

(2011) 07 SC CK 0041

In the Supreme Court Of India

Case No : Civil Appeal No's. 5416 and 5417 of 2011

MSK Projects (I) (JV) Ltd.

APPELLANT

Vs

State of Rajasthan and Another

RESPONDENT

Date of Decision : 21-07-2011

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 31(7), 34, 34(2), 37(1)(A), 8
Civil Procedure Code, 1908 (CPC) — Order 8 Rule 5
Contract Act, 1872 — Section 73, 74
Interest Act, 1978 — Section 3

Citation : AIR 2011 SC 2979 : (2011) AIRSCW 4528 : (2011) 3 ARBLR 119 :
(2011) 5 AWC 5076 : (2011) 5 CHN 313 Supp : (2011) 3 CompLJ 481 : (2011) 8
JT 37 : (2011) 6 MLJ 985 : (2011) 7 SCALE 694 : (2011) 10 SCC 573 : (2011) 9
SCR 402

Hon'ble Judges : P. Sathasivam, J;B.S. Chauhan, J

Bench : Division Bench

Advocate : K.K. Venugopal, Shirish Patel, Karan Patel, Ankur Saigal, Abhay Anand, Gaurav Singh and Bina Gupta, for the Appellant; Manish Singhvi, AAG, Vinay Verma and Milind Kumar, for the Respondent

Final Decision : Disposed Of

Judgement

B.S. Chauhan, J.—Both these appeals have been preferred by the rival parties against the judgment and order dated 24.4.2007 passed by the High Court of Rajasthan (Jaipur Bench) in Civil Misc. Appeal No. 1581 of 2006 u/s 37(1)(A) of the Arbitration and Conciliation Act, 1996 (hereinafter called "Act 1996") against the order dated 17.1.2006 passed by the District Judge, Jaipur City, Jaipur in Arbitration Case No. 89/2004 whereby the application filed by the State of Rajasthan u/s 34 of the Act 1996 for setting aside the arbitral award dated 1.12.2003 had been allowed.

2. Facts and circumstances giving rise to these appeals are:

A. The Public Works Department of the State of Rajasthan (hereinafter called "PWD") decided in September 1997 to construct the Bharatpur bye-pass for the

road from Bharatpur to Mathura, which passed through a busy market of the city of Bharatpur. For the aforesaid work, tenders were invited with a stipulation that the work would be executed on the basis of Build Operate and Transfer (BOT). The total extent of the road had been 10.850 k.ms. out of which 9.6 k.ms. was new construction and 1.25 k.ms. was improvement, i.e. widening and strengthening of the existing portion of Bharatpur-Deeg Road.

B. After having pre-bid conference/meeting and completing the required formalities it was agreed between the tenderers and PWD that compensation would be worked out on the basis of investment made by the concerned entrepreneur. The tender submitted by MSK-Appellant for Rs. 1,325 lacs was accepted vide letter dated 5.2.1998 and the MSK-Appellant was called upon to furnish security deposit which was done on 25.7.1998. Concession agreement dated 19.8.1998 was entered into between the parties authorising collection of toll fee by MSK-Appellant. According to this agreement, period of concession had been 111 months including the period of construction. The said period would end on 6.4.2008. It also contained the provisions for making repayment/collection of toll fee and in case of any difference/dispute to refer the matter to the Arbitrator.

C. MSK-Appellant completed the Bharatpur bye-pass Project on 10.4.2000 and also started collection of toll fee as provided under the agreement with effect from 28.4.2000. There had been some problem in collecting the toll fee because of agitation by local people. The State issued Notification dated 1.9.2000 under the provisions of the Indian Tolls Act, 1851 and Rajasthan Motor Vehicles Taxation (Amendment) Act, 1994 (hereinafter called the 'Notification dated 1.9.2000') preventing the entry of vehicles into Bharatpur city stipulating its operation with effect from 1.10.2000. MSK-Appellant invoked arbitration clause raising the dispute with respect to:

(a) Delay in issuance of Notification prohibiting entry of commercial vehicles into Bharatpur town and diverting traffic through the bye-pass; and

(b) Collection of toll from vehicles using Bharatpur-Deeg patch of the road.

