



2025:DHC:3197



* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
Date of decision: 22nd APRIL, 2025

IN THE MATTER OF:

+ **O.M.P. (COMM) 301/2018 & I.A. 9321/2018**

NATIONAL HIGHWAYS AND INFRASTRUCTURE
DEVELOPMENT CORPORATION LTD,Petitioner

Through: Ms Pinky Anand, Sr. Advocate with
Ms Nupur Aggarwal, Adv.

versus

GAMMON INDIA LTD- S.P. SINGLA CONSTRUCTION
PVT.LTD.(JV)Respondent

Through: Mr. Abhay Raj Varma and Mr. Arjun
Rekhi, Advs.

CORAM:

HON'BLE MR. JUSTICE SUBRAMONIUM PRASAD

JUDGMENT

1. The Petitioner has approached this Court under Section 34 of the Arbitration and Conciliation Act, 1996 challenging the Award dated 07.03.2018 passed by the Arbitral Tribunal.

2. Shorn of unnecessary details, facts giving rise to the present Petition are as under:

- (i) A contract agreement for the work of “4 laning of NH-37A from km 00.00 (Kaliabor-Tinali Road Junction) to km 17.300 (Dolabari Road Junction) including construction of new Brahmaputra Bridge on EPC basis in the State of Assam under Phase- A of SARDP-NE” was executed between Ministry of Road Transport & Highways through National Highways & Infrastructure Development Corporation Ltd., the Respondent herein and a joint venture of M/s Gammon India Ltd - M/s S.P. Singla Construction Pvt Ltd (JV), the Petitioner herein.



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- (ii) Bid dated 02.09.2014 was submitted by the Petitioner and the Letter of Acceptance was issued on 31.10.2014. Subsequently, a Contract Agreement dated 14.11.2014 was signed by the parties for a Contract Price of Rs. 588.95 crores for this work on EPC basis. The scope of work under the contract included design and construction and quoted price was on lump sum basis. The largest single work, out of the entire scope of work was the construction of a 3015-meter-long additional bridge called “New Brahamaputra Bridge” at a distance of 80 meters on downstream from existing bridge. The Bridge Work was valued at over 70% of the awarded Contract Price.
- (iii) For the abovementioned “New Brahamaputra Bridge” 24 piers along with 2 abutments were to be constructed by the Respondent as per the terms of the Contract, which included various codes of Indian Roads Congress (IRC).
- (iv) In terms of Sub-Clause 10.1.1(b) of the Contract, M/s B&S Engineering Consultants Pvt. Ltd. were appointed by the Petitioner as “Design Director”. Thereafter, pursuant to Clause 10.2.2 of the Contract, the Petitioner suggested three names as prospective proof consultants, i.e., M/s GILCON Project Services Ltd., Engineering & Planning Consultants & Indian Institute of Technology, Delhi. Clauses relevant to the interplay of responsibilities of the Design Director, Proof Consultant and the Authority Engineer are reproduced hereinbelow:

“10.1 Obligations prior to commencement of Works



10.1.1 Within 20 (twenty) days of the Appointed Date, the Contractor shall:

(a) appoint its representative, duly authorized to deal with the Authority in respect of all matters under or arising out of or relating to this Agreement;

(b) appoint a design director (the “Design Director”) who will head the Contractor’s design unit and shall be responsible for surveys, investigations, collection of data and preparation of preliminary and detailed designs;

(c) undertake and perform all such acts, deeds and things as may be necessary or required before commencement of Works under and in accordance with this Agreement, the Applicable Laws and Applicable Permits; and

(d) make its own arrangements for quarrying of materials needed for the Project Highway under and in accordance with the Applicable Laws and Applicable Permits.

10.1.2 The Authority shall, within 15 (fifteen) days of the date of this Agreement, appoint an engineer (the “**Authority’s Engineer**”) to discharge the functions and duties specified in this Agreement, and shall notify to the Contractor the name, address and the date of appointment of the Authority’s Engineer forthwith.

(A) 10.2. Design and Drawings

10.2.1. Design and Drawings shall be developed in conformity with the Specifications and Standards set forth in Schedule -D.

10.2.2. The Contractor shall appoint a proof check consultant (the “Proof Consultant”) after proposing to



the Authority a panel of three names of qualified and experienced firms from whom the Authority may choose one to be the Proof Consultant. Provided, however, that if the panel is not acceptable to the Authority and the reasons for the same are furnished to the Contractor, the Contractor shall propose to the Authority a revised panel of three names from the firms empaneled as proof consultants by the Ministry of Road Transport and Highways for obtaining the consent of the Authority. The Contractor shall a/so obtain the consent of the Authority for two key personnel of the Proof Consultant who shall have adequate experience and qualifications in highways and bridges respectively. The Authority shall, within 15 (fifteen) days of receiving a proposal from the Contractor hereunder, convey its decision, with reasons, to the Contractor, and if no such decision is conveyed within the said period, the Contractor may proceed with engaging of the Proof Consultant.

