Case Citation: (2026) ibclaw.in 3595 HC

IN THE HIGH COURT OF MADHYA PRADESH AT INDORE

BEFORE

HON'BLE SHRI JUSTICE PAVAN KUMAR DWIVEDI

ARBITRATION APPEAL No. 47 of 2011

M/S G.H.VIJAPURA INFRASTRUCTURE PVT.LTD.
Versus
EXECUTIVE ENGINEER GOVERNMENT OF MADHYA PRADESH

Appearance:

Shri Veyankatesh Garg - Advocate for the appellant (through VC).

Shri Dinesh Singh Chouhan - Government Advocate for the respondent/State.

HEARD ON:25/03/2026

PRONOUNCED ON: 25/06/2026

ORDER

Present is an appeal by the claimants/contractor being aggrieved by the impugned order dated 13.09.2011 passed by the learned District Judge in Civil MJC No. 54/2007 whereby the application filed by the respondent/State in terms of Section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the 'Act of 1996') has been allowed and the final award dated 08.09.2007 as well as the interim award dated 06.11.2006 passed by the Arbitral Tribunal was set aside in substantial part maintaining only the part of award whereby additional right to operate the toll for a period of 14 days duration for which the toll collection was

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Case Citation: (2026) ibclaw.in 3595 HC

unauthorisedly stopped by the respondent/Executive Engineer.

Facts of the case in brief :

2. The appellant M/s G.S.Vijapura Infrastructure Private Limited is a company registered under the provisions of the Companies Act. It is working as a works contractor for construction of roads, etc. The respondent is the State of M.P. through the Public Works Department. The respondent State issued NIT dated 08.07.2002 for "*Maintenance, reconstruction and repairing of medium and minor bridges, culverts, widening, up-gradation, BT renewal of Ratlam-Nagda-Lebad Road, Ratlam-Jaora Road and Ratlam Bypass Road (total 125.40 kms.)*" under the Build, Operate and Transfer (BOT) scheme with entrepreneur's own capital and resources including authorisation to collect toll tax.

3. Pursuant to the said NIT, appellant as well as others submitted their bids. Notably, the entire consideration for the work was to be paid by way of a right to collect toll for a specified number of days based on the estimation of the costing of the work and per day collection according to traffic on the concerned road. The contractor/appellant as per its estimation submitted a bid for 1311 days of toll collection.

3.1 The respondent State mentioned probable cost of work at Rs. 1055 lakhs.

4. Since, the quoted and demanded right to collect toll by the appellant was the lowest thus, the bid of the appellant was accepted and work

IBC Laws | www.ibclaw.in

Case Citation: (2026) ibclaw.in 3595 HC

was awarded to the appellant. Accordingly, an agreement was executed between the appellant and respondent on 18.08.2002 which was numbered as 17/2002-03 and on the same day, order was issued for commencement of work.

5. Before advancing further into the dispute at hand, it would be apposite to mention the scope of work as provided in the agreement which is described as under:

(a) Clause 1.1 of the NIT provided the name of work which is already mentioned hereinabove.

(b) In sub-Clause 2 of Clause 1.1 probable amount of work is provided as Rs. 1055 lakhs.

(c) Clause 2.1 of the agreement provides the scope of initial work of road, bridges, culverts, etc. as per Annexure 3(i) and Clause 2.2 provides for scope of work to be executed year-wise which was detailed in Annexure 3 (ii) and (iii). This year-wise work was to be performed during the toll collection period.

(d) The time frame for completion of work provided in Annexure 3(i) was six months. The designs for construction of bridge and culverts, etc. were to be submitted by the contractor himself. The construction programme was to be submitted within 15 days from the date of award of contract. According to Clause 3.5 of the contract, the standards as provided by the Indian Road Congress were to be adhered to and most significantly

IBC Laws | www.ibclaw.in

Case Citation: (2026) ibclaw.in 3595 HC

the implication of submission of tender are provided in Clause 4.6 of the agreement.

6. Appellant started the work in terms of order of commencement of work dated 18.08.2002. However, the initial work which was to be complied within six months i.e. up to 17.03.2003 was completed on 08.04.2003. Thus, there was a delay of 24 days. Consequently, the respondent/State authorised the claim to collect the toll tax for a period short by 24 days from the concession as quoted by the appellant in its tender bid in accordance with the provisions of the contract.

