate And Transfer (DBFOT) Toll Basis..”

7. The CA gave TTT the exclusive right and license to Design, Build, Finance, Operate and Transfer (in short “DBFOT”) the aforementioned road project. TTT, in order to finance the project, approached a consortium of lenders consisting of All. Bank, Andhra Bank, Bank of Baroda, Bank of Maharashtra, Corporation Bank and India Infrastructure Finance Company Ltd. (hereafter collectively referred to as “lenders”).

7.1. The TTT’s request for advancing a loan was sanctioned. TTT was advanced a sum of Rs. 405 Crores pursuant to a Common Loan Agreement dated 16.12.2010 (hereafter referred to as “CLA”) executed between TTT and All. Bank in its capacity as the lead member of the lender’s consortium (hereafter referred to as “Consortium”). Lenders in order to secure their interest had TTT execute simultaneously, certain security and ancillary documents.

7.2. Besides this, TTT also executed two vital documents which were the Escrow Agreement dated 19.04.2011 (in short “EA”) and the Substitution Agreement dated 21.05.2013 (in short “SA”). Parties to EA and SA were TTT, All. Bank as the lead member of the lenders’ consortium and NHAI.

7.3. It appears that TTT was derelict in its obligation to deposit the toll collections made by it in the designated Escrow Account.

7.4. This resulted in lenders convening a series of Joint Lenders Forum (JLF) meetings to flag the issue with TTT. These meetings evidently were held on 19.07.2016, 30.12.2016, 19.07.2017, 04.10.2017 and 17.11.2018. Besides the lenders convening JLF meetings, written communication in the form of letters was also issued to TTT dated 14.11.2017 and 22.08.2017.

8. It appears that TTT was also guilty of not observing financial discipline which led to a breach of the terms of CLA and other security and ancillary documents executed between TTT and All. Bank.

8.1. Consequently, All. Bank as the lead member of the consortium, wrote to NHAI on 28.02.2018 intimating its decision to recall the loan extended to TTT.

8.2. Simultaneously, a recall notice of even date i.e. 28.02.2018 was served by All. Bank on TTT. Via this notice, TTT was called upon to repay a sum of Rs. 458,41,88,688/- along with accrued interest and other charges till the date of actual payment. In this notice, All. Bank made it clear that the right to recall the loan was being exercised *dehors* other rights which were conferred upon the lenders under the CA and SA.

8.3. It may be relevant to note that according to TTT, just prior to the issuance of recall notice dated 28.02.2018, a meeting was held on 10.02.2018 between the representatives of TTT and those of All. Bank regarding non-deposit of toll collections in the designated Escrow Account. According to TTT, its representatives had indicated at this meeting that due to the change in the scope of work, the amounts collected as toll were expended towards expenditure incurred by TTT and that this issue had given rise to disputes between itself and NHAI. On the other hand, the stand which All. Bank has taken with regard to this meeting is that there has been no

change in the scope of work. For this purpose, it places reliance on NHAI's letter dated 19.12.2018.

9. Continuing with the narrative, on 10.03.2018, TTT triggered Clause 10 of the EA which incorporated the Arbitration Agreement. Via this notice, TTT indicated the name of its nominee-arbitrator. Evidently, All. Bank responded to the aforementioned notice *vide* reply dated 10.04.2018. *Inter alia*, in its reply, All. Bank took the stand that the disputes which had arisen between them would not fall within the ambit of Arbitration Agreement which stood incorporated in the EA.

10. The record shows that All. Bank did not rest with the recall of loan but took two other significant steps. The first step which All. Bank took was to institute an application under Section 7 of the Insolvency and Bankruptcy Code, 2016 (hereafter referred to as "the code"), for initiation of insolvency proceedings against TTT before the National Company Law Tribunal, Hyderabad Bench. This application was instituted on 12.04.2018. Likewise, the second step All. Bank took was to serve a Show Cause Notice dated 25.07.2018 on TTT and its directors to have them declared as "wilful defaulters".

11. While it is not known, as to whether TTT has filed a reply in the NCLT proceedings initiated against it, what is known though is that it responded to the aforementioned Show Cause Notice *vide* a reply dated 14.08.2018.

12. TTT on its part filed a petition under Section 11 of the 1996 Act on 31.08.2018 which is numbered as ARB. P. 661/2018. Arguments in this petition have been heard by me and it is reserved for judgement. NHAI on its part *vide* communication dated 10.10.2018 suspended the rights of TTT

as the concessionaire under the CA in the exercise of powers under Clause 36 of the CA.

