

A M/S. MSK PROJECTS (I) (JV) LTD
v.
STATE OF RAJASTHAN & ANR.
(Civil Appeal No. 5416 of 2011)

B JULY 21, 2011

[P. SATHASIVAM AND DR. B.S. CHAUHAN, JJ.]

Contract:

C *Construction of a bypass road – Concession agreement*
authorising contractor to collect toll fee – Dispute between
parties as to delay in issuance of notification by State
Government barring the use of old route as also entitlement
of contractor to collect toll fee from vehicles using a specific
D *patch of the road – Arbitral tribunal holding that there had*
been delay on the part of the State in issuing the notification
and the State failed to implement the same and the contractor
was entitled to collect fee even from vehicles using the
specific patch of the road – District Judge and High Court
E *holding that there was no clause in the agreement to issue*
notification barring the old route – However, the High Court
held that the contractor could collect toll fee from the specific
patch of the road – HELD: The State Government had not
taken the defence that it was not agreed between the parties
to issue the notification barring the traffic through the old route
F *– The only issue remained as to whether there was delay in*
issuance of notification and implementation thereof – In such
a fact-situation, the District Judge as well as the High Court
fell in error in considering the issue which was not taken by
the State before the arbitral tribunal during the arbitration
G *proceedings and holding that there was no agreement for*
issuance of notification by State barring the old route – The
issue as to whether the specific patch of the road was an
integral or composite part of the project and the contractor
could collect the toll fee on that part also stands concluded

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by the High Court and stands settled in favour of the contractor – Rajasthan Motor Vehicles Taxation (Amendment) Act, 1994 – Tolls Act, 1851. A

Tolls Act, 1851:

Toll fee – Nature of – Construction of a bypass road – Concession agreement authorising the contractor to collect toll fee – Dispute between parties – Arbitration – HELD: Toll fee is compensatory in nature wherein the Government can reimburse itself the amount which it had spent on construction of road/bridge etc. – 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 – It cannot be a source of revenue for the State – 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 – In the instant case, the work was to be executed in two phases – The first phase was completed and the amount spent by contractor on the said work was recovered with certain profit – The work of second phase was never executed – Therefore, contractor cannot be permitted to claim damages/compensation on this count – The arbitrator cannot proceed beyond the terms of reference and, therefore, the question of considering the non-execution of the work of second phase was neither permissible nor possible as it had arisen subsequent to the date of award in the arbitration proceedings – In order to do complete justice between the parties and protect the public exchequer, matter remitted to arbitral tribunal to work out the entitlement of the contractor – Arbitration and Conciliation Act, 1996 – Code of Civil Procedure, 1908 – O.8, r.5. B C D E F G

Arbitration:

Jurisdiction of arbitrator/arbitral tribunal – HELD: Special tribunals like arbitral tribunals and Labour Courts get jurisdiction to proceed with the case only from the reference H

A *made to them – Thus, an arbitrator cannot be allowed to assume jurisdiction over a question which has not been referred to him. Similarly, he cannot widen his jurisdiction by holding contrary to the fact that the matter which he wants to decide is within the submission of the parties in the case.*

B **Interest – HELD:** *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 – Therefore, the arbitrator is competent to award interest for the period commencing with*
 C *the date of award to the date of decree or date of realisation, whichever is earlier – So far as the rate of interest is concerned, s. 3 of Interest Act empowers 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*
 D *interest agreed by the parties – In the instant case, the High Court rightly held that the District Judge was justified in reducing the rate of interest to 10% from 18% as had been awarded by the arbitral tribunal – Interest Act, 1978 – s.3 – Arbitration and Conciliation Act, 1976.*

E **Words and Phrases:**

Expressions, 'compensation', 'reimbursement' – Connotation of.

