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

% ***Judgment Reserved on: 11th December, 2025***
Judgment pronounced on: 23rd January, 2026

\+ **O.M.P. (COMM) 170/2019**

NATIONAL HIGHWAYS AUTHORITY OF INDIA .....Petitioner

Through: Mr. Parv Garg and Mr. Pawas Kulshrestha, Advocates.

versus

M/S KOCHI AROOR TOLLWAYS PRIVATE LIMITED .....Respondent

Through: Mr. Abhishek Gupta and Mr. Suyash Gupta, Advocates.

CORAM:
HON'BLE MR. JUSTICE AMIT BANSAL

AMIT BANSAL, J.

1. The present petition has been filed under Section 34 of the Arbitration and Conciliation Act, 1996 ('Act') seeking setting aside of the Award dated 10th October, 2018 passed by the Arbitral Tribunal ('Award').

2. The petitioner (respondent in the arbitration proceedings) shall hereinafter be referred to as 'NHAI' and the respondent (claimant in the arbitration proceedings) shall hereinafter be referred to as 'KATPL'.

FACTUAL BACKGROUND

3. The brief facts relevant for adjudication of the present petition are set out below:

i. On 28th April, 2015, the parties entered into a Concession Agreement for operation, maintenance and transfer of Edapally-Vyttila-Aroor Section from 342.00 Km to 358.750 Km, in the State of Kerala on OMT basis on 28th April, 2015.

ii. Disputes arose between the parties in relation to the Concession Agreement. The Claimant wrote to the Chairman, NHAI for a settlement under Clause 36.2 of the Concession Agreement, which did not materialise. Accordingly, the claimant invoked the arbitration clause. Both the parties appointed their respective Nominee Arbitrators who mutually appointed the Presiding Arbitrator.

iii. KATPL made the following claims in its statement of claim:-

"(a)Claim No.1: Claim of Discrepancy in User Fee Rates: Rs.9,34,23,525/-

(b) Claim No.2: Claim for Delay in COD: Rs.2,72,54,400/-.

(c) Claim No.3: Claim Due to issuance of Free Passes: Rs.93,89,500/-."

iv. Claim 2 was further divided into four sub-claims as is evident from paragraph 5.29 of the Award. For ease of reference, relevant extract from the Award is set out below:

"5.29 … (a) Damages payable by the Authority under Clause 13.1.2 of CA for delay in achieving the COD from 12.06.2015 to 06.09.2015, amounting to Rs.1,40,35,200/-.
(b) Damages on account of delay in Fee Notification from 12.06.2015 to 01.07.2015 by the Respondent under clause 4.2 of CA amounting to Rs.15,50,400/-.
(c) Damages on account of delay in Validation of user fee rates from 12.06.2015 to 21.08.2015 amounting to Rs.57,12,300/-.
(d) Refund of the amount withdrawn by NHAI from Escrow account on 11.11.2016 for Rs.59,56,800/-.
The total of all above comes to Rs.2,72,54,400/-."

v. In addition, KATPL also claimed interest on the aforesaid amounts along with costs.

vi. NHAI filed its statement of defence. No counterclaim was filed on behalf of NHAI.

vii. The Arbitral Tribunal gave an Award in favour of KATPL and against NHAI.

viii. The sums awarded by the Arbitral Tribunal in respect of claims 1, 2 and 3 which are subject matter of challenge in the present petition are as below:

a. Claim No.1: Claim of Discrepancy in the User Fee Rates - Rs.9,34,23,525/-

b. Claim No.2: Claim of Delay in COD - Rs. 1,91,76,000/-.

c. Claim No.3: Claim due to issuance of Free passes - Rs.93,89,500/-.

4. In respect of Claim 2, the Arbitral Tribunal rejected claims 2(b) and 2(c) and allowed claims 2(a) and 2(d). During the course of submissions, NHAI has only raised objections *qua* Claim no. 2(a).

SUBMISSIONS ON BEHALF OF NHAI

5. Mr. Parv Garg, counsel appearing on behalf of NHAI has made the following submissions in support of the present petition:

i. In relation to claim no. 1, the Arbitral Tribunal has wrongly held that NHAI is in breach of the Concession Agreement. In this regard, reliance in placed on Clause 22.1.1 and Clause 22.1.2 of the Concession Agreement. In terms of the aforesaid Clauses, the toll has to be determined by the Ministry of Highways, Government of India

('Ministry') and not by NHAI. Hence, NHAI was not empowered to determine the user fee rates. Accordingly, the findings given by the Arbitral Tribunal are beyond the terms of the Concession Agreement.