10.2.3. The Proof Consultant shall:

(a) evolve a system approach with the Design Director so as to minimize the time required for final designs and construction drawings; and

(b) Proof check the detailed calculations, drawings and designs, which have been approved by the Design Director.

10.2.4. In respect of the Contractor's obligations with respect to the design and Drawings of the Project Highway as set forth in Schedule-I, the following shall apply:

(a) The Contractor shall prepare and submit, with reasonable promptness and in such sequence as is consistent with the Project Completion Schedule, three copies each of the design and Drawings, duly



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certified by the Proof Consultant, to the Authority's Engineer for review. Provided however, that in respect of Major Bridges and Structures, the Authority's Engineer may require additional drawings for its review in accordance with Good Industry Practice.

(b) by submitting the Drawings for review to the Authority's Engineer, the Contractor shall be deemed to have represented that it has determined and verified that the design and engineering, including field construction criteria related thereto, are in conformity with the Scope of the Project, the Specifications and Standards and the Applicable Laws;

(c) within 15 (fifteen) days of the receipt of the Drawings, the Authority's Engineer shall review the same and convey its observations to the Contractor with particular reference to their conformity or otherwise with the Scope of the Project and the Specifications and Standards. The Contractor shall not be obliged to await the observations of the Authority's Engineer on the Drawings submitted pursuant hereto beyond the said period of 15 (fifteen) days and may begin or continue Works at its own discretion and risk; Provided, however that in case of a Major Bridge or Structure, the aforesaid period of 15 (fifteen) days may be extended upto 30 (thirty) days;

(d) if the aforesaid observations of the Authority's Engineer indicate that the Drawings are not in conformity with the Scope of the Project or the Specifications and Standards, such Drawings shall be revised by the Contractor in conformity with the provisions of this Agreement and resubmitted to the Authority's Engineer for review. The Authority's



Engineer shall give its observations, if any, within 10 (ten) days of receipt of the revised Drawings.

(e) no review and/or observation of the Authority's Engineer and/or its failure to review and/or convey its observations on any Drawings shall relieve the Contractor of its obligations and liabilities under this Agreement in any manner nor shall the Authority's Engineer or the Authority be liable for the same in any manner; and if errors, omissions, ambiguities, inconsistencies, inadequacies or other defects are found in the Drawings, they and the construction works shall be corrected at the Contractor's cost, notwithstanding any review under this Article 10;

(f) the Contractor shall be responsible for delays in submitting the Drawing as set forth in Schedule-I caused by reason of delays in surveys and field investigations and shall not be entitled to seek any relief in that regard from the Authority; and

xxx

10.2.6. *Works shall be executed in accordance with the Drawings provided by the Contractor in accordance with the provisions of this Clause 10.2 and the observations of the Authority's Engineer thereon as communicated pursuant to the provisions of Clause 10.2.4 (d). Such drawings shall not be amended or altered without prior written notice to the Authority's Engineer. If a party becomes aware of an error or defect of a technical nature in the design or drawings, that party shall promptly give notice to the other party of such error or defect.*

(B) Clause 11.12- Quality Assurance, Monitoring and Supervision

11.12 Rejection



If as a result of an examination, inspection, measurement or testing, any Plant, Materials, design or workmanship is found to be defective or otherwise not in accordance with the provisions of this Agreement, the Authority's Engineer shall reject the plant, Materials, design or workmanship by giving notice to the Contractor; with reasons. The Contractor shall then promptly make good the Defect and ensure that the rejected item complies with the requirements of this Agreement.

If the Authority's Engineer requires the Plant, Materials, design or workmanship to be retested, the tests shall be repeated under the same terms and conditions, as applicable in each case. If the rejection and retesting cause the Authority to incur any additional costs, such cost shall be recoverable by the Authority from t/Je Contractor, and may be deducted by the Authority from any monies due to be paid to the Contractor.”

- (v) *Vide* letter dated 16.02.2015, the Authority Engineer approved the appointed of M/s GILCON Project Services Ltd. as Proof Consultant for scrutinizing the design prepared and submitted by the Design Director.
- (vi) On 05.03.2015, the Respondent submitted its first lot of Design and Drawings of the new Brahmaputra Bridge to the Authority Engineer, which was duly proof checked and approved by M/s GILCON Project Services Ltd. However, *vide* letter dated 20.03.2015, the Authority Engineer instructed the Respondent to get its Design and Drawings vetted from any IIT or Rail India Technical and Economic Service (RITES).



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(vii) Notwithstanding the fact that M/s GILCON had already given its approval, the Respondent was acquiesced to consider IIT Delhi as its substitute Proof Consultant and accordingly submit the credentials of Prof. Dr. Dipti Ranjan Sahoo (Assistant Professor, Department of Civil Engineering) as the Proof Consultant. The same was approved by the Authority Engineer.

3. Material on record before this Court indicates that the sum and substance of the disputes between the parties is encompassed in the interpretation and applicability of the clauses of the Contract as well as the relevant codes to be followed. Therefore, this Court will now navigate the distinct approaches of the parties towards the design, drawings and construction parameters for the New Brahmaputra Bridge under the Contract.

