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

Judgment reserved on: 15.01.2026
Judgment pronounced on: 26.05.2026

\+ **O.M.P. (COMM) 152/2022**

ATLANTA INFRA ASSETS LIMITED .....Petitioner

Through: Dr. Amit George, Mr. Chirag Shroff, Mr. Dhananjay Kataria, Mr. Bhrigu A. Pamidighantam, Ms. Ibansara Syiemlieh, Mr. Adhishwar Suri, Mr. Dushyant K. Kaul, Mr. Shivam Parashar, Ms. Rupam Jha, Ms. Medhavi Bhatia, Mr. Vaibhav Gandhi, Mr. Kartikay Puneesh, Advs.

versus

NATIONAL HIGHWAY AUTHORITY OF INDIA .....Respondent

Through: Mr. Mritunjay Kumar Singh, Ms. Tanya Singh, Ms. Srishti, Mr. Uday Chaudhary, Mr. Mukesh Rawat Kumar Mr. Amit, Advs.

\+ **O.M.P. (COMM) 243/2022**

NATIONAL HIGHWAY AUTHORITY OF INDIA .....Petitioner

Through: Mr. Mritunjay Kumar Singh, Ms. Tanya Singh, Ms. Srishti, Mr. Uday Chaudhary, Mr. Mukesh Rawat Kumar Mr. Amit, Advs.

versus

ATLANTA INFRA ASSETS LIMITED .....Respondent

Through: Dr. Amit George, Mr. Chirag Shroff, Mr. Dhananjay Kataria, Mr.

Bhrigu A. Pamidighantam, Ms. Ibansara Syiemlieh, Mr. Adhishwar Suri, Mr. Dushyant K. Kaul, Mr. Shivam Parashar, Ms. Rupam Jha, Ms. Medhavi Bhatia, Mr. Vaibhav Gandhi, Mr. Kartikay Puneesh, Advs.

CORAM:
HON'BLE MR. JUSTICE JASMEET SINGH

J U D G M E N T

1. These are cross petitions filed under section 34 of the Arbitration and Conciliation Act, 1996 ***("the Act")*** seeking to challenge the Arbitral Award dated 16.11.2021 ***("impugned Award")***-majority view, passed by the learned Arbitral Tribunal ***("AT")***, in the matter of Arbitration between *M/s Atlanta Infra Assets ltd. v. National Highway Authority of India.*

2. Both the parties have preferred their respective petitions to challenge the impugned Award, to the extent they are aggrieved by it.

3. Atlanta Infra Assets Limited ***("Atlanta")*** was the Claimant in the Arbitral proceedings and National Highway Authority of India ***("NHAI")*** was the respondent therein.

4. Atlanta and NHAI, both have approached this Court against the impugned Award by way of filing O.M.P. (COMM) 152/2022 and O.M.P. (COMM) 243/2022 respectively.

FACTUAL BACKGROUND

5. NHAI, is a statutory body established under Section 3 of the National Highways Authority of India Act, 1988, and operating under the aegis

of the Ministry of Road Transport & Highways, responsible for development, maintenance and management of national highways.

6. NHAI invited bids *vide* letter No. NHAI/BOT/NH-24035/42/2003 dated 09.06.2004 for the award of several projects including *"Improvement, Operation and Maintenance including Strengthening and Widening of existing 2 lane road to 4 lane dual carriageway from Km.9.200 to Km.50.000 of NH-6 (Nagpur - Kondhali Section) in the State of Maharashtra on Build Operate and Transfer (BOT)"**(**"Project"**)*.

7. The bid submitted by a consortium of M/s Atlanta Ltd. (Lead technical member) and SREI Infrastructure Finance Ltd. (Lead financial member) was accepted *vide* a letter of award dated 22.09.2005.

8. The tender document contemplated setting up of a special purpose vehicle ***("SPV")*** to execute and implement the project and hence a SPV namely, Balaji Tollways Ltd. was incorporated. Subsequently, the name of the SPV was changed to Atlanta Infra Assets Limited., i.e. the petitioner in O.M.P. (COMM) 152/2022 and respondent in O.M.P. (COMM) 243/2022.

9. Thereafter, a concession agreement ***("CA")*** dated 09.12.2005 was executed between the SPV and NHAI for twenty years.

10. Disputes arose between parties during the execution of works till the issuance of provisional commercial certificate ***("PCC")*** dated 22.09.2011 by the Independent consultant ***("IC")*** namely, M/s Aarvee Associates, Hyderabad. With respect to these disputes concerning breaches before 22.09.2011, the respondent invoked Arbitration mechanism under Clause No. 39.2 of the CA.

11. The arbitral proceedings with respect to pre-PCC disputes culminated in Atlanta's partial claim being allowed *vide* arbitral Award dated 29.09.2016, passed by the learned AT comprising of Mr Justice (Retd.) D P Wadhwa, Mr. Justice (Retd.) V N Khare, Mr. G G Shivdasani.

12. As the works under the Project could not be completed, NHAI and Atlanta entered into a supplementary agreement ***("SA")*** dated 22.09.2011, to complete the remaining work within 120 days of land being made available.

13. Several disputes arose between the parties post-PCC i.e., after 22.09.2011, which were initially attempted to be amicably resolved by invoking Clause No. 39.1 of the CA *vide* letter dated 19.10.2016, and referring the matter to the Chairman of NHAI and the Chairman of Atlanta, but the same could not result in amicable settlement of disputes.

14. Resultantly, Atlanta *vide* letter dated 01.08.2017 invoked Arbitration as contemplated under Clause No. 39.2 of the CA for adjudication of disputes and by letter dated 03.10.2017 submitted its Statement of Claims and relevant documents to the Indian Council for Arbitration.

15. Pursuant thereto, the present AT was constituted.

IMPUGNED AWARD

16. The Arbitral proceedings culminated in passing of the impugned majority Arbitral Award dated 16.11.2021 by Justice (Retd.) Manmohan Sarin and Er. Bharat Bhushan Gupta, with dissenting minority award passed by Er. V.S. Karandikar.

17. Thereafter, NHAI filed an application under Section 33 of the Act, seeking correction of the impugned Award to the extent of award *qua*

Counter Claim No. 4. The application was dismissed by the AT *vide* correction award dated 07.01.2022. Thus, NHAI is challenging the impugned award read with the correction award to the extent of Counter Claim No. 4.

18. During the course of judicial proceedings for these petitions, a limited settlement was concluded between the parties which was duly recorded by this Court in its Order dated 02.12.2022. Therefore, the dispute only remains with regards to NHAI's challenge to Counter Claim No. 4(c) and Atlanta's challenge *qua* Claim Nos. 1 and 6.

SUBMISSIONS ON BEHALF OF ATLANTA

Claim No. 1: Damages due to delay in handing over of land post provisional commercial operation date (PCOD) dated 22.09.2011 till 04.06.2019 and further continuing till the Commercial operation date (COD).

19. Dr. George, learned Counsel for Atlanta, submits that the AT has exceeded its jurisdiction by travelling beyond the express terms of the CA and has consequently rendered the impugned Award *qua* Claim No. 1, patently illegal and perverse.

20. The AT, despite acknowledging from a conjoint reading of Clause No. 13.5.2 and Schedule H of the CA, that the CA stipulated a period of 12 months for the purpose of handing over of additional right of way ***("AROW")***, proceeded to adopt a period of 18 months as the reasonable period without any reasons or evidentiary basis.

