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

% ***Reserved on: April 11, 2023***

Pronounced on: September 20, 2023

(i) + FAO(OS) (COMM) 314/2022 & CAV 429/2022 & CM APPL. 52675/2022, 52677/2022, 5648/2023, 5655/2023 & 5771/2023

NATIONAL HIGHWAYS AUTHORITY OF INDIA ... Appellant

Through: Ms.Maninder Acharya, Senior Advocate with Mr.Suman Jyoti Khaitan, Mr. Vikas Kumar, Mr.Viplav Acharya & Ms.Aarzu Khattar, Advocates

Versus

GMR AMBALA CHANDIGARH EXPRESSWAYS PRIVATE LIMITED & ANR. ..... Respondents

Through: Mr.Parag Tripathi, Senior Advocate with Mr.Atul Sharma, Mr. Milanka Chaudhary, Mr.Pranay Chitale, Ms.Abhilasha Sharma, Mr.Ankit Banati, Mr.Anirudh Dusaj, Mr.Kanav Vir Singh, Mr.Dipan Sethi & Mr. Pranshul Kulshrestha, Advocates for respondent No.1

Mr.Rajive Bhalla, Senior Advocate with Dr.Ashwinie Kumar Bansal, Mr.Pankaj Mehta, Ms.Shweta Soni, Ms.Akansha Singh. Mr. Sumeir Ahuja, Mr.Niranjan Sen & Mr.Bhavya Kohli, Advocates for respondent No.2

(ii) + FAO(OS) (COMM) 315/2022 & CAV 430/2022 & CM APPL. 52678/2022, 52680/2022, 5653/2023, 5772/2023 & 5785/2023

NATIONAL HIGHWAYS AUTHORITY OF INDIA ... Appellant

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(iii) + FAO(OS) (COMM) 11/2023 & CM APPL. 2722-724/2023

STATE OF HARYANA ..... Appellant

Through: Mr.Rajive Bhalla, Senior Advocate with Dr.Ashwinie Kumar Bansal, Mr.Pankaj Mehta, Ms.Shweta Soni, Ms.Akansha Singh. Mr. Sumeir Ahuja, Mr.Niranjan Sen & Mr.Bhavya Kohli, Advocates

Versus

GMR AMBALA CHANDIGARH PRIVATE LIMITED & ANR.
..... Respondents

Through: Mr.Parag Tripathi, Senior Advocate with Mr.Atul Sharma, Mr.Milanka Chaudhary, Mr.Pranay Chitale, Ms.Abhilasha Sharma, Mr.Ankit Banati, Mr.Anirudh Dusaj, Mr.Kanav Vir Singh, Mr.Dipan Sethi & Mr. Pranshul Kulshrestha, Advocates for respondent No.1

Ms.Maninder Acharya, Senior Advocate with Mr.Suman Jyoti Khaitan, Mr.Vikas Kumar, Mr.Viplav Acharya & Ms.Aarzu Khattar, Advocates for respondent No.2

CORAM:

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

JUDGMENT

SURESH KUMAR KAIT, J

1. The National Highway Authority of India (henceforth referred to as the 'NHAI') had invited bids for improvement, maintenance, operation and strengthening of two-lane road and widening to four lane dual carriage way of Ambala Chandigarh Section. The GMR Ambala Chandigarh Private Limited (henceforth referred to as ('GMR') was awarded the project on a 'negative grant' basis, who had chosen to quote on the basis of an aggressive negative bid, which was infact much higher than the next highest bidder. A Concession Agreement dated 16.11.2005

was entered between NHAI and GMR ("Concessionaire Agreement"). Besides, a Tripartite Agreement dated 21.02.2006 between NHAI, GMR and State of Punjab and Haryana was also executed.

2. GMR undertook the work as per the Concessionaire Agreement and started collection of toll on Project Highway w.e.f. 10.12.2008. In the year 2009, GMR raised allegations of reduction in traffic on the Project Highway due to competing roads and alleged improvements on Tepla-Banur-Kharar section of State Highway and Lehli-Banur road by the State of Punjab and its impact on Ambala-Chandigarh Section. GMR alleged that NHAI had violated the terms of Tripartite State Support Agreement whereunder State of Punjab & Haryana was restricted from creating a bypass to the Project Highway. After several rounds of meetings and written communications, NHAI rejected request of GMR for compensation stating that improvement of peripheral roads of NHAI did not constitute "additional toll-way", as was restricted under Clause-8.1 of the Concessionaire Agreement and Clause -3.2 of the State Support Agreement.

3. Being aggrieved, GMR preferred a Writ Petition being W.P.(C) No. 5804/2011, which was disposed of by this Court vide judgment dated 20.09.2011 directing the parties i.e. NHAI, GMR and States of Haryana and Punjab to nominate common person for constitution of Arbitral Tribunals against the two agreements. Thereafter, GMR preferred another petition [ARB.P.69/2012] under Section 11 of the Arbitration and Conciliation Act, 1996 seeking appointment of an Arbitrator, which was disposed of vide order dated 18.05.2012 thereby appointing Dr.

Justice A.S. Anand, the Chief Justice of India (Retd.), as the common Arbitrator on behalf of NHAI and State of Haryana &State of Punjab.

4. After constitution of Arbitral Tribunal, GMR filed its Statement of Claims on 15.02.2013 and the issues were framed on 13.09.2014. The learned Arbitral Tribunal, after examination of documentary evidence, testimonies of witnesses recorded during the arbitral proceedings and hearing the parties, passed the Arbitral Award dated 26.08.2020, with dissenting opinion by one of the learned Arbitrators. The Majority Award held that the claim filed by GMR was not maintainable and dismissed the same.

5. Dissatisfied by the Arbitral Award dated 26.08.2020, GMR preferred petitions under Section under Section 34 of the Arbitration and Conciliation Act, 1996 (henceforth referred to as 'the Act") being O.M.P. (Comm) No.480/2020 & O.M.P. (Comm) No.481/2020 against the majority Arbitral Award. In the meanwhile, GMR also filed a petition under Section 9 of the Act being O.M.P. (I) (COMM) 302/2020, which was dismissed by this Court vide order dated 24.09.2020; against which GMR preferred a petition under Section 37 of the Act [FAO (OS) (COMM) 129/2020], which also stood dismissed vide order dated 20.01.2020. Thereafter, vide judgment dated 26.09.2022, the petitions [O.M.P. (Comm) No.480/2020 and O.M.P. (Comm) No.481/2020] filed by GMR under Section 34 of Act, were allowed by the learned Single Judge of this Court.

6. It is against the aforesaid judgments dated 26.09.2022 passed in O.M.P. (Comm) No. 480/2020 & O.M.P. (Comm) No. 481/2020

preferred by GMR under Section 34 of the Act against the State of Haryana and State of Punjab respectively, wherein the majority Arbitral Award dated 26.08.2020 was challenged, that these appeals have been filed by NHAI and State of Haryana.

7. The above captioned first and second appeal being FAO(OS) COMM 314/2022 and FAO(OS) COMM 315/2022, have been preferred by NHAI and the above captioned third appeal FAO (OS) 11/2023 is preferred by the State of Haryana.

8. To assail the impugned judgment dated 26.09.2022, Ms. Maninder Acharya, learned Senior Counsel appearing on behalf of NHAI, submitted that the learned Single Judge has exceeded its jurisdiction by interfering into the merits of the case, which is impermissible under Section 34 of the Arbitration and Conciliation Act, 1996. It was submitted that while entertaining a petition under Section 34 of the Act, the Court cannot sit in appeal against the decision rendered by the Arbitral Tribunal and the Award cannot be overturned by cherry picking a few evidence recorded / placed before the Arbitral Tribunal. Learned Senior Counsel submitted that while passing the impugned Arbitral Award, the learned Arbitrator had examined the entire case record, including the evidence and recorded the findings of the important facts, which cannot be set aside, as the scope for interference under Section 34 of the Act is limited.

9. To substantiate the argument that the learned Single Judge has ignored the settled principles of law that if the Arbitral Tribunal has highlighted in detail the issues and recorded evidence, the Award cannot

be set aside; reliance was placed upon decision of Hon'ble Supreme Court in ***Anglo American Metallurgical Coal Pty. Ltd. Vs. MMTC Limited*** (2021) 3 SCC 308. It was submitted that reliance placed by learned Single Judge upon decision of Supreme Court in ***Dyna Technologies Private Limited Vs. Cromption Greaves Limited*** (2019) 20 SCC 1 is misplaced as it has been held therein that if the Award is based upon factual findings, then Court shall not set aside the Award on an application filed under Section 34 of the Act.

