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

% **Reserved on: 17th June, 2021**

Pronounced on: 6th July, 2021

\+ **O.M.P. (I) (COMM) 152/2021**

NAVAYUGA BENGALOORU TOLLWAY PVT LTD

.....Petitioner

Through: Ms. Meenakshi Arora, Senior Advocate with Mr. Dharmendra Rautray, Ms. Tara Shahani, Mr. Aayush Marwah and Ms. Lisa Mishra, Advocates

Versus

NATIONAL HIGHWAYS AUTHORITY OF INDIA

.....Respondent

Through: Mr. Ankur Mittal and Mr. Abhay Gupta, Advocates

CORAM:
HON'BLE MS. JUSTICE ASHA MENON

J U D G M E N T

[VIA VIDEO CONFERENCING]

O.M.P. (I) (COMM) 152/2021 & I.A. No. 7511/2021 (by the petitioner u/S 151 CPC for filing amended written submissions along with updated relevant documents/judgments)

1. This petition has been filed by the petitioner/Navayuga Bengalooru Tollway Pvt. Ltd. (for short, "NBTPL") under Section 9 of the Arbitration and Conciliation Act, 1996 (for short, "A&C Act") seeking

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the following reliefs:

> *"(i) Direct the respondent to release and/or deposit the amount of at least the 90% of the total Debt Due amounting to Rs. 395.11 crores in the Escrow Account and/or pay the said amount to the Lenders mentioned above.*
> *(ii) Direct the respondent to pay 90% of the Debt due including 90% of the subordinate Debt amounting to Rs. 693.89 Cr. to Project Lenders and Sub-Debt holders;*
> *(iii) pass such other or further Order(s) as this Hon'ble Court may deem fit and proper in the interest of justice"*

2. The facts as are relevant for the disposal of the present petition are that the petitioner/NBTPL was set up as a Special Purpose Vehicle Company under the Companies Act, 1956 with its registered office at Hyderabad, especially for the Designing, Engineering, Finance, Construction, Operation and Maintenance of Access controlled highway project namely, the development and the capacity improvement of the existing carriageways from km 10.000 to 29.500, on the Bangalore-Nelamangala section of the National Highway No.4 (NH-4) in the State of Karnataka on BOT basis for the respondent/National Highway Authority of India (for short, "NHAI").

3. The respondent/NHAI had invited proposals under Single Stage Process from bidders prescribing qualifications and the commercial terms and conditions for selection of a successful bidder under its Request for Proposal ('RFP') dated 29th May, 2006. The petitioner/NBTPL qualified for undertaking the work on BOT basis and the respondent/NHAI

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accepted their bid and issued its Letter of Acceptance ('LOA') being No. NHA1/GM(MC-III)/NH-4BNG-NEL/61 dated 1st March, 2007. The Concession Agreement (for short, "C.A.") dated 9th May, 2007 was executed between the parties. In terms of the said C.A., the petitioner/NBTPL also furnished Performance Security on 17th March, 2007 by submitting a Bank Guarantee for an amount of Rs.22.25 crores. The petitioner/NBTPL claims that it also achieved Financial Closure within the specified time under the C.A. by signing the Common Loan Agreement with Lenders dated 5th December, 2007 for Rs.539 crores. The lenders were a consortium of public sector banks with the Oriental Bank of Commerce as the Lenders' Agent.

4. The project was completed in the year 2010 by December after which the petitioner/NBTPL became entitled to collect the tolls which they continued to do till 2020. However, certain disputes and differences arose between the parties and it appears that both sides terminated the C.A., the petitioner/NBTPL issuing Termination Notice dated 21st October, 2020 and the respondent/NHAI issuing Notice of Termination on 10th March, 2021.

