2026:DHC:5961

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

% ***Judgment pronounced on: 28.07.2026***

\+ **O.M.P. (COMM) 542/2024, IA No.48442/2024, IA No.540/2025**

NATIONAL HIGHWAYS AUTHORITY OF INDIA ..... Petitioner

Through: Mr. A.K. Nijhawan and Mr. Abdul Vahiel, Advocates.

versus

M/S KURUKSHETRA EXPRESSWAY PRIVATE LTD. ..... Respondent

Through: Mr. Sandeep Sethi, Sr. Adv., Mr. Dayan Krishnan, Sr. Adv., Mr. Rishi Aggarwal, Mr. Sunil Mittal, Mr. Daksh Arora, Ms. Shruti Arora, Mr. Anant Shukla and Mr. Sukrit Seth, Advocates.

CORAM:
HON'BLE MR. JUSTICE SACHIN DATTA

JUDGMENT

IA No.540/2025

1. The present application has been filed by the respondent seeking dismissal of the petition filed under Section 34 of the Arbitration and Conciliation Act, 1996 challenging the arbitral award dated 16.08.2024, primarily on two grounds: (i) limitation, and (ii) suppression of material documents.

2. The respondent contends that the petition has been filed beyond the mandatory limitation period prescribed under Section 34(3) of the Act. The award was passed on 16.08.2024 and the statutory period of three months expired on 16.11.2024.

3. It is submitted that as per case history, as on 29.11.2024 no award, no *Vakalatnama*, and not even the memo of parties was filed. In fact, only 69 pages were filed. No single document/Annexure was filed. It is contended that the same amounts to a 'non-est' filing.

4. Reliance has been placed on ***Brahmaputra Cracker & Polymer Ltd. v. Rajshekhar Construction Pvt. Ltd.***, 2023/DHC/000642.

5. It is submitted that the petition was effectively filed only on 12.12.2024 (registered on 13.12.2024) without any application seeking condonation of delay and is therefore liable to be dismissed as time-barred.

6. The respondent further alleges that the petitioner deliberately suppressed material documents. While the arbitral record comprised approximately 4,574 pages, the petitioner filed only 134 pages, omitting several documents that formed the very basis of the Tribunal's findings.

7. It is submitted that the omitted documents include the "Disaggregation Letter" dated 04.02.2019, Independent Engineer's Letter dated 27.01.2022 and 29.03.2022, Statement of Claim, Statement of Defence, evidence affidavits, cross-examination transcripts, letter dated 25.02.2022 issued by Bank of Baroda, relevant provisions of the Concession Agreement, the Financial Model, and the Loan Agreement.

8. The respondent submits that the petitioner has selectively placed documents on record to present an incomplete and misleading picture.

9. The petitioner opposes the respondent's application for dismissal and contends that the Section 34 petition is within the prescribed limitation period and is not liable to be rejected on technical grounds.

10. The petitioner submits that the arbitral award was passed on 16.08.2024 and the Section 34 petition was initially filed on 13.11.2024,

well within the statutory period of three months. As per the submissions of the petitioner, the petition was accompanied by the arbitral award, relevant portions of the Concession Agreement, the *vakalatnama*, and the memo of parties. The subsequent re-filings were only to cure defects raised by the Registry and to place additional pages of the Concession Agreement on record pursuant to instructions from NHAI. The objections were ultimately removed on 12.12.2024, and the petition was listed on 17.12.2024. It is, therefore, asserted that the petition does not suffer from delay or latches, and the judgments relied upon by the Respondent to make out a case of 'non-est' filing, are inapplicable.

11. The petitioner further denies any suppression of material documents, contending that the entire Concession Agreement was eventually placed on record and that the petition itself sought summoning of the complete arbitral record, which is the normal practice in proceedings under Section 34.

12. The petitioner maintains that the petition complies with all procedural requirements and that there has been no concealment of facts or documents.

13. It is further prayed that, in the event this Court comes to the conclusion that the present petition has been filed beyond the prescribed period of three months, this Court may be pleased to condone the delay.

14. Having heard the learned counsel for the parties this Court is not inclined to allow the present application. It is the petitioner's case that the present petition was initially instituted on 13.11.2024, well within the prescribed limitation period of three months under Section 34(3) of the Arbitration and Conciliation Act, 1996. The petitioner has specifically averred that, at the time of the initial filing, the petition was accompanied by the arbitral award, the relevant extracts of the Concession Agreement, the

Vakalatnama, and the Memo of Parties. The subsequent re-filings were undertaken to cure the defects pointed out by the Registry. The Registry's objections were ultimately removed on 12.12.2024, whereafter the matter was listed before the Court on 17.12.2024.

15. The specific averments made by the petitioner in its reply dated 04.02.2025 are reproduced as under -

> *"That the contents of para no.4 of the Application, It is contended by the Respondent that "as on 29.11.2024, no Award, no Vakalatnama and not even the Memo of Parties was filed". In fact, on 13.11.2024, the Petition alongwith Award and the relevant pages of the Contract Agreement, Vakalatnama and Memo of Parties was filed before this Hon'ble Court, to which the Registry of this Hon'ble Court had raised objections. It is submitted here that during the process of removing the Objections NHAI instructed the Counsel to file the more Agreement pages may be filed such that during admission, in case certain queries are raised' by the Hon'ble Court the same could be replied effectively. It may be relevant to mention that the Agreement was apart of the Arbitration record and Petitioner had prayed that the same be called for, however, in view of the instructions Petitioner refiled the Petition with while removing fresh objections raised by the Registry, on 14.11.2024,"'02.12.2024, 07.12.2024, 11.12.2024. Finally objection were removed on 12.12.2024 and petition listed on 17.12.2024."*

16. Even in a situation where the petition under Section 34 was not filed within the initial period of three months from the date on which the petitioner received the arbitral award, Section 34(3) of the Arbitration and Conciliation Act, 1996 expressly empowers the Court to entertain such an application within a further period of thirty days, provided the applicant establishes sufficient cause for not filing the application within the prescribed period of three months. Section 34(3) reads as under –

> *"(3) An application for setting aside may not be made after three months have elapsed from the date on which the party making that application had received the arbitral award or, if a request had been made under section 33, from the date on which that request had been disposed of by the arbitral tribunal:*

Provided that if the Court is satisfied that the applicant was prevented by sufficient cause from making the application within the said period of three months it may entertain the application within a further period of thirty days, but not thereafter."

17. In ***Panjab Ali Alias Punjab Ali and Ors. v. State of West Bengal and Ors***., AP/92/2025 (order dated 19.1.2026), the Calcutta High Court has observed as under –

> *"Section 34(3) of the Arbitration and Conciliation Act, 1996 mandates that an application for setting aside an arbitral award must be made within a period of three months from the date on which the party making the application receives the arbitral award. The proviso to Section 34(3) permits the Court, upon sufficient cause being shown, to entertain the application within a further period of thirty days, but not thereafter. <u>Thus, the outer limit prescribed by law for filing a petition under Section 34 is three months plus thirty days, i.e., a total of 120 days from the date of receipt of the award</u>.*
>
> *This position has been consistently reaffirmed, inter alia, in Simplex Infrastructure Ltd. v. Union of India, (2019) 2 SCC 455, wherein the Supreme Court reiterated that an application for setting aside an arbitral award must be filed within three months from the date of receipt of the award, extendable only by a further period of thirty days on sufficient cause being shown, and not beyond. Any delay beyond the outer limit of 120 days renders the application non-maintainable, and the Court is rendered functus officio for the purpose of condoning such delay."*

18. It is also well settled that Section 34(3) of the A&C Act governs the initial institution of a petition; it has no application to delay thereafter occasioned in curing defects pointed out by the Registry and in re-filing. In ***Northern Railway v. Pioneer Publicity Corporation Pvt. Ltd***., (2017) 11 SCC 234, the Supreme Court held that the rigours of Section 34(3) are confined to the original presentation of the petition, and that delay in removal of office objections and re-filing does not attract the same standard, nor does it relate back so as to render an originally timely petition time-

barred. The several re-filings effected by the petitioner on 14.11.2024, 02.12.2024, 07.12.2024 and 11.12.2024, culminating in removal of objections on 12.12.2024, were accordingly steps in the process of curing defects in a petition already instituted within limitation on 13.11.2024, and stand on a wholly different footing from the institution of a fresh petition.

19. In the present case, the arbitral award is dated 16.08.2024. The petition was initially filed on 13.11.2024, and after curing all the defects pointed out by the Registry, it was ultimately re-filed on 12.12.2024. Thus, even reckoning the period up to the date of re-filing, the petition was brought on record within the outer limit of 120 days contemplated under Section 34(3) of the Act. Considering that the aforesaid outer limit has not been breached, even assuming that there was some delay (although it does not appear to be so), the same would be liable to be condoned given the voluminous nature of the record and the attendant facts and circumstances. As such, no ground is made out to reject the petition on the ground of limitation.

20. It is also significant to note that the petitioner has, in the prayer clause of the petition itself, sought summoning of the records from the learned Arbitral Tribunal. Had there been any intention on the part of the petitioner to suppress any material document, such a prayer would not have been made. This circumstance lends support to the petitioner's contention that there was no deliberate concealment or withholding of any document from the Court.

21. In view of the aforesaid facts and circumstances, this Court finds no merit in the present application. The same is, accordingly, dismissed.

O.M.P. (COMM) 542/2024 and IA No.48442/2024

22. The present petition assails an arbitral award dated 16.08.2024 rendered in relation to disputes between the parties arising under a Concession Agreement dated 13.07.2010. The said Agreement pertains to the design, construction, development, finance, operation and maintenance of the four-laning of the Rohtak–Bawal Section of NH-71, from KM 363.300 (design KM 363.300) to KM 450.800 (design KM 445.853), under NHDP III in the State of Haryana.

23. The claimant (respondent herein), M/s Kurukshetra Expressway Pvt. Ltd., is a Special Purpose Vehicle jointly promoted by M/s JMC Projects (India) Ltd (Lead member) and M/s SREI Infrastructure Finance Limited.

24. The request for qualification for the short-listing of bidders in connection with the aforesaid project was issued by the National Highways Authority of India (NHAI) on 16.04.2009. Pursuant thereto, a bidding process was conducted, culminating in the issuance of the Letter of Award dated 04.02.2010 in favour of the respondent/concessionaire. Thereafter, the Concession Agreement was executed on 13.07.2010, contemplating a concession period of 28 years from the appointed date, *i.e.,* 10.05.2011.

25. Provisional Completion Certificates were issued on 24.08.2013 and 30.09.2014 upon the substantial completion of the works. Toll collection commenced on 01.09.2013. The Completion Certificate was issued on 13.08.2018.

26. On 08.04.2014, the concessionaire applied to the Authority for the deferment of the annual premium payable by it, on the ground that the project was under financial stress. *Vide* letter dated 08.12.2014, the NHAI

sanctioned the deferment of the premium. Thereafter, certain disputes arising under the Concession Agreement became the subject matter of an arbitral reference, which culminated in an award dated 03.11.2018. Subsequently, certain claims raised by the Respondent/Concessionaire on account of the financial losses suffered by it were also referred to arbitration for adjudication.

27. The impugned Award in the present proceedings effectively arise out of the third round of arbitration between the parties. The same was occasioned by the termination of the Concession Agreement by the respondent/concessionaire in exercise of its rights under Clause 34.8 of the Concession Agreement, which provides as follows:-

> **34.8 Termination Notice for Force Majeure Event**
>
> If a Force Majeure Event subsists for a period of 180 (one hundred and eighty) days or more within a continuous period of 365 (three hundred and sixty five) days, either Party may in its discretion terminate this Agreement by issuing a Termination Notice to the other Party without being liable in any manner whatsoever, save as provided in this Article 34, and upon issue of such Termination Notice, this Agreement shall, notwithstanding anything to the contrary contained herein, stand terminated forthwith; provided that before issuing such Termination Notice, the Party intending to issue the Termination Notice shall inform the other Party of such intention and grant 15 (fifteen) days time to make a representation, and may after the expiry of such 15 (fifteen) days period, whether or not it is in receipt of such representation, in its sole discretion issue the Termination Notice.

28. *Vide* letter dated 07.10.2021, the respondent/concessionaire terminated the Concession Agreement on the ground of an "Indirect Political Force Majeure Event" and sought a termination payment of Rs.1347.53 Crore, along with certain other sums. For the adjudication of the aforesaid

disputes, the concerned Arbitral Tribunal, which has rendered the impugned Award, was constituted.

