

NON-REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

Special Leave Petition (C) No.....of 2016
(Diary No. 36526 of 2016)

NOIDA Toll Bridge Company Ltd. **Petitioner(s)**
Versus

Federation of NOIDA Residents Welfare
Association & Ors**Respondent(s)**

ORDER

L. NAGESWARA RAO, J.

I.A. No.....of 2016 which is an application for exemption from filing certified copy of judgment dated 26.10.2016 passed by the High Court of Judicature at Allahabad in Public Interest Litigation (PIL) No. 60214 of 2012 is allowed.

2. Issue notice. Respondent Nos. 1, 2, and 9 are represented by Mr. Sanjay Hegde, learned Senior Advocate, Mr. Ranjit Saxena, Advocate and Mr. K. K. Venugopal, learned Senior Advocate respectively. Notice shall now go to the remaining Respondents only.

3. Federation of NOIDA Residents Welfare Association & Ors., Respondent No.1 herein, filed PIL No.60214 of 2012 in the High Court of Judicature at Allahabad for a declaration that collection of toll fee should be stopped on the DND Flyover between New Delhi and NOIDA.

4. A Concession Agreement (hereinafter referred to as “the Agreement”) was entered into between the Petitioner, NOIDA (Respondent No.2) and IL & FS Ltd. (Respondent No.9) on 12.11.1997 for development of infrastructure facility of a bridge and an access road. The Project was conceived on Build-Operate-Transfer (BOT) basis. The 9th Respondent IL & FS had to arrange the investment for the Project which could be recovered by levy of toll from the users of the road and the Project.

5. As the main dispute in the PIL filed in the High Court revolves around the recovery of the Project Cost by the proponent, it is essential to refer to some important provisions of the Agreement. Section 2.3 refers to the concession period which is as follows:

“Section 2.3 Concession Period

(a) The Concession Period shall commence on the Effective Date and shall extend until the earlier of:

(i) A period of 30 years from the Effective Date; or

(ii) *The date on which the concessionaire shall recover the Total Cost of Project and the Returns as determined by the Independent Engineer and Independent Auditor in accordance with Section 14 thereon through (a) the demand, collection, retention and Appropriation of Fee, (b) the receipt, retention and appropriation of Development Income, or (c) any other method as determined by the Parties.*

(b) *Upon the termination of the Concession Period, the Concessionaire shall transfer the Project Assets to NOIDA in accordance with the terms of Article 19.”*

6. It is relevant to refer to the definition of ‘Effective Date’ which means the earlier of (a) the date of issuance of Certificate of Compliance or (b) the date of issuance of Certificate of Commencement. Article 19 provides that NOIDA will continue the operations of the DND project either directly or by its nominated agency from the ‘Transfer Date’ which is the day immediately following the last day of the concession period, including any extension thereto or earlier termination thereon in accordance with the terms of the Agreement.

7. Fixation and calculation of the fee is dealt with in Section 13. As per Section 14.1, the Total Cost of the Project shall be the aggregate of (i) Project Cost, (ii) Major Maintenance Expenses & (iii) Shortfalls in the recovery of

returns in a specific financial year as per the formula in Section 14.2 (a).

8. Section 14.2 contemplates that recovery of the Total Cost of the Project and Returns therefrom shall be as illustrated in Annexure F. The calculation of the Returns shall be made at annual intervals from the effective date in the following manner:

“Start with: Gross revenue from fee collections, income from advertising and Development income.

Less: O & M expenses

Less: Taxes (excluding any customs and import duties).”

9. “Returns” is defined in the Agreement as the returns on the Total Cost of Project recoverable by the Concessionaire from the effective date at the rate of 20 per cent per annum as per Section 14.2 of the Agreement.

10. Respondent No. 1 contended in the writ petition that the Total Cost of the DND Flyover Project was approximately Rs. 408.17 Crores and the cumulative toll income from the years 2001 to 2014 was Rs. 803.524 Crores. As on 31.03.2014 the cumulative net profit was Rs. 165.08 Crores. Respondent No. 1 further contended that the Total Cost of the Project as per the report of the Company’s Auditor was Rs. 2,339.69 crores as on 31.03.2012 which

increased to Rs. 2,955.1 crores as on 31.03.2013 and Rs. 3,448.95 crores as on 31.03.2014. It was further urged that the projected figure of the Total Cost of the Project as on 31.03.2016 was Rs. 5,000 crores. It was contended by Respondent No. 1 that as per the calculation of the Auditor of the Petitioner herein, the Total Cost of the Project can never be recovered and the Project will never be free from levy of toll.