5. Ms. Meenakshi Arora, learned Senior Counsel appearing for the petitioner/NBTPL submitted that the disputes arose on account of the fact that there were leakages occurring due to traffic being allowed on service roads and non-allocation of land for expansion of the toll-plaza and the repeated requests to the respondent/NHAI did not lead to any rectification of the problem, which she agreed, could be an arbitral dispute. But according to her, under the terms and conditions of the C.A., particularly Clauses 32.3 and 32.4.2, the termination of the agreement obligated the

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respondent/NHAI to make the payment of the Debt Due as defined therein. She submitted that despite all papers having been submitted to the respondent/NHAI, including the Statutory Certificate issued by the Statutory Auditors, which alone was sufficient for initiating payment, the respondent/NHAI had not done so. She drew the attention of this Court to the definitions of 'Debt Due', 'Termination Payment' and 'Total Project Cost' to submit that the respondent was obligated to make the payment of a sum of Rs.439,01,32,112 along with the accrued interest of SBI PLR (12.15%) plus 2% i.e., 14.15% for the period of delay from 29th October, 2020, as had been mentioned in the lenders' letter dated 13th January, 2021 addressed to the respondent/NHAI (Annexure P-33 at page 673 of Vol.4 of the e-file), particularly, as it was below the Total Project Cost amounting to Rs.718.59 crores.

6. The learned Senior Counsel submitted that the need to file the present petition seeking directions to the respondent/NHAI to release/deposit the amount of at least 90% of the total Debt Due amounting to Rs.395.11 crores in the Escrow Account or with the lenders as also 90% of the subordinate debt amounting to Rs.693.89 crores to the Project Lenders as Sub-debtholders was necessitated on account of the fact that since February, 2021, the respondent/NHAI had taken over the project and was collecting the toll, but had failed to deposit these collections into the Escrow Account which had been created on the basis of a Tri-partite agreement between the petitioner/NBTPL, the respondent/NHAI and the lenders. Thus, the lenders were deprived of payment from the Escrow Account or at the very least, the assurance that the Debt Due to them would be duly paid. As a consequence thereof, the

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lenders had issued letters to the petitioner/NBTPL indicating that they were going to declare the account of the petitioner/NBTPL as a Non-Performing Asset ('NPA'). If the lender' banks were to declare the petitioner/NBTPL's account as NPA, it would have a cascading effect on the credit-worthiness of the promoters, causing great harm to the reputation of the petitioner/NBTPL and the group companies impacting their current and future business ventures.

7. The learned Senior Counsel further submitted that the petitioner/NBTPL had terminated the C.A. because the respondent/NHAI had not responded to the Cure Period Notice dated 14th July, 2020 demanding curative actions be taken within 90 days thereof, and so its Termination Notice dated 21st October, 2020 was fully in accordance with the agreed and prescribed procedure. However, even if it was to be considered that the respondent/NHAI had a right to terminate the C.A., which it claims it did on 10th March, 2021, in terms of the Clause 32.3 of the C.A., 90% of the Debt Due had to be paid by the respondent/NHAI. If the respondent/NHAI was at fault, then 100% of the Debt Due was required to be paid. It is in these circumstances that the petitioner/NBTPL had approached the Court seeking directions to the respondent/NHAI to deposit 90% of the Debt Due amounting to Rs.395.11 crores so that the interest of the petitioner/NBTPL be protected.

8. Learned Senior Counsel placed reliance on the judgments in ***Rapid Metrorail Gurgaon Limited etc. v. Haryana Mass Rapid Transport Corporation Limited and Others*** 2021 SCC Online SC 269; ***National Highways Authority of India v. Punjab National Bank*** 2017 SCC OnLine Del 11312; ***Value Source Mercantile Ltd. v. Span***

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Mechnotronix Ltd 2014 SCC Online Del 3313; ***Ajay Singh v. Kal Airways Private Limited*** 2017 SCC Online Del 8934; ***Simplex Infrastructure v. National Highways Authority of India*** ILR (2011) Delhi 274 and in particular, the decision of this Court in ***Jetpur Somnath Tollways Limited v. National Highways Authority of India*** 2017 SCC Online Del 9453, pointing out that the decision of the learned Single Judge of this Court in ***Jetpur Somnath Tollways (supra)*** was upheld by the Division Bench of this Court and the SLP against it was dismissed. Learned Senior Counsel prays that similar relief be given to the petitioner/NBTPL, who was also ready and willing to furnish the required Bank Guarantee to safeguard its interest.

