

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

Reserved on: 17.01.2023

Date of decision: 16.02.2023

+ **O.M.P. (COMM) 286/2018 & I.A. 8863/2018, I.A. 2943/2019**

NATIONAL HIGHWAY AUTHORITY OF INDIA

..... Petitioner

Through: Mr.Narender Hooda, Sr. Adv.
with Mr.Arun Kumar Batta,
Ms. Neha Kumari, Mr. Abdul
Wahid, Ms. R. Ahuja,
Mr.Shaurya Lamba, Advs.

versus

ROHTAK PANIPAT TOLLWAY PVT. LTD.

..... Respondent

Through: Ms.Roopali Chaturvedi and
Ms.Sadiqua Fatima, Advs.

CORAM:

HON'BLE MR. JUSTICE NAVIN CHAWLA

1. The present petition has been filed under Section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the 'Act'), challenging the Arbitral Award dated 06.10.2017 passed by the learned Arbitral Tribunal, as well as the order dated 20.02.2018 passed by the learned Arbitral Tribunal on an application under Section 33(1)(a) and (b) of the Act.

2. The disputes between the parties arose out of the Agreement for the work of "Four Laning of Rohtak - Panipat Section of NH-71A from KM 0.00 (KM 63.00 OF NH 10) to KM 80.858 (KM 83.39 of NH-1) in the State of Haryana under the NDPH Phase III on Design, Build, Finance, Operate and Transfer ('DBFOT') Basis" awarded by the petitioner to the respondent.

Signature Not Verified

Digitally Signed By: SUNIL

Signing Date: 17.02.2023

17:37:01

O.M.P. (COMM) 286/2018

3. By the Impugned Award, the learned Arbitral Tribunal has allowed the claims of the respondent herein.

SUBMISSIONS OF THE LEARNED SENIOR COUNSEL FOR THE PETITIONER:

CLAIM NO. 1

4. Claim no.1 of the respondent was towards additional lead required for transportation of material on site. The learned senior counsel for the petitioner submits that the mining operation in the State of Haryana was lying closed since 01.03.2010. He submits that the Concession Agreement was signed between the parties on 09.03.2010 and the work commenced in April 2011, that is, after the closure of the mining operation. He submits that, therefore, the respondent could not have been allowed to take the benefit of Clause 41.1 of the Concession Agreement which provides for increase in costs due to change in law.

5. He submits that the claim for additional lead was raised by the respondent for the first time vide letter dated 13.05.2014, while the notice claiming arbitration was issued on 11.02.2016. He submits that, therefore, not only is the claim not maintainable in terms of the Concession Agreement, but is also barred by the Law of Limitation.

6. Placing reliance on *Geo Miller and Company Private Ltd. v. Chairman, Rajasthan Vidyut Utpadan Nigam Limited.*, (2020) 14 SCC 643 and *Bharat Sanchar Nigam Limited & Another v. Nortel Networks India Private Ltd.*, (2021) 5 SCC 738, the learned senior counsel for the petitioner submits that as the cause of action arose on 01.03.2010 and the notice claiming arbitration was issued only on 11.02.2016, the claim was barred by limitation. He submits that the

learned Arbitral Tribunal has ignored these important facts in adjudicating the claim no.1 in favour of the respondent.

7. He further submits that as per the Government Order dated 21.04.2012, sand mine in the Districts of Sonapat and Panipat and two small stone mines in the District of Mahendergarh remained operational even after 01.03.2010. Therefore, there was no compelling reason for the respondent to have allegedly chosen to procure the material from outside the State of Haryana. In any case, for this unilateral decision of the respondent, its claim for differential in prices was not justified and could not have been granted.

8. He submits that the learned Arbitral Tribunal has erroneously placed reliance upon the Feasibility Report, despite the fact that the Clause 2.13 of the RFP clearly states that the Feasibility Report is only a preliminary document and that nothing contained therein would be binding upon the Authority nor would it confer any right on the bidders. He submits that the Feasibility Report was only for the purpose of appraising the Concessionaire about the topography of the area and other different details mentioned in the said document, which are only indicative and not binding.

9. The learned senior counsel for the petitioner further submits that the learned Arbitral Tribunal has also erred in placing reliance upon the Letter dated 15.04.2013 from the Independent Engineer (in short, the 'IE') to the petitioner, wherein, the IE allowed the additional carriage charges with regards to transportation of stone aggregates from the State of Rajasthan as change of scope of work. He submits that the said letter has no relevance to a claim under change in law.

10. He submits that even the quantification of the sum awarded under claim no.1 cannot be sustained. He submits that assuming, but

not admitting, that the Feasibility Report was binding on the petitioner, even in such an event, as per the Feasibility Report, the Granular Sub-Base Material (in short, 'the GSB') was available at the maximum distance of 190 Kms, and assuming that it was brought by the respondent from the distance of 257 Kms, the respondent's claim could have been maintainable only for a lead distance for transportation of only 67 Kms. However, the learned Arbitral Tribunal erroneously quantified the claim with respect to additional transportation charges for GSB taking the lead distance of 134 Km on the basis of average distance of the mine mentioned in the Feasibility Report.

11. He submits that claim no.1 has been granted to the respondent on notional basis and without any evidence produced by the respondent. He submits that as the claim was of the nature of recovery of damages, the same could not have been allowed without proof of the same.

