

(2017) 01 DEL CK 0142
In the Delhi High Court
Case No : O.M.P. (COMM.) 201 of 2016

The National Highways Authority of India	APPELLANT
Vs	
M/s. Jivanlal Joitaram Patel	RESPONDENT

Date of Decision : 17-01-2017

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 31(3), Section 34

Citation : (2017) 2 ADDelhi 45 : (2017) 1 ArbiLR 348

Hon'ble Judges : S. Muralidhar, J.

Bench : Single Bench

Advocate : Mr. Harin P. Raval, Senior Advocate with Mr. Ritin Rai, Mr. Sidhartha Jha and Mr. Aabhas Kshetarpal, Advocates, for the Respondent; Mr. Arun Kumar Varma, Senior Advocate with Mr. Ashish Joshi, Mr. Sumit Gupta and Mr. Rohit Jain, Advocates, for the Petitioner

Final Decision : Disposed Off

Judgement

S. Muralidhar, J. - The National Highways Authority of India ("NHA") has filed this petition under Section 34 of the Arbitration & Conciliation Act, 1996 ("Act") challenging an Award dated 24th March, 2011 passed by the Arbitral Tribunal ("AT").

2. The disputes between the parties arose out of an Agreement dated 17th November, 2004 whereby the work of "Short-term Improvement and Routine Maintenance of Samakhiali ? Gandhidham Section (from KM 306 to 362.160) of NH-8A and Toll Collection at Samakhiali Toll Plaza" for 24 months was awarded by NHA to the Respondent, M/s. Jivanlal Joitaram Patel ("JJP").

3. At the outset, it has been clarified by Mr. Arun Kumar Varma, learned Senior counsel appearing for NHA that the objections in this petition are confined to the Award in relation to NHA's claim No. 1 and JJP's counter-claim Nos. 2, 5, 7 to 10 and 15.

The background facts

4. The contract price was Rs. 7,98,43,090 and the date of commencement of contract was 1st December, 2004. The scheduled date of completion was 30th November, 2006. The "Scope of Works" comprised of six types of works including collection of toll fee at Samakhiali Toll Plaza.

5. NHAI states that it got decoy checks conducted at the Samakhiali Toll Plaza between February and September, 2005. It is stated that the decoy agency reported a big pilferage in the toll fee collection. This led to NHAI issuing to JJP a show cause notice (SCN) dated 7th August, 2006 seeking to withdraw the tolling operation. After JJP submitted its reply on 14th August, 2006 and 12th September, 2006, NHAI withdrew the work of toll collection from JJP on 21st September, 2006 and awarded it to another agency viz., M/s. Bimla Enterprises (BE) on 30th September, 2006 for tolling operation at Samakhiali Toll Plaza for a period of six months. It is stated that on 28th December, 2006, JJP submitted the last Running Account Bill 24 for November, 2006.

6. The Project Director of NHAI assessed the loss for NHAI at Rs. 10,97,63,406 on account of pilferage in toll fees. On 2nd June, 2007, NHAI issued a demand notice to JJP for recovery of the aforementioned sum. In turn, JJP on 9th June, 2007 sent a notice demanding Rs. 2,84,27,729 against the 23rd and 24th interim bills and final bill.

7. On 18th July, 2007, NHAI invoked bank guarantee (BG) dated 20th October, 2004 furnished by JJP as performance security. The other BGs both dated 10th January, 2005 furnished by JJP as performance security under another contract for Abu Road ? Deesa Section of NH-14 in the sum of Rs. 20,25,700 and Rs. 50,07,500 were also encashed by NHAI.

8. Both NHAI and JJP issued notices on 21st August, 2007 invoking the arbitration clause. A three-member AT was constituted. NHAI submitted its claim statement and raised three claims mainly for damages for pilferage/short deposit of toll fee by JJP. Apart from submitting its defence statement, JJP raised 16 counter-claims essentially towards payment of outstanding bills and premature withdrawal of tolling operation. Findings of the AT

9. The AT framed 28 issues. Both parties adduced oral and documentary evidence. Col. Khushwant Singh, Project Director was examined by NHAI as CW-1. JJP examined Mr. Satish Patel, Project Director of JJP (as RW-1) and Mr. Vrajesh Shah, Accountant, JJP (as RW-2).

10. By an unanimous Award dated 24th March, 2011, the AT decided the claims and counter-claims as under:

Nature of Claims (Rs.)	Claims (Rs.)	Allowed by AT
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Claim No. 1: Damages towards pilferage in toll collection	10,97,63,406	19,30,502
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Claim No. 2: Past interest @ 18% on claim No. 1	2,79,89,669	2,45,623
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Claim No. 3: Cost of Arbitration To be quantified Nil

Summary of Counter-Claims (CC) OF JJP

CC No. 1: Payment of Running Bill-23 61,19,315 61,19,315

CC No. 2: Payment of Running Bill-24 2,46,35,530 2,46,35,530

CC No. 3: Price escalation for delayed indent for laying bituminous concrete work 3,04,00,866 Rejected

