

Nandi Highway Developers Ltd Vs. Executive Engineer (Union of India)

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Court : Karnataka Dharwad

Decided On : Oct-24-2017

Judge : G.Narendar

Appeal No. : WP 105421/2016

Appellant : Nandi Highway Developers Ltd

Respondent : Executive Engineer (Union of India)

Judgement :

1 R IN THE HIGH COURT OF KARNATAKA DHARWAD BENCH DATED THIS THE24TH DAY OF OCTOBER 2017 BEFORE THE HONBLE MR. JUSTICE G. NARENDAR W.P. NO.105421/2016 (GM-RES) BETWEEN: NANDI HIGHWAY DEVELOPERS LTD1 MIDFORD HOUSE, MIDFORD GARDEN OFF MG ROAD BANGALORE560001 REPRESENTED BY ITS DIRECTOR MR. SHIVAKUMAR KHENY AGE ABOUT68YEARS. (BY SRI. DHYAN CHINNAPPA-SR. COUNSEL FOR SRI. PETITIONER RAJASHEKHAR BURJI, SRI. S.B. MATHAPATI, SRI. GURURAJ.K. DESHPANDE, SRI. KOTRABASAPPA. H- ADVOCATES) EXECUTIVE ENGINEER AND:

1. (UNION OF INDIA) PUBLIC WORKS, PORTS & IWT DEPARTMENT (NATIONAL HIGHWAYS) PWD ANNEXE BUILDING, KR CIRCLE BENGALURU2 PUBLIC WORKS, PORTS & IWT DEPARTMENT (NATIONAL HIGHWAYS) NH CIRCLE, DHARWAD SUPERINTENDING ENGINEER2BHARAT PETROLEUM

COMPANY LTD.

3. EXECUTIVE ENGINEER PUBLIC WORKS, PORTS & IWT DEPARTMENT (NATIONAL HIGHWAYS) VISHWESHWAR NAGAR HUBBALLI-32 4. NO.G5& 6, SECTOR10 DWARKA, NEW DELHI11007. REPRESENTED BY ITS CHIEF GENERAL MANAGER5 BELGAUM TERRITORY NEAR DESUR RAILWAY STATION, ZEDSHAHPUR, DESUR POST, BELGAVI590014. REPRESENTED BY ITS TERRITORY MANAGER (RETAIL) 6. AGE: MAJOR, OCC: BUSINESS GOOD SHED ROAD, KULKARNI HAKKAL, HUBBALLI-580 020 7. BY THE MINISTRY OF HIGHWAYS AND SURFACE TRANSPORT, TRANSPORT BHAVAN NO.1, PARLIAMENT STREET, NEW DELHI110001, REPRESENTED THROUGH CHIEF ENGINEER. (BY SMT. VIDYAVATHI.K. - AGA FOR R2 & R3 SRI. M.B. KANAVI - ADV. FOR R1, SRI. K.L. PATIL - ADV. FOR R5, SRI. DINESH M. KULAKARNI - ADV. FOR R6, SRI. MRUTYUNJAYA TATA BANGI - ADV. FOR R7, UNION OF INDIA MR. N.H. KOPPAD, NATIONAL HIGHWAYS AUTHORITY OF INDIA RESPONDENTS 3 (V/O/D-11.07.2016) SRI. R.V. NAIK - ADV. FOR R4 & R7 SRI. SHIVASAI.M. PATIL - ADV. FOR R4. V/O/D-30.11.2016) THIS W.P. IS FILED PRAYING TO QUASH THE IMPUGNED NOC/LETTER DATED2212.2015 ISSUED BY RESPONDENT NO.1 VIDE ANNEXURE-A ETC. THIS WRIT PETITION HAVING BEEN HEARD AND RESERVED FOR

ORDER

; THIS DAY, THE COURT MADE THE FOLLOWING: Date of Reserving the Order
Date of pronouncing the Order : :

17. 10.2017 24.10.2017

ORDER

Heard the learned senior counsel for the petitioner, the learned counsel for respondent No.1, the learned Addl. Government Advocate for respondent Nos.2 and 3, the learned counsel for respondent Nos.4 and 7, the learned counsel for respondent No.5 and the learned counsel for respondent No.6. The brief facts necessary for adjudicating the lis between the parties is as follows:

2. 4 The petitioner is a company incorporated and concessionaire under the Concession Agreement entered into and executed by the Union of India, State of Karnataka- represented by its Secretary, Public Works Department and M/s. Bharat Forge Limited, a company incorporated under the provisions of Companies Act. M/s. Bharat Forge Limited is referred to as bidders to the Hubli-Dharwad Bypass Concession Agreement and M/s. Nandi Highway Developers i.e., the petitioner herein is referred to as Special Purpose Vehicle [SPV for short]. under the Concession Agreement, which is produced and marked as Annexure-B to the writ petition.

3. The Concession Agreement dated 05.02.1998 has been entered into for the purpose of constructing and maintaining the Hubli-Dharwad bypass, being a part of the National Highway No.4. The project was conceived as a Build, Operate and Transfer [BOT for short]. Scheme. In pursuance thereof, tenders were invited and M/s. Bharat Forge Limited, 5 who is referred to as bidder in the Concession Agreement was declared as the successful bidder. Thereafter, the present petitioner was introduced into the Concession Agreement as a SPV. The project was conceived as a two lane highway bypass only.

4. It is claimed by the petitioner that under Clause 5.3.6 of the Concession Agreement, the right to develop and maintain part of the highway [by-pass]. is vested with the concessionaire. That the right to maintenance would vest in it the absolute right to control traffic including the right to control access to the highway.

5. It is contended, that by the impugned proceedings i.e., grant of access permission by the 2 nd respondent is violative of the provisions of the Concession Agreement more particularly, Clause 5.3.6 of the Concession Agreement and that the right to grant access permission is vested only with the petitioner in terms of the Concession Agreement vide 6 Annexure-B and hence, the impugned proceedings is by an incompetent authority and hence is vitiated and illegal.

6. It is not in dispute that the 5 th respondent had sought for a no objection certificate for the purpose of establishing a petroleum product dispensing retail out-let, in the land owned by the 6 th respondent. It is also not in dispute that pursuant to the no objection/access permission, granted by the 2 nd respondent,

the 6th respondent commenced preparation and has executed civil work for establishing the retail unit. The photographs placed on record by the petitioner at Annexure-J series evidences the same.

7. It is contended by the learned senior counsel for the petitioner that the 7th respondent-Union Government with a view to encourage investments from private players, in the arena of infrastructure development, conceived participation of the private sector and one such sector was the development of national highways. That the Union Government with a view to achieve the object, amended the provisions of Section 8 of the National Highways Act, 1956 [Act of 1956 for short]. vide amendment Act 26 of 1995 and inserted the provisions of Section 8A into the National Highways Act, 1956. [NH Act for short].. Pursuant to the amendment, the Central Government came to be vested with the statutory power and authority to execute Concession Agreements for the purpose of achieving the object of development and maintenance of national highways, by which, either the whole or any part of national highway could be awarded and sub-Section (2) of the amended provision vested in favour of the Concessionaire a right entitling it to collect and retain fees at such rate, for the services or benefits rendered by him as the Central Government may, by notification in the Official Gazette specify. That such rates are to be calculated after having regard to the expenditure involved in building, maintenance, management and operation of the whole or part of such national highway, interest on the capital invested, reasonable return, the volume of traffic and 8 the period of such agreement. Under sub-Section (3) of Section 8A of the Act of 1956, the Concession holder shall have powers to regulate and control the traffic in accordance with the provisions contained in Section 8A of the Act of 1956, which reads as follows: Power of Central Government to enter into agreements for development and maintenance of national highways.- (1) Notwithstanding anything contained in this Act, the Central Government may enter into an agreement with any person in relation to the development and maintenance of the whole or any part of a national highway. (2) N o t w i t h s t a n d i n g a n y t h i n g contained in section 7, the person referred to in sub-section (1) is entitled to collect and retain fees at such rate, for services or benefits rendered by him as the Central Government may, 9 by notification in the Official Gazette, specify having regard to

the expenditure involved in building, maintenance, management and operation of the whole or part of such national highway, interest on the capital invested, reasonable return, the volume of traffic and the period of such agreement. (3) A person referred to in sub- section (1) shall have powers to regulate and control the traffic in accordance with the provisions contained in Chapter VIII of the Motor Vehicles Act, 1988 (59 of 1988) on the national highway forming subject- matter of such agreement, for proper management thereof. 8. The learned senior counsel would take this Court through the provisions of Chapter VIII of the Motor Vehicles Act, 1988 (M.V. Act for short) including the provisions of 10 Sections 112 to 138 and the chapter is titled as Control of Traffic. It is contended that if the provision of Chapter VIII of the M.V. Act are read in conjunction with the provisions of Clause 5.3.6 of the Concession Agreement, it amplifies the fact that not only the power to control the traffic as envisaged under Chapter VIII is vested with the petitioner but, also the right to control the access to the highway is vested in the concessionaire i.e., the petitioner herein. It is contended that the right to control of traffic includes the right to control the access to the project highway and it has to be read as such.

