

IN THE HIGH COURT OF DELHI AT NEW DELHI

% Judgment delivered on: 29.10.2021

+ **O.M.P. (COMM) 377/2020**

**GVK JAIPUR EXPRESSWAY PRIVATE
LIMITED**

..... Petitioner

versus

**NATIONAL HIGHWAY AUTHORITY OF
INDIA**

..... Respondent

Advocates who appeared in this case:

For the Petitioner : Mr. Samundra Sarangi, Ms. Shruti Raina
: and Ms. Moha Paranjpe, Advocates
For the Respondent : Mr. Shlok Chandra, Advocate

**CORAM
HON'BLE MR JUSTICE VIBHU BAKHRU**

JUDGMENT

VIBHU BAKHRU, J

Introduction

1. The petitioner has filed the present petition under Section 34 of the Arbitration and Conciliation Act, 1996 (hereafter the 'A&C Act') impugning an Arbitral Award dated 02.11.2019 delivered by the Arbitral Tribunal comprising of three members – Justice (Retired) R.C. Jain, Justice (Retired) Devinder Gupta and Justice (Retired) Sunil Ambwani as the Presiding Arbitrator. The impugned award was rendered by majority by Justice (Retired) R.C. Jain and Justice (Retired)

Sunil Ambwani concurring. Justice (Retired) Devinder Gupta entered a separate dissenting opinion.

2. The impugned award was rendered in the context of disputes that had arisen between the parties in connection with the Concession Agreement dated 08.05.2002 (hereafter the 'Concession Agreement'). The petitioner's claim for cost of constructing additional toll lanes was rejected as the Arbitral Tribunal (by majority), *inter alia*, found that the same was covered within the 'scope of work' under the Concession Agreement and, the petitioner was not entitled to any further payment in respect of the same. The petitioner contends that the said view is patently erroneous and disregards the express terms of the Concession Agreement.

Factual context

3. The parties entered into a Concession Agreement dated 08.05.2002 in respect of in respect of "*design, engineering, financing, procurement, construction, operation and maintenance for 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 km on Jaipur-Kishangarh Section of National Highway-8 in Rajasthan*" on Build, Operate and Transfer (BOT) basis (hereafter the 'Project Highway').

4. Admittedly, the Concession Agreement was divided into two phases. First, being the construction phase and the second, being the operation and maintenance phase. The entire construction of six-lanes

of the Project Highway was to be completed by the Commercial Operation Date (COD). In terms of the Concession Agreement, 'construction period' began from the appointed date (that is, the date on which the concession period commenced) and ended on the COD. The construction period ended on 20.10.2005 with the Independent Consultant (IC) issuing a Final Completion Certificate. There is no dispute that the petitioner had completed the construction of the Project Highway, in terms of the Concession Agreement, prior to the COD.

5. However, the obligations of the petitioner under the Concession Agreement did not end with the issuance of the Final Completion Certificate. It was also required to operate and maintain the Project Highway in terms of the said Concession Agreement.

6. The project review meetings were held between the parties periodically and, the issue of increase in traffic volume was discussed at the said meeting. The increase in the volume of traffic was due to congestion at the toll plazas and this was a matter of concern for the parties. One of the solutions, as discussed, was to increase the number of toll lanes required to accommodate the volume of traffic at the toll plazas. The petitioner had commissioned a consultant (M/s Consulting Engineering Group Limited) to prepare a comprehensive report with regard to the volume of traffic and to also suggest the number of lanes required to accommodate the projected traffic volume.

7. News items regarding congestion at toll plazas resulting in inconvenience and delays to users were reported in various newspapers.

In this context, the IC sent a letter dated 02.06.2012 advising the petitioner to explore the possibility of providing additional toll lanes at the two toll plazas in question. Thereafter, on 18.06.2012, the petitioner sent a proposal for increasing the number of toll lanes. The petitioner also pointed out that the issue regarding the requirement of additional toll plazas had been discussed in a project review meeting held at Jaipur Toll Plaza on 17.03.2010. Subsequent thereto, the petitioner had also sent a proposal to the then Independent Consultant - M/s Louis Berger Group, Inc. for its review. The petitioner, accordingly, requested the respondent (hereafter 'NHAI') for approving the increase in the number of toll lanes and to procure and provide land required for the same. The petitioner also mentioned that the construction of additional toll lanes would entail a change of scope and therefore, a "*change of scope notice*" was required to be issued by NHAI in terms of Article XVII of the Concession Agreement.

