

(2018) 10 RAJ CK 0035

In the Rajasthan High Court

Case No : Civil Miscellaneous Appeal No.6125 of 2017

State of Rajasthan @APPELLANT@Hash M/s. Madhav Infra Project Limited

Date of Decision : 04-10-2018

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 28(3), 34, 34(2)(b)(ii), 37

Citation : (2018) 10 RAJ CK 0035

Hon'ble Judges : Mohammad Rafiq, J;Alok Sharma, J

Bench : Division Bench

Advocate : Rajendra Prasad, Ashish Sharma, Karan Tibrewal, Ashok Mehta, Vivek Dangi, Hitesh Jatawat

Final Decision : Dismissed

Judgement

Alok Sharma, J.

Under challenge is the judgment dated 17-8-2017 passed by the Commercial Court (Additional District Judge No.1, Jaipur Metropolitan City, Jaipur)

dismissing objection No.45/2016 under Section 34 of the Arbitration and Conciliation Act, 1996 (hereafter 'the Act of 1996') by the appellate

State against the Arbitral Tribunal's award dated 8-8-2015.

The facts of the case that the appellant State (hereafter 'State') floated a Notice Inviting Tender (NIT) in August, 1997 for construction of the

Bharatpur-Mathura bye-pass road of 10.850 km. length (9.6 km new and 1.25 km improvement) on Build, Operate and Transfer (BOT) basis. The

respondent claimant's (hereafter 'claimant') tender for Rs.1325 lacs was accepted on 25-7-1998. The road in issue was to be constructed in two

phases i.e. Phase-I and Phase-II. An approximate cost for Phase-I was estimated at Rs.1045.23 lacs and Rs.354.75 lacs for Phase-II, which was to

be commenced after completion of Phase-I. The concession period agreed was

111 months, from the date of handing over the site of which the road was to be constructed within 24 months and the successful bidder thereafter authorized to collect toll at the State Government's notified rates till 6-4-2008. An agreement for the purpose was executed on 19-8-1998.

Construction under phase-I was completed on 10-4-2000 and as per the agreement in issue the claimant company commenced collection of toll.

However soon thereafter, the State, following local agitation to assuage which the Chief Minister announced restrain on collection of toll on the

Bharatpur-Deeg section (1.25 km stretch) of the Bharatpur bye-pass, prevented the claimant from so doing. This albeit the Bharatpur-Deeg section of

1.25 km was incontestably an integral part of the project facility (toll road) as obtained in the agreement dated 19-8-1998 and over which the claimant

had a right to collect toll from vehicles using any part it. The claimant in the circumstances invoked the arbitration clause under the agreement

between it and the State of Rajasthan claiming loss of Rs.453.69 lacs for reason of prevention from collection of toll and Rs.292.17 for the State's

purported delay in publishing the notification for restraining traffic entering into Bharatpur City for reason of which such traffic was not diverted and

did not use the newly constructed project facility i.e. toll road.

The Arbitral Tribunal on evaluation of the contesting cases â?"the claim and the defence as also evidence in support thereof particularly a joint survey

of 2001 regarding vehicular traffic on Bharatpur-Deeg section of the toll road passed its award on 1-12-2003 holding the state in breach of its

contractual obligation under the concession agreement dated 19-8-1998 and the resultant loss suffered by the claimant on account of being prevented

from collection of toll on the Bharatpur-Deeg section (1.25 km) of the Bharatpur Bye-pass. The State was directed under the said award to pay the

claimant an aggregate sum of Rs.990.52 lacs on multiple heads for the loss upto 31-12-2003, along with interest @18% p.a. from 12-4-2000 and

further directions for collection of toll/ compensation till the end of the concession period i.e. till 6-4-2008 were issued by the Arbitral Tribunal.

The award dated 1-12-2003 was subjected to objection by the State under Section 34 of the Act of 1996 before the jurisdictional civil court. Vide

order dated 17-1-2006, the court set aside the award pertaining to the claimant's right to compensation resulting from the alleged delay in the State's

notification stopping traffic from Mathura entering Bharatpur City and facilitating its diversion to the toll road on the ground that there was no such

clause in the agreement dated 19-8-1998 under which the State Government was obliged to issue such notification. It was further held by the Civil

Court that the claimant was not entitled to any monetary compensation for breach of contract in prevention from collection of toll on the Bharatpur-

Deeg section (1.25 km) of the Bharatpur Bye-pass. The claimant was held only entitled to extension of the concession period till the recovery of the

investment etc., on the construction of the Bharatpur Bye-pass, as contemplated by the parties.

The order dated 17-1-2006 passed by the District Judge setting aside the Tribunal's award dated 1-12-2003 was challenged by the claimant filing a

miscellaneous Civil appeal No.1581/2006, under Section 37 of the Act of 1996 before this court. Vide order dated 24-4-2007 this court held that the

Bharatpur-Deeg section was an integral part of the project facilities (toll road) under the agreement dated 19-8-1998 and the claimant was entitled to

collect toll thereon from vehicular traffic on it, as it was for the length of the entire 10.850 km toll road. Prevention of collection of toll on the

Bharatpur-Deeg section of 1.25 km was held by this court to be a breach of the agreement dated 19-8-1998 for which the claimant was entitled to

damages/ compensation as determined by the Arbitral Tribunal. The clause in the agreement for extension of the concession period did not attract to a

situation of the State consciously and deliberately stopping collection of toll on the Bharatpur-Deeg section as the civil court had found, was this court's

opinion and finding. And hence monetary compensation as damages were payable to the claimant to be estimated. For that the joint survey of the

traffic on the Bharatpur-Deeg Section (1.2 km) was held between 3-7-2001 and 10-7-2001 (survey of 2001) and was to be the basis of computation of

the compensation/ damages for breach of contract.