9. The respondent/NHAI, in its reply, has opposed the grant of any relief to the petitioner/NBTPL and submitted that it was the petitioner/NBTPL who was guilty of breach of contract and the respondent/NHAI was entitled to recover several crores of rupees from it. Mr. Ankur Mittal, learned counsel for the respondent/NHAI submitted that the relief sought could not to be termed as an interim measure and if such a relief was granted, then there would be nothing remaining for the Arbitral Tribunal to adjudicate, inasmuch as the core facts relating to the 'Termination Payment', including Debt Due, were disputed.

10. Learned counsel firstly contended that the date of termination itself was in dispute inasmuch as the petitioner/NBTPL claims to have terminated the agreement in October, 2020 whereas the respondent/NHAI had terminated the agreement in March, 2021. Learned counsel then submitted that the Debt Due as defined in the C.A. was with reference to the Financing Documents and was the amount outstanding on the

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Termination Date. Further, under the said definition, repayment of the debt could be rescheduled only with the prior consent of the respondent/NHAI.

11. According to the learned counsel, the rescheduling of the repayment of the loan in this case had occurred without the prior written consent of the respondent/NHAI and was not binding on it, particularly, when the rescheduling had resulted in greater financial burden on the respondent/NHAI, on account of the ballooning of the repayment resulting in larger sums of money being paid towards the end of the tenure of the loan. Learned counsel submitted that whereas originally the repayment was to end on 30th September, 2021, the unilateral amendment of the schedule resulted in the repayment being made upto 31st March, 2025. Thus, the rescheduling which had increased repayment obligations in the later years had a direct impact on the respondent/NHAI and therefore, could not have been done without its express and written consent. According to the learned counsel, the adherence to the original schedule of repayment would have resulted in very little of the loan remaining outstanding towards the principal at the time of termination of the C.A. by the respondent/NHAI on 10th March, 2021, whereas now the lenders were claiming about Rs.439,01,32,112/-. Therefore, the respondent/NHAI was contesting their claim as it was not in accordance with the agreed terms of the C.A.

12. Learned counsel further submitted that the definition of the 'Termination Payment' as provided in the C.A. clearly laid down that it would be determined on the capital cost of the Project Highway which at all times was to be reckoned as an amount not exceeding the Total Project

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Cost and the liability of the respondent/NHAI to make the Termination Payments relating to the Debt Due, Subordinated Debt and Equity, was to be determined as if such capital cost was restricted to the Total Project Cost. Referring to the definition of the Total Project Cost in the C.A., learned counsel contended that it had to be the lowest of either a sum of Rs.445 crores, the actual capital cost of the project upon its completion as certified by the Statutory Auditors or the Total Project Cost, as set forth in the Financing Documents.

13. Learned counsel submitted that the Common Loan Agreement dated 5th December, 2007 was no doubt the Financing Document, whereby a sum of Rs.539 crores had been lent to the petitioner/NBTPL which was clearly more than Rs.445 crores. Moreover, the repayment was to have concluded by September, 2021 but for the addendum dated 28th October, 2015 extending the date of repayment to 31st March, 2025 which addendum was in the face of Clause 9.1(iv) of the C.A. which prescribed that amendments could not be made without the prior written consent of the respondent/NHAI and any such amendment without such consent could not be enforced against the respondent/NHAI in any manner whatsoever.

