

NATIONAL COMPANY LAW APPELLATE TRIBUNAL
PRINCIPAL BENCH, NEW DELHI

Company Appeal (AT) No. 120 of 2021

IN THE MATTER OF:

Indian Bank,Appellant No. 1
Having its SAM Branch at
17, First Floor, Parliament Street,
New Delhi-110001.

Central Bank of India,Appellant No. 2
SAM Branch, Nariman Point,
Central Bank of India,
Ground Floor, Chandermukhi Building,
Nariman Point, Mumbai-400021.

Punjab National Bank,Appellant No. 3
Erstwhile Oriental Bank of Commerce,
Zonal Sastra,
1st Floor, 7, Bhikaji Cama Place,
New Delhi.

Tamilnad Mercantile Bank Limited,Appellant No. 4
Office at 92, Hemprakash Building,
Ground Floor, Kazi Syed Street,
Mandvi, Mumbai-400003.

Union Bank of IndiaAppellant No. 5
Erstwhile Corporation Bank,
Stressed Asset Management Branch,
Bharat House, Ground Floor,
104, B.S. Marg, Fort,
Mumbai-400023.

Life Insurance Corporation of India,Appellant No. 6
Investment (M&A) Dept.
Yogakshema East Wing,
6th Floor, J.B. Marg, Central Office,
Mumbai-400021.

India Infrastructure Finance CompanyAppellant No. 7
Limited,
5th Floor, Plate A & B, Tower-2,
NBCC Centre, Block-B,

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**East Kidwai Nagar,
New Delhi-110023.**

**IFCI Limited,
IFCI TOWER,
61, Nehru Place,
New Delhi-110019**

....Appellant No. 8

Vs.

**Infrastructure Leasing & Financial Services
Ltd. (IL&FS)
IL&FS Financial Centre,
Plot No. C-22, G Block,
Bandra Kurla Complex, Bandra (East),
Mumbai-400051. Maharashtra**

**....Respondent
No.1**

**M/s. Kiratpur Ner Chowk Expressway
Limited (KNCEL)
IL&FS Financial Centre,
Plot No. C-22, G Block,
Bandra Kurla Complex, Bandra (East),
Mumbai-400051.**

**....Respondent
No. 2**

**National Highways Authority of India
(NHAI)
G-5 & 6, Sector 10, Dwarka,
New Delhi-110075.**

**....Respondent
No. 3**

Present:

**For Appellants: Mr. Brijesh Kumar Tamber, Mr. Prateek
Kushwaha, Mr. Vinay Singh Bist, Advocates.**

**For Respondents: Mr. Raunak Dhillon, Mr. Vikash Kumar Jha,
Ms. Isha Malik, Mr. Nihaad Dewan,
Advocates for R-1 & R-2.**

**Ms. Shivangi Khanna, Ms. Madhu Sweta,
Advocates for R-3 (NHAI).**

**Judgment
(Date: 1.8.2023)**

[Per. Dr. Alok Srivastava, Member (Technical)]

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This appeal is filed by the Appellants under section 421 of the Companies Act, 2013 (in short “Companies Act”) aggrieved by the judgment and order dated 24.2.2021 (in short “Impugned Order”) of the National Company Law Tribunal, Mumbai Bench (in short “NCLT”) in CA No. 03 of 2021 filed under CP No. 3638/MB/2018.

2. The Impugned Order has been passed by NCLT, Mumbai by exercising jurisdiction under sections 241-242 of the Companies Act, 2013 (in short “Companies Act”) whereby a proposed settlement between the National Highways Authority of India (in short “NHAI”) and Kiratpur Ner Chowk Expressway Limited (in short “KNCEL”) has been approved resulting in foreclosure of the Concession Agreement regarding construction of Kiratpur – Ner Chowk section of National Highway.

3. In brief, the conspectus of the case is that a Concession Agreement was signed between the NHAI (the Concessions Party) and KNCEL (the Concessionaire) for constructing the Kiratpur-Ner Chowk section of the National Highway in 2012 on Design, Build, Finance, Operate and Transfer (DBFOT) basis. This project was taken up by NHAI through a Special Purpose Vehicle (“SPV”) *Company Appeal (AT) No. 120 of 2021*

KNCEL which is a subsidiary of IL&FS Transportation Network Limited (“ITNL”), which in turn is a subsidiary of Infrastructure Leasing & Financial Services Ltd. (“IL&FS”). According to the Appellants, they are senior lenders who have provided credit to KNCEL for implementation of the project. During the course of the implementation of the project dispute arose between NHA and KNCEL and there were claims and counter claims filed by both KNCEL and NHA against each other and after long-drawn series of communications between the two parties it was mutually decided to foreclose the Concession Agreement under the guidelines issued on 9.3.2019 by the Ministry of Road Transport & Highways (“MoRTH”) titled ‘Guiding Principles for Resolution of Stuck National Highways Projects’ (in short “MoRTH Guidelines”). .

