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AFR

Case :- PUBLIC INTEREST LITIGATION (PIL) No. - 60214 of 2012
Petitioner :- Federation Of NOIDA Residents Welfare Association
Respondent :- NOIDA Toll Bridge Company Ltd. And Others
Counsel for Petitioner :- Ranjit Saxena,Deepak Saxena
Counsel for Respondent :- C.S.C,A.S.G.I.(2012/5640),Ajay Bhanot,Shivam Saxena,Shivam Yadav

Hon'ble Arun Tandon,J.
Hon'ble Mrs. Sunita Agarwal,J.

(DELIVERED BY HON'BLE MRS. SUNITA AGARWAL, J.)

Heard Sri Ranjit Saxena, learned counsel assisted by Sri Deepak Saxena, learned Advocate for the petitioners, Sri P.H. Parikh and Sri Ajay Bhanot learned Senior Advocates assisted by Sri Shashank Shekhar Mishra learned counsel for respondent no. 1 namely Noida Toll Bridge Company, Sri C.B. Yadav learned Senior Advocate assisted by Sri Shivam Yadav learned counsel for the respondent no. 2 namely the NOIDA, Sri Piyush Joshi learned counsel for the Infrastructure Leasing and Financial Services Limited (IL&FS), respondent no. 9 and Sri C.B Yadav, learned Additional Advocate General has also appeared on behalf of the State and is assisted by Sri Shashank Shekhar Singh, learned Additional Chief Standing Counsel.

This is a public interest litigation challenging the levy and collection of toll in the name of User fee by NOIDA Toll Bridge Company from the Commuters for using the Eight-lane DND Flyway having stretch of 9.2 km. from NOIDA to Delhi.

The petitioner Federation Of NOIDA Residents Welfare Association is a society duly registered under the Societies Registration Act, 1860. The aims and objects of the society are to look after the welfare of the denizens of NOIDA, by espousing their cause before the authorities and to ensure that they are provided required Civic amenities and other developments in and around NOIDA.

New Okhla Industrial Development Authority (hereinafter referred to as “NOIDA”) has been established under the U.P. Industrial Area

Development Act, 1976 for planned development of the area within the territorial limits of NOIDA including roads and bridges etc. for the commuters.

'NOIDA' in furtherance of its obligation to provide road communication facilities to the denizens made an arrangement with a private company namely NOIDA Toll Bridge Company Limited (hereinafter referred as “NOIDA Toll Company” or the “Concessionaire”) for construction of bridge (DND flyway) under Build-Own-Operate-Transfer (“BOOT”) model. The NOIDA Toll Company is stated to be promoted by another Company known as Infrastructure Leasing & Financial Services Limited (in short referred as “IL&FS”).

Initially it was charging toll @ Rs. 8/- per entry of car which was later on hiked to Rs. 22/- and then to Rs. 25/- per car w.e.f. 9.2.2012. Similarly two wheelers are charged Rs. 12/- per vehicle.

The members of petitioner's Association who are using DND Flyway being aggrieved by the demand of the User fee made inquiry and it then transpired that the NOIDA Authority had authorised the private Company to impose and realise User fee under a Concession Agreement with the said Company known as NOIDA Toll Bridge Company. Under the said agreement, NOIDA Toll Company has been given power to increase the toll charges from time to time. Hence this Public Interest Litigation.

The parties have been heard at length, material on record has been examined, in detail. The facts on record of the present Public Interest Litigation (PIL) are:-

A Memorandum of Understanding (MOU) for Yamuna Bridge Project was arrived at on April 7' 1992 between New Okhla Industrial Development Authority (herein after referred to as 'NOIDA'), Delhi Administration (DA) and Infrastructure Leasing & Financial Services Limited (hereinafter referred to as 'IL&FS') a public financial company to establish an additional toll-way bridge with necessary facilities in the upstream of Okhla wayer for easier and fuel efficient movement of NOIDA area population to the southern part of Delhi and vice-versa. It was agreed that up-gradation of the

existing corridor by providing additional lanes shall be an integral part of the Yamuna Bridge Project.

The IL&FS was to be the promoter and developer of the Project. The function of IL&FS was to mobilize financial resources both from Domestic Capital Market as well as International Financers. Delhi Government was chosen as Nodel agency for conducting technical studies, feasibility report and preparation of DPR for the Project. NOIDA Authority was to provide finances up to Rs. 10 Crores for the Project and to acquire the land which lies in the State of U.P. for construction of the bridge alongwith access roads and to deliver physical possession of the land so acquired to IL&FS for the execution of the Project. This apart NOIDA Authority was to solicit and obtain required permission from the Authorities of State of U.P. and Delhi.

Salient features of the **MOU** are;

(1) The Project was conceived as toll-way Project on a Build-Operate-Transfer ("BOT") basis.

(2) The financial resources as required for the Project would be mobilized by IL&FS and the investment in the Project would be recovered by levy of **toll** on the users of the link bridge.

(3) IL&FS would be entitled to recover its capital outlays for the execution of the bridge together with interest @ 20% per annum from the date of disbursement of funds till the date of recovery by the levy and collection of **toll** on the vehicles intend to use the proposed link road, subject to the permission and approval to be granted by the Union/State Government.

(4) After full recovery of the investment landed cost of IL&FS for the Project, NOIDA Authority would be entitled to continue to levy and collect toll for the recovery of their remainder investment, if any, with due permission and consent of the State Government.

(5) The Rate of Return or Interest charge would be revisable on the changes in the policy of the Reserve Bank of India and movements in the capital market.

(6) The role of IL&FS was to perform the functions to organize and arrange funds, preparation of DPR, Coordination and finalisation of the study and technical supervision, execution of the Project including preparation and issue of tender and contract documents, finalising the structure for implementation of the Project and lastly collection of toll after commissioning of the Project and ongoing maintenance of the Project till handing over it to NOIDA Authority.

(7) NOIDA's responsibility was to provide land and external support i.e. permissions from the concerned authority for execution of the Project.

(8) Delhi administration was to act as Nodal agency for conducting technical studies, feasibility report and preparation of DPR for the Project and to assist IL&FS and NOIDA Authority to obtain other permission required for the execution of the Project as per the local rules and regulations in force.

(9) It was agreed that IL&FS shall decide in consultation with Government of U.P. and Union, as the case may be, the rates of toll to be levied on the vehicles intending to use the proposed bridge. The levy of toll shall be based on the benefits provided to the Users.

(10) It was agreed that IL&FS shall be entitled to recover one time management fee @ 1% of the total cost of the Project as certified by NOIDA Authority at the commencement of the bridge for public use and the said fee shall form part of the Landed cost of the Project to be recovered through the levy of toll. Any income generated from advertisements and utilisation of space in any other manner for commercial use of public places at the location on the bridge, project roads and adjacent corridors would be included alongwith the income from the toll collections for computation of returns on investment.

(11) All costs incurred for the development of the Project shall be treated as part of the Project cost and shall be recoverable through the levy of toll.

(12) The NOIDA Authority may verify the statement of cost

incurred by IL&FS.

(13) Lastly IL&FS was to be the lead financier for the Project.

Pursuant to the MOU, a Committee known as “Steering Committee” comprising of representatives of Government of U.P., Delhi Government, NOIDA and IL&FS was established to monitor the progress of the Project. It was decided by the Steering Committee that the Project be implemented by a Cooperate entity promoted by IL&FS. The respondent no. 1 namely NOIDA Toll Bridge Company (hereinafter referred to as the “Concessionaire”) was incorporated on April 8, 1996 to implement the NOIDA Toll Bridge Project. The MOU was placed before the Cabinet of Government of U.P. in August 1997. The Cabinet approved the Project package and constituted an Empowered Committee to make special recommendation on the Concession Agreement as well as the Support Agreement. A Committee was constituted for finalising the Concession Agreement and the Support Agreement. On November 12, 1997, the Concession Agreement for the NOIDA Bridge Toll Project was executed between the NOIDA Authority, IL&FS and NOIDA Toll Bridge Company. A support agreement dated 14.1.1998 was executed by the Government of U.P. and the Government of Delhi to effectuate the terms of the Agreement. On 23.10.1998, a Delhi land lease deed was executed between the President of India and NOIDA. A Delhi land sub-lease deed dated 23.10.1998 was executed between NOIDA Authority and Toll Bridge Company.

NOIDA land lease dated 23.10.1998 was executed between NOIDA and Toll Bridge Company. The sum of Rs. 5.7 Crores was paid to Delhi Government, Rs. 1.4 Crores to NOIDA and Rs. 3.98 Crores to Project affected persons as compensation. On August 31' 1999, Ashram Flyway site lease deed was executed between the Government of Delhi and NOIDA Toll Bridge Company to effectuate construction of Ashram Flyway contemplated at the Ashram Chowk as a part of the Concession Agreement. The Project was commissioned on February 6' 2001 and the bridge known as DND Flyway with approach roads was opened to traffic on

February 7, 2001. On 30.10.2001, Ashram Flyway was commissioned and opened for public.

We may also set out the relevant clauses of Concession Agreement dated 12th November, 1997 arrived between the NOIDA Authority, IL&FS termed as **"Sponsor"** and NOIDA Toll Bridge Project Company Limited referred to as the **"Concessionaire"**.

It may be noted that the **Articles** of the Concession Agreement referred to Chapter Heading and the **Sections** are mentioned as various Clauses of the Concession Agreement.

(1) In the opening paragraphs of the Concession Agreement, the reasons to undertake the Project by NOIDA with the support of Concessionaire and Sponsor have been narrated. It states that a study was conducted by National Capital Region Planning Board, a body constituted under the National Capital Region Planning Board Act, 1985 to review the requirements for the development of infrastructure facility in relation to Delhi and NOIDA regions. The study revealed that there was an urgent need for appropriate linkages or facilities for crossing the Yamuna river and easing the traffic congestion between Delhi and NOIDA. The parties to the Concession Agreement, therefore, agreed to construct the Delhi-NOIDA Bridge capable of handling sufficient volume of traffic so as to provide adequate, appropriate and convenient communication between Delhi and NOIDA, referred thereafter as the "Project". The IL&FS had agreed to act as "Promoter".

(2) Pursuant to the Memorandum of Understanding (MOU) arrived on April 7, 1992, a Committee consisting of representatives of Government of U.P. (GOUP), the Delhi Government (DG), the Ministry of Urban Affairs and Development, Government Of India, the Delhi Development Authority, the NOIDA Authority and IL&FS (which was termed as "the Steering Committee") was established to monitor the progress of the Project.

(3) Clause (f) of the Concession Agreement provides that the Steering Committee was chaired by the Secretary of the Ministry of Urban Affairs and Development, Government of India. Upon satisfaction in full of

all conditions precedent set forth in Article 3 of the Concession Agreement, the Steering Committee will be dissolved and will have no further role in the Project.

With the approval of the Steering Committee a detailed Project Report was prepared after the Feasibility Study conducted by Kampsax another private company engaged for the purpose.

(4) Clause (h) says that the Steering Committee had determined that the Project should be a toll-way connecting Maharani Bagh, at the Delhi end, with Okhla Barrage, at the NOIDA end and would comprise of the NOIDA Bridge with approach roads.

(5) Clause (i) says that in order to ease the traffic congestion that would result due to the increase in volume of traffic, due to construction of NOIDA Bridge, a Flyway be constructed at Ashram Chowk to be included as part of the Project.

(6) Clause (j) further says that the Steering Committee determined, after due consideration of DG's proposal that the Concessionaire shall construct a flyover at Ashram Chowk as part of the Project upon entering into the separate construction agreement with the Concessionaire on such terms and conditions reasonably acceptable to the Concessionaire, provided further that DG vests complete control and vacant possession of the Ashram Flyover Site to the Concessionaire till the commissioning of the Ashram Flyover.

(7) As per Clause (k), Steering Committee decided that the Project be implemented by a Corporate entity promoted by IL&FS incorporated in the State of Uttar Pradesh.

(8) Pursuant thereto, as per Clause (l) the IL&FS incorporated NOIDA Toll Bridge Company Limited for the purposes of execution of the agreement for construction of NOIDA Bridge. IL&FS remained as the Sponsor of the Project only.

(9) Clause (m) says that the Steering Committee further decided that the Project would be implemented by the Concessionaire through private financing on BOT basis under concessions and authority to be

granted by NOIDA Authority in exercise of its powers under the Act and that DG and GOUP shall execute the Support Agreement for making available the land by lease and to extend full cooperation to the Project.

(10) Under Clause (o), it is provided that the NOIDA Authority, after obtaining the prior approval of GOUP, shall formulate rules under the provisions of the Act providing for the collection of fee from the users of infrastructure facilities by NOIDA or such person as authorised under the rules for and on behalf of NOIDA.

Section 1.1 is the definition clause. Relevant definitions will be considered at appropriate places hereinafter.

Under Section 2.1 of the Agreement, NOIDA agreed irrevocably for grant to the Concessionaire the exclusive right and authority during the "Concession Period" to develop, establish, finance, design, construct, operate, maintain the NOIDA Bridge as an Infrastructure Facility and on the other hand, the Concessionaire agreed to accept the Concession granted to it by NOIDA and to implement the Project, in accordance with the terms and conditions of the Agreement.

Section 2.1(b) (i) & (iv) say that NOIDA further grants to the Concessionaire the exclusive right and authority during the Concession Period in accordance with the terms and conditions of the agreement to determine, demand, collect, retain and appropriate a fee from the Users of the NOIDA Bridge and apply the same in order to recover the Total Cost of Project and the Returns thereon.

Section 2.2 (a) says that NOIDA undertook and agreed not to propose, recommend, implement or permit to be implemented any bridge or other road transport service network (including tunnels) which does not involve the collection of fee or other charges or involves the collection of fee or other charges which are lower than the fee being charged for the NOIDA Bridge for the spans within the area as described in "Appendix E" of the Agreement for a period of 10 years or till the NOIDA Bridge achieves its Full Rated Capacity, whichever is later.

Section 2.2 (e) says that NOIDA undertook and agreed not to acquire

or take possession of the NOIDA Bridge otherwise than in accordance with Section 16.7.

Clause (f) of Section 2.2 says that NOIDA agreed not to levy any fee, charge or tax on the use of the NOIDA Bridge, or close down or otherwise cause any diversion of traffic on the approach roads to the Noida bridge so as to materially affect the free flow of traffic to and from the Noida bridge.

Section 2.3 (a) provides for the "Concession Period" to commence on the "Effective Date" and extend until (I) the period of 30 years from the Effective Date OR (ii) the date on which the concessionaire shall recover the Total Cost of the Project and the Returns as determined by the Independent Engineer and Independent Auditor in accordance with Section 14 of the agreement, through appropriation of fee or Development income or any other method.

Clause (b) of Section 2.3 says that upon the termination of the Concession Agreement, the Concessionaire shall transfer the Project Assets to NOIDA in accordance with the terms of Section 19.

Section 2.4 provides for extension of Concession Period and says that in the event the concessionaire is not able to recover the Total Cost of the Project and the Returns thereon upto the date of expiry of 30 years from the "Effective Date", the Concession Period shall, without qualification, be extended by NOIDA for a period of two years at a time, until the Total Cost of Project and the Returns thereon is recovered.

Section 2.5, however, clarifies that in the event the Concessionaire recovers the Total Cost of Project and the Returns thereon, as determined by the Independent Engineer and the Independent Auditor prior to the date 30 years from the Effective date, the Concessionaire shall transfer the Project Assets to NOIDA, in accordance with the provisions of Article 19.

Article 3 contains Conditions Precedent i.e. obligations of the Concessionaire and NOIDA.

Relevant Section 3.1 (a) (iv) provides for obligation of NOIDA to formulate regulations under Section 19 of the Act enabling the levy of Fee and NOIDA to authorise the Concessionaire to collect and appropriate the

fee.

Section 3.3 (b) says that in the event the conditions precedents are partially satisfied and the Concessionaire determines to commence work as set forth in subsection (a) of the Section 3.3, the Concessionaire shall deliver a Certificate of Commencement of Concession to NOIDA known as “Certificate of Commencement”. Upon issuance of the Certificate of Commencement, the term of the “Concession Period” shall commence (the “Effective Date”).

Section 3.4 (b) says that the Concessionaire, within four weeks of determination that all the conditions precedent set forth in Section 3.1 have been complied with to its satisfaction, shall be under obligation to issue a Certificate of Compliance with conditions precedent known as “Certificate of Compliance”.

Section 4.1 provides for grant of Development Rights in the event that the Independent Auditor determines that the fee collected from the Project is not generating sufficient revenues for the Concessionaire to recover the Total Cost of Project and the Returns thereon.

The “Development Rights” has been defined in Section 1.1 of the Concession Agreement which reads as under:-

“Development Rights: *means such additional rights, property and assets that are not part of and are not anticipated to be part of the Project as on the date of this Agreement but are granted to the Concessionaire by NOIDA in relation to the Project in accordance with Article 4 for enabling the Concessionaire to generate additional revenue, and may include without in any manner being limited to, provision of advertising services, right to develop hotels, restaurants and other facilities, services contracts and agreements and/or real property interests.”*

Upon receipt of such a request from the Concessionaire, the NOIDA **may in its sole discretion, grant Development Rights** to the Concessionaire for the generation of Development Income.

A separate agreement is to be arrived for grant of Development Rights which shall be governed by the terms of such agreement.

Section 6.1 sets out the obligations of the parties to the agreement namely NOIDA and the Concessionaire during the development stage of the Project.

Section 6.3-A (f) says that Concessionaire shall maintain the NOIDA Bridge till the end of Concession Period and transfer it to NOIDA in fair condition, subject to normal wear and tear and having regard to the nature of the asset, construction and life of the Project, as determined by the Independent Engineer.

Section 8.1 deals with the appointment of the "Independent Engineer" jointly by Lenders, Concessionaire and NOIDA for the project during the entire term of the Concession Period, who shall issue and sign the Virtual Completion Certificate and Final Completion Certificate.

The Independent Engineer alongwith the Independent Auditor shall verify the Cost of Construction of the Project as determined by the Project Engineer under Section 8.3. The Cost of Construction so determined and certified by the Independent Engineer shall be presented to NOIDA and shall be considered for the purposes of computing the Project Cost.

Section 8.3 says that the Concessionaire shall have the right to appoint Project Engineer who shall determine the Cost of Construction of the project and submit it to the Independent Engineer for finalization in accordance with Section 8.1(c).

"Cost of Construction" is defined in Section 1.1 as under:-

> ***"Cost of Construction:*** *means (a) all costs and expenses incurred for the design, development, construction and testing of the Facilities in accordance with Appendix "A" to "D" including any approved variations therefrom, which includes all payments to be incurred by the Concessionaire for this purpose under the Project Contracts. The Independent Engineer and the Independent Auditor shall approve the Cost of Construction for the purposes of determining the Project Cost."*

Sections 9.4 and 9.5 provide for completion and commissioning of the NOIDA bridge and the obligation of NOIDA to issue a notification, if required under the rules framed by it under Section 19 of Uttar Pradesh Industrial

Area Development Act, 1976 to enable the Concessionaire to demand, collect, retain and appropriate fee, for and on behalf of NOIDA, from the Users of the NOIDA Bridge.

Article 10 deals with the appointment of the Independent Auditor by Lenders, Concessionaire and NOIDA, who shall determine and certify the Project Cost in consultation with the Independent Engineer and shall submit report which determines Total Cost of Project on the Project Commissioning Date.

Article 13 deals with the collection of fee, determination of fee, annual revision of fee, establishment of fee Review Committee.

Relevant Clauses of Article 13 are quoted as under:-

*"**Section 13.1 Collection of fee***

(a) The fee shall be determined by the fee Review Committee in accordance with the provision of this Article 13 except for the Base fee Rates which have already been determined and approved by the Steering Committee and has been specified in Section 13.2 herein below.

(b) The fee shall be, collected, retained and appropriated from the Users of the NOIDA Bridge by the Concessionaire, commencing on the Project Commissioning Date.

(c) Power to Concessionaire to delegate its function to collect fee to the O&M contract in accordance with the Rules framed by NOIDA.

(d) NOIDA and the Concessionaire expressly recognizes (i) the right of the fee Review Committee to determine fee in accordance with the provisions of this Agreement, and the rules framed by NOIDA in relation to levy of fee under the Act. (ii) .xxxxxxxxxx.....xxxxxxxx.

(e) In the event that the fee is not recoverable for any reason related to a Change in Law or as a result of any restriction or injunction based on any process of law, the Concessionaire shall be entitled to receive compensation from NOIDA in accordance with Section 18."

Section 13.2 Base Fee Rate

(a) The Fee rates set forth below (the "Base Fee Rate") have been determined and set according to 1996 figures and shall be revised to

determine the initial fee to be applied to the Users of the Project on the Project Commissioning Date (the “Initial Fee Rate”). The Following are the Base Rates:

Type of Vehicle	***fee for a One Way Trip (Rupees)***
Earth Moving/Construction Vehicles	*30.00*
For each additional axle beyond 2-axles	*10.00*
Truck, 2-axles	*20.00*
Bus, 2-axls	*30.00*
Light Commercial Vehicle	*20.00*
Cars and other four wheelers/Three-Wheelers	*10.00*
Two-Wheelers	*5.00*
Non-motorized Vehicles	*Nil*

Section 13.3 Annual Revision of Fee Rate by the Fee Review Committee

Section 13.4 deals with the establishment and constitution of Fee Review Committee

Section 13.5 provides contingency in which the existing rates of fee are to be reviewed by the fee Review Committee.

Article 14 provides for Total Cost of Project and Calculation of Returns as under:-

Section 14.1 Total Cost of Project

(a) The Project Cost shall be determined as on the Project Commissioning Date by the Independent Auditor who shall seek the assistance of the Independent Engineer to determine the Cost of Construction component of the Project Cost.

(b) The Total Cost of Project shall be the aggregate of:

(i) Project Cost;

(ii) Major Maintenance Expenses; and

(iii) shortfalls in the recovery of Returns in a specific financial year as per the formula in Section 14.2(a).

Section 14.2 Calculation of Returns

(a) The amounts available for appropriation by the Concessionaire for the purpose of recovering the Total Cost of Project and the Returns thereon, as illustrated in Appendix F, shall be calculated at annual intervals from the Effective Date in the following manner:

Start with: Gross revenues from fee collections, income from advertising and Development Income

less O&M Expenses,

less Taxes (excluding any customs or import duties)

(b) The Total Cost of Project and the recovery thereof and of the Returns shall be determined by the Concessionaire annually in arrears, and certified by the Independent Auditor.

The 'Project Cost', 'Returns' and “Effective Date” have been defined in Section 1.1 of the Concession Agreement, which reads as under:-

“**Project Cost** means, collectively (a) the Cost of Construction and (b) the Other Costs of Commissioning. The Independent Auditor shall, in consultation with the Independent Engineer, determine the Project Cost as on the Project Commissioning Date.”

“**Returns** means the returns on the Total Cost of Project recoverable by the Concessionaire from the Effective Date at a rate of 20% per annum, as defined in Section 14.2 of this Agreement.”

“The **Effective Date** as defined in Section 1.1 of the definition clause of the agreement and referred to in Section 2.3 as above, means the earlier of two dates (a) the date of issuance of Certificate of Compliance or (b) the date of issuance of Certificate of the Commencement.”

The 'O&M Expense', 'Other Costs of Commissioning' and 'Major Maintenance Expenses' have been defined in Section 1.1 of the Concession Agreement which, reads as under:-

“**O&M Expense”** means, for any period commencing after the Project Commissioning Date, all costs and expenses incurred by the Concessionaire or the O&M Contractor on behalf of the Concessionaire in

relation to the operation and maintenance of the NOIDA Bridge, other than Major Maintenance Expenses, including, without limitation (a) all payments made to the Contractor under the O&M Contract (b) all cost of salaries and other employee compensation, (c) all cost of materials, supplies, utilities and other services, (d) all premiums for insurance, (e) all Taxes, other than Corporate Tax payable by the Concessionaire and other duties imposed upon or measured by income or receipts, interest, additions to tax, expenses and other similar costs associated therewith, (f) all franchise, licensing, excise, property and other similar taxes and all costs and fees incurred in order to obtain and maintain all Clearances necessary for the operation and maintenance of the NOIDA Bridge at their full rated capacity (g) all cost of settlement of pending or threatened actions, suits, claims and proceedings and all related fines, judgments and other costs (including, without limitation, attorneys' fees) associated therewith, other than the actions, suits, claims and proceedings resulting from the negligence or breach of the Concession Agreement by the Concessionaire (h) all repair, replacement and maintenance costs of the NOIDA Bridge, and all other expenditures of the Concessionaire required under applicable law or under applicable Clearances necessary for the operation and maintenance of the NOIDA Bridge at their full rated capacity (excluding all Major Maintenance Expenses), and (i) all fees and expenses of consultants and experts retained by the Concessionaire (including, without limitation, attorneys' and accountants' fees) in the ordinary course of business. The O&M Expense shall be determined and certified by the Independent Auditor.

“Other Costs of Commissioning” means all costs and expenses of whatever kind, as specified in the accounts maintained by the Concessionaire, NOIDA, Sponsor, GOUP and DG in the format approved by the Independent Auditor and are duly audited by the Independent Auditor, incurred in respect of the Project, prior to the Project Commissioning Date, other than the cost of Construction including but without being limited to: (a) cost incurred in relation to the acquisition and preparation of the land.....xxxx.....(b) all pre-operative expenses incurred by NOIDA, the Sponsor and the Concessionaire prior to entering

into this Agreement, (c) management overhead such as ....xxxxxxx.....(d) all consulting and advisory service fees incurred prior to the Project Commissioning Date, including.....xxxxx.....(e) expenses incurred by the Concessionaire for mobilization of financial resources,.....xxxxxxxx..... (f) any duties (including stamp duty payable on the Financing Agreements), taxes, levies, fees and commissions, duly grossed up, (g) other specific expenses as agreed upon and incurred by the Concessionaire, Sponsor, NOIDA, GOUP and DG under the Support Agreement or their respective agencies during implementation of the Project, (h) all costs of the insurance required to be obtained in connection with the Project prior to the Project Commissioning Date and (i) the Management fee. It is provided that only such amounts as are maintained in the format approved by the Independent Auditor shall be considered for determining the Other Costs of Commissioning.

"Major Maintenance Expenses" means all expenses incurred by the Concessionaire for any overhaul of, or major maintenance procedure for, the NOIDA Bridge or any portion thereof that requires significant disassembly or shutdown of the NOIDA Bridge or any portion thereof (including, without limitation, teardowns, overhauls, capital improvements and replacements of major components thereof), which overhauls or procedures are: (i) to be conducted upon the passage of the number of million standard axles specified in Appendix G or (ii) not regularly scheduled. The Independent Engineer shall determine the necessity, of conducting a major maintenance and certify that the work has been executed in accordance with specifications.

