

IN THE HIGH COURT OF DELHI AT NEW DELHI

% *Judgment delivered on: 22nd October, 2021*

+ **O.M.P. (I) (COMM) NO.211/2020**

PUNJAB NATIONAL BANK

..... Petitioner

Versus

**THE NATIONAL HIGHWAYS AUTHORITY
OF INDIA & ANR.**

..... Respondent

Advocates who appeared in this case:

For the Petitioner	:Mr. Sandeep Sethi, Sr. Adv. with Mr. :Rishabha Sharma, Mr. Pradyuman Sewar & :Mr. Manish Dembla, Advs.
For the Respondent	:Ms. Gunjan Sinha Jain with Mr. N.K. :Sharma, PIU Rohtak and Mr. Dheeraj :Upadhyay, Young Professional NHAI Legal :(for NHAI). :Mr. Salman Khurshid, Sr. Adv. with Mr. :Aadya Mishra & Mr. Rishabh Pant, Advs. :for R-2.

**CORAM
HON'BLE MR JUSTICE VIBHU BAKHRU
JUDGMENT**

VIBHU BAKHRU, J

Introduction:

1. The petitioner Punjab National Bank (hereafter the 'PNB') has filed the present petition under Section 9 of the Arbitration & Conciliation Act, 1996 (hereafter the 'A&C Act') *inter alia* praying that the respondent no.1, National Highways Authority of India (hereafter the 'NHAI'), be directed to perform its obligations under

Clause 5.1 of the Substitution Agreement and terminate the Concession Agreement entered into between NHAI and respondent no. 2, West Haryana Highways Projects Pvt. Ltd. (hereafter the 'Concessionaire'). PNB further prays that NHAI be directed to deposit the Termination Payment in an Escrow Account [Escrow Account bearing No. 2164002100009137 maintained with PNB] in accordance with the Concession Agreement amounting to ₹617,23,00,000/- (Rupees Six Hundred Seventeen Crores Twenty-Three Lakhs Only) as on 22.11.2019, along with interest at the bank rate plus 3% for the first ninety days and thereafter, at the bank rate plus 5% till the date of payment. PNB further prays that the payments be released to it without prejudice to the rights and contentions of the Concessionaire to recover higher Termination Payment in the arbitration proceedings that may ensue.

2. In addition, PNB states that NHAI be also directed to deposit the amount awarded in favour of the Concessionaire in terms of the Arbitral Award dated 29.08.2019 in the Escrow Account and, it be further directed that the said amount be applied in terms of Clause 4.2 of the Escrow Agreement.

Factual Context:

3. By a Letter of Acceptance dated 05.07.2007 (hereafter the 'LoA'), NHAI awarded the project for design, engineering, construction, finance, operation and maintenance of Delhi-Haryana Border to Rohtak Section of NH-10 from KM 29.70 to KM 87.00

including construction of Bahadurgarh and Rohtak bypasses in the state of Haryana (hereafter the 'Project') to a consortium of Karam Chand Thapar & Brothers Ltd. and Era Infra Engineering Ltd., on build, operate and transfer basis. The said consortium incorporated the Concessionaire as a Special Purpose Vehicle for the purpose of the Project.

4. Thereafter, on 06.11.2007, NHAI and the Concessionaire entered into a Concession Agreement. The consortium of lenders comprising of PNB (as the lead bank), India Infrastructure Finance Company Ltd., Central Bank of India, State Bank of Patiala (now merged with State Bank of India), Dena Bank (now merged with Bank of Baroda) entered into a Common Loan Agreement to finance the Project. The said consortium of banks (hereafter referred to as 'PNB Consortium') agreed to extend a Rupee Term Loan of an aggregate amount not exceeding ₹410,23,00,000/- (Rupees Four Hundred Ten Crores and Twenty-Three Lakhs Only) to the Concessionaire for executing the Project.

5. Thereafter, on 02.05.2008, the Concessionaire and the Subordinate Lenders under Structured Mezzanine Credit Facility (SMCF) through IL&FS Financial Services Ltd. (Facility Manager) entered into a Common Loan Agreement for Subordinated Debt for a sum of ₹29,30,00,000/- (Rupees Twenty-Nine Crores and Thirty Lakhs only). On 29.09.2008, an Escrow Agreement was executed between PNB (acting as the Lenders' Representative) and the respondents. In terms of the said Escrow Agreement, an Escrow

Account bearing No. 2164002100009137 was opened with PNB (hereafter the 'Escrow Account').

6. PNB claims that all amounts credited in the Escrow Account are to be appropriated in terms of the Escrow Agreement, which placed payments to PNB as the second highest in the order of priority, next to payment of all taxes in relation to the Project in the event of termination of the Concession Agreement.

7. PNB acting as the Lenders' Representative entered into a Substitution Agreement with the respondents on 29.09.2008. This was in the format provided under Schedule-V to the Concession Agreement.

8. The Senior Lenders entered into a Second Supplementary Agreement dated 31.01.2014 to the Common Loan Agreement and in terms thereof, extended additional term loan of ₹18,84,00,000/- (Rupees Eighteen Crores Eighty-Four Lakhs Only). This was followed by the Senior Lenders and the Concessionaire entering into a Third Supplementary Agreement dated 21.03.2014 to the Common Loan Agreement in terms of which the Senior Lenders extended further loan of ₹44,75,00,000 (Rupees Forty-Four Crores and Seventy-Five Lakhs only) as Funded Interest Term Loan in respect of the interest for the period from 01.07.2013 to 30.04.2014. On 25.02.2014, the Subordinate Lenders of the Concessionaire executed a Second Amendatory Common Loan Agreement in respect of the Common Loan Agreement for Subordinate Debt whereby ₹3,61,00,000/-

(Rupees Three Crores and Sixty-One Lakhs only) was sanctioned towards Funded Interest Term Loan.

9. NHAI issued a Provisional Completion Certificate to the Concessionaire on 25.11.2015 in respect of the Project pursuant to which the highway in question could be placed in commercial service and provisionally be declared fit for commercial operation.

10. It is stated that certain disputes arose between NHAI and the Concessionaire, which were referred to arbitration. The arbitral proceedings culminated in the Arbitral Award dated 29.08.2020 in favour of the Concessionaire.