12.1. On 13.10.2018, TTT had filed a reply to the aforementioned suspension notice. Within eight (8) days of suspending TTT's rights as a concessionaire, via two communications of even date dated 18.10.2018, NHAI appointed alternate persons/agencies for collection of tolls. While Mr. Dama Madhukar Reddy was appointed for collection of toll with respect to toll plaza situate at Pattariperumbudhur, M/s. Sri Sai Enterprises was appointed for the very same purpose in relation to toll plaza situate at S.V. Puram.

12.2. Thereafter, via notice dated 23.10.2018, NHAI also called upon TTT to handover possession of the project to the aforementioned persons/entities.

13. These actions of NHAI propelled TTT to approach this court by way of a Section 9 petition which was filed on 31.10.2018 and numbered as O.M.P. (I) COMM. 420/2018. By virtue of this petition, TTT sought an injunction on the operation of the aforementioned suspension and possession notice. This petition, however, did not reach fruition as it lacked material particulars. Accordingly, on 12.12.2018, it was disposed of as not pressed with the liberty to file a fresh petition after incorporating necessary averments in the petitions.

14. Against this background, All. Bank on 06.11.2018 conveyed its intention to NHAI that in order to protect the interests of the lenders, it intended to substitute TTT in accordance with the provisions of the SA.

15. It is in this vein that All. Bank issued the impugned notice dated 30.11.2018 inviting EOI so as to appoint a substitute concessionaire in place of TTT.

16. Evidently on 10.12.2018, *qua* the disputes which had arisen between TTT and NHAI, a petition under Section 11 of the 1996 Act was filed which was numbered as ARB. P. 876/2018. This petition came up for hearing before the Court on 11.12.2018 when it was dismissed as withdrawn, as the counsel for NHAI informed the Court that on 07.12.2018, it had already appointed its nominee-arbitrator.

17. It is in the backdrop of the aforesaid circumstances, TTT filed the instant petition.

18. As noticed at the very outset of my narration, on 17.12.2018, when the petition came up for hearing, notice was issued and All. Bank was restrained from taking a final decision with regard to the substitution of TTT as the concessionaire. Consequent thereto, as noticed hereinabove upon the reply being filed by All. Bank, arguments have been heard in the petition.

Submissions of the counsel

19. Arguments on behalf of TTT have been advanced by Mr. Ramesh Singh, instructed by Ms. Bina Gupta while on behalf of All. Bank, submissions have been made by Mr. Sandeep Sethi, Senior Advocate, instructed by Mr. Ashley Cherian and Ms. Shreya Jad, Advocates.

20. The submissions advanced by Mr. Ramesh Singh can be, broadly, paraphrased as follows:

(i) The foundation and/or the basis for issuing the impugned EOI does not subsist for the reason that it was based on suspension notice dated 10.10.2018 issued by NHAI, the operation of which has been stayed by a duly constituted arbitral tribunal *vide* order dated 06.03.2018 on an application under Section 17 filed by TTT. The fact that the impugned EOI

is rooted in Clause 3.3 of the SA emerges upon perusal of Paragraph U of the reply filed by All. Bank.

(ii) The submission, therefore, is that substitution of TTT was sought based on the alleged occurrence of concessionaire's i.e. TTT's default as encapsulated in Clause 3.3 of the SA and not on occurrence of "financial default" as captured in Clause 3.2 of the SA. The latter submission is a submission made orally across the bar which cannot efface the explicit assertion made in Para U of the reply filed on behalf of All. Bank.

(iii) The arbitral tribunal constituted to adjudicate upon the disputes between TTT and NHAI has not only stayed the operation of suspension notice dated 10.10.2018 but also the communication dated 23.10.2018 issued by NHAI, whereby, TTT's right to collect toll under the CA has been superseded. Despite the order of the arbitral tribunal, there has been no compliance, which has resulted in TTT filing a contempt petition (Cont. Cas. (C) 410/2019), in which, notice has been issued.

