

IN THE HIGH COURT OF KARNATAKA AT BENGALURU

DATED THIS THE 03RD DAY OF AUGUST, 2026

PRESENT

THE HON'BLE MR. VIBHU BAKHRU, CHIEF JUSTICE

AND

THE HON'BLE MR. JUSTICE C.M. POONACHA

COMMERCIAL APPEAL NO. 127 OF 2025

BETWEEN:

1. THE CHIEF ENGINEER
NATIONAL HIGHWAYS ZONE
PUBLIC WORKS DEPARTMENT
GOVERNMENT OF KARNATAKA
P.W.D. ANNEX BUILDING
2ND FLOOR, K.R. CIRCLE
BENGALURU - 560 001

...APPELLANT

(BY SRI GIRIDHAR S.V., ADVOCATE)

AND:

1. GVR INFRA PROJECTS LIMITED
A COMPANY DULY REGISTERED UNDER
THE PROVISIONS OF
THE INDIAN COMPANIES ACT, 1956
HAVING ITS REGISTERED OFFICE
AT VBC SOLITAIRE
9TH AND 10TH FLOOR
NO.47 AND 49, BAZULLAH ROAD
T. NAGARA, CHENNAI - 600 017
TAMIL NADU AND ITS BRANCH AT
#40, SNEHA NAGAR, 2ND CROSS
GROUND FLOOR
NEAR RELIANCE FRESH

AMRUTHAHALLI
BYTARAYANAPURA
NEW BANGALORE INTERNATIONAL
AIRPORT ROAD
BANGALORE - 560 092

REPRESENTED BY ITS
RESOLUTION PROFESSIONAL
MS. VANDANA GARG
[IBBI/IPA-001/IP-PWC
P00025/2016-2017/10058]
OFFICE, 252, VEER SAVARKAR MARG
SHIVAJI PARK, DADAR
MUMBAI CITY
MAHARASHTRA - 400 028

...RESPONDENT

(BY SRI YASHODHAR HEGDE, ADVOCATE)

THIS COMMERCIAL APPEAL IS FILED UNDER SECTION 13 (1-A) OF COMMERCIAL COURTS ACT 2015, READ WITH SECTION 37 OF THE ARBITRATION AND CONCILIATION ACT, 1996 PRAYING TO SET ASIDE THE JUDGMENT PASSED BY THE HON'BLE LXXXVII ADDITIONAL CITY CIVIL AND SESSIONS JUDGE, AT BANGALORE (CCH.88) DATED 05.09.2024 IN COMMERCIAL ARBITRATION PETITION NO.4/2020 AND CONSEQUENTLY ALLOW THIS APPEAL AS PRAYED FOR & ETC.

THIS COMMERCIAL APPEAL HAVING BEEN HEARD AND RESERVED FOR JUDGMENT, COMING ON FOR PRONOUNCEMENT THIS DAY, JUDGMENT WAS PRONOUNCED AS UNDER:

CORAM: HON'BLE MR. VIBHU BAKHRU, CHIEF JUSTICE
and
HON'BLE MR. JUSTICE C.M. POONACHA

C.A.V. JUDGMENT

(PER: HON'BLE MR. JUSTICE C.M. POONACHA)

The present appeal is filed by the National Highways Authority of India **[NHAI]** under Section 13(1A) of the Commercial Courts Act, 2015 **[CC Act]** read with Section 37 of the Arbitration and Conciliation Act, 1996 **[A & C Act]** impugning the judgment dated 05.09.2024 **[impugned judgment]** in Commercial Arbitration Petition No.4/2020 passed by the LXXXVII Additional City Civil and Sessions Judge at Bangalore **[Commercial Court]** whereunder the application filed by the NHAI under Section 34 of the A & C Act seeking to set aside the Arbitral Award dated 11.10.2019 **[impugned award]** passed by the Arbitral Tribunal was rejected.

2. The respondent-M/s GVR Infra Projects Ltd., **[GVR]** instituted arbitral proceedings for resolution of the disputes arising out of the contract work of Job No.NH-48-KNT-2014-15-734 for the work of strengthening from KM 216.00 (Gulagabale) to KM 237.00 (Maranahalli) and providing Rigid Pavement from KM 250.620 (Kemphole) to KM 263.00 (Addahole) (Shiradi Ghat) of NH-48

Bangalore-Mangalore Section in the State of Karnataka
[contracted works].

3. GVR was the successful tenderer in respect of the contracted works awarded by NHAI for a total sum of ₹90,27,83,520/- (Rupees Ninety Crore Twenty-seven Lakh Eighty-Three Thousand Five Hundred and twenty only). GVR and NHAI entered into an agreement on 06.11.2015 **[agreement]** and the site was handed over by NHAI to GVR on 23.12.2015, which was the appointed date.

4. In terms of the contract, GVR proceeded with the construction. However, the work could not be completed for various reasons. NHAI terminated the agreement on 04.01.2017. Being aggrieved, GVR initially filed W.P.No.1819/2017 before this Court which was dismissed on 12.12.2017, wherein GVR was permitted to raise all the pleas in arbitration proceedings.

5. Each of the parties nominated their respective arbitrators. The said arbitrators nominated the presiding arbitrator. Accordingly, the Arbitral Tribunal was constituted. The claimant-GVR made a total of 20 claims. NHAI also made a counterclaim. Oral and documentary evidence were adduced before the Arbitral Tribunal.

The Tribunal, vide the impugned award, partly allowed the claims made by GVR and rejected the counterclaim made by the NHAI.

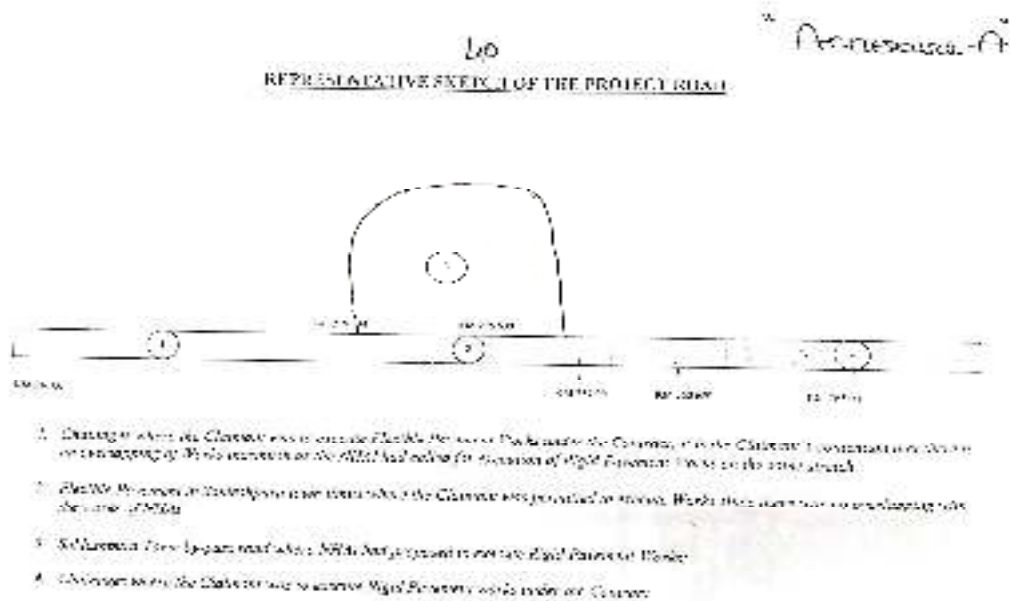
6. Being aggrieved, NHAI preferred an application under Section 34 of the A & C Act (COMAP No.4/2020) before the Commercial Court, the same was dismissed by the impugned judgment. Being aggrieved, the present appeal is filed.

BACKGROUND FACTS:

7. The scope of work as contemplated under the agreement together with the financial component of each item of work is as under:

Flexible pavement	216.00Km to 237.00Km	21.00Km	Rs.22.33 crores
Rigid pavement	250.62Km to 263.00Km	12.38Km	Rs.53.17 crores
Structures in Rigid Pavement(50 CDs)	Reconstruction of	14 CD's	Rs.2.53 crores
	Widening of	36 CD's	
Provision for road safety works			Rs.12.24 crores
Total			Rs.90.27 crores

8. Both the counsels in the course of submissions, placed on record a representative sketch which is as under:



9. Schedule-J as per Clause 10.3.2 of the agreement

contains the project completion schedule which is as under:

“Schedule-J

(See Clause 10.3.2)

PROJECT COMPLETION SCHEDULE

1. Project Completion Schedule

During Construction period, the Contractor shall comply with the requirements set forth in this Schedule I for each of the Project Milestones and the **Scheduled Completion Date**. Within 15 (fifteen) days of the date of each Project Milestone, the Contractor shall notify the Authority of such compliance along with necessary particulars thereof.

