IN THE HIGH COURT OF JUDICATURE AT BOMBAY,
NAGPUR BENCH, NAGPUR

WRIT PETITION NO. 1723 OF 2020

1.GMR Airports Ltd.
A Company incorporated under the Companies Act, 1956, having its Registered Office at 25/1, Skip House, Museum Road, Bangalore-560025, through Authorised Representative T.V. Ganesan, Aged about 54 years, r/o. 366D, Mayur Vihar Phase II, Delhi 110091.

2.GMR Nagpur International Airport Ltd.
A Company incorporated under the Companies Act, 1956, having its Registered Office at 1st Floor, Terminal Building, Dr.Babasaheb Ambedkar International Airport, Nagpur-440005, Maharashtra through Authorised Representative T.V. Ganesan, Aged about 54 years, r/o. 366D, Mayur Vihar Phase II, Delhi 110091. ..... PETITIONERS.

// VERSUS //

1.MIHAN India Ltd.,
through Chairman and Managing Director, having its Registered Office at 1st Floor, Old Terminal Building, Dr.Babasaheb Ambedkar International Airport, Nagpur-440005, Maharashtra.

2.Government of Maharashtra,
Through its Secretary,
Administration Reforms and Special
Projects, General Administration
Department, Mantralaya, Madam Cama
Road, Hutatma Rajguru Square,
Nariman Point, Mumbai 400032. .... RESPONDENTS

-=

Mr.A.M.Singhvi, Senior Advocate assisted by Mr.C.B.Dharmadhikari, Advocate for petitioners.
Mr.M.G.Bhangde, Senior Advocate with Mr.R.M.Bhangde, Advocate for respondent no.1.
Ms N.P.Mehta, A.G.P. for respondent no.2/State.

-=

****

Date of reserving the Judgment : 12.7.2021.
Date of pronouncement of the Judgment : 18.8.2021.

****

CORAM : SUNIL B. SHUKRE &
ANIL S. KILOR, JJ.

ORAL JUDGMENT (Per Sunil B. Shukre, J) :

1. **Rule**. Rule made returnable forthwith. Heard finally with the consent of learned Counsel for the respective parties.

Introduction

2. Petitioner no.1, a public limited Company. It claims to be an Airport developer and operator across the globe. Petitioner no.2 is

a wholly owned subsidiary company of petitioner no.1 and it is a Special Purpose Vehicle (for short "**SPV** ") incorporated by petitioner no.1 for the purpose of implementation of the project for up-gradation, modernization, operation and management of Dr.Babasaheb Ambedkar International Airport, Nagpur (for short "**Nagpur Airport**"), for which bids were invited from qualified bidders through a tender floated by respondent no.1.

3. Petitioner no.1 submitted its bid for the said project on 28.9.2018 and on completion of bid evaluation process by respondent no.1, petitioner no.1's bid was adjudged to be the highest in terms of the bidding documents. There were some negotiations between petitioner no.1 and respondent no.1 regarding possibility of petitioner no.1 increasing it's offer of revenue share, which petitioner no.1 did in-fact. Petitioner no.1 raised it's offer of revenue share from 5.76 % to 14.49 %. Petitioner no.1 in doing so stated that although any upward revision in the offer may adversely impact the financial position considered by petitioner no.1, it agreed to increase it's offer, in view of request made by the Project Monitoring and Implementation Committee (for short "**PMIC**"), importance of the project and larger interest of the people of Maharashtra and Nagpur.

4. It is the case of the petitioners that, in response to the revised offer given by petitioner no.1, respondent no.1 issued a letter of acceptance dated 7.3.2019, which petitioner no.1 says was a Letter of Award accepting the revised bid of the petitioner no.1 subject to further approval of GOI for (a) alienation of land owned by Airport Authority of India (for short "**AAI**") in favour of petitioner no.1 and (b) formation of SPV for the project. The petitioners further submit that petitioner no.1 was also called upon to return duplicate copy of the letter dated 7.3.2019 duly signed by it, to respondent no.1 within seven days thereby indicating its acceptance by petitioner no.1. The petitioners further submit that by letter of petitioner no.1 dated 12.3.2019, petitioner no.1 informed respondent no.1 its acceptance of the letter dated 7.3.2019 and returned a duly signed duplicate copy of the letter dated 7.3.2019 along with it.

5. Petitioners submit that petitioner no.1 took various steps for implementation of the project as required under the letter dated 7.3.2019 and respondent no.1 also acted in the direction of implementation of the project. Petitioners submit that letter of acceptance dated 7.3.2019 is a Letter of Award and it's acceptance by petitioner no.1 has resulted into a concluded contract between the

parties. Petitioners submit that execution of Concession Agreement was the next step, as per letter dated 7.3.2019, towards implementation of the project. But, respondent no.1 delayed execution of the Concession Agreement compelling the petitioners to file a petition being Writ Petition No.1343 of 2020 seeking directions to respondent no.1 to complete its formal obligation of executing Concession Agreement for the project. The petitioners submit that notice was issued by this Court in the said Writ Petition vide its order dated 11.3.2020 and according to the petitioners, copy of the notice was served by them upon respondent no.1 on 11.3.2020 itself. The petitioners submit that the notice that was issued in the Writ Petition was for final disposal of the petition at the admission stage and considering urgency of the matter, this Court had listed the petition for final disposal on 18.3.2020. Meanwhile, as submitted by the petitioners, respondent no.1 was also served with notice of Writ Petition through Court bailiff on 16.3.2020 and when this case was sub-judice, the petitioner no.1 received a letter dated 19.3.2020 informing it that pursuant to the directives received from the Government of Maharashtra vide communication dated 16.3.2020 and in accordance with clause 2.16 of RFP, respondent no.1 annulled the bidding process without award of contract. Being aggrieved by it,

the petitioners are before this Court through this petition.

6. According to respondent no.1, this is not a case of any concluded contract and no right whatsoever was vested in the petitioners by issuance of letter dated 7.3.2019. Respondent no.1 submits that, by this letter, it only communicated its acceptance of the revised bid for 14.49 % share in the gross revenue for the purpose of further consideration of the revised offer submitted by the petitioner no.1. It is further submitted by respondent no.1 that such acceptance of bid was subject to approval of Government of India regarding alienation of land owned by AAI in favour of petitioner no.1 and formation of SPV between the petitioner no.1 and the answering respondent. Respondent no.1 asserts that the letter dated 7.3.2019 is only a bid acceptance communication and not a Letter of Award and places its reliance upon clause 3.3.6 of the Request for Proposal.

7. The respondent no.1 further submits that copy of letter dated 7.3.2019 was sent by it to the AAI for processing of approvals stated therein. Ministry of Civil Aviation (for short "**MoCA**"), Government of India (for short "**GoI**") vide its communication dated 20.8.2019, raised certain queries regarding present tender process

following which a meeting was convened under the Chairmanship of Secretary, MoCA, GoI at New Delhi on 30.8.2019. Respondent no.1 further submits that, in this meeting the Secretary, MOCA, GOI, expressed dissatisfaction on the revenue share offered by petitioner no.1 and questioned financial viability of the project considering the present revenue being generated by the Nagpur Airport and thus, the MoCA sought a detailed justification in the matter.

8. Respondent no.1 further submits that the observations of MoCA were considered by the PMIC in its meeting held on 14.10.2019 and finding them to be correct, the PMIC decided to cancel the tender process and re-tender the project. Respondent no.1 also submits that the MoCA, Government of India is a necessary party. Respondent no.1 submits that the decision of the PMIC was communicated to it by letter dated 16.3.2020. Respondent no.1 also submits that even the audit report raised concerns about the financial viability of the bid submitted by the petitioner. Respondent no.1 further submits that the bank guarantee which was issued by petitioner no.1 towards the bid security was valid only till 30.4.2020 and the bank guarantee was not renewed thereafter by petitioner no.1 thereby indicating that petitioner no.1 also accepted the decision

to annul the tender process taken by respondent no.1 on the directive of respondent no.2 and communicated to petitioner no.1 on 19.3.2020.

9. Respondent no.1 further submits that it has earned gross profit of 49 Crores during the financial year 2018-19 and has estimated gross profit of Rs.64 Crores (unaudited) during the financial year 2019-20 and in its opinion, the offer of respondent no.1 at 14.49 % of gross revenue share is extremely low and financially unviable, which would cause great loss to the public exchequer. Respondent no.1 states that any up-gradation and modernization of Airport should lead to increase in revenue for the Government from the project or in other words the project should be financially viable and that being not the case here, it has annulled the tender process well within its rights and well in terms of the bidding documents and that now it has opted for the fresh tender process in public interest, wherein the financial model will be different from that of the present tender process. It, thus, prays for dismissal of the petition.

10. Respondent no.2 submits that the facts and circumstances leading to the impugned decision have already been pointed out by

the respondent no.1 and in view of them, respondent no.2 as well as the AAI, one of the stake holders in respondent no.1, which only implements on behalf of the State of Maharashtra a comprehensive project for development of Nagpur Airport to world class standards which goes by the acronym 'the MIHAN project', using the resources of respondent no.2 and the AAI, do not wish to go ahead with the present tender as their own financial bid received in the tender process is extremely low. It further submits that the respondents and the AAI have, therefore, decided to call for fresh tenders, possibly with a different financial model which will generate better revenue for the public exchequer.

Rival Submissions

11. Mr.A.M.Singhvi, learned Senior Advocate submits that the letter of acceptance dated 7.3.2019 is actually a Letter of Award, if one goes by it's tenor and terms and conditions of the RFP. He further submits that the Letter of Award has been accepted by petitioner in accordance with what is mentioned therein and the bidding documents and therefore, what is now there between the parties is a concluded contract which must lead to execution of

Concession Agreement(for short "**CA**"). Learned Senior Advocate further submits that the conditions mentioned in the Letter of Award dated 7.3.2019 are the post bid conditions as they are neither stated in the bidding documents nor are contemplated under the bidding documents. He submits that these conditions are for respondent no.1 to fulfill. In any case, he further submits, they are only a formality as the transfer of the Airport and its assets together with the land to respondent no.1 has already taken place with the approval of GoI. He further submits that the directive of respondent no.2 as mentioned in the impugned letter, is misplaced as respondent no.2 has no role to play in the matter. He further submits that the impugned communication does not show that there is any decision as such by respondent no.1 as the decision is taken by respondent no.2, which has no role to play in the bidding process.

12. Mr.Singhvi, learned Senior Advocate further submits that invocation of clause 2.16 for annulment of bidding process by respondent no.1 is wrong as it could be resorted to only when bidding process is on and not after it is over. He submits that with the issuance of Letter of Award dated 7.3.2013 by respondent no.1, and its acceptance by the petitioner no.1, marked completion of

bidding process. He further submits that as there was a concluded contract between the parties, what had remained to be done was only a ministerial act of execution of CA. He further submits that respondent no.2, by issuing a directive to the respondent no.1 in annulling the bidding process, has gone against the decision of Union Cabinet to subsequently transfer the Airport for further "development". He further submits that subsequent conduct of parties would show that letter dated 7.3.2019 was a Letter of Award infact and in law. He further submits that now contractual obligations have come into play, which could not be nullified by the acts of the parties with just exceptions arising from compelling circumstances such as threat to security or sovereignty of India or statutory provisions newly made, which circumstances are admittedly absent here. He also submits that principle of promissory estoppel would prevent the respondent no.1 from back-tracking on it's promise.

13. Learned Senior Advocate for petitioners submits that the justification now being given, which is based on so called audit report and which harps on the string of financial viability, is factually incorrect and misleading. He submits that this justification was not part of impugned communication. He submits that as vested rights

had been created in favour of petitioners, respondent no.1 should have atleast called for response of petitioner no.1 regarding it's so-called concerns over the profitability issue, but it did not, which was against the principles of good governance and transparency.

14. Thus, Mr.Singhvi, learned Senior Advocate submits that the whole action on the part of respondent in cancelling the annulment process through the impugned communication is arbitrary, unreasonable and violative of principles of natural justice and it smacks of legal malice deserving it to be quashed and set aside while issuing consequential directions.

15. Mr.M.G.Bhangde, learned Senior Advocate appearing for respondent no.1 disagrees. He asserts that there was never any concluded contract which came into being. He submits that the letter dated 7.3.2019 is not a Letter of Award but only a letter which indicated that bid was accepted subject to conditions, namely approval of GoI for alienation of land to the petitioners no.1 and for formation of SPV. He submits, by relying upon the bidding documents, that the bidding process had not been completed and it would have been completed only upon execution of the Concession

Agreement and, therefore, there is nothing wrong in cancellation of bidding process.

16. Mr.Bhangde, learned Senior Advocate for respondent no.1 further submits that circumstances of the case showed that efforts were made by respondent no.1 to seek necessary approval from the Government of India, but since certain queries were raised and some observations were made by the Secretary, MoCA, the PMIC held a meeting and on financial analysis, found that those observations were right and therefore, it decided to cancel the bidding process and re-tender the project and rightly so. He further submits that in the whole process, the Transaction Advisor was consulted, the Audit report was also considered and it was found that the revenue share offered by petitioner no.1 was inadequate and any acceptance of it would have led to loss to public exchequer and so the impugned decision was taken. He submits that such a decision taken by respondent no.1 was in the public interest inasmuch as there was unanimity amongst members of PMIC about it. He further submits that when the Nagpur Airport was earning good profit, existing model of revenue share, in which the revenue share offered by petitioner no.1 was not to the satisfaction of the Authorities, could not have

been a profit making proposition.