F **The Public Works Department of the State of Rajasthan accepted the tender of the appellant-contractor to construct Bharatpur by-pass road for Rs.1,325 lacs. The total extent of the road was 10.85 km out of which 9.6 kms was new construction and 1.25 kms.**
 G **was improvement of existing portion of the Bharatpur-Deeg road. A concession agreement dated 19.8.1998 was also entered into between the parties authorising the contractor to collect the toll fee for a period of 111 months till 6.4.2008. The agreement contained an arbitration**
 H **clause. According to the contractor, it completed the**

work on 10.4.2000. It started collection of toll fee w.e.f. 28.4.2000. The State issued the Notification preventing the entry of commercial vehicles into Bharatpur city w.e.f. 1.10.2000. The contractor invoked the arbitration clause raising the dispute with respect to: (a) delay in issuance of the Notification and (b) collection of toll from vehicles using Bharatpur-Deeg patch of the road. The arbitral tribunal, *inter alia*, held that there had been delay on the part of the State 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 Government was directed to pay a sum of Rs.990.52 lacs to the contractor as loss due upto 31.12.2003 with 18% interest from 31.12.2003 onwards. The State filed objections u/s 34 of the 1996 Act. The District Judge 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; that the arbitral tribunal erred in taking 1997 survey as basis for calculating the loss suffered by the contractor; and that the contractor was only entitled to extension of concession period. The rate of interest was reduced from 18% to 10%. On appeal by the contractor, the High Court 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; that 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; and that the District Judge was justified in reducing the rate of interest from 18% to 10%. Aggrieved, both the contractor as also the State Government filed the appeals.

The issues for consideration before the Court were:
(i) whether it was mandatory/necessary in view of the

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- A 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; (ii) whether the contractor had a right to collect the toll fee on the patch between Bharatpur – Deeg; and (iii)
- B whether the rate of interest could be reduced from 18% to 10% by the courts below.

Disposing of the appeals, the Court

- C HELD: 1. The arbitral tribunal considered the relevant agreement provisions as well as the land lease deed, the total package documents, the minutes of pre-bid meetings and the deed authorising collection of toll fee etc., and proceeded with the arbitration proceedings. The State Government had not taken the defence that it was
- D not agreed between the parties to issue 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, the District Judge as well as the
- E High Court fell in error in considering the issue which was not taken by the State before the arbitral tribunal during the arbitration proceedings; and holding that there was no agreement for issuance of Notification by the State barring the use of old route. [para 14, 2G] [422-D-F; 417-
- F B-C]

- 2.1 The issue as to whether the Bharatpur-Deeg patch was an integral or composite part of the project and the contractor could collect the toll fee on that part also stands concluded by the High Court after
- G considering the entire evidence on record. It is evident from the record as well as the judgments of the courts below that the bid documents contained the data collected on the flow of traffic on 14th and 15th April, 1994 to find out the viability and requirement of the
- H establishment of Bharatput 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. Besides, in pre-bid conference, it was clarified by the State authorities that the users of Bharatpur-Deeg patch would be required to pay the toll fee. [para20-22] [424-F-H; 425-A-B]

2.2 Further, 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. Therefore, it was not permissible for the State to take the plea that persons using such section of the road were not liable to pay the toll fee. It has not been denied that the said portion of road had been widened and strengthened by the contractor. Thus, the issue raised by the State that Bharatpur-Deeg section of the road was out of the project and the contractor was not entitled to collect the toll fee on that part of the road, stands settled in favour of the contractor. [para 23-24] [425-B-F]

3.1 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. [para 15] [422-G-H]

Union of India v. Bungo Steel Furniture Pvt. Ltd., 1967 SCR 324 =AIR 1967 SC 1032; *Executive Engineer, Irrigation, Galimala & Ors. v. Abnaduta Jena*, 1988 (1) SCR 253 = AIR 1988 SC 1520; *Gujarat Water Supply & Sewerage Board v. Unique Erectors (Gujarat) (P) Ltd. & Anr.*, 1989 (1)