4. The Appellants have stated that credit facilities provided by the Appellants to KNCEL were secured through various securities in favour of banks and financial institutions providing the credit facilities. Due to certain problems that arose in IL&FS and its group companies, a Company Petition CP No. 3638/MB/2018 was filed by the Union of India against IL&FS Limited under sections 241-242 of the Companies Act and by order of NCLT, Mumbai, the IL&FS Board was substituted by a New Board of Directors vide order dated 1.10.2018 of Hon’ble NCLT, Mumbai and moratorium *Company Appeal (AT) No. 120 of 2021*

was declared in IL&FS and its group companies. This order of NCLT was assailed before NCLAT, which by order dated 15.10.2018 granted 'interim stay' against any coercive action by the creditors against IL&FS and its group entities. By order dated 11.1.2019, the NCLT observed that the process required to be followed in the resolution of IL&FS and its group companies through a resolution framework was akin to Corporate Insolvency Resolution Process ("CIRP"). The Appellants have further stated that the proposed Resolution Framework does not envisage settlement in terms of the MORTH Guidelines. The Appellants have claimed that the Concession Agreement dated 16.3.2012 executed between NHAI and KNCEL was for a term of 28 years, which included three years construction period and the MoRTH Guidelines provide that the parties to the Concession Agreement may foreclose the Concession Agreement through mutually agreed terms by executing a 'Supplementary Settlement Agreement'. The Appellants have further stated that the MoRTH Guidelines stipulate that payment to the concessionaire as full and final settlement would be an amount which is the lower amount of the (a) value of work done; or (b) 90% of the debt due, and the calculation of 'Debt Due' will be as per the definition provided in the Concession Agreement.

5. The Appellants have further stated that due to disputes that arose between the two parties, termination notices were issued by both the parties, and KNCEL terminated the Concession Agreement vide its notice dated 24.1.2019 and NHAI communicated its notice of termination on 22.10.2019. During the course of negotiations between the parties, the value of work done in the project was assessed at Rs.1027.79 crores by Independent Engineers (IE). The Appellants have further stated that the amount of "Debt Due" was assessed to be Rs. 787.11 crores by NHAI. The Appellants have added that KNCEL proposed foreclosure of Concession Agreement on payment of compensation of Rs.735.56 crores, which was recalculated by NHAI and it proposed a compensation amount of Rs.708.40 crores to KNCEL and after recoveries of Rs.35.78 crores, a net compensation amount payable to KNCEL was arrived at Rs.672.62 crores as 'full and final settlement' by NHAI. The Appellants have stated that as per calculation which should have been done in accordance with the MoRTH Guidelines, the minimum amount payable works out to be Rs.1025.56 crores which is the amount of compensation that should have been paid to KNCEL as 'full and final settlement'.

6. The Appellants have submitted that they are senior secured lenders of KNCEL and the amount of compensation as 'full and
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final settlement' was arrived at without consulting the Appellants. The Appellants have further stated that approval of settlement by NCLT was beyond its jurisdiction and in violation of mandate under section 241-242 of the Companies Act and, therefore, approval of settlement amount was not in accordance with law.

7. We heard the arguments of the Learned Counsels for the Appellants and Respondents IL&FS and NHAI also perused the record with their able assistance.

8. The Learned Counsel for Appellants has argued that KNCEL had terminated the Concession Agreement vide its notice dated 24.1.2019 and NHAI, after a series of communications between the two parties NHAI and KNCEL, sent its notice of termination on 22.10.2019. Therefore, the Appellants have submitted, the termination notice issued by NHAI was an afterthought and relevant termination notice pertains to one issued by KNCEL on 24.1.2019. He has further argued that status quo was directed to be maintained on account of NCLT's order dated 15.10.2018 regarding IL&FS and its group entities and in the event of termination of contract by KNCEL, the applicable clause for calculation of termination payment is clause 37.3.2 of the Concession Agreement.

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9. The Learned Counsel for Appellants has referred to the circular dated 9.3.2019 issued by MoRTH titled 'Guiding Principles of Resolution of Stuck National Highway Projects' (MoRTH Guidelines) , wherein it is laid down that if there is inability of concessionaire to continue with the project on account of proceedings initiated under IBC or sections 241(2) of the Companies Act, then a Build, Operate, Transfer BOT), or a Design, Build, Finance, Operate and Transfer (DBFOT) project, which qualifies as 'stuck' project, may be foreclosed through mutually agreed Supplementary Agreement executed between the parties and the Concessions Party would pay as "full and final" settlement an amount which is lower of the (a) the value of the work done; and (b) 90% of the "debt due", and further in case of the investment in the project by the concessionaire is not covered under the definition of "debt due", the payment made be restricted to the value of work done.

10. The Learned Counsel for Appellants has claimed that after serving the termination notice, the KNCEL vide its letter dated 26.3.2019 requested for foreclosure of the Concession Agreement and further requested NHAI to pay the settlement amount in accordance with MoRTH Guidelines after foreclosing the *Company Appeal (AT) No. 120 of 2021*

Concession Agreement. He has further claimed that in terms of the MoRTH Guidelines, the minimum amount payable to concessionaire is Rs.1025.56 crores and not the amount of Rs.672.62 crores which is included in the Supplementary Agreement.

11. The Learned Counsel for Appellants has clarified that the Appellants are not aggrieved by the fact the settlement has been entered into between NHAI and KNCEL, but they are dissatisfied by the wrong calculation of “Debt Due” which has resulted in a loss of the amount of recovery to the Appellants which should have been in accordance with MoRTH Guidelines dated 9.3.2019. He has submitted that, in addition, the Appellants are also aggrieved by the extinguishment of their claims. The Learned Counsel has submitted that the senior lenders were not privy to the terms of the settlement between NHAI and KNCEL and were not granted any opportunity of being heard by the learned NCLT while upholding and approving the terms of settlement between NHAI and KNCEL. Thus, the senior lenders could not place on record their contention relating to calculation of ‘Debt Due’ and as on the cut-off date of 15.10.2018, a total sum of Rs.1025.56 cores was the amount of ‘Debt Due’ to the senior lenders of KNCEL, according to correct calculation.