11. PNB claims that the Concessionaire has failed to perform its payment obligations under the Common Loan Agreements and this failure constitutes an event of default under the said agreement.

12. On 17.09.2019, PNB in its capacity as the Lenders' Representative issued a Notice of Financial Default to the Concessionaire. PNB also alleged that the Concessionaire was in material breach of Clause 10.1 of the Common Loan Agreement.

13. PNB states that the Concessionaire failed to cure the default. Resultantly, on 22.11.2019, PNB acting as the Lenders' Representative called upon NHAI to terminate the Concession Agreement and take over the Project. As a consequence of termination of the Concession Agreement, NHAI would be obliged to release the Termination Payment amounting ₹598,22,46,819/- (Rupees Five

Hundred Ninety-Eight Crores Twenty-Two Lakhs Forty-Six Thousand Eight Hundred and Nineteen Only) in terms of Article 37.3 of the Concession Agreement. Accordingly, PNB called upon NHAI to release the same.

14. PNB claims that the said Termination Payment including interest, amounts to ₹617,23,00,000/- (Rupees Six Hundred Seventeen Crores and Twenty-Three Lakhs only) as on 22.11.2019.

15. After receiving the notice dated 22.11.2019, NHAI issued a Cure Period Notice to the Concessionaire followed by a Suspension Notice.

16. The said Suspension Notice was challenged by the Concessionaire in a Writ Petition being W.P.(C) No. 3348/2020. It is stated that by an order passed in the said Writ Petition, this Court has stayed the Suspension Notice.

17. NHAI has not terminated the Concession Agreement with the Concessionaire and has consequently not released the Termination Payment as demanded by PNB.

18. PNB has filed the present petition in the aforesaid context.

Submissions

19. Mr Sethi, learned senior counsel appearing for PNB submitted that Clause 37.1.1 of the Concession Agreement sets out a list of defaults that entitles NHAI to terminate the Concession Agreement.

And, in terms of sub-clause (v) of Clause 37.1.1 of the Concession Agreement, NHAI is entitled to terminate the Concession Agreement on failure of the Concessionaire to fulfil any obligation for which 'termination' has been specified under the Agreement. Article 48 of the Concession Agreement defines 'Agreement' to mean its recitals and schedules, which also includes the format of the Substitution Agreement. He contended that in terms of Clause 5.1 of the Substitution Agreement, NHAI has no option but to terminate the Concession Agreement with the Concessionaire as a notice to this effect was also served by PNB on NHAI.

20. Next, he submitted that PNB has complete discretion to substitute, suspend or terminate the Concession Agreement if an Event of Default has occurred. He referred to Clauses 3.2.2, 3.2.3 and 5.1 of the Substitution Agreement and submitted that once PNB has exercised the option to terminate the Concession Agreement, NHAI is bound to terminate it, in accordance with Article 37 of the Concession Agreement. Further, it is not open for NHAI or the Concessionaire to question the Notice of Financial Default. He referred to Clause 3.1.1 of the Substitution Agreement and submitted that the same expressly provides that such a notice would be conclusive evidence of Financial Default and is binding on the Concessionaire.

21. Mr Sethi referred to the decisions of a coordinate Bench of this Court in *Jetpur Somnath Tollways Limited and Ors. v. National Highways Authority of India and Ors.: 2017 SCC OnLine Del 9453*

and submitted that the controversy in the present petition is fully covered by the said decision.

22. Ms Gunjan Sinha Jain, learned counsel appearing for NHAI countered the aforesaid submissions. First, she submitted that PNB was not a party to the Concession Agreement and therefore, could not determine rights and obligations under the Concession Agreement.

23. Second, she submitted that PNB's claim for payments were in respect of various agreements extending financial assistance to the Concessionaire. However, except for the Common Loan Agreement dated 02.05.2008 and the Supplementary Common Loan Agreement dated 29.09.2008, none of the other agreements could be considered as 'Financing Agreements' under the Concession Agreement. She submitted that the other agreements relied upon by PNB, that is, the Monetary Common Loan Agreement dated 09.04.2009; Supplementary Loan Agreement dated 21.03.2014; and Second Monetary Common Loan Agreement dated 25.02.2014 – were not within the knowledge of NHAI and the said agreements could not be considered as Financing Agreements in view of Clause 5.2.2 and 5.2.3 of the Concession Agreement.

24. Third, she submitted that the relief sought by PNB was beyond the scope of Section 9 of the A&C Act as it was not in aid of any arbitral proceedings but in fact a final relief.

25. Fourth, she submitted that PNB's prayer for deposit of any default payment did not arise as NHAI had not terminated the

Concession Agreement and the question of default payment would arise only when NHAI has terminated the Concession Agreement. She submitted that therefore, the decision of the coordinate bench of this Court in *Jetpur Somnath Tollways Limited and Ors. v. National Highways Authority of India and Ors.* (*supra*) is not applicable.

26. Fifth, she submitted that PNB had not evinced any intention to refer the disputes to arbitration as even though the notice dated 22.11.2019 was issued several months ago, PNB had not taken any steps for invoking the arbitration agreement or for appointment of an arbitrator.

27. Lastly, she submitted that PNB is in breach of the Escrow Agreement as it had illegally appropriated toll which was collected by the Concessionaire from 26.11.2015 onwards, for servicing its debts without first providing for repair or the balance construction of the Project. She thus submitted that, PNB could not compel NHAI to make further payments until the Project was sufficiently repaired.

Reasons & Conclusions

28. It is apparent from the above that there are multiple facets to the controversy involved in the present petition. PNB seeks to enforce its rights under the Substitution Agreement by demanding NHAI to terminate the Concession Agreement with the Concessionaire on account of its Financial Default. On termination of the Concession Agreement, NHAI is required to deposit the Termination Payment in the Escrow Account. The quantum of the Termination Payment

required to be deposited by NHAI under the terms of the Concession Agreement depends on whether the termination is on account of default on the part of NHAI or the Concessionaire. PNB claims that it is not necessary to examine the said controversy at this stage as any controversy between NHAI and the Concessionaire regarding which party is responsible for the default is required to be left open for the Arbitral Tribunal to decide the same. However, it claims that NHAI cannot absolve itself from taking the necessary action under the Substitution Agreement.

