

(2024) 04 NCLAT CK 0006**National Company Law Appellate Tribunal New Delhi****Case No:** Interlocutory Application No.985 Of 2023 in Company Appeal (AT) No. 346 Of 2018

State Bank Of India

APPELLANT

Vs

National Highways Authority Of
India & AnrRESPONDENT

Date of Decision: April 2, 2024**Hon'ble Judges:** Ashok Bhushan, Chairperson; Barun Mitra, Member (T)**Bench:** Division Bench**Advocate:** Arun Kathpalia, Monika Singh, Gaurav Lavaina, Ramji Srinivasan, Raunak Dhillon, Isha Malik, Nihaad Dewan, Namrata Srivastava, Dakshita Chopra, Vikash Kumar Jha, Arvind Nayar, C.S.Chauhan, Aditya Sikka, Onshi Jakhar**Final Decision:** Disposed Of

Judgement

Ashok Bhushan, J.

1. This Application has been filed by State Bank of India in Company Appeal (AT) No. 346 of 2018 praying for certain reliefs. Brief facts necessary to be noticed for deciding the Application are:

(i) A Concession Agreement dated 24.04.2012 was executed between the National Highways Authority of India ("NHAI") (Respondent No.1) and Baleshwar Kharagpur Expressway Ltd. ("BKEL") (Respondent No.2.) in relation to development of a Road Project in Baleshwar-Kharagpur Section of NH-60 in the States of Orissa and West Bengal. IL&FS Transportation Networks Limited ("ITNL") promoted and incorporated BKEL as Special Purpose Vehicle to develop the Project. The BKEL availed financial facilities from State Bank of Patiala and two other Banks, i.e., Allahabad Bank and IL&FS Financial Services Limited. A Common Loan Agreement was executed. In terms of the Common Loan Agreement, Respondent No.2, State Bank of Patiala (as the Senior Lenders' representative), Respondent No.1 and SBP (as the Escrow Bank) entered into

an Escrow Agreement.

(ii) State Bank of Patiala was merged with State Bank of India ("SBI"). SBI presently is a lead Bank under the Common Loan Agreement. Under the Concession Agreement, the BKEL was obliged to pay Concession Fees and Premium to the NHAI as per the Concession Agreement.

(iii) Deferment in payment of premium was granted by NHAI with regard to which a Supplementary Agreement was entered in the year 2016. Under the Concession Agreement as well as Escrow Agreement a distribution mechanism was set out. Clause 4.1.1 provided distribution mechanism of the Escrow Agreement. Similarly, under Clause 31.3 of the Concession Agreement regulated the 'Withdrawal during Concession Period'.

(iv) This Tribunal passed an interim order on 15.10.2018 in Company Appeal (AT) No.346 of 2018 with regard to IL&FS and its Group Companies. By subsequent order dated 12.03.2020, this Tribunal confirmed the interim order and approved the Resolution Process of the IL&FS Group to be continued as per the procedure suggested by the Union of India. By an order dated 11.02.2019, this Tribunal accepted the classification of Respondent No.2 - BKEL as 'Red Entity' of the IL&FS Group. Respondent No.2 being Red Entity, it was required to discharge certain payment obligations, which was essential to maintain its going concern status.

(v) By order dated 15.09.2021, on an Application filed by Respondent No.2 for approval of the InvIT Resolution Process before the NCLT, Mumbai, the NCLT Mumbai passed an order stating that certain conditions were required to be fulfilled BY BKEL InvIT Transfer. Respondent No.2 has submitted a Resolution Plan to Senior Lenders for restructuring of its debt under the Reserve Bank of India ("RBI") Prudential Framework for Resolution of Stressed Assets dated 07.06.2019. Respondent No.1 by several letters demanded repayment of premium dues, interest, default interest, penal interest, interest overdue etc. The SBI submitted its objection to Respondent No.1 requesting not to take any coercive steps to jeopardize the Resolution of Respondent No.2