2. Project Milestone-I

2.1 Project Milestone-I shall occur on the date falling on the 180th (one hundred and fiftieth) day from the Appointed Date (the "**Project Milestone-I**").

2.2 Prior to the occurrence of Project Milestone-I, the Contractor shall have commenced construction of the Project Highway and submitted to the Authority duly and validly prepared Stage Payment Statements for an amount not less than 10% (ten percent) of the Contract Price.

3. Project Milestone-II.

3.1 Project Milestone-II shall occur on the date falling on the 365th (three hundred and thirtieth) day from the Appointment Date (the "**Project Milestone-II**").

Prior to the occurrence of Project Milestone-II, the Contractor shall have commenced construction of the Project Highway and submitted to the Authority duly and validly prepared Stage Payment Statements completion schedule in reference to Schedule-H Items, Stages and Sub-stages payment statements for an amount not less than 30% (thirty percent) of the Contract Price.

4. Project Milestone-III

4.1 Project Milestone-III shall occur on the date falling on the 550th (four hundred eightieth) day from the Appointed Date (the "**Project Milestone-III**").

4.2 Prior to the occurrence of Project Milestone-III, the Contractor shall have continued with construction of the Project Highway and submitted to the Authority duly and validly prepared Stage Payment Statements for an amount not less than 60% (sixty percent) of the Contract Price.

5 Schedule Completion Date

5.1 The Schedule Completion Date shall occur on the 650th (seven hundred and thirtieth) day from the Appointed Date.

5.2 On or before the Scheduled Completion Date, the Contractor shall have completed construction in accordance with this Agreement.

6. Extension of time

Upon extension of any or all of the aforesaid Project Milestones or the Scheduled Completion Date, as the case may be, under and in accordance with the provisions of this Agreement, the Project Completion Schedule shall be deemed to have been amended accordingly.”

10. The work schedule that was to be carried out by GVR, as noticed in the Arbitral Award, is as under:

- a) Flexible pavement and widening of 36 numbers of CDs was to be done during the period April-2016 to June-2016;
- b) Reconstruction of 14 numbers of CDs coming under the rigid pavement and construction of the rigid pavement was to be done during the period October-2016 to March-2017;

11. A request was made by GVR for closing the traffic in the rigid pavement section. However, the same was not done. GVR had also contended that certain portions of the flexible pavement section overlapped with the other tenders issued by NHAI.

12. Various correspondences were exchanged between GVR and NHAI with regard to the progress of the work. NHAI issued a memorandum on 24.09.2016 (Ex.C51), debarring GVR.

Vide letters dated 24.10.2016 (Ex.C52), GVR sought for reconsideration of the decision of NHAI to debar it. GVR also requested to invoke Article 26.2 of the agreement to appoint a conciliator. NHAI vide letter dated 18.11.2016 (Ex.C53), revoked the debarment notice with certain conditions.

13. NHAI issued a notice dated 02.12.2016 (Ex.C29) for termination for not procuring 50% of the materials and machinery required for carrying out rigid pavement works before closure of the traffic at Shiradi Ghat. GVR vide reply dated 12.12.2016 (Ex.C30) requested for withdrawal of the termination notice. However, the contract was terminated on 04.01.2017 (Ex.C35). NHAI terminated the contract on the ground that GVR did not achieve the first milestone. The gist of the milestones as per the agreement between the parties is as under:

1 st milestone	180 days at 10% (one hundred and fiftieth day)	Not less than 10% of the contract price
2 nd milestone	360 days at 30% (three hundred and thirtieth day)	Not less than 30% of the contract price
3 rd milestone	550 days at 60% (four hundred eightieth day)	Not less than 60% of the contract price
4 th milestone	730 days at 100% (650 th days) (seven hundred and thirtieth day)	Completion of the project

14. GVR, *inter alia*, contended that the road that was to be made available for carrying out the rigid pavement works by closing the traffic was not done. It was further contended that there was no clarity with regard to the work to be done over the flexible pavement section with regard to the overlapping extent; as also that there was a change in the scope of work. Hence, it is contended that the termination was illegal.

15. Both the parties submitted their draft issues consequent to which, ten issues were framed by the Tribunal, which are as under:

“ISSUES

The 10 Issues framed by the Claimant are as under

- i. Whether the duration of the performance under the contract is 18 months or 24 months?
- ii. Whether the site of the project highway is procured in accordance with the Contract Agreement?
- iii. Whether Claimant proves that the 'Authority Engineer' appointed was required to be an external engineer mandatorily and whether the Respondent can appoint its own engineer as 'Authority Engineer'?
- iv. Whether the road length from KM 216.00 to 237.00 of NH-48 requiring strengthening overlapped with the work proposed to be taken up by the NHAI and whether the Claimant was prevented by the

Respondent in completing the flexible pavement work from KM 216.00 to 237.00 of NH-48?

v. Was it possible to allow passage of traffic along the existing carriageway between KM 250.620 to KM 263.00 of NH-48 (Shiradi Ghat) under improvement, simultaneously carrying the work of Rigid Pavement?

vi. Whether the termination of the Contract by the Respondent is valid and legal?

vii. Whether the Claimant achieved the 1st Financial Milestone in terms of the Contract Agreement?

viii. Whether the Claimant is entitled to the Claims at Serial Nos. 1 to 20 amounting to Rs. 115.61 Crores claimed in the Statement of Claims?

ix. Whether the Respondent is entitled to the Counter-Claim amount from Serial Nos. 1 to 4 amounting to Rs. 79.65 Crores.

x. What relief?"

16. The Arbitral Tribunal, consequent to the oral and documentary evidence adduced between the parties, partly allowed the claims made by GVR and rejected the counterclaim made by NHAI. The abstract of the award amount as is forthcoming from the arbitral award is as under:

ABSTRACT OF AMOUNT AWARD

SL. NO.	Category of Claim	Amount Claimed as per SOC (in Rs.)	Awarded amount (in Rs.)	Remarks
1.	Claim No.1: Claim for Return, release and discharge of performance Security Bank Guarantee furnished to the Respondent BG 6,77,08,765/-+ BG Commission Rs.5,81,450/-	6,82,90,215/-	6,89,90,215/-	

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2.	Claim No.2: Claim for loss of profit @15% on the balance value of work, which could not be executed due to illegal & wrongful termination of the contract:	12,55,50,124/-	12,14,18,158/-	
3.	Claim No.3: Claim for Loss of Business Reputation/Loss of future business due to potential negative reputation following the termination	10,00,00,000/-	-	Rejected
4.	Claim No.4: Claim toward delay damages (as per Clause 8.3 of contract)	1,74,98,345/-	-	Rejected
5.	Claim No.5: Claim for Payment due towards Stage Payment -1, in respect of work done	6,57,82,695/-	9,33,29,134/-	
6.	Claim No.6: Claim for change of Scope items amounting to Rs.5,36,14,342/-	5,36,14,342/-	2,19,10,515/-	
7.	Claim No.7: Claim for Expenses incurred in carrying out Road Maintenance Work amounting to Rs.5,77,11,692/-	5,77,11,692/-	2,92,87,972/-	
8.	Claim No.8: Claim for additional area of Flexible Pavement works carried out than the average Km. area of the total project length Rs.47,67,443/-.	47,67,443/-	-	Rejected
9.	Claim No.9: Claim for loss on Deployment of Plant and Equipment owned by the Claimant amounting to Rs.2,89,92,000/-	2,89,92,000/-	1,99,38,000/-	
10.	Claim No.10: Plant & Equipment deployed in the Project which are owned by the Official Sub Contractor of the Claimant amounting to Rs.7,15,68,484/-	7,15,68,484/-	1,64,62,828/-	
11.	Claim No.11: Plant and Equipment Hired by Official Contractor of Claimant amounting to Rs.12,78,83,618/-	12,78,83,618/-	-	Rejected
12.	Claim No.12: Expenses incurred in Mobilization & Demobilization of plant and Machinery Rs.89,58,596/-	89,58,596/-	13,43,118/-	
13.	Claim No.13: Recovery of Machinery utilized for execution of works Rs.70,01,431/- (Negative Claim)	70,01,431/-	-	Rejected
14.	Claim No.14: Claim for Loss of unused Material Rs.5,86,41,696/-	5,86,41,696/-	2,93,20,848/-	
15.	Claim No.15(a): Claim for Administrative Expenses: Site Overheads and Establishment Expenses Incurred by the Claimant Rs.5,15,32,589/-	5,15,32,589/-	1,71,77,530/-	
	Claim No.15(b): Offsite Overheads / Apportionment Charges of Claimant @ 3% of Contract Value amounting to Rs.2,70,83,506/-	2,70,83,506/-	-	Rejected
	Claim No.15(c): Off-Site Overheads / Apportionment Charges of official Subcontractor of the Claimant Rs. 77,93,953/-	77,93,953/-	77,93,953/-	