CC No. 4: Damages arising from illegal withdrawal of tolling work 8,40,000 Rejected

CC No. 5: Payment of Final Bill 24,87,770 24,87,770

CC No. 6: Illegal withholding of retention money 31,45,081 31,45,081

CC No. 7: BG of Rs. 79,85,000 illegally encashed plus bank charge of Rs. 8,904 79,93,904 79,93,904

CC No. 8: Cost incurred in furnishing BG from Bank of Baroda 76190 76190

CC No. 9: Cost incurred in extending the BG from ICICI Bank 2,32,581 2,32,581

CC No. 10: Cost incurred in furnishing BGs from ICICI Bank in relation to Abu Road ? Deesa Contract 1,87,842 1,87,842

CC No. 11: TDS not remitted 51300 Rejected

CC No. 12: Legal fees and expenses incurred to restrain illegal invocation of Bank Guarantees To be assessed Rejected

CC No. 13: Loss of Business Opportunities and loss of profit 50,00,000

Rejected

CC No. 14: Loss of Goodwill 50,00,000 Rejected

CC No. 15: Declaration for prohibiting NHAH from withholding any amount due to JJP and from taking any action against JJP under any other contract -- Allowed

CC No. 16: Cost of Arbitration proceedings To be assessed Nil

Total 8,61,70,379 4,49,29,513

Interest for delayed payment of RA Bills and Final Bill 39,54,043

Total for counter-claims 4,88,32,256

11. As regards Claim No. 1, the case of NHAH was that M/s. Group-4 Securitas, a private detective agency was engaged in July, 2004 for conducting surprise checks at 25 toll plazas including Samakhiali Toll Plaza. These surprise checks were conducted during 13th February, 2005 and 23rd February, 2005 and again between 31st August, 2005 and 9th September, 2005. The agency submitted

reports, Report-1 and Report-2, in May, 2005 and February, 2006 respectively. Both reports stated that there existed big pilferage and various discrepancies in respect of toll fee collection. Based on the said report, NHAI issued an SCN dated 7th August, 2006. In its reply dated 14th August, 2006, JJP inter alia sought some more time to furnish a reply since it was necessary to identify the defaulting personnel from incumbency charts at toll gates mentioned in the observation report and obtain information from the defaulting personnel. It is further pointed out inter alia as under:

"4. We agree that incidences of irregularity as pointed by the Observation Team might have occurred. However, to avert and to avoid, such incidences, herein we submit that we as our contractual obligation in the interest of NHAI, have deployed our own vigilance team to detect any such wrong incidences.

5. As is known to you, toll collection being a cash transaction, spanning over a minute for every vehicles, it s hardly possible for us, the partners of the company, to scrupulously follow and maintain vigil on every personnel employed at Toll Booth round the clock.

6. However, to avoid and avert Incidence of such type, to which it is likely that toll booth operators may get induced to have short term so called no risk money when they get experience of the behaviour of vehicle drivers and probable illegal advantage they can earn in collusion with vehicle operators, since beginning, we have implemented a practise of discontinuing toll booth operators from their work after a period of about one month.

In spite of vigil and preventive action as above being implemented by us since beginning it might as observed by the observation team might have committed by our toll booth operators. But you will agree that for the act of such personnel employed on petty services, we cannot be punished out-rightly as such action will be totally unjust. We, therefore, though provided under contract, urge you to provide us opportunity to improve our working by differing penal action of withdrawing Tolling Item from our contract and oblige.

Herein we take this opportunity to assure you of our sincere efforts in averting such incidence in future and of our best services to NHAI"

12. This was followed by another letter dated 12th September, 2006 written by JJP to NHAI indicating the corrective action taken by it. The letter stated inter alia as under:

"1. You will agree that for we, partners of the Company, it is impossible to supervise toll collection round the clock during contract period. As such we have to depend upon employed persons for the work and trust their honesty and integrity to us and in turn to the assigned job and NHAI. When we came across incidence of pilferage in toll collection by our employees, to have vigil on them we have been taken action as under:

a. Changing the staff, their duties revolving their tollbooths and even removing

the persons of doubtful integrity very immediately.

b. We have made a practise to visit the toll plaza at odd hours of the day as has been done by the Investigation Team of NHAI since then.

c. We were dismissing the persons of doubtful integrity, if observed so, immediately to set example and to create atmosphere of strict discipline, threat and integrity among the remaining personnel.

d. We have deployed more supervisory staff to enforce discipline and integrity in collection.

e. We have employed supervisory staff also for vigilance checking to identify pilferage, if any, and persons involved therein.

f. We partners have increased our visits to Toll Plaza to improve on collections and enforcement of integrity.

g. We have erected close circuit cameras and are maintaining records of the activities at all Toll Plaza for subsequent checking. We have to inform you that in view of above stringent measures being practised by us toll collection has improved as can be seen from the records. We further assure you to be more vigilant in future to guard the interest of NHAI."