(vi) On 05.12.2022, Respondent No.1 issued notice, marked to Respondent No.2 for initiating proposal for procurement of a third-party agency for user fee collection in two toll plazas on NH-60, which are presently held by Respondent No.2. In response to letter dated 05.12.2022, the Applicant - SBI wrote to Respondent No.1 reiterating that Resolution of Respondent No.2 is currently in progress under the Prudential Framework. In the above background, this Application was filed by SBI praying for following reliefs:

"(a) This Hon'ble Tribunal direct that Respondent No. 1 shall not be permitted to recover, and Respondent No. 2 is not required to pay to Respondent No. 1 any amount

towards the premium payment and other dues (in the nature of default interest and penal interest etc) other than in accordance with the waterfall mechanism prescribed under Clause 4.1 .1 of the Escrow Agreement and prior to debt repayment to the Senior Lenders by Respondent No. 2;

(b) This Hon'ble Tribunal declare that the payments towards premium dues and other dues in the nature of default interest, premium interest, double charge penalty, damage penalty, penal interest etc. as demanded by Respondent No.1 from Respondent No. 2 are not in the nature of going concern payments of Respondent No. 2;

(c) This Hon'ble Tribunal be pleased to cancel and annul the process initiated by Respondent No. 1 for replacing Respondent No. 2 from collecting tolls arising out of the Project;

(d) This Hon'ble Tribunal be please to order and direct that pending resolution of Respondent No. 2 in terms of the Resolution Framework read with the InvIT Resolution Process and BKEL InvIT Transfer approved by the Hon'ble NCL T vide order dated 15 September 2021, Respondent No. 1 shall be restrained from taking any actions which may jeopardise the resolution of Respondent No. 1 including termination of the Concession Agreement, replacement of Respondent No. 2 (as the concessionaire) with any other entity/person for collection toll from the Project and/ or initiation of any legal proceedings against Respondent No. 2 for recovery of premium dues and other dues in the nature of interest and penalties etc;

(e) Ad-interim and interim injunction in terms of prayer clauses (a) to (c) above pending hearing and final disposal of this Application; and

(f) pass such further orders as this Hon'ble Tribunal may deem fit and necessary in consideration of facts and circumstances of the given case, and thus render justice."

2. Notices were issued in the Application and an interim order was passed on 26.04.2023 by this Tribunal in terms of prayers (c) and (d) of the Application. Reply has been filed to the Application by Respondent No.1, to which rejoinder has also been filed by the Applicant.

3. We have heard Shri Arun Kathpalia, learned Senior Counsel appearing for the Applicant; Shri Ramji Srinivasan, learned Senior Counsel appearing for IL&FS; and Shri Arvind Nayar, learned Senior Counsel appearing for NHAI - Respondent No.1.

4. Shri Kathpalia, learned Senior Counsel for the Applicant in support of the Application contends that NHAI has issued notices to Respondent No.2 asking Respondent No.2 to make payment of premium dues, interest, default interest, penal interest, interest overdue etc. and has threatened to terminate the Concession Agreement. It is

submitted that Respondent No.1 is not entitled to claim payment of premium in priority to the debts service of the Lenders. The premium dues as per the Concession Agreement as well as Escrow Agreement is in lower priority to service of debts of the Lenders. It is submitted that the Resolution Process of Respondent No.2 being in final stages, there is no occasion to terminate the Concession Agreement or to appoint a third agency in place of Respondent No.2 for collection of tolls. It is submitted that payment of premium cannot be said to be payment of going concern expenses. Going concern expenses are those, which are necessary for maintaining the business operations of the Corporate Debtor. Premium payment to NHAI are not related to the operation and maintenance of the Project developed by Respondent No.2. The premium payments can be deferred by Respondent No.1 and has also been deferred earlier from 2015 to 2025. NHAI's demand for payment of premium is more than INR 400 crores, whereas in Escrow Account at present the balance is only INR 291.41 crores. Permitting payment from Escrow Account to NHAI shall put Respondent No.2 in jeopardy and it will not be possible to run Respondent No.2 as a going concern.