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16.	Claim No. 16: Loss of Bonus for early Completion: 3% of Project Cost i.e., Rs.2,70,83,506/-	2,70,83,506/-	-	Rejected
7.	Claim No. 17: Design Charges 3% of Project Cost Rs.2,70,83,506/-	2,70,83,506/-	-	Rejected
18.	Claim No.18: Loss of Maintenance Benefit @ 3% of Contract Price i.e., Rs.2,70,83,506/-	2,70,83,506/-	-	Rejected
19.	Claim No.19: Interest on the duo amounts at the rate of 18% p.a amounting to Rs.20,23,71,654/-	20,23,71,654/-	-	Rejected
	Total	1,15,22,90,038/-	46,62,72,271/-	
20.	Claim No.20: Cost incurred on Legal proceedings at High Court and Civil Court, Bangalore Rs.38,14,882/-	38,14,882/-	38,14,882/-	
21.	a. The expenditure incurred by the Claimant for 21 hearings by AT (both the parties should share the amount equally) (Ex: C-93)	3,99,754	1,99,877/-	
	b. The expenditure incurred by the Claimant for arranging the internal meetings of the Arbitrator's on 11 th , 12 th , 14 th , 17 th , 18 th , 23 rd , 24 th and 25 th September and 6 th , 9 th and 10 th October (including food & other charges)	88,620/-	88,620/-	
		1,15,65,93,294/-	43,03,75,650/-	
22.	Counter claim Negated by the Tribunal except for refunding of excess BG (110%) collected	74,51,81,277/-	Rejected	45,13,920/-
	Grand total	1.15.65.93.294/-	43,48,89,570/-	

Note:

a. Interest to be paid for the award amount of Rs.42,62,72,271/- from the date: 12.03.2018 (date of submission of SOC till the date of Award dt:11.10.2019) @15% as per article 31 (7) (a) of Arbitration and Conciliation Act 1996.

b. Interest to be paid for the Award amount of Rs. 42,62,72,271/- at the rate of 15% up to 90 days,

c. If not paid the interest to be paid is at 18% from the date of award till the date of payment.”

17. With regard to Issue No.1 that is whether the time for performance was 18 months or 24 months, the Arbitral Tribunal noticing Clause 1.4.2 of the agreement, concluded that the time was 24 months.

18. With regard to Issue No.2, the Arbitral Tribunal concluded that the site of the project was not procured in accordance with the contract. This is with regard to the specific contention of GVR that the road for carrying out rigid pavement works was required to be closed for traffic.

19. With regard to issue No.3, the Tribunal concluded that NHAI could not have appointed its own engineer as the Authority Engineer. It was held that, under the agreement, the appointment of Authority Engineer was mandatorily required to be that of an External Engineer. The Authority Engineer appointed in the present case was the Executive Engineer, NHAI - Mangalore Division. The same was in violation of the terms of the Agreement.

20. Issue No.4 was as to whether GVR was prevented by NHAI in completing the flexible pavement work between 216.00 kms to 237.00 kms. The Tribunal concluded that there was an overlap in the work that was to be carried out between 216.00 kms

to 219.534 kms and 225.600 kms to 237.000 kms. The NHAI delayed in deciding with regard to the overlap of the work and the Arbitral Tribunal concluded that GVR was prevented from completing the flexible pavement work from 216.00 kms to 237.00 kms.

21. With regard to Issue No.5, the Tribunal concluded that the rigid pavement work cannot be taken up without closing the road between 250.620 kms to 263.00 km of NH 48 (Shiradi Ghat).

22. While considering Issue No.6, the Tribunal concluded that the termination of the contract by NHAI was not valid. With regard to Issue No.7, as to whether GVR achieved the first financial milestone in terms of the contract, the Tribunal concluded that GVR was prevented by NHAI from achieving the first milestone in terms of the contract.

23. Issue No.8 pertains to the damages claimed with respect to the claims 1 to 20 made by the claimant. Accordingly, the damages were assessed and the claims were awarded in terms of the abstract of the amounts awarded as noticed at paragraph No.16 (supra).

24. Issue No.9 was with regard to the counterclaim made by NHAI. The Tribunal concluded that NHAI was not entitled to the counterclaim. The counterclaim made by NHAI, *inter alia* claimed the amounts that it had incurred with respect to the fresh tender that was called, with respect to unfinished works consequent to the termination of the present tender as well as other charges.

CONTENTIONS:

25. The primary contention of the learned counsel for the appellant/NHAI is that the finding of the Arbitral Tribunal that the termination of the agreement with GVR was not justified and is patently illegal; NHAI also impugns the finding of the Tribunal that the road was required to be closed while rigid pavement work was to be carried out. It was also contended that the finding of the Tribunal with regard to completion of the first milestone by GVR was also patently illegal. The quantification of the damages is also pointed out as being patently illegal inasmuch as it is the contention of NHAI that the Emden's Formula is applicable only for engineering contracts and was not required to be adopted for the agreement in question.

26. Per contra, learned counsel for GVR justifies the award of the Tribunal and contends that the same is not to be interfered with by this Court in exercise of its jurisdiction contained under Section 37 of the A & C Act.

DISCUSSION AND REASONING:

27. The material on record clearly indicates that the contract between the parties consisted primarily of two parts, i.e., the flexible pavement works, which were to be carried out between 216 kms to 237 kms, i.e., for a total extent of 21 kms. The other part of the work was rigid pavement works, which were between 250.62 kms to 263 kms, i.e., for an extent of 12.38 kms. In the entire extent of both the flexible as well as rigid pavement works, GVR was also required to carry out reconstruction and widening of culverts [referred to as **CDs** at certain places]; and also, carry out other road safety works. As already noticed above, the break-up of the financial outlay with regard to the contracted works is as under:

a) Flexible pavement -	₹22.33 crores
b) Rigid pavement -	₹53.17 crores
c) Reconstruction and widening of 50 culverts -	₹2.53 crores
d) Provision for road safety works -	₹12.34 crores
Total	₹90.27 crores

28. With regard to the flexible pavement works, it is the contention of GVR that in respect of certain stretches of the road, there was overlapping inasmuch as NHAI had already proposed four- laning of the road before the agreement with GVR. The said overlapping was between 216 kms to 219.434 kms as well as between 225 kms to 237 kms. Hence, it was the contention of GVR that the contracted works for the said portions, which overlapped with the earlier proposed works, could not be carried out, and there was no clarity given by NHAI to the queries raised by GVR in that regard. It was contended that the overlapping stretch virtually reduced the scope of the project.

29. With regard to the rigid pavement works, GVR had requested NHAI to temporarily close the road and divert the vehicle traffic to enable GVR to carry out the rigid pavement works. The rigid pavement works were to be carried out between 250.60 km to 263.00 km.

30. The NHAI had terminated the agreement, since GVR had not even achieved the first financial milestone. In this regard, it

is to be noticed that as a first milestone, GVR was required to complete 10% of the contract price within 180 days.

REGARDING THE VALIDITY OF TERMINATION BY NHAI:

31. As noticed above, the agreement was entered on 06.11.2015 and the appointed date was 23.12.2015. In terms of the completion schedule (Annexure-J to the agreement), the first milestone was that GVR was required to complete construction of 10% of the contract price within 180 days from the appointed date. Accordingly, the first milestone was to be completed on or before 22.06.2016.

32. As already noticed above, the project contemplated carrying out of flexible pavement works of a total extent of 21 kms (that is from 216.00 kms to 237.00 kms) as well as rigid pavement works of 12.38 kms (that is from 250.62 kms to 263.00 kms). The works included NHAI to construct 50 culverts. Out of the 50 culverts, the works contemplated reconstruction of 14 culverts and widening of 36 culverts. The culverts were required to be constructed both in the flexible pavement stage as well as the rigid pavement stage.

33. While it is the contention of GVR that there was overlapping in the portion of the road where flexible pavement works was to be carried out and that NHAI did not, in any manner, clarify the said aspect of the matter, it is clear and forthcoming that between the stretch-219.534 kms (Sakleshpur bypass off take) to 225.600 kms (Sakleshpur bypass exit), which is a length of 6.066 kms in which stretch the flexible pavement works were required to be undertaken, there was no overlapping of work. Hence, the extent of 6.066 kms where flexible pavement work was required to be undertaken is that stretch of the road where there was no dispute between the parties as to the mode and manner of carrying out the work.