This court however in its aforesaid judgment dated 24-4-2007 held that damages determined by the Arbitral Tribunal payable to the claimant by the

State for the alleged belated notification by the State to divert traffic entering Bharatpur city from Mathura to the bye-pass (the toll road) were not in

order or payable to the claimant as the State had no such obligation under the concession agreement dated 19-8-1998. The order dated 17-1-2006

passed by the District Court was to that extent upheld by this court. Resultantly the claimant's appeal u/s. 37 of the Act of 1996 was partly allowed

accordingly.

That judgment dated 24-4-2007 passed by this court under Section 37 of the Act of 1996 was challenged before the Apex Court by the claimant on

the ground that the interest on the amount found due for breach of contract had been wrongly reduced from 18% to 10% as determined by the

Tribunal. Further the judgment of this court was challenged on the issue of damages for losses flowing from the State Government's delayed

notification. It was submitted that the said damages/ compensation allowed by the Arbitral Tribunal, but denied by the Civil Court, were also wrongly

denied by this court.

The State also filed its SLP against the judgment dated 24-4-2007 to the extent it was aggrieved thereof. Vide its judgment dated 21-7-2011 the Apex

Court [(2011)10 SCC 573], titled M/s. MSK Projects (I)(JV) Ltd. v. State of Rajasthan, disposed of the connected civil appeals and directed the

Arbitral Tribunal to address the two issues remand to it, i.e. (i) what amount could have been recovered by the claimant for the Bharatpur-Deeg part

of the road from the private vehicles using the road? And (ii) what would be the effect on contract as a whole for non execution of the work of phase-

II?

On remand on the aforesaid two issues the Arbitral Tribunal then passed its award dated 8-8-2015. On the issue of what amount the claimant could

recover for the Bharatpur-Deeg part of the Bharatpur Bye-pass from vehicles using the road, the Arbitral Tribunal held that the figure of anticipated

toll calculation on the Bharatpur-Deeg section (1.25 km) as per Table-2 and Table-3 for the period of 12-4-2000 to 31-12-2003â?"one month following

the award and 1-1-2004 to 6-4-2008 (end of concession period) (the remaining period) appended to the earlier award dated 1-12-2003 had been upheld

by the High court in its judgment dated 24-4-2007 and not interfered with or adversely commented upon by the Apex Court in its judgment dated 21-7-

2011. And therefore Table-2 and Table-3 aforesaid were relevant for the determination afresh, of issue No.1 on the Apex Court's limited remand as

to â??what amount could have been recovered by the â??private appellantâ? â?"the claimant for Bharatpur-Deeg section part of the Bharatpur Bye-

pass from the vehicles using the roadâ?. Based on this finding the Arbitral Tribunal by way of Table-A in its award dated 8-8-2015 computed a total

amount of Rs.1410.09 lacs that was to be recovered by the claimant from the State as compensation for being denied recovery of toll from vehicles

using Bharatpur-Deeg Section (1.25 km) of the 10.850 km Bharatpur bye-pass during the currency of the concession agreement dated 19-8-1998 i.e.

upto 6-4-2008. Interest @ 10% p.a. from the due date at the end of each quarter till the date of actual payment was also granted to the claimant and

against the state.

On issue No.2, as remanded by the Apex Court i.e. â??what could be the effect on contract as a whole for non executing the work of second

phase?â?, (which was a 40 mm asphaltic concrete over 60 mm thick DBM), the Arbitral Tribunal held that the claimant was indeed on this count in

breach of its obligation to the State under the agreement dated 19-8-1998. So holding it found that the claimant was liable therefor to the State for a

sum of Rs.354.75 lacs (cost of Phase-II as per agreement) with 10% simple interest from the date of the breach till the date of final payment. In

determining the second remanded issue by the Apex Court i.e. the Arbitral Tribunal recorded that in para 19 of the terms and conditions of BOT on

page 105 of the tender documents it was inter alia provided that on successful execution of the contracted work, the performance bank guarantee of

5% of the estimated cost of the work, retained for forfeiture, would be returned. The Arbitral Tribunal noted that the state had returned the

performance bank guarantee and not exercised the power to forfeit it, even consequent to the claimant's breach. On that aspect of the matter a fait

accompli obtained. The Arbitral Tribunal noted that initially there was a provision in the para 17 of the contract agreement for cancellation of the

contract in the event of a breach of a material condition, but the said part of the para (17) was later deleted consciously by the State in the pre-bid

discussions held by the Chief Engineer on 25-7-1998 i.e. even prior to the receipt of tenders and subsequent grant of contract for the construction of

Bharatpur Bye-pass. And consequently no condition/ clause obtained in the concession agreement dated 19-8-1998 for cancellation of contract, on the

claimant's breach of Phase-II obligation, and its consequences such as debarring the claimant altogether from collecting toll including on the

Bharatpur-Deeg Section (1.25 km) or refund the extent of toll collected from the Bharatpur bye-pass.

The Arbitral Tribunal has also considered and addressed the submission of the State that for reason of non execution of phase-II of the contract

agreement dated 19-8-1998 the concession period for toll collection be appropriately reduced and be brought to an end prior to the contracted date of

6-4-2008. For this conclusion the Arbitral Tribunal noted that the concession agreement only visualized reduction of the period of toll collection by way

of mutual agreement alone. Reference was made to paragraph 10 at page 163 of the agreement dated 19-8-1998 and it was held that nothing on

record established that the State had even contemplated at any point of time that the period of toll collection be reduced, what of having initiated such

a proposal and conveyed it to the claimant. In the aforesaid facts and terms of the contract agreement dated 19-8-1998, the Arbitral Tribunal held that

the claim of the State for reduction of the concession period for reason of the non execution of phase- II was wholly untenable. The Arbitral Tribunal

therefore held for reason of the claimant not executing Phase-II under the agreement dated 19-8-1998 only a levy of damages of 354.75 lacs with

interest @ 10% p.a. on the claimant could be made without it affecting the integrity of the agreement dated 19-8-1998 as a whole.

