



2023:DHC:8818



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* IN THE HIGH COURT OF DELHI AT NEW DELHI

Date of pronouncement: 11 December 2023

+ O.M.P. (COMM) 540/2020 & I.A. 10478/2020, I.A. 10479/2020, I.A. 10480/2020

NATIONAL HIGHWAY AUTHORITY OF INDIA (NHAI)

..... Petitioner

Through: Mr. Shlok Chandra, Adv.

versus

GVK JAIPUR EXPRESSWAY PVT. LTD. Respondent

Through: Mr. Gopal Jain, Sr. Adv. with
Mr. Devashish Bharuka, Mr. Ravi Bharuka
and Ms. Taniya Bansal, Adv.**CORAM:****HON'BLE MR. JUSTICE C. HARI SHANKAR****J U D G M E N T****11.12.2023**

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1. The National Highways Authority of India (NHAI), by means of the present petition under Section 34 of the Arbitration and Conciliation Act, 1996 (the 1996 Act) assails an award dated 6 February 2020, passed by a learned three-member Arbitral Tribunal, whereby the respondent, GVK Jaipur Expressway Pvt. Ltd. (GVK), has been awarded ₹ 21,75,45,640/- along with costs of ₹ 44,76,775/-.

Facts



2. On 3 May 2000, proposals were invited by NHAI from interested bidders for expanding and widening a stretch of the Jaipur-Kishangarh section of NH-8 (“the Project Highway”). The bid offered by a consortium of GVK International NV and M/s B. Seenaiiah and Company (Project) Ltd. was accepted by NHAI *vide* a letter of acceptance (LoA) dated 1 March 2002.

3. As required by the LoA, GVK was incorporated by the consortium to enter into a Concession Agreement (CA) with NHAI. On 8 May 2002, NHAI and GVK entered into the CA for execution of the work of widening of the Project Highway on build, operate and transfer (BOT) basis.

4. The following clauses of the CA are relevant:

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

(b) references to Indian law shall include the laws, acts, ordinances, notifications, rules, regulations, or bye laws which have the force of law in any State or Union Territory forming part of the Union of India.

1.4.2 In case of ambiguities or discrepancies within this Agreement the following shall apply:

(i) between two Clauses of this Agreement, the provisions of the specific clause relevant to the issue under consideration shall prevail over those in other Clauses;

3.1 Subject to and in accordance with the terms and conditions set forth in this Agreement, NHAI hereby grants to the



Concessionaire and the Concessionaire hereby accepts the concession for a period of 20 (twenty) years commencing from the Appointed Date. Including the exclusive right, license and authority during the subsistence of this Agreement to implement the Project and the Concession in respect of the Project Highway.

3.2 Subject to and in accordance with the terms and conditions set forth in this Agreement, the Concession hereby granted shall entitle the Concessionaire to enjoy, and oblige the Concessionaire to undertake the following in accordance with the provisions of this Agreement, the Applicable Laws and the Applicable Permits:

- (i) to develop, design, engineer, finance, procure, construct, operate and maintain the Project Highway during the Concession Period;
- (ii) upon completion of the Project Highway and during the Operations Period to manage, operate & maintain the Project Highway and regulate the use thereof by third parties;
- (iii) levy, demand, collect and appropriate the Fee from vehicles and persons liable to payment of Fee for using the Project Highway or any part thereof and refuse entry of any vehicle to the Project Highway if the due Fee is not paid;
- (iv) perform and fulfill all of the Concessionaire's obligations under this Agreement;
- (v) bear and pay all expense, costs and charges incurred in the fulfillment of all the Concessionaire's obligations under this Agreement;
- (vi) not to assign or create any lien or Encumbrance on the Concession hereby granted or on the whole or any part of the Project Highway nor transfer, lease or part possession therewith save and except as expressly permitted by this Agreement or the Substitution Agreement.

6.1 The Concessionaire shall be entitled during the Operations Period to levy, collect and appropriate the Fee from the users of the Project Highway pursuant to and in accordance with the Fee Notification set forth in Schedule 'G' and this Agreement.



Provided, however, that such Fee shall be rounded off to the nearest Five Rupees for ensuring ease of payment and collection.

VII Concession Fee and Excess Revenue Sharing

7.1 In consideration of the grant of Concession under this Agreement the Concessionaire agrees to pay a fee of Rupee one per annum (“Concession Fee”). The Concession Fee shall be paid in advance with in 90 (ninety) days of the commencement of the year for which it is due and payable.

7.2 Concessionaire shall share with NHAI any fee that it actually receives in any Accounting year which are in excess of the projected Fee for each Accounting Year commencing from the year in which COD shall occur, as set out in Schedule “Y” (the “Projected Fee”) for such Accounting Year (“Excess Fee”) in the following manner;

7.2.1. 80% of such Excess Fee (“Net Excess Fee”) shall be deposited into a separate sub-account as part of the Escrow arrangements on a monthly basis;

7.2.2 Subject to Sub-Clause 7.2.3 below funds from this sub-account shall be used to meet any shortfalls in Projected Fee that have arisen in any of the previous months of the Accounting Year or that may arise in any of the remaining months of the Accounting Year.

7.2.3 At the end of the Accounting Year, the Net Excess Fee less any funds used in accordance with Sub-clause 7.2.2 above shall be distributed equally between the parties hereto;

For the purposes of this Clause 7.2, a “shortfall” or “excess” in Projected Fee shall mean the difference between the Projected Fee in an Accounting Year, and the Realisable Fee on a monthly basis assuming a uniform monthly Fee projection.

7.2.4. Upon Termination, any amount left in the account referred to in para 7.2.1 above shall be distributed equally between NHAI and the Concessionaire.

7.3 The NHAI’s share of Net Excess Fee, if any, pursuant to Clause 7.2 above (“Excess Revenue Share”) shall be paid within 30 (thirty) days of the commencement of the Accounting Year



immediately following the Accounting Year for which it is due and payable.

16.4 Upon the Independent Consultant determining the Tests to be successful and all parts of the Project Highway to have been completed and the Project Highway can be legally safely and reliably placed in commercial operations, the Independent Consultant shall forthwith issue to the Concessionaire and NHAI a Certificate substantially in the form set forth in Schedule 'K' ("the Completion Certificate").

20.7 If either party disputes any advice, instruction on award of the Independent Consultant, the dispute shall be resolved in accordance with the Dispute Resolution Procedure.

29.1 Force Majeure Event: As used in this Agreement, a Force Majeure Event shall mean occurrence in India of any or all of Non Political Event/Indirect Political Event and/or Political Event as defined in Clauses 29.2, 29.3 and 29.4 respectively hereinafter which prevent the Party claiming Force Majeure (the "Affected Party") from performing its obligations under this Agreement and which act or event is (i) beyond the reasonable control and not arising out of the fault of the Affected Party, (ii) the Affected Party has been unable to overcome such act or event by the exercise of due diligence and reasonable efforts, skill and care, including through expenditure of reasonable sums of money and (iii) has a Material Adverse Effect on the Project.

29.3 Indirect Political Force Majeure Events: For purposes of Clause 29.1, Indirect Political Event shall mean one or more of the following acts or events;

- (i) an act of war (whether declared or undeclared), invasion, armed, conflict or act of foreign enemy, blockade, embargo, riot, insurrection, terrorist or military action, civil commotion or politically motivated sabotage which prevents collection of Fee by the Concessionaires for a period exceeding a continuous period of 7 (seven) days in



an Accounting Year,

(ii) radioactive contamination or ionizing radiation;

(iii) industry wide or state wide or India wide strikes or industrial action which prevent collection of Fee by the Concessionaire for a period exceeding a continuous period of 7 (seven) days in an Accounting year or

(iv) any public agitation which prevents collection of Fee by the Concessionaire for a period exceeding a continuous period of 7 (seven) days in an Accounting Year.

29.4 Political Force Majeure Events: For purposes of Clause 29.1, Political Event shall mean one or more of the following acts or events by or on account GOI, NHAI, GOR or any other Governmental Agency:

(i) Change in Law, only when provisions of Article XXXVI cannot be applied;

(ii) expropriation or compulsory acquisition by any Governmental Agency of any Project Assets or rights of the Concessionaire or of the Contractors; or

(iii) unlawful or unauthorized or without jurisdiction revocation of, or refusal to renew or grant without valid cause any consent or approval required by the Concessionaire or any of the Contractors to perform their respective obligations under the Project Agreements (other than a consent the obtaining of which is Condition Precedent) 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 consents or permits.

29.6 Effect of Force Majeure Event after Financial Close: Upon occurrence of any Force Majeure Event after Financial Close, the following shall apply:

(a) There shall be no Termination of this Agreement except as provided in Clause 29.8;



(b) Where the Force Majeure Event occurs before COD, the dates set forth in the Project Completion Schedule, and the Concession Period shall be extended by the period for which such Force Majeure Event shall subsist;

(c) Where a Force Majeure Event occurs after COD, the Concessionaire shall continue to make all reasonable efforts to collect Fee, but if he is unable to collect Fee during the subsistence of such Force Majeure Event, the Concession Period shall be extended by the period for which collection of Fee remains suspended on account thereof and

(d) Costs arising out of or concerning such Force Majeure Event shall be borne in accordance with the provisions of Clause 29.7.

29.7 Allocation of costs during subsistence of Force Majeure: Subject to the provisions of clause 29.6; upon occurrence of a Force Majeure Event after Financial Close, the costs arising out of such event shall be allocated as follows:

(a) When the Force Majeure Event is a Non Political Event, the Parties shall bear their respective costs and neither Party shall be required to pay to the other Party any costs arising out of any such Force Majeure Event.

(b) Where the Force Majeure Event is an Indirect Political Event, the costs attributable to such Force Majeure Event and directly relating to the Project (the "Force Majeure Costs") shall be borne by the Concessionaire to the extent of the Insurance Claims, and to the extent such Force Majeure Costs exceed the Insurance claims, one half of the same to the extent actually incurred and duly certified by the statutory Auditors of Concessionaire shall be reimbursed by NHAI to the Concessionaire in one lump sum or paid in three equal annual installments with interest @ SBI PLR plus two percent and,

(c) Where the Force Majeure Event is a Political Event, the Force Majeure Costs to the extent actually incurred and certified by the Statutory Auditors or Concessionaire shall be reimbursed by NHAI to the Concessionaire in one lump sum or paid in three equal annual installments with interest @ SBI PLR plus two



percent, provided that no Force Majeure Costs shall be payable by NHAI if the Concession Period is increased under Clause 29.6.

For avoidance of doubt, Force Majeure Costs shall not include loss of Fee revenues or any debt repayment obligations but shall include interest payments on such debt, O&M Expenses and all other costs directly attributable to the Force Majeure Event.

31.2 In the event of NHAI being in material default of this Agreement and such default is cured before Termination, NHAI shall pay to the Concessionaire as compensation, all direct additional costs suffered or incurred by the Concessionaire arising out of such material default by NHAI, in one lumpsum within 30 (thirty) days of receiving the demand or at NHAI's option in 3 (three) equal semi-annual installments with interest @ SBI PLR plus 2% (two percent).

34.6 Not less than 9 months nor more than 12 months prior to the expiry of the Concession Period, the Concessionaire and the Independent Consultant shall conduct a joint inspection (the "Second Inspection") of all elements of the Project Highway and Project Facilities (whether or not the Renewal Works have been carried out).

34.7 Within 30 days after the completion of the Second Inspection, the Concessionaire shall provide to the Independent Consultant a report on the condition of the Project Highway and Project Facilities and a notice setting out any revisions or additions to the renewal works required in order to ensure compliance with the Divestment Requirements.

XXXVI. CHANGE IN LAW

36.1 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 Rs. 10 million (Rupees ten million) in any Accounting Year, the Concessionaire may notify NHAI and propose amendments to this Agreement so as to put the Concessionaire in the same financial



position as it would have occupied had there been no such Change in Law resulting in such cost increase, reduction in return or other financial burden as aforesaid. Upon notification by the concessionaire as aforesaid, the Parties shall meet as soon as reasonably practicable but no later than 30 (thirty) days and either agree on amendments to this Agreement or on alternative arrangements to implement the foregoing.

