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* IN THE HIGH COURT OF DELHI AT NEW DELHI
% ***Judgment reserved on: 15.09.2026***
Judgment pronounced on: 28.09.2026
Judgment uploaded on: 28.09.2026

\# **CNR No. DLHC010371002026**

\+ FAO(OS) (COMM) 211/2026, CM APPL. 53404/2026, CM APPL. 53405/2026, CM APPL. 53406/2026 and CM APPL. 53407/2026

KURUKSHETRA EXPRESSWAY PRIVATE LIMITED .....Appellant

Through: Mr. Sandeep Sethi, Mr. Rajiv Nayar and Mr. Dayan Krishnan, Sr. Advs. along with Mr. Rishi Agrawala, Dr. Sunil Mittal, Mr. Daksh Arora, Mr. Rajat Sinha, Mr. Ranjan Mukherjee, Mr. Anant Shukla, Mr. Krisna Gambhir and Ms. Shreya Sethi, Advs.

versus

NATIONAL HIGHWAYS AUTHORITY OF INDIA .....Respondent

Through: Mr. A. K. Nijhawan and Mr. Abdul Vahid, Advs.

CORAM:
HON'BLE MR. JUSTICE ANIL KSHETARPAL
HON'BLE MS. JUSTICE SHAIL JAIN

JUDGMENT

ANIL KSHETARPAL, J.:

1. The present Appeal has been filed assailing the correctness of the judgment dated 28.07.2026[1] passed by the learned Single Judge[2],

[1] hereinafter referred to as 'Impugned Judgment'
[2] hereinafter referred to as 'LSJ'

through which the petition filed by the Respondent (Respondent before the Arbitral Tribunal) under Section 34 of the Arbitration and Conciliation Act, 1996[3], challenging the Arbitral Award dated 16.08.2024[4] passed by a majority comprising of two members out of three member Tribunal[5], was allowed, setting aside the Arbitral Award to the extent of relief granted in respect of Claim Nos.1 and 2, towards Termination Payment and interest thereon, respectively.

2. At the outset, it must be highlighted that the challenge before this Court, akin to that before the LSJ, was confined only to the Claim Nos.1 and 2 raised by the Appellant (Claimant before the Arbitral Tribunal). Hence, the examination in the present judgment is also confined to the aforesaid claims.

A. BRIEF FACTUAL BACKGROUND:

3. In order to appreciate the present controversy, the facts in brief are required to be noticed.

4. The present controversy finds its genesis in the Concession Agreement dated 13.07.2010[6], executed between the parties, whereby the Appellant was granted a concession, on a Design-Build-Finance-Operate-Transfer (DBFOT) basis, for the four-laning of the Rohtak–Bawal Section of NH-71 in the State of Haryana, under NHDP III, for a concession period of 28 years commencing from the appointed date of 10.05.2011.

5. Pursuant to the Agreement, provisional Completion Certificates

[3] hereinafter referred to as 'Act of 1996'
[4] hereinafter referred to as 'Arbitral Award'
[5] hereinafter referred to as 'Arbitral Tribunal'
[6] hereinafter referred to as 'Agreement'

were issued on 24.08.2013 and 30.09.2014, toll collection commenced on 01.09.2013, and the final Completion Certificate was issued on 13.08.2018. Notably, disputes between the parties had earlier been the subject matter of two rounds of arbitration. However, the present proceedings arise out of the third round of arbitration culminating into the Arbitral Award.

6. The third round of arbitration came to be initiated by the Appellant on account of the prolonged suspension of toll operations occasioned by the Farmers' Agitation and the COVID-19 pandemic, which the Appellant characterised as an Indirect Political Force Majeure Event subsisting beyond 180 days within a continuous period of 365 days. Accordingly, the Appellant, *vide* letter dated 07.10.2021, terminated the Agreement under Clause 34.8 thereof and called upon the Respondent to make a Termination Payment of Rs. 1,347.53 Crore together with certain other sums. Since no payment was forthcoming, the dispute was referred to a third round of arbitration, culminating in the Arbitral Award.

7. Before the Arbitral Tribunal, the Appellant filed its Statement of Claim, raising (06) six claims besides interest and cost, including a claim towards the Termination Payment and interest thereon. In turn, the Respondent filed its Statement of Defence alongwith (05) five counter claims aggregating to Rs.368 Crore, besides interest and costs.

8. Amongst the various Claims and Counter Claims, adjudicated upon by the Arbitral Tribunal, Claims Nos.1 and 2 alone form the subject matter of the present Appeal. The Claim No.1 came to be allowed by the Arbitral Tribunal to the extent of Rs. 911.13 Crore, as

against Rs. 1,347.53 Crore claimed, along with interest on Termination Payment under Claim No.2 at graded rates. Aggrieved thereby, the Respondent approached the LSJ, who by way of the Impugned Judgment, set aside the Arbitral Award to the extent of Claim Nos.1 and 2. Aggrieved thereby, the Appellant has now approached this Court by way of the present Appeal.

B. SUBMISSION OF THE PARTIES:

9. Learned senior counsel representing the Appellant, has made the following submissions:

9.1 It has been contended that the Appellant, as a Concessionaire, raised a debt of Rs. 794.06 crore and invested Equity of Rs.251.49 crore for construction of the Project with the express approval of the Respondent under Articles 4.1.3(e) to (f) 5.2.2 of the Agreement. The Financing Agreement, Financial Model and Financial Package were furnished to the Respondent, scrutinised, modified in terms of its comments, and thereafter accepted as being 'in order', culminating in the declaration of Financial Closure on 17.05.2011 in accordance with the Respondent's policy dated 12.05.2010.

9.2 Further, it has been argued that the Agreement undisputedly stood terminated on account of an Indirect Political Force Majeure Event, and the Respondent took over the Project Highway on 12.12.2021. Despite Article 37.3.3 of the Agreement, the Respondent neither paid the Termination Payment within 15 days nor deposited the toll revenues into the Escrow Account, thereby wrongfully appropriating approximately Rs. 320 crore, which ought to have been utilised towards discharge of the lenders' dues under Article 31.4.1 of the Agreement.

9.3 The central submission of the learned senior counsel orbited around the decision given by the LSJ, who as per the Appellant erred in treating the Total Cost Project (TPC) and Termination Payment as synonymous, thereby importing the definition of TPC under Article 48.1 into the computation of Termination Payment under Article 34.9.2, and introducing the lowest of three limbs test, capped at Rs. 650 Crore.

9.4 By doing so, it has been argued that the LSJ, failed to appreciate that Article 34.9.2 is a distinct and self-contained operative provision, expressly providing that, upon termination on account of an Indirect Political Event, the Appellant is entitled to a Termination Payment '*in an amount equal to: (a) Debt Due... and (b) 110% of the Adjusted Equity*'.

9.5 Relying upon the introductory paragraph of the definition clause under Article 48.1, reference has heavily been made to the expression, '*unless repugnant to the context or meaning thereof*', to argue that the definition of TPC could not be mechanically imported into Article 34.9.2 of the Agreement so as to introduce a substantive limitation not contemplated by the parties, thereby introducing words 'subject to a maximum of Rs.650 crores', into Article 34.9.2.

9.6. It has been submitted that the LSJ, in the Impugned

Judgment, misapplied ***K.V. Muthu v. Angamuthu Ammal***[7], which, read correctly, and as followed in ***Jagdeep Chowgule v. Sheela Chowgule***[8], and ***AICTE v. Shri Prince Shivaji Maratha Boarding House's College of Architecture***[9], in fact supports the Appellant's case, since it recognises that a defined term may bear a different meaning where the context so demands, and that the '*unless repugnant to the context*' qualification in the definition clause itself permits departure from the defined meaning. In this regard, it was further argued that the LSJ applied only the general rule stated in that decision while ignoring the very exception on which the Appellant's case rested and simultaneously overlooked the opening words of Article 48.1 and the specific-clause-prevails mandate of Article 1.4.2(a).

