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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**# **CNR No. DLHC010741212016**+ **O.M.P. (COMM) 64/2016 & I.A. 3702/2016****NATIONAL HIGHWAYS AUTHORITY OF INDIA**

.....Petitioner

Through: **Ms. Neetika Sharma, Ms.
Saloni Jagga, Adv.**

versus

EMAS EXPRESSWAY PRIVATE LIMITED Respondent

Through:

CORAM:**HON'BLE MR. JUSTICE OM PRAKASH SHUKLA****JUDGMENT(ORAL)**

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22.09.2026

1. This petition under Section 34 of the Arbitration and Conciliation Act, 1996¹ has been preferred by the National Highways Authority of India² for setting aside the Arbitral Award dated 30.11.2015³ rendered by a three-member Arbitral Tribunal comprising Sh. Shyam Kishore as the Presiding Arbitrator, Sh. Kanwarjit Singh and Sh. I.M. Singh, Arbitrator to the extent it allowed Claim Nos. 1, 2, 3 and 5 of the Respondent (Claimant before the Tribunal).

2. By the impugned award, the learned Tribunal awarded Rs. 27,24,88,198/- in favour of the Respondent⁴ along with future interest.

¹ "Act" hereinafter

² "NHAI" or "Petitioner" alternatively

³ "impugned award" alternatively

⁴ "Concessionaire" hereinafter



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3. The dispute stems from the Concession Agreement dated 27.03.2002⁵ executed between NHAI and the Concessionaire for Four-Laning including strengthening of the existing two-lane pavement of National Highway No. 2 from Palsit (Km 581.457) to Dankuni (Km 646) in the State of West Bengal, commonly known as the Durgapur Expressway⁶. The project also encompassed designing, building, installation etc. of ancillary facilities (“Project Facilities”) such as Maintenance Yard, Integrated Wayside Amenities Complex etc. by the Concessionaire on the project site in accordance with the requirements stipulated under Schedule D of the CA.

4. The Letter of Acceptance was issued on 31.01.2002 to a Consortium of Gamuda Bhd. and WCT Engineering Bhd., which promoted the Concessionaire as a special purpose vehicle to implement this Project.

5. The CA was structured on a Build-Operate-Transfer⁷ model on annuity basis for a concession period of 17 years and 4 months, beginning from the Commencement Date i.e. 27.10.2002 till 26.02.2020, with NHAI liable to pay the Concessionaire a bi-annual annuity of Rs. 39.998 crores for the Annuity Payment Period from 27.08.2005 and 27.02.2020, as per Article 8.1 of the CA read with Schedule J therein.

6. In terms of Article 4 of the CA, an Independent Engineer⁸ was appointed for supervision of compliance by the Concessionaire and its

⁵ “CA” hereinafter

⁶ “project” or “executed work” alternatively

⁷ “BOT” hereinafter



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adherence of duties stipulated in Schedule L of the CA. It was only upon the issuance of a Provisional or Completion Certificate by IE, that the Project would be deemed completed and open to public.

7. The CA envisages two phases: (i) Commencement of the Project from 27.10.2002 till the Completion Date on 26.02.2005. This is the “Implementation Period”, and (ii) The period beginning from after the Completion Date till the expiry of the CA is termed as the “Operation Period”. However, it appears from the record that the Project was completed on 20.06.2005 i.e., 114 days after the Completion Date.

8. During Implementation Period, the Concessionaire executed 22 items of Change of Scope⁹ works and one item of additional work, at the instance of NHAI as per Article 7 of the CA. The same is reproduced hereinbelow:

“Article 7-CHANGE OF SCOPE

7.1 Change of Scope

NHAI may, notwithstanding anything to the contrary contained in this Agreement, require a change in the scope of the Project ("Change of Scope"), provided that such change does not involve additional capital expenditure exceeding Rs.335 million. The Change of Scope may be required by NHAI by an order (the "Change of Scope Order") issued in accordance with the procedure set forth in Article 7.2.