Provided that if no agreement is reached as aforesaid by the Parties within 90 (ninety) days of the meeting pursuant to this Clause 36.1, the Concessionaire may by notice in writing require NHAI to pay an amount that would put the Concessionaire in the same financial position it would have occupied had there been so such Change in Law resulting in such cost increase, reduction in return or other financial burden as aforesaid. Such notice shall be accompanied by necessary particulars duly certified by the Statutory Auditors of the Concessionaire. NHAI shall make payment of such compensation within 15 (fifteen) days of receiving such notice or with interest @ SBI PLR if the payment thereof is delayed beyond such 15 (fifteen) days. If NHAI shall dispute the quantum of such compensation claim of the Concessionaire, the same shall be finally settled in accordance with the Dispute Resolution Procedure.

36.2 If as a result of Change in Law, the Concessionaire enjoys a reduction in costs or increase in net after tax return or other financial benefit, the aggregate financial effect of which exceeds Rs.10 million (Rupees ten million) in any Accounting Year, NHAI, may so notify the Concessionaire and propose amendments to this Agreement so as to put the Concessionaire in the same financial position as it would have occupied had there been so such Change in Law resulting in such decreased cost, increase in return or other financial benefit as aforesaid. Upon notification by the NHAI as aforesaid, the Parties shall meet as soon as reasonably practicable but no later than 30 (thirty) days and either agree on such amendments to this Agreement or on alternative arrangements to implement the foregoing.

Provided that if no agreement is reached as aforesaid by the Parties within 90 (ninety) days of the meeting pursuant to this Clause 36.2, NHAI may by notice in writing require the Concessionaire to pay an amount that would put the Concessionaire in the same financial position it would have occupied had there been no such Change in Law resulting in such decreased cost, increase in return or other financial benefit as aforesaid. Such notice shall be accompanied by necessary particulars duly certified by the NHAI Representative. The Concessionaire shall make such payment within 15 (fifteen)



days of receiving such notice or with Interest @ SBI PLR if the payment is delayed beyond such 15 (fifteen) days. If the Concessionaire shall dispute such claim of NHAI, the same shall be finally settled in accordance with the Dispute Resolution Procedure.

36.3 Notwithstanding anything to the contrary contained in this Agreement, NHAI shall not be liable to reimburse to the Concessionaire any sums on account of any Change in Taxes if the same are recoverable from the users of the Project Highway or if the aggregate financial effect of such changes in any Accounting Year is less than or equal to Rs.10 million (Rupees ten million).”

5. On 20 October 2005, Mr. Louis Berger & Co, the Independent Consultant (IC) of NHAI issued the Final Completion Certificate under Clause 16.4 of the CA, certifying successful completion and testing of the project and that it was ready for commissioning traffic commercially.

6. In terms of the CA, GVK commenced levying and collecting toll fee from users of the Project Highway. The CA entitled GVK to collect toll fee till 17 March 2023.

7. On 8 November 2016, the Department of Economic Affairs (DEA) in the Ministry of Finance (MoF) issued Notification SO 3407 (E) under Section 26(2)¹ of the Reserve Bank of India Act, 1934,

¹ 26. **Legal tender character of notes. –**

(1) Subject to the provisions of sub-section (2), every bank note shall be legal tender at any place in India in payment or on account for the amount expressed therein, and shall be guaranteed by the Central Government.

(2) On recommendation of the Central Board the Central Government may, by notification in the Gazette of India, declare that, with effect from such date as may be specified in the notification, any series of bank notes of any denomination shall cease to be legal tender save at such office or agency of the Bank and to such extent as may be specified in the notification.



declaring that, w.e.f. 9 November 2016, bank notes of denomination of ₹ 500/- and ₹ 1000/- would cease to be legal tender.

8. On 9 November 2016, the Ministry of Road Transport and Highways (MoRTH) wrote to NHAI, conveying the decision that toll collectors at toll plazas and highways would be permitted to accept notes of ₹ 500/- and ₹ 1000/- denominations till the mid-night of 11 November 2016. NHAI was, therefore, advised to issue appropriate instructions to all concessionaires and other toll collection agencies.

9. This was immediately followed by a second communication from the MoRTH to NHAI, conveying the decision of the Government to completely suspend collection of toll fee at toll booths till the mid-night of 11 November 2016. The letter, however, envisaged suitable compensation being paid to toll operators in that regard. It read as under:

“DO No. 277/Secretary...

Dated: 9th November 2016

Dear Sir

Further to Secretary (RT&H's) letter of even number dated 9 November 2016, on the subject of instructions issued by Ministry of Finance on 8 November 2016, about currency notes of the denominations of ₹ 500 and ₹ 1000 being no longer legal tender from midnight of 8/11/2016, the position was revisited by the Minister (RT&H).

2. There is considerable feedback that there are huge queries on the toll plazas hence it has been decided that toll collection may be suspended till the mid night of 11/11/2016. It has also been decided that the toll operators would be required to be suitably compensated.



2023:DHC:8818



With regards,

Yours sincerely,

Sd/-
(Dakshita Das)

Shri Raghav Chandra,
Chairman,
(National Highway Authority of India)
New Delhi.”

10. These communications were forwarded by the Project Director, NHAI to GVK on the very same day.

11. In compliance therewith, w.e.f. 6 p.m. on 9 November 2016, fee collection at the toll plazas on the project highway stood suspended.

12. *Vide* letter dated 11 November 2016, addressed to NHAI, the MoRTH conveyed the decision of the Government to continue to suspend the collection of toll at toll plazas till midnight of 14 November 2016. This decision was also communicated to GVK by the Project Director, NHAI, on the same day.

13. On 14 November 2016, NHAI addressed the following communication to GVK, apropos the decision of the DOE to demonetize ₹ 500/- and ₹ 1,000/-, stating that *ad hoc* payment of compensation to the concessionaire which were adversely impacted as a result of the said decision was being worked out, and requiring GVK to raise its invoices so that interim payments could be made:



2023:DHC:8818



“From: Chairman (NHAI)

Sent: 14 November 2016 15:28

To: ‘T.S. Venkatesan’

Cc: ‘NHBF’, ‘nhbdfdelhi@gmail.com’ ‘nirajverma@nhai.org’,
Singhal Udeep K, GM (Tech), Delhi; Navin Kumar Chaurasia,
DGM(T)

Subject: RE: Demonetization Impact and guidance to Tolled
National/State Highways

Importance: High

- 1) Toll exempted till 18th Friday midnight.
- 2) Compensation; adhoc payment being worked out. Please
send invoice so that interim payment can be released.
- 3) Announcement: Any harassment of toll plaza staff or by
toll plaza staff of public will be viewed seriously.
- 4) Copy of this to be sent to all concessionaires.

With kind regards

Raghav Chandra, IAS
Chairman, NHAI”

14. Suspension of collection of tolls was, thereafter, successively extended by the MoRTH, and communicated by NHAI to GVK, till 24 November 2016, *vide* communications dated 14 November 2016, 17 November 2016 and 18 November 2016. No toll fee was, therefore, collected by GVK during this period. However, interim invoices for payment were submitted by GVK to NHAI on 16 November 2016, 19 November 2016, 21 November 2016, 28 November 2016, 7 December 2016 and 2 January 2017, quantifying

OMP(COMM) 540/2020

Page 13 of 76



the compensation to which it was entitled for the loss suffered by it as a result, working out to a total of ₹ 21,75,45,640/-.

15. On 24 November 2016, MoRTH wrote to NHAI, stating that toll collection could commence from the midnight of 2 December 2016. NHAI, on the same date, communicated the said decision to GVK.

16. On 29 November 2016, NHAI issued the following office order:

“No. NHAI/CGM/BOT (FIN02016-17

Date: 29.11.2016

Office Order

Sub: Suspension of collection of user fee at toll plazas on NHs due to demonetization of Rs. 500 and Rs. 1000 notes – Immediate relief to be provided to BoT (Toll) Concessions.

Ref.: No. NH-24028/19/2016-H(pt.) dated ...Nov., 2016.

As per the guidelines issued by the Ministry of Road, Transport & Highways (Highway Section), the loss on account of non collection of toll from 9th Nov., 2016 onwards till the midnight of 2nd/3rd Dec., 2016 is to be addressed as per the provisions of the respective concessionaire/contract agreements that define the engagement of the Authority/MoRTH with such entities.

In Concession Agreements wherein clause 34.6.2(b) reads as below:

“ After COD, whereupon the Concessionaire is unable to collect fee despite making best efforts or it is directed by the Authority to suspend the collection thereof during the subsistence of such Force Majeure Event, the Concession Period shall be extended by a period equal in length to the period during which the Concessionaire was prevented from collection of fee on account thereof...”



Also relevant in this context is clause 34.7 that describes ‘the allocation of costs arising out of Force Majeure’.

Clause 34.7.2 says “*Upon occurrence of a Political Event, all Force Majeure Costs attributable to such Political event shall be reimbursed by the Authority to the Concessionaire.*” It is further stated that “*for the avoidance of doubt, Force Majeure costs may include interest payments on debt, O & M expenses, any increase in the costs of Construction Works on account of inflation and all other costs directly attributable to the Force Majeure Event, but shall not include loss of Fee revenues or debt repayment obligations, and for determining such costs information contained in the Financial Package may be relied upon to that extent that such information is relevant.*”

For reimbursement of cost under clause 34.7.2 following guideline is to be followed:

1. Interest payment on debt:

(i) The Concessionaire through his Statutory Auditor will submit a certificate certifying the Interest payment of debt as per the original financial package submitted at the time of Finance Close. In case NHAH has approved the elongated repayment period with the revised repayment schedule, the interest payment may be certified accordingly by the Statutory Auditors.

(ii) A certificate from the lead banker certifying the interest to be paid from 9th Nov. 2016 onwards till the midnight of 2nd/3rd Dec., 2016.

(iii) For avoidance of doubt, if there is a difference between the amount certified by the Statutory Auditor and the amount certified by the lead banker, the lower of the two will be taken for payment of interest.

2. O&M expenses:

The Concessionaire will submit the O&M expenses for 2015-16 and monthly O&M expenses for 2016-17. The Authority will consider payment of O&M on pro-rata basis based on the



above data duly certified by the Statutory Auditor based on Independent Engineer certification. These expenses shall not exceed O&M expenses projected in original financing documents.

3. For any other payments under Concession Agreement (Clause 34.7.2), the Concessionaire is requested to give detailed justification and the decision in such cases will be taken on case to case basis.

4. For BOT (Toll) concessions not covered under the above provisions, Authority will consider payment based on the provisions of the Concession Agreement to ascertain the exact formulation of the clause that is suppose to address such eventuality. Decisions will be taken on a case to case basis depending on the exact formulation in the respective Concession Agreement.

5. As the payment are to be released urgently, an undertaking will be submitted by the Concessionaire that these costs (interest payment on debt & O&M expenses) are arising due to the force majeure event and while auditing, if any amount is found due to the Authority, it will be recovered from the Escrow Account of the Concessionaire.

6. We may release 90% of the amount so arrived to keep a reconciliation margin.

This issues with the approval of Competent Authority.

Sd/-
(Nivedita Srivastava)
CGM(Finance)
29.11.2016.”

17. As directed by NHAI, GVK recommenced toll collection from midnight of 2 December 2016.

18. On 6 December 2016, GVK wrote to NHAI, claiming an amount of ₹ 22.68 crores as compensation for the loss suffered owing to suspension of collection of toll between 9 November 2016 and the



midnight of 2 December 2016. The IC, *vide* communication dated 30 December 2016, sought to know, from GVK, the provision under which it had raised the claim, in response to which GVK, *vide* communication dated 2 January 2017, informed the IC that the claim had been raised under Clause 31.2 of the CA.

