Noida
Toll Bridge Co. Ltd.

December 21, 2024

To

The Manager
Corporate Relations Department
Bombay Stock Exchange Limited
1st Floor, New Trading Ring Rotunda
Building, P J Towers Dalal Street, Fort
Mumbai – 400 001

Scrip Code No. 532481

The Manager
Listing Department
National Stock Exchange of India Ltd.
Exchange Plaza, 5th Floor
Plot No. C/1, G Block
Bandra-Kurla Complex, Bandra (E)
Mumbai – 400 051

Scrip Code No. NOIDA TOLL EQ

Sub: Noida Toll Bridge Company Limited Vs. Federation of Noida Residents' Welfare Association & Ors. SLP(C) No. 33403 of 2016 – Update on Litigation

Dear Sir/ Madam,

In sequence of our letter dated August 14, 2024 and December 20, 2024 in the matter of *Noida Toll Bridge Company Limited Vs. Federation of Noida Residents' Welfare Association & Ors. SLP(C) No. 33403 of 2016* this is to inform you that the judgement on the above-mentioned matter was pronounced on December 20, 2024 by the Hon'ble Supreme Court wherein the Hon'ble Supreme Court has dismissed the appeal in terms of the signed reportable judgment, which is placed on the file and pending applications, if any, to be disposed of.

The Order of Proceedings is enclosed for your information and records.

The details as required under SEBI Listing Regulations read with Circular no. SEBI/HO/CFD/CFDPoD1/P-CIR//2023/123 dated July 13, 2023, are enclosed as Annexure A.

The impact on the business is yet to be ascertained and the Company will find a way forward in consultation with appropriate office.

Thanking You
For **Noida Toll Bridge Company Limited**

GAGAN SINGHAL
Digitally signed by GAGAN SINGHAL
Date: 2024.12.21 09:22:34 +05'30'

Gagan Singhal
Company Secretary & Compliance Officer

Encl: A/a

Annexure-A

Sl. No.	Particulars	Remarks
1.	**Name of the Authority**	**Hon'ble Supreme Court of India**
1.	Nature and details of the action(s) taken, initiated or order(s) passed	Hon'ble Supreme Court has dismissed the appeal in terms of the signed reportable judgment, which is placed on the file and pending applications, if any, to be disposed of.
2.	Date of receipt of direction or order, including any ad interim or interim orders, or any other communication from the authority	December 20, 2024 The Appeal has dismissed in terms of the signed reportable judgment, which is placed on the file and pending applications, if any, to be disposed of.
3.	Details of the violation(s) / contravention(s) committed or alleged to be committed	Challenging the validity of the Concession Agreement between NOIDA, IL&FS and NTBCL
4.	Impact on financial, operation or other activities of the listed entity, quantifiable in monetary terms to the extent possible	Yet to be ascertained Find a way forward in consultation with appropriate office

2024 INSC 1027

REPORTABLE

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

Civil Appeal No. ____ / 2024
(Arising out of Special Leave Petition (C.) No. 33403 / 2016)

NOIDA Toll Bridge Company Ltd. ...Appellant(s)

versus

Federation of NOIDA Residents Welfare Association and others ...Respondent(s)

JUDGEMENT

SURYA KANT, J.

Leave granted.

2. The NOIDA Toll Bridge Company Limited (**NTBCL**), has preferred the instant appeal questioning the judgement dated 26.10.2016 passed by the High Court of Judicature at Allahabad (**High Court**). The issue before the High Court concerned a challenge to the collection and levying of toll, as legitimised by the provisions enumerated in the Agreement dated 12.11.1997 (**Concession Agreement**), executed between NTBCL, the New Okhla Industrial Development Authority (**NOIDA**) and the Infrastructure Leasing and Financial Services Limited (**IL&FS**). The

Concession Agreement conferred upon NTBCL the rights necessary for the implementation of the Delhi NOIDA Bridge Project or the Delhi-NOIDA Direct Flyway (**DND Flyway/Project**) and, in connection thereto, the collection and levying of toll.

3. The High Court has *vide* the impugned judgement held Articles 13 and 14 of the Concession Agreement to be bad in law and directed NTBCL to cease the imposition of user fees or toll upon commuters using the DND Flyway.

A. FACTS

4. Having laid out the observations of the High Court *in brevi*, it is essential at this juncture to delve into the facts of the instant case:

4.1. The controversy at hand concerns the toll levied on the users of the DND Flyway. The inception of this dispute can be traced to the 1980s when the State of Uttar Pradesh (**State of UP**) sought to construct a bridge connecting South Delhi and NOIDA, to improve connectivity between the two regions. However, the State of UP recognised that significant financial expenditure would be involved in this ambitious endeavour, which it could not undertake independently.

4.2. NOIDA and the Delhi Administration entered into a Memorandum of Understanding (**MoU**) with IL&FS on 07.04.1992, intending to construct the DND Flyway. IL&FS at that point in time, was a Company promoted by Public Financial Institutions to enable non-governmental investment in infrastructure development. In pursuance of the MoU, a Committee

comprising representatives of the Government of India, the Government of NCT of Delhi, the State of UP and IL&FS was constituted on 08.06.1993 to take important decisions relating to the Project and its implementation (**Steering Committee**).

4.3. Thereafter, the Steering Committee on 08.04.1996 approved the incorporation of NTBCL by IL&FS in accordance with the Companies Act, 1956, which was contemplated to operate as a Special Purpose Vehicle for developing the DND Flyway on a Build, Operate, Own and Transfer (**BOOT**) basis. It was thereby intended that NTBCL would recover its investment in developing the DND Flyway infrastructural facility by imposing user fees on the commuters availing such services.

4.4. In pursuance thereto, the State of UP accorded approval for the implementation of the DND Flyway and constituted an Empowered Committee, tasked with negotiating the Concession Agreement with IL&FS. The draft Concession Agreement was approved by the State Cabinet and reviewed by multilateral agencies financing the project, including the World Bank and the Asian Development Bank. This initiative was recognised as one of the pioneering projects in India developed under the Public Private Partnership model (**PPP**).

4.5. The Concession Agreement was executed on 12.11.1997, designating NOIDA and IL&FS as the 'Sponsors' and NTBCL as the 'Concessionaire'. The aforesaid Concession Agreement expressly provided for the construction of the DND Flyway, from the Okhla Barrage in NOIDA to a

location close to Maharani Bagh in Delhi. The project encompassed the development, establishment, financing, design, construction operation and maintenance of the DND Flyway, including the development, financing, design and construction of a flyover at Ashram Chowk.

4.6. In terms of Section 2.7 of the Concession Agreement, the State and the Government of NCT of Delhi entered into a State Support Agreement on 14.01.1998, which facilitated: (***i***) the execution of the Delhi Lands Lease Deed on 23.10.1998 between NTBCL and NOIDA; and (***ii***) the execution of the Ashram Flyover Site Lease Deed on 30.08.1999 between the Government of NCT of Delhi and NTBCL, for the construction of the Ashram Flyover.

4.7. The Project was thereafter initiated and completed, with the DND Flyway being opened for public use on 06.02.2001 (**Commissioning Date**). It consisted of: (***i***) the main bridge; (***ii***) three minor bridges; (***iii***) a 32-lane approach road with a 300-metre-wide toll plaza in NOIDA; (**iv**) an 11-lane toll plaza at Mayur Vihar; and (***v***) a flyover at Ashram Chowk.

4.8. Respondent No. 1 is an Association established to espouse the cause of NOIDA residents before the Public Authorities, particularly concerning civic issues. Nearly 15 years after the execution of the Concession Agreement, Respondent No. 1 approached the High Court (through a Writ Petition) purportedly in public interest seeking a direction to discontinue toll charged to the users of the DND Flyway. The Writ Petitioner contended that NTBCL had already recovered the project costs, thereby

eliminating the need to continue imposing user fees. Respondent No. 1 thereafter on 08.09.2014, amended the Writ Petition, seeking additional relief to annul both the MoU and the Concession Agreement.

4.9. The High Court, *vide* the impugned judgment dated 26.10.2016, while considering the constitutional validity of the Concession Agreement, has primarily held that: (***i***) Article 13 of the Concession Agreement, which governed the determination, collection, and appropriation of user fees by NTBCL, was invalid in law; (***ii***) Article 14 thereof, which outlined the calculation of the Total Project Cost, Returns, and their recovery by NTBCL, was to be severed from the Concession Agreement; and (***iii***) NTBCL was prohibited from continuing to impose or collect user fees. The High Court further held that the selection process of NTBCL for the Project violated Article 14 of the Constitution.