21. He also submits that these findings of the AT has resulted in substantial curtailment of the Atlanta's entitlement under various component sub-heads of Claim No. 1.

22. This adoption of 18 months as a reasonable period, in substitution of 12 months is bereft of any reasoning and is without any evidence. The impugned Award is further vitiated by internal inconsistencies, as it fails to disclose any cogent rationale for the differential application of two distinct time periods at different places of the award dealing with separate claims. Even though the AT is empowered to interpret the terms of the contract but such contractual interpretation cannot be devoid of any reasons and if so done, the same would be violative of fundamental policy of Indian law.

23. The AT cannot render contradictory findings, nor it can alter contractual terms or create a new contract/term or act in derogation of terms of the contract as the same would vitiate the impugned Award for being patently illegal. Thus, the AT cannot unilaterally rewrite the terms of the contract acting in breach of fundamental principles of justice. Reliance in support of the said submissions is placed on *Morgan Securities & Credits (P) Ltd. v. Samtel Display Systems Ltd.*[1], *PSA Sical Terminals (P) Ltd. v. V.O. Chidambaranar Port Trust, Tuticorin & Ors.*[2], and *Ssangyong Engg. & Construction Co. Ltd. v. NHAI*[3].

24. It is also stated that for all the aforesaid reasons the findings pertaining to Claim Nos. 1(a), 1(b), l(b-a), l(b-b), 1(c), should be set aside while granting liberty to pursue the said claims afresh by way of fresh arbitration.

[1]2023 SCC OnLine Del 8018.
[2](2023) 15 SCC 781.
[3](2019) 15 SCC 131.

25. In the alternative, it is prayed that the impugned Award be modified to the extent of construing 18 months as 12 months, along with all other consequential modifications thereto. Reliance is placed on *Gayatri Balasamy v. ISO Novasoft Technologies Ltd.*[4] and *Jagdish Kaur v. Jasbir Singh Sandhu & Ors.*[5].

Claim No. 6: Interest and Cost of Arbitration.

26. At the outset, it is contended that the impugned Award stands vitiated inasmuch as the AT has awarded different rates of interest on Claims and Counter Claims, in disregard of the mutual agreement between the parties which was recorded in the meeting dated 24.02.2020 wherein the rate of interest was fixed at 12% p.a.

27. Dr. George, submits that while NHAI has been awarded interest at the rate of 12% p.a. on its Counter Claim No. 2, Atlanta has been granted interest at a lesser rate of 10% p.a. on its Claim No. 6. Therefore, it is an error apparent on the face of record and the findings *qua* Claim No. 6 to the extent of interest deserves to be modified. Reliance is placed on *Gayatri Balasamy (Supra)* and *Jagdish Kaur (Supra).*

28. Reliance is also placed on *Indian Hume Pipe Co. Ltd. v. State of Rajasthan*[6], to submit that the grant of interest cannot operate differently between Claims and Counter Claims, both the claimant and respondent have to be treated equally.

Counter Claim No. 4(c): Failure to carry out Bituminous Overlay work and application of tack coat. (Against the challenge of NHAI in O.M.P. (COMM) 243/2022).

[4](2025) SCC Online SC 986.
[5]2025 SCC OnLine Del 10835.
[6](2009) 10 SCC 187.

29. Learned counsel for Atlanta, submits that the challenge of NHAI in O.M.P. (COMM) 243/2022 *qua* Counter Claim No. 4(c) is liable to be rejected as the AT has correctly dealt with this Counter Claim and awarded nominal damages by providing cogent reasoning and following settled position of law.

30. With regards to this Counter claim, the AT has rightly rejected the formula for computation of damages proposed by the IC on the ground that it would amount to rewriting of the contractual terms, and has instead proceeded strictly in accordance with the mechanism delineated in the CA.

31. He submits that NHAI has assailed the findings of the AT on the ground that damages under Clause No. 18.13(b) ought to have been calculated "for each day of default" but the same has been wrongly calculated. However, the same contention was raised before the AT under its Section 33 Application, which was rightly rejected by the AT *vide* order dated 07.01.2022 holding that the Counter Claim was premised on policy guidelines dated 05.02.2016, which were applicable to agreements executed in 2006 and 2007. Thus, only token damages were levied.

32. The AT has rightly awarded only token damage by observing the Counter Claim to be unsustainable as unilaterally issued policy guideline cannot bind the other party to the contract. The said policy cannot be retroactively applied to the agreement between the parties. Reliance is placed on *Ssangyong Engg. & Construction Co. Ltd. (Supra).*

33. Additionally, without prejudice to the aforesaid submissions, it was also submitted that the entire Counter claim No. 4(c) was *per* se unsustainable before the AT as it was not only based on mechanical invocation of contractual terms and inapplicable policy guidelines, but also the NHAI did not make any specific averments or demonstrated any actual loss suffered by the NHAI.

34. He also submits that liquidated damages cannot be awarded in absence of a clear demonstration of actual loss incurred. There remains an obligation not only to aver but also to prove actual loss incurred. Reliance is placed on *National Council of Education Research & Training v. Murli Industries Ltd.*[7] and *Indian Oil Corporation Limited v. Standard Casting Pvt. Ltd.*[8]

SUBMISSIONS ON BEHALF OF NHAI

35. At the outset, Mr. Singh, learned counsel for NHAI, submits that Atlanta has assailed the majority award dated 16.11.2021 on incorrect understanding of Section 34 of the Act which allows interference with the Award only on limited grounds as enumerated therein.

Claim No. 1

36. He further submits that in accordance with Schedule H of the CA, the NHAI was obliged to handover right of way within 12 months from the date of the CA i.e., 09.12.2005. However, due to unavailability of about 10% of the land, it was agreed between the parties that PCC would be issued for the executed work and for the remaining works a separate agreement (supplementary agreement) would be executed.

[7] 2025 SCC Online Del 6414.
[8] 2025 SCC Online Del 8393.

37. Consequently, for execution of the remainder work, a SA dated 22.09.2011 was executed between the parties stipulating a timeline of 120 days from the date of land availability for completion of remainder works. However, the SA did not prescribe any fixed timeline for handing over of the AROW.

38. The AT in order to ascertain the reasonable time for land handover, analysed the acquisition process in paragraph No. 60 of the Award and observed that, as there was no fixed timeline in the SA within which the land was required to be made available. In absence of any such stipulation concerning time, the AT proceeded to interpret reasonable time in view of the accompanying facts and circumstances. The AT relied on *Hungerford Investment Trust Ltd. v. Haridas Mundhra*[9] to substantiate its findings of reasonable time.

39. The AT in paragraph No. 71 of the impugned Award attributed the primary responsibility of delay to the respondent and in view of attendant circumstances 18 months from the date of SA was fixed as a reasonable time beyond which the breaching party was held to be responsible for delay.

Claim No. 6

40. Mr. Singh, learned counsel, *qua* Claim No. 6 submits that rate and quantum of interest falls within the discretionary ambit of AT and no judicial interference is warranted with the same.

41. The AT while adjudicating Claim No. 6 has exercised proper discretion. In paragraph No. 129 of the Award, it duly noted and took into consideration the frequent claim amendments by Atlanta, thereby

[9](1972) 3 SCC 684.

awarding *pendente lite* interest at the rate of 10% p.a. against the rate of 18% p.a. as claimed by Atlanta. The AT awarded no pre-reference interest and awarded cost of Arbitration as per actuals.