8. The IC sent a letter dated 03.07.2012, *inter alia*, stating that since the Project Highway had already been completed with COD on 09.04.2005, the petitioner's proposal could not be considered as additional work under the provisions for 'change of scope' under Article XVII of the Concession Agreement.

9. It is apparent from the said letter that according to him, the provisions of 'change of scope' under Article XVII of the Concession Agreement were not applicable during the Operation and Maintenance period. The petitioner did not concur with the aforesaid view and requested the IC to reconsider the same. The IC thereafter, sought legal

opinion on the question whether the 'change of scope notice' was required under Clause 17.2(b) of the Concession Agreement. Apparently, he received a legal opinion to the effect that the increase in lanes at the toll plaza would fall within the provisions regarding 'change of scope' under the Concession Agreement. The IC thereafter, sent a letter dated 31.07.2012 whereby it reviewed its stand and, now concurred that a notice under Clause 17.2(b) of the Concession Agreement was required to be issued.

10. Thereafter, on 26.10.2012, the IC recommended that in the first phase, two additional toll lanes at each toll plaza within the available right of way be constructed and a 'change of scope' notice for additional work for a sum of ₹5.43 crores be issued under Clause 17.2 of the Concession Agreement.

11. By a letter dated 30.10.2012, the petitioner, once again, requested for a 'change of scope' notice in terms of its proposal submitted earlier. NHAI did not concur with the said suggestion. According to NHAI, the petitioner was responsible for smooth operation of the toll plaza and was required to take all measures for the same. NHAI agreed to provide additional land for construction of the additional lanes at the toll plaza but did not accept that the additional construction would constitute any 'change of scope' as contemplated under Article XVII of the Concession Agreement.

12. A meeting was held between the representatives of the parties on 23.07.2013 and the minutes of the said meeting records that CGM (T),

NHAI HQ – who had chaired the said meeting – advised the petitioner to immediately commence the construction of the additional toll lanes to resolve the problem of congestion at the toll plazas. Thereafter, the IC also issued a letter dated 08.08.2013 reiterating that the petitioner had been advised to start the construction of two additional toll lanes at each toll plaza immediately.

13. On 04.10.2013, the petitioner submitted the drawings for construction of the additional toll lanes at the toll plazas within the available Right of Way (ROW). It also issued work orders to M/s Arham Infrabuild Ltd. for Civil Works at the Jaipur and Kishangarh Toll Plazas on National Highway-8; and, to M/s Pinkcity Steels Pvt. Ltd. for construction of new toll lanes at the said toll plazas.

14. On 05.07.2014, the petitioner once again requested NHAI to release the ‘change of scope order’ for the additional amount of ₹5.43 crores. NHAI forwarded the said letter to the IC for its comments. In the meanwhile, the petitioner continued to execute the works regarding construction of the additional lanes at the toll plazas.

15. By a letter dated 10.09.2014, the petitioner informed NHAI that construction of the additional two lanes was near completion. He once again requested NHAI to issue “‘Change of Scope’ Notice/Order as per clause 17 of Concession Agreement amounting to Rs. 5.43 Cr”. This was followed by another letter dated 18.09.2014, whereby the petitioner informed NHAI that the additional work of four lanes had been completed.

The dispute

16. According to NHAI, the construction of additional toll lanes did not warrant any 'change of scope' as contemplated under the Concession Agreement as the same was covered under Article XVII and other provisions of the Concession Agreement. According to NHAI, such additional construction was within the 'scope of work' of maintenance and operation of the Project Highway and therefore, the petitioner was not entitled to any additional payment for the same.