4.10. The aggrieved NTBCL, has preferred the instant appeal. The record reveals that this Court passed a self-speaking order on 11.11.2016, (***i***) outlining the facts of the case; (***ii***) identified that the matter contained issues that required thorough scrutiny; and (***iii***) also noted the conflicting claims regarding the Total Project Cost recovered by NTBCL. Thereafter, this Court directed the Comptroller and Auditor General of India (**CAG**) to verify NTBCL's claims and submit a Report. The salient features of the order dated 11.11.2016 may be highlighted at this stage:

> *"….3. Federation of NOIDA Residents Welfare Association & Ors., Respondent No.1 herein, filed PIL No.60214 of 2012 in the High Court of Judicature at Allahabad for a declaration that collection of toll fee should be stopped on the DND Flyover between New Delhi and NOIDA.*

4. A Concession Agreement (hereinafter referred to as "the Agreement") was entered into between the Petitioner, NOIDA (Respondent No.2) and IL & FS Ltd. (Respondent No.9) on 12.11.1997 for development of infrastructure facility of a bridge and an access road. The Project was conceived on Build-Operate-Transfer (BOT) basis. The 9th Respondent IL & FS had to arrange the investment for the Project which could be recovered by levy of toll from the users of the road and the Project..."

"...14. Prima facie, we are of the opinion that the various issues that arise in this SLP warrant a detailed scrutiny. Conflicting claims have been made regarding the recovery of the Total Cost of the Project by the Concessionaire. To resolve the dispute, it is appropriate that an independent agency is requested to examine the relevant records of the DND flyway. The said agency should examine the reports of the independent auditors appointed by the Petitioner and submit a report regarding the correctness of the Petitioner's claim that the Total Cost of the Project has not been recovered. We accept the suggestion of the Petitioner and request the Comptroller and Auditor General of India (CAG) to assist us in this matter. The Petitioner is directed to place the entire record pertaining to the recovery of the Total Project Cost of the DND flyover project as per the Agreement before the CAG. The CAG is requested to verify the claim of the Petitioner that the Total Cost of the Project has not been recovered and submit a report within four weeks. The CAG shall be at liberty to call for and examine all such records having a bearing on the financial aspects, as it requires to facilitate its decision. This will include matters and information pertaining to all the benefits which have flowed to the Petitioner under the entirety of the agreement, including the utilisation, if any. The Petitioner shall co-operate in all respects with the CAG and provide all documents, information and details as sought.

15. We do not agree with the submission that the Petitioner would suffer irreparable loss if the judgment of the High Court is not stayed. It will be impossible to provide restitution to the lakhs of commuters from whom the fee would be collected to repay them in the event of dismissal of the SLP. On the other hand, if the Petitioner succeeds, it can be compensated suitably by extension of time. The balance of convenience is also against the Petitioner. Therefore, we are not inclined to grant the interim relief as prayed for..."

4.11. In compliance, the CAG conducted a detailed examination of NTBCL's records, carrying out numerous surveys and tests to arrive at its findings, which have been submitted to this Court by way of a self-explanatory report, a detailed reference to which shall be made in the later part of this judgement.

B. ***CONTENTIONS* ON BEHALF OF THE APPELLANTS**

5. Dr. Abhishek Manu Singhvi, Learned Senior Counsel appearing on behalf of NTBCL, contended that the High Court has committed multiple errors while rendering the impugned judgement. In this regard, they made the following submissions:

(a) Owing to the considerable delay and laches in filing the original petition, the High Court ought to have rejected it at the threshold. The Writ Petition was filed twenty years after execution of the MoU and fifteen years after execution of the Concession Agreement, with no explanation provided to justify such a significant delay.

(b) The Writ Petition allegedly filed in public interest could not serve as a vehicle to interfere with a commercial contract like the Concession Agreement or render it invalid. A PIL cannot be utilised to annul or modify a Government Policy established and implemented through the Concession Agreement. It is beyond the scope of judicial review to invalidate a Government Policy decision solely based on the belief that an alternative policy might have been more appropriate.

Consequently, the subject PIL was beyond the purview of judicial powers exercisable under Article 226 of the Constitution of India.

(c) It was impossible during the relevant period to float tenders in order to develop the necessary infrastructure, due to the absence of non-governmental infrastructure developers from whom competitive bids could have been solicited. IL&FS was explicitly selected because it was a pioneer in the field, with 81% of its ownership held by public sector institutions. That apart, it is well-established in law that the non-floating of tenders alone does not constitute a sufficient basis to deem the actions of a public authority as arbitrary and illegal, nor does it invalidate the consequential contract.

(d) The Concession Agreement resulted from extensive deliberations and consultations among various Government entities over several years and thus could not be termed as an arbitrary decision. It received approval from the Steering Committee, which comprised of representatives from all stakeholders, and the Empowered Committee established by the State. Additionally, the World Bank, which provided funding for the Project through a line of credit to IL&FS, also endorsed the Agreement. The Concession Agreement being an outcome of consensual deliberations, the High Court ought not to have construed it as violating Article 14 of the Constitution.

(e) Article 13 of the Concession Agreement does not lack legal authority, as the rate of fees charged to users was determined by

the Fee Review Committee. This determination was made by applying the formula specified in the Concession Agreement and the base rate established by the Steering Committee. The Fee Review Committee itself comprised of representatives from both NOIDA and NTBCL, along with a third party, with each representative duly qualified and possessing adequate experience in the management, operation, and maintenance of bridges. Additionally, the involvement of the Independent Auditor and Engineer ensured a mechanism of checks and balances. There was thus no factual foundation on the basis of which it could be inferred that the authority to levy fees was exclusively delegated to NTBCL.

(f) NTBCL was empowered to collect user fees pursuant to Regulation 5(2) of the NOIDA (Levy of Infrastructure Fee) Regulations, 1998 (**Regulations**). These Regulations were formulated by NOIDA, in exercise of its powers under Section 6A read with Section 19 of the Uttar Pradesh Industrial Area Development Act, 1976 (**1976 Act**). The collection of user fees commenced only in 2001, after the 1998 Regulations had come into force. That being so, there is no legal or factual foundation to hold that Section 6A of the 1976 Act was applied retroactively. The Regulations were a condition precedent in the Concession Agreement, as outlined in Section 3.1 (a) (iv), which stipulated the formulation of such Regulations to authorise NTBCL to collect fees. There is thus no lack of legal authority, and Article

13 of the Concession Agreement does not suffer from excessive delegation.

(g) Article 14 of the Concession Agreement does not contravene public policy, and the High Court erred in applying the Doctrine of Severability. The rationale behind the formulation of the Total Project Cost took into account that NOIDA only contributed Rupees 10 crores towards the project, and the Internal Rate of Return (**IRR**) formula employed is a standard, accepted methodology. Without the safeguard of such a formula, no developer would be willing to undertake substantial investments, particularly given the risk of premature and arbitrary termination of the contract by NOIDA. Furthermore, the return of 20% cannot be deemed arbitrary, as the project had to compete with other infrastructure sectors to secure debt funding and equity investment from the private sector. Article 14 of the Concession Agreement, in the light of these mitigating circumstances, therefore, is not opposed to public policy.

(h) NTBCL is currently facing losses and has not yet recovered the Total Project Cost or returns. The CAG Report indicates that, at a minimum, Rupees 30 crores remain recoverable by the Appellant, as of date. Thus, the High Court erred in concluding that NTBCL had fully recovered the Total Project Cost and has made reasonable profits. Additionally, if the High Court's decision were upheld, NTBCL would be compelled to continue bearing maintenance costs until 2031 without any incoming revenue. Following the cessation

of toll collection, NTBCL has become entirely dependent on the revenue generated from advertising hoardings. However, the Court has failed to take notice that NTBCL shares its revenue with NOIDA through license fees for outdoor advertisements.

(i) NOIDA's failure to provide regular fee hikes as per the terms of the Concession Agreement has contributed to the escalation of the Total Project Cost and as such, NOIDA cannot be permitted to benefit from the impugned judgment. As stipulated in Clause 14.2 of the Concession Agreement, the aggregate of gross revenue from fee collections, income from advertising, and development income (minus Operation and Maintenance expenses) should yield 20% of the Total Project Cost annually. Consequently, the Appellant should be permitted to continue collecting user fees.

(j) The annulment of the Concession Agreement would deter future investors and undermine the sentiment for investment in similar projects. Instead, the residents in proximity to the project could be offered concessional treatment, while frequent users could benefit from discounted pricing.

C. CONTENTIONS ON BEHALF OF RESPONDENT NO. 1

6. *Per contra*, Mr. Parthiv Goswami, Learned Senior Counsel, representing the Respondent Welfare Association, supported the findings of the High Court and urged as follows:

(a) The Writ Petition was maintainable as it was filed promptly after NTBCL's Chartered Accountant's report was made available to the Respondents on 31.05.2012, revealing that users of the DND Flyway were being subjected to an illegal tax. Given that the cause of action is continuous, the issue of delay is irrelevant. The irreversible injury suffered by commuters necessitated examination on its merits, and therefore, no exceptions, including delay and laches, can be allowed to be raised to question the maintainability of the petition.

(b) The Writ Petition cannot be turned down at the outset merely on the ground that users have two alternative routes available, which do not require payment of user fees or tolls. The Project in question constitutes public property, and the Concession Agreement necessitates judicial scrutiny and potential intervention.

