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

Reserved on: 24 July 2024

Pronounced on: 11 February 2025

\+ O.M.P. (COMM) 261/2024

M/S IRB AHMEDABAD VADODARA SUPER EXPRESS TOLLWAY PVT. LTD. .....Petitioner

Through: Mr. Vikram Nankani, Sr. Adv. with Mr. Karan Bharihoke, Mr. Anirudh Bakhru, Ms. Devika Mohan, Ms. Teresa Daulat, Mr. Mohanish Patkar, Mr. Raj Adhia, Mr. Param Bir Singh, Mr. Humraz Bir Singh, Mr. Ankit Banati and Ms. Tarini Khurana, Advs.

versus

NATIONAL HIGHWAYS AUTHORITY OF INDIA .....Respondent

Through: Mr. Ankur Mittal, Mr. Abhay Gupta and Mr. Sanjivan Chakraborty, Advs.

CORAM:
HON'BLE MR. JUSTICE C. HARI SHANKAR

% JUDGMENT
11.02.2025

The challenge, and issue in controversy

1. Under challenge at the instance of IRB Ahmedabad Super Expressway[1], in the present petition preferred under Section 34 of the Arbitration & Conciliation Act, 1996[2] is an arbitral award passed by a learned three-member Arbitral Tribunal on 7 April 2024. IRB was the

[1] "IRB" hereinafter
[2] "the 1996 Act" hereinafter

claimant in the arbitral proceedings, and the National Highways Authority of India[3] was the respondent and counter-claimant.

2. The challenge, in this petition, is restricted to the rejection, by the Arbitral Tribunal, of the claim of IRB for compensation, from NHAI, under Article 35.4 of the Concession Agreement[4], dated 25 July 2011, executed between them.

3. To clear the air and not for anything else, I may note, here, that the CA envisaged payment of premium by IRB to NHAI. The Government had announced a Premium Deferment Scheme, whereunder part of the premium could be paid by Concessionaires (such as IRB) upfront, and the remainder deferred for payment later. NHAI raised a counter-claim, in the arbitral proceedings, against IRB, claiming payment of the deferred premium. The Arbitral Tribunal has held NHAI to be entitled to the said payment. IRB has, candidly, conceded that it is not challenging that part of the award, though the parties have joined issue, in other cognate proceedings, on the issue of whether the deferred payment is to be paid by IRB upfront, following the impugned Arbitral Award, or at a later point of time.

4. That controversy is, however, foreign to the present petition, which is restricted to IRB's claim against NHAI for compensation in terms of Article 35.4 of the CA, and the sustainability of the decision of the Arbitral Tribunal to reject the said claim. I have deemed it appropriate to mention this only because the impugned Award, which

[3] NHAI
[4] "CA" hereinafter

is lengthy deals at times with IRB's claim against NHAI and at others with NHAI's counter-claim against IRB, and there is chance of confusion.

5. To repeat for the third time, this petition is concerned only with the decision of the Arbitral Tribunal on IRB's claim, against NHAI, for compensation in terms of Article 35.4 of the CA.

6. Needless to say, even if this Court were to agree with IRB, that the Arbitral Tribunal was not justified in rejecting IRB's claim, for the reasons contained in the impugned award, this Court would have to stop at that. It cannot adjudicate on the claims on merits, as that would amount to modifying the impugned arbitral award, which the law proscribes. The power with the Court is only to uphold the award, or set aside the award, or, in the very limited circumstances envisaged by Section 34(4), adjourn the matter to enable the Arbitral Tribunal to take steps, as it may choose, to remove any removable defect in the Award, so as to avoid the Award being set aside on that ground[5]. Exercise of Section 34(4) jurisdiction can, however, only be on application *ad invitum*, and not *suo motu*.

7. It is nobody's case that Section 34(4) applies.

Facts

8. Under the CA, which was executed between IRB and NHAI on

[5] **NHAI v M. Hakeem, (2021) 9 SCC 1**

25 July 2011, IRB was to develop, maintain and manage, by six laning, a stretch of NH-8[6] between km 6.4 and km 108.7, and improve the existing Ahmedabad Vadodara Expressway from km 0.00 to km 93.302. The agreement was on Design, Build, Finance, Operate and Transfer basis, as per which, on completion of the construction of the Project Highway as per the CA, IRB could commence collecting toll from the users of the Highway.

9. In accordance therewith, consequent on completion of construction as per the contracted schedule, IRB commenced collecting toll, from the Project Highway, on 6 December 2015.

10. Under the CA, IRB, acquired exclusive license to operate and maintain the Project Highway for 25 years from the Appointed Date, which was 1 January 2013. All costs and expenses, towards operating and maintaining the Project Highway were to be borne by IRB. IRB was entitled to demand, collect and appropriate toll from vehicles plying on the Project Highway.