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12. The Learned Counsel for Appellants has also contended that in the Resolution Framework, it is nowhere stated that the consent of the Committee of Creditors, which is obtained in all resolutions of the IL&FS group companies, can be dispensed with when foreclosure of Concession Agreement takes place after mutually agreed settlement under the MoRTH Guidelines. He has further contended that that the Resolution Framework has to be interpreted in the light of prevailing methodology adopted for IL&FS Group Companies, and in the absence of any explicit provision to this effect in the Resolution Framework, it cannot be interpreted to take away the creditors' rights in cases covered by MoRTH Guidelines.

13. The Learned Counsel for Appellants has further argued that the value of work done has been assessed at Rs.1027.79 crores by Independent Engineers("IE") and further the calculation of the term 'Debt Due' has to be done as clearly defined in the Concession Agreement which would include the principal amount, all accrued interest and other charges payable thereon. Further, he has argued that the Appellants/Lenders' claims amounting to Rs.1144.74 crores have been admitted by the Claims Management Consultant appointed under the Resolution Framework. He has

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pointed out that even as per NHAI, the amount of senior debt is Rs.1240.77 crores, and when the sub debt is added to the senior debt amount, the total debt amount comes to Rs.1421.53 crores. He has claimed that rather than applying the definition of the term “Debt Due” as included in the Concession Agreement, the formula used by NHAI for calculating the “Debt Due”, which is by multiplying the Value of Total Project Cost (“TPC”) for work done and senior debt and dividing the same by (Equity + Actual Debt + Sub Debt), is not the correct way of calculation of “Debt Due”.

14. The Learned Counsel for Appellants has also claimed that no estoppel operates in filing the appeal as has been contended by the Respondent since there was no opportunity for representation on the part of the senior lenders before NCLT. Moreover, an estoppel cannot be used in the case of an ultra vires act.

15. The Learned Counsel for Appellants has cited the judgment of Hon’ble High Court of Delhi in the matter of **Jetpur Somnath Tollways Limited & Ors. vs. National Highways Authority of India and 7 Ors. [MANU/DE/2171/2017]** in which by judgment dated 31.7.2017, it was held that the “Debt Due” amount upon termination on account of concessionaire’s default during the operation period made it incumbent on Concessioneing Party NHAI
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to pay Jetpur Somnath Tollyways by way of termination payment, an amount equal to 90% of the “Debt Due” less insurance cover, and upon termination on account of NHAI’s default, NHAI has to pay to the Concessionaire by way of termination payment, an amount equal to the “Debt Due” plus 150% of the Adjusted Equity. He has claimed that the judgment further holds that the termination payment would be in accordance with the definition in the Concession Agreement. The Learned Counsel for Appellant has also contended that there is no stipulation in the Termination Payment clause that any adjustment is to be made prior to calculation of “Debt Due” and as per the definition of “Termination Payment” and “Debt Due” in the Concession Agreement, only the actual debt due has to be taken into account.

16. In reply, the Learned Counsel for R-1 & R-2 has argued that IL&FS and its group companies including KNCEL are currently undergoing a court-monitored resolution process under the aegis of this Appellate Tribunal and the Resolution Framework which is approved by NCLAT, inter-alia, contemplates the appointment of Claims Management Consultant for invitation and admission of claims from financial and operational creditors, resolution/sale of the relevant IL&FS entity and distribution of the financial bid amounts/termination amounts/settlement amounts in the manner *Company Appeal (AT) No. 120 of 2021*

set out in the Revised Distribution Framework. He has further argued that the present appeal seeks to challenge various provisions of the Resolution Framework regarding extinguishment of all third party claims including claims of Appellants herein, even though the Impugned Order was passed keeping in view the detailed order and judgment dated 12/3/2020 of the Appellate Tribunal, wherein the Appellate Tribunal has allowed the resolution of IL&FS Group Companies including KNCEL as per the procedure suggested by Union of India, which, inter alia also, includes (a) Resolution of “Stuck Projects” under MoRTH Guidelines, (b) Distribution of settlement amounts to creditors as per a settlement formula and on the basis of claims admitted pursuant to an independent claims management process; and (c) Extinguishment of such claims against the relevant entity upon disbursement of such settlement/ foreclosure amount, subject inter-alia to the approval of Hon’ble NCLT.

17. The Learned Counsel for R-1 and R-2 has further argued that while passing the March 12, 2020 order, the Appellate Tribunal considered the issue whether it could pass appropriate order under section 241 read with section 242 of the Companies Act for resolution of the problems faced by IL&FS and its group companies in a time bound manner for maximization of value of
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assets of the company while promoting entrepreneurship, availability of credit and balancing the interests of all the stakeholders and decided in the positive. He has argued that the Hon'ble Appellate Tribunal permitted the New Board of IL&FS appointed by NCLT vide orders dated 3.10.2021 and 21.12.2018 to proceed with the resolution of IL&FS group entities in accordance with the procedure suggested by Union of India vide its Affidavit dated February 17, 2020. He has thus argued that in view of the validity of the Resolution Framework, once the settlement was arrived at between the NHAI and KNCEL, the extinguishment of all claims and liabilities of the stake holders and third parties would happen. He has also argued that since the order dated 12.3.2020 of NCLAT has attained finality, Hon'ble NCLT has full jurisdiction and power to grant relief in terms of the Impugned Order because it is now settled that the jurisdiction conferred upon NCLT under sections 241-242 is an equitable distribution and NCLT is empowered to pass such orders as it deems fit to be just and equitable in the facts of the given case.