19. *Vide* a second communication dated 10 January 2017, GVK further clarified that its entitlement to compensation was not relatable to Article XXIX of the CA, which provided for *force majeure*.

20. On 12 January 2017, the IC wrote to GVK, disapproving the invocation, by GVK, of clause 31.2 of the CA and stating that the entitlement of GVK to compensation was under Clauses 29.4 and 29.7(c) of the CA. GVK, however, reiterated its claim in its response dated 21 February 2017. The IC again wrote to GVK on 23 February 2017, enclosing a legal opinion, opining that GVK's entitlement to compensation was not covered by Article XXXVI. This assertion was denied by GVK in its response dated 1 March 2017, by which GVK reiterated its claim for compensation of ₹ 21.75 crores.

21. On 9 March 2017, GVK again wrote to the IC, disputing the applicability of clause 29.4 and 29.7(c) of the CA for computing the compensation to which it was entitled. It reiterated its claim for compensation of ₹ 21.75 crores. The IC responded on 23 March 2017, adhering to its stand that the entitlement of GVK to compensation was under the *force majeure* Article XXIX in the CA



and, therefore, calling upon GVK to submit its clarification/documents with a revised claim.

22. As matters had reached at a stalemate, GVK wrote to the Chairman, NHAI, on 24 March 2017, requesting that a meeting be convened in terms of Clauses 39.1(b) and 20.7 of the CA so that the dispute could be resolved. As no such meeting was convened, GVK addressed a notice to the Chairman, NHAI, on 10 May 2017, under Section 21 of the 1996 Act, invoking the provision for arbitration contained in Clause 39.2 of the CA.

23. On NHAI continuing to remain silent, GVK wrote to the Indian Council of Arbitration (ICA) for initiating the arbitral process.

24. The ICA proceeded to appoint a three-member Arbitral Tribunal to arbitrate on the dispute.

25. Before the ICA, Statement of Claim (SOC) was filed by GVK on 1 August 2018. On 25 March 2019, the ICA constituted a three-member Arbitral Tribunal which came to render the award under challenge.

26. Before the said Arbitral Tribunal, NHAI filed its Statement of Defence (SOD), on 4 May 2019. Arguments before the learned Arbitral Tribunal were concluded on 12 October 2019 and written briefs were submitted by both sides on 22 November 2019.



27. The learned Arbitral Tribunal rendered the impugned award on 6 February 2020.

28. Before the learned Arbitral Tribunal, GVK claimed

- (i) compensation of ₹ 21,75,45,640/-, towards loss incurred due to suspension of toll collection from 9 November 2016 to 2 December 2016 with interest @ 18% p.a.,
- (ii) compensation of ₹ 6,72,82,146/- towards operation and maintenance (O&M) expenditure during the period 9 November 2016 to 2 December 2016 along with interest @ 18% p.a. w.e.f. 1 March 2017 till payment,
- (iii) compensation of ₹ 23,42,863/- towards interest paid to lenders on project loans for period 9 November 2016 to 2 December 2016 along with interest @ 18% p.a. w.e.f. 1 March 2017 till payment,
- (iv) a sum of ₹ 6,19,80,600/-towards interest paid to lenders on the rupee term loan for the period 9 November 2016 to 2 December 2016 along with interest @ 18% p.a. w.e.f. 1 March 2017 till payments and
- (v) costs as per Section 31A of the 1996 Act.

The learned Arbitral Tribunal awarded Claims (i) and (v) and passed no orders on claims (ii) to (iv), as GVK had claimed them in the alternative to claim (i). There is no challenge to the denial, by the



learned Arbitral Tribunal, to consider claims (ii) to (iv). Accordingly, this judgment eschews further reference to said claims.

Submissions before the learned Arbitral Tribunal

SOC by GVK

29. GVK based its claim in the SOC on the following reasoning:

(i) GVK had duly and diligently fulfilled its obligation under the CA and completed the construction work, as certified by the Final Completion Certificate issued by the IC on 20 October 2005.

(ii) The circumstances in which GVK was prevented from collection toll between 9 November 2016 and 3 December 2016, comprising

(a) the MoF notification dated 8 November 2016, demonetizing ₹ 500 and ₹ 1000 bank notes w.e.f. 9 November 2016,

(b) communication dated 9 November 2016 from MoRTH to the NHAI, communicating the decision to permit toll collectors to accept ₹ 500 and ₹ 1000 bank notes till 11 November 2016,

(c) communications dated 9 November 2016, from NHAI to GVK, conveying the said decision of the



Government and, immediately, thereafter, conveying the subsequent decision of the MoRTH to suspend collection of toll fee altogether till the midnight of 11 November 2016,

(d) communication dated 11 November 2016 from MoRTH to NHAI, conveying the Government's decision to extend the suspension of toll fee collection till the midnight of 14 November 2016,

(e) further communications dated 14 November 2016, 17 November 2016 and 18 November 2016 from NHAI to GVK, pursuant to directions of MoRTH, continuing suspension of collection of toll fee till the midnight of 24 November 2016, and

(f) communication dated 24 November 2016, from MoRTH to NHAI, conveying the Government's decision that collection of toll could commence from the midnight of 2 December 2016,

constituted "change in law" within the meaning of Article XXXVI in the CA.

(iii) The provisions relating to *force majeure*, contained in Article XXIX of the CA were, therefore, not applicable in view of Clause 29.4(a).

(iv) As vehicles were permitted to ply unhindered from the toll plazas from 9 November 2016 till the midnight of 2



December 2016, it was not possible to ascertain the number of vehicles which crossed. Moreover, the mechanism installed at the toll plaza for counting vehicles operated only when a vehicle actually stopped or at least slowed down while crossing the toll plaza. GVK had, therefore, worked out the loss suffered by it as a consequence of failure to collect toll from 9 November 2016 to 2 December 2016 by using the average daily traffic crossing the toll barrier during the month of October 2016.

(v) GVK had also submitted a certificate from its statutory auditor and lead banker, as desired by the IC, with request for early release of payments.

(vi) The instructions conveyed by NHAI to GVK not to collect toll between 9 November 2016 and 3 December 2016, amounted to a unilateral suspension of GVK's contractual right to levy and collect toll fee from the users of the Project Highway, which had a direct detrimental impact on its net return and cash flow, resulting in serious financial loss to GVK.

(vii) *Force majeure* was covered by Article XXIX of the CA. Clause 29.4 contemplated Political Force Majeure Events to include change in law only when Article XXXVI was not applicable. Article XXXVI specifically dealt with change in law. Clause 36.1, which was part of Article XXXVI, stipulated



that if, as a result of change in law, GVK was to suffer any loss which exceed ₹ 10 million (₹ 1 crore) in any accounting year, NHAI would have to compensate GVK in the manner specified in the clause. As Clause 36.1 was directly applicable, the applicability of Clause 29.4 stood contractually excluded.

Stand of NHAI in SOD

30. NHAI admitted the fact that GVK had indeed suffered loss owing to the suspension of toll between 9 November 2016 and 2 December 2016, and that it was entitled to compensation. However, the contention of NHAI was that GVK's claim of compensation was preferred under a wrong provision. NHAI contested GVK's claims on the basis of the following submissions:

- (i) It was admitted that GVK had completed construction work as endorsed by the Final Completion Certificate dated 20 October 2005 and that the six-lane project was in the operation and maintenance (O&M) phase since 9 April 2005.
- (ii) The loss suffered by GVK due to failure to collect toll had to be addressed as per Article VII of the CA, and not as per Article XXXVI.
- (iii) Alternatively, GVK's claim had to be considered under Article XXIX, specifically Clause 29.4, read with Article VII.



(iv) NHAI's Office Order dated 29 November 2016 clearly required the procedure for release of compensation to concessionaires as a result of suspension of toll collection to be in terms of the applicable Concession Agreements (CAs).

(v) As GVK had computed its claim on the basis of Clause 36.1 of the CA, which was not applicable, the claim was liable to be dismissed.

(vi) Moreover, the claim was purely speculative. It was not based on actual data, but by extrapolating historical data relating to the month of October 2016. GVK could be entitled to only actual, and not speculative, loss.

(vii) The allegation that there had been material default on the part of NHAI, as envisaged by Clause 31.2 of the CA, was categorically denied. As such, the invocation, by GVK, of Clause 36.1 of the CA, was also misconceived.

Rejoinder by GVK

31. In response to NHAI's submissions, GVK advanced the following contentions:

(i) The use of the figures of toll collection in October 2016, to work out the compensation payable to GVK, was as per the recommendation of the IC in its letter dated 21 November 2016.



(ii) There was no other way to compute the loss suffered, as actual data for the period 9 November 2016 to 2 December 2016 would obviously not be available in view of free flow of traffic which was permitted during the said period. Article XXXVI obligated NHAI, in the event of loss suffered by GVK consequent to change in law, to restore GVK to the position in which it was prior to the change in law.

(iii) As such, Article XXXVI was directly applicable and the reference, by NHAI, to Articles XXIX and VII was misconceived.

Issues framed by the learned Arbitral Tribunal

32. On the basis of the rival submissions contained in the pleadings of the parties, the following issues were framed by the learned Arbitral Tribunal as arising for consideration:

“1. Whether the Claimant has submitted its claims to the Respondent, in terms of the relevant provisions of the Concession Agreement, as applicable to the facts of the present case?

2. Whether the Claimant has provided, in support of its claims, on account of suspension of tolls from 09.11.2016 to 02.12.2016, all necessary information to the Respondent/NHAI, as required in law?

3. Whether on account of suspension of tolls from 09.11.2016 to 02.12.2016, the Claimant is entitled to the compensation of Rs. 21,75,45,640/- in terms of the Concession Agreement?



4. Whether the Claimant is entitled to further compensation in terms of prayer (b) of the Statement of Claim?
5. Whether the Claimant is entitled to further compensation in terms of prayer (c) of the Statement of Claim?
6. Whether the Claimant is entitled to further compensation in terms of prayer (d) of the Statement of Claim?
7. Whether the Claimant is entitled to interest. If so, for what period and at what rate?
8. Whether the costs of arbitration are to be borne by the Claimant or Respondent or both?"

Oral submissions

Submissions of GVK

33. In addition to the contentions advanced in the pleadings, GVK advanced the following contentions during oral arguments before the learned Arbitral Tribunal:

- (i) Clause 29.4 (i) in Article XXIX, which dealt with *force majeure*, itself clarified that it applied only where Article XXXVI was not applicable. Where, therefore, owing to a change in law, collection of toll got suspended, resulting in loss to GVK, compensation would be payable under Article XXXVI. This would directly exclude the applicability of Article XXIX.



(ii) Section 22² of the Reserve Bank of India Act, 1934 (“the RBI Act”) conferred, on RBI, the sole right to issue bank notes in India. Every such bank note was to be treated as legal tender throughout India under Section 26³, subject to the right of the Central Government to, by notification, declare that any series of bank note of any denomination would cease to be legal tender with effect from the date specified in the notification. It was in exercise of this power that notification SO. 3407(E) came to be issued by the MoF on 8 November 2016, declaring that bank notes of denominations of ₹ 500 and ₹ 1000 would cease to be legal tender w.e.f. 9 November 2016.

(iii) Consequent thereto, the MoRTH, by its letter dated 9 November 2016, addressed the NHAI, communicated the decision of the Central Government to suspend toll collection till the midnight of 11 November 2016, which was subsequently extended till the midnight of 2 December 2016, as communicated by NHAI to GVK *vide* letters dated 11

² 22. **Right to issue bank notes . –**

(1) The Bank shall have the sole right to issue bank notes in India, and may, for a period which shall be fixed by the Central Government on the recommendation of the Central Board, issue currency notes of the Government of India supplied to it by the Central Government, and the provisions of this Act applicable to bank notes shall, unless a contrary intention appears, apply to all currency notes of the Government of India issued either by the Central Government or by the Bank in like manner as if such currency notes were bank notes, and references in this Act to bank notes shall be construed accordingly.

(2) On and from the date on which this Chapter comes into force the Central Government shall not issue any currency notes.

