



IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

ARBITRATION APPEAL NO. 33 OF 2015

State of MaharashtraAppellant

Versus

M/s Patwardhan Infrastructure Pvt. Ltd.Respondent

Mr. Kuldeep Patil, *for Appellant.*

Ms. Sonal a/w Ujwala Kamat, Anoop Sharma, Sumit Khanna,
Vaibhav Singh, *for Respondent.*

Mr. A. R. Patil, *Addl. G. P. for State.*

CORAM : SOMASEKHAR SUNDARESAN, J.

DATE: : JANUARY 17, 2026

JUDGEMENT :

Context and Factual Background:

1. This Appeal has been filed under Section 37 of the Arbitration and Conciliation Act, 1996 (*“the Act”*) impugning an Arbitral Award dated November 7, 2012 (*“Impugned Award”*) and a Judgment dated September 24, 2014 (*“Impugned Judgment”*), which upheld the Impugned Award, dismissing a challenge under Section 34 of the Act.

2. The disputes and differences between the parties relate to the award of a work on August 31, 1999 and a short four-page agreement dated November 26, 1999, being signed (***“Agreement”***). The Appellant, the State of Maharashtra (***“State”***), awarded to the Respondent, Patwardhan Infrastructure Pvt. Ltd. (***“Patwardhan”***), a contract for construction of a two-lane bridge connecting Pen and Alibag across the Dharamtar Creek, on a build, operate and transfer basis, pursuant to a Tender inviting bids for the project (***“Project”***).

3. The Project had been bid for by M/s Ameya Developers (***“Ameya”***), which won the bid with a proposed concession period of 13 years, 7 months and 35 days. The State, Ameya and Patwardhan executed a tripartite agreement for implementation of the Project. For all purposes of this judgement, references to Patwardhan are references to the concessionaire which is considered by all parties as being bound by, and a beneficiary of, the obligations and rights respectively, contracted for the Project.

4. The Agreement between the parties is a short four-page contract, which essentially records that the Project stands awarded, pursuant to the bid by Ameya in response to the Notice Inviting Bids dated November 3, 1998 (***“Notice Inviting Bids”***), and the terms and conditions contained in the draft agreement set out in the said notice. The parties actually did not separately sign the draft agreement as an

executed agreement, but they have no quarrel that these terms, among others, constitute the contract-forming documentation binding the parties.

5. It is common ground between the parties that upon execution of the Agreement, it included within its sweep, the provisions of the Notice Inviting Bids and, thereby, the terms of the draft agreement contained therein, and indeed the minutes of the meeting held in relation to the Project before executing the Agreement. This judgement proceeds on this consensus and interprets the terms and conditions contained in the Notice Inviting Bids as also the minutes of the meeting held between the parties. At the heart of the adjudication in the underlying arbitration proceedings lies the interpretation of Clauses 3.4.19 and 3.7.2, as set out in the aforesaid terms and conditions, and the minutes of the meeting held on August 18, 1999 (“*MOM*”).

6. The Project, as is customary with toll-based concessions, entailed the bidding private concessionaires quoting the period after which the infrastructure facility constructed by them would revert to the State. In the interregnum, the private concessionaire would get to charge toll for usage of the bridge by vehicles. The toll data was indicated in the bid documents, and the rate and frequency of escalation of the toll tariff were also agreed stipulations in the Agreement.

7. It is common ground that there had been multiple disputes and consequential arbitration proceedings between the parties under the Agreement – including the proceedings underlying this Appeal, seven in number. All these proceedings have been adjudicated by the same Arbitral Tribunal. Owing to the outcome in one of them, the concession period was extended by a further 573 days.

8. It is common ground that for adjudication of the core issue raised in this Appeal within the contours of Section 37 of the Act, the other arbitration proceedings between the parties and the resultant awards do not bear much relevance, except for the adjustment of certain amounts made by the Learned Arbitral Tribunal on the premise of having awarded certain sums due to connected causes in some of the other arbitral awards.

Core Issue:

9. The core issue that falls for consideration is whether the *force majeure* clause contained in Clause 3.4.19 of the Agreement ceased to be a *force majeure* clause by reason of the MOM, and whether the parties had instead agreed to change the Project to one guaranteeing a minimum assured return, whereby any loss of toll collection of more than 20% would entail a rupee-for-rupee compensation by the State.

10. The upshot of the analysis and findings in the Impugned Award, upheld in the Impugned Judgement, is that the Agreement envisaged an obligation on the part of the State to compensate Patwardhan for any drop in toll collection of more than 20% in any period, including a part of a month.

11. After Ameya submitted its bid on March 15, 1999, and before the award of the Project, two letters, both dated July 2, 1999, were written by Ameya to the State. One letter drew reference to newspaper reports about the proposed construction of another bridge connecting Rewas and Karanja in the same Raigad district on a build, operate and transfer basis. Ameya apprehended that the new bridge would establish a shorter link for traffic between Mumbai and Alibag and that such a bridge would have an adverse impact on the traffic envisaged by Ameya when submitting its bid. When making its bid, the new bridge was not in contemplation at all, and such adverse impact had not been factored in. Ameya wanted an assurance that should such new bridge be completed and be made open to traffic before the end of the concession period for the Project, and if there were an adverse change in traffic, Ameya should be suitably compensated.