7.2 Procedure for Change of Scope

(a) NHAI may, at any time during the implementation Period but at least 90 days prior to the Scheduled Project Completion Date, require Change of Scope by a written notice (the

⁸ “IE” hereinafter

⁹ “COS” hereinafter



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"Change of Scope Notice) to the Concessionaire, through the Independent Engineer

(b) The Concessionaire shall, within 15 days of receipt of Change of Scope Notice, provide to the Independent Engineer such information as is necessary and reasonable together with preliminary documentation and details including calculations where necessary, in support of the following:

(i) the impact which the Change of Scope is likely to have on the Construction Requirements and/or the O&M Requirements.

(ii) the budgeted estimate of the Additional Cost to be incurred by the Concessionaire for implementing the Change of Scope.

(ii) the estimated additional time (number of days) that the Concessionaire would require to achieve COD consequent to Change of Scope.

(c) The independent Engineer shall after reviewing the information, documentation and the budgeted estimate of the Additional Cost submitted to it pursuant to preceding sub-article (b), settle the rates, approve the quantities/design and forward the budgeted estimate of the Additional Cost as duly certified by it in consultation with the Concessionaire, to NHAI. NHAI may, within a period of 15 (fifteen) days from the date of receipt of such statement, issue the Change of Scope Order. The final Additional Cost shall be computed by taking into account the actual work executed as measured and certified by the Independent Engineer at the rates settled.

(d) If for any reason NHAI chooses not to issue the Change of Scope Order, it shall reimburse to the Concessionaire the cost/expenses certified by the Independent Engineer as having been incurred by the Concessionaire in preparing and submitting the drawings, documents estimates and other information in compliance with the Change of Scope Notice.

(e) Simultaneously with the issue of the Change of Scope Order, NHAI shall notify the Concessionaire the mode of reimbursement of the Additional Cost which shall be one of the following modes:

(i) by lump-sum reimbursement to the Concessionaire of the Additional Cost;

(ii) reimbursement of Additional Cost to the Concessionaire, in not exceeding four equal half yearly



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installments, subject to payment of interest at SBI PLR + 2% on the amount the payment of which is deferred.

Provided that if the Change of Scope leads to increase in cost of meeting O&M Requirements only, such cost incurred during an Annuity Payment Period shall be reimbursed by NHAI to the Concessionaire on the Annuity Payment Date in respect of that Annuity Payment Period.

(f) The Change of Scope Order shall be effective from the date the mode of reimbursement is notified to the Concessionaire in terms of the preceding clause(e).

(g) NHAI shall, within 30 days from the date of receipt of a Certificate from the Independent Engineer certifying that the Concessionaire has completed the works in accordance with the Change of Scope Order, reimburse to the Concessionaire the Additional Cost by (i) lump-sum payment of the amount equal to the Additional Cost or (ii) advising the Concessionaire the number of installments in which NHAI proposes to reimburse the Additional Cost and paying the first of such installments."

7. As defined in Article 1.1, the expression "Additional Cost" means the additional capital expenditure and additional operating costs which the Concessionaire has or would be required to incur as a result of Change of Scope (i.e. Change in the scope of the Project), and "O&M Requirements" means the requirements as to operation and maintenance of the Project Facilities set forth in Schedule I."

9. While Article 7.1 allows for COS, Article 7.2 of the CA prescribes the procedure for the same. Article 7.2(e) thereunder provides, *inter alia*, for reimbursement to the Concessionaire for additional costs either by way of lumpsum payment or in instalments, which shall not exceed four equal half yearly instalments subject to the payment of interest at SBI PLR + 2%¹⁰ on the amount of which the payment is deferred. It further provides that if COS only causes

¹⁰ State Bank of India Prime Lending Rate plus 2%



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increase in operation and maintenance¹¹ costs then “*such cost incurred during an Annuity Payment Period shall be reimbursed by NHAI to the Concessionaire on the Annuity Payment Date*”.

