

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

WRIT PETITION NO. 5764 OF 2015
WITH
CIVIL APPLICATION NO.1782 OF 2015
WITH
CIVIL APPLICATION NO. 1783 OF 2015
WITH
CIVIL APPLICATION NO. 2320 OF 2015
WITH
CIVIL APPLICATION ST NO. 20760 OF 2015
WITH
CIVIL APPLICATION ST NO. 20758 OF 2015
WITH
CIVIL APPLICATION ST NO. 20761 OF 2015

M/s Sion Panvel Tollways Pvt. Ltd.,
through its Authorized Signatory,
Rajendra Mahajan
Co-operative Housing Society,
Koregaon Park, Pune 411 001. ...Petitioners

V/s.

1. The State of Maharashtra
Through Chief Secretary,
Mantralaya, Mumbai 400 032. ...

2. The Public Works Department,
Government of Maharashtra,
Through its Secretary (Roads)
Mantralaya, Mumbai 400 032. ...

3. The Chief Engineer,
Special Projects,
Public Works Department,
Fort Mumbai. ...Respondents

WITH
WRIT PETITION NO. 6577 OF 2015

M/s Sion Panvel Tollways Pvt. Ltd.,
through its Authorized Signatory,
T.K. Karthikeyan,
IVRCL House, 35, Suyojana
Co-operative Housing Society,
Koregaon Park, Pune 411 001. ...Petitioners

Vs.

1. The State of Maharashtra
Through Chief Secretary,
Mantralaya, Mumbai 400 032. .

2. The Public Works Department,
Government of Maharashtra,
Through its Secretary (Roads)
Mantralaya, Mumbai 400 032. ...

3. The Executive Engineer,
Multistory Building Construction
Division, Opp. Naaz Hotel,
L.B.S. Road, Kurla (West),
Mumbai – 400 070 ...

4. The Superintendent Engineer,
Mumbai Construction Circle,
Chembur, Mumbai ...

5. The Chief Engineer,
Special Projects,
Public Works Department,
Fort, Mumbai. ... Respondents

WITH
PUBLIC INTEREST LITIGATION NO.239 OF 2013

Mr. Vijay Jagganath Mane
Age-40 years, Occupation:Business,
Having address at Shop No. 4
Sagar Darshan CHS., Plot No. D91,
Sector-18, Nerul (West),
Navi Mumbai-400 706 ...Petitioners

Vs.

1.The State of Maharashtra ...

2. Minister,
Public Works Department,
State of Maharashtra, Mantralaya
Mumbai. ...

3. Secretary,
Public Works Department,
State of Maharashtra, Mantralaya
Mumbai. ...

4. Chief Engineer,
Public Works Department,
State of Maharashtra, Mantralaya
Mumbai. ...

5. Executive Engineer,
Multi Storeyed Building,
construction Division, Industrial
Chemical Lab Building, 1st Floor
VN. Purav Marg, Chunabhatti,
Mumbai- 400 022. ...

6. Executive Engineer,
Multi Storeyed Building,
construction Division, New
Administrative Building, 3rd Floor
Naaz Hotel, L.B.S. Marg, Kurla (West)

Mumbai – 400 070. ...

7. M/s Sion Panvel Tollways Pvt. Ltd.
IVRCL House, 35, Suyojana CHS.,
Koregaon Park. Pune 411 001. ...

8. Essel Mumbai WTR Private Limited
513/A, 5th Floor, Kohinoor City,
Kirol Road, L.B.S. Marg, Off. Bandra
Kurla Complex, Kurla (West),
Mumbai – 400 070. ...

9. J. Kumar Infra Projects Ltd.,
16/A, Andheri Industrial Estate,
Vira Desai Road, Andheri (West),
Mumbai – 400 058. ...

10. J. M. Mahtre Infra Pvt. Ltd.,
Market Yard, Plot No. 57/58,
Sahakar Nagar, Panvel,
District -Raigad 410 206. ...

11. Deputy Commissioner of Police
Traffic Control Division,
Navi Mumbai ...

12. Superintendent of Gardens & Trees,
Having office at Veer Mata Jijabai
Bhosle Udyan, Dr. Ambedkar Road,
Byculla (East), Mumbai 400 027 ... Respondents

Mr. Milind Sathe, Senior Advocate with Dr. Birendra Saraf with Mr. Hitesh Jain with Ms. Neha Prashant & Ms. Ankita Singh with Ms. Karishma Rathod and Ms. Cheryl Fernandis i/b ALMT Legal for petitioner in wp 5764/15 and wp 6577/15.

Mr. Vineet B. Naik, Senior Advocate and Spl counsel with A. B. Vagyani, G.P. and Mr. V. B. Thadani, AGP for Respondent State in wp 5764/15, wp 6577/15 CAST 20758/15, CAST 20760/15, CAST 20761/15 and CAW 1783/15.

Mr. A. Y. Sakhare, Senior Advocate with Mr. A. B. Vagyan, G.P and Mr.P. G. Sawant AGP for Respondent State in PIL 239/13 & CA No. 2320/15.

Mr. Ahmed Abdi i/b Abdi & Co. for Applicant in CAST 20761/15.

Ms. Urjita Badheka with Mr. Ambika Singh a/w Ms. Manorama Mohanty i/by S. K. Srivastava and Co for R. No 7 and 8 in PIL 239/13

Mr. Hanumant Govind Wakshe for petitioner in PIL 239/13.

Mr. Prashant P. Chavan i/by Ravindra R. Chile for Respondent No 2 (MSRDC)

Mr. Janak Dwarkadas, Senior Advocate with S. Jagtiani with Teresa Daulat i/b Divya Shah & Co. in WP No.7573/15, 7574/15 and 7575/15.

Mr. S. M. Mushrif for Applicant in CAWST 2320/15,

Mr. Pravin Upadhyay for Applicant in CAWST. 20760/15

Mr. Anil Y. Sakhare, Senior Advocate i/by Pralad Paranjape & Ruturay Pawar for Intervenor in CAW 1783/15

**CORAM : MOHIT S. SHAH, C.J. &
A.K. MENON, J.**

RESERVED ON : 25 AUGUST 2015

PRONOUNCED ON : 8 SEPTEMBER 2015

JUDGMENT (PER A.K. MENON, J.)

1. Historically speaking toll roads have been in existence since ancient times, be it across plains or mountain passes,

through the middle ages till this age as well. The present petitions arise out of a Concession Agreement in respect of a road tolling project. The petitioner in petition no. 5764 of 2015 and 6577 of 2015 (“the petitioners”) as the “Concessionaire” was required to widen and develop an existing highway which in the petitioners' words is the gateway from Mumbai to the southern parts of India. The petitioners are required to maintain the road while collecting toll for a concession period of 17 years and 5 months. The highway leads from the island city of Mumbai into Panvel in the Raigad District via Thane. This is the only highway access up to Panvel from where other options are available onwards to Pune such as the Mumbai Pune expressway or old Mumbai Pune road.

2. A few facts may be set out before considering the merits of the case. The petitioners are a private limited company which was awarded a project for construction, operation and maintenance of the road commencing from the junction of Bhabha Atomic Research Centre Junction (CH-140/690) upto Kalamboli Junction (CH-115/800). The contractor was awarded by the State of Maharashtra through its Public Works Department and vide a

letter of acceptance dated 15.9.10. The project was awarded on a Built, Operate and Transfer basis (BOT). The respondent no.1 in the present petition is the State of Maharashtra, respondent no.2 is the Public Works Department and respondent no.3 is the Chief Engineer of the Public Works Department. The entire length of the project is 23.09 km and is spread over Mumbai, Thane and Raigad. The project includes collection of toll at plazas at Kamothe and Kopra. It is a welfare project undertaken by respondent nos.2 and 3 to strengthen an arterial road.

3. The petitioners entered into a concession agreement with respondent no.1 on 19 January 2011 ("the agreement") after a competitive bidding process. The agreement provided that after work is completed and a provisional completion certificate is issued, the State would issue a notification under the provisions of the Bombay Motor Vehicles Tax Act, 1958 thereby authorising collection of toll. According to the petitioners there was unjustified delay in issuance of the toll notification by the respondent no.2 because of which the petitioners suffered losses. The petitioners filed a writ petition in this Court being writ

petition(L)no.3170 of 14 seeking orders directing respondent no.2 to publish a toll notification as required under the agreement. Under the agreement, the petitioners have been granted the right to collect toll for 17 years and 5 months including the construction period of 3 years.