4. The Petitioner's approach to the design issues is briefly stated below:

- (i) In respect of calculating Linear waterway, the Petitioner's Expert emphasized that clause no. 106.5.1.2 of IRC: 5- 2015 (Clause 104.3 of IRC : 5-1998) is applicable and not earlier one i.e. 106.5.1.1 (considered by Design Director of the Respondent). The Petitioner further insisted that C- Value should be taken as 4.8.
- (ii) With respect to the issue of vicinity, the Petitioner's approach is that 80 meter gap between two bridges qualifies for consideration that these structures are in vicinity and as such as per clause 705.1 of IRC : 78 2014, the founding levels of wells for new bridge should not be less than those of existing bridge.



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The Petitioner/Authority Engineer had given directives to the Respondent to revise design of foundations accordingly.

- (iii) As regards pier well foundation the Petitioner's approach was that checking of stability of foundations requires to be in accordance with IRC-45 and not as per guidelines given in Appendix - 3 of IRC : 78- 2014.
- (iv) The Petitioner has also quoted Clause 110.1.3 of IRC: 5-1-2009 as per which the formula given therein is to be used to calculate the Mean Scour Depth. Moreover, calculating Linear waterway Clause 104.6 to be used with value restricted to assessment done as per Clause 104.3.
- (v) One major approach for design of this bridge as advanced by the Petitioner was to rely more on "*Hydraulic Data Review and Recommendations for Existing Bridge*" by an Eleven-Member Expert Committee. As per the Petitioner, the recommendations of this Committee were used for design of existing bridge and same parameters are to be applied in designing the present bridge.
- (vi) As regards design of skin friction for pier well foundation reference to IRC:45-1972 is must and for Abutment, though it is beyond bund, scour depth to be taken same as that of other foundations.

5. Approach of the Respondent towards the design drawings and construction parameters is briefly stated as follows:

- (i) The Respondent followed the requirements as set out in the 'Manual for Specifications & Standards for Four Laning of



Highways through Public Private Participation (IRC : SP -84-2009/2014)', as stipulated under Schedule D of the Contract. The said Manual in turn referred to Clause IRC:78-2014 on "Design Discharge of Foundation," which is reproduced hereinbelow:

"To provide for an adequate margin of safety, the scour for foundation shall be designed for a larger discharge over the design discharge determined as per IRC: 5 as given below:

<i>Catchment area in KM2</i>	<i>Increase over Design Discharge in percent</i>
<i>0-3000</i>	<i>30</i>
<i>3000-10000</i>	<i>30-20</i>
<i>10000-40000</i>	<i>20-10</i>
<i>Above-40000</i>	<i>10</i>

NOTES: i) For intermediate values of catchment areas, interpolation may be adopted

ii) The minimum vertical clearance above the HFL already determined as per IRC: 5 need not be increased due to larger discharge calculated above."

- (ii) Further, the Respondent followed Clause 103.1 of IRC:5-1998, as per which a maximum flood discharge of 50 years' return cycle was required to be considered. Notably, upon being pointed out by the Petitioner/Authority Engineer that under IRC : SP-84, a return period of 100 years was required to be considered, the Respondent accepted and increased discharge by 5% to meet the said requirement.
- (iii) The Respondent adopted Clause 703.2 of IRC:78-2014 for "Mean Depth of Scour," which stated as follows:



“The mean scour depth below Highest Flood Level (HFL) for natural channels flowing over scourable bed can be calculated theoretically from the following equation:

$$d_{sm} = 1.34 (D_b^2 / 2 K_{st})^{1/3}$$

Where D_b = The design discharge for foundation per meter width of effective waterway.

K_{sf} = Silt factor for a representative sample of bed material obtained up to the level of anticipated deepest scour.”

- (iv) The Respondent then referred to Clauses 106.5.1.1 and 106.5.1.2 of IRC:5-2015, in which the provision for linear waterway is as under:

“106.5.1.1 For natural(non-meandering) channels in alluvial beds but with well-defined banks and for all natural channels in beds with rigid in-erodible boundaries, the linear waterway shall be the distance between banks at HFL, at which the designed maximum discharge determined in accordance with Clause 106.3 (103), can be passed (without creating harmful afflux).

106.5.1.2 For natural channels in alluvial beds and having undefined banks, the linear waterway shall be determined from the design discharge using some accepted rational formula at the discretion of the engineer responsible for the design. One such formula for regime conditions is:

$$W = C \text{ square root } Q$$

Where,

W = regime width in meters (equal to effective linear waterway under regime condition)



Q = the maximum design discharge in m^3/sec ;

C = a constant usually taken as 4.8 for regime channels but it may vary from 4.5 to 6.3 according to local conditions.”

According to the Respondent, as the alignment of the new Brahmaputra Bridge was fixed with one end located in guide bund of the existing bridge and Bhomoraguri hill formation on the other, the river channel at this location would flow with well-defined banks and bed with rigid in-erodible boundaries and as such, only Clause 106.5.1.1 would apply and not 106.5.1.2.

