* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Judgment reserved on : 1st June, 2010
Date of decision: 10th August, 2010

\+ **W.P.(C) No.13034/2009**

VHCPL-ADCC PINGALAI INFRASTRUCTURE PVT. LTD. AND ANR..... ..... Petitioner
Through Mr. U.U. Lalit, Sr. Adv. with Mr. Arunabh Chowdhary, Mr. Anupam Lal Das and Mr. Raktim Gogoi, Advocates

versus

UNION OF INDIA & ORS. .... Respondents
Through Mr. G. E. Vahanvati, Attorney General of India and Mr. A.S. Chandhiok, ASG with Mr. Atul Nanda, Mr. Jatan Singh, CGSC and Mr. Rahul Malik, Advs. for Respondent no. 1/UOI
Mr. Vivek Tankha, ASG with Ms. Padma Priya, Mr. Rishabh Sancheti and Ms. Meenakshi Sood, Advs. For Respondent no.2
Dr. A.M. Singhvi, Sr. Adv. and Mr. C.U. Singh, Sr. Adv. with Mr. Shivaji, Advs. for respondent no.3

CORAM:
HON'BLE MS. JUSTICE GITA MITTAL
HON'BLE MS. JUSTICE INDERMEET KAUR

1. Whether reporters of local papers may be allowed to see the Judgment? Yes
2. To be referred to the Reporter or not? Yes
3. Whether the judgment should be reported in the Digest? Yes

GITA MITTAL, J

1. *"A mans greed is like a snake that wants to swallow an elephant".*
- a Chinsese proverb which completely sums up the case in hand.

The petitioner, who was awarded a contract for the

construction and operation of a project involving a major bridge over the Pingalai river with approaches covering a total stretch of 2.2 km, claims that the Concession Agreement entered into by him in 2004 tantamounts to his having a preferential right of first refusal for award of the contract relating to the project for the four laning of a 66.73 Kms stretch of National Highway-6, being its Talegaon-Amravati KM 100 to KM 166.725 section, in the State of Maharashtra, without participation in the bidding process and completely unmindful of the public interest involved in the matter.

2. The record of the present case discloses, that on behalf of the MORT&H, the Public Works Department of the Government of Maharashtra had invited tenders for this project from eligible persons of construction, operation and maintenance of a major bridge and its approaches across the Pingalai river in KM 113/800 on the Nagpur-Edlabad Road section of N.H.6 with private sector participation on build, operate and transfer ('BOT') basis. It appears that a Memorandum of Understanding dated 21st February, 2003 (Schedule 'V') was entered into by two companies, Vishvaraj Housing Company Pvt. Ltd. and ADCC Computing and Research Centre Ltd. Pursuant thereto, a consortium formed by them for the purpose of bidding for the project, had submitted a bid for the project.

3. The MORT&H accepted the bid submitted by the said consortium and issued a letter of acceptance dated 4th July, 2003. As per the requirements of the tender/bid, this

consortium incorporated the 'concessionaire'-petitioner herein, as a special purpose vehicle to implement the said project on BOT basis. Pursuant to the aforesaid acceptance letter, on 14th May, 2004, the President of India represented by the Ministry of Road Transport and Highways of the Government of India entered into a 'Concession Agreement' with the VHCPL-ADCC Pingalai Infrastructure Pvt. Ltd. (the petitioner herein), who has been referred to as the 'concessionaire' in the agreement.

4. The work which forms subject matter of the agreement is described in schedule A of the Concession Agreement and is referred to as “the project” therein. The agreement was entered into on behalf of the President of India by the Ministry of Road Transport and Highways (hereinafter referred to as MORT&H) which is responsible for the development and maintenance of national highways in India.

5. Learned senior counsels for all the parties have extensively relied on the terms of the Concession Agreement dated 14th May, 2004, essential terms whereof are as follows :-

> “xxxx
>
> F. In accordance with the requirements of the said tender/bid submitted by the Consortium, the Consortium has incorporated the Concessionaire as a“ special purpose vehicle to implement the Project on BOT basis, and GOI has agreed to grant to the Concessionaire, the Concession (as hereinafter defined) on the terms, conditions and covenants hereinafter set forth in this Agreement.”
>
> xxxxx

Definitions & Interpretations :-

“Project” means the project described in Schedule 'A' which the Concessionaire is required to design, engineer, finance, construct, operate, maintain and transfer in accordance with the provisions of this Agreement.”

“**Project Assets**” means all physical and other assets relating to and forming part of the Project including but not limited to (i) rights over the Project Site in the form of license, right of way or otherwise, (ii)tangible assets such as civil works including the foundations, embankments, pavements, road surface, interchanges, bridges, approaches to bridges and flyovers, road overbridges, drainage works, lighting facilities, traffic signals, sign boards, milestones, toll plaza, equipment for the collection of tolls or relating to regulation of traffic, electrical works for lighting on the Project, telephone and other communication systems and equipment for the Project, rest areas, wayside amenities, administration and maintenance depots, relief centers, service facilities etc.(iii) Project Facilities situate on the Project Site, (iv) the rights of the Concessionaire under any Project Agreements, (v) financial assets, such as security deposits for electricity supply, telephone and other utilities, etc.(vi) insurance proceeds subject to Lenders' rights thereto and (vii) Applicable Permits and authorisations relating to or in respect of the Project.”

“**Project Facility**” means collectively the facilities on the Project site to be constructed, built, installed, errected or provided by the Concessionaire for use of the traffic by implementing the Project and more specifically set out in Schedule 'C'.

“**Project Site”** means the real estate particulars whereof are set out in Schedule 'B' on which the Project is to be implemented and the Project Facility is to be provided in accordance with this Agreement.

Definition of COD

“COD” means the commercial operations date of the Project, which shall be the date on which the independent Engineer has issued

the Completion Certificate or the Provisional Certificate upon completion of construction of the Project and which shall, subject to the provisions of this Agreement, be not later than.....

6. Schedule A describes the need for as well as the project and the relevant portion whereof reads as follows :-

> " **'Schedule A'**
>
> 1. **Need for the Project**
>
> The existing Nagpur Edlabad road section of N.H.6 crosses the Pinglai river in Km. 113/800 near Tiwasa village. There is existing submersible bridge having 22 spans of 2.2 mt c/c and width of 6.10 m. The existing bridge gets over topped during heavy floods of river and result interruption to traffic for 4 to 6 hours duration for several times and the traffic is held up. Tiwasa village is situated on just bank of river. Therefore it is necessary to construct high level bridge at an early owing to demand from public.
>
> 2. **Project Location**
>
> The project is situated in Amravati District of Maharashtra State. There is existing submersible bridge. The proposed bridge alignment is taken @ 15 m D/s away from the center of existing bridge. The necessary index map is enclosed in indicate drawings for reference....."

7. Some light on the issues raised before us is also thrown on by the contents of Schedule B defining the Project Site which are as follows :-

> " **Schedule B – Project Site**
>
> **Description and particulars of Land :**
>
> The entire project is to be implemented on available departmental land. The land width available is 45 m. The proposal involves construction of 4 lane major bridge with foot path including 4 lane approaches, CD, works, Minor bridges, Under passes, road side drainage, service road and toll plaza complex and other structures included in the project cost within two phases, within the available land

width without any new land acquisition."

8. The scope of the work concerned is described under Schedule C, under the heading of 'Project Facility' which makes a reference to the phases in which the work was to be completed.

9. So far as the concession which was granted under the agreement to the petitioner is concerned, the same is detailed in article 2.1 of Article 2 which reads as follows :-

> "GRANT OF CONCESSION
> Subject to and in accordance with the terms and conditions set forth in this Agreement, GOI hereby grants and authorizes the Concessionaire to investigate , study, design, engineer, procure, finance, construct, operate and maintain the Project/Project Facility and to exercise and/or enjoy the rights, powers, privileges, authorisations and entitlements as set forth in this Agreement, including but not limited to the rights to levy, demand, collect and appropriate fee from vehicles and persons liable to payment of fee for using the Project/Project Facility or any part thereof (collective "the Concession")."

10. The petitioner was thus granted such concession, in terms of article 2.2, for a period of twelve years, nine months and nine days commencing from the commencement date, during which the petitioner was authorised to implement the project and operate the project facility. Clause A of article 2.2 envisaged extension, while clause B postulated the concession period as ending with the termination, upon such eventuality.

11. The petitioner has premised its entire claim in the present writ petition on Article 14 of the Concession Agreement, the relevant portion whereof reads as follows :-

"Article 14

CAPACITY AUGMENTATION AND ADDITIONAL FACILITY

14.1 Capacity Augmentation of the **Project**

(a) The GOI may following a detailed traffic study conducted by it, at any time after COD decide to augment/increase the capacity of the Project (Capacity Augmentation) with a view to provide the desired level of service to the users of the Project Facility.

(b) The GOI shall invite proposals from eligible Persons for Capacity Augmentation. The Concessionaire shall have option to submit its proposal for Capacity Augmentation.

(c) The bid document for Capacity Augmentation shall specify a Termination Payment to be made to the Concessionaire in case the Concessionaire chooses not to submit its proposal or fails or declines to match the preferred offer as mentioned in sub-article (e) below.

(d) in case the Concessionaire, after participating in the bidding procedure, fails to give the lowest offer, the Concessionaire shall be given the first right of refusal to match the preferred offer. If the Concessionaire matches the preferred offer the Parties shall enter into a suitable agreement supplemental to this Agreement to give effect to the changes in scope of the Project, Concession Period and all other necessary and consequential changes. In such an event the Concessionaire shall pay to the bidder who had made the lowest offer sum of Rs.1.05 lacs (One Lac Five Thousand Only) towards bidding costs incurred by such bidder.

(e) In case the Concessionaire (i) chooses not to submit its proposal for Capacity Augmentation or (ii) is not the preferred bidder and also fails or declines to match the preferred offer, GOI shall be entitled to terminate this Agreement upon payment to the Concessionaire of the Termination Payment.

(f) The Termination Payment referred to in the preceding sub-articles (c) and (e) above shall be the amount equivalent to the amount of Termination Payment set out in

Article 16.2(b).

14.2 Additional Facility

GOI shall not construct and operate either itself or have the same, interalia, built and operated on BOT basis or otherwise a competing facility, either toll free or otherwise during the Concession Period Provided, GOI may build and operate such a facility subject to the fee charged for vehicles using such facility being at any not less than 133% of Fee for the time being charged for the vehicles using the Project Facility."

12. The Concession Agreement describes a Force Majeure Event in clause 15.1 of Article 15; a non-political event in clause 15.2; an indirect political event in clause 15.3; a political event in clause 15.4 of the concession agreement. The effect of a force majeure event has been described in clause 15.5 which also describes the eventuality and the manner in which termination of the agreement upon the occurrence of a force majeure event would take place. Clause 15.7 postulates a mutual decision to terminate or continue the agreement on continuation of the Force Majeure event beyond 120 days.

Inasmuch as the instant case is not concerned with a force majeure event, it is not necessary to advert to the other clauses of Article 15 dealing with costs, dispute resolution, liability for other losses and other events.

13. Article 16 of the Concession Agreement is concerned with events of default and termination of the Concession Agreement. The present case also does not involve any allegation of a default or breach by the petitioner of the Concession Agreement.

14. Dispute resolution is provided in Article 19 of the

agreement. First an effort to amicably resolve any dispute/difference or a controversy of whatsoever nature, however arising out of or in relation to the agreement including completion of the project (clause 19.1) by reference to the Director General (Road Development) Government of India, and the Chairman of the Board of Directors of the concessionaire, is to be attempted. Any dispute which is not so resolved, is to be finally settled as per Clause 19.2 by binding arbitration under Arbitration & Conciliation Act, 1996.

15. A State Support Agreement was also entered into by the petitioner with the President of India in his executive capacity for the Government Of India (referred to as 'GOI' in the agreement and hereafter) represented by MORT&H and the Governor of Maharashtra in his executive capacity for the State of Maharashtra acting through the Public Works Department, Government of Maharashtra on the 14th May, 2004, with the view to facilitate completion and operation of the project by the concessionaire in accordance with the Concession Agreement and to extend continued support and grant certain rights and authorities to the concessionaire.

16. Subsequently, a gazette notification dated 27th July, 2005 was issued by the Government of India under section 48 of the National Highways Act, 1956, whereby the concessionaire was entitled to collect toll from the “users of the major bridge and its approaches across Pingalai river at KM 113/800”.

17. On 29th May, 2008, the National Highway Authority of India-

respondent no. 2 herein (also referred to as the 'NHAI' hereafter), issued an advertisement in leading newspapers including the Hindustan Times and the Financial Express both dated the 29th of May, 2008 inviting Requests for Qualification ('RFQ' for brevity hereafter) to undertake inter alia the work involving the Talegaon-Amravati KM 100 to KM 166.725 (length-Km 66.73) Section of the National Highway No. 6 in the State of Maharashtra under NHDP Phase III, on design, build, finance, operate and transfer pattern ('DBFOT' pattern). The RFQ document was available from 27th of May, 2008 at a cost of Rs.10,000/- and the last date for its submission was the 15th of July, 2008.

18. The respondent no. 2 has explained that sixteen RFQs were received by the 24th of July, 2008 which was the extended last date for its submission. Though 11 applicants including respondent no. 3 had pre-qualified, as per the prescribed procedure, only names of six top shortlisted candidates were announced on 5th November, 2008. Some of the eligible applicants withdrew. Hence on 12th November, 2008, in terms of clause 2.2 of the RFQ, letters were issued to the next four out of the remaining qualified/eligible parties calling upon them to signify in writing whether they were willing to submit their bid for the project or wished to withdraw. The respondent no. 3 was consequently included in the revised list of short listed bidders in accordance with the notified procedure and vide a letter dated 25th November, 2008 was informed of the same. The final list of

5 qualified bidders was announced on 15th December, 2008.

19. So far as the project is concerned, the NHAI-respondent no. 2 has explained, that on 29th September, 2008, a proposal had been sent to the Department of Economic Affairs, Ministry of Finance of the Government of India for taking the approval of the Public Private Partnership Appraisal Committee ('PPPAC' hereafter) of the respondent no. 1 by the NHAI for clearance of the said project, alongwith all relevant documents including the draft concession agreement. A draft preliminary project report and a proposal to buy back the existing toll rights was also enclosed. This communication refers to an earlier decision of the PPPAC in its meeting held on 5th November, 2007 whereby it was decided to adopt a two stage bidding process and that accordingly the RFQ and the RFP had been prepared as per the guidelines of the Ministry of Finance.

20. The PPPAC considered this proposal as agenda item no. 3 in its 23rd meeting held on 20th February, 2009 which refers to it as the “Four laning of Talegaon Amravati section of NH-6 in the state of Maharashtra under NHDP III on DBFOT (Toll) Basis”. The minutes of its meeting recorded on 20th February, 2009 notice the submission of the Chairman of the NHAI that the plan project highway was a 'segment of the Kolkata-Mumbai East-West link in the country' and that its four laning would result in the four laning of the entire east west link. The cost of the project at Rs.9.27 crore per km was considered very high. The PPPAC suggested that the project could be considered for grant

of approval subject to the NHAI reviewing the project structures to reduce the project cost to Rs.8 crore per km. It was also noted that the traffic would reach the design capacity of the project highway in 22 years. The PPPAC therefore approved the concession period as being fixed as 22 years instead of 18 years proposed by the sponsoring authority. The proposal was granted final approval, subject to buy back of tolling rights being included in the pre-construction costs and not in the total project costs of the project.

21. The suggestions as made by the PPPAC were duly incorporated and thereafter the Cabinet Committee on Infrastructure ('CCI' hereafter) in its meting dated 30th July, 2009 considered the proposal for the instant project of four laning of the Talegaon-Amravati Section of NH-6 as well as another project relating to NH-9 in the State of Maharashtra and also granted approval to the same. This approval was communicated to the NHAI by a letter dated 10th August, 2009 from the Ministry.

22. The NHAI had issued and published the notice for RFP in leading newspapers and posted the same on the website of the NHAI. The RFP document was purchasable against payment of a non-refundable amount of Rs.10 lakhs and envisaged deposit of a security deposit of Rs.11.01 crores which was to be submitted alongwith the bid. A schedule for the various steps envisaged for submission of the RFP also stood notified.

23. The last date for submission of the RFP was appointed as

20th March, 2009 and the pre bid meeting was scheduled on 12th May, 2009. An addendum I to the RFP was issued on 29th May, 2009 while 26th of June, 2009 was appointed as the last date for submission of the bid.

24. It is at this stage that the petitioner, for the first time, wrote a letter dated 20th June, 2009 to the Chief Engineer of the Ministry of Shipping, Road Transport and Highways referring to a purported claim under article 14.1 of the Concession Agreement dated 14th May, 2004. In furtherance of this letter, the petitioner submits that it also sent reminders dated 14th July, 2009 and a second reminder dated 22nd July, 2009 to the respondent no. 1.

25. Our attention has been drawn to a communication dated 24th July, 2009 addressed by the MORT&H-respondent no. 1 to the NHAI, referring to the claim and representation of the petitioner seeking its comments on the following aspects :-

> "(i) Did the consultant of the proposed four-laning project of NHAI considered the fact that there exists a BOT project awarded by the Ministry, which forms part of the Section; and if they did; what advise was given to NHAI in this regard.
>
> (ii) NHAI did not make any reference to the concessionaire or to the Ministry with regard to this BOT stretch. NHAI may indicate how it is going to deal with this now.
>
> (iii) Since the BOT concessionaire has certain rights (Article 14 of Agreement) under existing concession agreement, NHAI should indicate what will be the status of this right in the new scheme of the project."

26. The NHAI responded to the MORT&H by a letter dated 18th August, 2009, inter alia informing it as follows :-

> "(i) The consultant of the proposed 4 laning project from Talegaon to Amravati Section of NH-6 considered the fact that there exists a BOT Project awarded by the Ministry which forms part of the section and advised for buy-back of bridge from existing Concessionaire. The cost of buy-back proposed is Rs.7.97 Cr. which is included in the total project cost.
> (ii) The cost of buy-back was included in the proposal submitted to Ministry for PPPAC Approval and PPPAC approved the proposal with buy-back of bridge from existing Concessionaire in its meeting held on 20.02.2009, NHAI intends to buy-back the bridge before commercial operation date of the project which is around 3 years from now i.e. October, 2012 (likely). The cost of buy-back shall be borne by NHAI.
> (iii) Since, the copy of Agreement of existing BOT Concessionaire is not available with NHAI, it is required to provide a copy of the Agreement so that necessary action as per the provisions of the Agreement can be taken for buy-back of the stretch under existing Concession Agreement."

27. The petitioner also relies on a notice dated 23rd September, 2009 issued as a follow up to its reminders.

28. So far as the acceptance of the bid was concerned, the NHAI- respondent no. 2 issued a letter of acceptance dated 27th August, 2009 to the respondent no. 3 accepting its proposal. All participants in the bidding process have accepted the process initiated and undertaken by the respondent no. 2 (NHAI) as well as the decisions taken by the respondent no. 1.

