

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

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Reserved on: October 18, 2022
Pronounced on: November 03, 2022

+ **FAO(OS) (COMM) 103/2022**

M/S IRB GOA TOLLWAY PRIVATE LIMITED Appellant

Through: Mr. Saurabh Kirpal, Sr.
Advocate with Mr. Saket Sikri,
Mr. Apoorv Agarwal, Ms.
Terresa R. Daulat, Mr. Sarthak
Sachdev, Mr. Mohnish Patkar,
Mr. Tushar Gupta, Mr. Nikhil
Arora, Ms. Radhika Sachdeva
and Mr. Parinay Gupta,
Advocates

versus

NATIONAL HIGHWAY AUTHORITY OF INDIA Respondent

Through: Mr. S. Nanda Kumar, Ms.
Deepika Nandakumar and Mr.
Anand Murthi Rao, Advocates

+ **FAO(OS) (COMM) 165/2022 & CM APPL. 29688-29691/2022**

NATIONAL HIGHWAYS AUTHORITY OF INDIA Appellant

Through: Mr. S. Nanda Kumar, Ms.
Deepika Nandakumar and Mr. Anand
Murthi Rao, Advocates

versus

M/S IRB GOA TOLLWAY PVT. LTD Respondent

Through: Mr. Saurabh Kirpal, Sr.
Advocate with Mr. Saket Sikri,
Mr. Apoorv Agarwal, Ms.
Terresa R. Daulat, Mr. Sarthak
Sachdev, Mr. Mohnish Patkar,
Mr. Tushar Gupta, Mr. Nikhil
Arora, Ms. Radhika

CORAM:
HON'BLE MR. JUSTICE SURESH KUMAR KAIT
HON'BLE MR. JUSTICE SAURABH BANERJEE

J U D G M E N T

SAURABH BANERJEE, J.

1. Both appeals under *Section 37* of the Arbitration and Conciliation Act, 1996¹ hereinbefore filed by two respective parties under dispute arise out of the same judgment dated 21.02.2022² under *Section 34* of the Act delivered by the Learned Single Judge, whereby the Award dated 26.02.2016 passed by the Arbitral Tribunal³ has been partially modified to the extent that the *Claim no.1* granted in favour of M/s. IRB Goa Tollway Private Limited⁴ has been upheld in its entirety whereas the *Claim no.2* granted in its favour has been rejected in its entirety, in favour of the National Highway Authority of India⁵.

2. As both appeals inter-se the parties pertain to the same set of facts and documents, involve the same position of law and most importantly, arise out of the same Impugned Judgment dated 21.02.2022, they have been heard together and are being disposed of vide this common

¹ Hereinafter referred as “Act”

² Hereinafter referred as “Impugned Judgment”

³ Hereinafter referred as “The Tribunal”

⁴ Hereinafter referred as “IRB”

judgment. It is to be noted that though NHAI has challenged the complete Impugned Judgment qua both *Claim nos. 1 and 2*, the challenge by IRB is restricted to modification of *Claim no.2* by the same Impugned Judgment.

3. As per facts, in March 2008, NHAI floated a tender for operation and maintenance of four laning of Road from Goa/Karnataka border to Panaji, Goa section of NH-4A from 84.000 kilometers to 153.070 kilometers in the State of Goa under NHDP Phase-III on Built, Operate and Transfer (BOT) Toll basis and declared the consortium of M/s. IRB Infrastructure Developers Limited⁶ and M/s. Modern Road Makers Limited as the successful bidder. In furtherance thereto, vide letter dated 20.07.2009, IIDL requested NHAI for issuance of a Letter of Acceptance, and further indemnified NHAI as under:

“2. We are aware of the recent changes brought in with regard to land acquisition related pre-compliances. In this regard, we hereby indemnify NHAI for any delay caused with respect to signing of Concession Agreement due to delay arising out of completion of 3D process for 80% land acquisition.”