- (v) Insofar as the issue of ‘Vicinity’ as mentioned in Clause 705.1 of IRC:78-2014, the Respondent’s approach was that the distance of 80 meters between the two bridges, that is, the existing bridge and the proposed new bridge, was sufficient and the requirement of matching their foundation levels was inapplicable.
- (vi) With respect to the design of side earth pressure in design of well foundation, the Respondent had used the methodology laid down in Appendix 3 of IRC:78-2014, instead of IRC:45-1972, as the former manual provided for the adoption of either methods under IRC:78-2014 or those in IRC:45-1972. The Respondent, accordingly, chose to follow IRC:78-2014.
- (vii) Insofar as the design of abutment was concerned, the Respondent’s approach was that since the abutment would be behind the existing guide bund, fully protected and not



requiring any flood protection, scour depth was not required to be considered as per Clause 703.3.1 and resistance from earth below well cap had been considered as per Clause 708.4.3.2.

6. Disputes arose on account of the evidence difference in interpretation of the applicable specifications and standards to be used in the construction of the New Brahmaputra Bridge and as to whether the Respondent was entitled to payment under variation for taking well foundation of the New Brahmaputra Bridge to deeper depths as recommended by the Petitioner/Authority Engineer and as decided by the Authority.

7. The parties attempted to resolve their disputes amicably *albeit* unsuccessfully. The parties were thus referred to arbitration.

8. The Respondent *vide* its letter dated 20.04.2016 invoked the dispute resolution mechanism as contained in Clause 26 of the Contract, nominating Sh. I.M. Singh, Engineer Engineer-in-Chief (Retd), PWD of Delhi Govt. as its nominee Arbitrator and the Petitioner appointed Shri. C. Kandasamy, DG(RD) & SS (Retd.), MORT&H as its nominee Arbitrator *vide* letter dated 20.05.2016. Both the Arbitrators after mutual consultation decided to select Shri Kuldip Singh, C.E.(Retd), Punjab PWD and he was appointed as the Presiding Arbitrator. However, on account of having conflict of interest, Sh. Kuldip Singh recused himself from being an arbitrator and instead, Shri A.R. Jambekar, Retd. Chief Engineer & General Manager (Tech.), CIDCO was appointed as the Presiding Arbitrator.

9. *Vide* its Statement of Claims, the Respondent/Claimant submitted the following claims for adjudication before the Arbitral Tribunal:



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- (i) An amount of amount of Rs. 30,42,52,270/- towards increase in pier and abutment foundations depths than the depth designed in accordance with the contract provisions;
 - (ii) Escalation payable on above amount;
 - (iii) Interest @ 12% on total amount from due dates of monthly payment;
 - (iv) Pre-award interest from date of invocation of dispute till date of award;
 - (v) Post award interest@ 18% p.a. and
 - (vi) Cost of Arbitration and litigation;
10. Subsequently, the Respondent sought the following modifications to its prayers in the Statement of Claims:
- (i) To give decision that the Respondent's design for foundation of pier wells P-1 to P-24 and abutment wells A-1 to A-2 conform to the provisions of the design codes as stipulated in the Contract;
 - (ii) To give declaration that the instruction of the Petitioner/ Employer to change the depth of founding level of the pier and abutment well foundations to match corresponding depth of founding levels of pier and abutment wells of the existing bridge constitute "Change of Scope" under Clause 13.1 of Contract; and
 - (iii) That the unit rate of Rs. 13,67,653/- per meter for increase in depth of foundation than as designed is payable to the quantum of increase in depth of foundation as per details given in the Statement of Claims; and



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(iv) That the unit rate as above shall be applied to the work of lowering as measured and paid for as the work progresses, the final amount of which is Rs. 30,42,52,270/-.

11. By way of the Impugned Award, the Arbitral Tribunal by majority held that the Design Director and Proof Consultant appointed under the Contract had complete authority to interpret, review, and modify the design and drawings submitted by the Respondent as per the various IRC guidelines laid down in the Contract between the parties. In this exercise, the role of Petitioner/Authority Engineer was limited inasmuch as he could intervene only if such design and drawings were not as per the provisions of the Contract.

12. Keeping in mind the duties of the Petitioner/Authority Engineer laid down in the Contract, the Arbitral Tribunal has held that the insistence of the Authority Engineer to use alternative specifications outside the contractual provisions (for instance, usage of details of the existing bridge) and to revise designs already cleared by Proof Consultant amounts to Change in Scope in terms of Clause 13.1 of the Contract. Accordingly, the Arbitral Tribunal held that the Respondent was entitled to payment under variation on account of the applicability of Clause 13.1.

13. On the issue of the dispute between the Petitioner and the Respondent for arriving at the value of 'C' for calculating the regime width, the Arbitral Tribunal took note wherein the value of the constant 'C' was stated to be taken in the range of 6.3-4.5 and further provided that the value is generally taken as 4.8. Observing that the Respondent had accordingly taken the value of 'C' as 6.3 which was in accordance with Clause 104.3 of IRC:5-1998, the Arbitral Tribunal held that the Authority Engineer's insistence to take the



value of 'C' as 4.8 also amounted to change in scope under Clause 13.1 of the Contract and variation was payable to the Respondent.