18. The Learned Counsel for R-1 and R-2 has further argued that the Appellants had, without reservation, accepted the proceeds of the settlement amount received in pursuance of the resolution carried out for KNCEL. He has clarified that KNCEL has

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received a sum of Rs.662.53 crores from NHAI Escrow Account no. 6112591866 after deducting an amount of Rs.10.09 crores towards TDS in terms of the Settlement Agreement dated 30.3.2021 entered between KNCEL and NHAI, the KNCEL has disbursed an amount of Rs.662.64 crores received as the settlement amount to its creditors during the period 9.4.2021 to 6.7.2021, which includes the Appellants. He has argued that in this situation, the principle of estoppel would apply and the present appeal which not will be maintainable on this account ought to be dismissed *in limine* with costs.

19. The Learned Counsel for R-1 and R-2 has also argued that the Impugned Order passed by NCLT, by which the claims of the Appellant were extinguished, is in accordance with the provisions of the Resolution Framework and the Union of India's Affidavit dated 7.2.2020 filed by the Union of India before the Appellate Tribunal laying down the Resolution Framework which was approved by the Appellate Tribunal. He has referred to Para 48 (E) of the Impugned Order regarding extinguishment of all claims against all liabilities of KNCEL after distribution of the net KNCEL settlement amount has been passed by the Hon'ble NCLT in accordance with the provisions and principles enumerated in the

Resolution Framework and Union of India's Affidavit dated 7.2.2020 filed before Hon'ble NCLT.

20. The Learned Counsel for R-1 and R-2 has also clarified that the "Debt Due" amount has been correctly computed following principles of fairness and transparency and value maximization and the Appellants' contention that the computation of "Debt Due" should have been done on the basis of relevant definition in the Concession Agreement is completely baseless and unfounded. He has submitted that in view of the project not having achieved "Commercial Operations", KNCEL was not entitled to receive any compensation under the Concession Agreement unless it could have proved that the project has stopped due to the sole default of NHAI. He has added that rather than engaging in any time consuming and protracted litigation with NHAI to determine whether default was due to NHAI or KNCEL, KNCEL decided to enter into a settlement by foreclosing the project under MoRTH Guidelines which is a legal way of resolving dispute, and this has resulted in KNCEL receiving a significant settlement/foreclosure amount of Rs.672.62 crores. He has clarified that the NHAI's computation of "Debt Due" has been stipulated in para 39 of the Affidavit dated 7.2.2020 of Union of India, and this Affidavit was approved by this Tribunal vide March 12, 2020 order, and in view *Company Appeal (AT) No. 120 of 2021*

of the fact that the process used for computation of “Debt Due” has been earlier approved in an appeal by this Tribunal, the Appellant’s grievance on the same is without merit.

21. The Learned Counsel for R-1 and R-2 has further submitted that ‘Debt Due’ was computed in a fair and transparent manner by an Independent Valuer appointed by NHA as Rs. 787.11 crores, which was done with a view to arrive at an expeditious settlement. He has further submitted that MoRTH Guidelines stipulate that compensation payable in a case of “stuck project” is equal to the lower of the value of the work done or 90% of the debt due, and the settlement amount computed as Rs.708.40 crores being 90% of the ‘Debt Due’ was approved by the Conciliation Committee of Independent Experts-II (“CCIE-II”) on 21.8.2020, which is the forum under whose aegis KNCEL and NHA were settling their dispute amicably. He has submitted that an amount of Rs.1030 crores as ‘Debt Due’ computed by the Appellants is overvalued, since it is erroneously based on the quantum of total claims admitted by the Claim Management Consultant rather than being in accordance with the procedure set out in the MoRTH Guidelines, and neither the Concession Agreement nor the Resolution Framework approved by the NCLAT give any right to the Appellants to insist and force KNCEL and NHA to accept

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payment of full claim amount to form the basis of computation of the 'Debt Due'.

22. The Learned Counsel for R-3 NHAI, while adopting the arguments of R-1 and R-2, has argued that a settlement was arrived at between the NHAI and KNCEL keeping in view the interest of all the stakeholders, including KNCEL's financial creditors, in the light of the MoRTH Guidelines and with the view to arriving at an amicable settlement expeditiously rather than engage in protracted litigation. She has further submitted that the settlement was arrived at under the guidance of the Conciliation Committee of Independent Experts-II and approved by this Conciliation Committee in its meeting dated 21.8.2020. She has also submitted that the settlement between KNCEL and NHAI was entered into in accordance with the Resolution Framework for IL&FS and its group companies as approved by NCLT and further the approval given by CCIE-II of the Settlement Agreement was approved by Hon'ble Justice D.K Jain (Retired), who is appointed to look into such resolutions including resolution by settlement of IL&FS and its Group Companies. It is only after the approval of CCIE-II and Hon'ble Justice D.K Jain Committee that the said settlement including the settlement amount was placed for

approval before the NCLT, which has approved it by the Impugned Order.

23. The issues that arise in the adjudication of this appeal are as follows:-

- (i) Whether NCLT was empowered to approve the “Settlement Agreement’ between KNCEL and NHAI and whether the senior creditors were required to be heard before according such approval, and
- (ii) Whether the calculation of “Debt Due” and the “Full and Final Settlement amount” has been done correctly and whether any estoppel would operate in view of the fact that the creditors/Appellants had accepted the distributed share of the settlement amount?

24. The first issue raised by the Learned Counsel for Appellants is that the Impugned Order passed by the Hon’ble NCLT was not legally tenable, which was done without giving an opportunity of hearing to the Appellants who by virtue of being financial creditors of KNCEL were interested parties in the said settlement between KNCEL and NHAI. The Learned Counsel for Appellants has also raised the issue that the Respondents have not followed procedure

and modality given in the the Resolution Framework as approved by this Tribunal.

