

IN THE HIGH COURT OF DELHI AT NEW DELHI

% Judgment delivered on: 23.08.2021

+ **O.M.P. (COMM) 554/2020 & I.A. 10984/2020**

**NATIONAL HIGHWAY AUTHORITY
OF INDIA**

..... Petitioner

versus

PATEL KNR INFRASTRUCTURE LTD.

..... Respondent

Advocates who appeared in this case:

For the Petitioner : Mr Balendu Shekhar, Advocate with
Mr Ravi Gopal, Mr Raj Kumar
Maurya and Mr Vijayant Sharma,
Advocates.

For the Respondent : Dr Amit George, Advocate with
Mr Swaroop George, Mr Amol
Acharya, Mr Rayadurgam Bharat,
and Mr P. Harold, Advocates.

**CORAM
HON'BLE MR JUSTICE VIBHU BAKHRU**

JUDGMENT

VIBHU BAKHRU, J.

1. The National Highway Authority of India (hereafter 'NHAI') has filed the present petition under Section 34 of the Arbitration and Conciliation Act, 1996 (hereafter 'the A&C Act') impugning the Arbitral Award dated 18.01.2020 (hereafter the 'impugned award') passed by the Arbitral Tribunal constituted of three members (hereafter 'the Arbitral Tribunal').

2. The Arbitral Tribunal has rendered the impugned award in the context of the disputes that have arisen between the parties arising out of a Concession Agreement dated 28.09.2006 (hereafter the 'Concession Agreement') executed between NHAI and the promoters of the respondent company in respect of the project entailing "Design, Construction, Development, Finance, Operation and Maintenance of Km 463.6 (AP/Karnataka border) to Km 524.0 (Avathi Village), covering 60.4 kms" and "Improvement, Operation and Maintenance of Km 524 (Avathi Village) to Km 527 (Nandi Hills Crossing) and Km 535 (Devanahalli Village) to Km 539 (Meenukunte Village) on NH-7 in the State of Karnataka on Build, Operate and Transfer (BOT) Annuity Basis" (hereafter the 'Project').

3. The principal dispute between the parties centers around the obligation of the respondent – Patel KNR Infrastructure Limited (hereafter the 'Concessionaire') – to maintain the Project Highways. In terms of the Concession Agreement, the Concessionaire was required to ensure the minimum standard of Pavement Riding Quality and to lay a renewal coat of bituminous concrete (hereafter 'BC') every five years after the period of initial construction. At the insistence of NHAI, the Concessionaire had laid a coat of 40mm thickness of BC on the Project Highways even though, according to the Concessionaire, the Concession Agreement did not oblige it to lay a renewal coat of such thickness. The surface roughness of the Project Highways had not deteriorated below the specified standards and therefore the Concessionaire claimed that it did not require a renewal coat. The Concessionaire claimed that in any event the requisite thickness of the

renewal coat of BC was not required to exceed 30mm.

4. In the aforesaid context, the Concessionaire claimed costs for laying an additional 10mm thickness of BC, which it quantified at ₹15,58,64,931/-. The Arbitral Tribunal accepted the aforesaid claim however, it did not accept the costs for executing such work as claimed by the Concessionaire. The Arbitral Tribunal accepted the additional cost of laying 10mm of BC as 8986.41 per cum of BC as determined by the Independent Consultant (IC). And applying the said rate, entered an Award for ₹11,75,05,551/- against the Concessionaire's claim for costs for the extra 10mm thickness of BC laid at the insistence of NHAI. In addition to the aforesaid claim, the Arbitral Tribunal also awarded interest at the rate of SBI PLR plus 2% per annum from 27.07.2016 (the date on which the work of laying renewal coat of 40mm of BC was completed) till 18.01.2020 (the date of Award). The Arbitral Tribunal computed the average SBI PLR at 13.875% and accordingly awarded pre-award interest at 15.875%. The Arbitral Tribunal also awarded costs computed at ₹10 lacs and future interest at 10% per annum on the awarded amount from the date of Award till the date of payment.