14. Similar findings were made by the Arbitral Tribunal on the issues of scour depth and calculation of side earth resistance. The Authority Engineer's insistence to use alternative methods, manuals, codes or data from existing bridge were similarly held as amounting to change of scope by the Arbitral Tribunal.

15. On the issue of the Respondent having not carried out hydrological studies as the per Contract as well as IRC clauses and instead having used the data of the existing bridge, the Arbitral Tribunal observed that this issue was brought up by the Petitioner only before the Arbitral Tribunal, but never communicated before to the Respondent. Not only that, the Petitioner/Authority Engineer had approved the Respondent's usage of the data from the existing bridge. Accordingly, the Arbitral Tribunal held that the Petitioner was estopped from raising the issue of the Respondent having not carried out hydrological studies, having never objected to the same whilst the Respondent was executing the works.

16. The reliefs granted by the Arbitral Tribunal are reproduced hereinbelow:

"21.0 AWARD OF THE TRIBUNAL

The Arbitral Tribunal, having carefully considered and applied its mind to the pleadings / submissions, arguments, counter arguments, various oral and written submissions made by both the parties in support of their contentions, has recorded its analysis, findings and conclusions as stated hereinabove in the previous para and in view of difference of opinion between Shri A. R. Jambekar, Presiding Arbitrator and Shri L.M. Singh, Co-Arbitrator on the one hand and



Shri C.Kandasamy, Co-Arbitrator on the other, we award by majority to the Claimant against the Respondent as below. The dissenting Award along with findings from Shri C. Kandasamy is attached.

21.1. Declaration in respect of Design of foundations by the Claimant:

AT declares that the design of well foundations for Piers and Abutments of the new Bridges, prepared by the 'Design Director' of the Claimant and proof checked by /IT - Delhi, Proof Consultant is as per contract conditions / provisions.

21.2 Declaration of unit rate for additional depth of foundations: -

(A) AT awards declared unit rate of Rs. 13,67,653/- (Rs. Thirteen lakhs sixty-seven thousand Six hundred fifty-three only) per meter for quantum of increase in depth of well foundation for all piers & Abutments, due to instruction of the Respondent / Employer to change the designed depths and founding the pier and abutments well foundations to match corresponding depth and founding levels of pier and abutment wells of the existing bridge as the same constitute a "Change of Scope" under clause 13.1 of contract as per findings recorded by AT. The quantum of work done till date of award shall be worked out and payment at above declared rate shall be released to the Claimant within 90 days of date of this award.

(B) For work to be done in future i.e., till completion of project, the Claimant shall also be paid at above declared rate through regular interim bill payments.

21.3 Extra work of concrete & Reinforcement in piers & Abutments:



(A) Payment for extra quantity of concrete and steel reinforcement due to instruction of AEI Authority I Respondent for following IRC: 451972 in case of piers and for considering scour all Abutment (A 1) as a/so due to taking well foundations deeper; i.e., for the quantities over and above quantities as executed vis-a-vis quantities as per the design prepared by the 'Design Director' of the Claimant and certified by /IT- Delhi (Proof Consultant) shall be released to Claimant by following procedure for 'Change of Scope' Clause 13.1, 13.2 & 13.3) and treading as 'Variation'. The payment for the work done till date of award shall be released within 90 days from date of award.

21.4 Payment of Escalation for Extra payments:

(A) Payments worked out for extra work as per above para No. 21.2& 21.3 shall qualify for escalation payment. The escalation payment to be based on indices for the months during which work is done and payment for escalation for work done up to date of award shall be released, within 90 days from date of award.

(B) For work done in future escalation payment for extra work shall be released to the Claimant through regular monthly bills.

21.5 Interest on extra work done up to date of award:

No interest is allowed for the additional works done as above till date of award.

21.6 Future interest:

Respondent shall release payments for additional work done and escalation thereon for the work done till date of award, within 90 days or else it shall carry simply interest at 12% per annum from the date of award.



21.7 Cost of Arbitration:

Each party to bear its cost for this Arbitration.

21.8 Counter claims of the Respondent are being adjudicated by another AT and as such no award on it.

The Award has been made on a Non-judicial Stamp Paper of the value of Rs. 500, supplied by the Claimant. As the award is for a higher amount, the Claimant is directed to get the same adjudicated by the collector of Stamps so that requisite stamp value is paid and deficiency is made up. This shall be done within the period prescribed by Law.”

17. Mr. C. Kandaswamy passed a dissenting award, observing as follows:

“6.12 Considering the above, I am of the firm opinion that:

(a) the Claimant has not followed the Contract conditions for the design consistently and in toto, and in accordance with good industry practice; and there is no change of scope from that specified in the Contract, and

(b) specifically, the decision I direction of the Respondent in the meeting on 9.9.2015 at their HQ (at page 188 of the Claimant) that

- Value of C be taken as 4.8, and*

- Depth of well foundations shall at least be equal to that of the existing bridge are within the CA (as brought out in the previous paras), and do not constitute a change of scope.”*

18. Since the Arbitral Tribunal has allowed majority of the claims made by the Respondent, the Petitioner has approached this Court under Section



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34 of the Act, seeking the setting aside of the Impugned Award dated 07.03.2018.