29. Inter alia, aggrieved by the failure of the respondent no.1 to favourably respond to its requests, the petitioner finally filed the present writ petition on or about the 30th October, 2009 making the following prayers :-

> "(a) issue a writ of mandamus and/or any other appropriate writ, order or direction quashing and

setting aside the entire tender process including RFP dated March 2009 and all subsequent actions of the Respondent No.2 NHAI in pursuance of the said tender/RFP for four laning of Talegaon Amaravati Section of NH-6 from km 100.000 to km 166.725 (length -km66.73) (Annexure-P.4 -; and

(b) issue a writ of mandamus and/or any other appropriate writ, order of direction declaring the award of contract by Respondent no.2 NHAI for four laning of Talegaon Amravati Section of NH06 from km 100.000 to km 166,725(length- km 66.73) in favour of Respondent no.3, as void and illegal and violative of the Petitioners fundamental rights under Articles 14 & 19 (1) (g) of the constitution of India apart from being contrary to the express terms of the subsisting Concession Agreement and the State Support Agreement dated 14.05.2004, in favour of the Petitioner No.1; and

(c) issue a writ of mandamus or any other appropriate writ, order or direction prohibiting Respondent Nos 1 & 2 and /or its agents/servants/assignees from entering into any contract/Concession Agreement/State Support Agreement etc. with regard to four laning of Talegaon Amravati Section of NH-6 from km 100,000 to km 166.725 (length-km 66.73) with Respondent No.3 ; and

(d) issue an appropriate writ, order or direction directing the Respondent Nos. 1 and 2 to give an opportunity to the Petitioners to match the offer of Respondent No.3 with regard to four laning of Talegaon Amravati Section of NH-6 from km100.000 to km, 166.725 (length-km 66.73) in terms of concession Agreement dated 14.05.2004"

30. In the meantime, pursuant to the letter of acceptance dated 27th August, 2009, NHAI-respondent no.2 also executed a Concession Agreement dated 18th November, 2009 with the respondent no. 3 who was the successful bidder. In this background, an order dated 24th November, 2009 was recorded in the present writ petition, the relevant portion whereof is as follows :-

> " xxxx
> We may also note that the learned counsel for the respondent no. 3 stated that the Letter of Acceptance as well as the Concession Agreement has already been signed by them on 27.08.2009 and 18.11.2009 respectively. However, the learned counsel for the respondent no. 3 states that nothing will happen on the ground till the next date of hearing inasmuch as the actual work would start only after about four months.
>
> Renotify on 17.12.2009."

It is noteworthy that this statement on behalf of the respondent no. 3 has continued till date and as a result, work on the public project pursuant to this agreement of 18th November, 2009 has not started till date.

Petitioners Contentions and Claim

31. The petitioner has contended that as the work in question was a project of capacity augmentation of the project of the petitioner, it had a preferential right under Clause 14 of the Concession Agreement dated 14th of May, 2004. It is contended that, therefore, it has a right to match the lowest bid with regard to the project which is the subject matter of the Concession Agreement dated 18th November, 2009 and was thus entitled to an individual notice in respect thereof once the project was envisaged. The petitioner's further contention is that having regard to the scheme of Article 14, it is deemed to have pre-qualified for exercise of its right to match the lowest bid received in respect of the project of sixteen laning of the Talegaon-Amravati section of NH-6. The further submission is

that, in view of its binding rights under the Concession Agreement of 2004, the respondents have no authority or power to terminate or to enforce their proposal to buy-back the tolling rights conferred on the petitioner. It is based on these submissions, it is contended that the award of the work to the respondent no. 3 is in violation of the rights of the petitioner and deserves to be set aside.

Respondents submissions

32. A preliminary objection has been taken by the respondents to the maintainability of the writ petition on the ground that the petitioner has raised contractual disputes which are beyond the permissible scope of judicial review by this court in exercise of its extraordinary jurisdiction under Article 226 of the Constitution of India. It is further urged, that the writ petition is not maintainable on grounds of availability of an equally efficacious remedy under the Concession Agreement of 2004. The respondents have also objected to the maintainability of the writ petition urging that the petitioner has suppressed and concealed material facts and merits and have sought its dismissal on grounds of gross delays and laches. The respondents have contested the claim of the petitioner on merits as well.

33. The respondents have disputed any similarity between the scope of work entrusted as per the terms of the Concession Agreement of 2004 and 2009. It is submitted that the scope of work in the agreement of 2004 is restricted to the work mentioned in Schedule C of the agreement and that the scope of

work entrusted to the respondent no. 3 in accordance with the agreement of 2009 is not limited to the project facility as described in Schedule C of the 2004 agreement. The respondents oppose the contention that the four laning of the Talegaon-Amravati section of NH-6 from KM 100.000 to KM 166.725 (of the length of 66.725 kms) at the instance of the NHAI falls within the meaning of the expression "capacity augmentation of the project" which could entitle the petitioner to invoke its preferential right of first refusal in terms of Article 14 of the Concession Agreement of 2004. The respondents have also made detailed submissions on the difference in the scope, nature and objectives of the two projects and dispute that any detailed traffic study so as to render clause 14.1 applicable, was ever necessitated, commissioned or conducted by the Government of India. The respondents have defended their action and disputed the maintainability of the writ petition on grounds of overriding interest of the public at large. It has further been urged that the proposal to buy-back the tolling rights of the petitioner by the respondent no. 2 has been made so as to create a balance between public interest and fairness to the petitioner. It has also been urged that no final decision in this regard is required to be taken at this stage.

Points of dispute

34. In view of the rival contentions, the questions that arise for consideration in this case can be summed up thus :-

(I) Whether the writ petition raises matters only in the realm

of contract and is therefore barred?

(II) Whether the scope of the work under the Concession Agreement dated 18th November, 2009 would be covered within the meaning of the expression 'Capacity Augmentation of the Project' as is appearing in Article 14 of the Concession Agreement dated 14th May, 2004.

(III) Whether the petitioner has an absolute preferential right to match the lowest bidder without pre-qualifying or participating in the bidding process for the four laning project in view of Article 14 of the Concession Agreement dated 14th of May, 2004?

(IV) Whether the proposal of the respondent no. 2 to buy back the tolling rights of the petitioner under the Concession Agreement of 2004 is legally permissible, justified and sustainable?

(V) Whether the petitioner has suppressed material facts and documents and the writ petition suffers from such gross and unexplained delay and laches on its part as would disentitle the petitioner to grant of any relief in this writ petition?

(VI) Interest of the public at large and costs of such litigation.

These questions, for convenience, are discussed in seriatum hereafter.

(I) Whether the writ petition raises matters only in the realm of contract and is therefore barred?

35. Learned senior counsel for the respondent nos. 2 and 3 have taken a strong objection to the maintainability of the writ petition under Article 226 of the Constitution of India. It has

been urged that the public law remedy would not be available to the petitioner who is seeking enforcement of a purely contractual right. It is also urged, that the contract between the parties is not a statutory contract in respect of which the writ petition could be maintained.

36. In support of the objection, Mr. Vivek Tankha, learned ASG appearing for the NHAI-respondent no.2 has relied upon the principles laid down in ***(2008) 8 SCC 172 Pimpri Chinchwad Municipal Corpn. vs. Gayatri Construction Co.,*** in which the Supreme Court held that in matters flowing from a contract, a petition under Article 226 was not maintainable.

37. Similar building contracts by government authorities were the subject matter of consideration in ***(1996) 6 SCC 22 State of U.P. vs. Bridge & Roof Company (India) Ltd.*** In the said case, the court held that the contract between the parties was not a statutory contract, fell in the realm of private law governed by the provisions of the Contract Act or by the provisions of the Sale of Goods Act and any dispute relating to the interpretation of the terms and conditions of such a contract cannot be agitated and could not have been agitated in the writ petition. The Supreme Court further stated the principle that the matter was either for arbitration as provided by the contract or for the civil court as the case may be.

38. A challenge was laid to the power or authority of the M.P. Electricity Board to alter terms and conditions of PPAs under

Sections 43 and 43A of the Electricity Supply Act in the judgment reported at ***(2000) 3 SCC 379 India Thermal Power Ltd. vs. State of M.P.*** In para 11 of the judgment, the court held that "*Merely because a contract is entered into in exercise of an enabling power conferred by a statute, that by itself cannot render the contract a statutory contract. If entering into a contract containing the prescribed terms and conditions is a must under the statute then that contract becomes a statutory contract. If a contract incorporates certain terms and conditions in it which are statutory then the said contract to that extent is statutory. A contract may contain certain other terms and conditions which may not be of a statutory character and which have been incorporated therein as a result of mutual agreement between the parties. Therefore, the PPAs can be regarded as statutory only to the extent that they contain provisions regarding determination of tariff and other statutory requirements of Section 43A(2). Opening and maintaining of an escrow account or an escrow agreement are not the statutory requirements and, therefore, merely because PPAs contemplate maintaining escrow accounts that obligation cannot be regarded as statutory.*"

39. The observations of the Supreme Court in paras 10 and 11 of the judgment in ***(2000) 6 SCC 293 Kerala SEB vs. Kurien E. Kalathil & Ors.*** also shed valuable light on this question and read as follows:-

"10. .....Learned Counsel has rightly

questioned the maintainability of the writ petition. The interpretation and implementation of a clause in a contract cannot be the subject-matter of a writ petition. Whether the contract envisages actual payment or not is a question of construction of contract? If a term of a contract is violated, **ordinarily** the remedy is not the writ petition under Article 226. We are also unable to agree with the observations of the High Court that the contractor was seeking enforcement of a statutory contract. A contract would not become statutory simply because it is for construction of a public utility and it has been awarded by a statutory body. We are also unable to agree with the observation of the High Court that since the obligations imposed by the contract on the contracting parties come within the purview of the Contract Act, that would not make the contract statutory. Clearly, the High Court fell into an error in coming to the conclusion that the contract in question was statutory in nature.

11. A statute may expressly or impliedly confer power on a statutory body to enter into contracts in order to enable it to discharge Its functions. Dispute arising out of the terms of such contracts or alleged breaches have to be settled by the ordinary principles of law of contract. The fact that one of the parties to the agreement is a statutory or public body will not of itself affect the principles to be applied. The disputes about the meaning of a covenant in a contract or its enforceability have to be determined according to the usual principles of the Contract Act. Every act of a statutory body need not necessarily involve an exercise of statutory power. Statutory bodies, like private parties, have power to contract or deal with property. Such activities may not raise any issue of public law. In the present case, it has not been shown how the contract is statutory. The contract between the parties is in the realm of private law. It is not a statutory contract. The disputes relating to interpretation of the terms and conditions of such a contract could not have been agitated in a petition under Article 226 of the Constitution of India. That is a matter for adjudication by a civil Court or in arbitration if provided for in the contract. Whether any amount is due and if so, how much and refusal of the appellant to pay it is justified or not, are not the matters which could have been agitated and decided in a writ petition. The contractor should

have been relegated to other remedies."

(Emphasis by us)

40. This very principle was reiterated in a matter relating to contract involving the NHAI (which is respondent no. 2 before us), in para 6 of the judgment reported at ***(2003) 7 SCC 410 National Highways Authority of India vs. Ganga Enterprises*** in the following terms :-

> "6. The Respondent then filed a Writ Petition in the High Court for refund of the amount. On the pleadings before it, the High Court raised two questions viz. (a) whether the forfeiture of security deposit is without authority of law and without any binding contract between the parties and also contrary to Section 5 of the Contract Act and (b) whether the writ petition is maintainable in a claim arising out of a breach of contract. Question (b) should have been first answered as it would go to the root of the matter. The High Court instead considered question (a) and then chose not to answer question (b). In our view, the answer to question (b) is clear . It is settled law that disputes relating to contracts cannot be agitated under Article 226 of the Constitution of India. It has been so held in the cases of *Kerala State Electricity Board* v. *Kurien E. Kalathil* AIR 2000 SC 2573 , *State of U.P.* v. *Bridge & Roof Co. (India) Ltd.* AIR 1996 SC 3515 and *B.D.A.* v. *Ajai Pal Singh* [1989] 1 SCR 743 , This is settled law. The dispute in this case was regarding the terms of offer. They were thus contractual disputes in respect of which a Writ Court was not the proper forum. Mr. Dave however relied upon the cases of *Verigamio Naveen* v. *Government of A. P.* AIR 2001 SC 3609 and *Harminder Singh Arora* v. *Union of India* [1986] 3 SCR 63 . These however are cases where the Writ Court was enforcing a statutory right or duty. These cases do not lay down that a Writ Court can interfere in a matter of contract only. Thus on the ground of maintainability the Petition should have been dismissed."

41. The respondents have raised an objection that the two

contracts which are the subject matter of the writ petition are non-statutory and no writ or order can be issued under Article 226 of the Constitution of India so as to compell the respondents to remedy a breach of contract here in simple. (Ref : ***(1989) 2 SCC 116 Bareilly Development Authority & Anr. vs. Ajai Pal Singh & Ors.; (1996) 6 SCC 22 State of U.P. & Ors. vs. Bridge & Roof Company (India) Ltd.***) There can be no dispute with the principles laid down in these judicial pronouncements.

42. On the other hand, Mr. U.U. Lalit, learned senior counsel for the petitioner has urged that the objection on behalf of the respondents that the present writ petition was not maintainable and that, in case the petitioner was aggrieved by any act of the respondent nos. 1 or 2, it had to take recourse to the remedy provided in the arbitration clause which exists in the Concession Agreement dated 14th of May, 2004 as Article 19 between the parties is misconceived in the facts of this case. Learned senior counsel contends that the petitioner had entered into the contract with the respondent no. 1 and that neither the NHAI-respondent no. 2 nor the respondent no. 3 were a party to it and therefore the remedy of arbitration as a dispute redressal mechanism againt them is not available to it.

43. The petitioner has also submitted, that the proposed buy-back arrangement suggested by the respondent nos. 1 and 2 and approved by the PPPAC or the Cabinet Committee, has no basis in the Concession Agreement which governs the relations

between the parties and therefore is wholly illegal and unenforceable.

44. It is to be noted, that this submission rests on the interpretation and implementation of clauses in the contract. It also lays a challenge to the proposed action of the respondent no. 2, based on rights asserted under the Concession Agreement which is a contract entered into between the petitioner and the respondent no. 1 alone. The petitioner thereby also challenges the authority of the respondent no. 2 to terminate the concession agreement on any terms whatsoever, apart from challenging on the proposed term suggested by the respondent nos. 1 and 2.

As has been observed in para 11 of ***Kerala SEB vs. Kurien E. Kalathil & Ors. (2000) 6 SCC 293***, such grievances of the petitioner do not raise any issue of public law. The terms of the proposed termination or the authority to do so is not even a quasi-judicial act, let alone a judicial act, looked at from any angle.

45. In ***(1994) 3 SCC 552 State of Gujarat vs. Meghji Pethraj Shah Charitable Trust***, the Apex Court held that termination of the arrangement is also not an executive or administrative act which could attract the duty to act fairly. With regard to such matters, a writ petition under Article 226 is clearly not maintainable, since it is a public law remedy which is not available in the private law field especially where the matter is governed by the non-statutory contract.

46. The fact that NHAI - respondent no. 2, herein or the private respondent no. 3 are not parties to the said Concession Agreement of 2004, would not impact consideration of the issue as to whether a public law remedy could be available to the petitioner for enforcement of its purported claims or not. Even if the alternate dispute remedy of arbitration as provided by the contract was not available for the reason that all the necessary parties (respondent nos. 2 and 3) to the dispute were not party to the arbitration agreement, nothing precludes the petitioner from bringing a civil suit and seeking adjudication therein of its rights.

47. The plea of the petitioner is that by awarding the contract to the respondent no. 3, the terms of the Concession Agreement of 2004 entered into by the respondent no. 2 with it have been violated. The challenge laid is based on the interpretation of Article 14 of the said agreement. In the present writ petition, the petitioner has also assailed to the award of the contract to the respondent no. 3 on grounds of arbitrariness and violation of Article 14 of the Constitution of India.

48. We, however, find that the prohibition urged by the respondents is not an absolute proposition. The parameters within which the court will interfere in a writ petition under Article 226 of the Constitution of India even in matters relating to contractual obligations of the state or its instrumentalities and even in matters relating to policy of the state or that of a statutory authority are well settled.

49. A challenge was laid to the manner in which the Government dispensed its largesse on grounds of violation of Article 14 of the Constitution of India in ***(1979) 3 SCC 489 Ramana Dayaram Shetty v. International Airport Authority of India*** . The oft quoted findings of the Apex Court, upon an elaborate consideration of the issue read thus :-

> "11. xxx The Government cannot be permitted to say that it will give jobs or enter into contracts or issue quotas or licenses only in favor of those having grey hair or belonging to a particular political party or professing a particular religious faith. The Government is still the Government when it acts in the matter of granting largessee and it cannot act arbitrarily. It does not stand in the same position as a private individual."

50. In ***R.D. Shetty (supra)***, the court placed reliance on the earlier pronouncement in *Erusian Equipment and Chemicals Ltd. v. State of West Bengal and* quoted therefrom as follows :-

> "12. .....But the Court, speaking through the learned Chief, Justice, responded that the Government is not like a private individual who can pick and choose the person with whom it will deal, but the Government is still a Government when it enters into contract or when it is administering largesse and it cannot, without adequate reason, exclude any person from dealing with it or take away largessee arbitrarily.
>
> xxx
>
> 20. The rule inhibiting arbitrary action by Government which we have discussed above must apply equally where such corporation is dealing with the public, whether by way of giving jobs or entering into contracts or otherwise, and it cannot act arbitrarily and enter into relationship with any person it likes at its sweet will, but its action must be in conformity with some principle which meets the test of reason and relevance."

(Underlining supplied)

51. In ***(1990) 3 SCC 752 Mahabir Auto Stores and Ors. v. Indian Oil Corporation and Ors.***, the appellant had been carrying on business of sale and distribution of lubricants for 18 years. The Indian Oil Corporation abruptly stopped supply of lubricants to the firm without any notice or intimation. No query or clarification was even sought and there was no adjudication as such. The petitioner impeached the action of the respondents contending that its decision in exercise of administrative jurisdiction was impeachable on grounds of arbitrariness and violation of Article 14 of the Constitution of India and on any of the grounds available in the public law field. In this behalf, the court observed thus :-

> "12. It is well settled that every action of the State or an instrumentality of the State in exercise of its executive power, must be informed by reason. In appropriate cases, actions uninformed by reason may be questioned as arbitrary in proceedings under Article 226 or Article 32 of the Constitution. .....It appears to us that rule of reason and rule against arbitrariness and discrimination, rules of fair play and natural justice are part of the rule of law applicable in situation or action by State instrumentality in dealing with citizens in a situation like the present one. Even though the rights of the citizens are in the nature of contractual rights, the manner, the method and motive of a decision of entering or not entering into a contract, are subject to judicial review on the touchstone of relevance and reasonableness, fair play, natural justice, equality and non-discrimination in the type of the transactions and nature of the dealings as in the present case.
>
> 13. The existence of the power of judicial

> review however depends upon the nature (of) and the right involved in the facts and circumstances of the particular case, it is well settled that there can be "malice in law". Existence of such "malice in law" is part of the critical apparatus of a particular action in administrative law. Indeed "malice in law" is part of the dimension of the rule of relevance and reason as well as the rule of fair play in action.

52. The Supreme Court in ***Mahabir Auto Store (supra)*** further held :-

> “17. We are of the opinion that in all such cases whether public law or private law rights are involved, depends upon the facts and circumstances of the case. The dichotomy between rights and remedies cannot be obliterated by any straight jacket formula. It has to be examined in each particular case. Mr. Salve sought to urge that there are certain cases under Article 14 of arbitrary exercise of such "power" and not cases of exercise of a "right" arising either under a contract or under a Statute. We are of the opinion that that would depend upon the factual matrix.”

The court therefore clearly held that even in matters relating to contract, the state or its instrumentality are required to satisfy the tests of their action not being arbitrary or unreasonable.

