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

% ***Reserved on: January 05, 2024***

Pronounced on: May 07, 2024

(i) + FAO(OS) (COMM) 108/2020 & CM APPL. 21850/2020
(ii) + FAO(OS) (COMM) 109/2020 & CM APPL. 21853/2020
(iii) + FAO(OS) (COMM) 110/2020 & CM APPL. 21856/2020

NATIONAL HIGHWAYS AUTHORITY OF INDIA ..... Appellant

Through: Mr.Jayant Bhushan, Senior Advocate with Mr.Manish Bishnoi, Mr.Tushar Bhushan, Ms.Pallavi Singh, Mr.Ketan Paul, Mr.Amartya Bhushan, Mr. Hitesh Lodwal & Mr.Nirmal Prasad, Advocates

Versus

GMR HYDERABAD VIJAYAWADA EXPRESSWAYS LTD. ..... Respondent

Through: Mr.Vikram Nankani, Senior Advocate with Mr.Manu Krishnan & Ms. Madhavi Agrawal, Advocates

CORAM:

HON'BLE MR. JUSTICE SURESH KUMAR KAIT
HON'BLE MS. JUSTICE NEENA BANSAL KRISHNA

JUDGMENT

SURESH KUMAR KAIT, J

1. The appellant-National Highways Authority of India (NHAI) has preferred these appeals against respondent-GMR Hyderabad Vijayawada

Expressways Ltd., a company incorporated as a joint venture company by GMR Infrastructure Ltd. and Punj Lloyd Ltd.; under Section37(1) (c) of the Arbitration and Conciliation Act, 1996 r/w Section10(2) of the Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts Act, 2015 challenging the judgment dated 04.08.2020 passed by the learned Single Bench of this Court in OMP (COMM.) No. 426 of 2020, OMP(I)(COMM.) No. 92 of 2020 and OMP (COMM.) No. 425 of 2020.

2. Vide impugned judgment dated 04.08.2020, the learned Single Judge has dismissed appellant's petition filed under Section34 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as 'the Act') against the impugned Arbitral Award dated 31.03.2020 and has allowed the petitions preferred by the respondent under Section34 and Section9 of the Act.

3. The brief background of the case, as narrated by the appellant in these appeals, is that appellant had invited tender for design, construction, development, finance, operation & maintenance of 4/6 laning of Hyderabad-Vijayawada Section from KM 40.000 to KM 221.500 on NH-9 in the State of Andhra Pradesh in December, 2007. The tender process comprised of two stages first technical stage and second financial bid stage.

4. For the first technical qualification stage, the appellant-NHAI published a Request for Qualification (RFQ) in 2007, Clause- 1.2.5 whereof prescribed that the bidder either with lowest quote amount or who offers the highest premium/revenue share, shall be the successful bidder. Further, Clause 1.2.7 of RFQ provided that the authority would also provide a Draft Concession Agreement (DCA) and project Report/feasibility Report as a part of bidding documents.

5. After examination of the bids submitted by 19 bidders, GMR Infrastructure Ltd./Punj Lloyd Ltd. (JV) were found technically eligible. However, the Central Government in exercise of powers under Section33 of the NHAI Act, 1988 intervened and re-evaluated the technical bids and declared the respondent ineligible. The parties contested till the Hon'ble Supreme Court and vide judgment dated 24.03.2009 in the case of ***Isolux-Soma-Omaxe Consortium Vs. Madhucon Projects (P) Ltd.*** (2009) 14 SCC 355, the Hon'ble Supreme Court directed that all the eight bidders should be allowed to participate in the financial bid stage. Consequently, the respondent-GMR Infrastructure Pvt. Ltd. and Punj Lloyd Ltd. (JV) submitted its financial bid, which was found to be L-1, was accepted by appellant-NHAI. Letter of Acceptance dated 27.05.2009 was issued in favour of the respondent.

6. According to appellant, as per Letter of Acceptance dated 27.05.2009, the respondent had offered to pay a premium in the form of 11169 days before the Commercial Operation Date ("COD"), for the start of premium payment as share of NHAI for undertaking the aforesaid project, making it concession fee/premium of 32.60% of the total realizable fee commencing from the date of COD. In addition, Clause 26.2.1 thereof also provided for 2% premium over and above the premium offered by the bidder and also, that the proportion of premium shall increase by 1% in comparison to the preceding year.

7. After the Award of work, the successful bidder was required to incorporate a new Company namely a SPV (Special Purpose Vehicle). Accordingly, the respondent company was incorporated and the Concession

Agreement dated 09.10.2009 was executed between the appellant-NHAI and respondent.

8. Thereafter, upon completing the construction of the project Highway, the respondent achieved COD on 20.12.2012 and commenced the operations/tolling and maintenance of the project. According to appellant, the liability to pay the premium arose on the date of COD i.e. 20.12.2012 when the commercial operations started. However, the respondent stopped paying the premium after 1.04.2015, even though it has been collecting tolls unfailingly.

9. It is averred that on 03.08.2015, the appellant sent a legal notice to the respondent demanding outstanding premium of Rs.36,52,06,983/-.

10. The respondent vide its reply dated 13.08.2015, drew attention of appellant to the opinion of M/s. Intercontinental Consultants and Technocrats Pvt. Ltd. ("ICT") dated 20.06.2015 which stated that "Change in Law" had resulted in adverse financial consequences upon the respondent. In addition, it was brought to light that request for premium deferment was pending with the appellant.

11. The appellant vide communication dated 12.11.2015, sanctioned premium deferment subject to the payment of penalty of Rs.8.7 crores along with arrears of premium of Rs.10.4 crores. However, the respondent vide communication dated 19.11.2015 requested the appellant to waive off the said condition.

12. On 16.12.2015, conciliation process was initiated by the respondent, however, it failed.

13. The appellant rejecting the claims of respondent as regards "Change in Law" and breach of its obligation to pay, withdrew the premium deferment vide its letter dated 08.06.2016, calling upon the respondent to pay the premium along with interest for delayed payment.

14. The respondent, vide communication dated 09.06.2016 claimed compensation of Rs.87.64 crores under Clauses 41.1 and 41.3 of the Concession Agreement in respect of Financial Year ending 31.03.2016. Further, vide its letter dated 17.06.2016, the respondent objected to the withdrawal of premium deferment by the appellant.

15. The respondent, vide its letter dated 30.06.2016 invoked arbitration in terms of Article 44.3 of the Concession Agreement and filed its statement of claim before the learned Arbitral Tribunal on 18.09.2017. The appellant also filed statement of defence on 08.12.2017.

16. In its Statement of Claims, filed by the respondent before the learned Arbitral Tribunal, averred that after the appellant invited bids for the execution of a project described as "Design, Construction, Development, Finance, Operation and Maintenance of Four/Six Lanning of Hyderabad-Vijayawada section starting at 40.000 KM and ending at 221.500 KM (length 181.981 KM) of NH-9" in the former State of Andhra Pradesh, the appellant called upon the bidders to conduct their own investigation and analysis and gather data on traffic, location, surrounding etc. to estimate expected costs, projected traffic and revenue among other things, which information would then be used to formulate a financial bid including offering a premium to the appellant.

17. Thereafter, the respondent got a detailed study done by a prestigious

consulting company namely Halcrow Consulting India Pvt. Ltd., which was a fully owned subsidiary of Halcrow Group, UK. The Halcrow Report dated 22.01.2009 provided traffic estimates, including the distribution of traffic commodity-wise such as sand, cement, building materials, agro and consumer goods, etc. Based on this Report, the respondent projected toll revenue for the project. After covering, *inter-alia*, the operational expenses, lender payments, and fair returns on equity investments made by the respondent for 4/6 laning the project highway over the concession period of 25 years, the surplus cash, constituting 32.60% of the Realizable Fees, was offered to the appellant as premium. This premium, payable annually, was subject to 1% increase every year.

18. The respondent-GMR further asserted before the Tribunal that in terms of Concession Agreement dated 09.10.2009, it sought finances from the lenders for the project and the lenders, relying upon the Halcrow Report, following discussions with the Halcrow team, prepared the Financial Model upon being satisfied with the Report and inputs received. The Financial Model was then submitted to NHAI.