On the aforesaid consideration and conclusion on the two issues, on which the remand was made by the Apex Court under its judgment dated 21-7-

2011, the Arbitral Tribunal directed under its award dated 8-8-2015 as under:-

I. The respondent to pay a sum of Rs.1410.09 lacs (Rupees One thousand four hundred ten point zero nine lacs only) to claimant towards

anticipated toll collection from vehicles using the Bharatpur Deeg part of the bye pass under this award with 10% simple interest from due date of

anticipated toll collection upto the date of actual payment.

II. The claimant to pay a sum of Rs.354.75 lacs (rupees three hundred fifty four point seventy five lacs) to respondents for not executing the work of

second phase of the agreement with 10% simple interest from due date of not executing the work of second phase upto the date of actual payment.

III. Both the parties must meet their own cost of arbitration.

IV. No further relief of any kind has been awarded by the Tribunal to any party.

The state dissatisfied and aggrieved with the award dated 8-8-2015 again filed

the second round of objections under Section 34 of the Act of 1996. Its objections have been dismissed by the Commercial Court under its detailed order dated 17-8-2017. Quite inevitably this miscellaneous appeal under Section 37 of the Act of 1996 impugning the civil court's dismissal of the State's objections and praying that the Arbitral Tribunal's award dated 8-8-2015 be set aside has been filed.

Mr. Rajendra Prasad appearing for the State submitted that the impugned award dated 8-8-2015 overlooks the principles set out by the Apex Court in its remand order dated 21-7-2011 for determining the compensation/ damages payable to the claimant under remanded issue No.1 i.e. on account of it being prevented from collecting toll from vehicles plying on Bharatpur-Deeg section (1.25 km) of the 10.850 km bye-pass constructed on BOT basis under the agreement dated 19-8-1998. That render the award non-judicious and liable to be set aside. He submitted that the Apex Court having found damages/ compensation of Rs.713.53 lacs to the claimant under the award dated 1-12-2003 for being prevented from collecting toll on the Bharatpur-Deeg section (1.25 km.) for a duration of only three years as "windfall profit", the Arbitral Tribunal could not then have relied upon the very same survey of 2001 and Table- 2 and Table-3 on which the earlier award dated 1-12-2003, was passed and passed an award of 1410.09 lacs and interest as damages/ compensation. Mr. Rajendra Prasad referred to para 38 of the remand order dated 21-7-2011 passed by the Apex Court [(2011)10 SCC 573] in support of his contention. Mr. Rajendra Prasad submitted that the concession period of 111 months (inclusive both of construction under Phase-I and II and toll collection for recovery of investments made etc.) under the agreement dated 19-8-1998 was premised on a total investment of Rs.1399.98 lacs and the origin and destination traffic survey 1994 and 1997 with 5% increase in traffic every year upto 6-4-2008 "the end of the concession period.

He submitted that the traffic surveys of 1994 or 1997 were much more extensive than that the joint survey of 2001, which was quite apparently not an origin and destination traffic survey for the Bharatpur-Deeg section of the Bharatpur bye-pass. Mr. Rajendra Prasad submitted that the basis of agreement dated 19-8-1998 including collection of toll thereunder being the investment by the claimant and the traffic survey of 1994/ 1997, the

Arbitral Tribunal in awarding damages/ compensation of Rs.1410.09 lacs plus interest committed a gross perversity and patent illegality in relying upon the joint traffic survey of 2001, and overlooking the claimant's truncated investment by not executing Phase-II. In so doing it also acted contrary to the terms of the contract for reason of which the award dated 8-8-2015 is vitiated under Section 28(3) of the Act of 1996 and liable to be set aside. He submitted that the contracted investment by the claimant on construction of the Bharatpur bye-pass of 10.850 km was not admittedly made deficient as it was to an extent of Rs.354.75 lacs to be expanded on Phase-II, which was admittedly not executed. The concession period for recovery of said truncated investment along with permissible charges ought to have been similarly reduced by the Arbitral Tribunal and compensation/ damages not based, as the Arbitral Tribunal did, taking the said concession period of 111 months from the handing over of the site to the claimant upto 6-4-2008.

Mr. Rajendra Prasad then submitted that in any event for the purpose of ascertaining damages/ compensation payable to claimant for reason of the State's breach in preventing it from collecting toll on Bharatpur-Deeg stretch (1.25 km) for which the investment was only of Rs.62.54 lacs, the contracted investment of Rs.1399.98 lacs could not have been reckoned for and compensation therefor ought to have been awarded considering only the investment of Rs.62.54 lacs, which related to the Bharatpur-Deeg section.

On remanded issue No.2 by the Apex Court, Mr. Rajendra Prasad submitted that the award to the state of Rs.354.75 lacs as damages along with 10% interest by the claimant as determined by the Arbitral Tribunal was not properly reflective of the effect on the contract under the agreement dated 19-8-1998 for non execution of phase-II by the claimant. Mr. Rajendra Prasad submitted that the Arbitral Tribunal has thus plainly misdirected itself on the two issues on which remand was made to it by the Apex Court and in determining the said two issues it failed to act judiciously, consequent to which injustice has been served to the State. More shockingly to the convenience, the claimant has been allowed a higher compensation/ damages of Rs.1410.09 lacs than the award of Rs.713 lacs under the award dated 1-12-2003 which the Apex Court had found a â??windfall profitâ??.