D. The State/PWD failed to make appointment of the Arbitrator. MSK-Appellant preferred SB Civil Arbitration Application No. 31 of 2002 before the High Court and the High Court vide order 12.4.2002 appointed the Arbitrator. The Arbitrators so appointed in their meeting on 8.5.2002 appointed the third Arbitrator. Claim Petition was filed before the Tribunal by MSK-Appellant on 23.9.2002. The State submitted its reply to the claim petition on 7.12.2002.

E. The Arbitral Award was made in favour of MSK-Appellant on 1.12.2003 according to which there had been delay on the part of the State of Rajasthan in issuing the Notification and the State failed to implement the same and the contractor was entitled to collect toll fee even from the vehicles using Bharatpur-Deeg part of the road. The State of Rajasthan was directed to pay a sum of Rs. 990.52 lacs to MSK-Appellant as loss due upto 31.12.2003 with 18% interest from 31.12.2003 onwards. The Tribunal further gave various other directions to

the State in this regard.

F. Being aggrieved, the State of Rajasthan filed objections u/s 34 of the Act 1996 and while deciding the same, the District Judge vide order dated 17.1.2006 set aside the Arbitral Award on the grounds that there was no clause in the agreement to issue notification barring the entry of vehicles in the city of Bharatpur; and the Tribunal erred in taking 1997 survey as basis for calculating the loss suffered by MSK-Appellant. It held that MSK-Appellant was not entitled to any monetary compensation under Clause 10 of the concession agreement, but only entitled to extension of concession period, and the rate of interest was reduced from 18% to 10%.

G. Being aggrieved, MSK-Appellant preferred an appeal before the High Court wherein the High Court vide impugned judgment and order dated 24.4.2007 held that Bharatpur-Deeg section was part of the project and the contractor could collect the toll fee from the users of this part of the road also. Clause 10 of the concession agreement was not attracted in the facts of the case. There was no agreement for issuance of Notification by the State barring the use of old route and directing the vehicles to use the new route alone. Therefore, the question of grant of compensation on that account for the traffic loss could not arise. The District Judge was justified in reducing the rate of interest from 18% to 10% in view of the provisions of Section 31(7)(b) of the Act, 1996 and economic realities, whereby the rate of interest had been reduced by the Banks in India.

Hence, these two appeals.

3. Mr. K.K. Venugopal, learned senior counsel appearing for the private Appellant, has submitted that it was implied in the agreement and there has been an understanding between the parties that State Government would issue notification barring the vehicles driven through the markets of Bharatpur City. This was not even an issue before the Tribunal and thus, could not be agitated by the State at all. Thus, the courts below erred in setting aside the award of arbitral tribunal to that extent, and secondly, that the rate of interest as reduced from 18 per cent to 10 per cent by the District Court as well as the High Court is in contravention of the terms of contract between the parties which fixed the rate of interest at 20 per cent. Further opposing the appeal by the State of Rajasthan, Shri Venugopal has submitted that Bharatpur-Deeg patch was an integral part of the project as there was only one composite contract of the entire bye-pass and, therefore, the private Appellant was entitled to collect the toll fee from the users of that part of the road also.