9. It is further contended that under the provisions of Chapter VIII more particularly, in the light of Section 112, the concessionaire has the right to limit the speed of the vehicle running on the road and the weight of the vehicle in terms of Section 113 of the M.V. Act and that the concessionaire is entitled to erect traffic signs as well as private traffic hoarding under Section 119 of the N.H. Act. It is contended that the above provisions coupled with the provisions of Section 8A of 11 Act of 1956 absolutely vests with the petitioner, the right to decide with regard to establishment of resting stations, where the public service vehicles may stop, way-side amenities, etc. That this absolute power is granted by the statute and cannot be abrogated except by an amendment to the statute, that is to Section 8A of NH Act of 1956.

10. It is contended that it is no doubt true that in such BOT project, the land belongs to the Government and it is handed over to the concessionaire for a certain specified period and during the said period, the concessionaire acquires certain inviolable rights and the same cannot be altered to the disadvantage of the concessionaire except by way of an amendment to the statute. But it is fairly

admitted that there is no lease of the project land involved nor granted in favour of the petitioner.

11. It is contended that, in respect of that part and parcel of the national highway, over which concession is 12 granted, both the Central and the State Government are denuded of authority to exercise any right over that place of the project highway, during the concession period.

12. It is contended that the right to establish any amenity or facility in any part of the project highway has been vested with the concessionaire only and once such a right to establish or create any amenity or facility is vested with the concessionaire, it has to be construed that the right to grant permission has also necessarily be read into the right vested in the petitioner to establish an amenity/facility.

13. It is further contended that once the access control is handed over to the concessionaire in terms of Section 8A of the Act of 1956 as well as by the Concession Agreement, then, it necessarily has to follow, that access permission has to be obtained from the concessionaire and any other interpretation would render nugatory the Concession Agreement in letter and spirit. That the Highway Administration, ceases to have control over such stretch of the national highway, which is handed over to a private party/concessionaire. Hence, the only logical conclusion that can be deduced is that access permission to that part of the project highway which is under the control of concessionaire, have to be sought and can be granted only by the concessionaire and not by the highway administration authority. The petitioner being in possession, ought to have been kept in the loop and the private respondent ought to have been asked to secure the permission from the concessionaire and the unilateral exercise of powers by the Highway Administration is illegal, unsustainable and in contravention and breach of the terms of the contract itself and hence, the petitioner prays for issuance of a writ of certiorari impugning the in-principle approval or no objection issued by the regional officer, who is the Highway Administrative Authority under the Control of National Highway (Land and Traffic) Act 2002 [Act of 2002 for short]..

14. 14 The respondents i.e., the Union Government, represented by the Ministry of Highways and Surface Transport and the National Highways Authority of India and the Executive Engineer, Public Works, Ports & IWT Department [National Highways]. have filed a detailed statement of objections.

15. It is contended by them that as per Clause 18.7 of the Concession Agreement, the ownership of the road continues to vest with the Union Government and that the Company is entitled only for collection of revenue in lieu of construction and maintenance of the project road and further as per Clause 18.8 of the Concession Agreement, the concessionaire has to hand-over to this respondent all the building and equipment including the toll plaza erected and maintained by it. It is contended that the question of granting access permission does not arise as there is no crossing facility at the sanctioned location and hence, the question of incursion or excursion of non-toll paid vehicles does not arise. 15 That the concept of access control is applicable only in respect of ingress and egress of vehicles at the designated points of access and that the concessionaire is entitled to regulate or control the access of vehicles on to that part of the toll road, i.e. at the entry point, with a view to ensure prevention of leakage of revenue on account of any unauthorized incursion of traffic into the tolled section of the project road.

16. It is contended that the total stretch of the toll road is only 30.34 kms. and entry to the toll road is only through the tolls established at 2 locations and the 3 interchanges along the bypass. It is further contended that the access control given to the petitioner is relevant only for the purpose of regulating the entry of traffic on to the toll roads at the 2 main sections and 3 interchanges and at these facilitation points alone, which provide access to the tolled road and that there is no other access point even to the knowledge of the petitioner. Hence, the question of the petitioner being entitled to the right of granting access 16 permission does not arise as approval of the facility does not involve the incursion and excursion of vehicles that have avoided toll fee and consequently, there is no leakage of revenue.

17. It is contended that the Ministry of Highways and Surface Transport is the prime agency for development, construction and maintenance of the national

highways across the country and the primary object of the Ministry is to execute projects through different agencies like the State Public Works Department, National Highway Authority of India and Private Entrepreneurs, on the said BOT method.

18. It is further contended that refueling and refilling is an important way-side facility on all national highways more particularly, on the project stretch of the road as there is no other refueling station in the entire stretch of the particular bypass road. That the Ministry by various circulars more particularly, Circular bearing No.RW/NH-33023/19/99-DO-III dated 31.08.2000 and Circulars bearing No.RW/NH- 33023/19/99-DO-III dated 25.09.2003 and 17.10.2003 has laid-down stringent guidelines for establishment of fuel station and other facility along the national highways and that the guidelines have been framed keeping in view the safety parameters of motorists. It is further contended that the unified norms have been codified only with an intention of ridding the department of arbitrariness in the matter of granting approvals.

19. It is contended that as regards the safety aspects of the project, the Ministry places reliance on the guidelines endowed in the Indian Road Congress and follows the norms laid-down therein. The broad guidelines and parameters, which are taken into consideration by the authority are (i) norms for location, layout, ingress and egress to the fuel station along NHs, (ii) general conditions of siting, separately for non-urban (rural) stretches, rural stretches, divided and undivided carriageway sections, (iii) specifies the minimum 18 distance from intersection with the national highways, state highways, MDRs., ODRs., and with the rural roads/approach roads to private and public properties. The guidelines also specifies about the (iv) standard dimensions of plot size for fuel station, (v) has standardized the access layout plan for fuel stations along undivided carriageway sections, divided carriageway sections and also in case of fuel stations in mountainous terrains and urban stretches separately. That these guidelines nowhere permit direct entry to the fuel station from the national highway. On the contrary, access is provided by a deceleration lane having a minimum length of 70 mtrs. and acceleration lane having minimum length of 100 mtrs. That all the above parameters are technically adjudged and hence it is asserted that there is no

grave danger that is occasioned on account of establishment of fuel station.

20. That the Ministry has set-out elaborate guidelines dated 24.07.2013, which requires to be adhered to while giving permission for access to national highways. It is 19 contended that the power to grant permission for access lies with the Highway Administration as constituted under Section 3 of the Act of 2002 and that under the said Act, the authority to grant right of access is vested in the Highway Administration as per the provisions of sub-Section (1) of Section 28 and Section 29 of the Act of 2002. It is further contended that the access to highway is subject to the guidelines and instructions issued by the Central Government from time to time. It is further contended that Section 29 of the above Act mandates the procedure to be followed for grant of permission to access the highway. It is further contended that Section 23 of the Act of 2002 has deemed that the highway land to be a property of the Central Government. The Act of 2002 also provides for establishment of a Tribunal. Further, by notification dated 02.06.2015, the Central Government has also notified the Regional Officer to exercise power of the Highway Administrator. 20 21. The Ministry by a D.O. letter has been pleased to nominate the Chief Engineers and Superintending Engineers posted and officiating in the Regional Offices to officiate and discharge the duties of the Regional Officer including exercising the powers of the Highway Administration under Section 28 of the Act of 2002. The scope, duties and responsibilities of the Regional Officer has been placed on record by the Ministry along with the additional statement of objections dated 20.01.2017.

22. It is further contended, that apart, the Ministry has also relied upon the Geometric Design Standards for Rural (Non-Urban) Highways and it has also placed reliance on the Manual of Specifications and Standards for Two Laning of Highways with Paved Shoulder and the Manual of Specifications & Standards for Four Laning of Highways through Public Private Partnership and they have also placed on record the check-list with regard to the fuel station facility sanctioned in favour of the 5 th respondent, which is yet again 21 a Government of India undertaken. A perusal of the check-list would show that the authorities have executed a detailed exercise with regard to measurements, for which the reference point would be from the central line of the nearest carriage way. It is

contended that the only right of access control vested with the concessionaire, is only the right to regulate the entry of vehicles at the entry points i.e., the two toll plazas and the 3 interchanges and that is, in order to ensure that no vehicle is able to use the project toll road, without suffering payment of toll fee.