³ 26. **Legal tender character of notes. –**

(1) Subject to the provisions of sub-section (2), every bank note shall be legal tender at any place in India in payment or on account for the amount expressed therein, and shall be guaranteed by the Central Government.

(2) On recommendation of the Central Board the Central Government may, by notification in the Gazette of India, declare that, with effect from such date as may be specified in the notification, any series of bank notes of any denomination shall cease to be legal tender save at such office or agency of the Bank and to such extent as may be specified in the notification.



November 2016, 14 November 2016, 17 November 2016 and 24 November 2016. The last of these communications conveyed the decision to permit collection of toll to re-commence from the midnight of 2 December 2016. Section 33⁴ of the National Highways Authority Act, 1988 (“the NHAI Act”) bound NHAI by directions on questions of policy as the Central Government would convey in writing from time to time. Being based on directions issued by MoRTH to NHAI consequent to the policy decision of the Central Government regarding demonetization and consequent suspension of toll collection, the said directions were clearly statutory in nature. They, therefore, amounted to change in law, attracting Article XXXVI.

(iv) The applicability of Article XXXVI contractually excluded the applicability of Article XXIX.

(v) Reliance was placed, in this context, on the deposition of Mr. N.N. Giri, who deposed as NHAI’s witness (RW-1), in which he admitted that the directions issued by MoRTH for suspension of toll collections were consequent on the Notification of the MoF dated 8 November 2016 and in terms of Section 33 of the NHAI Act.

⁴ 33. **Power of the Central Government to issue directions. –**

(1) Without prejudice to the other provisions of this Act, the Authority shall, in the discharge of its functions and duties under this Act, be bound by such directions on questions of policy as the Central Government may give to it in writing from time to time.

(2) The decision of the Central Government whether a question is one of policy or not shall be final.



(vi) Reliance was also placed on the letter dated 9 November 2016 from the MoRTH to NHAI, requiring toll operators, who had suffered losses due to the decision to suspend toll collection w.e.f. 11 November 2016 to be suitably recompensed.

(vii) Reliance was also placed on the e-mail dated 16 November 2016 from the Project Director, NHAI to GVK, forwarding the e-mail dated 14 November 2016 from NHAI to Mr. T.S. Venkatesan of L&T Infrastructure Development Projects Ltd, clarifying that *ad hoc* payments to concessionaires were being worked out and requiring the concessionaires to forward their invoices so that interim payment could be released.

(viii) Consequent on the said direction, interim invoices for a total amount of ₹ 21,75,45,640/- were forwarded by GVK to NHAI for payment.

(ix) The entitlement of GVK to payment in terms of Article XXIX could not, therefore, be questioned.

(x) As there was no way of computing the exact number of vehicles which had crossed the toll plazas during the period 9 November 2016 to 2 December 2016, free flow of vehicles having been permitted during the said period in accordance with the policy decision of the Government, the loss was correctly



computed on the basis of the data for the month of October 2016, which constituted a contemporaneous and authentic document. Reference to the data of October 2016 was, therefore, a reasonable and acceptable basis for calculating the compensation payable to GVK. This was also endorsed by the IC in its letter dated 21 November 2016 addressed to the Project Director, NHAI. GVK could not have been compelled to count the number of vehicles which crossed the toll plaza during the period 9 November 2016 to 2 December 2016, when free flow of traffic was permitted. No actual data for the said period was available either.

(xi) The reference to Article VII of the CA, by NHAI, was completely misplaced. Article VII figured in Chapter II of the CA and pertained to grant of concession and incidental aspects, dealing predominantly with revenue structuring between the parties when toll collection was uninterrupted by external intervention or was continuous in the normal course of events.

(xii) Suspension of collection of toll fee, owing to a change in law, exclusively attracted Article XXXVI, particularly as the financial loss suffered by GVK was in excess of ₹ 10 million (₹ 1 crore).



(xiii) If NHAI's interpretation of Article VII was to be accepted, Article XXIX and Article XXXVI would both be rendered nugatory.

(xiv) Insofar as GVK's claim to interest was concerned, there was no provision in the CA which prohibited grant of interest by the learned Arbitral Tribunal on any awardable amount. Clause 36.1, in fact, provided for grant of interest at the SBI PLR which was 18% p.a.

(xv) GVK was, therefore, entitled to interest at the rate of 18% p.a. as claimed, in terms of Section 31A⁵ of the 1996 Act.

34. To support the submission that the MoF notification dated 8 November 2016 had the force of law, learned Counsel for GVK relied on the judgment of the Supreme Court in *Shri Sitaram Sugar Company Ltd. v. UOI*⁶.

Response by NHAI

35. NHAI contended, *per contra*, thus:

⁵ 31-A. **Regime for costs.** –

(1) In relation to any arbitration proceeding or a proceeding under any of the provisions of this Act pertaining to the arbitration, the court or arbitral tribunal, notwithstanding anything contained in the Code of Civil Procedure, 1908 (5 of 1908), shall have the discretion to determine –

- (a) whether costs are payable by one party to another;
- (b) the amount of such costs; and
- (c) when such costs are to be paid.

⁶ (1990) 3 SCC 223.



(i) GVK's claim was not in terms of the CA or as per the guidelines issued by NHAI in its Office Order dated 29 November 2016.

(ii) GVK had failed to take steps, as required by Article VII, to communicate and address the shortfall in revenue collection for the period 9 November 2016 to 2 December 2016, at the end of the corresponding Accounting Year.

(iii) Mr. Ashwani Sharma, deposing as CW-1, had admitted that GVK had earned toll fee in excess of the Projected Fee during the years 2011-2012, 2012-13, 2013-2014, 2014-2015 and 2016-2017, ranging from ₹ 68.20 crores to ₹ 104.78 crores. This obligated GVK to share the excess revenue with NHAI in terms of Article VII, instead of resorting to Article XXXVI.

(iv) The CW had also admitted that, during the accounting year 2016-2017, GVK had realized excess fee of ₹ 77.18 crores, despite the suspension of toll collection from 9 November 2016 to 2 December 2016. This was a contingency clearly covered by Article VII of the CA, which covered all cases of excess or shortfall in toll fee realized in any accounting year, irrespective of the reason for shortfall.

(v) Article VII provided for adjustment of shortfall, in any month, against the net excess toll fee earned during that



Accounting Year at the end of the year. Any monthly shortfall in toll fee collection, irrespective of the cause or reason therefore, was, therefore, addressed by Article VII.

(vi) Other clauses of the CA were, therefore, applicable only if there was no excess revenue at the end of that accounting Year. Article XXXVI would, therefore, have no application.

(vii) Without prejudice, it was contended that, as one of the reasons for demonetizing ₹ 500 and ₹ 1000 bank notes was that large amount of fake currency was being used for subversive activities such as drug trafficking and terrorism, there was a clear nexus between demonetization and terrorist activities, thus bringing the situation within the purview of the expression “Indirect Political Force Majeure Event” as envisaged in the CA.

(viii) While NHAI was not seeking to contend that no amount was payable to GVK on account of suspension of toll collection from 9 November 2016 to 2 December 2016, the shortfall was required to be addressed in terms of Article VII of the CA.

(ix) GVK had not submitted any acceptable basis for computation of actual loss suffered by it between 9 November 2016 and 2 December 2016. The historical data for the month of October 2016 was not an acceptable basis for working out



the loss. Any compensation to which GVK would be entitled had to be in terms of Clause 7.2 of the CA. In the absence of any record of the actual number of vehicles which passed through the toll plaza during the period 9 November 2016 to 2 December 2016, GVK's claim for compensation, based on the historical data for October 2016, was patently erroneous and entitled to rejection.

(x) There was no justification provided for adopting the data in the month of October 2016 instead of, say, the data for the corresponding period in 2019, or in the previous year, or the average of all the days in the year 2016.

(xi) As the dispute between the parties was covered by Article VII and, alternatively, by Clauses 29.3 read with 29.6 and 29.7 of the CA, the claim, as made, was liable to be rejected.

Submissions of GVK in rejoinder

36. In rejoinder, GVK seriously objected to the invocation, by NHAI, of Article VII of the CA, as no such plea was contained in the SOD, filed by NHAI, which sought to discountenance GVK's claim only on the ground that Clause 29.4 applied and not Clause 36.1. NHAI could not, in oral arguments, be permitted to raise an entirely new case.



Submissions of NHAI in surrejoinder

37. Addressing this objection of GVK, NHAI, in surrejoinder, submitted that the SOD specifically pleaded that Article VII and Article XXIX, read with NHAI's Office Order dated 29 November 2016, applied, and not Article XXXVI.

The Impugned Award

38. The reasoning and consequent findings of the learned Arbitral Tribunal may be thus set out, seriatim:

(i) The debate centered around the provision of the CA, read with the guidelines contained in NHAI's Office Order dated 29 November 2016 which would apply to ascertain the compensation payable, if any, to GVK, for the loss suffered by it owing to suspension of toll collection between 9 November 2016 and 3 December 2016.

(ii) The letter dated 9 November 2016 from the MoRTH to NHAI, which was issued in continuation of the earlier letter of the same date, and referred to the MoF notification dated 8 November 2016, stated, in categorical terms, that toll operators were required to be suitably compensated for the loss suffered on account of suspension of toll collection. Suspension of toll



collection, in compliance of said directive, did commence from the midnight of 9 November 2016 and continued till the midnight of 2 December 2016 in compliance with consequential directions issued by the MoRTH and the NHAI.

(iii) The Chairman, NHAI, in an official e-mail dated 14 November 2016, which was forwarded by the Project Director, NHAI, to GVK under cover of e-mail dated 16 November 2016 titled “Demonetization Impact and Guidance to Tolled National/State Highways”, specifically noted that *ad hoc* payment towards compensation payable to concessionaires was being worked out and called upon the concessionaires to send invoices so that interim payment could be released. Even at that point, therefore, NHAI was aware of the compensation, for loss suffered by concessionaire due to suspension of toll collection, would be payable.

(iv) NHAI’s Office Order dated 29 November 2016 was specifically titled “Suspension of collection of user fee at toll plazas on NHs due to demonetization of ₹ 500 and ₹ 1000 notes – immediate relief to be provided to BoT (Toll) Concessions.” This clearly indicated acknowledgment, on NHAI’s part, that suspension of toll fee at toll plazas was due to bank notes of ₹ 500 and ₹ 1000 denominations ceasing to be legal tender, consequent on issuance of the earlier notification dated 8 November 2016 of the MoF. This nexus, between the MoF’s



notification dated 8 November 2016 and the prohibition on the collection of toll fee between 9 November 2016 and the midnight of 2 December 2016 was also manifested from the letters issued by MoRTH and NHAI, imposing the prohibition on toll collection.

(v) Mr. N. N. Giri, who testified as RW-1, also admitted, in cross-examination, that suspension of collection of toll fee, during the period 9 November 2016 and 2 December 2016 was attributable to the MoF Notification dated 8 November 2016 and consequential directions by MoRTH and NHAI from time to time.

(vi) NHAI's Office Order dated 29 November 2016 carved out, in paragraph 4, a self-contained and independent norm/guideline, to enable NHAI to examine and consider payment of compensation to concessionaires where on the basis of the respective concession agreement, Clauses 34.6 and 34.7, in the form set out in the Office Order, were not applicable. In view of the said stipulation, the entitlement of GVK to compensation had to be examined in terms of the relevant clause of the CA. Para 5 of the office order further stipulated that, as payments were to be released urgently, the concessionaire would have to submit an undertaking that the costs comprising interest payment on debt and O & M expenditure were arising due to the *force majeure* event. While



auditing, if any amount was found due to NHAI, it would be recovered from the Escrow Account of the concessionaire.

(vii) If, therefore, any such recovery from the Escrow Account was conceptually relatable to Article VII, this was patently limited to the GVK's entitlement by way of costs i.e. O & M expenditure and interest payment on debt. It could not extend to comprising GVK's entitlement to loss of revenue due to non-collection of toll fee, consequent on any *force majeure* envisaged in the CA. Para 5 of NHAI's Office Order dated 29 November 2016, therefore, excluded the application of Article VII of the CA, *vis-à-vis* GVK's claim for compensation owing to loss suffered by suspension of collection of toll fee, which thereby brought it within the purview of Article XXXVI.

