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

% *Order pronounced on: February 19, 2014*

+ **O.M.P. No.288/2013**

M/S DELHI-GURGAON SUPER CONNECTIVITY LTD
..... Petitioner

Through Mr.Akhil Sibal, Adv. with Ms.Meghna Mishra, Mr.Premtosh Mishra, Mr.Jatin Mongia & Ms.Manmeet Kaur, Advs.

versus

NATIONAL HIGHWAY AUTHORITY OF INDIA & ORS
..... Respondents

Through Mr.Sandeep Sethi, Sr.Adv. with Mr.Mukesh Kumar, Mr.Tavinder Sidhu, Ms.Meenakshi Sood & Ms.Tanu Priya Gupta, Advs. for R-1 along with Mr.K.Venkatraman, CGM, NHAI in person.
Mr.Pinaki Misra, Sr.Adv. with Mr.Arjun Pant, Adv. for R-2 along with Mr.Sanjay Grewal, Authorized Signatory of IDFC in person.
Mr.Sudhir Nandrajog, Sr.Adv. with Mrs.Biji Rajesh, Adv. for SDMC.
Mr.Manjit Singh, Addl. AG with Mr.Vikas Sharma & Ms.Nupur Chaudhary, Advs. for State of Haryana.

+ **Ex. P. No.88/2013**

I.D.F.C. LTD. & ORS ..... Decree Holders

Through Mr.Pinaki Misra, Sr.Adv. with

Mr.Arjun Pant, Mr.Ajit Warrier, Mr.Aashish Gupta & Ms.Tarunima Vijra, Advs. along with Mr.Sanjay Grewal, Authorized Signatory of IDFC in person.

versus

M/S DELHI-GURGAON SUPER CONNECTIVITY LTD & ANR
..... Judgment Debtors

Through Mr.Akhil Sibal, Adv. with Ms.Meghna Mishra, Mr.Premtosh Mishra, Mr.Jatin Mongia & Ms.Manmeet Kaur, Advs. for JD-1.
Mr.Sandeep Sethi, Sr.Adv. with Mr.Mukesh Kumar, Mr.Tavinder Sidhu, Ms.Meenakshi Sood & Ms.Tanu Priya Gupta, Advs. for JD-2 along with Mr.K.Venkatraman, CGM, NHAI in person.
Mr.Sudhir Nandrajog, Sr.Adv. with Mrs.Biji Rajesh, Adv. for SDMC.

CORAM:
HON'BLE MR. JUSTICE MANMOHAN SINGH

MANMOHAN SINGH, J.

1. OMP No.288/2013 has been filed by M/s Delhi-Gurgaon Super Connectivity Limited (DGSCL) against National Highways Authority of India (NHAI) and IDFC Ltd. under Section 9 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as "the Act") seeking to restrain the respondents from acting upon the show-cause notice dated 8th March, 2013 and/or terminating the Concession Agreement pending resolution of disputes in arbitration.

2. When the said OMP was listed on 21st March, 2013 before Court, notice was issued to the respondents and the effect of the show-cause notice dated 8th March, 2013 was stayed till pronouncement of the final order in the matter. Replies to the main petition were filed on behalf of respondents No.1 & 2. The parties have also made various submissions in support of their contentions.

3. During the pendency of the abovementioned petition, the following applications were filed:-

(i) I.A. No.8248/2013, filed by South Delhi Municipal Corporation of Delhi (SDMC), under Order 1 Rule 10 CPC for its impleadment as a party-respondent.

(ii) I.A. No.10709/2013, filed by State of Haryana, under Order 1 Rule 10 CPC for its impleadment as one of the respondents.

(iii) I.A. No.10720/2013, filed by State of Haryana, under Order XXXIX Rule 4 read with Section 151 CPC for disposal of the OMP.

(iv) I.A. No.13764/2013, filed by State of Haryana, under Order XXXIX Rule 4 read with Section 151 CPC for disposal of the OMP.

(v) I.A. No.13765/2013, filed by State of Haryana, under Order VI Rule 17 read with Section 151 CPC for amendment in I.A. No.10709/2013.