19. The respondent also claimed before the Tribunal that it fulfilled its responsibilities and obligations by completing the 4 lanning of the project Highway and began operations on 20.12.2012. However, upon starting toll collection, a significant decrease in traffic was observed compared to initial estimates. Through a study conducted, it was discovered that the main factors contributing to a steep decline in traffic were the various Court orders and Government directives issued by the State of Andhra Pradesh, leading to changes in sand mining policies. Furthermore, the substantial

decrease was also influenced by the bifurcation of the State of Andhra Pradesh into the new states of Andhra Pradesh and Telangana in the year 2014.

20. The respondent-claimant further averred before the Tribunal that the drop in traffic can be attributed to the following pivotal legal developments categorised as "Change in Law" in terms of Clause 48 of the Concession Agreement:-

> *(a) First Change in Law event prompted from the Supreme Court in the case of* ***Deepak Kumar Vs. State of Haryana****: 2012 (4) SCC 629 wherein, vide judgment dated 27.02.2012, all the States, Union Territories, MoEF and Ministry of Mines were directed to implement the recommendations made by MoEF in its Report of March, 2010 and the modal guidelines set by the Ministry of Mines, within six months. It was further directed that leases of mine and minerals including their renewal for an area of less than five hectares be granted by the States/Union territories only after obtaining environmental clearance from MoEF. Consequently, the High Court of Andhra Pradesh vide order dated 21.03.2012 in W.P. No.18822 of 2011, restrained the State Government from granting any sand mining or quarrying leases from 01.04.2012 onwards, without the permission of the High Court and simultaneously stayed the pending or proposed auctions. Thereafter, vide order dated 26.04.2012, the application for modification of order dated 21.03.2012 was rejected. This led to annulment and cessation of sand mining activities, eliminating commercial traffic related to transportation of sand and*

associated construction material, completely.
(b) The second significant event of "Change in Law" occurred on 2nd June, 2014, with the bifurcation of former state of Andhra Pradesh into the formation of new states of Telangana and Andhra Pradesh followed by the implementation of new Sand Mining Policies vide G.O.M. No. 95 dated 28.08.2014 issued by the Industries & Commerce (Mines-IV) department in the state of Andhra Pradesh and G.O.M. No. 3 dated 08.01.2015 issued by Industries & Commerce (Mines-I) department in the state of Telangana. The division led to introduction of new taxes on inter-state movements of commercial vehicles between the States of Andhra Pradesh and Telangana and the prohibition of sand transportation including minor minerals across state borders adversely impacting commercial traffic on the project Highway.

21. It was averred that due to the aforesaid bifurcation, out of the total length of 181.5 km of the project Highway, 150.6 km of the highway fell within the state of Telangana and the remaining 30.9 km became a part of the state of Andhra Pradesh. It was claimed that the respondent had originally proposed to expand National Highway No. 9 (now NH-65), connecting the prominent cities of Hyderabad, which was the capital and focal point of development activities, and Vijayawada, which served as a hub for commercial traffic to and from the state capital, in the former state of Andhra Pradesh with the expectation that the project would solely focus on Andhra Pradesh, without anticipating that the Project Highway would span across two states or encounter bans on inter-state movement of minor

minerals or imposition of permit taxes by each state, which would increase the cost of inter-state transport compared to intra-state transport, as outlined in the Agreement.

22. The respondent- claimant also asserted that the Project Highway was designed with three Toll Plazas, all situated within the boundaries of the state of Andhra Pradesh, at the locations such as Pathangi at km 60/650 (Existing Chainage), Korlapahad at km 118/250 (Existing Chainage) and Chillakalu at km 205/025 (Existing Chainage). However, after the said bifurcation, only one of the three toll plazas, located at Chillakalu (at km 205/025), remained in the state of Andhra Pradesh, whereas the other two fell within the borders of Telangana. It was asserted that this division significantly altered the basis on which the Concession Agreement was originally negotiated.

23. The respondent- GMR asserted that the arbitration was invoked to seek contractual compensation as per Clause- 41 of the Concession Agreement, aiming to restore it in the same position as it would have been if the Change in Law events had not occurred. In the alternative, sought compensation under the force majeure Clause such as Clause 34.3(a) of the Concession Agreement or frustration of contract.

24. The stand of appellant-NHAI in its Statement of Defence before the learned Tribunal as well as before the learned Single Judge was that the Change in Policy falls outside the scope of "Change in Law" as has been defined in the Concession Agreement. The appellant countered respondent's reliance upon decision in ***Deepak Kumar (Supra)*** by submitting that the Supreme Court did not impose any stay or prohibition in relation to ongoing

sand mining activities, as it pertained to sand mines with an area of less than 5 hectares, and no evidence was placed on record by the respondent before the learned Tribunal regarding the number of such sand mines operational in the Krishna District area in the former State of Andhra Pradesh during the period of 2012-2013. Additionally, the judgment primarily addressed the granting of new mining leases or renewals, without impacting existing leases or mining leases exceeding five hectares in the area. Regardless, the judgment did not automatically imply a complete ban or cessation of all sand mining activities. It was averred by NHAI that it cannot be said that all the sand mining activities came to an absolute halt due to the orders passed by the Supreme Court or High Court of Andhra Pradesh.

25. According to appellant-NHAI, the Concession Agreement dated 09.10.2009 stipulated various conditions, which were precedent for achieving financial close and execution of financial Agreements and one of which was the senior lenders adopting a financial model which determines the financial viability of the Project. The respondent had appointed IDBI as the primary or lead lender for arranging finances for the Project.

26. The project cost operation and maintenance cost vetted by the Lenders' Independent Engineer with regard to toll revenues or other funds used by the project, were to be routed through the Escrow account strictly in the manner pointed out in Clause 31.3 of the Concession Agreement and Clause 4.1.1 of the Escrow Agreement. For this purpose, an Escrow Agreement was also entered as a pre-condition mentioned in Clause 4.1.1 of the Concession Agreement. The Escrow Agreement set forth the funds available, if not sufficient to meet all the requirements; shall apply funds in

the serial order of priority. However, the appellant-NHAI had no right under the Concession Agreement and the Escrow Agreement to direct the Escrow agent to pay any monies from Escrow bank in contravention of the terms of the Escrow Agreement.

27. The appellant vide letter dated 12.05.2018 demanded the payment of premium from the respondent and upon receiving no reply, the appellant vide meeting 18.06.2018 intimated its intention to take steps for recovery of the premium by directly dealing with the Escrow agent. The respondent, filed an application under Section17 of the Act before the learned Arbitral Tribunal on 06.07.2018 seeking urgent interim relief, which was allowed vide order dated 07.07.2018 directing that no coercive action without the permission of the Tribunal, would be taken till the next date. On 14.09.2018 the Tribunal also gave liberty to the respondent to seek directions from the Court in case any coercive action is taken by the appellant.

28. The appellant thereafter vide letter dated 22.10.2018 demanded payment of a premium of Rs.372.08 crores, including interest as of 07.10.2018, from the respondent as the last opportunity before initiating any action under Article 35/36/37.1.1(h) of the Concession Agreement. This persuaded the respondent to file an affidavit dated 24.10.2018 before the learned Arbitral Tribunal to pursue its application under Section17 of the Act.

29. The appellant thereafter vide letter dated 09.09.2019 to the IDBI Bank urged remittance of the outstanding amount of Rs. 513.35 crores, up to 31.07.2019. This spurred the respondent to file another application dated 22.09.2019 under Section17 of the Act before the learned Arbitral Tribunal

seeking restraint of the action initiated by the Appellant and on the same day, an interim order was passed directing that no coercive action would be taken by the appellant. The said application was disposed of vide order dated 07.11.2019, not on merits, but in view of the fact that the IDBI Bank through communication dated 27.09.2019 had already rejected the appellant's request to remit the outstanding amount. Additionally, liberty was granted to the respondent to approach the learned Tribunal for interim direction in the event any cause of action arises.

