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

Date of decision: 03rd JULY, 2023

IN THE MATTER OF:

\+ **FAO (OS) (COMM.) 32//2022and C.M. No. 7032/2022**

NATIONAL HIGHWAYS AUTHORITY OF INDIA .....Appellant
Through: Mr. Manish K. Bishnoi and Mr. Nirmal Prasad, Advocates.

versus

GVK JAIPUR EXPRESSWAY PRIVATE LIMITED ....Respondents
Through: Mr. Samudra Sarangi, Ms. Shruti Raina and Ms. Abhilasha Khanna, Advocates.

CORAM:
HON'BLE THE CHIEF JUSTICE
HON'BLE MR. JUSTICE SUBRAMONIUM PRASAD

JUDGMENT

SATISH CHANDRA SHARMA, CJ

1. The instant appeal, under Section 37 of the Arbitration and Conciliation Act (*hereinafter referred to as* "**the Arbitration Act**"), has been filed against Judgment dated 29.10.2021 ("**Impugned Judgment**") passed by the Learned Single Judge in O.M.P. (Comm.) No. 377/2020 filed by the Respondent under Section 34 of the Arbitration Act challenging the arbitral award dated 02.11.2019. The Ld. Single Judge *vide* the Impugned Judgment has set aside the arbitral award on the ground that the same is contrary to the express terms of the contract.

2. Shorn of details, the brief facts leading up to the filing of the present appeal are as under:

i. The Appellant herein i.e. the National Highways Authority of India (**NHAI**), on 03.05.2000 issued notice inviting proposals for shortlisting of bidders for a project described as "widening of existing 2-lanes to 6-lanes divided carriageway facility including rehabilitation of existing 2-lanes from Km 273.500 to Km 363.885: on Jaipur-Kishangarh section of NH-8 in Rajasthan on Build Operate and Transfer (BOT) basis" (*hereinafter referred to as* "**the Project**").

ii. The bid of the Respondent, which is a consortium of M/s GVK International NV and M/s B Seenaiah & Company (Projects) Ltd. was accepted by the Appellant by a letter of acceptance dated 01.03.2002.

iii. On 08.05.2002, the Respondent entered into Concession Agreement in respect of the Project with the Appellant. It is stated that as per Schedule 'C' of the Concession Agreement, the Respondent constructed the Toll Plazas at Km. 286/450 to 286/950 (Jaipur End) and Km 260/200 to Km 360/700 (Kishangarh End).

iv. The Provisional Completion of the said project was achieved on 09.04.2005 and Final Completion Certificate was issued on 20.10.2005 by the Independent Consultant (**IC**) and thereafter the project has been in the Operation & Maintenance Phase. It is stated that while the Completion Certificate was issued, the project was not completed as the Respondent was required to construct the ETC system in one toll lane in each direction.

v. On 17.03.2010, a project review meeting was held regarding the issue of increased traffic at the Jaipur Toll Plaza and the

Respondent was directed to prepare and submit a proposal for construction of additional toll lanes at the toll plaza.

vi. On 22.03.2010, the Respondent submitted its proposal wherein it stated that the project would require additional facilities and there should be a change in scope of the Concession Agreement as per Good Industry Practices which reads as under:

> *"Sub.: Jaipur-Kishangarh Expressway (NH-8) BOT Project.*
> *Scope for additional requirements of Facilities/Underpasses/Toll Collection Booths on Jaipur-Kishangarh Expressway (NH-8) BOT Project.*
>
> *Dear Sir,*
>
> *With reference to the above cited subject and looking at the rate of growth of traffic against project, we are of the opinion that in coming future i.e. by year 2013; this project would be requiring additional facilities, other than as mentioned in Concession Agreement of project, mainly because of extension of SEZ's, new areas of development along the Highway, Extension/increase in population of habitant areas(Urban Areas).*
>
> *In lieu of the above said, we herewith submit a proposal for review & suggestions on the additional facilities that would be required as this augmentation of facilities shall initiate a change of scope order as per Good Industry Practices.*
>
> *Thanking you & assuring you the best of services at all times,*
>
> *Yours faithfully,*
>
> *P.K. Reddy,*
> *GM-Maintenance"*

vii. On 03.07.2012, the IC recommended to the Project Director of the Appellant for construction of additional toll lanes/additional toll collection facilities to reduce waiting time of vehicles as per Article XVII of the Concession Agreement. It is stated that the Respondent disagreed with the aforesaid opinion of the Independent Consultant and that construction of additional toll lanes as additional facilities would be contrary to the Concession Agreement.

viii. Thereafter, on 31.07.2012, the IC requested the Respondent to provide details of the land proposed to be acquired along with scientific plan, indicating the locations of existing toll plazas, right of way and proposed additional toll lanes.

ix. The Respondent, *vide* letter dated 25.09.2012 provided the cost estimate, Draft 3-A Notification, Layout Plan and land acquisition plans and requested the Appellant to issue Change of Scope Notice. The Appellant, on the same day asked the Independent Consultant to examine the feasibility of the submitted estimate and to submit the report with comments as per the Concession Agreement.

x. The IC *vide* a letter dated 26.10.2012 submitted its comments on the Respondent's proposal for constructing additional toll lanes and suggested implementation of measures to improve the efficiency of the tolling system. The relevant extracts of the said letter are reproduced as under:

> *"(i) In first phase, construction of two additional toll lanes at each toll plaza within the available ROW should be permitted for which change of scope notice for*

additional work of Rs. 5.43 crores is required to be issued under Clause 17. 2 of the Concession Agreement.

(ii) Land acquisition proceedings for construction of additional toll lanes (15+ 1+ 1) for entry side and (9+ 1+ 1) on exist side at each toll plaza (Jaipur and Kishangarh) as proposed by the Concessionaire in his report should be commenced.