7. The deduction of period of 24 days was only an initial dispute however, the real dispute arose when the initial work which was completed by the appellant/contractor within six months period was exceeded by value of Rs. 141.00 lakhs i.e. as per the estimated value, the works required to be carried out at SOR in the initial six months period was Rs. 392.40 lakhs however, the actual cost came to Rs. 533.40 lakhs. Similarly, for the first year, the actual cost varied from estimated Rs. 40 lakhs to Rs. 136.74 lakhs and for the second year, the variation was from estimated value of Rs. 30 lakhs to actual cost of Rs. 96.12 lakhs. In view of these variations, the appellant claimed before the respondent authority that this variation amounts to extra work. Thus, it demanded additional period of toll collection in lieu of above said purported extra work done by it which the respondent denied. Thus came into existence the instant dispute between the parties. As such, by invoking Clause 26.2 of the contract, both the parties i.e. the appellant and the State proposed their nominated Arbitrators who then agreed on the name

IBC Laws | www.ibclaw.in

Case Citation: (2026) ibclaw.in 3595 HC

of the Presiding Arbitrator. Thus, in terms of Section 11(3) of the Act of 1996, the Arbitral Tribunal of three Arbitrators was formed.

8. The appellant filed its statement of claim before the Arbitral Tribunal on 31.10.2006 wherein it claimed that the claimant started the work with due diligence and completed the works stipulated to be executed during the initial period of six months however, it was exceeded by 24 days. But there was an increase of Rs. 141 lakhs which is nearly 39.93% of the original estimated value. Thus, the claimant asserted that it is entitled for an additional period of 72 days and similarly for other periods also claims were raised. Hence, the total claim of 793 days with additional claim of further days for interest *pendente lite* and for compensation were claimed.

9. The respondent/State filed its statement of defence and asserted that the claimant/appellant has incorrectly construed the terms 'extra work' for the fact that as per the provisions of the contract, the work carried out by it was well within the scope of work assigned under the contract. The only extra work done by the appellant was the construction of C.D. in kms. 4/2 of the Ratlam-Nagda Road, only this can be termed as 'extra work' and the cost of this extra work was Rs. 14.36 lakhs for which right to collect toll for an additional 10 days is accrued in favour of the claimant/appellant.

10. The Arbitral Tribunal after considering the rival submissions observed in para 13 to 19 that the original liability of claimant/appellant is limited to execution of works to the extent of quantum and the value as estimated and provided for in the probable amount of contract and the

IBC Laws | www.ibclaw.in

Case Citation: (2026) ibclaw.in 3595 HC

quantity on which this estimated cost is based. It particularly observed in para 19 of the award that the actual quantity and cost of necessary patch and other repair work could not be found out in advance but only at the expiry of different periods. The Tribunal recorded that the cost of patch repairs estimated by the respondent is purely a rough lump-sum and imaginary guess work. The details of crust thickness were also not mentioned. It was also taken into account that there was only a 15 days' period available to the bidder between issue of NIT and stipulated date of receipt of tender bids. No bidder therefore, could be expected to explore and work out the exact quantity and the physical quantum of work and bids could only be based on estimate prepared and information supplied by the respondent.

11. The Tribunal thus considering the above as well as Clause 22.7 and 22.8 concluded that the work which was done beyond the estimated value of Rs. 1055 lakhs was to be treated as extra work.

12. Pertinently, the respondent/State had also raised counter claims on its part for various reasons.

13. The Tribunal allowed the claim of the appellant thereby allowing additional number of 584 days. However, as the counter claim of the respondent/State was also allowed for 123 days reduction, the total period granted for additional toll collection was 461 days with a stipulation of additional right of 3 days for every month of delay in realisation of this right in lieu of future interest.

14. It is pertinent to point out here that before passing the final

IBC Laws | www.ibclaw.in

Case Citation: (2026) ibclaw.in 3595 HC

award, the Tribunal had earlier passed an interim award on 14.11.2006 which was challenged by the respondent before this Court in M.A.No. 442/2007. This Court while allowing the said appeal, remanded the matter back to the District Court vide order dated 31.01.2011. However, as by then the final award was also passed by the Arbitral Tribunal, thus the Court observed that the proceedings instituted against the final as well as the interim award be decided together.

15. Being aggrieved, the respondent/State filed application in terms of Section 34 of the Act of 1996 before the District Court, Ratlam which was registered as MJC No. 54/2007 challenging the award on various grounds including the ground that the Tribunal has re-written the terms of the contract which is not permissible under the law. The appellant filed reply to this application and raised objection regarding scope of proceedings under Section 34 of the Act of 1996.

16. The learned District Judge vide impugned order dated 13.09.2011 allowed the application filed by the respondent under Section 34 of the Act of 1996 whereby the award of additional toll collection right of 546 days in lieu of extra work was set aside. Consequently, award of escalation and *pendente lite* interest and future interest was also set aside. The objections of the appellant were also rejected. However, additional right of toll collection for 10 days was maintained. Thus, being aggrieved, this appeal has been filed by the appellant.

