2024:DHC:8011

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

Judgment reserved on: 23.09.2024
Judgment pronounced on: 16.10.2024

\+ **OMP (ENF.) (COMM.) 97/2024, EX.APPL.(OS) 703/2024, EX.APPL.(OS) 1176/2024, EX.APPL.(OS) 1184/2024, EX.APPL.(OS) 1265/2024, EX.APPL.(OS) 1419/2024**

NATIONAL HIGHWAYS AUTHORITY OF INDIA
.....Decree Holder

Through: Mr. Ankur Mittal, Mr. Abhay Gupta, Mr. Ashish Gajwani, Advs.

versus

GURUVAYOOR INFRASTRUCTURE PVT. LTD.
.....Judgement Debtor

Through: Mr. Sandeep Sethi, Sr. Adv., Mr. Ajay Sondhi, Mr. Aditya Sagar, Mr. Vidit Agarwal, Ms. Renu Chauhan, Ms. Ritika Harplani, Advs. for applicant no. 1 and 2.
Ms. Bhavika Deora, Ms. Saru Sharma, Advs. for Escrow Agent, IDFC.
Mr. Arjun Syal, Mr. Shreyan Das, Advs.
Mr. Anurag Ahluwalia, Ms. Hridyanshi Sharma, Advs. for ED.

CORAM:
HON'BLE MR. JUSTICE JASMEET SINGH

J U D G M E N T

: JASMEET SINGH, J

EX.APPL.(OS) 921/2024 & EX.APPL. 1220/2024

1. EX.APPL.(OS) 921/2024 is an application filed by the respondent seeking modification of *ad-interim* order dated 02.05.2024 passed by this court in the captioned petition under section 17(2) of the Arbitration and

Conciliation Act, 1996 seeking enforcement of orders dated 11.10.2022 and 10.05.2023 passed by the Arbitral Tribunal. The prayer reads as under:-

> "*a. Modify its directions in the order dated 02.05.2024 insofar as it directs the Applicant to maintain a minimum balance of INR 100 crores in the Escrow Account and pay a sum of INR 10 crores to the Petitioner by the 10th of every month and in modification thereof dispense with the requirement to maintain any minimum balance and allow the Applicant pay a sum of Rs. 5 Crores and Rs. 10 Crores to the Petitioner by the 10th of each month during the financial year 2024 – 2025 and 2025 – 2026 respectively and that such monthly payment shall be done by the Applicant/Respondent till the realization of only the principal sum due towards Negative Grant under Article 23 of the Concession Agreement i.e. Rs. 200 Crores;"*

2. EX.APPL. 1220/2024 is an application on behalf of the lenders of the respondent, being India Infradebt Limited (Applicant No. 1) and IDFC First Bank Limited (Applicant No. 2), seeking modification of *ad-interim* order dated 02.05.2024. The prayer reads as under:-

> *"(i) the direction to ensure that a sum of Rs. 100 crores is maintained in the Escrow Account at any point in time - (a) is not meant to prejudice debt service to the Applicants; alternatively, (b) will be satisfied by retaining back in the Escrow Account the excess amount of Rs. 101 crores from the release of the excess amounts under the fixed deposit which currently stands lien marked in favour of the Enforcement Directorate); and*
> *(ii) the direction to pay by the 10th of every month a sum of Rs. 10 crores to NHAI be modified in order to not affect the rights of third parties i.e., the Applicants, such that the debt service payment is not affected."*

3. The facts encapsulating the present matter, as presented by the petitioner, are as under: -

a. The Petitioner and Respondent entered into Concessionaire Agreement dated 27.03.2006 (CA) for a project involving widening of existing two lane portion from Km 270.00 (Thrissur) to Km 316.70 (Angamali) section of National Highway 47 to four lanes and Improvement, Operation and Maintenance of Km 316.70 (Angamali) to Km 342.0 (Edapalli) on National Highway 47 in the State of Kerela. The Concession period was fixed from 22.09.2006 to 22.09.2026 (i.e. work commencement date under clause 1.1 was to start from 180 days of signing of the agreement).

b. As per clause 23 of the CA, the respondent was under an obligation to provide the petitioner negative grant for a sum of Rs. 215 crores, payable in six installments. It is submitted that respondent paid premium/negative grant towards the first instalment to the petitioner for a sum of Rs. 15,00,00,000/-, however failed to provide the second and subsequent negative grant to the petitioner.

c. The parties, the Lender's representative and the Escrow Agent entered into an Escrow Agreement dated 16.03.2007. Further, a State Support Agreement dated 14.12.2007 was also executed between the petitioner, respondent and Government of Kerala.

d. The parties also entered into two Supplementary Agreements dated 23.11.2009 and 03.12.2011. The Provisional Completion Certificate was issued to the respondent on 04.12.2011 and the Completion Certificate was issued on 18.04.2016. Subsequently, the

lender's representative and the escrow agent were changed to IDFC Bank Ltd. and a new Escrow Agreement dated 31.03.2017 was signed.

e. As per clause 25 of the CA, Respondent is to maintain the Escrow Balance and disburse the amount in the Escrow Account. Clause 25 of CA and Clause 3.3.1 of the Escrow Agreement dated 31.03.2017 provides for the mechanism as per which the funds were to be appropriated in order of preference amongst various stakeholders, hereinafter called the "*Waterfall Mechanism*."

f. In 2019, since disputes arose between the parties, arbitration was invoked and a three-member arbitral tribunal was constituted.