ii. In relation to claim 2, the Arbitral Tribunal has disregarded the letters dated 19th August, 2015 (page no.152 of the petitioner's document), 20th August, 2015 (page no.153 of the petitioner's document) and 26th August, 2015 (page no.162 of the petitioner's document) wherein KATPL had requested NHAI to first cure the alleged discrepancy in the toll fee notification and then declare the Commercial Operation Date ('COD'). The Arbitral Tribunal has failed to take note of the aforesaid clauses and proceeded to determine the user fee rate entitlement on its own. In this regard, reliance is placed on Clause 4.1.2 and Clause 13.1 of the Concession Agreement. In terms of Clause 4.1.3, it was the obligation of KATPL to notify NHAI. The Arbitral Tribunal has wrongfully relied upon Clause 13.1.2 to award damages in favour of KATPL. Under Clause 13.1.2, payment of damages in favour of KATPL were prohibited. Accordingly, it is argued that this amounted to rewriting of the contract and would amount to patent illegality.

iii. Insofar as claim no.3 is concerned, it is submitted that the Arbitral Tribunal has wrongfully relied on Clause 26.3 read with clause 26.7.2(b) of the Concession Agreement to award damages towards loss suffered on account of monthly passes issued by KATPL. It is argued that under clause 26.3(c) what is covered is prevention of collection of 'fee' and not 'costs'. Accordingly, non-issuance of sums towards local monthly pass may be the costs but would not amount to a fee. The Arbitral Tribunal itself has made a distinction between fee and costs in

paragraph 5.40 of the Award. Hence, it is submitted that the Award suffers from perversity.

SUBMISSIONS ON BEHALF OF KATPL

6. Mr. Abhishek Gupta, counsel appearing on behalf of KATPL counters the aforesaid submissions by submitting as under:

i. In relation to Claim 1, the defence raised by NHAI that it was not authorised to levy and collect toll fees was never taken up before the Arbitral Tribunal. The said defence is a new defence raised before this Court which cannot be permitted. Attention of the Court has been drawn to Gazette Notification dated 1st July, 2015 issued by the Ministry wherein specifically NHAI has been authorised to levy, determine and collect toll fees. In this regard, reliance is also placed on Section 12 of the NHAI Act, 1988.

ii. In relation to Claim 2, the delay in COD is totally attributable to NHAI. NHAI had failed to give possession of the site to KATPL in a timely manner. Hence, there is no infirmity in the findings of the Arbitral Tribunal that KATPL was entitled to damages on account of delay in COD. The Arbitral Tribunal has simply drawn analogy from clause 13.1.2 to arrive at the damages even though the damages have not been awarded in terms of the said clause. There is no bar under Clause 13.1.2 for award of damages in favour of KATPL. The bar therein is only in respect of damages to be payable by NHAI. The only bar contained in Clause 13.1.2 is that the damages cannot be levied against KATPL on account of default by NHAI.

iii. In relation to Claim 3, a Committee had been constituted by the

Arbitral Tribunal which gave a finding that 1055 monthly passes have been issued by KATPL without any payment from the Kerala State Government or NHAI. As per the Concession Agreement, NHAI was to reimburse the petitioner for the said costs. The Arbitral Tribunal has correctly awarded damages in favour of KATPL in terms of Clause 26.7.2(b) holding that KATPL had to incur costs by issuing free monthly passes to the local users covered under 'Indirect Political Event' as per Clause 26.3 (c) and (f).

ANALYSIS AND FINDINGS

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

8. The Supreme Court has defined the scope of interference by courts in a petition challenging an Award passed by the Arbitral Tribunal under Section 34 of the Act in a plethora of judgments.

9. In ***Associate Builders v. Delhi Development Authority***[1] ***('Associate Builders')***, the Supreme Court made the following observations:

> *"31.* ***The third juristic principle is that a decision which is perverse or so irrational that no reasonable person would have arrived at the same is important and requires some degree of explanation****. It is settled law that where:*
> *(i) a finding is based on no evidence; or*
> *(ii) an Arbitral Tribunal takes into account something irrelevant to the decision which it arrives at; or*
> *(iii) ignores vital evidence in arriving at its decision, such decision would necessarily be perverse."*
>
> [emphasis supplied]

[1] (2015) 3 SCC 49.

10. The findings in ***Associate Builders*** (supra) were reaffirmed by the Supreme Court in ***Ssangyong Engineering and Construction Company Limited* v. *National Highways Authority of India (NHAI)***[2] ***('Ssangyong')***. Relevant observations of the Supreme Court in ***Ssangyong*** *(supra)* are set out below:

> *"37. Insofar as domestic awards made in India are concerned, an additional ground is now available under sub-section (2-A), added by the Amendment Act, 2015, to Section 34.* ***Here, there must be patent illegality appearing on the face of the award, which refers to such illegality as goes to the root of the matter but which does not amount to mere erroneous application of the law.*** *In short, what is not subsumed within "the fundamental policy of Indian law", namely, the contravention of a statute not linked to public policy or public interest, cannot be brought in by the backdoor when it comes to setting aside an award on the ground of patent illegality.*
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> ***38. Secondly, it is also made clear that reappreciation of evidence, which is what an appellate court is permitted to do, cannot be permitted under the ground of patent illegality appearing on the face of the award.***
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> *39. To elucidate, para 42.1 of Associate Builders [Associate Builders v. DDA, (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204], namely, a mere contravention of the substantive law of India, by itself, is no longer a ground available to set aside an arbitral award. Para 42.2 of Associate Builders [Associate Builders v. DDA, (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204], however, would remain, for if an arbitrator gives no reasons for an award and contravenes Section 31(3) of the 1996 Act, that would certainly amount to a patent illegality on the face of the award.*
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> *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 [Associate Builders v. DDA, (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204], 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***

[2] (2019) 15 SCC 131.