5. NHAI also raised a counter-claim on account of the delay in laying the renewal coat of BC. The compensation on account of such delay had been determined and recommended by the IC. NHAI recovered the same before the reference of the disputes to arbitration. However, it raised a counter-claim for a further sum over and above the amount determined by the IC, which the Arbitral Tribunal found to be unsubstantiated. The Arbitral Tribunal found that the claim of damages

for delay also exceeded the costs of laying the renewal coat of BC and thus, was excessive and unreasonable. Accordingly, it rejected the same. NHAI claims that the decision of the Arbitral Tribunal is contrary to the express terms of the Concession Agreement, and therefore, the impugned Award is patently illegal and also against the policy of Indian Law.

6. In view of the above, the limited controversy to be addressed is whether the Arbitral Tribunal's decision to award costs for additional 10mm thickness of BC laid by the Concessionaire is contrary to the express terms of the Concession Agreement and whether the decision of the Arbitral Tribunal to reject NHAI's counter claim on account of delay in laying of the renewal coat of BC is patently illegal.

7. The aforesaid controversy arises in the following factual context:

7.1 On 27.05.2005, NHAI issued a Request for Proposal (RFP) document and invited proposals for executing the work of Design, Construction, Development, Finance, Operation and Maintenance of a specified section of the highway on BOT Annuity Basis.

7.2 Patel KNR Infrastructure Ltd submitted its bid pursuant to the said invitation which was accepted at a total cost of ₹402.87 Crore. The project was in two phases. The sections of the Highways in question (Project Highways) were to be constructed within 24 months and the relevant section was to be maintained and operated for a period of 18 years. The total term of the Concession Agreement was 20 years, which included a construction period of 24 months. Thereafter, on 28.09.2006, the promoters of the Concessionaire entered into the Concession

Agreement with NHAI and the Concessionaire was incorporated as a Special Purpose Vehicle (SPV) for construction, maintenance and operation of the Project Highways (sections of highways in question).

8. The scheduled appointed/commencement date was agreed as 26.03.2007. The construction period of 24 months was to be reckoned from the said date and the project was agreed to be completed on or before 26.03.2009 (the Scheduled Project Completion Date). NHAI accepted the provisional COD (Commercial Operation Date) as 21.12.2009.

9. By letters dated 10.04.2014 and 14.07.2014, the Team Leader of Unihorn India Private Limited (IC) called upon the Concessionaire to submit a detailed action plan for completing the activity of Regular Periodic Maintenance and Renewal of wearing surface of road pavement in terms of Clause 2.6.1 of Schedule L of the Concession Agreement. The Concessionaire was also asked to conduct the Benkelman Beam Deflection Test (BBD Test) and Roughness Test (Bump Integrator Test) before the commencement of the renewal course. The Concessionaire conducted the BBD Test from 27.09.2014 till 13.10.2014 and the Bump Integrator Test on 11.10.2014 in the presence of the Team Leader of IC and, submitted the test results under cover of his letters dated 16.10.2014 and 28.10.2014. Thereafter, by a letter dated 24.11.2014, the Team Leader advised the Concessionaire to design the renewal coat of BC as per the latest version of IRC-81-1997 and decide the thickness of the layer being laid. According to NHAI, the provisional COD was

issued on 20.12.2009, and therefore, the renewal coat of BC of 40mm thickness was required to be laid within five years.

10. The Concessionaire responded by a letter dated 25.11.2014 referring to the test results, which according to the Concessionaire, indicated that the Project Highway was structurally sound and did not demand laying of any overlay. According to the Concessionaire, the roughness value did not exceed 2000mm/Km in the major portion of the Project Highways except at a few stretches. The Concessionaire referred to the specifications of BC issued by the Ministry of Road Transport & Highways (hereafter 'MORTH'). The Concessionaire claimed that it could execute the renewal of the wearing surface of the road pavement by 25mm of BC. The Concessionaire contested the insistence on the part of the IC to lay the renewal surface coat of 40mm of BC and also pointed out that in respect of the other highways, NHAI had expressly specified renewal coat to be 25mm thick. The Concessionaire put NHAI to notice that in the event it was compelled to lay a renewal coat of 40mm BC despite finding no structural deficiency in the road pavement, it would be constrained to invoke the Dispute Resolution Clause.

