



2024:DHC:8034



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IN THE HIGH COURT OF DELHI AT NEW DELHI***Reserved on: 19 July 2024******Pronounced on: 18 October 2024***

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OMP (I) (COMM) 172/2024

**NATIONAL HIGHWAYS AUTHORITY
OF INDIA**

.....Petitioner

Through: Mr. Parag Tripathi, Sr. Advocate
with Mr. Ankur Mittal, Mr. Abhay Gupta
and Mr. Sanjivan Chakraborty, Advocates.

versus

M/S IRB AHMEDABAD VADODARA**SUPER EXPRESS TOLLWAYS PVT. LTD**Respondent

Through: Mr. Vikram Nankani and Mr.
Nitin Rai, Sr. Advocates with Mr. Karan
Bharihoke, Mr. Anirudh Bakhru, Ms.
Devika Mohan, Ms. Tarini Khurana, Mr.
Ankit Banati, Ms. Pragya Gautam and Ms.
Charu Shriyam Singh, Advocates.

CORAM:**HON'BLE MR. JUSTICE C. HARI SHANKAR****JUDGMENT**

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18.10.2024

1. This is a post award petition preferred by the National Highways Authority of India¹ under Section 9² of the Arbitration and

¹ "NHAI", hereinafter

² 9. **Interim measures, etc. by Court. –**

(1) A party may, before or during arbitral proceedings or at any time after the making of the arbitral award but before it is enforced in accordance with Section 36, apply to a Court—

(i) for the appointment of a guardian for a minor or a person of unsound mind for the purposes of arbitral proceedings; or

(ii) for an interim measure of protection in respect of any of the following matters, namely:—

(a) the preservation, interim custody or sale of any goods which are the subject-matter of the arbitration agreement;

(b) securing the amount in dispute in the arbitration;

(c) the detention, preservation or inspection of any property or thing which is the subject-matter of the dispute in arbitration, or as to which any



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Conciliation Act, 1996³, effectively seeking securing of an amount of ₹ 1586,25,75,403/- which, according to NHAI, stands awarded in favour of NHAI and against the respondent IRB Vadodara Super Express Tollways Pvt Ltd⁴ by an arbitral award dated 7 April 2024 passed by a learned three Member Arbitral Tribunal. Certain ancillary reliefs have also been sought. The prayer clause in this petition reads as under:

“In the light of the facts and circumstances of the present case and the submissions made in regard thereto, this Hon'ble Court may be pleased to:

- a) Direct the Respondent to secure the petitioner and deposit the entire amount awarded in favour of the Petitioner and outstanding as of 30.04.2024 amounting to a total of Rs. 1586,25,75,403/ (Rupees One Thousand Five Hundred and Eighty Six Crores Twenty-Five Lakhs Seventy-Five Thousand Four Hundred and Three only) with the Registry of this Hon'ble Court or with petitioner, as may be directed by this Hon'ble Court, till the enforcement of the Award;
- b) Pass an order restraining the respondent and its promoters from alienating any assets (movable or immovable), tangible and intangible assets, any mutual fund investments, FDRs, monies lying in any account belonging to it, including the escrow accounts bearing no. 217500C100000012, IFSC PUNB0127500 (Punjab

question may arise therein and authorising for any of the aforesaid purposes any person to enter upon any land or building in the possession of any party, or authorising any samples to be taken or any observation to be made, or experiment to be tried, which may be necessary or expedient for the purpose of obtaining full information or evidence;

(d) interim injunction or the appointment of a receiver;

(e) such other interim measure of protection as may appear to the Court to be just and convenient,

and the Court shall have the same power for making orders as it has for the purpose of, and in relation to, any proceedings before it.

(2) Where, before the commencement of the arbitral proceedings, a court passes an order for any interim measure of protection under sub-section (1), the arbitral proceedings shall be commenced within a period of ninety days from the date of such order or within such further time as the court may determine.

(3) Once the arbitral tribunal has been constituted, the court shall not entertain an application under sub-section (1), unless the court finds that circumstances exist which may not render the remedy provided under Section 17 efficacious.

³ “the 1996 Act”, hereinafter

⁴ “IRB”, hereinafter



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National Bank (of respondent herein) to the extent of amount of Rs. 1586,25,75,403/- (Rupees One Thousand Five Hundred and Eighty-Six Crores Twenty-Five Lakhs Seventy-Five Thousand Four Hundred and Three only) as on 30-04-2024;

c) Pass an order directing the respondent and its promoters to disclose on affidavit all their assets (movable or immovable), tangible and intangible assets, any mutual fund investments, shares, FDRs, bank accounts, any other investments, monies lying in any account belonging to it/ them, including the escrow accounts, beneficial interest in any property or assets, balance sheets for the last five years.”

Facts

2. Inasmuch as, by the present petition, NHAI is seeking a direction to IRB to deposit, with this Court, an amount of ₹ 1586,25,75,403/- on the ground that the said amount stands awarded in favour of NHAI by the arbitral award dated 7 April 2024, it is not necessary to enter in detail into the rival contentions raised before the learned Tribunal or the reasoning adopted by the learned Tribunal in deciding the issues before it. Those may form subject matter of consideration in a challenge, by one party or the other, to the arbitral award. Two issues alone arise for consideration in the present petition. The first is whether, in fact, an enforceable amount of ₹ 15,86,25,75,403/- stands awarded in favour of NHAI and against IRB payable as on date. The second is whether, assuming such an award exists, NHAI has been able to make out a case for securing the amount as sought.

3. IRB joins issue on both these aspects. It contends that there is, in fact, no enforceable award in favour of NHAI for the amount of ₹



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1586,25,75,403/- as claimed. It further asserts that the legal requirement for directing deposit by IRB, towards security of the amount awarded in favour of NHAI – assuming the amount was awarded – are not met.

4. In 2010, NHAI issued a Request for Qualifications⁵, followed by a Request for Proposal⁶, inviting proposals from interested bidders for 6 laning of the Ahmedabad to Vadodara section of NH 8 and for improvement of the Ahmedabad Vadodara Expressway covering a length of 93.302 km in the state of Gujarat. Clause 1.2.8 of the RFQ and Clause 1.2.6 of the RFP provided thus:

Clause 1.2.8 of the RFQ

“1.2.8 Bids will be invited for the Project on the basis of the lowest financial grant (the “**Grant**”) required by a Bidder for implementing the Project. A Bidder may, instead of seeking a Grant, offered to pay a premium in the form of revenue share and/or upfront payment, as the case may be (the “**Premium**”) to the Authority for award of the concession. The concession period shall be pre-determined, and will be indicated in the draft Concession Agreement forming part of the Bidding Documents. The Grant/Premium amount shall constitute the sole criteria for evaluation of Bids. The Project shall be awarded to the Bidder coating the highest Premium, and in the event that no Bidder offers a Premium, then to the Bidder seeking the lowest Grant.”

Clause 1.2.6 of the RFP

“Bids are invited for the Project on the basis of the highest premium (the “**Premium**”) offered by a Bidder for implementing the Project. A Bidder will offer to pay a premium in the form of revenue share and/or upfront payment, as the case may be, (the “**Premium**”) to the Authority for award of the Concession. The concession period is pre-determined, as indicated in the Concession Agreement. The Premium amount shall constitute the sole criteria for evaluation of Bids. Subject to Clause 2.16, the

⁵ "RFQ", hereinafter

⁶ "RFP", hereinafter



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Project will be awarded to the Bidder quoting the highest Premium.”

As required by the above clauses of the RFQ and the RFP, IRB, in its letter comprising the Bid, dated 21 March 2011 addressed to NHAI, in para 29, provided as under:

“29. We hereby submit our Bid and offer a Premium in the form of ₹ 309.60 crore only out of the gross revenues of the Project as share of the Authority for undertaking the aforesaid Project in accordance with the Bidding Documents and the Concession Agreement.”

5. Consequent on IRB emerging as the successful bidder, a Concession Agreement⁷ was executed between NHAI and IRB on 25 July 2011. IRB was required, under the CA, to maintain and manage a section of NH-8 and improve the existing Ahmedabad-Vadodara Expressway⁸. The agreement was on design, build, finance, operate and transfer basis. Under the CA, IRB had the exclusive right, licence and authority to operate and maintain the Project Highway for 25 years from the appointed date, which was 1 January 2013. IRB was obligated to bear all costs and expenses in respect of the Project Highway and was entitled to demand, collect and appropriate toll from vehicles plying on the Project Highway.

