IN THE HIGH COURT OF DELHI AT NEW DELHI

Judgment delivered on: November 25, 2019

\+ O.M.P.(I) (COMM.) 270/2019

IRB TUMKUR CHITRADURGA TOLLWAY LIMITED (EARLIER KNOWN AS IRB TUMKUR CHITRADURGA TOLLWAY PRIVATE LIMITED)

..... Petitioner

Through: Mr. Saurabh Kirpal, Mr. Parthiv Goswami, Mr. Sarthak Sachdev, Mr. Ishan Bisht, Mrs. Teresa.R. Daulat and Mr. Mohnish Patkar, Advs.

versus

NATIONAL HIGHWAYS AUTHORITY OF INDIA (NHAI)

..... Respondent

Through: Mr. Sandeep Sethi, Sr. Adv. with Mr. Ankur Mittal and Mr. Abhay Gupta, Advs.

CORAM:
HON'BLE MR. JUSTICE V. KAMESWAR RAO

J U D G M E N T

V. KAMESWAR RAO, J

1. The present petition has been filed by the petitioner under Section 9 of the Arbitration and Conciliation Act, 1996 ('Act of 1996', in short) with the following prayers:

"It is therefore humbly prayed that this Hon'ble Court may be pleased to:

A. Stay the operation and effect of the Letter dated 7th August, 2019 of the Respondent whereby the Respondent has purported to revoke / withdraw the

premium deferment scheme;

B. Restrain the Respondent from taking any coercive action pursuant to such revocation of the premium deferment scheme;

C. Grant ex parte ad interim orders in terms of Prayer A above;

D. Pass such further or other orders as it may deem fit and proper in the facts and circumstances of the case."

2. It is the case of the petitioner that it entered into a Concession Agreement ('CA', in short) with the respondent NHAI for six (6) lanning of the Tumkur-Chitradurga section of National Highway No.4 in the State of Karnataka and for operating and maintaining the Project Highway for a period of 26 years on "Design Build Finance Operate Transfer Basis". In terms of the CA, the petitioner is also required to pay a premium of ₹140.40 Crores to the respondent, each year till the subsistence of the agreement along with an annual increase at the rate of 5%. In compliance with the terms of the CA, the petitioner executed an Escrow Agreement with the State Bank of India.

3. It is the case of the petitioner that it executed all financing documents with a consortium of Banks obtaining a Rupee Term Loan of ₹831 Crores and declared financial closure as per the terms of the CA. It is the case of the petitioner that the respondent verified all the documents relating to financing and declared financial closure having been achieved on March 03, 2011. It is averred that the petitioner converted a portion of the

rupee term loan to the extent of ₹300 Crores to an ECB loan i.e fully convertible foreign currency loan. According to the petitioner, the ECB agreement entitled the petitioner to hedge the loan for a certain period, however the ECB loan was to be converted into a Rupee Term Loan at the end of seven years at which time the entire foreign losses was to be paid upfront to the said ECB Bank. According to the petitioner, it submitted a copy of the ECB Agreement to the respondent. It is averred that the respondent submitted its comments on the ECB Agreement and amendments to the main loan documents with the senior lenders due to the ECB loan. It is averred that the respondent gave its approval for amendments to the financing agreements. The final approved financing agreements including the amendments carried therein pursuant to the ECB loan, after due NOC from respondent, were submitted to the respondent in compliance with the terms of the CA. It is the case of the petitioner, in view of the revenue shortfall across projects and in order to assist concessionaires of such stressed projects, so that the project does not suffer, the Central Government sanctioned a *"Premium Deferent Scheme"* vide its Circular dated March 04, 2014 for all such stressed projects in pursuance of Article 28 of the Model CA. There under, the payment of premium to the extent of shortfall in subsistence revenue was deferred and payable at a later stage with interest.

4. According to the petitioner, in pursuance of the Central Government premium deferment policy, the petitioner made an application to the respondent for modification of terms of

premium payment under the CA, seeking deferment of premium. It is their case that on June 06, 2014, the respondent sanctioned and/or granted such approval for deferment of premium payment to the extent of revenue shortfall as projected and agreed. Clause 3(b) therein provided for levy of interest at the time of payment of the deferred premium amounts, at the rate of 2% above bank rate per annum till payment. It is their case, that Clause 3(o) provided for levy of penal interest of 2.5% per annum, if revenue shortfall was less than more than 5% of projected revenue shortfall, on such excess, till payment of additional premium to offset the excess. According to the petitioner, a Supplementary Agreement ('SA', in short) to the CA, was entered into between petitioner and respondent for deferment of premium in terms of the sanction letter and the Central Government Scheme for deferment of premium.

5. It is averred that the respondent vide its letter dated February 24, 2015 by referring to clause 3(o) of the sanction letter, requested the petitioner to undertake a review of the actual revenue deficit for the financial year 2014-15 and if necessary effect the required corrections and increase the premium payment. It is averred that the petitioner vide its letter dated April 22, 2015 informed the respondent that upon evaluation of actual revenue deficit for financial year 2014-15 it was seen that the actual revenue deficit is higher that the projected revenue deficit. The petitioner provided detailed calculations and submitted that the penal interest under clause 3(o) was not applicable. It is the case of the petitioner that the respondent vide its various letter

issued between September 2015 to May, 2016 requested the petitioner to provide audited financial statements, certified statements of month wise actual payment of interest and principle to lenders, O&M expenses, premium paid, bank account statements and various other documents with respect to expenses for the financial year 2014-15 & 2015-16, which the petitioner provided. It is averred that the respondent vide its letter dated July 28, 2016, informed the petitioner that upon their review of the actual data of the financial year 2014-15, it was seen that allegedly the actual revenue deficit was lesser by more than 5% of the projections. Therefore the respondent demanded that as per clause 3(o) additional premium amounting to ₹12.74 Crore was payable by the petitioner along with normal interest of bank rate plus 2% and penal interest at 2.5%. The petitioner had, vide its letter dated August 30, 2016, replied to the respondent reminding the respondent that in calculating the alleged excess revenue the respondent had not considered the foreign exchange losses which formed a part of debt servicing and have to be paid in 2017 when the ECB loan is converted into Rupee Term Loan and therefore the alleged revenue excess was notional and in view thereof there was no excess revenue as alleged. According to the petitioner, the petitioner had through various correspondences repeatedly explained to the respondent that in effect there was no excess revenue and the notional revenue savings were ultimately to be paid towards debt servicing in terms of the foreign losses at the time of conversion of ECB loan to Rupee Term Loan.

6. It is the case of the petitioner, that it also highlighted

various provisions of the sanction letter, lenders agreement/financing documents and the spirit of the Central Government premium deferment scheme, wherein it was clear that the purpose of the deferment scheme was to ensure that the project revenue was first used for satisfaction of O&M expenses and entire debt servicing. It was also clear that there was no provision for compelling the petitioner to pay additional premium at an earlier date and it is for such purpose that the deferment of premium was given at the cost of a normal interest of 2% above the bank rate and penal interest of 2.5%. However, the respondent constantly insisted on the payment of the additional premium along with normal interest and penal interest. In fact, it is the case of the petitioner that it vide its letter dated January 24, 2017 reiterated that there was no revenue excess and the petitioner has already paid the premium as payable under the sanction letter.

7. It is the case of the petitioner that it also reminded the respondent that the toll revenues were even lower than the projected revenues at the time of obtaining the deferment sanction and therefore the respondent ought not to insist on such payment of additional premium in contravention of the terms of the agreement. However without prejudice to such contention the petitioner offered to pay the penal interest at 2.5% of the alleged excess. It is the case of the petitioner that it vide letter dated July 15, 2017 wrote to the respondent submitting an audited statement of revenue shortfall for the project incorporating the foreign exchange losses on ECB part of the debt for the year ending March 31, 2016. Similar letter was also sent on November 16,

2017. It is also stated that the respondent vide its letter dated February 16, 2018, inter-alia acknowledge the petitioner's assurance to bear the penal interest at present and to pay the purported excess premium along with interest as soon as the project receives toll revenue in excess of the projected toll revenue. However, the respondent demanded that such proposal of the petitioner was under consideration at the respondent's Headquarters and the petitioner should remit additional premium for financial year 2015-16 along with interest & penalty. It is at that stage that the petitioner vide its letter dated August 01, 2018 has invoked dispute resolution mechanism in terms of Article 44.2 of the CA for conciliation, in view of the dispute/difference between the parties. The respondent vide various letters constantly postponed the conciliation proceedings. Be that as it may, the petitioner had addressed to the respondent that it has paid the last tranche of the ECB facility by availing a Rupee Term Loan on May 18, 2017 and the actual loss on repayment of the entire foreign exchange loss on such conversion has been paid. The petitioner submitted detailed statement wherein it was evident that after factoring such losses the actual revenue shortfall was higher than the revenue shortfall estimated in the SA and therefore no additional premium was payable. In response to the same, the respondent vide its letter dated November 20, 2018 stated that allegedly ECB facility was not a part of the financial package and NHAI has not granted any approval for re-financing through ECB and again demanded payment of additional premium for financial years 2014-2015

and 2015-2016, failing which it would consider revocation of premium deferment and initiate action as per CA. Finally, vide letter dated August 07, 2019, the respondent withdrew / revoked the deferment premium and demanded that the petitioner remit the entire balance outstanding premium as per the CA.

