

(2019) 11 DEL CK 0318

In the Delhi High Court

Case No : Original Miscellaneous Petition (I) (COMM.) No. 218 Of 2019

Bhubaneshwar Expressways Pvt. Ltd.

APPELLANT

Vs

National Highways Authority Of India

RESPONDENT

Date of Decision : 25-11-2019

Acts Referred:

Code Of Civil Procedure, 1908 — Order 39 Rule 1, Order 2 Rule 2, Order 39 Rule 2, Order 18 Rule 5, Order 38 Rule 5, Order 39 Rule 10
Arbitration And Conciliation Act, 1996 — Section 9, 9(ii), 17, 34(2)(a)(iv)
Specific Relief Act, 1963 — Section 38(3)(b)
Arbitration Act, 1940 — Section 20, 41, 41(b)

Citation : (2019) 265 DLT 631 : (2020) 1 ArbLR 144 : (2020) 2 AD(Delhi) 375

Hon'ble Judges : Jyoti Singh, J

Bench : Single Bench

Advocate : Sandeep Sethi, Abhyudai Singh, Sidhant Kumar, Sahil Tandon, Sudhir Nandrajog, C.S. Chauhan, Satish Kumar Mishra

Final Decision : Allowed

Judgement

Jyoti Singh, J

1. The present petition has been filed under Section 9 of the Arbitration & Conciliation Act, 1996 ("Act") seeking a direction to the respondent to pay/ deposit an amount of Rs. 3,37,73,19,434.10/- which constitutes 90% of the debt due amount as per the provisions of Concession Agreement, along with interest on the aforesaid amount from the date of termination i.e. from 20.03.2017 till 90 days therefrom, at a rate 3% above the Bank rate and further interest till the date of actual payment at a rate of 5% above the Bank rate in terms of the provisions of the Concession Agreement.

2. Necessary facts for adjudicating the present petition are that the parties had entered into a Concession Agreement dated 13.07.2010 (hereinafter referred to as the "Agreement") for four laning of Bhubaneshwar - Puri Section of National Highway 203 from KM 0.00 to KM 59.00 in the State of Odisha on a DBFOT basis.

The said Agreement was amended by a supplementary agreement dated 17.08.2016. The parties entered into an Arbitration Agreement reflected in Article 44.3 of the Agreement and agreed to resolve their disputes by way of arbitration through Society for

3. For the purpose of executing the project, the petitioner availed finance from various Banks and financial Institutions pursuant to a Loan Agreement dated 13.03.2011. The petitioner achieved Financial Closure on 13.01.2011 and the petitioner, respondent and PNB also executed a substitution agreement on 12.01.2011.

4. The estimated cost of construction and development of the project was initially Rs. 5,41,15,00,000/- and it was agreed to be financed through a loan of Rs. 244 Crores and Grant of by NHAI of Rs. 193.78 Crores.

5. It is the case of the petitioner that the respondent failed to provide encumbrance free site to the petitioner for development of the project and caused several delays in handing over the site. 80% of the site had to be made available as on the appointed date, whereas barely 25% was made available and complete site was handed over as late as in July 2015. The delays on the part of the respondent were observed by the Independent Engineer as well as the Project Director in the Regional office of the respondent and which is why they had approved the extension of time for completion of the project on two occasions viz. first by their letter dated 26.03.2014 upto 31.03.2015 and then upto 31.03.2016. The respondent had also delayed the appointment of the Independent Engineer beyond the period of 90 days from the execution of the Agreement.

6. It is the further case of the petitioner that the delay in completion of the project had severe cost implications for the petitioner including increase in costs of borrowing, mobilisation of manpower, machinery and resources, amount of interest payable etc. In fact, the petitioner and its lenders were compelled to infuse further funds of over Rs. 100 Crores to salvage the project and achieve completion, which was brought to the notice of the respondent. It is pleaded that despite all odds, the petitioner remained committed to the project and was able to achieve substantial completion to the extent of 80%. A provisional completion certificate was issued by the Independent Engineer on 20.08.2015. The Tolling operations began on 25.08.2015 but were stopped due to public agitation and even thereafter could be only partially resumed. The respondent even failed to procure support from the State Government to assist the petitioner in Toll collection.

7. The petitioner thereafter served a notice of default dated 06.01.2017 upon the respondent and made a claim of Rs. 4,45,00,00,000/- for the losses suffered on account of various breaches by the respondent. Eliciting no response from the respondent, the petitioner invoked the Arbitration Agreement. On receipt of the said notice, the respondent malafidely issued a show cause notice dated

13.01.2017 asking the petitioner to show cause why the Agreement not be terminated.

8. Finally, the Agreement was terminated by the respondent on 20.03.2017 alleging failures on behalf of the petitioner. The petitioner by way of a letter dated 31.03.2017 protested against the termination and sought release of Termination Payment.

9. Some disputes having arisen between the parties, the Arbitrator was appointed and the petitioner filed its statement of claim. The claims made in the said arbitration proceedings were as under:

SR. NO.

PARTICULAR

AMOUNT (IN RS.)

1

On account of amount payable to the EPC Contractor towards the deployment of machinery & equipments, manpower, increase in material cost, overheads etc. in the extended period etc.

3,00,11,62,277/-

2

On account of amount suffered by the Claimant due to loss in tolling.

1,49,68,75,492/-

3

On account of amount suffered by the Claimant due to loss towards Preliminary/ Pre-Operative expenses.

8,46,17,261/-

4

On account of amount suffered by the Claimant due to loss towards interest during construction.

55,86,59,833/-

5

On account of amount suffered by the Claimant due to loss towards interest on cost overrun.

25,95,19,510/-

6

On account of amount receivable by the Claimant towards grant and interest on delayed grant.

14,64,20,317/-

7

On account of amount receivable by the Claimant towards Change in Scope.

56,12,85,038/-

8

On account of additional amount deducted from grant towards IE Expenses.

3,46,81,682/-

9

On account of increase in rate of MAT.

3,73,41,164/-

10. The said arbitration proceedings culminated into an Arbitral Award dated 13.11.2018 whereby Rs. 2,88,59,94,926/- was awarded in favour of the petitioner and the Tribunal found that the respondent had delayed the handing over of the site and was also responsible for various delays resulting in failure to meet its contractual obligations. It is pertinent to note here that the said Award is a subject matter of challenge by both the parties, which is pending in this Court.