(c) The High Court correctly concluded that Article 13 of the Concession Agreement suffered from excessive delegation and was inconsistent with the provisions of the 1976 Act, thereby determining that NTBCL could not levy any user fees. Until the insertion of Section 6A of the 1976 Act on 14.08.1998, NOIDA lacked the authority to empower a developer to collect any tax or fee. Under Section 6A, the right to collect user fees could have been granted to NTBCL through the formulation of Regulations; however, the authority to levy such fees would remain with NOIDA as per Section 19(2)(e) of the 1976 Act. Furthermore, under the said parent Act, NOIDA had no authority to authorise the imposition of fees to

another entity. Section 6A was introduced much after the execution of the Concession Agreement and it is not retroactive in nature.

(d) The Concession Agreement is perpetual in nature and, therefore, contrary to public policy. Section 2.3 of the Concession Agreement stipulates that the concession period shall extend until the earlier of the two events: the completion of a 30-year period from the effective date or the date on which NTBCL recovers the Total Project Cost and returns, as determined by the Independent Engineer and Independent Auditor in accordance with Article 14 thereof. Furthermore, Section 2.4 states that if the Total Project Cost and returns are not recovered by the end of the 30-year period, the concession period shall, without qualification, be extended for two years at a time until recovery is achieved by NTBCL. According to the report dated 29.08.2007, the Total Project Cost has reached a critical point, rendering it improbable that NTBCL would return the assets to NOIDA, even after a century.

(e) Furthermore, under the stipulated formula, the Total Project Cost escalates annually as it comprises of: (a) the Project Cost; (b) major maintenance expenses; and (c) any shortfall in the recovery of returns for a specific financial year. This aggregation directly contributes to the continual increase of the Total Project Cost, rendering it impossible to achieve full returns even after 100 years. This situation necessitates a remedy by balancing the rights of the involved parties. Moreover, if an alternative were pursued and

NOIDA were to terminate the Concession Agreement, it would be obligated to compensate NTBCL in excess of Rupees 5000 crores. Given that these clauses impact the contract in its entirety, they must be severed from the rest of the agreement without undermining the overall contract. Consequently, Article 14 of the Concession Agreement, when read in conjunction with the formula, is *ex-facie* arbitrary and violative of Article 14 of the Constitution.

(f) The Independent Engineer and the Independent Auditor are appointed by a Committee comprising lenders, NTBCL, and NOIDA. Given that the lenders and NTBCL were effectively one and the same, NOIDA was consistently in the minority and lacked the authority to appoint either the Independent Engineer or the Independent Auditor. Consequently, NTBCL retained the power to appoint the personnel responsible for determining the extent of recovery of the Total Project Cost and Returns. This arrangement in a way allowed NTBCL to become a judge in its own cause, which is inherently unfair and unjust, thereby contravening Article 14 of the Constitution.

(g) NTBCL was granted 68 acres of land for a negligible annual fee, which was subsequently mortgaged. In allocating this land to NTBCL, NOIDA alone incurred the costs associated with compensation, rehabilitation, revised enhancements, and provision of employment. The assertion that NTBCL independently raised funds for the project is thus false and misleading.

(h) Pradeep Puri, designated as the Director of NTBCL, did not perform any substantive function; nevertheless, all expenses associated with his role, including his hefty remuneration, were incorporated into the Total Project Cost. A letter circulated by Puri indicated that the unrecovered Project Cost would stand at Rupees 5330 crores as of 31.03.2031. This figure included legal fees amounting to Rupees 11 crores, travel expenses of Rupees 4 crores, and costs associated with restructuring deep discount bonds totalling Rupees 33 crores. Consequently, the Total Project Cost is substantially higher than the actual investment made, and NTBCL has already received sums far exceeding their original investment, including reasonable profits and interest accrued from toll income.

D. CONTENTIONS ON BEHALF OF RESPONDENT NO. 9 (IL&FS)

7. Mr. Gopal Jain, Senior Counsel representing IL&FS, primarily supported the Appellant. The contentions put forth by him which were unique to IL&FS, may however be summarised as follows:

(a) As of present day, IL&FS is under the control of the Union of India, pursuant to the order dated 01.10.2018 passed by the NCLT, Mumbai, directing the suspension of the then-existing Board of Directors of IL&FS and constitution of a new Board of Directors comprising of nominees of the Ministry of Corporate Affairs.

(b) IL&FS, as the Sponsor of the Project, not only enabled and arranged the entire financing of the Total Project Cost but provided an

indemnity under the Concession Agreement to NOIDA that it would ensure the due implementation of the Project by the Appellant.

(c) The concession period is not perpetual as there is no automatic renewal of the Concession Agreement due to the inability to recover the Total Project Cost and returns. This is because Clause 2.4 of the Concession Agreement does not provide for a deemed extension of the concession period and instead requires NOIDA to extend it by two years at a time. If NOIDA does not do so, the day immediately following the last day of the concession period would be the transfer date and the obligation to transfer the Project would become effective. The language of Clause 2.4 does not say that if the Total Project Cost and returns were not recovered, the concession period would stand extended or be deemed to have been extended. Instead, it specifically vests the discretion to extend it with NOIDA.

(d) The recovery of the Project Cost was miscalculated by the High Court as it did not consider the actual rate of return received by the Appellant on the total investment made into the Project, which included not only the costs of construction but also the expenditure towards operation and maintenance, and taxes. The computation of the recovery of the Project cost as stated in the impugned judgment did not consider: (***i***) the final/actual project cost of Rupees 461.11 crores; (***ii***) the interest on debt paid by the Appellant till March 2014 (being an amount of Rupees 296.26 crores); (***iii***) the repayment of principal amount undertaken by the Appellant till March 2014

(being an amount of Rupees 280.36 crores); and (***iv***) other expenses of Rupees 22.90 crores, and additional taxes such as MAT and FBT, that had been paid by the Appellant, aggregating to Rupees 50.42 crores. In light of this and the fact that the Appellant only collected Rupees 810.18 crores, as on 31.03.2014, means that the Appellant was in loss of Rupees 454.71 crores—which continues to remain recoverable.

E. **SUBMISSIONS BY RESPONDENT NO. 2 (NOIDA)**

8. Lastly, NOIDA, as represented by Mr. Binay Kumar Das, Advocate-on-Record, made the limited submission that the Appellant failed to pay the charges under the permission granted for the display of outdoor advertisements. The outstanding dues on 31.10.2021 were Rupees 37.59 crores. Additionally, the Appellant has not placed on record the amount collected from outdoor advertisements.

F. ***ISSUES***

9. Having given our thoughtful consideration to the rival submissions at length, the following issues arise for the consideration of this Court:

i. Whether the Writ Petition purportedly filed in public interest was maintainable before the High Court?

ii. Whether the non-floating of tenders was justified in the instant case?

iii. Whether the power to levy fees could be delegated to the Appellant and if so, whether it was a case of excessive delegation?

iv. Whether Article 14 of the Concession Agreement read with the formula used therein is opposed to public policy?

v. Whether the Total Project Cost and Returns thereon have been recovered by the Appellant?

vi. Whether NOIDA is entitled to recover dues from the Appellant, in regards to the display of outdoor advertisements?

G. ANALYSIS

G.1 Maintainability of the Writ Petition before the High Court

10. At the very outset, it is essential to adjudicate the prefatory issue of maintainability before addressing the merits of the present case. In this regard, three primary prongs arise from NTBCL's contention challenging the very maintainability of the Writ Petition: (***i***) the *locus standi* of Respondent No. 1; (***ii***) ascertaining delay and laches; and (***iii***) the scope of judicial intervention in a commercial contract such as the Concession Agreement. All of these issues require careful analysis.

G.1.1. Locus standi of Respondent No. 1

11. NTBCL contended that the petition before the High Court amounted to proxy litigation, initiated by Respondent No. 1 at the behest of NOIDA, allegedly to enable NOIDA to evade its obligations under the Concession Agreement. In support of this contention, NTBCL cited landmark cases such as ***Chennai Metropolitan Water Supply and Sewerage Board***

and others v. T.T. Murali Babu[1] and ***Ramana Dayaram Shetty v. International Airport Authority of India***,[2] arguing that the petition filed by Respondent No. 1 did not satisfy the test of espousing a public cause which is a *sine qua non* for the maintainability of a PIL.

12. It is well-established that while public interest litigation serves as an effective tool for addressing the grievances of the public, it must be carefully scrutinised to prevent misuse or abuse by those with ulterior motives. Courts must look beyond the surface to assess whether the litigation has been genuinely initiated in the interest of the public or as a result of mischief.[3] The essence of PIL lies in its aim to remedy genuine public wrongs or injuries rather than being driven by personal vendetta or malice.[4]

13. In ***Janata Dal v. H.S. Chowdhary***,[5] while adjudicating a PIL challenging FIRs filed in the *Bofors* scandal, this Court elaborated on the rule of *locus standi* in a PIL. The Court held that there is no rigid litmus test to determine *locus standi* in a PIL, given the broad contours of such litigations. However, the Court must distinguish between genuine petitions and those filed for private gain or profit. Only individuals acting in good faith and with sufficient interest in the PIL should be permitted

[1] Chennai Metropolitan Water Supply and Sewerage Board and others v. T.T. Murali Babu, 2014 (4) SCC 108.
[2] Ramana Dayaram Shetty v. International Airport Authority of India, 1979 (3) SCC 489.
[3] Balco Employees' Union v. Union of India, 3 (2002) 2 SCC 333.
[4] Dattaraj Nathuji Thaware v. State of Maharashtra, 4 (2005) 1 SCC 590.
[5] Janata Dal v. H.S. Chowdhary, (1992) 4 SCC 305.

to proceed.[6] Accordingly, vexatious petitions disguised as PILs, aiming to address personal grievances, deserve rejection at the threshold.

