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

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Judgment reserved on: 24.03.2026
Judgment pronounced on: 21.04.2026

+ O.M.P. (COMM) 195/2023, I.A. 10225/2023 (Stay) & I.A. 10226/2023

NATIONAL HIGHWAYS AUTHORITY OF INDIA

.....Petitioner

Through: Mr. Rajkumar Dubey, Ms.
Bhavana Bhardwaj and Mr.
Arpit Singhal, Advocates

versus

PATEL KNR HEAVY INFRASTRUCTURE PVT LTD

.....Respondent

Through: Mr. George Thomas, Dr.
Swaroop George, Mr.
Abhinandan Jain, Mr. Sunny
Thomas, Mr. Abhigyan
Dwivedi, Mr. Shivam Prajapati
and Mr. Kartikey, Advocates

CORAM:

**HON'BLE MR. JUSTICE HARISH VAIDYANATHAN
SHANKAR**

J U D G M E N T

HARISH VAIDYANATHAN SHANKAR, J.

1. The present Petition under Section 34 of the **Arbitration and Conciliation Act, 1996**¹, has been preferred assailing the **Arbitral Award dated 16.01.2023**², rendered by the majority of the members

¹ A&C Act

² Impugned Award



of the learned Arbitral Tribunal, as well as the **dissenting Award dated 23.01.2023³** passed by the learned third Arbitrator.

2. By way of the Impugned Award, the learned Arbitral Tribunal has, in sum and substance, allowed the claim of the Respondent towards the cost incurred on account of the additional thickness of 10 mm **Bituminous Concrete⁴** applied as a renewal coat on the Project Highway, which constitutes the core subject matter of the present challenge.

3. Further, the limited challenge raised herein to the dissenting Award pertains to the rejection of the Counter-Claim preferred by the Petitioner and, to that extent, is in consonance with and supportive of the Majority Award.

BRIEF FACTS:

4. The facts germane to the institution of the present Petition are as follows:

- a. The Petitioner herein invited proposals for Design, Construction, Development, Finance, Operation and Maintenance of “**2 lane portion from Km 230/000 to Km 278/000, covering 53.017 kilometres**” NH-7⁵ on a Build-Operate-Transfer Annuity basis *vide* notice dated 07.07.2006, subject to the terms and conditions contained in the tender notice.

³ Dissenting Award

⁴ BC

⁵ Project Highway



- b. The Respondent emerged as the successful bidder. Consequent thereof, a letter of acceptance was issued by the Petitioner to the Respondent dated 30.03.2007 and thereafter, the parties entered into a **Concession Agreement dated 05.09.2007⁶**.
- c. The work scope, as laid down in the Agreement, was as follows:
- i. To develop, design, engineer, finance, construct, operate and maintain the project highway during the concession period.
 - ii. Upon completion of the Project highways and during the operations period, to manage, operate and maintain the project highway and regulate the use thereof by third parties,
 - iii. to allow NHAI to levy, demand, collect and appropriate the fees from vehicles and persons liable to payment of fees for using the project Highways or any part thereof as per Article VII,
 - iv. perform and fulfil all of the Concessionaire's obligations under this agreement,
 - v. bear and pay all expenses, cost and charges incurred in the fulfilment of all the Concessionaire's obligations under this Agreement, and
 - vi. not assign or create any lien or encumbrance on the concession hereby granted on the whole or any part of the Project Highways, nor transfer, lease, or part possession

⁶ Agreement



therewith, save and except as expressly permitted by the agreement or the substitution Agreement.

- d. The date for commencement of the Project was 02.03.2008 with a total concession period of 20 years, which included a construction period of 2 years and Operation and Management of 18 years.
- e. For the sake of clarity, the timeline and milestones that were decided as per the Agreement are tabulated herein below:

PARTICULARS	DATE/PERIOD
Date of signing the Concession Agreement	05.09.2007
Period of Concession Agreement	20 years
Construction Period	24 months
Development period	05.09.2007 - 02.03.2008 (180 days)
Scheduled Project Completion Date	01.03.2010
Independent Consultant appointed	02.11.2007
Provisional Commercial Operation Date certificate issued	11.06.2010
Commercial Operation Date certificate issued	27.12.2016
First renewal coat completed on	28.02.2017
Second renewal coat completed on	04.05.2021

- f. The Project was completed and the Provisional Commercial Operations Date was issued on 11.06.2010.
- g. In terms of the Agreement, the Respondent was required to maintain the Project Highway at all times in conformity with the Agreement and as per its standards laid down in the schedules thereof and the good engineering practice.
- h. The Agreement also provides for a renewal coat after every five years, irrespective of the condition of the Highway. This particular requirement forms the genesis of the present dispute.



- i. It is the case of the Petitioner that the Team Leader has issued a letter dated 26.02.2019, since the Respondent was supposed to undertake and complete the second periodic maintenance by 10.06.2020, considering the first period maintenance was completed on 10.06.2015.
- j. At the time of the second renewal coat, the Respondent proposed laying a 30mm thick layer of BC as per the specification of the **Ministry of Road Transport and Highways**⁷, which requires only a thin layer of BC for a smooth riding surface when no strengthening measures are warranted. However, the said proposal was not agreed upon by the Petitioner, and the thickness of BC was insisted on to be 40 mm.
- k. The Respondent, after various correspondences, *vide* its letter dated 14.04.2020, informed the Petitioner that, as per the confirmation given by the Petitioner, they shall proceed with laying the 40 mm thick layer of the BC.
- l. However, the Respondent further stated in the said letter that they shall be lodging a claim for the extra 10mm layer that they have been constrained to lay. They further stated that since the confirmation regarding the second renewal coat has only been received during the nationwide lockdown, if any penalty is levied due to delay in works, the same shall also be resolved by way of dispute resolution as stipulated in the Agreement.

⁷ MoRTH



- m. Thereafter, the Respondent *vide* its letter dated 27.05.2020 sought to invoke mediation to resolve the said disputes.
- n. Various correspondences were exchanged between the Respondent and Petitioner and an extension of time was sought by the Respondent. The second periodic maintenance process was completed on 04.05.2021.
- o. The Petitioner, *vide* letter dated 19.02.2022, submitted its claim for final damages on account of delay in the second periodic overlay, calculated as per the terms of Articles 18.12 and 18.13 of the Agreement, which came up to an amount of Rs. 1,92,58,192/-, payable by the Respondent for the said delay.
- p. Thereafter, arbitration proceedings were initiated at the instance of the Respondent and the learned Arbitral Tribunal was constituted.
- q. The learned Arbitral Tribunal, upon completion of pleadings, framed the following issues for consideration:

“.....