11. Since the termination had taken effect after the invocation of the earlier arbitration, the petitioner again sought to invoke the Arbitration Clause. The Arbitral Tribunal was constituted for disputes qua termination and the petitioner filed its statement of claim seeking Termination Payment along with pre-reference interest, pendente lite and future interest. Cost of arbitration was also sought. The petitioner also filed an application under Section 17 of the Act for an interim relief of Termination payment.

12. It was later discovered by the petitioner that one of the Arbitrators in the Tribunal had been a member in the Board of the respondent. The said Arbitrator subsequently recused himself but the substitute Arbitrator has not been appointed till date. On account of this, the application under Section 17 of the Act is pending and the present petition has been filed by the petitioner seeking the relief as aforesaid.

13. Learned senior counsel for the petitioner contends that by virtue of Article 37.3 of the Agreement, respondent is under obligation to make payment of the Termination Payment to the petitioner within a period of 15 days of the demand being raised by the petitioner and in the event of delay interest is payable at the rate equal to 3% above the Bank rate. As per Article 47.5 of the Agreement in

the event of delay beyond the said period interest at the rate of 5% above the prevailing Bank rate is payable for the period of delay. It is argued that the amount of Termination Payment is payable irrespective of the outcome of the disputes pending adjudication before the Tribunal. It is submitted that a bare reading of Article 37.3.2 of the Agreement shows that in case the Agreement is terminated due to the default of the respondent, the petitioner would be entitled to 100% of the debt amount and 150% of the adjusted equity. However, in terms of clause 37.3.1 of the Agreement, even if the termination is on account of the default by the petitioner, it would still be entitled to 90% of the "debt due". Learned senior counsel submits that thus in any event, 90% of the debt due is payable to the petitioner as Termination Payment, irrespective of the outcome of the arbitration proceedings.

14. It is next contended by the learned senior counsel that the petitioner had diligently pursued with the respondent for release of the Termination Payment. Due to the failure of the respondent to release the said payment, the debts of the petitioner have mounted and the lenders have filed recovery proceedings against the petitioner and its guarantors before the DRT. The petitioner has suffered severe financial losses and undue hardship. There is no reason according to the learned senior counsel, why the Termination Payment should not be released by the respondent.

15. In a nutshell the argument of the petitioner is that the liability of the respondent to pay the Termination Payment is absolute and indisputable as there is no exception once the completion has been achieved. In any event of termination 90% is payable, of course, a higher amount would be due if the reason for termination is the default of the respondent.

16. Learned Senior Counsel further submits that although an application under Section 17 is pending before the Arbitral Tribunal but on account of recusal of one of the members of the Tribunal, there is no Arbitral Tribunal in existence and since an urgent relief is required by the petitioner, present petition has been filed.

17. Per Contra, learned senior counsel for the respondent submits that the present application is an abuse of the process of law and is only aimed at extracting money from the respondent. It is submitted that the prayer in the present petition is for directions to the respondent to deposit/pay money under the clause of Termination Payment, which relief, cannot be granted under Section 9 of the Act.

18. The next contention of the learned Senior counsel is that termination of the Contract took place on 20.03.2017 whereas the petitioner invoked the Arbitration Clause for the Termination Payment only in October 2018 i.e. after more than 1½ years and the application under Section 17 was filed much later on 27.05.2019. The present petition has been filed on 17.07.2019 and it is thus evident that there is no urgency for claiming the relief sought.

19. It is contended that the Arbitral Tribunal has been constituted. Since the

petitioner challenged the appointment of one of the Co-Arbitrators, the Tribunal could not function. The respondent is in the process of appointing a substitute co-Arbitrator. Application under Section 17 of the Act is already pending and if the petitioner has waited for over two years since the termination, it can certainly await the matter to be considered by the Tribunal.

20. Learned senior counsel for the respondent next contends that the present petition under Section 9 of the Act is even otherwise not maintainable as the claims sought to be raised in the arbitration proceedings and the relief sought herein are barred by the principle underlying Order II Rule 2 of the Code of Civil Procedure. Paras 11.29 to 11.31 of the petition herein are indicative of the fact that on 31.03.2017, the petitioner had protested against the termination and had sought release of The Termination Payment. In the first Arbitral Proceedings, the Tribunal was constituted on 16.05.2017 and a statement of claim was filed by the petitioner on 13.06.2017. Having demanded the Termination Payment on 31.03.2017, the petitioner ought to have included the claim for Termination Payment in the said statement of claim. Having chosen not to do so, it is not open for the petitioner to even seek such a claim. Learned counsel argues that though it is true that provisions of CPC do not apply to arbitration proceedings yet it is against public policy to raise such a claim when the proceedings were at the fag end and the Award was awaited. It is a malicious act on the part of the petitioner to have issued a second invocation notice on 18.10.2018.

21. Learned senior counsel next contends that the only grounds for urgency pleaded by the petitioner are that the release of Termination Payment has been delayed which is leading to losses to the petitioner and that the loans due to the petitioner's lenders are subject to interest which is mounting day by day. Attention of the Court is drawn to paras 23, 20 and 32 of the petition in this regard. Thus, the relief is principally to prevent further losses and seek Termination Payment. This is a mere monetary claim and can certainly await Arbitration Proceedings to complete.

22. Learned senior counsel next contends that the petitioner is in fact seeking a relief in the nature of mandatory injunction which he cannot by virtue of provisions of Section 38(3)(b) of the Specific Relief Act, 1963.

23. The next contention of the respondent is that debt due has been defined in the agreement between the parties. The claim raised by the petitioner on account of the Termination Payment viz. 90% of the debt due is far in excess of the amount actually due without prejudice to the contention of the respondent that the said amount is not due. Linked with this is the contention of the respondent that the petitioner has already resorted to an Arbitration Proceedings in the first round and have claimed compensation in the sum of Rs. 445,00,00,000/- on account of breaches and misrepresentation by the respondent. Having raised a claim of compensation of a higher figure it is not open for the petitioner to make a claim in the nature of Termination Payment.

