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IN THE HIGH COURT OF DELHI AT NEW DELHI

Reserved on: 7th August, 2020

Pronounced on: 4th January, 2021

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O.M.P. (COMM) 442/2020 & I.A. 6166/2020

NATIONAL HIGHWAYS AUTHORITY OF INDIA

..... Petitioner

Through: Ms. Maninder Acharya,
Sr. Adv. with Mr. Viplov
Acharya, Mr. Sumit Gupta and
Ms. Neetika Sharma, Advs.

versus

PUNJAB NATIONAL BANK & ANR. Respondents

Through: Ms. Ginny Rautray,
Ms. Yashika Sarvaria and Ms.
Mitansha Chopra, Advs. for R-
1, Mr. Dharmendra Rautray and
Ms. Tara Shahani, Advs. for R-
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CORAM:

HON'BLE MR. JUSTICE C. HARI SHANKAR

JUDGMENT

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04.01.2021

(Video-Conferencing)

1. The National Highways Authority of India (NHAI) seeks, by means of this petition, under Section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as “the 1996 Act”), to challenge the Award, dated 24th March, 2020, of the learned Arbitral

Tribunal. The extent, to which NHAI is aggrieved by the impugned Award, would become apparent from the recital that follows.

Facts

2. NHAI invited bids, for construction, operation and maintenance of the Jetpur-Somnath section of NH-8D, spanning 127 km, in the state of Gujarat, on Design, Build, Finance, Operate and Transfer (DBFOT) basis. The bid of a consortium, comprising IDFC Projects Ltd and PLUS Expressways Berhad, of which IDFC Projects Ltd was the lead member, was accepted, and a letter of award, dated 13th September, 2010, was issued in favour of the said consortium. The consortium, subsequently, incorporated a Special Purpose Vehicle, i.e. Jetpur Somnath Tollways Pvt. Ltd. (Respondent No 2 herein, and referred to, hereinafter, as “JST”), for executing the contract.

3. A Concession Agreement, dated 7th February, 2011, followed, between JST and NHAI. Article 3.1 of the Concession Agreement granted the exclusive right, licence and authority to construct, operate and maintain the Project Highway, for 30 years from the Appointed Date, to JST. Subsequently, the Appointed Date was fixed, with consent of all parties, as 31st March, 2012, as recorded in the Minutes of the Meeting held, among the parties, on 27th March, 2012. Among the covenants of the Concession Agreement were the following:

(i) Article 14 dealt with the “Completion Certificate”.

Clause 14.2 stipulated that, upon completion of the construction

works, and on tests, carried out thereon, being successful, the Independent Engineer would issue, to the Concessionaire and NHAI, a Completion Certificate, in the form set forth in Schedule J to the Concession Agreement. Clause 14.3 provided for issuance of a Provisional Certificate, and read, with its sub-Clauses, thus:

“14.3 Provisional Certificate

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

14.3.2 The Parties hereto expressly agree that Provisional Certificate under this Clause 14.3 may, upon request of the Concessionaire to this effect, be issued for operating part of the Project Highway, if at least 75% (seventy-five percent) of the total length of the Project Highway has been completed. Upon the issue of such Provisional Certificate, the provisions of Article 15 shall apply to such completed part.”

The Punch List items were required to be completed in terms of Clause 14.4, which read as under:

“14.4 Completion of Punch List items

14.4.1 All items in the Punch List shall be completed by the Concessionaire within 90 (ninety) days of the date of issue of the Provisional Certificate and for any delay thereafter, other than for reasons solely attributable to the Authority or due to Force Majeure, the Authority shall be entitled to recover Damages from the Concessionaire to be calculated and paid for each day of delay until all items are completed, at the lower of (a) 0.1% (zero point one percent) of the Performance Security, and (b) 0.2% (zero point two percent) of the cost of completing such items as estimated by the Independent Engineer. Subject to payment of such Damages, the concessionaire shall be entitled to a further period not exceeding 120 (one hundred and twenty) days for completion of the Punch List items. For the avoidance of doubt, it is agreed that if completion of any item is delayed for reasons solely attributable to the Authority or due to Force Majeure, the completion date thereof shall be determined by the Independent Engineer in accordance with Good Industry Practice, and such completion date shall be deemed to be the date of issue of the Provisional Certificate for the purposes of Damages, if any, payable for such item under this Clause 14.4.1.

14.4.2 Upon completion of all Punch List items, the Independent Engineer shall issue the Completion Certificate. Failure of the Concessionaire to complete all the Punch List items within the time set forth in Clause 14.4.1 for any reason, other than conditions constituting Force Majeure or for reasons solely attributable to the Authority, shall entitle the Authority to terminate this Agreement.”

(ii) Article 26 dealt with “Concession Fee”. Clause 26.1, thereunder, required JST to pay, to NHAI, a concession fee of Re. 1 per annum, along with the premium specified in Clause 26.2. Clause 26.2 read thus:

“26.2 Additional Concession Fee

26.2.1 Without prejudice to the provisions of Clause 26.1, the Concessionaire agrees to pay to the Authority, on the COD Date, a Premium in the form of an additional concession fee equal to ₹ 22.71 crore (*Rupees Twenty Two Crore and Seventy One Lakhs Only*) as due to the authority during that year, due and payable for the period remaining in that year; and for each subsequent year of the Concession Period, the premium shall be determined by increasing the amount of Premium in the respective year by an additional 5% (five percent) as compared to the immediately preceding year. For the avoidance of doubt, the Premium for all subsequent years shall be determined by increasing the amount of premium by 5% as compared to the immediately preceding year.

For avoidance of doubt it is clarified that the term ‘Premium’ as referred to in para above shall be as applicable for one financial year. In accordance with and in compliance with the terms of this agreement, if payment of such ‘Premium’ is due and payable only for part of such financial year, then only pro-rata payments @1/12th of such premium shall be payable for each month of such part financial year for which such Premium payments is due as payable. For the purpose of assessing the amount due for payment on such payment of Premium, part of a month shall be deemed to be a full month. In such circumstances the subsequent year as referred to in para above, for the purpose of 5% annual escalation, shall fall to commence on 1st of April of the immediately succeeding financial year.

26.2.2 The Premium payable under Clause 26.2.1 shall be deemed to be part of the Concession Fee for the purposes of this Agreement.”

(iii) Article 37 of the Concession Agreement dealt with the termination thereof. Clause 37.1, thereunder, dealt with termination for default on the part of the concessionaire (i.e. JST), and sub-clause 37.1.1 enumerated the categories of defaults, the commission of which by the concessionaire, or omission, on the part of the concessionaire, to cure the defaults within the cure period, would deem the concessionaire to be in default of the Concession Agreement. Sub-clause (f) covered non-completion of the Punch List items within the period set forth in Clause 14.4.1. Sub-clause 37.1.2 entitled NHAI, on the occurrence of such a Concessionaire Default, to terminate the Concession Agreement, by issuance of a Termination Notice to JST, subject to 15 days' advance communication of such intention to JST, so as to enable JST to represent thereagainst. Clause 37.1.3 required the Senior Lenders, funding JST, to be intimated of such intention, and read thus:

“37.1.3 The Authority shall, if there be Senior Lenders, send a copy of its notice of Intention to issue a Termination Notice referred to in Clause 37.1.2 to inform the Lenders Representative and grant 15 (fifteen) days to the Lenders' Representative, for making a representation on behalf of the Senior Lenders stating the intention to substitute the Concessionaire in accordance with the Substitution Agreement. In the event the Authority receives such representation on behalf of Senior Lenders, it shall, in its discretion, either withhold Termination for a period not exceeding 180 (one hundred and eighty) days from the date of such representation or exercise its right of Suspension, as the case may be, for enabling the Lenders' Representative to exercise the Senior Lenders' Right of substitution in accordance with the Substitution Agreement:

Provided that the Lenders' Representative may, instead of exercising the Senior Lenders' right of substitution, procure that the default specified in the notice is cured within the aforesaid period of 180 (one hundred and eighty) days, and upon such curing thereof, the Authority shall withdraw its notice referred to above and restore all the rights of the Concessionaire :

Provided further that upon written request from the Lenders' Representative and the Concessionaire, the Authority shall extend the aforesaid period of 180 (one hundred and eighty) days by such further period not exceeding 90 (ninety) days, as the Authority may deem appropriate."

Clause 37.2 dealt with termination for "Authority Default", i.e. any default on the part of NHAI.

(iv) Clause 37.3 dealt with "Termination Payment". Sub-clauses 37.3.1, 37.3.2 and 37.3.3, thereunder, merit reproduction, thus:

"37.3.1 Upon Termination on account of a Concessionaire Default during the Operation, 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 the rate equal to 3% (three percent) 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.”

4. The Project was financed by a consortium of lenders, of which PNB, Respondent No. 1 herein, was the lead lender. Accordingly, on 16th August, 2011, a tripartite Escrow Agreement was executed among NHAI, JST and PNB. Clauses 3.2 and 4.2 of the Escrow Agreement read 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 and 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 the 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) the retention and payments arising out of, or in relation to, the 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 be undertaken only after the Vesting Certificate has been issued by the Authority.”