(viii) The Notification dated 8 November 2016 had clearly been issued by the MoF in exercise of the powers conferred by Section 26 of the RBI Act. In view of the fact that the declaration contained in the said Notification effectuated a government policy, incorporated in the Notification, the Notification had the force of law.

(ix) Section 33 of the NHAI Act made directions issued by the Central Government to the NHAI binding. The NHAI had no discretion to depart or deviate from the said directions or to defy them. The directives of the MoRTH, pursuant to the MoF



2023:DHC:8818



Notification dated 8 November 2016, to suspend collection of toll, and the consequent directions by NHAI to the concessionaires, including GVK, were also, therefore, in exercise of the statutory power conferred on the Central Government and NHAI. The imperative nature of this power was manifest from the statutory provisions themselves.

(x) The expression “change in law” encompassed, amongst others, enactment of any new Indian law or its applicability over any area where it was not applicable, as well as repeal, modify or re-enactment of any existing Indian law. This definition, when read in conjunction with Clause 1.2(b) of the CA, denoted that such change in law could be occasioned, *inter alia*, by a Notification having the force of law.

(xi) It was not in dispute that the Notification dated 8 November 2016 was issued by the MoF in exercise of the powers conferred by Section 26(2) of the RBI Act. There was also no dispute that the said Notification declared a policy decision that bank notes of ₹ 500 and ₹ 1000 denominations were de-notified and would cease to be legal tender. This Notification, having regard to the source of the power under which it was issued, and its very nature and the objective that it sought to achieve, indisputably had the force of law, as envisaged by Clause 1.2(b) of the CA. This was especially so as Section 26(1) of the RBI Act incorporated a guarantee, by the



Central Government, that every bank note would be legal tender at any place in India. Section 26(2) empowered the Central Government, on the recommendation of the Central Board of Directors of the RBI to, by Notification in the official Gazette, declare that such, with effect from such date as may be specified in the Notification, any series of bank notes of any denomination would cease to be legal tender, to the extent mentioned in the Notification.

(xii) Applying the decision of the Supreme Court in *Jayantilal Amratlal Shodhan v. F.N. Rana*⁷ and *Shri Sitaram Sugar Co.*, it was clear that the MoF notification dated 8 November 2016 unimpeachably had the force of law.

(xiii) The bank notes of ₹ 500 and ₹ 1000 denominations, having been issued by RBI, in exercise of the power conferred by Section 22 of the RBI Act, were, by operation of said section, legal tender till they were de-notified, *vide* the MoF Notification dated 8 November 2016. The Notification, therefore, amounted to enactment of a new Indian law in terms of Clause 1.2(b) of the CA. There was, therefore, “change in law” within the meaning of the CA. The suspension of collection of toll fee, which was directly attributable to the bank notes of ₹ 500 and ₹ 1000 denominations ceasing to be a legal tender, was, therefore, a direct consequence of such change in

⁷ AIR 1964 SC 648



law. ₹ 500 and ₹ 1000 bank notes, which were valid tender in terms of Section 26(1) of the RBI Act, ceased to be valid tender, with the change in law ushered in by the MoF Notification dated 8 November 2016. The existing law with respect to the said bank notes constituting the legal tender, therefore, stood modified to that extent by the Notification dated 8 November 2016.

(xiv) Clauses 3.2 and 6.1 in Chapter II of the CA, which dealt with “Grant of Concession”, awarded GVK the exclusive right to levy, demand, collect and appropriate fee from vehicles crossing toll plazas. Article VII designed a model for sharing the revenue earned by GVK with NHAI and provided the methodology therefor. Article VII was part of Chapter II, which was devoted to grant of concession and, therefore, comprehended a situation in which the concessionaire would be able to collect toll/user fee, unobstructed and in continuum, for the whole accounting year.

(xv) Chapter VI of the CA dealt with *force majeure*. Article XXIX was part of Chapter VI. Inasmuch as NHAI was only seeking to invoke Clauses 29.3 and 29.4 of Article XXIX, it was not necessary to refer to any of the other clauses in the said article. Clause 29.4(i) referred to “change in law” but applied only in circumstances in which Article XXXVI could not apply. Manifestly, therefore, Clause 29.4 would be attracted only in



the case of a Political Force Majeure Event to which Article XXXVI was inapplicable.

(xvi) Clause 31.2 stipulated that, if NHAI was in material default of the CA, and such default was cured before termination of the CA, NHAI would pay GVK, as compensation, all direct additional costs suffered or incurred by GVK arising out of NHAI's material default, in lumpsum within 30 days of receiving GVK's demand in that regard. The CA did not define "material default". However, it defined "material breach" as a breach, by either party, of any of its obligations under the CA, and deemed every material breach to have a material adverse effect on the project, which was not cured within the cure period. "Material adverse effect" was defined to mean material adverse effect of any act or event on the ability of either party to perform any of its obligations in accordance with the CA. As a consequence of the MoF notification dated 8 November 2016, and the resultant suspension of collection of toll fee, effectuated by the statutory directives of MORTH and enforced by NHAI by issuing periodical instructions, GVK's exclusive right, as a concessionaire, to levy, demand and collect appropriate fee from vehicles which crossed the toll plazas, as guaranteed by the CA, was transgressed/breached on account of no fault or default of GVK. Thus, GVK was prevented from collecting



toll/user fee on account of circumstances beyond its control and for which it was in no way responsible.

(xvii) Nor was it possible for GVK to exercise its authority to levy, demand, or collect appropriate toll fee by due diligence and reasonable efforts, skill and care as contemplated by Clause 29.1 of the CA. Thus, the suspension of collection of toll fee, put in place as a consequence of the directives issued by NHAI to GVK, amounted to a breach of NHAI's obligations as envisaged in the CA, resulting in "material adverse effects" on the ability of GVK to avail its exclusive right and privilege to collect toll fee, guaranteed and secured by the CA.

(xviii) A bare reading of Clause 29.4(i) made it abundantly clear that the change in law envisaged as a political Force Majeure Event would apply only when Article XXXVI was not applicable. In other words, Clause 29.4 would apply only where, as a result of the change in law, the concessionaire did not suffer an increase in costs or reduction in net after tax return or other financial burden, the effect of which exceeded ₹ 10 million (₹ 1 crore) in any Accounting Year.

(xix) The rival projections drew up the following broad points for determination:

"1. Whether the Claimant has submitted its claims to the Respondent, in terms of the relevant provisions of the



Concession Agreement, as applicable to the facts of the present case?

2. Whether the Claimant has provided, in support of its claims, on account of suspension of tolls from 09.11.2016 to 02.12.2016, all necessary information to the Respondent/NHAI, as required in law?

3. Whether on account of suspension of tolls from 09.11.2016 to 02.12.2016, the Claimant is entitled to the compensation of Rs.21,75,45,640/- in terms of the Concession Agreement?"

(xx) *Vide* Clause 3.1 in Article III of the CA, NHAI had granted, to GVK, for the concession period of 20 years commencing from the appointed date, the exclusive right, license and authority to implement the project and the concession in respect of the Project Highway, in terms whereof GVK was entitled, *inter alia*, to levy, demand and appropriate fee from vehicles which used the highway. Concession fee collected by GVK in excess of the projected fee in any Accounting Year was required to be shared with NHAI, applying the methodology envisaged by Article VII. Clause 7.2 required GVK to share, with NHAI, any fee which it had actually received in any Accounting Year in excess of the projected fee for that year, as set out in Schedule Y of the CA. The modalities for such sharing were set out in the remaining clauses of Article VII. Clause 7.2.1 required 80 % of such excess fee to be deposited in a separate Escrow account on a monthly basis. Being located in Chapter II, Article VII had



essentially to be construed as an integral constituent of the scheme modeled by the Article, bereft of any attribute or enjoinder, either inconsistent with the article or mutually mutilative of it. The grant of concession was a valuable right conferred on GVK. Any discontinuance of the levy or collection of toll fee, for whatever period, during an Accounting Year, attributable to external intervention beyond GVK's control or contemplation, therefore, incontestably violated GVK's secured rights which stamped from the grant of concession to it. The consequent loss could not, therefore, be lightly dismissed on the specious plea of adjustment against its income if it was in excess of the projected fee for that Accounting Year.

(xxi) The use of the words “actually receives” in Clause 7.2 was relevant. They indicated that the Projected Fee was computed and quantified on contemporaneous and relevant data and unequivocally represented the revenue expected to be realized in normal situations, in which GVK was permitted to levy and collect toll fee without any obstruction or impediment.

(xxii) That this was the correct contractual position was also clear from Clause 7.2.3. Clause 7.2.3 clarified that “shortfall” or “excess” in Projected Fee meant the difference between the Projected Fee in an Accounting Year and the realizable fee on a monthly basis, assuming a uniform monthly fee projection.



“Realisable Fee” was defined to mean all fee due and realisable under the CA, but did not include fee which GVK had not been able to realise after due diligence and best efforts. Thus, the definition of “Realisable Fee” excluded loss of revenue resulting from suspension of collection of toll in a case such as the present. The amount representing the revenue loss on that account could not, therefore, be adjusted treating as a shortfall as envisaged in Clause 7.2.2.

(xxiii) The words “on a monthly basis assuming a uniform monthly fee projection” also indubitably presupposed unhindered and unobstructed realisation of monthly fee as contemplated while quantifying the Projected Fee for the corresponding Accounting Year.

(xxiv) The Projected Fee/Cash Flow envisaged by Article VII and portrayed in Schedule Y to the CA reflected the expected collection of toll fee for the Accounting Years mentioned therein, if the process of fee realisation was free, continuous and unimpeded by any external factor beyond the contemplation and control of the parties. Viewed thus, therefore, too, the NHAI could not be said to be justified in evaluating GVK’s claim for compensation on the anvil of Article VII.



(xxv) A cumulative consideration of these factors, therefore, demonstrated that Article VII was not a provision in the CA available to address a claim for compensation for revenue loss arising out of a contingency in which the process of toll collection by a concessionaire suffered disruption due to any external interference beyond its control, in which it was rendered unable to levy and collect despite due diligence and best efforts, resulting in loss to GVK.

(xxvi) The IC, in its letter dated 21 November 2016 to NHAI, admitted that there was no specific direction regarding the manner of calculation of the revenue loss during the period 9 November to 2 December 2016 and that, therefore, the historical figures of October 2016 could be used as a basis for estimating *ad hoc* payments. GVK had, accordingly, furnished, to NHAI, in the form set forth in Schedule “M”, the Monthly Fee Statement for the month of October 2016 as per Clause 19.4 of the CA. The genuineness and authenticity of these documents were not in dispute.

(xxvii) To reckon the amount payable to concessionaires on account of loss suffered by them as a result of suspension of toll collection from 9 November to 2 December 2016, the provisions of the CA alone could be taken into consideration as per para 4 of NHAI’s Office Order dated 29 November 2016.



This was also acknowledged by the IC in its letter dated 12 January 2017.

(xxviii) MoRTH, in its letter dated 9 November 2016 addressed to NHAI clearly required toll operators to be suitably compensated for the restraint on toll collection, clamped on them as a result of the instructions in that regard issued by the MoRTH and the NHAI. Considering the events and the process which led to the issuance of the Notification dated 8 November 2016, it was clear that the Notification was a result of a Political Force Majeure Event occasioning a change in law. On a cumulative consideration of Sections 22 and 26 of the RBI Act and Section 33 of the NHAI Act as well as the directives of the MoRTH to the NHAI, it was clear that the suspension of collection of toll had its genesis in the MoF notification dated 8 November 2016. This was also acknowledged by Mr. N. N. Giri, deposing as RW-1, in the course of his cross examination, by specifically admitting that the directions issued by the MoRTH were pursuant to the MoF notification dated 8 November 2016 and that the directions issued by the NHAI were in view of the powers conferred on the Central Government by Section 33 of the NHAI Act. The Office Orders dated 29 November 2016 and 6 December 2016 issued by the NHAI also acknowledged that suspension of toll fee collection on the national highways during the period 9



November 2016 to 2 December 2016 was attributable to demonetization of ₹ 500 and ₹ 1000 notes.