Mr. Ashok Mehta, Senior Advocate appearing with Mr. Vivek Dangi for the

claimant submitted that the state's appeal under Section 37 of the Act of 1996 as also the objections under Section 34 thereof before the Commercial Court are/ were premised on a selective and consequent misreading of the remand order dated 21-7-2011 passed by the Apex Court. Mr. Ashok Mehta emphatically submitted that from a wholistic reading of the Apex Court's order it is evident that it had concurred with the conclusion of the Single Judge in his judgment dated 24-4-2007, MSK Projects (I) (JV) Ltd. Vs. State of Rajasthan, [2008(2) RLW 1157 (Raj.)] that the State was in clear breach of the agreement dated 19-8-1998 in preventing the claimant from collecting toll on Bharatpur-Deeg section (1.25 km) of the Bharatpur bye-pass, albeit the said section was very much a composite and integral part of the toll road over which the claimant was entitled to collect toll, at State Government's notified rates, from vehicles using it. Mr. Ashok Mehta submitted that the Apex Court in its judgment dated 21-7-2011, MSK Projects (I)(JV) Ltd. Vs. State of Rajasthan, [(2011)10 SCC 573] did not set aside or even adversely comment upon the joint traffic survey of 2001 with regard to traffic on Bharatpur-Deeg section of the Bharatpur Bye-pass on which the claimant was entitled to collect toll under the agreement dated 19-8-1998. The concession period was specified as 111 months from the handing over of the project site to the claimant.

The toll was to be collected from the date Phase-I was completed and State government in fact so allowed it to be initially collected including on the Bharatpur-Deeg section beginning 12-4-2000. From the date of completion of Phase-I, and state Government's, go ahead for toll collection, the last date for collection of toll, admittedly worked out to 6-4-2008. No term of the agreement permitted variation of the concession period as set out except by mutual consent of the contracting parties in specified situations of enhancement or reduction in the rates of toll collection notified by the State Government. Such a situation admittedly never arose during the currency of the agreement dated 19-8-1998. Mr. Ashok Mehta submitted that subsequent to the completion of construction of Phase-I of the Bharatpur bye-pass and commencement of toll collection, the claimant, on being prevented from collecting toll on Bharatpur-Deeg section 1.25 km by the State Government itself, raised a dispute in regard thereto and sought damages by way of compensation. Thereupon a 24 hours joint survey with the

participation of the officers of the state and the claimant was held between 3-7-2001 and 10-7-2001 (24 hours each day) for determining the vehicular traffic on the aforesaid Bharatpur-Deeg section from which the claimant was entitled to collect toll. Based on aforesaid joint survey of 2001 and reckoning for State Government's notified rates for toll collection table-2 and table-3 appended to award dated 1-12-2003 were prepared.

It was submitted that objection at the State's instance to the joint survey of 2001 is as an afterthought, essentially dishonest, hit by estoppel and of no event. And in any event Mr. Ashok Mehta submitted the traffic survey of 1994 or 1997 aside of admittedly being unilateral, random and avowedly non binding was wholly irrelevant for ascertainment of damages/ compensation to the claimant for being prevented from collecting toll on the Bharatpur-Deeg section. Mr. Ashok Mehta drew the attention of the court to clause 1 of the technical report appended to the bid document which clearly provided that the survey of 1994 was unilateral, not done meticulously but random. And for reason of that a disclaimer was made stating that no guarantee for the data included in the project report could be given by Government and the entrepreneur should make his own assessment also. Mr. Ashok Mehta submitted that subsequently a traffic survey the State on its own, alone conducted between 26-8-1997 to 28-8-1997 another survey (survey of 1997) which became part of the pre-bid meeting. Its methodology again remained the same as for the survey of 1994 and it remained non binding. The bidders continued to go forward with their own estimate of the manner and extent of recovery of the investments and cost to be expanded by them on the construction of the 10.850 km Bharatpur bye-pass. Mr. Ashok Mehta submitted that the entire controversy raised by the State with regard to validity of the joint survey of 2001 for determination damages/ compensation for the claimant being prevented from collecting toll on Bharatpur-Deeg section of the Bharatpur Bye-pass is thus wholly dishonest, unbecoming and without any foundation either in contract or in law.

This also for the reason that the right of the claimant to compensation for reason of the State's breach of the contract has been affirmed by the Apex Court in its judgment dated 21-7-2011 as also has been, at least impliedly the joint survey of 2001 as the foundation thereof testified as it is from the Apex Court not setting aside the reliance of the Single Judge on the joint survey

of 2001 in his judgment dated 24-4-2007. The judgment of the Apex Court on 21-7-2011 on appeal thereagainst only entailed a limited remand on two issues delineated in para 50 thereof. Hence only the issue of what amount could be recovered by the claimant for Bharatpur-Deeg section part of the Bharatpur bye-pass from vehicles using it and the issue as to what could be the effect of the contract from the non execution of phase-II by the claimant was open for the Arbitral Tribunal to address. Even otherwise there was no material or good cause before the Arbitral Tribunal to discard the joint survey of 2001 regarding vehicular traffic on the Bharatpur-Deeg section (1.25 km) as the basis of damages for the State's breach.

