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

Reserved on: 13th May, 2020
Pronounced on: 4th August, 2020

+ I.A. 3714/2020 in O.M.P.(COMM) 425/2020

**GMR HYDERABAD VIJAYAWADA
EXPRESSWAYS PVT LTD**

.... Petitioner

Through: Dr. Abhishek Manu Singhvi
and Mr. Ciccu
Mukhopadhyaya, Sr. Advocates
with Mr. Mahesh Agarwal, Ms.
Megha Mehta, Mr. Nishant Rao
and Mr. Ankit Banati, Advs.

versus

NATIONAL HIGHWAYS AUTHORITY OF INDIA

..... Respondents

Through: Mr. Tushar Mehta, Solicitor
General with Dr. Maurya Vijay
Chandra, Mr. Manish K.
Bishnoi and Mr. Karan Grover,
Advs.

+ O.M.P.(I) (COMM) 92/2020

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HON'BLE MR. JUSTICE C. HARI SHANKAR

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J U D G M E N T

1. All these petitions relate, one way or the other, to the Award,
dated 31st March, 2020, passed by a 3-member Arbitral Tribunal

(hereinafter referred to as “the learned Arbitral Tribunal”) comprising Hon’ble Dr. Justice Arijit Pasayat (Retd.), Hon’ble Mr. Justice C.M. Nayar (Retd.) and Lt. Gen. Y. P. Khurana. The majority Award was delivered by Hon’ble Dr. Justice Arijit Pasayat (Retd.) and Lt. Gen. Y. P. Khurana, with Hon’ble Mr. Justice C.M. Nayar (Retd.) penning a partly dissenting award.

2. Before the learned Arbitral Tribunal, GMR Hyderabad Vijayawada Expressways Pvt. Ltd. (hereinafter referred to as “GMR”) was the claimant and the National Highways Authority of India (NHAI) was the respondent.

The issue, in a nutshell

3. O.M.P. (COMM.) 426/2020, by the NHAI, and O.M.P. (COMM.) 425/2020, by GMR, have been preferred under Section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as “the 1996 Act”), and assail the aforesaid Award, dated 31st March, 2020 (hereinafter referred to as “the Award”), albeit on different aspects, and to different extents. O.M.P. (COMM) 426/2020, by the NHAI, seeks setting aside of the Award, *in toto*. O.M.P. (COMM) 425/2020, by GMR, is directed against paras 288 (in part), 292 (in part), 293 to 297 and 299 (in part) of the Award, and seeks setting aside of the Award, to the extent of the said paras.

4. The issue decided by the learned Arbitral Tribunal – and, consequently, the scope of controversy in the petitions, preferred by

NHAI and GMR, under Section 34 of the 1996 Act – is extremely limited. On the ground that there had been a “change in law”, during the currency of the agreement between GMR and NHAI, GMR claimed that it was entitled to compensation, under Clauses 41.1 and 41.3 of the Concession Agreement, dated 9th October, 2009, between GMR and NHAI. NHAI contested the claim. All the learned Members of the Arbitral Tribunal have held, *ad idem*, that the rejection, of the claim for compensation, by NHAI, was unsustainable. The majority Award (by Hon’ble Dr. Justice Pasayat and Lt Gen. Y. P. Khurana) proceeds, however, to permit NHAI to take a fresh decision, on the claims of GMR, and assess the compensation to which it would be entitled. Nayar, J., however, held, per dissent, that the task of examining the claim of GMR, on merits, ought not to have been delegated to NHAI, but ought to have been assigned to experts, such as an eminent body of auditors.

5. NHAI claims to be aggrieved by the decision, of the learned Arbitral Tribunal, holding GMR to be entitled to compensation, and contends, in its petition [O.M.P. (COMM.) 426/2020] that GMR was not entitled to any compensation on the ground of “change in law”. GMR, for its part, challenges [in O.M.P. (COMM.) 425/2020] the majority Award, to the extent it delegates the decision-making power, qua the claim, of GMR, to compensation, to NHAI. In other words, GMR seeks to contend that the minority Award of Nayar, J., ought to be accepted.

6. O.M.P. (I) (COMM.) 92/2020 has been preferred, by GMR, under Section 9 of the 1996 Act, essentially for the interim stay of operation of a letter, dated 16th April, 2020, issued by the NHAI to GMR, demanding premium and, further, restraining GMR from taking any coercive steps, under the Concession Agreement, dated 9th October, 2009 (hereinafter referred to as “the Concession Agreement”), against GMR, pending quantification of compensation payable to GMR. It is also prayed, in the said application, that an independent firm of Chartered Accountants of repute be appointed for confirming the quantification of the compensation payable.

The impugned Award

7. The facts of the case, as they emerge from the impugned Award, dated 31st March, 2020, deserve to be paraphrased, at the very outset, thus:

(i) *Vide* the National Highways (Amendment) Act, 1995, Section 8A was incorporated in the National Highways Act, 1956. This newly introduced provision empowered NHAI to enter into agreements, for development and maintenance of the whole, or part of national highways. It further provided that any person, with whom such agreement had been entered into, could collect and retain fees, for the services or benefits rendered by him, as provided by the notification issued by the Central Government, having regard to the expenditure involved in building, maintenance, management and operation of the

National Highway, interest on capital invested, reasonable return, the volume of traffic and the period of the agreement. These collaborations were, therefore, characteristically on a Public Private Partnership (PPP) basis, under the “Build, Operate and Transfer” (BOT) framework. The BOT framework envisaged the developer obtaining support from a consortium of financiers, contractors and consultants, and offering to construct the project at its own cost, thereby saving public money. The developer was allowed to recover the cost, along with reasonable profit, over the concession period, during which the developer operated the project, by collecting and retailing toll revenues from the public, who made use of the facility (i.e. the highway) developed by the developer. On conclusion of the concession period, the highway was transferred to the NHAI. In such contracts, therefore, the entrepreneur-developer, as the concessionaire, arranged the finances. The concessionaire entered into one, or more, contracts for design, procurement of material and equipment, completion, maintenance and operation of the highway, in accordance with the agreement with the NHAI.

(ii) The high traffic section of the National Highways were generally bid out either on Premium basis, or on Grant basis, under the BOT framework. Under the Premium system, the concessionaire offered premium to NHAI, in lieu of the right to build and operate the highway, during the concession period. In such a framework, the concessionaire was entitled to collect and

retain the toll collected from the public, who were using the highway, from which amount the concessionaire would (i) recover the cost of construction, maintenance and operation of the highway during the concession period, (ii) repay loans to lenders, (iii) pay premium to NHAI and (iv) recover the investment made by the concessionaire in the project, along with reasonable returns thereon.

(iii) Sand mining, in the state of Andhra Pradesh was, on the date of the Concession Agreement, between GMR and NHAI, governed by the Sand Mining Policy, contained in GOMs No. 24 Inds & Com (MIA) Dept. dated 12th February, 2007, issued by the Government of Andhra Pradesh, whereunder sand mining areas/leases of less than 5 Hectares (Ha) did not require environmental clearance.

(iv) A Request for Qualification (RFQ), inviting applications from bidders for 4/6 laning of NH-9 (now known as NH-65) was issued, by NHAI, in December, 2007. A consortium of GMR and Punj Lloyd Ltd. submitted its bid in January, 2008. *Vide* letter dated 26th August, 2008, NHAI disqualified the consortium, and qualified certain other bidders, for award of the tender. In September, 2008, the Request For Proposal (RFP) / tender documents were issued by NHAI.

(v) The consortium challenged its disqualification, by NHAI, before this Court, by way of CWP 6792/2008. *Vide* judgment

dated 16th December, 2008, the disqualification of the consortium, by NHAI, was quashed by this Court. The matter was carried, by the successful bidder, to the Supreme Court, but the Supreme Court allowed the consortium, *inter alia*, to bid for the project.

(vi) Pursuant thereto, on 16th December, 2008, the consortium furnished its bid and obtained a copy of the RFP/Tender Documents. Along with the Tender Documents, NHAI provided a Detailed Project Report (DPR). Clause 2.1.3 of the RFP stipulated that the DPR was provided only as a preliminary reference, for assistance to bidders, who were expected to carry out their own survey before submitting their bid.

(vii) Accordingly, the consortium had a detailed traffic study, of the Highway, conducted by M/s Halcrow Consulting India Private Limited (hereinafter referred to as “Halcrow”), to estimate the tollable traffic, and toll revenue, for NH 65, till the end of the 25-year concession period. Clause 1.2 (g) of the agreement noted that the purpose of the study was “Estimation of projected toll revenue as per categories of traffic streams”.

(viii) On 9th October, 2009, as already noted hereinabove, GMR and NHAI entered into the Concession Agreement. Clause 25.4 of the Concession Agreement contemplated payment of premium, by the concessionaire (GMR) to NHAI, and read thus:

“25.4 Premium

The Concessionaire acknowledges and agrees that as set forth in the Bid, it shall pay to the Authority for each year of the Concession Period, but commencing from the day falling after 0 (zero) days from the COD, a premium (the “**Premium**”) in the form of an additional Concession Fee, as set forth in Clause 26.2.1, and in the manner set forth in Clause 26.4.”

As per the Concession Agreement, the premium, payable by GMR to NHAI, was 32.6% of the total Realisable Fee during the year, and was to be increased by 1%, every year.

(ix) Fee, from users of the highway, could be collected, by the concessionaire, i.e. GMR, from the date of completion, till the date of transfer of the highway to NHAI, in accordance with Clause 27.1 of the Concession Agreement, which read thus:

“27.1 Collection and appropriation of Fee

27.1.1 On and from the COD till the Transfer Date, the Concessionaire shall have the sole and exclusive right to demand, collect and appropriate Fee from the Users subject to and in accordance with this Agreement and the National Highways Fee (Determination of Rates and Collection) Rules, 2008 (the “Fee Rules”); provided that for ease of payment and collection, such Fee shall be rounded off to the nearest 5 (five) rupees in accordance with the Fee Rules; provided further that the Concessionaire may determine and collect Fee at such lower rates as it may, by public notice to the Users, specify in respect of all or any category of Users of vehicles.”

(x) Clause 4.1.3, which set out the conditions precedent, to be satisfied by the concessionaire, i.e. GMR, prior to the appointed date, read thus:

“4.1.3 The Conditions Precedent required to be satisfied by the Concessionaire prior to the Appointed Date shall be deemed to have been fulfilled when the Concessionaire shall have:

- (a) provided Performance Security to the Authority;
- (b) executed and procured execution of the Escrow Agreement;
- (c) executed and procured execution of the Substitution Agreement;
- (d) procured all the Applicable Permits specified in Schedule-E unconditionally or is subject to conditions than all such conditions shall have been satisfied in full and such Applicable Permits are in full force and effect;
- (e) executed the Financing Agreements and delivered by the Authority 3 (three) true copies thereof, duly attested by a Director of the Concessionaire;
- (f) delivered to the Authority 3 (three) true copies of the Financial Package and the Financial Model, duly attested by a Director of the Concessionaire, along with 3 (three) soft copies of the Financial Model in MS Excel version or any substitute thereof, which is acceptable to the Senior Lenders;
- (g) delivered to the Authority from the Consortium Members, their respective confirmation, in original, of the correctness of the representations and warranties set forth in

Subclauses (k), (l) and (m) of clause 7.1 of this Agreement; and

(h) delivered to the Authority a legal opinion from the legal counsel of the Concessionaire with respect to the authority of the Concessionaire to enter into this Agreement and the enforceability of the provisions thereof:

Provided that upon request in writing by the Concessionaire, the Authority may, in its discretion, waive any of the Conditions Precedent set forth in this Clause 4.1.3.”

(xi) As required by the afore-extracted Clause 4.1.3 of the Concession Agreement, GMR submitted its Financial Model to NHAI, along with the Financing Documents, on 6th April, 2010. Clause 48.1 defined the “Financial Model”, thus:

“Financial Model’ means the financial model adopted by Senior Lenders, setting forth the capital and operating costs of the Project and revenues therefrom on the basis of which financial viability of the Project has been determined by the Senior Lenders, and includes a description of the assumptions and parameters used for making calculations and projections therein.”

(xii) Prior to the Date of Completion fixed by the Concession Agreement between GMR and NHAI, the Supreme Court, *vide* an order dated 27th February, 2012, passed in ***Deepak Kumar v. State of Haryana***¹, ruled that sand mines, over areas admeasuring less than 5 Ha, were also required to obtain environment clearance. Additionally, the Central Government was directed to take steps to bring, into force, the Minor

¹ (2012) 4 SCC 629

Minerals Conservation and Development Rules, 2010. Governments of States and Union Territories were also directed to take immediate steps to frame necessary rules under Section 15 of the Mines and Minerals (Development and Regulation) Act, 1957.

(xiii) This was followed by order, dated 21st March, 2012, of the High Court of Andhra Pradesh in WP (C) 18822 of 2011, whereby the Government was restrained from granting any sand mining/sand quarrying lease to any person, w.e.f. 1st April, 2012, without the permission of the High Court. The order was made applicable throughout the state of Andhra Pradesh. This interim order was, subsequently, made absolute, while disposing of the aforesaid writ petition, on 26th April, 2012.

(xiv) Further, *vide* order dated 7th May, 2012 in SLP (C) 15301-15305/2012 (***Government of Andhra Pradesh v. Annam Sivaiah***), the Supreme Court directed the government of the State of Andhra Pradesh to mandatorily require obtaining of an environment clearance, even for mines in areas admeasuring less than 5 Ha.

(xv) The consequence of these developments, according to GMR, was that mining activities, in the state of Andhra Pradesh, came to a standstill.

(xvi) Consequent on the aforesaid judicial orders, the Government of Andhra Pradesh issued a new sand mining policy, *vide* GOM No. 142 dated 13th October, 2012 and GOM No. 154 dated 15th November, 2012, which resulted in temporary stoppage of almost all sand mining contracts in force in the Krishna District.

(xvii) On 6th July, 2013, GMR wrote to NHAI, submitting that the new sand mining policy, as issued by the Government of Andhra Pradesh *vide* GOM No. 142 dated 13th October, 2012 and GOM No. 154 dated 15th November, 2012, constituted “change in law” for the purposes of Clauses 41.1 and 41.3 of the Concession Agreement, which read thus:

“41.1 Increase in costs

If as a result of Change in Law, the Concessionaire suffers an increase in costs or reduction in net after-tax return or other financial burden, the aggregate financial effect of which exceeds the higher of rupees one crore (rupees one crore) and 0.5% (zero point five percent) of the Realisable Fee in any Accounting Year, the Concessionaire may soon notify the Authority and propose amendments to this Agreement so as to place the Concessionaire in the same financial position as it would have enjoyed had there been no such Change in Law resulting in the cost increase, reduction in return or other financial burden as aforesaid. Upon notice by the Concessionaire, the Parties shall meet, as soon as reasonably practicable but no later than 30 (thirty) days from the date of notice, and either agree on amendments to this Agreement or on any other mutually agreed arrangement.

Provided that if no agreement is reached within 90 (ninety) days of the aforesaid notice, the Concessionaire may by notice require the Authority to pay an amount that would place the Concessionaire in the same financial position that it would have enjoyed had there been no such Change in Law, and within 15 (fifteen) days of receipt of such notice, along with particulars thereof, the Authority shall pay the amount specified therein; provided that if the Authority shall dispute such claim of the Concessionaire, the same shall be settled in accordance with the Dispute Resolution Procedure. For the avoidance of doubt, it is agreed that this Clause 41.1 shall be restricted to changes in law directly affecting the Concessionaire's costs of performing its obligations under this Agreement."