11. The Petitioner contested the Writ Petition on several grounds including the maintainability. The Petitioner herein relied upon the Agreement and the reports of the Independent Auditor appointed in accordance with the Agreement to contend that the Total Cost of the Project has not been recovered.

12. The High Court framed six questions for consideration and concluded as follows:

- a) *“This Public Interest Litigation is legally maintainable.*
- b) *In the facts of the case, interference with the Concessionaire agreement is warranted in exercise of powers of judicial review under Article 226 of the Constitution of India.*
- c) *Selection of Concessionaire in the facts of the case is violative of Article 14 of the Constitution of India and is found to be unfair and unjust. We, however, do not deem it fit to nullify the entire concession agreement.*

- d) Right to levy and collect User fee from the commuters as conferred upon the Concessionaire under the Concession Agreement suffers from excessive delegation and is contrary to the provisions of the U.P. Industrial Area Development Act, 1976. Article 13 (Clause) of the Concession Agreement is held to be bad and inoperative in the eyes of law.*
- e) The method of calculation of the Total Project Cost and appropriation of the User fee collection under Article 14 (Clause) of the Concession Agreement is held to be arbitrary and opposed to Public Policy. Article 14 (Clause) of the Concession Agreement is severed, therefrom.*
- f) The proposed Amendments do not affect the reliefs which have been prayed for in the petition.”*

On the basis of the above conclusions, the High Court directed the Petitioner not to impose any user fee/toll from the commuters for using the DND flyover.

13. Dr. Abhishek Manu Singhvi, learned Senior Advocate for the Petitioner submitted that the reports of the Independent Auditor appointed in accordance with the Agreement were not properly considered by the High Court. He handed over two charts which, according to him, were prepared in accordance with the terms of the Agreement. Relying on the charts, he submitted that the Total Cost of the Project has not been recovered. He urged that the Petitioner has created a world-class facility of a bridge over the river Yamuna and a 8 lane highway of 9.5 kilometres.

Dr. Singhvi submitted that the veracity of the Petitioner's claims that the Total Cost of the Project has not been recovered can be verified by taking the assistance of the Comptroller and Auditor General of India. Finally he submitted that the Petitioner would suffer irreparable loss if the judgment of the High Court is not stayed.

14. Prima facie, we are of the opinion that the various issues that arise in this SLP warrant a detailed scrutiny. Conflicting claims have been made regarding the recovery of the Total Cost of the Project by the Concessionaire. To resolve the dispute, it is appropriate that an independent agency is requested to examine the relevant records of the DND flyway. The said agency should examine the reports of the independent auditors appointed by the Petitioner and submit a report regarding the correctness of the Petitioner's claim that the Total Cost of the Project has not been recovered. We accept the suggestion of the Petitioner and request the Comptroller and Auditor General of India (CAG) to assist us in this matter. The Petitioner is directed to place the entire record pertaining to the recovery of the Total Project Cost of the DND flyover project as per the Agreement

before the CAG. The CAG is requested to verify the claim of the Petitioner that the Total Cost of the Project has not been recovered and submit a report within four weeks. The CAG shall be at liberty to call for and examine all such records having a bearing on the financial aspects, as it requires to facilitate its decision. This will include matters and information pertaining to all the benefits which have flowed to the Petitioner under the entirety of the agreement, including the utilisation, if any. The Petitioner shall co-operate in all respects with the CAG and provide all documents, information and details as sought.

15. We do not agree with the submission that the Petitioner would suffer irreparable loss if the judgment of the High Court is not stayed. It will be impossible to provide restitution to the lakhs of commuters from whom the fee would be collected to repay them in the event of dismissal of the SLP. On the other hand, if the Petitioner succeeds, it can be compensated suitably by extension of time. The balance of convenience is also against the Petitioner. Therefore, we are not inclined to grant the interim relief as prayed for.

16. A copy of this order shall be provided to the CAG expeditiously.

17. Three weeks time granted to the respondents for filing their Counters and one week thereafter to the petitioners for filing a Rejoinder, if any. List the matter after four weeks.

.....CJI
[T. S. THAKUR]

.....J
[Dr. D. Y. CHANDRACHUD]

.....J
[L. NAGESWARA RAO]

New Delhi,
November 11, 2016

JUDGMENT