24. Learned senior counsel for the petitioner in rejoinder vehemently opposed the argument that the claim for Termination Payment in the present petition is barred by the principle of Order II Rule 2 CPC. Learned counsel submits that the notice of invocation in the earlier Arbitration Proceedings was dated 19.1.2017. The terms of reference of the Arbitration Proceedings were circumscribed by the said notice. Termination has taken place subsequently on 20.3.2017 and therefore could not have been a part of notice invoking earlier arbitration and a subsequent event cannot enlarge the scope of reference. Thus, the present claim of Termination Payment was not available to the petitioner when the arbitration was invoked on 19.1.2017. When the Arbitral Tribunal entered upon reference in May, 2017, its scope of examining the disputes was restricted to the claims sought to be raised in the notice dated 19.1.2017. Learned senior counsel further submits that the respondent had itself taken a stand in the written submission filed in the earlier arbitration proceedings in para "D" that the issue of Termination Payment was not within the scope of the said proceedings and that the petitioner should seek appropriate legal remedies regarding the termination of the agreement as well as the Termination Payment mentioned in Clause 37.3 of the Agreement. Relevant para is extracted hereinunder.

"D. Moreover, when the concession agreement is terminated the procedure for calculating the Termination Payment is specifically provided in Clause 37.3 of the CA. Hence, it is appropriate for the claimant to seek remedy under 37.3 as well as remedy under 29.1.1 in the appropriate legal proceeding to be initiated by the claimant challenging the termination of the CA."

25. Learned senior counsel has further drawn the attention of this Court to the award passed by the arbitrator in the earlier proceedings, more specifically para 12 as well as paras 2 and 3. It is submitted that the Arbitral Tribunal had itself noted in para 12 of the Award that since the Concession Agreement had already been terminated, all the payments relating to loss in revenue would be considered under the Termination Payment which was not under the purview of the current Arbitral Tribunal. In para 2, the Arbitral Tribunal has noticed that termination issue was not within the scope of said Arbitration Proceedings and hence it would not be appropriate to consider the said termination. In para 3, it is observed that it would be appropriate for the claimant to seek remedy under Clauses 37.3 and 29.1.1 in the appropriate legal proceedings to be initiated by the claimant challenging the termination of the agreement. Paras 12, 2 and 3 of the Award are extracted herein below:-

"12. The Respondent further contended that since the CA has already been terminated, all the payments relating to loss in toll revenue would be considered under the Termination Payment which is not under the purview of the Current Arbitral Tribunal. This contention of the Respondent also does not hold good as the loss due to delay in tolling happened before the termination of the CA and was part of the disputes referred to the current Arbitral Tribunal and therefore, this Arbitral Tribunal is competent to decide this issue. Further, the term

Termination Payment is a defined term under the CA and the loss due to delay in tolling does not come under that."

xxx xxx xxx

"2. The contention of the Claimant that the concession agreement is already terminated and hence, they cannot wait till 2020 and then seek the remedy under Clause 29.1.1 is not acceptable and impermissible. The termination issue is not within the scope of the present arbitration proceedings and hence, it will not be appropriate to consider the termination and then grant the toll loss ignoring the contract terms. In such a case, AT will be travelling beyond the scope of the Arbitration reference.

3. Moreover, when the concession agreement is terminated the procedure for calculating the Termination Payment is specifically provided in Clause 37.3 of the CA. Hence, it is appropriate for the claimant to seek remedy under 37.3 as well as remedy under 29.1.1 in the appropriate legal proceeding to be initiated by the claimant challenging the termination of the CA."

26. Learned senior counsel submits that had the petitioner raised the disputes in the first arbitration this would have been a ground for challenge under Section 34(2)(a)(iv) of the Act by the respondent. The provision reads as under:-

"(iv) the arbitral award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration:

Provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the arbitral award which contains decisions on matters not submitted to arbitration may be set aside; or"

27. Learned senior counsel for the petitioner has heavily relied on the judgment passed by a Co-ordinate Bench of this Court in the case of Jetpur Somnath Tollways Limited vs. National Highways Authority of India 2017 SCC OnLine Del 9453. It is argued that the said case covers the present case in all four corners, both in terms of the facts as well as the legal issues involved. It is submitted that in the said case the petitioner had filed an application under section 9 of the Arbitration Act seeking a direction to the respondent who was none other than NHAI, to deposit the balance part of the Termination Payment into the Escrow Account. It is submitted that the same Clause viz 37.3 relating to Termination Payment was invoked for seeking the payment. The Court having examined the Clause as well as definition of the words "debt due", as in the present case, held that NHAI was liable to pay 90% of the debt due taking into account the circumstance that in case the said payment was not made the petitioner would be declared NPA and irreparable loss and injury would be caused to it. It was observed that equity demanded that the petitioner gets its amount and the remaining disputes could be resolved through the process of Arbitration. The Court held that under Section 9 of the Arbitration Act, it had the power to pass

such orders as appear to the Court to be just and convenient to prevent ends of justice being defeated. Court noticed that under Section 9 of the Act, several Courts have in the facts of the case passed mandatory interlocutory direction to the respondents to make payments.

28. Senior counsel has drawn the attention of this Court to the directions given in that case to NHAI to deposit the balance payment on account of Termination Payment into the Escrow account and the petitioner being directed to furnish unconditional and irrevocable bank guarantee in favour of NHAI.

29. It is further argued that against the said judgment of the Single Bench, NHAI had filed an appeal which was dismissed by a Division Bench on 27th October, 2017 and the SLP was also dismissed on 5th January, 2018.

30. Learned Senior counsel for the respondent on the other hand has relied on the judgment of the Apex Court in the case of Ghaziabad Development Authority vs. Union of India & Anr. 2000 (6) SCC 113, more particularly paragraphs 5, 6, 8 and 10. In Addition, learned Senior Counsel had sought to distinguish the judgment relied upon by the petitioner in the case of Jetpur (Supra). Learned counsel submits that in the said case PNB was acting as the lender's representative and being the Escrow Bank had executed a Tripartite Escrow Agreement with Jetpur and NHAI, whereas no such document had been executed in the present case. In fact in the said case the Escrow Agreement was envisaged under Clauses 3.2 and 4.2, whereby NHAI had agreed that as and when due and payable, the money would be deposited into the Escrow Account and most importantly the distinguishing factor is that the NHAI had not disputed its liability to pay the amount towards the debt due but had only questioned the quantum. This according to the Senior Counsel is reflected clearly in para 73 of the judgment. According to the Senior counsel in the present case, there is no admission of any liability to pay and per-contra the liability is clearly disputed.