> ***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).***
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> *41. What is important to note is that a decision which is perverse, as understood in paras 31 and 32 of Associate Builders [Associate Builders v. DDA, (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204], while no longer being a ground for challenge under "public policy of India", would certainly amount to a patent illegality appearing on the face of the award.* ***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]

11. The Supreme Court has reiterated the same principles in ***DMRC Limited v. Delhi Airport Metro Express (P) Ltd.***[3].

12. In substance, it is a settled position of law that an Award by the Arbitral Tribunal can be set aside only on limited grounds. One of the grounds for setting aside an Award is patent illegality in terms of Section 34(2)(a) of the Act which would occur when: a) the view taken by the Arbitral Tribunal is impossible or such that no reasonable person could arrive at it; b) if the Arbitral Tribunal exceeds its jurisdiction by going beyond the contract and adjudicating upon issues not referred to it; c) the finding of the Arbitral Tribunal is based on no evidence or it ignores material evidence. Pertinently, the illegality must go to the root of the matter. If two views are possible, the Court will not interfere with the view

[3] (2025) 6 SCC 357.

of the arbitral tribunal if it has taken one of the two views. Re-appreciation of evidence is also impermissible.

13. A perusal of the judgments in ***Associate Builders*** (supra) and ***DMRC Ltd*** (supra) makes it clear that the interpretation of the clauses in the Contract is within the domain of the Arbitral Tribunal. Only if it is found that the Contract has been construed in a manner that no fair-minded or reasonable person would, the Court would interfere with the Award on the ground of patent illegality. If the view taken by the Arbitral Tribunal is a plausible view, no interference is called for.

14. With this background, I shall now proceed to apply the aforesaid principles in the facts and circumstances of the present case to deal with the objections raised in each of the three claims.

CLAIM 1

15. This claim was in respect of a dispute regarding the 'user fee rates' for single journey of car/jeep/van/LMV.

16. KATPL *via* its letter dated 20th August, 2015 (at pages 153-154 of the petitioner's documents) to NHAI objected to the stagnant user fee rate of Rs.15 on '*single journey user fee for car category*' communicated by NHAI to KATPL *via* letter dated 4th August 2015 (at page 149 of the petitioner's documents) and called upon NHAI to re-work the user fee rates as per the National Highways Fee (Determination of Rates and Collection) Rules 2008 ('2008 Rules') and the Amended Rules of 2011. KATPL also sought compensation for loss caused to it on account of wrongful fixation of user fee rates by NHAI.

17. Counsel for KATPL has drawn this Court's attention to the letter

dated 23rd July, 2015 (page 146 of the petitioner's documents), wherein, NHAI had itself noted that the user fee rates had to be revised and accordingly sent a proposal to the Ministry.

18. At this stage, a reference may be made to clause 22.1.1 from the Concession Agreement is set out below:

> *"22.1.1* ***On and from the COD till the Transfer Date, the Concessionaire shall have the sole and exclusive right to demand, collect and appropriate Fee from the Users subject to and in accordance with this Agreement and the National Highways Fee (Determination of Rates and Collection) Rules, 2008 read along with National Highways Fee (Determination of Rates and Collection) Amendment Rules, 2010 issued vide Notification No G.S.R. 950 (E) dated 03.12.2010, National Highways Fee (Determination of Rates and Collection) Amendment Rules, 2011 issued vide Notification No G.S.R. 15 (E) dated 12.01.2011*** *and National Highways Fee (Determination of Rates and Collection) Second Amendment Rules, 2011 issued vide Notification No G.S.R-756 (E) dated 12.10.2011…"*
>
> [emphasis supplied]

19. Clause 22.1.1 of Concession Agreement provides that KATPL shall have the sole and exclusive right to demand, collect and appropriate Fee from the users. The user fee rates have to be determined in accordance with the Concession Agreement and 2008 Rules and the Amended Rules of 2011.

