

Mihan India Ltd. vs Gmr Airports Ltd. on 9 May, 2022

Author: Vineet Saran

Bench: J.K. Maheshwari, Vineet Saran

REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 3699 OF 2022

[ARISING OUT OF SPECIAL LEAVE PETITION [C] NO.15556 OF 2021]

MIHAN INDIA LTD.

....APPELLANT

VERSUS

GMR AIRPORTS LTD. & ORS.

.....RESPONDENT(S)

WITH

CIVIL APPEAL NO. 3701 OF 2022

[ARISING OUT OF SPECIAL LEAVE PETITION [C] NO._5686/2022]

DIARY NO.23479 OF 2021

AIRPORT AUTHORITY OF INDIA

....APPELLANT

VERSUS

GMR AIRPORTS LTD.

.....RESPONDENT(S)

WITH

CIVIL APPEAL NO. 3702 OF 2022

[ARISING OUT OF SPECIAL LEAVE PETITION [C] NO.16737 OF 2021]

GOVERNMENT OF MAHARASHTRA

....APPELLANT

VERSUS

Signature Not Verified

GMR AIRPORTS LTD.

Digitally signed by

ARJUN BISHT

Date: 2022.05.09

.....RESPONDENT(S)

19:54:05 IST

Reason:

1

WITH
CIVIL APPEAL NO. 3700 OF 2022
[ARISING OUT OF SPECIAL LEAVE PETITION [C] NO._5687/2022]
DIARY NO.23477 OF 2021

UNION OF INDIA

... .APPELLANT

VERSUS

GMR AIRPORTS LTD.

.....RESPONDENT (S)

JUDGMENT

Leave granted.

2. These four appeals have been filed challenging the judgment dated 18.08.2021 of the Nagpur Bench of the Bombay High Court whereby the Writ Petition of the respondent No. 1- GMR Airports Limited (for short 'GAL') and GMR Nagpur International Airport Limited (for short 'GNIAL') filed against MIHAN India Limited (for short 'MIL') and Government of Maharashtra (for short 'GoM') has been allowed. The High Court set-aside the impugned communication of annulling the bidding process and directed to take further necessary steps as per prayer clause (b) of the Writ Petition.

3. The appeal arising out of Special Leave Petition (C) No.15556 of 2021 has been filed by MIL (which was the respondent no.1 before the High Court) and appeal arising out of Special Leave Petition (C) No.16737 of 2021 has been filed by the GoM (which was the respondent No.2 before the High Court). The other two appeals arising out of Diary No.23479 of 2021 and Diary No.23477 of 2021 have been filed by the Airports Authority of India (for short 'AAI') and Union of India (for short 'UoI') respectively, which were not the party before the High Court and hence applications for permission to file the special leave petitions have been filed, which are granted in both the special leave petitions.

4. Since, the order under challenge in all the appeals is the same and the facts in the said appeals are common, however Special Leave Petition No.15556 of 2021 titled MIHAN India Limited versus GMR Airports Limited & Ors. is being treated as the lead petition.

5. Briefly, the facts relevant for the purpose of the appeals are that the Nagpur International Airport (for short 'Nagpur Airport') was being run by the AAI. On the initiative of GoM to develop a multi-modal international passenger and cargo hub airport at Nagpur, for brevity sake referred as 'MIHAN', in coordination with Government of India (for short 'GoI'), Ministry of Civil Aviation (for short 'MoCA'), AAI and Indian Air Force through Ministry of Defence has prepared the report for

MIHAN project. On 18.12.2006, GoI through MoCA and AAI on one side; and GoM and Maharashtra Airport Development Company (for short 'MADC') on the other side, entered into a Memorandum of Understanding (for short 'MoU') for the purpose of establishing a Joint Venture Company (for short 'JVC') and transferring the Airport to the said JVC to develop it into MIHAN. As per the said MoU, MADC shall have 51% of the equity and AAI 49% equity of the JVC. Pursuant to the MoU, the AAI and MADC entered into a Joint Venture Agreement (for short 'JVA') on 22.02.2009 for the purpose of incorporating a JVC, which is known as MIL. As per the terms and conditions of the MoU dated 18.12.2006 and the JVA dated 22.02.2009, MIL took over the Airport from AAI on 07.08.2009.

6. As per the instructions of GoI, it was thereafter, decided that for the upgradation, modernization, operation and maintenance of the Airport (subsequently named as Dr. Babasaheb Ambedkar International Airport, Nagpur) global tenders were to be called by MIL by inviting bids from private parties as per the Request for Qualification (for short 'RFQ') for selection of private developers, through public private participation (for short 'PPP') on Design, Build, Finance, Operate and Transfer (DBFOT) basis. On 11.12.2017, GoM constituted a High-Powered Project Monitoring and Implementation Committee (for short 'PMIC') consisting of eleven Members, being officers of GoM, GoI, MADC and AAI and the Chief Secretary of the GoM would be its Chairman to look after the MIHAN project on behalf of GoM. The Request for Proposal (for short 'RFP') was prepared by MIL and approved by PMIC in its meeting held on 24.01.2018. In response, six bidders were shortlisted, but, only five of them were approved for the next stage i.e. for issuance of RFP which was sent vide email dated 01.03.2018. On the final date for submission of bids i.e. 28.09.2018, MIL had received only two bids out of which the bid submitted by GAL proposing revenue share of 5.76% was found to be the highest. Thereafter, MIL asked GAL for discussion and negotiations on 05.03.2019 before PMIC regarding the offered revenue share. During discussion, GAL agreed for the revised revenue share of 14.49%. The said revised revenue share was communicated by GAL through letter dated 06.03.2019 with a request to declare it as the selected bidder and to issue the letter of award (for short "LoA").

7. Thereafter MIL issued the letter dated 07.03.2019 accepting the revised proposal. GAL accepted the letter dated 07.03.2019 and acknowledged the same by letter dated 12.03.2019 and communicated the same through a duly signed duplicate copy of the letter dated 07.03.2019.

8. Even on completing the said formalities, the Concession Agreement was not executed for a long time, however on 25.02.2020, request was made by GAL to MIL for execution of Concession Agreement so as to enable GAL to implement the MIHAN project. The said letter was neither responded nor any steps were taken to execute the Concession Agreement in favour of GAL and GNIAL (being the SPV incorporated for implementing the MIHAN project). Thus, GAL and GNIAL both filed Writ Petition No.1343 of 2020 before the Nagpur Bench of the Bombay High Court seeking direction to the MIL and GoM to take all necessary and consequential steps pursuant to the letter dated 07.03.2019 and to sign the Concession Agreement. On 11.03.2020, the High Court issued the notice and listed the case on 18.03.2020 for hearing. The notices were served on MIL and GoM by GAL on the same day and, through court bailiff on 16.03.2020. Immediately on receiving the notice, on the same day i.e. 16.03.2020, GoM issued the direction to MIL for retendering.

Pursuant thereto, MIL annulled the bidding process vide communication dated 19.03.2020. MIL also informed GAL to take back the bid security submitted towards bid. Thereafter, through email dated 04.05.2020 MIL informed GAL that since the bank guarantee towards bid security expired on 30.04.2020 and because of lockdown due to Covid-19, the same may be treated as cancelled and fully discharged and may be taken back.