17. The petitioner disputed the same and claimed that the construction of the additional toll lanes was beyond the 'scope of work' under the Concession Agreement and therefore, was entitled to payment of additional amount for the said construction.

Arbitral proceedings

18. The parties attempted to resolve their disputes amicably but were unsuccessful and the disputes were referred to arbitration.

19. The parties had agreed that the arbitration shall be conducted in accordance with the rules of the Indian Council of Arbitration (ICA), New Delhi. In terms of the Arbitration Clause, the respondent nominated an arbitrator. The respondent initially nominated Justice (Retired) R.C. Chopra and thereafter, successively nominated Justice (Retired) S.K. Mahajan, Justice (Retired) S.K. Misra and thereafter, nominated Justice (Retired) R.C. Jain. The respondent nominated Justice (Retired) Devinder Gupta as its nominee and the ICA appointed Justice (Retired) Sunil Ambwani, as the Presiding Arbitrator.

20. Before the Arbitral Tribunal, the petitioner filed a Statement of Claims, *inter alia*, claiming an amount of ₹5,43,07,356/- along with interest at the rate of 18% per annum from 18.11.2014 till 31.10.2017. The petitioner also claimed *pendente lite* interest at the rate of 18% per annum from 01.11.2017 till the date of the arbitral award and, further claimed future interest at the rate of 18% per annum from the date of the award till date of its payment or realization. A tabular statement indicating the breakup of the claim of ₹5,43,07,356/- is reproduced below:-

S. No.	Description of Expenditure	Amount (INR)
1.	Design & Drawings	
	Detailed Design for Additional Toll lanes (4 Nos.)	5,97,000
2.	Utility Shifting	
	Shifting of 11 KV HT Cable at Jaipur Toll Plaza,	7,47,811
3.	Civil Works	
	Road works	1,95,81,208
4.	Structural Works of Canopy, Booth, Bullnoses	
	Associated works for extension of Canopy, Bullnoses, Booth, Railings, etc.	1,21,12,841
5.	Toll Management Systems	

	Software & Hardware for 4 Lanes	52,74,923
6.	Other Miscellaneous items	
	Miscellaneous items for additional four lanes	9,93,573
	Sub Total >>>>(A)	3,93,07,356
	Operation, Maintenance & Replacement Cost for the period from 18.11.2014 to 31.10.2017: (B)	1,50,00,000
	Grand Total (A+B)	5,43,07,356

21. NHAI contested the claims made by the petitioner. In view of the rival stands, the Arbitral Tribunal formulated following points for determination.

“1. Whether the construction of two Additional Toll Lanes at the 2 Toll Plazas (four additional lanes) is outside the Scope of Work of the Project as per the provision of the Concession Agreement dated 08.05.2002?

2. Whether the Respondent was required to issue a 'Change of Scope Order' for the construction of two Additional Toll Lanes at the two Toll Plazas (4 additional lanes) undertaken by the Claimant?

3. Whether the Claimant is entitled to reimbursement of the cost incurred amounting to Rs. 5,43,07,356/- (Rupees Five Crores Forty-Three Lakh Seven Thousand Three Hundred and Fifty Six only) for the construction and operation of the two Additional Toll lanes at the 2 toll plazas (4 additional lanes) undertaken by the Claimant?

4. Whether the Claimant is entitled to interest. If so, for what period and at what rate?"

22. NHAI contested the claims made by the petitioner on, essentially, three fronts. First, it disputed that construction of the additional lanes at the toll plazas would constitute a 'change of scope' in terms of Article XVII of the Concession Agreement.

23. Second, NHAI contended that the petitioner had failed to perform its obligations as required under the Concession Agreement. It was urged on behalf of NHAI that the petitioner was required to deploy efficient and trained staff for toll booths. Amongst other measures, it was also required to operate at least one Electronic Toll Collection (ETC) lane in each direction. NHAI claimed that the requirement of construction of additional toll lanes had arisen due to inefficient operation and management on the part of the petitioner.

24. Third, NHAI claimed that it had never issued any order or change of scope notice and thus, had not agreed to any additional construction at its cost. Resultantly, NHAI had also not examined or verified the cost incurred by the petitioner as no such procedure as contemplated under Clause 17.2 of the Concession Agreement was followed.

