[2026:RJ-JP:30253-DB]

# HIGH COURT OF JUDICATURE FOR RAJASTHAN
# BENCH AT JAIPUR

D.B. Civil Miscellaneous Appeal No. 1560/2025
CNR: RJHC020268382025 | URN: CMA / 2660U / 2025

1. Jaipur Development Authority, Through Executive Engineer (PDC-1) Indira Circle, Jawaharlal Nehru Marg, Jaipur, Rajasthan
2. Urban Development And Housing Department (UDH), Government Of Rajasthan, Through Its Secretary, Food Building, Secretariat, Jaipur 302015, Rajasthan

----Appellants

Versus

Rohan Rajdeep Rajasthan Infra Project Limited, Through Director, Suhas K. Lunkad, 1, Modibaug, CTS No. 2254, Bhamburde, Ganeshkhind Road, Pune 441016, Maharashtra

----Respondent

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| For Appellant(s) | : | Mr. Rajendra Prasad, AG<br>Mr. Tanay Goyal, Adv.<br>Mr. Sheetanshu Sharma, Adv.<br>Ms. Harshita Thakar, Adv.<br>Ms. Dhriti Sharma, Adv. |
| For Respondent(s) | : | Mr. Sudhir Gupta, Sr. Adv.<br>Ms. Sweta Chauhan, Adv.<br>Mr. Tarak Ahuja, Adv.<br>Mr. Ishan Khanna, Adv.<br>Mr. Aditya Shandilya, Adv.<br>Mr. Rachit Somani, Adv. |

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**HON'BLE MR. JUSTICE ARUN MONGA**

**HON'BLE MR. JUSTICE SANDEEP TANEJA**

## Judgment

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**Reportable**

**Pronounced on :- 17/08/2026**

**Per: Arun Monga, J.**

**I. INTRODUCTION:**

1. Appeal herein is directed against the order dated 27.01.2025 passed by the learned District Judge, Commercial Court, Jaipur, whereby the objection petition preferred by the appellants under Section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as "the Act of 1996"), assailing the arbitral award dated 25.06.2023 and the corrigendum award dated 31.07.2023, was dismissed.

2. The controversy pertains to disputes, arising out of a Tripartite Concession Agreement dated 27.11.2009 executed between the Government of Rajasthan, Jaipur Development Authority and the respondent-concessionaire in relation to the construction, operation and

maintenance of an alternate route to "Ghat Ki Guni", through a tunnel in the Jhalana Hills to connect with NH-11 (Agra Road), Jaipur on Build, Operate and Transfer (BOT) basis.

3. Salient features of the work scope are tabulated as below:

| | |
|---|---|
| *Project Cost as per Bid Docs.* | *Rs. 150 Crores* |
| *Project Cost as quoted by Respondent*[*] | *Rs. 150 Crores* |
| *Date of Letter for agreement of Award* | *13.10.2009* |
| *Date of signing of Agreement* | *27.11.2009* |
| *Concession Period w.e.f .commencement date* | *13 years 05 months 20 days* |
| *IRR As per Cash Flow Projection of claimant* | *20.33%* |
| *Proposed Commencement date* | *01.12.2009* |
| *Actual commencement date* | *15.12.2010* |
| *Stipulated date of completion* | *14.06.2013* |
| *Actual date of completion* | *31.01.2013* |

4. The claims preferred before the learned Arbitral Tribunal as per statement of claim dated 15.02.2019 are tabulated as under:-

| *S. No.* | *Particulars* | *Amount* |
|---|---|---|
| *1.* | *Claim No. 1: For increase in project cost* | *175.67 crores* |
| *2.* | *Claim No. 2: For loss of toll* | *188.02 crores* |
| *3.* | *Claim No. 3: For compensation of toll loss due to delay in achieving the Commercial Operations Date (COD)* | *40.71 crores* |
| *4.* | *Claim No. 4: For revenue loss on account of denial of use of right of way for displaying advertisements* | *8.49 crores* |

Besides above, declaratory reliefs and Internal Rate of Return (IRR) @20.33% and arbitral costs were also sought.

The arbitral proceedings culminated in an award, whereby Claim No. 1 and Claim No. 4 were allowed, Claim No. 2 was partly allowed, and Claim No. 3 was rejected.

[*] [****] *Revised Project Cost as on 13.01.2013 (completion date) due to additional Scope* - Rs. 207.87 crores (as per claimant/respondent)

5. The decision of the learned Arbitral Tribunal on various claims is culled out and tabulated as under:

| *S.No.* | *Particulars* | *Decision* | *Amount (in Rupees)* |
|---|---|---|---|
| *1.* | *Claim No. 1: Increase in Project Costs* | *allowed in toto* | *175.67 crores* |
| *2.* | *Claim No.2 Loss of Toll* | | |
| | *i). On account of leakage of traffic through old GKG road.* | *allowed* | *12.20 crores* |
| | *ii). On account of diversion of traffic through Kho-Nagoriyan road after accident on 6th June, 2017* | *disallowed* | *--* |
| | *iii). On account of demonetization* | *allowed* | *1.68 crores* |
| | *iv). On account of traffic leakages through other competing roads.* | *disallowed* | *--* |
| *3.* | *Compensation of toll loss of 7 months due to delay in achieving COD* | *disallowed* | *--* |
| *4.* | *Loss of revenue due to prohibition to use ROW for Advertisements* | *allowed* | *8.49 crores* |
| *5.* | *Total award (as on date of filing statement of claim on 16.02.2019)* | | *198.04 crores* |
| *6.* | *Costs on account of payment of arbitral fee, legal expenses etc.* | | *23,66,061/-* |

Aside above, the learned Arbitral Tribunal also awarded IRR @ 20.33% per annum on the allowed claims, up to the date of the Award. It was further directed that, in the event the awarded amount was not paid within a period of 90 days from the date of the Award, the same would carry post-award interest @12% per annum until its actual payment.

6. Subsequently, vide a corrigendum award dated 31.07.2023, also assailed herein, the learned Sole Arbitrator, exercising powers under Section 33 of the Act of 1996, allowed the Respondent-Claimant's application for correction of clerical errors. The Corrigendum, *inter alia*, deleted the words *"amounting to Rs. 198.04 Crores", (*i.e. sum total of the award) from paragraph 141 and made the original Award dated

25.06.2023 without any upper cap, by adding IRR @20.33% on compounding basis per annum.

7. Apropros the award, the respondent is stated to have instituted execution proceedings, wherein, recovery is sought for a sum of Rs.544.43 crores which is calculated as per Rs. 198.04 crore along with the IRR @20.33% w.e.f 31.01.2019, plus additional 12% w.e.f. 01.08.2023. The learned Executing Court, *vide* its order dated 09.01.2026, had directed issuance of a warrant of recovery under Order XXI Rule 30 of the Code of Civil Procedure, 1908, for recovery of Rs. 544.43 crore.

8. However, pursuant to an order dated 22.01.2026 passed by this Court, the execution proceedings were stayed. Since the appellants challenge not only the conclusions drawn by the learned Sole Arbitrator but also the approach of the learned Commercial Court in refusing interference within the framework of Section 34 of the Act of 1996, it becomes necessary to set out the factual backdrop in some greater details.

**II. FACTUAL BACKGROUND:**

8.1. The project in question originated from a Notice Inviting Tender dated 04.08.2009, which was later amended on 17.08.2009. A pre-bid meeting was held on 08.09.2009. The minutes thereof were circulated on 14.09.2009. The respondent participated in the bidding process and, was declared the successful bidder. It was issued a Letter for agreement of Award dated 13.10.2009. Thereafter, on 27.11.2009, a Tripartite Concession Agreement was executed between the Government of Rajasthan, Jaipur Development Authority and the respondent, a Special Purpose Vehicle incorporated for implementation of the project.

8.2. Under the Concession Agreement, the respondent was entrusted with the concession to investigate, design, engineer, finance, construct, operate and maintain the project. The project thus stood structured on a Design- Build- Finance- Operate- Transfer/Build -Operate- Transfer (DBFOT/BOT) model. The rights and obligations of the parties, the standards governing execution, the risk allocation between the authority and the concessionaire, and the remedies available were all intended to be regulated by the contractual framework, i.e., concession agreement.

8.3. In pursuance of the agreement, the respondent is stated to have taken financial exposure by entering into a term loan agreement with Punjab National Bank in March 2010. It is further the respondent's case that, in the wake of subsequent revisions and escalations, an additional term loan was sanctioned in April 2011 and formalized in July 2011. The financial structure initially rested on an approved project cost of Rs. 150 crores, with the term loan and equity infusion being arranged on that basis. According to the respondent, the situation altered once execution commenced and the project allegedly encountered serious deficiencies in the Detailed Project Report (DPR), alignment-related issues, site constraints and additional instructions issued by the authority.

8.4. The central factual dispute, i.e., cost escalation (first claim), between the parties commenced with the respondent's allegation that the DPR supplied by the department was not merely imperfect but fundamentally defective in material particulars affecting the structural and engineering feasibility of the tunnel alignment. The respondent's case before the learned Tribunal was that, upon transfer of the alignment on the ground and upon conducting surveys in December 2009 and February 2010, it was discovered that the natural overburden over the tunnel tubes at material chainages shown in DPR was grossly inadequate from the standpoint of structural safety, and that the tunnel, if executed on the alignment indicated in the DPR, would not conform to minimum engineering norms. The respondent accordingly treated the DPR as the source of a foundational defect that compelled redesign and generated cost consequences.

9. In elaboration of the above, the respondent relied upon its communications dated 28.04.2010 and 12.05.2010, by which it highlighted discrepancies in the DPR and proposed alternative solutions. One option suggested construction of a cut-and-cover tunnel in a specified valley portion. The other involved lowering the finished road level to ensure compliance with minimum overburden requirements. The matter was also referred for technical evaluation, and according to the respondent, the expert inputs revealed serious concerns regarding water diversion, forest clearance, slope instability, risk of landslides, formation of weak junctions, and the need for substantial alteration in gradient, tunnel length and embankment profile. On that basis, the respondent asserted that revision in vertical and horizontal alignment was unavoidable and that the cost implication of the proposed changes alone was estimated at about Rs. 29 crores.

10. The respondent further asserted that these deficiencies were eventually acknowledged within the departmental setup. Reliance is placed on a sequence of communications dated 28.04.2010, 06.09.2010, 20.09.2010, 04.10.2010 and 20.10.2010, and on the department's agenda note, to contend that the revised horizontal and vertical alignment submitted by the respondent was approved on 20.10.2010. The respondent also relied upon material to suggest that the consultant associated with the earlier DPR was debarred for a period of two and a half years and that the services of its Project Head were terminated, which, according to the respondent, constituted

contemporaneous administrative recognition of the defects in the original report.

11. According to the respondent, even after approval of the revised alignment on 20.10.2010, further disruption occurred owing to the presence of Baba Balaknath Samadhi at chainage 0+650, which allegedly fell within the proposed right of way. It is the respondent's case that local resistance to removal of the Samadhi compelled stoppage of work and necessitated a further revision in alignment on the instructions of the authority itself. Reference is made to letters dated 14.06.2011 and 18.08.2011, and to subsequent approvals dated 16.11.2011 and 23.04.2012, to assert that repeated redesign had to be undertaken before work could effectively proceed.

12. The respondent also relies on the statement/cross-examination of the appellants' witness i.e. Executive Engineer, JDA, to assert that the encumbrance at chainage 0+650 was not removed and that the Samadhi fell within the right of way proposed by the claimant. According to the respondent, this evidence fortified its case that the delays and design modifications were not self-generated but arose from site conditions and institutional decisions attributable to the authority.

13. Apart from the alignment issue, the respondent alleged that the project cost escalated because certain additional works, not originally envisaged in the bid or base design, had to be executed at the instance of the authority. These included provision of a truck lay-bye between chainages 1990 to 2100, a slip road at chainage 2750 for merging traffic from Goner side, redesign and widening of the rotary, and widening of connecting roads on both sides of the rotary. The respondent's case is that these interventions were not voluntary betterments made for its own commercial convenience, but were

directed by the authority in the course of project supervision and traffic management, and therefore generated compensable cost overrun.

14. The respondent further asserts that the rotary works themselves suffered delay because existing electric cables were not rerouted in time by the authority. It is also the respondent's case that, during a site visit on 30.11.2012 by members of the Empowered Committee, DCP Traffic, JDC and other JDA officials, revision in the approved geometry of the rotary was suggested, leading to redesign, fresh approval, widening of the carriageway, and execution of work within an expedited time frame before inauguration. According to the respondent, all such works were beyond the original scope and directly impacted project cost and construction planning.

15. The respondent additionally alleges that it was burdened with expenditure on facilities provided to the Independent Consultant/Independent Engineer at the insistence of the authority, despite there being no contractual provision obliging it to bear such costs. In support, reliance is placed on the fact that the authority (JDA), by letter dated 21.04.2010, demanded deposit of an amount of approximately Rs. 1.799 crores for the Independent Consultant, and that although the respondent disputed the demand, it was eventually constrained, in the interest of project completion, to provide office space, furniture, clerical staff, office boys, vehicles, mobile connections and other logistical support over a prolonged period. According to the respondent, this constituted extra-contractual expenditure incurred in good faith and liable to reimbursement.

16. Yet another factual branch of the controversy pertains to forest clearance, site availability and encumbrance removal. The respondent's case is that, at the stage of bidding, it had been represented that land

acquisition was in process and that the project land would be made available free from encumbrances prior to commencement of work under the agreement. However, according to the respondent, forest clearance remained a live operational difficulty even after award of work; restrictions on working hours were communicated by the Forest Department; and by letter dated 06.01.2010, the respondent expressed its inability to work at full capacity and requested relaxation of time restrictions. The respondent thus treats delayed or conditional forest clearance, along with incomplete site readiness, as another cause of idling, disruption and cost increase.

17. In support of the project cost claim, the respondent also relied on evidence from Punjab National Bank to show that the original term loan had been sanctioned after technical vetting of project details, estimates and traffic survey, and that an additional term loan was later considered and sanctioned only after the escalated cost component was again technically vetted. The respondent accordingly sought to estalish that the escalation in project cost was not hypothetical or self-certified, but had undergone scrutiny by the lending institution, technical consultants and the lender's internal mechanisms.

18. The appellants, however, dispute the entire basis of the respondent's claim for enhanced project cost. Their case, simply put is that the project stood awarded on a DBFOT basis, under which the concessionaire had undertaken to conduct its own investigations, surveys and design development, and could not subsequently shift the consequences of its own technical or financial decisions onto the authority. It is further their case that the DPR was appended only as a reference document and that the governing standards were those prescribed in the Concession Agreement, the Indian Roads Congress

norms and MoRTH specifications. According to the appellants, the respondent was contractually expected to verify the project site, identify risks and shape its bid accordingly.

19. The appellants also take the factual position that large portions of the site had been made available, that encumbrances were either negligible or timely resolved. That the respondent exaggerated the effect of such issues on the progress of the work. They aver that the respondent itself delayed action on stretches where approvals had already been granted and that, in any event, the respondent had already been substantially compensated through extension of the concession period. According to the appellants, once such extensions had been granted under the contractual mechanism, the respondent could not seek a fresh money decree for the very same causes.

20. The second major head of claim relates to loss of toll revenue. The respondent asserts that traffic was diverted or leaked through alternate routes, including the old Ghat Ki Guni road and other competing roads, and that this affected the toll potential of the project. The respondent also claims that, owing to demonetisation and toll-suspension related directions, toll collections were adversely impacted and loss was caused. These assertions are opposed by the appellants, who dispute both the existence and extent of any enforceable obligation on their part and the computation methodology adopted by the respondent for estimating toll loss.

21. The third claim pertains to compensation for toll loss allegedly arising from delay in achieving the Commercial Operation Date. The respondent sought to connect delayed completion with acts or omissions attributable to the appellants, whereas the appellants denied

liability and disputed the maintainability of the claim on contractual and factual grounds.

22. The fourth claim concerned alleged revenue loss resulting from denial of permission to use the right of way for displaying commercial advertisements. According to the respondent, the concession arrangement envisaged commercial advertising opportunities and the refusal to permit such use caused measurable loss. The appellants, on the other hand, resisted the claim on grounds including safety, contractual limitation and limitation in law.

23. As the disputes remained unresolved, the respondent invoked the arbitration clause contained in the Concession Agreement. By order dated 28.09.2018 passed by this Court under Section 11 of 1996, the learned Sole Arbitrator was appointed to adjudicate the disputes between the parties.