Article 17 provides "the Events of Default of NOIDA" which are not caused by a default of the Concessionaire or Force Majeure as also "Events of Default of the Concessionaire" and provides that the parties shall have a right (vice-versa) to terminate the agreement in accordance with Article 18.

Section 17.1 provides the "Events of Default of NOIDA", which if not cured within the time period permitted, shall provide the Concessionaire the right to terminate the agreement in accordance with Article 18.

Section 17.2 provides the events of default of Concessionaire, the right to NOIDA to terminate the agreement in accordance with Article 18.

Article 18.1 provides for right and obligations of the parties in the event of suspension and termination of agreement in the event of default of both NOIDA and the Concessionaire.

Section 18.1 Termination by Concessionaire for a NOIDA Event of Default, Section 18.2 Termination by NOIDA for a Concessionaire Event of Default.

Provide that in such eventuality, all of the Concessionaire's right, title and interest in and to the Project Assets shall be transferred to NOIDA or its nominated agency in accordance with Article 19 and Article 17; respectively, and NOIDA or its nominated agency, as the case may be, shall accept such transfer. However, as a precondition to such transfer, NOIDA shall have to pay the Concessionaire, the aggregate of (i) all sums due and owing to the Lenders under the respective Financing Agreements, including any interest accrued thereon and any other amounts due and payable; (ii) an amount equal to the Total Cost of Project and the Returns thereon, outstanding until the termination date of the Concession Period as per this Article {excluding the amounts specified in sub-clause (i)}[only in case of NOIDA EVENT OF DEFAULT (under Section 18.13)] and (iii) all such additional costs that may be incurred in transferring the NOIDA Bridge as specified in Section 19.7(b); after deducting the aggregate of (i) any cash reserve(s) created for meeting debt service obligations of the Concessionaire, provided that such reserve(s) is utilised for the purpose for which it was created and (ii) the proceeds from the Insurance covers; as determined by the Independent Auditor; and the Concessionaire shall deliver to NOIDA all Proprietary Material and all correspondence and other documents concerning the project in the Concessionaire's control or possession. The privileged information, if any, shall be delivered to NOIDA in accordance with the agreement under which such privileged information had been delivered to the Concessionaire.

It is, thereafter, provided that inability to commence the construction of

an/or commission of the Ashram Flyover shall not be a Concessionaire Event of Default enabling NOIDA to terminate this Agreement.

Section 18.5 says that the Dispute arising out of or in relation to agreement shall be referred to Arbitrator.

Section 19.1 provides for the Transfer of Project Assets to NOIDA & **Section 19.7 (a) & (b)-** provides for Transfer Costs, it reads as under:-

> *"(a) The Project Assets shall be transferred to NOIDA for a sum of Rupee 1.00*
>
> *(b) NOIDA Shall be responsible for the costs and expenses, including stamp duties, taxes, legal fees and expenses, incurred in connection with the transfer of the Project Assets to NOIDA or its nominated agency. NOIDA shall at its own cost obtain or effect all Clearances and take such other actions as may be necessary for such transfer."*

Article 25 provides for Constitution and Function of the Project Oversight Board which is a single member body comprising of a Person duly qualified having experience in the field of highways bridge construction or operation and maintenance of roads and bridges or having experience in settling in commercial disputes to be appointed by consensus between NOIDA and the Concessionaire. In the event of no consensus between NOIDA and Concessionaire as to the constitution of the Project Oversight Board, then the Person recommended by the Lenders shall be appointed as constituting the Project Oversight Board.

Article 26 provides for dispute resolution proceedings under the Agreement amongst parties to be settled by a panel of arbitrators ((Arbitration Panel) in accordance with the Indian Arbitration and Conciliation Act, 1996 which consist of three parties.

Section 27.4 provides for **Severance of Terms** to be reproduced at an appropriate place.

IL&FS is projected as the Promoter of the Concessionaire and termed as "Sponsor" under the Concession Agreement which has agreed to be (a) share holder in the Concessionaire and; (b) a confirming

party to the Agreement which (c) which shall provide all reasonable support to the Concessionaire for the implementation of the Project until the Transfer date, Management Fee of 1% of the Project cost is payable to the “Sponsor” upon Financial close which is not to include in the Project cost for the purpose of calculating the Management Fee.

The factual grounds for challenge, (besides the legal pleas) with reference to different clauses of agreement as notedabove taken by the petitioner are that the total cost of the Project incurred by the Concessionaire relating to DND Flyover (alongwith Ashram Chawk) and support roads etc. till the date of commissioning as stated by Concessionaire was approx Rs. 408.17 Crores. The cumulative toll income from 2001 to 2014 is Rs. 803.524 Crores and other income from advertisement such as hoardings etc., from 2001 to 2014 is Rs. 38.01 Crores. Thus the total income upto 31.3.2014 comes to Rs. 841.25 Crores which is more than double the total cost of project incurred by the Concessionaire whereas after deducting the expenses including payment of taxes and the initial losses suffered during the year 2001 to 2005, the **Cumulative Net Profit as on 31.3.2014 is Rs 165.80 Crores**. Thus in any case, the Concessionaire had earned profits more than 20% of its investment after exclusion of expenses upto 31.3.2014. Thereafter for another two years and 6 months i.e. from 1.4.2014 to September 2016 further toll/user fee has been recovered which according to the petitioner would be around 300 crores. The concept of user fee/toll is to meet out the “Cost of Construction” plus some reasonable returns on the investment. As soon as the entire Cost of Construction plus reasonable returns had been realised by way of toll, the bridge and the road is to be exempted from imposition of toll/user fee. There is no justification for continuing the recovery of toll thereafter, for the use of the bridge/DND flyover.

The Concessionaire has been able to recover not only the Cost of Construction including the cost of maintenance of the bridge but reasonable returns also. However, based on the formula in “Annexure F” of the agreement readwith Article 14 of the Concession Agreement, the cost of Project as per the company's Auditor report as on 31.3.2012 is Rs. 2339.69

Crores which increased to Rs. 2955.1 Crores as on 31.3.2013 and Rs. 3448.95 Crores as on 31.3.2014. Till 31.3.2016, the total cost of project based on 20% assured returns reached a figure of Rs. 5,000 Crores plus. This amount will go on increasing further in view of the formula adopted in Article 14 of the Concession Agreement to determine the Total cost of project. The Total cost of Project can never be recovered and the bridge will never be free from levy of Toll. There is no chance of handing over bridge/Project Assets to NOIDA Authority even after 30 years nor NOIDA can terminate the agreement as in that eventuality, it would be under obligation to pay the Concessionaire an amount equal to the Total Project Cost and returns thereon apart from other expenses set out in Article 18.1, outstanding till the termination date. Since the accrued Total Project Cost due to the Concessionaire has reached a astronomical figure of Rs. 5000 Crores (approx), as on 31.3.2016, it is almost impossible for NOIDA to repudiate the agreement. Furthermore, in case of termination even on the Concessionaire Event of Default, liability is fixed on NOIDA to compensate the Concessionaire for the debt and debt service outstanding in accordance with Section 18.1 of the agreement.

The counsel for the petitioner refers to the Company's Auditor report dated 20.6.2012 for the year ended on 31.3.2012 enclosed with the supplementary affidavit dated 9.1.2013 of the petitioner (para '134') for referring to the Unrecovered Cost of Project, relevant portion is reproduced below:-

> *"The company considers that they will not be able to earn the assured return under the concession agreement over 30 years. The company has an assured extension of the concession as required to achieve project cost and designated returns. Based on the independent professional expert advice,* ***the estimated life of the bridge has now been considered as 100 years****".*

Learned counsel for the petitioner on the above facts with reference to the clauses of the Concession Agreement as noted above submits that various clauses of the Concession Agreement are against the public interest as Article 14 of the Concession Agreement gives a right to the

Concessionaire to collect “User Fees” not only to set off the Cost of the Project but also assured returns @ 20% per annum. The Concession period has to be extended beyond 30 years i.e. the initial period of BOOT in case of unrecovered Total Cost of project. There is no cap on the Total Project Cost and O&M expenses which are to be ultimately borne by Users. Increase in the Total Project Cost would mean that toll levels and the Concession period have to be adjusted upwards to permit recovery of Cost and returns. Users would end up paying unnecessary high tolls and for a longer period than warranted.

On the legal side, it is contended that no tender was invited before grant of contract for DND Flyover, there was no advertisement, no bidding. It was a clandestine deal that too with the view to benefit a private company at the cost of public. The award of the contract is, therefore, in violation of Article 14 of the Constitution of India.

Moreover, the concept of toll/user fee is only to realise the cost of construction and any other expenses extendable thereto. There cannot be an agreement by public body, with an aim of generating profits out of the Project, in favour of a private company at the expense of the common public.

Reliance is placed upon the judgment of Apex Court in **Mandsaur Transport Association versus State of M.P. and others**[1], **State of U.P. and others vs. Devi Dayal Singh and others**[2] **Kamaljeet Singh and others vs. Municipal Board, Pilkhwa and others**[3] and the Division Bench judgment of Patna High Court in **Baldev Chaudhary vs. State of Bihar**[4] to submit that only the cost of actual construction and some reasonable amount towards maintenance of roads can be recovered that too only by the State Government which can charge the toll tax.

Learned counsel for the petitioner also placed reliance upon the judgment of the Apex Court in **Janta Hill Truck Owners Association vs. Shailang Area Coal Dealer and Truck Owner Association and others**[5]

1 2001 (9) Supreme Court Cases 328
2 2000 (3) Supreme Court Cases 5
3 1986 (4) Supreme Court Cases 174
4 1997 (2) BLJR 1504
5 2009 (8) SCC 492

for the purpose that “user charges” are referable to reasonable amount of fee coupled with services rendered to individual that too by framing rules to regulate the levy.

It is urged that the Apex Court in **Institute of Law Chandigarh vs. Neeraj Sharma**[6] has pronounced categorically that no body can be allowed to make profit with the aid of public property and the authority of allotment should not be misused. There is no promissory estoppel for compelling the Government to implement a condition which is prohibited by law.

Reference is also made to **Sharma Transport vs. Govt. of A.P.**[7].

NOIDA Authority paid Rs. 10 Crores and gave 68 acres of land for the Project on a lease for Rs. 1/- per annum. Lease right also include right to mortgage the land. Only 32 acres of land has been utilized whereas the remaining 36 acres of surplus public land can be transferred to third party under the Agreement.

NOIDA has admitted in its counter affidavit that Section 14 of the Agreement read with Annexure 'F', i.e. the method of computing total project cost is not in public interest. The Concession Agreement, therefore, is not serving public interest. The Independent Auditor, the Independent Engineer are not appointed by NOIDA Authority, it has no control, no mechanics and no say in computation of total project cost by the Concessionaire by adopting unreasonable formula agreed between the parties which ensures that the Project cost is always escalating and returns can never match the Total Cost of Project, even if the term of contract is extended.

The public interest is in ensuring that only “appropriate” expenses are taken care of, the Agreement has not provided specifications nor any reasonable norms as to what would be the extent of expenses to be allowed. There is a cap on the expenses. The Concessionaire is at liberty to add expenses in the estimate of cost without any limitation. For instance attorney fees associated with the settling of pending or threatened suits/claims allowed the Concessionaire to add unlimited and uncaped

6 2015 (1) SCC 720
7 2002 (2) SCC 188

expenses to the Project cost. This is against the public interest.

The selection of Independent Auditor and Independent Engineer who have substantial decision making power in certification of compliance of quality standards, approval of construction, O&M costs, verification of calculation entertaining request for fee revision, determination of occurrence of Force Majeure and determination of process to restore financial viability of the Project, including award of development rights is without any procedure and criteria specified in the Agreement. The NOIDA has no say in the matter. It has to accept their reports on the face value.

The Project Oversight Board is a single member body. It has been assigned role to resolve any dispute that may arise in relation to any decision or findings of the Independent Engineer or the Independent Auditor sans well specified and transparent procedure for selection.

The Blog, a case study by Kapil Bajaj displayed by the Planning Commission on its Website dated 29th March, 2011, annexed as ***Annexure S.A. '2'*** to the supplementary affidavit dated 9.1.2013, has been referred by the learned counsel for the petitioner to impress upon his arguments.

The contention is that this situation has arisen because of the interwoven favourably drafted clauses of the Concession Agreement, for the Concessionaire. The unfair, untenable and irrational clauses in the contract make it arbitrary, unjust, opposed to public policy and amenable to judicial review.

In fact, NOIDA Toll Bridge Company instead of treating it as a project of the Public, for the Public is using it as a source for income of the Company creating a situation of clash between Public interest and private interest. In such conflict, the public interest will have to prevail.

Article 13 of the Agreement which provides for annual review of fee and revision in line with changes in C.P.I. (Consumer Price Index) published by the Reserve Bank of India is against Public Interest.

The Apex Court in **Padma vs. Hira Lal Moti Lal Desarda and others**[8] has not approved of such action by Public Authority and cancelled

8 2002 (7) SCC 564

the lease in a public interest litigation. Action of State in granting the contract in violation of Article 14 makes it unfair and arbitrary.

Reference to **Humanity and another vs. State of West Bengal**[9], **Akhil Bhartiya Upbhokta Congress vs. State of Madhya Pradesh**[10] and **City Industrial Development Corporation vs. Platinum Entertainment and others**[11] has been made.

Placing reliance upon the judgment of the Apex Court in **LIC of India & others vs. Consumer Education & Research Centre & others**[12] and **Kumari Shrilekha Vidyarthi vs. State of U.P.**[13], it is urged by the learned counsel for the petitioner that any action of the State or its instrumentality or public authority having public element if arbitrary, unjust and unfair, the Court under writ jurisdiction has a duly act to protect the public from such acts of public authority . It has the power to remedy injustice. Judicial review is permitted in public policy and contractual matters on th plea of arbitrary Sate action. The action of NOIDA in awarding the Concession Agreement dated 10.11.1997 in favour of NOIDA Toll Bridge Company i.e. the Concessionaire fails to satisfy the test of reasonableness and public interest as has been laid down by the Apex Court in **M/s. Kasturi Lal Lakshmi Reddy vs. State of Jammu & Kashmir**[14].

Sri P.H. Parikh Senior Advocate appearing on behalf of respondent no.1, NOIDA Toll Bridge Company i.e. the Concessionaire raised preliminary objections that the present petition is liable to be dismissed on the ground of latches which is completely unexplained. The PIL has been filed in the year 2012 to challenge MOU executed in April on 1992 and the Concession Agreement entered into in November, 1997 with further prayer to stop collection of user fee for use of the bridge that was completed and made operational in the year 2001. Ministry of Urban Development, Union of India played a key role in the implementation of the project, it had invited IL&FS for entering into the Memorandum of Understanding (MoU) for development of the project. A High Powered

9 2011 (6) SCC 125
10 2011 (5) SCC 29
11 2015 (1) SCC 558
12 1995 (5) SCC 482
13 1991 (1) SCC 212
14 1980 (4) SCC 1

Steering Committee was established to monitor the progress and to provide directions for the development of the project. The Steering Committee was chaired by the Secretary of the Ministry of Urban Affairs and Development, Government of India (presently Ministry of Urban Development), however, the Ministry of Urban Development has not been made party in the petition.

It is a project of National importance. Till the year 1992, certain sectors including infrastructure development projects were always undertaken by the Government either by itself or through Public Sector undertakings, even Banks involved were Public Sector Banks. There were no Private Sector players in road infrastructure till the year 1992. Till 1992 the concept of development of infrastructure facilities with minimal or no financial budgetary support from the Government authority was not known in India. All the entities that had undertaken the construction of Bridges or Roads had done so only as the contractors for the Government, funded out of the budget of the relevant Government or Public Authority.

Infrastructure Leasing and Financial Services Limited (IL&FS) was a public sector Company, 80% of its shares were held by Public Financial Institutions and PSU Banks. The Government instead of undertaking the project on its own decided to invite IL&FS to undertake the project. IL&FS was a pioneer in the private sector participation in development of infrastructure facilities in India and one of the proponents of PPP (Public Private Partnership) projects in infrastructure in India. It was one of the India's leading infrastructure development and finance Company.

The only financial contribution of the Government in the project is Rs. Ten Crores equity participation by NOIDA. All other funding has commercially been raised with no government subsidies or guarantees. The petitioners herein did not challenge the project when it commenced rather the residents of NOIDA at that point of time wrote to the Chief Minister and the Government to fast-track the project as there was urgent need for another connectivity between Delhi and NOIDA.

The project was completed on 07.02.2001 and was commissioned for use by public. Reasonable returns were excepted from the bridge and

roads constructed and maintained by NOIDA Toll Bridge Company, however, in the initial year the traffic was far below the expectation. The Noida Toll Bridge Company realized that it could not reverse its debt leave alone earning of the designated returns within the Concession Period of 30 years, as such it approached the government for grant of development rights. The company had accumulated losses of 79.16 crores as on 31.03.2003 which had risen up to Rs.100.264 crores as on 31.03.2004.

NOIDA is a signatory to the agreement, it cannot dispute the clauses of the agreement and it is not permissible for NOIDA to challenge the agreement after so many years. There was intervention of the Central Government. The roads for connecting Noida to Delhi was the need of the hour. Two Governments came forward and visualized the infrastructure of World class to be completed by a pioneer company in the field of construction. The plea of violation of Article 14 of the Constitution of India is not available after so many years.

Sri Ajay Bhanot learned Senior Advocate assisted by Sri Shashank Shekhar Mishra learned counsel for respondent no.1 namely Noida Toll Bridge Company adopting the abovenoted arguments submits that the reason for adopting PPP model (Public Private Partnership Model) for the construction of the flyway with the World class facilities was to ease the pressure on the existing roads. The development of the Bridge connecting South Delhi and NOIDA was in order to foster overall development of the National Capital Region. The 7th five year Planning Commission report recorded that there was lack of funds for maintenance and development of road network.

In order to augment the resources, the Highway sector would have to look for private participation in the road construction sector. A Public Private Partnership is characterized by the following elements.

1. Transfer of unencumbered right by way of agreement to the developer for construction of an infrastructure facility.

2. Non government recourse funding:- Funds to be raised by the developer from debt and equity market at its own risk.

3. Right granted to the developer to collect and appropriate 'User fee' during the Concession period.

4. Grant of development right to the developer to augment the recovery of investment. At the ends of the Concession Period. The infrastructure facility alongwith Project Assets, ultimately is to be handed back to the government by the developer.

Reliance is placed upon the judgements of Bombay High Court in **Kiran Anandrao Pawar & others Vs. Chief General Manager, IRB Kolhapur Integrated & others** and **Nandu Vs. State of Maharashtra & others** to submit that PPP Model on BOT basis under the Concession Agreement has been recognized by the Court. It was approved that the project cost can be recovered by the private party who can collect toll from the users of the said project.

There were number of risks associated with undertaking of this pioneer project. Noida Toll Bridge was a greenfield project which had to be constructed from the scratch. There was no preexisting road at the site of the DND flyway between Delhi and NOIDA. Within a 3 KM radius of DND Flyway, there were two preexisting facilities namely Kanlindikunj Road/Okhla Barrage and the Nizamuddin Bridge which were being used by the commuters without payment of any fee. Further there were many risks to the project like departmental, statutory clearances, land acquisition issues, traffic volume risk, political risk, technical issues like construction over the river bed, reluctance of the private sector to invest in road projects and competition. Government has not invested a single penny, only land was handed over to the Company and as such certain rights were given to the Company to secure the inherent risk.

He laid much stress on the fact that the IL&FS being the pioneer in Public Sector participation and one of the proponents of PPP project of infrastructure in India was the only India's leading infrastructure development and finance company. IL&FS was incorporated in 1987 by Central Bank of India, Housing Development Finance Corporation Limited (HDFC) and Unit Trust of India (UTI) for the specific purpose of enabling

and promoting infrastructure development on non government recourse basis and commenced its operations in 1988.

IL&FS was invited by the Ministry of Urban Affairs and Development, Government of India to undertake this project as there were no available government budgetary resources to develop a new Road and Bridge link between Delhi and NOIDA. There were no other bank or financial institution in the field of developing and financing infrastructure on a non government recourse basis. Moreover, the Government institutions have a dominant and pervasive control over the affairs of IL&FS.

The development of a greenfield Road and Bridge link between Delhi and NOIDA on a non government recourse basis for the first time in India was not to be executed as a work contract for which tender bid were required to be called for by the Government as there were no funds available to the Government of India or NOIDA Authority to enable such development as a works contract in 1992 nor was there any non government infrastructure developers at that time in 1992 from which a competitive bid could have been called.

The execution of the Concession Agreement was preceded by extensive deliberations/consultations over years, after the conceptualization of the project, between various governments, State instrumentalities, financial institutions and multilateral agencies. At different stages, the Government of U.P. and Government of India were involved.

The Steering Committee (consisting of representative of Government of U.P., Delhi Government, the Ministry of Urban Affairs and Development, Government of India, the Delhi Development Authority, NOIDA and IL&FS) was established to monitor the progress and for development of the project.

The Steering Committee decided that the project should be implemented by a Corporate entity promoted by IL&FS.

The Uttar Pradesh Cabinet approved the project and constituted an Empowered Committee to make recommendations on the Concession Agreement as well as support Agreement. Draft Concession Agreement was reviewed by the concerned departments of Government of U.P. Formal

approval of Government of U.P. was conveyed to the Concessionaire by the Special Secretary, Industrial Development, Government of U.P.

The World Bank approved the funding of the project via a line of credit to IL&FS, technical aspect of the projects were also examined. The project cost was reviewed and approved by the Board of Directors of NOIDA Toll Bridge Company. The Steering Committee gave various directions in regard to the Project and finally on 12.11.1997, the project was approved and the Concession Agreement was executed.

There is no infirmity in the process of execution of the Concession Agreement as it was not an arbitrary decision made in haste but after comprehensive deliberations at various government levels which took place over a long period of time and reflected proper application of mind. No arbitrariness can be attributed to the decision making process. The petitioner has failed to establish the same. The project has been extensively examined, reviewed, analyzed and approved by the concerned Wings of the Government.

Reliance is placed upon the judgements of the Apex Court in **Pathan Mohammed Suleman Rehmatkhan Vs. State of Gujrat,**[15] **& Villianur Iyarkkai Padukappu Maiyam Vs. Union of India,**[16] to submit that non-floating of tenders and absence of public auction or invitation alone is not a sufficient reason to characterize the action of a public authority as either arbitrary or unreasonable or improper exercise of power. No malafide can be attached to the said action.

The Concession Agreement cannot be considered and challenged in isolation, the support agreements and lease agreements are integral part of the Concession Agreement and are co-terminus with the Concession Agreement, cancellation of the Concession Agreement will nullify and unravel the arrangements between the parties. The necessary parties like Ministry of Urban Development, Union of India and the Delhi Government have not been impleaded.

The Concession Agreement was drafted in such a manner as to

15. 2014 (4) SCC 156
16. 2009 (7) SCC 561

assure the creditors of viability of the project and to persuade the investor of the regularity of the returns**.** In absence of the same, the funding of the project would not have been possible. Independent authorities such as independent Engineer, independent Auditor, Project Oversight Board are appointed under the contract to ensure transparent functioning and accountability of the Concessionaire. The NOIDA Authority has full access to the accounts. The Concessionaire being a public listed company, the financial statements of the company are available on the Stock Exchange website as also the official website of the Company. No dispute or grievance has been raised by the NOIDA Authority under the contract. The stand taken by NOIDA Authority in this PIL leads to an inevitable conclusion that NOIDA wants to overreach the contract and use the agency of PIL to secure what is not been available to it under the contract.

Referring to the judgements of Apex Court in **Arun Kumar Agarwal Vs. Union of India,**[17], **BALCO Employee' Union (Regd.) Vs. Union of India,**[18], **Villianur Iyarkkai Padukappu Maiyam (supra)** and **Raunaq International Ltd. Vs. I.V.R. Construction Ltd.,**[19], it is submitted that scope of interference in contractual matters for adjudicating the constitutional validity relating to economic policy matters of State is neither within the domain of the Courts, nor amenable to judicial review.

The power to levy the User fee can be traced to Section 6-A of U.P. Industrial Area Development Act, 1976 readwith New Okhla Development Area (Levy of Infrastructure Fee) Regulations, 1998 framed under section 19 of the Act, 1976. The validity of these provision is not subject matter of challenge in the present PIL. The concessionaire is levying and collecting User fee under the Concession Agreement and it cannot be termed the “toll tax”, as alleged.

Reference is made to **Narmada Bachao Andolan Vs. Union of India,**[20] to submit that where there is a valid law requiring the Government to act in a particular manner, the Court ought not to, without striking down

17. 2013 (7) SCC 1
18. 2002 (2) SCC 333
19. 1991 (1) SCC 492
20. 2000 (10) SCC 664

the law, give any direction which is not in accordance with law.

Reference is also made to **Col.T. Prasad Vs. Union of India,**[21] to submit that there is a difference between tolls/fees, charged for a private funded project and toll/fees charged for a project which has been funded entirely by Government funds at public expenses.

In the case of the fee charged by the company, the funding is entirely private. No part of it has come from tax revenues or other revenues raised by the Government. It is for this reason that the Company has been permitted by the Act 1976 and Regulations 1998 framed thereunder to not only collect the fee but also to appropriate and retain the same so as to recover the entire cost of the project and also to make profit thereon. No such situation is contemplated in the Indian Tolls Act, where the concept of toll tax is entirely different from the user fee being charged by the Concessionaire**.**

Placing observation of the Apex Court in **Sameer Desai Vs. State of Maharastra,**[22] that the respondents therein had not collected the “capital outlay” and the contract period was not over and thus it was held that the respondent cannot be legitimately prevented from collecting toll. It is submitted that law laid down in the case of **(Mandsaur Transport)** will have no applicability.

Paragraph no. '88' of the **Narendra Road Lines Pvt. Ltd. Vs. State of U.P.**[23], has been relied upon to submit that the clause for termination of the Concession Agreement has been provided after long deliberations and consideration with the officers of different departments of the State Government. The possibilities of the breach of agreement cannot be foreseen at this stage nor the effect of such termination on the rights of the parties to agreement are required to be considered by this Court at this stage. Whenever such occasion arises these rights may be subject to consideration by the Arbitrator or the Court in an appropriate proceedings at that appropriate stage. The possibility of advantage to be taken by the

21. 2007 (95) DRJ 146

22. 2004 (106) (3) Bom LR 774

23. 2010 SCC Online ALL 1177

Concessionaire is not a ground on which the Court may declare the Concession Agreement to be violative of public policy, so as to attract Section 23 of Indian Contract Act or to declare it inoperative.