Submissions by the Appellant:

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17. The main contention of the learned counsel for the appellant in the present appeal is based on the scope of Section 34 of the Act of 1996. It has been contended by the learned counsel for the appellant that in para 16 of the judgment, the learned District Judge has recorded that the respondent has not pressed the ground available under Section 34(2)(b)(ii) of the Act of 1996 which pertains to award being contrary to public policy. He submits that once this was recorded by the District Judge then there was no other ground available for setting aside the award passed by the Arbitral Tribunal. He further submits that the learned District Judge considered in para 19 whether the work executed by the appellant over and above the estimated cost of the respondent should be considered as additional work. The District Judge while referring to this issue wrongly answered that it was beyond the scope of the Reference before the Tribunal. He submits that this was the specific case presented by the appellant before the Arbitral Tribunal and terms of the agreement permitted to raise the same. Thus, the Arbitral Tribunal was well within its competence to decide the same and the District Judge cannot substitute its view with the view of the Tribunal as the Tribunal is the master of the agreement.

18. Learned counsel for the appellant submits that the scope of arbitration agreement is very wide as contained in Clause 26.2 which encompasses all types of disputes within the jurisdiction of the Arbitral Tribunal. He further submits that the District Judge erred in considering Clause 4.6 for the entire work. He submits that the learned District Judge failed in distinguishing that the agreement was in two parts. First, the

Case Citation: (2026) ibclaw.in 3595 HC

estimation regarding physical work and second, realisation of consideration through toll collection. Clause 4.6 was for toll collection and the estimation of work was not related to the same.

19. Learned counsel for the appellant submits that the District Judge has set aside the award only on the ground under Section 34(2)(a)(iv) of the Act of 1996. However, no such ground was raised by the respondent State in its application before the District Judge. He submits that in absence of raising such ground, the District Judge could not have set aside the award based on such ground. He further submits that for considering that, the only Clause which is required to be looked into for deciding whether the dispute not contemplated by or not filed within the terms of submission of arbitration is the Arbitration clause and in the present case, Clause 26.2 is the arbitration clause which is wide and includes the claim as raised by the appellant before the Tribunal. In support of his submission, he placed reliance on the judgment of the Hon'ble Apex Court rendered in the case of ***Olympus Superstructures Pvt. Ltd. vs Meena Vijay Khetan & Ors., 1999 (5) SCC 651*** and ***Pure Helium India (P) Ltd. vs. Oil & Natural Gas Commission, (2003) 8 SCC 593***.

20. Learned counsel further submits that the consideration of the learned District Judge is based on Clause 22.7 and 22.8 of the contract however, a bare perusal of these Clauses would reveal that awarding of the claim was not prohibited by them in any manner. He submits that the reliance as placed by the District Judge on the case of ***Bhagat Ram Sahni &***

IBC Laws | www.ibclaw.in

Sons vs. Delhi State Industrial Development Corporation, 1998 DLT 73-205 is misplaced as the said judgment was passed with respect to the Arbitration Act of 1940 and the Hon'ble Apex Court has already clarified in the case of ***Sundaram Finance Ltd. vs NEPC India Ltd, AIR 1999 SC 565*** that for interpreting the provisions of the Arbitration Act of 1996, no reliance can be placed on the judgments based on the Arbitration Act of 1940. He further submits that even the said judgment in case of ***Bhagat Ram Sahni (supra)*** is contrary to the judgment of the Hon'ble Supreme Court passed in the case of ***S. Harcharan Singh vs Union Of India, AIR 1991 SC 945***. He further submits that the District Judge erred in holding in para 33 that the escalation at 10% has been awarded. However, the addition of 10% was not on account of any escalation but it was for the actual rate to be paid for the work executed additionally as provided under Clause 22.7 of the Special Conditions of Contract.

21. Learned counsel for the appellant lastly submits that interpretation of contract is exclusively within the domain of the Arbitral Tribunal. The District Judge could not have set aside the award under Section 34(2)(a)(iv) of the said Act. In support of his submissions, he has placed reliance on the judgments rendered in case of ***G.Rama Chandra Reddy & Co. vs. Union of India & Anr. (2009) 6 SCC 414***; ***M.P.Housing Board vs. Progressive Writers and Publishers, AIR 2009 SCC 1585*** and; ***U.P.State vs. Mohan Lal, AIR 1971 Allahabad 521***.

Submission by the respondent:

Case Citation: (2026) ibclaw.in 3595 HC

22. *Per contra*, learned counsel for the respondent/State submits that the dispute in the present case has to be looked upon in the context of the nature of contract which is a Build, Operate and Transfer (BOT) contract. It involved execution of public infrastructure through private investment and recovery of cost through toll collection over a fixed concession period. He submits that such contracts are fundamentally distinct from conventional works contract in as much as they are structured on the principle of risk allocation, where the contractor assumes the financial, operational and revenue risks associated with the project. He submits that the entire economic structure of a BOT contract is premised upon the understanding that the contractor will execute work with its own resources and recover its investment through user charges for a predetermined duration which constitutes the sole consideration for the contract. He submits that in the present case the contractor submitted its bid for execution of work for consideration of a right to collect toll for a fixed period of 1311 days. He submits that this offer was given by the contractor after working out costing of the project as mandated under the terms of the contract particularly Clause 4 and Appendix 3(i), (ii) and (iii).

