

(2014) 11 DEL CK 0311
In the Delhi High Court
Case No : O.M.P. 1310/2014

Jaintia Highway Private Ltd.

APPELLANT

Vs

National Highways Authority of India

RESPONDENT

Date of Decision : 19-11-2014

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 8, 9

Citation : (2015) 1 ARBLR 50 : (2015) 147 DRJ 163

Hon'ble Judges : Rajiv Shakdher, J

Bench : Single Bench

Advocate : Sandeep Sethi, Kirti Uppal, Sr. Advs., Rakesh Sinha, Sourav Ghosh and Samrat Sengupta, Advocate for the Appellant; Pradeep K. Bakshi and Prachi V. Sharma, Advocate for the Respondent

Judgement

Rajiv Shakdher, J.—This is a petition filed under Section 9 of the Arbitration & Conciliation Act, 1996 (in short the Act) for seeking an injunction qua a bank guarantee dated 01.12.2012, furnished by Axis Bank Ltd., Kolkata, on behalf of the petitioner herein.

2. Shorn of verbiage, the injunction qua the bank guarantee is sought on the ground that it could be invoked and encashed if and only if there was default on the part of the petitioner in the due and faithful performance of its obligation during the construction period as provided in the main agreement, which is referred to as a Concession Agreement (hereafter referred to as C.A).

3. The bank guarantee, which on the face of it is unconditional and irrevocable, is sought to be portrayed as one, which is conditional, based on the argument that under the terms of the C.A., the construction period has not kicked-in. The plea of fraudulent invocation is sought to be weaved in with this submission, which is that, construction period having not commenced, the respondent, would have no right whatsoever to invoke and thereupon encash the bank guarantee in issue. I must, however, note that there is no plea or submission made before me that encashment of the bank guarantee in issue, would cause irretrievable injury,

which normally, is the other ground taken for seeking an injunction.

4. In order to appreciate the complete contours of the petitioner's submission, and the provision of the C.A., the following brief facts are required to be noticed. It is necessary to do so as the focal point of the petitioner's case is that the construction period can commence only if conditions precedent are fulfilled, one of which being, provision of access to at least 80% of the Right to Way (R.O.W.).

FACTS AND RELEVANT PROVISIONS OF THE C.A.

4.1. A company by the name of Simplex Infrastructure Ltd. bid against a tender floated by the respondent (hereinafter referred to as NHAI) for augmenting the existing road from chainage KM. 69.2 to K.M. 173.2, on the Jowai- Meghalaya Assam Border on the National Highway (NH) 44. (hereinafter compendiously referred to as the project) . The work envisaged two-laning of the aforesaid section of the highway. The bids, were required to be furnished on Design, Build, Finance Operate and Transfer (in short DBFOT) , basis.

4.2. Simplex Infrastructure Ltd. was declared as, the successful bidder. Accordingly, a Letter of Award 20.03.2012 (in short L.O.A) was issued in its favour. The L.O.A required formation of a special purpose vehicle for the purposes of execution of the aforementioned project. This led to the birth and/or the incorporation of the petitioner.

4.3. Consequent thereto, the petitioner and the National Highways Authority of India (hereinafter referred to as NHAI) executed a C.A. dated 05.06.2012. The C.A., as executed, contains several articles, clauses and sub-clauses. The articles relevant for purposes of adjudication of this petition and referred to in the course of submissions, advanced before me, by counsels, are as follows : Article 4 represents the conditions precedent; Article 6 pertains to obligations of NHAI; Article 9 relates to performance security; and Article 10 which, delineates the provisions with regard to Right Of Way (ROW) . I must only indicate here that while there are several clauses referred to under each of the Articles, reference by counsel has been made to certain specific clauses to which I will advert to in the course of my discussion hereafter.

