IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.3415 OF 2019

IRB Ahmedabad Vadodra Super Express
Tollay Pvt. Ltd. ..Petitioner
V/s.
Union of India & Ors. ..Respondents

Mr.Vikram Nankani, Senior Advocate a/w Raktim Gogoi, Jas Sanghavi I/b M/s.PDS Legal for the Petitioner.

Mr.Anil C. Singh-ASG a/w M.V. Kini, S.D. Shetty, Mr.Rakesh C. Singh, Carina Zervier, Geetika Gandhi I/by M/s.K.V. Kini & Co for respondent No.3 (NHAL)

Mr.A.A. Kumbhakoni-AG a/w P.P. Kakade-AGP, Haresh S. Shah for Respondent No.4.

CORAM : RANJIT MORE &
SMT.BHARATI H. DANGRE, JJ.

ORDER RESERVED ON : 08th APRIL 2019

ORDER PRONOUNCED ON : 16th APRIL 2019

P.C.

1. The petitioner a subsidiary of M/s.IRB Infrastructure Developers Limited, engaged in the activity of construction, operation and maintenance of highway projects, has approached this Court assailing the validity of Rule 7(1) of the National Highways Fee (Determination of Rates and Collection) Rules, 2008 as *ultra vires* and being violative of Article 14 of the Constitution of India

and for being in contradiction of Section 8A of the National Highways Act, 1956. The petition also seeks a relief for issuance of direction to the Punjab National Bank(Escrow Bank) to withdraw and appropriate the amounts from the Escrow Account of the petitioner as per the Escrow Agreement by excluding any payment of premium to the National Highways Authority of India (for short 'NHAI'), the same being not due and payable pursuant to the breach of the various provisions of the Concession Agreement read with Section 8A of the Act.

2. The petitioner company entered into a Concession Agreement with the NHAI i.e. respondent No.3 on 25.07.2011 for six laning of Ahmedabad to Vadodara Section of National Highway No.8 for total length of 102.300 kms and for improvement of existing Ahmedabad Vadodara Express Highway in the State of Gujarat on “Design Build Finance Operate Transfer Basis” (DBFOT). Under the said agreement the petitioner acquired exclusive right, license and authority to construct, operate and maintain the project for 25 years from the appointed date with obligation to finance the Project Highway and to bear all costs and expenses in respect of the same. On the basis of the Concession Agreement the petitioner is entitled to demand, collect and appropriate toll from vehicles using

the aforesaid project highway or any part thereof. In terms of the agreement the petitioner is also required to pay fixed premium of Rs.309.60 Crores to the respondent each year till the subsistence of the agreement along with an annual increase at the rate of 5%. A parallel agreement in form of Escrow Agreement was entered by the petitioner along with the respondent No.2.

In pursuance of this arrangement a Toll Fee Notification was issued by the Central Government on 17.12.2012. A State Support Agreement was also executed by the State of Gujarat, by which the State assured to grant its support for implementation and operation of the aforesaid project in accordance with the Concession Agreement being executed.

3. We have heard Shri.Nankani, senior Advocate in support of the petition.

At the outset learned counsel appearing for the petitioner seeks leave to delete State of Gujarat from the array of respondents. On his request the said prayer is granted and the respondent No.4 stands deleted.

The learned senior counsel Shri.Nankani, appearing for the petitioner submit that in terms of its obligation to design and build the Project Highway, the petitioner completed the work on

06.12.2015 and incurred an expenditure of Rs.4,669.77 Crore out of which an investment of Rs.1,512 Crore came from the promoter, whereas the remaining amount was raised by way of loan from the financial institutions. Shri.Nankani has invited our attention to the Clause contained in the Concession Agreement pertaining to Escrow Account. The learned Senior Counsel would submit that the Clause 31.3 govern the withdrawal from the Escrow Account and he submits that every month, the Escrow Account would be appropriated proportionately for clearing the taxes due and payable by the Concessionaire and for clearing all the payments relating to construction of the Project Highway. He would submit that the Concessionaire was duty bound to permit the said appropriation in the order of payment specified in clause 31.3.1 and this included the premium due and payable to the authority.

