


HIGH COURT OF JUDICATURE FOR RAJASTHAN
BENCH AT JAIPUR

D.B. Civil Miscellaneous Appeal No. 5302/2024

1. The State of Rajasthan, through District Collector Pali.
2. The Public Works Department, Jaipur Through The Chief Engineer (Roads) Jaipur Circle.
3. The Superintending Engineer, Public Works Department, Circle-Pali, Pali.

----Appellants

Versus

Sanwariya Infrastructure Private Limited, 2 Gulab Bagh Road, Near Krishna Palace Hotel, Udaipur (Raj.) Through Its Director Vishnu Kumar Suhalka S/o Late Shri Vardichandji Suhalka R/o 32-35, Basant Vihar, Opp. Swarna Jayanti Opark, Goverdhan Vilas, Udaipur (Raj.).

----Respondent

For Appellant(s)	:	Mr. Sandeep Taneja, AAG with Mr. Kartikeya Sharma, Ms. Kinjal Surana, Mr. Aman Bohra & Mr. Aditya Sharma
For Respondent(s)	:	Mr. R.N. Mathur, Sr. Adv. assisted by Mr. Divyesh Maheshwari & Mr. Yuvraj Mittal

HON'BLE MR. JUSTICE AVNEESH JHINGAN
HON'BLE MR. JUSTICE BHUWAN GOYAL

Judgment reserved on : **16/05/2025**

Judgment pronounced on : **28/05/2025**

AVNEESH JHINGAN, J:

1. State of Rajasthan and Public Works Department are in appeal under Section 37 of the Arbitration and Conciliation Act, 1996 (for short 'the Act of 1996') against the order dated 09.10.2024 of the Commercial Court, Jaipur (for short 'the court') dismissing the objections filed u/s 34 of the Act of 1996.

2. The State Government issued tender notices on 08.08.2003 inviting bids for construction of Pali Bypass, Jodhpur-Sumerpur road on Build-Operate-Transfer (for brevity 'BOT') basis. The respondent was successful bidder and letter of acceptance (for short 'LOA') was issued on 19.02.2004. The concession period was of seventy months, out of which eighteen months were for construction. Concession agreement provided for handing over of project land within sixty days extendable to one hundred twenty days. In last week of July, 2004, the respondent handed over cheques for cost of land acquisition. On 18.10.2004 major portion of the land was handed over to the respondent. The construction work was started on 18.10.2004. The balance land was handed over on 23.03.2006. After completion of construction of Railway Over Bridge (for brevity 'ROB') on 29.04.2006, the respondent started collecting toll from 03.05.2006. The steering committee on 31.05.2006 extended concession period by three months and ten days. The steering committee in the meeting held on 24.07.2008 considered the grievance of the respondent that three months extension was not sufficient. The steering committee in meeting held on 04.08.2010 again recommended extension of concession period. The respondent was informed that concession period shall end on 17.08.2010. There was also dispute between the parties with regard to date of commencement of concession period. In the year 2010 the respondent filed an application u/s 9 of the Act of 1996. Vide order dated 13.08.2010, status quo was ordered to be maintained. The application was disposed of on 23.01.2012 with

direction that toll collected by respondent upto 22.01.2012 shall be subject to the decision in arbitration. The respondent gave notice dated 17.09.2010 for appointment of the arbitrator. The application u/s 11 of the Act of 1996 filed in the year 2010 was allowed on 18.02.2014. The arbitration proceedings culminated in award dated 23.06.2019. The arbitrator held that commencement date of work shall be 23.03.2006 and allowed the respondent to retain toll collected upto 22.01.2012. The losses claimed for non-closure of the Level Railway Crossing (for brevity 'LRC') were accepted. The respondent was found entitled to receive a sum of Rs.50,28,27,944/- and the amount included interest upto 31.03.2018. The payment was to be made within three months and on failure the respondent was entitled to interest @ 12% per annum. The counter claim of the appellant was dismissed. The objections filed by the appellant u/s 34 of the Act of 1996 were dismissed vide order dated 09.10.2024. Hence, the present appeal.