11. Article 6.3 of the CA proscribed the emergence of any "Competing Road", as it would have adverse effect on the volume of traffic and the toll collections on the Project Highway. It read thus:

> "6.3 **Obligations relating to Competing Roads**
>
> The Authority shall procure that during the subsistence of this Agreement, neither the Authority nor any Government Instrumentality shall, at any time before the 10th (tenth) anniversary of the Appointed Date, construct or cause to be

[6] "the Project Highway" hereinafter

constructed any Competing Road; provided that the restriction herein shall not apply if the average traffic on the Project Highway in any year exceeds 90% (ninety percent) of its designed capacity specified in Clause 29.2.3. Upon breach of its obligations hereunder, the Authority shall be liable to payment of compensation to the Concessionaire under and in accordance with Clause 35.4."

12. "Competing Road", was defined, in the CA, thus:

> "Competing Road" means a road connecting the two end points of the Project Highway and serving as an alternative route thereof, such road being an existing paved road, which has been widened by more than 2 (two) metres of paved road for at least 75% (seventy five per cent) of the total length thereof at any time after the date of this Agreement, or a new road, which is constructed after such date, as the case may be, but does not include any road connecting the aforesaid two points if the length of such road exceeds the length of the Project Highway by 20% (twenty per cent) thereof."

13. Thus, a "competing road" was a road

(i) which connected the two ends of the Project Highway,

(ii) which served as an alternative route to the Project Highway, and

(iii) which was

(a) either an existing paved road, widened by more than 2 m for at least 75% of its length, after 25 July 2011, or

(b) a new road, constructed after 25 July 2011.

The definition excluded any road connecting the two ends of the Project Highway, if the length of the road exceeded the length of the Project Highway by 20%. As the recital hereinafter would disclose, the Arbitral Tribunal has proceeded on the premise that the Savli road – up and down which the dispute in this case has, in a sense, travelled

– was, in fact, a "competing road" as defined in the CA.

14. Breach, by NHAI, of the obligation cast by Article 6.3 resulted in IRB being entitled to compensation in terms of Article 35.4 of the CA, which read:

> "In the event that an Additional Tollway or a Competing Road, as the case may be, is opened to traffic in breach of this Agreement, the Authority shall pay to the Concessionaire, for each day of breach, compensation in a sum equal to the difference between the average daily Realisable Fee and the projected daily Fee (the "Projected Fee") until the breach is cured. The Projected Fee hereunder shall be an amount equal to the Average Daily Fee, increased at the close of every month by 0.5% (zero point five per cent) thereof and revised in accordance with Article 27.2. For the avoidance of doubt, the Average Daily Fee for the purposes of this Article shall be the amount so determined in respect of the Accounting Year or period, as the case may be, occurring prior to such opening or operation of an Additional Tollway or a Competing Road, as the case may be."

15. Towards compliance with its obligations under the CA, NHAI entered into a State Support Agreement[7] with the State of Gujarat on 11 February 2016. In furtherance of the CA, an Escrow Agreement was also executed among IRB, NHAI, Infrastructure Development Finance Company Ltd.[8] and the Punjab National Bank[9] on 10 February 2012. The CA and the Escrow Agreement envisaged resolution of disputes by arbitration.

16. The Court is, therefore concerned, in this petition, with the issue of whether the decision of the Arbitral Tribunal, *qua* IRB's claims,

[7] "SSA" hereinafter
[8] "IDFCL" hereinafter
[9] "PNB" hereinafter

can sustain the scrutiny of Section 34 of the 1996 Act.

The impugned Award, to extent it is challenged herein

17. IRB contended that it had completed construction and development of the Project Highway within the contractually stipulated period and commenced toll collection from 6 December 2015. However, the Savli road, which was a toll free State Highway constructed by the State of Gujarat, 119 km in length and connecting Vadodara to Ahmedabad, constituted a "Competing Road" as defined in the CA. The existence of this Competing Road resulted in adverse impact on the toll collections on the Project Highway, thereby entitling IRB to compensation in terms of Article 35.4 of the CA. A claim to this effect was, therefore, raised by IRB on NHAI *vide* letter dated 24 May 2017, reiterated in a subsequent communication dated 22 September 2017.

18. As already noted, the Arbitral Tribunal has ultimately rejected the claim of the IRB for compensation in terms of Article 35.4 of the CA, on account of the Savli Road having become a Competing Road.

19. What falls for consideration is, therefore, whether this rejection is sustainable in law.

20. For this purpose, it is necessary to reproduce, in full, paras 12 (i) to 12 (xiv) of the impugned award, thus:

"12(i) Issues No. (i) to (ix) flow from each other sequentially and

thus the Tribunal decides the basic issue which sings the signature tune underlying the nine issues. To make the issue short and crisp, the Tribunal notes that in its Interim Award dated 14.10.2021, the Tribunal has, in para 104 thereof, recorded: hence the broad end points of the Project Highway would be Vadodara and Ahmedabad. In para 106 the Tribunal has recorded that: the length of Project Highway is not to be derived. It is contained in the definition of Project Highway, and provides for the NH-8 Section length as 102.30 Km and the Expressway Section as 93.302 Km. This is in recital B of the Concession Agreement dated 25.07.2011. While deciding preliminary Issue A, the sub-issue whether the 'end points' of Savli Road are required to coincide with the 'end points' of the Project Highway for the Savli Road to qualify as a 'Competing Road', subject to further conditions laid under the definition of a Competing Road, the Tribunal had held in para 104 of the Interim Award as under:

> "104. Hence the broad end points of the Project Highway would be Vadodara and Ahmedabad. *It follows, that if there be an alternative toll-free route offered as a choice to any vehicle owner, which also similarly provides a connection between the city of the Ahmedabad and Vadodara, he would opt for such a route. In such case, such alternative toll-free route would 'compete' with the NH-8 Section. The Savli Road provides a connection between the cities of Vadodara and Ahmedabad, is a toll free (and hence commercially more attractive option for any vehicle user), becomes an alternative choice and thus become a 'Competing Road' for all intents and purposes, to the extent of this parameter*. The Claimant is correct in contending that merely because the 'Competing Road' terminates at a point earlier then or other than the exact termination point of the Project Highway, would be immaterial and does not take away from the fact that by using such 'Competing Road' a user can reach the same destination as the Project Highway' and thus such 'Competing Road' connects the end points of the 'Project Highway' i.e. Ahmedabad and Vadodara. This is the essence of the end point criteria mentioned in the definition of 'Competing Road'."

12(ii) The Claimant had argued that the end points of Savli Road would be Vadodara (Dhumad Chowkdi) to Ahmedabad (Hathijan) and the length is 119 Km and the Tribunal proceeds on the basis that this would be the length of the Savli Road. *The Tribunal further proceeds treating as correct the evidence led by the Claimant, which comprises letters obtained by the Claimant from the Public Works Department, State of Gujarat (Road & Bridges*

Department), without juxtaposing the rival evidence led by the Respondent which dents the correctness of the information conveyed to the Claimant by the Public Works Department. The Tribunal is also not venturing into the debate between learned counsel for the parties as to whose evidence had a better quality nor the argument of Learned Senior Counsel for the Claimant that since the information obtained and filed before the Tribunal by the Respondent was after the Claimant had led evidence the possibility of the information provided by the Public Works Department was tainted or contrived for the reason the State of Gujarat which had signed the State Support Agreement would have been fastened with the liability should the claim of Savli Road being a Competing Road succeed. In the written submissions filed by the Claimant at the opening arguments, in para 39, the Claimant has tabulated the widening details of Savli Road as emerging from the documentary evidence filed by the Claimant. The table reads as under[10]:

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12(iii) Clarifying once again that without venturing into the correctness of the information provided to the Claimant by the Public Works Department of the State of Gujarat and the Tribunal is treating the said data compilation to be correct, relevant would it to highlight that as per the table out of a total length of 119 Km of Savli Road, 92.310 Km length has been widened and the percentage of widening is 77.56%.

12(iv) The case of the Claimant is that the Project Highway was opened for tolling on 06.12.2015. The data compiled by the Claimant in the table reproduced by the Tribunal in para 12(ii) above shows that the widening of all the sections, except Ode-Umreth (length being 6.20 Km) which commenced on 17.01.2014 and was completed on 16.01.2016, commenced after 06.12.2015 and obviously was completed after 06.12.2015. Thus, treating the data compiled by the Claimant to be correct, it stands out that *only widening to the extent of 5.21% of Savli Road commenced before the Project Highway was opened to toll and even this segment was ultimately widened on 16.01.2016 i.e. a little over one month after the Project Highway was opened for tolling*.

12(v) The argument of Learned Senior Counsel for the Claimant was premised on the definition of the word 'construction' in Article 1.2.1(f) of the Concession Agreement and the mandate in Article 1.2.4 that words or expressions used in the Agreement shall, unless otherwise defined, bear their ordinary English

[10] The Table is annexed to this judgment as Annexure A

meaning. Thus, as per Learned Senior Counsel the word 'serving' and the word 'alternative' finding a mention in the definition of Competing Road must be accorded their ordinary English meaning.

12(vi) The Concession Agreement, vide Article 1.2.1(f) defines the words 'Construction' or 'Building' to include, unless the context otherwise requires, investigation, design, developing, engineering, procurement, delivery, transportation, installation, processing, fabrication, testing, commissioning and other activity incidental to the construction.

12(vii) Article 6.3 casts Obligations relating to Competing Roads, in the following terms: The Authority shall procure that during the subsistence of this Agreement, neither the Authority nor any Government Instrumentality shall, *at any time before the 10th (tenth) anniversary of the Appointed Date*, construct or cause to be constructed any Competing Road; provided that the restriction herein shall not apply if the average traffic on the Project Highway in any year exceeds 90% (ninety percent) of its designed capacity specified in Article 29.2.3. *Upon breach of its obligations hereunder, the Authority shall be liable to payment of compensation to the Concessionaire under and in accordance with Article 35.4.*

12(viii) Article 48.1 of the Concession Agreement defines Competing Road as follows: "Competing Road" means a road connecting the two end points of the Project Highway and serving as an alternative route thereof, such road being an existing paved road, which has been widened by more than 2 (two) metres of paved road for at least 75% (seventy five per cent) of the total length thereof at any time after the date of this Agreement, or a new road, which is constructed after such date, as the case may be, but does not include any road connecting the aforesaid two points if the length of such road exceeds the length of the Project Highway by 20% (twenty per cent) thereof.