9.7 Relying upon the Agreement, it has been argued that it prescribes a distinct formula for Termination payment depending upon the nature of terminating events, highlighted under Articles 34.9.1, 34.9.2, 34.9.3 and 37.3.2. It was submitted that this graded scheme, awarding progressively higher multiples of Adjusted Equity depending on the degree of fault attributable to the Respondent, is wholly irreconcilable with the existence of a single, overriding Rs. 650 Crore ceiling common to all scenarios. Since such a ceiling would render the enhanced 110%/150% multiples otiose in precisely those cases where the formula, if faithfully applied, would exceed Rs. 650 Crore. This internal structure, it was submitted, is itself decisive of the parties'

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[7] (1997) 2 SCC 53
[8] (2026) 5 SCC 667
[9] (2021) 12 SCC 629

intention that TPC was never meant to operate as a ceiling on Termination Payment.

9.8 Reliance has been placed on Articles 1.1.1 and 1.1.4 of the RFP, to argued that Rs. 650 Crore was expressly described as an estimated project cost at the bidding stage, with bidders required to independently assess the actual project cost. Article 1.4.1 of the RFP, in particular, made it clear that this estimate was not intended to survive as a cap on the Respondent's liability upon termination.

9.9 Against this backdrop, it had been argued that the LSJ, erred in elevating this estimated bid-stage figure into a binding ceiling on Termination Payment, disregarding Article 1.4.1 of the RFP, Article 2.2.4 of the Consultant Agreement, and Article 4.1.3(f) of the Agreement, and in doing so effectively re-adjudicated the matter as though sitting in appeal over the Arbitral Tribunal rather than exercising the limited jurisdiction under Section 34 of the Act of 1996.

9.10. Relying on ***Nabha Power Ltd. v. Punjab State Power Corporation Ltd.***[10], and ***Haris Marine Products v. Export Credit Guarantee Corporation (ECGC) Ltd.***[11], it was submitted that a commercial contract must be construed in a manner that accords with business common sense and avoids commercial absurdity. It was contended that capping the Termination Payment at Rs. 650 crores, despite the Respondent's knowledge and approval of the

[10] (2018) 11 SCC 508
[11] (2022) 20 SCC 776

actual Debt of Rs. 794.06 crore and corresponding Equity, would leave the Respondent with the commissioned highway while the lenders remain unpaid, defeating the financing structure underlying the PPP model.

9.11 It was further argued that the estimated TPC continues to serve independent purposes under the CA, including bank guarantees, Technical Expert's fee, change of scope thresholds and appointment of an additional auditor. Thus, it was the LSJ's interpretation, and not that of the Appellant, which rendered the expressions '*only the amounts so conveyed shall form the basis of computing Termination Payment*' and '*amount equal to*' in Article 34.9.2 of the Agreement otiose.

9.12 It was the case of the Appellant that the view taken by the Arbitral Tribunal was a plausible interpretation and not open to interference under Section 34 of the Act of 1996. The Arbitral Tribunal, upon construing Article 34.9.2 read with Article 1.4.2(a), the definition of Termination Payment and the Disaggregation Letter dated 04.02.2019, awarded Rs. 561.30 crore towards Debt Due and Rs. 349.80 crore towards 110% of Adjusted Equity, aggregating to Rs. 911.13 crore, strictly in terms of the contractual formula. It was submitted that even the Respondent, before the LSJ, had accepted that the Arbitral Award was 'at the least a plausible view', pointing to the dissenting Member's own computation of Rs. 684.70 crore as demonstrating that more than one reading of the contract was reasonably possible.

9.13. Reliance was placed on a consistent line of authority, including ***Hindustan Construction Company v. NHAI***[12], ***Konkan Railway Corporation Ltd. v. Chenab Bridge Project Undertaking***[13], ***South East Asian Marine Engineering & Construction Ltd. v. Oil India Ltd.***[14] and ***Anglo American Metallurgical Coal Pty. Ltd. v. MMTC Ltd.***[15]**,** among others for the settled proposition that a plausible interpretation adopted by the Arbitral Tribunal cannot be substituted under Section 34 merely because another view is possible. It was further submitted that, despite accepting the genuineness of the Disaggregation Letter, the LSJ failed to give effect to it while computing the Termination Payment.

9.14 As an additional and independent ground, a challenge has also been raised, in the written submissions and the grounds of appeal, to the findings returned by the LSJ on I.A. No. 540/2025. However, the same was not pressed during the course of oral arguments. Hence, we do not deem it appropriate to elaborate upon the same.

10. *Per contra*, learned counsel representing the Respondent has made the following submissions:

10.1 It was argued that Article 48 of the Agreement defines TPC, as the lowest of three specified figures, namely, the capital cost under the Financial Package, the actual capital cost upon completion, and Rs. 650 crore, while Article 1.4.1 gives the

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[12] (2024) 2 SCC 613
[13] 2023 INS 742
[14] (2020) 5 SCC 164
[15] (2021) 3 SCC 308

Agreement a precedence over other documents in case consistency. It has been stated that the definition of Termination Payment under Article 34.9.2 includes Debt Due and Adjusted Equity, both of which being defined with reference to TPC, makes the Termination Payment subject to the contractual ceiling provided under Article 48.1 of the Agreement.

10.3 It was submitted that the Arbitral Tribunal, at paragraph 55 of the Arbitral Award, computed the Termination Payment on the footing that the TPC was Rs. 1,045.5 Crore, in direct contravention of the capped definition under Article 48.1, under which the TPC could not exceed Rs. 650 Crore. This substitution of a higher, uncapped figure for the contractually mandated lowest-of-three limbs was not an exercise in interpretation but a rewriting of the bargain between the parties.

10.4 It was further submitted that, independent of the above error, the Arbitral Tribunal erred in additionally crediting a separate equity component under Claim No.1. Since the debt sanctioned to the Appellant by its lenders already exceeded/fully covered the TPC (whether reckoned at Rs. 650 Crore or otherwise), the TPC stood fully subsumed within the debt component alone, leaving no occasion to separately reckon or add an equity component. Since doing so would have resulted in a double counting not contemplated by Articles 34.9.2 and 48 of the Agreement.

10.5 In the alternative, and without prejudice to the foregoing, it was submitted that even if both components, Debt Due and

Adjusted Equity, are to be reckoned, their aggregate reflecting the contractually envisaged debt-equity ratio of approximately 80:20, could not, in any event, exceed the overall TPC ceiling of Rs. 650 Crore. On either analysis, the Arbitral Award of Rs. 911.13 Crore under Claim No.1 was demonstrably contrary to the express terms of Articles 48.1 and 34.9.2 of the Agreement.

10.6 In support of the above, reliance was placed on Articles 4, 8, 26 and 31 to establish that the Respondent was not bound by the Appellant's financing arrangements or the quantum of debt/equity claimed by it, and the contractual obligations and payment mechanism were governed by the Agreement itself. It had further been submitted that Debt Due and related termination entitlements could not exceed the contractually defined TPC, and the Appellant will remain subject to its own obligations under the Agreement.

10.7 Against the aforestated, it had been argued that the Arbitral Tribunal, while computing Claim Nos.1 and 2, disregarded the capped definition of TPC under Article 48.1 and thereby rewrote the contractual bargain, amounting to patent illegality under Section 34(2A) of the Act of 1996. Accordingly, the LSJ rightly set aside the Arbitral Award *qua* Claim Nos.1 and 2, leaving the remaining claims and counter-claims undisturbed and the Impugned judgment, therefore, warrants no interference.

