

IN THE HIGH COURT OF DELHI AT NEW DELHI

%

Judgment delivered on: 06.02.2017

+ **O.M.P (COMM) 298/2016 & IA No. 7250/2016**

NATIONAL HIGHWAYS AUTHORITY OF INDIA Petitioner

versus

**IRB AHMEDABAD VADODARA SUPER EXPRESS
TOLLWAYS PRIVATE LIMITED**

..... Respondent

Advocates who appeared in this case:

For the Petitioner : Mr Sandeep Sethi, Senior Advocate with Mr Mukesh Kumar and Ms Gunjan Sinha Jain, Advocates alongwith Mr R. K. Garg, Manager, NHAI.

For the Respondent : Mr P. Chidambaram and Mr Jayant Bhushan, Senior Advocates with Mr Shivaji M. Jadhav, Mr Anshuman Animesh, Mr Nipun Katyal, Mr Ketan Paul, Mr Ankit Nigam and Ms Reeja Varghese, Advocates.

CORAM

HON'BLE MR JUSTICE VIBHU BAKHRU

JUDGMENT

VIBHU BAKHRU, J

1. National Highways Authority of India (hereafter 'NHAI') has filed the present petition under Section 34 of the Arbitration and Conciliation Act, 1996 (hereafter 'the Act') *inter alia* impugning the arbitral award dated 08.01.2016 (hereafter 'the impugned award') made and published by the Arbitral Tribunal (by majority).

2. By the impugned award, the Arbitral Tribunal has allowed the claims made by the respondent, M/s IRB Ahmedabad Vadodara Super

Express Tollways Pvt. Ltd. (hereafter 'IRB') and has rejected the counter-claims made by NHAI.

3. IRB was awarded a project for *Six Laning of Ahmedabad to Vadodara Section of NH 8 from Km. 6.400 to Km. 108.700 (Length 102.300 Km.) in the State of Gujarat* (hereafter referred to as '*the NH8 section*') and *Improvement of Existing Ahmedabad Vadodara Expressway from Km. 0.000 to Km. 93.302 in the State of Gujarat (Length 93.302 Km.)* (hereafter referred to as '*the Expressway*') under NHDP Phase V on Design Build Finance Operate Transfer (DBFOT) Toll Basis (hereafter collectively referred to as 'the works').

4. The principal dispute between the parties relates to the applicability of concessions for local vehicles and frequent travellers using the Expressway. While IRB claims that concessional passes are not required to be issued either as per the provisions of the agreement between the parties or the National Highways Fee (Determination of Rates and Collection) Rules, 2008 (hereafter '*the 2008 Toll Rules*'), NHAI contends to the contrary.

5. Briefly stated, the relevant facts to address the aforesaid controversy are as follows:

5.1 NHAI invited bids by Request for Proposals (RFP) for the works, prescribing technical and commercial terms. Thereafter, the selected bidder's bid, submitted in response to the RFP, was accepted by NHAI and a Letter of Award (LOA) dated 28.04.2011 was issued in favour of the selected bidder. Thereafter, IRB (the concessionaire) was incorporated by the selected bidder as a limited liability company to perform the

obligations and exercise the rights of the selected bidder pursuant to the LOA. Subsequently, on 25.07.2011, the Concession Agreement was executed between NHAI and IRB for a concession period of 25 years. The appointed date was declared as 01.01.2013.

5.2 On 15.12.2012, IRB sent a letter submitting the proposal for validation of the toll rates for the Expressway. IRB further requested NHAI to issue the toll fee Notification and provide the validated toll rates to start the toll collection activity at the Expressway. These rates provided for discounts/concessions; IRB claims that the same were included by inadvertence. In response, NHAI validated the rates by a letter dated 26.12.2012, which did not provide for discounts/concessions on the Expressway. However, subsequently the issue was clarified and NHAI insisted that concessions be provided to local and frequent users of the Expressway as well. NHAI states that IRB started issuing return passes and multi journey passes after six months with effect from 01.07.2013; that is, after six months from the appointed date of 01.01.2013. Further NHAI did not issue monthly passes for local users (non-commercial vehicles, registered within 20 kilometres of the toll plazas). This led to disputes between the parties.

5.3 As the disputes between the parties could not be resolved, IRB sent a notice invoking the procedure for conciliation as per clause 44.2 of the concession agreement for amicable settlement of the disputes. However since amicable settlement of the disputes could not be arrived at, the parties executed a supplementary agreement dated 14.07.2014 for resolution of disputes through rules and procedure of Society of Affordable Resolution of Disputes (hereafter 'SAROD Rules'). While IRB nominated Prof. Dr.

Vandana Bhatt, NHAI nominated Mr Basant Kumar as their nominee arbitrators respectively. Both the appointed arbitrators appointed Maj. Gen. (Retd.) S.K. Sahijpal as the Presiding Arbitrator.

6. IRB filed its Statement of Claims which are summarised as under:

1. NHAI to allow IRB to issue only single journey tickets without giving any discounts/concessions on Ahmedabad - Vadodara Expressway.
2. NHAI to make good the recurring losses incurred by IRB on account of forced issuance of concession passes to the vehicles.
3. NHAI to protect IRB, if users object and protest against removal of Concession passes on Ahmedabad Vadodara expressway and bear the cost of damages, if IRB is unable to withdraw the Concessions.
4. *Pendente lite* interest at the rate of 18% per annum.
5. Cost of arbitration.