23. It is asserted by the respondents that there are no clauses or terms in the Concession Agreement, which mandates the reference of the application for access permission to the concessionaire and that it is only the Highway Administration, which is empowered and has accordingly processed the proposal of the 5th respondent company, which complies with the guidelines issued by the Ministry on 24.07.2013.

24. 22 It is contended that the entire length of 30.34 kms. of the bypass, is the toll road and the only available entries to the road is through the designated tolls and interchanges. Hence, the question of fuel the station enabling the unauthorized entry or exit of vehicles from and to the toll road is ruled out.

25. It is further contended that the sanctioned facility does not in any way come within the ambit of Section 8A of the N.H. Act. It is contended that Section 112 of the M.V. Act which enables specifying of speed limits, can only be exercised by the Central or the State Government as such speed limit can only be brought into existence by means of notification and that the power/authority to publish a notification in a gazette is vested only with the Government. It is contended that the concessionaire can only, at the most, recommend to the respective Government any proposed measure and does not possess any vested right. It is further 23 contended that as regards the provision of Section 113 of the N.H. Act, with reference to limit of weight and limitation on use, the power of concessionaire are not absolute, but only enables the same to execute what is prescribed by law at the entry points only. It is also contended that in respect of N.H. Act, the provisions of Section 114 of the N.H. Act the concessionaire can at most only verify, that the vehicle entering the express way or carriage way would not be carrying loads beyond the prescribed laden weight and no right is vested in the concessionaire to prescribe the laden and un-laden weight of the vehicles, which is again a statutory function and can be exercised only by the statutory authority

by way of notification in the official gazette.

26. It is contended that the specific reference to the provisions of Section 117 of the M.V. Act is also of no avail. As the same deals with the parking places and halting stations as it pertains to the fact of motor vehicles being permitted to remain idle at a particular place for a definite or indefinite 24 period and hence, the same does not apply to a fuel station. The Ministry further rejected the contention of the petitioner that the establishment of the fuel station amongst others, comes within the ambit of control of traffic. It is contended that no question of controlling any traffic arises and that the vehicles which have been permitted a right of way over the two lane by-pass merely enter and exit the fuel station and requires no control or regulation of traffic and that the entry and exit are through stipulated deceleration and acceleration lanes, leading to and from the facility and that the access to the facility is not directly from the national highway or carriage way, but through the deceleration and acceleration lanes only, which are of specified length and which connects the facility with the main carriage way. It is further contended that the sanctioned plan does not provide for any crossing facility at the location. That the Regional Officer in exercise of the powers conferred under the Act and in compliance of the guidelines notified by the Ministry of Highway by notification has been pleased to grant the in- 25 principle approval. It is contend that the 5 th respondent had engaged only the empanelled architects for drawing up of the designs of the facility as is required under the Act of 2002.

27. It is further contended that the approval of the facility is in compliance of the Ministrys guidelines dated 24.07.2013 and as per the certification by the Field Officer of the State Public Works Department and N.H. Division 1. That the Field Officer has visited the location and has physically verified it with the available data, as per the check-list appended to the Ministry guidelines and that the Highway Administration after cross-checking the data for compliance of the stipulated guidelines have proceeded to process the application by the respondents. That all the clarifications have been provided by the private respondent. It is stated that the licensee is required to pay a one time fee of Rs.2 lakhs with 5% license fee to be increased in subsequent years. 26 28. The State Government has also filed a detailed objections, which are in pari materia to the objections taken on behalf of

the Union Government and the Highway Authority. That apart, they have categorically stated that the Officers of the State have inspected the location, verified the data and thereafter the same was recommended.

29. The 5 respondent has also placed on record its objections with regard to the factual aspects of the lis apart from the legal aspects. It has further contended that it has sanctioned an amount of Rs.24.50 lakhs and it has also spent a sum of Rs.5 lakhs to procure oil storage tank and they have also paid a sum of Rs.2.10 lakhs as fee to the authority. It is further asserted that the facilities in the location, meaning thereby proposed buildings, are portable cabins and no permanent structure is visualized and that the approvals from the other department including Village Panchayat, Fire Brigade, Police, P.W.D., Revenue Department and lastly from the District Magistrate have been obtained and hence, it is 27 prayed that the writ petition is bereft of merits and is liable to be rejected in toto.

30. It is contended by the learned senior counsel that once the Concession Agreement is executed and access control as provided under Clause 5.3.6 of the Concession Agreement is vested with the concessionaire, the entire act of permitting or not permitting access to the carriage way vests with the petitioner only and that wherever an access point is created, it can only be with the sole and exclusive permission of the petitioner. It is contended that with the culmination of the execution of the Concession Agreement and fixation of entry and exit point, there cannot be an act of indirectly allowing another access point and such an act would amount to altering the approved design, which is sacrosanct and is impermissible and any such act would be in breach of the contract. The learned senior counsel would draw the attention of this Court to Clause 5.3.6 of the Concession Agreement which reads as under:

28. The Company shall have the right to control the access to the bypass outside the inter changes by means of fencing or other suitable methods, subject to provision of adequate crossing facilities. 31. He would contend that from a reading of the above it is made completely clear that the access control is exclusively vested in the concessionaire. He would lay further stress on the point of, right to control the access and state that it is all encompassing and the impugned act

amounts to whittling down the rights vested in the concessionaire and the same is impermissible as amounting to breach of the terms and conditions of the contract. He would further proceed to enlarge the contention by stating that, in view of the provisions of Section 8A of the Act of 1956, the Central Government has been vested with the power to enter into the Concession Agreement for development and maintenance of the national highways. He would draw the attention of the 29 Court to Sub-section (3) of the said Act, which reads as follows: A person referred to in sub- section (1) shall have powers to regulate and control the traffic in accordance with the provisions contained in Chapter VIII of the Motor Vehicles Act, 1988 (59 of 1988) on the national highway forming subject- matter of such agreement, for proper management thereof. 32. He would submit that if the provisions of sub- Section (3) of Section 8A of the Act of 1956 are read in conjunction with the provisions of Clause 5.3.6 of the Concession Agreement, the only logical conclusion that could be arrived at is that the entire power of granting or denying access permission is vested with the concessionaire only and that the statutory authorities constituted under the Act and Rules pursuant to the notification dated 02.06.2015 are denuded of any authority to exercise the power under Section 30 28 or 29 of the Act of 2002. Advancing and developing the said contention, he would state that it must be read and understood that the Act and Rules and the Notifications issued pursuant to it enable the Officers only in respect of such projects, which are developed, constructed and maintained by the Official respondents themselves i.e., in particular, 4 th respondent. He would contend that by no stretch of imagination can an interpretation be laid-down that the Act, Rules and Notifications issued thereunder apply to the projects being developed and maintained by private entities. As such an interpretation would be against the very grain and spirit of public-private-partnership. He would also draw the attention to Clause 6.1 of the Appendix-I to the Government Notification dated 24.07.2013, which pertains to access for new fuel stations along un-divided carriageway sections. Clause 6.1.1 of the Appendix-I reads as follows: The access to the fuel stations along un- divided carriageway sections of National Highway shall be through deceleration and acceleration 31 lanes. The deceleration and acceleration lanes may be dispensed with for the fuel stations located along urban roads and roads in hilly and mountainous terrain. The access to the fuel stations located on

National Highways with service road shall be only through that service road. 33. He would contend that there is no service road and that the Government of Karnataka by notification in the year 2001 has proposed widening of the two lane carriage way into a four lane carriage way and that the authorities have not taken the said fact into consideration prior to sanctioning of the access permission.

34. He would contend that the respondents have not followed their own norms and have blindly sanctioned the facility only in order to favour the 6th respondent. He would further draw the attention of the Court to Clause 6.1.4 of the Appendix-I and submit that as per the said Clause, a separate island is required to be provided in front of the fuel station so 32 that no right turning takes place and the length of the separate island would be determined on the basis of the intersecting points of the edge line of the separator island with the line drawn along the edge of chevron markings as indicated in Figures 1 and 2 of the norms and hence he would argue as to who is to foot the bill for installing the separator island. He would also draw the attention of the Court to Clause 6.1.6 stating that the provision for such a sudden can only result in accidents and further developing the contention, he would draw the attention of this Court to Annexure-H to t h e w r i t p e t i t i o n . A p p e r u s a l o f A n n e x u r e - H w o u l d demonstrate the same to be a compilation of the data with regard to the accidents that have occurred between the period from 01.01.2015 to 04.07.2016. In all, nearly 200 accidents have taken place. He would contend that the abnormally high rate of the accidents is on account of the proposed facility. He would also place reliance on Annexure-J series, which is a s e r i e s o f p h o t o g r a p h s , d e m o n s t r a t i n g l a y i n g o f t h e deceleration and acceleration lanes and leveling of the site 33 where it is proposed to set up the facility. He would contend that every time a vehicle accelerates out of acceleration lane, the possibility of an accident occurring is omnipresent.