12. Another letter of the same date sought to make some minor corrections of certain clerical errors that were said to have crept into the bid documents without any change in the proposal offered, since

“the project costs, rate of interest and concession period remain unaltered”. A “slight difference” in the traffic assumed by Ameya based on its own estimate was sought to be corrected. Ameya stated that such data was likely to be referred to only in case there was any change in the concession period, but it would be preferable that a correct statement be brought on record.

13. The two letters dated July 2, 1999, led to a meeting held by the Chief Engineer, Public Works of the State on August 18, 1999, to discuss the issues relating to the Project, which in turn led to the MOM. For felicity, the following extract from the MOM are vital to note:

At the outset, the Entrepreneur pointed out the very possibility of major variation in traffic intensity on the present facility as the Govt. has floated a tender for the construction of a major bridge connecting Rewas & Karanja. The Entrepreneur claimed that since Rewas Karanja project is a development that has taken place after the submission of his offer for the subjected work, he has not considered its effect while submitting his bid.

The following observations emerged from discussion at length.

I) The viability of Rewas Karanja project on B.O.T. Basis is not yet established.

II) The possible increase/decrease in traffic due to Rewas Karanja Project is a time based theme and unpredictable under present circumstances.

III) Although clause 3.7.2 of the contract is applicable for subjected work, in true spirit of the clause such a major change, totally strange to the Entrepreneur.

IV) Clause 3.4.19 of the contract provides that if there is variation more than 20% in traffic due to reasons beyond the control of the Entrepreneur, Govt. will compensate the Entrepreneur suitably.

It was, therefore, agreed by all, that a decision in this regard can be taken when Rewas Karanja Bridge is completed and opened to traffic, on merits of the case & on the basis of variation in actual traffic at that time.

[Emphasis Supplied]

14. The two clauses referred to in the aforesaid extract of the MOM, namely, Clause 3. 7.2 and Clause 3.4.19 would also be appropriate to extract :-

3.7.2. If traffic intensity data observed during the last few years is available with the Department, will be made available to the Entrepreneur if asked for in writing. The Government shall not accept any responsibility on account of loss suffered by the Entrepreneur either due to the use of the above data or any change in traffic plying as a result of construction of new roads/links or improvements to the exiting road network in the vicinity or any other similar change.

3.4.19 If any time during the execution / completion of the project the Entrepreneur not able to proceed with

constructing/completion of the project beyond a period of one month due to any reason beyond his control such as fire earthquake, floods, storm or any other such calamity, riots, civil commotion the Government shall compensate the Entrepreneur for such loss in a manner and form as may be decided by the Government. If also, the Entrepreneur is not able for a period even less than a month to collect any toll or if the toll collection is drastically reduced below 20% of normal toll collection due to any reasons whatever beyond his control such as transporter's strike, riots, civil commotion, closure of bridges for more than 24 hours for traffic on account of structural repairs (not due to Entrepreneur's fault) the Government shall compensate him for such deficit/shortfall in toll collection along with simple interest equivalent to prime lending rate of State Bank of India prevalent at the time. Amount of such deficit/shortfall, along with the interest thereon shall be paid by the Government to the Entrepreneur in one lump sum within 6 months after the demand for such force major claim is submitted to the Government. The Government however, shall have the option of extending the concession period in lieu of such payment. If there is any shortfall in toll collection due to wrong estimation of traffic by the Entrepreneur or if he fails to collect toll for any other reason, the Government shall not compensate the deficit loss or shortfall.

[Emphasis Supplied]

15. Whether the contents of the MOM extracted above had the effect of materially altering the aforesaid clauses, and if so, whether facts and events transpired that would attract these provisions as altered, fell for consideration by the Learned Arbitral Tribunal.

Contentions of Parties:

16. Against this backdrop, I have heard at length Mr. Kuldeep Patil, Learned Advocate on behalf of the State, and Ms. Sonal, Learned Advocate on behalf of Patwardhan. With their excellent assistance, I have navigated the record, neatly compiled into a convenience compilation.

17. Mr. Patil would submit that such a reading is totally perverse and no reasonable judicial mind would arrive at such a conclusion – of treating a *force majeure* clause as ceasing to be a *force majeure* clause, to accommodate a claim for compensation for a shortfall in toll in the admitted absence of a *force majeure* event. He would submit the findings are contrary to the contract, and perverse. The Learned Arbitral Tribunal has held that Clause 3.7.2 and Clause 3.4.19 underwent material alterations, and that forms the basis its award of a full compensation for any shortfall in toll collection of more than 20%. Mr. Patil would submit that the MOM did not effect any amendment at all to these clauses, since the parties only agreed to defer the decision to the situation of a real event of the Rewas-Karanja bridge coming up and getting operational. Since that project, or indeed any other like project, never came up, he would submit, the MOM has no implication at all for the contract between the parties.