9. GAL and GNIAL challenged the communication dated 19.03.2020 annulling the bidding process after issuance of LoA by filing another Petition before the Nagpur Bench of the Bombay High Court being Writ Petition No. 1723 of 2020. In the said Writ Petition, the respondents have prayed for appropriate directions to quash the letter of annulment dated 19.03.2020 and enforcement of letter dated 07.03.2019 with further directions as per prayer clause (b) reproduced as under:

b. Issue a writ or any other appropriate writ, direction or order directing the Respondents, to comply with the RFP conditions in its letter and spirit and undertake necessary and consequential steps in furtherance thereto and the Letter of Award dated 07.03.2019, including but not limited to the execution of the Concession Agreement in favour of the Petitioner No. 2 and other ancillary documents;

10. By filing the response, MIL has not disputed the formation of JVC, execution of MOU, handing over of Nagpur Airport by AAI to MIL on behalf of JVC, preparation of RFP by State Government, completing of tender process including offer made by the GAL of 5.76% revenue share. It is admitted that in front of PMIC, a meeting was held on 05.03.2019 at Mumbai for negotiation in which enhancement of the revenue share to 14.49% in place of 5.76% was offered by GAL and GAL requested for issuance of LoA through communication dated 06.03.2019. The appellant-MIL took stand before the High Court that the communication dated 07.03.2019 was merely an intimation regarding acceptance of revised bid subject to the approval of GoI for alienation of land of AAI in favour of the GAL as per the Concession Agreement and for formation of SPV. Placing reliance on Clause 3.3.5 it is said that LoA is different than communication. It is said in furtherance of the letter dated 07.03.2019, AAI initiated the process. On the proposal of AAI, the GoI through MoCA asked some explanations through the letter dated

20.08.2019. In the meeting held by MoCA on 30.08.2019, MIL and AAI have not submitted the explanation as asked and prayed for time to submit the same through PMIC. It was said that those explanations were required to prepare the note for Cabinet approval, otherwise for want of explanations, approval of Cabinet was not possible. It is said that GoI through MoCA was a necessary party which is not joined in the Writ Petition. Due to non-joinder of necessary party, the Writ Petition is not maintainable and may be dismissed. It is also stated that under the instructions of GoM, the order of annulling the bidding process was passed. On acceptance of the refund of the bid security, the GAL is estopped from challenging the order of annulling the bid process as the letter dated 07.03.2019 was a conditional and the GoI has not given any approval, therefore no vested right accrued to GAL to question the order annulling bidding process. It is also submitted that MIL earned profit of Rs. 49 crores during the financial year 2018-19 and has estimated gross

profit of Rs. 64 crores during the financial year 2019-20 and the offer of gross revenue share made by GAL of Rs. 15 crores is extremely low, which may not be in public interest and shall cause a huge financial loss to the public exchequer. Therefore, the action has rightly been taken by the authorities.

11. GoM has filed a separate reply on an affidavit of CS- cum-CFO, MIL, not in the capacity of the officer of GoM. In the said reply, it was urged that GoM is accepting the reply filed by MIL and the stand and contentions as taken therein. It was urged that MIL for implementation of MIHAN project is using the resources of respondent No. 2 (GoM) and AAI. By the outcome of acceptance of subject tender, the land belonging to AAI and MADC was required to be handed over to the concessionaire. In such circumstances, the active involvement of GoM, AAI and MoCA is imperative. Emphasising the importance of bid and its decision having long term impact, it is said that the revenue paid by the concessionaire shall be distributed amongst shareholders and the offer was found to be low in comparison to the profit earned in the year 2018-19. Thus, the bid has rightly been cancelled by annulling the bidding process. Thus, with the said objections, the Writ Petition filed before the High Court was resisted by the GoM and MIL.

12. The Nagpur Bench of the Bombay High Court, by impugned judgment dated 18.08.2021, allowed the Writ Petition and held that: (i) the letter dated 07.03.2019 is a LoA;

(ii) plea taken by MIL that the letter dated 07.03.2019 is a mere communication of bid acceptance is not correct. In fact, it has led to a concluded contract between the parties;

(iii) the action of MIL in annulling the bidding process by letter dated 19.03.2020 is arbitrary, unreasonable and unfair, therefore quashed and set-aside; (iv) in this case there are no such disputed questions of facts as would shut out the writ jurisdiction of the High Court and (v) this case does not involve a mere enforcement of contractual obligations simplicitor, but involves an issue of enforcement of public law arising out of contractual obligations. Resultantly, the High Court gave a direction to take further step to implement the prayer as made in clause (b) of the prayer clause of the Writ Petition.

13. Being aggrieved, the present four Civil Appeals have been filed, as described above by MIL, GoM, UoI and AAI.

14. We have heard Mr. Dushyant Dave, learned senior counsel for MIL, Mr. Shyam Divan, learned senior counsel for GoM, Mr. K.M. Natraj, learned ASG for AAI, Mr. Shailesh Madiyal, learned counsel for UoI and Dr. Abhishek Manu Singhvi, Mr. Maninder Singh and Mr. Parag P. Tripathi, learned senior counsels for the respondents at length and have perused the record.

15. After hearing the arguments as advanced and on perusal of the material available on record, the issues which arise for consideration in these appeals are as follows:

1) Whether the letter dated 07.03.2019 endorsing GAL as a selected bidder and on communication by GAL on a duplicate copy to MIL on 12.03.2019 would amount to LoA in terms of Clause 3.3.5 of RFP and, would it be treated as a concluded contract?

2) Whether the communication dated 19.03.2020 for annulment of bidding process is arbitrary and not in conformity to the terms of RFQ/RFP by following the procedure so prescribed?

3) In the facts and circumstances of the case, GAL being a successful bidder has a limited right only to ask for specific performance, and being a non-statutory contract, remedy under Article 226 of Constitution of India cannot be availed ?

4) Whether in the facts and circumstances of the case, UoI and AAI were necessary parties and without joining them, the relief as granted by the High Court warrants interference in the special leave petitions under Article 136 of the Constitution of India?

16. All the aforesaid questions are inter-related and the consequential answer would depend upon the conclusion that right exercised to annul the bidding process by the authorities is in conformity to the touchstone of Article 14 of the Constitution of India. Therefore, all the questions are commonly dealt with in succeeding paragraphs. While dealing with all the aforesaid questions, the background and certain facts which are on record are required to be traced at the cost of repetition.

17. In the present case, it is not in dispute that Nagpur Airport was being run by the AAI. On the initiative of GoM, MIHAN project was approved in coordination with GoI, MoCA, AAI and Indian Air Force through Ministry of Defence. Based on techno-Economic feasibility study (in short “TEFS”) of MIHAN project and report prepared by L&T Ramboll Consulting Engineer Limited, MoU was signed on 18.12.2006 between GoI through MoCA and AAI on the one side and GoM and MADC on the other side and decided to form JVC to whom the Nagpur Airport would be transferred for development maintenance and operation as per MIHAN project. After signing the MOU, a note was prepared on 07.02.2009 by MoCA for the purpose of transfer of Nagpur Airport to the joint venture company comprised of AAI and MADC. The said note was approved by the Cabinet in its meeting held on 11.02.2009. The note as approved has been placed for ready reference during hearing, its contents are relevant, therefore reproduced as thus:

“The Cabinet considered the note dated 07.02.2009 from the Ministry of Civil Aviation (Nagar Vimanam Mantralaya) and approved the proposals contained in paragraph 6 with the following directions:

(i) the valuation of the assets of the respective partners, be carried out within one month and any dispute in the matter be put to a Committee of Secretaries for a final decision;

(ii) irrespective of the assets brought in by the Joint Venture (JV) partners, the equity structure will be 49:51 between AAI and MADC;

(iii) assets of the JV partners will not be the assets of the JV and would form the basis for determining the revenue share of respective partner;

(iv) assets placed at the disposal of second JV, as and when it is formed, will continue to be the assets of the respective partners;

(v) the proposal for formation of the second JV be brought up before the Cabinet at an appropriate time; and

(vi) partners for the second JV be selected through competitive bidding.” The said decision of the Cabinet was communicated by MoCA vide letter dated 18.2.2009 to the Chairman, AAI with a copy to GoM including the Ministry of Defence.

18. In terms of the MoU and approval of the Cabinet, JVA was entered on 22.02.2009 incorporating the first JVC, known as MIL. As per the MOU and the JVA, MIL took over the Nagpur Airport from AAI on 07.08.2009. As per the approval of the Cabinet, the valuation of assets of the respective partners was to be carried out by a Committee of Secretaries for final decision. MADC and AAI would be the partners of 51:49% shares respectively. The assets which belonged to AAI and MADC would not be the assets of JVC. The bifurcation 51:49% is only for determination of the revenue share of respective partners. Even on formation of JVC, the assets would continue to be the assets of respective partners. The partners for the second JVC shall be selected through competitive bidding and the proposal for formation of second JVC be brought up before the Cabinet at an appropriate time.