20. The Arbitral Tribunal calculated the user fee rates as per clause 22.1 of the Concession Agreement read with the 2008 Rules and the Amendment Rules of 2011 for the relevant period and gave its findings in paragraph 5.17 of the Award. The relevant findings of the Arbitral Tribunal in paragraph 5.17 are set out below:

> *"5.17 From the above comparative tables, it is evident that the rates validated by NHAI are in violation of provisions of CA and 2008 Rules read with Amendment Rules 2011. Such validation is a breach of the Contract causing loss to the Concessionaire who could only collect user*

fee rates as validated by NHAI. Under Section 73 of the Indian Contract Act 1872 ***the Claimant is entitled for compensation for the loss caused to them on account of wrong validation of user fee rates by the Respondent when this validation of the user fee rates came to the notice of the Claimant, they made a number of references to the Respondent for correcting the user fees rate before declaring the COD but to no avail.****"*

[emphasis supplied]

21. The Arbitral Tribunal also noted that NHAI has not objected to the traffic volume submitted by KATPL to NHAI in terms of the Concession Agreement. Therefore, Arbitral Tribunal accepted the figures in respect of traffic volume provided by KATPL and allowed the claim of KATPL. The findings of the Arbitral Tribunal in this regard are set out below:

"15.18. In the computation of the quantum of compensation, in addition to user fees rate, the other input is the traffic volume which has passed the toll plaza. As per Article 19.1 of CA, a weekly statement relating to the numbers and type of the vehicles using the project highway is required to be compiled and furnished by the Concessionaire to the Authority-in the form specified in Schedule-1. ***Illustrative examples for submission of such weekly traffic statements have been filed by the Claimant {C-26 of CD-I(A)} which is accepted by the Respondent in the Statement of Admission and Denial (RD-II). The Respondent has also not contested the traffic volume used by the Claimant in the computation of the quantum of this claim.*** *So, AT has got no reservation in accepting the traffic volume as incorporated in computation of claims by the Claimant as actual traffic volume having passed through toll plaza in the specified period."*

[emphasis supplied]

22. This Court is of the view that the Arbitral Tribunal has correctly come to the conclusion that the user fee rates notified by NHAI were not in accordance with the provisions of the Concession Agreement read with 2008 Rules and the Amendment Rules of 2011. Hence, Arbitral Tribunal worked out the user fee rates in accordance with the Concession Agreement and the

aforesaid 2008 Rules and Amendment Rules of 2011 and held that KATPL was entitled for compensation in accordance with Section 73 of the Indian Contract Act, 1872. The finding of the Arbitral Tribunal is based on the contractual framework between the parties read with the relevant Rules and does not disclose any perversity or patent illegality.

23. Insofar as submission of NHAI is concerned that the onus to decide the user fee rate was on the Ministry, the counsel for KATPL has correctly pointed out that this submission was never made before the Arbitral Tribunal and is being made for the first time before this Court.

24. On merits, counsel for KATPL has drawn attention of the Court to the notification dated 1st July, 2015 by the Ministry of Road Transport and Highways (pages 362-364 of the petitioner's documents). Relevant extracts from the notification are set out below:

> *"S.O. 1785 (E).- Whereas, by notification of the Government of India in the erstwhile Ministry of Shipping, Road Transport and Highways issued under section 11 of the National Highways Authority of India Act, 1988,* ***the Central Government has entrusted the following stretches of National Highways in the state of Kerala to the National Highways Authority of India (hereinafter referred to as the "Authority").***
>
> *** *** ***
>
> *And whereas, in exercise of the powers conferred by section 7 of the National Highway Act 1956 (48 of 1956) read with the Rule (3) of the National Highways Fee (Determination of Rates and Collection) Rules, 2008, the Central Government by notification no. S.O. 1098 dated 24.04.2015 of the* ***Government of India authorized Authority for levying and collecting fee on mechanical vehicles for use of four lane section from km 342.000 to km 358.750 (Edapally Vytilla - Aroor Section) of National Highway No. 66 (formerly as NH·47) in the State of Kerala*** *under transition from Fee Rules 1997 to Fee Rules 2008 as amended.*
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> *** *** ***
>
> *10. Based on the base rate of fee per km for the base year 2007-08 as mentioned in Table-1 above,* ***<u>the actual amount of fee to be charged</u>***

> ***from the mechanical vehicles and the discounts will be calculated by the Authority.*** *The same shall be got published by the Authority in at least one newspaper, each in English and vernacular language through the Concessionaire and thereafter revised annually in accordance with the rule 5 of the said Rules and provisions of the Concession Agreement and will be published provided, that no revision shall be effected within a period of 6 (six) months from the date of the preceding revision of fee.*
>
> [emphasis supplied]

25. A reading of the aforesaid notification demonstrates that the Central Government had authorised NHAI to levy and collect the user fee and also to calculate actual amount of fee to be charged. Therefore, this Court is of the view that even on merits, there is no substance in the contention by NHAI that the onus to decide the user fee rates was solely on the Ministry.

26. In view of the above, this Court does not find any infirmity in the findings of the Arbitral Tribunal in respect of Claim 1.