12(ix) The phrase: 'Serving as an alternative route', or even 'alternative route' and 'serving' have not been defined in the Concession Agreement and therefore as per Learned Senior Counsel for the Claimant the ordinary English meaning of the words 'alternative' and 'serving' have to be adopted. Learned Senior Counsel submitted that the word 'alternative' is defined in the Oxford Advanced Learner's Dictionary to mean: 'a thing that you can choose to do or have out of two or more possibilities.' The Collins Dictionary defines the word to mean (i) 'If one thing is an alternative to another, the first can be found, used, or done instead of the second, (ii) An alternative plan or offer is different from the one that you already have, and can be done or used instead.'

Merriam Webstar Dictionary defines the word to mean: 'Offering or expressing a choice'. The word 'serving' is defined in the Oxford Advanced Learner's Dictionary to mean: to provide an area or a group of people with a product or service serve somebody/something'. The Collins Dictionary defines it to mean: If something serves people or an area, it provides them with something that they need. The Merriam Webstar Dictionary defines it to mean: 'to be of use'. Learned Senior Counsel for the Claimant had additionally submitted that it would be impermissible to add the phrase 'resulting in a diversion of traffic' in the definition of the Competing Road.

12(x) Even if the argument of Learned Senior Counsel for the Claimant is accepted and the principle of interpretation of contracts being that where a word has both an ordinary meaning as well a specialized meaning, no evidence will be admitted of the specialized meaning, unless it is first proved that parties intended to use the word/phrase in the latter sense as per the opinion in the decision reported as ***Holt & Co. v Collyer***[11] and the decision reported as ***Briggin Hill Airport Ltd. v Bromley***[12], is accepted and adopting the wide meaning of the word 'Construct' to include investigation, design, developing, engineering, procurement, delivery, transportation, installation, processing, fabrication, testing, commissioning and other activity incidental to the construction, would only mean that the moment a design is made or the moment developing activity commences on an existing paved road, of widening the same by more than 2 meters and ultimately resulting in at least 75% of the total length thereof widened by more than 2 meters, it would result in the said road being a Competing Road from the date when developing activity commences.

12(xi) The consequence of a Competing Road being allowed to come into existence, is in Article 35.4 of the Concession Agreement, for the same provides the compensation for Competing Road and reads: *In the event that an Additional Tollway or a Competing Road, as the case may be, is opened to traffic in breach of this Agreement*, the Authority shall pay to the Concessionaire, for each day of breach, compensation in a sum equal to the difference between the average daily Realisable Fee and the projected daily Fee (the "Projected Fee") until the breach is cured. The Projected Fee hereunder shall be an amount equal to the Average Daily Fee, increased at the close of every month by 0.5% (zero point five per cent) thereof and revised in accordance with Article 27.2. For the avoidance of doubt, the Average Daily Fee for

[11] **(1881) 16 Ch D 719**
[12] **(2001) EWCA CIV 1089**

the purposes of this Article shall be the amount so determined in respect of the Accounting Year or period, as the case may be, occurring prior to such opening or operation of an Additional Tollway or a Competing Road, as the case may be.

12(xii) The compensation for allowing a Competing Road to be constructed, as per Article 35.4 of the Concession Agreement, requires the Tribunal to keep in mind that *the compensation triggers only when the Competing Road 'is opened to traffic'*. A road being 'opened to traffic' means that the travel lanes are available for the unrestricted flow of traffic, and this has to be in the realm of reality i.e. actually existing in the world. Thus, it is only when such road (Competing Road) is opened to traffic, can the toll revenues of the Claimant be impacted. *Thus, the compensation provision triggers not when a Competing Road is constructed as projected by the Claimant. The right to seek compensation triggers only when such road is opened to traffic.* The interplay between the definition of a Competing Road and the compensation for said Competing Road being opened to traffic, plainly means that *such paved road has to be opened to traffic after 75% length thereof is widened by more than 2 meters for the entitlement to compensation to kick-in.*

12(xiii) Learned Senior Counsel for the Claimant, with respect to the interpretation of Competing Road, had argued that if the interpretation as proposed by him was not accepted, the Respondent (a public authority) could cheat the concessionaire by widening an existing paved road by more than 2 meter thereof only to the extent of 74.99% to avoid the 75% limit and just a day after the end of the concession period widen the same by 0.01%. This would be rank cheating; an act to be frowned upon. As the Tribunal has noted, by accepting the data tabulated by the Claimant, in para 12(iv), *only widening to the extent of 5.21% of Savli Road commenced before the Project Highway was opened to toll and even this segment was ultimately widened on 16.01.2016 i.e. a little over one month <u>after the Project Highway was opened for tolling</u>*. The theoretical argument need not be answered by the Tribunal as the same does not arise to be considered in the facts of the instant case, because the process of widening of only 5.21% of the Savli Road commenced <u>*prior to when the Project Highway was opened to toll*</u> and even that segment was widened <u>*after the tolling commenced*</u>.

12(xiv) The compensation claim for Savli Road even if it is treated as a Competing Road when tolling commenced on the Project Highway must therefore fail."