23. Learned counsel for the respondent submits that concession period in no way is contingent upon the actual cost incurred or variation in the work value but it is fixed at the time of acceptance of the bid and represents the final and binding consideration agreed between the parties. The contractor being a commercial entity, entered into the agreement with full knowledge of the risks involved including the possibility of cost

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escalation or variation in work. According to the learned counsel for the State, the estimated project cost and projected toll revenues were merely indicative and formed part of the tender process. They are neither binding nor fixed. Learned counsel submits that after performance of contract, claiming compensation for so called extra work by relying on the estimated cost of the project is not permissible in terms of contract for the reason that the indicative costing was not the actual costing. The actual costing was to be ascertained by the contractor himself as provided in the agreement itself. The learned counsel further submits that the additional toll collection period was granted on the basis of increased value of work despite there being no contractual provision permitting such extension and the Tribunal by doing so has has effectively nullified the core consideration of law and has introduced a new compensation mechanism which was never contemplated by the parties in terms of the agreement.

24. Learned counsel for the respondent/State submits that the claim before the Tribunal in fact seeks to introduce a cost recovery mechanism into the BOT contract thereby converting it into a cost plus arrangement whereby the contractor is assured recovery of its expenditure. He submits that this approach is wholly alien to the contractual framework and undermines the very essence of the BOT model which is based on risk assumptions and not guaranteed return. The Tribunal by entertaining such claim has departed from the contractual scheme and has introduced a new basis of entitlement which finds no mention in the agreement. Learned counsel further submits Clause 3 of the contract if read in conjunction with the core consideration

Case Citation: (2026) ibclaw.in 3595 HC

clause, clearly establishes that upon acceptance of the tender, the contractor is bound to execute the work strictly in accordance with the agreed terms and the consideration according to such agreement terms is limited to the right to collect toll for a fixed period. That period is also decided on the proposal of the contractor itself. Thus, after assessing the cost of the project, contractor proposed certain number of days for right to toll collection and that proposal is accepted by the State, then the contractor cannot turn around and say that its estimation was incorrect thus, looking to the cost of work further days of toll collection be provided. He further refers to Clause 7.1 and Annexure 3(i) of the agreement and submits that even this obligation of completing initial work within six months was breached by the contractor. He thus finally submits that the arbitral award has correctly been set aside by the District Judge as it was in disregard to the terms of the contract and particularly breached/altered Clause 3, 7.1 and Annexure 3(i) of the same. He thus prays for dismissal of the appeal.

25. Apart from this, learned counsel for the respondent submits that the jurisdiction of this Court while hearing an appeal filed in terms of Section 37 of the Act of 1996 is very limited and is confined to examine whether the Court while exercising jurisdiction under Section 34 of the Act has acted within the permissible limits as provided in said Section 34 and it has not re-appreciated the arbitral award on merits. He thus submits that considering the fact that the District Judge has passed the order well within the contour of Section 34 of the Act of 1996, no interference is warranted.

IBC Laws | www.ibclaw.in

Case Citation: (2026) ibclaw.in 3595 HC

Conclusions by the Court:

Heard the rival submissions of learned counsel for the parties. Perused the record.

26. The question before this Court is whether the District Judge while passing the impugned order has exercised its jurisdiction within the contours of Section 34 of the Act of 1996. In order to decide this issue, reference to certain salient features of the contract is required. The NIT was issued on 08.07.2002 and the last date for receipt of tender bids was 23.07.2002.

Clause 1.1(i) provided the name of work thus:

"*Maintenance, reconstruction and repairing of medium and minor bridges, culverts, widening, up-gradation, BT renewal of Ratlam-Nagda-Lebad Road, Ratlam-Jaora Road and Ratlam Bypass Road (total 125.40 kms.)*

Clause 1.1 (ii) provides thus:

1.1 (ii) Probable Amount of Work Rs. 1055 Lacs

Clause 2 provided thus:

2. SCHEDULES:

2.1 Scope of initial work for road, bridges, culverts and other works, etc. Annexure - 3(i)

2.2 Scope of work to be executed year wise by the Entreprenuer during the toll collection period Annexure - 3(ii) & Annexure 3(iii)

IBC Laws | www.ibclaw.in

Case Citation: (2026) ibclaw.in 3595 HC

Clause 3.1 to 3.2 provided thus:

3.1 The work(s) as stipulated under Annexure 3(i) shall have to be completed in specified time frame i/e Six Months.

3.2 The works shall have to be executed as specified in Clause - 2 above.

Clause 3.5.1 provided thus

3.5.1 The maintenance of road, cross drainage, longitudinal drainage protection work, toll barriers, booth, plantation, fencing and truck parking lay bye etc. shall be done strictly in accordance with the Manual for Maintenance of Road 'Pocket Book for Highway Engineers' and 'Pocket Book for Bridge Engineers' Published in the Indian Roads Congress New Delhi.