53. In ***(1991) 1 SCC 212 Shrilekha Vidyarthi (Kumari) v. State of U.P.*** it was clearly held by the Supreme Court that such requirement extends even in the sphere of contractual matters in which the state is concerned which would thus be amenable to judicial review :-

"29. .....In our opinion, it would be alien to the constitutional scheme to accept the argument of exclusion of Article 14 in contractual matters. The scope and permissible grounds of judicial review in such matters and the relief which may be available are different matters but that does not justify the view of its total exclusion.

xxxx

30. xxx In view of the wide ranging and, in essence, all-pervading sphere of State activity in discharge of its welfare functions, the question assumes considerable importance and cannot be shelved. The basic requirement of Article 14 is fairness in action by the State and we find it difficult to accept that the State can be permitted to act otherwise in any field of its activity, irrespective of the nature of its functions when it has the uppermost duty to be governed by the rule of law. Non-arbitrariness, in substance, is only fair play in action. We have no doubt that this obvious requirement must be satisfied by every action of the State or its instrumentality in order to satisfy the test of validity.

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35. It is now too well settled that every State action, in order to survive, must not be susceptible to the vice of arbitrariness which is the crux of Article 14 of the Constitution and basic to the rule of law, the system which governs us. Arbitrariness is the very negation of the rule of law. Satisfaction of this basic test in every State action is sine qua non to its validity and in this respect, the State cannot claim comparison with a private individual even in the field of contract. This distinction between the State and a private individual in the field of contract has to be borne in the mind."

54. An objection to the maintainability of the writ petition on the ground of availability of the arbitration clause in the contract fell for consideration before the Apex Court in ***Harbanslal Sahnia v. Indian Oil Corpn. Ltd. (2003) 2 SCC 107*** :-

"xxx xxxx xxxx

> 7. So far as the view taken by the High Court that the remedy by way of recourse to arbitration clause was available to the appellants and therefore the writ petition filed by the appellants was liable to be dismissed is concerned, suffice it to observe that the rule of exclusion of writ jurisdiction by availability of an alternative remedy is a rule of discretion and not one of compulsion. In an appropriate case, in spite of availability of the alternative remedy, the High Court may still exercise its writ jurisdiction in at least three contingencies: (i) where the writ petition seeks enforcement of any of the fundamental rights; (ii) where there is failure of principles of natural justice; or (iii) where the orders or proceedings are wholly without jurisdiction or the vires of an Act is challenged. (See Whirlpool Corporation v. Registrar of Trade Marks). The present case attracts applicability of the first two contingencies. Moreover, as noted, the petitioners' dealership, which is their bread and butter, came to be terminated for an irrelevant and non-existent cause. In such circumstances, we feel that the appellants should have been allowed relief by the High Court itself instead of driving them to the need of initiating arbitration proceedings."
>
> (Underlining by us)

55. The same question was also raised before the Supreme Court in ***(2004) 3 SCC 553 ABL International Ltd. and Anr. v. Export Credit Guarantee Corporation of India Limited and Ors***. Placing reliance on the principles laid down in the earlier judgments, the court held that in exercise of jurisdiction under Article 226 of the Constitution, depending on the fact situation before it, the high court is adequately empowered to grant the relief. The principles were so enunciated by the court :-

> "8. As could be seen from the arguments addressed in this appeal and as also from the divergent views of the two courts below one of the questions that falls for our consideration is whether a writ petition under Article 226 of the

Constitution of India is maintainable to enforce a contractual obligation of the State or its instrumentality, by an aggrieved party.

xxx xxx

23. It is clear from the above observations of this Court, once State or an instrumentality of State is a party to the contract, it has an obligation in law to act fairly, justly and reasonably which is the requirement of Article 14 of the Constitution of India. Therefore, if by the impugned repudiation of the claim of the appellants the first respondent as an instrumentality of the State has acted in contravention of the above said requirement of article 14 then we have no hesitation that a writ court can issue suitable directions to set right the arbitrary actions of the first respondent.

xxxx xxxx

28. However, while entertaining an objection as to the maintainability of a writ petition under Article 226 of the Constitution of India, the court should bear in mind the fact that the power to issue prerogative writs under Article 226 of the Constitution is plenary in nature and is not limited by any other provisions of the Constitution. The High Court having regard to the facts of the case, has a discretion to entertain or not to entertain a writ petition. The Court has imposed upon itself certain restrictions in the exercise of this power [See : Whirlpool Corporation v. Registrar of Trade Marks, Mumbai and Ors. And this plenary right of the High Court to issue a prerogative writ will not normally be exercised by the Court to the exclusion of other available remedies unless such action of the State or its instrumentality is arbitrary and unreasonable so as to violate the constitutional mandate of Article 14 or for other valid and legitimate reasons, for which the court thinks it necessary to exercise the said jurisdiction.

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53. From the above, it is clear that when an instrumentality of the State acts contrary to public interest, unfairly, unjustly and unreasonably, in its contractual, constitutional or statutory obligations, it really acts contrary to the constitutional guarantee found in Article 14 of the Constitution."

(Emphasis supplied)

56. So far as the objection to the maintainability of the writ petition on the ground that the same is beyond the permissible parameters of judicial review is concerned, the same has to be tested on demurrer.

57. The petitioner has also made prayers premised on a challenge to the action of the respondent no. 2 in floating the tender and awarding the contract in favour of respondent no. 3, inter alia on the ground that the same was an arbitrary act and, in view of the covenants contained in the Concession Agreement dated 14th May, 2004, was in the teeth of Article 14 of the Constitution of India. It has also urged that the contracts by the respondent nos. 1 and 2 including the Concession Agreement dated 14th May, 2004 are statutory in nature and are violative of the rights of the petitioner under Article 19(1)(g) of the Constitution of India. It has also been urged that the action of the respondents in failing to issue notice to the petitioner before proceeding with the impugned tender process discloses lack of fairness and action and was violative of the principles laid down by the Supreme Court in ***(1990) 3 SCC 752 Mahabir Auto Stores and Ors. v. Indian Oil Corporation and Ors.***

58. The pleas in the writ petition, therefore, would show that the challenge by the petitioner is premised not on matters arising of contract alone but on assertions of violation of constitutional provisions and is, therefore, sustainable. This is not to say that there is merit in the challenge which we shall

consider hereafter. However, in the light of the principles laid down by the Supreme Court in ***R.D. Shetty vs. IAAI, Mahabir Auto Stores and Ors. v. Indian Oil Corporation and Ors., Whirlpool Corporation v. Registrar of Trade Marks, Mumbai and Ors., ABL International Ltd. and Anr. v. Export Credit Guarantee Corporation of India Limited and Ors.*** (supra) and the nature of the challenge raised before us, the present petition cannot be rejected on this preliminary objection and requires to be considered on merits.

59. We now propose to examine the other contentions urged by the parties in this matter.

(II) Whether the scope of the work under the Concession Agreement dated 18th November, 2009 would be covered within the meaning of the expression 'Capacity Augmentation of the Project' as is appearing in Article 14 of the Concession Agreement dated 14th May, 2004?

It now becomes necessary to consider the objection of the respondents, that Article 14 of the Concession Agreement dated 14th May, 2004 was not applicable, as the work of four laning of the section of NH-6 awarded to respondent no. 3 was effectively not a project to augment/increase the capacity of the petitioner's project and whether the same has been undertaken with a view to provide the desired level of service to the users of the project facility as is envisaged under Article 14 of the Concession Agreement of 2004.

60. It is contended, that any development on the National Highway-6, as a whole or any portion thereof, which includes the

Pingalai river bridge or the approaches to the bridge (which forms part of the Concession Agreement dated 14th May, 2004), would require to be treated as capacity augmentation of the project and would render Article 14.1 operative, thus entitling the petitioner to enforce its preferential right to match the lowest bidder. The submission on behalf of the petitioner would suggest that the concession agreement dated 14th May, 2004 prescribes no limits, and is open ended.

61. Article 14.1(a) refers to a decision of the Government of India taken following a detailed traffic study at any time after the COD to 'augment/increase the capacity of the project' with a view 'to provide the desired level of service to the users of the project' while Article 14.2 is concerned with 'additional facilities'.

We may note, that there is no dispute before us as to the basic submission that Article 14.1 comes into operation only if a decision for and such capacity augmentation of the project is envisaged under the concession agreement dated 14th May, 2004.

62. Unfortunately, the expressions 'capacity'; 'augmentation' or 'capacity augmentation' have not been described under the agreement. These words and the phrases would therefore take their ordinary meaning as applicable in the general context in which these terms are used.

63. So far as the meaning of 'augmentation' is concerned, the petitioner has placed reliance on the meaning of augmentation in the Oxford English Reference Dictionary, 2nd Ed. Revised which

reads as follows :-

> "**augmentation :** enlargement; growth; increase; the lengthening of the time-values of notes in melodic parts"

64. We may advert to the meaning attributed to 'augmentation' in some other dictionaries as well which shed light on the various nuances of and varied contexts in which the expression appears or is used. In The New Lexicon Webster's Dictionary of the English Lanugage, 'augmentation' is described as follows:-

> "**augmentation :** an increasing or being increased; something which is an increase or addition; (in counterpoint) the repeating of a phrase in notes longer than those first used"

65. In the Legal Thesaurus - Deluxe Edition by William C. Burton the meanings assigned to 'augmentation' and the several meanings assigned to 'capacity' are as hereafter :-

> "**augmentation :** accessory, accrual, accruement, accumulation, adding, advance, advancement, aggrandizement, amplification, appreciation, appurtenance, broadening, build-up, cumulative effect, cumulativeness, development, enhancement, enlargement, enlarging, expansion, extension, gain, growth, improvement, increase, increasing, increment, intensification, magnification, progress, proliferation, redoubling, reinforcement, rise, something added, spread, supplement, widening"
>
> **capacity (aptitude), noun:-** ability, ableness, aptness, capability, capableness, competence, competency, effectuality, faculty, giftedness, potentiality, power, proficiency, qualification, range, reach, scope, skill, talent
>
> **capacity (maximum), noun:-** ampleness,

amplitude, breadth, compass, comprehensiveness, containing power, extent, full complement, full extent, full volume, fullness, greatest amount, greatest extent, greatest size, holding ability, largeness, limit, limit of endurance, limitation, measure, physical limit, plentidue, reach, room, scope, spacious-ness, stretch, tankage, upper limit, volume

capacity (sphere), noun:- ambit, area, arena, boundaries, bounds, division, domain, extent, field, jurisdiction, limits, orbit, pale, province, reach realm, region, scope, specialty, stretch, territory.

66. The Oxford English Dictionary, 2nd Edn., Vol.I gives the following meanings of 'augmentation' and 'capacity' :-

"**augmentation :** the action or process of augmenting, making greater, or adding to, extension, enlargement' the action or process of raising in estimation or dignity; exaltation, honouring; theprocess of becoming greater; growth, increase; augmented state or condition; increased size, amount, degree, etc.; increase;.....

Capacity : ability to receive or contain; holding power"

67. These words are also defined in Webster's Third New International Dictionary of the English Lanugage Unabridged which read as follows :-

"**augmentation :** the act, action, or process of augmenting: the process of becoming augmented: the state of being augmented : something that augments : the device of modifying a musical subject or theme by repetition in tones of : increase of stipend obtained by a parish minister: an additional charge to a coat of arms given as an honor

capacity : the power or ability to hold, receive, or accommodate: an empty space: a hollowed-

out area : a containing space: a measure of content for gas, liquid or solid : the amount held : the measured ability to contain: the ability to absorb: attaining to or equaling maximum capacity"

68. The meaning of 'augment' and 'capacity' given in the 'Legal Glossary' is :-

"**augment :** to increase

capacity : legal qualification; capability; a position enabling one to do something; a containing space, area or volume"

69. From the above, it is apparent that augmentation is not confined to increase in size alone but takes within its ambit development, enhancement and improvement of an existing facility/situation as well. So far as the context under consideration is concerned, capacity would relate to the limits or the extent to which a facility can accommodate a particular thing. In our view, the expression 'augmentation' cannot be read in isolation of 'capacity' or devoid of the prime objective of the work to which article 14.1 would apply.

70. Mr. Lalit, learned senior counsel for the petitioner has urged that such increase cannot be confined to a lateral or horizontal increase and has to take into its ambit a longitudanal increase as well. In this regard, reliance has also been placed on the pronouncement of the Karnataka High Court reported at ***1999 Crl.L.J. 4220 Abdul Khader vs. Secretary to Government of India & Ors.*** In this case, the court was

concerned with the construction of the words 'conservation' and 'augmentation' for the purposes of section 3 of the Conservation of Foreign Exchange & Prevention of Smuggling Activities Act (52 of 1974). In para 8 of this judgment, reliance was placed on a previous judgment of the Division Bench of the Calcutta High Court reported at ***1975 Crl.LJ 1790*** entitled ***Mangilal Baid vs. Secy. Home (SPL) Department of State of W.B.*** on the same question wherein the expression 'augmentation' was held to mean 'the act or process of increasing the size or amount'. The Karnataka High Court also observed that the expression 'conservation' is wider than 'augmentation'.

71. An increase, so far as foreign exchange is concerned, has no correlation to an increase in the capacity of an infrastructure related construction project as in the instant case. Furthermore, the expressions have to be interpreted keeping in view the spirit, intendment and purpose of the agreement. 'Capacity augmentation' in Article 14.1(a) has to derive colour from the intent to provide the 'desired level of services to the users of the project facility'. The principles laid down in the pronouncements of the Karnataka and Calcutta High Court have to be read in the context in which they were laid.

72. It requires to be borne in mind, that so far as a road or highway or any portion thereof is concerned, its capacity is relatable to the volume and intensity of the traffic plying thereon at any point of time. Capacity augmentation with regard to a road or a highway would obviously relate to increase in such

volume or intensity of the traffic plying on it. The total length of the petitioner's project was confined to 2.2 Kms. Capacity augmentation of this project would obviously require such steps to be taken as would enable increase of the volume of the traffic plying on this portion of the highway.

73. Dr. A.M. Singhvi and Mr. C.U. Singh, learned senior counsels appearing for the respondent no. 3 have vehemently contended, that increase in the length of the highway or the four laning of the 66.73 kms portion of the NH-6 would not have the effect of increasing the traffic volume or capacity of the 2.2 km portion which forms part of the petitioner's project facility. In order to accommodate increase in traffic intensity or traffic volume on this stretch of 2.2 kms, the width of the section would necessarily require to be increased to accommodate the additional volume.

74. It is further pointed out, that the Pingalai bridge project of the petitioner already stands four laned and there was no further need to widen this bridge. The respondent no. 1 in its affidavit has affirmed that no further widening of the Pingalai river bridge or its approaches is envisaged in the scope of the work allotted to respondent no. 3.

75. We also find that consideration of this issue cannot be from the aspect of traffic volume alone. In order to be covered under Article 14 of the agreement, such augmentation has to be with the intent of providing the desired level of services to the users of the project facility. An increase in traffic volume alone cannot

be considered to be a step towards any improvement of the level of service to the users of the bridge or its approaches. Such improvement would more to take into its ambit provision of other facilities and amenities as well.

76. There is another aspect to the contention under examination. It has been urged on behalf of the petitioner that examination of the excerpts of the concession agreement of respondent no. 3 placed on record would show that the respondent no. 3 has to actually carry out work on the stretch on which the petitioner has raised construction pursuant to the agreement of 14th May, 2004.

77. In the rejoinder which has been filed to the counter affidavit of the respondent no.1, it is stated by the petitioner, that the work to be done by the respondent no. 3 in this section is absolutely identical to the work undertaken by the petitioner. It has further been stated that the respondent no. 3 has also to build major and minor bridges under its Concession Agreement. The petitioner has also pleaded similarity of the two works involved in the two projects for the reason that the respondent no. 3 has also been permitted toll collection rights under the concession agreement of November, 2009.

78. It is, therefore, necessary to examine whether the scope of the work entrusted upon the petitioner pursuant to the Concession Agreement dated 14th May, 2004 and that under the Concession Agreement which stands entered into between the respondent nos. 2 and 3 in November, 2009 are indentical.

79. Our attention is drawn by Mr. Lalit, learned senior counsel for the petitioner to clause 1 of the Schedule B of this Concession Agreement of November, 2009, which gives the description of the four-laning. Clause 1 relates to the width of the carriage way which is to be provided. Learned senior counsel for the petitioner points out that the village Tiwasa, which is located between the chainage 112/000 to 114/200, has been mentioned in clause 1.1 of the Schedule B of 2009 agreement and that the petitioner's project was at KM 113.800 of NH-6. It is to be noted that Clause 1.1 contains a proviso and describes urban stretches wherein the width of the paved carriageway was to be restricted to 18.00 mtrs.

Reliance has also been placed on appendix B-1 which describes the typical cross sections. It has been pointed out that clause 2 of appendix B-I requires that between the chainage from 113/400 to 114/300, for a length of 0.90 KM, cross section, construction of type A has to be provided while from chainage 112/000 to 113/400 for a length of 1.40 KM, type A-2 cross section has to be provided.

Learned senior counsel also points out, that the chainage of the petitioner's location is to be found also in details of service road in Appendix B-IV (from 112/000 to 113/400) giving details of services; proposed ROW in Appendix B-V giving the design chainage of KM 112+000 to 114+200; two major intersections in the petitioner's location details whereof are given in Appendix B-VI ; and minor junctions in Appendix B-VII.

The petitioner's contention is that the above shows that extensive work is proposed to be carried out on the stretch covered by its project and that its entire project is subsumed in the project of the respondent no. 3.

80. Mr. Goolam Vahanwati, learned Attorney General of India has placed the Concession Agreement of 2009 before us. We find that the Wardha river bridge and the Pingalai river bridge are only listed therein as major bridges physically existing on the site where the respondent no. 3 is to execute the project. It is important to note, that Appendix B-XI of this concession agreement of November, 2009 lists the new major bridges which are required as well as the existing bridges requiring rehabilitation, repair and widening schemes. A similar list of minor bridges is listed in Appendix B-XII. However, in Appendix B-XI, river Wardha bridge is the only new major bridge mentioned as being constructed. Rehabilitation/repair/widening of only the existing Wardha river bridge is also mentioned. The Pingalai river bridge is thus clearly outside the scope of the work which has been assigned to the respondent no. 3.

81. The respondent no. 3 has explained that the documents referred to by the petitioner indicate only the location of junctions, intersections and right of way and that no work is being required to be actually carried out on the existing Pingalai river bridge (which is specifically excluded from the scope of the work under the Concession Agreement of 2009) or the approach roads built by the petitioner. It is pointed out, that the

approaches built by the petitioner are already four laned and consequently are not requiring four-laning. So far as building of the service lane or intersections etc are concerned, it is submitted that these are non-toll facilities which are outside the scope of the petitioner's portion of National Highway-6 for which it is collecting toll duty.

82. On a perusal of the Concession Agreements, we find the submission of the petitioner may not be completely correct. From a reading of these extracts in the concession agreement of November, 2009, the exact location, nature or extent of these works is not clear. Therefore, adjudication on the issue as to whether the work which is to be undertaken by the respondent no. 3 includes or is identical to the project assigned to the petitioner, cannot rest on the above features alone. The petitioner's contention that extensive work including main carriageway, minor and major bridges etc have to be rebuilt on the Pingalai river project is certainly not discernible from the scope of work in the Concession Agreement of November, 2009 as placed before this court.

83. It is noteworthy, that the Concession Agreement of the petitioner clearly describes the scope of work to be undertaken by the petitioner as inclusive of a bridge having the length of 92.70 mtrs and collective approach roads of 2.1 km on either side, thus being a total of 2.2 km in KM 113.800 of NH-6. Therefore it is essentially a bridge construction project.

So far as the project which the respondent no. 3 has been

assigned is concerned, the same relates to four laning of the Talegaon-Amaravati Section of NH-6 from KM 100.000 to KM 166.725 being a length of 66.725 KM under the National Highway Development Project (NHDP)-phase III, which thus is essentially a highway project.