CLAIM NO. 2

12. Claim no.2 pertains to the alleged loss of revenue suffered by the respondent due to delay in granting permission for collection of toll and the Provisional Completion Certificate (hereinafter referred to as the 'PCC').

13. The learned senior counsel for the petitioner submits that as per Article 14 of the Concession Agreement, PCC could be issued to the respondent only after successful conclusion of safety tests and when the Project Highway could safely and reliably be put to commercial operations. He submits that the IE, with respect to safety, was to be guided by the Safety Consultant appointed by the petitioner as per the Article 18 of the Concession Agreement. The application made by the

respondent vide letter dated 24.08.2013 for issuance of PCC was not considered by the petitioner and the PCC could not have been issued. He submits that even in the letter dated 18.09.2013, which forms the basis for the learned Arbitral Tribunal to pass the Award in favour of the respondent, the works mentioned in Appendix A-1 and A-2 to the said letter were not complete and the respondent had to complete the same before the issuance of the PCC. The IE, even vide letter dated 30.09.2013, pointed out that certain items were yet to be completed; the respondent was instructed to complete the pending works at the earliest and submit a Total Compliance Report. One of the most crucial items, as pointed out in the said letter, was the compliance regarding the metal beam crash barrier which was not completed by the respondent. In the light of the said letter dated 30.09.2013, the application made by the respondent for issuance of PCC was not considered by the petitioner.

14. He submits that the IE had communicated to the petitioner, vide letter dated 25.10.2013, that as on 25.10.2013, certain works were pending as per the Safety Audit Report attached with the said letter under serial no. 1, Row 5. These works were a part of the Safety Audit Report, and as such, it was paramount for the petitioner to complete the same before the issuance of PCC to the petitioner.

15. He submits that in view of the above, the Award passed by the learned Arbitral Tribunal is in violation of the fundamental policy of Indian Law as the learned Arbitral Tribunal has, arbitrarily and without any application of mind, held that none of the items said to be incomplete were such which may pertain to reliability and safety of the Project Highway, even though, the said items were brought to

notice for compliance by the Safety Consultant, as is evident from the aforementioned letter dated 30.09.2013.

16. He submits that the learned Arbitral Tribunal has also failed to consider the fact that in terms of the Clause 26.2.1 of the Concession Agreement, the Concessionaire (the respondent herein) had to pay to the petitioner, on COD date, a premium in the shape of additional Concession Fees for the amount of Rs. 45 Crore during that year and for each subsequent year of the Concession Period. He submits that even if the conclusion of the learned Arbitral Tribunal on Claim no.2 is upheld, the proportionate amount of the Concession Fees of Rs. 45 Crore should be deducted from the amount awarded by the learned Arbitral Tribunal. He submits that the learned Arbitral Tribunal failed to deduct the proportionate amount of approximately 90 days of the year 2013 and 8 days of the year 2014 as Concession Fees payable by the respondent to the petitioner in terms of Clause 26.2.1 of the Concession Agreement. The Concession Fees as such for the said period come out to be approximately Rs. 12,08,00,000/-, which is required to be deducted from amount awarded under the claim no.2 of the respondent.

SUBMISSIONS OF THE LEARNED COUNSEL FOR THE RESPONDENT:

17. On the other hand, the learned counsel for the respondent, while reminding the Court of the limited jurisdiction that it exercises under Section 34 of the Act, submits that the Impugned Award is based on a proper appreciation of the contractual terms and the facts, and, therefore, deserves no interference from this Court.

CLAIM NO. 1

Signature Not Verified

Digitally Signed By: SUNIL

Signing Date: 17.02.2023

17:37:01

M.P. (COMM) 286/2018

18. On Claim no.1, she submits that the request for proposal was issued by the petitioner on 05.06.2009; the respondent submitted its bid on 30.11.2009; and the Letter of Award (in short, the 'LOA') was issued to the respondent by the petitioner on 04.01.2010. She submits that in terms of Clause 2.15.1 of the RFP, the bid could not have been modified, substituted, or withdrawn by the respondent after the bid date. She submits that in terms of Clause 3.3.6 of the RFP, the respondent was not entitled to seek any deviation in the Concession Agreement, which was to be signed between the parties after the acknowledgement of LOA dated 04.01.2010. She submits that, therefore, the binding Contract came into being between the parties on 04.01.2010, and as the mining activity was banned vide order dated 21.04.2012 with effect from 01.03.2010, that is, after the issuance of the LOA, the same falls within the ambit and scope of Clause 41.1, that is, 'change in law'.

19. On the question of limitation, she submits that in terms of Clause 41.1, it was only where the Concessionaire suffers an increase of cost as a result of change in law, the aggregate financial effect of which exceeds higher of Rs.1 Crore or 0.5% Realisable Fee in the Accounting Year, that the Concessionaire was to notify the Authority seeking amendment of the Agreement. She submits that the work on the project commenced on 18.04.2011; the respondent applied for Completion Certificate for the full length of the project on 13.11.2013; and the Provisional Certificate was issued by the petitioner on 06.01.2014. The respondent thereafter raised a claim on 13.05.2014, which was rejected by the petitioner on 25.05.2015. The respondent thereafter invoked the Arbitration Agreement on 11.02.2016. She submits that therefore, the invocation was within the period of

limitation; there was also no delay in raising of the claim before the petitioner.