8. A reply has been filed by the respondent. At the outset, the respondent has taken a preliminary objection about the maintainability of the petition, inasmuch as the Arbitration clause in the CA has no applicability to the SA and as such the petition is not maintainable. In this regard, it is stated that the scheme of premium deferment, which was extended by the Central Government does not form part of CA but was extended on the strength of a Supplementary Agreement, which did not have the arbitration clause.

9. That apart, on merit, it is stated that under the CA dated August 16, 2010, more particularly as per Article 26 thereof, the petitioner is admittedly liable to pay premium to the respondent authority. As per the provisions of Article 26.2.1 thereof, the petitioner is liable to pay a premium in the form of additional concession fee equivalent to ₹140.40 Crores commencing with effect from the appointed date. The said premium is to be increased on annual basis by an additional 5% amount as compared to the immediately preceding years. The Premium Deferment Scheme floated by the Government of India in the year 2014, do not take away the fact that the NHAI is liable to recover the premium from the Concessionaire, though under the Deferment Scheme, based on the cash projections made by the

Concessionaire with respect to the traffic flow on annual basis, if a particular project is falling in the category of *"stressed"* as per the scheme, the premium deferment scheme has been permitted subject to review of actual revenue deficit with projected deficit at the end of every year and if the actual deficit is less than the projected revenue deficit by more than 5% for payment of additional concession fee. It is the case of the respondent that before entering into the SA dated June 6, 2014, the Concessionaire had made an application on March 25, 2014. In order to assess the claim for deferring of premium, the Concessionaire had made the assessment of following costs and expenses:

a. operation and management outflows;

b. debt servicing;

c. tax payment, if any;

d. actual premium payable under the CA;

10. After adding up the aforesaid amounts, subsistence revenue was arrived at. The subsistence revenue was thereafter compared with the projected cash flows made by the Concessionaire for the respective years at the end of each year, for Concessionaire to arrive at the figure of revenue shortfall in the year concerned. The Concessionaire i.e the petitioner, in its application filed with NHAI on March 25, 2014 sought deferment of this revenue shortfall through deferment of premium payable as per CA. The respondent would submit that as per the calculations circulated by the petitioner along with the application dated March 25, 2014, debt servicing has been

divided into two parts, interest payment and principal payment. The payment of interest has been captured in the calculations furnished by the petitioner, which is related to calculating the interest on the principal amounts at certain rate. The principal amount repayment has been shown to be NIL initially, which gradually increases over a period of time. According to the respondent, the petitioner itself has only engulfed the amount of interest payment and principal payment towards debt servicing. There is not even an iota of whisper regarding so called foreign losses on account of currency fluctuation. The petitioner had not taken the foreign loss into account as a part of debt servicing, while submitting the projections to NHAI. The petitioner has not further explained, as to why such losses were not hedged by way of obtaining appropriate hedging policy at the beginning itself. As such, the SA signed on June 6, 2014 is not based upon and do not take into account any foreign loss on account of currency fluctuation, as part of debt servicing. Thus, the petitioner is not entitled to claim any benefit on this count.

11. The respondent has further stated that for the financial year 2014-15, the petitioner had given a figure of revenue shortfall of ₹81.45 Crores, the same, apart from others, based upon debt servicing amount of ₹95.57 Crores. However, when the review was undertaken by NHAI as per clause 3(o) of the SA dated June 6, 2014, it was found that as against the debt servicing amount stated by the claimant to be at ₹95.57 Crores, the debt serviced was actually only ₹81.52 Crores, thus lesser by an amount of ₹14.05 Crores. At the same time, the total inflows

were projected at ₹185.46 Crores, however the actual collection stated by the petitioner was to be ₹184.15 Crores. Thus, there is a loss of ₹1.31 Crores. As a result, the revenue shortfall or revenue deficit, which was originally projected at ₹81.45 Crores was only ₹ 68.71 Crores, lesser by an amount of ₹12.74 Crores. As a result, revenue deficit which was originally projected at a different amount, was actually lesser by an amount of ₹12.74 Crores, thus triggering invocation of clause 3(o) of the SA dated June 6, 2014. As per the said stipulation, if the revenue deficit at the end of the year is lesser by more than 5% of the figures given under the projections, the petitioner is liable to pay a penalty of 2.5% additional interest over and above the normal interest of bank rate plus 2% on the said excess. It is the case of the respondent that any amount recovered by the petitioner resulted into less revenue deficit, then the projections originally made, should be transferred to respondent. The amount so recovered or reduced expense cannot be retained by the petitioner, as it will be incomplete and absolute breach of the spirit of the contract and the premium deferment. The premium has been deferred on the touchstone that the project must be in stress, and as such, a one-time benefit was granted to postpone payment of premiums by arriving at the figure of revenue shortfall. But, if the revenue shortfall is less than what was projected, so long as the premium committed to respondent under the CA is not met out, the petitioner has no authority to retain such additional amount, or else it would amount to paying a premium to the petitioner for making the wrong cash projections originally to its benefit. It is

the case of the respondent that the petitioner has failed to pay reviewed premium amounting ₹12.74 Crores for the financial year 2014-15 along with interest at the rate of the bank rate + 2% and penal interest of 2.5% over and above the normal interest of bank rate plus 2% despite several reminders.

12. Similarly, for the financial year 2015 - 16, there is the difference of ₹4.24 Crores, which is liable to be paid to the respondent along with interest and penal interest as above. For Financial Year 2016 - 17, there is no shortfall. For financial year 2017 - 18, there is a difference of ₹46.78 Crores, which again is liable to be paid to the respondent with interest and penal interest as above. In total, the revenue amount additionally collected is ₹63.76 Crores, which is liable to be remitted to the respondent forthwith, together with interest at the rate of bank rate +2% per annum and additionally penal interest at the rate of 2.5% as above. The total calculation results to a figure of ₹124,32,56,689/- as on August 31, 2019. In fact, it is the case of the respondent vide letter dated January 24, 2017, admitted that it is liable to pay penal interest together with interest as per clause 3(o) above. Therefore, the petitioner cannot be permitted to plead or argue contrary to the contention of the said letter. The petitioner had sought deferment of the additional amount collected in the said letter, which was not permissible under the CA or the Supplementary Agreement, therefore, the respondent did not accept the same. It is also stated that the excess collected by the petitioner vis-a-vis the projected revenue deficit cannot be permitted to be retained by petitioner, or else it will have

cascading effect on other companies to whom similar scheme was extended by respondent, apart from the fact that the same is in violation of the terms of the SA and is nowhere provided. It is also stated that the benefit of deferment of premium was made on the understanding that the project is under stress, thus affecting the ability of the petitioner to pay the premium under the CA as per the schedule laid down therein. If any amounts collected by the petitioner are permitted to be retained by it, it would directly affect the ability of petitioner to pay the amount in future, where already the premium payment amount are swelled up due to deferment permitted in initial years. Such deferment of amount collected in the pocket of petitioner, which is legally due to respondent, would end up adding more stress to the project. The petitioner, by attempting not to pay the said amount, is seeking to defer the inevitable default. It is stated that an attempt on the part of petitioner to retain the revenue collected the debt, despite under an obligation to pay premium to respondent would amount to causing loss to public exchequer, and conferring undue benefit to the petitioner. The deferment permitted to petitioner earlier was never on the understanding or basis that the petitioner be permitted to retain certain amounts for itself. It is stated that foreign loss on account of currency fluctuations, captured in the accounts of petitioner on annual basis is not a debt servicing. It is only an accounting entry to reflect the true nature of accounts as on the financial year concerned. The foreign exchange loss so captured is only notional, and is not the actual loss suffered, inasmuch, the repayment of ECB loan is to be done over a period

of years. The notional amount which is captured in the accounts, relates to foreign exchange loss or foreign exchange gain, on account of currency fluctuations. Eventually, at the time when the actual repayment is made, if the value of rupee has gone up vis-a-vis the foreign currency, dollar in this case, the petitioner could have gained instead of suffering loss. Therefore, the petitioner ought to have taken this factor into account and hedged the same by way of having an appropriate hedging policy. It is stated that all banks and financial institutions funding any foreign currency loan would insist on hedging, however it is not clear as to why the same was not done by the petitioner in the instant case. If the petitioner eventually decided to repay the said foreign currency loans or convert them into rupee term loan, which resulted into allegedly causing some foreign loss, the same cannot be considered as a part of debt servicing as projected by the petitioner at the time of seeking benefit of the scheme in question, as the same were not taken into account at the time of projection for availing premium deferment. Thus, foreign loss, if any, has to be borne out by the petitioner independent of the projected cash flows. In any case, no reserve can be permitted to be created by the petitioner, while not making payment to respondent mandated under the CA, by citing stress in the project and the revenue shortfall was related to debt servicing, but does not include any and every loss suffered by petitioner over a period of years.