6. Reference may be made to the relevant clauses in the CA, as under.

6.1 Clauses relating to Premium and its payment

⁷ “CA”, hereinafter

⁸ “the Project Highway”, hereinafter



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6.1.1 Clause 25.4 of the CA required IRB to pay, to NHAI, for each year of the Concession Period, a Premium, in the form of an Additional Concession Fee, as set forth in Clause 26.2.1 and in the manner set forth in Clause 26.4. Clauses 26.2.1 and 26.4 read as under:

“26.2 Additional Concession Fee

26.2.1 Without prejudice to the provisions of Clause 26.1, the Concessionaire agrees to pay to the Authority, on the Appointed Date a Premium in the form of an additional Concession Fee equal to ₹ 309.6 (Rupees Three Hundred Nine Crores and Sixty Lakhs only) crores as due to the authority during that year, due and payable for the period remaining in that year; and for each subsequent year of the Concession Period, the Premium shall be determined by increasing the amount of Premium in the respective year by additional 5% (five percent) as compared to the immediately preceding year. For the avoidance of doubt, the Premium for all subsequent years shall be determined by increasing the amount of Premium by 5% (five percent) as compared to the immediately preceding year.”

“26.4 Payment of Concession Fee

The Concession Fee payable under the provisions of Article 26 shall be due and payable in monthly instalments, within 7 days of the close of each month.”

6.1.2 Article 31 of the CA dealt with the provisions regarding maintenance of an Escrow Account. The relevant clauses of the said Article may be reproduced as under:

“31.1 Escrow Account

31.1.1 The Concessionaire shall, prior to the Appointed Date, open and establish an Escrow Account with a Bank (the “Escrow Bank”) in accordance with this Agreement read with the Escrow Agreement.



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31.2 Deposits into Escrow Account

The Concessionaire shall deposit or cause to be deposited the following inflows and receipts into the Escrow Account:

- (a) all funds constituting the Financial Package;
- (b) all Fee and any other revenues from or in respect of the Project Highway, including the proceeds of any deposits, capital receipts or insurance claims; and
- (c) all payments by the Authority after deducting of any outstanding Concession Fee:

Provided that the Senior Lenders may make direct disbursements to the EPC Contractor in accordance with the express provisions contained in this behalf in the Financing Agreements.

31.3 Withdrawals during Concession Period

31.3.1 The Concessionaire shall, at the time of opening of the Escrow Account, gave irrevocable instructions, by way of an Escrow Agreement, to the Escrow Bank instructing, inter alia, that deposits in the Escrow Account shall be appropriated in the following order of the month, or at shorter intervals as necessary, and if not due in a month then appropriated proportionately in such month and we take into Escrow Account and paid out there from in the month when due:

- (a) all taxes due and payable by the Concessionaire for in respect of the Project Highway;
- (b) all payments relating to construction of the Project Highway, subject to add in accordance with the conditions, if any, are set forth in the Financing Agreements;
- (c) O & M Expenses, subject to the ceiling, if any, are set forth in the Financing Agreements;
- (d) O & M Expenses and other costs and expenses incurred by the Authority in accordance with the provisions of this Agreement, and certified by the Authority as due and payable to it;



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- (e) Concession Fee due and payable to the Authority;
- (f) monthly proportionate provision of Debt Service due in an Accounting Year;
- (g) Premium due and payable to the Authority;
- (h) all payments and Damages certified by the Authority as due and payable to it by the Concessionaire, including repayment of Revenue Shortfall Loan;
- (i) monthly proportionate provision of debt service payments due in an Accounting Year in respect of Subordinated Debt;
- (j) Any reserve requirements set forth in the Financing Agreements; and
- (k) balance, if any, in accordance with the instructions of the Concessionaire.”

The payment mechanism/arrangement envisaged by Clause 31.3 is also referred to, in the CA and other associated documents, by the somewhat picturesque appellation of “the Waterfall Mechanism”. The substantive provisions obligating payment of the amounts envisaged in Clause 31.3 are to be found in Articles 25, 26, 27 and 28 of the CA.

6.1.3 Clause 47.10 envisaged, *inter alia*, the obligations of IRB under the RFQ at the RFP as forming part of the CA. To the extent relevant, the Clause read thus:

“47.10 Entire Agreement

... For the avoidance of doubt, the Parties hereto agree that any obligations of the Concessionaire arising from the Request for Qualification or Request for Proposals, as the case may be, shall be deemed to form part of this Agreement and treated as such.”



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6.2 Clauses relating to “competing road”

6.2.1 NHAI was obligated, in terms of the Article 6.3 of the CA, to ensure that no Competing Road, as defined in Article 48.1 of the CA, came into existence, as it would adversely affect the volume of traffic on the Project Highway and therefore, the toll collected. Breach of the said obligation by NHAI entitled IRB to compensation in terms of Article 35.4 of the CA. Articles 6.3, 35.4 and 48.1 of the CA read thus:

“6.3 Obligations relating to Competing Roads

The Authority shall procure that during the subsistence of this Agreement, neither the Authority nor any Government Instrumentality shall, at any time before the 10th (tenth) anniversary of the Appointed Date, construct or cause to be constructed any Competing Road; provided that the restriction herein shall not apply if the average traffic on the Project Highway in any year exceeds 90% (ninety percent) of its designed capacity specified in Clause 29.2.3. Upon breach of its obligations hereunder, the Authority shall be liable to payment of compensation to the Concessionaire under and in accordance with Clause 35.4.

35.4 Compensation for Competing Roads

35.4.1 In the event that an Additional Tollway or a Competing Road as the case may be, is opened to traffic in breach of this Agreement, the Authority shall pay the Concessionaire, for each day of breach, compensation in a sum equal to the difference between the average daily Realisable Fee and the projected daily fee (the “Projected Fee”) until the breach is cured. The projected fee hereunder shall be an amount equal to the Average Daily Fee, increased at the close of every month by 0.5% (zero point five per cent) thereof and revised in accordance with Clause 27.2. For the avoidance of doubt, the Average Daily Fee for the purposes of this Clause shall be the amount so determined in respect of the Accounting Year or period, as the case may be, occurring prior to such opening or operation of an Additional Tollway or a Competing Road, as the case may be.



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35.4.2 Payment of compensation under this Clause 35.4 shall be deemed to cure the breach of this Agreement so long as the Authority continues to pay compensation hereunder.

48.1 Definitions

In this Agreement, the following words and expressions shall, unless repugnant to the context or meaning thereof, have the meaning hereinafter respectively assigned to them:

"Adjusted Equity" means the Equity funded in Indian Rupees and adjusted on the first day of the current month (the **"Reference Date"**), in the manner set forth below, to reflect the change in its value on account of depreciation and variations in WPI, and for any Reference Date occurring:

- (a) on or before COD, the Adjusted Equity shall be a sum equal to the Equity funded in Indian Rupees and expended on the Project, revised to the extent of one half of the variation in WPI occurring between the first day of the month of Appointed Date and the Reference Date;
- (b) from COD and until the 4th (fourth) anniversary thereof, an amount equal to the Adjusted Equity as on COD shall be deemed to be the base (the **"Base Adjusted Equity"**) and the Adjusted Equity hereunder shall be a sum equal to the Base Adjusted Equity, revised at the commencement of each month following COD to the extent of variation in WPI occurring between COD and the Reference Date;
- (c) after the 4th (fourth) anniversary of COD, the Adjusted Equity hereunder shall be a sum equal to the Base Adjusted Equity, reduced by 0.33% (zero point three three per cent) thereof at the commencement of each month following the 4th (fourth) anniversary of COD and the amount so arrived at shall be revised to the extent of variation in WPI occurring between COD and the Reference Date;

"Competing Road" means a road connecting the two end points of the Project Highway and serving as an alternative route thereof, such road being an existing paved road, which has been widened by more than 2 (two) metres of paved road for at least 75% (seventy five per cent) of the total length thereof at any time after the date of this Agreement, or a new road, which is constructed after such date, as the case may be, but does not include any road connecting the aforesaid two points if the length of such road exceeds the length of the Project Highway by 20% (twenty per cent) thereof;



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7. In 2014, the Government of India announced a Premium Deferment Scheme⁹, which was intended to assist Concessionaires in stressed projects of NHAI, who were experiencing revenue shortfall. The PDS envisaged reduction/revision of the annual Premium payable by the concessionaire and deferment of the payment of the remainder till FY 2025-2026, subject to interest @ 2% above bank rate per annum.

8. IRB applied for the benefit of the PDS *vide* application dated 10 March 2014 and 25 March 2014. On the basis of assessment of cost and expenses expected to be undertaken by it, in the coming years, the total deferred premium over a period of 11 years from FY 2014-2015 to FY 2024-2025 worked out to ₹ 1740 Crores. The payment of the deferred premium along with interest was to commence from FY 2025-2026 and the entire deferred premium along with interest was expected to be paid by FY 2033-2034.