Mr. Ashok Mehta further submitted that the determination of damages for breach of contract essentially entails a methodology which would broadly, as far as possible, put back the party aggrieved to a situation it would be but for the breach. It was submitted that thus fundamentally the traffic on Bharatpur-Deeg section (1.25 km) 10.850 of the Bharatpur bye-pass at the time relevant to the breach and thereafter was material, for determination of damages/ compensation. Hence a joint survey of 2001 (soon after the State's breach of April/ May 2000 and continued thereafter) was conducted for the specific purpose of assessing the loss to the claimant on account of denial of the contractual right of toll collection from the vehicles using the Bharatpur-Deeg section of the Bharatpur Bye-pass. The Arbitral Tribunal in its award dated 8-8-2015 has appropriately dealt with this issue and rightly held thus:

“The issue about traffic survey to be adopted for the purpose of calculation of toll revenue has been argued in great details by advocate of respondent before the Hon’ble High Court. After hearing the pleadings on traffic survey to be considered for calculation of toll losses the Hon’ble High Court has upheld the decision of arbitration tribunal award dated 1-12-2003. The decision of Hon’ble High Court was not challenged or argued by respondent before the Hon’ble Supreme Court. the Hon’ble Supreme Court has also not commented on the judgment of the Hon’ble High Court in the matter of accepting the traffic survey of 2001 as base for calculation of toll revenue on Bharatpur Deeg section.

Thus the decision on the point of traffic survey to be adopted for calculation of toll on Bharatpur-Deeg Section is now finally settled by the

Honorable High Court & Supreme Court. the Tribunal now has no right to open up this issue that stands settled by courts of law and therefore any

arguments furnished above by learned advocate of respondents cannot be considered by the Tribunal.

Mr. Ashok Mehta submitted that the Commercial Court has also roundly dealt with the issue, found no force or legal merit in the State's objection

under Section 34 of the Act of 1996 and concurred with the Arbitral Tribunal. Mr. Ashok Mehta submitted that the assertion of the State that the

claimant was entitled to claim compensation for being prevented from collecting toll on the Bharatpur-Deeg section of the Bharatpur Bye-pass only on

the basis of the cost of construction of Bharatpur-deeg 1.25 km section i.e. Rs.26.34 lacs, is wholly misconceived, baseless, and dehors the terms of

the agreement dated 19-8-1998. He submitted that the tender issued by the State for construction and maintenance of Bharatpur bye-pass measuring

10.850 km including the 1.25 km section was a composite one. It could not be sub-divided into parts. To do so, would be doing violence to the terms

of the agreement dated 19-8-1998. The claimant was thus entitled to collect the toll for recovery of entire of its investment, cost and other expenses

on the construction of the entire Bharatpur bye-pass i.e. 10.850 km. compensation for reach by the State in preventing it to do so even on a portion of

the toll road." Bharatpur-Deeg section, cannot be confined to the monies expended on that section alone. Mr. Ashok Mehta submitted that the

claimant was entitled to collect toll from all vehicular traffic plying on any section of the Bharatpur bye-pass 10.850 km, including the Bharatpur-Deeg

section, upto the concession agreement dated 19-8-1998 ending 6-4-2008.

It was submitted that after completion of phase-I of the Bharatpur Bye-pass which was to the extent of 9.65 km., and broadening and strengthening of

the Bharatpur-Deeg section, the claimant was entitled to collection of toll at State Government's notified rates. Compensation by the Arbitral Tribunal

has been worked out on the anticipated toll collection of 95% of the vehicular traffic of the average daily traffic assessed, under the joint survey of

2001, excluding expenses for (i) toll collection, (ii) on account of insurance charges during toll period, (iii) advertisement, (iv) toll supervision etc., (v)

maintenance and route improvement charges which altogether aggregated to 20% of the anticipated toll collection. Table-2 and 3 to the award dated

1-12-2003 were accordingly prepared. Mr. Ashok Mehta pointed out that the Apex Court in its judgment dated 21-7-2011 has approved with

reference to Table-4 similarly prepared the claim of Rs.26.34 lacs for the claimant's losses, resulting from the delay in the State issuing notification for

diversion of traffic from Bharatpur city towards Bharatpur bye-pass. Table-4 prepared on the same principle as deployed for preparing table-2 and 3

to the award dated 1-12-2003. The Arbitral Tribunal award dated 8-8-2015 relies on the very arithmetic in deciding the remanded issue No.1 relating

to the amount of compensation to the claimant for being prevented from collecting toll on the Bharatpur-Deeg section of the Bharatpur bye-pass from

the vehicles using it.

Mr. Ashok Mehta emphatically submitted that the compensation to which the claimant was held entitled under the award dated 8-8-2015 is plainly a

question of facts and having been determined objectively by the Arbitral Tribunal appreciating the evidence before it and on a plausible construction of

the operating terms and conditions of the agreement dated 19-8-1998, no interference is warranted therewith by this court in an appeal under Section

37 of the Act of 1996.

On the argument of the State that the claimant could not be allowed â??windfall profitâ? of Rs.713 lacs as compensation/ damages for three years on

being prevented to collect toll on the Bharatpur-Deeg 1.25 km section, Mr. Ashok Mehta submitted that the words â??windfall profitâ? used by the

Apex Court in its remand judgment dated 21-7-2011, were in the context of the overall facts in the appeal, where the subsequent post 2005 breach by

the claimant for non execution of phase-II of the agreement dated 19-8-1998 and resultant saving of Rs.354.75 lacs was not reckoned for when the

award was passed on 1-12-2003. And in the meantime when the Apex Court decided Civil Appeal No.5416/2011 and No.5417/2011, the time for

execution of phase-II under the agreement dated 19-8-1998 had lapsed. Mr. Ashok Mehta submitted that the work on phase- II was to commence in

the year 2005 from the revenue generated from the toll leviable on the Bharatpur bye-pass, which commenced in April, 2000. But collection of that toll

was partially prevented by the State on the Bharatpur-Deeg section in the year 2000 itself in a breach of its obligation and the claimant's right under

the agreement dated 19-8-1998. In terms of the contract on investment made

by it on construction of the bye-pass Phase-I, the claimant was entitled to collect toll for recovery of its investment and redeploy it to the extent of anticipated amount reflected in the agreement for construction of Phase-II.