(iii) As the land acquisition proceedings come to final stage decision for construction of additional toll lanes as per requirement of year 2018 or 2023 may be taken and change of scope notice may be used accordingly. "

xi. It is stated that representations were made by Kishangarh Marble Association regarding the traffic congestion problem and on consideration of the same, the IC recommended construction of two additional lanes on each toll plaza and for issuance of change of scope notice to the Claimant under Clause 1.2 of the Concession Agreement and for initiating land acquisition proceedings for construction of additional toll lanes.

xii. There was disagreement between the Appellant and the Respondent whether the construction of new toll lanes at the Toll Plaza would constitute change of scope and whether the obligations of the Appellant were limited to making available additional land or would it also include reimbursement of cost associated with construction of the proposed additional lanes. Amidst this disagreement, the Respondent decided to proceed with the construction of two additional toll lanes at each toll plaza in the available Right of Way (**ROW**) and informed the Petitioner that it

had awarded the work of construction by placing Work Orders on M/s Arham Infra Build Ltd. and M/s Pinkcity Steels Pvt. Ltd.

xiii. Thereafter, on 16.04.2014 and 05.07.2014, the Respondent wrote to the Appellant, reiterating its demands for compensation for work awarded.

xiv. Unable to settle the dispute amicably, the dispute arising between the parties herein was referred to arbitration. The Respondent filed a Statement of Claim, claiming an amount of Rs. 5,43,07,356/- along with 18% interest per annum from 18.11.2014 till 31.10.2017. It also claimed pendent lite interest at the rate of 18% from 01.11.2017 till date of the arbitral award and further future interest rate of 18% per annum from date of award till date of payment or realisation.

xv. The Arbitral Tribunal, by majority, rejected the claims of the Respondent. The majority held that the Operation and Maintenance of the Project Highway was an integral part of the Respondent/Claimant's obligation under the Concession Agreement, and as per the same the Respondent/Claimant was required to undertake all its obligations at its own risk. It also held that the Appellant was not required to issue a 'Change of Scope' order for construction of the additional lanes and the NHAI was justified in not issuing the same under the Concession Agreement. The Arbitral Tribunal also held that in view of its finding that the 'change of scope' order was not necessary as the construction of the additional toll lanes was not outside the scope of the work project; it was not necessary to decide the question, whether the Respondent/Claimant was entitled to reimbursement of the cost

quantified at Rs. 5,43,07,356/-. It further held that even if the construction of additional lanes was not covered under this obligation of Operation and Maintenance phase, the Respondent/Claimant is not entitled to compensation as it had not furnished any bill of expenses to NHAI and the same could not be verified or approved by NHAI. The majority also rejected the Respondent/Claimant's claim for compensation under Section 70 of the Indian Contract Act, 1882.

xvi. The Respondent-herein challenged the arbitral award under Section 34 of the Arbitration Act, in the underlying proceedings before the Learned Single Judge. The Ld. Single Judge *vide* judgment dated 29.10.2021 set aside the impugned award on the ground that the same is contrary to the terms of the contract as it ignores Clause 18.4 of the Concession Agreement.

xvii. Aggrieved with the aforesaid decision, the Appellant has filed the present appeal under Section 37.

3. Mr. Manish K. Bishnoi, learned Counsel for the Appellant, submits that the Impugned Judgement is erroneous as the arbitral award dated 02.11.2019 is well reasoned, contains no perverse findings and presents a plausible view, therefore it did not warrant any interference under Section 34 of the Arbitration Act. He states that the Impugned Judgment notes that the interpretation as given by the majority of the arbitral tribunal is a plausible opinion, however the Ld. Single Judge has still set aside the arbitral award. He relies upon the decision of the Apex Court in Dyna Technologies (P) Ltd. v. Crompton Greaves Ltd.,**(2019) 20 SCC 1** in support of this contention.

4. Mr. Bishnoi submits that the Ld. Single Judge has set aside the arbitral award on the ground that the Respondent-herein's contention pertaining to the interpretation of Clause 18.4 of the Concession Agreement has not been considered in full. He submits that the interpretation of Clause 18.4 of the Concession Agreement as given by the Ld. Single Judge is erroneous as the said clause is applicable only if the said maintenance is not part of the project. He submits that after the arbitral tribunal has concluded that the construction of additional toll lanes were a part of the project, it is not necessary to determine the Respondent's contention pertaining to Clause 18.4 of the Concession Agreement.

5. It is submitted by Mr. Bishnoi that the law pertaining to the exercise of jurisdiction under Section 34 of the Arbitration Act is well settled. He submits that re-appreciation or re-agitation of evidence or facts is not contemplated under the Arbitration Act. He relies upon the decision of the Hon'ble Supreme Court in Delhi Airport Metro Express (P) Ltd. v. DMRC, **(2022) 1 SCC 131** in support of his contention.

6. Mr. Samudra Sarangi, learned advocate for the Respondent, submits that the scope of interference by courts in Section 37 of the Arbitration Act is narrower than that of a Court exercising jurisdiction under Section 34 of the Arbitration Act. He submits that the limited query before a Court hearing an appeal under Section 37 of the Arbitration Act is to determine whether the Ld. Single Judge through its judgment has not exceeded its powers under Section 34 of the Arbitration Act. He submits that the Appellant has failed to make out a case that warrants interference with the Impugned Judgment by this Court in exercise of its powers under Section 37 of the Arbitration Act.

7. Mr. Sarangi submits that the Ld. Single Judge has proceeded with utmost caution in setting aside the arbitral award. He submits that the Ld.

Single Judge has correctly observed that the failure of the majority award in considering Clause 18.4 of the Concession Agreement is a patent illegality.