"41.3 Protection of NPV

Pursuant to the provisions of Clauses 41.1 and 41.2 and for the purposes of placing the Concessionaire in the same financial position as it would have enjoyed had there been no Change in Law affecting the costs, returns or other financial burden or gains, the Party shall rely on the Financial Model to establish and a net present value (the "NPV") of the net cash flow and make necessary adjustments in costs, revenues, compensation or other relevant parameters, as the case may be, to procure that the NPV of the net cash flow is the same as it would have been if no Change in Law had offered."

"Change in law" was defined, in Clause 48.1 of the Concession Agreement, thus:

"Change in Law" means the occurrence of any of the following after the date of Bid:

- (a) the enactment of any new Indian Law;
- (b) the repeal, modification or re-enactment of any existing Indian Law;
- (c) the commencement of any Indian law which has not entered into effect until the date of Bid;
- (d) A change in the interpretation or application of any Indian law by a judgment of a court of record which has become final, conclusive and binding, as compared to such interpretation or application by a court of record prior to the date of Bid; or
- (e) any change in the rates of any of the Taxes that have a direct effect on the Project”.

(xviii) As required by the Concession Agreement, GMR submitted the draft financing documents to NHAI, for review and approval, on 7th February, 2010. Consequent to review, thereof, by NHAI, the draft financing documents were executed on 5th April 2010 and submitted to NHAI, by GMR, on 6th April, 2010.

(xix) The Concession Agreement was, as noted hereinabove, executed, between the parties, on 9th October, 2009. Admittedly, the construction (4-laning) of the highway was completed, by GMR, within time, and operation of the highway was commenced on 20th December, 2012.

(xx) On commencing operations, it was found that the traffic, on the highway, was drastically low, compared to the traffic that had been estimated, at the time of entering into the

Concession Agreement. GMR asserted that this reduction in traffic was owing to (a) certain notifications/orders issued by the Government, as well as by various judicial authorities and Courts, resulting in changes in the sand mining policy applicable till then and (b) bifurcation of the State of Andhra Pradesh into the twin states of Andhra Pradesh and Telangana, in 2014. More specifically, GMR contended that the reduction in traffic was owing to

- (a) court orders and Government notifications, resulting in an annulment/banning of, *inter alia*, sand mining activities, which completely eliminated commercial traffic carrying sand and related construction traffic,
- (b) frequent disruption of movement of the regular traffic, on account of statewide agitation/block its, due to proposed bifurcation of the State of Andhra Pradesh into Andhra Pradesh and Telangana,
- (c) bifurcation of the state of Andhra Pradesh, and introduction of new sand mining policies, resulting in complete ban on interstate transportation of minor minerals, which caused a major adverse impact on traffic and
- (d) imposition of permit tax on inter-State movement of commercial vehicles to and from the newly created states of Andhra Pradesh and Telangana.

(xxi) The above events/developments, contended GMR, constituted “change in law”, which entitled GMR to compensation, in accordance with Clauses 41.1 and 41.3 of the Concession Agreement. GMR asserted, in its letter, that, during the bidding phase, sand contributed 30% of commercial truck traffic movement, especially between Krishna and Nalgonda/Hyderabad Districts, with a majority of the trucks of loading the sand and returning the same day. The GOMs dated 13th October, 2012 and 15th November, 2012, issued by the Government of Andhra Pradesh, however, annulled almost all mining contracts in force in the Krishna District, which were based on the earlier sand mining policy. This reduction in commercial traffic, it was pointed out, had occurred after the Commercial Operation Date of 20th December, 2012. GMR submitted that the Financial Model, furnished by GMR to NHAI, too, was based on beating assumptions, which did not in research the change in Sand Mining Policy. GMR submitted, further, that, on observing the fall in commercial traffic, it had undertaken a detailed origin-destination study, in order to ascertain the reasons for the variation, which revealed that the reduction in movement of sand-carrying vehicles was the cause, and that this reduction was attributable to the new sand mining policies of the Government of Andhra Pradesh, promulgated in 2012. These, therefore, it was submitted, constituted “Change in Law”, within the meaning of Clause 41.2 of the Concession Agreement, which had resulted in reduction of the revenue of GMR, and consequent financial burden on it. As this financial

loss was more than ₹ 1 crore, GMR asserted its right to compensation, under Clause 41.1 of the Concession Agreement, so that it was restored to the position prior to the change in law. It was, therefore, proposed, in the said communication, to amend the provisions relating to Additional Concession Fee, so that the financial loss, suffered by GMR, could be adjusted/recovered from the premium payable to NHAI, within 12 months. GMR, therefore, solicited the cooperation of NHAI, to discuss the issue.

(xxii) NHAI sought the opinion of the independent engineer appointed by it, M/s. Intercontinental Consultants and Technocrats Pvt. Ltd. (hereinafter referred to as “ICT”), on the aforesaid request of GMR. ICT responded to NHAI, *vide* letter dated 7th October, 2013. The letter, at the very outset, identifies the issues, which were referred to a legal expert for its opinion, thus:

- “ – Whether the Concessionaire is eligible to the benefits due to Change in Law
- The quantum of benefits due to the above change.”

Apropos the first issue, it was opined that “since there has been modification of existing notification and replacement of the same by a different one, the change in Sand mining policy would get covered under the definition of Change in Law.” Apropos the second, even while observing that GMR was entitled to compensation, as it had established the existence of

substantial movement of sand mining vehicles on NH-9 (later renumbered NH-65) during the period 2007-2008 to 2012-2013, the communication, from ICT further went on to opine thus, towards the conclusion thereof:

“The Concessionaire has claimed that the resultant loss due to reduction in traffic is a direct consequence of Change in Law. Therefore, the claim of the Concessionaire regarding the Change in Law is only based on the reduction in traffic of the sand mining vehicles. Be that as it may, whatever data has been submitted by the Concessionaire in respect of the number/percentage of the sand mining vehicles in support of its plaint, the same cannot be said to be final as the correctness thereof cannot be verified.

However, the quantum of compensation, if any, required to be paid to the Concessionaire in terms of the proviso to Clause 41.1, if it is able to establish the loss is a direct consequence of Change in Law, cannot be ascertained in view of the reasons explained hereinabove.”

In substance, therefore, ICT opined that, though the new sand mining policy, introduced by the Government of Andhra Pradesh *vide* GOM No. 142 dated 13th October, 2012 and GOM No. 154 dated 15th November, 2012, constituted “change in law” within the meaning of Clauses 41.1 and 41.3 of the Concession Agreement, the quantum of compensation payable to GMR, as a consequence thereof, in terms of the proviso to Clause 41.1, could not be ascertained on the basis of the data provided by GMR.

(xxiii) On 30th July, 2013, the demand for bifurcation of the state of Andhra Pradesh into two states, of Andhra Pradesh and Telangana, was approved, in principle, by the Congress Working Committee. This resulted in widespread agitation in the state, to the extent that several government establishments were shutdown, power supply was disrupted, highway traffic was affected, and riots took place. This resulted in GMR addressing a further communication, dated 8th October, 2013, to NHAI, pointing out that, as a result of the widespread agitation following the proposal to bifurcate the State of Andhra Pradesh, commercial and economic activity in the state had been severely impacted, resulting in civil commotion, political agitation and industrial actions which continued for more than 7 days, as stipulated in Clause 34.3 of the Concession Agreement. Article 34 of the Concession Agreement, it may be noted, dealt with *force majeure*. GMR suggested, in its communication, that the agitation, following the announcement of the proposal to bifurcate the state of Andhra Pradesh, and the resultant impact on the commercial and economic activity in the state, constituted an “indirect political event”, which had resulted in “material adverse effect on the performance of obligations” by GMR. It was informed, therefore, the GMR would seek appropriate relief from NHAI, in that regard, after quantification of relevant data.

(xxiv) *Vide* GOM No. 186, dated 17th December, 2013 and GOM No. 63 dated 22nd February, 2014, the Government of

Andhra Pradesh further amended the sand mining policy. This, GMR alleged, resulted in minimal or almost no allotments of sand mining, in the Krishna District catchment area during the year 2013-2014 which, in turn, further adversely impacted commercial traffic on the Project Highway.

(xxv) The Andhra Pradesh Reorganisation Act, 2014, which crystallised the bifurcation of the state of Andhra Pradesh into the two states of Andhra Pradesh and Telangana, came into effect on 2nd June, 2014. Consequent thereupon, of the total length of the Project Highway, relating to the Concession Agreement, a length of 150.6 km fell within Telangana and 30.9 km fell within Andhra Pradesh.

(xxvi) Consequent to the bifurcation, the Government of Andhra Pradesh announced the Mines and Minerals New Sand Mining Policy, 2014, *vide* GOM No. 94, dated 28th August, 2014. Clause (17) of the said Policy (hereinafter referred to as the “2014 AP Sand Mining Policy”) specifically stipulated that no transportation of sand, from the State of Andhra Pradesh, would be made across the border to other States. The restricted movement of sand, across the border between Andhra Pradesh and Telangana, thereby, metamorphosed into a total cessation of such movement.

(xxvii) In the circumstances, GMR wrote to NHAI, on 5th September, 2014, stating that the total prohibition, on

transportation of sand, across the border from Andhra Pradesh to other states, majorly impacted the traffic and toll revenue on the Project Highway, regarding which an appropriate claim would be made, by GMR, under the provisions of the Concession Agreement.

(xxviii) On 8th January, 2015, the Government of Telangana also promulgated a new Mines and Minerals Sand Mining Policy, 2014, *vide* GOM No. 3. Clause 12 of the said policy (hereinafter referred to as “the 2014 Telangana Sand Mining Policy”) was identical, to all intents and purposes, with Clause (17) of the 2014 AP Sand Mining Policy, and prohibited transportation of sand, from the State of Telangana, across the border, to other States.

(xxix) On 13th January, 2015, GMR wrote to NHAI, drawing the attention of the latter, to the 2014 Telangana Sand Mining Policy, and pointing out that the ban on transportation of sand, from Telangana to all other states, had resulted in cessation, still further, of movement of sand on the Project Highway. This, it was reiterated, had a major impact on the traffic and toll revenue which could be generated from movement of traffic on the Project Highway, regarding which a claim would be made at the appropriate time, as per the Concession Agreement.

(xxx) On 24th February, 2015, GMR wrote to NHAI, requesting that, till it was compensated, by NHAI, for the

financial loss suffered on account of the change in the Sand Mining Policy from time to time, and the bifurcation of the state of Andhra Pradesh into the states of Andhra Pradesh and Telangana, both of which, according to GMR, constituted “change in law” within the meaning of Clauses 41.1 and 41.3 of the Concession Agreement, deferment of the requirement of payment of premium, by GMR to NHAI, be granted, as was permissible *vide* a Premium Deferment Scheme floated by the Government of India on 4th March, 2014, in the case of “stressed” projects.

(xxxi) As in the case of the new Sand Mining Policies, twin OMs, being GOM No. 15 dated 30th March, 2015 and GOM No. 22 dated 24th April, 2015, were issued by the Governments of Telangana and Andhra Pradesh, under the Telangana Motor Vehicle Taxation Act, 1963 and the Andhra Pradesh motor Vehicle Taxation Act, 1963, providing for levy of Tax on all commercial vehicles entering the concerned State from any other State. Correspondingly, GMR also wrote, on 6th April, 2015 and 1st August, 2015, to NHAI, intimating NHAI of the issuance of the said GOMs, and informing that, as a result thereof, traffic and revenue numbers, on the Project Highway had dropped still further, vis-à-vis the traffic in the previous Financial Year 2014-2015. The claim, based on the quantum of revenue loss would, it was intimated, be submitted at the appropriate time, as per the provisions of the Concession Agreement.

(xxxii) Premium was paid, by GMR to NHAI, as per Clause 25.4 of the Concession Agreement, till March, 2015. Initially, however, premium was paid only for January, 2015, whereupon NHAI wrote, to GMR on 7th May, 2015, calling on GMR to immediately deposit the concession fee/premium, constituting the revenue share of NHAI, for the months of February, March and April, 2015, within 7 days. This was followed by a request, dated 21st May, 2015, to the Escrow Bank (the IDBI Bank) to remit, to NHAI, the outstanding Concession Fee for the months February to April 2015, from the Escrow Account. *Vide* letter dated 22nd May, 2015, GMR requested NHAI to withdraw the said communication, to the Bank, as it had applied for premium deferment, which was pending consideration with NHAI.

(xxxiii) NHAI appointed M/s. Sheladia Associates Inc. (hereinafter referred to as “Sheladia”) as the new Independent Engineer, substituting ICT. Sheladia tendered an opinion, dated 20th June, 2015, to the effect that the claim for compensation, by GMR, under Clause 41 of the Concession Agreement, on the ground of change in law, was “an educated guess and conjecture”. Following this, on 8th July, 2015, NHAI wrote to GMR, rejecting its claim for compensation, and advising it to seek a resolution of the dispute in accordance with Clause 44 of the Concession Agreement.

(xxxiv) On 3rd August, 2015, NHAI issued a legal notice to GMR, demanding payment, by GMR, of the allegedly outstanding premium of ₹ 36,52,06,983/-. GMR responded, *vide* communication dated 13th August, 2015, drawing attention to the opinion of ICT, dated 20th June, 2015, to the effect that change in law, resulting in adverse financial consequences on GMR, had taken place, as well as the fact that its request, for premium deferment, was pending with NHAI.

(xxxv) Ultimately, *vide* communication dated 12th November, 2015, NHAI sanctioned premium deferment to GMR but subject to payment, by GMR, of penalty of ₹ 8.7 crores along with arrears of premium of ₹ 10.4 crores with which condition, according to GMR, it was in no position to comply. GMR, accordingly, requested NHAI, *vide* communication dated 19th November, 2015, to waive the said conditions.

(xxxvi) *Vide* communication dated 16th December, 2015, GMR served a notice of dispute on NHAI, in terms of Clause 41.1 of the Concession Agreement, invoking the conciliation process, contemplated in Clause 44.2 thereof.

(xxxvii) *Vide* communications dated 2nd February, 2016 and 22nd February, 2016, NHAI informed GMR that its request for premium deferment could not be accepted. GMR, in the circumstances, paid NHAI the premium amounts, for the

months of February and March, 2015, with interest, under cover of letter dated 29th February, 2016.

(xxxviii) On the same day, i.e. 29th February, 2016, NHAI informed GMR that the conciliation process, initiated by GMR *vide* letter dated 16th December, 2015 *supra*, had failed.

(xxxix) On 8th June, 2016, NHAI wrote to GMR, withdrawing the premium deferment, granted by NHAI *vide* its earlier communication dated 12th November, 2015 *supra*.

(xl) *Vide* communication dated 9th June, 2016, addressed to NHAI, GMR claimed compensation of ₹ 87.64 crores, under Clauses 41.1 and 41.3 of the Concession Agreement, in respect of the Financial Year ending 31st March, 2016. This claim was amended, during the arbitral process, to ₹ 231.85 crores.

(xli) This was followed by communication dated 17th June, 2016, whereby GMR responded to the letter, dated 8th June, 2016 *supra*, from NHAI, and protested against the withdrawal of premium deferment.