4.4. Suffice it to say, that clause 4.1.2, on which much emphasis has been laid by the petitioner, broadly, provides that once a performance security (which in this case has been given in the form of a bank guarantee) , has been provided in accordance with Article 9 by the concessionaire (i.e., the petitioner in this case) , then the concessionaire can, by a notice require NHAI, to satisfy any or all of the conditions precedent, within a period of thirty (30) days of the said notice or such longer period not exceeding sixty (60) days, as may be specified in the notice. The sub-clause under clause 4.1.2, go on to delineate the conditions precedent, which are required to be fulfilled by NHAI,. These are provided in sub-clauses (a) to (e) . The proviso to clause 4.1.2 is indicative of the fact that NHAI has been vested with the power to extend the time frame for procuring approvals set for in sub-clause (d) and sub-clause (e) by giving notice in that behalf,

subject to a maximum of six months. There is no leeway given vis-à-vis the conditions precedent set forth in sub-clause (a) , i.e., with regard to ROW. One may only note sub-clause (d) pertains to approval that NHAI is required to obtain from railway authorities for construction of road over-bridges, under- bridges, at level crossings, which fall on the project highway, while sub- clause (c) requires it to obtain environmental clearances.

4.5. In case of delay in fulfilling conditions precedent set forth in clause 4.1.2, the concessionaire (in this case the petitioner) , has been given the right to claim damages, provided the delay in fulfilling all or any of the conditions precedent are not attributable to the concessionaire or, do not arise due to a force majeure condition. The damages, under the said sub- clause are required to be calculated at the rate of 0.1% of the value of the performance security for each day's delay in the fulfilment of conditions precedent, subject to a maximum of 20%.

4.6. Under sub-clause 4.1.3, there are certain conditions precedent prescribed for the concessionaire, as well. Amongst others, sub-clauses (e) deals with execution of financing agreements and their delivery, while sub clause (f) obliges the concessionaire to deliver to NHAI, copies of financial package and financial modules, which are acceptable to its lenders. As in the case of NHAI, failure to fulfil any of the conditions precedent, entitles NHAI to seek, similarly, recovery of damages under sub-clause 4.3, from the concessionaire. The parameters for claiming damages are identical to the one provided in clause 4.3.

4.7. Amongst various obligations which the NHAI is required to fulfil under Article 6, there is a requirement to obtain environmental clearances under clause 6.5. The obligation on the part of the concessionaire (i.e., the petitioner herein) , to furnish an irrevocable and unconditional bank guarantee in the sum of Rs. 19.58 crores, as a performance security, is provided in sub clause 9.1.1. Sub-clause 9.2, inter alia, gives the right to NHAI to encash and appropriate the relevant amounts from performance security, as damages, upon any default or failure on the part of the concessionaire to meet any of the conditions precedent. This right is conferred on NHAI de-hors any other right and / or remedy that may be available to it.

4.8. Sub-clause 10.3.1, inter alia, provides that pursuant to notice specified in clause 4.1.2, the authority and the concessionaire shall on a mutually agreed date and time, inspect the site and prepare a memorandum containing an inventory of the site including the vacant and unencumbered land, buildings, structures, road works, trees or any other immovable property on or attached to the site. Such memorandum is required to be accompanied by an appendix wherein, those portions of the site to which vacant access and ROW has not been granted to the concessionaire, is required to be specified, with reasonable details, mentioned thereto. Sub-clause 10.3.2 is indicative of the fact that NHAI on or prior to the Appointed date should have granted vacant access and ROW to the concessionaire (i.e., the petitioner) , of at least 80% of the total area of site, as the appendix, as alluded to in the said sub- clause, cannot include more than

20% of the total area of the site, required and necessary for execution of the project.

4.9. Quite peculiarly the definition of terms and expression used in the C.A., find mention towards the end, that is, in Article 48. There are three expressions one has to take note of : "Appointed date", "Construction Period" and "Commercial Operation Date (C.O.D.) ". I would be referring to them and explaining their significance during the course of my discussion.