- A **SCR 318 =AIR 1989 SC 973**; *Secretary, Irrigation Department, Govt. of Orissa & Ors. v. G.C. Roy*, 1991 (3) Suppl. **SCR 417 = AIR 1992 SC 732**; *Hindustan Construction Co. Ltd. v. State of Jammu & Kashmir*, 1992 (1) Suppl. **SCR 297 =AIR 1992 SC 2192**; *Executive Engineer, Dhenkanal Minor Irrigation Division, Orissa v. N.C. Budharaj (Dead) by Lrs.*, 2001 (1) **SCR 264 = AIR 2001 SC 626**; *Bhagawati Oxygen Ltd. v. Hindustan Copper Ltd.*, 2005 (3) **SCR 232 = AIR 2005 SC 2071**; and *Indian Hume Pipe Co. Ltd. v. State of Rajasthan* 2009 (15) **SCR 254 = (2009) 10 SCC 187** – relied on

3.2 So far as the rate of interest is concerned, s. 3 of the Interest Act 1978 empowers 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. In the instant case, the High Court, while dealing with the rate of interest, has relied upon the judgment of this Court in *Krishna Bhagya Jala Nigam Ltd.* and, thus, there is no scope for this Court to interfere with the rate of interest fixed by the courts below.

[para 16 and 19] [423-D, F-G; 424-E]

Krishna Bhagya Jala Nigam Ltd. v. G. Harischandra Reddy & Anr., 2007 (1) **SCR 698 = AIR 2007 SC 817**; *H.U.D.A v. Raj Singh Rana*, 2008 (10) **SCR 1034 =AIR 2008 SC 3035**, *Ghaziabad Development Authority v. Balbir Singh*, 2004 (3) **SCR 68 =AIR 2004 SC 2141**; *Bihar State Housing Board v. Arun Dakshy*, 2005 (2) Suppl. **SCR 819 = (2005) 7 SCC 103**; *Haryana Urban Development Authority v. Manoj Kumar & Anr.*, (2005) 9 **SCC 541**; *H.U.D.A v. Prem Kumar Agarwal & Anr.*, 2008 (1) **SCR 807 = JT 2008 (1) SC 590** - relied on.

4. As regards the jurisdiction of the arbitral tribunal to decide an issue not referred to, 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, an arbitrator cannot be allowed to assume jurisdiction over a question which has not been referred to him and, similarly, he cannot widen his jurisdiction by holding contrary to the fact that the matter which he wants to decide is within the submission of the parties. 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. If the arbitrator commits an error in the construction of the contract, this is an error within his jurisdiction. But if he wanders outside the contract and deals with matters not allotted to him, he commits a jurisdictional error, which needs to be proved by evidence extrinsic to the award. [para 6-8] [419-B-H; 420-A-B]

Grid Corporation of Orissa Ltd. & Anr. v. Balasore Technical School, AIR 1999 SC 2262; and *Delhi Development Authority v. R.S. Sharma and Company*, New Delhi, 2008 (12) SCR 785 =(2008) 13 SCC 80; *Associated Engg. Co. v. Govt. of Andhra Pradesh & Anr.*, 1991(2) SCR 924 =AIR 1992 SC 232; *Gobardhan Das v. Lachhmi Ram & Ors.*, AIR 1954 SC 689; *Seth Thawardas Pherumal v. The Union of India*, 1955 SCR 48 =AIR 1955 SC 468; *Union of India v. Kishorilal Gupta & Bros.*, 1960 SCR 493=AIR 1959 SC 1362; *Alopi Parshad & Sons. Ltd. v. Union of India*, 1960 SCR 793 =AIR 1960 SC 588; *Jivarajbhai Ujamshi Sheth & Ors. . Chintamanrao Balaji & Ors.*, 1964 SCR 480 = AIR 1965 SC 214; and *Renusagar Power Co. Ltd. v. General Electric Company & Anr.*, 1985 (1) SCR 432 =AIR 1985 SC 1156; *Kishore Kumar Khaitan & Anr. v. Praveen Kumar Singh*, (2006) 3 SCC 312, *Williams v. Lourdusamy & Anr.*, 2008 (6) SCR 929 =(2008) 5 SCC 647; *Cellular Operators Association of India & Ors. v. Union of India & Ors.*, 2003 (3)

A SCR 691 = (2003) 3 SCC 186; *Oil & Natural Gas Corporation Ltd. v. SAW Pipes Ltd.* 2003 (3) SCR 691 = AIR 2003 SC 2629; and *Hindustan Zinc Ltd. v. Friends Coal Carbonisation* (2006) 4 SCC 445 - referred to.