(iv) Apart from the fact that NHAI's suspension notice dated 10.10.2018 proceeds on the allegation that TTT is in default of the provisions of the CA and not on the basis that it has committed any financial default, All. Bank has not served TTT with any notice of financial default as contemplated in Clause 3.2.1 of the SA. The only notice that All. Bank has served TTT with is the notice for recall of loan dated 28.02.2018 - *inter alia*, on the ground that there is an alleged non-deposit of toll collected by TTT in the designated Escrow Account as per the provisions of the EA. The dispute arising from this recall notice is the subject matter of ARB. P. 661/2018 in

which this court has heard arguments and reserved the matter for rendering a judgment.

(v) Without prejudice to the contentions made hereinabove, the entire basis on which All. Bank alleges financial default, which in turn is pivoted on an alleged failure by TTT to deposit the toll collection made by it in the designated Escrow Account is misconceived for the following reasons:

(v.1) Clause 4 of the EA which, *inter alia*, obliges TTT to deposit toll revenue in the designated Escrow Account has set forth a waterfall mechanism i.e. an order of priority for withdrawal and/or utilization of amounts deposited in the designated Escrow Account. As per Clause 4.1.1 of the EA, the order of precedence for withdrawal and utilisation of amounts is as follows:

- (a) Firstly, for payments of taxes.
- (b) Secondly, for payments relating to the construction of the project highway.
- (c) Thirdly, towards expenses incurred on operation and maintenance (O&M expenses) subject to the ceiling, if any, set forth.
- (d) Fourthly, O&M expenses incurred by NHAI provided that there is a certification in that behalf issued by NHAI to the Escrow Bank.
- (e) Fifthly, for the purpose of concession fee due and payable to NHAI.

- (f) Sixthly, for making a monthly proportionate provision in respect of Debt Service due in an Accounting Year.
- (g) Seventhly, in respect of premium due and payable to NHAI.
- (h) Eighthly, *vis-a-vis* all payments and damages certified by NHAI as due and payable by TTT as per the CA including repayment of revenue shortfall loan.
- (i) Ninth, to provide for proportionate monthly debt service payments due in an Accounting Year in respect of subordinated debt(s).
- (j) Tenth, in respect of any reserve requirements set forth in the Financing Agreements and
- (k) Lastly, to ensure payment of balance amount, if any, in accordance with the instructions of TTT.

(v.1.1) Contrary to the aforementioned waterfall mechanism, the lenders have accepted payments towards loan amounts advanced by them to TTT. Furthermore, despite TTT approaching All. Bank for release of money for defraying O&M expenses, All. Bank has not moved in the matter, contrary to the provisions of Clause 4 of the EA. In this behalf, reference is made to the letters dated 28.04.2015, 09.05.2015 and 02.06.2015.

(v.1.2) In addition, thereto, it was contended that due to delay in handing over land by NHAI and the consequent delay in the commencement of construction of the project, there has been a cost overrun of nearly Rs. 80 Crores. A reference was also made to the fact that the change in scope of

work brought about at the request of NHAI was also a factor which contributed to cost overrun.

(vi) The All. Bank having accepted money contrary to Clause 4 of the EA and hence being *pari delicto* cannot be permitted to allege the breach of the very same provision by TTT. It is in the aforesaid circumstances that TTT was constrained to utilise the toll revenue without depositing the same in the designated Escrow Account. However, the money so collected against toll has been utilised by TTT as per the provisions of Clause 4 of the EA. In this behalf, reliance is placed on the affidavit dated 08.05.2019, and in particular the chart appended at Page 12 of the affidavit; the financial statement of TTT for the period 01.04.2015-31.03.2018 and Paragraphs 6(vi), (ix), (x) of the final audit report submitted by All. Bank.

(vi.1) Based on the chart appended at page 12 of the affidavit dated 08.05.2019, it is contended that not only did TTT utilise the toll revenue in accordance with provisions of Clause 4 of the EA and for the purposes of execution of the project but also ended up infusing additional funds amounting to Rs. 32 Crores to discharge its obligations *qua* the project. Therefore, the stand of All. Bank that TTT has diverted the toll revenue collected by it is *ex-facie* baseless.

(vi.2) Apart from the merits, the balance of convenience is also in favour of TTT on account of the following factors.

- a) TTT has already completed construction of approximately 108 Kms. out of a total road stretch of 124 Kms.
- b) TTT was allowed to collect toll to the extent of 96 Kms of the total project length.