8. It is submitted by Mr. Sarangi that the majority award is contrary to the fundamental policy of Indian law as *firstly*, it adopted an interpretation of Clause 18.1 of the Concession agreement which no fair-minded or reasonable person would come to, and, *secondly*, the majority award fails to consider Clause 18.4 of the Concession Agreement. He places reliance upon the decision of this Court in Bentwood Seating System P Ltd. v. Airport Authority of India,**2021 SCC OnLine Del 3989** in support of his contention.

9. Heard learned Counsels for the parties and perused the documents on record.

10. The short question which arises in the instant appeal before this Court is whether the construction of two additional lanes falls within the scope of the contract or not and whether the award is vitiated because of non-consideration of Clause 18.4 of the Concession Agreement.

11. The scope of interference by a Court exercising its jurisdiction under Section 37 of the Arbitration Act is well settled. The Hon'ble Supreme Court, in the case of MMTC Ltd. v. Vedanta Ltd., **(2019) 4 SCC 163**, has held that an interference under Section 37 of the Arbitration Act cannot undertake an independent assessment of the merits of the arbitral award. In the context of an appeal arising from an order passed under Section 34 of the Arbitration Act, the Appellate Court under Section 37 of the Arbitration Act must only determine, that the Section 34 Court has not exceeded the scope of its jurisdiction under the provision. The relevant excerpt from the aforesaid judgment reads as under:

> ***"14.As far as interference with an order made under Section 34, as per Section 37, is concerned, it cannot***

> ***be disputed that such interference under Section 37 cannot travel beyond the restrictions laid down under Section 34. 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 Section 34 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 Section 34 and by the court in an appeal under Section 37, this Court must be extremely cautious and slow to disturb such concurrent findings."* (emphasis supplied)

12. The aforesaid principle has been recently reiterated in Haryana Tourism Ltd. v. Kandhari Beverages Ltd., **(2022) 3 SCC 237**, wherein the Court has held as under:

> *"**9.** As per settled position of law laid down by this Court in a catena of decisions, an award can be set aside only if the award is against the public policy of India. The award can be set aside under Sections 34/37 of the Arbitration Act, if the award is found to be contrary to: (a) fundamental policy of Indian law; or (b) the interest of India; or (c) justice or morality; or (d) if it is patently illegal. None of the aforesaid exceptions shall be applicable to the facts of the case on hand.* ***The High Court has entered into the merits of the claim and has decided the appeal under Section 37 of the Arbitration Act as if the High Court was deciding the appeal against the judgment and decree passed by the learned trial court. Thus, the High Court has exercised the jurisdiction not vested in it under Section 37 of the Arbitration Act.*** *The impugned judgment and order [Kandhari Beverages Ltd. v. Haryana Tourism Ltd., 2018 SCC OnLine P&H 3233] passed by the High Court is hence not sustainable."* (emphasis supplied)

13. A reading of the aforestated decision of the Hon'ble Supreme Court clarifies, that in the context of an order challenging an order passed under Section 34 of the Arbitration Act, a Court in exercise of its appellate powers under Section 37 of the Arbitration Act is limited to what has been conferred by Section 34 of the Arbitration Act. The Court cannot re-appreciate evidence or enter into the merits of an arbitral award but can only adjudicate upon the order impugned in the proceedings to determine whether the Section 34 Court has exceeded its jurisdiction under Section 34 of the Arbitration Act or not.

14. In the instant case, the Ld. Single Judge has set aside the arbitral award dated 02.11.2019 under Section 34 of the Arbitration Act on the ground that the arbitral award is that the said award has failed to consider Clause 18.4 of the Concession Agreement entered into between the parties. It has been the case of the Claimant/Respondent-herein that the non-consideration of Clause 18.4 of the Concession Agreement by the Arbitral Tribunal in its majority award is patently illegal and is in contravention of the fundamental policy of Indian law. In order to determine whether the Ld. Single Judge has correctly set aside the award or not, it is apposite to understand how Courts have interpreted the term "patent illegality" and "fundamental policy of Indian law" as found under Section 34 of the Arbitration Act. The law in this regard has been well settled by the Apex Court in Associate Builders v. DDA,**(2015) 3 SCC 49** where it interprets the term "fundamental policy of Indian law" as under:

> *18. In Renusagar Power Co. Ltd. v. General Electric Co. [Renusagar Power Co. Ltd. v. General Electric Co., 1994 Supp (1) SCC 644] , the Supreme Court construed Section 7(1)(b)(ii) of the Foreign Awards (Recognition and Enforcement) Act, 1961:*

"7. Conditions for enforcement of foreign awards.— *(1) A foreign award may not be enforced under this Act—*

***

(b) if the Court dealing with the case is satisfied that—

***

(ii) the enforcement of the award will be contrary to the public policy."

In construing the expression "public policy" in the context of a foreign award, the Court held that an award contrary to

(i) The fundamental policy of Indian law,

(ii) The interest of India,

(iii) Justice or morality,

would be set aside on the ground that it would be contrary to the public policy of India. It went on further to hold that a contravention of the provisions of the Foreign Exchange Regulation Act would be contrary to the public policy of India in that the statute is enacted for the national economic interest to ensure that the nation does not lose foreign exchange which is essential for the economic survival of the nation (see SCC p. 685, para 75). Equally, disregarding orders passed by the superior courts in India could also be a contravention of the fundamental policy of Indian law, but the recovery of compound interest on interest, being contrary to statute only, would not contravene any fundamental policy of Indian law (see SCC pp. 689 & 693, paras 85 & 95).