10. Learned Senior Counsel next submitted that the learned Single Judge failed to appreciate that it is only the Arbitral Tribunal which has the power to interpret any Contract or Agreement entered between the parties and it is not open for the Single Judge to interfere with such interpretation and if the opinion of learned Single Judge was different than the one of the learned Arbitrator, the impugned majority Arbitral Award cannot be set aside.

11. Attention of this Court was drawn to Clause-8.1 of the Concessionaire Agreement to submit that it was agreed between the parties that no expressway or other toll road shall be built or opened before expiry of 08 years from the appointed date. However, a Highway could have been built. It was submitted that NHAI has not built any bypass and the State of Haryana has strengthened the existing roads, as has been considered under the Majority Award. Further submitted that the learned Single Judge has failed to appreciate the reasoning given by the learned Arbitral Tribunal in respect of longer distance and economic viability of saving of Rs.140. Also submitted that the construction of

ROB Kesri was not an expected development for GMR, as the order dated 13.12.2002 had already been issued by the Government of Haryana and so, the work under taken by the Railways was well within the public knowledge. Therefore, the learned Arbitral Tribunal while passing the majority Award dated 26.08.2020 has rightly rejected the contention of GMR that it had no prior knowledge of the construction of ROB at Kesri and had not sought any information regarding competitive schemes and future developments in the region. The learned Single Judge failed to appreciate the delay on the part of GMR in raising protest against the construction of ROB at Kesri, which has rightly been appreciated in the majority Award.

12. Learned Senior Counsel for NHAI submitted that the learned Single judge did not take into consideration that GMR had willingly opted the project work at negative grant despite being aware of the non-binding and exaggerated nature and that there was a substantial difference of Rs.137.52 crores between the bid of GMR and the second lowest bidder. Also, while interpreting the Contract in question, the learned Single Judge did not keep in mind that if two possible interpretations of contractual provisions is possible, then also scope of interference under Section 34 of the Act, is limited. Further submitted that in terms of Section 5 of the National Highways Act, 1956, the NHAI is obligated to maintain, widen and strengthen the National Highways and the learned Single Judge has incorrectly held that this leads to contract being modified and the learned Tribunal has given due consideration to the 'intent of parties' while interpreting the contractual

provisions.

13. On behalf of NHAI, it was further submitted that in the impugned majority Arbitral Award the learned Tribunal has examined the various relevant clauses and definition of the term "bypass", whereas the learned Single Judge held that modification of an existing road can covert the same to a bypass, even if the contract specifically does not provide so. In this way, the learned Single Judge has not only travelled into the merits of the dispute but has also implied the terms of the contract.

14. Learned Senior Counsel for NHAI submitted that the view of the learned Single Judge written in Para-27.5 of the impugned judgment that an existing road which takes off from a point -23 km before/after the project road cannot constitute a bypass, is contrary to its own finding recorded in Para-27.3.4 which states that for being a bypass it first must be a road, other than the project road, connecting the points to which the project road connects.

15. Learned Senior Counsel drew attention of this Court to Para-27.8.7 of the impugned judgment wherein the learned Single Judge has held that *'construction of a bypass to an existing highway would also be an exercise guided by public interest, as it would facilitate movement of traffic. The sovereign right of the Government to construct bypass to ease traffic cannot, therefore, be curtailed by a private contract between two parties."*

16. Further attention was drawn to Para-27.8.8 of the impugned judgment wherein the learned Single Judge has held that *"If however, construction of the bypass results in a Material Adverse Effect to the*

contractor- i.e. to GMR, then GMR has to be indemnified for the loss it suffers."

17. Learned Senior Counsel submitted that the learned Arbitral Tribunal in the majority Award dated 26.08.2020 noted in Para-24 that the Shahabadand Panchkula was a State Highway for 17 kms and a National Highway for remaining 57 kms and these stretches were good for commercial traffic even before construction of ROB at Kesri and if these highways were already existing, the same would not become bypass to the project road. To this contrary view, the learned Single judge in Para 27.06.1 of the impugned judgment held that the State and National Highway became viable option for commercial traffic post their modification undertaken by the appellant.

18. Learned Senior Counsel further submitted that the learned Single Judge has erroneously set aside the material findings of the learned Arbitral Tribunal recorded in the impugned Award to the effect that GMR should have studied the relevant features of the project before opting for negative grant, which was based upon the disclaimers for all intending contractors. The learned Single Judge had though in principle agreed with the findings of the Arbitral Tribunal that the projections in DPR ("Detailed Project Report") may not be binding or final and the contractors are required to carry out their own traffic studies, but still returned the findings that the DPR projections cannot be ignored in circumstances where loss is suffered by the contractor. Thereby, the learned Single Judge has held that DPR projections are binding where the same is beneficial for the contractor. Learned counsel submitted that such

interpretation of the Disclaimers and addition of a proviso not given therein, is a presumption beyond the terms of the contract and therefore, the findings returned by the learned Single Judge in Para-27.8.10 of the impugned judgment deserve to be set aside.

19. Learned Senior Counsel appearing for NHAI submitted that the learned Arbitral Tribunal rightly assessed that the dispute between the parties did not relate to the fixation of fee, as provided under the statutory provision and even if GMR would have raised such claim, it was beyond the scope of consideration by the Arbitral Tribunal.

20. It was next submitted that the learned Single Judge failed to consider that the Central Government as well as State Government bear the responsibility to develop, maintain and repair all National Highways for safe and smooth public transportation in terms of Section 5of National Highways Act, 1956.

21. Also submitted that the learned Arbitral Tribunal had seriously taken note of the fact that after delay of 07 years, GMR had sought certain documents and no leave was sought to fill up the gap having arisen due to non availability of documents during the arbitral proceedings. It was submitted that after six-eight months of passing the Award, GMR made an application for supply of the documents and the deliberate delay is to secure the benefit of interim order. Learned Senior Counsel submitted that consideration of these documents would amount to re-opening of a matter wherein arguments were concluded long ago and even otherwise, the documents are noting and internal communication between the departmental officials of NHAI and these

documents do not prove that there was diversion of traffic from project road to the alleged bypass. The learned Arbitral Tribunal has rightly concluded in the Award that the entire case of GMR was based upon alleged traffic diversion, however, no evidence regarding diversion and leakage of traffic from the project road to the alleged bypass has been placed on record. To the contrary, the learned Single Judge did not take into consideration the evidence placed on record by the NHAI pertaining to widening and strengthening of NH-73.

22. Further it was submitted by Ms.Maninder Acharya, learned Senior Counsel that the learned Single Judge in violation of provisions of Section 15(3) of the Arbitration and Conciliation Act, 1996, which provides that only the hearings are to be repeated; has ordered *de novo* repetition of pleadings and the evidence. Lastly, it was submitted that the majority Arbitral Award is based upon findings returned on the voluminous documentary record, whereas the judgment passed by the learned Single Judge is in contravention of the well settled principles of law, as the same could not have been interfered by the learned Single Judge. Thus, setting aside of the impugned judgment dated 26.09.2022 passed by the learned Single Judge is sought.

23. Appearing on behalf of appellant- State of Haryana, Mr.Rajive Bhalla, learned Senior Counsel submitted that GMR had bid for the Project Highway on a negative grant basis and was awarded the project being the highest negative grant. It was submitted that GMR willingly chose to value the project liberally and placed very high negative bid as opposed to other bidders. A concession Agreement dated 16.11.2005 was

entered between GMR and NHAI and a Tripartite State Support Agreement dated 21.02.2006 was entered with State of Punjab and Haryana.

24. Learned Senior Counsel appearing on behalf of State of Haryana next submitted that GMR was fully aware of the factors and plan to construct the project highway and it could have asked for all the information in the pre-bid meeting before bidding. It was submitted that the learned Arbitral Tribunal has rightly held that NH-73 spanned the distance from Saharanpur to Panchkula, whereof the last stretch from Shahazadpur to Panchkula regarded as NH-7, being a National Highway, was capable of carrying heavy vehicles even prior to the execution of the Concession Agreement in question. Thereby, the expenditure incurred in widening and strengthening of NH-73 could not be regarded as breach of Concession Agreement and State Support Agreement.

