



\$~4

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

Decided on: 24.04.2023

+ **FAO(OS) (COMM) 151/2020, CM APPL. 29414/2020, CM APPL. 29415/2020 & CM APPL. 28664/2021**

PUNJAB NATIONAL BANK

..... Appellant

Through: Mr. Sudhanshu Batra, Sr. Advocate with Mr. Krishna Vijay Singh and Mr. Pradyuman Sewar, Advocates.

versus

WEST HARYANA HIGHWAYS PROJECTS PRIVATE LIMITED & ORS.

..... Respondents

Through: Mr. Salman Khurshid, Sr. Advocate with Mr. Apoorv Agarwal, Mr. Manav Goyal, Ms. Saloni Singh, Ms. Aadya Mishra, Ms. Sommya Chaturvedi and Ms. Arushi Jain, Advocate for R-1. Ms. Gunjan Sinha Jain, Advocate for NHAI.

CORAM:

HON'BLE MR. JUSTICE NAJMI WAZIRI

HON'BLE MR. JUSTICE SUDHIR KUMAR JAIN

NAJMI WAZIRI, J (ORAL)

The hearing has been conducted through hybrid mode (physical and



virtual hearing).

1. This appeal impugns the order dated 07.10.2020 passed by the learned Single Judge in *West Haryana Highways Projects Private Limited vs. National Highways Authority Of India and Ors.*, which has issued the following directions:

“Directions

80. Accordingly, in view of the aforesaid discussion, these petitions are disposed of with the following directions:

i. The first petition, OMP(I)(COMM) 144/2020 seeking stay of the impugned NITs dated 17.04.2020 and 05.05.2020 is dismissed.

ii. The second petition, OMP(I)(COMM) 263/2020, is partly allowed by staying the operation of notice/letters No. NHAI/PIU-RTK/B-H/LTR/20-21/300 dated 27.05.2020 and letter No. NHAI/PIU-RTK/B-H/LTR/20-21/339 dated 28.05.2020 suspending the rights of the petitioner under the Concession Agreement. However, this direction shall only subsist for a period of three months from today, or until further orders in this regard are passed in arbitration, whichever is earlier. It is made clear that in case the petitioner fails to invoke arbitration within three months, this interim order will no longer continue to operate. Furthermore, while carrying out toll collections, the petitioner shall ensure that all sums collected are duly deposited in the escrow account, as per the stipulations of the agreements between the parties.

iii. In IA 6365/2020, the respondent no.2 is directed to



release 50% of INR 5.25 crores to the petitioner, after deducting the sum of INR 42 lakh which has already been paid to it pursuant to the orders of this Court.”

2. The learned Senior Advocate for Punjab National Bank (‘PNB’) submits that no monies are payable at all, especially when there is a claim of over Rs.700 crores recoverable from the concessionaire. The concessionaire was declared a NPA in 2016 and notice of default was issued in 2019. The entire NHAI project was financed by PNB and other consortium of lenders. It is not in dispute that no arbitral proceedings have been initiated by any party against the other. The impugned order directs payment of 50% of Rs.5.25 crores after deducting Rs.42 lacs from the 50% on the basis that work was carried out between 30.08.2020 to 24.09.2020 during the pendency of section 9 petitions. The court had rightly taken the view that an act of good can do no harm, and in any case, the larger public interest should prevail. However, every such claim would have to be first verified. The procedure for verifying the claim is that after a Request for Inspection (‘RFI’) is issued by the concessionaire apropos any work carried out by it, the NHAI would verify the work carried out through its engineers, often accompanied by the engineers of PNB and consortium of lenders.
3. The learned counsel for NHAI submits that for the relevant periods, the NHAI visited the site apropos all the RFIs sent to them. They approved bills for an amount of Rs.40 lacs. Such



bills or the inspection reports are independently verified by engineers of PNB and consortium of lenders. However, according to NHAI, bills for the claim of roughly Rs.5.25 crores were never presented to it. Consequently, no inspection of the site took place and there was no occasion for any verification. The PNB and consortium of lenders would only be required to look into payments only after the verification of bills and reports, etc. In the absence of any bills being raised of any RFI or a verification of the same either first by the NHAI or subsequently by PNB, there cannot be any cause for either the banker or NHAI to release 50% of Rs.5.25 crores. Therefore, the assumption that work has been carried out in terms of the claim of the erstwhile concessionaire is not justified. The direction contained in 80(iii) of the impugned order is thus unsustainable.