19. In view of the said decisions and to act there upon, MIL prepared RFQ dated 12.05.2016 for upgradation, modernization, operation and maintenance of the Airport through PPP mode on DBFOT basis emphasizing the importance of MIHAN project and specifying that the MIL shall be authority for implementation of the MIHAN project. The particulars of the Nagpur Airport, details about the project, eligibility for the bidders, scope of work, who may participate in bidding process and also specifying the selected bidder were incorporated in RFQ. On perusal of the cabinet decision and MoU, it is quite apparent that MIL was the first JVC incorporated to act on behalf of AAI and MADC who are banking upon the authority of MoCA and GoM. As explained above, PMIC is a high powered committee constituted by GoM and held its meeting on 24.01.2018. MIL presented the RFP for approval which was approved with certain changes and published on 01.03.2018 with the intent to carry out and complete the bidding process.

20. On the basis of the said RFQ and RFP, bids were invited by the MIL and the GAL submitted its bid on 28.09.2018. The bid submitted by the GAL at revenue share payable @ 5.76% was the highest. But MIL was not satisfied by the said offer, however invited GAL for negotiation before PMIC on 05.03.2019. During negotiation, the GAL gave the offer of 14.49% revenue share in place of 5.76%. After such negotiation, a request was made by GAL to MIL on 06.03.2019 for issuance of LoA at the earliest. MIL, vide communications dated 07.03.2019 in reference to the RFP dated 01.03.2018 and the bid submitted by GAL dated 28.09.2018 and revised financial offer dated 06.03.2019, accepted the proposal and selected GAL as a highest bidder. In the said communication MIL informed that the Competent Authority has accepted the revised bid with clarification that the said acceptance is subject to further approval of GoI for alienation of land owned by AAI in favour of the second party and formation of SPV for the project (‘Approval’) means second JV. By the said

letter, GAL was called upon to submit the consent for revised bid on the duplicate copy within 7 days, on failure MIL would have the right to revoke the acceptance, otherwise to follow the consequences as stated in the letter. The GAL submitted acceptance after signing on the duplicate copy of letter to the MIL on 12.03.2019 within the time so prescribed.

21. As the tenders were invited in pursuance of RFP, however to understand the procedure for selection of bid and its acceptance or rejection and to issue LoA to declare the selected bidder as concessionaire, relevant clauses are required to be seen. As per Clause 1.2.6 (b) of RFP, it is clear that the bidder, who is offering the highest revenue share at the time of the evaluation of the bids, would be the highest bidder subject to the provisions of Clause 2.16.1 of RFP. The said Clause 2.16 deals with rejection of bids and Clause 3.3 deals with selection of bidder. All the aforesaid Clauses of RFP are relevant however reproduced as thus:

CHAPTER -1:

Highest Bidder:

1.2.6 (a) Bids are invited for the Project on the basis of the Revenue Share payable to the Authority in terms of the Concession Agreement.

(b) In this RFP, the term “Highest Bidder” shall mean the Bidder who is offering the highest Revenue Share. The concession period and other terms are pre-determined, as indicated in the draft Concession Agreement and the percentage revenue share shall constitute the sole criteria for evaluation of Bids. Subject to the provisions of Clause 2.16, the Project will be awarded to the Highest Bidder.

CHAPTER -2 2.16: Rejection of Bids:

2.16.1 Notwithstanding anything contained in this RFP, the Authority reserves the right to reject any Bid and to annul the Bidding Process and reject all Bids at any time without any liability or any obligation for such acceptance, rejection or annulment and without assigning any reasons therefor. In the event that the Authority rejects or annuls all the bids, it may, in its discretion, invite all eligible Bidders to submit fresh Bids hereunder.

2.16.2: The authority reserves the right not to proceed with the Bidding Process at any time, without notice or liability, and to reject any Bid without assigning any reasons.

CHAPTER-3 3.3.1.: Subject to the provisions of Clause 2.16.1, the Bidder whose Bid is adjudged as responsive in terms of Clause 3.2.1 and, who quotes the highest Revenue Share offered to the Authority shall ordinarily be declared as the selected Bidder (the “Selected Bidder”). In the event that the Authority rejects or annuls all the Bids, it may, in its discretion, invite all eligible Bidders to submit fresh Bids hereunder.

3.3.5 : After selection, a Letter of Award (the “LOA”) shall be issued, in duplicate, by the Authority to the Selected Bidder and the Selected Bidder shall, within 7 (seven) days of the receipt of the LOA, sign and return the duplicate copy of the LOA in acknowledgement thereof. After acknowledgement of the LOA as aforesaid by the Selected Bidder, the Selected Bidder will be required to submit the Performance Security within the time period prescribed in the LOA/Concession Agreement. In the event the duplicate copy of the LOA duly signed by the Selected Bidder is not received by the stipulated date or the Selected Bidder fails to provide the Performance Security within the stipulated date, the Authority may, unless it consents to extension of time for submission thereof, appropriate the Bid Security of such Bidder as damages on account of failure of the Selected Bidder to acknowledge the LOA or submission of Performance Security as the case may be, and the next eligible Bidder may be considered.

The said Clauses are required to be looked with the intent to know the scheme of RFP, its applicability and object. Chapter 1, in which the highest bidder has been defined, deals with the incorporation of the project, description of bidding process, schedule of bidding process and pre-bid conference. As per the definition of highest bidder in Clause 1.2.6, it is clear that if any bid is invited for a project, it shall be on the basis of the highest revenue share payable to the Authority in terms of Concession Agreement and the sole criteria would be percentage revenue share and, on the said basis highest bidder of the project may be declared, subject to the rejection of bid as per Clause 2.16.

20. Chapter 2 of RFP deals with the general terms of bidding, change in composition of the Consortium, change in ownership, cost of bidding, site visit and verification of information, verification and disqualification, contents of RFP, clarifications, amendment of RFP, preparation and submission of bids including format and signing of bid, sealing and marking of bids, due date of bid, late bids, contents of the bid, modifications/substitution/withdrawal of bids, rejection of bids, validity of bids, confidentiality, correspondence with the bidder, bid security etc. The abovesaid are the instructions to bidders in general. As per Clause 2.16.1, the Authority reserves the right to reject any bid and to annul the bidding process and reject all bids at any time without any liability or any obligation for such acceptance, rejection or annulment and without assigning any reason therefor. In case the Authority rejects or annuls all the bids, it has the discretion to invite all eligible bidders to submit fresh bids hereunder. A literal construction of the said Clause would mean that the Authority have a right to annul the bidding process, reject all bids without having any obligation for such acceptance, rejection or annulment, that too without assigning any reason. As per later part of the Clause, on rejection or annulment of the bids, the Authority may in its discretion invite all eligible bidders to submit the fresh bids. Thus annulment of bidding process, rejection of all bids is without any obligation for acceptance. It clarifies that prior to acceptance, annulment, rejection may be done without assigning any reason as per Clause 2.16.2.

22. Chapter 3 deals with evaluation of bids on its opening, test of responsiveness, selection of bidder, contacts during bid evaluation, bid parameter. Under Clause 3.3.1, subject to the provision of Clause 2.16.1 means if the bid is not rejected or annulled and whose bid is adjudged as responsive as per Clause 3.2.1 ({a} to {i}) would be responsive with highest revenue share and the said bidder shall ordinarily be declared as a selected bidder. Thus, in the event, the bid is not rejected, the procedure for selection of the bidder under Clause 3.3.1 shall be observed. If the bidder quotes

highest revenue share and its bid is adjudged as responsive shall be declared as the selected bidder under Clause 3.3.1. In absence of the contingencies as specified in Clauses 3.3.2 to 3.3.4, the procedure contemplated on selection of highest bidder as per Clause 3.3.5 is to be followed. As per said clause, after selection, LoA is required to be issued in duplicate by the Authority to the selected bidder who shall, within seven days of the receipt, sign it on duplicate copy and return the same. Thereafter the highest bidder is required to furnish the performance security within the time so prescribed in LoA/Concession Agreement. In case, acknowledgement of LoA within the time stipulated has not been made by highest bidder, the next eligible highest bidder may be called and considered. As per Clause 3.3.6, on receiving the acknowledgment of the LoA by the selected bidder, it shall cause the Concessionaire to execute the Concession Agreement within 60 days of award of LoA as prescribed in Clause 1.3 at serial No. 11. It is also clarified that the selected bidder shall not be invited to cause any default, modification of amendment in the Concession Agreement, so executed. Thus, as per the scheme of RFP, if the highest bidder has qualified the test of responsiveness without any order of rejection or annulment and has offered highest revenue share, he be declared as a selected bidder and in terms of Clause 3.3.5, LoA be issued which shall be acknowledged and after signing duplicate copy shall be returned within specified time. Thereafter, the concessionaire is required to execute the Concession Agreement. In the present case, the GAL has qualified the test of responsiveness and on making offer of highest revenue, it was declared selected bidder. LoA has been issued vide letter dated 07.03.2019 which has been acknowledged and signed on duplicate copy and returned to Authority on 12.03.2019, within the period as specified. The bid security of Rs. 16.85 crores deposited by the GAL was also extended from time to time under instructions of MIL. Thus, GAL has become concessionaire as per Clause 3.3.6 of RFP and cause the execution of Concession Agreement as per Clause 1.3.