3. Learned counsel for the appellants argues that physical possession of major portion of the project site was handed over on 18.10.2004 and balance on 23.03.2006. The cause of action for the respondent for delay in handing over the physical possession of the project site accrued in the year 2006, the claim filed is time barred.

3.1 It is contended that construction work was started by respondent on 18.10.2004 and the balance land to be handed over was small portion, the arbitrator erred in determining the date of commencement as 23.03.2006. The argument is that the

period for collection of toll was extended beyond the prescribed period of fifty two months.

3.2 Learned counsel contended that neither there is any clause in the concession agreement for cash reimbursement of losses nor for awarding the compound interest.

3.3 It is argued that arbitrator could not have gone beyond the terms and conditions of concession agreement and the award is patently illegal. Reliance is placed upon decisions of the Supreme Court in ***State of Rajasthan Vs. Nav Bharat Construction Company*** reported in **(2006) 1 SCC 86**; ***Patel Engineering Ltd. Vs. North Eastern Electric Power Corporation Ltd.*** reported in **(2020) 7 SCC 167**.

3.4 The decision of the Supreme Court in ***Delhi Metro Rail Corporation Ltd. Vs. Delhi Airport Metro Express Pvt. Ltd.*** reported in **(2024) 6 SCC 357** is relied upon to contend that view of the arbitrator in awarding damages is not a plausible view and the award suffers from patent illegality.

3.5 The grievance raised is that inspite of extending concession period for collection of toll, the arbitrator awarded damages of Rs.14,12,54,682/- and interest thereupon of Rs.4,48,77,258/-, to be paid in cash. Thereafter, compound interest was awarded and the award is patently illegal.

3.6 It is argued that on failure of the respondent to prove that the appellant was obligated to permanently close the LRC, the claim for loss incurred was allowed on presumption that appellant failed to do the needful. The quantification of loss is challenged for being without basis.

3.7 Argument is that the work was to be started from the date of commencement and starting of work by the respondent on the day of handing over of major portion of the land, shall not entitle it to collect toll before eighteen months from date of commencement. The arbitrator erred in awarding the interest on basis that toll could have been collected from 18.10.2005 and holding respondent to be entitled to interest on interest compounded quarterly.

4. Per contra the objection of limitation is refuted by contending that the matter was being consistently agitated. The steering committee on 31.05.2006 considering that delay was on part of the appellant, extended the concession period for three months and ten days.

4.1 The definition of 'commencement date' does not stipulate partial handing over of physical possession of the site. The argument is that starting of construction by respondent shall not change the commencement date.

4.2 Learned senior counsel objects that the contention of awarding damages and interest thereupon is not as per terms of concession agreement was neither raised before the arbitrator nor in objection u/s 34 of the Act of 1996.

4.3 To buttress the argument that damages have been rightly awarded, reliance is placed upon decision of the Supreme Court in ***Construction and Design Services vs. Delhi Development Authority*** reported in (2015) 14 SCC 263 and contended that liquidated damages for breach of contract can be awarded.

4.4 It is argued that non-closure of LRC was not pressed and was admitted before arbitrator. It canvased that the scope of interference u/s 37 of the Act of 1996 is limited moreso, in case of concurrent finding.

4.5 Reliance is placed upon decisions of the Supreme Court in ***Pam Developments Private Limited vs. State of West Bengal And Anr.*** reported in **(2024) 10 SCC 715** and ***Hyder Consulting (UK) Limited vs. Governor, State of Orissa*** reported in **(2015) 2 SCC 189** to support the contention that interest on interest can be awarded.

5. The physical possession of site was partially handed over to the respondent on 18.10.2004, with a delay. The possession of rest of site was handed over on 23.03.2006. The concession period was for seventy months, eighteen months for construction and fifty two months for collection of toll.

6. The cause of action to file the claim arose when the appellant communicated that concession period shall end on 17.08.2010 i.e. seventy months from the date of partial hand over of possession of site and not from the date of handing over of entire physical possession of site.