25. The Arbitral Tribunal, by majority, accepted the aforesaid contention. The Arbitral Tribunal held that Operation and Maintenance of the Project Highway was an integral part of the petitioner's obligation under the Concession Agreement. It also noted that in terms of Clause 2.1 of the Concession Agreement, the petitioner was required to

undertake all its obligation at its own risk. The Arbitral Tribunal held that the petitioner's request for issuance of the 'change of scope' notice remained under consideration and, no such notice was issued by NHAI. However, since the petitioner had proceeded to execute the work in absence of a 'change of scope' order, it must have reconciled to the fact that it had to do the said work in performance of its obligations regarding Operation and Maintenance of the project. The Arbitral Tribunal also held that construction of additional toll lanes was a part and parcel of the obligations of the petitioner under the Operation and Maintenance phase. The Arbitral Tribunal also held that the respondent was not required to issue a 'change of scope' order for construction of the additional lanes at the toll plaza. Next, the Arbitral Tribunal held that the procedure under Article XVII of the Concession Agreement had not been followed, therefore, NHAI was fully justified in not issuing the 'change of scope' order.

26. 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 petitioner was entitled to reimbursement of the cost quantified at ₹5,43,07,356/-. However, the Arbitral Tribunal held that even if it was assumed that the petitioner prevailed in its stand that construction of the additional toll lanes was not covered under its obligations under the Operation and Maintenance phase and NHAI was required to issue a 'change of scope order', the petitioner would not be entitled to any reimbursement as it

had not furnished any bill of expenses to NHAI and therefore, the same could not be verified or approved by NHAI.

27. The Arbitral Tribunal also rejected the petitioner's claim for compensation under Section 70 of the Indian Contract Act, 1882 by holding that the construction of the additional toll lanes fell within the Operation and Maintenance obligations of the concessionaire.

28. Insofar as the petitioner's claim for a sum of ₹1,50,00,000/- on account of Operation, Maintenance & Replacement Cost for the period from 18.11.2014 to 31.10.2017 is concerned, the Arbitral Tribunal found that the petitioner had not provided any details regarding the same and had also not indicated any provision in terms of which it could claim any amount for maintenance and operation of the toll plazas.

Submissions

29. It is contended by Mr Sarangi, learned counsel appearing for the petitioner that the impugned award is vitiated on the ground of patent illegality as it is contrary to terms of the Concession Agreement and particularly Clause 18.4 of the Concession Agreement. He submits on a plain reading of the Concession Agreement, it is clear that the construction of additional toll lanes was not a part of the scope of works.

30. He also contends that although the petitioner had relied upon Clause 18.4 of the Concession Agreement in support of its contention, the Arbitral Tribunal had completely disregarded the same and the

impugned award does not even mention the said clause and therefore, the impugned award is unreasoned.

Reasons and Conclusion

31. The principal question to be addressed is whether the decision of the Arbitral Tribunal that the construction of the additional toll lanes was included in the scope of work, in the Operation and Maintenance phase under Article XVIII of the Concession Agreement, is *ex facie* erroneous and contrary to the terms of the contract.

32. It is relevant to note that the attention of this Court was drawn to the written submissions filed by the petitioner before the Arbitral Tribunal. The same indicates that the petitioner had relied on Clause 18.4 of the Concession Agreement in support of its contention that the scope of maintenance activities under the Concession Agreement did not include any other civil works, which were not a part of the project. However, the said clause was not specifically adverted to.

33. Before proceeding further, it would be necessary to refer to the relevant extract of the impugned award, which indicates the reasons that persuaded the Arbitral Tribunal to reject the petitioner's claim. Paragraphs 9.3, 9.4, 9.5 and 9.6 of the impugned award are relevant and are set out below:

“9.3 Clause 2.1 also clearly indicates that the Concessionaire shall undertake its obligations on its own risk and cost. Clause 3.2 sets out the rights and obligations of the Concessionaire during the concession period and during the operation period.