C. ANALYSIS AND REASONING:

11. Before entering into the merits of any challenge to the Impugned Judgment passed by the LSJ, this Court exercising

jurisdiction under Section 37(1)(c) of the Act of 1996 must first remind itself of the narrow channel within which the present jurisdiction flows. An appeal contemplated by Section 37 is not an occasion to re-examine the Arbitral Award at large, rather it is merely confined to testing whether the LSJ, while exercising jurisdiction under Section 34 of the Act of 1996 remained within the four corners of the grounds available under the said provision.

12. The aforesaid position also stands settled by a consistent line of Supreme Court authority. In ***Bombay Slum Redevelopment Corpn. (P) Ltd. v. Samir Narain Bhojwani***[16], the Supreme Court held that the Section 37 forum's task is only to ascertain whether the Court acting under Section 34 exercised its jurisdiction within the statutory grounds, a jurisdiction narrower even than that available under Section 34 itself. The same principle was reiterated in ***Reliance Infrastructure Ltd. v. State of Goa***[17], where the Court cautioned that a Court acting under Section 37 cannot travel beyond Section 34 to independently reappreciate evidence or the merits of the underlying dispute.

13. Further, in ***Haryana Tourism Ltd. v. Kandhari Beverages Ltd.***[18]**,** it was held that the appellate court cannot convert itself into a first appellate forum against the arbitral award, and its interference remains confined to the recognised Section 34 grounds. More recently, in ***Somdatt Builders-NCC-NEC (JV) v. NHAI***[19], the Supreme Court observed that because the jurisdiction under Section 34 is itself narrow, the appellate jurisdiction under Section 37 over an

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[16] (2024) 7 SCC 218
[17] (2024) 1 SCC 479
[18] (2022) 3 SCC 237
[19] (2025) 6 SCC 757

order made under Section 34 becomes narrower, acting as a double filter, so to speak. Lastly, ***AC Chokshi Share Broker (P) Ltd. v. Jatin Pratap Desai***[20], further reinforces the position that the Section 37 Court's function is to test whether the Section 34 Court properly exercised its jurisdiction, not to substitute its own view of the contract where the Section 34 Court's view was itself a reasonable one.

14. The upshot of this recognised position of law is that this Court while examining the Impugned Judgment, asks itself a narrower and logical question, '*did the LSJ, in setting aside the Arbitral Award on Claim No.1, stay within the grounds that Section 34 permits, or did he overstep them?*' It is with this touchstone alone that the present appeal must be examined.

15. Turning now to the dispute that arises before this Court, we may note that the entire controversy in the present case traces to a single interpretive fork in the road, what is the Total Project Cost (TPC) against which the Termination Payment payable to the Appellant is to be computed?

Overview of the findings given by the Tribunal and the LSJ

16. The Tribunal by way of the Arbitral Award, while answering the aforesaid question, held that the Disaggregation Letter dated 04.02.2019, by which the Concessionaire notified the Respondent of a TPC of Rs.1,045.55 crore constituted the operative and binding basis for computing the Termination Payment. On this footing, applying the formula under Article 34.9.2 of the Agreement, the Tribunal arrived at

[20] (2025) 5 SCC 321

a Termination Payment of Rs. 911.13 crore.

17. While reaching this conclusion, the Tribunal reasoned that Article 1.4.2(a) of the Agreement, which provides that a specific clause relevant to the issue at hand prevails over other clauses, rendered the Rs. 650 crore ceiling included in the definition of TPC under Article 48.1 as irrelevant to the computation of Termination Payment, on the basis of a reasoning that the definition of Termination Payment itself referred to the disaggregation notified by the Appellant as the operative basis.

18. On the contrary, the LSJ held that the construction provided by the Tribunal could not be sustained. On his reading, the definition of TPC under Article 48.1, as the lowest of (a) the capital cost per the Financial Package, (b) the actual capital cost on completion, and (c) Rs. 650 crore less Equity Support, was not a free-standing or dispensable definition. It was his view that the said provision and the three limbs provided thereunder, laid at the very heart of the risk allocation the parties had struck, and was designed specifically to cap Respondent’s exposure on termination.

19. The LSJ, with respect to the Disaggregation Letter, was of the view that, it served a wholly different function, by merely apportioning an already-determined TPC between its Debt and Equity components and was not a mechanism by which the Appellant could unilaterally enlarge the TPC itself. Upon reading the definition clause and the Termination Payment clause together, the LSJ concluded that the Termination Payment could not lawfully exceed what the TPC definition permitted and set aside the Arbitral Award to that extent.

Scope of jurisdiction exercised by the LSJ

20. At this stage, we deem it appropriate to also highlight the boundaries of Section 34 of the Act of 1996, within the four walls of which, the LSJ was expected to perform the jurisdiction so vested upon him. Section 34 does not clothe the Court with appellate jurisdiction over the merits of an arbitral award. Instead, it permits interference only on the limited grounds enumerated in the provision, including, where the Tribunal has taken a view that is otherwise a possible one, the ground of patent illegality where the Tribunal has construed the contract in a manner that no fair-minded or reasonable person could adopt. Ordinarily, where the Tribunal's interpretation of a contractual term is a *possible* one, the Court acting under Section 34 must defer to it, no matter how much it may itself have preferred a different view.

21. Therefore, what follows from the aforestated is that whether the LSJ correctly identified and applied the limited ground of patent illegality, *i.e.*, whether he was right to conclude that the Tribunal's construction was not a possible one, and whether in undoing that construction he himself stayed within the same narrow confines, without descending into a re-appreciation of evidence or a substitution of one reasonable contractual reading for another.

Examination of findings returned by the LSJ

22. Before proceeding further, we deem it appropriate to reproduce the relevant paragraphs of the Impugned Judgment, which form the basis of our analysis. The same is reproduced hereunder:

> *"53. This three limbed definition, particularly the cap contained in*

sub-clause (c), lies at the very heart of the Concession Agreement and cannot be treated as surplusage for the purpose of determining the "Termination Payment". The purpose of this provision is clearly to limit the financial exposure of NHAI upon termination. Indeed, this provision is at the very heart of risk allocation in the Concession Agreement.

54. Evidently, NHAI, as a public authority, set out this cap in the RFP document itself so that its maximum financial exposure upon termination would be confined to the project cost. This cap serves a specific and vital commercial purpose; it protects NHAI against cost over-run incurred by the concessionaire (whether due to inefficiency, over borrowing or for any other reason) being passed on to NHAI in the guise of a "Termination Payment". Without this cap, a concessionaire could borrow far in excess of the sanctioned project cost and on termination, present NHAI with a demand that NHAI never agreed to underwrite. The award by accepting the "total project cost" at Rs.1045.5 Crore has rendered sub-clause (c) entirely nugatory, effectively reducing it to a dead letter.