(xlii) *Vide* communication dated 30th June, 2016, GMR invoked the arbitration clause in the Concession Agreement.

(xliii) On 29th September, 2016, Sheladia wrote to NHAI, opining that the bifurcation of the state of Andhra Pradesh into

Andhra Pradesh and Telangana, on 2nd June, 2014, constituted “change in law”, within the meaning of Clause 41 of the Concession Agreement, but that GMR had overestimated the prospective traffic on the Project Highway.

(xlv) Sheladia had, in the meanwhile, solicited a legal opinion, from M/s S.V.S. Chowdary & Co., Advocates, on the following specific queries:

i. Whether the changes made to the Sand Policy through ‘Government Orders’ by State Government of AP would constitute a ‘Change in Law’?

ii. Whether the bifurcation of the State of Andhra Pradesh into the reorganised states of State of Andhra Pradesh and the State of Telangana would constitute a ‘Change in Law’?”

(xlv) It was opined, by M/s S.V.S. Chowdary & Co., on 4th October, 2016, that

(a) as a minor mineral, any policy, for mining of sand, fell exclusively within the domain of the State Government,

(b) such policy was normally issued in the form of Government Orders,

(c) GOMs No. 24, dated 12th February, 2007, 142 dated 13th October, 2012 and 154 dated 15th November, 2012, modified the existing law in the state of Andhra Pradesh from time to time, and each such GOM, consequently, constituted a Change in Law,

- (d) the interim order, dated 21st March, 2012 and final order dated 26th April, 2012, of the High Court of Andhra Pradesh in WP 18822/2011, and the consequent order, dated 7th May, 2012, of the Supreme Court, in SLP (C) 15301-15305/2012, directing the State Government to obtain environmental clearance even for quarry leases of less than 5 Ha, resulted in sand quarrying activity coming to a standstill with effect from April and May 2012, which adversely affected the construction activity/industry and other developmental works, during the working season,
- (e) this adverse effect, of the aforesaid judicial orders, was also noted in the OM No. 142 dated 13th October, 2012 *supra*, whereby the Sand Mining Policy in the state of Andhra Pradesh was reviewed,
- (f) the said judicial orders, therefore, constituted “Change in Law”,
- (g) the contention, of GMR, that the change in sand mining policy, by the Government, and the judicial orders passed by the Supreme Court and the High Court of Andhra Pradesh, constituted “change in law” was, therefore, correct,
- (h) regarding the reorganisation of the State of Andhra Pradesh into the states of Andhra Pradesh and Telangana, there could be no two opinions that the said reorganisation amounted to a “Change in Law”, and

(i) the effect of such “change in law” would, however, have to be decided on the factual matrix of each case.

(xlvi) On 14th October, 2016, Sheladia wrote to NHAI, in continuation of its earlier letter dated 8th October, 2016 *supra*, computing the compensation, to which GMR would be entitled, were its claim for compensation, on the basis of change in law, on account of the new Sand Mining Policy and the bifurcation of the state of Andhra Pradesh, accepted by NHAI. The computation, it was stated, was based on the approved DPR, of NHAI itself, comparing the figures therein with the actual traffic figures. On the basis thereof, the communication estimated the compensation payable to GMR, for the financial years 2012-2013 to 2015-2016, as ₹ 185.54 crores, against ₹ 229.55 crores, claimed by GMR. The balance premium, required to be paid by GMR to NHAI, for the said financial years, was also computed, in the said communication, as ₹ 136.52 crores.

(xlvii) NHAI, in the meanwhile, requisitioned yet another legal opinion, regarding the claims of GMR, from M/s M. V. Kini, a well-known law firm. M/s M.V. Kini, too, provided a legal opinion, *vide* letter dated 7th November, 2016, opining thus:

“The Concessionaire’s claim against NHAI for payment to the storage to the same “Financial position” as it would have enjoyed had there been no such “Change in law”, resulting in reduction of loss in revenue. We therefore opined that AP State Bifurcation and substantial Amendments to AP Minor

Mineral Concession Rules, 1966 both satisfied the definition of “Change in law” in terms of Article 48, however whether the Concessionaire is entitled to release provided under Article 41.1 or not, can only be asserted by examining traffic data both prior to and post “Change in law” situations. Since it is beyond the scope of our expertise, we suggest that NHAI take a considered view and proceed with the matter. While analysing data NHAI must bear in mind Article 8 of the Concession Agreement as it needs to be strictly adhered to and no documents of material obtained by either party’s prior to Concession Agreement (i.e. 09-10-2009) be given any credence.”

8. As the disputes, between GMR and NHAI, seemed incapable of resolution by conciliation, or by any other means, they proceeded to arbitration. C.M. Nayar, J. (retd.) and Lt. Gen. Y. P. Khurana, were nominated, by GMR and NHAI, as their respective learned arbitrators. As the said arbitrators were unable to arrive at a consensus regarding the Presiding Arbitrator, the Indian Council of Alternative Dispute Resolution (ICADR) was requested to appoint the Presiding Arbitrator, in accordance with Clause 44.3.3 of the Concession Agreement. The ICADR appointed Dr. Justice Arijit Pasayat (retd.) as the learned Presiding Arbitrator. Thus was constituted the learned Arbitral Tribunal, which came to pass the impugned Award.

9. Statement of claim, Statement of Defence, Rejoinder of the Claimant, i.e. GMR, and affidavits of admission/denial were filed, before the learned Arbitral Tribunal, and evidence of witnesses recorded. No exception has been taken, by either party before me, to the procedure followed by the learned Arbitral Tribunal.

10. It is not necessary to dwell, in any detail, to the proceedings before the learned Arbitral Tribunal, or even to the contentions of the parties before the learned Tribunal, as they have been advanced, in exhaustive detail, before me, over several days, and copious written submissions have also been tendered by both parties. Suffice it to state that, as NHAI was intent on proceeding, against the Escrow Account of GMR, for recovering premium, allegedly due to it, applications, under Section 17 of the 1996 Act were preferred, by GMR, on 6th July, 2018 and, later, on 30th October, 2018, and that NHAI agreed not to take any precipitate action against GMR. Hearing, by the learned Arbitral Tribunal, was concluded on 2nd August, 2019, and award was reserved. Subsequently, written submissions were also filed, by GMR and NHAI, before the learned Arbitral Tribunal, on 6th September, 2019. Thereafter, on 9th September, 2019, NHAI directed the IDBI Bank, as the Escrow agent to remit, forthwith, to NHAI, ₹ 513.35 crores, representing the allegedly outstanding premium, due from GMR till 31st July, 2019. This provoked GMR to file yet another application, under Section 17 of the 1996 Act, whereon the learned Arbitral Tribunal, *vide* order dated 22nd September, 2019, restrained NHAI from taking any coercive steps against GMR. IDBI, *vide* letter dated 27th September, 2019, clarified that the Escrow Account was for payment of debts, to be made prior to payment of premium. In view thereof, the learned Arbitral Tribunal disposed of the application, under Section 17 of the 1996 Act, preferred by GMR, *vide* order dated 7th November, 2019, stating that no further orders were required to be passed on the application, but reserving liberty, to GMR, to reapproach the learned

Tribunal for interim directions, should occasion so arise. On 18th November, 2019, NHAI invoked Article 36 of the Concession Agreement, *vide* a Notice to GMR, seeking to immediately take over operation and maintenance of the Project Highway. GMR, thereupon, moved yet another application, under Section 17 of the 1996 Act, before the learned Tribunal, which stayed the proposed action of NHAI, *vide* order dated 18th November, 2019. This order was carried, in appeal, by NHAI, to this Court, *vide* Arb A (COMM.) No. 33 of 2019, which was dismissed, *vide* order dated 25th November, 2019. The application of GMR, under Section 17 of the 1996 Act was, thereafter, disposed of, by the learned Tribunal, *vide* order dated 9th December, 2019, directing GMR to pay ₹ 25 crore per month, for the next three months. This order was challenged, by GMR as well as NHAI, before this Court which, *vide* judgment dated 30th January, 2020, declined to interfere with the order of the learned Arbitral Tribunal. The Supreme Court was approached, thereagainst, by NHAI, *vide* SLP(C) 4107/2020, which was disposed of, by the Supreme Court, on 19th March, 2020, holding that, as the award of the learned Arbitral Tribunal was scheduled to be delivered on 31st March, 2020, no intervention was required.

11. The impugned Award came, thus, to be rendered, by the learned Arbitral Tribunal, on 31st March, 2020.

12. I do not deem it necessary to advert, in detail, to the rival contentions, of the parties, before the learned Arbitral Tribunal, as the said contentions have been advanced, in detail, before me, and would

be dealt with, at the appropriate stage(s). I proceed, therefore, to deal with the findings, of the learned Arbitral Tribunal, on the issues in controversy before it.

Issues, as framed by the learned Arbitral Tribunal

13. The “fundamental questions”, arising before it for consideration, were enumerated, by the learned Tribunal, in para 220 of the impugned Award, thus:

“(a) Whether Court orders and sand mining policies of 2011-12 and 2012-13 including the ban on non-issuance of sand mining permits in the State of Andhra Pradesh (prior to bifurcation) constituted a “Change in Law” as defined in the CA?

(b) Whether the Bifurcation of the State of Andhra Pradesh into the State of Andhra Pradesh and State of Telangana constitutes a “Change in Law” (in fact NHAI accepts that Bifurcation amounts to “Change in Law” and hence it is the admitted position by the Parties insofar as Bifurcation is concerned)?

(c) Whether the Change in Law negatively impacted the commercial traffic on the Project Highway vis-à-vis the traffic numbers which have been incorporated in the Financial Model and for the earlier periods basis the Halcrow Report (as explained above)?

(d) Whether the Financial Model is to be the basis on which the impact of the “Change in Law” is to be determined for the purposes of compensation in order to put the Concessionaire back in the same position it would have been but for the “Change in Law”?

(e) Whether in view of the plain language of Clauses 41.1 and 41.3 read with the definition of “Financial Model”, the Respondent is estopped from disputing traffic numbers which

form the basis of the revenue streams in the Financial Model?”

14. On these issues, the majority Award, passed by the learned Arbitral Tribunal (per Dr Pasayat, J. and Lt. Gen. Y.P. Narula), proceeds to observe, reason, and hold, as under:

(i) All other issues being purely legal in nature, the only limited question of fact, which arose for consideration, was whether the change in law, in the form of bifurcation of the State of Andhra Pradesh, resulted in lower actual commercial traffic, on the Project Highway, vis-à-vis the numbers incorporated in the Financial Model.

(ii) The toll plaza data relied on, by NHAI, in its Statement of Defence, to contend that, in fact, after bifurcation, traffic had increased in most of the toll plazas, demonstrated the following:

(a) The Project Highway fed sand reaches of the Krishna river proximate to the Project Highway to Hyderabad, the main consumption Centre for sand, prior to the bifurcation.

(b) There was substantial reduction in commercial traffic on the Project Highway, due to bifurcation and ban on interstate traffic of sand, as well as the imposition of entry tax on commercial vehicles.

(c) After bifurcation, even while transportation to Hyderabad was banned, increased development activities were taking place within Andhra Pradesh, at places such as Vijayawada, Visakhapatnam, Guntur and other areas which developed as a result of the bifurcation. This resulted in increased traffic, to those areas, from sand reaches proximate thereto, which did not involve the use of the Project Highway, being situated in a different direction.

(d) While refuting the claim of GMR, NHAI had disputed the applicability of Clause 41 of the Concession Agreement, to the present case, altogether. NHAI sought to contend that Clause 41 related to change in costs, etc., on account of change in law, and did not cover losses of toll revenue, on account of reduction of traffic on the Project Highway. Such an eventuality, according to NHAI, was covered by Article 29 of the Concession Agreement, and the various Clauses thereunder. For ready reference, Article 29 of the Concession Agreement is reproduced, thus:

“Article 29

EFFECT OF VARIATIONS IN TRAFFIC GROWTH

29.1 Effect of variations in traffic growth

29.1.1 The Authority and the Concessionaire acknowledge that the traffic as on December 1, 2019 (the

"Target Date") is estimated to be 36666 PCUs per day (the "Target Traffic"), and hereby agree that for determining the modifications to the Concession Period under this Article 29, the actual traffic on the Target Date shall be derived by computing the average of the traffic as determined by traffic sampling to be undertaken, in accordance with Clause 22.3, on the date that falls one year prior to the Target Date, on the Target Date and on the first anniversary of the Target Date (the "Actual Traffic"). For the avoidance of doubt, it is agreed that traffic sampling shall be undertaken for a continuous period of 7 (seven) days during anytime within 15 (fifteen) days prior to the date specified herein and the average thereof shall be deemed to be the actual traffic.

29.1.2 In the event that the Actual Traffic shall have fallen short of the Target Traffic by more than 2.5% (two point five per cent) thereof or exceeded the Target Traffic by more than 2.5% (two point five per cent) thereof, the Concession Period shall be deemed to be modified in accordance with Clause 29.2. For the avoidance of doubt, in the event of any Dispute relating to Actual Traffic, the Dispute Resolution Procedure shall apply.

29.2 Modification in the Concession Period

29.2.1 Subject to the provisions of Clause 29.1.2, in the event Actual Traffic shall have fallen short of the Target Traffic, then for every 1% (one per cent) shortfall as compared to the Target Traffic, the Concession Period shall, subject to payment of Concession Fee in accordance with this Agreement, be

increased by 1.5% (one point five per cent) thereof; provided that such increase in Concession Period shall not in any case exceed 20% (twenty per cent) of the Concession Period. For the avoidance of doubt, and by way of illustration, it is agreed that in the event of a shortfall of 10.6% (ten point six per cent) in Target Traffic, the Concession Period shall be increased by 15% (fifteen per cent) thereof. 29.2.2 Subject to the provisions of Clause 29.1.2, in the event Actual Traffic shall have exceeded the Target Traffic, then for every 1 % (one per cent) excess as compared to the Target Traffic, the Concession Period shall be reduced by 0.75% (zero point seven five per cent) thereof; provided that such reduction in Concession Period shall not in any case exceed 10% (ten per cent) thereof. For the avoidance of doubt and by way of illustration, it is agreed that in the event of an excess of 8.7% (eight point seven per cent) in Target Traffic, the Concession Period shall be reduced by 6% (six per cent) thereof:

Provided further that in lieu of a reduction in Concession Period under this Clause 29.2.2, the Concessionaire may elect to pay, in addition to the Concession Fee that would be due and payable if the Concession Period were not reduced hereunder, a further premium equal to 25% (twenty five per cent) of the Realisable Fee, and upon notice given to this effect by the Concessionaire no later than two years prior to the Transfer Date contemplated by this Clause 29.2.2, the Authority shall waive the reduction in Concession Period hereunder forthwith.

29.2.3. Notwithstanding anything to the contrary contained in this Agreement, if the average daily traffic of PCUs in any Accounting Year shall exceed the designed capacity of the Project Highway and shall continue to exceed the designed capacity for 3 (three) Accounting Years following thereafter, an Indirect Political Event shall be deemed to have occurred and the Authority may in its discretion terminate this Agreement by issuing a Termination Notice and making a Termination Payment under and in accordance with the provisions of Clause 34.9.2; provided that before issuing such Termination Notice, the Authority shall inform the Concessionaire of its intention and grant 180 (one hundred and eighty) days time to make a representation, and may after the expiry of such 180 (one hundred and eighty) days period, whether or not it is in receipt of such representation, in its sole discretion issue the Termination Notice. For the avoidance of doubt, the Parties agree that an average daily traffic of 60000 PCUs and 90000 PCUs shall be deemed to be the designed capacity of the Four-Lane Project Highway and Six-Lane Project Highway respectively.