84. We find that the project of the petitioner as defined in Schedule A of the Concession Agreement of 2004 notices that in 2003/2004, the then existing submersible bridge having 22 spans of 2.2 mtr C/C and width of 6.10 mtrs. was susceptible to getting submerged during heavy floods of the river thus resulting in disruption of traffic for 4-6 hours duration several times and its being held up. The Tiwasa Village was situated on the bank of the river. For these reasons, it was necessary to construct a “high level bridge” expeditiously on account of the demand from the public.

85. Schedule B of the petitioner's Concession Agreement of 2004 which describes the 'project site', clearly records that the proposal involved construction in two phases of a four lane major bridge with footpaths including four lane approaches, CD-Works, minor bridge, underpasses, roadside drainage, service road and toll plaza complex and other structures included in the project on the available land. Schedule C states that the first phase would include construction of a two lane high level major bridge with footpath on the left side with RTL 96.40m and construction of 2 lane approaches with retaining wall paved shoulders on the left side. In the second phase, the project

envisaged dismantling of the existing bridge, disposing off the dismantled material and construction of a two lane high level major bridge with footpath on the right side with R.T.L. 96.405. The petitioner was entitled to charge a fee from the users of the 'construction of major bridge and its approaches across Pingalai river in KM 113/800' only for the construction raised by it and for nothing beyond.

86. The captioning of the work envisaged under the concession agreement dated 14th May, 2004 clearly shows that the work envisaged was construction of a major four lane high level bridge across the Pingalai river and that the construction of the four lane approaches on either side was merely incidental or ancilliary to the same. Also, even the letter dated 20th June, 2009 written by the petitioner to the Chief Engineer, MORT&H (Ministry of Road Transport & Highways) refers to the petitioner's contract for “construction of a major bridge”. The averments in paragraph 8.1 of the writ petition also refer to the contract of the petitioner as a 'bridge contract'.

87. It has been observed that the requirement for the roads on either sides of the bridge was related to the efficient and efficacious utilisation of the Pingalai river bridge and nothing more. The petitioner's have argued that the 'approach' as defined by the Indian Road Congress is the point at which the slope from bridge touches ground level of road. The petitioner contends that the width of the Pingalai river bridge which was constructed by it was only 15 mtr and therefore as per the IRC

norms, the approach to the bridge would be of the length of 15 mtrs only. The contention is that the very fact that the petitioner was asked to construct a four laned road of 80 mtr (on the Nagpur side) on one side and 100 mtr (on the Amravati side) on the other side of the bridge would show that the petitioner had constructed not merely approaches to the bridge but had developed a 2.2 km section of NH-6. It is urged, that the petitioner was required to construct the road of 100 mtr on one side and 80 mtr on the other side.

However, merely because the petitioner may have been asked to build 80 mtr. road on the Nagpur side and 100 mtr on the Amravati side, which is beyond the width of the bridge as per IRC norms, would not change the real nature of the work which was assigned to the petitioner or be decisive of the main issues which are being urged before this court. The consideration of the issue in the present case has to be confined to the meaning of the expressions under the Concession Agreement. We also find that Schedule C to the Concession Agreement dated 14th May, 2004 which defines project facility contains details of the scope of the work awarded to the petitioner. There is a clear reference in Schedule C of the work of construction of “approach 2.100 KM' to the bridge which the petitioner was required to construct in two phases.

88. We also find that the reference to the petitioner's project as the 'bridge project' relates to the primary work which the petitioner was required to undertake which was to replace the

existing bridge on the Pingalai river with the new bridge and construction of the approach roads'. It certainly cannot be contended or held that the approach roads were the primary work which the petitioner was to undertake.

89. In any case, so far as consideration of the identity or similarity of the work undertaken under the two concession agreements is concerned, this would also require an examination of the volume of the work which is involved and would not rest on considerations of whether a particular intersection or a service road is to be constructed at any point of the petitioner's project work alone.

90. It has been brought to our notice that the project executed by the petitioner was captioned as “Construction, operation and maintenance of major bridge and its approaches across Pingalai River in KM 113/800 on Nagpur- Edlabad Road section of NH-6 on Build, Operate, Transfer (BOT) basis”. The work which is to be undertaken by the respondent no. 3 is captioned as “Design, engineering, finance, procurement, construction, operation and maintenance of the 4 laning of Talegaon-Amaravati Section of NH-6 from km 100.000 to km 166.725 in the State of Maharashtra under NHDP-Phase III Design, Built, Finance, Operate and Transfer (DBFOT) basis”.

91. The above would show that in terms of the Concession Agreement dated 14th of May, 2004, the petitioner was assigned the work of replacing the existing bridge and construction of a major bridge over the Pingalai river and provision for approach

roads thereof. The total distance over which the petitioner has raised construction admittedly forms a total of about 2.2 kms whereas the respondent no. 3 has been required to undertake work over 66.725 Kms. The project of the petitioner therefore is hardly 3.3% of the work which the respondent no. 3 is to undertake.

92. It has been pointed out, that as per the Concession Agreement of 2004, the total value of the petitioner's project would be between Rs.14 to 15 crores only, which is a smal fraction of the value of the Talegaon-Amravati-NH-6 project and barely more than the security amount of asound of 11.79 crores for it.

93. The total value of the project undertaken by the petitioner was around Rs.14 to 15 crores crores whereas the project which the respondent no. 3 is to undertake is valued at approximately Rs.567 crores. In terms of the costing as well, the work which the petitioner has undertaken thus forms a miniscule percentage of the work which the respondent no. 3 is to undertake.

94. The concerns of the Government in awarding the work to the petitioner were clearly not relating to any other part of the NH-6 but were centered around the plight of the users of the existing bridge who were getting stranded on account of the bridge getting submerged during rains.

95. The petitioner also has not been able to point out any decision of the respondent no. 1 to augment/increase the capacity of is project. Also there is no capacity augmentation of

the approaches because no further widening either of the bridge or its approaches is envisaged on the scope of work allotted o respondent no. 3.

96. Generally capacity augmentation may relate to a qualitative and quantitative increase not restricted to either a lateral, horizontal or longitudinal increase of the highway or road. However, in the instant case, such augmentation has to be for the stated object of optimising service level for the bridge users. This would restrict the scope of the expression which certainly cannot be limit less.

97. Other than a bald submission by the petitioner that the impact of traffic on 66 KM to be constructed by respondent no. 6 would have a direct bearing on the Pingalai river bridge, the approach road and the highway, the petitioner does not disclose as to how the widening of the sixty six kilometer stretch would lead to achievement of the “desired level of service to the users of the project facility”. There is therefore nothing to support the submission that the Talegaon Amravati project can be treated as a capacity augmentation of the Pingalai River project so far as the concession agreement dated 14th May, 2004 is concerned.

98. Mr. Goolam Vahanwati, learned Attorney General of India has urged that the project of 2009 has no connection with the petitioner's project and that this is also manifested from the fact that the traffic study as is envisaged under Article 14 of the Concession Agreement of 2004, has not been undertaken before taking the decision for four laning of the Talegaon-Amravati

stretch of NH-6.

99. The petitioner has taken a strong exception to this contention of the respondent no. 1. It has been urged on behalf of the petitioner that as per clause 6.1 of the guidelines being, 'IRC SP 19/2001', issued by the Indian Road Congress ; “information about traffic is indispensible for any highway project since it would form the basis for the design of the pavement, fixing the number of traffic lanes, design of intersections and economic appraisal of the project etc.,” A traffic survey analysis is also provided thereunder.

100. Learned senior counsel for the petitioner has also placed reliance on article 29 of the bid document for the respondent no. 3's project, which provides for the effect of variation in traffic growth, suggesting that a study was undertaken prior thereto by the government.

101. These submissions on behalf of the petitioner however, fail to consider, that so far as the claimed rights of the petitioner are concerned, the traffic study which is required to be conducted has to be in terms of article 14.1(a) of the Concession Agreement of 2004 which is envisaged after the commencement of the commercial operations of the Pingalai River bridge project. As urged by the learned Attorney General of India, such study has to be for the singular specified purpose of taking a decision on the capacity augmentation of this project alone so as to provide the desired level of service to the users of the project facility.

102. A study undertaken for the purposes of other development/construction work on NH-6 would not be for the purpose envisaged under Article 14. Therefore, reliance on a traffic study undertaken with regard to the NH-6 or any portion thereof, would not be of the nature envisaged under Article 14.1(a). The impact on the project of the petitioner or the provision of the desired level of service to the users of this project may be incidental to any development/construction work undertaken on any portion of NH-6. The petitioner has been unable to place any material to indicate that a study of the nature envisaged under Article 14.1(a) was at all undertaken.

Therefore, the submission on behalf of the respondent no. 1 that a detailed traffic study of the Pingalai river bridge after the commercial operation date of the project as stipulated under article 14.1(a) has not been conducted, has to be accepted.

103. The petitioner has also been unable to support the contention that the work which is part of the project awarded to the respondent no. 3 could be considered as providing the 'desired level of services to the users of the project facility' or that there is substantial development or enhancement or improvements being undertaken so far as the Pingalai river bridge or its approach roads are concerned. The project which has been assigned to the respondent no. 3 therefore is clearly not covered within the meaning of the expression “capacity augmentation” of the petitioner's project. The petitioner can take no benefit from the oversight of the NHAI to specifically

provide for the exclusion of the 2.2 kms stretch over which the petitioner is operating.

104. In view of the above discussion, the construction of a new highway or expansion of 66.83 kms into a four laned highway awarded to the respondent no. 3, which may have the incidental effect of expediting access to the petitioner's project or such like impact certainly cannot be held to be work undertaken for 'capacity augmentation of the project' with the object of providing the 'desired level of service' to the 'users of the river Pingalai bridge' as envisaged under the Concession Agreement dated 14th of May, 2004.

105. For all the foregoing reasons, it cannot therefore be held that the work carried out by the petitioner and the work allotted to the respondent no. 3 through the Concession Agreement is the same or identical. This contention of the petitioner is wholly misconceived and devoid of merit.

(III) Whether the petitioner has an absolute preferential right to match the lowest bidder without pre-qualifying or participating in the bidding process for the four laning project in view of Article 14 of the Concession Agreement dated 14th of May, 2004?

106. The petitioner has premised its challenge and prayers on a claim that Article 14 of the Concession Agreement of 2004 in clear terms gives certain preferential rights to the petitioner as the existing concessionaire in case of any capacity augmentation of the project and thus the respondent no. 1 was bound to give the petitioner the first right of refusal to match the

preferred offer. The submission on behalf of the petitioner is that the petitioner is deemed to be eligible for submitting a proposal for the purposes of capacity augmentation and consequently is exempted from participating in the bidding process at the first stage.

107. Detailed submissions have been made on the construction of Article 14.1(e) of the concession agreement dated 14th May, 2004. It is urged that this Article is applicable in two eventualities. The first being the concessionaire chosing not to submit its proposal as part of the bidding and the second being the situation when the concessionaire submits its proposal and is not the preferred bidder. Mr. U.U. Lalit, learned senior counsel for the petitioner, has contended that there is no punctuation in the nature of a “comma” or a “semi-colon” before the word “or” which occurs between these two eventualities in Article 14.1(e). It is contended, therefore, that the words 'also fails or declines to match the preferred offer', qualify both the aforentoiced eventualities which, according to learned senior counsel, is evident from the use of the word 'and' after the second condition.

108. It is also urged that the rule of contra proferentum (Ref : ***(2009) 5 SCC 313 Bank of India vs. K. Mohan Das)*** would apply and that the ambiguity in the contract has to be interpreted strongly against the person/party drafting it (Ref : ***(1963) 3 SCR 183 Khardah Co. Ltd. vs. Raymon & Co. (India) Pvt. Ltd. ; AIR 1965 SC 1288 Central Bank of India***

vs. Hardford Fire Insurance Co.). Learned senior counsel contends that such an interpretation has to be given to effectuate the rights of the petitioner in Article 14.1. In this regard, reliance is placed on the pronouncements of the Apex Court in ***(1979) 1 SCC 568 Mohd. Shabir vs. State of Maharashtra*** and ***(1988) 4 SCC 21 Dr. M.K. Salpekar vs. Sunil Kumar Shamsunder Chaudhari & Ors.***

109. The further submission on behalf of the petitioner is that the preferential right conferred under Article 14.1 is not circumscribed by any condition, nor is the participation of the petitioner at the RFQ stage necessary to enforce its right of first refusal and/or the right to match the preferred offer.

110. Our attention is drawn to the Shipping Circular no. 2 of 2004 which sets out the Guidelines on Chartering of Foreign Flag Dredgers issued by the Directorate General of Shipping dated 16th April, 2004 in the matter of dredging contracts. This circular notifies the parties that in order to exercise such right of first refusal, the participation in the bidding process is a sine qua non. The contention is that no such condition exists or can be imported into Article 14.1(e) of the concession agreement dated 14th May, 2004 which was executed barely about a month after the issuance of the said circular.

111. In support of the contention that the preferential right under Article 14.1 is valid and enforceable, it has been urged that the same is akin to adoption of the 'Swiss Challenge Method' which was approved by the Supreme Court of India in

(2009) 7 SCC 462 Ravi Development vs. Shri Krishna Prathisthan.

112. The respondents on the other hand refute these contentions. It is further contended that if the terms of the Concession Agreement of 2004 were so construed, the respondents action would be violative of Articles 14, 16, 19 and 21 of the Constitution of India and be liable to interference by this court.

113. We have carefully considered the rival contentions. The pronouncement of the Supreme Court relied on by the petitioner, reported at ***(1979) 1 SCC 568 Mohd. Shabir vs. State of Maharashtra*** was concerned with a construction of Section 27 of the Drugs & Cosmetics Act, 1940. The court held that this section postulated three separate categories of cases and no other and that 'stocks or exhibits for sale' is one indivisible whole category. It was held that section 27 took within its sweep not merely stocking of drugs, but stocking the drugs for the purposes of sale and unless all the ingredients of the category were satisfied, section 27 would not be attracted. In so holding the Supreme Court had held that the three categories in section 27 namely 'manufature for sale', 'sell' have a comma after each clause but there is no comma after the clause 'stocks or exhibits for sale'. The absence of any comma after the word 'stocks' indicates that the clause 'stocks or exhibits for sale' is one indivisible whole and it contemplates not merely stocking the drugs but stocking the drugs for the purposes of sale.

114. In ***(1988) 4 SCC 21 Dr. M.K. Salpekar vs. Sunil Kumar Shamsunder Chaudhari & Ors.*** also relied on by the petitioner, the court was concerned with the existence of a punctuation in a rent control statute in sub-clause (v) of clause 13(3) of the C.P. and Berar Letting Houses and Rent Control Order, 1949.

115. There can be no dispute at all to the proposition laid down by the court. However, the judgment has to be examined in the context of the issues which were before the court. Issue arising out of interpretation of statutory provisions were raised in the cases discussed above. The Supreme Court was not concerned with interpretation or construction of the terms of a contract, especially one relating to creation of a preferential right on the happening of a specified contingency. This very issue has been further considered in several later pronouncements as well, and the contention raised before us has been held to be not of universal or absolute application, even in matters involving statutory interpretation.

116. In ***(1982) 1 SCC 561 State of West Bengal vs. Swapan Kr. Guha & Ors.***, relied upon by the petitioner, the court was concerned with the interpretation of section 2(c) of the Prize, Chits and Money Circulation Scheme (Banning) Act, 1978. On the issue of the use of commas in the legislation, and their effect, the court had observed as follows :-

> "7. Grammar and punctuation are hapless victims of the pace of life and I prefer in this case not to go merely by the commas used in Clause

> (c) because, though they seem to me to have been placed both as a matter of convenience and of meaningfulness, yet, a more thoughtful use of commas and other gadgets of punctuation would have helped make the meaning of the clause clear beyond controversy. Besides, how far a clause which follows upon a comma governs every clause that precedes the comma is a matter not free from doubt. I, therefore, consider it more safe and satisfactory to discover the true meaning of Clause (c) by having regard to the substance of the matter as it emerges from the object and purpose of the Act, the context in which the expression is used and the consequences necessarily following upon the acceptance of any particular interpretation of the provision, the contravention of which is visited by penal consequences."
>
> (Underlining supplied)

117. It is clearly evident from the reading of the aforenoticed observations of the Supreme Court, that there is no absolute rule to the effect that a clause which follows upon a comma, governs every clause that preceeds the comma. Even in the context of statutory interpretation, the Supreme Court has held that the substance of the matter as emerges from the object and purpose of the Act has to be given regard to, and also the context in which the expression is used as well as the consequences which would necessarily follow upon the acceptance of any particular interpretation of the provision, the contravention of which is visited by penal consequences.

118. In ***(2009) 5 SCC 313 Bank of India vs. K. Mohan Das***, also relied upon by the petitioner, the court was concerned upon the construction of a Voluntary Retirement Scheme, 2000 made available to employees of the public sector banks. The scheme was held to be contractual. The court was concerned with issues

relating to construction of the contract. The observations of the court relevant for the present consideration, read as follows :-

> "28.The true construction of a contract must depend upon the import of the words used and not upon what the parties choose to say afterwards. Nor does subsequent conduct of the parties in the performance of the contract affect the true effect of the clear and unambiguous words used in the contract. The intention of the parties must be ascertained from the language they have used, considered in the light of the surrounding circumstances and the object of the contract. The nature and purpose of the contract is an important guide in ascertaining the intention of the parties.
>
> Xxx xxx
>
> 31. It is also a well-recognized principle of construction of a contract that it must be read as a whole in order to ascertain the true meaning of its several clauses and the words of each clause should be interpreted so as to bring them into harmony with the other provisions if that interpretation does no violence to the meaning of which they are naturally susceptible. [(The North Eastern Railway Company v. L. Hastings) 1900 AC 260].
>
> 32. The fundamental position is that it is the banks who were responsible for formulation of the terms in the contractual Scheme that the optees of voluntary retirement under that Scheme will be eligible to pension under Pension Regulations, 1995, and, therefore, they bear the risk of lack of clarity, if any. It is a well-known principle of construction of contract that if the terms applied by one party are unclear, an interpretation against that party is preferred. *[Verba Chartarum Fortius Accipiuntur Contra Proferentum*]."
>
> (Emphasis by us)

This judgment also does not lay down the absolute proposition suggested on behalf of the petitioner and it was observed that discretion is conferred on the court to construe

the contract based on words used therein.

119. The pronouncement of the Apex Court reported at ***AIR 1962 SC 1810 Khardah Co. Ltd. vs. Raymon & Co. (India) Pvt. Ltd.*** has made similar observations and laid down the following principles in para 18 :-

> "18. But it is argued for the respondents that unless there is in the contract itself a specific clause prohibiting transfer, the plea that it is not transferable is not open to the appellants and that evidence allunde is not admissible to establish it and the decisions in (1951) 1 MLJ 147 *Boddu Seetharamswami vs. Bhagwathi Oil Company, AIR 1954 Mad 87 Illuru Hanumanthiah vs. Umnabad Thimmaiah and Hussain Kasam Dada vs. Vijayanagaram Comm. Asson.* are relied on it support of this position. We agree that when a contract has been reduced to writing we must look only to that writing for ascertaining the terms of the agreement between the parties but it does not follow from this that it is only what is set out expressly and in so many words in the document that can constitute a term of the contract between the parties. If on a reading of the document as a whole, it can fairly be deduced from the words actually used therein that the parties had agreed on a particular term, there is nothing in law which prevents them from setting up that term. The terms of a contract can be express or implied from what has been expressed. It is in the ultimate analysis a question of construction of the contract. And again it is well established that in construing a contract it would be legitimate to take into account surrounding circumstances. Therefore on the question whether there was an agreement between the parties that the contract was to be non-transferable, the absence of a specific clause forbidding transfer is not conclusive. What has to be seen is whether it could be held on a reasonable interpretation of the contract, aided by such considerations as can legitimately be taken into account that the agreement of the parties was that it was not to be transferred. When once a conclusion is reached that such was the understanding of the parties, there is

> nothing in law which prevents effect from being given to it. That was the view taken in *AIR 1956 Mad 110 Virjee Daya & Co. vs. Ramakrishna Rice & Oil Mills,* and that in our opinion is correct."
>
> (Emphasis supplied)

120. In para 5 of ***AIR 1965 SC 1288 Central Bank of India Ltd. vs. Hartford Fire Insurance Co. Ltd.***, the Supreme Court has reiterated the well settled principle that, "*it is the court's duty to give effect to the bargain of the parties according to their intention and when that bargain is in writing, the intention is to be looked for in the words used unless they are such that one may suspect that they do not convey the intention correctly*". The Supreme Court had further stated that *"if those words are clear, there is very little that the court has to do. The court must give effect to the plain meaning of the words however it may dislike the result"*. In para 6 of the judgment, the court held that plain and categorical language cannot be radically changed by relying upon the sorrounding circumstances. In para 7, referring to Halsbury's Laws of England (3rd Edn.) Volume II, paragraph 640, page 391, it was observed that the rule laid down therein did not permit a court to speculate and that the court must be able to say with certainty what the intention was, in order that it may add something to the language used by the parties.

