

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

Decided on: 06.07.2018

+ **FAO(OS) 162/2017, C.M. APPL.19958/2017 & 19960/2017**

THE STATE OF GUJARAT

..... Appellant

Through: Sh. Preetesh Kapur, Ms. Puja Singh and Ms.
Hemantika Wahi, Advocates.

versus

ASHVIKA CONSTRUCTION PVT. LTD. AND ANR.

..... Respondents

Through: Sh. Praveen Kumar Jain and Ms. Komal
Pandey, Advocates.

CORAM:

HON'BLE MR. JUSTICE S. RAVINDRA BHAT

HON'BLE MR. JUSTICE A.K. CHAWLA

MR. JUSTICE S. RAVINDRA BHAT

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1. Arguing that the judgment and order of a learned Single Judge rejecting its petition under Section 34 of The Arbitration and Conciliation Act, 1996 (hereafter “the Act”) is erroneous, the State of Gujarat (hereafter “the State”) or “the appellant”) approaches this Court. The State challenged an award dated 10.12.2010 made by the sole Arbitrator in disputes between it and the respondent (hereafter “Ashvika”) which arose out of a tripartite Build, Operate and Transfer (hereafter “BOT”) Agreement dated 19.09.1996 between the Government of India on the one part, the State and Ashvika on the other hand. The agreement was for building a four-lane Road Over Bridge (hereafter “ROB”) and its approaches from km 259/4 to km 263/4 in the Ahmedabad-Mumbai section of NH-8 on BOT basis in place of the then

existing two-lane Railway level crossing No. 13-A, between km 261/2 to km 261/4 of the said section of the National Highway.

2. Under the BOT scheme, the selected entity, had to design and construct the four-lane ROB and its approaches and also maintain it for an agreed period known as the ‘Concession Period’ at its own cost. The contractor (Ashvika) was allowed the rights to collect and retain the fees from the users of the facility at agreed rates during the ‘Concession Period’, so as to recover its investment with returns. Ashvika’s tender was successful; the BOT agreement was signed. The construction period was 18 months and the ‘Concession Period’ was 23 months and 5 days. Under Clause 3.10 of the BOT Agreement, Ashvika could levy fees on vehicles using the facility in accordance with the National Highways Act, 1956 (hereafter “NH Act”) after the Central Government issued a notification to that effect. On 10.07.1998, a Notification was issued by Central Government of India in exercise of the powers conferred under Sections 7 and 8A of the NH Act authorizing Ashvika or its authorized legal representative to collect and retain fees in terms of the rates specified in the Schedule appended to the Notification from 13.07.1998 to 17.04.2000 for use of the part of NH-8 i.e., four-lane ROB from km 261/2 to km 261/4 including its approaches from km 259/4 to km 263/4 in Ahmedabad-Mumbai Section NH-8. Separate rates were specified for different classes of vehicles including heavy vehicles (i.e. trucks, trailer combinations laden with goods / passengers both loaded and unloaded @ ₹ 15 per trip per vehicle etc.).

3. In terms of Clause 1.2 and 8 of the BOT Agreement, a Steering Group (hereafter “SG”) was to be constituted. Its duties and responsibilities

were outlined thereunder. The said SG was to be the technical authority under whose direction and control the work was to be carried out. Clause 8 provided that the SG would be the final authority in all technical matters. The drainage arrangements, layout of junction improvements, other details of the road works, cross-drainage works etc. were to be approved by the SG. The completion of the construction was on 15.07.1998 and collection of fees from the users started from 16.07.1998.

4. A co-operative, i.e. Chalthan Vibhag Khand Udyog Sahakari Mandli Ltd. espousing local interests filed Civil Suit No. 12/1998 in the Court of Civil Judge, Senior Division, Surat, Bardoli against the Central and the State governments of India, and Ashvika challenging the proposed collection of fees from vehicles which would not use the ROB. An interim order was issued, restraining Ashvika from collecting fees from vehicles that were not crossing over the ROB. The onus was put on Ashvika to collect tax from mechanical vehicles crossing over and using the ROB. The suit was decreed on 30.04.2005; the Court declared that vehicles crossing over the bridge from North to South as well as South to North would have to pay the toll fee. It was further declared that the collection of fees from East to West or West to East without crossing over the bridge was illegal. Earlier, on 15.02.2000 at a SG meeting the interim order (of 29.07.1999) was discussed. The SG then agreed that the said order amounted to “Force Majeure” in terms of Clause 11.3 of the BOT Agreement. In terms of Clause 11.3 during the subsistence of the agreement, that if, at any time during the ‘Concession Period’, Ashvika could not collect any fee or the fee collection was drastically reduced due to reasons beyond its control such as fire,