4. The execution petition being Ex.P. No.88/2013 has been filed by five decree-holders, namely, IDFC Ltd., Bank of India, Punjab National Bank,

Oriental Bank of Commerce and State Bank of Bikaner and Jaipur against DGSCL and NHAI, under Order XXI Rules 11 & 15 read with Section 151 CPC, seeking following reliefs:-

> "a) Issue necessary orders appointing Decree Holder No.1 acting for the Decree Holders, itself or through a sub-agent as a receiver for the Project to operate, maintain, protect, preserve the Project assets and to carry such further duties as stipulated above, pending the appointment of a Selectee for the Project by the Decree Holders;
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> b) Issue necessary orders directing the provision of police and administrative assistance to Decree Holder No.1 acting for the Decree Holders, itself or through a sub-agent, to assist it in taking over, operating and running the Project and to carry any such further obligations as may be directed by this Hon'ble Court;
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> c) Issue necessary orders directed Judgment Debtor No.1 to handover the possession of the Project in the manner stipulated above."

5. Along with the execution petition, an application being E.A.(OS) No.216/2013 was also filed by the decree-holders for directions and interim protection. Notice was issued to the judgment-debtors. Replies/objections under Section 47 CPC were filed on behalf of judgment-debtors No.1 & 2.

6. The above said execution petition was argued along with the OMP from time to time.

7. During the pendency of the matters, the three main parties, i.e. National Highways Authority of India, IDFC Ltd. and M/s Delhi-Gurgaon Super Connectivity Limited have settled their disputes. Before passing the final order, it is necessary that the details of the previous litigations provided by the parties are referred to, which are given as under:-

(i) The NHAI entered into a Concession Agreement dated 18th April, 2002 with Jaypee DSC Ventures Limited (now DGSCL). Later, NHAI issued a Preliminary Notice dated 7th December, 2011 for terminating the said Agreement, which was challenged in OMP No.945 of 2011 before this Court. The said notice was followed by Termination Notice dated 18th February, 2012. In the meanwhile Senior Lenders filed suit, being CS(OS) No.510/2012, relating to the said Agreement. The said OMP and the said suit were decreed by this Court on 18th September, 2012 in terms of compromise contained in MoU dated 18th September, 2012 entered into between NHAI, DGSCL and IDFC (as Lender's Representative).

(ii) Subsequently, NHAI gave show-cause notice dated 8th March, 2013 to DGSCL which is challenged in the present OMP. In the meanwhile, Senior Lenders filed execution petition, being Ex.P.No.88/2013 to execute the aforesaid decree.

8. The parties have handed over the documents, i.e. affidavit and consent order along with Exhibits A to D, photocopy of the site plan of the toll plaza and copy of Memorandum of Agreement dated 17th February, 2014, in order to dispose of the pending matters. The same are taken on record with the consent of the parties. The said exhibits are copy of letter dated 2nd May, 2013 of IDFC Ltd. submitted to NHAI, copy of NHAI's Board Meeting dated 14th May, 2013, copy of relevant extract of para 7(c) of the said Agenda Notes and copy of Ministry of Road Transport & Highways (MoRTH) Letter dated 16th May, 2013. It is recorded in the consent order

that IDFC Ltd. (on behalf of the Senior Lenders) has proposed a settlement on terms set out in its letter dated 2nd May, 2013, marked as Exhibit-A. The Board of NHAI at its meeting held on 14th May, 2013 considered the said proposal and resolved that in case the Court is not inclined to accept the request for termination of the Concession Agreement under Option 1 & 2, the said proposal of IDFC (on behalf of the Senior Lenders) may be agreed subject to conditions in para-7(c) of the Agenda Note of the said meeting. The Board also resolved that the aspect of tolling at km.61 needs to be examined by the Ministry of Road Transport & Highways (MoRTH). The relevant extract of the minutes of the said Board meeting are marked as Exhibit-B. The relevant extract of para-7(c) of the said Agenda Note is marked as Exhibit-C. MoRTH after considering the matter conveyed vide letter dated 16th May, 2013, inter alia, that should the option of terminating the concession not be possible, the alternative of having a single toll plaza at Km.42 could be a fall back arrangement. MoRTH's said letter is marked as Exhibit-D.