(Emphasis supplied)

5. The Concession Agreement also required JST to construct 19.8 km of the Junagarh Bypass. Acquisition of land, for the said purpose, was *sub judice*, and was cleared by the Supreme Court, *vide* a judgement rendered in March, 2015. Following thereupon, JST submitted a work program to NHAI, whereunder work on the Junagarh Bypass was to start on 1st October 2015, and was to be completed within 540 days, i.e. by 9th May, 2017. Accordingly, on 4th May, 2015, the Independent Engineer of NHAI issued a Provisional Completion Certificate, including the Junagarh bypass in the Punch List.

6. Article 15 of the Concession Agreement required the Highway to be put to commercial use on 4th May, 2015. NHAI alleges that 75% of the land, required by JST, was provided by NHAI within a reasonable time and that, on 17th June, 2016, NHAI wrote to JST, informing that the entire land required was available.

7. It is alleged that JST delayed construction of the Junagarh Bypass, which amounted to an Event of Default within the meaning of Clause 37.1.1(f) of the Concession Agreement. Further, it is alleged that JST defaulted in paying premium, @ ₹ 1,89,25,000/- per month,

as required by Clause 26.2.1 of the Concession Agreement, during the period from May, 2015 (as the Provisional Completion Certificate was issued on 4th May, 2015) till March 2016. During this period, it was alleged that there was a default of payment of premium, by JST, to the extent of ₹ 36,14,675/-. According to NHAI, JST was required to pay the said amount, along with the premium for the month of March 2016 and interest for the delay in payment of premium. Based on this premise, NHAI addressed two cure period notices, dated 7th March, 2016 and 21st April, 2016 to JST, granting JST 60 days, *vide* each notice, to remedy the alleged defaults. Failure, on the part of JST, to do so, it is alleged, constituted “Concessionaire Default”, within the meaning of clause (k) of sub-clause 37.1.1 of the Concession Agreement, which covered “breach of any of the Project Agreements by JST”, which “caused a Material Adverse Effect”. According to NHAI, JST had breached the Concession Agreement by (i) failing to complete the Punch List items even after expiry of 60 days from the Cure Period notices, (ii) failing to pay Premium of ₹ 1,89,25,000/-, with effect from March, 2016, thereby violating Clause 26.2.1 of the Concession Agreement and (iii) failing to comply with its Maintenance Obligations under Articles 17 and 18 of the Concession Agreement. These defaults, allege NHAI, constitute “Events of Default”, under Clause 37.1.1 of the Concession Agreement.

8. JST, for its part, also issued a 90 day Cure Period Notice, to NHAI, under Article 37.2.1 of the Concession Agreement, alleging defaults on the part of NHAI, on 13th May, 2016.

9. On 10th August, 2016, NHAI again wrote to JST, evincing its intention to terminate the project. As required by Clause 37.1.3 of the Concession Agreement, a copy of the aforesaid Termination Notice was also sent to the consortium of Senior Lenders, which was headed by PNB, in accordance with Clause 37.1.3 of the Concession Agreement, so as to give an opportunity, to the Senior Lenders, to substitute JST with another Concessionaire. However, the Senior Lenders, including PNB, did not take any step to substitute JST.

10. On failure, on the part of JST, to remedy the aforesaid defaults, and on the part of the Senior Lenders, led by PNB, to substitute JST, NHAI terminated the Concession Agreement, *vide* Termination Notice dated 10th November, 2016.

11. JST responded *vide* a counter-Termination Notice, dated 17th November, 2016, also seeking to terminate the Concession Agreement. Various allegations, against NHAI, were levelled in the said Termination Notice.

12. Consequent to termination of the Concession Agreement, by it, allegedly for default of JST, NHAI claims that it had already deposited, in the Escrow Account, ₹ 222.03 crores, and that the remaining amount of Termination Payment, to be paid, was only 6.14 crores, which NHAI was ready and willing to pay.

13. PNB and JST, however, maintained that the Termination Payment, by NHAI, in the Escrow Account, was not in accordance

with Clause 37.3 of the Concession Agreement. OMP (I) (Comm) 221/2017, and OMP (I) (Comm) 227/2017 were, in the circumstances, preferred, before this Court, by JST and PNB, respectively. JST contended that NHAI was required to pay a further amount of ₹ 359.19 crores into the Escrow Account, whereas PNB maintained that NHAI had to pay a further amount of ₹ 374.51 crores into the Escrow Account, towards Termination Payment. JST prayed for a direction to NHAI to deposit the said remainder of the Termination Payment, whereas PNB prayed, additionally, that the lenders, including PNB, be permitted to withdraw the Termination Payment, after the default of ₹ 374.51 crores was made up by NHAI.

14. Both the aforesaid petitions, i.e. OMP (I) (Comm) 221/2017 and OMP (I) (Comm) 227/2017, were disposed of, by a learned Single Judge of this Court, by a detailed and well considered judgement, on 31st July, 2017. It is not necessary to enter into the specifics of the findings of the learned Single Judge, as the matter travelled, thereafter, to the Supreme Court, which directed the arbitral proceedings to proceed uninfluenced by the said findings. Suffice it to state that the learned Single Judge held that, irrespective of whether the termination of the Concession Agreement was on account of default of NHAI, or of JST – which was a matter which would be adjudicated in the arbitral proceedings – NHAI was, in any event, bound to pay, into the Escrow Account, by way of Termination Payment, at least 90% of the “Debt Due”. The “Debt Due” being ₹ 640 crores (even as per the Concession Agreement), NHAI, held the learned Single Judge, was bound to pay at least ₹ 576 crores,

constituting 90% thereof. The learned Single Judge held that NHAI was not entitled to adjust, from the said payment, any amount allegedly due to it, and that it could only recover any such amount by raising a claim in the arbitral proceedings. NHAI, held the learned Single Judge, was bound, in the first instance, to deposit 90% of the Debt Due, thereafter to raise a dispute claiming the amounts allegedly payable by JST to it, and proceed to arbitration to secure its claim. As an amount of ₹ 222.03 crores was already deposited by NHAI in the Escrow account, the learned Single Judge disposed of the OMPs with the following directions to NHAI, PNB and JST (which, in the judgement of the learned Single Judge, is referred to as “JETPUR”):

“(i) JETPUR is directed to furnish an unconditional and irrevocable cap 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.”*

(Emphasis supplied)

15. At this juncture, it may be noted that the basic controversy, before me, relates to the interpretation of directions (iii) to (v) of the judgement of the learned Single Judge *supra*, specifically to the interpretation of the expression “final award of (or by) the Arbitral Tribunal”. This is because two arbitral proceedings came to be initiated, both connected, one way or the other, to the aforesaid Concession Agreement and Escrow Agreement. One has been concluded, by the passing of the impugned Award, whereas the other is still continuing. The impugned Award has directed return of the Bank Guarantee furnished by JST, to it, on the ground that the arbitral proceedings stood concluded. NHAI contends that the afore-extracted directions of the learned Single Judge required the Bank Guarantee to be kept alive till the conclusion of the presently pending arbitral proceedings. PNB and JST, *per contra*, contend that the “arbitral proceedings”, to which the afore-extracted directions of the learned Single Judge refer, are the arbitral proceedings which stand concluded by the impugned Award and that, therefore, the learned Arbitral Tribunal was justified in directing release of the Bank Guarantee. Much, therefore, turns on what the learned Single Judge intended to convey, when he referred to the “making of the final award by the Arbitral Tribunal”. This direction has not been disturbed, though the matter was carried to the Supreme Court. To that extent, therefore, it would be necessary to appreciate the true import of the directions issued by the learned Single Judge – but at the appropriate stage.

16. NHAI challenged the aforesaid judgement, dated 31st May, 2017, of the learned Single Judge, before the Division Bench of this Court, by way of FAO (OS) 165/2017 and FAO (OS) 166/2017.

17. Both these FAOs came to be dismissed, by the Division Bench of this Court, *vide* judgement dated 27th October, 2017. NHAI carried the matter, further, to the Supreme Court by way of SLP (C) 35087/2017, which was disposed of, *vide* order dated 5th January, 2018, with the following directions:

“(i) The finding by the High Court with regard to encashment of bank guarantee is affirmed.

(ii) The petitioner shall pay a sum of Rs. 348.604 crores within a span of six weeks from today.

(iii) If the bank seeks arbitration and the petitioner seeks arbitration against the Bank, the same shall be arbitrated upon.

(iv) The amount shall be kept in the Escrow Account as directed by the High Court.

(v) Any finding recorded by the learned Single Judge or the Division Bench on the merits of the claim shall not be relied upon in the arbitration proceedings.”

(Emphasis supplied)

18. On 29th January, 2018, NHAI deposited ₹ 341,63,19,200/- (net of TDS) in the Escrow Account, by way of compliance with the directions of the Supreme Court.

Arbitral Proceedings

19. On 17th July, 2017, during the pendency of FAO (OS) 165/2017 and FAO (OS) 166/2017 before the Division Bench of this Court, JST invoked arbitration, for resolution of its disputes with NHAI, arising

from the Concession Agreement, under Clause 44.3 of the General Conditions of Contract, which constituted a part thereof. The said arbitral proceedings continue to remain pending before a learned Arbitral Tribunal comprising three members. The composition of the said learned Arbitral Tribunal is different from the composition of the learned Arbitral Tribunal which has passed the presently impugned award, as there was no consensus, between the parties, to both arbitrations being decided by the same learned Arbitral Tribunal.

20. The arbitral proceedings, from which the present petition emanates, were initiated by notice invoking arbitration issued by PNB on 28th August, 2017, under Clause 10.1 of the Escrow Agreement and Clause 8.1 of the Substitution Agreement. PNB was, therefore, the claimant before the learned Arbitral Tribunal, whereas NHAI and JST were Respondents Nos 1 and 2.