35. Nextly, it is contended that the approved plan is contrary to the respondents own specification of not permitting constructions within a distance of 75 mtrs. He would state that as per the sanctioned plan, the proposed buildings are within 75 mtrs. distance. In support thereof, he has placed on record a copy of the sanctioned plan. A perusal of the same would prima facie show, that the proposed

buildings are beyond 75 mtrs. mark. Further, the learned senior counsel is unable to state as to what is the total size of the plot that is now been considered for housing the fuel station. The learned senior counsel would attempt to make out a case based on the markings set-out in the plan. Prima facie, the markings are not conclusive of the allegations being set-out by the petitioner. 34 36. Next, the learned senior counsel would contend that even assuming without admitting that the power of granting access permission is exercisable by the statutory authority, then the petitioner had a right of audience as a project executor and contractor and it ought to have been heard before grant of approval for establishing the fuel station. He submits that on this count alone, the impugned approval is contrary to the known and settled principles of natural justice and hence, the same is vitiated and calls for interference by this Court. Next, it is contended by the learned senior counsel that the order is not passed by the competent authority vested with the power under Section 28 of the Act of 2002. He would draw the attention of the Court to the impugned order at Annexure-A and would state that the said document though emanating from the office of the Superintending Engineer but, the same is signed by the Executive Engineer and hence, he would submit that the impugned order is passed by an incompetent authority and hence, it is bad in the eye of law. 35 37. Per contra, the learned counsel for the Ministry would contend that the writ is not maintainable in view of the Arbitration Clause contained in the Concession Agreement, more particularly, he would draw the attention of the court to Clause 19 of the Concession Agreement and would submit that the parties be relegated to arbitration. The said contention is rejected on the premise that it was being raised belatedly and after the matter was substantially heard. Further, as it involved determination of third party rights i.e., th 5 and 6 th respondents, the counsel fairly submits that this Court may hear the matter in the light of the concurrent jurisdiction vested in the Court under the provisions of Section 15 of the Act of 2002. Further, as it involved interpretation of the Concession Agreement, it was agreed that this Court proceed with the hearing in disposal of the writ petition.

38. Next, the learned counsel for the Ministry would submit that the interpretation to Clause 5.3.6 of the Concession Agreement is erroneous. Further elaborating, he 36 would contend that access control stipulated in the said Clause is relatable only to designated entry points under the Concession Agreement and is in no way

relatable to the access permission as envisaged under Section 28 of the Act of 2002. He would further contend that the petitioner was put on notice at the earliest point of time and the petitioner chose to remain a mute spectator. He would submit that the petition is vitiated by delay and laches. He would draw the attention to one of the communication dated 05.10.2015 and submit that the copy of the same has been forwarded to the General Manager of the petitioner company. He would state that the petitioner has slept over the same for almost a year and thereafter approached this Court and hence, this petition is vitiated by delay and laches. He would further endeavour to develop this argument and would contend that the writ petition is vitiated by delay and laches on account of the fact of creation of third party rights, by the time petitioner approached this Court. He would contend that the petitioner having been indolent and negligent and thereby permitting 37 creation of third party right, has disentitled itself for any equitable reliefs much less for issuance of a writ of certiorari. A copy of the letter dated 05.10.2015 is produced by the 5 th respondent as Annexure-R5B3, but the petitioner deemed fit to approach this Court in July 2016. He would contend that the petitioner did not raise even a whisper of an objection and that the approval which is impugned in the present petition came to be passed on 22.12.2015 and thereafter, the 5 th respondent commenced the construction activity and that substantial work has been done and substantial amount has been expended. The petitioner after an inordinate delay of nearly 7 months, approached this Court and hence, he would submit that the writ petition is liable to be rejected on the sole ground of delay and laches.

39. The learned counsel for the Ministry would further submit that the interpretations of all the statutory provisions, on which reliance is placed on by the learned senior counsel is contrary to the law and settled principles of interpretation. He 38 would contend that the provisions of the Act of 2002 are unambiguous and specifically worded and give no scope for any vagueness. He would contend that the Act of 2002 categorically vested the power of granting access permission in the statutory authority only and that neither the Act of 2002 nor the Concession Agreement envisaged a departure from it. He would contend that the access control as provided under Clause 5.3.6 of the Concession Agreement is only with regard to regulation of entry of the vehicles at the

designated points and it is nothing more and nothing less and hence, the interpretation otherwise is unsustainable and neither under the Act of 2002 nor under the Concession Agreement, such a right is ostensibly conferred on the petitioner.

40. He would submit that the facility of fuel station has been conceived by respondent Nos.5 and 6 and that the fuel station project was thereafter handed over to the empanelled architect, who was well versed with the guidelines. After preparation of the plan in accordance with 39 the guidelines, the same was forwarded to the Field Officer, who thereafter visited and inspected the location site and submitted a report. He would contend that even the Officers of the State from the relevant department viz., Public Works Department and the District Magistrate have visited the location site and have thereafter expressed their consent and no objection to sanction the facility. He would contend that the petitioner has not been able to place even an iota of evidence demonstrating any error in the planning and execution of the fuel station facility. That it is also not the case of the petitioner that the sanctioned plan does not conform to stipulated guidelines.

41. He would contend that under the Concession Agreement, no proprietary right has been vested in the petitioner. He would contend that as per sub-Clause 18.7 of the Concession Agreement read with Section 23 of the Act of 2002, the highway land is deemed to be the property of the Central Government. 40 42. Next, he would contend that though the provisions of Section 8A(3) of the Act of 1956 enable the vesting of power envisaged under Chapter VII of the N.H. Act, it cannot be inferred that the act visualizes a subrogation of the statutory powers to the contractor and that the invocation of the powers under Chapter VIII of the said Act by the contractors is to the extent of only supplementing and aiding the statutory authority and at most it could be construed to be merely a recommendatory power vested in the petitioner. He would submit that any variation of the stipulations or criteria under various chapters requires to be done by way of a notification published in the official gazette and that neither the provisions of Section 8A(3) of the Act of 1956 or the terms of the Concession Agreement enable the petitioner to promulgate any notification and have it published in a gazette. Hence, assertion to

the contrary is without any substance. The learned counsel for the Ministry would further submit that the petitioner has been unable to point out any contraventions of the guidelines/norms laid-down by the Ministry dated 41 24.07.2013. He would further draw the attention of this Court to paragraph 3 of the said guidelines, which would vest the power to accord permission or access on to the national highway by the highway administration as provided under the Act of 2002 and the High Way Administration Rules, 2004. The learned counsel would also rely upon the document produced along with the memo 24.01.2017 to demonstrate that the impugned order is one by a competent authority. A perusal of the document would reveal that the Government of India has set-out duties and responsibilities of the Regional Officers and it is stated that in some cases apart from the Superintending Engineer, Engineer Liaison Officers of the Ministry have been authorised to act as Regional Officer. He would contend that in the instant case, there is no other officer in the office of the authority and that the signatory in the office of the Superintending Engineer, is discharging the function of the Regional Officer, the contention merits consideration. 42 43. The learned counsel for the other contesting respondents have adopted the arguments advanced on behalf of the Ministry.

44. This Court has given its anxious consideration to the material on record, the contentions canvassed on behalf of the parties and the various facets of the case before this Court. After advertng to the facts, it is seen that the centric argument canvassed by the petitioner is that the impugned order amounts to violation of the conditions pertaining to the access control, more particularly, with reference to Clause 5.3.6 of the Concession Agreement. In view of the above, the points that fall for consideration are; (1) Whether the access control as provided under the provisions of Clause 5.3.6 of the Concession Agreement dated 05.02.1998 amounts to or can be equated with the concept of the access permission 43 as envisaged under Section 28 of the Act of 2002?. (2) Whether the ingress and egress to and from the fuel station, by the vehicles entitled to access the highway, tantamounts to breach of access control condition of the petitioner as provided under Clause 5.3.6 of the Concession Agreement?. Some of the statutory provisions examined by This Court for determination of the lis are extracted herein below for the sake of convenience. The National Highways Act, 1956 -

Responsibility for development and maintenance of national highway- Section:

8. (1): It shall be the responsibility of the Central Government to develop and maintain in proper repair all national highways; but the Central Government may, by notification in the 44 Official Gazette, direct that any function in relation to the development or maintenance of any national highway shall, subject to such conditions, if any, as may be specified in the notification, also be exercisable by the Government of the State within which the national highway is situated or by any officer or authority subordinate to the Central Government or to the State Government. 8A(2): Notwithstanding anything contained in section 7, the person referred to in sub-section (1) is entitled to collect and retain fees at such rate, for services or benefits rendered by him as the Central Government may, by notification in the Official Gazette, specify having regard to the expenditure involved in building, maintenance, management and operation of the whole or part of such national highway, interest on the capital invested, reasonable return, the volume of traffic and the period of such agreement. 8A(3): A person referred to in sub-section (1) shall have powers to regulate and control the traffic in accordance with the provisions contained 45 in Chapter VIII of the Motor Vehicles Act, 1988 (59 of 1988) on the national highway forming subject-matter of such agreement, for proper management thereof.]. I - National Highway Rules, 1957: 2(b) : Approved work 2(b) : Approved work means any work relating to, or connected with, the development, maintenance, and repair of a national highway in respect of which the Central Government has accorded technical and administrative approval and financial sanction under rule 3;]. (d) : Executing Agency) Executing Agency means - (i) in the case of a Union territory, the administrator thereof to whom the functions of the Central Government in relation to the execution of works pertaining to national highways are delegated under Article 239 of the Constitution; and 46 (d) (ib) National Highway Authority of India: in the case of a National Highway or part thereof in respect of which such functions are delegated to the National Highways Authority of India;]. (ii) authority or officer delegated u/s 5 of the Act. in any other case, any officer or authority subordinate to the Central Government or the State Government to which such functions are delegated under section 5 of the Act;]. Rule :

7. - Progress reports and inventory: (1) The executing agency shall establish monitoring cells for the purpose of monitoring the progress of sanctioned work on a national highway, in the office of the Chief Engineer concerned with the works of such highway and the executing agency shall furnish to the Central Government progress reports in respect of such works in such form and at such intervals as may be specified by the Central Government from time to time. 47 (2)(a) The executing agency shall prepare and maintain inventory of national highways and measurement of roughness of the roads in the form specified by the Central Government, which shall be updated periodically. (b) The inventory prepared and updated under clause (a) shall be furnished to the Central Government at such intervals as may be specified by it.]. Rule :

9. - Inspection of works: Director-General (Road Development) to the Government of India or any officer authorised by him in this behalf may inspect at any time any approved work in progress or completed work and a report of every such inspection shall be submitted to the Central Government.]. II - The National Highways Fee (Determination of Rates and collection) Rules, 2008 2(ba) - build, operate and transfer(annuity) project means a project relating to any Section of a national highway, permanent bridge, bypass or tunnel, as the case may be, for which an agreement is entered into with a concessionaire, 48 for payment of annual grant for construction of section of highway;]. (f) executing authority- means an officer or authority notified by the Central Government under Section 5 of the Act; (m) Private investment project- means a project relating to section of national highway, permanent bridge, by pass or tunnel, as the case may be, for which an agreement is entered into with a concessionaire; th Schedule: Entry 23 of Union List of 7 THE NATIONAL HIGHWAYS AUTHORITY OF INDIA ACT, 1988: S:2 : (a) Authority means the National Highways Authority of India constituted under section 3; S:10: Authority to Act on Business Principles.- In the discharge of its functions under this Act, the Authority shall act, so far as may be, on business principles. 49 S:12: Transfer of assets and liabilities of the Central Government to the Authority.- (1) On and from the date of publication of the notification under section 11,- (a) all debts, obligations and liabilities incurred, all contracts entered into and all matters and things engaged to be done by, with, or for, the Central Government, immediately before such date for or in connection

with the purposes of any national highway or any stretch thereof vested in, or entrusted to, the Authority under that section, shall be deemed to have been incurred, entered into and engaged to be done by, with, or for, the Authority; [S:13: Compulsory acquisition of land for the Authority.- Any land required by the Authority for discharging its functions under this Act shall be deemed to be land needed for a public purpose and such land may be acquired for the Authority under the provisions of the National Highways Act, 1956 (48 of 1956).]. 50 S:14: Contracts by the Authority.- Subject to the provisions of section 15, the Authority shall be competent to enter into and perform any contract necessary for the discharge of its functions under this Act. S:16 - Functions of the Authority.- (1) Subject to the rules made by the Central Government in this behalf, it shall be the function of the Authority to develop, maintain and manage the national highways and any other highways vested in, or entrusted to, it by the Government. (2) Without prejudice to the generality of the in sub-section (1), the provisions contained Authority may, for the discharge of its functions- (a) survey, develop, maintain and manage highways vested in, or entrusted to, it; (b) construct offices or workshops and establish and maintain hotels, motels, restaurants and rest-rooms at or near the highways vested in, or entrusted to, it; (c) construct residential buildings and townships for its employees; 51 (d) regulate and control the plying of vehicles on the highways vested in, or entrusted to, it for the proper management thereof; (f) provide such facilities and amenities for the users of the highways vested in, or entrusted to, it as are, in the opinion of the Authority, necessary for the smooth flow of traffic on such highways; [(h) engage, or entrust any of its functions to, any person on such terms and conditions as may be prescribed;]. (k) collect fees on behalf of the Central Government for services or benefits rendered under section 7 of the National Highways Act, 1956 (48 of 1956), as amended from time to time, and such other fees on behalf of the State Governments on such terms and conditions as may be specified by such State Governments; and (3) Nothing contained in this section shall be construed as- (a) authorizing the disregard by the Authority of any law for the time being in force; 52 THE CONTROL OF NATIONAL HIGHWAYS (LAND AND TRAFFIC) ACT, 2002 (2) It extends to the whole of India. S:2 : (e) Highway means a National Highway declared as such under section 2 of the National Highways Act, 1956 (48 of 1956)

and includes any Expressway or Express Highway vested in the Central Government, whether surfaced or unsurfaced, and also includes- (f) Highway Administration means the Highway Administration established under section 3; (g) Highway land means the land of which the Central Government is, or is deemed to be, the owner under sub-section (1) of section 23; (i) Means of access means any permanent means of access, whether private or public, for vehicles of any kind; (m) Unauthorized occupation means any occupation of the highway land, without permission under this Act for such purpose, by a person who-

S:3 53 : Establishment of Highway Administrations.-(1) The Central Government shall, by notification in the Official Gazette,- (a) establish, for the purposes of this Act, a body or authority consisting of one or more officers of the Central Government or the State Government to be known as Highway Administration to exercise powers and discharge functions conferred on it under this Act; and (b) define the limits of the Highway within which, or the length of Highway on which, a Highway Administration shall have jurisdiction: Provided that the Central Government may, in the notification issued under this sub-section or by any general or special order, impose any condition or limitation subject to which a Highway Administration shall exercise powers and discharge functions conferred on it under this Act. (2) The Central Government may establish one or more Highway Administrations for a State or Union territory or for a Highway under sub-section (1). 54 (3) Subject to the provisions of this Act, the Highway Administration shall exercise powers and discharge functions conferred on it under this Act in such manner as may be prescribed. S:23: property of Central Government.- (1) All lands Highway land to be deemed as forming parts of a Highway which vest in the Central Government or which do not already vest in the Central Government but have been acquired for the purpose of Highway shall, for the purposes of this Act, and other Central Acts, be deemed to be the property of the Central Government as owner thereof. (2) The Highway Administration shall cause to be maintained a record in the prescribed manner in which the particulars of the lands, relating to the Highway, of which the Central Government is the owner shall be entered and the entries of the particulars of such lands in any record maintained for such purpose before the commencement of this Act shall be deemed to be the entry of the particulars of such lands made in the first said record and accordingly the Central 55

Government shall be deemed to be the owner of the lands regarding which the entries have been made in such records maintained before the commencement of this Act. (3) Any person claiming against the ownership of the Central Government referred to in sub-section (2) shall make written complaint to the Highway Administration and prove his claim before it and the Highway Administration, after considering the evidence produced by such person, may correct such records or reject the claim. Chapter: IV S:

28. Right of Access.- (1) No person shall have right of access to a Highway either through any vehicle or on foot by a group of five or more persons except permitted by the Highway Administration either generally or specifically in the manner specified in section 29. (2) The access to a Highway under sub-section (1) shall be subject to the guidelines and instructions issued by the Central Government from time to time. 56 (3) The Highway Administration may, by notification in the Official Gazette, declare a Highway or any portion thereof to be limited for access in the manner as specified in such notification and may also impose any restriction or control on such access to, from or across such Highway as specified in that notification. S:29 : Procedure for Permission to Access to Highway: (1) General permission u/s 28(1) - by notification in official gazette, for such purpose and specific permission. (1) The general permission under sub-section (1) of section 28 shall be given by issuing notification in the Official Gazette for such purpose and specific permission under that sub-section shall be given in the manner specified hereinafter under this section. (2) Specific permission - specifying the means of access. (2) Any person desirous of obtaining specific permission referred to in sub-section (1) may 57 make an application in the prescribed form to the Highway Administration specifying therein the means of access to which such permission relates and shall also be accompanied with such fees as may be prescribed and the Highway Administration shall, after considering the application either give the permission with or without the terms and conditions as may be prescribed or reject the application as it may deem fit. IV - The Highways Administration Rules, 2004- R:2 (c) : Officer, in respect of a Highway Administration, means the Officer referred to in clause (i) or clause (ii) of rule 3, as the case may be; (g): Licence r/w R.9, 10 and one granted u/r 25: (g): Licence, for the purposes of rules 9 and 10, means the license granted under section 25; R:3 -