23. Thereafter, MIL through Shri Kumar Ranjan Thakur sent an email on 20.03.2019 attaching the draft Concession Agreement. He has shared the final version of the draft Concession Agreement in MS Word format. Thereafter on behalf of MIL, Shri M.A. Abid Ruhi sent a communication on 29.05.2019 with a request to amend the draft Concession Agreement in “track change mode” only which would enable him to identify the changes carried out by GAL. GAL communicated the draft Concession Agreement after making the changes. Thereafter, no communication was made on behalf of MIL. In the meantime, the GAL requested MIL to provide space in old terminal building vide communication dated 26.07.2019. The said request was accepted vide communication dated 16.08.2019 and a space to run the office was provided. Thereafter GAL on 24.08.2019 requested for incorporation of a company namely; GNIAL to run the MIHAN project on its behalf, which remained unresponded.

24. As per the above discussion, we do not have any hesitation to hold that letter dated 07.03.2019 is a LoA after selecting the GAL as a highest bidder and it acquired the status of concessionaire. It was only the Concession Agreement required to be executed and there was no fault on the part of the GAL in complying with the provisions of RFP. The conduct of appellant MIL also indicates that concession agreement is required to be executed by concessionaire (GAL). Thus, after proposal of highest revenue share on issuing the letter of acceptance and also as reflected by conduct, it has become a concluded contract.

25. When the steps for execution of the Concession Agreement had not been taken after LoA for quite sometime, a request was made by GAL on 25.02.2020 for execution of the Concession Agreement being Concessionaire, but no heed was paid. Then Writ Petition No. 1343 of 2020 was filed praying the following reliefs:

a) Issue a writ of mandamus or any other appropriate writ, direction or order directing the respondents to undertake necessary and consequential steps in furtherance of the Letter of Award dated 07.03.2019 including but not limited to execution of the Concession Agreement in favour of the petitioner No. 2 and other ancillary documents;

b) Pass an ex-parte ad interim order directing the respondents not to undertake any coercive steps that shall be detrimental to the interests and rights of the petitioners in the said project and public at large.”

26. On issuing notice by High Court vide order dated 11.03.2020, the matter was kept for final disposal on 18.03.2020. The copy of the said notice was served on MIL and GoM on 11.03.2020 and also through Bailiff of the Court on 16.03.2020. On receiving the said notice, GoM on 16.03.2019 directed MIL to carry out the tender process afresh in reference to the PMIC letter dated 14.10.2019. In pursuance, letter dated 19.03.2020 was issued by MIL for annulling the bidding process in terms of Clause 2.16.1. It is relevant that fresh tender process as directed by PMIC cannot be possible without taking decision after selection of the bidder and issuing of LoA. Therefore, the MIL issued the order of annulling the bidding process without any direction for fresh tender process. The validity of the said letter dated 19.03.2020 was questioned in Writ Petition No. 1723 of 2020 before the Nagpur Bench of the Bombay High Court which was allowed by the impugned order.

27. Now to justify the reasoning of the High Court, the material which has been brought by filing the counter affidavit, which formed the basis of annulling the bidding process is required to be referred. From the material, it is revealed that after communication of the Concession Agreement and proposing amendments to be carried in Track Change Mode, AAI put up a note sheet to the GoI on 26.07.2019 in which the entire background regarding execution of the MoU dated 18.12.2006 between GoI through MoCA and GoM through MADC for development of MIHAN project is re-stated; formation of JVC; JV agreement dated 27.02.2009; admission of transfer of the airport to MIL; determination of the shares of the partners of the JVC; steps taken for inviting the bids and quoting the details of negotiation to increase the revenue share as approved by AAI Board, present status of land at Nagpur Airport, were mentioned. However, in the said note sheet, it was prayed to GoI to accord approval for long term lease of land to MIL for 30 years from the effective date of commencement of operation by second JVC/Concessionaire (i.e. GNIAL for GMR Airport Ltd) and ratification of possession of demised land and operation of Nagpur Airport by MIL from 06.08.2009 till the date of commencement of operation by the second JVC/Concessionaire. A request was further made that for formation of second JV i.e. Special Purpose Vehicle (SPV) (i.e. GNIAL for GMR Airports Ltd) for upgradation, modernization, operation and maintenance of Nagpur Airport, the license of AAI Land admeasuring 897 acres approx. for a period of 30 years from the date of commencement of operation by the second JVC/Concessionaire may be sent. The draft of Cabinet

Note was attached for perusal and to seek approval of the GoI. On the said note, the MoCA sought certain clarifications from the Chairman, AAI by letter dated 02.08.2019. The said letter is relevant, therefore reproduced as thus:

“ AV-21018/2/2019-AAI-MOCA Government of India Ministry of Civil Aviation
B-Block, Rajiv Gandhi Bhawan, Safdarjung Airport, New Delhi.

Dated: 2nd August, 2019 To, The Chairman, Airports Authority of India, Rajiv
Gandhi Bhawan, Safdarjung Airport, New Delhi.

Subject: Execution of Lease Deed between AAI and Joint Venture Company (JVC)
MIHAN India Ltd. (MIL) for leasing of Nagpur Airport Land AND Approval of
formation of the Second JV i.e. “Special Purpose Vehicle (SPV) for the concession”
for upgradation, modernization, operation and maintenance of Babasaheb Ambedkar
International Airport, Nagpur. Sir, I am directed to refer to AAI’s UO Note No.
AV-21012/63/2003-LM/Vol.IV/369, dated 26.07.2019 on the subject mentioned
above and to say that the following details/clarification may be provided urgently to
this Ministry for processing the matter further:-

(a) While granting permission to form JV at Nagpur between MADC and AAI,
Ministry vide letter dated 18.02.2009 had conveyed that the proposal of formation of
the second JV would be brought up before the Central Government at an appropriate
time. Further, during the PPP process for Delhi & Mumbai airports in the first phase
and six other airports in the second phase, AAI had taken prior approval of the Union
Cabinet before initiating bidding process to private concessionaires.

However, in the instant case, it is not clear as to why AAI did not seek prior approval of the Cabinet
before initiating any bidding process for MIHAN Project.

(b) Since the Nagpur airport is proposed to be developed through PPP, it may be clarified as to
whether all the guidelines issued by Department of Economic Affairs and PPPAC (Public Private
Partnership Appraisal Committee) in this regard have been followed.

(c) What was the basis for increasing revenue share quoted by the highest bidder from 5.76% to
14.49% and basis of the negotiations held between MIL and GMR?

(d) Copies of the bid and transaction documents may be shared for examination.

(e) Land ownership at Nagpur Airport is also not clear from the above proposal. Therefore, AAI may
inform the exact quantum of land in their ownership at present.

(f) There is a land dispute between AAI and IAF w.r.t. 288.74 acres of land at Nagpur Airport which
has not been sorted out yet. Without concrete details the proposal is difficult to process for the
Cabinet approval. Also, it needs to be clearly stated that demised land measuring 897 acres

proposed to be licensed to second JV/SPV does not overlap with the disputed land of 288.74 acres which is in possession of IAF at Nagpur Airport.

(g) A coloured map showing clear demarcation of land belonging to AAI, MIL and the land proposed to be given to GMR at Nagpur Airport has not been provided.

(h) It is not clear from the proposal as to what the revenue share between AAI and MADC is at present and what will be the share between them after formation of second Joint Venture.

2. AAI is requested to kindly furnish clarifications/information in respect of the above mentioned observations to this Ministry at the earliest.