SUBMISSIONS ON BEHALF OF THE PETITIONER

13. Mr. Saurabh Kirpal, learned counsel for the petitioner

submitted that the CA dated August 16, 2010 executed between the Petitioner and Respondent *inter alia* requires the Petitioner to pay a premium of ₹140.40 Crores to the respondent each year till the subsistence of the agreement along with an annual increase at the rate of 5%. Article 44 provides for a dispute resolution mechanism whereby the partiers first resolve the dispute through conciliation as per Article 44.2, failing which Article 44.3 provides for arbitration. The premium obligation under the CA, was agreed to be modified in accordance with a Circular dated March 04, 2014 of the Central Government for deferment of premium read with the petitioner's application dated March 25, 2014 and sanction letter dated June 06, 2014 issued by respondent. Therefore, Supplement Agreement to the CA was executed recording such modified terms of payment of premium incorporating therein the terms of Sanction letter and Central Government resolution / scheme. Recital Clause H of the Supplemental Agreement recorded *"Save and except provided in this agreement, the Scheme and the letter of the Authority dated June 06, 2014 the terms and conditions of the Concession Agreement shall remain final and binding on the parties."*. Therefore, it is submitted that the supplemental agreement dated June 06, 2014 is an amendment / addendum to the CA and not a separate agreement. Article 47.10 of the CA specifically requires that any amendment or modification has to be carried out in writing and therefore, there was a need to execute the Supplemental Agreement. Thus, the arbitration agreement contained at Clause 44 of the CA covers the disputes relating to

or arising out of the terms contained in the said Supplemental Agreement to the CA. Both agreements, CA and Supplemental Agreement to CA contain the Clause I stating that "this agreement shall be subject to jurisdiction of Courts of Delhi". This does not negate Arbitration Agreement. In fact, he submitted by participating in the Conciliation procedure as per Article 44.2 of the CA with respect to this dispute, the Respondent has acted and accepted the same.

14. Without prejudice to the aforesaid, he submitted even otherwise the arbitration agreement is incorporated by reference in terms of Section 7(5) of the Act of 1996 as the Supplement Agreement specifically refers to the CA. He would rely on the judgment of the Supreme Court in the case of ***Alimenta S.A. vs. National Agricultural Co-operative Marketing Federation of India Ltd. and Anr., (1987) 1 SCC 615***, to contend that arbitration clause of an earlier contract can by reference be incorporated into a later contract provided it is not repugnant to or inconsistent with the terms of the contract in which it is incorporated.

15. He further submitted that the Petitioner has a *prima facie* case, irreparable harm, loss, injury shall be caused to the petitioner. According to him, as per the CA the Petitioner has carried the work of construction and continues to operate and maintain the Project, entirely at the petitioner's costs, including payment of premium. There is no financial or other liability upon the respondent for the project. To finance the Project the Petitioner obtained a Rupee Terms Loan of ₹831 Crores from a

consortium of Banks which is approved by Respondent. Subsequently, a portion of the said Rupee Term Loan to the extent of ₹300 Crores was converted into an ECB loan (i.e. fully convertible foreign currency loan) for a term of 7 years, which requires that at the end of 7 years when the ECB loan is converted into Rupee Term Loan all forex losses are payable upfront to the Bank. The terms of the ECB agreement were also known to Respondent as the documents were submitted to the Respondent and it suggested some changes.

16. In 2013-2014 Central Government sanctioned a "Premium Deferent Scheme" vide its Circular dated March 04, 2014 for all financially stressed projects. The Scheme is not a special / extra contractual sanction but rather in terms of contractual provisions contained in Article 28 of the Model CA – Revenue Shortfall Loan. *The intent of the scheme is* that revenue from the Project can be used first for satisfying the operation and maintenance cost and debt servicing, so that main Project cost required for running the Project are satisfied and the Project does not suffer. Pertinently, during this entire time period of premium deferment, the Concessionaire was not permitted to appropriate for itself (i.e. take any profits) any toll revenues.

17. It is in line of such policy that the Petitioner made an Application dated March 25, 2014 to Respondent for deferring the payment of premium for specific years till 2024, after which year i.e. from FY 2024-2025 till FY 2029-2030 all the deferred premium along with interest @2% above bank rate would be paid by the Petitioner in agreed tranches. Due to such deferment the

Petitioner is now liable to pay ₹1149 Crores as total premium rather than the previous obligation of ₹405 Crores. Therefore, again there is absolutely no loss to the Respondent, rather there is profit as the interest is 2% higher than Bank rate.

18. He submitted, the Sanction letter incorporated in the Supplemental Agreement, granting such Deferment, at Clause 1 crystallises the years for which premium would be deferred (i.e. 2014-2015 to 2023-2024), the amount of premium deferred for these specified years and the amount of revised premium payable during these years. After the year 2024 all these deferred premium were payable to the Respondent with the agreed interest as per the application and sanction letter. Clause 3 (b) of the sanction letter provided that till the amounts of deferred premium are repaid or recovered, the deferred amount shall at all times carry an interest rate equal to 2% above bank rate per annum. Clause 3 (h) provided that during the deferment period the Petitioner was not entitled to any return on equity (i.e. the Petitioner could not take any revenue for itself except for project cost towards O & M expenses, debt servicing and payment of premium.) Clause 3(o) provided that if the revenue deficit as actually seen on review at the end of the year is lesser by more than 5% of the figures projected the Petitioner 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. It also recorded that "however if the Petitioner effects the required correction and increases the premium payment so as to have no excess no such penalty would be payable".

19. Thus, according to him it is evident from the plain reading of the clauses, the Petitioner was entitled to pay the entire deferred premium amounts only after FY 2024-2045 i.e. period of deferment. In consideration whereof, the Petitioner was required to pay interest on such deferred amounts @ 2% above bank interest rate, along with the deferred premium amounts. Further, in the event it was seen that there was any excess revenue during any financial year, than the projections, then at the time of paying such determined deferred premium amounts with interest @ 2% above bank rate the petitioner was liable to pay additional interest @ 2.5% over such revenue excess. Nowhere do the terms of the agreement require / provide that in the event of such excess revenue, Petitioner was liable to forthwith pay additional premium. Clearly the liability that accrued upon determination of such revenue excess (or shortfall in revenue deficit) was to bear more interest over the total deferred premium (principal) and not that additional premium was to be paid forthwith. However, if the Petitioner chose to pay the additional premium so as to negate the excess revenue of that year, then the penalty interest would not be levied. Pertinently the payment of the additional premium amount (which is a part of principal) would result in a reduction in the total deferred premium to be paid with interest after 2024 and if such additional premium is not paid then when the total deferred premium is paid with normal interest the Petitioner would be liable for additional interest, because there could be no change in the total deferred premium amount payable. The only variable was the applicable interest but as the nature of the scheme was

that this interest and the principal i.e. the deferred premium, was not payable immediately (rather payable after 2024), no such inference can be drawn that it was a contractual obligation to pay the additional premium upfront, upon determination. This is a commercial consideration by the Respondent in view of the higher interest rates being paid to the Respondent. In fact the Petitioner has duly paid all the agreed revised premium amounts payable after the deferred premium amounts and by 2017-2018 the Petitioner paid a total of ₹462.15 Crores as revised premium amount.

20. In view of the aforesaid, the demand of the Respondent for payment of ₹12.54 Crores for 2014-2015 and ₹3.60 Crores for 2015-2016 along with normal interest and penalty interest in terms of Clause 3(o) of the sanction letter for an alleged lesser revenue shortfall/revenue excess, is in breach of the terms of the contact. It is submitted that firstly there has been no shortfall in revenue deficit in the financial years 2014-2015 and 2015-2016. The Respondent has not considered forex losses which forms part of Debt Servicing. The revenue savings / shortfall in revenue deficit seen in 2014-2015 and 2015-2016 is only notional, as the entire forex losses have been re-paid at the end of 7 years when the ECB loan is repaid and converted into Rupee Term Loan. Petitioner has borne forex losses to the tune of ₹111.83 Crores and the same is certified by the Statutory Auditor, who itself considers this as Debt. Article 48 of the CA defines Debt Service as *"the sum of all payments on account of principal, interest, financing fees and charges due and payable in an Accounting*

Year to the Senior Lenders under the Financing Agreements". As seen at pg.33 of the Petition, in 2017-2018 the Petitioner has paid a total of ₹241.89 Crores towards Debt Servicing as against the projected Debt servicing of ₹96.55 Crores as per the supplemental agreement. Further, between the period 2014 to 2018 the Project has not been cash/revenue surplus i.e. it has always been in revenue deficit. As against a projected Revenue Shortfall of ₹238.38 Crores there has been an actual revenue deficit of ₹422.87 Crores. Therefore, it is submitted that the provisions of Clause 3 (o) of the Sanction letter are not invoked as there is no shortfall in revenue deficit.

21. He stated, assuming without admitting that there is a more than 5% shortfall in revenue deficit, even then as per the plain language of Clause 3(o) there is no provision requiring the Petitioner to upfront / forthwith pay the additional premium. In fact as stated earlier, Clause 3(o) only contemplates that in such event the Petitioner would be liable to pay additional interest as penalty. It is submitted that when the scheme of deferment itself requires that the principal (deferred premium amount) and the interest (normal interest of 2% above bank rate) is to be paid only after 10 years (2024) which is the period of deferment, then Clause 3(o) can by no stretch of imagination be construed as a liability of the Petitioner to pay additional premium and normal interest and penalty interest forthwith or prior to the said 10 year period. It is submitted that as per the principle of contra proferentem, any ambiguity in the terms of the contract have to interpreted against the interest of the party who drafted the

contract, which in the instant case is the Respondent. The Petitioner's interpretation regarding operation of Clause 3 (o) of the Deferment Sanction is both plausible and within the framework of the 'Scheme'.