10. Further, Article 7.2(g) of the CA provides that reimbursement by NHAI would be subject to issuance of a certificate by the IE to the effect that the Concessionaire has completed the works as per the COS order and that NHAI is bound to reimburse the Concessionaire within thirty days of receipt of such certificate.

11. Disputes arose between the parties concerning, (i) delayed payment/reimbursement of the costs and interest thereof with respect to the COS/additional works, (ii) a deduction of Rs. 6,59,92,600/- by NHAI from the Concessionaire’s dues on the ground of a “cost saving” due to change in the crust thickness of the flexible pavement, (iii) the Concessionaire’s entitlement to Routine and Periodic maintenance cost with respect to the COS items and (iv) interest, both *pendente lite* and future on the amounts found due.

12. These disputes were referred to arbitration in terms of Article 17.2 of the CA.

13. Accordingly, the learned Arbitral Tribunal entered upon reference and rendered the impugned award on 30.11.2015 with respect to the six heads of claims of the Concessionaire. Notably, the Petitioner did not raise any counter-claims.

14. The present objection petition pertains to Claim Nos. 1, 2, 3 and

¹¹ “O&M” hereinafter



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5, which are as follows:

Claim No. 1	- Interest on cost of COS and additional works for the period up to 14.10.2010 – Rs. 11,90,36,696/- . - Further interest on Rs. 6,59,92,000/- at SBI PLR + 2% from 15.10.2010 till date of award.
Claim No. 2	Amount deducted by NHAI as cost savings for change in crust thickness of flexible pavement – Rs. 6,59,92,600/- .
Claim No. 3	- Amount of maintenance cost of COS items as per invoices submitted with the Concessionaire's letters dated 06.07.2009 and 11.01.2010 – Rs. 5,12,29,821/- - Less: Amount received on 25.02.2010 with 10th Annuity Payment – Rs. 7,33,000/- - Balance: Rs. 5,04,96,821/- - Interest on Rs. 5,12,29,821/- at SBI PLR + 2% for the period from respective due dates till 24.02.2010 – Rs. 42,99,855/- - Interest on Rs. 5,04,96,821/- at SBI PLR + 2% from 25.02.2010 to 14.10.2010 – Rs. 43,84,759/- - Further Interest on Rs. 5,04,96,821/- from 15.10.2010 till date of award.
Claim No. 5	Interest on sum directed to be paid by arbitral award @ 18% p.a. from date of award till payment.

15. With respect to Claim No. 1, the learned Tribunal rejected NHAI's contention that interest could run only from 30 days after the IE's letter dated 01.01.2007, holding instead that since COD¹² stood achieved on 20.06.2005 and sample COS computation corroborated the completion dates adopted by the Concessionaire, it could not be penalised for the IE's delay in formally certifying completion. Accordingly, interest at SBI PLR + 2% under Clause 7.2(e)(ii) was computed from 30 days after actual completion of each item, subject to a deduction for delay of 538 days attributable to the



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Concessionaire's own belated amendment application.

16. On Claim No. 2, the learned Tribunal held that in case of ambiguity, Schedule Q of the CA prevailed over Schedule 'G' by virtue of Clause 1.4(e) of the GCC, and that the Concessionaire's alternative pavement design envisaging an initial 10-year design life with 50 mm overlays at the 5th, 10th and 15th years to achieve a total design life of 20 years was consistent with DPR's own two-stage design, which had been reviewed and accepted by the IE without any extra cost to the CA. It was also held that the IE had consistently opined against any deduction by NHAI, and that the Concessionaire's undertaking *vide* letter dated 04.08.2005 to revert any cost saving was not voluntary.

17. The learned Tribunal with respect to Claim No. 3 held that COS items, being part of the project facilities under Schedule T, required both routine and periodic maintenance, which was expressly contemplated by Article 7.2(e). However, in the absence of any contractually agreed formula, the learned Tribunal adopted the cash-flow-factor method under Schedule K for quantification. The Tribunal also deemed it fit to exclude the re-designed Toll Plaza items (COS 8A/8B) from the set-off claimed by NHAI on the ground that Toll Plaza maintenance was NHAI's responsibility as per the Schedule Q, corrigendum to Clause 2.9.1 of Schedule D.