4. Thereafter, NHAI issued a Letter of Acceptance dated 05.01.2010. After incorporation of IRB as a Special Purpose Vehicle on 05.02.2010 by the consortium, a Concession Agreement dated 19.02.2010⁷ was executed inter-se IRB and NHAI. The relevant Clause(s) of Agreement are reproduced as under:

“4.1 Conditions Precedent

⁵ Hereinafter referred as “NHAI”

⁶ Hereinafter referred as “IIDL”

⁷ Hereinafter referred as “Agreement”

4.1.2 The Concessionaire may, upon providing the Performance Security to the Authority in accordance with Article 9, at any time after 90 (ninety) days from the date of this Agreement or on an earlier day acceptable to the Authority, by notice require the Authority to satisfy any or all of the Conditions Precedent set forth in this Clause 4.1.2 within a period of 30 (thirty) days of the notice, or such longer period not exceeding 60 (sixty) days as may be specified therein, and the conditions precedent required to be satisfied by the Authority prior to the Appointed Date shall be deemed to have been fulfilled when the Authority shall have:

(a) provided to the Concessionaire the Right of Way to the site in accordance with the provisions of Clause 10.3.1; provided that the conditions set forth in Clause 10.3.2 shall also be satisfied on or prior to the Appointed Date;

(b) Deleted

(c) procured approval of the Railway authorities in the form of a general arrangement drawing that would enable the Concessionaire to construct road overbridges/ underbridges at level crossings on the Project Highway in accordance with the Specifications and Standards and subject to the terms and conditions specified in such approval; and

(d) procured all Applicable Permits relating to environmental protection and conservation of the Site:

(e) execute and procure execution of the State Support Agreement.

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4.2 Damages for delay by the Authority

In the event that (i) the Authority does not procure fulfilment of any or all of the Conditions Precedent set forth in Clause 4.1.2 within the period specified in respect thereof, and (ii) the delay has not occurred as a result of breach of this Agreement by the Concessionaire or due to Force Majeure, the Authority shall pay to the Concessionaire Damages in an amount calculated at the rate of 0.1% (zero point one

percent) of the Performance Security for each day's delay until the fulfilment of such Conditions Precedent, subject to a maximum of 20% (twenty percent) of the Performance Security.

7.2 Representations and Warranties of the Authority

The Authority represents and warrants to the Concessionaire that:

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(d) this Agreement constitutes a legal, valid and binding obligation enforceable against it in accordance with the terms hereof;

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(i) it has the right, power and authority to manage and operate the Project Highway up to the Appointed Date;

(j) it has good and valid right to the Site, and has power and authority to grant a licence in respect thereto to the Concessionaire; and

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10.3 Procurement of the Site

10.3.2 Without prejudice to the provisions of Clause 10.3.1, the Parties hereto agree that on or prior to the Appointed Date, the Authority shall have granted vacant access and Right of Way such that the Appendix shall not include more than 50% (fifty per cent) of the total area of the Site required and necessary for the Four-Lane Project Highway, and in the event Financial Close is delayed solely on account of delay in grant of such vacant access and Right of Way, the Authority shall be liable to payment of Damages under and in accordance with the provisions of Clause 4.2.

24.1 Financial Close

24.1.1 The Concessionaire hereby agrees and undertakes

that it shall achieve Financial Close within 180 (one hundred and eighty) days from the date of this Agreement and in the event of delay, it shall be entitled to a further period not exceeding 120 (one hundred and twenty) days, subject to payment of Damages to the Authority in a sum calculated at the rate of 0.1% (zero point one per cent) of the Performance Security for each day of delay; provided that the Damages specified herein shall be payable every week in advance and the period beyond the said 180 (one hundred and eighty) days shall be granted only to the extent of Damages so paid; provided further that no Damages shall be payable if such delay in Financial Close has occurred solely as a result of any default or delay by the Authority in procuring satisfaction of the Conditions Precedent specified in Clause 4.1.2 or due to Force Majeure.

24.2 Termination due to failure to achieve Financial Close

24.2.2 Upon Termination under Clause 24.2.1, the Authority shall be entitled to encash the Bid Security and appropriate the proceeds thereof as Damages provided, however, if Financial Close has not occurred solely as a result of the Authority being in default of any of its obligations under Clause 4.1.2. it shall upon Termination, return the Bid security forthwith along with Damages, equal to 25% (twenty five per cent) thereof. For the avoidance of doubt, it is expressly agreed that if the Bid Security shall have been substituted by Performance Security, the Authority shall have been substituted by Performance Security, the Authority shall be entitled to encash therefrom an amount equal to Bid Security.