4. The learned Senior Advocate for PNB draws the court's attention to the manner in which the Escrow account has to be maintained and the same is detailed in clause 3 of the Escrow Agreement, which reads *inter-alia* as under:

“3. DEPOSITS INTO ESCROW ACCOUNT

3.1 Deposits by the Concessionaire

3.1.1 The Concessionaire agrees and undertakes that it shall deposit into and/or credit the Escrow Account with:-

- (a) *all monies received in relation to the Project from any source, including the Senior Lenders, lenders of Subordinated*



Debt and the Authority;

- (b) all funds received by the Concessionaire from its share holders, in any manner or form;*
- (c) all fee levied and collected by the Concessionaire*
- (d) any other revenues from or in respect of the Project Highway; and*
- (e) all proceeds received pursuant to any insurance claim.*

3.1.2 The Concessionaire may at any time make deposits of its other funds into the Escrow Account, provided that the provisions of this Agreement shall apply to such deposits.

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 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.



3.3 Deposits by Senior Lenders

The Lenders' Representative agrees, confirms and undertakes that the Senior Lenders shall deposit into and/or credit the Escrow Account with all disbursements made by them in relation to or in respect of the Project; provided that notwithstanding anything to the contrary contained in this Agreement, the Senior Lenders shall be entitled to make direct payments to the EPC Contractor under and in accordance with the express provisions contained in this behalf in the Financing Agreements.

3.4 Interest on deposits

The Escrow Bank agrees and undertakes that all interest accruing on the balances of the Escrow Account shall be credited to the Escrow Account; provided that the Escrow Bank shall be entitled to appropriate therefrom the fee and expenses due to it from the Concessionaire in relation to the Escrow Account and credit the balance remaining to the Escrow Account.”

5. The learned Senior Advocate for R-1 submits that there is nothing wrong with the impugned order because all it directs is that the monies be released from the Escrow Account for the work carried out by R-1 during the pendency of petitions under section 9 of the Arbitration and Conciliation Act, 1996. In particular, reference is made to the orders passed by the learned Single Judge on 24.09.2020, which reads *inter-alia* as under:

“...

3. At this stage, learned Senior counsel for the petitioner submits that on 10.07.2020, the respondent



no.1 had expressed its willingness to withdraw the NITs, subject to an undertaking furnished by the petitioner to complete the work as set out in the two impugned NITs on or before 30th November, 2020. Pursuant thereto, the petitioner had submitted its undertaking before this Court on 05.08.2020 and commenced the repair and maintenance work w.e.f. 06.08.2020. He submits that though the petitioner has, as on date, completed works to the tune of Rs.5.25 cores, in accordance with the specifications prescribed by the respondent no.1, the said respondent is malafidely claiming that this work is substandard.

4. On the other hand, learned counsel for the respondent no.1 submits that the petitioner's work since 06.08.2020, as per instructions, has remained sub-standard and, as a result, the respondent no.1 is neither inclined to permit the petitioner to continue carrying out this work nor to bear the costs of the same. She, therefore, prays that the petitioner be directed forthwith to stop all repair and maintenance work at the project site.

5. In the light of the stand taken by respondent no.1, learned senior counsel for the petitioner submits that the petitioner would stop the ongoing repair and maintenance work with effect from tomorrow itself, after utilising the material already placed on site. He however, prays that the payments for the work done by the petitioner, pursuant to the orders dated 10.07.2020 and 05.08.2020 passed by this Court, be released in favour of the petitioner from the Escrow Account. This aspect will also be considered at the time of the final decision.

... ”

6. Reference is also made to the reasoning in the impugned order which reads *inter-alia* as under:



“ ...