Exercise of powers and functions by Highway Administrations.- Subject to the provisions of the Act and the conditions or 58 limitations imposed by the Central Government under the proviso to sub-section (1) of section 3,- (i) Where a Highway Administration consists of only one Officer, then, such Officer shall exercise the powers and discharge the functions of the Highway Administration under the Act and these rules by himself or such powers shall be exercised and functions shall be discharged by the subordinate officers under his supervision to the extent as is authorized by such Officer to the subordinate Officers from time to time; (ii) Where a Highway Administration consists of m o r e t h a n o n e O f f i c e r , t h e n , t h e C e n t r a l Government shall designate one of them as the Senior Officer who shall assign to each of such Officers (including himself), the length of Highway within the jurisdiction of such Highways and the Officer to whom such length of Highways is so assigned shall exercise the powers and discharge the functions of the Highway Administration under the Act and these rules in respect of such length of Highway in the manner as specified in clause (i) for exercising of powers and discharging of 59 functions of Highway Administrations consisting of one Officer: Provided that the Senior Officer so designated shall have the general provision over the exercising of powers and discharging of functions of the Highway Administration by the other Officers. 6. Conditions subject to which permit may be issued.- A permit shall contain any one or more of the following conditions which the Highway Administration or any officer authorized under sub- section (1) of section 2 4, as the case may be, while granting a permission under sub-section (2) of the said section deems fit having regard to the safety and convenience of traffic and nature of the permission, namely;- (i) That the person to whom the permission is granted shall not do or cause to be done any act in pursuance of the permission which may cause damage to highway and highway land or inconvenience to the traffic on the highway; (ii) that such person shall not do or cause to be done any act in pursuance of the permission which 60 may cause any damage to the Highway land which cannot be restored immediately on the expiry of the permission granted; (iii) that such person shall not do or cause to be done any act on the Highway occupied in pursuance of the permission which may cause air pollution or water pollution or noise pollution on the Highway: Provided that such extent of reasonable pollution which the Central Government may, from time

to time by notification in the Official Gazette, specify, shall be permissible under this clause; (iv) that such person shall not make or cause to be made any structure of such nature which cannot be removed easily on the expiry of the permission granted; (v) that any breach of the conditions so imposed shall be a ground to cancel the permit. 15 . T e r m s a n d c o n d i t i o n s f o r s p e c i f i c permission to access to a Highway.- The Highway Administration may, while giving a permission under sub-section (2) of section 29, 61 impose any one or more of the following terms and conditions, namely:- (i) that the specific permission shall be for a limited period of time and for the purposes as specified by the Highway Administration in the licence issued under sub-section (3) of section 29; (ii) that the specific permission shall be limited for the access to such length of a Highway as may be specified in the said licence; (iii) that the person to whom the specific permission is given shall not do or cause to be done in pursuance of the specific permission any act which may cause any damage to Highway; (iv) that such person shall not do or cause to be done, in pursuance of the specific permission, any act by which safety and convenience of traffic on the Highway shall be disturbed; (v) that such person shall while utilizing permission shall observe such guidelines relating to safety and convenience of traffic on the Highway, hygiene, prevention of nuisance and pollution on the Highway as may be specified by the Highway Administration in the said licence. 62 45. This court is of the opinion that before the facts are adverted to and findings rendered it is necessary to delve into the wisdom of the apex court with regard to the concepts of regulation and prohibition and how the same have been interpreted and their connotations. Admittedly no lease hold rights are created over the lands, in favour of the petitioner.

46. The apex court in the case of State of Tamil Nadu vs M/s. Hind Stone and Others reported in 1981 2 SCC205 was pleased to observe as follows: We do not think that regulation has that rigidity of meaning as never to take in prohibition. Much depends on the context in which the expression is used in the statute and the object sought to be achieved by the contemplated regulation. It was observed by Mathew, J.

in G.K. Krishna v. State of Tamil Nadu: The word regulation has no fixed connotation. Its meaning differs according to the nature of the thing to which it is applied (emphasis supplied by this Court). In 63 modern statutes concerned as they are with economic and social activities, regulation must, of necessity, receive so wide an interpretation that in certain situations, it must exclude competition to the public sector from the private sector. More so in a welfare State. It was pointed out by the Privy Council in Commonwealth of Australia v. Bank of New South Wales - and we agree with what was stated therein - that the problem whether an enactment was regulatory or something more or whether a restriction was direct or only remote or only incidental involved, not so much legal as political, social or economic consideration and that it could not be laid down that in no circumstances could the exclusion of competition so as to create a monopoly, either in a State or Commonwealth agency, be justified. Each case, it was said, must be judged on its own facts and in its own setting of time and circumstances and it might be that in regard to some economic activities and at some stage of social development, prohibition with a view to State monopoly was only practical and reasonable manner of regulation. 64 47. The Apex Court in the case of Sheikh Mohd. Omar vs. Collector of Customs, Calcutta reported in 1970 2 SCC728 has been pleased to hold as follows:- We are not impressed with this argument. What clause (d) of Section 111 says is that any goods which are imported or attempted to be imported contrary to any prohibition imposed by any law for the time being in force in this country is liable to be confiscated. Any prohibition referred to in that section applies to every type of prohibition. That prohibition may be complete or partial. Any restriction on import or export is to an extent a prohibition. The expression any prohibition in Section 111(d) of the Customs Act, 1962 includes restrictions. Merely because Section 3 of the Imports and Exports (Control) Act, 1947, uses three different expressions prohibiting, restricting or otherwise controlling, we cannot cut down the amplitude of the word any prohibition in Section 111(d) of the Act. Any prohibition means every prohibition. In other words all types of prohibitions. Restriction is one type of prohibition. 65 48. The apex court in the case of Corporation of the City of Nagpur vs. Ramchandra and Others reported in 1981 2 SCC714 had proceeded to examine the import of the word control and was pleased to observe as follows:-

When the words control and vests are read together they are strong terms which convey an absolute control in the authority in order to effectuate the policy underlying the rules and makes the authority concerned the sole custodian of the control of the servants and officers of the Municipal Corporation(emphasis supplied by this Court). In the case of State of W.B. v. Nripendra Nath Bagchi while interpreting a similar language employed in Article 235 of the Constitution of India which confers control by the High Court over District Courts, this Court held that the word control would include the power to take disciplinary action and all other incidental or consequential steps to effectuate this end and made the following observations: The word control, as we have seen, was used for the first time in the Constitution and it is 66 accompanied by the word vest which is a strong word. 4. It is thus now settled by this Court that the term control is of a very wide connotation and amplitude and includes a large variety of powers which are incidental or consequential to achieve the powers vested in the authority concerned. In the aforesaid case, suspension from service pending a disciplinary inquiry has clearly been held to fall within the ambit of the word control. On a parity of reasoning, therefore, the plain language of clause (b) of Section 59(3), as extracted above, irresistibly leads to the conclusion that the Municipal Commissioner was fully competent to suspend the respondents pending a departmental inquiry and hence the order of suspension passed against the respondents by the Municipal Commissioner did not suffer from any legal infirmity. The High Court was, therefore, in error in holding that the order of suspension passed by the Municipal Commissioner was without jurisdiction. In this view of the matter the order of the High Court cannot be maintained and has to be quashed. 67 49. The Apex court in the case of K. Ramanathan Vs State of Tamil Nadu reported in 1985 2 SCC116while interpreting the word regulation was pleased to hold as follows:- 18. The word regulation cannot have any rigid or inflexible meaning as to exclude prohibition. The word regulate is difficult to define as having any precise meaning. It is a word of broad import, having a broad meaning, and is very comprehensive in scope. There is a diversity of opinion as to its meaning and its application to a particular state of facts, some courts giving to the term a somewhat restricted, and others giving to it a liberal, construction. The different shades of meaning are brought out in Corpus Juris Secundum. Vol. 76 at page

611: Regulate is variously defined as meaning to adjust; to adjust, order, or govern by rule, method, or established mode, to adjust or control by rule, method, or established mode, or governing principles or laws; to govern; to govern by rule; to govern by, or subject to, certain rules or restrictions; to govern or direct according to rule; to control, govern, or direct by rule or regulations. Regulate is also defined as meaning to direct; to direct by rule or restriction; to direct or manage according to certain standards, laws, or rules; to rules; to conduct; to fix or establish; to restrain; to restrict. (See also Websters Third New International Dictionary, Vol. II, p. 1913 and Shorter Oxford Dictionary, Vol. II. 3 Edn., p. 1784.) 19. It has often been said that the power to regulate does not necessarily include the power to prohibit, and ordinarily the word regulate is not synonymous with the word prohibit. This is true in a general sense and in the sense that mere regulation is not the same as absolute prohibition. At the same time, the power to regulate carries with it full power over the thing subject to regulation and in absence of restrictive words, the power must be regarded as plenary over the entire subject. It implies the power to rule, direct and control, and involves the adoption of a rule or guiding principle to be followed, or the making of a rule with respect to the subject to be regulated. The power to regulate implies the power to check and may imply the power to prohibit under certain circumstances, as where the best or only efficacious regulation consists of suppression. It would therefore appear that the word regulation cannot have any inflexible meaning as to exclude prohibition. It has different shades of meaning and must take its colour from the context in which it is used having regard to the purpose and object of the legislation, and the Court must necessarily keep in view the mischief which the Legislature seeks to remedy (emphasis supplied by this Court).