24. During the arbitral proceedings, the appellants also questioned the arbitrability of the disputes by contending that the Concession Agreement envisaged a multi-stage dispute resolution mechanism requiring amicable settlement before recourse to arbitration. The learned Sole Arbitrator rejected the objection by holding that the plea had not been raised within the time contemplated by Section 16 of the Act of 1996 and was therefore liable to be rejected.

25. Upon adjudication, the learned Sole Arbitrator rendered the award dated 25.06.2023. As already noted, the claims preferred before the learned Tribunal included are as

(i) Claim No. 1 for increase in project cost quantified at Rs. 175.67 crores,

(ii) Claim No. 2 for loss of toll quantified at Rs. 188.02 crores,

(iii) Claim No. 3 for compensation of toll loss due to delay in achieving COD quantified at Rs. 40.71 crores,

(iv) Claim No. 4 for revenue loss on account of denial of use of right of way for displaying advertisements quantified at Rs. 8.49 crores, besides declaratory reliefs, return at the rate of IRR and arbitral costs.

By the award, Claim No. 1 was allowed, Claim No. 2 was partly allowed, Claim No. 3 was rejected, and Claim No. 4 was allowed.

25.1 Thereafter, a corrigendum award dated 31.07.2023 came to be issued on an application under Section 33(1)(a) of the Act of 1996, culminating into the instant appeal in hand. Relevant paragraphs of corrigendum are as below:

*"9. From the perusal of the whole award, it is clear that the intention of the Arbitrator was not to restrict the award amount to Rs.198.04 crores till the date of the award. Rs.198.04 crores is the amount awarded only till the date of filing of the claim petition and the said amount does not include the amount awarded for the period between filing of the claim petition and the date of the award. The intention of the Arbitrator was to award the claim till the date of the award. Therefore, "amounting to Rs. 198.04 Crores" has been wrongly mentioned in Para 141 on Page 106 and requires correction. The said correction is only typographical/clerical.*

*10. I find that other corrections sought by the Claimant are merely spelling/typographical errors. I deem it appropriate to allow the application of the Claimant. The corrigendum for correction of typographical/ clerical errors in the award dated 25.06.2023 shall be treated as part of the award. The corrections to be made to the award are as under:*

| ***S.No.*** | ***Para and Page of the Award*** | ***To Be Replaced/deleted*** | ***Corrected Portion/Deleted Part*** |
|---|---|---|---|
| *1.* | *Para 141 on Page 106* | *amounting to Rs. 198.04 Crores* | *Deleted* |
| *2.* | *Page 1* | *Mr. Rajan Khandoliya* | *Mr. Rajan Khandoliya* |
| *3.* | *Para 2 on Page 2* | *Arbitraion Case No.31 of 2018* | *S.B. Civil Arbitration Application No. 31 of 2018* |
| *4.* | *Para 46 on Page 32* | *13.5% per annum* | *12% per annum* |
| *5.* | *Para 77 on Page 61* | *Annexure C-59* | *Annexure C-20* |

| | | | |
|---|---|---|---|
| *6.* | *Para 74 on Page 71* | *Rs.20.787.16/- Lakhs* | *Rs.20.787.16/- Lakhs* |
| *7.* | *Para 98 on Page 79* | *letter dated 08.01.2017* | *letter dated 18.01.2017* |
| *8.* | *Page 108* | *Place of Arbitration: Jabalpur* | *Place of Arbitration: Jaipur* |

*11. The application of the Claimant is allowed. No orders on cost."*

**III. ARGUMENTS ON BEHALF OF THE APPELLANTS:**

26. Learned Advocate General for the State, Mr. Rajendra Prasad, Senior Advocate assisted by Mr. Sheetanshu Sharma, Mr. Tanay Goyal, Ms. Harshita Thakar, and Ms. Dhriti Sharma, appeared for the appellants. He argued on the lines of the written submissions handed over in the course of court hearing. The oral submissions are noted hereunder, and the written submissions are thereafter reproduced verbatim:-

26.1 Elaborating the written submissions, Learned senior counsel for the appellants submitted that the impugned order of the learned Commercial Court, together with the arbitral award dated 25.06.2023 and the corrigendum award dated 31.07.2023, are contrary to the facts and the law and deserve to be set aside in their entirety. It is contended that the award suffers from patent illegality, perversity and irrationality, and is opposed to the fundamental policy and public policy of India as reflected in the Limitation Act, the Indian Contract Act, the Interest Act, and the Rajasthan Road Development Act, 2002 and the Rules framed thereunder.

26.2 It is further submitted that the learned Sole Arbitrator failed to test each of the claims against the applicable law of limitation and that, had such exercise been undertaken, the claims would have been held to be *ex facie* time-barred. According to him, this objection went to the very root of the adjudication, yet neither the award nor the order under Section 34 contains a proper or independent determination thereon.

26.3 In relation to Claim No. 1, learned senior counsel for the appellants submited that the learned Sole Arbitrator fundamentally misconstrued the status of the Detailed Project Report under the Concession Agreement. It is urged that, under the contractual scheme, the governing standards were those prescribed by the Indian Roads Congress and MoRTH specifications, whereas the DPR was appended only for reference. He would also rely upon the pre-bid clarification, especially the response to the bidder's query regarding whether the DPR was required to be followed, to contend that the non-binding character of the DPR was made explicit even prior to bid submission.

26.4 He would further contend that the revised alignment had in fact been placed before and approved by the Empowered Committee constituted under the Act of 2002. Once such approval was granted, deviation from the original DPR could not by itself furnish a cause for monetary compensation against the authority. It is also submitted that the learned Sole Arbitrator failed to identify any positive contractual obligation breached by the appellants, and instead proceeded on assumptions not borne out by the agreement.

26.5 It is next contended that under the scheme of the Concession Agreement, the ordinary contractual method of compensating the concessionaire, save in a case of termination payment, was by extension of concession period and not by grant of cash compensation. Learned senior counsel would submit that extensions aggregating 484 days (which in money terms yielded additional revenue of Rs. 120 crores to the respondent) had already been granted by the Empowered Committee. Thus, the learned Sole Arbitrator could not have superadded monetary compensation for the same causes. According to him, the award thereby defeats the negotiated risk allocation embedded in the contract.

26.6 He would also submit that the learned Sole Arbitrator committed a manifest error in equating the Internal Rate of Return of 20.33 with an interest rate payable by the appellants. It is urged that IRR is merely an internal financial metric relating to the respondent's investment model and cannot be mechanically converted into an interest entitlement against the JDA. It is further contended that additional loan arrangements between the respondent and Punjab National Bank were private financial arrangements, to which the appellants were not parties, and that the contractual bar against fastening such financing consequences upon the authority was ignored.

26.7 He would further argue that the computation of increased project cost is itself unsustainable. According to him, inasmuch as, components such as interest during construction, survey expenses, loan processing fees and allied items were the respondent's own contractual responsibility. It is also urged that the award failed to account for the fact that, on account of deviation from the original DPR, the tunnel length allegedly reduced from 3.70 km to 2.8 km, thereby resulting in de-scoping and cost saving which ought to have been adjusted against any escalated claim.

26.8 In relation to Claim No. 2, learned senior counsel for the appellants would submit that the appellants had undertaken only to restrict heavy vehicular traffic, namely buses and trucks, from the old Ghat Ki Guni road, and had never undertaken to ban all tollable traffic, as was allegedly assumed in the award. It is submitted that the commitment made by the appellants was honoured through the gazette notification dated 31.01.2013 and by erection of physical barriers, and that any residual flow of other vehicles could not translate into a contractual claim for damages.

26.9 As regards the demonetisation component of Claim No. 2, it is submitted that the same was allowed without the mandatory certification by the Steering Group and verification by the Chief Engineer, JDA/UDH, allegedly required under the contract. It is further contended that demonetisation caused no material adverse effect of the kind claimed, particularly when the toll denominations were below the affected currency values and when the project road did not fall within the category of National Highways to which certain tolling directions were addressed.

26.10 With respect to Claim No. 4, learned senior counsel for the appellants would contend that the learned Sole Arbitrator recorded no sustainable finding either on whether the proposal for advertisements compromised road safety or on whether the quantified loss of Rs. 8.49 crores was proved in accordance with law. The appellants also assail the grant of costs. He would also submit that the corrigendum award exceeded the limited jurisdiction available under Section 33 of the Act of 1996 by making a substantive alteration under the guise of clarification.

26.11 Lastly, it was argued that the learned Commercial Court failed to discharge the jurisdiction vested in it under Section 34 of the Act of 1996. According to learned senior counsel for the appellants, the Commercial Court proceeded on an unduly narrow understanding of its powers, mechanically reproduced the restrictive principles governing Section 34 review, and failed to independently examine the specific grounds of patent illegality, contractual infraction and public policy violation raised in the objections petition.

**26.12 WRITTEN SUBMISSIONS ON BEHALF OF THE APPELLANTS (reproduced verbatim):-**

Apart from the arguments addressed before the Court, written submissions on behalf of the appellants were also tendered during the course of hearing. For ready reference relevant portion of written submission thereof are reproduced hereinbelow:-

"***POINTS OF SUBMISSIONS***

*I.The Agreement was a DBFOT concession providing only for extension of the concession period, and no cash compensation; the award ofcash compensation amounts to re-writing of the contract.*

- *Award: Arbitrator has taken a contrary stand on this by allowing Claim 1 and denying Claim 3 in Para 130*
- *Relevant Docs: Concession Agreement (Vol II) Cl. 10, 12.*

*II. Article 16 (disclaimer) expressly allocated the design-risk and waswrongly nullified on misapplied precedents*

- *Claimant entered into the contract with open eyes and therefore could not dispute its obligations and the terms made under it (RIICO vs Diamond and Gem, (2013) 5 SCC 470 – Para 23)*
- *Disclaimer clause was not in teeth of any provision of the Indian law (Para 71 @ Pg 52 of the Award)*
- *Board of Trustees for the Port of Calcutta vs. Engineers-De-Space Age, (1996) 1 SCC 516 and the Delhi High Court in Simplex Concrete Piles (India) Ltd. vs. Union of India, 2010 SCC OnLine Del 821 both authorities were misapplied and are clearly distinguishable on facts*
- *Ignored binding precedent in the case of Ramnath International Construction (P) Ltd. vs. Union of India, (2007) 2 SCC 453.*

*III. The DPR was a reference document only; treating it as mandatoryreference contradicts Clauses 2.1, 5.1, Article 7 and Schedule-A.*

- *Under the DBFOT scheme, investigation and design were the Concessionaire's exclusive responsibility*
- *Relevant Docs: Query No. 99 of the Pre-Bid Meeting (An. C3)*
- *Award passed clearly contrary to the contract and evidence.*

*IV. No breach by the Appellants was found; damages without breach goesagainst Sections 54/55/73 of the Contract Act.*

- *Learned Arbitrator does not any breach of contractual obligation attributable to the Appellants*
- *Kailash Nath Associates vs Delhi Development Authority, (2015) 4 SCC 136.*

*V. The 484-day extension already compensated the Respondent; theaward therefore directs double recovery.*

- *Initial extension in the concession period for 379 days awarded for any extra cost that might have accrued to the Claimant at the start of the project due to change in alignment*
- *Second extension of 105 days was granted for hindrances and encumbrances leading to delay in the Project.*

*VI. Para 124 contradicts the allowance of Claims 1, 2(i), 2(iii) and 4 andvitiates the award.*

- *Para 123 (Pg 96) - The Contract between the parties shows the joint intent of both the parties and has to be interpreted holistically (previously contrarily and erroneously holding that design faults are the Appellants' fault while the obligation was on the Claimant)*

- *While denying Claim 2(iv), in para 124 Ld Arbitrator observes that the agreement does not provide for cash compensation but only extension, therefore the claim for cash compensation is rejected*
- *This observation renders the award internally contradictory which makes it patently illegal and liable to be set aside.*

*VII. IRR was wrongly equated with interest, inflating the claim and theinterest rate (20.33%).*

- *IRR is defined as the discount rate that makes an investment's net present value of cash flows equal to zero; it is used to see the viability of an investment*
- *IRR assumes that any cash payouts received during the investment are immediately put back as re-investment which is clearly not the case herein*
- *IRR was part of a Feasibility Study of the Agreement and was not an admitted or agreed upon term (An. C7 Vol II Pg 152)*
- *Claimant's argument would mean that IRR is a guarantee of returns, which is clearly contrary to the entire framework of the Agreement. IRR is an entirely fictional measure based on estimates to see probable profitability of an investment.*
- *Reliance on State of Maharashtra vs. Khare & Tarkunde Infrastructure Pvt. Ltd., 2021 SCC OnLine Bom 220, by the Arbitrator is misplaced as there the High Court upheld interest reflecting the actual bank rate the contractor was paying its lenders.*
- *All Claims have also been grossly inflated based on the compounding nature of IRR*
- *When applied as interest by the Arbitrator, it is without any analysis as to reasonability and in absolute non-consideration of relevant factors applicable while calculating interest.*

*VIII. Claim 2(i); there was no obligation to ban all tollable traffic, and the Appellants in fact issued the 31.01.2013 notification.*

- *Consistent with the pre-bid assurance, the Appellants in fact issued a gazette notification on 31.01.2013 banning heavy vehicles on the old GKG road, diverted that traffic to the project road, and erected barriers. The Appellants thus performed the only obligation they had undertaken (DOC).*

*IX. Claim 4 elevated private profit over user safety and ignored theEmpowered Committee's safety rejection.*

- *Article 17.3 permitted advertising subject to user safety. The Empowered Committee, vide its meeting dated 06.02.2015, rejected the advertising proposal precisely because the serpentine alignment rendered roadside advertising unsafe. (Award Para 137, 138)*

*X. Ld. Arbitrator, without holding the safety rejection unjustified, simply accepted the Claimant's figure of Rs. 8.49 crore and faulted the Appellants for an alleged "lack of concern for the profit-earning opportunity" of the Claimant, thereby elevating private profit over public safety, which is arbitrary, perverse and beyond the contract.*

*XI. Claim for any escalation in cost is barred by Limitation.*

- *Work Completed on 31.03.2013, hence, no additional costs to accrue after this date; therefore, limitation has to run from this date – 3 years as per Art. 55/113.*
- *Relevant Docs: Para 4.9 Claim @ Pg 36; Work Completion certificate An C-11A Vol III Pg 495.*

*XII. The corrigendum award exceeded Section 33 by granting interest@20.33% not granted in the original award.*

- *The allowance of deletion of "amounting to Rs. 198.04 cr." changes the entire quantum of the award and grants a subsequent substantial relief which is not a clerical or typographical error permitted to be corrected under Section 33.*

*XIII. The impugned order is non-reasoned and failed to apply therecognised Section 34 tests.*

- *Ld. Commercial Court merely re-iterates the arguments of the parties and holds that it does not have appellate power under Section 34 and since it is a detailed and reasoned award it cannot be set aside*
- *Ld. Commercial Court fails to test the arguments against the parameters enshrined in Section 34.*

*Therefore, it is most respectfully prayed, that the present appeal may be allowed and the impugned order dated 27.01.2025 passed by the Learned Commercial Court and the impugned awards dated 25.06.2023 and 31.07.2023 may kindly be quashed and set aside."*

**IV. ARGUMENTS ON BEHALF OF THE RESPONDENT:**

27. Au contraire, Mr. Sudhir Gupta, Senior Advocate, assisted by Mr. Tarak Ahuja, Ms. Sweta Chauhan, Mr. Ishan Khanna, Mr. Aditya Shandilya and Mr. Rachit Somani, argued in favour of upholding the impugned award, canvassing rather strenuously that, this Court must dismiss the appeal, given the limited scope under Section 37 of the Act of 1996, which is far more circumscribed than Section 34 itself. Apart therefrom, he addressed arguments on merits of the award and also tendered written submissions in support of his arguments.

27.1 In course of his arguments, learned senior counsel for the respondent would rather vigorously urge that the learned Sole Arbitrator undertook a detailed examination of the pleadings, the documentary record, the correspondence exchanged between the parties, the contractual framework, and the oral evidence led before the learned Arbitral Tribunal, and thereafter returned a reasoned award which did not warrant interference under Section 34 of the Act of 1996 and thus the instant appeal be also dismissed.

27.2 On merits, learned senior counsel for the respondent would submit that the Detailed Project Report supplied at the inception contained material deficiencies which directly affected the structural feasibility and safe execution of the project. According to the respondent, the revision in horizontal and vertical alignment was compelled by engineering realities and site conditions, and not by any unilateral commercial preference of the concessionaire. It is urged that the subsequent approval of the revised alignment, the departmental agenda notes, and the action taken against the consultant associated with the DPR all support the respondent's case that the original report was defective and that the resulting redesign generated compensable consequences.