25. In this connection, we note that Hon'ble NCLAT, in its order dated 15.10.2018 in CA (AT) No. 346/2018, has held the NCLT has much wider powers under sections 241-242 of the Companies Act than the powers vested under provisions of IBC and therefore, it is fully empowered to pass orders for resolution under sections 241-242 of the Companies Act. On the same premise NCLAT decided to impose a 'stay' regarding various actions which are akin to 'moratorium' under section 14 of the IBC and hear cases relating to resolution of IL&FS and its group companies. The relevant part of NCLAT's order is reproduced below:-

"3. The questions that arise for consideration in these appeals are:

- (i) Whether the Tribunal can pass appropriate order under Section 241 read with Section 242 of the Companies Act, 2013 for resolution of the problems faced by the Company in a time-bound manner for maximisation of value of assets of the Company, to promote entrepreneurship, availability of credit and balance the interests of all the stakeholders, and in case of failure of resolution pass appropriate order of liquidation; and*
- (ii) Whether the Tribunal in exercise of powers conferred Under Section 242 (1) (b) read with Section 242 (2)(m) and Section 242(4) of the Companies Act, 2013 read with Rule 11 of the National Company Law Tribunal Rules, 2016, can pass appropriate interim order similar to order under Section 14 of the Insolvency and Bankruptcy Code, 2016.*

XX XX XX XX

6. Issue notice on Respondents, including newly impleaded Respondents by speed post. Requisite along with process fee, if not filed, be filed in course of the day. If the Appellant(s) provides the e-mail address of Respondents, let notice be also issued through e-mail. Dasti service is permitted particularly in the newly impleaded Respondents.

Post these appeals 'for admission' on 13th November, 2018 on the top of the list.

Taking into consideration the nature of the case, larger public interest and economy of the nation and interest of the Company and 348 group companies, there shall be stay of

- (i) The institution or continuation of suits or any other proceedings by any party or person or Bank or Company, etc. against 'IL&FS' and its 348 group companies in any Court of Law/Tribunal/Arbitration Panel or Arbitration Authority; and
- (ii) Any action by any party or person or Bank or Company, etc. to foreclose, recover or enforce any security interest created over the assets of 'IL&FS' and its 348 group companies including any action under the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002;
- (iii) The acceleration, premature withdrawal or other withdrawal, invocation of any term loan, corporate loan, bridge loan, commercial paper, debentures, fixed deposits, guarantees, letter of support, commitment or comfort and other financial facilities or obligations vailed by 'IL&FS' and its 348 group companies whether in respect of the principal or interest or hedge liability or any other amount contained therein.
- (iv) Suspension of temporarily the acceleration of any term loan, corporate loan, bridge loan, commercial paper, debentures, fixed deposits and any other financial facility by the 'IL&FS' and its 348 group companies by any party or person or Bank or Company, etc. as of the date of first default.

(v) *Any and all banks, financial institutions from exercising the right to set off or lien against any amounts lying with any creditor against any dues whether principal or interest or otherwise against the balance lying in any bank accounts and deposits, whether current or savings or otherwise of the 'IL&FS' and its 348 group companies."*

26. On the issue whether the settlement agreement between KNCEL and NHAI is in accordance with the proposed Resolution Framework for IL&FS and its group companies, we note that the procedure suggested by Union of India through its Affidavit dated 17.2.2020, which has been approved by NCLT and NCLAT dated 17.2.2020, gives various options for final resolution. These options include modalities for Group Level Resolution, Vertical Level Resolution and Asset Level Resolution. The Resolution Framework considers Asset Level Resolution as the most feasible option and includes sale of entity as Asset Level Resolution. This sale of entity can take place wherever feasible. The Resolution Framework also stipulates that Asset Level Resolution is to be undertaken in a fair and transparent manner to determine the best possible price to effect a change in the ownership and the relevant company in accordance with process supervised by the New Board and approved under section 242 of the Companies Act.

27. In the present case, it is seen that the resolution of KNCEL is proposed under the Guidelines of MoRTH for resolution of “stuck projects”. These Guidelines provide for settlement between the Concessionaire KNCEL and Concessions Party NHAI and execution of a Supplementary Settlement Agreement to finalise and concretise the settlement between the two parties. Further, the settlement between the parties is worked out under the guidance of the Conciliation Committee of Independent Experts-II, which comprises of a Retired Hon’ble Judge of High Court and two Learned Technical Experts as conciliators. The Conciliation Committee looks at all the factors such as facts and circumstances of the case, provisions of the Concession Agreement, prevailing practice and past precedents and above all the intent of the parties to resolve the disputes quickly and amicably in a spirit of mutual understanding instead of getting involved in protracted and long-drawn litigation. It then considers the settlement terms for its fairness, transparency and reasonability and after the parties submit their free consent to settle the dispute it puts its stamp on the Settlement Agreement. .

28. In this regard, clauses (K) and (P) of the Settlement Agreement dated 30.3.2021 is worth reproducing, which inter alia records the process undergone in arriving at the settlement:-

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“K. As agreed by Executive Committee of NHAI in its meeting held non 08.01.2020 during Conciliation Committee meeting held on 14.01.2020, NHAI appraised CCIE-2 about debt due amount as Rs.787.11 Crore, 90% of debt due as Rs.708.40 crore and full and final settlement amount for foreclosure of Concession Agreement as Rs. 672.62 Crore after recovery of Rs.35.78 crore subject to submission of UDIN based Certification of statutory Auditor w.r.t. the outstanding amount of principal and interest of the Sr. lenders, Subordinate Debt, Equity, and grant released. Further the certification of Sr. Lenders w.r.t. the outstanding amount of principal and interest is also required.

xx xx xx xx

P. Concessionaire vide letter dated January 14, 2020 submitted its consent to settle the issues/disputes on payment of Rs.672.62 crore net of recoveries amounting to Rs.35.78 crore along with request to add accrued interest on the senior debt and sub debt as part of debt due as defined in the Concession Agreement. Concessionaire vide said letter also requested to pay interest on amount arrived as above for delay in release of payment from date of termination of the Project till date of actual transfer.”