Counter Claim No. 4(c)

42. Mr. Singh, learned counsel for NHAI, submits that the Award dated 16.11.2021 read with order dated 07.01.2022 is contrary to an express contractual Clause of the CA bearing Clause No. 18.13(b). The AT in paragraph No. 125 of the Award duly decided the Claim in accordance with the said Clause but omitted to multiply the relevant figure with 517 and arrived at an erroneous finding by not taking into consideration the factor of 517 days delay.

43. Although the AT took note of the letter dated 22.03.2018 issued by the IC stating the delay of 517 days attributable to Atlanta, the same has been overlooked by the AT in awarding this Claim and arriving at its findings without any rationale.

44. NHAI duly flagged the computational lapse *vide* an application filed under Section 33 of the Act but the AT erroneously justified the Award *qua* Counter Claim No. 4(c) adopting a fresh approach stating that only token damages were awarded based on the rationale established in paragraph Nos. 121 to 125. This justification however finds no support in the said paragraphs and in paragraph No. 125 specifically, the AT only dealt with the issue of Schedule of Rates prescribed by Public Work Department-Nagpur adopted by the NHAI as per Policy Guideline dated 05.02.2018, and completely ignored to multiply the amount with the number of days of delay.

45. Moreover, the order dated 07.01.2022 dismissing the application of NHAI is patently illegal as it is based on a new approach of token damages which was not even explained in paragraph No. 125 as to on what basis such damages were being awarded.

46. Reliance is placed on *Gayatri Balasamy (Supra)* to state that the aforesaid computational error can be corrected to award Rs. 4,57,87,588/- to NHAI by multiplying the already awarded amount by 517.

ANALYSIS AND FINDINGS

47. I have heard the learned counsels for the parties and perused the documents placed on record.

SCOPE OF INTERFERENCE UNDER SECTION 34 OF THE ACT

48. The scope of interference under Section 34 of the Act is now clearly established. The Court is not required to sit in appeal as an Appellate Court over the Award, and it can neither reappreciate the evidence nor reinterpret the terms of the contract, when the view already taken by the arbitrator is a probable and possible one. Judicial intervention with the Award is permissible only on limited and specific grounds, as encapsulated under Section 34 of the Act. The Court is not required/empowered to reappreciate evidence or substitute its own view with that of the Arbitral Tribunal. It is a settled position of law that Section 34 of the Act, embodies the principle of minimal judicial interference, thereby preserving the foundational precept of the Act, the finality and efficacy of Arbitral Awards. The Hon'ble Supreme Court has recently observed this scope of interference in the judgment of

Consolidated Construction Consortium Ltd. v. Software Technology Parks of India[10], the relevant paragraphs of which reads as under:

> *"46. Scope of Section 34 of the 1996 Act is now well crystallised by a plethora of judgments of this Court. Section 34 is not in the nature of an appellate provision. It provides for setting aside an arbitral award that too only on very limited grounds i.e. as those contained in sub-sections (2) and (2-A) of Section 34. It is the only remedy for setting aside an arbitral award. An arbitral award is not liable to be interfered with only on the ground that the award is illegal or is erroneous in law which would require re-appraisal of the evidence adduced before the Arbitral Tribunal. If two views are possible, there is no scope for the court to re-appraise the evidence and to take the view other than the one taken by the arbitrator. The view taken by the Arbitral Tribunal is ordinarily to be accepted and allowed to prevail. Thus, the scope of interference in arbitral matters is only confined to the extent envisaged under Section 34 of the Act. The court exercising powers under Section 34 has per force to limit its jurisdiction within the four corners of Section 34. It cannot travel beyond Section 34. Thus, proceedings under Section 34 are summary in nature and not like a full-fledged civil suit or a civil appeal. The award as such cannot be touched unless it is contrary to the substantive*

[10](2025) 7 SCC 757.

provisions of law or Section 34 of the 1996 Act or the terms of the agreement."

49. At the outset, Mr. Singh, learned counsel for the NHAI, states that the petition O.M.P. (COMM) 152/2022 is *sans merit* as the petitioner has failed to plead or establish any specific permissible ground under Section 34 of the Act. The Award is a detailed Award substantiated by the evidence available on record and the same does not suffer from any vices as enumerated under Section 34 of the Act warranting interference by this Court. The findings of the AT are plausible and therefore cannot be interfered with under the Section 34 jurisdiction.

50. With the above scope of Section 34 of the Act in mind, I shall now deal with the rival contentions.

Claim No. 1: Damages due to delay in handing over of land post provisional commercial operation date (PCOD) dated 22.09.2011 till 04.06.2019 and further continuing till the Commercial operation date (COD).

51. The primary challenge of Atlanta *qua* Claim No. 1 can be essentially distilled into one core controversy i.e. the findings of the AT on the point of reasonable period to provide AROW under the SA dated 22.09.2011.

52. Atlanta has assailed the findings of the AT *qua* Claim No. 1 for being patently illegal on three fold grounds:

i. The AT in its findings read Schedule H with Clause No. 13.5.2 of the CA to acknowledge the relevant period as 12 month, but proceeded to consider the reasonable period as

18 months without any evidentiary basis thereby rewriting the terms of the Contract.

ii. There is no reasoning/rationale given by the AT in arriving at its finding of treating 18 months as the reasonable period.

iii. There are inconsistencies in the award with respect to the differentiated application of reasonable period as 12 months and 18 months at different sections of the award.

53. Per Contra, NHAI contends that although the CA in its Schedule H originally stipulated 12 months from 09.12.2005 but when nearly 10% of the land was still unavailable, the PCC was issued for the executed works and a SA was executed with a stipulation to complete remaining works within 120 days from the date on which land became available, not prescribing any fixed timeline was a conscious alteration in the agreement.

54. In absence of any such definite period, the AT has duly and justifiably examined the attendant circumstances to determine/interpret a reasonable period for handing over of AROW. The view of the AT is supported by cogent reasoning.

55. Summarily, the core controversy revolves around the reasonable time within which the land was to be handed over, after which the works under the SA were to be executed within 120 days, in accordance with the relevant provision of the SA. The relevant provision of the SA reads as under:

> *"As and when the land becomes available, the Concessionaire agrees to complete the work within 120 days. The delay in completion of such balance works*

effective from the date on which the land becomes available shall be dealt with as per the provision of the main Concession Agreement."

(Emphasis Supplied.)

56. The AT *qua* this finding of reasonable period has given its reasons and explanations in paragraph Nos. 60, 61 and 71 of the Award and the same read as under:

"60. We may notice, in brief, the process of land acquisition. Commencing from survey of land, assessment and proposal for the acquisition of land were to emanate from the Concessionaire i.e. the Claimant. Respondent after verification of land records, upon finding it feasible, is to process the same. Respondent would have the obligation to pursue it with the State Government and functionaries and deposit the compensation payable. Upon successful acquisition, land is made available to the Concessionaire.