17. Learned Senior Advocate for respondent no.1 further submits that pre-requisites of a concluded contract is that it's acceptance must be absolute and not conditional in accordance with Section 7 of the Indian Contract Act and in the present case, letter dated 7.3.2019 only informs to the petitioner no.1 decision of respondent no.1 regarding acceptance of the bid in a conditional manner and subject to the approvals regarding land transfer and formation of SPV from the Government of India. He, therefore, submits that the letter of acceptance dated 7.3.2019 is not a Letter of Award, that it is subject to afore-said two conditions and further conditions like execution of Concession Agreement and furnishing of performance security within the time prescribed in the Concession Agreement. He submits all these conditions were never fulfilled, no Concession Agreement was executed within the stipulated time of sixty days of the receipt of letter dated 7.3.2019 and there was no furnishing of the performance security within the prescribed time and as such, no vested rights are created in petitioner no.1. He submits that there is neither any promise given nor any position altering as a result of any promise, and so principle of promissory estoppel has no

application here.

18. Mr.Bhangde, learned Senior Advocate further submits that this case involves disputed questions of facts and also enforcement of contractual obligations, if any. He further submits that there is also no involvement of any public law element and there is no question of legal malice. He maintains that appropriate remedy for the petitioners would be to approach the Civil Court. He further submits that the petitioner has accepted the conditions of the letter of acceptance dated 7.3.2019, and so now cannot say that approvals of GoI are not necessary, and if it says so, it would mean that petitioner no.1 desires to accept only a part of it and wishes against rest of its parts, which is not permissible in law, as acceptance must be absolute and unqualified. Mr.Bhangde, learned Senior Advocate further submits that there has been a long gap of about five years from the initiation of the bidding process and now the situation has substantially changed warranting annulment of the bidding process.

19. Mr.Bhangde, learned Senior Advocate further submits that Bank guarantee towards bid security has not been extended after 30.4.2020 which itself shows that petitioners have accepted the

impugned decision. He further submits that subsequent conduct of the parties is not relevant, there being no Letter of Award issued. He submits that SPV that is petitioner no.2, was not constituted in accordance with bidding documents. He submits that there is no arbitrariness and unreasonableness. On all these grounds, the learned Senior Advocate urges that the petition be dismissed.

20. Ms Nivedita Mehta, learned A.G.P. supports the decision of annulment of the bidding process as reflected in the impugned letter dated 19.3.2020 and adopts the argument of Mr.M.G.Bhangde, learned Senior Advocate.

Historical Facts

21. For effectively dealing with rival submissions, it would be necessary to consider the historical facts from which has evolved the present bidding process for development of the Airport at Nagpur. These facts, about which there is no dispute, are summarised thus :

a) Nagpur Airport was established in the year 1917-18 and saw its being managed since then by different

Authorities at different times starting with Royal Military Force, then Indian Air Force and National Airport Authority and finally AAI till the year 2009. Respondent no.2 took the initiative to develop a "Multi Modal International Passenger and Cargo Hub Airport" at Nagpur ("**MIHAN Project**") in co-ordination with MoCA, AAI and Ministry of Defence and appointed Maharashtra Airport Development Company (for short "**MADC**") as a nodal agency for taking further steps to implement the MIHAN project. Accordingly, a Memorandum of Understanding (for short '**MoU**'), dated 18.12.2006 was entered into between the MoCA and AAI of one part and GoM (respondent no.2) and MADC of the other part. By this MoU, it was agreed between the parties that a Joint Venture Company (for short "**JVC**") consisting of MADC and AAI would be incorporated. It was agreed that MADC would have 51% shareholding and AAI would have 49% shareholding. The purpose of establishing a JVC was to develop and run the Nagpur Airport. It was agreed that Nagpur Airport would be transferred to the said JVC. It was agreed between the parties that MoCA and AAI would

take all necessary steps for expediting the transfer of Airport to the JVC to be formed including transfer of land and other assets. The relevant clauses of said MoU are re-produced as below :

"8. The JVC should be formed expeditiously and best efforts should be made to transfer the Airport to be the JVC within 3 months from the date of the signing of the MoU at an annual lease rent of Rs.1/- for a period of 30 years. This period can be extended on mutually agreed terms and conditions."

"14.MoCA/AAI shall take necessary steps to transfer the Nagpur Airport along with all its land and other assets to the JVC within a period of 180 days from the date of signing of this MOU."

b) Subsequently, the Union Cabinet gave its "in-principle" approval for transfer of the Nagpur Airport to the proposed JVC on 17.1.2008. It also permitted the proposed JVC to involve a strategic partner on build, operate and transfer basis for development of Nagpur Airport to world-class standards. The Union Cabinet, in the said approval, noted the fact that transfer of Nagpur

Airport would bring about much needed development in the Vidarbha region, which had been a long and cherished demand of the people of the region.

c) In pursuance of the said MoU, a Joint Venture Agreement ("**JVA**" for short) dated 22.2.2009, was executed between the MADC and AAI. Clause 3.1 of the JVA noted the fact that GoI had accepted approval of transfer of Nagpur Airport to the JVC, proposed to be formed for its development as MIHAN. The JVA led to formation of the JVC, the MIL, the respondent no.1. Respondent no.1, MIL was thus established with the primary object of maintaining, operating and developing Nagpur Airport as a part of MIHAN project. Respondent no.1 took over the Nagpur Airport for its operation, maintenance and further developments w.e.f. 7.8.2009.

d) Under the JVA, MADC and AAI agreed that development of Nagpur Airport shall be undertaken after the transfer of assets to the MIL. It was agreed, amongst others, that AAI would contribute its existing land and

MADC would bring in additional land. It was further agreed that the first JVC would enter into a Concession Agreement with the developer who would 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 the Request for Qualification (for short "**RFQ**") and Request for Proposal (for short "**RFP**") and Concession Agreement already approved by the Government of India. Relevant extract of clause (G) is reproduced as below :

"G. Further development of the Nagpur airport will be undertaken by the JVC after transfer of the assets (as defined in the Annexures to this JVA) to the JVC comprising MADC having 51% equity and AAI having 49% equity. Both the partners will bring in their respective assets to the JVC, with AAI contributing the existing land, building and structure and MADC bringing in additional land for development of the airport irrespective of the non-cash assets brought in by the JV Partners, the equity structure of the JVC will continue to be 49:51 of the Partners to the JVC. The first JVC will enter into a Concession Agreement with Developers who 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 RFQ, RFP and Concession Agreements, already approved by the Government of India. "

It was, thus, agreed that after transfer of assets to respondent no.1, respondent no.1 would undertake further development of Nagpur Airport, which would be done by it by entering into a Concession Agreement (CA) with Developers, who will be selected through competitive bidding for highest revenue share as per standard methodology for development of Airports, using the standard documents including RFQ, RFP and CA, already approved by GoI.

Backdrop Facts of the Dispute

22. The above referred facts and circumstances indicate the history of evolution of Airport at Nagpur to it's present stage and aspirations of the Government and people of Maharashtra to develop the Airport to world class standard. There are still a few more facts

which are relevant, undisputed and helpful in our endeavour to resolve the dispute. We have chosen to call them backdrop facts of the dispute. They are recapitulated in the ensuing sub-paragraphs.

a) In pursuance of the MoU and JVA, AAI handed over its assets pertaining to Nagpur Airport to MIL on 6.8.2009 and these assets included the land belonging to AAI. Completion of handing over of the assets was recorded in handing over agreement entitled "Handing over of AAI's assets of Dr.Babasaheb Ambedkar International Airport, Nagpur to MIHAN India, Joint Venture Company" executed between the AAI and MIL on 6.8.2009. This document recorded the fact of handing over of Nagpur Airport to MIL for the purpose of its operation and management w.e.f. 7.8.2009.

b) In order to achieve the object of maintenance and development of Nagpur Airport and as contemplated by MoU, JVA and also the in-principle approval given by Union Cabinet and steps taken for handing over of assets of Nagpur Airport to respondent no.1, respondent no.1 decided to invite International competitive bids for receipt of the highest revenue share in the award to be made of the project for up-gradation, modernisation, operation and

management of Nagpur Airport through public private partnership on Design, Build, Finance, Operate and Transfer ("**DBFOT**" for short) basis which was to be given to the selected bidder. Accordingly, respondent no.1 initiated an open competitive two stage bidding process for the said project. The first part was of qualification stage and the second was of bid stage. The first part had the object of shortlisting the bidders while the second part had the object of selecting the bidder for the project. So, applications for the project were invited by issuance of RFQ, dated 12.5.2016, as amended from time to time. Through the RFQ, respondent no.1 informed all interested parties that AAI had transferred all the assets including existing and additional land, buildings and structures at the Airport to the Authority i.e. MIL, respondent no.1. This fact was noted in clause 1.1.1 (a)(4.) of the RFQ. Relevant portion of this clause is extracted as below :

> "1.1.1 (a) Brief particulars on Nagpur Airport :
> 1.....
> 2.....
> 3.....
> 4.MIHAN India Limited (the "Authority") a joint venture company formed by Maharashtra Airport Development

> Authority (MADC) and Airport Authority of India (AAI), was formed in 2009. As per the joint venture agreement, AAI had transferred all assets including existing and additional land, buildings and structures to the Authority. The current terminal facility include the building over an area of 22,500 square metres and has a capacity to handle 400 arriving and 400 departing domestic passengers and 150 arriving and 150 departing international passengers during peak hours, two conveyor belts each in departure, the domestic arrival hall and in the international arrival hall, two aerobridges, eighteen parking bays and a car park to accommodate 600 vehicles. ”

c) In response to RFQ, petitioner no.1 submitted its application and was eventually shortlisted as a qualified bidder. A qualified bidder, as per the structure of the bidding process, would get the RFP, if it deposited stipulated amount. Petitioner no.1 on being called upon by respondent no.1, deposited an amount of Rs.8 lacs (Rupees Eight Lacs only) towards procurement of the RFP documents and same were issued to it. The RFP contained necessary information, terms and conditions required to be followed by the prospective bidders and various clauses governing the bidding process. The RFP also included the bidding documents including draft concession agreement, master plan and so on. It required the

prospective bidders to submit bid security of Rs.16.85 Crores along with their respective bids. The bid security was refundable within 60 days of the last date of submission of the bid, except in the case of a successive bidder, whose bid security would be retained till the selected bidder had provided a performance security in terms of the Concession Agreement. The RFP contained a schedule of bidding process and it stated that the Authority i.e. respondent no.1 would endeavour to adhere to it, though in the present case, it was not followed in it's letter and spirit.

d) In the background of the above referred facts and circumstances, the present bidding process for up-gradation, development, operations, maintenance of Nagpur Airport (the project) as envisaged in the JVA (clause G) was initiated on DBFOT basis and the bids were invited with a view to selecting a Developer through competitive bidding for highest revenue share as per standard methodology for development of Airports using standard bidding documents and procedure including RFQ, RFP and Concession Agreement already approved by the GoI.

e) The bidding process was thus initiated. It went on

substantially as per the terms of RFQ and RFP. At the qualification stage, scrutiny of the bidders was made and after due evaluation, six bidders were shortlisted for participation in the second stage of bidding process. Details from these bidders were called for, but only five of the shortlisted bidders submitted those details which included the petitioner no.1. Security clearance of these five shortlisted bidders was obtained from the Ministry of Home Affairs and thereafter the Government of Maharashtra granted approval for issuance of RFP to all the five Companies which were found to be qualified bidders.

f) The Government of Maharashtra, on 11.12.2017, constituted an eleven member Project Monitoring and Implementation Committee (PMIC) under the Chairmanship of Chief Secretary, Government of Maharashtra for the purpose of finalising the RFP documents consisting of RFQ, Concession Agreement (CA) and schedules thereto. The PMIC approved these documents and thereafter, they were issued to all the five qualified bidders for submitting their quotations regarding the percentage of revenue shares they intended to offer to respondent no.1, with date of 28.9.2018 being the revised final due date for submission of the

quotation bids, which was the last extended date for submission of such bids.

g) On 28.9.2018, the respondent no.1 received two bids. One bidder offered 3.08% share of gross revenue while the other bidder, which was petitioner no.1, offered 5.76 % share of gross revenue and thus, petitioner no.1 emerged to be the highest bidder. However, this offer of petitioner no.1 was considered to be financially low and therefore, the issue was discussed in the Board meeting of respondent no.1 held on 14.2.2019 which ultimately decided to approach the PMIC for the possibility of negotiations with petitioner no.1. Petitioner no.1 was called to the meeting convened by PMIC on 5.3.2019 for negotiations. The PMIC requested the petitioner no.1 to revise the offer in line with the assumptions presented by the PMIC during the course of meeting. Petitioner no.1 accepted the request and revised the offer by enhancing the revenue share percentage from 5.76 % to 14.49 %. Petitioner no.1 communicated such upward revision of it's offer to respondent no.1 vide it's letter dated 6.3.2019. It also noted the fact that though the upward revision made in the offer would impact adversely it's financial projections for the project, it

enhanced it's offer in view of request made by the PMIC, the importance of the project and also larger interest of the people of Maharashtra and Nagpur. Accordingly, it made a request to petitioner no.1 to issue Letter of Award (LoA) at the earliest.

h) The revised offer of 14.49 % gross revenue share given by petitioner no.1 was accepted by respondent no.1. The acceptance was communicated to petitioner no.1 by respondent no.1 (1st party) vide it's letter dated 7.3.2019. The acceptance letter made it clear that respondent no.1 had right to revoke the acceptance and forfeit and appropriate the bid security as per the terms of RFP in the event the petitioner no.1 (2nd party) failed to accept and comply with it's obligations as specified in the RFP and this letter and in case of such revocation of acceptance and consequent encashment of bid security, the petitioner no.1 would have no claim whatsoever against respondent no.1 save and except as expressly provided under the law. By this letter of acceptance, respondent no.1 informed the petitioner no.1 that, in the event of duplicate copy of letter of acceptance duly signed by it was not received by respondent no.1 within seven days, it may revoke the acceptance and consequences noted earlier would follow.