27.3 It is further submitted that the respondent had contemporaneously brought the discrepancies to the notice of the appellants, furnished alternative technical options, disclosed the cost implications thereof, and proceeded only upon administrative approval. According to the learned senior counsel for the respondent, the chain of correspondence and approvals clearly demonstrates that the redesign, the additional alignment work, and the consequential delay were within the knowledge of and accepted by the appellants.

27.4 He also contended that the presence of Baba Balaknath Samadhi, the non-removal of the encumbrance at chainage 0+650, and the resulting need for further revision in alignment were matters attributable to the appellants and not to the respondent. He relied upon the material noticed in the award to submit that the encumbrance was not removed and that corrective measures had to be taken in consequence thereof.

27.5 As regards additional works, he would submit that the provision of truck lay-bye, slip road, redesign of the rotary, widening of the rotary and adjoining roads, and provision of facilities to the Independent Consultant were all either specifically directed by the appellants or necessitated by the manner in which the project was supervised and modified during execution. According to him, these were not cost items already internalized in the original project estimate and hence the learned Sole Arbitrator rightly treated them as contributing to the increase in project cost.

27.6 He would further submit that issues concerning forest clearance, restricted working hours, site encumbrances and delayed availability of an unhindered work front materially affected execution and contributed to delay and escalation. It was urged that the lending arrangements, additional technical vetting and sanction of additional finance by the bank corroborate the existence of actual cost overrun and demolish the appellants' suggestion that the claim was speculative or unsupported.

27.7 In relation to Claim No. 2, the learned senior counsel for the respondent would submit that the communications issued by the Government, the traffic restrictions and the actual traffic conditions on the ground adversely affected toll collection and that the learned Sole Arbitrator assessed the loss on the basis of material placed before him. It is also the respondent's case that the impact of demonetisation on tolling revenue was real and was duly appreciated in the award.

27.8 As regards Claim No. 4, it is submitted that denial of permission to commercially use the right of way for advertisements caused measurable revenue loss and that the award on this issue rests on a valid appreciation of the contractual arrangement and the evidence led.

27.9 Learned senior counsel for the respondent lastly reiterated that the learned Commercial Court correctly appreciated the limited scope of interference under Section 34 of the Act of 1996. The Court exercising jurisdiction under Section 34 does not sit in appeal over the award and cannot reappreciate evidence or substitute one plausible interpretation of the contract for another, he would urge. It is therefore urged that once the view taken by the learned Sole Arbitrator was a possible and reasoned view, the learned Commercial Court rightly declined interference and this Court, while examining the appeal, ought not to unsettle that conclusion save on the recognized grounds available in law.

**27.10 WRITTEN SUBMISSIONS ON BEHALF OF THE RESPONDENT (reproduced verbatim):-**

> ***"Submissions: -***
> *Vide the present Appeal, the Appellant has made averments and raised grounds against the Award and Order passed by the Commercial Court, which are totally beyond the scope of Section 37.*
> *1. The contours of jurisdiction vested in this Hon'ble Court by virtue of Section 34 and 37 of the Act are settled by a plethora of decisions of the Hon'ble Supreme Court and reiterated by several Hon'ble High Courts including this Hon'ble Court, whereby it has been held as under:*
> *i. Jurisdiction under Sections 34 and 37 is not akin to appellate jurisdiction and arbitral awards cannot be interfered with in a cavalier or casual manner by re-appreciation of evidence.*
> *ii. Construction of the terms of the contract is primarily for an arbitrator to decide and if an Arbitrator construes a term of the contract in a reasonable manner, it cannot be set aside.*
> *iii. When a view taken by the Arbitrator is a plausible view, no interference under Section 34 is warranted.*
> *iv. Mere illegality or irregularity is not sufficient to invite interference under Section 34, rather it has to be demonstrated that the illegality is 'patent' which goes to the root of the matter.*
> *v. Fresh grounds and pleas which were not taken by a party before the arbitrator, cannot be taken for the first time in proceedings under Section 34 or 37 of the 1996 Act.*
> *2. The plea of limitation in the present Appeal was not raised before the Arbitrator, hence barred from being taken for the first time in the present proceedings. It is settled proposition of law that the limitation is a mixed question of fact and law. Adjudication of this ground would require re-appreciation of evidence.*
> *3. The Project was implemented in DBFOT mode, constructed by the Respondent with its own funds along with the funds borrowed from the financial institution(s).No amount has been paid by the Appellant either towards cost of construction or towards compensation awarded by the Arbitral Tribunal.*
> *4. The grounds taken by the Appellant are not permissible within the limited scope of Sections 34 and 37 of the A&C Act.*
> *5. It is a settled proposition of law, in case an Arbitral Award has been upheld under Section 34 of the Act, the Appellate Court must be extremely cautious and slow to disturb such concurrent findings as the scope of intervention under Section 37 is even narrower than Section 34.*
> *6. Various grounds raised by the Appellant are devoid of any substance and merit and are not sustainable as per settled proposition of law. The Grounds are of such a nature as would entail review on merits of the matter by reappreciation of evidence, which cannot be permitted.*
> *The matter has been heard by this Hon'ble Court on 03.07.2026, 06.07.2026, 07.07.2026 & 08.07.2026 and the judgement has been reserved for order.*

*Detailed Submissions made by the Respondent in response to the various contentions/grounds raised by the Appellant during the course of hearing are briefly stated hereunder, for ready reference:*

***A.1 New Grounds (Not raised before the Arbitral Tribunal and / or Ld. Commercial Court):***

***A.2 Grounds raised by Appellant:*** *Ld. Commercial Court / Arbitrator has not dealt with the barrier of Limitation.*

***Reply:***

- *Appellant has failed to raise this ground before the Arbitral Tribunal and is deemed to have been waived off nor did the Appellant address oral arguments on the said ground before the Ld. Commercial Court. Increase in project cost could only be ascertained only at Commercial operations Date (COD) i.e. 31.01.2013. Thereafter, the Respondent invoked dispute resolution mechanism as per Article 15 in 2014. The Appellant itself recognizes that the final decision in the said regard was taken in 2015. Since, the decision in regard to failure of amicable settlement was only taken on 22.06.2015 (R-1, Pg.99; Reply to SoC). Therefore, considering 2015 as the year of breaking point/ rejection of the claim of the Respondent gave cause of action to the Respondent and accordingly, arbitration was invoked within 3 years by the Respondent on 18.09.2017. The cause of action for each of claims allowed by the Arbitrator have been provided below in a tabulated form:-*

| ***Claim. No*** | ***Claim Particulars*** | ***Cause of Action*** | ***Remarks as to Limitation*** |
|---|---|---|---|
| *01* | *Increase in Project Cost amounting to Rs 175.67 Cr* | *11.09.2015* | *Well within limitation period of 3 years* |
| *02* | *Loss of Toll:<br>Old GKG Road leakage Rs 12.20 Cr Demonetization Rs 1.68 Cr* | *Continual in nature 02.12.2016* | *NA<br>Well within Limitation period of 3 years* |
| *03* | *Advertisement Rs8.49 Cr* | *Empowered Committee meeting on 22.06.2015* | *Well within limitation period* |

***A.3 Grounds raised by Appellant:*** *Award of IRR of 20.33% compounding annually is in contradiction of S. 31(7) of the Arbitration Act. At the most Arbitrator could have awarded interest as per S. 31(7).*

***Reply:***

- *Appellant has never raised this ground before Ld Commercial Court and has been pleaded for the first time. Noteworthy, Appellant has also never disputed the computation of claims submitted by the Respondent. There is no contravention of Section 31(7) of the Arbitration Act. The Arbitral Tribunal has examined in depth the concept of IRR in paras 72, 73, 74, 75, 84 and 141, and has accordingly granted IRR on the Claim amount which forms part of the cash flow statement contained in Annexure A of the Concession Agreement (CA). Lastly, IRR being a financial arithmetic term by the very nature demonstrates annually compounded financial return. The Arbitral Tribunal as per Section 31*

*(7) of A&C Act, granted 12% p.a. interest on the awarded amount for the future period only, if in case the awarded amount is not paid within 90 days from the date of the Award.*

**A.4** ***Grounds raised by Appellant:*** *Arbitrator failed to take cognizance of extension of concession period by 484 days thereby compensating more than 120 Cr by way of toll collection.*

***Reply:***

- *This ground was never raised before the Arbitrator, and was raised for the first time in S 34 Proceedings.*

*1st Grant of 379 days was ought to be given on account of change in commencement date, as recorded vide MoM dt.05.01.2012 (R-24(Colly), Pg. 53; Reply to Rejoinder). Later on instead of changing the commencement date, extension of concession period was granted. In essence compensation was for delay not for increase in project cost.*

*2nd grant of 105 days was granted vide 22-06-2015 against Concessionaires claim of 210 days incurred during the end of construction period.*

- *Respondent had made separate claims for Increase in Project Cost & Extension of Concession Period. Appellant had only granted extension of Concession.Period and denied the Claim for Increase in Project Cost citing that there exists no provision for compensation of Increase in Project Cost.*
- *Total Concession period comprised of Construction (Implementation) period and Operation Period. Delays incurred were in the construction period and accordingly same were granted. However, this has not resulted into additional revenue generation, whatsoever, for the Concessionaire as this merely affected extension of COD.*

***Other Grounds:***

**4** ***Grounds raised by Appellant:*** *Deletion of "amounting to Rs 198.04 Cr" in the corrigendum award enlarging Award amount from 198.04 Cr to Rs 457 Cr, amounting to modification of award.*

***Reply:***

- *Para 141 cannot be read in isolation to infer that amount of Award was restricted to 198.04 Cr. This has to be read with para 139 citing operative part of the Award that clearly shows the amounts of claim allowed till the date of reference i.e. 31.01.2019, against individual claims, which when added reached to Rs 198.04 Cr.*
- *Hence, reading the Award as a whole necessarily implies that the words "**amounting to Rs 198.04 Cr**" have been inserted erroneously. Ld. Sole Arbitrator in Corrigendum Award, clearly includes the rationale behind correction of this peripheral mistake / error in para 6 of the corrigendum award.*

**4** ***Grounds raised by Appellant:*** *Award of Monetary Compensation along with IRR is against the basic framework of CA, as grant of Concession Period was the sole criteria for bidding and any remedy thus could have been sought only in terms of Concession Period.*

***Reply:***

- *Although, sole criteria for bidding was the grant of Concession Period, the Cash flow projections in the format provided by the Appellant forms the part of CA. The Cash Flow Projections forms the very basis of arriving at the grant of Concession Period and thus cannot be plainly rejected as beyond the framework of CA. Had cash flow projections & IRR been of no relevance, Appellant would not have included the same in its own format as part of the CA.*
- *CA framework contemplates compensation by way extension of Concession Period only as could be made out by the provisions of Art 10.3, Art 11.5, Art 13.2, but has failed to cite any provision in the CA that expressly bars for compensation in cash. In absence of such provision in CA, Concessionaire cannot be left deprived of any remedy. The Ld. Sole Arbitrator in paras 71, 72 and 80 has given the rationale for award of monetary compensation in absence of any bar in CA for seeking compensation.*

- *All the above provisions in CA providing for the extension of Concession Period are pertaining to the specific event that may occur during the tenure of the Project; however, do not deal with breach of contract for the peculiar reasons in this Contract.*
- *Appellant has never denied Increase in Project Cost by 57.85 Cr; however, the Appellant has rejected Concessionaire's request on the basis that Project Cost could not be more than 150 Cr citing the its definition and further stating that there exists no provision in CA for Increase in Project Cost (Lt. 30.01.2015, C-39,Pg.684, Vol-5;SoC))*
- *Ld. Sole Arbitrator vide para 80 of the Award has held that "**CA is silent with regard to payment of damages/ compensation in the event of breach of Contract"** while allowing monetary compensation as the same are not explicitly barred in the CA. Noteworthy, Arbitrator has also in the same para observed that **"situation would have been different had there been a prohibitory clause barring payment of compensation"***
- *Moreover, pursuant to the passing of the Corrigendum Award, the Appellantshad unilaterally and illegally invoked Respondent's Bank Guarantee amountingto Rs 3.00 Cr on 27.11.2024 for effecting recovery of dues, thereby not onlyexplicitly relying upon but also acting upon the cash said flow projections Pg.359, Vol-2 of SoC in the Concession Agreement in pursuance of whichpayment of Rs 3.42 Cr was required to be made by the Respondent on any dayin April 2021 to the Appellant.*

**4** ***Grounds raised by Appellant:*** *Award is made without taking into cognizance 'Article 16.2 – Disclaimer' and its applicability in DBFOT projects**.***

***Reply:***

- *Art 16.2 starts as 'without prejudice to any express provisions contained in this Agreement ….' meaning thereby that the provisions of the said disclaimer clause are subject to any express provision in the Agreement including the Schedules appended thereto.*
- *Appellant in NIT has declared the **"Alignment and other parameters are duly approved by JDA"** leaving no room for any doubt upon error/mistake as claimed vide Disclaimer Clause of 16.2. Further, as Clause 2.5 of Annexure I to Schedule A expressly provides that horizontal and vertical alignment of the DPR are the minimum standards and only deviation therefrom is permitted with a view to enhance the standard of safety and mobility, the DPR would be covered within the expression 'Without prejudice to any express provision contained in this Agreement' occurring in the opening sentences of Clause 16.1.*
- *Also, disclaimer vide Article 16.2, explicitly provides for the nature and extent of difficulties, risk and hazards which the concessionaire is **likely to face** during performance of its obligations under the Agreement. By no stretch of imagination it was likely that the Concessionaire would have foreseen difficulties that were faced on account of faulty DPR.*
- *The Ld. Sole Arbitrator in para 66, 67 of the Award has given its rationale qua the same.*

**4** ***Grounds raised by Appellant:*** *Arbitrator considered the DPR as an important document which actually was provided as a reference document.*

***Reply:***

- *Alignment, cross sections and other parameters provided in the DPR was included as it is in the Concession Agreement at Appendix A-1, Vol 3 schedule.*

- *NIT at Pg. 81 Vol-1 of SoC expressly declares that **"Alignment and other parameters are duly approved by JDA"** leaving no room for any doubt upon error/mistake as claimed vide Disclaimer Clause of 16.2*
- *Appellant on one hand has termed this as reference document allowing concessionaire to adopt its own design and on the other has made certain minimum/design requirements set forth in Schedule A of Annex I of the CA, by virtue of which finished top level of the road cannot be changed.*
- *DPR was defective to such an extent that Appellant debarred the DPR consultants and terminated the services of Advisor (RRP)-Project Head-Member Secretary of the Project.*
- *Arbitrator in para 65 of the Award has discussed the relevancy and importance of DPR in DBFOT project.*

4 ***Grounds raised by Appellant:*** *Arbitrator allowed entire Project cost. At the most he could have granted change of scope as per Art 10.*

***<u>Reply:</u>***

- *Art 10 applicable for Change of Scope has to be initiated by GOR by providing COS order, provided that:*
  4..a *It does not require expenditure exceeding / reducing 10% of Project Cost i.e Rs 15 Cr; and*
  4..a *It does not adversely affect the Scheduled Project completion date*
- *Art 10.3 casts duty upon Appellant to determine the increase / reduction in the Concession Period only in event of COS Order being issued has impact of more than 2% of the Project Cost.*
- *In present case, GOR did not issue any COS order as the Change in Project cost were not required by GOR as contemplated under Art 10, but, the change in project cost was compelled beyond 10% on account of blatant deficiencies in tunnel alignment and other parameters. Hence, the Project contemplated under the CA Schedule A was completely overturned to significant extent beyond 10% project cost and the Project Completion Date was also adversely affected.*

4 ***Grounds raised by Appellant:*** *Arbitrator has made contradictory findings in the Award as to the grant of monetary compensation.*

***<u>Reply:</u>***

- *Ld. Sole Arbitrator has rejected monetary compensation for claims No 3 vide para 124, stating that "**claimant having not asked for extension cannot make out claim"**.*
- *The aforesaid finding is not contradictory; rather is complying with the CA provisions which include the decisions taken in pre-bid meetings. Arbitrator has discussed reply to the relevant pre-bid query No.6 in para 122 for competing roads observing that "Any change in concession period because of development of future requirement would be addressed by the Committees under Art 15.1 of CA". Gathering joint intent of the parties therefrom to seek remedy on such account in the form of extension of concession period Tribunal had rejected the monetary compensation.*
- *However, in case of Claim No 1 Increase in Project Cost, Claim No 2 (i) Old GKG road Cl No 2 (iii) Demonetization & Claim No 4 for Advertisement, Arbitrator has inferred grant of monetary compensation as the **CA is silent upon the remedy in case of breach of Contract** as observed vide para 80 of the Award.*