But that was not to be because of the State's breach. Further the Apex Court, Mr. Ashok Mehta submitted that now the compensation/ damages of Rs.1410.09 lacs under the award dated 8-8-2015 is for about eight years, while it earlier was of 713.53 lacs only for three years. Mr. Ashok Mehta submitted that the award is based on the joint traffic survey of 2001, which was upheld earlier by this court in its judgment dated 24-4-2007 and despite challenge thereto not adversely commented by the Apex Court. Once the right of claimant for recovery of toll from vehicular traffic on the Bharatpur-Deeg section had been recognized and its breach established, upto the Apex Court, the claimant is entitled to the compensation now reasonably determined on objective criteria and facts. The compensation determined by the Arbitral Tribunal, now under its award dated 8-8-2015 is a question of fact, therefore is not open to be questioned either in Section 34 or Section 37 of the Act of 1996 proceedings as no case of it being perverse or unjust has been made out.

Mr. Ashok Mehta then submitted that the Arbitral Tribunal, on the second issue remanded to it by the Supreme Court i.e. as to what would be the effect of the claimant failing to execute phase-II as per the agreement dated 19-8-1998, has on the basis of the conditions and clauses of the agreement in issue has held that cancellation of the agreement for such a default was clearly excluded. In this regard Mr. Ashok Mehta submitted that even though initially there indeed was a provision in para 17 of the bid document for cancellation of the contract in the event of a breach by the successful bidder, this para was subsequently deleted in the pre-bid negotiation by the Chief Engineer on 24-7-1998, even prior to issue of the tender (104 Page-99). On this fact, Mr. Ashok Mehta submitted, the Arbitral Tribunal noting this fact rightly held that neither the agreement dated 19-8-1998 could be cancelled as a consequence of non execution of phase-II work by the claimant, nor could resultantly the claimant be debarred from collection of toll under the said agreement nor for that matter required to deposit back with the State the toll collected following the date of its breach for non execution of phase-II. Mr. Ashok Mehta submitted that the Tribunal also rightly

rejected the contention of the State for reduction of concession period from 6-4-2008 as per the schedule under the agreement dated 19-8-1998 for non execution of phase-II, for the reason that no such eventuality was at all visualized in the agreement. Clause 10 of the agreement dated 19-8-1998 merely provided that the State could revise the rate for toll collection upward or downward following which it and the claimant by mutual consent could vary the concession period. Mr. Ashok Mehta submitted that at no point of time the State even worked out a potential reduction of the concession period for reason of non execution of phase-II by the claimant, nor in fact ever communicated such an intent to the claimant. Nor in fact it could at all have so done. The State's argument on this aspect, is wholly peculiar and rather baseless aside of it neither being set up as a counter claim before the Arbitral Tribunal or the courts in the first round of litigation. He submitted that the Tribunal in the facts of the case and on its construction of the agreement dated 19-8-1998 therefore on the claimant's breach qua phase-II directed it to pay as damages Rs.354.75 lacs to the state along with 10% interest from the date it was in breach of its obligation in issue till the date of payment. No ground for interference with that conclusion of the Arbitral Tribunal in its award dated 8-8-2015 within the scope of Section 34 of the Act of 1996 can make out. Mr. Ashok Mehta then emphatically submitted that it is well settled that proceedings before the commercial court by resort to Section 34 of the Act of 1996 or before the appellate court under Section 37 thereof are in the nature of annulment proceedings and the civil courts do not exercise appellate jurisdiction. The merits of the award dated 8-8-2015 both on fact and law can not thus be addressed on a re-appreciation of evidence or even on a potentially different view of the terms and conditions of the agreement dated 19-8-1998, even though that possibility does not exist in the instant case, Mr. Ashok Mehta hastened to add. The conclusions of the Arbitral Tribunal on the two issues remanded by the Apex Court under its order dated 21-7-2011 have not been impugned by the State, either for reason of fraud or corruption. No ground, in the State's appeal, founded on breach of any fundamental law of India by the Arbitral Tribunal passing the impugned award dated 8-8-2015. No case of patent illegality is even remotely made out. Nor is the award open to be questioned on the ground of being contrary to public

policy as defined in explanation to Section 34(2)(b)(ii) of the Act of 1996. The award is not vitiated even remotely by the morality. Nor injustice, as nothing shocking to the court's conscience is established. Rather the injustice is suffered by the claimant in seeking compensation/ damages for the State's breach of contract for the last eighteen years odd. Mr. Ashok Mehta submitted that contrarily the award dated 8-8-2015 is well reasoned, based on appreciation of evidence and on the only possible interpretation of the terms and conditions of the agreement dated 19-8-1998. And to interfere therewith on argument of prejudice largely agitated by the State on the non contextual invocation, of the words "windfall profit" by the Apex Court in its judgment dated 21-7-2011 on glossing over the fact that the earlier award of 713 lacs was only for three years compensation, while the present one dated 8-8-2015 is for compensation for eight years would be most unjust. Mr. Ashok Mehta submitted that in the context of the scope of interference with awards under the Act of 1996 as detailed above, as also its lack of merits, the State's appeal ought to fail. Mr. Ashok Mehta relied upon the judgment of the Apex Court in the case of Associate Builders Vs. Delhi Development Authority [(2015)3 SCC 49] in support of his contentions. Heard. Considered.