9. IRB's request for premium deferment was approved *vide* a Sanction Letter resulting in execution of a Supplementary Agreement between NHAI and IRB on 6 June 2014. The original yearly premium which IRB would have had to pay, the amount of deferment allowed and the revised premium payable by IRB to NHAI every year from 2014-2015 to 2024-2025 stands tabulated thus in para 3(viii) of the arbitral award:

Financial Year	Premium payment as originally contracted (in crores)	Deferment of premium granted (in crores)	Revised premium payable under the
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⁹ "PDS", hereinafter



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			Scheme (in crores)
2014-15	341.33	236.71	104.62
2015-16	358.40	248.98	109.42
2016-17	376.32	266.28	110.04
2017-18	395.14	234.75	160.39
2018-19	414.89	205.56	209.33
2019-20	435.64	279.69	155.95
2020-21	457.42	114.93	342.49
2021-22	480.29	53.00	427.29
2022-23	504.31	25.73	478.58
2023-24	529.52	0.00	529.52
2024-25	556.00	73.74	482.26
TOTAL	4849.26	1739.37	3109.89

10. Article 3(a) of the Sanction Letter clarified that financial stress, for the purposes of Article 28 of the CA, had to be relatable to premium payment and not to any cash shortfall on account of other factors such as O&M expenses, debt servicing, etc. Article 3(g) of the Sanction Letter required IRB to provide, to NHAI, a bank guarantee for ₹ 315.7 Crores. Article 3(o) of the sanction letter further provided thus:

“(o) If revenue deficit as actually seen on review at the end of the year is lesser by more than 5% of the figures given under the projections now being considered, the concessionaire will be liable to pay a penalty of 2.5% additional interest over and above the normal interest of Bank Rate +2%, on the said excess. However, if Concessionaires effects the required correction and increases the premium payment so as to have no excess by the end of relevant year, no such penalty would be imposed.”

11. The disputes between the parties, which culminated in the passing of the arbitral award, were triggered by a communication dated 24 February 2015 from NHAI to IRB, requiring IRB to carry out the review of revenue deficit for FY 2014-2015 in terms of Article



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3(o) of the sanction letter. IRB responded on 22 April 2015 stating that it had carried out a review of the revenue deficit of FY 2014-2015 and that the actual revenue deficit for the said year was found to be lower than the projected revenue deficit by ₹ 21.7 Crores. This was in excess of 5% of the projected revenue deficit by ₹ 9.86 Crores.

12. As a result, NHAI, *vide* communication dated 4 September 2017, raised a demand, on IRB, for ₹ 29.73 Crores along with additional interest, of which penal interest of 2.5% was charged on ₹ 17.89 Crores, stated to be in excess of 5% of the revenue shortfall as estimated by IRB. IRB responded on 27 December 2017 contending that, while working out the extent to which the actual revenue deficit was lower than the projected revenue deficit for FY 2014-2015, IRB was entitled to factor in forex losses. In as much as forex losses for 2014-2015 were to the tune of ₹ 7.39 Crores, it was stated that the surplus above 5% of the projected revenue deficit was only ₹ 70 lakhs. IRB contended that Article 3(o) of the Sanction Letter entitled IRB to retain up to 5% of the surplus of ₹ 11.84 Crores, by paying penal interest on the said figure of ₹ 70 Lakhs. NHAI, by its reply dated 11 July 2018, contested IRB's right to factor in forex losses while computing the surplus of revenue deficit in excess of the projected revenue deficit.

13. Side by side, another dispute was brewing between the parties. IRB contended that the Savli Road, which was a toll-free State Highway constructed by the State of Gujarat spanning 119 kms in length and connecting Vadodara to Ahmedabad was a "Competing Road", within the meaning of Article 48.1 of the CA. The coming into



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existence of the said Competing road, it was submitted, had resulted in adverse impact of the revenue collections from the Project Highway. Premised on this submission, IRB, *vide* letter dated 24 May 2017 claimed compensation from NHAI in terms of Article 35.4 of the CA.

14. Inasmuch as the learned Arbitral Tribunal has ultimately rejected IRB's claim for compensation under Article 35.4 of the CA on the ground that a Competing Road, in the form of Savli Road, had come into existence, the rival contentions of the parties on this aspect need not be noted. It merits mention, however, that this dispute was carried to the High Court of Bombay by way of WP (C) 3415/2019 and that, in its judgment dated 16 April 2019 in the said writ petition, the High Court held that the Savli Road was *prima facie* a Competing Road which posed a threat and was adversely affecting collection of toll by IRB. The High Court also protected IRB from termination of the CA on the ground of default in payment of premium for the period of three months subject to an undertaking by IRB that in the event of its being unsuccessful in arbitration, it would tender the premium on the principles of the PDS with applicable interest.

15. This decision was carried in appeal by both parties to the Supreme Court by way of Special Leave Petitions. While summarily dismissing the petitions on 11 September 2019, the Supreme Court made it clear that the Bombay High Court had not expressed any view on the merits of the matter as would influence the learned Arbitral Tribunal.

16. The learned Arbitral Tribunal framed the following issues as



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arising for consideration :

“2(xiii) Issues were settled vide Order dated 18.12.2021 as under:

I. What is the meaning of the expression “serving as an alternative route” as appears in the definition of ‘Competing Road’?

II. Whether ‘Savli Road’ serves as an alternative route to the Project Highway?

III. What is the length of ‘Savli Road’?

IV. Whether ‘Savli Road’ has been widened after the execution of the Concession Agreement dated 25.07.2011 by more than two meters of the paved road for at least 75% of its total length?

V. Whether in view of the finding rendered by this Tribunal in Para 104 of its interim Award dated 14.10.2021, juxtaposed with the description of ‘Project Highway’ contained in Article 48.1, whether there is necessity to determine the length of ‘Project Highway’. If yes, then what is the length of NH-8 Section of the ‘Project Highway’?

VI. Whether the length of ‘Savli Road’ exceeds the length of the ‘Project Highway’ by more than 20%?

VII. Whether NHAI is in breach of its obligations comprised under Article 6.3 read with Article 48 and Article 1.2.1(f), Article 17.14, Article 7.2 (a) & (h) and Article 35.4 of the ‘Concession Agreement’ with respect to ‘Competing Road’?

VIII. If Issue (VII) is answered in the affirmative, whether NHAI can be directed to cure the breach?

IX. If Issue (VII) is answered in affirmative, the quantum of compensation liable to be awarded in favour of the Concessionaire as envisaged under Article 35.4 of the ‘Concession Agreement’?

X. Whether the obligation of the Concessionaire to pay the revised premium in terms of ‘Supplementary Agreement’ dated 06.06.2014 is dependent upon the revenue collected?

XI. Whether the Concessionaire is entitled to deviate from its obligation of payment of revised premium under the ‘Supplementary Agreement’ dated 06.06.2014 for the reason of



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perceived breaches on part of NHAI?

XII. Whether NHAI is entitled to payment of pending premium in terms of the 'Supplementary Agreement' dated 06.06.2014 and interest thereon as prayed under Counter-Claim No. 2?

XIII. Whether the Counter Claim No. 1 raised by NHAI seeking recovery of an amount of Rs. 29.73 crores and further sums as comprised in prayer (a) is barred by limitation?

XIV. If the above issue is answered in negative, the extent of actual revenue deficit in excess of 5% threshold of the projections for F.Y 2014-15, if any, as envisaged under Article 3(o) of the 'Sanction Letter' read with Supplementary Agreement and Premium Deferment Scheme?

XV. Whether it would be permissible to take into consideration forex losses as a concomitant of 'Debt Servicing' while computing 'Subsistence Revenue'?

XVI. If the above issue is answered in affirmative, the extent of forex losses suffered by the Concessionaire during the repayment of External Commercial Borrowing ('ECB')?

XVII. Whether the Concessionaire is in default of Article 3(o) of the 'Sanction Letter' dated 06.06.2014 read with Supplementary Agreement and Premium Deferment Scheme and the amount payable thereunder, if any?

XVIII. Whether in terms of Article 3(g) of the Sanction Letter NHAI was entitled to withhold the bank guarantee of INR. 145 Crores after completion of construction work under the Concession agreement?

XIX. If issue No. (XVIII) is answered in the negative, the relief liable to awarded in favour of the Concessionaire in terms of its prayers (h) (i)?

XX. Whether NHAI was entitled to withhold the bank guarantee amounting to Rs. 21 crores furnished by the Concessionaire in furtherance of Article 3(g) of the 'Sanction Letter' owing to the perceived defaults on part of the Concessionaire in payment of revised premium etcetera?

XXI. If the above issue is decided in the negative, the relief liable to be awarded in favour of the Concessionaire in terms of its prayer (h)?



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XXII. To what relief(s), if any, the Claimant is entitled.

XXIII. To what relief(s), if any, the Counter-Claimant is entitled.

Cost of the present proceedings to be borne by which party(ies) and proportion thereof, if any?"