13. Before the AT, the case of NHAI was that the above two letters constituted an unambiguous admission of the pilferage by the employees of JJP. NHAI maintained that the Engineer had every justification for seeking to recover from JJP the loss dues against the bills. The following two issues framed by the AT on this aspect as under:

"Issue No. 1: Whether the Claimant proves pilferage or shortfall in toll collection by the Respondent? If so, to what extent?

Issue No. 2: Whether the Claimant proves the contents, authenticity and accuracy of the reports at Annexure C-4 and Annexure C-5 of the Statement of Claim? (SOC) [Claim No.1]"

14. The findings of the AT on the above issues were as under:

i. Apart from the two decoy reports submitted by M/s. Group-4 Securitas, there was no direct or indirect evidence of pilferage on record. However, the possibility of shortfall on account of dishonest conduct of some of the employees of JJP could not be ruled out as admitted by JJP in its reply to NHAI.

ii. The routine checks carried out by the Project Director of NHAI, the consultants, Epicon Consultant Pvt. Ltd., and the Chartered Accountant ("CA"), Patel & Patel Associates, did not indicate any discrepancy.

iii. The details of vehicle types and tickets furnished by JJP were incomplete. Except for producing 46 computerized box files, no other records were maintained by them. The AT, accordingly, observed that "... this is serious

negligence of both the parties in not maintaining the records of important activity of Tolling operation in terms of the contract."

iv. There was no clarification as to which of the reports of M/s. Group-4 Securitas was the interim and which was the draft.

v. The casual approach of NHAH that the note for initiating action against JJP was put up after about one and a half months after getting the second decoy report and after about ten months after the first report. Even thereafter, the approval by the Chairman for initiating action took about four months.

vi. The only witness of NHAH viz., Col. K. Singh was unable to prove authenticity of the decoy reports. Since the said witness took over as the Project Director only in July, 2006, he was in no position to give direct evidence as to the contents? authenticity or accuracy of the said report.

vii. The reports on their face appeared to be unreliable and did not inspire enough confidence. The persons, who prepared the reports were not produced for cross-examination. JJP had demonstrated major discrepancies in the decoy reports. Accordingly, Issue No.2 was decided against NHAH and in favour of JJP.

viii. As regards Issue No. 1, it was held that since the decoy report had not been proved, NHAH was unable to prove any pilferage by JJP. The AT, however, concluded "on the basis of the material on record that the possibility of shortfall in toll collection cannot be ruled out." What weighed with the AT in this regard was that after the issuance of the SCN, JJP showed increase in toll collection although such increase could be for various reasons including JJP having strengthened its system of checks and balances and having improved its surveillance on staff.

15. As regards the claim of NHAH for damages on account of pilferage/shortfall in toll collection, issue No. 3 was framed by the AT. Here, the subsequent agreement entered into by NHAH with BE and the figure of toll collection by the said agency for the month of December, 2006 became relevant and were taken into account by the AT. It was noticed that the monthly increase in toll collection by JJP for the corresponding period in 2005 was far less than the collections made by BE for the same period in 2006. The AT found that the factual position that was emanating from the perusal of the two decoy reports was that the amount of pilferage/shortfall collection worked out at 33.75% of the total collection deposited by JJP with NHAH. Further, when compared with the collection made by BE, the average monthly increase in three months worked out at 17.85%. Therefore, the plea that the shortfall could be because of rainy season was viewed by the AT only a pretext to negate an unduly 40.43% of monthly increase from September, 2006 to October, 2006.

16. The AT referred to a letter dated 29th March, 2007 written by the Project Director (PD), Palanpur to the General Manager (GM), NHAH setting out the manner of calculation of damages. The said calculation was approved by the

letter dated 7th May, 2007 and on that basis a notice for recovery was issued to JJP on 2nd June, 2007. The two main factors on the basis of which NHAI calculated damages was ? (i) Average collection during December, 2006 by BE (ii) the average yearly increase in traffic @ 7.5% in terms of clause 3.3.2 of "IRC-37:2001 ? Guidelines for the design of flexible pavements." The AT noted that in the letter dated 29th March, 2007 of the PD, Palanpur, a reference was made to a letter dated 28th November, 2006 wherein details of an earlier calculation of shortfall had been submitted for approval of the competent authority. However, the said letter was not actually enclosed with the letter dated 29th March, 2007. Accordingly, the AT drew an adverse inference that it was deliberately withheld by NHAI. The AT also observed that it is only pursuant to the directions and insistence of the AT that the said letter was filed by NHAI on 4th May, 2010. The said letter quantified the recovery amount at either Rs. 18,33,942 or Rs. 19,30,502.

17. The AT then proceeded to discuss the data submitted to it by NHAI as under: "1) Monthly vehicle passing and AVCC compliance report of Samakhiali Toll Plaza. (Ref: CD7, Page 1340 to 1352), 2) Month wise traffic data of Samakhiali Toll Plaza for Nov. 2005 to Dec. 2009. (CD-I3, Pg. 1414) 3) Agency wise by toll collection from 01/06/2003 to 30/09/2006. (CD-13, Pg. 1410 to 1413"

18. The AT undertook a detailed analysis of the said data and concluded that it showed why the collection of BE may have been higher than that of JJP. The fifty-fold increase in the EME category of vehicles was indicative of a large scale industrial project further along the highway (such as development of a port or a Special Economic Zone). There was also a corresponding but less proportionate increase in other vehicle categories. However, since NHAI had adequate data in its possession, there was no occasion for it to take recourse to IRC-37 since the said guideline offered a 7.5% increase only where adequate data was not available.