29. As noted above, NHAI has opposed the present petition on several grounds including that the financial facilities provided by PNB Consortium will not fall within the scope of the Financing Documents and therefore, NHAI does not require to take any action for default on the part of the Concessionaire irrespective of its obligation to repay the extended loans.

Analysis of relevant contractual provisions

30. Before proceeding further, it would be relevant to refer to certain clauses of the relevant agreements, that is, the Concession Agreement and the Substitution Agreement. Article 2 of the Concession Agreement defines the ‘Scope of the Project’. The same includes not only construction of the Project Highway but also its operation and maintenance in accordance with the provisions of the Concession Agreement.

31. In terms of Clause 5.1.1 of the Concession Agreement the Concessionaire is obliged to procure the finance at its cost and expense for undertaking *“the design, engineering, procurement, construction, operation and maintenance of the Project Highway and observe, fulfill, comply with and perform all its obligations set out in this Agreement [Concession Agreement]”*.

32. In terms of sub-clause (c) of Clause 5.1.4 of the Concession Agreement, the Concessionaire is obliged to perform and fulfill its obligations under the Financing Agreements. Sub-clause (c) of Article 5.1.4 of the Concession Agreement reads as under:

“5.1.4 The Concessionaire shall, at its own costs and expense, in addition to and not in derogation of, its obligations elsewhere set out in this Agreement:

XXXX XXXX XXXX

(c) perform and fulfill its obligations under the Financing Agreements;

XXXX XXXX XXXX”

33. The term ‘Financing Agreement’ is defined under Clause 48.1 of the Concession Agreement which reads as under:

“Financing Agreements means the agreements executed by the Concessionaire in respect of financial assistance to be provided by the Senior Lenders by way of loans, guarantees, subscription to non-convertible debentures and other debt instruments including loan agreements, guarantees, notes, debentures, bonds and other debt instruments, security agreements, and other

documents relating to the financing (including refinancing) of the Total Project Cost, and includes amendments or modifications made in accordance with Clause 5.2.2.”

34. In terms of Clause 5.2.2 of the Concession Agreement, the Concessionaire was obliged to submit all Project Agreements to NHAI for its review and comments. In terms of Clause 5.2.3 of the Concession Agreement, it was agreed that the Concessionaire will not make any replacement or amendments to any of the Financing Agreements without the prior written consent of NHAI if such replacement or amendments would have the effect of imposing or increasing any financial liability or obligations on NHAI.

35. Article 31 of the Concession Agreement contains provisions regarding opening of an Escrow Account. In terms of Clause 31.1 of the Concession Agreement, the Concessionaire is required to establish an Escrow Account in accordance with the Concession Agreement and the Escrow Agreement (in the format as set out in Schedule ‘S’ of the Concession Agreement). In terms of Clause 31.2 of the Concession Agreement, the Concessionaire was obliged to deposit all funds constituting the Financial Package; all fees and revenues from or in respect of the Project; and all payments by NHAI after deduction of any outstanding Concession Fee into the Escrow Account.

36. Clause 31.3 of the Concession Agreement contains provisions regarding withdrawals from the Escrow Account during the concession period and in the order in which the same is required to be made. Clause 31.3.1 of the Concession Agreement also provides for a

waterfall mechanism for withdrawal from the Escrow Account which is to be made periodically and, in the order, as stipulated. Clause 31.4 of the Concession Agreement contains provisions for withdrawal of amounts from the Escrow Account upon termination of the Concession Agreement. Similar terms for withdrawal from the Escrow Account are provided in the Escrow Agreement as well.

37. Clause 31.4 of the Concession Agreement reads as under:

“31.4.1 Notwithstanding anything to the contrary contained in this Agreement, all amounts standing to the credit of the Escrow Account shall, upon Termination, be appropriated in the following order:

- (a) all taxes due and payable by the Concessionaire;
- (b) 90% (ninety per cent) of Debt Due excluding Subordinated Debt;
- (c) outstanding Concession Fee;
- (d) all payments and Damages certified by the Authority as due and payable to it by the Concessionaire, including Premium and repayment of Revenue Shortfall Loan;
- (e) retention and payments relating to the liability for defects and deficiencies set forth in Article 39;
- (f) outstanding Debt Service including the balance of Debt Due;
- (g) outstanding Subordinated Debt;
- (h) incurred or accrued O&M Expenses;
- (i) any other payments required to be made under this Agreement; and
- (j) balance, if any, in accordance with the instructions of the Concessionaire;

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

38. As is apparent from the above, upon termination of the Concession Agreement, the amounts deposited in the Escrow Account are to be utilized for making payments towards taxes and debts payable by the Concessionaire and thereafter, for payment of 90% of the debt due excluding subordinated debt. Thus, upon termination of the Concession Agreement, PNB would be entitled to receive 90% of the debt due from the Concessionaire by withdrawing the same from the Escrow Account.

39. At this stage, it is relevant to refer to the Substitution Agreement dated 29.09.2008 entered into between the parties. The recitals of the Substitution Agreement make it clear that the said agreement is to secure the interest of the Senior Lenders through assignment, transfer and substitution of the Concession to a Nominated Company in accordance with the provisions of the Substitution Agreement and the Concession Agreement. The Senior Lenders had agreed to finance the project to the extent of ₹410.23 crores in accordance with the terms as set forth in the Financing Agreements. In order to secure their exposure, the Substitution Agreement entitled them to substitute the Concessionaire by another Concessionaire (Nominated Company). The rationale for entering into the said agreement is clear. Since highways are to be constructed

and operated on the basis of the finance secured by the Concessionaire under the Financing Agreements, it was necessary for the Lenders to secure themselves against any default on the part of the Concessionaire by enabling them to substitute the Concessionaire after the Project was substantially completed (to the extent of 75%). In terms of Clause 2 of the Substitution Agreement, the Concessionaire assigned its rights and interest in the Concession in favour of the Lenders' Representative (PNB) by way of security.