4 ***Grounds raised by Appellant:*** *IRR as a concept is completely foreign to the CA and is an internal mechanism of the Concessionaire. Arbitral Award of IRR @ 20.33% is equated to interest.*

***<u>Reply:</u>***

- *IRR being included in cash flow projections form part of CA and cannot be termed as foreign to CA.*

- *IRR is a finance term regularly used in financial analysis to estimate the commercial viability of potential investments. IRR is a discount rate that makes the net present value (NPV) of all cash flows equal to zero in a discounted cash flow analysis*
- *Ld. Sole Arbitrator vide paragraph 72, 73, 74, 75, 84 and 141 of the Award has discussed the concept of IRR and its relevance into cash flow projections and compared with the ordinary levy of interest observing that as and when the project becomes profitable, IRR increases.*
- *All the investments being made by Concessionaire were agreed to generate IRR of 20.33% as contemplated under Cash Flow Projections. As there happened to be increase in Project cost by Rs 57.87 Cr, requiring Concessionaire to additionally invest this amount, Concessionaire is legitimately entitled to recover the additional investments made at an IRR of 20.33%.*

4 ***Grounds raised by Appellant:*** *Arbitrator failed to appreciate definition of Project Cost & Art 9.2 'Amendments to financing documents.*

***Reply:***

- *Appellant has neither disputed the Project Cost to Rs 207.85 Cr nor objected the Statutory Auditors certificate certifying Project Cost of 207.85 Cr.*
- *Definition of Project cost cannot be viewed in isolation and has to be strictly viewed in correlation with the definition of Project.*
- *Project as defined in CA is as described in Schedule A, has completely changed on account of facts witnessed during the course of execution. The tunnel length, that was the heart of project, increased from 647 to 875 mtrs along with many other variations on account of various deficiencies found in the DPR but also majorly due to additional works undertaken as clearly depicted in the comparative statement vide Annex. C-23, Pg. 547, Vol-3 of SoC.*
- *Ld. Sole Arbitrator vide para 80 of the Award held that the "**Project Cost has rendered otiose or futile in view of a project has suffered a complete overturn**"*
- *Ld. Sole Arbitrator vide para 85 of the Award held that it has of hesitation in accepting the certificate of Chartered Accountant more particularly because the Appellant has cross examined CW 2 & 3.*
- *Art.9.2. has limited applicability only in the event of Termination.*

4 ***Ground raised by Appellant:*** *Arbitrator failed to appreciate that Appellant has fulfilled its obligation by issue of Notification for Banning of tollable vehicles through Old Ghat ki Guni Road:*

***Reply:***

- *Appellant had expressly promised vide Pre bid reply query that the Old GKG route will be totally banned/restricted by all tollable vehicles. (Refer to Pre-Bid query nos. 9,66,85,92)*
- *Appellant through Police Dy. Commissioner – Traffic had issued Gazette Notification dt.31-01-2013 banning of tollable traffic through Old GKG Road, however, took no effective measures to implement the same.*
- *Even after Respondents repeated requests to conduct joint survey, Appellant failed to undertake such surveys to ascertain factually the leakage of traffic through Old GKG Road.*

4 ***Ground raised by Appellant :*** *Claim No 4 On account of Denial to use ROW for Displaying Commercial Advertisement*

***Reply:***

- *Art 17.3 of the CA, Concessionaire was entitled to display advertisements, display or hoarding such on the Project site, subject to it does not affect the safety of the users of the Project Road while driving.*

- *Concessionaire submitted the tentative locations to put up hoardings; however, Appellant plainly rejected the same without assigning any reason on 22.06.2015 (MoM 31.07.2015, R-1, Pg.98; Reply to SoC), thereby depriving Respondent of its legitimate right to earn revenue through display of Commercial Advertisement.*

*Apart from the above submissions, the Respondent herein below apprises this Hon'ble Court of the subsequent developments and present status of Project Concession Agreement after the pronouncement of Award (including corrigendum Award) and during the pendency of present proceedings:*
***A.1*** *The Concession Agreement has come to an end on 11.10.2024 by efflux of grant of concession period and its extension.*
***A.2*** *Thereafter, Respondents reliably understand that Appellants have appointed private toll collection contractor for a period of 6 years and are earning revenue of approximately around Rs 895 Cr Approx. therefrom by way of equated monthly installments.*
***A.3*** *Appellants had unilaterally and illegally invoked Respondents Bank Guarantee amounting to Rs 3.00 Cr on 27.11.2024 by explicitly relying upon and acting upon the cash flow projections Pg. 359, Vol-2 of SoC in the Concession Agreement in pursuance of which payment of Rs 3.42 Cr was required to be made by the Respondent on any day in April 2021 to the Appellant. On one hand, the Appellant before this Hon'ble Court denies the relevancy of DPR as reference document, as well as applicability of Cash flow projections and IRR included therein as merely estimates, and on the other hand the Appellant takes unilateral coercive action of invoking Respondent's Bank Guarantee for effecting recovery of dues by explicitly relying upon and acting upon the very same DPR & Cash flow Projections which form part of CA and envisages the payment of Rs.3.42 Cr. by the Respondent to the Appellant."*

## V. DISCUSSION AND FINDINGS

28. Heard learned counsel for the parties at length and perused the entire record, including the impugned order dated 27.01.2025, the arbitral award dated 25.06.2023, the Corrigendum Award dated 31.07.2023, the Concession Agreement dated 27.11.2009 together with its Schedules, the minutes of the pre-bid meeting dated 14.09.2009, and the written submissions filed on behalf of both sides. In light thereof we shall now proceed to render our opinion based on the discussion and analysis recorded here in after in the light of the settled principles governing judicial interference with arbitral awards.

29. Before we proceed further, apt it is to observe that the principal ground taken in the objections, as noticed by the Commercial Court, was that the award was contrary to the public policy of India, contrary

to the terms of the contract, and vitiated by patent illegality. The respondent resisted the objections by supporting the reasoning of the award and by submitting that the learned Sole Arbitrator had rendered a detailed and reasoned decision on the basis of the pleadings, documents and evidence led in the arbitral proceedings.

30. The Ld. Commercial Court upheld, in substance, the resistance to interfere in the award, as canvassed by the claimant and *inter alia* held that the scope of interference under Section 34 of the Act of 1996 is limited, that reappreciation of evidence is impermissible, and that the findings returned by the learned Sole Arbitrator on Claim Nos. 1, 2 and 4 were reasoned, plausible and supported by material on record.

## A. QUESTIONS FOR DETERMINATION

31. Even though there is no requirement of framing any questions of law in exercise of appellate jurisdiction under Section 37 of the Act of 1996, however, for our own clarity and convenience of structuring our judgment, and to distill the arguments of both parties, we feel that the following core questions arise for determination:-

(i) Whether the claim petition of the respondent was *ex facie* barred by limitation?

(ii) Whether the arbitral award dated 25.06.2023, as modified by the corrigendum award dated 31.07.2023, suffers from patent illegality or is in conflict with the public policy of India.

(iii) Whether the learned Sole Arbitrator traversed beyond the scope of the Concession Agreement, thus rendering the award unsustainable in law.

(iv) Whether the corrigendum award dated 31.07.2023 exceeds the permissible scope of Section 33 of the Act of 1996.

(v) Whether the learned Commercial Court failed to exercise jurisdiction vested in it under Section 34 of the Act of 1996 while declining interference with the award.

## B. RELEVANT CONTRACTUAL CLAUSES AND STATUTORY PROVISIONS

### *a) Contractual Stipulations of the Concession Agreement*

32. Before adverting to the merits of the issues framed hereinabove, it would be apposite to identify, with specificity, the contractual stipulations of the Concession Agreement which stand attracted in the light of the written submissions and the passages extracted from the award and the objections as already noticed in the record.

The issues canvassed by the parties require consideration, *inter alia*, of the following clauses of the Concession Agreement, along with their subject-heads:

| **S. NO.** | **Relevant Clauses** | **Particulars** |
|---|---|---|
| 1. | Clause 1.1 | Definitions |
| 2. | Clause 2.1 | Grant of Concession |
| 3. | Clause 2.2 | Concession Period |
| 4. | Clause 2.3 | Acceptance of Concession |
| 5. | Clause 2.6 | Environmental Clearance |
| 6. | Clause 4.1(a) | Right to Levy, Demand, Collect and Appropriate Fee |
| 7. | Clause 5.1 | General Obligations of the Concessionaire |
| 8. | Clause 7.1 | Preparation of Drawings |
| 9. | Clause 9.2 | Amendments to Financing Documents |
| 10. | Article 10 | Change of Scope |
| 11. | Clause 11.5 | Force Majeure and Consequential Relief/Extension |
| 12. | Clause 11.6(d) | Certification / Verification in relation |

| | | |
|---|---|---|
| | | to Force Majeure consequences |
| 13. | Clause 12.1(b) | Notice of Breach |
| 14. | Clause 12.2 (b) (2) | Termination Payment |
| 15. | Clause 13.2 | Change in Law |
| 16. | Clause 15.1(a) and Clause 15.1(c) | Dispute Resolution / role of the Empowered Committee and expressly stated contractual departures |
| 17. | Clause 15.2 | Arbitration |
| 18. | Clause 16 / Clause 16.2 | Disclaimer / Independent Evaluation / Acceptance of Risk of Error |
| 19. | Clause 17.7 | Amendment only in the manner provided in the Agreement |
| 20. | Schedule A | Project Description and Broad Particulars |
| 21. | Annexure I to Schedule A, Clause 1.1 | Alternative Design / Cross-Sections / Lowering of Formation Level in case of apparent DPR errors |
| 22. | Annexure I to Schedule A, Clause 2.5 | Minimum Parameters for Horizontal and Vertical Alignment. |

***b) The Statutory Framework***

33. Insofar as the statutory framework is concerned, the issues would require consideration of, among others, Section 11, Section 31, Section 33, Section 34 and Section 37 of the Act of 1996. The challenge to the corrigendum award would fall to be considered in the context of Section 33 thereof. The scope of judicial interference with the award, and with the order passed under Section 34, would necessarily be examined in the light of Sections 34 and 37 of the Act of 1996.

34. The appellants have additionally invoked the Limitation Act in support of their objection that the claims, or some of them, were barred by time.

35. The controversy concerning grant of compensation and the nature of contractual breach would also require reference to the relevant provisions of the Indian Contract Act, including the principles embodied

in Sections 54, 55 and 73, as relied upon by the appellants, and the broader contractual law principles governing claim for damages during subsistence of contract as noticed by the courts below. The plea concerning award of interest would also have to be examined in the light of the Interest Act and the principles governing arbitral discretion in awarding interest.

36. The Rajasthan Road Development Act, 2002 and the role of the Empowered Committee constituted thereunder, the extent and legal effect of approvals granted by such authority may also require examination, depending upon the issue under consideration.

**C. Scope of interference under Sections 34 & 37 of the Act, 1996**

37. Before adverting to the rival submissions, it is apposite to remind ourselves of the contours of jurisdiction. It is well settled, and is not in dispute between the parties, that a Court exercising jurisdiction under Section 34 of the Act of 1996, does not sit in appeal over the arbitral award; it does not re-appreciate evidence; and where the learned Arbitrator has taken a view which is a possible or plausible one on a fair construction of the contract, no interference is warranted. The jurisdiction under Section 37 is narrower still. This position stands crystallised by the judgments of the Hon'ble Supreme Court in ***Associate Builders v. DDA***[1], ***Ssangyong Engineering & Construction Co. Ltd. v. NHAI***[2], ***Delhi Airport Metro Express (P) Ltd. v. DMRC***[3], and ***Konkan Railway Corporation Ltd. v. Chenab Bridge Project Undertaking***[4] (relied upon by the respondent itself).

38. Equally well settled, however, is the converse: the ground of "patent illegality" under Section 34(2A) is squarely attracted where the

1 (2015) 3 SCC 49
2 (2019) 15 SCC 131
3 (2022) 1 SCC 131
4 (2023) 9 SCC 85

learned Arbitral Tribunal (i) decides the dispute in disregard of, or contrary to, the terms of the contract, in the teeth of Section 28(3) of the Act of 1996; (ii) construes the contract in a manner which no reasonable or fair-minded person could adopt, i.e., takes a view which is not even a possible view; (iii) ignores vital evidence or binding precedent, thereby offending the "judicial approach" limb of fundamental policy of Indian law; (iv) renders findings which are internally contradictory and hence perverse; or (v) awards relief without any legal foundation, in contravention of the substantive law of the land. An award which re-writes the bargain between the parties is not saved by the deference ordinarily shown to arbitral adjudication — ***Ssangyong* (supra)**; ***PSA Sical Terminals (P) Ltd. v. Board of Trustees*, *V.O. Chidambranar Port Trust*[5]; *Indian Oil Corporation Ltd. v. Shree Ganesh Petroleum*[6]**,. Judicial restraint under Sections 34 and 37 does not translate into judicial abdication. It is on this touchstone that the submissions of the parties fall to be examined.

**D. CASE SET UP BY THE APPELLANTS**

39. Though the written submissions of the appellants are elaborate, but on analysis thereof we deem it appropriate to crystallise the same into the following eight submissions:

**Submission I-**

The claims, in particular the claim for escalation/increase in project cost, were barred by limitation, the work having been completed on 31.03.2013 and the Statement of Claim having been filed only on 16.02.2019 and the plea of limitation being available at any stage.

**Submission II-**

5 (2023) 15 SCC 781
6 (2022) 4 SCC 463

The Concession Agreement, being a DBFOT/BOT concession awarded on the sole bid criterion of concession period under the Rajasthan Road Development Act, 2002, contemplated restoration of the concessionaire's economic position only by adjustment (extension) of the concession period and made no provision for cash compensation except a Termination Payment under Clause 12.2(b)(2); the award of cash compensation amounts to re-writing the contract; the extension of 484 days already granted by the Empowered Committee fully compensated the respondent, rendering the award one of double recovery; and paragraph 124 of the award, rejecting sub-claim 2(iv) on the ground that the Agreement provides only for change of concession period, is irreconcilable with the allowance of Claims 1, 2(i), 2(iii) and 4, rendering the award internally contradictory.

**Submission III-**

Article 16.2 (Disclaimer), an express allocation of design risk, was wrongly nullified by the learned Sole Arbitrator on the strength of misapplied and distinguishable precedents **(*Simplex Concrete Piles, Board of Trustees for the Port of Calcutta v. Engineers-De-Space-Age*[7], *Asian Techs, G. Ramchandra Reddy, NHAI v. Shillong Expressway*[8])**, while ignoring the binding judgment of the Hon'ble Supreme Court in ***Ramnath International Construction (P) Ltd. v. Union of India***,[9] .

**Submission IV-**

The DPR was, under the express terms of Schedule- A/Annexure-I read with Query No. 99 of the pre-bid meeting, only a reference document; the learned Tribunal's treatment of the DPR as a document of

7 (1996) 1 SCC 516
8 2018 SCC OnLine Del 12342
9 (2007) 2 SCC 453

"paramount importance" and as the benchmark of design contradicts Clauses 2.1 and 5.1, Article 7 and Schedule-A of the Agreement.

**Submission V-**

The award records no finding of breach of any identified contractual obligation by the appellants; compensation in the absence of breach is contrary to Sections 54, 55 and 73 of the Indian Contract Act, 1872 and to ***Kailash Nath Associates v. DDA***[10].

**Submission VI-**

The learned Tribunal erred in equating the IRR of 20.33%, a project-appraisal metric contained in the cash flow projections, with interest/assured return, and in awarding all claims together with IRR at 20.33% on a compounding basis, in misapplication of ***State of Maharashtra v. Khare & Tarkunde***[11] and without any of the considerations mandated by ***Vedanta Ltd. v. Shenzen Shandong Nuclear Power Construction Co. Ltd.***[12]**.**

**Submission VII-**

Claims 2(i), 2(iii) and 4 were allowed beyond the terms of the contract: there was no obligation to ban all tollable traffic on the old GKG road and the notification dated 31.01.2013 banning heavy vehicles was in fact issued (***MSK Projects (India) (JV) Ltd. v. State of Rajasthan***[13]; the Force Majeure costs on account of demonetisation were allowed without the certification of the Steering Group and verification by the Chief Engineer mandated by Clause 11.6(d); and Claim 4 was allowed by elevating the respondent's profit-earning opportunity above user safety, without holding the Empowered Committee's safety-based

10 (2015) 4 SCC 136
11 1992 SCC OnLine Bom 16
12 (2019) 11 SCC 465
13 (2011) 10 SCC 573

rejection dated 06.02.2015 to be unjustified and without scrutiny of the quantum of Rs. 8.49 crores.

