* IN THE HIGH COURT OF DELHI AT NEW DELHI

% **Judgment reserved on: 28.04.2026**
Judgment pronounced on: 06.05.2026

\+ O.M.P. (COMM) 263/2018 & I.A. 3084/2023

NATIONAL HIGHWAY AUTHORITY OF INDIA .....Petitioner

Through: Mr. Arun Kumar Varma, Sr. Adv. with Mrs. Asha Gopalan Nair, Mr. Sandeep Narain & Ms. Nivedita Nair, Advs.

versus

GMR HIGHWAYS LTD .....Respondent

Through: Mr. Rajshekhar Rao, Sr. Adv. with Ms. Richa Kapoor, Mr. Kunal Anand, Ms. Aditi Rathore & Mr. Wamic Wasim Nargal, Advs.

CORAM:
HON'BLE MR. JUSTICE AVNEESH JHINGAN

J U D G M E N T

1. This petition is filed under Section 34 of the Arbitration and Conciliation Act, 1996 (for short 'the Act') against the arbitral award dated 24.02.2018 (for brevity 'the award').

2. The brief facts are that the Government of India through the petitioner/National Highways Authority of India (for short 'NHAI') invited bids for development of the stretch of National Highway from 28 km to 121 km of Tambaram-Tindivanam section of NH-45 in Tamil Nadu. The respondent through a consortium was a successful

bidder and was issued a Letter of Acceptance dated 16.08.2001. In terms of the proposal, the consortium incorporated a special purpose vehicle i.e. the respondent for implementing the project. The Concession Agreement dated 09.10.2001 (for short 'CA') was entered between the petitioner and the respondent. The project was on Build Operate and Transfer (for short 'BOT') basis. The construction was completed on 11.10.2004, and the concession period was of seventeen years and six months, ending on 08.11.2019. The project was successfully completed and there is no dispute relating to the completion and operation of the project. The respondent raised a claim for additional cost incurred consequent to change in rates of Minimum Alternate Tax (for short 'MAT') under Chapter XII-B of the Income Tax Act, 1961 (for brevity '1961 Act'), Fringe Benefit Tax (for short 'FBT') under Chapter XII-H of the 1961 Act and Service Tax (for short 'ST') under Chapter V of the Finance Act, 1994.

2.1 The change in rates was subsequent to the proposal due date i.e. 31.05.2001. The respondent vide letter dated 19.04.2012, raised claim. The Independent Engineer forwarded the claim to the independent auditor in terms of Article 11.3(b) of the CA. The petitioner on 05.12.2014, rejected the claim for reimbursement of additional cost. The terms and conditions agreed between the parties provided for dispute resolution through arbitration. The arbitration was invoked at the instance of the respondent and culminated in the impugned award. The claim of the respondent to the tune of Rs.14,51,57,902/- was allowed. Interest in terms of Article 19.2 of the CA up to the date of the award was granted and on failure to pay the awarded amount by 07.04.2018, interest at the rate of 7% from the date of the award till actual payment was awarded.

3. Learned senior counsel for the petitioner contended that the claim was barred by limitation. The cause of action arose to the respondent when the rates of tax varied in financial years (for short 'FY') 2007-08 but the claim was raised after three years vide communication dated 19.04.2012.

3.1 It is argued that the variation in rates of tax under the 1961 Act does not fall within the ambit of 'additional cost' and under Article 11 of the CA. The submission is that the tribunal erred in reading the definition of 'tax' in isolation and not along with the definition of 'additional cost'.

3.2 The award is challenged to be perverse as the claim was allowed in the absence of evidence to establish that the taxes at the enhanced rates were actually paid by the respondent and that the tax rates varied after the proposal due date.

3.3 The grievance is that the contentions raised in the statement of defence (for short 'SOD') were not considered by the tribunal. The notifications dated 27.07.2009 and 20.06.2012 were relied to contend that no ST was payable on services provided by respondent to petitioner.

4. *Per contra,* the claim is within limitation. It is contended that the cause of action arose in the year 2010 when the additional cost incurred exceeded rupees one crore and thereafter the respondent

proceeded in terms of Article 11 of the CA to raise the claim vide communication dated 19.04.2012.

4.1 The submission is that the petitioner for rejecting the claim erred in relying upon the definition of 'tax' in the Model Concession Agreement which came into existence subsequent to the execution of the CA and more so when 'tax' is defined in the CA. It is emphasised that the project was on BOT basis, after construction the project was handed over to the petitioner for collection of toll and the respondent was to receive payment of annuity for the stipulated period. Reliance is on communication dated 30.01.2012, to contend that petitioner was put to notice that the profitability of the respondent reduced due to variation in tax rates. The argument is that the share of additional cost for FY 2007-08 to 2012-13 to be borne by the respondent amounting to rupees six crores was reduced and only the balance amount was claimed.