22. He submitted that while the contention whether these amounts are a payable or not forms part of the dispute to be decided by the arbitral tribunal, on one hand the Respondent is refusing to appoint their arbitrator, on the other hand the Respondent has by its Letter dated August 07, 2019 illegally terminated / revoked / withdrawn the deferment scheme and has by its letter dated August 14, 2018 called upon the Escrow Bank to release an amount of ₹524,27,30,506/- (being the entire amount of deferred premium along with normal interest and penal interest) to be paid within 15 days of the Notice. It is submitted that if such action on part of the Respondent is not stayed then the Escrow Bank shall release the said amounts, even though contractually the same are not payable and the arbitration invoked by the Petitioner would frustrate. Further, the revenues from the Project will not be sufficient to service the Operation and Maintenance cost of the project and the project would turn NPA. This would be contrary to the very principle of the Deferment Scheme which was, to ensure that Operation and Maintenance cost and Debt servicing are met and could lead to termination of the CA itself. The claim of the Respondent is only a monetary claim and is secured by the interest component secured in the contract itself, as per Clause 3(o). Further, in the event that the Petitioner for any reason, is unable to pay the amounts due to the

Respondent as per the Award, the Respondent has the contractual right to terminate the CA and take over the Project assets (which have been created by the Petitioner at its own cost) and collect and appropriate toll thereon. In any event the Petitioner is a well-established company and after having invested such huge amounts in the construction of the Project and typing up debt obligation, they will not renege from its obligations and leave the project. Therefore, the petitioner seeks that reliefs sought herein are granted.

SUBMISSIONS ON BEHALF OF THE RESPONDENT:

23. On the other hand, Mr. Sandeep Sethi, learned Senior Counsel appearing for the respondent would submit that a CA dated August 16, 2010 was entered between petitioner and respondent for six-laning of the subject project highway from the existing four lanes.

24. The Concessionaire was entitled to collect the toll from the existing project highway. As per Article 26 of CA, the petitioner is admittedly liable to pay premium (part of concession fee as per article 26.22) to respondent Authority. As per Article 26.21, a premium of ₹140.40 annually in the form of additional concession fee was payable by petitioner to respondent commencing from appointed date. The said premium is to be increased on annual basis by additional 5% amount as compared to immediately preceding year. The Concession period under the CA is 26 years.

25. Article 28 provides for revenue shortfall loan by NHAI. As per the said article, if the realisable fee in any accounting year

fall short of subsistence revenue as a result of Indirect political event, political event or Authority default, a provision for loan by Authority to Concessionaire has been carved out. Article 44 is the dispute resolution clause providing for arbitration.

26. Petitioner vide letter dated February 03, 2011 intimated to NHAI that it has executed the Financing Agreements with its lenders allegedly incorporating NHAI's comments. Vide the said letter petitioner further declared that Financial Close for the project in terms of Cl. 24.1.2 has been achieved. As per List of Dates filed by petitioner, a Rupee Term Loan of ₹ 831 Crores was availed by petitioner.

27. Vide letter dated April 01, 2011 NHAI declared that petitioner has achieved Financial Close on March 03, 2011 with a delay of 14 days as compared to stipulated time of 180 days (as per clause 24.1.1) from date of CA under the CA. That on June 29, 2011 petitioner obtained Rupee Term Loan of ₹ 300 Crores from ICICI Bank with a sublimit of ECB (External Commercial Borrowing) loan i.e. foreign currency loan to the extent of USD 66.70 million. Unlike Rupee Term loan wherein petitioner has sought NHAI's comments before executing the documents, no comments or concurrence was sought before executing the ECB agreement dated June 29, 2011.

28. That petitioner after having already executed the ECB facility agreement dated June 29, 2011, vide letter dated August 18, 2011 (almost after 2 months of having entered into ECB agreement on June 29, 2011) chose to intimate NHAI that petitioner has availed financial assistance from ICICI bank

limited in the form of rupee facility of ₹300 crores with an ECB sub-limit not exceeding USD 66,700,000/-, such that the aggregate amount of loan commitments available to the Borrower from existing lenders as well as ICICI Bank limited does not exceed ₹831 crores.

29. He stated the letter dated August 18, 2011 in most unambiguous terms and categorically stated that execution of the new documents (including ECB agreement) would not have the effect of imposing or increasing any financial liability or obligation on NHAI. The relevant extract is reproduced herein under:

"We hereby confirm that execution of the aforesaid new documents would not have the effect of imposing or increasing any financial liability or obligation on NHAI"

30. According to him, the petitioner was fully aware at the relevant time that there may be currency fluctuation resulting into forex gain or loss, however, petitioner made a categorical statement in the above terms comforting the NHAI that the entering into of ECB Agreement by petitioner will not add any additional burden or obligation on NHAI.

31. That NHAI in response to letter dated August 08, 2011, vide letter dated January 30, 2012 informed petitioner that financial Consultant and Credible Management & Consultant (Pvt.) Ltd. has examined the Term Loan Agreement and Amendment to the Financing Agreement and has furnished their comments in terms of Annexure A and Annexure B annexed with the said letter. It was categorically stated that draft copies of the

agreement and amendments which is requirement of the Cl. 5.2 of CA have not been provided by petitioner.

32. That petitioner in response to letter dated January 30, 2012, vide its letter dated March 26, 2012 admitted that draft copies of agreement were not submitted to NHAI. Petitioner again reiterated that new agreements and amendments carried out/executed does not increase the financial liability of NHAI. He mentioned that response of petitioner against each of the comments raised by NHAI vide letter dated January 30, 2012 would show that no changes/modifications to already executed ECB agreements and other agreements was agreed upon by petitioner for one or the other reason. Further, vide its letter dated March 26, 2012 petitioner had sought concurrence of NHAI.

33. It is relevant to mention that no concurrence whatsoever was ever accorded by NHAI vis-à-vis ECB agreement. The reliance placed by petitioner on letter dated May 02, 2012 to suggest that concurrence was provided is highly misplaced. A perusal of the aforesaid letter would show that letter is related to different transaction altogether i.e. ₹136 Crores from IDFC to IIFCL whereas the ECB agreement was regarding ₹300 Crore with ICICI Bank Limited Bahrain Branch. Hence, the contention of the petitioner that NHAI have its approval to ECB agreement is completely baseless. Not even a single document has been placed before this Court to support the bald assertion that NHAI has ever agreed or concurred for ECB transaction.

34. On March 04, 2014, Govt. of India floated Premium Deferment Scheme. As per the said deferment scheme, if a

project fell in the category of 'stressed' as per the defined criteria, then in such case, the Concessionaire will be extended benefit of determent of premium by a certain number of years. The scheme provides for mode of implementation of said deferment scheme, including the terms and conditions governing the implementation thereof.

35. Clause 6(a) of the deferment scheme categorically provides that the financial stress is only limited to premium payment and "***not linked to any cash shortfall on account of any O&M Expenses, debt servicing etc.***" The Concessionaire vide letter dated March 25, 2014 applied for deferment of premium under the aforesaid deferment scheme (*and not under the concession agreement/or claiming any revenue shortfall loan under article 28).* Along with the said application, the Petitioner made the assessment of following costs and expenses in order to arrive at Subsistence Revenue:

i. Operation and management outflows

ii. Debt servicing

iii. Tax payment

iv. Actual premium payable under Cl.26.2.1

36. A perusal of the calculations made by the Concessionaire itself (and forming part of the application dated March 25, 2014) would reveal that the Concessionaire included only two components as a part of debt servicing:

(a) *Interest payment*

(*b)* *principal payment*

No other component towards debt servicing was either

contemplated or reserved to be added in future, or proposed to NHAI for consideration as a part of sanction, much less any forex loss. Even otherwise, forex loss on a future date at best is an operational loss, and is not part of debt servicing. Without prejudice, the petitioner, in any case, never included the same as a part of debt servicing.

37. Vide sanction letter dated June 06, 2014 a sanction was provided and benefit of Deferred Premium Scheme was conferred upon the petitioner relying upon the application dated March 25, 2014. Thus, the parties had never contemplated forex loss/gain as a part of debt servicing. Pursuant thereto, a SA dated June 06, 2014 was also executed between petitioner and NHAI. It was categorically stated in SA that terms and conditions envisaged in the sanction letter dated June 06, 2014 would be binding on the parties.

38. As per clause 3 (o) of sanction letter dated June 06, 2014 issued by NHAI, in case revenue deficit at the end of year is lesser by more than 5% of the figures given under the projections now being considered, petitioner would 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. During review for the year 2014-15 as compared to deferment based on projected figure of ₹ 81.45 Crore, the premium deferment based on actual figure worked out less i.e. ₹ 68.71 Crore, thereby petitioner retaining ₹ 12.74 Crore beyond its entitlement under the scheme. During review for the year 2015-16 as compared to deferment based on projected figure of ₹ 67.8 Crore, the premium deferment based on

actual figure worked out less i.e. ₹63.56 Crore, thereby retaining ₹4.24 Crore beyond its entitlement under the scheme.

39. Similarly, for the year 2017-18 as compared to deferment based on projected figure of ₹36.28 Crore, the premium deferment based on actual figure worked out in negative i.e. ₹10.75 Crore, thereby petitioner retaining ₹46.78 Crore beyond its entitlement under the scheme.

40. Admittedly, petitioner retained the aforesaid amount, despite, several correspondences by NHAI seeking demand of the revenue shortfall, and did not even pay the penal interest, thus committing default. Respondent was constrained to withdraw benefit of the scheme vide letter dated August 07, 2019 under Cl. 3(p) and demanded the deferred premium and other amounts.

41. He submitted that deferment of premium is not contemplated in the CA, as such, same has solely been granted to petitioner based on the scheme floated by the Govt. of India on March 04, 2014. It is relevant to mention that SA dated June 06, 2014 by way of which benefit of aforesaid deferment scheme was conferred on the petitioner does not contained any arbitration clause.

42. According to him, the petitioner in its attempt to bring the present dispute within the scope of arbitration clause (Clause 44 of CA dated August 16, 2010) is trying to place reliance on Article 28 of CA to suggest that Premium Deferment Scheme was sanctioned to petitioner based on Article 28. The said contention of the petitioner is completely misplaced.