- c) The total cost of the project has escalated from Rs. 578.49 Crores to Rs. 660.73 Crores. The escalation in the project cost has been completely absorbed and financed by TTT. Reliance on this behalf has been placed on Paragraphs 5 and 6(3) of the forensic audit report submitted by All. Bank.
 - d) TTT has undertaken additional works valued at Rs. 98.68 Crores.
 - e) Ever since TTT was allowed to collect toll revenue, it has infused a sum of Rs. 32 Crores over and above the revenue collected by it to meet its obligations under Clause 4 of the EA.
- (vii) In sum, it is argued that the only means available to TTT to collect the money spent on the project is by means of a collection of toll revenue. It was also sought to be brought to the notice of this Court that the agency appointed by lenders at their JLF meeting held on 01.04.2019, has not deposited a sum of Rs. 6,39,94,857/- collected in the form of toll revenue and that this has led the lenders to now appoint another agency to collect toll.

21. On the other hand, on behalf of All. Bank, Mr. Sethi made the following submissions:

- (i) There is no challenge raised by TTT that the outstanding dues today, hover, around Rs. 458 Crores. TTT both in its pleading and via submissions made by its counsel has admitted that it has not deposited monies in the designated Escrow Account, *albeit*, for the reasons such as cost overrun, inability to persuade All. Bank to release monies towards O&M expenses and payments of monies to lenders towards service of debts- assuming

without admitting, these reasons are correct, none of these reasons can obliterate the breach committed by TTT of its obligation to deposit the entire toll revenue in the designated Escrow Account. Therefore, even if it is believed that TTT's grievance as regards the manner in which designated Escrow Account was being operated was valid, it still was not justified in arrogating to itself, the right to decide as to how the toll collected ought to be utilised. Furthermore, in any event, the obligation to service the debt was independent of the obligation placed upon TTT to act in accordance with Clause 4 of the EA.

(ii) The impugned EOI was issued by All. Bank pursuant to rights conferred upon it under Article 36.4 of the CA and not under the provisions of the CLA, the EA and/or the SA. As a matter of fact, All. Bank, which is otherwise empowered to take action to substitute TTT under the provisions of CLA, EA and SA could not do so in view of the interim order dated 17.12.2018 issued by this Court.

(iii) As per the final forensic report dated 28.02.2019 (which spans the period between FY 2014-2015 and FY 2017-2018), total toll collection made by TTT was Rs.128.37 Crores. Out of this sum, TTT deposited in the Escrow Account only a sum of Rs. 51.45 Crores. The balance amount i.e. Rs. 76.91 Crores was not deposited in the designated Escrow Account. As submitted above, TTT's claim is that on account of various difficulties faced by it, the balance sum was not deposited though it was utilised in terms of obligations cast upon it under Clause 4 of the EA. Besides this, TTT has taken the stand that out of the money which was not deposited in Escrow Account, a sum of Rs. 40 Crores was paid to the lenders. Though this assertion is both mischievous and irrelevant as TTT's obligation to repay the

principal amount and interest is not contingent upon toll revenue collections, there would still be an unaccounted and/or diverted amount of Rs. 35 Crores *qua* which TTT cannot escape culpability.

(iv) The stand which TTT took before this Court on 17.12.2018 that All. Bank was required to give a cure notice of 180 days which was extendable by 90 days before substituting TTT was incorrect. The cure notice is required to be issued as per the provisions of Article 36.1 to Article 36.4 of the CA prior to termination under Article 37.1. For the purposes of issuance of suspension notice by NHAI or for carrying out substitution by All. Bank, no such cure notice is required to be given.

(v) As indicated above, All. Bank is empowered to substitute TTT in the exercise of powers contained in the SA as well as under the CLA.

(v)(a) In this behalf, reference was made to Clause 1.1, 3.2 and 3.4 of the SA and Clause 7.1 and 7.2(7) of the CLA.

(vi) Insofar as the provisions of SA are concerned, it was submitted that upon notice of financial default being issued which points in the direction of continuous default in the service of debt for a period of 3 months, All. Bank was entitled to substitute TTT with a nominated company. Likewise, upon the event of default occurring as defined in Clause 7.1 read with Clause 7.2 (7) of CLA, All. Bank is entitled to substitute TTT with another concessionaire. In this case, the event of default has occurred as the debt has not been serviced.

(vii) Furthermore, one of the covenants of CLA is that all receivables of the project are to be deposited in the designated Escrow Account and that lenders have a first charge among others on the monies deposited in the designated Escrow Account.

(vii)(a) Reliance on this behalf was placed on Clause 3, 3.1 (a) (c), 3.2 and 3.3 of the CLA.