- i. Whether the thickness of Bituminous Concrete liable to be laid by the Claimant as the second renewal coat was to be 40mm BC? OPCR
- ii. Whether the Claimant is entitled for an amount of Rs. 13,44,09772/- towards cost of extra thickness of 10mm BC laid as renewal coat in project highway? OPC
- iii. Whether the Claimant is entitled for a declaratory award that it had completed renewal coat within the eligible time and that the Claimant is not liable to pay any damages to the respondent under Clause 18.12 or under 18.13 of the Concession Agreement? OPC
- iv. Whether there was any delay on the part of the Claimant in the completion of the second periodic maintenance as alleged by the Respondent/Counter Claimant? OPR
- v. Whether the Claimant is entitled to interest and arbitration cost? OPC



- vi. Whether the Respondent/Respondents entitled to any final damages for an amount of Rs. 1,92,58,192/- from the Claimant? OPR
- vii. Whether the Respondent/Respondents entitled to any interest and cost? OPR”
- r. The learned Arbitral Tribunal, consisting of the majority of its members, rendered the Impugned Award on 16.01.2023, whereas the dissenting Award was passed by the learned third Arbitrator on 23.01.2023.
- s. *Brevitatis causa*, the claims awarded by the learned Arbitral Tribunal are summarised and tabulated below:

Sr. no.	Claims and Counterclaims	Award	Awarded Amount
Claims preferred by the Respondent (claimant therein)			
1.	Claim A - Claim for extra thickness of 10 mm BC laid as renewal coat in the Project Highway	Partly allowed	Rs. 12,35,18,570/-
2.	Claim B - Declaratory award by the Hon'ble Arbitral Tribunal that the Claimant has completed renewal coat within the eligible time and that the Claimant is not liable to pay any damages to the Respondent under clause 18.12. and 18.12 or any other conditions of the Concession Agreement	Allowed	Nil
3.	Claim C - Claim for Past, <i>Pendente lite</i> and future interest	Allowed	
4.	Claim D - Claim for Arbitration Cost	Partly Allowed	Rs. 40,00,000/-
Counter-Claims preferred by the Petitioner (Respondent therein)			
5.	Counter Claim A - Claim for final damages towards delay in completion of second periodical	Partly Allowed	Rs. 25,30,000/-



	maintenance		
6.	Counter Claim B - Claim for Past, <i>Pendente lite</i> and future interest	Allowed	
7.	Counter Claim C - Claim for Arbitration Cost	Rejected	NIL

5. Aggrieved by the Impugned Award and the dissenting Award insofar as it affirms the findings of the Majority Award pertaining to the partial rejection of the counterclaims of the Petitioner, the Petitioner has preferred the present Petition before this Court.

SUBMISSIONS ON BEHALF OF THE PARTIES:

6. Learned counsel for the Petitioner has assailed the Impugned Award, stating it to be vitiated by patent illegality.

7. He would rely upon Clause 1 of Schedule L of the Agreement to state that the said clause provides that the Project Highway shall be constructed, operated, and maintained during the concession period in accordance with the Scope defined in Schedules-B&C, and therefore, any maintenance activity had to be carried out by Respondent in consonance and in conformity with the standards provided in Schedules-B & C.

8. He would further rely on Clause 7.3 of Schedule B of the Agreement to buttress his argument that the same provides a 40 mm BC overlay for strengthening of the existing pavement.

9. Learned counsel for the Petitioner would also seek to rely upon Clause 1.6 of Schedule D to submit that the Project Highway was required to conform with the guidelines of the MoRTH and IRC Standard and Code, as a reading of Para 81 of IRC would make it



clear that the same provides that from structural considerations, the recommended minimum bituminous overlay thickness is 50 mm bituminous macadam with an additional surfacing course of 50 mm DBM or 40 mm BC.

10. He would submit that the learned Arbitral Tribunal has erroneously granted the claim in favour of the Respondent and has done selective reading and interpretation while arriving at the impugned finding that only Schedule-L will be applicable insofar as the Operation and Management period is concerned and that the same has been arrived at by doing an isolated and selective reading of Schedule L. Therefore, he would submit that the Majority Award is perverse and illegal and contrary to the terms of the Agreement and liable to be set aside.

11. To further buttress his argument, learned counsel for the Petitioner would rely upon the selective reasoning given by the learned Arbitrator in the dissenting Award.

12. Learned counsel would submit that the learned Arbitrator in his dissenting opinion has rightly held that the argument advanced by the Respondent before the learned Arbitral Tribunal proceeded on an erroneous premise and was vitiated by a fundamental misconception inasmuch as it equated the concept of a “Renewal Coat”, undertaken once every five years, with routine or periodic maintenance activities. Such an interpretation disregards both the rationale and the intended purpose underlying the provision for a Renewal Coat. The Renewal Coat is not a mere maintenance exercise; rather, it is a specialized intervention aimed at restoring the pavement, as far as practicable, to



its original condition. It serves to remedy the cumulative wear and tear sustained over a five-year period, preserve the essential structural and functional characteristics of the pavement, and prepare it to withstand the operational demands of the ensuing cycle. Accordingly, any attempt to conflate it with ordinary maintenance is misconceived and deserves outright rejection.

13. The second grievance that the learned counsel for the Petitioner has raised is with respect to the partial rejection of the counterclaim of the Petitioner pertaining to the delay in execution of the renewal coat.

14. He would submit that the learned Arbitral Tribunal has erred in rendering this finding, as in terms of the Contractual time schedule, the second periodic maintenance ought to have been completed by the Respondent by 21.01.2021, which was instead completed only on 27.01.2022, i.e., after a delay of 341 days.

15. He would submit that the learned Arbitral Tribunal has wrongly calculated that the Respondent completed the BC overlay on 04.05.2021, i.e., 14 days behind schedule, but within the 30-day cure period. He would submit that the alleged finding is factually incorrect, as the cure period had ended on 20.02.2021 and the BC overlay was completed on 04.05.2021, which is an admitted position. Hence, there was a delay of 73 days in the BC overlay by the Respondent. Therefore, he would submit that the impugned finding in the Award that the Respondent is not liable to pay damages to the Petitioner towards delay in completion of laying of BC coat is factually wrong, incorrect and not sustainable.



16. He would further submit that the finding wherein the learned Arbitral Tribunal has altered the calculation and quantum of damages that were originally claimed by the Petitioner is beyond the contractual provision and is therefore liable to be set aside.

17. It would be submitted by learned counsel for the Petitioner that the impugned finding in the Award, whereby, while referring to Clause 18.13 of the Agreement, it is held that damages at the rate of 0.1% of the estimated cost of repair per day of delay constitute a penalty and are thus unenforceable, whereas damages of Rs. 10,000/- per day are treated as liquidated damages being a genuine pre-estimate of loss, is legally untenable and stands vitiated by patent illegality on the face of the Award.

18. It would also be submitted that Clause 18.13 of the Agreement provides that the amount of damages shall be calculated for each day of default at the higher of the following, *namely*, (a) Rs. 10,000/- and (b) 0.1% of the cost of such repair as estimated by the Independent Consultant. Hence, the mandate of Clause 18.13 of the Agreement is clear, i.e., the Respondent shall be liable to pay to the Petitioner the higher of the two above-referred amounts. Accordingly, the findings in the Impugned Award, being contrary to the aforesaid provisions, are *ex facie* beyond the terms of the Agreement and are, therefore, liable to be set aside in *toto*.

19. **Per Contra**, learned counsel for the Respondent would, at the very outset, draw the attention of this Court to a judgment of the co-ordinate Bench of this Court in ***NHAI vs. Patel KNR Infrastructure***



*Ltd.*⁸ and would submit that the present dispute stands squarely covered by the said judgement.

20. He would further submit that the learned Arbitral Tribunal has rightly rendered the finding that the only applicable schedule during the Operation & Maintenance period (period in which renewal coat was laid), as provided in the Contract Agreement, is Schedule- L.