43. According to Mr. Sethi, Article 28 does not contemplate

any premium Deferment rather it contemplates disbursement of Revenue shortfall loan or Provisional Shortfall loan in case Realisable Fee falls short of Subsistence Revenue due to happening of Indirect Political Event, Political Event or an Authority's Default. Importantly, it is neither the case of the petitioner that any indirect political event, Political Event or Authority's default has occurred nor NHAI has disbursed any loan to the petitioner. The aforesaid facts clearly suggest non-applicability of Article 28 in the present case.

44. The dispute resolution Clause 44 which limits its applicability to disputes, differences or controversy of whatever nature howsoever arising under or out of or in relation to the CA. Evidently, the CA did not contemplate Premium Deferment (as same was granted to the petitioner based on the Government of India Scheme dated March 04, 2014) hence, the grant or withdrawal of premium deferment scheme neither arises under or out of or in relation to CA. Hence, the present dispute is not arbitrable.

45. According to Mr. Sethi, the petitioner further seeks to rely upon clause H of the Supplemental Agreement dated June 06, 2014 to assert that the arbitration clause is deemed to have been incorporated by way of reference in the supplemental agreement. He stated, Clause H provides as under:

"H. Save and except provided in this Agreement, the scheme and the sanction letter of the Authority dated June 04=6, 2014 the terms and conditions of Concessions Agreement shall remain final and binding on parties."

46. It is submitted that the only purpose of inserting clause H is to deal with the binding nature of the scheme and the sanction letter issued by the Authority on June 06, 2014. The intention of the parties was not to incorporate the arbitration clause by way of reference. It is submitted that the scheme is floated by the Government of India, and is outside the scope of the original contract entered i.e. CA into between the parties. The purpose of scheme and the subsequent sanction letter and signing of SA was merely limited to grant the benefit of said deferment scheme.

47. As a matter of fact, clause 3(p) of the sanction letter itself deals with the default in compliance with the terms and conditions of the sanction letter and entitlement of NHAI to suspend or withhold or withdraw the facility of deferment of premium and demand repayment of all outstanding liabilities including interest accrued.

48. Learned counsel for the respondent seeks to rely on the judgment of the Supreme Court in the case of ***M.R. Engineers and Contractors Pvt. Ltd. v. Som Datt Builders Ltd., (2009) 7 SCC 696.*** He stated, the SA dated June 06, 2014 neither it contains any arbitration clause not it makes reference to the arbitration clause in the main agreement. As such, had there been any intention to resolve dispute arising out of SA by way of arbitration then there was no reason for parties not to have mentioned the arbitration clause or not to have referred to arbitration clause in the main agreement. On the contrary, clause I of the SA makes a reference to the jurisdiction of Courts at Delhi.

49. He submitted that the petitioner made an assertion that the SA is not separately terminable, and it merely amends the terms of the CA. It is submitted that the intention and purpose of entering into a SA was to confer the benefit of deferment scheme floated by the Government of India, which was outside the scope of original contract i.e. the CA. It is with this intention, the SA makes reference to the application dated March 25, 2014 and the sanction dated March 6, 2014 as the basis of entering into the supplementary agreement. He submitted that the intention of parties was not to incorporate the arbitration clause 44 into the supplementary agreement. This according to him fortified by the fact that by way of letter dated August 7, 2019, the NHAI has simplicitor withdrawn the benefit of deferment granted earlier. The CA continues to govern the parties and is binding.

50. Once, the dispute in question is not arbitrable, a petition Section 9 of the Act of 1996 is not maintainable.

51. Mr. Sethi also submitted, with the application dated March 25, 2014 petitioner in order to assess the claim (amount) for deferring of premium, had made the assessment of following costs and expenses:

i. Operation and management outflows

ii. Debt servicing

iii. Tax payment

iv. Actual premium payable under Cl.26.2.1

52. After adding up the aforesaid amounts, Subsistence Revenue was arrived at. The Subsistence Revenue was thereafter compared to projected cash flow/inflow for respective year and

the difference between the two (Subsistence Revenue and Cash inflow) was sought for premium deferment. As such, the amount projected against each of the heads under costs and expenses becomes significant, as the amounts are projected figures which may vary from actual figures, NHAI contemplating the aforesaid situation took care of it under Clause 3 (o) of its sanction letter dated June 06, 2014.

53. As per Cl. 3(o) of sanction letter dated June 06, 2014 issued by NHAI, in case revenue deficit at the end of year is lesser by more than 5% of the figures given under the projections in letter of petitioner dated March 25, 2014, petitioner would 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. As per the data, the actual figures against the projected figures, year-wise are as under:

A. For the year 2014-15

Rs. In Crores

Year 2014-15	**Projected figures taken for deferment of premium**	**Actual figures worked out**	**Difference**
O & M	8.81	8.81	0
Debt Services	95.57	81.52	14.05
Premium Payable	162.53	162.53	0
Subsistence revenue	266.91	252.86	14.05
Toll inflows	185.46	184.15	1.31
Revenue shortfall	81.45	68.71	12.74

B. For the year 2015-16:

Rs. In Crores

Year 2014-15	Projected figures taken for deferment of premium	Actual figures worked out	Difference
O & M	9.25	9.25	0
Debt Services	96.35	86.19	10.16
Premium Payable	170.66	170.66	0
Subsistence revenue	276.26	266.1	10.16
Toll inflows	208.46	202.54	5.92
Revenue shortfall	67.8	63.56	4.24

C. For the year 2016-17: No shortfall

D. For the year 2017-18:

Rs. In Crores

Year 2014-15	Projected figures taken for deferment of premium	Actual figures worked out	Difference
O & M	10.2	10.2	0
Debt Services	96.55	20.37	76.18
Premium Payable	188.15	188.15	0
Subsistence revenue	294.9	218.72	76.18
Toll inflows	258.69	229.29	-29.4
Revenue shortfall	36.21	-10.57	46.78

Abstract Recovery of Premium based on review as per above tables:

Sl.No.	Year	Premium amount to be recover (Rs. in Crs.)
A	2014-15	12.74
B	2015-16	4.24
C	2016-17	0
D	2017-18	46.78
	TOTAL	63.76

54. He submitted that the excess amount is admittedly retained by the petitioner. The only explanation being, that the petitioner seeks to keep the same as reserves for meeting out future forex losses. It is the case of the petitioner that aforesaid excess amount is to be adjusted towards forex losses which may be incurred by it on account of External Commercial Borrowing (ECB). According to him on a perusal of the calculations made by the Concessionaire itself (and forming part of the application dated March 25, 2014) would reveal that the Concessionaire included only two components as a part of debt servicing:

(a) *Interest payment*

(*b)* *principal payment*

No other component towards debt servicing was either contemplated or reserved to be added in future, or proposed to NHAI for consideration as a part of sanction. As such so called forex losses were never included by petitioner while seeking benefit of premium deferment scheme.

55. He stated even otherwise also, petitioner could not have sought for any forex losses for the simple reason that petitioner vide its letter dated August 18, 2011 categorically stated that execution of the new documents (including ECB agreement) would not have the effect of imposing or increasing any financial liability or obligation on NHAI. The aforesaid stand was reiterated by petitioner vide its letter dated March 26, 2012 wherein it again stated that new agreements and amendments carried out does not increase the financial liability of NHAI. Hence, attempt of petitioner to somehow

justify the retention of excess amount towards alleged forex losses is completely misplaced and contrary to its own stand.

56. Importantly, as far Excess amount of ₹12.54 cores for FY 2014-15 is concerned as stated herein above by respondent, same has been shown by petitioner in its own calculations as well (through in its pleading petitioner seeks to explain it as notional revenue savings).

57. Hence, once the excess amount of ₹12.54 crores is admitted, which is more than 5% of the figures given under projection under application dated March 25, 2014 by petitioner, clause 3(o) is invoked. As such, the petitioner ought to have paid the excess amount to NHAI along with penalty of 2.5% additional interest over and above the normal interest of Bank rate +2% on the said excess. Evidently, till date, petitioner has neither paid the penalty of 2.5% additional interest over and above the normal interest of Bank rate +2% on the said excess nor has it paid the excess amount.

58. He submitted that it is contended by the petitioner's counsel that even if petitioner has retained the excess revenue, petitioner would not be in default as long as he is ready and willing to pay penalty of 2.5% additional interest over and above the normal interest of Bank rate +2% on the said excess. It was also contended by the petitioner' counsel that the terms of the sanction/SA does not stipulate remittance of the excess amount or the interest or the penal interest immediately.

59. In this regard, he submitted that non-payment of excess amount and penalty by petitioner amounts to default. Evidently, various demand letters have been made to the petitioner, however,

petitioner till date has neither chosen to pay the excess amount nor the penalty+interest as per Cl.3(o). The interpretation given by petitioner would virtually bring the entire deferment scheme to standstill, and defeat its very purpose. Instead of deferment being a temporary measure to rescue the stressed projects to tide over the stressed situation, it becomes a measure for the concessionaire (who is otherewise bound by CA to pay concession fee including the premium), to retain in his own pocket for a certain number of year, certain amounts of money, at the cost and expense of NHAI.

60. The very objective and basis of the deferment scheme is to defer only that portion of revenue deficit, which is not earned or collected in the concerned financial year by the concessionaire. The concessionaire cannot argue that although it saved more in particular financial year, yet it would retain the same in its own pocket, while differing the otherwise payment already due and payable to NHAI.