21. For the sake of convenience, the arbitration initiated by notice dated 17th July, 2017, of JST, would be referred to, hereinafter, as “the first arbitration”, or the “first arbitral proceedings”, whereas the arbitration initiated by notice dated 28th August, 2017 of PNB would be referred to as “the present arbitration”, or “the present arbitral proceedings”.

22. Consequent to PNB, NHAI and JST appointing their respective Arbitrators, the learned Arbitral Tribunal, thus constituted, entered into the reference on 12th March, 2018.

23. During the pendency of the present arbitral proceedings, JST, on 30th June, 2018, paid, to PNB, the balance 10% of the “Debt Due”. Further, on 10th August, 2018, JST submitted a Bank Guarantee, to NHAI, for ₹ 354.74 crores. The said Bank Guarantee stands extended by JST. The impugned Award, of the learned Arbitral Tribunal, directs NHAI to return this Bank Guarantee to JST. NHAI is aggrieved thereby. As such, it is this Bank Guarantee which constitutes the fulcrum of the controversy in the present proceedings.

24. PNB, vide its Statement of Claim, prayed for the learned Arbitral Tribunal to

- (i) declare that PNB was entitled to be paid 100% of the Debt Due, under Clause 37.3.2 of the Concession Agreement, “pursuant to an award passed in favour of” JST in the 1st arbitral proceedings, pending before a different Arbitral Tribunal (as already noted hereinabove),
- (ii) direct NHAI, “upon an order passed in favour of (JST) in the aforesaid arbitration proceeding”, to deposit into Escrow Account the 100% Debt Due in accordance with Clause 3.2 of the Escrow Agreement, and
- (iii) direct NHAI to pay pre-arbitration, *pendente lite* and future interest, till the date of realisation, for the delay in payment of 100% Debt Due.

25. At a bare glance, it is apparent that the reliefs, claimed by PNB in the present arbitral proceedings, were conditional on the outcome of the first arbitral proceedings. What, essentially, PNB sought, in the

present arbitration, was to secure its entitlement to payment, *in the event of JST succeeding in the first arbitral proceedings.*

26. As against this, NHAI, in its Statement of Defence, filed in the present arbitration, prayed that PNB be held to be disentitled to any relief, that its claims be dismissed, and that the amount of ₹ 3,48,60,40,000/–, deposited by NHAI in the Escrow Account, be reimbursed to it.

27. JST filed its Statement of Defence, along with a counter-claim, seeking an award, against NHAI, for all arbitration costs, legal fees, venue costs and other expenses, together with interest.

28. In the present arbitration, JST, on 9th January, 2019, moved an application, praying for an interim award, *inter alia* directing NHAI to (i) pay 100% of the Debt Due, of ₹ 1,21,76,43,327/–, along with interest on the 10% of Debt Due paid by JST on 28th June, 2018 and 30th June, 2018 and (ii) release the Bank Guarantee, dated 10th August, 2017, submitted by JST for an amount of ₹ 348.604 crores.

29. PNB, *vide* application dated 11th January, 2019, amended its Statement of Claim, for a declaration, by the learned Arbitral Tribunal, that NHAI was liable to pay 90% of the Debt Due towards Termination Payment under Clause 37.3.1 of the Concession Agreement, which stood secured by Bank Guarantee furnished by JST in terms of the directions contained in the judgement dated 27th October, 2017, of the Division Bench of this Court in FAO (OS)

165/2017 and FAO (OS) 166/2017, and the order, dated 5th January, 2018, of the Supreme Court in SLP(C) 35087/2017. The objection, by NHAI, to the aforesaid amendment, on the ground that the amended prayer was beyond the scope and ambit of the present arbitration, was dismissed, by the learned Arbitral Tribunal which went on to frame the following additional issue, consequent on the said amendment:

“Whether the Claimant is entitled and Respondent No. 1/NHAI is liable to pay 90% of the Debt Due towards Termination Payment in respect of which the Claimant has received payment pursuant to a Bank Guarantee submitted by Respondent No 2/JSTPL and consequential reliefs.”

The Award, the Challenge and the Analysis thereof

30. The learned Arbitral Tribunal went on to decide the claims, of PNB, thus.

31.1 Re. Claim (a)

PNB sought, by this claim, a declaration, from the learned Tribunal that, consequent to the possible award, in the first arbitration, being in favour of JST, PNB would be entitled to be paid 100% of the Debt Due. Noting the fact that, in any case, PNB had already received payment of 100% of the Debt Due, the learned Arbitral Tribunal held, correctly, that no award could be passed on this claim, as it was dependent on the award in the first arbitration being in favour of JST. The claim was disposed of in the said terms. There is no challenge to this part of the impugned Award, by either party.

31.2 Re. Claim (b)

31.2.1 Claim (b), of PNB, was for a declaration that NHAI was liable, under Clause 37.3.1 of the Concession Agreement, to pay 90% of the Debt Due towards Termination Payment, against which Bank Guarantee already stood submitted by JST. The learned Tribunal has, initially, noted the prevarication, on the part of NHAI, on its undertaking to pay 90% of the Debt Due under Clause 37.3.1 and how it was only after the order, dated 5th January, 2018, that the said amount of ₹ 3,48,60,40,000/- was released by it, on 29th January, 2018. Strictly speaking, these details are not of much relevance, insofar as the claim of PNB is concerned. The learned Arbitral Tribunal has held, unexceptionably, that Clause 37.3.1 of the Concession Agreement was plain and unequivocal, and clearly required NHAI to pay 90% of the Debt Due, even in the case of default on the part of the Concessionaire. The learned Single Judge, in his judgement dated 31st May, 2017 *supra*, and the Division Bench, in its judgement dated 27th October, 2017 *supra*, rationalised this dispensation, as contained in the Concession Agreement, on two grounds, i.e., firstly, that the entire investment, in the Project, was made by JST by loans from the lenders (led by PNB) and by equity sourcing, with no contribution by NHAI and, secondly, that once the commissioned work was undertaken, NHAI obtained full advantage of the constructed Highway, practically free of cost. Both lines of reasoning are appealing, and I am respectfully inclined to agree therewith. In any event, whatever be the philosophy behind Clause

37.3.1 of the Concession Agreement, the dispensation contained in the said Clause is clear and unambiguous. Even where the Concessionaire, i.e. JST in the present case, was at fault, NHAI was bound to pay 90% of the Debt Due less Insurance Cover, as Termination Payment, into the Escrow Account.

31.2.2 The learned Arbitral Tribunal has held that NHAI was not entitled to deduct any amount from the Debt Due, and that it would have to agitate any claim, that it may have had against JST, in the first arbitral proceedings. In so holding, the learned Arbitral Tribunal echoed the views of the learned Single Judge and the Division Bench, in their judgements dated 31st May, 2017 and 27th October, 2017 *supra*. I find no reason to differ therewith. The Concession Agreement did not permit any deduction from the amounts payable by NHAI under Clause 37.3.1. NHAI could not, of its own, tinker with the covenants of the Concession Agreement, to which it was a willing signatory. Even assuming, *arguendo*, that NHAI's claims, against JST, were in excess of the amount of 90% of the Debt Due, which it was required to deposit under Clause 37.3.1 of the Concession Agreement, it would be for NHAI to establish its entitlement, to such claims, against JST, in the first arbitral proceedings. As the learned Single Judge correctly held in his judgement dated 31st May, 2017 *supra*, NHAI was required, as a consequence of the termination of the Agreement, whether on account of the breach of NHAI or of JST, to pay, at least 90% of the Debt Due, to PNB and other lenders. No deductions, therefrom, were permissible.

31.2.3 The learned Arbitral Tribunal has correctly held that any deductions, from the amount to be deposited, by NHAI into the Escrow account in terms of Clause 37.3.2 of the Concession Agreement, would infract Clause 3.2 (d) of the Escrow Agreement. This is, in fact, obvious from a reading of the said clause, which obliges NHAI to deposit into, and/or credit the Escrow Account with, the Termination Payment, as and when due and payable. In fact, Clause 3.2 requires NHAI to so undertake. There can be no question, therefore, of any amount being deducted from the Termination Payment, to be deposited by NHAI into the Escrow Account, consequent on termination of the Concession Agreement.

31.2.4 That the alleged recoveries, to which NHAI claimed entitlement from JST, were still inchoate, till the first arbitral proceedings reached fruition, is also relevant. No pecuniary liability of JST, towards NHAI, could be said to have materialised, at any point prior thereto, and the judgements cited by the learned Single Judge in his judgement dated 31st May, 2017 *supra*, are precisely on the point.¹

31.2.5 Besides, the debt had been extended, by the lenders, led by PNB, to JST, for the project forming subject matter of the Concession Agreement. Once the Concession Agreement itself stood terminated, the loaned amount was required to be returned. The lenders, led by PNB, had no concern with the inter se disputes between NHAI and JST. It is for this reason that the Concession Agreement, rightly,

¹ *Iron and Hardware (India) Co. v. Shamlal & Bros.*, AIR 1954 Bom 423, successively approved in *U.O.I. v. Raman Iron Foundry*, (1974) 2 SCC 231 and *Gangotri Enterprises Ltd v. U.O.I.*, (2016) 11 SCC 720; *Indian Oil Corporation Ltd v. S.P.S. Engineering Ltd*, (2011) 3 SCC 507 and *J. G. Engineers Pvt Ltd v. U.O.I.*, (2011) 5 SCC 758

made deposit by NHAI, into the Escrow Account, as well as the withdrawal, thereby, by the lenders, the inevitable sequitur to termination of the Concession Agreement. The amounts claimed by NHAI from JST were subject matter of the inter se dispute between NHAI and JST. The right of NHAI to claim these amounts from JST cannot be gainsaid. That, however, was rightly made subject matter of a separate arbitral proceeding, which is presently pending. Whatever be the outcome of the arbitral proceeding, the fact that the Concession Agreement stands terminated and that, thereby, NHAI became liable to deposit, into the Escrow Account, at least 90% of the Debt Due, is an undeniable, even if uncomfortable (to NHAI), contractual reality. The attempt of NHAI to “adjust”, from the said figure, the amounts which, according to it, are liable to be paid by JST, amounts to taking, from Peter, what is due from Paul. NHAI and Paul may be at loggerheads in the first arbitral proceeding; that cannot delegate from the right of Peter, to the return of the debt extended by it.