7. Before the Arbitral Tribunal, IRB contended that Rule 9 of the 2008 Toll Rules - which required the Concessionaire (IRB) to provide a pass for multiple journeys to cross a toll plaza – was applicable only with respect to the NH8 section and could not be made applicable to the Expressway. IRB claimed that granting concessions as per Rule 9 of the 2008 Toll Rules would be applicable on the Highway having open tolling system but not on the Expressway, having access controlled/closed tolling system. IRB further pleaded that a concessional pass could be issued only to cross a specified toll plaza and not any toll plaza. In other words, it contended that a pass could not be used to cross or enter another toll plaza which is not located in a district in which the pass is issued.

8. Next, it was contended that the term “Project Highway” as used in Sub-article 27.3 and 27.5 of the concession agreement would not include within its ambit, the Expressway as Sub-article 27.1.1 of the concession agreement distinctly defined the word “Project Highway” to mean the Ahmedabad - Vadodara section of the National Highway No. 8. IRB claimed that Article 48 - which included both, the Expressway and the NH8 section in the definition of “Project Highway” - would not be applicable as there was no ambiguity about the language of Sub-article 27.3 and 27.5 as regards the word “Project Highway”.

9. IRB further alleged that before the appointed date of the project, the Expressway was operated by a 100% subsidiary of NHAI under a concession agreement and the National Highways (Collection of Fees by Any Person for the Use of Section of National Highways / Permanent Bridge / Temporary Bridge on National Highways) Rules, 1997 and no concessions were given to the local users of the Expressway and further that even after the 2008 Toll Rules came into force, the concessions were not offered on the Expressway. Therefore, NHAI's interpretation as regards the applicability of concessions on the Expressway prior to the appointed date, was in line with that of IRB.

10. IRB also referred to the Review of Toll Policy Report published by the Planning Commission, Government of India to contend that provision of concessions under the 2008 Toll Rules was for Toll Plazas under Open Toll system and not for the Closed Toll system.

11. NHAI countered the claims made by IRB. NHAI asserted that the concession agreement provided for concessions with respect to the Expressway as well, and the same had already been clarified in response to

pre-bid queries. It further asserted that fee for the NH8 section and the Expressway was provided under the same notification issued by the Ministry of Road Transport and Highways which also expressly provided for concessions and therefore, IRB could not avoid its obligations to provide the necessary concessions. NHAI further explained that its subsidiary was collecting toll on the Expressway prior to the execution of the concession agreement, on the basis of a separate concession agreement dated 05.03.2002, which was completely different from the concession agreement entered into with IRB. NHAI also challenged the manner in which IRB had sought to quantify its claims. Further NHAI also raised counter claims which are summarised as under :

1. IRB shall give concessions to local and frequent users of the Expressway.
2. Allow recovery of Rs 5.05 crores with interest @bank rate + 5% p.a till the date of payment from IRB.
3. Recovery with damages at 25% and interest @ bank rate +5% p.a. for not giving monthly passes for non-commercial vehicles by IRB.
4. Cost of arbitration.

Impugned Award

12. The Arbitral Tribunal passed the impugned award allowing the claims made by IRB and rejecting the claims of NHAI. The Arbitral Tribunal held that there was no provision for issuance of a monthly pass or tickets at concessional rates in the concession agreement and the intention of the parties was that two roads (the Expressway and the NH8 section) were to be treated differently. The Arbitral Tribunal referred to a letter dated 03.01.2013 issued by the General Manager of NHAI wherein it was

admitted by NHAI that the NH8 section and the Expressway are to be treated as two separate roads for collection of toll.

13. It was further held that before the commencement of the concession agreement, concessions were granted on the NH8 section but no concessions were granted by NHAI on the Expressway; even though both the toll roads were being operated by a 100% subsidiary of NHAI.

14. The Arbitral Tribunal further held as follows :

"Expressway cannot be considered and treated at par with National Highway nor National Highway can offer the services being offered by Expressway.

Expressway is a superfast, unhindered driveway from point to point without any possibility of a 'U' turn on the road, whereas the National Highway offers exit and entry to the interim points for short drive and there is no sanctity to provision of a 'U' turn being possible.

The intention of the parties under the Agreement and the scheme is plain and clear. The public has been offered option of interim stations visit or a thorough speedy travel from one end of Expressway to the other. There is no reason for any other confusion so that the people using the Expressway are not taxed rationally for the better facility. It is therefore, absolutely essential that the Claimants contention need be endorsed. The Respondents - case stands rejected.

The Tribunal is completely conscious and aware that the parties have referred this issue based on whether a return toll ticket need be issued as interpreted by NHAI. The Tribunal is fully convinced and the same will be against

the intention, spirit, the terms of the contract and purpose of providing two separate and different of categories of roads will be defeated and hence it will be cardinal breach of contract. Hence, the status quo ante to the direction of NHAI for recovery and subsequent action is awarded to be restored with immediate effect."