55. A copy of Request for Proposal (RFP) has been filed by the Respondent. Clause 1.1.1 of the RFP clearly mentions the estimated project cost as Rs. 650 Crore. The relevant portion of the same is reproduced as under –

NATIONAL HIGHWAY AUTHORITY OF INDIA

(Ministry of Road Transport & Highways, Government of India)

1. INTRODUCTION

1.1 Background[2]

1.1.1 The {National Highways Authority of India} (the "**Authority**") is engaged in the development of {highways} and as part of this endeavour, the Authority has decided to undertake development of "Four laning of NH-71 from Rohtak to Bawal section from km 363.300 (design km 363.300) to km 450.800 (Design km 445.853) in the state of Haryana " Project (the "**Project**") through private participation on Build, Operate and Transfer (the "**BOT**") basis, and has decided to carry out the bidding process for selection of the Bidder to whom the Project may be awarded. Brief particulars of the Project are as follows:

Name of the National Highway	Length in km	Estimated Project Cost in Rs crore
Four laning of NH-71 from Rohtak to Bawal section from km 363.300 (Design km 363.300) to km 450.800 (Design km 445.853) in the state of Haryana.	82.553	Rs 650.000 crore

56. Evidently, the figure of Rs. 650 crore represented the estimated Project Cost as reckoned at the time of bidding. By making it the ceiling in the definition of the "Total Project Cost," the parties sought to ensure that, even if the actual cost exceeded this amount, NHAI's financial exposure towards Termination Payment would continue to be anchored to this ceiling. The unmistakable commercial rationale underlying the contractual provision is that NHAI assumes the risk of cost overruns during construction only to the extent contemplated under sub-clause (c), and not in respect of any unlimited or excessive expenditure that the Concessionaire may incur.

57. The Concession Agreement is founded upon a concession *framework, under which the termination liabilities of the Authority are capped. It is on strength of this risk matrix that bids were invited, that the premium of Rs.12 crore per annum (escalating at 5% annually) was offered by the respondent, and that the financial exposure of the public exchequer stood crystallised. The ceiling ensures that the consequence/s of any cost overrun or over-leveraging is not transmuted into a liability of the Authority upon termination. To construe the Agreement in a manner which dissolves this ceiling is to redistribute, ex post facto, the very risk which the parties had definitively allocated inter-se.*

THE APPROVAL OF THE FINANCIAL PACKAGE DOES NOT ASSIST THE RESPONDENT

58. Considerable emphasis was laid on behalf of the respondent on the circumstance that the Financial Package (reflecting a capital cost of Rs.992.58 crore), the Financial Model and the Financing Agreements were scrutinised and approved by NHAI prior to financial close. The submission is of no avail to the respondent. Sub-clause (a) of the definition of "Total Project Cost" itself refers to "the capital cost of the Project, as set forth in the Financial Package". The parties were, therefore, fully alive to the fact that the Financial Package would reflect a capital cost, and that such cost might well exceed Rs.650 crore; it is precisely for this reason that the definition stipulates that the Total Project Cost shall be the lowest of the three specified amounts. The Financial Package figure thus stands internalised within the definition itself – it supplies limb (a); it does not, and cannot, abolish limb (c). The scrutiny of the financing documents by the Authority serves an altogether distinct purpose, namely, to ensure that the Concessionaire does not enter into arrangements with its lenders which imperil the interests of the Authority; such scrutiny cannot be construed as an undertaking by the Authority to underwrite the entirety of the said cost upon termination. Moreover, in terms of Article 1.4.1 of the Concession Agreement, the Agreement prevails over all other documents.

TERMINATION SPECIFIC PROVISO – CONFIRMING ITS APPLICABILITY FOR THE PURPOSE OF DETERMINING "TERMINATION PAYMENT"

59. The definition of "Total Project Cost" contains the following proviso:

"provided that in the event of Termination, the Total Project Cost shall be deemed to be modified to the extent of variation in WPI or Reference Exchange Rate occurring in respect of Adjusted Equity and Debt Due, as the case may be, in accordance with the provisions of this Agreement; provided further that in the event WPI increases, on an average, by more than 6% (six per cent) per annum for the period between the date hereof and COD the Parties shall meet, as soon as reasonably practicable, and agree upon revision of the amount herein

before specified such that the effect of increase in WPI, in excess of such 6% (six per cent), is reflected in the Total Project Cost;"

60. This proviso is of significant importance. It expressly addresses the termination scenario and provides for the modification of the "Total Project Cost" figure, but only to the extent of variation in the WPI. The fact that the Concession Agreement itself incorporates a termination-specific proviso into the definition of the "Total Project Cost" conclusively establishes two things:

(i) that the definition is intended to apply in the context of termination and is neither rendered inapplicable nor repugnant for the purpose of determining the "Termination Payment". A definition which itself provides for the termination scenario cannot, in the same breath, be branded as repugnant to that very scenario ;

(ii) that the parties specifically contemplated that the "Total Project Cost" might require upward revision in a termination scenario, but only by way of WPI adjustment and, where the WPI exceeded 6% per annum, through mutual agreement between the parties. There is no mechanism under the Concession Agreement permitting the Concessionaire to unilaterally enhance the "Total Project Cost" by relying upon a disbursement letter reflecting actual project costs far in excess of the contractual cap.

61. If the parties had intended that the actual project cost notified in the disaggregation letter would entirely displace or render nugatory the definition of "total project cost", there would have been no need whatsoever for this proviso. Its very existence, providing a measured / WPI linked adjustment mechanism, demonstrates that the parties never intended the contractual cap to be by-passed by a unilateral cost notification / disaggregation letter.

62. A unilateral notification by the Concessionaire of its actual expenditure is not a mode of modification of the "Total Project Cost" recognised anywhere in the Agreement. It is elementary that a contract can be varied only in the manner provided therein or by the mutual agreement of the parties; it cannot be varied by the unilateral act of one party. Yet, the construction adopted by the Tribunal ascribes to the disaggregation letter (a unilateral communication), the effect of an amendment of the contractually defined "Total Project Cost" from Rs.650 crore to Rs.1045.55 crore. No canon of interpretation sanctions such an outcome.

DEFINITION OF "TERMINATION PAYMENT" EXPRESSLY INCORPORATES THE CEILING REFERRED TO IN THE DEFINITION OF "TOTAL PROJECT COST"

63. The definition of "Termination Payment" in Article 48.1 provides *that it "may consist of payments on account of and restricted to, the Debt Due and Adjusted Equity, as the case may be, which form part of the Total Project Costin accordance with the provisions of this Agreement".*

64. Three expressions in this definition are of significant importance and, independently support the relevance of the ceiling for the purpose of determining the Termination Payment:

(i) "Restricted to" – the use of these words is intended to limit the extent of the Termination Payment and to make it circumscribed;

(ii) "Which form part of the Total Project Cost" – this is a qualifying and limiting stipulation. Only such Debt Due and Adjusted Equity as form part of the contractually defined "Total Project Cost" are payable. The inevitable consequence is that payments in excess of the "Total Project Cost" are expressly excluded;

(iii) "In accordance with the provisions of this Agreement" – this cross-reference ties the computation of the "Termination Payment" to the definition of the "Total Project Cost" and precludes the possibility of importing a different "Total Project Cost" figure from outside that is at variance with, or inconsistent with, the contractual ceiling contained in the definition of the "Total Project Cost."

THE DISAGGREGATION LETTER CANNOT OVERRIDE THE CAP IN THE DEFINITION OF "TOTAL PROJECT COST"; IT OPERATES WITHIN IT

65. The respondent's principal submission, as accepted by the Arbitral Tribunal, is that the disaggregation letter clause contained in the definition

of "Termination Payment" makes the notified "Total Project Cost" figure the sole basis for computing the "Termination Payment," thereby displacing the contractual cap of Rs. 650 crore. This argument fundamentally misconstrues the function and purpose of the disaggregation letter.

66. The disaggregation letter clause requires the Concessionaire to notify NHAI of the "Total Project Cost" as on the COD, together with its disaggregation into Debt Due and Equity. The purpose of this requirement is to inform NHAI how the "Total Project Cost", already determined under the Concession Agreement as the lowest of the three alternatives, is apportioned between its Debt Due and Equity components so that the formula prescribed under Article 34.9.2 (Debt Due + 110% Adjusted Equity) can be correctly applied.