5. At this juncture, it may be relevant to note that the period of concession as provided in sub clause 3.1.1 was 30 years, commencing from the Appointed date. Under the C.A., the NHAI was required to communicate the Appointed date upon completion of achievement of "financial close" by the concessionaire (i.e., the petitioner) . As per the provisions of sub-clause 12.4.1, the concessionaire (i.e., the petitioner) was required to execute the project within 910 days from the Appointed date.

6. It is in the background of the aforesaid provisions, that the petitioner, upon having furnished a performance security in the form of a bank guarantee, issued a notice on the same day, i.e., 01.12.2012, under clause 4.1.2 of the C.A., calling upon NHAI, to fulfil the conditions precedent.

6.1. One of the conditions precedent, on which stress was laid, was the obligation to provide ROW to the extent of at least 80% of the total area of the site required for execution of the project, prior to the declaration of the Appointed date, in terms of clause 10.3.2 of the CA. There were references to other approval as well, though as indicated above, the stress was on access to ROW.

6.2. Ordinarily, the notice period would have expired after thirty (30) days, subject to a maximum of sixty (60) days as provided in clause 10.3.2. The petitioner, however, did not raise the issue for quite some time. The reason for this, was perhaps that the joint site visits had taken place between 30.08.2013 and 03.09.2013. This aspect is brought up in the petitioner's own letter dated 13.09.2013, addressed to NHAI. In this letter what is brought out is that the existing land area which was available, as ascertainable upon joint verification, was 130 Hectares (in short Ha) ; which had been increased by another 5.6 Ha. The design consultant of the petitioner had evidently come to the conclusion that the additional land requirement, as indicated in its earlier communication dated 28.08.2013, was not accurate as it excluded land required for facilities and amenities, like toll plaza, way side amenities, and truck parking etc. Therefore, what the petitioner projected by this communication was that, the existing land available was 130 Ha against the total land required, which was 186.02 Ha. In absolute and percentage terms, according to the petitioner, the deficit was 56.02 Ha, which was equivalent to 30.11%. Thus, according to the petitioner, in percentage terms only 69.89% of the total area of land required was made available. This assertion though was based on its projection of total area required

by acknowledging the fact that previously, land required for certain facilities and amenities had not been factored in.

6.3. Before, I proceed further it must be noted that NHAI's stand though, is that, joint inspection of available land took place between May and July 2013.

6.4. Proceeding further, in response thereto, the NHAI vide communication dated 08.10.2013, informed the petitioner that according to them, 138.35 Ha of land area was available, (apart from 5.6 Ha, which was added on subsequently) . In other words, NHAI's view at this stage was that of the total land required more than 90%, was at the disposal of the petitioner, for execution of the work at the project site. Accordingly, by this communication, a request was made to the petitioner to proceed with financial closure, so that the Appointed date could be indicated, to avoid delay, in the commencement of the contract.

6.5. The petitioner, though, vide its letter 27.10.2013 stuck to its stand that only 69.88% of the total land required, was available. In this letter the petitioner inter alia made the following observation:

"....Your contention that 90% land is available is based on proposed ROW mentioned in Appendix B v. of schedule B. We have already clarified that appendix B v. is indicative and not can not be taken into account considering the additional width required for drain, slope etc...."

6.6. The NHAI, on its part issued a series of letters including the letters dated 14.11.2013 and 19.11.2013. Pertinently, in the letter dated 14.11.2013 NHAI brought to fore the fact that according to its own consultant, the total requirement of land was 141.13 Ha, out of which 132.75 Ha was available, and therefore, of the total land required 94.06% was at petitioner's disposal for execution of the project. It was further averred in this letter, that on account of discussions held at its regional office, in Guwahati, with the petitioner, the issue of enhanced requirement of land came up, which led to the total requirement of land being up-scaled to 186.02 Ha. The land available, as per this communication, was a total of 152.35/149.60 Ha, which comprised of : 132.75 Ha/ 130 Ha, as confirmed by DPR consultants/ concessionaire; 5.6 Ha made available subsequently, during joint inspection; and 14 Ha made available by the State Government of Meghalaya. Since, according to NHAI, the total land available was more than 80%, it was conveyed to the petitioner that it could bring about financial closure, so that, the Appointed date, could be fixed for commencement of execution of the work. This aspect was reiterated by NHAI vide letter dated 19.11.2013.