g. Since the respondent failed to pay the negative grant and was paying its lenders, investing in mutual funds and fixed deposits in violation of terms of CA and the waterfall mechanism under the Escrow Agreement dated 31.03.2017, the petitioner issued numerous notices, including notice of default dated 11.01.2022.

h. The respondent being aggrieved by the notice dated 11.01.2022, filed an application under section 17 of the Arbitration and Conciliation Act, 1996 seeking stay of effect and operation of the Notice dated 11.01.2022.

i. The Arbitral Tribunal *vide* order dated 26.02.2022 directed the parties to maintain status quo in terms of the Notice issued. However, on an application under section 27 of Arbitration and Conciliation Act, 1996 dated 11.04.2022 by the petitioner seeking interim measures securing the amount of negative grant, the Arbitral Tribunal *vide* order dated 11.10.2022 directed that the Escrow Account shall be strictly

operated in terms of the Escrow Account Agreement dated 31.03.2017. The operative portion of the order dated 11.10.2022 reads as under:-

> "*4. On being asked to seek instructions on the letter dated 10.12.2021, addressed by the Independent Engineer to the Project Director, NHAI, filed with the Application by the NHAI, Mr. Bhandari states, on instructions, that whatever amounts had been withdrawn from the Escrow Account for investments, either in the Mutual Funds or in Fixed Deposits, shall be re-deposited by the Claimant in the Escrow Account, within ten days from today. Further, in future, the Escrow Account shall be operated strictly in terms of the Escrow Account Agreement dated 31.03.2017. It is ordered accordingly.*"

j. Further, the Arbitral Tribunal *vide* order dated 10.05.2023, while disposing of three applications by the parties under section 17 of the Arbitration and Conciliation Act, 1996, observed that the order dated 11.10.2022 is clear and the parties are still governed by the contractual obligations under both the CA and the Escrow Agreement. The operative portion of order dated 10.05.2023 reads as under:-

> *"7. Having bestowed its anxious consideration to the rival submissions, the Tribunal is of the view that the Interim Order dated 11.10.2022, quoted above, is clear and admits of no ambiguity. Admittedly, the Concession Agreement is still alive and hence the rights and obligations of Parties are still governed by the contractual stipulations therein, which obviously, includes the Escrow Account/Escrow Account and the mechanism to between the Parties for of the Escrow Account. Needless to add that Parties to the Escrow Agreement/Escrow Account remain bound bv the terms thereof till the continues to be in force. It, however, for*

reason, NHAI is convinced that the Claimant and/or the Escrow Agent is committing any breach of the Interim Order passed by the Tribunal under Section 17 of the Act, it is always open to it to seek redressal in accordance with law. Enforcement of its Order passed under Section 17 of the Act would be beyond the domain of the Tribunal [See: Amazon.Com NV Investment Hollings LLC v. Euhre Retail Limited & Ors, (2022) 1 SCC 209]

8. As regards the interim reliefs prayed for by NHAI in its Application dated 11.04.2022, inter-alia, seeking a direction to the Claimant to secure the amount of Negative Grant to the extent of an amount of approximately 446 crores and not to divert funds from the Escrow Account towards debt servicing, the Tribunal is of the view that in the light of its Interim Order dated 11.10.2022, no further directions, as prayed for in the Application, can be issued. It will, however, be open to the Parties to the Escrow Agreement to consider and work out some mutually agreeable arrangement whereby the interest of NHAI, at least to the extent of Rs. 200 Crores [Rs. 215 towards the principal amount of Negative Grant less Rs. 15 crores already paid], is protected and at the same time the debt of the Claimant is serviced from the balance amount in the Escrow Account, after meeting the O&M Expenses. If the Parties arrive at any such interim arrangement, the Escrow Agent shall secure a sum of Rs. 200 crores, before any amount towards the debt servicing is released, till further Orders by the Tribunal in that regard."

k. The petitioner submits that despite unambiguous directions of the Arbitral Tribunal to maintain the amount in the Escrow Account as per the Escrow Agreement, the respondent during period from 01.10.2022 till 28.02.2024 continued to make payment towards Debt

Service, invested in Mutual Funds, FDs and legal fee which amounted to Rs 246,90,45,130/- while an amount of Rs. 614,41,01,903/- towards Negative Grant is still outstanding towards the petitioner.

l.In this view, the present captioned petition seeking enforcement of the orders dated 11.10.2022 and 10.05.2023 of the Arbitral Tribunal was filed and an interim order was passed on 02.05.2024. The operative portion of order dated 02.05.2024 reads as under:-

> *"33. Bearing these proposals in mind and the schedule which was provided in the Concession Agreement, prima facie, the Court is of the opinion that the amount termed as negative grant per the Concession Agreement, deserves to be secured. It also appears from the submissions today that there are some proceedings which the Enforcement Directorate has also commenced against the Judgment Debtor herein. These factors, in fact, lend credence to the further apprehension of the NHAl that the revenues may not be recoverable later on. Under such circumstances, the following directions are issued:*
>
> *i. By 15th May, 2024, the Respondent/Judgment Debtor herein shall pay a sum of Rs. 50 Crores to NHAI Thereafter, by the 10th of every month a further sum of Rs. 10 Crores shall be continued to be paid to the NHAI*
>
> *ii. It shall be ensured that a minimum balance of Rs. 100 crores is maintained in the escrow account at any point in time.*
>
> *iii. None of the FDs created by GIPL from the funds arising out of the Escrow account, shall be encashed or withdrawn.*