40. Clause 3 of the Substitution Agreement contained provisions regarding substitution of the Concessionaire. Clause 3.2 of the Substitution Agreement is relevant and the same is set out below:

“3.2 Substitution upon occurrence of Financial Default

3.2.1 Upon occurrence of a Financial Default, the Lenders' Representative may issue a notice to the Concessionaire (**the “Notice of Financial Default”**) along with particulars thereof, and send a copy to the Authority for its information and record. A Notice of Financial Default under this Clause 3 shall be conclusive evidence of such Financial Default and it shall be final and binding upon the Concessionaire for the purpose of this Agreement.

3.2.2 Upon issue of a Notice of Financial Default hereunder, the Lenders' Representative may, without prejudice to any of its rights or remedies under this Agreement or the Financing Agreements, substitute the Concessionaire by a Nominated Company in accordance with the provisions of this Agreement.

3.2.3 At any time after the Lenders' Representative has issued a Notice of Financial Default, it may by notice require the Authority to suspend all the rights of the Concessionaire and undertake the operation and maintenance of the Project Highway in accordance with the provisions of Article 36 of the Concession Agreement, and upon receipt of such notice, the Authority shall undertake Suspension under and in accordance with the provisions of the Concession Agreement. The aforesaid Suspension shall be revoked upon substitution of the Concessionaire by a Nominated Company, and in the event such substitution is not completed within 180 (one hundred and eighty) days from the date of such Suspension, the Authority may terminate the Concession Agreement forthwith by issuing a Termination Notice in accordance with the provisions of the Concession Agreement; provided that upon written request from the Lenders' Representative and the Concessionaire, the Authority may extend the aforesaid period of 180 (one hundred and eighty) days by period not exceeding 90 (ninety) days.

41. In terms of Clause 3.2.1 of the Substitution Agreement, on occurrence of Financial Default, the Lenders' Representative is entitled to issue a Notice of Financial Default to the Concessionaire. The term 'Financial Default' is defined under Clause 1.1 of the Substitution Agreement, which reads as under:

“Financial Default” means occurrence of a material breach of the terms and conditions of the Financing Agreements or a continuous default in Debt Service by the Concessionaire for a minimum period of 3 (three) months;”

42. Clause 3.2.1 of the Substitution Agreement makes it expressly clear that the Notice of Financial Default under Clause 3 of the Substitution Agreement is conclusive evidence of Financial Default and would be binding on the Concessionaire for the purpose of the Substitution Agreement. Undisputedly, on issuance of the Notice of Financial Default, the Lenders' Representative has the right to substitute the Concessionaire by a Nominated Company. Therefore, PNB has the right to substitute the Concessionaire by a Nominated Company.

43. Clause 3.3 of the Substitution Agreement contains provisions regarding substitution of the Concessionaire by NHAI on account of the Concessionaire's default. The same provides that in such an event, NHAI is required to give a notice to the Lenders' Representative informing it of its intention to issue a Termination Notice and thus, entitling the Lenders' Representative to make a representation for substituting the Concessionaire by a Nominated Company. Clause 3.4 of the Substitution Agreement contains a provision regarding the procedure for such substitution.

44. A plain reading of Clause 3 of the Substitution Agreement indicates that the Lenders' Representative is entitled to require NHAI to suspend the rights of the Concessionaire and to undertake the operation and maintenance of the Project in accordance with Article 36 of the Concession Agreement after it has issued a Notice of Financial Default. However, the said period of suspension is not indefinite. If the substitution is not completed within a period of 180

days, NHAI is entitled to terminate the Concession Agreement by issuing the Termination Notice. The suspension as referred to in Clause 3.2 of the Substitution Agreement is required to be done in terms of Article 36 of the Concession Agreement.

45. Clause 36.3 of the Concession Agreement provides for revocation of suspension if the Concessionaire rectifies or removes the causes of suspension within the stipulated period not exceeding ninety days. In such case, all rights of the Concessionaire are required to be restored. NHAI is also entitled to act on behalf of the Concessionaire and remove or rectify the cause of suspension within the period of 90 days from the date of suspension. In the event the cause is addressed and cured, the Concessionaire suspension is required to be revoked and all rights of the Concessionaire are required to be restored.

46. Clause 36.5 of the Concession Agreement provides for termination in case where the Concessionaire has been suspended. Clause 36.5 of the Concession Agreement is relevant and is set out below:

“36.5 Termination

36.5.1 At any time during the period of Suspension under this Article 36, the Concessionaire may by notice require the Authority to revoke the Suspension and issue a Termination Notice. Subject to the rights of the Lenders' Representative to undertake substitution in accordance with the provisions of this Agreement and within the period specified in Clause 36.4, the Authority shall within 15

(fifteen) days of receipt of such notice, terminate this Agreement under and in accordance with Article 37.

36.5.2 Notwithstanding anything to the contrary contained in this Agreement, in the event that Suspension is not revoked within 180 (one hundred and eighty) days from the date of Suspension hereunder or within the extended period, if any, set forth in Clause 36.1, the Concession Agreement shall, upon expiry of the aforesaid period, be deemed to have been terminated by mutual agreement of the Parties and all the provisions of this Agreement shall apply, *mutatis mutandis*, to such Termination as if a Termination Notice had been issued by the Authority upon occurrence of a Concessionaire Default.”

47. It is apparent from a conjoint reading of Clause 3.2 of the Substitution Agreement and Article 36 of the Concession Agreement that the suspension of a Concessionaire cannot continue indefinitely. During the period of suspension, the Concessionaire has the option to revoke the suspension and issue a Termination Notice to terminate the Concession Agreement in accordance with Article 37 thereof. Clause 36.5.2 of the Concession Agreement also clarifies that if suspension is not revoked within a period of 180 days from the date of suspension or a further period of 90 days, then on a request from the Lenders’ Representative as contemplated in Clause 36.1 of the Concession Agreement, the Concession Agreement would be deemed to have been terminated by mutual consent and it will further be deemed that the

termination notice has been issued by NHAI on occurrence of the Concessionaire's Default.

48. Insofar as, the requirement of suspension under Article 36 of the Concession Agreement is concerned, there appears to be no dispute that the Lenders' Representative can demand the same in the event of a Financial Default.