B 5.1 With regard to the entitlement of the contractor, the State authorities cannot be permitted to use the collection of toll fee as augmenting the State revenues. In fact, the toll fee under the Tolls Act, 1851 is compensatory in nature wherein the Government can reimburse itself the amount which it had spent on construction of 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. 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. [para 25-27] [425-G-H; 426-D-E-H; 427-A-C]

F 5.2 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. [para 28] [427-D]

G *State of Gujarat v. Shantilal Mangaldas & Ors.*, 1969 (3) SCR 341 = AIR 1969 SC 634; *Tata Iron & Steel Co. Ltd. v. Union of India & Ors.*, 2000 (5) Suppl. SCR 228 = AIR 2000 SC 3706; *Dwaraka Das v. State of Madhya Pradesh & Anr.*, 1999 (1) SCR 524 = AIR 1999 SC 1031; *State of U.P. & Ors. v. Devi Dayal Singh*, 2000 (1) SCR 1205 = AIR 2000 SC 961 - relied on.

H 5.3 Claim of expected profits is legally admissible on

proof of the breach of contract by the erring party. 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. [para 30] [428-A-C]

M/s. A.T. Brij Paul Singh & Ors. v. State of Gujarat, AIR 1984 SC 1703; *B.S.N.L v. Reliance Communication Ltd.*, 2010 (15) SCR 705 = (2011) 1 SCC 394 – relied on

5.4 In the instant case, undoubtedly, the total construction was for Rs. 13.25 crores. It is evident from the bid-documents filed by the contractor that the work was to be executed in two phases. In the first phase, the contractor spent about Rs.10.45 crores and recovered the said amount with certain profit, by collection of toll fee within the stipulated period. The documents reveal that phase II work was of worth Rs.354.75 lacs, but, admittedly, this part of the contract had never been executed by the contractor and the said amount of Rs.354.75 lacs had not been spent by it. This issue has been agitated by the State before this Court in its counter affidavit and the averments made therein have not been denied by the contractor while submitting its rejoinder. Thus, there is no specific denial of the allegations/averments taken by the State as required by the principle enshrined in O 8, r. 5 of the Code of Civil Procedure, 1908. The contractor cannot be permitted to claim damages/compensation in respect of the amount of Rs.13.25 crores, as it did not spend the said amount stipulated in the terms of agreement. The contractor 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. [para 33-34 and 36] [429-A-B; 430-E-F; 431-C-E-H]

5.5 In fact, the tribunal has dealt with the issue in

A 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. 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. The arbitrator cannot proceed beyond the terms of reference and, therefore, the question of considering the non-execution of the work of second phase was neither permissible nor possible as it had arisen subsequent to the date of award in the arbitration proceedings. Therefore, any award in favour of the contractor in that respect for non-issuance of notification beyond the date of the notification cannot be held to be justified and the same is set aside. [para 37-38] [432-A-B-F; 433-D-E]

D 5.6 In order to do complete justice between the parties and protect the public exchequer, the matter is remitted to the arbitral tribunal for reconsideration and adjudication as to: (i) what amount could have been recovered by the contractor for Bharatpur-Deeg part of the road from the vehicles using the road; and (ii) what could be the effect on the contract as a whole for non-executing the work of the second phase. The contractor shall be entitled only to 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. [para 38] [433-E-H; 434-A-B]

Case Law Reference:

G	AIR 1999 SC 2262	referred to	para 6
	2008 (12) SCR 785	referred to	para 6
	1991 (2) SCR 924	referred to	para 7
	1955 SCR 48	referred to	para 8
H	1960 SCR 493	referred to	para 8