20. On the quantification of the claim, the learned counsel for the respondent submits that the same has been done in a reasonable manner and in terms of table numbers 8.5 and 8.8 of the Final Feasibility Report and the letter dated 15.04.2013 issued by the IE, which established the fact of sourcing of the materials by the respondent from Rajasthan and also the acceptance of carriage charges in accordance with the Haryana Schedule of Rates, Public Works Department, Haryana. She submits that no fault can be found with the learned Arbitral Tribunal in taking the average of the lead distance from the Feasibility Report.

21. She further submits that, in fact, the learned Arbitral Tribunal has rejected the respondent's claim for additional cost for carriage of sand since the sand was available in the Districts of Sonapat and Panipat in Haryana. The same cannot be said for the availability of GSB material and Aggregates.

CLAIM NO. 2

22. On Claim no.2, she submits that in terms of Clause 14.3.1 and 14.3.2, the IE was to issue the PCC on completion of at least 75% of the Project Highway if the tests are successful and the Project Highway can be safely and reliably put to commercial operations. The PCC was to be issued by the IE even though certain works or things forming part thereof were not yet complete and were outstanding. She submits that the respondent applied for PCC vide letter dated 24.08.2013 for 93.7% of the Project Highway. Various test reports as per the contractual provisions were submitted and the respondent also

undertaking and the completion of the works as stated in the Punch List-C that the IE vide letter dated 18.09.2013 informed the petitioner that the Project Highway can be safely and reliably put to commercial operation as all mandatory tests have been successfully conducted. Despite the fact that it was the IE who was the Competent Authority to issue the PCC, IE sought the approval of the petitioner in terms of Clause 12 of the Terms of Reference of the Independent Engineer Consultancy Agreement, though the same was not binding or applicable to the respondent. She submits that the items mentioned by the IE as incomplete were not essential to put the Project Highway safely and reliably on commercial operation. The same were just additional compliances sought by the Safety Consultant in its Audit Report. In any case, the IE vide letter dated 25.10.2013 informed the petitioner of completion of these works. She submits that, therefore, no fault can be found in the impugned Arbitral Award on the date when the respondent was entitled to grant of the PCC.

23. Without prejudice to the above submission, she submits that as against 75% of the Project Highway which was required to be completed in terms of Article 14.3 for issuance of the PCC, the respondent had sought the PCC for 93.7% of the Project Highway. Therefore, even if some works remained pending, the respondent was, entitled to grant of PCC.

24. On the claim of the petitioner for deduction of proportionate amount of Concession Fee for the period for which Claim no.2 has been granted by the Arbitral Tribunal, the learned counsel for the respondent submits that the same cannot be agitated at the stage of challenge to the Arbitral Award under Section 34 of the Act. The

petitioner having not raised this claim before the learned Arbitral Tribunal, cannot challenge the Award on basis thereof.

ANALYSIS AND FINDINGS:

25. I have considered the submissions made by the learned counsels for the parties.

26. At the outset, I have to remind myself of the limited jurisdiction that I exercise under Section 34 of the Act. This Court cannot consider the award as an Appellate Court. The scope of interference/challenge has been explained by the Supreme Court in *Ssangyong Engineering and Construction Company Limited v. National Highways Authority of India (NHAI)*, (2019) 15 SCC 131, wherein it has been *inter alia* held as under:

“34. What is clear, therefore, is that the expression “public policy of India”, whether contained in Section 34 or in Section 48, would now mean the “fundamental policy of Indian law” as explained in paras 18 and 27 of Associate i.e. the fundamental policy of Indian law would be relegated to “Renusagar” understanding of this expression. This would necessarily mean that Western Geco expansion has been done away with. In short, Western Geco, as explained in paras 28 and 29 of Associate Builders, would no longer obtain, as under the guise of interfering with an award on the ground that the arbitrator has not adopted a judicial approach, the Court's intervention would be on the merits of the award, which cannot be permitted post amendment. However, insofar as principles of natural justice are concerned, as contained in Sections 18 and 34(2)(a)(iii) of the 1996 Act, these continue to be grounds of challenge of an award, as is contained in para 30 of Associate Builders.

35. It is important to notice that the ground for interference insofar as it concerns

“interest of India” has since been deleted, and therefore, no longer obtains. Equally, the ground for interference on the basis that the award is in conflict with justice or morality is now to be understood as a conflict with the “most basic notions of morality or justice”. This again would be in line with paras 36 to 39 of Associate Builders, as it is only such arbitral awards that shock the conscience of the court that can be set aside on this ground.