CLAIM 2

27. Claim 2 is with respect to the dispute concerning delay in declaration of the COD under the Concession Agreement, wherein KATPL sought compensation for the period during which it was unable to commence collection of user fee despite having fulfilled its contractual obligations. The dispute centres on whether the delay between 12th June, 2015 and 6th September, 2015 was attributable to NHAI's failure to perform the Conditions Precedent under the Concession Agreement.

28. In terms of Clause 13.1.1 of the Concession Agreement, the COD of the project was to be the date on which the Conditions Precedent as stipulated in Article 4 of the Concession Agreement being satisfied. In terms of Clause 13.1.2, KATPL had to achieve COD within 45 days from the date of the agreement *i.e.* 28th April, 2015. For the sake of convenience, Clauses

13.1.1 and 13.1.2 are set out below:

> *"13.1.1* ***The commercial operation date of the Project shall be the date on which all Conditions Precedent have been satisfied in accordance with Article 4 (the "COD").*** *The Project Highway shall enter into commercial service on COD whereupon the Concessionaire shall be entitled to demand and collect Fee in accordance with the provisions of Article 22.*
>
> *13.1.2* ***The Concessionaire hereby agrees and undertakes that it shall achieve COD within 45 (forty five) days from the date of this Agreement*** *and in the event of delay, it shall be entitled to a further period not exceeding 30 (thirty) days subject to payment of Damages to the Authority in a sun calculated at the rate of 0.2% (zero point two percent) of the Performance Security for each day of delay; provided that the Damages specified, herein shall be payable every week in advance and the period beyond the said 45 (forty-five) days shall be granted only to the extent of Damages so paid****; provided further that no Damages shall be payable if such delay in COD has occurred solely as a result of any default or delay by the Authority in procuring satisfaction of the Conditions Precedent specified in Clause 4.1.2 or due to Force Majeure. For the avoidance of doubt, the Damages payable hereunder shat be in addition to the Damages payable under the provisions of Clause 4.2.****"***
>
> [emphasis supplied]

29. Now a reference may be made to Clauses 4.1 of the Concession Agreement which deals with the 'Conditions Precedent' required to be fulfilled by both the parties. Clause 4.1.2 stipulates the 'Conditions Precedent' in respect of NHAI whereas Clause 4.1.3 stipulates 'Conditions Precedent' to be fulfilled by KATPL. A reference may be made to Clauses 4.1.1, 4.1.2 and 4.1.3 of the Concession Agreement which are set out below:

> *"****4.1 Conditions Precedent***
> *4.1.1 Save and except as expressly provided in Articles 4, 9, 10, 26, 36 and 39, or unless the context otherwise requires, the respective rights and obligations of the Parties under the Agreement shall be subject to satisfaction in full of the conditions precedent specified in this Clause 4.1 (the "Condition Precedent").*

4.1.2 The Concessionaire may, upon providing the Performance Security to the Authority in accordance with Article 9, and having delivered to the Authority, the legal opinion referred to in Clause 4.1.3 (c) below, by notice require the Authority to procure the right of way as a Condition Precedent to be satisfied within a period of 30 (thirty) days of the notice, and the ***obligations of the Authority hereunder shall be deemed to have been fulfilled when the Authority shall have procured for the Concessionaire the Right of Way to the Site in accordance with the provisions of Clause 10.03.1.*** ***For the avoidance of doubt, the Authority shall, suo moto, procure notification of the Fee Notification as a Condition Precedent to be fulfilled within a period of 45 (forty five) days from the date of this Agreement.***

4.1.3 ***The Condition Precedent required to be satisfied by the Concessionaire within a period of 45 (forty five) days from the date of this Agreement*** *and prior to COD shall be deemed to have been fulfilled when the Concessionaire shall have:*
(a) provided Performance Security to the Authority;
(b) executed and procured execution of the Escrow Agreement; and
(c) delivered to the Authority a legal opinion from the legal counsel of the Concessionaire to enter into this Agreement and the enforceability of the provisions thereof."

[emphasis supplied]

30. The aforesaid Clauses make it clear that the Conditions Precedent are reciprocal in nature requiring KATPL to fulfil its obligations under Clause 4.1.3 and NHAI, independently and *suo moto*, to procure the 'Right of Way' and issue the fee notification within the stipulated period under Clause 4.1.2. The declaration of COD is thus contingent upon timely compliance by both parties, and any failure on the part of NHAI in performing its obligations would necessarily delay COD.

31. The Arbitral Tribunal came to the conclusion that KATPL fulfilled its obligations stipulated under the 'Conditions Precedent', however, NHAI failed to fulfil its obligations. It therefore came to the conclusion that the

delay in achieving COD was attributable to NHAI.