5. Shri Arvind Nayar, learned Senior Counsel appearing for Respondent No.1, refuting the submissions of learned Senior Counsel for the Applicant submits that the premium dues are nothing but concession fee. Learned Senior Counsel has referred to Clause 25.4 and 26.2.1 of the Concession Agreement and submits that payment of concession fee has priority over the Lenders debt, as per the distribution mechanism in the Escrow Agreement. Also the concession fee has to be paid before the services of debt of Lenders. It is submitted that payment of premium is payment as a going concern and the SBI itself has made the payment of premium till April 2021 and now it has stopped the payment of premium. Concessionaire had not been depositing the monthly deferred premium to the NHAI since April, 2021. It is submitted that under the Concession Agreement, Respondent No.1 is entitled to terminate the Concession Agreement as well as appoint a third party/ agency to collect the toll. Respondent No.1 is fully entitled to terminate the Concession Agreement and appoint any agency, but due to interim order passed by this tribunal on 26.04.2023, Respondent No.1 could not terminate the Agreement. Respondent No.1 has right to take over the toll collection from Concessionaire. It is submitted that premium of total dues against Respondent No.2 are more than INR 400 crores. As per the Concession Agreement, payment has to be made to Respondent No.1 within 30 days of receiving a demand along with necessary particulars. It is submitted that prayers made in IA No.985 of 2023 need to be rejected.

6. Learned Counsel appearing for Respondent No.2 has opposed the prayers (a) and (b) made in the Application, however, it has supported prayers (c) and (d) made in IA No.985 of 2023. It is submitted that payment of premium is payment towards going concern payment and for survival and continued operations of the Entity payment of

premium has to be made to Respondent No.1. It is submitted that SBI has earlier made the payment of premium as a going concern, but has suddenly stopped after April 2021. It is submitted that payment of premium is a payment as a concession fee and payment of concession fee as per the Escrow Agreement as well as Concession Agreement has priority over the payment of dues of the Bank. Learned Counsel for Respondent further submits that going concern payments for IL&FS entity has been permitted by this Tribunal by various orders, including the order dated 29.05.2019 and 14.08.2019. It is submitted that even as per contractual arrangement between the parties concern, the waterfall mechanism set out under the Concession/ Escrow Agreement, payment of premium is on a higher footing than the debt service to the lenders.

7. We have considered the submissions of learned Counsel for the parties and have perused the records.

8. The first question, which needs to be answered is as to whether as per the Concession Agreement and the Escrow Agreement, payment of premium has priority over the payment of debts of the Bank. Both the parties having relied on various clauses of Concession Agreement and Escrow Agreement, we need to notice the relevant clauses herein. The Concession Agreement dated 24.04.2012, in Article 25.4, defines 'premium' in following words:

"25.4. Premium

The concessionaire acknowledges and agrees that as set forth in the Bid, it shall pay to the Authority for each year of the Concession Period, a premium (the "Premium") in the form of an additional Concession Fee, as set forth in Clause 26.2.1, and in the manner set forth in Clause 26.4."

9. Clause 26.1 and 26.2, which are also relevant, are as follows:

"26.1 Concession Fee

In consideration of the grant of Concession, the Concessionaire shall pay to the Authority by way of concession fee (the "Concession Fee") a sum of Re. 1 (Rupee one) per annum and the Premium specified in Clause 26.2.

26.2 Additional Concession Fee

26.2.1 Without prejudice to the provisions of Clause 26.1, the Concessionaire agrees to pay to the Authority, on the Appointed Date a Premium in the form of an additional Concession Fee equal to Rs 35 Crores (Thirty Five Crores) as due to the authority during that year, due and payable for the period remaining in that year, and for each subsequent year of the Concession Period, the Premium shall be determined by

increasing the amount of Premium in the respective year by an additional 5% (five percent) as compared to the immediately preceding year. For the avoidance of doubt, the Premium for all subsequent years shall be determined by increasing the amount of Premium by 5% (five percent) as compared to the immediately preceding year.