19. The AT then concluded that the methodology adopted by NHAI to quantify damages was arbitrary. It was based on decoy reports, which were unreliable. There was no basis for calculating damages based on IRC publication. Additionally, the retrogression methodology employed was "extremely speculative" and "not a methodology known to law to compute damages, which must be actual damages". The AT, therefore, was unable to agree with the revised calculation as worked out by the PD, PIU, Palanpur.

20. In para 232 of the Award, the AT set out the calculations worked out by the PD, PIU, Palanpur "for LCV vehicles only" for the period between February, 2005 to September, 2006 and came to the conclusion that the data indicated that the Petitioner had suffered damages on account of the shortfall on the total collection by the JJP. The three columns in the said table set out by the AT read "Months" (column 1), "As per Agency" (column 2) and "As per Special Team Decoy report-PD, PLN's letter Dated 27.11.2016" (column 3). The total sum shown was Rs. 19,30,502.40. On the basis of the above conclusion, the AT was

"persuaded to accept the figure of shortfall as contained in the letter of PD, PIU, NHAI, Palanpur, dated 27th November, 2006, which is Rs. 19,30,502.40."

21. The next issue i.e., Issue No. 3A was "whether the claimant proves that the Respondent breached any of the provisions of the contract." The AT held that NHAI had been able to establish that "JJP did not maintain the records of tolling operations and thereby breached the basic provisions of contract."

22. Issue No. 4 was "whether the Claimant was justified in partially terminating/ withdrawing the work of toll collection in terms of the Agreement?" and Issue No. 5 was "if issue No. 4 is answered in the negative, what is its effect?" On issue No. 4, the AT came to the conclusion that the item of tolling operation was severable and divisible from the rest of the four items of work entrusted to JJP and that it was open to NHAI to continue with the other works even while withdrawing the tolling work. The AT concluded that the withdrawal of the tolling work was absolutely authorised, lawful and justified. Correspondingly, Issue No. 5 did not have to be decided.

23. The AT also rejected counter-claim No. 4 of JJP, which was a claim for damages in the sum of Rs. 8.4 lakh as a result of the withdrawal of the work of toll collection.

Submissions of counsel for NHAI

24. Mr. Arun Kumar Varma, learned Senior Advocate appearing for NHAI submitted that there were inherent internal contradictions in the findings of the AT and this amounted to the lack of reason. According to him, on one hand, the decoy reports were rejected as not having been proved and in the same breath the AT concluded "on the basis of material on record that the possibility of shortfall in toll collection cannot be ruled out."

25. Mr. Varma submitted that JJP never disputed the existence or authenticity of decoy reports. Therefore, the finding that "the claimant has not proved any pilferage by the Respondent" was a contradictory finding. He pointed that Issue No. 1 should have been first decided affirmatively in favour of NHAI by holding that NHAI proved pilferage by JJP and only thereafter should Issue No. 2 have been decided. He submitted that the Indian Evidence Act, 1872 is not strictly not applicable to arbitration proceedings. He relied upon the decisions in *Satyanarayana Brothers (P.) Ltd. v. Tamil Nadu Water Supply & Drainage Board* (2004) 5 SCC 314 and *R.K. Bhandari v. Satish Jassal* 2008 (2) Arb.LR 513 (Del).

26. Mr. Varma then pointed out that the IRC-37 was a guideline and showed an annual increase in traffic and clause 3.3.2.2 showed an average increase at more than 7.5% if adequate data was not available. The data available suggested an annual traffic increase at more than 8%. Even the average monthly collection of toll by BE from October to December, 2006 was 17.85%. He further pointed out that the amount of loss was being calculated by NHAI at 7.5% per annum in reverse order from September, 2006 to December, 2004. He submitted that the

letter dated 27th November, 2006 was misread. The case of NHAI was that the said letter had calculated the loss of pilferage at Rs. 19,30,502 on the basis of comparison between the number of vehicles that had crossed as per JJP data and those as per the decoy reports. Moreover, that was limited to LCV category of vehicles. It had failed to consider the average yearly increase in traffic at 7.5%. Therefore, by a letter dated 18th December, 2006, the PD was asked to re-assess the recovery on the basis of three documents namely, (a) the decoy agency reports; (b) the collection given by BE (c) the average yearly increase in traffic volume as recommended by IRC-37:2001 Clause 3.3.2.2. It is on this basis that the loss was re-calculated at Rs. 14,53,99,479 and demand notice dated 2nd June, 2007 was issued to JJP. Therefore, the finding of the AT that NHAI offered no explanation regarding increase in loss was a perverse finding and completely contrary to the record.