31.2.6 Which leaves us with the direction, by the learned Arbitral Tribunal, to return, to JST, the Bank Guarantee of ₹ 354.74 crores, furnished by it. The finding of the learned Arbitral Tribunal, in this regard, reads as under:

“68.6 (a) *****

(b) *****

(c) With regard to the later part of the aforesaid issue of consequential reliefs and Respondent No 2’s prayer made vide its submission dated 09.01.2019, there appears to be no reason, in view of the AT’s

decision in respect of the first part of the issue, to keep the aforesaid BG by the Respondent No 1 or to keep the same alive by the Respondent No 2 beyond the period of 4 months after taking the final award by AT (refer Para 106 (iv) of Hon'ble High Court's order dt. 31.07.2017 – Ann C-46, pg. 2445 – 2480 of CD-11).

68.8 This Claim is decided in favour of the Claimant and as against the Respondent No. 1. The Claimant is entitled in the Respondent No. 1 is liable to pay 90% of Debt Due amount towards termination payment. In view of this award, there appears to be no reason to keep the aforesaid BG by the Respondent No. 1 or to keep the BG alive by the Respondent No. 2.”

31.2.7 Huge stakes do not necessarily make out an arguable case. I am completely unable to understand how NHAI can claim to be aggrieved, in any manner, by the direction, of the learned Arbitral Tribunal, to return the Bank Guarantee furnished by JST. The dispute has nothing to do with the issue of breach of the Concession Agreement, or as to the entity responsible for such breach. Whether the breach of the Concession Agreement, if it occurred, was attributable to NHAI or to JST, Clause 37.3.1 of the Concession Agreement cast on NHAI the liability, consequent on termination of the Concession Agreement, to pay, into the Escrow Account, at least 90% of the Debt Due. There was no escaping this liability. 90% of the Debt Due, i.e. ₹ 3,48,60,40,000/- was deposited, into the Escrow Account, by NHAI. ₹ 6.14 crores, additionally, were required to be paid, which NHAI undertook to pay. The learned Arbitral Tribunal correctly held that NHAI was liable to pay the said amount, rejecting its contention that it was entitled to adjust, thereagainst, amounts

allegedly due, to it, by JST. The Bank Guarantee, furnished by JST, was to secure the said deposit, to be made by NHAI. Once the deposit stood made, the liability of NHAI to deposit the said amount was confirmed by the learned Arbitral Tribunal, and the entitlement, of PNB, to withdraw the said amount from the Escrow Account, was also confirmed, there was no justification, whatsoever, to permit NHAI to continue to hold on to the Bank Guarantee furnished by JST. As the learned Arbitral Tribunal correctly observes, there was “no reason” to keep the said Bank Guarantee by NHAI, or to insist on the Bank Guarantee being kept alive by JST. The pendency of the first arbitration can have no bearing on the said Bank Guarantee, as the Bank Guarantee was never furnished by JST to secure the claim of NHAI in the said arbitral proceeding. In case NHAI is awarded any amount in the said arbitral proceeding, it would be entitled to recovery, thereof, from JST, but not by invocation or encashment of the Bank Guarantee of ₹ 348.604 crores, furnished by JST. A bare reading of directions (i) and (ii), in para-106 of the judgement, dated 31st May, 2017, of the learned Single Judge in OMP (I) (Comm) 221/2017 and OMP (I) (Comm) 227/2017, makes it clear that the furnishing of the Bank Guarantee, of ₹ 348.604 crores, by JST, was essentially to counterbalance the deposit, by NHAI, into the Escrow Account, of ₹ 354.744 crores. This is clear even from the figures reflected in the said two directions, as the figure of ₹ 354.744 crores has been arrived at by adding the figures of ₹ 348.604 crores and ₹ 6.14 crores, representing the total amount which, even according to the calculations of NHAI, constituted 90% of the Debt Due. In fact, a conjoint and juxtaposed reading of directions (i) to (iii) of the

judgement of the learned Single Judge makes this clear, beyond any shadow of doubt. For ready reference, and at the cost of repetition, these directions are reproduced as under:

- “(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”

Clearly, what the learned Single Judge has done is to enforce Clause 37.3.1 of the Concession Agreement, by directing payment, in terms of the said Clause, by NHAI, into the Escrow Account, and securing the said payment by directing JST to furnish an equivalent Bank Guarantee. Direction (iii) in para 106 of the judgement of the learned Single Judge has to be understood in this context. So understood, the hyper-semantic argument, regarding the exact ambit of the expression “final award of the Arbitral Tribunal”, and as to whether the Bank Guarantee is required to be kept alive to the rendition of the final award in the first arbitration, substantially loses significance. Seen in the backdrop of directions (i) and (ii), direction (iii), in para 106 of the judgement of the learned Single Judge clearly envisages keeping of the Bank Guarantee for ₹ 348.604 crores, to be furnished by JST in accordance with the direction (ii), alive and unencashed, only subject to, and pending the decision on, the “final award” *which adjudicates*

on the entitlement of PNB to withdraw 90% of the Debt Due, and the liability of NHAI to pay the said amount into the Escrow Account.

Once these aspects stood decided, i.e. once the liability of NHAI to deposit, into the Escrow Account, 90% of the Debt Due, and the entitlement of PNB to withdraw the said amount from the Escrow Account, stood adjudicated by the learned Arbitral Tribunal, the judgement of the learned Single Judge does not, in my view, envisage keeping alive, of the Bank Guarantee of ₹ 354.74 crores, furnished by JST, for a moment more. Whether the decisions on these aspects, were arrived at in the present arbitral proceedings, or in the first arbitral proceedings, is totally irrelevant. To reiterate, the “final award”, to which directions (iii) and (iv), in para 106 of the judgement of the learned Single Judge, refers, is obviously the final award which adjudicates the liability, of NHAI, to deposit 90% of the Debt Due, into the Escrow Account, and the entitlement of PNB to withdraw the said amount from the Escrow Account. That final award has been passed, and is under challenge in these proceedings. The decision, of the learned Arbitral Tribunal, that NHAI was contractually obligated to deposit, in the Escrow Account ₹ 348.604 crores, and that PNB was entitled to withdraw, from the said Escrow Account, the said amount, is, in my view, unexceptionable and deserving of acceptance. Requiring JST to continue to keep the Bank Guarantee for ₹ 348.604 crores, furnished by it, alive thereafter would, in my view, in fact do violence to the directions of the learned Single Judge. This would, additionally, also infract the directions issued by the Supreme Court, as the very first direction was by way of affirmation of the findings of this Court “with regard to encashment of bank guarantee”.

31.2.8 The attempt, by NHAI, to link the Bank Guarantee for 348.604 crores, furnished by JST, to the inter se dispute between NHAI and JST regarding the breach of the Concession Agreement and liabilities that arose as a consequence thereof is, in my view, completely misguided. This submission was advanced by Ms. Maninder Acharya, learned Senior Counsel for NHAI, and is also reflected in the “Note on Arguments”, filed by NHAI, which asserts that “the issue with regard to the Bank Guarantee is between Petitioner/NHAI and Respondent No 2/Concessionaire”. This, in my view, is incorrect. To repeat, the “issue with regard to the Bank Guarantee” had nothing to do with the dispute between NHAI and JST. That dispute, which constitutes the subject matter of the first arbitral proceeding, relates to breach of the Concession Agreement. Regardless of such breach, or of whether the breach was attributable to NHAI or to JST, the termination of the Concession Agreement resulted in liability, on the part of NHAI, to deposit, forthwith, 90% of the Debt Due, into the Escrow Account. The entitlement, of PNB, to withdraw the said amount, also followed as an inevitable sequitur thereto. No requirement of continuing the Bank Guarantee, furnished by JST as a security against the deposit by NHAI into the Escrow Account could, conceivably, remain thereafter. It is, therefore, not correct on the part of NHAI to contend that the issue with regard to the Bank Guarantee was between NHAI and JST.

31.2.9 Para 7 of the Note on Arguments, submitted by NHAI contends that “the Bank Guarantee issued by the Respondent No.

2/Concessionaire is to safeguard the interests of the Petitioner/NHAI". I am unable to agree. The purpose of directing JST to furnish the Bank Guarantee for ₹ 348.604 crores was to secure the money deposited by NHAI in the Escrow Account. That requirement, even as per the directions issued by the learned Single Judge, which were affirmed, positively, by the Supreme Court, continued only till the stage of determination of the liability of NHAI to deposit the said amount, and the entitlement of the lenders, led by PNB, to withdraw the said amount. It is, therefore, fallacious, on the part of NHAI, to contend that the Bank Guarantee was directed to be furnished, by JST, by the learned Single Judge, to safeguard the interests of NHAI.