(vii)(b) In support of the submission that the proceeds have to be deposited in the designated Escrow Account, reference was also made to Clause 3.1 of the EA.

(viii) It was submitted that All. Bank was entitled to substitute TTT as a concessionaire in terms of Article 36.4 of the CA at any time during the period of suspension by NHAI of the concessionaire.

(ix) The recall notice dated 28.02.2018 was served on TTT by All. Bank as it had failed to repay the principal amount and service interest in terms of financing agreements which included CLA, security and other ancillary documents. In the recall notice, it is recorded that TTT's account had been declared a Non-Performing Asset (NPA) due to its failure to repay the loan amount along with interest. It was in this background that the loan was recalled and TTT was called upon to repay a sum of Rs. 458,41,88,686 (including interest). The recall of loan was in addition to its right of substitution, as indicated above under the CA, SA and financing agreements.

(x) The forensic audit report submitted by PVRN & Co Chartered Accountants dated 28.02.2019 records that TTT is guilty of diversion of monies from the designated Escrow Account. According to this report, monies diverted from the designated Escrow Account have been funnelled to TTT's holding company. Furthermore, despite TTT, in its financial statements for FY 2015-2016 and FY 2017-2018 showing an EBITDA as well as cash profits, it chose not to service its debt and interest but instead used up the toll revenue contrary to the provisions of the EA. Reliance on this behalf was placed on the contents of the forensic audit report.

(xi) Lastly, it was contended that because TTT did not service its debt despite the availability of funds, a Show Cause Notice dated 25.07.2018 was served upon TTT and its directors as to why they should not be declared wilful defaulters.

(xii) In sum, Mr. Sethi contended, for all the reasons set forth hereinabove, it was a fit case in which this Court should dismiss the captioned petition and vacate the interim order dated 17.12.2018.

Reasons:

22. Having heard the learned counsel for parties and perused the material, what emerges from the record *qua* which I find no contestation is as follows:

(i) All. Bank had issued a recall notice on 28.02.2018 in which it called upon TTT to repay a sum of Rs.458,41,88,686/-.

(ii) The recall notice was preceded by a meeting, which, even according to TTT, was held on 10.2.2018 between its representatives and those of All. Bank wherein, *inter alia*, the issue regarding failure to deposit the toll revenue in designated Escrow Account was discussed. It is TTT's say that at this meeting, it gave its reasons for not depositing the toll revenue in the designated Escrow Account. The reasons furnished by TTT pertained to change in scope of work which according to it entailed expenses, appropriation of money by All. Bank towards loan extended to it and failure on the part of All. Bank to release funds for O&M expenses.

(iii) Concededly, between March 2015 - March 2018, TTT had collected toll revenue equivalent to Rs. 128.37 Crores. Over this period of 37 months, TTT deposited Rs. 53.28 Crores in the designated Escrow Account and according to it, paid Rs. 40.14 Crores to the lenders for servicing its debt. These assertions have been made by TTT in Paragraph 17 of its petition.

Thus clearly, there was a shortfall, if not of more, a sum of Rs. 34.95 crores during the aforesaid period in the deposit made in the designated Escrow Account. TTT has sought to get over this admitted breach by making a further assertion in the very same paragraph that a sum of Rs. 58.89 Crores was expended by it towards construction and O&M expenses.

(iv) Upon disputes having arisen between TTT and NHAI, NHAI issued a suspension notice dated 10.10.2018 and a notice for handing over possession on 23.10.2018. These disputes have been referred to the Arbitral Tribunal. The Arbitral Tribunal *vide* order dated 06.03.2019 has stayed the operation of suspension notice and the communication dated 23.11.2018 whereby TTT was restrained from collecting toll revenue. TTT's grievance is that there has been no compliance of this order and therefore, it has instituted a contempt petition (Cont. Cas. (C) 410/2019) in which notice has been issued which is coming up before this Court on 22.08.2019.

(v) NHAI has already appointed agencies to takeover toll collection at two places i.e. Pattariperumbudhur and S.V. Puram. The letters dated 18.10.2018 issued by NHAI in this behalf bear out this position.