29. A statement of claim came to be filed on 01.10.2022, wherein the following claims were raised:-

a. On account of Termination Payment to the tune of Rs 1,347,53,00,000/- [One Thousand Three Hundred Forty Seven Crores and Fifty Three Lacs only];
b. Towards Pre-reference interest on Termination payment in terms of Clause 37.3.3 & 47.5 of CA, to the tune of Rs 120.93 Cr;
c. For cost towards the Force Majeure Events being Covid-19 and Farmers'Agitation to the tune of Rs 30.93 Cr;
d. For additional cost and foregone benefits claim to the tune of Rs. 539 Cr;
e. For loss of opportunity from the Termination date till the expiry of the Concession Period to the tune of Rs 1768.60 Crore;
f. For the refund of Rs. 1,30,86,924/- paid towards the insurance policy renewal;
g. Direction to the Respondent to issue the Vesting Certificate in accordance to Article 38.4 as set forth in Schedule-U of CA;
h. Interest @18% per annum on all the above mentioned claim amounts, from the period of date of cause of action till the filing of Statement of Claim, pendent lite and future interest till the actual receipt of payments as per Section 31(7)(b) of the Act, 1996;
i. Costs under section 31A of the Act of 1996 including, but not limited to administrative charges, expenses incurred for the present arbitration, fees of the Hon'ble Tribunal, legal costs and all other expenses;
j. Grant the applicable taxes on the claimed amount, if any.

30. NHAI filed its Statement of Defence on 19.01.2023 along with counter-claims as under:

1. Maintenance Obligation under clause 38.1 of CA of Rs. 183.28 Cr
2. Recovery of Premium with Interest of Rs. 158.95Cr
3. Outstanding Liabilities towards various vendors and sub-Agencies of Concessionaire of Rs. 13.49 Cr
4. Recoveries for breach of Maintenance Obligations of the Project Highway as per Clause 17.8 of CA of Rs. 12.18 Cr
5. 50% Share of the IE to be reimbursed by the Concessionaire as per Clause 23.3 of CA of INR 0.595 Cr
6. Toward the interest @ 18% p.a. on the amount claimed as in counter-claims No. 1,2, 3& 4 from the date of invocation of the present Arbitration till the date of the award, and further interest from the date of the award till actual payment - 18% on Claim No.1, 2, 3, 4 and 5
7. Cost of Arbitration, administrative charges and expenses incurred for the present Arbitration including but not limited to the legal cost as per actual total Rs 368.495 Crore + 18% interest p.a. on the amount claimed as in counter-claim no. 1,2, 3, 4 and 5 + Cost of Arbitration administrative charges. expenses incurred for the present Arbitration.

31. A summary of amounts awarded under the various claims and counter-claims are as under:-

CLAIMS of KEPL	**AMOUNT CLAIMED (IN RUPEES)**	**AMOUNT AWARDED (IN RUPEES)**
Claim No. 1 towards Termination Payment	1347.53 Cr	911.13 Cr
Claim No. 2 towards Interest on Termination	120.93 Cr	Interest on the amount awarded by way of termination payment as follows:

Payment		Amount payable by way of interest @ 3% above the bank rate for 90 days (22.10.2021 to 20.01.2022). Thereafter, interest @ 5% over and above the bank rate on the said amount from 21.01.2022 till 23.07.2022. With effect from 24.07.2022, the Concessionaire shall be entitled to interest on this amount @ 9% per annum till the date of realization.
Claim No. 3 towards loss suffered on account of force majeure events	Covid Rs. 15.13 Cr Farmers Agitation Rs. 15.80 Cr ___________________ Total Rs. 30.93 Cr.	Covid Rs. 15.13 Cr Farmer Agitation Rs. 11.19 Cr Total 26.32 Cr ___________________________ The Concessionaire shall be entitled to interest on this amount @ 9% per annum from 11.06.2022 till the date of realization
Claim No. 4 towards Additional Costs and foregone benefits	539 Cr	Rejected
Claim No. 5 towards Loss of Opportunity	1768.60 Cr	Rejected
Claim No. 6 towards Refund of Insurance Premium	1,30,86,294	1,30,86,294 The Concessionaire is entitled to recover interest @9% per annum from 23.11.2021 till the date of realization.
Claim No. 7 towards Interest	_	Concessionaire is entitled for interest on the sums awarded under Claim Nos.1, 2, 3 & 6 @9% per annum from the dates mentioned in respect claims till the date of realization.
Claim No. 8 towards Costs	_	Rs. 1,10,00,000/- In case the payment is not made within 2 months from the date of Award, the Concessionaire shall be entitled for the interest @9% per annum thereafter till the date of realization.

COUNTER CLAIMS

COUNTER CLAIMS	AMOUNT CLAIMED	AMOUNT AWARDED (IN RUPEES)

	(IN **RUPEES)**	
Claim No. 1 towards cost of maintenance of project highway	183.28 Cr	80.49 Cr with 9% interest from 25.03.2022 till the date of Award. The amount maybe adjusted against the Award in favour of the Concessionaire.
Claim No. 2 towards outstanding dues of deferred premium	158.95 Cr	Allowed subject to directions as contained in Paragraph 138 of the Award
Claim No. 3 towards outstanding payments to agencies	13.49 Cr	3.50 Cr with 9% interest from 28.12.2021 till the date of Award. The amount may be adjusted against the Award in favour of the Concessionaire.
Claim No. 4 towards non rectification of various defects	12.18 Cr	Rejected
Claim No. 5 towards remuneration paid to the I.E.	59.49 Cr	Rejected

32. Although the present petition, filed under Section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the 'A&C Act'), assails the award on various grounds, the primary controversy raised by the Petitioner during the course of arguments pertains to the amount awarded to the Respondent towards the "Termination Payment" (Claim No. 1).

33. The primary bone of contention is the award in respect of claim no.1. The same reads as under:-

CLAIM NO. 1

The Concessionaire is entitled for a sum of Rs. 1347.53 Cr towards the Termination Payment as per Clause 34.9.2 of CA

23. Shri Manoj Kumar Singh, Learned Counsel for the Concessionaire has submitted that due to unavoidable circumstances i.e. Indirect Political Force Majeure Event on account of toll suspension due to Farmer's Agitation and Covid-19 continued for more than 180 days within a continuous period of 365 days, which had Material Adverse Effect on toll

collection. The Concessionaire served the notice dated 17.08.2021, showing its intention to terminate the contract. The Concessionaire issued the Notice of Termination dated 7.10.2021 under Clause 34.8 of the CA and claimed for Termination Payment. The Authority was under obligation to make the payment but nothing has been paid. Thus the Concessionaire is entitled for Termination Payment in accordance with the terms of CA.

24. Shri Ashok Nijhawan, Learned Counsel for the Authority has submitted that the Termination Payment has been assessed by the Concessionaire wrongly. There could be no justification for the Concessionaire to ask for a sum of Rs 1347.53 Cr towards the Termination Payment and Rs. 120.93 Cr as interest on the said amount. The CA contains a formula and the Concessionaire cannot ask for anything over and above its entitlement as per the said formula. The claim is exorbitant and the calculations provided therein are not correct. Thus, liable to be rejected.

ANALYSIS AND FINDINGS

25. From the pleadings and submissions advanced by the Learned Counsels for the Parties, the following is evident :

I. Indisputably, termination of the contract took place due to subsistence of Indirect Political Force Majeure Event for a period beyond 180 days in a continuous period of 365 days

II. Termination Payment is to be computed in consonance and conformity with Clause 34.9.2 of the CA, which provides specific methodology for the same.

26. Termination Payment has been defined under Clause 1.2.1 of Article 48 as under:

> *"**Termination Payment**" means 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;*
>
> *....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;*

27. The Termination Payment has to be calculated as per the terms of Clause 34.9.2, which reads as under:

" If Termination is on account of an Indirect Political Event, the Authority shall make a Termination Payment to the Concessionaire in an amount equal to:

(a) Debt Due less Insurance Cover; provided that if any insurance claims forming part of the Insurance Cover are not admitted and paid, then 80% (eighty per cent) of such unpaid claims shall be included in the computation of Debt Due; and

(b) 110% (one hundred and ten per cent) of the Adjusted Equity."

28. Debt Due has been defined under Clause 2.2.1 of Article 48, as:

***"Debt Due"** means the aggregate of the following sums expressed in Indian Rupees outstanding on the Transfer Date:*

(a) the principal amount of the debt provided by the Senior Lenders under the Financing Agreements for financing the Total Project Cost (the "principal") but excluding any part of the principal that had fallen due for repayment two years prior to the Transfer Date;

(b) all accrued interest, financing fees and charges payable under the Fiancing Agreements on, or in respect of, the debt referred to in Sub-clause (a) above until the Transfer Date but excluding (i) any interest, fees or charges that had fallen due one year prior to the Transfer Date, (it) any penal interest or charges payable under the Financing Agreements to any Senior Lender, and iii) any pre-payment charges in relation to accelerated repayment of debt except where such charges have arisen due to Authority Default;

(c) .....

29. Equity has been defined in the CA, as:

***"Equity"** means the sum expressed in Indian Rupees representing the paid up equity share capital of the Concessionaire for meeting the equity component of the Total Project Cost.*

30. The Total Project Cost has also been defined as under:

> ***"Total Project Cost"*** *means the* ***lowest of:***
>
> *(a) the capital cost of the Project, as set forth in the Financial Package;*
>
> *(b) the actual capital cost of the Project upon completion of Four-Laning of the Project Highway; and*
>
> *(c) a sum of Rs. 650.00 crore (Rupees Six Hundred Fifty crores only), 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 WPI 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 herein before specified such that the effect of increase in WPI, in excess of such 6% (six per cent), is reflected in the Total Project Cost;* ***(Emphasis Added)***

31. The Total Project Cost makes reference to Financial Package which further makes reference to Financial Model and Financing Agreements. All these phrases have been defined in the CA, as under:

> ***"Financial Model"*** *means the financial model adopted by Senior Lenders, setting forth the capital and operating costs of the Project and revenues therefrom on the basis of which financial viability of the Project has been determined by the Senior Lenders, and includes a description of the assumptions and parameters used for making calculations and projections therein;*
>
> ***"Financial Package"*** *means the financing package indicating the total capital cost of Four-Laning and the means of financing thereof, as set forth in the Financial Model and approved by the Senior Lenders, and includes Equity, all financial assistance specified in the Financing Agreements, Subordinated Debt and Equity Support, if any;*
>
> ***"Financing Agreements"*** *means the agreements executed by the Concessionaire in respect of financial assistance to be provided by the Senior Lenders by way of loans, guarantees, subscription to non-convertible debentures and other debt instruments including loan agreements, guarantees, notes, debentures, bonds and other debt instruments, security agreements, and other documents relating to the financing (including refinancing) of the Total Project Cost, and includes amendments or modifications made in accordance with Clause 5.2.2;*

32. Clause 1.4.2(a) of the CA provides that specific clause relevant to an issue shall prevail over other clauses in the Agreement, which reads:

1.4.2 Subject to the provisions of Clause 1.4.1, in case of ambiguities discrepancies within this Agreement, the following shall apply:

(a) *Between two or more Clauses of this Agreement, the provisions of a specific Clause relevant to the issue under consideration shall prevail over those in other Clauses;*

33. Mr. Montek Mayal (CW-3) has filed his evidence affidavit wherein the Total Project Cost has been shown as Rs. 914.1 Cr. During his cross-examination, the witness has explained how he computed that figure. Considering all these aspects, and particularly the deposition of Mr. Montek Mayal (CW-3), Shri Manoj Kumar Singh, Learned Counsel for the Concessionaire reduced the claim to Rs. 914.1 Cr. However, Shri Singh, placed very heavy reliance on Disaggregation Letter dated 04.02.2019 wherein the Total Project Cost has been shown as 1045.55 Cr. The said letter has not been denied by the Authority in its affidavit of admission and denial. The IE has accepted the said figure, as is evident from the letter of the IE dated 27.01.2022. The relevant part of which reads:

7. The Total Project Cost Reported by the Concessionaire is Rs. 1,045.55 Cr as per following details:

Description	***Amount (Rs Cr)***
Debt	*794.06*
Equity	*198.52*
Additional Funding for COS Items	*52.97*
Total Capitalization	*1,045.55*

8. On 30th October 2013, the Authority had issued a COS Order to the Concessionaire to undertake the COS works worth Rs. 58.18 Crores out of which for works worth Rs. 12.77 Crores the tolling rights of 1.102 was added to the Concession instead of payments being released. Consequently the Concessionaire had to invest further Rs. 12.77 Crores to meet the Cost of COS. However, subsequently on 14th October 2014, the lE has estimated certain negative change of scope and the value of the same was finalized by the IE as Rs. 4.27 Crore

16.As the termination Payment comprises of 110% of Adjusted Equity and Debt Due, the total Termination Payment comes out to be Rs. 748.16 Crores as per details given below.

Description	Amount (Rs Cr)
Adjusted Equity	171.00
110% of Adjusted Equity	188.10
Debt Due	560.06
Total Termination Payment	748.16

..Although this letter has been issued nearly 175 days after the issuance of Completion Certificate by the IE (Letter No 728 dated 13" August 2018 - Ref. #19 above = Copy enclosed), as against the required 60 days, the delay can be attributed to certain COS works that were delinked from the Completion and were to be completed within 270 days after the issuance of the Completion Certificate. The COD Letter by the lE states This clearly that certain items of works were still balance and were delinked from the Completion Certificate.