14. The learned counsel for the respondent/NHAI also submitted that the sum of Rs.445 crores would have to be apportioned under the different heads namely, Debt Due, Subordinated Debt and Equity and merely because the demand raised by the lenders was just over Rs.439 crores would not suffice as this demand would be subject to the proportion of Debt Due in the Total Project Cost. He thus submitted that the quantum of Termination Payment to be made was not yet determined

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and in light of the rival claims made, the question would have to be determined by the Arbitral Tribunal. Any order directing payment at this stage was therefore not warranted. Finally, it was submitted that the decision in ***Jetpur Somnath Tollways (supra)*** could not be followed in the present case owing to different fact situations prevailing in both the cases.

15. Learned counsel has pointed out that in ***Jetpur Somnath Tollways (supra)***, there was no dispute that the Debt Due on termination was Rs.640.86 crores but the NHAI had offered to deposit a balance of Rs.6.14 crores claiming various adjustments which the court had disallowed the NHAI to make. Moreover, the Total Project Cost was more than the loan amount, whereas in the present case, it was the reverse. Further, in the present case, the loan was restructured altering the liability of the respondent/NHAI by more than three times.

16. Therefore, it was urged that it would be appropriate that the Court permits the Arbitral Tribunal to determine all these issues, as else once the court decided the factual matrix, nothing would remain for arbitration. As regards the urgency, according to the learned counsel for the respondent/NHAI, none existed inasmuch as after the notice of termination dated 21st October, 2020, no steps have been taken by the petitioner/NBTPL to refer the matter to arbitration and if it had done so, the relief presently sought could have been sought under Section 17 of the A&C Act. The banks had only placed the petitioner/NBTPL under the category of SMA-2 and had not declared it as NPA. The respondent/NHAI had also sought clarifications from the petitioner/NBTPL to enable it to determine the quantum of Termination

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Payments and delay was only on the part of the petitioner/NBTPL in claiming that the certificate of the Statutory Auditors was sufficient.

17. During the hearing, this Court drew the attention of the learned counsel to the decision of a Division Bench of this Court (of which I was a member) in ***National Highways Authority of India vs. Bhubaneswar Expressway Private Limited*** 2021 SCC OnLine Del 2421 and time was granted to both counsel to go through the same. Thereafter, while the learned counsel for the respondent/NHAI submitted that the said decision was applicable on all fours to the facts of this case and the present petition was liable to be dismissed, the learned Senior Counsel for the petitioner/NBTPL submitted written arguments detailing the differences between the two cases, also highlighting that the facts in the present case were closer to those prevailing in ***Jetpur Somnath Tollways (supra)*** rather than ***Bhubaneswar Expressway (supra)***.

18. It was submitted by learned Senior Counsel that as opposed to the circumstances in ***Bhubaneswar Expressway (supra)*** where a previous arbitration had been invoked culminating in an arbitral Award and thereafter, a further claim for Termination Payments was raised before another Arbitral Tribunal, in the present case, arbitration proceedings had not yet been initiated. Secondly, the present petition u/S 9 of the A&C Act, had been filed seeking release of the Debt Due and not of the entire Termination Payment as was the case in ***Bhubaneswar Expressway (supra)***. It was further pointed out that in that case, there was no risk of the Concessionaire being declared as NPA and no public funds were involved while the entire case of the petitioner/NBTPL rests on its apprehension of being declared as NPA which would result in irreparable

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harm to its reputation as also the reputation of its promoters and group companies. There has been no assignment of the loan in the present case. The rescheduling of payment resulting in the addendum dated 28th October, 2015 had been duly informed to the respondent/NHAI vide letter dated 27th May, 2016 and since the respondent/NHAI had not raised any objections to the rescheduling of the repayment schedule, they had waived their rights to raise any such objections as were being raised now. The learned Senior Counsel urged that the facts of the present case were more akin to ***Jetpur Somnath Tollways (supra)*** as the respondent/NHAI had not invested any amount in the project and was collecting the tolls without depositing the same in the Escrow Account from which public sector banks could receive payments towards repayment of the Debt Due to them. She therefore urged for the same relief being granted in the present petition.