34.1 Force Majeure

As used in this Agreement the expression "Force Majeure" or "Force Majeure Event" shall mean occurrence in India of any or all of Non-Political Event, Indirect Political Event and Political Event, as defined in Clauses 34.2, 34.3 and

34.4 respectively, if it affects the performance by the Party claiming the benefit of Force Majeure (the "Affected Party") of its obligations under this Agreement and which act or event (i) is beyond the reasonable control of the Affected Party, and (ii) the Affected Party could not have prevented or overcome by exercise of due diligence and following Good Industry Practice, and (iii) has Material Adverse Effect on the Affected Party.

34.4 Political Event

A Political Event shall mean one or more of the following acts or events by or on account of any Government Instrumentality:

- (a) Change in Law, 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;*
- (b) compulsory acquisition in national interest or expropriation of any Project Assets or rights of the Concessionaire or of the Contractors;*
- (c) unlawful or unauthorised or without jurisdiction revocation of, or refusal to renew or grant without valid cause, any clearance, licence, permit, authorisation, no objection certificate, consent, approval or exemption required by the Concessionaire or any of the contractors to perform their respective obligations under this Agreement and the Project Agreements; provided that such delay, modification, denial, refusal or revocation did not result from the Concessionaire's or any Contractor's inability or failure to comply with any condition relating to grant, maintenance or renewal of such clearance, licence, authorisation, no objection certificate, exemption, consent, approval or permit;*
- (d) any failure or delay of a Contractor but only to the extent caused by and/or Political Event and which does not result in any offsetting compensation being payable to the*

*Concessionaire or on behalf of such Contractor; or
(e) any event or circumstance of a nature analogous to any
of the foregoing*

34.5 Duty to report Force Majeure Event

34.5.1 Upon occurrence of a Force Majeure Event, the Affected Party shall by notice report such occurrence to the other Party forthwith. Any notice pursuant hereto shall include full particulars of:

- (a) the nature and extent of each Force Majeure Event which is the subject of any claim for relief under this Article 34 with evidence in support thereof;*
- (b) the estimated duration and the effect or probable effect which such Force Majeure Event is having or will have on the Affected Party's performance of its obligations under this Agreement;*
- (c) the measures which the Affected Party is taking or proposes to take for alleviating the impact of such Force Majeure Event; and*
- (d) any other information relevant to the Affected Party's claim.*

34.5.2 The Affected Party shall not be entitled to any relief for or in respect of a Force Majeure Event unless it shall have notified the other Party of the occurrence of the Force Majeure Event as soon as reasonably practicable, and in any event not later than 7 (seven) days after the Affected Party knew, or ought reasonably to have known, of its occurrence, and shall have given particulars of the probable material effect that the Force Majeure Event is likely to have on the performance of its obligations under this Agreement.

34.5.3 For so long as the Affected Party continues to claim to be materially affected by such Force Majeure Event, it

shall provide the other Party with regular (and not less than weekly) reports containing information as required by Clause 34.5.1, and such other information as the other Party may reasonably request the Affected Party to provide.

34.9 Termination Payment for Force Majeure Event

34.9.3 If Termination is on account of a Political Event, the Authority shall make a Termination Payment to the Concessionaire in an amount that would be payable under Clause 37.3.2 as if it were an Authority Default.

37.3 Termination Payment

37.3.2 Upon Termination on account of an Authority Default, the Authority shall pay to the Concessionaire, by way of Termination Payment, an amount equal to

- (a) Debt Due; and*
- (b) 150% (one hundred and fifty per cent) of the Adjusted Equity.*

48.1 Definitions

"Appointed Date" means the date on which Financial Close is achieved or an earlier date that the Parties may by mutual consent determine, and shall be deemed to be the date of commencement of the Concession Period;

5. Soon, IRB apprised NHAI of having achieved the *Financial Close* in terms of Clause 24.1.2 of the Agreement vide letter dated 31.03.2010. IRB then furnished a *Performance Security* dated 30.07.2010 in terms of Agreement and informed of the same to NHAI on 02.08.2010. Thereafter, though the scheduled date of *Financial Close* was 18.08.2010, however, NHAI accepted the actual date of *Financial Close* as 03.09.2010 and vide its letter dated 20.10.2010 accepted that IRB had achieved *Financial*