4. Per contra, Dr. Manish Singhvi, learned Additional Advocate General for the State of Rajasthan, has submitted that arbitration proceedings could not be proceeded in contravention to the terms of agreement and statutory provisions. There was no obligation on the part of the State authorities to issue the notification restraining the entry of vehicles to the market side of the city. The rate of interest has rightly been reduced considering the prevailing rate of

interest in banking transactions during the relevant period of contract. In support of the appeal of the State, it has been submitted that there was a clear understanding between the parties that the private Appellant shall not collect any toll fee on the Bharatpur-Deeg patch and to that extent the Tribunal and the courts below committed an error. It has further been submitted that the total contract had been for a sum of Rs. 13.25 crores including interest. The project was to be executed in two phases. The second phase for a sum of Rs. 3.24 crores had never been executed by the private Appellant. The contractor could collect the compensation only on the basis of investment made by it. The concept of toll fee is of compensatory in nature wherein the State which has spent huge amount on construction of roads/bridges etc. has a right to get the said amount reimbursed, and therefore, in such a contract the concept of profit which prevails in other forms of contract cannot be the relevant component.

5. We have considered the rival submissions made on behalf of the parties and perused the record.

In the appeal filed by the private contractor, MSK Projects, two issues are involved; namely, whether it was mandatory/necessary in view of the agreement/contract or on the basis of pre-bid understanding that the State had to issue the notification barring the vehicles through the markets of Bharatpur city; and secondly whether the rate of interest could be reduced from 18% to 10% by the courts below.

In the State appeal, the only issue required to be considered is whether the private Appellant had a right to collect the toll fee on the patch between Bharatpur - Deeg.

6. The issue regarding the jurisdiction of the Arbitral Tribunal to decide an issue not referred to is no more *res integra*. It is a settled legal proposition that special Tribunals like Arbitral Tribunals and Labour Courts get jurisdiction to proceed with the case only from the reference made to them. Thus, it is not permissible for such Tribunals/authorities to travel beyond the terms of reference. Powers cannot be exercised by the Tribunal so as to enlarge materially the scope of reference itself.

If the dispute is within the scope of the arbitration clause, it is no part of the province of the court to enter into the merits of the dispute on the issue not referred to it. If the award goes beyond the reference or there is an error apparent on the face of the award it would certainly be open to the court to interfere with such an award. (Vide: *Grid Corporation of Orissa Ltd. and Another Vs. Balasore Technical School, ; and Delhi Development Authority Vs. R.S. Sharma and Co., New Delhi,*

7. In *Associated Engineering Co. Vs. Government of Andhra Pradesh and another, ,* this Court held that an umpire or arbitrator cannot widen his jurisdiction by deciding a question not referred to him by the parties. If he exceeded his jurisdiction by so doing, his award would be liable to be set aside.

Thus, an arbitrator cannot be allowed to assume jurisdiction over a question which has not been re-ferred to him, and similarly, he cannot widen his jurisdiction by hold-ing contrary to the fact that the matter which he wants to decide is within the submission of the parties.

8. If the arbitrator commits an error in the construction of the contract, that is an error within his jurisdiction. But if he wanders out-side the contract and deals with matters not allotted to him, he com-mits a jurisdictional error. Extrinsic evidence is admissible in such cases because the dispute is not something which arises under or in relation to the contract or dependent on the construction of the contract or to be determined within the award. The ambiguity of the award can, in such cases, be resolved by admitting extrinsic evidence. The rationale of this rule is that the nature of the dispute is something which has to be determined outside and independent of what appears in the award. Such a jurisdictional error needs to be proved by evidence extrinsic to the award. (See: Gobardhan Das Vs. Lachhmi Ram and Others, ; Seth Thawardas Pherumal Vs. The Union of India (UOI), ; The Union of India Vs. Kishorilal Gupta and Bros., Alop Parshad and Sons Ltd. Vs. Union of India (UOI), Jivarajbhai Ujamshi Sheth and Others Vs. Chintamanrao Balaji and Others, and Renusagar Power Co. Ltd. Vs. General Electric Company and Another,

9. In Kishore Kumar Khaitan and Another Vs. Praveen Kumar Singh, , this Court held that when a court asks itself a wrong question or approaches the question in an improper manner, even if it comes to a finding of fact, the said finding of fact cannot be said to be one rendered with jurisdiction. The failure to render the necessary findings to support its order would also be a jurisdictional error liable to correction. (See also: Williams Vs. Lourdusamy and Another,

10. In Cellular Operators Association of India and Others Vs. Union of India (UOI) and Others, , this Court held as under:

As regards the issue of jurisdiction, it posed a wrong question and gave a wrong answer.... The learned TDSAT, therefore, has posed absolutely a wrong question and thus its impugned decision suffers from a misdirection in law.