25. Learned Senior Counsel submitted that the majority Arbitral Award passed by the learned Arbitrator is well merited and the learned Arbitrator has correctly interpreted Clause- 8 of the Concession Agreement and Clauses- 3.1 & 3.2 of the State Support Agreement. It was submitted that while passing the impugned Judgment, the learned Single Judge has ignored the well settled principles of law that under Section 34 of the Act, the Court does not sit as Court of Appeal, cannot reinterpret the Contract and re-appreciate the evidence and substitute the Arbitral Award with its own interpretation. To substantiate the aforesaid submission, reliance was placed upon Hon'ble Supreme Court's decision in ***Dyna Technologies Private Limited (Supra).***

26. Learned Senior Counsel for State of Haryana next submitted that despite opportunity given, GMR had failed to produce the original reports by IMACS and placed only unsigned executive summaries of the report, wherein the methodology of survey and estimates conducted by the agency, was not clear. Also submitted that the learned Single Judge failed to interpret or appreciate the Clauses-8.1 and 3.2 of the Concession Agreement, which do not bar the State of Haryana from strengthening, maintaining and widening the pre-existing State and National Highways. Learned Senior Counsel submitted that the State of Haryana cannot be expected to not maintain the peripheral road for 20 years during subsistence of Concession Agreement.

27. It was further submitted by learned Senior Counsel for State of Haryana that the internal documents, noting, communications are not meant for third parties to constitute an admission by the NHAI. It was submitted that the learned Single Judge in Para-27.5 of the impugned order has reversed the finding of the Arbitral Tribunal that an existing road which takes off from a point 23 km away from the project road cannot constitute a bypass in contradiction of its finding recorded in Para-27.3.4 of the impugned order. Also that the finding returned by the learned Arbitral Tribunal that the bypasses were fully functional at the time of invitation of the bids, has been erroneously set aside by the learned Single Judge holding that the National and State Highways only became a viable option for the commercial traffic post their modification undertaken by the State of Haryana.

28. Learned Senior Counsel next submitted that the learned Single

Judge in Para-27.8.9 has recorded that the projections in the DPR may not be binding or final. On the other hand, learned Single Judge has also noted a proviso to the Disclaimers in the contract that the DPR projections cannot be ignored in circumstances in case of loss suffered by the contractor. Such interpretation of the Disclaimers and addition of a proviso not given, is a presumption beyond the covenants of contract. It was submitted that by directing *de novo* arbitral proceedings in accordance with the law, the learned Single Judge has curtailed the independence of the Arbitral Tribunal, which cannot be allowed. On this aspect, reliance was placed upon decision of Hon'ble Supreme Court in ***Ssangyong Engineering and Construction Company Limited Vs. NHAI*** (2019) 15 SCC 131. Reliance was also placed upon another decision of Supreme Court in ***State of Uttar Pradesh Vs. M/S Satish Chand Shivhare and Brothers*** 2022(2) SC 531 to submit that if two interpretations of the contract are possible, the interpretation given by the Arbitral Tribunal cannot be held to be against the terms of the contract or patently illegal.

29. Learned Senior Counsel submitted that with regard to longer distance, the learned Arbitral Tribunal has returned the findings in the majority award dated 26.08.2020 that *the distance between the alleged Bypass road Shahabad-Saha-Panchkula is longer than that between Shahabad-Ambala-Zirakpur-Panchkula using the Project Road. The argument that Trucks would avoid a dual carriageway shorter distance road and prefer two lane road without any divider only to avoid payment of Rs.140 or so per truck as Toll Fee appears to be unlikely to us".* It was

submitted that this finding with regard to longer distance and viability of saving Rs.140 has not been touched upon by the learned Single Judge and, therefore, the conclusion of the learned Arbitral Tribunal as well as Award should survive. Also submitted that while returning the finding that GMR should not turn around and claim redress, the learned Arbitral Tribunal on Page-25 of the majority award has correctly noted the reasoning that GMR had prior knowledge of construction of ROB at Kesri since order dated 13.12.2002 issued by the Government of Haryana and the construction work undertaken by the Railways was well within public knowledge. It was submitted that GMR did not seek any information regarding competitive schemes and future development plans in the region despite having opportunity in the pre-bid meetings on 15.05.2005 and 07.06.2005.

30. Learned Senior Counsel further submitted that the learned Single Judge failed to consider the material finding returned in the majority Award by the learned Arbitral Tribunal that ROB Kesri was completed in the year 2007 whereas till June, 2009, GMR had not registered any protest with State of Haryana or with NHAI about the said development. Reliance was placed upon decision of Supreme Court in ***State of Uttar Pradesh Vs. M/s Satish Chand Shihare and Brothers*** 2022 (2) SC 531 to submit that in case there are two possible interpretations of a contractual provision, then the view given by the Arbitrator has to be hold and the same is not required to be interfered under Section 34 of the Act. However, the learned Single Judge in Para-27.4 has given unreasonable reasoning to set aside the majority Arbitral Award.

31. Learned Senior Counsel appearing on behalf of State of Haryana submitted that the learned Single Judge did not appreciate that the learned Arbitral Tribunal took note of all the relevant factors and held that Clauses 3.2 and 8.1 of the State Support Agreement and Concession Agreement respectively do no bar maintenance and upkeep of pre-existing roads. Also, that the learned Arbitral Tribunal had rejected application dated 09.04.2020 for supply of documents filed by GMR in respect of certain documents mentioned in letter dated 24.07.2013 on various grounds, primarily that leave of the Tribunal was not sought in case of non-availability of documents with GMR till conclusion of the arguments and also it is only after six-eight months of reserving the matter, the said application was filed. Even otherwise, the documents do not in any manner establish the diversion of traffic from the Project Road to the alleged bypass and no document or evidence regarding the alleged diversion has been placed on record.

32. Lastly, learned Senior Counsel submitted that under the provisions of Section 15(3) of the Act, there is no legal requirement to repeat the pleadings and the evidence, however, the learned Single Judge has *de novo* passed such directions, curtailing the powers of the Arbitral Tribunal.

33. To the contrary, Mr.Parag Tripathi, learned Senior Counsel appearing on behalf of GMR submitted that these appeals have been filed by the NHAI and State of Haryana the impugned Judgment dated 26.09.2022 against setting aside of the majority Arbitral Award has essentially been challenged on two grounds, first that the learned Single

Judge has exceeded the scope of Section 34 of the Act and second, learned Single Judge has touched upon important findings rendered by the Arbitral Tribunal.

34. It was empathically submitted that the learned Single Judge in the impugned judgment has rightly noted that an Award under Section 34 of the Act can be set aside if it is found to be contrary to fundamental policy of Indian law and patently illegal and since the Arbitral Award contained findings based on no evidence, therefore, in view of reasonings given in Para-23.2 and Para-44 of the impugned judgment, the majority Arbitral Award has rightly been set aside.

35. Reliance was placed upon decisions of Hon'ble Supreme Court in ***MMTC Limited Vs. Vedanta Limited*** *(2019) 4 SCC 163* and ***Haryana Tourism Ltd. Vs. M/s Kandhari Beverages Limited*** *(2022) 3 SCC 237*, to submit that in an appeal filed under Section 37 of the Act, the scope of interference by the High Court is narrow and is only limited to ascertain the legality of the original decree passed under Section 34 of the Act. Thus, the plea of NHAI and State of Haryana that the learned Single Judge did not take into consideration various findings returned by the learned Arbitral Tribunal, deserves rejection. On the plea of NHAI and State of Haryana that under Section 34 of the Act, the Court is not required to controvert each and every finding of the Arbitral Tribunal, learned Senior Counsel submitted that the findings which go the root of the dispute between the parties, have rightly been touched upon by the learned Single Judge as the findings of the learned Arbitral Tribunal were perverse. In support of this submission, reliance was placed upon

decision in ***Project Director, NHAI vs. M Hakeem*** (2021) 9 SCC 1. It was rather view of the settled legal position is that under Section 37 of the Act, re-appreciation of merits and evidence is impermissible.

36. Learned Senior Counsel submitted that the learned Arbitral Tribunal vide order dated 14.03.2013 permitted GMR to complete discovery and inspection of documents and pursuant thereto, vide letter dated 24.07.2013 GMR requested NHAI to provide some documents, however, such documents were not provided. It was submitted that the learned Single Judge has taken serious note of the fact that the documents sought by GMR were not produced by the NHAI and without those documents being brought on record, the arbitration proceedings could not have been continued. Accordingly, it was observed by the learned Single Judge that despite repeated directions of the learned Arbitral Tribunal vide order dated 24.07.2013; 07.10.2013; 29.03.2014 and 13.09.2014, NHAI failed to furnish the documents to GMR which is serious infirmity in conducting the arbitral proceedings and is in violation of principles of natural justice. The learned Tribunal ignored its earlier orders in respect of non-supply of documents, which renders the Arbitral Award perverse. Learned Senior Counsel submitted that the documents sought to placed on record were internal communications of NHAI wherein it was acknowledged that the upgradation and strengthening of the alternate road / competing road, resulted in creation of bypass and the fact of diversion of traffic from the Project Highway, has been disregarded by the learned Arbitral Tribunal. These internal communications between the officers of the NHAI acknowledging the fact of diversion of traffic

from the Project Highway to the Alternate Road have been disregarded as mere interdepartmental communications of no evidentiary value in the majority Arbitral Award.