For avoidance of doubt it is clarified that the term 'Premium' as referred in para above shall be as applicable for one financial year. In accordance with and in compliance with the terms of this agreement, If payment of such 'Premium' is due and payable only for part of such financial year, then only pro-rata payments @ 1 / 12th of such Premium shall be payable for each month of such part financial year for which such Premium payments is due as payable. For the purpose of assessing the amount due for payment on such payment of Premium, part of a month shall be deemed to be a full month. in such circumstances the subsequent year as referred to in para above, for the purpose of 5% (five per cent) annual escalation, shall fall to commence on 1st of April of the immediately succeeding financial year.

26.2.2 The Premium payable under Clause 26.2.1 shall be deemed to be part of the Concession Fee for the purposes of this Agreement.”

10. The above clauses of the Concession Agreement indicate that Concessionaire has agreed that it shall pay to the Authority for each year of the Concession Period, a premium in the form of an additional concession fee. The Clauses 25.4 and 26.2 contain an agreement of Concessionaire to pay the Authority a premium in the form of an additional concession fee. The definition, thus, clearly indicate that premium is treated to be additional concession fee. Both the clauses uses expression ‘concession fee’ and ‘premium’. Article 31 of the Agreement delas with Escrow Account, Clause 31.3 deals with ‘Withdrawals during Concession Period’. Clause 31.3.1 is as follows:

“31.3 Withdrawals during Concession Period

31.3.1 The Concessionaire shall, at the time of opening the Escrow Account, give irrevocable instructions, by way of an Escrow Agreement, to the Escrow Bank instructing, inter alia, that deposits in the Escrow Account shall be appropriated in the following order every month, or at shorter intervals as necessary, 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:

- (a) all taxes due and payable by the Concessionaire for and in respect of the Project Highway;
- (b) all payments relating to construction of the Project Highway, subject to and in accordance with the conditions, if any, set forth in the Financing Agreements;
- (c) O&M Expenses, subject to the ceiling, if any, set forth in the Financing Agreements;

- (d) O&M Expenses and other costs and expenses incurred by the Authority in accordance with the provisions of this Agreement, and certified by the Authority as due and payable to it;
- (e) Concession Fee due and payable to the Authority;
- (f) monthly proportionate provision of Debt Service due in an Accounting Year;
- (g) Premium due and payable to the Authority;
- (h) all payments and Damages certified by the Authority as due and payable to it by the concessionaire, including repayment of Revenue Shortfall Loan;
- (i) monthly proportionate provision of debt service payments due in an Accounting Year in respect of Subordinated Debt;
- (j) any reserve requirement set forth in the Financing Agreements; and
- (k) balance, if any, in accordance with the instructions of the Concessionaire."

11. When we look into different Clauses, Clause 31.3.1 at Clause (e), deals with 'Concession Fee due and payable to the Authority'; Clause (f) deals with 'monthly proportionate provision of debt service due in an Accounting Year; and Clause (g) deals with 'Premium due and payable to the Authority'. The Escrow Agreement between the parties has also been brought on record. Escrow Agreement dated 22.11.2012 also needs to be noticed to find out the relevant Clauses of the Escrow Agreement with regard to withdrawal during concession period. Clause 4 deals with 'Withdrawals from Escrow Account' and Clause 4.1 deals with 'Withdrawals during Concession Period. Clause 4.1.1 is as follows:

"4. WITHDRAWALS FROM ESCROW ACCOUNT

4.1 Withdrawals during Concession Period

4.1.1 At the beginning of every month, or at such shorter intervals as the Lenders' Representative and the Concessionaire may by written instructions determine, the Escrow Bank shall withdraw amounts from the Escrow Account and appropriate them in the following order by depositing such amounts in the relevant Sub- Accounts for making due payments, and if such payments are not due in any month, then retain such monies in such Sub-Accounts and pay out therefrom on the Payment Date(s):