67. The word "disaggregation" is itself dispositive. To disaggregate means to break down a whole into its component parts. The disaggregation letter mechanism is intended to allocate the "Total *Project Cost" between Debt Due and Equity. It is not a mechanism by which the Concessionaire has been granted carte blanche to*

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unilaterally 're-determine' the "Total Project Cost" or to undermine or nullify the contractual ceiling prescribed thereunder.

68. If the interpretation canvassed by the respondent were correct, the disaggregation letter would become an instrument by which the Concessionaire could inflate NHAI's termination liability simply by notifying a higher "Total Project Cost" figure, regardless of the contractual ceiling prescribed for the same. This would lead to absurd consequences and would be manifestly contrary to the intention of the parties, who deliberately defined the "Total Project Cost" as the lowest of the three alternatives

precisely to prevent such an outcome.

69. No rational commercial party could have intended that the applicability of a ceiling, negotiated for the protection of one party, should depend upon the unilateral election of the very party whom it constrains. The deeming provision in the definition of "Termination Payment" demonstrates that whether or not a disaggregation letter is furnished, the contractually defined "Total Project Cost" remains operative; the letter fixes the internal apportionment between debt and equity, and nothing more. On the face of it, the letter is intended to convey a "disaggregation", not a unilateral re-valuation.

MISCONCEIVED RELIANCE ON THE EXPRESSION "ONLY THE AMOUNT SO CONVEYED SHALL FORM THE BASIS OF COMPUTING TERMINATION PAYMENT" (OCCURING IN THE DEFINITION OF "TERMINATION PAYMENT" AS DEFINED UNDER ARTICLE 48)

70. The reliance placed by the Arbitral Tribunal on this expression is untenable. The Arbitral Tribunal has, unfortunately, laid emphasis on only a part of the relevant contractual provision while overlooking the preceding as well as the succeeding parts of the same clause. The first paragraph of the relevant clause defining "Termination Payment" makes it expressly clear that the "Termination Payment" is to be restricted to Debt Due and Adjusted Equity, which form part of the "Total Project Cost." The succeeding clarificatory paragraph refers to the "Total Project Cost" and requires the Concessionaire to notify the Authority of its disaggregation into Debt Due and Equity. The stipulation that only the amount so conveyed or notified shall form the basis for computing the "Termination Payment" was clearly not intended to override the contractual ceiling contained in the definition of the "Total Project Cost." Had that been the intention of the parties, nothing would have been easier than to expressly provide so.

71. The use of the expression "only the amount so conveyed shall form the basis of computing the Termination Payment" was intended only to preclude reliance upon extraneous sources for the purpose of disaggregation. The concluding portion of the same paragraph is significant. It provides that, in the event such disaggregation is not *notified to the Authority, the Equity shall be deemed to be the amount arrived at by subtracting the Debt Due from the "Total Project Cost."*

72. The above clearly demonstrates that the disaggregation letter is only intended for the purpose of internal split between debt due and equity; the outer limit as set out in the definition of the "total project cost" is not rendered irrelevant.

THE FINDINGS QUA THE DISAGGREGATION LETTER DO NOT CONCLUDE THE ISSUE

73. The Tribunal has devoted considerable attention to establishing that the disaggregation letter dated 04.02.2019 exists; that the delay in its submission was not attributable to any default or malafide on the part of the Concessionaire; that its contents were not specifically traversed by the Authority in its pleadings; and that the Independent Engineer treated it as the formal disaggregation for the purpose of computing the Termination Payment (paras 33 to 46 of the award). This Court has no reason to disturb any of the said findings; they are findings of fact within the exclusive domain of the Tribunal. The said findings, however, do not carry the matter any further, inasmuch as the existence, genuineness and bona fides of the letter were never determinative of the controversy. The controversy concerns the legal effect of the letter under the Concession Agreement and as to whether it is capable in law of enlarging the "Total Project Cost" beyond the contractual ceiling.

74. The reliance placed by the Tribunal on ***National Highway Authority of India v. PNC-BEL (JV)****, 2019 SCC OnLine Del 9461 (at para 46 of the award) is misplaced. It was held therein that the certification by the Independent Engineer in that case, of rates in respect of non-BOQ items, which the Engineer had certified and submitted for approval, cannot be selectively disregarded by the Authority. Evidently, the certification in question pertained to a function which the contract contemplated from the Engineer. No such function (for re-determining "Total Project Cost" in derogation/disregard of the contractual ceiling) has been committed to the Independent Engineer in the present case (as is evident from contractual provisions noticed hereinbelow).*

75. The reliance on ***Jetpur Somnath Tollways Limited v. National Highways Authority of India****, 2017 SCC OnLine Del 9453 (at para 53 of the award) is equally misplaced. The said decision was rendered on petitions under Section 9 of the A&C Act (by the concessionaire therein and by its lender), seeking interim measures of protection pending arbitration, in the nature of a direction to NHAI to secure the termination payment. The observations therein were, ex facie, rendered at a prima facie stage, for the limited purpose of moulding interim relief; they did not constitute a final adjudication of the quantum of the termination payment. Further, the question considered in paragraph 81 of the said decision was an altogether different one.*

NHAI had sought, on the strength of Recital B to the Common Loan Agreement dated 19.08.2011 executed in that case (which recorded a debt-equity ratio of 72.58:27.42) to import the said ratio so as to make a further adjustment to the "Debt Due". It was in that context that the Court observed that there was "admittedly, no such stipulation in the Termination Payment clause that any such adjustment is to be made prior to payment of the Debt Due" and that "only the actual Debt Due has to be taken into account". The decision thus declined to permit an adjustment extraneous to the contractual provisions. The said judgement did not deal with the operation of a definitional ceiling, forming an express part of the contractual text itself. The said decision points against the respondent rather than in its favour inasmuch as its ratio is fidelity to the 'Termination Payment' provisions as written. In the present case, the award disregards the contractual ceiling of Rs.650 crore, and the words of restriction in the definition of "Termination Payment".

76. Pertinently also, the function assigned to the Independent Engineer under the Concession Agreement do not extend to determining the "Total Project Cost". Article 23.2.1 provides that the Independent Engineer "shall discharge its duties and functions substantially in accordance with the terms of reference set forth in Schedule-Q." The relevant portions of Schedule-Q read as under:-

"3.1 The role and functions of the Independent Engineer shall include the following:

(vi) determining, as required under the Agreement, the costs of any works or services and/or their reasonableness; ...

8.1 The Independent Engineer shall determine the costs and/or their reasonableness that are required to be determined by it under the Agreement"

77. The cost-determination function of the Independent Engineer is a power exercisable only in respect of costs which the Agreement specifically requires his determination. No provision of the Concession Agreement commits the determination of "Total Project Cost" to the Independent Engineer. The definition of "Total Project Cost" in Article 48.1 is self-executing: it is the lowest of three arithmetically stated figures, subject only to the WPI proviso (as already noticed). What the Independent Engineer was called upon to examine was whether the disaggregation letter dated 04.02.2019 "be considered by the Authority as acceptable within the definition as stipulated in the Concession Agreement" (para 34 of the award). This is a question of the timeliness and procedural acceptability of the letter. The Tribunal's treatment of the Independent Engineer's recommendation as though it were a determination of quantum does violence to both the language and purport of the contract. The Agreement nowhere empowers the Independent Engineer to approve, sanction or certify a substitute "Total Project Cost" put forward *unilaterally by the Concessionaire.*

REPUGNANCY ARGUMENTS

78. The respondent has vehemently argued that the definition of the "Total Project Cost" as on the COD is repugnant to the meaning sought to be given by NHAI thereto. The said argument is thoroughly misconceived.

79. Repugnancy can be said to arise only where the application of the contractual definition results in a direct contradiction or absurdity. It cannot be said to arise merely because the application of the contractual definition results in a financially inconvenient outcome or yields a lower recovery than that which the respondent would prefer.