70. On the other hand, Mr. Sethi submits that the entire project work has been carried out from the monies of the Bank under the financing agreements, which is evident from the contents of paragraphs 19,41,42 of the petition. However, once the petitioner was declared as a NPA and failed to make repayment of installations, an event of default was triggered under Clause 10.1.1 of the Common Loan Agreement. Therefore, respondent no.2, by way of Clause 10.4.3 of the Common Loan Agreement, was entitled to either suspend further drawings of the loan amount or suspend or terminate further use thereof or cancel the loan itself. By relying on Clause 11.1.1 of the Common Loan Agreement, he submits that once there was an event of default, the senior lenders were granted a right to suspend or terminate the petitioner's further access to Escrow Account.

...

74. Not only the afore-extracted provision, even Article 31.3.1 (b) of the Concession Agreement stipulated that all payments relating to construction of the project highway shall attain precedence for withdrawal of the monies from the Escrow Account. The record also shows that the petitioner was indeed declared a NPA w.e.f. 30.06.2019 and that respondent no.2 had an undeniable right to not only seek termination of the Concession Agreement but also substitution of the petitioner as the Concessionaire under the Substitution Agreement. However, considering the reliefs sought in the application and these petitions, I find that it is not necessary for this Court to venture into the issue of substitution rights of respondent no.2. I have also considered the decision in Transstoy (supra) relied upon by respondent no.2, and find it inapplicable to the facts of the present case. In that decision, the Concessionaire was found guilty of diverting toll



collections from the Escrow Account, whereas the petitioner herein has not indulged in any such conduct. Furthermore, the Court in that case was not dealing with a situation like the present one whereunder the parties have agreed upon an order of precedence which gives priority to the Escrow Agreement over all other financing agreements.

75. For the time being, in the facts of the present case, the agreements collectively require respondent no.2 to release monies from the Escrow Account for the purpose of repair and maintenance work of the highway, especially in public interest. It was the essence of this argument which had convinced this Court, on 05.08.2020, to direct respondent no.2, on an interim basis, to release monies to the petitioner from the Escrow Account for the purpose of carrying out repair and maintenance work as directed by respondent no.1. As a result, the petitioner had been carrying out the work and submitting a Request for Inspection (RFI) on a daily basis to respondent no.1, to have its repair work inspected and verified. Once respondent no.1 would signify its approval of this work, the certified RFIs would be submitted to respondent no.2 for release of monies from the Escrow Account. From the documents placed before this Court, evidently, all the petitioner's RFIs w.e.f. 06.08.2020 till 30.08.2020 were duly approved and certified by the respondent no.1 which ensured release of INR 17 lakh from the escrow account in favour of the petitioner, as against its claim for approximately INR 22 lakh. However, w.e.f. 31.08.2020 the respondent no.1 has rejected all the work carried out by the petitioner, which culminated in the events of 08.09.2020 when the respondent no.1 refused to release any further amounts in the Escrow Account to the petitioner for work which was not certified by respondent no.1. The petitioner claims that these rejections are malafide while



respondent no.1 has argued, by drawing my attention to its own tabular summary of the RFIs, that the work submitted by the petitioner was inadequate which resulted in the rejection. However, during the course of arguments, it was found that the tabular summary filed by respondent no.1 was unreliable inasmuch as it shows RFIs dated 23.08.2020 and 24.08.2020 as having been rejected when the documents placed on record show otherwise. The petitioner has also alleged that earlier, although its lenders used to assess its work through their own Engineer, this has stopped owing to the fact that the petitioner is a NPA and its lenders do not wish to incur any further expenditure on assessing the petitioner's work or certifying it. These issues, I find, also do not fall within the purview of examination of this Court. The only relevant aspect which arises out of these contentions is the admitted position that as on date, the petitioner has not been paid for any work it did, as per its undertaking before the Court, for the period between 31.08.2020 to 24.09.2020.

76. The petitioner claims that the value of the major repair and maintenance work which remains unpaid, as on date, is INR 5.25 crores, which it has borne alone by taking further loans from private lenders. Notwithstanding the fact that respondent no.1, on 03.09.2020, filed an affidavit before this Court expressing its dissatisfaction with the works executed by the petitioner, the petitioner continued to execute the major repair and maintenance work till 24.09.2020. Admittedly, while the respondent no.1 has only approved some of the work carried out by the petitioner during this period and not all of it, this Court cannot delve into the merits of the approval or lack thereof.