Yours faithfully, Sd/-

(V R Hegde) Director”

28. It appears that some correspondence has been made in response to the said letter vide letter No. AV/21012/63/2003- LM-Vol 656 dated 08/09.08.2019 to AAI, which is not on record. In continuation, the MoCA, vide letter dated 20.08.2019, has reported some deficiencies in paragraph 2 of the letter which is reproduced as under:

“No. AV-21018/2/2019-AAI(AD) Government of India Ministry of Civil Aviation
B-Block, R.G. Bhawan, Safdarjung Airport, New Delhi.

Dated 20th August, 2019 To, The Chairman, Airports Authority of India, Rajiv
Gandhi Bhawan, New Delhi.

Subject: Execution of Lease Deed between AAI and Joint Venture (JVC) MIHAN
India Ltd. (MIL) for leasing of Nagpur Airport Land.

AND Approval for formation of the Second JV i.e. ‘Special Purpose Vehicle (SPV) for the concession’ for upgradation modernization, operation and maintenance of Babasaheb Ambedkar International Airport, Nagpur. Sir, I am directed to refer to AAI’s UO Note No. AV-21012/01/2016-LM/155, dated 26.07.2019 and No. AV-21012/63/2003-LM/Vol.656 dated 08/09.08.2019 on the subject mentioned above.

2. The proposal of AAI has been examined and various deficiencies have been observed which need to be addressed for preparing the Note for the Cabinet. Major observations are as under:-

(i) While granting the approval in the meeting held on 07.02.2009, Union Cabinet had decided that the developer will be selected through competitive bidding for highest revenue share as per standard methodology for development of airports, using the standard bidding documents and procedures, including PFQ, RFP and concession agreements, approved by the Government of India. This decision was

conveyed to AAI, Government of Maharashtra and MADC vide letter dated 18.02.2009.

It may be clarified whether the Model documents issued by the erstwhile Planning Commission (standard document adopted by PPPAC) have been adopted in the tendering process of Nagpur airport. If not, the deviating statement may be furnished.

(ii) Whether there was provision in the Transaction document for negotiation in the bidding parameter? What were the terms of negotiation in the Revenue share from 5.14% to 14.49%? Whether other bidders also given the option of negotiating the revenue share?

(iii) What are the benefits that will accrue to AAI on transfer of the Airport land to private developer? What will be the return on the investment made by AAI for development of airport so far?

(iv) The Equity Ratio between AAI and MADC in MIL is 49.51. Whereas the current proposal provides for revenue sharing between AAI and MADC in the ratio of (45:55) of Gross Revenue of MIL. AAI may provide the justification for the deviation.

(v) What are the salient features of the bidding process viz. Stages of bidding, qualification criteria, basis of the deciding the concession period, no. of bids received etc.?

3. AAI is requested to kindly furnish clarification/reply on the above observation to this Ministry urgently.

Yours faithfully, Sd/-

Krishna Kr. Singh Section Officer” In furtherance, a meeting was held on 30.08.2019 under the Chairmanship of the Secretary (Civil Aviation), MoCA wherein in paragraph 5, the clarifications with regard to the letter dated 20.08.2019 were sought for. The Minutes of the Meeting are reproduced as thus:

“Minutes of the meeting held on 30.08.2019 under the Chairmanship of Secretary, Civil Aviation in Rajiv Gandhi B Bhavan, New Delhi to discuss the issues relating to leasing of Nagpur Airport under PPP.

A meeting was held on 30.08.2019 with the officers/representatives of State Government of Maharashtra to take forward the issues related to leasing out of Nagpur Airport to a private concessionaire under Public Private Partnership (PPP).

2. List of participants attached.

3. Secretary, Civil Aviation welcomed the participants and requested Principal Secretary, Govt. of Maharashtra to elaborate the details of the bidding process

followed in respect of leasing of Nagpur airport. A detailed presentation was made by Government of Maharashtra (copy enclosed).

4. During the presentation, it was informed that a Joint Venture Company (JVC) between Airports Authority of India (AAI) and Maharashtra Airport Development Company Ltd (MADC) was formed in 2009 to upgrade the Nagpur airport. The JVC so formed was named as Multi Modal International Passenger and Cargo Hub Airport at Nagpur India Limited (MIL) wherein AAI holds 49% equity and MADC hold remaining 51%. It was further informed that MIL is operating the Nagpur airport since 2009 and earned a profit of approximately Rs. 49 crores for the year 2018-19. Thereafter, the detailed procedure followed for inviting tender to select concessionaire was explained by officials of Govt. of Maharashtra.

5. After the presentation, Secretary, Civil Aviation requested MADC officials to clarify the following specific issues related:

(i) Clause 2.2.1(c) of RFQ stipulates that the concessionaire shall be selected based on the sole criteria of highest revenue share quoted, negotiation with highest bidder on revenue share (increased from 5.76% to 14.49%). Post bid negotiation needs to be justified.

(ii) There were frequent changes in the eligibility criteria w.r.t. airport experience from the period of RFQ to bid opening date. The grounds for the same may be stated with cogent reasons.

(iii) Since the bid document has undergone frequent changes and there are deviation from the standard documents, a detailed deviation statement vis-à-vis approved document along with justification needs to be provided.

(iv) The airport is presently being operated successfully by the government undertaking and earning a profit of Rs. 49 cr. for the 2019 and will continue to earn profits with an estimated traffic growth of more than 20%. Therefore, the revenue share offered by the concessionaire will result to a profit of just Rs. 15 crore to the Government undertaking. Whether it is justified to lease out the airport, which is earning a profit of Rs. 50 cr. per annum, to the private concessionaire at a profit of Rs. 15 crores (even if the potential revenue generation from the land parcel to the concessionaire is not considered).

6. Secretary stated that for leasing of assets including land of AAI to private party, approval of the Union Cabinet is required. Therefore, he requested the representative of Government of Maharashtra to send a detailed justification for each of the above observations along with the views of the State Government for placing the same before the Union Cabinet.

5.6 Principal Secretary, Govt. of Maharashtra has informed that since the bid process was carried out under overall supervision of PMIC, the replies to above queries will be sent to GoI with the approval of the PMIC.

6. Meeting ended with vote of thanks to the Chair.”

29. The counter-affidavit filed before the High Court by MIL or GoM did not give any explanation to the letters dated 20.08.2019 and 30.08.2019, though it was incumbent upon them to submit their explanation. They have taken a pretext in meeting that the response be sent after discussion with PMIC. The record further reveals that a meeting of PMIC was held on 14.10.2019, wherein retendering was directed. The record note of discussions of the said meeting is reproduced as under:

Project Monitoring and Implementation Committee (PMIC) for Up- gradation and Modernization of Dr. Babasaheb Ambedkar International Airport, Nagpur on DBFOT basis under PPP (the “Project”) 14th October 2019 Record Note of Discussions The 9th meeting of the Project Monitoring and Implementation Committee (PMIC) on the captioned project, chaired by Honourable Chief Secretary, Government of Maharashtra was held on 14th October 2019 at 4:30 p.m. at the Chief Secretary Office, Mantralaya, Mumbai. The agenda for the meeting was to discuss the justification/response to MoCA’s observations as per its letter dated 30 August 2019.

The Vice Chairman & Managing Director, MADC / Chairman and Managing Director, MIHAN India Limited welcomed the committee members and provided opening remarks. Then he requested the Transaction Advisors (TA), Ernst & Young LLP, to present the justification/response to MoCA’s observations.

TA presented to the committee members the responses to the following observations raised by MoCA as per its letter dated 30th August 2019.

1. Justification on post bid negotiation
2. Changes in the eligibility criteria at the RFQ and RFP stage
3. Deviations from the standard document
4. Considering the current financials of MIL, justification to lease out the airport.

TA also presented the financial analysis with respect to justification to lease out the Nagpur airport. Basis the analysis, TA brought to notice of PMIC that the Net Present Value of the Revenue Share being offered by the Highest Bidder is not commensurate with the profit that MIL would earn following the AERA philosophy for tariff determination in the coming 30 years. Based on the above discussions and deliberations, PMIC directed to re- tender the bid for the Project.

The meeting ended with a vote of thanks to the Chair and with a request to CMD, MIL to keep the members informed about the developments in this regard, from time to time.