31.2.10 Ms. Acharya also sought to contend that, once 90% of the Debt Due was deposited by NHAI, PNB had no surviving claim against it. This submission, too, is not acceptable, as the deposit of 90% was, as per NHAI, required to be made only after adjusting the amounts which, according to it, were payable by JST. The quantum of the said amount was, therefore, in dispute, which was why PNB had to initiate arbitral proceedings. It is apparently for this reason that the Supreme Court expressly reserved liberty to PNB to have its entitlement adjudicated by arbitration. In this view of the matter, in fact, the objection, of NHAI, to the maintainability of the present arbitral proceedings also stands revealed as misguided. It was only consequent to initiation of arbitral proceedings by PNB, pursuant to the liberty granted by the Supreme Court, and adjudication of the rival contentions, advanced before the learned Arbitral Tribunal, by the impugned award, that the entitlement of PNB, to receive 90% of the

Debt Due from NHAI, could be said to stand crystallised. JST was also a party to the present arbitral proceedings, and cannot be treated as a stranger. The Bank Guarantee of ₹ 348.604 crores was furnished by JST, as directed by the learned Single Judge, only to secure the deposit by NHAI into the Escrow Account of ₹ 354.644 crores. Once the liability of NHAI in that regard stood concluded by the learned Arbitral Tribunal, and the entitlement of PNB to withdraw the said amount also stood decided, JST was entitled, as of right, to return of the Bank Guarantee furnished by it. This is all that the learned Arbitral Tribunal has held, and I find no reason, whatsoever, to interfere therewith.

31.2.11 Ms. Acharya also sought to contend that, with the payment, into the Escrow account, by NHAI, of 100% of the Debt Due, nothing survives for adjudication in the present arbitration. I am unable to agree with this contention either. PNB had specifically sought, in the present arbitration, a declaration, to the effect that NHAI was liable to pay 90% of the Debt Due. The mere payment, by NHAI, into the Escrow Account, of ₹ 354.744 crores (which was also consequent to the affirmation, by the Supreme Court, of the directions issued by the learned Single Judge in his judgement dated 31st May, 2017 *supra*), could not extinguish the right of PNB, to seek such a declaration. Payment of the amount, into the Escrow Account did not, *ipso facto*, finalise, conclusively, the issue of liability of NHAI to make the said payment, which would stand finalised only on the declaration, to the said effect, by a competent adjudicating authority – in the present case, by the learned Arbitral Tribunal. The contention,

of Ms. Acharya, that, with the payment of 100% of the Debt Due, into the Escrow Account by NHAI, the grievance in the present arbitral proceedings did not survive for consideration is not, therefore, acceptable.

31.2.12 Every right, accruing to one party has, in law, to be counterbalanced by a liability on another. Right and liability are two sides of one coin. It was for this reason, apparently, that PNB sought, by way of an amendment to the prayer clause in its Statement of Claim, a declaration that NHAI was liable to pay 90% of the Debt Due. Inasmuch as the right of PNB, to the said amount, was subject matter of the present arbitration, the learned Arbitral Tribunal rightly allowed the said amendment and, accordingly, framed a specific issue, regarding the liability, of NHAI, to pay 90% of the Debt Due. There is, in fact, no challenge, in these proceedings, to the order, dated 1st July, 2019, of the learned Arbitral Tribunal, framing the said separate issue. Once the issue was framed and, in deciding the same, the learned Arbitral Tribunal concluded that the liability to pay 90% of the Debt Due was contractually of NHAI, no exception, in my view, can be taken to the consequent direction, of the learned Arbitral Tribunal, to return the Bank Guarantee furnished by JST.

31.2.13 Ms. Acharya also sought to contend that JST had not prayed, in its Statement of Defence filed before the learned Arbitral Tribunal, for return of the Bank Guarantee of ₹ 348.604 crores, deposited by it. Superficially seen, this submission may be correct, on facts. The impugned Award notes, however, that, on 9th January,

2019, a specific application was made, by JST, praying, *inter alia*, for release of the aforesaid Bank Guarantee for ₹ 348.604 crores. It may not be strictly accurate, therefore, to urge that no such claim was made by JST before the learned Arbitral Tribunal.

31.2.14 Moreover, the claimant before the learned Arbitral Tribunal, in the present proceedings, was PNB, not JST. As such, the principle that, in awarding claims to the claimant, the Arbitral Tribunal is not allowed to grant relief in excess of that claimed, may not directly apply. More closely viewed, it becomes apparent that, in directing the return of the Bank Guarantee to JST, the learned Arbitral Tribunal has merely effectuated the directions contained in para 106 of the judgement, dated 31st May, 2017 *supra*, of the learned Single Judge, which also received the unequivocal approval of the Division Bench and, subsequently, of the Supreme Court. Furnishing of the Bank Guarantee had been directed, by the learned Single Judge, to secure the deposit, by NHAI, into the Escrow Account, of ₹ 354.644 crores. Once the liability of NHAI, to make such deposit stood decided, affirmatively, by the learned Arbitral Tribunal, and the right of PNB, to the said amount, also stood confirmed, no further requirement, of securing the deposit, remained. The direction to return the Bank Guarantee to JST was, therefore, merely an inevitable sequitur to the determination of the liability of NHAI, and of the right and entitlement of PNB, and no exception can, therefore, be taken thereto, on the ground that the learned Arbitral Tribunal granted relief, to JST, in excess of that sought by it.

31.2.15 It has been further urged, by NHAI, that the learned Arbitral Tribunal placed reliance on the judgement, dated 31st May, 2017 *supra*, of the learned Single Judge, which was in contravention of the directions issued by the Supreme Court. Ms. Acharya points out that the Supreme Court had specifically proscribed the learned Arbitral Tribunal from relying, in the arbitration proceedings, on the findings recorded by the learned Single Judge and the Division Bench of the merits of the claim. Undoubtedly, the Supreme Court did so direct. I am not, however, in agreement with Ms. Acharya in her contention that the learned Arbitral Tribunal has *relied on* the findings of the learned Single Judge or of the Division Bench. A holistic reading of the impugned Award reveals that the learned Arbitral Tribunal has arrived at its own conclusion regarding the final findings recorded by it. The reasoning and analysis, by the learned Arbitral Tribunal, for arriving at its findings regarding Claim No. (b) of PNB, are to be found in as many as 17 sub-paras [numbered (a) to (q)] of para 66 and, thereafter, in paras 68.1 to 68.8, of the impugned Award. Paras 68.6 (c) and 68.8 already stands reproduced in para 31.2.6 *supra*. For ready reference, paras 66 (e), (i) and (p), and paras 68.3 to 68.5, which are self-speaking, may also be reproduced, thus:

“66. From the above contractual provision reproduced hereinabove as well as the correspondence exchanged between the parties the following points emerged:

(e) The Claimant, after issuance of the termination notice on 10.11.2016 by Respondent No. 1 had intimated the amount of Debt Due as on 10.11.2016 amounting to Rs. 640,85,99,733/- vide their letter

dated 16.11.2016. The 90% of this amount, as calculated hereinabove, comes to ₹ 576.77 crores. The Respondent No. 1 was just required to pay an amount of ₹ 576.77 crores to the Claimant by 25.11.2016/05.12.2016 (as noted hereinabove).

(i) The Respondent No. 1 had communicated the Respondent No. 2 about their own calculations with regard to sum of 90% Debt Due. *These calculations were not according to the contractual provision. As such, the calculations done by the Respondent No. 1 were uncalled for and deserve rejection. AT holds that the calculations done by the Claimant for the sum of ₹ 576.77 crores as 90% of Debt Due are correct and have to be applied.*

(p) *This action of the Respondent No. 1 to make alleged recoveries, which had neither been ascertained nor determined nor agreed by the Respondent No. 2 was not justified. If the Respondent No. 1 had any grievance and claims against the Respondent No. 2, they could have invoked the Dispute Resolution Mechanism as per Article 44 of CA. In the absence of this, the recovery of any amount from the 90% Debt Due was clearly in breach of Clause 3.2(d) of Escrow Agreement as well as the agreement agreed amongst all the parties on 05.09.2016. Even otherwise, as per various terms and conditions of CA, Escrow Agreement and Substitution Agreement this amount of 90% Debt Due towards termination payments belonged to the Claimant and as such any recovery by the Respondent No. 1 towards any dispute claim with Respondent No. 2 was not permissible to be made.*

68.3 *The calculations submitted by the Respondent No. 1 with regard to the calculations of Debt Due were not correct as noted hereinabove as well as by Hon'ble High Court of Delhi (Division Bench) in its order dated 31.10.2017.*

68.4 *The Respondent No. 1 is not entitled to effect any recoveries from the 90% Debt Due amount payable to the Respondent No. 2. The sum of 90% Debt Due belonged to the Claimant in accordance with various provisions of Escrow Agreement and Substitution Agreement. As such the Respondent No. 1 could not have effected any recovery from this sum which it has done, the Respondent No. 2. These recoveries are yet to be asserted that determined by any Competent Forum in accordance with law, before they can be enforced against the Respondent No. 2. The Respondent No. 1 has to get these recoveries adjudicated in accordance with Article 44 of CA. Even the Respondent No. 1 was conscious of the fact that these recoveries if any, have to be made from the Respondent No. 2, as such the calculations of the Debt Due and the proposed recoveries were sent by the Respondent No. 1 to Respondent No. 2 and only a copy of the same had been endorsed to the Claimant for information.”*

(Emphasis supplied)

These, quite obviously, are findings of the learned Arbitral Tribunal, and not mere echoes of the views expressed by the learned Single Judge and the Division Bench. The mere reference, by the learned Arbitral Tribunal, to the fact that the Division Bench had also taken a similar view, does not amount to “reliance”, by the learned Arbitral Tribunal, on the judgement of the Division Bench. In fact, in para 68.5 of the impugned Award, the learned Arbitral Tribunal goes on to “hold” that PNB was entitled, and NHAI was liable to pay 90% of the Debt Due towards termination payment, “in view of the findings as recorded hereinabove” – not, significantly, in view of the findings recorded by the learned Single Judge, or by the Division Bench, of this Court. It cannot, therefore, be said that the learned Arbitral Tribunal proceeded in defiance of the directions of the Supreme Court.