> *iv. Further an affidavit shall be filed confirming the status of the amounts which were to be put back in the Escrow account as recorded in order 11th October 2022, of the Arbitral Tribunal.*
>
> *v. The Escrow Agent shall be bound to act strictly in terms of the Escrow Agreement and not permit any withdrawals contrary to the said Agreement. An affidavit shall be filed by the Escrow Agent confirming this, failing which stringent action would be liable to be taken against IDFC - the Escrow Agent.*
>
> *The present order shall be communicated by NHAI as also the Judgement Debtor to the Escrow Agent, for strict compliance of the same.*
>
> *34. It is directed that if there is any violation or non compliance of the directions passed above, the NHAI is free to move an application to seek a freezing of the escrow account/ further debits that are being made from the said escrow account."*

m. The SLP(C) No. 13032/2024 preferred against the abovesaid order has been dismissed on 14.06.2024 by the Hon'ble Supreme Court. The order reads as under:_

> "*We are not inclined to interfere with the impugned judgment and order. The Special Leave Petition is, accordingly, dismissed."*

Submissions by respondent

4. The respondent submits that without prejudice to its rights and contentions, the respondent has complied with the direction contained in para 33 (i) of the order dated 02.05.2024 and transferred a sum of Rs. 50

crore in favour of the petitioner on 16.05.2024. With regard to the direction contained in para (iv), the respondent duly complied with the same and filed compliance affidavits dated 03.11.2022 and 09.01.2023 in this regard. However, by way of the present application, the respondent is seeking to modify direction of this court in para 33(i) and (ii) to the extent wherein the respondent has been directed payment of a sum of INR 10 crores by the 10th of every month and maintaining a minimum balance of INR 100 crores in the Escrow Account at any point in time.

5. The respondent submits that paragraph 33(ii) is incapable of being complied with since the respondent company does not generate enough revenue to keep aside Rs. 100 crore, despite its best efforts**.** The average monthly cashflow of the project is Rs. 16 crore and the quarterly debt obligation of the respondent is Rs. 17 crore approx. The average monthly Operations and Management ('O&M') is Rs. 2.5 to Rs. 3 crores. Reliance is also placed on the bank account statements of the Escrow Account, maintained by the respondent, showing that the respondent is not in a position to maintain a minimum balance of Rs. 100 crores in the Escrow Account at all times or pay Rs. 10 crore every month to the petitioner.

6. The respondent submits that in the orders dated 11.10.2022 and 10.05.2023 by the Arbitral Tribunal there is no direction maintain a minimum balance of Rs. 100 Crores in the Escrow Account nor does such a direction have any contractual basis. Additionally, relief of this nature has not been prayed for in the petition. The respondent submits that the order dated 11.10.2022 was passed with respect to monies in the Escrow Account being invested and not to payments being made from Escrow Account towards the purported Negative Grant dues.

7. With respect to non-payment of negative grant, the respondent submits that the same is not a deliberate non-performance but a result of the breaches and non-fulfillment of obligations on the part of the petitioner. It is stated that ever since the commencement of commercial operations in February 2012, the petitioner has been in continuous violation of obligations under the Escrow Agreement dated 31.03.2017 and the Concession Agreement dated 27.03.2006. The breaches are:-

a. Continuing/recurring losses on account of non-payment of reimbursable claims arising out of free passes issued to locals pursuant to Government Order dated 18.02.2012 resulting in losses amounting to Rs. 382.19 Crores as on February 2024 including interest.

b. Continuing/recurring losses on account of non-payment of toll fees by KSRTC buses resulting in losses amounting to Rs. 315.74 Crores as on February 2024, including interest.

c. Non – implementation of toll fee revision resulting in losses amounting to Rs.13,08,41,660/-.

8. It is submitted that the obligation to pay Negative Grant from the toll collections during the period from 2016 – 2020 was subject to the ability of the Respondent to exercise its rights to collect toll as provided under Article 3 of the Concessionaire Agreement. Since it was the petitioner who was in violation of the terms under CA, which was acknowledged by the petitioner, the petitioner took no coercive steps, voluntarily, against the respondent for non-payment of the Negative Grant.

9. The obligation of the Applicant/Respondent to pay the Negative Grant under Article 23 of the Concession Agreement is intrinsically and directly linked to the ability of the Respondent to exercise its unfettered rights as

provided under Article 3 of the CA. The obligation of the Applicant/Respondent to follow the waterfall mechanism under Article 25.2 of the CA is subject to the ability of the Applicant/Respondent to exercise its right guaranteed under Article 3 of the CA. Therefore, in the event of failure on the part of the Petitioner to fulfil its obligations under Article 25.1, the Petitioner is not entitled to claim Negative Grant and/or priority in disbursal towards the payment of Negative Grant as provided under Article 25.2.

10. The respondent submits that the arbitral tribunal *vide* its order dated 10.05.2023 never intended that the negative grant be paid, since such an order would tantamount to granting a final relief at the interim stage. It is submitted that the order of 10.05.2023 was contingent upon an interim arrangement reached between the parties for securing of an amount and since no arrangement was arrived at, there exists no direction to secure any amount, especially any direction for prioritizing of negative dues over and above debt service obligations.

11. The respondent submits that if the Applicant/Respondent is made to pay Rs. 10 crores on a monthly basis to the Respondent then the Applicant/Respondent will not only be rendered incapable of servicing its debt obligations and thereby become NPA but will also fail to undertake O&M expenditure on the Project.