**Submission VIII-**

The Corrigendum Award dated 31.07.2023 travelled beyond Section 33 by effecting a substantive enhancement of the award through deletion of the words "amounting to Rs. 198.04 crores" in paragraph 141; and the impugned order of the learned Commercial Court is a non-reasoned order which failed to apply the recognised Section 34 tests to the objections actually raised.

**E. CASE SET UP BY THE RESPONDENT**

40. The respondent, per contra, has supported the award and the impugned order, and as understood by us, pre dominantly on five planks which are summed up as below:

(i) The narrow scope of Sections 34 and 37 and the impermissibility of re- appreciation of evidence.

(ii) That several grounds, including limitation and the plea of double recovery through the 484-day extension, are new grounds not raised before the learned Tribunal.

(iii) That the cash flow projections and the IRR of 20.33% form part of the Concession Agreement and therefore the award of IRR is intra-contractual;

(iv) That the Concession Agreement is silent on the remedy for breach and does not expressly bar cash compensation, and hence the learned Tribunal rightly awarded damages, the award being a plausible view.

(v) That the findings on the faulty DPR, the Balaknath Samadhi encumbrance, traffic leakage and demonetisation are findings of fact based on evidence.

**OUR-VIEW:**

**F. Re:question (i)**

**Whether the claim petition of the respondent was *ex facie* barred by limitation?**

**a. Submission I — Plea of limitation**

41. The plea of limitation must be examined first, for if it were to succeed, a substantial part of the claims would logically fail at the threshold. Learned Senior Counsel for the appellants contended that the work stood completed on 31.03.2013, the Completion Certificate dated 12.09.2013 fixing the COD as 01.02.2013, and that no additional cost could accrue thereafter; that limitation for the claim of escalation/increase in project cost therefore began to run from that date under Articles 55/113 of the Schedule to the Limitation Act, 1963; and that the Statement of Claim filed on 16.02.2019 was hopelessly beyond three years. Reliance was placed on ***State of Chhattisgarh v. Sal Udyog (P) Ltd.***[14], ***Narne Rama Murthy v. Ravula Somasundaram***[15], ***R. Nagaraj v. Rajmani***[16]and allied decisions for the proposition that a plea of limitation, being a plea of law which goes to the root of jurisdiction, can be raised at any stage.

42. Having given our anxious consideration to the submission, we are unable to accept it, for the following reasons:

42.1 *First*, the plea in the form now canvassed was admittedly not raised before the learned Arbitral Tribunal. The award does not reflect any issue of limitation having been framed or pressed qua the claims. The only threshold objection pressed before the learned Tribunal, as the award records, was the objection founded on the multi-tier dispute

14 (2022) 2 SCC 275
15 (2005) 6 SCC 614
16 2025 SCC OnLine SC 762

resolution mechanism, which was rejected with reference to Section 16(2) of the Act of 1996. It is trite that limitation is a mixed question of law and fact: the date of accrual of the cause of action for each claim, when the increase in project cost crystallised, when each demand was made and rejected, whether the losses on account of traffic leakage were continuing in nature, are all questions which required pleadings and evidence before the learned Tribunal. A plea which cannot be adjudicated without a fresh investigation into facts cannot be permitted to be raised for the first time in proceedings under Section 34, much less in an appeal under Section 37, for its adjudication would entail precisely the re- appreciation of evidence which Section 34 forbids.

42.2 *Secondly*, the judgments relied upon by the appellants do not carry their case further. In ***Sal Udyog* (supra)** and other authorities cited on limitation, the plea permitted to be raised was a pure plea of law apparent on the face of the award and the admitted record, requiring no further evidence. That principle, which we shall ourselves invoke later in this judgment in a different context, has no application where the plea of limitation is fact- dependent. The present plea does not appear ex facie from the award. On the contrary, the admitted documents on record point the other way, as noticed hereinafter.

42.3 *Thirdly*, even if the plea were to be examined on merits on the admitted documents, it must fail. The Concession Agreement, by Article 15, prescribed a mandatory multi-stage mechanism of amicable resolution through the Steering Group and the Empowered Committee, the latter a statutory authority under the Rajasthan Road Development Act, 2002 and described in Clause 15.1(c) as the final dispute-settlement authority, before recourse to arbitration. The admitted List of Dates shows that the respondent raised its consolidated demand for extension of the concession period and compensation against increase in project cost by letter dated 21.07.2014, sought reference of the disputes to the Steering Committee on 22.12.2014, approached the Empowered Committee on 12.03.2015, and the Empowered Committee took its final decisions on 22.06.2015, granting only an extension of 105 days (communicated on 11.09.2015) while declining the monetary claims. It is upon this rejection, the "breaking point" in the parties' negotiations conducted under a contractually mandated mechanism, that the cause of action to invoke arbitration can be said to have finally accrued, on the principle recognised by the Hon'ble Supreme Court in ***Geo Miller & Co. (P) Ltd. v. Rajasthan Vidyut Utpadan Nigam Ltd.***[17] The notice invoking arbitration under Section 21 was issued on 18.09.2017, well within three years of 22.06.2015/11.09.2015. By virtue of Section 21 read with Section 43 of the Act of 1996, the arbitral proceedings commenced on 18.09.2017, and the subsequent filing of the Statement of Claim on 16.02.2019 is within time for computing limitation.

42.4 *Fourthly*, so far as the remaining claims are concerned, the position is even clearer. The claim on account of demonetisation relates to the period 09.11.2016 to 02.12.2016. The claim on account of denial of advertising rights arises from the rejection of the respondent's proposal in the Empowered Committee's decision of 2015; and the claim on account of leakage of traffic through the old GKG road was, in its nature, founded on a continuing state of affairs. Each of these is comfortably within three years of the Section 21 notice dated 18.09.2017.

43. For these reasons, Submission II fails and the plea of limitation raised on behalf of the appellants is rejected. We hasten to add,

17 (2020) 14 SCC 643

however, that the rejection of this plea does not advance the respondent's case on the merits of the award, to which we now turn.

**G. Re:Question (ii):**

**Whether the arbitral award dated 25.06.2023, as modified by the corrigendum award dated 31.07.2023, suffers from patent illegality or is in conflict with the public policy of India**

**(a) Submission II — Award of cash compensation contrary to the scheme of the Concession Agreement**

44. The Concession Agreement is a tripartite DBFOT concession awarded, under the regime of the Rajasthan Road Development Act, 2002, on the sole bid criterion of the lowest concession period. The respondent was selected on its quoted concession period of 13 years, 5 months and 20 days for a tentative Project Cost of Rs. 150 crores. The definition of "Project Cost" in Article 1 pegs it to the *lowest* of (a) Rs. 150 crores, (b) the actual capital cost as certified by the Statutory Auditors, and (c) the Project Cost set forth in the financing documents. The language deployed in the Concession Agreement is throughout consistent and unambiguous. Article 10 (Change of Scope) contemplates that changes in scope shall be addressed through a prescribed Change of Scope procedure and adjustment of the concession period; Clause 10.3 (capacity augmentation) thereof contemplates change of the concession period by a supplemental agreement whereas, Clause 13.2 restores the concessionaire's financial position upon a Change in Law by extension or reduction of the concession period. Pertinently, the solitary provision for payment of money to the concessionaire is the Termination Payment under Clause 12.2(b)(2), payable upon termination for an event of Government's default, an event which admittedly never occurred.

44.1 Aforesaid, relevant Articles of CA are reproduced hereinbelow for ready reference:-

*"ARTICLE 10*
*CHANGE OF SCOPE*

*X-X-X-X-X*

*10.3 Capacity Augmentation of the Project V*
*(a) The GOR may following a detailed traffic study conducted by it, at any time after COD decide to augment / increase the capacity of the Project (Capacity Augmentation) with a view to provide the desired level of service to the users of the Project Facility.*
*(b) The GOR shall invite proposals from eligible Persons for Capacity Augmentation. The Concessionaire shall have option to submit its proposal for Capacity Augmentation.*
*(c) The bid document for Capacity Augmentation shall specify a Termination Payment to be made to the Concessionaire in case the Concessionaire chooses not to submit its proposal or fails or declines to match the preferred offer as mentioned in sub-article (e)- below.*
*(d) In case the Concessionaire, after participating, in the bidding procedure, fails "to give the lowest offer, the Concessionaire shall be given the first right of refusal to match the preferred offer. If the Concessionaire matches the preferred offer Parties shall enter into a suitable agreement supplemental to this Agreement to give effect to the changes in scope of the Project, Concession Period and all other necessary and consequential changes. in such event the Concessionaire shall pay to the bidder who had made the lowest an offer a sum of Rs.-0.1% of the estimated project cost of maximum of Rs. 10 lacs which shall be indicated in the bid document-towards bidding costs incurred by such bidder.*
*(e) In case the Concessionaire*
*(1) chooses not to submit its proposal for Capacity Augmentation or*
*(II) is not the preferred bidder and also fails or declines to match the preferred offer.*
*GOR shall be entitled to terminate this Agreement upon payment to the Concessionaire of the Termination Payment GOR may also cause the payment to be made by the new concessionaire.*
*(f) The Termination Payment referred to in the preceding sub-articles (c) and (e) above snail be the amount equivalent to the amount of Termination Payment set out in Article 12.2(b).*

*X-X-X-X-X*

*ARTICLE 11*
*FORCE MAEJURE*

*X-X-X-X-X*

*11.5 Effect of Force Majeure Event.*
*Upon occurrence of any Force Majeure Event. the following shall apply:*
*(a) There shall be no Termination of this Agreement*
*(b) Where the Force Majeure Event occurs before. COD, the dates set forth in the Project Completion Schedule, and the Concession Period shall be extended by the period for which such Force Majeure Event shall subsist;*
*(c) Where a Force Majeure Event occurs after COD, the Concessionaire shall continue to make all reasonable efforts to operate the Project and / or to collect Fee, but if it is unable or prevented from doing so, the Concession Period shall, having due regard to the extent of the impact thereof as determined by the Steering Group, be extended by the period for which collection of Fee remains affected on account thereof, and*
*(d) Costs arising out of or concerning such Force Majeure Event shall be borne in accordance with the provisions of the Article 11.6 hereinafter.*

*X-X-X-X-X*

*ARTICLE 12*
*EVENTS OF DEFAULT AND TERMINATION*
*X-X-X-X-X*
*12.2. Termination due to Event of Default*
*(b) Termination for GOR Events of Default*
*(1) The Concessionaire may upon the occurrence and continuation of any GOR Event of Default terminate. this Agreement by issuing Termination Notice to GOR*
*(2) Upon Termination of this Agreement by the Concessionaire due to a GOR Event of Default, the Concessionaire shall be entitled to receive from GOR, by way of Termination Payment a sum equal to assessed value of the work (Project cost or the value assessed by Superintending: Engineer whichever is less) / assets available reduced by the amount already collected as fee till such termination is effected and an additional sum upto 10% thereon as recommended by the Steering Group, as approved by GOR.*
*X-X-X-X-X*
*ARTICLE13*
*CHANGE IN LAW*
*X-X-X-X-X*
*13.2 Extension of Concession Period*
*The Chief Engineer shall upon being notified by the Concessionaire /UDHAIDA Engineer of the Change in Law and the proposed amendments to this Agreement, assess the change in the financial position as a result of such Change of Law and determine the extension/ reduction to the Concession Period so as to put the Concessionaire in the same financial position and recommend the same to GOR. GOR shall, within 30 days of receipt of such recommendation, extend / reduce the concession period, as it may deem fit."*
*X-X-X-X-X*

45. The scheme of Concession Agreement is neither accidental nor unusual. In a BOT/DBFOT concession in which the concession period is itself the bid variable, the parties consciously stipulate that the concessionaire's economic equilibrium shall be restored through *time* adjustment of the concession period, and not through *money* from the public exchequer. That is precisely how the parties themselves acted. The Empowered Committee, by its decision of 07.12.2011 (communicated on 16.05.2012), extended the concession period by 379 days expressly to compensate the concessionaire for any additional cost that may have accrued on account of the revised alignment and by its decision of 2015 it granted a further extension of 105 days on account of hindrances and encumbrances. The respondent accepted and enjoyed both extensions.

46. Against this contractual matrix, the learned Sole Arbitrator awarded cash compensation of Rs. 198.04 crores (Claims 1, 2(i), 2(iii) and 4), together with IRR at 20.33%. In doing so, the learned Tribunal did not rest its conclusion on any provision of the Agreement entitling the concessionaire to money payments. It proceeded on the footing, recorded in paragraph 80 of the award, that the Agreement "is silent with regard to payment of damages/compensation in the event of breach of contract" and that the situation would have been different "had there been a prohibitory clause barring payment of compensation". With respect, this reasoning invert seems to the correct approach to a commercial concession of this nature. Where the contract provides a specific, exhaustive and carefully calibrated remedy, adjustment of the concession period, for every category of supervening event (change of scope, force majeure, change in law), the absence of an express prohibition on cash compensation cannot be treated as an implied entitlement to it. The learned Arbitrator, being a creature of the contract, was bound by Section 28(3) of the Act of 1996 to decide in accordance with its terms; an award which substitutes a remedy the parties never agreed upon effectively re-writes the contract, such a course is impermissible, see ***Indian Oil Corporation Ltd. v. Shree Ganesh Petroleum* (supra)**; ***PSA Sical Terminals* (supra)**; ***Rajasthan State Mines & Minerals Ltd. v. Eastern Engineering Enterprises***[18].

Also, a subsequent judgment rendered by Hon'ble Supreme Court of India by decision dated 11.12.2006 in ***Ramnath International Construction Pvt. Ltd. v. Union of India***[19]**,** wherein, reiterating

18 (1999) 9 SCC 283
19 AIR 27 SC 509 : 2007(2)SCC 453

***Associated Engineering Co. v. Government of Andhra Pradesh and Anr.***[20], it was held as under:

> *"12. We are fortified in this view by several decision of this Court. We may refer to two of them. In Associated Engg. Co. v. Govt. of A.P. this Court was concerned with an appeal which related to similar claims based on delays in execution. The High Court had held (State of A.P. v. Associated Engg. Enterprises²) thus:*
>
> > *"26. Applying the principle of the above decision to the facts of the case before us, it must be held that clause 59 bars a claim for compensation on account of any delays or hindrances caused by the department. In such a case, the contractor is entitled only to extension of the period of contract. Indeed, such an extension was asked for, and granted on more than one occasion. (The penalty levied for completing the work beyond the extended period of contract has been waived in this case.) The contract was not avoided by the contractor, but he chose to complete the work within the extended time. In such a case, the claim for compensation is clearly barred by clause 59 of the A.P. DSS which is admittedly, a term of the agreement between the parties."*
>
> *This Court noticed that the claims were set aside by the High Court on the ground that those claims were not supported by any agreement between the parties, and that the arbitrator had travelled outside the contract in awarding those claims. This Court held that the said claims were not payable under the contract and that the contract does not postulate, in fact prohibits, payment of any escalation under those heads. It affirmed the decision of the High Court setting aside the award of those claims."*
>
> *(emphasis supplied)*

47. What places the matter beyond the pale of a merely being erroneous, or even a plausible, is the learned Tribunal's own construction in paragraph 124. While rejecting sub-claim 2(iv), the learned Tribunal held:

> *"The dispute resolution mechanism provides only to the extent of seeking change in the Concession Period, the Claimant having not asked for extension, cannot make out a claim and therefore is not entitled to claim under this head."*

This finding, which, in our considered view, correctly reflects the scheme of the Agreement, is wholly irreconcilable with the allowance, in the very same award and on the very same contractual matrix, of cash compensation under Claims 1, 2(i), 2(iii) and 4. The learned Tribunal has thus taken two mutually contradictory views on the self-same question in the self-same award. An award which is internally contradictory on the central question of entitlement is perverse and

[20] (1991) 4 SCC 93

irrational, and falls foul both of the "patent illegality" grounds under Section 34(2A). See also, ***Associate Builders*** **(supra)**.