17. Claims and counter-claims of the IRB against NHAI and of NHAI against IRB respectively, as raised, were as follows:

“CLAIMS RAISED BY RESPONDENT /CLAIMANT

S.No.	CLAIM	AMOUNT (In Cr.)
1.	Compensation for loss of toll revenue from 06.12.2015 to 30.09.2022 due to competing road	₹ 2,123.27 [loss ₹ 1655.06 + interest ₹ 468.21]
2.	Loss of interest payable on margin money of Rs. 8.141 Crores for bank guarantees amounting to Rs. 145.71 Crores from the period between 4.12.2015 to 31.7.2017.	₹ 2.02
3.	Interest calculated at the rate of 15% p.a. on the margin money of Rs.2.10 Crore for the bank guarantee of Rs.21 Crores as well as bank commission charges incurred by the Respondent/claimant, from the date of submission of the guarantee on 18.07.2017 till release of the same; or in the alternative from 5.11.2018 (date of issuance of Completion Certificate) till release / return of the said bank guarantee of Rs.21 crores.	Interest – 17.07.2017 18.07.2017 7 –30.11.2022 ₹2.65 05.11.2018 - 30.11.2022; ₹2.01 Bank Commission Charges – Rs.1.82
4.	Cost of Arbitration	
	TOTAL	₹2,131.77

COUNTER-CLAIM RAISED BY PETITIONER

S.No.	CLAIM	AMOUNT (In Cr.)
1.	Illegal retainment of excess amount of Rs.29.73 crores by the concessionaire	₹56.22



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	alongwith interest	
2.	Payment of pending premium in terms of the Supplementary Agreement dated 06.06.2014 and interest thereon	₹ 1471.98
3.	Cost of arbitration	

18. The present petition pertains to Counter Claim 2 raised by NHAI. NHAI contends that against the claims of IRB, the learned Arbitral Tribunal awarded only an amount of ₹ 1.9 Crores against Claim 3 and that against the counter-claims raised by NHAI while Counter Claim 1 has been deferred to be raised at the appropriate stage, regarding Counter Claim 2, premium payable by IRB to NHAI has been worked out as under:

Financial Year	Premium Payment originally contracted (in Cr.)	Deferment of Premium granted (in Cr.)	Revised premium payable under the Scheme (in cr.)
2014-15	341.33	236.71	104.62
2015-16	358.40	248.98	109.42
2016-17	376.32	266.28	110.04
2017-18	395.14	234.75	160.39
2018-19	414.89	205.56	209.33
2019-20	435.64	279.69	155.95
2020-21	457.42	114.93	342.49
2021-22	480.29	53.00	427.29
2022-23	504.31	25.73	478.58
2023-24	529.52	0.00	529.52
2024-25	556.00	73.74	482.26

19. NHAI contends that the arbitral award has held the revised premium indicated in the fourth column of the above table to be payable by IRB to NHAI along with interest at 2% above the bank rate per annum. Thus computed, NHAI contends that an amount of ₹1586,25,75,403/- is payable by IRB to NHAI. NHAI has provided, in



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Document 6 annexed with the petition, a work-sheet working out the aforesaid figure to ₹ 1586,25,75,403/-.

20. It may be noted, here, that with respect to Counter Claim 2 of NHAI against IRB, after extracting the above table in para 12 (xvii), para 12 (xviii) of the arbitral award holds as under:

“12(xviii) The Sanction Letter dated 06.06.2014 nor the Supplementary Agreement has any provision linking the payment of revised premium to the toll collected i.e. the revenue generated. The case of the Claimant that since it was entitled to compensation on account of a Competing Road having come into existence it was not liable to pay the revised premium under the Scheme is akin to a plea of set off. Thus, the Tribunal holds that the Claimant is liable to pay the revised premium indicated in the last column of the table extracted in the preceding paragraph and to that extent allows Counter Claim No. 2. The Sanction Letter dated 06.06.2014, concerning the deferred premium contemplates interest equal to 2% above the bank rate per annum as specified in Article 28 of the Concession Agreement. The Tribunal holds that on the revised premium payable as per column No. 4 of the table above, the Claimant is liable to pay to the Respondent interest as aforementioned from the date the revised premium was payable till the date of payment. The Tribunal notes that for some years part revised premium under the Scheme had been paid and while computing the interest said amount paid shall be taken into account. Issues No. (x) to (xii) are decided accordingly.”

21. In the operative portion of the arbitral award, the award with respect to Counter Claim 2 reads thus:

“12(xxxvi) On Counter Claim No. 2, the Tribunal holds that the Claimant IRB Ahmedabad is liable to pay to the Respondent the revised premium indicated in the last column of the table extracted in the paragraph 12(xvii) above, from which amounts the part revised premium already paid would be adjusted and on the residual unpaid amount the Claimant shall pay to the Respondent interest equal to 2% above the bank rate per annum. The interest would accrue from the last date of the Financial Year when the revised premium was payable till when payment is made.”



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The Present Petition

22. After the passing of the arbitral award, NHAI wrote to IRB on 16 April 2024 and 8 May 2024, claiming that the premium amount of ₹ 1358.3 Crores, as per the arbitral award, had become due from IRB to NHAI till that date, and calling upon IRB to remit the said amount immediately to avoid further litigation. This was followed by a reminder on 8 May 2024, in which the amount was revised to ₹ 1586,25,75,403/-.

23. It is in these circumstances that NHAI has referred the present petition before this Court under Section 9 of the 1996 Act. Arguments by NHAI on this application were essentially addressed at seeking a direction to IRB to deposit, with the Registry of this Court, ₹ 1586,25,75,403/-, till enforcement of the arbitral award.

24. It is necessary to reproduce the paras, from the present petition, which contain the averments on the basis of which the prayer for a direction to IRB to deposit ₹ 1586,25,75,403/- is sought to be justified. Para 14 of the petition reproduces para 12 (xvii), (xviii) and (xxxvi) of the arbitral award. Of these, para 12 (xxxvi) has already been reproduced above. Sub-paras (xvii) and (xviii) of para 12, as reproduced in para 14 of the petition, read thus:

“12 (xvii) As noted by the Tribunal in para 8 (xiv) Learned Senior Counsel for the Claimant had argued Issues (x), (xi) and (xii) together. The arguments are premised on the reasoning that the premium in sum of INR 309.60 crores per year offered by the Claimant in its financial bid dated 21.03.2011 was factored on the estimated traffic on the Project Highway in view of the Concession Agreement contemplating no Competing Road to come up. Since



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the Tribunal has already held that the Claimant has failed to establish any compensation under Article 35.4 of the Concession Agreement, the Tribunal looks at the Supplementary Agreement dated 06.06.2014 to the Concession Agreement, which incorporates the Sanction Letter dated 06.06.2014 of the Respondent and thus the terms of the Supplementary Agreement have to be derived from the Sanction Letter dated 06.06.2014. In para-1 of the letter dated 06.06.2014, the approval granted for deferment of premium is as under¹⁰:

12(xviii) The Sanction Letter dated 06.06.2014 nor the Supplementary Agreement has any provision linking the payment of revised premium to the toll collected i.e. the revenue generated. The case of the Claimant that since it was entitled to compensation on account of her Competing Road having come into existence it was not able to pay the revised premium under the Scheme is akin to a plea of set off. Thus, the Tribunal holds that the Claimant is liable to pay the revised premium indicated in the last column of the table extracted in the preceding para and to that extent allows Counter Claim No. 2. The Sanction Letter dated 06.06.2014, concerning the deferred premium contemplates interest equal to 2% above the bank rate per annum as specified in Article 28 of the Concession Agreement. The Tribunal holds that on the revised premium payable as per column No. 4 of the table above, the Claimant is liable to pay to the Respondent interest as aforementioned from the date the revised premium was payable till the date of payment. The Tribunal notes that for some years part revised premium under the Scheme had been paid and while computing the interest said amount paid shall be taken into account. Issues No. (x) to (xii) are decided accordingly.”

25. Paras 15 to 19, and the Grounds which follow, read thus:

“15. As such, the Respondent is now liable to pay the revised premium to the Petitioner in terms of the sanction letter dated 06.06.2014 and also in terms of the Award dated 07.04.2024 passed by the Hon'ble Arbitral Tribunal.

16. The total amount outstanding that is payable by the Respondent to the Petitioner, from April 2019 till March 2024, along with interest calculated up to 30.04.2024, amounts to Rs. 1586,25, 75,403/- (Rupees One Thousand Five Hundred and

¹⁰ Below this follows the Table already reproduced in para 18 supra



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Eighty-Six Crores Twenty-Five Lakhs Seventy-Five Thousand Four Hundred and Three only). ...