earthquake, floods, storm or any other such calamity etc., *injunction from any court* or the closure of bridges for more than 24 hours at a time on account of structural repairs etc., the Central Government was to compensate Ashvika for such deficit / shortfall in the fee collection along with interest as may be decided by the SG. The SG accordingly directed that Ashvika together with the PWD Personnel would collect the traffic census data for 7 days (24 hours a day), conduct an O-D Survey at both the ends of the project location to assess the possible loss of collection after accounting seasonal variations. The SG met again on 13.07.2000 and 14.07.2000 and it calculated the compensation payable to Ashvika as ₹15,48,120.

5. This determination was unacceptable to Ashvika, which sought reference of the disputes to Arbitration in terms of Clause 10 of the BOT Agreement. The Central Government of India appointed a sole Arbitrator by a letter dated 28.09.2000. The tribunal by award dated 04.07.2007, held that on account of the judgment dated 30.04.2005 of the Civil Judge in Special Civil Case No. B/12/A.D 1998, he could not act as an Arbitrator to adjudicate the claim. Therefore, leave was granted to seek appropriate relief against the judgment of the Civil Judge. Ashvika challenged the order before this court under Section 34; its petition succeeded and the court held that the award was wrongly made.

6. In the fresh arbitration proceedings, the appellant claimed ₹ 4,22,50,100 with interest. This amount was later amended to ₹ 2,40,33,825/-. The claimant, Ashvika explained that a substantial traffic used part approaches of the ROB for travelling to and from the State Highway leading to Udhna Industrial Estate. It was urged that the compensation should be

based on the traffic count taken from 21.02.2000 to 27.02.2000, which captured the entire traffic that used the facility toll free. The State, argued that Ashvika's proposal at the stage of bidding for the contract was based on the traffic study conditions in terms of Clause 3.1 of the BOT Agreement. The burden was upon it to have carried out its own traffic study and make an independent assessment to arrive at a likely volume of the traffic data. The State also urged that Ashvika was aware of the legal conditions and was to bid accordingly for the work which was on a commercial format of BOT. Further, it was pointed out that the Arbitrator could not go against the finding of the Civil Judge, Senior Division, Bardoli who had interpreted the notification and passed an order disallowing levy of fee on such users who did not cross over the ROB.

7. The tribunal allowed Ashvika's claims and held that it was entitled to collect fee even from users of part facility i.e., from those who used only part of approach roads without crossing the ROB. The award also held that of the total project cost of ₹ 996.74 lakhs, the cost of ROB was ₹ 202.88 lakhs and the cost of approaches was ₹ 630 lakhs. The remaining was for other ancillary items like cost of collection booths/office, lighting and interest on borrowed capital etc. Therefore, approaches constituted a major component of the project. The non-levy of the fee for the use of such approaches violated the spirit of the BOT Agreement, in terms of which Ashvika was given fee collection rights in terms of Clause 2.4 to recover the entire project cost of ₹ 996.74 lakhs. Referring to the correspondence, the tribunal concluded that Ashvika had furnished details of expected fee collections on the assumption that fees could be recovered from all the users

of the facility except exempted categories (defence vehicles, vehicles with VIP symbols etc.). The correspondence showed that the State accepted the proposal. Therefore, it was also of the view that all users, including part users who might not cross the bridge were liable to pay the toll. The denial to Ashvika of the right of collection of toll from users of part facility gave rise to a genuine claim. The tribunal noted that till reference of disputes, both the Union and State government were of the view that Ashvika could collect toll even from users of part facility. Considering the injunction decree, it was held that the inability of Ashvika to collect toll dues on its account, entitled it to compensation by reason of clause 11.3 of the BOT Agreement. The tribunal also went by the disagreement between the state and Ashvika in respect of compensation recommended by the SG and held that the State felt that the former had a right to collect user fee from all vehicles using the facility either in part or in full. The learned Arbitrator held that the evidence showed that the State considered the traffic data assumed by Ashvika as realistic. This also meant that the State believed at the time of acceptance of the contractor's proposal that the entire traffic including that, which would use the facility only partly, would be liable to pay the user fee after construction of the facility. The tribunal accepted the claimant's approach to quantify its claim on the basis of a joint traffic survey of February, 2000. The award concluded that:

"10.7.2. ... Under the circumstances, the compensation that the Claimant will now receive would mainly contribute to his profit. Hence I am of the view that a simple rate of interest of 14 % would meet the ends of justice in this case. As regards the date from which the interest should be payable, I am of the view that if the Steering Group had correctly quantified the claim in

July 2000, the Claimant would probably have accepted the same and then the same would have been received by the Claimant by the end of September 2000. Therefore the Claimant should get interest on the awarded amount with effect from 1st October, 2000."