15. In view of the above, the Arbitral Tribunal (by majority) made the following award:

"THE AWARD

We, member of Arbitral Tribunal having entered upon reference and heard the parties, pursued all documentation brought on record, DO HEREBY DECLARE and publish the award by majority of two Arbitrators as below. The dissenting award by Shri Basant Kumar is attached herewith separately alongwith this majority Award.

1. The Respondents must allow the Claimants the authority to issue only single journey without any discount on the Ahmedabad Vadodara Expressway.
2. The Recurring losses incurred by the Claimants on account of forced issuance of concession passes to the vehicles amounting to Rs. Rs.24,89,59,565.00 (July 2013 to April 2015). The amount will attract interest @ 15 % p.a from the date of the award till date of realization.
3. The recurring losses from May 2015 till effective steps to restore situation of single journey pass and no concession to locals. This amount will attract interest @ 15 % from the day audited account is submitted till date of realization of payment.

Shri Basant Kumar (Co-Arbitrator) has desired to make and publish a dissent Award may be annexed to the majority Award in full. The majority Award is being made and pronounced by the two Arbitrators viz. Maj. Gen. (Retd) S. K. Sahijpal (Presiding Arbitrator) and Prof. Dr. Vandana Bhatt (Co-Arbitrator)."

16. Mr Basant Kumar entered a dissenting opinion rejecting the claims and counter-claims made by the parties. He held that Article 27.3 and 27.5 of the concession agreement were also applicable to the Expressway and the word "Project Highway" was used for both the sections - the Expressway as well as the NH8 section. Mr Basant Kumar rejected the contention of IRB that implementation of concessions was impossible on the Expressway by holding that lakhs of passes at concessional rates were issued by IRB. He also rejected IRBs claim for compensation of loss on account of discounted passes, holding that calculations had been made without examining the correctness of numbers and further that the loss claimed was presumptive. Mr Kumar also rejected the counter claims of NHAI by holding as under :

"11.3 The stated amounts are not a loss to the Respondents but it is the public that were deprived of the concessions. I agree with the Claimants that the Respondents do not have a claim on this presumptively calculated amount. There is no mechanism by which the Respondents can restore to the public the loss suffered.

11.4 I hold that the Respondents cannot be paid the amount claimed and reject the Counter Claim."

Submissions

17. Mr Sethi, the learned senior counsel appearing for NHAI submitted that the impugned award was contrary to the plain terms of the concession

agreement inasmuch as Article 27 of the Concession agreement plainly provided for discounted fares to be applicable for the “Project Highway”, which was defined under Article 48 of the concession agreement to include both, the NH8 section as well as the Expressway. He submitted that in the circumstances, the impugned award, which sought to distinguish the NH8 section and the Expressway for the purposes of applicability of concessional fare, was contrary to the plain language of the concession agreement. He submitted that IRB's entitlement of demand and collection of appropriate fee from users was subject to the conditions of the concession agreement and the applicable rules, which required providing discounts. Thus, IRB could not avoid its obligation to provide the necessary discounts as contemplated under the concession agreement as well as under the applicable rules. He earnestly contended that the impugned award was perverse as no reasonable person could interpret the concession agreement in the manner as was done by the Arbitral Tribunal in the impugned award.

18. He further submitted that the impugned award had failed to deal with the counter-claims made by NHAI and the same were rejected without providing any reason.

19. Mr Sethi, contended that the reliance placed on the letter dated 03.01.2013 sent by the General Manager was wholly misplaced as that was an internal communication from General Manager to Chief General Manager (Tech) seeking his comments and in any event, the said letter was rejected by a subsequent letter dated 11.01.2013, issued by the Chief General Manager, directing implementation of concessions to the users of the Expressway. He further submitted that the difficulties expressed by

IRB in implementing the scheme of discounts were non-existent as IRB had implemented the scheme of discounts and in another similar case of Allahabad bypass, similar concessions were being granted.

20. Mr Chidambaram, the learned senior counsel appearing for IRB contested the arguments advanced on behalf of NHAI. He advanced his contentions broadly on two fronts. First of all, he contended that Rule 9(1) of the 2008 Toll Rules was wholly inapplicable to an expressway which worked on a closed tolling system. He submitted that in a close tolling system, the entry and exit points are limited and a user pays the toll depending on the distance covered from the point of entry to the point of exit; the fee is based on the distance covered and not on crossing a toll plaza. He submitted that it is only in the case of NH8 section that toll is collected on crossing a toll plaza with no reference to the actual distance covered by the user. He earnestly contended that discounts as referred to in Rule 9(1) of the 2008 Toll Rules were only applicable where the charge of toll was based on crossing a toll plaza and not on the actual distance covered.

21. Secondly, Mr Chidambaram contended that it was impractical to provide the concessions as contemplated under the Rule 9(2) of the 2008 Toll Rules. He submitted that in terms of Rule 9(2) of the 2008 Toll Rules, the concessionaire was required to charge 1.5 times the fee payable for a single journey for two one way journeys within the validity period of 24 hours. He submitted that it would be impracticable to monitor the same. He submitted that there are five toll plazas on the Expressway. As an illustration, he submitted that if a person enters the Expressway at Ahmedabad toll plaza and claims to be travelling to Nadiad, he would be

required to be issued an Ahmedabad - Nadiad return pass. He submitted that the user could exit at Nadiad and take an alternate route (other than the Expressway) to Vadodara and on return journey, enter the Expressway at Vadodara and travel to Ahmedabad. And, would produce the Ahmedabad-Nadiad return pass (and not the ticket issued at Vadodara) while exiting the Toll Plaza at Ahmedabad. Thus, not making any further payment for the journey for the section from Vadodara to Nadiad. He submitted that a similar issue would arise in the case of a monthly pass system as well.

