

\$~

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

+ **FAO(OS) (COMM) 50/2017 & CM No.7361/2017**

Reserved on : 22nd November, 2017

Date of decision : 11th May, 2018

**IRB AHMEDABAD VADODARA SUPER EXPRESS TOLL
WAYS PVT LTD**

..... Petitioner

Through: Mr. A.S. Chandhiok and Mr. Akhil
Sibal, Senior Advocates with Mr.
Ritesh Kumar, Ms. Monika Tyagi,
Mr. Tejaswi Chaudhary and Mr.
Shivaji Jadhav, Advocates.

versus

**NATIONAL HIGHWAYS AUTHORITY
OF INDIA**

..... Respondent

Through: Mr. Sandeep Sethi, Senior Advocate
with Ms. Gunjan Sinha Jain, Mr.
Karan Grover and Mr. R.K. Garg,
Advocates.

CORAM:

HON'BLE MR. JUSTICE SANJIV KHANNA

HON'BLE MS. JUSTICE PRATHIBA M. SINGH

JUDGMENT

Prathiba M. Singh, J.

IRB Ahmedabad Vadodara Super Express Toll Ways Pvt Ltd –the appellant Company (*for short, 'appellant'*) entered into a Concession Agreement dated 25th July, 2011 (*for short, 'agreement'*) with the Respondent – National Highways Authority of India (*for short, 'NHAI'*) for the development, maintenance and management of National Highway No.8 connecting Ahmedabad and Vadodara (*for short 'NH-8'*) and the

improvement of the already existing Ahmedabad-Vadodra Expressway (*for short 'Expressway'*). NH-8 and the Expressway are two alternative routes available for commuters travelling between Ahmedabad and Vadodara. The Agreement was on a DBFOT (Design, Build, Finance, Operate and Transform) basis.

2. A Request for Qualification (RFQ) was issued by NHAI in May 2010. Bidders were shortlisted and bids were invited from the shortlisted bidders of which one was M/s IRB Infrastructure Developers Ltd. (*hereinafter, 'selected bidder'*). The bid of the selected bidder was accepted. The selected bidder promoted and incorporated the appellant, and requested the NHAI to accept the appellant as a Concessionaire. All the obligations of the selected bidder were to be performed by the appellant – Concessionaire. The Agreement with the appellant, after taking proper assurances and undertakings from the selected bidder, was entered into on 25th July, 2011.

3. Disputes arose between the parties in 2014, for which amicable resolution was tried but to no avail. Arbitration clause in the agreement had provided for resolution of disputes through International Council of Alternative Dispute Resolution (ICADR). A Supplementary Agreement dated 14th July, 2014 was entered for resolution of disputes through rules and procedures of the Society of Affordable Resolution of Disputes (SAROD) instead of ICADR. To this extent there is no dispute.

4. SAROD is a body set up by NHAI. A three member tribunal was constituted as per the Rules of SAROD. Claims and Counter Claims were filed before the Arbitral Tribunal. The Arbitral Tribunal by a 2:1 majority upheld the claims of the Appellant in the following terms:

“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.”*

5. NHAI challenged the award under Section 34 of the Arbitration and Conciliation Act, 1996 (for short, ‘Act’). The Ld. Single Judge on 6th February, 2017 set aside the Arbitral award dated 8th January, 2016. The present appeal has been preferred against the impugned judgment of the Ld. Single Judge dated 6th February, 2017.

6. The crux of the dispute is the issuance of discounted passes, exemptions and concessions on the Expressway. There are four different types of discounts that are given to frequent/local users of the Expressway. The same are:

- (i) Multiple journey tickets for frequent travellers using the section of the National Highway for two one way journeys during the day @ 1.5

times single journey ticket valid for 24 hours (*Return trip passes to frequent users on Expressway/NE-1*);

- (ii) Monthly passes consisting minimum 50 coupons @ 2/3rd amount for 50 single journeys issued to vehicles travelling to and fro daily on the section of the National Highway (*Multiple Trip Passes for frequent users on Expressway/NE-1*);
- (iii) Passes for vehicles of local residents who reside within a distance of 20 kms from the nearest Toll Plaza (*Monthly passes to local non-commercial vehicles*);
- (iv) Passes for vehicles which are registered within the District where Toll Plazas are located (*Discounted fee to local commercial vehicles*).