121. The submission on behalf of the petitioner fails to consider an important aspect of the matter. The two eventualities contemplated under Article 14 of the Concession Agreement may not be separated by use of a comma. However, there is

separation by numerical enumeration between the two possible situations which establishes a clear demarcation between them. The latter part of the second eventuality cannot be construed as applicable to the first one as well.

122. The aforenoticed judicial pronouncements of the Supreme Court relied upon by the petitioner also lay down the principle that regard has to be had to the intention of the parties, as well as the nature and purpose of the contract, surrounding circumstances and object of the contract which would guide the construction which has to be placed on the terms thereof. Clearly sub-article (e) of Article 14.1 cannot be read disjunctively or in isolation and has to be read in conjunction with the other sub clauses having regard to the entire spirit, intendment and scheme of Article 14 and the other stipulations in the Concession Agreement of 2004. The argument of the petitioner based on lack of punctuation severing the two portions is, therefore, not acceptable.

123. We may now examine the scheme of Article 14 of the Concession Agreement of 2004. Sub-article (b) of article 14.1 enables the respondent no. 1 to invite proposals from eligible persons for capacity augmentation of the project which is the subject matter of the Concession Agreement dated 14th of May, 2004. It requires that the petitioner be given the option to submit its proposal for work involving capacity augmentation of the existing project. So far as 'eligible persons' are concerned, the respondent no. 1 is entitled to scrutinise the eligibility of

persons who apply for the capacity augmentation work.

124. Further, sub-article (c) of article 14.1 stipulates that in case the concessionaire chooses not to submit its proposal or upon finalisation of the bid, fails or declines to match the preferred offer, in terms of sub-article (e), the bid document for 'capacity augmentation' shall specify a termination payment to be made to it. From a reading of sub-article (c), it is apparent that termination payment was envisaged in two eventualities; the first being the concessionaire choosing not to submit its proposal, and the second being the contingency when the concessionaire's offer is not the preferred offer or the concessionaire fails to or declines to match the preferred offer. This sub-article clearly suggests that failure on the part of the concessionaire or its declining to match the preferred offer does not apply to the eventuality when the concessionaire chooses not to submit its proposal.

125. This scheme of Article 14.1 is evident from a bare reading of the further provisions of Sub-article (d) which provides the manner in which the parties would proceed if the concessionaire matches the preferred offer. It states in case the concessionaire, after participating in the bidding, fails to give the lowest offer, it shall be given the first right of refusal to match the preferred offer and, that if the concessionaire matches the preferred offer, the parties are required to enter into a suitable agreement which would be suplemental to the concession agreement dated 14th May, 2004. In such an event, sub-article

(d) stipulates that a payment of Rs.1.05 lakhs is required to be made by the concessionaire to the bidder who had made the lowest offer towards the bidding costs which were incurred by it.

No such provision has been made if the concessionaire does not participate in the bidding.

126. Sub-article (e) is the entire basis of the rights asserted before us. The petitioner would like us to read this contractual provision as conferring the first right of refusal to match the preferred offer being available to the concessionaire whether or not it chooses to submit its proposal for capacity augmentation or not.

We find that the specification of a termination payment is specified in sub-article (c). This payment is to be made to the concessionaire in case it chooses not to submit its proposal or fails or declines to match the preferred offer.

Sub-article (e) of Article 14.1 further states that in case the concessionaire chooses not to submit its proposal for capacity augmentation or is not the preferred bidder and also fails or declines to match the preferred offer, GOI shall be entitled to terminate this agreement upon payment to the concessionaire of the termination payment.

127. It is important to note, that no provision has been made in Article 14.1 for availability of the right of refusal to match the preferred offer in case the concessionaire did not participate in the bidding process, nor any procedure laid out for the exercise of an opportunity to the concessionaire without such

participation. It also does not provide for execution of any supplementary agreement in case such right, even if available without participation in the bidding, was exercised. This intention of the parties is evident from the fact that the contract does not even contemplate a supplementary agreement or payment of bidding costs to the lowest bidder if such opportunity was to be provided.

It is therefore evident, that if the concessionaire chooses not to submit its proposal, it does not have the right to match the preferred offer. Such right is found given to the concessionaire in sub-article (d) which clearly shows that after participating in the bidding procedure, in case the concessionaire fails to give the lowest offer, then it is to be given the first right of refusal to match the preferred offer. It also stipulates the manner in which the parties would proceed in case the concessionaire exercised the option.

It is noteworthy, that clause (c) of Article 14.1 is a clear warning to the concessionaire that if it did not participate in the bidding, it would suffer termination of the Concession Agreement. It is clearly evident therefrom that the clauses set out thereafter would be neither attracted nor applicable.

The scheme of article 14.1 read as a whole, permits no other interpretation.

128. The petitioner has also placed reliance on Article 14.2, which is in the nature of a non-compete clause, whereby the respondent no. 1 is prohibitted from constructing and operating,

either itself or having the same, built and operated, on BOT basis or otherwise, a competing facility, either toll free or otherwise during the concession period. The respondent no. 1 is however permitted to build and operate such a facility only subject to the fee charged for the vehicles using such facility being at not less than 133% of the fee for the time being charged for vehicles using the project facility constructed by the petitioner.

Even this Article imposes only a limited prohibition on the Government, and it is entitled to construct and maintain, build and operate even a competing facility during the operation of the petitioner's contract, subject to payment of the toll at the rates prescribed in this sub-article.

129. The petitioner has also raised an issue that no individual notice was issued to him in accordance with the preferential right in terms of Article 14.1 of the Concession Agreement. In response, the respondent no. 2 - NHAI has stated that it was not a party to the Concession Agreement dated 14th May, 2004. It is also stated that the petitioner was fully aware of all steps taken by the respondents.

130. The respondent no. 2 has also pointed out, that the advertisements were issued notifying applications for the Request For Qualification ('RFQ' hereafter) by public advertisement which were published and circulated on 29th May, 2008 in national dailies including the Hindustan Times and the Financial Express for two major highway projects including the project in question. Additionally the RFQ document was also

posted on the website of the NHAI, notifying the public of the decision to carry out the bidding process for selection of the bidders.

131. The notice clearly informed the public that the NHAI intended to pre-qualify and shortlist suitable applicants who would be eligible for participation for awarding the project through an open competitive process in accordance with the procedure notified in the advertisement.

132. The RFQ document which has been placed on record, has stipulated a two stage bidding process. The first stage has been described as the 'qualification stage' of the process, which involves qualification of interested parties/consortiums who make an application in accordance with the provisions of the RFQ. At the end of this stage, the NHAI was required to announce a shortlist of up to seven suitable pre-qualfiied applicants who shall be eligible for participation in the second stage of the bidding process, which is the 'bid stage', comprising of the 'Request For Proposals' ('RFP' hereafter). Article 1.2.2 of the RFQ clearly declared that only those applicants that are pre-qualifed and shortlisted by the NHAI shall be invited to submit their bids for the project. This declaration was clear, unequivocal and without exception. The public was also notified that the authority was likely to provide a comparatively short time span for submission of the bids for the projects. The applicants were advised to visit the site and familiarise themselves with the project.

133. Article 1.2.3 of the RFQ also informed that so far as the bid stage (RFP stage) was concerned, the bidders would be called upon to submit their financial offers in accordance with the RFP and other documents provided by the NHAI. Such bidding documents for the project would be provided to every bidder against payment of Rs.50,000/- only.

134. In terms of the Article 1.2.4 of the RFP, a bidder was required to deposit along with its bid, a bid security amount of Rs.11.79 crores, refundable not later than 60 days from the bid due date, except in the case of the bidder who sought the lowest amount of grant from the authority or shared the highest premium/revenue and whose bid security would be retained till it had provided a performance security under the Concession Agreement. So far as evaluation of the bid was concerned, in Article 1.2.8 of the RFQ, the NHAI had stated that bids would be invited for the project on the basis of the lowest financial grant required by a bidder for implementing the project. A bidder could instead of seeking a grant, offer to pay a premium to the NHAI for award of the concession. The grant/premium amount would constitute the sole criteria for evaluation of bids.

135. Stringent conditions were also prescribed for assessing eligibility of the applicants. So far as the technical capacity was concerned, Article 2.2.2(A) of the RFQ stipulated possession of experience over the past five financial years, in eligible projects such that the total sum of the projects was more than Rs.500 crores which had been referred to as the 'Threshhold Technical

Capability' ; Article 2.2.2(B) of the RFQ prescribed that the applicant was required to have a minimum net worth (financial capacity) of Rs.154.75 crore at the close of the preceeding financial year and positive net cash accruals during any three years preceeding the application due date. The eligibility requirements of a consortium were differentially prescribed. In terms of Article 3.2.6 of the RFQ, the method of construing the applicant's experience was provided. The RFQ provided for several declarations and undertakings which the participant was required to submit.

136. It is not the petitioner's case before us, that the eligibility requirement for the Pingalai river project and the project relating to the four laning of the Talegaon-Amravati section of NH-6 are the same.

137. It is noteworthy, that neither the consortium which had participated in the bidding for Pingalai River bridge project and incorporated the petitioner as a special purpose vehicle for the execution of the same, nor the petitioner participated in or submitted the RFQ for the project in question.

138. There is nothing on record at all either in any of the communications opted to be placed on record by the petitioner or in the petition which could even remotely suggest that the petitioner, or even the consortium, met the prescribed eligibility conditions or had the capacity or expertise or were at all interested or had consented to the execution of the work which is the subject matter of the present writ petition. We also do not

find any power or authority in the respondent no. 2 to waive or relax any of the aforenoticed stipulations.

139. The petitioner first wrote to the Chief Engineer, MORT&H on 20th June, 2009 wherein it asserted rights based on Article 14 of the Concession Agreement. The petitioner also claimed that the NHAI should have issued the RFP to it as well and only on their refusing to participate and writing could the open bidding excluding them be proceeded with. It sought stoppage of the bidding process. Other than this, nothing was mentioned which could even remotly suggest that the petitioner met the required eligibility criteria or had the capacity or expertise to execute the said project.

In the further letters dated 14th July, 2009 and 21st July, 2009 too, other than making a bald claim about the clauses in the Concession Agreement and claiming a violation of the terms of the Concession Agreement occurring by the invitation of the bids, nothing about the credentials of the petitioner to execute the said project or about the existence of any consortium was mentioned.

140. Interestingly, the petitioner has addressed a letter dated 6th August, 2009 to the Minister for Road, Transport and Highways for the first time, submitting that it had grown with time, had already qualified and was undertaking Rs.500 crore projects in the public private sector for the Government of Maharashtra and claimed that it was capable of handling the proposed length by

the National Highway Authority of India. This communication does not refer to any consortium which had been created by the petitioner. It also does not state its technical or financial ability with regard to the execution of the contract which facts could suggest the petitioner's eligibility. The petitioner purports to exercise an absolute right of first refusal without anything more. Other than this bald claim, there is no material at all placed either before the respondents or before this court with regard to the capability and eligibility of the petitioner to undertake the work in question.

141. It may be noted, that this submission on behalf of the petitioner that it is deemed to have pre-qualified and it is not required to undergo the requirements of even meeting the eligibility requirements under the new proposal has been developed during the pendency of the matter. There is no contention in the writ petition that the petitioner was deemed to have pre-qualified or was exempted from participation in the pre-qualification procedure.

142. For all these resons, we find no merit in this submission of the petitioner and hold that even to operate Article 14 of the Concession Agreement of 2004, it was essential for the petitioner to have participated in the pre-qualification and bidding process.

143. On a detailed consideration, we have also arrived at a conclusion that the project of 2009 was not in the nature of capacity augmentation/additional facility which has already been

discussed in detail so as to bring the desired level of service to the users of the Project Facility within the meaning of Article 14 of the Concession Agreement of 2004. We have also held that even if Article 14 of the Concession Agreement became applicable, the petitioner had failed to participate in the bidding process and was, therefore, disentitled to match the preferred offer. We find that the petitioner has not asserted that it had any preferential right after the project of 2009 was initiated at the relevant stages when it ought to have asserted rights, if any. The petitioner made no complaint that the respondents had not disclosed to the potential bidders, in the notice inviting RFQs, of the rights of the petitioner. The petitioner also never made any grievance that the termination payment postulated under Article 14 had not been notified. Therefrom, it is amply clear, that the petitioner also did not consider the project awarded to respondent no. 3 as tantamounting to capacity augmentation of its project facility. For this reason, it did not make any claim as has been raised in the present writ petition. In this background, we further hold that there was no necessity of an individual notice to be issued or served upon the petitioner notifying it to exercise a preferential right to match the preferred offer. In any case, in view of the clear knowledge of the petitioner with regard to the notice issued by the respondent no.2 inviting RFQs and the process for award of the said contract undertaken by the NHAI, even if individual notice was required, no prejudice has enured to the petitioner for non-service thereof and the action of

the respondents cannot be faulted for this reason.

144. There is yet another submission on behalf of the respondents which would disentitle the petitioner to grant of relief in the present writ petition. It has been urged that the National Highway Authority of India has been statutorily created in exercise of powers under the NHAI Act, 1982. The stretch of NH-6 has been vested with the respondent no. 2 by virtue of Gazette Notification dated 22nd September, 2009 of the Government of India-respondent no. 1 herein. It is its statutory duty to undertake the work of development improvement etc of national highways. The NHAI has power to enter into contracts by virtue of Section 14 of the NHAI Act. It is stated that in view of the principles laid down in ***R.D. Shetty vs. IAAI (supra)***, award of any contract to undertake these responsibilities by the NHAI, tantamounts to distribution of state largesse.

145. Mr. Vivek Tankha, learned ASG on behalf of the respondent no. 2, has placed reliance on the pronouncement of the Supreme Court in ***(2006) 13 SCC 382 Nagar Nigam, Meerut vs. Al Faheem Meat Exports (P) Ltd. & Ors.*** contending that the NHAI is a public authority and has to adopt a transparent and open process of awarding a contract, failing which, its action would be in the teeth of article 14 of the Constitution of India. It is urged that for this reason the stipulation in the Concession Agreement of 2004 cannot be read in the manner urged by the petitioner.

146. It needs no elaboration that the question as to who should

be given the contract for construction of the highway and on what terms is for the respondent nos. 1 and 2 to decide and not for the courts.

147. So far as the issue of award of a contract or disposition of the largesse by the State or any authority within the meaning of Article 12 of the Constitution is concerned, the authorities are to be guided by well settled principles in respect thereof. As back as in ***(1979) 3 SCC 489 : AIR 1979 SC 1628 Ramana Dayaram Shetty vs. International Airport Authority of India***, it was held that the state cannot distribute its largesse (including award of contracts) at its own sweet will or at the whim and caprices of the officers of the government or legal body in an arbitrary manner.

148. On the same issue, in the pronouncement reported at ***(2006) 13 SCC 382 Nagar Nigam, Meerut vs. Al Faheem Meat Exports (P) Ltd. & Ors.***, the court reiterated the need to maintain transparency in grant of public contracts. The observations of the court throw valuable light on the issues which arise for consideration having regard to the claim made by the petitioner and read as follows :-

> "12. In this case, however, we are concerned with a different question. It is now a well settled principle of law that having regard to the provisions of Article 14 of the Constitution of India, a State within the meaning of Article 12 thereof cannot distribute its largesse at its own sweet will, vide R.S. Shetty v. Union of India (1979) II LLJ 217 SC. The Court can ensure that the statutory functions are not carried out at the whims and caprices of the officers of the government/local body in an arbitrary manner.

> But the Court cannot itself take over these functions.
> 13. This Court time and again has emphasized the need to maintain transparency in grant of public contracts. Ordinarily, maintenance of transparency as also compliance of Article 14 of the Constitution would inter alia be ensured by holding public auction upon issuance of advertisement in the well known newspapers. That has not been done in this case. Although the Nagar Nigam had advertised the contract, the High Court has directed that it should be given for 10 years to a particular party (respondent No. 1). This was clearly illegal.
> 14. It is well settled that ordinarily the State or its instrumentalities should not give contracts by private negotiation but by open public auction/tender after wide publicity. In this case the contract has not only been given by way of private negotiation, but the negotiation has been carried out by the High Court itself, which is impermissible."

149. After consideration of the law on the subject, in ***Nagar Nigam, Meerut vs. Al Faheem Meat Exports (P) Ltd. & Ors.*** (supra), the court observed as follows :-

> "18. The law is, thus, clear that ordinarily all contracts by the Government or by an instrumentality of the State should be granted only by public auction or by inviting tenders, after advertising the same in well known newspapers having wide circulation, so that all eligible persons will have opportunity to bid in the bid, and there is total transparency. In our opinion this is an essential requirement in a democracy, where the people are supreme, and all official acts must be actuated by the public interest, and should inspire public confidence."

150. We may hasten to add that as noticed above, that the Supreme Court has not completely ousted the discretion to award a contract other than by public auction or tender. In this behalf, in paras 15 and 16 (page 394-395) of ***Nagar Nigam,***

Meerut vs. Al Faheem Meat Exports (P) Ltd. & Ors.(supra), the court has, however, stated that award of a contract by way of private negotiations in such manner may be permissible to the state or its own instrumentalities in rare and exceptional cases. In this regard, the court has observed as follows :-

> "15. We have no doubt that in rare and exceptional cases, having regard to the nature of the trade or largesse or for some other good reason, a contract may have to be granted by private negotiation, but normally that should not be done as it shakes the public confidence.
>
> 16. The law is well-settled that contracts by the State, its corporations, instrumentalities and agencies must be normally granted through public auction/public tender by inviting tenders from eligible persons and the notification of the public-auction or inviting tenders should be advertised in well known dailies having wide circulation in the locality with all relevant details such as date, time and place of auction, subject-matter of auction, technical specifications, estimated cost, earnest money Deposit, etc. The award of Government contracts through public-auction/public tender is to ensure transparency in the public procurement, to maximise economy and efficiency in Government procurement, to promote healthy competition among the tenderers, to provide for fair and equitable treatment of all tenderers, and to eliminate irregularities, interference and corrupt practices by the authorities concerned. This is required by Article 14 of the Constitution. However, in rare and exceptional cases, for instance during natural calamities and emergencies declared by the Government; where the procurement is possible from a single source only; where the supplier or contractor has exclusive rights in respect of the goods or services and no reasonable alternative or substitute exists; where the auction was held on several dates but there were no bidders or the bids offered were too low, etc., this normal rule may be departed from and such contracts may be awarded through 'private negotiations'. (See ***Ram and Shyam Company*** v. ***State of Haryana and Ors.***: AIR 1985 SC 1147)."