Petitioner no.1 by it's letter dated 12.3.2019 sent it's acceptance without prejudice and pursuant to the provisions of RFP and Concession Agreement. It also sent along with it a duplicate copy of the letter dated 7.3.2019 duly signed by the authorised signatory of petitioner no.1.

i) In terms of RFP, every bidder was required to submit bid security along with it's bid. The petitioner no.1 had also submitted it's bid security by furnishing a bank guarantee of the requisite amount in favour of respondent no.1. After issuance of letter of acceptance dated 7.3.2019, further events took place such as extension of bid security from time to time, at the request of respondent no.1, exchange of drafts of Concession Agreement (CA) to be executed by petitioner no.1 with some correspondence regarding corrections of some errors suggested by petitioner no.1, giving of no objection and concurrence by respondent no.1 to petitioner no.1 for incorporation of Company, GMR Nagpur International Airport Limited as SPV to execute the Concession Agreement and implement the project, giving of No Objection by respondent no.1 to petitioner no.1 for use of office space and address by the SPV to be formed and formation of SPV i.e.

petitioner no.2 and it's intimation being given by petitioner no.1 to respondent no.1. Apart from these events, there were also some events which took place at the end of respondent nos. 1 and 2 together with Ministry of Civil Aviation and PMIC. But, the petitioner no.1 was not aware of them as it was not kept informed by the respondents. The CA was never executed and ultimately, the whole exercise carried out by respondent no.1 for about five years saw it's unexpected end, which was bitter for petitioner no.1, in issuance of impugned communication annulling the bidding process without award of contract.

j) Meanwhile, the petitioner no.1 kept on requesting respondent no.1 to complete the formality of execution of Concession Agreement and let it start the work of implementation of the project. The petitioner no.1 informed the respondent no.1 that since it had complied with all it's obligations under the RFP and the letter of acceptance dated 7.3.2019, it was necessary that the Concession Agreement was executed. It sent a letter dated 25.2.2020 in this regard to the respondent no.1. But there being no response given by the respondent no.l, the petitioners filed a Writ Petition bearing Writ Petition No.1343 of 2020 seeking direction to

respondent no.1 to execute the concession agreement. Notice in this petition was issued on 11.3.2020. Private service of notice was permitted. The petitioners filed an affidavit of service on 17.3.2020. However, on 19.3.2020, the petitioner received a communication from the respondent no.1 annulling the bidding process without award of contract. The communication noted that annulment of the bidding process was done in pursuance of the directives dated 16.3.2020 received from the Government of Maharashtra.

23. Being aggrieved by the abrupt end of the bidding process, the petitioners have filed the present petition seeking quashing of the letter dated 19.3.2020 annulling the bidding process and issuing a direction to the respondents to comply with the RFP conditions in their letter.

Questions To Be Answered

24. Now, let us come back to the present dispute as put before us by the parties in the light of their rival submissions. These rival submissions point out certain questions which we must

answer. These questions could be broadly formulated as under :

a) Whether the letter of acceptance dated 7.3.2019 is a Letter of Award ?

b) Whether the letter of acceptance dated 7.3.2019 is only a communication that the bid is accepted, it being conditional ?

c) Is there any concluded contract between the parties ?

d) Whether the action of respondent no.1 in annulling the bidding process by it's letter dated 19.3.2020 (impugned communication) is arbitrary, unreasonable and unfair ?

e) Whether the case involves disputed questions of fact and an issue of enforcement of contractual obligations simplicitor, a remedy for which would lie elsewhere ?

25. We now begin our quest to attempt answers to the questions by organising them in two parts; first part would deal with first three questions; and the second part with remaining two questions.

Part I Questions

26. The letter dated 7.3.2019, which is at the centre of the controversy here, addressed by respondent no.1 to petitioner no.1 makes a reference to certain relevant facts. It notes that pursuant to the bid submission for the said project by petitioner no.1 on 28.9.2018 and completion of bid evaluation process, the bid submitted by petitioner no.1 was observed to be the highest with the revenue share quote of 5.76 % of the gross revenue which was, following the discussions and negotiations held between the parties on 5.3.2019, revised to revenue share quote of 14.49 %. It makes a categorical statement that this revised Bid has been accepted by the Competent Authority. It, however, puts a rider that such acceptance is "subject to further approval of Government of India for (a) alienation of land owned by the AAI in favour of the second party i.e. petitioner no.1 and (b) formation of SPV for the Project ("Approval)" and other terms and conditions mentioned in the letter. It further mentions that in case approval is not received, this acceptance would stand revoked without any legal or financial implications to either parties. It further states that subject to written intimation of the

approval by the first party i.e. respondent no.1 to the second party i.e. petitioner no.1, the latter shall complete various activities from the date of such intimation including but not limited to the actions named therein within the time period specified therein. The actions that were supposed to be completed by petitioner no.1 were in respect of execution of the Concession Agreement (CA) within sixty days of receipt of written intimation of the approval from the respondent no.1 and the petitioner no.1 furnishing a performance security within the time prescribed in the CA. The letter of acceptance emphasises that the first party or the respondent no.1 would have the right to revoke this acceptance, forfeit and appropriate the bid security ***as per the terms of RFP*** in the event the second party fails to accept and comply with it's obligations as specified in the RFP and the letter dated 7.3.2019. Lastly, it lays down that in the event the duplicate copy of this letter of acceptance duly signed by the petitioner no.1 is not received within 7 days, the respondent no.1 may revoke this acceptance and the consequences stated in the letter would follow.

Now, the question is whether this letter of acceptance dated 7.3.2019 is a Letter of Award, which it is, as argued by the learned Senior Advocate for the petitioners or it is only a simple

communication made by the respondent no.1 to the petitioner that the bid is accepted, which it is, as submitted by the learned Senior Advocate for the respondent no.1 and also learned A.G.P. for respondent no.2.

27. Learned Senior Advocate for the petitioners submits that this letter of acceptance having been issued in terms of the RFP and containing categorical statements regarding acceptance of revised bid offered by the petitioner no.1 and calling upon the petitioner no.1 to send a duly signed duplicate copy of letter within seven days towards acceptance of what is stated in this letter is unmistakably a Letter of Award (LoA) of contract of the project to the petitioner no.1. He submits that with issuance of LoA, there is a concluded contract which binds the parties. He places reliance upon the case of **Har Shankar and Others .vs. The Deputy Excise and Taxation Commissioner and Others** reported in (1975) 1 SCC 737.

28. Learned Senior Advocate for respondent no.1 would submit that not only the conditions stated in the said letter but also various clauses of the RFP would certainly show that by the said letter, respondent no.1 has only communicated to the petitioner no.1

it's acceptance of bid subject to fulfillment of the conditions stated therein and as those conditions were not fulfilled and even the part that was required to be completed by the petitioner no.1 remained to be fulfilled, the said letter could not be termed as the LoA. Learned Senior Advocate for respondent no.1 further submits that this LoA does not create any binding obligations so as to result into a concluded contract between the parties, as the acceptance is not conditional. He seeks support from Section 7 of the Indian Contract Act, 1872. He points out that, in the said letter of acceptance, the words "*tendered work is awarded to you*" are not mentioned and therefore, it could not be regarded as LoA. He also submits that having accepted the conditions of the said letter of acceptance, it was necessary for the petitioner no.1 to have executed Concession Agreement and furnished a performance security and same having not done, no vested rights are created in petitioner no.1 and that it cannot say that it would accept only some of the conditions of the said letter and would reject the others. He places reliance upon the cases of **Rishi Kiran Logistics Private Limited vs. Board of Trustees of Kandla Port Trust and Others** reported in (2015) 13 SCC 233, **Padia Timber Company Private Limited .vs. Board of Trustees of Visakhapatnam Port Trust, through its Secretary** reported in (2021) 3

SCC 24 and **PSA Mumbai Investments PTE. Limited vs. Board of Trustees of the Jawaharlal Nehru Port Trust and another** reported in (2018) 10 SCC 525.

29. Parties here have not pointed out to us any prescribed format for issuance of LoA. The RFP and other approved documents do no include any such pre-determined form. Therefore, whether the letter of acceptance dated 7.3.2019 is a Letter of Award or not would have to be ascertained from its contents, clauses of RFP and intention of the parties as gathered from the attending facts and circumstances. Let us, therefore, consider the relevant clauses of the RFP, the contents of the letter of acceptance and the relevant circumstances.

30. Clause 3.3.1 of the RFP makes it clear as to who would be declared as the Selected Bidder. It reads as under :

> *"3.3* ***Selection of Bidder***
>
> *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. "

31. In this case, there is no dispute about the fact that petitioner no.1's bid was found to be the highest and therefore, the petitioner no.1 was declared as the highest bidder on 28.9.2018 based on the revenue share, highest among all, offered by the petitioner no.1. Such declaration of the petitioner no.1 made it "the Selected Bidder" in accordance with the above referred clause.

32. In the disclaimer statement of RFP, there is a clause to the effect "the bidder shall not claim for selection or appointment as the Selected Bidder or Concessionaire upon participation unless the Authority intimates to any bidder about its selection as such and the decision of the Authority in all cases would be final and binding on Bidder as the case may be. " Here, the Authority is "respondent no.1".

33. Thus, as per clause 3.3.1 r/w. said disclaimer part of the RFP, the petitioner no.1 became the Selected Bidder or Concessionaire. Clause 3.3.5 reveals what follows after appointment

of a bidder as the Selected Bidder. For the sake of convenience, it is re-produced as below :

> *" **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 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. "*

34. It would be clear from the above referred clause that after appointing a bidder as Selected Bidder what would follow is a "Letter

of Award (LOA)" to be issued in duplicate by the Authority i.e. respondent no.1 to the selected bidder i.e. petitioner no.1. The words "Letter of Award ("the LOA") shall be issued" are significant. They do not leave any further choice to the Authority or respondent no.1 to deviate from it's obligation to issue the Letter of Award in duplicate. However, there is an exception to this course which is otherwise mandated to be followed by respondent no.1 under clause 3.3.5. The exception is to be found in clause 2.6.3. This clause being relevant is re-produced as below :

> *"2.6* ***Verification and Disqualification***
>
> ***2.6.1……..***
>
> ***2.6.2……..***
>
> ***2.6.3.*** *In case it is found during the evaluation or at any time before signing of the Concession Agreementor after its execution and during the period of subsistence thereof, including the Concession thereby granted by the Authority, that one or more of the pre-qualification conditions have not been met by the Bidder, or the Bidder has made material misrepresentation or has given any materially incorrect or false information, the Bidder shall be disqualified forthwith if not yet appointed as the Concessionaire either by issue of the LOA or entering into of the Concession Agreement, and if the Selected Bidder*

has already been issued the LOA or has entered into the Concession Agreement, as the case may be, the same shall, notwithstanding anything to the contrary contained therein or in this RFP, be liable to be terminated, by a communication in writing by the Authority to the Selected Bidder or the Concessionaire, as the case may be, without the Authority being liable in any manner whatsoever to the Selected Bidder or Concessionaire. In such an event, the Authority shall be entitled to forfeit and appropriate the Bid Security or Performance Security, as the case may be, as Damages, without prejudice to any other right or remedy that may be available to the Authority under the Bidding Documents and/or the Concession Agreement, or otherwise."

35. A bare reading of the above referred clause would show that the power which it confers upon the Authority or the respondent no.1 is about disqualification of the bidder if not appointed as a Concessionaire either by issuance of Letter of Award or by entering into the Concession Agreement or termination of the Letter of Award or Concession Agreement as the case may be, upon happening of the contingencies stated therein. These contingencies are :

a) the bidder not meeting any of the pre-qualification conditions.

b) the bidder making material misrepresentations or giving materially incorrect or false information.

If any of these contingencies are met, the Bidder shall be disqualified forthwith if not yet appointed as a Concessionaire either by issuance of LoA or entering into CA or the LoA or CA itself would be liable to be terminated, in case the Selected Bidder has been issued the LoA or has executed the CA.

36. In the present case, however, the contingencies mentioned in clause 2.6.3 never arose and therefore, there was no occasion for the respondent no.1 to have invoked it's power thereunder. That being so, what was left for respondent no.1 to do was to proceed further as per clause 3.3.5. It then became necessary for the respondent no.1 to have issued LoA, in duplicate, in favour of petitioner no.1 and thereby call upon the petitioner no.1 to sign and return the duplicate copy of LoA in acknowledgement thereof, within seven days of it's receipt, which in fact the respondent no.1 did.