There is no automatic renewal of the Concession Period due to inability to recover Total cost of the project and returns thereon. Clause 2.4 does not provide for a deemed extension of the Concession period and instead requires NOIDA Authority to extend the Concession Period by two years at a time. If NOIDA does not extend the Concession Period in advance by two years, the day that is immediately following the last day of the Concession Period under Section 2.3 (a) of the Concession Period will be the Transfer Date. The NOIDA Authority has discretion in the matter of extension of the Concession Period.

The Transfer date as per the definition in Section 1.1 is the date immediately following the last day of the Concession Period including any extensions thereto or earlier termination thereof, in accordance with the terms of the Concession Agreement". Thus if a concession period is not extended by NOIDA then the day immediately following the last day of the initial thirty years Concession Period shall be the transfer day and the company shall be under obligation to transfer the project together with the project asset to NOIDA.

There was rationale for the formula for computation of Total cost of project. The concept of Total cost of project and Termination payment was devised by experts keeping in view the factors such as:-

1. It was first greenfield PPP project in India implemented through Private Financing.

2. Interest rates were at an all time high.

3. The investors in the project needed adequate returns and insulation from risk, to consider investing in the project.

4. The formula for return on project is standard accepted formula for project financing and was comparable with the return formula in the power sector at that point of time.

5. In absence of such formula, no developer would have risked such huge investment especially in view of inherent risks. Even otherwise, the Total cost of project was very much an achievable target. However, due to default of NOIDA in satisfying its obligation under the Concession Agreement, the recovery of Total Cost of Project has become onerous.

The formula of the Total Cost of Project and Termination payment was devised by experts to impart requisite confidence to the Lenders who were instrumental to the project. The total cost of project is notional figure, it only represents the risk of the investors, no claim/bill on NOIDA, no assurance of the return of money to the concessionaire and not linked to user fee. It is only a risk insurance clause against premature and arbitrary termination of contract by NOIDA. The increasing value of total cost of project does not create a financial obligation/monetary liability on NOIDA to make any payment under ordinary circumstances during the currency of the Concession Period. NOIDA becomes liable only in the event of the termination of the Concession period owing to its own defaults which it fails to cure or due to premature or arbitrary termination of the contract. The amount of user fee paid by the commuters is also independent and does not get affected by the increasing value of the total cost of project.

There are two methods of accounting.

a. Concession account.

b. Statutory account; both having different purpose and usage.

The Concession accounting is for determining the Cost of project and returns thereon, whereas Statutory accounting determines profit and loss of the company prescribed under the Companies Act. The figures presented by the petitioner do not establish that the project cost has been recovered. There is no material on record to support any conclusion on recovery of project cost nor there exists any basis to allege that the Total Cost of project has been recovered. The Court may appoint a panel of expert to analyze the accounts of the Company namely NTBCL to ascertain the correctness of rival allegation of the parties in this regard.

It is further submitted that the NOIDA has been non-cooperative after

the DND flyover was commissioned. Non compliance of the provisions of the agreement by NOIDA has resulted in spiralling of total cost of project. On September 3, 2001, a letter was written by the independent Auditor to NTBCL based on the traffic data from February 7, 2001 to July 31, 2001 that revenue generated by NTBCL would not be sufficient to recover the total cost of the project and the returns thereon within the stipulated Concession period. On September 4, 2001, said letter was forwarded by the Independent Auditor to NOIDA with a request to grant the development rights to NTBCL. On November 15, 2001 the meeting of Sub Committee constituted by the Board of NOIDA for grant of development rights was held. The Sub Committee realised that revenues are not sufficient to recover the financial obligation of NTBCL and grant of development rights is needed, however, recommended that the grant of development rights should be contingent to an increase in paid up equity of NOIDA in NTBCL, equal to the value realized by the Company through the exercise of development rights. On November 20, 2001 the NTBCL wrote to NOIDA stating therein that the recommendation of the NOIDA Sub Committee in the matter of development rights was not in compliance with the Concession Agreement and defeated the purpose of grant of development rights as income generated from the Development Rights was required to be applied towards recovery of total project cost. On November 27, 2001, NTBCL wrote to the Industrial Development Commissioner with a copy to CEO, NOIDA forwarding a legal opinion in respect of the conditions proposed by the Sub committee for grant of development rights. From 2001 till 2009, NTBCL continuously followed up with NOIDA on the issue of grant of development rights, however, NOIDA did not grant the development rights which led to mounting Total Cost of Project as per the formula in the Concession Agreement. However, spiraling of total cost of project did not create any financial liability on NOIDA or the amount of user fee paid by the commuters.

Thus it is submitted that the revenues were insufficient to cover the financial obligation of NTBCL and therefore, the need existed to grant Development rights as per the Concession Agreement. NOIDA arbitrarily

denied the grant of development rights on extraneous considerations in violation of the Concession Agreement. NOIDA has further failed to provide regular fee hikes to the NTBCL in terms of the Concession Agreement. Now it cannot take advantage of its own wrong.

The company has not been permitted to recover requisite returns in addition to the project cost and thus has been prejudiced at the hands of NOIDA. The state or public authority are not permitted to resile from their promises and responsibility. To support this submision reliance is placed upon the judgement of apex Court in **State of Orissa & others Vs. Mangalam Timber Products Ltd,[24] and Monnet Ispat & Energy Ltd. Vs. Union of India,[25], and Shyam Telelink Ltd. Vs Union of India[26].**

At this stage, it is submitted by Sri Ajay Bhanot learned Senior counsel for the Concessionaire that Section 27.1 deals with the procedure of amendment to the Concession Agreement. The exercise to amend the terms of the contract was initiated at the behest of NOIDA. The Concessionaire had submitted following proposal and is awaiting clearance by NOIDA/State of U.P.;-

a. handing over of the project assets including the DND Bridge to NOIDA in 2031.

b. freezing of total cost of project as on March 31, 2011 to be relevant only if NOIDA stands in default of the Concession Agreement or seeks to prematurely terminate the Concession Agreement in an arbitrary manner.

Several letters have been written by concessionaire to NOIDA and Government of U.P., however, NOIDA has failed to take further steps in this regard. Statements in this regard have been given in paragrah no.12 to 19 of the Supplementary Counter Affidavit dated 14.09.2015 and in paragraph no.4 to 7 of the Supplementary Counter Affidavit dated 21.01.2016 filed by the Conessionaire.

It is thus submitted that in case this Court considers Article 14 and Appendix 'F' of the Concession Agreement as unconscionable, even then

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24. 2004(1) SCC 139

25. 2012 (11) SCC 1

26.2010 (10) SCC 165

by applying the doctrine of severability**,** the concession period of 30 years under section 2.3 of the Concession Agreement will remain intact, Section 27.4 of the Concession Agreement will take care of this situation. Moreover, concession period of 30 years has not been challenged. There are various precedents which show that a period of 30 years is not unconscionable per se. It was devised amongst the parties after due consideration and deliberation and the parties to the contract should not be permitted to renege from the same.

The doctrine of frustration of contract shall not apply as it is a case of default of NOIDA itself. Reliance is placed upon the judgment of Apex Court in the case of **Shin Satellite Public Co. Ltd. Vs. Jain Studios Ltd,**[27]**, *Eacom's Controls (India) Ltd Vs.* Bailey Controls Company & Others,**[28] *to* submit that the contract cannot be held totally illegal or void because certain parts of it are illegal or against public policy. The question then arises whether any unobjectionable clauses may be enforced while the objectionable clauses are disregarded or severed. It is open for a Court of law to dissect a contract by taking out a part treating it to be contrary to law and by ordering enforcement of the rest if otherwise, it is not im-permissible. It is well settled that where the contract is in several parts, some of which are legal and enforceable and some are unenforceable, lawful parts can be enforced provided they are severable. A contracting party cannot be relieved from the performance of his part of the contract if the frustration of the contract is self generated or the disability is self induced.

On the maintainability of the PIL, it is submitted that the petitioners have not disclosed their credentials in a full and satisfactory manner. Share holders have not been impleaded who are necessary and proper parties to the PIL as they have vital stakes in the project. (NTBCL) is a listed company with more than Eighty thousand share holders. No dividend was paid to them till 2009. Reference is made to **Raunaq International Ltd. (supra) and Narmada Bachao Andolan Vs. Union of India,**[29]**.**

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27. 2006(2) SCC 628
28. 1998 (ILR) Delhi 392
29. 2000 (10) SCC 664

It is also submitted that the petition is premature, the extension, if any, to the Concession period will have to be considered at the end of the Concession period. NOIDA is not faced with *fait accompli* to renew the agreement, the situation and the circumstance *inter se* the parties at the end of Concession period is only a matter of conjectures and surmises. The question of extension after thirty years will depend upon various variable and unpredictable factors which at this juncture can neither be predicted nor advanced decision based on the situation suppose to prevail at that time can be made.

It is lastly submitted that the project has contributed immensely to the growth of the region and economic activity. The execution and existence of the project is certainly in the interest of public at large. Any adverse view will adversely impact the PPP model of infrastructure development and dissuade private players/lenders and investor from participating in PPP Projects. It will result into an adverse impact on the development of infrastructure projects in the Country and more importantly affect the creation of jobs for the poor and marginalized section.

Referring to judgements of the Apex Court in **Dr. B.Singh Vs Union of Inda & others,[30] and Soma Isolux NH One Tollway Private Limited Vs Harish Kumar Puri & others[31].** It is urged that the Court has to be extremely careful that under the guise of redressing a public grievance, it does not encroach upon the sphere reserved by the Constitution to the Executive and the Legislature. The tool of PIL cannot be used to effect the contractual agreement itself which reduces a valid and legal document into a worthless piece of paper. The relationship between the parties is governed and supported by a valid and legal contract and cannot be interfered in the guise of PIL interest.

Lastly it is reiterated that the parties are voluntarily negotiating for an amendment to the contract and are close to a settlement, any intervention by the Court would be an inference in the contractual rights of the parties and restrict their contractual choices and thus amount to rewriting the terms

30. 2004(3) SCC 363
31., 2014(6) SCC, 75

of the contract which is not permissible.

Ultimately NOIDA will be benefited from its wrongs as the project assets will revert prior to the expiry of the Concession Period.

Sri Piyush Joshi learned counsel appearing on behalf of respondent no.9, the Infrastructure Leasing and Financial Services Limited (IL&FS) which is one of the signatory to the Concession Agreement dated November, 12, 1997 submits that IL&FS as sponsor of the project had provided an indemnity under the Concession Agreement to Noida that it would ensure the due implementation of the project by NTBCL. IL&FS had undertaken the development and financing implementation of the Delhi-Noida Bridge project under the overall supervision of a High powered Steering Committee. Reference is made to Section 20.2 of the Concession Agreement to submit that the clause defines the rights and obligations of IL&FS. In case of failure of the concessionaire, IL&FS had undertaken to indemnify.

On the maintainability of the PIL, preliminary objection has been raised on the same ground as pressed by learned counsels appearing for the Concessionaire, NTBCL. The ground of delay and latches on the part of the petitioners has been vehemently pressed to impress upon the Court that the PIL need not be entertained and that the petitioners have no locus to maintain the PIL.

On merits, it is submitted that the petitioners are seeking to challenge the policy decision of the Government of India and the Government of U.P. to undertake the development of the Delhi Noida Bridge on private sector financing. It is settled law that the policy decision of the State is not to be interfered with or substituted by the Courts of law. Reliance is placed upon **the Judgement of** Apex Court in **State of M.P. Vs. Narmada Bachao Andolan & another[32], Jal Mahal (P) Ltd. Vs. K.P. Sharma and others[33], Ekta Shakti Foundation Vs Government of NCT of Delhi.[34]**

On a pointed query made by the Court as to how the contract for

32. 2011(7) SCC 639
33. 2014 (8) SCC 804
34. 2006 (10) SCC ??

development of Public road/bridge was settled in favour of NTBCL with IL&FS as the promoter that too without inviting others, submissions of the learned counsel for the Concessionaire have been adopted. It is reiterated that 81% (approx) of the equity share capital of IL&FS was owned by the public financial institution. There were two Government of India nominees on the Board of IL&FS in 1992 namely the Secretary, Ministry of Surface Transport and the Secretary, Ministry of Urban Development. Thus the Board was overwhelmingly controlled by the Government of India. The overall scenario in late 1980 and early 1990 was characterized by the financial crisis and economic situation faced by the Government of India and also the State Governments. Against this back drop, a policy decision was taken to invite private sector participation in development of infrastructure across sectors to minimize recourse to government funds for maintenance and development of road network. This policy decision also finds reflection in the 7th Five Year Plan issued by Planning Commission for the year 1985-90.

It is a project where the role of the concessionaire under the contract was to undertake the project on the concept of Build, own, Operate and Transfer (BOOT) basis. The basic reason why no competitive bid process had been undertaken at that time was because there was no other entity in the private sector undertaking for such huge investments as well in developing large infrastructure project in the Road Sector. The respondent no.9, a public sector financial corporation being **Pioneer** in the field, undertook to develop an infrastructure of World class. The project was implemented under the supervision of High power Steering Committee. Reliance is placed upon judgment in the case of **Pathan Mohammed Suleman Rehmatkhan Vs. State of Gujrat & others,**[35] and **In Re Natural Resources Allocation, Special Reference No.1 of 2012,**[36] to submit that non-floating of tenders or absence of public auction or invitation alone is not a sufficient reason to characterize the action of a public Authority as either arbitrary or unreasonable.

As per the concept of BOOT, the assets are to be transferred back to

35. 2014 (4) SCC 156
36. 2012 (10) SCC 352

NOIDA after the cost is realized by the Concessionaire. No public largesse has been given to the Concessionaire, either under the MOU or the Concession Agreement. The lands do not vest with respondent no.9 or respondent no.1, no right to lands has been created in favour of IL&FS and NTBCL. The allegation that the MOU or the Concession Agreement gave land free of cost to IL&FS or the Concessionaire is wrong and without basis. The land has been leased out for a period that is co- terminus with the Concession Agreement and can be used only for the purposes of the project. The majority of the land comprising the project site is river-bed land and not capable of being used under applicable laws for any other purpose nor it has any commercial value. Further-more the majority of the land lie on the Delhi side of the Noida Bridge which is not subject matter of the present PIL. It is urged that in the case of **Villianur Iyarkkai Padukappu Maiyam v. Union of India & others**[37], the Apex Court has held that the development of Port on Build, Operate and Transfer basis can never be equated with intended sale of government lands or transfer of state largesse.

Further the Apex Court in the case of **Madhya Pradesh Vs. Narmada Bachao Andolan & another,**[38], **Jal Mahal Resorts (P) Ltd. K.P. Sharma,** [39], **Ekta Shakti Foundation Vs. Govt. NCT Delhi,**[40] and **State of Orissa and others Vs. Gopinath Dash and others,**[41] has held that the power of judicial review of the executive and legislative action must be kept within the bounds of constitutional scheme and the policy matters of the Government must be left to it. In the matter of policy decision or exercise of discretion by the Government so long as the infringement of fundamental right is not shown, Courts will have no occasion to interfere.

It is vehemently argued that the Doctrine of Unconscionable contract is not applicable in relation to the Concession Agreement dated 12.11.1997. The doctrine of Unconscionability of the contract has its basis in Section 23 of the Indian Contract Act, 1872 and is attracted, in a case, where the contracting parties have grossly unequal bargaining power due to great

37. 2009(7) SCC 561

38. 2011 (7) SCC 639
39. 2014 (8) SCC 804
40. 2006 (10) SCC 337
41. 2005 (13) SCC 495

disparity in economic strengths to the point where free consent may not be presumed on behalf of the weaker party. Given the fact where the State authority was a stronger party to the Concession Agreement, there can be no claim founded in law or fact that the contract was unconscionable to the Government. The Noida authority which is an arm of the State Government cannot claim to be at a lesser or disadvantage or unequal bargaining position to a Company that has been incorporated to implement a specific project. The Concession Agreement was not unconscionable either at the time of execution, nor has it becomes unconscionable after almost 20 years during which the significant public infrastructure has been built and successfully operated under the terms of the Concession Agreement. The Apex Court in the case of **Central Inland Water Transport Corporation Vs. Brojo Nath Ganguly,**[42] has held that the power of the Court to strike down unfair and unreasonable contract or unfair and unreasonable clause is limited to a circumstance whether the contract is entered into by the parties who are not equal in bargaining power. The concept has been explained by the Supreme Court in **Balmer Lawrie anc Co. Ltd. And Ors Vs. Partha Sarathi Sen Roy and Ors**,[43].

It is submitted that the clauses of the Concession Agreement containing the provisions of total cost of project and returns thereon were neither unconscionable nor have become unconscionable over the period of time for the reason that the concept of total cost of project and returns thereon does not result in any monetary obligation on either the general public or NOIDA.

The Noida becomes liable to make payment under Section 18.1 of the Concession Agreement of the total cost of project and returns thereon only in the case of Noida events of default. There is no other provision under which the said amount, otherwise becomes payable. The concept of total cost of project and returns thereon is a risk mitigation measure which can be understood best as a risk insurance clause against Noida repudiating the Concession agreement or failing to cure the defects notified to NOIDA resulting in default the Concession Agreement. It was incorporated in order

42. 1986 (3) SCC 156
43. 2013 (8) SCC 345

to make the Noida Toll Bridge Project viable for Lenders as well as Investors due to it being the first green field road and bridge project being implemented on private sector financing basis. The said concept has received approval of the Apex Court in **Narendra Road lines** (supra)**.**

It is vehemently urged that the concept of total cost of project and returns thereon has no linkage to the fee being charged from the User of the Delhi Noida Bridge**.** The fee does not get adjusted on account of high or unachievable Total Cost of Project and Returns thereon. The fee is determined by its own separate formula and any revision to the fee has to be undertaken only through the Fee Review Committee. The concept of Total Cost of Project and Returns is not an actual monetary liability and there is no right to receive the same except in the event of termination of contract by the Concessionaire in the case of a NOIDA Events of Default. It was incorporated precisely to safeguard against the political risks as in case of the long term agreement by government entity, there is continued risks that the private party to the Concession Agreement may face a situation of wrongful termination.

The Noida cannot be allowed to use the judicial process in the name of PIL to renege a valid Concession Agreement for no fault or breach by the Concessionaire and in the situation when it has been part performed by the Concessionaire with significant investments and deployment of technological and human resources. None of the two events which may impose a liability of payment upon Noida has occurred nor can be foreseen by the Court as 15 years are still to go.

The Concessionaire is continuously approaching Noida to grant development rights and submitted proposal for grant of development rights under the terms of the Concession Agreement. It is the conduct of Noida which has directly resulted in the total cost of project and returns thereon rising to the levels that it did. The position faced by the project is a direct result of the contribution or in-action of Noida, it cannot be said that the provisions of the Concession Agreement were or have become unconscionable. None of the elements on which the concept of total cost of project and returns thereon has been framed are against Public Interest.

The user fee charged for recovery of cost of project and the investment on operation and maintenance of Delhi Noida Bridge cannot be equated with the concept of Toll under the Indian Tolls Act 1851 which permits toll fee to enable recovery of cost incurred. The Noida Toll Bridge is not a public property built by government funds rather it has been built by private sector funds. The period of recovery of cost of project for 30 years i.e. concession period and the provision for collection of fee as determined by the formula being monitored by the Fee Review Committee in accordance with the provisions of the Concession Agreement cannot be said to be bad. The Concession Period is 30 years and is not in perpetuity. The Transfer date has been defined in Section 1.1 to mean "the day immediately following the last day of the Concession Period", including any extension thereto or earlier termination thereof, in accordance with terms of the Concession agreement.

Lastly it has submitted that an amendment stipulating the transfer date removing the concept of extension of Concession Period and the concept of recovery of total cost of project and returns thereon had been submitted by the Concessionaire to Noida in July, 2015 which is under consideration.

The public interest litigation process cannot be allowed to be misused in a manner so as to act as a means for the parties to exit long term contracts entered into on the basis of PPP (Public Private Partnership) to develop a large Scale Infrastructure facility.

We may notice at this stage that the New Okhla Industrial Development Authority i.e. respondent no. 2 did not file any reply till 31.1.2013 when the matter was taken up by this Court and specific direction was issued requiring NOIDA to make its stand clear, whether it is in favour of continuance of Agreement dated 12.11.1997 made with NOIDA Bridge Company Limited i.e. the respondent no. 1 or it is with the petitioner in public interest.

NOIDA the respondent no. 2, thereafter, filed an affidavit dated 18th February, 2013 referring to various clauses of the Agreement and submitted

that the provisions of Section 14 read with Appendix “F” of the Concession Agreement which guarantees an annual return of 20% of the Project cost and addition of the shortfall in the return of the previous year in the next year, is against public interest.

It is submitted that the Project Cost calculated on the date of commissioning of the bridge on 7.2.2001 was Rs. 407.64 Crores which was compounded and risen over Rs. 953 Crores just about five years thereafter. Going by the same method of calculation, the unrecovered total Project Cost as per the Concession Agreement (calculated under Article 14 read with Appendix “F”) as against of Rs. 407.64 Crores on 7.2.2001 has risen to Rs. 2339.07 Crores on 31.3.2012. If this Project is to be taken back by the NOIDA Authority as on 31.3.2012, the NOIDA Authority will have to pay Rs. 2339.07 Crores to the Concessionaire. Going by the same method of calculation, at the end of the Concession period of 30 years in addition to the Toll fee which the Concessionaire has collected so far and would continue to collect in future till 31.3.2031, the total liability would be about Rs. 53,000 Crores to be paid by NOIDA. In case of non payment of this amount by NOIDA, it has necessarily to extend the period of Concession in favour of the Concessionaire. It is averred in paragraph '9' of the affidavit of NOIDA Authority dated 18th February, 2013 that at the time of making of the Concession agreement, makers thereof could not either anticipate or comprehend the impact of Section 14 read with Appendix 'F' of the Concession Agreement.

It is further submitted in paragraph '10' of the said affidavit that keeping in view the statement made in the preceding paragraphs of the said affidavit and taking into account the public interest, NOIDA had written to the Concessionaire way back in the year 2001 to do away with the Section 14 of the Agreement. It is further stated that the initial cost has already been recovered by the Concessionaire with the recovery of Toll.

In the supplementary counter affidavit dated 11.5.2014, it is further stated in paragraph '4' that the Concession Agreement executed by NOIDA Authority is not serving public interest. The averment made in paragraph '10' of the affidavit dated 18.2.2013 has been reiterated by NOIDA to

reaffirm its stand.

It is also stated that vide letter no. 129 dated 8.7.2011, NOIDA had called upon the Concessionaire to make modifications in the Concession Agreement.

With regard to the grant of development rights, the stand taken is that the Sub-Committee consisting of Senior Officers in the Government of U.P. was constituted to examine the matter. The Committee as per its recommendation, suggested that development rights can be given for 4 acres of land and the remaining 32 acres of surplus land has to be returned by the Concessionaire to NOIDA.

The Committee also suggested that the income generated by the Concessionaire through these development rights, if granted, be treated as equity of NOIDA in the Company namely NOIDA Toll Bridge Company Limited.

The Concessionaire namely NOIDA Toll Bridge Company refused to accept this citing the reasons:-

(a) All the Project assets including lands are mortgaged to the Lenders as security.

(b) Treating the development income as NOIDA's equity will result in NOIDA taking over the management control of the Company. The paid up equity of the Company is Rs. 122 Crores of which NOIDA has paid Rs. 10 Crores which comes to 8.6%. Taking the development income as Rs. 50 Crores, in case of treating it equity, NOIDA will become the largest shareholder.

It is categorically submitted in paragraph '6' of the supplementary affidavit dated 11.5.2016 that the development rights have not been granted by NOIDA to the NOIDA Toll Bridge Company Limited as yet.

During oral submissions, Sri C.B. Yadav learned Senior Advocate assisted by Sri Shivam Yadav, learned counsel for the respondent no. 2 submitted that the relief sought in the amended writ petition is for quashing of the Concession Agreement which was arrived in the year 1997

incorporated by filing an amendment application on 12.2.2013. The Concession Agreement cannot be challenged after 16 years.

On the power to levy toll/user of fee by the Concessionaire, submission of Sri C.B. Yadav, learned Senior Counsel on behalf of NOIDA is that under Section 19(2)(e) of the Uttar Pradesh, Industrial Area Development Act, 1976, NOIDA has a power to make regulations with the previous approval of the State Government, to levy fees in discharge of its function.

He further submitted that Section 6-A of the Act 1976, NOIDA confers a power on NOIDA to authorise a person to provide or maintain or continue to provide or maintain any infrastructure or amenities under the Act and to collect taxes or fees, as the case may be, levied therefor.

In exercise of powers under Section 19 read with section 6-A of the Act, 1976 (as noted above) NOIDA Authority with the approval of the State Government has framed regulations for the above noted purpose. These regulations are known as New Okhla Industrial Development Area (Levy of Infrastructure Fee) regulations 1998, (hereinafter referred to as 'Regulation 1998') which were notified sometime in September, 1998.

Specific reference has been made to Regulations 3, 5.1, 5(2) and 5(3).

It is explained that the regulations 1998 authorise NOIDA to enter into an Agreement with the developer for the purpose of providing an infrastructure in the area and levy and collect fee for said infrastructure. Simultaneously, it is also submitted that the Concessionaire is authorised under the Concession Agreement to levy the user fee to realise the project Cost.

During the course of the argument on 26.7.2016, on a query made by this Court on the issue that the Concession Agreement entered being hit by Article 14 of the Constitution of India as the agreement has not been preceded by any advertisement nor other person working in the field was invited to participate in the process before award of the public contract, an affidavit dated 28th July, 2016 has been filed on behalf of NOIDA, wherein it

is admitted that there was no advertisement or tender notice issued by NOIDA. The company namely IL&FS was selected for implementation of Delhi-NOIDA Bridge Project (DND Flyway) under the tripartite Memorandum of Understanding (MOU) signed on 7.4.1992 by NOIDA, Delhi Administration and IL&FS.

It is further submitted by Sri C.B. Yadav, learned Senior Advocate for NOIDA that 68 acres of land has been given by NOIDA Authority and Delhi Government has handed over 342 acres of land. Out of the total area approximately 400 acres of land which was handed over to the Concessionaire, it has utilised only 144 acres of land for the purpose of construction of Flyway and Bridge. The rest of the land has not been utilised, but the entire land has been mortgaged by the Concessionaire to different banks to take loan against the same. The Concessionaire appears to have exercised the right conferred upon it under Section 15.2 (a) of the Concession Agreement.

Sri C.B. Yadav, learned Senior Advocate for NOIDA lastly stated that NOIDA is helpless inasmuch as it is not in a position to terminate the agreement in view of the liability/obligations which it would incur under Section 18.1 and 18.2 of the Concession Agreement. In the event of termination of agreement, the NOIDA would be under obligation to pay to the Concessionaire a huge sum i.e. something more than Rs. 5,000 Crores as on 31.3.2016. On the question of Agreement being unconscionable and the Court's power of judicial review to test reasonableness of the Agreement on the touchstone of public interest, submission is that the Court is not powerless to examine whether the agreement is unconscionable in the facts of the present case.