6.7. Importantly, by letter dated 08.01.2014, NHAI, communicated to the petitioner, based on the letter of its senior lender, ICICI bank, dated 03.12.2013, that financial closure qua the project had been achieved on the said date. It was also communicated to the petitioner that penalty, in the sum of Rs. 37.202 lacs was payable by it, for delaying the financial closure, beyond the date of fulfilment of conditions precedent by NHAI. The penalty, was demanded for the period

spanning between 13.11.2013 and 02.12.2013.

6.8. The aforesaid letter was followed by a letter dated 10.01.2014, whereby NHAI declared the Appointed date, as the date on which the letter was sent, i.e., 10.01.2014. By this letter, NHAI waived the remaining conditions precedent which had to be achieved by the petitioner.

6.9. NHAI's aforesaid letter was followed by letter dated 20.01.2014, whereby the petitioner was requested to mobilize its staff for execution of the work at site.

7. More importantly, twenty (20) days later vide letter dated 30.01.2014, information in terms of clause 10.3.1 of the C.A. was also provided. In this letter, NHAI alluded to the fact that 149.6 Ha of unencumbered land, which had been jointly verified, included 135.97 Ha of existing ROW, and that, the said area of land had been procured and handed over for execution of the project. The said letter was accompanied by an appendix and an inventory of site memorandum as required by clause 10.3.1 of C.A.

7.1. As expected, by a return communication dated 05.02.2014, the petitioner refuted the fact that the minimum 80% of ROW, free from all encumbrances, had been made available by NHAI. It was also indicated in the said communication that on account of unforeseen delay, the petitioner was likely to incur losses to the tune of Rs. 125 crores.

7.2. Immediately thereafter, in order to protect itself from a possible invocation of the bank guarantee in issue, the petitioner, issued a letter to its bankers dated 11.02.2014, inter alia, indicating therein that since, the conditions precedent for invocation had not been met by NHAI, any attempt made to encash the bank guarantee, ought not to be entertained. In other words, what was sought to be conveyed was this : that the bank guarantee, which was sought to be enforced, so to say, was effective only during the construction period, and since, the construction period had not commenced, the bank guarantee, had not come into effect, as yet. In sum, an assertion was made that any attempted invocation or consequent encashment of the bank guarantee, would be fraudulent and / or illegal.

7.3. Notably, the NHAI was not marked a copy of the letter sent to Axis Bank Ltd. What was done instead, was that, a civil suit was instituted in the Calcutta High Court. This suit was numbered as : CS 52/2014. In the said suit, two interlocutory applications were moved, one of which being: GA No. 630/2014. By this application, injunction was sought qua the bank guarantee in issue.

7.4. In response thereto, NHAI filed an application under Section 8 of the Act, which was numbered as : GA 671/2014.

7.5. The Calcutta High Court, however, by order dated 12.03.2014, observed that while, it was not granting any injunction restraining NHAI, from invoking the bank guarantee, it would have to give at least two weeks' notice to the petitioner before invoking the bank guarantee, to enable it to approach the court.

7.6. I am informed that this suit was ultimately, withdrawn, perhaps in view of the application preferred by NHAI, under Section 8 of the 1996 Act.

7.7. To complete the narration, the petitioner shot off another letter dated 09.04.2014. The burden of this letter, once again, was that, minimum of 80% of the ROW was not available, and because of the delay, the project had become "unviable" leading to possible losses, which would in the coming days only increase.

7.8. The NHAI, on its part, issued a letter dated 08.08.2014 giving notice to "cure the defaults", within a period of sixty (60) days, as required under the C.A. The petitioner, was also informed, that if there was failure on its part to cure its defaults, NHAI would be constrained to exercise its rights under the C.A. and applicable laws, which would include, though, not be limited to, encashment of performance security and termination of the C.A. The petitioner in response vide its letter dated 17.09.2014; denied that it was, in default.