7. The dispute in the present case relates to the first three categories of discounts to be given by the appellant on the Expressway, as noted by the Ld. Single Judge, for local vehicles and frequent travellers using the Expressway. It is the case of the appellant that on an interpretation of various clauses of the agreement, it is not liable to grant these discounts/concessions on the Expressway. As a result thereof, it is liable to be compensated by the NHAI. The Arbitral Tribunal accepted the stand of the appellant and awarded a sum of Rs.24,89,59,565.00/- (from July, 2013 to April, 2015) to be paid by the NHAI along with interest @ 15%, as also amount of recurring losses to the appellant from May, 2015 which amount was to carry an interest @15% from the day audited account is submitted till date of passing of the award.

8. The question as to whether the appellant is liable to grant the discount/concessions is to be determined as per the terms of the Agreement and also depends upon the applicability of the National Highways Fee

(Determination of Rates and Collection) Rules, 2008 (*for short, 'NHF Rules, 2008'*). It is the stand of the appellant that these Rules have no application to an “Expressway” and hence it is not liable to grant the discounts and concessions under the NHF Rules, 2008.

9. Some of the relevant clauses of the Concession Agreement dated 25th July, 2011 are as under:

2.1 Scope of the Project

The scope of the Project (the “Scope of the Project”) shall mean and include, during the concession Period:

- (a) construction of the Project Highway on the Site set forth in Schedule-A and as specified in Schedule-B together with provision of project Facilities as specified in Schedule-C, and in conformity with the Specifications and Standards set forth in Schedule-D;*
- (b) operation and maintenance of the Project Highway in accordance with the provisions of this Agreement; and*
- (c) performance and fulfillment of all other obligations of the concessionaire in accordance with the provisions of this Agreement and matters incidental thereto or necessary for the performance of any or all of the obligations of the concessionaire under this Agreement.*

.....

3.1 The concession

3.1.1 Subject to any in accordance with the provisions of this Agreement, the Applicable Laws and the Applicable Permits, the Authority hereby grants to the Concessionaire the concession set forth herein including the exclusive right, licence and authority during the subsistence of this Agreement to construct, operate and maintain the Project (the “Concession”) for a period of 25 (twenty five) years commencing from the Appointed Date, and the Concessionaire hereby

accepts the Concession and agrees to implement the Project subject to and in accordance with the terms and conditions set forth herein:

.....
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.*

.....
27.3 Exemption of 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.

.....

27.11 Display of Fee rates

27.11.1 The Concessionaire shall, one kilometer before the Toll Plaza, 500 (five hundred) meters before the Toll Plaza and 50 (fifty) meters before entry to the Toll Plazas, prominently display the applicable rates of Fee

for information of Users approaching the toll Plaza and shall also publish and display such other information in such manner as may be prescribed under the Fee Rules.

27.11.2 The Concessionaire shall, from time to time, inform the Authority of the applicable Fee and the detailed calculation thereof. Such information shall be communicated at least 15 (fifteen) days prior to the revision of Fee under and in accordance with the Fee Rules.

27.11.3 The Concessionaire shall not revise, display or collect any amounts in excess of the rates of Fee payable under the Fee Rules. In the event any excess amounts are collected by or on behalf of the concessionaire, it shall, upon receiving a notice to this effect from the Authority, refund such excess amounts to the authority along with Damages equal to 25% (twenty five percent) thereof.

.....

48.1..... **“Fee”** means the charge levied on and payable for a vehicle using the Project Highway or a part thereof, in accordance with the Fee Rules and this Agreement;

48.1..... **“Fee Notification”** means the Notification to be issued by the Government, prior to the Appointed Date, in exercise of the powers conferred by Section 7 of the National Highways Act, 1956 read with Rule 3 of 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 in respect of the levy and collection of Fee during the Concession Period, substantially in the form at Schedule-R;

48.1..... **“Fee Rules”** mean 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;

48.1 **“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 0.0000 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; ”**

10. Relevant clauses of the National Highway Fee (Determination of Rates and Collection) Rules, 2008 are 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
<i>One and half times of the fee for one way journey</i>	<i>Two</i>	<i>Twenty four hours from the time of payment</i>
<i>Two-third of amount of the fee payable for fifty single journeys.</i>	<i>Fifty</i>	<i>One month from date of payment</i>

(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, authorizing 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.