18. Further, *qua* Claim 5, the learned Arbitral Tribunal declined the claimed rate of 18% per annum and instead, exercised its discretion

¹² Commercial Operations Date



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under Section 31(7)(b) of the Act to award simple interest @ 10% p.a. on the awarded sums, commencing 90 days after the Award until actual payment.

19. Though not challenged in the present proceedings, Claim No. 4 was awarded as *nil* since all computations with respect to interest were worked out and subsumed in Claim Nos. 1 and 3. Claim No. 6, though also not challenged in these proceedings, the Tribunal directed parties to bear their own costs of arbitration.

20. In aggregate, the learned Arbitral Tribunal awarded the Concessionaire a sum of Rs. 27,24,88,198/- together with post-award simple interest @ 10% from the 90th day after the Award until actual payment.

21. NHAH assails the said arbitral award to the extent of Claims 1, 2, 3 and 5, essentially on the ground that it suffers from patent illegality and perversity, being rendered in the teeth of express terms of the CA and thus *ultra vires* the remit of the learned Tribunal under Section 28(3) of the Act.

22. NHAH assailed Claim No. 1 on the strength of Article 7.2 of the CA, more particularly Article 7.2(g) therein and contended that the liability to pay interest arose only after 30 days of the IE's letter dated 01.01.2007, which for the first time quantified the COS dues and demanded additional cost. Thus, according to the learned Counsel, interest was payable from 01.02.2007 and not from COD or any other earlier date. It was submitted that the finding of the learned Arbitral



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Tribunal was contrary to the said provision of the CA and thus contrary to Section 28 of the Act, which binds a Tribunal from going beyond the contract.

23. It was further urged that NHAI had already made payments to the tune of Rs. 10,00,00,000/- on 26.12.2006 and Rs. 6,94,00,287/- on 02.05.2009 which was the net amount payable to the Concessionaire on account of the COS works and that after these payments were made, nothing remained payable to the Concessionaire for interest on the cost of COS works and additional works.

24. Apropos Claim No. 2, it was contended that the said claim was not maintainable altogether in view of Clause 1.2 to Schedule G of the CA, which categorically “*under no circumstance*” permitted any reduction in the thickness of individual pavement layers. It was argued that while Schedule Q was given primacy over Schedule G as per Clause 1.4(e) of the GCC, however, this bar was not diluted by Schedule Q and that the Concessionaire having furnished an undertaking dated 04.08.2005 to revert any cost saving to NHAI could not resile from it. In this regard, reliance was also placed on NHAI’s own letter dated 18.11.2006 and Minutes of Meeting dated 10.11.2004 between NHAI, Project Director and the Concessionaire, whereby it was affirmed that cost savings from revised design would accrue to NHAI.

25. It was further submitted in regard to Claim No. 2 that initially NHAI was opposed to the reduction in layer thickness, however, it allowed the same subsequently in view of the larger interest of the



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completion of the project. It was urged that the said variation was subject to review and approval by NHAI and accordingly, the learned Tribunal erred in awarding the claim in favour of the Concessionaire.

26. With respect to Claim No. 3, NHAI maintained that the Routine Maintenance Cost was wrongly computed by disregarding negative cost-saving variations and that Periodic Maintenance is not contemplated by the CA at all and further that in any case, maintenance pertaining to the Toll Plaza could not be fastened upon NHAI.

27. It was submitted that Claim No. 5 is assailed to the extent that it is consequential upon the challenge to Claim Nos. 1 to 3. Additionally, in support of its contentions, reliance was placed on ***All India Power Engineer Federation & Ors. v. Sasan Power Ltd. & Ors.***¹³

28. *Per contra*, learned Counsel for the Respondent submitted that the impugned award was squarely based on correct understanding and interpretation of the CA and its Schedules and hence, did not warrant any interference by this Court.