22. Lastly, Mr Chidambaram referred to the decision of the Supreme Court in **Associate Builders v. Delhi Development Authority : (2015) 3 SCC 49** and submitted that the findings of the Arbitral Tribunal are final and cannot be interfered with unless the same are found to be perverse.

Reasoning and conclusion

23. As stated hereinbefore, the project in question consisted of works on two stretches of road from Ahmedabad to Vadodara. The first being National Highway No. 8 from Ahmedabad to Vadodara (NH8 section) and second being the Ahmedabad and Vadodara expressway (the Expressway). Both the stretches of road connect Ahmedabad to Vadodara *albeit* by a different route. The controversy between the parties relates to applicability of discounts for users of the Expressway and concern three kinds of concessions: (i) multiple journey tickets for frequent travellers using a section of the highway for two one way journeys during the period of 24 hours at the rate of 1.5 times the fare for a single journey ticket – return trip passes for users of the Expressway; (ii) monthly passes consisting of 50 single journey coupons at the rate of $\frac{2}{3}$ rd of the aggregate fare for 50 single journeys; and (iii) passes in respect of non-commercial vehicles

which are owned by persons residing within 20 kilometres of the nearest Toll Plaza.

24. The first and foremost issue to be addressed is whether IRB was obliged to provide the necessary concessions to the users of the Expressway in terms of the concession agreement. In this regard, it is necessary to refer to Article 27 of the concession agreement which relates to 'User Fee'. Sub-article 27.1 provides for collection and appropriation of fee. By virtue of Sub-article 27.1.1 of Article 27 of the concession agreement, IRB has the sole and exclusive right to demand, collect and appropriate fee from the users of the Expressway subject to and in accordance with the concession agreement and the 2008 Toll Rules read with National Highways Fee (Determination of Rates and Collection) Amendment Rules, 2010 and National Highways Fee (Determination and Collection) Amendment Rules, 2011. Sub-article 27.1.1 also expressly provides that IRB would not be entitled to demand any fee from the users of the NH8 section till completion of six laning of the said highway.

25. Sub-article 27.3 of Article 27 of the concession agreement provides for exemption to local users and Sub-article 27.5 provides for discounted fee from frequent users. The relevant extracts of Article 27 of the concession agreement are set out below:-

"27.1 Collection and appropriation of Fee

27.1.1 On and from the COD till the Transfer Date, the Concessionaire shall have the sole and exclusive right to demand, collect and appropriate Fee from the Users of Ahmedabad - Vadodara Expressway Section subject to and in accordance with this Agreement and the National Highways Fee (Determination of Rates

and Collection) Rules, 2008, read along with National Highways Fee (Determination of Rates and Collection) Amendment Rules, 2010, read along with National Highways Fee (Determination of Rates and Collection) Amendment Rules, 2011 (the “**Fee Rules**”); Provided that the Concessionaire shall not be entitled to demand, collect and appropriate Fee from the Users of the Project Highway from km. 6.400 to km 108.700 of Ahmedabad Vadodara Section of NH 8 till the completion of Six Laning i.e. before COD provided that for ease of payment and collection, such Fee shall be rounded off to the nearest 5 (five) rupees in accordance with the Fee Rules; provided further that the Concessionaire may determine and collect Fee at such lower rates as it may, by public notice to the Users, specify in respect of all or any category of Users or vehicles.

27.1.2 The Parties acknowledge that a notification for levy and collection of Fee shall be issued by the Government under Section 8A of the Act (the “**Fee Notification**”), read along with National Highways Fee (Determination of Rates and Collection) Amendment Rules, 2010, read along with National Highways Fee (Determination of Rates and Collection) Amendment Rules, 2011 within 120 (One hundred and twenty) days hereof substantially in the form set forth in Schedule-R.

27.1.3 The Concessionaire acknowledges and agrees that upon payment of Fee, any User shall be entitled to use the Project Highway and the Concessionaire shall not place, or cause to be placed, any restriction on such use, except to the extent specified in any Applicable Law, Applicable Permit or the provisions of this Agreement.

27.1.4 The Concessionaire acknowledges and agrees that any User who is not liable for payment of the Fee shall be entitled to use the Project Highway without any restrictions, except to the extent specified in any

Applicable Law, Applicable Permit or the provisions of this Agreement. For the avoidance of doubt, the Concessionaire hereby acknowledges that Exempted Vehicles are not liable to payment of Fee.

*** **

27.3 Exemption for Local Users

The Concessionaire shall not collect any Fee from a Local User for non-commercial use of the Project Highway, and shall issue a pass in respect thereof for commuting on a section of the Project Highway as specified "in such pass and for crossing the Toll Plaza specified therein. For carrying out the provisions of this Clause 27.3, the Concessionaire shall formulate, publish and implement an appropriate scheme, and make such modifications to the scheme as may reasonably be suggested by the Authority or by Local Users from time to time; provided that for defraying its expenses on issuing of passes and handling of Local Users, the Concessionaire shall be entitled to charge a monthly fee of Rs.150 (Rupees one hundred and fifty only), with reference to the base year 2007-08, to be revised annually in accordance with the Fee Rules to reflect the variation in WPI, and then rounded off to the nearest 5 (five) rupees; provided further that no passes will be required or Fee collected from a vehicle that uses part of the Project Highway and does not cross a Toll Plaza.