18. In contrast, Ms. Sonal would contend that the Agreement must be examined in the context of the era in which it was contracted. In the 1990s, private participation in public infrastructure was at nascent stage and the State was seeking to provide strong support to private players to take up infrastructure investment. Clause 3.4.19 originally provided a benchmark of traffic falling to below 20% (i.e. a traffic fall of more than 80%), while the MOM referred to that very clause as entailing compensation if toll collections fell by more than 20%. This, Ms. Sonal would submit is a material change and indicative of how the bargain had changed between the parties. Ms. Sonal would also differentiate between “failure to collect” and “fall in toll collection” to contend that a failure envisaged in the exception in Clause 3.4.19 has to be a positive failure in the character of a breach while the MOM had made the exception in Clause 3.4.19 irrelevant since the very metric was changed from *a fall in traffic to below 20%* to *a fall in toll collection by 20%*.

19. Likewise, Clause 3.7.2 had provided that there would be no implication for the State at all from other links and projects in the vicinity, Ms. Sonal would submit, but the State had agreed in the MOM that it would visit the impact of Rewas-Karanja bridge as and when it became operational. Therefore, with the MOM having been agreed to even before the work was awarded and before the Agreement was

signed, and being an integral part of the contract, the bargain between the parties had changed. On this premise, Ms. Sonal would assert that the findings of the Learned Arbitral Tribunal fall within the ambit of being plausible findings, and that scope of interference by the Section 34 Court should not be forgotten – it is not open to substitute one plausible interpretation of the contract with another that finds more favour with the Court.

Analysis and Findings :-

Scope and Standard of Review:

20. Before delving into the analysis, a few points would need to be underscored. *First*, the jurisdiction of the Section 37 Court being an appeal from a decision of the Section 34 Court is necessarily concurrent with and circumscribed by the contours of jurisdiction under Section 34 of the Act. In other words, this Court in exercise of jurisdiction under Section 37 of the Act has to act in conformity with the scope of jurisdiction under Section 34 of the Act. *Second*, the challenge under Section 34 in the instant case was launched before October 23, 2015, when the amendments of 2015 to the Act took effect. In fact, both the instruments – the Impugned Award and the Impugned Judgement – relate to the period prior to 2015. Therefore, the grounds of interference did not include Section 34(2-A), which inserted the ground of “patent illegality” and indeed the *Explanation 1* to Section 34(2)(b)

(ii), which sought to regulate the application of the “*public policy*” ground for interference with arbitral awards, did not then exist in law.

21. Therefore, when one tests if the Section 34 Court was right in its exercise of jurisdiction over the Impugned Award, one must apply Section 34 as it then stood and assess how the challenge ought to have been considered under Section 34 of the Act. It is with this perspective in mind that the analysis that follows must be read.

Contract Formation:

22. I have already made a brief note on the contract formation between the parties at the start of this judgement. Therefore, suffice it to say that the parties have consensus that what applies to them are the provisions contained in the terms and conditions enclosed in the Notice Inviting Bids, read with the MOM, and there is no quarrel that the amalgam of the two and their combined effect would bind them. This reiteration is felt necessary since, when asked for the signed contract, both advocates pointed to the four-page contract signed on November 26, 1999, which in turn alludes in a circular manner to “*contract documents*” constituting the term “Contract Documents” without explicitly listing which documents comprise them. Clause 2 of the signed agreement dated November 26, 1999, alludes to other documents such as additional details of the proposal, the bank

guarantee towards security deposit, and other correspondence between the parties, which would be treated as “*Reference Documents*”.

23. However, there is no difference of view between both the parties that the terms set out in the Notice Inviting Bids and the MOM jointly constitute the Agreement – the parties only differ on the implications of their joint impact on their respective rights and obligations.

24. The short question that falls for consideration in these proceedings is whether the MoM, and in particular, the portions extracted above have the effect of materially modifying Clause 3.4.19 and Clause 3.7.2, and if so modified, what such modified position is; and more importantly, whether the Impugned Award returns a reasonable, defensible and plausible view that ought not to be interfered with.

25. The Impugned Award holds that the Chief Engineer who conducted the meeting which led to the MOM had the full authority to amend the terms on which the Project was to be implemented and that the MOM constitutes a significant and material change to Clause 3.4.19 in the draft contract annexed to the Notice Inviting Bids. This view has been concurrently upheld in the Impugned Judgement which also emphatically holds that the Clause 3.4.19 and Clause 3.7.2 stood materially deviated from, due to the MOM, and the result would be that

any shortfall in traffic by 20% would automatically have to be compensated by the State.

Analysis of the Relevant Clauses and the MOM:

26. Therefore, at the threshold, it would be appropriate to examine the contents of the clauses and the MOM extracted above, just to see what they entail, and not with an intent to reinterpret the provisions. It is made clear that such an exercise is necessary to see whether the outcome that has transpired is a finding that no reasonable and prudent person would return, and whether the findings are a product of a non-judicial approach.