8. The tribunal assessed damages at ₹ 1,05,68,915 for the loss suffered on account of not being able to realise the user fee from local users during the Concession Period together with simple interest at 14% per annum from 01.10.2000. The parties were to bear their own costs.

9. The State objected to the award, urging that the interpretation of the contract by the tribunal was palpably unreasonable, because what the parties consented to in the BOT agreement was Ashvika's right to charge only those who traversed the highway and facility and not those who did not use it. The State relied on the notification issued which authorized the collection of toll, to emphasize this aspect. It was also argued that the SG had to function within the parameters laid down in Clauses 1.2 and 1.8 of the BOT Agreement. It was argued that the SG did not have the authority to decide on compensation. In doing so, it acted beyond its jurisdiction. Therefore, it was futile for the Arbitrator to have relied upon the decision of the SG erroneously hold that the understanding of the parties from the beginning was that the fees could be collected from even part users of the facility. The tribunal's understanding of the Clause 11.3 of the BOT Agreement was also erroneous. The mere passing of an injunction by a Civil Court would not attract Clause 11.3.

10. The learned Single Judge rejected all the State's contentions, holding that the tribunal's interpretation of the contract and the surrounding

circumstances, to say that the claimant had to be compensated, was neither erroneous nor contrary to contract. It was also held that the interpretation of clause 11.3 was within the domain of the tribunal's jurisdiction. Furthermore, the learned Single Judge held that the analysis of the various conditions and the material evidence in the facts of the case, were not patently illegal nor were they unreasonable.

11. Mr. Preetesh Kapur, learned counsel appearing for the State, urged that the notification which enabled Ashvika to collect fees from mechanical vehicles was not leviable for the approach roads. The Notification defined the ROB as *"four lane road over bridge in lieu of level crossing between km 261/2 to km 261/4 including its approaches from km 259/4 to km 263/4 in the Ahmedabad-Mumbai section of NH-8."* He argued that the tribunal erred in concluding that the fees could be collected from users of the approach roads who had not crossed the ROB. It was submitted next that the agreement fully authorized the Union Government to determine the rate of fee to be calculated and provided the manner and category of vehicles liable to pay fees. The Schedule set out the rates applicable to users of the ROB. The intention at all times, was to collect fee only from the users of the ROB and not part users of the facility; had that been the intention, the Schedule would have included the rates payable by part users. Also, explanation in the Schedule clarified that Ashvika could collect the fee if the vehicle were to cross over the bridge. Fee could, therefore, not be collected from vehicles which were using the approach roads and not the ROB.

12. Mr. Kapur argued that the SG acted beyond its mandate in deciding on compensation and acted beyond its jurisdiction. The tribunal's

construction of the *force majeure* condition, i.e. Clause 11.3 of the BOT Agreement too was erroneous. The grant of an injunction by a Civil Court *per se* did not attract Clause 11.3. The use of a flat road of about 1270 metres on Kadodra side and 1070 metres on Karan side which accounted for only 15% and 19% respectively of the project cost could not be made the subject of toll collection. Finally, it was argued that principles of *res judicata* bound the claimant and the tribunal, in view of the decree of the civil court. The award, therefore, was contrary to the fundamental policy of Indian law.

13. In the present case, the work described included the approaches from km 259/4 to km 263/4. The recitals to the BOT Agreement reiterated that the work was not only for the construction of the ROB but also its approaches. Likewise, Clause 1.8 which defines “Project” states that it shall mean construction of the ROB *"along with approaches, the subways, CD Works, landscaping ..."* The tribunal noted that at the time of bidding, costs to be recovered foresaw collections from all customers and not just users of the ROB. The bid documents and contracts visualized that the cost of the approach roads was more than the cost of the ROB. The joint affidavit filed by the State and the Union of India in the civil suit contradicted their stand; rather they supported the contractor. It is further seen that the tribunal went by *the joint survey map and the joint survey report*, which was an accurate determination. The award was based on a proper analysis of the clauses of the BOT Agreement and was a plausible view.