19. Learned Senior Counsel appearing for the Petitioner submits as under:

(a) The Arbitral Tribunal has committed a grave error by failing to consider the technical data & the reasoning given by the Petitioners in respect of the impact of the change in value of 'C' and therefore, the impugned Award the same falls within the scope of patent illegality.

(b) The Arbitral Tribunal has committed an error by holding that role of the Authority Engineer is very limited in the design matter and that Authority Engineer is not bestowed with authority of approval of design and drawings and that it is the Design Director that is having full authority to interpret the codes and decide the options if any available.

(c) On the issue of vicinity, the Arbitral Tribunal has not considered that the existing bridge is only 80 meters upstream and therefore, must be used as the bridge in vicinity. In doing so, the Arbitral Tribunal has overlooked that the Respondent itself had sought the data of the existing bridge from the Authority Engineer *vide* a letter dated 30.09.2015;

(d) The Arbitral Tribunal has erroneously accepted the Respondent's contention that IRC:45 was only optional and not mandatory and thus has wrongly interpreted the Authority Engineer's insistence on the usage of the said manual as change in scope. It is stated that the usage of IRC:45 by the Respondent would jeopardize the safety of the entire bridge.

(e) The Arbitral Tribunal failed to consider the fact that the Respondent did not make any investigations/studies to obtain hydraulic data, despite of being obligated to do so as per Clause 3.1.1 of the Contract.



20. *Per contra*, Counsel for the Respondent has supported the findings of the Arbitral Tribunal in the Impugned Award.
21. Heard the learned Counsel for the parties and perused the material on record.
22. The principal question requiring adjudication by this Court is whether the decision of the Arbitral Tribunal to find that the instructions of Petitioner to *inter alia* increase the depth of well foundations on the proposed new Brahmaputra Bridge amounted to Change of Scope as per Clause 13 of the Contract, warrants interference or not.
23. Article 2 of the EPC Contract sets out the scope of the Project. The same is set out below:

**“ARTICLE 2
SCOPE OF THE PROJECT**

2.1 Scope of the Project

Under this Agreement, the scope of the Project (the “Scope of the Project”) shall mean and include:

- (a) Construction of the Project Highway on the Site set forth in Schedule A and as specified in Schedule B together with provision of Project Facilities as specified in Schedule C and in conformity with the Specifications and Standards set forth in Schedule D;*
- (b) Maintenance of the Project Highway in accordance with the provisions of this Agreement and in conformity with the requirements set forth in Schedule E; and*
- (c) Performance and fulfillment of all other obligations of the Contractor in accordance with the provisions of this Agreement and matters incidental thereto or necessary for the performance of any or all of the obligations of the Contractor under this Agreement.”*



24. An extract from Schedule B of the Contract relevant to the adjudication of the present case is stated below:

*“**At Sl No. 7 above, there is construction of new 2 lane Brahmaputra Bridge. Since this is 3.015m long bridge, hence this bridge shall be designed by the contractor by collecting the relevant hydraulic data and discharge of the area very carefully. Design of this Brahmaputra Bridge shall be got proof checked by either IIT / RITES. This Bridge has been proposed 80m D/s of the existing Bridge. Distance between the existing Bridge and the Proposed Bridge should not be less than 80m. Design of this bridge shall also include design and construction of Guide Bund and Afflux Bunds etc as per the hydraulic requirement. Both ends of Bridge must be protected suitably with proper length of guide bunds on both sides. Also, Embankment protection measures in the guide bund and the Road Embankment may be designed suitably keeping the floods in the adjoining area.”*

25. It is relevant to note that the EPC Contract between the parties stipulates the usage of specifications and standards as published by the IRC for the various components required to be erected at the New Brahmaputra Bridge. These specifications and standards published by the IRC enable the streamlining of the construction contracts and supplement the contractual provisions from a technical standpoint.

26. A bare perusal of the contentions brought forth by the parties before the Arbitral Tribunal showcase that the root of disputes is embedded in the interpretation and applicability of these IRC specifications and standards and whether the same are in conformity with the Contract between the parties.

27. Substantial emphasis has been laid by the Arbitral Tribunal on the fact that once the design and drawings of the Respondent's Design Director were



checked and approved by the Proof Consultant and found to be complying with the IRC specifications as stipulated under the Contract, then the insistence of the Petitioner/Authority Engineer to undertake those techniques recommended by it was unwarranted.

28. In fact, in places where following a certain specific code was mandatory under the Contract, the Respondent had followed them without any protest. For instance, as per IRC: SP-84-2014 (mentioned in Schedule - D), under 'Hydrology', a flood return period of 100 years was mentioned, though the relevant IRC-5-1970 permits 50 years. Upon there being pointed out by the Petitioner/Authority Engineer, the Respondent accepted this observation and corrected its design by increasing discharge by 5%, which was accepted by Petitioner/Authority Engineer.