4. It is a specific case of the petitioner that the petitioner is duty bound to comply with the terms of the agreement and the order of payment from the Escrow Account. However, on account of Competing Roads of length of 119 km being constructed from Dhumad Chowkdi (Vadodara) to Hatijan (Ahmedabad), the said road has immensely affected petitioner's toll collection as there is diversion of substantial traffic to the Competing Road leading to the

reduction in revenue and since there is no toll levied on the 'competing road', the traffic has substantially reduced and diverted to the competing road. Shri.Nankani has also invited our attention to the terms of the Concession Agreement and in particular clause 6.3 which pertains to "obligation relating to the competing roads." He would submit that upon breach of its obligations the authority shall be liable for payment of compensation to the Concessionaire in accordance with clause 35.4. According Shri.Nankani follow up claim was submitted by the petitioner after a traffic survey however the claim came to be rejected on 30.11.2018 by the respondent No.3 by citing a reason that at present the requirement of fulfilling the condition, by widening of 2 metres of existing old road is not meeting the definition of competing road as claimed by the Concessionaire. The learned senior counsel, Assistant Solicitor General Shri.Anil Singh, appearing for the National Highways Authority of India seriously disputed that the said road is competing road. He submit that the remedy available to the petitioner is the mechanism set out in the agreement in case of any dispute and since the present petition involves disputed question of fact the present petition cannot be entertained in exercise of Writ jurisdiction of this Court, being a purely contractual matter.

5. In light of the peculiar factual scenario Shri.Nankani would submit that Section 8A of the National Highways Act, 1956 do not contemplate payment of the premium whereas in terms of the Rule 7(1) of the National Highways Fee (Determination of Rates & Collection) Rules, 2008, the fee collected under the provisions of the rules is to be appropriated by the Concessionaire in accordance with the provisions of and performance of its obligation under agreement entered into by such concessionaire. The submission of the learned counsel is to the effect that the 'premium otherwise payable by the agreement, is not “due and payable” in view of the breach of various mandatory and essential provision of the Agreement by the NHAI which is continuously causing huge loss of revenue i.e. collection of Fee, to the grave prejudice of the Concessionaire and according to him no 'premium' is due and payable to the NHAI.

6. With the assistance of the learned senior counsels for the respective parties, we have perused the statutory provision. Section 8A of the National Highways Act, 1956 reads as under:-

> *“8.A Power of Central Government to enter into agreements for development and maintenance of National Highways (1) Notwithstanding anything contained in*

this Act, the Central Government may enter into an agreement with any person in relation to the development and maintenance of the while or any part of a national highway.

(2) Notwithstanding anything contained in Section 7, the person referred to in sub-section (1) is entitled to collect and retain fees at such rate, for services or benefits rendered by him as the Central Government may, by notification in the Official Gazette, specify having regard to the expenditure involved in building, maintenance, management and operation of the while or part of such national highway, interest on the capital invested reasonable return, the volume of traffic and the period of such agreement.

(3) A person referred to in sub-section (1) shall have powers to regulate and control the traffic in accordance with the provisions contained in Chapter VIII of the Motor Vehicles Act, 1988 (59 of 1988) on the national highway forming subject matter of such agreement, for proper management thereof."