14. This court notices at the outset that the scope of the powers of the Court under Section 34 is well delineated. The learned Single Judge relied

on *National Highway Authority of India v. ITD Cementation India Limited* (2015) 14 SCC 21 which held as follows:

"25. It is thus well settled that construction of the terms of a contract is primarily for an arbitrator to decide. He is entitled to take the view which he holds to be the correct one after considering the material before him and after interpreting the provisions of the contract. The court while considering challenge to an arbitral award does not sit in appeal over the findings and decisions unless the arbitrator construes the contract in such a way that no fair minded or reasonable person could do."

15. The tribunal in the award outlined several factors to conclude that all parties, including the State, were of the opinion that in terms of the BOT Agreement, the claimant had a right to collect toll from *users of part facility* and that the claimant's inability in that regard was a compensable event. The learned Single Judge noted that the total cost of the facility was estimated at ₹ 873.08 lakhs. The cost of the ROB was 25% of the total cost, i.e. ₹ 202 lakhs. Resultantly, both the governments were of the view that a vehicle entering a toll collection booth had to pay the toll fee irrespective whether it intended to cross the ROB or not. Else, neither of the governments would have allowed construction of the toll booths to be constructed on either side of the ROB at locations that would trap even the traffic not crossing ROB but only using part of the facility i.e., the approach road on either side.

16. The tribunal held that *"the toll booths on the central verge of the highway on either side would have captured the outward traffic from Chaltan also."* It also noted that in the State's affidavit and that of the Union Government in the Court of the Civil Judge, Ashvika's right to collect fee

even from part users of the facility who did not cross the ROB was acknowledged. Thus, design of the BOT Agreement acknowledged the right of the Concessionaire to recover its investments, other expenses and profit by realizing fee from the highway users of the facility constructed and maintained by it. The contract framework was premised on estimated traffic that was expected to use the facility. The Concessionaire, of course, bore the risk of reduced traffic. However, where reduction of traffic was not due to action within the concessionaire's control, it had to be compensated on account of Clause 11.3 of the BOT Agreement, which specifies reduction in the fee due to *"injunction from any court"* as a force majeure event. Consequently, the Court is unable to agree with the submission of the Petitioner that the learned Arbitrator proceeded on an erroneous interpretation of Clause 11.3 of the BOT Agreement. In this view, the interpretation given by the tribunal of the injunction order, which resulted in its inability to collect fees for part use, was not only plausible but justified and warranted. This Court, therefore, holds that the construction of the contract in this regard was within the scope and jurisdiction of the arbitral tribunal. Likewise, factually, there can be no quibble about the fact that the SG's ruling was accepted and in fact payments were made to Ashvika by the State. Furthermore, SG meetings were presided over by the officials of the Union Ministry of Surface Transport, and, thus, the genuineness of the claims of compensation by Ashvika were accepted in principle. The quantum of compensation was a matter of dispute. In this regard, the learned Single Judge noted that the tribunal based its decision on an elaborate discussion and reasoning, justifying why the SG's opinion was not acceptable, because it merely considered truck traffic were engaged

exclusively for the Chaltan sugar factory, ignoring other traffic, for no reason. The tribunal, therefore, rejected the SG's calculation. The learned Single Judge noted that the State was unable to point out any flaw, through any evidence why the calculation of damages (which was based on a joint survey) was patently or manifestly erroneous. Even before this Court, no attempt was made to support the allegation that compensation awarded was unprincipled.

17. The last argument regarding finality of civil court's decree precluding any claim for compensation is without basis; it is precisely such a decree of Court which amounts to a *force majeure* event, justifying a claim under Clause 11.3 of the BOT Agreement. It is in the event that a Court decrees injunction against collection of toll from part users becomes final that compensation can be claimed under Clause 11.3. The State's argument to the contrary is, therefore, without any merit.

18. In view of the above discussion, it is held that the impugned judgment does not suffer from any infirmity; this Court cannot, therefore, interfere with it, having regard to the extremely limited appellate jurisdiction under Section 37 of the Act. The appeal is, therefore, insubstantial and consequently, dismissed.

S. RAVINDRA BHAT
(JUDGE)

A.K. CHAWLA
(JUDGE)

JULY 06, 2018