11. This Court, in Oil and Natural Gas Corporation Ltd. Vs. SAW Pipes Ltd., and Hindustan Zinc Ltd. Vs. Friends Coal Carbonisation, held that an arbitration award contrary to substantive provisions of law, or provisions of the Act, 1996 or against terms of the contract, or public policy, would be patently illegal, and if it affects the rights of the parties, it would be open for the court to interfere u/s 34(2) of the Act 1996.

12. Thus, in view of the above, the settled legal proposition emerges to the effect that the arbitral tribunal cannot travel beyond terms of reference; however, in exceptional circumstances where a party pleads that the demand of another party is beyond the terms of contract and statutory provisions, the tribunal may examine by he terms of contract as well as the statutory provisions. In the absence of proper pleadings and objections, such a course may not be

permissible.

13. Be that as it may, in the instant case, a reference to the Tribunal had been made on the basis of statement of facts, claims by the private Appellant, defence taken by the Respondent-State and re joinder by the claimant. After completing the formalities of admission and denial by each party in respect of each other's documents and submission of draft proposed issues and respective oral evidence, the Tribunal on 4.1.2003 framed the following issues:

1. Whether claimant as per agreement is entitled to recover its amount of claim of Rs. 453.69 lacs upto 31.12.2002 and on wards or not?
2. Whether there was delay on part of State in issuing notification for restriction of traffic through the Bharatpur Town, which has effected the toll tax or not? If so, how much delay and delay in full rate of safe implementation as on date, or not? By virtue of it, is the claimant entitled to recover its claim of Rs. 292.17 lacs upto 31.12.2002 and thereafter onward or not; or merely by extension of concession period as averred by respond-ent?
3. As a consequence of issue 1 &2, which party breached the contract?
4. Whether the claimant is entitled to claim interest on its any due claim amount as per decision of issue 1 & 2? If so, from what date and at what rate of simple/ compound interest?
5. Whether claimant or Respondent is entitled for cost of arbitration incurred and claimed by, each party? If so, what amount and to which party?
6. Any other if any demanded by any party during proceedings.

14. The Tribunal considered the relevant agreement provisions as well as land lease deed, total package documents, minutes of pre-bid meetings and deed authorising collection of toll fee etc., and proceeded with the arbitration proceedings. The State of Rajasthan had not taken the defence that it was not agreed between the parties to is-sue the notification barring the traffic through the markets of Bharatpur city. The only issue remained as to whether there was delay in issuance of notification and implementation thereof. In such a fact-situation and considering the settled legal propositions, we are of the view that the District Judge as well as the High Court fell in error considering the issue which was not taken by the State before the Tribunal during the arbitration proceedings.

15. Furthermore, it is a settled legal proposition that the arbitrator is competent to award interest for the period commencing with the date of award to the date of decree or date of realisation, whichever is earlier. This is also quite logical for, while award of interest for the period prior to an arbitrator entering upon the reference is a matter of substantive law, the grant of interest for the post-award period is a matter of procedure.

(Vide: Seth Thawardas Pherumal (Supra); Union of India (UOI) Vs. Bungo Steel Furniture Pvt. Ltd., Executive Engineer, Irrigation, Galimala and Ors. v. Abnaduta

Jena AIR 1988 SC 1520; Gujarat Water Supply and Sewerage Board Vs. Unique Erectors (Gujarat) (P) Ltd. and Another, ; Secretary, Irrigation Department, Government of Orissa and others Vs. G.C. Roy, Hindustan Construction Co. Ltd. Vs. State of Jammu and Kashmir, ; Executive Engineer, Dhenkanal Minor Irrigation Division, Orissa, Vs. N.C. Budharaj (Dead) by Lrs. etc. etc., Bhagawati Oxygen Ltd. Vs. Hindustan Copper Ltd., and Indian Hume Pipe Co. Ltd. Vs. State of Rajasthan,