30. Thereafter on 18.11.2019, the appellant through a Notice, as an immediate measure invoked Article 36.1 of the Concession Agreement and sought instant take-over of the operation and maintenance of the project by suspending the rights of the respondent to collect fee and other revenues. In defiance of this, the respondent on 18.11.2019 moved yet another application under Section17 of the Act before the learned Arbitral Tribunal which, on the same day, stayed the proposed action of the appellant and directed that the aforesaid Notice shall not be given effect until further orders.

31. The appellant preferred an appeal being ARB. A. (COMM.) 33/2019 before this Court under Section 37(2)(b) of the Act, challenging the aforesaid order dated 18.11.2019 passed by the learned Tribunal. However, the same was dismissed by this Court vide order dated 25.11.2019 by observing that the application under Section17 of the Act was already coming up for consideration before the learned Arbitral Tribunal on 28.11.2019.

32. According to the appellant, during the hearing on 28.11.2019, the

learned Member of the Arbitral Tribunal suggested that the respondent should make a pre-deposit of approximately 150 crores in three instalments to secure the appellant's interest. As a result, the matter was adjourned to 07.12.2019 allowing the respondent to consider this suggestion and submit a memorandum proposing a deposit amount that is practical for it without prejudice to its respective stand. However, the respondent's memorandum dated 01.12.2019 only offered to deposit Rs.15 crore by 31.12.2019 and an additional Rs. 10 crore by 31.01.2020. The appellant deemed this offer not only in bad faith but also insufficient and so, vide email dated 05.12.2019 requested the Tribunal for disposal of the application pleading urgency.

33. On 09.12.2019, the learned Tribunal, as an interim measure and without prejudice, directed the respondent to deposit Rs. 25 crores per month for three consecutive months.

34. The appellant has averred that the respondent violated the aforesaid interim order by depositing the specified amount in No lien Escrow Account at the IDBI Bank Limited, Cargo Terminal Branch, New Delhi on 31.12.2019, instead of directly depositing it with the appellant resulting into non-compliance of the said order.

35. The appellant vide letter dated 08.01.2020 expressed dissatisfaction with the respondent’s failure to comply with interim order dated 09.12.2019, and sought deposit of the said amount from the respondent, failing which it indicated its resolve to initiate action in terms of suspension Notice dated 18.11.2019. The appellant subsequently filed an application under Section17 of the Act before the learned Tribunal, pursuant to which the learned Arbitral Tribunal clarified vide Order dated 09.01.2020 that the respondent

was obligated to deposit the amount with the appellant. Consequently, the respondent deposited the specified amount with the appellant.

36. It is asserted by the appellant that even though Independent Engineer wrote to the appellant highlighting the shortcomings observed in the respondent's management of the National Highways Operation and Maintenance (O&M), but despite being aware of these issues, the appellant was unable to take any action. The interim order essentially prevented the appellant from exercising its rights under the Concession Agreement, despite respondent’s blatant violation of the terms of the Concession Agreement.

37. The order dated 09.12.2019 passed by the learned Arbitral Tribunal was challenged by both the parties, appellant as well as respondent in ARB. A. (COMM.) 2/2020 and ARB. A. (COMM.) 1/2020 respectively, and this Court vide common judgment dated 30.01.2020 dismissed the said Appeals holding that the aforesaid order did not require any interference as the same was pending adjudication of the dispute between the parties. It is asserted by the appellant that although the learned Single Judge had taken note of the interim order preventing the appellant from recovering the outstanding premium, however, there was a refusal to interfere with it. Furthermore, the contentions of the appellant were not dealt with and disregarded for no reason.

38. The appellant also claims that despite benefitting from the interim order, and complying with it, the respondent who filed the appeal in December did not endeavour to expedite the hearing of its appeal. However, upon receiving the advance copy of the appeal filed by the appellant, the

respondent promptly got the same listed for hearing. The appellant claims that this conduct shows that the respondent was never actually aggrieved by the said interim order.

39. Being aggrieved by the common judgment dated 30.01.2020, the appellant filed SLP (C) No.4107/2020 before the Supreme Court on 05.02.2020. Meanwhile, the parties received an email dated 28.02.2020 from learned Arbitral Tribunal urging them to take steps for extension of time for delivery of Award which was fixed for 31.03.2020 vide order dated 02.09.2020 in O.M.P.(MISC.)(COMM.) 344/2019 further to 30.06.2020 due to voluminous pleadings and complex legal and factual issues involved. It is asserted by the appellant that during proceedings in the aforesaid SLP on 02.03.2020 and 06.03.2020, the Supreme Court directed the respondent to prepare a proposal to secure the amount of premium to be paid to the appellant. However, when a meeting to this effect between the Chairman of appellant/NHAI and the representatives of the respondent/GMR was held at the office of the appellant, the respondent refrained from giving a proper proposal. When this fact was brought to the notice of the Supreme Court on 06.03.2020, the respondent was directed to come up with a viable and feasible proposal.

40. It is claimed by the appellant that to avoid the direction given in the said matter and to render the proceedings before the Supreme Court infructuous, the respondent on 13.03.2020 filed an application before the learned Arbitral Tribunal requesting to expedite the date of the decision of the Award by 31.03.2020. On the next day, the appellant wrote an email dated 14.03.2020 to the Arbitral Tribunal bringing to their notice the

intention of the respondent behind filing of the application dated 13.03.2020. Thereafter, the learned Tribunal vide order dated 15.03.2020 notified the parties that Award shall be pronounced and delivered on 31.03.2020.

41. As a consequence of the aforesaid order by the learned Tribunal, the Supreme Court on 19.03.2020 opined that no further order was required to be passed as the Award was already going to be delivered by 31.03.2020. Having said that, the Supreme Court requested the learned Tribunal to pass the Award by 01.04.2020 and disposed of the said SLP. The learned Tribunal passed the Award on 31.03.2020, *inter alia* holding as under:-

> *"292. Though the Tribunal is of the view that the decision of the Respondent in denying the claim is erroneous, the natural consequence is not that the claimant's claims are to be allowed. To what extent the Claimant has been able to establish its claim has to be factually determined by the Respondent by taking into account all factors for and against the claim.*
>
> *293. Therefore, while holding that the decision of the Respondent to deny Claimant's claims on the ground of non-consideration of relevant material / consideration of the irrelevant material and attempt to justify the denial on materials which were not considered while taking the decision is erroneous and indefensible, the Tribunal is of the view that the Respondent has to take a fresh decision.*
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> *294. The Claimant when called upon by the Respondent to produce material in support of its claims shall be required to do so.*

295. Keeping in view the nature of the Contract where the figures are required to be considered qua the target date i.e. 01.12.2019 for variation of the contract period, the Respondent can call for the details and the data from the Designated Agency who provides figures in that context. That also would be relevant data for dealing with the claims of the Claimant. It would be open for the Respondent to ask the said Designated Agency for data relating to the subject period (to which the claims relate).

296. The Respondent shall constitute the Committee within three weeks from today and on being notified about the constitution of the Committee shall furnish all data, details, documents which according to it have relevance and bearing to its claims. If the Respondent intends to rely on any document, material and / or data to deny such claims, needless to say it shall furnish them to the Claimant.

297. The exercise directed to be undertaken shall be completed within a period of two months from today i.e. by 31.05.2020 (which can be extended on mutual consent for such period as agreed upon).

298. In view of the aforesaid directions, the Tribunal does not consider it necessary to deal with the alternate claim (frustration of concession).

299. In view of the conclusions and directions recorded supra, there is no question of grant of any interest. The adjustment of the amounts which have been deposited pursuant to the orders passed by the Tribunal in terms of Section17 of the Act would depend upon the adjudication of the claims of the Claimant."

42. On 16.04.2020, vide letter No. NHAI/PIU-Hyd/NH-65/Hyd-Vij/2020/430 the appellant demanded a payment of premium of Rs/627.146 crores payable as on 03.04.2020 against which the respondent on 18.04.2020 filed a petition under Section9 seeking interim stay on the operation of the aforesaid letter. The respondent also preferred petition under Section34 of the Act against the portion of the Majority Award dated 31.03.2020 to the extent of paras 288 (in part), 292 (in part), 293 to 297 and 299 (in part) of the Award.