27. Mr. Varma insisted that the letters dated 28th November, 2006 and 29th March, 2007 were internal communications of NHAI vis-a-vis its PD and were not binding/conclusive and could not be relied upon by anyone unless it was communicated to them. Reliance was placed on the decisions in *Union of India v. Vartak Labour Union* 2011 (4) SCC 200; *Union of India v. Kartick Chandra Mondal* 2010 (2) SCC 422; *Sethi Auto Service Station v. DDA* 2009 (1) SCC 180 and *Shanti Sports Club v. Union of India* 2009 (15) SCC 705.

28. Mr. Varma submitted that having agreed with NHAI that it was justified in terminating the contract on account of pilferage, the AT contradicted its own decision by not awarding damages for loss due to such pilferage. Secondly, on one hand, the calculations of the PD, Palanpur were rejected but, on the other hand, they were relied upon in to for awarding NHAI the restricted sum of Rs. 19,30,502. Mr. Varma submitted that the statistics furnished to the AT substantiate the case of NHAI that the increase in traffic was across all categories of vehicles and yet that was discarded by the AT.

29. Mr. Varma took exception to the finding in support of Issue No. 11 to the effect that NHAI decided even prior to the issuance of SCN to withdraw the tolling operation from JJP. According to him, the scheme formulated by the Director General of Resettlement (DGR) to encourage awarding of contracts to Ex-Service Men (ESM) was invoked since 1994 and not in 2006 as wrongly assumed by the AT. The DGR scheme was recommendatory and not mandatory. JJP was not a DGR agency at the time the contract was awarded to it. He also submitted that this contradicted the earlier finding of the AT that there was sufficient material for NHAI to have terminated the contract as there was pilferage in the toll collection. He, accordingly, submitted that the decision in issue No. 11 was inconsistent with the decision in issue Nos. 3A, 4 & 5.

30. As regards the decision in counter-claim Nos. 2, 5, 7 to 10 and 16, Mr. Varma pointed out that by not allowing counter-claim No. 5 in its entirety, the AT overlooked the fact that the JJP had withdrawn the first part of the claim during the course of arbitration proceedings in the sum of Rs. 15,47,861. This was duly

recorded in the minutes of the meeting of the AT held on 2nd/3rd April, 2010. The second part in the sum of Rs. 9,39,909 was modified to Rs. 6,08,295 by JJP in its written synopsis. Yet the entire amount of Rs. 28,87,770 was allowed by the AT. As regards counter-claim No. 2 in the sum of Rs. 2,46,35,530 towards outstanding Running Account (RA) Bill No. 24, it was pointed out that the final bill was, in fact, submitted only during the course of arguments before the AT and there was no occasion for it to be verified by the Consultant Engineer (CE) and NHAI as was required to be done under the agreement. This led to the AT requiring the parties to reconcile the final statement and extending time for that purpose. Mr. Varma pointed out that in a strange turn of events when without approval of the variation order, the AT gave a vague Award allowing the counter-claims subject to a note that in the event the said claims which were still under consideration of NHAI were settled by "accord and satisfaction of both the parties" then "necessary adjustment shall be made accordingly." He submitted that there are, in fact, no reasons whatsoever given by the AT for allowing the said counter-claims in the manner it has.

31. Dealing next with counter-claim Nos. 7 to 10 towards bank charges/expenses, Mr Varma pointed out that once the AT held that NHAI was justified in withdrawing the tolling activities from JJP, then there was no reason to allow the expenses/bank charges/commission incurred in obtaining/extending BGs. The BGs were given as part of the obligation under the agreement. The contention of NHAI was based on the decision in H.M. Kamaluddin v. Union of India 1983 (4) SCC 417 that giving the Government wider power to recover the amount under the contract by appropriating any sum payable to the same contractor under another contract was not even discussed by the AT.

32. Lastly, it was submitted that the award of interest on Bill No. 24 was not justified when the Award in respect of the said bill itself was not sustainable in law. It was also submitted that future interest at 18% per annum was exorbitant.

Submissions of counsel for the Respondent

33. Countering the above submissions Mr. Harin P. Raval, learned Senior Advocate appearing for the Respondent, supported the impugned Award. He pointed out that the running bills stood admitted by NHAI in its pleadings filed before the AT. In the letter dated 7th May, 2007, while according approval to the proposal of the PD, a noting stated that a notice should be issued to JJP to deposit the "short collection of Rs. 10,97,63,406 within 20 days period failing which the available amount with NHAI i.e., Rs. 4,64,83,848 will be forfeited and further action under the provisions of the contract will be taken to recover the balance amount." It was, accordingly, submitted that but for the said adjustment the said amount was admittedly payable by NHAI which it could not have sought to adjust in the manner indicated.

34. Further, according to Mr. Raval, there was no challenge raised by NHAI to the counter-claim in respect of running bill Nos. 24 and 25. He referred to the cross-

examination of CW-1 where had re-confirmed that the manner in which the anticipated shortfall was adjusted against running bills had been explained in the letter dated 29th March, 2007. The documents which were sought to be verified did not include running bill Nos. 23 and 24. Even as regards the illegal withholding of retention money under counter-claim No. 6 i.e., Rs. 31,45,081, there was no challenge whatsoever by NHAH even in the present petition.