7.9. It appears that, left with no alternative, NHAI, in terms of the relevant provisions of the C.A., sent a notice to the petitioner, expressing its intent to terminate the C.A.

8. It is in this background that the aforesaid petition was filed, in this court, on 30.10.2014. The matter was moved in court on 31.10.2014, when notice on behalf of NHAI was accepted by Mr. Bakshi. Upon completion of pleadings, arguments in the matter were heard.

SUBMISSIONS OF COUNSELS

9. Mr. Sethi, learned senior counsel, who advanced arguments on behalf of the petitioner, broadly, submitted that the invocation of the bank guarantee was conditional on the construction period being made operable, which in turn, was dependent on the fulfilment on conditions precedent, as provided in clause 10.3.1 and 10.3.2.

9.1. Based on these clauses, Mr. Sethi contended that NHAI, was required to provide a minimum of 80% of the total area of the site required for execution of the project. In other words, according to Mr. Sethi, the non-accessible area could not exceed 80%. It was Mr. Sethi's contention that a memorandum containing inventory of site, which would include, vacant and unencumbered land, buildings, structures etc., had to be drawn up; accompanied by an appendix, which was required to specify those portions of the site to which vacant access or ROW was not available.

9.2. Mr. Sethi submitted that the out of the 186.02 Ha, even according to NHAI, only 135.97 Ha was available, which in percentage terms was little over to 72%.

9.3. According to Mr. Sethi the conditions precedent provided in sub clause (a) of clause 10.03.1 read with 10.3.2, were not fulfilled.

9.4. This argument was tied-in by Mr. Sethi, with the definition of appointed date

and construction period as set out in Article 48 of the C.A. Based on the definitions provided in the C.A. qua the said expressions, it was contended that the construction period, was a period which commenced from the appointed date and ended on the Commercial Operation Date (C.O.D) , as defined in clause 15.1 of the C.A.

9.5. The Appointed date, according to Mr. Sethi was, the date, on which the "financial close" was achieved or on an earlier date which parties by mutual consent may so determine. The appointed date so determined, as per Mr. Sethi, would then be deemed as the date when concession period would commence.

9.6. Mr. Sethi submitted that what was important to bear in mind, was that, for the appointed date to trigger, conditions precedent had to be satisfied or waived. Mr. Sethi, thus stated, that since, conditions precedent as set forth in a sub-clause 10.3.1, were incorporated for the benefit of the petitioner, unless waived, NHAI was required to provide a ROW equivalent to at least 80% of the total site area required for the execution of the project. It was thus, Mr. Sethi's contention that, in the circumstances of the case, since conditions precedent had not been fulfilled, logically, the construction period had not commenced, and therefore, the bank guarantee in issue, could not be invoked.

9.7. In support of his submissions, Mr. Sethi, relied upon the judgement of the Supreme Court in the case of Hindustan Construction Co. Ltd. Vs. State of Bihar and Others, .

10. Mr. Bakshi, on the other hand, submitted that at the stage when the tender was floated, each bidder was given an opportunity to study the documents accompanying the tender and avail of the facility to examine the site and carry out an independent evaluation. It was stated that, a detailed project report of an independent consultant was generated, which was indicative of the fact that the project in issue had to be executed on an area of land equivalent to 141.13 Ha, out of which 132.75 Ha was made available at that very point in time.

10.1. Mr. Bakshi, went on to assert, based on averments made in the affidavit-in-reply, that a joint inspection in respect of available land was carried out between the months of May and July, 2013, which revealed that 132.75 Ha, was indeed, available. It was contended that thereupon, in November, 2013, an additional 5.65 Ha, was made available.