After completion of the project highway Concessionaire is given right to levy, demand, collect appropriate fees from vehicles and persons liable to payment of fees for using the project highway or any part thereof and refuse entry of any vehicle to the project highway if the due fee is not paid. Sub-clause (v) of clause 2.1 is important and spells out the obligations of the Concessionaire to bear and pay all expenses, costs and charges incurred in the fulfilment of all Concessionaire's obligations under the Agreement. A conjoint reading of the above clauses does not leave any doubt to hold that the obligation of the Concessionaire even at the operation & maintenance stage of the project highway extends to operating & maintaining of the toll plazas and the toll lanes.

- 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 2012 and 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 cost and 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 straight away 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 all other 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.”

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.

37. The observations in the impugned award to the effect that the petitioner had resiled to the fact that it was contractually obliged to construct the additional toll lanes is, *ex facie*, untenable. There is no

dispute that the petitioner was pursuing with the IC and NHAI for issuance of a notice for change of scope. It had undertaken the construction to address the problem of congestion at the toll plazas after discussions with the IC and NHAI. There is no dispute that the construction of the additional toll lanes was necessary. Both the IC and NHAI had advised the petitioner to carry out the said construction. NHAI had also provided land for the said purpose. The petitioner had constructed the additional toll lanes/booth while continuing to pursue with NHAI for issuance of the notice under Article XVII of the Concession Agreement even while carrying out the construction. The question of NHAI examining the bills would arise only once it accepted that the additional work required is a change of scope, which it had not. Concededly, there is no procedure for submitting the bills for construction and for NHAI to examine the same without accepting that the same was outside the scope of work under the Concession Agreement.

38. Mr Chandra, learned counsel for NHAI also fairly stated that the finding of the Arbitral Tribunal that the construction of additional toll lanes/booths fell within the scope of work under the Concession Agreement was at core to the controversy in this petition. Thus, the decision on whether the finding is contrary to the terms of the Concession Agreement would be dispositive of the present petition.

39. Article 2 of the Concession Agreement sets out the scope of the project. The same is relevant and is set out below:

“II SCOPE OF PROJECT

2.1 The Project shall be executed on the Site, which is described in Scheduled ‘A’ of this Agreement. The scope of the Project shall include performance and execution by the Concessionaire of all design, engineering, financing, procurement, construction, completion, operation and maintenance of the Project Highway as described in Schedule ‘B’ and Schedule ‘C’ of this Agreement. It shall include strengthening of the existing two lanes of NH-8 from Km. 273/500 to Km.363/885, six-laning thereof in accordance with the Specifications and Standards set forth in Schedule ‘D’ and operation and maintenance thereof in accordance with Scheduled ‘L’. It shall also include the performance and fulfillment of other obligations by the Concessionaire under this Agreement.

The Concessionaire shall undertake its obligations at its own cost and risk.”

40. As is clear from the above, Clause 2.1 of the Concession Agreement specified that the scope of the project entailed six laning of the existing two lanes of NH-8 from KM 273/500 to KM 363/885 in accordance with the specifications and standards as set out in Schedule D. The Project Highway was required to be operated and maintained in accordance with Schedule L of the Concession Agreement.

41. Schedule A of the Concession Agreement clearly indicates that NHAI had decided to augment the capacity of the Jaipur and Kishangarh Section of NH-8 “*by widening the existing 2 lanes to 6 lanes*”. In terms of the Concession Agreement, the petitioner was also obliged to operate the toll plazas. The facility of the toll plaza is

described in Schedule C of the Concession Agreement in the following terms:

“2. TOLL PLAZA

Two toll plazas shall be provided, one at the Jaipur end and the other at the Kishangarh end. The location for toll plaza at Jaipur end shall be between km 286/450 to km. 286/950, and that at Kishangarh end between km 360/200 to Km. 360/700. At these locations there is sufficient land available on either side of the highway to accommodate the additional lanes for toll booths. The layout of the toll plaza shall be such that there is no possibility of the traffic bypassing it.