Clause 4.6, 4.6.1 to 4.6.5 provided thus:

4.6 IMPLICATION OF SUBMISSION OF TENDER

4.6.1 Entrepreneur are advised to visit site sufficiently in advance of date fixed for submission of tender. Entrepreneur shall be deemed to have full knowledge of the relevant documents, samples, site, etc. whether he/they inspects them or not.

4.6.2 The submission of tender by an Entrepreneur implies that he has read the notice conditions of the tender and all other contract documents and made himself aware of the standards and procedures in this respect, laid down in specifications for Roads and Bridge Works (3rd revision) Published by Indian Road Congress, New Delhi and National Building Code of India 1970 relevant Indian Standard IRC codes the scope and specifications of the work to be done and the conditions etc. specified therein.

4.6.3 The submission of tender by an Entrepreneur also implies that he has been the quarries with their approaches, site of work etc. and satisfied himself regarding the suitability and availability of site of work and satisfied himself regarding the suitability and availability of the materials at the quarries. The responsibility of opening new quarries and/or construction and maintenance f approaches there to shall lie wholly with the Entrepreneur.

4.6.4 The entrepreneur will asses and satisfy himself regarding the volume of traffic, likely to pass over the section of road/bypass, bridge during the period of toll collection by him. The information supplied by the department is for general guidance only.

4.6.5 No claims or compensation of any kind will be admissible on account

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of any decrease in the traffic, for any reason whatsoever.

4.6.6 The Government shall not accept any responsibility for any loss, if suffered by the entrepreneur, due to change in the traffic plying on project road as result of the construction of new road/links.

27. What emerges from the clauses cited above is the fact that the respondent/State amply provided clear particulars of the work and standards according to which the said work was to be completed. The probable amount of work at Rs. 1055 lakhs was only indicative. In fact, it was the mandate of Clause 4.6.1 that the contractor was to visit the site sufficiently in advance of date fixed for submission of tender. Clause 4.6.2 provides that submission of a tender would entail that the contractor is aware of the standard and procedure in respect of specification for roads, bridge works as published by the Indian Road Congress, the scope and specifications of the work to be done and the conditions, etc. specified therein. Based on this understanding, it was for the bidders to quote the number of days for recovering cost and profit by collecting toll for which separate provision is made in Clause 4.6.4 to 4.6.6. It was for the entrepreneur/contractor that he shall assess and satisfy himself regarding the volume traffic likely to pass every day. It was made clear in Clause 4.6.5 that no claim or compensation of any kind will be admissible on account of any decrease in the traffic and Clause 4.6.6 expressly provided that the government shall not accept any responsibility for any loss if suffered by the entrepreneur.

28. What essentially comes to the fore by reading the terms of the contract is that it was for the bidders to assess the overall costing of the project and then quote number of days for recovery of that cost. The

estimated amount of Rs. 1055 lakhs in no way was the fixed cost of project. It was only indicative in nature as the Clause itself says probable cost. However, it is clearly qualified by Clause 4.6.1 that it is the bidder who has to satisfy himself and the entire Clause 4.6 overall enjoins upon the bidder to bid responsibly after assessing every factor involved in the project.

29. Learned counsel for the respondent/State is right in submitting that the nature of the contract in the present case is different from a conventional agreement, these BOT contracts are fundamentally distinct from conventional works contract in as much as they are structured on the principle of risk allocation, where the contractor assumes the financial, operational and revenue risks associated with the project. The contractor being a commercial entity, entered into the agreement with full knowledge of the risks involved. We cannot lose sight of the fact that it was a competitive bid. Thus, if the appellant contractor after assessing the number of days required to recovering the expenditure incurred in the project and the profit, quoted certain number of days which were found lowest and if for that reason, the contract is awarded to the appellant then it means that other bidders were excluded from the frame. Thus, by quoting less number of days, the entire competition was excluded by the appellant, this was a calculated risk taken by it. Thereafter, the appellant cannot turn around and claim additional number of days for toll collection because if originally he would have claimed the number of days as subsequently claimed before the Arbitrators then he may not have been L1 bidder. Thus, it becomes wholly unfair to other bidders that first the appellant was awarded contract being the L1 bidder as less number of days were quoted by him and thereafter, he be permitted to bargain for more number of days, this in view of the fact that it is not

the amount of work which has increased but it is the estimation of the contractor which fell on the wrong side of the actual expenditure. The work which has been executed by the appellant/contractor is included in the scope of work thus the work itself cannot be said to be extra work but the appellant is trying to term it extra work only because the expenditure in performing the same has gone beyond the cost indicated by the State.