34. The contention of GVR is that since certain portions of the flexible pavement works were overlapping with an earlier work and there was no clarity from NHAI, there was delay in the completion of the works and the milestones stipulated in the agreement could not be adhered to; and hence, the termination of the contract by NHAI was illegal. In order to consider the said contention, vis-à-vis the findings of the Arbitral Tribunal regarding the same, it is necessary to notice certain correspondences exchanged between the parties.

35. In the meeting held on 14.03.2016 (part of Ex.R8), it was, *inter alia*, agreed between the parties as under:

“The contractor has assured to executed the work as follows:

1. 10 pipe culverts and 3 Km flexible pavement by the end of March 2016.

2. 12 pipe culverts and 7 Km flexible pavement by the end of April 2016.

3. 14 pipe culverts and 11 Km flexible pavement by the end of May 2016.

Instructions were issued to the contractor to execute 22 CD's and 10 Kms flexible pavement within a period of one month.

Since the working period for the above work is only from October to April end, instructions were given to the Superintending Engineer to monitor the progress of work for a period of 1 month, if contractor fails to achieve the above said progress in this period and instructed to submit the specific proposal with recommendations whether to take up the work with the same agency or to rescind the contract.”

(emphasis supplied)

36. Vide letter dated 04.04.2016 (part of Ex.R10), GVR has, *inter alia*, furnished the details of the materials procured as well as the status of the culvert works. The relevant portion of the status regarding the culvert works is as under:

“3. The modified programme will be submitted on 07.04.2016. As per modified programme the flexible pavement of 7 Kms and 6 No's Culverts already completed and 16 No's of Pipe/slab culverts will be

completed in all respects by the end of April 2016.
The balance stretch will be completed after monsoon.

4. The Rigid Pavement work cannot be tackled until closure of Road due to restricted width in ghat section as the Slip form paver blocks the flow of traffic and also in the interest of safety of the Road users as traffic is prohibited during the laying of rigid payment as per the norms.

5. xxxxx

6. Further it is reported that we have taken up construction and widening of 26 nos. of Pipe / Slab culverts wherever it is found that the safety road is not affected due to widening/reconstruction work. The remaining structures cannot be tackled until closure of Road in the safety interest of the Road users. In this regard we wish to submit that as there is no change in formation levels the widening of these culverts have been taken up based on the existing top of culvert levels and the work is not stopped as reported in your letter and they are in progress and will be completed well before the onset of monsoon.
The present status of structures are as below”

Sl. No.	Type of Structures	Units	As per Agreement	Completed	Work in Progress	Balance	Status
	Widening						
1	Slab Culverts	No's	12	0	10	2	Walls 1 st lift in progress
2	Pipe Culverts	No's	24	6	10	8	Head wall 1 st & 2 nd lift in progress
	Reconstruction						
3	Slab Culverts	No's	14	0	0	14	Will start after Closure of road.

(emphasis supplied)

37. In response to the said letter dated 04.04.2016 NHAI vide its letter dated 05.04.2016 (part of Ex.R.9) intimated GVR regarding the start of flexible pavement works as under:

“The proposal submitted vide your letter cited above has been examined and as such to start the work of flexible pavement work from Km 216.00 to Km 237.00 may be taken up subject to the following conditions:-

1. Quality Assurance, Monitoring and Supervision should be as per Article 11 of the agreement.
2. Original agreement between M/s BSCPL infrastructure Limited and M/s GVR Infra Projects Ltd is not yet furnished till date.
3. The Batch Mix plant may be got inspected by the Regional Officer (Mechanical) for the condition and fitness of the plant.
4. Quality tests for the materials collected may be got done both from your end and National Highway Quality Control Authorities.
5. The Design Mix may be got approved from the competent Authority.
6. As traffic flow in this stretch is around 17,000 PCU, all safety measures may be taken and ensure that there is free flow of traffic during execution of the work.
7. Suitable Traffic signals may be provided in this stretch during execution of the work.”

(emphasis supplied)

38. In the meeting dated 27.04.2016 (part of Ex.R8), it was noticed that in the previous meeting dated 14.03.2016 GVR had

assured that the culvert works would be completed (as noticed in para 35 above). However, it was noticed by NHAI that no progress has been achieved as per the said assurance. It was also noticed that GVR had opened 25 culverts and not carried out the work which was hazardous to the safety of the road users. Hence, GVR was instructed to close the culverts and make the same safe for road users. It was also noticed that since the rigid pavement work was very important, if GVR proceeded with the same speed for the execution of the work, the closing of the Shiradi Ghat highway for a period of three to four months would be very difficult.

39. A meeting was held on 02.05.2016 (part of Ex.R8) between the representatives of the NHAI and GVR. It is relevant to notice the minutes of the said meeting, which are as under:

“The above work was entrusted to M/S GVR Infra projects Ltd Chennai, on 06/11/2015. The site was handed over on 23-12-2015 and the same has been declared as appointed date by the Authority Engineer.

The Chief Engineer noted with displeasure regarding nil progress of the above Project up to the end of April-2016, even though it was assured by the agency to complete 22 nos of culverts and 10 Kms of flexible pavement during the meeting held on 14-03-2016.

It is also reiterated by the Chief Engineer that the monsoon rains will start from second week of May, and observing the present methodology adopted by the agency

it would be vague to say that all the 22 culverts and 10 Km of flexible pavement would be completed in next 10 days and it clearly Indicates that it is not possible to complete culverts and flexible pavement works before the onset of monsoon. Hence it is very difficult to achieve the first mile stone progress of 10% as on 23-06-2016 i.e, 180 days from the appointed date at this juncture.

However once again the agency assured that the above shortfall of progress will be made good by completing all the 25 nos of culverts which are already tackled by providing necessary traffic safety measures alongwith 10 Kms of flexible pavement before 12-05-2016. It is also discussed and opined in the meeting that since there is lack of time for bleeding for bituminous work and the pavement shall only be made after monsoon.

The Assistant Executive Engineer, National Highway Sub Division Sakaleshpura stated that, the approval to the OGLs, Design and Drawings may be obtained from the competent authority prior to commencement of any work.

The Chief Engineer instructed the agency to get the approval to the OGLs, Design and Drawings from the competent authority before commencement of any work.

Conclusion of the meeting:

It is instructed the field staff to closely monitor the day to day progress of the work up to 12-05-2016 and final decision of termination of contract will be taken on 12-05-2016 after reviewing the progress of the work and a clear decision would be taken with respect to termination of the contract as discussed in the meeting held on 27th April-2016 and directed the Managing Director, M/S GVR Infra projects Ltd Chennai asked to be present on that day.

The meeting was concluded with thanks to all the officers present.”

(emphasis supplied)

40. It is pertinent to notice here that GVR vide its letter dated 06.04.2016 intimated NHAI that it would be starting the flexible pavement works between 216.00 km to 237.00 km. The same was reiterated by GVR vide its letter dated 20.05.2016 (both the letters are part of Ex.R.10). In response to the same, the NHAI vide its letter dated 23.05.2016 (Ex.C.20) replied to GVR, wherein it is stated as under:

“Please refer to your letter Dtd: 20.05.2016 cited above wherein it is stated that the work of flexible pavement work from Km 216.00 to 237.00 would be stated as the material and machinery for laying crack seal, DBM & BC is mobilized and also the batch mix plant on lease basis from BSCPL is available at Km.160 of NH 48.

Prior to this letter, in your letter Dtd: 04.04.2016 (ref 2), it was also stated the work of flexible pavement would be started and this office vide letter Dtd: 05.04.2016(ref 3) accorded permission subject to certain conditions. Even then, no action has been taken.

It is at this juncture, especially during the third week of May 2016 wherein the pre-monsoon showers have already begun, it is stated in your letter Dtd: 20.05.2016 that the work would be started.

In this regard, in the proceeding of the meeting held on 02.05.2015 (ref 1) under the chairmanship of the Chief Engineer along with the officers concerned and the representatives Shri Gangaprasad, Managing Director, Shri Gopalkrishna and Shri Venkateshwaralu were also present, the chief Engineer reiterated that the monsoon rains would

start from second week of May, 2016 and observing the present methodology adopted by the agency, it would be vague to say that all the 22 culverts and 10 Kms of flexible pavement would be completed in next 10 days and it clearly indicated that it is not possible to complete culverts and flexible, pavement works before the onset of monsoon and it is very difficult to achieve the first mile stone progress of 10% as on 23.06.2016 i.e., 180 days from the appointed date at this juncture.