31.3 Re. Claim (c)

31.3.1 Claim (c), of PNB, was for direction, to NHAI, to pay interest, on the Debt Due, for the delay in payment thereof, reckoned from 17th November, 2016, i.e. immediately after the details of the Debt Due were furnished by PNB to NHAI, on 16th November, 2016. Inasmuch as Claim (a), for being awarded 100% of the Debt Due, was itself made conditional to the award in the first arbitration, the learned Arbitral Tribunal held that it was not possible to award interest, in the present arbitral proceedings, to PNB, on 100% of the Debt Due. Interest could, at best, be awarded on 90% of the Debt Due. Accordingly, the learned Arbitral Tribunal awarded interest, on ₹ 576.77 crores, representing 90% of the Debt Due, from 5th December, 2016 till the date of award @ 9% p.a. (amounting to ₹ 15.93 crores), and *pendente lite* on the unpaid amount of ₹ 354.77 crores from 27th March, 2017 to 29th January, 2018 @ 9% p.a. (amounting to ₹ 27.03 crores), totalling ₹ 42.96 crores. Similarly, future interest, from the date of the impugned Award till the date of actual payment of the aforesaid amount of ₹ 42.96 crores has been awarded, by the learned Arbitral Tribunal @ 9% p.a. The requirement of payment of this 9% future interest component has, however, been deferred, by the learned Arbitral Tribunal, by a period of 90 days from the date of award. In other words, the learned Arbitral Tribunal has held that, if NHAI fails to pay ₹ 42.96 crores to PNB within three months from the passing of the impugned Award, the said amount would carry interest @ 9% p.a.

31.3.2 No specific submissions were advanced, before me, by NHAI, challenging the award of interest by the learned Arbitral Tribunal. The written submissions, filed by way of a “Note of Argument”, too, do not address the issue of awarded interest. The only substantive challenge to the award of interest, by the learned Arbitral Tribunal, is to be found in Ground Q in the petition, in which NHAI contests the award of interest on the ground that ₹ 348.604 crores was paid, by it, on 29th January, 2018, within the period stipulated by the Supreme Court in its order dated 5th January, 2018.

31.3.3 Section 31(7)(a) of the 1996 Act empowers the Arbitral Tribunal to include, in the sum for which the award is made, interest, at such rate as it deems reasonable, on the whole or any part of the money, for the whole or any part of the period *between the date on which the cause of action arose and the date on which the award is made*. The learned Tribunal has held, in the present case, that the cause of action arose, in favour of PNB, on 17th November, 2016, and this finding has not been traversed by NHAI. Section 31(7)(a), therefore, empowered the learned Arbitral Tribunal to award interest, to PNB, from 17th November, 2016 till the date of making of the award. No jurisdictional error can, therefore, be said to have been committed by the learned Arbitral Tribunal in doing so. The learned Arbitral Tribunal has computed interest, on the entire quantum of 90% of the Debt Due, from 5th December, 2016 till 26th March, 2017 and, thereafter, on ₹ 354.77 crores (being the amount remaining unpaid after 5th December, 2016) till the date of the award, i.e. pre-arbitral

and *pendente lite* interest. No occasion arises for this Court to interfere with such computation either.

31.3.4 Section 31(7)(b) provides that any sum, directed to be paid by the arbitral award, would carry interest at a rate 2% higher than the current interest rate prevalent on the date of the award, from the date of the award till the date of payment, unless otherwise directed in the award. In other words, this is a statutory dispensation, which is to *ordinarily* apply, unless and until the arbitral award directs to the contrary. The rule, therefore, is that the awarded amount would carry interest at 2% higher than the prevalent rate of interest, from the date of award till the date of payment, and the exception is where the arbitral award directs otherwise. NHAI has not been able to make out, in the present proceedings, in any case, as would merit extending, to it, the benefit of the exception, in preference to the rule. The award of interest, by the learned Arbitral Tribunal, from the date of award till the date of payment, @ 9% p.a., being 2% above the prevalent ordinary rate of interest on the date of passing of the impugned arbitral award does not, therefore, call for interference.

31.3.5 The impugned award, qua Claim (c), too, therefore, deserves to be upheld.

32. Re. Claim (d)

Though Ms. Maninder Acharya did contend that NHAI was challenging the impugned Award in its entirety, the present petition

does not contain any ground of challenge, insofar as the award of costs, by the learned Arbitral Tribunal, is concerned. Costs have been awarded by the learned Arbitral Tribunal in accordance with Section 31(8) of the 1996 Act, read with Section 31A thereof. The extent of costs to be awarded, under the regime contained in the 1996 Act is, essentially, a matter of discretion of the learned Arbitral Tribunal and, if it is sought to be challenged, it is for the challenger to make out a case of erroneous exercise of discretion, as would merit interference by the Court in exercise of the jurisdiction vested in it by Section 34. No effort, to make out any such case, has been expended by NHAI. I find no reason, therefore, to interfere with the award of costs by the learned Arbitral Tribunal.

The eventuate

33. The scope of interference, by Courts, under Section 34 of the 1996 Act, is extremely limited. In another decision being pronounced today, I have culled out the following principles from *Ssangyong Engineering and Construction Co. Ltd v. N.H.A.I.*², to govern the scope of interference by Courts with arbitral awards, under Section 34, after its amendment by the Arbitration and Conciliation (Amendment) Act, 2016:

- (i) The expression “public policy of India” would have to be understood as the “fundamental policy of Indian Law”, as

² (2019) 15 SCC 131

explained in paras 18 and 27 of the earlier decision in *Associate Builders v. D.D.A.*³, which read thus:

“18. In *Renusagar Power Co. Ltd. v. General Electric Co.*, 1994 Supp (1) SCC 644, the Supreme Court construed Section 7(1)(b)(ii) of the Foreign Awards (Recognition and Enforcement) Act, 1961:

“7. Conditions for enforcement of foreign awards.—(1) A foreign award may not be enforced under this Act—

(b) if the Court dealing with the case is satisfied that—

(ii) the enforcement of the award will be contrary to the public policy.”

In construing the expression “public policy” in the context of a foreign award, the Court held that an award contrary to

- (i) the fundamental policy of Indian law,
- (ii) the interest of India,
- (iii) Justice or morality,

would be set aside on the ground that it would be contrary to the public policy of India. It went on further to hold that a contravention of the provisions of the Foreign Exchange Regulation Act would be contrary to the public policy of India in that the statute is enacted for the national economic interest to ensure that the nation does not lose foreign exchange which is essential for the economic survival of the nation (*see* SCC p. 685, para 75). Equally, disregarding orders passed by the superior courts in India could also be a contravention of the fundamental policy of Indian law, but the recovery of compound interest on interest,

³ (2015) 3 SCC 49

being contrary to statute only, would not contravene any fundamental policy of Indian law (*see* SCC pp. 689 & 693, paras 85 & 95).

Fundamental Policy of Indian Law

27. Coming to each of the heads contained in ***Saw Pipes [(2003) 5 SCC 705 : AIR 2003 SC 2629]*** judgment, we will first deal with the head “fundamental policy of Indian law”. It has already been seen from ***Renusagar*** judgment that *violation of the Foreign Exchange Act and disregarding orders of superior courts in India would be regarded as being contrary to the fundamental policy of Indian law. To this it could be added that the binding effect of the judgment of a superior court being disregarded would be equally violative of the fundamental policy of Indian law.*”

(Emphasis supplied)

(ii) The Court cannot interfere with an Award on the ground that the arbitrator has not adopted a judicial approach, as that would amount to intervention on the merits of the award, which was not permissible post the amendment of Section 34.

(iii) Violation of the principles of natural justice constitutes a legitimate ground to challenge an award.

(iv) In understanding whether an award was in conflict with the “most basic notions of morality or justice”, the Court would have to be guided by paras 36 to 39 of ***Associate Builders***⁴:

“Justice

36. The third ground of public policy is, if an award is against justice or morality. These are two different concepts in law. *An award can be said to be against justice only when it shocks the conscience of the court.* An illustration of this can be given. A claimant is content with restricting his claim, let us say to Rs 30 lakhs in a statement of claim before the arbitrator and at no point does he seek to claim anything more. The arbitral award ultimately awards him Rs 45 lakhs without any acceptable reason or justification. Obviously, this would shock the conscience of the court and the arbitral award would be liable to be set aside on the ground that it is contrary to “justice”.