31. Responding to this argument, learned Senior counsel for the petitioner submits that both the cases are absolutely similar. Significantly, even the respondent is the NHAI in both cases and most of the terms of the agreement are identical. He further points out that even in the present case, the agreement between the parties contains a provision for entering into an Escrow Agreement and Escrow Account is defined. Learned senior counsel points out Clause 31.1 which refers to the "Escrow Account" and submits that the concessionaire is bound to open the said account with an Escrow Bank in accordance with the Escrow Agreement and Clause 31.2 mandates the concessionaire to deposit various payments mentioned therein in the said account. Attention is also drawn to Clause 31.4 of the Agreement more particularly 31.4.1(b) to argue that as per the Agreement all amounts standing to the credit of Escrow Account shall upon termination be appropriated in the manner prescribed in the said Clause and this includes 90% of the debt due. Learned senior counsel also argues that under Clause 31.4.2 the instructions contained in the Escrow Agreement shall remain in full force until the obligations set-forth in Clause 31.4.1 have been discharged.

Learned Senior Counsel thus contends that the respondent has made a misconceived distinction between the judgment in Jetpur (supra) relied upon by the petitioner and the present case.

32. Learned senior counsel further submits that even the liability cannot be said to be disputed by the respondent. The entire case set up by the respondent in defence is that the present claim should have been raised at the time of the first Arbitral Proceedings. Beyond this the respondents have neither disputed the contractual provisions relating to Termination Payment nor is it disputed that 90% of the debt due is payable.

33. I have heard the learned counsels for the parties and have examined their respective contentions.

34. The contention of the petitioner in a nutshell is that on termination of the Agreement, Termination Payment to be paid by NHAI is 90% of the "debt due", if the termination is for default of the petitioner and 100% of the debt due plus 150% equity is payable, if the termination is on account of NHAI's default. Thus, the contention is that even assuming though not admitting that default is on the part of the petitioner, it would still be entitled to a payment of 90% of the debt due. This is in terms of Clauses 37.3.1 and 37.3.2 of the concession agreement, which are extracted as under:

"37.3.1 Upon Termination on account of a Concessionaire Default during the Four laning of Bhubaneswar-Puri Section from Km 0.00 to Km 59.00 of NH-203 in the 116 State of Orissa to be executed as BOT (Toll) project on DBFOT pattern under NHDP Operation Period, the Authority shall pay to the Concessionaire, by way of Termination Payment, an amount equal to 90% (ninety per cent) of the Debt Due less Insurance Cover; provided that if any insurance claims forming part of the Insurance Cover are not admitted and paid, then 80% (eighty per cent) of such unpaid claims shall be included in the computation of Debt Due. For the avoidance of doubt, the Concessionaire hereby acknowledges that no Termination Payment shall be due or payable on account of a Concessionaire Default occurring prior to COD.

37.3.2 Upon Termination on account of an Authority Default, the Authority shall pay to the Concessionaire, by way of Termination Payment, an amount equal to:

(a) Debt Due; and

(b) 150% (one hundred and fifty per cent) of the Adjusted Equity."

35. "Termination Payment" has been defined in the concession agreement to mean "the amount payable by the authority to the concessionaire upon Termination and may consist of payments on account of and restricted to the debt due and adjusted equity".

36. "Debt due" has been defined to mean the aggregate of the sum outstanding on the transfer date of the principle amount of the debt provided by the lender

under the financing agreements for financing the total project cost.

37. A perusal of Clauses 37.3.1 and 37.3.2 makes it evident that even where the termination is on account of the default of the petitioner, NHAI is liable to pay by way of Termination Payment an amount equal to 90% of the debt due, less insurance cover. There is no dispute between the parties that the agreement stands terminated at the instance of the NHAI. Thus, prima facie by virtue of the Clauses mentioned above, respondent is liable to pay at least 90% of the debt outstanding. The concession agreement gives a comfort to the lenders that their debt is secured, inasmuch as, whatever be the reason for termination, they are at least assured of 90% of the outstanding debt. It is also pertinent to notice at this stage the stand of the petitioner that more than 95% of the work had been completed and a Provisional Completion Certificate for at least 80% of the work done was issued by the independent Engineer, on 20.8.2015.

38. The question whether the breach is on the part of the petitioner or the respondent would no doubt be ultimately decided by the Arbitral Tribunal and is pending adjudication, but for deciding the present controversy the outcome of the adjudication is irrelevant. This is because even assuming that it is found that the petitioner had defaulted, still 90% of the payment is assured to the petitioner under the concession agreement. NHAI of course disputes the liability as also the quantum claimed by the petitioner towards the debt due. In my, prima facie, view reading of the clauses relating to Termination Payment supports the stand of the petitioner.

39. In fact the interpretation of this Clause is no longer res-integra. A Co-ordinate Bench of this Court in O.M.P.(I) (COMM) 221/2017 was dealing with a similar Concession Agreement, with an identical clause of Termination Payment i.e. 37.3.1 and 37.3.2. Significantly the respondent in the said matter was NHAI. The question that arose before the Co-ordinate Bench was release of 90% of the debt due as Termination Payment. After examining the law, under Section 9 of the Act, the Court directed NHAI to deposit the Termination Payment (balance of the 90% of the debt due) in the ESCROW Account. The said judgment was carried in appeal by the NHAI and the Division Bench in FAO(OS) 166/2017 dismissed the appeal on 27.10.2017. SLP being No. 35078/2017 was dismissed by the Apex Court on 5.1.2018. A reading of the judgment of the Division Bench makes it clear that Clause 37.3.1 of the Concessionaire Agreement has been interpreted to entitle the petitioner to 90% of the debt due even when the default is of the petitioner. The said interpretation as given by the Co-ordinate Bench in the case of Jetpur (supra) has been upheld by the Division Bench and affirmed by the Apex Court. Relevant para of the judgment of the Division Bench reads as under:

"36. As held by the learned Single Judge the clause relating to Termination Payment is apparently to protect the interest of the lenders, who would have been reluctant to provide finance for the Highway Project without their principal and interest being secured in the event dispute arises between the NHAI and the

Concessionaire, which would then become subject matter of legal proceedings. NHAI has to pay Termination Payment even if the concessionaire is at fault. As per the terms stipulated in Clause 37.3.1, upon termination on account of concessionaire default the interest of NHAI is also protected because upon termination they step in and are entitled to collect user fee from third parties. JSTL, it is pertinent to record, had spent and paid the construction and maintenance costs of the project highway. NHAI is not to make the payment of equity component but pay as Termination Payment i.e. 90% of the "debt due" which excludes equity component and less insurance."