48. There is a further and independent vice. The Empowered Committee had already compensated the respondent for the very causes underlying Claim 1, the revised alignment and the site hindrances, by extensions aggregating 484 days. On the respondent's own cash flow projections, an additional operational period of that order carried very substantial toll revenue. The appellants have quantified revenue generation for those 484 days at upwards of Rs. 119 crores against an alleged cost increase of Rs. 57.87 crores. Pertinently, said figure of Rs. 119 crore as revenue receipt is not disputed by the respondent. Whether or not that precise quantification is accepted, the award nowhere accounts for, set off, or even advert to the compensation already received in the form of extended concession period while awarding cash for the same causes. The result is double compensation for a single loss, arrived at by ignoring vital and admitted material on record, a recognised facet of perversity. The respondent's answer that the first extension of 379 days was referable only to delay in the commencement date is belied by the record noticed above, which shows the Empowered Committee's decision to have been expressly relatable to the additional cost on account of revised alignment.

49. Submission I is accordingly accepted.

**(b) Submission III — Nullification of Article 16.2 (Disclaimer)**

50. Article 16.2 of the Agreement embodies an acknowledgment by the concessionaire of the risks of adequacy, mistakes or errors in or relating to the matters set forth in the Agreement, in substance, an express contractual allocation of the investigation and design risk to the concessionaire, entirely consonant with the DBFOT character of the concession under which investigation, study, design and engineering

were the concessionaire's exclusive domain (Clause 2.1). Relevant extract of Article 16.2 is reproduced hereinbelow:-

> *"16.2 Disclaimer*
> *(a) Without prejudice to any express provision contained in this. Agreement, the Concessionaire acknowledges that prior to the execution of this Agreement the Concessionaire has after a complete and careful examination made an independent evaluation of the traffic volumes, Specifications and Standards. Project Site and all the information provided by GOR, and has determined to the Concessionaire's satisfaction the nature and extent of such difficulties, risks and hazards as are likely to arise or may be faced by the Concessionaire in the course of performance of its obligations hereunder*
> *(b) The Concessionaire further acknowledges and hereby accepts the risk c adequacy mistake or error in or relating to any of the matters set forth in (an above and hereby confirms that GOR shall not be liable for the same in are manner whatsoever to the Concessionaire."*

The learned Tribunal declined to give effect to this clause, holding it to be an exclusionary clause which could not operate over Section 73 of the Contract Act, relying upon ***G. Ramchandra Reddy, Asian Techs (supra), Board of Trustees for the Port of Calcutta v. Engineers-De-Space-Age (supra)*** and the judgments in ***Simplex*** and ***NHAI v. Shillong Expressway (supra)***. In our considered opinion, each of these authorities was misapplied as elaborated hereafter.

50.1 ***Board of Trustees* (supra)** dealt with a Clause in the contract barring the departmental authority from entertaining a claim for pendente lite interest. The Hon'ble Supreme Court held that a fetter on the departmental authority was not a fetter on the learned Arbitrator's power to award interest. The decision is an authority on pendente lite interest and the reach of a clause addressed to a departmental officer. It lends no support to the proposition that a risk- allocation/disclaimer clause consciously bargained between commercial parties can be disregarded by the learned Arbitrator.

50.2 ***Asian Techs* (supra)** turned on its peculiar facts i.e. the Department had assured payment to the contractor, and it was that assurance which precluded the Department from invoking the disclaimer clause. No comparable assurance exists here. On the contrary, the pre-bid clarification to Query No. 99 (noticed hereinafter) was to the opposite effect.

50.3 ***G. Ramchandra Reddy* (supra)** concerned damages in a post-termination scenario. Admittedly, there was no termination in the present case, nor any finding of breach as discussed and held under submission V in later part of our order. The decision was therefore applicable herein.

50.4 ***NHAI v. Shillong Expressway* (supra)** is distinguishable on the learned Tribunal's own reasoning. The deficiencies in the DPR necessitated acquisition of additional land which was delayed by NHAI. In the present case, it is nobody's case that the revision of alignment necessitated acquisition of additional land as the project was executed within the available right of way.

50.5 Most significantly, the judgment of the Hon'ble Supreme Court in***Ramnath International Construction (P) Ltd. v. Union of India*[21]*,*** which upholds a contractual stipulation confining the contractor's remedy for delay to extension of time and excluding claims for compensation, was specifically brought to the notice of the learned Tribunal, and indeed stands acknowledged in the very judgment of the Delhi High Court in ***Simplex*** on which the learned Tribunal relied. The learned Tribunal nonetheless preferred the view of a High Court over the binding pronouncement of the Hon'ble Supreme Court, without distinguishing the latter. Disregard of a binding precedent of the Hon'ble Supreme Court, brought to the learned Tribunal's notice is against the fundamental public policy of law on the first principles of “stare decision” and constitutes patent illegality.

[21] (2007) 2 SCC 453

51. One cannot also lose sight of the fact that the respondent, a commercial entity, entered into the Agreement with open eyes after due inspection of the site between 04.08.2009 and 14.09.2009 and after seeking and obtaining clarifications in the pre-bid meeting. A party which accepts a contract with a conscious allocation of risk could not be relieved of its obligations under that bargain by the learned Arbitrator. See:- ***RIICO v. Diamond & Gem Development Corporation Ltd.***[22] ***and Indian Oil Corporation Ltd. v. Shree Ganesh Petroleum*** **(supra)**. Submission III is thus accepted.

**(c) Submission IV — The DPR was a reference document**

52. The entire edifice of Claim 1 rests on the learned Tribunal's finding that the DPR was of "paramount importance" and constituted the minimum design requirement, deficiencies wherein visited the appellants with liability. The express terms of the Agreement do not admit of such an interpretation construction. Under Clause 2 of Annexure-I of Schedule-A, the codes and standards governing design were those of the Indian Roads Congress and the MoRTH Specifications. Building works were to conform to Rajasthan PWD Specifications. Geometric design standards were to follow IRC guidelines applicable to National Highways. The DPR, prepared by M/s SPAN Consultants, was furnished merely as a *reference.* The word "may" preceding its mention does not make it binding. That aside, tellingly, the possibility of apparent errors in the DPR was itself expressly acknowledged in the bid documents. The DPR was excluded from the defined expression "Specifications and Standards". Clause 2 of Annexure-I of Schedule-A is reproduced hereinbelow for ready reference:-

> *"2.0*
> *CODES AND STANDARDS*

---
22 (2013) 5 SCC 470

*The codes and standards applicable for the design of the Project and Project Facilities are:*
*(i) Indian Road Congress (IRC) Codes and Standards; and*
*(ii) Ministry of Road Transport and Highways (MORTH) Specifications*
*Both as applicable to National Highways and shall include policy circulars, guidelines and special publications, issued in respect thereof by IRC or MORTH, as the case may be, from time to time and shall incorporate all amendments and/or modifications to such codes and standards which are available to public 30 days before the Proposal Due Date unless otherwise specified in this Schedule.*
*The terms 'Ministry of Surface Transport' and 'Ministry of Road Transport, Highways' and 'Ministry of Shipping Road Transport and Highways' shall be considered as synonymous to each other.*
*A list of IRC/MORTH codes is provided in Appendix C*
*2.2 Where the aforesaid codes, standards and specifications are silent on any aspect, the following standards in order of preference shall be adopted in consultation with the JDA, unless otherwise specified in this Schedule:*
*(a) Bureau of Indian Standards (BIS)*
*(b) American Association of State Highway and Transport officials (AASHTO)*
*(c) Geometric Design Standards for Ontario Highways*
*(d) American Society of Testing Materials (ASTM)*
*(e) British Standards (BS)*
*(f) Suitable specification/standard devised by the JDA*
*(g) Any other standard proposed by the Concessionaire*
*2.3 All items of building works shall conform to Rajasthan Public Works Depatment (UDH/JDA)*
*specifications for Class 1 building works and standards given in the National Building Code (NBC). To the extent specific, provisions for building works are provided in IRC/MORTH specifications, the same shall prevail over the UDH/JDA/NBC provisions. For this purpose, building works shall be deemed to include road furniture, roadside facilities, landscape elements and/or any other works incidental to the building works.*
*2.4 The Geometric Design Standards for the. Project/Project Facilities shall be as per IRC Guidelines as applicable to the National Highways, urban arteries*
*2.5. The designed parameters for horizontal and vertical alignments shown in the DPR are the minimum requirements to be maintained for the project. The concessionaire may adopt better standards for enhancing the requirements of safety and mobility."*

53. Any residual doubt stands dispelled by the minutes of the pre-bid meeting dated 14.09.2009, which, by common consent, form part of the Agreement. Query No. 99 raised by the bidders was: “the concessionaire is not required to follow the Detailed Project Report (DPR) given in Vol-IV, please specify”. The answer given to all bidders was “Yes, but there would not be any impact on concession period and cost.” The bidders were thus told, in unequivocal terms, two things at once, i.e., (i) that the DPR was not binding, *and* (ii) that deviation from

it would have no impact on the concession period or the cost. The respondent gave its bid on that footing. The learned Arbitral Tribunal's conclusion that the DPR was nonetheless the benchmark whose deficiencies rendered the appellants liable in money is a construction which the contract, read as a whole, cannot reasonably bear. That conclusion ignores the express dispensation in Schedule-A and the pre-bid clarification altogether. A construction which no fair-minded or reasonable person could adopt on the contract read as a whole is not a plausible or even a "possible view" attracting deference. With respect, it is a case of patent illegality. Submission IV is thus also accepted.

**(d) Submission V — Compensation without a finding of breach**

54. Compensation under Section 73 of the Contract Act presupposes a breach of contract. Whereas Sections 54 and 55 presuppose, respectively, reciprocal promises and a time-bound obligation undertaken by the party in default. As held in ***Kailash Nath Associates v. DDA***[23], damages are payable only upon breach being established. On a careful reading of the award, we find that the learned Tribunal has nowhere identified the contractual provision which obliged the appellants to furnish a workable design or an error-free DPR, nor recorded a finding that any identified obligation of the appellants was breached. Indeed, no such obligation could have been identified, as under the DBFOT allocation (Clause 2.1 read with Clause 5.1 and Article 7) the investigation, study, design and engineering of the project were the exclusive responsibility, and at the exclusive cost, of the concessionaire. Clauses 2.1, Clause 5.1 and Article 7 is reproduced hereinbelow for ready reference:-

*"2.1 Grant of Concession*

23 (2015) 4 SCC 136

*Subject to and in accordance with the terms and conditions set forth in this Agreement, GOR hereby grants and authorizes exclusively the Concessionaire to investigate, study, design, engineer, procure, finance, construct, operate and maintain the Project / Project Facility and to exercise and / or enjoy the rights, powers, privileges authorizations and entitlements (including limited ownership for concession period) as set forth in this Agreement, including but not limited to the right to levy, demand, collect end appropriate Fee from vehicles and Persons liable to payment of Fee for using the Projects/ Project Facility or any other part thereof (collectively "the Concession").*

*X-X-X-X-X*

*5.1 General Obligations of the Concessionaire*

*The Concessionaire shall at its own cost and expense:*

*(1) Investigate, study, design, construct, operate and maintain the Project Assets / Project Facility in accordance with the provisions of this Agreement, Good Industry Practice and Applicable Laws;*

*(II) Obtain all Applicable Permits in conformity with the Applicable Laws and be in compliance with thereof at all times during the Concession Period,*

*(III) 'Procure and maintain in full force and effect, as necessary, appropriate proprietary rights, licenses, agreements and permissions for materials, methods, processes and systems used in or incorporated into the Project;*

*(IV) Ensure and procure that each Project Agreement contains provisions that would entitle GOR or a nominee of GOR to step into such agreement at GOR's discretion, in place and substitution of the Concessionaire in the event of Termination pursuant to the provisions of this Agreement;*

*(V) Provide all assistance to UDH/JDA Engineer and Steering Group as they may reasonably require for the performance of their duties and services under this Agreement;*

*(VI) Provide to the Steering Group reports or a regular basis during the implementation. Period and the Operations Period in accordance with the provisions of this Agreement;*

*(VII) Appoint, supervise, monitor and control the activities of Contractors under their respective Project Agreements as may be necessary and develop, implement and administer a surveillance and safety program for the Project / Project Facility and the users thereof and the Contractors personnel engaged in the provision of any services under any of the Project Agreements including correction of safety violations and deficiencies, and taking of all other actions necessary to provide a safe environment in accordance with Applicable Laws and Good Industry Practice.*

*(VIII) Take all reasonable precautions for the prevention of accidents on or about the Project Site / Project Facility and provide all reasonable assistance and emergency medical aid to accident victims;*

*(IX) Not to place or create nor to permit any Contractor or other person claiming through or under the Concessionaire to create or place any Encumbrance over all or any part of the Project Assets, or on any rights of the Concessionaire therein, save and except as expressly set forth in this Agreement;*

*(X) Make its own arrangements for quarrying, if necessary, and observe, and fulfill the environmental and other requirements under the Applicable Laws and Applicable Permits;*

*(XI) Be responsible for safety, soundness and durability of the-Project Facility (Including toilet, parking way as specified) including all structures forming part thereof and their compliance with the Specifications and Standards;*

*(XII) Ensure that the Project Site remains free from all encroachments and take all steps necessary to remove encroachments, if any:*

*(XIII) Make payment to Police Department or any Government Agency, if required, for provision of such services as are not provided in the normal, course or are available only on payment;*
*(XIV) Operate and maintain the Project at all times during the Operations. Period in conformity with this Agreement including but not limited to the Specifications and Standards, the Maintenance Programme and Good Industry Practice;*
*(XV) Remove promptly according to Good industry Practice, from the Project Site, all surplus construction machinery and materials, waste materials (including, without imitation, hazardous materials and waste water), rubbish and other debris (including without limitation accident debris) and keep the Project Site in a neat and clean condition and in conformity with the Applicable Laws and Applicable. Permits.*

*X-X-X-X-X*

*7.1 Preparation of Drawings. The Concessionaire shall, at its cost, charges and expenses, cause Drawings to be prepared in accordance with the Specification and Standards. The Concessionaire may, for this purpose, adopt with or without any modifications the Drawings, if any, any, made available by GOR, provided, notwithstanding such adoption, the Concessionaire shall be solely responsible for the adequacy of the Drawings.*
*7.2 Review and Approval of Drawings.*
*(a) The Concessionaire shall promptly and in such sequence as is consistent with the Project Completion Schedule, submit a copy each of all Drawings to the Superintending Engineer and the Steering Group.*
*(b) By forwarding the drawings pursuant to sub-article (a) above, the Concessionaire represents that it has determined and verified that the design and engineering including field construction criteria related thereto are in conformity with the Specifications and Standards-*
*(c) Within 15 (fifteen) days of the receipt of the Drawings, Superintending Engineer shall review the same and convey comments / observations, if any, thereon to the Concessionaire with particular reference to the conformity or otherwise with the Specifications and Standards. GOR shall not be liable for The adequacy of the Drawings and that the Concessionaire shall solely be responsible therefore and shall not be relieved or absolved in any manner whatsoever of its obligation, duties and liabilities as set forth in this Agreement.*
*(d) If the Superintending Engineer does not object to the Drawings submitted to it by the Concessionaire within a period stipulated in above sub-article(c) the Concessionaire shall be entitled to proceed with the Project.*
*(e) The Concessionaire shall be responsible for delays in Project Completion and consequences thereof caused by reason of any Drawings not being in conformity with the Specifications and Standards and shall not be entitled to seek any relief in this regard from GOR.*
*(f) Within 90 (ninety) days of the COD, the Concessionaire shall furnish to GOR three copies of as built Drawings duly veiled by the Executive Engineer or a firm of consultants reflecting the Project as actually designed, engineered and Constructed, including without limitation an as built survey illustrating the layout of the Project and-setback lines, if any. of the buildings and structures forming part of Project Facility."*

In light of the above, the learned Tribunal has, in effect, *presupposed* an obligation of the appellants which the Agreement does not contain. It thus proceeded to award damages for its supposed breach without establishing any actual, either the obligation or its breach or actual damages. An award of compensation dehors any finding of breach of an identified contractual obligation is contrary to the substantive provisoins contained in Sections 54, 55 and 73 of the Contract Act. It is thus patently illegal. Accordingly, submission V is accepted.

**(e) Submission VI — IRR of 20.33% equated with interest**

55. The Internal Rate of Return is, by definition, as we have understood, is the discount rate at which the net present value of the projected cash flows of an investment equals zero. It is a tool of project appraisal. It is an *ex ante*, estimated measure of the anticipated viability of an investment. It is premised, *inter alia*, on the assumption of reinvestment of interim cash flows. It is neither a promised return nor a rate of interest. The figure of 20.33% appears in the cash flow projections forming part of the feasibility material annexed to the bid. There is nothing in the Agreement which converts that IRR projection into a guaranteed return, much less into a contractual rate of interest on the claims raised by the respondent. The admitted position on record is that the respondent's actual cost of borrowing from its lenders was 13.5%.