37. Further submitted that the plea of appellants that the communications between the Project Director and CGM cum Regional Officer of NHAI be considered as mere 'internal communications' having no evidentiary value, as these were recommendations issued by the officers of the NHAI consequent upon representations made by GMR regarding development of alternate routes. Reliance was placed upon decision in ***Ssangyong Engg. (Supra),*** wherein it is held that non consideration of material placed, which could have a vital effect on the outcome of the arbitral proceedings, is perverse in law.

38. At the time of final arguments, attention of this Court was drawn to letter dated 24.06.2010 written by Project Director of NHAI; Minutes of the joint meeting held on 15.07.2010 and letter dated 26.08.2010 by the Regional Officer of NHAI to substantiate diversion of the traffic from the Project Highway to the alternate routes/competing roads as well as the consequent loss caused to the GMR.

39. Attention of this Court was also drawn to evidence of CW-1 to show that GMR had conducted its own study to confirm traffic flow and data provided as part of RFP. This witness in his affidavit has stated that alternate roads were not capable of catering commercial traffic, however, post development the commercial traffic started to opt to ply on said roads and the learned Arbitral Tribunal did not take into consideration this crucial fact. The learned Single Judge in the impugned judgment

held that evidence CW-1 remained unrebutted and uncontroverted by State of Haryana. Learned Senior Counsel placed reliance upon decision in ***Associate Builders Vs. DDA*** (2015) 3 SCC 49 to submit that where a finding is based on no evidence or the vital evidence is ignored, such decision is patently illegal.

40. Learned Senior Counsel submitted that GMF appointed an independent agency namely M/s ICRA Management Consulting Services Ltd. ("IMACS") to undertake a detailed traffic validation study in and around Ambala-Chandigarh section of the National Highway to establish the existing and future (over the entire concession period) tollable traffic on the Project Highway and the impact of the competing highways/alternate roads on the Project Highway in the year 2009 and again in the year 2012, with the permission of NHAI. The executive summaries submitted by the IMACS attributed traffic diversion from Project Highway to the Alternate Routes developed by the State of Haryana.

41. It was next submitted by learned Senior Counsel appearing on behalf of GMR that IMACS reports of studies conducted in 2009 and 2012 relied upon by GMR, have been ignored by the Arbitral Tribunal to be of no evidentiary value on the ground that they were in the nature of executive summaries and not the entire reports. Learned Senior Counsel submitted that these reports stood proved by deposition of the witness (CW-1) of the GMR during his cross examination, which remained uncontroverted. Learned counsel submitted that in several decisions, reliance has been placed on executive summaries of reports, wherein it is

held that in the absence of any challenge to the correctness of the executive summary "*the Court can proceed on the basis of the facts, which are brought out in the Report, and in the absence of a challenge to the same, proceed on the basis that, they are correct.*" In support of above submission, reliance was placed upon decision in ***National Highways Authority of India and Others Vs. Madhukar Kumar and Others*** 2021 SCC OnLine SC 791.

42. Next submitted that the learned Arbitral Tribunal interpreted the definition of 'by-pass' as a road meant to provide to the truckers, motorists and other users, the means to avoid the Project Highway. However, without application of mind held that an existing road will not become a by-pass because of its upkeep and maintenance as there was no intention to by-pass the Project Highway. The learned Tribunal erroneously held that strengthening and widening of alternate route is not in breach of Clause- 8.1 of the Concession Agreement or Clause- 3.2 of State Support Agreement and to be a by-pass, the road must start from a proximate point and join the other end of the same road at the proximate point. To counter this claim, the learned Single Judge held that if a connected road is modified in such a manner that it becomes capable of carrying commercial traffic, then such a road has to be considered as a by-pass.

43. Even the learned tribunal in the majority award has erroneously disregarded the DPR, which formed the basis of the bid of GMR on the ground of having Disclaimer clause. Also, the learned Arbitral Tribunal has disregarded the admission of NHAI in the mediation committee

meeting held on 15.07.2010 that the upgradation of Shahabad-Panchkula Highway has resulted in diversion of traffic.

44. It was submitted that the learned Arbitral Tribunal has without assigning any reason rendered the opinion that there was no violation of provisions of Section 8A of the National Highways Act, 1956 and it is not the case that its provisions were examined by the learned Arbitral Tribunal to return the finding that there was no reduction in overall returns earned by GMR from the toll users. Learned Senior Counsel submitted that the learned Single Judge in the impugned judgment has rightly not agreed with understanding of term 'bypass' by the learned Arbitral Tribunal, as the same was beyond the contractual covenants. Thus, it was submitted that the impugned majority Award on account of non-consideration of crucial evidence and ignorance of relevant documents on record, has rightly been set aside by the learned Single Judge and so, the impugned judgment is liable to be upheld and the appeals preferred by NHAI and State of Haryana deserve to be dismissed.

45. In rebuttal, learned Senior Counsel appearing on behalf of NHAI as well as State of Haryana reiterated that the learned Single Judge has erroneously set aside the well reasoned Arbitral Award and re-appreciated the evidence and Contract, which is impermissible under Section 34 of the Act. It was submitted that the learned Single Judge has rendered a different opinion on alternate roads and bypass as if the Court sitting in appeal, which cannot be permitted. Also submitted that the learned Arbitral Tribunal has rightly held that there was no violation of

Section 8 A of the National Highways Act, Clause 8 of the Concession Agreement and of Clause 3.2 of the State Support Agreement, as none of these provisions barred upkeep and maintenance of the existing road. Lastly submitted that it is the settled position of law that majority Arbitral Award cannot be interfered with, as the minority award is not an Award but merely an opinion.

46. Having conferred the arguments advanced by learned Senior Counsel appearing for the parties and on perusal of material placed before this Court, we find that the common issues involved in these appeals are premised upon Concession Agreement dated 16.11.2005 entered between NHAI and GMR and Tripartite Agreement dated 21.02.2006 entered amongst NHAI, GMR and State of Punjab; which was challenged before the learned Arbitral Tribunal; who rendered its majority Award dated 26.08.2020, against dissenting view of one member; which was set aside by the learned Single Judge vide judgment dated 26.09.2022; and the same is under challenge in these appeals, therefore, with the consent of learned counsel for the parties, these appeals were heard together and are being disposed of by this common judgment.

47. The undisputed facts of these appeals are that for carrying out work on NH-21 and NH-22 National Highways, bids were invited by the NHAI after providing the Detailed Project Report (DPR), which according to GMR projected the annual toll revenue to be earned from 2009 till 2024. Those bidders who opted for "negative grant" were required to pay Rs.174.752 crores to the NHAI, out of which Rs.55.921

crores was payable during construction and the remaining amount during the period of concession and the actual toll revenue was to steadily increase from Rs.18.62 crores in 2019 to Rs.41.55 cores in the year 2017. The bid offered by the GMR was accepted and a Concession Agreement dated 16.11.2005 was entered between GMR and NHAI for improvement, operation, maintenance, widening and strengthening of existing two-lane road to four lane dual carriage away from (i) km 5.735 to km 39.960 of NE-22 and (ii) km 0.00 to km 0.871 of NH-21 (Ambala-Chandigarh section) in the States of Haryana and Punjab. Besides, a State Support Tripartite Agreement dated 08.03.2006 amongst NHAI, GMR and States of Haryana as well as Punjab was also executed on 08.03.2006 and 21.02.2006 respectively.

48. According to GMR, the controversy arose when the State of Haryana allegedly in violation of Concession Agreement dated 16.11.2005 and State Support Concession Agreement dated 08.03.2006, developed, improved and strengthened the peripheral road from Shahabad to Panchkula i.e. SH-31 from Shahabad to Saha and NH-73 from Saha to Panchkula, which rendered this stretch carrying commercial traffic, which it was not capable of carrying prior to the said improvement. This resulted in becoming an alternative route and reduction of toll collection. GMR claimed that construction and strengthening of Shahabad-Panchkula highway was in breach of Clause-8.1 of Concession Agreement and Clause -3.2 of State Support Concession Agreement. GMR alleged that it had submitted the bid on negative grant model expecting that the commercial traffic would

increase on the project highway, however, with the construction of Railway Over Bridge on Saha-Shahabad of SH-31 at Kesri, including widening of the Saha-Shahabad Road and strengthening and Widening of NH-73 between Saha to Panchkula, it became an alternative competing route by-pass for commercial vehicles, which were otherwise using the Project Highway and it adversely affected toll revenue collection by GMR.