Minutes of the meeting held on 30.08.2019 under the Chairmanship of Secretary, Civil Aviation in Rajiv Gandhi B Bhavan, New Delhi to discuss the issues relating to leasing of Nagpur Airport under

PPP.

30. In the facts of the case, the objections raised vide letters dated 02.08.2019, 20.08.2019 and in meeting of MoCA dated 30.08.2019 and in record note of discussion by PMIC in its meeting dated 14.10.2019 are required to be analysed with the intent that while issuing the direction of re-tendering, the order of annulling the bidding process is how far just, reasonable and equitable. In fact such letter is against the various clauses of RFP. In this regard as explained above, for the purpose of transfer of the Nagpur Airport to JVC comprising of AAI and MADC, the Cabinet note was put on 07.02.2009 by MoCA which was approved with certain directions. The Cabinet permitted to select the second JV through competitive bidding and proposal for formation of second JV be brought before the Cabinet at an appropriate time. Therefore, on submitting the bid and on declaring GAL as selected bidder after issuance of LoA, as per the Cabinet decision, the second Cabinet note is required to be put up after selection of the partner by the competitive bidding for the formation of the second JV. It is to be observed that if procedure of competitive bidding was fair merely on the pretext of the Cabinet approval, interference by the authorities would not be permissible.

31. MoCA held its meeting on 30.08.2019. Admittedly, the said meeting is on the note of AAI dated 26.07.2019 to which the objection was submitted vide letter date 02.08.2019 and the response by AAI on 08/09.08.2019 (not available on record but referred to in the letter of MoCA dated 20.08.2019) have been considered. How far those objections may be relevant are required to be considered to test the action of the authorities for annulling the bidding process and to know whether the said action was not arbitrary. In the meeting on 30.08.2019, presentation was made by MADC to which Secretary, MoCA further asked for clarifications.

32. The first clarification sought was that the criteria for selection of the bidder shall be based on the highest revenue share quoted. After negotiation by PMIC, the revenue share quoted as 5.76% was increased to 14.49%. However, what was the justification for post-bid negotiation. From the material available on record, neither PMIC which represents GoM nor MIL has filed any material to clarify the same. But, in the non-controverted facts, it cannot be lost sight that GAL was called by GoM and MIL for negotiation to fetch more revenue share in public interest. They were successful to get 14.49% revenue share in place of 5.76%. Thus, how far such an action is required to be questioned by MoCA. In our view, after negotiation if more revenue share has been earned by MIL or GoM, such an act is just, fair and reasonable. It cannot be said to be arbitrary and clarification on para 5(i) of minutes of Meeting dated 30.8.2019 sought by MoCA was unreasonable in terms of RFP. No material has been brought before the High Court or even before this Court to justify such objection.

33. The second clarification/objection raised was regarding frequent changes in the eligibility criteria with respect to airport experience from the period of RFQ to bid opening date for which reasons were sought by the MoCA. It is to be noted here that RFQ was prepared prior to the bidding process. After floating the tender, five bidders were shortlisted, who were issued the RFP dated 01.03.2018. Out of the five bidders, two submitted the final bids. So, if any changes were made in the RFQ prior to floating the tender, it was for all the bidders. How can it affect the bid submitted by

selected bidder in terms of RFQ. There is no justification either before the High Court or before this Court to say that such an action would be arbitrary. Nothing is brought on record to suggest that MIL or GoM has favoured the GAL for oblique reasons. In such circumstances, the second objection/clarification as raised in the meeting dated 30.08.2019 is wholly unjust, particularly after issuance of the LoA.

34. The third objection/clarification was sought regarding frequent changes in the bid document. It is said that there was a deviation from the standard document (model Request for Qualification for PPP Projects and model Request for Proposal for PPP Projects). The statement of justification for deviation was asked from MIL and GoM. The standard document (Model Request for Qualification for PPP Projects and Model Request for Proposal for PPP Projects, for short “model RFQ and RFP”) is merely a model to be followed. On the basis of said model RFQ and RFP, the authority inviting the tenders for a particular project is required to prepare RFQ and RFP. In the present case, the RFQ and RFP were prepared by MIL and approved by PMIC considering the nature of the project. Therefore, the clarification sought by MoCA regarding deviation from model RFQ and RFP or in a bid document based on the model RFQ and RFP cannot be said to be justifiable. It appears the objection has been raised analysing the terms of RFQ and RFP issued by the department on the basis of which the bidding process was completed. In our view, the said objection/clarification is suffering from the vice of arbitrariness and without any justification. In view of the discussion made above regarding objections/clarifications of MoCA in para 5 (i to iii) in the proceedings 30.8.2019 are arbitrary, unreasonable and without any justification, submitted by the authorities even before this Court. Therefore, all these queries are violative of Article 14 of the Constitution of India.

35. The fourth objection/clarification sought was regarding the profit of Rs. 49 crores earned in the year (2018-19) and the prospective profit to be earned for the succeeding year i.e. 2019-20 due to estimated traffic growth of 20%. In this regard justification was sought as to how the offer made by the concessionaire which will result into lesser profit of Rs. 15 crores as against the profit of Rs. 50 crores which the airport is currently earning is just. PMIC in its meeting held on 14.10.2019 considered this issue along with other three issues as discussed above. In the said meeting, there is no deliberation regarding the three issues and the issue of financial viability of MIL on leasing out the Airport. In our view, there would be no lease of the airport in favour of GAL. In fact, the lease would be in favour of MIL by AAI and MADC which is its first JV formulated to carry out their work. Therefore, it is completely a mis-statement of fact. It is clarified that after acceptance of the bid, GAL and GNIAL would be a licensee for implementation of the MIHAN project.

36. For dealing the fourth objection of the meeting dated 30.08.2019 of MoCA and 14.10.2019 of PMIC, the Court knows its limitation and is reluctant to interfere because they are not expert to analyse the financial viability, but the Court can see the justification of the issue in a matter where after following the procedure established by law, LoA was issued in favour of GAL. Awaiting long, when the Concession Agreement was not executed, GAL knocked the door of the Court and thereafter the order of annulling of the bidding process has been passed, which is quashed by the High Court. In such circumstances, we have to examine whether the defence taken by the authorities is just and reasonable or suffers from vice of arbitrariness on the pretext of loss to public exchequer.

37. The objection/clarification in para 5(iv) of the letter dated 30.08.2019 has been discussed by PMIC in its meeting dated 14.10.2019, wherein it perused the analysis of Transaction Advisors Ernst & Young (for short "E&Y") and observed that the offer of highest revenue share made by the selected bidder is not commensurate with the profit that MIL would earn following the AERA philosophy for tariff determination in the coming 30 years. The PMIC for the said reason directed to re-tender the bid for the MIHAN project. In the said context, the factual aspect of the report of E&Y is required to be referred. The report of E&Y discusses about the financial snapshot in case the development is taken by the private concessionaire, on the basis of which it is clear that the net present value of cash flows if MIL undertakes investment of Rs. 1683 crores would be Rs. - 473 crores and if revenue share of 14.49% is given, then its value would go to Rs. + 472 crores. It is clarified that in case it is privatized, MIL is not required to take any burden of CAPEX as it would be done by the private sector. It is further put in the note that a private player operating will make MIL an asset light organization and that also it will earn revenue share from the private player which in the net present value is more and implementation, operational efficiency of the private sector can be capitalized. Therefore, it is clear that as per the said report without any investment made by AAI, MIL will get the revenue of Rs. 15 crores per annum.

38. As per RFP, it is clear that MIL floated a tender for up-gradation, modernization, operation and maintenance of Nagpur Airport. Apparently, the primary impression which can be gathered from the objection raised in the meeting held on 30.08.2019 and the meeting of PMIC dated 14.10.2019 indicates the prospective revenue gain but it does not indicate the investment in up-gradation and modernization of the Nagpur Airport for which planning and designing of a world class international airport, not only for the passengers but also for the cargo transport in the name of MIHAN is required. As per the RFP and the Concession Agreement, all the investment for design, up-gradation, operation and maintenance has to be borne out by the private player and not by MIL. It is pertinent to note here that after issuance of LoA by the internal correspondence of MoCA and GoM on the note of AAI, the financial viability relying upon the report of E&Y has been considered. If there was any issue regarding financial viability, it was the duty of the GoM, AAI or MoCA to call GAL, to whom the right has accrued and has to pay the revenue share as proposed and agreed to by MIL, for justification. Otherwise, taking a decision on the said basis behind the back of GAL was violative of Article 14 of the Constitution of India and also against the principles of natural justice.