11. Thereafter by a letter dated 25.12.2014, the Concessionaire submitted its proposal to lay a renewal coat of BC of 30mm thickness in conformity with "table 500-18 – Grading 2 of the MORTH Specifications for road and bridge work, 2001 (4th Revision)". The Team Leader (IC) responded to the Concessionaire's letter dated

25.12.2014 by its letter dated 29.12.2014 and insisted that the Concessionaire should lay the renewal coat of BC of 40mm thickness.

12. NHAI also insisted that a renewal coat of BC of 40 MM be laid in accordance with Para 7.7 of IRC-81-1997, Para 4.2.3.4 of IRC-37-2001 and Annexure 5 of IRC-37-2001. According to NHAI, the said guidelines set out the standard specifications that the Concessionaire was required to meet. The Concessionaire responded to the said letter on 19.01.2015 disputing that the said standards were applicable. It claimed that since there was no structural deficiency indicated from the deflection values, only 'thin servicing' was required to be provided to meet the standards of the riding quality. It reiterated its stand that it would lay BC of 30mm thickness.

13. The Concessionaire sent another letter dated 21.01.2015 in furtherance of its letter dated 19.01.2015 reiterating that it would provide 30mm BC in accordance with "MORTH Double 500-18 grading 2", which according to the Concessionaire was appropriate to meet the requirement of servicing and was also in accordance with Clause 4.3.2 (I) of Schedule L of the Concession Agreement.

14. NHAI sent a letter dated 07.04.2015 informing the Concessionaire that its proposal to provide a renewal coat of 30 mm thickness BC was taken up at NHAI's Headquarters and the Competent Authority had decided that directions be issued to the Concessionaire to execute a renewal coat of BC of 40 mm thickness. This, according to NHAI, was in conformity with the obligations of the Concessionaire

under the Concession Agreement.

15. The Concessionaire complied with the said direction. It executed the overlay with 40 mm BC. Subsequently, it sent a letter dated 11.05.2016 stating that it had completed the work of laying a renewal coat with 40mm BC and claimed an amount of ₹15,58,64,931/- being the additional cost incurred for extra thickness by 10 mm BC. The said claim was escalated to a dispute that was referred to arbitration.

16. NHAI filed its Statement of Defence and also raised a Counter Claim for damages amounting to ₹104,76,87,816/- on account of delay of alleged 1439 (One Thousand Four Hundred and Thirty-Nine) days in laying the renewal coat. The said counter claim was revised to ₹21,95,12,075/- as the period of delay was reduced to 433 (Four Hundred and Thirty-Three) days. The impugned award notes that NHAI had sought to further revise its Counter Claim to ₹23,26,17,274/- for a delay of 469 (Four Hundred and Sixty-Nine) days. However, in the synopsis of its contentions filed by NHAI, it once again mentioned the initial figure of ₹104,76,87,816/- as the quantum of its Counter Claim.

17. NHAI claimed that the COD (Commercial Operation Date) of the project was 21.12.2009. According to NHAI, the Concessionaire was required to complete the renewal coat of BC by 21.12.2014 as in terms of Clause 4.3.1 of Schedule L of the Concession Agreement, it was required to do so once in every five years.

18. However, the IC had calculated the period of delay after providing for a period of six months to complete the work. The damages as assessed by the IC were recovered from the Concessionaire. NHAI

claims that the period of delay was required to be computed from 21.12.2014.

Reasons and Conclusion

19. The Arbitral Tribunal accepted the Concessionaire's contention that it was not obliged to lay a renewal coat of 40mm BC. The Arbitral Tribunal found that the service roughness of the Project Highway did not exceed 3000 mm/km at any point in time. Therefore, the Concessionaire had complied with Sub-Clause (ii) of Clause 4.3.1 of Schedule L of the Concession Agreement, which required that the surface roughness should not exceed 3000 mm/km during the surface life of pavement at any time. The Arbitral Tribunal noted that the Concessionaire was required to lay a renewal coat of BC every five years after the initial construction or after the surface roughness value reaches 3000 mm/km, whichever is earlier. Since the surface roughness did not exceed 3000 mm/km, the Concessionaire was required to lay the renewal coat of BC every five years.