Referring to the affidavit dated 28th July, 2016 of the Secretary, Infrastructure and Industrial Development Department, Government of U.P., it is submitted by the learned Additional Advocate General that the said affidavit has been filed in compliance to the order dated 26.7.2016 passed by this Court to clarify the stand of the State Government on the issue of grant of contract without advertisement or inviting others working in the same field to participate in the process of awarding of public contract.

In paragraph '5' of the said affidavit, it is stated that the State Government did not sign the Memorandum of Understanding (MOU) dated 7.4.1992. The Government of India, Ministry of Urban Development vide its letter dated May 1984 had approached the IL&FS company as promoted by the Central Bank of India, U.T.I. And H.D.F.C to implement the Project and arrange finance and subsequently recoup the investment by changing the end user. The letter of the Under Secretary, Ministry of Urban Development, Government of India, Delhi dated 18.5.1995 is appended with the said affidavit.

In paragraph '6' of the aforesaid affidavit, it is stated that the decision of the Cabinet in its meeting dated 22.8.1997 was based on the reason given by the Secretary, Government of India, Ministry of Urban Development which has been duly incorporated in the Office Memorandum No. 3736 dated 4.9.1997. The Cabinet took a decision to authorise NOIDA Authority to finalise the Concession Agreement and the Support Agreement as IL&FS has been projected as the company promoted by the Government of India.

At this stage, it is submitted by Sri C.B. Yadav, leaned Additional Advocate General appearing for the State that Sri R.K. Bhargawa who was the Chairman of NOIDA Toll Bridge Company since its inception, was the member of Indian Administrative Services. He was Principal Secretary, Urban Planning and Development, Government of India who had ensured the execution of the Project.

Referring to “Compilation III” of the list of documents filed on behalf of the State of U.P., it is submitted that Sri Pradeep Puri who was projected as Director of company was not discharging any function/obligation for the company yet all expenses including the remuneration paid to Mr. Pradeep Puri were added to the project cost. Sri Pradeep Puri in the letter dated 29th August, 2007 sent to the Chief Executive Officer, NOIDA (appended as Annexure A-7, (para '11') to the Supplementary Affidavit No. 326053 dated 14.9.2015 had enclosed a certificate on the total unrecovered project cost upto March 31, 2007 as verified by the Independent Auditor, M/s A.F. Ferrguson & Co. This certificate discloses the increase in the

Unrecovered Total Project Cost as per the formula given in Annexure 'F' of the Concession Agreement and that the closing balance after 30 years of the Concession Agreement as on March 31, 2031 would be approximately Rs. 53353 Crores, the term of the Project be now taken as 100 years.

He further submits that O&M expenses (Office and Maintenance Expenses) though are not included in the total cost of Project as per Section 14.1(b) of the Concession Agreement, however, under Clause 14.2 (a) calculation of returns is to be done by addition of gross revenues, from User fee collection, income from advertising and development income minus the O&M expenses. For computation of Total Cost of Project. As per Clause (b)(iii) of Section 14.1 of the Concession Agreement, shortfalls in the recovery of returns in a specific financial year as per the formula in Section 14.2 (a) has to be added to Total Project Cost. This results in addition of O&M expenses in the total cost of Project whereas the Section 14.1(b) contemplates only addition of Major Maintenance Expenses.

Alongwith the aforementioned compilation III (containing list of documents) a chart has been appended at page '2' and '3' to state that exorbitant expenditure has been made by the Concessionaire on payment of remuneration to two key managerial personnel namely Mr. Pradeep Puri and Ms. Monisha Macedo. In the accounts of the year 2003, 2005, 2006, 2007 and 2009, the remuneration of Mr. Pradeep Puri and Ms. Monisha Macedo has increased from Rs. 37 lakhs in the year 2002 to Rs. 67 lakhs in the year 2003 and to Rs. 393.8 lakhs in the year 2009. Exorbitant expenses towards legal and professional fee, approximately Rs. 1191.17 lakhs and travelling and financing expenses approximately Rs. 462 lakhs (more than 40 Crores) have been shown in the Company's accounts till the year 2012. As per the report of M/s A.F. Ferrguson Company, i.e. the Independent Auditor dated 10.7.2007, furnished before NOIDA Authority, the company had reimbursed IL&FS limited a sum of Rs. 12,43,13,38/- for restructuring of Deep Discount Bonds during the year ending on March 31, 2006. The cost of restructuring of Deep Discount Bonds was Rs. 50 Crores which is exorbitant.

On the legal prepositions of judicial review, reliance is placed upon

the judgment of Apex Court appended with Compilation 'I' and 'II' by Sri C.B. Yadav, learned Additional Advocate General.

Specific reference has been made to the pronouncements of Apex Court in **ABL International Ltd. & another vs. Export Credit Guarantee Corporation of India Ltd. and others**[44], **Noble Resources Ltd. vs. State of Orissa and another**[45], **Jagdish Mandal vs. State of Orissa and others**[46] and **Coal India Limited and others vs. Alok Fuels Private Limited through Director and other**[47], to submit that once the State or a NOIDA which is instrumentality of the State enters into a contract, it has an obligation in law to act fairly, justly and reasonably as required under Article 14 of the Constitution of India, Writ Court can issue suitable directions to set right the arbitrary action of the State or its instrumentality.

The contractual matter are not beyond the realm of judicial review though its application is limited. Where the public interest is affected, the power of judicial review will be permissible even in contractual matters.

Referring to judgment of Apex Court In **Tata Cellular vs. Union of India**[48] (in Compilation II), it is submitted though the Government has freedom in the matter of contract, inviting of tender and refusal of any tender which pertains to its policy matter, but the decision/action of the Government is to be tested on the touchstone of “Wednesbury” principles of unreasonableness. When the decision is such as no reasonable person on proper application of mind could not take or there is procedural impropriety, the Court would intervene and set right the decision making process.

In rejoinder Sri Ranjit Saxena learned counsel for the petitioners contends that under the Uttar Pradesh Industrial Area Development Act, 1976, there was no provision for levy of toll “User Fee” on the date the Concession Agreement was executed on 12th November, 1997. The levy of toll or user fee is a Government function. A private company has no competence to levy fee. The Regulations, 1998 in exercise of the powers conferred under Section 19 of the Act was framed by NOIDA after the

44 2004 (3) SCC 553
45 2006 (10) SCC 236
46 2007 (14) SCC 517
47 2010 (10) SCC 157
48 1994 (6) SCC 651

execution of the Concession Agreement.

Consequently, the power under Section 2 of the Indian Tolls Act, 1851 could be the only source with NOIDA to levy toll/user fee for bridges etc.

On the submission made by learned counsel for the parties, the following questions do arise for consideration in the present Public Interest Litigation:-

a. Whether this Public Interest Litigation is maintainable under law?

b. What is the scope of interference in the matter of public contracts in exercise of power under Article 226 of the Constitution of India and the test therefor?

c. Whether the award of the Contract/Concession Agreement in favour of Noida Toll Company (the Concessionaire), in the facts of the case is fair and just?

d. Whether the 'User fee' levied and collected by Noida Toll Bridge Company is legally sustainable? If not, what would be its effect on Article 13 (the Clause) of the Concession Agreement?

e. Whether the Articles 14 (the Clause) of the Concession Agreement (for computation and recovery of total cost of project and returns thereon) is arbitrary, opposed to public policy and deserves to be severed from the Concession Agreement?

f. What would be the effect of proposed amendments to the Concession Agreement viz-a-viz relief prayed for in this petition?

Whether this Public Interest Litigation is maintainable:-

The petitioner Association before us represents the cause of its members who are the commuters using the DND Fly over. The petitioners are aggrieved by the continuance of the levy and collection of the Toll/User Fee under the Contract between NOIDA Authority and the Concessionaire as (a) they are required to pay the toll in the name of “User Fee”, even after the actual cost of construction of the DND flyover and reasonable profits/returns thereon having been recovered by the Concessionaire. (b) The period of 30 years fixed by the Concessionaire for realizing the toll

in the name of “User Fee” is arbitrary and opposed to public policy. The petitioners have challenged the Concession Agreement on various grounds narrated in the preceding part of this judgment.

The respondents have vehemently opposed the petition on the ground of maintainability with the assertion that the petitioner Noida Residents Welfare Association was well aware of the execution of the Concession Agreement as well as the construction of the project and commencement of its operation. There is no explanation nor any justification for the delay of more than 22 years in challenging the MOU and 17 years in challenging the Concession Agreement. Moreover, 15 years have passed from the Commissioning of the bridge and commencement of the levy of fee for the use of Delhi Noida Bridge. The Concessionaire and IL&FS have discharged their obligations and duties under the MOU as well as the Concession Agreement. This inordinate delay on the part of the petitioner has not been satisfactory explained. Moreover, the credentials of the petitioner are tainted with vested interest to gain free excess to the Delhi Noida Bridge. In fact this is a proxy litigation set up by Noida Authority in order to avoid its obligation under the Contract. Reliance is placed upon the judgement in the cases of **Chennai Metropolitan Water Supply and Sewerage Board and othes Vs. T.T. Murali Babu,[49], State of M.P. And others Vs. Nandlal Jaiswal and others,[50], Ramana Dayaram Shetty Vs. International Airport Authority of India and others,[51], Gram Panchayat of Village Mundhal Khurd Vs. Amar Singh (Dead) and others,[52]** to submit that this petition does not meet the test for Public Interest Litigation as laid down by the Apex Court and the petitioner has no locus to file and maintain this petition.

So far as the credentials of the petitioner association are concerned, suffice it to say that in paragraph no.4 of the writ petition it is categorically stated that the Federation of Noida Residents Welfare Association is a society duly registered under the Societies Registration Act, 1860. The aims and object of the society are to look after the welfare of the residents of

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49. 2014(4) SCC 108
50.1986 (4) SCC 566
51.1979 (3) SCC, 489
52.2000 (10) SCC 644

NOIDA and to espouse the cause of residents before the concerned Authorities in order to ensure that they are provided civic amenities alongwith the planned development of the city.

The present Public Interest Litigation raises an important question of public interest. The challenge is to the levy/user fee of toll by a private company i.e. the Concessionaire under the Concession Agreement which has been executed with reference to public land.

The plea of delay has no substance. The commuters were justified in believing that the NOIDA Authority will take care of their interest. In the year 2012, when they realized that they are being taxed illegally, they have approached this Court with a specific contention that the Concessionaire had already realised the investment for construction of the bridge alongwith reasonable interest and hence they are not entitled to recover the User fee any further. The levy of toll/user fee is a continuing cause of action which has been espoused before us by a section of public i.e. the commuters. Serious questions of public interest have been raised before us regarding the validity of the Concession Agreement and its continuance as on date.

Public interest in simple terms means that principle of law which holds that no subject can lawfully do that which has a tendency to cause injury to the public or is against the public good. The doctrine of public interest is founded on the current needs of the Community. The issue is always raised with reference to the interest of a Section of the Community. It is thus sufficient to show that the interest of such section of the community is the interest of the Public. The injury or tendency to injure that particular section of the community would be against the Public Interest. However, no satisfactory definition could be found as to what is public interest. We will go by what has been stated in Pollock “On contract” (12th Edition) at page 290:-

> *“Frequently in considering the interests of the public as a whole, the interests of a section of it have been taken into account in actual decisions in which the question of public policy has been raised; but the seeming paradox is explained by the fact that, although these decisions may relate primarily to sectional interests they nevertheless reckon with the interests of the community at large.”*

Thus in our, opinion, the injury to this section of the community “i.e.

the Commuters", who are petitioners before us does need examination on merits to see whether the Concession Agreement and its continuance is opposed to Public Policy or not.

The cause espoused before us is Pro Bono Publico and no exception can be taken thereof.

Thus, in our opinion, since continuance of the contract/agreement as on date has been questioned, the plea of laches appears to be wholly misconceived. Whether the concessional agreement/contract has outlived its term or not or whether restrain is to be put on realization of toll (user fee) now, have necessarily to be adjudicated on the pleadings of the parties to the present writ petition.

Completion of the DND Flyover and its use by the members/Commuters since 2001 are facts, which are of not much substance for judging the issue in hand nor it is fair on the part of the respondents to raise the plea of latches in such circumstances.

In fact what is contended before us by the petitioner is that the concession period has come to an end in view of Section 2.3 of the agreement. The respondents cannot be permitted to gain undue profits in the garb of realization of user fee (toll) from the users of DND Flyover i.e. once it has recovered the cost of the project along with reasonable profits interest thereon.

Other plea raised on behalf of the respondents that the present writ petition is not a bona fide petition as the members of the petitioner's Association can use other links available between the Noida and Delhi, where no toll is charged, is a submission bound to be repelled. DND Flyover has been constructed over the public property. The State of U.P. and Noida both act as trustees of the said public property for the people of India. All infrastructure developed thereon has necessarily to be permitted to be used by every one irrespective of the fact as to whether the user is unmindful of the money, which is being charged by Noida Toll Company or a vigilant person, who objects to realization of toll (user fee), demand of which according to him, is illegal.

If vigilant members of the society question the demand of toll (user

fee) for use of infrastructure developed over public property, it is not open either to the Commissionaire to allege that they may use other facility as they cannot pay the fee for use of this facility, specifically when the challenge is to the very levy of the fee. The State and its Concessionaire have to meet the challenge on merits rather than taking shelter behind technical objections like the use of other linkages.

The plea that this petition has been prompted by NOIDA to avoid its contractual obligation has been so stated before us without any material to support such vague sweeping allegations. The petitioners have stated in so many terms before us that the levy and collection of Toll/User Fee must stop. All other rights and obligations of party to the agreement is of no concern of the petitioners.

We further find that Government of India and Delhi Government are not party to the Concession Agreement nor they have signed the same. No rights of the two governments are being reflected upon by this Court in any manner while considering the issues in hand. Therefore, we record that they are neither necessary nor proper party to the petition. Their impleadment is, therefore, not required.

So far as the share-holders of Noida Toll Company are concerned, we may record that their interest is looked after by the Company itself. Despite opportunity, counsel for the share-holders could not explain to the Court as to what rights of the share-holders are not being taken care of by the Company.

The judgments relied upon by Concessionaire and IL&FS are distinguishable in the fact and circumstances of the instant case.

We, therefore, find it difficult to accept the preliminary objection raised on behalf of the respondents to the maintainability of this petition.

Legal position regarding the scope of interference in Public Contract:-

(a) The test of reasonableness and fairness :- to be applied in the matter of grant of contract in order to determine the validity of the Governmental action in public contracts has been laid down by the Apex Court in the celebrated judgment, in the case of **M/s Kasturi Lal Lakshmi**

Reddy (supra). It has been held that there are two limitations imposed by law which structure and control the discretion of the Government in the matter of grant of Government largess, licence etc. The first is in regard to the terms on which largess may be granted and the other in regard to the persons who may be recipients of such largess.

It is stated in paragraphs '11' & '12' as under:-

*"**11.** So far as the first limitation is concerned, it flows directly from the thesis that, unlike a private individual, the State cannot act as it pleases in the matter of giving largess. Though ordinarily a private individual would be guided by economic considerations of self-gain in any action taken by him, it is always open to him under the law to act contrary to his self-interest or to oblige another in entering into a contract or dealing with his property. But the Government is not free to act as it likes in granting largess such as awarding a contract or selling or leasing out its property. Whatever be its activity, the Government is still the Government and is, subject to restraints inherent in its position in a democratic society. The constitutional power conferred on the Government cannot be exercised by it arbitrarily or capriciously or in an unprincipled manner; it has to be exercised for the public good. Every activity of the Government has a public element in it and it must therefore, be informed with reason and guided by public interest. Every action taken by the Government must be in public interest; the Government cannot act arbitrarily and without reason and if it does, its action would be liable to be invalidated. If the Government awards a contract or leases out or otherwise deals with its property or grants any other largess, it would be liable to be tested for its validity on the touch-stone of reasonableness and public interest and if it fails to satisfy either test, it would be unconstitutional and invalid."*

*"**12.** Now what is the test of reasonableness which has to be applied in order to determine the validity of governmental action. It is undoubtedly true, as pointed out by Patanjali Shastri, J. in State of Madras v. V.G. Rau, that in forming his own conception of what is reasonable, in all the circumstances of a given case, it is inevitable that the social philosophy and the scale of values of the judge participating in the decision, would play an important part, but even so, me test of*

reasonableness is not a wholly subjective test and its contours are fairly indicated *by the Constitution. The concept of reasonableness in fact pervades the entire constitutional scheme. The interaction of Arts. 14, 19 and 21 analysed by this Court in Maneka Gandhi vs. Union of India, clearly demonstrated that the requirement of reasonableness runs like a golden thread through the entire fabric of fundamental rights and, as several decisions of this Court show, this concept of reasonableness finds its positive manifestation and expression in the lofty ideal of social and economic justice which inspires and animates the Directive Principles. It has been laid down by this Court in E.P. Royappa v. State of Tamil Nadu, and Maneka Gandhi's case (supra) that Article 14 strikes at arbitrariness in State action and since the, principle of reasonableness and rationality, which is legally as well as philosophically an essential element of equality or non-arbitrariness, is protected by this article, it must characterise every governmental action, whether it be under the authority of law or in exercise of executive power without making of law. So also the concept of reasonableness runs through the totality of Article 19 and requires that restrictions on the freedoms of the citizen, in order to be permissible, must at the best be reasonable. Similarly Article 21 in the full plenitude of its activist magnitude as discovered by Maneka Gandhi's case, insists that no one shall be deprived of his life or personal liberty except in accordance with procedure established by law and such procedure must be reasonable, fair and just. The Directive Principles concretise and give shape to the concept of reasonableness envisaged in Articles 14, 19 and 21 and other articles enumerating the fundamental rights. By defining the national aims and the constitutional goals, they setforth the standards or norms of reasonableness which must guide and animate governmental action. Any action taken by the Government with a view to giving effect to any one or more of the Directive Principles would ordinarily, subject to any constitutional or legal inhibitions or other over-riding considerations, qualify for being regarded as reasonable, while an action which is inconsistent with or runs counter to a Directive Principle would incur the reproach of being unreasonable."*

It was, further, held that the concept of public interest must as far as possible receive its orientation from the Directive Principles of State Policy.

In paragraph 13, the Apex Court goes on to say:-

> ***13.-*** *"So also the concept of public interest must as far as possible receive its orientation from the Directive Principles. What according to the founding fathers constitutes the plainest requirement of public interest is set out in the Directive Principles and they embody par excellence the constitutional concept of public interest. If, therefore, any governmental action is calculated to implement or give effect to a Directive Principle, it would ordinarily, subject to any other overriding considerations, be informed with public interest."*

It was thus held that the Government action which fails to satisfy the test of reasonableness and public interest and is found to be wanting in the quality of reasonableness or lacking in the element of public interest, would be liable to be struck down as invalid. The principles which flow as a necessary corollary of this proposition is that the Government cannot act in a manner which would benefit a private party at the cost of the State; such an action would be both unreasonable and contrary to public interest. The Government while granting the contract or lease of its property cannot give a Contract or lease out its property for a consideration less than the highest that can be obtained for it, unless of course there are other considerations which render it reasonable and in public interest to do so. Such considerations may be that some Directive Principle is sought to be advanced or implemented or that the contract or the property is given not with a view to earning revenue but for the purpose of carrying out a welfare scheme for the benefit of a particular group or section of people deserving it or that the person who has offered a higher price is not otherwise fit to be given the contract or the property.

Going further in the matters of evaluation of Governmental action, whether reasonable and in public interest, the role of the Court has been described in paragraph '14' as under:-

> ***"14.-*** *….....xxxxxxxxx.....We have referred to these considerations to only illustratively, for there may be an infinite variety of considerations which may have to be taken into account by the Government in formulating its policies and it is on a total evaluation of*

various considerations which have weighed with the Government in taking a particular action, that the Court would have to decide whether the action of the Government is reasonable and in public interest. But one basic principle which must guide the Court in arriving at its determination on this question is that there is always a presumption that the Governmental action is reasonable and in public interest and it is for the party challenging its validity to show that it is wanting in reasonableness or is not informed with public interest. This burden is a heavy one and it has to be discharged to the satisfaction of the Court by proper and adequate material. The Court cannot lightly assume that the action taken by the Government is unreasonable or without public interest because, as we said above, there are a large number of policy considerations which must necessarily weigh with the Government in taking action and, therefore, the Court would not strike Down governmental action as invalid on this ground, unless it is clearly satisfied that the action is unreasonable or not in public interest. But where it is so satisfied, it would be the plainest duty of the Court under the Constitution to invalidate the governmental action. This is one of the most important functions of the Court and also one of the most essential for preservation of the rule of law. It is imperative in a democracy governed by the rule of law that governmental action must be kept within the limits of the law if there is any transgression the Court must be ready to condemn it."

With regard to the second limitation on the discretion of the Government in the grant of largesse to choose the persons to whom such largesse may be granted, it has been held that in selecting the recipients for its largesse, the Government cannot choose to deal with any person it pleases in its absolute and unfettered discretion. Following principles have been laid down in **Ramana Dayaram Shetty** (supra) in paragraph '15' as under:-

*"**15.** It is held that The second limitation on the discretion of the Government in grant of largess is in regard to the persons to whom such largess may be granted. It is now well settled as a result of the decision of this Court in* Ramana D. Shetty v. International Airport Authority of India & Ors. *(supra) that the Government is not free like an ordinary individual, in*

selecting the recipients for its largess and it cannot choose to deal with any person it pleases in its absolute and unfettered discretion. The law is now well established that the Government need not deal with anyone. but if it does so, it must do so fairly without discrimination and without unfair procedure. Where the Government is dealing with the public, whether by way of giving jobs or entering into contracts or granting other forms of largess. the Government cannot act arbitrarily at its, sweet will and, like a private individual, deal with any person it pleases, but its action must be in conformity with some standard or norm which is not arbitrary, irrational or irrelevant. The governmental action must not be arbitrary or capricious, but must be based on some principle which meets the test of reason and relevance. This rule was enunciated by the Court as a rule of administrative law and it was also validated by the Court as an emanation flowing directly from the doctrine of equality embodied in Article 14. The Court referred to the activist magnitude of Article 14 as evolved in E.P. Royappa v. State of Tamil Nadu (supra) and Maneka Gandhi's case (supra) and observed that it must follow

> *"as a necessary corollary from the principle of equality enshrined in Article 14 that though the State is entitled to refuse to enter into relationship with anyone, yet if it does so, it cannot arbitrarily choose any person it likes for entering into such relationship and discriminate between persons similarly circumstanced, but it must act in conformity with some standard or principle which meets the test of reasonableness and non-discrimination and any departure from such standard or principle would be invalid unless it can be supported or justified on some rational and non-discriminatory ground."*

This decision has reaffirmed the principle of reasonableness and non-arbitrariness in governmental action which lies at the core of our entire constitutional scheme and structure."

Approving the abovenoted two tests of reasonableness and fairness to determine the validity of the Government action, the Apex Court in **LIC of India** (supra) held that every action of the public authority or the person acting in public interest or any act that gives rise to public element, should be guided by public interest. It is the exercise of the public power or

action hedged with public element that becomes open to challenge. If it is shown that the exercise of the power is arbitrary, unjust and unfair, it should be no answer for the State, its instrumentality, public authority or person whose acts have the insignia of public element to say that their actions are in the field of private law and they are free to prescribe any conditions or limitations in their actions as private citizens, simplicitor do in the field of private law. Its action must be based on some rationale and relevant principles. In paragraph '24', it was thus observed:-

> *"**24.** .....…...xxxxxxxx.....that even in contractual relations the Court cannot ignore that the public authority must have constitutional conscience so that any interpretation put up must be to avoid arbitrary action, lest the authority would be permitted to flourish as imperium a imperia. Whatever be the activity of the public authority, it must meet the test of Article 14 and judicial review strikes an arbitrary action."*

It was held that the State, when acting in its executive power, enters into contractual relations with the individual, Article 14 would be applicable to the exercise of such power. The relevant paragraphs '25', '26', '27' and '29' are quoted as under:-

> *"**25.** In Mahabir Auto Stores v. India Oil Corporation, AIR 1990 SC 1031, it was held that the State when acting in its executive power, enters into contractual relations with the individual, Article 14 would be applicable to the exercise of the power. The action of the State or its instrumentality can be checked under Article 14. Their action must be subject to rule of law. If the governmental action even in the matter of entering or not entering into contracts, fails to satisfy the test of reasonableness, the same would be unreasonable. Rule of reason and rule against arbitrariness and discrimination, rules of fair play, natural justice are part of the rule of law applicable in situation or action by State/instrumentality in dealing with citizens. Even though the rights of the citizens, therefore, 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 and natural justice, equality and non-discrimination. It is well settled that there can*

be "malice in law". It was also further held that whatever be the act of the public authority in such monopoly or semi- monopoly, it must be subject to rule of law and must be supported by reasons and it should meet the test of Article 14."

*"**26.** This Court has rejected the contention of an instrumentality or the State that its action is in the private law field and would be immuned from satisfying the tests laid under Article 14. The dichotomy between public law and private law rights and remedies, though may not be obliterated by any straight jacket formula, it would depend upon the factual matrix. The adjudication of the dispute arising out of a contract would, therefore, depend upon facts and circumstances in a given case. The distinction between public law remedy and private law field cannot be demarcated with precision. Each case will be examined on its facts and circumstances to find out the nature of the activity, scope and nature of the controversy. The distinction between public law and private law remedy has now become too thin and practicably obliterated."*

*"**27.** In the sphere of contractual relations the State, its instrumentality, public authorities or those whose acts bear insignia of public element, action to public duty or obligation are enjoined to act in a manner i.e. fair, just and equitable, after taking objectively all the relevant options into consideration and in a manner that is reasonable, relevant and germane to effectuate the purpose for public good and in general public interest and it must not take any irrelevant or irrational factors into consideration or arbitrary in its decision. Duty to act fairly is part of fair procedure envisaged under Articles 14 and 21. Every activity of the public authority or those under public duty or obligation must be informed by reason and guided by the public interest."*

29. *"…….....xxxxxxxxxxx.....In Sterling Computers Ltd. vs. M&N Publications Ltd., (1993)1 SCC 445 at page 464 para 28, it was held that even in commercial contracts where there is a public element, it is necessary that relevant considerations are taken into account and the irrelevant consideration discarded. In Union of India v. M/s. Graphic Industries Co., (1994)5 SCC 398, this Court held that*

even in contractual matters public authorities have to act fairly; and if they fail to do so approach under Article 226 would always be permissible because that would amount to violation of Article 14 of the Constitution.....xxxxxxxxxxxxxxxx....”