29.2.4 If the Concessionaire shall have, prior to issue of a Termination Notice under Clause 29.2.3, completed the Construction Works necessary for augmenting the capacity of the Project Highway such that its capacity shall have increased sufficiently for carrying the then current traffic in accordance with the corresponding provisions of the Indian Roads Congress Publication No. IRC-64, 1990 or any substitute thereof, the Indirect Political Event specified in

Clause shall be deemed to have been cured.”

(e) This issue was required to be decided in the light of the definition of “change in law”, as contained in Clause 48.1 of the Concession Agreement, read conjointly with Clause 1.2.1 (b) which may be reproduced thus:

“1.2.1 In this Agreement, unless the context otherwise requires,

(b) references to laws of India or Indian law or regulation having the force of law should include the laws, act, ordinances, rules, regulations, bylaws or notifications which have the force of law in the territory of India and as from time to time may be amended, modified, supplemented, extended or re-enacted;”

In view of Article 1.2.1 (b), the contention, of NHAI, that the expression “law” included only primary legislation, and did not include Rules or Regulations, was not sustainable. Reliance was also placed, in this regard, on the judgements of the Supreme Court in *Energy Watchdog v. C.E.R.C.*², and of this Court in *N.H.A.I. v. Hindustan Construction Co Ltd*³, *N.H.A.I. v. Oriental Structure Engineers Ltd*⁴ and *N.H.A.I. v. Hindustan Construction Co Ltd*⁵. Reckoned thus, “the amendment notification/Government Orders issued by the undivided

² (2017) 14 SCC 80

³ Judgement dated 20th November 2011 in OMP 455/2010 and OMP 456/2011

⁴ Judgement dated 7th December 2013 in OMP 357/2011

⁵ 2018 (4) Arb LR 392 (Del)

State of Andhra Pradesh and the States of Andhra Pradesh and Telangana (were) covered by clauses (b) and (d) of the definition of Change in Law”.

(f) NHAI sought, further, to contend that the expression “modification”, as employed in clause (b) of Article 48 of the Concession Agreement, was required to be interpreted *ejusdem generis*, and *noscitur a sociis*, with the expressions in the company of which it was found and, thus interpreted, had to be construed as “an amendment of the existing Indian Law”. The changes in the Sand Mining Policy and other measures taken by the erstwhile State of Andhra Pradesh, relatable to judicial orders passed between March and November, 2012 were not, therefore, “changes in law”. This plea was clearly untenable. “If that was the intention, it is not explained, as to why the expression ‘amendment’ was not used and the expression ‘modification’ was used.”

(g) NHAI further sought to contend that statutory notifications were not covered by clause (b) of Article 48, as they already stood covered by clause (d) thereof, relating to changes in rates of taxes. The learned Arbitral Tribunal rejected this contention, in the following words:

“This stand is untenable because clauses (b) and (d) envisaged different situations and it cannot be amalgamated or crystallized into one

category. Additionally the position regarding subordinate legislation is an statutory rules as been highlighted in detail supra.”

(h) NHAI sought, further, to contend that the judgement of the Supreme Court, in *Deepak Kumar*¹ did not impose any new obligation, but merely clarified the legal position. This submission, too, was not correct as, prior to the judgement, there was no obligation for obtaining environment clearance for the Sand reaches of less than 5 Ha. The said direction was issued, by the Supreme Court, in exercise of the powers conferred by Article 141 of the Constitution of India. The judgement, therefore, did bring about a “change in law”.

(i) The Independent Engineer, on the basis of legal opinions, notified NHAI that there was a change in law, but that the quantum of compensation was disputable. On the position that there was, in fact, a “change in law”, therefore, there was no real dispute.

(j) The attempt, of NHAI, to brush aside the opinions, of the Independent Engineer and legal experts, as not binding on it, could not sustain, as there was no document on record, to show that NHAI had ever disagreed with the said views. In fact, the opinion, of the Independent Engineer and legal experts, that a

“commodity-wise survey” was necessary, itself predicated the existence of “change in law”.

(k) NHAI had itself constituted a ‘Conciliation committee’ of three Chief General Managers, to examine the claims of GMR, of reduction in commercial traffic carrying sand. The constitution of this Committee, too, indicated that NHAI was of the view that there was a “change in law” situation.

(l) “Force majeure” stood defined in *Dhanrajmal Gobindram v. Shamji Kalidas & Co.*⁶, *Md. Serajuddin v. State of Orissa*⁷ and *Continental Grain Export Corpn. v. S.T.M. Grain*⁸, as well as in Article 34 of the Concession Agreement.

(m) Apropos the question of whether Article 29 of the Concession Agreement would apply, or Article 41 thereof, GMR had correctly pointed out that Article 29 (2) referred to “modification in the concession period”. The only sub-clause, under Article 29, which referred to financial implications, was Clause 29.2.3 (already reproduced hereinabove).

⁶ AIR 1961 SC 1285 : (1961) 3 SCR 1020

⁷ (1975) 2 SCC 47

⁸ [1979] 2 Lloyd’s Rep 460

(n) In these facts, the principle of *contra proferentem* would also apply.

(o) In order to buttress its stand that there had been reduction in traffic, post the Commercial Operation Date (COD), GMR stressed the following:

(a) Though the actual number of passenger vehicles, during the period 2012-2013 to 2018-2019, had increased, over the projected numbers as reckoned in the DPR as well as in the Financial Model, the number of commercial vehicles, for 2018-2019, vis-à-vis the projected numbers in the DPR for the said period, had decreased. The DPR projected the traffic volume, for commercial vehicles for 2018-2019, was 11635, whereas the actual flow was 4647. In contradistinction, for the year 2012-2013, the actual commercial traffic, 4499, was comparable to the projected commercial traffic, as per the DPR, of 5813.

(b) The actual commercial traffic of 4219, up to 2017-2018, was significantly less than the actual commercial traffic in 2005.

(c) NHAI had not sought to assign any reason, to justify the sharp decrease in commercial traffic, though, in non-commercial traffic, there was a rise.

(d) The only attributable reason could, therefore, be the change in law that occurs in the interregnum.

(e) The significant drop in commercial traffic was also borne out by the data of NHAI itself, for 35 toll plazas in the state of Andhra Pradesh and the State of Telangana after bifurcation, of which 32 toll plazas were away from the Project Highway.

(f) The reduction in commercial traffic, and consequent reduction in revenue, suffered by GMR as a result thereof, were borne out by the certificates, dated 8th January, 2018, of the statutory auditor/Chartered Accountant, which compared the category-wise projected vehicles in the Financial Model, vis-à-vis the actual number, and assessed the revenue and shortfall in revenue collection as a result thereof. The witness of GMR was not cross-examined, resulting in the correctness of the said computations remaining undisputed. No alternative calculation was provided by NHAI. As

such, one of the conditions were relatable to Article 41.1 had been established.

(p) NHAI contended, *per contra*, that the traffic and revenue projections, made by GMR, in the Financial Model, were exaggerated and unrealistic and that, therefore, the submission that there had been reduction in traffic and revenue was false. It was submitted that GMR had subverted the competitive bidding process by putting a high premium and, after having secured the bid, was attempting to wriggle out of its obligation regarding payment, thereof, to NHAI. The veracity and validity of the Halcrow Report was disputed, pointing out that the said Report had been prepared prior to submission of bid, in which process NHAI had no role to play. As such, it was contended that the Halcrow Report had no contractual relevance, qua NHAI. Moreover, the Halcrow Report was not submitted to NHAI, with the Financial Model, and was tendered, belatedly, in 2013, to support the claim for compensation on the ground of change in law. The Financial Model, it was further submitted, contained only the category-wise traffic numbers, without any information regarding the commodity-wise traffic. In the absence of any information regarding commodity-wise traffic, no claim for compensation could be founded solely on the Financial Model. No evidence had, it was submitted, been produced, by GMR, to

substantiate its claim that sand carrying commercial traffic had reduced to zero, on the Project Highway. Though CW-2 (Mr. Venkat Subbarao Chunduru) had referred to such a study having been conducted, no details, thereof, were forthcoming on record.

(q) The claim of GMR, to compensation on the ground of reduction of vehicular traffic, was founded, principally, on the Halcrow Report, dated 22nd January, 2009. The report, expressly, related to “Toll Traffic and Revenue Forecasting Study for Hyderabad to Vijayawada Section of NH-9 in the State of Andhra Pradesh”. The “Objective and Scope of Work”, as set out in the Halcrow Report, was described as “estimating the tollable traffic and toll revenue on the Malkapur-Nandigama section {km 40.000 – km 221.500} of NH-9 the State of Andhra Pradesh”. Further, the objective of the study was stated to be “to formulate projections for the project road in the end of the concession period of 25 years”. The ingredients of this objective were enumerated thus, in the Halcrow Report:

“(a) Undertake traffic surveys on the highway section and its competing roads, if any, in the project influence area.

(b) To identify competing routes and analyse the networks conditions, traffic characteristics and level of tolls charged, if any on the competing corridors.

- (c) A review of past traffic data and other relevant reports as may be available.
- (d) Undertake inventory of project road and competing/alternative routes, if any.
- (e) Preparation of traffic projections based on above analysis for 20 years concession period.
- (f) Estimation of tollable traffic streams for different categories of traffic streams paying normal and concessional toll rates.
- (g) Estimation of projected toll revenue as per categories of traffic streams.”

Though NHAI was the custodian of all highways in the country, and had the largest database of traffic across the highways, it chose not to lead any evidence to throw any light and/or contradict the Halcrow Report. The Halcrow Report referred to actual count of existing traffic during the financial year 2008-09 including passenger cars, commercial vehicles and thereafter projected the future traffic based on normal indices including economic activities, social economic development in the area for which purpose it took an average rate of growth for passenger traffic and commercial traffic 6.1% and 6.2% respectively for a period of 25 years. Based on the traffic study for a period of 25 years and a reasonable return of 16% on investment and the concession period of 25 years, the consortium had offered a premium of 32.6% of Realizable Fee from the Commercial Operation Date (COD), to be augmented by 1% every year.

(r) Clause 24.1.2 of the Concession Agreement mandated, as a condition precedent, submission of the Financial Model along with the Financing Agreement. Even prior to execution of the Financing Agreement, GMR was required to, and in fact did, provide, to NHAI, the approved Financial Model. The said clause read thus:

“24.1.2 The Concessionaire shall, upon occurrence of Financial Close, notify the Authority forthwith, and shall have provided to the Authority, at least 2 (two) days prior to Financial Close, 3 (three) true copies of the Financial Package and the Financial Model, duly attested by a Director of the Concessionaire, along with 3 (three) soft copies of the Financial Model in MS Excel version or any substitute thereof, which is acceptable to the Senior Lenders.”

(s) It was not, however, sufficient for GMR to establish that a change in law had occurred; it was further required to prove that, owing to such change in law, reduction of revenue had taken place, resulting in GMR suffering a substantial financial burden, entitling it to compensation under Article 41.1 and 41.3. For this purpose, GMR relied on the Halcrow Report, the views expressed by the independent engineer in its letter dated 14th October, 2016, which quantified the compensation payable to GMR at ₹ 185.54 crores, and the Financial Model, which was defined in Article 48 of the Concession Agreement and which was provided, by

GMR to NHAI in terms of Clause 4.1.3 (f) thereof – which was broadly the same as Clause 24.1.2, reproduced *supra*. GMR had pointed out that, among the documents which were required to be filed by it, with NHAI, as conditions precedent, to be fulfilled prior to the appointed date, was the Financial Model (as per Article 4.1.3). Adoption of the Financial Model, which determined the financial viability of the project, by the Senior Lenders was, even as contemplated in the Concession Agreement, one of the prerequisites for achieving Financial Close and execution of the Financing Agreements.

(t) NHAI placed reliance on the recommendations of the Committee of CGMs, constituted by it, to examine the grievances of GMR, and the rejection, by the said Committee, of the grievances, as intimated *vide* letter dated 8th June, 2017. A perusal of the letter revealed that it related to GMR's application for deferment of premium. It baldly alleged that GMR had "deliberately" added induced traffic. It also referred to a traffic survey conducted during the period 16th to 22nd September, 2015, and to the target traffic, as per Clause 29.1.1 of the Concession Agreement, on the target date of 1st December, 2019. The relevance, of these observations, to the issue of reduction of traffic due to change in law, consequent on the Sand Mining Policy, was not clear.

(u) The observation, in the communication, dated 29th September, 2016, from Sheladia, to the effect that “the DPR, for the project, did not mention the percentage of vehicles carrying sand, as it was not the general practice to mention the number of vehicles commodity-wise”, was cited as a ground to discredit the Halcrow Report. This was unsustainable. Merely because the Independent Engineer had stated that it was not the general practice to mention the number of vehicles commodity-wise, the Halcrow Report, which did so, could not be discredited.

(v) Even while relying on the said observation, in the communication dated 29th September, 2016, from Sheladia, NHAI discarded the view, expressed by Sheladia itself, in its letter communication dated 8th October, 2016, which computed compensation, in favour of GMR, by comparing the DPR with actual traffic.

(w) GMR had never been informed that the approach of Sheladia was impermissible, vis-à-vis the tender conditions.

(x) The reliance, by NHAI, on the affidavit of Mr. W. V. Chandra Shekar, Joint Director, Directorate of Mines

& Geology, Government of Andhra Pradesh, was also misplaced. There was no reference, in the Statement of Defence of NHAI, to any document emanating from Mr. Chandra Shekar. No such document found reference in any of the communications addressed by NHAI to GMR. As such, the statements of Mr. Chandra Shekar, in his affidavit, were merely his opinions, without any supporting factual data. The fact that he was not cross-examined could not lend any additional credibility to the said opinion.

(y) The Halcrow Report could not be said to be of no relevance, as it provided the foundation of GMR's claim regarding reduction in traffic. While the evidentiary value of the said Report was a different matter, it could not be contended that the report had no contractual relevance.

(z) Similar was the position with respect to the Financial Model, tendered by GMR. NHAI ought to have considered the data provided therein and, thereafter, drawn conclusions regarding the acceptability, or otherwise, of the said data. This was also not done.

(aa) Following on the above discussion, the majority award, by Dr. Pasayat, J and Lt. Gen. Y.P. Narula, held

that the existence of change in law, and the entitlement, of GMR, to compensation, as a consequence thereof, could not be denied. In rejecting the said claim, therefore, it was held that NHAI had erred. Even so, the majority Award held that the extent, to which GMR had been able to establish its claim, was required to be factually determined by taking into account all factors for adjudicating the claim. The following findings and directions were issued, in paras 292 to 296 of the majority Award, as a consequence of the above discussion:

“292. Though the Tribunal is of the view that the decision of the Respondent in denying the claim is erroneous, the natural consequence is not that the Claimant's claims to be allowed. To what extent the Claimant has been able to establish its claim has to be factually determined by the Respondent by taking into account all factors for and against the claim.