9. The following are the main terms and conditions of the settlement:-

(i) DGSCL and IDFC (on behalf of the Senior Lenders) by a joint letter dated 10th January, 2014 confirmed their agreement for substitution of DGSCL by SPV formed by Senior Lenders and withdrawal of claims and actions by the parties.

(ii) IDFC (on behalf of the Senior Lenders) has filed an affidavit dated 27th January, 2014 deposing inter alia in para 5 thereof that IDFC (on behalf of the Senior Lenders) confirms that they are agreeable to Option (3) of the decision of the NHAI Board as recorded in

minutes dated 14th May, 2013 and as modified vide letter dated 16th May, 2013 of MoRTH.

(iii) DGSCL and the Senior Lenders consent to and agree to abide by the NHAI's Board resolution (Exhibit-B & C) and MoRTH's letter (Exhibit-D). In these circumstances, the parties hereto i.e. NHAI, DGSCL and the Senior Lenders are agreed that the DGSCL be substituted in the said Concession Agreement by SPV formed by the Senior Lenders. The parties are further agreed that they have settled their disputes and differences as per Option (3) of the decision of the NHAI's Board as recorded in minutes dated 14th May, 2013, as modified by letter dated 16th May, 2013 of MoRTH. The parties shall remain bound by the terms contained in the Exhibits A to D.

(iv) IDFC (on behalf of the Senior Lenders) and DGSCL have agreed that henceforth DGSCL/DSC stands duly discharged of all claims, liabilities and obligations, existing and future, under the Concession Agreement dated 18th April, 2002, the Rupee Loan Agreement dated 9th September, 2010 and under the MoU dated 18th September, 2012 (hereinafter referred to as the said obligations and liabilities). The said liabilities and obligations are hereby taken over and assumed by IDFC (on behalf of the Senior Lenders) on terms set out in the Bilateral Agreement between DGSCL and IDFC (on behalf of Senior Lenders) and upon appointment of a new selectee the said obligations and liabilities shall be assumed and taken over by the said new selectee, and NHAI consents thereto subject to no liability coming on to NHAI

due to the said bilateral agreement.

(v) It is further agreed between the parties that on the revised toll notification becoming effective, no toll or user fee shall be collected from km.24 toll plaza and the said toll plaza shall be dismantled. Further the user fee at Km.42 toll plaza shall be revised to be in line with the arrangement as per Para (d) of Annexure-I of letter dated 2nd May, 2013 of IDFC (Exhibit A) as modified vide letter dated 16th May, 2013 of MoRTH (Exhibit D).

10. The affidavit of Mr.Sanjay Grewal, Authorized Signatory of IDFC Ltd., who is present in Court, has also been filed in Court itself by way of undertaking, confirming that the IDFC Ltd. being Senior Lender as per the terms of settlement/Bilateral Agreement dated 17th February, 2014 executed between IDFC (as Lenders' Representative of the Senior Lenders) and DGSCL, has agreed to pay a sum of Rs.24.65 crores to DGSCL. He further submitted that out of the aforesaid amount, the Senior Lenders have issued demand drafts totalling to an amount of Rs.8.85 crores to DGSCL. It is also stated in the affidavit that in terms of clause 1.2 of the Bilateral Agreement dated 17th February, 2014 executed between IDFC (As Lenders' Representative of the Senior Lenders) and DGSCL, the outstanding amount is Rs.15.80 crores. The Senior Lenders unconditionally undertake to pay to DGSCL Rs.15.80 Crores by way of demand draft, on or before 28th February, 2014. IDFC Ltd. shall be bound by the undertaking which is filed by way of an affidavit.