36. *Thus, it is clear that public policy of India is now constricted to mean firstly, that a domestic award is contrary to the fundamental policy of Indian law, as understood in paras 18 and 27 of Associate Builders, or secondly, that such award is against basic notions of justice or morality as understood in paras 36 to 39 of Associate Builders. Explanation 2 to Section 34(2)(b)(ii) and Explanation 2 to Section 48(2)(b)(ii) was added by the Amendment Act only so that Western Geco, as understood in Associate Builders, and paras 28 and 29 in particular, is now done away with.*

37. *Insofar as domestic awards made in India are concerned, an additional ground is now available under sub-section (2-A), added by the Amendment Act, 2015, to Section 34. Here, there must be patent illegality appearing on the face of the award, which refers to such illegality as goes to the root of the matter but which does not amount to mere erroneous application of the law. In short, what is not subsumed within “the fundamental policy of Indian law”, namely, the contravention of a statute not linked to public policy or public interest, cannot be brought in by the backdoor when it comes to setting aside an award on the ground of patent illegality.*

38. *Secondly, it is also made clear that reappreciation of evidence, which is what an appellate court is permitted to do, cannot be permitted under the ground of patent illegality appearing on the face of the award.*

39. *To elucidate, para 42.1 of Associate Builders, namely, a mere contravention of the*

substantive law of India, by itself, is no longer a ground available to set aside an arbitral award. Para 42.2 of Associate Builders, however, would remain, for if an arbitrator gives no reasons for an award and contravenes Section 31(3) of the 1996 Act, that would certainly amount to a patent illegality on the face of the award.

40. The change made in Section 28(3) by the Amendment Act really follows what is stated in paras 42.3 to 45 in Associate Builders, namely, that the construction of the terms of a contract is primarily for an arbitrator to decide, unless the arbitrator construes the contract in a manner that no fair-minded or reasonable person would; in short, that the arbitrator's view is not even a possible view to take. Also, if the arbitrator wanders outside the contract and deals with matters not allotted to him, he commits an error of jurisdiction. This ground of challenge will now fall within the new ground added under Section 34(2-A).

41. What is important to note is that a decision which is perverse, as understood in paras 31 and 32 of Associate Builders, while no longer being a ground for challenge under “public policy of India”, would certainly amount to a patent illegality appearing on the face of the award. Thus, a finding based on no evidence at all or an award which ignores vital evidence in arriving at its decision would be perverse and liable to be set aside on the ground of patent illegality. Additionally, a finding based on documents taken behind the back of the parties by the arbitrator would also qualify as a decision based on no evidence inasmuch as such decision is not based on evidence led by the parties, and therefore, would also have to be characterised as perverse.”

27. In *Delhi Airport Metro Express Private Limited v. Delhi Metro Rail Corporation Limited*, (2022) 1 SCC 131, the Supreme Court

reiterated the limited scope of interference permitted under Section 34 of the Act, as under:-

28. This Court has in several other judgments interpreted Section 34 of the 1996 Act to stress on the restraint to be shown by Courts while examining the validity of the arbitral awards. The limited grounds available to Courts for annulment of arbitral awards are well known to legally trained minds. However, the difficulty arises in applying the well-established principles for interference to the facts of each case that come up before the Courts. There is a disturbing tendency of Courts setting aside arbitral awards, after dissecting and reassessing factual aspects of the cases to come to a conclusion that the award needs intervention and thereafter, dubbing the award to be vitiated by either perversity or patent illegality, apart from the other grounds available for annulment of the award. This approach would lead to corrosion of the object of the 1996 Act and the endeavours made to preserve this object, which is minimal judicial interference with arbitral awards. That apart, several judicial pronouncements of this Court would become a dead letter if arbitral awards are set aside by categorising them as perverse or patently illegal without appreciating the contours of the said expressions.

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".

30. Section 34(2)(b) refers to the other grounds on which a court can set aside an arbitral award. If a dispute which is not capable of settlement by arbitration is the subject-matter of the award or if the award is in conflict with public policy of India, the award is liable to be set aside. Explanation (1), amended by the 2015 Amendment Act, clarified the expression "public policy of India" and its connotations for the purposes of reviewing arbitral awards. It has been made clear that an award would be in conflict with public policy of India only when it is induced or affected by fraud or corruption or is in violation of Section 75 or Section 81 of the 1996 Act, if it is in contravention with the fundamental policy of Indian law or if it is in conflict with the most basic notions of morality or justice.

(emphasis supplied)

28. Applying the above test to the facts of the present case, I shall consider the objections of the petitioner on merit.

CLAIM NO. 1:

29. On the applicability of Clause 41.1, the learned Arbitral Tribunal in its Impugned Award has observed as under: -

"20. Before we may deal with the controversy on merit in the context of the relevant clauses as mentioned above, it would be appropriate

to deal with the twin objections as noted above. We have already mentioned that the Claimant was the highest bidder. His bid was accepted on 30.11.2009 or at the most when a Letter of Award was issued in his favour on 4.1.2010. Highest bid given by the Claimant is an offer, it is accepted at least when Letter of Award was issued in its favour. In view of the provisions contained in Section 4 of the Indian Contract Act, 1872 the communication of an acceptance is complete as against the proposer, when it is put into a course of transmission to the person to whom it is made, so as to be out of the power of the acceptor and as against the acceptor, when it comes to the knowledge of the proposer. In view of the facts as mentioned above, when the Letter of Award was issued to the Claimants on 4.1.2010 a concluded and binding contract would come into existence. The mining operations stopped in the State of Haryana on 1.3.2010 i.e. after the contract had already come into being. The ground for rejection as contained in the letter of the Respondent referred to as also in the counter that the concluded contract came into being when the Concession Agreement was signed by the parties on 9.3.2010 by which time the Claimants had come to know about halting of mining operations in the State needs to be repelled. The provisions of Section 4 of the Contract Act are clear. However, we may mention that Hon'ble Supreme Court in Haridwar Singh v. Begum. Sumbruiu AIR 1972 SC 1942 has held that the communication of acceptance of the highest bid is necessary for completed contract. Surely, when Letter of Award was issued by none other than the Respondent, it certainly would be an acceptance of the highest bid given by the Claimant.