12. The respondent further submits that the petitioner has sought contempt action before the learned Arbitral Tribunal for non-compliance of the orders dated 11.10.2022 and 10.05.2023, therefore the petitioner is estopped from pursuing enforcement of these orders before this court.

Submission by lenders

13. On the other hand, the lenders are also seeking clarification/modification of the order dated 02.05.2024 on the ground that even though they are strangers to the ongoing arbitration between the parties, but the mechanism created under the interim order of 02.05.2024 for securing the claims of NHAI is interfering with the contractual entitlements of the lenders with the respondent company.

14. It is submitted by the lenders that initially, a consortium of lenders, with Punjab National Bank as the Lead Bank, had loaned a sum of about Rs. 465 crores to the respondent for building the project highway (as defined under the CA). The Punjab National Bank was also appointed as the Escrow Agent, however subsequently, in 2013, the Applicant No.2 refinanced the entire loan of Rs. 460 crores to the Respondent for construction of the Project. Accordingly, the applicants and the respondent entered into a Common Loan Agreement dated 27.03.2013. However, the Punjab National Bank continued to act as the Escrow Agent.

15. The lenders submit that to promote lenders to lend capital for creation of crucial public infrastructure projects, Union of India evolved the contractual structure for execution of an Escrow Agreement contemplating payment of cashflow generated from the infrastructure project to be used for repayment of loan amounts. The credit facility granted by Applicant No. 2 was secured by:-

a. Escrow Account Agreement dated 25 February 2014 entered into between Punjab National Bank (as the Escrow Agent), Applicant No.1 (as the Lenders' Representative), respondent and NHAI;

b. Substitution Agreement dated 25 February 2014 entered into between NHAI, GIPL and the Applicant No.2 (as the Senior Lender),

which inter alia made provision in relation to substitution of the Selectee in place of GIPL in case of any Event of Default on GIPL's part and payment of 'Termination Payments' by NHAI to the Senior Lender.

c. Tripartite Agreement dated 27 June 2014 was entered into between the Applicant No.1, NHAI and GIPL wherein in 2014, a part of the loan given by the Applicant No.2 (Rs. 100 crores) was assigned by part downsell of the facility by the Applicant No.1.

d. Punjab National Bank continued to act as the Escrow Agent till 2017. Thereafter, on 31 March 2017, respondent, the Applicant No.2 (as the Escrow Agent), the Applicant No.2 (as the Lender's Representative) and NHAI entered into the Escrow Account Agreement whereby the Applicant No.2 was appointed as the Escrow Agent, in place of Punjab National Bank.

16. The lenders submit that the Directorate of Enforcement, Cochin Zonal Office ("ED") has attached/ seized an amount of Rs. 125.21 crores under Section 17(1-A) of the Prevention of Money Laundering Act, 2002 *vide* its order dated 17 October 2023. Due to the said order, the respondent created an interest bearing fixed deposit *('FD')* for an amount of Rs. 125.21 crores from the Escrow Account in favor of ED. Therefore, the direction by this Hon'ble Court *vide* the Order dated 02.05.20224 to maintain a sum of Rs. 100 crores was in any event incapable of being complied with by the respondent since the balance amount in the Escrow account on 02.05.2024 was only Rs. 50,18,34,670.42.

17. The respondent submits that the CBI has filed a chargesheet dated 28 December 2023 with the Special Judge, CBI Cases-III, Ernakulam, wherein

it is stated that the loss to the government is only approximately Rs. 24 crores. Therefore, in view of this quantification by the CBI, the balance sum of Rs. 101 crores shall be available as security for Negative Grant. It is undertaken by the respondent *vide* letter dated 21 February 2024, that the amount attached by the ED would be made available as security for Negative Grant.

18. With regard to the direction that the payment of Rs. 10 crores p.m. to NHAI, the lenders submits that that after making the said payment, the respondent will not be able to service its debt and the account of the respondent would be declared as a Non-Performing Asset. It is submitted that the account of the respondent is already overdue.

19. Further, it is submitted by the lenders that the even the learned Arbitral Tribunal was conscious of the fact that debt service payments need to be continued. In the order dated 10.05.2023, it was emphasized that the parties should work towards mutably agreeable arrangement wherein the NHAI's claim for Negative Grant, should only be secured with respect of the principal amount of Negative Grant, i.e. Rs. 200 crores and the debt of the respondent is also serviced. It is also submitted that the lenders deal with public money so their debt should be paid.

Submissions by the petitioner

20. The petitioner submits that the SLP against the interim order dated 02.05.2024 was dismissed by the Hon'ble Supreme Court and hence the order has attained finality and should not be modified. It is submitted that the present modification applications are nothing but a review petition disguised as a modification and it cannot be entertained once the SLP against the order in question has been dismissed. Reliance is placed on the

judgment of the Hon'ble Division Bench of this court *in Deepak Khosla v. Montreaux Resorts Pvt. Ltd*., 2014 SCC OnLine Del 1301 which reads as under:-