29. However, other technical components like the approaches of the Respondent towards depth of foundation of abutment, calculation of side earth resistance, etc., were found to be in line with the respective contractual provisions. In light of the same, the Arbitral Tribunal has correctly concluded that the persistence of the Petitioner/Authority Engineer to change the method adopted by the Respondent despite of the same being approved by the Proof Consultant, is beyond what is contemplated in the Contract, as no mandatory requirement was contained for these issues.

30. Learned Senior Counsel for the Petitioner has argued that the Arbitral Tribunal has overlooked the fact that the Respondent failed to carry out hydraulic studies afresh and merely adopted the data of the existing bridge. The Arbitral Tribunal has considered the relevant contractual provisions, to conclude that the Authority Engineer was estopped from raising this issue in the Statement of Defence, while it was never communicated to the



Respondent at the relevant point in time when the works were being executed. This Court is in agreement with the view taken by the Arbitral Tribunal, as it cannot be said that the same is made without appreciation of evidence, in ignorance of any contractual provisions or any of the other parameters set out under Section 34 of the Act.

31. At this juncture, it is necessary to state that the examination under Section 34 of the A&C Act is limited and this Court is not required to re-adjudicate the disputes and supplant its view over that of the Arbitral Tribunal. The Arbitral Tribunal's decision is final and binding on the parties unless it established that the same is in conflict with the public policy of India or is vitiated by patent illegality on the face of the award.

32. The issues raised by the Petitioner before this Court go into the matters of evidence, re-appreciation whereof is not permitted under Section 34 of the Act. The Apex Court in OPG Power Generation Private Limited v. Enxio Power Cooling Solutions India Private Limited &Anr., **2024 SCC OnLine SC2600**, has observed as under:

" 60. In Associate Builders [Associate Builders v. DDA, (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204] , while this Court was dealing with the concept "public policy of India", in the context of a Section 34 challenge prior to the 2015 Amendment, it was held that an award can be said to be against justice only when it shocks the conscience of the court [See Associate Builders case, (2015) 3 SCC 49, para 36 : (2015) 2 SCC (Civ) 204] . The Court illustrated by stating that where an arbitral award, without recording reasons, awards an amount much more than what the claim is restricted to, it would certainly shock the conscience of the court and render the award vulnerable and liable to be set aside on the ground that it is contrary to justice.



61. In *Ssangyong [Ssangyong Engg. & Construction Co. Ltd. v. NHAI]*, (2019) 15 SCC 131 : (2020) 2 SCC (Civ) 213], which dealt with post the 2015 Amendment scenario, it was observed that an argument to set aside an award on the ground of being in conflict with “most basic notions of justice”, can be raised only in very exceptional circumstances, that is, when the conscience of the court is shocked by infraction of some fundamental principle of justice. Notably, in that case the majority award created a new contract for the parties by applying a unilateral circular, and by substituting a workable formula under the agreement by another, *dehors* the agreement. This, in the view of the Court, breached the fundamental principles of justice, 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 with the other party [See *Ssangyong Engg. case*, (2019) 15 SCC 131, para 76 : (2020) 2 SCC (Civ) 213]. **However, a note of caution was expressed in the judgment by observing that this ground is available only in very exceptional circumstances and 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 because that would be an entry into the merits of the dispute.**

62. In the light of the discussion above, in our view, when we talk about justice being done, it is about rendering, in accord with law, what is right and equitable to one who has suffered a wrong. Justice is the virtue by which the society/court/Tribunal gives a man his due, opposed to injury or wrong. Dispensation of justice in its quality may vary, dependent on person who dispenses it. A trained judicial mind may dispense justice in a manner different from what a person of ordinary prudence would do. This is so, because a trained judicial mind is likely to figure out even minor



infractions of law/norms which may escape the attention of a person with ordinary prudence. Therefore, the placement of words “most basic notions” before “of justice” in Explanation 1 has its significance. Notably, at the time when the 2015 Amendment was brought, the existing law with regard to grounds for setting aside an arbitral award, as interpreted by this Court, was that an arbitral award would be in conflict with public policy of India, if it is contrary to:

- (a) the fundamental policy of Indian law;
- (b) the interest of India;
- (c) justice or morality; and/or is
- (d) patently illegal.

63. As we have already noticed, the object of inserting Explanations 1 and 2 in place of earlier explanation to Section 34(2)(b)(ii) was to limit the scope of interference with an arbitral award, therefore the amendment consciously qualified the term “justice” with “most basic notions” of it. In such circumstances, giving a broad dimension to this category [In conflict with most basic notions of morality or justice.] would be deviating from the legislative intent. In our view, therefore, considering that the concept of justice is open-textured, and notions of justice could evolve with changing needs of the society, it would not be prudent to cull out “the most basic notions of justice”. Suffice it to observe, they [Most basic notions of justice.] ought to be such elementary principles of justice that their violation could be figured out by a prudent member of the public who may, or may not, be judicially trained, which means, that their violation would shock the conscience of a legally trained mind. In other words, this ground would be available to set aside an arbitral



award, if the award conflicts with such elementary/fundamental principles of justice that it shocks the conscience of the Court.