61. The petitioner cannot further be permitted to argue that it is willing to pay interest as well as penalty for pocketing such money at the end of the deferred period (10 years in this case). Such an interpretation would defeat the entire deferment scheme and would open the doors to such unscrupulous concessionaire, to keep on pocketing the revenue earned in a financial year, while asking the NHAI to wait for 10 years to recover its premium alongwith interest and penal interest.

62. He submitted, the repeated emphasis by Mr. Kirpal during arguments, that the interest rate is a huge burden, is a farce. On the contrary, the interpretation amounts to a soft unsecured loan to petitioner on a meagre rate of interest. It is submitted that the

concessionaire cannot be permitted to pocket any excess money, which is otherwise due and payable to NHAI as per the CA. The deferment is not aimed at filling the coffers of concessionaire or providing concessionaire a soft unsecured loan on a meagre rate of interest, while keeping the NHAI at bay. Such interpretation is absurd and would make the scheme itself unworkable.

63. The situation that stands today is that petitioner is enjoying the excess amount without paying the penalty as contemplated under clause 3(o). Hence, merely expressing its willingness to pay the penalty (and that too belatedly in the year 2017) and not actually paying anything to NHAI, the same does not exonerate petitioner from being in default. He stated that for purposes of making its submissions, respondent is referring to the excess amount of ₹12.54 Crores in FY 2014-15, as such, same submissions regarding the excess the amount for other financial years may also be read accordingly.

64. According to him as per clause 3(b) of sanction letter dated June 06, 2014, the amounts of deferred premium are to be repaid or recovered from the date such amounts are deferred with an interest equal to 2% above the bank rate per annum. The Interest will be compounded annually and calculated on the daily outstanding balance of deferred premium. The aforesaid clause is applicable to the deferred premium. However, the sanction letter under cl. 3(o) vis-à-vis excess revenue envisages a penalty of 2.5% additional interest over and above the normal interest of bank rate plus 2% on the said excess.

65. The clause 3(o) suggests no other option but payment of

penal interest @2.5% over and above the bank rate +2% on the said excess (alongwith the excess payment) in case petitioners fails to increase the premium amount so as to have no excess by the end of the relevant year. He submitted that the comparison between the two clauses i.e. Cl. 3(b) and Cl. 3(o) is only with respect to additional 2.5% of interest. Hence, if the contention of Mr. Kirpal that petitioner can retain the excess merely by assuring to pay the penalty (and not even paying the penalty also) is assumed to be correct, then it would result into petitioner retaining the excess amount for the indefinite term at the meagre interest rate of 2.5% over the bank rate. He submitted that petitioner would be more than happy to pay 2.5% additional interest and enjoy crores of rupees which otherwise if he would have borrowed from the market (bank/NBFCs/other lenders) would not have come to it for less than 18-20% of interest that too he would have been required to secure the aforesaid amount with some security. He stated, it is amply clear that the contention of the petitioner that it can retain the excess by merely paying the penalty defies all the logic of commercial and current market situation. Hence, the contention of the petitioner that it can retain the excess amount by merely offering to pay additional rate of 2.5% interest (and that too on a future date not clarified) is meritless.

66. He stated the provisions of penalty is with an objective to act as a deterrent for concessionaire not to default in paying excess to NHAI. It nowhere absolves the concessionaire of its inherent liability to pay the premium or excess amounts. If in a particular year, the concessionaire ends up not being in revenue deficit at all and earns more than what was projected, as per the interpretation of

Concessionaire, it would be entitled to retain all the excess money in its own pocket, while asking the NHAI to keep on waiting, despite the fact that there may not be a revenue deficit at all. Such is not the understating of the deferment scheme.

67. Hence, according to Mr. Sethi, petitioner being in default and respondent is well within its right to withdraw the benefit of the scheme under clause 3(p) of the sanction letter dated June 06, 2014.

III. FOREIGN EXCHANGE LOSS

68. He further submitted that the forex loss was neither contemplated by Concessionaire in its application dated March 25, 2014 nor forming part of sanction dated June 06, 2014; the SA dated June 06, 2014. Even otherwise, forex loss on account of currency fluctuations, allegedly captured in the accounts of Concessionaire on annual basis is not a debt servicing. It is only an accounting entry to reflect the true nature of accounts of the Financial Year concerned. The forex loss so captured is only notional, and is not the actual loss suffered, inasmuch as the repayment of ECB loan is to be done over a period of years. The notional amount which is captured in the accounts, relates to forex loss or foreign exchange gain, on account of currency fluctuations. Eventually, at the time when the actual repayment is made, if the value of rupee has gone up vis-à-vis the foreign currency, dollar in this case, the petitioner could have gained instead of suffering loss.

69. He submitted, therefore, that the Concessionaire ought to have taken this factor into account and hedged the same by way of having an appropriate hedging policy. It is equally important to note that over a period of years, all banks and financial institutions

funding any foreign currency loan would insist on hedging, however, it is not clear whether petitioner has hedged its foreign currency loan or not, further, if petitioner has not hedged it, it is not clear as to why the same was not done by the Concessionaire in the instant case. If the Concessionaire eventually decided to repay the said foreign currency loans or convert them into rupee term loan, which resulted into allegedly causing some forex loss, the same cannot be considered as a part of debt servicing as projected by the Concessionaire at the time of seeking benefit of the scheme in question. Therefore, forex loss, if any, has to be borne out by the Concessionaire independent of the projected cashflows. In any case, no reserve can be permitted to be created by the Concessionaire, while not making payment to NHAI mandated under the CA, by citing stress in the project. It is submitted that the revenue shortfall was related to debt servicing, but does not include any and every loss suffered by Concessionaire over a period of years.

70. Respondent is not at all liable to extend any deferment benefit for ECB losses as no prior approval was taken by the petitioner for availing ECB loan and ECB loan is not a part of the financial closure on the basis of which appointed date declared. The financial closure was achieved by the petitioner on March 03, 2011. Subsequently, the Concessionaire chose to avail a financial assistance from ICICI bank limited by way of rupee loan was only a sub-limit of the said rupee term loan facility.

71. The Concessionaire never sought approval from NHAI for execution of ECB Facility Agreement, which was executed as early as on June 29, 2011. A letter dated August 18, 2011 appears to have

been sent to NHAI for mere information and records. He submitted that the said letter categorically made an assertion that the aforesaid new documents will not have any increased financial liability or obligation on NHAI. Relevant extract of the said letter is reproduced as under:

"*we hereby confirm that the execution of the aforesaid new documents would not have the effect of imposing or increasing any financial liability or obligation on NHAI."*

72. This ECB Facility Agreement was executed between the respective parties (not NHAI) to capture the sub-limit of rupee loan facility of ₹300 Crores. Insofar as the rupee facility of ₹300 Crores granted by ICICI bank is concerned, the lenders had amended the original Common Rupee Loan Agreement dated February 03, 2011 amended on August 05, 2011 which has not been produced on records by the Concessionaire.

73. The repayment clause 6 in the ECB Facility Agreement, provides that the repayment is to be made in an equal semi-annual installments in line with the repayment schedule of the rupee lenders under the amended Common Rupee Loan Agreement. In other words, the repayment was to continue alongside repayment of rupee loan and the last payment was to be made on the date when the rupee loan would have been closed. The Concessionaire has not placed material on record to show the repayment schedule or under the amended Common Rupee Loan Agreement. Despite having full knowledge of the ECB Facility Agreement executed as earlier as on 2011, in the application filed by the Concessionaire on March 25, 2014 for seeking benefit of Deferment Scheme, no provision was

made towards forex loss. He submitted that the Concessionaire did not do so, as it was fully aware that the debt servicing will not include the component of forex loss, which is contingent liability in nature.

74. Mr. Sethi submitted, after having signed the SA with open eyes, and after having projected the cashflows including the debt servicing based on certain understanding, which form the basis of execution of Supplementary Agreement, the Concessionaire cannot be permitted to take a U-turn and start adding more components within the definition of debt servicing.

75. He submitted that an ECB Loan was preferred by the petitioner by converting Indian currency loan of ₹300 Crores into USD loan of 6.67 Crores USD and again reconvert the same into rupee term loan at the end of 7 years and incurred forex losses and appropriate the losses so occurred against revenue savings accruing to them due to the hedging of the ECB Loan. He submitted that the same is totally an unwarranted exercise of which NHAI is not a party i.e., no approval was taken from NHAI for the same. The petitioner also has not produced any approval from NHAI for such ECB loan.

IV. <u>Clause 6(a) of the Deferment Scheme</u>

76. Clause 6(a) of the deferment scheme categorically provides that the financial stress is only limited to **premium payment** and "***not linked to any cash shortfall on account of any O&M Expenses, debt servicing etc.***" Therefore, any stress that is adding to the project on account of debt servicing, may be on a higher rate, involving of commissions, on account of various charges etc. is something which is not to be taken into account to capitulate the

financial stress.

77. The subsequent so called alleged forex loss, which is nothing but a operational loss on account of a contingent liability, cannot be taken into account to capitulate the financial stress in the project. The concessionaire cannot be permitted to amend the terms of its own application, and the subsequent sanction dated June 06, 2014 issued by NHAI to add forex loss as a part of debt service.

V. <u>Relief of Mandatory Injunction</u>

78. He submitted that the deferment granted, by its very nature, is terminable. As per the original CA, the concessionaire was liable to pay the premium as per Article 26 of the CA. The NHAI extended the benefit of deferment of premium in view of the government scheme in this regard, and the application of the concessionaire and the subsequent sanction dated June 06, 2014 by the NHAI. The NHAI has already withdrawn the said grant of deferment and has called upon the concessionaire to repay the dues as per the CA.