293. Therefore, while holding that the decision of the Respondent to deny Claimant's claims on the ground of non-consideration of relevant material/consideration of the irrelevant material and attempt to justify the denial on materials which were not considered while taking the decision is erroneous and indefensible, the Tribunal is of the view that the Respondent has to take a fresh decision.

294. The Claimant when called upon by the Respondent to produce material in support of its plaint is shall be required to do so.

295. Keeping in view the nature of the Contract where the figures are required to be

considered qua the target date i.e. 01.12.2019 for variation of the contract period, the Respondent can call for the details and the data from the Designated Agency who provides figures in that context. That also would be relevant data for dealing with the claims of the Claimant. It would be open for the Respondents to ask the said Designated Agency for data relating to the subject period (to which the claims relate).

296. The Respondent shall constitute the Committee within three weeks from today and on being notified about the Constitution of the Committee shall furnish all data, details, documents which according to have relevance and bearing to its claims. If the Respondent intends to rely on any document, material and/or data to deny such claims, needless to say it shall furnish them to the Claimant."

15. C.M. Nayar, J., penned a partly dissenting award. While agreeing with the majority Award, insofar as the entitlement, in principle, of GMR, to compensation, on account of change in law that had taken place, Nayar, J disagreed with the decision to remand the matter, for a fresh look, to NHAI, observing that the independence and impartiality of NHAI was unclear. Nayar, J observed that the learned Arbitral Tribunal ought to have itself adjudicated the compensation payable to GMR, or appointed an eminent body of Chartered Accountant/Auditors, or of Engineers, to consider the competing claims and assess the merits of the claims of GMR, on the basis of the material on record. Section 26 of the 1996 Act, it was observed, empowered the learned Arbitral Tribunal to do so.

16. As noted towards the commencement of this judgement, the aforesaid Award, dated 31st March, 2020, has been challenged both by GMR, as well as by NHAI, to the extent and on the aspects already set out in para 3 *supra*.

Rival Contentions and Analysis

17. I have heard detailed and elaborate arguments, by Dr. Abhishek Manu Singhvi, arguing on behalf of GMR, and by the learned Solicitor General, appearing on behalf of NHAI.

Scope of Interference

18. Before proceeding to identify the issues that arise, and analyse the comparative merits of submissions of learned Senior Counsel, it would be appropriate to delineate the scope of interference, by this Court, in exercise of its powers under Section 34 of the 1996 Act, with arbitral awards, and findings returned therein.

19. The Division Bench of this Court has, in *N.H.A.I. v. Hindustan Construction Co Ltd.*⁹ and *M.T.N.L. v. Finolex Cables Ltd.*¹⁰, analysed several earlier decisions, of the Supreme Court, on the scope of interference, under Section 34 of the 1996 Act, as rendered in *D.D.A. v. R.S. Sharma & Co.*¹¹, *Mc Dermott International Inc. v. Burn Standard Co. Ltd.*¹², *N.H.A.I. v. J.S.C. Centrodorstroy*¹³, *M.*

⁹ 2017 (5) ARBLR 258 (Delhi)

¹⁰ 2017 (166) DRJ 1

¹¹ (2008) 13 SCC 80

¹² (2006) 11 SCC 81

*Ansuya Devi v. M. Manik Reddy*¹⁴, *N.H.A.I. v. I.T.D. Cementation India Ltd.*¹⁵ (which itself digests several earlier decisions), *Swan Gold Mining Ltd v. Hindustan Copper Ltd*¹⁶, *Navodaya Mass Entertainment Ltd v. J.M. Combines*¹⁷ and what may be regarded as the high watermark of the law relating to Section 34, *Associated Builders v. D.D.A.*¹⁸, and has, thereafter, culled out the following clear principles, as emanating therefrom:

“(i) The four reasons motivating the legislation of the Act, in 1996, were

- (a) to provide for a fair and efficient arbitral procedure,
- (b) to provide for the passing of reasoned awards,
- (c) to ensure that the arbitrator does not transgress his jurisdiction, and
- (d) to minimize supervision, by courts, in the arbitral process.

(ii) The merits of the award are required to be examined only in certain specified circumstances, for examining whether the award is in conflict with the public policy of India.

(iii) An award would be regarded as conflicting with the public policy of India if

- (a) it is contrary to the fundamental policy of Indian law, or
- (b) it is contrary to the interests of India,
- (c) it is contrary to justice or morality,
- (d) it is patently illegal, or
- (e) it is so perverse, irrational, unfair or unreasonable that it shocks the conscience of the court.

¹³ (2016) 12 SCC 592

¹⁴ (2003) 8 SCC 565

¹⁵ (2015) 14 SCC 21

¹⁶ (2015) 5 SCC 739

¹⁷ (2015) 5 SCC 398

¹⁸ (2015) 3 SCC 49

(iv) An award would be liable to be regarded as contrary to the fundamental policy of Indian law, for example, if

- (a) it disregards orders passed by superior courts, or the binding effect thereof, or
- (b) it is patently violative of statutory provisions, or
- (c) it is not in public interest, or
- (d) the arbitrator has not adopted a "judicial approach", i.e. has not acted a fair, reasonable and objective approach, or has acted arbitrarily, capriciously or whimsically, or
- (e) the arbitrator has failed to draw an inference which, on the face of the facts, ought to have been drawn, or
- (f) the arbitrator has drawn an inference, from the facts, which, on the face of it, is unreasonable, or
- (g) the principles of natural justice have been violated.

(v) The "patent illegality" had to go to the root of the matter. Trivial illegalities were inconsequential.

(vi) Additionally, an award could be set aside if

- (a) either party was under some incapacity, or
- (b) the arbitration agreement is invalid under the law, or
- (c) the applicant was not given proper notice of appointment of the arbitrator, or of the arbitral proceedings, or was otherwise unable to present his case, or
- (d) the award deals with a dispute not submitted to arbitration, or decides issues outside the scope of the dispute submitted to arbitration, or
- (e) the composition of the Arbitral Tribunal was not in accordance with the agreement of the parties, or in accordance with Part I of the Act, or
- (f) the arbitral procedure was not in accordance with the agreement of the parties, or in accordance with Part I of the Act, or
- (g) the award contravenes the Act, or
- (h) the award is contrary to the contract between the parties.

(vii) "Perversity", as a ground for setting aside an arbitral award, has to be examined on the touchstone of the

Wednesbury principle of reasonableness. It would include a case in which

- (a) the findings, in the award, are based on no evidence, or
 - (b) the Arbitral Tribunal takes into account something irrelevant to the decision arrived at, or
 - (c) the Arbitral Tribunal ignores vital evidence in arriving at its decision.
- (viii) At the same time,
- (a) a decision which is founded on some evidence, which could be relied upon, howsoever compendious, cannot be treated as “perverse”,
 - (b) if the view adopted by the arbitrator is a possible view, it has to pass muster,
 - (c) neither quantity, nor quality, of evidence is open to re-assessment in judicial review over the award.
- (ix) “Morality” would imply enforceability, of the agreement, given the prevailing mores of the day. “Immorality”, however, can constitute a ground for interfering with an arbitral award only if it shocks the judicial conscience.
- (x) For examining the above aspects, the pleadings of the parties and materials brought on record would be relevant.
- (xi) The court cannot sit in appeal over an arbitration award. Errors of fact cannot be corrected under Section 34. The arbitrator is the last word on facts.”

20. A point which, at times, courts tend to overlook, despite the afore-quoted decisions of the Supreme Court having reiterated it, time and again, is that, even on questions of law, the arbitrator, or the arbitral tribunal, is the final word, absent, in its findings in that regard, perversity or “patent illegality”. Patent illegality may be said to exist, in the interpretation of the law, by the arbitrator, only where such interpretation is, *ex facie*, erroneous as well as unacceptable, and not where the Court feels that another, and more appropriate, view, exists.

The court is concerned with the possibility of the view expressed by the arbitrator, and not the plausibility thereof. Absent impossibility, implausibility, ordinarily, is no ground to set aside, or interfere with, an arbitral award, under Section 34 of the 1996 Act. One of the rare cases where the rigour of this principle has been relaxed, it may be noted for the sake of clarity, is to be found in *N.H.A.I. v. Progressive-MVR (JV)*¹⁹, which advocated exercise of jurisdiction, by the High Court, under Section 34, even where the view taken by the arbitrator was possible, in a situation in which different arbitrators, interpreting like provisions in different contracts entered into, by the NHAI across the country, were adopting different interpretations. Needless to say, no such exigency exists, in the present case.

21. The position stands further underscored by the following passages, from *Dyna Technologies Pvt Ltd v. Crompton Greaves Ltd*²⁰ (which were reiterated in *South East Asia Marine Engineering and Constructions Ltd v. Oil India Ltd*²¹):

“26. There is no dispute that Section 34 of the Arbitration Act limits a challenge to an award only on the grounds provided therein or as interpreted by various Courts. We need to be cognizant of the fact that arbitral awards should not be interfered with in a casual and cavalier manner, unless the Court comes to a conclusion that the perversity of the award goes to the root of the matter without there being a possibility of alternative interpretation which may sustain the arbitral award. Section 34 is different in its approach and cannot be equated with a normal appellate jurisdiction. The mandate under Section 34 is to respect the finality of the arbitral award and the party autonomy to get their dispute adjudicated by an

¹⁹ (2018) 14 SCC 688

²⁰ 2019 SCC OnLine SC 1656

²¹ 2020 SCC OnLine SC 451

alternative forum as provided under the law. If the Courts were to interfere with the arbitral award in the usual course on factual aspects, then the commercial wisdom behind opting for alternate dispute resolution would stand frustrated.

27. Moreover, umpteen number of judgments of this Court have categorically held that the Courts should not interfere with an award merely because an alternative view on facts and interpretation of contract exists. The Courts need to be cautious and should defer to the view taken by the Arbitral Tribunal even if the reasoning provided in the award is implied unless such award portrays perversity unpardonable under Section 34 of the Arbitration Act.”

22. Paras 11, 12, 14, 15 and 16 of the report in *M.M.T.C. Ltd v. Vedanta Ltd.*²² are also relevant, in this context:

“11. As far as Section 34 is concerned, the position is well-settled by now that the Court does not sit in appeal over the arbitral award and may interfere on merits on the limited ground provided under Section 34(2)(b)(ii) i.e. if the award is against the public policy of India. As per the legal position clarified through decisions of this Court prior to the amendments to the 1996 Act in 2015, a violation of Indian public policy, in turn, includes a violation of the fundamental policy of Indian law, a violation of the interest of India, conflict with justice or morality, and the existence of patent illegality in the arbitral award. Additionally, the concept of the "fundamental policy of Indian law" would cover compliance with statutes and judicial precedents, adopting a judicial approach, compliance with the principles of natural justice, and *Wednesbury* [*Associated Provincial Picture Houses v. Wednesbury Corpn., (1948) 1 KB 223 (CA)*] reasonableness. Furthermore, "patent illegality" itself has been held to mean contravention of the substantive law of India, contravention of the 1996 Act, and contravention of the terms of the contract.

12. It is only if one of these conditions is met that the Court may interfere with an arbitral award in terms of Section 34(2)(b)(ii), but such interference does not entail a review of

²² (2019) 4 SCC 163

the merits of the dispute, and is limited to situations where the findings of the arbitrator are arbitrary, capricious or perverse, or when the conscience of the Court is shocked, or when the illegality is not trivial but goes to the root of the matter. An arbitral award may not be interfered with if the view taken by the arbitrator is a possible view based on facts. (See *Associate Builders v. DDA*, (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204. Also see *ONGC Ltd. v. Saw Pipes Ltd.*, (2003) 5 SCC 705; *Hindustan Zinc Ltd. v. Friends Coal Carbonisation*, (2006) 4 SCC 445; and *McDermott International Inc. v. Burn Standard Co. Ltd.*, (2006) 11 SCC 181)

14. As far as interference with an order made under Section 34, as per Section 37, is concerned, it cannot be disputed that such interference under Section 37 cannot travel beyond the restrictions laid down under Section 34. In other words, the court cannot undertake an independent assessment of the merits of the award, and must only ascertain that the exercise of power by the court under Section 34 has not exceeded the scope of the provision. Thus, it is evident that in case an arbitral award has been confirmed by the court under Section 34 and by the court in an appeal under Section 37, this Court must be extremely cautious and slow to disturb such concurrent findings.

15. Having noted the above grounds for interference with an arbitral award, it must now be noted that the instant question pertains to determining whether the arbitral award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or contains decisions on matters beyond the scope of the submission to arbitration. However, this question has been addressed by the courts in terms of the construction of the contract between the parties, and as such it can be safely said that a review of such a construction cannot be made in terms of reassessment of the material on record, but only in terms of the principles governing interference with an award as discussed above.

16. It is equally important to observe at this juncture that while interpreting the terms of a contract, the conduct of parties and correspondences exchanged would also be relevant factors and it is within the arbitrator's jurisdiction to

consider the same. [See *Mc Dermott International Inc. v. Burn Standard Co. Ltd.*, (2006) 11 SCC 181; *Pure Helium India (P) Ltd. v. ONGC*, (2003) 8 SCC 593 and *D.D. Sharma v. U.O.I.*, (2004) 5 SCC 325]”

23. The peripheries of Section 34 stand, thereby, well-demarcated.

Issues

24. Fundamentally, the following specific issues may be delineated, as arising for consideration in the present case, both before the learned Arbitral Tribunal, as well as before this Court:

(i) The first issue is whether “change in law” had taken place, within the meaning of the expression as defined in Clause 48 of the Concession Agreement. The learned Arbitral Tribunal has answered this issue in the affirmative, holding that the change in the Sand Mining Policy, as introduced *vide* various GOMs issued by the states of Andhra Pradesh and Telangana, as well as the bifurcation of the state of Andhra Pradesh into the states of Andhra Pradesh and Telangana, were both events which resulted in “change in law”. NHAI has disputed this finding.

(ii) The second issue is whether Article 28, or Article 41, of the Concession Agreement, applies in the present case. The learned Arbitral Tribunal has held that Article 41 applies and that, by virtue of Clauses 41.1 and 41.3 thereof, GMR is entitled to compensation. NHAI contends, in its challenge under

Section 34 of the 1996 Act, that Article 41 has no application at all, and that, even if it were to be assumed that there had been a fall in commercial traffic, that exigency stood covered by Article 28, whereunder no provision for awarding compensation, to GMR, existed.

(iii) The third issue is the extent, if at all, to which GMR has suffered financial prejudice, as a consequence of the aforesaid “change in law”. The learned Tribunal has not pronounced on this issue, holding that the extent to which GMR has been able to establish its claim would have to be factually determined. While, on the first and second issues aforesaid, the majority, and minority, awards, are *ad idem*, on this third issue, there is a difference of view, of the learned dissenting arbitrator, vis-à-vis the view of the majority. While the majority Award directs GMR to establish, before NHAI, its entitlement to compensation, under Clause 41.1 and 41.3 of the Concession Agreement, the dissenting Award opines that, instead of allowing NHAI to adjudicate thereon, the exercise ought to be delegated to an independent authority, such as a reputed firm of Chartered Accountants, or the like. This third issue does not impact the petition, under Section 34 of the 1996 Act, filed by NHAI (O.M.P. (COMM.) 426/2020), as NHAI questions the very entitlement, of GMR, to compensation. The petition of GMR, under Section 34 (O.M.P. (COMM.) 425/2020), however, is concerned only with the third issue, with GMR

contending that the minority Award deserves acceptance, in preference to the majority Award.