30. The number of days become significant for the reason that work has clearly been described in Appendix 3(i), (ii) and (iii). Apart from these clauses, in specified condition of the contract execution of work is further explained in Clause 21 which expressely provides that entrepreneur shall be responsible to keep the entire length of road in traffic worthy condition throughout the contract period. Potholes of the road surface in any season should be attended immediately during the contract period. The patch repair work should be done by Bitumen or emulsion. Now the case of the appellant before the Tribunal is recorded in para 3 of its statement of claim. What contended before the Tribunal was that the NIT was issued on 08.07.2022 and the last date for submission of bid was 23.07.2002. Thus, within a period of 15 days from the date of issuance of NIT, the bid was to be submitted. The appellant states in para 3 of his statement of claim before the Tribunal that the claimant can only superficially examine the site of work and bid based on the data, estimated cost and other information available with or supplied by the respondent. This is a clear admission on the part of the contractor of dereliction in complying with the requirements of Clause 4.6.1, 4.6.2 and other sub-Clauses of Clause 4.6. It was an obligation on the part

of the contractor to satisfy itself about the site, the work intended to be carried out and the standard according to which it has to be performed, then it was required to assess the load of traffic and by arriving at a net value for recovery of cost and profit, the days were required to be calculated. However, the appellant/contractor submits that it did not do so and relied on probable data provided by the Government. Thus, what was being asked by the contractor before the Tribunal was premium on its own mistake. This submission of the appellant was considered by the Tribunal in para 19 of the award dated 08.09.2007. The Tribunal observed that only 15 days period was available to the bidders between issuance of NIT and the stipulated date for receipt of tender bids. It observed that no bidder could be expected to explore and work out the exact quantity and the physical quantum of work and the bid can only be based on the estimate prepared and information supplied by the respondent and probable amount of contract stipulated in the NIT. This observation of the Tribunal formed basis for awarding additional number of days for collection of toll. In the considered view of this Court, this observation of the Tribunal is totally beyond the scope of terms of the contract as the contractor was not made to quote its bid based on information given only as an indicative value but there were clear instructions in clause 4.6 to work out the same by physical examination by bidders but the appellant made bid on its own volition and will with open eyes. He could have refused to bid for inadequacy of time provided. However, the contractor took a calculated risk and when it suffered losses, claim was filed. It is not acceptable considering that the contract was awarded to the appellant

at the expense of other bidders who quoted higher number of days.

31. The Tribunal referred in para 28 to 29 a letter issued by the then Chief Engineer, Public Works Department, Ujjain to the Principal Secretary and then the Tribunal considered the fact that the work done by the appellant beyond the extent of Rs. 1055 lakhs could be termed as extra work or not. It recorded in para 17 to 19 that in view of Clause 22.8, the additional work and extra work are used synonymously and that the probable cost of Rs. 1055 lakhs was the contract value and thus, the actual amount of contract exceeding this value has to be additional extra work. The Tribunal further held that such additional cost cannot be claimed by the respondent as gratis. Thus, the award was passed by granting 584 additional days for collection of toll. However, as the counter claim of the State for reduction of 123 days was also allowed, thus, net additional right to toll collection for a period of 461 days was granted by the Tribunal.

32. The approach of the Tribunal is not only contrary to the essence of the contract but it is also in complete disregard to the terms of the contract. The probable cost was never determinative factor for ascertaining the number of days for toll collection. It was for the contractor to decide in terms of Clause 4.6 of the agreement and work was never measured in terms of cost. What was required to be performed under the contract is provided in Appendix 3(i), (ii) and (iii) as well as the Clause 21 of the Special Conditions of Contract. The standards according to which these works were to be performed were provided in Clause 2 and 3 of the agreement. Now, this probable cost of Rs. 1055 lakhs or more than that, is totally irrelevant.

Case Citation: (2026) ibclaw.in 3595 HC

The entire work as provided in these clauses was the work under the contract. Thus, treating the expenditure beyond Rs. 1055 lakhs as extra work is nothing but re-writing the terms of the contract which was expresely barred by the contract itself in Clause 4.6.5 and 4.6.6 which are quoted hereinabove. It was clearly provided in the agreement that the government shall not accept any responsibility for the loss.

33. It has to be borne in mind that a BOT agreement by its very nature includes inherent risk of loss. The cost is based on estimation and recovery of cost is also based on estimation. Significantly, the estimation is also to be done by the bidders, and the estimation of State was not binding but only an indication. The appellant with his eyes wide open took this risk. All other bidders had quoted higher number of days from the present appellant, thus he became L1 bidder. Now, he cannot turn back and claim compensation (by demanding more number of days for toll collection) for losses suffered by it.