Morality

37. The other ground is of “morality”. Just as the expression “public policy” also occurs in Section 23 of the Contract Act, 1872 so does the expression “morality”. Two illustrations to the said section are interesting for they explain to us the scope of the expression “morality”:

“(j) A, who is B's Mukhtar, promises to exercise his influence, as such, with B in favour of C, and C promises to pay 1000 rupees to A. The agreement is void, because it is immoral.

(k) A agrees to let her daughter to hire to B for concubinage. The agreement is void, because it is immoral, though the letting may not be punishable under the Penal Code, 1860.”

38. In *Gherulal Parakh v. Mahadeodas Maiya* [1959 Supp (2) SCR 406 : AIR 1959 SC 781], this Court explained the concept of “morality” thus : (SCR pp. 445-46 : AIR pp. 797-98)

“*Re. Point 3 — Immorality*: The argument under this head is rather broadly stated by the learned counsel for the appellant. The learned counsel attempts to draw an analogy from the Hindu law relating to the doctrine of pious obligation of sons to discharge their father's

debts and contends that what the Hindu law considers to be immoral in that context may appropriately be applied to a case under Section 23 of the Contract Act. Neither any authority is cited nor any legal basis is suggested for importing the doctrine of Hindu law into the domain of contracts. Section 23 of the Contract Act is inspired by the common law of England and it would be more useful to refer to the English law than to the Hindu law texts dealing with a different matter. Anson in his Law of Contracts states at p. 222 thus:

‘The only aspect of immorality with which courts of law have dealt is sexual immorality....’

Halsbury in his Laws of England, 3rd Edn., Vol. 8, makes a similar statement, at p. 138:

‘A contract which is made upon an immoral consideration or for an immoral purpose is unenforceable, and there is no distinction in this respect between immoral and illegal contracts. The immorality here alluded to is sexual immorality.’

In the Law of Contract by Cheshire and Fifoot, 3rd Edn., it is stated at p. 279:

‘Although Lord Mansfield laid it down that a contract *contra bonos mores* is illegal, the law in this connection gives no extended meaning to morality, but concerns itself only with what is sexually reprehensible.’

In the book on the Indian Contract Act by Pollock and Mulla it is stated at p. 157:

‘The epithet “immoral” points, in legal usage, to conduct or purposes which the State, though disapproving them, is

unable, or not advised, to visit with direct punishment.’

The learned authors confined its operation to acts which are considered to be immoral according to the standards of immorality approved by courts. The case law both in England and India confines the operation of the doctrine to sexual immorality. To cite only some instances : settlements in consideration of concubinage, contracts of sale or hire of things to be used in a brothel or by a prostitute for purposes incidental to her profession, agreements to pay money for future illicit cohabitation, promises in regard to marriage for consideration, or contracts facilitating divorce are all held to be void on the ground that the object is immoral.

The word ‘immoral’ is a very comprehensive word. Ordinarily it takes in every aspect of personal conduct deviating from the standard norms of life. It may also be said that what is repugnant to good conscience is immoral. Its varying content depends upon time, place and the stage of civilisation of a particular society. In short, no universal standard can be laid down and any law based on such fluid concept defeats its own purpose. The provisions of Section 23 of the Contract Act indicate the legislative intention to give it a restricted meaning. Its juxtaposition with an equally illusive concept, public policy, indicates that it is used in a restricted sense; otherwise there would be overlapping of the two concepts. In its wide sense what is immoral may be against public policy, for public policy covers political, social and economic ground of objection. Decided cases and authoritative textbook writers, therefore, confined it, with every justification, only to sexual immorality. The other limitation imposed on the word by the statute, namely, ‘the court regards it as immoral’, brings out the idea that it is also a branch of the common law

like the doctrine of public policy, and, therefore, should be confined to the principles recognised and settled by courts. Precedents confine the said concept only to sexual immorality and no case has been brought to our notice where it has been applied to any head other than sexual immorality. In the circumstances, we cannot evolve a new head so as to bring in wagers within its fold.”

39. This Court has confined morality to sexual morality so far as Section 23 of the Contract Act, 1872 is concerned, which in the context of an arbitral award would mean the enforcement of an award say for specific performance of a contract involving prostitution. “Morality” would, if it is to go beyond sexual morality necessarily cover such agreements as are not illegal but would not be enforced given the prevailing mores of the day. However, *interference on this ground would also be only if something shocks the court's conscience.*”

(Emphasis supplied)

Thus, only such arbitral awards which shocks the conscience of the court, can be set aside on the ground of being in conflict with the “most basic notions of morality or justice”.

(v) “Patent illegality” appearing on the face of the award refers to such illegality as goes to the root of the matter, but which does not amount to be erroneous application of the law. As such, contravention of a statute not linked to public policy or public interest, cannot be said to amount to “patent illegality”. Mere contravention of the substantive law of India is no longer a ground available to set aside an arbitral award.

(vi) A Section 34 court cannot re-appreciate evidence, even on the ground of patent illegality.

(vii) Absence of reasons is, however, a ground to set aside an award, as it would violate Section 31(3) of the 1996 Act.

(viii) Construction of the terms of the contract is primarily for the arbitrator to decide. Unless the arbitrator construes the contract “in a manner that no fair-minded or reasonable person would; in short, the view of the arbitrator is not even a possible view to take”, interference is not warranted.

(ix) If the arbitrator wanders outside the contract and deals with matters not allotted to him, he commits an error of jurisdiction, on which ground the award could be set aside under Section 34 (2-A). “Where an Arbitral Tribunal has rendered an award which decides matters either beyond the scope of the arbitration agreement or beyond the disputes referred to the Arbitral Tribunal, as understood in paras 10 and 11 of *State of Goa v. Praveen Enterprises*⁴, the arbitral award could be said to have dealt with decisions on matters beyond the scope of submission to arbitration”. Paras 10 and 11 of *Praveen Enterprises*⁴ read as under:

“10. “Reference to arbitration” describes various acts. Reference to arbitration can be by parties themselves or by an appointing authority named in the arbitration agreement or by a court on an application

⁴ (2012) 12 SCC 581

by a party to the arbitration agreement. We may elaborate:

(a) If an arbitration agreement provides that all disputes between the parties relating to the contract (some agreements may refer to some exceptions) shall be referred to arbitration and that the decision of the arbitrator shall be final and binding, the “reference” contemplated is the act of parties to the arbitration agreement, referring their disputes to an agreed arbitrator to settle the disputes.

(b) If an arbitration agreement provides that in the event of any dispute between the parties, an authority named therein shall nominate the arbitrator and refer the disputes which required to be settled by arbitration, the “reference” contemplated is an act of the appointing authority referring the disputes to the arbitrator appointed by him.

(c) Where the parties fail to concur in the appointment of the arbitrator(s) as required by the arbitration agreement, or the authority named in the arbitration agreement failing to nominate the arbitrator and refer the disputes raised to arbitration as required by the arbitration agreement, on an application by an aggrieved party, the court can appoint the arbitrator and on such appointment, the disputes between the parties stand referred to such arbitrator in terms of the arbitration agreement.

11. Reference to arbitration can be in respect of all disputes between the parties or all disputes regarding a contract or in respect of specific enumerated disputes. Where “all disputes” are referred, the arbitrator has the jurisdiction to decide all disputes raised in the pleadings (both claims and counterclaims) subject to any limitations placed by the arbitration agreement. Where the arbitration agreement provides that all disputes shall be settled by arbitration but excludes certain matters from arbitration, then, the arbitrator

will exclude the excepted matter and decide only those disputes which are arbitrable. But where the reference to the arbitrator is to decide specific disputes enumerated by the parties/court/appointing authority, the arbitrator's jurisdiction is circumscribed by the specific reference and the arbitrator can decide only those specific disputes.”

If an arbitrator wandered outside the contract and dealt with matters not allotted to him, it would constitute a jurisdictional error, correctable on the ground of “patent illegality”, but would not amount to dealing with matters beyond the scope of the arbitration agreement.

(x) Perversity in an award, though not a ground to challenge the award as being contrary to the “public policy of India”, certainly amounts to a patent illegality appearing on the face of the award. “Thus, a finding based on no evidence at all or an award which ignores vital evidence in arriving at its decision would be perverse and liable to be set aside on the ground of patent illegality.” “A finding based on documents taken behind the back of the parties by the arbitrator would also qualify as a decision based on no evidence inasmuch as such decision is not based on evidence led by the parties, and therefore, would also have to be characterised as perverse.”

(xi) Failure, by an Arbitral Tribunal to deal with every issue referred to it will not ordinarily render its arbitral award liable to be set aside. The crucial question in every case is whether there has been real or actual prejudice to either (or both) of the

parties to the dispute. The following passage, from Redfern and Hunter was cited, with approval, in this regard:

“The significance of the issues that were not dealt with has to be considered in relation to the award as a whole. For example, it is not difficult to envisage a situation in which the issues that were overlooked were of such importance that, if they had been dealt with, the whole balance of the award would have been altered and its effect would have been different.”

(Emphasis supplied)

This principle, though not directly forming part of the enunciation of the law by the Supreme Court in *Ssangyong Engineering and Construction Co. Ltd*³, finds place in the ruling of the Court of Appeal of Singapore in *CRW Joint Operation v. PT Perusahaan Gas Negara (Persero) TBK*⁵, which has been reproduced in para 61 of the report in *Ssangyong Engineering and Construction Co. Ltd*³, obviously with approval.