7 On receipt of communication that in the meeting of the empowered committee held on 27.08.2010, it is decided that concession period was ending on 17.08.2010, the respondent filed an application u/s 9 of the Act of 1996, which was disposed of on 23.01.2012.

8. On 17.09.2010, notice for resolving dispute through arbitration was served on the appellant. The application u/s 11 of

the Act of 1996 for appointment of arbitrator was filed in the year 2010.

9. As per section 21 of the Act of 1996, the arbitral proceedings commenced from the date the respondent received request for resolution of dispute through arbitration.

10. Another aspect to be considered is that the respondent was raising grievances before the appellant and these were being considered. The steering committee in May, 2006 extended concession period for three months and ten days. On a representation made by the respondent, the matter was considered by the steering committee on 24.07.2008 and it was decided that the matter falls within the purview of higher authorities. In a meeting held on 04.08.2010, the steering committee recommended for extension of concession period due to failure of appellants to timely hand over the entire project.

11. The contention of the appellants that cause of action arose in March, 2006 and the claim is time barred, has no merit.

12. For dealing with the issue as to when concession period shall commence, clause 2.2 'concession period' is relevant :-

"2.2 Concession Period

The concession hereby granted is for a period of 70 (seventy) months commencing from the Commencement Date (the Concession Period) during which the Concessionaire is authorized to implement the Project and to operate Project Facility which is liable to change with extension/early termination in accordance with the provisions hereof."

12.1 The language of clause 2.2 is unambiguous that concession was granted for period of seventy months from the commencement date and liable to be extended or terminated early.

12.2 Commencement date is defined as:

“‘Commencement date’ means the date on which the physical possession of the Project site is delivered by GOR to the concessionaire, which shall not be later than 30, 60 & 90 days from the issue of LOA to the concessionaire for the project costing up to Rs. 20 crores, more than Rs. 20 & up to Rs 50 crores and more than Rs. 50 crores respectively, whichever is later, provided that this can be increased by 100% by GOR depending upon circumstances.”

Commencement date is when physical possession of the project is delivered to concessionaire i.e. respondent.

12.3 ‘Project Site’ is defined as:

“‘Project Site’ means the real estate particulars whereof are set out in Schedule ‘B’ on which the Project is to be implemented and the Project Facility is to be provided in accordance with this Agreement.”

The definition of project site defines real estate depicted in Schedule ‘B’ on which implementation of project is to be done and project facility to be provided.

13. Acceptance of the argument of the counsel for the appellants that major portion of the land was handed over on 18.10.2004 and construction was started on the same day would amount to

adding words to the definitions quoted above and this is not permissible.

14. Starting of work by the respondent on partial receipt of physical possession of site shall not change interpretation of period of concession and commencement date, as defined in concession agreement. The view taken by the arbitrator is plausible and is in consonance with the terms of concession agreement.

15. Albeit, minutes of pre-bid meeting are not part of the concession agreement but it cannot be lost sight of that the issue of commencement date was raised by bidders and was addressed that concession period shall be reckoned from date of handing over of entire land to the concessionaire. In other words, the appellants had same interpretation of the clauses as arrived at by the arbitrator.

16. The respondent claimed for losses suffered on account of commissioning of mega highway and non-closure of LRC. The claim for losses suffered due to commissioning of mega highway was rejected. With regard to non-closure of LRC, it was held that the respondent had incurred losses due to non-closure. It was presumed that the agreement for construction of ROB must have taken place between the Government of Rajasthan and the Railways. A consolidated figure of loss incurred by commissioning of mega highway and non-closure of LRC was specified. The arbitrator apportioned 40% of the loss figure to non-closure of LRC. The claim to tune of Rs.14,12,54,682/- was allowed and interest of Rs.4,48,77,258/- was awarded.

17. The contention of the counsel for the appellants that there is no clause in concession agreement for awarding damages has merits.

18. The concession agreement is of BOT. The respondent had to construct the road, operate for collection of toll and thereafter, it was to be transferred. No clause in the concession agreement is shown under which for non compliance of obligation as per concession agreement, compensation in cash can be claimed.