4.2 The argument is that the notifications relied upon by the petitioner to contend that no ST was leviable on services provided for construction and maintenance of roads used by the general public are not applicable. The claim for ST by the respondent was in respect of services rendered by the professionals engaged by the respondent and the hiring of the professionals was in compliance with the terms of the CA.

4.3 Reliance is on the decision of the Supreme Court in **Som Datt Builders Ltd. v. State of Kerala**, (2009) 10 SCC 259 to contend that reasoned award is not to be equated with a judgment of a court. The reasons implicit from the reading of award as a whole would suffice. Learned senior counsel refers to the written submissions filed before the tribunal to demonstrate that the award is reasoned.

4.4 It is contended that the definition of 'tax' and 'additional cost' is widely worded and would include the variation in rates of MAT, FBT and ST and claim was illegally rejected by the petitioner. It was not considered that the respondent is an SPV and would not be able to avail the credit of MAT after completion of the project.

5. Before proceeding further it would be apposite to reproduce Article 11 of the CA and the definitions of 'tax' and 'additional cost':-

> "**ARTICLE 11**
>
> 11.1 Change In Law
>
> Change in Law means the occurrence or coming into force of any of the following, after the Proposal Due Date:
>
> a) the enactment of any new Indian law;
>
> b) the repeal, modification or re-enactment of any existing Indian law;
>
> c) a change in the interpretation or application of any Indian law by a court of record;
>
> d) any change in the rates of any of the Taxes.
>
> Provided that Change in Law shall not include;
>
> (i) coming into effect, after the Proposal Due Date, of any provision of a statute which is already in place as of the Proposal Due Date or
>
> (ii) any new law or any change in the existing law under the active consideration of or in the contemplation of any government as of the Proposal Due Date, which is a matter of public knowledge.
>
> 11.2 Relief to Concessionaire

Subject to the Concessionaire taking necessary measures to mitigate the impact or the likely impact of Change in Law on the Project, if as a direct consequence of a Change in Law, the Concessionaire is obliged to incur Additional Cost in any Accounting Year, such Additional Cost shall (without duplication) be allocated and shared between the Concessionaire and NHAI as under:

Increase in Capital Expenditure (Rs. In Million)	NHAI's Share
From Rs. 0 to 60 Million	0%
Above Rs. 60 Million	100% of the capital expenditure in excess of Rs. 60 Million.

Increase in Costs/ Taxes (Rs. In Million)	NHAI's Share
From Rs. 0 to 10 Million	0%
Above Rs. 10 Million	100% of the amount in excess of Rs. 10 Million.

11.3 Obligations of the Concessionaire

(a) Upon occurrence of a Change in Law, the Concessionaire may, if it is entitled to claim relief under the provisions of Article 11.3, notify NHAI and the Independent Engineer, of the following:-

i. the nature and the impact of Change in Law on the Project;

ii. in sufficient detail, the estimate of the Additional Cost likely to be incurred by the Concessionaire on account of the Change in Law;

iii. the measures, which the Concessionaire has taken or proposes to take to mitigate the impact of Change in Law; including in particular, minimising the Additional Cost;

iv. the relief sought by the Concessionaire.

(b) Upon receipt of the notice of Change in Law issued by the Concessionaire pursuant to the preceding sub-article(a), NHAI and the Concessionaire shall along with the Independent Engineer hold discussions and take all such steps as may be necessary including determination/certification by the Independent Engineer and where necessary by the Independent Auditor of the Additional Cost and to determine the quantum of the Additional Cost to be borne and paid by NHAI.

(c) NHAI shall within 30 days from the date of determination of quantum of Additional Cost, provide relief to the Concessionaire in either of the following ways:

i. by lump-sum reimbursement of the Additional Cost to the Concessionaire:

ii. reimbursement of the Additional Cost to the Concessionaire, in not exceeding four half yearly instalments, subject to payment of interest at SBI PLR + 2% on the amount the payment of which is deferred."

"**Additional Cost** means the additional capital expenditure and/or the additional operating costs or additional taxes or both as the case may be, which the Concessionaire has or would be required to incur and which has arisen as a result of Change of Scope or Change in Law."

"**Tax** means and includes all taxes, fees, cesses, levies that may be payable by the Concessionaire under any Applicable Law.