56. The learned Tribunal nevertheless awarded every allowed claim together with IRR at 20.33%, on a compounding basis, from accrual, treating the IRR as the measure of the respondent's entitlement as if it were the rate of the interest which was agreed by the appellant. The reliance on ***State of Maharashtra v. Khare & Tarkunde(supra)*** is misplaced. There, the rate upheld reflected the *actual* rate of interest the contractor was paying to its bankers, which the banks had declined to reduce. The decision is no authority for adopting a notional appraisal metric as the rate of return on an award. Nor does the award reflect any consideration of the factors governing the award of interest recognised

in ***Vedanta Ltd. v. Shenzen Shandong* (supra)**, or of the settled position that compound interest/interest upon interest is not to be awarded absent contractual or statutory sanction (***State of Haryana v. S.L. Arora & Co.***[24] ***D. Khosla & Co. v. Union of India***).

56.1 The adoption of 20.33% compounding IRR inflates every claim exponentially, on the respondent's own showing, it is this element which swells the award from Rs. 198.04 crores to a figure in the region of Rs. 544.43 crores as on 28.02.2025 (date of execution petition). This element of the award is without contractual foundation, without reasons addressing reasonableness, and vitiates the quantification of each claim in its entirety. Submission VI is also accepted.

**<u>(f) Submission VII — Claims 2(i), 2(iii) & 4 beyond the contract</u>**

57. *Claim 2(i) — leakage of traffic through the old GKG road (Rs. 12.20 crores).* The learned Tribunal has not referred to any provision of the Concession Agreement obliging the appellants to ban *all* tollable traffic on the old GKG road. The pre-bid assurance, on the record as we read it, extended to restricting the entry of heavy vehicles, buses and trucks, on the old road. In consonance therewith, a gazette notification dated 31.01.2013 was, in fact, issued banning heavy traffic on the old GKG road. That traffic was diverted to the project road, and even barriers were erected. The appellants thus performed the only obligation they had undertaken. To hold the appellants liable in damages for not banning other categories of traffic they never undertook to ban amounts to enforcing an obligation which the contract does not contain. The judgment of the Hon'ble Supreme Court in ***MSK Projects (India) (JV) Ltd. v. State of Rajasthan***[25], where a claim for loss of toll was negatived notwithstanding the issue of a toll

24 (2010) 3 SCC 690

25 (2011) 10 SCC 573

notification restricting heavy vehicles, applies with full force and was not noticed by the learned Tribunal.

58. *Claim 2(iii)- demonetisation (Rs. 1.68 crores).* The claim was allowed as Force Majeure costs. Clause 11.6(d) of the Agreement, however, mandates that Force Majeure costs be certified by the Steering Group and thereafter verified by the Chief Engineer, JDA/UDH. Admittedly, no such certification or verification was ever undertaken. The learned Tribunal accepted the figures on the strength of the respondent's own material. The contractual machinery for quantification was thus bypassed altogether. Further, the office orders suspending toll relied upon by the respondent were issued by the Public Works Department and NHAI for roads under their respective jurisdictions. No order of the appellants directed suspension of toll on the project road, which is not a National Highway. The respondent, in fact, continued collecting toll on 9, 10 and 11 November 2016. Nor was any Material Adverse Effect of the demonitisation event pleaded. The O&M expenses and interest-repayment obligations allowed under this head bear no direct correlation with the Force Majeure event as envisaged under Article 11. The claim was thus allowed both beyond the terms of the Agreement and in disregard of its mandatory machinery and its mechanism.

59. *Claim 4 — denial of advertising rights (Rs. 8.49 crores).* Article 17.3 permits advertising on the project site *subject to the safety of the users* of the project road. Article 17.3 is reproduced hereinbelow for ready reference:-

> *"Article 17.3- Advertising on the Project Site:*
> *The Concessionaire shall not undertake or permit any form of commercial advertising, display or hording at any place on the Project site if such advertising, display or hording shall affect the safety of users of the Project facility while driving. Provided, however, that this sub-article shall not apply within the rest areas on the Project Site, which the concessionaire may/may allow to operate".*

The Empowered Committee, in its meeting of 06.02.2015, rejected the advertising proposal on the express ground that the serpentine alignment of the road rendered roadside advertising unsafe. The learned Tribunal has not recorded any finding that this safety-based rejection was unjustified, colourable or contrary to Article 17.3. Instead, it faulted the appellants for a "lack of concern for the profit earning opportunity" of the respondent. With respect, in a contest between a statutory authority's assessment of road-user safety and a concessionaire's profit expectation, the contract itself, through its Article 17.3, subordinates the latter to the former. Even otherwise, the learned Tribunal accepted the quantum of Rs. 8.49 crores as claimed to be gospel, without any scrutiny of its computation. The allowance of Claim 4 is thus both beyond the contract and perverse. Submission VII is accepted.

**G. Re:Question (iii):**

> **Whether the learned Sole Arbitrator traversed beyond the scope of the Concession Agreement, thus rendering the award unsustainable in law**

60. We now turn to question (ii), i.e., whether the learned Arbitrator travelled beyond the scope of the Concession Agreement. At the outset, a caveat is necessary, lest the respondent form the impression that we intend to re-appreciate the evidence or freshly interpret the terms of the commercial contract. We propose to do neither. Our sole inquiry is whether the learned Sole Arbitrator, being a creature of the contract, exceeded the bounds of the Concession Agreement. We shall not, therefore, either delve into the merits of the evidence, or examine the merits of the underlying dispute, or reinterpret the contract executed between the parties, or even undertake any independent assessment of

the merits of the award. With this limitation in mind, we proceed to analyse the three claims allowed by the learned Arbitral Tribunal.

***(a) Reasoning on Claim No. 1 (Increase in Project Cost)***

61. The challenge laid by the appellants to Claim No. 1 proceeds, in the first instance, upon the contractual structure of the project as a DBFOT concession. Reliance in this context is placed upon Clause 2.1 under the head 'Grant of Concession', Clause 2.3 under the head 'Acceptance of Concession', Clause 5.1 under the head 'General Obligations of the Concessionaire', and Clause 7.1 under the head 'Preparation of Drawings' which are already reproduced in Para 54(supra) in the preceding part.

Upon a conjoint reading of these stipulations, the position which emerges is that the concessionaire had expressly undertaken to investigate, survey, design and execute the project at its own cost and risk, and that the drawings, even where adopted from departmental material, remained the sole responsibility of the concessionaire. This contention of the appellants, in our considered opinion, merits acceptance. Once the parties had consciously allocated the risk of investigation, survey and design to the concessionaire under the aforesaid clauses, the learned Sole Arbitrator could not have invoked the mandate of Section 28(3) of the Act of 1996 and thus, fastened the financial consequences of redesign upon JDA without first locating a contractual stipulation displacing burden of that allocation. The award identifies no such stipulation, and the effective transfer of the design risk from the respondent to the appellants runs counter to the express terms of the Concession Agreement.

62. Furthermore, the appellants contention is that the DPR was only a referential document and not a binding design code. This plea, in fact,

stands substantiated on a plain reading of Schedule A under the head 'Project Description and Broad Particulars', (Annexure-I to Schedule A), Clause 1.1 under the head 'Alternative Design / Cross-Sections / Lowering of Formation Level' in case of apparent DPR errors (Annexure-I to Schedule A), Clause 2.5 under the head 'Minimum Parameters for Horizontal and Vertical Alignment'. Clause 2 of Schedule A prescribed the Indian Roads Congress norms and Ministry of Road Transport and Highway (MoRTH) specifications as the governing standards. Whereas, the DPR stood appended only for reference. The pre-bid clarification issued in response to the specific query as to whether the DPR was required to be followed showing the non-binding character of that document beyond doubt even prior to submission of bids. In such a contractual setting, the DPR could not have been elevated into a binding design mandate, and the learned Tribunal's finding to the contrary amounts to rewriting the bargain between the parties, which is impermissible.

63. The contrary reasoning recorded in the award, namely that the DPR and the alignment parameters shown therein constituted minimum design requirements and that deviation therefrom was permissible only upon demonstration of apparent error and sound durable design, does not, in our view, amounts to rewriting the terms of concession agreement. Annexure I to Schedule A, Clause 1.1 itself contemplates adoption of alternative design, cross-sections and lowering of formation level in the event of apparent errors in the DPR. The contract thus foresaw the possibility of imperfections in the DPR and cast the burden of devising a sound and durable design upon the concessionaire as part of its own obligations under Clause 7.1, rather than converting every such imperfection into a compensable event against the authority. By reading Clause 7.1, Annexure I to Schedule A, Clause 1.1 and Annexure

I to Schedule A, Clause 2.5 as fastening upon the appellants the consequences of the very errors whose correction the contract entrusted to the concessionaire, the learned Sole Arbitrator went way beyond the contractual scheme. Thus, we cannot concur with such an approach as it does not appear to be reasonable to us, thereby attracting the vice of patent illegality.

64. The appellants also contend that the revised alignments had been placed before and duly approved by the Empowered Committee. This submission is referable to Clause 15.1(c) under the head Dispute Resolution / role of the Empowered Committee and expressly stated contractual departures, read with the Rajasthan Road Development Act, 2002. Clause 15.1(c) is reproduced hereinbelow for ready reference:-

> *"(c) Stage 3: If the dispute is not settled within 6 months, the concessionaire may refer the dispute to Empowered Committee for final settlement."*

Apropos, the revised alignment was admittedly placed before and approved by the Empowered Committee constituted under the Act of 2002. Once such statutory approval was granted through the mechanism which the contract and the statute themselves contemplated, the deviation from the DPR could not, by itself, be attributed as a breach on the part of the appellants or be converted into a foundation for monetary compensation. We are of the view that the award, inasmuch as, treating the very approvals granted in the respondent's favour as circumstances fastening liability upon the JDA, falls foul of the legal effect of those approvals. The appellants' contention on this score, therefore, must be accepted.

65. Equally weighty is the appellants' argument founded upon Clause 16 / Clause 16.2 under the head Disclaimer / Independent Evaluation / Acceptance of Risk of Error. Under Article 16, the concessionaire

acknowledged that it had made an independent evaluation of the site, the specifications, the standards and the traffic, and had accepted the risk of adequacy, mistake or error in the information supplied, with the further stipulation that the authority would not be held liable in respect thereof. The alleged deficiencies in the DPR fall squarely within the field occupied by this provision. Clause 16 is a considered risk-allocation clause negotiated between commercial parties to a concession of this magnitude, and it directly barred the respondent from claiming damages on account of any error in the bid documents, including the DPR. The contention of the appellants that the claim was contractually excluded therefore deserves acceptance.

66. The submission that the learned Sole Arbitrator wrongly discarded the protection flowing from Article 16, and erred in applying precedent/case law to dilute its effect, must also succeed. Said submission falls for out consideration against the same contractual head of Disclaimer / Independent Evaluation / Acceptance of Risk of Error. Pertinently, Article 16 is not a clause exempting the authority from the consequences of its own breach. It is a clause allocating, in advance, the risk of adequacy, mistake or error in the information supplied to the bidders. The exclusionary clauses considered in the reported decisions relied upon in the Award stand on a materially different footing. Their ratio could not have been invoked to efface an express risk-allocation stipulation. Impugned Award thus disregards the binding term of the contract which is contrary to mandate of Section 28(3) of the Act of 1996. It is vitiated by patent illegality on that count also.

67. The appellants' plea that there was no identified contractual breach, and that compensation could not be awarded merely on broad notions of unfairness, is also well founded when tested against Clause

2.3 under 'Acceptance of Concession', Clause 5.1 under 'General Obligations of the Concessionaire', Clause 7.1 under 'Preparation of Drawings', and Clause 12.1(b) under 'Notice of Breach'. No positive obligation regarding provision of designs and drawings lay upon the appellants. The same being the concessionaire's own responsibility under the DBFOT structure. No notice of breach under Clause 12.1(b) was ever issued. The award does not identify any specific contractual obligation of the appellants which stood violated. Compensation under Sections 54, 55 and 73 of the Contract Act presupposes an obligation and established breach of an identified obligation. In its absence, the grant of damages which rests upon considerations of perceived unfairness is alien to the contract. Learned Arbitrator, being creation of contract adjudicatory forum, is equally bound by the agreement. The finding on liability under Claim No. 1 is, for this reason as well, unsustainable.

68. The appellants' central submission that the contract contemplated extension of concession period, and not cash compensation, for non-termination situations also commends acceptance. Same is borne out from a combined reading of Article 10 under Change of Scope, Clause 11.5 under Force Majeure and Consequential Relief/Extension, Clause 13.2 under Change in Law, Clause 12.2(b)(2) under Termination Payment, and Clause 12.1(b) under Notice of Breach. These contractual clauses have already reproduced in Para 44(supra). The contractual scheme, save and except the case of termination payment, recognized extension of the concession period as the compensatory mechanism for the events pleaded, and extensions aggregating 484 days had in fact been granted by the Empowered Committee for the very causes underlying the claim. Having received that relief translated in money terms as Rs. 119 crore, which the contract itself provided by way of

extention of time, the respondent could not have been granted a superadded money claim for the same causes. In allwoing that claim, the learned Sole Arbitrator substituted a compensatory regime of it’s own making for the negotiated risk allocation embedded in the agreement, thereby travelling beyond the contract.

69. The appellants' objection to the reliance placed by the respondent on additional term loan arrangements, enhanced project cost and financing documents likewise deserves acceptance, having regard to Clause 9.2 under the head ‘Amendments to Financing Documents’, Clause 17.7 under the head ‘Amendment only in the manner provided in the Agreement’, and the definitional provisions of Clause 1.1. The additional term loan of Rs. 23.72 crores was a private arrangement between the respondent and Punjab National Bank, to which the appellants were not parties. *Qua* with which they had no privity. Clause 9.2 regulated amendments to financing documents, and Clause 17.7 mandated that the Concession Agreement could be amended only in the manner provided therein. No amendment binding the JDA, or enhancing the approved project cost as against the JDA, could be inferred dehors this express contractual machinery. The award thus errs in treating the enhanced financing as if it enlarged the appellants' obligations.

70. For the same reasons, the appellants' contention that no monetary consequence could flow from the additional financing arrangements, and that the express bar under Clause 17.7 prevented any deemed amendment of the bargain, must be upheld. In taking the enhanced project cost, the additional borrowing and the projected return as the measure of the appellants' liability, the learned Sole Arbitrator effectively restructured the project cost, return and compensation payable under the concession, an exercise which neither

Clause 9.2 under Amendments to Financing Documents nor Clause 17.7 under Amendment only in the manner provided in the Agreement permits. An Arbitral Tribunal, being a creature of the contract, cannot remake or rewrite the contract for the parties, and the award, insofar as it proceeds upon such deemed restructuring, travels outside the four corners of the agreement.

71. The appellants' submission that the learned Sole Arbitrator wrongly treated IRR at 20.33 as if it were an enforceable rate of interest or return against the appellants is also merited. The Internal Rate of Return is an internal financial metric employed by the concessionaire and its lenders for appraisal of the investment model reflected in Schedule A and the financing framework. It is not a contractual promise by the authority to assure any particular return. Neither the Concession Agreement nor the applicable legal framework permits the mechanical transposition of such a projection into a money decree, or into a rate of interest, against the authority. The adoption of IRR at 20.33 as the measure of recovery is without contractual foundation and constitutes a further facet of the patent illegality vitiating the award on Claim No. 1.

***(b) Reasoning on Claim No. 2 (Loss of Toll Revenue)***

72. In relation to Claim No. 2, the entitlement asserted by the respondent rests upon Clause 4.1(a) under the head Right to Levy, Demand, Collect and Appropriate Fee. That clause confers upon the concessionaire the right to levy, demand, collect and appropriate the fee from users of the project facility. It does not, by its terms, amount to a guarantee by the authority of any particular volume of tollable traffic, nor an indemnity against leakage or diversion of traffic through the old Ghat Ki Guni road or other routes. The award proceeds upon the premise that the entitlement to collect toll carried with it an enforceable

assurance of traffic, a premise which finds no support in the language of Clause 4.1(a). To the extent, the award elevates a contractual right to collect fee into a warranty of revenue against the authority and the appellants' objection is well taken.