34. The District Judge has correctly considered in para 19 to 25 the issue of extra work and rightly concluded that the work performed by the appellant cannot termed as extra work.

35. As regards the argument by the learned counsel for appellant with respect to the finding recorded by the District Judge in para 15 and 16 that the award passed by the Tribunal was not in conflict with the public policy, opening line of para 15 has to be seen which begins with the words 'the interim award passed by Arbitral Tribunal'. A close scrutiny of para 15

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Case Citation: (2026) ibclaw.in 3595 HC

and 16 would show that this finding is only limited to the interim award passed by the Tribunal on 11.06.2006 and not the final award. Thus, the contention of learned counsel for the appellant that once the Court recorded in para 16 that the award is not in conflict with the Public Policy of India no interference can be made is contrary to the record, hence not sustainable.

36. As regards the submission of the learned counsel for the appellant that the learned District Judge failed to consider that Clause 4.6.4 was only with respect to volume of traffic and not the work to be performed, it would suffice to say that though it is correct that Clause 4.6.4 is only with respect to volume of traffic resultantly directly connected to toll collection. However, Clause 4.6.1, 4.6.2 and 4.6.3 are for civil work to be performed and it was the contractor who was required to satisfy itself about the volume of work and the cost involved therein. Thus, this submission of the learned counsel that the District Judge failed to consider the impact of Clause 4.6 is also not sustainable.

37. As far as reliance placed by the learned counsel for the appellant on the judgment of the Hon'ble Apex Court in the case of ***Olympus Superstructures (supra)*** is concerned, the judgment in the said case was on the issue of jurisdiction. The Court was considering whether the Tribunal has jurisdiction to try the issue which is not the case in the present matter. In the present appeal, the issue is whether the Tribunal can be permitted to re-write the terms of the contract as the Tribunal has re-written the terms of the contract by holding that the work beyond the probable cost of Rs. 1055 lakhs

IBC Laws | www.ibclaw.in

Case Citation: (2026) ibclaw.in 3595 HC

has to be termed as extra work which is in direct conflict with the scope of work provided in the agreement.

38. As far as the judgment in case of ***Pure Helium (supra)*** is concerned, issue in the said case was compensation resultant to fluctuations in foreign exchange rate and not escalation in prices. The Court considered that there is no bar for awarding compensation for fluctuation in foreign exchange however, in the present case facts are completely different. In the present case there is a clear bar in Clause 4.6.6 according to which the State is not responsible for any loss incurred by the contractor in the project. As can be seen from the pleadings in para 3 of the statement of claims, it was the fault of the contractor himself that he did not carry out due diligence before quoting the number of days for collection of toll and thus, it incurred losses. The scope of arbitration is not to compensate the losses for the fault of the contractor himself which could have only been done by tweaking the terms of the contract. Thus, the Tribunal in order to award additional days for toll collection to make good the losses suffered by the contractor tweaked the terms of the contract by terming the works beyond Rs. 1055 lakhs as extra work, which is nothing but re-writing the conditions of the contract which is not at all permissible in view of the clear stipulations in the contract.

39. As far as the case of ***Sundaram Finance Ltd. (supra)*** is concerned, the same has been relied upon by the appellant for the fact that the District Judge has passed the impugned award based on ***Bhagat Ram Sahni's*** case ***(supra)*** which was passed by the Delhi High Court under the provisions of the Arbitration Act of 1940 and the Hon'ble Supreme Court in

IBC Laws | www.ibclaw.in

Case Citation: (2026) ibclaw.in 3595 HC

case of ***Sundaram Finance Ltd. (supra)*** held that while interpreting provisions of the the Arbitration and Conciliation Act, 1996 no reliance can be placed on the judgments emanating out of the Act of 1940. This will also not come to rescue the case of the appellant for the reason that irrespective of the judgment in case of ***Bhagat Ram Sahni (supra)*** the award of the Tribunal cannot be sustained for the reasons as detailed above.

40. As far as the judgment in the case of ***S. Harcharan Singh (supra)*** is concerned, in that case the issue was whether the contractor can be compelled to execute extra quantities for unlimited period. It is not the case in the present matter. In the present matter, the quantity, time and standards are clearly provided in the contract. The only dispute is the probable cost of the contract which was to be ascertained by the contractor himself in which the contractor failed. Thus, this case will also not help the appellant.

41. As far as the judgment in the case of ***G.Rama Chandra Reddy (supra)*** is concerned, the Hon'ble Apex Court held in the said case that if two views are possible, then the award of the Tribunal cannot be reversed by the District Judge for the reason that it has taken a different view. There is no difficulty in accepting this proposition of law. However, in the present case, this is not the situation. Here, the Arbitral Tribunal has gone beyond the terms of the contract and has re-written the same which is not sustainable in the eyes of law.