> *"7. The first question to be decided is whether the dismissal of the SLP filed by the applicant against the order dated 24.04.2012 passed by the Division Bench precludes the filing of the present applications for "modification" and "clarification". The order passed by the Supreme Court on the SLP is as under:*
> *"Delay condoned. We see no reason to interfere with the directions passed by the High Court. The special leave petition is, therefore, dismissed." It is a settled proposition that mere dismissal of an SLP without assigning any reason does not tantamount to affirmation of the impugned judgment on merits. The question here however is if an SLP is rejected by a speaking or reasoned order, what would be its effect. This aspect has been dealt with by the Supreme Court in Kunhayammed v. State of Kerala, AIR 2000 SC 2587, a judgment of a three Judge Bench. At page 2597 of the report it was observed as under: -*
> *"A petition for leave to appeal to this court may be dismissed by a non-speaking order or by a speaking order. Whatever be the phraseology employed in the order of dismissal, if it is a non-speaking order, i.e., it does not assign reasons for dismissing the special leave petition, it would neither attract the doctrine of merger so as to stand substituted in place of the order put in issue before it nor would it be a declaration of law by the Supreme Court under article 141 of the Constitution for there is no law which has been declared. If the order of dismissal be supported by reasons then also the doctrine of merger would not be attracted because the jurisdiction exercised was not an appellate jurisdiction but merely a discretionary jurisdiction refusing to grant leave to appeal. We have already dealt with this aspect earlier. Still the reasons stated by the court would attract applicability of article 141 of the Constitution if there is a law declared by the Supreme Court which*

obviously would be binding on all the courts and tribunals in India and certainly the parties thereto. The statement contained in the order other than on points of law would be binding on the parties and the court or tribunal, whose order was under challenge on the principle of judicial discipline, this court being the apex court of the contrary. No court or tribunal or parties would have the liberty of taking or canvassing any view contrary to the one expressed by this court. The order of the Supreme Court would mean that it has declared the law and in that light the case was considered not fit for grant of leave. The declaration of law will be governed by article 141 but still, the case not being one where leave was granted, the doctrine of merger does not apply. The court sometimes leaves the question of law open. Or it sometimes briefly lays down the principle, may be, contrary to the one laid down by the High Court and yet would dismiss the special leave petition. The reasons given are intended for purposes of article 141. This is so done because in the event of merely dismissing the special leave petition, it is likely that an argument could be advanced in the High Court that the Supreme Court has to be understood as not to have differed in law with the High Court." (underlining ours)

It is evident from the above observations that in the present case though the doctrine of merger is not attracted, still the statement contained in the order passed by the Supreme Court on the SLP to the effect that it does not see any reason to interfere with the directions passed by this Court is binding on the parties as well as this Court whose order was under challenge, on the principle of judicial discipline. The parties would, therefore, have no liberty of taking or canvassing any view contrary to the one taken by the Supreme Court. It follows that the applicant does not have the liberty of seeking any clarification or modification of the order dated 24.04.2012 which would result in propounding a view contrary to the view expressed by the Supreme Court that there was no reason to interfere with the directions issued by this Court.

> *Moreover, the applicant has not taken the leave of the Supreme Court to file a review petition before this Court nor has he sought the leave of the Supreme Court to file "clarification" or "modification" petition before this Court. In this view of the matter, we are of the opinion that the present applications which have disguised him different nomenclature of "clarification" or "modification" cannot be entertained by this Court."*

21. Even though, the applicant/respondent has paid a sum of Rs. 50 cores on 16.05.2024 and two monthly instalments of Rs. 10 Crore each on 10.06.2024 and 05.07.2024, in terms of the directions passed by this Court, however the respondent has failed to maintain balance of Rs. 100 crore in the Escrow Account and continued to make payment towards debt service, in violation of the waterfall mechanism under the CA and the Escrow Agreement.

22. It is submitted that the averment that obligation to pay negative grant under Article 23 of the CA is directly linked to the ability to collect toll fees in terms of Article 3 of the Concession Agreement is without merit. A combined reading of Article 23 and Article 3 of the CA makes it clear that the payment of Negative Grant under Article 23 and the right of the Petitioner under Article 25.2 to secure the amount of Negative Grant, as per the waterfall mechanism, are not dependent on the rights of the Applicant provided under Article 3 of the CA.

23. It is also submitted that the averment that the issuance of free pass to locals restricted the rights of the respondent is without merit since the petitioner did not have any role or liability towards the same and the said averment already stands rejected by the Hon'ble Supreme Court *vide* order dated 14.06.2024 in the SLP filed challenging the order dated 02.05.2024.

24. Further, it is submitted that the there was no modification of the waterfall mechanism provided under the CA and the Escrow Agreement. The learned Arbitral Tribunal *vide* its order dated 11.10.2022 had directed the parties to follow the waterfall mechanism as provided under the agreements. The payment of Negative Grant is on a higher pedestal than the debt service payments. The same was also noted by this court while passing the order dated 02.05.2024.

25. With respect to the inability to comply due to the FD, the petitioner submits that the directions by this court could have been complied with through toll collection itself had the respondent in collusion with the lenders not created FD from amount lying in the Escrow Account, especially when the said monies do not belong to the respondent.

26. The petitioner submits that the lenders are seeking a direction that their debts be serviced contrary to the waterfall mechanism. A perusal the waterfall mechanism, as contained in the Escrow Agreement, would show that debt service falls below payment of negative grant. Thus, even going strictly by the waterfall mechanism, no debt can be served through the Escrow Account unless the total negative grant already due to the petitioner stands paid.

Analysis

27. I have heard the learned counsel for the parties and perused the material on record.

28. The first question that arises for consideration of this court is that once an SLP has been dismissed by the Hon'ble Supreme Court against the interim order dated 02.05.2024, can the present applications for modification be sustained?