21. He would submit that the reliance of the learned counsel for the Petitioner on Clause 7.3 of Schedule B is misplaced, as the same is to be considered when a structural deficiency is found.

22. Further, he would submit that the learned Arbitral Tribunal has not erred in interpreting the terms of the Agreement, as a perusal of Clauses 2.6 and 4.3 and of the Schedule L would make it clear that the strengthening course is required only when certain technical parameters call for the strengthening and structural deficiencies are found. The learned Tribunal, upon an appreciation of the contemporaneous road test results, has returned a finding of fact that the prescribed parameters were not satisfied, and consequently, no requirement for strengthening arose, particularly in view of the relevant Clauses.

23. Learned counsel for the Respondent would also support the finding of the learned Arbitral Tribunal by stating that the Agreement does not specify the thickness of the renewal coat and MoRTH specifications also provide for 30mm thickness being a sufficient layer when applying a renewal coat.

⁸ OMP (COMM) 554/2020



24. He would submit that the learned Arbitral Tribunal has rightly held that a penalty cannot be levied in terms of the law, and only a genuine pre-estimate of the damages caused can be recovered as liquidated damages. Further, the learned Tribunal rightly held that when the agreement mentions two amounts and saddles the party in breach with a liability to pay the higher of the two amounts and that higher amount has no reference to the actual loss/damage, it cannot be said to be a genuine pre-estimate of the loss/damage that may be suffered in the future. If the pre-estimate is to be genuine, there can only be one sum stipulated as payable. Thereby, the learned Arbitral Tribunal has awarded damages on the basis of Rs. 10,000 per day.

25. It would be further argued by the learned counsel for the Respondent that for 0.1% of the cost to be applicable, there would need to be repair work. No repair work is involved in the renewal of the wearing course of road/pavement once every 5 years, as stipulated in clause 2.6.1(i) and 4.3.1 (ii) of Schedule L of the Agreement. This is for the simple reason that the renewal of the wearing surface is not “repairs” stipulated in Article 18.13(b) of the Concession Agreement. The words ‘maintain’ and ‘repair’ have different meanings, and the same is revealed from the wording in Article 18.12. The word ‘maintenance’ is intentionally removed from 18.13(b). Therefore, Article 18.13 damages are confined to Rs 10,000/- per day in the subject case, as there was no repair involved in doing the renewal coat.

26. In view thereof, the learned counsel for the Respondent would urge that the Impugned Award does not merit any interference and if



the finding of the learned Arbitral Tribunal is one of two possible views, then this Court shall only intervene when the view taken is perversely and patently illegal, which is not the case in the present dispute.

ANALYSIS:

27. This Court has carefully considered the submissions advanced on behalf of both sides and, with their able assistance, has perused the Impugned Award as well as the dissenting Award and other materials placed before this Court.

28. At the outset, it is apposite to note that this Court remains conscious of the limited scope of its jurisdiction while examining an objection petition under Section 34 of the A&C Act. There is a consistent and evolving line of precedents whereby the Hon'ble Supreme Court has authoritatively delineated and settled the contours of judicial intervention in such proceedings.

29. In this regard, a three-Judge Bench of the Hon'ble Supreme Court, after an exhaustive consideration of a catena of earlier judgments, in *OPG Power Generation (P) Ltd. v. Enxio Power Cooling Solutions (India) (P) Ltd.*⁹, while dealing with the grounds of conflict with the public policy of India and patent illegality, grounds which have also been urged in the present case, made certain pertinent observations, which are reproduced hereunder:

“Relevant legal principles governing a challenge to an arbitral award

30. Before we delve into the issue/sub-issues culled out above, it would be useful to have a look at the relevant legal principles

⁹ (2025) 2 SCC 417



governing a challenge to an arbitral award. Recourse to a court against an arbitral award may be made through an application for setting aside such award in accordance with sub-sections (2), (2-A) and (3) of Section 34 of the 1996 Act. Sub-section (2) of Section 34 has two clauses, (a) and (b). Clause (a) has five sub-clauses which are not relevant to the issues raised before us. Insofar as clause (b) is concerned, it has two sub-clauses, namely, (i) and (ii). Sub-clause (i) of clause (b) is not relevant to the controversy in hand. Sub-clause (ii) of clause (b) provides that if the Court finds that the arbitral award is in conflict with the public policy of India, it may set aside the award.

Public policy

31. “Public policy” is a concept not statutorily defined, though it has been used in statutes, rules, notification, etc. since long, and is also a part of common law. Section 23 of the Contract Act, 1872 uses the expression by stating that the consideration or object of an agreement is lawful, unless, inter alia, opposed to public policy. That is, a contract which is opposed to public policy is void.

37. What is clear from above is that for an award to be against public policy of India a mere infraction of the municipal laws of India is not enough. There must be, inter alia, infraction of fundamental policy of Indian law including a law meant to serve public interest or public good.

The 2015 Amendment in Sections 34 and 48

42. The aforementioned judicial pronouncements were all prior to the 2015 Amendment. Notably, prior to the 2015 Amendment the expression “in contravention with the fundamental policy of Indian law” was not used by the legislature in either Section 34(2)(b)(ii) or Section 48(2)(b). The pre-amended Section 34(2)(b)(ii) and its Explanation read:

44. By the 2015 Amendment, in place of the old Explanation to Section 34(2)(b)(ii), *Explanations 1 and 2* were added to remove any doubt as to when an arbitral award is in conflict with the public policy of India.

45. At this stage, it would be pertinent to note that we are dealing with a case where the application under Section 34 of the 1996 Act was filed after the 2015 Amendment, therefore the newly substituted/added Explanations would apply [*Ssangyong Engg. & Construction Co. Ltd. v. NHAI, (2019) 15 SCC 131*].

46. The 2015 Amendment adds two Explanations to each of the two sections, namely, Section 34(2)(b)(ii) and Section 48(2)(b), in place of the earlier Explanation. The significance of the newly inserted *Explanation 1* in both the sections is two-fold. First, it



does away with the use of words : (a) “*without prejudice to the generality of sub-clause (ii)*” in the opening part of the pre-amended Explanation to Section 34(2)(b)(ii); and (b) “*without prejudice to the generality of clause (b) of this section*” in the opening part of the pre-amended Explanation to Section 48(2)(b); secondly, it limits the expanse of public policy of India to the three specified categories by using the words “*only if*”. Whereas, *Explanation 2* lays down the standard for adjudging whether there is a contravention with the fundamental policy of Indian law by providing that a review on merits of the dispute shall not be done. This limits the scope of the enquiry on an application under either Section 34(2)(b)(ii) or Section 48(2)(b) of the 1996 Act.

47. The 2015 Amendment by inserting sub-section (2-A) in Section 34, carves out an additional ground for annulment of an arbitral award arising out of arbitrations other than international commercial arbitrations. Sub-section (2-A) provides that the Court may also set aside an award if that is vitiated by patent illegality appearing on the face of the award. This power of the Court is, however, circumscribed by the proviso, which states that an award shall not be set aside merely on the ground of an erroneous application of the law or by reappraisal of evidence.

48. *Explanation 1* to Section 34(2)(b)(ii), specifies that an arbitral award is in conflict with the public policy of India, *only if*:

(i) the making of the award was induced or affected by fraud or corruption or was in violation of Section 75 or Section 81; or

(ii) it is in contravention with the fundamental policy of Indian law; or

(iii) it is in conflict with the most basic notions of morality or justice.