16. So far as the rate of interest is concerned, it may be necessary to refer to the provisions of Section 3 of the Interest Act 1978, relevant part of which reads as under:

(1) In any proceedings for the recovery of any debt or damages or in any proceedings in which a claim for interest in respect of any debt or damages already paid is made, the court may, if it thinks fit, allow interest to the person entitled to the debt or damages or to the person making such claim, as the case may be, at a rate not exceeding the current rate of interest....

(Emphasis added)

Thus, it is evident that the aforesaid provisions empower the Court to award interest at the rate prevailing in the banking transactions. Thus, impliedly, the court has a power to vary the rate of interest agreed by the parties.

17. This Court in Krishna Bhagya Jala Nigam Ltd. Vs. G. Harischandra Reddy and Another, , while dealing with the similar issue held as under:

...after economic reforms in our country the interest regime has changed and the rates have substantially reduced and, therefore, we are of the view that the interest awarded by the arbitrator at 18% for the pre-arbitration period, for the pendente lite period and future interest be reduced to 9%.

18. In H.U.D.A v. Raj Singh Rana AIR 2008 SC 3035, this Court considered various earlier judgments of this Court including Ghaziabad Development Authority Vs. Balbir Singh, ; Bihar State Housing Board Vs. Arun Dakshy, Haryana Urban Development Authority Vs. Manoj Kumar and Another, H.U.D.A. Vs. Prem Kumar Agarwal and Another, and came to the conclusion:

...the rate of interest is to be fixed in the circumstances of each case and it should not be imposed at a uniform rate without looking into the circumstances leading to a situation where compensation was required to be paid.

19. Be that as it may, the High Court while dealing with the rate of interest has relied upon the judgment of this Court in Krishna Bhagya Jala Nigam Ltd. (supra) and thus, there is no scope for us to interfere with the rate of interest fixed by the courts below.

20. The issue raised by the State before this Court in its appeal as to whether the Bharatpur-Deeg patch was an integral or composite part of the project and the private Appellant could collect the toll fee on that part also stands concluded by

the High Court after considering the entire evidence on record.

21. It is evident from the record as well as the judgments of the courts below that bid documents contained data collected on the flow of traffic on 14th and 15th April, 1994 to find out the viability and requirement of the establishment of Bharatputr bye-pass and it included the traffic flow on the Bharatpur-Deeg section also which indicates that this particular patch had also been an integral part of the project.

22. In pre-bid conference the interveners wanted a clarification as to whether the persons using this particular patch of road between Bharatpur-Deeg could be liable to pay toll fee. It was clarified by the Respondent-State authorities that the users of this patch would be required to pay the toll fee.

23. Clause 5 of the Concession agreement also provided that Government would levy and charge the fee from all persons using the project facilities. The project was not in parts rather it was a composite and integrated project which included the Bharatpur-Deeg section also. Hence, it was not permissible for the Respondent-State to take the plea that persons using such section of the road were not liable to pay the toll fee. We do not find any force in the submission made by Dr. Manish Singhvi, learned Counsel for the State that it was not a newly constructed road. However, he is not in a position to deny that the said portion of road had been widened and strengthened by the private Appellant and could not be termed as service road which could be used free of charge in view of Clause 7 of the concession agreement as service road has been defined as any road constructed temporarily for use of traffic for short period during construction of the main road. Such a facility had to be provided in order to maintain the free flow of traffic during the construction of the road.

24. Thus, in view of the above, the issue raised by the State that Bharatpur-Deeg section of the road was out of the project and the private Appellant was not entitled to collect the toll fee on that part of the road, stands settled in favour of the private Appellant.