Close, and requested IRB to deposit damages @ 0.1% of the *Performance Security* for each day of delay w.e.f. 18.08.2010 till the date of *Financial Close* i.e., 03.09.2010 in terms of Clause 24.1.1 of the Agreement. *In view of the said admission made by NHAI in its letter dated 20.10.2010 and in its written statement before the Tribunal, the date of Financial Close has been taken as 03.09.2010 by both the Tribunal and the Learned Single Judge.*

6. Receipt of letter dated 20.10.2010 led IRB to appoint a Statutory Auditor in concurrence with NHAI in terms of Agreement on 26.10.2010. Thereafter, NHAI appointed an Independent Engineer vide letter dated 01.11.2010 in terms of the Agreement. However, NHAI vide Notice of Termination dated 23.11.2011 terminated the Agreement as the Project could not commence. Though NHAI contended that it was due to both IRB and NHAI, *but the said contention was rejected by both the Tribunal and the Learned Single Judge.* The aforesaid led to NHAI asking demobilization of resources by IRB vide its letter dated 25.11.2011. In return, IRB submitted its claim for Rs. 267.1245 crores and Rs. 4.71 crores in terms of Clause nos. 37.3.2 and 4.2 of the Agreement alongwith relevant details vide its letter dated 06.02.2012. Hearing nothing positive, IRB finally issued a Notice of Invocation dated 25.11.2013 in terms of Clause 44.3 of the Agreement under *Section 21* of the Act, which led to the constitution of the Tribunal. Before the Tribunal, NHAI raised no claims whereas the IRB raised only two claims as under:-

- (I) ***Claim arising out of termination on account of NHAI default*** An amount of Rs. 267.1245 crores towards 150 % of adjusted equity of Rs. 178.083

crores. This claim is as per the provision of contract under article 37.3.2

- (II) Damages for delay by Authority** Under article 4.2 of the Concession Agreement, the authority is liable to pay to the Concessionaire the damages on account of delay in fulfilment of conditions as set forth in contract under article 4.1.2. The Concessionaire vide their letter dated 28.04.2011 has claimed for damages for 200 days. The amount of damages works out to $200 \text{ days} \times 0.10\% \times \text{Rs. } 23,55,00,000 = \text{Rs. } 4,71,00,000$

7. The Tribunal, after considering the rival contentions of both parties, passed a Majority Award in the following terms:-

“143. From the aforesaid discussion, the following final position emerges:

(a) In respect of claim No. 1, the claim for a sum of ₹ 196.380 crores (Rupees one hundred ninety six crores thirty eight lakhs only) is allowed.

(b) Interest from the date of termination of the Concession Agreement, that is, November 23, 2011 at the rate of 12 per cent per annum till the date of award, that is 29th February 2016 (for four(4) years and three(3) months) amounting to Rs. 100,15,38,000 (rupees one hundred crore fifteen lakhs . thirty eight thousand only) is allowed.

(c) In respect of claim No. 1, the claim for a sum of ₹ 15.69 crores (rupees thirteen crores 69 lakhs only) is rejected.

(d) In respect of claim No. 2, the claim for a sum of Rs.4,71,00,000 (Rupees Four Crores Seventy One lakhs only) is allowed.

(e) interest from the date of the demand of the Right of way, that is, April 27, 2011 at the rate of 12 per cent per annum till the date of award, that is, 29th February, 2016 (for

four(4) years and ten(10) months) amounting to Rs.2,73,18,000 (rupees two crore seventy three lakhs eighteen thousand only) is allowed.

(f) The Claimants have also paid, as per their letter dated 9th September 2015 arbitration venue charges and other expenses for 10 hearings amounting to Rs.90,426. The Claimants are entitled to 50% (fifty per cent) of the said fees and expenditure amounting to Rs.45,213 (rupees forty five thousand two hundred thirteen only). The same is allowed to the Claimants.