20. The Arbitral Tribunal accepted the Concessionaire's contention that in the given circumstances, the Concession Agreement did not require it to lay a renewal coat of 40 mm thick BC and a renewal coat of 30mm BC would be a due performance of its obligations under the contract. The Arbitral Tribunal referred to the Flow Chart set out in Appendix 3.1 of the Concession Agreement which specified that in case the roughness testing was within the prescribed limit of 3000 mm/km, the Concessionaire was required to "Do nothing". However, since Clause 4.3.1 (ii) stipulated laying of the renewal coat of BC every five

years, the Concessionaire was required to do so. The Tribunal accepted the Concessionaire's contention that the Concession Agreement did not specify the thickness of the renewal coat of BC. The Tribunal held that in such circumstances IRC-81-1997, "*Guidelines for Strengthening of Flexible Road Pavement Using Benkelman Beam Deflection Test Technique*" was required to be followed and the same expressly provided that "*where strength deficiency is not indicated from Deflection value, then servicing may be provided to improve the riding quality as required*". In addition, the Arbitral Tribunal also referred to the Circulars issued by NHAI, which in turn enclosed the circular dated 26.09.2002 issued by MORTH that stipulated that 25 mm/BC would be laid for high traffic road in cases where the existing BC is wearing coarse. The Arbitral Tribunal also referred to the Circular dated 28.09.2016 issued by MORTH notifying its decision for use of Micro Surfacing as preventive maintenance/renewal treatment. The said Circular stipulated that 6 – 8 mm Micro Surfacing was required for medium traffic roads.

21. The Arbitral Tribunal referred to other contract packages relating to National Highway No. 5 and National Highway No. 9 for similar road works, where NHAI had specified that 25 mm thick BC would be laid as a renewal coat for periodic maintenance. Thus, NHAI's direction to lay a renewal coat of 40 mm BC was also inconsistent with the requirement in respect of other similar works.

22. The principal question to be addressed is whether the impugned award is contrary to the express terms of the Concession Agreement.

NHAI's contention rests on a reading of Schedule-B of the Concession Agreement, which details the scope of the project.

23. At this stage, it will be relevant to refer to the clauses relied upon by the Arbitral Tribunal in concluding that the Concession Agreement does not provide for any specific thickness of the renewal coat of BC to be laid as a part of the periodic maintenance.

24. Schedule L of the Concession Agreement includes the provisions relating to 'Operation and Maintenance Requirements'. Clause 2.6 of Schedule L sets out the important activities to be carried out during the entire operation period of the project highway. Clause 2.6 of Schedule L of the Concession Agreement is relevant and is set out below:-

"2.6. Operation and Maintenance Stage

2.6.1. This is applicable for the entire Operations Period for the Project Highway during the entire Concession Period. Various important activities to be carried out during this stage are :

a) Regular Periodic maintenance activities

i) Renewal of the wearing surface of the road pavement once every 5 years;

ii) Strengthening course to be provided on 'as required' basis.

b) Maintenance activities arising out of the specific need(s) on account of the site conditions are:

i. Strengthening course required on account of the Benkelman Beam Deflection (B.B.D) values in excess of the prescribed criteria obtained during

regular testing as per the Concession Agreement requirement;

ii. Wearing course required on account of the IRI values higher than the prescribed criteria obtained during regular testing as per the Concession Agreement requirement;

iii. Localized repairs in short lengths less than 500 m on account of pot holes, cracking, subsidence in isolated spots or in scattered areas.”

25. It is apparent from the above that renewal of the wearing service of the road pavement was required to be done every five years in terms of Sub-Clause (i) of Clause 2.6.1 of Schedule L of the Concession Agreement as quoted above. Clause 4.1.1 requires the Concessionaire to maintain the Project Highway *“in traffic-worthy condition throughout the Concession period through regular maintenance and preventive maintenance of various items and elements of the Project Highway”*.