39. Further, in paragraph 6 of the minutes of the Meeting held on 30.08.2019, the Secretary, MoCA said that for leasing of assets including leasing of land of AAI to private party, approval of Union Cabinet is required. On perusal of the record, it is not out of place to mention here that the lease of the land is not required to be executed in favour of GAL. It is only the license which is required to be given by Concession Agreement. Prior to executing the agreement, the recourse, as taken, is not fair and just. As per the terms of Clauses 3.1.1. and 10.2.2 of the Concession Agreement, it is clear that the GAL would be the licensee. For ready reference, the relevant Clauses are reproduced as thus:

"3.1.1 Subject to and in accordance with the provisions of this Agreement, GoI Approval, Applicable Laws and the Applicable Permits, the Authority hereby grants to the Concessionaire, the concession set forth herein including the exclusive right, license and authority to develop, finance, operate and maintain the Airport

(“Concession”) for an initial period of 30 (thirty) years commencing from the COD, and the Concessionaire hereby accepts the Concession and agrees to implement the Project subject to and in accordance with the terms and conditions set forth herein.

Provided that in the event the Concessionaire shall have discharged its obligations under this Agreement without any material breach thereof for a period of 27 (twenty seven) years from the COD, and intimate the Authority about its interest and request for renewing/extending the term of this Concession by another period of 30 (thirty) years. While making such request, the Concessionaire shall submit a confirmation that it is agreeable to participate in the international competitive bidding process for the determination of the Premium for an additional period of 30 (thirty) years, in the form and manner, as may be prescribed by the Authority, at such time, and in any such case of international competitive bidding: (a) the Concessionaire shall have a right to match the highest bid, if its bid is within 05.00% of the highest bid that may be offered at that time in accordance with the terms and conditions of the bidding documents issued at such time, and (b) the Affiliate (s) of the Concessionaire shall not be qualified, either directly or indirectly, participating in any such bidding process. Provided further that, in the event the Airport is not expanded by the Concessionaire in accordance with the provisions of this Agreement or the Concessionaire has been in default of the provisions of this Agreement, then the Authority shall not be under any obligation to extend the Concession Period under this Clause 3.1.1. Any material breach shall for the purposes hereof mean Suspension or cumulative levy of Damages by the Authority exceeding a sum equivalent to 10% (ten percent) of the Performance Security. Along with the notice for extension of the Concession Period, the Concessionaire shall submit the following documents:

(a) a certificate confirming that there has been no material default by the Concessionaire under this Agreement (including compliance of provisions relating to any of the Key Performance Indicators), resulting in the accrual of a right in favour of the Authority to identify any such event as Concessionaire’s Default;

(b) a certificate confirming from Airports Council International or any other equivalent agency of similar international repute confirming that the Airport has been within top 20 (twenty) percentile of all airports in its category in the world, for a continuous period of preceding 5 (five) years as on the date of such application; and

(c) an undertaking that the Concessionaire shall continue to comply with the terms and conditions of the Agreement in its full form and effect for the remainder of the Concession Period.

Provided further that, in the event the Airport is not expanded by the Concessionaire in accordance with the provisions of this Agreement or the Concessionaire has been in default of the provisions of this Agreement, then, the Authority shall not be under any obligation to extend the Concession Period under this Clause 3.1.1.

In any event, at all times, any decision concerning the extension of the Concession Period will solely vest with the Authority.

10.2.2 In consideration of the Concession Fees, and Revenue Share, this Agreement and the covenants and warranties on the part of the Concessionaire herein contained, the Authority, in accordance with the terms and conditions set forth herein, shall grant to the Concessionaire commencing from the COD, license rights in respect of all the land (along with any buildings, constructions or immovable assets, if any, thereon) comprising the Site which is described, delineated and shown in Schedule A hereto as the Site, free of any Encumbrances, to develop, operate and maintain the Site, together with all and singular rights, liberties, privileges, easements and appurtenances whatsoever to the said Site, hereditaments or premises or any part thereof belonging to or in any way appurtenant thereto or enjoyed therewith, for the purposes permitted under this Agreement, and for no other purpose whatsoever, for the Concession Period.”

40. In view of the aforesaid, it is clear that no lease is going to be executed in favour of GAL or GNIAL. It is only a license right in respect of all the lands along with any buildings, constructions or immovable assets and other movables specified in the schedules of concession agreement is required to be conferred upon GAL or GNIAL. In the said context, the argument advanced, relying upon Section 12A of the Airports Authority of India Act, 1994 (for short “AAI Act”) requires consideration. Section 12A is reproduced as thus:

“12A-Lease by the authority (1) Notwithstanding anything contained in this Act, the Authority may, in the public interest or in the interest of better management of airports, make a lease of the premises of an airport (including buildings and structures thereon and appertaining thereto) to carry out some of its functions under section 12 as the Authority may deem fit:

Provided that such lease shall not affect the functions of the Authority under Section 12 which relates to air traffic service or watch and ward at airports and civil enclaves.

(2) No lease under sub-section (1) shall be made without the previous approval of the Central Government. (3) Any money, payable by the lessee in terms of the lease made under sub-section (1) shall form part of the fund of the Authority and shall be credited thereto as if such money is the receipt of the Authority for all purposes of Section 24. (4) The lessee, who has been assigned any function of the Authority under sub-section (1) shall have all the powers of the Authority necessary for the performance of such function in terms of the lease.”

41. On perusal thereto, it is clear that Section 12A applies in the case of lease by the authority and no such lease under sub-section (1) shall be made without previous approval of the Central Government. In the present case, no lease is required to be executed in favour of GAL or GNIAL. The pretext taken on the basis of Section 12A of AAI Act in a case of annulment of bidding process by the AAI and the GoI primarily appears to be fallacious.

42. Now, as per the material available and discussed hereinabove, it is clear that the appellants were aware of the procedure which is being adopted. After completion of the bidding process, GAL was declared as a selected bidder on offering highest revenue share and on issuance of LoA, it has been declared as a concessionaire and at the stage of execution of Concession Agreement, all these formalities are not relevant and it amounts to arbitrary exercise of the power by the authorities which is not permissible under law. The said approach is fortified with the view taken in the judgment of this Court in *Union of India and others vs. Dinesh Engineering Corpn.* and another (2001) 8 SCC 491, wherein while dealing with the rejection of bid of the respondent therein by Railways in a tender floated for procurement of certain items of spare parts for use in GE governors, this Court has held that power to reject bids cannot be exercised arbitrarily merely because Railways has the power to do so. Any arbitrary exercise of power to reject bids has been held violative of Article 14. Paragraphs 15 and 16 of the aforesaid judgment are relevant and reproduced thus:

“15. Coming to the second question involved in these appeals, namely, the rejection of the tender of the writ petitioner, it was argued on behalf of the appellants that the Railways under clause 16 of the Guidelines was entitled to reject any tender offer without assigning any reasons and it also has the power to accept or not to accept the lowest offer. We do not dispute this power provided the same is exercised within the realm of the object for which this clause is incorporated. This does not give an arbitrary power to the Railways to reject the bid offered by a party merely because it has that power. This is a power which can be exercised on the existence of certain conditions which in the opinion of the Railways are not in the interest of the Railways to accept the offer. No such ground has been taken when the writ petitioner's tender was rejected. Therefore, we agree with the High Court that it is not open to the Railways to rely upon this clause in the Guidelines to reject any or every offer that may be made by the writ petitioner while responding to a tender that may be called for supply of spare parts by the Railways. Mr. Iyer, learned senior counsel appearing for the EDC, drew our attention to a judgment of this Court in *Sterling Computers Ltd. etc. v. M/s. M & N Publications Ltd.* (1993 1 SCC 445) which has held: (SCC p. 455, para 12) "Under some special circumstances a discretion has to be conceded to the authorities who have to enter into contract giving them liberty to assess the 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 on the principle laid down by Justice Holmes, that courts while judging the constitutional validity of executive decisions must grant certain measure of freedom of "play in the joints" to the executive."