20. The question essentially is one of degree and it is impossible to fix any definite point at which regulation ends and prohibition begins. We may illustrate how different minds have differently reacted as to the meaning of the word regulate depending on the context in which it is used and the purpose and object of the legislation. In *Slattery v Nalyor*, the question arose before the Judicial Committee of the Privy Council whether a bye-law by reason of its prohibiting internment altogether in a particular cemetery, was ultra vires because the Municipal Council

had only power of regulating internments whereas the bye-law totally prohibited them in the cemetery in question, and it was said by Lord Hobhouse, delivering the judgment of the Privy Council: A rule or bye-law cannot be held as ultra vires merely because it prohibits where empowered to as regulation often involved regulate, prohibition.

21. In contrast in *Municipal Corporation of the City of Toronto V. Virgo*, where the question for decision was whether a section or a bye-law prohibiting hawkers from plying their trade, was competently and validly made, Lord Davey delivering the judgment of the Privy Council while laying down that a power to make a bye-law to regulate and govern a trade does not authorize the prohibition of such trade, and added:

71. There is a marked distinction between the prohibition or prevention of a trade and the regulation or governance of it, and, indeed, a power to regulate and govern seems to imply the continued existence of that which is to be regulated or governed.

22. The predominant object of the Act, as reflected in the preamble is to provide, in the interests of the general public, for the control of the production, supply and distribution of, and trade and commerce in, essential commodities. The various Control Orders issued by the Central Government under sub-section (1) of Section 3 of the Act or by the State Governments under Section 3 read with Section 5 have introduced a system of checks and balances to achieve the object of the legislation i.e. to ensure equitable distribution and availability of essential commodities at fair prices. Special public interest in an industry e.g. that it is engaged in the production of a commodity vitally essential to the community, may justify the regulation of its production, supply and distribution and its trade and commerce, provided such regulation is not 72 arbitrary and has a rational nexus with the object sought to be achieved.

23. The power to regulate or prohibit the production, supply and distribution of, and trade and commerce in, essential commodities may be exercised in innumerable ways. One of the ways in which such regulation or control over the production, supply and distribution of, and trade and commerce in, an essential commodity like

foodstuffs may be exercised is by placing a ban on inter-State or intra-State movement of foodstuffs to ensure that the excess stock of foodstuffs held by a wholesale dealer, commission agent or retailer is not transported to places outside the State or from one district to another with a view to maximise the procurement of such foodstuffs from the growers in the surplus areas for their equitable distribution at fair prices in the deficit areas. The placing of such ban on export of foodstuffs across the State or from one part of the State to another with a view to prevent outflow of foodstuffs from a State which is a surplus State prevents the spiral rise in prices of such foodstuffs by artificial creation of the spiral rise in prices of such 73 foodstuffs by artificial creation of shortage by unscrupulous traders. But such control can be exercised in a variety of ways otherwise than by placing compulsory levy on the producers, for example, by fixing a controlled price for foodstuffs, by placing a limit on the stock of foodstuffs to be held by a wholesale dealer, commission agent, or retailer, by prohibiting sales except in certain specified manner, etc. These are nothing but regulatory measures.

49. We find no lawful justification for giving a restricted meaning to the word regulating in clause (d) of sub-section (2) of Section 3 of the Act as not to take in prohibiting. In *State of Tamil Nadu v. M/s Hind Stone, Chinnappa Reddy, J.*

referred with approval the observations of Mathew, J.

in *G.K. Krishnan v. State of Tamil Nadu* laying down that the word regulation has no fixed connotation and that its meaning differs according to the nature of the thing to which it is applied. The learned Judge also observed: [SCC p.217, para 10].. In modern statutes concerned as they are with economic and social activities, regulation must, 74 of necessity, receive so wide an interpretation that in certain situations, it must exclude competition to the public sector from the private sector. More so in a welfare State. It was pointed out by the Privy Council in *Commonwealth of Australia v. Bank of New South Wales* - and we agree with what was stated therein - that the problem whether an enactment was regulatory or something more or whether a restriction was direct or only remote or only incidental involved, not so much legal as political, social or economic consideration and that it could not be laid down that in no circumstances could the exclusion of

competition so as to create a monopoly, either in a State or Commonwealth agency, be justified. 50. The need and necessity for this court for placing reliance on the above would be obviated by the findings to be hereinafter recorded by this court.

51. Be that as it may, what one can grasp from the above catena of decisions is that the Apex Court has consistently held that the meaning and definition that has to be attached to the words regulation, control, prohibition etc. depends on the connotation and context they are used and by the accompanying language of the statute and ought to be interpreted keeping in view the aims and objectives of the legislation.

52. At the cost of being repetitive the Clause 5.3.6 of the Concession Agreement and the provisions of Sections 28 and 29 of the Act of 2002 are herewith extracted for the purpose of convenience: 5.3.6. The Company shall have the right to control the access to the bypass outside the inter changes [emphasis supplied by this court]. by means of fencing or other suitable methods, subject to provision of adequate crossing facilities. Section: 28. Right of access.-(1) No person shall have right of access to a Highway either through any vehicle or on foot by a group of five or more persons except permitted by the Highway Administration either generally or specifically in the manner specified in section 29. (2) The access to a Highway under sub-section (1) shall be subject to the guidelines and instructions issued by the Central Government from time to time. (3) The Highway Administration may, by notification in the Official Gazette, declare a Highway or any portion thereof to be limited for access in the manner as specified in such notification and may also impose any restriction or control on such access to, from or across such Highway as specified in that notification. 53. The learned senior counsel for the petitioner has interchangeably used the phrase access control and the word permission. On a closer scrutiny, with reference to the concession Agreement & the statutes, the two denote an entirely different style of activity and operate in different domains. The phrase access control as used in Clause 5.3.6 of the Concession Agreement denotes only vesting of right enabling the concessionaire to regulate the entry of motor vehicles only on the outside of the established/designated interchanges, i.e., by imposition of a fee or charge on the

person, who is desirous of using carriage way, developed and maintained by the concessionaire. It is neither argued nor pleaded by the petitioner that despite the willingness of the person to pay the fee, a right is envisaged in the concessionaire to deny entry to such a person. From a reading of the various clauses and provisions of law it is seen that the control envisaged under the contract can only be equated with regulation and not with prohibition. The definition of the words control, regulation and prohibition obviates much discussion. Control and regulation are synonyms, whereas the word prohibition exclusively denotes the exercise of a power by an authority or act of an authority. 78 Regulation and control are lesser variant of the act of prohibition. In the absence of vesting of such a right, especially under the contract, the contention on behalf of the petitioner is fallacious. A careful reading of Clause 5.3.6 of the Concession Agreement would further amplify that even the exercise of power of access control vested in the petitioner is limited to the extent of regulating the entry (demanding payment for entry and use of carriage way) and in order to prevent leakage of revenue and in that direction to fence the entry point to prevent any unauthorized ingress by vehicles, which have not suffered the toll.

54. The words access permission denotes an entirely different activity and also includes the establishment of a new access/entry point. It is not the case of the petitioner that it can establish entry points at its own will and volition at any point of the stretch of road, developed and maintained by it. The power vested in the petitioner under Clause 5.3.6 of the Concession Agreement is only limited to the extent of 79 regulating entry at the access point, which has been permitted under Section 28 of the Act of 2002 and hence, the attempt by the petitioner to enlarge the same and to equate it with the right to establish an entry point requires to be rejected and it is accordingly rejected. In the considered opinion of this Court, the right to regulate entry to the project road and to grant access permission are wholly different concept and do not stand on the same footing. As explained above, access control and access permission indicates two wholly different activities. This Court draws sustenance for the above interpretation from the provisions of Section 28 of the Act of 2002.