4. On 23 December 2014, this Court directed respondent no.2 to issue the notification. The notification was issued on 3 January 2015 as directed, permitting levy and collection of toll from 1 January 2015 but only until 30 June 2015. Even this notification according to the petitioners did not comply with the requirements of the concession agreement, since the respondents had granted additional exemptions beyond what was contemplated under the agreement. In the result, the petitioners complained that its losses were mounting. The notification dated 3 January 2015 contained a schedule appended thereto listing out the tariff for toll collection with description of the vehicles and the amount of the toll to be collected. This included light motor vehicles at serial no.2A and buses of the Maharashtra State Road Transport Corporation ("MSRTC").

5. On 26 May 2015 a further notification bearing no. PSP.2006/C.R.-181/(Part-3)/Road-9A came to be issued whereby the respondent in exercise of powers conferred by sub-section 1(E) of section 20 of the Maharashtra Motor Vehicles Tax Act exempted light motor vehicles and buses of MSRTC from payment of toll w.e.f 1 June 2015. Thus while the notification dated 3 January initially permitted the collection of toll upto 30 June 2015, by the impugned notification of 26 May 2015 not only was the petitioners prevented from collecting toll from light motor vehicles of MSRTC buses after 30 June 2015 but the petitioners could not collect toll on the exempted categories of vehicles from 1 June itself.

6. The petitioners therefore filed the second petition No.6577 of 2105 on 30 May 2015. An ad-interim application was made on 30 May 2015 seeking stay of the notification. The Court declined to grant the relief. As a result the petitioners filed a Special Leave Petition before the Hon'ble Supreme Court which came to be disposed of on 3 June 2015 granting liberty to the petitioners to approach this Court for modification of the order, if so advised. It is pursuant to this liberty that the present civil application has been filed. We may clarify that the petition was

initially filed on the original side and was transferred to the appellate side in view of the fact that the area of operation of contract extended upto to Panvel District Raigad. The Notice of Motion taken out has therefore been numbered as a civil application. PIL No.239 of 2013 was filed by the PIL petitioner complaining about the work being carried on the highway. The petitioner in the aforesaid writ petitions are party respondents and hence PIL was directed to be heard alongwith said two writ petitions.

7. The Civil Application was taken out in June 2015. On 30 June 2015 a further notification came to be issued whereby apart from exempting light motor vehicles from collection of toll and section claiming 2A of the schedule to the notification of 3 January 2015 buses of the MSRTC all vehicles coming from Taloja MIDC and School buses were also exempted. The present petition was amended and challenges both these notifications.

8. The Civil Application seeks stay on operation of notification dated 26 May 2015 issued by respondent no.1 which restricted the petitioner's right to levy and collect toll as per

notification dated 3 January 2015. The petitioners also seeks stay of the notification dated 30 June 2015 to the extent the notification exempts collection of toll from light motor vehicles, buses of the Maharashtra State Road Corporation (MSRTC), all vehicles coming from Taloja MIDC area and school buses. According to the petitioners, after the agreement was executed on 19 January 2011 there was unjustified delay in issuance of notification by respondent no.2 because of which there was already substantial delay in collection of toll resulting in financial losses. The petitioners claim to have taken term loans of an amount of Rs.1299.17 crores and construction was commenced on 29 May 2011 thereafter since some of the construction would be within the 50 metres buffer zone of mangroves, permission was obtained from this Court on or about 29 October 2013.

9. It is the petitioners case that the petitioners would only recover Rs.26 lakhs per day after the issuance of the restrictive notification dated 3 January 2015 and that meant there was a reduction in collection of Rs.17 lakhs per day and as a result the “Capital Outlay” as contemplated in the Maharashtra Motor Vehicles Act, 1958 would not be achieved during the concession

period. The petitioners contend that by virtue of the impugned notifications, the toll collection will be lower than the actual operating cost of the toll plaza, let alone maintenance costs. According to the plaintiffs and according to the petitioners, the action of the respondents in issuing the impugned notification is arbitrary and they have, therefore, invoked the jurisdiction of this Court under Article 226.

10. The submissions on behalf of the petitioners are briefly as follows:-

- (i) The Notification issued by State Government dated 26th May 2015 and 30th June 2015, exempting a class of vehicles from payment of toll in deviation from the format Notification appended in Schedule 'F' to the Concession Agreement, is liable to be set aside and quashed as arbitrary and unreasonable;
- (ii) The exemptions granted are causing a loss of about Rs.45 lakhs a day;
- (iii) The State Government should be directed to issue appropriate orders/authorisations/notifications to empower the petitioners to levy, collect and recover toll

from all vehicles (except the exempted category of vehicles indicated in Schedule 'F' of the format Notification).

- (iii) The Concession Agreement entered into between the petitioners and the State Government is not an ordinary contract but is an extra ordinary contract and its enforcement is in the public interest.
- iv) The actions of the State Government are arbitrary, unreasonable and violative of Article 14, 19 (1) (g) and 300 A of the Constitution of India.
- v) That the actions of the State are against public interest.
- vi) That the actions on the part of the Respondents are contrary to and in violation of doctrine of legitimate expectation / promissory estoppel.

The relevant prayers in the writ petition no.6577 of 2015 are reproduced below :

- (a) (i) That this Hon'ble Court be pleased to issue a writ of certiorari or a writ in the nature of certiorari or any other writ, order or direction under Article 226 of the Constitution calling for the records and papers pertaining to the impugned Notification being Exhibit "H" hereto, and after going into the legality, validity and propriety of

the impugned Notification, quash and set aside the impugned Notification to the extent it exempts the collection of toll from light motor vehicles as defined under the Motor Vehicles Act, 1958 in column (a-ii) of the Schedule, the buses of the Maharashtra State Road Transport Corporation, all vehicles coming from Taloja MIDC and school buses;

- (a) (ii) That this Hon'ble Court be pleased to direct the Respondents to re-issue/amend/rectify the impugned Notification dated 30th June 2015 to bring it in direct consonance with Schedule "F" of the Concession Agreement dated 19th January 2011 as appended at Exh. "B" hereto, and thereby allow the petitioners to levy and collect toll on that basis as agreed upon under the Concession Agreement."

The relevant clauses of this agreement are as follows:-

2.1. **Grant of Concession**

Subject to and in accordance with the terms and conditions set forth in this Agreement, GOM hereby grants and authorizes the Concessionaire to investigate, study, design, engineer, procure, finance, construct,

operate and maintain the Project/Project Facility and to exercise and/or enjoy the rights, powers, privileges, authorisations and entitlements as set forth in this Agreement, including but not limited to the right to levy, demand, collect and appropriate Toll from vehicles and Persons liable to payment of Toll for using the Project/Project Facility or any part thereof (collectively “the Concession”).

2.2. Concession Period

The Concession hereby granted is for a period as per accepted Bid in Financial Bid Volume III commencing from the Commencement Date (the Concession Period) during which the Concessionaire is authorized to implement the Project and to operate Project Facility in accordance with the provisions hereof. (as per Bidding Data – volume II)

Provided that ;

- (a) in the even of the Concession being extended by the GOM beyond the said period in accordance with the provisions of this Agreement, the Concession Period shall include the period/aggregate period by which the Concession is so extended, and*
- (b) in the event of Termination, the Concession Period shall mean and be limited to the period commencing from the Commencement Data and ending with the termination.*

Article 4 provides for right to concession to levy, collect

and appropriate toll. Article 4 reads thus :

4.1. Levy, Collection and appropriation of Toll

- (a) *Subject to the provisions of this Agreement, the Concessionaire shall during Operations Period be entitled to levy, demand and collect Toll in accordance with the Toll Notification and to appropriate the same. (as per schedule I)*
- (b) *The GOM undertakes to publish to Toll Notification as per Schedule 'F' after issue of provisional completion certificate by Engineer in Charge as per Schedule 'N'.*
- (c) *The concessionaire shall give concession to users as per Toll Notification.*
- (d) *The Concessionaire shall not levy and collect any Toll until it has received Toll Notification issued by the GOM.*
- (e) *The Concessionaire shall not collect any Toll in relation to Exempted Vehicles.*
- (f) *The Concessionaire shall conspicuously display the Toll Rates at the Toll Plazas and also at a distance about 200 meters ahead of Toll Plazas on either side of Project Facility.*
- (g) *The concessionaire shall provide uniform to staff working on toll stations. The colour and type shall be got approved from the Engineer in Charge.*
- (h) *The concessionaire shall provide drinking water and toilet facilities for the road users near the toll*

plaza.

