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DUA ASSOCIATES

IN BRIEF – INFRASTRUCTURE & PROJECTS

Infrastructure Development Vision

The Government relying heavily on the infrastructure growth over the last 5 (five) years, has a vision plan for India to be a developed nation by 2047, commencing with being a five trillion economy by 2025. Pivotal to realizing these goals is a robust infrastructure development that includes developing 2 lac-kms of national highways and increasing the number of airports to 220 by 2025, besides plans to also develop transport (urban transport and railways) and the logistics sectors.

Private Sector Participation

Infrastructure growth has also attracted considerable private sector interest, which sector had earlier been reticent about participating in infrastructural development, due to long gestation periods for a return on investments, and multiple issues in development and implementation of the projects, such as delays in land availability/ acquisition, regulatory compliances, difficulties in project financing, and revenue uncertainty. It is not that most of these hurdles have been addressed, but the Government, the legislature and the judiciary have contributed significantly in facilitating project development by easing the burden of compliance and ensuring smoother processes. The Government has revised the 'PPP Policy' for better transparency. The contractual framework and tendering processes for infrastructure projects have more or less been settled while addressing stakeholder concerns to a large extent. The present framework enables easy institutional financing. The PPP Model has been successfully implemented in airports, highways, and ports. Consequently, a large number of private companies have entered this sector and many have obtained considerable success.

Some of the hurdles, however, faced in the private sector participation in infrastructure projects are as follows:

(i) ***PPP Model:***

Although the PPP Model is seen to bridge the funding gap for the planned large scale infrastructural growth, it has its own challenges. Eventually, the cost is borne by the users, for the returns that the private sector is expected to make. Moreover, there are security concerns in sensitive sectors, such as airports and ports. An informed and careful assessment needs to be undertaken prior to any private sector participation.

(ii) ***Land Issues:***

The legal issues relating to land acquisition, despite digitization of records in many States, remains a major roadblock and there is currently a lack of support from the States in the land acquisition process. Land acquisition is usually a condition precedent to the concessions granted by an authority. Project finance terms require a clean 30-year title chain to be established in case of acquisition of private land. This often has its own challenges in terms of access to the land records. Once the land is identified, it usually is in many parcels, and to aggregate all landowners to either sell, lease, or provide right of way is quite arduous.

(iii) ***Project Approvals:***

The number of approvals required to commence and to operate an infrastructure project cover a number of areas, such as environmental clearances, right-of-way access, petroleum laws, and state-specific permits. For instance, in the power sector, grid connectivity is a pre-requisite for power to be evacuated. The power developer needs to coordinate with many departments of the Central and State Government and this process can take a significant amount of time and effort. Obtaining the required approvals are pivotal to the effectiveness of the concession granted and any delays can lead to consequences/ termination.

(iv) ***Environmental Laws:***

Environmental laws remain a major concern in infrastructure projects, as non-compliance can result in heavy penalties. Compliance requires considerable allocation of finances, which are often not considered at the planning stage and as a result, these costs are often not built into the tariff and remain an unplanned and unrecoverable cost for the developers.

(v) ***Stamp Duty:***

In relation to financing of the projects, stamp duty issues continue to be diverse and present interpretational difficulties. The lenders usually require an indenture of mortgage over the project assets, through a mortgage. In some States, stamp duty on an indenture of mortgage, is not capped and is a percentage of the entire amount of the loan provided by the lender.

With, however, there being issues with the participation in infrastructure projects, there have equally been reliefs provided by both the legislature as well as the Courts in matters relating to infrastructure projects:

(i) ***Court Rulings on Infrastructure Projects:***

The Courts in India have, however, been proactive in helping expedite the process of land acquisition, while also safeguarding the interests of the landowners. In March 2023, the Allahabad High Court in *Rajesh Chandra v. St. of UP*[1] directed the Principal Secretary (Revenue) Uttar Pradesh to conduct an inquiry against the officials of the National Highways Authority of India (NHAI) for a delay in awarding compensation to people of nine villages, despite acquiring their land for a highway project, calling it a clear violation of Article 300A of the Constitution of India.

The Supreme Court in October 2023 directed the NHAI to pay enhanced land compensation to the landowners, whose lands were acquired for the widening of the National Highway No. 24, on the Bareilly-Sitapur section of Uttar Pradesh and also permitted the landowners/ farmers to withdraw the compensation amount deposited with the concerned district court, along with the accrued interest thereon.

In the case of *The Roadway Solutions India Infra Ltd. V. NHAI*[2], the Delhi High Court observed that courts should interfere minimally to ensure that public works are not stalled.

The Supreme Court of India in the matter of *NG Projects Ltd. V. Vinod Kumar Jain*[3], has stated that courts must realise their limitation and the likely havoc caused by needless interference in commercial matters, especially infrastructure projects.

In *National High Speed Rail Corporation Ltd. v. Montecarlo Ltd.*[4], the Supreme Court of India observed that courts should be circumspect in granting injunctive reliefs that may delay projects.

In *Uflex Ltd. v. Government of TN*[5], the Supreme Court did not grant injunctive reliefs to parties who were unsuccessful at a bid or those who did not even participate in the tender process.

(ii) ***Legislative Support:***

Whilst the Government is doing its part for infrastructure growth, the legislature has also made its contribution by amending the Specific Relief Act, 1963, by introducing Section 20A and Section 41(ha) to facilitate the smooth operation of infrastructure projects and reduce delays in development. These provide that no injunctions would be granted by a court in matters relating to infrastructure projects, where they may hinder or delay progress or interfere with the continued provision of related facilities or services. The infrastructure sectors covered under the amendment include transport, energy, water and sanitation, communication, and social and commercial infrastructure.

(iii) ***Court Interpretations on Power Projects:***

The Courts have also passed orders interpreting policy and other provisions, which have had an effect on the development of ownership of infrastructure projects. The Supreme Court of India in *Dakshin Gujarat Vij Company Limited v. Gayatri Shakti Paper and Board Limited*[6] and Another, etc., has clarified that an entity that owns a 26% stake in a captive power-generating project and consumes at least 51% of the electricity generated, can be considered a captive user and that when a group of individuals collectively constitute captive users, they must jointly hold a minimum ownership stake of 26% in the project and consume at least 51% of the electricity generated annually, and that the ownership threshold of 26% must be maintained consistently throughout the calendar year to meet the criteria.

Another interesting clarification provided is that if members of a cooperative society collectively consume more than 51% of the electricity generated, the project qualifies as a captive generating project, and the society's members are regarded as captive users. A special purpose company formed for electricity generation cannot consume electricity as a captive user but its shareholders and other users that meet the captive user criteria can. These clarifications have helped entities that genuinely meet the criteria to get the benefits under the Electricity Act, 2003.

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[1] 2023 SCC OnLine All 83: (2023) 4 All LJ 114
[2] 2023 SCC OnLine Del 3082
[3] 2022 SCC OnLine SC 400
[4] (2022) 6 SCC 401
[5] (2022) 1 SCC 165
[6] Civil Appeal Nos. 8527-8529 of 2009