55. A careful and conjoint reading of Sections 28, 29 and 30 of the Act of 2002 clearly demonstrates, that the Act visualizes the right of access, procedure for permission to access to highway, regulation or diversion of access, etc. as three independent activities. Section 28 of the Act of 2002 prohibits the access to a notified highway only. The provision 80 of sub-Section (3) of Section 28 of the Act of 2002 declares that the highway administration may, by notification in the Official Gazette, declare a Highway or any portion thereof to be limited for access in the manner as specified in such notification and may also impose any restriction or control on such access to, from or across such Highway as specified in that notification. Section 29 of the Act of 2002 states that, general permission to access the highway shall be given by issuing notification in the official gazette. Sub-Section (2) of Section 29 of the Act of 2002 stipulates that any person desirous of obtaining specific permission referred to in sub- Section (1) may make an application in the prescribed form to the Highway Administration specifying therein the means of access to which such permission relates.

56. Section 30 of the Act of 2002 relates to regulation or diversion of access, etc. A reading of the same would show that notwithstanding any permission given under sub-Section (1) or sub-Section (2) of Section 29, the Highway 81 Administration, shall have the power, in the interest of the safety and convenience of the traffic to refuse, regulate or divert any proposed or existing access to the highway. A further perusal of Sections 33 and 34 of the Act of 2002 would demonstrate that the Act vests power in the highway administration alone to either temporarily or permanently close the highway. Neither the said provisions or the terms of the contract even envisage the confirmation of such power on the petitioner. The only right conferred on the petitioner is that of collection of fees with the corresponding duty to develop and maintain the highway. Hence, the first point is answered against the petitioner.

57. In the instant facts, it is not in dispute that the land where fuel station facility is proposed is lying abutting the by-pass/highway. It is also not in dispute rather no material is placed on record by the petitioner to demonstrate, that, there can be vehicles which use the fuel station facility and not pay the toll, leading to leakage of revenue on account 82 of illegal incursion. It is not in dispute that the vehicles,

which can access the fuel station facility are the vehicles which are permitted on to the toll road/carriage way, by the petitioner. That being the fact situation, the argument canvassed on behalf of the petitioner that it could lead to leakage of revenue is wholly baseless. This opinion of the Court is fortified by the document placed on record by the petitioners themselves more particularly, Annexure-J series i.e., photographs which clearly demonstrates that there is no other access to the fuel station from any other point. That apart, the approved sketch which is placed on record by the petitioner also does not indicate that there are other access points to the fuel station. In this scenario, the incursion and excursion to the fuel station would only be by the vehicles which have paid the toll fee, and hence the demand of the petitioner, that the developers are the facilitators, who are the owners of the land abutting the highway want to secure license or permission from the concessionaire is unsubstantiated and not supported by any provision of law. If 83 the contention on behalf of the petitioner, that it is the sole repository, vested with the right of granting access permission, is to be accepted, it could lead to absurdities, and resulting in creation of a hegemony, which neither the Act nor the Concession Agreement provided nor visualize. If such an interpretation is accepted, then it would create a hegemony of the concessionaire over all the lands abutting or adjoining the project highway, resulting in the trampling of the constitutional rights guaranteed under Article 300-A of the Constitution of India. A case of constitutionally guaranteed rights being negated by a mere contract is impermissible. That apart, it would also been in the teeth of the Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013. The Act mandates that there can be no acquisition without appropriate compensation. Hence, the contention on behalf of the petitioner that the right of granting access permission is vested in the petitioner is wholly unsustainable and is liable to be rejected at the threshold. 84 58. Now with regard to the factual aspects of the case, it is to be seen that; Whether the ingress and egress to the fuel station by way of deceleration and acceleration lanes amounts to an access to the two lane bypass developed and maintained by the petitioner and whether there is an infraction or violation of the petitioners right to revenue?.

59. The entire basis for present lis, is the approval granted by the 4 respondent/National Highways Authority of th India to establish a way-side facility i.e., a fuel station. It is once again necessary to reiterate the undisputed facts. Under the Concession Agreement, there are 5 authorized access points i.e., 2 access points at each end of the project highway and 3 access points at the interchange, as detailed in the Concession Agreement. It is not the case of the petitioner that apart from the above notified access points, it is possible 85 for the motor vehicles to access the carriage highway without paying the toll fee and utilize the facility. If this be true, then the contention of the petitioner that ingress and egress from the fuel station amounts to access to carriage way or highway is falsified. This contention as canvassed is preposterous and would result in absurd situations. It could lead to a situation, where a vehicle which has broken down on the toll road is moved of the toll road to undergo repair and when it is brought back on the toll road, the concessionaire could demand for payment of fee on the premise that the vehicle is accessing the carriage way. The access control envisaged and vested in the petitioner under Clause 5.3.6 of the Concession Agreement is only with a view to enable the petitioner to ensure prevention of the revenue leakage. By no stretch of imagination, can it be said or stretched to an extent to contend that a statutory power can be vested in a contractor by the terms and conditions of a commercial contract. The access control vested in the petitioner is limited to the access point as enumerated under the contract and as discussed in 86 the earlier part of the order. If the contractor is allowed to step into the shoes of the statutory authority, it would automatically result in vesting of police powers and it could result in disastrous consequences. Even in developed nations, police powers are not outsourced.

60. The aim and object of the provisions of Section 8A of the Act of 2002 is to aid and achieve the object of the said provision i.e. development of Highways. A perusal of the provision of Section 8A of the Act of 2002 would demonstrate that, the ostensible object of the provision is to enable private participation in Development and Maintenance of the National Highways i.e., the provision is an enabling provision, which empowers the Central Government to permit a private player to undertake the work of development and maintenance of the highway, which otherwise was in the sole domain of the Highway Authority. A perusal of

sub-Section (3) of Section 8A of the Act of 2002 only states the person referred to under sub-Section (1) shall have power to regulate and control the 87 traffic. The words regulation and control" used in the provision cannot be given an elastic interpretation and by the resultant position, police power being vested in a commercial enterprise. Such an interpretation would be a recipe for anarchy and an invitation to disorder and lawlessness as its exercise would be by a person without any corresponding duty or responsibility. The exercise of police power is the exclusive domain of the State and the statutory powers cannot be bartered or parted away under the guise of development. The provisions of sub-Section (3) of Section 8A of the Act of 2002 i.e., development and maintenance, meaning thereby that the concessionaire can only suggest to the authorities, measures that are required for achieving the object of the provision. The provision cannot be construed or interpreted in the manner and read and read in the manner interpreted by the concessionaire and vest it with police power. The argument is fallacious and cannot be countenanced too. The police power are functions provided by the State and cannot be gifted away to private entrepreneurs, as the same would be contrary to 88 the basic structure of the constitution. Hence, the second point is also answered against the petitioner.

61. The petitioner has also advanced and canvassed the case that on approval, the execution of the civil works has resulted in quantum increase in accidents. Annexure-H is the statement and data pertaining to the accident for two previous years. It is seen that the permission is granted only in December 2015 and the visuals of the location produced at Annexure-J series would suggest that mere earth work is in progress. To be more specific, the respondents have commenced earth work, that is, leveling the land, laying of bunds to construct the deceleration and acceleration lanes. It is inconceivable that the execution of civil works on a site which is far removed from the carriage-way, has resulted in accidents. Even going by the data furnished by the petitioner, majority of the accidents have taken place even prior to the grant of approval. There is neither specific case made out nor detailing of any accident on account of the work in progress.

62. 89 A contention was raised by the learned senior counsel as to who is going to foot the bill for installing the separate island/lanes to prevent vehicles from taking

sudden turns. These are issues to be debated by the petitioner with the authority. If the designs and specifications approved by the authority are in conformity with the guidelines laid-down by the Highway Authority, then it is obvious that the same is to be borne by the entity which has been granted the approval to establish the facility. When such an occasion arises, the authority shall intimate the petitioner and the petitioner shall supervise and co-operate for creation of such a median.

63. Lastly, it is seen that the petitioner has been indolent and negligent in approaching this Court. By a Communication dated 05.10.2015, the petitioner was put on notice regarding procession of the application for sanction and thereafter, the sanction has been accorded in December i.e., 22.12.2015. The petitioner was idle and silent for nearly 7 long months and approached the Court in July, 2016. In the 90 interregnum, the 5 and 6 th th respondents have incurred huge expenditure running into lakhs of rupees. It is not in dispute that the 5 th respondent is a public sector enterprise and a Government of India Undertaking, which necessarily implies that the funds expended by the 5 respondent comes from th the public exchequer. By expending the funds, the respondents acquired a semblance of vested right. On the contrary, the petitioners conduct occasioning the delay in approaching this Court, has thereby permitted creation of third party rights. Hence, the belated approach to the Court is vitiated by delay and laches and the writ petition requires to be rejected on the ground of delay and laches also. Consequently, this Court is of the considered opinion that the writ petition is wholly bereft of merits and is liable to be rejected. Accordingly, the writ petition stands dismissed. Ksm*/Chs* Sd/- JUDGE

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