Unjust Enrichment Or Unjust Interference? The Supreme Court's DND Flyway Judgment And Its Impact On PPPs

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During the last decade, India has seen an increasing trend of judicial scrutiny of Public-Private Partnership (PPP) contracts in an attempt to strike a balance between public-interest and interests of private parties. What once lay in the ostensibly private realm of a “commercial bargain” is fast becoming subject to rigorous public-law standards, particularly where the contract involves public assets, monopoly rights, or statutory delegations. The Supreme Court's in its recent decision in ***NOIDA Toll Bridge Company Ltd. v. Federation of NOIDA Residents Welfare Association*** **(2024 INSC 1027)** reinforced and upheld the decision of the Hon'ble Allahabad High Court to remove levy of Toll on the Delhi-NOIDA Direct Flyway (DND Flyway) in public interest. While the judgment calls into question pattern of cost inflation, lack of transparency in delegation of taxing powers, and significant profits to the concessionaire, it also raises the most important question about the limits of judicial intervention in PPP frameworks.

The DND Flyway was conceived in the early 1990s to improve connectivity between South Delhi and NOIDA. For execution of this Project, the State of Uttar Pradesh (through NOIDA) executed a Memorandum of Understanding dated 07.04.1992, with Infrastructure Leasing & Financial Services Ltd. (IL&FS). In 1996, IL&FS incorporated NOIDA Toll Bridge Company Ltd. (“NTBCL”) as a special-purpose vehicle; a detailed Concession Agreement dated 12.11.1997 was executed, which *inter alia* included:

- Build-Operate-Own-Transfer model for 30 years—or until NTBCL recovered “Total Project Cost” plus a 20 percent annual return, whichever was later;
- Delegation, through Regulations framed under the Uttar Pradesh Industrial Area Development Act, 1976 (“1976 Act”), of power to collect and levy user fees;

- Determination of costs and returns by an Independent Engineer and Independent Auditor appointed through a committee dominated by NTBCL's parent IL&FS;
- Provision for two-year rolling extensions if full recovery was not achieved after 30 years.

The DND Flyway opened in February 2001; tolls were levied thereafter. In 2012, nearly 11 years later, the Federation of NOIDA RWAs (NOIDA RWA) moved before the Allahabad High Court, alleging that NTBCL had long since recovered costs and was indulging in perpetual profiteering. The High Court struck down Articles 13 and 14 of the Concession Agreement, prohibited further toll collection, and declared the selection process of NTBCL *ultra vires* Article 14 of the Constitution of India. NTBCL appealed. The Hon'ble Supreme Court, ordered a CAG Forensic Audit and affirmed the High Court's decision in material part, criticizing “unjust enrichment” at the expense of the travelling public and extensive cost padding.

Primarily, there were two issues for determination before the Hon'ble Supreme Court, firstly whether NTBCL's continued levy of tolls based on a self-escalating cost-plus formula amounted to unjust enrichment at the expense of the public; and secondly, whether the Court's interference with contractual clauses constitutes unjust and excessive interference with a PPP bargain freely entered into by the State and the private party.

The Hon'ble Supreme Court held that awarding the contract to NTBCL i.e. a private entity to levy toll from commuters plying on the DND flyway was unjust, unfair and arbitrary. The Court observed that NOIDA lacked statutory competence to delegate the power to levy a fee to a private entity. Delegation of the right to calculate, revise, and perpetually escalate tolls, to NTBCL amounted to impermissible “sub-delegation” on part of NOIDA. From these facts the Court deduced that the mechanism under the Concession Agreement effectively guaranteed indefinite Toll collection, having converted what should be a risk-bearing equity return into a risk-free annuity. On the principle that quid pro quo must remain rationally correlated to service rendered, the judgment finds the arrangement “arbitrary” under Article 14.

Finding Articles 13 and 14 “opposed to public policy,” the Court relied on the Judgment *Central Inland Water Transport Corpn. Ltd. v. Brojo Nath Ganguly, (1986) 3 SCC 156* to strike down the said clauses and held that Contracts loaded with terms which are so unfair and unreasonable, that they truly baffle this Court, are undoubtedly opposed to public policy and must be adjudged void. Court invoked the Doctrine of Severability and severed the incurable parts of the contract from the whole.

In this case, the Hon'ble Supreme Court has held that State-linked contracts are always amenable to review under Article 14 of the Constitution. This will have a far-reaching impact on all State-linked contracts bringing another level of scrutiny which may act as a deterrent for PPP contracts.

This decision is a double-edged sword as its broad language risks greater scrutiny and Investors may be vary of ex-post nullification. In sum, *DND Flyway Judgment* is a landmark case on unjust enrichment, but it has also set a dangerous precedent in re-engineering PPP economics in the name of constitutional morality and public-interest.

The Supreme Court's decision, while rooted in concern of public interest and statutory interpretation, fails to adequately recognize that PPP parties, including NTBCL and IL&FS, acted in good faith and in accordance with the then-prevailing policy environment. The DND Flyway Judgment has not considered that the Concession Agreement was the product of extensive deliberation, oversight by multiple government agencies, and endorsement by international financial institutions, reflecting transparency and due diligence.

The formula for cost recovery and returns, as well as the mechanisms for toll collection, were designed to ensure the financial viability of a high-risk, first-of-its-kind infrastructure project, and to attract private investment in a sector where such participation was virtually non-existent. The absence of competitive bidding was not a result of arbitrariness, but a reflection of the market realities and the nascent stage of PPPs in India at the time.

The Supreme Court's decision to invalidate key provisions of the Concession Agreement and to characterize the arrangement as contrary to public policy undermines the sanctity of Government contracts and the principle of legitimate expectations for private investors. It sets a precedent that may deter future private investment in public infrastructure, thereby impeding innovation and much-needed development.

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