37. Clause 3.3.6 lays down that after acknowledgement of the LoA as required under clause 3.3.5 by the Selected Bidder, the

respondent no.1 shall cause the Concessionaire to execute the Concession Agreement within the period prescribed in Clause 1.3, which is sixty days of the LoA. For the sake of convenience, this clause is re-produced thus :

> *"**Clause 3.3.6.** After acknowledgement of the LOA as aforesaid by the Selected Bidder, it shall cause the Concessionaire to execute the Concession Agreement within the period prescribed in Clause 1.3. The Selected Bidder shall not be entitled to seek any deviation, modification or amendment in the Concession Agreement."*

38. It is seen from the letter dated 7.3.2019 that it not only acknowledges the petitioner no.1 to be the Selected Bidder as defined under clause 3.3.1, but also appoints the petitioner as Concessionaire in terms of clause 2.6.3 which says that a Selected Bidder would be a Concessionaire upon issuance of the LoA or entering into of the Concession Agreement. It is further seen that this letter of acceptance dated 7.3.2019 has all the attributes, barring the GoI approval part, of a Letter of Award, which are detailed in clauses 3.3.5 and 3.3.6. It requires that it's duplicate copy duly

signed by petitioner no.1 be returned to the respondent no.1 within seven days in acknowledgement of it's acceptance by petitioner no.1 and any failure on the part of petitioner no.1, would lead to respondent no.1 revoking the acceptance with the consequence of forefeiture and encashment of bid security and the Selected bidder having no claim as regards such forfeiture against the respondent no.1 stated therein. It also directs the petitioner no.1 to execute the Concession Agreement within sixty days of receipt of written intimation of the approval from respondent no.1 and further directs the petitioner no.1 to furnish the performance security within the time prescribed in the CA. Here a deviation regarding the time stipulated for execution of the CA is seen. As per clause 1.3, Item No.11, CA is required to be executed within 60 days of the award of LoA while, in this acceptance, period of 60 days is to be reckoned from the date of written approval from respondent no.1. The approval spoken about is of the GoI as regards alienation of land owned by the AAI in favour of the petitioner no.1 and formation of SPV for the project. This deviation about ascertainment of time of sixty days would not be significant, if it is seen that putting of condition of GoI approval itself was impermissible, and in any case did not prevent the contractual relationship from coming into

existence, which we have found to be so in next paragraphs.

39. Now, if we consider the terms of the RFP, we would find that in the entire RFP it has not been stated anywhere that acceptance of bid and issuance of LoA would be subject to further approval of Government of India as regards land alienation and SPV formation. But, in the letter dated 7.3.2019, the acceptance though given, has been made subject to such approval of GOI. This is a departure from clause 3.3.5 of the RFP. This departure, would not, in our opinion, be sufficient to say that the letter dated 7.3.2019 has not been issued in terms of clause 3.3.5 as, except for the said deviation, every parameter of the LoA prescribed in clause 3.3.5 read with clause 3.3.6 of the RFP is seen to be met in it. The condition of GoI approval, being not part of the RFQ or the RFP, is a post bid condition, as rightly submitted by the learned Senior Advocate for petitioners, and therefore, would not prevent the birth of a contract from taking place on the petitioner no.1 signing a duplicate copy of the said letter and returning it to respondent no.1 within stipulated time in terms of clause 3.3.5 and what is stated in the said letter. The petitioner no.1, there is no dispute, signed the duplicate copy of the said letter acknowledging it's acceptance in toto and returned it

to petitioner no.1 within stipulated time of seven days. The acceptance of letter dated 7.3.2019 here by the petitioner no.1 has been absolute and unqualified, and it has turned the promise held out by respondent no.1 in the letter dated 7.3.2019, the promise to award the project with condition of GoI approval, into a binding contract in terms of Section 7 of the Contract Act. It is the LoA which would create binding obligations for respective parties and which would conclude a contract. When acceptance of bid is communicated without mention of Letter of Award and there is a dispute about what it means, the Court is required to examine it's contents in the light of the relevant clauses of the bidding documents and intention of the parties discernible from their conduct and attending facts and circumstances of the case. As said earlier, the letter dated 7.3.2019 fits into all the parameters and requirements of clause 3.3.5 read with clause 3.3.6, except the post bid condition of GoI approval, not part of the RFQ and RFP, which was really meant for, not the petitioners, but the respondent no.1. A post bid condition like the contract being subject to further approval of GoI regarding land alienation and SPV formation, without saying anything about it's rationale and permissibility, when accepted by the Selected Bidder and Concessionaire as it is and without any qualification, would

result into a binding contract between the parties. Thereafter, the burden to obtain approval from GoI would be on the party which has put such a condition and in case approval is refused, at the most, it would enable the party stipulating the condition to save itself from the ignominy of paying damages. But, a post-bid condition like the present one, would not stop the contract from coming alive. At the most, it may affect the excutability and workability of a contract, and that too, when the approval is expressly refused, and not otherwise.

40. As regards the approval of GoI mentioned in the letter dated 7.3.2019, we must say, there is force in the argument of the learned Senior Advocate for the petitioners that the approval of GoI appears to be a formality considering the background facts discussed earlier. We must say it here that petitioners have not said that approval is not necessary. What they have said is that it is only a formality. The MoU dated 18.12.2008 shows that it was agreed between MoCU and AAI of one part and GoM and MADC of other part to transfer Nagpur Airport to the JVC to be formed, which is now Respondent no.1 and that parties would take all necessary steps to transfer Nagpur Airport along with all it's land and other assets to the JVC in 180 days of the date of the MoU. This was followed by Union

Cabinet giving it's approval for transfer of the Nagpur Airport to the proposed JVC on 17.1.2008. This approval also permitted the proposed JVC to involve a strategic partner on build, operate and transfer basis for development of Nagpur Airport to world class standards. The JVA dated 22.2.2009, by virtue of which respondent no.1 was constituted, made it clear that further development of Nagpur Airport would be undertaken by the respondent no.1 after all the assets of the Airport were transferred to it and such development of the Airport would be through a Developer with whom the respondent no.1 would enter into a Concession Agreement and who would 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 RFQ, RFP and CA, already approved by the GoI. On 6.8.2009, the assets of the AAI pertaining to the Nagpur Airport were also handed over. On this backdrop, it would be gee-whiz naivete to say that seeking of approval regarding land alienation was a serious business for respondent no.1 to do. Ordinarily, it would be a matter of course, except for some extra-ordinary reasons interjecting between respondent no.1 and the petitioners, which was never the case here as there was no letter sent by respondent no.1 to GoI seeking latter's

formal approval and admittedly, there was no refusal of approval whatsoever by the respondent no.1.

41. Coming back to the manner in which the bid process was conducted, we find it worthy to note that respondent no.1 had declared that the bidding process would be governed by the approved documents including the RFQ and the RFP; that the bidders had, believing in this declaration, submitted their bids and, therefore, reasonable expectation of any bidder including the petitioner no.1 would be that these documents were treated by the party issuing the documents with sanctity that they deserved. These documents laying down a frame-work of rules of completion of bidding process obligated not only the bidders but also the employer of the contract who invited offers from the tenderers, to abide by the rules of the game. The rules were framed by the employer and accepted by the bidders and the sanctity of the rules and morality of law required the parties, especially the State of which respondent no.1 is an instrumentality, to adhere to the rules, and not deviate from them, without any reason of extra-ordinary nature like some unforseen event not within the power and control of parties overtaking the bidding process. This is a principle of law which applies with greater

force to the State which is a willing party to a contract. Observations of Hon'ble Apex Court, as they appear in paras 22 and 24 of it's Judgment in **Kumari Shrilekhavidyarthi vs. State of U.P.**, (1991) 1 SCC 212 would elucidate the point and they are extracted as below :

> *" The impact of every State action is also on public interest. It is really the nature of its personality as State which is significant and must characterize all its actions, in whatever field, and not the nature of function, contractual or otherwise which is decisive of the nature of scrutiny permitted for examining the validity of its act. The requirement of Article 14 being the duty to act fairly, justly and reasonably, there is nothing which militates against the concept of requiring the State always to so act, even in contractual matters."*

Such obligation of the State flows from the very nature of it's Constitutional power and it's duty to act fairly under Article 14. After all, the Government is nevertheless the Government; and it's every action has a public element in it and the legality and morality of it's Constitutional power would not let it go astray from it's Constitutional duty [see Kasturilal Lakshmi Reddy .vs. State of J & K (1980) 4 SCC 1, (para 11) and M/s. Motilal Padampat Sugar Mills

Co. Ltd. vs. State of Uttar Pradesh and Others reported in (1979) 2 SCC 409, (para 24)]

42. Clause 3.3.5 of the RFP did not contain any condition that the Letter of Award shall be issued subject to further approval of the Government of India regarding land alienation and formation of SPV and yet this condition was inserted in the letter dated 7.3.2019. But, this condition, a bare reading of it would suffice, was of such a nature as had no bearing upon performance by the Selected Bidder and the Concessionaire of the obligations resulting from acceptance of it's bid in terms of clause 3.3.5. We may reiterate here that letter dated 7.3.2019 has all the characteristics of LoA as envisaged under the clauses 3.3.5, 3.3.1 and 3.3.6 of the RFP. These characteristics were in the nature of the highest bidder being appointed as the Selected Bidder, the requirement of clause 3.3.5 coming into operation upon such selection, communication of acceptance of bid in duplicate via sending a letter, which is of the date 7.3.2019 here thereby requiring the petitioner no.1 to return the duly signed duplicate copy of the letter within seven days of it's receipt, calling upon the petitioner no.1 to execute the Concession Agreement within the stipulated period and also to furnish performance security

within the time prescribed in the concession agreement. All these requirements of clause 3.3.5 r/w. Clauses 3.3.1 and 3.3.6 were met in the present case except for two deviations discussed earlier. The first deviation is of the GoI approval and the second of the reckoning of the time of sixty days from the intimation about GoI approval, instead of from the date of issuance of the letter. But, this departure from the RFP, going by the principles of law referred to earlier, was not permissible and was unreasonable, there being no extra-ordinary reason to justify it, on the touchstone of Article 14. Even on their own merits, these deviations at the most cast a duty on respondent no.1 to obtain the approval of the GoI at the earliest, which was almost a formality, and in their worst consequence, the consequence of rejection of the approval, the fall out would have been that of inexecutability of the contract for reasons attributable to the GoI and not the petitioner no.1, though that possibility never saw the light of the day, as there was no refusal of approval anytime by the GoI. But, for that matter, there is no gain saying that by issuing the letter dated 7.3.2019, no conclusion of contract visited the parties as an inevitable consequence of it.

43. Under Section 7 of the Indian Contract Act, 1872, in order

to convert a proposal into a promise, acceptance must be absolute and unqualified and it should be expressed in some usual and reasonable manner and if manner of expression of acceptance is prescribed in the proposal, the acceptance has to be made in the prescribed manner. In this case, the manner of acceptance of proposal was prescribed in clause 3.3.5 of the RFP and it ought to have been followed by the respondent no.1. But, the proposal of petitioner no.1 was accepted by respondent no.1 subject to the further approval of the GoI. This acceptance was nevertheless substantially in the manner prescribed in clause 3.3.5, except for insertion of condition of GoI approval. Even this condition was accepted by petitioner no.1 in an unqualified manner when it signified it's such unconditional acceptance by it's signing the duplicate copy of the letter and returning it to the respondent no.1 within seven days. This act of the petitioner no.1 fulfilled the requirements of Section 7 of the Contract Act.

The discussion thus far made has impelled us to find that the letter dated 7.3.2019 is nothing but a Letter of Award in terms of clause 3.3.5 of the RFP.

44. At this juncture, we would like to elaborate upon the aspect of the condition of the GoI approval, though in some measure it may sound to be an exercise in repetition of what we have said earlier. But, that seems necessary, in our considered view. The condition of further approval of the GOI had no bearing whatsoever upon the performance of obligations of the Selected Bidder and Concessionaire like the petitioner no.1 so appointed by the letter in question and the burden was only upon the respondent no.1 to obtain the requisite approval. But, pending such approvals, could it be said that no binding contractual relations flowing from a concluded contract between the parties came into being ? After all, there is a difference in forging of a contact between the parties and it's execution being frustrated by something not within the control of the parties to the contract. It would then mean that if the approval is obtained, the contract is on and the Concessionaire has to take further steps which in this case would be such as furnishing of performance security, execution of the Concession Agreement and actual execution of the awarded contract in the manner prescribed under the terms and conditions of the Concession Agreement. If the approval is rejected, it would only lead to frustration of the contract with attendant consequences. But, here, in this case, it is an

established fact that not a single letter was sent by the respondent to the GOI seeking it's specific approval regarding land alienation. An explanation has been given in this regard that considering the observations made in the meeting subsequently held on 30.8.2019, chaired by the Secretary of MoCA at New Delhi, such approval was not sought. In fact, after issuance of the letter dated 7.3.2019, which was done upon due evaluation of the offer of highest revenue share by the petitioner no.1 from out of two bidders; due consideration of implications of the offer; and due deliberations over the offer, made in the meeting of the PMIC held on 5.3.2019, there was no reason for questioning the financial viability of the project, as was done in the meeting of the PMIC held on 30.8.2019, which as a fact has come out for the first time in the reply of respondent no.1. We wonder if this was done as an after thought or an excuse to not abide by the rules of the game. Whatever be the intent, giving of reason of financial impracticability of the offer after it's acceptance, was something which was external to the whole bidding process rendering it meaningless and aimless thereby raising a question why on earth it was initiated at all and taken to it's logical end in issuance of letter accepting the highest bid, substantially in terms of clause 3.3.5 of the RFP ? But, the fact remains that the bidding process was initiated as

per the RFQ and RFP and was concluded by issuance of the letter dated 7.3.2019 substantially in terms of the RFP. The condition of the GoI approval was a post-bid condition, not a part of the bidding documents and was almost a formality in view of earlier discussed background facts, and in any case, it having been accepted as it is by the petitioner no.1, it was to be fulfilled only by the respondent no.1 and not by the petitioner no.1, all of which did not prevent the binding contract from coming into existence. In such a case, we are of the view that it does not lie in the mouth of respondent no.1 to say that the letter of acceptance dated 7.3.2019 is conditional and qualified and therefore, does not result into any concluded contract between the parties. If it is conditional, it is so only from the view point of the respondent no.1 and not the petitioners. But even this argument pales into obscurity once we consider the unqualified acceptance given by the petitioner to the said additional post-bid condition.