1960 SCR 793	referred to	para 8	A
1964 SCR 480	referred to	para 8	
1985 (1) SCR 432	referred to	para 8	
(2006) 3 SCC 312	referred to	para 9	B
2008 (6) SCR 929	referred to	para 9	
2003 (3) SCR 691	referred to	para 10	
2003 (3) SCR 691	referred to	para 11	
2006 (4) SCC 445	referred to	para 11	C
1967 SCR 324	relied on	para 15	
1988 (1) SCR 253	relied on	para 15	
1989 (1) SCR 318	relied on	para 15	D
1991 (3) Suppl. SCR 417	relied on	para 15	
1992 (1) Suppl. SCR 297	relied on	para 15	
2001 (1) SCR 264	relied on	para 15	E
2005 (3) SCR 232	relied on	para 15	
2009 (15) SCR 254	relied on	para 15	
2007 (1) SCR 698	relied on	para 15	
2008 (10) SCR 1034	relied on	para 15	F
2004 (3) SCR 68	relied on	para 15	
2005 (2) Suppl. SCR 819	relied on	para 15	
2005 (9) SCC 541	relied on	para 15	G
2008 (1) SCR 807	relied on	para 15	
2000 (1) SCR 1205	relied on	para 25	
1969 (3) SCR 341	relied on	para 28	H

- A 2000 (5) Suppl. SCR 228 relied on para 28
1999 (1) SCR 524 relied on para 29
AIR 1984 SC 1703 relied on para 30
B 2010 (15) SCR 705 relied on para 31

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 5416 of 2011.

- C From the Judgment & Order dated 24.04.2007 of the High Court of Judicature at Rajasthan at Jaipur in Civil Misc. Appeal No. 1581 of 2006.

WITH

C.A. No. 5417 of 2011.

- D K.K. Venugopal, Shirish Patel, Karan Patel, Ankur Saigal, Abhay Anand, Gaurav Singh, Bina Gupta for the Appellant.

Dr. Manish Singhvi, AAG, Vinay Verma, Milind Kumar for the Respondents.

- E The Judgment of the Court was delivered by

- F **DR. B.S. CHAUHAN, J.** 1. 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 under Section 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 G the State of Rajasthan under Section 34 of the Act 1996 for setting aside the arbitral award dated 1.12.2003 had been allowed.

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

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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

A 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 (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 under Section 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

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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.

A 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.

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

G 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.

H 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.

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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.

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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. & Anr. v. Balasore Technical School*, AIR 1999 SC 2262; and *Delhi Development Authority v. R.S. Sharma and Company*, New Delhi, (2008) 13 SCC 80).

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7. In *Associated Engg. Co. v. Govt. of Andhra Pradesh & Anr.*, AIR 1992 SC 232, 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 referred to him, and similarly, he cannot widen his jurisdiction by holding contrary to the fact that the matter which he wants to decide is within the submission of the parties.

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8. If the arbitrator commits an error in the construction of the contract, that is an error within his jurisdiction. But if he wanders outside the contract and deals with matters not allotted to him, he commits a jurisdictional error. Extrinsic evidence is

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- A 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
- B 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 v. Lachhmi Ram & Ors.*, AIR 1954 SC 689; *Seth Thawardas Pherumal v. The Union of India*, AIR 1955 SC 468; *Union of India v. Kishorilal Gupta & Bros.*, AIR 1959 SC 1362; *Alopi Parshad & Sons. Ltd. v. Union of India*, AIR 1960 SC 588; *Jivarajbhai Ujamshi Sheth & Ors. v. Chintamanrao Balaji & Ors.*, AIR 1965 SC 214; and *Renusagar Power Co. Ltd. v. General Electric Company & Anr.*, AIR 1985 SC 1156).
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9. In *Kishore Kumar Khaitan & Anr. v. Praveen Kumar Singh*, (2006) 3 SCC 312, 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

E 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.

- F (See also: *Williams v. Lourdusamy & Anr.*, (2008) 5 SCC 647)

10. In *Cellular Operators Association of India & Ors. v. Union of India & Ors.*, (2003) 3 SCC 186, this Court held as under:

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“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

H misdirection in law.”