(xxix) NHAI did not seek to plead that the suspension in toll collection was necessitated due to any agitation or protest by the public at the toll plazas or that the decision to suspend toll collection had to be taken to protect public properties, as would attract Clause 29.3 of the CA. Moreover, during the aforesaid period of 9 November 2016 to 3 December 2016, suspension of toll collection was complete and total. There was no material on record, therefore, on the basis of which it could be said that, in such a situation, Clause 29.4(ii) was attracted. NHAI's contention that GVK's claim for compensation had to be tested on the basis of Clause 29.3 or 29.4(ii) was not, therefore, acceptable.

(xxx) Article VII of the CA had been designed to govern and regulate sharing of revenue actually earned by GVK during the relevant Accounting Year, without break or discontinuation. It was not intended to apply in a situation in which realisation of toll fee was debarred or disabled temporarily or otherwise. The manner in which NHAI was seeking to interpret Article VII was incompatible and irreconcilable with the tenor of the Article. It also reduced, to a redundancy, Articles XXIX and XXXVI. It could not be argued, by any means, that Article VII would continue to apply in all situations and contingencies, including



those envisaged as *force majeure* events under the CA, during which the concessionaire suffered loss in revenue owing to inability to collect toll fee for reasons beyond its control. In the absence of any provision or suggestion, in the CA, that Article VII would exclude the applicability of Articles XXIX and XXXVI, if there was net excess fee earned by GVK at the end of the Accounting Year, despite collection of toll fee having been placed in complete suspension during part of the said year, thereby denying to GVK its guaranteed exclusive privilege to levy, demand and collect toll fee without hindrance, Article VII could not be pressed into service in such circumstances. Nor was there any provision in the CA which, explicitly or impliedly, excluded the applicability of Articles XXIX or XXXVI in a circumstance in which Article VII was invocable. The emphasis, by learned Counsel for NHAI, on Article VII of the CA, during the course of arguments, represented a marked shift in NHAI's stand as contained in its SOD, which was that GVK's claim was required to be dealt with in accordance with Article XXIX and Article VII.

(xxxi) Even in its letter dated 12 January 2017, the IC had opined that GVK's claim attracted Clauses 29.4 and 29.7(c). Earlier, by email dated 14 November 2016, addressed to all concessionaires, NHAI had informed that the compensation payable to them, consequent on the impact of demonetization, had been worked out. NHAI's stand during closing



submissions and its written synopsis was, therefore, a departure from its earlier stands. Having admitted that GVK had suffered loss owing to the suspension of toll collection, and having intimated GVK that the compensation payable to it was being worked out, NHAI was estopped in law from executing a *volte face*. The contention that GVK's claim was liable to be rejected under Article VII could not, therefore, be accepted.

(xxxii) As the DOE notification dated 8 November 2016, consequent decision to suspend toll collection, as communicated by the MORTH to NHAI and the consequent instructions by NHAI to concessionaires, including GVK, constituted "change in law", and the consequences thereof as envisaged in Article XXXVI, and as Clause 29.4(i) treated a change in law as a Political Force Majeure Event for the purposes of Clause 29.1 only where Article XXXVI could not be applied, the claim of GVK to compensation had necessarily to be assessed under Article XXXVI, rather than Article XXIX or any of the clauses of the latter article.

(xxxiii) As the amount of compensation claimed by GVK was in excess of ₹ 10 million (₹ 1 crore), Article XXXVI became directly applicable and, per corollary, Clause 29.4(a) rendered Article XXIX inapplicable. As such, GVK had correctly computed its claim for compensation under Clause 36.1.



(xxxiv) Having, in principle, accepted that GVK was entitled to compensation for the loss suffered owing to suspension of toll collection, NHAI was estopped in law from contending to the contrary, especially by misconstruing Articles VII and XXIX of the Agreement. Clause 36.1 was intended to ensure that, if the contingencies envisaged by the said clause applied, the concessionaire was compensated so as to restore the concessionaire to the same financial condition which it occupied prior to the change in law, which resulted in financial burden to it. In view thereof, NHAI's contention that Articles XXIX and XXXVI were applicable only where the annual income of the concessionaire dropped below the Projected Fee in any Accounting Year was clearly flawed. The fact that GVK had earned excess fee of ₹ 77,18,92,505/- during the financial year 2016-17, therefore, was of no consequence. The loss suffered by GVK, owing to suspension of toll collection, was independent of GVK's earnings during normal circumstances. That loss could not be disregarded for the purpose of compensation in terms of Clause 36.1 of the CA.

(xxxv) Besides, Clause 1.4.2(i) of the CA also provided that, in the case of ambiguities or discrepancies between different clauses of the CA, the specific clause which was relevant to the issue under consideration would prevail. Applying this principle, too, Clause 36.1 was entitled to



primacy over Clause 29.4(i) in the circumstances of the case. This also enforced the position that Clause 29.4(a) had logically to be interpreted as rendering Clause 29.1 applicable only where Article XXXVI could not be applied. The invocation, by NHAI, of Clauses 29.6 and 29.7 of the CA, predicated on the premise that Clause 29.4 was applicable in the first instance was, therefore, misguided.

(xxxvi) Resultantly, it was clear that GVK was entitled to be compensated in accordance with Clause 36.1 of the CA.

(xxxvii) The surviving issue which remained for consideration was whether GVK was justified in computing the compensation to which it was entitled for the loss suffered consequent to the suspension of toll during the period 9 November 2016 to 2 December 2016 on the basis of the historical traffic movement figures in the month of October 2016. In this regard, it was important to note that, if the figures of October 2016 were applicable to the compensation to which GVK was entitled, the correctness of the figures of October 2016, as well as the arithmetic employed by GVK in working out the compensation to which it was entitled, was not in dispute. No error in computation had been pointed out by NHAI. NHAI's basic plea was that GVK could not work out the compensation to which it was entitled on account of



suspension of toll collection during the period 9 November 2016 to 2 December 2016 on the basis of the historical data applicable to October 2016.

(xxxviii) GVK had furnished, to NHAI, the Monthly Fee Statement for the month of October 2016, in the prescribed format contained in Schedule “M” to the CA. This format required disclosure, in detail, of the types of vehicles, number, rate of fee and collection during the concerned month. NHAI was not seeking to contend that the historical data for the month of October 2016, which was applied by GVK to work out the compensation due to it, was at variance with the Monthly Fee Statement submitted by GVK to NHAI. The authenticity and correctness of the Monthly Fee Statement for the month of October 2016 as submitted by GVK to NHAI was not in question.

(xxxix) The computation of the compensation to which GVK was entitled, on the basis of the historical data for the month of October 2016 was also endorsed by the IC in his letter dated 21 November 2016.

(xl) All these factors, seen together, indicated that the average daily traffic data of October 2016 constituted an acceptable, contemporaneous and authentic yardstick for computation of



the loss of revenue suffered by GVK owing to suspension of toll collection during the period 9 November 2016 to 2 December 2016. Even otherwise, the said data represented the figures most proximately available to the period for which loss was suffered and, even for that reason, merited acceptance. No actual data of traffic and revenue loss suffered during the period 9 November 2016 to 2 December 2016 was available. NHAI did not undertake traffic sampling in terms of Article XXVI during the said period. Nor did NHAI issue any instruction to GVK to maintain records of the traffic, which was freely permitted to ply on the project highway. This fact was also deposed on oath by RW-` Mr. N. N. Giri in cross examination, by admitting that NHAI did not issue any instruction to GVK to count the vehicles which passed the toll plaza during the period of suspension of collection of toll fee.

(xli) In these circumstances, NHAI's contention that alternate methods could also have been adopted by GVK to calculate the loss suffered on account of toll fee collection suspension during the period 9 November 2016 to 2 December 2016 could not be accepted, as the contention overlooked the requirement of the basis of computation having to be proximate to the period during which loss was suffered. In the absence of any better parameter available on record, the average daily traffic data for the month of October 2016, the correctness or credibility of which was not questioned by NHAI, constituted a



logical, creditworthy, contemporaneous and reliable basis to work out the loss of revenue suffered by GVK during the period 9 November 2016 to 2 December 2016. Being fully aware of the fact that GVK would have to be compensated for the said loss, NHAI, having failed to devise or suggest any better methodology for determining the loss, could not seek to question the entitlement of GVK to compute the loss on the basis of the historical data for the month of October 2016.

(xlii) Following on the above discussion, the claim of ₹ 21,75,45,640/-, as raised by GVK, was found to be sustainable and acceptable.

(xliii) On the aspect of interest, it was noted that CA did not prohibit or bar grant of interest. Rather Clauses 29.7(b) and (c), 31.2 and 36.1 envisaged payment of interest by NHAI on the amounts to which GVK was found entitled at the rate of SBI PLR. Rule 52(g) of the ICA Rules also vested the Arbitral Tribunal with the discretion to award interest including *pendente lite* interest. Section 31 of the 1996 Act also vested the learned Arbitral Tribunal with the discretion and power to grant interest. In the absence of any agreement between NHAI and GVK prohibiting grant of interest, GVK was entitled to interest.

39. On the basis of the aforesaid discussion, the learned Arbitral



Tribunal proceeded, by way of the impugned award, to hold GVK entitled to (i) ₹ 21,75,45,640/- by way of compensation for loss incurred due to suspension of toll collection for the period 9 November 2016 to the midnight of 2 December 2016 along with interest at 10% per annum w.e.f. 18 January 2017 till the date of payment and (ii) costs of ₹ 44,76,775/-, to be paid within a period of 60 days, failing which interest at 10% per annum would be payable till the date of payment.

40. Aggrieved by the aforesaid award, NHAI has approached this Court under Section 34 of the 1996 Act.

41. This matter had come up for hearing before the Court during the currency of the COVID-19 Pandemic. Detailed arguments were advanced by Mr. Shlok Chandra, on behalf of NHAI and Mr. Gopal Jain, Senior Counsel instructed by Mr. Devashish Bharuka, on behalf of GVK. Judgment was reserved. However, owing to the restricted functioning of the Court at the said time, and given the volume of work, judgment could not be delivered. As considerable time had elapsed since it was reserved, and in the interests of justice, learned Counsel for the parties were requested to appear personally before the Court on 6 December 2023 on which date they were queried as to whether they desired to address fresh arguments in the matter. Both learned Counsel, very fairly, and in a spirit of cooperation, agreed to the judgment being delivered in the case on the basis of arguments advanced and the written submissions tendered in the matter.



Rival submissions before the Court

Contentions of NHAI

42. Mr. Shlok Chandra submitted, at the outset, that NHAI was not disputing GVK's entitlement to compensation for the loss suffered on account of suspension of toll collection during the period 9 November 2016 to 2 December 2016 *per se*. However, GVK had sought compensation by applying the wrong clause of the CA. The clause which was applicable was Article VII. Instead GVK had applied Article XXXVI. The consequence is that the impugned award has resulted in unjust enrichment to GVK, as the amount awarded is far in excess of what GVK would have earned had the toll plaza actually functioned.

43. Mr. Shlok Chandra submits that Article VII of the CA specifically dealt with excess revenue sharing, and that Clause 7.2 required GVK to share, with NHAI, any fee, which was in excess of the Projected Fee. The Projected Fee for the financial year 2016-17 was ₹ 224.76 crores. The actual collection by GVK, during the said financial year was ₹ 301.95 crores. As a result, Clause 7.2 clearly required GVK to share, with NHAI, the fee collected, to the extent it was in excess of the Projected Fee.

44. Article VII required that 80% of the excess fee collected in



every Accounting Year was to be deposited in an Escrow sub-account and shared between NHAI and GVK in the manner envisaged by the said article.