61. Supplementary Agreement has not prescribed the period within which the land is required to be made available to the Concessionaire. The operative part of the provision is "as and when the land becomes available". However, the absence of any time being prescribed cannot make it ad infinitum. Whenever there is no time prescribed for a particular act, it has been judicially interpreted as 'reasonable time' considering all relevant facts and circumstances. Reference in this regard is invited to the decision of the Hon'ble Supreme Court in Hungerford

Investment Trust Ltd. v. Haridas Mundhra (1972) 3 SCC 684. The provisions of the Concession Agreement and Supplementary Agreement provide clues which can aid and guide the determination. As per Schedule 'H' of the Concession Agreement, Respondent was obliged to handover Additional Right of Way within 12 months from the signing of the Concession Agreement. The conditions precedent, respective obligations of the Concessionaire and NHAI as contained in Clause 9.1 (vi), (xxiv), (xxviii), (xxix), (xxx), (xxxi), (xxxiii) and 10.1 (i), (ii), (iii), (iv), (xi), (xiii), (xiv) Clause 13.5.2 tend to demonstrate the obligations put on the respective parties for expedited resolution and accomplishment of the work.

...

71. Before proceeding with determination of the Claims and Counterclaims, it is imperative to determine what would be a 'reasonable period' to complete handing over of additional land to the Claimant under the Supplementary Agreement. Considering the period prescribed for additional land to be made available under the Concession Agreement i.e. within 12 months of execution, as well as the attendant circumstances as seen from the correspondence exchanged and noticed by us, the primary responsibility for the delay rests with Respondent. This also becomes clear from the letter dated 03.03.2021 (Pg. 1408, Convenience Compilation-III) of the Competent Authority of the

Respondent communicating to PIU Amravati its concurrence to issue "Completion Certificate" to the Claimant following certification by the Engineer that all the works and all the punch list items where land is available had been completed and items which could not be completed due to non-availability, have been de-scoped.

In the facts and circumstances, we find that the 'reasonable period' under the stipulation 'as and when land becomes available' for implementation of Supplementary Agreement would be 18 months from the date of execution. Any delay in execution thereafter, the party in breach would be accountable and answerable for the claims."

57. In paragraph No. 60, AT has outlined the sequential steps in land acquisition procedure under such contractual frameworks wherein the land availability is not a single step but a chain of events involved in the acquisition process, this discussion is important as it substantiates the decision of the AT to arrive at a reasonable period.

58. After identifying that the SA contained no express stipulation as to the time limit, the AT returned its findings in paragraph No. 61 by applying governing legal principles applicable in such a factual scenario. The AT proceeded to observe that the use of phrase *"as and when land becomes available"* does not permit an infinite and endless postponement of performance. The AT relied on ***Hungerford Investment Trust Ltd. (Supra)*** to support its findings that in absence of any prescribed time for performance of an obligation, the law implies determination of a reasonable time which is to be ascertained from the

relevant facts and circumstances. From a perusal of the paragraph No. 61 it is also clear that the stipulation of 12 months period in the CA was not discarded altogether but the same was expressly treated as a relevant clue for determining reasonableness under the altered contractual agreement. In this backdrop, I am of this view that the AT treated this 12 month period as a baseline indicator while interpreting the reasonable period with the help of other relevant facts and circumstances.

59. The important reasoning for the findings challenged under this Claim No. 1 is clear from a perusal of the paragraph No. 71 of the Award, wherein the AT read together in harmony not only the contractual framework but also the prevailing circumstances.

60. In this view, the fixation of reasonable period as 18 months under the stipulation *"as and when land becomes available"* cannot be said to be decided without reasons. The AT took into consideration the relevant contractual period of 12 months and viewed it in the context of the SA that deliberately excluded any such stipulation of a fixed time period, and examined the practical aspects of land acquisition and then factored in the surrounding circumstances to arrive at a finding of 18 months as a reasonable period. Thus, the view taken by the AT is a plausible view supported by sufficient reasons and not vitiated by any perversity or patent illegality.

61. The said findings does not amount to rewriting of the contract as the CA and the SA are different contracts governing different aspects of a same project, the contractual term of CA cannot be allowed to be imported in the SA. In absence of any specific contractual timeline in

the SA, the AT has only exercised its statutory power to interpret a term of contract which is well within its jurisdiction. The same being interpretation of a term of a contract, cannot be revisited by this Court under Section 34 jurisdiction. The view of AT is both plausible and reasonable.

Claim No. 6: Interest and Cost of Arbitration.

62. The Claim No. 6 is categorised into two sub-claims with Claim No. 6.1 pertaining to the award of *pendente lite* interest and Claim No. 6.2 pertaining to the cost of Arbitration, as claimed by Atlanta.

63. Atlanta under Claim No. 6.1, claimed *pendente lite* interest at the rate of 18%, which was awarded by the AT at the rate of 10% p.a. instead, and under Claim No. 6.2, the cost of Arbitration were also awarded to the tune of Rs. 1,96,11,906/-.

64. Atlanta has assailed the Award *qua* Claim No. 6 primarily on the ground that during the meeting dated 24.02.2020 the parties had already agreed to fix the rate of interest at 12% p.a. and that the AT cannot award two different rates of interest for the Claims and Counter Claims.

65. From a perusal of the record of the order sheet of the AT dated 24.02.2020, it is clear that there is no such omnibus/uniform rate of interest fixed for all Claims and Counter Claims during the hearing/meeting. The order records a specific and a limited settlement with interest rate of 12% only fixed and applied on the Claims and Counter Claims, which were settled amicably on that day and were duly recorded in the order of the AT. The order dated 24.02.2020, reads as under:

BEFORE THE INDIAN COUNCIL OF ARBITRATION

(Case No. AC-2118)

IN THE MATTER OF ARBITRATION:

M/s Atlanta Infra Assets Limited

...Claimant

Vs.

National Highways Authority of India, New Delhi

...Respondent

Order Sheet of the 27th hearing held on 24th February, 2020 at11:00 a.m. at Federation House, Tansen Marg, New Delhi

PRESENT:

ARBITRAL TRIBUNAL

Mr. Justice Manmohan Sarin ...Presiding Arbitrator

Mr. Vilas Sridhar Karandikar ...Ld. Arbitrator

Mr. Bharat Bhushan Gupta ...Ld. Arbitrator

SECRETARIAT

Ms. Lakshmi K P ...Case Manager

ON BEHALF OF THE CLAIMANT

Dr. P.C. Markanda, Sr. Advocate

Mr. Rajesh Markanda, Advocate

Ms. Neihal Dogra, Advocate

Mr. RajhooBbarot, MD, Atlanta

Mr. Ulhass N. Bhole, Vice President

ON BEHALF OF THE RESPONDENT

Mr. Ramesh Kumar, Advocate

Mr. Abhishek Gusain, Advocate

Mr. V. P. Brahmankar, Project Director, NHAI, PIU Amravati

PROCEEDINGS DT. 24.02.2020

The position with regard to counter claims of the respondent was reviewed and the positions taken by the parties in support and in opposition to the counter claims was revisited in particular with regard to counter claim no. 5 and 7.

COUNTER CLAIM NO. 5

The respondent claims Rs. 49,87,73,425/- cost of overlay of the Project Highway for the period 01.04.2014 to 31.05.2018. The claimant opposes the claim on the ground that they are carrying out the overlay work and hence, the respondent cannot claim the entire cost of the overlay.

COUNTER CLAIM NO. 7

The position as to certain factual aspects with regard to balance works in respect of Service roads (Counter claim no. 7) may be noted:

(i) The total Service Roads remaining to be completed 23.67 km as per original scope of work.

(ii) 16.085 work completed as on 31.1.2020.