49. In the instant case, there is no allegation that the making of the award was induced or affected by fraud or corruption, or was in violation of Section 75 or Section 81. Therefore, we shall confine our exercise in assessing as to whether the arbitral award is in contravention with the fundamental policy of Indian law, and/or whether it conflicts with the most basic notions of morality or justice. Additionally, in the light of the provisions of sub-section (2-A) of Section 34, we shall examine whether there is any patent illegality on the face of the award.

50. Before undertaking the aforesaid exercise, it would be apposite to consider as to how the expressions:

(a) “in contravention with the fundamental policy of Indian law”;

(b) “in conflict with the most basic notions of morality or justice”;

and

(c) “patent illegality” have been construed.



In contravention with the fundamental policy of Indian law

51. As discussed above, till the 2015 Amendment the expression “in contravention with the fundamental policy of Indian law” was not found in the 1996 Act. Yet, in ***Renusagar Power Co. Ltd. v. General Electric Co., 1994 Supp (1) SCC 644***, in the context of enforcement of a foreign award, while construing the phrase “contrary to the public policy”, this Court held that for a foreign award to be contrary to public policy mere contravention of law would not be enough rather it should be contrary to:

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

55. The legal position which emerges from the aforesaid discussion is that after “the 2015 Amendments” in Section 34(2)(b)(ii) and Section 48(2)(b) of the 1996 Act, the phrase “in conflict with the public policy of India” must be accorded a restricted meaning in terms of *Explanation 1*. The expression “in contravention with the fundamental policy of Indian law” by use of the word “fundamental” before the phrase “policy of Indian law” makes the expression narrower in its application than the phrase “in contravention with the policy of Indian law”, which means mere contravention of law is not enough to make an award vulnerable. To bring the contravention within the fold of fundamental policy of Indian law, the award must contravene all or any of such fundamental principles that provide a basis for administration of justice and enforcement of law in this country.

56. Without intending to exhaustively enumerate instances of such contravention, by way of illustration, it could be said that:

- (a) violation of the principles of natural justice;
- (b) disregarding orders of superior courts in India or the binding effect of the judgment of a superior court; and
- (c) violating law of India linked to public good or public interest, are considered contravention of the fundamental policy of Indian law.

However, while assessing whether there has been a contravention of the fundamental policy of Indian law, the extent of judicial scrutiny must not exceed the limit as set out in *Explanation 2* to Section 34(2)(b)(ii).

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 vitiated 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 reappraisal of evidence.

66. In *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 v. DDA*, (2015) 3 SCC 49, 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].

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) 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 Engg. & Construction Co. Ltd. v. NHAI*, (2019) 15 SCC 131 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. & Construction Co. Ltd. v. NHAI*, (2019) 15 SCC 131]. Further, it was observed, reappraisal of evidence is not permissible under this category of challenge to an arbitral award [See *Ssangyong Engg. & Construction Co. Ltd. v. NHAI*, (2019) 15 SCC 131].

Perversity as a ground of challenge

69. Perversity as a ground for setting aside an arbitral award was recognised in *ONGC Ltd. v. Western Geco International Ltd.*, (2014) 9 SCC 263. Therein it was observed that an arbitral decision must not be perverse or so irrational that no reasonable



person would have arrived at the same. It was observed that if an award is perverse, it would be against the public policy of India.

70. In *Associate Builders v. DDA*, (2015) 3 SCC 49 certain tests were laid down to determine whether a decision of an Arbitral Tribunal could be considered perverse. In this context, it was observed that where:

- (i) a finding is based on no evidence; or
- (ii) an Arbitral Tribunal takes into account something irrelevant to the decision which it arrives at; or
- (iii) ignores vital evidence in arriving at its decision, such decision would necessarily be perverse.

However, by way of a note of caution, it was observed that when a court applies these tests it does not act as a court of appeal and, consequently, errors of fact cannot be corrected. Though, a possible view by the arbitrator on facts has necessarily to pass muster as the arbitrator is the ultimate master of the quantity and quality of evidence to be relied upon. It was also observed that an award based on little evidence or on evidence which does not measure up in quality to a trained legal mind would not be held to be invalid on that score.

71. In *Ssangyong Engg. & Construction Co. Ltd. v. NHAI*, (2019) 15 SCC 131, which dealt with the legal position post the 2015 Amendment in Section 34 of the 1996 Act, it was observed that a decision which is perverse, 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. It was pointed out that an award based on no evidence, or which ignores vital evidence, would be perverse and thus patently illegal. It was also observed that 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 [See *Ssangyong Engg. & Construction Co. Ltd. v. NHAI*, (2019) 15 SCC 131].

72. The tests laid down in *Associate Builders v. DDA*, (2015) 3 SCC 49 to determine perversity were followed in *Ssangyong Engg. & Construction Co. Ltd. v. NHAI*, (2019) 15 SCC 131 and later approved by a three-Judge Bench of this Court in *Patel Engg. Ltd. v. North Eastern Electric Power Corpn. Ltd.*, (2020) 7 SCC 167.

73. In a recent three-Judge Bench decision of this Court in *DMRC Ltd. v. Delhi Airport Metro Express (P) Ltd.*, (2024) 6 SCC 357, the ground of patent illegality/perversity was delineated in the following terms: (SCC p. 376, para 39)

“39. In essence, the ground of patent illegality is available for setting aside a domestic award, if the decision of the arbitrator



is found to be perverse, or so irrational that no reasonable person would have arrived at it; or the construction of the contract is such that no fair or reasonable person would take; or, that the view of the arbitrator is not even a possible view. 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 under the head of “patent illegality”. An award without reasons would suffer from patent illegality. The arbitrator commits a patent illegality by deciding a matter not within its jurisdiction or violating a fundamental principle of natural justice.”

Scope of interference with an arbitral award

74. The aforesaid judicial precedents make it clear that while exercising power under Section 34 of the 1996 Act the Court does not sit in appeal over the arbitral award. Interference with an arbitral award is only on limited grounds as set out in Section 34 of the 1996 Act. A possible view by the arbitrator on facts is to be respected as the arbitrator is the ultimate master of the quantity and quality of evidence to be relied upon. It is only when an arbitral award could be categorised as perverse, that on an error of fact an arbitral award may be set aside. Further, a mere erroneous application of the law or wrong appreciation of evidence by itself is not a ground to set aside an award as is clear from the provisions of sub-section (2-A) of Section 34 of the 1996 Act.

75. In *Dyna Technologies (P) Ltd. v. Crompton Greaves Ltd.*, (2019) 20 SCC 1, paras 27-43, a three-Judge Bench of this Court held that courts need to be cognizant of the fact that arbitral awards are not to be interfered with in a casual and cavalier manner, unless the court concludes that the perversity of the award goes to the root of the matter and there is no possibility of an alternative interpretation that may sustain the arbitral award. It was observed that jurisdiction under Section 34 cannot be equated with the normal appellate jurisdiction. Rather, the approach ought to be to respect the finality of the arbitral award as well as party's autonomy to get their dispute adjudicated by an alternative forum as provided under the law.”