The Apex Court in **Padma (**supra) while dealing with the matter of bulk sale for land by CIDCO (City Industrial Development Corporation) a Government Company incorporated under Section 617 of the Companies Act, has pointed out that the land acquired and entrusted to CIDCO cannot just be permitted to be parted with, guided by the sole consideration of money-making. CIDCO is not a commercial concern whose performance is to be assessed by the amount it earns. Rather its performance would be assessed by finding out the number of needy persons who have been able to secure shelter through CIDCO and are benefited by the beauty of township and improved quality of life for people achieved by CIDCO through its planned development schemes. So long as such objectives are fulfilled, CIDCO's operation on 'No-profit-No Loss' basis cannot be found faulted with.

In **Humanity** (supra) applying the test of fairness and non-discrimination in the matter of granting largesse, the Supreme Court has reiterated that whenever any governmental action fails to satisfy the test of reasonableness and public interest, it is liable to be struck down as invalid. The Government cannot act in a manner which would benefit a private party such action will be contrary to public interest. That was a case where no advertisement was issued and no offer was sought to be obtained from the members of public in respect of the allotment of land, it was held therein that the allotment is clearly in breach of principles of Article 14 explained by this Court in **Ramana Dayaram Shetty** (supra) and **M/s. Kasturi Lal Lakshmi Reddy** (supra) etc.

In Institute of Law Chandigarh (supra) following **Kasturi Lal** (supra), the Apex Court has observed that the discretionary power upon the public authorities to carry out the necessary regulations for allotting land for the purpose of constructing a public institution should not be misused. The State is within its competence to put reasonable restrictions. The allottee

cannot be allowed to make money or profiteer with the aid of the public property. In absence of a transparent policy based on objective criteria and without giving any public notice, the allotment of land for establishment of the educational institution was held arbitrary, unreasonable and unjust and opposed to the provisions of Article 14 of the Constitution of India.

In **City Industrial Development Corporation (CIDCO)** (supra), it was observed that whenever the Government dealt with the public establishment in entering into a contract or issuance of licence, the Government could not act arbitrarily on its sweet will but must act in accordance with law and the action of the Government should not smack of arbitrariness. The principles laid down by the Apex Court in **Akhil Bhartiya Upbhokta Congress** (supra) have been approved in paragraph '38' as under:-

> ***"38.*** *In the case of Akhil Bhartiya Upbhokta Congress vs. State of Madhya Pradesh & ors., (2011) 5 SCC 29, this Court while considering the question of legality of allotment of land by the State or its agencies on the basis of applications made by individual, observed as follows:-*
>
> > *"65. What needs to be emphasised is that the State and/or its agencies/instrumentalities cannot give largess to any person according to the sweet will and whims of the political entities and/or officers of the State. Every action/decision of the State and/or its agencies/instrumentalities to give largesse or confer benefit must be founded on a sound, transparent, discernible and well-defined policy, which shall be made known to the public by publication in the Official Gazette and other recognised modes of publicity and such policy must be implemented/executed by adopting a non-discriminatory and nonarbitrary method irrespective of the class or category of persons proposed to be benefited by the policy. The distribution of largesse like allotment of land, grant of quota, permit licence, etc. by the State and its agencies/instrumentalities should always be done in a fair and equitable manner and the element of favouritism or nepotism shall not influence the exercise of discretion, if any, conferred upon the particular functionary or*

officer of the State.

66. *We may add that there cannot be any policy, much less, a rational policy of allotting land on the basis of applications made by individuals, bodies, organisations or institutions dehors an invitation or advertisement by the State or its agency/instrumentality. By entertaining applications made by individuals, organisations or institutions for allotment of land or for grant of any other type of largesse the State cannot exclude other eligible persons from lodging competing claim. Any allotment of land or grant of other form of largesse by the State or its agencies/instrumentalities by treating the exercise as a private venture is liable to be treated as arbitrary, discriminatory and an act of favouritism and/or nepotism violating the soul of the equality clause embodied in Article 14 of the Constitution."*

The law laid down by the Apex Court in **Ramana Dayaram Shetty, Kasturi Lal Lakshmi Reddy**, **Humanity** (supra) in the matter of grant of largesse has been followed.

Having considered the pronouncements of the Apex Court in the matter of grant of contract with regard to the public property in favour of the private person/individual, it is clear that the Government action must not be arbitrary or capricious but must be transparent based on principles which meet the test of reasons and relevance. This rule has been enunciated by the Court as a rule of Administrative law and it was also validated by the Court as an emanation flowing directly from the principles embodied in Article 14 of the Constitution of India.

(b) Role of Government:-

Considering the Role of Government in the matters of Contract, it is observed by the Apex Court in **Ramana Dayaram Shetty**, (supra) that the Government is a welfare State and is the regulator and dispenser of special services and provider of a large number of benefits including contracts, licences, quotas, mineral rights etc. The valuables dispensed by Government may take many forms, but they all share One characteristic. That is where the Government is dealing with the public, whether by way

of giving jobs or entering into contracts or granting other forms of largesse, the Government cannot act arbitrarily at its sweetwill, and like a private individual, deal with any person it pleases. Its action must be in conformity with such standards or norms and must not be arbitrary or irrational.

In **Akhil Bhartiya Upbhokta Congress** (supra), Justice G.S. Singhvi speaking for the Bench observed in paragraphs '47', '48' and '49' as under:-

> ***47.*** *When the Constitution was adopted, people of India resolved to constitute India into a Sovereign Democratic Republic. The words `Socialist' and `Secular' were added by the Constitution (Forty-second Amendment) Act, 1976 and also to secure to all its citizens Justice - social, economic and political, Liberty of thought, expression, belief, faith and worship; Equality of status and/or opportunity and to promote among them all Fraternity assuring the dignity of the individual and the unity and integrity of the Nation. The expression `unity of the Nation' was also added by the Constitution (Forty-second Amendment) Act, 1976. The idea of welfare State is ingrained in the Preamble of the Constitution. Part III of the Constitution enumerates fundamental rights, many of which are akin to the basic rights of every human being. This part also contains various positive and negative mandates which are necessary for ensuring protection of the Fundamental Rights and making them real and meaningful.*
>
> ***48.*** *Part IV contains `Directive Principles of State Policy' which are fundamental in the governance of the country and it is the duty of the State to apply these principles in making laws. Article 39 specifies certain principles of policy which are required to be followed by the State. Clause (b) thereof provides that the State shall, in particular, direct its policy towards securing that the ownership and control of the material resources of the community are so distributed as best to sub-serve the common good. Parliament and Legislatures of the States have enacted several laws and the governments have, from time to time, framed policies so that the national wealth and natural resources are equitably distributed among all sections of people so that have-nots of the society can aspire to compete with haves.*
>
> **49.** The role of the Government as provider of services and benefits to the people was noticed in Ramana Dayaram Shetty (in paragraph '11' therein)".
>
> *"11. Today the Government in a welfare State, is the regulator and*

dispenser of special services and provider of a large number of benefits, including jobs, contracts, licences, quotas, mineral rights, etc. The Government pours forth wealth, money, benefits, services, contracts, quotas and licences. The valuables dispensed by Government take many forms, but they all share one characteristic. They are steadily taking the place of traditional forms of wealth. These valuables which derive from relationships to Government are of many kinds. They comprise social security benefits, cash grants for political sufferers and the whole scheme of State and local welfare. Then again, thousands of people are employed in the State and the Central Governments and local authorities. Licences are required before one can engage in many kinds of businesses or work. The power of giving licences means power to withhold them and this gives control to the Government or to the agents of Government on the lives of many people. Many individuals and many more businesses enjoy largesse in the form of Government contracts. These contracts often resemble subsidies. It is virtually impossible to lose money on them and many enterprises are set up primarily to do business with Government. Government owns and controls hundreds of acres of public land valuable for mining and other purposes. These resources are available for utilisation by private corporations and individuals by way of lease or licence. All these mean growth in the Government largesse and with the increasing magnitude and range of governmental functions as we move closer to a welfare State, more and more of our wealth consists of these new forms. Some of these forms of wealth may be in the nature of legal rights but the large majority of them are in the nature of privileges."

In paragraph '50', it was further observed that in our constitutional structure, no functionary of the State or public authority has an absolute or unfettered discretion. The very idea of unfettered discretion is totally incompatible with the doctrine of equality enshrined in the Constitution and is an antithesis to the concept of rule of law.

While rejecting the theory of absolute discretion, **Lord Denning's** principles have been cited with approval by the Apex Court in paragraphs '54' and '55' as under:-

54. *In Breen v. Amalgamated Engineering Union (1971) 2 QB 175, Lord Denning MR said: "The discretion of a statutory body is never unfettered. It is a discretion which is to be exercised according to law. That means at least this: the statutory body must be guided by relevant considerations and not by irrelevantly. If its decision is influenced by*

extraneous considerations which it ought not to have taken into account, then the decision cannot stand. No matter that the statutory body may have acted in good faith; nevertheless the decision will be set aside. That is established by Padfield v. Minister of Agriculture, Fisheries and Food which is a landmark in modern administrative law."

***55.** In Laker Airways Ltd. v. Department of Trade 1977 QB 643, Lord Denning discussed prerogative of the Minister to give directions to Civil Aviation Authorities overruling the specific provisions in the statute in the time of war and said:*

> *"Seeing that prerogative is a discretion power to be exercised for the public good, it follows that its exercise can be examined by the Courts just as in other discretionary power which is vested in the executive."*

In paragraph '60', it was further considered:-

***"60.** …....xxxxxxxxxxx.....22. The Government today, in a welfare State, provides large number of benefits to the citizens. It distributes wealth/largesse in the form of allotment of plots, houses, petrol pumps, gas agencies, mineral leases, contracts, quotas and licences etc. in various forms. The elected representative who is the Executive Head of the department concerned has to deal with the people's property in a fair and just manner. He cannot commit breach of trust reposed in him by the people."*

(c) Public interest and Public Policy:-

The Apex Court in **Centre for Public Interest Litigation v. Union of India**[53] has held that the natural resources belong to the people, the State legally own them on behalf of its people and from that point of view the natural resources are considered as national assets, more so because the State benefits immensely from their value. The State is empowered to distribute natural resources. However, while distributing, the State is bound to act in consonance with the principles of equality and public trust and ensure that no action is taken which may be detrimental to public interest.

In paragraphs '75', '80', '86', '87', '88' and '89', it has been stated as under:-

*"**75.** The State is empowered to distribute natural resources. However, as*

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they constitute public property/national asset, while distributing natural resources, the State is bound to act in consonance with the principles of equality and public trust and ensure that no action is taken which may be detrimental to public interest. Like any other State action, constitutionalism must be reflected at every stage of the distribution of natural resources. In Article 39(b) of the Constitution it has been provided that the ownership and control of the material resources of the community should be so distributed so as to best sub-serve the common good, but no comprehensive legislation has been enacted to generally define natural resources and a framework for their protection. Of course, environment laws enacted by Parliament and State legislatures deal with specific natural resources, i.e., Forest, Air, Water, Costal Zones, etc.

80. *In Jamshed Hormusji Wadia's case, this Court held that the State's actions and the actions of its agencies/instrumentalities must be for the public good, achieving the objects for which they exist and should not be arbitrary or capricious. In the field of contracts, the State and its instrumentalities should design their activities in a manner which would ensure competition and non-discrimination. They can augment their resources but the object should be to serve the public cause and to do public good by resorting to fair and reasonable methods.*

86. *In Akhil Bharatiya Upbhokta Congress v. State of M.P. (2011) 5 SCC 29, this Court examined the legality of the action taken by the Government of Madhya Pradesh to allot 20 acres land to an institute established in the name of Kushabhau Thakre on the basis of an application made by the Trust. One of the grounds on which the appellant challenged the allotment of land was that the State Government had not adopted any rational method consistent with the doctrine of equality. The High Court negatived the appellant's challenge. Before this Court, learned senior counsel appearing for the State relied upon the judgments in Ugar Sugar Works Ltd. v. Delhi Administration (2001) 3 SCC 635, State of U.P. v. Choudhary Rambeer Singh (2008) 5 SCC 550, State of Orissa v. Gopinath Dash (2005) 13 SCC 495 and Meerut Development 80 Authority v. Association of Management Studies (2009) 6 SCC 171 and argued that the Court cannot exercise the power of judicial review to nullify the policy framed by the State Government to allot Nazul land without advertisement.*

87. *This Court rejected the argument, referred to the judgments in Ramanna Dayaram Shetty v. International Airport Authority of India (1979) 3 SCC 489, S.G. Jaisinghani v. Union of India AIR 1967 SC 1427, Kasturilal Lakshmi Reddy v. State of J & K (1980) 4 SCC 1, Common Cause v. Union of India (supra), Shrilekha Vidyarthy v. State of U.P. (1991) 1 SCC 212, LIC v.*

Consumer Education and Research Centre (1995) 5 SCC 482, New India Public School v. HUDA (1996) 5 SCC 510 and held:

> *65. "What needs to be emphasised is that the State and/or its agencies/instrumentalities cannot give largesse to any person according to the sweet will and whims of the political entities and/or officers of the State. Every action/decision of the State and/or its agencies/instrumentalities to give largesse or confer benefit must be founded on a sound, transparent, discernible and well-defined policy, which shall be made known to the public by publication in the Official Gazette and other recognised modes of publicity and such policy must be implemented/executed by adopting a non-discriminatory and non-arbitrary method irrespective of the class or category of persons proposed to be benefited by the policy. The distribution of largesse like allotment of land, grant of quota, permit licence, etc. by the State and its agencies/instrumentalities should always be done in a fair and equitable manner and the element of favouritism or nepotism shall not influence the exercise of discretion, if any, conferred upon the particular functionary or officer of the State."*

88. *In Sachidanand Pandey v. State of West Bengal (1987) 2 SCC 295, the Court referred to some of the precedents and laid down the following propositions:*

> *40. ….....xxxxxx.....State-owned or public-owned property is not to be dealt with at the absolute discretion of the executive. Certain precepts and principles have to be observed. Public interest is the paramount consideration. One of the methods of securing the public interest, when it is considered necessary to dispose of a property, is to sell the property by public auction or by inviting tenders. Though that is the ordinary rule, it is not an invariable rule. There may be situations where there are compelling reasons necessitating departure from the rule but then the reasons for the departure must be rational and should not be suggestive of discrimination. Appearance of public justice is as important as doing justice. Nothing should be done which gives an appearance of bias, jobbery or nepotism."*

89. *In conclusion, we hold that the State is the legal owner of the natural resources as a trustee of the people and although it is empowered to distribute the same, the process of distribution must be guided by the constitutional principles including the doctrine of equality and larger public good."*

(d) Scope of Judicial review:-

Having considered the law relating to the role of Government and public authority in private contracts and the element of public interest in

testing the validity of the Government contracts, the next principle needs to be discussed is as to what would be the scope of interference by the Court in such matters of State policy i.e. the Scope of Judicial Review in contractual matter where State is party. It has been held in **LIC of India** (supra) that the act of the State, its instrumentality, any public authority or person whose actions bear insignia of public law element or public character are amendable to judicial review and the validity of such an action would be tested on the anvil of Article 14. While exercising the power under Article 226, the Court would be circumspect to adjudicate the disputes arising out of the contract depending on the facts and circumstances in a given case. The distinction between public law remedy and private law field cannot be demarcated with precision. Each case has to be examined on its facts and circumstances to find out the nature of the activity or scope and nature of the controversy.

In **Sterling Computers Limited vs. M&N Publications Ltd.**[54], it was held that even in commercial contracts where there is public element, it is necessary that relevant considerations are taken into account and the irrelevant considerations discarded.

In **Union of India v. Graphic Industries Co.**[55], it is held that even in contractual matters, public authorities have to act fairly and if they fail to do so, the enquiry under Article 226 would always be permissible because that would amount to violation of Article 14 of the Constitution.

The scope of judicial review in contractual matters came up for consideration before the Apex Court in **Tata Cellular** (supra) wherein it is observed in paragraphs '70', '71', '72', '73' and '74' as under:-

> *"**70**. It cannot be denied that the principles of judicial review would apply to the exercise of contractual powers by Government bodies in order to prevent arbitrariness or favoritism. However, it must be clearly stated that there are inherent limitations in exercise of that power of judicial review. Government is the guardian of the finances of the State. It is expected to protect the financial interest of the State. The right to refuse the lowest or any other tender is always available to the Government. But, the principles laid down in Article*

54 1993 (1) SCC 445
55 1994 (5) SCC 398

14 of the Constitution have to be kept in view while accepting or refusing a tender. There can be no question of infringement of Article 14 if the Government tries to get the best person or the best quotation. The right to choose cannot be considered to be an arbitrary power. Of course, if the said power is exercised for any collateral purpose the exercise of that power will be struck down.

71. *Judicial quest in administrative matters has been to find the right balance between the administrative discretion to decide matters whether contractual or political in nature or issues of social policy; thus they are not essentially justifiable and the need to remedy any unfairness. Such an unfairness is set right by judicial review."*

72. *Lord Scarman in Nottinghamshire County Council v. Secretary of State for the Environment proclaimed :*

> *"Judicial review' is a great weapon in the hands of the judges; but the judges must observe the constitutional limits set by our parliamentary system upon the exercise of this beneficial power."*

Commenting upon this Michael Supperstone and James Goudie in their work Judicial Review (1992 Edn.) at p. 16 say:

> *"If anyone were prompted to dismiss this sage warning as a mere obiter dictum from the most radical member of the higher judiciary of recent times, and therefore to be treated as an idiosyncratic aberration, it has received the endorsement of the Law Lords generally. The words of Lord Scarman were echoed by Lord Bridge of Harwich, speaking on behalf of the Board when reversing an interventionist decision of the New Zealand Court of Appeal in Butcher v. Petrocorp Exploration Ltd. 18-3- 1991."*

73. *Observance of judicial restraint is currently the mood in England. The judicial power of review is exercised to rein in any unbridled executive functioning. The restraint has two contemporary manifestations. One is the ambit of judicial intervention; the other covers the scope of the court's ability to quash an administrative decision on its merits. These restraints bear the hallmarks of judicial control over administrative action.*

74. *Judicial review is concerned with reviewing not the merits of the decision in support of which the application for judicial review is made, but the decision-making process itself."*

S. Mohan J. speaking for the bench of three judges in the case of

Tata Cellular (supra) framed two questions for explaining the law on judicial review of administrative action. These questions have been beautifully framed as (i) “What is this charming principles of Wednesbury unreasonableness? (ii) Is it a magical formula?” In answering these questions, the statement about judicial review by Lord Denning where he emphasises the supervisory nature of the jurisdiction of the Court, has been quoted in paragraph '83' as under:-

> *“**83.** A modem comprehensive statement about judicial review by Lord Denning is very apposite; it is perhaps worthwhile noting that he stresses the supervisory nature of the jurisdiction:*
>
> > *"Parliament often entrusts the decision of a matter to a specified person or body, without providing for any appeal. It may be a judicial decision, or a quasi-judicial decision, or an administrative decision. Sometimes Parliament says its decision is to be final. At other times it says nothing about it. In all these cases the courts will not themselves take the place of the body to whom Parliament has entrusted the decision. The courts will not themselves embark on a rehearing of the matter. See Healey v. Minister of Health (1955) 1 QB 221: (1954) 3 All ER 449: (1954) 3 WLR 815. But nevertheless, the courts will, if called upon, act in a supervisory capacity. They will see that the decision-making body acts fairly. See H.K. (an infant), Re (1967) 2 QB 617,630: (1967) 1 All ER 226: (1967) 2 WLR 692, and R. V. Gaming Board for Great Britain, ex p Benaim and Khaida (1970) 2 QB 417: (1970) 2 All ER 528: (1970) 2 WLR 1009. The courts will ensure that the body acts in accordance with the law. If a question arises on the interpretation of words, the courts will decide it by declaring what is the correct interpretation. See Punton v. Ministry of Pensions and National Insurance (1963) 1 WLR 186: (1963) 1 All ER 275. And if the decision-making body has gone wrong in its interpretation they can set its order aside. See Ashbridge Investments Ltd. v. Minister of Housing and Local Government (1965) 1 WLR 1320: (1965) 3 All ER 371. (I know of some expressions to the contrary but they are not correct). If the decision-making body is influenced by considerations which ought not to influence it; or fails to take into account matters which it ought to take into account, the court will interfere. See Padfield v. Minister of Agriculture, Fisheries and Food 1968 AC 997: (1968) 1 All ER*

694. If the decision-making body comes to its decision on no evidence or comes to an unreasonable finding so unreasonable that a reasonable person would not have come to it then again the courts will interfere. See Associated Provincial Picture Houses Ltd. v. Wednesbury Corpn. (1948) 1 KB 223: (1947) 2 All ER 680. If the decision making body goes outside its powers or misconstrues the extent of its powers, then, too the courts can interfere. See Anisminic Ltd. v. Foreign Compensation Commission (1969) 2 AC 147: (1969) 1 All ER 208: (1969) 2 WLR 163. And, of course, if the body acts in bad faith or for an ulterior object, which is not authorised by law, its decision will be set aside. See Sydney Municipal Council v. Campbell 1925 AC 338: 1924 All ER Rep 930. In exercising these powers, the courts will take into account any reasons which the body may give for its decisions. If it gives no reasons in a case when it may reasonably be expected to do so, the courts may infer that it has no good reason for reaching its conclusion, and act accordingly. See Padfield case (as AC pp. 1007, 1061)1968 AC 997: (1968) 1 All ER 694."

Dealing with the concept of “reasonableness” in administrative law elaborated by **Venkatachaliah, J. in G.B. Mahajan v. Jalgaon Municipal Council**[56], it is noted that in the administrative law, test of reasonableness is not by the standards of the 'reasonable man' of the torts law. Emphasis was supplied to what Prof. Wade says in his book on “Administrative Law” in paragraphs '89' & '90' as under:-

*“**89.** This is not therefore the standard of "the man on the Clapham omnibus". It is the standard indicated by a true construction of the Act which distinguishes between what the statutory authority may or may not be authorised to do. It distinguishes between proper use and improper abuse of power. It is often expressed by saying that the decision is unlawful if it is one to which no reasonable authority could have come. This is the essence of what is now commonly called "Wednesbury unreasonableness", after the now famous case in which Lord Greene, MR. expounded it."*

90. *“*Referring to the doctrine of unreasonableness, Prof. Wade says in his book on “Administrative Law” (supra):-

“The point to note is that a thing is not unreasonable in the legal sense merely because the court thinks it is unwise."

56 1991 (3) SCC 91

In paragraph '92', the observation of the Apex Court in **Sterling Computers Limited** (supra) is quoted that:-

> *"92.....xxxxxxx.....It is not possible for the courts to question and adjudicate every decision taken by an authority.....xxxxxxxxxx.....Under some special circumstances a discretion has to be conceded to the authorities who have to enter into contract giving them liberty to assess overall situation for purpose of taking a decision as to whom the contract be awarded and at what terms. If the decisions have been taken in bona fide manner although not strictly following the norms laid down by the courts, such decisions are upheld.....xxxxxxxxxxxx....."*.

The following principles of Judicial Review have been laid down in the matters of Government Policy in paragraph '94' in **Tata Cellular** (supra):-

> **94.** *"(1) The modem trend points to judicial restraint in administrative action.*
>
> *(2) The court does not sit as a court of appeal but merely reviews the manner in which the decision was made.*
>
> *(3) The court does not have the expertise to correct the administrative decision. If a review of the administrative decision is permitted it will be substituting its own decision, without the necessary expertise which itself may be fallible.*
>
> *(4) The terms of the invitation to tender cannot be open to judicial scrutiny because the invitation to tender is in the realm of contract. Normally speaking, the decision to accept the tender or award the contract is reached by process of negotiations through several tiers. More often than not, such decisions are made qualitatively by experts.*
>
> *(5) The Government must have freedom of contract. In other words, a fair play in the joints is a necessary concomitant for an administrative body functioning in an administrative sphere or quasi-administrative sphere. However, the decision must not only be tested by the application of Wednesbury principle of reasonableness (including its other facts pointed out above) but must be free from arbitrariness not affected by bias or actuated by mala fides.*
>
> *(6) Quashing decisions may impose heavy administrative burden on the administration and lead to increased and unbudgeted expenditure."*

(e) Concept of public policy under Section 23 of the Indian Contract Act:-

We may first refer to Section 23 of The Indian Contract Act, 1872:-

*"**23.** What consideration and objects are lawful, and what not*

The consideration or object of an agreement is lawful, unless -It is forbidden by law; or is of such nature that, if permitted it would defeat the provisions of any law or is fraudulent; of involves or implies, injury to the person or property of another; or the Court regards it as immoral, or opposed to public policy."

Simply put, the section says that in each of such cases where the consideration or object is unlawful or opposed to Public Policy, the agreement is void.

As it is understood in legal parlance, the doctrine of public policy has been explained and applied by the Apex Court in the case of **Gherulal Parakh Vs. Mahadeodas Maiya and others,**[57]. The meaning and concept of public policy with reference to section 23 of the Contact Act, has been discussed elaborately by considering the law declared by the Courts in England and India and in paragraph no.21 it was observed as under;-

"21…..xxxxxxxxx.....We may say, however, that the policy of the law has, on certain subjects, been worked into a set of tolerably definite rules. The application of these to particular instances necessarily varies with the conditions of the times and the progressive development of public opinion and morality, but, as Lord Wright has said public policy, like any other branch of the Common Law, ought to be, and I think is, governed by the judicial use of precedents. If it is said that rules of public policy have to be moulded to suit new conditions of a changing world, that is true; but the same is true of the principles of the Common Law generally. "

In Halsbury's Laws of England, 3rd Edn., Vol. 8, the doctrine is stated at p. 130 thus:

" Any agreement which tends to be injurious to the public or against the public good is void as being contrary to public policy. It seems, however, that this branch of the law will not be extended. The determination of what is contrary to the so-called policy of the law necessarily varies from time to time. Many transactions are upheld now which in a former generation would have been avoided as contrary to the supposed policy of the law. The rule remains, but its application varies with the principles which for the time being guide public opinion.....xxxxxx....."

57. AIR 1959 SC 781

and in paragraph no. 23 which is also quoted as under;-

“23…....xxxxx....."The Courts have again and again said, that where a contract does not fit into one or other of these pigeon-holes but lies outside this charmed circle, the courts should use extreme reserve in holding a contract to be void as against public policy, and should only do so when the contract is incontestably and on any view inimical to the public interest ".