49. The controversy in the present case arises as to the interpretation of Clause 5.1 of the Substitution Agreement which entitles the Lenders' Representative to demand that the Concession Agreement be terminated forthwith.

50. Clause 5 of the Substitution Agreement contains provisions regarding termination of the Concession Agreement. The said Clause reads as under:

“5 TERMINATION OF CONCESSION AGREEMENT

5.1 Termination upon occurrence of Financial Default

At any time after issuance of a Notice of Financial Default, the Lenders' Representative may by a notice in writing require the Authority to terminate the Concession Agreement forthwith, and upon receipt of such notice, the Authority shall undertake Termination under and in accordance with the provisions of Article 37 of the Concession Agreement.

5.2 Termination when no Nominated Company is selected

In the event that no Nominated Company acceptable to the Authority is selected and recommended by the Lenders' Representative within the period of 180 (one hundred and eighty) days or any extension thereof as set forth in Clause 3.3.2, the Authority may terminate the Concession Agreement forthwith in accordance with the provisions thereof.

5.3 Realisation of Debt Due

The Authority and the Concessionaire hereby acknowledge and agree that without prejudice to their any other right or remedy, the Lenders' Representative is entitled to receive from the Concessionaire, without any further reference to or consent of the Concessionaire, the Debt Due upon Termination of the Concession Agreement. For realization of the Debt Due, the Lenders' Representative shall be entitled to make its claim from the Escrow Account in accordance with the provisions of the Concession Agreement and the Escrow Agreement.”

51. A plain reading of Clause 5.1 of the Substitution Agreement indicates that it refers to termination under Article 37 of the Concession Agreement. And, NHAI is obliged to terminate the Concession Agreement in terms of Article 37 of the Concession Agreement.

52. Clause 37.1 of the Concession Agreement sets out the provisions regarding termination of the agreement on Concessionaire's default. Clause 37.1.1 of the Concession Agreement sets out the defaults which will be considered as the Concessionaire's default. The defaults as mentioned in Clause 37.1.1 also include

occurrence of a Financial Default. The relevant extract of Clause 37.1 of the Concession Agreement is set out below:

“37. Termination for Concessionaire Default

37.1.1 Save as otherwise provided in this Agreement, in the event that any of the defaults specified below shall have occurred, and the Concessionaire fails to cure the default within the Cure Period set forth below, or where no Cure Period is specified, then within a Cure Period of 60 (sixty) days, the Concessionaire shall be deemed to be in default of this Agreement (a “Concessionaire Default”), unless the default has occurred solely as a result of any breach of this Agreement by the Authority or due to Force Majeure. The defaults referred to herein shall include:

(j) upon occurrence of Financial Default, the Lenders’ Representative has by notice required the Authority to undertake Suspension in accordance with the Substitution Agreement and the Commissionaire fails to cure the default within the Cure Period specified in the Substitution Agreement.

37.1.2 Without prejudice to any other rights or remedies which the Authority may have under this Agreement, upon occurrence of a Concessionaire Default, the Authority shall be entitled to terminate this Agreement by issuing a Termination Notice to the Concessionaire; provided that before issuing the Termination Notice, the Authority shall by a notice inform the concessionaire of its intention to

issue such Termination Notice and grant 15 (fifteen) days to the Concessionaire to make a representation, and may after the expiry of such 15 (fifteen) days, whether or not it is in receipt of such representation, issue the Termination Notice, subject to the provisions of clause 37.1.3.

- 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.”

53. In the facts of the present case, NHAI has issued the Suspension Notice pursuant to a Notice of Financial Default which was issued by PNB. As noticed above, there is no provision in the Concession Agreement, which entitles NHAI to continue the suspension for an indefinite period. The suspension is either required to be revoked or be escalated to the termination of the Concession Agreement.

54. In view of the above, an analysis of the provisions of the Concession Agreement and the Substitution Agreement indicates that there is merit in PNB’s contentions that once a Notice of Financial Default is issued, NHAI is required, in terms of the Substitution Agreement read with Concession Agreement, to terminate the Concession Agreement.

55. The question whether the same is required to be preceded by suspension of the Concession Agreement or a cure notice is rendered academic, as considerable period has since elapsed after NHAI had suspended the Concessionaire.

56. It is also clear from the Concession Agreement that once such termination is effected, NHAI is required to make Termination Payments as contemplated under Clause 37.3 of the Concession Agreement. Clause 37.3 of the Concession Agreement is set out below:

“37.3 Termination Payment

- 37.3.1 Upon Termination on account of a Concessionaire Default during the Operation Period, the Authority shall pay to the Concessionaire, by way of Termination Payment, an amount equal to 90% (ninety per cent) of the Debt due less Insurance Cover, provided that if any insurance claims forming part of the Insurance Cover are not admitted and paid, then 80% (eighty per cent) of such unpaid claims shall be involved 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 concerning prior to COD.
- 37.3.2 Upon Termination on account of the Authority Default, the Authority shall pay to the Concessionaire, by way of Termination Payment, an amount equal to:
- (a) Debt Due; and
 - (b) 150% (one hundred and fifty per cent) of the Adjusted Equity.
- 37.3.3 Termination Payment shall become due and payable to the Concessionaire within 15 (fifteen) days of a demand being made by the Concessionaire to the Authority with the necessary particulars, and in the event of any delay, the Authority shall pay interest at a rate equal to 3% (three per cent) above the Bank Rate on the amount of Termination Payment remaining unpaid; provided that such delay shall not exceed 90 (ninety) days. For the avoidance of doubt, it is expressly agreed that Termination Payment shall constitute full

discharge by the Authority of its payment obligations in respect thereof hereunder.”

57. It is necessary to clarify that although this Court has expressed its view as to the interpretation of various clauses of the Substitution Agreement and the Concession Agreement, the said view is only a *prima facie* view and, cannot substitute a determination which is yet to be arrived at by the Arbitral Tribunal. Admittedly, the parties have agreed that the disputes are required to be resolved through arbitration. In the circumstances, notwithstanding that the counsels have addressed their arguments regarding the interpretation of the relevant Agreements, this Court must refrain from a final determination, as any dispute between the parties is required to be adjudicated by an Arbitral Tribunal.