- (i) The concessionaire shall provide sufficient area lighting near the toll plaza.

4.2. Revision of Toll

In the event of extension of Concession Period in accordance with provisions of this Agreement, the GOM shall issue revised Toll Notification (s) taking into account increase in Toll rates (as Specified in Schedule 'F' or as per contract data Volume II).

4.3. Traffic Sampling :-

To ascertain the actual Toll income joint traffic survey will be conducted after completion of 5 years from COD. The traffic survey will be conducted twice in a year in the month of March / October of every year of continuous period not less than 7 days and average count will be taken as base.

To compute yearly toll income the following procedure shall be followed :

Yearly Toll Income – Average Traffic count of each category worked out as above [x] prevailing toll rate [x] 365 days [x] 0.85 [Discount factor for coupons / Monthly passes] From actual Toll income worked out as above, 10% will be

deducted and there after from the balance toll income, the estimated, Toll income during that year considered in the cash flow submitted with the bid, will be deducted and balance will be shared equally with Authority.

(x) Article 5 provides for obligations and undertakings.

(xi) Article 5.3 provides for obligations of GOM.

(xii) Clauses (ix) and (x) of Article 5.3 provide for GOM to compensate the additional amount either in the form and extended concession period or in cash. These clauses reads as follows :-

(ix) assist the concessionaire for shifting of utility and cutting of trees if such utility and tree cause a material adverse effect on the construction or maintenance of project Highway, to seek the permissions from various department. The cost of shifting of utility be borne by concessionaire. The Concessionaire shall carry out the work of utility shifting and tree cutting and will bear the cost to the extent specified in the NIT. The GOM shall compensate the additional amount over and above what has been provided in the NIT to the Concessionaire either in the form of extended concession period or in cash as would be decided by Engineer in charge.

(As Per Contract Data – Vol. II)

(x) Shall carry out the necessary proceeding for the land

acquisition and encroachment removal. The cost to the extent as specified in NIT shall be borne by the concessionaire.

The GOM shall compensate the additional amount over and above what has been specified in the NIT to the concessionaire either in the form of extended concession period or in cash as would be decided by Engineer in charge.

(xiii) Article 9 provides for project management and operation.

(xiv) Article 9.2. provides for project completion and reads as follows :-

9.2 Project Completion

- (a) The Project shall be deemed to be complete and open to traffic only when the Completion Certificate is issued by the Engineer in charge in accordance with the provisions of Article 9.3. (the “Project Completion”) (as per contract data in volume II).*
- (b) The Concessionaire guarantees that the Project Completion shall be achieved in accordance with the provisions of this Agreement on a date not later than 36 Calendar months from the Commencement Date. (“the Scheduled Project Completion Date”) (As per contract data in volume II).*
- (c) If the Project Completion is not achieved by the Scheduled Project Completion Date for any reason other than Force Majeure or reasons attributable to*

the GOM, the Concessionaire shall be liable to pay liquidated damages for delay beyond the Scheduled Project Completion Date, to the extent of Rs. 4.00 Lacs per day for every day of delay. Provided that such liquidated damages do not exceed in aggregate (As per contract data Volume-II) Provided further that nothing contained in this sub-article (d) shall be deemed or construed to authorise any delay in achieving Project Completion.

(d) If the COD does not occur within 180 days from the Scheduled Project Competition Date, the GOM shall subject to the provisions of this Agreement relating to excuse from performance of the Concessionaire's obligations hereunder, be entitled to Terminate this Agreement in accordance with the provisions of Article 162.

(xv) Article 9.4. provides for operation and maintenance and reads as follows :-

9.4. Operation and Maintenance

The Concessionaire shall operate and maintain the Project/project Facility by itself, or through a Contractor and if required, modify, repair or otherwise make improvements to the Project/Project Facility to comply with Specifications and Standards, and other requirements set forth in this Agreement, Good Industry Practice, Applicable Laws and

Applicable Permits and manufacturer's guidelines and instructions with respect to Toll Plaza More specifically, the Concessionaire shall be responsible for:

- (i) ensuring smooth and uninterrupted flow of traffic during normal operating conditions;*
- (ii) charging, collecting and appropriating Toll in accordance with the Toll Notification and this Agreement;*
- (iii) minimizing disruption to traffic in the event of accidents or other incidents affecting the safety and use of the Project/Project Facility by providing a rapid and effective response and for this purpose maintaining liaison with emergency services;*
- (iv) undertaking routine maintenance including prompt repairs of potholes, cracks, concrete joints, drains, line marking, lighting and signage;*
- (v) undertaking maintenance works in accordance with Maintenance Manual and the maintenance Programme;*
- (vi) preventing with the assistance of concerned law enforcement agencies where necessary, any unauthorised entry to and exit from the Project;*
- (vii) preventing with the assistance of the concerned law enforcement agencies where necessary, any encroachments on the Project/Project;*

(viii) *adherence to the Safety Standards set out in Schedule 'P'.*

(xvi) *Article 13 provides for change of scope of work.*

(xvii) *Article 13.2(e) provides for extension in concession period in the event of change in scope of work, which reads as follows:-*

13.2(e) The Change of Scope Order shall be effective and binding upon receipt thereof by the Concessionaire. Notwithstanding a Dispute regarding cost and time Concessionaire shall proceed with the performance of such order promptly following receipt thereof. Any Dispute regarding the extension in the Concession Period recommended by the Engineer in charge shall be resolved in accordance with the Dispute Resolution Procedure.

(xviii) *Article 16 provides for events of default and termination.*

(xix) *Article 16.1(b) provides for GOM in the event of default and reads as follows:-*

(b) The GOM Event of Default.

The following events shall constitute events of default by the GOM (each a “GOM Event of Default”), unless any such the GOM Event of Default has occurred as a result of Concessionaire Event of Default or due to a

Force Majeure Event:

- (1) The GOM is in breach of this Agreement and has failed to cure such breach within 90(ninety) days of receipt of notice in that behalf from the Concessionaire;*
- (2) The GOM repudiates this Agreement or otherwise evidences as intention not to be bound by this Agreement.*
- (3) The GOM or any the GOM Agency has by an act of commission or omission created circumstances that have a Material Adverse Effect on the performance of its obligations by the Concessionaire and has failed to cure the same within 60 days of notice thereof by the Concessionaire.*
- (4) The GOM has delayed payment of any amount that has fallen due in terms of this Agreements beyond 90 (ninety) days.*

Any representation made or warranties given by the GOM under this Agreement is found to be false or misleading.

(xx) Article 16.2(3)(b) provides for termination for the GOM event of default and reads as follows:-

(b) Termination for the GOM Events of Default

- (1) The Concessionaire may, upon the occurrence and continuation of any of the GOM Event of*

Event of Default terminate this Agreement by issuing Termination Notice of h GOM.

(2) Upon Termination of this Agreement by the Concessionaire due to a GOM Event of Default, the Concessionaire shall be entitled to receive from the GOM, by way or Termination Payment a sum equal to:

- (i) The total Debt Due, plus*
- (ii) 120% (one hundred twenty percent) of the Equity subscribed in cash and actually spent on the Project if such Termination occurs at any time during three years commencing from the Comm Date and for each successive year thereafter, such amount shall be adjusted every year to fully reflect the changes in WPI during such year and the adjusted amount so arrived at shall be reduced by 7.5% (seven and half percent) per annum.*

(xxi) Article 16.4 provides for termination payment.

(xxii) Article 17 provides for change in law and Article 17.2 provides for extension of concession period on the basis of change in law and reads thus:-

17.2 Extension of concession Period

The Engineer in charge shall upon being notified by the concessionaire of the

Change in Law and the proposed amendments to this Agreement, assess the change in the financial position as a result of such Change of Law and determine the extension to the Concession Period so as to put the Concessionaire in the same financial position as it would have occupied had there been no such Change in Law and recommend the same to the GOM. The GOM shall, within 60 days of receipt of such recommendation, decide the extension to the concession period extend the Concession Period by such period.