151. The Supreme Court in ***Nagar Nigam, Meerut vs. Al Faheem Meat Exports (P) Ltd. & Ors***.(supra), also placed reliance on the pronouncement in ***AIR 1987 SC 1109 : (1987) 2 SCC 295 Shri Sachidanand Pandey vs. State of W.B. & Ors.*** wherein it was observed that the rule for award of a contract by public auction or inviting tenders was not only to get the highest price but also to ensure fairness in the activities of the state or public authorities. Ordinarily actions would be legitimate and dealings should be above board; transactions without aversion or affection and would not be suggestive of discrimination without giving any impression of bias, favouritism or nepotism if the matter was brought to public auction or sale of tenders. This may be the ordinary rule but is not invariable and departure has to be justified by compulsions and not by compromise, by compelling reasons and not by just convenience.

152. The petitioner has placed reliance on the pronouncement of the Apex Court reported at ***(2009) 7 SCC 462 Ravi Development vs. Shri Krishna Prathisthan*** to contend that in view of the ratio of this judgment, the preferential right conferred on the petitioner under Article 14 of its Concession Agreement was just and fair and deserves to be enforced. In the case of ***Ravi Development (supra)***, a challenge was laid to the validity of the award of a government tender following the Swiss Challenge Method on a pilot project basis. The appellant M/s Ravi Development had provided MHADA with its innovative

project plan on how to balance highly developed high-rise with the low-rise buildings of lower specifications built up for EWS, LIG and HIG groups in accordance with the objective of MHADA. The Maharashtra government took a suo-moto decision after due deliberations and study of various methodologies for dealing with, and decided to apply the Swiss Challenge Method for award of work for the proposal of the appellant on a pilot basis. As per this method, which was made known to all the participating parties in the bidding which was invited, the originator of the proposal must, in consideration of his vision and initiative, be given the benefit of matching the highest bid submitted for the project. The rejection of the highest bidder was made by following the pre-condition of the acceptance of the tender already given in the public notice. The award of the contract to the appellant was challenged in a public interest litigation. So far as this method of award of tender was concerned, the court observed as follows :-

> “54. The Swiss Challenge method is transparent inamsuch as all the parties were well aware of the "right of first refusal" accorded to the "originator of proposal". As per the method which was known to all the parties the originator of the proposal must in consideration of his vision and his initiative be given to the benefit of matching the highest bid submitted. As pointed out earlier, the said method is beneficial to the government inasmuch as the government does not lose any revenue as it is still getting the highest possible value.
> 55. Further, in view of financial crunch and availability of undeveloped lands, the national and State Housing Policies provide for encouragement of private participation. The

> State Government is also well within its rights to try out on pilot basis a methodology recognized internationally as well as in India."

In this background, the court had approved the adoption of the Swiss Challenge Method and award of the contract to the petitioner.

153. In so concluding, the court had placed reliance on several prior pronouncements wherein also an exception has been made to the open tendering and auction method for allotment of the government contracts. Amongst others, reliance was placed on the pronouncement reported at ***(1986) 4 SCC 586 State of M.P. vs. Nand Lal Jain***, wherein Supreme Court held that when the state government was granting license for putting up a new industry, it was not necessary that it should advertise and invite offers for putting up such industry. The state government was held entitled to negotiate with those who had come up with the offer to set up such industry.

154. On the same issue, in para 17 also of ***(2003) 8 SCC 100 5 M & T Consultants vs. S.Y. Nawab***, it was held as follows :-

> "17. .....It is by now well settled that non-floating of tenders or absence of public auction or invitation alone is no sufficient reason to castigate the move or an action of a public authority as either arbitrary or unreasonable or amounting to mala fide or improper exercise or improper abuse of power by the authority concerned. Courts have always leaned in favour of sufficient latitude being left with the authorities to adopt their own techniques of management of projects with concomitant economic expediencies depending upon the exigencies of a situation guided by appropriate financial

> policy in the best interests of the authority motivated by public interest as well in undertaking such ventures....”

155. It is noteworthy, that in the aforenoticed three decisions, the court was concerned with the reasons, object and spirit and the justification behind the method which had been adopted for the award of contract.

156. In the light of the above principles, financial concerns are not the sole consideration for award of public contracts. Technical innovation, the nature of the project, objects of economic, social and or industrial developments and other concerns have also been held to be valid considerations for deviating from the process of award of contracts based on the financial criterion. (Ref : ***(1991) 1 SCC 492 Raunaq International Ltd. vs. IVR Construction Ltd. & Ors.***).

157. This is an important aspect of this matter. In ***Raunaq International Ltd. vs. I.V.R. Construction Ltd. & Ors. (supra)***, the court was concerned with the award of a contract by the State Electricity Board for design, engineering etc of pipes and steel tanks with all accessories and auxiliaries etc for two units of a Thermal Power Station. In para 9, it was observed by the court that the award of a contract, whether it is by a private party or by a public body or the State, is essentially a commercial transaction. So far as considerations for taking the decision to award the contract are concerned, the court laid down the following conditions :-

“9. In arriving at a commercial decision considerations which are of paramount importance are commercial considerations. These would be :
(1) The price at which the other side is willing to do the work;
(2) Whether the goods or services offered are of the requisite specifications;
(3) Whether the person tendering has the ability to deliver the goods or services as per specifications. When large works contracts involving engagement of substantial manpower or requiring specific skills are to be offered, the financial ability of the tenderer to fulfil the requirements of the job is also important;
(4) the ability of the tenderer to deliver goods or services or to do the work of the requisite standard and quality;
(5) past experience of the tenderer, and whether he has successfully completed similar work earlier;
(6) time which will be taken to deliver the goods or services; and often
(7) the ability of the tenderer to take follow up action, rectify defects or to give post contract services.

Even when the State or a public body enters into a commercial transaction, considerations which would prevail in its decision to award the contract to a given party would be the same. However, because the State or a public body or an agency of the State enters into such a contract, there could be, in a given case, an element of public law or public interest involved even in such a commercial transaction.
10. What are these elements of public interest ? (1) Public money would be expended for the purposes of the contract; (2) The goods or services which are being commissioned could be for a public purpose, such as, construction of roads, public buildings, power plants or other public utilities. (3) The public would be directly interested in the timely fulfilment of the contract so that the services become available to the public expeditiously. (4) The public would also be interested in the quality of the work undertaken or goods supplied by the tenderer. Poor quality of work or goods can lead to tremendous public hardship and substantial financial outlay either in correcting mistakes or in rectifying defects or even at times in re-doing the entire work - thus involving larger outlays or public money and delaying the availability of services, facilities or goods, e.g. A delay in commissioning a

> power project, as in the present case, could lead to power shortages, retardation of industrial development, hardship to the general public and substantial cost escalation."

158. Mr. Vivek Tankha, learned ASG appearing for the National Highway Authority of India-respondent no. 2 has drawn our attention to the schedule to the National Highway Act, 1956. So far as National Highway-6 is concerned, it has been described in the Schedule at serial no. 7 as the highway starting from the junction near Dhulia with the highway specified in serial no.4 and connecting Nagpur, Raipur, Sambalpur, Baharagora and Calcutta. It has been submitted that National Highway-6 covers more than 800 kms and, interalia, includes several bridges.

159. Acceptance of the submission on behalf of the petitioner that capacity augmentation of the project in the Concession Agreement of 2004 is open ended and that any development on NH-6 which includes the Pingalai River bridge and its approaches, tantamounts to augmentation or increase of the capacity of the project of the petitioner, would result in a completely irrational, absurd and unwarranted situation. The respondents would be barred from considering any of the aspects pointed out in para 9 of ***Raunaq International (supra)*** and precluded effecting any development work on NH-6 or any portion thereof, of which the Pingalai river was a part, without giving effect to the claimed preferential rights of the petitioner. As a result, so far as NH-6 or any portion thereof involving the

Pingalai River Bridge, was concerned, a monopoly of the petitioner would stand created. This is certainly not the purport or intendment of Article 14.1 or 14.2 of the Concession Agreement dated 14th May, 2004.

160. The impact of the acceptance of the submissions of the petitioner would be placing the public authorities totally at the mercy of the petitioner for undertaking any construction or development work at any site, on the NH-6 unrestricted by magnitude, which may include the Pingalai River bridge, without taking into consideration the capacity or the ability of the petitioner to undertake the work; ignoring better expertise, technology or a scientifically more viable proposal from any third party. Certainly, there cannot be such monopolistic dispensation of state largesse and the same is legally impermissible.

161. Unlike ***M/s Ravi Development (supra)*** who was the appellant before the Supreme Court, the petitioner is not the originator or creator of some unique design or methodology which was the consideration which weighed with the state government in adopting the Swiss Challenge Method in the said case. The application of the Swiss Challenge Method in ***Ravi Development case (supra)*** also does not have the effect of creating the monopoly of the kind which results if Article 14 of the Concession Agreement of 2004 is worked in the manner suggested by the petitioner. This is yet anotehr reason as to why the challenge to the award of the contract premised on the petitioner's reading of Article 14 of the Concession Agreement is

clearly unsustainable.

162. The constraints on the court exercising power of judicial review in administrative action, especially in matters of contract have also been considered by the Supreme Court. In ***(2006) 13 SCC 382 Nagar Nigam, Meerut vs. Al Faheem Meat Exports (P) Ltd. & Ors.,*** placing reliance on the earlier pronouncements in ***(2005) 1 SCC 679 Association of Registration Plates vs. UOI & Ors. ; (2005) 6 SCC 138 Master Marine Services (P) Ltd. vs. Metcalfe & Hodgkinson (P) Ltd.***, it was observed that :-

> "13. In the present case, unfortunately, the High Court's attention was not drawn to the aforementioned legal principles. Furthermore, we see force in the submission of Mr. Jayant Bhushan, learned senior counsel for the appellant, that it was not for the High Court to fix the terms and conditions of the Contract. It is for the state authorities to take a policy decision and fix the terms and conditions of the Contract. It is one thing to say that the High Court in exercise of power of judicial review may strike down the contract or a notice inviting the tender if it offends Article 14 of the Constitution of India, but it is another thing to say that the High Court in exercise of the power of judicial review would thrust a contract upon a non-willing party particularly when the said exercise would be violative of Article 14 of the Constitution. Yet again, save and except in some very rare and exceptional case, the question of fixing any terms of the Contract or laying down the terms and conditions is for the concerned authority to decide, and it is not a matter within the domain of the Courts.
>
> 15. Similarly in ***Master Marine Services (P) Ltd.*** v. ***Metcalfe & Hodgkinson (P) Ltd. and Anr.*** MANU/SC/0300/2005 :

> AIR2005SC2299 , this Court held that the modern trend points to judicial restraint in reviewing the administrative action. The court does not sit as a court of appeal over such a decision but merely reviews the manner in which the decision was made. The court ordinarily would not interfere with an administrative decision. The Government must have freedom of contract. Some fair play in the joints is a necessary concomitant for an administrative body functioning in an administrative sphere. We have carefully perused the impugned advertisement and we do not find any arbitrariness, discrimination or malafides in the same. Hence the High Court had no justification for interfering with the said advertisement"

163. In ***(1994) 6 SCC 651 Tata Cellular vs. UOI***, this court authoritatively laid down the parameters of judicial review in the case of a tender awarded by a public authority for carrying out certain work. It was held that the principles of judicial review can apply to the exercise of contractual powers by government bodies in order to prevent arbitrariness or favouritism. However, the court warned that there were inherent limitations in the exercise of that power of judicial review. It was also observed that the right to choose cannot be considered as an arbitrary power. However, such power could not be exercised for collateral purposes. These principles have been relied upon and reiterated in several later cases.

164. The Supreme Court has repeatedly deprecated interference in decisions of the Government in cases of award of a contract.

In para 35 of ***(1981) 1 SCC 568 Fertilizer Corpn. Kamgar Union (Regd.) vs. UOI***, the Apex Court had observed that "*the court cannot usurp or abdicate, and the parameters of judicial review must be clearly defined and never exceeded. If the Directorate of a Government company has acted fairly, even if it has faltered in its wisdom, the court cannot, as a super auditor, take the Board of Directors to task. This function is limited to testing whether the administrative action has been fair and free from the taint of unreasonableness _ and has substantially complied with norms of procedure set for it by rules of public administration.*"

165. The principles governing the scope of judicial review in award of contract pursuant to a tendering process were succinctly restated by the Apex Court in the judgment reported at ***(2000) 5 SCC 287 Monarch Infrastructure (P) Ltd. vs. Commr., Ulhasnagar Municipal Corpn.*** in the following terms:-

> "10. There have been several decisions rendered by this Court on the question of tender process, the award of contract and evolved several principles in regard to the same. Ultimately what prevails with the courts in these matters is that while public interest is paramount there should be no arbitrariness in the matter of award of contract and all participants in the tender process should be treated alike. We may sum up the legal position thus:
> (i) The Government is free to enter into any contract with citizens but the court may interfere where it acts arbitrarily or contrary to public interest;
>
> (ii) The Government cannot arbitrarily choose any person it likes for entering into such a relationship

> or to discriminate between persons similarly situate;
>
> (iii) It is open to the Government to reject even the highest bid at a tender where such rejection is not arbitrary or unreasonable or such rejection is in public interest for valid and good reasons.
>
> 11. Broadly stated, the courts would not interfere with the matter of administrative action or changes made therein unless the Government's action is arbitrary or discriminatory or the policy adopted has no nexus with the object it seeks to achieve or is mala fide."

Having regard to the limited object of Article 14.1 of the Concession Agrreement dated 14th May, 2004 which is confined to 'capacity augmentation of the project in the interest of the users of the facility', we are unable to hold that the preferential right of first refusal was in the teeth of the constitutional provisions and rights or the principles laid down in ***R.D. Shetty vs IAAI (supra)***.

166. On the other hand, the absolute proposition on the interpretation of Article 14 of the Concession Agreement urged by the petitioner before us has however the consequence of giving the petitioner the absolute right to match all bids involving development or maintenance of any part of NH-6 of which the Pingalai river bridge may be a part. Such working of Article 14 of the Concession Agreement dated 14th of May, 2009 would have the effect of the respondents being required to ignore all benefits of technological advancements and advantages which may enure from award of contract to another

person whose proposal to undertake the work may be scientifically more developed than the technique adopted by the petitioner or have a more efficient outcome.

167. We find that after a close scrutiny of the bids which required evaluation of stringent eligibility criterion and technical expertise, a considered decision was taken by the respondent no. 2 to award the contract to the respondent no. 3. The RFQ and the RFP did not provide any waiver or relaxation of any of the stipulated conditions. These documents have been approved at the highest level and as noted above are in terms of guidelines of the Ministry.

168. The petitioner makes no allegations of malafides. There is also no allegation that the contract has been entered into for colateral purposes or its award suffers from Wednesbury unreasonableness. It is also not the petitioner's contention that the respondent no. 3 was not eligible or had not qualified in the bidding process. No objection with regard to the process adopted and implemented by the respondent no. 2 has been made. The limitations on exercise of the powr of judicial review have been noted above. The decisions of the respondent nos. 1 and 2 with regard to the project of four laning of Talegaon-Amravati section of NH-6 and award of the contract to respondent no. 3 cannot be faulted on any legally tenable ground.

The challenge to the award of contract to the respondent no. 3 on the sole ground that the petitioner had a preferential

right under Article 14 of the Concession Agreement, 2004 with regard to the subject project/work is clearly misplaced and devoid of legal merit and is rejected.

(IV) Whether the proposal of the respondent no. 2 to buy back the tolling rights of the petitioner under the Concession Agreement of 2004 is legally permissible, justified and sustainable?

169. The petitioner has urged, that the respondents have proposed to buy back the tolling rights of the petitioner in the documentation placed on record, which is not envisaged under the concession agreement dated 14th May, 2004. It has also been urged that termination of its agreement is envisaged only in the contingencies specified under Article 14, 15 and 16 of the Concession Agreement of 2004 and no other.

170. The petitioner asserts in the writ petition, that the impugned actions of respondent nos. 1 and 2 are arbitrary and contrary to the provisions of the Concession Agreement. The petitioner has claimed that the NHAI being a part of the Central Government, is bound by its subsisting Concession Agreement dated 14th May, 2004 with the GOI and that the Concession Agreement and the State Support Agreement are not contracts simplicitor but are statutory contracts to further the objects set out in the Highways Act and the NHAI Act.

171. Before us, the petitioner contends that the NHAI is also bound by the Concession Agreement entered into by the GOI with it and cannot terminate its agreement.

172. Our attention has been drawn to the provisions of section 2

and 4 of the National Highways Act of 1956 ('NH Act, 1956' hereafter). By virtue of section 4, all national highways vest in the Union of India. This provision further states that for the purposes of the statute, highways, inter alia, include all bridges, culverts, tunnels, causeways, carriageways and all other structures constructed on or across such highways. The responsibility for the development and maintenance of national highways rests on the Central Government which is empowered by virtue of section 5 to direct that any function in relation to the development or maintenance of any national highway shall, subject to such conditions, if any, as may be specified in the notification, also be exercisable by the Government of the State within which the national highway is situated, or by any officer or authority subordinate to the Central Government or the State Government.

173. The National Highway Authority of India Act, 1982 (NHAI Act, 1982 hereafter) was enacted to provide for the constitution of such authority for the development, maintenance and management of national highways and for matters connected therewith. The National Highway Authority of India ('NHAI' hereafter) is a statutory body constituted under Section 3 of the NHAI Act, 1982. It has been statutorily entrusted with the responsibility of development, maintenance and management of National Highways vested in or entrusted to it by the Central Government. Section 11 empowers the Central Government to vest or entrust any National Highway in the state authority by

notification in the official gazette.

So far as the power to contract is concerned, the same is provided and the mode stipulated under section 14 and 15 of the NHAI Act, 1982 respectively.

174. The petitioner, however, has challenged the authority to terminate its concession agreement in the given circumstances as well as the proposed rates at which the respondent nos. 1 and 2 have suggested the buy back. The petitioner's contention that its contractual rights and entitlements are governed by the stipulations in the concession agreement dated 14th May, 2004 and that it would be entitled to enforce the same cannot be disputed.

175. As per the counter affidavit filed by the-respondent no. 2, the Ministry of Road Transport and Highways is the concerned ministry which exercises control over the NHAI. The jurisdiction of the NHAI is restricted to such highways which are vested in it or entrusted to it by the Central Government.

176. In exercise of the powers conferred under section 11 of the NHAI Act, 1982, the Central Government issued a notification no. 2427 dated 22nd September, 2009, entrusting the stretch of the highway no. 6 Nagpur-Talegaon-Amravati by-pass from KM 9.20 to KM 162.75 and KM 405.000 to 485.00 (Raipur-Nagpur Section of highway no. 6) to the NHAI.

177. In the affiavit dated 26th April, 2010, the respondent no. 1 has clearly stated that no final decision with regard to the petitioner's rights with regard to the Concession Agreement

dated 14th May, 2004 requires to be taken at this stage for the reason that the petitioner would be entitled to continue with its toll arrangements till the commissioning of the project by the respondent no. 3 which in any case will not happen before the end of 2012. In an affidavit sworn as late as on 26th April, 2010, the respondent no. 1 submits, that it has also been informed that the respondent no. 2 is not intending to have any work performed/executed on the portion of the Pingalai bridge project.

178. The respondent no. 1 has also submitted that the petitioner has exercised unfettered rights to collect toll since 2004-05 and as per the said proposal would continue to do so till 2012. As per the financial working of the consultant of the respondent no. 1, while the total cost of the Pingalai bridge project was Rs.14.15 crores, the petitioner is projected to have collected the toll amounting to Rs.12.39 crores up to the year 2009. It has been pointed out, that these are projected figures and the actual figures may be much more.