11. Copy of the Memorandum of Agreement dated 17th February, 2014 entered into between DGSCL and IDFC Ltd. is also filed. Clauses 1.4 and

1.5 thereof, which pertain to liabilities and obligations relating to NHAI, are reproduced here below:-

> "1.4 It is hereby clarified that upon payment of Rs.24.65 Crores (Rupees Twenty Four Crores Sixty Five Lakhs only) as stated in Clause 1.2 (a) above and Rs.3.85 Crores (Rupees Three Crores Eighty Five Lakhs only) as stated in Clause 1.3 above, the Senior Lenders/Selectee shall not be liable for any other third party liability pertaining to the Project for the period prior to passing of the Consent Order and for any employee severance payment to the employees of DGSCL, except the liabilities/obligations relating to NHAI, labour cess of Rs.4.5 Crores (Rupees Four Crores and Fifty Lakhs only) paid by NHAI, Municipal Corporation of Delhi (MCD) and taxes relating to payments to NHAI and MCD as provided in clause 1.5 below.
>
> 1.5 Subject to clause 1.2 above, the Senior Lenders confirm and agree that DGSCL stand duly discharged of all claims, liabilities and obligations, existing and future, under the Concession Agreement with NHAI dated 18.04.2002 and the liabilities/obligations relating to NHAI, labour cess of Rs.4.5 crores (Rupees Four Crores and Fifty Lakhs only) paid by NHAI, Municipal Corporation of Delhi (MCD) and taxes relating to payments to NHAI and MCD, which liabilities/ obligations shall be taken over/borne by the Senior Lenders/the Selectee. The Senior Lenders/the Selectee hereby agree to indemnify and keep indemnified DGSCL with respect to all liabilities/obligations as assumed in this clause 1.5."

12. As far as the pending applications are concerned, in the application being I.A. No.10709/2013 (filed by State of Haryana, under Order 1 Rule 10 CPC for its impleadment as one of the respondents), the main reason given by the applicant was that the Toll Plazas operated by the petitioner had been causing unavoidable and unnecessary inconvenience to the general public using the NH-8. Regular traffic jams on both the toll plazas are daily affairs and because of this inconvenience, it causes deep rooted public resentment,

thereby giving a bad name to the State Government as well as NHAI and the Central Government. The said fact was also brought to the notice of NHAI and the petitioner by the State of Haryana who expects an early solution in order to avoid inconvenience and harassment to ordinary citizens and commuters. Mainly on the said reason, the application is filed for impleadment.

13. Thereafter, the State of Haryana has filed other applications being I.A. No.10720/2013 (under Order XXXIX Rule 4 read with Section 151 CPC for disposal of the OMP), I.A. No.13764/2013 (under Order XXXIX Rule 4 read with Section 151 CPC for disposal of the OMP) and I.A. No.13765/2013 (under Order VI Rule 17 read with Section 151 CPC for amendment in I.A. No.10709/2013). Notices of these applications were not issued. Now, since the disputes between the three parties have been resolved, the abovementioned applications have become infructuous and the same are disposed of as such.

14. As far as the application being I.A. No.8248/2013 is concerned, the same has been filed by South Delhi Municipal Corporation of Delhi under Order 1 Rule 10 CPC for its impleadment as a party-respondent. The said applicant has also filed a separate petition under Section 9 of the Act being OMP No.171/2014 against Government of National Capital Territory of Delhi, State of Haryana, NHAI and M/s Jaypee-DSC Ventures Ltd. The prayer sought in the said petition is to restrain these respondents from preventing the applicant/petitioner from collecting the Toll Tax from Rajokari Toll Plaza by using the existing infrastructure during the arbitration proceedings using their own man power. The counsel for the MCD/SDMC

has referred the facts mentioned in the application under Order 1 Rule 10 read with Section 151 CPC.

The relevant facts are:

(a) By virtue of Section 113(2)(g) of the Delhi Municipal Corporation Act, 1957 (hereinafter referred to as DMC Act) and Toll Tax Bye Laws, 2007, the applicant is entitled to levy and collect toll tax from the specified commercial vehicles on the entry in Delhi. As per the said provisions, a statutory duty was imposed upon the applicant for the collection of toll taxes.