The lE letter states as under:...

...From the above, it can be ascertained that the delay in submission of Disaggregation Letter was not the Concessionaire's default and certain Items of work were still outstanding due to the matter being sub-judice. It is therefore recommended that this letter from the Concessionaire (dated in February 2019) may be considered by the Authority as acceptable within the definition as stipulated in the Concession Agreement.

34. Authority has not accepted the said Disaggregation Letter on the grounds thatit had been submitted at a belated stage. However, IE in its letter dated 29.03.2022 has explained the position observing as under:

> *Reg: Termination Payment as per Clause 34.9.2 - Submission of requisite information sought by NHAI HQ in the matter of termination payment*
>
> ……
>
> *3. Whether the Disaggregation Letter was submitted by the Concessionaire within 60 days from COD and whether the same has been accepted by NHAI:*
>
> …….
>
> *From the above, it can be ascertained that the delay in submission of Disaggregation Letter was not the Concessionaire's default and certain items of work were still outstanding due to the matter being sub-judice. It is therefore recommended that this letter from the Concessionaire (dated 4th Febraury 2019) may be considered by the Authority as acceptable within the definition as stipulated in the Concession Agreement.*
>
> *Further, the query whether the Disaggregation Letter was accepted by NHAI is not meaningful as NHAI never provided any acceptance or approval for such letters for the reason that any acceptance can possibly be construed as acceptance of Concessionaire Chatt at final TPC.*
>
> *However we did not find any communication from NHAI which could be considered as rejection of this Disaggregation Letter and therefore, it deemed reasonable to consider this letter as formal Disaggregation Letter for the purpose of calculation of Termination Payments as per Concession Agreement and subsequent Guidelines issued by the Authority in this regards.*

35. Thus, it is evident that though the Disaggregation Letter dated 04.02.2019 was submitted beyond the stipulated period of 60 days but its existence was never disputed by the Authority. The communication between the IE and the Authority clearly reveals that for the delay, the Concessionaire could not be imputed with the motive to inflate the figures of the Termination Payment, for the reason that the letter had been written much prior to the starting of the Force Majeure Event, which ultimately resulted the termination. For this very reason, even by imagination, no malafide could be imputed against the Concessionaire.

36. As per the Letter of Disaggregation, the Concessionaire notified the Total Project Cost as Rs. 1045.55 Cr. The debt shown as Rs. 794.06 Cr and the original equity of INR. 198.52 Cr already stood approved. The amounts shown therein had been approved by the Authority while making the scrutiny for approval of Financial Package, Financial Model, Loan Agreement and Other Financial Agreements. The said exercise was undertaken by the Authority before declaration of Financial Closeon 20.05.2011 w.e.f from 17.05.2011. The IE in its letter dated 17.01.2022 acknowledged that Equity was increased by Rs. 52.97 Cr on account of additional funding from promoters.

37. After considering the aforesaid material on record, the IE vide letter dated 27.02.2022 intimated the Project director, as under:

> *10. However, in the Concession Agreement there is a Definition of **"Termination Payment"** which states as under:*

***"Termination Payment"** means..*

Further in the Escrow Agreement (A Tri Party Agreement between all which has been clarified by the Authority, the Concessionaire, and the Lenders which does recognize all the conditions of the Financing Agreements) there was some dispute regarding the Debt Due which has been clarified by the Authority in their Policy Guidelines dated 3rd February 2021 (Ref. #20 above-copy enclosed).

12. Accordingly, the Debt Due, by definition that does not include any backlog or default of the Concessionaire in making interest & Principle payments, in view of these provisions, the amount of Rs. 560.06 becomes the Debt Due for the Purpose of estimation of Termination Payments as per following details:

Description	***Amount***
Total Principle Due	*545.23*
Interest Accrued	*14.83*
Base Equity (TPC-Debt Due)	*560.06*

16. As the Termination Payment comprises of 110% of Adjusted Equity and Debt Due, the total Termination Payment comes out to be Rs. 748.16 Crores as per details given below:

Description	***Amount (Cr)***
Adjusted Equity	*171.00*
110% of Adjusted Equity	*188.10*
Debt Due	*560.06*
Total Termination Payment	*748.16*

38. Thus, it is evident, the IE has clearly recorded that the Disaggregation Letter of the Concessionaire was the formal Disaggregation for the purpose of computing the Termination Payment.

39. Specific pleadings had been taken by the Concessionaire in paragraphs 4(g) & (h) in its SoC. The Authority in its SoD has not specifically denied the same rather stated to be a "matter of record."

40. Order VIII Rule 3, CPC requires the defendant to make denial of each allegation of fact of which he does not admit the truth specifically. Rule 4 thereof prohibits the defendant to make evasive denial and requires to answer the point of substance. Rule 5 thereof provides for the consequences of non-specific denialimplied admission. The written statement must deal specifically with each allegation of fact in the plaint and when a defendant denies any such fact, he must not do so evasively, but answer the point of substance. If his denial of a fact is not specific but evasive, the said fact shall be taken to be admitted. Under section 58 of the Evidence Act, 1872, a fact admitted need not be proved unless the court warrants it. (Vide: ***Badat and Co. Bombay* v. *East India Trading Co.***, AIR 1964 SC 538; ***Ahmedsahebv. Sayed Ismail,*** (2012) 8 SCC 516; ***Thangam & Anr. v. Navamani Ammal,*** 2024 INSC 164; and ***Srinivas Raghavendra Rao Desai v. V Kumar Vamanrao alias Alok & Ors***, 2024 SCC OnLine SC 226).

41. Moreover the Concessionaire's witness on the Letter of Disaggregation. The effect of non cross-examining of a witness was not questioned in his cross-examination on a particular fact/circumstance has been dealt with and explained by the Supreme Court in ***Laxmibai* v. *Bhagwantbuva***, AIR 2013 SC 1204, observing as under:

> *"If a party wishes to raise any doubt as regards the correctness of the statement of a witness, the said witness must be given an opportunity to explain his statement by drawing his attention to that part of it, which has been objected to by the other party, as being untrue. Without this, it is not possible to impeach his credibility. Such a law has been advanced in view of the statutory provisions enshrined in section 138 of the Evidence Act, 1872, which enable the opposite party to cross-examine a witness as regards information tendered in evidence by him during his initial examination in chief, and the scope of this provision stands enlarged by section 146 of the Evidence Act,*

which permits a witness to be questioned, inter-alia, in order to test his veracity. Thereafter, the unchallenged part of his evidence is to be relied upon, for the reason that it is impossible for the witness to explain or elaborate upon any doubts as regards the same, in the absence of questions put to him with respect to the circumstances which indicate that the version of events provided by him, is not fit to be believed, and the witness himself, is unworthy of credit. Thus, if a party intends to impeach a witness, he must provide adequate opportunity to the witness in the witness box, to give a full and proper explanation. The same is essential to ensure fair play and fairness in dealing with witnesses."

(*See* also: ***Ravinder Kumar Sharma* v. *State of Assam***, AIR 1999 SC 3571; ***Ghasita Sahu* v. *State of Madhya Pradesh***, AIR 2008 SC 1425; ***Rohtash Kumar* v. *State of Haryana*, (2013)** 14 SCC 434; and ***Gulam Sarbar* v. *State of Bihar (Now Jharkhand)***, (2014) 3 SCC 401.)

42. The effect of cross-examination is a matter of substance and not of procedure. Parties require to put their own version in cross-examination of opposite party. The effect of non cross-examination of the witness has not been disputed and if no such questions are put, the Court would presume that the witness account has been accepted. (Vide: ***Bhoju Mandal v. Devnath Bhaga***t AIR 1963 SC 1906; and ***Muddsani Venkata Narsaiah (D) Th. Lrs. v. Muddasani Sarojana***, AIR 2016 SC 2250)

43. The Authority did not carry out any effective cross-examination of the Concessionaire's witnesses in this regard. Therefore, the unchallenged deposition of the witnesses is to be taken as admission on the part of the Authority.

44. On the other hand, the Learned Counsel for the Concessionaire has effectively cross-examined Mr. Raghav Madan (RW). Relevant part of his cross-examination reads as under:

Q. 40. Have you ever examined any termination payment during your seven year's association with NHAI?

Ans. Yes, I have examined many termination payments during this tenure.

Q. 41. Is it correct that termination payment is calculated on the basis of disaggregation letter?

Ans. Yes, disaggregation letter forms an important part of calculating the termination payment.

Q. 42. What do you understand by 'disaggregation letter'?

Ans. My understanding of 'disaggregation letter' is that it is a communication from the Concessionaire to NHAI upon completion of the construction of the project and it details the actual amount of funds utilized for construction of the project. It also includes details regarding the sources of these funds including their classification into debt and equity.

Q. 44. (Shown Q/A 42and Annexure C-21)

For what reason you have not considered Equity amount as Rs. 251.49 Crore as reflected in disaggregation letter of 04.02.2019?

Ans. After the concessionaire had submitted its disaggregation letter, the Independent Engineer on project had submitted that the disaggregation letter was issued nearly 175 days after the issuance of the Completion Certificate. However, the Independent Engineer had also mentioned that the delay in submission of disaggregation letter was not a default of the concessionaire. In this regard, I had a discussion with NHAI's officials and had communicated to them that they need to take a view regarding the acceptability of the disaggregation letter. I had also informed that the calculations shall be suitably revised in case the disaggregation letter is considered permissible. The disaggregation letter was not accepted by NHAI.

Q. 52. Do you agree that determination of the cost of the project squarely falls under the function of Independent Engineer?

Ans. Yes, I agree.

Q. 64. (Shown witness affidavit at internal page 4)

Is it correct to say that as per your witness affidavit dated 06.03.2024, you were not infrared by NHAI till 06.03.2024 whether the Disaggregation Letter has been accepted by them or not?

Ans. This is correct.

45. Thus, it is evident that the said witness has deposed that Disaggregation Letter formed an integral part for computing the Termination Payment. If the Disaggregation Letter is taken into consideration, the calculation made by the Authority would require to be revised. The determination of the cost of project falls within the functions of the IE and the Authority should not act disregarding the recommendation made by the IE.

46. In ***National Highway Authority of India v. PNC-BEL (jv),*** 2019 SCC OnLine Del 9461, the Court held that the IE's recommendations are binding on the Authority, being an independent professional appointed by none other than the Authority itself. Relevant part thereof reads as under:

> *15. Lastly, it has been urged before us that the learned Single Judge failed to appreciate that the Arbitral Tribunal had erred in directing release of payment in respect of items No. 4, 6 and 8 out of ten non-BOQ items in favour of the respondent by relying on the certification of the rates submitted by the Engineer for approval on 13.03.2012.* ***It is an admitted position that the Engineer, who had certified the rates, is an independent professional appointed by none other than the appellant/NHAI itself.*** *Once the Engineer had finally certified the rates and submitted the same for approval in respect of all the ten non-BOQ items, there was no justification for the appellant/NHAI to have selectively released payments in respect of items No. 1, 2, 3, 5, 7, 9 and 10 while withholding payments in respect of items No. 4, 6 and 8. This is more so when the rates relating to non-BOQ items had already been approved by the appellant/NHAI.* ***(Emphasis added)***

47. The Authority had submitted its own computation of Termination Payment in the SoD. However, the said computation is much lower than the Termination Payment computed by the IE and the Concessionaire. During the course of hearing, Shri Ashok Nijhawan, Learned Counsel for the Authority submitted that none of the said calculations was correct and contradicted its own calculation made in the SoD. Further, Shri Nijhawan contended that there could be no effect of Wholesale Price Index (WPI) on the Total Project Cost and hence could not be taken note of. The submission advanced in respect of application of WPI is not worth acceptance being not in consonance and conformity with the terms of CA.

48. More so, the cross examination of Mr. Raghav Madan (RW) in this respect has been as under:

Q.93. (Shown unnumbered para 3 at page 5 of the report dated 22.02.2024)

What is the basis of your calculation of WPI growth rate as mentioned in the aforesaid unnumbered para 3?

Ans. WPI growth rate has been calculated based on the data published by the office of the Economic Advisor, Department for Promotion of Industry and Internal Trade, Ministry of Commerce and Industry.

Q.94.(Shown unnumbered para 3 at page 5 of the report dated 22.02.2024)

Can you provide the computation of WPI impact on the total project cost as 7.31% as mentioned in your aforesaid report?

Ans. Yes, I can provide the complete computation.

Q. 95. I suggest that you have not provided the computation of 7.31% as you have not undertaken any such computation and your numbers are hypothetical. What do you have to say?

Ans. I disagree with the statement.