*** **

27.5 Discounted Fee for frequent Users

27.5.1 The Concessionaire shall, upon request from any person, issue a return pass on payment of a sum equal to 150% (one hundred and fifty per cent) of the Fee payable for the respective vehicle if it were to undertake a single one-way trip on the Project Highway. Such return pass shall entitle the specified

vehicle to undertake a return journey within 24 (twenty four) hours from the time of payment of Fee.

- 27.5.2 The Concessionaire shall, upon request from any person for issue of 50 (fifty) or more one-way toll tickets, issue such tickets at a discounted rate equivalent to two-thirds of the Fee payable for the respective vehicle. Such discounted tickets shall entitle the specified vehicle to commute on the Project Highway by using one ticket for a single one-way trip at any time during a period of one month from the date of payment of Fee.

*** *** *** ***

27.8 Fee collection points

Fee shall ordinarily be collected at the Toll Plazas from vehicles crossing the Toll Plazas and using the whole or part of the Project Highway; provided that for preventing evasion of Fee by any vehicle circumventing one or both of the Toll Plazas and using the whole or part of the Project Highway located between such Toll Plazas, the Concessionaire shall be entitled to set up at its own risk and cost, and in consultation with the Independent Engineer, its temporary or permanent Fee collection booths, as may reasonably be necessary for preventing such evasion. For the avoidance of doubt, the Concessionaire hereby acknowledges and agrees that it shall not determine or collect Fee from Users who do not use any part of the Project Highway which is situated between the two Toll Plazas. It is further acknowledged and agreed that the restrictions hereunder shall not extend beyond a distance of 10 (ten) kilometres from the Toll Plazas and the provisions of this Clause 27.8 shall be so enforced as to minimise inconvenience to Users who are not liable to payment of Fee. Notwithstanding anything contained in this para "Fee Collection points" shall always be governed by provisions of National Highways Fee (Determination of Rates and Collections) Rules 2008, read along with National

Highways Fee (Determination of Rates and Collection) Amendment Rules, 2010, read along with National Highways Fee (Determination of Rates and Collection) Amendment Rules, 2011 (the "Fee Notification") in this regard."

26. The Arbitral Tribunal has interpreted the aforementioned provisions, which pertain to exemptions/concessions for local users and discounted fee for frequent users, to be inapplicable to the Expressway as according to the Arbitral Tribunal, the expression "Project Highway", as used in sub-article 27.3 and 27.5 of the concession agreement, only referred to the NH8 section and not the Expressway.

27. In my view, the aforesaid interpretation is *ex facie* flawed and militates against the plain language of the concession agreement. Article 48.1 of the concession agreement defines the words and expressions as used in the concession agreement including the expression "Project Highway". The relevant extract from Article 48.1 is set out below:-

"48.1 Definitions

In this Agreement, the following words and expressions shall, unless repugnant to the context or meaning thereof, have the meaning hereinafter respectively assigned to them:"

*** *** *** ***

"Project Highway" means the Site comprising the existing road comprising NH- 8 from km 6.400 to km 108.700 (Length 102.300 km) in the State of Gujarat and improvement of existing Ahmedabad Vadodara Expressway from km 0.000 to km 93.302 (Length 93.302 km) in the State of Gujarat and all Project Assets, and its subsequent development and augmentation in accordance with this Agreement."

28. It is apparent from the above that the expression “Project Highway” would include both the NH8 section as well as the Expressway. The Arbitral Tribunal has referred to sub-article 27.1.1 of the concession agreement to hold that the expression “Project Highway” only referred to the NH8 section. This is plainly unsustainable. Sub-article 27.1.1, *inter alia*, provides that “.....the Concessionaire shall not be entitled to demand, collect and appropriate Fee from the Users of the Project Highway from km. 6.400 to km 108.700 of Ahmedabad Vadodara Section of NH 8 till the completion of Six Laning”. This cannot be read to mean that the expression “Project Highway” in Article 27 of the concession agreement would only mean the NH8 section and exclude the Expressway. On the contrary, the above language specifies that the reference is to the NH8 section of the Project Highway; which only means that it does not refer to the other section of the Project Highway, that is, the Expressway. The conclusion that sub-article 27.1.1 defines Project Highway, is *ex facie* erroneous.

29. Sub-article 27.1.3 and sub-article 27.1.4 of the concession agreement also records the acknowledgement and agreement of the concessionaire that upon payment of fee, the user shall be entitled to use the Project Highway; admittedly this applies to the Expressway as well. Plainly, the expression “Project Highway” would also include the Expressway and there was no occasion for the Arbitral Tribunal to hold that in the context of Article 27, the expression “Project Highway” would only mean the NH8 section. It is well settled that an arbitral award that is contrary to the plain language of the agreement between the parties would be amenable to judicial review within the scope of Section 34 of the Act.