40. In fact, the Division Bench has also adjudicated on the question of exercise of power by the Court under Section 9 of the Act. Referring to the various clauses of the Concessionaire Agreement the Court has categorically held that Clause 37.3.1 is an express and mandatory provision and has to be given effect to even where the agreement is terminated on account of the fault of the concessionaire. The Division Bench has held that to accept the plea of NHAI that Section 9 cannot be invoked, would negate and obliterate the aforesaid clauses and their effect. Reliance was placed by the Court on another judgment of the Division Bench in the case of Value Source Mercantile Limited vs. Span Mechnotronix Limited (2014) 143 DRJ 505 which decision emphasised that the expression "interim measure of protection" is distinct from the expression "temporary injunction" used in Order 39 Rules 1 and 2 CPC. Interim injunction is one of the measures prescribed in Clause (b) to Section 9(ii) of the Act and Clause (e) is a residuary power of a Court to issue or direct other interim measures of protection. The Court exercising power under Section 9 has the same powers as a civil Court. The Division Bench finally held that the order of the Single Judge protects the interest of NHAI since it has directed furnishing of an unconditional and irrevocable bank guarantee favour of NHAI and found no fault with the direction of the Learned Single Judge in directing NHAI to deposit the amount due towards Termination Payment in the ESCROW account. The relevant para of the judgment of the Division Bench is as under:

"37. On the question of exercise of power under Section 9 of the A&C Act, we have already referred to Clauses 37.3.1 of the Concessionaire Agreement which is an express and mandatory provision when said agreement is terminated on account of concessionaire fault. We have also referred to Clauses 3.2 and 4.2 of the tripartite Escrow Agreement which refers to Termination Payment. To accept the plea of NHAI that section 9 of the A&C Act cannot be invoked, would negate and obliterate the aforesaid Clauses and their effect. In the aforesaid circumstances the ratio of decision of the Division Bench of this Court in Value Source Mercantile Limited Vs. Span Mechnotronix Limited (2014) 143 DRJ 505, is apposite, if not definite and conclusive. Referring to Section 9 of the A&C Act, this decision emphasized that the said provision uses the expression "interim measure of protection" as distinct from the expression "temporary injunction" used in Rules 1 and 2 of Order XXXIX of the Code of Civil Procedure, 1908. Interim injunction is one of the measures or orders prescribed in Clause (d) to

section 9 (ii) of the A&C Act, albeit a party to the arbitration agreement is entitled to apply for and seek "interim measure of protection". Clause (e) to Section 9(ii) is a residuary power of the court to issue or direct other "interim measures of protection". Thus, the court has the power to issue or direct other interim measures of protection as may appear to the court to be just and convenient. Section 9 encompass the power of making orders as the Civil Court has for the purpose of, and in relation to any proceedings before it. This decision refers to Rule 10 of Order XXXIX of the aforesaid Code which empowers the Court to direct to deposit payment of the admitted amount. Therefore the court exercising power under Section 9 of the A&C Act has the same power as that of a civil court during pendency of the suit."

41. Learned senior counsel for the respondent sought to distinguish the judgment in the case of Jetpur (supra) on the ground that in the said case there was in existence an Escrow account which does not exist in the present case and further that the NHAI never disputed the liability to pay. Mr. Sethi, learned senior counsel, in my view, has rightly pointed out that these objections are without merit. Attention is drawn to the definition of escrow account in Clause 31.1 of the Contract. It is further pointed out that admittedly the petitioner, the respondent and Punjab National Bank had entered into an Escrow agreement dated 12.1.2011 for maintaining an Escrow account with the Punjab National Bank. The said account is still operational as on date and as per clause 31.4.2 of the concession agreement the account shall remain in full force and effect until complete discharge of all obligations set out in Clause 31.4.1. Clause 31.4.1 provides the manner in which all the amounts standing to the credit of the escrow account would be appropriated upon termination. Therefore, in my view the contention of the respondent that the judgment of Jetpur (supra) is distinguishable as in the present case there is no escrow agreement or an escrow account, is without merit.

42. NHAI has sought to contend that since the liability to pay has been disputed in this case, the judgment in the case of Jetpur (supra) would not apply. In my view, this cannot be a factor to distinguish the said judgment. The Coordinate Bench of this Court as well as the Division Bench has clearly interpreted the clause of Termination Payment holding that 90% of the debt due is payable to the concessionaire despite its default and this is a reason enough to entitle the petitioner herein to the relief sought as the claim is made under the similar clause in the present case. Thus, the argument that NHAI disputes the liability can not take away the present case out of the four corners of the said judgment. It needs to be noted that NHAI has not disputed the contractual provisions relating to Termination Payment and there is no dispute that 90% of the debt due would be payable even if the petitioner is in breach. There is yet another reason why the present petition deserves to be allowed and which is detailed hereinafter.

43. It is pertinent to note that after the judgment was reserved in the present

case on 29.7.2019, the petitioner moved an application being I.A. No.14220/2019 praying to place on record minutes of the meeting held between the petitioner and the NHAI on 6.6.2019. Notice was issued and the respondent sought time to take instructions on the said documents. On 14.10.2019, when the application came up for hearing, Mr. Nandrajog, senior counsel submitted that while the authenticity of the minutes is not in question but the contention of the petitioner that there is any admission of liability to pay by the respondent is disputed. The application was allowed taking the document on record and leaving the question of admission of liability to be decided with the main petition.