49. Mr. Raghav Madan (RW) failed to substantiate the stand of the Authority in respect of WPI growth rate and its overall impact. The stand taken by the Authority is inconsistent and in contradiction with other pleas. For driving the base equity, the Authority computed the same as 20% of Rs. 650 Cr and for computing the adjusted equity, the Authority has relied upon the variation in WPI as calculated by Concessionaire's financial expert, Mr. Montek Mayal (CW-3), to arrive at Rs. 162.37 Cr as adjusted equity. The submissions advanced on behalf of the Authority that the Total Project Cost be taken as Rs. 650 Cr seems to be attractive as non-acceptance of the submission may render the phrase 'lowest of' redundant. However, this interpretation is not acceptable for the reason that the terms of the Contract have to be interpreted keeping in view Clause 1.4.2(a) which provides that between two or more Clauses of this

Agreement, the provisions of a specific Clause relevant to the issue under consideration shall prevail over those in other Clauses.

50. If there is a direct conflict between two clauses of the contract, the clause appearing first is to be given effect.

51. In ***Radha Sundar Dutta v. Mohd. Jahadur Rahim and Ors.***, AIR 1959 SC 24, the Apex Court held:

"If, in fact, there is a conflict between the earlier clause and the later clauses and it is not possible to give effect to all of them, then the rule of construction is well established that it is the earlier clause that must override the later clauses and not vice versa."

(See also: ***Ramkishorelal v. Kamalnarayan***, AIR 1963 SC 890; ***Sahebzada Mohd. Kamgar Shah v. Jagdish Chandra Deo Dhabal Deo***, AIR 1960 SC 952 ; ***Delhi Development Authority v. Durga Chand Kaushish***, AIR 1973 SC 2609)

52. Be that as it may, Clause 34.9.2 of the CA states that if termination is on account of Indirect Political Event, the Authority **shall** make a termination payment to the Concessionaire to an amount equal to:

(a) debt due

(b) 110% of the adjusted equity

Further, as per the definition of Termination Payment under Clause 48.1.2.1, the disaggregation of debt and equity as notified to the Authority has to be the basis of computing the Termination Payment.

53. In ***Jetpur Somnath Tollways Limited v. National Highways Authority of India***, 2017 SCC OnLine Del 9453, the High Court while dealing with the issue held as under:

> ***81.*** *There is admittedly, no such stipulation in the Termination Payment clause that any such adjustment is to be made prior to payment of the Debt Due. As per the definition of Termination Payment and Debt Due, only the* ***actual Debt Due*** *has to be taken into account.* ***(Emphasis added)***

54. For the purpose of determining what was the actual amount of Debt Due, the Concessionaire has put on record a Lender Bank letter dated 25.02.2022 as on the date of termination to the tune of Rs. 561.33 Cr.

Admittedly there had been no principal debt that had fallen due for repayment 2 years prior to the termination date.

55. The Concessionaire through its financial expert Mr. Montek Mayal (CW-3) has ascertained the Termination Amount as Rs. 914.10 Cr. However, after taking into consideration all the material, the Tribunal is of the view that the Termination Payment should be calculated as under:

a. Total Project Cost = Rs 1045.5 Cr

b. Debt Due = Rs. 561.3 Cr

c. Base Equity (1045.5-794.1) = Rs 251.5 Cr

d. Variation in WPI between AD to COD/2 = 11.6%

e. Variation in WPI between COD to Termination Date = 13.3%

f. Adjusted Equity = Rs 318 Cr

g. 110% of Adjusted Equity = Rs 349.8 Cr

h. **Termination Payment = Debt Due + 110% of Adjusted Equity = Rs 911.13 Cr**

56. The claim is allowed to the extent of Rs. 911.13 Cr.

34. It is the case of the petitioner that in determining the "termination payment" to which the respondent is entitled, the impugned Award has completely disregarded the framework and provisions of the Concession Agreement.

35. Concededly, the "termination payment" is to be assessed on the basis of the stipulation set out in Article 34.9.2 of the Concession Agreement which provides as under:-

34.9.2 If Termination is on account of an Indirect Political Event, the Authority shall make a Termination Payment to the Concessionaire in an amount equal to:

(a) Debt Due less Insurance Cover; provided that if any insurance claims forming part of the Insurance Cover are not admitted and paid, then 80% (eighty per cent) of such unpaid claims shall be included in the computation of Debt Due; and

(b) 110% (one hundred and ten per cent) of the Adjusted Equity.

36. In terms of the aforesaid provision, the respondent is entitled to: (i) Debt Due; and (ii) Adjusted Equity. It is the case of the petitioner that the components of the "termination payment" (debt due and adjusted equity), form part of the "Total Project Cost", which is defined as under:-

> *"**Total Project Cost**" means the **lowest of**:*
>
> *(a) the capital cost of the Project, as set forth in the Financial Package;*
>
> *(b) the actual capital cost of the Project upon completion of Four-Laning of the Project Highway; and*
>
> *(c) a sum of Rs. 650.00 crore (Rupees Six Hundred Fifty crores only), 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 WPI 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 herein before specified such that the effect of increase in WPI, in excess of such 6% (six per cent), is reflected in the Total Project Cost;* ***(Emphasis Added)***

37. It is submitted that in view of the above definition (in terms of which the TPC is the lowest of the "capital cost", the "actual capital cost" or "Rs.650 Crore"), it is wholly untenable to work out the "termination payment" on the basis that the "total project cost" is Rs.1045.5 Crore.

38. It is submitted that the award of Rs.911.13 Crore under the head of "termination payment" is grossly excessive and in complete disregard of the express terms of the Concession Agreement.

39. On the contrary, it has been submitted on behalf of the respondent as under:-

i. Article 34.9.2 does not limit the quantum of the "Termination Payment" in any manner, including by reference to the lowest of the "Total Project Cost", as defined in Article 48.1;

ii. The definition of "Termination Payment" makes it clear that it is the amount payable by the Authority to the concessionaire upon termination of the Concession Agreement. The definition does not prescribe any limitation on the quantum of such payment. It provides what elements the Termination Payment "may" consist of which form part of the Total Project Cost as per the CA.

iii. Thus, the elements of the "Termination Payment" are neither fixed nor inflexible. The definition further clarifies that "*the Concessionaire shall notify to the Authority, the Total Project Cost as on COD and its disaggregation between Debt Due and Equity.*";

iv. The estimated Capital Cost, i.e., the "Total Project Cost" as reflected in the Financial Package, was Rs. 992.58 Crore. It is also noteworthy that, in terms of Article 4.1.3(e) and (f), the Financing Agreement, the Financial Package and the Financial Model were required to be submitted to the NHAI upon their execution and prior thereto, in terms of Articles 5.2.2 and 5.2.3, drafts thereof, were required to be submitted, and, once executed, no changes or amendments could be made thereto without the written consent of the NHAI. In the present case, the Financial Package was approved by the NHAI;

v. There is no dispute that the actual "Total Project Cost" as on the COD (i.e., 13.08.2018) was Rs.1045 Crore and that prior thereto, at the time of the Financing Agreement and the Financial Package, the "Total Project Cost" was estimated at Rs. 992.58 Crore;

vi. Even though sub-clause (c) of the definition of the "Total Project Cost" mentions Rs.650 Crore, the capital cost in the Financial Package cannot be lost sight of and because of the expression "unless repugnant to the context" in the opening sentence of the definition would become irrelevant for "Termination Payment". Any other reading of definition of "Total Project Cost" would make large parts of the contract otiose. Harmonious construction leads to only one interpretation that if there is repugnancy to the context the definition is to be ignored. The "Total Project Cost" as defined can mean larger sums than Rs.650 Crore and due to the construction attributed to Article 34.9.2, the limitation in sub clause (c) of the definition of "Total Project Cost" becomes repugnant to the context;

vii. The definition of the "Termination Payment" contains critical words that are destructive to the NHAI's interpretation. These words are "*..and only the amounts so conveyed shall form the basis of computing Termination Payment*". In other words, where the concessionaire has notified the Total Project Cost as on the COD and provided its disaggregation between the Debt Due and Equity in respect of that actual "Total Project Cost", the Concession Agreement expressly restricts these amounts i.e. Debt Due, Equity and Total Project Cost as on COD notified by the respondent as being the only basis for computing the "Termination Payment". No other basis could therefore be used for the purpose of computing "Termination Payment";

viii. NHAI is precluded from resorting to and relying on any lower amount in the definition of “Total Project Cost” once the concessionaire (respondent) has notified its actual “Total Project Cost” - “*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…*”;

ix. The context in which therefore the “Total Project Cost” on COD is used, is repugnant to the meaning sought to be given by NHAI in the definition of the “Total Project Cost” as the lowest of the three figures. In support of this contention, reliance is placed on the judgments of the Supreme Court in ***Pernod Ricard India Ltd. vs. The State of Madhya Pradesh,*** 2024 INSC 327**;** ***K.V. Muthu Vs. Angamuthu Ammal,*** (1972) 2 SCC 53; ***Ramdev Food Products Ltd. Vs. Arvindbhai Rambhai Patel,*** (2006) 8 SCC 726**;** ***Dy. Chief Controller of Imports & K. T. Kosalram,*** (1970) 3 SCC 22.

x. Reliance is also placed on the judgment of the English Commercial Court in the matter of ***Europa Plus SCA SIF v Anthracite Investments (Ireland) Plc,*** [2016] EWHC 437 (Comm), wherein, the Court explained the interplay between a definition clause and operative parts of a contract. In particular, the Court noted that when interpreting a contract, it should not be automatically assumed that the parties intended a defined term to bear its defined meaning at all times. Instead, the process of interpretation requires the Court to consider whether giving effect to the defined meaning in a specific context would lead to absurd commercial consequences; and

xi. It is submitted that the "Total Project Cost" of Rs.650 Crore becomes relevant only if the concessionaire completely fails to notify the "Total Project Cost" on COD with disaggregation of the Debt and Equity on the said date.

REASONING AND CONCLUSION

40. As noticed, the fulcrum of the controversy is the award in respect of claim no.1. The central issue is whether the award of Termination Payment (under claim no.1) amounting to Rs.911.13 crore is liable to be interfered with in the exercise of jurisdiction under Section 34 of the A&C Act.

41. At the outset, it is necessary for this Court to take note of the limited scope of interference with an arbitral award under Section 34 of the A&C Act. The legal position is well settled and has been reiterated time and again by the Supreme Court that this Court would not interfere with the interpretative exercise undertaken by an Arbitral Tribunal or with findings of fact. The jurisdiction under Section 34 of the A&C Act is not akin to appellate jurisdiction; rather, it is confined to scrutinizing the award within the narrow confines and limited scope of Section 34. The view taken by the Arbitral Tribunal, as long as it is a possible view (even if it is not the most plausible view), must be sustained. In support of the said proposition, the respondent has rightly placed reliance on ***Hindustan Construction Company v. National Highways Authority of India***, 2023 INSC 768; ***NHAI v. ITD Cementation India Ltd***., (2015) 14 SCC 21; ***Konkan Railway Corporation Limited v. Chenab Bridge Project Undertaking***, 2023 INSC 742; and ***Raghunath Builders Pvt. Ltd. v. Anant Raj Limited***, 2023 DHC 8143-DB.

42. At the same time, the deference which informs the exercise of jurisdiction under Section 34 of the A&C Act has its own well-defined limits. In ***Associate Builders v. Delhi Development Authority***, (2015) 3 SCC 49 (at paragraph 42.3)[1], the Supreme Court held that although the construction of the terms of a contract is primarily a matter for the arbitrator, the position is otherwise where the arbitrator construes the contract in such a way that no fair-minded or reasonable person could do so. The said principle stands codified in the ground of "patent illegality" under Section 34(2A) of the A&C Act, as authoritatively expounded in ***Ssangyong Engineering & Construction Co. Ltd. v. National Highways Authority of India***, (2019) 15 SCC 131, wherein it was held as under:-

> *"40. The change made in Section 28(3) by the Amendment Act really follows what is stated in paragraphs 42.3 to 45 in Associate Builders (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(2A)."*

43. In ***PSA SICAL Terminals Pvt. Ltd. v. Board of Trustees of V.O.***

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[1] 42.3. (c) Equally, the third subhead of patent illegality is really a contravention of Section 28(3) of the Arbitration Act, which reads as under:
"28.Rules applicable to substance of dispute.—(1)-(2)***
(3) In all cases, the Arbitral Tribunal shall decide in accordance with the terms of the contract and shall take into account the usages of the trade applicable to the transaction."
This last contravention must be understood with a caveat. An Arbitral Tribunal must decide in accordance with the terms of the contract, but if an arbitrator construes a term of the contract in a reasonable manner, it will not mean that the award can be set aside on this ground. Construction of the terms of a contract is primarily for an arbitrator to decide unless the arbitrator construes the contract in such a way that it could be said to be something that no fair-minded or reasonable person could do.