The Indian cases also adopt the same view. A division bench of the Bombay High Court in Shrinivas Das Lakshminarayan v. Ram Chandra Ramrattandas observed at p. 20: "It is no doubt open to the Court to hold that the consideration or object of an agreement is unlawful on the ground that it is opposed to what the Court regards as public policy. This is laid down in section 23 of the Indian Contract Act and in India therefore it cannot be affirmed as a matter of law as was affirmed by Lord Halsbury in Janson v. Driefontein Consolidated Mines, Limited (1902 A. C. 484 at p. 491) that no Court can invent a new head of public policy, but the dictum of Lord Davey in the same case that " public policy is always an unsafe and treacherous ground for legal decision " may be accepted as a sound cautionary maxim in considering the reasons assigned by the learned Judge for his decision ".

The same view is confirmed in Bhagwant Genuji Girme v.Gangabisan Ramgopal (2) and Gopi Tihadi v. Gokhei Panda (3). The doctrine of public policy may be summarized thus: Public policy or the policy of the law is an illusive concept; it has been described as " untrustworthy guide ", " variable quality ", " uncertain one ", " unruly horse ", etc. ; the primary duty of a Court of Law is to enforce a promise which the parties have made and to uphold the sanctity of contracts which form the basis of society, but in certain cases, the Court may relieve them of their duty on a rule founded on what is called the public policy; for want of better words Lord Atkin describes that something done contrary to public policy is a harmful thing, but the doctrine is extended not only to harmful cases but also to harmful tendencies; this doctrine of public policy is only a branch of common law, and, (1) I.L.R. (1920) 44 Bom. 6. (2) I.L.R. 1941 Bom- 71. (3) I.L.R. 1953 Cuttack 558 just like any other branch of common law, it is governed by precedents; the principles have been crystallized under different heads and though it is permissible for Courts to expound and apply them to different situations, it should only be invoked in clear and incontestable cases of harm to the public....”

Crisply put, the Apex Court had laid down the principle in the matter of public policy by terming it as 'illusive concept', “unruly horse,” a branch of comman law which is governed by judicial precedents. A word of caution has

been added by saying that “public policy” is always an unsafe and treacherous ground for legal decision. Simultaneously it was held that by application of such principle, it is inevitable that the judge must find the facts on which he must decide whether the fact so found do or do not come within the principle i.e. a principle of public policy, recognized by the law, which suggested contract is infringing, or shall infringe.

In **Kedar Nath Motani And Others vs Prahlad Rai And Others,**,[58] Hidayatullah J, speaking for the three judges bench after considering the English law on the subject as stated by Lord Mansfield in Holman v. Johnson [(1775) 1 Cowp. 341, 343; 98 E.R. 1120, 1121], held in paragraph no.12 as under;-

> ***12.*** ***“****The law was stated as far back as 1775 by Lord Mansfield in Holman v. Johnson [(1775) 1 Cowp. 341, 343; 98 E.R. 1120, 1121], I n the following words :*
>
> *"The principle of public policy is this; ex dolo malo non oritur actio. No Court will lend its aid to a man who founds his cause of action upon an immoral or an illegal act. If, from the plaintiff's own stating or otherwise, the cause of action appears to arise ex turpi causa, or the transgression of a positive law of this country, there the Court says he has no right to be assisted. It is upon that ground the Court goes; not for the sake of the defendant, but because they will not lend their aid to such a plaintiff. So if the plaintiff and defendant were to change sides, and the defendant was to bring his action against the plaintiff, the latter would then have the advantage of it; for where both are equally in fault, potior est conditio defendentis.....*

In **Central Inland Water Transport Corporation Limited and Another Vs. Brojo Nath Ganguly and Another,**[59], while expounding the principle governing public policy in the matter of contract between employer and employees, the principle of “test of reasonableness or fairness” of a clause in contract had been applied in a case where there was inequality of bargaining power.

Though the instant case proceeds on a different footing however, for the purpose of understanding the expression “public policy” or “opposed to public policy”, under the Indian Contract Act, paragraphs 92 and 93 of the aforementioned judgment, in our opinion, are relevant and quoted as under:-

> ***“92.*** *The Indian Contract Act does not define the expression "public policy"*

58. AIR 1960 SC 213
59.1986 (3) SCC 156

or "opposed to public policy". From the very nature of things, the expressions "public policy", "opposed to public policy" or "contrary to public policy" are incapable of precise definition. Public policy, however, is not the policy of a particular government. It connotes some matter which concerns the public good and the public interest. The concept of what is for the public good or in the public interest or what would be injurious or harmful to the public good or the public interest has varied from time to time. As new concepts take the place of old, transactions which were once considered against public policy are now being upheld by the courts and similarly where there has been a well-recognized head of public policy, the courts have not shirked from extending it to new transactions and changed circumstances and have at times not even flinched from inventing a new head of public policy. There are two schools of thought - "the narrow view" school and "the broad view" school. According to the former, courts can not create new heads of public policy whereas the latter countenances judicial law-making in this area. The adherents of "the narrow view" school would not invalidate a contract on the ground of public policy unless that particular ground had been well-established by authorities. Hardly ever has the voice of the timorous spoken more clearly and loudly than in these words of Lord Davey in Janson v. Uriefontein Consolidated Mines Limited [1902] A.C. 484, 500 "Public policy is always an unsafe and treacherous ground for legal decision." That was in the year 1902. Seventy-eight years earlier, & Burros, J., in Richardson v. Mellish, [1824] 2 Bing. 229, 252; s.c. 130 E.R. 294, 303 and [1824-34] All E.R. Reprint 258, 266, described public policy as "a very unruly horse, and when once you get astride it you never know where it will carry you." The Master of the Rolls, Lord Denning, however, was not a-man to shy away from unmanageable horses and in words which conjure up before our eyes the picture of the young Alexander the Great taming Bucephalus, he said in Enderyby Town Football Club Ltd. v. Football Association Ltd., [1971] Ch. 591, 606. "With a good man in the saddle, the unruly horse can be kept in control. It can jump over obstacles." Had the timorous always held the field, not only the doctrine of public policy but even the Common Law or the principles of Equity would never have evolved. Sir William Holdsworth in his "History of English Law", Volume III, page 55, has said :

> *"In fact, a body of law like the common law, which has grown up gradually with the growth of the nation, necessarily acquires some fixed principles, and if it is to maintain these principles it must be able, on the ground of public policy or some other like ground, to supress practices which, under*

ever new disguises, seek to weaken or negative them.

"It is thus clear that the principles governing public policy must be and are capable, on proper occasion, of expansion or modification. Practices which were considered perfectly normal at one time have today become obnoxious and oppressive to public conscience. If there is no head of public policy which ***D covers*** *a case, then the court must in consonance with public conscience and in keeping with public good and public interest declare such practice to be opposed to public policy. Above all, in deciding any case which may not be covered by authority our courts have before them the beacon light of the Preamble to the Constitution. Lacking precedent, the court can always be guided by that light and the principles underlying the Fundamental Rights and the Directive Principles enshrined in our Constitution.*

93. *The normal rule of Common Law has been that a party who seeks to enforce an agreement which is opposed to public policy will be non-suited. The case of A. Schroeder Music Publishing Co. Ltd. v. Macaulay, however, establishes that where a contract is vitiated as being contrary to public policy, the party adversely affected by it can sue to have it declared void. The case may be different where the purpose of the contract is illegal or immoral.* ***,In Kedar Nath Motani and others v. Prahlad Rai and others*** *[1960] 1 S.C.R. 861 reversing the High Court and restoring the decree passed by the trial court declaring the appellants' title to the lands in suit and directing the respondents who were the appellants' benamidars to restore possession, this Court, after discussing the English and Indian law on the subject, said (at page 873):*

> *"The correct position in law, in our opinion, is that what one has to see is whether the illegality goes so much to the root of the matter that the plaintiff cannot bring his action without relying upon the illegal transaction into which he had entered. If the illegality be trivial or venial, as stated by Willistone and the plaintiff is not required to rest his case upon that illegality, then public policy demands that the defendant should not be allowed to take advantage of the position. A strict view, of course, must be taken of the plaintiff's conduct, and he should not be allowed to circumvent the illegality by restoring to some subterfuge or by mis-stating the facts. If, however, the matter is clear and the illegality is not required to be pleaded or proved as part of the cause of action and the plaintiff recanted before the illegal purpose was achieved, then, unless it be of such a gross nature as to outrage the conscience of the Court, the plea of the defendant should not prevail."*

The types of contracts to which the principle formulated by us above applies are not contracts which are tainted with illegality but are contracts which contain terms which are so unfair and unreasonable that they shock the conscience of the court. They are opposed to public policy and require to be adjudged void."

In **Rattan Chand Hira Chand Vs. Askar Nawaz Jung (Dead) By Lrs and others,**[60] in paragraph no.18 it has been observed as under:-

"18. *It is true that as observed by Burrough, J. in Richardson v. Mellish, [1824] 2 Bing. 229 at 252 public policy is "an unruly horse and dangerous to ride" and as observed by Cave, J. in re Mirams, [189] 1 QB 594 at 595 it is "a branch of the law, however, which certainly should not be extended, as judges are more to be trusted as interpreters of the law than as expounders of what is called public policy". But as observed by Prof. Winfield in his article 'Public Policy in the English Common Law'.*

"Some judges appear to have thought it [the unruly horse of public policy] more like a tiger, and refused to mount it at all perhaps because they feared the fate of the young lady of Riga. Others have regarded it like Balaam's ass which would carry its rider nowhere. But none, at any rate at the present day, has looked upon it as a Pegasus that might soar beyond the momentary needs of the community."

All courts are at one time or the other felt the need to bridge the gap between what is and what is intended to be. The courts cannot in such circumstances shirk from their duty and refuse to fill the gap. In performing this duty they do not foist upon the society their value-judgments. They respect and accept the prevailing values, and do what is expected of them. The courts will, on the other hand, fail in their duty if they do not rise to the occasion but approve helplessly of an interpretation of a statute or a document or of an action of an individual which is certain to subvert the societal goals and endanger the public good."

In the case of **City Industrial Development Corporation** (supra), applying the test of reasonableness and non arbitrariness in government action as per the settled principles discussed above in detail, it was observed in paragraph no.49, 50 and 51 quoted as under;-

"49. *State and its agencies and instrumentalities cannot give largesse to any person at sweet will and whims of the political entities or officers of the State. However, decisions and action of the State must be founded on a sound, transparent and well defined policy which shall be made known to the public. The disposal of Government land by adopting a discriminatory*

60. 1991 (3) SCC 67

and arbitrary method shall always be avoided and it should be done in a fair and equitable manner as the allotment on favoritism or nepotism influences the exercises of discretion. Even assuming that if the Rule or Regulation prescribes the mode of allotment by entertaining individual application or by tenders or competitive bidding, the Rule of Law requires publicity to be given before such allotment is made. CIDCO authorities should not adopt pick and choose method while allotting the Government land.

***50**. Furthermore, this Court has already stated in Akhil Bhartiya Upbhokta Congress Vs. State of M.P. (2011) 5 SCC 29, that the State or its agencies or instrumentalities must give largesse founded on a sound, transparent, discernible and well-defined policy, which should be made known to the public at large and further held that a rational policy of allotting land on the basis of individual applications cannot de hors an invitation or advertisement by the State or its instrumentality, bringing it to the knowledge of public at large so that the eligible persons should not be excluded from lodging their competitive claims.*

***51**. The action of cancellation of allotment of plots, as tried to be justified by CIDCO, would show that the High Court failed to appreciate such cogent reasons in deciding the matter while exercising the power of judicial review. It is more evident and clear that arbitrariness had a role to play in the matter while allotting the three plots in favour of one group of persons which certainly would come within the meaning of arbitrariness on the part of CIDCO and against the public policy. Such an action on the part of CIDCO, it appears to us, is nothing but a favouritism based on nepotism and was irrational and unreasonable and functioning in a discriminatory manner as voiced by this Court in the case of Raman Dayaram Shetty."*

It was held that in the matter of allotment of plots by CIDCO, the arbitrariness had a role to play and the allotment made in favour of one group of persons would be against the public policy. The action of CIDCO was found tainted with favoritism based on nepotism and opposed to public policy.

In the most recent case of **Board of Control For Cricket In India Vs. Cricket Association of Bihar and others**[61], the concept of public policy has been discussed in paragraph no.90 to 96. The meaning attached to the expression "public policy" has been discussed with reference to what has been stated in paragraph no. 92 of the judgement in the case of **Central**

61.2015 (3) SCC 251

Inland Water Transport Corporation (supra).

We only reproduce paragraph nos. 90, 94 and relevant portion of paragraph no. 96 which are relevant to the fact of this case:-

> **"*90.*** *The validity of Rule 6.2.4 as amended can be examined also from the standpoint of its being opposed to "public policy". But for doing so we need to first examine what is meant by "public policy" as it is understood in legal parlance. The expression has been used in Section 23 of the Contract Act, 1872 and in Section 34 of the Arbitration and Conciliation Act, 1996 and a host of other statutes but has not been given any precise definition primarily because the expression represents a dynamic concept and is, therefore, incapable of any straitjacket definition, meaning or explanation. That has not, however, detered jurists and courts from explaining the expression from very early times.*
>
> ***94.*** *We may also refer to the decision of this Court in ONGC Ltd. v. Saw Pipes Ltd, wherein this Court was considering the meaning and import of the expression "public policy of India" as a ground for setting aside an arbitral award. Speaking for the Court M.B. Shah, J. held that the expression "public policy of India" appearing in the Act aforementioned must be given a liberal meaning for otherwise resolution of disputes by resort to arbitration proceedings will get frustrated because patently illegal awards would remain immune to court's interference. This Court declared that what was against public good and public interest cannot be held to be consistent with public policy. The following passage aptly summed up the approach to be adopted in the matter: (Saw Pipes Ltd. Case, SCC pp. 727-28, para 31)*
>
> > *"31. Therefore, in our view, the phrase, 'public policy of India' used in Section 34 in context is required to be given a wider meaning. It can be stated that the concept of public policy cannotes some matter which concerns public good and the public interest. What is for public good or in public interest or what would be injurious or harmful to the public good or public interest has varied from time to time. However.....*
>
> ***96.*** *To sum up: public policy is not a static concept. It varies with times and from generation to generation. But what is in public good and public interest cannot be opposed to public policy and vice versa. Fundamental Policy of law would also constitute a facet of public policy. This would imply that all those principles of law that ensure justice, fair play and bring transparency and objectively and promote probity in the discharge of public functions would also constitute public policy. Conversely, any deviation, abrogation, furstration or negation of the salutary principles of justice, fairness, good conscience, equity and objectively will be opposed to public policy. It follows that any rule,*

contract or arrangement that actually defeats or tends to defeat the high ideals of fairness and objectivity in the discharge of public functions no matter by a private non-governmental body will be opposed to public policy.".....

The rule of law requiring opportunity to all who may be invited before grant of contact is thus settled. A public Authority cannot adopt pick and choose method while entering into the Public Contract. In cases, the Court is not denuded of the powers to look into the agreement and see whether the clauses of agreement are such as would benefit the private person at the cost of public.

There cannot be a doubt that the law has to grow in order to satisfy the needs of the fast changing society and keep abreast with the economic development taking place in the country. As new situations arise the law has to evolve in order to meet the challenges of such new situations. Law cannot afford to remain static. The Court has to evolve new principles and lay down new norms which arise in a highly industrialised economy. Therefore, when new changes are thrown open, the laws must grow as a social engineering to meet the challenges and every endeavour should be made to cope with the contemporary demands to meet socio-economic challenges under rule of law, either by discarding the old and unsuitable or adjusting legal system to the changing socio-economic scenario.

At the same time it is also settled principle of law that every action of the public authority or the person acting in public interest or any act that gives rise to public element, should be guided by public interest. It should be no answer for the State, its instrumentality, public authority or person whose acts have the insignia of public element to say that their actions are in the field of private law and they are free to prescribe any conditions or limitations in their actions as private citizens, simplicitor, do in the field of private law. Its actions must be based on some rationale and relevant principles and should be in public interest.

Whether awarding of the contract in favour of Noida Toll Company in the facts of the case is legally sustainable?

Thus following legal principles emerge in the matter of scrutiny in the case of award of contract, by Government or Public Authority which reflect upon public money/properties:-

(a) In view of the Article 14 of the Constitution of India the Government or an instrumentality of the State while awarding the contract must select the recipient after due advertisement/notice inviting tenders.

Reference **M/s. Kasturi Lal Lakshmi Reddy** and **Ramana Dayaram Shetty.**

(b) It is only in exceptional cases that the recipient of the contract can be selected without advertisement or notice inviting tender.

In the case of **Villianur Iyarkkai Padukapu Maiyam** (supra) relied by the Concessionaire, it was found that the petition was filed by a person who had neither participated in the process of selection of consultants/developers nor had expressed desire to develop a port. Moreover, it was not a case of establishment of new port at Pondicherry rather it was a case of developing an existing port in order to improve the existing port facility. It was therefore, held that the development of existing port on BOT basis cannot be equated with the transfer of State largess and therefore, non inviting of tender was not found fatal.

The **Raunaq International** (supra) was a case where tenders were invited, evaluation committee of experts was appointed to evaluate offers. After giving due consideration to the records and past performance of the tenderers, the Committee selected the tenderer of higher price for a better equality of work. It was therefore, held by the Apex Court that merely because lowest tender was not accepted by the committee, it cannot be said that the decision was faulty and the Court, therefore, will not substitute the decision of an experts.

The judgments relied upon by the Concessionaire on the issue are distinguishable in the facts of the present case.

We will, therefore, first proceed to examine as to whether in the facts of the case, there are exceptional reasons for the NOIDA to enter into the Concession Agreement with NOIDA Toll Company and IL&FS, without satisfying the requirements of Article 14 of the Constitution of India.

From the stand taken by the IL&FS and NOIDA Toll Company the reasons disclosed to this Court for not publishing notice inviting tenders in the matter of construction of D.N.D. Flyover are (a) at the relevant point of

time there was no private player/institution interested in participating in such road projects, and (b) that IL&FS was the proponent of the concept of public private partnership (PPP Model) and was the only agency at the relevant time which could generate money from banks and financial institutions and provide expertise in the matter of such road infrastructures. (c) Lastly IL&FS was controlled by public sector, inasmuch as 81% (approx) of its shares at the relevant time were held by the L.I.C./Nationalized Banks.

We are of the considered opinion that none of the above three reasons make out a case of exception in the case of non-compliance of the requirements of Article 14 of the Constitution of India for awarding of the contract in favour of NOIDA Toll Company by private negotiation.

The allegation that there was no other private player interested in such projects at the relevant time is based on mere surmises and conjunctures of respondents being not supported by any material with which it could be demonstrated that any such similar project was advertised at the relevant time and no offers were received.

So far as the IL&FS is concerned, we need not to comment upon its credibility, but it is apparent from the Concession Agreement that the Memorandum of Understanding was designed and signed by the then Secretary, Urban Affairs and Development, Union of India. The State of U.P. is not a signatory to the said Memorandum of Understanding.

It is surprising to notice that under the Concession Agreement itself it is mentioned that a Steering Committee be constituted, which in turn decided that the project of DND Flyover be implemented through a private company to be promoted by IL&FS.

We may also record that NOIDA Toll Bridge Company is stated to be incorporated subsequent to the Memorandum of Understanding to be precise in 1996 but prior to signing of the Concession Agreement. It is, therefore, writ large on record that a private company was set up to become the Concessionaire on the asking of the IL&FS, for which no reason or justification could be furnished to this Court.

NOIDA Toll Bridge Company can have absolutely no experience in the matter of construction of such road projects and, therefore, the entire case

pleaded by ILFS and NOIDA Toll Bridge Company for suggesting that there was no requirement of advertisement/notice inviting tenders in the facts of the case falls to ground.

It would also be appropriate for us to record that in case other competitors had been invited, probably better favourable condition both in the matter of what would be the fair and reasonable expenses which could be deducted from the tolls recovered, and to what extent could have been ascertained.

Similarly, if others were permitted to compete, probably the State/NOIDA could have found more commercially viable project and a better deal. Similarly, there would have been offers much more attractive and much more in the public interest, if a transparent procedure for awarding the contract, as per the law explained by the Apex Court in the case of **M/s. Kasturi Lal Lakshmi Reddy** (supra), had been adopted by the respondents.

We may also record that the execution of the Concession Agreement has not resulted in any benefit either to NOIDA/State owing to the various clauses of the agreement, specifically (a) the clause pertaining to the Total Cost of Project and liability of NOIDA to repay the same, (b) no capping on the total expenditure to be deducted.

Role of the then Secretary, Ministry of Urban Development, Government of India;-

Additional Advocate General, Sri C.B. Yadav has specifically informed the Court that the Secretary, Ministry of Urban Development, Government of India at the relevant time of the execution of MOU was Sri R. K. Bhargava, an IAS officer. He was infact instrumental in conceptualization of the project and had initially projected that IL&FS would undertake the project under the MOU. From the letter dated 18.05.1995 [reference paragraph no.5 of the counter affidavit filed by the State Government dated 28.07.2016](appended as Annexure no.1 to the counter affidavit), it is clear that pursuant to the signing of MOU, a Steering Committee was constituted of which the Secretary, Ministry of Urban Development, Government of India was the Chairman i.e. Sri R.K.

Bhargava. From the Clause (f) of the Concession Agreement, it is further evident that the Steering Committee was chaired by the Secretary of the Ministry of Urban Affairs & Development (now Ministry of Urban Development), Government of India. In Clause (k) of the Concession Agreement, it is mentioned that the Steering Committee had decided to implement the project by a Corporate entity promoted by IL&FS to be incorporated in the State of U.P., pursuant thereto, NTBCL (Noida Toll Bridge Company Ltd.) was incorporated and registered under the Companies Act having its office in the State of U.P with Sri R.K. Bhargava as Chairman of the Company. [Reference communication dated 08.07.2011 sent by the Chief Executive Officer, Noida to Sri R.K. Bhargava as Chairman to NTBCL (enclosed with the list of documents in "Compilation no. III" submitted by State Government)].

In these circumstances, we arrive at an irresistible conclusion that the entire project of DND Flyover was the brain child of one man namely Sri R.K. Bhargava who was the then Secretary in the Ministry of Urban Development, Government of India. After signing of the MOU, Sri R.K. Bhargava he being the Chairman of the Steering Committee suggested that the project be implemented by a private company, 'NTBCL' was incorporated and selected as the Concessionaire, of which he was the Chairman.

We have no hesitation to record that IL&FS had only negotiated with the NOIDA authority and has succeeded in the contract being awarded to a private company under the agreement dated 12th November, 1997 in a manner which, in our opinion, is unfair.

We would have directed that, in the facts of the case that the award of the contract itself was hit by Article 14 of the Constitution of India and, therefore, liable to be declared null and void, but we are deliberately avoiding such a direction only because during this period the Concessionaire has performed its part of obligation and has completed the construction of the Toll Bridge.

Whether the user fee charge by Noida Toll Company is legally sustainable or not.

So far as levy and collection of user fee by the Concessionaire is concerned, submission is that the Concessionaire has been authorised

under the Concession Agreement to levy and collect fee from the users of the NOIDA Toll Bridge and appropriate the same for recovery of the investments made plus returns thereon.

The Concessionaire has contended that the User fee is being charged under 1998 Regulations which have been framed by NOIDA in exercise of its powers conferred by Sections 6-A readwith Section 19 of the Uttar Pradesh Industrial Area Development Act, 1976 (hereinafter referred to as the Act, 1976). The NOIDA in its counter affidavit has only referred to the Concession Agreement for approving the levy and collection of user fee and its revision.

To test the abovenoted submissions, we may first go through the relevant provisions of the Act, 1976 as existing on the date of execution of the Concession Agreement:-

*"**Section 6** Functions of the Authority.- (1) The object of the Authority shall be to secure the planned development of the industrial development area.*

(2) Without prejudice to the generality of the objects of the Authority, the Authority shall perform the following functions:–

(a) to acquire land in the industrial development area, by agreement or through proceedings under the Land Acquisition Act, 1894 for the purpose of this Act;

(b) to prepare a plan for the development of the industrial development area;

(c) to demarcate and develop sites for industrial, commercial and residential purposes according to the plan;

(d) to provide infrastructure for industrial, commercial and residential purposes;

(e) to provide amenities;

(f) to allocate and transfer either by way of sale or lease or otherwise plots of land for industrial, commercial or residential purposes;

(g) to regulate the erection of buildings and setting up of industries; and

(h) to lay down the purpose for which a particular site or plot of land shall be used, namely for industrial or commercial or residential purpose or

any other specified purpose in such area."

*"**Section 11** Levy of tax:- (1) For the purposes of providing, maintaining, or continuing any amenities in the industrial development area, the Authority may, with the previous approval of the State Government, levy such taxes as it may considers necessary in respect of any site or building on the transferee or occupier thereof, provided that the total incidence of such tax shall not exceed twenty five per cent of the annual value of such site or building.*

Explanation.- For the purpose of this sub-section, the expression 'market value' means the amount of-

(a) consideration, in the case of lease; or

(b) premium, in the case of lease; or

(c) the minimum value determined in accordance with the rules made under the Indian Stamp Act, 1899, which ever is more.

(2) If the State Government considers it necessary or expedient in the public interest it may, by a general or special order, exempt wholly or partly – any such transferee or occupier or any class thereof from the taxes levied under sub-section (1)".

Section 19(1) readwith Section 19(2)(e) confer a power upon the Authority to frame regulations for administration of its affairs in consonance with the provisions of the Act and Rules with the previous approval of the State Government. The relevant provisions are reproduced as under:-

"**Section *19.*** *Power to make regulations (1) The Authority may with the previous approval of the State Government make regulation not inconsistent with the provisions of this Act or the rules mode thereunder for the administration of the affairs of the Authority.*

(2) *In particular, and without prejudice to the generally of the foreboding power, such regulations may provide for all or any the following matters namely–*

(e) fee to be levied in the discharge of its functions;"

So far as Section 6-A is concerned, it was introduced/inserted by U.P. Act No. 2 of 1999 w.e.f. 14.8.1998.

Relevant Section 6-A reads as under:-

*"**6-A.** Power to authorize a person to provide infrastructure or amenities and collect tax or fee.-Notwithstanding anything to the contrary contained in any other provisions of this Act and subject to such terms and conditions as may be*

specified in the regulations, the Authority may, by agreement, authorize any person to provide or maintain or continue to provide or maintain any infrastructure or amenities under this Act and to collect taxes or fees, as the case may be, levied therefor."