26. Clause 4.3.1 of the Concession Agreement sets out the minimum requirements regarding the riding quality of the pavement. The said Clause reads as under :-

“4.3.1. Pavement Riding Quality

The riding quality of the pavement shall be ensured by satisfying the minimum requirements given herein under.

i) Surface roughness of the Project Highway on completion of construction shall be 2000 mm/km as measured by vehicle mounted Bump Integrator.

- ii) Surface roughness shall not exceed 3000 mm/km during the service life of pavement at any time. A renewal coat of bituminous concrete shall be laid every 5 years after initial construction or where the roughness value reaches 3000 mm/km whichever is earlier to bring it to the initial value of 2000 mm/km.”

27. It is clear from the above that the Concession Agreement stipulated that a renewal quality of BC shall be laid every five years after the initial construction. But it did not specify the thickness of the renewal coat of BC.

28. It is also apparent that the intent of the parties was to ensure that the riding quality of the payment does not fall below the specified minimum standard. The Concessionaire was obliged to ensure the surface roughness at 2000 mm/km on completion of the construction and take periodic steps to bring it to the said level by laying a renewal coat of BC. The said renewal coat was also required to be laid if the service roughness reached the value of 3000 mm/km, notwithstanding, that the period of five years had not elapsed from the completion of the construction or the execution of such renewal work. However, in cases where the service roughness did not deteriorate below the specified threshold of 3000 mm/km, the concessionaire was required to lay a renewal coat of BC after every five years after the initial construction. The quality of the renewal coat was required to be such so as to reduce the surface roughness value to 2000 mm/km. Since the thickness of the renewal coat was not specified, it would stand to reason that the same would be such as necessary to achieve the required specifications of

service roughness of 2000 mm/km.

29. Mr Shekhar, learned counsel appearing for NHAI, referred to the opening sentence of the introductory paragraph of Schedule L that reads as under:-

“The Concession Agreement stipulates that length of Project Highway shall be constructed, operated and maintained during the Concession Period by the Concessionaire in accordance with scope defined in Schedules B & C and thereafter transferred to National Highways Authority of India (NHAI).”

30. He contended that in view of the above, the specifications as set out in Schedule B of the Concession Agreement were required to be followed. In particular, he referred to Clause 7.2 of Schedule B of the Concession Agreement which, *inter alia*, contains provisions regarding the thickness of BC to be provided as an overlay for strengthening of existing carriageway. The said clause is set out below:-

“7.2 Strengthening of Existing Pavement

The thickness for Bituminous Concrete (BC) and Dense Bituminous Macadam (DBM) to be provided as a overlay for strengthening of existing carriageway in both the homogeneous should not be less than that shown in following Table.

Overlay Thickness for Different Homogeneous Sections :-

Pavement Composition	Thickness for HS 1 (in mm)	Thickness for HS 3 (in mm)
BC	40	40

DBM – Top Layer	90	70
-----------------	----	----

Note: HS2 is Chickhallapur bypass portion

If the concessionaire desires to use geosynthetics as part of strengthening of the existing carriageway, the same shall be finalised in consultation with IC before execution of work. The above, prescribed minimum thickness for overlay shall be laid even with such special provisions.

The composition of profile corrective course shall be as follows.

- If the level difference between the underside of total overlay thickness and existing centre line level is – Up to 150 mm – PCC is by BM
- More than 150 mm and up to 300 mm – Dismantle the existing bituminous course and provide 75 mm BM + rest with WMM as PCC
- More than 300 mm and up to 500 mm – Dismantle existing bituminous course and provide 75 mm BM + 250 mm WMM + Remaining with GSB as PCC
- More than 500 mm – Reconstruction with new carriageway pavement thickness with dismantling of existing carriageway to requisite depth
- More than 1600 mm – Reconstruction with new carriageway pavement thickness without dismantling existing bituminous course.”

31. It is apparent that the Arbitral Tribunal had not accepted NHAI's aforesaid contention that Clause 7.2 of Schedule B was applicable as the said Clause provides for the specification of “*overlay for strengthening of existing carriage way*” and not for periodic maintenance for the purposes of reducing the service roughness value to 2000 mm/km. Paragraphs 59 and 60 of the impugned award clearly

indicate the same and are reproduced below:-

“59. The Respondent is relying on the Table B-4 – Pavement Composition for New Construction, Schedule B (Scope of the Project) at page 116 of CA wherein 40 mm thickness BC is shown for the wearing course. It is not in dispute that 40 mm thick BC wearing course was to be provided for new construction and accordingly it has been provided for the main carriageways. The roughness test is within the limit of prescribed 3000 mm/km. The strength of the pavement is intact and good and technically does not require any Renewal Coat. The criteria of “Do Nothing” of Flow Chart, Appendix 3.1 at p 227 of CA applies.