Addressing the issues, seriatim

Was there “change in law”?

25. The definition of the expression “change in law”, as contained in Clause 48 of the Concession Agreement, has already been reproduced in sub-para (xvii) of para 7 *supra*.

26. The findings of the learned Arbitral Tribunal, on this aspect, are to be found in paras 232, 233 and 238 to 242 of the impugned Award, which are, therefore, reproduced, *in extenso*, thus:

“232. The said Article defines “Applicable Laws” to mean all laws, brought into force and effect by GOI or the State Government including rules, regulations and notifications made thereunder, and judgments, decrees, injunctions, writs and orders of any court of record, applicable to this Agreement and the exercise, performance and discharge of the respective rights and obligations of the Parties hereunder, as may be in force and effect during the subsistence of this Agreement.

233. Article 48 has to be read conjointly with Article 1.2.1 (b) which provides that references to laws of India or Indian law or regulation having the force of law shall include the laws, acts, ordinances, rules, regulations, bye laws or notifications which have the force of law in the territory of India and as from time to time may be amended, modified, supplemented, extended or re-enacted.

238. As noted supra, sub-articles (a), (c) and (d) deal with enactment of any new Indian law, commencement of any Indian law which has not entered into effect until the date of bid and a change in the interpretation of application of any Indian law by a judgment which has become final, conclusive and binding as compared to such interpretation or application prior to the date of the bid, by a court of record. The amendment notifications / Govt Orders issued by the undivided State of Andhra Pradesh and the States of Andhra Pradesh and Telangana are covered by clauses (b) and (d) of the definition of Change in Law.

239. It is emphasized by the Respondent that the changes in Sand Mining Policy and other measures taken by the erstwhile State of Andhra Pradesh on account of court order etc. from March – April 2012 to November 2012 are not covered by the definition of Change in Law because no act either by the State Legislative Assembly or the Parliament was enacted. The expression “modification” has to be interpreted by application of the principles of “ejusdem generis” and the doctrine of “noscitur-a-socis”. Modification of any “existing Indian law” has to be construed as “an amendment of an existing Indian law”. This plea is clearly untenable. If that was the intention, it is not explained, as to why the expression “amendment” was not used and the expression “modification” was used. The further stand that the subordinate legislations in the form of statutory notifications are not covered under (b) as that is already covered by (d) relating to change in rates of taxes. This stand is untenable because clauses (b) and (d) envisaged different situations and it cannot be amalgamated or crystallized into one category. Additionally the position regarding subordinate legislations and statutory rules has been highlighted in detail supra.

240. Coming to the stand of the Respondent that the decision in **Deepak Kumar v. State of Haryana, (2012) 4 SCC 629** was only clarifying the position in law and did not impose new obligations needs to be considered in the background of what was the effect of the judgment. Prior to the judgment, there was no obligation for obtaining environment clearance for sand reaches of less than 5 hectares. This direction was given in exercise of powers under Article 141 of the Constitution of India, 1950 (in short “the

Constitution”). Prior to this judgment, sand reaches of less than 5 hectares did not require any environmental clearance and, therefore, sand reaches of less than 5 hectares did not require obtaining of environmental clearance and such clearances were not being taken. Post Deepak Kumar’s case that was required to be taken. Therefore, Deepak Kumar’s judgment brought about a situation which is covered under the definition of Change in Law. The consequential directions given by the Hon’ble Andhra Pradesh High Court reiterating the directions of the Hon’ble Supreme Court in Deepak Kumar’s case amounted to and constituted Change in Law.

241. It has been emphasized by the Claimant that the Respondent changed its position after initiation of arbitration proceedings though prior to that, Independent Engineer acting on its behalf and the Respondent itself accepted the position that orders of the Hon’ble Supreme Court and amendments to the Andhra Pradesh Miner Mineral Concession Rules constituted a Change in Law under the Concession Agreement. Referring to a decision of the Hon’ble Supreme Court in *Godhra Electricity Co. Ltd. v. State of Gujarat, (1975) 1 SCC 199*, it is submitted that such interpretation which has been consistently applied should be determinative.

Emphasis is made on para 11 of the decision which reads as follows:

“11. In the process of interpretation of the terms of a contract, the court can frequently get great assistance from the interpreting statements made by the parties themselves or from their conduct in rendering or in receiving performance under it. Parties can, by mutual agreement, make their own contracts; they can also by mutual agreement remake them. The process of practical interpretation application, however, is not regarded by the parties as a remaking of the contract; nor do the courts so regard it. Instead, it is merely further expression by the parties of the meaning that they give and have given to the terms of their contract previously made. There is no good reason why the courts should not give great weight to these further expressions by the parties, in view of the

fact that they still have the same freedom of contract that they had originally. The American Courts receive subsequent actions as admissible guides in interpretation. It is true that one party cannot build up his case by making an interpretation in his own favour. It is the concurrence therein that such a party can use against the other party. This concurrence may be evidenced by the other party's express assent thereto by his acting in accordance with it, by his receipt without objection of performances that indicate it, or by saying nothing when knows that the first party is acting on reliance upon the interpretation (see Corbin on contracts, Vol.III, pp.249 and 254-55)”.

242. Another factor which assumes importance is that the Independent Engineer on the basis of legal opinions clearly notified the Respondent that there was a Change in Law situation but the dispute was only relating to quantum of compensation. As rightly contended by learned counsel for the Claimant, the first aspect was never disputed and on the other hand was being accepted all through that there was a Change in Law situation. ”

27. Neither before the learned Arbitral Tribunal, nor before this Court, has NHAI sought to urge that the bifurcation of the state of Andhra Pradesh, into the states of Andhra Pradesh and Telangana, and the enactment of the Andhra Pradesh Reorganisation Act, 2014, did not constitute “change in law”. It was, however, seriously contended, by NHAI, that the introduction of new Sand Mining Policies, and the change in the existing Sand Mining Policy, by the various GOMs issued by the States of Andhra Pradesh and Telangana, from time to time, as also the judgement of the Supreme Court in ***Deepak Kumar***¹ did *not* constitute “change in law”. The manner in which the learned

Arbitral Tribunal has interpreted the expression “change in law” has, therefore, been criticised, by NHAI, as perverse.

28. “Change in law”, as defined in Article 48 of the Concession Agreement, it is sought to be contended by NHAI, was intended to cover only “primary legislation”, by way of statute, subordinate legislation being included within the ambit of the said definition only to the extent it related to taxation. It is sought to be contended that, if changes introduced by subordinate legislation were to be included within the ambit of the definition of “change in law”, there would be no necessity for sub-clause (e) in Clause 48.1 of the Concession Agreement which would, therefore, be reduced to a redundancy – or, more appropriately, a superfluity. The expression “existing Indian Law”, as employed in sub-clause (b) of Clause 48.1, it is contended, refers only to primary legislation. The expression “modification”, as employed in the same sub-clause, equivalently, it is sought to be contended, is to be read as “amendment”. Reference has also been made, in the written submissions filed by NHAI, to certain judicial authorities – which, incidentally, found “change in law” to have, in fact, taken place in those cases – to contend that the said cases related to primary legislation. NHAI would seek to contend, by relying on the said decisions, that, where the instrument in question was not “primary legislation”, it could not be said to result in “change in law”. In a somewhat contradictory vein, it is also sought to be contended, by NHAI, in its written submissions, that the learned Arbitral Tribunal erred in relying on judicial decisions to understand the expression

“change in law”, as the said expression stands defined in Clause 48.1 of the Concession Agreement.

29. To my mind, no exception, whatsoever, can be taken, to the findings, of the learned Arbitral Tribunal, as contained in the paras extracted hereinabove, to the effect that the judgement of the Supreme Court in *Deepak Kumar*¹, and the change in the Sand mining policy, as it occurred from time to time by the issuance of various GOMs by the states of Andhra Pradesh and Telangana, constituted “change in law”. I do not find, in the Concession Agreement, anything to indicate, either expressly or by necessary implication, that the expression “existing Indian Law” has necessarily to be limited to “primary legislation”, and would not embrace subordinate legislation, or executive orders having the force of law. Nor do I find any basis for the submission, of NHAI, that the expression “modification”, as used in sub-clause (b) of Clause 48.1, has to be read as “amendment”. It is hardly necessary to cite any authority, for the proposition that the exercise of interpretation of the covenants of a contractual document cannot, at any time, extend to modification, or rewriting thereof.

30. I agree with the submission, of the learned Solicitor General, articulated on behalf of NHAI, that, in view of the express definition of the expression “change in law”, as contained in Clause 48.1 of the Concession Agreement, no recourse is needed, to any judicial authority, which interprets the said expression. At the same time, the expression “existing Indian Law”, as used in the said sub-clause, does not find definition in the Concession Agreement. To my mind, it is

axiomatic that the judgement in *Deepak Kumar*¹ constitutes “law”, and one need look no further, for this, than Article 141 of the Constitution of India. It cannot be denied that, by the said judgement, sand mining, over areas of less than 5 Ha, were held to require environmental clearance. It is also not denied that, prior to the said decision, this requirement did not exist. That the judgement of the Supreme Court in *Deepak Kumar*¹ resulted in a “change in law” cannot, therefore, in my view, be denied.

31. Equally, the resultant interim orders, dated 21st March, 2012, of the High Court of Andhra Pradesh, and the order, dated 7th May, 2012, of the Supreme Court in SLP (C) 15301-15305/2012 in *Annam Sivaiah (supra)*, which specifically directed the State Government to require obtaining of environmental clearance even for mining areas of less than 5 Ha, obviously, constituted “law”, and resulted in a change in the then existing law. The GOMs, dated 13th October, 2012 and 15th November, 2012, having been issued in compliance of the directives of the Supreme Court, equally, therefore, constituted “law”. If at all it was required, one may refer, in this context, to clause (29) in Section 3 of the General Clauses Act, 1897, which defines “Indian Law” to mean any “Act, Ordinance, regulation, rule, order or bye-law which, before the commencement of the Constitution had the force of law in any Province of India or part thereof and hereafter has the force of law in any Part A State Part C State or part thereof, but does not include any Act of Parliament of the United Kingdom or any Order in Council, rule or other instrument made under such Act.” Referring to the said provision, it was held, by the High Court of Madhya Pradesh,

in *State of Madhya Pradesh v. Ramcharan*²³, that “under our legal order ‘law’ does not include only legislative enactment is but it also includes rules, orders, notifications etc. made or issued by the Government or any subordinate authority in the exercise of dedicated legislative power.” At the same time, purely administrative orders, not issued in exercise of any statutory authority, were held, in *Jayantilal Amratlal v. F. N. Rana*²⁴, not to constitute “law”. These decisions stand noted, and approved, by the Supreme Court in *Sudhir Shantilal Mehta v. C.B.I.*²⁵. It has not been contended, by NHAI, that the GOMs, issued by the States of Andhra Pradesh and Telangana, were devoid of any statutory authority, so as to stand excluded from the ambit of the expression “Indian Law”.

32. The submission, of NHAI, that subordinate legislation, or executive orders, would tantamount to “Indian Law”, for the purposes of Clause 48.1 of the Concession Agreement, only to the extent they fall within sub-clause (e) thereof, i.e. they relate to rates of taxes, too, fails to impress. Indeed, there is no reference, in sub-clause (e), either to subordinate legislation, or to any executive orders or instructions. If such subordinate legislation, or executive instructions, to the extent they change the rates of taxes, applicable to the Project, were to be included within the expression “change in law”, by invocation of sub-clause (e) of Clause 48.1, I see no reason why such subordinate legislation, or executive instructions, issued in exercise of statutorily

²³ AIR 1977 MP 68

²⁴ AIR 1964 SCC 648: 1964 (5) SCR 294

²⁵ (2009) 8 SCC 1

conferred powers and authority, would not qualify as “Indian Law”, for the purposes of sub-clause (b) of Clause 48.1.

33. Nor am I convinced with the contention, of NHAI, that extending the scope of sub-clause (b) of Clause 48.1, to GOMs, issued by the states of Andhra Pradesh and Telangana, and to the modification and change of the Sand Mining Policy affected thereby, would result in sub-clause (e) being rendered superfluous or redundant. Sub-clause (e) of Clause 48.1 deals with a specific exigency, i.e. change of taxes, having a direct impact on the project. The mere fact that Clause 48.1 may have chosen to specify this exigency by way of a separate category thereunder, i.e. sub-clause (e) cannot, in my view, detract from the ambit and scope of sub-clause (b). The principle against tautology, often invoked while interpreting legislative instruments, does not, necessarily, apply to covenants in contractual documents, and instances where clauses have been engrafted, in a contract, *ex abundanti cautela*, are not unknown.

34. In any event, it is obvious that the reasoning of the learned Arbitral Tribunal, as contained in the passage as extracted hereinabove, cannot be said to suffer from any legal infirmity, as would justify interference by this Court, in exercise of its limited jurisdiction, under Section 34 of the 1996 Act. The issue is purely one of law, and of interpretation of Clause 48.1 of the Concession Agreement. The learned Arbitral Tribunal has interpreted the clause to hold that the change in the Sand Mining Policy, as effected by the GOMs issued by the States of Andhra Pradesh and Telangana from

time to time, and the bifurcation of the state of Andhra Pradesh, constituted “change in law”, within the meaning of the said Clause. No case, for interference therewith, under Section 34 of the 1996 Act, can be said to exist.

Re. Clause 41.1

35. The learned Arbitral Tribunal has held the reduction in commercial traffic, consequent on the restrictions and prohibitions, imposed on Sand mining, by the aforesaid “change in law” incidents, to justify invocation, by GMR, of Clause 41.1 and 41.3 of the Concession Agreement, and the rejection, by NHAI, of the claim of GMR, under the said heads, to be unjustified. It is also categorically observed, in para 257 of the impugned Award, that NHAI had “not ... clarified how increasing cost is the only operated expression”, in Article 41.

36. A plain reading of Clause 41.1 of the Concession Agreement discloses that it applies, expressly, where “as a result of Change in Law, the Concessionaire suffers an increase in costs or reduction in net after-tax return or other financial burden”. Though NHAI sought to contend, before the learned Arbitral Tribunal – as it has sought to contend, before this Court as well – that this Clause was intended to apply only where the change in law had resulted in increase in costs, to the concessionaire. The submission, quite obviously, flies in the face of the wording of the Clause itself. Acceptance of the said submission would render the words “or reduction in net after-tax

return or other financial burden”, especially the words “or other financial burden”, otiose. On this aspect, the learned Solicitor General sought to contend that the words “reduction in net after-tax return” could not be equated with “reduction in revenue”, and dealt, instead, solely with a situation of increase in cost, or other expenditure, which the concessionaire, i.e. GMR, had to suffer as a result of the change in law. Equally, it was submitted, the words “other financial burden” related to financial liability on account of increase in cost and expenditure. These words, submits the learned Solicitor General, were required to be interpreted *noscitur a sociis* with the words “increase in cost” and “reduction in net after-tax return”. Thus interpreted, submits the learned Solicitor General, the words “other financial burden” would also require, for their application, increase in costs incurred by GMR. Any other interpretation, contends NHAI, would result in an “over expansionist” construction being extended, to Clause 41.1, which would, in turn, result in GMR becoming insured against any kind of financial loss, or hardship, suffered by it, irrespective of the cause thereof. It is submitted that Clause 41.1 could never have been intended to provide such an omnibus insurance to GMR, for all financial constraints suffered by it. Reliance was also placed, by the learned Solicitor General, in this context, on the heading of Clause 41.1, which reads “increase in costs”.