43. On 24.04.2020, the appellant also filed a petition under Section34 of the Act against the Arbitral Award dated 31.03.2020 challenging the portion of the majority Award whereby Arbitral Tribunal had permitted the NHAI to take a fresh decision and assess the compensation.

44. Vide judgment dated 04.08.2020, petition under Section34 of the Act filed by the appellant against the Arbitral Award dated 31.03.2020 was dismissed, whereas the petitions preferred by the respondent under Section34 and Section9 of the Act, were allowed.

45. To assail the impugned judgment dated 04.08.2020**,** Mr. Jayant Bhushan, learned Senior Counsel appearing on behalf of the appellant-NHAI submitted that the learned Single Judge has exceeded his jurisdiction under Section34 of the Act by amending the Arbitral Award dated 31.03.2020 to the degree of substituting the majority Award with the minority Award and altering it by appointing Justice D.K. Jain (Retd.) instead of allowing the appellant to decide the claims of the respondent in accordance with the majority Award. Reliance has been placed on ***NHAI***

Vs. Hakeem 2021 SCC Online 473 to emphasize that the Courts have no power to modify or alter the Arbitral Award under Section34 of the Act. Instead, they have limited right to either set-aside the Award or leave the parties to pursue new arbitration proceedings, if necessary. The learned Senior Counsel submitted that this interpretation has consistently been followed in various judgments, further placing reliance on ***Larsen Air Conditioning and Refrigeration Company Vs. Union of India*** 2023 SCC OnLine SC 982***; Indian Oil Corporations Ltd. Vs. Sathyanarayana Service Station*** 2023 SCC Online SC 597***; Angel Broking Vs. Urmil Modi*** 2022 SCC Online Del 1328***; Pradeep Vinod Const. Co. Vs. UOI,*** 2022 SCC Online Del 4937**.**

46. It was asserted by learned Senior Counsel for appellant that the learned Arbitral Tribunal and the learned Single Judge failed to consider that Clause 41.1 of the Concession Agreement provides that the most essential pre-requisite to have this Clause attracted is that the concessionaire must have suffered an increase in cost of performing its obligations under the Agreement or had faced reduction in net after-tax-return or any other financial burden as a direct consequence to "Change in Law", which did not happen in the present case. It is further averred that the ambit of the said Clause is restricted to cases resulting in "increase of cost" due to the Change in Law and does not spread to all kinds of losses suffered on account of reduction of revenue due to reduced traffic. In fact, a situation of this kind would be dealt under Article 29 of the Concession Agreement wherein production of traffic flow and effect of variations in traffic growth have been discussed elaborately. Moreover, the said Clause provides for all cases of

reduction in traffic for any reason whatsoever. It is further averred that if Clause 41 is interpreted to include this kind of exigency, the respondent will end up reaping double benefit.

47. It was next submitted by the learned Senior Counsel for the appellant that the learned Single Judge overlooked the fact that according to Article 48 of the Concession Agreement, "Change in Law" was meant to only include "primary legislation" by way of a statute, and subordinate legislation was to be considered only in relation to taxation. That is to say, all forms of subordinate legislation or Notifications, unless expressly mentioned in Article 48(e) of the Concession Agreement, were not intended to be included in the definition of "Change in Law" in the Concession Agreement. Thus, since subordinate legislation was expressly excluded, and considering that both the "repeal and re-enactment" of any existing law can only occur through primary legislation, the term "modification" needed to be interpreted as an "amendment" to any "existing Indian law" as mentioned in sub-Clause (b) of Article 48.1 of the Concession Agreement, through primary legislation. If changes made by subordinate legislation were to be included in Clause (b) or (d) of the Article 48.1 of the Concession Agreement, then sub-Clause (e) of Article 48.1 would become redundant. It is stated that the Tribunal as well as the learned Single Judge erred in not considering this aspect.

48. It was next submitted by the learned Senior Counsel for the appellant that the learned Single Judge was in grave error in not recognizing that evidently, Article 48.1 starts with the words "occurrence of any of the following" and further goes on to list five separate events, indicating they

are distinct. Subordinate legislation or notifications are only covered under Clause (e) if they relate to changes in tax rates directly affecting the project, excluding them from other Clauses like (b). Essentially, if subordinate legislation was already covered under Clause (b), there would be no need to include it specifically in Clause (e).

49. It was next submitted that the learned Single Judge failed to take note of patent illegality in the interpretation of Article 41.1 of the Concession Agreement which altered the clear and unambiguous language used both in the heading and the proviso of Article 41.1. The proviso, being an integral part of the main text, could not have been disregarded, even if it was assumed that the heading alone could not be the determinative factor. Further submitted that the use of the words "for the avoidance of doubt" in the said article were construed keeping in view the limitation provided in the proviso, even if broader interpretation of the terms "reduction in net after-tax return" or "financial burden" was possible. Despite clear wordings in the proviso, the interpretation provided by the Arbitral Tribunal was upheld by the Single Judge contradicting the terms used in the Clause.

50. Learned Senior Counsel next submitted that the learned Single Judge overlooked a glaring error in the interpretation of Article 41.3 of the Concession Agreement. The said Article stipulates that the parties will rely on the Financial Model to establish the "Net Present Value" ("NPV") of the "Net Cash Flow" and adjust costs, revenue, compensation, or other relevant parameters to ensure that, in the event of Change in Law, the NPV remains unchanged. Essentially, the Clause aims to determine the impact of increased costs resulting from a Change in Law on the NPV of the net cash

flow. It allows for adjustments in costs, revenue, compensation, etc., at the time of the Change in Law to protect the interests of the appellant, as in such cases, despite the increase in cost due Change in Law, no compensation may be owed to the Concessionaire after adjusting other components. Therefore, Article 41.3 of the Concession Agreement limits the reliance on the Financial Model only to the extent of determining the increase in cost due to the changes in law. However, both the Tribunal as well as the learned Single Judge failed to consider the intention behind the said provision of the Concession Agreement.

51. Learned Senior Counsel for the appellant submits before this Court that the learned Single Judge in OMP(I)(COMM.) No. 92 of 2020, overlooked the necessity of the payment of premium, as they constitute public revenue, collected for improving National Highways and are acknowledged contractual obligations, which have not been fulfilled by the respondent. Despite the claim of the respondent that the "Change in Law" occurred even before the project was completed, the respondent paid the premium from December, 2012 to March, 2015. However, they abruptly stopped paying the premium, claiming loss in revenue. The appellant investigated the claims of the respondent, but they were found unwarranted. Even then, the respondent refused to pay, citing arbitration proceedings. It is stated that the learned Single Judge was not justified in granting stay of the letter No. NHAI/PIU-Hyd/NH-65/Hyd-Vij/2020/430, dated 16.04.2020, issued by the appellant to the respondent when the actions of the respondent were in clear breach of contractual terms. Furthermore, the learned Single Judge disregarded the fact that successive Section17 applications were filed

before the learned Tribunal in an attempt to prevent the appellant from the recovery of premium. These applications were not even maintainable since premium was not disputed and did not form subject matter of the proceedings before the learned Tribunal, yet ad hoc interim orders were passed and the said applications were disposed of without merit, by the learned Tribunal.

52. It was further submitted that on appellant's application under Section17 of the Act before the learned Tribunal, the appellant had orally agreed to maintain *status quo* and not to take further action till the final order was made, in sincere belief that the learned Tribunal would dispose of the application on merit very soon. However, to its utter shock and surprise, order on the application was reserved on 30.10.2018, but the same was never pronounced. In the meantime, the arbitration proceedings continued and the Award was reserved on 02.08.2019. The appellant claims that order was passed without providing an opportunity of hearing and disregarding its request to withhold interim relief to the respondent as it only serves to increase the premium dues over time.