21. From a reading of the aforesaid passages from the impugned award, the reasoning adopted by the Arbitral Tribunal, for arriving at a finding that IRB is not entitled to its claim for compensation under Article 35.4 of the CA may be set out thus:

(i) Out of a total 119 km length of the Savli Road, 92.31 km had been widened. *This amounted to 77.56%.*

(ii) Of this stretch, the entire exercise of widening of the road, except for 6.2 km of the Ode-Umreth stretch, commenced and was completed after 6 December 2015, when the Project Highway was opened to toll.

(iii) The 6.2 km Ode-Umreth stretch constituted 5.21% of the Savli Road.

(iv) *The Savli Road was a "Competing Road", within the meaning of definition of the expression as contained in the CA.* On this aspect, the Arbitral Tribunal has followed para 104 of the interim award dated 14 October 2021, rendered by it.

(v) The right to seek compensation from NHAI, for breach of Article 6.3 of the CA, in terms of Article 35.4, *triggered only when the Competing Road was opened to traffic.* A road could be treated as having been "opened to traffic" only when all its travel lanes were available for unrestricted flow of traffic as it was only then that the toll revenue of IRB could be set to be

impacted.

(vi) In the present case, *the commencement and construction of the entire stretch of the Competing Road, except for 5.21%, representing the Ode-Umreth stretch, was after 6 December 2015*, when IRB started collecting toll from the Project Highway. Even in respect of the Ode-Umreth stretch, completion of widening was only on 16 January 2016.

(vii) As such, *no part of the Competing Road had been "opened to traffic" prior to commencement of collection of toll from the Project Highway by IRB, on 6 December 2015.*

(viii) *The right to compensation, in terms of Article 35.4 of the CA, had not, therefore, been triggered before IRB commenced collecting toll from the Project Highway. Ergo, IRB's claim to compensation had to fail.*

22. Clearly, the entire controversy revolves around Articles 6.3 and 35.4 of the CA, chiefly the latter, in the light of the definition of "Competing Road" in the CA. This Court is, therefore, required to examine whether the interpretation, by the Tribunal, of these covenants, can sustain Section 34 scrutiny.

23. The extent to which interpretation of contract, by an Arbitral Tribunal, can be vivisected under Section 34 of the 1996 Act has been subject matter of several judicial authorities. The parameters of

judicial review, in this regard, stand authoritatively delineated, most recently, in ***DMRC Ltd v Delhi Airport Metro Express Pvt Ltd***[13], the relevant passages of which may thus be reproduced:

> "34. The contours of the power of the competent court to set aside an award under Section 34 has been explored in several decisions of this Court. In addition to the grounds on which an arbitral award can be assailed laid down in Section 34(2), there is another ground for challenge against domestic awards, such as the award in the present case. Under Section 34(2-A) of the Arbitration Act, a domestic award may be set aside if the Court finds that it is vitiated by "patent illegality" appearing on the face of the award.
>
> 35. In ***Associate Builders v DDA***[14], a two-Judge Bench of this Court held that although the interpretation of a contract is exclusively within the domain of the arbitrator, construction of a contract in a manner that no fair-minded or reasonable person would take, is impermissible. A patent illegality arises where the arbitrator adopts a view which is not a possible view. A view can be regarded as not even a possible view where no reasonable body of persons could possibly have taken it. This Court held with reference to Sections 28(1)(*a*) and 28(3), that the arbitrator must take into account the terms of the contract and the usages of trade applicable to the transaction. The decision or award should not be perverse or irrational. An award is rendered perverse or irrational where the findings are:
>
> (i) based on no evidence;
> (ii) based on irrelevant material; or
> (iii) ignores vital evidence.
>
> 36. Patent illegality may also arise where the award is in breach of the provisions of the arbitration statute, as when for instance the award contains no reasons at all, so as to be described as unreasoned.
>
> *****
>
> 38. In ***Ssangyong Engg. & Construction Co. Ltd. v NHAI***[15], a two-Judge Bench of this Court endorsed the position in ***Associate Builders* v *DDA***[16], on the scope for interference with domestic awards, even after the 2015 Amendment :

[13] **(2024) 6 SCC 357**
[14] **(2015) 3 SCC 49**
[15] **(2019) 15 SCC 131**
[16] **(2015) 3 SCC 49**

"*40*. The change made in Section 28(3) by the Amendment Act really follows what is stated in paras 42.3 to 45 in ***Associate Builders v DDA*** (*supra*), namely, that the construction of the terms of a contract is primarily for an arbitrator to decide, *unless the arbitrator construes the contract in a manner that no fair-minded or reasonable person would; in short, that the arbitrator's view is not even a possible view to take. Also, if the arbitrator wanders outside the contract and deals with matters not allotted to him, he commits an error of jurisdiction. This ground of challenge will now fall within the new ground added under Section 34(2-A).*

41. … Thus, a finding based on no evidence at all or an award which ignores vital evidence in arriving at its decision would be perverse and liable to be set aside on the ground of patent illegality. Additionally, a finding based on documents taken behind the back of the parties by the arbitrator would also qualify as a decision based on no evidence inasmuch as such decision is not based on evidence led by the parties, and therefore, would also have to be characterised as perverse."