30. It is important to note that in response to the pre-bid queries, NHAI had clarified that exemptions as per Article 27.3 of the Draft concession agreement would be applicable. Further in response to another query as to whether discounts would be applicable on the Expressway, NHAI had responded that Toll would be as per the “Fee Rules”. The relevant queries and NHAI’s response thereto are provided as under :

“Query No. 85 : Article 27-Clause 27.3 pg No. 83

Exemption of Local users: Are the local users of the Expressway also eligible for the clause 27.3 i.e. “Exemption for Local Users” Should they be given the facility of monthly fee of Rs.150/-.

Reply : As per Clause 27.3 of the Draft Concession Agreement.

Query No. 119 : Schedule R : Toll rates on Express way

Provide the base toll fee matrix of NE-1 since it is a closed tolling system.

And also kindly confirm if the NH 8 Toll fee determination rules is applicable for NE-1 Expressway also.

Reply : For both NH-8 and NE-1, toll would be collected as per National Highways Fee (Determination of Rates and Collection) Amendment Rules, 2011, read in conjunction with National Highways Fee (Determination of Rates and Collection) Amendment Rules, 2010 and National Highways Fee (Determination of Rates and Collection) Rules, 2008.”

31. NHAI, on the strength of the aforesaid, had contended that there was no scope for any confusion that concessions for local users/frequent users would be available in the use of Expressway as well. The Arbitral Tribunal

has completely ignored the aforesaid contention and there is no discussion regarding the same in the impugned award.

32. The reliance placed by the Arbitral Tribunal on the letter dated 03.01.2013 is also not warranted. The said letter was an internal communication and more importantly was expressly withdrawn by a subsequent letter dated 11.01.2013, which has been completely ignored by the Arbitral Tribunal.

33. The next issue to be examined is whether Rule 9 of 2008 Toll Rules, which provides for discounts to users, is inapplicable in the case of the Expressway.

34. Rule 2(g) of the 2008 Toll Rules defines “expressway” as under:-

“(g) “expressway” means a national highway having a divided carriageway suitable for high speed traffic and with control of access.”

35. It is apparent from the above that the word “expressway” is also a National Highway, albeit with control of access. Entry 23 of the List I of the Seventh Schedule to the Constitution of India reads as under:

"23. Highways declared by or under law made by Parliament to be national highways."

36. Admittedly, the 2008 Toll Rules apply to expressways and have been made in exercise of powers under Section 9 of the National Highways Act, 1956, which is enacted by the Parliament. And, the legislative competence for which is traceable to Entry 23 of List I.

37. Rule 3(1) of the 2008 Toll Rules provides for levy of fee and reads as under:-

“3. Levy of fee.- (1) The Central Government may by notification, levy fee for use of any section of national highway, permanent bridge, bypass or tunnel forming part of the national highway, as the case may be, in accordance with the provisions of these rules:

Provided that the Central Government may, by notification, exempt any section of national highway, permanent bridge, bypass or tunnel constructed through a public funded project from levy of such fee or part thereof, and subject to such conditions as may be specified in that notification.”

38. It is apparent from the above that the right of IRB to collect toll is traceable to Rule 3(1) of the 2008 Toll Rules which, *inter alia*, provides for levy of fee for use of any section of the National Highway. Admittedly, this includes levy of fee for use of an expressway.

39. Rule 6 of the 2008 Toll Rules provides for collection of fee. Rule 6(1) and 6(2) are relevant and are set out below:-

"6. Collection of fee.- (1) Fee levied under these rules shall be collected by the Central Government or the executing authority or the concessionaire, as the case may be at the toll plaza.

(2) Every driver, owner or person in charge of a mechanical vehicle shall for the use of the section of national highway, permanent bridge, bypass or tunnel, before crossing the toll plaza, pay the fee specified under these rules."

40. Rule 9 of the 2008 Toll Rules provides for discounts. Sub-rule 1,2 and 3 of Rule 9 reads as under:-

“9. Discounts.-(1) The executing authority or the concessionaire, as the case may be, shall upon request provide a pass for multiple journeys to cross a toll plaza

within the specified period at the rates specified in sub-rule (2) of rule 9.

(2) A driver, owner or person in charge of a mechanical vehicle who makes use of the section of national highway, permanent bridge, bypass or tunnel, may opt for such pass and he or she shall have to pay the fee in accordance with the following rates, namely:-

Amount payable	Maximum Number of one way journeys allowed	Period of validity
One and half times of the fee for one way journey	Two	Twenty four hours from the time of payment
Two-third of amount of the fee payable for fifty single journeys.	Fifty	One month from date of payment

(3) A person who owns a mechanical vehicle registered for non-commercial purposes and uses it as such for commuting on a section of national highway, permanent bridge, bypass or tunnel, may obtain a pass, on payment of fee at the base rate for the year 2007-2008 of Rupees one hundred and fifty per calendar month and revised annually in accordance with rule 5, authorising it to cross the toll plaza specified in such pass:

Provided that such pass shall be issued only if such driver, owner or person in charge of such mechanical vehicle resides within a distance of twenty kilometers from the toll plaza specified by such person and the use of such section of national highway, permanent bridge, bypass or tunnel, as the case may be, does not extend beyond the toll plaza next to the specified toll plaza.