Chidambranar Port Trust, Tuticorin, 2021 SCC OnLine SC 508, the Supreme Court, upon finding that the arbitral tribunal had, in effect, foisted upon the parties a bargain which they had never made, set aside the award, holding as under:-

> *"85. ….In our view, re-writing 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."*

44. The touchstone which emerges from the aforesaid line of authority is that interpretation is an exercise performed upon the words of the contract; it consists in ascribing to those words a meaning which they are reasonably (or possibly) capable of bearing. Re-writing, on the other hand, is an operation performed upon the contract itself; it consists in adding to, subtracting from, or overriding the stipulations of the parties, so as to produce a bargain different from the one which they made. The former is the legitimate province of the arbitral tribunal, howsoever erroneous the outcome may appear to a court; the latter is a jurisdictional transgression which vitiates the award on the ground of patent illegality.

45. In the above conspectus, this Court has examined the award insofar as it relates to the Termination Payment awarded under Claim No. 1 (Rs. 911.13 crore), which is the primary bone of contention between the parties.

46. At the outset, it is important to take note of the relevant contractual provisions governing the Termination Payment, which becomes payable in the event of termination of the Concession Agreement on account of an "Indirect Political Event". The relevant provisions are set out hereunder:-

i. Definition of Total Project Cost (TPC) (Article 48.1) is reproduced as under -

> **"Total Project Cost"** means the lowest of:
>
> (a) the capital cost of the Project, as set forth in the Financial Package;
>
> (b) the actual capital cost of the Project upon completion of Four-Laning of the Project Highway ; and
>
> (c) a sum of Rs. 650.00 crore (Rupees Six Hundred Fifty crores only), 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 WPI 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 WPI, in excess of such 6% (six per cent), is reflected in the Total Project Cost;

ii. Definition of Debt Due (Article 48.1) is reproduced as under -

> **"Debt Due"** means the aggregate of the following sums expressed in Indian Rupees outstanding on the Transfer Date:
>
> (a) the principal amount of the debt provided by the Senior Lenders under the Financing Agreements for financing the Total Project Cost (the **"principal"**) but excluding any part of the principal that had fallen due for repayment two years prior to the Transfer Date;
>
> (b) all accrued interest, financing fees and charges payable under the Financing Agreements on, or in respect of, the debt referred to in Sub-clause (a) above until the Transfer Date but excluding (i) any interest, fees or charges that had fallen due one year prior to the Transfer Date, (ii) any penal interest or charges payable under the Financing Agreements to any Senior Lender, and (iii) any pre-payment charges in relation to accelerated repayment of debt except where such charges have arisen due to Authority Default; and
>
> (c) any Subordinated Debt which is included in the Financial Package and disbursed by lenders for financing the Total Project Cost;
>
> provided that if all or any part of the Debt Due is convertible into Equity at the option of Senior Lenders and/or the Concessionaire, it shall for the purposes of this Agreement be deemed to be Debt Due even after such conversion and the principal thereof shall be dealt with as if such conversion had not been undertaken;

iii. Definition of Equity (Article 48.1) is reproduced as under -

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"**Equity**" means the sum expressed in Indian Rupees representing the paid up equity share capital of the Concessionaire for meeting the equity component of the Total Project Cost, and shall for the purposes of this Agreement include convertible instruments or other similar forms of capital, which shall compulsorily convert into equity share capital of the Company, and any interest-free funds advanced by any shareholder of the Company for meeting such equity component, but does not include Equity Support;

iv. Definition of Termination Payment (Article 48.1) is reproduced as under -

"**Termination Payment**" means 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

-laning of Rohtak Bawal Section of NH-71 from km 363.300 (design km 363.300) to km 450.800 (design km 445.853) under NHDP III in the State of Haryana on Design, Build, Finance, Operate and Transfer (DBFOT) basis.

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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;

v. Termination Payment for Indirect Political Event is provided for in Article 34.9.2. The same is reproduced as under –

34.9.2 If Termination is on account of an Indirect Political Event, the Authority shall make a Termination Payment to the Concessionaire in an amount equal to:

(a) Debt Due less Insurance Cover; provided that if any insurance claims forming part of the Insurance Cover are not admitted and paid, then 80% (eighty per cent) of such unpaid claims shall be included in the computation of Debt Due; and

(b) 110% (one hundred and ten per cent) of the Adjusted Equity.

-laning of Rohtak Bawal Section of NH-71 from km 363.300 (design km 363.300) to km 450.800 (design km 445.853) under NHDP III in the State of Haryana on Design, Build, Finance, Operate and Transfer (DBFOT) basis.

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47. In light of the aforesaid contractual provisions, the central question is whether the definition of TPC – with its lowest of three formulation and the Rs.650 Crore cap in sub-clause (c) – operates as a ceiling on the "Termination Payment" or whether the project cost as notified in the Disaggregation Letter (Rs.1045.55 crore) displaces it.

48. The Tribunal answered the aforesaid question in favour of the respondent. It held that the contents of the disaggregation letter formed an integral part for the computation of the "Termination Payment". (Para 45 of the award).

49. It was further held that Rs.650 Crore cap in the definition of TPC would not be relevant in view of the fact that clause 1.4.2(a) of the Contract provides that "between two or more Clauses of this Agreement, the provisions of a specific Clause relevant to the issue under consideration shall prevail over those in other Clauses". (Para 49 of the award)

50. The Arbitral Tribunal held that in terms of the definition of the "Termination Payment" under Article 48.1, the disaggregation of debt and equity as notified to the authority had to be the basis for computing the Termination Payment. (Para 52 of the award)

51. Having perused the award, this Court is of the opinion that the Arbitral Tribunal has grievously erred and committed patent illegality in arriving at the above conclusion; the error is of a nature that warrants interference under Section 34 of the A&C Act. The reasons are as under:

<u>THE AWARD DEFEATS THE VERY PURPOSE OF DEFINING "TOTAL PROJECT COST"</u>

52. As noticed hereinabove, Article 48.1 of the Concession Agreement

defines "Total Project Cost" as the lowest of the following three alternatives: (a) the capital cost of the project as set-forth in the financial package; (b) the actual capital cost of the project upon completion of four laning of the project highway; and (c) a sum of Rs.650 Crore, less equity support.

53. This three limbed definition, particularly the cap contained in sub-clause (c), lies at the very heart of the Concession Agreement and cannot be treated as surplusage for the purpose of determining the "Termination Payment". The purpose of this provision is clearly to limit the financial exposure of NHAI upon termination. Indeed, this provision is at the very heart of risk allocation in the Concession Agreement.

54. Evidently, NHAI, as a public authority, set out this cap in the RFP document itself so that its maximum financial exposure upon termination would be confined to the project cost. This cap serves a specific and vital commercial purpose; it protects NHAI against cost over-run incurred by the concessionaire (whether due to inefficiency, over borrowing or for any other reason) being passed on to NHAI in the guise of a "Termination Payment". Without this cap, a concessionaire could borrow far in excess of the sanctioned project cost and on termination, present NHAI with a demand that NHAI never agreed to underwrite. The award by accepting the "total project cost" at Rs.1045.5 Crore has rendered sub-clause (c) entirely nugatory, effectively reducing it to a dead letter.

55. A copy of Request for Proposal (RFP) has been filed by the Respondent. Clause 1.1.1 of the RFP clearly mentions the estimated project cost as Rs. 650 Crore. The relevant portion of the same is reproduced as under –

NATIONAL HIGHWAY AUTHORITY OF INDIA

(Ministry of Road Transport & Highways, Government of India)

1. INTRODUCTION

1.1 Background[2]

1.1.1 The {National Highways Authority of India} (the "**Authority**") is engaged in the development of {highways} and as part of this endeavour, the Authority has decided to undertake development of "Four laning of NH-71 from Rohtak to Bawal section from km 363.300 (design km 363.300) to km 450.800 (Design km 445.853) in the state of Haryana " Project (the "**Project**") through private participation on Build, Operate and Transfer (the "**BOT**") basis, and has decided to carry out the bidding process for selection of the Bidder to whom the Project may be awarded. Brief particulars of the Project are as follows:

Name of the National Highway	Length in km	Estimated Project Cost in Rs crore
Four laning of NH-71 from Rohtak to Bawal section from km 363.300 (Design km 363.300) to km 450.800 (Design km 445.853) in the state of Haryana.	82.553	Rs 650.000 crore

56. Evidently, the figure of Rs. 650 crore represented the estimated Project Cost as reckoned at the time of bidding. By making it the ceiling in the definition of the "Total Project Cost," the parties sought to ensure that, even if the actual cost exceeded this amount, NHAI's financial exposure towards Termination Payment would continue to be anchored to this ceiling. The unmistakable commercial rationale underlying the contractual provision is that NHAI assumes the risk of cost overruns during construction only to the extent contemplated under sub-clause (c), and not in respect of any unlimited or excessive expenditure that the Concessionaire may incur.

57. The Concession Agreement is founded upon a concession framework, under which the termination liabilities of the Authority are capped. It is on

the strength of this risk matrix that bids were invited, that the premium of Rs.12 crore per annum (escalating at 5% annually) was offered by the respondent, and that the financial exposure of the public exchequer stood crystallised. The ceiling ensures that the consequence/s of any cost overrun or over-leveraging is not transmuted into a liability of the Authority upon termination. To construe the Agreement in a manner which dissolves this ceiling is to redistribute, *ex post facto*, the very risk which the parties had definitively allocated *inter-se*.

THE APPROVAL OF THE FINANCIAL PACKAGE DOES NOT ASSIST THE RESPONDENT

58. Considerable emphasis was laid on behalf of the respondent on the circumstance that the Financial Package (reflecting a capital cost of Rs.992.58 crore), the Financial Model and the Financing Agreements were scrutinised and approved by NHAI prior to financial close. The submission is of no avail to the respondent. Sub-clause (a) of the definition of "Total Project Cost" itself refers to "the capital cost of the Project, as set forth in the Financial Package". The parties were, therefore, fully alive to the fact that the Financial Package would reflect a capital cost, and that such cost might well exceed Rs.650 crore; it is precisely for this reason that the definition stipulates that the Total Project Cost shall be the lowest of the three specified amounts. The Financial Package figure thus stands internalised within the definition itself – it supplies limb (a); it does not, and cannot, abolish limb (c). The scrutiny of the financing documents by the Authority serves an altogether distinct purpose, namely, to ensure that the Concessionaire does not enter into arrangements with its lenders which

imperil the interests of the Authority; such scrutiny cannot be construed as an undertaking by the Authority to underwrite the entirety of the said cost upon termination. Moreover, in terms of Article 1.4.1 of the Concession Agreement, the Agreement prevails over all other documents.

THE DEFINITION "TOTAL PROJECT COST" INCORPORATES A TERMINATION SPECIFIC PROVISO – CONFIRMING ITS APPLICABILITY FOR THE PURPOSE OF DETERMINING "TERMINATION PAYMENT"

59. The definition of "Total Project Cost" contains the following proviso:

> *"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 WPI 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 herein before specified such that the effect of increase in WPI, in excess of such 6% (six per cent), is reflected in the Total Project Cost;"*

60. This proviso is of significant importance. It expressly addresses the termination scenario and provides for the modification of the "Total Project Cost" figure, but only to the extent of variation in the WPI. The fact that the Concession Agreement itself incorporates a termination-specific proviso into the definition of the "Total Project Cost" conclusively establishes two things:

(i) that the definition is intended to apply in the context of termination and is neither rendered inapplicable nor repugnant for the purpose of determining the "Termination Payment". A definition which itself provides for the termination scenario cannot, in the same breath, be branded as repugnant to that very scenario ;

(ii) that the parties specifically contemplated that the "Total Project Cost" might require upward revision in a termination scenario, but only by way of WPI adjustment and, where the WPI exceeded 6% per annum, through mutual agreement between the parties. There is no mechanism under the Concession Agreement permitting the Concessionaire to unilaterally enhance the "Total Project Cost" by relying upon a disbursement letter reflecting actual project costs far in excess of the contractual cap.

61. If the parties had intended that the actual project cost notified in the disaggregation letter would entirely displace or render nugatory the definition of "total project cost", there would have been no need whatsoever for this proviso. Its very existence, providing a measured / WPI linked adjustment mechanism, demonstrates that the parties never intended the contractual cap to be by-passed by a unilateral cost notification / disaggregation letter.

62. A unilateral notification by the Concessionaire of its actual expenditure is not a mode of modification of the "Total Project Cost" recognised anywhere in the Agreement. It is elementary that a contract can be varied only in the manner provided therein or by the mutual agreement of the parties; it cannot be varied by the unilateral act of one party. Yet, the construction adopted by the Tribunal ascribes to the disaggregation letter (a unilateral communication), the effect of an amendment of the contractually defined "Total Project Cost" from Rs.650 crore to Rs.1045.55 crore. No canon of interpretation sanctions such an outcome.