27. Clause 3.7.2 stipulates that if traffic data observed in the previous few years were available with the State, it would be made available for the asking. However, the State would not accept any responsibility on account of loss suffered due to the use of such data. The upshot is that the concessionaires ought to conduct their own traffic analysis and formulate their bids accordingly. Likewise, Clause 3.7.2 provides that if there is any change in traffic as a result of the construction of any new roads or links, or improvements to the existing road network in the vicinity, or any other change, there would be no compensation. The (then) proposed Rewas-Karanja bridge would fall squarely within the ambit of this exclusion of compensation for loss. The MOM has to be read in this context, as is done later in this judgement.

28. As regards Clause 3.4.19, it is evidently a *force majeure* clause, which reduces to writing the approach of the parties in the event of *force majeure* conditions arising. A plain reading of Clause 3.4.19 would show that if the concessionaire is not able, for a period of even less than one month, to collect any toll, or if the toll collection is drastically reduced to below 20% of normal toll collection due to any *force majeure* conditions whatsoever, which are also illustrated with examples, the State would compensate the concessionaire either in funds or by extension of the concession period, as the State opts.

29. The illustrative examples of “*any reasons whatever*” beyond the concessionaire’s control are set out in the words “*such as transporter’s strike, riots, civil commotion, closure of bridges for more than 24 hours for traffic on account of structural repairs (not due to Entrepreneur’s fault)*” in Clause 3.4.19. Therefore, while the words “any reasons whatever” may appear to be a wide phrase, unmistakably, these words are housed in a *force majeure* clause. The sentences preceding the sentence in which this phrase is used, and the words that follow this wide phrase, all indicate without doubt, that the provision is a *force majeure* clause.

30. It is also apparent from the very same clause that any wrong estimation of traffic by the concessionaire or failure to collect toll “*for any other reason*” would not lead to the State having to compensate for

the deficit arising out of the shortfall. The reference to wrong estimation of traffic ties in with the requirement for the concessionaire to estimate traffic under Clause 3.7.2. The reference to “any other reason” would contextually indicate the “reasons” for the failure to collect toll, being reasons *other* than *force majeure* conditions. Failure to collect toll for such reasons would not be compensated.

31. Be that as it may, these were the clauses in the Notice Inviting Bids that Ameya had before it made its bid. When Ameya raised concerns about the newly proposed Rewas-Karanja bridge, the meeting that led to the MOM was held. The MOM essentially lists out the concerns and the observations made by the parties, and concludes with what the parties “agreed” at the meeting. The MOM records that the new project was only being conceptualised and there was no insight into whether it would actually be implemented. However, the parties agreed in the MOM that as and when, and if and when, the Rewas-Karanja bridge was to be completed and traffic actually started plying within the concession period of the Project, depending on the actual impact on traffic, a decision would be taken.

32. Therefore, what transpired in the meeting that led to the MOM is that the parties agreed to agree on a decision, if and when, and as and when, the Rewas-Karanja bridge was to get operational within the concession period of the Project.

33. Now, it is common ground that the Rewas-Karanja bridge was never implemented. It is also common ground that no other comparable project in the vicinity was implemented.

34. However, Patwardhan made a claim for a rupee-for-rupee compensation for the shortfall in toll collection for the months in which the toll collection fell by more than 20%. This was claimed on the premise that the MOM had changed the bargain between the parties. Any shortfall of more than 20% was claimed as triggering the State's liability to compensate Patwardhan. This has been unanimously allowed in the Impugned Award and upheld in the Impugned Judgement.

35. What the Learned Arbitral Tribunal and the Section 34 Court have done is to examine the provisions of Clause 3.4.19 and the MOM to return a finding that the MOM rewrote Clause 3.4.19 in such a material manner that the latter ceased to be a *force majeure* provision. To begin with the MOM does not contain any agreement. The MOM is an outcome of Patwardhan's expression of concerns about the implications of the Rewas-Karanja bridge that was being reported in the newspapers. The parties merely agreed to defer a decision on such implications to a date when the Rewas-Karanja bridge actually comes about, and after appreciating the actual impact, if any, of such bridge on the Project.

36. It is the set of “observations” of the parties “that emerged” and were recorded in the MOM that precede the portion which records the above agreement (to defer the decision to a later date) reached by the parties, that have been treated by the Learned Arbitral Tribunal and the Section 34 Court as an amendment to Clause 3.4.19 and indeed Clause 3.7.2. Even if one were to accept for the sake of argument that these “observations that emerged” constituted an “agreement to amend” Clause 3.4.19 and Clause 3.7.2, by no stretch of imagination could one contend that these observations resulted in a detailed *force majeure* clause ceasing to have anything to do with *force majeure*.

37. The two forums are not wrong in indicating that the observations (if one were to treat them as an agreement) are at material variance with the two clauses, but in my opinion, no judicial reading could treat such variation as being a means of effacing and wiping out the very words “*force majeure*” from Clause 3.4.19.