Provided further that no such pass shall be issued if a service road or alternative road is available for use by such driver, owner or person in charge of a mechanical vehicle."

41. The contention that Rule 9 is not applicable for use of the Expressway since the toll charged is for the specified distance and not on mere crossing of a toll plaza is inconsiderable. In terms of Rule 6(1), the fee for usage of the section of a national highway - which includes the Expressway - can only be collected at the toll plaza. Thus, the reference to a toll plaza in Rule 9 cannot be read as restricted to only a toll plaza on a national highway other than an expressway. Whether the toll is collected only on crossing of a toll plaza or it is collected for the specified journey, would make little difference for the purposes of Rule 9 of the 2008 Toll Rules as in either case, toll is collected only at a toll plaza in terms of Rule 6(1) of the 2008 Toll Rules.

42. Indisputably, the method of toll collection in respect of national highways other than expressways and expressways is different. Whereas in the case of former, toll is collected at a toll plaza irrespective of the distance covered and in the latter case, toll is collected either at the toll plaza at point of entry or at the toll plaza at the point of exit but the fee collected depends on the distance covered. However, the difference in the method of collecting toll does not in any manner dilute the provision that the toll is collected at a toll plaza and in terms of Rule 9(1) of the 2008 Toll Rules, a user would be entitled to obtain a pass at the rates as provided under Rule 9(2) of the 2008 Toll Rules to cross a toll plaza. Obviously, the expression 'toll plaza' in Rule 9(1) refers to the toll plaza at which the toll is collected.

43. It is difficult to accept that whereas user fee can be collected on crossing a toll plaza, the concessions for crossing a toll plaza would not be available. The use of the word ‘toll plaza’ in Rule 9(1) and the expression “the toll plaza” in Rule 6(1) cannot have different connotations. In the scheme of the 2008 Toll Rules, the right to collect toll cannot be divorced from the obligation to provide concessions as provided.

44. It is also important to mention that the Ministry of Road Transport and Highways had issued a notification dated 17.12.2012 (S.O. 2921(E)) under Section 8A of the National Highways Act, 1956 read with Rule 3 of the 2008 Toll Rules as amended, fixing the rates for collection of fees. The said notification expressly applied to both the NH8 section (which was described as ‘Section 1’) and the Expressway (which was referred to as ‘Section 2’). The notes at the end of the notification also prescribed the rates for monthly passes for non-commercial vehicles owned by persons residing within a distance of 20 kilometres from the Toll Plazas as also the rates for passes for frequent users. The relevant extract from the notes to the said notification are as under:-

"1. The fee levied and collected hereunder shall be due and payable at the following Toll Plazas for the distance specified for such Toll Plaza(s):

(a) For Ahmedabad – Vadodara section of NH 8 from COD.

Location of Toll Plaza(s) (Chainage)	Length (in km) for which Fee is payable
Km/Ch. 44.005, (near Radhvanaj village in Kheda District)	50.815

Km/Ch. 92,000, (near Vasad village in Vadodara District)	50.486
--	--------

(b)For Ahmedabad – Vadodara expressway of NE 1 from Appointed Date.

Location of Toll Plaza (chainage)	Length (Km)
Ahmedabad Toll Plaza at Km 2.600	For the actual length travelled
AUDA Ring Road Toll Plaza at Km 3.800	
Nadiad Toll Plaza at Km 43.855	
Anand Toll Plaza at Km 58.616	
Vadodara Toll Plaza at Km 86.000	

3. The rate of monthly pass for a person who owns a mechanical vehicle registered for non-commercial purposes and resides within a distance of twenty kilometres from the toll plaza is Rs.200.00 (Rupees Two Hundred only) for the year 2012-13 and is subject to revision every year as per the provisions of the National Highways Fee (Determination of Rates and Collection) Rules, 2008.

4. For multiple journeys on the highway section, passes shall be issued at the following rates, namely.

Amount Payable	Maximum number of one way journeys allowed	Period of validity
One and half times of the fee for one way journey	Two	Twenty four hours from the time of payment

Two-third of amount of the fee payable for fifty single journeys or more	Fifty or more	One month from date of payment
--	---------------	--------------------------------

9. Based on the base rates of fee per km for the Base Year 2007-2008 as mentioned in Table 1 & 2 above, the actual amount of fee to be charged from the mechanical vehicles and the discounts will be calculated by the Authority and revised annually in accordance with the rule 5 of the said Rules provided that no revision shall be effected within six months and the same shall be published in at least one newspaper, each in English and vernacular language accordingly.”

45. The next controversy to be examined is whether issuance of passes for multiple journeys on an expressway renders the monitoring of the discounts impracticable, as contended on behalf of IRB.

