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

% **Date of decision: 11th May, 2021.**

\+ **FAO(OS) (COMM) 66/2020 & CMs No.11332/2020 (for stay), 11532/2020 (of appellant for condonation of 25 days delay in filing appeal) & 12220/2020 (of respondent for directions)**

NATIONAL HIGHWAYS AUTHORITY OF INDIA ...Appellant

Through: Mr. Parag P. Tripathi, Sr. Adv. with Mr. C.S. Chauhan and Mr. Srinivasan Ramaswamy, Advs. with Mr. A.K. Tripathi, Legal Advisor and Mr. Prashant Gawasne, GM(T), NHAI.

Versus

BHUBANESWAR EXPRESSWAY PRIVATE LIMITED ..... Respondent

Through: Mr. Sandeep Sethi, Sr. Adv. with Mr. Kamal Shankar, Mr. Abhudai Singh, Mr. Atif Shamim, Mr. Sahil Tandon and Mr. Rakesh Tiwari, Advs.

CORAM:
HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW
HON'BLE MS. JUSTICE ASHA MENON

[VIA VIDEO CONFERENCING]

RAJIV SAHAI ENDLAW, J.

1. 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 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.

2. Though the pure question of law aforesaid is short, but the narrative of facts and history of this litigation is long.

3. This appeal, under Section 37(1)(b) of the Arbitration Act read with Section 13 of the Commercial Courts Act, 2015, impugns the judgment/order dated 25th November, 2019 allowing OMP(I)(COMM.) No.218/2019 under Section 9 of the Arbitration Act, filed by the respondent Bhubaneswar Expressway Private Limited (BEPL) and directing the appellant National Highways Authority of India (NHAI) to, subject to the respondent BEPL furnishing an unconditional and irrevocable bank guarantee in favour of the appellant NHAI and further subject to final award of the Arbitral Tribunal, deposit in an escrow account, a sum of Rs.337,73,19,434.10 paise, found due from NHAI to BEPL towards termination payment under the Concession Agreement between NHAI and BEPL.

4. The appeal, accompanied with an application for interim stay came up first before this Court on 26th May, 2020, when the senior counsel for BEPL appearing on advance notice contended that the last date for preferring the appeal was 1st February, 2020 but the appeal was filed on 26th February, 2020 and was barred by time and no application even for condonation of delay in filing the appeal, had been filed. The senior counsel for NHAI, anticipating this objection, during the hearing on 26th May, 2020, circulated ***N.V. International Vs. State of Assam*** (2020) 2 SCC 109, though holding

that the condonation of delay in preferring an appeal under Section 37 of the Arbitration Act can be of maximum 30 days and not more, but on the basis thereof contended that the limitation for preferring an appeal under Section 37 is 90 days and not 60 days, on the basis whereof the senior counsel for BEPL was computing the last date for filing the appeal as 1st February, 2020. It was thus argued that there was no delay in filing the appeal on 26th February, 2020 and the appeal was within time. However the said contention of NHAI was rejected vide order dated 26th May, 2020, reasoning and directing as under:

> *"10. We are unable to agree that the limitation for preferring a intra-court appeal under Section 37 of the Arbitration & Conciliation Act is of 90 days. Supreme Court in* ***N.V. International*** *(supra) was concerned with an appeal from an order of the District Judge to the High Court and the limitation wherefor provided under the Limitation Act, 1963 is of 90 days. However, the limitation provided for in the Limitation Act for preferring an intra-court appeal is of 30 days and which by virtue of Section 13(1A) of the Commercial Courts Act has been increased to 60 days.*
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> *11. It thus appears that the appeal filed on 26th February, 2020 is within the extendable period of 30 days. We have thus enquired from the senior counsel for the respondent, whether the respondent is contesting the aspect of limitation.*
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> *12. The senior counsel for the respondent has replied in the affirmative.*
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> *13. The senior counsel for the appellant states that the application for condonation of delay, though ready, remained to be filed, and will be filed today itself, with advance copy to the opposite side.*
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> *14. Reply be filed by day after tomorrow."*

5. On the next date of hearing i.e. 29th May, 2020, the following order was passed:

> *"4. During the hearing, it has transpired that the appellant had originally filed an appeal on 26th February, 2020 vide Diary No.303871/2020 and on which the Registry put certain objections. According to the senior counsel for the appellant, the appeal, after removing the objections, was re-filed from time to time, last on 20th March, 2020 and when further objections thereto were put on 21st March, 2020. The contention of the senior counsel for the respondent is, that what is listed today before us was filed for the first time on 22nd May, 2020 vide Diary No.442684/2020 and thus the present appeal which is being taken up for consideration cannot be said to be the appeal stated to have been filed on 26th February, 2020 and which is stated to be still lying in the Registry, under objections.*
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> *5. Per contra, it is the contention of the senior counsel for the appellant that owing to the prevalent lockdown and restricted functioning of the Court it has not been possible for the appellant to remove the further objections put on 21st March, 2020 on the appeal which was filed first on 26th February, 2020 and since there was an urgency for seeking interim relief, fresh appeal was filed on 22nd May, 2020 and which in this Covid-19 circumstances is to be treated as continuation of what was originally filed on 26th February, 2020.*
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> *6. The senior counsel for the appellant has further stated, (i) that application for certified copy of the impugned order dated 25th November, 2019 was filed on the very next day i.e. 26th November, 2019 and the certified copy was ready on 3rd December, 2019; (ii) the time of sixty days under Section 13(1)(A) of the Commercial Courts Act, 2015 available to the appellant for filing the appeal was thus till 1st February, 2020 and the appeal was filed on 26th February, 2020; (iii) from 26th February, 2020, as per Rule 5 of Delhi High Court (Original) Side Rules, 2018, thirty days time till 27th March, 2020 was available to the appellant for re-filing; (iv) the appeal which*

was filed on 26th February, 2020 was last re-filed on 20th March, 2020 and further objections raised by the Registry on 21st March, 2020 but in view of prevalent lockdown with effect from 24th March, 2020, it has not been possible for the appellant to take back the paper book from the Registry and to remove objections and re-file; (v) prior thereto, Supreme Court vide order dated 23rd March, 2020, extended the limitation for all matters till expiry of 15 days after the resumption of physical functioning of the Courts; (vi) thus what was originally filed on 26th February, 2020 is alive and within limitation till date; and, (vii) however owing to the urgency, the appellant on 22nd May, 2020 filed afresh but which is a copy of what was filed on 26th February, 2020. The senior counsel for the appellant has further contended that the respondent is raising the technical plea of limitation knowing fully well that the facts of the present case are not covered by ***Jetpur Somnath Tollways Ltd. Vs. National Highways Authority of India*** *2017 SCC OnLine Del 9453, erroneously following which the Single Judge has allowed the petition under Section 9 of the Arbitration & Conciliation Act, 1996 of the respondent. It is contended that in* ***Jetpur Somnath Tollways Ltd.*** *supra order was passed for the benefit of lenders / financial institutions but here the lenders / financial institutions have no stake as the debt has been taken over by M/s Arcelor Mittal.*

7. Per contra, the senior counsel for the respondent has contended that the filing of the appeal on 26th February, 2020 was without furnishing advance copy to the respondent, as required by the Rules; the respondent was first served on 16th March, 2020. It is further contended that in the application for condonation of delay, the explanation is from 1st February, 2020 to 26th February, 2020 only and not for thereafter.

8. The respondent, in reply to the application for condonation of delay, has also pleaded that it suspects that what was filed on 26th February, 2020 was a bunch of papers unreletable to the appeal as filed on 22nd May, 2020 and the senior counsel for the respondent has contended that owing to the prevalent lockdown, it has not been possible for the respondent to inspect the file of what was originally filed on 26th

February, 2020 and which, as per the counsel for the appellant is still lying under objection in the Registry after having been last filed on 20th March, 2020.

9. It is deemed apposite that the Registry traces the paper book of the matter which was first filed on 26th February, 2020 vide Diary No.303871/2020 and last re-filed on 20th March, 2020 bearing Diary No.303871/2020 and after scanning each and every page thereof, transmits the same electronically to the Bench as well as to the counsels for both the parties. It is so ordered.

10. The Registry is further directed to show the original of the aforesaid filing to the Bench.

11. After the counsel for the appellant has received electronic copy of the original filing, the appellant, if so desires may file an additional affidavit in support of the application for condonation of delay, within one week thereof and the respondent may respond thereto within further one week thereafter."

6. NHAI, in compliance of the order dated 29th May, 2020, filed an affidavit pleading, (I) that the appeal filed on 26th February, 2020 was with the original court fee, original certified copy of the impugned judgment, duly signed memorandum of appeal and applications along with the duly affirmed affidavits and a duly signed and stamped *Vakalatnama*; what was however not filed along with the appeal on 26th February, 2020, was certain voluminous documents; hence, the appeal filed on 26th February, 2020 was complete, both in facts and in law; (II) that there was however a default, in not serving the advance copy of the appeal on BEPL; (III) that the Registry of this Court, on scrutiny of the appeal filed on 26th February, 2020, raised certain defects/objections and intimation whereof was conveyed to the counsel for NHAI on 27th February, 2020; (IV) that the defects/objections

raised were qua, (a) certain columns of the opening sheet having not been filled up, (b) it having not been stated how the FAO(OS)(COMM) was maintainable and, (c) certain other common objections; (V) that after curing the defects/objections so raised by the Registry of this Court and relying on ***N.V. International*** supra for the proposition that the appeal first filed on 26th February, 2020 was within limitation, and after serving a advance copy on BEPL on 16th March, 2020, the appeal was re-filed on 18th March, 2020; (VI) that the Registry of this Court, on 19th March, 2020 again raised certain other defects/objections and which defects/objections were cured/removed and the appeal re-filed on 20th March, 2020; (VII) that on 21st March, 2020, the Registry of this Court again raised an objection qua limitation; (VIII) however from 20th March, 2020, owing to the Covid-19 pandemic, nobody was allowed to enter the Registry of this Court and from 25th March, 2020, a lockdown was declared by the Central Government; the appeal thus remained lying in the Registry of this Court; (IX) that the time period prescribed for curing the defects/objections raised on scrutiny of the appeal filed, under the Delhi High Court (Original) Side Rules, 2018, is of 30 days and if there is a further delay in re-filing, the Rules provide for applying for condonation of delay in re-filing; (X) that the Supreme Court, owing to the Covid-19 pandemic, suspended the period of limitation, with effect from 15th March, 2020, till further orders; (XI) that the Registry of this Court having raised the objections for the first time on 27th February, 2020, the time of 30 days for re-filing therefrom would have expired on 27th March, 2020, before which the period of limitation was suspended as aforesaid; (XII) that BEPL filed IA No.1898/2020 in OMP(I)(COMM.) No.218/2019 from which this appeal arises, for clarification of the judgment dated 25th

November, 2019 and which application was pending and was got listed by BEPL for hearing on 12th May, 2020 and in which application, orders were reserved on 14th May, 2020; (XIII) that in view thereof, the counsel for NHAI, on 22nd May, 2020 applied for urgent listing of this appeal and for this purpose an electronic copy of the appeal was filed; the original appeal filed on 26th February, 2020 and re-filed as aforesaid, remained in the Registry; (XIV) that the appeal filed on 22nd May, 2020 was not different from the appeal filed on 26th February, 2020; (XV) that no urgency for having the appeal listed for hearing was felt till BEPL got its application for clarification listed for hearing as aforesaid and immediately thereafter, this appeal was got listed for hearing; and, (XVI) that the Single Judge, vide order dated 3rd June, 2020 on IA No.1898/2020 supra, has clarified certain aspects and issued certain directions.