17. In view of the above, the Petitioner issued its first notice regarding the non-remittance of the revised premium on 16.04.2024. However, the Respondent failed to respond to the said notice. Since the Respondent failed to comply with the award dated 07.04.2024 and also, more than a month has lapsed since the passing of the award in favour of the Petitioner, Petitioner once again, vide its demand notice dated 08.05.2024, called upon the Respondent to deposit the entire outstanding amount on an immediate basis.

19. That keeping in mind the stakes involved and the financial condition and conduct of the Respondent, depriving the Petitioner of its legal entitlement, the Petitioner prefers the present petition under Section 9(ii)(b) of the Arbitration and Conciliation Act, 1996, seeking an interim measure of protection in respect of securing the amount awarded in its favour vide arbitral award dated 07.04.2024 on the following ground:

GROUND:

A. BECAUSE the respondent has failed to comply with the award and has failed to make payment of the awarded amount under counterclaim no. 2 to date.

B. BECAUSE a huge amount of Rs. 1586,25,75,403/(Rupees One Thousand Five Hundred and Eighty-Six Crores Twenty-Five Lakhs Seventy-Five Thousand Four Hundred and Three only) as of 30.04.2024 is to be recovered by the Petitioner from the Respondent, and therefore, the same is required to be urgently secured to protect the interest of the Petitioner.

C. BECAUSE The Respondent has failed to make payment of the revised premium in terms of the sanction letter dated 06.06.2014 since April 2019, and as such, has huge outstanding against the Petitioner and has deprived the Petitioner of its legal entitlement from 2019 onwards. It is submitted that the revised premium payable in terms of the sanction letter was agreed upon by the parties and was formulated based upon the application dated 25.03.2014 submitted by the Respondent to the Petitioner under the premium deferment scheme based upon the projections of the Respondent itself. As such, the said financial position of the parties was crystalised even prior to the invocation of the Arbitration. That being the case, the conduct of the Respondent in not honouring the terms of the sanction letter dated 06.06.2014 from 2019 onwards raises questions on the



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financial position of the Respondent. Therefore, securing the amount awarded till its execution is of extreme importance.

D. BECAUSE the balance outstanding is about Rs. 1586,25,75,403/- (Rupees One Thousand Five Hundred and Eighty-Six Crores Twenty-Five Lakhs Seventy-Five Thousand Four Hundred and Three only). As such, being unaware and apprehensive of the financial condition of the Respondent and in order to safeguard its interests until the execution of the award, it is of paramount importance that the Petitioner is granted interim protection to secure the amount awarded in its favour.

E. BECAUSE the Hon'ble Supreme Court in **Hindustan Construction Co. Ltd. v. Union of India**¹¹, has held:

"35. This also finds support from the language of Section 9 of the Arbitration Act, 1996, which specifically enables a party to apply to a court for reliefs " ...after the making of the arbitration award but before it is enforced in accordance with Section 36. The decisions in NALCO and Fiza Developers & Inter-Trade (P) Ltd.¹² overlook this statutory position. These words in Section 9 have not undergone any change by reason of the 2015 or 2019 Amendment Acts.

36. Interpreting Section 9 of the Arbitration Act, 1996, a Division Bench of the Bombay High Court in **Dirk (India) (P) Ltd. v. Maharashtra State Power Generation Co. Ltd.**¹³ held that: (SCC OnLine Born para 13)

"13 The second facet of Section 9 is the proximate nexus between the orders that are sought and the arbitral proceedings. When an interim measure of protection is sought before or during arbitral proceedings, such a measure is a step-in aid to the fruition of the arbitral proceedings. When sought after an arbitral award is made but before it is enforced, the measure of protection is intended to safeguard the fruit of the proceedings until the eventual enforcement of the award. Here again the measure of protection is a step-in aid of enforcement. It is intended to ensure that enforcement of the award results in a realisable claim and that the award is not rendered illusory by dealings that would put the subject of the award beyond the pale of enforcement."

¹¹ (2020) 17 SCC 324

¹² (2009) 17 SCC 796

¹³ (2013) SCC OnLine Bom 481, hereinafter referred to as "Dirk"



37. *This being the legislative intent, the observation in NALCO that once a Section 34 application is filed, "there is no discretion left with the Court to pass any interlocutory order in regard to the said award ... " flies in the face of the opening words of Section 9 of the Arbitration Act, 1996, extracted above."*

As such, in view of the *stakes* involved and being apprehensive of the financial condition of the Respondent, the Petitioner prefers the present petition to safeguard the fruits of the Arbitral proceedings until the enforcement of the award.

F. BECAUSE this Hon'ble Court has also, in ***Power Mech Projects Ltd. v. Sepco Electric Power Construction Corpn.***¹⁴, has held, relying upon the aforementioned judgment of the Hon'ble Supreme Court that the award debtor needs to deposit the whole award awarded in favour of the award holder, to secure the award holder of its interests.

G. BECAUSE no injury will occur to the Respondent if the said interim relief is granted in favour of the Petitioner. However, grave injury will be caused to the Petitioner if the same is not allowed.

20. Therefore, in view of the facts and circumstances mentioned above, it would be proper and in the interest of justice for this Hon'ble Court to exercise its jurisdiction under Section 9(ii)(b) of the Arbitration and Conciliation Act, 1996 (as amended) and grant the Petitioner the interim measure/protection as sought by the Petitioner herein.

21. The balance of convenience, as well as a *prima facie* case, lies in favour of the Petitioner, as can be seen from the facts and circumstances mentioned above. Further, if the aforesaid relief is not granted, it would render the amount awarded in favour of the Petitioner a mere illusion and would put the subject of the award beyond the pale of enforcement."

Analysis

26. Arguments were addressed, on behalf of NHAI by Mr. Parag Tripathi, and on behalf of IRB, by Mr. Vikram Nankani, learned Senior Counsel.

¹⁴ 2020 SCC Online Del 204



27. Are the pre-requisites of a post-award Section 9 petition, seeking deposit of the allegedly awarded amount, satisfied?

27.1 Section 9 of the 1996 act, as the provision itself says, can be invoked before, during, or after, arbitration. The considerations which apply in each case are, however, distinct and different. We need not concern ourselves with the necessary ingredients to maintain a successful claim under Section 9 before commencement of arbitral proceedings, or during the arbitration, as we are dealing, here, with a post-award Section 9 claim, seeking a direction for deposit.

27.2 Once an arbitral award is rendered, the successful claimant/counter-claimant in the arbitration is, classically, required to proceed for execution of the award, in terms of Section 36¹⁵ of the 1996 Act, for reaping its fruits. If, therefore, an arbitral award directs one party to pay a particular amount to the other, the second party, ordinarily, has to proceed for execution of the award, to obtain the

¹⁵ 36. **Enforcement.** –

(1) Where the time for making an application to set aside the arbitral award under Section 34 has expired, then, subject to the provisions of sub-section (2), such award shall be enforced in accordance with the provisions of the Code of Civil Procedure, 1908 (5 of 1908), in the same manner as if it were a decree of the court.

(2) Where an application to set aside the arbitral award has been filed in the court under Section 34, the filing of such an application shall not by itself render that award unenforceable, unless the court grants an order of stay of the operation of the said arbitral award in accordance with the provisions of sub-section (3), on a separate application made for that purpose.

(3) Upon filing of an application under sub-section (2) for stay of the operation of the arbitral award, the court may, subject to such conditions as it may deem fit, grant stay of the operation of such award for reasons to be recorded in writing:

Provided that the court shall, while considering the application for grant of stay in the case of an arbitral award for payment of money, have due regard to the provisions for grant of stay of a money decree under the provisions of the Code of Civil Procedure, 1908 (5 of 1908) :

Provided further that where the Court is satisfied that a prima facie case is made out that,—

- (a) the arbitration agreement or contract which is the basis of the award; or
- (b) the making of the award,

was induced or effected by fraud or corruption, it shall stay the award unconditionally pending disposal of the challenge under Section 34 to the award.



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awarded amount. In execution proceedings, the executing Court is duly empowered to direct deposit, by the judgment/award debtor, of the awarded amount.

27.3 Section 9 cannot, quite obviously, be regarded as a shortcut to avoid Section 36. In fact, it is not often that one encounters a post-award Section 9 petition. Orders of deposit of the awarded amount are generally passed by the executing court, which is activated by the award holder under Section 36, or by the Court in which the unsuccessful award debtor challenges the award under Section 34.

27.4 Quite obviously, therefore, a direction for deposit of the awarded amount, under Section 9, is not routinely to be passed. It is plain that the mere fact that an amount stands awarded, irrespective of the magnitude of the amount, cannot constitute the basis for the award holder to seek, from the Court, a direction to the award debtor to deposit the awarded amount. Such orders, if passed, have to be reserved for rare and exceptional cases, in which deposit of the awarded amount is absolutely imperative to protect the interests of the award holder.