(xxiii) Article 19 provides for resolution of disputes by way of amicable resolution, conciliation and arbitration which, however, has been substituted by a mechanism through Engineer In-charge, Chief Engineer and a Committee. Substituted Article 19 reads as follows:-

Amicable Resolution *(This clause substituted the original Arbitration clause)*

(A) Save where expressly stated otherwise in this Agreement any dispute, difference or controversy of whatever nature

howsoever arising under, out or in relation to this Agreement including in completion of the project between the parties and so notified in writing by either party to the other (The “dispute”) in the first instance shall be attempted to be resolved amicable by the Engineer and charge and failing resolution of the same in accordance with the procedure set forth in sub-article (b) below

- (B) Either party may require the dispute to be referred to the Superintending Engineer. The Superintending Engineer shall give his decision within 30 days. The Concessionaire may within 30 days of receipt by him of any order passed by the S.E as aforesaid appeal against it to the Chief Engineer.*

The Chief Engineer shall give his decision within 30 days. In case the Concessionaire is not satisfied with the decision of the Chief Engineer, the Concessionaire may request in writing to the Secretary Public Works Department, Govt. of Maharashtra. The Secretary PWD if convinced that prima facie the Concessionaire's claims of rejected by the SE/CE is not frivolous and that there is some substance in the claims of the Concessionaire as would meant a detailed examination and decision by standing committee refer the dispute to the standing committee setup at Govt. level vide P.W. Department's GR No. 2002/CR-116/rd-9 dated 11.3.03.

- C) Pending the submission of and/or decision on a dispute, difference or claims or until the decision of*

standing committee is finalized, the party shall continue to perform all of their obligations under this agreement without prejudice to final adjustment with decision of standing committee.

11. On behalf of Respondents nos.1 to 3 an affidavit of Dilip Salunke, Superintendent Engineering, Mumbai Construction Circle has been filed in reply to the civil application. The affidavit states that the notification dated 26 May 2015 is based on a well thought out policy decision taken in larger public interest. The impugned notifications have been issued after due consideration and prior approval of the competent authority. By Government Resolution bearing No.PVT-2014/cr-27/RD-9 dated 5.12.2014, a committee was formed consisting of ten members to consider closure of toll plazas. The committee thereafter submitted a report and after considering the same the state took a policy decision to close down 11 Toll Plazas under the jurisdiction of Public Works Department (PWD) and one Toll Plaza under the jurisdiction of Maharashtra State Road Development Corporation (MSRDC) from 1 June 2015. It was also decided to exempt light motor vehicles from payment of toll on 27 Toll Plazas in 19 projects under the jurisdiction of PWD and

26 Toll Plazas in 12 projects under MSRDC. Thus in all exemption is granted to 53 Toll Plazas in 31 projects across the State from 1 June 2015 onwards. According to the deponent, the exemption in the instant case has been granted to light motor vehicles in exercise of the powers conferred under sub-sections (1-E) of section 20 of the Maharashtra Motor Vehicles Tax Act, 1958.

12. Furthermore, the State Government also constituted a committee under the Chairmanship of the Minister (Public Works Undertaking) for study of the Integrated Road Development Plan, Kolhapur and Mumbai Pune Expressway and Mumbai entry point toll. It is submitted that on receipt of recommendations from the aforesaid committee suitable action would be taken in respect of those projects as well. According to the deponent, no loss would be caused to the petitioners by way of the notification and care has been taken that the State does not resile from the agreed terms and conditions of the Concession Agreement. It stated that cash flow projections have been prepared by the petitioners after considering viability of the project and the projection as reflected in the statement (Form 4) was accepted by the State and that the petitioners are estopped from claiming any deviation of any

nature.

13. The affidavit further states that the effect of exemption granted to light motor vehicle would be made good by the answering respondents to the petitioners/Concessionaire as per the accepted cash flow and the shortfall in the cash flow statement will be computed in a manner such that the accepted IRR of 13.94% would be met by the petitioners over the concession period. All monetary loss would be made good in keeping with cash flow statement. It is submitted that no loss would be caused to the petitioners.

14. The respondents have denied that the impugned notification results in breach of Articles 14 and 19(1)(g) of the Constitution of India. It is submitted that the petitioner's claim is only for monetary loss. The State has denied that the petitioners is suffering monetary loss of Rs. 45 lacs per day. It is stated that the present dispute is a contractual dispute for which there is efficacious and alternative remedy provided in the contract itself. Reference is made to the provisions of the Amicable Resolution provisions in the agreement. We may mention here that this

amicable resolution provision was in substitution of the provision for arbitration and as such substitution is consensual and the petitioners has agreed to the same.

15. According to the respondents the petitioners have changed their case from what was pleaded in Writ Petition (Lodging) No.1595 of 2015 and even the case in the Civil Application is different than in the writ petition. It is further state that the respondents have never declined to fulfill their obligation under the Concession Agreement. The respondents have denied the fact that the petitioners has invested Rs.1843 crores in the project as stated in paragraph 13 of the affidavit in support and it is contended that the State has only recognised capital cost of Rs.1220 crores as set out in the cash flow statement. We may mention here that it is petitioners' stated case that it has borrowed Rs.1299.7 crores. The State presently is only willing to recognise the figure mentioned in the cash flow statement. The State's affidavit denies that exemption to light motor vehicles from payment of toll has resulted in 95% of traffic being exempted.

16. In paragraph 22 of the affidavit while dealing with paragraph 18 of the affidavit in support of the Civil Application, it is stated that the respondents have sought from the petitioners a calculation of average loss being caused but these details have not been provided. Unless these details are provided the same cannot be gone into. It is stated that the impugned notification is the result of a policy decision and it is not that the petitioner's project has been singled out. On this basis the civil application has been opposed.

17. In the affidavit in rejoinder of the petitioners dated 26 June 2015, the deponent has contended that decisions of the committee constituted do not disclose the basis on which the decision was arrived at. He submits that there is no rationale or public policy involved in the impugned notification and differentia is not intelligible i.e. the distinction between the same class is not justified/reasoned and therefore, the same is in violation of Article 14 of the Constitution. According to deponent public policy of respondent no.1 should be applied uniformly in the State and to pick and chose some toll booths and the so called comprehensive policy is applied only to selective toll plazas and

is therefore arbitrary. He reiterates that there is tremendous financial loss suffered by the petitioners. He further submits that the remedy of the petitioners is not barred in cases where the fundamental right is to be enforced. There is failure in observing the principles of natural justice. He submits that while issuing the notification all these principles have been violated.

18. Dr. Milind Sathe, learned Senior Advocate appearing for the petitioners submitted that before issuing the impugned notifications the state should have issued a draft informing the affected party so that the petitioners would have had an opportunity to make representations. In the present case this right has been violated and no such draft of the notification was shared with the petitioners. As a result, principles of natural justice have not been followed by the respondents. Dr. Sathe, then, submitted that the present petitions are maintainable also on the count of principles of legitimate expectation based on the state's representation that it would be able to collect toll under the agreement for a period of 17 years and 5 months. By issuing the notifications the respondent no.1 has breached the agreement and made it impossible for the petitioners to exercise their rights.

19. Dr. Sathe further submitted that under the Concession Agreement being a public private partnership the bargaining power of charges has to be taken into consideration. The petitioners, he submitted had a vested right to collect toll, reimburse itself and earn reasonable profits as a consequence of the assignment of the project rights. The respondents have therefore after taking advantage of the petitioners obligation to complete the project, issued the impugned notification taking away the petitioner's right to recover monies spent and reasonable returns as specified in agreement. Having borrowed about Rs.1300 crores from a consortium of banks to finish the project, the decision to stop collection of toll from the exempted category of vehicles effectively means that the petitioners would be unable to repay the loans obtained from the bank and would be unable to recover the Capital Outlay. Dr. Sathe then referred to the definition expression 'Capital Outlay' under section 20(1A)(ii). For ease expression 'capital outlay' is reproduced below:-

“Explanation :- For the purposes of this section, the expression “Capital Outlay” shall include the

anticipated cost of certain essential on goings or imminent works like improvements, strengthening, widening, structural repairs, maintenance, management, operation, reasonable returns and interest on such outlay at such rates as the State Government may fix until the full amount of such outlay is recovered.”

20. Learned senior counsel submitted that until the entire capital outlay has been recovered, the petitioners would be entitled to collect toll under the agreement for a period of at least 17 years and 5 months. The learned Senior Counsel further submitted that by issuing the impugned notifications the respondents had violated right of the petitioners to recover the entire capital outlay.

21. The other ground on which the petitioners have assailed the notification is that the respondents had acted in an arbitrary and discriminatory manner by excluding some toll projects from the ambit of the notifications. Dr. Sathe pointed out that in the State of Maharashtra respondent no.2 i.e. Public Works Department operates 38 toll booths whereas the MSRDC operates 53 toll booths. Out of these 11 booths operated by Public Works

Department and one operated by MSRDC have been completely shut down. 37 toll booths operated by Public Works Department and 26 which were operated by MSRDC have been partially shut and by the impugned notifications pertaining to the petitioners project and the 27 booths operated by the Public Works Department have been partially shut. It is the grievance of the petitioners that the other toll booths at Kolhapur, Mumbai Entry Points, Mumbai Express Way have been left untouched by the respondent. This conduct of the respondents is, therefore, arbitrary since public interest cannot be restricted to few toll booths. There is no justification in partially or fully closing some toll booths leaving the others to operate the booths and collect toll.