7. BEPL has also filed an affidavit pursuant to the order dated 29th May, 2020, stating (A) that the first filing made of the present appeal on 26th February, 2020 comprised only of 80 pages and was merely a bunch of papers which were not even signed and dated, as evident from the objections raised thereto; (B) that what was re-filed on 18th March, 2020, comprised of 1580 pages and which clearly shows that as many as 1500 pages were added by NHAI at the time of re-filing on 18th March, 2020; (C) that the purported re-filing on 18th March, 2020 and the subsequent filing on 22nd May, 2020 have to be regarded as fresh filings and which is beyond the limitation period of 60 days under Section 13(1A) of the Commercial Courts Act as well as beyond the maximum grace period of 30 days therefrom as per ***N.V. International*** supra; (D) that the Division Bench of this Court, in ***Union of India Vs. Associated Construction Co.*** (2019) 264 DLT 523, has rejected

condonation of delay on the grounds of administrative delay by Government Department in relation to proceedings under the Commercial Courts Act; and, (E) that the filing made on 26th February, 2020 was a sham and only to stall the period of limitation.

8. The counsels were heard, on the aspect of delay as well as on merits, from 10th June, 2020 till 23rd November, 2020, when orders were reserved.

9. We will first deal with the aspect of limitation.

10. NHAI, in its application for condonation of delay has pleaded and the senior counsel for NHAI has argued, (i) that the impugned order is dated 25th November, 2019; the certified copy was applied on the very next day on 26th November, 2019 and was obtained on 3rd December, 2019, wherefrom 60 days, expiring on 1st February, 2020, were available to NHAI for preferring the appeal; (ii) however NHAI filed the appeal on 26th February, 2020; (iii) that Section 9 of the Arbitration Act, unlike Section 34 thereof, does not provide any limitation for filing of an application thereunder or the maximum period of delay which can be condoned in filing thereof; thus what has been held in ***N.V. International*** supra with respect to an appeal under Section 37 against an order of dismissal of an application under Section 34, does not apply to an appeal under Section 37 against an order on an application under Section 9; however even if ***N.V. International*** supra were to apply, even as per the said judgment, after expiry of 60 days, grace period of 30 days is available and within which, on 26th February, 2020, the appeal was preferred; (iv) that after the certified copy of the impugned order was obtained, it was sent to the competent authority of NHAI, for further action; NHAI, on 6th December, 2019 sought an opinion from its counsel

with regard to challenge to the order dated 25th November, 2019; the counsel, on 9th December, 2019 opined that an appeal should be filed; NHAI on 16th December, 2019 asked its counsel to prepare an appeal and the counsel sent the first draft on 30th December, 2019 to the Project Implementation Unit, Bhubaneswar, which, on 10th January, 2020, sent the draft appeal to the counsel with certain modifications; the counsel, on 14th January, 2020, sent a revised draft appeal to the Project Implementation Unit, Bhubaneswar and which was forwarded to the Headquarter of the appellant NHAI on 20th January, 2020; information from the Finance Division of NHAI was sought on 24th January, 2020 and which was furnished on 10th February, 2020 and on the basis whereof the appeal was again modified and referred to the senior counsel for vetting and who returned the same on 24th February, 2020 and the appeal was filed on 26th February, 2020; (v) that in the circumstances, there is sufficient cause for condonation of delay of 25 days in preferring the appeal; (vi) that the appeal filed on 26th February, 2020 comprised of duly signed and stamped *Vakalatnama*, certified copy of the impugned judgment, affidavits, all of which are crucial to the maintainability of the appeal; and, (vii) NHAI, while re-filing the appeal, had only added documents and some grounds.

11. BEPL, in its reply to the application of NHAI for condonation of delay, pleaded (a) that NHAI has concealed, that the appeal which came up before this Court first on 26th May, 2020, was not the appeal which was filed on 26th February, 2020; (b) that the appeal which was listed before this Court on 26th May, 2020, was filed for the first time on 22nd May, 2020 i.e. after a delay of more than 135 days and is therefore barred by time; (c) that the appeal which was filed on 26th February, 2020, is still pending under

objections with the Registry and objections whereto were not cured, even after re-filing on 20th March, 2020; (d) that in fact what appears to have been filed on 26th February, 2020 was only a bunch of papers, not even constituting a proper appeal and no copy thereof even was furnished to BEPL on that date, as should have been furnished, if had been intended to be filed as an appeal; (e) NHAI, even though knew that the appeal, even if taken to be filed on 26th February, 2020, was barred by time, did not file an application for condonation of delay and on 26th May, 2020 sought to explain away the same by relying on ***N.V. International*** supra and which plea was rejected; (f) that all this shows lack of *bona fide* on the part of NHAI; (g) that the reasons disclosed in the application for condonation of delay also do not disclose sufficient cause; (h) that the reasons disclosed for condonation of delay are merely administrative and which, in various dicta, have not been accepted as sufficient cause; (i) NHAI's own Policy Guideline 2.1.22/2017 dated 1st June, 2017 containing Standard Operating Procedure for Handling of Arbitration Matters and Court Cases, provide for timely filing of appeals, within the limitation period and the cause pleaded for delay, being in violation thereof, cannot be accepted; and, (j) that in ***Postmaster General Vs. Living Media India Limited*** (2012) 3 SCC 563, it has been held that where the persons concerned were aware of the issues involved including the prescribed period of limitation, there is no ground for condonation. The senior counsel for BEPL, referred to:

(a) ***Associated Construction Co.*** supra, laying down that the aim and objective of Commercial Courts Act is to provide speedy disposal of commercial disputes, so as to create a positive image and to improve the international image of Indian Justice Delivery System;

the grounds pleaded for condonation of delay, of certain rounds in Government Departments, were baseless and vague and failed to show any valid and sufficient cause for the delay of 227 days in filing the appeal and 200 days in re-filing the appeal against the order of dismissal of an application under Section 34 of the Arbitration Act.

(b) ***Jammu & Kashmir State Power Development Corporation Vs. KJMC Global Market (India) Limited*** (2017) 239 DLT 763, where, finding that (i) the appeal against the order of dismissal of an application under Section 34 of the Act, when initially filed, was incorrectly classified as FAO instead of FAO(OS) and the appeal paper book was returned with the said objection; (ii) the said appeal paper book which was so returned was never re-filed; (iii) instead, another appeal was filed with the correct nomenclature but which also was deficient and invited objections, which were removed and the appeal re-filed; (iv) the application for condonation of delay filed along with the appeal so re-filed, did not set out the correct facts and was withdrawn for filing a proper application; (v) however instead of filing another application, an affidavit setting out the same reasons as in the earlier application, was filed; (vi) only after report was called for from the Registry, was a proper application for condonation of delay filed; and, (vii) that even the certified copy of the impugned order was not applied till it was so pointed out during the hearing of the appeal, the Division Bench of this Court held, (A) that the limitation could not be computed from the date of filing of the appeal, which on being returned with objections was never re-filed and that the appeal subsequently filed was a fresh appeal and limitation has to

be computed with reference to the date of filing thereof; (B) that the entire conduct of the appellant showed a lax approach on part of the appellant and which militated against the *bona fides* of the appellant; (C) that the conduct of the appellant showed blatant disregard for the procedure of the Court and the appellant therein was not pursuing the matter diligently; and, (D) that no sufficient cause for delay had been shown, and the appeal was dismissed as barred by time.

(c) Order dated 14th August, 2017 of the Supreme Court of dismissal *in limine* of SLP(C) No.12953/2017 titled ***Jammu and Kashmir State Power Development Corporation Vs. K.J.M.C. Global Market (India) Limited***.

(d) ***INX News Pvt. Ltd. Vs. Pier One Construction Pvt. Ltd.*** MANU/DE/4292/2013, where a Single Judge of this Court, in the context of an application under Section 34 of the Arbitration Act, held that Courts do have the power to condone the delay in re-filing, if the initial filing is within the period prescribed in Section 34(3) of the Act and that the result depends on facts and circumstances of each case; in the facts of that case, finding the delay to be *mala fide*, the delay in re-filing was not condoned.

(e) ***Union of India Vs. Bharat Biotech International Ltd.*** (2020) 268 DLT 140, where a Single Judge of this Court refused to condone the delay of 50/55 days in re-filing the application under Section 34 of the Arbitration Act, finding that the application as originally filed comprised of 83 pages and admittedly neither included a copy of the impugned award nor was accompanied with any application seeking

exemption from filing the same and what was re-filed ran into 441 pages, and held that filing without court fees, with undated *Vakalatnama*, incomplete statement of truth, lack of critical information and most glaringly, without the impugned award, was no filing at all.

(f) ***S.P. Chengalvaraya Naidu Vs. Jagannath*** (1994) 1 SCC 1, to contend that fraudulent conduct of the parties vitiates the proceeding.

12. Needless to state, the senior counsel for NHAI, in rejoinder has sought to differentiate the facts of the judgments aforesaid from the facts of the present case.

13. We have considered the aspect of condonation of delay and for the reasons following, are of the view that NHAI in the present case has disclosed sufficient cause for condonation of delay.

(A) The questions for consideration are, (i) whether the filing of the appeal on 22nd May, 2020 was a re-filing of the appeal originally filed on 26th February, 2020, or a fresh filing; (ii) if the same was a case of re-filing, whether there was sufficient cause for delay of 25 days in filing of the appeal; and, (iii) conversely, if the filing of the appeal on 22nd May, 2020 was a case of fresh filing, whether the delay beyond 30 days in filing of the appeal is condonable by the Court.