179. It has further been argued by the learned Attorney General that the decisions of the respondents have been taken on account of supervening public interest in relation to upgrading of 66.73 kms of NH-6. The respondent no. 1 has submitted that the issuance of the NH-6 tender was first preceded by identification of the Nagpur-Talegaon-Amravati stretch of the highway as a selected stretch under the NHDP-Phase III as the Stretch/Corridor no. 11 on 23rd February, 2005 by the Cabinet Committee on Economic Affairs. The proposal with regard to this

stretch was duly submitted to the PPPAC and approved by it.

180. The respondent no. 1 has submitted that in order to ensure that the petitioner is not dealt with unfairly and in view of the decisions taken, the NHAI-respondent no. 2 will buy back the toll rights now being exercised by the petitioner and compensate him by payment of what has been termed as a 'termination payment' under the umbrella of the mechanism provided under article 15 and 16 of the Concession Agreement, even though there has been no default by any party. A lump sum termination payment has been calculated by the Detailed Project Report Consultants engaged by the respondent no. 2 as Rs.7.97 crores. This payment has been included by the respondents in the pre-construction costs, and not in the total project costs, for the reason that the burden of the compensation to the petitioner would be borne by the NHAI in the larger public interest. This proposal of the respondent no. 2 to buy back the rights of the petitioner stands approved by the respondent no. 1.

181. The NHAI in its letter dated 18th August, 2009 to the MORT&H has also indicated that it intends a 'buy-back' of the bridge from the existing concessionaire before the commercial operations date of the project which is around October, 2012 and that it shall bear the cost of the buy-back.

182. From the above narration, it is evident that the proposals to buy back the petitioner's rights has not culminated in a decision which has been implemented so far. It has not even been communicated to the petitioner. As of now, there is no

termination of the petitioner's agreement and this matter remains at the stage of a proposal only. The petitioner's grievance that such proposal is in breach of its concession agreement cannot be examined in the present writ petition having regard to the nature of the limited challenge before us. The petitioner also assails the authority of the NHAI-respondent no. 2 to terminate its concession agreement with the GOI.

183. On a perusal of the Concession Agreement of 2004, we also find that it records that the petitioner was incorporated as a special purpose vehicle by the consortium which had bid for the purpose of implementing project. Neither the memorandum of understanding dated 21st February, 2003 nor the document creating the petitioner company have been placed before this court. However, these documents certainly cannot refer to an eventuality which has not come into existence and obviously cannot relate to any other project as the one in question or to any matter beyond the subject of the concession agreement.

184. So far as the Concession Agreement is concerned, only the petitioner was a party thereto and not the constituents of the consortium. The executant has also been referred to as “GOI” in the agreement while the petitioner is referred to as the “concessionaire”. The agreement states that these two expressions shall include the successor and assigns of the 'GOI' and the 'concessionaire' respectively. There is nothing to show that the NHAI-respondent no. 2 is either a successor or an assignee of the Government of India. Similarly, the companies

constituting the consortium are also not successors or assignees of the petitioner.

185. The letter dated 6th August, 2009 by the petitioner to the MORT&H makes no reference at all to the consortium.

186. The NHAI is admittedly not a party to the Concession Agreement. It is not the petitioner's case that the National Highway Authority of India is an agent of the respondent no. 1. The said support agreement dated 14th May, 2004 was also entered into by the President of India in his executive capacity for the Government of India represented by the MORT&H; and the Governor of Maharashtra in his executive capacity for the State of Maharasthtra acting through the Public Works Department and the petitioner.

The petitioner does not explain as to how article 14 of the said agreement would bind parties or authority(ies) which were not a party to the said agreement.

187. In this background, the emphasis laid on behalf of the petitioner to the request by the NHAI in its letter dated 18th August, 2009, for a copy of the existing concession agreement between the petitioner and the Government is also wholly misplaced.

188. So far as the 2009 project is concerned, undisputedly RFQs were invited by the NHAI and bidders short listed by it. The RFQ clearly states that the NHAI is engaged in the development of national highways and as part of this endeavour, the authority has decided to undertake development on a national highway

through public–private/private sector partnership. The only reference to the Government of India is to be found in clause 1.2.1 which is part of the request for qualification and gives the brief description of the bidding process. This clause 1.2.1 informs the applicants that the Government of India has issued guidelines for qualification of bidders seeking to acquire stakes in any public sector enterprise through the process of dis-investment and that these guidelines shall apply mutatis mutandis to the bidding process. The pre-qualified applicants were invited by the NHAI to submit their bids to undertake the project, without the intervention of the Government of India. The power to disqualify an applicant in accordance with the aforesaid guidelines at any stage of the bidding process was vested absolutely and exclusively in the NHAI without reference to or involvement of the respondent no. 1.

189. The Concession Agreement dated 18th November, 2009 also has been entered into by the NHAI with the respondent no. 3.

190. Having noticed these facts, we do not deem it appropriate to decide on a proposed course of action. As and when the respondent(s) firm up on a decision to take any action with regard to the petitioner's Concession Agreement, or to buy back its rights thereunder, it shall be open to the petitioner to assail the same by way of appropriate legal remedy on all grounds available to it. The above aspects have a bearing on this issue and would require to be examined more closely. This shall

obviously happen in case the respondents take some action with regard to the petitioner's agreement and a challenge is laid thereto. In this writ petition and at this stage, we are not concerned with this aspect of the matter. Any decision on this aspect by us may impact respective rights in such challenge. We, therefore, refrain from doing so. We, therefore, make it clear that so far as the permissibility, legality and validity of any proposal of the respondents to terminate the Concession Agreement dated 14th of May, 2004 or to buy back of tolling rights by the NHAI; payment of termination money as well as the proposed rates for the buy back are concerned, nothing herein contained is an expression of opinion on the merits of the rival contentions.

(V) Whether the petitioner has suppressed material facts and documents and the writ petition suffers from such gross and unexplained delay and laches on its part as would disentitle the petitioner to grant of any relief in this writ petition?

191. Mr. Goolam Vahanwati, learned Attorney General of India, has submitted at some length that the petitioner has suppressed material facts and misled this court in its pleadings in the writ petition. It is contended that the petitioner has deliberately not disclosed the date of the Request for Qualification while wrongly referring to it as a letter of invitation, nor has it disclosed the date of its knowledge. The writ petition does not disclose the fact that the advertisements inviting requests for qualification were published in leading newspapers and put on the website. The petitioner admits knowledge of the information on the

website which would manifest that the petitioner was aware of the proposal of the respondent no. 2 right from May, 2008. The petitioner has also not reacted to the Request for Proposals and waited till six days before the closure/last date for submission of bids before writing its first letter dated 20th June, 2009 claiming a first right of refusal relying upon the aforenoticed article 14 of the Concession Agreement.

192. The aforenoticed incomplete disclosure by the petitioner has been strongly objected to by the respondents as well. Mr.Vivek Tankha, learned ASG for the NHAI - respondent no. 2 has placed reliance on ***(2008) 12 SCC 481 K.D. Sharma vs. Steel Authority of India Ltd. & Ors.*** in support of his submissions. The submission is that the writ petition is liable to be dismissed on this ground alone.

193. In ***K.D. Sharma vs. Steel Authority of India Ltd. & Ors. (supra)***, the court had reiterated the well settled principle that prerogative writs issued by the Supreme Court under Article 32 and by the High Court under Article 226 are for doing substantial justice and that the jurisdiction of the courts therein is extraordinary, equitable and discretionary; that the petitioner approaching the writ court must come with clean hands, put forward all facts before the court without concealing or suppressing anything and seek an appropriate relief. In para 34 of the above pronouncement, it was held that failure to candidly disclose relevant and material facts would tantamount to guilt of the petitioner of misleading the court, and rendering the petition

liable of dismissed at the threshhold. Reliance was placed by the Apex Court on the following principles stated by Scrutton, L.J. in the leading case of R.V. Kensington Income Tax Commrs., wherein the court has held as follows :-

> "…..it has been for many years the rule of the Court, and one which it is of the greatest importance to maintain, that when an applicant comes to the Court to obtain relief on an ex parte statement he should make a full and fair disclosure of all the material facts- it says facts, not law. He must not misstate the law if he can help it; the Court is supposed to know the law. But it knows nothing about the facts, and the applicant must state fully and fairly the facts; and the penalty by which the Court enforces that obligation is that if it finds out that the facts have not been fully and fairly stated to it the Court will set aside any action which it has taken on the faith of the imperfect statement."

194. On an application of the principles laid down in Kensington Income Tax Commrs. (supra), the Supreme Court laid down the law which would govern consideration of this issue in writ petitions under Article 32 and 226 in the following terms :-

> "38. The above principles have been accepted in our legal system also. As per settled law, the party who invokes the extraordinary jurisdiction of this Court under Article 32 or of a High Court under Article 226 of the Constitution is supposed to be truthful, frank and open. He must disclose all material facts without any reservation even if they are against him. He cannot be allowed to play `hide and seek' or to `pick and choose' the facts he likes to disclose and to suppress (keep back) or not to disclose (conceal) other facts. The very basis of the writ jurisdiction rests in disclosure of true and complete (correct) facts. If material facts are suppressed or distorted, the very functioning of Writ Courts and exercise would become impossible. The petitioner must disclose all the facts having a bearing on the relief sought without any qualification. This is because, "the Court knows law but not facts".

> 39. If the primary object as highligted in Kensington Income Tax Commissioners is kept in mind, an applicant who does not come with candid facts and `clean breast' cannot hold a writ of the Court with `soiled hands'. Suppression or concealment of material facts is not an advocacy. It is a jugglery, manipulation, maneuvering or misrepresentation, which has no place in equitable and prerogative jurisdiction. If the applicant does not disclose all the material facts fairly and truly but states them in a distorted manner and misleads the Court, the Court has inherent power in order to protect itself and to prevent an abuse of its process to discharge the rule nisi and refuse to proceed further with the examination of the case on merits. If the Court does not reject the petition on that ground, the Court would be failing in its duty. In fact, such an applicant requires to be dealt with for contempt of Court for abusing the process of the Court."
>
> (Underlining by us)

195. In para 52 of ***K.D. Sharma (supra),*** the Supreme Court had further observed, that even though the appellant had not come forward with all facts and had chosen to create a wrong impression before the writ court, the court had considered the merits of the case and observed that even on merits it was satisfied that no case had been made out to interfere with the actions of SAIL.

196. Several other judicial pronouncements on this issue also guide us to take the same course of action. In this regard, we may usefully refer to the pronouncements reported at ***AIR 1994 SC 853 S.P. Chengalvaraya Naidu (Dead) by LRs. vs. Jagannath (Dead) by LRs. And Ors.; (2003) 8 SCC 319 Ram Chandra Singh vs. Savitri Devi & Ors***. and ***1994 ECR 636 (SC) Chandra Shashi vs. Anil Kumar Verma.*** A similar

view was also taken in the judgment rendered on 17th July, 2006 in Arbitration Petition No. 22/2006 entitled ***GE Countrywide Consumer Financial Services Ltd. vs. Shri Prabhakar Kishan Khandare & Anr.***

197. The instant case relates to a project being undertaken in public interest in relation to a national highway. The consideration of the project began in 2005; it was approved by the PPPAC on 29th September, 2008 and even by the Cabinet Committee on Infrastructure on 30th July, 2009.

198. Intrestingly, in the letter dated 20th of June, 2009 of the petitioner addresed to the MORT&H, it stated that it understood that the Talegaon-Amravati section was getting widened into four lanes under NHAI initiatives, and that the RFP for the project stood issued to the shortlisted bidders for further action. It asserted rights based on Article 14 of the Concession Agreement 2004 and claimed that formal information about the bidding process and offer of first right of refusal was not given to it. It was also contended that the take over value of the project was wrongly mentioned and that the RFP should have shown the correct cost as per the records of MOST and certification of auditors. The petitioner claimed that the NHAI should also have issued the RFP to it and only on their refusing to participate in writing could the open bidding excluding them be proceeded with. It sought stoppage of the process of bidding.

199. In para 8.7 of the writ petition, the petitioner refers to a letter of invitation' on the NHAI website for the four laning of the

Talegaon Amravati section of NH-6. In the same paragraph after this reference, the petitioner states that the 'LOI/RFP' was contrary to the Concession Agreement dated 14th May, 2004 and that in pursuance to the said Letter of Invitation ('LOI' hereafter), the NHAI had also invited a request for proposal/bid document. The petitioner contends that pursuant to this LOI, several parties submitted their respective bids'. The petitioner claims that “on coming to know about the said LOI and RFP with regard to augmentation of a part of the same stretch for which the petitioner had a subsisting Concession Agrreement, the petitioner immediately on 20th June, 2009 wrote to MORT&H pointing out their existing Concession Agreement”.

200. We have found that no complaint was made by the petitioner that its preferential rights were not disclosed and that no termination payment was specified in the public notices. The RFP form required payment of Rs.10 lakhs and its submission envisaged a deposit of a bid security amount of Rs.11.79 crores. The petitioner made no effort to take any of these steps nor deposited any of these amounts. Nor did it say that it was not required to prequalify or to deposit these amounts. The petitioner did not care to submit any proposal for the project.

It has laid no claim at all during the entire period over which the respondent no. 2 has effected scrutiny of the offers received by it. The last dates for every step were duly notified in the public notice well in advance. The petitioner does not even suggest that there is any element of public interest in award of

the contract to it but is seeking to enforce a claimed preferential right to match the best offer received by the respondents.

201. The facts brought on record by the respondents were thus in the public domain. The petitioner who states that he is involved in the same business was certainly aware of all these developments.

Even the incomplete disclosure in the writ petition manifests that the petitioner was fully aware of the matter at every stage and it has waited for the entire process to be over before filing the present writ petition.

202. It has been observed before us, that a letter of acceptance was issued to the respondent no. 3 on 27th August, 2009. The petitioner opted to file this writ petition more than two months later on or around the 30th October, 2009 without giving any of the above details.

203. We may also examine the objection to this petition based on unexplained delay and laches. The Supreme Court has repeatedly emphasized that so far as award of contracts relating to public projects are concerned, belated petitions should not be entertained. In ***(1999) 1 SCC 492 Raunaq International vs. I.V.R. Construction Ltd.,*** it was further emphasized that the same considerations must weigh with the court when interim orders are sought or passed. The observations of the Supreme Court in paras 17 and 18 of this judgment deserve to be considered in extenso and read as follows :-

> "17. Normally before such a project is

undertaken, a detailed consideration of the need, viability, financing arid cost, effectiveness of the proposed project and offers received takes place at various levels in the Government. If there is a good reason why the project should not be undertaken, then the time to object is at the time when the same is under consideration and before a final decision is taken to undertake the project. If breach of law in the execution of the project is apprehended, then it is at the stage when the viability of the project is being considered that the objection before the appropriate authorities including the Court must be raised. We would expect that if such objection or material is placed before the Government the same would be considered before a final decision is taken. It is common experience that considerable time is spent by the authorities concerned before a final decision is taken regarding the execution of a public project. This is the appropriate time when all aspects and all objections should be considered. It is only when valid objections are not taken into account or ignored that the court may intervene. Even so, the Court should be moved at the earliest possible opportunity. Belated petitions should not be entertained.

18. The same considerations must weigh with the court when interim orders are passed in such petitions. The party at whose instance interim orders are obtained has to be made accountable for the consequences of the interim order. The interim order could delay the project, jettison finely worked financial arrangements and escalate costs. Hence the petitioner asking for interim orders, in appropriate cases should be asked to provide security for any increase in cost as a result of such delay, or any damages suffered by the opposite party in consequence of an interim order. Otherwise public detriment may outweigh public benefit in granting such interim orders. Stay order or injunction order, if issued, must be moulded to provide for restitution."

(Underlining by us)

204. In ***Raunaq International Ltd. (supra)***, the court has observed that by court intervention, the proposed project may be considerably delayed thus escalating the cost far more than

any saving which the court may ultimately effect in public money by deciding the dispute in favour of one tenderer or the other tenderer who have premised their challenge on a mere difference in the prices offered by two tenderers. It has been laid down that unless the court is satisfied that there is substantial amount of public interest or the transaction is entered into malafide, the court should not intervene under Article 226 in disputes between two rival tenderers.

205. We may also notice that even if the petitioner had made out valid legal grounds for the challenge, so far as exercise of discretion under Article 226 in challenges relating to action taken in public interest for public purposes is concerned, the observations of the Supreme Court in para 10 of the pronouncement ***(1997) 1 SCC 134 Ramniklal N. Bhutta & Anr. vs. State of Maharashtra & Ors***. in regard to proposed acquisition by the state in public interest deserve to be considered in extenso and read as follows :-

> "10. Before parting with this case, we think it necessary to make a few observations relevant to land acquisition proceedings. Our country is now launched upon an ambitious programme of all-round economic advancement to make our economy competitive in the world market. We are anxious to attract foreign direct investment to the maximum extent. We propose to compete with China economically. We wish to attain the pace of progress achieved by some of the Asian countries, referred to as "Asian tigers", e.g., South Korea, Taiwan and Singapore. It is, however, recognised on all hands that the infrastructure necessary for sustaining such a pace of progress is woefully lacking in our country. The means of transportation, power and communications are in dire need of substantial improvement, expansion

and modernisation. These things very often call for acquisition of land and that too without any delay. It is, however, natural that in most of these cases, the persons affected challenge the acquisition proceedings in courts. These challenges are generally in the shape of writ petitions filed in High Courts. Invariably, stay of acquisition is asked for and in some cases, orders by way of say or injunction are also made. Whatever may have been the practices in the past, a time has come where the courts should keep the larger public interest in mind while exercising their power of granting stay/injunction. The power under Article 226 is discretionary. It will be exercised only in furtherance of interests of justice and not merely on the making out of a legal point. And in the matter of land acquisition for public purposes, the interests of justice and the public interest coalesce. They are very often one and the same. Even in a civil suit, granting of injunction or other similar orders, more particularly of an interlocutory nature, is equally discretionary. The courts have to weigh the public interest vis-a-vis the private interest while exercising the power under Article 226 indeed any of their discretionary powers. It may even be open to the High Court to direct, in case it finds finally that the acquisition was vitiated on account of non-compliance with some legal requirement that the persons interested shall also be entitled to a particular amount of damages to be awarded as a lumpsum or calculated at a certain percentage of compensation payable. There are many ways of affording appropriate relief and redressing a wrong; quashing the acquisition proceedings is not the only mode of redress. To wit, it is ultimately a matter of balancing the competing interest. Beyond this, it is neither possible nor advisable to say. We hope and trust that these considerations will be duly borne in mind by the courts while dealing with challenges to acquisition proceedings."

(Emphasis supplied)

Thus, even on making out of a legal point, a person may not necessarily be entitled to relief in a writ petition in matters involving public interest. As noticed above, the petitioner in the present case has failed to make out any legal point justifying

intervention by this court.

206. We may mention, that the instant case is concerned with a public project leading to improvement in the national highway network. The project has been undertaken in public interest. On account of the filing of the writ petition and the intervention by the order dated 24th November, 2009, despite execution of a Concession Agreement, the project has been substantially delayed. We may notice the anguish expressed on behalf of respondent no. 3 during the hearings that the advent of the ensuing monsoon would further impede movement of material and manpower. It sought leave to do so pending hearings without creation of rights, for expediency and in public interest. This was not acceptable to the other side and monsoon certainly would have intervened and continuing on date in Maharashtra where the project is to be undertaken by the time hearings closed.

207. It is in this background alone, following the procedure followed by the court in ***K.D. Sharma vs. Steel Authority of India Ltd. & Ors.*** (para 52) ***supra,*** that we have been persuaded to consider the contentions of the petitioner on merits so as to avoid any further adjudicatory delays.

208. Not so long ago, Rabindra Nath Tagore has stated as follows :-

> "The greed of gain has no time or limit to its capaciousness. Its one object is to produce and consume. It has pity neither for beautiful nature nor for living human beings. It is ruthlessly ready without a moment's hesitation

> to crush beauty and life out of them, molding them into money."