19. Before proceeding further, it would be useful to refer to the judgment of the Division Bench in ***Bhubaneshwar Expressway (supra)***. The NHAI had filed an appeal against an order of the learned Single Judge under Section 9 of the A&C Act directing the respondent/NHAI to deposit into the Escrow Account, subject to the final Award of the Arbitral Tribunal, a sum of Rs.337,73,19,434.10 paise, as being due from the NHAI to the Bhubaneshwar Expressway Private Limited (in short, 'BEPL') towards the 90% of the Debt Due component of 'Termination Payment' under the C.A. between the said parties. The question that arose for adjudication in that appeal was whether Section 9 of the A&C Act empowered the Court to grant to an applicant interim relief, which was in the nature of the final relief, even if a case for urgent need was made out

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and the relief was granted on a *prima facie* view of the matter and making it subject to the Arbitral Award and securing the respondent against whom the relief was so granted, for restitution.

20. Since the learned Senior Counsel had sought to distinguish the judgment on the basis of facts, it would be useful to refer to the contentions raised in that case. The contentions of the BEPL were as follows: -

> *"**18.** The contention of BEPL in the Section 9 application/proceeding from which this appeal arises was, (a) that by virtue of Article 37.3, NHAI was under an obligation to make payment of the termination payment to BEPL within a period of 15 days of demand being raised by BEPL and in the event of delay, interest at rate equal to 3/5% above the prevailing bank rate is payable; (b) that termination payment is payable by NHAI to BEPL, irrespective of the outcome of the dispute pending adjudication before the Arbitral Tribunal;* ***(c) that a bare reading of Article 37.3.2 shows that in case the termination is due to default of NHAI, BEPL would be entitled to 100% of the debt amount and 150% of the adjusted equity; however in terms of Article 37.3.1, even if the termination is on account of default of BEPL, BEPL would still be entitled to 90% of the debt due; (d) that thus BEPL, in any event, was entitled to 90% of the debt due as termination payment, irrespective of the outcome of the second round of arbitration proceedings;*** *(e) that due to failure of NHAI to release the termination payment, the debts of BEPL had mounted and the lenders had filed recovery proceedings against BEPL and its guarantors before the Debt Recovery Tribunal (DRT); and,* ***(f) that the liability of NHAI for termination payment of 90% of the debt due, is absolute and once in the arbitration underway it is found that the***

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termination was for the default of NHAI, BEPL would be entitled to further amounts towards termination payment.*"*

(Emphasis added)

21. The NHAI countered as follows:

> *"1**9.** NHAI opposed the application under Section 9, contending* ***(i) that the relief sought of directing NHAI to make termination payment, cannot be granted under Section 9 of the Act;*** *(ii) that though the termination of the contract had taken place on 20th March, 2017, but BEPL invoked the arbitration clause for the claim of termination payment, only in October, 2018 i.e. after more than one and a half years therefrom and the application under Section 17 was filed much later, on 27th May, 2019 and the application under Section 9 was filed on 17th July, 2019; (iii) that all this shows that there was/is no urgency for claiming the relief under Section 9, which same relief had been claimed in Section 17 application before the Arbitral Tribunal and which application was pending; (iv) that there was no delay attributable to NHAI in the arbitration proceedings and NHAI was in the process of appointing a substitute for the Arbitrator who had recused; (v) that the claims of BEPL in the second round of arbitration were barred by the principles underlying Order II Rule 2 of the Code of Civil Procedure, 1908 (CPC);* ***(vi) that the relief sought in Section 9 application was in the nature of mandatory injunction and which cannot be granted by virtue of Section 38(3)(d) of the Specific Relief Act, 1963****; and, (vii) that BEPL already had an award in its favour from the first round of arbitration and BEPL having raised a claim for compensation for an amount higher than that of termination payment, is not entitled to make a claim for termination payment."*

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(Emphasis added)

22. There is no gainsaying that it would be hard to find two cases with identical fact situations. There can be similarities in facts on the basis of which similar relief can be claimed. Much importance cannot, therefore, be given to facts as highlighted by the learned Senior Counsel, noting that the decision in ***Bhubaneshwar Expressway (supra)*** was rendered on a pure question of law, which for ready reference is reproduced hereinbelow:

> *"**1. <u>The short question for adjudication in this appeal is, whether Section 9 of the Arbitration and Conciliation Act, 1996 empowers the Court to grant to an applicant, a relief, not in the nature of interim measure of protection, but in the nature of a final relief, even if a case for urgent need thereof is made out</u>** and merely by expressing the same to have been granted on a prima facie view of the matter and by making it subject to the arbitral award and by securing the respondent, against whom the relief is so granted, for restitution."* ***(Emphasis added)***

23. It may be noticed that the learned Single Judge had followed the decision in ***Jetpur Somnath Tollways (supra)*** and also concluded that the question whether the breach was on the part of the NHAI or on the part of the BEPL, which was to be ultimately decided by the Arbitral Tribunal was irrelevant for deciding the liability of NHAI to pay 90% of the Debt Due towards Termination Payment as in any case that amount had to be paid in terms of the Agreement between the parties. This was the argument pressed before the Division Bench and the same argument is being made before this Court, that under the C.A., even if termination had

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occurred because of the faults of the petitioner/NBTPL, the respondent/NHAI had nevertheless to deposit 90% of the Debt Due into the Escrow Account. To argue, however, that in ***Bhubaneswar Expressway (supra)***, Total Termination Payment was the subject matter, whereas here it was 90% of the Debt Due, would be an exercise in semantics. Again, it is to be noted that the learned Single Judge in ***Bhubaneswar Expressway (supra)*** had accepted the argument as afore-noted despite the NHAI denying the claims of BEPL on multiple grounds, and in the present case too, the NHAI is disputing the liability on multifarious grounds.

24. Therefore, the observations of the Division Bench in ***Bhubaneswar Expressway (supra)*** to answer the question, may be usefully reproduced as below:

> *"**30.** In our view, the claim of BEPL for termination payment of 90% of the debt due, could only be adjudicated by the Arbitral Tribunal and could not be adjudicated in a Section 9 proceeding. BEPL was/is claiming the said amount in enforcement of a clause of the Concession Agreement and not by way of interim measure.*
>
> ***31.** **Though in the present case, NHAI, before the Commercial Division as well as before us, denied, not only liability for termination payment claimed by BEPL but also quantification thereof, but even if it were to be the case for NHAI having admitted the said claim or the defence of NHAI thereto not raising any triable issue, the relief of recovery of termination payment of 90% of the debt due, being in the nature of a final relief, could only have been granted by the***

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Arbitral Tribunal and not by the Court in exercise of powers under Section 9 of the Act.

32. Section 9 of the Act only empowers the Court to issue orders to preserve and does not empower the Court to, even before the Arbitral Tribunal has had an occasion to adjudicate the claim, allow the claim*. A perusal of the interim measures of protection described in clauses (a) to (d) of Section 9(1)(ii) does not show any of them to be having any element of finality; they are only to secure and preserve, during the pendency of arbitration. Clause (e) of Section 9(1)(ii) empowers the Court to grant "such other interim measure of protection as may appear to the Court to be just and convenient" and the relief granted thereunder cannot be anything other than interim in nature or granting protection during the pendency of arbitration.* ***In exercise of power under Section 9(1)(ii)(e), no relief of final nature can be granted, no monetary claim allowed, howsoever urgent the same may be and howsoever just and convenient it may be to grant the same.*** *Even if it were to be the contention of the applicant in a Section 9 application, that the opposite party has admitted the entitlement of the applicant to the final relief, the same, in our view, can still not be granted by the Court and the jurisdiction to grant the same is of the Arbitral Tribunal."* ***(Emphasis added)***

25. Thus, it is evident that directing a party to pay up/deposit an amount finding the opposite party to be so entitled to it on an interpretation of the Clauses of the C.A. without a determination of the same by an Arbitral Tribunal would tantamount to usurping the latter's jurisdiction. It bears reiteration that the A&C Act does not envisage

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adjudication in two stages, i.e., summary adjudication by the Court under Section 9 and a final adjudication by the Arbitral Tribunal under Section 6.