(B) On the anvil of judgments cited by the senior counsel for BEPL, we are unable to agree with the senior counsel for BEPL that what was filed on 22nd May, 2020 cannot be said to be relatable to what was filed on 26th February, 2020. Though undoubtedly there is a vast difference in the number of pages, in the appeal filed on 26th

February, 2020 and the appeal re-filed on 18th March, 2020 (and thereafter on 20th March, 2020) and electronic form whereof was filed on 22nd May, 2020, but the test to be applied, is not quantitative i.e. of number of pages, but qualitative i.e. of what was originally filed. In ***Indian Statistical Institute Vs. Associated Builders*** (1978) 1 SCC 483, it was held that the objections raised by the Registry of the Court, of not being properly stamped and of verification being not dated, are not material, since under Section 149 of the CPC Court has jurisdiction to extend the time for payment of court fees and since non-dating of the verification is not serious enough and not fatal and curable. Supreme Court, in ***Udai Shankar Triyar Vs. Ram Kalevar Prasad Singh*** (2006) 1 SCC 75 held that (i) non-compliance with any procedural requirement relating to memorandum of appeal should not entail automatic dismissal or rejection, unless the relevant statute or rule so mandates; (ii) procedural defects and irregularities which are curable, should not be allowed to defeat substantive rights or cause injustice; and, (iii) only where the statute describing procedure also prescribes specifically, the consequence of non-compliance or where the procedural defect is not rectified even after pointed out and opportunity given or where violation is deliberate and mischievous or where rectification of defect would affect the case on merits or where in the case of a memorandum of appeal, there is complete absence of authority and the appeal is presented without knowledge, consent and authority of the appellant, should the filing with such defects entail dismissal. A Division Bench of this Court in ***Delhi Development Authority Vs. Durga Construction Co.*** MANU/DE/4933/2013 held,

(a) that delay in re-filing is different from delay in filing, inasmuch as in the case of re-filing, the party has already evinced its intention to take recourse to the remedy and has taken steps in that regard and cannot be assumed to have given up the rights; (b) only where the petition or application filed is so hopelessly inadequate and insufficient or contains defects which are fundamental to the institution of the proceeding, is the party to be not given the benefit of initial filing and the date on which the defects are cured will have to be considered as the date of initial filing; and, (c) however when the defects are perfunctory and not affecting the substance of the application, the delay in re-filing could be condoned. Similarly, in ***DSA Engineers (Bombay) Vs. Housing and Urban Development Corporation*** MANU/DE/1937/2002, defects of non-filing of *Vakalatnama* and non-obtaining of caveat report were held to be not substantial, to render the filing *non est*.

(C) What prevailed with the Division Bench in ***Jammu & Kashmir State Power Development Corporation*** supra and with the Single Judge in ***Bharat Biotech International Ltd.*** supra was that what was originally filed did not comprise of essentials of an appeal and hence did not constitute an appeal. However it is not so in the present case. As aforesaid, vide order dated 29th May, 2020, opportunity was given to both parties to, after going through what was filed on 26th February, 2020, file affidavits. NHAI, in its affidavit, as aforesaid, has categorically stated that the original filing on 26th February, 2020 included, (i) a memorandum of appeal supported by duly affirmed affidavit, (ii) accompanying applications with duly affirmed

affidavits, (iii) certified copy of the impugned judgment, (iv) duly executed *Vakalatnama* and, (v) court fees. BEPL, in its affidavit in response, has not expressly controverted the aforesaid categorical assertion in the affidavit of NHAI. Rather, BEPL has used the words "suspects" and "it appears", to state that what was filed on 26th February, 2020 was a "bunch of papers". For BEPL to rely on the judgments cited, it was incumbent to, match the facts of the present case with those of the judgments cited and to in its affidavit, expressly state that what was filed on 26th February, 2020 did not include what the affidavit of NHAI claimed; BEPL is found to have shied away from so stating. BEPL has neither pleaded nor argued, which essential element of an appeal was lacking in what was filed on 26th February, 2020. BEPL has also not argued that non-furnishing by NHAI of advance copy of the appeal filed on 26th February, 2020 made the filing *non est* under any Rule, as laid down in ***Indian Statistical Institute*** and ***Udai Shankar Triyar*** supra.

(D) Though undoubtedly NHAI, in the subsequent filing on 18th March, 2020, added grounds to the memorandum of appeal as well as documents but it cannot be said that what was originally filed was not sufficient to constitute an appeal or lacked essential ingredients of an appeal, to be totally ignored. It is not shown that the memorandum of appeal originally filed on 26th February, 2020 had no grounds set out therein. The Courts, even otherwise in appeals are known to adopt a liberal approach qua grounds of appeal and are not known to shut out an argument, otherwise borne out from the record, merely for the reason of having not been pleaded in the grounds of appeal. In fact,

filing of copies of documents on the file of the Court of Original Jurisdiction, along with the appeal, is only a practice, evolved to expedite the hearing and to enable the Appellate Court to, on the very first date, if does not find any merit in the appeal, dismiss the same. Else in the olden times, when appeals were type-written and facility of photocopy was not available, the appeals were filed without any record of the Court from whose order/judgment the appeal arose and the practice prevalent was of the Appellate Court calling for the said records.

(E) No merit is also found in the argument, that what was filed originally on 26th February, 2020, remained lying in the Registry even on 26th May, 2020 when the appeal first came up before this Court and for this reason, is not relatable to what was filed on 26th February, 2020. Owing to the prevalent pandemic and the limitations / restrictions placed by it on the normal working of the Courts and to continue to provide access to justice, this Court relaxed a large number of procedural Rules qua filing/electronic filing. So much so, filing without payment of court fees was permitted. No fault can thus be found in NHAI, since an urgency had occurred, electronically filing what was last filed/re-filed in the Registry of this Court, to have the appeal listed for consideration. What may be required or be the rule in normal times, if had been insisted upon in the abnormal times in which we have been living for the last more than one year, would have amounted to shutting the doors of the Court.

(F) We thus hold that the appeal listed on 26th May, 2020 was relatable to the original filing on 26th February, 2020.

(G) That bring us to the question, whether NHAI discloses "sufficient cause" for condonation of delay of 25 days, in filing the appeal on 26th February, 2020. NHAI, in its application/affidavit has given date-wise steps taken after the impugned order dated 25th November, 2019. It is not in dispute that the certified copy was applied immediately on the next date and collected immediately when ready. The same alone shows the intention to not accept the impugned order and to explore the options available and viability thereof. However, the decision to file the appeal was not taken immediately, as a natural person would have taken, only by studying the impugned order and consulting the lawyer and steps as detailed in the application, taken in the decision making process. Supreme Court, in ***State of Nagaland Vs. Lipok Ao*** (2005) 3 SCC 752 held that in litigations to which Government is a party, there is yet another aspect which cannot be ignored; if appeal brought by Government are lost for such defaults, no person is individually affected, but what in the ultimate analysis suffers, is public interest; the decisions of the Government are collective and institutional decisions do not share the characteristics of decision of private individuals; the law of limitation, no doubt the same for a private citizen as for government authorities, but a somewhat different complexion is imparted to the matter where the Government makes out a case where public interest is shown to have suffered owing to acts of its officers or agents; thus in assessing what constitutes sufficient cause for the purposes of Section 5, it

might perhaps be somewhat unrealistic to exclude from consideration these factors which are peculiar to and characteristic of the functioning of the Government; Government decisions are proverbially slow, encumbered by a degree of procedural red tape in the process of their making; a certain degree of latitude is thus not impermissible. Applying the said line of reasoning and also applying the principles enunciated in a recent judgment discussed below, we find NHAI to have disclosed "sufficient cause" for condonation of delay of 25 days in filing the appeal.

(H) Though during the hearing, we entertained reservation qua applicability of what is laid down in ***N.V. International*** supra, concerned with an appeal under Section 37 against an order of dismissal of an application under Section 34 of the Act, to an appeal under Section 37 against an order allowing an application under Section 9 of the Act and wondered whether the rule down in ***N.V. International*** supra, of delay beyond 30 days in preferring appeal under Section 37 being not condonable, would apply, even to an appeal against an order setting aside an arbitral award under Section 34, but the need to decide the said issues does not arise because ***N.V. International*** supra, recently in ***Government of Maharashtra Vs. Borse Brothers Engineers and Contractors Private Limited*** 2021 SCC OnLine SC 233 has been held to have been wrongly decided and been overruled and it has been held, (i) that on a reading of the Arbitration Act and the Commercial Courts Act as a whole, it is clear that when Section 37 of the Arbitration Act is read with Article 116 or 117 of the Limitation Act or Section 13(1A) of the Commercial

Courts Act, the object and context provided by the aforesaid statutes, read as a whole, is the speedy disposal of appeals filed under Section 37 of the Arbitration Act; (ii) that the expression "sufficient cause" contained in Section 5 of the Limitation Act is elastic enough to yield different results, depending upon the objects and context of a statute; (iii) that given the objects sought to be achieved under both, the Arbitration Act and the Commercial Courts Act, i.e., the speedy resolution of disputes, the expression "sufficient cause" is not elastic enough to cover long delays beyond the period provided by the appeal provision itself; "sufficient cause" is not itself a loose panacea for the ill of pressing negligent and stale claims; (iv) that merely because the Government is involved, a different yardstick for condonation of delay cannot be laid down; the claim on account of impersonal machinery and inherent bureaucratic methodology of making several notes, cannot be accepted in view of the modern technologies being used and available; (v) that the law of limitation binds everybody, including the Government; (vi) that unless the Government bodies have reasonable and acceptable explanation for the delay and there was a *bona fide* effort, there is no need to accept the usual explanation; the Government Departments are under a special obligation to ensure that they perform their duties with diligence and commitment; (vii) that condonation of delay is an exception and should not be used as an anticipated benefit for the Government Departments; (viii) that merely because sufficient cause has been made out in the facts of a given case, there is no right in the appellant to have delay condoned; and, (ix) that given the object of speedy

disposal sought to be achieved, both under the Arbitration Act and the Commercial Courts Act, for appeals filed under Section 37 of the Arbitration Act governed by Articles 116 and 117 of the Limitation Act or Section 13(1A) of the Commercial Courts Act, a delay of beyond 90 days, 30 days or 60 days respectively, is to be condoned by way of an exception and not by way of rule; in a fit case, in which a party has otherwise acted *bona fide* and not in a negligent manner, a short delay beyond such period can, in the discretion of the Court, be condoned, always bearing in mind that the other side of the picture is that the opposite party may have acquired, both in equity and justice, what may now be lost by the first party's inaction negligence or latches.