The disputes between the claimant and the state with regard to the agreement dated 19-8-1998 have in the first instance travelled through the award dated 1-12-2003, it being set aside by the District Judge under order dated 17-1-2006, appeal thereagainst under Section 37 of the Act of 1996 which was partly allowed by this court vide order dated 24-4-2007 and finally civil appeals before the Apex Court, by the claimant and the State. The Apex Court by its judgment dated 21-7-2011 made a limited remand to the Arbitral Tribunal only on two issues, copiously detailed earlier in this judgment. In the case of Mohan Lal Vs. Anandibai [(1971)1 SCC 813] a three judge bench of the Apex Court held that all issues finally decided by the trial court could not on a specific remand on some of them by the higher court be made the subject matter of a fresh trial. A reading of para 9 of the aforesaid judgment clearly indicates that the findings which the appellate court did not set aside, could not be made subject to a retrial when a limited remand on specific issues is made. The order of specific remand entails only retrial on issues

remanded. To wit, the findings on issues on which remand was not made would be final. This judgment of the Apex Court was followed by the Apex court in the case of Paper Products Ltd. Vs. CCE [(2007)7 SCC 352].

We are of the considered view that, in the circumstances, the earlier adjudication by this court in its judgment dated 24-4-2007 and by the Apex Court in its judgment dated 21-7-2011, entails finality on several of the other issues in the dispute between the claimant and the State. The areas of finality can be said to be as under:

(i) The State was in breach of its obligation under the concession agreement dated 19-8-1998 by preventing the claimant from collecting toll on the

Bharatpur-Deeg section (1.25 km) which was a composite and integral part of the project facility i.e. the Bharatpur bye-pass admeasuring 10.850 km.

(ii) Resultant of the State's breach aforesaid the claimant has been held entitled both by this court in its judgment dated 24-4-2007 and the Apex

Court in its judgment dated 21-7-2011 to compensation with reference to the investments etc. made by it: Net return for repayment of principal and

interest etc. on quantity basis, after accounting for cost, expenses, service charges, maintenance and route improvement (as provided for in the agreement dated 19-8-1998).

(iii) That for the measurement of compensation for the State's breach of the contract a joint traffic survey on the Bharatpur-Deeg section (1.25

km.) of the Bharatpur Bye-pass (10.850 km.) was held between 3-7-2001 and 10-7-2001 (24 hours each day) (survey of 2001), in which the officers

of the PWD, the District Magistrate and the claimant participated.

(iv) The joint traffic survey of 2001 for Bharatpur-Deeg section of the Bharatpur Bye-pass (the project facility under the agreement dated 19-8-1998)

was not contrary to terms of the agreement dated 19-8-1998 and even otherwise being a joint one, is relevant for determination of compensation to the claimant.

We do not find any force in the contention of Mr. Rajendra Prasad that for the assessment of damages/ compensation for the breach of contract by

the State the survey of 1994 or for that matter of 1997 to assess vehicular traffic on the Bharatpur-Deeg section of the Bharatpur Bye-pass ought to

have been relied upon. The Arbitral Tribunal has rightly held in an extended discussion in its award dated 8-8-2015 that the survey of 1994 was only unilateral and random as was indicative from the State's own categorical disclaimer as to its effect. Contrarily it was unequivocally left by the State to the participating bidders to make their own estimation of the traffic on the Bharatpur bye-pass (obviously including the Bharatpur-Deeg section) to be constructed and then make their respective bids. We are of the view that the Arbitral Tribunal having taken the correct view on the non-binding unilateral and admittedly random view of the State's unilateral traffic surveys of 1994 and 1997, generally made on the one hand, and the binding nature of the joint traffic survey of 2001, by the State and the claimant, specifically done in the context of the dispute arising from the State preventing collection of toll on the Bharatpur-Deeg section of the Bharatpur Bye-pass, on the other hand, for assessment of damages/ compensation to the claimant on the State's breach of its obligation under the agreement dated 19-8-1998, it was a matter wholly within its jurisdiction and the State cannot assail that matrix by way of objections under Section 34 of the Act of 1996 and further in appeal under Section 37 thereof. No ground therefor within the scope of Section 34(2)(b)(ii) of the Act of 1996 can be made out. We are also of the considered view that the judgment of the Apex Court rendered on 21-7-2011 does not unsettle the binding nature of the joint traffic survey of 2001, as it was not held to be contrary to any contractual conditions, nor was otherwise adversely commented upon. Resultantly the finding of the Single Judge in his judgment dated 24-4-2007, from which the appeal before the Apex Court was, holding that the joint traffic survey of 2001 was within the terms of the contract dated 19-8-1998, and even otherwise based on mutual agreement between the State and the claimant, could not be objected to for being used as a foundation for determination of the compensation payable to claimant, attained finality.â?Notwithstanding the limited remand on two issues by the Apex Court. We are also of the considered view that table-2 and 3, appended to the award dated 1-12-2003, not having been negated or set aside by the Apex Court in its remand judgment dated 21-7-2011, based on the joint traffic survey of 2001, also remained valid for determination of the compensation/ damages payable to the claimant for being prevented from collecting toll on the Bharatpur-Deeg section

of the Bharatpur bye-pass.