45. Apart from what is stated above, letter dated 7.3.2019 leaves no choice with the petitioner no.1 to reject it without suffering the consequence of forfeiture and appropriation of the bid security amount furnished by the petitioner no.l with no claim available

against the respondent no.1 as regards such forfeiture. This is really a Hobson's choice; a choice to show on face but a compulsion beneath the face. This condition of letter dated 7.3.2019 was in accordance of clause 3.3.5, and it being what it was, the petitioner no.1 accepted as it was. Now, can the respondent no.1 justifiably say that letter dated 7.3.2019 was a harmless communication only informing petitioner no.1 that it's bid was accepted and nothing more? The answer is no, given the consequences that are threatened to visit petitioner no.1, if it rejected the acceptance. It, therefore, does not matter that the letter dated 7.3.2019 does not contain the sentence "Letter of Award is issued to you". It is the intention of the parties which, together with spirit and substance of an act, decides the nature of an act. The forfeiture clause together with the contents of the said letter and attending circumstances clearly points out that the intention of the parties was to treat the said letter as Letter of Award and they proceeded further considering it to be so, irrespective of it's nomenclature and some play of words in it.

46. We, therefore, find that the letter of acceptance dated 7.3.2019 is indeed a Letter of Award and not a letter merely communicating that the bid is accepted and this Letter of Award has

resulted into a concluded contract between the parties.

47. The conclusion so reached by us is further fortified by the subsequent conduct of the parties showing the real intention of the parties in issuance and acceptance of the letter dated 7.3.2019. We have made an elaborate discussion of such conduct of the parties in the later paragraphs of this judgment. Suffice it to say it here that respondent no.1, by giving it's concurrence to the petitioner no.1 to incorporate petitioner no.2 as SPV for execution of the CA and implementation of the project, by exchanging draft CA and requesting the petitioner no.1 to extend the Bank Guarantee from time to time and so on, and petitioner no.1 positively responding to same, has made it's intention loud and clear that the letter dated 7.3.2019 is not a letter which merely informs the petitioner no.1 that it's bid has been accepted and nothing more. In fact, this letter, as guaged from the conduct of the parties post it's issuance, accentuates the intention of the respondent no.1 rather than slighting it, that the respondent no.1 as well as the petitioner always meant, understood and acted upon it like a Letter of Award resulting into a concluded contract between the parties.

48. Now, let us turn to the cases relied upon by respondents to support their case that the letter dated 7.3.2019 is not a Letter of Award. They are :

(I) Rishi Kiran Logistics Private Ltd. vs. Board of Trustees Kandla Port Trust and Others, (2015) 13 SCC 233.

(II) Padia Tumber Company Private Limited .vs. Board of Trustees of Vishakhapatnam Port Trust, (2021) 3 SCC 24.

(III) PSA Mumbai Investment PTE. Ltd. vs. Board of Trustees of the Jawaharlal Nehru Port Trust and another, (2018) 10 SCC 525.

49. In the case of Rishi Kiran Logistics Private Ltd. (supra), the Hon'ble Supreme Court has held in the facts of that case that there was no concluded contract having come into existence as a matter of fact and even if it was assumed for the sake of argument that there was indeed such a contract, mere termination thereof could not be considered as arbitrary, as a concluded contract when terminated in a bona fide manner may amount to breach of contract and certain consequences may follow thereafter under the Law of Contract, and then the remedy for breach thereof would not be by invoking Writ jurisdiction but by approaching a Civil Court.

50. The facts in the case of Rishi Kiran Logistics Private Ltd. would, however, show that they are different from the facts of the present case. In that case, the tenders were invited by Kandla Port Trust for allotting it's plots on leasehold basis for a period of 30 years for the purpose of enabling the allottees to put up construction of liquid storage tanks. After considering the bids of various tenderers, the letters of intent were issued to various successful bidders. The letter of intent, however, mentioned that "formal letter" will be issued after receipt of CRZ clearance. It was in the context of these facts, the Hon'ble Apex Court held that the letter of intent which said that the final allotment would be made later by issuing a "formal letter" after obtaining of CRZ and other clearances, only displayed an intention to enter into a contract at a later stage. In the present case, there was no rider stated in the letter dated 7.3.2019 that "final letter of acceptance or award of contract would be issued after obtaining the approval from the GOI." Therefore, to this extent, in our respectful submission, no assistance could be sought by the respondents from the said case of Rishi Kiran Logistics Private Ltd. But, even in this case, the Hon'ble Supreme Court has held that whenever a case involves public law element, the Writ jurisdiction of the High Court would be available.

51. In the case of Padia Timber Company Private Limited (supra), it was held on facts that there being a conditional acceptance of offer, there was no concluded contract between the parties, when the condition was not accepted by any of the parties. The facts of this case disclose that the contract that was to be awarded was for supply of the sleepers to the Port Trust and offer of the lowest bidder therein was accepted by the Port Trust subject to the condition that the bidder would have to make delivery of the wooden sleepers at the place of the Port Trust by transporting them by road at his cost and final inspection would be made at the general store of the Port Trust. These conditions were not as per the bidders offer and were not accepted by the bidder. In this context of the facts, it was held that the acceptance of offer of the bidder was conditional and the condition not having been accepted by the bidder, no concluded contract between the parties flowed from the conditional acceptance by the Port Trust. We have already noted the facts of the present case which are different from the said facts of Padia Timber Company Private Limited and therefore, in our humble opinion, the case of Padia Timber Company Private Limited would render no assistance to the case of the respondents.

52. The respondents placing heavy reliance upon the case of PSA Mumbai Investments PTE. Limited (supra), have maintained that ratio of this case squarely applies to this case. In the said case, it is held that under Section 7 of the Indian Contract Act, 1872, a proposal would not be converted into promise unless the acceptance is absolute and unqualified. It is further held on facts of the case that there was no absolute and unqualified acceptance by the Letter of Award. Learned Senior Advocate for respondent nos. 1 and 2 has submitted that the decision in the case of PSA Mumbai Investments PTE. Limited clinches the issue involved here in favour of the respondents. He has submitted that the RFP documents which were considered in the case of PSA Mumbai Investments PTE. Limited contained almost similar clauses as the RFP which governs the present case and the Hon'ble Supreme Court, after considering various clauses thereof, has found that the bidding process was not concluded therein. It would be, therefore, necessary for us to consider the facts of the case of PSA Mumbai Investments PTE. Limited (supra).

53. The facts of the afore-stated case would show that there

was a Consortium of appellant and respondent no.2 which had submitted it's bid for award of contract of Fourth Container Terminal Project on DBFOT basis at Jawaharlal Nehru Port and since it's offer was found to be most favourable from the financial view point, Letter of Award dated 26.9.2011 was issued by respondent no.1, the Jawaharlal Nehru Port, to the Consortium of appellant no.1 and respondent no.2. Some problem as to exact stamp duty between the parties arose as a result of which there was some delay in signing the agreement document. The facts further show that respondent no.2 therein opted out of the bid process and on being informed about the same, respondent no.1 therein, by letter dated 30.4.2012, indicated to the appellant therein that the appellant would be left as the sole bidder and, therefore, it should be ready to form Special Purpose Vehicle for entering into and execute the contract in the form of Draft Concession Agreement. However, this letter was made conditional upon the Ministry of Shipping according it's approval. The appellant therein anticipated that such approval would be given and therefore, by letter dated 30.5.2012, the appellant therein informed the respondent no.1 therein that it had, in fact, incorporated another Special Purpose Vehicle to execute and perform the Concession Agreement. However, as things turned out to be, the Ministry of

Shipping refused to accord it's approval and the appellant was informed by letter dated 30.8.2012 that the Ministry of Shipping had refused to grant it's approval regarding change of constitution of the bidder as from a Consortium to a single entity. Thereafter, on 18.9.2012, the bid security given by the consortium was encashed by respondent no.1 therein for recovery of which, a suit was filed by the appellant therein. At that stage, the respondent no.1, by show cause notice dated 12.9.2012, called upon the Consortium to perform it's part of bid as originally agreed to and since this was not done, by the letter dated 16.10.2012, the Letter of Award that was accorded and acknowledged by the appellant therein on 29.6.2011 was "withdrawn" by respondent no.1. Consequent to this, respondent no.1 therein also claimed a sum of Rs.446.28 Crores by way of damages against the Consortium and sent an arbitration notice stating that, according to it, Clause 19 of the draft Concession Agreement being an arbitration clause governed the parties and so the dispute would be resolved by resorting to it. Respondent no.1 therein also indicated the name of the arbitrator that it intended to appoint. The appellant therein did not agree that there was any scope for arbitration, there being no agreement having been entered into between the parties. However, by taking recourse to the

arbitration clause in the Draft Concession Agreement, the respondent no.1 therein declared that the arbitrator appointed by it would be the sole arbitrator to ad-judicate upon the dispute between the parties. The arbitrator agreed with the contention of the appellant therein and against his decision, the respondent no.1 therein filed an appeal before the High Court under Section 37 of the Arbitration and Conciliation Act, 1996 ,wherein the High Court held that there was a concluded contract between the parties as the Letter of Award had been accepted by the appellant therein and since the arbitration clause formed part of the bid documents between the parties, the arbitration clause governed the dispute between the parties.

54. Against this decision of the High Court, the appellant came before the Hon'ble Supreme Court and the Hon'ble Supreme Court, against the background of the above referred facts and circumstances, held that the acceptance being not absolute and unqualified, there was no Letter of Award resulting into a concluded contract between the parties. It also held that the RFP only showed that there was a bid process which was going on between the parties and that the conditional acceptance by itself was not a contract concluded between the parties, that the bid process would conclude

upon the Draft Concession Agreement finally becoming an agreement between the respondent no.1 and the Special Purpose Vehicle, and that the bid process might be annulled without giving any reason whatsoever by the respondent no.1, as it had not been concluded therein. It was in this context that it was found that there was neither any concluded contract between the parties nor any Concession Agreement having been executed between the parties which would give rise to an enforceable arbitration clause.

55. In the present case, we have already found for the reasons stated earlier that the letter dated 7.3.2019 is a Letter of Award, which has been issued after acceptance of the bid of the petitioner no.1 offering highest revenue share in terms of clause 3.3.5 r/w. Clauses 3.3.1 and 3.3.6 of the RFP together with such condition as would have no bearing upon the performance of any obligations under the contract by the petitioner. We have also found that intention of the parties gathered from their subsequent conduct was that the said letter was intended to be and was in fact treated to be the Letter of Award by the parties and that it resulted into a binding contract between the parties, though the executability of the contract as such depended on respondent no.1 fulfilling it's obligation to

obtain the necessary approval of the GoI. Such being not the facts of PSA Mumbai Investments PTE. Ltd (supra), in our respectful submissions, it would have no application to the facts of this case. Then, in PSA Mumbai Investments PTE. Limited (supra), as the letter of acceptance had not become the Letter of Award, the bidding process was alive and therefore, it was held that right uptil the stage of entering into the agreement, the bid process may be annulled without giving any reason. In the present case, the bidding process was terminated on reaching the stage of issuance of Letter of Award and therefore, what was required to be done thereafter was in the nature of further steps given in clause 3.3.6 of the RFP. These facts also distinguish themselves from the facts involved in PSA Mumbai Investments PTE. Limited.

56. Now, let us consider what assistance the two cases namely the case of Har Shankar and Others and the case of Proactive In and Out Advertising Pvt. Ltd. vs. Pune Mahanagar Parivahan Mahamandal Ltd. reported in 2018 (6) Mh.L.J. 561 relied upon by the petitioners, offer to us in the present case.

57. In the case of Har Shankar and Others (supra) relied upon

by the petitioners, those interested in running liquor vends offered their bids voluntarily in the auction held for grant of licences for the sale of country liquor. The Government accepted the bids of willing bidders and it was held that on such acceptance the contract between the bidders and the Government became concluded and a binding contract came into existence between them. It was noticed that after coming into existence of binding agreements between the parties, the successful bidders also granted licences evidencing the terms of contract between the bidders and the Government under which they became entitled to sell liquor. The licencees also exploited the respective licences presumably in expectation of the profit. However, this venture was found later on by the appellant therein as not profitable and that they were unable to meet the conditions of the license, and fell in arrears. The State Government threatened to cancel the licences granted to the appellants unless they paid the arrears. Matter came to Supreme Court. The Hon'ble Apex Court held that commercial considerations may have revealed an error of judgment in the initial assessment of profitability of the adventure, but that is a normal incident of trading transactions. It further held that those who contract with open eyes must accept the burden of contract along with its benefits. It further held that reciprocal rights

and obligations arising out of the contract do not depend for their enforceability upon whether the contracting party finds it proper to abide by the terms of contract or not or otherwise no contract could ever have any binding force.

58. In our view, the observations of the Hon'ble Supreme Court and what it has held in the said case of Har Shankar and Others squarely apply to the facts of the present case. Here, the bid of petitioner no.1 was accepted by respondent no.1 and a letter accepting the bid was issued substantially in accordance with clause 3.3.5 of the RFP, a duplicate copy of which was duly signed by petitioner no.1 and returned to respondent no.1. This resulted into a binding agreement coming into existence between the parties. Once, a contractual relationship is built between the parties, a party thereto cannot say that the contract ought not to have been entered into, doubting it's profitability, as has been done in this case, and that the validity of a binding contract between the parties here cannot be made dependent upon what a party thinks about propriety of a contract nor can it be judged by uncertainty of it's enforceability resulting from imposition of a post-bid condition, which is accepted unconditionally by the petitioner no.1 and which is for the

respondent no.1 only to fulfill.