79. By way of seeking interim relief before this Court, the concessionaire is seeking relief in the nature of mandatory injunction for a direction to NHAI to continue to grant the benefit of deferment of premium. In other words, the same is in the nature of seeking specific performance of deferment scheme, the benefits thereof is already withdrawn. He submitted that the said relief would be hit by Section 14 of the Specific Relief Act. In the first instance, the benefit, by its very nature, is determinable. In any case, if the concessionaire so feels, it can seek appropriate relief by way of damages. It is submitted that the petitioner does not have any prima facie case in its favour. The balance of convenience does not lie in

favour of petitioner. No irreparable loss or injury will be caused to the petitioner if the reliefs sought for is not granted.

80. Having heard the learned counsel for the parties, the first and foremost issue that arises for consideration is whether the dispute between the parties is arbitrable under Article 44 of the CA. It was the submission of Mr. Sethi that, SA is a separate agreement, governing the deferment of the premium, never intended to be part of CA. According to him, in the absence of arbitration clause in the SA the petition is not maintainable.

81. When the CA was executed in the year 2010, the scheme of Government of India for deferment of premium was not in existence. It was notified on March 04, 2014. So clause 44 of the CA was applicable to disputes, differences in relation to CA. But thereafter, on an application of the petitioner for deferment of the premium under the scheme was accepted by the NHAI, a SA was executed on June 06, 2014. I may state here, that Article 47.10 of the CA specifically requires that any amendment or modification has to be carried out in writing, so accordingly, the SA was executed. As the name suggest this SA is to the CA. The SA was necessitated because the authority agreed with the request of the Concessionaire for deferment of the premium which stipulation was not existing in the CA. The following clauses of the SA are of some importance:

> *"H. Save and except provided in this agreement, the Scheme and the sanction letter of the Authority dated 6/6/14 the terms and conditions of Concession Agreement shall remain final and binding on parties.*
>
> *I. This agreement shall be subject to jurisdiction of*

Court of Delhi.

NOW THEREFORE, *in consideration of the foregoing and the respective covenants and agreements set forth in the Concession Agreement dated 16/08/2010, the Scheme and the letter of the Authority dated 06/06/2014 agreeing to the request of the Concessionaire for deferment of premium, the receipt and sufficiency of which is hereby acknowledged, and intending to be legally bound hereby, the Parties enter into this Supplementary Agreement to the aforesaid Concession Agreement on this day." (emphasis supplied)*

82. Clause H stipulates the binding nature of the supplementary agreement, the scheme, the sanction letter of the authority apart from the terms and conditions of the CA. So, it follows even with the execution of the supplementary agreement, the terms and conditions of the CA, which includes clause 44, continued to be binding, on the parties. The subsequent clause also clarifies the position that the SA is to the CA. Hence, it is clear that the SA is part of the CA. Rightly so, as per Article 26 of the CA, the petitioner was liable to pay the premium to the respondent authority, but by the SA the payment of premium has undergone a change.

83. In fact, I note that the sanction letter issued on June 06, 2014 vide clause 4 states that to evidence the deferment of premium and attendant obligations thereunder, the Concessionaire shall execute a SA to the CA and the sanction shall be subject to the signing of the supplementary agreement. The effect of execution of SA is the

premium that is paid to the authority under Article 26.2 of the CA shall get deferred in the manner stated in the SA, i.e., in accordance with the scheme on terms and conditions conveyed vide letter dated June 06, 2014. So, any dispute arising with regard to deferment of premium shall be an issue arising in relation to CA, and as such arbitrable under Article 44 of the CA. In fact, the above was the understanding of the respondent as, I have been informed that the parties resorted to conciliation proceeding under Article 44.2 of the CA, which resulted in failure. The reliance placed by Mr. Sandeep Sethi on the judgment of the Supreme Court in the case of ***M.R. Engineers and Contractors Pvt. Ltd. (supra)*** is concerned, in the said judgment the Supreme Court was concerned with the facts that the Public Works Department, Government of Kerala entrusted the work of "four-laning and strengthening of Alwaye-Vyttila and Aroor-Cherthala and strengthening of Vyttila to Aroor section of NH 47-N2 and N3 packages" which included the work of "construction of project directorate building for national highway four laning project at Edapally, Cochin" to the respondent. The said contract between the Public Works Department and the respondent contained a provision for arbitration, as per Clause 67.3 of the general conditions of the contract.

84. The appellant before the Supreme Court is a sub contractor of the respondent. The respondent entrusted a part of the work entrusted to it by the Public Works Department, namely, "construction of project directorate building" to the appellant under its work order dated May 04, 1994. The appellant alleges that it informed the respondent that it executed certain extra items and

excess quantities of agreed items on the instructions of the Public Works Department and requested the respondent to make a claim on the Public Works Department in that behalf; that the respondent accordingly made necessary claims in that behalf on the Public Works Department; that the said claims, as also several other claims of the respondent against the Public Works Department were referred to arbitration and the arbitrator made an award dated August 18, 1999.

85. According to the appellant, the arbitrator awarded certain amounts in regard to its claims put through the respondent and in terms of the arrangement between the respondent and the appellant, the respondent is liable to pay to the appellant, 80% of the amounts awarded for such claims. The appellant, thereafter, lodged a claim on the respondent by letter dated July 05, 2000, for payment of ₹65,11,341/-.

86. As the claim was not settled, the appellant sent a letter dated December 06, 2000 seeking reference to the disputes to the arbitration. As the respondent failed to comply, the appellant filed an application under Section 11 of the Act. According to the appellant, clause 67.3 of the general conditions of the contract forming part of the contract between the Public Works Department and the respondent, providing for arbitration, was imported into the sub contract between the respondent and the appellants. The appellant relies upon the term in the work order dated May 04, 1994 that the "sub-contract shall be carried out on the terms and conditions as applicable to the main contract" to contend that the entire contract between the department and the respondent, including clause 67.3

relating to arbitration, became a part and parcel of the contract between the parties. The respondent denied the said claim and contention.

87. The designate of the learned Chief Justice by order dated January 31, 2003 rejected the application on the ground that the arbitration clause was not incorporated by reference in the contract between the respondent and the appellant.

88. The Supreme Court, on an interpretation of Section 7(5) of the Act of 1996, has summarized its scope and intent in the following manner:-

> *"24 (i) An arbitration clause in another document, would get incorporated into a contract by reference, if the following conditions are fulfilled : (i) The contract should contain a clear reference to the documents containing arbitration clause, (ii) the reference to the other document should clearly indicate an intention to incorporate the arbitration clause into the contract,*
>
> *(iii) The arbitration clause should be appropriate, that is capable of application in respect of disputes under the contract and should not be repugnant to any term of the contract.*
>
> *(ii) When the parties enter into a contract, making a general reference to another contract, such general reference would not have the effect of incorporating the arbitration clause from the referred document into the contract between the parties. The arbitration clause from another contract can be incorporated into the contract*

(where such reference is made), only by a specific reference to arbitration clause.

(iii) Where a contract between the parties provides that the execution or performance of that contract shall be in terms of another contract (which contains the terms and conditions relating to performance and a provision for settlement of disputes by arbitration), then, the terms of the referred contract in regard to execution/performance alone will apply, and not the arbitration agreement in the referred contract, unless there is special reference to the arbitration clause also.

(iv) Where the contract provides that the standard form of terms and conditions of an independent Trade or Professional Institution (as for example the Standard Terms & Conditions of a Trade Association or Architects Association) will bind them or apply to the contract, such standard form of terms and conditions including any provision for arbitration in such standard terms and conditions, shall be deemed to be incorporated by reference. Sometimes the contract may also say that the parties are familiar with those terms and conditions or that the parties have read and understood the said terms and conditions.

(v) Where the contract between the parties stipulates that the Conditions of Contract of one of the parties to the contract shall form a part of their contract (as for example the General Conditions of Contract of the

Government where Government is a party), the arbitration clause forming part of such General Conditions of contract will apply to the contract between the parties."

89. In the said case, the Supreme Court had come to a conclusion that the arbitration clause between the PWD and the Som Datt Builders has no applicability to the contract executed between the parties before the Supreme Court which was a sub contract. Suffice it would be to state that the facts in the judgment, as relied upon by Mr. Sethi, are not similar to the one, which arise for consideration in this case. Hence, the judgment is distinguishable and has no applicability, more so, in view of my above conclusion.

90. Having said that, the question which arises for consideration is whether the petitioner is entitled to relief it has sought for in this petition.

91. It has been contended by Mr. Kirpal that the petitioner has a prima facie case and irreparable loss shall cause to the petitioner if the prayer as prayed for is not granted. The prayers made have already been reflected above. The impugned order dated August 7, 2019 reads as under:

"Sir,
Please refer sanction letter cited under ref (i) above vide which deferment of premium was sanctioned to the Concessionaire.
2. As per clause 3 (o) of the approval letter review of deferred premium was done and the Concessionaire was requested to remit premium on the basis of review of premium deferment amounting to Rs.12.74 Cr. for the year 2014-15 & Rs.4.24 Cr. for the year 2015-16 along with interest and penal interest.