(g) Thus, the Respondents are liable to pay to the Claimants a total sum of Rs. 303,98,01,213 (rupees three hundred three crore ninety eight lakhs one thousand two hundred thirteen only). The said amount shall be paid within 30 days from the date of receipt of this Award. If the Respondents fail to pay the same, the Respondents shall be liable to pay interest at the rate of 12% (twelve per cent) on the total amount of Rs. 303,98,01,213 from the date of Award till the date of payment.

(h) All other claims and counter claims, if any, not specifically dealt with herein shall be treated as rejected.

(i) The Parties to bear their own cost of these arbitration proceedings.”

8. Being aggrieved, NHAI filed objections under *Section 34* of the Act before the Learned Single Judge. Based on the documents, it transpires that before the Tribunal and the Learned Single Judge, NHAI primarily contended that as IRB had failed to pay penalty/damages in terms of Clause 24.1.1 of the Agreement, no *Financial Close* had taken place and the *Appointed Date* was never fixed by NHAI and thus the *Concession Period* was yet to commence. NHAI next contended that the Agreement was terminated on account of non-fulfillment of conditions precedent by

both parties, which had not been waived by NHAI and that the termination was valid. NHAI also contended that merely achieving *Financial Close* did not amount to fixation of *Appointed Date* and IRB had not achieved the said *Financial Close* till the termination of the Agreement by NHAI on 23.11.2011. Lastly, relying upon Clause 34 of the Agreement, NHAI contended that the Agreement was terminated as there was a failure on behalf of both parties to fulfil the Conditions Precedent owing to *force majeure*.

9. After hearing both parties, the learned Single Judge vide the Impugned Judgment upheld the award qua *Claim no.1* but modified the award qua *Claim no.2* in view of the two claims being severable. This has led to filing of the appeals under *Section 37* of the Act by both parties.

10. While examining the case of NHAI as set out in its appeal, we find that of the many grounds raised by NHAI, however, learned counsel for NHAI primarily restricted his arguments by placing reliance upon the letter dated 20.07.2009 issued by IRB wherein it had indemnified “...*NHAI for any delay caused with respect to signing of Concession Agreement*” to contend that IRB was not entitled to any claims and thus the Award rendered by the Tribunal and the Impugned Judgement passed by the Learned Single Judge are bad in law.

11. Learned counsel for NHAI contended that IRB failed to deposit the applicable damages @ 0.1% of the *Performance Security* for delay of each day as IRB was to achieve the actual date of *Financial Close* in terms of Agreement by 18.08.2010 whereas the same was achieved only on 03.09.2010. Learned counsel for NHAI also contended that a bare perusal

of the Notice of Termination dated 23.11.2011 issued by NHAI clearly bears out that there was a default on the part of IRB as well. Thus, for both these reasons, NHAI was entitled to this amount in terms of Clause 24.1.1 of the Agreement.

12. Learned counsel for NHAI further contended that while passing the Majority Award, the Tribunal wrongly placed reliance upon the latest figures provided in the statement dated 21.08.2015 by the Statutory Authority as they are unsubstantiated. Lastly, placing reliance upon the Minority Award, learned counsel for NHAI contended that the said award rightly granted relief of only 9.344 Crores to the IRB as IRB was not entitled to any amount as fixed overheads because neither any work of the Project had commenced nor any *Appointed Date* had been declared as yet. Thus, for the reasons above, IRB was not entitled to the reliefs as claimed.

13. To substantiate his arguments, learned counsel for NHAI relied upon *MMTC Limited vs. Vedanta Limited*⁸; *Haryana Tourism Limited vs. Kandhari Beverages Limited*⁹ and *State of Chhattisgarh & Anr. vs. Sal Udyog Private Limited*¹⁰ to contend that under *Section 37* of the Act, this Court had ample powers to interfere with the impugned judgment under appeal.

14. Learned senior counsel for IRB on the other hand, to controvert the arguments of learned counsel for NHAI, has drawn our attention to the limited scope of challenge under *Section 37* of the Act and has contended that the present appeal of NHAI is not maintainable and the Impugned

⁸ (2019) 4 SCC 163

⁹ (2022) 3 SCC 237

¹⁰ (2022) 2 SCC 275

Judgement calls for no interference by this Court. In support of his arguments, learned senior counsel has relied upon the judgement passed by this Court in *M/s Shine AD.(Through Its Proprietor Shri Digvijay Singh) vs North Delhi Municipal Corporation*¹¹.