Provided that for the purpose of Article 11.2, Tax shall not include any penalty, interest or other penal sum levied on or payable by the Concessionaire on account of non-payment, short payment or delayed payment of Tax or on account of any other default."

6. The construction of the project was completed on 11.10.2004, and the concession period ended on 08.11.2019. The claim for additional expenses due to variation in rates of MAT, FBT and ST is from the FY 2007-08 to 2015-16. The cause of action arose in 2010 when the quantum of additional cost incurred exceeded rupees one crore. The respondent proceeded under Article 11 of the CA and after rejection of the claim on 05.12.2014, arbitration was invoked. The objection of limitation does not merit acceptance. The tribunal rightly held the claim to be within limitation and no ground is made out for interference with the finding.

7. The respondent claimed that the additional cost incurred due to variation in rates of MAT, FBT and ST was covered under Article 11. Before proceeding to deal with the issue as to whether this claim was maintainable under Article 11 it is necessary to consider as to whether the claim made was proved before the tribunal.

8. The respondent vide communication dated 18.08.2014 invoked Article 11 for raising a claim for the FY 2007-08 to 2012-13 tabulating the variation in tax rates, the effect thereof and the share of the additional cost to be borne by the petitioner but the claim was rejected. In the statement of claim filed before the tribunal, the respondent furnished a tabulated statement for the FY 2007-08 to 2015-16. Both the tabulated statements are reproduced hereunder:-

	Additional Cost/ Taxes incurred under					
Financial Year	Minimum Alternate Tax (MAT) (a)	Fringe Benefit Tax (FBT) (b)	Service Tax (ST) (c)	Total of Additional Cost (d)= (a)+(b)+(c)	Amount to be borne by Concessionaire (e)	Share of Additional cost to be borne by NHAI (f)= (d)-(e)
2007-08	92,05,272	6,15,225	11,49,441	1,09,69,938	1,00,00,000	9,69,938
2008-09	1,03,70,252	4,44,324	6,66,995	1,14,81,571	1,00,00,000	14,81,571
2009-10	4,05,80,618	0	22,22,327	4,28,02,945	1,00,00,000	3,28,02,945
2010-11	2,62,33,044	0	19,84,999	2,82,18,043	1,00,00,000	1,82,18,043
2011-12	2,91,56,640	0	28,55,846	3,20,12,486	1,00,00,000	2,20,12,486
2012-13	1,59,87,589	0	42,90,447	2,02,78,036	1,00,00,000	1,02,78,036
TOTAL	**13,15,33,415**	**10,59,549**	**1,31,70,055**	**14,57,63,019**	**6,00,00,000**	**8,57,63,019**

Financial Year (FY)	**Increase in tax rate under MAT (In %)**	**Increase in tax rate under FBT (In %)**	**Increase in tax rate under ST (In %)**	**Share of Additional cost to be borne by NHAI due to differential tax liability caused by increase in MAT, FBT and ST (in Rupees)**
2007-08	11.330	30.00	12.24 & 12.36	9,69,939
2008-09	11.330	30.00	12.36 & 10.30	14,81,571
2009-10	16.995	30.00	10.30	3,28,02,945
2010-11	19.9305	-	10.30	1,82,18,043
2011-12	20.0077	-	10.30	2,20,12,486
2012-13	20.0077	-	12.36	1,02,78,037
2013-14	20.9605	-	12.36	1,97,96,105
2014-15	20.9605	-	12.36	2,08,74,346
2015-16	21.3416	-	14.00 & 14.50	1,87,24,430
TOTAL				**14,51,57,902**

9. Apart from the tabulated claim, no evidence was led by the respondent to prove the change in rates of tax after the proposal due date and that the tax at the enhanced rates was actually paid by the respondent. Copies of the returns and proof of tax deposited were not produced. The fundamental requirement under Article 11 was the incurring of additional cost and in the absence of proof of tax having been paid at the enhanced rates the foundation of the claim for additional cost is missing.

10. The law is well settled that filing of a claim by itself is not a proof to substantiate the claim. Reference is to the following decisions of the Supreme Court:

10.1 In **Ssangyong Engg. & Construction Co. Ltd. v. NHAI,** (2019) 15 SCC 131 wherein it was held as under:

> "41. What is important to note is that a decision which is perverse, as understood in paras 31 and 32 of *Associate Builders* [*Associate Builders* v. *DDA*, (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204] , while no longer being a ground for challenge under "public policy of India", would certainly amount to a patent illegality appearing on the face of the award. Thus, <u>a finding based on no evidence at all or an award which ignores vital evidence in arriving at its decision would be perverse and liable to be set aside on the ground of patent illegality.</u> Additionally, a finding based on documents taken behind the back of the parties by the arbitrator would also qualify as a decision based on no evidence inasmuch as such decision is not based on evidence led by the parties, and therefore, would also have to be characterised as perverse."