(b) On 24th May, 2004/22nd February, 2005 a State Support Agreement (hereinafter referred to as SSA) was entered into between the GNCTD, State of Haryana, NHAI and M/s. Delhi-Gurgaon Super Connectivity Ltd. As per Clause 3.1.(iv) of the said SSA, '*the parties agreed to ensure that no barriers are erected by any Government Agency of GNCTD/GOH that interrupts the free flow of the traffic on the project highway*'. Further, as per Clause 3.1 (xii), the petitioner was supposed to collect the Toll Tax on behalf of the GNCTD/GOH including the entry fee.

15. It is admitted in para 4 of the application that the NHAI vide its letter dated 22nd February, 2013 intimated the applicant-SDMC that NHAI may terminate their contract with the petitioner DGSCL and in that case, the applicant should make their own arrangements and collect the entry tax at Rajokari Toll Plaza. Copy of the said letter is also placed on the record. A meeting was also held on 1st March, 2013. During the meeting, the local bodies directed that in case of the termination of the contract between the

DGSCL and NHAI, the NHAI should frame procedures and intimate the applicant well in advance about the same and allow the applicant's Contractor M/s SMS-AAMW Tollways Pvt. Ltd. to access of all 18 lanes set up for collection of Toll Tax/Fee from specified commercial vehicles entering Delhi from Haryana and also permit to use the existing infrastructure and building for collection and monitoring purpose at Rajokari Toll Plaza (NH-8). However, NHAI did not intimate anything further. It was stated in the application that since the parties were trying to shift/remove the Toll Plaza from the Rajokari Border, it will affect the applicant's interest and before finding any workable solution between the parties, shifting or removal of Toll Plaza, the applicant should be heard as its interest would be affected.

16. Mr. Nandrajog, learned Senior counsel appearing on behalf of the MCD/SDMC submitted that some arrangement is necessary to protect his client's interest otherwise his client would be facing difficulty to segregate the traffic in order to collect the toll collection from the commercial vehicles. Commercial vehicles must be tolled as per the Supreme Court's order while entering Delhi. His submission is that unless issue raised by him is resolved, the lanes of tolls from the side of entry in Delhi be not allowed to be removed.

17. Mr.Sandeep Sethi, learned Senior counsel appearing on behalf of the NHAI has agreed that the MCD/SDMC is entitled to charge the Toll Tax/Fee from the commercial vehicles entering in Delhi and his client has no objection for the same. Counsel has identified four lanes out of 16 existing toll lanes at the main toll plaza in Jaipur-Delhi entering Delhi. He

referred the copy of the site plan from where they can make the arrangements and create infrastructure for the said purposes. His client will provide cooperation in order to collect the Entry Tax by the commercial vehicles on the stretch identified in the site plan as it is done on NH-1 and NH-24.

His further submission is that the application filed by the MCD/SDMC is otherwise not maintainable as the applicant is not a party to the Concession Agreement dated 18th April, 2002. Even, separate petition under Section 9 of the Act filed by the applicant is also pending. Still, the interest of the applicant is taken care of in the Memorandum of Agreement dated 17th February, 2014.

In order to counter the arguments of Mr.Rajiv Nayar's client, namely, M/s SMS-AAMW Tollways Pvt. Ltd. whose separate petition under Section 9 of the Act is also pending against MCD/SDMC, he states that the said petition is filed on the basis of Toll Tax Collection and Toll Plaza Development Agreement dated 14th May, 2011 between the MCD and M/s SMS-AAMW Tollways Pvt. Ltd. It is stated that M/s SMS-AAMW is not a party to the agreement dated 18th April, 2002 and even, his client, IDFC Ltd. and DGSCL are also not the parties to the said agreement. Even, no application under Order 1 Rule 10 CPC has been filed by M/s SMS-AAMW, thus, the grievance of M/s SMS-AAMW is irrelevant as far as the present cases are concerned, the separate petition is already pending which has to be decided as per its own merits.

With regard to the arguments of Mr.Nandrajog, Mr.Sethi has informed the Court that no doubt, the MCD/SDMC is entitled to charge the

Toll Tax from the commercial vehicles entering in Delhi as per the orders of the Hon'ble Supreme Court. The detailed plan was discussed at the meeting with the Commissioner of SDMC where it was agreed that four lanes would be kept for collecting Entry Tax.