29. With respect to NHAI's contention as to computation of interest under Claim No. 1, learned Counsel submitted that the IE and the learned Tribunal both considered the material on record in its entirety to hold that interest would be payable after 30 days of completion of COS items. Learned Counsel placed reliance on para 1.3.7 of the

¹³ Civil Appeal Nos. 5881-5882 of 2016, decided on 08.12.2016



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impugned award, whereby the learned Tribunal referred to documents filed before it by NHAI itself on which dates of completion of COS items was mentioned. Reliance in this regard was also placed on letter dated 23.02.2006.

30. Learned Counsel submitted *qua* Claim No. 2 that even if the undertaking is considered to be tendered out of free will, the IE and Tribunal both concluded that there was no saving by the Concessionaire, therefore, no occasion arose for NHAI to deduct an amount under this head. In support, reliance was placed on a letter dated 23.04.2007.

31. It was urged that the contentions of NHAI with respect to Claim Nos. 3 and 5 were already dealt with and rejected by the learned Tribunal and therefore, warranted no interference.

32. I have heard the learned Counsel for both parties and perused the material on record.

33. This Court is mindful of the limited scope of interference envisaged under Section 34 of the Act. There is no quarrel with the well-settled proposition of law that this Court does not sit in appeal over the decisions of the Arbitral Tribunal and cannot substitute its view solely because another plausible view exists. The Arbitral Tribunal is entrusted with the interpretation of the contract and its effect thereof. This Court cannot intervene in this determination unless the interpretation so adopted, *inter alia*, re-writes the contractual bargain between the parties or is inconsistent with the terms of the



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contract, or is one which no reasonable person would arrive at.

34. Bearing the scope of Section 34 of the Act in mind, I am unable to the interfere with the impugned award for the reasons to follow.

Claim No. 1

35. NHAI's objections mainly reduce to the contention that the trigger date for interest under Clause 7.2(e)(ii) of the CA ought to have been 30 days after the IE's letter dated 01.01.2007, and not an earlier date keyed to COD in view of Clause 7.2(g). The learned Arbitral Tribunal, however, has given cogent reasons at paragraph 1.3.7 of the Award, for declining this contention, that COD was achieved on 20.06.2005 and the works were deemed completed on that date, that sample computations of specific COS items corroborated the completion dates independently adopted by the Concessionaire and confirmed by the IE in his letter dated 23.02.2006, and that the Concessionaire ought not to be penalised for the IE's own delay in formally issuing the completion certificate, which, on NHAI's own pleaded case, was issued only on 08.12.2005.

36. The aforesaid reasoning indicates that the learned Tribunal gave due regard to the contractual bargain between the parties. It is, therefore, not a case where the provisions of the contract were overlooked. Accordingly, this Court is of the considered view that the finding of the learned Tribunal *qua* Claim No. 1 is neither perverse nor contrary to any provision of law and does not offend Section 28(3) of the Act. This is manifestly an exercise of contractual interpretation



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reasonably open to the Arbitral Tribunal on the material before it. This Court cannot intervene unless the Tribunal arrives at a construction that no reasonable person would¹⁴.

Claim No. 2

37. NHAI's further grievance is with respect to the award of Rs. 6,59,92,600/- to the Concessionaire. NHAI deducted this sum under the head of cost saving by the Concessionaire arising from change in crust thickness of the flexible pavement.

38. NHAI contests this claim on the strength of Clause 1.2 of Schedule G, which is reproduced hereinbelow:

"1.2 The Concessionaire, subject to review and approval of the same by IE/NHAI, can adopt alternative design of pavement.