27.5 In the present case, NHAI has, in the present petition, merely urged the “stakes involved” and “the financial condition and conduct of the respondent”, as the justification for directing IRB to deposit the allegedly awarded amount. It is submitted, in Ground C in the petition, that the inaction, on the part of IRB, in paying the amount of ₹ 1586,25,75,403/- to NHAI from 2019 onwards “raises questions on the financial position of” IRB. In Ground D, it is pleaded that NHAI



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is “apprehensive of the financial condition of the respondent” and desires “to safeguard its interests until the execution of the award”. Emphasis is once again placed, in Ground E, on “the stakes involved” and NHAI “being apprehensive of the financial condition of the respondent”. In Ground G, it is further averred that no injury would occur to IRB if interim relief (by way of deposit) is granted in favour of NHAI, whereas, if the said relief is not granted, “grave injury will be caused to the petitioner”.

27.6 It has to be seen whether these averments and assertions – for there are no other – suffice for the Court to direct deposit, by IRB, of the allegedly awarded amount of ₹ 1586,25,75,403/- even before NHAI proceeds for execution.

27.7 NHAI has placed reliance, in Ground E, on the judgment of the Supreme Court in *Hindustan Construction Co Ltd v UOI*, specifically citing the following paras from the said decision:

“35. This also finds support from the language of Section 9 of the Arbitration Act, 1996, which specifically enables a party to apply to a court for reliefs” ...*after the making of the arbitration award but before it is enforced in accordance with Section 36*. The decisions in *National Aluminium Co. Ltd. v. Pressteel & Fabrications (P) Ltd*¹⁶ and *Fiza Developers & Inter-Trade (P) Ltd. v. AMCI (India) (P) Ltd (supra)* overlook this statutory position. These words in Section 9 have not undergone any change by reason of the 2015 or 2019 Amendment Acts.

36. Interpreting Section 9 of the Arbitration Act, 1996, a Division Bench of the Bombay High Court in *Dirk (India) (P) Ltd. v. Maharashtra State Power Generation Co. Ltd (supra)*, held that:

¹⁶ (2004) 1 SCC 540



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“13. ... The second facet of Section 9 is the proximate nexus between the orders that are sought and the arbitral proceedings. When an interim measure of protection is sought before or during arbitral proceedings, such a measure is a step in aid to the fruition of the arbitral proceedings. When sought after an arbitral award is made but before it is enforced, the measure of protection is intended to safeguard the fruit of the proceedings until the eventual enforcement of the award. Here again the measure of protection is a step in aid of enforcement. It is intended to ensure that enforcement of the award results in a realisable claim and that the award is not rendered illusory by dealings that would put the subject of the award beyond the pale of enforcement.”

37. This being the legislative intent, the observation in *NALCO* that once a Section 34 application is filed, “*there is no discretion left with the Court to pass any interlocutory order in regard to the said award...*” flies in the face of the opening words of Section 9 of the Arbitration Act, 1996, extracted above.”

In *Hindustan Construction Co*, the Supreme Court was examining the correctness of its earlier decision in *NALCO*, to the effect that, once an arbitral award had been rendered, no scope was left for the Court to pass any interlocutory orders. The Supreme Court held that, inasmuch as Section 9 was statutorily available even post-award, protective orders under the said Section could be passed even after the arbitral award had been rendered. It was, however, clarified – and this is of some importance – that, in order for such protective directions to be issued, there had, in the first instance, “a realisable claim” emerging from the arbitral award and, in the second instance, a possibility of the award being “rendered illusory by dealings that would put the subject of the award beyond the pale of enforcement”. These, according to para 13 of the judgment of the High Court of Bombay in *Dirk*, quoted with approval in *Hindustan Construction*, constitute the *raison d’etre* for providing for protective measures



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being available, to secure the awarded amount, even before action for enforcement is initiated.

27.8 Before, therefore, condescending to the request of the award holder for a direction to the opposite party to secure the awarded amount by deposit, the Court has to be satisfied that the award results in a realisable claim for the said amount, in favour of the award holder, and that it is necessary to pass protective orders of security as, else, there is a possibility of the award being rendered illusory by dealings which would put it beyond the pale of enforcement. Quite clearly, **Hindustan Construction** does not envisage, in every case where there is a money award in favour of one party, a direction by the Court to the other party to deposit the said award by way of security, in proceedings under Section 9.

27.9 It must be realised, in this context, that, while dealing with the post-award Section 9 petition, the Court does not examine the merits of the award, or entertain any challenge thereto. The merits of the award would fall for consideration either in a Section 34 challenge by the award debtor or, to a very limited extent, in execution proceedings, if and when launched by the award holder – subject, of course, to the well settled principle that the executing court cannot travel behind the award. Inasmuch as, in a post-award Section 9 petition, the opposite party has no opportunity to contest the correctness of the award, the Court has to be doubly sure that the two considerations which require satisfaction before any protective order under Section 9 can be passed, as elucidated in **Dirk** and approved in **Hindustan Construction**, are satisfied. Not only, therefore, must



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there be an enforceable and realisable award, in favour of the Section 9 petitioner, for the amount that the petitioner seeks to secure, but there must also exist a real and alive likelihood of the award being rendered illusory or unenforceable, were protective measures, as sought, not granted. Non-insistence on rigorous adherence to, and compliance with, these standards, would render Section 9 a means to short-circuit both Section 34 and Section 36 of the 1996 Act. That, according to me, is not what the legislature intended when it provided for Section 9 being available even at the post-award stage.

27.10 It is also necessary to note, in this context, that, prior to 2015, the very filing of a challenge to an arbitral award, under Section 34 of the 1996 Act, resulted in *ipso facto* stay of operation of the award. This position was remedied in 2015, by providing, in Section 36(2)¹⁷, that the mere filing of a challenge to the order under Section 34 would not automatically result in stay of the award, and that the Section 34 challenger would have to make out a case for stay, which would be examined by the Court as envisaged by Section 36(3)¹⁸. This amendment is significant, insofar as the entitlement, of the award holder, to protective relief by way of security of the awarded amount,

¹⁷ (2) Where an application to set aside the arbitral award has been filed in the Court under section 34, the filing of such an application shall not by itself render that award unenforceable, unless the Court grants an order of stay of the operation of the said arbitral award in accordance with the provisions of sub-section (3), on a separate application made for that purpose.

¹⁸ (3) Upon filing of an application under sub-section (2) for stay of the operation of the arbitral award, the court may, subject to such conditions as it may deem fit, grant stay of the operation of such award for reasons to be recorded in writing:

Provided that the court shall, while considering the application for grant of stay in the case of an arbitral award for payment of money, have due regard to the provisions for grant of stay of a money decree under the provisions of the Code of Civil Procedure, 1908 (5 of 1908) :

Provided further that where the Court is satisfied that a prima facie case is made out that,—

(a) the arbitration agreement or contract which is the basis of the award; or
(b) the making of the award,

was induced or effected by fraud or corruption, it shall stay the award unconditionally pending disposal of the challenge under Section 34 to the award.



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is concerned. Earlier, if the opposite party, i.e. the unsuccessful litigant before the arbitral tribunal, challenged the award under Section 34, the execution of the the award automatically got stayed. This could, therefore, postpone, indefinitely, the enforcement of the award, during which period the award debtor would have every chance to create a situation in which the awarded amount would become unrealisable; for example, by removing all its assets from the jurisdiction of Indian courts. In such circumstances, the necessity of securing the awarded amount, so that, pending adjudication of the Section 34 challenge, the award was not rendered illusory by the award debtor, acquires prominence.

27.11 With the amendment of the 1996 Act in 2015, however, that danger stands obviated, to a large extent. Even if the award was challenged by the award debtor under Section 34, there is no automatic stay of the award. It nonetheless remains enforceable in law, unless a stay is granted by the Court under Section 36(3). To an extent, therefore, this reduces the urgency of passing protective post-award Section 9 orders, securing the awarded amount. Even in the pre-amendment regime, a learned Single Judge of the High Court of Bombay observed, in *Afcons Infrastructure Ltd v Board of Trustees of Port of Mumbai*¹⁹, that “the parameters under Section 9 are only for preservation of the subject matter of the arbitration agreement or securing the amount in dispute and not for execution of the award pending the objections against the award”. That position, in my opinion, continues to hold, even post the amendment of the 1996 Act in 2015.