49. To ascertain the loss in toll collection, GMR engaged services of M/s ICRA Management Consultancy Service Limited and it was reported that the total traffic using at the project highway had 40% declined and for commercial / goods traffic, there was 80% decline. Similarly, on the alternative by-pass the traffic had shown growth of 25% between 2005 till 2009. Also, the traffic plying through Delhi/Haryana/Rajasthan/South India and Mohali/Kalka/Panchkula were opting alternative route instead of project highway. Accordingly, GMR made several representations and requests to NHAI seeking appropriate relief and also sought resorted to Dispute Resolution Mechanism in terms of Clause 39.1(b) of the Concession Agreement. GMR also approached State of Haryana in terms of Clause-7 of the State Support Agreement seeking compensation to the tune of Rs.1,323/- lakhs being the revenue from December, 2008 till June, 2010.

50. Finding no resolution, GMR preferred petition under Section 11 of the Arbitration and Conciliation Act, 1996 which was disposed of vide judgment dated 08.08.2012, in furtherance whereof arbitration proceedings commenced between the parties. Before the learned Arbitral

Tribunal, GMR claimed amount of Rs.86,69,37,141/- jointly from NHAI and State of Haryana.

51. The learned Arbitral Tribunal, framed the following issues for consideration:-

> *"1. Whether the acts of State of Haryana / Respondent No.2 in improving, developing and strengthening the:*
> *i) Road Over Bridge (ROB) on Saha and Shahabad of SH 31 at Kesri;*
> *ii) NH-73 between Saha to Panchkula;*
>
> *And the acts of Respondents in allowing the operation of aforesaid roads to vehicular traffic has:*
> *a) Caused the leakage/deviation of vehicular traffic (commercial & private) from the Project Highway to the aforesaid roads?*
> *b) Any Material Adverse Effect on the performance of its obligations by the Claimant under the Concession Agreement?*
> *c) The effect of causing the Claimant to violate any provisions of the Concession Agreement?*
> *d) The effect of frustrating the fundamental economics on which the Concession Agreement was executed?*
> *1. Whether Respondent No.1/NHAI is liable to determine all additional costs suffered or incurred by the Claimant due to improvement, development, strengthening and operation of the aforesaid roads on account of statutory guarantee (of interest on capital invested and reasonable return) to the Claimant under the National Highways Act, 1956?*
> *2. Whether the Respondent No.1/NHAI vide its letter dated 05.08.20l1, wrongfully rejected the request of the Claimant to determine all direct*

additional costs suffered or incurred by the Claimant due to the improvement, development, strengthening and operation of the aforesaid roads?

3. What is the percentage traffic deviation from the Project Highway (vis-a-vis the projections of NHAI in Bid Document) and consequently the direct additional costs suffered or incurred by the Claimant on account of leakage/deviation of traffic from Project Highway?

4. Whether the Claimant is entitled to award of a direction to the respondents to jointly and severally continue to compensate till the time the financial viability as statutorily guaranteed to the Claimant is restored by taking all appropriate steps?

5. Whether the Claimant is entitled to the award of interests both pendentelite and future on all amounts as may be awarded at the rate of SBI PLR +2%?

6. Whether the Claimant is entitled to an Award of costs of all proceedings including the present proceeding?

7. Whether the Claimant can claim any waiver of Negative Grant under Clause 7.1 of the State Support Agreement?

8. Whether Respondent No.1 can be made to suffer any financial and/or other liability for the alleged breach if made by Respondent No.1 in any of its obligations as defined in the Concession Agreement?"

52. To substantiate their claims before the learned Arbitral Tribunal, GMR examined two witnesses; State of Haryana examined four witnesses and NHAI chose not to lead any evidence.

53. To decide the above noted issues, the learned Arbitral Tribunal

considered Clause-8 of the Concession Agreement and Clause-3.2 of the State Support Agreement as well as other evidence on record and rendered the Arbitral Award dated 26.08.2020. The aforesaid Arbitral Award was challenged by GMR before a Single Bench of this Court under the provisions of Section 34 of the Act, which was allowed. It is against the setting aside of Arbitral Award dated 26.08.2020 by the learned Single Judge vide judgment dated 26.09.2022 that these appeals have been filed by NHAI and State of Haryana.

54. The first and foremost question for consideration by this Court is as to whether the learned Single Bench in proceedings under Section 34 of the Act, exceeded its jurisdiction by interfering into the merits of the arbitral decision or was justified in doing so.

55. Upon perusal of impugned judgment dated 26.09.2022 we find that the learned Single judge has categorically noted that under Section 34 of the Act, the Court cannot interfere with the Arbitral Award on the ground that the contractual covenants have not been interpreted correctly. However, in cases where the Arbitral Tribunal while dealing with the same contract has arrived at different conclusions, the Supreme Court has permitted to interfere. The Single Bench has relied upon decisions in ***N.H.A.I. Vs. Progressive MVR JV*** (2018) 14 SCC 688 and ***Associate Builders Vs. DDA*** (2015) 3 SCC 49.

56. On this aspect, this Court finds that the Hon'ble Supreme Court in ***National Highways No. 45E and 220 National Highways Authority of India Vs. M. Hakeem***, 2021 SCC OnLine SC 473 has held that under Section 34 of the Arbitration and Conciliation Act, 1996, Courts cannot

modify or vary an Arbitral Award. It has been further held that *"given the very limited judicial interference on extremely limited grounds not dealing with the merits of the award, the "limited remedy" under Section 34 is coterminous with the "limited right" namely, either to* ***set aside an award or remand the matter under the circumstances mentioned in Section 34 of the Arbitration Act****, 1996."*

57. Further, Supreme Court in ***Delhi Airport Metro Express Pvt. Ltd. Vs. Delhi Metro Rail Corporation Ltd.*** (2022) 1 SCC 131 has observed as under:-

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

29. Patent illegality should be illegality which goes to the root of the matter. In other words, every error of law committed by the Arbitral Tribunal would not fall within the expression 'patent illegality'. Likewise, erroneous application of law cannot be categorised as patent illegality. In addition, contravention of law not linked to public policy or public interest is beyond the scope of the expression 'patent illegality'. What is prohibited is for courts to re-appreciate evidence to conclude that the award suffers from patent illegality appearing on the face of the award, as courts do not sit in appeal against the Arbitral Award. The permissible grounds for interference with a domestic award under Section 34(2-A) on the ground of patent illegality is when the arbitrator takes a view which is not even a possible one, or interprets a clause in the contract in such a manner which no fair-minded or reasonable person would, or if the arbitrator commits an error of jurisdiction by wandering outside the contract and dealing with matters not allotted to them. An Arbitral Award stating no reasons for its findings would make itself susceptible to challenge on this account. The conclusions of the arbitrator which are based on no evidence or have been arrived at by ignoring vital evidence are perverse and can be set aside on the ground of patent illegality. Also, consideration of documents which are not supplied to the other party is a facet of perversity falling within the expression 'patent illegality'.

XXXXX

XXXXX

XXXXX

36. The Division Bench referred to various factors leading to the termination notice, to conclude that the award shocks the conscience of the court. The

discussion in paragraph 97 of the impugned judgment amounts to appreciation or re-appreciation of the facts which is not permissible under Section 34 of the 1996 Act. The Division Bench further held that the fact of the AMEL being operated without any adverse event for a period of more than four years since the date of issuance of the CMRS certificate, was not given due importance by the Arbitral Tribunal. As the arbitrator is the sole judge of the quality as well as the quantity of the evidence, the task of being a judge on the evidence before the Tribunal does not fall upon the court in exercise of its jurisdiction under Section 34. On the basis of the issues submitted by the parties, the Arbitral Tribunal framed issues for consideration and answered the said issues. Subsequent events need not be taken into account."

58. Further, the Supreme Court in ***N.H.A.I. Vs. Progressive MVR JV (Supra)*** has held as under:-

"40. Once we interpret the formula in the manner indicated above, the necessary consequences would be to hold that the Arbitral Tribunal(s) did not decide the cases with the correct application of the formula and further that the claim for price adjustment in respect of bitumen laid by the contractors was not correct. Therefore, it can be held that the award(s) are contrary to the contractual terms. At the same time, this outcome poses a dilemma inasmuch as in these cases, the Arbitral Tribunal has taken a particular view and when this was a plausible view, keeping in mind the parameters of judicial review of the Court in exercise of powers under Section 34 of the Act, normally the Court would not interfere with such awards. However, as already indicated above, such a situation has arisen because of conflicting

awards given by the Arbitral Tribunals themselves, which has provoked this Court to take a final view in the matter, necessitated by the aforesaid reason. If one takes into consideration the theory that one applies the principle mechanically i.e. that a plausible view is not to be interfered with, then it may lead to very anomalous situation. In such an eventuality, view taken by a particular Arbitral Tribunal in favour of the contractor would be upheld as plausible view. Likewise, the Court will have to uphold the view taken by a particular Arbitral Tribunal in favour of NHAI as well as a plausible view. Therefore, the purpose is to avoid such a situation which cannot be permitted as it would result in upholding both kinds of Arbitral Awards interpreting the same clause, whether they go in favour of the employer or they go in favour of the contractor. When the exercise is done keeping in view these considerations and outcome thereof is not determined, interest of justice would also demand that this result has to be applied to the pending cases, which have not attained finality. Therefore, in these peculiar circumstances, we hold that the principle of issue estoppel will apply only in those cases where matters have attained finality and no judicial proceedings are pending. In all those cases, including the present one, where awards are challenged on this particular aspect, this judgment will govern the outcome."