(4) *No pass shall be issued or fee collection from a driver, owner or person in charge of a mechanical vehicle that uses part of the section of a national highway and does not cross a toll plaza.”*

Submissions of the Appellant

11. On the basis of the above mentioned Clauses of the contract and the NHF Rules 2008, it is the case of the appellant that it was not liable to give any of the discounts mentioned in Clause 27 of the Agreement on the Expressway section as the said discounts and exemptions apply to commuters only on NH-8.

12. According to the appellant, the term “Project Highway” contained in the Agreement can only mean NH-8 and not the Expressway. The appellant relies on the fact that the term Expressway was never meant to include a

highway and the Agreement all along kept a distinction between the two, namely, NH-8 and Expressway. The appellant further relies upon a clarification issued by the NHAI headquarters to the NHAI, Gujarat office to the following effect:

“4. As per the earlier Fee rates of 2011-12, communicated vide NHAI’s letter dated 20.06.2011, separate rates had been mentioned for Ahmedabad-Vadodara Expressway and Ahmedabad-Vadodara Section of NH-8 where in Fee for Single Journey / Fee for Multiple Journey / Fee for Monthly passes had been mentioned for only for Ahmedabad-Vadodara Section of NH-8.”

13. On the basis of this letter, it is the submission of the appellant that it was not feasible for it to offer these exemptions and discounts on the Expressway inasmuch as the manner in which the fees was collected on the Expressway was different from the manner in which toll was collected on NH-8. On the Expressway, the fee collected was based on the distance travelled but on NH-8, every time a commuter passed through the toll plaza a fixed fee was liable to be paid. The argument of the appellant is that a commuter who entered through the Expressway by not paying any amount could exit on to the NH-8 and use the entire stretch by paying only for a lesser stretch of the Expressway. Such a situation was not contemplated in the Agreement and was therefore resulting in a huge loss for the appellant. According to the appellant, the Expressway followed a closed tolling system whereas NH-8 followed an open tolling system and commuters were therefore able to misuse the pass given at the time of entry into the Expressway, and traveling a longer stretch, without paying anything by taking one of the exits on the Expressway. The appellant had also submitted

that prior to the Agreement being entered into, the NHAI was itself not giving discounts and concessions to frequent/local users on the Expressway.

Submissions of the Respondent

14. On the other hand, it is the submission of the NHAI that as per the NHF Rules, 2008, an Expressway includes a National Highway and the exemption and discounts were applicable on the Expressway as well. It is the submission of NHAI that the letter dated 3rd, January, 2013 was subsequently withdrawn vide letter dated 11th January, 2013 and thus the reliance upon the former, which was only an internal correspondence, was totally misplaced. The further submission of NHAI is that the appellant was all along well aware of the discounts and exemptions that were to be granted and during the bidding process the financial model which was presented by the appellant took the said discounts and concessions into consideration. The chart submitted by the appellant vide letter dated 15th December, 2012 at the time of bidding was heavily relied upon in support of this submission.

15. The NHAI further submits that the award of the tribunal was totally perverse as there was no distinction between Expressways and other National Highways. One of the major grounds urged by NHAI is that the appellant had itself successfully implemented the scheme of discounts/concessions in case of the Expressway for a period of six months and similar concessions were being given by the appellant even on the Allahabad bypass, which also had a closed tolling system. It was submitted that the Arbitral Tribunal's finding that there were several difficulties in the implementation of discounts and concessions was belied by the appellant's

own conduct. Thus, NHAI argues for upholding the judgment of the learned Single Judge.

Analysis and findings

16. It is the well settled position that under Section 34 of the Act, arbitral awards are not to be easily interfered with. The scope of Section 34 has been recently reiterated by the Supreme Court in **HRD Corporation v. GAIL (India) Ltd. 2017 (10) SCALE 71** (hereinafter, 'HRD Corporation') and thus the present case has to be adjudicated within the said boundaries. The Supreme Court has observed in the context of Section 34 as under:

"18.Shri Divan is right in drawing our attention to the fact that the 246th Law Commission Report brought in amendments to the Act narrowing the grounds of challenge co-terminus with seeing that independent, impartial and neutral arbitrators are appointed and that, therefore, we must be careful in preserving such independence, impartiality and neutrality of arbitrators. In fact, the same Law Commission Report has amended Sections 28 and 34 so as to narrow grounds of challenge available under the Act. The judgment in ONGC v. Saw Pipes Ltd., (2003) 5 SCC 705, has been expressly done away with. So has the judgment in ONGC v. Western Geco International Ltd., (2014) 9 SCC 263. Both Sections 34 and 48 have been brought back to the position of law contained in Renusagar Power Plant Co. Ltd. v. General Electric Co., (1994) Supp (1) SCC 644, where "public policy" will now include only two of the three things set out therein, viz., "fundamental policy of Indian law" and "justice or morality". The ground relating to "the interest of India" no longer obtains. "Fundamental policy of Indian law" is now to be understood as laid down in Renusagar (supra). "Justice or morality" has been tightened and is now to

be understood as meaning only basic notions of justice and morality i.e. such notions as would shock the conscience of the Court as understood in Associate Builders v. Delhi Development Authority, (2015) 3 SCC 49. Section 28(3) has also been amended to bring it in line with the judgment of this Court in Associate Builders (supra), making it clear that the construction of the terms of the contract is primarily for the arbitrator to decide unless it is found that such a construction is not a possible one.

19. Thus, an award rendered in an international commercial arbitration-whether in India or abroad-is subject to the same tests qua setting aside Under Section 34 or enforcement Under Section 48, as the case may be. The only difference is that in an arbitral award governed by Part I, arising out of an arbitration other than an international commercial arbitration, one more ground of challenge is available viz. patent illegality appearing on the face of the award. The ground of patent illegality would not be established, if there is merely an erroneous application of the law or a re-appreciation of evidence.

Thus, an arbitral award which is governed by Part I of the Act can be set aside if it is in contravention with the fundamental policy of Indian law, justice and morality or if it suffers from a patent illegality.

17. The Ld. Single Judge has held in para 53 of the impugned judgment as under:

“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.”

18. Though, the Ld. Single Judge has set aside the award by applying a specific sub-section of Section 34, the legality and validity of award can be adjudged on the touchstone of Section 34 as a whole.

19. The Agreement relates to an infrastructure project between two major cities in India, namely, Ahmedabad and Vadodara. The volume of traffic on this stretch would have been the basis for the decision to have two separate major roads connecting the two cities. The density of population also must have been very high, which may have been the reason for the Expressway with various exits between the two cities being improved, along with construction and development of NH-8.

20. The Agreement, especially Clause 27.1.1, 27.3 and 27.5 reflect a major issue of public policy, namely, to keep the usage of the Expressway reasonable for local residents and frequent users. Thus, the Agreement in the present case is not to be interpreted only from the point of view of a commercial contract but also keeping in mind the purpose behind the granting of discounts, exemptions and concessions for frequent travellers and local users. The accessibility and usability of Expressways to the large number of people living in the neighboring areas of the Expressway was a matter of great convenience which could be completely taken away if the discounts, exemptions and concessions were not granted. It is in this background that the Clauses of Agreement need to be interpreted.

21. As per the terms of the agreement, under Clauses 27.3 and 27.5 there were two categories of Users who were entitled to discounts. Category 1 are

Local users under Clause 27.3 and Category 2 are Frequent Users who were entitled to two types of passes – a daily return pass and a monthly pass. Both these were to be given to commuters using the 'Project Highway'. Further, as per the Agreement, the charges had to be approved by the NHAI.

22. A perusal of the letter dated 15th December, 2012, which forwarded the initial financial proposal seeking the validation of toll rates on the Expressway filed by the appellant and the Annexure thereto reveals that the appellant itself had sought validation of toll rates after considering the discounts/concessions to be given to local/frequent users. There is sufficient correspondence on record to show that the NHAI had validated the rates for multiple journey/monthly passes which was forwarded by NHAI on 4th February, 2013 to the appellant. In fact, on 26th June, 2013, the appellant categorically stated as under:

“To

*The Project Director
National Highways Authority of India
3A & 3B/2nd floor, Amul Building,
Nr. Dena Bank, Vejalpur Road, Jivraj park,
Ahmedabad - 380051.*

Sub: Six laning of Ahmedabad to Vadodara section of NH 8 from 6.400 to Km. 108.700 (length-102.300) In the State of Gujarat and Improvement of Ahmedabad Vadodara Expressway from km. 0.000 to 93.302 in the State of Gujarat (Length - 93.302 km.) under NHDP Phase V on Design Build Finance Operate Transfer (DBFOT) Toll basis: Applicability of Monthly passes on Ahmedabad Vadodara Expressway.