25. Determination of the aforesaid three issues brings us to the entitlement of the private Appellant.

The Court is not oblivious to the fact that the State authorities cannot be permitted to use the collection of toll fee as augmenting the State revenues. In *State of U.P. and Ors. v. Devi Dayal Singh* AIR 2000 SC 961, this Court defined 'toll' as a sum of money taken in respect of a benefit arising out of the temporary use of land. It implies some consideration moving to the public either in the form of a liberty, privilege or service. In other words, for the valid imposition of a toll, there must be a corresponding benefit. The Court further held:

Although the section has empowered the State Government to levy rates of tolls "as it thinks fit", having regard to the compensatory nature of the levy, the rate of toll must bear a reasonable relationship to the providing of benefit. No doubt,

by virtue of Section 8 of the Act, the tolls collected are part of the public revenue and may be absorbed in the general revenue of the State, nevertheless by definition a toll cannot be used for otherwise augmenting the State's revenue.

(Emphasis added)

26. In fact, the toll fee under the Tolls Act, 1851 is of compensatory in nature wherein the Government can reimburse itself the amount which it had spent on construction of road/bridge etc.

Clause IV(a) of the statutory notification dated 10.2.1997 which entitled the government to give present road on toll is reproduced below:

IV (a). The toll of any of the aforesaid facilities/constructions shall be levied only for so long as the total cost of its construction and maintenance including interest thereupon, and the total expenditure in realisation of toll has not been realised in full or for a period of 30 years.

(Emphasis added)

It is evident that Clause IV(a) of the Notification dated 10.02.1997 envisages that toll can only be collected as long as total cost of construction and maintenance including interest thereupon is recovered. A person is debarred by law and statutory inhibition as contained in Clause IV(a) of the notification from collection of toll beyond the recovery of cost of construction.

27. Thus, from the above referred provisions, it is evident that toll fee is compensatory in nature and can be collected by the State to reimburse itself the amount it has spent on construction of the road/bridge etc. The State is competent to levy/collect the toll fee only for the period stipulated under the Statute or till the actual cost of the project with interest etc. is recovered. However, it cannot be a source of revenue for the State.

28. In common parlance, "reimbursement" means and implies restoration of an equivalent for something paid or expended. Similarly, "Compensation" means anything given to make the equivalent. (See: State of Gujarat Vs. Shantilal Mangaldas and Others, Tata Iron and Steel Co. Ltd. v. Union of India and Ors. AIR 2000 SC 3706; Ghaziabad Development Authority (Supra); and H.U.D.A v. Raj Singh Rana, (Supra).

29. However, in Dwaraka Das Vs. State of Madhya Pradesh and Another, , it was held that a claim by a contractor for recovery of amount as damages as expected profit out of contract cannot be disallowed on ground that there was no proof that he suffered actual loss to the extent of amount claimed on account of breach of contract.

30. In A.T. Brij Paul Singh and Others Vs. State of Gujarat, while interpreting the provisions of Section 73 of the Indian Contract Act, 1972, this Court held that damages can be claimed by a contractor where the government is proved to have committed breach by improperly rescinding the contract and for estimating

the amount of damages, court should make a broad evaluation instead of going into minute details. It was specifically held that where in the works contract, the party entrusting the work committed breach of contract, the contractor is entitled to claim the damages for loss of profit which he expected to earn by undertaking the works contract. Claim of expected profits is legally admissible on proof of the breach of contract by the erring party. It was further observed that what would be the measure of profit would depend upon facts and circumstances of each case. But that there shall be a reasonable expectation of profit is implicit in a works contract and its loss has to be compensated by way of damages if the other party to the contract is guilty of breach of contract cannot be gainsaid.

31. In B.S.N.L. Vs. Reliance Communication Ltd., this Court held as under:

53. Lastly, it may be noted that liquidated damages serve the useful purpose of avoiding litigation and promoting commercial certainty and, therefore, the court should not be astute to categorise as penalties the clauses described as liquidated damages.