19. Another aspect is that in BOT contract the consideration is by collection of toll. Taking the case of the respondent at the highest, in the eventualities of non performance of obligations mentioned in the concession agreement at-most, the concession period could have been extended and which was actually extended.

20. Another angle is that concession period consisted of seventy months, out of which fifty two months were for collection of toll. With extension of concession period the respondent collected toll for more than sixty five months. To say it differently, the respondent was duly compensated with extension of toll collection period.

21. An award passed beyond terms and conditions agreed between the parties comes within the teeth of grounds available u/s 37 of the Act of 1996 for interference.

22. The Supreme Court in case of **State of Rajasthan vs. Nav Bharat Construction Co.** (supra) held that the award cannot be passed beyond terms of the contract. Relevant para is quoted:-

“23. There can be no dispute to the well established principle set out in these cases. However these cases

do not detract from the law laid down in Bharat Coking Coal Ltd's case or Continental Construction Co. Ltd's case (supra). An arbitrator cannot go beyond the terms of the contract between the parties. In the guise of doing justice he cannot award contrary to the terms of the contract. If he does so he will have misconducted himself. Of course if an interpretation of a term of the contract is involved then the interpretation of the arbitrator must be accepted unless it is one which could not be reasonably possible. However where the term of the contract is clear and unambiguous the arbitrator cannot ignore it."

22.1. The Supreme Court in **DMRC Ltd. v. Delhi Airport Metro Express** (supra) held:-

"34. The contours of the power of the competent court to set aside an award under Section 34 has been explored in several decisions of this Court. In addition to the grounds on which an arbitral award can be assailed laid down in Section 34(2), there is another ground for challenge against domestic awards, such as the award in the present case. Under Section 34(2A) of the Arbitration Act, a domestic award may be set aside if the Court finds that it is vitiated by "patent illegality" appearing on the face of the award.

35. In *Associate Builders v. DDA*, (2015) 3 SCC 49, a two-Judge Bench of this Court held that although the interpretation of a contract is exclusively within the domain of the arbitrator, construction of a contract in a manner that no fair-minded or reasonable person

would take, is impermissible. A patent illegality arises where the arbitrator adopts a view which is not a possible view. A view can be regarded as not even a possible view where no reasonable body of persons could possibly have taken it. This Court held with reference to Sections 28(1)(a) and 28(3), that the arbitrator must take into account the terms of the contract and the usages of trade applicable to the transaction. The decision or award should not be perverse or irrational. An award is rendered perverse or irrational where the findings are:

- (i) based on no evidence;
- (ii) based on irrelevant material; or
- (iii) ignores vital evidence.

36. Patent illegality may also arise where the award is in breach of the provisions of the arbitration statute, as when for instance the award contains no reasons at all, so as to be described as unreasoned.

37. A fundamental breach of the principles of natural justice will result in a patent illegality, where for instance the arbitrator has let in evidence behind the back of a party. In the above decision, this Court in *Associate Builders v. DDA* observed:

“31. The third juristic principle is that a decision which is perverse or so irrational that no reasonable person would have arrived at the same is important and requires some degree of explanation. It is settled law that where:

- (i) a finding is based on no evidence, or
- (ii) an Arbitral Tribunal takes into account something irrelevant to the decision which it arrives at; or
- (iii) ignores vital evidence in arriving at its decision, such decision would necessarily be perverse.

40. In essence, the ground of patent illegality is available for setting aside a domestic award, if the decision of the arbitrator is found to be perverse, or so irrational that no reasonable person would have arrived at it; or the construction of the contract is such that no fair or reasonable person would take; or, that the view of the arbitrator is not even a possible view. A 'finding' based on no evidence at all or an award which ignores vital evidence in arriving at its decision would be perverse and liable to be set aside under the head of 'patent illegality'. An award without reasons would suffer from patent illegality. The arbitrator commits a patent illegality by deciding a matter not within his jurisdiction or violating a fundamental principle of natural justice.