59. In the second case of **Proactive In and Out Advertising Pvt. Ltd. vs. Pune Mahanagar Parivahan Mahamandal Ltd. and Others** reported in 2018 (6) Mh.L.J. 561 referred to us by the learned Senior Advocate for the petitioners, it was held by the Hon'ble Apex Court that once the letter of intent issued by the respondent therein was accepted by the petitioner therein and the petitioner promised the respondent therein to furnish a Bank Guarantee, it was not open for the respondent therein to cancel the tender and issue a fresh tender. These observations would show that upon acceptance of the letter of intent with all conditions stated therein by the bidder, a binding agreement would come into being between the parties and thereafter, a reverse turn is not permissible. The facts of this case being similar to the facts involved here, in our respectful submissions, the ratio of the case of Proactive In and Out Advertising Pvt. Ltd. would govern the instant case.

60. In view of above, we find that the letter dated 7.3.2019 cannot be treated as a communication by the respondent no.1 which merely informs the petitioner no.1 that the bid is accepted, rather the

said letter, in our opinion, amounts to a Letter of Award which has led to a concluded contract between the parties. The questions (a), (b) and (c) are answered accordingly.

Part Two

61. Now we would take up the remaining two questions, question (d) and question (e), for their answers. These questions are about the arbitrariness, unreasonableness and unfairness or otherwise of the action of respondent no.1 in annulling the bidding process by the impugned communication and involvement of disputed questions of facts and enforceability of contractual obligations by invoking Writ jurisdiction of this Court.

62. The impugned communication sent by the respondent no.1 to the petitioner no.1 dated 19.3.2020 is just a three liner which informs the petitioner no.1 that pursuant to the directives received by the Government of Maharashtra dated 16.3.2020 and in accordance with clause 2.16 of RFP, respondent no.1 decided to annul the bidding process without award of contract. The petitioners have assailed this communication on several grounds while the

respondents have stoutly defended it saying it to be within the parameters in law.

63. Upon consideration of the contents of the impugned communication, the conduct of parties post issuance of letter dated 7.3.2019 by the respondent no.1, the law governing the field and also in view of our finding that the letter dated 7.3.2019 is actually a Letter of Award which has resulted into a concluded contract between the parties, we would say that the argument advanced on behalf of the respondent no.1 and adopted by the respondent no.2, does not hold any water. We have stated the reasons for this conclusion in the following paragraphs.

64. The letter dated 7.3.2019 which amounts to the Letter of Award has created rights in favour of the petitioner no.1 to execute, through the SPV formed for the purpose, a Concession Agreement and implement the project in accordance therewith. Once a binding agreement comes into existence between the parties, as held in the case of Har Shankar and Others (supra), it would not be open for the employer of the contract to go back on it's promise and cancel the contract. Sometimes financial projections and commercial

considerations of one party to the contract may be found out subsequently to be wrong but just because of that the party which thinks it's such calculations have gone wrong, is not permitted in law to cancel the contract and if it does so, it must suffer the consequences therefor. In Har Shankar and Others (supra), the Hon'ble Supreme Court has succinctly summed up the position of the parties to the contract when it observed, "those who contract with open eyes must accept the burden of the contract along with its benefits" and also when it said, "reciprocal rights and obligations arising out of contract do not depend for their enforceability upon whether a contracting party finds it prudent to abide by the terms of the contract. By such a test no contract could ever have a binding force".

65. Apart from what is stated above, the figures of profit shown by the respondent no.1 are seriously disputed by the petitioners and therefore, nothing can be said about their being based upon any realistic calculations. In any case, the consideration of financial viability of the contract arising from issuance of LoA to petitioner no.1 cannot be made a subject matter of judicial review, this Court not being an expert and well equipped to deal with the

same and so, we would refrain from going into it. Suffice it to say that when such consideration is turned into one of the grounds for annulment of the bidding process by the employer of the contract, which is respondent no.1 here, a question arises about it's permissibility and tenability in law on the basis of principles of Wednesbury unreasonableness and procedural fairness when the State or it's instrumentality is the employer of the contract. The principle of Wednesbury unreasonableness would require a party to contract to shun irrelevant and extraneous considerations to direct it's actions (See Raunaq International Ltd. vs. I.V.R. Construction Ltd. And Others, (1999) 1 SCCC 492). The principle of procedural fairness would confine the Court to only examine whether the parties have followed the prescribed procedure equally and without discrimination and to not consider what is right or what is wrong or whether the decision taken should and ought to have been taken or not (see Tata Cellular vs. Union of India, (1994) 6 SCC 651).

66. When these parameters are applied to the present case, what we find here is an instance of procedural unfairness and also unreasonableness. The clauses of RFP are very clear on the subject. Clause 2.16.1 is the clause relied upon in the impugned

communication. A careful consideration of this clause is, therefore, necessary. It reads thus :

> *"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. "*

67. It would be clear from the above referred clause that it empowers the Authority to annul the bidding process only when it exercises it's right to reject any bid or all bids. It does not give any right to the respondent no.1 to annul the bidding process independent of it's right to reject a bid. It indicates that annulment of bidding process may follow upon rejection of a bid or all bids at any time. The position here, however, is quite different from the situation contemplated in clause 2.16.1. Here, the respondent no.1 had already accepted the bid of the petitioner no.1 and therefore,

there was no question of annulment of the bidding process under this clause. The impugned communication, however, says that the respondent no.1 has decided to annul the bidding process without award of contract in accordance with clause 2.16 of the RFP and also in accordance with the directives it received from the GoM vide letter dated 16.3.2020. This reliance on clause 2.16 shown in the impugned communication is wrong and to the knowledge of respondent no.1, could not have been made by it. Yet it was made.

68. There is one more clause in the RFP i.e. clause 2.6.3., which speaks about disqualification of a bidder or termination of LoA issued to the Concessionaire. Under this clause, disqualification or the termination of the LoA is possible on meeting it's requirement. The requirement is of the bidder not fulfilling the pre-qualification conditions or the bidder making material misrepresentations or giving materially incorrect or false information. If any of these requirements are met, the consequence will be of disqualification of the bidder to whom no LoA is issued or the termination of the LoA and also the CA, when the LoA is issued and the CA, if any, is executed. So, here at the most, the LoA could have been terminated on any of the grounds stated in Clause 2.6.3. But, no ground being

available thereunder, there was no termination of the LoA under clause 2.6.3, and rightly so.

69. In the impugned communication, respondent no.1 has also given the reason of directions issued by GoM vide it's letter dated 16.3.2020 regarding re-tendering of the work following which the impugned communication was issued. Learned Senior Advocate for the respondent no. 1 has taken us through this communication and also the minutes of the meeting held on 30.8.2021 under the Chairmanship of Secretary, MoCA, record note of discussions in respect of PMIC meeting held on 14.10.2019 and the documents reflecting the calculations made by respondent no.1 with the help of it's Auditor and Transaction Advisor regarding financial viability of the contract.

70. We must point out here that the GoM was not a party to the bidding process as could be seen from the RFQ and RFP and it could not have been a party in view of object and purpose for which the JVC i.e. respondent no.1 was formed and the sole authority given to the respondent no.1 to be the anchor, driver and master of the process of development of Nagpur Airport to be undertaken by it by

selecting a Developer. A detailed narration of the relevant facts in this regard has already been made by us in the Historical Facts chapter of this Judgment. We are, therefore, of the opinion that the GoM could not have taken upon itself to decide about re-tendering of the project and should have left it to the discretion of the JVC i.e. respondent no.1 to decide about it in accordance with the rules of game as regulated by the RFQ and RFP. But, the GoM in fact did it, albeit without any authority or right in law or under the contract, at a time when the contractual obligations had come into play. This action on the part of the GoM was arbitrary and unreasonable and therefore, was not within it's Constitutional power.

71. Besides, all the acts as reflected in above-referred documents having been not contemplated in any manner under the RFQ and RFP, which together constitute a framework of rules within which the tender process was required to be proceeded and completed, could not have been made any basis for taking a decision to annul the bidding process. All the acts as evidenced by these documents are external and irrelevant for completion of the bidding process as per the rules prescribed and the procedure laid down in the RFP, in as much as, limits of our power of judicial review, would

not permit us to go into them. This is where we find that there is a fundamental flaw in the procedure adopted by the respondent no.1 in cancelling the bidding process which has amounted to cancellation of the LoA issued in favour of the petitioner no.1. Then, the respondent no.1 knew that the grounds that it were taking to annul the bidding process could not have been taken by it under the terms and conditions prescribed in the RFP and also under the law governing the field. But still, it resorted to those grounds while issuing the impugned communication. Therefore, we are of the view that the impugned communication suffers from the vice of arbitrariness and unfairness as contemplated by Article 14 of the Constitution of India. It also exhibits unreasonableness of the degree required for attracting the principle of Wednesbury unreasonableness, as irrelevant considerations were taken into account and relevant considerations as governed by the RFP were ignored while arriving at a decision of cancellation of the bidding process and the LoA issued to the petitioner no.1.

72. In the case of **Smt. S.R.Venkataraman .vs. Union of India and another** reported in (1979) 2 SCC 491, the Hon'ble Supreme Court has held that legal malice means such malice as may be

assumed from the doing of a wrongful act done intentionally but without just cause or excuse, or for want of reasonable or probable cause. In another case of **State of A.P. and Others vs. Goverdhanlal Pitti** reported in (2003) 4 SCC 739, it is held by the Hon'ble Supreme Court that legal malice or malice in law means "something done without lawful excuse". In other words, the Hon'ble Apex Court held, "it is an act done wrongfully and wilfully without reasonable or probable cause, and not necessarily an act from ill-feeling and spite. It is a deliberate act in disregard of the rights of others."

73. Facts noted above would show that the impugned communication is also hit by the principle of legal malice as explained in above referred cases. The respondent no. 1 knew that it could not annul the bidding process under clause 2.16.1 without first rejection of the bid, that it could not draft in decision of a party stranger to contract to cancel the LoA; and yet it did after acceptance of the bid, without any lawful cause and in a deliberate disregard of the rights of the petitioner no. 1.

74. There is another aspect of the impugned communication. It relates to the conduct of the parties. On 20.3.2019, an email was

sent by the respondent no.1 to the petitioner no.1 wherein it forwarded in pdf format the final Concession Agreement incorporating the corrigendum issued by it to the petitioner no.1. There is a correspondence between the respondent no.1 and the petitioner no.1, copies of which are filed on record and about which there is no dispute. It shows that the bank guarantee issued towards bid security to be furnished by the petitioner no.1 was renewed from time to time at the request of respondent no.1 with last email sent in this regard by the respondent no.1 to the petitioner no.1 being on 30.1.2020, in response to which, the petitioner no.1 got extended the Bank Guarantee till 30.4.2020. An email sent on 29.5.2019 by the respondent no.1 to the petitioner no.1 showed that as per the request of petitioner no.1, the respondent no.1 sent to it a soft copy of the Concession Agreement to enable the petitioner no.1 to make the necessary corrections in the draft Concession Agreement. The letter dated 13.6.2019 sent by the petitioner no.1 to respondent no.1 disclosed that the list of discrepancies observed in the final draft Concession Agreement and the list of details to be filled in at the time of signing of the Concession Agreement, were exchanged between the parties and it was informed that necessary changes in MS-Word version of draft Concession Agreement were incorporated by the

petitioner no.1. By the letter dated 29th July, 2019, the petitioner no.1 made a request to the respondent no.1 to grant it's concurrence to proceed with the SPV formation so as to enable the petitioner no.1 to sign the Concession Agreement at a short notice upon receipt of intimation from respondent no.1 as mentioned in the LoA. By the letter dated 5th August, 2019 addressed by the respondent no.1 to the petitioner no.1, no objection regarding incorporation of a Company by name GMR Nagpur International Airport Ltd. (petitioner no.2) for the purpose of execution of Concession Agreement with respondent no.1 subject to fulfillment of other conditions stated in the letter dated 7.3.2019 and the RFP was communicated to petitioner no.1. By the letter dated 16.8.2019, the respondent no.1 communicated to the Ministry of Corporate Affairs, Government of India that it had no objection for the proposed GMR Nagpur International Airport Ltd. to use address "1st Floor, Old Terminal Building, Dr.Babasaheb Ambedkar International Airport, Nagpur" as it's registered Office address. By this very letter, the respondent no.1 also gave it's no objection that the said "GMR Nagpur International Airport Ltd." would carry out it's business activities from the said address. It also certified that the respondent no.1 was in possession of the premises located at the said address. By the letter dated 24.8.2019, the

petitioner no.1 informed the respondent no.1 that it has promoted and incorporated a wholly owned subsidiary Company named "GMR Nagpur International Airport Limited", which would execute the Concession Agreement with the respondent no.1 as a Concessionaire. It also sent therewith a copy of Certificate of Incorporation of the said subsidiary Company, which was SPV as contemplated under the RFQ.