60. However, Clause 4.3.1 (ii) prescribes for laying a Renewal Coat of bituminous concrete every 5 years after initial construction (irrespective of whether the roughness value remains within limits). The thickness of the Renewal Coat to be applied as Periodic Maintenance is not specified in Clause 4.3.1 of Schedule L or schedule B or anywhere else in the CA. The dispute is regarding the thickness of BC to be laid as Renewal Coat.”

32. This Court is unable to accept NHAI’s contention that the Concession Agreement had expressly provided that the thickness of BC for the renewal coat to be laid in terms of Clause 4.3.1 of Schedule L of the Concession Agreement was necessarily required to be 40 mm. In any case, the Arbitral Tribunal’s view that Clause 7.2 of Schedule B was not applicable cannot be held to be patently illegal or *ex facie* contrary to the terms of the Concession Agreement.

33. It is settled that a matter of construction is within the jurisdiction of the Arbitrator and *“If the arbitrator commits an error in the construction of the contract, that is an error within his jurisdiction”* (***MSK Projects (I) (JV) Ltd. v. State of Rajasthan*, (2011) 10 SCC 573**). And, the arbitral award does not warrant any interference under Section 34 of the A&C Act on account of such errors unless the court finds that the award is vitiated by patent illegality appearing on the face of the award; the award contravenes the fundamental policy of Indian law; or conflicts with the most basic notions of morality or justice.

34. In ***Rashtriya Ispat Nigam Ltd. v. Dewan Chand Ram Saran* : (2012) 5 SCC 306**, the Supreme Court referred to its earlier decisions in ***SAIL v Gupta Brother Steel Tubes Ltd.* (2009) 10 SCC 63** and ***Sumitomo Heavy Industries Ltd. v ONGC Ltd.* (2010) 11 SCC 296** and explained that if the interpretation of the contractual clauses by the Arbitrator was *“a possible if not a plausible”* interpretation, the court would have no reason to interfere with the arbitral award.

35. In view of the above, this Court finds no infirmity with the decision of the Arbitral Tribunal in accepting the Concessionaire’s Claim for costs for the addition 10 mm of BC thickness that it was compelled to execute as a part of its periodic maintenance.

36. The next question to be addressed is whether the decision of the Arbitral Tribunal to reject NHAI’s counter claim for compensation for delay in execution of renewal coat of BC is perverse or patently illegal.

37. The Arbitral Tribunal had noted that NHAI had initially raised a counter claim quantified at ₹104,76,87,816/-, along with the Statement

of Defence. According to NHAI, it was entitled to damages in terms of Clause 18.13 of the Concession Agreement on account of default on the part of Concessionaire in operating and maintaining the Project Highway in conformity with the Concession Agreement. In terms of Clause 18.13, damages were to be calculated at the rate of ₹10,000/- per day or 0.1% per day of the costs of repairs required to cure the deficiencies. NHAI had calculated damages till November 2018 – for a delay of 1439 days – as according to NHAI, the default was continuing.

38. NHAI claimed that the Concessionaire was also required to remove the existing BC by milling or any other means, for maintaining the Finished Road Level (FRL) at the same level. NHAI contended that by laying a renewal coat of 40 mm over the existing surface, the Concessionaire had raised the FRL and had also avoided expenditure on removal of the existing BC wear course. According to NHAI, the Concessionaire was required to remove the existing course and then overlay BC of 40 mm thickness. NHAI calculated the cost of laying BC at ₹62,34,59,317/- and the cost of milling of the existing BC at ₹10,46,07,268/- thus, quantifying the total cost of laying the renewal coat at ₹72,80,66,585/-. NHAI calculated damages at the rate of 0.1% per day on the aforesaid costs for a period of 1439 days.