26. From the submissions made on behalf of the respondent/NHAI, it is clear that it has disputed what constitutes Debt Due in the Termination Payment on the grounds that the date of termination was in dispute; that there was an increased financial obligation imposed on the respondent/NHAI on account of the restructuring of the loan repayment schedule; the addendum to the loan agreement was without its consent; and, the Termination Payment itself had not been quantified as the loan was far in excess of the Total Project Cost/Capital Cost. On the other hand, learned Senior Counsel for the petitioner/NBTPL relied on a letter dated 27th May, 2016 written to the respondent/NHAI by the petitioner/NBTPL intimating the restructuring of the repayment schedule and enclosing the addendum dated 28th October, 2015 and claimed that by not raising a protest at that time, the respondent/NHAI had waived its rights to question the restructuring and the manner and schedule of repayment as per the Addendum.

27. It is apparent that there are disputed questions of fact to be determined on interpretation of the Clauses of the C.A. that would have a bearing on what would be the Termination Payment and what part of it could be Debt Due. This determination falls in the domain of the Arbitral Tribunal and cannot be determined by the court and that too, in an application under Section 9 of the A&C Act.

28. The learned Senior Counsel for the petitioner/NBTPL urged that as the Division Bench had not differed with the judgment rendered in ***Jetpur***

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Somnath Tollways (supra), therefore, this Court ought to grant the relief as prayed for, for two reasons, namely, that as in ***Jetpur Somnath Tollways (supra)***, here too, public sector banks were involved and the respondent/NHAI had also taken over a completed project without any investment by it.

29. Even if that be so, there are significant differences that cannot be overlooked by this Court. In ***Jetpur Somnath Tollways (supra)***, the respondent/NHAI had admitted its liability for making 'Termination Payment' of Rs.640.86 crores and in fact had made part payment thereof of a sum of Rs.222.03 crores and was willing to make a further payment of Rs.6.14 crores by claiming adjustments, whereas in the present case, the respondent/NHAI was seeking clarifications from the petitioner/NBTPL regarding the quantum of Debt Due that would become payable as 'Termination Payment'. Additionally, the application under Section 9 of the A&C Act had been filed by Jetpur Somnath Tollways Limited and the Punjab National Bank. In the face of these facts, the discretionary relief granted by this Court in ***Jetpur Somnath Tollways (supra)*** will not *ipso facto* follow in the present case.

30. The power to issue directions in the nature of 'interim measures' or 'protection' under Section 9 of the A&C Act can only be exercised, if it does not involve a final adjudication and at best, is on a *prima facie* view of the matter and does not require interpretation of the terms of a contract and enforcement thereof. Even if a party were to offer to secure deposits directed to be mandatorily made, by furnishing a Bank Guarantee, the Court would still go beyond its domain were it to decide substantive claims and direct payments while disposing of a petition under Section 9

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of the A&C Act. Grant of such a relief as prayed for in the present petition, would be one directing mandatory payment, which would also go against the principles of grant of interim mandatory injunction as laid down in ***Dorab Cawasji Warden v. Coomi Sorab Warden*** (1990) 2 SCC 117 followed in ***Metro Marins v. Bonus Watch Co. Pvt. Ltd.*** (2004) 7 SCC 478, ***Kishore Kumar Khaitan v. Praveen Kumar Singh*** (2006) 3 SCC 312 and ***Samir Narain Bhojwani v. Aurora Properties and Investments*** (2018) 17 SCC 203.

31. In light of the foregoing discussion therefore, the relief prayed for by the petitioner/NBTPL cannot be granted by this Court.

32. The petition is accordingly dismissed along with the pending application.

33. The judgment be uploaded on the website forthwith.

(ASHA MENON)
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