34. These principles stand, *inter alia*, reiterated in the recent decision of the Supreme Court in *Anglo American Metallurgical Coal Pty Ltd v. MMTC Ltd.*⁶, paras 51 and 52 of which read thus:

“51. The judgment in *Associate Builders* (*supra*) examined each of the heads set out in *Renusagar Power Co. Ltd. v. General Electric Co., 1994 Supp (1) SCC 644*, together with the addition of the fourth head of “patent illegality” laid down in *ONGC Ltd. v. Saw Pipes Ltd., (2003) 5 SCC 705*. Since we are concerned with the “perversity principle”, the relevant paragraphs of this judgment are set out as follows:

⁵ 2011 SGCA 33

⁶ 2020 SCC OnLine SC 1030

“29. It is clear that the juristic principle of a “judicial approach” demands that a decision be fair, reasonable and objective. On the obverse side, anything arbitrary and whimsical would obviously not be a determination which would either be fair, reasonable or objective.” (page 75)

“31. The third juristic principle is that a decision which is perverse or so irrational that no reasonable person would have arrived at the same is important and requires some degree of explanation. It is settled law that where:

- (i) a finding is based on no evidence, or
- (ii) an Arbitral Tribunal takes into account something irrelevant to the decision which it arrives at; or
- (iii) ignores vital evidence in arriving at its decision, such decision would necessarily be perverse.

32. A good working test of perversity is contained in two judgments. In *Excise and Taxation Officer-cum-Assessing Authority v. Gopi Nath & Sons, 1992 Supp (2) SCC 312*, it was held : (SCC p. 317, para 7)

“7. ... It is, no doubt, true that if a finding of fact is arrived at by ignoring or excluding relevant material or by taking into consideration irrelevant material or if the finding so outrageously defies logic as to suffer from the vice of irrationality incurring the blame of being perverse, then, the finding is rendered infirm in law.”

In *Kuldeep Singh v. Commr. of Police, (1999) 2 SCC 10*, it was held : (SCC p. 14, para 10)

“10. A broad distinction has, therefore, to be maintained between the decisions which are perverse and those which are not. If a decision

is arrived at on no evidence or evidence which is thoroughly unreliable and no reasonable person would act upon it, the order would be perverse. But if there is some evidence on record which is acceptable and which could be relied upon, howsoever compendious it may be, the conclusions would not be treated as perverse and the findings would not be interfered with.”

33. It must clearly be understood that when a court is applying the “public policy” test to an arbitration award, it does not act as a court of appeal and consequently errors of fact cannot be corrected. A possible view by the arbitrator on facts has necessarily to pass muster as the arbitrator is the ultimate master of the quantity and quality of evidence to be relied upon when he delivers his arbitral award. Thus an award based on little evidence or on evidence which does not measure up in quality to a trained legal mind would not be held to be invalid on this score. Once it is found that the arbitrators approach is not arbitrary or capricious, then he is the last word on facts. In ***P.R. Shah, Shares & Stock Brokers (P) Ltd. v. B.H.H. Securities (P) Ltd. [(2012) 1 SCC 594]***, this Court held : (SCC pp. 601-02, para 21)

“21. A court does not sit in appeal over the award of an Arbitral Tribunal by reassessing or reappreciating the evidence. An award can be challenged only under the grounds mentioned in Section 34(2) of the Act. The Arbitral Tribunal has examined the facts and held that both the second respondent and the appellant are liable. The case as put forward by the first respondent has been accepted. Even the minority view was that the second respondent was liable as claimed by the first respondent, but the appellant was not liable only on the ground that the arbitrators appointed by the Stock Exchange under Bye-law 248, in a claim against a non-member, had no jurisdiction to decide a claim

against another member. The finding of the majority is that the appellant did the transaction in the name of the second respondent and is therefore, liable along with the second respondent. Therefore, in the absence of any ground under Section 34(2) of the Act, it is not possible to re-examine the facts to find out whether a different decision can be arrived at.”

34. It is with this very important caveat that the two fundamental principles which form part of the fundamental policy of Indian law (that the arbitrator must have a judicial approach and that he must not act perversely) are to be understood.” (pages 75-77)

“42. In the 1996 Act, this principle is substituted by the “patent illegality” principle which, in turn, contains three subheads:

42.1. (a) A contravention of the substantive law of India would result in the death knell of an arbitral award. This must be understood in the sense that such illegality must go to the root of the matter and cannot be of a trivial nature. This again is really a contravention of Section 28(1) (a) of the Act, which reads as under:

“28. Rules applicable to substance of dispute. — (1) Where the place of arbitration is situated in India —

(a) in an arbitration other than an international commercial arbitration, the Arbitral Tribunal shall decide the dispute submitted to arbitration in accordance with the substantive law for the time being in force in India;”

42.2. (b) A contravention of the Arbitration Act itself would be regarded as a patent illegality – for example if an arbitrator gives no reasons for an award in

contravention of Section 31(3) of the Act, such award will be liable to be set aside.

42.3. (c) Equally, the third subhead of patent illegality is really a contravention of Section 28(3) of the Arbitration Act, which reads as under:

“28. Rules applicable to substance of dispute –

(1)-(2)***

(3) In all cases, the Arbitral Tribunal shall decide in accordance with the terms of the contract and shall take into account the usages of the trade applicable to the transaction.”

This last contravention must be understood with a caveat. An Arbitral Tribunal must decide in accordance with the terms of the contract, but if an arbitrator construes a term of the contract in a reasonable manner, it will not mean that the award can be set aside on this ground. Construction of the terms of a contract is primarily for an arbitrator to decide unless the arbitrator construes the contract in such a way that it could be said to be something that no fair-minded or reasonable person could do.” (page 81)

52. This judgment has been consistently followed in a plethora of subsequent judgments, including:

a. *National Highways Authority of India v. ITD Cementation India Ltd.*, (2015) 14 SCC 21 at paragraph 24 (page 38);

b. *Centrotrade Minerals & Metal Inc. v. Hindustan Copper Ltd.*, (2017) 2 SCC 228 at paragraph 45 (page 252);

c. *Venture Global Engg. LLC v. Tech Mahindra Ltd.*, (2018) 1 SCC 656 at paragraph 85 (page 687);

d. *Sutlej Construction Ltd. v. State (UT of Chandigarh)*, (2018) 1 SCC 718 at paragraph 11 (page 722);

e. *Maharashtra State Electricity Distribution Co. Ltd. v. Datar Switchgear Ltd.*, (2018) 3 SCC 133 at paragraph 51 (page 169);

f. *HRD Corpn. v. GAIL (India) Ltd.*, (2018) 12 SCC 471 at paragraphs 18-19 (page 493);

g. *M.P. Power Generation Co. Ltd. v. ANSALDO Energia SpA*, (2018) 16 SCC 661 at paragraph 25 (page 679);

h. *Shriram EPC Ltd. v. Rioglass Solar Sa*, (2018) 18 SCC 313 at paragraph 34 (page 328);

i. *State of Jharkhand v. HSS Integrated Sdn*, (2019) 9 SCC 798 at paragraph 7 (page 804); and

j. *Ssangyong Engg. & Construction Co. Ltd. v. NHAI*, (2019) 15 SCC 131 at paragraphs 20, 34-36 (pages 154, 169-170).”

(Emphasis as in original)

35. Viewed thus, and following on the above discussion, I find no reason to interfere with the impugned arbitral award.

Conclusion

36. As a result, the challenge to the impugned Award, by NHAI, fails. The period of 90 days, granted by the learned Arbitral Tribunal,

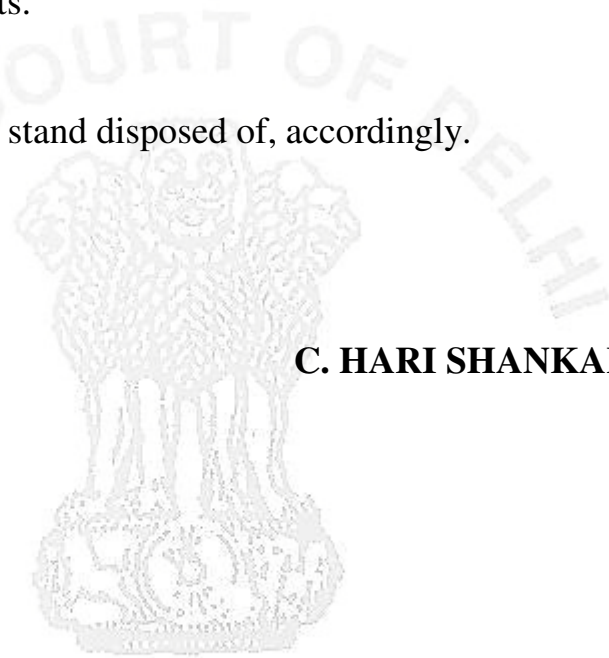
to NHAI, to make payment of ₹ 42.96 crores, in accordance with the impugned Award, shall, however, stand reckoned from the date of receipt, by NHAI, or the learned Counsel who represented NHAI in the present proceedings, of a copy of this judgement by email, sent by the Registry of this Court.

37. Subject to this modification, the present petition is dismissed, with no orders as to costs.

38. Pending IAs, if any, stand disposed of, accordingly.

JANUARY 04, 2021
HJ

C. HARI SHANKAR, J.



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