23. Given the aforesaid facts, the argument advanced on behalf of TTT is that the impugned EOI has been issued by All. Bank pursuant to NHAI's suspension notice dated 10.10.2018 and since the suspension notice is a subject matter of adjudication before an arbitral tribunal, no further steps can be taken for substituting TTT as a concessionaire. In support of this submission, reference is made to assertion contained in paragraph U of the reply filed by All. Bank. It is submitted that the impugned EOI has been issued in terms of Clause 3.3 of the SA which provides for substitution upon occurrence of concessionaire's default.

23.1. All. Bank, on the other hand, has made out a case of financial default *qua* which no notice has been issued and in any event that circumstance falls in Clause 3.1 of the SA. Furthermore, as noted above, TTT's stand is that, in respect of recall notice dated 28.02.2018, arbitration has been triggered by taking recourse to Clause 10 of the EA. In this behalf, as noticed above, reference was made to the Section 11 petition filed by TTT numbered as ARB. P. 661/2018.

24. In my opinion, the arguments advanced by Mr. Ramesh Singh on behalf of TTT are untenable. The reason for the same is this: while the CA has been executed between TTT and NHAI, the CLA has been executed between TTT and the lenders. Upon the petitioner being appointed as the concessionaire for the project, it required finance and therefore, it executed the CLA and other security and ancillary documents with the lenders. Thus, as correctly argued, All. Banks' rights under the CLA, the security and ancillary documents collectively known as financing instruments are independent of the rights that NHAI has under the CA *qua* TTT.

24.1. The suspension notice issued by NHAI does not emasculate All. Bank of its rights under CLA or SA or even the EA.

24.2. The impugned EOI is only a step towards a possible substitution of TTT in the exercise of its rights under CLA and SA. Article 7.1 of CLA describes the events of default. Clauses (a) and (b) of Article 7.1¹ speak

¹ **ARTICLE- VII**

EVENTS OF DEFAULT AND REMEDIES

7.1 EVENTS OF DEFAULTS

For the purpose of this Agreement, each of the following shall constitute an Event of Default:

a) Default in Payment of Principal Sums of the Loans

Default has occurred in the payment of principal sums of the Loans on the Due Dates.

b) Default in Payment of Interest etc.

Default has been committed by the Borrower in payment of any installment of interest on the Loans and/or payment of any amount payable pursuant to this Agreement or a Security Document on respective Due

about default in payment of the principal sum of the loan amount or default in payment of interest as an event of default. Article 7.2² of the CLA adverts to consequences of default.

24.3. This Article, *inter alia*, states that the lenders shall have the right without prejudice to any other right or action that they may be entitled to under the applicable law or the CA to exercise any one or more rights or remedies provided therein subject to the written consent of NHAI. Under Article 7, the lenders have been given, *albeit*, without consent of borrower i.e. TTT and notwithstanding anything contained to the contrary in any project agreement, right to substitute not only themselves but any one of them and/or their nominee(s) or their designees under the project agreement.

Dates or on being demanded by the Lenders, as the case may be.

² 7.2 CONSEQUENCES OF DEFAULT

If one or more of Events of Default occur(s), the Lenders shall have the right, without prejudice to any other right or action that the Lenders may be entitled to under Applicable Law or this Agreement, to exercise any or all of the following rights or remedies, subject to prior written consent of NHAI:

- i) suspend or cancel the Loans, which the Borrower has not withdrawn prior to the occurrence of the Event of Default;
- ii) demand all the payment, repayment or reimbursement, as the case may be, by issuing a notice in writing to the Borrower and the Borrower pay all such amount immediately as demanded in such notice;
- iii) enforce all or any part of the Security Interest created in terms of this Agreement;
- iv) exercise any and all rights specified in the Security Documents and other Finance Documents;
- v) enter upon and take possession of the assets of the Borrower charged to the Lenders;
- vi) transfer by way of lease, leave and license and/or sale the assets of the Borrower charged to the Lenders;
- vii) without any consent of the Borrower and notwithstanding anything to the contrary contained in any Project Agreement, substitute themselves or any one of them or their nominees or their designee for the Borrower under any or all of the Project Agreements;
- viii) exercise any and all rights specified in the Security Documents and other Transaction Documents including, without limitation, to accelerate the obligations of the Shareholder/ Sponsor(s) to make equity and other contributions and to enforce all of the Security created pursuant to the Security Documents,
- ix) pursue any other legal remedy or right provided under Jaw including but not limited to taking appropriate action under the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002.

It is clarified that the rights and remedies of the Lenders herein are cumulative and are in addition to any rights and remedies provided by Applicable law.