(iii) 0.485 km completed between 01.08.2017 and 31.01.2020 leaving balance of 7.615 km.

(iv) The respondents have proposed descoping of 4.62 km. to Headquarters which will leave 2.99 km which the respondent asked to carry out without insisting upon the minimum width of 7 meters and as per availability at site.

As regards, Service Roads which is one of the component of this claim, parties after addressing submissions and reflecting thereon reached an understanding which is being recorded.

1. Out of the 23.67 km. of Service Roads, 15.6 km. had been completed as on the date of invocation of arbitration as on 1st August, 2017. Some part of the Service Roads was done between August, 2017 and January, 2020 leaving a balance of 7.615 km. The NHAI has recommended descoping of 4.62 km. leaving a balance of 2.99 km or 3 km. approximately. It has been specifically agreed by the respondents that this length of service roads on which standard width of 7 meters is not available may be carried out on the width as available on the basis of approved drawings to be made available within 10 days from today. The claimants undertake to complete the work within 3 months of the drawings including all the related works as given under the heading remaining works.

In this view of the matter, since the counter claim is

based on, the estimated cost of balance work as per the punch list A and B, Claimant having agreed to carry out the remaining works as detailed below and as required by the respondent, the counter claim no. 7 does no longer survive.

S.No.	***Completed Works***	***Remaining Works***
1.	*Highway lighting not required on service roads*	*Clearance for Right of Way on entire Service Roads*
2.	*Truck Lay- byes (6 Nos.)*	*Road Signs, Road marking for balance service roads*
3.	*Development of Major State Highway Junction at Km 18.120*	*Development of minor junctions wherever required on balance service roads not more than 3 in number*
4.	*Curves of less than 1000-meter radius erection of Chevrons and W-Metal Beam Crash barriers*	*Extension of pipes for hume pipe /box /slab culvert wherever required on balance service roads not more than 2 in number*
5.	*Minor bridges*	*ROW boundary pillars wherever required at every 50 meters as required on the entire length of Highway*

6.	*Filling trenches within ROW dug for mining murrum used for embankment construction*	
7.	*Safety measures like erection of solar blinkers, delineators, W-Metal, Beam Crash Barriers etc. on medium openings and junctions.*	

The overall position with respect to the counter claims after discussion and attempted settlement is as under:-

Counter Claim	***Particulars***	***Amount***	***Period***	***Decision/settlement***
1	*Cost of Plantation and Maintenance of Avenue Plantation*	*Rs. 4,32,94,105.00 (The said claim was reduced subsequently as noted in the signed notes of proceedings dt. to 22.01.2020 Rs. 1,20,39,397/- being maintenance the charges from 01.04.2016 30.06.2018)*	*01.04.2016 to 31.05.2018*	*After threadbare discussion of all aspects parties agree that the said counter claim shall stand satisfied in case, the respondents receive or get a set off Rs. 50,00,000.00 in all. Further, the claimant shall maintain the plantation/avenue till 5th plantation October, 2026.*
2	*Opposite Party/Claimant's share of fees & expenses of IC (05.10.2011 to 31.03.2018)*	*Rs. 3,18,67,767.00*	*05.10.2011 to 17.04.2018*	***Rs. 47,58,821.33 till 31.03.2019 plus interest @12% per annum w.e.f. 01.04.2019 as agreed by the Parties in line with the claimant's submission dt. 27.07.2019. The proportion as per***

				letter dt. 27.07.2019 shall continue for sharing of IC Fee till completion of service roads. Thereafter, the claimant will reimburse 50% of the IC Fees as per the agreement.
3.	*Reimbursement of expenses for engaging two vehicles for inspection of the Project Highway*	*Rs. 31,55,625.00*	*01.10.2015 to 31.05.2018*	*Rs. 21 lakhs inclusive of interest as per Order dt. 21.01.2020*
4.	*Damages payable by the Opposite Party/Claimant for poor O&M of the Project Highway*	*Rs. 5,87,85,296.00*	*21.09.2015 to 31.05.2018*	*To be adjudicated by the Tribunal including for delay in overlay.*
5.	*Cost of overlay of the Project Highway*	*Rs.49,87,73,425.00*	*01.04.2014 to 31.05.2018*	*63% overlay work is completed by the Claimant and balance is to be completed by 31st May, 2020 and since no work is done by the Respondent, the counter claim does not survive. However, this is without prejudice to counter claim no. 4.*
6.	*Recovery of cost of providing Police assistance for removal of encroachments*	*Rs. 2,69,470.00*	*17.04.2014 to 31.05.2018*	***Rs. 1,54,673/- plus interest at 12% per annum from 17.04.2014***
7.	*Cost of Balance*	*Rs.*	*22.09.2011*	*In view of the*

	work of Punch List	*60,30,69,951.00 (Claim Amount: 27,35,30,000.00 + Interest Rs. 32,95,39,951.00)*	*31.05.2018*	*agreement reach between the parties for completion and the execution of the remaining works and the time period therefor as recorded in proceedings above.*
8.	*Cost of Proceedings*	*As per Actuals*	*-*	*To be adjudicated by the Tribunal*

66. In this view, the contention of Atlanta that the AT in awarding 10% p.a. has acted in disregard of a mutual agreement between the parties is unfounded and misconceived. The limited scope of order dated 24.02.2020 cannot be allowed to be misinterpreted as a blanket pre-determination/fixation of rate of interest for all pending Claims and Counter Claims.

67. Another contention of Atlanta that the AT has awarded different rates of interest for Claims and Counter Claims, is also misconceived as it is clear from the perusal of the order sheet dated 24.02.2020 that it was mutually agreed between the parties that a rate of 12% would apply *qua* Counter Claim Nos. 2 and 6 only. The same has also been recorded by the AT in paragraph No. 112 of the impugned Award, which reads as under:

> *"**Counterclaims raised by the Respondent***
>
> *112. Respondent has raised 8 Counterclaims against the Claimant. The same have been tabulated at para 27 hereinabove. On reviewing the positions of the parties, Counterclaims No. 1, 2, 3, 5, 6 and 7 came to be settled and the agreement reached was recorded in the proceedings*

held on 24.02.2020 (Annexure-D) and the Order sheet signed by both parties as token of their acceptance of the same. The particulars of the Counterclaim, amounts claimed and settlement arrived at is tabulated hereunder for facility of reference:…"

68. Moreover, the AT in awarding *pendente lite* interest at the rate of 10% p.a. against the claimed rate of 18% p.a. has only exercised its statutory power and has not violated any terms of the contract to warrant interference with the same. It is no longer *res integra* that the AT is having wide scope of power to award interest under Section 31(7)(b) of the Act and once the AT has taken a view which is plausible, it cannot be substituted by the Court under Section 34 jurisdiction. The Hon'ble Supreme Court in its judgment ***Hyder Consulting (UK) Ltd. v. State of Orissa***[11]**,** made the following observations:

"69. I take note that the Arbitral Tribunal has been given the discretionary power of not only imposing interest, but also for determining the rate of interest that could be imposed from the date of cause of action to the date of the award. The Arbitral Tribunal has the discretion to decide whether such interest would be imposed on the whole or a part of the money awarded, and further whether it would be imposed for the entire duration from the date of cause of action to the date of award, or on a part of it. However, such discretion is not unfettered and is not exercisable upon the mere whims and fancies of the tribunal. In Principles of

[11] (2015) 2 SCC 189.