35. While not disputing that a substantial portion of counter-claim No. 5 had, in fact, been given up by JJP, Mr. Raval was keen to point out that the allowing of counter-claims under issue Nos. 14 and 15 subject to the note was, in fact, helpful to NHAH. He submitted that it was not as if all of the counter-claims had been granted.

36. Mr. Raval submitted that NHAH miserably failed to prove the decoy reports by not producing the authors of those reports. There was inordinate delay in taking action even on those reports. There was every justification for rejecting the methodology adopted by NHAH based on IRC guidelines since adequate data was, in fact, available. He referred to the annexure to the letter dated 2nd June, 2007 which showed that the basis of the calculation of the shortfall was only by adopting a 7.5% increase, which per se, was arbitrary.

Scope of the powers of the Court under Section 34 of the Act

37. Before proceeding to discuss the above submissions, the law on the scope of the powers of the Court under Section 34 of the Act requires recapitulation. In *Associate Builders v. Delhi Development Authority* AIR 2015 SC 620, the Court summarised what constituted the fundamental policy of Indian law. In that process, it extracted certain passages from the earlier decision in *ONGC Ltd. v. Western Geco International Ltd.*, 2014 (9) SCC 263. In para 40 of that judgment, it was observed as under:

"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."

38. A reference was also made in *Associate Builders v. Delhi Development Authority* (supra) to the decisions in *Kuldeep Singh v. Commissioner of Police* (1999) 2 SCC 10 and *P.R. Shah, Shares & Stock Brokers (P) Ltd. v. B.H.H. Securities (P) Ltd.*, (2012) 1 SCC 594, where it was reiterated that the Court does not sit in appeal over the Award of an Arbitral Tribunal by reassessing or re-appreciating the evidence. It was reiterated that the Award could be challenged

only on the grounds mentioned under Section 34(2) of the Act.

Analysis and reasons

39. There were three distinct facts that formed the basis of NHAI's claim towards loss on account of pilferage/short collection. The first was that the two letters of JJP dated 14th August, 2006 and 12th September, 2006 which according to NHAI constituted a clear and unequivocal admission of pilferage and short collection of toll fee by the employees of JJP. The said two letters were also stated to constitute an admission as to the existence of the two decoy reports. The second basis of the claim were the two decoy reports. The third factor was the increase in the traffic volume at the Samakhiali Toll Plaza evidenced by the figures of vehicles crossing which were furnished to the AT, which were exhibited as CD-7 and CD-13.

40. As far as the two letters of JJP are concerned, what is evident from a reading of the two letters is definitely an admission about JJP having come across "incidents of pilferage in toll collection by its employees." The letter dated 12th September, 2006 lists out the action taken by JJP as a result thereof. While it is true that the two letters by themselves do not constitute an unequivocal admission, they do show that JJP did not deny that pilferage was taking place and that a tighter supervision over the staff at the toll plaza was required to avoid pilferage. In fact, the AT also appears to have come to a similar conclusion in observing that "the possibility of shortfall in toll collection cannot be ruled out."

41. The second piece of evidence relied upon by NHAI are the two decoy reports. Insofar as the AT decided not to place reliance on the said two decoy reports on the basis that NHAI did not produce any competent witness to prove the said reports, there appears to be an inherent contradiction in the Award. While dealing with issue Nos. 1 & 2, the AT appears to have been categorical while answering issue No. 2 that NHAI had failed to prove the "contents, authenticity and accuracy" of the two decoy reports. However, while dealing with issue No. 1 regarding the extent of pilferage or shortfall in collection, the AT said that it would be dealing with that question under issue No. 3. From paras 180 to 183 of the Award, the AT proceeds to discuss the very two decoy reports which it had in the previous paragraphs held to be unreliable and not proved. In para 194, it acknowledges that by the letter dated 27th November, 2006, the PD, PLN had worked out the loss at Rs. 19,30,502 "on the basis of comparison between number of vehicles cross as per contractor/agency and that as per decoy reports."

42. In rendering the finding on issue No. 3, what the AT proceeds to do is to rely on this very letter dated 27th November, 2006. Here again, it does a flip-flop. While in para 231 it states that "we are therefore unable to agree with the revised calculation as worked out by PD, PIU, Palanpur" on the basis of the IRC guidelines, in the very next paragraph i.e., para 232, it picks up the very same document dated 27th November, 2006 and set out the calculation contained therein which were on the basis of the decoy reports. In fact, Rs. 19,30,502,

which has been awarded by the AT to NHAI against claim No. 1 was worked out on the basis of the decoy reports.

43. The Court fails to understand as to how on the one hand the AT was rejecting the decoy reports as having not been proved and on the other awarding NHAI a sum towards claim No. 1 based on those very decoy reports. If indeed the decoy reports were being rejected, the question of awarding any sum to NHAI on that basis did not arise. Add to this is the fact that JJP is not aggrieved by the above conclusion. It is NHAI which has come before the Court to object to the Award on the ground that claim No. 1 for the sum of Rs. 10,97,63,406 should have been allowed in its entirety. The Court is unable to reconcile these two mutually inconsistent portions of the Award.