29. Admittedly, the Concessionaire and Concessions Party had signed the original Concession Agreement. Therefore, in our view they are the necessary parties to enter into a settlement agreement. We have noted earlier in this judgment that the settlement agreement has been worked out under the supervision of CCIE-II, which in para 2.1 notes the gross settlement amount of Rs.708.40 crores and the net due amount, after taking into account Rs.35.78 crores towards recoveries, is Rs. 672.42 crores.

This amount is cleared by CCIE-II as being fair, reasonable and arrived at in a transparent manner with regard to the facts and circumstances of the case and the intention of the two parties to arrive at an early settlement. On this basis we are of the view that the Settlement Agreement and amount of 'full and final' settlement included therein does not suffer from any flaw or legal infirmity.

30. We are, therefore, of the considered view that the Settlement between KNCCEL and NHAI was in consonance with the provisions of the Resolution Framework for IL&FS and its group entities and approved by NCLAT, which was further approved by CCIE-II and Hon'ble Shri Justice D.K. Jain.

31. We now consider the contention of the Appellants that the "Debt Due" should have been calculated in terms of the definition of "Debt Due" provided in the Concession Agreement. In this connection we note that in the reply of IL&FS it is stated that the settlement has been worked out keeping in view the "Guiding Principles of Stuck Highways Projects" (MoRTH Guidelines), wherein the settlement amount was mutually agreed between KNCCEL and NHAI. We also note the argument of the IL&FS that the amount of "Debt Due" is worked out keeping in view a formula that has been used in similar cases which takes into account the
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interest of all stakeholders and approved by the CCIE-II after being worked out in a fair and transparent manner.

32. The Learned Counsels for IL&FS and NHAI have both stated that the amount of full and final settlement has been decided and agreed upon through mutual consultation between KNCEL and NHAI with regard to facts and circumstances of the case, and the interest of both the parties for an early and amicable settlement.

33. We also examine whether the Termination Payment in accordance with Article 37.3.1 of the Concession Agreement as claimed by the Appellant will be applicable in the present case.

34. We note that article 37.3.1 of the Concession Agreement provides for payment of termination amount on account 'concessionaire default' during the 'operation period'. Quite clearly, and as admitted by the Appellants, the work on the proposed project was only about 60% complete and work had stalled and the project which could not, therefore, come into 'operation period'. We, therefore, see no reason why the Termination Payment should be made in accordance with article 37.3 of the Concession Agreement to the concessionaire when the project had not come into "operation period".

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35. In this connection, it is also noted that there was dispute between KNCEL and NHAI as to who was responsible for the default and both the parties had given their own dates of termination through separate termination notices. In such a situation, and since both the parties were keen for foreclosure of the Concession Agreement, a settlement was worked out based on MoRTH Guidelines under the guidance of CCIE-II, and further the amount of full and final settlement was worked out again as mutually agreed between the two parties. Therefore, Termination Payment in accordance with Concession Agreement is not applicable in the present case.

36. The procedure set out in the MoRTH Guidelines stipulates that Concession Agreement may be foreclosed vide a Supplementary Agreement, mutually agreed and executed between the parties. Annexure I of these guidelines refers to 90% of 'Debt Due' amount, which is calculated in accordance with the formula which is discussed and then accepted by both the parties. Since the two original parties in the Concession Agreement were entering into a Supplementary Settlement Agreement, there does not appear to be any requirement to consult all stakeholders including financial creditors at the stage when the two parties to the *Company Appeal (AT) No. 120 of 2021*

Concession Agreement are settling their dispute. The amount of “Debt Due” which has been calculated by the Appellants based on the claims admitted by the Claim Management Consultant cannot be the amount of settlement.

37. We also note that after CCIE-II has given its approval for the settlement agreement, the Hon’ble Shri Justice D.K. Jain has also considered the proposal submitted by IL&FS through a supplementary memorandum dated 25.12.2020 and earlier memorandum dated 24.11.2020 (attached at pp.258-314 of reply of R-1, vol. II), which was duly considered and approved by Hon’ble Shri Justice D.K. Jain by order dated 29.12.2020 (attached at pp.290-314 of reply of R-1, vol. II). This adjudication takes note of the fact that KNCEL settlement amount is less than the total admitted debt of KNCEL as on 15.10.2018, which is aggregating to Rs.1862.07 crores. The creditors of KNCEL will be required to forego certain outstanding in respect of the admitted claims. The relevant para 47 of the order is reproduced below:-

“47. Given that the KNCEL Settlement amount agreed to with NHAI is less than the total admitted debt of KNCEL (as of 15th October, 2018), aggregating to Rs1862,07,37,830, the creditors of KNCEL will be required to forego certain outstanding in respect of the admitted claims.”

38. The calculation of the settlement amount, which includes the calculation of “Debt Due” through a specific formula, which has been used in similar cases, where foreclosure of concession agreements have been done through a mutually agreed settlement between the concessionaire and concessioning party is found reasonable and taking into account the interests of all the stakeholders.