22. By way of illustration, Dr. Sathe pointed out that entry point at Mumbai Vashi the charge of Rs.35/- levy for every car on each trip a return journey is not even considering. Thus, the person going to Vashi and return same day would be at Rs.70/- whereas the petitioners charge Rs.30/- for the entire long distance upto Panvel in Raigad District and Rs.45/- for a return journey, apart from exempting cars from local village areas specified in impugned notification. According to the petitioners, exempting

only one toll booth would not serve any purpose. The petitioners therefore allude to favoritism shown to some other private parties. Dr. Sathe, then, submitted that the impugned notifications affect the viability and feasibility of the Build, Operate and Transfer scheme. The petitioners have borrowed money from a consortium of banks which loans also constitute public money which is at stake by virtue of the impugned notifications. The petitioners have incurred costs to construct the road after acquiring permissions has constructed the road and is willing to comply with its duties and responsibilities under the agreement provided it is entitled to recover its capital outlay. According to Dr. Sathe, the state had assigned a sovereign function of collecting toll which was akin to a tax. Thus having assigned such sovereign function the state cannot dilute the assignment. According to learned senior counsel in the alternative, the petitioners have a vested right to collect toll as an agent of the state, therefore, the petitioners having acted on the basis of the representations and assurances contained in the Concession Agreement the State must be held to their part of the bargain and a situation should not arise whereby after the work of construction had done the respondent fails to abide by the representation and assurances under the concession agreement.

23. Dr Sathe submitted that the entire substratum of the concession agreement gets diluted if the impugned notifications were allowed to remain, seriously prejudicing the petitioners. The State, he submitted must be compelled to perform their part of the obligations. Dr. Sathe further submits that apart from the fact that the impugned notifications are violative of the rights of the petitioners under Article 14, 19(1)(g) of the Constitution, the impugned notifications by exempting the specified vehicles destroy the essence of the concession agreement and are against the public policy which is to uphold sanctity of contract. Dr. Sathe submitted that effect would be to defeat the basic principles to arrive at public partnership and undermines the project as a whole.

24. According to the petitioners, by virtue of the impugned notifications over 95% of road users will be allowed to use the projects section free of cost. It will obviously cause substantial loss to the petitioners and the said notifications have issued unilaterally without any undertaking feasibility analysis/commercial viability of the project. Mr. Sathe further submitted that there is over whelming public interest in supporting public private partnership

projects. The Concession Agreement is a public welfare project strengthen road infrastructure. There is a public interest in preserving the project. Stopping collection of toll will destroy the substratum of the agreement and affect public interest as it will discourage investments in group projects.

25. According to Dr. Sathe, the respondents have constitutional duty to act in public interest. He further submitted in the case in hand, the original and only gateway between Bombay and Southern India was a six lane road. This has been increased to 10 lanes under the public private partnership model. The public at large will benefit from the enhanced infrastructure while private parties such as the petitioners recoup the investments and reasonable return thereon. The impugned notifications are violative of this basic expectation under the agreement. Dr. Sathe, learned Senior Counsel for the petitioners also submitted that if the petitioners are not protected, the result of the impugned notifications is that the term loans taken by the petitioners will be jeopardy as there will not be able to repay the monies.

26. Dr. Sathe further submitted that the actions of the respondents are arbitrary, unreasonable and capricious. He relied upon the decision of the Hon'ble Supreme Court in ***Srilekha Vidyarthi V/s. State of U.P.***¹ in support of the contention that the petitioner's rights are arising out of the concession agreement which are separate special rights which cannot be dealt with under the alternate rules and regulations. Dr. Sathe also relied upon the decision of Hon'ble Supreme Court in the case of ***Jitendra Kumar V/s. State of Haryana***² in which the Hon'ble Supreme Court held that legitimate expectation is not the same as an anticipation. However, it is distinct from a desire and hope. A legitimate expectation is based on a right and grounded in the rule of law as requiring regulatory, predictability and certainty in the Government's dealings with the public. The Hon'ble Supreme Court held that the legitimate expectation operates both in procedural and substantive matters.

27. The learned Senior Counsel also relied upon the observations of the Hon'ble Supreme Court in ***Madan Mohan Pathak***³ in which the Hon'ble Supreme Court observed that the

1 AIR 1991 SC 537

2 (2008) 2 SC 161

3 (1978) 2 SCC 50

representations made by, the conduct of the Government and equities arising therefrom may be taken into consideration for judging whether a particular piece of legislation, initiated by the Government and enacted by Parliament is reasonable.

28. Dr. Sathe then submitted that the acts of the State are not immune from challenge on the ground that they are covered under the policy domain. He submitted that by citing policy these acts cannot be excluded from judicial review. According to Dr. Sathe, if the policy decision is ultra vires the statute or the constitution or it violates any of the fundamental rights guaranteed under Part III of the Constitution and it seeks to take away a vested right of a person, such policy decision is clearly arbitrary, unreasonable and violative of petitioner's rights under Articles 14, 19(1)(g) , 265 and 300A of the Constitution of India. Accordingly, he submitted that such decisions are subject to judicial review and it is necessary to apply wednesbury principles of reasonableness. He relied upon the decision of the *Tata Cellular V/s. Union of India*⁴. Lastly, he submitted that in writ jurisdiction under Article 226 this Court has power to mould the relief to do justice. He

4 (1994) 6 SCC 651

relied upon the observation of the Hon'ble Supreme Court in *Shri Anadi Mukta Trust V/s. V. R. Rudan*⁵ in which the Hon'ble Supreme Court held that a public duty does not necessarily have to be imposed by statute. It may be sufficient for the duty to be imposed even by contract and judicial control over the fast expanding maze of bodies affecting the rights of the people should not be put in watertight compartment. It should remain flexible and technicalities should not come in the way of granting relief.

29. Mr. Naik, learned senior counsel on behalf of the respondent submitted that notification dated 26.5.2015 was issued pursuant to section 20 sub-sections (1-A) to (1-E) particularly under sub-section (1-E) of the Maharashtra Motor Vehicles Tax Act, 1958. He submitted that on 30.5.2015, the Court has already rejected the prayer for interim relief and Hon'ble Supreme Court had granted liberty to apply for modification without being influenced by the observations. He submitted that there has been no change in the circumstances. He submitted that the impugned notification was issued on the basis of a well thought out public policy based on recommendations of a

5 (1989) 2 SCC 691

Committee and the Government took a decision to close some Toll Plazas and exempt light motor vehicles from payment of toll in other cases. He submitted that grant of the interim relief would have a cascading effect over 52 projects proponents of which are not before the Court. In the circumstances he prayed that the Court may not interfere in the policy matters.

30. Mr. Naik then submitted that the contention of the petitioners that the concession agreement is a statutory contract is not true. According to him this is a purely commercial contract between the State and Private Entity such of whom had entered into negotiations and arrived at contract for collection of toll. The toll notification was issued under section 20(1A) and 20(1B) of the Motor Vehicles Tax Act, 1958 and that merely because toll notification is issued under the Act it does not mean that the contract is a statutory contract.

31. Mr. Naik submitted that amendment to the Motor Vehicles Act in 2001 recognised the fact that private participation is permissible in such projects. He denied the contention that sovereign functions of the State have been delegated to a private

entrepreneur. He further denied the contention that toll is being collected as a tax. He submitted that a sovereign function would be in the nature of those relating to defence of the country, foreign affairs, power to acquire territory etc. which are not amenable to the jurisdiction of the ordinary civil Court. The other functions such as the present one form part of the welfare activity of the State could not be construed as exercise of sovereign functions. He submitted that the State's activities are multifarious and every such activity could not be construed as a sovereign function capable of being assigned to an outside agency. It is in this behalf the following judgments of the Supreme Court are referred :

“2000 (8) SCC 61 (Agricultural Produce Market Committee Vs. Ashok Harikuni and Anr.) and

2013 (8) SCC 345 (Balmer Lawrie and Co. Ltd. & Ors. Vs. ParthaSarathi Sen Roy & Ors.)”