- (a) all taxes due and payable by the Concessionaire for and in respect of the Project Highway;
- (b) all payments relating to construction of the Project Highway, subject to and in accordance with the conditions, if any, set forth in the Financing Agreements;

- (c) O&M Expenses, subject to the ceiling, if any, set forth in the Financing Agreements;
- (d) O&M Expenses incurred by the Authority, provided it certifies to the Escrow Bank that it had incurred such expenses in accordance with the provisions of the Concession Agreement and that the amounts claimed are due to it from the Concessionaire;
- (e) Concession Fee due and payable to the Authority;
- (f) monthly proportionate provision of Debt Service due in an Accounting Year;
- (g) Premium due and payable to the Authority;
- (h) all payments and Damages certified by the Authority as due and payable to it by the Concessionaire pursuant to the Concession Agreement, including repayment of Revenue Shortfall Loan;
- (i) monthly proportionate provision of debt service payments due in an Accounting Year in respect of Subordinated Debt;
- (j) any reserve requirements set forth in the Financing Agreements; and
- (k) balance, if any, in accordance with the instructions of the Concessionaire."

12. When we look into Clause 31.3.1 and Clause 4.1.1, it is clear that both the provisions provide same priority and Clauses (e), (f) and (g) are the same. The bone of contention between the parties are that since Clause (e) uses word 'Concession Fee due and payable to the Authority', it is higher in priority from Clause (f), which deals with 'monthly proportionate provision of Debt Service due in an Accounting year' and concession fee includes the premium, hence, the premium has to be paid priority to the payment under Clause (f). We have already noticed the relevant Clauses of Concession Agreement, i.e., 25.4, 26.1 and 26.2, where Concessionaire has agreed to make payment of premium. Under the Agreement Clause 26.2, premium payable was treated to be part of Concession Fee for the purposes of the Agreement. When Clauses 25.4, 26.1 and 26.2 are read together, it is clear that 'premium' is treated to be part of Concession Fee, however, 'premium' and 'Concession Fee' are defined separately. The parties entering in the contract were well aware with both 'concession fee' as well as 'premium'. Hence, Clauses (e) and (g) are used separately for 'concession fee' and 'premium'. In event the payment of 'premium' was to be made under Clause (e), there was no occasion for using 'premium' separately in Clause (g). It is well settled rule of construction of contract that when contract between the parties is clear, it has to be given effect to and further no part of the contract can be treated to be OTIOSE. Parties having categorized 'premium' in different Clause, which is below the monthly proportionate provisions of Debt Service due in an Accounting year, it cannot be said that the same was done without any meaning and 'premium' payment is in lower

priority to monthly proportionate provision of Debt Service due in an Accounting Year. We, thus, find substance in the submission of learned Counsel for the Applicant that with regard to withdrawal from Escrow Account, the priority as given in Clause 4.1.1 of Escrow Agreement has to be followed.

13. We, however, notice that in the present case, the 'resolution' of Respondent No.2 as per the Resolution Framework approved by this Tribunal on 12.03.2020 is in final stages. The order dated 15.09.2021 passed by the NCLT has been brought on the record, which notices the approval by Justice D.K. Jain also. When an entity is to be resolved as per Resolution Framework, payments to all creditors/ claimants including the Lenders have to be as per the Resolution of the Entity.

14. It is also relevant to notice that when Resolution of Respondent No.2 is at the final stages, there is no occasion for Respondent No.1 to proceed to terminate the Concession Agreement to further complicate the Resolution of an Entity. Order of this Tribunal dated 12.03.2020, already has set out the Resolution Framework for Entities including the 'Red Entities' and it is in the interest of justice for all the parties that final Resolution of Respondent No.2 be achieved at an early date.

15. In view of the foregoing discussions, we are of the view that IA No.985 of 2023 filed by the State Bank of India deserves to be allowed in terms of prayers (a), (b), (c) and (d). We further direct that the Applicant as well as Respondents to take appropriate measures for final Resolution of the Entity, i.e. Respondent No.2. IA No.985 of 2023 is disposed of accordingly.