(I) Applying the tests aforesaid laid down in ***Borse Brothers Engineers and Contractors Private Limited*** supra also, it will be seen, that (a) the delay in filing the appeal, was of 25 days i.e. from 1st February, 2020 to 26th February, 2020; (b) upon the Registry of this Court on scrutiny of the appeal paper book filed, raising objections, the re-filing was done within the permitted time; (c) it was not the objection of the Registry, that what was filed on 26th February, 2020, was not an appeal or lacked any of the essentials of the appeal; (d) not only the country but the world, since the end of the year 2019 has been facing a pandemic, owing whereto the functions of various instrumentalities of State have been affected in diverse ways; (e) the functioning of this Court was curtailed with effect from 16th March, 2020 and totally stopped with effect from 24th March, 2020, owing to the prevalent Covid-19 pandemic and remained suspended till 4th

April, 2020, whereafter also only electronic filing of urgent matters was permitted; (f) it was thus not possible for NHAI to re-file what was originally filed on 26th February, 2020 and what came up before this Court on 26th May, 2020, when the appeal first came up, was what was electronically filed on 22nd May, 2020; (g) Supreme Court, vide order dated 23rd March, 2020 directed that the period of limitation in filing petitions/applications/suits/appeals/all other proceedings, irrespective of the period of limitation described under the special or general laws, shall stand extended with effect from 15th March, 2020 till further orders; (h) Supreme Court, though vide order dated 8th March, 2021 directed exclusion of the period from 15th March, 2020 till 14th March, 2021 but recently vide order dated 27th April, 2021 has restored the order dated 23rd March, 2020 and directed that the period of limitation as prescribed under any general or special laws in respect of all judicial or quasi-judicial proceeding, whether condonable or not, shall stand extended till further orders; (i) it will thus be seen, that the limitation for what was filed on 26th February, 2020 is still available; however owing to the urgency which arose as aforesaid, the appellant NHAI electronically filed the appeal and got the same listed on 26th May, 2020; (j) in the said scenario, it cannot be said that owing to the delay of 25 days in filing the appeal, any prejudice has been caused to or any rights have accrued to BEPL; (k) it cannot also be lost sight of, that till 3rd June, 2020, the application of BEPL being IA No.1898/2020, before the Commercial Division, for clarification / modification of the order impugned in this appeal, was pending consideration and immediately after decision whereof the

urgency leading to the electronic filing the appeal was felt and immediate steps taken by NHAI; (l) NHAI is thus found to have acted *bona fide* and not in a negligent manner, for the short delay of 25 days to be condoned; and, (m) NHAI has thus disclosed "sufficient cause" for condonation of delay, of 25 days, beyond 1st February, 2020 till 26th February, 2020.

(J) As far as the argument of the senior counsel for BEPL with reference to the Standard Operating Procedure for Handling of Arbitration Matters and Court Cases of NHAI is concerned, the same is a measure of good administration and cannot prevent the Court from, notwithstanding having found sufficient cause for condonation of delay, condoning the said delay.

14. Accordingly, CM No.11532/2020 is allowed and the delay in filing the appeal is condoned and the appeal entertained on merits.

15. As far as merits of the appeal are concerned, BEPL filed the application under Section 9 of the Arbitration Act, pleading (i) that the parties had entered into a Concession Agreement dated 30th July, 2010 and a Supplementary Agreement dated 17th August, 2016, for four laning of Bhubaneswar – Puri Section of National Highway 203 from Km 0.00 to Km 59.00 in the State of Orissa, on "Design Build Finance Operate Transfer" basis; the said agreement provided for resolution of disputes by way of arbitration; (ii) that BEPL got the project financed from various banks and financial institutions; (iii) that there were delays on the part of NHAI in performance of its obligations under the agreement aforesaid and which delayed the execution of the project, causing severe cost implications for

BEPL, including increase in the costs of borrowing, and compelling BEPL and its lenders to infuse further funds to salvage the project and achieve completion and all of which was brought to the notice of NHAI; (iv) that BEPL served notice dated 6th January, 2017, of default, on NHAI, making a claim of Rs.4,45,00,00,000/- for the losses suffered on account of breaches by NHAI; that upon NHAI not responding, BEPL invoked the arbitration agreement; (v) that the said disputes were referred to arbitration; (vi) that BEPL made its claim before the Arbitral Tribunal and the arbitration proceedings culminated in an arbitral award dated 13th November, 2018, whereby Rs.2,88,59,94,926/- was awarded in favour of BEPL and against NHAI; the award also found that it was NHAI who was responsible for the delays caused in the project; (vii) that NHAI has filed an application under Section 34 of the Arbitration Act with respect to the said award and which is pending consideration; (viii) that BEPL, notwithstanding the said delays on the part of NHAI, remained committed to the project and achieved substantial completion to the extent of 80%; (ix) that NHAI, during the pendency of the arbitration proceedings aforesaid, with a *mala fide* intention issued a notice dated 13th January, 2017 asking BEPL to show cause why the agreement be not terminated; (x) that NHAI terminated the agreement on 20th March, 2017, alleging failures on the part of BEPL; (xi) that since NHAI had terminated the contract after BEPL had invoked arbitration, BEPL again invoked the arbitration clause and Arbitral Tribunal was constituted; (xii) one of the claims of BEPL against NHAI, arising from termination of the agreement by NHAI, pertains to release of termination payment; (xiii) that BEPL also filed an application under Section 17 of the Arbitration Act for the interim relief of release of termination payment; and,

(xiv) that it was later discovered that one of the Arbitrators in the Arbitral Tribunal had been a member of the Board of NHAI and the said Arbitrator recused himself but the substitute Arbitrator had not been appointed till then and on account whereof the application under Section 17 of the Act could not be considered by the Arbitral Tribunal, compelling BEPL to file the subject application under Section 9 of the Act.

16. As would be obvious from the above, the Section 9 application from which this appeal arises, is with reference to the second round of arbitration between the parties, after the first round of arbitration has culminated in a monetary award in favour of BEPL and against NHAI and Section 34 proceedings with respect whereto are pending consideration. One of the claims of BEPL against NHAI in the said second round of arbitration is for termination payment in accordance with the Concession Agreement, on account of NHAI having terminated the agreement, after the project had achieved commercial operation.

17. Article 37 of the Concession Agreement between the parties is titled "Termination" and Article 37.3 thereunder is titled "Termination Payment" and is as under:

> ***"37.3 Termination Payment***
>
> *37.3.1 Upon Termination on account of a Concessionaire Default during the Operation Period, the Authority shall pay to the Concessionaire, by way of Termination Payment, an amount equal to 90% (ninety per cent) of the Debt Due less Insurance Cover; provided that if any insurance claims forming part of the Insurance Cover are not admitted and paid, then 80% (eighty per cent) of such unpaid claims shall be included in the computation of Debt Due. For the avoidance of doubt, the*

Concessionaire hereby acknowledges that no Termination Payment shall be due or payable on account of a Concessionaire Default occurring prior to COD.

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

(a) Debt Due; and

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

37.3.3 Termination Payment shall become due and payable to the Concessionaire within 15 (fifteen) days of a demand being made by the Concessionaire to the Authority with the necessary particulars, and in the event of any delay, the Authority shall pay interest at a rate equal to 3% (three per cent) above the Bank Rate on the amount of Termination Payment remaining unpaid; provided that such delay shall not exceed 90 (ninety) days. For the avoidance of doubt, it is expressly agreed that Termination Payment shall constitute full discharge by the Authority of its payment obligations in respect thereof hereunder.

37.3.4 The Concessionaire expressly agrees that Termination Payment under this Article 37 shall constitute a full and final settlement of all claims of the Concessionaire on account of Termination of this Agreement for any reason whatsoever and that the Concessionaire or any shareholder thereof shall not have any further right or claim under any law, treaty, convention, contract or otherwise."

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

19. 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.

20. Needless to state, BEPL, in its rejoinder before the Section 9 Court, opposed the aforesaid arguments on behalf of NHAI.

21. The Commercial Division has allowed the application under Section 9, of BEPL, finding/observing/holding/reasoning, (a) that a perusal of Clauses 37.3.1 and 37.3.2 aforesaid makes it makes it evident that even where the termination is on account of the default of BEPL, NHAI was liable to make Termination Payment equal to 90% of the debt due; (b) that there was no dispute that the agreement stands terminated at the instance of NHAI; (c) that thus *prima facie* NHAI was liable to pay at least 90% of the debt outstanding; (d) that Concession Agreement gives a comfort to the lenders that their debt is secured, inasmuch as, whatever be the reason for

termination, they are at least assured of 90% of the outstanding debt; (e) that according to BEPL, more than 95% of the work had been completed and a Provisional Completion Certificate for at least 80% of the work done had been issued by an independent Engineer, on 20th August, 2015; (f) that the question, whether the breach was on the part of NHAI or on the part of BEPL, was to be ultimately decided by the Arbitral Tribunal but for deciding the claim of BEPL against NHAI for termination payment to the extent of 90% of the debt due, the adjudication by the Arbitral Tribunal was irrelevant because even assuming that the Arbitral Tribunal found that BEPL had defaulted, still 90% of the debt due was assured by NHAI to BEPL under the agreement; (g) that though there was a dispute as to the quantum of 90% of the debt due but a reading of the clauses relating to termination payment, *prima facie* supported the stand of BEPL; (h) that a Single Judge of this Court in ***Jetpur Somnath Tollways Ltd. Vs. National Highways Authority of India*** 2017 SCC OnLine Del 9453 had dealt with the said aspect and held that to accept the plea of NHAI, that Section 9 of the Arbitration Act cannot be invoked for the claim of termination payment, would negate and obliterate Article 37 of the Concession Agreement and its effect; the said judgment was upheld by the Division Bench of this Court vide judgment reported as 2017 SCC OnLine Del 11312 and Special Leave Petition (Civil) No.36692/2017 preferred thereagainst was also dismissed on 5th January, 2018; (i) that the expression "interim measure" used in Section 9 is distinct from the expression "temporary injunction" used in Order XXXIX Rules 1 and 2 CPC, as held in ***Value Source Mercantile Limited Vs. Span Mechnotronix Limited*** 2014 SCC OnLine Del 3313 (DB); (j) that the interest of NHAI could be protected by directing payment by NHAI of

termination payment of 90% of the debt due, against an unconditional bank guarantee to be furnished by BEPL; (k) that the arguments of NHAI, distinguishing ***Jetpur Somnath Tollways Ltd.*** supra were of no avail; (l) that the Minutes of the Meeting on 6th June, 2019 showed an admission by NHAI that money in the sum of Rs 123.23 crores was due to BEPL on account of termination payment; (m) that the Arbitral Tribunal was non-functional as of then, and waiting for disposal of application under Section 17 would not be an efficacious remedy, when BEPL was in a financial crisis; (n) that there was no merit in the plea of NHAI, that the claim of BEPL in the second round of arbitration was barred by Order II Rule 2 of the CPC; (o) that in exercise of powers under Section 9 of the Arbitration Act, mandatory directions had been issued by the Courts in several dicta; and, (p) that BEPL had made out a *prima facie* case for grant of interim mandatory order and the balance of convenience was also in favour of BEPL. Accordingly, (i) BEPL was directed to furnish an unconditional and irrevocable bank guarantee in favour of NHAI, undertaking to pay to NHAI an amount of Rs.3,37,73,19,434.10 paise, subject to the final award of the Arbitral Tribunal; (ii) NHAI was directed to, on furnishing of the said bank guarantee, deposit Rs.3,37,73,19,434.10 paise in the escrow account; (iii) the encashment of the bank guarantee was made subject to final award of the Arbitral Tribunal; and, (iv) BEPL was directed to keep the bank guarantee alive upto six months after the final award of the Arbitral Tribunal.