10.2 In **State of Rajasthan and Anr. v. Ferro Concrete Construction Private Limited** (2009) 12 SCC 1 it was held:

> "55.While the quantum of evidence required to accept a claim may be a matter within the exclusive jurisdiction of the arbitrator to decide, <u>if there was no evidence at all and if the arbitrator makes an award of the amount claimed in the claim statement, merely on the basis of the claim statement without anything more, it has to be held that the award on that account would be invalid</u>. Suffice it to say that the entire award under this head is wholly illegal and beyond the jurisdiction of the arbitrator, and wholly unsustainable."
>
> (emphasis supplied)

11. As per Article 11 the respondent was to bear the additional cost

incurred up to rupees one crore in each accounting year and could claim only the amount in excess thereof. From the tabulated statement placed before the tribunal, it is not forthcoming that such deduction was made for the FY 2013-14 to 2015-16. No evidence was adduced to prove that the amount claimed for these FY was in accordance with Article 11 of the CA.

12. Section 31(3) of the Act mandates a reasoned award. The law is well settled that the requirement of Section 31(3) of the Act is not a mere formality. The reasoning in an appropriate case can be implied upon a fair reading of the award and the documents referred to therein. Reference is to the decision of the Supreme Court in **Dyna Technologies Pvt. Ltd. v. Crompton Greaves Ltd.** (2019) 20 SCC 1 wherein it was held as under:

> "34. The mandate under Section 31(3) of the Arbitration Act is to have reasoning which is intelligible and adequate and, which can in appropriate cases be even implied by the courts from a fair reading of the award and documents referred to thereunder, if the need be. The aforesaid provision does not require an elaborate judgment to be passed by the arbitrators having regard to the speedy resolution of dispute."

12.1 In **Som Datt Builders Ltd.** (supra), it was held as follows:

> "25. The requirement of reasons in support of the award under Section 31(3) is not an empty formality. It guarantees fair and legitimate consideration of the controversy by the Arbitral Tribunal. It is true that the Arbitral Tribunal is not expected to write a judgment like a court nor is it expected to give elaborate and detailed reasons in support of its finding(s) but mere noticing the

> submissions of the parties or reference to documents is no substitute for reasons which the Arbitral Tribunal is obliged to give......"
>
> (emphasis supplied)

13. From the perusal of the award it is forthcoming that there is no discussion of the material relied upon to award the claimed amount. There is no material on record to prove the variation in rates of tax and tax deposited at the enhanced rates.

14. The grievance of learned counsel for the petitioner regarding non-consideration of the issues raised in the SOD deserves acceptance and is fatal to the award. The petitioner relied upon notifications dated 27.07.2009 and 20.06.2012, refuting the claims made for enhanced rate of ST. It was canvassed that no ST was leviable on the project awarded to the respondent. The defence of the petitioner was neither noted nor dealt with. The contention of learned counsel for the respondent that the notifications were not applicable was an issue to be considered by the tribunal for the award to be a reasoned award.

15. There cannot be a quarrel with the proposition propounded by learned senior counsel for the respondent that the award is to be read as a whole, fairly and with the documents referred to therein to determine the compliance of Section 31(3) of the Act. However, in the case in hand the award is bereft of reasons. There is no discussion of the evidence produced and relied upon for awarding the claim. The contentions raised by the petitioner in the SOD were brushed under the carpet and the issue as to whether the ST was leviable in view of the notifications relied upon was not dealt with.

16. Allowing the claim without evidence by an unreasoned award renders the award perverse and in conflict with the public policy of India and is consequently set aside.

17. The issue as to whether variation of rates in tax of MAT, FBT and ST is covered under Article 11 read with the definition of 'tax' and 'additional cost' would also involve the following issues: (i) whether the definition of 'tax' would include direct taxes leviable under the 1961 Act and (ii) whether 'additional cost' would cover taxes impacting only the profit earned by the respondent? These issues need not be dilated upon after the award having been set aside in view of the discussion above.

18. Similarly, the issue as to whether the FBT arising from the division of remuneration of employees of the respondent in fringe benefits and cash emoluments would constitute an additional cost for the project or whether it affected the only profitability of the respondent need not be gone into.

19. The petition is allowed and the award is set aside. Pending applications if any are disposed of.

AVNEESH JHINGAN, J

MAY 06, 2026
Ch

Reportable:- **Yes**