That apart, the RFP clearly states that no bid shall be modified, substituted or withdrawn by the bidder after the bid date and further the selected bidder shall not be able to make any deviation in the Concession Agreement after acknowledgement of the LOA. Clauses 2.15.1 and 3.3.6 read as follows:

“2.15.1 The Bidder may modify, substitute or withdraw its Bid after

Signature Not Verified

Digitally Signed By: SUNIL

Signing Date: 17.02.2023

17:37:01 J.M.P. (COMM) 286/2018

submission, provided that written notice of the modification, substitution or withdrawal is received by the Authority prior to Bid Due Date. No Bid shall be modified, substituted or withdrawn by the Bidder on or after the Bid Due Date."

"3.3.6. After acknowledgement of the LOA as aforesaid by the Selected Bidder, it shall execute the Concession Agreement within the period prescribed in Clause 1.3. The Selected Bidder shall not be entitled to seek any deviation in the Concession Agreement."

The very fact that the Claimants could not modify, substitute or withdraw their bid after the Bid Due Date i.e. 30.11.2009 and further that Concessionaire was not entitled to seek any deviation in the Concession Agreement after acknowledgement of LOA would conclusively manifest that the contract had come into being at least when LOA was issued by the Respondent."

30. The above finding of the learned Arbitral Tribunal is based on the interpretation of various terms of the RFP. I find no infirmity in the above view taken by the learned Arbitral Tribunal. In terms of Clause 3.3.6 of the Concession Agreement, the respondent was not entitled to seek any deviation in the Concession Agreement after the acknowledgement of the LOA. Admittedly, the mining activity in the State of Haryana was banned vide order dated 21.04.2012 with effect from 01.03.2010, that is, after the issuance of the LOA on 04.01.2010. The same would, therefore, fall within the scope of 'change in law'.

31. On the question of the claim no.1 being barred by limitation, I again find no merit in the objection raised by the petitioner. Clause 41.1 of the Concession Agreement is reproduced hereinunder:-

"41.1 Increase in costs

If as a result of Change in Law, the Concessionaire suffers an increase in

Signature Not Verified

Digitally Signed By: SUNIL

Signing Date: 17.02.2023

17:37:01

M.P. (COMM) 286/2018

costs or reduction in net after tax return or financial burden, the aggregate financial effect of which exceeds the higher of Rs. 1 crore (Rupees one crore) and 0.5% (zero point five percent) of the Realisable Fee in any Accounting Year, the Concessionaire may so notify the Authority and propose amendments to this Agreement so as place the Concessionaire in the same financial position as it would have enjoyed had there been no such Change in Law resulting in the cost increase, reduction in return or other financial burden as aforesaid upon notice by the Concessionaire, the Parties shall meet, as soon as reasonably practicable but no later than 30 (thirty) days from the date of notice, and either agree on amendments to this Agreement or on any other mutually agreed arrangement: Provided that if no agreement is reached within 90 (ninety) days of the aforesaid notice, the Concessionaire may by notice require the Authority to pay an amount that would place the Concessionaire in the same financial position that it would have enjoyed had there been no such Change in Law, and within 15 (fifteen) days of receipt of such notice, along with particulars thereof, the Authority shall pay the amount specified therein; provided that if the Authority shall dispute such claim of the Concessionaire, the same shall be settled, in accordance with the Dispute Resolution Procedure. For the avoidance of doubt, it is agreed that this Clause 41.1 shall be restricted to changes in law directly affecting the Concessionaire's costs of performing its obligations under this Agreement."

32. In the present case, the work commenced on 18.04.2011. The claim was raised by the respondent with the petitioner on 13.05.2014. Even in terms of the Clause 41.1, the claim for seeking amendment in

change of law would arise in favour of the respondent only on the end of the Accounting Year. Therefore, the claim was raised within the period of limitation by the respondent. The same was rejected by the petitioner only on 25.05.2015, whereafter, the respondent invoked the Arbitration Agreement on 11.02.2016. From the date of rejection of the claim, the invocation was also within the period of limitation.

33. In the present case, as is noted hereinabove, the '*dispute*' between the parties can be said to arise only with the rejection of the claim of the respondent by the petitioner vide its letter dated 25.05.2015. Delay in raising the claim by the respondent cannot be a ground to hold the same to be not maintainable.

34. In ***Geo Miller*** (*supra*), the Supreme Court has held that the period of limitation for commencement of arbitration runs from the date on which, had there been no arbitration clause, the cause of action would have accrued. The cause of action would also arise when '*dispute arises between the parties.*' It has been held that the period during which the parties were *bona fide* negotiating towards an amicable settlement may be excluded for the purpose of computing the period of limitation for reference to arbitration under the Act. While mere failure to pay may not give rise to a cause of action, once the applicant has asserted its claim and the respondent fails to respond to such claim, such failure will be treated as a denial of applicant's claim giving rise to a dispute and, therefore, the cause of action for reference to arbitration.