In exercise of power under Section 6-A readwith Section 19(2)(e) NOIDA framed Regulations, 1998 and enforced it sometime in the month of September, 1998. The relevant clauses of Regulations 1998 are as under:-

*"**Regulation 2-A (b) 'Agreement'** means an agreement entered into between the authority and Developer on which basis the Developer develops, constructs, maintain or provides an infrastructure or collects fee therefore in the area.*

***(e) 'Developer"** means a person who constructs, develops, maintains or provides an infrastructure or collects fee therefore in the Area on the basis of an agreement made before or after the commencement of these regulations, providing or maintaining or continuing to provide or maintain any infrastructure in the New Okhla Industrial Development Area.*

***(f) 'Fee'** in relation to an infrastructure means an amount levied upon or payable by a person under these regulations for the use of an infrastructure in the Area.*

***Regulation 3.** (a) The Authority may either itself or through a Developer on the basis of an agreement, develop, construct, provide or maintain or continue to provide or maintain an infrastructure in the Area.*

(b) In particular, any without prejudice to the generality of the powers of the Authority in this behalf the agreement may provide for any or all of the following matters:-

(i) ...xxxxxx.....

(ii) rights and obligations of the parties to the Agreement;

(iii) Standards and specifications for the design, construction and maintenance of an infrastructure;

(iv) Fee to be levied and collected for an infrastructure in the Area.

(v) Process for computing the reasonable returns for the Developer.

(vi) Procedure for surrender, release or extinguishing of the rights of the Developer or otherwise the transfer of an infrastructure.

(vii) Rights of the lenders of the Developer in relation to an

infrastructure;

(viii) Termination of the Agreement;

(ix) Mechanism for settlement of disputes; and

(x) Any other terms and conditions as may be agreed upon by the Authority, Developer or lender of the Developer.

Regulation 5. *(1) For the purpose of providing or maintaining or continuing to provide or maintain an infrastructure in the Area either by itself or through a Developer the Authority may levy and collect at the rate determined on the basis of a formula prescribed and notified by the authority. In case an infrastructure is developed, constructed or maintained or provided under an agreement such formula shall be such as may be determined and agreed to between the Authority and the Developer. The formula prescribed may provide for different rates for different classes of infrastructure.*

(2) The authority shall have the powers to authorise the developer to collect and appropriate the fee levied under sub-clause (1) in accordance with the Agreement. Developer"s rights to collect or appropriate the fee may be assignable to the lenders of the Developer.

(3) Where the authority authorizes the Developer to collect and appropriate the Fee in accordance with sub-regulation (2), the agreement shall provide for a mechanism for determination, revision, and publication of the rate of fee.

(4) A rate of Fee so determined shall be duly published and exhibited in Hindi Devanagri Script, English, and Urdu at such places and in such manner as may be determined by the Authority.

(5) A developer shall maintain and keep such registers and other records as may be directed by the Authority."

We may also refer to the relevant Clauses of the Concession Agreement which have already been set out in the preceding part of this judgment. Clause (o) of the agreement and Article 13 which confers a power upon the Concessionaire to levy fee find specific reference here.

We may reproduce the definition of "fee" provided under Section 1.1 of the Concession Agreement hereunder:-

*"**Fee** means the amount of money demanded, charged, collected,*

retained and appropriated by the Concessionaire, for and on behalf of the NOIDA, from the users of NOIDA Bridge as fee for the provision of the Noida Bridge, in accordance with the rules prepared by NOIDA under Section 19 of the Act and the provisions of Article 13 herein."

From a careful reading of the above mentioned provisions of the Act, 1976, it is clear that under Section 11 of the Act, 1976, there is a provision for levy of taxes by the Authority, with the approval of the State Government for providing, maintaining or continuing any amenities in the Industrial Development Area to the extent of 25% of the annual value of the site or the building. Section 19 of the Act, 1976 confers power to make regulations consistent with the provisions of the Act which includes the power to frame regulations for levy of fee under Sub-section 2(e) of Section 19 of the Act.

Till the insertion of Section 6-A by Amendment Act, 1999 i.e. prior to 14.8.1998, the NOIDA Authority did not have power to authorise a developer to collect tax or fee. For the first time, this power has been provided by the Amendment Act No. 2 of 1999.

From a simple reading of Section 6-A of the Act, it is clear that the NOIDA could authorise a developer **only to collect the fee or tax levied therefor** and this power to collect was available only after the Regulations 1998 were enforced.

The words "Levy" and "Collect" are not synonyms, while "Levy" would mean the assessment or charging or imposing a tax or fee; "Collect" would be physical realisation of the tax/fee which is levied or imposed, an act to be performed at a subsequent stage.

This is also clear from the dictionary meaning of words "Levy" and "Collect".

"Levy" in the Black's law Dictionary, Ninth Edition means as under:-

Levy, *(lev-ee), n. 1. "The imposition of a fine or tax; the fine or tax so imposed – Also termed tax levy."*

Levy, *vb. 1. "To impose or assess (a fine or a tax) by legal authority".*

The literal meaning of words "Levy" and "Collect" in 'the New Lexicon

Webster's Dictionary of the English Language' Deluxe Encyclopedic Edition:-

***"Levy** 1. pl. **lev.ies** n. the imposition by a state or organization of a tax, duty, fine etc."*

"***Collect** 1. v.t. to gather in or together, to collect taxes, to accumulate (things of a similar kind)"*

In the 'Concise Oxford English' Indian Edition, the meaning of these two words given are as under:-

***Levy** n. (pl. **levies**) 1. the imposition of a tax, fee, fine, or subscription".*

***"Collect** v. 1. bring or gather together.*

The distinction between "Levy" and "Collection" with reference to Article 265 of the Constitution of India has been considered by the Apex Court in **Assistant Collector of Central Excise, Calcutta Division vs. National Tobacco Co. of India Ltd.**[62] wherein it was held that although the connotation of the term "levy" seems wider and may include both "imposition" of a tax as well as assessment, yet it cannot be extended to "collection".

The relevant paragraph '19' is quoted as under.

> *"19. The term "levy" appears to us to be wider in its import than the term "assessment". It may include both "imposition" of a tax as well as assessment. The term "imposition" is gene- rally used for the, levy of a tax or duty by legislative provision indicating the subject matter of the tax and the rates at which it has to be taxed. The term "assessment", on the other hand, is generally used in this country for the actual procedure adopted in fixing the liability to pay a tax on account of particular goods or property or whatever may be the object of the tax in a particular case and determining its amount. The Division Bench appeared to equate "levy" with an "assessment" as well as with the collection of a tax when it. held that "when the payment of tax is enforced, there is a levy". We think that, although the connotation of the term "levy" seems wider than that of "assessment", which it includes, yet, it does not seem to us to extend to "collection". Article 265 of the Constitution makes a distinction*

62 1972 (2) Supreme Court Cases 560

between "levy" and "collection". We also find that in N.B. Sanjana Assistant Collector of Central Excise, Bombay & Ors. v. The Elphinstone Spinning & Weaving Mills Co. Ltd, A. (1), this Court made a distinction between "levy" and "collection" as used in the Act and the Rules before us. It said there with reference to Rule 10 :-

> *"We are not inclined to accept the contention of of Dr. Syed Mohammad that the expression 'levy' in Rule 10 means actual collection of some amount. The charging provision Section 3(1) specifically says. 'There shall be levied and collected in such a manner as may be prescribed the duty of excise . . .' It is to be noted that subsection (i) uses both the expressions "levied and collected" and that clearly shows that the expression 'levy' has not been used in the Act or the Rules as meaning actual collection".*

So far as levy of fee under the Act, 1976 is concerned, we may state that the State Government has power to legislate under Article 246 of the Constitution of India for levy of fee in respect of any of the matters with reference to the Entry '66' in List-II in VII Schedule of the Constitution of India. Under the Statute to be so framed, the State Legislature may delegate such power to a local authority. We may also record that the power to levy fee has been delegated to the NOIDA Authority in discharge of its functions under Section 19 of the Act, 1976.

It is settled law that an authority vested with the power to frame Subordinate legislation has to act within the limits of its power and cannot transgress the same. The initial difference between Subordinate legislation and the Principal Statute lies in the fact that a Subordinate law making body is bound by the terms of its delegated or derived authority. The extent and amplitude of the rule making power would depend upon and be governed by the language of the Statute.

The Apex Court in the case of **Hukum Chand vs. Union of India**[63], has held that the Court of law, as a general rule, will not give effect to the Rule made by a Statutory authority, unless satisfied that all the conditions

63 AIR 1972 SC 2427

precedent to the validity of the Rules have been fulfilled.

The said principle has been cited with approval by the Apex Court in **Commissioner of Income-tax, U.P.-II, Lucknow vs. Bazpur Co-operative Sugar Factory Ltd. Bazpur, Dist. Nainital**[64].

In **Additional District Magistrate (Rev.) Delhi Administration vs. Shri Ram**[65], it has been held in paragraph '16' as under:-

> "*16. It is well recognised principle of interpretation of a statute that conferment of rule-making power by an Act does not enable the rule-making authority to make rule which travels beyond the scope of the enabling Act or which is inconsistent therewith or repugnant thereto. From the above discussion, we have no hesitation to hold that by amending the Rules and Form P-5, the rule-making authority have exceeded the power conferred on it by the Land Reforms Act.*"

In the case of **M. Chandru vs. Member-Secretary, Chennai Metroplitan Development Authority and another**[66], the Apex Court has held in paragraph '18' that the power to delegate being a statutory requirement must find its place in the Principal Act itself and not in the regulations.

> *"18. The Sewerage Board is a State within the meaning of Article 12 of the Constitution of India. It is a creature of a statute. It can delegate its power provided there exists a provision in the Act. Power to delegate, thus, being a statutory requirement must find its place in the principal Act itself and not in the Regulation. The High Court, in our opinion, has asked unto itself a wrong question. The appropriate question required to be posed was not as to whether the CMDA was appointed as an agent, but was as to whether the Sewerage Board could delegate its power to CMDA. It may have some advantages. But the same may not answer the legal requirement."*

Meaning thereby, under Section 6-A of the Act, 1976 only the right to collect tolls/User fee could have been provided to the Concessionaire that

64 AIR 1988 Supreme Court 1263
65 2000 (5) Supreme Court Cases 451
66 2009 (4) Supreme Court Cases 72

too by framing regulations while the power to levy the fee would remain with the NOIDA Authority under its delegated power as per Section 19(2)(e) of the Act.

The NOIDA Authority on the other hand by framing Regulations 1998 has not only delegated the power to collect fee but also to levy (devising mechanism for determination, revision and publication of rate of fee) upon the developer by an Agreement. Under the Parent Act, 1976, it has no such power to sub-delegate or authorise the levy of fee.

In our opinion, sub-delegation of power, to levy and thereafter collect the toll/user fee upon a private company namely the Concessionaire under the Concession Agreement is bad. The Regulations 1998 framed by NOIDA Authority to justify such delegation runs contrary to Section 6-A read with Section 19 of the Act.

Furthermore, Section 6-A to U.P. Act No. 6 of 1976 was added subsequent to the execution of the contract/agreement to be precise on 12th Day of November, 1997.

The amended provision has no retrospective operation. In **Zile Singh vs. State of Haryana and others**[67], the Apex Court held in paragraph '13' as under:-

> *"It is a cardinal principle of construction that every statute is prima facie prospective unless it is expressly or by necessary implication made to have a retrospective operation. But the rule in general is applicable where the object of the statute is to affect vested rights or to impose new burdens or to impair existing obligations. Unless there are words in the statute sufficient to show the intention of the Legislature to affect existing rights, it is deemed to be prospective only 'nova constitutio futuris formam imponere debet non praeteritis' __ a new law ought to regulate what is to follow, not the past. (See : Principles of Statutory Interpretation by Justice G.P. Singh, Ninth Edition, 2004 at p.438). .....xxxxxxxxxxx.....*
>
> *(emphasis supplied)"*

The Apex Court in its recent judgment in the case of **State of Rajasthan & Others versus Basant Agrotech (India) Ltd.**[68], after noticing

67 2004 (8) Supreme Court Cases 1
68 2013 (15) SCC 1

the distinction between the parent Act and the subordinate legislation like rules and regulations framed there-under as well as after noticing the meaning to be attached to Section 14 and Section 21 of the General Clauses Act, 1897, has specifically laid down that the Subordinate Legislation has to act within the four corners of the parent Act and the authority delegated therein. If the parent Act does not confer any power upon the Subordinate Legislation, like framing of regulations with retrospective effect then there cannot be any theory of implied intent or the concept of incidental and ancillary power in the matter of exercise of fiscal power. Relevant paragraph '21' is quoted as under:-

> *"**21.** There is no dispute over the fact that a legislature can make a law retrospectively or prospectively subject to justifiability and acceptability within the constitutional parameters. A subordinate legislation can be given retrospective effect if a power in this behalf is contained in the principal Act. In this regard we may refer with profit to the decision in Mahabir Vegetable Oils (P) Ltd. and another v. State of Haryana and Others [(2006) 3 SCC 620], wherein it has been held that:-*
>
> > *'41. We may at this stage consider the effect of omission of the said note. It is beyond any cavil that a subordinate legislation can be given a retrospective effect and retroactive operation, if any power in this behalf is contained in the main Act. The rule-making power is a species of delegated legislation. A delegatee therefore can make rules only within the four corners thereof.*
> >
> > *42. It is a fundamental rule of law that no statute shall be construed to have a retrospective operation unless such a construction appears very clearly in the terms of the Act, or arises by necessary and distinct implication. (See West v. Gwynne)[(1911) 2 Ch 1 : 104 LT 759 (CA)]."*

In paragraph '24' the Apex Court referring to paragraph of the another judgment of the Apex Court in the case of **Ahmedabad Urban Development Authority vs. Sharadkumar Jayanti-Kumar Pasawalla**[69] stated as under:-

> *"24. In Ahmedabad Urban Development Authority v. Sharadkumar Jayantikumar Pasawalla and others[18], a three-Judge Bench has ruled thus:*

69 1992 (3) SCC 285

"7... in a fiscal matter it will not be proper to hold that even in the absence of express provision, a delegated authority can impose tax or fee. In our view, such power of imposition of tax and/or fee by delegated authority must be very specific and there is no scope of implied authority for imposition of such tax or fee. It appears to us that the delegated authority must act strictly within the parameters of the authority delegated to it under the Act and it will not be proper to bring the theory of implied intent or the concept of incidental and ancillary power in the matter of exercise of fiscal power."

The Apex Court has thereafter gone on to hold in paragraph-25 as under:-

"25. On a perusal of the aforesaid authorities there can be no scintilla of doubt that if the power has been conferred under the main Act by the legislature, the State Government or the delegated authority can issue a notification within the said parameters. ….."

In the facts of the case, under the concessional agreement/contract not only the base price of user fee has been fixed but the mechanics for enhancement of such User fee from time to time has also been provided.

In our opinion, Section 6-A of U.P. Act No. 6 of 1976 does not permit levy of user fee by the Developer. It only permits collection thereof. The Regulations 1998 cannot travel beyond the main Section 6-A of U.P. Act No. 6 of 1976 nor can it infuse life to the concessional agreement/contract by giving retrospective operation to the Regulations 1998. The base user fee had been determined under the agreement itself that is on a date when the Regulations 1998 had not seen the light of the day.

The plea raised on behalf of the Concessionaire to support the levy of user fee under the provisions of Section 6- A of U.P. Act No. 6 of 1976 read with the Regulations 1998 cannot, therefore, be legally sustained.

Under the Indian Tolls Act 1851, the Government or a public authority is empowered to levy fee/toll upon any road or bridge, however, lease for the right to collect tolls can be given to a contractor for specified period provided therein. The idea is that the amount spent towards cost of construction of the bridge or road is realised.

In the case of **Kiran Anandrao Pawar & others Vs. Chief General**

Manager, IRB Kolhapur Integrated & others and **Nandu Vs. State of Maharashtra & others** relied by the Concessionaire to justify levy, it was found by the Bombay and Nagpur High Courts that the relevant statute permitted the recovery of cost and expenses and the grant of concession was within the four corners of the said statute.

Reliance placed upon another judgment of the Maharashtra High Court in **Sammer Desai** is misplaced in view of the categorical finding recorded therein that the Concessionaire has not been able to recover the capital outlay.

In **Col.T. Prasad Vs. Union of India** (supra), the issue being examined by us was not subject matter of challenge. The said judgments relied upon by the Concessionaire being based on the individual facts of the case are clearly distinguishable.

This case is a glaring example of misuse of power by a Public Authority in first entering into the agreement and then framing Regulations to bring the clauses of Agreement with a private person (Company) in line with the legislation so as to give it a statutory backing.

In view of the above, we hold that 'Article 13' of the Concession Agreement suffers from want of legal authority. It is, therefore, held to be bad and liable to be struck down. Resultantly, no User fee can be legally levied/charged by the Concessionaire under the Concession Agreement.

Whether the concept of Total Cost of Project and Returns under Article 14 (Clause) of the Concession Agreement is arbitrary, opposed to Public Policy? And if so, the effect.

On the facts of this case read with the clauses of the Concession Agreement, it is more than apparent that the Concession period is not fixed i.e. 30 years at the maximum, as suggested by the Concessionaire. The Concession Agreement, contemplates under section 2.3 read with section 2.4 that the Concession period has to be extended beyond 30 years, if the Total cost of the project is not recovered within 30 years from the “Effective Date”. Going by the formula as per Article 14 read with Annexure 'F' of the Concession Agreement, the total cost of Project is escalating each year.

The total Cost of Project as per the Company's Auditor report as on 31.03.2012 was Rs.2339.69 crores, which increased to Rs.2951.1 crores as

on 31.03.2013, Rs.3448.95 crores as on 31.03.2015. By 31.3.2016, the total cost of Project as per the formula contained in Article 14 of the Concession Agreement would reach a figure of more than 5000 Crores.

The idea of Total cost of the Project under the Concession Agreement:-

Under Section 1.1, the “project cost” as defined means, “the cost of construction” and “the other Costs of Commissioning” “to be determined” on the “project commissioning date” by the Independent Auditor in consultation with the Independent Engineer. According to us, after commissioning of the Project, the Concessionaire would only be entitled for the maintenance cost plus interest/reasonable profits on the investments.

The Total Project cost under the method of “Cost and Accounting” as provided under Article 14 read with Annexure 'F' of the Concession Agreement, is continuously increasing. The reason is obvious, as per Section 14.1 of the Agreement, the Total Cost of Project is aggregate of (a) the project cost, (b) major maintenance expenses and (c) short fall in the recovery of returns in a specific financial year as per the formula in section 14.2(a).

Section 14.2 says that the amount available for appropriation by the Concessionaire for the purpose of recovering the total cost of project and returns thereon (as illustrated in Appendix-F) shall be calculated by deduction of Operation and Maintenance expenses and taxes (excluding any custom or import duties) from the Gross revenues i.e. from fee collection, income by advertisement and development income. As per the definition of “Returns” in section 1.1, it is the amount computed at the rate of 20% per Annum on the Total Cost of Project, which is recoverable by the Concessionaire, from the Effective date. Any short fall in recovery of returns is added to the unrecovered total cost of project of the previous year to arrive at the unrecovered project cost of that particular year (ending on 30th March).

This apart the O&M expenses as defined in Section 1.1 of the Concession Agreement include all fees and expenses, without limitation, of attorney's consultants and experts retained by the Concessionaire in the

ordinary course of its business. The O&M expenses are to be determined and certified by the Independent auditor under the Concession Agreement. The agreement has not provided any specification nor there are norms based on estimate of cost as to what should be the expenses allowed nor there is any limit on the expenses. The Concessionaire is at liberty to add expenses in the estimate of cost without any limitation.

The result is that going by the formula adopted in Article 14 of the Concession Agreement, the unrecovered cost goes on escalating and it would not be possible to achieve 100% returns of the Total Project Cost even at the end of 100 years what to talk of 2031 i.e. 30 years of the Concession period. The ultimate result is that the Concessionaire will go on realizing the Toll fee in the name of "User Fee" for indefinite period much beyond the period of 30 years and will continue to tax the public by collecting user fee under the pretext that they have not been able to recover the Total Cost of the Project and the profits thereon.

The Independent Auditor in Company's audit report for the year ending on 31.3.2012 after referring to the unrecovered cost of project of Rs. 2339.69 Crores states as under:-

"The company considers that they will not be able to earn the assured return under the concession agreement over 30 years. The company has an assured extension of the concession as required to achieve project cost and designated returns. Based on the independent professional expert advice, ***the estimated life of the bridge has now been considered as 100 years****".*

In the report dated August 29, 2007 Sri Pradeep Puri, the President & CEO of NOIDA Toll Bridge Company forwarded to the Chief Executive Officer, NOIDA Authority regarding the proposal for construction of office building adjacent to DND Toll Plaza, submitted as under:-

"Though the traffic and revenue of the Project has increased significantly, the Project is still not earning sufficient revenues to cater for the designated returns. The total Unrecovered Project Cost, computed by the Independent Auditor as per formula provided in the Concession Agreement works out to Rs. 1109 crores as on March 31, 2007 and based on projected estimates of traffic and revenue attached at Annexure-I, it is unlikely that the Project Cost can ever be recovered. ***In other word, this has become a perpetual concession****.*

Annexure-I also provides a scenario wherein the Company has recourse to a stream of rental income. It may be seen that in the event, that the proposal outlined below, is implemented, the project alongwith its assets would revert free of cost to NOIDA in 2030."

The Concessionaire had thus realized as early as in the year 2007 that it would not be able to ever recover the Total Cost of Project as per the formula provided in Article 14 read with Annexure 'F' by adding assured returns of 20% cumulatively and the Total Cost of Project would be ever escalating.

Thus from the report of Company's Auditor and the admission of Company's Executive, the Total Cost of Project has reached a point of no return and it would not be possible for the Concessionaire to revert the Project Assets free of cost to NOIDA Authority even after expiry of 100 years what to say of the period of 30 years.

This element of perpetuity in the Public contract where the assets belonging to State have been put in the hands of a public Company (under PPP model) is bothering us.

From the position that emerges can it be said that the Court is handicapped in such a situation and should sit quiet by showing its inability to touch the contract under the fear that it may enter into the realm of contract i.e. an area where rights and obligations of the contracting parties are likely to be affected.

We are sure that the Court cannot be a silent spectator and allow the contracting parties before us to perpetuate an illegality writ large on the face of the record. The situation has to be remedied by us by balancing the rights and obligation of the litigating parties namely the Public/Commuters on one hand and the contracting parties i.e. the Concessionaire and NOIDA Authority.

We find it difficult to accept the contention of the Concessionaire and respondent no.9 (IL&FS) that the Total cost of project calculated under Article 14 of the Concession Agreement has no impact upon the Users when we read Section 2.1(b)(iv) of the Agreement, which provides that the Concessionaire will have a right to levy fee and apply the same in order to recover the Total Cost of the Project and Returns thereon. The submission

in this regard made by the concessionaire i.e. respondent no.1 and IL&FS, respondent no. 9 is nothing but a desperate attempt to save themselves from the clutches of legal provision and to dissuade the Court from entering into the correctness of the clauses which authorise realization of User fee from the public for an indefinite period under the misnomer of Unrecovered Total Cost of the Project.

Actual Cost of Project recovered by the Concessionaire:-

While the petitioners would contend that the total cost of project alongwith reasonable returns has been recovered and, therefore, the Concessionaire now cannot charge user fee. The Concessionaire in reply with reference to clauses of the agreement would contend that it is entitled to realise the user fee as it has not achieved the figure of Total Cost of Project under the agreement which has been entered into with open eyes by the NOIDA.

We would, therefore, examine from the records as to whether the money invested by the Concessionaire in the Project has been recovered alongwith reasonable interest and returns or not.

The record indicates that the Independent Auditor namely M/s A.F. Ferrguson & Co. gave its report dated April 23, 2001 determining the project cost upto the commissioning date i.e. February 6, 2001, calculated as per provisions of Article 10.1 of the Concession Agreement. The said report is appended at page '466' of the counter affidavit of the Concessionaire dated 13.11.2014 (hereinafter referred to as 'CCA') and at page '46' of the Supplementary Affidavit No. 326046 dated 14.9.2015 and appended as Annexure SCA-'5' to the said affidavit.

A careful reading of the said documents and the admission of the Concessionaire in paragraph '67' and '68' of the counter affidavit dated 13.11.2014 shows that, for the period from April 8, 1996 to February 6, 2001, for Delhi NOIDA Bridge and Ashram Flyover, the Project Cost incurred by the respondent no. 1 as certified by M/s A.F. Ferrguson & Co. (Independent Auditor) vide certificate dated April 23, 2001 was INR 3776.56 millions (i.e. approximately Rs. 377 Crores). The cost of construction as submitted by Project Engineer incurred by respondent no. 3 towards

construction of Noida Toll Bridge DND Flyover was approximately Rs. 188.3 Crores and the Project Cost of which is disclosed as Rs. 265.7 Crores. The cost of construction of Ashram Flyover included in the Project though was subject matter of separate Construction agreement, was approximately Rs. 20 crores and was also added in the Project cost computed as on February 6, 2001. Relevant part of the report of the Independent Auditor as narrated in paragraph '70' of the counter affidavit of the Concessionaire is reproduced below:-

NOIDA TOLL BRIDGE COMPANY LIMITED	
Project Cost	*As per Concession*
	06.02.2001
DND Flyway	*2,657,975,837.64*
Ashram Flyover	*20,454,320.58*
Total 1	*2,678,430,158.22*
Premilinary	*422,089,255.47*
Fund Mobilisation	*149,009,151.87*
Other Fixed Asset	*10,405,608.44*
Total 2	*581,504,015.78*
Total 1+2	*3,259,934,174.00*
Interest	*516,615,405.42*
Grand Total	*3,776,549,579.42 (Rs. 377 crores approx)*

In paragraph '84' of the abovementioned counter affidavit filed by respondent no. 1, a Statement of Computation as on 31.3.2014 in tabular form has been given. It is reproduced hereunder:-

Si. No.	*Description*	*Amount (in Crores)*
1.	*Total of toll income received from the date of commencing of the Project.*	*810.18*

2.	*Total of O&M expenses from the date of commencing of the Project (Column-5)*	*(214.98)*
3.	*Total of **corporate** income tax from the date of commencing of the Project (Column-6)*	*(16.40)*
4.	*Surplus after tax but before interest, depreciation and lease rental received from the date of commencing of the Project (Column-7)*	*578.80*

The Income of Rs. 810.18 as per own admission of the Concessionaire, was received from the toll collected, till 31.3.2014 from the date of commissioning of the project, surplus after tax was Rs. 578.80 it does not include income from other sources.

Furthermore, from a perusal of the Statement of Computation of 'returns and arrears' as on 31, March, 2014, appended at page '488' of the 'CCA' of the Concessionaire and as Annexure S.C.A.-3 (at page 96 of Supplementary Affidavit No. 326053 dated 14.09.2015 filed by the concessionaire), it is clear that the gross revenues i.e. total income from the toll earned by Concessionaire in each year is increasing gradually.

From the said document, it is further clear that the Project Cost incurred by the Concessionaire upto February 6, 2001 was Rs. 325.9 crores. The Unrecovered Project Cost between 7th February, 2001 to 31st March, 2001 has been mentioned as Rs. 407.6 crores which includes returns of 20% to the tune of Rs. 81.6 crores (approx).