15. After hearing (senior) counsels for both parties at considerable length and adverting to the various documents on record, this Court is of the view that the letter dated 20.07.2009 is of no assistance to NHAI as the same has since lost its sheen as it was pertaining to a limited period, i.e., till the execution of Agreement only and since there was no mention thereof in the Agreement, it stood overridden. In any event, the said letter dated 20.07.2009 had nothing to do with the claims of IRB.

16. This Court finds that a perusal of the Notice of Termination dated 23.11.2011 issued by NHAI reveals that there was no default on the part of IRB as it clearly stated that “...*despite best efforts of NHAI, the project cannot be started...*”. Further it has been acknowledged by NHAI in its own letter dated 22.10.2010 and the written statement filed before the Tribunal that *Financial Close* had been achieved by IRB on 03.09.2010. Thus, all correspondences, which were otherwise, inter-se the parties are of no relevance. The *Appointed Date* has been specifically defined in the Agreement as being the actual date of *Financial Close*. In view thereof, as per NHAI, *Financial Close* had been achieved on 03.09.2010 and thus by operation of Clause 48.1 of the Agreement, the *Appointed Date* was also the same, i.e., 03.09.2010. In terms of the said Clause 48.1 of the

¹¹ [Order dated 08.07.2022 in FAO(COMM) 97/2022]

Agreement, the *Appointed Date* automatically came into existence on achievement of *Financial Close*. There is nothing wrong in that.

17. Thus, for the above reasons, NHAI could not be entitled to the amount in terms of Clause 24.1.1 of the Agreement. Further, it is a matter of fact that NHAI never raised any Counter Claim before the Tribunal at any stage.

18. This Court finds that NHAI cannot dispute the figures provided in the statement by the Statutory Authority which forms the basis of *Claim no.1* as the said Statutory Authority was appointed by IRB vide letter dated 26.10.2010, after the concurrence of NHAI in terms of Clause 33.2.1 of the Agreement. As such the said figures cannot be faulted with. Furthermore, NHAI is estopped from raising any new contentions, especially as they never raised prior to the commencement of proceedings, more so, whence it had never challenged the quantification thereof at any stage.

19. Interestingly all the above contentions raised by NHAI were also raised before the Tribunal and the learned Single Judge and both the said forums have returned concurrent findings denying them.

20. Traversing to the settled law qua maintainability of an appeal under *Section 37* of the Act, it is trite law that in an appeal under *Section 37* of the Act, the Court is required to tread on an extremely narrow trail, carefully, without any deviations, and with a particularly myopic view. Under *Section 37* of the Act, the Court is not to and in fact cannot go into the merits or demerits of the claims but is only to remain bound within the confines of what has been held in the impugned judgment under *Section*

34 of the Act. According to us, the present appeal is beyond the confines of *Section 37* of the Act for the reasons that the grounds urged by NHA for setting aside the Award under *Section 34* are identical to those urged by it before the two earlier forums, and which have been rejected by speaking order(s) on both occasions. Before this Court, NHA has been unable to urge anything new or different to show any fault with the Impugned Judgment. This Court in *Shine (supra)*, while dealing with the scope of *Section 37* of the Act under similar circumstances, while discussing the settled position of law, has held as under:-

“16. Before advertizing and giving our finding upon the facts of this case, we wish to summarize the established position of law with respect to Section 37 of the Act. It is trite law that the scope of an appeal under Section 37 of the Act is extremely limited. It is an established position that while entertaining appeals under Section 37 of the Act, the Court is not to sit as a court of appeal and is not to reappraise or reassess the evidence or interfere with the findings of the arbitrator and thus such interference by the Court is uncalled for. In fact, the Court is to intervene in few circumstances only like in case of fraud and bias by the arbitrator, violation of principles of natural justice, etc, and cannot correct errors in the arbitral award. Further, as per the Act, the Court has to play only a supervisory role for review to ensure fairness.”