(emphasis supplied)

39. In essence, the ground of patent illegality is available for setting aside a domestic award, if the decision of the arbitrator is found to be perverse, or so irrational that no reasonable person would have arrived at it; or the construction of the contract is such that no fair or reasonable person would take; or, that the view of the arbitrator is not even a possible view [***Patel Engg. Ltd.* v *North Eastern Electric Power Corpn. Ltd***.[17]]. A "finding" based on no evidence at all or an award which ignores vital evidence in arriving at its decision would be perverse and liable to be set aside under the head of "patent illegality". An award without reasons would suffer from patent illegality. The arbitrator commits a patent illegality by deciding a matter not within his jurisdiction or violating a fundamental principle of natural justice."

24. The view, of the Arbitral Tribunal, as expressed in para 12 (xii) of the impugned Arbitral Award, that

[17] **(2020) 7 SCC 167**

(i) the mere construction of a Competing Road would not *ipso facto* entitle IRB to compensation, till the road was opened to traffic,

(ii) a road can be regarded as "opened to traffic" only when its "travel lanes are available for the unrestricted flow of traffic, and this has to be in the realm of reality i.e. actually existing in the world", and

(iii) "such paved road has to be opened to traffic after 75% length thereof is widened by more than 2 meters for the entitlement to compensation to kick-in",

in my view, reflects a plausible interpretation of Article 35.4 of the CA, and cannot brook interference under Section 34 of the 1996 Act.

25. Proceeding therefrom, and with greatest respect to the learned Members of the Arbitral Tribunal, for whom this court has the highest regard, there appear, to me, to be two fundamental mistakes in the reasoning adopted by the Arbitral Tribunal which, if endorsed, would require Article 35.4 to be rewritten, and Article 6.3 of the CA to be read in part and omitted in part. These may be noted thus:

(i) <u>Re. Article 35.4</u>

(a) The Arbitral Tribunal has held that, as the Competing Road was opened to traffic only after 6 December 2015, when IRB started collecting toll, no compensation under Article 35.4 could be paid. *The Arbitral Tribunal has, therefore, proceeded on the*

*premise that IRB would be entitled to compensation, under Article 35.4 of the CA, only if the Competing Road was opened to traffic **before** IRB commenced collection of toll from the Project Highway.*

(b) In my respectful opinion, there is no sustainable basis for this inference.

(c) *The linking of the date of opening of the Competing Road to traffic, with the date from which IRB commenced collecting toll from the Project Highway, as a basis to determine IRB's entitlement to compensation under Article 35.4 of the CA, is not borne out by Article 35.4 itself and amounts, in fact, to introduction, into Article 35.4, of a consideration which is not to be found in the Article. There is no clause in the CA which entitles IRB to compensation only if the Competing Road is open to traffic before collection of toll by IRB commences.*

(d) In fact, the view adopted by the Arbitral Tribunal, if accepted, would require Article 35.4 of the CA to be rewritten thus, adding the italicized words:

> "In the event that an Additional Tollway or a Competing Road, as the case may be, is opened to traffic in breach of this Agreement, *after the date on which the Concessionaire commences collection of toll from the Project Highway*, the Authority shall pay to the Concessionaire, for each day of breach, compensation in a sum equal to the difference between the average daily Realisable Fee and the projected daily Fee (the "Projected Fee") until the breach is cured. The Projected Fee hereunder shall

> be an amount equal to the Average Daily Fee, increased at the close of every month by 0.5% (zero point five per cent) thereof and revised in accordance with Article 27.2. For the avoidance of doubt, the Average Daily Fee for the purposes of this Article shall be the amount so determined in respect of the Accounting Year or period, as the case may be, occurring prior to such opening or operation of an Additional Tollway or a Competing Road, as the case may be."

The interpretation adopted by the Arbitral Tribunal in para 12 (xiii) of the impugned award effectively re-writes Article 35.4 of the CA by inserting, into the said Article, the italicized words *supra*. It is settled, in law, that an Arbitral Tribunal, which re-writes a contractual covenant, is liable to be set aside even on that score. The Supreme Court held, in ***PSA Sical Terminals Pvt Ltd v Board of Trustees of V.O. Chidambranar Port Trust***[18], thus:

> "85. As such, as held by this Court in ***Ssangyong Engg. & Construction Co. Ltd. v NHAI*** (*supra*), the fundamental principle of justice has been breached, namely, that a unilateral addition or alteration of a contract has been foisted upon an unwilling party. This Court has further held that a party to the agreement cannot be made liable to perform something for which it has not entered into a contract. In our view, *rewriting a contract for the parties would be breach of fundamental principles of justice entitling a court to interfere* since such case would be one which shocks the conscience of the court and as such, would fall in the exceptional category."
>
> (Emphasis supplied)

(e) If an Arbitral Tribunal cannot foist, on a party,

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any liability by effectively rewriting the contract, neither, in my respectful opinion, can an Arbitral Tribunal deny, to a party, a right to which it is entitled under the contract, by introducing, into the concerned contractual clause, a consideration which is not to be found therein as that, too, would result in rewriting the contract.