73. The appellants' plea that they had undertaken only to restrict heavy vehicles, and not all tollable traffic, must equally be accepted on a consideration of Clause 4.1(a), the pre-bid minutes relied upon by the parties, and the contractual matrix governing toll entitlement. The commitment reflected in the pre-bid minutes concerned buses and trucks only, and that commitment stood honoured through the gazette notification dated 31.01.2013 and the erection of physical barriers. The assumption in the award that the appellants had undertaken to ban all tollable traffic from the old road enlarges the appellants' obligation beyond anything found in the contract or the pre-bid record, and the residual movement of other categories of vehicles could not, in law, translate into a contractual claim for damages. The finding on this component of Claim No. 2 therefore rests upon an obligation which never existed.

74. Insofar as the component of Claim No. 2 founded on demonetisation is concerned, the matter is governed by Clause 11.5 under Force Majeure and Consequential Relief/Extension and Clause 11.6(d) under Certification/Verification in relation to Force Majeure consequences. Clause 11.6(d) made certification by the Steering Group, and verification by the Chief Engineer, JDA/UDH, a mandatory precondition to the allowance of force majeure costs. Admittedly, no such certification or verification preceded the allowance of the demonetisation component. The grant of relief in the absence of an express condition precedent stipulated by the parties is not a matter of

appreciation of evidence but a departure from the contractual machinery itself, and the appellants' contention that this component could not have been allowed without compliance with Clause 11.6(d) must be accepted.

**(c) Reasoning on Claim No. 4 (Advertisement Rights)**

75. As regards Claim No. 4, relating to compensation for denial of use of the right of way for advertisements, the claim was required to be established with reference to the provisions of the Concession Agreement and Schedule A dealing with commercial exploitation and advertisement rights. The award records no sustainable finding on whether the proposal for advertisements compromised road safety, which was the ground on which permission was declined, nor does it contain an assessment, in accordance with law, of the quantified loss of Rs. 8.49 crores, and the objections founded on contractual limitation and limitation in law remained unaddressed. An award of compensation which neither anchors the entitlement in an identified contractual provision nor records proof of the loss claimed cannot withstand scrutiny, and the appellants' challenge to the finding on Claim No. 4 accordingly succeeds.

**H. Re:Question (iv):**

**Whether the corrigendum award dated 31.07.2023 exceeds the permissible scope of Section 33 of the Act of 1996**

**Submission VIII —**

76. Section 33(1)(a) of the Act of 1996 permits correction of computation errors, clerical or typographical errors or errors of a similar nature. Upon the respondent's application dated 29.07.2023, the learned Tribunal, by the Corrigendum Award dated 31.07.2023, deleted the words "amounting to Rs. 198.04 crores" occurring in

paragraph 141 of the award. The effect of the deletion, as the respondent's own note before us demonstrates, is to unshackle the direction for payment of IRR at 20.33% from the ceiling of the aggregate figure and to enlarge the operative award from Rs. 198.04 crores to a figure in the region of Rs. 457 crores. A deletion which multiplies the award more than twofold is not the correction of a clerical, typographical or computational error; it is a substantive modification of the award and the grant, after the award, of a relief not granted in the award, a course wholly outside Section 33, after which the learned Tribunal stood functus officio: ***State of Arunachal Pradesh v. Damani Construction Co.***[26]; ***Gyan Prakash Arya v. Titan Industries Ltd.***[27]. The Corrigendum Award is unsustainable on this short ground alone.

77. We are of the considered opinion that, in relation to the corrigendum award, the jurisdiction under Section 33(1)(a) of the Act of 1996,is confined to the correction of computation, clerical, typographical or similar errors, and does not extend to substantive modification of the award. By granting interest at 20.33 under the guise of clarification, when the original award, read with the financing and compensation clauses of the Concession Agreement noticed above, furnished no basis for such relief, the corrigendum effected a substantive alteration of the award. The appellants' contention that the corrigendum award dated 31.07.2023 exceeded the permissible scope of Section 33 of the Act of 1996 is therefore accepted, and the corrigendum cannot survive independently of the award which it purported to clarify.

Submission VIII is accordingly, accepted.

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[26] (2007) 10 SCC 742
[27] (2023) 1 SCC 153

**I. Re:Question (v):**

**Whether the learned Commercial Court failed to exercise jurisdiction vested in it under Section 34 of the Act of 1996 while declining interference with the award**

78. As regards the impugned order dated 27.01.2025, we regret to observe that the learned Commercial Court, though correctly extracted the statutory tests under Section 34 and the case-law delineating them, but it did not thereafter apply those tests to the specific objections raised. It also disregarded SC judgment in ***Ramnath*** **(supra).** The adoption of IRR as interest, the bypassing of Clause 11.6(d) and the scope of Section 33 was also given a short shift. The operative reasoning of the learned Commercial Court is, in substance, that the award is "detailed and reasoned" and that the Court "does not have appellate jurisdiction" and therefore "cannot delve into the merits". The limited nature of Section 34 jurisdiction is not a warrant for declining to exercise it at all. Where objections squarely invoking patent illegality and conflict with public policy are raised, the Commercial Court is bound to test the award against those parameters and record its own reasons. Failure to do so is a failure to exercise jurisdiction vested in it.

**(J) Disproportionality -**

79. Dehors all that has been discussed in the preceding part, there is one further, overarching aspect of the matter which, in our considered opinion, independently vitiates the award, and which we consider it our duty to record. The arithmetic of the award, when laid bare, speaks for itself. Conceded case of the claimant/respondent is that the actual date of completion of the work is 31.01.2013, on which date as per its own calculations, as against the project cost of Rs. 150 crores, it incurred Rs. 207.87 crores. Thus, a cost overrun of Rs. 57.87 crores. After the actual completion date, i.e., 31.01.2013, there was no further cost and

it was all revenue receipts against toll collection. Taken to its best, the claimant could, at the most, seek compensation of Rs. 57.87 crores along with interest, but that too not in monetary terms but by extension of time since as per the contract, time was revenue.

79.1 However, we have already held that extension of time of 484 days was granted and no further was asked for. The Project Cost stood contractually frozen at Rs. 150 crores. On the respondent's own showing, resting on the certificates of its Chartered Accountants/Statutory Auditors, the actual capital cost of the project upon completion was Rs. 207.85 crores. That is to say, the entire cost escalation which the respondent itself asserted, and which the learned Tribunal accepted, was of the order of Rs. 57.87 crores. Upon this foundation of Rs. 57.87 crores, the learned Tribunal awarded, under Claim 1 alone, a sum of Rs. 175.67 crores, the principal escalation compounded at the so-called IRR of 20.33%, i.e., more than three times the escalation itself, and to this were added the further claims, taking the aggregate award, as on the date of the Statement of Claim, to Rs. 198.04 crores. The Corrigendum Award of 31.07.2023 then jumped even that ceiling, directing IRR at 20.33% until actual realisation.

79.2 The consequence, as pointed out at the Bar and not disputed before us, is that in the execution proceedings arising out of the award as corrected, the respondent has laid a claim exceeding Rs. 500 crores. In other words, an admitted cost escalation of about Rs. 57 crores has, by the alchemy of a compounding "internal rate of return", been transmuted into a demand of over Rs. 500 crores against the public exchequer, roughly nine times escalation on which the entire claim was founded, and more than three times the agreed cost of constructing the tunnel project itself. Indeed, Claim No. 1 alone, at Rs. 175.67 crores, exceeds the contractually frozen cost of the entire project; the "compensation" for an incident of the project has outstripped the cost of the project.

80. Such a result seems to us, with due respect, rather preposterous, and no process of reasoning consistent with law can sustain it. The law of damages is compensatory, not punitive. Section 73 of the Contract Act entitles a party only to compensation for loss or damage which naturally arose, or which the parties knew to be likely to arise, from the breach, and to nothing more.

80.1 An award mechanism under which the remedy grows, year upon year and on a compounding basis, at a rate half as high again as the claimant's own admitted cost of borrowing (13.5%), and continues to grow after the award until realisation, does not just compensate a loss; In fact, it confers a windfall, converts the arbitral award into a high-yield investment against the State, and creates the perverse consequence that every day of delay enriches the claimant beyond any loss it could conceivably have suffered.

80.2 When the paying party is a statutory development authority and the ultimate source of payment is public money collected from the citizens, the award operates as unjust enrichment at the cost of the public exchequer. Proportionality between the wrong (if any) and the remedy is an elementary requirement of justice. An award which bears no rational proportion to the loss found, indeed, in the present case, to a loss never found, there being no finding of breach at all, shocks the conscience of the Court. As held in ***Associate Builders*** **(supra)** and reiterated in ***Ssangyong*** **(supra)**, an award which shocks the conscience of the Court conflicts with the most basic notions of morality and justice within the meaning of Explanation 1(iii) to Section 34(2)(b)

(ii) of the Act of 1996, and this ground, though to be applied sparingly, exists precisely for a case such as the present.

81. We are conscious that inadequacy or excessiveness of the amount awarded is not, by itself, a ground of challenge to the Award under Section 34, and that the Court does not sit in appeal over quantum. But that principle presupposes an award whose measure of compensation is anchored in the contract or in law.

81.1 In the case in hand, the very *measure* adopted is a notional, compounding project- appraisal rate (IRR) applied to claims which have been allowed. That too, without a finding of breach. And as an icing on the cake, unmoored by the corrigendum from any ceiling, which is itself dehors to the contract. Moreover, it is contrary to Section 73 of the Contract Act. It is contrary to the public policy reflected in the Interest Act. It is contrary to Section 31(7) of the Act of 1996 and productive of a result which is wholly unconscionable.

81.2 The vice is therefore not one of mere quantum but of the legal foundation of the award itself, and squarely falls within Section 34(2)(b)(ii) read with Explanation 1, as also Section 34(2A). This aspect, too, wholly escaped the attention of the learned Commercial Court.

81.3 The award is liable to be set aside on this ground independently of, and in addition to, the grounds recorded hereinabove.

82. We may also add here that as regards the corrigendum of the award, since the main award has not be found tenable by us, on that ground alone the sequel thereof i.e. corrigendum award is liable to be set aside, though, of course, in the preceding part we have dilated on its merits also and given independent reasons for its un-sustainability.

**K. Our view on submissions of the respondent**

83. The submissions advanced on behalf of the respondent, though attractively presented by Sh. Sudhir Gupta, learned Senior Advocate, do not, in our considered opinion, salvage the award. Let us see how.

83.1 ***Narrow scope of Sections 34/37; plausible view.***

The propositions of law are unexceptionable, and we have kept them in the forefront of our consideration. But the deference owed to a plausible arbitral construction presupposes that the construction is one which the contract can reasonably bear. For the reasons recorded under Submissions I, IV and VI, the learned Tribunal's construction, that a contract whose every provision channels relief through the extension of concession period nonetheless permits cash compensation with a compounding return of 20.33%, and that a DPR expressly furnished for reference with an express acknowledgment of possible error was nonetheless the binding benchmark, is not a possible view on the Agreement read as a whole. The vices found by us, re-writing of the contract, internal contradiction, disregard of binding precedent and of vital evidence, compensation without breach, and an out-of-jurisdiction corrigendum, are the very grounds which Sections 34(2A) and 34(2)(b)(ii) recognise; interference on these grounds is not re-appreciation of evidence.

83.2. ***New grounds.***

The objection is not borne out by the record. The award itself records (inter alia in the discussion of Claim 1) the appellants' submissions before the learned Tribunal on the absence of any enabling provision for compensation, on the definition of Project Cost, on Clause 9.2, on Article 16, on the pre-bid queries and on the incorrectness of the 20.33% IRR. The pleas of internal contradiction and of the corrigendum exceeding Section 33 could, in the nature of things, arise only after the award and the corrigendum respectively. In any event, a patent illegality appearing on the face of the award, and each of the vices found by us so appears, can be examined by the Court, as held in ***Sal Udyog* (supra)**, the very decision the parties cite. The plea of double recovery rests on the Empowered Committee's decisions, which were part of the record before the learned Tribunal.

83.3 ***Cash flow projections and IRR form part of the Agreement.***

Even accepting that the cash flow projections in the prescribed format formed part of the bid documents, their incorporation does not transmute an estimated appraisal metric into a guaranteed return. The projections were the basis on which the concession period was quoted and evaluated. The Agreement's chosen mechanism for preserving the economics so projected was, again, adjustment of the concession period, a remedy the respondent sought and obtained. The submission proves, if anything, the appellants' case.

83.4 ***Silence of the contract.***

The contention that the Agreement, being silent on damages for breach and containing no express bar on cash compensation, left the field open to the learned Tribunal, is answered by what we have held under Submissions I and V. To sum up, the contract is not silent, it prescribes a specific and exhaustive remedy and in any event no breach of any identified obligation of the appellants was found. The learned Tribunal's own paragraph 124 accepts the correct position.

83.5 ***Findings of fact on the faulty DPR etc.***

The deficiencies in the DPR, the debarment of the DPR consultant, and the presence of the Balaknath Samadhi may all be accepted as facts. They do not answer the anterior legal questions, upon whom the Agreement placed the design and investigation risk, and what remedy the Agreement provided, which the learned Tribunal answered contrary to the contract.

83.6 ***Concurrent findings.***

The caution against disturbing concurrent findings under Section 37 presupposes that the Section 34 Court in fact examined the objections. For the reasons recorded in paragraph 80 above, it did not. Where the first Court fails to exercise its jurisdiction, the appellate Court under Section 37 must correct the error rather than compound it.

84. The aforesaid submissions of the respondent are accordingly rejected.

**L. Conclusion**

85. Findings on the respective rival submissions are thus :

(i) the plea of limitation raised by the appellants (Submission II) is rejected for the reasons recorded in paragraphs 40 to 42 above;

(ii) Submissions I and III to VIII of the appellants are accepted;

(iii) the submissions of the respondent are all rejected.

**M. ANSWERS TO THE LEGAL QUESTIONS**

86. In light of the discussion on the applicable law and the outcome thereof as recorded in the preceding part, the answers to the all the four legal ponis as framed in para -30 are in the affirmative.

**N. SUMMARY**

87. To summarise:

(i). The arbitral award dated 25.06.2023, as modified by the Corrigendum Award dated 31.07.2023, in so far as it allows Claims 1, 2(i), 2(iii) and 4 with IRR at 20.33% and costs, suffers from patent illegality appearing on its face and is in conflict with the fundamental policy of Indian law and the basic notions of justice, within the meaning of Section 34(2)(b)(ii) read with Explanations 1 and 2 and Section 34(2A) of the Act of 1996:

(ii). it travels beyond and re-writes the terms of the Concession Agreement; it is internally contradictory; it disregards the vital admitted material;

(iii). it awards compensation without any finding of breach; it adopts a rate of return foreign to the contract;

(iv). it inflates an admitted escalation of about Rs. 57.87 crores into a liability now claimed in execution at over Rs. 500 crores (plus other claims), a result which shocks the conscience of the Court;

and

(v). the corrigendum exceeds the jurisdiction conferred by Section 33 of the Act of 1996.

88. The infirmities noticed above are not confined to any severable part of the award. The misconstruction of the contractual scheme infects the entitlement under every allowed claim. Furthermore, the adoption of IRR at 20.33% infects the quantification of every allowed claim.

89. This is, therefore, not a case in which any portion of the impugned award dated 25.06.2023 can be salvaged by severance on the principles recognised in ***Gayatri Balasamy v. ISG Novasoft Technologies Ltd.***[28]***.*** The impugned award, to the extent it allows the claims, must therefore, fail as a whole. Equally, the impugned order dated 27.01.2025, passed by the learned Commercial Court, having failed to test the award on the statutory parameters, cannot be sustained.

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**O. ORDER**

90. Upshot of our analysis leads us to pass the following resultant order:

**(i)** The appeal is allowed.

**(ii)** The order dated 27.01.2025 passed by the learned District Judge, Commercial Court No. 2, Jaipur Metropolitan-II in Objection Application No. 85/2024 is set aside.

**(iii)** The arbitral award dated 25.06.2023 and the Corrigendum Award dated 31.07.2023 passed by the learned Sole Arbitrator are set aside.

**(iv)** The amounts, if any, deposited by or recovered from the appellants in execution or otherwise pursuant to the award, including any amount realised by invocation of bank guarantee referable to the award, shall abide by such restitution as the parties may be entitled to in accordance with law.

**(v)** In the circumstances of the case, the parties shall bear their own costs. All pending applications stand disposed of.

**(SANDEEP TANEJA),J** **(ARUN MONGA),J**

2/TUSHAR KUMAWAT