35. In ***Bharat Sanchar Nigam Limited*** (*supra*), the Supreme Court held that the period of limitation for issuing notice of arbitration would not get extended by mere exchange of letters, or mere settlement discussion, '*where a final bill is rejected by making*

deduction or otherwise.’ It was held that the notice invoking arbitration must be received by the other party within a period of three years from the rejection of the final bill, failing which the time bar would prevail.

36. The above judgments, therefore, do not support the plea of the petitioner that the claim of the respondent was barred by limitation.

37. The learned Arbitral Tribunal has also discussed the above issue and has held as under:-

“21. In so far as second plea pertaining to the claim being barred by time is concerned, the same has no merit either. It may be recalled that the bid was accepted on 4.1.2010 by which the Claimants were informed that the concession period is 25 years including construction period of 910 days from the Appointed Date. The construction of the project would only start after the Concession Agreement is signed by parties. The actual work was to start even as per the case set up by the Respondent in the written synopsis of arguments on 18.4.2011. It is further the case of the Respondent in synopsis that the Claimant applied for Completion Certificate for full length on 13.11.2013. Provisional Certificate was issued by the Respondent on, 6.1.2014 which would only show that substantial work had already been done. The Claimants, however, state that the Provisional Certificate should have been granted 3/4 months earlier. Complete computation of the extra cost incurred by the Claimants could be done only after the construction was complete. The claim was raised on 13.4.2014 and the same can by no stretch of imagination be termed as barred by time or belated.

Further, for the claim to be barred by time, the Respondent places reliance on Article 41.1 which has already been reproduced hereinabove. A bare reading of the Article would show that there is no time limit to notify the Authority of the proposed amendments of the Agreement if as a result of Change of Law, Concessionaire has suffered

an increase in costs and put to financial loss etc. If no time may be prescribed to file suit/application or claim, it could be said at best that the claim is belated but if the present case even this plea appears to be impermissible.”

38. I find no infirmity with the view expressed by the learned Arbitral Tribunal and, consequentially, find no merit in the above objection of the petitioner.

39. On the question of quantification of the claim, I would first quote from the Impugned Award:-

“(i) Rates for carriage of material: The carriage charges have been taken from Haryana Schedule of Rates, Public Works Department, Haryana 1988 with premium applicable with effect from 31.10.2011 as per 22.11.2011. The relevant pages of the same are annexed at page nos.705, 706 and 707 of the SOC. CD -5. The Independent Engineer has computed the rates based on the same for the year 2011 and has adopted the same rates for 2012-2013. The relevant page of the same is at page no.104 of the SOC. CD-1.

The Claimant has also computed the rates as per the said Schedule of Rates & Premium applicable for the year 2011 and has adopted the same rates for subsequent years without any escalation thereon. The computation of carriage charges by the Claimant is at Page 704 of the SOC and the said rates of 2011 have been used to compute the amount for Claim No.1 which is at Page 686 of the SOC. CD-5.

Even the Independent Engineer in its letter dated 15.04.2013, Annexure C-18 annexed at page no.101 of SOC. CD-1 has observed that "the carriage charges by mechanical means and loading & unloading of materials have only been taken from Haryana Schedule of Rate, Public Works Department, Haryana 1988 with premium applicable with effect from 31.10.2011 as per Haryana Public Works

Department (B&R) Memo No.7739-56 dated 31.10.2011",

Thus, the Claimant has used the minimum rate for the entire period in the computation of the Claim No.1.

(ii) Lead distance for transportation of raw material:

For GSB: *So as to rationalize the claim amount, the Lead distance for transportation of raw material, can be taken as 113 Km, which is the average of 60 km, 90 Km and 190 Km, as mentioned in Table 8.5 at page 8-11 of the Final Feasibility Report got prepared by the Authority, which is also attached as page 61 of the Statement of Claims (CD-1):*

For Aggregate: *The Lead distance for transportation of raw material should be taken as 75 Km, which is the average of 60 km and 90 Km mentioned in Table 8.8 at page 8-13 of the Final Feasibility Report got prepared by Authority and attached with the Statement of Claims (CD-1) at page 63.*

For Sand: *So as to rationalize the claim amount, the compensation for Sand need not be granted and thus, we are not inclined to include the same in the awarded amount."*

40. A reading of the above would show that the learned Arbitral Tribunal has taken the rates from the Haryana Schedule of Rates, Public Works Department. The Arbitral Tribunal has also placed reliance on the report of the IE dated 15.04.2013 to conclude that the respondent had transported stone/GSB from Rajasthan. The Arbitral Tribunal has awarded the claim taking the lead distance as an average of what was provided in the final Feasibility Report. The approach adopted by the learned Arbitral Tribunal can in no manner be said to be perverse so as to warrant interference from this Court.

41. As far as the submission of the learned senior counsel for the petitioner that in terms of the Government Order dated 21.04.2012, two small stone mines in District Mahendergarh were in operation and that the respondent should have sourced the stone and aggregate from the said mine rather than from Rajasthan, the same also cannot be accepted as falling within the scope of the limited grounds available with a party to challenge the Arbitral Award. As noted hereinabove, the learned Arbitral Tribunal has placed reliance on the report of the IE, which though was for the purpose of change in scope of work, admitted to the respondent procuring the stone/GSB from Rajasthan.