22. The senior counsel for NHAI argued, (a) that the claim of BEPL, of termination payment has to be seen in the context of BEPL, in the first round of arbitration, having already made monetary claims against NHAI for losses suffered by it and which claims had been partly allowed and

which amounts had already been partly deposited by NHAI as a condition of grant of stay of that arbitral award during the pendency of Section 34 application preferred thereagainst; (b) that Clause 37.3 aforesaid provides for termination payment to be a full and final payment and the termination payment subject matter thereof cannot be a full and final payment where there is a prior arbitral award granting monetary claims of BEPL; (c) that the said substantial plea though was raised before the Commercial Division, has not been dealt with in the impugned order; (d) that the impugned order is based entirely on the dicta of this Court in ***Jetpur Somnath Tollways Ltd.*** supra, without noticing the important differences in facts thereof; (e) that the Commercial Division also erred in, on the basis of a document filed by BEPL along with an application filed before the Commercial Division after the order on Section 9 application had been reserved, holding that NHAI had admitted termination payment to be due to BEPL; (f) that the said document was an internal decision of NHAI and was not a public document; (g) that even as per the said document, the admission on the part of NHAI is of liability for termination payment of Rs.123.23 crores; however the Commercial Division, in the impugned order, has directed NHAI to make termination payment of Rs.3,37,73,19,434.10 paise, without even an iota of discussion, how the amount over and above the purported admission of liability for termination payment of Rs.123.23 crores, was directed to be paid; (h) that the Commercial Division erred in holding that NHAI had admitted liability for termination payment in the sum of Rs.123.23 crores and in further holding the matter to be thus squarely covered by ***Jetpur Somnath Tollways Ltd.*** supra; the admission was imputed on the basis of decision recorded qua agenda item 392.07 in the Minutes of the Meeting

held on 6th June, 2019 and there was nothing before the Commercial Division to show what the agenda was; moreover the said decision itself records that no further action be taken on the termination payment and proceeds to record that a sum of Rs.200 crores may be deposited in the Courts so that NHAI's application challenging the arbitral award dated 13th November, 2018 is admitted in the Court; (i) that the impugned order does not even discuss whether Clause 37.3 supra, payment whereunder is directed, is applicable; (j) that Clause 37.3 supra provides for 90% of the debt due and the impugned order nowhere computes the debt due or indicates, on what basis the debt due had been computed at Rs.388 crores and 90% thereof amounting to Rs.3,37,73,19,434.10 paise been directed to be deposited; (k) that in ***Jetpur Somnath Tollways Ltd.*** supra, the order was made for the benefit of the lender; however there is no lender in the present case, inasmuch as in the proceedings initiated by the lender against BEPL before the DRT, it was informed that the lenders had sold the debt, not under the Securitisation and Reconstruction of Financial Assets and Enforcement of Securities Interest Act, 2002 (SARFAESI Act) but pursuant to the Supreme Court order in the case of merger of Arcelor Mittal; (l) that the scope of Article 37.3 of the Concession Agreement was required to be dealt with by the Arbitral Tribunal and not in a Section 9 application; (m) that the purported admission is only of a quantification, if at all termination payment was to be paid; (n) that the Commercial Division, while holding an admission against NHAI, has not followed the principles applicable thereto; (o) that even if there was any admission, on the basis of admission, an arbitral award on admissions could have been obtained and not an order under Section 9 of the Act; (p) that the direction in ***Jetpur Somnath***

Tollways Ltd. supra was given for the benefit of and to protect the lenders and without noticing that there were no lenders in this case, the said judgment has been wrongly followed; there is no public interest of financial institutions involved here; (q) that the Commercial Division did not notice the differences in the facts of the present case and in the facts of ***Jetpur Somnath Tollways Ltd.*** supra, (i) in ***Jetpur Somnath Tollways Ltd.*** supra, the lender Punjab National Bank (PNB) had applied to be substituted in Section 9 application, in place of the concessionaire and which is not so in the present case; (ii) in ***Jetpur Somnath Tollways Ltd.*** supra, the liability for the amount which was directed to be paid, was admitted in a communication by NHAI to concessionaire and there is no communication of admission of liability by NHAI to BEPL in the present case; (iii) in the present case, BEPL has done only 75% of the work; that debt which BEPL was entitled to take as per the Concession Agreement, was Rs.244 crores only; BEPL however claims to have taken Rs.332 crores, without any permission of NHAI and all of which facts did not exist in ***Jetpur Somnath Tollways Ltd.*** supra; (iv) in ***Jetpur Somnath Tollways Ltd.*** supra, there was no assignment of the debt by the lenders/financial institutions, as in the present case; (v) there is no public financial institution's interest in the present case, as was in ***Jetpur Somnath Tollways Ltd.*** supra; and, (vi) there were no earlier arbitration proceedings between the parties and monetary award in favour of concessionaire, in ***Jetpur Somnath Tollways Ltd.*** supra, as in the present case; (r) that a Division Bench of this Court, in ***Ratnagiri Gas and Power Pvt. Ltd. Vs. Joint Venturre of Whessoe Oil and Gas Ltd. (WOGL)*** (2013) 199 DLT 212, SLP preferred whereagainst was dismissed, has held that in a Section 9 application, no order in the nature of an order under Order XXXIX

Rule 10 of the CPC, mandating the respondent, could be issued, though in ***Value Source Mercantile Limited*** supra, the aforesaid judgment was held to be *per incuriam*; (s) that BEPL, in the Section 9 proceedings, concealed the factum of the debt of the public institutions and the banks having been settled/assigned and have till date not placed the assignment deed on record; (t) that though the debt was settled prior to the filing of the Section 9 application but no mention was made thereof and on the contrary Section 9 application was filed claiming that public monies were held up; (u) that on the contrary, BEPL throughout in the Section 9 proceedings created an impression as if the financial institutions and banks who had lent monies for the project, were strangulating BEPL; (v) that BEPL is now a part of Arcelor Mittal Group; (w) that the escrow agreement and the escrow account, in which in ***Jetpur Somnath Tollways Ltd.*** supra, the monies were directed to be deposited, are not even alive in the present case; (x) that Clause 37.3 supra is applicable only to debt of banks or financial institutions and does not recognize private assignment of debt; (y) reference was made to ***ICICI Bank Limited Vs. APS Star Industries Limited*** (2010) 10 SCC 1 to contend that only a financial institution or a bank could step in the place of the lender under the Concession Agreement and a private party as Arcelor Mittal cannot step in place of lender, for the purposes of Clause 37.3 supra; and, (z) that there is no admission in terms of ***Uttam Singh Duggal & Co. Ltd. Vs. United Bank of India*** (2000) 7 SCC 120, ***State of Bihar Vs. Kripalu Shankar*** (1987) 3 SCC 34, ***Dadarao Vs. State of Maharashtra*** (1974) 3 SCC 630 and ***Himani Alloys Limited Vs. Tata Steel Limited*** (2011) 15 SCC 273.

23. Per contra, the senior counsel for BEPL contended, (i) that a provision for termination payment in Concession Agreements came to be included because no one was coming forward to enter into Concession Agreements with NHAI, inasmuch as no bank or financial institution was willing to finance the said projects owing to disputes often arising between NHAI and its concessionaires; (ii) that as per the design of the Concession Agreement, the concessionaire builds and operates the highway with own funds and/or with funds borrowed from banks and financial institutions and recovers the same over the concession period, which is generally long, in this case of 29 years; (iii) that the banks/financial institutions feel secured to lend monies for the said projects only on being assured of return of the monies so lent and for which, the termination payment provision was devised; (iv) that the contention of NHAI that owing to arbitral award in favour of BEPL in the present case, termination payment is not due, is contrary to Article 37.5 of the Concession Agreement, which is as under:

> ***"37.5 Survival of rights***
>
> *Notwithstanding anything to the contrary contained in this Agreement, but subject to the provisions of Clause 37.3.4, any Termination pursuant to the provisions of this Agreement shall be without prejudice to the accrued rights of either Party including its right to claim and recover money damages, insurance proceeds, security deposits, and other rights and remedies, which it may have in law or contract. All rights and obligations of either Party under this Agreement, including Termination Payments and Divestment Requirements, shall survive the Termination to the extent such survival is necessary for giving effect to such rights and obligations.*

and a reading whereof shows that the termination payment is without prejudice to the accrued rights; therefore for the purposes of termination payment, the prior claims or arbitral award, if any, will not reduce the debt due; (v) that the expression "debt due" in Clause 37.3, is defined in Article 48 (Definitions), as the principal amount of debt provided by the senior lenders under the financing agreements for financing the total project cost but excluding any part of the principal that had fallen due for re-payment two years prior to the transfer date together with interest accrued thereon; and, (vi) that what has been awarded to BEPL under the arbitration award of the first round of arbitration, is compensation for breach of contract within the meaning of Article 35 of the contract and as per Article 35.5, the said compensation is in addition to and not in substitution of or in derogation of the termination payment, if any.

24. At this stage, we interrupted the senior counsel for BEPL and enquired, whether not the compensation, if received by BEPL under the arbitral award of the first round of arbitration, will also go to the escrow account and adjusted against the debt due.