38. The two concurrent findings take a view that every shortfall in toll collection by 20% would need to be made good by the State by compensating Patwardhan for such shortfall. This is clearly implausible. Clause 3.4.19 provides for a benchmark as to when the obligation to compensate would kick in, specifically, when a *force majeure* event occurs. If an impact that meets that threshold were to occur, i.e., a shortfall in traffic by 80% (truly in accord with a force

majeure condition) for any reason whatsoever, the State would compensate. Even the compensation is not meant to only write out a cheque in Patwardhan's name – the State could simply allow for a longer concession period to enable Patwardhan to collect toll and recoup this impact. Even if the observations in the MOM in its description of Clause 3.4.19 were to be treated as an agreement to amend, all that would be amended is the benchmark – it would change from an over-80% fall in traffic to an over-20% fall in toll collection. Such a benchmark may change, but it is still intended to trigger compensation should such a fall were to occur due to a *force majeure* event. The types of *force majeure* events are also listed in Clause 3.4.19. While these are evidently illustrations of events that fall outside the control of the concessionaire, they are equally events that the State would not intend to occur or would do its best to ensure they do not occur. It is the occurrence of such events that would need to constitute a valid reason for a shortfall (in collections, as per the Learned Arbitral Tribunal's reading of the MOM; or in traffic, as per the clause on its own), and when such shortfall meets the benchmark threshold, the obligation to compensate would be triggered.

39. What the Learned Arbitral Tribunal and the Section 34 Court have done is turn this on its head. They have simply taken the observations in the MOM to treat them as an amendment not just to

the benchmark for compensating for a *force majeure* event but even for circumstances that do not even constitute a *force majeure* event. In disputes over infrastructure contracts, whether an event that has occurred is a *force majeure* event is itself often a mixed question of fact and contract, for which evidence has to be led. It is after the occurrence of a *force majeure* event is established, that the next step would be to examine if the benchmark threshold for compensation has been reached. If that threshold has been reached, the next step would then be compensation, with the form of compensation being left to the option of the State – whether to pay money or extend the concession period to enable the collection of tolls from the public for a longer period.

40. All of this has been thrown to the winds in the concurrent findings. They have simply made a leap, or rather multiple leaps of faith – *first*, to treat observations in the MOM as an agreement; *second*, to ignore what the MOM records the parties have actually agreed upon; and *third*, to treat such observations as having been an amendment of such a nature that the parties intended to change the foundational risk-reward profile of the Project by making a conditional compensation clause into a minimum guaranteed return contract.

41. It cannot be forgotten that the MOM pre-dates the award of the work and the execution of the Agreement. If the parties were to alter

the very basic structure of their bargain from what was set out in the Notice Inviting Bids, there would be a reasonable prospect that such a vital, fundamental change would be an explicit part of the documentation they would execute. I have already made by observations about the manner of contract formation in this case. Without doubt, such contract formation has led to ambiguity being asserted in the arbitral proceedings.

Dispute Resolution Fails Business Efficacy Test:

42. In defence of the Impugned Award and the Impugned Judgement, Ms. Sonal invokes the business efficacy test to resolve the ambiguity in the contract. Indeed, the business efficacy test ought to have been applied to resolve the ambiguity perceived in the manner of contract formation, on which I have already commented above.

43. Therefore, it would be appropriate to examine what this test is, and how it would play out in the facts of the case.

44. In *Nabha Power*¹ the Supreme Court noticed various earlier judgements on how to give commercial sense to terms in a contract that may not lend themselves to a clear unequivocal meaning, in the following terms:

49. We now proceed to apply the aforesaid principles which have evolved for interpreting the terms of a commercial contract in

1 Nabha Power Ltd. v. Punjab SPCL – (2018) 11 SCC 508

question. Parties indulging in commerce act in a commercial sense. It is this ground rule which is the basis of *The Moorcock* [*The Moorcock*, (1889) LR 14 PD 64 (CA)] test of giving “business efficacy” to the transaction, as must have been intended at all events by both business parties. The development of law saw the “five condition test” for an implied condition to be read into the contract including the “business efficacy” test. It also sought to incorporate “the Officious Bystander Test” [*Shirlaw v. Southern Foundries (1926) Ltd.* [*Shirlaw v. Southern Foundries (1926) Ltd.*, (1939) 2 KB 206 : (1939) 2 All ER 113 (CA)]]. This test has been set out in *B.P. Refinery (Westernport) Proprietary Ltd. v. Shire of Hastings* [*B.P. Refinery (Westernport) Proprietary Ltd. v. Shire of Hastings*, 1977 UKPC 13 : (1977) 180 CLR 266 (Aus)] requiring the requisite conditions to be satisfied: (1) reasonable and equitable; (2) necessary to give business efficacy to the contract; (3) it goes without saying i.e. the Officious Bystander Test; (4) capable of clear expression; and (5) must not contradict any express term of the contract. The same penta-principles find reference also in *Investors Compensation Scheme Ltd.v. West Bromwich Building Society* [*Investors Compensation Scheme Ltd. v. West Bromwich Building Society*, (1998) 1 WLR 896 : (1998) 1 All ER 98 (HL)] and *Attorney General of Belize v. Belize Telecom Ltd.* [*Attorney General of Belize v. Belize Telecom Ltd.*, (2009) 1 WLR 1988 (PC)] Needless to say that the application of these principles would not be to substitute this Court's own view of the presumed understanding of commercial terms by the parties if the terms are explicit in their expression. The explicit terms of a contract are always the final word with regard to the intention of the parties. The multi-clause contract inter se the parties has, thus, to be understood and interpreted in a manner that any view, on a particular clause of the contract, should not do violence to another part of the contract.