7. The purport of the said Statutory Provision is to convey the rights of development and maintenance of the whole or part of the National Highways to a private entity and authorizing it to develop the National Highways and to empower it to regulate traffic and also to permit to collect the toll fee. The said Statutory provision do not reflect any legislative intent of payment of any

premium to the National Highway Authority by the private person. The obvious purpose for tapping the entrepreneurship is to arrange for resources in the development of road sector and Section 8A specifically set out the factors to be taken into consideration by the Central Government for notifying the amount of fee to be collected and retained, which includes the expenditure involved in building maintenance, management and operation of the highway, the interest on the capital invested, reasonable return, the volume of traffic and the period of such agreement. The aforesaid factors in no case convey an intention that the Central Government is expected to take into account the premium which is contemplated by the Concession agreement by which the petitioner is obliged to abide by. By virtue of Rule 7(1) of the National Highways Fee (Determination of Rates and Collection) Rules, 2008 relating to private investment projects, provision is carved out for remitting the fee collected under the provisions of the Rules to the Central Government. The said Rule contemplates that in case of private investment projects, the fees collected under the provisions of the Rules shall be appropriated by the Concessionaire in accordance with the provisions of and for performance of its obligations under the agreement entered into by such concessionaire. The petitioner is thus duty bound to abide by the terms and conditions of the agreement which, we have noted include payment of premium due and payable to the authority in terms of Clause 31.3.1. In terms of the agreement the Concessionaire is duty bound to deposit or caused to be deposited, all the inflows and receipts into the Escrow Account including all the funds constituting the financial package and all the fee and other revenues in respect of the project highway. The agreement also makes it imperative for the concessionaire to give irrevocable instructions by way of an Escrow Agreement to the Escrow Bank instructing, *inter alia* that the deposits in the Escrow Account shall be appropriated in the order set out in the agreement and the concessionaire is not permitted to modify the order of payment stipulated in agreement except with the prior approval of the authority.

8. The case of the petitioner as set out before us is the hardship faced by the company in view of the Competing Road being made operational and the claim made by the petitioner in relation to the said road which made it entitled for availing the compensation being rejected. The petitioner has set before us the cash flow and the shortfall in the cash flow for preceding three years. The Statutory Auditor Certificate evidencing the cash flow shortfall of Rs.440.61 Crores upto December 2018 is placed on

record by the petitioner and this includes the premium payment to the NHAI in terms of the Supplementary Agreement. It is an admitted fact that the Supplementary Agreement executed between the NHAI and the petitioner, the concessionaire has been conferred with the benefit of deferment of premium in terms of the request. The deferment of the premium is granted till the year 2024-25 in terms of the financial stress as per Article 28 of the Concessional Agreement and it has been limited to the premium payment excluding any other cash shortfall on account of O & M expenses. However, the said Supplementary Agreement also ensures that till the amount of deferred premium are repaid or recovered from the date of such amounts as deferred, they shall at time carry on interest rate equal to 2% above the Bank Rate per annum as specified in Article 28 of the Agreement.

We have noted the predicament faced by the petitioner in light of the Statutory Provision in existence on one hand which do not contemplate payment of premium to the NHAI whereas the Rules frame under the said Act contemplating strict adherence to the terms and conditions of the Concession Agreement on the other. The power to fix the toll fees vests in the Central Government and the said fees would be fixed by the Central Government by taking into consideration the expenditure involved by the Concessionaire and other factor stipulated in Section 8A of the National Highway Act, 1956. The premium payable to the NHAI is not a component to be taken into consideration by the Central Government while fixing the toll fee under Section 8A. The petitioner is therefore caught in a quagemire. However, there is no running away from the said situation since the petitioner is bound by the terms and conditions of the agreement. The petitioner has therefore posed a challenge to Rule 7(1) of the National Highway Rules of 2008 and it is sought to be challenged on the ground that Section 8A of the Parent Act do not contemplate payment of premium which is agreed in the Concession Agreement and which binds the Concessionaire. However, on examination of the terms and conditions of the various agreements entered into by the petitioner company and the fact of shortfall being rising on account of Competing Road, though its existence is denied by the respondent authority, we are of the opinion that the petition revolves around the disputed question of fact. Moreover, the petitioner is provided a remedy under the agreement for claiming compensation, though we are conscious of the evolution of law to the effect that if the action of the State is arbitrary, then even if it is in the realm of contract, it is open for the High Court to interfere under Article 226 of the Constitution of India. On the other hand our attention has also been invited to the dispute resolution mechanism as set out in Article 44 of the Concession Agreement and where emphasis is on the amicable settlement of the dispute by conciliation at the first instance and on the failure, by making reference to arbitration by Board of Arbitrators to be appointed in accordance with Clause 44.3.2. Such an arbitration is to be held in accordance with the Rules of Arbitrary/International Center for Alternative Dispute Resolution, New Delhi or such Rules mutually agreed between the parties. Clause 44.3.2 prescribed for Board of three arbitrators of whom each party will select one and third arbitrator to be appointed by two arbitrators who would be selected. The award made in arbitration is accorded finality. In view of the said mechanism being in place, and since the claim of the petitioner involves the disputed question of fact we deem it appropriate to relegate the petitioner to the dispute resolution mechanism contemplated under the agreement. Without expressing any opinion on the merits of the matter we deem it appropriate to permit the petitioner to invoke the Arbitration Clause set out in the agreement.