29. The Hon'ble Supreme Court in *Khoday Distilleries Ltd. v. Sri Mahadeshwara Sahakara Sakkare Karkhane Ltd.*, (2019) 4 SCC 376 has settled the legal position in this regard. The operative portion reads as under:-

> *"**26.** From a cumulative reading of the various judgments, we sum up the legal position as under:*
>
> ***26.1.** The conclusions rendered by the three-Judge Bench of this Court in Kunhayammed and summed up in para 44 are affirmed and reiterated.*
>
> ***26.2.** We reiterate the conclusions relevant for these cases as under:*
>
> > *"(iv) An order refusing special leave to appeal may be a non-speaking order or a speaking one. In either case it does not attract the doctrine of merger. An order refusing special leave to appeal does not stand substituted in place of the order under challenge. All that it means is that the Court was not inclined to exercise its discretion so as to allow the appeal being filed.*
> >
> > *(v) If the order refusing leave to appeal is a speaking order i.e. gives reasons for refusing the grant of leave, then the order has two implications. Firstly, the statement of law contained in the order is a declaration of law by the Supreme Court within the meaning of Article 141 of the Constitution. Secondly, other than the declaration of law, whatever is stated in the order are the findings recorded by the Supreme Court which would bind the parties thereto and also the court, tribunal or authority in any proceedings subsequent thereto by way of judicial discipline, the Supreme Court being the Apex Court of the country. But, this does not amount to saying that the order of the court, tribunal or authority below has stood merged in the order of the Supreme Court rejecting the special leave petition or that the order of the Supreme Court is the only order*

binding as res judicata in subsequent proceedings between the parties.

(vi) Once leave to appeal has been granted and appellate jurisdiction of the Supreme Court has been invoked the order passed in appeal would attract the doctrine of merger; the order may be of reversal, modification or merely affirmation.

(vii) On an appeal having been preferred or a petition seeking leave to appeal having been converted into an appeal before the Supreme Court the jurisdiction of the High Court to entertain a review petition is lost thereafter as provided by sub-rule (1) of Order 47 Rule 1 CPC."

26.3. Once we hold that the law laid down in Kunhayammed is to be followed, it will not make any difference whether the review petition was filed before the filing of special leave petition or was filed after the dismissal of special leave petition. Such a situation is covered in para 37 of Kunhayammed case.

***27.** Applying the aforesaid principles, the outcome of these appeals would be as under.*

***28.** In the instant case, since special leave petition was dismissed in limine without giving any reasons, the review petition filed by the appellant in the High Court would be maintainable and should have been decided on merits. Order dated 12-11-2008 passed by the High Court is accordingly set aside and matter is remanded back to the High Court for deciding the review petition on merits. The civil appeal is disposed of accordingly.*

***29.** In this case, we find that the special leave petition was dismissed with the following order passed on 5-1-2012:*

"We find no ground to interfere with the impugned order. The special leave petition is dismissed."

Here also, the special leave petition was dismissed in limine and without any speaking order. After the dismissal of the special leave petition, the respondent in this appeal had approached the High

Court with review petition. The said review petition is allowed by passing order dated 12-12-2012 on the ground of suppression of material facts by the appellant herein and commission of fraud on the Court. Such a review petition was maintainable. Therefore, the High Court was empowered to entertain the same on merits. ....”

30. What appears from the above judgment is that if an order of dismissal of the SLP is a non-speaking order and no reasoning has been given by the Hon’ble Supreme Court for the same, then review of the order challenged is permissible.

31. The judgment of the Hon’ble Supreme Court in *Khoday Distilleries (supra)* is later than the judgment of the Division Bench of this court in *Deepak Khosla (supra)* and is of a Superior Court. Therefore, the judgment of *Khoday Distilleries (supra)* needs to be followed.

32. Since the SLP, filed by the respondent/applicant, has been dismissed *in limine vide* order dated 14.06.2024, then the order of this court has not merged with the order of the Hon’ble Supreme Court. Therefore, the dismissal of SLP by the Hon’ble Supreme Court would not limit this court to modify or clarify the interim order dated 02.05.2024.

33. Hence, I am of the view that the present applications can be decided on merits and are therefore being entertained.

34. The next question that arises for the consideration of this court is that whether the interim order dated 02.05.2024 warrants any interference/modification as prayed?

35. The respondent is seeking modification on the grounds that: (i) Interim orders of the Arbitral Tribunal do not direct for negative grant to be paid or minimum balance to be maintained; (ii) Compliance with the directions of this court shall jeopardize the O&M of the project; (iii) The

waterfall mechanism was subject to unfettered rights of toll collection; (iv) Since an application for contempt has been preferred by the petitioner before the learned Arbitral Tribunal, therefore the present enforcement shall not lie.

36. The lenders are seeking modification primarily on the ground that the respondent is under an obligation to service its debt and if the interim order of 02.5.2024 is not modified then the respondent will not be able to service its debt obligations.

37. The relevant clauses of the CA and the Escrow Agreement, with respect to the underlying waterfall mechanism, are reproduced below:-

"**Clause 23 of CA**

XXIII. NEGATIVE GRANT/ GRANT

The Concessionaire agrees to provide to NHAI cash payment (the "Negative Grant") equal to the sum, set forth in the Bid of the Bidder and accepted by NHAI in accordance with the provisions of this Article XXIII.

23.1 The Negative Grant shall be paid by Concessionaire as proposed by the Concessionaire in its Bid as set forth below:

For Negative Grant (Rs in crores) Rs. 215.00 Crores

Concession Year	1	2	3	4	5	6	7	8	9	10	11	12	13
Negative Grant (upto 13th year of the Concession Period)	15	0	0	0	0	0	0	0	40	40	40	40	40

Negative Grant shall be paid in advance within 90 days of the commencement of the year for which it is due and payable.