39. In para 48 of the order of Hon’ble Shri Justice D.K. Jain, there is mention of two valuers, namely RNC Valuecon LLP and Adroit Valuation Services Private Limited who have assessed the liquidation value of KNCEL which are Rs.658.08 crore and Rs. 501.13 crore respectively and average liquidation value as of 15.10.2018 is Rs.574.61 crore. The said order also note that the settlement is in line with the approved Resolution Framework, which is recorded in para 54 of the said order. Para 54 of the said order is reproduced herein below:-

“54. As regards the compliance with the guidelines for submitting Resolution Proposals for approval of the undersigned, it is stated that the same are not entirely applicable in the present proposal. Nevertheless, it is pointed out that A&M, vide email dated 21st November 2020, has recommended that the settlement is in line with the Approved resolution Framework; the distribution of the KNCEL Settlement Amount to the creditors of KNCEL is in accordance with the Revised Distribution Framework, and will be subject to the orders of the Hon’ble NCLT, and that there are no

complaints/representations filed by any party in relation to the Proposal.”

40. Finally in para 57, approval is accorded by Hon'ble Justice D.K. Jain, which is reproduced below:-

“57. I have examined the proposal, which is stated to be in synne with the Resolution Framework placed before the Hon'ble NCLT by the MCA. Further, it is also asserted that the distribution of the KNCEL Settlement Amount along with the additional amounts lying in the KNCEL Escrow account is in accordance with the Revised Distribution Framework approved by the Hon'ble NCLAT. This, coupled with the assertion in the Memorandum that the Project being incomplete and yet to achieve commercial operations/ final operations, settlement of foreclosure of claims is the only solution mechanism possible for KNCEL, and failure to recover an amount of 3672.62 crores from NHAI will result in almost negligible recovery to the Creditors of KNCEL, I am inclined to agree with the decision of the Board in according its approval to the Proposal notwithstanding the fact that under the stated Revised Distribution Framework, the Creditors of KNCEL. will get a preferential treatment in comparison to their counter parts in respect of the other IL&FS/ITNL entities.”

41. We thus note that after the approval of CCIE-II, Hon'ble Shri Justice D.K. Jain has also accorded approval of the said Supplementary Agreement regarding Settlement.

42. The Learned Counsel for Appellants has cited the judgment in the matter of **Jetpur Somnath Tollways Limited & Ors. (supra)** passed by Hon'ble Delhi High Court claiming that the amount of “Debt Due” has been held to be calculated by the *Company Appeal (AT) No. 120 of 2021*

definition of “Debt Due” as given in the Concession Agreement and that the same principle should be applied in the present case. This issue has been dealt with in paragraphs 57 to 60 of the above mentioned judgment, which is reproduced below for ready reference:-

“57. Clause 37.3 of the Concession Agreement makes it clear that upon Termination on account of JETPUR'S Default during the Operation Period, NHAI has to pay to JETPUR by way of Termination Payment, an amount equal to 90% (ninety per cent) of the Debt Due less Insurance Cover and upon Termination on account of NHAI's default, NHAI has to pay to JETPUR, by way of Termination Payment, an amount equal to the Debt Due plus 150% of the Adjusted Equity.

58. "Termination Payment" has been defined by the Concession Agreement to mean the amount payable by the Authority to the Concessionaire upon Termination and may consist of payments on account of and restricted to the Debt Due and Adjusted Equity, as the case may be, which form part of the Total Project Cost in accordance with the provisions of this Agreement; provided that the amount payable in respect of any Debt Due expressed in foreign currency shall be computed at the Reference Exchange Rate for conversion into the relevant foreign currency as on the date of Termination Payment. For the avoidance of doubt, it is agreed that within a period of 60 (sixty) days from COD, the Concessionaire shall notify to the Authority, the Total Project Cost as on COD and its disaggregation between Debt Due and Equity, and only the amounts so conveyed shall form the basis of computing Termination Payment, and it is further agreed that in the event such disaggregation is not notified to the Authority, Equity shall be deemed to be the amount arrived at by subtracting Debt Due from Total Project Cost.

59. "Debt Due" has been defined to mean the aggregate of inter alia the sum expressed in Indian Rupees outstanding, on the Transfer Date, of the principal amount of the 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 repayment two years prior to the Transfer Date;

60. The "Total Project Cost" has been defined to mean the lowest of:

- (a) the capital cost of the Project, less Equity Support as set forth in the Financial Package;*
- (b) the actual capital cost of the Project upon completion of Four-Laning of the Project Highway less Equity Support; and*
- (c) a sum of Rs. 828.00 crore (Rupees Eight Hundred and Twenty Eight crore), less Equity Support;*

provided that in the event of Termination, the Total Project Cost shall be deemed to be modified to the extent of variation in WPI or Reference Exchange Rate occurring in respect of Adjusted Equity and Debt Due, as the case may be, in accordance with the provisions of this Agreement; provided further that in the event WI increases, on an average, by more than 6% (six per cent) per annum for the period between the date hereof and COD, the Parties shall meet, as soon as reasonably practicable, and agree upon revision of the amount hereinbefore specified such that the effect of increase in WI, in excess of such 6% (six per cent), is reflected in the Total Project Cost."

43. As earlier noted in this judgment, we note that the Concession Agreement formed the sole valuable asset of KNCEL and after termination of the said Concession Agreement and distribution of settlement amounts to the creditors, KNCEL possesses negligible assets, which is also borne out by the fact that the average liquidation value (as of 15.10.2018) is Rs. 589.61 crore.