42.1. ...

42.2. (b) A contravention of the Arbitration Act itself would be regarded as a patent illegality — for example if an arbitrator gives no reasons for an award in contravention of Section 31(3) of the Act, such award will be liable to be set aside.

47. Interference with an arbitral award cannot frustrate the 'commercial wisdom behind opting for alternate dispute resolution', merely because an alternate view exists. However, the interpretation of a contract cannot be unreasonable, such that no person of ordinary prudence would take it. The contract, which is a culmination of the parties' agency, should be given full effect. If the interpretation of the terms of the contract as adopted by the tribunal was not even a possible view, the award is perverse."

22.2 The Supreme Court in ***Patel Engineering Ltd. Vs. North Eastern Electric Power Corporation Ltd.*** (supra) held:

“22. The present case arises out of a domestic award between two Indian entities. The ground of patent illegality is a ground available under the statute for setting aside a domestic award, if the decision of the arbitrator is found to be perverse, or, so irrational that no reasonable person would have arrived at the same; or, the construction of the contract is such that no fair or reasonable person would take; or, that the view of the arbitrator is not even a possible view.

27. In our view, while dealing with the appeal Under Section 37 of the Act, the High Court has considered the matter at length, and held that while interpreting the terms of the contract, no reasonable person could have arrived at a different conclusion and that the awards passed by the arbitrator suffer from the vice of irrationality and perversity.”

23. The contention of the counsel for the respondent that plea of claim being beyond terms and conditions of concession agreement is raised for the first time, is noted to be rejected. This plea was raised before the arbitrator as well as in proceedings u/s 34 of the Act of 1996 and was noted by the court.

24. The submission that there was admission before the arbitrator that it was mandatory for the appellant to close LRC, even if accepted for sake of argument does not enhance the cause of the respondent. We have already held that the claim for compensation of losses suffered due to non-closure of LRC was against the terms and conditions of the concession agreement.

25. The amount awarded for losses incurred for delay in handing over the physical possession of the site having been set-aside, the interest on this amount being consequential meets the same fate.

26. The interest was claimed by respondent on the ground that the collection of toll was delayed due to non handing over of the physical possession of project site within prescribed time. The arbitrator held that LOA was issued on 19.02.2004, accounting the period for handing over the site and by adding eighteen months of construction period, toll collection could have started from 18.10.2005 but it started from 03.05.2006. The respondent was held entitled to interest for the period 18.10.2005 to 03.05.2006 amounting to Rs.36,29,526/-. Further on this amount interest @ 15% compounded quarterly for the period from 03.05.2006 to December, 2009 was awarded to the tune of Rs.25,94,736/-.

27. On the total amount awarded Rs.19,23,56,202/- (that included loss on account of non-closure of LRC, interest thereon and two interest mentioned in the above para), interest @15% compounded quarterly from 23.01.2012 (last date till the toll was collected) to the date of filing of the claim was allowed totaling to Rs.30,85,96,742/-.

28. Admittedly the physical possession of the site was not handed over within the period prescribed in agreement but in absence of terms and condition in concession agreement for monetary compensation for delay in handing over site, the arbitrator erred in allowing claim for loss.

29. Article 11 in the concession agreement deals with 'Force Majeure' which includes non political event, indirect political event and political event but the claim was not made by respondent invoking Article 11.

30. The event of defaults and termination of agreement is dealt by Article 12 of the concession agreement. Failure of concessionaire and the Government of Rajasthan to comply with the terms and to be considered as default have been detailed therein. Both the parties had right to terminate the agreement in an event of default, the respondent opted not to do so.

31. The claim for losses and interest for delay in start of collection of toll have been awarded beyond the terms and conditions and the award suffers from vice of patent illegality and are quashed, consequently the entitlement of respondent to get interest thereon does not survive.