30. At this stage, for the sake of clarity, this Court deems it appropriate to reproduce the relevant clauses of the Agreement, which are as follows:

I. Article 9.2 of the Agreement reads as follows:



“Article 9.2: - Subject to the terms and conditions of this Agreement the Concessionaire shall at its own cost and expense:

- I. Undertake the design, engineering, procurement and construction and financing of the Project Highway in accordance with this Agreement,
- II. operate and maintain the Project Highway at all times in conformity with this Agreement including but not limited to the Specifications and standards set forth in schedule 'D', Schedule 'L', the Maintenance Programme and Good Industry Practice.

The concessionaire was obliged to provide a renewal coat of BC on completion of five years from the date of construction and as per the specifications given in the concession agreement and MORTH, a minimum thickness of 40 MM is required to be provided by the concessionaire. This renewal cot has to be completed by end of five years from the date of construction and second coat In Ten years from the date of construction, which the concessionaire has failed to provide and has to pay damages in terms of agreement.”

II. Relevant Clauses of Schedule L of the Agreement are as follows:

“2.6 Operation and Maintenance Stage

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

- a) Regular periodic maintenance activities:
 - i. Renewal of the wearing surface of the road pavement once every 5 years;
 - ii. Strengthening course to be provided on ‘as required’ basis.
- b) Maintenance activities arising out of the specific need(s) on account of the site conditions are:
 - i. Strengthening course required on account of the Benkelman Beam Deflection (B. B. D) values in excess of the prescribed criteria obtained during regular testing as per the Concession Agreement requirement;
 - ii. Wearing course required on account of the IRI values higher than the prescribed criteria obtained during regular testing as per the Concession Agreement requirement.



- iii. Localized repairs in short lengths less than 500mm on account of pot holes, cracking subsidence in isolated spots or in structured area.

4.3 Periodic Maintenance of Pavement

The framework of activities relating to pavement maintenance and rehabilitation in respect of flexible and rigid pavement are given in the flowcharts in Appendix 3.1 and Appendix 3.2 respectively. The Concessionaire shall set forth in the Operation and Maintenance Manual the detailed procedures to be followed under each of these activities and also those the operational and performance criteria from the performance standards set forth in this Schedule.

4.3.1 Pavement Riding Quality

- i. The riding quality of the pavement shall be ensured by satisfying the minimum requirements given herein under, Surface roughness of the Project Highway on completion of construction shall be 2000mm/km as measured by vehicle mounted Bump Integrator.
- ii. Surface roughness shall not exceed 3000mm/km during the service life of pavement at any time. A renewal coat of bituminous concrete shall be laid every 5 years after initial construction or where the roughness value reaches 3000mm/km whichever is earlier to bring it to the initial value of 2000mm/km

4.3.2 Structural Condition of the Pavement

- i. The structural condition of the flexible pavement of the Project Highway shall be assessed every year by taking Benkelman Beam Deflections and working out characteristic deflections of homogenous sections of the Project Highway as per IRC 81-1997, wherever the characteristic deflection exceeds 1.2 mm a bituminous overlay shall be provided appropriately designed according to IRC-81-1997 or its latest versions or amendments to it.
- ii. Recycling of existing crust using milling as an option can be explored by the Concessionaire in consultation with the IC to maintain the FRL at the same level throughout the concession period. However, while adopting such measures, the residual strength of existing pavement shall be estimated and equivalent thickness of new material added before laying the designed overlay. The



- design of profile with altered pavement treatments shall be finalized in consultation with IC.
- iii. In the case of cement concrete pavement, joint shall be thoroughly inspected every year and the loss of sealing compounds made good.”

III. Clause 1.6 of Schedule D of the Agreement reads as follows:

“1.6 All works related to the Project Highway shall conform to the Guidelines and Special Publications as applicable to National Highways and Ministry of Shipping, Road Transport and Highway earlier Ministry of Road Transport and Highways (MORT&H) specifications and India Roads Congress (IRC) standards, Codes, with all updates till 30 days before the date of bid submission by the Concessionaire. In the absence of any definite provisions on any particular issue related to the Specifications and/or Standards, reference may be made to the latest codes and Specifications of Bureau of Indian Standards, British Standards, AASHTO, ASTM or any other International Standard in that order. But, where even these are silent, the construction and completion of the works shall conform to sound engineering practice with the approval of the Independent Consultant /NHAI.”

IV. Clause 7.3 of Schedule B of the Agreement reads as follows:

“7.3 Strengthening of the existing flexible pavement

Strengthening of the existing flexible pavement shall not be less than 40mm Bituminous / Asphalt concrete and 125 mm Dense Bituminous Macadam (DBM) over profile corrective course. The composition of profile corrective course shall depend on its thickness as given below:

<40mm	DBM
Up to 100mm	BM
Up to 150mm	50mm DBM + 100mm BM
Up to 375mm	WMM, by scarifying the existing BT
Up to 575mm	Granular overlay by scarifying the existing BT
>575mm	New Construction

If the concessionaire desires to use geo synthetics, geo nets etc as part of strengthening of the existing carriageway, the same shall be finalised in consultation



with IC before execution of work. The above-prescribed minimum thickness for overlay shall be laid even with such special provisions.”

31. After a perusal of the relevant clauses of the Agreement, the pivotal question that arises for consideration before this Court is whether the findings rendered by the learned Arbitral Tribunal are beyond the scope of the Agreement, or a misinterpretation of the terms of the Agreement. For the sake of clarity, the reasoning rendered by the learned Arbitral Tribunal on issue number 1 is reproduced, which is as follows:

“....

It is observed that the Claimant carried out BBD tests in February 2019 and again in February 2020, conducted by Sri Infotech in the presence of representative of IE as well as the Respondent. Results of the tests conducted during February 2019 have been submitted by the Claimant in CD-VOL.4 at Page 155 to 315, which have been certified by Central Road Research Institute vide its letter dated 24.06.2019 at Page 316 of CD-IV. It is noted that report of Benkelman Beam Deflection survey reveals that characteristic deflection in the entire stretch of the highway is less than 1.2 mm. The report on Bump Integrator survey reveals that roughness index in the entire stretch of highway is less than 2000 mm / km. It implies that the results of BBD and Surface roughness tests reveal that the performance parameters are within the limits as provided in Clause 4.3.1(ii) and Clause 4.3.2 (I). The test results clearly indicate that structural condition of the pavement and pavement riding quality parameters are within the prescribed limits in February 2019. The flow chart in Appendix 3.1 of Schedule-L clearly suggests that the project is not a candidate for strengthening of the pavement by providing overlay as provided in Para 7.5 of IRC-81 of 1997. As per Clause 4.3 periodic maintenance of pavement frame work is given in Appendix 3.1 of Schedule-L, which leads to conclusion that the project does not require any periodic maintenance.

It is also noted that SRI INFOTECH again carried out report on Bump Integrator Survey in February 2020 (Page 253 to 315 of CD-IV) and Central Road Research Institute submitted calibration report vide its letter dated 24.06.2019 (Page 316 of CD-IV). SRI INFOTECH also carried out Benkelman Beam Deflection survey in February 2020 (Page 318 of CD-IV to Page 437 of CD-V). It is



noted that test results of 2020 also reveals that characteristic deflection in the entire stretch of the highway is less than 1.2mm / km. and roughness index in the entire stretch of highway is less than 2000mm / km. It implies that the results of BBD and Surface roughness tests reveals that the performance parameters are within the limits provided in the flow chart in Appendix 3.1 of Schedule-L, which clearly suggests that the project is not a candidate for strengthening of the pavement by providing overlay as provided in Para 7.5 of IRC- 81 of 1997.