10.2. Accordingly, it was the contention of Mr. Bakshi, that since 135.56 Ha of the land was available out of the total of 141.13 Ha, a ROW of more than 90% was available to the petitioner for execution of the project. Mr. Bakshi placed reliance in this behalf not only on NHAI's letter dated 13.09.2013 and 22.10.2013, but also on the letter of the independent consultant dated 18.07.2013. Based on the letter of independent consultant, one, Intercontinental Consultants and Technocrats Pvt, Ltd., Mr. Bakshi reiterated his submission that to begin with against the total area of approximately 141.13 Ha, an area of 131.17 was available.

10.3. It was contended by the learned counsel, that, it is only after the petitioner, got its own design consultant to prepare an alignment design, based on the CA and, the feasibility report of the NHAI's consultant, that it came to the conclusion, that an additional area, equivalent to 56.02 Ha, in addition to the existing land then available, would be required. In this behalf, Mr. Bakshi sought to draw my attention to the letter of the petitioner dated 13.09.2013.

10.4. In sum, Mr. Bakshi's submission was that, the minimum ROW was available to the petitioner, even at the tender stage, and that, as of now, nearly 152.35 Ha against the envisaged requirement of 186.02 Ha, was available for execution of the project by the petitioner.

10.5. It was thus Mr. Bakshi's contention that at the end of the day, as to whether or not the required ROW was available, or other clearances were obtained, could at best be a subject matter of a dispute, which then may be resolved, in appropriate proceedings lodged by the petitioner.

10.6. Mr. Bakshi, on the basis of clause 4.2 of the CA laid stress on the fact that the CA itself provided that, in case, the conditions precedent as prescribed in clause 4.2.1 were not met, NHAI could be mulcted with damages, at the rate prescribed in the said clause.

10.7. In the circumstances, Mr. Bakshi submitted that there was no case made out for an injunction. In support of his submissions, Mr. Bakshi relied upon the judgment in the case of M/s. Indu Projects Ltd. Vs. Union of India, .

REASONS

11. I have heard the learned counsels for the parties. What emerges from the record, is that, that a dispute has arisen between the parties herein as to whether or not the conditions precedent as prescribed in clause 4.1.2 have been fulfilled. Mr. Sethi's contention that since 80% of the ROW was not available, the condition precedent stands unfulfilled, is a contention which is disputed by NHAI. But what clearly surfaces from the record, is that, even according to the petitioner, 135 Ha of land was available. This is stated in no uncertain terms in paragraph 34 of the petition. The relevant portion reads as follows:

".....34. The petitioner however refuted each and every contention of the respondent since as per the petitioner only 135.6 hectares of land has been made available by the respondent to them which was much less than 80% of the total area professed to be made available to the petitioner...."

11.1. The moot question then is: what is the total area against which the available land is to be squared up with. It is NHAI's case that the initial requirement, as ascertained by its consultant, was only 141.13 Ha, which subsequently got enhanced to 186.02 Ha. Undoubtedly, the petitioner's letter dated 13.09.2013, is indicative of the fact that this aspect was overlooked, and that, upon a revisit, it was found necessary to acquire another 56Ha of land for factoring in amenities and facilities. A clear indicator, qua this aspect, is found in

a letter dated 28.08.2013 issued by the petitioner, which preceded its letter dated 13.09.2013. In this letter, in no uncertain terms, the petitioner stated that the: "total available existing land, within EROW was 130 Ha, whereas total additional land required as 43.09 Ha." Therefore, according to the petitioner, only 75.10% of land was available, at that point in time.

11.2. Between that date and the communication dated 13.09.2013, the petitioner realized that its requirement for land had increased from 173.09 Ha to 186.02 Ha. There has, therefore, even according to the petitioner, been a variation in what was required in terms of land area, for execution of the project.

11.3. NHAI, on the other hand, quite clearly has taken the stand that the initial proposal was for 141.13 Ha, which got enhanced to 186.02 Ha and as against that what was available was 152.35 Ha, or in the very least, 149.06 Ha. Either way, in percentage terms, according to NHAI, the availability of ROW, varies between 80.42% to 81.89%, even if the total area is taken as 186.02 Ha.