45. Funds from the said Escrow sub-account were required to be used to meet any shortfalls in Projected Fee which had arisen in previous months. At the end of the Accounting Year, net excess fee, less any amount which had been used for meeting shortfall in previous months, was to be distributed between NHAI and GVK.

46. Undisputedly, in the 2016-17 financial year, GVK had earned ₹ 77.18 crores in excess of the Projected Fee for that year, despite suspension of toll between 9 November 2016 and the midnight of 2 December 2016.

47. Mr. Shlok Chandra submits that the learned Arbitral Tribunal was clearly in error in its view that Article VII covered only shortfalls due to external reasons. This was in the teeth of the article itself which used the expression “any shortfalls”.

48. The impugned award was also contrary to Article VII as the learned Arbitral Tribunal failed to notice that, even if toll fee had been collected during the period for which they remained in suspension, the net excess fee would have had to be deposited in the Escrow sub-account and would have been equally distributed between GVK and NHAI. NHAI, thereby, became disentitled, as a result of the



impugned award to its share of the fee which it would have earned had toll been collected. The entire compensation could not, therefore, have been awarded by the learned Arbitral Tribunal to GVK in a lumpsum fashion.

49. Similarly, submits Mr. Shlok Chandra, the learned Arbitral Tribunal was in error in holding that paragraph 5 of the NHAI's office order dated 29 November 2016 excluded the application of Article VII. In fact, the office order clearly stated that, in working out the compensation to which individual concessionaires would be entitled, as a result of suspension of toll fee collection, the respective concessionaire agreements would govern. Thus, the learned Arbitral Tribunal could not have arrived at the conclusion that Article VII of the CA stood excluded from application.

50. The learned Arbitral Tribunal, it is further contended, was also in error in accepting the computation of the compensation by GVK on the basis of the projected figures of toll collected during the month of October 2016. This was a purely speculative computation and could not, therefore, have constituted the basis of the award.

51. Mr. Shlok Chandra further submits that Clause 36.1 of the CA even if applicable, envisaged amendment to the CA as the remedy available if GVK suffered financial burden as a result of change in law. In such a circumstance, GVK was required to notify NHAI and propose amendments to the CA so as to restore GVK to the financial



position in which it would have been, had there been no change in law. The Model Concession Agreement, to which the NHAI's office order dated 29 November 2016 made reference, submits Mr. Shlok Chandra, contained no clause for revenue sharing. As such, reliance on the said Office Order was misplaced.

52. Even if Article XXXVI of the CA were to apply, Mr. Shlok Chandra seeks to point out that the parties would be required to be placed in the same financial position as if there was no change in law. Had there been no change in law, NHAI would have been entitled to a share of the toll fee collected by GVK at the toll plaza. The learned Arbitral Tribunal has, therefore, in his submission, erred in completely overlooking the share to which NHAI would have been entitled, even if Clause 36.1 was deemed to apply.

53. Responding to the said submissions, Mr. Gopal Jain, learned Senior Counsel appearing for GVK, on the other hand, relied on the reasoning adopted by the learned Arbitral Tribunal in arriving at its decision and submitted that, given the restricted scope and sweep of Section 34 of the 1996 Act, no occasion to interfere with the impugned Arbitral award can be said to exist.

Analysis

54. NHAI's challenge to the impugned Award is predicated solely on the premise that the learned Arbitral Tribunal has erred in



interpreting the clauses of the CA. While the learned Arbitral Tribunal agreed with GVK's submission that it was entitled to compensation under Article XXXVI, NHAI's contention is that the appropriate provisions, which would apply, those contained in Article VII and Article XXIX.

55. I have already set out, *in extenso*, the reasoning of the Arbitral Tribunal in arriving at its conclusions. Reiterating the said reasons would result in avoidable prolixity. It is obvious, however, that the impugned Award is comprehensively reasoned and has considered the reliance, by NHAI, on Articles VII and XXIX. It is not, therefore, as though the basis of NHAI's contest, to GVK's claim, has not been appreciated or addressed.

56. NHAI is, therefore, already on a slippery slope. The scope of interference with arbitral awards, under Section 34 of the 1996 Act, is classically heavily circumscribed. The Arbitral Tribunal enjoys a much higher degree of autonomy, in the matter of interpretation of contractual covenants, than that enjoyed by traditional courts. The necessity of maintaining the integrity of the arbitral process, and the arbitral establishment, requires Courts not only to keep their hands off an arbitral award which has considered the relevant contractual clauses, and to eschew the temptation to enter into its own examination of the contract and its covenants.

57. There is no sense in embarking on the journey, if the destination is out of bounds. When considering whether the challenge to the



arbitral award does, or does not have substance, the Court, therefore, does not re-examine the contract, or enter into a re-appraisal of its clauses, but merely appreciates the manner in which the Arbitral Tribunal has interpreted the agreement and examines whether the Section 34 applicant has made out a case to characterise the said interpretation as patently illegal or perverse. Absent patent illegality or perversity, interference by the Court, with an arbitral award, in exercise of the jurisdiction vested in it by Section 34 of the 1996 Act, is completely proscribed.

58. In the present case, the learned Arbitral Tribunal has juxtaposed Article XXXVI, on which GVK predicates its claim, with Articles VII and XXIX, on which NHAI relies, and has come to an informed conclusion that, firstly, the entitlement of GVK to compensation flows from Article XXXVI and not Article XXIX, and, secondly, that the said entitlement is not compromised, in any fashion, either by Article VII or Article XXIX.

59. The fact that GVK was entitled to be compensated for the loss suffered by it as a consequence of suspension of toll collection, is not in dispute. To that extent, it must be said that NHAI, from the very inception, has been candid in acknowledging that GVK had indeed suffered loss and that it was entitled to be compensated. The dispute related only to the provision of the CA in terms of which the compensation was to be assessed and worked out.



60. At a later stage, however, NHAI apparently reconsidered its options and introduced a more drastic challenge to GVK's claim, by seeking to invoke Article VII of the CA.

61. Two contentions have been raised, predicated on Article VII.

62. The first is that Article VII required GVK to deposit its monthly earnings from the use of the Project Highway, to the extent they exceeded the Projected Fee, in an Escrow account. This Escrow account, and the amounts so deposited therein, it is sought to be contended, were also intended to cater to any incidental expenses that might have arisen during that year in execution of the Project or operation of the Project Highway. At the end of the year, if, after adjustment of such expenses, there was a surplus in the Escrow Account, it was to be distributed between NHAI and GVK in the manner envisaged by the CA. The earnings from operation of the Project Highway, during the year 2016-2017, it is pointed out, was admittedly in excess of the Projected Fee by ₹ 77.18 crores. There was, therefore, no question of NHAI having to make any payment to GVK for the year 2016-2017. Rather, it was GVK which was obligated to deposit the aforesaid amount of ₹ 77.18 crores in the Escrow account, adjust, therefrom, the loss suffered by it as a consequence of suspension of collection of toll between 9 November and 3 December 2016 and to distribute the balance between NHAI and



GVK in the manner envisaged in the CA. Article VII, it is sought to be contended, is a complete provision, which sufficiently caters to contingencies such as those which have arisen in the present case, and there was no question, therefore, of directing any payment to be made by NHAI to GVK.

63. Article VII is alternately sought to be pressed into service to contend that, assuming any amount was payable to GVK as compensation, that amount would also be deposited in the Escrow account and subjected to adjustment and distribution as envisaged by the said Article.

64. Without prejudice to the aforesaid contentions predicated on Article VII, NHAI contends that *force majeure* being a contingency for which Article XXIX specifically provides, the recourse, by the learned Arbitral Tribunal, to Article XXXVI was manifestly unjustified.

65. Though NHAI, again fairly, does not allege perversity, it seeks to contend that the above infirmities, which plague the impugned Award, constitute “patent illegality” within the meaning of Section 34(2)(a) of the 1996 Act.

66. To know how restricted the scope of interference with the manner in which the Arbitral Tribunal interprets the contract is, one needs only to refer to the following passages from the judgments of



the Supreme Court in *Ssangyong Engg & Construction Co.Ltd v. NHAI*⁸ , *PSA Sical Terminals (P) Ltd. v. V.O. Chidambramar Port Trust*⁹ and *Delhi Airport Metro Express Pvt. Ltd. v. Delhi Metro Rail Corporation Ltd*¹⁰:

Ssangyong Engg & Construction Co.Ltd

69. We therefore hold, following the aforesaid authorities, that in the guise of misinterpretation of the contract, and consequent “errors of jurisdiction”, it is not possible to state that the arbitral award would be beyond the scope of submission to arbitration if otherwise the aforesaid misinterpretation (which would include going beyond the terms of the contract), could be said to have been fairly comprehended as “disputes” within the arbitration agreement, or which were referred to the decision of the arbitrators as understood by the authorities above. *If an arbitrator is alleged to have wandered outside the contract and dealt with matters not allotted to him, this would be a jurisdictional error which could be corrected on the ground of “patent illegality”, which, as we have seen, would not apply to international commercial arbitrations that are decided under Part II of the 1996 Act. To bring in by the backdoor grounds relatable to Section 28(3) of the 1996 Act to be matters beyond the scope of submission to arbitration under Section 34(2)(a)(iv) would not be permissible as this ground must be construed narrowly and so construed, must refer only to matters which are beyond the arbitration agreement or beyond the reference to the Arbitral Tribunal.*

76. However, when it comes to the public policy of India, argument based upon “most basic notions of justice”, it is clear that this ground can be attracted only in very exceptional circumstances when the conscience of the Court is shocked by infraction of fundamental notions or principles of justice. It can be seen that the formula that was applied by the agreement continued to be applied till February 2013 — in short, it is not correct to say that the formula under the agreement could not be applied in view of the Ministry's change in the base indices from 1993-1994 to 2004-2005. Further, in order to apply a linking factor, a Circular, unilaterally issued by one party, cannot possibly bind the other party to the agreement without that other party's consent. Indeed,

⁸ (2019) 15 SCC 131

⁹ (2021) 18 SCC 716

¹⁰ (2022) 1 SCC 131



the Circular itself expressly stipulates that it cannot apply unless the contractors furnish an undertaking/affidavit that the price adjustment under the Circular is acceptable to them. We have seen how the appellant gave such undertaking only conditionally and without prejudice to its argument that the Circular does not and cannot apply. This being the case, *it is clear that the majority award has created a new contract for the parties by applying the said unilateral Circular and by substituting a workable formula under the agreement by another formula dehors the agreement.* This being the case, a fundamental principle of justice has been breached, namely, that *a unilateral addition or alteration of a contract can never be foisted upon an unwilling party, nor can a party to the agreement be liable to perform a bargain not entered into with the other party.* Clearly, such a course of conduct would be contrary to fundamental principles of justice as followed in this country, and shocks the conscience of this Court. However, *we repeat that this ground is available only in very exceptional circumstances, such as the fact situation in the present case. Under no circumstance can any court interfere with an arbitral award on the ground that justice has not been done in the opinion of the Court. That would be an entry into the merits of the dispute which, as we have seen, is contrary to the ethos of Section 34 of the 1996 Act, as has been noted earlier in this judgment.*

PSA Sical Terminals (P) Ltd.