[Emphasis Supplied]

45. In coming to the foregoing view, the Supreme Court endorsed and reiterated what had been stated in a long line of judgements that had endorsed these principles including in the cases of *Dhanrajamal Gobindram*² (paragraph 19); *D.N. Revri*³ (paragraph 7); and *Satya Jain*⁴ (paragraphs 33 to 35).

46. The invocation of the business efficacy test to resolve ambiguous positions emerging from a contract would therefore need to meet five factors. The resolution of the ambiguity must be (i) reasonable and equitable; (ii) necessary to give business efficacy to the contract; (iii) it should 'go without saying'; (iv) capable of clear expression; and (v) must not contradict any express term of the contract. Each of these tests fails in the matter in hand.

47. *First*, the purported efficacy sought to be given by the impugned findings is not reasonable or equitable. The extrapolations made by the Learned Arbitral Tribunal and the Section 34 Court from the MOM, have converted the Project for which the Notice Inviting Bids had envisaged the private sector bearing the risk of the project with some specific protections into a risk-free State-underwritten project with guaranteed income of least 80% of the toll collections projected by the private bidder. Since it has been held that the contract moved from a

² *Dhanrajamal Gobindram v. Shamji Kalidas and Co.* – (1961) 3 SCR 1020 : AIR 1961 SC 1285

³ *Union of India v. D.N. Revri & Co.* – (1976) 4 SCC 147

⁴ *Satya Jain v. Anis Ahmed Rushdie* – (2013) 8 SCC 131

shortfall in traffic to a shortfall in toll collections, the two forums ought to have dealt with the baseline from which such shortfall is to be computed. The baseline appears to be whatever Patwardhan projected as its anticipated toll collection, with a fall of more than 20% from that being held as a trigger for compensation. In my opinion, far from giving business efficacy, this is an absurd turn and a foundational change of the very foundation of the Project's contractual design.

48. Indeed, other bidders would be entitled to say that if the Project had been a guaranteed 80% toll collection proposition they would have quoted a different concession period and ought to have been selected. While this may be in the realm of speculation, the point being made is that one has to examine if the emphatic reading given in the Impugned Award and the Impugned Judgement to the MOM is in consonance with public policy imperatives of how a contract that is a product of open bidding ought to play out to be in compliance with law. On this count, the resolution provided by the Learned Arbitral Tribunal is contrary to the fundamental policy of Indian law.

49. *Second*, the findings do not give any efficacy to the contract. The baseline contract terms entailed the conditions under which compensation for *force majeure* would be dealt with. To translate that into a purported amendment that obviates the very need for a *force majeure* event is inexplicable. The MOM was a product of a meeting to

discuss the implications of the Rewas-Karanja bridge. That project did not even get started. No other like project in the vicinity transpired. Indeed, the claim raised by Patwardhan is simply a claim made at the end of the contract, simply pointing out that the shortfall it suffered must be compensated. The Learned Arbitral Tribunal comprising retired senior Public Works Department officials, has simply granted this compensation by holding that Clause 3.4.19 stood materially amended. To hold that a *force majeure* clause was so materially deviated from that it ceased to even be a *force majeure* clause is irrational, to say the least – and that too with nothing more to show than the mere contents of the MOM, which are extracted above.

50. Within the “observations that emerged” as recorded in the MOM that have been treated as amendments to the two clauses, sub-para (III), which deals with Clause 3.7.2, speaks of a shortfall in traffic. Sub-para (IV), which deals with Clause 3.4.19, alludes to a shortfall in toll collection. Therefore, it is not as if the observations in the very same meeting to discuss the potentially cannibalising project consistently changed the metric from traffic shortfall to toll collection shortfall. Therefore, these were nothing more than observations recorded. After these observations, the parties decided not to decide at that stage, but to defer to a later stage. To treat these observations as material and

inexorable amendments is totally arbitrary and perverse and fails to give efficacy to the contract.

51. *Third*, the outcome rendered in the two concurrent findings are not writ so large that it “goes without saying”. On the contrary, it has taken abject violence to the language of Clause 3.4.19 and indeed the MOM itself, to conjure the outcome rendered. Therefore, the outcome fails the third test too.

52. *Fourth*, the outcome is not capable of clear expression. To make the outcome clear in its expression, one must find that the parties decided that *force majeure* conditions were irrelevant for operation of the *force majeure* clause, and that a project that entailed the concessionaire running the project risk in consideration for which he could charge tolls from all members of the public for its use was suddenly accorded protection for any shortfall in toll collection of more than 20%. The very discussion occurred in the context of a competing project that never even got implemented. The outcome in the MOM was that the parties agreed to defer the issue to a stage when such a competing project actually transpired. Nothing of that sort transpired.