32. Relevant findings of the Arbitral Tribunal are set out below:

> *"5.24 From the provisions in the CA, it is evident that the object of the CA was that the project should be put into commercial operation within 45 days from the date of Agreement i.e., by 12.06.2015.* ***In view of fulfillment of all three Conditions Precedent by the Concessionaire on 12.06.2015, the Concessionaire achieved the COD within 45 days of the date of agreement. Thus, there was absolutely no delay on the part of the Concessionaire in achieving the COD.***
>
> *5.25 The obligation of the Respondent was that they had to procure the Fee Notification and subsequently declare the COD within 45 days of Agreement i.e., by 12.06.2015. This obligation was to be performed by NHAI for achieving the object of the CA i.e., putting the project highway into commercial operations.* ***However, the facts of the case reveals that NHAI failed to fulfill its obligation in the stipulated time on both grounds i.e. neither the Fee Notification was published nor the COD was declared.***
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> [emphasis supplied]

33. The Arbitral Tribunal noted that the COD had to be declared by NHAI and that there was a delay on the part of NHAI in declaring the COD. The relevant findings of the Arbitral Tribunal from the Award are set out below:

> *5.26 Records reveal that the Fee Notification was published by the Central Government in the Gazette of India on 01.07.2015 (Page 96-101 of CD-IA) and the validation of the user fees rates was done by the Respondent vide letter dated 13.07.2015 (R-1 of RD-I).*
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> *5.27* ***After Fee Notification, the date of COD was to be declared by NHAI as stated in the Fee Notification itself*** *but instead of declaring the date of COD, the Respondent wrote to the Concessionaire to achieve the COD whereas* ***the facts of the case are that the COD had already been achieved as far as the Concessionaire was concerned and no further obligation was required to be performed by the Concessionaire in the declaration of the COD which was the exclusive job of the NHAI only.***

> *5.28* ***When the Respondent time and again wrote to the Concessionaire for achieving the COD, the Concessionaire ultimately stated that 06.09.2015 may be kept as COD, although this statement of Concessionaire was of no legal significance as declaration of COD was the exclusive obligation of NHAI only.*** *Subsequent to this statement,* ***NHAI vide its letter dated 27.08.2015 (C-24 of CD-IA) declared COD as 06.09.2015.*** *The PD vide its order dated 05.09.2015 (C-25 of CD-IA) ordered that the Concessionaire may take charge of the Plaza from the present tolling contractor Shri Md. Usman effective from 11.59.59 on the day of 06.09.2015 and commence tolling from 12 hours (mid-day) of the above day."*
>
> [emphasis supplied]

34. The finding of the Arbitral Tribunal that the delay in declaration of COD from 12th June, 2015 to 6th September, 2015 was attributable to NHAI is based on the material available on record and interpretation of Articles 4 and 13 of the Concession Agreement. On account of the said delay, KATPL could not claim the user fee from 12th June, 2015 to 6th September, 2015 and hence the Arbitral Tribunal held that KATPL was entitled to damages. This Court does not find any infirmity or perversity in the said findings.

35. It is contended on behalf of NHAI that no damages could be awarded in favour of KATPL under Clause 13.1 of the Concession Agreement and that the said Clause only provided for damages to be awarded in favour of NHAI.

36. Clause 13.1.2 provides for damages to be paid by KATPL to NHAI in the event of delay on the part of KATPL in achieving COD. Clause 13.1.2 also provides that no damages shall be payable to NHAI if the delay in COD has occurred as a result of any delay or default on the part of NHAI in satisfying the Conditions Precedent specified in Clause 4.1.2 or due to *force majeure*. However, this Clause does not bar KATPL from claiming damages from NHAI for the loss caused to KATPL on account of delays attributable

to NHAI. The Arbitral Tribunal has placed reliance on the parameters provided in Clause 13.1.2 of the Clause *i.e.* rate of 0.2% of the performance security for each day of delay.

37. In the opinion of this Court, the Arbitral Tribunal has not rewritten the contract but has applied Clause 13.1.2 for quantifying the loss caused by NHAI's default. The Arbitral Tribunal was competent to award damages in terms of clause 4.2 of the Concession Agreement. Therefore, there was nothing wrong with the approach adopted by the Arbitral Tribunal.

38. NHAI has placed reliance on the letters dated 19th August, 2015 (at page 152 of the petitioner's document) and 20th August, 2015 (at pages 153-154 of the petitioner's document) written by KATPL to NHAI calling upon NHAI to cure the discrepancy in toll fee rate notification and then declare COD w.e.f. 6th September, 2015. Therefore, it is submitted that the COD was fixed for 6th September, 2015 at the request of KATPL. Further, since KATPL never communicated that it intended to claim damages for the delay, it cannot claim any compensation for the said delay.

39. A perusal of both the aforesaid letters makes it evident that KATPL has stated that it is incurring expenses and is not able collect toll on account of delay attributable to NHAI. Therefore, there was no waiver to claim damages.

40. In view of the above, this Court does not find any infirmity in the findings of the Arbitral Tribunal in respect of Claim 2.