From the same document it is further clear that the surplus i.e. the net income under column-7 in the year ended on 31, March, 2014 from toll was approximately Rs. 947 crores.

The amount of total income from 31.03.2014 till 30.9.2016 i.e. for 2½ years is yet to be added to the income which, if, calculated on the basis of receipt of the financial year 2014-15, would be another 300 crores.

From the statement made on oath in the counter affidavit filed by NOIDA Toll Bridge Company Ltd. in paragraph no. 84, Statement of computation of returns and arrears as on 31.03.2014, the document filed at page '488' of the counter affidavit as also from the Statement of account of returns and arrears as on 31.03.2012 forwarded under letter of NOIDA Toll Bridge Company Ltd dated 06.12.2012 to NOIDA (appended as Annexure

no.CA-1 to the counter affidavit dated 11.05.2014 filed by the NOIDA authority), following facts are established:-

a. Total Cost of the Project on a day prior to its commissioning was Rs. 325.99 Crores.

b. The total toll income from the toll receipt till 31.03.2014 was Rs.810.18 Crores and the surplus after taxes was Rs.578.80/- Crores after excluding the O&M expenses and Corporate taxes. These figures, however, do not tally from the Statement of Computation of returns in arrears as verified by the Chartered Account M/s S.N. Dhawan & Company dated 20.06.2012 appended with the letter dated 6.12.2012 of the Company Executive annexed as Annexure '1' to the counter affidavit but this much is reflected that the total income from the toll and the surplus is much in excess of the figures disclosed in paragraph no. 84 of the counter affidavit. Similarly the Statement of Account of returns in arrears (signed by T.R. Chaddha & Company) filed alongwith the counter affidavit at page no. '488' of the counter affidavit again reflects different figures in the columns of Total income from toll and Surplus after deduction of O&M expenses and Corporate Income tax.

What we can simply infer without entering into the nuances of the Accounting on the basis above material is that the Total Cost of Project is many times more than the actual investment in the Project. The Concessionaire had received much more than the money invested in the project plus reasonable profits and interest thereon from the Toll income. This apart, they have also earned income from advertisement and rental income which is not included in the Statement of Computation as on 31.3.2014.

As a matter of fact the NTBCL has tried to confuse this Court by referring to different amount in the accounts of the Company at different places of the counter affidavit for suggesting that they have not been able to recover reasonable profits on the investment made. The counter affidavit and supplementary affidavits are infact an attempt to lead this Court to accept that all the projects which had been executed by the Company and

the income and losses thereto must also be taken into consideration for dealing the issue in hand. The facts given in the affidavits of Concessionaire in our opinion are not answer to the challenge made by the petitioner.

It is sought to be submitted in paragraph '87' of the counter affidavit that the figure of outstanding project cost under the Concession Agreement is an amount to be recovered in the future from an indeterminable class of Users i.e. Users of the DND Flyway through payment of User fees and the same is not reflected in the Profit & Loss Account of the company.

It is further submitted in paragraph '86' and '88' of the counter affidavit that the resultant figure in the Profit & Loss Account is a different concept from the “Returns” as defined under the Concession Agreement. Thus although the Company may have made some profits in a given financial year by dint of the total revenue exceeding the total expenditure, that by itself would not imply or lead to the conclusion that the Project Cost has been fully recovered.

The Concessionaire and IL&FS (respondent no. 9) vehemently submitted is that the company has not been able to earn the assured returns under the Concession Agreement. For the remaining Concession period of 30 years, it can make efforts to achieve the Total project cost and the designated returns. It is argued by the Concessionaire that the revenue collected from the User Fee was much lower than the projected figures although the company has kept on incurring expenditures in maintenance of the Bridge. In order to achieve the reasonable returns, the company had approached the Noida authority for grant of development rights. Refusal by NOIDA to grant such rights made the recovery onerous. The Concessionaire has a right to collect and appropriate user fee during the Concession period. It is also sought to be submitted that the Total Cost of Project is only a notional figure, it represents the risk of the investors and is not linked to user fee. It is only a risk insurance clause against premature and arbitrary termination of contract by Noida. It is urged that the amount of user fee paid by the Commuters is independent and does not get affected by the increasing value of the Total Cost of Project.

Giving thoughtful consideration, the contentions so raised, in our opinion are not well founded. A bare look at the Section 2.3(a) and 2.3 (b) which provides the Concession period, shows that the Concession period is not necessarily the period of 30 years from the “Effective date” rather it is the period till the date, on which the Concessionaire recovers the Total Cost of Project and the returns as per Section 14 of the Agreement. Section 2.3(b) provides for transfer of the project assets to Noida in accordance with the terms of the Article 19 upon termination of the Concession Agreement. However, Section 2.4 makes it compulsory that the Concession period be extended for a period of two years at a time, in the event, Total Cost of Project and the returns thereon are not recovered within 30 years.

At this stage we may also note of the plea of the Concessionaire in their written statement as also the learned counsels for the Concessionaire and IL&FS in their oral submissions that the formula for computing Total cost of project and termination payment may not be touched by the Court as it was devised by the experts as a risk insurance clause against the premature and arbitrary termination of contract by NOIDA, keeping in view that the investors in the project needed adequate returns and insulation from risk, to consider investment in the project.

The assertion on page 25 of the written submission dated August 19, 2016 of the Concessionaire (respondent no.1) is reproduced as under:-

> *The concept of the Total Cost of Project was (a) devised by experts keeping in view the above mentioned factors (b) clause duly approved by various governments (c) notional figure only represents the risks of the investors (d) no claim/bill on NOIDA (e) no assurance of the amount to the Concessionaire (f) not linked to user fee (g) not void ab-initio as per admission of NOIDA (Page-14, Para-31 of Counter Affidavit dt. 11.05.2015 of Noida) (h) it is a risk insurance clause against premature and arbitrary termination of contract by NOIDA. Lenders have been made stake holders in the agreement under Article 15. The formula of the Total Cost of Project and Termination Payment were devised to impart requisite confidence to the Lenders who were instrumental to the Project.”*

Risk Insurance Clause has become redundant.

Considering the submissions made even if we accept that the high returns in the PPP model of the contract has been provided considering a

reward for high risk or the figures shown as total cost of project are notional figures as a risk insurance against arbitrary termination of contract by Noida, at any time, in our considered opinion, this contention has lost efficacy now in the year 2016 no such risk survives. The political scenario or the uncertainty in completion of project, even if it was there, at some point of time does not survive now. The project has been completed and the Concessionaire has been able to recover cost and reasonable profits from the project. It is not open to the Concessionaire to say that there are still risks and it they would have to leave the project, in between, without realizing the actual investments with reasonable interest incurred by it.

We may also take note of one more admission of the Concessionaire on record that is the Company has started giving dividends to its share holders to the extent of 5% in the year 2010-11, 10% in the year 2011-12, 10% in the year 2012-13 and 25% in the year 2013-14. This simply means the company has earned profits from the revenue generated by recovery of User fees from the Commuters of DND Flyover i.e. the NOIDA Toll Bridge.

Keeping in mind the public interest, as per the settled position of law that no private person or company can be allowed to earn profit from the public property at the cost of public at large **[See Institute of Law, Chandigarh vs. Neeraj Sharma (para 31);** emphasis supplied] for indefinite period and the Concept of Toll in India, the levy of User fee by the Concessionaire cannot be justified.

It is also noteworthy that the toll plaza has been constructed only on the DND fly-over for realizing toll (user fee) from the commuters. Ashram Fly way, which was constructed on the land given by the Delhi Government, was also agreed as part of the project. It was handed over to Delhi Government after commissioning, however, the cost of construction of Ashram fly-over was added and included as part of the “Cost of Project” to be realized from the levy of user fee from the commuters of DND fly over. Reference may be taken to the clauses (i) and (j) of the Concession Agreement already set out in the preceding paragraphs of this judgment. We are of the opinion that the NOIDA could itself levy user fee within its territorial limits and not beyond that. For this reason also we record that

authorisation by NOIDA to adjust the Cost of Construction of infrastructure (Ashram Flyover) from collection of User fee is without authority.

Viewed from any angle, we find that the Concessionaire have been able to recover not only the cost of construction i.e. the Project Cost but also reasonable profits which are being shared with the shareholders in the form of dividends since 2010-11. In view of the clauses of the agreement on cost being recovered, the bridge can be handed over to NOIDA even before 2031 i.e. 30 years period under the agreement.

We are also sure that in the instant case, if we would have gone into the question of decision making process for looking into the validity of the Concession Agreement, we could have quashed the entire Concession Agreement being opposed to Public Policy and hit by Article 14 of the Constitution of India. However, giving due consideration to the fact that the Concessionaire has performed its part of the obligations and the bridge has been constructed and is being used by the Public and the contract has worked for about 15 years, we do not propose to traverse all the contractual obligations and liability of the parties but in order to rectify the situation before us we can take the help of “Doctrine of Severibility” so as to see that only offending clauses of the Agreement to the extent they are harming the “Public interest” i.e. the interest of the commuters are severed from the contract leaving the contracting parties to perform their other obligations.

We may also take assistance from the Concession Agreement itself which contains a clause of severability. Relevant section 27.5 of the Agreement says:-

> “*If any provisions of this Agreement are declared to be invalid, uneforceable or illegal by any competent arbitral tribunal or court, such invalidity, uneforceability or illegality shall not prejudice or affect the remaining provisions of this Agreement which shall continue in full force and effect.”*

The doctrine of severability has been considered in paragraph no. 14, 15, 16 & 17 in the judgement **Shin Satellite Public Co. Ltd,** which is quoted as under;-

> **14**. **“In Halsbury's Laws of England (Fourth Edition); Volume 9; Para 430; p. 297, it has been stated:**

"430. *Severance of illegal and void provisions. A contract will rarely be totally illegal or void and certain parts of it may be entirely lawful in themselves. The question therefore arises whether the illegal or void parts may be separated or "severed" from the contract and the rest of the contract enforced without them. Nearly all the cases arise in the context of restraint of trade, but the following principles are applicable to contracts in general.*

First, as a general rule, severance is probably not possible where the objectionable parts of the contract involve illegality and not mere void promises. In one type of case, however, the courts have adopted what amounts almost to a principle of severance by holding that if a statute allows works to be done up to a financial limit without a licence but requires a licence above that limit, then, where works are done under a contract which does not specify an amount but which in the event exceeds the financial limit permitted without licence, the cost of the works up to that limit is recoverable.

Secondly, where severance is allowed, it must be possible simply to strike out the offending parts but the court will not rewrite or rearrange the contract.

Thirdly, even if the promises can be struck out as afore-mentioned, the court will not do this if to do so would alter entirely the scope and intention of the agreement.

Fourthly, the contract, shorn of the offending parts, must retain the characteristics of a valid contract, so that if severance will remove the whole or main consideration given by one party the contract becomes unenforceable. Otherwise, the offending promise simply drops out and the other parts of the contract are enforceable."

Reference may be made to Chitty on Contracts (29th Edition); Volume I; pp. 1048-49;

"16-188 Introductory. Where all the terms of a contract are illegal or against public policy or where the whole contract is prohibited by statute, clearly no action can be brought by the guilty party on the contract; but sometimes, although parts of a contract are unenforceable for such reasons, other parts, were they to stand alone, would be unobjectionable. The question then arises whether the unobjectionable may be enforced and the objectionable disregarded or "severed". The same question arises in relation to bonds where the condition is partly against the law."

16-189 Partial statutory invalidity. It was laid down in some of the older cases that there is a distinction between a deed or condition which is void in part by statute and one which is void in part at common law. This

distinction must now be understood to apply only to cases where the statute enacts that an agreement or deed made in violation of its provisions shall be wholly void. Unless that is so, then provided the good part is separable from and not dependent on the bad, that part only will be void which contravenes the provisions of the statute. The general rule is that "where you cannot sever the illegal from the legal part of a covenant, the contract is altogether void; but, where you can sever them, whether the illegality be created by statute or by the common law, you may reject the bad part and retain the good." Thus, a covenant in a lease that the tenant should pay "all parliamentary taxes," only included such as he might lawfully pay, and a separate covenant to pay the landlord's property tax, which it was illegal for a tenant to contract to pay, although void, did not affect the validity of the instrument. In some situations where there is a statutory requirement to obtain a licence for work above a stipulated financial limit but up to that limit no licence is required, the courts will enforce a contract up to that limit. There is some doubt whether this applies to a lump sum contract "for a single and indivisible work." Even in this situation if the cost element can be divided into its legal and illegal components, the courts will enforce the former but not the latter."

***15.** It is no doubt true that a court of law will read the agreement as it is and cannot rewrite nor create a new one. It is also true that the contract must be read as a whole and it is not open to dissect it by taking out a part treating it to be contrary to law and by ordering enforcement of the rest if otherwise it is not permissible. But it is well-settled that if the contract is in several parts, some of which are legal and enforceable and some are unenforceable, lawful parts can be enforced provided they are severable.*

***16**. The learned counsel for the petitioner, in my opinion, rightly submitted that the court must consider the question keeping in view settled legal position and record a finding whether or not the agreement is severable. If the court holds the agreement severable, it should implement and enforce that part which is legal, valid and in consonance of law.*

***17**. In several cases, courts have held that partial invalidity in contract will not ipso facto make the whole contract void or unenforceable. Wherever a contract contains legal as well as illegal parts and objectionable parts can be severed, effect has been given to legal and valid parts striking out the offending parts.*

In **LIC of India** (supra) while considering the question whether the offending clauses in the contract can be severed by an order of the Court,

it has been observed in paragraphs no. 50, 51 & 52 that:-

50. *"It is settled law that the arms of the court are long enough to reach injustice wherever it is found and the court would mould the relief appropriately to meet the peculiar and complicated requirements of the country vide Dwarkanath v. Income Tax Officer, Kanpur, 1965 (3) SCR 536 at 540,* Andi Mukta Trust v. V.R. Rudani*, 1989(2) SCC 691 at 699-700, Unni Krishnan v. State of A.P., 1993 (1) SCC 645 at 693-97 and Hochitief Gammon v. State of Orissa, 1975 (2) SCC 649 at 656. In M.J. Sivani and others v. State of Karnataka, S.L.P. No.11012/1991 etc. dated April 17, 1995, it was contended that since the High Court held that a part of the notification was inapplicable to the licence for Video games, it was not severable from the rest of the notification and the whole notification must be declared to be ultra vires or inapplicable to video games. Rejecting the contention of the licensees on that ground, this Court held that the entire order did not become invalid due to in applicability of a particular provision or a clause in the general order unless the invalid part is inextricably interconnected with the valid part. The court would be entitled to consider whether the rule as a whole or in part is valid or becomes invalid or inapplicable. On finding that to the extent of the rule was not relevant or invalid, the court is entitled to set aside or direct to disregard the invalid or inapplicable part leaving the rest intact and operative. In that case Para 3(2) of the notification for licencing public places or the places of public resort or amusement for conducting video in gaming house though was held to be inapplicable to video games the rest of the notification was declared valid.*

51*.* In Praga Tools Corpn. v. C.A. Imanual*, 1969 (1) SCC 585 at 589, this Court held that mandamus may be issued to enforce duties and positive obligation of a public nature even though the persons or the authorities are not public officials or authorities. The same view was laid in Anadi Mukta v. V.R.* Rudani*, (1989)2 SCC 691, and Unnikrishnan v. State of A.P., (1993)1 SCC 645.* In Comptroller & Auditor General of India v. K.S. Jagannathan*, 1986 (2) SCR 17 at 36- 40, this Court held that a mandamus would be issued to implement directive principles when Government have adopted them. They are of public obligations to give preferential treatment implementing the rule of reservation under Arts.14 and 16(1) and (4) of the Constitution.*

52. *It is seen that the respondents are not seeking any direction in their favour to call upon the appellants to enter into a contractual relations of term policy in Table 58. Their privilege and legitimate expectation to seek acceptance of policy of life insurance are their freedom. Instead they sought for a declaration that the policy confining to only salaried class from*

government, semi- government or reputed commercial firms is discriminatory offending Article 14. *Denial thereof to larger segments violates their constitutional rights. We are of the considered view that they are right. They are not seeking any mandamus to direct the appellants to enter into contract of life insurance with them. The rest of the conditions age etc are valid and do not call for interference. The offending clause extending the benefit only to the salaried class in Government, semi-Government and reputed firms is unconstitutional. Subject to compliance with other terms and conditions, the appellant is free to enforce Table 58 policy with all eligible lives. The declaration given, therefore, is perfectly valid. The offending part is severable from the rest of the conditions"*

Considering the legal position and the fact that certain clauses of the Concession Agreement are affecting the public at large i.e. commuters who are subjected to pay toll for the use of public road in perpetuity due to wrongful arbitrary terms and conditions of the contract, we have no hesitation to hold that the offending clauses can be severed from the rest of the agreement without affecting the contract as a whole and leaving the Concessionaire and Noida Authority to perform their part of contract.

As reasonable returns/interest in addition to the Cost of Construction of DND Flyway (NOIDA Toll Bridge), have been recovered by the Concessionaire, they are not entitled to recover any amount over & above what they had already received.

We, therefore, hold that, henceforth, the Concessionaire will not be entitled to realise User fee from the Users/Commuters of the NOIDA Toll Bridge (DND Flyover).

On the above discussion made on each issue, we find that the judgments relied upon by learned counsel for the Concessionaire **in Soma Isolux NH One Tollway Private Limited Vs. Harish Kumar Puri & others, Villianur Iyarkkai Padukapu Maiyam, Pathan Mohammed Suleman Rehmatkhan Vs. State of Gujarat and Centre for Public Interest Litigation Vs. Union of India & others, Pathan Mohammad Suleman Rehmatkhan**, **Arun Kumar Agarwal Vs. Union of India and others** and **Centre of Public Interest Litigation Vs. Union of India** are distinguishable, in the facts and circumstances of this case.

Proposed Amendments

Both the learned counsels for the respondent no. 1 Concessionaire and respondent no. 9 the IL&FS laid much stress upon the proposed amendment to the Concession Agreement. It is submitted by respondent no. 9 the IL&FS in paragraph 16.1 of the written submission filed by it that comprehensive amendment to the Concession Agreement proposed by the Concessionaire vide letter dated July 9, 2015 contemplates amendment in two parts inter alia:-

Part 'A' the Main Amendments and Part 'B' for Consequential Amendments to the Concession Agreement.

The Draft Amendments proposed to the Concession Agreement sent by Respondent no. 1 the Concessionaire, to Respondent no. 2, the NOIDA Authority, is appended as Annexure SCA '3' to the Supplementary Counter Affidavit-II dated 21.1.2016 filed by the Concessionaire, the respondent no. 1, which is being considered as under:-

Part 'A'- main amendments:-

(i) The 'Transfer Date' to be fixed as 1st April, 2031 making it clear that the NOIDA bridge shall be handed over to NOIDA by the Concessionaire on that date.

(ii) The amendment of Section 2.1(b)(iv) by the following:-

"Section 2.1(b), sub Clause (iv):- determine, demand, collect, retain and appropriate a fees from the Users of the NOIDA Bridge."

(iii) The amendment of Section 2.3 fixing the "Concession Period" (a) to expire by efflux of time at the end of 31st March, 2031 and; (b) the Concessionaire shall have to transfer the NOIDA Bridge to NOIDA in accordance with the terms of Article 19, on the transfer date i.e. 1st April 2013.

(iv) Deletion of Section 2.4 (extension of Concession period) and Section 2.5 (earlier termination of concession period)(which provides that the Concessionaire shall transfer the Project Assets to NOIDA upon recovery of the Total Cost of the Project and the Returns thereon).

(v) Section 14.1 to be amended as follows:-

*"**Section 14.1 Total Cost of Project***

For the duration of the Concession Period, the Total Cost of Project be as on 31st March, 2011 (as has been certified by the Independent Auditor). Provided that in the event of Termination, the Total Project Cost shall be deemed to be modified to the extent it has been recovered through collection of fees till the termination date (as certified by the Independent Auditor) in accordance with Article 18".

Part 'B';Consequential amendments would be inter alia:-

(i) The description of 'Concessionaire' be amended as follows:-

*"**NOIDA TOLL BRIDGE COMPANY LIMITED,** a public limited company incorporated under the Indian Companies Act, 1956 and having its registered office at Toll Plaza, DND Flyway, NOIDA-201301 (hereinafter referred to as the **"Concessionaire"** which expression shall include its successors and permitted assigns)".*

(ii) In Section 1.1, a new definition of the term 'Amendment Agreement' would be added as follows:-

*"**Amendment Agreement**" means the agreement titled "Amendment Agreement to the Concession Agreement dated 12.11.1997 for the Delhi NOIDA Bridge Project" executed on [ ], 2015".*

(iii) Article 3 would stand deleted completely.

(iv) Article 10 would be amended and replaced by the following:-

"10.1 *The Lenders, Concessionaire and NOIDA shall appoint the Independent Auditor. There shall be an Independent Auditor for the entire term of the Concession Period. Subject to Section 25.2 the Parties agree that the Independent Auditor so appointed shall have the status of an expert whose reports and decisions in discharge of his role under Article 16 (Force Majeure), and Article 18 (Suspension and Termination Obligations) shall be final and binding on the Parties hereto (save in respect of manifest error or fraud).*

10.2 The Independent Auditor had certified the Total Cost of Project, as of March 31, 2011, which is now being taken as the fixed

Total Cost of Project in relation to the NOIDA Bridge. The determination of Total Cost of Project and Returns thereon is no longer required after the date of execution of the Amendment Agreement."

(v) Section 14.2 re: Calculation of Returns would be deleted completely.

(vi) Section 19.1 regarding Scope of transfer be modified and replaced as under:-

"Section 19.1 <u>Scope of Transfer</u>

On the Transfer Date, the Concessionaire shall transfer the NOIDA Bridge to NOIDA. The Concessionaire shall also deliver to NOIDA on such date such operating manuals, plans, design drawings and other information as may reasonably be required by NOIDA to enable it to continue the operation of the NOIDA Bridge either directly or by it nominated agency."

(vii) As a consequence of these amendments, the term 'Returns', 'and Returns thereon' and 'meet the Concessionaire's Returns thereon', wherever appearing, in the unamended Concession Agreement would stand deleted and replaced by the term 'Total Cost of Project', where the context so requires.

Submission is that as a consequence of acceptance of the proposed amendment, Total cost of project as on 31.3.2011, to the tune of Rs. 2168 Crores (approx), would be the figure only with reference to Article 18.1 (a) so as to act as a Risk Insurance Measure against arbitrary termination of the Concession Agreement by NOIDA (to repeat, after the amendment is approved). In the event of automatic termination of the Concession Agreement at the end of Concession period so amended, the total project cost shall be deemed to be modified to the extent that 'it has been recovered through collection of fees till the termination date (as certified by the Independent Auditor) in accordance with Article 18'.

As we understand the Amendment proposed by the Concessionaire are:-

(a) The Concessionaire will keep on charging 'User fees till the year

2031 i.e. 1st April, 2031 which is the proposed “Transfer date”.

(b) In the case of arbitrary termination of the Concession (amended) Agreement, NOIDA will have to compensate and shall have to pay Rs. 2168 Crores to the Concessionaire for getting back the Project Assets.

(c) Shortfall in the recovery of Total Project Cost of Rs. 2168 Crores as on 31.3.2031 shall be paid by NOIDA to the Noida Toll Company.

It is vehemently argued by the counsels for both the Concessionaire (respondent no. 1) and IL&FS (respondent no. 9) that the parties are voluntarily negotiating an amendment to the contract, in terms of the contract and are close to a settlement. An intervention by the Court would restrict the contractual choices of the parties and interfere with the contractual rights of the parties and will amount to rewriting the terms of the contract by the Court.

We have repeatedly observed that we are not entering into the rights of the Contracting parties under the Concession Agreement, it is open for them to make any amendment (s) which they choose to agree. As we have already held that the User fees realised by the Concessionaire under the Concession Agreement, (in the guise of power delegated upon it under the Regulations, 1998 framed by the NOIDA in purported exercise of power Section 6-A read with Section 19 of the Act, 1976), is not in conformity with the provisions of the Act, 1976, the Concessionaire, according to their own financial statements, has recovered Rs. 810.18 Crores (approx) from toll income from the date of commencement of the project till 31.3.2014 and after deduction of O&M expenses and Corporate income tax the surplus was Rs. 578.80 Crores (computed before interest, depreciation and lease rental received by the Concessionaire). They have further realized user fee/toll two and half years thereafter i.e. between 1.4.2014 to 30.9.2016 which as per the collection of User fee in the year 2013-2014 would workout to an additional sum of Rs. 300 crores approx.

We are, therefore, more than satisfied that the Concessionaire cannot now recover the User fees from the Users/Commuters of the NOIDA Toll

Bridge i.e. DND Flyover.

We have not been able to convince ourselves by the arguments of the counsels for the respondent nos. 1 and 9 that the Court may dismiss the writ petition in view of the proposed amendment in the rights of the contracting parties. We have made it clear that we are only concerned with the rights of the Users/Commuters of NOIDA Toll Bridge known as DND Flyway who are being illegally taxed in the name of User fee.

Even under the proposed amendment, the condition of recovery of User fees till 2031 by the Concessionaire has been reiterated. The User fee which is being levied/realised is not supported by the legal provisions, sought to be relied upon by the Concessionaire, the IL&FS and the NOIDA Authority.

For the reasons recorded and the conclusions arrived at, we hold:-

(a) This Public Interest Litigation is legally maintainable.

(b) In the facts of the case, interference with the Concessionaire agreement is warranted in exercise of powers of judicial review under Article 226 of the Constitution of India.

(c) Selection of Concessionaire in the facts of the case is violative of Article 14 of the Constitution of India and is found to be unfair and unjust. We, however, do not deem it fit to nullify the entire Concession Agreement.

(d) Right to levy and collect User fee from the commuters as conferred upon the Concessionaire under the Concession Agreement suffers from excessive delegation and is contrary to the provisions of the U.P. Industrial Area Development Act' 1976. Article 13 (Clause) of the Concession Agreement is held to be bad and inoperative in the eyes of law.

(e) The method of calculation of the Total Project Cost and appropriation of the User fee collection under Article 14 (Clause) of the Concession Agreement is held to be arbitrary and opposed to Public Policy. Article 14 (Clause) of the Concession Agreement is severed, therefrom.

(f) The proposed Amendments do not affect the reliefs which have been prayed for in the petition.

We direct that, henceforth, NOIDA Toll Bridge Company, the Concessionaire shall not impose or recover any User fee/Toll from the commuters for using the DND Flyover.

This Public Interest Petition is **allowed** to the extent indicated above.

I agree

(Sunita Agarwal, J.) (Arun Tandon, J.)

Order Date :- 26.10.2016
B.K./Himanshu