14. In the instant case, Respondent No. 1 is a Society duly registered under the Societies Registration Act, 1860, with the primary objective of promoting the welfare of NOIDA residents. The society acts as a bridge between the residents and public authorities, catering to the former's needs for essential civic amenities. Given this object, it is clear that Respondent No. 1 approached the High Court in good faith, with a view to safeguard the interests of NOIDA residents, who had been subjected to the levy of toll at the DND Flyway under the guise of user fees by NTBCL. Consequently, we do not find any merit in NTBCL's contention that Respondent No. 1 lacked *locus standi* in approaching the High Court.

15. As regard to NTBCL's contentions pertaining to the alleged collusion between Respondent No. 1 and NOIDA, we find that there is not an iota of material on record to substantiate these sweeping insinuations.

G.1.2. Delay and laches

16. NTBCL contended that there was an inordinate delay on the part of the Respondent Association in filing the Writ Petition before the High Court. NTBCL argued that the DND Flyway had been operational since 2001, with the MoU and Concession Agreement having been executed as far back as 1992 and 1997, respectively. Given this, the Writ Petition was

[6] Villianur Iyarkkai Padukappu Maiyam v. Union of India, (2009) 7 SCC 561.

filed by Respondent No. 1 only in 2012—nearly 20 years after the execution of the MoU and 15 years after the Concession Agreement. NTBCL asserted that this substantial delay should have been sufficient grounds for the High Court to dismiss the Writ Petition at the outset.

17. This contention, in our considered opinion is wholly misconceived and misdirected. We say so for the reason that *firstly*, writ proceedings under Articles 32 or 226 are not guided by the provisions of the Limitation Act, 1963, but instead, by the Doctrine of Delay and Laches. Without adverting much into its pith and substance, it is ubiquitous that the doctrine of delay and laches cannot be applied *stricto senso* to writ petitions invoking public interest jurisdiction, unless the court is satisfied that the party has not approached it with clean hands. It is now well established that while delay is a material factor, there is no fixed period of limitation for invoking jurisdiction under Article 226 and that each case should be considered on its own facts and circumstances, thus allowing for a more liberal approach when applying this doctrine.[7] It is indeed beyond any doubt that the doctrine is not a rigid rule but is rather a practice that is founded on the exercise of sound judicial discretion.

18. In a much more rudimentary sense, it must also be borne in mind that the cause of action in these set of circumstances could have arisen and perhaps actually arose only after expiry of a reasonable period, within which the cost of the Project was expected to be recovered. The filing of

[7] R&M Trust v. Koramangala Residents Vigilance Group, (2005) 3 SCC 91; State of Madhya Pradesh and another v. Bhailal Bhai and others, AIR 1964 SC 1006.

the Writ Petition immediately after the Concession Agreement and other Supporting Agreements were entered into, would have been highly premature and ill-advised, without giving a reasonable time to the project proponent to recover the actual cost of the project.

19. In this vein, the High Court rightly observed that the plea of delay lacks substance, as the commuters, including Respondent No. 1, were justified in trusting that NOIDA would protect their interests. However, in 2012, after learning that they were being misled and subjected to an illegal toll based on an audit report from NTBCL's Auditor and Chartered Accountant—indicating that as of 31.05.2012, Rupees 2340 crores were still to be recovered from the public, and the recovery period had extended from 30 years to 100 years—they were prompted to immediately approach the High Court.

20. Furthermore, it must be acknowledged that the levying of user fees or tolls by NTBCL constituted a continuing cause of action, which was challenged by the Association of affected commuters. An established exception to the defence of delay is the presence of a continuous injury stemming from an ongoing wrong.[8] The plea of delay and laches cannot be raised in a case of a continuing cause of action.

21. In our considered view, the challenge laid by Respondent No. 1 before the High Court, regarding the levying of toll or user fees, being rooted in public interest and involving *en masse* potential violations of

[8] Union of India and another v. Tarsem Singh, (2008) 8 SCC 648.

Fundamental Rights of citizenry, warrants thorough examination. Given that NTBCL's actions represented a continuing cause of action, we concur with the High Court in rejecting the hyper technical objection of delay and laches.

G.1.3. Scope of judicial intervention

22. In the context of maintainability, NTBCL has also contended that the High Court should not have intervened in a commercial contract such as the Concession Agreement and rendered its provisions invalid, as it amounts to judicial interference into a Governmental Policy.

23. While considering these submissions, the High Court conducted a detailed analysis and has addressed them based on two principal rationales: (***i***) the judicial review of administrative action, and (***ii***) the public interest factor. These rationales were employed to determine whether the Court had the jurisdiction to adjudicate on the validity of the Concession Agreement and the levying of toll upon commuters using the DND Flyway.

24. Having said that, we also deem it necessary to embark on an independent analysis and assess whether the conclusion of the High Court having employed such rationale would hold sway. *First*, regarding the judicial review of administrative action, NTBCL has contended that courts cannot interfere in contractual obligations or policy decisions.

25. It is indeed true that the Concession Agreement and the MoU involved the NOIDA authorities as a party, and the decision to grant development

and construction rights to NTBCL was somewhat a policy decision by the Government, considering the financial and technical constraints present at the time. The crucial question, however, is whether such commercial contracts, which may stem from a Government Policy decision or where one of the parties is the State or its instrumentalities, are entirely insulated from judicial review.

26. This issue is no longer *res integra* and there is no absolute bar on the maintainability of writ petitions, even in matters concerning contracts or monetary claims. In such cases, the discretion lies with the Court as held in ***Joshi Technologies International Inc. v. Union of India***,[9] which summarised the legal position on judicial review of contracts entered into by public authorities with private parties. Judicial review, being a dynamic process as opposed to static, has experienced a significant shift in terms of the degree of judicial interference in contractual disputes, especially when one of the parties involved is the State or its instrumentalities.[10]

27. This is because when contractual power is exercised for public purposes, the State and its instrumentalities bear the responsibility to act fairly, without arbitrariness or caprice.[11] In such situations, where State action is challenged as arbitrary or capricious, courts are justified in intervening through judicial review to determine whether the State has adhered to the principles embodied in Article 14 of the Constitution of

[9] Joshi Technologies International Inc. v. Union of India, (2015) 7 SCC 728.
[10] Subodh Kumar Singh Rathour v. Chief Executive Officer, 2024 SCC Online SC 1682.
[11] Silippi Constructions Contractors v. Union of India, (2020) 16 SCC 489.

India, which mandates fairness and non-arbitrariness in State actions. Considering that the Concession Agreement involves not only entities like IL&FS and NTBCL but also a Public Authority such as NOIDA, it is evident that the Concession Agreement, though commercial in nature, is subject to judicial scrutiny. This is particularly true given the public interest concerns raised by Respondent No. 1, while challenging the fairness and legality of the toll collection and overall execution of the Agreement. The involvement of a public authority necessitates cognizance to ensure that the Agreement upholds constitutional principles. In such scenarios, it becomes the solemn duty of the judiciary, entrusted under the Constitution as an independent arbiter, to intervene and protect the interests of the public at large.

28. *Second*, it is crucial to recognise that when a contract involving a State instrumentality like NOIDA, significantly impacting the public, the metes and bounds of judicial review ought to be expanded. The guiding principle is that every State action must prioritise public interest. If a governmental action disproportionately favours a private entity at the expense of public welfare, it is liable to be struck down as invalid.[12] As rightly acknowledged by the High Court also, the State is duty-bound to act equitably and in accordance with the Public Trust Doctrine, ensuring that no action harms the broader public interest.[13]

[12] Kasturi Lal Lakshmi Reddy. v. State of Jammu and Kashmir, 1980 (4) SCC 1.
[13] Centre for Public Interest Litigation v. Union of India, 2012 (3) SCC 1.

29. In light of the above, it is evident that the High Court was justified in entertaining the petition filed by Respondent No. 1 in public interest. The continued levy of toll and the Concession Agreement were directly impacting the rights and interests of commuters. NTBCL's attempts to classify the Concession Agreement as a purely private contractual matter, sequestered from such scrutiny, thus holds no ground. The Project, having been developed for public benefit, cannot escape judicial oversight, particularly when the allegations pertain to the public's rights and interests, which are being infringed upon by the levying of user fees. The contention of NTBCL seeking dismissal of Respondent No. 1's petition at the threshold was thus rightly rejected by the High Court.