*Ref: 1.Your letter No. NHAI/PIU
Ahmedabad/1101/3/13/NH 8/6 laning/l8225,
dated 26/06/2013.*

**2.Our letter No.IAVSET/BD/Toll
Rates/13/11700/,dated 20/06/2013**

Dear Sir,

We reference to the above 2 letters, we hereby confirm that all necessary action is being taken for commencing issue of multiple journey tickets / Monthly passes and daily return passes to the road users immediately. We assure you that the process of updating our computerized tolling system and also updating the signage boards to adhere to the above shall be completed latest by 30th June, 2013, so that we can actually start the issue of multiple journey tickets / monthly passess and daily return passes with effect from 01st July, 2013.

Your are requested to kindly validate the revised rates inclusive of daily/ monthly passes at the earliest.

Thanking you and assuring your our best services.

For IRB Ahmedabad Vododara Super Express Tollway Pvt. Ltd.

V.K. Menon

Authorized Signatory

CC: 1. Member (Admin), NHAI, New Delhi

2. GM (CO), NHAI, New Delhi.

3. CGM (RO), RO Gandhinagar, NHAI, Gandhinagar,

4. GM (T), NHAI, New Delhi.

5. Team Leader, Aarvee Associates, Architects, Engineers & Consultants Pvt. Ltd., Anand Gujarat.”

23. Despite this letter, the appellant did not implement the monthly passes/return journey tickets scheme, which led to the dispute. The appellant was well aware, all along, right from the time of submitting the financial proposal that exemptions/ discounts would be applicable on the

Expressways. It appears that the appellant after having initially agreed to issuance of discounts/concessions including monthly passes had a change of mind and thus, decided to raise disputes in respect of issuance of the same.

24. Moreover, a perusal of Clauses of the Agreement, especially Clause 27 leaves no doubt that the term “*Project Highway*” as contemplated in Clause 27 includes both the Expressway and NH-8 as per the Definition Clause 48.1. The NHF Rules, 2008 also lend credence to the stand of NHAI that an Expressway means a National Highway and thus, the confusion attempted to be created by the appellant between the term ‘*Expressway*’ and ‘*National Highway*’ to escape from its obligation is completely baseless and misplaced.

25. The purpose of using two different terms in the contract i.e., *Expressway for the section of Highway which was to be improved* and *NH-8 for the Highway which was to be built* was only to distinguish the role of the appellant qua these two Highways. It was not meant to allow an exit for the appellant from its obligations of extending the discounts/concessions to local users and frequent users. The appellant, being fully conscious of its obligations under the Agreement, has attempted to wriggle away by creating a farce of a dispute, when there was none. The correspondence and records beginning with the financial proposal and the letter dated 26th June, 2013 quoted above clearly shows that the appellant was conscious of its obligations. The appellant tried to explain away its earlier conduct by stating in letter dated 26th July, 2013 that it had implemented the discounts only upon being forced to do so by NHAI, though vide letter dated 26th June, 2013, the appellant had not expressed any reservation against the issuance of

multiple journey tickets/monthly passes and daily return passes on the Expressway. The relevant portion of letter dated 26th July, 2013, by which there was a change of stand by the appellant, reads as under:

“.....We had started Issuance of Return Journey Pass and Multiple Journey Pass on Ahmedabad Vadodara Expressway with effect from 01st July, 2013 upon your insistence even though the matter was under contractual Dispute. It is further insisted by your personnel to start issuance of Monthly pass/discounted Fees to the local non commercial vehicles.....”

It appears that through this letter, the appellant was trying to sow seeds of doubts where there were none leading to this litigation between the parties.

26. The award of the Arbitrators ignores all the above documents on record and distinguishes between a Highway and Expressway without any basis. The Clauses use the term Project Highway which is a defined term in the contract and expressly includes the Expressway in the definition which reads as - ***“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.....”.

27. The Supreme Court in ***Associate Builders v. Delhi Development Authority (2015) 3 SCC 49*** (hereinafter, ‘Associate Builders’), had elaborated on the scope of the term “patent illegality” in relation to an arbitral award. The Court held as under:

“42.3. (c) Equally, the third subhead of patent illegality is really a contravention of Section 28(3) of the Arbitration Act, which reads as under:

*“28. Rules applicable to substance of dispute –
(1)-(2)*

(3) In all cases, the Arbitral Tribunal shall decide in accordance with the terms of the contract and shall take into account the usages of the trade applicable to the transaction. “

This last contravention must be understood with a caveat. An Arbitral Tribunal must decide in accordance with the terms of the contract, but if an arbitrator construes a term of the contract in a reasonable manner, it will not mean that the award can be set aside on this ground. Construction of the terms of the contract is primarily for an arbitrator to decide unless the arbitrator construes the contract in such a way that it could be said to be something that no fair-minded or reasonable person could do.”