Statutory Interpretation, Justice G.P. Singh, 13th Edn., 2012, at p. 482, it has been stated as follows:

> *"Even where there is not much indication in the Act of the ground upon which discretion is to be exercised it does not mean that its exercise is dependent upon mere fancy of the court or tribunal or authority concerned. It must be exercised in the words of Lord Halsbury, 'according to the rules of reason and justice, not according to private opinion; according to law and not humour; it is to be not arbitrary, vague and fanciful, but legal and regular'."*

70. It can be concluded that the discretion, whether to award interest by the Arbitral Tribunal under clause (a), is necessarily to be exercised as per the facts and circumstances of each case. The said discretion must be within the parameters of the statute and in accordance with the rule of law. Furthermore, the said clause states that the rate of interest, if such interest is awarded by the Arbitral Tribunal, must be as the said tribunal deems reasonable. It is settled law that discretion must always be exercised lawfully."

(Emphasis Supplied.)

69. I am of the view that the submission of NHAI holds merit and that the AT in paragraph No. 129 of the award of Claim No. 6.1, has taken a plausible view in not awarding the claimed 18% rate of interest. The AT in awarding interest at the rate of 10% p.a. duly considered the

frequent amendments and also the prevailing rate of interest during the relevant period. The view of AT is based on cogent reasoning and no interference is warranted with the same. The relevant paragraphs of the impugned Award reads as under:

> *"**Claim No. 6.1: Claim for Interest***
>
> *127. Claimant demands pendente lite interest @ 18 p.a. on the sums due and future interest @ 18% compounded monthly from due date of payment to date of payment.*
>
> *128. The Tribunal came to be constituted on 01.08.2018. Claimant filed its first Statement of Claim with the ICA on 03.10.2017 raising claims in the sum of INR 90.78 crores, which was amended and the sum claimed revised to INR 124.12 crores on 22.08.2018. Subsequently, Claimant filed an updated calculation for Claims No. 1 and 2, with the result that the total sum claimed stood revised to INR 1,44,74,85,212/-.*
>
> *129. The amounts claimed have been subject to frequent amendment and have come to be crystallised only by this Award. In these circumstances, and keeping in mind the average bank lending rate for the relevant period, it would be apposite to award pendente lite interest from date of constitution of the Tribunal i.e. 01.08.2018 till realization of the awarded amounts @ 10%p.a.*

70. As regards the argument of Atlanta for applying separate rates of interest on Claims and Counter Claims is concerned, the said argument is misconceived. On 24.02.2020, the parties agreed to the rates of

interest for Counter Claim Nos. 2 and 6 only, the same is not an agreement of the parties *qua* the binding rate of interest for all Claims and Counter Claims. Hence, the AT was very much within its discretion to award interest at the rate of 10%.

71. Additionally, the AT has awarded cost of Arbitration based on the actual Arbitral fee deposited and assessed reasonable legal fee. The same is based on cogent reasoning and presents a plausible view. Learned Counsel for Atlanta has also not made any submissions specific to Claim No. 6(b). Thus, no interference with the same is warranted.

Counter Claim No. 4(c): Failure to carry out Bituminous Overlay work and application of tack coat. (Challenged by NHAI in O.M.P. (COMM) 243/2022)

72. NHAI has challenged the Award *qua* Counter Claim No. 4(c) only to the extent that the awarded amount must be recomputed for the delay of 517 days by factoring in this delay and the amount awarded should be modified and read as Rs. 4,57,87,588 /- instead of Rs. 88,564/-.

73. NHAI had preferred an application under Section 33 of the Act before the AT, raising identical grounds as raised herein the present petition. Subsequently, the said application was dismissed by the AT *vide* correction Award/order dated 07.01.2022. The order dated 07.01.2022 reads as under:

> *"1. An Application moved by the Respondent U/s 33 of the Arbitration and Conciliation Act, 1996 seeking corrections in the majority Award dated 16.11.2021, has been taken up for consideration. The Applicant appears to be aggrieved by*

the decision of the Tribunal in respect of award of the Counterclaim No.4 (c) whereby in respect of said Counterclaim, a sum of Rs.88,564/- has been assessed and awarded, while the Applicant contends that the award as per formula should have been Rs.4,57,87,588/-.

2. Ld. Counsel for the Claimant Mr. Rajesh Markanda objects to the Application as being wholly misconceived since it seeks a review on merits, which is beyond the scope of correction envisaged U/s 33 of clerical or arithmetical errors.

3. Without there being a necessity of going into it, we may notice in the passing that the rationale of assessing token damages flows from the finding of breach as given in the Award. The Concession Agreement was executed on 09.12.2005 and the policy guidelines circular dated 05.02.2016 made the guidelines applicable to Agreements entered into in 2006 – 2007. Accordingly, only token damages were levied in the exercise of Arbitral jurisdiction in Counterclaim No.4 (c) as per the rationale given in paras 121 to 125 of the Award.

4. We find considerable merit in Mr. Markanda's objections that the Application as framed would not be maintainable in terms of Section 33 as it fails to disclose any arithmetical/clerical error. The Application is accordingly dismissed."

(Emphasis Supplied)

74. The AT dismissed the Section 33 application *vide* order dated 07.01.2022, on the ground that the application instead of disclosing any arithmetical or clerical error, seeks merit based review of the AT's decision and that the AT has levied token damages based on the rationale already noted in paragraph Nos. 121 to 125 of the Award. The said paragraphs of the impugned Award read as under:

> *"**Delay in submission of O&M Plan***
>
> *121. Clause 18.13 of the CA provides that in case the Respondent does not exercise its option to undertake the required repair and maintenance after expiry of 30 days as stipulated in Clause 18.12, it shall recover damages from the Concessionaire, payable after the expiry of the aforesaid period of 30 days until the default is cured, as per sub-clause (a) and (b) which are reproduced hereunder:*
>
> *(a) Rs. 10,000/-*
>
> *(b) 0.1% of the cost of such repairs as estimated by the Independent Consultant.*
>
> *122. Clause 18.12 clearly stipulates that the deviation/shortcoming in O&M should be qua the 'Maintenance Manual' and/or the 'Maintenance Programme' and not the 'O&M Plan'. No doubt that the Claimant was required to submit an annual O&M Plan under Clause 3.1(c), however, the O&M activities to be performed were set out in the O&M Manual ("Manual") which the Claimant supplied on 23.05.2011 (Annexure A-6, CD-8, pg. 92-188) and were to be controlled by the said*

Manual.

A perusal of the Manual shows that it is exhaustive in detail with separate sections for Operations and Maintenance detailing the works to be carried out and responsibilities to be discharged by the Concessionaire-Claimant. That the Manual, as submitted, was a complete guide for execution of O&M works is evident from the complete absence of any letter or communication, between 2011 and 2014, from the Respondent requesting the Claimant to furnish an annual O&M Plan. This would imply that annual O&M plans were, by no means, indispensable or necessary, for carrying out O&M works, absence of which would impede performance. Respondent'simposition of INR 10,000/- per day for 341 days in respect of delay in submission of O&M Plan conveniently ignores condonation granted, as discussed hereinabove in para 120. Accordingly, the damages for non-submission of the O&M Plan are assessed at INR 2,80,000/- computed for 28 days at the rate of INR 10,000/- per day and the said sum is awarded to the Respondent.