42. As far as the judgment in the case of ***M.P.Housing Board (supra)*** is concerned, the facts in the said case were completely different. In

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the said case, the terms of agreement provided that the Board would execute construction of complex and the cost of construction was to be borne by the depositor. The cost of construction of the building was estimated at Rs. 28 lakhs and in case of overrun of expenditure and funds, the revised estimates were to be submitted and the administrative approval of the depositors was required to be obtained. Clearly, the nature of contract was completely different. There was a provision of estimated cost and other provision of overrun of expenditure. However, present is a case of completely different league of contracts. Here, the contract in question is a Build, Operate and Transfer contract in which the terms are completely different. In such contracts, work needed to be performed is provided. It was for the contractor to decide as to how many number of days of toll collection will reimburse the cost of project and provide profit to it and this decision solely has to be taken by the contractor, there is an inherent risk of loss in these kind of contracts and it is for the contractor to decided wether it is willing to take this risk, which in this case has willingly been taken by the appellant. Thus, the said case will also not apply in the facts of the present case.

43. As far as the judgment in case of ***Mohan Lal (supra)*** is concerned, the facts of that case were completely different from the facts of the present case.

44. In view of the above facts and analysis, it is clear that the Arbitral Tribunal has re-written the terms of the contract in awarding additional number of days for toll collection to the appellant, which is not

permissible. The Hon'ble Apex Court in case of ***Oil & Natural Gas Corporation Ltd. vs Saw Pipes Ltd., AIR 2003 SC 2629*** considered the aspect of construction of a contract and in para 40 of the judgment laid down as under:

> *"It cannot be disputed that for construction of the contract, it is settled law that the intention of the parties is to be gathered from the words used in the agreement. If words are unambiguous and are used after full understanding of their meaning by experts, it would be difficult to gather their intention different from the language used in the agreement. If upon a reading of the document as a whole, it can fairly be deduced from the words actually used therein that the parties had agreed on a particular term, there is nothing in law which prevents them from setting up that term. {Re:* ***Modi & Co. v. Union of India [(1968) 2 SCR 565]****}. Further, in construing a contract, the Court must look at the words used in the contract unless they are such that one may suspect that they do not convey the intention correctly. If the words are clear, there is very little the court can do about it. {Re:* ***Provash Chandra Dalui and another v. Biswanath Banerjee and another [1989 Supp (1) SCC 487]****}."*

45. In case of ***Steel Authority Of India Limited vs J.C. Budharaja, Government And Mining Contractor, AIR 1999 SC 3275***, the Hon'ble Apex Court held that the Arbitrator derived authority from the contract and if he acts in manifest disregard of the contract, the award given by him would be an arbitrary one. This deliberate departure from the contract amounts not only to manifest disregard of the authority or misconduct on his part, but it may tantamount to mala fide action. Again in the case of ***Rajasthan State Mines & Minerals Ltd. vs. Eastern Engineering Enterprises & Anr., (1999) 9 SCC 283***, the Hon'ble Apex Court observed that there is specific terms in the contract or the law which does not permit or give Arbitrator the power to

decide or to adjudicate on a dispute raised by the claimant or there is a specific bar to the raising of a particular dispute or claim, then any decision given by the Arbitrator in respect thereof would clearly be in excess of jurisdiction.

46. In view of the analysis of the above facts, this Court is of the considered view that the Arbitral Tribunal passed the award thereby altering the conditions of the contract which is in contravention to the fundamental policy of Indian Law as once a contract is executed between the parties which is legally enforceable, then the terms of the contract can only be altered with the consent of the parties to the contract and they will be governed by the provisions of the Indian Contract Act. Here the alteration in the conditions of the contract was unilateral at the behest of appellant contractor against the consent of the respondent/State Government. Thus, the award is in direct contravention with the fundamental policy of the Indian Law.

47. The Hon'ble Apex Court recently in the case of ***M/s C And C Constructions Ltd. vs Ircon International Ltd., (2025) 4 SCC 234*** has held that jurisdiction of the Appellate Court under Section 37 is akin to the jurisdiction of the District Court under Section 34 of the Act of 1996. In view of the above analysis of facts and terms of contract, this court is of the considered view that the award as passed by the Arbitral Tribunal is not sustainable and consequently no interference in the impugned order is required.

Case Citation: (2026) ibclaw.in 3595 HC

48. In view of the above conclusions and legal position, this Court is of the considered view that the learned District Judge has correctly set aside the impugned award passed by the Arbitral Tribunal and no interference is warranted in the same for the reasons as detailed herein above. Consequently, the appeal fails and is hereby **dismissed**.

(PAVAN KUMAR DWIVEDI)
JUDGE

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