53. To deal with this, the Learned Arbitral Tribunal has conjured another inexplicable proposition. The Learned Arbitral Tribunal and the Section 34 Court have held that the MOM may have recorded a discussion in the context of the Rewas-Karanja bridge, but that does

not mean it is restricted to that project. If this was their line of reasoning, they ought to have pointed out what alternative factor, akin to the Rewas-Karanja bridge, took place that led to the shortfall in toll collection for the perceived gap to be compensated. Simply stating that the material variation in how Clause 3.4.19 is described in the “observations” contained in the MOM constitutes an amendment to how the parties understood Clause 3.4.19, even if accepted, cannot shrug off the need for a competing bridge-like or other similar causation for the shortfall.

54. *Finally*, the resolution returned in the concurrent findings is directly contrary to other provisions in the contract. The last sentence of Clause 3.4.19 provides that a failure to collect toll arising out of *any other reason* would not be compensated. The word “other” has to necessarily relate to some base reason for which the clause was drafted – that reason is the occurrence of a *force majeure* event. If, for any reason other than a *force majeure* event, there were to occur a failure to collect toll, the State is expressly protected from any obligation to compensate. The resolution of the dispute provided in the concurrent findings flies in the teeth of this provision.

55. That apart, even Clause 3.7.2 explicitly provides that the State would not compensate for any change in traffic pattern due to other linkages and other projects that may be undertaken. As a matter of

fact, no other project was undertaken in the vicinity. Even the MOM which discussed the potential means of dealing with one such other potential project contains the “observations” that Clause 3.7.2 would indeed apply. Yet, “*in true spirit*” the parties’ observation that “*such a major change*” was observed as being strange. The use of the word “such” necessarily benchmarks the need for the change to be of the order of magnitude as a competing bridge that would provide a better link between Mumbai and Alibag, seriously affecting the Project. Therefore, it was agreed that should there arise an impact if and when, and as and when, the Rewas-Karanja bridge was to get implemented, the parties would have a discussion. Indeed, no *such* project ever came up.

56. Since the Learned Arbitral Tribunal and the Section 34 Court have treated these “observations” as agreements, they ought to have noticed that the parties had observed that Clause 3.7.2 indeed applies. If the parties had agreed to delete that clause, even the “observations” would have said so, rather than stating that it indeed applies. Since no cannibalising project ever came up in the vicinity, there was no basis to infer that Clause 3.7.2 was altered or given a complete go-by.

57. Patwardhan’s defence of reading the “failure to collect” as a positive violation and breach of collection is disingenuous, to say the least. If a private concessionaire failed to collect tolls despite being

given the power to charge and collect toll, it could never be because of a breach by such concessionaire, willful or otherwise. It could only be because despite his best efforts at collecting tolls, he failed to collect – say, due to the use of force by local users against which he could not do much and the State could not enforce the rule of law. Therefore, to distinguish the “failure to collect” from a “shortfall in collection” does not lend itself to acceptance. These are merely two ways of expressing the same situation in a toll-based road contract. The core element is that if such a failure were due to a *force majeure* condition, *and* the impact were of the order agreed by the parties, there would be compensation. If the failure to collect were due to any reason other than *force majeure*, there would be no question of compensation. This is an express provision with which the resolution provided by the Learned Arbitral Tribunal and the Section 34 Court is in irreconcilable conflict.

Conclusion:

58. This facet, along with the analysis set out above, to my mind, emphasises the absence of a judicial approach in the course of dispute resolution, rendering the Impugned Award contrary to public policy of India. As reiterated above, the scope and standard of review adopted by me is a narrow one, bearing in mind that the scope is limited to applying the contours of the Section 34 jurisdiction in my capacity as

the Section 37 Court. That said, I must state that even if this had been an arbitral award challenged after October 23, 2015, to my mind, even the narrowed scope of challenge due to Explanation 1 would not be a hurdle in returning a finding that the Impugned Award is contrary to the fundamental public policy of India.

59. My disagreement with the Impugned Award is not based on finding errors in its reading of the Agreement. Interpretation of a contract is in the domain of the Learned Arbitral Tribunal, and it is entitled to make errors provided they are not so egregious or so manifestly perverse as to cut to the root of the matter. The very foundational and fundamental change to the very project design (a guaranteed revenue of 80% toll collection, as against a design of compensating for *force majeure* events that have material impact) being perceived by the Learned Arbitral Tribunal, the perversity indeed cuts to the root of the matter.

60. In my opinion, for the reasons set out above, the reasoning and the outcome in the Impugned Award are not in the realm of mere errors but in the realm of manifest perversity, in changing the very nature of the contract represented by the Agreement with an impossible view on the impact of the MOM on the Agreement. This is why, much against the grain of the standard approach to arbitral awards, in my opinion, despite the concurrent findings, this case

represents a fit case for interference under Section 34 read with Section 37 of the Act.