In the meeting your representatives assured that the above shortfall of progress will be made good by completing all the 25 nos of culverts which are already tackled by providing necessary traffic safety measures alongwith 10 kms of flexible pavement before 12.5.2016 and it was also discussed and opined in the meeting that since there is lack of time for bleeding for bituminous work and the pavement shall only be made after monsoon.

Also as many as 25 culverts as against 22 have been tackled and it is required that these culverts should be immediately tackled and completed before the onset of monsoon. It is also should be that at one culvert before the inspection of the Secretary, PWD which was intended on 10.05.2016 concrete was laid and the following day no curing was done. Also during the inspection of the undersigned, it was observed that the machinery were laying idle.

As regards flexible pavement it is reiterated that as already discussed in the meeting held on 02.05.2016, and it was also discussed and opined in the meeting that since there is lack of time for bleeding for bituminous work and the payment shall only be made after monsoon. Further, it is opined that since there is already intermittent monsoon rains and after completion of bituminous work there will not be time for bleeding also. If there is no time for

bleeding there is every chance of damages to the bituminous layer during monsoon.

The subject was discussed with the Chief Engineer, National Highways and with the Superintending Engineer, National Highways who reiterated to adhere to the minutes of the proceedings held on 02.05.2016.

Further, The Superintending Engineer, National Highway circle has opined to start the work of flexible pavement from reach 219.534(Kollahalli, starting point of Sakaleshpura bypass) to Km 225.600 (Anemahal, ending point of Sakleshpura bypass) at present stage.

"Hence it is once again instructed to adhere to the minutes of the meeting held on 02.05.2016".

This is for information and further necessary action."

(emphasis supplied)

41. It is clear and forthcoming from the aforesaid communications that NHAI had been following up with GVR regarding construction of culverts from 14.03.2016 (as noticed in Para 35 above) and even as on 23.05.2016 the construction of culverts had not been completed by the agency. It is also forthcoming from the said communications that the flexible pavement works were required to be carried out consequent to the completion of the culvert works. However, the said works had not commenced till 23.05.2016, which has led NHAI to apprehend

regarding the quality of the asphaltting work if the monsoon commences. Hence, it is clear that it was not for the first time, that NHAI had, vide the said letter dated 23.05.2016 (Ex.C20), called upon GVR to commence the flexible pavement works.

42. NHAI vide its communication dated 24.06.2016 (Ex.C17) had in detail noticed the various works and the progress of various work was adduced. It was noticed that “since about six months there is no considerable progress and only meagre progress is achieved”; that with regard to flexible pavement stretch, the preliminary work concluded till about 2.20 kms. It was also noticed that work on 25 culverts was started in December 2015 and the widening had not been completed and that all the 25 culverts had become hazardous locations. That road safety signs of 25 culverts were not provided and that work had completely stopped due to litigation over the settlement of dues of the supervisory staff and labourers of GVR. The mobilisation of material was also noticed to be less than 50%. An explanation from GVR was sought for all the deficiencies that were pointed out in the said letter.

43. NHAI vide its communication dated 30.06.2016 (Ex.R.21), notified GVR that it has not completed the first milestone

of 10% of the financial progress of the contract within 180 days (i.e., within 22.06.2016). Hence, GVR was notified that the said works were required to be completed within the cure period of 45 days from 23.06.2016. In the said letter-Ex.R21, the details of the materials and equipment that had not been mobilised were set out. Further, the progress of construction of the culverts (both pipe culverts and slab culverts) was set out. It was specifically noted that in respect of the said culvert works, only 15% of the physical progress was achieved, i.e., 0.41% of the whole work. Further, with regard to the flexible pavement works, physical progress is achieved only up to 1.54%, i.e., 1.29% of the whole work. Accordingly, GVR was notified that 1.70% physical progress has been achieved as against 10% of the progress as required under the agreement.

44. NHAI vide letter dated 16.07.2016 (Ex.C.44), which had been issued during the cure period, notified GVR that despite the notice- Ex.R21, action for making good the shortfall has not been reported. It was also reported that progress has been reviewed as on 12.07.2016, i.e., about 20 days of the cure period having been completed and there was no significant progress in the project site except collection of GSB material of 1900 COM.

Hence, GVR was called upon to explain as to how the shortfall would be made good in the remaining period of 25 days of the cure period.

45. At this juncture, it is pertinent to notice that there is no material on record to indicate that GVR had responded to the said cure period notice -Ex.R21. It is further pertinent to note that in all the correspondence until the issuance of the said cure period notice, GVR had not raised the contention that portions of the road where the flexible pavement work was required to be carried out overlapped with an earlier work. In fact, in the letter dated 05.04.2016 (part of Ex. R.9) (which has been noticed at para 37 hereinabove) GVR has been specifically called upon to carry out the flexible pavement works. However, in none of the correspondence thereafter, the issue with regard to the overlap has been raised. In all the correspondences the only aspect that has been repeatedly raised by NHAI with GVR is the fact that the culvert work had not been completed and the flexible pavement work had not commenced; as also the materials as well as machinery had not been mobilized as required.

46. The inspection note of the inspection dated 22.09.2016 (Ex.C46) also discloses that the material at the site was 42.15%. It is also noticed that no labourers were engaged during monsoon for maintenance work. With regard to the extent of work, it is necessary to extract the relevant portion of the inspection note, which reads as under:

“On the day of inspection the patching of pot holes at Km:232 in flexible pavement reach is in progress. In the balance reach of flexible pavement lot of pot holes has been observed the same shall be covered immediately to avoid inconvenience to the road commuters.

In the proposed Rigid Pavement reach from Km:250.620 to 263.000, lot of pot holes are observed causing inconvenience to the road users the same may be covered and road shall be maintained traffic worthy by providing Wet Mix Mecadam immediately by engaging more maintenance batches as it is the primary responsibility of the tender agency.

The centering/shuttering for three half done culverts has been erected in Km:259. It is reported by the contractor that the concrete batch of 40 members has been arrived at the project site. The contractor has been instructed to mobilize still more concrete batches to complete the culvert work in time.

A meeting has been convened in the Shiradi Ghat inspection bungalow with the officials and the contractor.

It is briefed to the agency regarding the meeting to be held on 26-09-2016 under the chairmanship of Principal Secretary, PWP & IWT Dept. Government of Karnataka with all the District Commissioners and Superintendent of Police of the concerned districts to discuss regarding the traffic closure from 15-10-2016.

But during the discussion the contractor is requesting for traffic closure from 01-11-2016 due to the following reasons:

- The work could not be started since the monsoon rains are still continuing.
- The scope of work in respect of culvert widening is increased.
- Mobilizing the Slip form paver with automatic dowel bar inserter is taking time.
- The agency sought permission for starting the bituminous work and culvert works up to 01-11-2016, which in turn helps to cash flow for further work.

Regarding traffic closure, it is instructed to adhere as was committed in the meeting which held under the chairmanship of Chief Engineer, National Highways on 16-09-2016. It is instructed the agency to prepare the programme on stage construction basis. Culvert works shall be completed in the first stage of 5 kms from where the rigid pavement work could start shall be completed first.

It is also instructed to keep continuing the material collection like sand and aggregates.

Regarding flexible pavement, the bituminous work may be get started if the rain stops."

(emphasis supplied)

47. The NHAI vide the Official Memorandum **[OM]** dated 24.09.2016 (Ex.C51) **[debarment order]** debarred the participation of GVR in all future tenders of the NHAI-Zone of PWD, Karnataka and as also recommended to the Ministry of Road Transport and Highways, Government of India **[MORTH]**, to take similar action of

debarment till 23.09.2017 or the further notice, whichever, is earlier of GVR in other centrally sponsored works elsewhere in the country. It is forthcoming that the OM dated 24.09.2016 (Ex.C51) was issued having regard to the fact that GVR had delayed in the execution of three contracted works, in which the present contracted work was also included.

48. GVR vide letter dated 24.10.2016 (Ex.C52), requested for withdrawal to revoke the said debarment order. In the said reply, GVR has set out the progress of works in each of the contracts which was the subject matter of the debarment order. It had been represented by GVR that the contracted works were a special type of project wherein, the methodology of execution is totally different from other road construction projects, as the road traverses in the ghat section and reserve forest area. It was also stated that the said region experiences one of the highest rainfalls starting from May to October end and that the works can be executed only during November to April. Hence, it was stated that “huge quantities of materials have to be procured for uninterrupted progress of work during the available non-seasonal rainfall period of four months”. GVR also set out the status of its collection of material, as well as the mobilization of equipment.