80. Applying the "Total Project Cost" cap in the context of "Termination Payment" does not create any absurdity or contradiction. On the contrary, it produces precisely the outcome that the parties agreed to when they executed the Concession Agreement. The cap is not repugnant to the context of the "Termination Payment", rather, it is entirely consonant with it.

81. Importantly, as noticed hereinabove, the definition of the "Total Project Cost" itself contains a termination-specific proviso addressing WPI adjustments. A definition that expressly accounts for a termination scenario cannot simultaneously be said to be repugnant to the context of "Termination Payment."

*82. The authorities cited on behalf of the respondent in this behalf, far from advancing its case, affirm the settled position that the defined meaning is the rule and its displacement the exception. In **K.V. Muthu v. Angamuthu Ammal**, (1997) 2 SCC 53, the Supreme Court held that where a definition is preceded by the words "unless the context otherwise requires", the definition is ordinarily to be applied and given effect to, and may be departed from only if there is something in the context to show that the definition could not be applied at all. (paragraphs 10 to 12)[2].*

CLAUSE 1.4.2(a): NEITHER ATTRACTED NOR OF ANY ASSISTANCE TO THE RESPONDENT

83. The Arbitral Tribunal has relied upon Article 1.4.2(a), which provides that between two or more clauses, the specific clause relevant to the issue under consideration shall prevail. Article 34.9.2 is indeed the specific provision governing the quantum of the "Termination Payment" in the event of an Indirect Political Event. However, the impugned majority award overlooks the fact that Article 34.9.2 operates by reference to the defined terms "Debt Due" and "Adjusted Equity," both of which are, in turn, defined by reference to the "Total Project Cost."

84. Thus, it is wholly untenable for the purpose of Article 34.9.2 to ignore the definition of "Total Project Cost" inasmuch as the latter *gives content to the relevant components of "Termination Payment".*

23. The LSJ while reaching to the conclusion of setting aside the Arbitral Award to the extent of Claim No.1, located his interference squarely within the ground of patent illegality under Section 34(2A) of the Act of 1996, on the footing that the Tribunal's construction of the TPC definition was not a construction that a fair-minded or reasonable adjudicator could have arrived at on the words of the contract.

24. Notably, the law on when an arbitrator's interpretive exercise crosses over into patent illegality is well settled. In ***Associate Builders v. Delhi Development Authority***[21], the Supreme Court recognised that while construction of contractual terms is ordinarily the exclusive domain of the Arbitrator, this deference yields where the arbitrator adopts a construction that no fair-minded or reasonable person could adopt. This principle was carried forward into the statutory text of Section 34(2A) of the Act of 1996 itself, as explained in ***Ssangyong Engineering & Construction Co. Ltd. v. National Highways Authority of India***[22], wherein the Court clarified that if the arbitrator wanders outside the terms of the contract, or adopts a reading no reasonable person would adopt, an error of jurisdiction results, falling squarely within the new patent-illegality ground.

25. The distinction that emerges from this line of authority, and which the LSJ also correctly drew upon, is between '*interpreting*' a contract and '*rewriting*' it. An interpretation is the ascription of a meaning that the words of the contract are reasonably capable of bearing, however debatable that meaning might be; it is protected, and

[21] (2015) 3 SCC 49
[22] (2019) 15 SCC 131

a court must not disturb it merely because another view is equally or even more plausible.

26. By contrast, rewriting involves adding to, subtracting from, or overriding what the parties actually agreed, so as to produce a bargain the parties never made. This is precisely the defect identified by the Supreme Court in ***PSA SICAL Terminals Pvt. Ltd. v. Board of Trustees of V.O. Chidambranar Port Trust, Tuticorin***[23], and also relied upon by the LSJ, wherein the Court held that an award that effectively imposed upon the parties a bargain they had never struck was held to be liable to interference as shocking the conscience of the Court.

27. Applying this test, the central question before the LSJ was not which of the two interpretations was better. The question was whether the Tribunal had merely interpreted the definition of TPC or had effectively rewritten it. The LSJ held that the Tribunal had rewritten the definition, and it is this conclusion that now falls for consideration.

28. At its core, the dispute now raises one simple question: whether the TPC for calculating the Termination Payment, is ***(i)*** the amount determined under the three limbed definition under Article 48.1, which is subject to a cap (as held by the LSJ), or ***(ii)*** the amount notified by the Appellant to the Respondent through the Disaggregation Letter as the actual project cost (as held by the Arbitral Tribunal)?

29. On a considered examination of the Agreement as a whole, this

[23] 2021 SCC OnLine SC 508

Court finds itself unable to fault the reasoning of the LSJ, inasmuch as several provisions of the Agreement, when read together, support the conclusion reached by him, which are examined hereunder.

30. Firstly, in the opinion of this Court, the Tribunal erred in treating Article 34.9.2, which prescribed the formula for Termination Payment, i.e., Debt Due and 110% of Adjusted Equity, as the only specific provision governing the subject and, on that basis, permitting it to override the definition of TPC contained in Article 48.1 by invoking Article 1.4.2(a) of the Agreement.

31. However, the definition of TPC is itself a specific provision. It expressly contemplates computation upon termination and contains a termination-specific proviso dealing with WPI-based adjustment. More importantly, it provides the basis for determining "Debt Due" and "Adjusted Equity", which are the very components used in the formula under Article 34.9.2.

32. Where two provisions of a contract deal with the same subject, the proper approach is to read them together and give effect to both, rather than allowing one to override the other. This is what the Impugned Judgment endeavours to do, it treats the definition of TPC as prescribing the ceiling, while Article 34.9.2 provides the formula for calculating the Termination Payment within that ceiling.

33. Such an interpretation gave effect to both provisions and avoided rendering any part of the Agreement meaningless. On the other hand, the Tribunal's interpretation, effectively rendered sub-clause (c) of the TPC definition redundant. The Agreement must, as far as possible, be construed in a manner that gives meaning and effect

to all its provisions. The aforesaid position also stands recognised by the Supreme Court in ***BGS SGS SOMA JV v. NHPC***[24], wherein it was held that conflicting portions of a judgment must be harmonised by reading the judgment as a whole and the same interpretive discipline applies to contractual instruments.

34. Secondly, the LSJ was right in holding that the definition of Termination Payment does not simply say that it consists of Debt Due and Adjusted Equity; it says that it is 'restricted to' the Debt Due and Adjusted Equity 'which form part of the Total Project Cost.' Words of restriction and qualification deliberately incorporated into a definition clause must be given meaning and effect.

35. Their purpose is precisely to cap the outer limit of the obligation being defined. To read the clause as the Tribunal did, permitting a Termination Payment computed on a debt and equity figure with no relationship to the capped TPC, empties these words of any operative content. This Court is unable to accept that commercially sophisticated parties, negotiating a public infrastructure concession running into decades, inserted words of limitation into the very definition of the Respondent's termination liability without intending them to limit anything.

36. Thirdly, the LSJ was right in holding that the proviso to the TPC definition confirms, rather than dilutes, its application on termination. If the parties had truly intended that the contractually fixed TPC would become irrelevant upon termination, displaced entirely by whatever figure the Appellant chose to notify, there would

[24] (2020) 4 SCC 234

have been no occasion for them to have inserted, within that very definition, a proviso addressing how the TPC is to be adjusted for WPI variation specifically 'in the event of Termination'.

37. The Agreement provides a specific mechanism for such adjustment, namely, adjustment based on WPI variation, and where such variation exceeds the prescribed limit, the adjustment is subject to mutual agreement. No provision, however, permits the Concessionaire to unilaterally enhance the TPC through a Disaggregation Letter.