<u>DEFINITION OF "TERMINATION PAYMENT" EXPRESSLY INCORPORATES THE CEILING REFERRED TO IN THE</u>

DEFINITION OF "TOTAL PROJECT COST"

63. The definition of "Termination Payment" in Article 48.1 provides that it "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".

64. Three expressions in this definition are of significant importance and, independently support the relevance of the ceiling for the purpose of determining the Termination Payment :

(i) "Restricted to" – the use of these words is intended to limit the extent of the Termination Payment and to make it circumscribed;

(ii) "Which form part of the Total Project Cost" – this is a qualifying and limiting stipulation. Only such Debt Due and Adjusted Equity as form part of the contractually defined "Total Project Cost" are payable. The inevitable consequence is that payments in excess of the "Total Project Cost" are expressly excluded;

(iii) "In accordance with the provisions of this Agreement" – this cross-reference ties the computation of the "Termination Payment" to the definition of the "Total Project Cost" and precludes the possibility of importing a different "Total Project Cost" figure from outside that is at variance with, or inconsistent with, the contractual ceiling contained in the definition of the "Total Project Cost."

THE DISAGGREGATION LETTER CANNOT OVERRIDE THE CAP IN THE DEFINITION OF "TOTAL PROJECT COST"; IT OPERATES WITHIN IT

65. The respondent's principal submission, as accepted by the Arbitral Tribunal, is that the disaggregation letter clause contained in the definition

of "Termination Payment" makes the notified "Total Project Cost" figure the sole basis for computing the "Termination Payment," thereby displacing the contractual cap of Rs. 650 crore. This argument fundamentally misconstrues the function and purpose of the disaggregation letter.

66. The disaggregation letter clause requires the Concessionaire to notify NHAI of the "Total Project Cost" as on the COD, together with its disaggregation into Debt Due and Equity. The purpose of this requirement is to inform NHAI how the "Total Project Cost", already determined under the Concession Agreement as the lowest of the three alternatives, is apportioned between its Debt Due and Equity components so that the formula prescribed under Article 34.9.2 (Debt Due + 110% Adjusted Equity) can be correctly applied.

67. The word "disaggregation" is itself dispositive. To disaggregate means to break down a whole into its component parts. The disaggregation letter mechanism is intended to allocate the **"**Total Project Cost" between Debt Due and Equity. It is not a mechanism by which the Concessionaire has been granted carte blanche to unilaterally 're-determine' the "Total Project Cost" or to undermine or nullify the contractual ceiling prescribed thereunder.

68. If the interpretation canvassed by the respondent were correct, the disaggregation letter would become an instrument by which the Concessionaire could inflate NHAI's termination liability simply by notifying a higher "Total Project Cost" figure, regardless of the contractual ceiling prescribed for the same. This would lead to absurd consequences and would be manifestly contrary to the intention of the parties, who deliberately defined the "Total Project Cost" as the lowest of the three alternatives

precisely to prevent such an outcome.

69. No rational commercial party could have intended that the applicability of a ceiling, negotiated for the protection of one party, should depend upon the unilateral election of the very party whom it constrains. The deeming provision in the definition of "Termination Payment" demonstrates that whether or not a disaggregation letter is furnished, the contractually defined "Total Project Cost" remains operative; the letter fixes the internal apportionment between debt and equity, and nothing more. On the face of it, the letter is intended to convey a "disaggregation", not a unilateral re-valuation.

MISCONCEIVED RELIANCE ON THE EXPRESSION "ONLY THE AMOUNT SO CONVEYED SHALL FORM THE BASIS OF COMPUTING TERMINATION PAYMENT" (OCCURING IN THE DEFINITION OF "TERMINATION PAYMENT" AS DEFINED UNDER ARTICLE 48)

70. The reliance placed by the Arbitral Tribunal on this expression is untenable. The Arbitral Tribunal has, unfortunately, laid emphasis on only a part of the relevant contractual provision while overlooking the preceding as well as the succeeding parts of the same clause. The first paragraph of the relevant clause defining "Termination Payment" makes it expressly clear that the "Termination Payment" is to be restricted to Debt Due and Adjusted Equity, which form part of the "Total Project Cost." The succeeding clarificatory paragraph refers to the "Total Project Cost" and requires the Concessionaire to notify the Authority of its disaggregation into Debt Due and Equity. The stipulation that only the amount so conveyed or notified shall form the basis for computing the "Termination Payment" was clearly not intended to override the contractual ceiling contained in the definition of

the "Total Project Cost." Had that been the intention of the parties, nothing would have been easier than to expressly provide so.

71. The use of the expression "only the amount so conveyed shall form the basis of computing the Termination Payment" was intended only to preclude reliance upon extraneous sources for the purpose of disaggregation. The concluding portion of the same paragraph is significant. It provides that, in the event such disaggregation is not notified to the Authority, the Equity shall be deemed to be the amount arrived at by subtracting the Debt Due from the "Total Project Cost."

72. The above clearly demonstrates that the disaggregation letter is only intended for the purpose of internal split between debt due and equity; the outer limit as set out in the definition of the "total project cost" is not rendered irrelevant.

THE FINDINGS QUA THE DISAGGREGATION LETTER DO NOT CONCLUDE THE ISSUE

73. The Tribunal has devoted considerable attention to establishing that the disaggregation letter dated 04.02.2019 exists; that the delay in its submission was not attributable to any default or malafide on the part of the Concessionaire; that its contents were not specifically traversed by the Authority in its pleadings; and that the Independent Engineer treated it as the formal disaggregation for the purpose of computing the Termination Payment (paras 33 to 46 of the award). This Court has no reason to disturb any of the said findings; they are findings of fact within the exclusive domain of the Tribunal. The said findings, however, do not carry the matter any further, inasmuch as the existence, genuineness and bona fides of the letter were never determinative of the controversy. The controversy

concerns the legal effect of the letter under the Concession Agreement and as to whether it is capable in law of enlarging the "Total Project Cost" beyond the contractual ceiling.

74. The reliance placed by the Tribunal on ***National Highway Authority of India v. PNC-BEL (JV)***, 2019 SCC OnLine Del 9461 (at para 46 of the award) is misplaced. It was held therein that the certification by the Independent Engineer in that case, of rates in respect of non-BOQ items, which the Engineer had certified and submitted for approval, cannot be selectively disregarded by the Authority. Evidently, the certification in question pertained to a function which the contract contemplated from the Engineer. No such function (for re-determining “Total Project Cost” in derogation/disregard of the contractual ceiling) has been committed to the Independent Engineer in the present case (as is evident from contractual provisions noticed hereinbelow).

75. The reliance on ***Jetpur Somnath Tollways Limited v. National Highways Authority of India***, 2017 SCC OnLine Del 9453 (at para 53 of the award) is equally misplaced. The said decision was rendered on petitions under Section 9 of the A&C Act (by the concessionaire therein and by its lender), seeking interim measures of protection pending arbitration, in the nature of a direction to NHAI to secure the termination payment. The observations therein were, *ex facie*, rendered at a prima facie stage, for the limited purpose of moulding interim relief; they did not constitute a final adjudication of the quantum of the termination payment. Further, the question considered in paragraph 81 of the said decision was an altogether different one. NHAI had sought, on the strength of Recital B to the Common Loan Agreement dated 19.08.2011 executed in that case (which recorded a

debt-equity ratio of 72.58:27.42) to import the said ratio so as to make a further adjustment to the "Debt Due". It was in that context that the Court observed that there was "admittedly, no such stipulation in the Termination Payment clause that any such adjustment is to be made prior to payment of the Debt Due" and that "only the actual Debt Due has to be taken into account". The decision thus declined to permit an adjustment extraneous to the contractual provisions. The said judgement did not deal with the operation of a definitional ceiling, forming an express part of the contractual text itself. The said decision points against the respondent rather than in its favour inasmuch as its ratio is fidelity to the 'Termination Payment' provisions as written. In the present case, the award disregards the contractual ceiling of Rs.650 crore, and the words of restriction in the definition of "Termination Payment".

76. Pertinently also, the function assigned to the Independent Engineer under the Concession Agreement do not extend to determining the "Total Project Cost". Article 23.2.1 provides that the Independent Engineer "shall discharge its duties and functions substantially in accordance with the terms of reference set forth in Schedule-Q." The relevant portions of Schedule-Q read as under:-

> *"3.1 The role and functions of the Independent Engineer shall include the following:*
> *(vi) determining, as required under the Agreement, the costs of any works or services and/or their reasonableness; ...*
> *8.1 The Independent Engineer shall determine the costs and/or their reasonableness that are required to be determined by it under the Agreement"*

77. The cost-determination function of the Independent Engineer is a power exercisable only in respect of costs which the Agreement specifically

requires his determination. No provision of the Concession Agreement commits the determination of "Total Project Cost" to the Independent Engineer. The definition of "Total Project Cost" in Article 48.1 is self-executing: it is the lowest of three arithmetically stated figures, subject only to the WPI proviso (as already noticed). What the Independent Engineer was called upon to examine was whether the disaggregation letter dated 04.02.2019 "be considered by the Authority as acceptable within the definition as stipulated in the Concession Agreement" (para 34 of the award). This is a question of the timeliness and procedural acceptability of the letter. The Tribunal's treatment of the Independent Engineer's recommendation as though it were a determination of quantum does violence to both the language and purport of the contract. The Agreement nowhere empowers the Independent Engineer to approve, sanction or certify a substitute "Total Project Cost" put forward unilaterally by the Concessionaire.

REPUGNANCY ARGUMENTS

78. The respondent has vehemently argued that the definition of the “Total Project Cost” as on the COD is repugnant to the meaning sought to be given by NHAI thereto. The said argument is thoroughly misconceived.

79. Repugnancy can be said to arise only where the application of the contractual definition results in a direct contradiction or absurdity. It cannot be said to arise merely because the application of the contractual definition results in a financially inconvenient outcome or yields a lower recovery than that which the respondent would prefer.

80. Applying the “Total Project Cost” cap in the context of “Termination

Payment" does not create any absurdity or contradiction. On the contrary, it produces precisely the outcome that the parties agreed to when they executed the Concession Agreement. The cap is not repugnant to the context of the "Termination Payment", rather, it is entirely consonant with it.

81. Importantly, as noticed hereinabove, the definition of the "Total Project Cost" itself contains a termination-specific proviso addressing WPI adjustments. A definition that expressly accounts for a termination scenario cannot simultaneously be said to be repugnant to the context of "Termination Payment."

82. The authorities cited on behalf of the respondent in this behalf, far from advancing its case, affirm the settled position that the defined meaning is the rule and its displacement the exception. In ***K.V. Muthu v. Angamuthu Ammal***, (1997) 2 SCC 53, the Supreme Court held that where a definition is preceded by the words "unless the context otherwise requires", the definition is ordinarily to be applied and given effect to, and may be departed from only if there is something in the context to show that the definition could not be applied at all. (paragraphs 10 to 12)[2].

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[2] 10. Apparently, it appears that the definition is conclusive as the word "means" has been used to specify the members, namely, spouse, son, daughter, grandchild or dependant parent, who would constitute the family. Section 2 of the Act in which various terms have been defined, opens with the words "in this Act, unless the context otherwise requires" which indicates that the definitions, as for example, that of "family", which are indicated to be conclusive may not be treated to be conclusive if it was otherwise required by the context. This implies that a definition, like any other word in a statute, has to be read in the light of the context and scheme of the Act as also the object for which the Act was made by the legislature.
11. While interpreting a definition, it has to be borne in mind that the interpretation placed on it should not only be not repugnant to the context, it should also be such as would aid the achievement of the purpose which is sought to be served by the Act. A construction which would defeat or was likely to defeat the purpose of the Act has to be ignored and not accepted.
12. Where the definition or expression, as in the instant case, is preceded by the words "unless the context otherwise requires", the said definition set out in the section is to be applied and given effect to but this rule, which is the normal rule may be departed from if there be something in the context to show that the definition could not be applied.

<u>CLAUSE 1.4.2(a): NEITHER ATTRACTED NOR OF ANY ASSISTANCE TO THE RESPONDENT</u>

83. The Arbitral Tribunal has relied upon Article 1.4.2(a), which provides that between two or more clauses, the specific clause relevant to the issue under consideration shall prevail. Article 34.9.2 is indeed the specific provision governing the quantum of the "Termination Payment" in the event of an Indirect Political Event. However, the impugned majority award overlooks the fact that Article 34.9.2 operates by reference to the defined terms "Debt Due" and "Adjusted Equity," both of which are, in turn, defined by reference to the "Total Project Cost."

84. Thus, it is wholly untenable for the purpose of Article 34.9.2 to ignore the definition of "Total Project Cost" inasmuch as the latter gives content to the relevant components of "Termination Payment".