75. Of course, there is an objection taken by the learned Senior Advocate regarding formation of SPV in terms of the RFQ and the RFP. He draws our attention to clause 2.2.6 of the RFQ and the footnote appearing below it, which clarifies that Mihan Limited Nagpur i.e. respondent no.1 and the Selected Bidder i.e. petitioner no.1 shall, subject to and in accordance with the bidding documents, subscribe to such shareholding in the subscribed and paid up capital of the SPV as required to own and hold, legally and beneficially, to the extent of 26% and 74% respectively in the share capital of the SPV. He submits that in the SPV so incorporated, the condition of 26% and 74% share holding of the respondent no.1 and the petitioner no.1 respectively has not been fulfilled and therefore, the SPV has not been properly formed. The contention, in our opinion, is incorrect. The SPV has been formed with due approval given by the

respondent no.1 and while giving the approval, the respondent no.1 never questioned the composition of shareholding and never put any condition about the shareholding at the time of formation of SPV. Respondent no.1 has given it's no objection to the petitioner no.1 to use it's Office address and carry out it's business activities from it's premises at Nagpur. Not only that, the respondent no.1 also accordingly informed the Ministry of Corporate Affairs, Government of India regarding formation of the SPV. In none of these letters, the respondent no.1 raised any issue about percentage of shareholding. Such a conduct of respondent no.1 together with what is indicated by footnote below clause 2.2.6 of the RFQ would show that the issue of shareholding was not to come in the way of formation of SPV and it was to be sorted out later on. Such a conclusion is further bolstered up by what is stated in clause 5.4.1 of the draft Concession Agreement which, as per the RFP, is part of the bidding documents.

> "**5.4 Obligations relating to Shareholding of the Authority** :
>
> **5.4.1.** The Concessionaire and the Selected Bidder shall execute an agreement with the Authority, substantially in the form specified at Schedule S ("**Shareholders' Agreement**"), providing for the issue and allotment of one

non-transferable equity share of the Concessionaire ("**Authority's Share**") in favour of the Authority and/or its nominee, and shall inter-alia also provide for the following:

(a) appointment of nominee(s) of the Authority on the Board of Directors of the Concessionaire;

(b) an irrevocable undertaking that the rights vested in the Authority shall not be abridged, abrogated or in any manner affected by any act done or purported to be done by the Concessionaire or any of its Associates or Affiliates;

(c) an irrevocable undertaking that any divestment of Equity in the Concessionaire shall not in any manner affect the rights of the Authority herein and that the successors, assigns and substitutes of the Selected Bidder and the Concessionaire shall be bound by such undertaking; and

(d) any other manner mutually agreed upon between the Parties. "

76. This clause stipulates that the Concessionaire and the Selected Bidder shall execute an agreement with the Authority i.e. respondent no.1 substantially in the form specified in Schedule S

(Shareholder's agreement), providing for the issue and allotment of one non-transferable equity share of the Concessionaire ("Authority's Share") in favour of the Authority and/or its nominee and also other mutually agreed matters. It would then follow that the SPV was duly formed by the petitioner no.1 with the object of execution of the Concession Agreement and implementation of the project as contemplated by the RFP and the issue of shareholding could be mutually sorted out later.

77. Reverting to the conduct of the parties post issuance of the LoA dated 7.3.2019, as revealed by the earlier mentioned documents, we would say that the only conclusion that is possible from such conduct is that the parties not only intended that the letter dated 7.3.2019 be the Letter of Award which awards the contract, but the parties also acted upon it pushing forward the contract towards execution of the Concession Agreement by the petitioner no.2. It further showed that believing in the promise given by the respondent no.1, the petitioner no.1 altered it's position and incorporated the SPV. Petitioner no.1 went on to carry out several other acts as a consequence to the issuance of LoA. It obtained no objections regarding use of Office address and Office space of

respondent no.1 at Nagpur and got extended the Bank Guarantee given towards bid security at the request made by the respondent no.1 from time to time. Such conduct of the petitioner no.1, we have to say, would give rise to application of principle of promissory estoppel against the respondent no.1 which is an instrumentality of the State, and now the respondent no.1 is estopped from going back on it's promise to award the contract, which in fact it already has given.

78. In the case of **M/S. Motilal Padampat Sugar Mills Co. Ltd.** (supra), the Hon'ble Supreme Court held that where the Government makes a promise knowing or intending that it would be acted upon by the promisee and, in fact, the promisee acting in reliance of it, alters his position, the Government will be held bound by the promise of the promisee, notwithstanding that there is no consideration for the promise and the promise is not recorded in the form of a formal contract as required by Article 299 of the Constitution. It also held that if the Government makes a promise and the promisee acts in reliance upon it and alters his position, there is no reason why the Government should not be compelled to make good such promise like any other private individual. It was

observed that the law cannot acquire legitimacy and gain social acceptance unless it accords with the moral values of the society. It also held that the doctrine of promissory estoppel being an equitable doctrine, it would yield when the equity so requires and that means if it is shown by the Government that having regard to the facts of the case it would be inequitable to hold Government liable to the promise made by it, the Courts would not raise equity in favour of the promisee and enforce the promise against the Government. These observations appear in paragraph 24 of the Judgment. For the sake of convenience, a portion of para 24 is extracted as below :

> "*The law may, therefore, now be taken to be settled as a result of this decision, that where the Government makes a promise knowing or intending that it would be acted on by the promisee and, in fact, the promisee, acting in reliance on it, alters his position, the Government would be held bound by the promise and the promise would be enforceable against the Government at the instance of the promisee, notwithstanding that there is no consideration for the promise and the promise is not recorded in the form of a formal contract as required by Article 299 of the Constitution. It is elementary that in a republic governed by the rule of law, no one, howsoever high or low, is above the law. Every one is subject to the*

law as fully and completely as any other and the Government is no exception. It is indeed the pride of constitutional democracy and rule of law that the Government stands on the same footing as a private individual so far as the obligation of the law is concerned: the former is equally bound as the latter. It is indeed difficult to see on what principle can a Government, committed to the rule of law, claim immunity from the doctrine of promissory estoppel. Can the Government say that it is under no obligation to act in a manner that is fair and just or that it is not bound by considerations of "honesty and good faith"? Why should the Government not be held to a high "standard of rectangular rectitude while dealing with its citizens"? There was a time when the doctrine of executive necessity was regarded as sufficient justification for the Government to repudiate even its contractual obligations, but let it be said to the eternal glory of this Court, this doctrine was emphatically negatived in the Indo-Afghan Agencies case and the supremacy of the rule of law was established. It was laid down by this Court that the Government cannot claim to be immune from the applicability of the rule of promissory estoppel and repudiate a promise made by it on the ground that such promise may fetter its future executive action. If the Government does not want its freedom of executive action to be hampered or restricted, the Government need not make a promise knowing or intending that it

would be acted on by the promisee and the promisee would alter his position relying upon it. But if the Government makes such a promise and the promise and the promisee acts in reliance upon it and alters his position, there is no reason why the Government should not be compelled to make good such promise like any other private individual. The law cannot acquire legitimacy and gain social acceptance unless it accords with the moral values of the society and the constant endeavor of the Courts and the legislatures must, therefore, be to close the gap between law and morality and bring about as near an approximation between the two as possible. The doctrine of promissory estoppel is a significant judicial contribution in that direction. But it is necessary to point out that since the doctrine of promissory estoppel is an equitable doctrine, it must yield when the equity so requires. If it can be shown by the Government that having regard to the facts as they have transpired, it would be inequitable to hold the Government to the promise made by it, the Court would not raise an equity in favour of the promisee and enforce the promise against the Government."

79. In the present case, there is no equitable ground for the respondent no.1 to take recourse to, to wriggle itself out of the obligations which have come into play on issuance of Letter of

Award. The LoA spoke about approval of GoI in respect of alienation of land and formation of SPV. As regards formation of SPV, the Ministry of Corporate Affairs was duly informed by the respondent no.1 and there being no disapproval having been given by the GoI, it can be taken that part of the condition regarding GoI approval of SPV has been fulfilled. In respect of other part of the condition, respondent no.1 did not make any attempt to seek approval of GoI as it never wrote to it specifically in that regard. No ducment seeking approval for land alienation in a specific manner has been placed before us. Then, it is not the case of respondent no.1 that such approval has been refused by the GoI. All these facts and circumstances of the case would show that there is not available any equitable consideration for not applying the principle of promissory estoppel. Rather, these very facts and circumstances of the case have tilted the balance of equity in favour of the petitioner no.1. Then, the reason of the award of contract being not a very profitable and financially unviable proposition, apart from it being questionable on merits considering the objections taken by the petitioner no.1, is itself irrelevant and extraneous to various clauses of RFP which have delineated the contingencies in which and the conditions on which the bidding process could be annulled, and

these clauses nowhere incorporate the factor of unprofitability and financial non-viability found subsequently after the LoA is acted upon, as a ground for taking a reverse turn and cancel the bidding process. On the contrary, we would say that when the LoA is issued by communicating acceptance of bid, and in a manner prescribed in the bidding document, which we have found substantially to be the case here, it is presumed that the LoA has been issued by the employer only on being satisfied about the profitability, and workability of the bid offered by the tenderer and therefore, if the employer seeks to wriggle himself out from such acceptance, he could do so only on legally permissible grounds such as fraud, misrepresentation, misconception of facts, change in law and the like, but never on re-evaluation of the bid on merits post issuance of LoA, as has been done here. Therefore, this ground taken subsequently is hit by the principle of Wednesbury unreasonableness. All these factors, in our view, make the application of principle of promissory estoppel a reality and necessity and accordingly, we find that the respondent no.1, which is a State instrumentality, must be held bound by it's promise given under LoA and as such, the LoA would be enforceable at law.

80. There is a curious thing about the impugned communication. It states two reasons for annulment of bidding process and cancellation of LoA and both these reasons have already been found by us to be arbitrary and not permissible to be taken in view of the procedure prescribed in the RFP. The first reason relates to GoM issuing directives to re-tender the work. These directives have been accepted and acted upon by the respondent no.1 when it cancelled the bidding process. This shows it's non-application of mind. The GoM was not a party to the whole bidding process and therefore, it could not have issued such directives as elaborated by us earlier. Then, all the documents starting from the MoU dated 18.12.2006 through the Joint Venture Agreement dated 22.2.2009 to the bidding documents including RFQ and RFP would show that, the development of Nagpur Airport was to be carried out by the proposed JVC, which in fact was formed and after it's formation it was for the JVC, which is respondent no.1, to select a Developer through competitive bidding process at highest revenue share arrived at by standard methodology based upon standard documents including the RFQ and the RFP already approved by the GoI. The RFQ and the RFP also showed that it were the respondent no.1 only which was in-charge of and master of the bidding process.

Against such overwhelming authority existing in favour of respondent no.1 to embark upon and complete the bidding process, there was no reason for the GoM to step in and issue directives for re-tending of the work and even if it had, there was no reason for the respondent no.1 to implement it without thinking about the clauses of the RFP which authorised it to cancel the bidding process only when those conditions were met. The respondent no.1, however, simply implemented the directives and we would say it did so mechanically and without any authority of law. The impugned communication is, therefore, a no decision in the eye of the law and it smacks of legal malice.

81. The respondent no.1 has also attempted to support it's decision to cancel the bidding process by giving reason of questionable financial viability of the contract. In support, respondent no.1 has produced on record several documents to demonstrate as to how true have been it's projections about decrease in profitability and it's consequent increase in profitability, if LoA is cancelled and the work is re-tendered. The impugned communication, however, makes not even a whisper about all these projections and therefore, they cannot be taken into account on the

basis of the principle that when a statutory functionary makes an order based on certain grounds, its validity must be judged by the reasons so mentioned and it cannot be supplemented by fresh reasons in the shape of affidavit or otherwise as propounded in the case of **Mohinder Singh Gill and Others vs. the Chief Election Commissioner, New Delhi and Others** reported in (1978) 1 SCC 38. That apart, it does not lie within the power of this Court to examine them in any manner, this Court not being a financial expert.

82. There are also other factors which must be considered. If any query has been raised in the meeting held on 30.8.2019 at New Delhi, and justification was sought regarding post bid negotiations, changes made in the eligiblity criteria at the RFQ and the RFP stage, deviation from the standard documents and the current financial standing of respondent no.1 and justification to lease out the Airport, we ask a question – Would it not have been appropriate for respondent no.1 to have called upon the petitioner no.1, being a Concessionaire in whose favour the LoA dated 7.3.2019 has been issued and much water has flown from under the bridge after issuance of the LoA dated 7.3.2019, to submit it's say in respect of these issues. The answer has to be given in the affirmative. By

issuance of the LoA dated 7.3.2019, a civil right regarding execution of Concession Agreement and implementation of the project through the SPV had arisen in favour of the petitioner no.1 and therefore, there was a possibility of the petitioner no.1 being adversely affected by some decision that may have been taken in the said meeting. But, the petitioner no.1 was never asked to submit it's explanation regarding the doubts expressed by the MoCA and this does not speak of good governance on the part of the respondent no.1, which it is obliged to exhibit, it being bound by rule of law. In the case of Mohinder Singh Gill and another (supra), it is held that when a civil right is likely to be adversely affected, an invocation of audi alteram partem rule is a necessity. But, this rule, in the peculiar facts and circumstances of this case, though attracted, was ignored.

83. At this stage, we would like to deal with the argument made by learned Senior Advocate that by not extending the Bank Guarantee beyond 30.4.2020 and not furnishing any performance security, the petitioner no.1 has acquiesced in the decision of the respondent no.1 to cancel the bidding process. He has also submitted that even the Concession Agreement was not executed by the petitioner no.1 and therefore, the fault also lay with the

petitioner no.1. The argument is incorrect and deserves to be rejected. Performance security could not have been furnished till the CA was executed and the CA could not have been executed unless written intimation of approval was given to the petitioner no.1 and therefore, what was not in the hands of the petitioner no.1 cannot be made a ground to find any fault with the petitioner no.1. There is also no question of acquiescence for the reason that even after cancellation of the bidding process for about more than a month, the Bank Guarantee had remained valid and the annulment of bidding process having had taken it's toll on the petitioners, there was no reason for them to get extended the Bank Guarantee just for the heck of it. The argument is, therefore, rejected.