42. In view of the above, challenge of the petitioner to the grant of Claim No. 1 in favour of the respondent by the learned Arbitral Tribunal, is rejected.

CLAIM NO. 2

43. As far as Claim no.2 is concerned, Article 14.3 of the Concession Agreement is relevant to the same, and is reproduced hereinbelow:-

“14.3 Provisional Certificate

*14.3.1 The Independent Engineer may, at the request of the Concessionaire, issue a provisional certificate of completion substantially in the form set forth in Schedule-J (the, “**Provisional Certificate**”) if the Tests are successful and the Project Highway can be safely and reliably placed in commercial operation though certain works or things forming part thereof are outstanding and not yet complete. In such an event, the Provisional Certificate shall have appended thereto a list of outstanding items signed jointly by the Independent Engineer and the Concessionaire (the, “**Punch List**”); provided that the Independent Engineer shall not withhold the Provisional Certificate for reason of any work remaining incomplete if the delay in*

completion thereof is attributable to the Authority.

14.3.2 The parties hereto expressly agree that a Provisional Certificate under this Clause 14.3 may, upon request of the Concessionaire to this effect, be issued for operating part of the Project Highway, if atleast 75% (seventy five percent) of the total length of the Project Highway has been completed. Upon issue of such Provisional Certificate, the provisions of Article 15 shall apply to such completed part.”

(Emphasis supplied)

44. A reading of the above would show that though the PCC is to be issued if atleast 75% of the total length of project highway has been completed, it is also the condition of contract that the same would be issued only where the project highway can be ‘*safely and reliably placed in commercial operation though certain works or things forming part thereof are outstanding and not yet complete.*’

45. The learned Arbitral Tribunal has placed reliance on the letter dated 18.09.2013 from the IE on the grant of PCC, and has held as under:-

“...Then there is a mention of some outstanding work but the same was not towards the safety of the road but was such that, may be required to be done as per the punch list.

xxxxx

37. What further emerges from the observations and findings of the Independent Engineer is that all tests had been successfully carried out. The request of the Concessionaire was examined for grant of Provisional Certificate and 93.70% of the total work of the project had been completed. It is specifically mentioned by the Independent Engineer that 93.70% is more than 75% of the total project length which is required to grant Provisional Certificate.

38. We are not at all impressed with the objections raised by the Respondent that some

*items were still left to be worked out by the Claimants and therefore, the Provisional Certificate was not issued when the Independent Engineer made recommendations for the same. None of the items said to be not complete were such which may pertain to reliability and safety. Further, it is specifically provided that Provisional Certificate shall be issued when 75% of the work has been done even when some items may have been left out and may be completed later. We are also of the view that as per provisions contained in Article 14.3.1 the Independent Engineer was himself competent to issue Provisional Certificate and it was the Independent Engineer (and not NHAI) who was required to finally satisfy itself with regard to the project highway being capable of being safely and reliably being opened to traffic for commercial operations. Our observations made above get support from the observations made in **Soma Isolux Kishangarh Beawar Tollway Pvt. Ltd. {Supra}** and NHAI's letter dated 05.05.2015 recognizing the effect of the aforesaid judgment."*

(Emphasis Supplied)

46. A reading of the above observations/findings of the learned Arbitral Tribunal would show that the learned Arbitral Tribunal has concluded that the said letter dated 18.09.2013 does not indicate any work outstanding towards the safety of the road.

47. For appreciating the above findings, the letter dated 18.09.2013, so far as it is relevant to the present petition, is reproduced hereinbelow:-

"We have examined the request of the Concessionaire for grant of Provisional Completion Certificate from km. 0+000 to km. 75+765. Our recommendations are as under:-

As per clause no. 14.3.2 (Article 14), of Concession Agreement "The Parties hereto expressly agree that a Provisional Certificate under this clause 14.3 may, upon request of the Concessionaire to this affect be issued for

operating part of the Project Highway, if at least 75% (seventy five per cent) of the total length of the Project Highway has been completed. Upon issue of such Provisional Certificate, the provisions of Article 15(ENTRY INTO COMMERCIAL SERVICE) shall apply to such completed part.”

The Concessionaire has completed the project highway in a length of 75.765 (km 04000 to 75+765) out of total project length of 80.858 which is 93.70% of total project length. The completed 93.70% of the project highway is more than 75% of the total project length.

xxxxx

All the tests as required under Article 14 of the Concession Agreement to check the compliance of the project highway to the provisions of Schedule have been conducted in the presence of the I.E.'s representatives and Concessionaire's representative's. A list showing the status of various tests is enclosed as Annexure-I.

3 lists of outstanding works of the Project Highway have been prepared after Joint Inspection by the Independent Engineer and Concessionaire on 16.08.2013, 17.08.2013 and 04.09.2013 which are as under:-

- (i) Appendix-A1 & A2 cover the Items of work which the Concessionaire will complete before issue of Provisional Completion Certificate.*
- (ii) Appendix B- The Punch list covers items which do not affect the safe Operation of the Project Highway and will be completed by the Concessionaire within 90 days of the issuance of the Provisional Completion Certificate as per clause no. 14.4.1 (Article 14) Vol-I of Concession Agreement.*
- (iii) Appendix-C covers Items of works, which could not be undertaken due to Land*

Acquisition Issues and for reasons attributed to NHAI.