G.2 The validity of awarding the contract to NTBCL

30. One of the primary contentions raised by Respondent No. 1 before the High Court was that the contract for the development and construction of a significant project like the DND Flyway had been awarded to NTBCL without NOIDA having followed any formal tender procedure, such as advertising or issuing a notice inviting competitive tenders. In response, NTBCL argued that, at the time, it would not have been feasible to float tenders due to a shortage of private companies capable of undertaking such large-scale infrastructure projects. NTBCL further contended that the mere absence of a competitive tendering process was not, in itself, sufficient grounds to invalidate the agreement.

31. In this context, it is evident that NTBCL entered into an agreement with NOIDA to undertake a project that involved an overwhelming public

element, comprising of public funds and public assets. When such a project is undertaken by the State in partnership with a private entity, the element of public interest necessitates strict adherence to Constitutional obligations. The State is obligated to ensure that its actions remain free from any arbitrariness or capriciousness, particularly when public welfare is at stake.

32. Considering the onus placed upon the State, it requires no further elaboration that every action or decision of the State or its instrumentalities in conferring any form of largesse or benefit must be grounded in a just, transparent, and well-defined policy. Such a policy should be made known to the public through appropriate publication and implemented through non-discriminatory means, free from bias or favouritism.[14] Even when the Government awards a contract or grants similar benefits, such bestowal must meet the standards of reasonableness and public interest. Should either of these criteria remain unmet, the conferment would be deemed unconstitutional.[15] As a necessary corollary thereto, the Government must not act in a manner benefitting private entities at the expense of the State. Such actions, if unreasonable and contrary to the aegis of public interest, would undermine the State's Constitutional obligations.[16]

[14] City Industrial Development Corporation v. Platinum Entertainment, (2015) 1 SCC 558.
[15] Kasturi Lal Lakshmi Reddy, supra note 12.
[16] Ibid; Villianur Iyarkkai Padukappu Maiyam v. Union of India and others, (2009) 7 SCC 561.

33. The Concession Agreement for the development of the DND Flyway, entered into between NOIDA, IL&FS and NTBCL, is conspicuously silent regarding the issuance of any tender or inviting bids from other competitors. It may be true that the mere non-floating of tenders or absence of a public auction or invitation alone cannot, serve as sufficient grounds to term the actions of a public authority as arbitrary or *mala fide*.[17] The Courts have rather consistently held that the State and its instrumentalities are free to make financial decisions, provided such decisions are guided by considerations of economic viability and public interest. This, however, does not absolve the State or its instrumentalities from their obligation to demonstrate due application of mind, ensure transparency and fairness in their decision-making process.

34. To instantiate, in the case of ***City and Industrial Corporation of Maharashtra Limited v. Shishir Realty***,[18] this Court reiterated the well-established principle that Article 14 of the Constitution, which abhors arbitrariness, imposes a duty on public authorities to ensure that bias or favouritism does not infiltrate the bidding process. A transparent bidding process is essential to fulfil Constitutional obligations. Further, in ***Meerut Development Authority v. Association of Management Studies***,[19] the Court noted that while invitations to tender typically fall

[17] Pathan Mohammed Suleman Rehmatkhan v. State of Gujarat, 2014 (4) SCC 156; Tata Cellular v. Union of India, (1994) 6 SCC 651.
[18] City and Industrial Corporation of Maharashtra Limited v. Shishir Realty, (2022) 16 SCC 527.
[19] Meerut Development Authority v. Association of Management Studies, (2009) 6 SCC 171.

within the realm of contract law and are subject to limited judicial scrutiny, Courts are justified in reviewing cases where the terms of the invitation appear tailored to favour a particular person or entity, thereby excluding all others from the bidding process.

35. The golden principle thus is that Government procedures or policies pioneered in public interest must genuinely serve the public and not merely enrich private entities. When public interest is overshadowed, it does raise concerns as to whether the Government has acted in a manner that appears capricious or arbitrary. It then becomes imperative for the Court to scrutinise whether such actions vitiate the Constitutional mandate of equality. Such procedures, must therefore satisfy the litmus test of due application of mind, fairness, transparency and most pertinently, being *bona fide*.

36. Turning to the events of the case in hand, it is a matter of record that the Government made no efforts to issue tenders, invitations, or seek competitive bids from other interested entrepreneurs. There is no basis at all to claim that following such a procedure would have been detrimental to the proposed Project. Contrarily, NOIDA, in collaboration with IL&FS, assigned the mammoth responsibility of constructing this novel infrastructure upon NTBCL. Interestingly, NTBCL was a non-existent entity, as it came to be incorporated only on 08.04.1996, i.e. four years after the MoU was executed between the Delhi Administration, NOIDA, and IL&FS, to establish a bridge between Delhi and NOIDA.

37. The justification rendered by NTBCL and NOIDA that there was no other infrastructure development company at the time, who could undertake the construction of the DND Flyway, is nothing but a self-serving claim by an entity who is the sole beneficiary of the State largesse. The assertion that IL&FS, being the only institution or agency controlled by the public sector, was uniquely positioned to offer expertise in specialised infrastructure development and generate the necessary financing, is also hardly a justification for the undue favour extended to NTBCL.

38. As the High Court rightly observed, the selection of NTBCL appears to have been strategically aligned, given that the Concession Agreement entrusted the Steering Committee with selecting a private company promoted by IL&FS to implement the DND Flyway project. As already noticed, this private company—NTBCL—was incorporated only after the MoU had been executed and thus could not be considered as having extensive experience in developing such large-scale infrastructural projects.

39. The contention that there were no suitable companies capable of undertaking such infrastructural development during that period lacks any substantiation or material on record to support such sweeping claims. In our considered view, the aforesaid plea could carry some weightage had there been even a single attempt to invite bids. It is difficult to accept that there was such a dearth of experienced companies offering better financial terms and solutions for developing the DND Flyway alongside IL&FS.

40. The selection of NTBCL without following proper procedure and without giving any opportunity to bid, to other competitors, was nothing but an opaque device resorted to, in contravention of Article 14 of the Constitution of India.

G.3 Delegation of power to levy fees and its validity

41. Delving deeper into one of the core issues, we encounter the matter of the levy and collection of user fees by NTBCL, which the Appellant claims to be duly authorised under Section 13.1 of the Concession Agreement. NTBCL has further urged that this user fee is being charged in the exercise of powers conferred upon it by NOIDA, pursuant to the Regulations formulated under Section 6A in conjunction with Section 19 of the 1976 Act.

42. Section 13.1 of the Concession Agreement deals with the 'Collection of Fee.' It grants NTBCL the right to collect, retain, and appropriate fees from users of the DND Flyway starting from the Commissioning Date. The fee amount is to be determined by the Fee Review Committee. Additionally, NTBCL is empowered to delegate the collection function to the O&M Contractor, who would collect fees on behalf of NTBCL, in accordance with the Rules framed under the 1976 Act. Notably, in contingencies where neither NTBCL nor the O&M Contractor is unable to collect fees as a result of any change in law or any restriction or injunction based on any process of law, NTBCL is entitled to receive compensation from NOIDA in lieu thereof.

43. It thus becomes evident that the authority to collect fees by NTBCL has been purportedly derived from certain Rules that were to be framed by NOIDA. Given this background, it is equally imperative, if not more, to delve into what are the statutory provisions dealing with the levy and collection of such fees; who may collect or levy such fees under the relevant legal framework; whether such authority could be delegated; and if so, by whom?

44. As on the date of the execution of the Concession Agreement, the 1976 Act was the relevant Statute in vogue. Section 6 thereof outlines the '*Functions of the Authority*', aimed at ensuring the planned development of Industrial Areas. The Authority means the Corporate Body constituted by the State of Uttar Pradesh. Section 11 of the 1976 Act provides that the Authority may levy taxes to provide, maintain, or continue amenities within the Industrial Development Area, subject to the approval of the State government. More specifically, Section 19(1) of the Act, read with Section 19(2)(e), grants the Authority the power to frame Regulations necessary for the administration of its affairs, including for the levying of fees in the discharge of its functions. Thus, the Authority's ability to levy and collect fees is traceable in the provisions of the 1976 Act.

45. Thereafter, Section 6A of the 1976 Act was inserted *vide* the Uttar Pradesh Act No. 2 of 1999, with effect from 14.08.1998. It enumerated that the '*Authority may by agreement authorise any person to provide or maintain or continue to provide or maintain any infrastructure or amenities, and to collect taxes or fees, as the case may be, levied*

thereof'. In furtherance of the power conferred under Section 6A, read with Section 19(2)(e) of the 1976 Act, NOIDA framed the Regulations, which came into force in September 1998. These Regulations, in simple terms, effectively empowered NOIDA to authorise the designated developer to levy and collect the applicable fee, which would in turn, be based on a mutually agreed formula between the parties. This designated developer in the instant case would be NTBCL.