11.4. In my view, these are disputes, which can only be agitated in a properly lodged action by the aggrieved party. This aspect, cannot be debated upon or examined by the concerned bank, which has furnished the bank guarantee in issue. The terms of the bank guarantee, clearly stipulate that the sole judge as to whether the concessionaire (i.e., the petitioner) is in default, in the due and faithful performance of its obligation during the construction period as prescribed under the CA is NHAI. Therefore, all that the concerned bank has to see, is as to whether according to NHAI, the construction period has commenced. The NHAI, before me, has at least prima facie established that at every given stage the minimum ROW, equivalent to 80%, was made available to the petitioner. The fact that the requirement of land, according to the petitioner, got enhanced, as due to oversight, land required for amenities and/or facilities was not included, does not obviate the position that conditions precedent were fulfilled. The NHAI, insists that all conditions, which includes environmental clearances etc. are in place; this is an aspect which the concerned bank cannot be called upon to examine. It, in my view, would be putting an unacceptable burden on the bank, and if permitted, would defeat the very purpose for which bank guarantees are furnished. Bank guarantees are furnished to strengthen and cement commercial dealings. Interference by a court on grounds other than a case of established fraud known to the concerned bank or irretrievable injury or failure to fulfil conditions prescribed in the bank guarantee, at the stage of invocation, would lead to collapse of trade and commerce. As to whether conditions prescribed in the bank guarantee are fulfilled, much would depend on the words and expression used. Suffice it to say, in finding out whether a condition given in the bank guarantee stand fulfilled, the concerned bank is not required to carry out a forensic analysis. It is this approach that the court has to adopt when faced with such a submission.

11.5. The other argument of the petitioner, that the prescription contained in clause 10.3.1, which required generation of a memorandum of an inventory at

site and appendix containing details of that portion of the project site to which access was not available, is also untenable, in view of the fact that, the NHAI, sent the requisite information along with its letter dated 30.01.2014.

11.6. Furthermore, as rightly pointed out by Mr. Bakshi, clause 4.2 of the agreement clearly envisages payment of damages by NHAI in case, it is ultimately found that conditions precedent have not been fulfilled. Therefore, intrinsically, the C.A. provides for a circumstance, in which, the conditions precedent may not stand fulfilled. But that, is an issue, which can be adjudicated upon, in a dispute, raised qua the main contract, i.e., the C.A.. There is, to my mind, no occasion for the bank to enter the fray and take upon itself the role of an adjudicator qua issue : as to whether or not the conditions precedent prescribed in the C.A. had been fulfilled, and therefore, by logical corollary, as to whether or not the construction period had kicked-in.

11.7. I may also note that there is also a dispute between the parties even with regard to date of financial closure. According to the petitioner, financial closure was attained on 04.06.2013, whereas in so far as NHAI is concerned, it was attained on 03.12.2013. As indicated in my narration above, NHAI declared the Appointed date as 10.01.2014. Perhaps, nothing would turn on these dates by themselves, as the triggering of Appointed date upon financial closure being achieved, by itself, is not sufficient since, it does not do away with the obligation placed on parties in the C.A. to fulfil their respective conditions precedent. The reason, I have mentioned this aspect, is because, it is reflective of the fact that parties are entrenched their respective positions, with regard to the dispute at hand.

12. Having regard to the aforesaid discussion, I am not persuaded to grant the relief of injunction, as sought for by the petitioner. There is to my mind, no case made out for fraudulent injunction. For whatever reasons, the petitioner is presently of the view that, the execution of the project has become unviable, and that, continuation with the project could cause a loss to it. This aspect has been clearly averred to, by the petitioner, in paragraph 41 of its petition, wherein damages have been pegged, perhaps tentatively, at about Rs.3,91,60,000/-, as on 05.02.2014.

12.1. Before I conclude, in my view the judgment in the case of Hindustan Construction would have no applicability, given that the construction period has commenced.

13. For all these reasons, I am of the opinion that the petition is without merit, and is, accordingly, dismissed. Needless to say, any observation made hereinabove, will not affect the merits of any action that either of the parties, may initiate hereafter.