9. The Concession Agreement contains a provision for compensation to be paid for Competing Road Clause 35.4 makes it imperative for the authority to pay to the Concessionaire,

compensation which is sum equal to the difference between the average daily Realisable Fee and the projected daily fee until the breach is cured. The parties have serious dispute as to whether the road is a Competing Road which is assigned a definite meaning in Article 48 of the Concession Agreement as a road connecting the two end points of the Project Highway and serving as an alternative route thereof, such road as a paved road, which has been widened by 2 meters of paved road for at least 75% of the total length thereof at any time after the date of this Agreement, or a new road, which is constructed after such date, but it will not be a road connecting the aforesaid points if the length of such road exceeding the length of Project Highway by 20% thereof.

The material placed on record before us *prima facie* reveal that the State of Gujarat has constructed a Competing Road of length 119 kms and the State was not prohibited from causing construction of the said road and though there is a dispute between the parties about as to whether this would fall within the definition of 'Competing Road' as defined under Section 48 of the Concession Agreement, the existence of the said road is not in dispute. It can thus be very well seen that in order to avoid the toll, the vehicles deem it convenient to take up the alternate route which is free of any toll. Issue as to whether the said road is Competing Road and whether its existence would make the petitioner entitle for a compensation would be determined by the arbitrator however, we are of the *prima facie* view that such a road is posing threat to the estimated collection of the toll by the Concessionaire and it adversely affecting him.

10. The matter though requires detailed adjudication of facts, it is very much apparent that the petitioner is suffering huge losses in view of the actual volume of traffic being far less than projected. The possible diversion of traffic as framed by the petitioner, therefore *prima facie* cannot be ruled out.

11. However, since we have noted that the petitioner is in arduous situation on account of existing statutory scheme which we have set out briefly in above paragraph, we deem it appropriate to exercise our jurisdiction conferred under Article 226 of the Constitution of India and for limited period we protect the petitioner Company from being faced with an action of termination of agreement in the contingency of default in payment of premium to the NHAI for the period of three months subject to the petitioners under taking to the Court within the period of one week that in the event the petitioner is unsuccessful in the arbitration, the premium

for above period shall be payable by the petitioner on the principle of "premium deferment scheme" of the Central Government earlier agreed in supplementary agreement dated 06.06.2014 with applicable interest. Needless to state that the petitioner would be entitled to claim further appropriate interim relief under the provisions of Sections 9 and 17 of the Arbitration and Conciliation Act, 1996.

We make it clear that we have not deliberated on the issue on the merits of the matter and the opinion expressed by us is *prima facie* and the Board of Arbitrators would be at liberty to resolve the dispute strictly within the four corners of the agreement and the existing Statutory Scheme. As regards the challenge of the petitioner to Rule 7(1) of the National Highways Fee (Determination of Rates and Collection) Rules, 2008, we leave the said challenge open without going into the merits of the same at this stage. In the light of the aforesaid directions the Writ Petition stands disposed of.

(SMT.BHARATI H. DANGRE, J.) **(RANJIT MORE, J.)**