<u>THE AWARD RE-WRITES THE CONTRACT NOT MERELY INTERPRETS THE RELEVANT PROVISIONS</u>

85. The Supreme Court has consistently drawn a line between the interpretation of a contract which is within the Arbitral Tribunal's jurisdiction, and re-writing of a contract which constitutes patent illegality warranting interference under Section 34 of the A&C Act. An award that departs from an express, unambiguous contractual provision crosses this line. In the present case, the award does not merely re-interpret the Concession Agreement, it rewrites it in the following specific and identifiable ways –

(i) It renders sub-clause (c) of the definition of the "Total Project

Cost", which prescribes the contractual cap of Rs. 650 crore, inoperative in the very context for which it was most significant, namely, the determination of the "Termination Payment."

(ii) It rendered the word "restricted to ……. which form part of the total project cost" in the definition of "Termination Payment" entirely meaningless and otiose. Such manifest disregard of contractual provision/s cannot pass muster under Section 34 of the A&C Act;

(iii) It treats the disaggregation letter as a document capable of overriding express contractual definitions contrary to the priority clause in Article 1.4.1 which makes the Concession Agreement supreme over all other documents;

(iv) In reaching the conclusion that the expression "Total Project Cost" as expressly defined in the Concession Agreement is not relevant for the purpose of "Termination Payment", the award disregards the fact that the definition of the "Total Project Cost" itself expressly contemplates and speaks of termination and provides for a WPI based adjustment. It is thus wholly incongruous and contrary to express contractual provisions, to declare the definition of the "Total Project Cost" as being irrelevant for the purpose of assessing "Termination Payment"; and

(v) It elevates a unilateral notification issued by the Concessionaire, to the status of a binding contractual mandate, and thereby effectively denudes the contractual stipulation/s of their intended effect.

86. These are not errors within the permissible zone of arbitral interpretation. They are fundamental departures from express terms of the

Concession Agreement resulting in excess payment of hundreds of crores, a sum which the Concession Agreement never authorised. The same constitute patent illegality on the face of the record within the meaning of Section 34(2A) of the A&C Act.

87. Before concluding the discussion on Claim No.1, it is again necessary to note that the law leans heavily, and rightly, against interference with arbitral awards. Arbitration is a forum of the parties' own choosing, and a court which subjects awards to a review on merits defeats the very object of the A&C Act. This Court is conscious that judicial intervention with arbitral awards must be kept to the barest minimum, lest the efficacy of arbitration itself be undermined, and the endeavour of the Court must always be to sustain the view taken by the arbitral tribunal. However, the jurisdiction under Section 34 of the A&C Act, though narrow, is not akin to a 'rubber stamp'. Restraint on the part of the Court and fidelity to the contract on the part of the tribunal are two sides of the same compact, and the first cannot be invoked where the second has not been kept. That is the position here; the parties wrote a ceiling into their bargain for the express eventuality of termination payment/s, and the award has erased it at the very moment it was meant to operate. Interference with such an award does not diminish the authority of arbitration; it is the award which does. In these circumstances, and with due circumspection, that this Court is unable to sustain the award in respect of Claim No.1.

88. The award in respect of Claim No.1 is, accordingly, set aside.

89. Under Claim No. 2, the Tribunal awarded interest on the Termination Payment. The relevant portion of the award is reproduced as under:–

60. The Termination Payment was demanded first by the Concessionaire on 07.10.2021. The Authority has not made the payment even partly till today. The quantum of the Termination Payment remained in dispute and is to be determined by the Tribunal. The Concessionaire is entitled to interest at the rate of 3% above the Bank Rate from payment due for 90 days i.e. 22.10.2021 – 20.01.2022. Thereafter the Concessionaire is entitled for interest at the rate of 5% over and above the Bank Rate on the said amount from 21.01.2022 till the constitution of the Tribunal i.e. 23.07.2022.With effect from24.07.2022, the Concessionaire shall be entitled to interest on this amount at the rate of 9% till the date of realization.

90. Since the Award on Claim No. 1, which determined the quantum of the Termination Payment, has been set aside by this Court, the foundation of Claim No. 2 no longer survives. Consequently, the award of interest, being entirely dependent upon the determination of the Termination Payment under Claim No. 1, cannot be sustained, and is also set aside.

OTHER CLAIMS

91. Insofar as the award in respect of other claims are concerned, this Court finds no basis to interfere therewith.

92. The findings and conclusions in respect of other claims and counter claims are briefly summarized hereinbelow.

A. Claim No. 3 - Claims arising out of loss suffered on account of Force Majeure Events being Covid-19 & Farmers' Agitation

i. The Concessionaire sought Rs. 30.93 crore towards losses arising from Force Majeure events, comprising Rs. 15.13 crore for the COVID-19 pandemic and Rs. 15.80 crore for the Farmers' Agitation.

ii. As regards the claims made by the Concessionaire in relation to the COVID-19 pandemic, the Tribunal accepted the Concessionaire's claim for the period from March 2020 to September 2020. It noted that the Statutory Auditor had certified the claim at Rs. 15.80 crore, the Authority had neither challenged the certification nor cross-examined the witnesses with respect to the same, and the Independent Engineer's recommendation covered only a shorter period. Considering the prolonged impact of the pandemic, the Tribunal allowed the claim of Rs. 15.13 crore. It further awarded interest at 9% per annum from 11.06.2022 until realization.

iii. The Concessionaire claimed Rs. 15.8 crore towards Force Majeure costs arising from the Farmers' Agitation. The Tribunal observed that the IE had assessed the claim in accordance with the NHAI Policy Guidelines dated 02.07.2021, which provided for reimbursement of 50% of O&M and interest, besides extension of period for the days tolling has been impacted. Since the Authority did not dispute the IE's calculations and merely stated that the recommendation was pending approval, the Tribunal allowed the claim to the extent recommended by the IE, i.e., Rs. 11,19,50,485.39, together with interest at 9% per annum from 11.06.2022 till realization.

iv. The aforesaid findings returned by the learned Arbitral Tribunal are findings of fact based on the appreciation of the evidence on record. This Court, while exercising its jurisdiction under Section 34 of the Arbitration and Conciliation Act, 1996, cannot reappreciate the evidence or interfere with such factual findings merely because another view may be possible.

B. Claim No. 4 - Additional Cost and Foregone Benefits Claim - rejected by the Tribunal.

C. Claim No. 5 – Loss of opportunity from the Termination date till the Concession Period - rejected by the Tribunal.

D. Claim No. 6 - Refund of Insurance Premium

i. The findings of the Tribunal with respect to the Claim No. 6 are reproduced as under –

> 91. Clause 32.1. of the CA mandatorily obligates the Concessionaire to effect and maintain at its own cost insurance as required under the Financing Agreements and applicable laws. Clause 32.3 further provides that after obtaining the insurance cover, the Concessionaire shall furnish to the Authority notarised true copies of the certificate of insurance, copies of the insurance policies and payment received in respect of such insurances. It restrains the Concessionaire to get it cancelled, modified or allowed to expire or lapse at least for 45 days after notice of such proposed cancellation, modification or non-renewal. Clause 32.4 provides that in case the insurance is not taken or not renewed, the Authority shall keep in force any such insurance at its own cost and recover the same from the concessionaire. Or in event of computation of termination payment treat an amount equal to its cover as deemed to have been received by the Concessionaire.
>
> 92. Clause 32 of the CA provides a detailed procedure for getting the insurance policies in respect of the project. In case the Concessionaire fails to take such policies or renew the same, the Authority is to take such policies and recover the amount from the Concessionaire. Thus, having the insurance policy is mandatory under the CA.
>
> 93. There is no denial by the Authority of the fact that seven insurance policies had been renewed by the Concessionaire and after some time contract was terminated. The Concessionaire vide letter dated 11.07.2022 sought from the Authority the document and particulars so that insurance policy could be transferred in favour of the Authority. The Authority vide its email dated 17.07.2022 shared the documents. The Concessionaire has specifically pleaded in Claim no. 6 paragraph (e) that insurance stood transferred in the name of the Authority. The Authority in reply to this claim has not refuted this factual averment i.e that the insurance stood transferred in favour of the Authority.

94. In ***Badat and Co. Bombay v. East India Trading Co.,*** AIR 1964 SC 538, the Hon'ble Supreme Court analysed the provision of **Order VIII, Rules 3, 4 and 5,** CPC read with Section 58 of the Evidence Act 1872 and observed:

> "*The written statement must deal specifically with each allegation of fact in the plaint and when a defendant denies any such fact, he must not do so evasively, but answer the point of substance. If his denial of a fact is not specific but evasive, the said fact shall be taken to be admitted. In such an event, the admission itself being proof, no other proof is necessary........ Under that proviso the court may, in its discretion, require any fact so admitted to be proved otherwise than by such admission.*"

Thus not denying the claim specifically amounts to admission.

95. The Concessionaire in its letter dated 14.06.2022, furnished the total information to the Authority, relevant part thereof reads:

> *In compliance to the above mentioned terms of the Concession Agreement, KEPL had been maintaining various insurances, renewing those from time to time with NHAI, being a co-insured entity. Accordingly, KEPL renewed the following insurances in the month of September-October 2021 in advance, paying a total premium of Rs. 132,05,819/-*

Sr. No.	*Policy Number*	*Insurance for/Perils covered*	*Premium*	*Insurance Period*	
1	*1001/230080392/00/000*	*STANDARD FIRE AND SPECIAL PERILS INSURANCE*	*77,73,150*	*06-10-2021*	*05-10-2022*
2	*1001/230138372/00/000*	*STANDARD FIRE AND SPECIAL PERILS INSURANCE*	*36,97,675*	*06-10-2021*	*05-10-2022*
3	*1020/230329051/00/000*	*Bharat Laghu Udyam Suraksha Content, Machinery Breakdown Insurance,*	*2,63,971*	*06-10-2021*	*05-10-2022*

		Burglary, Fidelity			
4	*5002/230543464/00/ 000*	*ELECTRONIC EQUIPMENT INSURANCE POLICY*	*6,310*	*06-10-2021*	*05-10-2022*
5	*4006/230670515/00/ 000*	*Money Insurance Policy*	*16,502*	*06-10-2021*	*05-10-2022*
6	*1002/230614606/00/ 000*	*FIRE LOSS OF PROFIT*	*8,82,050*	*06-10-2021*	*05-10-2022*
7	*OG-22-1919-4004 00000107*	*STANDARD FIRE AND SPECIAL PERILS POLICY-OTHERS*	*5,66,160*	*06-10-2021*	*05-10-2022*

However, as you are aware, KEPL terminated the Concession Agreement on 07.10.2021 due to Indirect Political Force Majeure Event of Farmers' Agitation. The termination came into effect forthwith. In view of the

same, even though the insurances were continued after 07.10.2021, the right of KEPL to receive the insurance claim and its liability to maintain the insurances got absolved from 08.10.2021.

96. Such a transfer of insurance is in consonance and conformity with the provision of Section 38 of the Insurance Act, 1938.In ***Uttar Pradesh State Road Transport Corporation* v. Kulsum,** (2011) 8 SCC 142, the Hon'ble Supreme Court while dealing with the liability in an accident by the bus of a private owner taken by the UP SRTC under an agreement held that the liability to pay compensation would be of UPSCRTC, for the reason that it would be deemed that the vehicle stood transferred along with the insurance policy, even if it were insured at the instance of original owner. The said judgement has been approved and followed by the Supreme Court while decidingCivil Appeal No.s 18490-18491 of 2017 ***Uttar Pradesh State Road Transport Corporation* v. National Insurance Co. Ltd.**decided on 14.07.2021.

97. The Concessionaire is entitled to recover a sum of Rs.1,30,86,294/- as on 22.11.2021 i.e. 45 days after the notice of termination in terms of Clause 32.3 of the CA. The claim is accordingly allowed.

98. The Concessionaire is also entitled to recover interest @9% per annum from 23.11.2021 till the date of realization.

ii. The aforesaid findings recorded by the learned Arbitral Tribunal are largely factual in nature, predicated on contractual provisions, and are not amenable to reappreciation by this Court in proceedings under Section 34 of the Arbitration and Conciliation Act, 1996.

E. Claim No. 7 - Interest

i. The Arbitral Tribunal observed that an arbitrator is a creature of an agreement and therefore he cannot award interest if prohibited by the contractual terms. However, in absence of any stipulation in the Contract Agreement in this respect, the arbitrator is competent to award interest for pre-reference, pendente lite and post-award period at a reasonable rate as provided under Section 31 (7) of the Act, 1996.

ii. It further observed that since interest had already been awarded wherever the Concessionaire's claims were allowed, the Tribunal did not record any separate findings on this claim.

iii. The Arbitral Tribunal has rightly observed that it is well settled that, in the absence of any contractual stipulation prohibiting the grant of interest, an arbitral tribunal is empowered to award interest for the pre-reference, pendente lite, and post-award periods.