Morality

64. The other ground is of morality. On the question of morality, in *Associate Builders* [*Associate Builders v. DDA*, (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204] , this Court, after referring to the provisions of Section 23 of the Contract Act, 1872; earlier decision of this Court in *Gherulal* [*Gherulal Parakh v. Mahadeodas Maiya*, 1959 SCC OnLine SC 4 : AIR 1959 SC 781] ; and *Indian Contract Act by Pollock and Mulla*, held that judicial precedents have confined morality to sexual morality. And if “morality” were to go beyond sexual morality, it would cover such agreements as are not illegal but would not be enforced given the prevailing mores of the day. The Court also clarified that interference on this ground would be only if something shocks the Court's conscience [See *Associate Builders* case, (2015) 3 SCC 49, para 39 : (2015) 2 SCC (Civ) 204] .

Patent illegality

65. Sub-section (2-A) of Section 34 of the 1996 Act, which was inserted by the 2015 Amendment, provides that an arbitral award not arising out of international commercial arbitrations, may also be set aside by the Court, if the Court finds that the award is visited by patent illegality appearing on the face of the award. The proviso to sub-section (2-A) states that an award shall not be set aside merely on the ground of an erroneous application of the law or by reappreciation of evidence.

66. In *Saw Pipes* [*ONGC Ltd. v. Saw Pipes Ltd.*, (2003) 5 SCC 705] , while dealing with the phrase “public



policy of India” as used in Section 34, this Court took the view that the concept of public policy connotes some matter which concerns public good and public interest. If the award, on the face of it, patently violates statutory provisions, it cannot be said to be in public interest. Thus, an award could also be set aside if it is patently illegal. It was, however, clarified that illegality must go to the root of the matter and if the illegality is of trivial nature, it cannot be held that award is against public policy.

67. In *Associate Builders* [*Associate Builders v. DDA*, (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204] , this Court held that an award would be patently illegal, if it is contrary to:

(a) substantive provisions of law of India;

(b) provisions of the 1996 Act; and

(c) terms of the contract [See also three-Judge Bench decision of this Court in *State of Chhattisgarh v. SAL Udyog (P) Ltd.*, (2022) 2 SCC 275 : (2022) 2 SCC (Civ) 776] .

The Court clarified that if an award is contrary to the substantive provisions of law of India, in effect, it is in contravention of Section 28(1)(a) [“28. Rules applicable to substance of dispute.—(1) Where the place of arbitration is situated in India—(a) in an arbitration other than an international commercial arbitration, the Arbitral Tribunal shall decide the dispute submitted to arbitration in accordance with the substantive law for the time being in force in India;*** (2) *** (3) While deciding and making an award, the Arbitral Tribunal shall, in all cases, take into account the terms of the contract and trade usages applicable to the transaction.” (As substituted by Act 3 of 2016 w.e.f. 23-10-2015) Prior to substitution by Act 3



of 2016, sub-section (3) of Section 28 read as under: “28. (3) In all cases, the Arbitral Tribunal shall decide in accordance with the terms of the contract and shall take into account the usages of the trade applicable to the transaction.”] of the 1996 Act. Similarly, violating terms of the contract, in effect, is in contravention of Section 28(3) of the 1996 Act.

68. In Ssangyong [Ssangyong Engg. & Construction Co. Ltd. v. NHAI, (2019) 15 SCC 131 : (2020) 2 SCC (Civ) 213] this Court specifically dealt with the 2015 Amendment which inserted sub-section (2-A) in Section 34 of the 1996 Act. It was held that “patent illegality appearing on the face of the award” refers to such illegality as goes to the root of matter, but which does not amount to mere erroneous application of law. It was also clarified that 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 [See Ssangyong Engg. case, (2019) 15 SCC 131, para 37 : (2020) 2 SCC (Civ) 213] . **Further, it was observed, reappreciation of evidence is not permissible under this category of challenge to an arbitral award [See Ssangyong Engg. case, (2019) 15 SCC 131, para 38 : (2020) 2 SCC (Civ) 213] .”**

(emphasis supplied)

33. This Court is of the view, that the Arbitral Tribunal in the present case comprises of technical experts in the field conversant with the nature of the contract and greater weight must be given to the views expressed by such experts. This approach is in line with the opinion of the Apex Court in Delhi Airport Metro Express Private Limited v. Delhi Metro Rail Corporation Limited, (2022) 1 SCC 131.



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34. Applying the aforesaid law laid down by the Apex Court, this Court is of the opinion that the findings of the Arbitral Tribunal in the Impugned Award do not warrant interference as the same are plausible views taken after due consideration of the facts, contentions and evidences put forth by the parties before it. The conclusion arrived at by the Arbitral Tribunal cannot be found fault with either on the ground that it is opposed to the policy or on the ground that it is in contravention with the fundamental policy of Indian law or is in conflict with the basic notion of morality and justice or is vitiated by patent illegality. Therefore, the challenge to the Impugned Award cannot be sustained.

35. In view of the above, the present petition is dismissed along with pending application(s), if any.

SUBRAMONIUM PRASAD, J.

APRIL 22, 2025

RJ/AP