“17. Moreover, an arbitral award can be interfered only whence the finding therein is based on “no evidence” or the arbitrator has wrongly taken into account something irrelevant to the decision arrived at or when any vital evidence has been ignored while arriving at the decision. An Award can be said to be against justice only when it shocks the conscience of the Court or it is in contravention of any of the substantive provisions of law of India or it is in

contravention of any of the provisions of the Act or it is in contravention of any of the terms of the Contract in dispute before the arbitrator or it is patently illegal or prejudicial to the rights of the parties.”

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“21. We find that in both these appeals also the learned counsel for the appellant posits the identically similar contentions as those agitated by him before the learned trial Court. Interestingly, on a bare perusal of both the arbitral awards and the impugned orders before us, we note that the appellant is guilty of pleading and raising fresh/new arguments before the learned trial court and before this Court for the first time, and that they were neither a part of the pleadings pleaded nor were part of arguments raised before the learned arbitrator. We also note that all the objections raised by the learned counsel for the appellant before the learned trial court have already been heard, deliberated and finally decided by the learned trial court vide the two well-reasoned and detailed impugned orders before us. We concur with the well-reasoned findings of the learned trial court in the impugned orders.”

“22. In view of the aforesaid discussion and settled law of the land, we find no infirmities, illegality in the impugned orders passed by the learned trial court which require interference in the present appeal. We, thus hold that the appellant has failed to make out a case for this Court to interfere under the provisions of Section 37 of the Act and also reiterate that the learned counsel for the appellant has merely agitated the same objections, already heard and rejected by the learned trial court vide its impugned orders, once again before this Court. Thus, the learned counsel for the appellant has failed to make out a case for the maintainability of the appeals under Section 37 of the Act.”

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“25. In view of the provisions of Section 19 of the Act, the aforesaid contentions of the learned counsel for the

appellant are bereft of any credence as the appellant had never raised any iota of doubt over the manner and/or the procedure adopted by the learned arbitrator at any point of time during the arbitration proceedings and in fact, willingly participated therein for more than two years until passing of the impugned arbitral awards. The appellant cannot approbate and reprobate and try to unwind the clock by raising new found issues after facing defeat before the learned arbitrator by agitating fresh grounds in the petition under Section 34 of the Act or in the appeal under Section 37 of the Act.”

21. This Court also ably finds support in **MMTC Limited** (*supra*), cited by learned counsel for NHAI, wherein it has been held as under:-

“10. Before proceedings further, we find it necessary to briefly revisit the existing position of law with respect to the scope of interference with an arbitral award in India, though we do not wish to burden this judgment by discussing the principles regarding the same in detail. Such interference may be undertaken in terms of Section 34 or Section 37 of the Arbitration and Conciliation Act, 1996 (for short “the 1996 Act”). While the former deals with challenges to an arbitral award itself, the latter, inter alia, deals with appeals against an order made under Section 34 setting aside or refusing to set aside an arbitral award.”

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“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 37 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 37 and by

the Court in an appeal under Section 37, this Court must be extremely cautious and slow to disturb such concurrent findings.”

22. Further reliance is placed upon ***Haryana Tourism Limited (supra)***, cited by learned counsel for NHAI, wherein it has been held as under:-

“8. In an appeal under Section 37 of the Arbitration Act, the High Court has entered into the merits of the claim, which is not permissible in exercise of powers under section 37 of the Arbitration Act.”

“9. As per settled position of law laid down by this Court in a catena of decisions, an award can be set aside only if the award is against the public policy of India. The award can be set aside under Sections 34/37 of the Arbitration Act, if the award is found to be contrary to: (a) fundamental policy of Indian law; or (b) the interest of India; or (c) justice or morality; or (d) if it is patently illegal. None of the aforesaid exceptions shall be applicable to the facts of the case on hand. The High Court has entered into the merits of the claim and has decided the appeal under Section 37 of the Arbitration Act as if the High Court was deciding the appeal against the judgment and decree passed by the learned trial court. Thus, the High Court has exercised the jurisdiction not vested in it under Section 37 of the Arbitration Act.”