The test results indicate that there being no structural deficiency in the entire project length as characteristic deflection was less than 1.2 mm therefore there was no requirement of Bituminous overlay for structural strengthening. As Surface roughness was well below 2000 mm / km, there was no contractual requirement for overlay to improve riding quality. However the Claimant was required to provide renewal coat in accordance with Clause 4.3.1(ii) of Schedule-L, which stipulates, as under:

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

The test results conducted in February 2020 indicate that roughness value was less than 2000mm/km on the entire stretch of the highway indicating that pavement riding quality was within the prescribed limits.

Clause 4.3.1 (ii) makes it mandatory to provide a renewal coat of bituminous concrete on every 5 years after initial construction or where the roughness value reaches 3000mm/km, whichever is earlier to bring it to the initial value of 2000mm/km. The Respondent has relied upon provisions of IRC-81-1997 Para 7.6 which stipulate that where structural deficiency is not indicated from deflection values, thin surfacing may be provided to improve the riding quality. The heading of this code is “Guidelines for strengthening of flexible road pavement used Benkelman Beam deflection technique. This is applicable if strengthening is required due to assessment of the road by taking Benkelman Beam deflection technique. Such a test was conducted and as the characteristic deflection found to be less than 1.2mm and therefore no bituminous overlay was required to be designed according to IRC: 81-1997 and also the surface roughness was less than 2000 mm/ km. However 7.6 of IRC: 81-1997 stipulated as under:

7.6: Where structural deficiency is not indicated from deflection values, thin surfacing may be provided to improve the riding quality as required



Therefore IRC: 81-1997 itself states that if the characteristic deflection is less than 1.2 and the roughness index is less than 2000 mm/ km, a thin layer can be laid. Para 7.5 of IRC: 81-1997 is not applicable as no strengthening was required in the Road.

The contract does not provide for any specific thickness of renewal coat, therefore, the Claimant has to fulfill its obligation as listed in Clause 9.2 (ii) of CA which stipulates, as under:

“Operate and maintain the project highway at all times in conformity with this Agreement including but not limited to the specifications and standards set forth in Schedule-D, Schedule-L, the Maintenance programme and Good Industry Practice”.

Clause 1.6 of Schedule-D, provides that all works related to the project highway shall conform to the guidelines and special publication as applicable to National highways and MoRT&H specifications and Indian Road Congress standards, codes with all updates till 30 days before the date of bid submission by the Concessionaire.

The Respondent has issued vide its letter dated 08.11.2002 (C-3, Page 5 of CD-IV), revised guidelines of MoRT&H for periodic renewal dated 26.09.2002, which is applicable in the present matter. As per these guidelines, thickness of periodical renewal in Para 4 (iv) (b), 25mm BC for high traffic roads shall be laid as a wearing course. MoRT&H specification to be followed as per Clause 1.6 of Schedule-D, Section 5.09 provides for specification of BC, wherein Table 500-18 provides for layer thickness of 30 to 45mm when using nominal aggregate size of 13mm (Page 703 of Vol. V). It is also noted that IRC-29-1988 provides for specification for bituminous concrete wherein Para 2.3 and 4.2 provides for a compacted layer thickness of 25mm BC using aggregate gradation as shown in Table-3 for Grading-1.

Respondent had submitted payment specialist report dated 8th May 2019 on the thickness of periodic renewal coat should (R-8/RD-02). The other contention raised during argument is that pavement specialist report is given in Exhibit C-7. It was argued that both I. C. and Pavement Specialist took the same stand and therefore according to them 40mm BC should be laid as Renewal Coat. The Claimant response is as under:

- (i) The Senior Pavement Specialist is one of the Personal of the I. C. and not a third party.
- (ii) The personal, pavement specialist did not examine the Pavement layer to find out whether the layer laid / to be laid was in accordance with the specifications in the contract.

Pavement specialist had, also observed that “Therefore, the laying periodical renewal on regular basis be carried out mandatorily in the entire project highway at the specified frequency of once in



every five years irrespective of whether the roughness index or BBD is less than the prescribed limits given in the Concession Agreement'. The word 'Renewal' used in Clause 2.6.1(a) (I) of Schedule L of CA has been interpreted by the pavement specialists as 'Repetition' of the original 'Wearing Surface of Road Pavement' which had originally been laid with thickness of 40 MM and had held that the renewal coat of 40 MM thickness of bituminous concrete is required to be laid every Five years.

Interpretation on a renewal was debated during course of proceedings and it was apparent that the renewal does not mean repeating the old surface as the intention of the contract agreement by providing renewal quote coat was to ensure smooth riding surface when there was no structural requirement for relaying or overlaying as there had been no need for a strengthening keeping in view the test results of BBD and deflection areas of rates have been met fully what was required was to ensure that the riding surface of the pavement continues to be one as per the only requirement and the Wear and tear which is taking place in a period of five years is made up by new layer.

Keeping in view the fact that Schedule B lays down the scope of the project clearly specifying requirements for new construction as well as for strengthening of the existing pavement and Schedule 'D' gives the specifications and standards for design of new works and provisions of IRC 82 and IRC 37 are applicable for design of new construction of highways and are not directly applicable for the maintenance operations of highways; provisions which have been detailed in schedule 'L' of the Contact Agreement have to be followed for renewal coat. When structural deficiency is found recourse has to be taken to provisions of clause 7.3 of Schedule B. AT members are of the considered opinion that the provisions of contact agreement and the specifications standards mentioned therein do not specify and require laying of 40 MM thickness of Bituminous Concrete for renewal coat.

Therefore, against Issue No.1, the AT concludes that the thickness of BC during Second Renewal Coat to be laid by the Claimant was not to be 40mm.

.....”

32. This Court is conscious of the law laid down by a catena of judgements that if the learned Arbitral Tribunal has taken one of the two possible views and if the interpretation of the contractual clauses



by the Arbitrator was “a possible if not a plausible” interpretation, the court would have no reason to interfere with the arbitral award.

33. In the present case, the Impugned Award would only merit interference if the view taken by the learned Arbitral Tribunal is in violation of the Principles of Reasonableness, meaning thereby that the reasoning rendered is so unreasonable that no reasonable person acting reasonably could have made it. This Court is also guided by the judgment of the Apex Court in *Rashtriya Ispat Nigam Ltd. v. Dewan Chand Ram Saran*¹⁰.

34. A perusal of Schedule L indicates that it contemplates renewal of the wearing surface at periodic intervals, without prescribing any fixed thickness for such renewal. The emphasis is on maintaining the prescribed riding quality and surface roughness parameters. The learned Arbitral Tribunal has, therefore, correctly construed the obligation as one relating to performance standards rather than rigid structural specifications.