46. A plain reading of Section 6A makes it unequivocally clear that the 'Authority' is empowered to delegate the *power to collect taxes or fees* levied by it. However, under no circumstances does Section 6A authorize the delegation of the *power to levy taxes or fees*. Similarly, Section 19(2)(e) of the 1976 Act enables NOIDA to frame Regulations governing the levy of taxes or fees. This provision, however, cannot be interpreted as empowering NOIDA to delegate the power of levying taxes or fees through an agreement under Section 6A of the Act. It is, therefore, evident that while the power to levy taxes or fees remains exclusively vested in the Authority, from 14.08.1998 onwards, the power to collect such taxes or fees could be delegated to any person with whom an agreement for the maintenance of infrastructure or amenities has been executed.

47. However, NOIDA overstepped its authority by delegating the power to levy fees to NTBCL through the Concession Agreement and Regulations, exceeding the scope of its powers. In this context, the High Court rightly noted that it is a well-established law that an authority vested with the power to frame subordinate legislation must act within the bounds of

that power and refrain from exceeding its limits. It goes without saying that the power to delegate must be expressly discernible in the Principal Act itself and in the absence of such provisions, no circular method can be countenanced to extract such power.

48. In complete contradiction and violation of the scheme of the Statute, NOIDA in purported exercise of its power to formulate Regulations not only delegated the power to collect fee but also authorised NTBCL to revise and levy such charges. Such a delegation was totally in violation of the provisions of the 1976 Act. The responsibility to determine the amount and rate of fees lies with NOIDA; by delegating this function to NTBCL via the Concession Agreement and reinforcing it through the Regulations, NOIDA exceeded its authority moored under the 1976 Act.

49. It is pertinent to underscore herein that taxing statutes, being penal in nature, must be construed strictly. The power to levy a tax or fee cannot be inferred by implication but must be expressly conferred by Statute. Under our Constitutional framework, no private entity can be granted the authority to levy taxes or fees, for such powers are exclusively vested in public authorities.

50. Nevertheless, the collection of fees or toll can be assigned to a developer or contractor for a defined period, including for the purpose of recovery of the investment made in developing the infrastructure. Thus, we concur with the High Court's conclusion that the Concession Agreement, in so far as it sub-delegates the power to levy and collect fees to NTBCL, is

unlawful, and the Regulations justifying such sub-delegation undermine the objective of Section 6A of the 1976 Principal Act.

51. Not only this, the Regulations came to be enacted only after the Concession Agreement had been executed, and were seemingly designed to validate the actions already taken by NTBCL and NOIDA. We may also hasten to add that the subject Regulations are neither retroactive nor can be applied retrospectively and are thus alien to the terms and conditions of the Concession Agreement.

52. It seems that NTBCL and NOIDA have indulged in trickery and placed the cart before the horse, in attempting to authorise actions *post facto*, thereby obscuring the full extent of misuse of power. We find it evident that these Regulations were introduced by NOIDA in the aftermath of enacting the Concession Agreement, serving merely as an afterthought, while having no authority to do so. We thus hold that NOIDA did not have any competence to delegate the power to levy fees and toll to NTBCL, and thereby overstepped its statutory bounds. Accordingly, we are not inclined to interfere with the findings of the High Court on this issue.

G.4 Dissonance between Article 14 of the Concession Agreement read with the formula vis-à-vis public policy

53. Article 14 of the Concession Agreement defines the 'Total Cost of the Project' and its calculation methodology, as elaborated in Annexure F. The issue herein concerns whether this provision aligns with the

principles of public policy and the Constitution of India. To elucidate, the relevant language of Article 14 of the Concession Agreement states:

> *"Article 14: Costs and Accounting*
> *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) Shortfall 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:*
> *Out of gross revenues from fee collections, income from advertising and Development Income deduct O&M Expenses.*
>
> *(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.*
>
> *Section 14.3: Accounts of Concessionaire*
> *The Concessionaire shall keep and maintain the books of accounts for the Project in accordance with the format approved by the Independent Auditor and the accounting practices specified by the Independent Auditor and the statutory requirements consistently applied in accordance with Indian law."*

54. To this end, NTBCL has defended the validity of Article 14 and argued that the provision, when read alongside the formula in Annexure F, does not contravene the Constitution or public policy. It further contended that the formula was reasonable, ensuring adequate returns for

developers, and emphasized that the concession period could not be extended without NOIDA's consent, thereby preventing indefinite imposition of user fees. *Per contra*, Respondent No. 1 contended that the continually escalating Total Project Cost and returns have effectively transformed the Concession Agreement into a perpetual arrangement, ensuring that NTBCL would not return the assets to NOIDA even after 100 years. They further argued that such provisions are detrimental to public interest and should be severed from the Concession Agreement without affecting the validity of the contract as a whole.

55. We are of the considered view that this issue hinges on two primary prongs requiring detailed analysis: (***i***) the reasonableness of the formula outlined in Annexure F, and (***ii***) the perpetual nature of the Concession Agreement.

G.4.1. Reasonableness of the formula in Annexure F

56. NTBCL contended that the formula in Annexure F of the Concession Agreement was reasonable and computed by experts. It asserted that the Concession Agreement was executed after proper application of mind entailing extensive deliberations and consultations over the years between the two State governments and their agencies. It was further explained that the Steering Committee decided the Project to be implemented by NTBCL. Subsequently, the State approved the Project and constituted an Empowered Committee to make recommendations on the Concession Agreement. Finally, the World Bank approved funding for the Project *via* a line of credit to IL&FS. The rationale behind adopting

such a formula was that the Project was the first of its kind in India, interest rates were at an all-time high, and investors had to be guaranteed adequate returns. It was also adopted with the justification that, *sans* such a formula, no developer would have shouldered the risks of the Project.

57. The High Court while analysing the reasonableness of the formula adopted, held that Article 14 of the Concession Agreement was perpetual in nature and it entitled NTBCL to recover user fees/ toll indefinitely. Such a clause, therefore, being opposed to public policy was unjust and arbitrary and liable to be severed from the Concession Agreement.

58. We find no error in the analysis undertaken by the High Court. It is pertinent to understand that the formula in Annexure F of the Concession Agreement calculates the Total Project Cost and returns. As per the formula, the Total Project Cost is the aggregate of (***a***) the Project cost; (***b***) major maintenance expenses; and (***c***) shortfall in the recovery of returns in a specific financial year.

59. To gain further clarity on the costs and structure of the formula involved, it is essential to consider the figures underpinning the calculation of the Total Project Cost. The original cost as on the Commissioning Date was Rupees 325.99 crores. Operation and Maintenance (**O&M**) expenses are deducted from the gross revenue, and the Concession Agreement, per Section 1.1, does not specify any cap or detailed guidelines for these expenses. Further, returns are calculated at a 20% annual rate on the

Total Project Cost from the effective date. According to Section 14.1(b)(iii), any shortfall in return recovery is added to the unrecovered Total Project Cost of the previous year, thus increasing the base amount on which returns at the prescribed rate are computed for the following year. Consequently, annual shortfalls in returns inflate the Total Project Cost year over year.

60. To understand the increasing Total Project Cost, the CAG Report submitted to this Court is illuminating. The Report highlights those provisions in the Concession Agreement—including fixed, assured high returns without risk-sharing by the Concessionaire, overlapping roles with potential conflicts of interest for key stakeholders, unrestricted project costs, unlimited charge of O&M expenses, and lack of effective revenue control—all primary contributors to the growing unrecovered Total Project Cost.

61. In this regard, the Comptroller-Auditor General made the following germane observations:

i. There was no justification to: (*a*) allow an assured and high rate of Return of 20% in 1997, when the Prime Lending Rate was 13%; (*b*) not include a clause for revision of the rate of Return based on the Reserve Bank of India's policies; and (*c*) not use the opportunities provided at various stages for revising the rate of Return.

ii. Since no competitive bidding was held, the Project Cost was not decided in advance nor capped. Thus, NTBCL had no incentive to

control the Project Cost and minimise expenses. This violates the principles of financial propriety.

iii. The Project Cost, determined by the Independent Auditor, was inflated by Rupees 44.87 crores. The Project Cost on the Commissioning Date should have been Rupees 281.12 crores instead of Rupees 325.99 crores. Such inflated project cost occurred only because returns were allowed before the date of commissioning. The Independent Auditor's certificate stated that there was an unrecovered Project Cost of Rupees 407.64 crores as on 06.02.2001, which included Rupees 325.99 crores (Project Cost) and Rupees 81.65 crores (unrecovered returns at the rate of 20% from 30.12.1998 to 06.02.2001). The Project Cost prior to the commissioning date should have been taken as nil since no returns before 06.02.2001 were recoverable, as per Sections 14.1 and 14.2 of the Concession Agreement.

iv. The Independent Auditor certified O&M expenses of Rupees 272.40 crores from 06.02.2001 to 31.03.2016. NTBCL booked excessively high O&M expenses of Rupees 272.40 crores during 2000-01 to 2015-16, which was higher than the standard norms used by NHAI/MoRTH, as well as the Feasibility Report of the DND Flyway itself.

v. After the appointment of the ITNL Toll Management Services Limited, a subsidiary of NTBCL, as the O&M contractor, the

expenditure on account of the O&M contractor's fee increased from Rupees 5.16 crores between 2008-09 to Rupees 10.49 crores between 2015-16. Thus, the O&M contractor's fee increased by 103% over eight years from 2008-09 to 2015-16.

vi. NTBCL did not apply economic prudence and allowed liberal increases in benefits, concessions, and remuneration to its employees, management, O&M contractor etc., which burdened the Project, resulting in O&M expenses of the Project exceeding the project feasibility norms by more than 100%. This inflated the Total Project Cost due to the compounding effect of the formula.