49. The inspection note of the inspection held on 25.10.2016 (Ex.C45) in the presence of the representatives of NHAI and M/s. Suryodaya Infra Pvt Ltd (stated to be the sub-contractor of GVR) noticed that GVR had failed to achieve the assurances that were given by them in the meeting held on 13.10.2016. Further, the sub-contractor agreed to complete 36 out of the 71 culverts by 15.11.2016, which is a prerequisite for closing of the road. It was decided to give a last and final chance to GVR for making use of the working period from October, 2015 to April 2016, even though 18 months is stipulated as the working period as per the agreement. It was also noticed that the material that was mobilised was 42.15%. It is also pertinent to note that GVR was required to take up the undisputed extent of 6.06 kms and there is reference to submission of a change of scope proposal to be submitted.

50. However, it is pertinent to note here that the change in the scope of work as referred to in the inspection dated 25.10.2016 (Ex.C45) is occasioned due to the inability of GVR to complete the work within the time stipulated as per its assurances. Despite periodic reviews and setting milestones for completion of culvert works and commencement of flexible pavement works, GVR failed

to complete the said milestones. As already noticed above, the flexible pavement work was required to be completed prior to the commencement of monsoon. However the culvert work itself, which was required to be done prior to commencement of the flexible pavement work, was also not done.

51. Vide OM dated 18.11.2016 (Ex.C53), the debarment order was withdrawn since GVR has assured that the work specified would be completed within the stipulated period.

52. A meeting was held on 05.11.2016 between the representatives of the parties. The relevant extract of the minutes of the meeting (part of Ex.R8) is as under:

“A meeting was held on 05-11-2016 and the following points were discussed:-

The Chief Engineer has again instructed to adhere the dates given by the Principal Secretary, Public Works, Ports & Inland Water Transport Department, Bangalore during the inspection of Shiradi Ghat on 04-11-2016.

During the inspection the Agency has assured as follows:

1. Out of 74 CD's, 46 CD's will be completed before 15-11-2016 and balance will be completed by the end of December 2016.
2. DLC Paver will be brought to site on: 07-11-2016.

3. Slip form paver will be brought to site on: 20-11-2016.

It is instructed the agency to complete the all the work as per his assurance before 20-11-2016 without fail.

Further, instructions are also issued to the Superintending Engineer and Executive Engineer to watch the progress of the agency and submit the report on daily basis, if progress of the work is not satisfactory the Superintending Engineer and Executive Engineer are Authorized to Terminate the Contract without taking permission from the Chief Engineer's Office duly observing all precautionary measures and action taken may be reported to this office.

It is decided to convey a meeting on 20-11-2016 at 11.30 A.M to take further action.”

(emphasis supplied)

53. It is clear and forthcoming from the said minutes that out of 74 culverts, GVR had assured, *inter alia*, that 46 culverts would be completed before 15.11.2016 and the balance would be completed by the end of December-2016. Further, the pavers were to be brought to the site by 20.11.2016.

54. A meeting was once again held on 23.11.2016 between the representatives of the parties. The minutes of the said meeting (part of Ex.R8) clearly noted that 42.87% of the materials were collected to the site. The equipment brought to the site was also noticed. Thereafter, it is also noticed that GVR had failed to

complete the progress of the work as assured by them. Hence, in the interest of the completion of the work, GVR was also permitted to sub-contract the work. Relevant extracts of the said minutes is as under:

“During the last meeting held on 05-11-2016, instructions were issued to the agency to complete the all the work as per his assurance before 20-11-2016 without fail. During the meeting held on 05-11-2016, the MD, M/s GVR Infra Projects Limited, Bangalore has reported that if agency fails to deploy the slip form paver on or before 20-11-2016 any decision may take to rescind the contract or to change the subcontract.

Further, instructions are also issued to the Superintending Engineer and Executive Engineer to watch the progress of the agency and submit the report on daily basis, if progress of the work is not satisfactory the Superintending Engineer and Executive Engineer are Authorized to Terminate the Contract without taking permission from the Chief Engineer's Office duly observing all precautionary measures and action taken may be reported to this office.

In observing the above progress of the agency, till today agency has not adhered to the dates assured by the agency in any of the work from last one year. This is a very important nature of Rigid Pavement work, if contractor goes with the same speed in executing the above work the closing of Shiradi Ghat highway for a period of 3-4 months is not possible which will lead-to-Chaos and resentments.

During the inspection of the Principal Secretary, Public Works Department on 04-11-21016, instructions were issued to the undersigned to watch the progress of the contractor upto 21-11-2016, if contractor fails to achieve

progress as per his assurance action may be initiated to terminate the contract.

Under the above circumstances, in observing the progress of the subcontractor from last 3-4 months contractor fails to achieve the progress as per his assurance.

As discussed with the MD, M/s GVR Infra Projects Limited, Bangalore instead of terminating the contract, he requested to change the existing sub contract to the M/s Ocean Constructions(India) Pvt Ltd, Mangalore. The same was consented by the SE, NH Circle, Bangalore, EE NH Division, Mangalore and AEE NH Sub Division, Sakaleshpura since first project was executed by the M/s Ocean Constructions (India) Pvt Ltd, Mangalore as they have all equipments and man power required for the work and also they have experience in the last project.

Hence, in the interest of work and public, it is decided allow M/s GVR Infra Projects Limited to sub contract the work to the M/s Ocean Constructions (India) Pvt Ltd, Mangalore since M/s GVR Infra Projects Limited himself suggested the name of M/s Ocean Constructions(India) Pvt Ltd, Mangalore and directions were issued to the M/s GVR Infra Projects Limited, Bangalore to give a proposal of subcontract in the name of M/s Ocean Constructions(India) Pvt Ltd, Mangalore immediately and make all contractual arrangements within 28-11-2016 and directed to attend this office with all records on 28-11-2016. If these things are not fulfilled within 28-11-2016 the Executive Engineer is directed to terminate the contract by 30-11-2016 and report to this office by 01-12-2016.

Meeting was ended with thanks to the Chair.”

(emphasis supplied)

55. It is pertinent to note that in the said meeting held on 23.11.2016, it has been specifically noticed that GVR has not

adhered to the dates assured by it for completion of the work for one year. Hence, since GVR was unable to complete the works as required, it suggested an appointment of a specific sub-contractor which was permitted by NHAI.

56. Thereafter, vide communication dated 02.12.2016 (Ex.C.29), NHAI issued a notice for termination as per Clause 23.1.2 of the agreement. In the said notice, it was intimated that 180 days from the appointed date expired on 22.06.2016, and that 10% of the project milestone had not been completed. As per the said date, payments have been made only with respect to the first and second instalment of the mobilisation advance. GVR was also intimated that despite the letter dated 30.06.2016 (Ex.R.21) issued by NHAI to cure the said defect, the same had not been done. It was further noticed that GVR in the meeting dated 05.11.2016 (part of Ex. R.8), had represented that it would complete 46 out of 74 CDs by 15.11.2016 and the balance by 31.12.2016 and that mobilisation would be done by 20.11.2016 at the site. However, in the meeting dated 23.11.2016, it was noticed that GVR had failed to adhere to the said assurance. Hence, NHAI notified GVR of its intention to issue a termination notice and called upon GVR to respond within 15 days.

57. The said letter dated 02.12.2016 (Ex.C29) was responded to by GVR by its letter dated 12.12.2016 (Ex.C30). GVR responded by stating that the roads were required to be blocked for the entire period of the contract. That the delay in execution of the project was not attributable to them and in the meeting held on 09.11.2016, all the issues were explained, and a request was made for change of milestones. It was alleged that the delays were due to the government agencies and department officials. GVR intimated that they are awaiting the road closure to start the construction work. Hence, they requested for withdrawal of the notice for termination.

58. Vide Letter dated 02.01.2017 (Ex.R.22) written by the Executive Engineer, NHAI, Mangalore Division to the Superintendent Engineer, NHAI, it was placed on record that GVR was able to achieve total progress of 3.78% after completion of 11 months of the 18 months of the tender period. It was further specifically noted that in the inspection dated 04.11.2016, GVR had assured to procure the materials and complete 46 culverts out of 74 culverts on 15.11.2016 and the remaining culverts by 30.12.2016. However, the said progress has not been achieved. It was further noticed that on 19.12.2016, the progress of the work

was once again reviewed and even after a lapse of more than one and a half months from the inspection dated 04.11.2016, only 23 culverts had reached road level. Further, when an explanation was sought from GVR, they gave a commitment letter dated 21.12.2016, which they had failed to comply with. Hence, it was reported that GVR was not able to complete the culverts as per its commitment and there was no further collection of aggregates at the site. It was also noticed that the requisite pavers with DBI (Dowel Bar Insertter) had not been procured.