11. This Court, in *Oil & Natural Gas Corporation Ltd. v. SAW Pipes Ltd.*, AIR 2003 SC 2629; and *Hindustan Zinc Ltd. v. Friends Coal Carbonisation*, (2006) 4 SCC 445), 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 under Section 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 the 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 rejoinder 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 onwards 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

A concession period as averred by respondent?

3. As a consequence of issue 1 &2, which party breached the contract?

B 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?

C 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.

D 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 issue 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.

G 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.

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(Vide: *Seth Thawardas Pherumal (Supra)*; *Union of India v. Bungo Steel Furniture Pvt. Ltd.*, AIR 1967 SC 1032; *Executive Engineer, Irrigation, Galimala & Ors. v. Abnaduta Jena*, AIR 1988 SC 1520; *Gujarat Water Supply & Sewerage Board v. Unique Erectors (Gujarat) (P) Ltd. & Anr.*, AIR 1989 SC 973; *Secretary, Irrigation Department, Govt. of Orissa & Ors. v. G.C. Roy*, AIR 1992 SC 732; *Hindustan Construction Co. Ltd. v. State of Jammu & Kashmir*, AIR 1992 SC 2192; *Executive Engineer, Dhenkanal Minor Irrigation Division, Orissa v. N.C. Budharaj (Dead) by Lrs.*, AIR 2001 SC 626; *Bhagawati Oxygen Ltd. v. Hindustan Copper Ltd.*, AIR 2005 SC 2071; and *Indian Hume Pipe Co. Ltd. v. State of Rajasthan*, (2009) 10 SCC 187).

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. v. G. Harischandra Reddy & Anr.*, AIR 2007 SC 817, 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

A 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%.”

B 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 v. Balbir Singh*, AIR 2004 SC 2141; *Bihar State Housing Board v. Arun Dakshy*, (2005) 7 SCC 103; *Haryana Urban Development Authority v. Manoj Kumar & Anr.*, (2005) 9 SCC 541; *H.U.D.A v. Prem Kumar Agarwal & Anr.*, JT 2008 (1) SC 590 and came to the conclusion:

C “.....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.”

D 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.

E 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.

F 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 Bharatput 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.

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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. & Ors. v. Devi Dayal Singh*, AIR 2000 SC 961, this Court defined 'toll'

A 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:

B “Although the section has empowered the State
C 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.*”

D (Emphasis added)

E 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:

F “IV(a). The toll of any of the aforesaid facilities/
G 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)

H 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. A

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. B C

28. In common parlance, "reimbursement" means and implies restoration of an equivalent for something paid or expanded. Similarly, "Compensation" means anything given to make the equivalent. (See: *State of Gujarat v. Shantilal Mangaldas & Ors.*, AIR 1969 SC 634; *Tata Iron & Steel Co. Ltd. v. Union of India & Ors.*, AIR 2000 SC 3706; *Ghaziabad Development Authority (Supra)*; and *H.U.D.A v. Raj Singh Rana, (Supra)*.) D E

29. However, in *Dwaraka Das v. State of Madhya Pradesh & Anr.*, AIR 1999 SC 1031, 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. F

30. In *M/s. A.T. Brij Paul Singh & Ors. v. State of Gujarat*, AIR 1984 SC 1703, 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 G H

A 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
B 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
C contract *is guilty of breach of contract* cannot be gainsaid.

31. In *B.S.N.L v. Reliance Communication Ltd.*, (2011)
1 SCC 394, this court held as under:

D “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.”

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

F “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
G 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....”

H 33. Thus, the case requires consideration in the light of the

Y 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 appellatant 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)	Super- vision Charges @ 10%	Total (in lacs)	Inte- rest @ 20%	Total invest- ment of Strs	Upto date invest- ment (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
9/99	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

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PHASE - II

B

2005-06						
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

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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.

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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:

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"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

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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 Special Leave Petition 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.

A 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:

B "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
 C 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
 D 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
 E 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
 F 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.

G 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
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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

A 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.

B R.P.

Appeals disposed of.