32. In all fairness, we deal with the citations relied upon by learned senior counsel for the respondent.

33. The decision in ***Construction and Design Services vs. Delhi Development Authority*** (supra) relied upon to buttress the argument that for breach of contract liquidated damages can be awarded, is not applicable in the facts of the present case. In that case, there was clause in the agreement stipulating maximum percentage of compensation that can be awarded. The issue being considered was that in absence of evidence of actual loss suffered, to what extent compensation awarded can be considered liquidated damages and in nature of penalty. In the case in hand, there is no clause stipulating for awarding monetary compensation or fixing maximum limit for the compensation to be awarded.

34. Reliance is placed upon ***Hyder Consulting (UK) Limited vs. Governor, State of Orissa*** (supra) and ***Pam Developments Private Limited vs. State of West Bengal And Anr.*** (supra) to

contend that interest on interest can be awarded. This averment need not be gone into after the sum awarded is quashed in the case in hand. Suffice to say none of the authorities cited support the issue that compound interest can be given in absence of terms in the agreement.

35. Having accepted the argument of the appellants, challenging the award of compensation for losses incurred, the argument that figure of losses claimed had no basis is rendered academic.

36. The Supreme Court in case of ***Gayatri Balasamy vs. M/s. ISG Novasoft Technologies Limited*** reported in **2025 INSC 605** dealing with issue as to whether u/s 34 or 37 of Act of 1996 arbitral award can be modified, held:

“35. However, we must add a caveat that not all awards can be severed or segregated into separate silos. Partial setting aside may not be feasible when the “valid” and “invalid” portions are legally and practically inseparable. In simpler words, the “valid” and “invalid” portions must not be inter-dependent or intrinsically intertwined. If they are, the award cannot be set aside in part.

36. The Privy Council, in *Pratap Chamaria v. Durga Prasad Chamaria*, addressed this issue with the following pertinent observations:

“...If, however, the pronouncement of the arbitrators is such that matters beyond the scope of the suit are inextricably bound up with matters falling within the purview of the litigation, in that case, the court would be unable to give effect to the award because of the difficulty that it cannot determine to what extent the

decision of the subject-matter of the litigation has been affected and coloured by the decision of the arbitrators in regard to matters beyond the ambit of the suit....”

Thus, the power of partial setting aside should be exercised only when the valid and invalid parts of the award can be clearly segregated—particularly in relation to liability and quantum and without any correlation between valid and invalid parts.

85. Accordingly, the questions of law referred to by Gayatri Balasamy (supra) are answered by stating that the Court has a limited power under Sections 34 and 37 of the 1996 Act to modify the arbitral award. This limited power may be exercised under the following circumstances:

I. when the award is severable, by severing the “invalid” portion from the “valid” portion of the award, as held in Part II of our Analysis.

II. by correcting any clerical, computational or typographical errors which appear erroneous on the face of the record, as held in Part IV and V of our Analysis;

III. post award interest may be modified in some circumstances as held in Part IX of our Analysis; and/or

IV. Article 142 of the Constitution applies, albeit, the power must be exercised with great care and caution and within the limits of the constitutional power as outlined in Part XII of our Analysis.”

37. It is held that the court u/s 34 of the Act of 1996 and in appeal u/s 37 has power to sever part of award in cases meeting out the parameters set out in the judgment.

38. In the case in hand the claims can be divided into two heads. First is with regard to collection of toll upto 22.01.2012 and the retention of the amount collected by the respondent. Second part is awarding of damages for loss incurred due to non-closure of LRC and the interest for delay in start of collection of toll & further interest thereon. Both claims are severable and are not inter connected. The severability of both claims is legally and practically possible.

39. In view of above discussion:

- (i) the arbitral proceedings are held to be within limitation;
- (ii) the award of the claim of collection of toll tax up to 22.01.2012 and the amount to be retained by respondent is upheld;
- (iii) awarding of compensation for loss incurred due to non-closure of LRC and interest granted for delay in start of collection of the toll are set aside being against the terms and conditions of the concession agreement; and
- (iv) the interest awarded is quashed.

40. The appeal is partly allowed.

(BHUWAN GOYAL),J

(AVNEESH JHINGAN),J

Simple Kumawat/reserve

Whether Reportable: Yes