59. The aforesaid decisions clearly spell out that though scope of interference in an Arbitral Award by a Court under Sections 34 of the Act is limited, however, if the award suffers from perversity or patent illegality, the provisions thereof do no restrict interference by the Court

and perversity and patent illegality has to be ascertained from the root of the matter; with correct interpretation of the contract.

60. Coming to the appeals in hand, this Court finds that the arbitral proceedings have culminated into a Majority Award, whilst a member of the Arbitral Tribunal has rendered a different opinion. With regard to scope of interference by this Court under the provisions of Section 37 of the Act, we find that while sitting in appellate jurisdiction over an Arbitral Award, an independent evaluation of the merits of the Award is impermissible and this Court has to cautiously adjudge the findings returned by the Single Bench under Section 34 of the Act. Hence, the decisions in ***Anglo American Metallurgical Coal Pty. Ltd. (Supra)*** and ***Dyna Technologies Private Limited (Supra)*** are of no help to the case of appellants to submit that settled principles of law have not been followed. In our considered opinion, learned Single Judge has rightly gone into the terms of the Concession Agreement and State Support Agreement as well as into the merits of the case for just adjudication of the dispute.

61. Primarily, in these appeals, the dispute *inter se* the parties, is premised upon the Concession Agreement dated 16.11.2005 and Tripartite State Support Agreement dated 21.02.2006.

62. The Clause-8 of the Concession Agreement reads as under:-

> ***"VIII. ADDITIONAL TOLLWAY***
> *8.1 Notwithstanding anything to the contrary contained in this Agreement, any of NHAI, GOI, GOHR or GOPb may construct and operate either itself or have the same, inter alia, built and operated on BOT basis or otherwise any Expressway or other toll road, not being a by-*

pass, between, inter alia, Ambala-Chandigarh Section from i) Km 5 + 735-Km 39 + 960 of NH-22 or ii) Km 0 + 000 – Km 0 + 871 of NH-21 (the "Additional Tollway") provided that such Additional Tollway shall not be opened to traffic before expiry of 8 (eight) years from the Appointed Date.

8.2 In the event of NHAI, GOI, GOHR or GOPb, as the case may be, constructing or permitting construction of any Additional Tollway as set forth in this Clause 8.2 and the Additional Tollway is commissioned at any time after 8 (eight) years from the Appointed Date, the Concession Period shall be increased by half the number of years by which such commissioning precedes the expiry of the Concession Period.

8.3 Upon commissioning of the Additional Tollway, the Concessionaire shall continue to levy and collect the Fee under this Agreement and shall not offer any discounts or reductions in such Fee except with the prior written consent of NHAI. Provided, however, that any such discounts or reductions that the Concessionaire had offered to any general or special class of users or vehicles for a continuous period of three years prior to the commissioning of the Additional Tollway may continue in the same and manner after the commissioning of such Additional Tollway.

8.4 NHAI shall ensure that the per kilometer fee to be levied and collected from any vehicle or class of vehicles using the Additional Tollway shall at no time be less than an amount which is 133% of the per kilometer Fee levied and collected from similar vehicles or class of vehicles using the Project Highway.

VIII.A. Capacity Augmentation

Notwithstanding anything contained anywhere in this Concession Agreement contrary to the

provisions here below, the following are prescribed.

8A.1 The NHAI may, following a detailed traffic study conducted by it, at any time after 8 years following COD decide to augment/increase the capacity of the Project (capacity Augmentation) with a view to provide the desired level of service to the users of the Project Facility.

8A.2 The NHAI shall invite proposals from eligible Persons for Capacity Augmentation. The Concessionaire shall have option to submit its proposal for Capacity Augmentation.

8A.3 The bid document for Capacity Augmentation shall specify a Termination payment to be mode to the Concessionaire in case the Concessionaire chooses not to submit its proposal or fails or declines to match the preferred offer as mentioned in Cl 8A.5 below.

8A.4 In case the Concessionaire after participating in the bidding procedure, fails to give the lowest offer, the Concessionaire shall be given the first right of refusal to match the preferred offer, the Parties shall enter in to a suitable agreement supplemental to this Agreement to give effect to the changes in scope of the Project. Concession Period and all other necessary and consequential changes. In such an event the Concessionaire shall pay to the bidder who had made the lowest offer sum of Rs.10 lakhs (Ten Lakhs) towards bidding costs incurred by such bidder.

8A.5 In case the Concessionaire (i) chooses not to submit its proposal for Capacity Augmentation or (ii) is not the preferred bidder and also fails or declines to match the preferred offer, NHAI shall be entitled to terminate this Agreement upon payment to the Concessionaire of the Termination Payment.

8A.6 The Termination payment referred to in the preceding clauses 8A. 3 & 8A. 5 above shall be the amount equivalent to the amount of Termination Payment set out in CI. 32.4.2."

63. Further, Clause 3.2 of the State Support Agreement reads as under:-

"3.2 Notwithstanding anything to the contrary contained in the Agreement, GOHR may construct and operate either itself or have the same, inter alia, built and operated on BOT basis or otherwise any Expressway or the toll road, not being a bye-pass, between inter alia, Ambala-Chandigarh Section from 1) Km 5 + 735 - Km 39 + 960 of NH-21 and ii) Km 0 + 000 - Km 0 + 871 of NH-21 (the "Additional Tollway"), provided that such Additional Tollway shall not be opened to traffic before expiry of8 (eight) years from the Appointed Date."

64. The learned Arbitral Tribunal in the majority Award interpreted the afore-noted Clause-8 of the Concession Agreement and Clause-3.2 of the State Support Agreement and observed that these are *para materia* and permit the NHAI and States of Haryana and Punjab to construct and operate any expressway, provided it is not a bypass between Ambala – Chandigarh; and it is not opened to traffic for a period of 08 years from the appointed date; and if it is opened to traffic after 08 years, the same shall be subject to condition of extension of concession period and rate at which the toll has to be collected.

65. Pertinently, GMR resorted to the arbitral proceedings to indemnify the loss suffered due to diversion of commercial traffic as a result of

rendering the stretch of the Shahabad- Saha-Panchkula highway viable Alternate Competing Route (ACR) /bypass.

66. Whether or not the expressway between Ambala – Chandigarh is a bypass, the learned Arbitral Tribunal has interpreted the term by-pass, holding it to be stretch of road which circumvents the traffic congestion and slows down vehicular movement. The learned Tribunal has held that the contracts in question restrict the GoI, NHAI and State of Haryana to construct a by-pass, however, it nowhere prohibits the maintenance and upkeep of an existing road and while maintaining its upkeep, there was no intention to by-pass the Project Highway.

67. The learned Arbitral Tribunal in the majority award dated 26.08.2020 observed and held as under: -

> *"It would also mean that the bye pass is constructed with the intention of bye-passing the 'Project Road'. In as much as Clause 8 of the Concession Agreement and Clause 3.2 of the State Support Agreement both forbid the GOI, NHAI, State of Haryana and State of Punjab from constructing a road that is a Bye pass to_ the Project Road, the prohibition must of necessity apply in fixture. The contractual prohibition contained in the clauses extracted above does not in our opinion conceive of an existing State Highway or any existing National Highway becoming a 'Bye Pass' only because of its upkeep, maintenance, strengthening or widening, as is the position here. We therefore have no hesitation in holding that, on a true and correct interpretation of the two clauses, in the literal and contextual setting in which the expression 'Bye Pass' is used therein, the parties never contemplated that an*

existing Highway like the one from Shahabad to Panchkula, could also become a Bye Pass. Nor could the parties ever intend to consider the improvement, or -maintenance of an existing highway, major part whereof was a National Highway even on the date the Bids were invited being treated as a Bye Pass so as to fall foul of Clauses 8.1 and 3.2 of the Concession and State Support Agreements. Indeed, if parties ever intended to mean that an existing highway could also become a Bye Pass, by reason of its improvement or strengthening, they would have provided for such a contingency and specifically forbidden it. In as much as the provisions of clauses 8 of the Concession Agreement and Clause 3.2 of the State Support Agreements prohibited the GoI, NHAI, the State of Haryana and State of Punjab, from constructing a Bye Pass, between Ambala and Zirakpur, all that they intended to say was that no new road shall be constructed so as to provide an alternate route or a parallel road to the Project Road."