44. In accordance with the Resolution Framework, IL&FS filed an application before NCLT, Mumbai Bench (CA No. 290 of 2021) for initiation of proceedings under Section 27(a) of the Companies Act, 2013 for winding up of KNCEL and this application was approved by the Hon'ble NCLT vide order dated 14.10.2022, wherein it is recorded that in the event any subsequent recoveries is made by KNCEL in the form of tax refund etc., the same will be distributed to the remaining creditors of KNCEL in accordance with the Revised Distribution Framework. The relevant portion of the NCLT order in CA No. 290/2021 in CP (IB) No. 3638/MB/2018 dated 14.10.2022 is reproduced below:-

"52. Accordingly, the Applicant is before us praying for reliefs as follows:

Xx xx xx

(iii) To direct that the Applicant be permitted to utilize and/or pay from residual FSEL Settlement Amount:

Xx xx xx

h. To direct the liquidator appointed pursuant to the initiation of winding up of Kiratpur Ner Chowk Expressway Limited in terms of prayer D above, shall distribute any subsequent recoveries made on behalf of Kiratpur Ner Chowk Expressway Limited to the Residual Creditors of Kiratpur Ner Chowk Expressway Limited in the same proportion that the Net KNCEL Settlement amount was distributed to such creditors as per the revised distribution Framework pursuant to the orders of this Tribunal dated February 4, 2021 in Company Application No. 3 of 2021.

Xx xx xx

ORDER

57. *In the interest of justice, accordingly, application is allowed in terms of the reliefs A to H of the Application without prejudice of course to any proceedings that any investigative or any other authorities may take against the erstwhile directors of the companies that are subject matter of this application.*”

45. We consider the contention of the Appellant that the principle for calculation of “Debt Due” should be the same as accepted in the judgment in **Jetpur Somnath Tollways Limited & Ors.(supra)**. We note that this case was filed under section 9 of Arbitration and Conciliation Act, 1996, which has been mentioned in para 1 of the said judgment. Therefore, the **Jetpur Somnath Tollways Limited & Ors. case** relates to arbitration proceedings under the Concession Agreement. It is in this light that clause 37.3 of the Concession Agreement has been considered in para 15 of the judgment for calculation of “Debt Due” and “Termination Payment”. As against this, we note that in the present case, a settlement has been entered into between KNCEL and NHAI and a Supplementary Agreement was signed non mutually agreed terms between the two parties. Therefore, any reference to the clauses of the Concession Agreement for calculation of ‘Termination Payment’ is not justified and the full and final settlement amount in the present case is as per the settlement agreement. Thus the **Jetpur Somnath Tollways Limited & Ors.(supra)** judgment can be

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distinguished from the facts and circumstances of the present case.

46. The Learned Counsel for R-1 and R-2 has cited the judgment of NCLT, Mumbai Bench in **CA No. 290/2021 in CP (IB) No. 3638/MB/2018** in the matter of **Infrastructure Leasing & Financial Services Limited versus Union of India, MCA (through the RD)**, wherein using the same principle for calculation of resolution amount has been done. He has cited this judgment in support of his contention that since the Concessionaire is insolvent and would not be able to pay its liabilities since most of its investments, loans and advances would yield little return and may have to be written off. In particular, para 23 of the said judgment is worth reproducing in this regard, which is in support of the R-1 contention. Para 23 of the judgment is as under:-

“23. Moreover, we note that, (i) The offshore entities in which IIPL had stake, have been resolved by being disposed of fully or substantially either through divestment, closure or liquidation; (ii) Further, recovery of loans provided to subsidiaries is doubtful as most of the subsidiaries are under insolvency or have been closed; (iv) the monies available with IIPL is sufficient to meet all external borrowings but it is not sufficient to meet all liabilities including the related party payables and loans. Thus, IIPL would not be able to meet all its liabilities and would accordingly be considered insolvent under Singapore Laws; and (iv) Given the considerable

amount of liabilities on the books of IPL, it is evident that IPL is insolvent and would not be able to repay its liabilities since most of its investments and loans/ advances have yielded little returns and may have to be written off. Therefore, the resolution of IPL by the aforesaid modes will directly result in reduction of liabilities, which would enable an effective resolution of the larger Applicant Group. Thus, we take on record and approve the proposed closure in the interest of justice.”

47. The Learned Counsel for R-1 and R-2 has cited the judgment of Hon'ble High Court of Delhi in the case of **Navayuga Bengalooru Tollway Pvt. Ltd. v. NHAI, OMP (I) (CPMM) 152 of 2021**, in which in a petition filed under Section 9 of the Arbitration and Conciliation Act, 1996, a prayer was made for directing the Respondent (NHAI) to release the amount of at least the 90% of the total “Debt Due” and to pay the said amount to the lenders of the Concessionaire. In this matter, Hon'ble High Court held that it would serve the requirement of justice if the money that is available as assets of the Concessionaire is distributed in terms of the Revised Distribution Framework approved by the NCLT vide order dated 12.3.2022. On this ground and since the proposal for settlement and payment to creditors was approved by Hon'ble Shri Justice D.K. Jain (Retired) to oversee the resolution process, the proposal to wind up the Concessionaire was allowed and no extra amount was ordered to be paid to the creditors as was prayed in the said OMP. This judgment is also distinguishable since it

relates to winding up of the concessionaire after settlement between the parties.

48. In view of the detailed foregoing discussion, we are of the clear view that the settlement entered into by KNCEL and NHAI for foreclosure of the Concession Agreement relating to Kiratpur - Ner Chowk Project under the MoRTH Guidelines is in accordance with the approved Resolution Framework in relation to the ILF&S and its group entities which are correctly approved by the NCLT by the Impugned Order. The Appeal is, therefore, devoid of merit and is accordingly dismissed.

49. There is no order as to costs.

**[Justice Ashok Bhushan]
Chairperson**

**[Dr. Alok Srivastava]
Member (Technical)**

New Delhi

1st August, 2023

/aks/