4. Despite several reminders, the premium has not been remitted by the Concessionaire, instead the Concessionaire choose to raise the dispute and invoked arbitration. The Competent Authority decided that the dispute raised by the Concessionaire does not qualify under Clause 44 of the Concession Agreement since the facility of premium deferment is extended to the Concessionaire under the special scheme of Central Govt., "Policy of rationalization of premium quoted by the Concessionaire in respect of highways project" (the "Scheme") to benefit highway projects under financial stress. The above fact was communicated to the Concessionaire vide NHAI letter cited under ref (ii) above and requested to remit the demanded premium amounting to Rs.12.74 Cr. for financial year 2014 -15, Rs.4.24 Cr. for financial year 2015-16 along with interest and penal interest at the earliest to avoid default as per provision of Concession Agreement, failing which NHAI will be considering revocation of premium deferment on account of default in adhering to the terms and conditions and may also initiate other action as per Concession Agreement. However, the above demanded premium has not been remitted by Concessionaire.

4. The Competent Authority has now decided to withdraw the deferment of premium and the Concessionaire is requested to remit the balance outstanding premium as per Concession Agreement (including deferred premium) along with interest as per provision of Concession Agreement to avoid concession default.

This issue with the approval of Competent Authority."

92. From the above, it is seen that the respondent has decided to revoke the premium deferment scheme as sanctioned on account of default of the petitioner to remit the demanded premium and amounts of ₹12.74 Crores (for the financial year 2014-2015) and ₹4.24 (for the financial year 2015-2016) along with interest and penal interest.

93. Further the question that would arise is whether the petitioner is liable to pay amount of ₹12.74 Crores and ₹4.24 Crores along with interest and penal interest and on failure to pay the same, whether the respondents are within their right to revoke the premium deferment scheme as sanctioned vide letter dated June 6, 2014. .

94. The submissions made by Mr. Kirpal can be noted as the following:

A. The Scheme of Deferment is not a special / extra contractual sanction, but rather in terms of Article 28 of the CA.

B. The intent of the scheme is that revenue from the Project can be used for satisfying the operation and maintenance cost and debt servicing.

C. During this period, the concessioner is not permitted to appropriate for itself any toll revenues.

D. The petitioner made an application for deferring the payment of premium for the specific years till 2024 after which year from 2024-2025 till financial year 2029-2030 all the deferred premiums along with interest @ 2% bank rate shall be paid by the petitioner in agreed tranches.

E. Clause 3(b) of the sanction letter provided that till the amounts of deferred premiums are repaid or recovered, the deferred amount shall at all times carry an interest rate equal to 2% of the bank rate per annum.

F. Clause 3 (o) provided that if the revenue deficit as actually seen on review at the end of the year is lesser than by more than 5% of the figures projected, the petitioner 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.

G. On a plain reading of the clauses, the petitioner was entitled to pay the entire deferment premium amount on or after the financial year 2024-2045, i.e., the period of deferment.

H. Nowhere do the terms of the agreement require / provide that in the event of such excess revenue the petitioner was liable to forthwith pay additional premium.

I. The liability that accrued about determination of such revenue excess was to bear more interest over the total deferred premium and no additional premium was to be paid forthwith.

J. The payment of additional premium amount would result in a reduction in the total deferred premium to be paid with interest after 2024 and if such additional premium is not paid, then when the total deferred premium is paid with normal interest, the petitioner shall be liable for additional interest because there could be no change in the total deferred premium amount payable.

K. The nature of scheme is that the interest and the principal, i.e., the deferred premium was not payable immediately and no inference can be drawn that it was a contractual obligation to pay additional premium upfront upon determination.

L. The demand of the respondent for payment of ₹12.74 Crores and ₹4.24 Crores along with normal interest and penal interest in terms of Clause 3 (o) of the sanction letter being

alleged lesser revenue shortfall / revenue excess is in breach of the terms of the contract.

M. The respondent has not considered the foreign exchange losses which form part of the debt servicing.

N. Assuming that there is more than 5% shortfall in revenue deficit even then as per the plain language of clause 3 (o), there is no provision requiring the petitioner to upfront / forthwith pay the additional premium.

O. When the scheme of deferment itself requires that the principal and the interest is to be paid only after 10 years, which is the period of deferment, then clause 3 (o) can by no stretch of imagination be construed as a liability of the petitioner to pay additional premium or normal interest and penal interest forthwith or prior to the said 10 years period.

95. Similarly, the submissions made by Mr. Sethi in support of the impugned order can be summed up as under:

A. Clause 6 (a) of the Deferment Scheme categorically provides that the financial stress is only limited to premium payment and not linked to any cash shortfall on account of any O & M expenses, debt servicing etc.

B. The concessioner included only two components as par part of debt servicing (a) interest payment and (b) principal payment.

C. As per clause 3 (o) of the sanction letter, dated June 6, 2014, issued by the NHAI in case of revenue deficit at the end of the year is lesser by more than 5% of the figures given under the projects now being considered, petitioner shall be

liable to pay penalty of 2.5% additional interest over and above the normal interest of bank rate + 2% on the said excess.

D. Admittedly, the petitioner retains the amount of ₹12.74 Crores and 4.24 Crores despite demand by the NHAI and did not even pay the interest and penal interest thereon, thus committed default.

E. The non-payment of excess amount, interest and penalty interest by petitioner amounts to default.

F. The petitioner is enjoying the excess amount without paying the penalty as contemplated in clause 3(o). Merely expressing its willingness to pay the interest, penalty interest and not actually paying anything, the same does not exonerate the petitioner from being in default.

96. Having summed up the submissions made by the counsel for the parties, this court having said that the dispute between the parties is arbitrable is conscious of the fact that the issue which falls for consideration is only a petition under Section 9 of the Act of 1996 and the main issue needs to be decided by the Arbitral Tribunal so constituted. But pending decision by the Arbitral Tribunal, is the petitioner entitled to the relief as prayed for.

97. From the above, it is seen that both the parties have tried to justify each other's stand. Surely, on a prima facie finding, this Court can grant such relief, which will prevail till the matter is decided by the Arbitral Tribunal.

98. The plea of Mr. Kirpal is primarily that the impugned order has been passed by the respondents on failure on the part of the

petitioner to remit the amounts of ₹12.74 crores and ₹4.24 crores with interest and penal interest.

99. The petitioner has contested the payments sought for on the ground that they are payable before 2024-25.

100. On the other hand, the respondent has justified the claim of the amounts by relying on Clause 3(o) of the sanctioned letter. In fact, they have justified the impugned order on the ground of failure on the part of the petitioner to pay the amounts by relying upon Clause 3(p) of the sanctioned letter. Clause 3(o) of the sanctioned letter reads as under:-

> *"3(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 the Concessionaires effects the required correction and increases the premium payment so as to have no excess by the end of the relevant year, no such penalty would be imposed."*

101. From the perusal of the clause above, it is seen, if the revenue deficit is lesser by more than 5% of the figures under the projections *at the end of the year* "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." Similarly, Clause 3(p) of the sanctioned letter reads as under:-

"3(p) Nothing in this sanction shall be construed as entitling the Concessionaire for any Termination Payment in excess of what is provided for in the Concession Agreement dated 16/08/2010. In the event of any Default in the compliance to the terms and conditions mentioned herein in this sanction letter, or in the compliance the terms of concession as mentioned in the Concession Agreement and the Supplementary Agreement, NHAI shall be entitled, without prejudice to its other rights and remedies under the Concession Agreement, to suspend/ withhold or withdraw this facility of deferment of premium and demand repayment of all outstanding liabilities including interest accrued."

102. From the perusal of Clause 3(p) as well, it is seen that in the event of any default in compliance of the terms and conditions mentioned in the sanctioned letter, the NHAI shall be entitled, without prejudice to its other rights and remedies, under the Concession Agreement, to suspend / withhold or withdraw this facility of deferment of premium and demand repayment of all outstanding liabilities including interest accrued.

103. It is the case of the petitioner that there is no revenue deficit. The respondent has not considered foreign exchange losses which form part of debt servicing. It is also its case that assuming that there is a more than 5% shortfall in revenue deficit, even then there is no provision requiring the petitioner to upfront / forthwith pay the additional premium.

104. The pleas are unsustainable as clause 6(a) of the deferment scheme provides that the financial stress is only limited to premium payment and not linked to any cash shortfall on account of any O and M expenses, debt servicing etc. Further on a conjoint reading of Clauses 3(o) and 3(p), it is clear that if the revenue deficit is less by more than 5% of the figures under the projections *at the end of the year*, the consessioner is liable to pay penalty of 2.5% additional interest over and above the normal interest of bank rate + 2% on the said excess, which admittedly has not been paid by the petitioner. Hence, the effect, as laid down in Clause 3(p) of the sanctioned letter shall come into play. It precisely for this reason that the impugned action has been taken

105. As stated above, the issue has to be decided through Arbitration. Pending decision by the Arbitrator / Arbitral Tribunal, I am of the view that by balancing the equities the only order that can be passed is that the petitioner shall deposit with the respondent the amounts of ₹12.74 Crores, ₹4.24 Crores and ₹46.78 Crores along with penalty interest of 2.5% and additional interest of 2% over and above the normal interest of Bank rate within a period of four weeks from today as stipulated in clause 3(o) of the sanction letter. On such deposit the impugned communication dated August 07, 2019 to the extent that the respondent has withdrawn the facility of deferment payment shall remain stayed.

106. The amounts deposited by the petitioner shall be kept by the NHAI in interest bearing FDRs so that the benefits thereof shall enure to the successful party before the Arbitrator / Arbitral Tribunal.

107. It is made clear that the aforesaid is a *prima facie* view and shall be subject to the final adjudication by the Arbitrator / Arbitral Tribunal.

108. The petition is disposed of.

109. No costs.

V. KAMESWAR RAO, J

NOVEMBER 25, 2019*/aky/jg*