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> *27. Coming to each of the heads contained in Saw Pipes [(2003) 5 SCC 705 : AIR 2003 SC 2629] judgment, we will first deal with the head "fundamental policy of Indian law". It has already been seen from Renusagar [Renusagar Power Co. Ltd. v. General Electric Co., 1994 Supp (1) SCC 644] judgment that violation of the Foreign Exchange Act and disregarding orders of superior courts in India would be regarded as being contrary to the fundamental policy of Indian law. To this it could be added that the binding effect of the judgment of a superior court being disregarded would be equally violative of the fundamental policy of Indian law.*

15. Following the aforesaid judgment, the Hon'ble Supreme Court in Ssangyong Engineering and Construction Company Limited v. National Highways Authority of India (NHAI), **(2019) 15 SCC 131** has interpreted "fundamental policy of Indian law" and "patent illegality" as under:

> *"**34. What is clear, therefore, is that the expression "public policy of India", whether contained in Section 34 or in Section 48, would now mean the "fundamental policy of Indian law" as explained in paras 18 and 27 of Associate Builders[Associate Builders v. DDA, (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204] i.e. the fundamental policy of Indian law would be relegated to "Renusagar" understanding of this expression.** This would necessarily mean that Western Geco [ONGC v. Western Geco International Ltd., (2014) 9 SCC 263 : (2014) 5 SCC (Civ) 12] expansion has been done away with. In short, Western Geco [ONGC v. Western Geco International Ltd., (2014) 9 SCC 263 : (2014) 5 SCC (Civ) 12] , as explained in paras 28 and 29 of Associate Builders [Associate Builders v. DDA, (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204] , would no longer obtain, as under the guise of interfering with an award on the ground that the arbitrator has not adopted a judicial approach, the Court's intervention would be on the*

merits of the award, which cannot be permitted post amendment. However, insofar as principles of natural justice are concerned, as contained in Sections 18 and 34(2)(a)(iii) of the 1996 Act, these continue to be grounds of challenge of an award, as is contained in para 30 of Associate Builders [Associate Builders v. DDA, (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204] .

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36. Thus, it is clear that public policy of India is now constricted to mean firstly, that a domestic award is contrary to the fundamental policy of Indian law, as understood in paras 18 and 27 of Associate Builders [Associate Builders v. DDA, (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204] *, or secondly, that such award is against basic notions of justice or morality as understood in paras 36 to 39 of Associate Builders [Associate Builders v. DDA, (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204] . Explanation 2 to Section 34(2)(b)(ii) and Explanation 2 to Section 48(2)(b)(ii) was added by the Amendment Act only so that Western Geco [ONGC v. Western Geco International Ltd., (2014) 9 SCC 263 : (2014) 5 SCC (Civ) 12] , as understood in Associate Builders [Associate Builders v. DDA, (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204] , and paras 28 and 29 in particular, is now done away with.*

37. Insofar as domestic awards made in India are concerned, an additional ground is now available under sub-section (2-A), added by the Amendment Act, 2015, to Section 34. Here, there must be patent illegality appearing on the face of the award, which refers to such illegality as goes to the root of the matter but which does not amount to mere erroneous application of the law. In short, what is not subsumed within "the fundamental policy of Indian law", namely, the contravention of a statute not linked to public policy or public interest, cannot be brought in

by the backdoor when it comes to setting aside an award on the ground of patent illegality*.*

38. Secondly, it is also made clear that reappreciation of evidence, which is what an appellate court is permitted to do, cannot be permitted under the ground of patent illegality appearing on the face of the award.

39*. To elucidate, para 42.1 of Associate Builders [Associate Builders v. DDA, (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204] ,* ***namely, a mere contravention of the substantive law of India, by itself, is no longer a ground available to set aside an arbitral award. Para 42.2 of Associate Builders [Associate Builders v. DDA, (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204] , however, would remain, for if an arbitrator gives no reasons for an award and contravenes Section 31(3) of the 1996 Act, that would certainly amount to a patent illegality on the face of the award.***

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

(emphasis supplied)

16. The above decisions have been recently followed in Delhi Airport Metro Express (P) Ltd. v. Delhi Metro Rail Corporation Limited, **(2022) 1 SCC 131**, wherein the Court 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.*
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> ***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 reappreciate 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".*
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> (emphasis supplied)

17. A reading of the aforesaid decision clarifies that "fundamental policy of Indian law" means contravention of a law protecting national interest or disregarding orders of a superior court. It also clarified that mere contravention of a statute, if the same does not affect the protection of national interest, would not constitute as a violation of "fundamental policy of Indian law" under Section 34(2) of the Arbitration Act. Similarly patent illegality has been interpreted to mean an illegality that goes to the root of the matter, and every illegality cannot be construed to be a patent illegality. An erroneous application of law does not constitute patent illegality, and the Court can also not re-appreciate evidence while exercising its jurisdiction under Section 34. An arbitral award can be said to be illegal if the arbitral tribunal takes a ground which is not a possible one, interprets a clause in the

contract which no fair person minded would conclude, makes an error of jurisdiction or states no reason for its decision.

18. The learned counsel for the Petitioner has placed reliance upon the decision of the Apex Court in Dyna Technologies (supra) which follows the aforesaid principles and states:

> *"24. There is no dispute that Section 34 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. Section 34 is different in its approach and cannot be equated with a normal appellate jurisdiction. The mandate under Section 34 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.*
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> *25. Moreover, umpteen number of judgments of this Court have categorically held that the courts should not interfere with an award merely because an alternative view on facts and interpretation of contract exists. The courts need to be cautious and should defer to the view taken by the Arbitral Tribunal even if the reasoning provided in the award is implied unless such award portrays perversity unpardonable under Section 34 of the Arbitration Act."*

19. *Per contra*, learned counsel for the Respondent has relied upon Bentwood Seating (supra)to urge that the non-consideration of Clause 18.4

of the Concession Agreement is a ground to set aside the arbitral award. The relevant extracts of the judgment are reproduced as under:

> *"15. In Dyna Technologies (supra), the Supreme Court highlighted that while there is no dispute that Section 34 of the Act limits a challenge to an Award only on the grounds provided therein and an Arbitral Award should not be interfered with in a casual and cavalier manner, the necessity of providing reasons for the Award has been statutorily provided under Section 31(3) of the Act and that there is no gainsaying that arbitration proceedings, though not per se comparable to judicial proceedings before the Court, the Arbitral Award is to contain reasons which are intelligible and adequate. Such reasons need not be elaborate, but must have three characteristics of being proper, intelligible, and adequate. If the challenge to an Award is based on the ground that the same is unintelligible, the same would be equivalent to providing no reasons at all. Ordinarily unintelligible awards are to be set aside, subject to party autonomy to do away with the reasoned Award. In absence of reasoning in the Arbitral Award, Section 34(4) of the Act can be resorted to cure such defects.*
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> *16. However, the above judgment would come to no avail to the appellant inasmuch as the present case does not reflect a mere defect of not giving reasons for the Award but the essential issue having escaped the attention of the learned Arbitrator altogether. It is a case of no finding rather than a finding not supported with reasons. This ground has also persuaded the learned Single Judge to not take recourse to Section 34(4) of the Act by observing as under:*
>
> > *"54. Considering the above, this Court is of the view that AAI's defence that the Purchase Order had been procured by fraud was one of the essential issues that was required to be addressed by the Arbitral Tribunal. It is apparent from the*

plain reading of the impugned award that the Arbitral Tribunal has not addressed the said issue. The Arbitral Tribunal has proceeded on the basis that since the reasons as stated in the letter of termination were not merited, BSS was entitled for specific performance of the contract in question. However, if it is established that the Purchase Order had been procured by fraud, directing its specific performance clearly falls foul of the fundamental policy of Indian law. Since the aforesaid issues - that is, whether the Purchase order had been secured by fraud and if so, whether AAI was entitled to avoid the contract - were undoubtedly part of the principal controversy between the parties and in absence of any decision on the said dispute, the impugned award cannot be sustained.

55. The contentions advanced on behalf of BSS that in absence of reasons on the aforesaid issue, the present proceedings are required to be adjourned to enable the parties to resume arbitration, is unpersuasive. This is not a case where reasons for the conclusion are sketchy and require clarification. In the present case, the Arbitral Tribunal has not decided one of the principal disputes between the parties. This defect cannot be cured by adjourning the present proceedings to enable the Arbitral Tribunal to issue any clarification/reasons. More importantly, the decision on questions whether the Purchase Order was secured by fraud and whether AAI is entitled to treat the same as void would have a material bearing on the relief granted to BSS. The scope of Section 34(4) of the A&C Act is limited and it can be resorted to enable the arbitrator to cure certain curable defects."

20. For applying the law enshrined by the Apex Court to the facts of the present case, first it is necessary to reproduce the clauses of the Concession Agreement. Clause 18.1 and 18.4 of the Concession Agreement which are relevant reads as under:-

> *"18.1 The Concessionaire shall operate and maintain the Project Highway by itself, or through O&M Contractors and if required, modify, repair or otherwise make improvements to the Project Highway to comply with Specifications and Standards, and other requirements setforth in this Agreement, Good Industry Practice, Applicable laws and Applicable Permits and manufacturer's guidelines and instructions with respect to toll systems, and more specifically:*
>
> *(i) permitting safe, smooth and uninterrupted flow of traffic during normal operating conditions;*
>
> *(ii) charging, collecting and retaining the Fees in accordance with this Agreement;*
>
> *(iii) minimizing disruption to traffic in the event of accidents or other incidents affecting the safety and use of the Project Highway by providing a rapid and effective response and maintaining liaison procedures with emergency services;*
>
> *(iv) undertaking routine maintenance including prompt repairs of potholes, cracks, concrete joints, drains, line marking, lighting and signage;*
>
> *(v) undertaking major maintenance such as resurfacing of pavements, repairs to structures, repairs and refurbishment of tolling system and hardware and other equipment;*
>
> *(vi) carrying out periodic preventive maintenance to Project Highway including tolling system;*

(vii) preventing with the assistance of concerned law enforcement agencies unauthorised entry to and exit from the Project Highway;

(viii) preventing with the assistance of the concerned law enforcement agencies encroachments on the Project Highway including Site and preserve the right of way of the Project Highway;

(ix) maintaining a public relations unit to interface with and attend to suggestions from users of the Project Highway, the media, Government Agencies, and other external agencies; and

(x) adherence to the safety standards set out in Schedule 'S'.

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18.4 Maintenance shall include replacement of equipment/consumables, horticultural maintenance and upkeep of all Project Assets in good order and working condition. Maintenance shall not include the extension of any existing pavements, bridges, structures and other civil works unless part of the Project."

21. It is relevant to extract the relevant portion of the majority award where the Tribunal has discussed the discussed the scope of the agreement:-