Failure to carry out Benkelman Beam Deflection Test and Road Roughness Test

123. Respondent has levied these damages on the failure of the Claimant to carry out Road Roughness Test and Benkelman Beam Deflection (BBD) Test, as required and on the stipulated periodicity under the Concession Agreement. Respondent first brought this to the Claimant's notice in the

meeting held on 03.01.2015 between the Claimant and IC, Minutes of which were enclosed with the IC's letter of 04.01.2015 (RD-13, R-548/39-44). Item 8 of the Minutes pertains to carrying out of Benkelman Beam Test (under Clause 3.4.2.3 of Schedule-L) and Road Roughness Test and records the Claimant's assurance of acting on the same.

Claimant conducted both these tests in July 2015 as can be seen from its letter dated 05.08.2015 (CD-10, pg. 259) [Roughness Index result sheets attached] and letter dated 14.08.2015 (CD-10, pg. 266) [Report on BBD Survey & Overlay Design attached). While it is true that the Respondent for almost a year did not raise the demand for conducting these tests. However, by its communication of 27.04.2016 (RD-14/34) Claimant was again directed to carry out tests followed by, after another gap of almost one year, letter dated 03.02.2017 (RD-16/74).

124. Provision of Clauses 3.4.2.2 and 3.4.2.3 mandate that road roughness value shall be measured at least twice in a year by a properly calibrated Bump Integrator device before and after monsoon and the structural condition of the flexible pavement of the Project Highway shall be assessed every year by taking Benkelman Beam Deflections, respectively. In view of the clear and categorical provision requiring the Roughness Test to be carriedout at least twice in a year. These are clear indications that the above is a minimum requirement and therefore, Dr.Markanda's

submission that only when roughness index is found to be greater than 3000mm/km, are the clauses to be invoked and not on the basis of periodicity, is not tenable. It is not in dispute that the Claimant failed to carry out the roughness test at least twice and the BBD test, annually. Accordingly, in terms of the contractual provisions, the Respondent was justified in levying the damages as per its letter of 21.08.2017 (RD-16, pg. 75). Respondent claims to have assessed damages based on 'best industry practice', arriving at a figure of INR 6500/km for BBD Test and INR 7500/km for Road Roughness Test and imposing, in total, INR 8,72,632/-. Claimant has not placed on record anything to rebut the above or to indicate that the same is excessive or not in accordance with 'best industry practices'. Respondent is accordingly awarded INR. 8,72,632 on this account.

Failure to carry out Bituminous Overlay Work

125. The last aspect to be dealt with is damages on account of failure to carry out Bituminous Overlay work. Calculation of damages is based on Policy Guidelines of 05.02.2018. We find that these Guidelines are inapplicable to the dispute before us as the Concession Agreement was executed on 09.12.2005 and the circular expressly states that it shall apply to agreements entered in 2006 and 2007. Moreover, the Policy Guidelines, purportedly seek to supply only a clarification, however, in our view it prescribes a new formula distinct from the one prescribed in 18.13(b).

Accepting this new formula would amount to rewriting the contract, in as much as the same was not something both parties agreed to at the time of execution of the Concession Agreement. Further, the IC has taken the rates prescribed under the Scheduleof Rates of PWD, Nagpur despite comparable rates for similar works being prescribed in the BOQ. Item 4.03 under 'Bituminous Courses' prescribes a rate of INR 4131 / (m^3) for carrying out profile correction. Item 4.02 for emulsified tack coat was to be executed at INR 8 /m^2, which should be the rates at which damages should have been calculated as opposed to the price taken by the IC in its letter of 22.03.2018. Respondent's entitlement under this head is as follows:

S. No.	*Item of Work*	*Quantity*	*Rate as per BOQ*	*Cost of Work in INR*
1.	*Bituminous Concrete*	*20049.80 m^3*	*4131/ m^3*	*8,44,74,819*
2.	*Application of tack coat*	*511245 m^2*	*8/m^2*	*40,89,960*
	Total			*8,85,64,779*

As per clause 18.13(b) the amount of damages would equal 0.1% of the cost of work done which comes to INR 88,564/- Accordingly, for Claimant's failure to submit O&M Plan, conduct Roughness and BBD Test and complete Bituminous

overlay work, the Respondent is awarded INR 8,18,564/-, which is detailed as below:

Sl.No.	*Item of Work*	*Amount Awarded (INR)*
1.	*Delay in O&M Plan Submission*	*2,80,000/-*
2.	*Failure to carry out Benkelman Beam Deflection Test and Road Roughness Test*	*8,72,632/-*
3.	*Failure to carry out Bituminous Overlay and Application of Tack Coat*	*88,564/-*
	Total	*12,41,196/-*

Accordingly, the Respondent is awarded a sum of INR 12,41,196/- (Rupees Twelve Lakh forty one thousand one hundred ninety six only) against the Claimant."

75. The contentions of NHAI are based on the premise that the AT acted in deliberate ignorance of the number of days of delay stated in the letter by the IC and has not acted in accordance with the Clause No. 18.13 of the CA by not computing the damages for the total number of days of delay i.e. 517 days as computed by the IC. The Clause No. 18.13 is important and reads as under:

"18.13 In the event NHAI does not exercise its option to undertake the required repair and maintenance after expiry

of the 30 (thirty) days period stipulated in Clause 18.12 it shall recover Damages from the Concessionaire for default in operating and maintaining the Project Highway in conformity with this Agreement. Such Damages shall be payable after the aforesaid period of 30 (thirty) days and until the default is cured. The amount of Damages shall be calculated for each day of default at the higher of the following, namely (a) Rs.10,000 (Rs. Ten thousand), and (b) 0.1 % (zero point one per cent) of the cost of such repair as estimated by the Independent Consultant. Recovery of such Damages shall be without prejudice to the rights of NHAI under this Agreement, including Termination thereof."

(Emphasis Supplied.)

76. It is also the case of NHAI that the AT has erred in dismissing the Section 33 application and justifying the award of Counter Claim No. 4(c) by taking a new approach that the AT has only awarded token damages and stating it to be based on cogent reasoning contained in paragraph No. 121-125 of the Award.

77. *Per Contra,* Atlanta has defended the award of this Counter Claim No. 4(c) by the AT on the ground that it is based on cogent reasoning and the AT has correctly awarded nominal damages. The AT has already adjudicated an application filed by the NHAI on the same grounds and held that the reasoning provided in the Award is sufficient and explains the award of token damages. Thus, the order dated 07.01.2022, clearly shows the manifest intent of the AT to award these damages as token damages. Additionally, as liquidated damages cannot be awarded in

absence of clear averments and evidence as to actual loss, the Counter Claim being totally unsubstantiated and based on mechanical invocation has been rightly adjudicated by the AT to the extent of awarding only token damages.