23.2 Subject to provisions of the Clause 23.4, the Grant shall be applied by the Concessionaire for meeting the capital cost of the Project and shall be treated as part of the shareholders' funds ("the Equity Support").

Clause 25 of CA

"***XXV ESCROW ACCOUNT***

25.1 The Concessionaire shall within 60 days from the date of this Agreement open and establish the Escrow Account with a Bank (the

"Escrow Bank") and all funds constituting the Financing Package for meeting the Total Project Cost shall be credited to such Escrow Account. During Operations Period all Fees collected by the Concessionaire from the users of the Project Highway shall be exclusively deposited therein. In addition, all Fees collected by NHAI in exercise of its rights under this Agreement during the Concession Period and all disbursements or payments by NHAI pursuant hereto shall also, subject to the rights of deductions and appropriations therefrom of NHAI under this Agreement, be deposited by NHAI in the Escrow Account.

25.2 Disbursements from Escrow Account

25.2.1 The Concessionaire shall give, at the time of the opening of the Escrow Account, irrevocable instructions by way of an Escrow Agreement substantially in form set forth in Schedule 'Q' (the "Escrow Agreement") to the Escrow Bank instructing, inter alia, that the deposits into the Escrow Account shall subject to Clause 25.2.3, be appropriated in the following order every month and if not due in a month then appropriated proportionately in such month and retained in the Escrow Account and paid out therefrom in the month when due unless otherwise expressly provided in the instruction letter:

(i) All taxes due and payable by the Concessionaire;

(ii) All expenses in connection with and relevant to the Construction of Project Highway by way of payment to the EPC Contractor and such other persons as may be specified in the Financing Documents;

(iii) O&M Expenses including Fees collection expenses incurred by the Concessionaire directly or through O&M Contractor and/or Tolling Contractor, if any, subject to the items and ceiling in respect thereof as set forth in the Financing Documents but not exceeding 1/12 (one twelfth) of the annual liability on this account;

(iv) The whole of the expense on completion of Punch List items incurred by NHAI;

(v) The whole or part of the expense on repair work or O&M Expense including Fees collection expenses incurred by NHAI;

(vi) All Concession Fees and any Negative Grant due to NHAI from the Concessionaire under this Agreement;

(vii) Reimbursements of expenditure incurred by NHAl, if any, for payment of insurance premia, etc., which are otherwise Concessionaire's responsibility, on account of failure on part of the Concessionaire to keep such insurance(s) effective and in force.

(viii) Monthly proportionate provision of Debt Service Payments due in an Accounting Year and payment of Debt Service Payments in the month when due;

(ix) One-half of such remuneration, cost and expenses of the Independent Consultant in case the Concessionaire does not reimburse the remuneration, cost and expenses of the Independent Consultant to NHAI within 15 (fifteen) days of receiving a statement of expenditure from NHAI.

(x) Any payments and Damages due and payable by the Concessionaire to NHAI pursuant to this Agreement, including repayment of Revenue Shortfall Loans, recovery due to reduction in the scope of work, penalty for non completion of Punch List items, penalty for O&M expenses incurred by NHAI; and

(xi) Balance in accordance with the instructions of the Concessionaire.

25.2.2 The Concessionaire shall not in any manner modify the order of payment specified in this clause 25.2 except with the prior written approval of NHAI.

Clause 3.3.1 of the Escrow Agreement dated 31.03.2017

"3.3.1 The Escrow Agent shall withdraw amounts from the Escrow Account and appropriate in the following order every month as more

particularly given in the Bank Performa and deposit in the relevant Sub-Account for payments and if not due in a month then appropriate proportionately in such month and retain in the Sub-Account and pay out therefrom on the Payment Date(s):

(a) All taxes due and payable by the Concessionaire;

(b) All expenses in connection with and relevant to the Construction of Project Highway by way of payment to the EPC Contractor and such other persons as may be specified in the Financing Documents;

(c) O&M Expenses including Fees collection expenses incurred by the Concessionaire directly or through O&M Contractor and/or Tolling Contractor. If any, subject to the items and ceiling in respect thereof as set forth in the Financing Documents but not exceeding one twelfth (1/12) of the annual liability on this account;

(d) The whole of the expenses on the completion of Punch List items incurred by NHAI and 2.0 times of such expenses subject to a minimum of Rs.1,000,000 (Rs. One million) in case the punch list items are not completed by the Concessionaire within 120 days from the issue of the provisional completion certificate in accordance with the Specifications and Standards and as detailed in clause 16.5 of the Concession Agreement;

(e) The whole or part of the expenses on repair work or O&M Expenses including Fees collection expenses incurred by NHAI and 1.25 times of the O&M expenses incurred by NHAI if any, in the event of repair and maintenance work being carried out by NHAI (pursuant to the failure on part of the Company in doing so) to maintain and/or repair the Project Highway or a part thereof up to and in accordance with the Specifications and Standards and/or failure on part of the Company to commerce remedial works within 30 (thirty) days of receipt of notice in this regard from NHAI or the Independent Consultant, if any, including those on account of exercise of any of its rights under this Agreement provided NHAI certifies to the Escrow Agent that NHAI has incurred such expenses in accordance with the provisions of this Agreement;

(f) All Concession Fees and Negative Grants payments due to NHAI from the Concessionaire under this Agreement;

(g) Monthly proportionate provision of Debt Service Payments due in an Accounting Year and payment of Debt Service Payments in the month when due;

(h) Reimbursements of expenditure incurred by NHAI, if any, for payment of insurance premia, etc. which are otherwise Company's responsibility, on account of failure on part of the Company to keep such insurance(s) effective and in force;

(i) One half of such remuneration cost and expenses of the independent Consultant in case the Concessionaire does not reimburse the remuneration cost and expenses of the Independent Consultant to NHAI with l 5(fifteen) days of receiving a statement of expenditure form NHAI; () Any payments and Damages due and payable by the Company to NHAI pursuant to this Agreement including Recovery due to reduction in Scope of Work and repayment of Revenue Shortfall Loans; and (k) Balance in accordance with the instructions of the Company. The amounts specified in Clause 3.3.l (a) to (h) constitute the Permitted Payments For each year, Bank Proforma would be separately provided by the Company to the Escrow Agent with the permission of Lenders Representative not later than 60 days prior to the first day of each year."