61. Without burdening this judgement further with extracts from well-known and oft-reiterated principles governing interference with arbitral awards, it would suffice to quote only from *Associate Builders*⁵, which in turn cites *Western Geco*⁶ as follows:

28. *In a recent judgment, ONGC Ltd. v. Western Geco International Ltd. , this Court added three other distinct and fundamental juristic principles which must be understood as a part and parcel of the fundamental policy of Indian law. The Court held : (SCC pp. 278-80, paras 35 & 38-40)*

“35. What then would constitute the ‘fundamental policy of Indian law’ is the question. The decision in *ONGC* does not elaborate that aspect. Even so, the expression must, in our opinion, include all such fundamental principles as providing a basis for administration of justice and enforcement of law in this country. Without meaning to exhaustively enumerate the purport of the expression ‘fundamental policy of Indian law’, we may refer to three distinct and fundamental juristic principles that must necessarily be understood as a part and parcel of the fundamental policy of Indian law. The first and foremost is the principle that in every determination whether by a court or other authority that affects the rights of a citizen or leads to any civil consequences, the court or authority concerned is bound to adopt what is in legal parlance called a ‘judicial approach’ in the matter. The duty to adopt a judicial approach arises from the very nature of the power exercised by the court or the authority does not have to be separately or additionally enjoined upon the fora concerned. What must be remembered is that the importance of a judicial approach in judicial and quasi-judicial determination lies in the

⁵ *Associate Builders v. DDA – (2015) 3 SCC 49*

⁶ *ONGC vs. Western Geco International Ltd. – (2014) 9 SCC 263*

fact that so long as the court, tribunal or the authority exercising powers that affect the rights or obligations of the parties before them shows fidelity to judicial approach, they cannot act in an arbitrary, capricious or whimsical manner. Judicial approach ensures that the authority acts bona fide and deals with the subject in a fair, reasonable and objective manner and that its decision is not actuated by any extraneous consideration. Judicial approach in that sense acts as a check against flaws and faults that can render the decision of a court, tribunal or authority vulnerable to challenge.

38. Equally important and indeed fundamental to the policy of Indian law is the principle that a court and so also a quasi-judicial authority must, while determining the rights and obligations of parties before it, do so in accordance with the principles of natural justice. Besides the celebrated audi alteram partem rule one of the facets of the principles of natural justice is that the court/authority deciding the matter must apply its mind to the attendant facts and circumstances while taking a view one way or the other. Non-application of mind is a defect that is fatal to any adjudication. Application of mind is best demonstrated by disclosure of the mind and disclosure of mind is best done by recording reasons in support of the decision which the court or authority is taking. The requirement that an adjudicatory authority must apply its mind is, in that view, so deeply embedded in our jurisprudence that it can be described as a fundamental policy of Indian law.

39. No less important is the principle now recognised as a salutary juristic fundamental in administrative law that a decision which is perverse or so irrational that no reasonable person would have arrived at the same will not be sustained in a court of law. Perversity or irrationality of decisions is tested on the touchstone of Wednesbury principle of reasonableness. Decisions that fall short of the standards of reasonableness are open to challenge in a court of law often in writ

jurisdiction of the superior courts but no less in statutory processes wherever the same are available.

40. It is neither necessary nor proper for us to attempt an exhaustive enumeration of what would constitute the fundamental policy of Indian law nor is it possible to place the expression in the straitjacket of a definition. What is important in the context of the case at hand is that if on facts proved before them the arbitrators fail to draw an inference which ought to have been drawn or if they have drawn an inference which is on the face of it, untenable resulting in miscarriage of justice, the adjudication even when made by an Arbitral Tribunal that enjoys considerable latitude and play at the joints in making awards will be open to challenge and may be cast away or modified depending upon whether the offending part is or is not severable from the rest.”

29. It is clear that the juristic principle of a “judicial approach” demands that a decision be fair, reasonable and objective. On the obverse side, anything arbitrary and whimsical would obviously not be a determination which would either be fair, reasonable or objective.

[Emphasis Supplied

62. I have consciously not gone into judgements that relate to awards challenged after October 23, 2015. Applying the principles extracted above, in my opinion, the Learned Arbitral Tribunal has not adopted a judicial approach. The multiple leaps of faith, as articulated above – *first*, treating observations that emerged and were recorded in the MOM as an agreement; *second*, to ignore what the MOM records as the parties having actually agreed upon; and *third*, treating such observations as having been amendments of such a magnitude and nature that the parties intended to change the foundational risk-reward

profile of the Project by transforming a conditional compensation clause into a minimum guaranteed revenue contract, whereby a *force majeure* provision ceased to have anything to do with *force majeure* – all together point to the absence of a judicial approach and to perversity leading to the fundamental policy of Indian law being violated.

63. Therefore, while it is not usual for two concurrent findings to be reversed by the Section 37 Court, in the facts of this case, for the reasons set out above, in my opinion, it is necessary to allow this Petition, and set aside the Impugned Award and the Impugned Judgement.

64. All actions required to be taken pursuant to this order shall be taken upon receipt of a downloaded copy as available on this Court's website.

[SOMASEKHAR SUNDARESAN, J.]