58. In the aforesaid context, the only issue to be addressed is whether the relief as sought for, can be granted to PNB in view of the aforesaid *prima facie* view of this Court.

59. At this stage it is necessary to note that it is not PNBs’ case that there are any grounds for seeking an attachment before judgment as contemplated under Order XXXVIII Rule 5 of the Code of Civil Procedure, 1908. Any claim that PNB may have for recovery of any amount from NHAI is not required to be secured, as PNB has not raised any doubt as to NHAI’s inability to repay its debts. PNB has rested its case for relief in the present petition entirely on the premise that there is no real dispute regarding NHAI’s obligations to terminate the Concession Agreement on a demand made by PNB after issuance

of a Notice of Financial Default. Upon termination of the Concession Agreement, NHAI is required to deposit Termination Payment as contemplated under Clause 37.3 of the Concession Agreement. There is a dispute between the Concessionaire and NHAI. The questions whether NHAI is responsible for the Concessionaire's financial default and, if so, whether it entitles the Concessionaire to claim that the termination of the Concession Agreement as demanded by PNB be considered as termination on account of NHAI's default, are contentious issues and it is not necessary to address the same in these proceedings. PNB claims that notwithstanding the said dispute, NHAI, as a bare minimum, is required to pay the Termination Payment as contemplated under Clause 37.3.1 of the Concession Agreement being an amount equal to 90% of the debt due less the stipulated deductions.

60. As noticed above, NHAI has resisted the present petition on several grounds. First, it was contended that PNB cannot demand termination of the Concession Agreement as it is not a party to that Agreement.

61. The said contention is clearly unmerited. The express terms of the Substitution Agreement to which PNB is a party creates certain rights and obligations between the parties and, NHAI is obliged to perform the same. As discussed above, the rights available to the Lenders' Representative includes a right to seek substitution of the Concessionaire and demand termination of the Concession Agreement in the event, the Concessionaire has committed a Financial Default.

NHAI's contention that PNB cannot demand the same despite the expressed terms of the Substitution Agreement is clearly insubstantial.

62. It was next contended that the relief sought by PNB was beyond the scope of Section 9 of the A&C Act as it would amount to grant of a final relief.

63. The scope of Section 9 of the A&C Act has been a subject matter of much debate. In ***Adhunik Steels Ltd. v. Orissa Manganese and Minerals (P) Ltd.: (2007) 7 SCC 125***, the Supreme Court had observed as under:

“11. It is true that Section 9 of the Act speaks of the court by way of an interim measure passing an order for protection, for the preservation, interim custody or sale of any goods, which are the subject-matter of the arbitration agreement and such interim measure of protection as may appear to the court to be just and convenient. The grant of an interim prohibitory injunction or an interim mandatory injunction are governed by well-known rules and it is difficult to imagine that the legislature while enacting Section 9 of the Act intended to make a provision which was de hors the accepted principles that governed the grant of an interim injunction. Same is the position regarding the appointment of a receiver since the position regarding the appointment of a receiver since the section itself brings in the concept of “just and convenient” while speaking of passing any interim measure of protection. The concluding words of the section, “and the court shall have the same power for making orders as it has for the purpose and in relation to any proceedings before it” also suggest that the normal rules that govern the court in the grant of interim orders is not sought to be jettisoned

by the provision. Moreover, when a party is given a right to approach an ordinary court of the country without providing a special procedure or a special set of rules in that behalf, the ordinary rules followed by that court would govern the exercise of power conferred by the Act. On that basis also, it is not possible to keep out the concept of balance of convenience, prima facie case, irreparable injury and the concept of just and convenient while passing interim measures under Section 9 of the Act.”

64. In ***Nimbus Communications Limited v. Board of Control for Cricket in India & Anr.: (2013) 1 MahLJ 39***, the Bombay High Court had observed as under:

“24. A close reading of the judgment of the Supreme Court in *Adhunik Steels* would indicate that while the Court held that the basic principles governing the grant of interim injunction would stand attracted to a petition under Section 9, the Court was of the view that the power under Section 9 is not totally independent of those principles. In order words, the power which is exercised by the Court under Section 9 is guided by the underlying principles which govern the exercise of an analogous power in the Code of Civil Procedure 1908. The exercise of the power under Section 9 cannot be totally independent of those principles. At the same time, the Court when it decides a petition under Section 9 must have due regard to the underlying purpose of the conferment of the power upon the Court which is to promote the efficacy of arbitration as a as a form of dispute resolution. Just as on the one hand the exercise of the power under Section 9 cannot be carried out in an uncharted territory ignoring the basic principles of procedural law contained in the Code of Civil Procedure 1908,

the rigors of every procedural provision in the Code of Civil Procedure 1908 cannot be put into place to defeat the grant of relief which would subserve the paramount interests of justice. A balance has to be drawn between the two considerations in the facts of each case. The principles laid down in the Code of Civil Procedure 1908 for the grant of interlocutory remedies must furnish a guide to the Court when it determines an application under Section 9 of the Arbitration and Conciliation Act, 1996. The underlying basis of Order 38 Rule 5 therefore has to be borne in mind while deciding an application under Section 9(ii)(b). ”

65. In *West Haryana Highways Projects Private Limited v. National Highways Authority of India and Ors: OMP (I) (COMM) 144/2020 and OMP (I) (COMM) 263/2020 decided on 07.10.2020*, a coordinate bench of this Court had referred to the aforesaid decisions and observed as under:

“36. Thus, it is evident that while the well-settled principles governing grant of injunctions, as laid out under the provisions of the Specific Relief Act and Code of Civil Procedure, are to guide this Court while exercising its powers under Section 9, they do not strictly bind the course of the decision. Ultimately, the Court, after examining the facts of the case, has a duty to assess and decide which would be the most just and convenient route to take as also to prevent the ends of justice from being defeated”

66. In *Ajay Singh and Ors. v. Kal Airways Private Limited and Ors.: 2017 SCC OnLine Del 8934*, the Division Bench of this Court had observed that although Section 9 of the A&C Act gives wide

powers to the Courts in fashioning an appropriate interim order, the exercise of such power should be founded on established principles and known guidelines. The relevant extract of the said decision is set out below:

“26. Though apparently, there seem to be two divergent strands of thought, in judicial thinking, this court is of the opinion that the matter is one of the weight to be given to the materials on record, a fact dependent exercise, rather than of principle. That Section 9 grants wide powers to the courts in fashioning an appropriate interim order, is apparent from its text. Nevertheless, what the authorities stress is that the exercise of such power should be principled, premised on some known guidelines – therefore, the analogy of Orders 38 and 39. Equally, the court should not find itself unduly bound by the text of those provisions rather it is to follow the underlying principles.”