(ii) Article 6.3

(a) In conjunction with this, it appears that the Arbitral Tribunal has completely overlooked the words "at any time before the tenth Anniversary of the Appointed Date", contained in Article 6.3 of the CA. The *terminus ad quem*, by which date the construction of the Competing Road was required to be completed, to sustain a finding that NHAI had breached Article 6.3 of the CA was, therefore, the tenth Anniversary of the Appointed Date. The Appointed Date was 1 January 2013. The tenth Anniversary of the Appointed Date would, therefore, be 1 January 2023. Admittedly, the construction of the entire Competing Road was over before 1 January 2023.

(b) *Ipso facto*, therefore, by completing the construction of the Competing Road before the tenth Anniversary of the Appointed Date, Clause 6.3 of the CA

stood breached. This fact has, it appears, not engaged the attention of the Arbitral Tribunal while passing the impugned Arbitral Award.

(iii) That said, however, *mere* breach of Clause 6.3 would not inexorably entitle IRB to compensation from NHAI, as such entitlement would have to be in accordance with Article 35.4. Not only would, therefore, the Concessionaire have to establish breach, by NHAI, of Article 6.3; it would also have to establish satisfaction of the ingredients of Article 35.4, in order to be entitled to compensation.

(iv) The issue, therefore, again peters down to Article 35.4. In that regard, and at the cost of repetition, the Arbitral Tribunal has, in my respectful opinion, erred in holding that, merely because the Competing Road was opened to traffic after 6 December 2015, when IRB commenced collecting toll from the Project Highway, the claim of the IRB under Article 35.4 of the CA had to fail. As already noted, this would require re-writing of Article 35.4 by introduction, into the Article, of an additional requirement of the Competing Road being opened to traffic before the date when toll collection, by IRB, from the Project Highway, commenced.

(v) Viewed from another perspective, Article 35.4 merely envisaged "opening to traffic", of "an Additional Tollway or Competing Road … in breach of (the CA)" as sufficient to entitle IRB to compensation from NHAI. *There was no further*

requirement, in the CA, of the construction of the Competing Road to be complete prior to commencement of toll collection, by IRB, from the Project Highway. This is an additional conditionality, effectively imported into Article 35.4 of the CA by the impugned Arbitral Award, which is not to be found therein.

(vi) Even if, therefore, the Competing Road was opened to traffic *after IRB had commenced toll collection from the Project Highway on 6 December 2015*, the entitlement of IRB for compensation under Article 35.4 would have nonetheless to be reckoned *from the date when the Competing Road was opened to traffic*. The claim could not *altogether* have been rejected.

Application of the law, and the sequitur

26. In the above backdrop, when one applies the judicially recognized tests regarding scope of scope of interference, under Section 34 of the 1996 Act, with the manner in which an Arbitral Tribunal interprets a contract, as exposited, most recently, in ***DMRC***, the following position emerges:

(i) The opinion, expressed by the Arbitral Tribunal, that entitlement to compensation, in terms of Article 35.4, is not triggered merely by the fact of construction of a Competing Road, but would commence only when the Competing Road is opened to traffic, is a plausible interpretation, which cannot brook interference under Section 34.

(ii) The opinion of the Arbitral Tribunal, in para 12 (xiii) of the impugned Award, that compensation under Article 35.4 would be available only if the Competing Road was opened to traffic prior to the commencement of collection of toll from the Project Highway by IRB is, however, unsustainable, as the said interpretation re-writes Article 35.4 in the manner indicated in para 25 (i) *supra*.

(iii) The Arbitral Tribunal also appears to have overlooked the fact that, if the Competing Road completely came into existence *prior to the tenth Anniversary of the Appointed Date (and not necessarily prior to commencement of toll collection by IRB from the Project Highway)*, there was *ipso facto* breach, by NHAI, of Article 6.3 of the CA.

(iv) At the very least, therefore, the Arbitral Tribunal would be required to revisit the claim, of IRB, to compensation in terms of Article 35.4 of the CA, with effect from the date when the various stretches of the Savli Road were opened to traffic.

27. Mr. Nankani, learned Senior Counsel for the petitioner, valiantly sought to exhort this Court to advance some opinion, even tentative, regarding the entitlement of IRB to compensation under Article 35.4 of the CA. I, however, am not inclined to do so. Embarking on such an exercise would, in my view, amount to this Court substituting its view in place of the view expressed by the

Arbitral Tribunal, regarding the merits of the petitioner's claim to compensation under Article 35.4. ***NHAI v M. Hakeem*** forbears this Court from doing so. Having expressed the view that the interpretation of the contractual covenants, by the Arbitral Tribunal, may not sustain Section 34 scrutiny, the Court has necessarily to leave the exercise of determination of whether IRB would be entitled to compensation, were the contractual covenants to be interpreted as this judgement holds, to the Arbitral Tribunal, in a *de novo* exercise.