23. As per the settled position of law and when two forums below, i.e., the Tribunal and the learned Single Judge, have returned concurrent findings in favour of IRB and against NHAI, there is no further requirement of this Court to again return findings which are contrary thereto. More so, whence this Court is in complete concurrence with the reasoning and findings of the Tribunal/Court below and there is nothing to shock the conscience of this Court under *Section 37* of the Act. Further,

NHAI cannot be permitted to reagitate the same issues repeatedly, especially when they are contrary to its own documents and whence it has never denied the existence thereof.

24. In view of the above, reliance by learned counsel for NHAI upon *MMTC Limited (supra)* and *Haryana Tourism Limited (supra)* are misplaced in as much as they pertain to cases where there is a possibility of two or more plausible views. Similarly, *State of Chhattisgarh & Anr. (supra)* is also not applicable to the facts of the present case as it pertains to a situation arising under *Section 34(2A)* of the Act.

25. In view of the observations made hereinabove, we agree with the reasoning and finding of the learned Single Judge qua *Claim no.1* and thus the same is upheld.

26. Next, while examining the case of IRB as set out in its appeal, we find that the learned senior counsel for IRB has restricted his arguments to the sole ground of *Claim no.2* being disallowed, contending that the same is in contravention of settled law and that it has been wrongly held by learned Single Judge that IRB has been enriched twice.

27. In support of his arguments, learned senior counsel relied upon *UHL Power Company Limited vs State of Himachal Pradesh*¹²; *Delhi Airport Metro Express Private Limited vs Delhi Metro Rail Corporation Limited*¹³ and *Haryana Tourism Limited (supra)* to contend that in an appeal under *Section 34* or *Section 37* of the Act, it is impermissible for the Court to reappreciate evidence and that when two plausible

¹² (2022) 4 SCC 116

¹³ (2022) 1 SCC 131

interpretations of the Award are possible, fault cannot be found with the tribunal if it proceeds to accept any one of the two interpretations.

28. Per contra, learned counsel for NHAI contended that IRB cannot be enriched for the same period twice over again and has thus argued that the modification of *Claim no.2* by the learned Single Judge was required and was rightly done.

29. Adverting to the aforesaid sole issue raised by IRB, in our view though the said *Claim no.2* raised by IRB is arising from Clause 4.1.2 of the Agreement, however, as the same is pertaining to the same period as covered in *Claim no.1* for which the Statutory Authority has already issued a statement and based whereupon the *Claim no.1* has already been allowed in favour of IRB, granting the *Claim no.2* will tantamount to double enrichment. There would be an overlapping of the two reliefs if *Claim no.2* is allowed.

30. As IRB was always aware of the practical situation on ground, i.e., the NHAI had not been able to procure the Right of Way in terms of the Agreement, it would be a travesty of justice if IRB is allowed to reap dual benefits for the same period. During the period when there was no work, idle machinery, investments etc., IRB was free to terminate the Agreement, which it did not do and instead chose to continue with the Agreement. This cannot render it to take benefit for the same period, more so, as it is not the case of IRB that NHAI had called upon it or pressurized it to continue with the Agreement. This Court finds nothing wrong with the modification of *Claim no.2* by the learned Single Judge and the same is within the permissible confines of *Section 34* of the Act.

31. The reliance of the learned senior counsel for IRB on *UHL Power Company Limited (supra)*, *Delhi Airport Metro Express Private Limited (supra)* and *Haryana Tourism Limited (supra)* is also misplaced, as according to us, though there can be no denial to the propositions of law as laid down in the aforesaid judgements, however, the same are not applicable to the facts of the present case as the learned Single Judge has not reappreciated any evidence to modify the Arbitral Award and further the view expressed by the Learned Single Judge in the Impugned Judgement qua *Claim 2* was the only and not one of the possible/plausible views.

32. In view thereof we agree with the reasoning and modification of the learned Single Judge qua *Claim no.2* and thus the same is upheld.

33. Accordingly, the appeals before us are not fit for this Court to interfere and/or exercise jurisdiction under *Section 37* of the Act as they are not falling/covered within the ambit/confines thereof.

34. In view of the aforesaid, both the appeals, being filed by NHA and IRB respectively are dismissed, both under law and on facts. The pending application(s), if any, also stand dismissed.

35. The parties to bear their own costs.

(SAURABH BANERJEE)
JUDGE

(SURESH KUMAR KAIT)
JUDGE

NOVEMBER 03, 2022/rr