25. The senior counsel for BEPL, after obtaining instructions, responded (a) that the proceedings in the first arbitration round commenced on 19th January, 2017 and BEPL made claims therein, as had accrued to it even prior to the termination of the agreement by NHAI; (b) that NHAI terminated the agreement on 20th March, 2017 i.e. during the pendency of the first round of arbitration; (c) that as per the terms of the agreement, on the date of termination, the asset is automatically transferred from BEPL as concessionaire to NHAI; thus the date of termination is also the date of

transfer; (d) that as per Article 37.3.3, NHAI was required to pay the termination payment by 15th April, 2017 and which payment, if had been made, would have discharged NHAI of all obligations; (e) that the first award amount does not affect the debt due as the termination payment is the deferred price of the project, to be paid by NHAI to the concessionaire; (f) that the termination payment does not take into account the claims of the sub-contractors against the concessionaire; (g) that the debt due is the amount due from the concessionaire to the lenders; (h) that had the amount of the first arbitral award been received before the date of termination i.e. 20th March, 2017, the same would have altered the termination payment; (i) however the arbitral award of the first round of arbitration was made only on 13th November, 2018; (j) that the termination payment does not depend upon the amount in the escrow account, inasmuch as, as per the agreement between the concessionaire and the lenders, the lenders are entitled only to the monthly installment fixed and not more; and, (k) that the debt due is a definite and unalterable figure.

26. The senior counsel for BEPL, otherwise continuing his arguments, contended (i) that the definition in Article 48, of "Senior Lenders" includes within its ambit, financial institutions, banks etc. including their successors and assignees who have agreed to guarantee or provide finance to the concessionaire under any of the financing agreements for meeting all or any part of the total project cost and who hold *pari passu* charge on the assets, rights, title and interest of the concessionaire; (ii) that thus the fact that the debt in the present case stood assigned by the banks and financial institutions to Arcelor Mittal on 17th October, 2018, does not disentitle BEPL to termination payment; (iii) reference was made to ***Ledvance***

Private Limited Vs. Gail India Limited 2019 SCC OnLine Del 7443 (DB), on the concept of termination payment and the same being distinct from liquidated damages; (iv) that NHAI, before this Court, has raised arguments which were not raised before the Commercial Division; (v) that before the Commercial Division, there was no dispute as to what was the debt due on the date of termination of the agreement; (vi) that NHAI, in its reply to the application, under cover of which the Minutes of the Meeting held on 6th June, 2019 were placed on record, did not plead that the Committee whose minutes admitted termination payment of Rs.123.23 crores, was not authorised to take the decision; (vii) that the plea taken by NHAI, of Order II Rule 2 of the CPC is *mala fide*; (viii) that NHAI, in its written submissions in the first round of arbitration, clearly admitted that termination payment was not the subject matter of the first round of arbitration; (ix) that BEPL, in its statement of claim in the second round of arbitration, made pleadings giving particulars of the debt due on the date of termination; (x) that NHAI, in its reply to the said statement of claim, did not controvert the quantification pleaded by BEPL in its statement of claim, of the debt due on the date of termination; (xi) that BEPL, in Section 9 application, in paragraph 31 again pleaded the quantum of debt due on the date of termination and NHAI, in its reply to the Section 9 application also, did not controvert the computation of termination payment or the amount owed to the lenders on that date; (xii) that thus NHAI, before the Commercial Division did not dispute the claim of BEPL as to what was the debt due on the date of termination and it is for this reason that the Commercial Division, in the impugned order did not feel the need to go into the said aspect; (xiii) that this Court, in ***Jetpur Somnath Tollways Ltd.***

supra, has dealt with all the submissions as made in this appeal by NHAI, and negated the same; (xiv) attention was drawn to the letter dated 5th October, 2018 of Punjab National Bank to NHAI, furnishing to NHAI, as per proforma provided by NHAI, the total debt due as on termination date of 20th March, 2017; (xv) that the compensation awarded to BEPL in the first round of arbitration is merely to put back BEPL in the same position in which BEPL would have been but for the delays on the part of NHAI; (xvi) that NHAI has no say in the matter of debt due; (xvii) reference was made to ***S. Harinder Singh Vs. S. Nirmal Singh*** 2009 SCC OnLine Del 3618 (DB), ***Value Source Mercantile Limited*** supra and ***Ajay Singh Vs. Kal Airways Private Limited*** 2017 SCC OnLine Del 8934 (DB), to contend that under Section 9, mandatory direction can be given and that the scope of Section 9 is wider than that of Order XXXIX or Order XXXVIII of the CPC; (xviii) that termination payment is the agreed price for purchasing a built asset viz. the stretch of National Highway for which Concession Agreement was entered into and collection of toll with respect whereto had started; (xix) that NHAI, after taking over the said asset from BEPL, has already auctioned recovery of toll with respect thereto; (xx) that the purport of termination payment is to free the concessionaire from the loan taken for the project, inasmuch as NHAI, on termination, takes over the asset free of all claims of the bank and other encumbrances; (xxi) that if the award amount of the first round of arbitration would have come in the account before the termination, the banks, therefrom would have been entitled to only overdue installments and the remaining award amount would have been used by BEPL for payment of taxes, to EPC Contractor etc. and the amount of the first arbitral award would not have otherwise reduced the debt due; (xxii) that though

under the financing agreement, the lenders are entitled only to the agreed Equated Monthly Installment (EMI) but on termination of contract by NHAI, the lenders become entitled to the entire debt due on that date and the mode of computation whereof has been agreed in the Concession Agreement; (xxiii) that the assignment of debt by the lenders to Arcelor Mittal, is of a date subsequent to the termination of Concession Agreement by NHAI, and on which date of termination, the liability of NHAI for termination payment crystallized; (xxiv) that the said assignment of debt does not make any difference to liability of NHAI, which arose prior thereto; (xxv) that BEPL disclosed the assignment in the Section 17 application and the argument, that BEPL concealed the same, is without any basis; (xxvi) that in fact NHAI was a party to the proceedings before the DRT and therefrom also knew of assignment; (xxvii) that BEPL, in pursuance to the impugned order, has already furnished the bank guarantee; (xxviii) that Clause 5.3 of Schedule 5 (titled "Substitution Agreement" and to be executed in terms of Article 40.3.1 of the Concession Agreement in the eventuality of the lenders exercising the right to substitute the concessionaire) also provides that the lenders are entitled to receive from the concessionaire the debt due upon termination of the Concession Agreement by NHAI; (xxix) that NHAI was informed of the additional funding required for the project and did not raise any objection thereto and because of the said additional funding only, 80% of the work was completed and benefit of which, on termination, has vested in NHAI and it is too late in the day for NHAI to contend that the additional funding is not to be computed in the debt due; (xxx) that the value of the asset taken over by NHAI is over Rs.614 crores, as against the grant made by NHAI of Rs.193 crores only;

(xxxi) that NHAI, even after paying termination payment of Rs.3,37,73,19,434.10 paise, will be holding an asset in excess of the value of its grant and the termination payment; (xxxii) that the provision of paying 90% of the debt due on the date of termination can never be prejudicial to NHAI because the termination does not include 10% of the debt due and the equity investment of the concessionaire; (xxxiii) attention was drawn to the document dated 17th February, 2020 filed as Annexure A-3 to the appeal, being the extract of the internal note sheet of Finance Division of NHAI, to contend that the same explains the difference between termination payment of Rs.157 crores admitted in the Minutes of the Meeting dated 6th June, 2019 and of Rs.3,37,73,19,434.10 paise claimed by BEPL; (xxxiv) that NHAI had admitted the termination payment of Rs.3,37,73,19,434.10 paise and is belatedly raising doubts with respect to the quantum thereof; and, (xxxv) that the scope of this appeal, against an order on a Section 9 application, has to be within the confines of ***Wander Ltd. Vs. Antox India P. Ltd.*** 1990 Supp SCC 727 and there is no perversity in the order of the Commercial Division, for this Court to intervene.

27. The senior counsel for NHAI, in rejoinder, argued (a) that a conspectus of the financing arrangement under the Concession Agreement does not permit merger of the entities of the lenders and the equity participants in the concessionaire and envisages funding of the project only by banks and financial institutions and the clause regarding termination payment is to secure the public monies of the banks and financial institutions; (b) that the termination payment is for the benefit of the lenders who have guaranteed to finance the project before the date of termination; (c) that the assignment of debt in the present case is not under the provisions

of the SARFAESI Act but is by way of a private agreement in relation to the Corporate Insolvency Resolution Process of Essar Steel India Limited; (d) that the assignment envisaged in the Concession Agreement is from one bank to another; (e) that in the present case, Arcelor Mittal bought the debt owed by BEPL to banks, to become eligible to submit a resolution plan for Essar Steel India Limited; (f) that debt due does not include debt due to the shareholders of the concessionaire; (g) that in ***Jetpur Somnath Tollways Ltd.*** supra, the payment which was directed to be made was not for the benefit of the concessionaire, but for the benefit of the bank; here there is no bank in picture; (h) that though the banks and financial institutions who had loaned monies for the subject project were entitled to assign the same but the benefit of Article 37.3 would not be available to an assignment as in the present case; (i) that in ***APS Star Industries*** supra, it was held that inter-bank transfer is not trading in loan; (j) that Arcelor Mittal, the assignee of the debt in the present case, has not stepped into the shoes of the banks and financial institutions; (k) that the rights of banks as senior lenders, under Article 37.3 are non-assignable; (l) that the transfers and assignments permitted under the Concession Agreement are those covered under SARFAESI Act and not those by way of private arrangement; (m) that the scheme of the Concession Agreement does not permit that after termination, the senior lender is changed by private arrangement; (n) that there could be no assignment of the benefit of Article 37, after the date of termination of the contract; (o) that the Banking Regulation Act, 1949 creates a monopoly with respect to banking business; (p) that though a debt can be assigned by a private arrangement but the assignee would not step into the shoes of the bank; (q) that the purpose of Article 37.3 of the Concession Agreement is

not to permit trading in debts; (r) that adverse inference has to be drawn from non-production of the document of assignment of debt; (s) that BEPL, before the Commercial Division, argued as though public monies were at stake in the present case also, as in the case of ***Jetpur Somnath Tollways Ltd.*** supra and suppressed the factum of no public monies being involved in the present case; (t) that the Minutes of the Meeting dated 6th June, 2019 are an internal document of NHAI and no admission against NHAI can be construed therefrom; communication of the admission to the party whose claim is admitted, is essential and without communication, there can be no admission; (u) that even otherwise, the quantification of the debt due, in the Minutes of the Meeting on 6th June, 2019, is coupled with the payment being not due and thus there can be no admission; (v) reliance by BEPL on ***Ledvance Private Limited*** supra is misconceived, inasmuch as the consideration of debt due in that case was in the facts of that case which was concerned with a contract of a different nature; and, (w) that the impugned order fails to decide the defence of NHAI with respect to the Article 37.4 of the agreement.