32. It is submitted that the Notification dated 26.5.2015 is based on a well thought public policy decision, which is in the larger interest of the public and has extremely wide impact. It is

submitted that since there was a huge public outcry against the collection of toll, the Government with an intention to being fair constituted a Committee vide Government Resolution dated 5.12.2014 under the Chairmanship of Chief Engineer, Public Works Region, Mumbai and included ten other members being Chief Engineer, Pune/Nashik/ Amravati/Nagpur/ Aurangabad/ MSRDC / PPP Advisor and Section Engineer, Raigad considering the report of the Committee, the Government took a policy decision to :

- (A) Close 11 toll plazas in 9 projects of PWD
- (B) Close 1 toll plaza in 1 project of MSRDC
- (C) Grant exemption to LMVs from payment of toll at 27 toll plazas in 19 projects of PWD
- (D) Grant exemption to Light Motor Vehicles from payment of toll at 26 toll plazas in 12 projects of MSRDC.

LMVs have thus been granted exemption at a total of 53 toll plazas in the state.

33. It is submitted that, any grant of any interim relief here would have an cascading effect on 52 toll plazas none of whom are before the Court. It is further submitted that, the decision of

the Government is in the larger public interest and is in the realm of the policy decisions and the Hon'ble Court should therefore refrain from interfering in policy matters of the Government.

34. Mr. Naik submitted that the contention of the petitioners that there has been violation of Articles 14, 19 (1) (g) of the Constitution of India is without any basis. It is further submitted that the State Government has also constituted a Committee under the Chairmanship of the Minister, Public Works Department for studying the integrated road development plan, Kolhapur and also constituted a Committee under the Chairmanship of the Additional Chief Secretary, Public Works Department for studying the Mumbai-Pune Expressway and Mumbai entry point toll and on receipt of the said reports, the State Government will take appropriate action regarding the said tolls.

35. According to the State, interim relief cannot be granted for two reasons; firstly, there is no financial loss as is sought to be projected by the petitioners and based on the accepted cash flow which is part of the concessionaire agreement, the Government is

committed to reimburse the Petitioners vis-a-vis a toll collection projected of LMVs, thereby maintaining the Internal Rate of Returns (IRR) and the concession period of 17 years 5 months. Secondly, apart from the fact that grant of interim relief is in the nature of final relief, there are innumerable practical difficulties if such an order is granted. For example the petition being dismissed, the petitioners cannot refund the amounts of toll collected to the vehicle owners. On the other hand if the Petition is allowed, then on the basis of damages to be ascertained, the Petitioners can always recover the same from the Government.

36. Mr. Naik on behalf of the State submitted that in the Concessionaire Agreement, Article 4 relates to levy, collection and appropriation of Toll. Clause A (4.1) reads '*subject to the provisions of this agreement, the Concessionaire shall be entitled to levy, demand and collect toll.*'; Clause E categorically indicates that the Concessionaire shall not collect tolls in relation to exempted vehicles. The reference to Schedule F at page 125 at best is to a *proforma* / standard Notification. This does not form part of the Agreement. In fact, at Page 127, the nine types of Motor Vehicles which are exempted can at best be indicative and not an

exhaustive list because, the definition of '*exempted vehicles*' at Page 34 specifically mentions '*vehicles as specified in the Toll Notification as prescribed in the BMV Tax Act, 1958*'. Section 20 (1E) contains the power to grant such an exemption, which power has been exercised in public interest.

37. The policy decision of the Government of Maharashtra is having regard to public discontent and criticism regarding toll collections at toll plazas. This was studied by constitution of an 11 member High Power Committee. Various recommendations were made by the committee on the basis of which, the GOM has taken the aforesaid decision. This therefore, is in the realm of the policy decision of the government and any loss caused will be compensated by the State.

38. Mr. Naik submitted that allegations have been made by the petitioners that the State Government has acted in an arbitrary and high handed manner by issuing notification dated 26 May 2015 but according to him the state government has acted fairly and while granting exemptions to light motor vehicles from payment of toll, the state government has taken care to ensure that

no loss is caused to the petitioners and it is clarified that the state will not resile from the agreed terms and conditions of the Concession Agreement. It is submitted that the cash flow statement which was submitted by the petitioners before entering into the contract and on the basis of which the agreement was entered into between the state and the present petitioners permitting the petitioners to levy toll will be honoured. It is further submitted that the amount due and payable to the petitioners on account of the exemption being granted would be made good by the state government on the basis of the accepted cash flow at the accepted IRR of 13.94% and the concession period of 17 years and 5 months including period of 3 years construction period as agreed upon in the concession agreement. Therefore, no loss is likely to be caused to the petitioners.

39. Mr. Naik submitted that entire grievance of the petitioners is that the monetary loss would have been caused to the petitioners. Learned Senior counsel submitted that agreement entered into provided for an alternate mechanism to deal with dispute and that the petitioners ought to have availed of alternate remedy and no fundamental right of the petitioners has been

violated. The entire dispute, he submitted, from day one being related to monetary loss, the appropriate remedy was therefore to invoke the dispute redressal mechanism contemplated under Concession Agreement. An exhaustive procedure has been prescribed and in this process all disputes will be decided and adjudicated upon.

40. Mr. Naik also submitted that the petitioners' contention that they have suffered huge additional project costs due to inflation is not bonafide inasmuch as the respondents had delayed the financial closure. Mr. Naik submitted that Government accepted tender on 5.8.2010 and that it informed agency to achieve financial closure before 15.9.2010 and accordingly the last date for financial closure was 14.3.2011(180 days from 15.9.2010). However, financial closure was achieved by the agency on 30.5.2011, therefore, it took eight and half months for achieving financial closure as a result of which the petitioners may have suffered inflation in the project cost. The petitioners has thus projected higher loss and the government has disputed the contention that the petitioners had suffered loss to such an extent.

41. In this manner, Mr. Naik submitted that no interim relief should be granted. Mr. Naik reiterated that the State was willing to pay over the respondents the sum of money which would represent the loss caused by not collecting from exempted vehicles contemplated in Form 4. Dr. Sathe submitted that Form 4 annexed to the agreement showed the estimated yearly toll collection. Considering the traffic growth over a period of contractual agreement it revealed that in the year 2015-16 total of 55,974 cars were expected to pass through the toll gates everyday. A total 6,733 light commercial vehicles were expected to pass and those numbers would steadily increase to about 99,669 and 11,988 respectively in the year 2028-29 when the concession period would end.

42. Mr. Naik submitted a table showing a summary of projections of built operate transaction basis for which concession were granted from 1 June 2015 and the number of toll collection years remaining where total of 19 PWD projects and 12 MSRDC project. Thus total of 31 number remaining toll acquire between 1 to 5 years, 6 to 10 years six projects, 11 to 15 years seven

projects, 16 to 20 years three projects and 21 to 25 years eight projects. He submitted that in all these cases the state government would compensate the parties concerned on the basis of projected income. According to Mr. Naik in the present case since Form 4 estimated the number of cars passing through toll booth in 2015-16 was 55974, the State would compensate the petitioners by paying an amount equivalent to Rs.30/- per car multiplied into number of cars. Dr. Sathe on the other hand submitted that government has considered various issues arising out of notification and arrived at formula for compensating the concession which they are willing follow. Accordingly, Mr. Naik submitted that they would compensate the petitioners by paying approximately Rs.385.02 lakhs per month computed at the rate of approximately Rs. 12.59 lakhs per day considering 25% deficit due to the exemptions quoted. He relied upon the state's proposal which offer Rs.12.59 lakhs per day in 2015-16 and steadily rises to Rs.43.12 lakhs per day in 2027-28 subject to the conditions provided in the proposed copy of which has been provided to the petitioners as well.

43. Dealing with Dr. Sathe's argument that a sovereign

function is being conducted by the petitioners, Mr. Naik in the course of submissions referred to the observations of the Supreme Court in Agricultural Produce Market Committee Vs. Ashok Harikuni and Anr. (2000) 8 SCC 61. In paragraph 21 the Supreme Court has observed that what is “sovereign” is defence of the country, raising armed forces, making peace or war, foreign affairs, power to acquire and retain territory all of which are not amenable to the jurisdiction of the ordinary civil Courts. He submitted that this ruling supported his contention that other functions of the State including welfare activity of government cannot be construed as an exercise of a sovereign function. He submitted that in paragraph 32 of the said judgment the Supreme Court observed that sovereign functions in the new sense may have very wide ramifications but essentially sovereign functions are primary inalienable functions which only the State could exercise. He submitted that dichotomy between any sovereign and non sovereign function could be ascertained by finding which of the functions of the State could be undertaken by any private person or body and the one which cannot be so undertaken. According to him the judgment in the Agricultural Produce Market Committee (supra) is to be read along with

decision in the case of *Balmer Lawrie & Company Ltd. and Others Vs. Partha Sarathi Sen Roy & Others* (2013) 8 SCC 345 in which the Court observed that often there is confusion as to what would amount to sovereign function and what not. The Supreme Court clarified that every Government function need not be sovereign since the state's activities are multifarious. The sovereign function are restricted to those which are primarily inalienable. In our view the petitioners contention that collection of toll was sovereign function which has been assigned cannot be accepted. Collection of toll in our view is not an inalienable function and the toll business demonstrates otherwise.