(Emphasis Supplied)

38. A perusal of the above sections shows that there is an existing mechanism for disbursal of amounts from the Escrow Agreement.

39. The orders dated 11.10.2022 and 10.05.2023 passed by the Arbitral Tribunal categorically holds that the Escrow Agreement is operational and the obligations contained therein continue to be in force. Similarly, it also observes that the CA is alive and the parties are bound by the contractual stipulations therein.

40. The modification sought with regard to payment of Rs. 10 crores towards negative grant by the 10th of every month (contained in para 33(i) of the order dated 02.05.2024) on the ground that the debt obligations of the respondent is to be served (before the amounts towards negative grant is secured) is without any basis and cannot be a ground for modification of the order 02.05.2024.

41. The obligation of servicing debt by the respondent, in terms of both the concessionaire agreement as well as the escrow account agreement, is below the obligation of payment of negative grant to the petitioner. There is nothing on record to show that the obligations under the CA or Escrow Agreement, i.e. the Waterfall Mechanism, have been disturbed, modified or varied. In fact, Clause 25.2.2 of the CA categorically states that the Concessionaire shall not modify the order of payment specified in Clause 25.2 without prior written approval of NHAI.

42. That being the position, there is no basis on which the respondent can seek to modify payment of Rs. 10 crores by the 10th of every month, especially when the said direction has been made to secure payment of principal amount of the negative grant due towards the petitioner.

43. In addition, it can be seen that the order dated 10.05.2023 only states that in case the parties are able to work out an agreeable arrangement, some amount may be released for debt servicing. Since nothing has been brought before me, showing any mutually agreeable arrangement between the parties, I see no ground to modify the condition imposed for payment of Rs. 10 crores by the 10th of every month.

44. Further, with respect to modification of direction of maintaining Rs. 100 cores in the escrow account (contained in para 33(ii) of the order dated

02.05.2024) is concerned, the same is made primarily with a view to secure the negative grant in favour of the petitioner.

45. The fact whether the respondent owes about Rs. 600 crores to the petitioner or that the respondent is entitled to compensation for non-payment of toll fees by KSRTC buses/free passes to the locals, are all matter for adjudication, which the learned Arbitral Tribunal will decide.

46. As of today, payment of negative grant outstanding is more than Rs. 100 crore. The direction for maintenance of minimum balance has been issued to ensure that the petitioner is secured for its amount due and payable towards the negative grant. This amount has not been directed to be released to the petitioner.

47. The argument that the directions contained in para 33(i) and (ii) of the interim order will jeopardise the O&M expenses of the project is also without merit. A perusal of clause of 25 of the CA and Clause 3.3.1 of the Escrow Agreement shows that the payment of Negative Grant is below the payment of O&M expenses for the maintenance of the project. As per the applicant's/respondent's own averments, the average monthly cashflow of the project is Rs. 16 crore and the average monthly expenditure towards O&M is in-between Rs. 2.5 to Rs. 3 crores. In view thereof, the direction contained in para 33(i) and (ii) of the order does not warrant any interference since the payments towards both O&M and negative grant can be made.

48. Further, the argument by the respondent that the payment of negative grant is subject to the unfettered rights of the respondent to collect toll, is a question on merits of the matters and the same shall be decided by the Arbitral Tribunal at the appropriate stage. Hence, it cannot be a ground for seeking modification at this juncture.

49. Additionally, it is settled law that merely pendency of enforcement proceedings shall not bar contempt action and *vice-versa*. The two jurisdictions serve different purposes and there is no overlap between the two. The execution/enforcement proceedings are preferred for the purpose of giving effect to the directions contained in the decree or order, including recovery of amounts due, while contempt proceedings is for wilful disobedience of the directions passed by the court. Hence, I am of the view that enforcement proceedings and contempt proceedings can continue simultaneously.

50. For the said reasons, the arguments raised by the respondent and the lenders, to my mind, are devoid of substance. The court at this stage is only considering if the interim arrangement envisaged in the order dated 02.05.2024 needs modification. Since none of the parties have been able to dispute the waterfall mechanism existing with respect to disbursal of the amounts in the Escrow Account, it is clear that the debt service obligation is due only after the negative grant due to petitioner has been acceded to.

51. For the reasons stated above, no ground is made out for the modification of the order dated 02.05.2024 at this stage.

52. The applications are dismissed.

OMP (ENF.) (COMM.) 97/2024, EX.APPL.(OS) 703/2024, EX.APPL.(OS) 1176/2024, EX.APPL.(OS) 1184/2024, EX.APPL.(OS) 1265/2024, EX.APPL.(OS) 1419/2024

53. List for hearing on 15.01.2025.

OCTOBER 16, 2024 / (DJ) **JASMEET SINGH, J**