18. I find force in the submissions of Mr.Sethi, learned Senior counsel appearing on behalf of NHAI who is agreeable that the MCD/SDMC is entitled to charge the Toll Tax from the commercial vehicles entering Delhi. The applicant is also entitled to use the signage/indicators which are usually applied in other countries of the world in order to charge the Toll Tax. Even, the said practice was adopted in this country when the concept of Toll Plaza was not available. As the suggestion made by Mr.Sethi, the applicant is entitled to make the arrangements and to create the infrastructure with the cooperation of NHAI in order to charge the Toll Tax. The applicant may also take the assistance of the police to catch any violator and penalize as per law.

19. Mr.Sethi has also referred the copy of the note sheet dated 6th February, 2014 which reads as under:-

> "Sub: Delhi-Gurgaon BOT (Toll) Project – Collection of Entry Tax by MCD/SDMC in case of removal of Rajokri Toll Plaza at Km.24 of NH-8.
>
> As discussed with Chairman in connection with letter dated 30.01.2014 of MCD/SDMC, Member (A) took a meeting on above subject with Mr. Pawan Sharma, Commissioner, SDMC and other officials of SDMC at NHAI, New Delhi on 05.02.2014 when the following were clarified and MCD/SDMC was asked to make their own arrangements for collection of Entry Tax by their own agency.

(i) In case of removal of Rajokri Toll Plaza under Delhi – Gurgaon Project, for smooth collection of Entry Tax by MCD/SDMC for vehicles entering Delhi, NHAI would give 4 toll lanes, out of 16 existing toll lanes at Main Toll Plaza in Jaipur – Delhi direction alongwith the split toll plaza.

(ii) As regards erection of Administrative Block/Office by MCD/SDMC vacant land available near Udyog Vihar Road will be given to MCD.

2. As discussed in above meeting, MCD/SDMC officials visited the site on 06.02.2014 jointly with PD, NHAI, Gurgaon. As the matter is clear now, we may ask MCD/SDMC to make their own preparations/arrangements accordingly for collecting their Entry Tax on their own, as soon as the order of the Court is passed in above matter/revised Fee Notification becomes effective, which is expected any day after 07.02.2014."

20. In view of the above said facts and circumstances, after hearing, this Court is inclined to accept the settlement arrived between the three parties, namely, National Highways Authority of India, IDFC Ltd. and M/s Delhi-Gurgaon Super Connectivity Limited, as the applicant is not a party to the agreement; its independent petition is also pending. Thus, the prayer made in the application under Order 1 Rule 10 CPC by the applicant for its impleadment as respondent cannot be accepted, coupled with the fact that NHAI has agreed to provide four lanes of the Toll Plaza, as discussed earlier, to the applicant to charge the Toll Tax from the commercial vehicles. The NHAI is also ready to cooperate with the applicant who can create its infrastructure for the purposes of collecting the Toll Tax.

21. I.A. No.8248/2013 is accordingly disposed of.

22. In view of the settlement arrived at between the parties as well as the relevant documents produced in Court and the affidavit of Mr.Sanjay Grewal on behalf of IDFC Ltd. filed in Court, the present OMP and the execution petition are disposed of and satisfied in terms of the said Exhibits A to D as modified/clarified by the present order. The decree dated 18th September, 2012 also stands modified in terms of the said Exhibits A to D as modified/clarified by the present order. All the three parties to the settlement shall be bound by the terms and conditions thereof.

23. All pending applications are disposed of.

24. The interim order granted on 21st March, 2013 stands vacated. It is, however, clarified that pending cases, i.e. I.A. No.2268/2014 in OMP No.408/2011, OMP No.171/2014 and OMP No.185/2014 shall be considered by the Court as per their own merits and without any influence of the present order passed in the OMP and execution petition.

25. No costs.

26. Copies of this order be given *dasti* to all the parties, under the signatures of the Court Master.

(MANMOHAN SINGH)
JUDGE

FEBRUARY 19, 2014