*However, **under no circumstance:***

- (i) the cross-sectional elements can be reduced,*
- (ii) thickness for different constituent layers of flexible pavement can be reduced,*
- (iii) the furnished (sic) top elevations of the road lowered than that provided in DPR."*

(emphasis supplied)

39. The learned Tribunal's finding on Claim No. 2 proceeds on a structured construction of the CA. It notes the apparent tension between the abovementioned Clause 1.2 of Schedule G which, on its face, bars reduction of individual layer thicknesses and NHAI's clarification recorded against a query posed by one of the bidders in Schedule Q. The learned Tribunal resolved that tension in the

¹⁴ **National Highways Authority of India v. JSC Centrodorstroy, (2016) 12 SCC 592; MSK Projects (I) (JV) Ltd. v. State of Rajasthan, (2011) 10 SCC 573**



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following manner:

“Question of Bidder - "The DPR pavement composition does not meet the Schedule G Design requirements of Concession agreement. Please confirm that there would not be any review by the independent Engineer1NHAI if DPR composition is followed..... "

Answer by NHAI - "Basis of pavement design as per AASTHO guidelines is given in section 6.3 (Vol-III Design report Part -A Pavement Design report) considering composite analysis of pavement. If deemed necessary the concessionaire can furnish his own design."

From the above answer, it is quite evident that the NHAI did not precisely answer the pointed question implying that they realised the inadequacy of DPR design and , therefore , did not dispute the Bidder's contention (that the DPR composition did not meet the schedule G Design requirements) but instead allowed the Bidder to furnish his own design. It also means that they did not waive off the stipulation for review of the Concessionaire's design even if the DPR Design was to be followed.

We observe that the option to bidders for furnishing alternative design was already provided in clause 1.2 of Schedule G but that was provided with a rider that under no circumstances the thickness for different constituent layers of flexible pavement could be reduced. NHAI could have simply referred to that clause in answer to the pointed question.

Providing clarification at the Pre-Bid meeting stage (in answer to the pointed question) permitting the bidders to adopt their own design (because of the inadequacy of DPR design as pointed out by the bidder) implied that there was no restriction in changing the thickness of different layers and that the bidders could adopt their own design but the same must be reviewed by I.E./NHAI. After all, the design of the crust is nothing but determining the thickness of various constituent layers. Permitting the bidders to adopt their own design without any riders at the Pre-Bid meeting stage clearly implied that the bidders could change the thickness of various layers. We , therefore , agree with the contention of the Claimant , duly supported by I.E”

(emphasis supplied)

40. It is borne from a plain reading of the above that NHAI, in its clarification, permitted bidders to furnish their own designs and



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further, cautioned the bidders to consider all clarifications while tendering for the project. The learned Tribunal observed that NHAI did not press on any other condition such as the thickness of the component layers of the pavement while inviting the bidders to submit their own designs. As noted by the Tribunal, these clarifications formed part of Schedule Q to the CA. In this light, reliance was also placed on Clause 1.4(e) of the GCC, under which Schedule Q being the addendum to the DPR, was expressly given an overriding effect over Schedule G in cases of ambiguity.

41. Thus, the reliance placed by NHAI on Clause 1.2 of Schedule G stands belied in view of the aforesaid specific finding rendered by the learned Tribunal. The Tribunal categorically held that NHAI could have simply referred to the said clause in its answer to the query or dispute the bidder's contention, however, it chose to permit the bidders to furnish their own designs. This, in view of the learned Tribunal, had an overriding effect.

42. The learned Tribunal further relied on the DPR along with various letters of the IE dated 15.01.2004, 23.02.2006, 18.04.2007 and 23.04.2007, to hold that the Concessionaire's two-stage design did not, in substance, depart from the CA as the same was contemplated by the DPR in per Para 6.3.1 as well coupled with the fact that the IE saw no justification for any deduction by NHAI.

43. With respect to the purported undertaking dated 04.08.2005 by the Concessionaire that cost saving would accrue to NHAI, the learned Tribunal found this undertaking to not be tendered out of free will.