"9.4 Next relevant article is Article (xviii), governing the subject of operation& maintenance. Clause 18.1 casts an obligation on the Concessionaire to operate & maintain the project highway by itself, or through O&M Contractors, and if required, modify, repair or otherwise make improvements to the project highway to comply with the specifications and standards and other requirements set-forth in the Agreement and in accordance with the instructions with respect to toll system and ***specifically for permitting safe, smooth***

and uninterrupted flow of traffic during normal operating conditions. *This article clearly envisages making of improvement to the project highway for permitting safe, smooth and uninterrupted flow of traffic. Therefore, logically it would follow that whatever was required to be done in order to ensure uninterrupted traffic flow during the normal operating conditions was the obligation of the Concessionaire. In the case in hand, it is not disputed that congestion of traffic started at the toll plazas around the period 2012and therefore, the NHAI had called upon the Claimant, by issuing directions, to take various measures in order to ensure smooth flow of traffic. These directions included making the ETC lanes operative, review of the existing manpower and various other measures. According to the Claimant, it has taken necessary action to implement the said directions but there was no appreciable improvement in the situation as the traffic congestion continued constantly, due to the increased traffic flow. Faced with this situation the Contractor suggested the construction of extra toll lanes at the toll plaza as a long-term solution to the traffic congestion problem. Ample material, by way of correspondence exchange between the parties has been brought on record in order to show that the said proposal of the Claimant remained under consideration of the independent consultant as well as the Respondent-NHAI but the question as to whether the construction of additional toll lanes could be considered to be extra/ additional work requiring a 'change of scope' notice within the meaning of Article (xvii) was not decided, yet the Claimant went ahead and engaged an agency to execute the work of construction of the additional lanes at the two toll plazas on the existing right of way made available by the Respondent-NHAI. In fact the contemporaneous correspondence brought on record between the Claimant, Independent Contractor and Respondent would show that there was some kind of consensus between the three as to the construction of additional*

toll lanes at least in principle. The Independent Consultant of course treated the said work as extra work requiring the 'change of scope' notice under Article (xvii) at some initial stages but ultimately it changed its opinion and held out that the said work of construction of additional lanes squirrelly fell under the obligations of the Contractor relating to operation& maintenance, clause and therefore the said work did not require issue of 'change of scope' order. Respondent-NHAI in no uncertain terms had notified to the Claimant that construction of the additional toll lanes was work which squarely fell under Article (xviii) rather than Article (xvii) requiring a change of scope order. The NHAI of course agreed to provide right of way which was already available for the purpose of construction of additional toll lanes. The Claimant having undertaken the work of construction of additional toll lanes was therefore clearly at its own costand peril and was warranted in order to meet the exigent situation of congestion of traffic at the toll plazas. By doing so and in the absence of' change of scope' order, the Claimant must have reconciled to the fact that it had to do the said work under his operation and maintenance obligations. Therefore, considering all the relevant clauses of the Agreement and the stand of the Independent Consultant and Respondent as is exhibited from the contemporaneous correspondence exchanged between the parties and the Independent Consultant, there is no escape from the conclusion that even making provisions of the additional toll lanes was part and parcel of the obligations of the Claimant under the operation & maintenance phase. Therefore, the said work cannot be said to be outside the scope of work of the project as per the Concession Agreement as is the stand of the Respondent - NHAI.

9.5 As a necessary corollary to the above finding, the Tribunal can straightaway hold that the Respondent was not required to issue a 'change of scope' order for the construction of the additional lanes at the toll

plazas'. That would be fortified by reading the provisions of Article 17, which envisages a certain stages and procedure to be followed. Assuming but not admitting, that the construction of additional toll lanes was beyond the 'scope of work', the said additional work could only be commissioned at the behest of Respondent-NHAI and only after fulfilling the condition precedent necessary for issuing of a 'change of scope' notice and allot her parameters prescribed in Article (xvii) had been fulfilled. From the correspondence and the material brought on record, it is evident that the procedure set out in Article (xvii) has not been followed at all. In fact, it appears to the Tribunal that Article (xvii) with regard to change of scope could be initiated by the NHAI and not by the Concessionaire. In the opinion of the Tribunal, the conditions required for issue of change of scope notice have not been followed in the case in hand in as much as the relevant material and information in regard to the impact of the work on the project, completion schedule etc. were not followed. Therefore, strictly speaking, the Respondent-NHAI was fully justified in not issuing the change of scope order having regard to the factual position on the ground and the interpretation of the relevant provisions of the Concession Agreement.

9.6 There is no denial of the position that due to the increase in the volume of traffic as compared to the projected traffic volume, need was felt to construct the additional toll lanes at the toll plazas. The proposal of construction of the additional toll lanes remained under consideration of the Claimant, Independent Consultant and the Respondent and all three agreed that it was a long-term solution to ease out the congestion of traffic at the toll plazas which has been caused due to extra ordinary increase in the traffic volume. The Claimant engaged an agency for the construction of the additional lanes in anticipation but in the hope of getting a 'change of scope' order under

> *Article (xvii), as in the view of the Claimant, the construction of additional toll lanes was extra work requiring a change of scope order. The Independent Consultant was initially of the view that the said work was extra work requiring the change of scope order but ultimately it change its opinion and held that the work was covered under the obligations of the Contractor under operation & maintenance phase so no change of scope order was necessary. The Respondent declined to issue the change of scope order. The Claimant went ahead for executing the work without providing all requisite details as to the cost of the work etc. and even failed to provide the details which were necessary for issuing a change of scope order. Having regard to the provisions of the Clauses under Article (xvii) and(xviii) of the Concession Agreement and the material obtaining on record Tribunal has no hesitation to hold that the construction of additional toll lanes was not outside the scope of work of the project and consequently the Respondent was not required to issue change of scope order for the said work. Both these points are unanswered in negative and against the Claimant and in favour of the Respondent."*

22. At this juncture, it becomes relevant to look at relevant paragraphs in the Impugned Judgment, wherein the Ld. Single Judge has considered the arbitral award and given his reasons to set aside the arbitral award dated 02.11.2019. The relevant extracts of the Impugned Judgment read as under:-

> *"34. At the outset, the Arbitral Tribunal had concluded that the decision on the point in issue would be dependent on the interpretation of the Concession Agreement and it proceeded to examine the same. A plain reading of the impugned order indicates that the petitioner's claim was rejected as the Arbitral Tribunal had reasoned that in terms of Clause 18.1 of the Concession Agreement, the petitioner was required to make improvement to the Project Highway for*

permitting safe, smooth and uninterrupted flow of traffic. And, it logically followed that "whatever was required to be done in order to ensure uninterrupted traffic flow during the normal operating conditions was the obligation of the Concessionaire". Accordingly, construction of additional toll lanes fell within the scope of the petitioner's obligation under the Concession Agreement.