28. We have considered the rival contentions and perused the judgments cited at the bar as well as the written submissions of BEPL.

29. What belied us throughout the hearing was, whether the claim of BEPL which has been allowed by the Commercial Division, qualified as an "interim measure" within the meaning of Section 9 of the Arbitration Act. The pleading and argument of BEPL, before the Commercial Division as well as before us, was/is, that BEPL, under Article 37.3 of the Concession Agreement, is entitled to termination payment of 90% of the debt due on the

date of termination, *de hors* any adjudication by the Arbitral Tribunal i.e. irrespective of whether the termination was for breach of the agreement, by NHAI or BEPL. The Commercial Division has accepted the said plea, notwithstanding denial of the claim of BEPL by NHAI on diverse grounds as aforesaid, and in the impugned order held, that the question, whether the breach was on the part of NHAI or on the part of BEPL, was to be ultimately decided by the Arbitral Tribunal but for deciding the claim of BEPL against NHAI for termination payment to the extent of 90% of the debt due, the adjudication by the Arbitral Tribunal was "irrelevant" because even assuming that the Arbitral Tribunal found that BEPL had defaulted, still 90% of the debt due was assured by NHAI to BEPL under the agreement. Thus, BEPL was/is not claiming interim measure awaiting adjudication by Arbitral Tribunal. What BEPL was claiming, was the final relief of recovery of termination payment. BEPL did not approach the Commercial Division to secure the said termination payment; it was not its case, that unless 90% of the debt due was secured, by directing payment thereof in the escrow account, BEPL, inspite of award in its favour therefore, will not be able to recover the same from NHAI.

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 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.

33. Once it is so, we wondered whether not the Commercial Division, in the garb of granting interim measures, has passed an award of recovery of

Rs.3,37,73,19,434.10 paise, in favour of BEPL and against NHAI and the making of which award is in the domain of the Arbitral Tribunal and not in the domain of this Court. We felt so, because the Commercial Division, on interpretation of the Concession Agreement, has held that BEPL is entitled to the amount, irrespective of the determination by the Arbitral Tribunal. We also felt so because the Commercial Division has returned the finding of NHAI having admitted not only the liability for but also the quantum of termination payment. When one party pleads an admission and the other party denies, it is only the forum vested with adjudicatory powers and which in the present case is the Arbitral Tribunal, which can return a finding in this regard.

34. We are also of the opinion, that merely because the Commercial Division, in the impugned order has made the release of such monies by NHAI, subject to BEPL furnishing a bank guarantee and merely because Commercial Division has made the same subject to the award, would not change the nature of the relief granted. Moreover, the Commercial Division, in the impugned order, has not given any reason for making the deposit directed to be made by NHAI, subject to furnishing of bank guarantee and subject to the award of the Arbitral Tribunal. On the contrary, as aforesaid, the Commercial Division has reasoned that the entitlement of BEPL to the amounts ordered, is irrespective of the arbitral award and the arbitral award is not relevant thereto. There is no discussion, as to on what finding being returned by the Arbitral Tribunal, would BEPL be not entitled to the termination payment.

35. Arbitration Act does not envisage adjudication in two stages i.e. summary adjudication by the Court under Section 9 and final adjudication by the Arbitral Tribunal under Chapter VI of Part I of the Act.

36. A reading of the impugned judgment of the Commercial Division does indeed indicate that the findings returned by the Commercial Division, on the interpretation of the terms of the Concession Agreement, are final and not of an interim nature. The Commercial Division has nowhere held that there can be an eventuality of no termination payment being due to BEPL from NHAI, depending on the findings to be returned by the Arbitral Tribunal and for which eventuality a bank guarantee has been directed to be furnished by BEPL for the termination payment which NHAI has been directed to make to BEPL. The bank guarantee has been directed to be furnished, merely because it was so directed in ***Jetpur Somnath Tollways Ltd.*** supra and without noticing that in ***Jetpur Somnath Tollways Ltd.*** supra, the bank guarantee was directed to be furnished for different reasons as discussed herein below.

37. Moreover, even if any liability whatsoever of NHAI for termination payment to BEPL were to be dependent upon any finding to be returned by the Arbitral Tribunal, the grant of the relief of payment, as an interim measure, in the mandatory form, is contrary to the principles of grant of interim mandatory injunction, as laid down in ***Dorab Cawasji Warden Vs. Coomi Sorab Warden*** (1990) 2 SCC 117 followed in ***Metro Marins Vs. Bonus Watch Co. Pvt. Ltd.*** (2004) 7 SCC 478, ***Kishore Kumar Khaitan Vs. Praveen Kumar Singh*** (2006) 3 SCC 312 and ***Samir Narain Bhojwani Vs. Aurora Properties and Investments*** MANU/SC/0884/2018, that interim

mandatory relief is to be granted only to restore *status quo* of the last non-contested status which preceded the pending controversy, until the final hearing, when full relief may be granted, or to compel the undoing of those acts which have been illegally done or the restoration of that which was wrongfully taken from the party complaining, and not to create a different situation than as existing at the time of commencement of the dispute, on a *prima facie* view of the matter.

38. The response of the senior counsel for BEPL to our aforesaid queries/concerns, was twofold. Firstly, it was contended that a Coordinate Bench of this Court in ***Jetpur Somnath Tollways Ltd.*** supra having allowed a claim for termination payment on a demurer, in exercise of powers under Section 9, we are bound thereby. The second contention was, that the scope and powers of this Court under Section 9 is wider than that under Order XXXIX or under Order XXXVIII of the CPC.

39. We thus proceed to discuss herein below, ***Jetpur Somnath Tollways Ltd.*** supra, to see whether ***Jetpur Somnath Tollways Ltd.*** supra considers the aforesaid questions.

40. A perusal of the judgment of the Single Judge of this Court in ***Jetpur Somnath Tollways Ltd.*** supra shows, (i) that the said pronouncement was on the applications under Section 9 of the Arbitration Act filed by Jetpur Somnath Tollways Ltd. as well as Punjab National Bank, both seeking a direction to NHAI to deposit the "balance" part of the minimum termination payment into the escrow account; (ii) that it was one of the defences of NHAI in that case, that Jetpur Somnath Tollways Ltd. and Punjab National Bank were seeking to enforce the terms of the contract by way of a petition

under Section 9 of the Act and the order sought was analogous to the orders under Order XII Rule 6 of the CPC and the Court, under Section 9 cannot direct payment even of admitted amount; (iii) that however what prevailed with the Court to allow the applications under Section 9 was the facts (a) that even prior to NHAI issuing a termination notice, in a joint meeting of Jetpur Somnath Tollways Ltd., NHAI and senior lenders, NHAI had represented that the termination payment to be made by it in the escrow account would be in excess of Rs.550 crores; (b) that in pursuance to the demands of Jetpur Somnath Tollways Ltd. and Punjab National Bank, of termination payment in the sum of approximately Rs.945 crores, NHAI released an amount of approximately Rs.217 crores in the escrow account but refused to deposit the balance amount of termination payment; (c) that the entire project had been funded by Jetpur Somnath Tollways Ltd. from its own sources, by raising loans as well as equity and without any contribution from NHAI and the costs so incurred were to be recovered from the toll collection over the specified period and rights wherefor, upon termination of contract, had been taken over by NHAI; (d) that Punjab National Bank, though was entitled under the tripartite agreement between Jetpur Somnath Tollways Ltd., NHAI and Punjab National Bank, to take over the toll collection but had not done so because of the representation aforesaid made by NHAI that termination payment in excess of Rs.550 crores would be deposited in the escrow account and from which representation, NHAI was reneging; (e) that on termination of the contract, NHAI had got the entire project virtually free of cost and the entire cost whereof had been borne by Jetpur Somnath Tollways Ltd., either from its own resources or from loans; (f) that there was no dispute as to the quantum of the debt due and the

termination payment to be made; however NHAI was deducting therefrom losses which it claimed to have suffered and claim for which losses was subject to adjudication before the Arbitral Tribunal and which losses NHAI was held to be not entitled to deduct from termination payment which was due immediately, without the said losses being proved and entitlement to compensation therefor being adjudicated in the arbitration proceedings; (g) that though Punjab National Bank was entitled to substitute itself as a concessionaire in the case of default but had not exercised the said power of substitution because NHAI had assured that it shall deposit Rs.550 crores in escrow account; (h) that Jetpur Somnath Tollways Ltd. was directed to furnish the bank guarantee for the amount directed to be released to it towards termination payment, not for the eventuality of no termination payment being found due by the Arbitral Tribunal but to secure NHAI against recovery of compensation, for breaches by Jetpur Somnath Tollways Ltd., if any found due by Arbitral Tribunal; (i) that there was no financial outflow of NHAI for the projected highway; (j) that in case termination payment was not made by NHAI, not only would the account of Jetpur Somnath Tollways Ltd. been declared NPA but the lenders including Punjab National Bank would also have suffered grave injury; and, (k) that "the concern" was more for the public funds that had been provided by Punjab National Bank and their lenders and which would have been embroiled in the *inter se* disputes between Jetpur Somnath Tollways Ltd. and NHAI; equity demanded that the lenders and Punjab National Bank should get their amounts and the *inter se* disputes between Jetpur Somnath Tollways Ltd. and NHAI could be sorted out through the arbitration; (iv) that under Section 9, the Court has power to pass orders as appear to be just and

convenient to prevent ends of justice from being defeated; and, (v) that in exercise of powers under Section 9, several benches, Single and Division of the Court, had passed mandatory interlocutory directions, including to make payment.