68. On this aspect, the learned Single Judge held that the expression "bypass" was not defined in Concession Agreement or Tripartite Agreement and upheld the observations made on 'bypass' defining it as a *stretch of road that circumvents a town or city with a view to avoiding traffic congestion which generally slows down the vehicular movement.* However, with regard to observation of the learned Arbitral Tribunal that for a road to be a bypass means it must have been constructed with the intention of bypassing the project road, the learned Single Judge held that there was no justification to add the word *'intention'* with the bypass, as the same is immaterial. The learned Single Judge held that what has not

been found in the agreements and contracts, cannot be read by the Court.

69. On this issue, the learned Single Judge in the impugned Judgment has observed and held as under:-

> *"17.4 (c) On a true and correct interpretation of Clause 8 of the CA and Clause 3.l of the SSA, the parties never contemplated that an existing highway could also become a bypass. Nor could the parties ever intend to consider the improvement, or maintenance of an existing highway, a major part of which was a National Highway even on the date of invitation of bids, being treated as a bypass within the meaning of Clauses 8.1 and 3.2 of the CA and SSA respectively. Had the parties so intended, the CA and SSA would specifically have so provided.*
> *(d) All that Clauses 8 of the CA and 3.2 of the SSA intended to say was, therefore, "that no new road shall be constructed so as to provide an alternate route or a parallel road to the Project Road".*

70. The learned Single Judge has further held as under:-

> *"27.7.1 'Bypass' stands defined, in the impugned Arbitral Award, as "a stretch of road that circumvents a town or city with a view to avoiding traffic congestion which generally slows down the vehicular movement". There are, therefore, only two ingredients of this definition, viz. that the bypass must "circumvent a town or city" and enable commuters to use the bypass to "avoid traffic congestion". The definition does not incorporate any element of "intention". It does not state that the bypass must be a "new road". It does not require the bypass to start and end at points proximate to the road which is bypassed. The learned Arbitral Tribunal has itseif held that*

a road which is meant to provide, to truckers, motorists and other users thereof, the means to avoid the project road, would amount to a bypass. All that the learned Arbitral Tribunal was required to do, therefore, was to examine whether, by its act, the State of Haryana had brought into existence a road which provided, to truckers, motorists and other users of the road, a means to avoid the project road. This, in my understanding, would include a road which, thitherto, was incapable of carrying commercial (and/or other) traffic and which, by the changes brought about by the activities of the State Governments, was rendered capable of doing so."

71. This Court shall now proceed to examine as to whether or not the Tepla-Banur-Kharar section of State Highway and Lehli-Banur road by the State of Punjab were alternative roads or bypass, within the meaning of Clause 8.1of the Concession Agreement and Clause 3.2 of the State Support Agreement.

72. In the arbitral award, the Arbitral Tribunal on the plea of appellants herein that Clause-8.1 of the Concessionaire Agreement though stipulated that no expressway or other toll road shall be built or opened before expiry of 08 years from the appointed date, held that as such no highway has been built. Learned Arbitral Tribunal held that a bypass would actually and contextually imply a road that is meant to provide to truckers, motorists and other users of the road, the means to avoid the Project road between Ambala and Zirakpur. Thereby, the contention of GMR that maintenance of NH-73 and SH-31 by the State of Haryana resulted in becoming bypass, was rejected. It is further held

by the learned Arbitral Tribunal that for being a bypass, it has to start from a point proximate to the Project Highway and join the other end of the same road at a similar proximate point, whereas the pre-existing road at SH-31, NH-73 and NH-7 took off from Shahabad, which was 23 kms away from the starting point of project highway and did not join the project highway at Chandigarh, but ended at Panchkula. Further held that the road connecting Shahbad and Panchkula was not narrow, muddy or unsteady and it was a State Highway for 17 Km and a National Highway for remaining 57 km. The Arbitral Tribunal also held that on the day execution of the Agreement, NH-73 and SH-31 were both existing highways and were good for commercial traffic even before construction of ROB at Kesri or the undertaking of repair or maintenance work.

73. The learned Single Judge of this Court considered Para-24 of the evidence of CW-1 (Venkata Subba Rao), wherein it is stated that due to improvement, development and strengthening of SH-31 at Kesri and widening of NH-73, between Saha to Panchkula, the commercial vehicles started opting to ply on these roads, thereby avoiding Project Highway, avoiding and bypassing the toll plaza. This witness in his cross-examination has categorically stated that the commercial traffic which was earlier using the Project Highway, diverted to the bypass, starting at the junction of SH-31 and NH-1. Besides, learned Single Judge also considered the amended written statement dated 28.05.2015 filed by the State of Haryana wherein it is stated that earlier the stretch from Shahabad to Saha was having very bad condition and was got repaired for convenience of the traffic.

74. The learned Single Judge has also relied upon letter dated 30.06.2010 written by the Regional Officer, NHAI to the General Manager (Technical), P & H, NHAI; the minutes of mediation meeting dated 15.07.2010 between NHAI and GMR; letter dated 26.08.2010 from the CGM-cum- Regional Officer, NHAI, Chandigarh to the Member (Project), NHAI and the IMACS reports dated 29.09.2009 and December, 2012, to hold that these have been ignored by the learned Arbitral Tribunal, which has vitiated the impugned Award in its entirety.

75. Relevantly, before this Court State of Haryana has taken a stand that for being Highway, it has to begin and end on the Project Highway and therefore, the Alternate Road cannot be said to be a By-Pass as stipulated in Clause 3.2 of the SSA and Clause 8.1 of the Concession Agreement.

76. On this aspect it is relevant to produce extract of questions put to witnesses of State of Haryana during their cross-examination, which have been answered as under:-

(i) **Mr. Sandeep Singh, Sub Divisional Engineer**

Q 125 Is it correct that a by-pass is generally constructed to avoid a particular route?.

A. Yes. It is correct. By pass is constructed to avoid a particular route or a stretch of road or a village or a town.

(ii) **Dr. Sanjiv Kumar Aggarwal**.

Q.14 Which road did you identify to be the alternate road?

A. There are in fact two roads. One is from Ambala-Tepla-

Banur-Zirakpur to Chandigarh and the other one is Ambala- Shahbad-Saha-Panchkula-Zirakpur to Chandigarh.

Q24 Could you tell this Hon'ble Tribunal that if the traffic coming from Delhi side can opt to Pannchkula either from Shahbad Junction to Saha to reach Panchkula or through the Project Highway. Is that correct?

A. Yes. It is correct depending on the personal choice of the driver/passenger.

(iii) **Mr. Vishal Sharma, Executive Engineer**

Q53 Is it correct that a vehicle coming from Delhi and proceeding towards Panchkula has the option of avoiding NH-
1 and NH-22 at Shahabad Junction and proceed on NH-73 via SH-31 i.e. Shahabad-Saha and move towards Panchkula?

A. Vehicle has the option based on the perception of the driver of the vehicle.

77. The deposition of afore-noted witnesses of State of Haryana clearly shows that there has been traffic diversion on the project Highway. Accordingly, the opinion rendered by the learned Single Judge that the contractual terms which are entered into a commercial contract, manifest the intention of the parties to the contract, is justified. The court arbitrating a dispute or sitting in appeal, cannot presume the "intention of the parties" and shall go by the terms and specifications mentioned in the agreement for the purpose of adjudication of the disputes. As in the present case, Clause 8.1of the Concession Agreement and Clause 3.2 of

the State Support Agreement described the terms on which Project Highway has to run and once it has been agreed that NHAI, Government of India, Government of Haryana and Government of Punjab, shall not open any other alternative toll way for a period of 08 years, the parties were bound to adhere to it.

78. The undisputed fact is that SH- 31 (Shahabad-Saha) and NH-73 (Saha-Panchkula) has been widened from 5.5 metres to 7.5/10 metres including construction of RoB at Kesri. As per IRC 64-1990, a road with 5.5 metres paved width, has a Design Service Volumes (Design capacity) of 6000 PCU/day and that a two-lane road, with paved width of 7m, has Design Capacity of 15000 PCU per day which is 250% increase in capacity. Even bare reading of Clause 3.2 of the State Support Agreement and Clause 8.1 of the Concession Agreement shows that for being a bypass, it must begin with the start point of actual road, and if it is interpreted in the manner as has been claimed by State of Haryana, it would defeat the intention of prohibition contemplated in these Agreements.