35. The impugned award indicates that the petitioner's claim was liable to be rejected because (i) the procedure under Article XVII of the Concession Agreement was not followed and the petitioner did not await the issuance of the notice of change of scope before commencing the works; (ii) that the petitioner had resiled to the fact that the work in question was a part of its obligations under the Concession Agreement; (iii) that the petitioner did not submit the bills to NHAI for its examination; (iv) that the petitioner could not be awarded any amount under Section 70 of the Indian Contract Act, 1882 as the work in question fell within the scope of work under the Concession Agreement.

36. It is apparent from the above that the impugned award is pivoted on the finding that the petitioner was obliged to construct additional toll lanes at its costs in terms of its obligations under Clause 18.1 of the Concession Agreement.

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44. The main issue required to be addressed by the Arbitral Tribunal was whether construction of the additional work fell within the scope of Operation and Maintenance under Article XVIII of the Concession Agreement as it clearly did not fall within Schedule B, Schedule C or Schedule D of the Concession Agreement.

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47. The Arbitral Tribunal had interpreted Clause 18.1 of the Concession Agreement to mean that the obligations of the petitioner to modify, repair or otherwise make improvements to the project for permitting safe, smooth and uninterrupted flow of traffic during normal operating conditions also included construction of additional toll lanes and booths for the purpose of decongesting toll plazas and ensuring a smooth flow of traffic. This Court is unable to concur with the aforesaid interpretation. The words "modify, repair or otherwise make improvements to the project highway" cannot be read to include construction of additional lanes. The construction phase of the project entailed broadening of the Project Highway from two lanes to six lanes and the same was completed. The logical sequitur of the Arbitral Tribunal's interpretation of the aforesaid words in Clause 18.1 is that the concessionaire would also be required to broaden the highway if the volume of the traffic increased beyond its capacity. The import of the aforesaid words is certainly not as wide so as to include additional construction. The conclusion of the Arbitral Tribunal that the said clause entailed that "whatever was required to be done in order to ensure uninterrupted traffic flow" would fall within the scope of the highway maintenance obligations of the petitioner, would mean that even if additional pavements and lanes were required to be constructed to expand the capacity of the Project Highway to ensure smooth traffic, Clause 18.1 of the Concession Agreement would cover the same.

48. Having stated the above, it is also necessary to state that the examination under Section 34 of the A&C Act is limited and this Court is not required to re-adjudicate the disputes and supplant its view over that of the Arbitral Tribunal. The Arbitral Tribunal's decision is final and binding on the parties unless it

established that the same is in conflict with the Public Policy of India or is vitiated by patent illegality on the face of the award. Viewed in this perspective, notwithstanding that this Court does not concur with the view of the Arbitral Tribunal with regard to interpretation of Clause 18.1 of the Concession Agreement, the same may not be amenable to challenge under Section 34 of the A&C Act.

49. However, the issue is not limited to interpretation of Clause 18.1 of the Concession Agreement, solely on which the impugned award, essentially, rests. The interpretation of Clause 18.4 of the Concession Agreement is also vital to the controversy in the present case. The petitioner had relied on Clause 18.4 of the Concession Agreement and had contended that in terms of the said clause, any additional civil works were specifically excluded from the purview of Article XVIII of the Concession Agreement. Undisputedly, construction of additional lanes and toll booths entailed civil works and Clause 18.4 of the Concession Agreement expressly provided that "maintenance shall not include the extension of any existing pavement, bridges, structures and other civil works unless part of the project". Clause 18.4 of the Concession Agreement, thus, clarified that extension of any structure or other civil works would not be included as part of maintenance. The written submissions filed by the petitioner before the Arbitral Tribunal indicates that the petitioner had canvassed the said clause and specifically clarified that the construction of additional lanes over and above as specified under the Concession Agreement, is excluded from the scope of maintenance. A plain reading of the impugned award indicates that the Arbitral Tribunal had not considered Clause 18.4 of the Concession Agreement while interpreting the question whether construction of the additional lanes fall within the scope of Operation and Maintenance obligations of the petitioner.

50. Mr Chandra had submitted that Clause 18.4 of the Concession Agreement would not exclude construction of additional lanes as Clause 18.1 of the Concession Agreement has an overriding effect to include the same within the scope of the project. This contention is not persuasive. However, more importantly, it is clear that the Arbitral Tribunal has not considered this contention even though it was urged before the Arbitral Tribunal. Undeniably, Clause 18.1 of the Concession Agreement could not have been interpreted in isolation. It was also required to be examined in the context of the other clauses of the Concession Agreement – including Clause 18.4 of Concession Agreement, Clause 2.1 of the Concession Agreement, which defined the scope of the contract and Clause 2 of Schedule C of the Concession Agreement, which described the specifications of a toll plaza, were also required to be interpreted.

51. In view of the above, there is merit in the petitioner's contention that since one of the principal contentions advanced by the petitioner regarding interpretation of Article XVIII of the Concession Agreement has not been considered and the impugned award rests substantially on the interpretation of a sub-clause of Article XVIII of the Concession Agreement; the award must be construed to be unreasoned.

52. Section 31(3) of the A&C Act requires that an arbitral award must state reasons upon which it has been based. The said requirement must be read in a meaningful manner. In an adversarial system of litigation, the reasons for a decision must necessarily take into account the relevant rival contentions. Thus, the question whether construction of additional lanes and toll booths fall within the scope of the Concession Agreement was required to be addressed in the light of the contentions advanced by both parties. However, the Arbitral Tribunal has completely ignored the

petitioner's contention regarding the interpretation of Clause 18.4 of the Concession Agreement.