53. Learned senior counsel also submitted that the learned Tribunal failed to consider that the alleged Halcrow Report, upon which the Financial Model was based, was prepared before the respondent submitted the bid. At that juncture, the appellant had no association with the respondent and no involvement in the preparation of the alleged Halcrow Report as well as the Financial Model. Furthermore, the appellant had also asserted ignorance of any reliance on the alleged Report in the Financial Model. Thus, the finding of the learned Tribunal that the Financial Model based on the said Report

could bind the appellant, is erroneous.

54. Learned senior counsel for the appellant also submitted that the findings given by the learned Tribunal are perverse and legally untenable, thereby overlooking the fact that the Financial Model is not a Financing Agreement but merely a projection tool detailing project costs and revenues based on assumptions. Financing Agreements, on the other hand, are the actual Agreements between senior lenders and the Concessionaire for funding the project and are subject to review under Clause 5.2.2 as per the Concession Agreement. The attempt to equate the Financial Model with Financing Agreement by the respondent before the learned Tribunal was inappropriate and misleading. Besides, it was contended that the credibility of the alleged Halcrow Report is also questionable, as it deviates from standard practice by projecting commodity-specific traffic over a long period of 20 years, which is not generally done in traffic studies that focus on overall traffic growth based on economy and other factors. To discredit the Halcrow Report, reference was made to letter dated 29.09.2016 addressed by the Independent Engineer Shealadia Associates Inc. in which it was stated that it was not a general practice to mention the number of vehicles commodity-wise. It was submitted stated that the learned Arbitral Tribunal did not take into consideration this crucial fact.

55. It was further submitted that the exaggerated traffic projections in the alleged Halcrow Report are evident from the Pavement Design Report, which the Respondent intentionally withheld from the Arbitral Tribunal despite having possession of it. This Report, admitted by the Respondent, was presented by the appellant during arguments highlighting discrepancies

between the projected traffic in the Financial Model and actual counts in terms of Clause 3.3 of the IRC (Indian Roads Congress) 37 of 2001. The Pavement Design Report prepared for designing flexible pavement, underscored a significant disparity in the two traffic projections submitted by the respondent, further supporting the claim of the appellant that these projections are speculative and cannot form the basis of the contract. However, the learned Arbitral Tribunal disregarded this crucial evidence.

56. It was submitted that the appellant had strongly challenged the credibility of the alleged Halcrow Report, casting doubt on the time it was stated to be prepared. During the cross-examination of CW-2 (Mr. Venkat Subbarao Chunduru), discrepancies were highlighted regarding its supposed issuance in January, 2009 but being printed with a copyright date in 2010 by Halcrow Consulting India Pvt. Ltd. This discrepancy was pointed out to the witness, who failed to provide an explanation. Furthermore, the alleged template sheets utilized by the Halcrow team to gather commodity-wise data were not submitted as evidence, despite the witness admitting that the respondent is in possession of these sheets.

57. It was further submitted that admittedly, the respondent did not present any commodity-wise traffic study conducted after the COD to support its claim that sand-carrying commercial traffic on the Project Highway was zero in 2012-13 & 2013-14. Such a study was essential to substantiate this assertion. However, the respondent intentionally omitted to provide the survey despite CW-2 acknowledging the existence of such a study, so that it could avoid contradicting its own claim. This would further highlight that the claim of the respondent relies solely on assumptions and

hypotheses, lacking concrete evidence to support its case, which fact was ignored by the learned Tribunal.

58. Learned Senior Counsel for the appellant submitted that the learned Tribunal relied on letter dated 08.10.2016 from the Independent Engineer Shealadia Associates Inc., which computed compensation for the respondent by comparing the Detailed Project Report ("DPR") with actual traffic. However, it is claimed that this contradicts the consistent view of the Independent Engineer that the respondent did not conduct a commodity-wise traffic survey at the Toll plazas and lacked authentic data. Despite this, compensation was assessed by comparing the DPR with actual data, contrary to the conditions of the Tender in terms of Clause 2.1.3 of the RFP which specifies that the DPR projections are only for the purpose of reference and are not binding upon the appellant. It is submitted that the learned Tribunal failed to consider this discrepancy.

59. Learned Senior Counsel next submitted that the learned Single Judge erred in replacing the majority Award with the minority Award, which cannot be done exercising powers under Section34 of the Act. It is established that the power of the Court to set aside the Award is limited and does not extend to modifying or changing it. Moreover, this was done without even setting-aside the majority Award. In this regard, reference has been made to ***Ssangyong Engg. (Supra),*** where the minority Award was substituted with majority Award, but only by the Supreme Court invoking power under Article 142 of the Constitution of India. However, the High Court is not vested with such power. Therefore, the minority Award cannot be declared as the "Award" while exercising powers under Section34 of the

Act.

60. It was also highlighted that there was no legal obstacle for the Tribunal to send the matter back to the appellant for making a fresh decision to determine the claim of the respondent as it would not necessarily make the appellant an Arbitrator under Section12(5) of the Act. Clearly, if the respondent disagreed with the decision made by the appellant, it could have invoked the arbitration Clause and have Arbitral Tribunal constituted. Thus, the learned Single Judge erred in drawing an analogy with Section 12(5) of the Act to say that giving appellant the authority to decide the claims of the respondent could not be permitted.

61. It was next submitted that the learned Single Judge erred in not using the power under Section34 of the Act to set-aside the Arbitral Award dated 31.03.2020. The Award was blatantly unreasonable and arbitrary not only in terms of contractual Clauses and legal principles but also exhibited Wednesbury's unreasonableness to such an extent that no prudent person could arrive at the same conclusion as the learned Tribunal had arrived.

62. It was further submitted that the Tribunal as well as the learned Single judge did not take into consideration that Article 1.2.1, which falls under the chapter of Definitions and Interpretation of the Concession Agreement includes words such as “unless the context otherwise requires” allowing for alternative interpretation of the expression “Law” based on context. Therefore, before adopting the meaning of “Existing Indian Law” for interpreting “Change in Law” under Article 48.1 of the Concession Agreement, it should have been considered that this exception would apply.

63. The respondent, on the other hand, pleaded before the learned Single

Judge that the project's span across two states posed challenges, particularly regarding the transportation of minor minerals like sand, aggregate, clay, etc. from Krishna District in Andhra Pradesh to Hyderabad in Telangana. The ban on inter-state transport of minor minerals disrupted the return traffic of commercial vehicles, impacting the project's viability. Moreover, with the establishment of Amaravati as the new capital of Andhra Pradesh, construction activities shifted from Hyderabad to Amaravati and nearby areas. Consequently, commercial traffic no longer relied heavily on the Project Highway. Additionally, cities like Vijayawada, Vishakhapatnam, Kakinada, and Guntur in Andhra Pradesh experienced growth and increased construction activities, further diverting traffic away from the highway. Similarly, development in various areas of the new state of Telangana also reduced commercial traffic from Telangana to Andhra Pradesh.

64. Before this Court, learned Senior Counsel for respondent, asserted that the learned Tribunal rightly dismissed the claim of the appellant that only “Primary Legislation” qualified as “Law” and amendments would not be covered under the definition of the term “Law” and was correct in holding that the amendments to rules can constitute “Change in Law”. Accordingly, the learned Single Judge was correct in upholding the said interpretation observing that issue was purely of law and did not require any interference.

65. The claim of the appellant that Clause 41.3 of the concession Agreement does not bind them to the Financial Model, has been disputed by the respondent and the learned Tribunal, in its Award has rightly dismissed this claim emphasizing the legal obligation to consider the impact of

"Change in Law" and observed that documents like the Halcrow Report cannot be disregarded solely based on contractual constraints and applied the same principle to the Financial Model. It was asserted that the learned Tribunal rightly held that the respondent's claims were contractual and were governed by Clause 41.3, which explicitly mandated using the Financial Model for accurate quantification. Furthermore, the Financial Model was provided to the appellant before the financial close for verification, negating the claim of the appellant of having no role in its adoption. It is averred that if the appellant disagreed with the Financial Model, it could have objected, thereby preventing the Financial Close and halting the progression of the project.