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27.12 G.S. Patel J, sitting singly in the High Court of Bombay held thus, with respect to the principles which would apply while considering an application for post-award security under Section 9 of the 1996 Act, in ***Felguera Gruas India Pvt Ltd v Tuticorin Coal Terminal Pvt Ltd***²⁰:

“The principles, therefore, would be those that guide the discretion of a Court of equity when presented with an application for a temporary injunction and an interlocutory order under Order 39 of the CPC. These are the very principles that must apply today to a consideration of the relief that Mr. Andhyarujina seeks in terms of prayer clause (b)(iii). The principles are well established by now and required no great elaboration. They may be stated simply. The applicant must first make out a sufficiently strong prima facie case. The balance of convenience must be demonstrated to be with the petitioner or applicant *and there must be at least some demonstration of a likelihood of irreparable injury or prejudice should reliefs be refused.*”

(Emphasis supplied)

Power Mech Projects v Sepco Electric Power Construction Corporation²¹ was a case in which a learned Single Judge of this Court in fact directed the entire awarded amount to be deposited by the award debtor. That, however, was a case in which the issue in controversy was delineated, in para 13 of the judgement, as “whether the petition under Section 34 of the Act, which is listed alongwith this petition today, can be heard on merits, against the Award without the petitioner first securing the complete awarded amount”. The Court was, therefore, not limiting its consideration to the entitlement, of the award holder, to an order of deposit in a post-award Section 9 petition, but also to the interim relief to which the opposite party was entitled,

¹⁹ 2013 SCC OnLine Bom 1946

²⁰ 2019 SCC OnLine Bom 9851



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before being permitted to prosecute its Section 34 challenge. Strictly speaking, therefore, this judgement may not be an authority for a situation in which the Court has, with it, only a Section 9 petition. Be that as it may, even in ***Power Mech***, this Court directed deposit of the awarded amount keeping in mind the fact that the opposite party was a foreign company registered in China with no realisable assets in India, and there was want of balancing, in the accounts of the said party as produced before the Court.

27.13 Ergo, it is only where the Court is satisfied that, if the awarded amount is not directed to be deposited, the award may be rendered illusory, that a direction for deposit under Section 9 can be passed. The standard to be satisfied is very high. In ***Essar Oil Ltd v United India Insurance Co Ltd***²², M.R. Shah, J (as he then was) held that the mere fact that the opposite party was a loss-making company would not suffice to direct deposit of the awarded amount, in a proceeding under Section 9. In the absence of any allegation that the opposite party was disposing of its property or was intending to do so with intent to obstruct or delay realisation of the awarded amount, the Court expressed the view that an order of deposit under Section 9 of the 1996 Act would not be justified. Of course, the said decision was rendered in the pre-amendment regime.

27.14 At the very least, therefore, there must be a substantial averment, in the Section 9 petition, which would convince the Court that, if deposit of the awarded amount is not directed, the award would

²¹ 2020 SCC OnLine Del 2049

²² 2014 SCC OnLine Guj 6737



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be rendered illusory. This could be demonstrated either by reference to the precarious financial condition of the opposite party, or by material which would indicate that the opposite party was siphoning off its assets or taking them outside the enforceable jurisdiction of Indian courts, or that the opposite party had no such assets in India. In the present petition, there is no such averment. All that the petitioner NHAI alludes to, is an “apprehension” regarding the financial status of IRB. The basis of this “apprehension” is not forthcoming. There is no pleading, by NHAI, to the effect that IRB has no realisable assets in India or that it was taking steps to render the arbitral award illusory.

27.15 We are dealing, in the present case, with a subsisting Concession Agreement. The CA has not been terminated. It is still in the process of performance. The contractual relationship between NHAI and IRB, therefore, continues to exist. It is not in dispute that IRB has invested ₹ 4669.77 crores in the construction and development of the Project Highway. IRB has already undertaken not to appropriate any amounts from the Escrow Account, till the entire Premium is paid, with interest. Till then, IRB has also waived its right to claim return on equity.

27.16 In these circumstances, I find substance in IRB’s contention that no case for directing upfront deposit, by IRB, of the allegedly awarded amount of ₹ 1586,25,75,403/-, can be said to exist.

28. Does the arbitral award entitle NHAI to recover, from IRB, they claimed amount of ₹ 1586,25,75,403/-?



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28.1 No direction for payment forthwith

28.1.1 IRB contends, through Mr Nankani, that there is, in fact, no realisable or enforceable award, in favour of NHAI and against IRB, for ₹ 1586,25,75,403/-. The learned Arbitral Tribunal, it is submitted, consciously refrained from quantifying the amount of premium payable. Counter Claim 2, it is pointed out, has been allowed in terms of Article 28 and the provisions of the Sanction Letter dated 6 June 2014 read with the Supplementary Agreement. The learned Arbitral Tribunal has further directed that the balance amount of revised premium, up to March 2025, would be payable to NHAI in terms of Article 31, which envisages withdrawal from the Escrow Account as per the waterfall mechanism. There being, therefore, no direction for payment, by IRB to NHAI, of ₹ 1586,25,75,403/-, it is contended that there can, equally, be no direction to IRB to deposit the said amount with this Court.

28.1.2 Arguing *per contra*, Mr. Tripathi submits that there is a distinction between revised Annual Premium and deferred premium. He submits that, in the Table contained in para-12 (xvii) of the arbitral award, these two amounts are separately indicated. While deferred premium is payable at the end of the concession period, Mr. Tripathi submits that the Annual Premium was payable at the end of every year, and that, to the extent of the balance Annual Premium which has been awarded by the learned Arbitral Tribunal to NHAI is concerned, NHAI is entitled to recover the said amount immediately.



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28.1.3 That there is a difference between the revised Annual Premium (after deferment is allowed in terms of the PDS), and the Deferred Premium, can hardly be disputed. To the extent that Mr. Tripathi seeks to draw a distinction between these two Premiums, he is right. The issue, nonetheless, survives for consideration as to whether the arbitral award has directed upfront payment of the balance amounts of Annual Premium. According to Mr. Nankani, there is no such direction and, in fact, a reading of the arbitral award would indicate to the contrary.

28.1.4 It goes without saying that, while dealing with the present petition under Section 9, this Court cannot rewrite the arbitral award, or second guess the reasons for the Award directing as it does. The Court is required to proceed exactly on the basis of what the arbitral award has directed. The question that is to be addressed is, therefore, whether the directions in the arbitral award, with respect to Counter Claim 2 of NHAI, entitle NHAI to demand, upfront, from IRB, the amount of ₹ 1586,25,75,403/-.

28.1.5 It becomes immediately apparent, from a bare reading of the arbitral award that there is, in fact, no quantification, by the learned Arbitral Tribunal, of any amount equivalent to ₹ 1586,25,75,403/-, which NHAI claims.

28.1.6 That apart, para 12 (xviii) of the arbitral award commences with the observation that “the Sanction Letter dated 06.06.2014 nor the Supplementary Agreement has any provision linking the payment of revised premium to the toll collected i.e. the revenue generated”.



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Thus, the learned Arbitral Tribunal has itself acknowledged the relevance of the Sanction Letter dated 6 June 2014, even insofar as payment of the revised premium – and not just the Deferred Premium – is concerned. The learned Arbitral Tribunal goes on, in the same para, to observe that IRB was liable to pay the revised premium, as indicated in the Table in para 12 (xvii) and, to that extent, allows Counter Claim 2 of NHAI. Significantly, any plea, by NHAI, that IRB is liable to pay the said amount upfront may stand negated by the further observation, in para 12 (xviii), that “on the revised premium payable as per column No. 4 of the table above, the Claimant is liable to pay to the Respondent *interest as aforesaid from the date the revised premium was payable till the date of payment*”. Upfront payment of the differential revised premium, therefore, is clearly not envisaged by the arbitral award; all that is envisaged is that IRB would become liable to pay interest, which would continue to accumulate till the date of actual payment of the differential Revised Premium.

28.1.7 In fact, if this Court were to regard the differential Revised Premium to be payable upfront by IRB, it would reduce, to a redundancy, the words “till the date of payment”, as contained in para 12 (xviii) of the arbitral award. The operative para 12 (xxxvi) of the arbitral award again underscores this position by directing, in conclusion, that “the interest would accrue from the last date of the Financial Year when the revised premium was payable *till when the payment is made*”. The choice, which IRB, to pay the differential revised premium at a later stage, thereby, stands preserved. All that IRB would incur, as a result, is running interest.



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28.1.8 This aspect was also underscored by the learned Arbitral Tribunal in para 115 of its interim award dated 14 October 2021, which has been incorporated, bodily, in para 12 (xx) of the impugned final arbitral award, by the following observation:

“115. A microscopic analysis of the said Article²³ in juxtaposition with the other terms of the Sanction Letter/Supplementary Agreement would unequivocally evince that a Concessionaire has an option either to effect the required correction by paying additional premium to the Respondent and thus avoid imposition of penal interest. Alternatively, if the Concessionaire does not choose to deposit the additional premium so as to effect a correction to bring the excess below permissible 5% threshold, he would be required to bear additional penal interest to the extent of excess above the stipulated 5% threshold.”