53. Justice (Retired) Devinder Gupta has, in his opinion, considered all the relevant clauses of the Concession Agreement including Clause 18.4 of the Concession Agreement and concluded that the scope of work under the Concession Agreement did not include construction of additional lanes at the toll plazas. This Court concurs with the said view.

54. In the aforesaid context, this Court is of the view that the impugned award is contrary to the expressed terms of the contract as it ignores Clause 18.4 of the Concession Agreement, which expressly provides that extension of pavements or 'other civil works' would not be included as a part of maintenance unless such construction is a part of the project. There is no clause in the Concession Agreement, which specified construction of additional toll lanes as a part of the project.

55. In view of the above, the impugned award is set aside. The petitioner is at liberty to seek a reference of the disputes to arbitration."

23. A reading of the aforesaid highlights that the Ld. Single Judge has noted that its jurisdiction under Section 34 of the Arbitration Act is limited and the Court is not required to re-adjudicate disputes and supplant its view over that of the Arbitral Tribunal. It re-interprets Clause 18.1 of the Concession Agreement and then proceeds to note that it does not agree with the view of the Arbitral Tribunal pertaining to its interpretation, but the same may not be amenable to challenge under Section 34 of the Arbitration Act. It goes on further to interpret Section 18.4 of the Concession Agreement and states that the arbitral tribunal has failed to consider the same.

24. This Court is in agreement with the submission of Mr. Bishnoi and his reliance on Dyna Technologies (supra)to state that if the arbitral tribunal has given its reasons for a finding on an issue before it and the same is a plausible view, then a Court should not interfere with the award in exercise of its jurisdiction under Section 34 of the Arbitration Act.

25. Upon a reading of Clauses 18.1 and 18.4 of the Concession Agreement and the Arbitral Award as reproduced hereinabove, it is apparent that the view as taken by the majority of the Arbitral Tribunal is a plausible view. The majority undertakes a thorough discussion on Clause 18.1 of the Concession Agreement, what the obligations of the Concessionaire are under the agreement, particularly with regards to the operation and maintenance of the project and whether the same includes the construction of additional toll lanes or not. The majority has discussed whether the construction of additional toll lanes would require a change of scope notice under the Concession Agreement. It is only when the majority has come to the conclusion that the construction of the additional toll lanes is a part of the Project and that a change of scope notice is not required, did the majority reject the claim raised by the Respondent-Claimant. As Clause 18.4 squarely provides that the said clause is applicable only if the said maintenance is not part of the project, it would not be necessary for the majority to refer to the said clause in order to reject the claim of the Respondent-Claimant, after it has concluded that the said work is part of the Project. It is thus clear, that the findings of the majority of the Arbitral Tribunal is a view that is reasoned and plausible and interference by a Court under Section 34 of the Arbitration Act was not necessary.

26. In the opinion of this Court, the non-consideration of Clause 18.4 of the Concession Agreement cannot be said to be an error made by the arbitral

tribunal which is opposed to the fundamental policy of Indian law, nor can the same be said to be patently illegal. The concession agreement is neither a statute, nor is it a law which protects the national interests of this nation and a mere failure of the arbitral tribunal to consider an argument on the same would not render the arbitral award in contravention of the fundamental policy of Indian law.

27. Similarly, the non-consideration of Clause 18.4 cannot be said to be an error that goes into the root of the award and thus cannot amount to a patent illegality. The reasoning given by the arbitral award, which is based upon an interpretation of Clause 18.1 is a plausible view, as taken by the majority of the Arbitral Tribunal. A perusal of the award shows that the Tribunal has gone through the clauses and has given interpretation on the scope of the agreement entered into between the parties and after examining various clauses of the contract came to the conclusion that there is an obligation of the concessionaire to operate and maintain the Project Highway and more particularly ensure smooth and uninterrupted flow of traffic during normal operating conditions. The Tribunal, therefore, held that whatever is required to be done to ensure uninterrupted flow of traffic during normal operating conditions was the obligation of the Respondent and the construction of the toll plazas cannot be considered as extra additional work requiring change of scope. The re-interpretation of Clause 18 of the Concession Agreement by the ld. Single Judge would amount to a re-appreciation of evidence which is impermissible under Section 34 of the Arbitration Act. The Ld. Single Judge had correctly in the Impugned Judgment observed that its disagreement with view of the arbitral tribunal pertaining to the interpretation of Clause 18.1 is beyond the scope of its jurisdiction under Section 34 of the Arbitration Act.

28. The reliance placed by Mr. Sarangi on the decision in Bentwood Seating(supra) does not aid his case. The said judgment distinguishes between an award where adequate reasons have not been provided and an award where an essential issue has escaped the attention of the Arbitrator together. In the instant case, all the issues that were before the arbitral tribunal have been decided with reasons. While there may be disagreement with the reasoning given by the arbitral tribunal and whether the same are adequate or not, however it cannot be said that the arbitral tribunal has failed to adjudicate an essential issue that was before it.

29. In such a scenario, the argument made by the Respondent's herein that the non-consideration of Clause 18.4 of the Concession Agreement is a ground to set an arbitral award does not hold merit. The findings made by the arbitral tribunal in the majority award dated 02.11.2019 present a plausible view and the same ought not to have been set aside by a Court in exercise of its jurisdiction under Section 34 of the Arbitration Act.

30. With these observations, the appeal stands allowed, the Impugned Judgment is set aside. The appeal stands disposed of along with pending application(s), if any.

SATISH CHANDRA SHARMA, C.J.

SUBRAMONIUM PRASAD, J

JULY 03, 2023
S. Zakir/Arsh