84. The respondents have also taken an objection to the petitioners' not making GoI through MoCA a party. The objection carries no weight and has no meaning as the petitioners have not asked for anything from the GoI or MoCA, which could be seen from the prayers made in the petition. Besides, they have not done anything which has affected the rights of the petitioner. Whatever the MoCA did was to ask for some justification from the respondents which was not given by them and a decision was straightway taken

not by the MoCA but by the respondent no.2 to cancel the bidding process and re-tender the project, which was put into effect by respondent no.1. They are, therefore, not necessary parties.

85. An argument has also been made in support of the decision to cancel the bidding process that when for two years of 2018-19 and 2019-20 Nagpur Airport was operated by the respondent no.1, good profit was earned and estimated, it made no sense to allot Nagpur Airport for it's development, operation and management to an outside agency. Alternatively, it has also been argued that re-tendering is required to be done by adopting some new model. It is also stated that already there is a long gap of five years since commencement of the bidding process and now going ahead with the same, may not be practicable.

86. All these submissions, in our considered view, do not appeal to reason. When it is said that self-operation of Nagpur Airport generates more revenue, it does not explain the decision taken by the GoM. The decision is to re-tender the project, which goes against the argument of self-operation and more revenue. When it is said that re-tendering will be done by adopting some new model, again, it does not

explain as to how would it be possible when the only approved model so far, as per the JVA, RFQ and RFP, is of competitive bidding on the basis of highest revenue share by adopting standard methodology. If this methodology of highest revenue share is to be changed, the respondents would be required to start right from amendment of the JVA. In any case, it has not been explained to us as to the likely nature of new model and whether or not the new model has been approved by the GoI and MoCA. As regards the practicability of implementation of the project through the petitioners after a long gap of about five years since commencement of the bidding process, we must say that the delay is entirely on the part of the respondents and not on the side of the petitioners. We do not understand as to why the ground of practicability of award of the project after a gap of five years has been raised by the respondents when the respondents know it well that they themselves are responsible and even if it is assumed for the sake of argument that they are not responsible, they must be held responsible for not acting responsibly in issuing the Letter of Award on 7.3.2019 about more than three years after the bidding process began and cancelling the bidding process and intimating the decision about cancellation of bidding process and re-tendering the project about five months after the PMIC had taken a decision in that regard and an year after the issuance of Letter of

Award. All the submissions are, therefore, rejected.

87. Now we would consider some more cases, which we find as supporting the conclusions made by us regarding the arbitrariness and unreasonableness of action of respondent no.1 in annulling the bidding process and also about enforceability of contractual obligations. The consideration is made in ensuing paragaphs.

88. In the case of **State of Orissa vs. Dr. (Miss) Binapani Dei and Others** reported in AIR 1967 SC 1269, the Hon'ble Supreme Court held that when an order by the State is to the prejudice of a person in derogation of his vested rights, it may be made only in accordance with basic rule of justice and fair play. In the present case, basic rule of justice and fair play required the respondent no.1 to atleast give an opportunity to the petitioner no.1 to submit an explanation in respect of doubts raised by the MoCA before it went ahead to cancel the bidding process by issuing the impugned communication. Then, it is not the case that it were the MoCA which had confirmed it's doubts about financial viability. It had only sought justification to lease out the Airport in view of current financial standing of the MIL and surprisingly enough, the respondent no.1

did not send any justification to MoCA and straightway took a decision through the PMIC and on the directives of the GoM, to cancel the bidding process. Such an action of respondent no.1 is not one of fair play; not the least of justice part.

89. In the present bidding process what was involved was not a mere award of contract for completion of some work but something which was for achieving a long term goal of development of Nagpur Airport to world class standard which would usher in economic development of Maharashtra in general and Vidarbha region in particular. Master of the bidding process was an instrumentality of the State and it was bound by such documents as MoU dated 18.8.2006, JVA dated 22.2.2009, in-principle approval given by the Union Cabinet for approval of Dr.Babasaheb Ambedkar Nagpur Airport to the JVC i.e. respondent no.1, which all spoke about developing the Nagpur Airport to world class Multi Modal International Passenger and Cargo Hub which would lead to improvement in tourism and international trade in the region and would also enable optimum utilisation of the Airport and in this way, would fulfill the long cherished demand of the people of the Vidarbha region. The respondent no.1 was also bound by the RFQ

and the RFP, which laid down the frame work within which the bidding process was to be completed or aborted. All these factors necessarily involved a public law element in the whole process and therefore, this could not have been a case involving mere enforcement of contractual obligations requiring the petitioner no.1 to shun the public law remedy of Writ Petition before this Court and take recourse to a civil law remedy for resolution of it's grievance as held in the case of Rishi Kiran Logistics Private Ltd. (supra). Therefore, this Writ Petition is maintainable. Besides, this case, as we have seen from the narration of facts made earlier, does not involve any disputed question of fact.

90. In the case of **ABL International Ltd. and another .vs. Export Credit Guarantee Corporation of India Ltd. And Others** reported in (2004) 3 SCC 553, it has been held by the Hon'ble Supreme Court that in an appropriate case a Writ Petition as against the State or an instrumentality of the State arising out of a contractual obligation is maintainable and not only that, even a Writ Petition involving a consequential relief of monetary claim is also maintainable. It is further held that when an instrumentality of the State acts in contravention of Article 14, a Writ Petition can lie for

setting right such arbitrary action. The observations in this regard are to be found in paragraph nos. 23 and 24. The relevant portions of paragraph nos. 23 and 24, for the sake of convenience, are re-produced as below :

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

> *"24.It is clear from the above two objects of the company that apart from the fact that the company is wholly a Government-owned company, it discharges the functions of the Government and acts as an agent of the Government even when it gives guarantees and it has a responsibility to discharge such functions in the national interest. In this background it will be futile to contend that the actions of the first respondent impugned in the writ petition do not have a touch of public function or*

discharge of a public duty. Therefore, this argument of the first respondent must also fail.

91. There is another perspective to the issue involved here, which we find it necessary to dwell upon. Awarding of a contract of a project of immense public interest, which is the case here, is ultimately a new form of property *in the shape of Government largesse,* declared the Hon'ble Supreme Court in the case of **Ramana Dayaram Sheetty .vs. the International Airport Authority of India and Others** reported in (1979) 3 SCC 489. In this very case, the discretion of the Government in grant of such largesse has been held to be not unlimited; in that Government cannot give largesse in it's arbitrary discretion or at it's sweet will or on any such terms as it chooses in it's absolute discretion. The Hon'ble Supreme Court further held that there are, however, two limitations imposed by law which structure and control the discretion of the Government in this behalf with the first being in respect of the terms on which largesse may be granted and the other being in regard to the persons who may be recipients of such largesse. Hon'ble Supreme Court in the case of **M/s. Kasturi Lal Lakshmi Reddy, represented by it partner Shri Kasturi Lal, ward no.4, Palace Bar, Poonch, Jammu and Others .vs. State of Jammu and**

Kashmir and another reported in (1980) 4 SCC 1 has held that in granting the largesse, the State cannot act as it pleases. It further held that whatever be its activity, the Government is still the Government and is subject to restraints inherent in its position in a democratic society and therefore, the Constitutional power conferred on the Government would require it to act reasonably and in public interest even in contractual matters. The observations of Hon'ble Apex Court made in this regard appear in paragraph 11 of the said Judgment, which reads thus :

> "*So far as the first limitation is concerned, it flows directly from the thesis that, unlike a private individual, the State cannot act as it pleases in the matter of giving largesse. Though ordinarily a private individual would be guided by economic considerations of self-gain in any action taken by him, it is always open to him under the law to act contrary to his self-interest or to oblige another in entering into a contract or dealing with his property. But the Government is not free lo act as it likes in granting largesse such as awarding a contract or selling or leasing out its property. Whatever be its activity, the Government is still the Government and is, subject to restraints inherent in its position in a democratic society. The constitutional power conferred on the Government*

cannot be exercised by it arbitrarily or capriciously or in an unprincipled manner; it has to be exercised for the public good. Every activity of the Government has a public element in it and it must therefore, be informed with reason and guided by public interest. Every action taken by the Government must be in public interest; the Government cannot act arbitrarily and without reason and if it does, its action would be liable to be invalidated. If the Government awards a contract or leases out or otherwise deals with its property or grants any other largesse, it would be liable to be tested for its validity on the touch-stone of reasonableness and public interest and if it fails to satisfy either best, it would be unconstitutional and invalid."

93. The law laid down in above-referred cases applies to the facts of this case. The facts of this case discussed earlier show that the present bidding process involves a public law element and, therefore, the requirement of law for a party like the respondent no.1, an instrumentality of the State, is to act reasonably and in public interest and not arbitrarily or capriciously. Even in a contractual matter like the present one, necessity for the State and it's instrumentality to act reasonably and fairly is an intrinsic part of Article 14 of the Constitution of India and it along with Article 21

channelises the exercise of Constitutional power into a vibrant and life sustaining stream of rule of law. The impugned communication, as we have seen, is arbitrary, unreasonable and unfair, and has, therefore, breached the stream of rule of law. It has thereby adversely affected the rights vested in the petitioner no.1 by virtue of issuance of LoA to it. Such an action of respondent no.1 is against public interest as it is not taken reasonably, and fairly. We, therefore, find that the action of respondent no.1 in annulling the bidding process by the impugned communication is arbitrary, unreasonable and unfair.

94. About the objection of disputed questions of facts being involved here, we must say that this case is mainly based on the record created by the parties and it's correctness has not been doubted by the parties. As such, there are no disputed questions of fact which have troubled us here. About the availability of Civil court remedy for enforcement of contractual obligations, we have already made ourselves clear that this petition involving a public law element and further elements of unreasonableness and lack of fair play in State action, is maintainable here.

95. In view of above, we find that the impugned communication is arbitrary, unfair and unreasonable and, therefore, it deserves to be quashed and set aside. We further find that in this case there are no such disputed questions of facts as would shut out the Writ jurisdiction of this Court. We also find that this case does not involve a mere enforcement of contractual obligations simplicitor, but involves an issue of enforcement of public law right arising out of contractual obligations. This petition is, therefore, maintainable. Questions (d) and (e) are answered accordingly.

Interlude

96. Before parting with the Judgment, we find it necessary to deal with some more cases relied upon by the respondent no.1. They are as follows :

a) Jagdish Mandal vs. State of Orissa and Others, (2007) 14 SCC 517.

b) Gupta Sugar Works vs. State of U.P. and Others, 1987 (Supp) SCC 476.

c) Reliance Telecom Limited and another .vs. Union of India and another, (2017) 4 SCC 269.

d) Municipal Council, Neemuch .vs. Mahadeo Real Estate and Others, (2019) 10 SCC 738.

97. In the case of **Jagdish Mandal vs. State of Orissa and Others** reported in (2007) 14 SCC 517, it is held that evaluating tenders and awarding contracts are essentially commercial activities and principles of equity and natural justice stay at a distance. It is further held that if the decision relating to award of contract is bona-fide and is in public interest, Courts will not exercise power of judicial review. In the instant case, we have found that the decision as manifested through the impugned communication suffers from the vice of arbitrariness and unreasonableness and it is hit by the doctrines of promissory estoppel and legal malice and that it is not found to be taken in public interest and therefore, on the parameters of said case of Jagdish Mandal (supra), judicial review of the impugned decision is permissible.

98. In the case of **Gupta Sugar Works .vs. State of U.P. and Others** reported in 1987 (Supp) SCC 476, it is held that price fixing is neither a function nor a forte of the Court and the Court only examines whether the price determined was with due regard to the considerations provided by the Statute and whether extraneous considerations, have been excluded from determination, as the Court not being an expert cannot substitute it's decision for that of an

expert. Same principle of law is laid down in the case of **Reliance Telecom Ltd. and another vs. Union of India and another,** (2017) 4 SCC 269. By applying these principles of law only that we have made our enquiry and given our answers here.

99. In the case of **Municipal Council, Neemuch .vs. Mahadeo Real Estate and Others** reported in (2019) 10 SCC 738, it is held that the scope of judicial review of an administrative action is very limited. It is further held that unless the Court comes to a conclusion that the decision-maker has not understood the law correctly that regulates his decision-making power or when it is found that the decision of the decision-maker is vitiated by irrationality and that too, on the principle of "Wednesbury reasonableness" or unless it is found that there has been a procedural impropriety in the decision-making process, it would not be permissible for the High Court to interfere in the decision-making process. It is further held that it is not permissible for the Court to examine the validity of a decision but the Court can examine only the correctness of the decision-making process. What we have examined here is the correctness or otherwise of the decision making process by following these principles of law.

Conclusion And Final Order

100. In the result, we find that the impugned communication is not sustainable in the eye of law and it deserves to be quashed and set aside. We further find that a direction to the respondents is necessary to take further steps in the matter. The petition is, therefore, allowed.

The impugned communication dated 19.3.2020 is hereby quashed and set aside.

The respondents are directed to take further necessary steps as prayed for in prayer clause (b) of the petition within six weeks of the Judgment and Order.

In the facts and circumstances of this case, there shall be no order as to costs.

JUDGE JUDGE

jaiswal