44. I have carefully perused the relevant para of the minutes of meeting dated 6.6.2019 which reads as under:

Decision

(i) EC discussed the matter and agreed to the calculations of the Termination Payment due of Rs.123.23Cr. (157.18 - 33. 95) alongwith applicable interest. However, no further action be taken at this stage on the Termination Payment.

(ii) As per the Interim Order dated 17.05.2019 of Hon'ble Delhi High Court, Rs.200Cr. may be deposited in the Court so that NHAI's petition challenging the Arbitral Award dated 13.11.2018 is admitted by the Court.

(iii) As proposed at Para-5.3.7 of EC Note, the State Govt. should be intimated of their failure under SSA and based on their response, a request be made to MoRTH to recover from CRF.

45. Perusal of the Minutes clearly shows that the respondent has admitted that money is "due" to the petitioner on account of Termination Payment. Calculation of the amount is also mentioned being Rs.123.23 crores. It is clearly mentioned that this amount is due to the petitioner along with applicable interest. However, since the matter was sub judice, it was decided not to take further action at that stage with regard to the payment. In my view the petitioner is right in contending that there is a clear admission of liability in the minutes of meeting aforementioned towards the petitioner.

46. Learned senior counsel for the respondent has also opposed the present petition on the ground that the Arbitral Tribunal has been constituted and one of the Co-Arbitrators would be substituted in the near future and the pending application under Section 17 of the Act would be decided by the Arbitral Tribunal. No doubt, that the Arbitral Tribunal was constituted and was seized of the application under Section 17 of the Act, but one of the Co-Arbitrators recused himself and there has been no substitution of the Co-Arbitrator. The Arbitral Tribunal is not functioning for the present. Learned senior counsel for the petitioner rightly points out that even when the Tribunal is constituted powers under Section 9 of the Act can be exercised by virtue of sub-section (3) to Section 9 of the Act. As observed above, prima facie, reading of the clause of Termination Payment shows that the petitioner is entitled to at least 90% of the

debt due. In such circumstance, waiting for disposal of the application under Section 17 of the Act may not be an efficacious remedy, more particularly, when the petitioner has sought to argue the financial crisis and irreparable harm that it is suffering on account of non-release of the payments by the respondent.

47. In so far as argument that the claim in the present petition is barred by the principle underlying Order 2 Rule 2 CPC is concerned, this Court finds no merit in the said argument of the respondent. The notice of invocation in the earlier arbitration proceedings was issued on 19.1.2017, circumscribing the terms of reference of those proceedings. The termination took place on 20.3.2017, and obviously this issue was not a part of the said invocation. Claim of Termination Payment could also not be a part of the earlier Arbitral Proceedings. In fact, the respondent had itself taken a stand in the written submissions that the issue of termination payment was not within the scope of the said proceedings. The Arbitrator has observed in the Award that the termination payment was not under the purview of the Arbitral Tribunal and hence it would not be appropriate to consider the said issue. Relevant paras of the Award and the statement of defence in this regard have been extracted above.

48. Learned senior counsel for the respondent has also questioned the jurisdiction of this Court under Section 9 to direct payment of the amounts claimed as that according to the respondent this would amount to granting mandatory injunction. Under Section 9 of the Act, Court has the power to pass orders as appear to the Court to be just and convenient to prevent ends of justice being defeated and when the risk of injustice is greater. The Division Bench of this Court in *Ajay Singh and Ors. vs. Kal Airways Private Limited and Ors.* 2017 (4) ARBLR 186 (Delhi), has held as under:

"24. The first question which the court addresses is the one adverted to by the appellant, that principles underlying Order 38, Rule 5 CPC have to be kept in mind, while making an interim order, in a given case, directing security by one party. *Indian Telephone Industries v Siemens Public Communication* 2002 (5) SCC 510 is an authority of the Supreme Court, which tells the courts that though there is no textual basis in the Arbitration Act, linking it with provisions of the CPC, nevertheless, the principles underlying exercise of power by courts-in the CPC- are to be kept in mind, while making orders under Section 9. In *Arvind Constructions v Kalinga Mining Corporation* 2007 (6) SCC 798, the court held as follows:

"The power under Section 9 is conferred on the District Court. No special procedure is prescribed by the Act in that behalf. It is also clarified that the Court entertaining an application under Section 9 of the Act shall have the same power for making orders as it has for the purpose and in relation to any proceedings before it. Prima facie, it appears that the general rules that governed the court while considering the grant of an interim injunction at the threshold are attracted even while dealing with an application under Section 9 of the Act. There is also the principle that when a power is conferred under a special statute and it is

conferred on an ordinary court of the land, without laying down any special condition for exercise of that power, the general rules of procedure of that court would apply. The Act does not prima facie purport to keep out the provisions of the Specific Relief Act from consideration. No doubt, a view that exercise of power under Section 9 of the Act is not controlled by the Specific Relief Act has been taken by the Madhya Pradesh High Court. The power under Section 9 of the Act is not controlled by Order XVIII Rule 5 of the Code of Civil Procedure is a view taken by the High Court of Bombay. But, how far these decisions are correct, requires to be considered in an appropriate case. Suffice it to say that on the basis of the submissions made in this case, we are not inclined to answer that question finally. But, we may indicate that we are prima facie inclined to the view that exercise of power under Section 9 of the Act must be based on well recognized principles governing the grant of interim injunctions and other orders of interim protection or the appointment of a receiver."