With regard to the observation of the Apex Court, in its judgment dated 21-7-2011, on the claimant not being allowed 'windfall profit', we are of

the view that ordinarily it would have been for the Apex Court itself to state what the import of the said words was. However, it has fallen to us to

consider the words above, as the appellant State has emphasized them to contend that where Rs.713 lacs as compensation to the claimant for it being

prevented to collect toll for three years on the Bharatpur-Deeg section was found as windfall profit, the award of Rs.1014.09 lacs (albeit for eight

years) by the Arbitral Tribunal following the remand is wholly excessive and injudicious for reason of which the award dated 8-8-2015 be set aside.

We are of the considered view that the observation of the Apex Court on 'windfall profit' to the claimant, was in the limited context of the

claimant being allowed damages/ compensation for the breach by the State of its obligation by preventing the claimant from collecting toll on

Bharatpur-Deeg section, but in the meantime the claimant having defaulted on the second phase of the execution of the agreement dated 19-8-1998

which saved it on its obligation to invest Rs.354.75 lacs thereunder. It would be well to reiterate that the Apex Court at the same time had found the

State to be in breach of contract in preventing the claimant to collect toll on the Bharatpur-Deeg section of the Bharatpur bye-pass on completion of

Phase-I of the agreement dated 19-8-1998. Issue No.1 as remanded therefore left it to the Arbitral Tribunal to assess damages/ compensation.

As far as the issue of non completion of phase-II of the agreement dated 19-8-1998 having a bearing on the overall contract for construction of the

Bharatpur bye-pass (10.850 kms) on BOT basis by the claimant, the Arbitral Tribunal has reasonably held, on construction of the terms of the contract

that albeit the claimant was indeed in breach of its obligations on that count. Such breach could not have entailed the cancellation of the contract

primarily for the reason that the State had taken a decision in the pre-bid meetings that the breach by the successful bidder would not entail the

cancellation of his contract. The Arbitral Tribunal held that in these circumstances there was no legal foundation for the State to claim on issue No.2,

as remanded by the Apex Court, that the failure of the claimant in executing phase-II would entail cancellation of the contract with all its

consequences. The Arbitral Tribunal therefore found the claimant liable to pay Rs.354.75 as damages to the State along with interest 10% p.a. The

Arbitral Tribunal has also rightly rejected the claim of the State with regard to its purported entitlement to recover Rs.535.19 lacs from the claimant as

allegedly expanded on the maintenance of the road and strengthening of pavement of the Bharatpur bye-pass after expiry of the concession period.

That conclusion of the Arbitral Tribunal is based on the rock solid reason that the State had at no point of time in earlier round of arbitration upto the

Apex Court raised such a counter claim. Being a forum of limited jurisdiction entitled to adjudicate only claims referred to it by the parties, and in this

case the remand by the Apex Court on two limited issues, nothing illegal can be attributed to the Arbitral Tribunal's declining to entertain the counter

claim, set up on the fly by the State first time before it without ever earlier having agitated it or being referred to it. The Arbitral Tribunal further held

that in any event the allegation in the claim for recovery of Rs.535.19 lacs expanded on maintenance, etc. of the Bhartpur Bye-pass for reason of it

not being constructed as per the prescribed standard, was an obvious afterthoughtâ?"if not incorrectâ?"as the State itself had not issued any notice of

30 days, required under the agreement dated 19-8-1998 to recover the cost purportedly incurred by it on claimantâ??s behalf for maintenance/

repairs. In fact the performance bank guarantee of the claimant in terms of the clause 11 of the bid agreement dated 19-8-1998 was released. The

Arbitral Tribunal in its award dated 8-8-2015 has appropriately dealt with the said issue in detail as under:

â??On going through the arguments of both the parties and after perusal of agreement the Tribunal holds that in view of clear provision in the

contract agreement as referred above, the respondents were required to carry out measurements of levels of road surface every six months and

intimate the same to entrepreneurs to carry out the needed maintenance, by giving notice to the claimant during the contract period. After giving due

notice, the respondents should have carried out repair of road and recovered cost of maintenance from performance guarantee. The respondents

however returned the performance guarantee on completion of the work without taking any such action. It is worth mentioning here that cost of the

two layers of the strengthening of road surface by providing 40 mm asphaltic concrete over 60 mm thick dense Bitumen Macadam on entire road

surface is only estimated to cost of 354.75 lacs. It is beyond imagination as how the estimate cost of repair of road amounting Rs.535.19 lacs

conveyed to claimant after he has left the work on completion of concession period can be relied upon??.

We are of the considered view that in the facts obtaining none of the grounds under Section 34 of the Act of 1996 for determination of appeal under

Section 37 of the Act of 1996 against the order of the commercial court upholding the award are made out. The award dated 8-8-2015 is not even

remotely in conflict with the public policy, inasmuch as it is neither vitiated by immorality, or injustice or for that matter patently illegal or otherwise in

conflict with any fundamental policy of any Indian law. Re-appreciation of evidence on which the Arbitral Tribunal award dated 8-8-2015 was passed

is outside the ken of Section 34 of the Act of 1996?"as specifically provided for under its Explanation-2.

Conversely the award dated 8-8-2015 is well rooted in terms of the concession agreement dated 19-8-1998 and the Contract Act, 1872 in awarding

damages/ compensation for reason of breach of state's obligation to allow collection of toll on a portion of the project facility on the one hand

(Bharatpur-Deeg section of the Bharatpur Bypass) and damages to the State for reason of claimant's own breach in non completion of phase-II

under the agreement dated 19-8-1998 in failing to strengthen the road surface by providing 40 mm Asphaltic concrete over 60 mm thick Dense

Bitumen Macadam on entire road surface of the bypass. The challenge to the award dated 8-8-2015 has been rightly negated by the Commercial

Court vide judgment dated 17-8-2017. There is no warrant for interference therewith. The appeal is without any force. Dismissed.