37. Adverting to this last contention first, the learned Tribunal has, in para 257 of the impugned Award, dwelt, at some length, on the inadvisability of limiting the construction of Clause 41.1, on the basis of its heading. Certain judicial authorities have also been cited, in this

context. In my opinion, the finding of the learned Arbitral Tribunal is obviously unexceptionable, and no reference, to any judicial authority, is necessary in this regard. As is apparent from a plain reading, while the heading of Clause 41.1 read “Increase in costs”, the clause itself refers to “increase in costs or reduction in net after-tax return or other financial burden”. Where the words used in the clause are, on their face, broader than the heading, it is obviously impermissible to limit the words in the clause, on the basis of the heading. To reiterate, if the submission of NHAI, in this regard, is to be accepted, it would result in rendering, completely redundant, the words “or reduction in net after-tax return or other financial burden”, in Clause 41.1.

38. That apart, the claim of GMR would, in my opinion, sustain, even on the anvil of “increase in costs”, to which NHAI would crave limitation of Clause 41.1. I would deal with this aspect a little later.

39. For the present, the words “other financial burden”, as employed in Clause 41.1, are, in my view, expansive and comprehensive in equal measure, and would encompass any kind of financial burden, to which GMR would be subjected, as a consequence of the “change in law”. I do not deem it necessary to discuss, at any length, the etymological connotations of the expression “financial burden”, as they are well understood. NHAI has, however, sought to invoke, as noted above, the *noscitur a sociis* doctrine, to limit the ambit of the expression “other financial burden”, to “financial burden” akin to “increase in cost” or “reduction in net after-tax return”. Thus viewed, submits NHAI, mere reduction in revenue

realisation, consequent to decrease in traffic, would not qualify as “other financial burden”, for the purposes of Clause 41.1.

40. The reliance, by NHAI, on the *noscitur a sociis* principle is, in my view, fundamentally unsound. It is axiomatic that the recourse, to interpretative aids, to understand provisions of the statute, or contract, is justified – and, indeed, is necessary – only where the provision does not admit of interpretation, plainly read, or presents ambiguous choices. There is no ambiguity, in my view, in the expression “increase in costs or reduction in net after-tax return or other financial burden”. The intention, of the framers of the contract, in using the expression “other financial burden” is, quite clearly, to encompass all financial burdens, as would befall the concessionaire, as it would be impossible to predict, in anticipation, the possible adverse financial consequences which could befall the concessionaire, consequent to “change in law”, even before the law has changed. The expression “other financial burden” does not, etymologically, admit of more than one interpretation. It would be folly to employ the *noscitur a sociis* principle to deliberately constrict the scope of an expression of words of wide import, consciously used. The following words, from *State of Bombay v. Hospital Mazdoor Sabha*²⁶ explain the concept thus:

“It is, however, contended that, in construing the definition, we must adopt the rule of construction *noscuntur a sociis*. This rule, according to Maxwell, means that, when two or more words which are susceptible of analogous meaning are coupled together they are understood to be used in their cognate sense. They take as it were their colour from each other, that is, the more general is restricted to a sense

²⁶ AIR 1960 SC 610:1960 (2) SCR 866

analogous to a less general. The same rule is thus interpreted in Words and Phrases (Vol. XIV, p. 207): “Associated words take their meaning from one another under the doctrine of *noscuntur a sociis* the philosophy of which is that *the meaning of a doubtful word* may be ascertained by reference to the meaning of words associated with it; such doctrine is broader than the maxim *Ejusdem Generis*.” In fact the latter maxim “is only an illustration or specific application of the broader maxim *noscuntur a sociis*”. The argument is that certain essential features or attributes are invariably associated with the words “business and trade” as understood in the popular and conventional sense, and it is the colour of these attributes which is taken by the other words used in the definition though their normal import may be much wider. We are not impressed by this argument. It must be borne in mind that *noscuntur a sociis* is merely a rule of construction and it cannot prevail in cases where it is clear that the wider words have been deliberately used in order to make the scope of the defined word correspondingly wider. It is only where the intention of the legislature in associating wider words with words of narrower significance is doubtful, or otherwise not clear that the present rule of construction can be usefully applied. It can also be applied where the meaning of the words of wider import is doubtful; but, where the object of the legislature in using wider words is clear and free of ambiguity, the rule of construction in question cannot be pressed into service. As has been observed by Earl of Halsbury, L.C., in *Corporation of Glasgow v. Glasgow Tramway and Omnibus Co. Ltd.* [(1898) AC 631 at p. 634] in dealing with the wider words used in Section 6 of Valuation of Lands (Scotland) Act, 1854, “the words ‘free from all expenses whatever in connection with the said tramways’ appear to me to be so wide in their application that I should have thought it impossible to qualify or cut them down by their being associated with other words on the principle of their being *ejusdem generis* with the previous words enumerated”.”

(Emphasis supplied)

41. There is some amount of flexibility in the legal position, qua the applicability of the *noscitur a sociis* – or *ejusdem generis* –

principle, where the general expression uses the word “other”. In *Uttar Pradesh S. E. Board v. Hari Shanker*²⁷, while interpreting the words “other rules or regulations”, as used in Section 13B of the Industrial Employment (Standing Orders) Act, 1946, which read “Nothing in this Act shall apply to an industrial establishment insofar the workman employed therein are persons to whom the Fundamental and Supplementary Rules, Civil Services (Classification Control and Appeal) Rules, Civil Services (Temporary Service) Rules, Revised Leave Rules, Civil Service Regulations, Civilians in Defence Service (Classification, Control and Appeal) Rules or the Indian Railway Establishment Code or any other rules or regulations that may be notified in this behalf by the appropriate Government in the Official Gazette apply”, the Supreme Court held that though the rules, to which reference was made in the preceding portion of the provision, were all applicable to Government servants, that specification could not be extended to the broad-based genus “other rules or regulations”, so as to narrow the scope of the said expression. For that reason, the Supreme Court held that the words “any other rules or regulations” referred to all statutory rules governing the workman, and not merely to rules applicable to Government servants.

42. Clause 41.1 in the Concession Agreement is in the nature of an indemnity clause. It seeks to indemnify the concessionaire, for the financial burden, suffered by its going through unforeseeable changes in law. The use of the omnibus expression “other financial burden”, thus viewed, appears, to me, to be intended at covering all financial

²⁷ AIR 1979 SC 65 : (1978) 4 SCC 16

burden, that the concessionaire may undergo, owing to change in law. This also demonstrates the fallacy of the contention, of NHAI, that, were such an “over-expansionist” interpretation to be accorded to Clause 41.1, it would operate as an omnibus insurance, covering the financial hardship that the concessionaire would suffer. The learned Solicitor General submitted that the clause was never intended to operate as an insurance, to GMR, covering all its financial risks. The submission, in my view, misses the wood for the trees. Interpreting the words “other financial burden”, as I have done hereinabove, does not convert Clause 41.1 into an omnibus insurance clause, covering all financial burden that the concessionaire would suffer. The clause is, expressly, limited only to financial burden suffered owing to “change in law”. The intent is, quite obviously, to indemnify the concessionaire, for the financial burden suffered by it, owing to change in law, for the simple reason that changes in law are unpredictable, unforeseeable, and beyond the control both of GMR and NHAI. Viewed thus, imparting, to the expression “other financial burden”, any restricted interpretation would, in my view, in fact defeat the very intent of using the said expression. The submission, of the learned Solicitor General, that the expression “other financial burden”, as employed in Clause 41.1, is required to be interpreted *noscitur a sociis* with the preceding expressions “increase in cost” and “reduction in net after-tax return”, therefore, in my view, does not commend acceptance.

43. The learned Solicitor General also relied, in the aforesaid context, on the concluding sentence in Clause 41.1 of the Concession

Agreement, which stated, “for the avoidance of doubt”, “that this Clause 41.1 shall be restricted to changes in law directly affecting the Concessionaire’s costs of performing its obligations under this Agreement.” In this context, I am in agreement with the submission, of NHAI, that the cost, for any concessionaire, comprises of two fundamental components, viz., of debt and of equity. Diminishing revenue returns are bound, inescapably, to result in increased costs. The interlink between costs and revenue is, in my view, completely obfuscated, in the submissions advanced by the NHAI. It would be wholly unrealistic, in my view, to interpret Clause 41.1 to mean that, even where the monies received, by operating the toll, are severely diminished, owing to an exponential fall in the traffic volume on the highway, the concessionaire would not be entitled to any recompense, merely because its “costs” have not increased. Such an interpretation would amount to viewing “costs” as merely an arithmetical figure, taking no stock of the financial impact that the costs have on the concessionaire, consequent on decrease in commercial traffic. Commercial contracts, as NHAI itself correctly contends, are required to be advanced a business-like interpretation. So advanced, the interconnect between costs suffered, and revenue realised, cannot be overlooked.

44. That apart, in my opinion, it would be fallacious to isolate the last sentence in the proviso to Clause 41.1 of the Concession Agreement, and place sole reliance thereon, ignoring the main body of the said Clause. The manner in which NHAI chooses to rely, in isolation, on the said sentence, would amount to doing away with the

reference, in the main body of Clause 41.1, to “reduction in net after-tax return” and “other financial burden”. This, in my view, is impermissible. As NHAI has itself contended, the Concession Agreement was required to be read as a whole, and the intent of the parties thereto, defined therefrom. The caveat entered, at the conclusion of the proviso to Clause 41.1, “for the avoidance of doubts” cannot, therefore, be torn away from the main Clause, so as to constrict the scope thereof.

45. Significantly, Clause 41.1 requires the concessionaire, in the event of the application of provision, to “propose amendments to this Agreement so as to place the Concessionaire in the same financial position as it would have enjoyed had there been no such Change in Law resulting in the cost increase, reduction in return *or other financial burden as aforesaid*”. Nothing more, in my view, is required, to indicate that the Clause was never intended to be limited to cost increase. The submission of the NHAI, to the said effect has, therefore, to be regarded as misconceived.

46. The applicability of Clause 41.1, to the facts of the present case cannot, therefore, in my view, be gainsaid.

Clause 41.3

47. Clause 41.3 of the Concession Agreement is a sequel to Clause 41.1. It states that, pursuant to the provision of, *inter alia*, Clause 41.1, for the purposes of placing the concessionaire in the same

financial position at it would have enjoyed had it not suffered financial burden on account of change in law, the concessionaire “shall rely on the Financial Model” to establish a net present value (NPV) of the net cash flow, and make necessary adjustments in”, inter alia, compensation, so as to ensure that the NPV was the same as it would have been, had there been no change in law. In this context, NHAI has sought to discredit the Halcrow Report, as well as the Financial Model, on which GMR placed reliance. The findings, in the impugned Arbitral Award, in this regard, as contained in para 78 thereof, read thus:

“278. One of the stands taken by the Respondent is that the Halcrow Report, the so called origin-destination study has not been shared with it. According to Claimant, IRC SP 19-2001 has so recommended carrying out commodity wise analysis of traffic. Since Respondent is the custodian of all highways in the country and has the largest data base of traffic across the highway it is but natural to assume and believe that the Respondent would have the largest data base of traffic across all the highways. But it chose not to aduce any evidence to throw any light and / or contradict the Halcrow Report. The Halcrow Report refers to actual count of the existing traffic during the financial year 2008-09 including passenger cars, commercial vehicles and thereafter project the future traffic based on normal indices including economic activities, social economic development in the area it took an average rate of growth for passenger traffic and commercial traffic as 6.1% and 6.2% respectively for a period of 25 years. In the Financial Model, the growth rate was reduced. Based on the traffic study for a period of 25 years and a reasonable return of 16% on investment and the concession period of 25 years, the consortium had submitted its offering a premium of 32.6% of Realizable Fee from Commercial Operation Date (COD) which increases by 1% every year on every anniversary of the appointed date. Claimant has highlighted the importance of the Financial Model. It is pointed out that 24.1.2 of the Concession Agreement mandates as a condition precedent, the submission

of Financial Model along with Financing Agreement. Even prior to the execution of the Financing Agreement, the Claimant was required to and in fact provided to the Respondent the approved Financial Model. The relevant provision 24.1.2 reads as follows:

“24.1.2 The Concessionaire shall, upon occurrence of Financial Close, notify the Authority forthwith, and shall have provided to the Authority, at least 2 (two) days prior to Financial Close, 3 (three) true copies of the Financial Package and the Financial Model, duly attested by a Director of the Concessionaire, along with 3 (three) soft copies of the Financial Model in MS Excel version or any substitute thereof, which is acceptable to the Senior Lenders” ”

48. In making the necessary adjustments, including payment of compensation, so as to restore the concessionaire to the financial position enjoyed by its prior to the happening of the change in law, Clause 41.3 of the Concession Agreement expressly requires the parties to rely on the Financial Model. It is not open, therefore, to NHAI, to discredit the Financial Model. Indeed, as has rightly been observed by the learned Arbitral Tribunal, Clause 24.1.2 of the Concession Agreement requires the concessionaire, i.e. GMR, to provide, upon occurrence of Financial Close, to NHAI, three true copies of the Financial Model, duly attested by its Director, along with three soft copies thereof, as acceptable to the senior lenders. Besides, the Halcrow study, resulting in the Halcrow Report, was undertaken, by GMR, in accordance with Clause 2.1.3 of the RFP, which required the bidders to carry out their own survey before submitting their bids. Clause 1.2 (g) of the Report observed that the purpose of the study was “estimation of projected toll revenue as per the categories of traffic streams”. As such, the Halcrow Report was a

category-wise report. Clause 4.1.3 of the Concession Agreement, particularly sub-clause (f) thereof, required the Concessionaire to deliver, to the authority, three copies of the Financial Model, as one of the conditions precedent, to be satisfied by the concessionaire prior to the appointed date. The authority to waive this condition precedent vested in the NHAI, by the proviso to the said Clause, but no such waiver was ever granted. As such, in accordance with the mandate of the said sub-clause, GMR submitted its Financial Model to NHAI on 6th April, 2010. The ingredients of the Financial Model were also provided in Clause 48.1 of the Concession Agreement, which clearly stated that the financial viability of the project was determined, by the senior lenders, on the basis of the said Financial Model. As is correctly noted by the learned Arbitral Tribunal in para 278 of the impugned Award, NHAI, despite being the custodian of all highways in the country, with the largest database of traffic across all highways, did not adduce any evidence, on the basis of which the Halcrow Report, or the Financial Model, could be discredited. In fact, the premium, offered by GMR and sought to be realised by NHAI, was also based on the Realisable Fee, based on the traffic study resulting in the Halcrow Report.

49. Ironically, while seeking to discredit the Halcrow Report in the Financial Model, which were in existence prior to finalisation of the Concession Agreement, and the providing of the latter of which was a condition precedent, NHAI seeks to rely (in its written submissions) on data, allegedly collected by it, regarding traffic movement on highways closed to NH-9, and on a Pavement Design Report. The

learned Arbitral Tribunal has correctly found the reliance, by NHAI, on this material, to be inexplicable. When actual data, relating to movement of traffic on the Project Highway, was available, it defeats comprehension as to how NHAI could choose to discredit that data, and rely on data relating to the movement on “proximate” highways.