The Concessionaire has confirmed vide their letter no. SEL/RP/SITE/IC/1424 dt. 05.09.2013 that

- (i) Items of Appendix-A1 & A2 will be completed before issue of Provisional Completion Certificate.
- (ii) *Items of Punch List Appendix-B will be completed within 90 days of the issue of Provisional Completion Certificate.*
- (iii) *Items of Appendix-C will be completed as and when land is made available by NHAI.*

xxxxx

The provision of the Article 14.3 permit the Independent Engineer to Issue Provisional Certificate at the request of Concessionaire if the tests are successful as per Schedule 'I' of CA and the Project Highway can be safely and reliably placed to commercial operation. However, the Clause 12 of TOR of the Independent Engineer Consultancy Agreement with NHAI requires IE to take prior approval of NHAI before the issuance of the Provisional Certificate. The prior approval for issuance of Provisional Certificate is being sought vide this letter to enable the Concessionaire to commence Commercial Operation at the earliest.

The draft Provisional Certificate as per Schedule 'J' of Concession Agreement for the completed part of the Project Highway is attached herewith for your kind perusal (Annexure-II).

Based on the above facts we are of the opinion that Project Highway can be safely and reliably placed in Commercial Operation."

(Emphasis supplied)

48. Appendix A-1 to the said letter is titled as under:-

Signature Not Verified

Digitally Signed By: SUNIL

Signing Date: 17.02.2023

17:37:01 M.P. (COMM) 286/2018

***“ITEMS REQUIRED TO BE COMPLETED
BEFORE ISSUE OF PROVISIONS
COMPLETION CERTIFICATE”***

49. Similarly Appendix A-2 is titled as under:-

***“Items required to be completed before issue
of Provisional Completion Certificate – As
per Safety Consultant.”***

50. Clearly, therefore, by the above letter the IE had opined that the respondent shall have to complete the items of work mentioned in Appendix A-1 and A-2 to the said letter. The work mentioned in Appendix A-1 was to be completed by the respondent before issuance of PCC. It was based on the undertaking given by the respondent that these items will be completed before the issuance of the PCC, that the IE submitted the draft Provisional Certificate for the approval of the petitioner. The reliance of the learned Arbitral Tribunal on the said letter to conclude that no issue of safety was raised by the IE or that the said letter amounts to an unconditional opinion of the IE to the grant of Provisional Certificate to the respondent is, therefore, completely perverse and unfounded and against the bare reading of the letter itself. The opinion of the IE that the “Project Highway can be safely and reliably placed in Commercial Operation” was based on the undertaking of the respondent that it shall complete the work mentioned in Appendix A-1 to the letter before grant of PCC. It was therefore, conditional in nature and could not operate unless the respondent completes the work mentioned in Appendix A-1 to the letter to the satisfaction of the IE. The learned Arbitral Tribunal has, however, taken the said letter as an unconditional opinion of the IE that the PCC can be granted to the respondent. This finding, therefore, cannot be sustained.

51. In fact, the learned senior counsel for the petitioner has also drawn my reference to the subsequent letter dated 25.10.2013 of the 'Team Leader', which in turn records the Compliance Report of Pre-COD Safety Audit Report, and which in turn lists out certain items for which the IE has reported the work to be still in progress. The learned Arbitral Tribunal has ignored the said letter altogether. The said letter shows that even as on 25.10.2013 certain work to make the Project Highway safely and reliably to be put in Commercial Operation were pending at the end of the respondent.

52. The learned Arbitral Tribunal while awarding Claim no.2 has taken 15 days from the date of the above letter as the start point for the loss of revenue awarded to the respondent. In view of my observation hereinabove, the start point for award of the claim to the respondent is therefore, contrary to the evidence on record and cannot be upheld.

53. The learned counsel for the respondent, faced with the above, submitted that as Clause 14.3.2 provides that the PCC can be granted on completion of 75% of the Project Highway, whereas the respondent had sought the same on completion of 93.7% of the Project Highway, the work that was still remaining could not come in the way of grant of PCC to the respondent.

54. In my opinion, however, as the learned Arbitral Tribunal has not considered the above submission nor has rendered its findings based thereon; the same being a factual issue, it is not for this Court to adjudicate thereon and to hazard a guess thereon while exercising its jurisdiction under Section 34 of the Act. This plea was to be considered by the learned Arbitral Tribunal at the first instance and cannot be considered by this Court in absence thereof.

55. In view of the above, the Impugned Award on Claim no.2, even applying even the limited jurisdiction that this Court possesses under Section 34 of the Act, cannot be sustained.

RELIEF:

56. In view of the above, the challenge of the petitioner to the impugned Arbitral Award on Claim no.1 is rejected. The Impugned Award, so far as it grants Claim no.2 in favour of the respondent, is, however, set aside.

57. The petition is disposed of in the above terms.

58. There shall be no order as to costs.

NAVIN CHAWLA, J.

FEBRUARY 16, 2023/rv/DJ