66. Also, the stand of respondent is that the appellant is wrong in submitting that respondent did not provide evidence of reduced commercial traffic or a commodity-wise traffic study. Therefore, appellant's claim that the learned Single Judge was wrong in holding that there was no requirement of a commodity-wise traffic study after the "Change in Law" as per the Concession Agreement, is baseless. It was further averred that the learned Single Judge correctly interpreted the Concession Agreement, stating that it does not mandate a commodity-wise study. Further, the learned single Judge was correct in holding that to claim compensation under Clauses 41.1 or 41.3, the respondent must demonstrate a financial burden resulting from the Change in Law, which it did by showing a reduction in commercial traffic and if appellant could not justify this reduction, respondent would establish the link between the Change in Law and the financial burden. It is asserted that it was rightly observed that both

majority and minority Awards had already directed a fresh examination of this matter, thus, there was no basis in the submission of the appellant.

67. Learned Senior Counsel for respondent asserted that the claim of the appellant regarding the modification of the Award under Section34 of the Act, is unfounded. It was submitted that the learned Tribunal directed the appellant to make a fresh decision to quantify the claim of the respondent and the learned Single Judge merely appointed Hon'ble (Retd.) Justice D.K. Jain, instead of allowing the appellant to quantify the aforesaid claims and therefore, it cannot be said that the Award was modified. The appellant now, cannot object, having previously accepted that the learned Tribunal could remand the matter to the appellant for quantification. Moreover, it is stated that the appellant vide email dated 13.08.2020 addressed to the sole Arbitrator Hon'ble (Retd.) Justice D.K. Jain, acknowledged his appointment and conveyed that it is not *per se* aggrieved by his selection and appointment.

68. It was claimed on behalf of the respondent that the replacement of the appellant with the learned Sole Arbitrator can be dealt with separately to ensure fairness. Furthermore, upon invoking the principle of severability, as illustrated in several cases of ***J.G. Engineers Pvt. Ltd. Vs. Union of India,*** (2011) 5 SCC 758**,** ***R.S. Jiwani Vs. Ircon International Limited*** **(**2010) 1 BOM. CR. 529**,** ***National Highway Authority of India Vs. The Additional Commissioner, Nagpur,*** 2022 SCC OnLine Bom 1688**,** ***National Highways Authority of India Vs. Trichy Thanjavur Expressway Ltd.,*** 2023 SCC OnLine Del 5183**,** the learned Single Judge made no error in remanding the

matter to Hon'ble Justice D. K. Jain (retd.) instead of the appellant. This is because the Award under Section34 of the Act can partly be set-aside if it is severable in nature, which is evident in the present case.

69. The respondent in its written submissions has disputed that the contention of the appellant that the words "unless context otherwise requires" in Article 1.2.1 of the Concession Agreement does not allow for a broad interpretation of the words "Existing Indian Law" to include subordinate legislation, is baseless and lacks merit. Moreover, this contention was neither raised before the learned Tribunal or before the learned Single Judge and introducing it for the first time in an appeal under Section37 of the Act is not permissible. It is asserted that interpreting Clause 48 of the Concession Agreement suggests that subordinate legislation, like executive decisions or amendments to the Andhra Pradesh Minor Mineral Concession Rules, 1966, would be included. However, this remains a matter of interpretation and is not subject to judicial review under sections 34 or 37 of the Act.

70. Learned senior counsel for the respondent has denied the averments of the appellant and has contended that the learned Tribunal rightly held that the aforesaid notifications/Government Orders issued by the undivided State of Andhra Pradesh and the States of Andhra Pradesh and Telangana were covered by Clauses (b) and (d) of the definition of "Change in Law" in terms of Article 48.1 of the Concession Agreement. It is asserted that the said finding has rightly been upheld by the learned Single Judge observing that the issue is purely one of law and interpretation of Clause 48.1 of the Concession Agreement and does not call for any interference as it does not

suffer from any legal infirmity.

71. It was next submitted by the learned Senior Counsel for the appellant that the learned Single Judge was in grave error in not recognizing that evidently, Article 48.1 starts with the words "occurrence of any of the following" and further goes on to list five separate events, indicating they are distinct. Subordinate legislation or notifications are only covered under Clause (e) if they relate to changes in tax rates directly affecting the project, excluding them from other Clauses like (b). Essentially, if subordinate legislation was already covered under Clause (b), there would be no need to include it specifically in Clause (e).

72. The learned senior counsel for the respondent argued that the appellant's fresh averment suggesting that the words "occurrence of any of the following" in Clause 48.1 of the Concession Agreement only mean to include subordinate legislation specifically in sub-Clause (e) of the definition of Change in Law, is baseless. Moreover, this averment was never brought up before the Arbitral Tribunal or the Learned Single Judge. It is asserted that placing reliance on this interpretation in the present appeal should not be allowed. Additionally, it is submitted that the learned Tribunal has interpreted the terms of the contract reasonably and it should not be interfered with, under the limited jurisdiction of Section37 of the Act, by this Court.

73. Learned counsel for the respondent contended that the learned Tribunal rightly held that the aforesaid notifications/Government Orders issued by the undivided State of Andhra Pradesh and the States of Andhra Pradesh and Telangana were covered by Clauses (b) and (d) of the definition

of "Change in Law" in terms of Article 48.1 of the Concession Agreement. It was submitted that the said finding has rightly been upheld by the learned Single Judge observing that the issue is purely one of law and interpretation of Clause 48.1 of the Concession Agreement and does not call for any interference as it does not suffer from any legal infirmity.

74. Learned Senior Counsel for the respondent that the learned Tribunal had correctly rejected the contention of the appellant that Clause 41.1 of the concession Agreement would only apply to cases where the concessionaire had suffered an "Increase in Cost" or "reduction in net after tax return" or "other financial burden", considering both the intention behind the contract and legal precedents, and rightly noted the appellant's failure to justify its narrow interpretation. Similarly, it was submitted that the learned Single Judge was right in his view in reiterating the finding of the learned Tribunal in this regard.

75. It was argued that by filing these appeals, the appellant intends to re-argue the matter. The learned Arbitrators and the learned Single Judge have arrived at concurrent conclusions after following a comprehensive examination of the provisions of the contract, factual evidence, and legal arguments. In light of such findings, it was argued that there are no cogent grounds to interfere with the Judgement dated 04.08.2020 and the Award dated 31.03.2020. Thus, the appeal preferred by the appellant is liable to be dismissed.

76. The submissions advanced by learned Senior Counsel representing both the sides were heard at length and the order passed by the learned Arbitral Tribunal and the judgment passed by the learned Single Judge, have

been perused by this Court.

77. The foremost question that arises in this group of appeals is whether the learned Single Judge, in proceedings under Section34 of the Act, exceeded his jurisdiction by upholding the minority Award of the Arbitral Tribunal, which resulted in the appellant being denied the opportunity to take a fresh decision, and instead appointed a sole Arbitrator to adjudicate the claim of the respondent and whether the learned Single Judge was justified in doing so.

78. It is not disputed that all three Arbitrators, both in minority and majority Awards, concurred in their view that the change in existing Sand Mining Policy, implemented through various GOMs issued by the undivided state of Andhra Pradesh, along with introduction of new Sand Mining Policies issued by the states of Andhra Pradesh and Telangana, as well as various Court orders passed subsequent to the judgment dated 27.02.2012 in ***Deepak Kumar (Supra)***, constituted "Change in Law" under Article 48 of the Concession Agreement. Therefore, the appellant's decision to reject the respondent's claim of compensation by relying on Article 29 of the Concession Agreement was deemed legally unsustainable. It was unanimously held that the claim of the respondent must be evaluated in accordance with Article 48.1 and Article 48.3 of the Concession Agreement and not as per Article 29. However, the sole point of disagreement between the majority and minority Awards pertained to the delegation of the task of assessing the claim of the respondent. Learned Arbitrator, Justice C.M. Nayar (Retd.), in his minority Award opined that directing the appellant, who was an interested party, to make a factual determination of the

respondent's claim, would not serve the ends of justice. The learned Single Judge upheld this view and appointed Justice D.K. Jain (retd.) as a sole Arbitrator, to adjudicate the claim of the respondent.