59. NHAI issued the termination notice dated 04.01.2017 (Ex.C35). In the said notice, a detailed reference has been made to all the correspondence exchanged between the parties as well as the relevant stipulations in the agreement. It was placed on record that since the first milestone was not completed, the contract was terminated as per Clause 23.1.1 C and 23.1.1.O.

60. The Issue No.6 is whether the termination by NHAI is valid and legal. Issue No.7 is whether GVR achieved the first financial milestone in terms of the contract. The Arbitral Tribunal, while coming to the conclusion that the action of the NHAI in terminating that contract is not valid and legal, has merely noticed

some of the communication between the parties. However, the arbitral tribunal did not notice the communications in terms of the sequence of events so as to appreciate and adjudicate as to whether the GVR had completed the first milestone. Further, while considering Issue No.7, the Arbitral Tribunal concluded that the GVR was prevented by NHAI in completing the works in terms of the contract. The said conclusion was arrived at having regard to the finding recorded in Issue No.4.

REGARDING FLEXIBLE PAVEMENT WORKS:

61. Issue No.4 was with regard to whether there was overlapping in the flexible pavement works and as to whether GVR was prevented from completing the flexible pavement works. The Tribunal, while considering Issue No.4, held and concluded as under:

“Thus A.T finds that,

- i) The Claimant was prevented from carrying out flexible pavement work upto 23.05.2016. The claimant completed the work of flexible pavement in the Town Limit of Sakaleshpur from Km 219.534 to Km 225.600 for a length of 6.06.Km on 09.06.2016.
- ii) The Authority instructed the Claimant on 25.10.2016 (Ex C-45) to carry out the remaining

length of 14.558 Km by providing 30 mm B.C, which resulted in Change in Scope of work.

iii) No directions to the claimant were given by the Authority/Authority Engineer between 23.05.2016 to 25.10.2016 regarding carrying out flexible pavement work

iv) The respondent has also not included this flexible pavement stretch while inviting tender.

The AT comes to the conclusion that

i) The road length from KM 216.000 to Km. 219.534 and Km.225.600 to KM 237.000 over lapse with work proposed to be taken up by the NHAI.

ii) The delay in taking the decision by the Authority has prevented the Claimant in completing the flexible pavement work from KM 216 to KM 237 before June 2016 as per programme submitted by him.”

62. The said finding was recorded by the Arbitral Tribunal noticing the letter of NHAI dated 23.05.2016 (Ex.C-20) written to GVR; the inspection note dated 25.10.2016 (Ex.C-45) and the letter dated 05.01.2017 (Ex.C-87) written by the NHAI-Mangalore Division to the NHAI, KR Circle, Bangalore.

63. At this juncture, it is pertinent to note that the entire contents of the letter-Ex.C20 have been extracted at paragraph 40 supra. The context of the letter i.e., the previous correspondence, has also been noticed at paragraphs 35 to 39 supra. It is clear and forthcoming from a plain reading of the same that the GVR was

called upon to start the flexible pavement work in Sakleshpur Town limit between 219.432 KM to 225.50 KM (6.07 KM), which is the undisputed portion at that point of time. This was in the context of NHAI noticing that GVR had consistently defaulted in completing the works as was required to be done by them.

64. With regard to the inspection note dated 25.10.2016 (Ex.C-45), which has been extracted by the Arbitral Tribunal, it is noticed that the preamble of the said inspection note has been extracted in the findings of the Arbitral Tribunal. In the said inspection note, consequent to the review of the progress, it was noticed as under:

“The Agency has agreed to complete 36 culverts out of 71 within 15-11-2016 which is a prerequisite for closing the road. The Assistant Executive Engineer briefed the necessity of the construction of guard wall on valley side and drain on hillock side before laying GSB wherever the width constraints are encountered for ensuring confinement to the GSB as well as safe passage to the slip from paver movement. The agency has instructed to deploy additional concrete batches immediately for such locations.”

(emphasis supplied)

65. Further, in the said inspection note, it was also noticed that the mobilisation of material by GVR was of a cumulative of 42.15% and that there was no progress achieved since the previous meeting. The GVR had given various assurances with regard to further mobilization of material. Hence, in the inspection note, it was concluded that the assurance of GVR about the progress would be reviewed on 15.11.2016 and a final decision will be taken.

66. It is clear and forthcoming from the said inspection and all the prior communications between the parties, as well as the Minutes of the Meetings that GVR had never completed the work in terms of the contract. The consistent defaults of GVR had been repeatedly noticed and placed on record by NHAI in the various communications and meetings. The timelines were reviewed periodically by NHAI merely to ensure compliance of the same by GVR, which has also not yielded any result. It is pertinent to notice here that even as on the said date of inspection i.e., 25.10.2016 i.e., after lapse of more than four months of the expiry of the first milestone period of 180 days, the GVR was yet to complete even the construction and modification of culverts.

67. With regard to the contention of GVR regarding closure of the road, the request of GVR for closure of the road for carrying out rigid pavement work was made vide letter dated 04.04.2016 (part of Exhibit R10). In response to the said request, the Assistant Executive Engineer, NHAI Sakleshpur in its communication dated 20.04.2016 (Ex.C.25) to the Executive Engineer, NHAI, Bangalore Division, a copy of which was marked to GVR has inter alia stated as under:

“Since this is an important time bound state project, the above project site is located on the main National Highway No-48, connecting Capital city Bangalore and port city Mangalore. The construction of rigid pavement work is to be taken up by totally closing the vehicular traffic on the above project stretch for as minimum period as possible to avoid inconvenience to the road users. There will be lot of pressure from the Public as well as from the elected representatives to complete the work early in view of traffic closure.

Keeping in view the above condition of the project it is instructed the tender agency to collect minimum of 50% of total requirement of the construction materials so that the progress of the work should not be hampered or stopped in the middle for want of construction materials. Sometimes there may be imposition of ban on the mining activities of sand and metal from the district administration side time to time, which in turn affect the progress of the project.

Keeping in view of the above consequences the tender agency may be instructed to explore the possibility of hiring the level ground for collection of

construction materials, the same has been done by the adjacent contractor while executing the work of "Providing Rigid pavement from Km:237.000 to Km:263.000 (Shiradi Ghat) of NH-48, B-M section" and identified several stacking yards nearby and collected 50% of construction material in advance."

(emphasis supplied)

68. It is clear that the work of construction and modification of culverts and other works were to be completed before the task of asphaltting the road could be done. This aspect has been specifically stipulated as is forthcoming from the Minutes of the Meeting held on 16.09.2016 (Ex.C.19). Perusal of the said minutes indicates that NHAI has specifically stipulated that the culverts of at least 5 km stretch of the road should be completed before the start of the rigid pavement work. It was also noticed that the requisite material was not available at the site. A schedule for the procurement of machinery was also specified. Since a request was made by GVR for closure of the road, it is noticed that NHAI has specifically briefed GVR of the inconvenience caused due to closure of road which is an important national highway connecting the capital city-Bangalore and the port city-Mangalore; as also the sensitiveness of the project. It is in the said context, the NHAI had specifically stipulated that the closure of the road could be done

only if the requisite material is available at the site and the culvert work was completed. GVR was called upon to give a programme of work in which the requisite stipulated works would be carried out. However, the said aspect of the matter which is forthcoming from material on record has not been noticed by the Arbitral Tribunal while recording its findings.

69. The Tribunal has also noticed the letter dated 05.01.2016-Ex.C87, whereunder the NHAI-Mangalore Division had reported to the NHAI-K.R.Circle, Bangalore regarding the other works as well as the present contract in question. In this context, NHAI, Mangalore Division had opined to the NHAI, Bangalore Division that the work pertaining to the present contract was required to be done in precedence over the other works. The same clearly falsifies the contentions ought to be taken by GVR that it had been orally asked not to carry out the works which was overlapping with the present works.

70. It is clear from the sequence of communication between the parties as well as the minutes of the meeting (as noticed at paragraphs 35 to 54 herein above) that GVR had defaulted in the timelines stipulated for completion of the various

works. The periodic assurances given by GVR from time to time in the various meetings and letters have not been adhered to. It is pertinent to notice (at cost of repetition) that the first milestone of 180 days from the appointed date expired on 22.06.2016, within which GVR was required to complete 10% of the value of the contract. The NHAI had vide its communication dated 30.06.2016 (Ex.R.21) notified GVR that since the first milestone was not completed within the stipulated time, the same was required to be completed within 45 days from 23.06.2016 (cure period). A reminder was issued vide letter-Ex.C.44 during the cure period whereunder it was indicated that there was no significant progress in the work. Despite the same the requisite work was not completed even during the cure period. Subsequently, the debarment order (Ex.C.51) was issued, which was withdrawn (vide Ex.C53 dated 18.11.2016). Further, the notice for termination dated 02.12.2016 (Ex.C.29) was issued consequent to which the termination notice dated 04.1.2017 (Ex.C35) has been issued.