46. In order to address the aforesaid issue, it is essential to understand the manner in which the toll is collected on the Expressway. The Expressway has five toll plazas situated at Ahmedabad, Auda Ring Road, Nadiad, Anand and Vadodara. A person travelling on the Expressway can only enter at one of the said five toll plazas and exit at another. It is stated that when a user enters the Expressway at a toll plaza, he receives a ticket indicating the toll plaza at which he had entered. The ticket also specifies the toll plaza where he has to exit. The user then pays for the distance travelled at the plaza where he exits the Expressway. It was contended that the system of tolling makes it impracticable for issue of return journey passes which are issued at 1 ½ times the fee for the single journey. The illustration that was provided by Mr Chidambaram was of a user who

would enter the toll plaza at Ahmedabad for a journey to Nadiad; he would be issued a ticket at the Ahmedabad toll plaza. He could exit at Nadiad and then take an alternative route to go to Vadodara. On the return journey, he would enter the Expressway at Vadodara where he would collect a fresh ticket (bearing the name of the Vadodara Toll Plaza) for his journey to Ahmedabad. However, while crossing the toll plaza at Ahmedabad, he would not produce the ticket issued to him at Vadodara but would produce the pass issued to him indicating the return journey from Nadiad. It was contended that in this manner, the user would effectively avoid paying for the journey from Vadodara to Nadiad and only paying for the journey from Ahmedabad to Nadiad and back at concessional rate.

47. A closer examination of the aforesaid illustration would clearly indicate that the difficulties expressed are only illusory. A person who enters the Expressway from a toll plaza for his journey to another destination - in the above mentioned illustration from Ahmedabad to Nadiad - would be issued a ticket at the point of entry which would also specify the exit plaza. Thus, in a case of return journey, a ticket would also enable the user to enter again from the point of exit and complete the return journey to the point of original entry. In the illustration mentioned above, it would be from Nadiad to Ahmedabad. Thus, when a person using the return pass enters the Expressway at Ahmedabad, he would be issued a pass for the return journey as well which would indicate the exit toll plaza. In the above illustration, the pass would indicate Nadiad as the exit toll plaza. At the exit toll plaza at Nadiad, the user would pay 1 ½ times the fare for the return pass. On the return journey, he would again have to pass through the Nadiad toll plaza where the said pass could be validated /stamped. He would not be charged any further fare on his exiting at the

Ahmedabad toll plaza within the period of validity of the pass on his showing the return pass validated at Nadiad. There would be no difficulty in implementing the same because the user would have to show his pass at Nadiad toll plaza while entering the Expressway on the return journey and that pass would be validated / stamped. In the illustration which was earnestly canvassed, it was contended that the user could travel by an alternate route to Vadodara after exiting at Nadiad and enter from Vadodara and produce the return journey pass from Nadiad to Ahmedabad while exiting the Expressway at Ahmedabad. This is plainly addressable as the user would not be able to show the entry endorsement for the return journey segment from Nadiad to Ahmedabad. In other words, his ticket would not bear the endorsement of Nadiad Toll Plaza from where he ought to have entered the Expressway on his return journey - the only proof of entry on the Expressway on return journey would be the entry ticket issued to him at Vadodara.

48. It is also important to note that it is not disputed that IRB has been implementing and providing concessions to the users of the Expressway. On a pointed query by the Court as to how the discount for a return journey pass was being implemented; IRB produced a scanned copy of one of the passes which clearly indicates the date; the validity period; the toll plaza at which the user entered the Expressway; the exit toll plaza as well as other particulars such as the fee, vehicle class, pass type etc. Thus, in fact, IRB has been providing concessional passes for return journey at the concessional rate of 1.5 times the fare of one way journey.

49. Similarly, there is no plausible reason why the monthly pass covering 50 single journeys cannot be issued at 2/3rd the amount of fee payable for 50 single journeys.

50. Thus, the contention that the issuance of discounts in terms of Rule 9 of the 2008 Toll Rules is impracticable, is also unsustainable.

51. The Arbitral Tribunal was persuaded to hold in favour of IRB, *inter alia*, for the reason that prior to the commencement of the concession agreement, toll was being collected by a subsidiary of NHAI and no concessions were provided by the said entity. NHAI had explained that toll was being collected on the Expressway prior to execution of the concession agreement dated 05.03.2002 which did not provide for any concessions. According to NHAI, the concession agreement dated 05.03.2002 was completely different from the concession agreement with IRB. The impugned award does not indicate any reason or any discussion for rejecting the aforesaid contention.

52. Before concluding, it is also relevant to note that in the financial model (financial closure) submitted to NHAI, the financials clearly indicated fund flows from collection of toll adjusted for the discount applicable. In other words, in the financial closure statement submitted to NHAI, it was contemplated that the discount on fee would be provided to users of the Expressway. Mr Jayant Bhushan, the learned counsel appearing for IRB did not dispute the above. He, however, submitted that the financial closure had been appraised by the banks and it was the banks, who were responsible for computing the fund inflow from toll collection. This contention is also unpersuasive as admittedly, the financial closure was submitted to NHAI on behalf of the concessionaire - IRB. At that

stage, IRB did not object that projected fund inflow submitted to NHAI had been under stated on account inapplicable discount factor. Thus, IRB cannot now be heard to contend otherwise.

53. For the reasons stated above, this Court is of the view that the impugned award is fundamentally flawed, contrary to the express language of the concession agreement and, thus, wholly unsustainable on the touchstone of Section 34(2)(b)(ii) of the Act. Further the Arbitral Tribunal has also failed to address all the issues raised by NHAI.

54. The impugned award is, accordingly, set aside. The pending application stands disposed of. The parties are left to bear their own costs.

FEBRUARY 06, 2017
RK

VIBHU BAKHRU, J