Provided that the rights of the Lenders under this Article shall be subject to the provisions as contained in the Concession Agreement, Substitution Agreement and Escrow Agreement.

24.4. Likewise, Clause 3 of the SA provides for substitution of the concessionaire. Clause 3.1.1 of the SA³ provides that pursuant to rights, title, interest assigned under Clause 2.1 (which is the right which the concessionaire has assigned in favour of lenders by way of security in respect of finance made over to it by senior lenders under the financing agreements), lenders are entitled to substitute the concessionaire by the nominated agencies under provisions of CA and SA.

24.5. Clause 3.1.2 speaks of the agreement by NHAI to substitute the concessionaire by making an endorsement on CA in favour of the nominated agency selected by the lenders in accordance with the provisions of SA.

24.6. In other words, if lenders were to take a decision with regard to substitution of the concessionaire, authority i.e. NHAI can have no objection. Clause 3.2 and various sub-clauses framed thereunder speak about substitution on the occurrence of financial default. To trigger this clause, the lenders are required to issue a notice of financial default (See Clause 3.2.1) and upon issuance of notice of financial default, the lenders without prejudice to any of its rights and remedies under SA or the financial agreements, are entitled to substitute the concessionaire via nominated agencies. Under Clause 3.3, the lenders can call upon authority (i.e. NHAI) to suspend the rights of concessionaire and undertake the operation and maintenance of the project highway in accordance with provisions of Article 36 of CA and upon such notice being issued, the authority is required to

³ 3. SUBSTITUTION OF THE CONCESSIONAIRE

3.1 Rights of substitution

3.1.1 Pursuant to the rights, title and interest assigned under Clause 2.1, the lenders representative shall be entitled to substitute the Concessionaire by a Nominated Company under and in accordance with the provisions of this Agreement and the Concession Agreement.

undertake suspension under and in accordance with the provisions of CA. This suspension can, however, be revoked.

24.7. Under Clause 3.3, All. Bank has been conferred with the right to substitute the concessionaire on the occurrence of concessionaires' default. This is a right given to authority (i.e. NHAI) to give notice to the lenders of its intention to issue a termination notice with a right conferred on the lenders to make a representation. In case the lenders were to state in its representation to the authority that within 15 days they intend to substitute the concessionaire by a nominated company, the Lenders' Representative shall be entitled to undertake and complete substitution of the concessionaire by a nominated company. The remaining Clause 3.4 and the sub-clauses thereunder give the procedure for substitution.

24.8. Therefore, as noted above, what comes through is both under CLA and SA, All. Bank has a right of substitution. Under the SA, as noticed above, All. Bank could seek substitution on the occurrence of financial default or also on the occurrence of concessionaire's default. These rights are not linked with the right of NHAI to issue a suspension notice under CA. That right flows under Clause 37.2 of the CA.

24.9. The emphasis placed by Mr. Ramesh Singh on assertions made in paragraph U of All. Bank's reply, to my mind, does not in any way impact the right of All. Bank to issue the impugned EOI.

25. The fact that TTT has purported grievances with regard to Clause 4 of the EA not being operated in a manner stipulated therein, as rightly contended by Mr. Sethi, could not have given the right to TTT to re-route the funds in a manner of its own choosing.

25.1. As noticed above, even according to TTT, there is a short deposit of approximately Rs. 35 Crores in the Escrow Account during March 2015-March 2018. The explanation given that approximately Rs. 58 crores were expended towards construction and O&M expenses cannot, in my view, be an answer to the breach of obligations under EA.

26. Thus, given the fact that All. Bank has a huge exposure of nearly Rs. 458 crores and that there has been admittedly diversion of toll revenue by TTT, apart from anything else is a good ground for me to come to a conclusion that interim order dated 17.12.2018 deserves to be vacated. An interim injunction cannot be continued to protect indefensible breach of contractual obligation. The malaise of NPAs has affected the performance of banks in both the public and private sector. Courts, therefore, cannot be seen to impede enforcement of contractual provisions by creditor-banks unless a clear case of abuse of power, unreasonableness, and irrationality is brought forth. No such case is made in the instant matter. Furthermore, if nothing else, the balance of convenience is clearly in favour of All. Bank.

27. Consequently, the captioned petition is dismissed. Interim order dated 17.12.2018 shall stand vacated.

(RAJIV SHAKDHER)
JUDGE

JULY 9, 2019
AJ