CLAIM 3

41. This claim arises out of the dispute relating to issuance of local monthly passes to residents of Kumbalam Panchayat following toll-related

agitation and law and order issues, which prevented collection of user fees. KATPL sought reimbursement of ₹93,89,500/- towards the cost incurred for 1055 such passes, contending that the same constituted *Force Majeure* under the Concession Agreement.

42. The toll collection started on 11th June, 2011 and had to be stopped on account of local agitation. The Government of Kerala issued an order dated 18th July, 2011 stating that it will bear the expenses towards payment of toll at the rate of ₹150 per month per vehicle for local monthly passes for the vehicles of the residents of Kumbalam Panchayat.

43. After KATPL started its commercial operations on the highway w.e.f. 6th September, 2015, KATPL had to issue a number of free monthly passes to the residents of Kumbalam Panchayat. The Arbitral Tribunal constituted Committee for verification of the number of passes issued which comprised five members, one from NHAI, two from claimant and two independent Engineers. In terms of the report submitted by the said Committee, 1055 local vehicles were identified who are not paying the user fee since COD. Towards this claim, the Arbitral Tribunal has awarded a sum of ₹93,89,500/- as reimbursement to the KATPL up till September, 2018.

44. On behalf of NHAI, it has also been submitted that the Arbitral Tribunal misinterpreted Clauses 22.3, 26.3, 26.7.2(b) of the Concession Agreement to grant reimbursement to KATPL.

45. In this regard, reference may be made to Clause 22.3 of the Concession Agreement which are set out below:-

> *"**22.3 Exemption for Local Users***
> *The Concessionaire shall not collect any Fee from a Local User for non-commercial use of the Project Highway, and-shall issue a pass in respect thereof for commuting on a section of the Project Highway as specified*

> *in such pass and for crossing the Toll Plaza specified therein. For carrying out the provisions of this Clause 22.3, the Concessionaire shall formulate, publish and implement an appropriate scheme, and make such modifications to the scheme as may reasonably be suggested by the Authority, or by Local Users from time to time**; provided that for defraying its expenses on issuing of passes and handling of Local Users, the Concessionaire shall be entitled to charge a monthly fee of Rs.150 (Rupees one hundred and fifty), with reference to the base year 2007-08, to be revised annually in accordance with the Fee Rules to reflect the variation in WPI, and then rounded off to the nearest 5 (five) rupees**; provided further that no passes will be required or Fee collected from a vehicle that uses part of the Project Highway and does not cross a Toll Plaza."*
>
> [emphasis supplied]

46. A reading of Clause 22.3 would show that in respect of monthly passes issued for local users, KATPL would be entitled to charge a monthly fee of ₹150/- per vehicle.

47. Article 26 of the Concession Agreement is the *force majeure* clause. Clause 26.1 states that *force majeure* event would include *inter alia* 'Indirect Political Event'. For ease of reference, Clause 26.1 is set out below:

> *"**26.1 Force Majeure***
>
> ***As used in this Agreement, the expression "Force Majeure" or "Force Majeure Event" shall mean occurrence in India of any** or all of the Non-Political Event, **Indirect Political Event** and Political Event, **as defined in Clauses** 26.2, **26.3** and 26.4 respectively, if it affects the performance by the Party claiming the benefit of Force **Majeure** (the "Affected Party") of its obligation under this Agreement andf which act or event (i) is beyond reasonable control of the Affected Party, and (ii) the Affected Party could not have prevented or overcome by exercise of due diligence and following Good Industry Practice, and (iii) has Material Adverse Effect on the Affected Party."*
>
> [emphasis supplied]

48. Clause 26.3 of the Concession Agreement defines events or circumstances amounting to an 'Indirect Political Event'. Relevant extracts

from Clause 26.3 are set out below:

> *"**26.3 Indirect Political Event***
> *An Indirect Political Event shall mean one or more of the following acts or events.*
> *…**(c) any civil commotion, boycott or political agitation which prevents collection of Fee by the Concessionaire for an aggregate period exceeding 7 (seven) days in an Accounting Year**, or*
> *** *** ***
> ***(f) any event or circumstances of a nature analogous to any of the foregoing…"***
>
> [emphasis supplied]

49. Clause 26.7.2(b) stipulates that KATPL shall be reimbursed by NHAI if any 'Indirect Political Event' occurs. For ease of reference, relevant extracts from Clause 26.7.2 of the Concession Agreement are set out below:

> ***26.7.2** Upon occurrence of a Force Majeure Event after COD, the costs incurred and attributable to such event and directly relating to the Project (the "Force Majeure Costs") shall be allocated and paid as follows:*
> *(a) upon occurrence of a Non-Political Event, the Parties shall bear their respective Force Majeure Costs and neither Party shall be required to pay to the other Party any costs thereof, or*
> ***(b) upon occurrence of an Indirect Political Event or a Political Event, all Force Majeure Costs attributable to such Indirect Political Event or Political Event, as the case may be, shall be reimbursed by the Authority to the Concessionaire**…"*
>
> [emphasis supplied]