41. We have also perused the judgment of the Division Bench in ***Jetpur Somnath Tollways Ltd.*** supra and find the Division Bench to have dealt with the questions as has been raised by us hereinabove, observing/holding (a) that "to accept the plea of NHAI that Section 9 of the A and C Act cannot be invoked would negate and obliterate the aforesaid clauses and their effect"; (b) that Section 9 uses the expression "interim measure of protection" as distinct from the expression "temporary injunction" in Order XXXIX Rules 1&2 of the CPC; (c) that interim injunction is one of the measures of orders described in Section 9; (d) that Clause (e) of Section 9 (1)(ii) is a residuary power of the Court, to issue other interim measures of protection; (e) that thus the Court has the power to issue or direct other interim measures of protection as may appear to the Court to be just and convenient; (f) that Section 9 encompasses the power of making orders as the Civil Court has for the purpose of and in relation to any proceeding before it; (g) that Court exercising power under Section 9 has the same power as that of a Civil Court during the pendency of the suit, under Order XXXIX Rule 10 of the CPC; and, (h) that the order of the Single Judge took care of the interest of NHAI as it directed furnishing of an unconditional bank guarantee in favour of NHAI for the amount which was directed to be deposited.

42. As would be obvious from the above, ***Jetpur Somnath Tollways Ltd.*** supra was a case where, (i) NHAI had not made any contribution whatsoever for the project; as distinct therefrom, NHAI in the present case has paid part of the project cost, by making a grant of Rs.193 crores; (ii) NHAI had not only admitted its liability for making termination payment but in pursuance to the said admission also made part payment; as distinct therefrom, here there is a total denial by NHAI of its liability for termination payment; (iii) there was no dispute as to the quantum of termination payment; however NHAI was found to be deducting from the termination payment admitted to be due, its claims for losses incurred by NHAI for breach of contract by Jetpur Somnath Tollways Ltd. and which losses, NHAI, in law, was found/held to be not entitled to adjust at that stage from admitted liability; as distinct therefrom, in the present case, there is a denial by NHAI not only of liability for termination payment but also of the quantum of termination payment claimed by BEPL and though the Commercial Division has relied on admission to the extent of Rs.123.23 crores in the Minutes of the Meeting of 6th June, 2019 but the impugned order is quiet as to how the termination payment in excess thereof has been computed/arrived at—we, on perusal of pleadings and records of the Commercial Division, are unable to accept the contention that NHAI did not dispute the same before the Commercial Division; had NHAI not been disputing the quantum of termination payment, the occasion for BEPL to, after the orders were reserved, file an application to place on record the Minutes of the Meeting dated 6th June, 2019, would not have arisen; we also have reservations about the finding of the Commercial Division of the said Minutes containing an admission but since are of the view that the relief

claimed in the Section 9 application was/is beyond the ambit thereof and the impugned order allowing the said application is in excess of jurisdiction, would not, by entering into discussion with respect thereto, commit the same mistake; (iv) the direction for payment in enforcement of the contract, in exercise of powers under Section 9, was held to be just and convenient since public monies were at stake and held up; as distinct therefrom, there is no bank or financial institution in the picture in the present case and no public monies involved; the Commercial Division, in the impugned order has not even given any reason why the direction issued was just and convenient; and, (v) direction for payment of termination payment against furnishing of a bank guarantee therefor was issued, to secure NHAI for realisation of its claims against Jetpur Somnath Tollways Ltd. which were subject matter of arbitration; in the present case, at least till now there is no plea of any claims of NHAI against BEPL in the second round of arbitration underway and as aforesaid, the Commercial Division has given no reason also why BEPL has been directed to furnish the bank guarantee.

43. For the differences aforesaid, between the facts of ***Jetpur Somnath Tollways Ltd.*** supra and of the present case, we do not consider ourselves bound to follow the said judgment or to, if disagreeing therefrom, refer the matter to a larger bench. Moreover, an order directing interim measures, on a *prima facie* view of the matter, is essentially in exercise of discretion vested in the Court in the matter of grant thereof. Exercise of discretion in a particular way, in the facts of one case, cannot constitute a precedent. The reasons which prevailed in ***Jetpur Somnath Tollways Ltd.*** supra for holding the direction issued to be just and convenient within the meaning of Section

9(1)(ii)(e), of public monies admittedly owed to banks and public financial institutions who were not parties to the arbitration, being required in public interest to be re-paid, do not exist in the present case, where there is no fear of BEPL being declared NPA.

44. If the Courts, in exercise of powers under Section 9, start enforcing the terms of the contract, it would do extreme disservice to the very concept of arbitration, where the parties choose to have their disputes adjudicated, instead of by the Courts, by Arbitrators of their choice. In the present case, the appellant NHAI has disputed its liability for termination payment on diverse grounds, as can be understood from the narrative hereinabove of the arguments of the senior counsel for NHAI. If this Court, while exercising jurisdiction under Section 9, were to adjudicate whether there is any legal merit in the said grounds or not, this Court would be adjudicating the disputes, which the parties have agreed to be adjudicated by arbitration and in fact there would be nothing left for the Arbitral Tribunal to decide, as far as the claim of BEPL for the termination payment directed to be made is concerned. In fact, after reading the impugned judgment, we have also wondered what remains for the Arbitral Tribunal to decide, as far as the claim of BEPL for termination payment on a demurer, believing the breach to be on the part of BEPL, is concerned. It is a hard reality that once there is judicial order on the merits of the dispute and which judicial order is not granting any interim measure but granting the final relief claimed in the arbitration proceeding, the Arbitral Tribunal would hesitate from deciding contrary to the findings returned by the Court on interpretation of terms of the Concession Agreement and of admission, and to which Court, an

application under Section 34 of the Act would lie against the award of the Arbitral Tribunal.

45. The 1996 Act, as distinct from the Arbitration Act, 1940 earlier in force, to curb such tendency of the Courts to decide the lis brought before it, vide Section 5 of the 1996 Act prohibits and bars the Courts from intervening in arbitral disputes except where so provided in the 1996 Act. Section 9 of the 1996 Act titled "Interim Measures, etc. by Court", permits application to the Court "for an interim measure of protection in respect of" matters described therein. The matters described are, "(a) the preservation, interim custody or sale of any goods which are the subject-matter of the arbitration agreement; (b) securing the amount in dispute in the arbitration; (c) the detention, preservation or inspection of any property or thing which is the subject-matter of the dispute in arbitration, or as to which any question may arise therein and authorising for any of the aforesaid purposes any person to enter upon any land or building in the possession of any party, or authorising any samples to be taken or any observation to be made, or experiment to be tried, which may be necessary or expedient for the purpose of obtaining full information or evidence; (d) interim injunction or the appointment of a receiver; (e) such other interim measure of protection as may appear to the Court to be just and convenient." It is not the argument that the matters prescribed in any of the clauses (a) to (d) hereinabove empower the Court to finally adjudicate disputed claims pending arbitration. The senior counsel for BEPL has however relied on clause (e) to contend that the same vests power in the Court to grant the relief as has been granted. We are unable to agree. The power under clause (e) is not only

circumscribed by the language of clause (ii) of Section 9 using the expression "interim measure" but reiterates the said expression in clause (e) and further uses the word "protection", again indicating that it is *de hors* final adjudication and at best on a *prima facie* view of the matter. The Court, in the garb of clause (e) cannot certainly appropriate to itself the power of adjudication which the parties by agreement have vested in the Arbitral Tribunal. Neither does the impugned order discuss nor has the senior counsel for BEPL disclosed the "protection" afforded to BEPL by directing NHAI to make payment or the need therefor nor has it been disclosed in the arguments. On the contrary, the argument is that the payment is due as per the terms of the agreement, *de hors* any finding of the Arbitral Tribunal. We fail to see how adjudication of such argument is not final but fits in the parameters of "interim measures".

46. The judgments of the Division Bench of this Court in ***Value Source Mercantile Limited*** supra (which incidentally, is authored by one of us (Rajiv Sahai Endlaw, J.)) and ***Kal Airways Private Limited*** supra cannot be read as entitling the Court to, in the garb of Section 9, decide substantive claims and direct payments to be made merely because the claimant offers to secure the same by a bank guarantee. While (a) in ***Value Source Mercantile Limited*** supra, in exercise of powers under Section 9, admitted rent for the admitted period due, direction wherefor at interim stage is permitted to be made under Order XXXIX Rule 10 of the CPC and under Order XV-A of the CPC as applicable to Delhi also, was directed to be made, (b) in ***Kal Airways Private Limited*** supra, in exercise of powers under Section 9, the amounts were directed to be secured, by part deposit in the Court and by

part furnishing of bank guarantee, and which power is expressly vested under Section 9(1)(ii)(b). Though undoubtedly, as held, the powers of the Court under Section 9 are wide but cannot be held to be so wide as to be in excess of preserving the status required to be preserved and so as not to reduce the arbitral award to a paper decree and so as not to lead either party to the arbitration to steal a march over the other. The exercise of powers under Section 9 is subject to bar/prohibition contained in Section 5. Clause (e) of Section 9(1)(ii), in our view has to be read *ejusdem generis* to the earlier clauses (a) to (d) which are all of an interim nature.

47. As far as reliance/reference as aforesaid, in some of the judgments on Order XXXIX Rule 10 of the CPC is concerned, the same empowers the Court to, in a suit, subject matter whereof is money or other deliverable property, to order the same to be deposited in Court or delivered with or without security and subject to further direction, only where it is admitted by the party against which order is sought that it is holding such money or property as a trustee for another or that it belongs to or is due to the party claiming it. The same nowhere empowers the Court to, before final adjudication, as an interim measure and on a *prima facie* view, direct delivery, when there is no such admission. In the facts of the present case, as aforesaid, there is no admission of NHAI and the ingredients of Order XXXIX Rule 10 of the CPC are not satisfied, as they were satisfied in ***Jetpur Somnath Tollways Ltd.*** supra.

48. Having held as aforesaid, what follows is that the exercise undertaken by the Commercial Division, was beyond the jurisdiction vested in the Court under Section 9 of the Arbitration Act. The observations/findings and

reasoning of the Commercial Division in the impugned order, being without jurisdiction, cannot be sustained.

49. Further, having held as aforesaid, we also would not like to proceed to adjudicate the respective contention of NHAI and BEPL or to go into the correctness of the reasons recorded by the Commercial Division, being of the view that any opinion expressed by us may also prejudice the findings to be returned by the Arbitral Tribunal, to whose decision thereon the parties have agreed and bound themselves. Moreover, having held that the relief claimed by BEPL is not an interim measure capable of being granted under Section 9 of the Act, we exercising appellate jurisdiction against an order in a Section 9 application, do not even have jurisdiction to deal with the said arguments.

50. Resultantly, the appeal is allowed; the impugned order/judgment dated 25th November, 2019 is set aside; the application of BEPL under Section 9 of the Act, being OMP(I)(COMM) No.218/2019, is dismissed.

51. However the parties are left to bear their own costs.

RAJIV SAHAI ENDLAW, J.

ASHA MENON, J.

MAY 11, 2021
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