35. The contractual scheme, when read as a whole, draws a clear distinction between routine maintenance activities and structural strengthening. While renewal of the surface is a periodic maintenance requirement, strengthening overlays are contemplated only when structural deficiencies are detected on the basis of technical parameters. Clause 7.3 of Schedule B, which forms the fulcrum of the Petitioner’s submission, pertains to strengthening the existing pavement and prescribes a minimum thickness in that context. The

¹⁰ (2012) 5 SCC 306



learned Arbitral Tribunal has rightly held that this provision cannot be read in isolation and applied to renewal coats governed by Schedule L.

36. The interpretation canvassed by the learned counsel for the Petitioner would effectively obliterate the distinction between renewal and strengthening, thereby rendering the specific provisions of Schedule L redundant. The learned Arbitral Tribunal's construction, on the other hand, preserves the internal coherence of the Agreement and gives effect to each provision in its proper context.

37. The learned Arbitral Tribunal has also considered Clause 1.6 of Schedule D, which incorporates MoRTH and IRC standards. It has correctly appreciated that such standards operate within the framework of the Agreement and supplement, rather than supplant, the contractual provisions. The material placed before the learned Tribunal indicated that, in the absence of structural deficiencies, MoRTH specifications permit a thinner BC layer for renewal of the wearing course. The reliance placed on such specifications is thus consistent with the contractual scheme.

38. Importantly, the learned Arbitral Tribunal has returned a finding of fact that the pavement did not exhibit structural deficiencies warranting a strengthening overlay. This finding is based on technical material and evidence on record. It is, therefore, not open to this Court, in exercise of jurisdiction under Section 34, to reappraise such evidence or arrive at a different conclusion.

39. Once it is held that a 40 mm BC layer was not contractually mandated, the further conclusion of the learned Arbitral Tribunal that the additional 10 mm thickness was executed at the insistence of the



Petitioner follows as a logical consequence. The learned Arbitral Tribunal has noted that the Respondent carried out the work under protest and had reserved its right to claim compensation. The Award, therefore, cannot be said to be arbitrary or unsustainable.

40. Learned counsel for the Petitioner has also sought to derive support from the dissenting opinion rendered by the learned Arbitrator, contending that the dissent correctly characterises a “Renewal Coat” as a specialised intervention distinct from routine maintenance and, therefore, necessitating a higher standard of execution. This submission, however, fails to persuade this Court.

41. It is pertinent to note that a dissenting opinion, by its very nature, does not constitute the binding determination of the learned Arbitral Tribunal. The enforceable award is that of the majority, and the scope of examination under Section 34 of the A&C Act is confined to testing the validity of the majority award on the limited grounds statutorily prescribed. The mere existence of a dissenting view, even if plausible or persuasive, cannot be a ground to displace the conclusions reached by the majority.

42. In the present case, the Majority Award has undertaken a detailed analysis of the contractual framework, including the scheme of Schedule L, and has drawn a clear distinction between renewal of the wearing surface and structural strengthening. It has been concluded that a renewal coat, as envisaged under the Agreement, is a periodic activity linked to maintenance of riding quality and surface parameters, and does not, in the absence of structural deficiency, mandate the specifications applicable to strengthening overlays. This



interpretation is rooted in the text of the Agreement and supported by the material placed before the learned Tribunal.

43. The reasoning adopted in the dissenting opinion essentially reflects an alternative construction of the same contractual provisions by attributing a more intensive and restorative character to the renewal coat. While such a view may not be wholly implausible, it nonetheless represents only one of the possible interpretations of the Agreement. The settled position of law is that where two views are possible, and the learned Arbitral Tribunal has adopted one such view, the Court cannot interfere merely because another view, including that expressed in a dissent, may appear preferable.

44. The reliance placed by the learned counsel for the Petitioner on the conceptual distinction sought to be drawn in the dissent between “*renewal*” and “*routine maintenance*” does not, therefore, advance its case. The majority has not equated renewal coat with routine maintenance in a simplistic sense; rather, it has interpreted the contractual obligation in its proper context, distinguishing it from strengthening measures that are triggered by structural deficiencies.

45. This construction, in the considered opinion of this Court, cannot be said to be either perverse or contrary to the terms of the Agreement.

46. In this regard, it bears reiteration that the jurisdiction under Section 34 does not extend to substituting the Court’s view for that of the learned Tribunal or to choosing between competing interpretations merely because one appears more attractive. The test is whether the view adopted by the majority is a plausible and reasonable one. Once



that threshold is satisfied, as it is in the present case, no interference is warranted.

47. Accordingly, the reliance placed on the dissenting opinion is misplaced, and the same does not furnish any ground to interfere with the Impugned Award.

48. The next limb of the challenge pertains to the issue of delay and the imposition of damages. This Court deems it appropriate to extract the relevant finding rendered by the learned Arbitral Tribunal, which reads as follows:

“....

While discussing the issue number one it has been established that the Claimant was not required to lay Bituminous Concrete of 40 MM thickness as part of contractual requirement for the renewal course to be laid every five years. The contract agreement only provides for laying of a thin layer of Bituminous Concrete for improving the riding quality which is required to be laid every five years irrespective of the fact whether the existing pavement was meeting the deflection criteria and roughness prescribed criteria stipulated in the specifications. The Claimant had proposed laying of a thickness of 30 MM, keeping in view the MoRTH specifications. AT has agreed with the contention of the Claimant that laying a renewal course of Bituminous Concrete of 30mm thickness was adequate in terms of the concession agreement and improving the riding quality of the pavement was required to be laid every five years. In view of this, the Claimant is entitled to reimbursement of cost incurred by laying an extra 10 MM thick bituminous concrete towards second renewal coat.

MoRT&H specifications (Fourth Revision) for Bituminous Concrete in Section 5, stipulates minimum layer thickness of 30mm for nominal aggregate size of 13mm for bituminous concrete pavement layers (Table 500 — 18, Page 703, CD Vol.V). It is admitted position that the Claimant submitted its proposal for 30mm thick renewal coat as per good engineering practice right from April 2019 till the date on 07.04.2020 (C-29, Page 440 CD-Vol.V). The Team Leader vide its letter dated 07.04.2020 directed the Claimant to provide 40mm thick renewal coat, The Claimant vide its letter dated 14.04.2020 (C-30, Page 442 of CD-V), objected the interpretation of Contract Clauses and direction issued by the Respondent reserving its right to lodge claim for 10mm



thick BC (extra thickness) as per Clause XXXIX of Concession Agreement. The Claimant had prepared and mobilized appropriate resources to undertake laying of renewal coat from January 2020. The Claimant did not agree to the interpretation forced upon him by the Respondent and referred the dispute to Team Leader of Independent Engineer for amicable settlement on 27.05.2020 (C-33, Page 454, Vol.V).

Claimant has submitted in one Volume (Volume -II), the detailed breakup of the cost analysis of the Claim. The Respondent did not specifically dispute the quantification as worked out by the Claimant. The Respondent also did not provide any Counter rate analysis. Further for the calculation of the Counter Claim, the Respondent considered more rate of BC than the Claimant. It may be pertinent to state that the Claimant has arrived the rate of BC as Rs. 9238/- per cum (SOC Page N. 4 of Volume —II) whereas, the Respondent has considered Rs. 10342/- per cum in non-Municipal limit and Rs. 10910/- per cum in the Municipal limit (SOD Page No. 112).