39. The Arbitral Tribunal noted that NHAI had sought to revise its claims by reducing it to ₹21,95,12,075/- for 433 days and further reducing it to ₹23,26,17,274/- by calculating the period of delay as 469 days.

40. The Arbitral Tribunal found NHAI's counter claim to be

unmerited for various reasons including that Clause 4.3.2 of the Concession Agreement did not apply to maintenance of the roughness requirements or renewal requirements but only to strengthen the Project Highway and therefore, was inapplicable in this case. It is not disputed that the controversy in the present case was with regard to laying of a renewal coat in terms of clause 4.3.1 of Schedule L of the Concession Agreement, which required that such renewal coat be laid once in five years.

41. Mr Shekhar did not contest the finding of the Arbitral Tribunal in this regard. He contended that since there is an admitted delay in completion of the laying of the renewal coat, the Concessionaire was liable for damages on the cost of delay for the entire period from 12.12.2014 (that is five years after COD) till actual completion, which was admittedly achieved on 27.07.2016.

42. The Arbitral Tribunal did not accept NHAI's calculation of delay as it did not take into account several factors. First, the Arbitral Tribunal held that the time taken by NHAI for deciding the thickness of the renewal coat was liable to be excluded. The final decision of NHAI directing the Concessionaire to lay 40 mm thick layer of BC was communicated on 07.04.2015 and therefore, the time prior to that was required to be excluded from the period of delay.

43. Second, the Arbitral Tribunal noted that there was no provision specifying the time for commencement and completion of the work of laying the renewal coat and therefore, a reasonable period for the same was required to be granted to the Concessionaire. The period of delay

would only commence after the said period expired. The IC had further noted that as per good industry practice the Concessionaire would require at least six months time for completion of the renewal coat with effect from 15.04.2015. In addition, at least one-and-a-half months further would be required since the monsoon season spanning three months also fell within the said period. Thus according to the IC, the work was required to be completed by 29.11.2015.

44. Third, the Concessionaire had requested for extension of time due to delay caused by *force majeure* events and the said delay was assessed by the IC to be 23 days. After accounting for the same, the entire work was required to be completed by 22.12.2015. In addition, a further grace period of 30 days levy of damages was also admissible and therefore, the damages could not be levied for the period prior to 21.01.2016.

45. Fourth, the Arbitral Tribunal noted that clause 18.12 provides that if the Concessionaire did not maintain or repair the Project Highway in accordance with the specifications and the standards and had failed to commence remedial work within 30 days from the date of the notice in this regard, NHAI would be entitled to undertake the same on its risks and costs and to recover the costs from the Concessionaire. In terms of Clause 18.13 damages would be payable from 30 days after the date of such notice. The IC had given a notice under Clause 18.13/18.14 by a notification dated 01.06.2016 for levy of damages with effect from 22.01.2016 and therefore, the period of delay was to be reckoned from 21.02.2016.

46. The Arbitral Tribunal found no fault with the IC's calculation of

the period of delay as aforesaid and accepted the same. This Court also finds no infirmity with the decision of the Arbitral Tribunal in accepting IC's assessment for the period of delay.

47. The damages on account of delay were to be levied on the quantum of work remaining unexecuted and therefore, NHAI's claim which was computed based on the entire costs of laying 40 mm thick BC, was in any event highly exaggerated. The IC assessed the cost for the remaining work and had levied damages in terms of the Concession Agreement for the period of delay commencing from 21.01.2016 till the completion on 27.07.2016. The said damages were assessed at ₹23,22,227/-. Admittedly, NHAI had accepted the said assessment at the material time; it had recovered the said amount from the Concessionaire without any reservation as to the quantum of the assessed damages.

48. In view of the above, this Court finds no infirmity with the decision of the Arbitral Tribunal to reject NHAI's counter claim for damages over and above, the damages already recovered (that is damages quantified by IC at ₹23,22,227/-).

49. In the aforesaid view, this Court finds no ground to interfere with the impugned award. The petition is accordingly, dismissed. The pending application is also disposed of.

VIBHU BAKHRU, J

AUGUST 23, 2021

nn