87. As such, as held by this Court in ***Ssangyong Engineering and Construction Company Limited*** (supra), the fundamental principle of justice has been breached, namely, that a unilateral addition or alteration of a contract has been foisted upon an unwilling party. This Court has further held that a party to the Agreement cannot be made liable to perform something for which it has not entered into a contract. In our view, *re-writing a contract for the parties would be breach of fundamental principles of justice entitling a Court to interfere since such case would be one which shocks the conscience of the Court and as such, would fall in the exceptional category.*

Delhi Airport Metro Express Pvt. Ltd

29. *Patent illegality should be illegality which goes to the root of the matter. In other words, every error of law committed by the Arbitral Tribunal would not fall within the expression “patent illegality”. Likewise, erroneous application of law cannot be*



categorised as patent illegality. In addition, contravention of law not linked to public policy or public interest is beyond the scope of the expression “patent illegality”. What is prohibited is for Courts to reappraise evidence to conclude that the award suffers from patent illegality appearing on the face of the award, as Courts do not sit in appeal against the arbitral award. The permissible grounds for interference with a domestic award under Section 34(2-A) on the ground of patent illegality is when the arbitrator takes a view which is not even a possible one, or interprets a clause in the contract in such a manner which no fair-minded or reasonable person would, or if the arbitrator commits an error of jurisdiction by wandering outside the contract and dealing with matters not allotted to them. An arbitral award stating no reasons for its findings would make itself susceptible to challenge on this account. The conclusions of the arbitrator which are based on no evidence or have been arrived at by ignoring vital evidence are perverse and can be set aside on the ground of patent illegality. Also, consideration of documents which are not supplied to the other party is a facet of perversity falling within the expression “patent illegality”.

67. To my mind, the use of the words “patent illegality” are telling, both in their import and impact. The fact that Section 34(2A) envisages “patent illegality” as a ground to set aside an arbitral award, unambiguously indicates that no illegality, much less infirmity, which falls short of “patent illegality” would justify interference with the award. The legislature, it is trite, does not indulge either in superfluity or in tautology.¹¹ Every word used by the legislature is, classically, to be regarded as having been deliberately used, and has to be accorded its due meaning and importance. The words “patent illegality” are strong words. They are not to be lightly employed. It is obvious that a view which may not, in the opinion of the Court, be entirely correct or acceptable, does not, by that reason, become “patently illegal”.



68. Where the question is one of interpretation of the contract, it is only where the Arbitral Tribunal proceeds in a manner which cannot commend itself to acceptance in law at all, or which results in the rewriting of the contractual provisions, that interference under Section 34 is permissible. This follows from the principle that the Arbitral Tribunal being itself a creature of the agreement between the parties, it does not possess the jurisdiction to rewrite the clauses of the said agreement.

69. A telling decision, which possibly represents the most recent expression of opinion by the Supreme Court on the issue of the scope of interference, under Section 34, with the manner in which the arbitral tribunal has interpreted the contract before it, is to be found in the judgment in *Hindustan Construction Co. Ltd v. N.H.A.I.*¹² In that case, as in the present, the Supreme Court was concerned with a challenge to an arbitral award purely on the manner in which the Arbitral Tribunal had interpreted the contractual covenants. The following passages from the decision clearly set out the legal position:

“26. The prevailing view about the standard of scrutiny- *not judicial review*, of an award, by persons of the disputants' choice being that of their decisions to stand-and not interfered with, [save a small area where it is established that such a view is premised on patent illegality or their interpretation of the facts or terms, perverse, as to qualify for interference, courts have to necessarily chose the path of *least interference, except when absolutely necessary*]. By training, inclination and experience, judges tend to adopt a corrective lens; usually, commended for appellate review. However, that lens is unavailable when exercising jurisdiction under Section 34 of the Act. Courts cannot, through process of

¹¹ Refer *Umed v. Raj Singh*, (1975) 1 SCC 76; *Dilbagh Rai Jerry v. UOI*, (1974) 3 SCC 554

¹² 2023 SCC OnLine SC 1063



primary contract interpretation, thus, create pathways to the kind of review which is forbidden under Section 34. So viewed, the Division Bench's approach, of appellate review, twice removed, so to say [under Section 37], and conclusions drawn by it, resulted in displacing the majority view of the tribunal, and in many cases, the unanimous view, of other tribunals, and substitution of another view. As long as the view adopted by the majority was plausible- and this court finds no reason to hold otherwise (because concededly the work was completed and the finished embankment was made of composite, *compacted* matter, comprising both soil and fly ash), such a substitution was impermissible.

27. For a long time, it is the settled jurisprudence of the courts in the country that awards which contain reasons, especially when they interpret contractual terms, ought not to be interfered with, lightly. The proposition was placed in *State of UP v. Allied Constructions*¹³:

*“[...] It was within his jurisdiction to interpret Clause 47 of the Agreement having regard to the fact-situation obtaining therein. It is submitted that an award made by an arbitrator may be wrong either on law or on fact and error of law on the face of it could not nullify an award. The award is a speaking one. The arbitrator has assigned sufficient and cogent reasons in support thereof. Interpretation of a contract, it is trite, is a matter for arbitrator to determine (see *Sudarsan Trading Co. v. The Government of Kerala*¹⁴). Section 30 of the Arbitration Act, 1940 providing for setting aside an award is restrictive in its operation. Unless one or the other condition contained in Section 30 is satisfied, an award cannot be set aside. The arbitrator is a Judge chosen by the parties and his decision is final. The Court is precluded from reappraising the evidence. Even in a case where the award contains reasons, the interference therewith would still be not available within the jurisdiction of the Court unless, of course, the reasons are totally perverse or the judgment is based on a wrong proposition of law”*

28. This enunciation has been endorsed in several cases (Ref *McDermott International Inc. v. Burn Standard Co. Ltd.*¹⁵). In *MSK Projects (I) (JV) Ltd v. State of Rajasthan*¹⁶ it was held

¹³ 2003 Supp (2) SCR 55

¹⁴ (1989) 2 SCC 38; AIR 1989 SC 890

¹⁵ 2006 Supp (2) SCR 409

¹⁶ (2011) 9 SCR 402



that an error in interpretation of a contract by an arbitrator is “an error within his jurisdiction”. The position was spelt out even more clearly in *Associate Builders* (supra), where the court said that:

“[...] if an arbitrator construes a term of the contract in a reasonable manner, it will not mean that the award can be set aside on this ground. Construction of the terms of a contract is primarily for an arbitrator to decide unless the arbitrator construes the contract in such a way that it could be said to be something that no fair minded or reasonable person could do.”

(Italics in original; underscoring supplied)

70. The law could not have been more plainly stated.

71. It is also well-settled that, in the absence of any contractual stipulation in that regard, where computation is required to be done, the Arbitral Tribunal is entitled to adopt a reasonable method of computation. Such an exercise is not open to interference under Section 34 of the 1996 Act. The following passages from the judgment of a Division Bench of this Court in *N.H.A.I. v. Oriental Pathways (Nagpur) Pvt Ltd*¹⁷ conclude the point, especially as they are rendered particularly in the context of the compensation payable by NHAI to a contractor:

“38. It is trite that it is open to the Arbitrator to adopt any reasonable formula for arriving at the computation of the compensation. In this regard, reference may be made to the pronouncement of the Supreme Court in *Associate Builders v. D.D.A.*¹⁸ extracted above.

39. In para 43 of the judgment, the Supreme Court has held that the construction of the contract by the Arbitrator is also within the

¹⁷ (2016) 3 Arb LR 448 (DB)

¹⁸ (2015) 3 SCC 49



jurisdiction of the Arbitrator. It is trite law that such construction is clearly beyond the scope of consideration by the Court while considering objections under Section 34 of the Arbitration and Conciliation Act, 1996.

40. In paragraph 56 of the judgment, the Supreme Court has held that the adoption and application of a formula by an Arbitrator is a pure question of fact. Clearly, the same is beyond the purview of objections under Section 34 of the Arbitration and Conciliation Act.”

Having failed to convince a Division Bench of this Court that the manner in which the compensation payable to the contractor was computed by the learned Single Judge may invite interference under Section 34 of the 1996 Act, NHAI can hardly hope to succeed in the same attempt before me, sitting singly.

72. The inbuilt restraints on the scope of interference, by Courts, with the manner in which the Arbitral Tribunal has interpreted the relevant statutory covenants, in fact, also inherently advise against the Court embarking on the exercise of interpreting the contract for itself. The occasion for the Court to interpret the contractual provisions would arise only if the Court can, based on its interpretation, assess the correctness of the decision – whether order or award – under challenge before it. The law firmly proscribes the Court from interfering with the award only because, in its view, the contractual clauses should have been interpreted differently. The Court’s scope of interference is restricted to cases where the interpretation of the contract, by the Arbitral Tribunal, is vitiated by patent illegality or perversity. For this, all that is to be seen is the manner in which the



Arbitral Tribunal has interpreted the contract. Of course, the Court has, in doing so, to bear settled principles of contractual interpretation in mind. The mere fact that the Arbitral Tribunal has erred in its interpretation, in the perception of the Court, would not, however, justify interference. There is always scope for a difference of views, even in the matter of interpretation of a contract. Where, however, the manner in which the Arbitral Tribunal has interpreted the contract is patently illegal or perverse, the Court must unquestionably step in and right the wrong. Absent such patent illegality or perversity, however, both parties have to live with the understanding, by the Arbitral Tribunal – a forum which they have themselves conceived and created – of the contractual provisions.

73. Para 38 *supra* clearly sets out, in detail, the reasoning of the learned Arbitral Tribunal. No reiteration thereof is necessary. Clearly, the learned Arbitral Tribunal has appreciated all the objections raised by the petitioner, as the respondent before it. Broadly, the learned Arbitral Tribunal has dealt with the said matter thus:

- (i) The official communication from the MoRTH to the NHAI, as well as from NHAI to GVK, indicated that MoRTH and NHAI were both *ad idem* that GVK was required to be compensated for the loss suffered by it owing to suspension of toll collection between 9 November 2016 and 3 December 2016. GVK had been directed to provide the figures of the compensation to which it was entitled and to raise interim bills, which it did.



(ii) The MoF Notification dated 8 November 2016 was in exercise of powers conferred by Section 26 of the RBI Act. Section 33 of the NHAI Act made directives of the Central Government binding on the NHAI. The MoF Notification dated 8 November 2016 constituted law within the meaning of Clause 1.2(b) of the CA. Prior to the Notification dated 8 November 2016 and the consequent directions issued by the MoRTH to NHAI, ₹ 500 and ₹ 1000 notes constituted legal tender. The notification, therefore, altered this legal position and amounted, therefore, to “change in law” within the meaning of the CA. Admittedly, the directions to GVK not to collect toll till the midnight of 2 December 2016 was consequent on the aforesaid change in law. The financial impact suffered by GVK as a result was in excess of ₹ 10 million (₹ 1 Crore). The case, therefore, directly attracted Article XXXVI of the CA. By operation of Clause 29.4(i) of the CA, therefore, the applicability of Article XXIX stood ruled out.

(iii) Insofar as Chapter VII of the CA was concerned, that envisaged the modalities for sharing the toll fee collected in excess of the Projected Fee, worked out at the time of entering into the CA. The Projected Fee was worked out assuming uninterrupted traffic on the project highway and undisturbed collection of toll fee. The Projected Fee did not cater to a situation such as that in the present case when, owing to a



change in law, the collection of toll fee was suspended during a part of a year. This circumstance, therefore, stood outside the contemplation of Chapter VII of the CA. The entitlement of GVK to compensation, arising from Article XXXVI of the CA could not, therefore, be compromised by referring to Article VII.

(iv) GVK was, therefore, indisputably entitled to compensation in terms of Article XXXVI of the CA.

(v) The computation of the compensation, by GVK, on the basis of the traffic figures and the toll collected during the month of October 2016 could also not be faulted, as there was no other way to estimate the traffic flow during the period for which toll collection remained suspended. Once there was an official direction to suspend toll collection, and NHAI was not able to provide any alternative or better method of estimating the toll which would have been collected had no such direction been issued so that the loss occasioned to GVK could be worked out, GVK was entitled to adopt a reasonable method for working out the loss. The traffic for the month of October 2016 constituted the most proximate basis for assessing the loss suffered by GVK. As such, the method of computation of loss by GVK could also not be faulted.



2023:DHC:8818



74. Any interference, by this Court, with the impugned Award, would do complete disservice to the very principle of according sanctity to the arbitral process.

Conclusion

75. In view of the aforesaid, there is clearly no ground to interfere with the impugned award, within the limited confines of the jurisdiction vested in this court by section 34 of 1996 Act.

76. The petition is dismissed with no order as to costs.

C. HARI SHANKAR, J.

DECEMBER 11, 2023

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