44. Turning to the third factor that formed the basis of NHAI's claim and which is perhaps the only important factor was the increase in the traffic movement at Samakhiali Toll Plaza. Both sides have relied upon the data in CD-7 and CD-13 in this regard. In the first place, the Court would like to refer to the letter dated 27th November, 2006. It must be recalled that the said letter is based only on the figures of Light Commercial Vehicles (LCV). The shortfall in the sum of Rs. 19,30,502 was arrived at by the PD, PLN by increasing 32% of vehicles for the period from 1st February, 2005 to 30th September, 2006 and 26% from the period 1st October, 2005 to 30th September, 2006. The recovery was worked out by increasing at 32% for the entire period. Therefore, it is plain that the said figure pertains only to LCV and not to all types of vehicles. This important distinction was somehow totally missed by the AT.

45. The second aspect of the matter is that the revision of the above figure was triggered by the decoy agency reports as well as the collection figures of BE, which showed a much higher corresponding figure for the months of November and December, 2006. This was not an arbitrary figure because as is seen from the actual traffic data which was placed before the AT, there was a marked increase in the number of vehicles across categories i.e., car, jeep, van, LCV, Bus/Truck, HCM/EME vehicles. It was pointed out by Mr. Varma that if the actual figures were taken into consideration, the shortfall/pilferage just for LCV worked out to 32% and if that mode was adopted across all vehicles then the shortfall would be much higher. All that had been done was actually to limit it to 7.5% increase as per IRC-37. It was on that basis that the total likely collection for the period between December, 2004 and September, 2006 was worked out to be Rs. 34,27,52,085.

46. Mr Raval, in fact, offered an alternative calculation by applying 7.5% on the actual collection month-wise from December, 2004 to September, 2006 and worked out the shortfall at Rs. 5,51,12,368.27. Be that as it may, it appears to the Court that the approach of the AT to this actual traffic data is somewhat intriguing. The AT used this data to discard the application of the IRC guidelines. This is on the basis of the AT reading the IRC guidelines in a way that would make them applicable only if no data is available. The logic adopted here was

that since data was available, the question of going by the IRC guidelines did not arise. If indeed the IRC guidelines were to be rejected, the actual figures of traffic data should have been relied upon. However, while the data is discussed in para 230 of the Award and even reasons are given for the-50 fold increase in the categories of certain vehicles, strangely, the AT does not carry it to the logical end of requiring the re-working of the loss figures as a result of the pilferage. It only uses this data to hold that recourse to IRC-37 is wholly "without any basis or merit." It then states in one line that the toll collection by BE "for a short duration due to local factors, cannot be taken as a basis for working out pilferage/ shortfall of Respondent, JJP for a prior period in question."

47. If one actually looks at the figures available before the AT in the form of CD-13 the traffic data was available for a much longer period up to December, 2009. The patterns were clear therefore not just for the three months in question but for a longer period. Interestingly, in the letter dated 29th March, 2007, NHAI has been able to explain the entire basis for re-working of the loss figures. It takes the average traffic for the years 2003 and 2004. It is not as if some arbitrary figure was just picked up. The detailed calculation was given as an annexure to the said letter by adopting the average annual growth at 7.5%.

48. Why the AT overlooked this entire evidence is not clear. This, when contrasted with the Award of Rs. 19,30,502 NHAI under claim No. 1 on the basis of the calculations of NHAI for only the LCV based on the decoy reports, brings about the glaring internal contradiction in the arbitral Award. The Court is, therefore, unable to sustain the impugned Award as regards Claim No. 1 in view of the irreconcilable inherent contradictions rendered by the AT as pointed out hereinbefore. The Court is of the view that this would be an instance of the AT drawing an inference from the evidence which is untenable and failing to draw an inference which ought to have been drawn thereby rendering the Award opposed to the fundamental policy of Indian law. It would, therefore, be covered under Section 34(2)(b)(ii) read with Explanation (1) and (2) of the Act.

49. There are other more serious problems with the impugned Award as regards counter-claim Nos. 2, 5, 7 to 10 and 15. At the outset, it must be noted that as far as the counter-claim No. 5 is concerned, Mr. Raval could not dispute the fact that in the course of the arbitration proceedings, JJP itself had given up a substantial portion thereof. The minutes of the meeting held on 2nd/3rd April, 2010 recorded that counsel for the JJP was dropping the counter-claim for Rs. 15,47,861. It stated, "now onwards Respondent/JJP will not press for this counter-claim". This appears to have been completely overlooked by the AT. Again, when the Respondent filed its written synopsis before the AT specifically as regards issue No. 18 in para 106, it modified the balance amount as Rs. 6,08,295. Even Mr. Raval was unable to explain how despite the above the AT proceeded to allow counter-claim No. 5 to the full extent.