62. The CAG Report shockingly reveals that the Directors of NTBCL, including Pradeep Puri (who it seems was a senior bureaucrat), apparently did not perform any responsibility, yet all their expenses, including high-end remuneration were added in the Total Project Cost. Further, legal fees amounting to Rupees 11 crores, travelling expenses amounting to Rupees 400 lakhs, and the cost of restructuring deep discount bonds at Rupees 33 crores, were also added to the Total Project Cost. More egregiously, NTBCL seems to have incurred an expenditure of Rupees 72.25 lakhs on account of purchase and distribution of 'Corporate Gifts', including the generous distribution of gold coins to its employees, sub-staff and drivers.

63. It is evident that, despite approval from various authorities, the formula used was far from reasonable. The compounding nature of the formula

granted NTBCL the right to collect user fees indefinitely; the absence of a cap on O&M expenses allowed for potential inflation of costs by including extraneous expenditures in the Total Project Cost; and the fixed, unrealistic return rate of 20% ensured that the Total Project Cost would escalate yearly without possibility of adjustment by the parties involved.

64. This situation reflects serious impropriety not only by IL&FS and NTBCL but also by the then officers of NOIDA, the State of UP, and the NCT of Delhi. It is inconceivable that multiple layers of Government, advised by some of the most astute financial minds, failed to foresee that this formula would impose an undue and unfair burden on the users—the general public. Such an outcome could only arise through extraneous considerations influencing several stakeholders. This blatant misuse of power and breach of public trust has profoundly shocked the conscience of this Court. The manner in which some senior bureaucrats manipulated the siphoning of project funds for their personal gains clearly make out a fit case for investigation under the Prevention of Corruption Act, 1988, although the ship might have sailed for such action at this stage.

65. In our considered view, the method used to calculate the Total Project Cost was fundamentally a mechanism for unjust enrichment by a select few and, as such was rightly deemed to be inherently arbitrary by the High Court. Accordingly, we have no hesitation to hold that the formula

outlined in Annexure F of the Concession Agreement is unreasonable and contravenes Article 14 of the Constitution.

G.4.2. Perpetuity of the Concession Agreement

66. NTBCL argued that under Section 2.4 of the Concession Agreement, the concession period could not be extended without NOIDA's explicit consent. Section 2.4 lacks any provision for an automatic or 'deemed' extension, requiring instead that NOIDA actively extend the Concession Agreement by two-year increments. If NOIDA does not approve an extension in advance, the day following the concession period's final day becomes the transfer date, at which point NTBCL must transfer the Project. The language of Section 2.4 does not imply that an unrecovered Total Project Cost or returns would automatically extend the concession period. Rather, it grants NOIDA the sole discretion to determine extensions, thereby preventing an indefinite levy of user fees or tolls.

67. The High Court observed that, given the continual escalation of Total Project Cost, it would be infeasible to achieve full returns even over a 100-year period, resulting in NTBCL indefinitely collecting user fees. This assessment was corroborated by the Independent Auditor's report for the year ending 31.03.2012, as well as a letter dated 29.08.2007 from Pradeep Puri to the CEO of NOIDA, which noted that the concession period had effectively become perpetual. Consequently, it was clear that NTBCL would be unable to revert the Project assets to NOIDA free of cost, even after a century.

68. The prolonged success of this arrangement appears rooted in the deliberately crafted language of the Concession Agreement. The Concession Agreement contains provisions under Section 2.3 that establish a concession period of either 30 years from the effective date or until NTBCL recovers the Total Project Cost and returns, based on determinations made by the Independent Engineer and Auditor per Article 14 of the Concession Agreement. Should recovery not be achieved within 30 years, Section 2.4 provides for two-year extensions, repeating as necessary, until full recovery is realized. This clause raises the key question of whether such extensions are automatic or contingent upon NOIDA's explicit consent, as NTBCL contends.

69. Given the critical roles of the Independent Auditor and Independent Engineer in determining the recovery of Total Project Cost and returns, it is essential to clarify whether their appointment lies with NTBCL, NOIDA, or both parties jointly.

70. According to Articles 8 and 10 of the Concession Agreement, the Independent Engineer and Independent Auditor are appointed by a Committee formed by the lenders, including IL&FS, NTBCL, and NOIDA. As NTBCL is a subsidiary of IL&FS, this arrangement positioned NOIDA as a minority member without meaningful authority in the appointments. Thus, IL&FS and NTBCL effectively controlled the selection, which casts serious doubts on the transparency and so-called independence of these appointments. This structure enables IL&FS and NTBCL to unilaterally influence as to whether the Total Project Cost and

returns are deemed recovered, with NOIDA obliged to accept these determinations with hardly any other alternative.

71. The next point to address is whether NOIDA's consent is required to extend the concession period or whether the concession period automatically extends based on the certification by the Independent Auditor and Independent Engineer regarding the recovery of the Total Project Cost after 30 years.

72. It is important to note that Article 18 of the Concession Agreement stipulates that if NOIDA decides to terminate the Concession Agreement before the Total Project Cost and returns are fully recovered, in that case NOIDA is obligated to compensate NTBCL the deficiency in Total Project Cost, returns, and any other expenses, as specified in Section 8.1 of the Agreement.

73. As previously mentioned, a letter dated 29.08.2007 from the CEO of the Appellant to NOIDA indicated that the Total Project Cost after 30 years would be approximately Rupees 5,353 crores, suggesting that the term of the Project should be extended to 100 years. The CAG Report pertinently states that, if NTBCL continues to operate under the current terms of the Concession Agreement, with extensions as per its provisions, the unrecovered Total Project Cost could rise to around Rupees 7,200 crores by 31.03.2020 and Rupees 15,200 crores by 31.03.2029. This unending escalation in the Total Project Cost leaves no room to doubt

that the Concession Agreement was cleverly designed to remain perpetually operational.

74. A conjoint reading of these aspects reveals that NOIDA effectively faced two options: (***i***) allow NTBCL to recover the Total Project Cost and returns through user fees, even after the initial 30-year concession period, by granting indefinite 2-year extensions, or (***ii***) pay the Total Project Cost of and returns themselves, to terminate the Concession Agreement either at the end of 30 years or before. Therefore, NOIDA's 'choice' was limited to either bearing the financial burden itself—by paying Rupees 5,353 crores through public funds—or allowing the Concession Agreement to continue, forcing the general public to pay user fees indefinitely. In either case, the inevitable result is the unjust enrichment of NTBCL at the cost of public suffering.

75. In such dire circumstances, NTBCL cannot assert that NOIDA has a genuine 'choice' or the ability to 'withhold consent' from extending the Concession Agreement. NOIDA effectively has no choice and is perversely being browbeaten to continue enforcing the Concession Agreement. Despite the supposed 'choice,' it is burdened with the obligation to repay an exorbitant sum, which we have already established is unreasonably calculated.

76. This 'consensual' extension is solely a show of smoke and mirrors and has been cunningly engineered by NTBCL and IL&FS. They successfully ensured that: *first*, the formula was designed in such a way that the Total

Project Cost and returns would escalate each year; *second*, inflated and unnecessary expenses could be included in the Total Project Cost, making repayment impossible; *third*, the Concession Agreement would only terminate upon full repayment of the Total Project Cost and returns, knowing as early as 2007 that 30 years would not suffice for recovery; and *finally*, NOIDA was left with no real choice but to extend the concession period due to the ultimatum presented in Article 18, masked as 'consent.'

77. Contracts loaded with terms which are so unfair and unreasonable, that they truly baffle this Court, are undoubtedly opposed to public policy and must be adjudged void.[20] The Court is always cautious when determining if a particular contract or action is opposed to public policy, but in doing so, it cannot shirk from its duty and approve helplessly the interpretation of a Statute or a document or of an action which is certain to subvert the societal goals and endanger the public good.[21]

78. To do so, the Court may invoke the Doctrine of Severability and sever the incurable parts of the contract from the whole. The Court can do so only when the rest of the contract can breathe and survive without the aid of its void covenants. The Court must ask itself whether the parties would have agreed to the valid terms of the agreement if they knew that the invalid terms would be removed.[22] Given the extent of manipulation in the instant case, we must intervene and hold that Article 14 of the

[20] Central Inland Water Transport Corpn. Ltd. v. Brojo Nath Ganguly, (1986) 3 SCC 156.
[21] Rattan Chand Hira Chand v. Askar Nawaz Jung, (1991) 3 SCC 67.
[22] Beed District Central Coop. Bank Ltd. v. State of Maharashtra, (2006) 8 SCC 514.