Conclusion

28. In the result, while setting aside the impugned award, to the extent it rejects the claim of IRB to compensation under Article 35.4 of the CA, the Court leaves it open to IRB to reinitiate arbitral proceedings with respect to the said claim. In the event such proceedings are initiated, the Arbitral Tribunal would re-examine the claim in the light of the aforesaid observations and findings.

29. It is made clear that the Court has not expressed any opinion on the actual entitlement of IRB to compensation under Article 35.4 of the CA as claimed by it. The examination would, however, have to be in terms of the observations and views expressed in this judgement, regarding the interpretation of Articles 6.3 and 35.4 of the CA. Needless to say, the *de novo* proceedings, if they are initiated, would have to consider all the material produced by IRB to substantiate its claim to compensation under Article 35.4 of the CA. On the sufficiency, or merits, of the said material, however, I do not venture

any opinion. It would be for IRB to satisfy the Arbitral Tribunal that it is, in fact, entitled to compensation under Article 35.4 and, needless to say, it would be open to NHAI to assert to the contrary.

30. Should either side be aggrieved by the decision of the Arbitral Tribunal, if and when it is rendered, the remedies, in law, to the aggrieved party/parties shall remain reserved.

31. The petition is disposed of in the aforesaid terms.

C. HARI SHANKAR, J.

FEBRUARY 11, 2025
aky/ar

Click here to check corrigendum, if any

Annexed: Annexure A, as per Footnote 10 *supra*.

ANNEXURE A

	Ahmedabad-Vadodara Project Completing Road Widening Details									
	Status of Competing Road							Total Length of Competing Road		
Sr.	Division	Name of Road	Chainage /Km		Length of road as per site check	Widening Scheme		Date of start of Roads works as per RTI	Date of completion of road works as per RTI	Length of Competing Road as per certification received from R&B Department
			From	To		Earlier road width as per RTI	Road width after development /widening works as per RTI			
1.	Vadodara	Vadodara – Savli Km. 9/6 to 18/0	9.600	18.000	8.40	7.0 m (2 lane)	14.0 m (4 lane)	25.12.2015	Road is traffic worthy in full width and only sundry work in progress	8.40
2.		Vadodara – Savli Km. 18/0 to 32/4	18.000	32.400	14.40	7.0 m (2 lane)	14.0 m (4 lane)	25.12.2015	Road is traffic worthy in full width and only	14.40

									sundry work in progress	
3.		Savli – Poicha – Ahima Km. 0/0 to 5/2	0.00	5.20	9.70	7.0 m (2 lane)	7.0 m (2 lane)	13.10.2017	12.12.2017	0.00
4.		Savli – Poicha – Ahima Km. 5/20 to 9/7	5.20	9.70		7.0 m (2 lane)	7.0 m (2 lane)	12.11.2018	11.01.2019	0.00
5.	Anand	Ahima – Ode Km 14/4 to 8/6	14.40	8.60	7.50	7.0 m (2 lane)	10.0 m (2 lane)	23.10.2019	22.10.2020	5.80
6.		Ode – Umreth (GSHP)	0.00	9.20	9.30	7/10 m (2 lane)	10/14 m (2/4 lane)	17.01.2014	16.01.2016	6.20
7.		Umreth to Dakor Km 83/0 to 86/2	83.00	84.50	1.50	15.0 m (4 Lane)	15.0 m (4 Lane)	23.10.2017	22.01.2019	0.00
8.			84.50	86.20	1.70	15.0 m (4 Lane)	18.0 m (4 Lane)	23.10.2017	22.01.2019	1.70
9.	Noida				5.10	10.0	14.0 m (4	2008	2009	0.00

						m (2 lane)	lane)			
10.		Alina to Dakore Km 43/00 to 54/35	54.35	51.00	5.60	7.0 m (2 lane)	14.0 m (4 lane)	2007	2008	0.00
11.			51.00	43.00	8.00	7.0 m (2 lane)	14.0 m (4 lane)	06.05.2016	05.08.2017	8.00
12.		Mahudha – Alina Km 30.150 to 43.00	43.00	30.15	12.85	7.0 m (2 lane)	14.0 m (4 lane)	03.05.2016	02.11.2017	12.85
13.		Khatraj Chokdi Mahudha Chokdi from Km 13/60 to 30/150	30.15	13.60	15.55	7.0 m (2 lane)	14.0 m (4 lane)	03.05.2016	02.11.2017	16.55
14.		Nenpur Chokdi to Khatraj Chokdi	25.00	30.15	5.15	10.0 m (3 lane)	14.0 m (4 lane)	12.05.2016	31.12.2017	5.15

		from 25.00 to 30/150								
15.		Ahmedabad – Mahemdabad Km 16/140 to 25.00	16.14	25.00	13.26	10.0 m (3 lane)	14.0 m (4 lane)	15.01.2016	10.12.2017	8.86
16.	Ahmedabad	Hirapur Chowkdi – Hathijan Circle Km 11/8 to 16/2	11.80	16.20		10.0 m (2 lane)	15.0 m (4 lane)	30.12.2015	29.11.2016	4.40
Total length in Km					**119.0**					**92.310**
75% length as per site check in Km					**89.26**					**77.56%**