38. If the intention was that the contractually determined TPC would cease to apply upon termination and could be replaced by any figure notified by the Concessionaire, there would have been no need for a termination-specific mechanism for adjustment of the TPC. The existence of such a mechanism supports the view of the learned Single Judge that the TPC continues to govern the computation of the Termination Payment and may be adjusted only in the manner provided under the Agreement. The Disaggregation Letter cannot be treated as an independent or additional mechanism for enhancing the TPC.

39. Fourthly, the LSJ rightly held that the function of disaggregation is definitionally an internal apportionment, not a re-valuation. The ordinary meaning of disaggregation, ***i.e.***, breaking a known whole into its constituent parts, is itself instructive. The clause requires the Appellant to notify the TPC as on COD and its break-up between Debt and Equity. Whereas the deeming provision that follows, equity to be treated as TPC less Debt Due, where no letter is

furnished, shows that the entire clause is addressed to internal allocation, not to establishing what the TPC itself is. To read a letter whose stated purpose is disaggregation as instead performing the function of re-fixing the aggregate itself is to invert the letter's own name and purpose.

40. Fifthly, the LSJ was also right in holding that a unilateral communication cannot vary a bilaterally agreed ceiling. It is elementary that a written contract, once concluded, can be varied only by the process the contract itself prescribes, or by the mutual agreement of both parties and not by the unilateral act of one contracting party purporting to notify a different figure to the other contracting party. However, the Tribunal's approach effectively permitted exactly this, it allowed a communication emanating solely from the Appellant to operate as an amendment of a heavily negotiated, capped definition from Rs. 650 crore (adjusted) to Rs. 1,045.55 crore. In this regard, it is to be noted that no principle of contractual interpretation permits a party to unilaterally enlarge an obligation which the other party undertook subject to a defined ceiling.

41. Sixthly, the LSJ was right to say that the ceiling of Rs. 650 crore was based on the Respondent's estimated project cost at the RFP stage and was intended to define the outer limit of its contingent liability upon termination. To hold as the Tribunal did, that this ceiling could be displaced merely because the Appellant subsequently notified a higher actual cost would effectively shift the risk of cost overruns and additional borrowing to the Respondent, without any provision in the Agreement permitting such a reallocation.

42. Seventhly, the reliance so placed on the Independent Engineer's acceptance of the Disaggregation Letter also did not assist the Tribunal's conclusion. This Court agrees that the Tribunal's treatment of the Independent Engineer's recommendation as though it were a determination of quantum does not do justice to both the language and object of the contract, as the LSJ correctly held. Additionally, the approval of the Financial Package also does not assist the Appellant, and the LSJ rightly observed that, sub-clause (a) of the TPC definition itself refers to the capital cost of the Project, as set forth in the Financial Package, and the parties were fully alive to the fact that the Financial Package would reflect a capital cost possibly exceeding Rs. 650 crore. As such, this figure stands internalised within the definition itself under limb (a) and cannot render limb (c) otiose. This Court finds no reason to disturb this reasoning and adopts it as its own.

<u>Examination of contentions raised by the Appellant:</u>

43. Learned counsel representing the Appellant has contended that the debt and equity were raised with the approval of the Respondent, following further scrutiny and acceptance of the Financial Package. This contention, insofar as it rests on the proposition that such approval assists the Appellant in enlarging the TPC, already stands answered by this Court at paragraph no.42 above, where, adopting the reasoning of the LSJ at paragraph no.58 of the Impugned Judgment, it has been held that the Financial Package figure stands internalised within limb (a) of the TPC definition and cannot render limb (c) otiose. This Court sees no reason to re-examine that finding here and confines the present discussion to the further and independent points that arise from this contention.

44. Independent of the observation made by the LSJ, we must highlight that the consensual character of the Agreement precludes any subsequent unilateral enlargement of the TPC; absent an express contractual mechanism, mere review of the Financial Package cannot be relied upon to enlarge the Respondent's liability.

45. While it is true that the Financial Package, reflecting a capital cost of Rs. 992.58 crore was scrutinised and approved by the Respondent prior to financial close. But this circumstance, far from assisting the Appellant, only reinforces the correctness of the LSJ's view. Had the parties intended, including at the stage of such approval, that this higher, approved figure would operate as the TPC for the purposes of Termination Payment, superseding the Rs. 650 crore ceiling, nothing prevented them from recording an express amendment or addendum to the Agreement to that effect.

46. Indeed, Articles 5.2.2 and 5.2.3 of the Agreement required drafts of the Financing Agreements and the Financial Package to be submitted to the Respondent in advance, and provided that no change or amendment thereto could be made without Respondent's written consent. If the Appellant wished the reviewed and approved Financial Package figure to serve as the operative TPC for termination purposes, displacing or enhancing the Rs. 650 crore ceiling, it was open to it to have this incorporated as an express stipulation or amendment to the Agreement at that stage.

47. However, in the absence of any such contractually recorded enhancement, the Agreement, having been entered into with the free consent of both parties with full knowledge of the definitional cap,

must be given effect to strictly as it stands; neither party can be permitted to read into it, after the fact, a term enlarging its own entitlement merely because a subsequent document, either the Financial Package or the Disaggregation Letter, reflected a higher figure.

48. It is a long-settled principle that where the terms of a contract are unambiguous, effect must be given to them as they stand, and neither a court nor a tribunal can substitute a different arrangement merely because it may appear more fair or convenient. The Supreme Court has repeatedly, by way its judgments in ***General Assurance Society Ltd. v. Chandumull Jain***[25]**,** and ***Nabha Power Ltd. v. Punjab State Power Corporation Ltd.***[26], held that the commercial hardship or subsequent convenience of a party cannot justify departing from the terms expressly agreed between the parties.

49. Applying this principle, the subsequent review or approval of the Financial Package by Respondent, in the absence of any amendment to the Agreement enhancing the Rs. 650 crore ceiling could not by itself alter the contractual TPC or enlarge the Termination Payment. To hold otherwise would permit the Appellant to unilaterally alter the agreed allocation of risk after the event. The dispute before the Arbitral Tribunal was one concerning the interpretation and application of the Agreement as executed, and not an occasion to modify its terms or substitute a different bargain. Such an interpretation would defeat the very purpose of reducing the parties' bargain into a written and negotiated contract.

[25] AIR 1966 SC 1644
[26] (2018) 11 SCC 508

50. The Appellant's contentions regarding the alleged conflation of TPC with Termination Payment, and the characterisation of Article 34.9.2 as a self-contained provision, have already been addressed by the LSJ in paragraph nos.83 and 84 of the Impugned Judgment and by this Court at preceeding paragraph nos.30 to 33 above. Hence, there is no need to revisit the same reasoning.

51. The contention of learned senior counsel representing the Appellant, wherein heavy reliance was placed upon the expression '*unless repugnant to the context or meaning thereof*', to argue that the definition of TPC cannot be imported into Article 34.9.2 of the Agreement, does not merit acceptance. This argument has also been addressed by the LSJ under paragraph nos.78 to 82 of the Impugned Judgment, wherein it was held that the cap provided under Article 48.1, in the context of Termination Payment, does not depict absurdity or contradiction.

52. This Court finds the reasoning provided by the LSJ sound in every particular. The relevant paragraphs of ***K.V. Muthu*** *(Supra)*, as extracted by the LSJ, make it clear that a '*context otherwise requires*' clause does not license departure from a defined term merely because an alternative construction is available; rather it permits departure only where the defined meaning cannot be applied at all to the provision in question without producing an absurdity or contradiction, which is a considerably higher threshold than mere inconvenience or a less favourable financial outcome for one party.