16. But then as has been held by this Court in the very same judgment that a public authority even in contractual matters should not have unfettered discretion and in contracts having commercial element even though some extra discretion is to be conceded in such authorities, they are bound to follow the norms recognised by courts while dealing with public property. This requirement is necessary to avoid unreasonable and arbitrary decisions being taken by public authorities whose actions

are amenable to judicial review. Therefore, merely because the authority has certain elbow room available for use of discretion in accepting offer in contracts, the same will have to be done within the four corners of the requirements of law especially Article 14 of the Constitution. In the instant case, we have noticed that apart from rejecting the offer of the writ petitioner arbitrarily, the writ petitioner has now been virtually debarred from competing with the EDC in the supply of spare parts to be used in the governors by the Railways, ever since the year 1992, and during all this while we are told the Railways are making purchases without any tender on a proprietary basis only from the EDC which, in our opinion, is in flagrant violation of the constitutional mandate of Article 14. We are also of the opinion that the so-called policy of the Board creating monopoly of EDC suffers from the vice of non-application of mind, hence, it has to be quashed as has been done by the High Court.”

43. Bare perusal of the above stated case-law in light of the facts of the instant case makes it clear that merely having the power of rejection of bids does not entitle authorities to exercise the said power arbitrarily. While discussing the applicability of Clauses 2.16.1, 3.3.1 and 3.3.5, it is made clear that in pre-bid procedure prior to acceptance, the bidding process may be annulled otherwise after issuance of LoA, the annulment cannot be done. The authorities further acted arbitrarily relying upon the GoM’s letter dated 16.03.2020 in reference to PMIC’s meeting dated 14.10.2019 in which re-tendering was directed. Re-tendering was not possible without ignoring the bid already accepted. Therefore, the order of annulment has been directed applying Clause 2.16.1 arbitrarily.

44. As discussed hereinabove, while explaining the scope of Chapters 1, 2 and 3 of RFP, it is clear that Chapter 2 deals with the bidding instructions which are general in nature. Clause 2.16 deals with the rejection of bid which is a situation prior to acceptance of the bid. After Chapter 2, in Chapter 3 evaluation of bid starts. While evaluating those bids in Clause 3.3.1, if the provision of Clause 2.16.1 has not been invoked and the bidder whose bid has been adjudged as responsive in terms of the Clause 3.3.1 and who offered the highest revenue share would be a selected bidder. In the present case, the selection of the bidder was complete. Thereafter, LoA was issued as per Clause 3.3.5 and by issuance of draft of Concession Agreement, it has been declared as a concessionaire. At that stage, Clause 2.16.1 for annulment of the bidding process would not apply. It appears to us that as per the objections raised in the Meeting dated 30.08.2019 held by MoCA, clause (iv) in paragraph 5 persuaded the MIL and GoM to pass the order of re-tendering.

45. In this regard, a 3-Judge Bench judgment of this Court in the case of Vice-Chairman & Managing director, City and Industrial Development Corporation of Maharashtra Ltd. and Another vs. Shishir Realty Private Limited and Ors. [Civil Appeal No. 3956-57 of 2017] is relevant, paras 67 to 70 are reproduced as thus:

“67. Before we state the conclusions, this Court would like to reiterate certain well established tenets of law pertaining to Government contracts. When we speak of Government contracts, constitutional factors are also in play. Governmental bodies being public authorities are expected to uphold fairness, equality and rule of law even while dealing with contractual matters. It is a settled principle that right to equality

under Article 14 abhors arbitrariness. Public authorities have to ensure that no bias, favouritism or arbitrariness are shown during the bidding process.

A transparent bidding process is much favoured by this Court to ensure that constitutional requirements are satisfied.

68. Fairness and the good faith standard ingrained in the contracts entered into by public authorities mandates such public authorities to conduct themselves in a non-arbitrary manner during the performance of their contractual obligations.

69. The constitutional guarantee against arbitrariness as provided under Article 14, demands the State to act in a fair and reasonable manner unless public interest demands otherwise. However, the degree of compromise of any private legitimate interest must correspond proportionately to the public interest, so claimed.

70. At this juncture, it is pertinent to remember that, by merely using grounds of public interest or loss to the treasury, the successor public authority cannot undo the work undertaken by the previous authority. Such a claim must be proven using material facts, evidence and figures. If it were otherwise, then there will remain no sanctity in the words and undertaking of the Government. Businessmen will be hesitant to enter Government contract or make any investment in furtherance of the same. Such a practice is counterproductive to the economy and the business environment in general.

46. In view of the above, it is apparent that in government contracts, if granted by the government bodies, it is expected to uphold fairness, equality and rule of law while dealing with contractual matters. Right to equality under Article 14 of the Constitution of India abhors arbitrariness. The transparent bidding process is favoured by the Court to ensure that constitutional requirements are satisfied. It is said that the constitutional guarantee as provided under Article 14 of the Constitution of India demands the State to act in a fair and reasonable manner unless public interest demands otherwise. It is expedient that the degree of compromise of any private legitimate interest must correspond proportionately to the public interest. It is specified that using a ground of public interest or loss to the treasury cannot undo the work already undertaken by the authority.

47. Analysing the facts of this case in the light of the judgments in Dinesh Engineering (Supra) and Shishir Realty (Supra), after issuing the LoA in terms of Clause 3.3.5 of RFP and declaring GAL as concessionaire as per Clause 3.3.6, issuing letter of annulment of bidding process on the basis of the meeting of PMIC on 14.10.2019, which directed for re-tendering of the bid, is completely an arbitrary exercise of power, contrary to the provisions of RFP and violative of Article 14 of the Constitution of India.

48. In view of the discussion made hereinabove, we are of the considered opinion that the findings as recorded by the High Court in the impugned judgment are in consonance with the above reasonings. The impugned judgment passed by the High Court is based on the sound reasonings and

true analysis of facts, which do not warrant interreference by this Court.

49. In the facts of the present case and the findings so recorded hereinabove, it is clear that the authorities have acted arbitrarily in violation of Article 14 of the Constitution of India. In such a situation, the public law remedy has rightly been availed, invoking the jurisdiction of the High Court under Article 226 of the Constitution of India. The findings recorded by the High Court to entertain the petition in paragraph 95 are just and proper and we are in full agreement to those findings. In the facts of the present case, the argument advanced by the appellants to compel GAL to take the remedy of specific performance under the provisions of Specific Relief Act is hereby repelled.

50. Learned counsel on behalf of the UoI and AAI have vehemently argued that without joining them as a party to the proceedings, the Writ Petition was not entertainable and the relief as directed, could not have been allowed.

51. From the above, it is clear that in pursuance to the decision taken by the Cabinet, the second JV is required to be selected through competitive bidding. In the present case, global tenders were invited and competitive bidding process was followed. The procedure of issuance of LoA is completely a fair procedure as prescribed in RFP. As per the decision taken by MoCA, AAI and MADC, MIL is the authority to complete the bidding process and PMIC, acting on behalf of GoM was supervising the entire process. The annulment has been directed in reference to the letter dated 16.3.2020 for re-tendering of bid. Therefore, in issuing the annulment letter, there is no role of UoI and AAI. The serious objection has been raised regarding the grant of relief as prayed in Clause

(b) by the High Court. In this regard, if we examine the said relief and direction, as issued by the High Court in terms of the Cabinet decision dated 11.2.2009, we are satisfied that UoI and AAI are not adversely affected after issuing the direction to select the second JV by competitive bidding. More so as discussed, except to produce the first approval of the Cabinet dated 11.02.2009, letters dated 02.08.2019, 20.08.2019 and 30.08.2019, nothing new has been brought before us to show what serious prejudice has been caused to them due to non-joinder by the Writ Court. In absence thereto, we are of the considered opinion that the objection regarding non-joinder raised by the appellants is bereft of any merit and the High Court has rightly rejected the same.

52. In view of the discussion made hereinabove, we are of the considered opinion that the findings recorded by the High Court allowing the Writ Petition are in accordance to law. Those findings do not suffer from any illegality, warranting interreference by this Court in exercise of the power under Article 136 of the Constitution of India. All these appeals are hereby dismissed. Parties to bear their own costs.

..... J .
(VINEET SARAN)

..... J .

NEW DELHI;
MAY 9, 2022.

(J.K. MAHESHWARI)