25. Interestingly, in a previous decision, *Firm Ashok Traders & Anr v Gurumukh Das Saluja & Ors* (2004) SCC 155, the Supreme Court observed that:

"13...The Relief sought for in an application under Section 9 of the A&C Act is neither in a suit nor a right arising from a contract. The right arising from the partnership deed or conferred by the Partnership Act is being enforced in the Arbitral Tribunal; the court under Section 9 is only formulating interim measures so as to protect the right under adjudication before the Arbitral Tribunal from being frustrated..... "

26. Though apparently, there seem to be two divergent strands of thought, in judicial thinking, this court is of the opinion that the matter is one of the weight to be given to the materials on record, a fact dependent exercise, rather than of principle. That Section 9 grants wide powers to the courts in fashioning an appropriate interim order, is apparent from its text. Nevertheless, what the authorities stress is that the exercise of such power should be principled, premised on some known guidelines - therefore, the analogy of Orders 38 and 39. Equally, the court should not find itself unduly bound by the text of those provisions rather it is to follow the underlying principles. In this regard, the observations of Lord Hoffman in *Films Rover International Ltd. v. Cannon Film Sales Ltd.* (1986) 3 All ER 772 are fitting:

"But I think it is important in this area to distinguish between fundamental principles and what are sometimes described as 'guidelines', i.e. useful generalisations about the way to deal with the normal run of cases falling within a particular category. The principal dilemma about the grant of interlocutory injunctions, whether prohibitory or mandatory, is that there is by definition a risk that the court may make the 'wrong' decision, in the sense of granting an injunction to a party who fails to establish his right at the trial (or would fail if there was a trial) or alternatively, in failing to grant an injunction to a party who succeeds (or would succeed) at trial. A fundamental principle is therefore that the court should take whichever course appears to carry the lower risk of

injustice if it should turn out to have been 'wrong' in the sense I have described. The guidelines for the grant of both kinds of interlocutory injunctions are derived from this principle."

27. It was observed later, in the same judgment that:

"The question of substance is whether the granting of the injunction would carry that higher risk of injustice which is normally associated with the grant of a mandatory injunction. The second point is that in cases in which there can be no dispute about the use of the term 'mandatory' to describe the injunction, the same question of substance will determine whether the case is 'normal' and therefore within the guideline or 'exceptional' and therefore requiring special treatment. If it appears to the court that, exceptionally, the case is one in which withholding a mandatory interlocutory injunction would in fact carry a greater risk of injustice than granting it even though the court does not feel a 'high degree of assurance' about the plaintiff's chances of establishing his right, there cannot be any rational basis for withholding the injunction.""

49. In exercise of powers under Section 9 of the Act, several Benches of this Court have passed mandatory interlocutory directions directing payments to be made to the petitioners. Relevant portions are as under:

a. Forbes Facility Services Pvt. Ltd. v. G.B. Pant Hospital, (OMP No.129/2015, decided on 18.02.2015), has held as under:

"11. It needs to be considered whether a positive direction in the nature, asked for by the petitioner in prayer (c) can be given in the facts of this case. A perusal of the submissions made above, would reveal that the parties are at variance in their stand whether, the minimum wages as increased by the appropriate Govt. be payable over and above agreed to at the time of grant of contract and the petitioner is liable to pay back the excess amount received by it. These issues are primarily issues on merit and needs to be gone into and decided by the learned Arbitrator. Pending decision, whether in the facts of this case, this Court would be within its right to give a positive direction as sought for.

12. It is not in dispute that this Court in exercise of its power under Section 9 is within its right to grant an interim relief, which is discretionary pending adjudication by the Arbitrator. The position of law laid by the Supreme Court in Adhunik Steels Ltd. Vs. Orissa Manganese and Minerals Pvt. Ltd., MANU/SC/2936/2007 : AIR (2007) SC 2563, it has been opined that, it would not be correct to say that power under Section 9 of the Act is totally independent of the well known principles governing the grant of interim injunction that generally governs the Courts in this connection. The relevant para of the judgment of the Supreme Court requires reproduction

"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 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."

13. This Court noted the submission made by the counsel for the petitioner that the petitioner is ready to give a bank guarantee of the total amount as due to the petitioner is released in its favour by the Court. At the same time, the learned counsel for the respondent has vehemently argued that the past conduct of the petitioner is such that the petitioner had not extended the validity of the bank guarantee as given in terms of the Contract, it would be better instead of releasing the money against a security in the nature of a bank guarantee, the respondent itself would deposit the amount adjusted i.e. Rs.1,88,54,376/- in this Court and likewise the petitioner be also directed the amount excess paid to the petitioner and which is due to the respondent i.e. Rs.28,76,306/- be also directed to be deposited, I am of the view that to balance the equities and no prejudice is caused to either of the parties, the respondent is directed; (i) to release an amount of Rs.1,50,00,000/- to the petitioner within three weeks subject to petitioner furnishing a bank guarantee of the said amount in favour of the respondent herein within two weeks from the date of this order and with a further direction that the respondent would keep alive the bank guarantee till the culmination of the arbitration proceedings; (ii) The petitioner shall also furnish a bank guarantee for Rs.28,76,306/- in favour of the respondent which would be kept alive till the culmination of the arbitration proceedings. The learned Arbitrator would be at liberty to pass appropriate orders for the extension of the validity of the bank guarantees, if the situation so demand."

b. Mafatlal Industries Ltd. and Ors. V. Mahanagar Telephone Nigam Ltd. (OMP No.394/2001, decided on 03.05.2002), has held as under:

"16. The second challenge to the petition is on the ground that the relief claimed is in the nature of allowing the whole claim amounting to specific performance of

contract, which cannot be allowed under Section 9 of the Act. The relief claimed by the petitioner in para 8(a) of the petition, which is in the nature of specific performance of contract, has not been pressed by the learned counsel for the petitioner at the outset. The interim relief claimed is the delivery of cheque for Rs. 1,37,76,401/- as against Invoice No. 67 dated 18th October, 2001 and processing the payment against the admitted supply of cloth as per Invoice No. 68. This claim of the petitioner is in fact an admitted obligation of the respondent. The fact that the cheque for Rs. 1,37,76,401/- dated 22nd October, 2001 was prepared against Invoice No. 67 is not denied. Also the cloth having been supplied and received against this invoice is admitted. Supply against Invoice No. 68 is also admitted to have been received and even utilised. Regarding these two claims, there is no dispute which can be referred for adjudication to the Arbitrator. It is for this admitted obligation, the petitioner is seeking directions and such an admitted obligation can be enforced under Section 9 of the Act by way of interim relief. In the given facts and circumstances of the case it would be just and convenient to grant relief claimed by the petitioner. Reference is made to 2000 (3) Arb. LR 668 (Cal), Tata Finance Limited v. Pragati Paribahan and Ors. where relief under Section 9 of the Act was granted with respect to the admitted obligation of respondent. In the said case, Pragati Paribahan, the hirer, entered into an agreement of hire purchase with the appellant M/s Tata Finance Limited the hirer failed to make payment of Installments as specified in the agreement, as a result of which the entire amount became payable at once empowering the appellant/financier to seize the vehicle in question. In reply to the notice served by the financier, the hirer admitted his fault and requested for allowing him some time to pay the arrears of Installments. The appellant had, however, seized the vehicle. At this, the respondent/hirer moved the court under Section 9 of the Act for interim directions. The Trial Court directed the respondent/hirer to deposit the arrears by a particular date and to pay the Installments within a time frame. It was further directed that on payment of arrears, appellant shall release the vehicle. On appellant preferring an appeal, a Division Bench of Calcutta High Court directed the respondent to pay the entire arrears of Installments which had become due up to 5th June, 1999 i.e. the date of seizure within one month. The arrears already paid were allowed to be adjusted. After such payment, the vehicle was directed to be released and after a month of the release of the vehicle, respondent/hirer was directed to pay rest of the monthly Installments. Such an interim order was passed by the Calcutta High Court because of the admitted liability of the hirer in order to protect the interest of both the parties as there was no dispute that the payment was due.