71. As already noticed above, there were various correspondences exchanged and meetings that were held after issuance of the debarment order and before its withdrawal; as well as after issuance of the notice for termination – Ex.C29 and the

termination notice – Ex.C35. In none of the said communication there was request by GVR for closure of the road while carrying out the flexible pavement works.

72. The Tribunal had concluded that there was overlapping from 216 km., to 219.435 km., and from 225.600 km., to 237.000 km., and that the delay by NHAI in taking the decision prevented GVR from completing the flexible pavement work with regard to the said extent of work. However, the Tribunal had also concluded that GVR had completed the work of flexible pavement in the town limit of Sakleshpura for the undisputed extent of 6.066 km. It was concluded that GVR was prevented from carrying out the flexible pavement work upto 23.05.2016.

73. It is clear from the aforementioned discussion that the findings of the Tribunal on Issue No.4 as well as Issue No.6 and 7 have been recorded without noticing all the material available on record and the said findings are patently illegal.

REGARDING RIGID PAVEMENT WORKS:

74. Issue No.5 was with regard to the road between 250.620 km. to 263.00 km., i.e., the extent of road where the rigid

pavement work was required to be carried out. The Tribunal concluded that the said work could not be carried out without closing the said road.

75. It is pertinent to note here that the closure of the road to carry out the rigid pavement works is not contemplated under the agreement. GVR had requested for closure of the road to carry out the rigid pavement works. However, the NHAI had acceded to the request of GVR with regard to closure of the road upon GVR completing the culvert works. The material on record, as already noticed above, would clearly indicate that GVR had not even completed the work of construction/modification of the culverts in the section of the rigid pavement works until the date of termination of the agreement. The finding of the Tribunal that the said work could not be carried out without closure of the road is without taking into consideration the material which indicated that the culvert works were required to be completed before contemplating closure of the road.

76. As noticed at para 68 above, the request of GVR for closure of the road was acceded to by NHAI only in the interest of the works being completed expeditiously subject to certain

conditions. Further, it is to be noticed that when the request by GVR for closure of the road was made, NHAI considering the same request, noticed the importance of the road *vis-à-vis* its connectivity etc., as also noticing that GVR had delayed in the completion of the works clearly specified that the request for closure of the road would be considered upon completion of the construction/modification of the road as well as upon GVR mobilizing the requisite material. The aspect regarding mobilizing the material was specifically stipulated by NHAI since it had apprehended that after closure of the road, GVR would not have been able to complete the work within the time stipulated by it. This aspect of the matter is clear and forthcoming from the communications, as noticed above, which has not been appreciated by the Tribunal. Hence, the finding of the Tribunal on Issue No.5 is *ex-facie* patently illegal.

77. With regard to the scope of this Court as contemplated under Section 37 of the A & C Act, it is relevant to notice the judgment of the Supreme Court in the case of **Dyna Technologies**

Private Limited v. Compton Greaves Limited¹, wherein it has been, *inter alia*, held as under:

“34. The mandate under Section 31(3) of the Arbitration Act is to have reasoning which is intelligible and adequate and, which can in appropriate cases be even implied by the courts from a fair reading of the award and documents referred to thereunder, if the need be. The aforesaid provision does not require an elaborate judgment to be passed by the arbitrators having regard to the speedy resolution of dispute.

35. When we consider the requirement of a reasoned order, three characteristics of a reasoned order can be fathomed. They are: proper, intelligible and adequate. If the reasonings in the order are improper, they reveal a flaw in the decision-making process. If the challenge to an award is based on impropriety or perversity in the reasoning, then it can be challenged strictly on the grounds provided under Section 34 of the Arbitration Act. If the challenge to an award is based on the ground that the same is unintelligible, the same would be equivalent of providing no reasons at all. Coming to the last aspect concerning the challenge on adequacy of reasons, the Court while exercising jurisdiction under Section 34 has to adjudicate the validity of such an award based on the degree of particularity of reasoning required having regard to the nature of issues falling for consideration. The degree of particularity cannot be stated in a precise manner as the same would depend on the complexity of the issue. Even if the Court comes to a conclusion that there were gaps in the reasoning for the conclusions reached by the Tribunal, the Court needs to have regard to the

¹ (2019) 20 SCC 1

documents submitted by the parties and the contentions raised before the Tribunal so that awards with inadequate reasons are not set aside in casual and cavalier manner. On the other hand, ordinarily unintelligible awards are to be set aside, subject to party autonomy to do away with the reasoned award. Therefore, the courts are required to be careful while distinguishing between inadequacy of reasons in an award and unintelligible awards.”

REGARDING ISSUE NO.2 - WHETHER THE SITE WAS PROCURED

IN ACCORDANCE WITH AGREEMENT:

78. The Arbitral Tribunal had concluded, while considering Issue No.2 that “the project highway site is not procured by the parties in accordance with the agreement.” In this context, the Tribunal noticing the letter dated 17.12.2015 (Ex.C24) wherein GVR was instructed to inspect the site and prepare a memorandum as per Article 8.2., held that the parties had not followed the said instructions and the conditions of the contract; but simply enclosed Schedule-A to the Agreement and road details.

79. It is relevant to notice that the works that were required to be carried out under the agreement were upon an existing highway. There was no fresh acquisition of land from any private party. The subject matter of the contract was not laying down of a

fresh road. Under the circumstances, the finding of the Tribunal on Issue No.2 is *ex-facie* to be interfered with as patently illegal.

REGARDING THE COUNTERCLAIM OF NHAI:

80. The NHAI had made a counterclaim of ₹79,65,98,050/-. The Tribunal had framed Issue No.9 with regard to the counterclaim of NHAI. The said counterclaim was quantified primarily taking into account the value of the work that was subsequently entrusted to another agency for completion, which was in a sum of ₹74 Crore. The other claims are with regard to performance security bank guarantee, mobilization advance bank guarantee, legal expenses and valuation of unpaid works. However, the said finding recorded by the Tribunal rejecting the counterclaim is primarily premised on the finding recorded on Issue No.6 that the termination of the agreement by NHAI was not proper. The said finding on, inter alia, Issue No. 6 being patently illegal, the finding of the Tribunal rejecting the counterclaim is also to be set aside. However, the parties are at liberty to initiate arbitration proceedings with regard to adjudication of the said aspect.

OTHER ISSUES:

81. Issue No.1 framed by the Tribunal is with regard to the duration of the contract. The Tribunal had concluded that the duration of the agreement was 24 months; the same is on the basis of the schedule to the agreement. A perusal of various materials on record would clearly indicate that GVR has also admitted that the duration of the agreement is 18 months. A specific reference is to be made to letter dated 25.11.2015 (Ex.C3) written by GVR while furnishing the bank guarantee, whereunder they indicated that they were planning to complete the project in 6 months instead of 18 months. The duration of the agreement as 18 months is also mentioned by GVR in its letter dated 25.10.2016 (Ex.C28). Accordingly, the finding of the Tribunal in Issue No. 1 is *ex facie* patently illegal.

82. Issue No.3 is whether the Authority Engineer is required to be an independent engineer. The Tribunal concluded that NHAI cannot appoint its own engineer as Authority Engineer. In this context, it is pertinent to note that NHAI is required to appoint an Authority Engineer in terms of Article 18 of the Agreement and that a 'consulting engineering firm' must be

appointed. Appointment of a government entity as an authority engineer is also permitted provided that, inter alia, the same should not be owned or controlled by NHA1.

83. The requirement of appointing an Authority Engineer is only with the intention of ensuring that an independent perspective and advice is available to NHA1 when it reviews the work under the contract in question. The said appointment would not entitle GVR to allege breach of the terms of the agreement. Hence, the findings of the Arbitral Tribunal on Issue No.2 are also to be set aside on the ground of patent illegality.

84. In view of the aforementioned discussion, the findings of the Arbitral Tribunal on Issue Nos.1 to 7 are set aside. Consequently, Issue No.8 whereunder the claims made (Claim 1 to 20) by GVR were considered and the damages have been awarded with respect to some of the claims are also set aside. Liberty is reserved to the parties to re-arbitrate on Issue No.9 regarding counterclaim.

85. The appeal is partly allowed in the aforementioned terms.

**SD/-
(VIBHU BAKHRU)
CHIEF JUSTICE**

**SD/-
(C.M. POONACHA)
JUDGE**

BS/YAN/PMP/RKM/ND