44. Mr. Naik then referred to the decision of the Supreme Court in *Sethi Auto Service Station and Anr. Vs. Delhi Development Authority and Others*⁶ in which the case of *Punjab Communications Ltd. Vs. Union of India*⁷ was considered. He submitted that doctrine of legitimate expectation although accepted in a subjective sense as part of our legal jurisprudence, it arises when an administrative body by reason of a representation or by past practice or conduct gave rise to an expectation which it

6 (2009) 1 SCC 180

7 (1999) 4 SCC 727

would fulfill unless some overriding public interest comes in the way. The judgment holds that a person who claims on the basis of this doctrine must be in the first instance, satisfied that he has relied upon the said representation and that the denial of that expectation has worked to his detriment. The Court could only interfere with the decision taken by the authority if it was found to be arbitrary, unreasonableness or in gross abuse of power or in violation of principles of natural justice and if it is not taken in the public interest. The Supreme Court has observed that it is well settled that the concept of legitimate expectation has no role to play where the State action is taken as a matter of public policy or in the public interest unless the action taken amounts to an abuse of power. The Court must not usurp the discretion of the public authority which is empowered to take decisions in law and the Court is expected to apply an objective standard. Even in case where the decisions are taken entirely at the discretion of the authority concerned but if the decision is taken fairly and objectively, the Court will not interfere on the ground of procedural fairness, to a person whose interest based on legitimate expectation might be affected. Thus the grounds on which relief can be granted on the basis of legitimate expectation

is extremely limited.

45. In the course of submissions Mr.Naik had referred to the decision of *Villianur Iyarkkai Padukappu Maiyam Vs. Union of India & Others*⁸ in support of his contention that the Court held that in the matter of policy decision and economic tests the scope of judicial review is very limited and unless the decision is shown to be contrary to any statutory provision or the Constitution, the Court would not interfere with an economic decision taken by the State. The Supreme Court held that in a democracy it is prerogative of the elected Government to follow its own policy and often change in a Government may result in the shift in focus or change in economic policies. Any such change may result adversely affecting some vested interest but unless any illegality is committed in the execution of the policy or the same is contrary to law or malafide, a decision bringing about change cannot per se be interfered with by the Court.

46. The Supreme Court further held that it is not within the domain of the Courts or the scope of judicial review to embark

8 (2009) 7 SCC 561

upon an enquiry as to whether a particular public policy is wise or whether better public policy can be evolved. Nor are the courts inclined to strike down a policy at the behest of the petitioners merely because it has been urged that a different policy would have been fairer or wiser or more scientific or more logical. Wisdom and advisability of economic policy are ordinarily not amenable to judicial review and we do not find any reason to stay the present decision resulting in impugned notifications. The Court is not a forum for questioning correctness of a policy. The Supreme Court further observed that a presumption operates that Governmental action is reasonable and in public interest. In the event of challenge it is for the petitioners to show that such policy was wanting in reasonableness and is not in public interest. Such burden of proof is to be discharged by the petitioners to the satisfaction of the Court which in the instant case the petitioners has not been able to do. The government may be entitled to make decision and policy which may be necessary in the peculiar circumstances. The Supreme Court observed this in the case of privatisation of the Port in the State of Pondicherry. However, the essence of the decision is that the policy matters are not to be lightly interfered with especially when the petitioners are

unable to show that it has been arbitrary and unreasonable.

47. In rejoinder, Dr. Sathe made reference to Form VI being Cash Flow Projection statement which had pegged project costs to Rs.1220 crores. He submitted that according to this chart in the year 2015-16, the net toll income to be derived from toll was estimated at Rs.162.82 crores. In this manner the income would keep increasing till it peaks 525.74 crores in the year 2026-27 and stand reduced to Rs.226.70 crores in the year 2027-28 thereby providing IRR of 13.94%. Dr. Sathe submitted that the projections were made at the time of entering into the Concession Agreement and they have thereafter undergone revision and that actual cash flow has since been updated in form VI which he then took us through.

48. According to updated form, the total costs has escalated to 21.66 crores and for relevant period 2015-16 net toll income stood at Rs.46.75 crores. It is according to this updated statement Dr. Sathe pointed out that net toll income would peak in 2027-28 at Rs.127.82 crores and thereafter reduce to Rs.87.37 crores in 2028-29. According to him the

effect of notification would mean that instead of making reasonable profit, the petitioners are likely to face a deficit of Rs.3988.01 crores. These are all figures of computation arrived at on the basis of inputs based on current operations of the project. Although the petitioners have relied on contents of Form 4, except for a revised and updated version of Form 6, they have not relied upon any further financial analysis which reveal the effect after the exemptions were granted. In our view the order we intend to pass it is not necessary to deal with these factual aspects of the matter.

49. Dr. Sathe submitted that the contentions of the State that it has taken steps so that no loss would be caused to the petitioners by compensating in good measure to enable the petitioners to meet IRR of 13.94% has no merit. He submitted that quite apart from the numbers mentioned in the projections, the State should compensate the project for the actual number of vehicles that would pass through the Toll Plaza.

50. Therefore according to Dr. Sathe, the difference between the figures in the Form IV and the actual number of

vehicle of each exempted cars passing through the Toll Plazas should be mentioned and the State must make payments on the differential as well in accordance with the agreed toll.

51. In view of the suggestions made by Mr. Naik, learned Senior Counsel appearing for the State to pay the difference in actual toll collections and the projected collections as per Form 4, Dr. Sathe had contended that the only manner in which the present dispute should be resolved in by the State agreeing to one of the following:-

(i) (A) The State shall pay to the petitioners on monthly basis difference between net collection of toll as projected in Form 6 (column 12) being part of the Concession Agreement and the actual collection of toll amount at the toll plaza.

Or

(B) The State shall pay to the petitioners on ad-hoc basis an amount equivalent to the number of vehicles of exempted category being Car, Jeep such as Tata Sumo, Trax, Commander and any other similar vehicles (having carriage capacity upto twelve passengers excluding driver) and Six Seater Auto-Rickshaw (Tum-Tum) (i.e. column 2(a) of the Schedule to the Notification dated

30th June, 2015), the Buses of Maharashtra State Road Transport Corporation (ST), all the vehicles coming from Taloja MIDC and school buses (hereinafter collectively referred to as “exempted vehicles”), (as mentioned in Form IV being part of the annexure to the Agreement) multiplied by the toll rate of each category of vehicles for that year and further pay/recover on monthly basis an amount calculated on the basis of actual number of vehicles of those categories passing through toll booth multiplied by the toll rate of that category of vehicles for that year.

Or

(ii) To reissue the Notification under the Maharashtra Motor Vehicles Taxation Act, 1958, exactly in format of Schedule F appended to Concession Agreement authorising the petitioners to levy and collect the toll on the vehicles as per such notification.”

52. On behalf of the petitioners reliance was placed on *ABL International Ltd. and Anr. Vs. Export Credit Guarantee Corporation of India Ltd. and Others*⁹ wherein the Supreme Court observed that where a party discharges an act of the Government and acts as an agent of the Government and discharges functions in the national interest and that in such

⁹ (2004) 3 SCC 553

situation it would be futile to contend that action such as the notification which are impugned in the writ petition did not have touch of public function or discharge public duty. The Court had laid down legal principles as to maintainability of the writ petition and in appropriate case writ petition is against the State or an instrumentality of the State arising out of contractual obligation is maintainable. Merely because some disputed questions of facts arise for consideration the same cannot be the ground to refuse to entertain a writ petition. In some cases as a matter of rule, writ petitions involving monetary claim is also maintainable. In that case the Hon'ble Supreme Court was hearing a challenge to the judgment of the Appellate Bench of Calcutta High Court. The learned Single Judge of the Calcutta High Court after hearing parties concluded that although dispute arose out of contract, the first respondent being State within meaning of Article 12, was bound by the term of contract and therefore for non performance a writ action was maintainable. In appeal filed by the first respondent before the Division Bench the findings were reversed. It was held that the appellants claim involved disputed questions of fact which could not be adjudicated under Article 226. As a result the Supreme Court

observed that divergent views of two Courts have resulted in a question of consideration as to whether the writ petition under Article 226 is maintainable to interfere with contractual obligations of the State or instrumentality by the appealing party.