17. The above judgment is fully applicable to the facts of the instant case. In the instant case, there is no dispute about the quantity, quality and delivery of the goods supplied by the petitioner. Till date the contract has neither been repudiated nor cancelled. The supplies against Invoice No. 67 and 68 are duly received and even utilised by the respondent. The cheque against supplies of

Invoice No. 67 was duly prepared and drawn in favor of the petitioner. These are the admitted obligations of the respondent on which there is no dispute which would be referred for Arbitration. Allowing such a claim does not amount to the allowing of the whole claim or specific performance of the contract.

18. Learned counsel for the respondent has relied upon 1987 (2) Arb. LR 10, Vinit Manchanda v. Rishi Co-operative Group Housing Society and Anr. It was a case under the Old Act. The petitioner in the said case was awarded a contract for construction, in pursuance of which, he had taken possession of the site. The petitioner's contract was later on cancelled on account of certain irregularities and the contract of construction was awarded to some other person. The petitioner invoked the arbitration clause. He also sought interim relief under Section 41 of the Old Act restraining the respondent from dispossessing the petitioner from the work site and from directly and indirectly interfering with the awarded work. This relief was declined as grant of such interim relief, amounted to the specific performance of the contract. Otherwise also, it was held that the contract depended upon volition of the parties and it could not be enforced specifically. This case is not applicable on facts to the case in hand.

19. Learned counsel for the respondent also refers to 1995 (2) Arb. LR 479, Mahanagar Telephone Nigam Ltd. v. Vichitra Construction Pvt. Ltd. In this case, M/s Vichitra Construction Pvt. Ltd. had entered into a contract with MTNL. After the completion of work, the contractor submitted 13 bills. The MTNL refused to pay the same in the stipulated period. Disputes arose between the parties. The contractor invoked the provisions of Section 20 of the Arbitration Act, 1940 and prayed for appointment of an arbitrator. Along with the petition, the contractor also moved an application under Section 41(b) of the 1940 Act for interim relief seeking injunction restraining the MTNL from recovering or adjusting the amount of Rs. 2,57,767/- against the alleged excess amount paid to the contractor. The Trial Court gave an interim direction in favor of the contractor, but the High Court set aside the same holding that the claim of the contractor was yet to be adjudicated and allowing the same would amount to the allowing his whole claim. This case also has no bearing on the facts of the present case. In the instant case, the relief claimed is the release of cheque already prepared against Invoice No. 67 and processing the payment against Invoice No. 68 for which supply has been admittedly received and utilised which is an admitted obligation of the respondent.

20. Also reference to MANU/DE/0656/1998: AIR1998Delhi 397, Global Company v. National Fertilizers Ltd. does not help the respondent. It is also not applicable to the facts of the instant case. In the said case, an award was passed in favor of M/s Global Company. Respondent failed to file objections under Section 34 of the Act and the award became a decree. The petitioner moved the Court under Section 9 of the Act for securing the decretal amount payable to them. The relief was declined as the interim orders could not be granted on the sole ground of protection of his financial interests. In the instant case, interim orders claimed by

the petitioner are not in the nature of securing or protecting their financial interests. But what is sought by way of interim relief is discharge of respondent's admitted obligation under the contract for which there is no dispute between the parties which could be referred to the Arbitrator. The interim reliefs claimed in the instant case is nothing else but an admitted obligation on the part of the respondent and such an obligation can be enforced under Section 9 of the Act by way of interim relief."

50. This Court does not find any merit in the contention of the respondent that having waited for several months before approaching this Court in the present petition, the petitioner is disentitled to the relief claimed. It is a matter of record that the petitioner had filed an application under Section 17 of the Act before the Arbitral Tribunal. However, the Tribunal could not function on account of one of the Co-Arbitrators recusing and the petitioner had no other remedy, but to file the present petition. It is settled law that if the alternative remedy is not efficacious and a party is suffering loss and hardship, it can certainly avail the remedy available to it, which in the present case is a petition under Section 9 of the Act.

51. In my view, the petitioner has made out a prima facie case for grant of interim mandatory order and the balance of convenience is also in its favour. I, accordingly, pass the following directions:

(a) Petitioner will furnish an unconditional and irrevocable Bank Guarantee in favour of NHA I undertaking to pay to the NHA I an amount of Rs. 3,37,73,19,434.10/- towards the 90% of the debt due as Termination Payment within a period of two weeks from today.

(b) On furnishing of the Bank Guarantee, the respondent shall deposit the said amount in the sum of Rs. 3,37,73,19,434.10/- in the escrow account, within three weeks thereafter.

(c) The encashment of the Bank Guarantee shall be subject to final award of the Arbitral Tribunal; and

(d) The petitioner shall keep the Bank Guarantee alive up to a period of six months after the final award is passed by the Arbitral Tribunal.

52. It is clarified that this Court has not expressed any opinion on the merits of the case pending before the Arbitral Tribunal, and the Tribunal is free to decide uninfluenced by the observations of this Court.

53. It is also clarified that the above narrative is only to decide the interim relief and should not influence the decision in adjudication of the disputes between the parties pending before the Tribunal.

54. The Tribunal is at liberty to modify/vary or vacate the above order while considering the application under Section 17 of the Act, after hearing the parties.

55. Petition is allowed in the aforesaid terms.