Concession Agreement, read with the formula in Annexure F, is opposed to public policy and must be cut apart from the Concession Agreement.

G.5. Recovery of Total Project Cost and returns thereon by NTBCL

79. It is pertinent to note that NTBCL has consistently claimed that the Total Project Cost and returns thereon have not been recovered so far. This claim is the primary reason that the extension of the concession period has come under scrutiny. In contrast, Respondent No. 1 asserts that the project costs and reasonable profits have long been recovered by NTBCL, thereby negating the need to continue imposing user fees/tolls.

80. The High Court has categorically held that NTBCL was not entitled to recover any amount over and above what had already been received by it. This was determined on the following basis:

(i) The project cost incurred for the Delhi-NOIDA Bridge and Ashram Flyover was Rupees 377 crores.

(ii) The cost of construction, as submitted by the Project Engineer, was Rupees 188.3 crores but was disclosed as Rupees 265.7 crores.

(iii) The cost of construction of the Ashram Flyover was Rupees 20 crores and was included in the Project cost even though it was the subject matter of a separate construction agreement.

(iv) The gross income for the year ending on 31.03.2014 was Rupees 810.18 crores, as per NTBCL. The surplus after tax was Rupees 578.80 crores (not including income from other sources).

(v) The Statement of Computation of Returns and Arrears dated 14.09.2015 (filed by NTBCL) revealed that the gross revenues earned by NTBCL have been increasing gradually each year.

(vi) The income from advertisement and rent is not included in the Statement of Computation.

(vii) The user fees collected between 01.04.2014 and 30.09.2016 would tally to an additional sum of approximately Rupees 300 crores.

(viii) NTBCL even started giving dividends to its shareholders to the extent of 5% in 2010-2011, 10% in 2011-2012, 10% in 2012-2013, and 25% in 2013-2014. This meant that NTBCL had earned sufficient profits from the revenue generated *via* the user fees. The Project could thus be handed over to NOIDA even before the expiry of the concession period, i.e. 30 years.

81. NTBCL contended that the impugned judgment failed to account for: (***i***) the total user fee collected, considering only the provisional project cost of Rupees 377 crores; (***ii***) the interest on debt paid by NTBCL until March 2014; (***iii***) the repayment of the principal by NTBCL, which amounted to Rupees 280.36 crores; and (***iv***) other expenses of Rupees 22.9 crores and additional taxes, including MAT and FBT, totalling Rupees 50.42 crores. NTBCL argued that since these amounts were not kept in view by the High Court, it still needed to recover an aggregate sum of Rupees 454.71 crores from user fees and other income, which was the computation of losses it had suffered as on 31.03.2014.

82. NTBCL further contended that it generated a revenue of Rupees 743.34 lakhs (out of Rupees 2028.88 lakhs) from the display of advertisement hoardings on the NOIDA side of the Project in 2019-2020, which increased to Rupees 399.81 lakhs in 2020-2021. Out of this advertising revenue, Rupees 339.87 lakhs were paid towards license fees in 2019-2020, and Rupees 84.97 lakhs in 2020-2021. After the collection of tolls was discontinued, NTBCL became solely reliant on the revenue generated from advertisement hoardings.

83. We find that no independent evaluation of these competing claims is required to be undertaken by us as the issues raised by NTBCL have been effectively answered by the independent arbiter, namely the CAG, through its Report submitted to this Court concluding that:

(i) The total expenses incurred by NTBCL are Rupees 1,136.26 crores.

(ii) The total income generated by NTBCL is Rupees 1,103 crores.

(iii) The Total Project Cost has been recovered to a large extent and only around Rupees 15 crores remained to be recovered as of 31.03. 2016.

(iv) Other future recurring costs which would be incurred over the life span of the DND Flyway are the O&M costs. These are to be calculated as per the norms adopted in the Feasibility Study of the DND Flyway based on which the expenditure for the year 2015-16 can be reasonably estimated to be around Rupees 19 crores.

84. The sum of Rupees 1,136 crores, i.e. the total expenses incurred by NTBCL are based on the statutory accounts from 2001 to March 2016. This sum includes all the unrecovered project costs added before the date of commissioning of the Project and the inflated and unnecessary expenditures undertaken by NTBCL such as, travelling expenses, legal fees, extraordinary salaries and bonuses to employees, etc. as specified in paragraph 62 of this judgement.

85. It seems to us that no person or entity can be allowed to make an undue and unjust profit from public property, at the cost of the public at large.[23] In ***Mandsaur Transport Assn. v. State of M.P.***, when dealing with the aspect of the collection of toll to recover the costs of construction of a bridge, this Court held that there was no reason for the collection of the toll to continue if the State Government had recovered the costs of construction and maintenance several times over.[24] This reasoning was reiterated in ***MSK Projects (I) (JV) Ltd. v. State of Rajasthan***.[25]

86. The CAG Report further states that the annual toll income of NTBCL during 2001-2016 was Rupees 892.51 crores. NTBCL has been making profits for the last 11 years; has no accumulated losses as of 31.03.2016; has paid dividends of Rupees 243.07 crores till 31.03.2016 to its shareholders; and repaid all its debt with interest. NTBCL had thus, by 31.03.2016, recovered the project costs, the maintenance costs, and a

[23] Institute of Law, Chandigarh v. Neeraj Sharma, (2015) 1 SCC 720.
[24] Mandsaur Transport Assn. v. State of M.P., (2001) 9 SCC 328.
[25] MSK Projects (I) (JV) Ltd. v. State of Rajasthan, (2011) 10 SCC 573.

significant profit on its initial investment. There is no rhyme or reason for the collection of user fees/tolls to continue.

87. An exhaustive reading of the CAG Report highlights the extent to which the public has been defrauded. The general public has been forced to part with hundreds of crores by IL&FS and NTBCL, under the guise of providing necessary public infrastructure. This could not have been done but for the collusion of the then officers of the two State Governments and of NOIDA, who closed their eyes while the contractual obligations were incurred. Had Respondent No. 1 not been vigilant of their rights, the public funds would have continued to be misappropriated for private profiteering. Furthermore, the role played by IL&FS in this entire scheme is highly questionable. We say nothing except that the facts speak for themselves. *Res ipsa loquiter*.

88. That being said, since NTBCL has recovered the costs of the project and substantial profits thereon by virtue of imposition of user fees/tolls and given the existing position of law, we find no error in the High Court's judgment and its directions in restraining the imposition and collection of user fees/tolls.

G.6 Recovery of dues arising out of display of outdoor advertisements

89. The question pertaining to outdoor advertisements does not constitute the subject matter of the present appeal, where the matter assailed by the Respondent Welfare Association before the High Court was restricted to the imposition and levy of user fees or toll by NTBCL and

concomitantly, the validity of certain provisions of the Concession Agreement. Regardless, Respondent No. 2, NOIDA, has alleged that NTBCL owes substantial dues to them, accrued through outdoor advertising, for which the license had been granted by NOIDA.

90. All that we thus observe, is that NOIDA shall be at liberty to initiate recovery proceedings as per the dispute resolution mechanism outlined in the Delhi Land Lease and NOIDA Land Lease Agreements. Such a process shall be subject to the defence and objections that may be available to NTBCL before the appropriate forum. Consequently, this issue does not fall within the scope of the instant appeal and therefore we have not expressed any opinion on its merits.

H. CONCLUSION AND DIRECTIONS

91. In light of the above analysis, it is held that there is no infirmity in the impugned judgement and we find no reason to interfere with it. The instant appeal is consequently dismissed. Nonetheless, we consider it essential to summarize our conclusions on the issues raised:

i. The High Court rightly entertained the writ petition filed by Respondent No. 1, who had the requisite *locus standi*. The said writ petition filed in public interest was maintainable;

ii. There were no delay or laches in approaching the High Court;

iii. The contract awarded to NTBCL through the Concession Agreement by State authorities and NOIDA was unfair, unjust and inconsistent with Constitutional norms;

iv. NOIDA exceeded its authority by delegating the power to levy fees or impose tolls to NTBCL, rendering such delegation invalid.

v. Article 14 of the Concession Agreement, read with the formula in Annexure F, contravenes public policy and is, therefore, liable to be severed from the Agreement.

vi. NTBCL has recovered the project costs and substantial profits, eliminating any justification for the continued imposition or collection of user fees or tolls.

vii. The issue pertaining to outdoor licensing fees between NOIDA and NTBCL does not fall within the purview of the present challenge.

92. As regard to SLP(C) No. 8060/2019, concerning the challenge to the arbitration proceedings between NOIDA and NTBCL, it is clarified that the said matter shall be heard and decided separately on its own merit.

93. Ordered accordingly. Pending applications if any, to be disposed of.

.....J.
(SURYA KANT)

.....J.
(UJJAL BHUYAN)

NEW DELHI;
DATED: 20.12.2024.