50. Much has been sought to be made, in the written submissions of NHAI, on the non-availability of any commodity-wise traffic study, for the period after the change in law. Exception has been taken to the fact that the plea, of GMR, for the decline in traffic is sought to be based on a comparison of the total commercial vehicular traffic, before and after the change in law. Having perused the Concession Agreement, I can find no basis for this submission. The Concession Agreement does not require any commodity-wise study to be undertaken. Any claim to entitlement for compensation, under Clause 41.1 of 41.3, requires, *a priori*, establishment of the existence of financial burden, on the concessionaire, i.e. GMR, as a consequence of the change in law. The reduction in commercial traffic was shown, by GMR, as evidence of the fact that it had, in fact, suffered financial burden as a result of the change in law. If this plea, of reduction in commercial traffic, was found to be correct, in the absence of any material, adduced by NHAI, to justify such reduction, GMR would have succeeded in establishing the causal connection between the change in law, and financial burden, arising from the reduction in commercial traffic. This exercise has, both by the majority, as well as by the minority, awards, been directed to be undertaken *de novo*.

51. In this context, and given the tenor of the submissions of NHAI, I deem it appropriate to observe that, unlike a statutory instrument, a contract is, entered into, between the parties thereto, with open eyes, and with the wherewithal to include, in the contract, all such covenants as would manifest their intention. The intent of parties, to a contract has, therefore, to be discerned from the provisions of the contract, and cannot be inferred - unlike a statutory instrument, in which the parties, who are required to interpret the statute, are not privy to the framing thereof.

Re. Clause 29

52. NHAI has contended that the clause, which would apply in the case of production of flow of traffic, would be Clause 29.1 of the Concession Agreement, and not Clause 41.1, or 41.3. It has also been sought to be pointed out that, unlike Article 41, traffic flow, under Article 29, is based on the number of Passenger Car Units (PCUs), and not on the basis of the number of commercial vehicles. Though Article 29, and the various clauses thereunder, do not refer to Change in Law, NHAI contends that the said Article caters to all cases of reduction in traffic, for any reason. In all such cases, Clause 29.1 requires increasing the concession period, so as to result in increase in revenue. It is contended, by NHAI, that, if Article 41 were to be treated as catering to the same exigency, GMR would get a double benefit. It is also sought to be contended that Article 29 is a more specific provision, which deals with reduction in traffic flow, as compared to Article 41 and that, therefore, applying Clause 1.4.2 of

the Concession Agreement, the case of GMR would fall, appropriately, under Article 29.

53. Dr. Singhvi, meeting the said submissions, pointed out that Article 29 does not deal, at all, with change in law. That, in my view, is a complete answer to the submissions of NHAI, relying on Article 29. “Change in law”, clearly, had taken place, and the claims, of GMR, were consequent thereupon. Article 41 specifically dealt with “change in law”, and the consequences thereof. Article 29 did not make any reference, at all, to “change in law”. If, therefore, the learned Arbitral Tribunal relied on Article 41.1 and 41.3, in preference to Article 29, that was, in my view, eminently in accordance with the express terms of the Concession Agreement.

54. In this context, Clause 1.4.2, on which NHAI sought to place reliance, actually furthers the cause of GMR. Sub-clause (a) of Clause 1.4.2 specifically states that, “in case of ambiguities or discrepancies within this Agreement, ... between two or more Clauses of this Agreement, the provisions of a specific Clause *relevant to the issue under consideration* shall prevail over those in other Clauses”. The issue under consideration being the entitlement, of GMR, to compensation, on account of financial difficulties faced consequent to change in law, it is obvious that the specific Clauses, engrafted in the Concession Agreement to deal with such an exigency, is Clause 41.1, and Clause 41.3, and not Clause 29.1.

55. Clause 29.1, in fact, does not deal with such a specific exigency at all. Clause 29.1.1 is, expressly, engrafted “for determining the modifications to the Concession Period under this Article 29”. Modifications to the Concession Period, under Article 29, is covered by Clause 29.2. Sub- clause 29.2.1, thereunder, stipulates that, if the actual traffic is found to have fallen short of the Target Traffic then, for every 1% shortfall, the Concession Period shall, subject to payment of Concession Fee in accordance with the Concession Agreement, be increased by 1.5% thereof, subject to a maximum increase of 20%. The manner in which it is to be ascertained, as to whether Actual Traffic has, or has not, fall short of the Target Traffic, is prescribed in Clause 29.1.1. The Target Traffic is estimated on the Target Date (1st December, 2019), by the said Clause, as 36666 PCUs per day. The Clause goes on to require traffic sampling to be undertaken on the date one year prior to the Target Date, on the Target Date and one year after the Target Date. On each occasion, the traffic sampling is to be undertaken for 7 continuous days. The average of the traffic flow, on the said 7 days, would be deemed to be the actual traffic. Clause 29.1.2 specifies that, if the actual traffic, thus reckoned, fall short of the Target Traffic by more than 2.5%, or exceeds the Target Traffic by more than 2.5%, the Concession Period would be modified in accordance with Clause 29.2.

56. It is obvious that Clause 29 is not even intended to cater to financial hardship, resulting to the Concessionaire, much less where such financial hardship is attributable to change in law. Adverse financial consequences, resulting from change in law, are specifically

covered by Clause 41.1 and 41.3. The invocation, by NHAI, of Clause 29 of the Concession Agreement is, therefore, thoroughly misconceived.

57. In view thereof, no exception can be taken, to the finding, of the learned Arbitral Tribunal, that the rejection, by NHAI, of the claim, of GMR, to compensation, predicated on Clauses 41.1 and 41.3, was not in accordance with the terms of the contract, and could not sustain in law. The learned Arbitral Tribunal has correctly held that the adverse financial consequences, which have been claimed, by GMR, to have visited it, as a result of the change in law, justify invocation of Clauses 41.1 and 41.3 of the Concession Agreement. As the said finding is obviously in accordance with the terms of the Concession Agreement, and, on its face, Article 29 does not apply to such a situation, the mere fact that no detailed discussion, regarding inapplicability of Article 29 of the Concession Agreement, is to be found in the impugned Award, cannot, in my view, vitiate it to any extent.

58. As the view, of the learned Arbitral Tribunal, that “change in law” did exist, and that the claim of GMR, to compensation, was maintainable under Clauses 41.1 and 41.3 of the Concession Agreement, merit acceptance, for the reasons stated hereinabove, I do not deem it necessary to enter, in any detail, into the issue of *force majeure*, on which, too, the learned Arbitral Tribunal has founded its decision, especially in view of sub-clause (a) of Clause 34.4, which

makes “change in law” a “political event”, for the purposes of *force majeure*, “only if consequences thereof cannot be dealt with under and in accordance with the provisions of Article 41 and its effect, in financial terms, exceeds the sum specified in Clause 41.1”. No claim to compensation has been laid, by NHAI, attributable to “change in law”, beyond the effect of such change, in financial terms, as contemplated by Clause 41.1.

Resultantly

59. As a result, the findings, of the learned Arbitral Tribunal, that (i) the amendments in the Sand Mining Policy, as effected, from time to time, by the States of Andhra Pradesh and Telangana, as also the judgement of the Supreme Court in *Deepak Kumar*¹, and the bifurcation of the state of Andhra Pradesh, amounted to “change in law”, within the meaning of Clause 48 of the Concession Agreement and (ii) the decision of NHAI, to reject the claim, to compensation, by GMR, by relying on Article 29 of the Concession Agreement, could not sustain in law, stands affirmed. Clearly, the claim of GMR would have to be assessed on the basis of Clauses 48.1 and 48.3, and not on the basis of Clause 29.

60. Having thus held, the learned Arbitral Tribunal has also held, correctly, that GMR would not, merely by virtue of these findings, become, *ipso facto*, entitled to compensation under Clause 48.1 or 48.3. It would be necessary for GMR to establish the “financial

burden”, suffered by its as a consequence of the aforesaid changes in law, in order to be entitled to compensation under the said Clauses. This finding, of the learned Arbitral Tribunal, too, is eminently in order, and does not call for interference.

61. O.M.P. (COMM) 426/2020 stands disposed of, in the aforesaid terms.

O.M.P. (COMM.) 425/2020 and I.A. 3714/2020

62. On the issue of the authority, to whom the task of determining the actual entitlement of GMR, to compensation, should be assigned, the opinions of the learned arbitrators diverge. The majority award remits this issue to NHAI, for consideration, whereas the minority Award (per Nayar, J.), disagrees therewith, and opines that the learned Arbitral Tribunal ought to have itself decided the actual entitlement of GMR, or assigned the task to an independent expert/body of experts.

63. O.M.P. (COMM.) 425/2020, by GMR, assails the decision, by the majority Award dated 31st March, 2020, to leave the exercise of determining and quantifying the entitlement, of GMR, to compensation, under Clauses 41.1 and 41.3 of the Concession Agreement, to NHAI.

64. In this regard, a perusal of the reliefs sought by GMR, in its Statement of Claim, filed before the learned Arbitral Tribunal, reveals that GMR had specifically claimed ₹ 752.32 crores, under Clauses

41.1 and 41.3 of the Concession Agreement, as the amount due to it, consequent to the aforesaid “change in law”. Interest, on the said amount, also stands claimed.

65. The actual amount, payable to GMR on account of the aforesaid “change in law”, therefore, constitutes an inalienable part of the dispute, which was referred to the learned Arbitral Tribunal. As Nayar, J., correctly observes, the learned Arbitral Tribunal could itself have decided the issue. Having said that, there can be no cavil with the decision, of the learned Arbitral Tribunal, to assign the task of deciding the actual amount payable to GMR, to another body, as it could involve disputed facts and figures. Any such body, however, would be, in effect, an extension of the learned Arbitral Tribunal itself, as it would be deciding the dispute, which stood referred to the learned Arbitral Tribunal. GMR and NHAI having been at loggerheads, throughout, regarding the entitlement of GMR, I find myself in agreement with Nayar, J., that NHAI itself could not be assigned the task of adjudicating on the claim of GMR. There is, *prima facie*, substance in the submission, of Dr. Singhvi, that any such delegation would be bound to result in futility. That impression stands underscored by the emphasis with which NHAI has, before this Court, contested the entitlement, of GMR, to any compensation and, in fact, the very existence of “change in law” itself.

66. I may refer, with advantage, in this regard, to Section 12 (5) of the 1996 Act, which specifically disentitles any person “whose relationship, with the parties or Council or the subject-matter of the

dispute, falls under any of the categories specified in the Seventh Schedule”, to be ineligible for appointment as an arbitrator. It is hardly necessary to refer to the various categories of persons, who were disentitled, by operation of Section 12 (5), read with the Seventh Schedule to the 1996 Act, from acting as arbitrators, as, in the present case, the majority Award as assigned the task of determining the entitlement of GMR, to NHAI itself. In my view, this is impermissible.

67. While, therefore, issuing notice on this petition, returnable on 15th March, 2021, I deem it appropriate to appoint D. K. Jain, J. (r/o C-3/5, Ground floor, Safdurjung Development Area, New Delhi - 1100016 Tel. No. 9999922288), one of the most respected retired Judges of the Supreme Court, who has also adorned the bench of this Court, the High Court of Punjab and Haryana (as Chief Justice) and of the National Consumer Disputes Redressal Commission, as its Chairperson, to undertake and complete the task which stands assigned, by the Majority Award the present case, to the NHAI. Inasmuch as D. K. Jain, J., would be effectively taking off from where the learned Arbitral Tribunal passed its Award in the present case, and solely for that reason, he would be referred to, hereinafter, as “the learned Sole Arbitrator”. The learned Sole Arbitrator would undertake the task in accordance with paras 293 to 297 of the impugned Award.

68. For this purpose, GMR is directed to file, before the learned Sole Arbitrator, a clear statement of its claim to compensation, under

Clauses 41.1 and 41.3 of the Concession Agreement, with all particulars thereof.

69. GMR is directed to contact the learned Sole Arbitrator at the contact information provided hereinabove within 48 hours, so as to fix a schedule for the proceedings and furnishing its statement of claim.

70. The discretion, on whether to permit GMR, or NHAI, to introduce any further documents, beyond those which were already filed during the arbitral proceedings conducted thus far, would rest with the learned Sole Arbitrator. Needless to say, the learned Sole Arbitrator would afford an adequate opportunity of hearing to both sides, before arriving at his decision.

71. Given the magnitude of the task involved, I deem it appropriate to enhance the time, available with the learned Sole Arbitrator, to arrive at his decision, to six months, from the date of presentation, of its claim, by GMR, to the learned Sole Arbitrator. Should the time prove insufficient, it would be open to either party to apply to this Court, for extension of time.

72. The learned Sole Arbitrator would be entitled to conduct the proceedings at a venue suitable to him, subject to consent by GMR and NHAI. He shall also be entitled to charge, for the said proceedings, the fees being paid to the learned Presiding Arbitrator, in the proceedings conducted thus far. The learned Sole Arbitrator would also be entitled to requisition the services of an expert, or a

team of experts, such as a reputed firm of Chartered Accountants, should he deem it necessary. In such an eventuality, the learned Sole Arbitrator would be entitled to fix the fees of such expert(s), after consultation with both sides.

73. The decision, of the Sole Arbitrator, regarding the entitlement, if at all, of GMR to compensation, would be provided to the parties, and forwarded, to this Court, by the learned Sole Arbitrator.

74. Notice of this petition is accepted by Mr. Manish Bishnoi, learned counsel for NHAI. Renotify on 15th March, 2021.

75. In view of the aforesaid direction, I.A. 3714/2020 does not survive for further consideration, and stands disposed of.

O.M.P. (I) (COMM) 92/2020

76. Issue notice, returnable on 15th March, 2021. Notice is accepted by Mr. Manish Bishnoi on behalf of the respondent.

77. Counter affidavit, in response to this petition, be filed within a period of four weeks with advance copy to the petitioner who may file rejoinder thereto if any, within a period of four weeks thereof.

78. This petition assails a communication, dated 16th April, 2020, by NHAI, demanding premium from GMR, in the context of the Concession Agreement, dated 9th October, 2009 *supra*. GMR, in turn,

contends that it was entitled to compensation, from NHAI, under Clauses 41.1 and 41.3 of the Concession Agreement. *Vide* my judgement and order hereinabove, I have upheld the applicability of the aforesaid Clauses 41.1 and 41.3, to the claim of GMR, and have appointed a learned Sole Arbitrator to adjudicate on the actual entitlement of GMR, to compensation under the said clauses. Inasmuch as the claim to premium, by NHAI, and the claim to compensation, by GMR, constitute rival monetary claims, emanating from the same Concession Agreement, the interests of justice, in my view, would justify staying the recovery, from GMR, by NHAI, of premium, in terms of the impugned letter dated 16th April, 2020, pending the decision of the learned Sole Arbitrator on the entitlement, of GMR, to compensation. The considerations of balance of convenience and irreparable loss would also, in my view, justify this decision, given the amounts involved, and the fact that, were NHAI ultimately to succeed, it would be open to NHAI to recover the amount of premium, if recoverable, with or without interest, even at that stage.

79. Accordingly, till the next date of hearing, the operation of the impugned letter No. NHAI/PIU-Hyd/NH-65/Hyd-Vij/2020/430, dated 16th April, 2020, issued by NHAI to GMR, would stand stayed.

C. HARI SHANKAR, J.

AUGUST 4, 2020

HJ