F. Claim No. 8 – Costs

i. The Arbitral Tribunal held that under Section 31A of the Arbitration and Conciliation Act, 1996, costs ordinarily follow the event, and the successful party is entitled to recover the reasonable costs incurred in the proceedings. While awarding costs, the Tribunal considered factors such as the parties' conduct and the outcome of the arbitration etc.

ii. The Tribunal noted that the arbitration involved total claim of Rs. 1,347.53 crore and counterclaim of Rs. 368 crore, which were adjudicated over 32 sittings. Despite repeated directions, the Authority failed to pay its share of the Tribunal's fees, compelling the Concessionaire to deposit on behalf of the Authority as well. Considering the Authority's conduct and the substantial expenses incurred by the Concessionaire in pursuing the arbitration, the Tribunal awarded Rs. 1.10 crore towards cost, inclusive of the Authority's unpaid share of arbitral fees. The awarded cost was directed to be paid within two months, failing which, it was directed that, they would carry interest at 9% per annum until realization.

iii. This Court finds no ground to interfere with the aforesaid findings of the learned Arbitral Tribunal in the exercise of its jurisdiction under Section 34 of the Arbitration and Conciliation Act, 1996, particularly when the petitioner failed to deposit its share of the arbitral tribunal's fees.

G. Counter-Claim No. 1 – Claim for the Maintenance of the Project Highway

i. Upon consideration of the record, the Tribunal observed that, following a joint inspection conducted by the Authority, the

Independent Engineer, and the Concessionaire, the Independent Engineer had quantified the divestment cost at Rs. 80.49 crores, and the Concessionaire had expressly accepted this assessment by its letter dated 25.03.2022.

ii. The Tribunal rejected the Authority's reliance on subsequent letters dated 21.08.2022 and 21.10.2022, by which the claim had been increased first to Rs. 152.74 crores and then to Rs. 183.28 crores, including a 20% penalty under Article 17.9 of the Concession Agreement. It held that these letters were based on inspections conducted without notice to or participation of the Concessionaire, contrary to the mandatory procedure prescribed under Article 38.2. Moreover, these documents were merely internal communications of the Authority, were neither proved as admissible evidence nor shown to have been communicated to the Concessionaire.

iii. The Tribunal further held that the Concessionaire's contractual liability to maintain the Project Highway ceased on 04.02.2022, i.e., 120 days after termination (as per Article 39.1). Consequently, reliance on letters issued after that date was held to be legally inconsequential. The Tribunal also found that although several notices had been issued before termination, the Authority failed to establish compliance with the procedure prescribed under Article 17.9.

iv. Accordingly, the Tribunal concluded that the Authority's claim of Rs. 183.28 crores was grossly exaggerated and unsupported by admissible evidence. However, observing that the Independent Engineer's assessment of Rs. 80.49 crores, made on 02.02.2022, had been accepted by the Concessionaire on 25.03.2022, the Tribunal held that the Authority was entitled only to that amount.

v. The Tribunal therefore partly allowed Counter-Claim No. 1, awarding the Authority Rs. 80.49 crores, together with interest at 9% per annum from 25.03.2022 till the date of the Award.

vi. The learned Arbitral Tribunal, upon a due appreciation of the evidence on record and the relevant contractual provisions, has arrived at a reasoned finding of fact. Such a finding, being founded on an appreciation of the evidence and the terms of the contract, does not warrant interference in the exercise of this Court's limited jurisdiction under Section 34.

H. Counter-Claim No. 2 – Outstanding dues of Deferred Premium

i. Upon consideration of the rival submissions, the Tribunal took note of all the relevant documents, the provisions of the Agreement, and the MoRTH Policy dated 04.03.2014. The Tribunal also examined the evidence on record, including the cross-examination of the Concessionaire's witness.

ii. It further took note of the Independent Engineer's letter dated 31.01.2022, which recommended recovery of the outstanding deferred premium and had quantified the dues at Rs. 132.98 crore. However, the Authority had ultimately claimed Rs. 158.95 crore on the basis of Annexure R-15 of the arbitral record, the contents of which had been specifically denied by the Concessionaire. The Tribunal held that the Authority had failed to formally prove the said document and, therefore, it could not be relied upon. Referring to Section 101 of the Evidence Act, 1872, as well as the principles of natural justice, the Tribunal held that the burden of proving the computation rested upon the Authority and that an unproved document could not constitute the basis for granting the claim.

iii. The Tribunal thereafter interpreted Clause 25.4 of the Concession Agreement, which expressly provided as under –

> *25.4 Premium*
>
> *The Concessionaire acknowledges and agrees that as set forth* ***in the Bid,*** *it shall pay to the authority for each year of the Concession Period, a premium (the "Premium") of Rs 12.00 Crore (Rupess Twelve Crore)* ***out of the gross revenues of the project*** *as share of the Authority commencing on COD, in the form of an additional concession fee, as set forth in Clause 26.2.1, and in the manner set forth in Clause 26.4.*

iv. Applying principles of contractual interpretation, the Tribunal held that the provision is clear and unambiguous and must be given its plain meaning. It concluded that the parties had consciously agreed that the premium would be payable only from the gross revenue of the project. It further observed that the entire gross revenue of the project goes to the Escrow Account. Consequently, it was observed that the Concessionaire could not be compelled to satisfy the premium liability from its own independent resources. The Tribunal further observed that the very purpose of the Premium Deferment Scheme was to protect the concessionaires from financial hardships.

v. Accordingly, it was observed that the Concessionaire is not liable to pay any amount in this respect and if the payment is to be made, it is required to be made from the Escrow Account itself. It further observed that this factual and legal obligation has been conceded very fairly by the Learned Counsel for the Authority.

vi. Liberty was given to the Authority to make the recovery as per the amount due and to the extent of availability of funds in the Escrow Account.

vii. The conclusions arrived at by the learned Arbitral Tribunal cannot be said to have transgressed the limits of its jurisdiction. The Tribunal has adopted a plausible and reasonable interpretation of the relevant provisions of the Agreement.

viii. The Tribunal has also independently recorded that the said position was fairly conceded by the learned counsel appearing for the Authority.

ix. In the exercise of its jurisdiction under Section 34 of the Arbitration and Conciliation Act, 1996, this Court cannot substitute its own interpretation of the contractual provisions merely because an alternative view is possible. So long as the interpretation adopted by the learned Arbitral Tribunal is a possible one and does not suffer from any patent illegality or contravene the fundamental policy of Indian law, no interference is warranted.

I. Counter-Claim No. 3 - Outstanding dues to the Agencies

i. The findings of the Tribunal with respect to the Counter Claim No. 3 are reproduced as under –

142. The relevant part of the letter of the IE dated 28.12.2021 reads as under:

In view of the above it is recommended that since toll operations have already been resumed by the Authority itself with substantial revenue inflow with new NHAI Toll accounts in Canara Banks, for which the existing services of concessionaire's sub agencies were used on emergency grounds all of a sudden for the resumption of toll operations, which was under seizure due to the long agitating farmers blockage, without any toll loss and deployment process of agency by NHAI HQ thorough open bidding which is under way, the release of payments may be directly made to sub vendors of the Concessionaire after deduction/accounting from outstanding due payments in terms of termination payment calculation which is being determined by I.E, amounting to Rs. 3.52 Cr. as per details below:

S. No.	*Vendor*	*Service*	*Amount*
1	*Skylark Infra Engineering Pvt. Ltd.*	*Toll Operations*	*1,07,54,118*
2	*Kosher Infrastructure Pvt. Ltd.*	*Route Operation & Routine Maintenance*	*2,35,67,580*
3	*Texture Technologies*	*IT Manpower at Toll*	*7,16,767*
4	*SIS Cash Service Pvt Ltd*	*Toll cash pick up service*	*1,25,123*
		Total Payments	*3,51,63,588*

143. The Concessionaire in its reply has submitted that its total outstanding liabilities was only for Rs. 3.50 Cr which had been certified and recommended by the IE in its letters dated 28.12.2021 and 12.01.2022.

144. The Authority could adjust any other amount in the Termination Payment provided it had spent that amount on this head. It is not the case of the Authority that it had made payment to any agency. Thus, it seems to be a case only of paper entries. For want of proper pleadings and proof by affirmative evidence that the Concessionaire failed to make payments of any other vendor, recovery of any such payment is not permissible.

145. In such a factual situation, it is evident that the payment, if any had to be made by the Authority to any other agency from the Escrow Account and could not be the liability of the Concessionaire.

146. Clause 31.4 of the CA deals with withdrawal upon termination of the CA which includes any other payment required to be made under the Agreement. Both the Parties have been signatories to the Escrow Agreement dated 06.04.2011. Clause 3.2 thereof provides that Termination Payment shall be deposited in the Escrow Account. Clause 4.2 further provides for withdrawal from the Escrow Account upon termination, which includes clauses (i) and (j) which provide withdrawal of any payments required to be made under the CA and balance if any, in accordance with the instructions of the Concessionaire.

147. Thus in view of the above the Authority is entitled to make the recovery/adjustment of Rs. 3.50 Cr with 9% interest from 28.12.2021 till the date of Award. The counter claim is partly allowed. The Authority shall be allowed to make such an adjustment from the amount of Award in favour of the Concessionaire.

ii. The Arbitral Tribunal has partly allowed the petitioner's counterclaim after considering the IE's letter dated 28.12.2021 and the Concessionaire's reply thereto. The Tribunal has observed that it is not the Authority's case that it had made the payment to any agency. Equally, in the absence of any specific pleadings or cogent evidence to establish that the Concessionaire had failed to make such payment to any agency, the Tribunal returned the aforesaid finding. The Tribunal has further placed reliance upon Clause 31.4 of the Concession Agreement as well as the provisions of the Escrow Agreement while adjudicating the issue. This Court finds no infirmity in the findings and conclusions arrived at by the learned Arbitral Tribunal. The view taken is a plausible one, based on the material available on record and the interpretation of the contractual provisions, and therefore warrants no interference in the exercise of this Court's jurisdiction under Section 34 of the Arbitration and Conciliation Act, 1996.

J. Counter- Claim no. 4 - For non-rectification of defects

i. The Tribunal held that the Authority had failed to establish the essential prerequisites for recovery under the Concession Agreement, namely, issuance of notices by the IE or the Authority, failure of the Concessionaire to comply and execution of remedial works by the Authority, and the actual expenditure incurred. The Tribunal found that the chart (annexed as Annexure R-16 of the arbitral record) was inadmissible, as it was disputed by the Concessionaire and remained unproved.

ii. It also held that the claims, largely relating to the period 2013–2020, were time barred under Section 43 of the Arbitration and Conciliation Act, 1996, and, except for two items, were additionally barred by the principles of Order II Rule 2 CPC.

iii. Accordingly, the Tribunal rejected Counter-Claim No. 4 in its entirety.

iv. The learned Arbitral Tribunal has recorded its findings on the basis of the evidence adduced before it and, upon an appreciation thereof, has arrived at findings of fact. Such findings are not amenable to interference by this Court in the exercise of its jurisdiction under Section 34 of the Arbitration and Conciliation Act, 1996.

K. Counter- Claim no. 5 - Towards IE's remuneration

i. The Arbitral Tribunal observed that Article 23.3 requires the Concessionaire to reimburse 50% of the IE's remuneration after receiving a statement of expenditure from the Authority. The Tribunal found that the Authority had failed to produce any evidence showing the amount paid by it in respect of the fees of the IE, the date on which such payment was made, or that it had issued any statement of expenditure or demand for reimbursement to the Concessionaire.

ii. It is further observed that there is no pleading that the Authority had actually paid the IE's fees after October 2020. Consequently, Counter-Claim No. 5 was rejected.

L. Counter- Claim no. 6 – Interest

A regards Claim No. 6, following observation has been made –

Claim for Interest

167. In view of the fact that the interest has already been awarded on the counter claims accepted fully or partly, the issue does not survive.

M. Counter- Claim no. 7 – Cost

Regarding Claim no. 7, following has been observed -

Claim for Cost

168. So far as the Counter Claim no. 7 is concerned, the Authority failed to make Termination Payment to any extent and the cost has been awarded to the Concessionaire. The demand of cost by the Authority is rejected.

93. Similarly, no interference is warranted with the findings recorded by the learned Arbitral Tribunal in respect of Counter Claim Nos. 5, 6 and 7.

94. Thus, in respect of the aforesaid claims and counterclaims, the learned Arbitral Tribunal has duly considered the pleadings, the evidence, and the documents placed before it before recording its findings. The interpretation accorded by the Tribunal to the contractual provisions is a plausible and reasonable view based on the terms of the Agreement.

95. In exercise of jurisdiction under Section 34 of the A&C Act, this Court is not inclined to interfere with the above (except in respect of Claim Nos.1 and 2).

96. In the circumstances, the present petition is partly allowed; the impugned award in respect of Claim Nos.1 and 2 is set aside.

97. Pending applications also stand disposed of.

SACHIN DATTA, J

JULY 28, 2026/*r, sv*