50. As far as counter-claim No .2 of JJP is concerned, this pertained to RA Bill No. 24 for Rs. 2,46,35,530. The fact remained that JJP did not submit the final

statement/bill prior to the commencement of arbitration. The final bill was submitted during the course of arbitration. Consequently, there was no occasion for any verification of any such final bill to have taken place prior to the arbitration proceedings by NHAI or its Consultant Engineer.

51. From para 398, the AT recorded its findings and views for issue Nos. 14 and 15. It stated that it "waited sufficiently for more than six months informing both the parties to settle these issues." It also set out in full a letter dated 30th December, 2011 from the AT addressed to both parties. The letter noted that the matter was still pending verification. The AT in para 3 of the said letter observed that both the parties were "throwing responsibility on each other for not resolving this issue" and in para 4 that if it was not resolved by NHAI by 25th December, 2010, "the Award will be finalised and declared on the basis of material on record on the assumption that those bills have not been cleared." Finally, the parties were informed by the letter dated 5th February, 2011 about the "finalisation of award." In response thereto, the PD, PIU, NHAI, Palanpur by the letter dated 23rd February, 2011, (a scanned copy of which was set out immediately thereafter) informed that the approval of the competent authority for variations was awaited and without such approval the reconciliation could not go forward.

52. What the AT proceeded to do thereafter is inexplicable. It did not discuss the tenability of the RA bill No.24 being cleared as it is. It simply stated that subject to a noting appended to the Award under issue Nos. 14 and 15 it was deciding counter-claim Nos.1, 2, 5 & 6 in favour of the Respondent/JJP. The note sets out the contents of PD, PIU's letter dated 23rd February, 2011 and proceeds to state that in case counter-claim Nos.1, 2, 5 and 6 still under consideration by NHAI are settled to the satisfaction of both the parties and not "as awarded above", then "necessary adjustment shall be made accordingly."

53. In deciding claim No. 2, the AT also appears to have overlooked the settled legal position as explained in *NHAI v. ITD Cementation India Ltd.*, 2007 (4) Arb LR 555 (Del) that it was necessary for the AT to quantify the amount instead of leaving it to NHAI to again decide it. Although it was argued by Mr. Raval that, in fact, it was advantageous to NHAI, the Court finds that this type of determination will not resolve the issue and can only lead to further litigation defeating the very object of arbitration.

54. The Award in respect of issue Nos. 14 & 15 relatable to counter-claim Nos. 1, 2, 5 & 6 are not based on any reasons.

55. As already noticed at the outset, the challenge in the present petition by NHAI is not to the Award in respect of counter-claim Nos. 1 and 6. What survives is the challenge to the Award to counter-claim Nos. 1 and 5. For the reasons already noted, the Award in respect of counter-claim No. 5 is wholly untenable as it suffers from non-application of mind for the fact that JJP itself had given up a substantial portion of counter-claim No. 5 during the course of arbitration.

56. As far as counter-claim No. 2 is concerned, the Award at best can be termed as a vague Award which leaves the possibility of the AT's own Award being discarded if the issue is settled by "satisfaction of both the parties." There are no reasons why counter-claim No. 2 was being allowed in to without any verification thereof. If the AT was not going to be waiting for reconciliation and verification to take place, then it should have proceeded to discuss and decide the merits of counter-claim No. 2 instead of simply allowing it in its entirety without reasons.

57. At this stage, the Court would also like to observe that the AT has followed certain patterns in the discussion of certain claims and counter-claims. First, it sets out the entire submissions of the claimant. Then it sets out the entire submissions of the Respondent. Thereafter, under a separate heading of 'findings and views' it purports to give its conclusions on the said issue. Even as regards issue Nos. 14 and 15, the same pattern has been followed, viz., first the arguments for the claimant in respect of issue Nos. 14 and 15 have been set out in its entirety. Then arguments by the counsel for the Respondents on both issue Nos. 14 & 15 are set out in its entirety. Then in paras 385 to 397 the arguments of the claimant on issue No. 15 have been set out. Thereafter, in para 398, findings and views of the AT in respect of issue Nos. 14 & 15 have been set out. There are no reasons from para 398 onwards. There are only a series of conclusions. Consequently, this part of the Award does not satisfy the requirement of Section 31(3) of the Act, which makes it mandatory for the AT to give reasons. Such an Award would, undoubtedly, be opposed to the fundamental policy of Indian law in terms of the tests laid down in *Associate Builders v. Delhi Development Authority* case (supra).

Conclusion

58. For the aforementioned reasons, the Court sets aside the impugned Award insofar as NHAI's claim No. 1 and JJP's counter-claim Nos. 2, 5, 7 to 10 and 15 are concerned. As far as counter-claim No. 7 is concerned, in view of the setting aside of the Award in respect of claim No. 1 and counter-claim Nos. 2 and 5, the Award in respect of claim No. 7 towards bank charges and expenses is required to be necessarily set aside. As regards issue No. 15 pertaining to interest as a result of the above determination, the corresponding interest awarded on JJP's counter-claim Nos. 2, 5, 7 to 10 is also hereby set aside.

59. The petition is disposed of in the above terms.