32. This Court further stated in Oil and Natural Gas Corporation Ltd. v. SAW Pipes Ltd. (Supra):

64. ...This section is to be read with Section 74, which deals with penalty stipulated in the contract, inter alia (relevant for the present case) provides that when a contract has been broken, if a sum is named in the contract as the amount to be paid in case of such breach, the party complaining of breach is entitled, whether or not actual loss is proved to have been caused, thereby to receive from the party who has broken the contract reasonable compensation not exceeding the amount so named. Section 74 emphasizes that in case of breach of contract, the party complaining of the breach is entitled to receive reasonable compensation whether or not actual loss is proved to have been caused by such breach....

33. Thus, the case requires consideration in the light of the aforesaid settled legal principles.

Undoubtedly, the total construction was for Rs. 13.25 crores. It is evident from the Bid-documents filed by the private Appellant that the work was to be executed in two phases and the relevant part thereof reads as under:

PHASE – I

Year

Const.

Cost

(in lacs)

Supervision

Charges @

10%

Supervision

Charges @

10%

Interest @

20%

Total

investment

of Strs

Upto date

investment

(in lacs)

1998-99

6/98

75

7.5

82.50

4.12

86.62

86.62

9/98

80

8.0

88.00

8.52

92.52

183.14

12/98

80

8.0
88.00
12.92
100.92
284.06
3/99
80
8.0
88.00
17.32
105.32
389.32
Total
315
31.5
346.50
42.88
389.38
389.88
1999-2000
6/99
110
11.0
121
23.37
144.37
533.75
6/99
120
12.0

132.0
29.97
161.97
695.72
12/99
120
12.0
132.0
36.57
168.57
864.29
3/2000
125
12.50
137.50
43.44
180.94
1045.23
Total
475
47.50
522.50
133.35
655.85
1045.23
Grand Total
790
79.0
869.0
176.23

1045.23

1045.23

PHASE – II

1045.23

6/2005

150

15.0

165

8.25

173.25

173.25

9/2005

150

15.0

165

16.50

181.50

354.75

Total

300

30.0

330

24.75

354.75

354.75

The documents further reveal that phase II work was of worth Rs. 354.75 lacs and it included repairing, maintenance and second layer of bitumen on the entire road. Admittedly, this part of the contract had never been executed by the private Appellant. More so, the chart filed by the State of Rajasthan shows that the estimated cost of the work had been recovered by the private Appellant as the schedule prepared for repayment tally with the amount collected by the private Appellant as toll fee within the stipulated period.

34. In the first phase, the private Appellant spent about Rs. 10.45 crores and recovered the said amount with certain profit, though the actual figure i.e. the toll fee recovered has not been disclosed. So far as the second phase is concerned, admittedly, the amount of Rs. 354.75 lacs has not been spent by the private Appellant. This issue has been agitated by the State of Rajasthan before this Court in its Counter Affidavit wherein it is stated as under:

It is respectfully submitted that as per the terms of the Agreement, Petitioner was required to complete the project in two phases. In the first phase investment of Rs. 1045 lacs and after 5 years in the second phase Rs. 354.75 lacs was to be made by the Petitioner. However, the Petitioner has not abided by the terms of the agreement and has not made any investment for the second phase and, therefore, it has breached the terms of the contract and, therefore, it is respectfully submitted that the contention of the Petitioner that he is entitled to recover its investment, is erroneous and Petitioner is trying to give wrong picture about investment made and has not come to this Hon'ble Court with clean hands and, therefore, the present SLP is liable to be dismissed by the Hon'ble Court. The concession period has come to an end.

35. The aforesaid allegations have not been denied by the private Appellant while submitting its rejoinder. Relevant part of the rejoinder affidavit reads:

...the present contention as raised was not part of the arbitration proceeding, before the arbitral Tribunal. It is further submitted that this contention was never raised before the District Court and as well as before the Hon'ble Court of Rajasthan. The point as raised is subsequent to completion of the project and work to be done after the period of 5 years....