79. The stand of appellant is that the decision of the learned Single Judge would be inconsistent with the principle established in ***NHAI Vs. Hakeem (Supra)*** wherein it is held that the Courts have no power to modify or alter the Arbitral Award under Section34 of the Act. Instead, they have limited right to either set-aside the Award or leave the parties to pursue new arbitration proceedings, if necessary. The appellant has further placed reliance on ***Larsen Air Conditioning and Refrigeration Company Vs. Union of India*** 2023 SCC OnLine SC 982***; Indian Oil Corporations Ltd. Vs. Sathyanarayana Service Station*** 2023 SCC Online SC 597***; Angel Broking Vs. Urmil Modi*** 2022 SCC Online Del 1328***; Pradeep Vinod Const. Co. Vs. UOI*** 2022 SCC Online Del 4937 to substantiate its argument.

80. On perusal of the decisions cited, this Court finds that the learned Single Judge has rightly held that it was unnecessary to delve into details of the categories of individuals who are disqualified from acting as Arbitrators under Section12(5) of the Act, read with the Seventh Schedule. This is because the majority Award evidently assigned the task of deciding the entitlement of the respondent to the appellant itself, which per se is an interested party and could not be permitted to take that decision. Therefore, in our considered view, the learned Single Judge made no error in appointing a sole Arbitrator, an independent authority, to adjudicate the claim of the respondent. This will eliminate potential bias, ensuring impartiality and fairness in the process. Moreover, it is settled law that the

principle of severability can be invoked if the Award can partly be set-aside, if it is severable in nature. This has been illustrated in ***J.G. Engineers Pvt. Ltd. Vs. Union of India*** (2011) 5 SCC 758, wherein it was held that even if some parts of the Award are deemed bad in law, the Courts have the power to segregate the part which does not suffer from any infirmity and uphold the Award to that extent.

81. Even this Court in ***National Highways Authority of India Vs. Trichy Thanjavur Expressway Ltd.,*** 2023 SCC OnLine Del 5183**,** elaborated on the principle of severability under Section34 of the Act. Drawing reference to ***Hakeem (supra),*** and noted that the term "setting aside" in Section34 includes the power to invalidate a portion of the Award, as long as that portion is severable and does not affect or overshadow other aspects of the Award**.** Further observed that the decision to partially annul a portion of the Award relies on whether the part is distinct and independent and its nullification would not affect other findings and declarations made by the Arbitral Tribunal. It is noteworthy to mention that the case of ***Hakeem (Supra),*** relied on by the appellant, does not apply to the facts of the present case as it does not address the issue of partially setting aside the Award. Instead, it focussed on the permissibility of modifying an Award under Section34 of the Act. Furthermore, it is observed that the learned Single Judge upheld the Award and only took a different approach by assigning the task of assessing the claim of the respondent to the sole Arbitrator instead of the appellant itself, by applying the principles of severability. Therefore, we find no perversity in the finding of the learned Single Judge and his decision to appoint Justice DK Jain (Retd.) as the learned sole Arbitrator to factually

determine the claim of the respondent.

82. At the core of these appeals, the dispute *inter se* the parties, is premised upon the "Change in Law" events that are upheld to have occurred as per Clauses (b) and (d) of the definition of "Change in Law" in terms of Article 48.1 of the Concession Agreement dated 09.10.2009.

83. Clause (b) of Article 1.2.1 of the Concession Agreement reads as under:-

> *"1.2.1 In this Agreement, unless the context otherwise requires,*
>
> *(b) references to laws of India or Indian Law or regulation having the force of law shall include the laws, acts, ordinances, rules, regulations, bye laws or notifications which have the force of law in the territory of India and as from time to time may be amended, modified, supplemented, extended or re-enacted;"*

84. Further, definition of "Change in Law" in terms Article 48.1 of the Concession Agreement reads as under:-

> ***"Change in Law"*** *means the occurrence of any of the following after the date of Bid:*
>
> *(a) the enactment of any new Indian law;*
>
> *(b) the repeal, modification or re-enactment of any existing Indian law;*
>
> *(c) the commencement of any Indian law which has not entered into effect until the date of Bid;*
>
> *(d) a change in the interpretation or application of any Indian law by a judgement of a Court of record which has become final,*

conclusive and binding, as compared to such interpretation or application by a Court of record prior to the date of Bid; or
(e) any change in the rates of any of the Taxes that have a direct effect on the Project;

85. A conjoint reading of Article 1.2.1(b) and Article 48.1(b) and (d) of the Concession Agreement dated 09.10.2009, clearly indicates that the change in existing Sand Mining Policy as implemented through various GOMs issued by the undivided state of Andhra Pradesh along with introduction of new Sand Mining Policies issued by the states of Andhra Pradesh and Telangana as well as various Court orders passed subsequent to the judgment dated 27.02.2012 in ***Deepak Kumar (Supra)*** constituted "Change in Law" in accordance with Clauses (b) and (d) of Article 48.1 of the Concession Agreement.

86. This Court finds itself in disagreement with the contention of the appellant that Article 48.1 beginning with the words "occurrence of any of the following" confines subordinate legislation or notifications only to Clause (e) excluding them from other Clauses like (b). It is a settled position in law that Section34 of the Act clearly delineates the limited grounds upon which an Arbitral Award can be challenged or as interpreted by various Courts. It is essential to understand that such Awards should not be meddled with casually unless they are fundamentally perverse and no alternative interpretation could justify them. Unlike regular Appellate jurisdiction, Section34 of the Act mandates respecting the finality of Arbitral Awards and the discretion of the parties to approach alternate forum. The Supreme

Court in ***Dyna Technologies (P) Ltd. Vs. Crompton Greaves Ltd.*** 2019 SCC OnLine SC 1656 laid down the scope of such interference, which is reproduced as under:

> *"24. There is no dispute that Section34 of the Arbitration Act limits a challenge to an Award only on the grounds provided therein or as interpreted by various Courts. We need to be cognizant of the fact that Arbitral Awards should not be interfered with in a casual and cavalier manner, unless the Court comes to a conclusion that the perversity of the Award goes to the root of the matter without there being a possibility of alternative interpretation which may sustain the Arbitral Award. Section34 is different in its approach and cannot be equated with a normal appellate jurisdiction. The mandate under Section34 is to respect the finality of the Arbitral Award and the party autonomy to get their dispute adjudicated by an alternative forum as provided under the law. If the Courts were to interfere with the Arbitral Award in the usual course on factual aspects, then the commercial wisdom behind opting for alternate dispute resolution would stand frustrated."*

87. In the instant case, the interpretation of Article 48.1 of the Concession Agreement arrived at by the learned Tribunal is both possible and plausible and the learned Single Judge has rightly affirmed it. The mere possibility of an alternative interpretation is no sufficient ground for Court to interfere with the Award. We uphold the finding of the Tribunal as well as the learned Single Judge on the interpretation of the relevant provision.

88. With regard to raising the fresh contention about Article 1.2.1 of the Concession Agreement, which includes the words "unless context otherwise requires" and stating that this exception should apply when read with Article 48.1 to interpret "Change in Law", suggests a tactical approach to avoid addressing the claim of respondent and assessing the extent of its losses resulting from "Change in Law". Introducing this claim now, solely to demonstrate that government notifications and Court orders did not constitute *Change in Law* suggests an effort to sidestep accountability.

89. The appellant has disputed that Article 41.1 of the Concession Agreement applies only in those cases where the concessionaire has suffered an "increase in cost" or has faced "reduction in net after-tax-return" or any other "financial burden" as a direct consequence to "Change in Law". Attention was drawn to the heading of Article 41.1 that reads "Increase in costs" indicating that the provision is triggered by any increase in costs, with the other expressions to be interpreted in the same context. However, it is well-established that while headings may assist in understanding the subject matter of a Clause, they do not dictate the interpretation of the Agreement. Thus, we concur with the Tribunal's interpretation that restricting Article 41.1 to only cover "increase in costs" would render terms like "reduction in net after-tax-return" and "financial burden" redundant, contrary to the intended purpose of the contract.