28.1.9 NHAI has sought to contend, in this context, that Clause 2 of the Sanction Letter dated 6 June 2014 does not permit deferment of premium in excess of the amounts of which deferment is allowed by the Sanction Letter itself. This argument cannot be countenanced by this Court, while dealing with the present Section 9 petition. The arbitral award does not contain any stipulation requiring payment, by IRB, of the differential Revised Annual Premium forthwith or upfront. Rather, it only mulcts IRB with the requirement of payment of interest till the date when it pays the differential Annual Premium. Even if, therefore, IRB were to, for example, pay the differential Annual Premium, as awarded by the arbitral Award two years hence, it would not be breaching the Award, provided it pays interest till that date. This position is clear from the arbitral award itself, and the provision, therein, that IRB would have to pay interest “*from the date when*

²³ Article 3(o) of the Sanction Letter



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revised premium was payable till the date of payment". Thus, while recognising that there may be a date when the revised premium was *payable*, contractually, the arbitral award independently recognises a separate date when the revised premium would *actually be paid* by IRB. The arbitral award requires IRB to pay interest during the intervening period. The very acknowledgement, in the arbitral award, of these two distinct dates, defeats NHAI's contention that the Award requires the differential Revised Annual Premium to be paid immediately by IRB.

28.2 Para 3(c) of the Sanction Letter and Article 31 of the CA - the waterfall mechanism

28.2.1 There is yet another, significant, aspect of the matter. As already noted, the learned Arbitral Tribunal has observed that the Sanction Letter and Supplementary Agreement dated 6 June 2014 are also relevant in the aspect of payment of the revised Annual Premium. Clause H of the Supplementary Agreement specifically saves the terms of the CA, save and except as otherwise provided in the Supplementary Agreement, the PDS or the Sanction Letter dated 6 June 2014. Para 3 (c) of the Sanction Letter unambiguously clarifies that there would "be no change in the waterfall prescribed for withdrawal from the Escrow Account as provided in Article 31 of the MCA". Article 31 of the CA deals specifically with withdrawals from the Escrow Account during the Concession Period. It prescribes a waterfall mechanism for withdrawals, as per the order of priority contained in Clause 31.3.1. "Premium due and payable to the Authority" figures at (g) in Clause 31.3.1. Any payment of Annual



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Premium, whether as originally paid by IRB, or the differential Revised Premium awarded by the learned Arbitral Tribunal, can only be paid in terms of Clause 31.3.1, by withdrawal from the Escrow Account. The learned Arbitral Tribunal does not, in the arbitral award, effect any change in the waterfall mechanism for withdrawal envisaged by Clause 31.3.1.

28.2.2 In fact, Clause 31.3.2 prohibits IRB from, in any manner, modifying the order of payment specified in Clause 31.3.1, except with prior written approval of NHAI.

28.2.3 It is worthwhile, in this context, to reproduce the contentions advanced by NHAI in its written submissions, by way of response to the above contention of IRB. NHAI submits thus:

“CONTENTION OF CLAIMANT THAT ARTICLE 31 CANNOT BE DEVIATED TO MAKE PAYMENT OF REVISED PREMIUM IS ALSO MISLEADING

i) IRBAV has contended that Article 31 of CA lays down that waterfall mechanism for appropriation of funds in the Escrow Account, therefore, no payment can be made to NHAI towards revised premium, inasmuch as, revenue/toll collection is not sufficient. IRBAV has reached the aforesaid argument to the effect that revised premium payment is subject to revenue collection before AT. AT was pleased to reject the said argument.

j) Perusal of para-12 (xviii) would show that AT has categorically rejected the said argument of IRBAV and held that neither the Sanction Letter dated 06.06.2014 nor the Supplementary Agreement has any provision linking the payment of revised premium to the toll collected i.e. the revenue generated. In view of the above findings, it is not permissible for IRBAV to re-agitate the same issue before this Hon’ble Court.

k) Further, Article 31 of CA does not determine the liability of IRBAV towards payment of revised premium, it only stipulates that priority of appropriation of funds in the Escrow Account.



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Article 31 does not in any manner suggest that merely because funds are not available in the Escrow Account same is not liable to be paid by IRBAV. Liability of IRBAV is determined under Clause 26.2.1 read with sanction letter dated 06.06.2014 and supplementary agreement dated 06.06.2014 and not under Article 31.

1) It is submitted that it is for the IRBAV to arrange for the money for payment of revised premium awarded by AT in the favour of NHAI.”

In so submitting, NHAI omits to notice that the observation, by the learned Arbitral Tribunal, in para 12 (xviii) of the arbitral award, that the Sanction Letter dated 6 June 2014 and the Supplementary Agreement did not have any provision linking payment of revised premium to toll collected, was returned in the context of IRB’s claim that, as toll collected had reduced because of the competing Savli Road, there was a corresponding reduction in IRB’s liability to pay revised premium. The observation by the learned Arbitral Tribunal cannot be read as an omnibus declaration that revenue generation had nothing to do with the Premium payable. Apart from the fact that such a declaration would be contrary to Clause 31.3.1 of the CA, it would also be contrary to Rule 7 of the National Highway Fee (Determination of Rates & Collection) Rules, 2008²⁴, which had been incorporated by reference in Article 27 of the CA, and which stipulates that the “fee collected” shall be appropriated by the concessionaire in accordance with the provisions of, and for performance of its obligations under the agreement entered into by such concessionaire”. There can, therefore, be no absolute severance of relationship between the fee collected and the obligation to pay revised premium. The observation in para 12 (xviii), besides having

²⁴ "the 2008 Fee Rules", hereinafter



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been returned in the context of IRB's claim based on its contention that the Savli Road was a "competing road", is also in the context of the Sanction Letter dated 6 June 2014 and the Supplementary Agreement. Significantly, there is no response, in the written submissions of NHAI, to the contention of IRB predicated on Rule 7 of the 2008 Fee Rules.

28.2.4 Any direction to IRB to pay the differential revised Annual Premium upfront would, therefore, be in the teeth of Clause 31.3.1 of the CA. There is also, therefore, *prima facie* substance in IRB's contention that the omission, on the part of the learned Arbitral Tribunal, to direct upfront payment of the differential Revised Annual Premium was also, perhaps, in awareness of Clause 31.3.1 of the CA.

28.3 Without, therefore, entering into the correctness of the figure of ₹ 1586,25,75,403/-, of which NHAI seeks a direction for deposit to IRB, I find substance in both the contentions advanced by IRB. In the first place, there is no direction, in the arbitral award, to IRB to pay ₹ 1586,25,75,403/- to NHAI. In the second, Clause 31.3.1 of the CA, which specifically stands saved in the Sanction Letter dated 6 June 2014, requires Annual Premium, whether Revised or Deferred, to be recovered from the deposits in the Escrow Account in terms of the waterfall mechanism envisaged in Clause 31.3.1 of the CA.

The Sequitur

29. For the following reasons, therefore, the prayers of the petitioner cannot be granted:



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(i) There are no pleadings, worth the name, which would make out a case for securing the allegedly awarded amount of ₹ 1586,25,75,403/- at this stage, as required by Section 9 of the 1996 Act. All that is averred is that the amount is considerable, and that NHAI has apprehensions regarding IRB's financial condition. The basis of these apprehensions is not forthcoming. IRB is continuing to perform its obligations under the CA. There is a subsisting contractual relationship between NHAI and IRB. No material, to indicate that IRB is taking any steps to frustrate the arbitral award or to render it impossible of performance, has been produced. The standard required to be met by a post-award Section 9 applicant, seeking securing of the awarded amount before proceeding to execution, is higher than the standard which has to be met by a pre-award Section 9 applicant. The pleadings in the petition do not meet that standard. Nor are there any submissions, in that regard, in the written submissions tendered by NHAI or the oral arguments advanced at the Bar.

(ii) There is no direction, by the learned Arbitral Tribunal, to IRB, to pay ₹ 1586,25,75,403/-, forthwith or upfront, to NHAI. Rather, the Award entitles IRB to pay the differential Revised Annual Premium at a later date, only subject to the condition that it would pay interest for the interregnum.

(iii) Rule 7 of the 2008 Fee Rules, read with Clause 3(c) of the Sanction Letter dated 6 June 2014 and Clause 31.3.1 of the



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CA permits withdrawal, towards payment of Premium to NHAI, as per the waterfall mechanism envisaged therein. The arbitral award does not, in any manner, alter or dilute this dispensation. Any direction to IRB to pay the claimed amount upfront to NHAI would, therefore, be violative of Clause 31.3.1.

Conclusion

30. The petition is, therefore, dismissed.

31. Needless to say, observations contained in this judgement are restricted to consideration of NHAI's prayer for a direction to IRB to deposit, with this Court, ₹ 1586,25,75,403/-. They are to be read as limited to the said purpose, and would not influence the Court in any other application or petition, filed by either of the parties in the context of the present controversy.

C. HARI SHANKAR, J.

OCTOBER 18, 2024

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