Thus, there is no specific denial of the allegations/averments taken by the State as required by the principle enshrined in Order VIII Rule 5 of the Code of Civil Procedure, 1908.

36. It is strange that a person who has not complied with terms of contract and has acted in contravention of the terms of agreement claims that he was entitled to earn more profit. The private Appellant cannot be permitted to claim damages/compensation in respect of the amount of Rs. 13.25 crores, as he did not spend the said amount stipulated in the terms of agreement. Private Appellant cannot claim the amount of Rs. 7.13 crores for a period of three years for a small patch of 1.25 kilometres out of the total length of the road to the extent of 10.85 kilometres.

37. In fact, the tribunal has dealt with the issue in correct perspective only to the extent the period of delay by which the notification barring the heavy vehicles through market of Bharatpur had been issued stating as under:

The traffic survey conducted by the claimant on 17th, 18th & 19th April, 2000 has not been accepted by the Respondent. The arbitral tribunal also feels that this survey, which has been done by the claimant alone, cannot be relied upon

for this purpose, because Respondent is not a party to this survey. The claim lodged by claimant on its own survey as per para 12.3(iii) from 12/4/2000 to 30/9/2000 is for Rs. 31.18 lacs. In this regard tribunal is of the opinion that traffic survey of 1997 as per agreement in which both parties bears consent of each other therefore can safely be relied upon for purpose of assessment of such losses to the claimant, because the occurrence of loss as such to the claimant has not been denied by Respondent, which otherwise is an established fact as per documentary evidence on record. The tribunal has assessed this part of loss on the traffic survey of 1997 for commercial vehicles only as Rs. 26.34 lacs from 12/4/2000 to 30/9/2000.

As the notification had been issued, and it was not the responsibility of the State to establish a police chowki etc. to implement the notification, there was no occasion for the tribunal to proceed further. Therefore, any award in favour of the private Appellant in that respect for non-issuance of notification beyond the date of the notification, cannot be held to be justified and the same is liable to be set aside.

38. The State authority has decided to establish a toll road as it was not having sufficient funds. In case the claim of the private Appellant is allowed and as the State is not in a position to grant further facility to collect the toll fee at such a belated stage, the purpose of establishing the toll road itself stands frustrated. More so, the toll fee cannot be collected to recover the amount never spent by the contractor. It is evident from the discourse in pre-bid meetings of the parties that it had been decided that compensation would be worked out on the basis of investment made by concerned contractor. More so, the statutory notification dated 10.2.1997 provided to recover the cost of construction and maintenance including interest thereon. Therefore, the question of non-execution of work of second phase of the contract becomes very material and relevant to determine the real controversy. The State authorities for the reasons best known to them, did not make reference to the arbitration proceedings for non-execution of the work of the second phase of the contract. However, the relief claimed by the private Appellant would prove to be a "windfall profit" without carrying out the obligation to execute the work just on technicalities. We have held in this very case, that the arbitrator cannot proceed beyond the terms of reference and, therefore, the question of considering the non-execution of work of second phase of the work was neither permissible nor possible as it had arisen subsequent to the date of award in the arbitration proceedings.

Be that as it may, in order to do complete justice between the parties and protect the public exchequer, we feel that the matter requires adjudication and reconsideration on the following points by the arbitration tribunal:

- i) What amount could have been recovered by the private Appellant for Bharatpur-Deeg part of the road from the vehicles using the road?
- ii) What could be the effect on the contract as a whole for non-executing the

work of the second phase?

In view of the fact that a long time has elapsed, we request the learned tribunal to decide the case as early as possible after giving due opportunity to the parties concerned. The private Appellant shall be entitled only for a sum of Rs. 26.34 lacs awarded by the tribunal for delay in issuing the notification with 10% interest, if not paid already or it could be adjusted in the final accounts bills. With these observation, the appeals stand disposed of. No costs.