Such aspirations of men as well as corporations created by them and their tendency to live and prosper at the expense of, and to the exclusions of all others, though unfortunate, but remain a hard reality. Such culture of uncontained self-promotion has often led to throttling of legitimate competition and creation of monopolies in commerce as is attempted in this case. This court cannot countenance or allow effectuation of such aspirations, more so when they deviate from the larger element of public interest.

209. These facts and chain of events in the present case, lead us to observe that the petitioner has made incomplete disclosure and has also concealed material facts. The writ petition also suffers from unexplainable delay and laches. Even on a consideration of the issue at hand on merits, it cannot be held that the petitioner has made out any valid legal ground in support of its claim. The petitioner's challenge with regard to the applicability of the Concession Agreement dated 14th May, 2004 and the absolute preferential right based thereon claimed by the petitioner has been held to be devoid of merit and deserves to fail. The petitioner rightly does not make a remotest suggestion to any element of public interest.

For all the reasons mentioned heretofore and based on the discussion, the writ petition deserves rejection.

(VI) Interest of the public at large and costs of such

litigation

210. The Supreme Court has reiterated the undesirability of intervention in contractual transactions by the Government bodies in matters relating to public projects. In ***Raunaq International vs. IVR Construction Ltd.(supra)***, it was emphasized that a high cost project for which loans from international bodies have been obtained should not be inteferred with, being detrimental to public interest. So far as interim orders are concerned, reliance was placed on earlier pronouncements and in para 24, the court held that in granting an injunction or stay against the award of a contract by the Government or a Government agency, the court has to satisfy itself that the public interest in holding up the project far outweighs the public interest in carrying it out within a reasonable time. The Supreme Court clearly stated that the court must also take into account the cost involved in staying the project and whether the public would stand the benefit of incurring such a cost.

211. In para 25 of ***Raunaq International Ltd. (supra)***, the Supreme Court laid down the principle that any interim order which stops a public project from proceeding further must provide for reimbursement of cost to the public in case the litigation ultimately fails. It was clearly laid down that the public must be compensated by them for the delay in implementation of the project and the cost escalation resulting from such delay. It was held that unless an adequate provision is made for this in

the interim order, the interim order may prove counter productive.

212. In ***(2000) 2 SCC 617 Air India Ltd. vs. Cochin Int. Airport Ltd. & Ors.***, the above principles were restated and it was further observed in para 15 that *: "Even when some defect is found in the decision making process, the Court must exercise its discretionary powers under Article 226 with great caution and should exercise it only in furtherance of public interest and not merely on the making out of a legal point. The Court should always keep the larger public interest in mind in order to decide whether its intervention is called for or not. Only when it comes to a conclusion that overwhelming public interest requires interference, the Court should interfere."*

These principles were reiterated in a later judgment of the Supreme Court reported at ***(2005) 6 SCC 138 Master Marine Services (P) Ltd. vs. Metcalfe & Hodgkinson (P) Ltd. & Anr.***

213. It is not possible to arrive at an actual figurative computation of the damages which which would have resulted on account of delay in the execution of the project in hand taken in public interest. The petitioner has sat by and waited for the entire tendering process to be over and the contract awarded before it has mouthed its objections or approached this court. Delay in the completion of the project would have an inevitable and obvious impact on the interest of the users of this stretch of

the NH-6 for whose benefit the project is being undertaken.

214. The petitioner before us has not even suggested involvement of any public interest so far as award of the contract to it is concerned. A public infrastructure project could not be commenced despite completion of all formalities from as back as 18th November, 2009 till date on wholly untenable grounds. The project was clearly being undertaken in public interest and would have been of tremendous utility to the users of NH-6. The respondent no. 3 has submitted that it has duly furnished the bid security of Rupees eleven crores and expended rupees twenty crores for mobilisation of material.

215. The backlog and existence of arrears is the single and largest criticism which is levelled against severely over-burdened courts. The issue of costs for misconceived and unwarranted litigation is, therefore, extremely important. This very issue had arisen for consideration in the judgment reported at **MANU/DE/9816/2006 : 138 (2007) DLT 62** in CCPO No. 130/2005 in OMP No. 361/2004 decided on 19th October, 2006 entitled ***Goyal MG Gases Pvt. Ltd. vs. Air Liquide Deutschland Gmbh and Ors.*** wherein on the issue of the impact of insufficient costs, it was observed as follows :-

> "60. Vexatious and frivolous litigation poses a number of threats to the efficient operation of any civil justice system. Those threats stem from the manner in which the vexatious and frivolous litigant conducts litigation before the courts. Such proceedings, apart, from the oppression and the harassment inflicted on the adversary,

> are extremely damaging to public interest. Judicial resources are valuable and scarce. The resources of the court are not infinite, especially in terms of judicial time. Therefore, administration of justice and interests of equity and fair play mandate that a party which succeeds is compensated by award of costs in respect of false or vexatious claims or defences. A faulting party may be required to pay to the other party such costs as would, in the opinion of the court, be reasonably sufficient to reimburse the other party in respect of the expenses incurred by him in attending the court on that date and payment of such costs on the next date following the date of such order if unreasonable adjournments are taken by the parties. However, many unscrupulous parties take advantage of the fact that either costs are not awarded or nominal costs alone are awarded against the unsuccessful party."

216. The malaise remains the same as is manifested in the instant case. The several judicial pronouncements and observationss in ***Goyal MG Gases (supra)***, may be usefully extracted and read as follows :-

> "61. The legislature has recognised the need for imposition of costs and consequently, so far as the civil proceedings are concerned, has enacted Section 35 of the Code of Civil Procedure which provides for imposition of costs. The Apex Court was concerned with the manner in which the costs are imposed resulting in undue advantage being taken by parties of the fact that notional costs are awarded which do not deter or discourage persons from filing vexatious or frivolous claims or defences. In this behalf, in ***(2005) 6 SCC 344 Salem Advocate Bar Association Vs. Union of India***, the court observed thus:-
>
> > "37. Judicial notice can be taken of the fact that many unscrupulous parties take advantage of the fact that either the costs are not awarded or nominal costs are awarded against the unsuccessful party. Unfortunately, it has become a practice to direct parties to bear their own costs. In a large number of cases, such an order is

> passed despite Section 35(2) of the Code. Such a practice also encourages the filing of frivolous suits. It also leads to the taking up of frivolous defences. Further, wherever costs are awarded, ordinarily the same are not realistic and are nominal. When Section 35(2) provides for cost to follow event, it is implicit that the costs have to be those which are reasonably incurred by a successful party except in those cases where the court in its discretion may direct otherwise by recording reasons therefor. The costs have to be actual reasonable costs including the cost of the time spent by the unsuccessful party, the transportation and lodging, if any, or any other incidental costs besides the payment of the court fee, lawyer's fee, typing and other costs in relation to the litigation. It is for the High Courts to examine these aspects and wherever necessary make requisite rules, regulations or practice direction so as to provide appropriate guidelines for the subordinate courts to follow."

62. However, there are several proceedings which are not governed by the Code of Civil Procedure. The courts have recognised the inherent power of the court to award costs in the interest of justice.

63. In ***(2006) 4 SCC 683 entitled State of Karnataka Vs. All India Manufacturers Organisation***, a challenge was laid to a common judgment of the High Court of Karnataka disposing of three public interest litigations whereby a direction was issued to the State of Karnataka to continue to implement a certain project known as the "Bangalore-Mysore Infrastructure Corridor Project". While dismissing the appeals, the Apex Court held that there was no merit in them. It was further directed that:-

> "Considering the frivolous argument and the mala fides with which the State of Karnataka and its instrumentalities have conducted this litigation before the High Court and us, it shall pay Nandi costs quantified at Rs.5,00,000/-, within a period of four weeks of this order".
>
> "The appellants in CA No.3497/2005 (J.C. Madhuswami & Ors.) in addition to the costs already ordered by the High Court, shall pay to the Supreme Court Legal

Services Authority, costs quantified at Rs.50,000- within a period of four weeks of this order....."

64. The observations of the Apex Court in this behalf as back as in ***(1994) 4 SCC 225*** (at page 246) ***Morgan Stanley Mutual Fund Vs. Kartick Das*** are also topical and instructive and were made with the intention of discouraging speculative and vexatious litigation and judicial adventurism. In this behalf, the court observed thus:-

"47 There is an increasing tendency on the part of the litigants to indulge in speculative and vexatious litigation and adventurism which the fora seem readily to oblige. We think such a tendency should be curbed. Having regard to the frivolous nature of the complaint, we think it is a fit case for award of costs, more so, when the appellant has suffered heavily....."

65. The Division Bench of this court in ***2004 (110) DLT 186*** entitled ***Indian Steel & Wire Products Vs. B.I.F.R. (DB)***, held that the sole purpose of filing the petition was to sabotage the proposal/scheme of TISCO which was accepted by the BIFR. The court held that the petitioner-company's false offer and undertaking has delayed the implementation of the scheme and the interest of workers and other creditors have suffered. The court held that the petitioner had not approached the court with clean hands and that such practice and tendency needed to be strongly discouraged and effectively curbed so that "*in future, the petitioner and such like litigants should not gather the courage of abusing the process of law for ulterior motives and extraneous considerations. Such motivated petitions pollute the entire legal and judicial process which seriously affects the credibility of this system*".

66. In these circumstances, the court held that the respondent who had to appear before the court in pursuance of the notice issued had to "unnecessarily incur the costs to contest such a frivolous petition. In our considered opinion, at least those respondents who have appeared and contested this litigation and incurred costs must be compensated to some extent". The court consequently awarded costs to each of the

respondents who appeared in the matter on consideration of the totality of the facts and circumstances and in the interest of justice and fair play.

67. Imposition of costs normally follows the indemnity principle which is simply described as “If you lose, you will be responsible not merely for your own legal costs but you must pay the other side's too”.

68. In this background, there is yet another more imperative reason which necessitates imposition of costs. The resources of the court which includes precious judicial time are scarce and already badly stretched. Valuable court time which is required to be engaged in adjudication of serious judicial action, is expended on frivolous and vexatious litigation which is misconceived and is an abuse of the process of law. A judicial system has barely sufficient resources to afford justice without unreasonable delay to those having genuine grievances. Therefore, increasingly, the courts have held that such totally unjustified use of judicial time has to be curbed and the party so wasting precious judicial resources, must be required to compensate not only the adversary but also the judicial system. For this reason, in the ***State of Karnataka Vs. All India Manufactures Organisation (Supra)***, the appellants were required to pay costs to the Supreme Court Legal Services Authority in addition to paying the costs to the adversarial party. Such vexatious litigation has to be deprecated. Lord Phillips MR in a judgment rendered in the court of appeal in ***(2004) 1 WLR 88 (CA)*** entitled ***Bhamjee v. Forsdick & Ors.*** said:-

> “(8) In recent years the courts have become more conscious of the extent to which vexatious litigation represents a drain on the resources of the court itself, which of necessity are not infinite. There is a trace of this in the judgment of Staughton LJ in Attorney-General v. Jones (1990) 1 WLR 859, 865C, when he explained why there must come a time when it is right for a court to exercise its power to make a civil proceedings order against a vexatious litigant. He said that there were at least two reasons:
> “First, the opponents who are harassed by the worry and expense of vexatious litigation

are entitled to protection; secondly the resources of the judicial system are barely sufficient to afford justice without unreasonable delay in those who do have genuine grievances and should not be squandered on those who do not."

69. The same concerns were articulated in ***Attorney-General Vs. Ebert (2004) EWHC 1838 (Admn.)*** thus:-

"Mr. Ebert's vexatious proceedings have ..... been very damaging to the public interest; quite aside from the oppression they have inflicted on his adversaries. ... The real vice here, apart from the vexing of Mr. Ebert's opponents, is that scarce and valuable judicial resources have been extravagantly wasted on barren and misconceived litigation, to the detriment of other litigants with real cases to try." Silber J, concurring, referred (at para 61) to "a totally unjustified use of judicial time".

70. .....Yet another impact of frivolous and vexatious litigation. In ***1995 (59) DLT 604 Jagmal Singh Vs. Delhi Transport Corporation***, the court was called upon to consider a challenge to the disciplinary proceedings at the hands of an employee of the Delhi Transport Corporation. While noticing the various reasons as to the self-imposed limitations on the courts in interfering with interlocutory stages of departmental proceedings, the court arrived at a finding that the writ petition by the petitioner was not only misconceived but an abuse of the process of the court. After so holding, the court observed thus:-

"We are firmly of the view that petitioner has resorted to the dilatory tactics hereby crippling the progress of the departmental enquiry pending against him for the last about eight long years. It is not only unfortunate but matter of concern to all of us being the members of the society, that the petitioner by indulging in this type of frivolous litigation has ***not only wasted his time and money but has also wasted the time of the court and other public functionaries thereby causing unnecessary drain on the resources of public exchequer whose coffers are filled in by poor people's money***. In such a case with a view to discourage frivolous

litigation, it becomes our duty not only to see that the petitioner is saddled with exemplary costs but also to ensure that he gets no benefit on account of the delay caused by him in the departmental enquiry pending against him."

71. There have been several other instances when the courts have been called upon to consider such frivolous and sham claims. In the judgment dated 17th July, 2006 passed by this court in Arb.Petition No.22/2006 entitled ***M/s Ge Countrywide Consumer Financial Services Ltd. Vs. Shri Prabhakar Kishan Khandare & Anr***., it was observed thus:-

"30. The matter however cannot rest here. It is apparent that the petitioner has caused the respondents to incur heavy expenses and to contest litigation in a city where they do not reside or work for gain. The petition was filed in the district courts wherein it was contested by the respondents and thereafter in the jurisdiction of this court. Having regard to the entire conspectus and facts noticed above, in my view, punitive and exemplary costs deserve to be imposed on the petitioner for its conduct in effecting the interpolations in the agreement and placing reliance on the same before this court as well as in compelling the respondents to contest litigation which it knew was not maintainable within the jurisdiction of this court. The petitioner also deliberately and mala fide concealed a material facts while filing the present petition. The petitioner has deliberately wasted precious court time with impunity and without remorse. Therefore, whether dismissal or withdrawl, the petitioner cannot be permitted to get away without compensation to the respondents and the justice system. The matter has been listed before this court on several dates and before the District Courts before that. Such conduct has not only to be condemned but it is necessary to impose such costs as would deter the petitioner and others like it from resorting to such tactics. Therefore, while dismissing the petition I hereby impose punitive and exemplary costs on the petitioner of Rs.1,20,000/- The petitioner shall apportion the costs which have been

awarded equally between the respondents, the Delhi High Court Lawyers' Social Security & Welfare Fund and the National Legal Aid Fund (NALSA). The costs shall be deposited by the petitioner within four weeks. Proof of deposit of the costs shall be placed before this court."

72. It has been held that the present petition is wholly misconceived and without merit. In my view, the petitioner has wasted valuable judicial time unjustifiably with the intent to oppress its adversaries for commercial gains. The petitioner has persisted with this petition despite having been unsuccessful in obtaining prohibitory order which it has sought in the earlier litigation. Undoubtedly, the petitioner must be required to compensate the other side by the costs which they would have incurred in the litigation and also to afford some measure of compensation to the judicial system.
73. In ***2006 (32) PTC 133 (Del.)*** entitled ***Austin Nichols & Anr. Vs. Arvind Behl & Anr.***, a learned Single Judge of this court has expressed the view that mere injunction does not subserve the interest of unsuccessful party and that the actual legal costs incurred by them for contesting the application would be awarded to the party that succeeds. The plaintiff had indicated that it had incurred costs of Rs.18,85,000/-. In these circumstances, as the plaintiff succeeded in the application, it was held that it was entitled to costs which were quantified at Rs.18,85,000/- even at the interlocutory stage.

217. In ***GE Countrywide Consumer Financial Services Ltd. vs. Shri Prabhakar Kishan Khandare & Anr.(supra)***, on the issue of costs, it was held that :-

"17. It is also necessary to notice the observations of the Apex Court while considering another act of fraudulent concealment of the material facts and filing of fraudulent litigation. In the pronouncement reported at ***2000(4) SCALE 692 Rajappa Hanamantha Ranoji v. Sri Mahadev Channabasappa & Ors***., the Apex Court held that such tendency deserves to be taken serious note of and curbed by passing appropriate orders including imposition of exemplary costs. In this behalf , the court observed thus :-

> “12. The appellant had admittedly knowledge of the eviction petition filed by respondent no. 1 against his brother respondent no. 1*(sic).* On the facts of the case, it was over simplification for the first appellate court to observe that what transpired between the appellant and his brother was of no consequence in so far as the appellant is concerned. It is evident that the appellant was set-up by his brother after having lost in the eviction petition upto High Court and the suit was filed in the year 1976 during the pendency of the execution proceedings of the eviction order. We fail to understand what appellant was doing from 1968 upto 1976. The net result of all this has been that despite lapse of nearly 30 years since filing of the eviction petition, respondent no. 1 was unable to recover the possession and that is despite the respondent no. 1 having succeeded up to High Court in the eviction case nearly a quarter century ago. For the aforesaid reasons we dismiss the appeal with costs.
> 13. It is distressing to note that many unscrupulous litigants in order to circumvent orders of Courts adopt dubious ways and take recourse to ingenious methods including filing of fraudulent litigation to defeat the orders of Courts. Such tendency deserves to be taken serious notices of and curbed by passing appropriate orders and issuing necessary directions including imposition of exemplary costs. As noticed, despite eviction order having become final nearly a quarter century ago, respondent no. 1 still could not enjoy the benefit of the said order and get possession because of the filing of the present suit by the brother of the person who had suffered the eviction order. Under these circumstances, we quantify the costs payable by the appellant to respondent no. 1 at Rs.25,000/-”

218. The time, therefore, appears to have come that just as in some other jurisdictions, in this country as well the losing party

must compensate the other side for actual costs incurred by it as well as the justice dispensation system for the court time expended on the lis. Only then will parties carefully assess legal merits in their case before filing or contesting misguided litigation. Courts are required to keep a record of the time spent in hearings, evidence, length of cross examinations and unnecessary evidence as well as arguments etc for this purpose. They also ought to ensure that parties place such information on record during the pendency of the case. Appropriate observations thereon must be recorded and discretion to impose costs carefully exercised in accordance with law.

219. Unfortunately, we do not have the benefit of the details or sufficient material in the present matter to pass such an order.

220. Valuable court time has been expended on a wholly misconceived claim raised by the petitioner. The project of 2004 is stated to be valued at around 14 to 15 crores of rupees whereas the 2009 project is valued at over rupees 567 crores.

The petitioner and respondent no. 3 are both located in Maharashtra as per the memo of parties. The record and several order sheets are testimony to the seriousness and weight of the contest. We have had the valuable assistance of the learned Attorney General of India as well as the learned Additional Solicitor General of India, Standing counsels for the Government of India, learned senior counsels for all the parties and several learned counsels who have assisted them and appeared before us during the protracted hearings. Judicial

notice can, therefore, be taken of the fact that every hearing in the matter may have caused parties to incur prohibitive costs. The respondent nos. 1 and 2 have been compelled to utilise public money for defending this misconceived petition. The loss to public interest could not be assessed or computed.

221. We are, therefore, of the view that the petitioner deserves to be burdened with exemplary costs in the matter.

Result

222. In view of the above discussion, we find no merit in the writ petition which is hereby dismissed subject to costs payable by the petitioner to each of the respondent nos. 1, 2 and 3 of Rupees two lakhs each.

The costs shall be paid by the petitioner to the respondents within a period of four weeks from today.

GITA MITTAL
(JUDGE)

INDERMEET KAUR
(JUDGE)

August 10th, 2010.
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