50. A reference may be made to the relevant extracts from the findings of the Arbitral Tribunal which are set out below:

> *"**5.40** AT observes that as stated in Article 22.3 of CA, charges of Rs. 150/- per month per pass are meant for defraying the Concessionaire's expenses or issuing of passes and handling of local users. **So, this is a cost being incurred by the Concessionaire and not any 'Fee' as defined under Article 40.1 which the Concessionaire charges from the users under 2008 Rules. AT also observes that for avoiding the violence, clash and law & order problem caused by the villagers, the***

> ***Concessionaire had to incur this cost of Rs. 150/- by way of issuing free passes to them. So, this cost is evidently covered under Indirect Political Event (Article 26.3 (c) & (f)) and this cost is reimbursable by NHAI under Article 26.7.2 (b) of CA.*** *Therefore, AT is of the considered opinion that even under the provisions of CA, the Concessionaire is entitled to be reimbursed by NHAI for the charges of free passes issued to the users of Kumbalam Panchayat.*
>
> *** *** ***
>
> ***5.42*** *In respect of Claim No.3, Dr. Jayant Dasgupta, Arbitrator, is of the view that neither the principle of natural justice has been violated nor the obligation of State instrumentality in the operation of the Contract, as beinq stressed in the above Para, is attracted. He is further of the considered opinion that the provisions of Article 26.3 (c) and (f) relating to an Indirect Political Event are not attracted in this case, and consequently the provisions of Article 26.7.2 (b) are also not attracted."*
>
> [emphasis supplied]

51. As is evident from paragraph 5.42 of the Award set out above, the Arbitral Tribunal (majority) has taken a view that the costs incurred by KATPL would be covered under 'Indirect Political Event' and hence would be liable to be reimbursed by NHAI. On the other hand, the minority has given a dissenting opinion holding that provisions of Clauses 26.3 (c) and (f) relating to 'Indirect Political Event' would not be attracted in this case and hence, NHAI is not required to reimburse the said cost to KATPL.

52. NHAI has submitted that as per Clause 22.3, KATPL did not collect any 'Fee' from the locals and therefore should not be entitled to 'costs' as awarded by the Arbitral Tribunal. The Arbitral Tribunal has correctly come to the conclusion that KATPL had to incur costs on account of issuance of free local monthly passes. The Arbitral Tribunal was justified in holding that the this was a *force majeure* event arising out of an "Indirect Political Event" within the meaning of Clauses 26.3(c) and (f). The conclusion that such costs are reimbursable by NHAI under Clause 26.7.2(b) is a rational

application of the contractual framework and does not amount to rewriting the contract or travelling beyond its terms.

53. It is further contended by NHAI that NHAI had written several letters to the Government of Kerala for reimbursement against these local monthly passes but did not receive any reimbursement. Therefore, it is not liable to reimburse any amount to KATPL. It is further submitted that KATPL could have directly approached the Kerala Government in this regard.

54. *Per contra*, it is the case of KATPL that NHAI did not disclose to KATPL about the problems with regard to issuance of free local monthly passes. NHAI did not even inform that the Government of Kerala failed to pay the amount in respect of the monthly passes in terms of their order dated 18th July, 2011. Had NHAI informed them of these particulars, KATPL could have charged a higher concession fee.

55. The Arbitral Tribunal rejected the contention of NHAI that it was liable to reimburse the said amount to KATPL only after it receives the same from Government of Kerala. The relevant observations of the Arbitral Tribunal are set out below:-

> *5.41 The Respondent, in Para 3.21 of RD-1 stated that they had already intimated to the Claimant that the reimbursement would be made to them after procuring the same from the Gov't of Kerala.* ***However, AT finds that CA does not provide linking of reimbursement to receipt of money by NHAI from Gov't of Kerala. So, from various considerations like Principles of natural justice, obligation on the NHAI being a state instrumentality to act in a just and fair manner and obligation to comply with the provisions of CA, the Claimant is entitled for reimbursement of Rs.93,89,500/- by NHAI, towards loss caused to them on account of non-payment of the charges for free passes issued to residents of Kumbalam Panchayat…"***
>
> [emphasis supplied]

56. This Court fully endorses the view taken by the Arbitral Tribunal that the Concession Agreement does not provide that reimbursement to KATPL would be made only after receiving the same from Government of Kerala.

57. In view of the above, this Court does not find any infirmity in the findings of the Arbitral Tribunal in respect of Claim 3.

CONCLUSION

58. In view of the discussion above, this Court is of the view that NHAI has failed to make out any ground for interference with the Award under Section 34 of the Act.

59. Accordingly, the petition is dismissed.

AMIT BANSAL
(JUDGE)

JANUARY 23, 2026
ds