‘Open System’ of toll collection shall be provided on the Project Highway with collection of user fee from vehicles only at the two toll plazas. **There will be total 12 (twelve) lanes, 10 (ten) of which shall have a semi-automatic system of toll collection comprising equipments of vehicle classification, ticket issuing, data processing and power supply. One toll lane in each direction should have Electronic Toll Collectionsystem.**

(emphasis supplied)”

42. The specifications of the toll plaza as stated in Schedule C also makes it amply clear that there would be a total of twelve lanes. Thus, there is no ambiguity as to the scope of the construction work required to be executed by the petitioner.

43. Admittedly, the final completion certificate could be issued only after the completion of the six lanes of the Project Highway in terms of the Concession Agreement. It was not NHAI’s case that the petitioner

was required to construct any additional lane in addition to the twelve toll lanes at the toll plazas, for the aforesaid purpose.

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.

45. The petitioner was required to carry out Operation and Maintenance of the Project Highway in accordance with Schedule L of the Concession Agreement. However, there is no provision in Schedule L which remotely suggests that the concessionaire was required to construct the additional four lanes.

46. At this stage, it is relevant to refer to the sub-clauses of Article XVIII of the Concession Agreement. The same are set out below:

“XVIII. OPERATION AND MAINTENANCE

18.1 The Concessionaire shall operate and maintain the Project Highway 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 set forth 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 the concerned law enforcement agencies unauthorised entry to and exist 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 set out in Schedule 'S'

18.2 The Concessionaire shall in consultation with the Independent Consultant prepare not later than 180 (one hundred and eighty) days before the Scheduled Project Completion Date, the repair and maintenance manual (the "Maintenance Manual") for the regular and periodic maintenance, and shall ensure and procure that at all times during the Operations Period, the Project Highway is maintained in a manner that it complies with the Specifications and Standards and the minimum maintenance requirements set forth in Schedule L. The concessionaire shall supply, at least two months before the COD, 10 (ten) copies of the Maintenance Manual to NHAI and 3 (three) copies each to the GOI, GOR and Independent Consultant. Copies of the Maintenance Manual shall also be made available by the Concessionaire for public inspection during office hours at a conspicuous place adjacent to each Toll Plaza on the Project Highway.

18.3 Not later than forty five (45) days before the beginning of each Accounting year, the Concessionaire, shall in consultation with the Independent Consultant prepare and provide to NHAI, its proposed programme of preventive and other scheduled maintenance of the Project Highway subject to the minimum maintenance requirements set forth in Maintenance Manual and

in Schedule 'L' necessary to maintain the Project Highway at all times in conformity with the Specifications and Standards (the "Maintenance Programme"). Such Maintenance Programme shall include but not be limited to the following:

- (i) intervals and procedures for the carrying out of inspection of all elements of the Project Highway;
- (ii) criteria to be adopted for deciding maintenance needs;
- (iii) preventive maintenance schedule;
- (iv) intervals at which the Concessionaire shall carry out periodic maintenance;
- (v) intervals for major maintenance and the scope thereof; and
- (vi) lane closures schedule for each type of maintenance (length and time).

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.

18.5 The Concessionaire shall keep the carriageway, rest areas and other Project Facilities and Toll Plazas in a clean, tidy and orderly condition free of litter and debris.

18.6 During the Operations Period, the Concessionaire shall not carry out any material modifications to the Project Highway save and except where such

(i) modifications is required by Good Industry Practice; or (ii) modification is necessary for the Project Highway to operate in conformity with the Specifications and Standards prescribed under this Agreement. Provided that the Concessionaire shall notify NHAI of the proposed modifications along with details thereof at least fifteen days before commencing work on such modifications and shall reasonably consider such suggestions as NHAI may make within 15 (fifteen) days of receipt of such details by NHAI.

18.7 The Concessionaire shall be responsible for the maintenance of the approach roads to and underpasses and overpasses upto 100 mtrs from the Project Highway in accordance with Good Industry Practice.”

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.

56. The petition is allowed in the aforesaid terms.

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VIBHU BAKHRU, J

OCTOBER 29, 2021

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