28. Furthermore, recently the Supreme Court in **HRD Corporation** (*supra*), in light of the Arbitration and Conciliation (Amendment) Act, 2015 has held that “Section 28(3) has also been amended to bring it in line with the judgment of this Court, in *Associate Builders* (*supra*), making it clear that the construction of the terms of the contract is primarily for the arbitrator to decide unless it is found that such a construction is not a possible one.”

29. Applying the above tests, the Arbitrator’s conclusion in paragraph 12.6 i.e., “By no rational, “**Highway**” can be and should be treated as “**Expressway**”, is clearly unsustainable and is vitiated by patent illegality i.e., contrary to the terms of the contract itself as held by the by the Supreme Court in **Associate Builders** (*supra*). Such a finding is also contrary to the fundamental policy behind incorporation of discount and concession clauses. The Ld. Single Judge has rightly analyzed the NHF Rules, 2008 and the

notifications issued by the Central Government which apply to NH-8 and the Expressway. The Ld. Single Judge has further accepted the explanation of NHAI as to why concessions were not being granted prior to the Agreement with the appellant. The provisions of the Concession Agreement dated 5th March, 2002 prevalent at the time were different from the present agreement dated 25th July, 2011. Thus, no parallels could be drawn in the manner sought to be drawn by the appellant.

30. The appellant has sought to raise technical difficulties in terms of how a particular exit on the Expressway would be used by commuters and thereafter re-entered for the return journey for the longer stretch of the Expressway. Such arguments have no basis inasmuch as the definition of toll plaza is quite clear and it was up to the appellant to set up a monitoring system to ensure that there was no misuse and the proper discounts and concessions were granted, as agreed and prescribed in the Agreement. The appellant having taken into consideration the discounts and concessions that it had to offer both on the Expressway and NH-8 at the time of bidding cannot be permitted to resile from the same.

31. It appears from the correspondence that, after having been awarded the bid for this project, the intention of the appellant appears to have changed. After having initially implemented the discounts as per the Agreement, the appellant's attempt to withdraw the monthly passes and other concessions for local and frequent users is not acceptable and is contrary to the contract.

32. No other grounds are argued or pressed by the appellant. The award is completely vitiated by patent illegality and is also contrary to the policy of

using and making available Highway infrastructure to local users on discounted passes and has therefore, been rightly set aside by the Ld. Single Judge.

33. The Court has not been appraised as to whether the discounts and monthly passes are being currently offered by the appellant. It is expected that the NHAI would ensure that the notified monthly passes, discounts and concessions to local/frequent users are being made available to the public with immediate effect so as to ensure that commuters are able to avail of the same.

34. Before the Arbitrator, the NHAI had filed counter claims and prayed as under:

“6. In view of the submissions made above, the Claims of the Claimant may be rejected and the Claimant be directed to:

i) continue issuing return journey tickets and remit the already collected excess amount with interest and damages;

ii) direct the Claimant to extend the concessional passes for non commercial

vehicles residing within 20 km of Toll plaza immediately and submit the details of excess amount collected so far by not extending the said concessions, inspite of clear provisions in the Concession Agreement and repeated requests from the Respondents. Such excess amount collected may be allowed to be recovered along with damages and interest as in case of (i) above.

iii) The cost of arbitration as per actual may be reimbursed.”

35. The Arbitrators, in the award, did not go into the counter claims of NHAI but granted the claims of the appellant. Since, the stand of the appellant has been rejected and award has been set aside, it is directed that the NHAI shall ensure that the concessional passes, discounts and exemptions as per the notified toll rates are being extended to commuters and users. The appellant shall submit all its accounts within eight weeks to NHAI, who shall be entitled to recover all the excess amounts charged by the appellant.

36. The Appeal is dismissed. All pending applications are disposed of. The NHAI is directed to file its bill of costs of the Arbitration and subsequent bill of costs within four weeks with a copy to the Appellant. The NHAI is awarded actual costs as per both its bills of costs to be paid within eight weeks from receipt of the same.

PRATHIBA M. SINGH, J.

SANJIV KHANNA, J.

May 11, 2018

Rahul/Nk