90. We also disagree with the appellant's argument that the use of words "for the avoidance of doubt" in the Article 41.1 limit the interpretation of the terms "reduction in net after-tax return" and "financial burden". We are, in fact, in accord with the view expressed by the learned Single Judge rightly

pointing out that suggesting to deny the compensation to the concessionaire when toll revenues decrease due to a significant drop in highway traffic, simply because "costs have not increased" would be unrealistic. Furthermore, such an interpretation would reduce "costs" to a mere numerical figure disregarding the financial impact of reduced traffic on the concessionaire. While we dismiss the contention of the appellant, it is essential to note that Article 41.1 does not confine solely to "increase in costs" as this understanding would not give effect to its true intent and purpose.

91. The learned Single Judge has correctly observed that reliance on the isolated phrase "for the avoidance of doubt" alone would ignore the broader context of the Clause, which includes references to "reduction in net after-tax-return" and "financial burden" in Article 41.1. Hence, the words "for the avoidance of doubt" cannot be detached from the main Clause to restrict its scope and for this reason, the interpretation offered by the appellant could not have been permitted. We uphold the finding of the Tribunal as well as the learned Single Judge in this regard.

92. Further, we firmly reject the appellant's contention to discredit the Halcrow Report as well as the Financial Model claiming that Article 41.3 of the Concession Agreement does not bind them to it. A bare reading of Article 41.3 of the Concession Agreement makes it clear that it explicitly requires reliance on the Financial Model to establish a NPV of the net cash flow for making adjustments, including compensation, to restore the financial position of the concessionaire as if there had been no "Change in Law". It is untenable on the part of the appellant to challenge the credibility

of the Financial Model, after the happening of such contingency, especially while considering it was submitted to the appellant on 06.04.2010 in accordance with the Concession Agreement. Similarly, the Halcrow Report, which is used in accordance with RFP, was also submitted to the appellant prior to the appointed date with no waiver granted by the appellant at the relevant time. The specifics of the Financial Model were outlined in Article 48.1 of the Concession Agreement, and its validity was acknowledged by senior lenders who followed discussions with the Halcrow team to prepare the Financial Model. Only after being satisfied with the Report and inputs received, the lenders finalised the Financial Model.

93. We find ourselves in Agreement with the finding of the Tribunal that the appellant, despite its extensive database of traffic across all Highways, failed to bring on record any evidence to discredit the Halcrow Report or Financial Model. Moreover, it cannot be ignored that the premium offered by the respondent, was also based on the realizable fee derived from traffic study in the Halcrow Report.

94. The appellant has placed reliance on data which purportedly collected on traffic movement on highways near NH-9, and a Pavement Design Report highlighting discrepancies between the projected traffic in the Financial Model and actual counts in terms of Clause 3.3 of the IRC (Indian Roads Congress) 37 of 2001. The appellant has emphasized that the PDR underscored a significant disparity in the two traffic projections submitted by the respondent arguing that these projections are speculative and cannot form the basis of the contract.

95. So far as the argument of appellant that reliance placed on traffic data

from proximate highways was justified because if claim of the respondent about reduced traffic due to "Change in Law" was valid, it would have affected traffic across the state and other proximate highways as well, not just the Project Highway. However, we find no merit in this argument. We affirm the finding of the learned Single Judge that the appellant had no reason to rely on the data from nearby highways, especially when actual data of the traffic movement on the Project Highway was available. Moreover, discrediting the Report solely on this basis would be highly unjustified. Therefore, we uphold the finding of the Arbitral Tribunal as well as the learned Single Judge on this aspect.

96. The appellant has also submitted that concerns regarding traffic variations fall under the purview of Article 29 and not under Article 41 of the Concession Agreement, as it covers all kinds of losses suffered on account of reduction of revenue due to reduced traffic. If Article 41 is interpreted to include this kind of exigency, the respondent will end up reaping double benefit. It is further argued that Article 29 comprehensively addresses all instances of traffic reduction, necessitating an extension of concession period so that there can be an increase in revenue. Reliance has been placed on Clause 1.4.2 of the Concession Agreement to show that in case of any ambiguity or discrepancy between two or more Clauses of the Concession Agreement, the provisions of a specific Clause *relevant to the issue under consideration* shall prevail.

97. This Court, however, does not find any basis in these arguments on thorough reading of Article 41.1, Article 41.3 and Article 29 would show that Article 41.1 and Article 41.3 are indeed specific provisions, as they

directly address financial burdens resulting from "Change in Law". On the contrary, Article 29 is not designed to address financial hardships and clearly lacks any reference to financial impact stemming from a contingency like one. We find no legal infirmity in the view taken by the Tribunal as well as the learned Single Judge in observing that adverse financial impacts due to "Change in Law" warrant the application of Article 41.1 and Article 41.3 of the Concession Agreement, not Article 29.

98. Learned Senior Counsel for the appellant submitted before us that the learned Single Judge in OMP(I)(COMM.) No. 92 of 2020, overlooked the necessity of the payment of premium constituting public revenue, collected for improving National Highways and are acknowledged contractual obligations, which have not been fulfilled by the respondent. Despite the claim of the respondent that the "Change in Law" occurred even before the project was completed, the respondent paid the premium from December, 2012 to March, 2015.

99. We find no merit in the above submission raised on behalf of the appellant. We are in Agreement with the view taken by the learned Single Judge that the parties; appellant and the respondent; have rival claims arising from the same Concession Agreement. Therefore, we find the stay granted by the learned Single Judge on letter No. NHAI/PIU-Hyd/NH-65/Hyd-Vij/2020/430 dated 16.04.2020, issued by the appellant to the respondent, was justified to ensure fairness in the process until the respondent's actual entitlement to compensation is determined by the learned Sole Arbitrator.

100. In our opinion, if the respondent fails to substantiate its claim, the

appellant retains the option to recover the outstanding premium with interest later. However, compelling the respondent to pay the premium before its claim is decided, would not only worsen the loss of revenue it has already endured from reduced traffic but also strain its resources needed for effective functioning of the Highway. This Court upholds the finding of the learned Single Judge on balance of convenience and irreparable loss, answering both in favour of the respondent.

101. It is apposite to mention that the Supreme Court in ***MMTC Ltd. Vs. Vedanta Ltd., (2019) 4 SCC 163*** laid down the scope of interference under Section37 of the Act, which is reproduced as under:-

> *"14. As far as interference with an order made under Section34, as per Section37, is concerned, it cannot be disputed that such interference under Section37 cannot travel beyond the restrictions laid down under Section34. In other words, the court cannot undertake an independent assessment of the merits of the Award, and must only ascertain that the exercise of power by the court under Section34 has not exceeded the scope of the provision. Thus, it is evident that in case an Arbitral Award has been confirmed by the court under Section34 and by the court in an appeal under Section37, this Court must be extremely cautious and slow to disturb such concurrent findings."*

102. In light of the aforementioned observations of the Hon'ble Supreme Court in ***MMTC (Supra)***, the scope of interference for an appellate court to intervene under Section37 of the Act is even narrower than deciding a

petition under Section34. Therefore, this Court is not inclined to interfere with the judgment passed by learned Single Judge of this Court.

103. In view of the aforesaid, this Court finds no legal infirmity in the interpretation and reasoning provided by the Arbitral Tribunal regarding the provisions of the Concession Agreement dated 09.10.2009. The learned Single Judge made no error in upholding the minority Arbitral Award dated 31.03.2020 and rightly modified the majority Award to the extent of appointing Justice D.K. Jain (Retd.) to adjudicate the claim of the respondent based on credible and material evidence.

104. Accordingly, these appeals against Arbitral Award dated 31.03.2020 and the common judgment dated 04.08.2020, passed by the learned Single Judge with pending applications, if any, are dismissed.

(SURESH KUMAR KAIT)
JUDGE

(NEENA BANSAL KRISHNA)
JUDGE

MAY 07, 2024
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