53. The argument of the Appellant when analysed properly, does not demonstrate that the TPC definition cannot be applied to Article

34.9.2 of the Agreement; it only demonstrates that applying it yields a smaller recovery than the Appellant would prefer, and this is precisely the species of argument, paragraph no.79 of the Impugned Judgment rejects.

54. Since the correctness of the LSJ's reliance on ***K.V. Muthu*** *(Supra)* has been specifically assailed by learned senior counsel, it deserves pointed examination. The decision does not permit a free departure from a defined term merely because the contractual context is perceived to be in tension with the defined meaning; rather, it establishes a rule of restrained displacement, under which the definition remains the governing rule, and the expression "*unless the context otherwise requires*" operates only as an exception where giving effect to the definition would defeat the object or purpose of the instrument.

55. Measured against this standard, the LSJ was correct in holding that the exception has no application in the present case. A definition which expressly contemplates the termination scenario and prescribes a specific mechanism for its adjustment in that eventuality cannot, in the same breath, be rendered inapplicable merely because the context is one of termination.

56. In respect to contention of the Appellant covered under paragraph nos.9.8 and 9.9, it may be noted that the ceiling of Rs. 650 crore, traceable to the Respondent's estimated project cost at the RFP stage, was intended to define the outer limit of its contingent liability upon termination. It could not be displaced merely because the Appellant subsequently notified a higher actual cost, as already stands

examined and accepted by this Court at paragraph no.41 above. To permit such displacement would effectively shift the risk of cost overruns to the Respondent without contractual sanction. What remains for independent examination is the further and more specific submission that Article 1.4.1 of the RFP itself disclaims any intention that the estimate survive as a binding cap, a submission which, although not argued in these precise terms before the LSJ, must nevertheless be addressed.

57. In the considered view of this Court, this further submission does not alter the outcome already reached by the LSJ. Whatever the RFP's own terms may say about the provisional character of the estimate for purposes of the bidding process, that estimate ceased to be a mere pre-contractual approximation the moment it was consciously carried forward and written into the operative definition clause of the executed Agreement, as one limb of the three-limbed 'lowest of' formula under Article 48.1 of the Agreement.

58. In any event, the RFP is a pre-contractual document, and the LSJ, under paragraph no.58 of the Impugned Judgment, has already noted, in the context of rejecting reliance on the approved Financial Package, that '*in terms of Article 1.4.1 of the Concession Agreement, the Agreement prevails over all other documents*'. It necessarily follows that whatever qualification Article 1.4.1 of the RFP may purport to place on the continued applicability of the RFP's estimates, it cannot override or dilute a term that the parties, with full knowledge of such estimate's provenance, chose to incorporate as a binding limb of the definition in the concluded Agreement itself.

59. The Appellant's submission under paragraph no.9.10 was not urged before the LSJ, and consequently, has also not been dealt with thereof. However, even upon an independent examination of the said argument and the reliance placed on ***Nabha Power*** *(Supra)* and ***Haris Marine Products*** *(Supra)*, this Court finds it to be misconceived.

60. The business-common-sense canon of construction, as explained in ***Nabha Power*** *(Supra)*, is a tool for resolving genuine ambiguity or for declining to imply a term into a contract's silence. It authorises a Court to prefer the construction that avoids commercial absurdity only where the contractual language itself admits of more than one meaning. Even then, the implication of any additional term must satisfy the strict test of business necessity, not the lesser test of mere reasonableness or convenience to one party.

61. Similarly, ***Haris Marine Products*** *(Supra)*, stands on no different footing, it also addresses the construction of doubtful or silent contractual language, not the displacement of an express, unambiguous limitation because one party finds its consequences commercially not viable. Moreover, the underlying premise of the Appellant's argument itself is not sound. The risk that the Appellant's actual project debt might, at completion, exceed the ceiling negotiated at the RFP and definitional stage was a risk that the Respondent and its lenders assumed when they structured the financing of the project. It was not a risk the Respondent undertook to absorb, and nothing in the Agreement suggests otherwise.

62. The consequence of enforcing the cap may leave certain lenders less than fully satisfied out of the Termination Payment is a

consequence of the parties' own bargain, not an absurdity of the kind that permits a court or tribunal to depart from the plain words of that bargain. Accordingly, the Court finds no substance in the reliance placed on ***Nabha Power*** *(Supra)* and ***Haris Marine Products*** *(Supra)*, and, if anything, this Court finds that the reasoning in ***Nabha Power*** *(Supra)*, if properly understood, operates against, rather than in favour of, the Appellant's case.

Tribunal's construction of the Agreement was not a possible view

63. Having examined the findings of the LSJ and the contentions of the Appellant, it remains to determine, in the context of patent illegality, why the Tribunal's interpretation falls outside the permissible limits of contractual interpretation, despite the broad latitude ordinarily available to an arbitral tribunal in interpreting a contract.

64. In the present case, as discussed under paragraph nos. 30 to 62 of this judgment, the Tribunal's construction could not be sustained merely as an alternative interpretation of the Agreement. An arbitral tribunal is entitled to construe contractual provisions and to adopt a plausible interpretation where the language admits of more than one meaning. It cannot, however, give a provision a meaning which is inconsistent with an express limitation elsewhere in the Agreement, or confer upon a subsequent notification a contractual effect which the Agreement does not provide.

65. The contractual scheme, read as a whole, does not permit the TPC to be enlarged through the Disaggregation Letter or the subsequently approved Financial Package so as to displace the agreed

ceiling. In treating the Disaggregation Letter as capable of enhancing the TPC notwithstanding the Rs. 650 crore ceiling, the Tribunal failed to give effect to an express contractual limitation and thereby enlarged the Respondent's liability without any contractual mechanism authorising such variation.

66. Such an interpretation cannot be reconciled with the contractual scheme as a whole and, in effect, substitutes a different allocation of risk for that which the parties had agreed. It therefore travels beyond a mere disagreement on interpretation and amounts to altering, rather than interpreting, the contractual arrangement between the parties.

67. Therefore, this Court is unable to accept that the Tribunal's construction can be characterised as a possible view merely because an arbitral tribunal ordinarily enjoys latitude in interpreting a contract. The Tribunal's construction consequently falls outside the permissible limits of contractual interpretation and attracts the ground of patent illegality as exercised by the LSJ.

68. Before parting, we must appreciate the clarity, depth and analytical rigour with which the LSJ has dealt with the intricate questions of contractual construction arising in the present case. The Impugned Judgment reflects a careful and nuanced examination of the contractual framework, the relevant provisions and the competing interpretations advanced by the parties and demonstrates a faithful application of settled principles governing the interpretation of commercial contracts.

D. CONCLUSION:

69. For the reasons set out above, this Court finds no error in the learned Single Judge's decision to set aside the Arbitral Award insofar as Claim Nos. 1 and 2 are concerned. The learned Single Judge remained within the limited scope of Section 34 and correctly found that the Tribunal's construction amounted to rewriting the Concession Agreement, rather than a permissible interpretation of its terms, thereby attracting the ground of patent illegality.

70. The learned Single Judge was also correct in reading the TPC definition and the Termination Payment clause harmoniously, as complementary provisions forming part of the same contractual scheme. This Court, while exercising jurisdiction under Section 37, has confined its examination to the legality of the exercise undertaken under Section 34 and has not re-appreciated the merits of the dispute.

71. Therefore, no ground for interference under Section 37(1)(c) of the Act of 1996 is made out.

72. Accordingly, the Impugned Judgment insofar as it sets aside the Arbitral Award on Claim Nos.1 and 2, is affirmed, and the present Appeal, stands dismissed.

73. Pending applications stands disposed of.

ANIL KSHETARPAL, J.

SHAIL JAIN, J.

SEPTEMBER 28, 2026
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