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This conclusion was arrived at in the following manner:

"2.3.15 Commenting on the Concessionaire's undertaking vide his letter dated 4.8.2005 (p-54-55, RD-2) again, the IE in his aforesaid letter dated 23.4.2007 (p-97-103, RD-1) had explicitly stated Claimant's stand on the said undertaking that This undertaking has y been made, not to delay the first annuity, due to the fact that the financial impact of the revised pavement design has not yet been finally clarified." (p-102, S.No. 24, RD-1)

2.3.16 The IE's aforesaid observation is significant and it will be seen that the Concessionaire had completed the Project as achieving COD on 20 June 2005 and the 1st Annuity of Rs.399.98 million had become due as payable on the specified Annuity Payment Date of 27 August 2005 and pursuant to the provisions of Article 8.5 of the Concession Agreement, the Concessionaire had submitted to IE its relevant Invoice for payment of Annuity.

2.3.17 The Concessionaire was required to meet his payment obligations to the Lenders i.e. financial institutions and banks financing the cost of the Project. Any delay in the payment of Annuity would have led to obvious financial difficulties and attendant consequences. Clearly, NHAI was in a stronger position as to dominate the will of Concessionaire and it is an age-old maxim that necessity knows no law. Then, by his subsequent letter dated 3.11.2005 (p-56-57, RD-2) the Claimant went back on his said undertaking to return the saving due to the revised design of the flexible pavement.

2.3.18 The Arbitral Tribunal, therefore, is of the view that the undertaking by the said letter dated 4.8.2005 given by the Concessionaire, as desired by NHAI, was not voluntary or of the Concessionaire's free will. Moreover, even if there had been undertaking between the parties against the provisions of the contract it would not be valid and enforceable in Law."

(emphasis supplied)

44. Thus, from the reading of the CA and the record before it, the learned Tribunal concluded that there was, in fact, no cost saving accruing to the Concessionaire in the first place, and that the Concessionaire's letter dated 04.08.2005 relied upon by NHAI as an unconditional undertaking to revert any saving, was not shown to have been furnished voluntarily.



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45. The Tribunal arrived at this construction from the interplay between, *inter alia*, Clause 1.4(e) of the GCC, Clause 1.2 to Schedule G and Schedules D and Q. Such a construction was squarely within the learned Tribunal's domain to make, especially because it is supported by contemporaneous correspondence and by the consistent opinion of the IE, i.e. the very expert the parties had agreed would adjudicate technical questions of such kind. In the opinion of this Court, the aforesaid interpretation adopted by the learned Tribunal cannot be said to be a view that no fair-minded person could have taken and therefore, does not warrant any interference.

46. NHAI's submission, in substance, invites this Court to re-read Schedule G in isolation and to re-appraise the weight to be given to the Concessionaire's letter dated 04.08.2005, the minutes of the meeting dated 10.11.2004, and dilute the weight of the consistent stance of the IE, an exercise squarely proscribed in proceedings under Section 34 of the Act. Accordingly, these contentions do not come to the rescue of the Petitioner.

Claim No. 3

47. This claim pertains to: (i) Maintenance costs (Routine and Periodic Maintenance) on COS items payable to the Concessionaire and (ii) Interest payable by NHAI due to delay in payment of dues accrued to the Concessionaire.

48. As far as Routine Maintenance is concerned, the learned



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Tribunal observed, without demur from either party, that routine maintenance cost of COS items was payable in principle, the only controversy being the correct base figure.

49. For computation in this regard, the learned Tribunal accepted the cash-flow projections method derived from Schedule K, a methodology common to both parties' own calculations. It also found that the amounts towards redesign of Toll Plazas at Dankuni and Palsit were wrongly deducted since maintenance of those Toll Plazas was the responsibility of NHAI and not the Concessionaire, as evident from "Schedule 'Q' – Corrigendum to Clause 2.9.1". Therefore, according to the learned Tribunal, the same would not be attributable to the Concessionaire.

50. This, in the considered opinion of this Court, is a reasoned reconciliation of the parties' own figures by reference to a contractual provision, not disregard of the contractual bargain.

51. Further, the CA envisaged two kinds of maintenance costs i.e. routine and periodic. The former includes costs arising out of day-to-day maintenance work and the latter largely encompasses major renewal work carried out at specific intervals rather than on a day-to-day basis¹⁵.