77. It will, however, be a travesty of justice to exact all



of this repair and maintenance work from the petitioner, under Court orders, without compensating it for its efforts. I am of the view that the petitioner should not be deprived of its right to recover the amounts it spent, out of the toll collection deposited in the escrow account, especially in view of the admission on the part of respondent no.1 that the petitioner has indeed carried out major repair and maintenance work of the highway, albeit not to its satisfaction. Moreover, although Clause 4.1.1 of the Escrow Agreement holds the petitioner entitled to recover the entire costs incurred in carrying out major repair and maintenance work as per the directions of respondent no.1, but since the petitioner's bills for these works remain unverified by respondent no.1, interest of justice demands that the petitioner ought to be reimbursed for some part of the amount it has spent on the major maintenance work.

78. The application is, therefore, liable to be partly allowed by directing respondent no.2 to pay the petitioner, at this stage, a sum equivalent to 50% of INR 5.25 crores from the Escrow Account for the costs it claims to have incurred in carrying out major repair and maintenance work. However, this direction would be subject to any orders passed in this regard, including any orders for restitution or further payment, in arbitration which the parties propose to invoke.

... ”

7. The learned Senior Advocate for R-1 submits that the highway was made available by them in the larger public interest and it is a matter of record that there is no impediment in the use of the highway. It is in this good faith that monies would be reimbursed to be repaid to the concessionaire for the work carried out. He further submits that the spirit of public interest in the work carried out by R-1 finds resonance in the order



dated 26.08.2020 passed by the Division Bench in FAO(OS)(COMM) 100/2020 which, *inter-alia*, has noted as under:

“ ...

7. In view of the submissions made hereinabove and the fact that the appellant has itself admitted before the learned Single Judge that a monthly sum of Rs.71 lakhs is payable to the respondent No.1 for operation and maintenance work of the National Highway, we see no reason to interfere with the impugned order passed by the learned Single Judge, who has prioritised public interest over the interest of the appellant and the consortium of Lender Banks while directing the appellant to release amounts in favour of the respondent No.1 to carry out major repair work. Even otherwise, it is not as if the appellant is remediless. If the respondent No.1 is a defaulter, the appellant is well entitled to seek legal recourse against it, in terms of the contract governing the parties and the applicable law.... ”

8. The said order was passed in an appeal by PNB impugning the order of 05.08.2020, directing PNB to release of some monies subject, however, to the final outcome of the section 9 petitions, in which the now impugned directions were passed.
9. The learned Senior Advocate for the concessionaire submits that the bills were submitted, however, they might have been rejected. Be that as it may, such rejection, if any, will not foreclose the rights and remedies of the concessionaire to pursue its claims before any appropriate forum, in accordance with law.



10. The Escrow Account envisaged in the Agreement is in the nature of a receptacle, in which not only the toll collection but all monies received by the concessionaire would be deposited, this would include loan amounts that maybe arranged by the concessionaire. In paragraph 76 of the impugned order, it is recorded that to carry out the maintenance work R-1 had taken a loan from some entity and this financing facilitated R-1 to discharge its responsibilities. However, it is not specified by R-1 as to: i) what was the quantum of this loan; ii) which entity it was borrowed from? and iii) how the said financing was utilized for their work of major repairs?
11. If the major repair works, stated to have been carried out by R-1, was facilitated by and was contingent upon loan monies received by R-1, then at least the details of receipt of the loan should have been specified. Conversely, in the absence of any proof of any such monies/loan amounts coming into the bank account of R-1, the latter would have been unable to carry out any repair work. Therefore, it cannot be presumed that the repair work was carried out in the manner and to the extent claimed by R-1. Therefore, *prima facie*, there is no justification for release of the monies as directed in the impugned order in Para 80 (iii). In any case, all monies including loan amounts should have first come into the Escrow account and only then could the work have been carried out. The said direction is accordingly stayed till a final decision is taken in the pending section 9 petitions.



12.The appeal is allowed and disposed-off in terms of the above.
Pending applications too are disposed-off.

NAJMI WAZIRI, J

SUDHIR KUMAR JAIN, J

APRIL 24, 2023
SS