67. In a subsequent decision in *National Highways Authority of India v. Punjab National Bank and Ors.*: 2017 SCC OnLine Del 11312, the Division Bench of this Court had referred to the decision in *Ajay Singh and Ors. v. Kal Airways Private Limited and Ors.* (*supra*). The relevant extract of the said decision is set out below:

35. On the question of exercise of power under Section 9 of the A&C Act, we have already referred to Clauses 37.3.1 of the Concessionaire Agreement which is an express and mandatory provision when said agreement is terminated on account of concessionaire fault. We have also referred to Clauses 3.2 and 4.2 of the tripartite Escrow Agreement which refers to termination

payment. To accept the plea of NHAI that section 9 of the A&C Act cannot be invoked, would negate and obliterate the aforesaid Clauses and their effect. In the aforesaid circumstances the ratio of decision of the Division Bench of this Court in ***Value Source Mercantile Limited v. Span Mechnotronix Limited***: (2014) 143 DRJ 505, is apposite, if not definite and conclusive. Referring to Section 9 of the A&C Act, this decision emphasized that the said provision uses the expression ‘interim measure of protection’ as distinct from the expression ‘temporary injunction’ used in Rules 1 and 2 of Order XXXIX of the Code of Civil Procedure, 1908. Interim injunction is one of the measures or orders prescribed in Clause (d) to Section 9(ii) of the A&C Act, albeit a party to the arbitration agreement is entitled to apply for an seek ‘interim measure of protection’. Clause (e) to Section 9(ii) is a residuary power of the court to issue or direct other “interim measures of protection”. Thus, the court has the power to issue or direct other interim measurers of protection as may appear to the court to be just and convenient. Section 9 encompass the power of making orders as the Civil Court has for the purpose of, and in relation to any proceedings before it. This decision refers to Rule 10 of Order XXXIX of the aforesaid Code which empowers the Court to direct to deposit payment of the admitted amount. Therefore the court exercising power under Section 9 of the A&C

Act has the same power as that of a civil court during pendency of the suit.”

68. In the present case, in essence PNB seeks a mandatory injunction directing NHAI to do certain acts which it claims NHAI is obliged to do in terms of their contract. Thus, the principles that govern the grant of mandatory interim injunctions are necessarily to be borne in mind. In ***Dorab Cawasji Warden v Coomi Sorab Warden and Others : (1990) 2 SCC 117***, the Supreme Court had examined the law on the subject and after examining various authorities had observed as under:-

“16. The relief of interlocutory mandatory injunctions are thus granted generally to preserve or restore the status quo of the last non-contested status which preceded the pending controversy until the final hearing when full relief may be granted or to compel the undoing of those acts that have been illegally done or the restoration of that which was wrongfully taken from the party complaining. But since the granting of such an injunction to a party who fails or would fail to establish his right at the trial may cause great injustice or irreparable harm to the party against whom it was granted or alternatively not granting of it to a party who succeeds or would succeed may equally cause great injustice or irreparable harm, courts have evolved certain guidelines. Generally stated these guidelines are:

- (1) The plaintiff has a strong case for trial. That is, it shall be of a higher standard than a prima facie case that is normally required for a prohibitory injunction.

- (2) It is necessary to prevent irreparable or 'serious injury which normally cannot be compensated in terms of money.
- (3) The balance of convenience is in favour of the one seeking such relief.

17. Being essentially an equitable relief the grant of refusal of an interlocutory mandatory injunction shall ultimately rest in the sound judicial discretion of the court to be exercised in the light of the facts and circumstances in each case. Though the above guidelines are neither exhaustive nor complete or absolute rules, and there may be exceptional circumstances needing action, applying them as prerequisite for the grant or refusal of such injunctions would be a sound exercise of a judicial discretion.”

69. In the present case, as noted above, PNB has made a compelling case, which certainly meets a standard higher than a *prima facie* case. However, that by itself is not sufficient for grant of interim mandatory injunctions. It is also necessary to examine whether such a relief is necessary to prevent irreparable or a serious injury that cannot be compensated in terms of money and whether the balance of convenience requires such a relief to be granted. In this regard, Mr Sethi, had relied heavily on the decision of a coordinate bench of this Court in ***Jetpur Somnath Tollways Limited and Ors. v. National Highways Authority of India and Ors.*** (*supra*). In that case, NHAI had terminated the Concession Agreement. The concessionaire in that case (Jetpur Somnath Tollways Limited) as well as PNB (who was also the Lenders' Representative in that case) had filed petitions under Section 9 of the A&C Act [OMP (I) COMM 221/2017 and OMP (I)

COMM 227/2017] praying that directions be issued to NHAI to deposit certain sums in the Escrow Account. Whereas, the Concessionaire sought deposit of ₹359.199 crores, PNB had sought a direction to NHAI to pay an amount of ₹374.51 crores. There was a controversy whether the termination was on account of Concessionaire's default or NHAI's default. The Court had noted notwithstanding the aforesaid dispute, NHAI had an obligation to deposit the Termination Payment in the Escrow Account. Undoubtedly, the quantum of the termination payment would depend on whether the Concessionaire or NHAI prevailed in their respective stands. However, in case NHAI prevails, it was liable to pay 90% of the debt due, but in the event, Concessionaire succeeded in the disputes, NHAI would be entitled to pay an higher amount. The Court noted that there was no dispute between NHAI and the Lenders' Representative (PNB). In this view, the Court directed NHAI to deposit ₹354.744 crores in the Escrow Account subject to the Concessionaire furnishing an unconditional and irrevocable bank guarantee in favour of NHAI for a sum not exceeding ₹348.604 crores, which was equivalent to 90% of the remaining debt due less an amount of ₹6.14 crores which NHAI had agreed to pay in any case.