79. With regard to diversion of traffic and loss suffered by GMR, learned Single Judge relied upon evidence of CW-1, specifically Paras-27 & 28 of the affidavit in evidence, wherein it is held that during building process of Project Highway, NH-73 was a single lane road, without good surface quality, which was connected to NH-j at Shahbad and traffic was diverted. Also, that the SH-31 was a single lane road, however, during the bid stage it undergone substantial improvement with the development of RoB at Kesri.

80. In the light of above, in the pertinent opinion of this Court, with the development, improvement, widening and construction of the NH-73 and SH-31 including the construction of RoB, the entire stretch (Shahabad-Saha- Panchkula) has become viable for heavy commercial traffic and became an alternate road and resulted in substantial diversion of traffic from the Project Highway, affecting the toll revenue. Also, the construction of RoB at Kesri between Shahabad-Saha provided the missing link made the Shahabad-Saha- Panchkula stretch an alternative for the commercial traffic which earlier used Project Highway.

81. To substantiate its claim of diversion of traffic to the alternate route from the Project Highway, GMR obtained services of IMACS, an independent Agency, specialized in traffic study which submitted its report, which corroborated the claim of GMR in respect of diversion of traffic from Project Highway to Shahabad-Saha-Panchkula Road. CW-1 examined before the learned Tribunal and in his affidavit evidence has claimed that he was part of 2009 study of IMACS report, which is relied upon in 2012 report and the said investigation was carried out with the permission of NHAI. These reports have been denied by NHAI and it is pleaded before this Court on the ground that GMR had failed to produce the original reports by IMACS and placed only unsigned executive summaries of the report, wherein the methodology of survey and estimates conducted by the agency, was not clear. The learned arbitral has not considered these reports having no evidentiary value and being in the nature of executive summaries and not the entire reports.

82. With regard to report of IMACS, the learned Single Judge has

opined that :-

> *"The learned Arbitral Tribunal completely ignored the two reports of IMACS, consequent to the studies conducted in 29.09.2009 and December, 2012 respectively, on the ground that GMR bad merely filed executive summaries of the reports and had not filed the complete reports. CW-1, in response to question no. 69 put to him, specifically confirmed that the executive summary which had been placed on record was an executive summary of the actual report of IMACS and undertook, should the learned Arbitral Tribunal require, to file the complete report. The learned Arbitral Tribunal never called upon GMR to file the complete report of IMACS. Inasmuch as the executive summary of the reports stood proved by the deposition of CW-1, in response to a query put to him in cross-examination, it was not open to the learned Arbitral Tribunal to reject the executive summary on the ground that it was unsigned or that the author of the summary had not come into the witness box. The learned Arbitral Tribunal has failed to take note of the aforesaid question no. 69 put to CW-1 and his response thereto. There are several decisions of the Supreme Court and other Courts in which the Courts have placed reliance on executive summaries of reports which were filed before them. The need to cite the said decisions is, however, obviated, as this objection of NHAI stands covered by the recent judgement of the Supreme Court in N.H.A.I. v. Madhukar Kumar [2021 SCC OnLine SC 791]. In that case, too, the entire DPR had not been produced before the Court, and what was placed was only an executive summary. The Supreme Court held that, in the absence of any challenge to the correctness of the executive summary, "the Court can proceed on the basis of the facts, which are brought out in the Report, and in the absence of a challenge to the same, proceed*

> *on the basis that, they are correct." Reliance was, in fact, placed, by the Supreme Court, in that case, on the executive summary of the DPR, even by quoting, in extenso, the relevant portions thereof. The learned Arbitral Tribunal could not, therefore, in the present case, have brushed aside the executive summary of the report, consequent to the study conducted by IMACS as of no evidentiary value whatsoever."*

83. At this juncture, it is relevant to note that at the time of inviting bid for the Project Highway, a Detailed Project Report prepared by M/S CES, with regard to scope of work, traffic studies, economic viability, financial viability etc. was enclosed, which also contemplated the risks factors involved in the project.

84. Next, the learned Tribunal relied upon Item 14 of the table 8.3 in the tender documents as well as Disclaimer contained in the tender documents and Request for Proposal to hold that GMR was required to undertake its own due diligence exercise and would have been aware of the plan to construct the ROB at Kesri on SH-31 which was sanctioned in 2004 and should have sought relevant information in the pre-bidding meeting held on 15.05.2005 and 07.06.2005.

85. There is no doubt that before bidding for the Project Highway, GMR could have conducted its own study, however, it is not the case of GMR that the traffic flow projected in DMR at the time of bidding attached by the NHAI was incorrect or that there was any risk for diversion of traffic to an alternate route at the time of the bid. The fact remains that there has been diversion of traffic off the Project Highway to the Shahabad-Saha-Panchkula section, with the admitted widening,

strengthening and improvement of the Shahabad-Saha Panchkula Section.

86. Another plea taken by NHAI and State of Haryana that the strengthening of Shahabad-Saha-Panchkula section was well within the knowledge of public domain, the GMR has pleaded that the detailed DPR annexed with the tender documents, did not mention it and infact, the bids for Project Highway were submitted in June, 2005 and no document has been brought on record that construction on Shahabad-Saha-Panchkula section had commenced prior thereto.

87. Moreover, the learned Single Judge in the impugned judgment has taken note of various communications between GMR and NHAI and also within NHAI, being letter dated 24.06.2010 written by Project Director of NHAI; Minutes of the joint meeting held on 15.07.2010 and letter dated 26.08.2010 by the Regional Officer of NHAI to substantiate diversion of the traffic from the Project Highway to the alternate routes/competing roads as well as the consequent loss caused to the GMR.

88. So far as the plea of NHAI and State of Haryana as well as view of learned Arbitral Tribunal that GMR had sought certain documents after about seven years of commencement of arbitral proceedings and has therefore rightly not considered these documents as it would amount to reopening of arbitral proceedings, the learned Single Judge has noted that NHAI had failed to produce the crucial documents despite repeated directions by the Arbitral Tribunal vide order dated 14.03.2013; 24.07.2013; 29.03.2014; 13.092014. In our considered opinion, first;

NHAI in complete defiance of directions of the Arbitral Tribunal did not furnish the documents and thereafter, even Arbitral Tribunal at the time of rendering the Award did not consider the vital documents, which according to GMR were probative to prove its case. During the course of hearing, attention of this Court was drawn to letter dated 24.06.2010 written by Project Director of NHAI to the CGM-Cum-Regional Officer of NHAI; minutes of joint meeting held on 15.07.2010 and letter dated 26.08.2010 written by CGM-Cum-Regional Officer of NHAI to the Project Director, to show admission of NHAI with regard to diversion of the commercial traffic from the project highway to the alternative routes.

89. The learned Single Judge has noted that it was never pleaded by NHAI that those documents were not available and yet, the learned tribunal failed to draw an adverse inference. Accordingly, in the opinion of this Court, whether those documents were 'internal communications' and had any evidentiary value that could be ascertained only after those were produced in the Arbitral Proceedings and an opinion thereon would be rendered. Non production of documents by the NHAI has led to denial of an opportunity to the GMR to establish that officers of NHAI had acknowledged the fact that with the widening and strengthening of alternate route had resulted in becoming by-pass to the project highway.

90. The NHAI has pleaded that with regard to longer distance and viability of saving Rs.140 has not been touched upon by the learned Single Judge and, therefore, the conclusion of the learned Arbitral Tribunal as well as Award should survive. On this aspect, this Court finds that the aspect with regard to basic rate of concession, levy of fee or

collection of toll tax by the GMR are governed on the period and flow of traffic and only after it is determined as to whether with the strengthening and maintenance of alternative road, has affected the rights of GMR that these questions required to be answered. Moreover, the learned Arbitral Tribunal did not take into consideration the report of IMACS in corroboration with the evidence of CW1 to determine whether upgradation and strengthening of Shahabad-Panchkula highway had resulted in the creation of a bypass and diversion of traffic.

91. In view of the aforesaid, this Court finds that there is no violation of provision of Section 34 of the Act by the learned Single Judge, who has rightly interfered with the merits of the case on the basis of evidence on record. In our considered opinion the learned Single Judge has rightly set aside the impugned Arbitral Award and remanded the case back to the arbitral Tribunal to adjudicate the dispute in the light of documents, which construe an imperative part of evidence.

92. In view of above-said, these appeals against the judgment dated 26.09.2022 passed by the learned Single Judge with pending applications, if any, are accordingly dismissed with no order as to costs.

(SURESH KUMAR KAIT)
JUDGE

(NEENA BANSAL KRISHNA)
JUDGE

SEPTEMBER 20, 2023/r