In the absence of any mention of thickness of renewal coat in Concession Agreement, MoRT&H guidelines, IRC Codes are to be referred as provided in the Concession Agreement. Para 7.6 of IRC-81-1997 stipulates that “Where structural deficiency is not indicated from deflection values, thin surfacing may be provided to improve the riding quality as required”. Therefore, MoRT&H guidelines dated 08.11.2002 and IRC-29 — 1988, Para 4.2, Table-3 have been relied upon by the Claimant, wherein 25mm thickness of Bituminous Course for grading -1 size of aggregates is provided for Bituminous Concrete.

MoRT&H specifications (Fourth Revision) for Bituminous Concrete in Section 5, stipulates minimum layer thickness of 30mm for nominal aggregate size of 13mm for bituminous concrete pavement layers (Table 500 — 18, Page 703, CD Vol.V). It is admitted position that the Claimant submitted its proposal for 30mm thick renewal coat as per good engineering practice right from April 2019 till the date on 07.04.2020 (C-29, Page 440 CD-Vol.V). The Team Leader vide its letter dated 07.04.2020 directed the Claimant to provide 40mm thick renewal coat, The Claimant vide its letter dated 14.04.2020 (C-30, Page 442 of CD-V), objected the interpretation of Contract Clauses and direction issued by the Respondent reserving its right to lodge claim for 10mm thick BC (extra thickness) as per Clause XXXIX of Concession Agreement. The Claimant had prepared and mobilized appropriate resources to undertake laying of renewal coat from January 2020. The Claimant did not agree to the interpretation forced upon him by the Respondent and referred the dispute to Team Leader of



Independent Engineer for amicable settlement on 27.05.2020 (C-33, Page 454, Vol. V).

Keeping in view the provisions of Contract Agreement, the AT concludes that the Claimant is entitled for payment of cost incurred for 10mm extra thickness of Bituminous concrete towards second renewal coat.

The Claimant has submitted total cost incurred towards this claim for Rs.13,44,09,772/-, wherein the Claimant has provided detailed working out of claim. The Claimant has given break-up of cost in three parts i.e. (A), (B) and (C). Part—A is for extra 10 mm thickness of Bituminous Concrete, Part-B is for Semi Dense Bituminous Concrete in to Service Road (Additional Length) and Part-C is for Tack Coat for additionally executed length of Slip road and Service Road, costing. The AT has noted that the Claimant in its pleading has claimed cost of extra 10mm thickness of BC towards second renewal coat. There is no mention anywhere in the pleadings regarding Semi Dense Bituminous Concrete (SDBC) in additional length of Service Road or Tack Coat for additional length of Slip Road/Service Road.

Therefore, the AT has taken in to consideration the cost pertaining to extra thickness of 10mm BC only. The AT holds that the Claimant is entitled for the cost of extra thickness of 10mm BC.

It is noted that the Respondent has not submitted anything pertaining to quantification of this claim except the arguments that the Respondent is not liable to pay claim No.(a) to the Claimant towards extra thickness of 10mm Bituminous Concrete (BC) to be laid for renewal coat.

The Claimant has claimed that it has executed total quantity of 12,765.88 cum towards extra thickness of 10 mm BC in second renewal coat. The Claimant has submitted rate analysis for BC at Page 4, of CD Vol. II, according to which the rate of BC claim is Rs.9238/- per cum. As against it the Respondent in its Counter Claim (A) has considered rate of BC as Rs.10342/- per cum in outside of municipal limits and Rs.10910/- per cum within the municipal limits (C-28, Page 112 of Counter Claim 1, Vol. III). Derived rates of BC are as per SSR of the year 2020-21, and GST @12% and Royalty / Seigniorage charges in the rate analysis for BC have been added.

Keeping in view the fact that the some of the resources would be same for both 40 mm thick BC and 30 mm thick BC, AT has examined the rate analysis and corrected the same due to reasons stated in Annexure-A attached with the Award, wherein rate derived for BC comes to Rs..8639/- per cum. Since the Respondent has not specifically contested the quantity of Bituminous Concrete (for extra thickness of 10mm) i.e. 12765.88 cum, in its SOD, the quantities worked out by Claimant have been adopted for



quantification of the Claim. Therefore, the Claimant is entitled to Rs.12,35,18,570/- [12765.88 x 8639 x 1.12 (GST @ 12%)] towards the cost of extra thickness of 10mm BC laid for second renewal coat in the Project Highway. Issue No.2 is decided accordingly. We award an amount of Rs. 12,35,18,570/- in favour of Claimant against its claim of Rs. Rs.13,44,09,772/-.

....”

49. The Petitioner had initially raised the claim damages to the tune of Rs. 1,92,58,192/- for the delay in execution of the renewal coat.

50. The Petitioner has sought to demonstrate that the learned Arbitral Tribunal erred in computing the period of delay and wrongly concluded that the Respondent was not liable to pay damages as claimed.

51. However, a perusal of the Impugned Award indicates that the learned Arbitral Tribunal has considered the contractual milestones, the correspondence exchanged between the parties, and the sequence of events leading to the completion of the renewal coat. On such consideration, it has arrived at a finding that the delay was either marginal or did not justify the imposition of damages to the extent claimed by the Petitioner. This again is a finding of fact based on an appreciation of evidence and is not open to interference unless shown to be perverse, which has not been established in the present case.

52. The more substantial challenge of the Petitioner is directed towards the interpretation of Clause 18.13 of the Agreement, which provides for damages at the higher of two amounts, *namely*, Rs. 10,000 per day or 0.1% of the cost of repair. The learned Arbitral Tribunal has examined this clause in the light of settled principles governing liquidated damages and penalties. It has been concluded that a stipulation requiring payment of the higher of two amounts,



without any clear nexus to the actual loss likely to be suffered, cannot be regarded as a genuine pre-estimate of damages. Consequently, the learned Arbitral Tribunal has treated the higher amount as penal in nature and has restricted the damages to Rs. 10,000 per day as a reasonable measure.

53. This approach is in consonance with the principles embodied in Section 74 of the Indian Contract Act, 1872, which mandates that only reasonable compensation may be awarded, irrespective of the amount named in the contract. The learned Arbitral Tribunal has not rewritten the contract but has instead harmonised the contractual stipulation with the governing legal framework. Such an exercise falls squarely within the jurisdiction of the learned Arbitral Tribunal and does not call for interference.

54. The learned Tribunal has also accepted the contention of the Respondent that the expression “repair” used in Clause 18.13(b) does not encompass periodic renewal of the wearing surface. This interpretation is supported by the internal structure of the Agreement, which consciously distinguishes between maintenance, renewal, and repair activities.

55. This Court finds that the aforesaid interpretation is not only plausible, but is also consistent with the contextual usage of the terms employed in the Agreement. Therefore, no infirmity can be found in the findings rendered by the learned Arbitral Tribunal. Consequently, the challenge raised by the Petitioner is devoid of merit and is accordingly rejected.



CONCLUSION:

56. In view of the foregoing analyses, this Court is of the considered opinion that the learned Arbitral Tribunal has assigned cogent, well-reasoned, and sustainable grounds in support of the Impugned Award. No perversity, infirmity, or patent illegality has been demonstrated by the Petitioner so as to warrant interference with the Impugned Award.

57. Accordingly, the present petition, along with pending application(s), if any, stands dismissed.

58. No orders as to cost.

HARISH VAIDYANATHAN SHANKAR, J.

APRIL 21, 2026/va