70. Mr Sethi, had relied heavily on the said decision in support of the claim that NHAI was obliged to deposit the Termination Payment as sought for by PNB. However, it is relevant to note that the Court was persuaded to grant the said relief in that case, as it was of the view that irreparable loss and injury would be suffered by the

Concessionaire as its account would be declared a Non-Performing Asset (NPA) and PNB would also suffer grave injury. This is relevant from the following passage from the said decision:

“101 In case, this payment is not made by NHAI, the account of JETPUR would be declared as NPA and irreparable loss and injury would be suffered. Not only would JETPUR suffer irreparable, the Lenders including PNB would suffer grave injury. The concern is more of the public funds that have been provided by PNB and the lenders which would be embroiled in the inter se disputes between JETPUR and NHAI. Equity demands that the lenders and PNB should get their amount and the inter se disputes can be sorted out between the NHAI and JETPUR through the process of Arbitration.”

71. In the present case, the Concessionaire has opposed the present petition; it opposes termination of the Concession Agreement. It is also apparent from the record that the Concessionaire (respondent no.2) is seeking to specifically enforce the Concession Agreement and has contested NHAI's action of suspension under Article 36 of the Concession Agreement. In such circumstances, there is no ground of the Concessionaire suffering any irreparable loss or injury for want of grant of the relief as sought for by PNB.

72. In view of the above at best the present case must be considered as PNB's demand for securing its funds.

73. In *National Highways Authority of India v. Punjab National Bank and Ors.* (*supra*) the Division Bench of this Court had rejected the appeal against the decision of the Single Judge of this Court in

Jetpur Somnath Tollways Limited and Ors. v. National Highways Authority of India and Ors. (*supra*), the reasoning of the Court is relevant. With regard to the exercise of powers, the Court had reasoned as under:

35. On the question of exercise of power under Section 9 of the A&C Act, we have already referred to Clauses 37.3.1 of the Concessionaire Agreement which is an express and mandatory provision when said agreement is terminated on account of concessionaire fault. We have also referred to Clauses 3.2 and 4.2 of the tripartite Escrow Agreement which refers to termination payment. To accept the plea of NHAI that section 9 of the A&C Act cannot be invoked, would negate and obliterate the aforesaid Clauses and their effect. In the aforesaid circumstances the ratio of decision of the Division Bench of this Court in *Value Source Mercantile Limited v. Span Mechnotronix Limited* MANU/DE/1318/2014 : (2014) 143 DRJ 505, is apposite, if not definite and conclusive. Referring to Section 9 of the A&C Act, this decision emphasized that the said provision uses the expression ‘interim measure of protection’ as distinct from the expression ‘temporary injunction’ used in Rules 1 and 2 of Order XXXIX of the Code of Civil Procedure, 1908. Interim injunction is one of the measures or orders prescribed in Clause (d) to Section 9(ii) of the A&C Act, albeit a party to the arbitration agreement is entitled to apply for an seek ‘interim measure of protection’. Clause (e) to Section 9(ii) is a residuary power of the court to issue or direct other “interim measures of protection”. Thus, the court has the power to issue or direct other interim measurers of

protection as may appear to the court to be just and convenient. Section 9 encompass the power of making orders as the Civil Court has for the purpose of, and in relation to any proceedings before it. This decision refers to Rule 10 of Order XXXIX of the aforesaid Code which empowers the Court to direct to deposit payment of the admitted amount. Therefore the court exercising power under Section 9 of the A&C Act has the same power as that of a civil court during pendency of the suit.”

74. In this case, no amount is admittedly due by NHAI to pay PNB as it has not terminated the Concession Agreement. NHAI also disputes that the agreements entered into between PNB and Concessionaire for financing the Project constitutes Financing Agreements as apart from the initial Financing Agreements, the remaining were not furnished to NHAI. Although, it does appear that the Concessionaire’s default also pertains to the Common Loan Agreements which were admittedly a part of the Financing Agreements, it is not readily ascertainable as to which part of the amounts claimed by PNB are attributable to those agreements and which part of the debt is attributable to Agreements which NHAI disputes to be Financing Agreements.

75. It is also necessary to observe that any order passed under Section 9 of the A&C Act must fall within the broad scope of an interim measure. Such orders must be in aid of the arbitral proceedings. Given the conspectus of disputes between the parties, this Court is not persuaded to accept on the anvil of tests of irreparable loss/injury as well as balance of convenience, that an interim order be

issued directing NHAI to terminate the Concession Agreement. The said order by its very nature is irrevocable and final and, cannot be construed as an interim measure.

76. PNB has prayed that NHAI be directed to deposit the awarded amount in terms of the Arbitral Award dated 29.08.2019 in the Escrow Account. The Concessionaire had prevailed in the arbitration instituted against NHAI and is, thus, entitled to receive certain amounts in terms of the Arbitral Award. However, NHAI has contested the said Arbitral Award.

77. If the Concessionaire is able to recover any amount from NHAI, PNB would be well within its right to seek attachment of the said proceeds or take such steps for recovery of the amount from the Concessionaire. However, PNB would require to institute separate proceedings for recovery of amounts from the Concessionaire and clearly the same cannot be directed by an order under Section 9 of the A&C Act. Importantly, an arbitral award is required to be enforced as a decree of the court in terms of Section 36 of the A&C Act. The said procedure cannot be circumvented by seeking directions under Section 9 of the A&C Act. Thus, PNB is not precluded from instituting appropriate proceedings for attachment of the awarded amount on the Arbitral Award being enforced, however no relief in this regard can be granted in these proceedings.

78. The petition is, accordingly, dismissed. It is, however, clarified that nothing stated in this order shall be construed as an expression of

final opinion on the merits of the controversy between the parties and the parties are at liberty to agitate all their rights and contentions before an appropriate forum.

VIBHU BAKHRU, J

OCTOBER 22, 2021

‘gsr’