52. In this regard, the learned Tribunal relied upon Article 7.2(e) of the CA to hold that the CA did provide for reimbursement to the

¹⁵ Para 3.4.18 of the impugned award – "Periodic Maintenance has been specified in B-2 of Schedule-I and mainly consists of profile corrective course overlaid with a renewal wearing course of 50 mm thick Asphaltic Concrete laid after application of a bituminous tack coat, providing road markings and treatment to paved and earthen shoulders and repair of stone pitching wherever required at 5', 10" and 15" year from the COD."



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Concessionaire with respect to O&M costs on COS works. Accordingly, it opined that some of the COS works would undoubtedly require periodic maintenance by the Concessionaire, thereby increasing its incurred costs. The learned Tribunal, in view of proviso to Article 7.2 (e), also categorically rejected NHAI's contention that periodic maintenance cost was not envisaged by the CA in view of Article 7.2(e) and observed that “...*there is no reason why Respondent does not agree to pay for periodic maintenance when he has already paying for routine maintenance.*”

53. Therefore, NHAI's contention on periodic maintenance, that the CA does not contemplate any such liability is answered directly by the aforesaid. This conclusion of the learned Tribunal is squarely derived from the contractual bargain. Further, with respect to the interest component, the Tribunal has not deviated from the interest envisaged by the CA i.e., SBI PLR + 2% and has granted the same when the cause of action arose, in accordance with Section 31(7) of the Act.

54. Therefore, no patent illegality going to the root of the matter is made out; if anything, it is the Arbitral Tribunal's rejection of the Concessionaire's higher, schedule of rates-based claims in favour of the more conservative Schedule K cash-flow-factor computation that has operated to NHAI's benefit.

Claim No. 5

55. The Concessionaire sought interest at 18% per annum from date of award till realisation. However, the learned Tribunal granted simple



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interest at the rate of 10% per annum since the CA provided for SBI PLR + 2%, which was indeterminable for the future. It is well settled that the Arbitral Tribunal has discretion to grant post award interest. This Court finds that grant of interest at 10% per annum is reasonable. Therefore, in view of the aforesaid and the findings with respect to Claim Nos. 1, 2 and 3, no reason is made out for interference by this Court with Claim No. 5.

56. For the foregoing reasons, this Court finds that no ground under Section 34 of the Act is made out in order to warrant interference with the impugned award *qua* Claim Nos. 1, 2, 3 or 5. The learned Arbitral Tribunal's construction of the CA and its Schedules present a possible and plausible view reasonably open to it based on the material on record. This Court under Section 34 of the Act, cannot substitute its own appraisal of that evidence, or its own construction of the CA, for the view taken by the learned Tribunal.

57. In view of the foregoing, the instant object petition stands dismissed. Accordingly, the arbitral award dated 30.11.2015 is upheld.

58. Before parting, I also deem it fit to reiterate the words of S. Ravindra Bhat, J. (as he then was) in ***M/S PCL-SUNCON (JV) v. NHAI***¹⁶, as follows:

“21. As a postscript, this Court believes that it is imperative to sound a word of caution. Notwithstanding the considerable jurisprudence advising the Courts to remain circumspect in denying the enforcement of arbitral awards, interference with the awards challenged in the petitions before them has become a matter of routine, imperceptibly but surely erasing the distinction

¹⁶ **FAO(OS) No.131/2014, decided on 02.11.2015**



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between arbitral tribunals and courts. Section 34 jurisdiction calls for judicial restraint and an awareness that the process is removed from appellate review. Arbitration as a form of alternate dispute resolution, running parallel to the judicial system, attempts to avoid the prolix and lengthy process of the courts and presupposes parties consciously agreeing to submit a potential dispute to arbitration with the object of actively avoiding a confrontation in the precincts of the judicial system. If a court is allowed to review the decision of the arbitral tribunal on the law or on the merits, the speed and, above all, the efficacy of the arbitral process is lost.”

OM PRAKASH SHUKLA, J

SEPTEMBER 22, 2026/at