78. Atlanta has also made these similar submissions before the AT, as can be seen from paragraph No. 88-90 of the reply dated 31.10.2018 filed by Atlanta to the said Counter Claim. The relevant paragraph of the reply reads as under:

> *"88 – 90. The contents of paragraphs 88 to 90 of the Counter Claim Statement are denied being wrong and incorrect. It is respectfully submitted that the Claimant replied to the letters written by NHAI claiming damages for non maintenance under Clause 18 of the Concession Agreement disputing the penalty levied by. the independent Consultant vide letter dated 30.09.2016(C-108, CD-7/1541-1542). In the said letter it was stated that the reliance on, Clause 18 by the Respondent for alleged default is misplaced, since the said clauses are generic clauses. The relevant provision for maintenance was contained in Schedule 'L' and the same was strictly adhered to by the Claimant. The Claimant had maintained the Project Highway in the traffic worthy condition. Thus, the action of the Respondent in seeking recovery of the said amount without any adjudication of their highly one-sided and arbitrary stance is untenable. After receipt of the aforesaid letter dated 30.09.2016, the Respondent did not deny or*

controvert the submissions made and did not take any action pursuant thereto but abruptly after a passage of approximately one year sought to recover the said amount through Union Bank of India vide letter dated 24.07.2017, which again reveals the arbitrariness and highhanded action by the Respondent. Further, the recovery proposed is not justified even in terms of Clause 18 of the CA, which has been relied upon by the Respondent. The said Clause does not provide for any such recovery. In any case, the Claimant denies and disputes the power or jurisdiction of the Respondent to make claims for damages on account of alleged inconvenience to the public at large. It is stated that the Respondent has no locus standi to raise the present claim. Further, no costs have been incurred by the Respondent in terms of Clause 18.12 to justify the recoveries made. Moreover, the Claimant, without admitting any of the allegations of the Respondent states that the calculation of damages by the Respondent is wrongful, non-contractual and has no basis. It is stated that the Law relating to a claim for damages has been well settled by a series of decisions of the Apex Court, wherein it has been laid down that any party which claims damages needs to prove that it actually suffered damages by reason of the breach. In the instant case, the Claimant was neither in breach of any of the provisions of the Concession Agreement nor have any actual damages been occasioned to

the Respondent. Moreover, assuming without admitting that the delay, in fact, occurred in carrying out repairs, the delay/inconvenience caused thereby was to the General Public and not to the Respondent. The Respondent, therefore, cannot seek to recover damages for delay/ inconvenience, if any, suffered by road users, without showing the proof of reimbursement to the road users. The Respondent cannot therefore seek unjust enrichment. The quantification of the Counter Claim is disputed and denied as is the interest claimed and it is prayed that the Respondent may be put to strict proof in respect of the same."

(Emphasis Supplied.)

79. In this view of the matter, it cannot be denied that Atlanta already disputed the Counter Claim on the basis of NHAI's failure to aver and prove any actual damage as required for the award of damages by AT under Counter Claim No. 4(c).

80. The Award *qua* Counter Claim No. 4(c) is not a deviation from Clause No. 18.13, instead it is application of settled principles of law by the AT that the liquidated damages cannot be mechanically awarded in absence of any demonstrated actual loss. The AT in paragraph No. 121 to 125 categorically observed that the CA predated the policy guidelines dated 05.02.2016 and the calculations of IC are based on these inapplicable policy guidelines and PWD, Nagpur Schedule of rates, which is also not applicable to the CA. Thus, in this view the AT

rejected the computations provided by the IC and took into account the submissions made by Atlanta.

81. The approach of AT is entirely consistent with the settled law on damages, which has been reaffirmed from time to time. It is no longer *res integra* that mere existence of a stipulation for liquidated damages will not entitle the party to the same without any proof of actual damages.

82. Recently, a Coordinate Bench of this Court in its judgment titled ***National Highways Authority Of India v. Patel Knr Heavy Infrastructure Pvt Ltd***.[12], while dealing with a similar Clause made the observations while dismissing the challenge of the petitioner therein to hold that arbitral tribunals interpretation that when there is no nexus between the stipulated amount and the actual loss likely suffered by the aggrieved party then the stipulation cannot be regarded as a genuine pre-estimate of damages. Thus, it is exclusively within the domain of the arbitral tribunal to decide the same. The relevant paragraphs of the judgment read as under:

> *"52. The more substantial challenge of the Petitioner is directed towards the interpretation of Clause 18.13 of the Agreement, which provides for damages at the higher of two amounts, namely, Rs. 10,000 per day or 0.1% of the cost of repair. The learned Arbitral Tribunal has examined this clause in the light of settled principles governing liquidated damages and penalties. <u>It has been concluded that a stipulation requiring payment of the higher of two amounts,</u>*

[12]2026 SCC OnLine Del 2895.

without any clear nexus to the actual loss likely to be suffered, cannot be regarded as a genuine pre-estimate of damages. Consequently, the learned Arbitral Tribunal has treated the higher amount as penal in nature and has restricted the damages to Rs. 10,000 per day as a reasonable measure.

53. This approach is in consonance with the principles embodied in Section 74 of the Indian Contract Act, 1872, which mandates that only reasonable compensation may be awarded, irrespective of the amount named in the contract. The learned Arbitral Tribunal has not rewritten the contract but has instead harmonised the contractual stipulation with the governing legal framework.Such an exercise falls squarely within the jurisdiction of the learned Arbitral Tribunal and does not call for interference."

(Emphasis Supplied.)

83. Also, the Hon'ble Division Bench of this Court in its judgment titled ***National Highways Authority of India v. D.S. Toll Road (P) Ltd.***[13], while upholding the quantification of nominal damages by the arbitral tribunal made the observation that in a scenario where a party is entitled to compensation but is unable to prove the same, nominal damages can nonetheless be awarded. The relevant paragraph of the judgment reads as under:

"36. The Arbitral Tribunal had accepted that DTRL was entitled to compensation for loss of opportunity and profits

[13]2024 SCC OnLine Del 316.

due to prolongation of the construction period. However, the Arbitral Tribunal did not accept DTRL's computation of the claimed amount of Rs. 9,06,45,316/-. The Arbitral Tribunal found that DTRL had not produced sufficient proof for establishing the quantum as claimed. Accordingly, the Tribunal awarded nominal damages. It is well-settled that where a party, which is entitled to compensation, is unable to establish the same, nominal damages can be awarded. It is also well-settled that nominal damages are not necessarily restricted to a token amount. In the present case, the Arbitral Tribunal had quantified the nominal damages to 1% of the amount as claimed. We are unable to accept that the impugned award in this regard is liable to be set aside in these proceedings."

(Emphasis Supplied.)

84. In the instant case as clear from the aforesaid paragraphs, Atlanta, from the outset has denied any breach on its part and challenged the mechanical invocation of Clause No. 18 on the ground that no actual damage has been suffered by the NHAI to claim damages.

85. It is clear in view of the aforesaid principles that it is exclusive domain of the AT to interpret any contractual clause and decide the quantum of claims, which cannot be interfered with by this Court in its Section 34 jurisdiction. The said Clause cannot be reinterpreted or the evidence cannot be reappreciated by this Court so as to exceed its jurisdiction and act as an appellate Court.

86. The findings of the AT *qua* Counter Claim No. 4(c) represents a plausible view which is supported by the settled position of law and falls within the domain or discretion of the AT. In this view of the matter, no ground warranting interference with the findings of the AT is established.

CONCLUSION

87. For all the aforesaid reasons, and having found no ground within the confines of Section 34 of the Act to set aside the reasoned findings of the Learned Arbitral Tribunal, I am of the view that the impugned Award read with the Correction Award/order does not suffer from perversity, patent illegality or any other recognised vice warranting interference.

88. Accordingly, the petitions are dismissed in the aforesaid terms, along with pending applications, if any.

JASMEET SINGH, J

MAY 26th , 2026/(SS)