53. The Court observed that the issue is not *res integra* and in large number of decisions which referred to the Court inter alia observed that once the State or instrumentality of the State is a party to the contract it is under an obligation to act in law fairly, justly and reasonably as required under Article 14 of the Constitution of India. According to Dr. Sathe these observations of the Supreme Court which were reflected in the facts of that case where the company in question was acting as an agent of the Government giving guarantee and had responsibility to discharge such function in the national interest were clearly applicable in the instance case as well. Further reference was made to the decision in *Joshi Technology International Inc. Vs. Union of India* 2015 SCC Online SC 490.

54. Dr. Sathe relied upon paragraphs 55 and 57 of the judgment and submitted that in the present writ petition a public

law remedy is what the petition seeks to invoke, in contradistinction to the private law remedy simplicitor under the contract. In the said judgment reliance is placed on the observation of Kumari Shri Lekha Vidyarthi Vs. State of U.P. and others (1991) 1 SCC 212 and other judgments which dealt with issue of nature. Dr. Sathe relied upon the observations of the Court as to various legal positions that emerge from the judgments which are summarised by the Supreme Court as follows :

“(i) At the stage of entering into a contract, the State acts purely in its executive capacity and is bound by the obligations of fairness.

(ii) State in its executive capacity, even in the contractual field, is under obligation to act fairly and cannot practice some discriminations.

(iii) Even in cases where question is of choice or consideration of competing claims before entering into the field of contract, facts have to be investigated and found before the question of a violation of Article 14 could arise. If those facts are disputed and require assessment of evidence the correctness of which can only be tested satisfactorily by taking detailed evidence, Involving examination and cross- examination of witnesses, the case could

not be conveniently or satisfactorily decided in proceedings under Article 226 of the Constitution. In such cases court can direct the aggrieved party to resort to alternate remedy of civil suit etc.

(iv) Writ jurisdiction of High Court under Article 226 was not intended to facilitate avoidance of obligation voluntarily incurred.

(v) Writ petition was not maintainable to avoid contractual obligation. Occurrence of commercial difficulty, inconvenience or hardship in performance of the conditions agreed to in the contract can provide no justification in not complying with the terms of contract which the parties had accepted with open eyes. It cannot ever be that a licensee can work out the license if he finds it profitable to do so: and he can challenge the conditions under which he agreed to take the license, if he finds it commercially inexpedient to conduct his business.

(vi) Ordinarily, where a breach of contract is complained of, the party complaining of such breach may sue for specific performance of the contract, if contract is capable of being specifically performed. Otherwise, the party may sue for damages.

(vii) Writ can be issued where there is executive action unsupported by law or even in respect of a corporation there is denial of equality before law or

equal protection of law or if can be shown that action of the public authorities was without giving any hearing and violation of principles of natural justice after holding that action could not have been taken without observing principles of natural justice.

(viii) If the contract between private party and the State/instrumentality and/or agency of State is under the realm of a private law and there is no element of public law, the normal course for the aggrieved party, is to invoke the remedies provided under ordinary civil law rather than approaching the High Court under Article 226 of the Constitutional of India and invoking its extraordinary jurisdiction.

(ix) The distinction between public law and private law element in the contract with State is getting blurred. However, it has not been totally obliterated and where the matter falls purely in private field of contract. This Court has maintained the position that writ petition is not maintainable. Dichotomy between public law and private law, rights and remedies would depend on the factual matrix of each case and the distinction between public law remedies and private law, field cannot be demarcated with precision. In fact, each case has to be examined, on its facts whether the contractual relations between the parties bear insignia of public element. Once on

the facts of a particular case it is found that nature of the activity or controversy involves public law element, then the matter can be examined by the High Court in writ petitions under Article 226 of the Constitution of India to see whether action of the State and/or instrumentality or agency of the State is fair, just and equitable or that relevant factors are taken into consideration and irrelevant factors have not gone into the decision making process or that the decision is not arbitrary.

(x) Mere reasonable or legitimate expectation of a citizen, in such a situation, may not by itself be a distinct enforceable right, but failure to consider and give due weight to it may render the decision arbitrary, and this is how the requirements of due consideration of a legitimate expectation forms part of the principle of non-arbitrariness.

(xi) The scope of judicial review in respect of disputes falling within the domain of contractual obligations may be more limited and in doubtful cases the parties may be relegated to adjudication of their rights by resort to remedies provided for adjudication of purely contractual disputes.

55. Dr. Sathe had placed reliance on points (v), (vii), (ix) and (x) to submit that the writ petition is maintainable and

appropriate writ can be issued since distinction between public law and private law is not so clear in the present case. It is not correct that the present matter falls in private law field of contract and once it is observed that the nature of activity involves a public law element the matter can be examined by the Court under Article 226 to see whether the same is fair, just and equitable.

56. Mr. Janak Dwarkadas, learned senior counsel is appearing for some of the petitioners in other petitions, wherein the issues are not identical to the present petitioners. He requested us to hear him on the aspect of policy issues since the decision in these petitions may have a bearing on the petitioners whom he represents. Accordingly, we have permitted Mr. Dwarkadas to make submissions on the larger issue involved. In the course of arguments, he submitted that the State has been picking and choosing projects to select to implement their policy. He submitted that impugned notifications are not issued generally to exempt all projects from payment of toll but are being issued selectively as in the case of the petitioners and his clients who are petitioners in writ petition Nos. 7573/2015, 7574/2015 and 7575/2015. According to Mr. Dwarkadas, the State did not

merely act on a recommendations of the Committee but had set up the Committee with the task of determining which toll plaza should be closed. Therefore an arbitrary decision was taken and an attempt was made to cover it up by involving the Committee. He submitted that in the case of these petitions, the facts may be slightly different, inasmuch as unlike the petitioners herein, the petitioners in other petitions are not “start ups” in the operation of the Toll Plazas. They have been operating the projects for a number of years and have some years to go before the concession period comes to an end. He submitted that if the respondents agreed to compensate the petitioners herein, his clients also would be entitled to benefit of current policy being implemented pursuant to the impugned notifications. According to him “toll policy” is conveniently employed to affect certain persons and not others. He submitted that while enforcing policy due regard has to be given to uniformity in the Court rather than selective. Citing an example, he stated that certain projects which also involve the MSRDC are excluded from the policy decision.

57. Mr. Dwarkadas also assailed the present impugned notification in the policy cited by the Government on the ground

that, although Mr.Naik cited development and implementation of measures for avoiding the public discontent in view of public agitation under levy of toll at toll plazas, it is pertinent to mention that insofar as toll plazas of MSRDC are concerned, the MSRDC had communicated in 26 toll plazas in five projects it is not feasible to provide exemption to cars, jeeps and MSRDC buses. This admission in the report of the Government relied upon by Mr. Naik itself shows that policy is not based in the public interest.

58. The learned Senior Counsel relied upon ***Bannari Amman Sugars Ltd. Vs. Commercial Tax Officer & Others***¹⁰ (2005) 1 SCC 625 wherein the Hon'ble Supreme Court has dealt with principle of promissory estoppel and observed that for taking up policy decision the Government is now required to hear persons of benefit which is sought to be withdrawn. However, when such benefit is sought to be withdrawn the Court must consider all aspects including result sought to be achieved and public good at large keeping in mind fundamental principles of equity.

¹⁰ (2005) 1 SCC 625

59. It is further observed by the Supreme Court that in cases where the doctrine of promissory estoppel is invoked a clear, sound and positive foundation must be laid in the petition itself by the party invoking the doctrine and bald expressions without any supporting material will not be sufficient. The Courts are bound to consider all aspects including public good at large. Mr. Dwarkadas also relied upon decision of the Punjab Communication Ltd. (supra) and submitted that change in policy defeating the substantive legitimate expectation must satisfy the the test of Wednesbury reasonableness.

60. After having perused the pleadings and documents and having heard counsel, we find that the case of the petitioners in a nutshell is that the respondents had acted in arbitrary and unreasonable manner in having issued the impugned notification without following due process of publishing draft notification and having issued the notification the respondents sounded the death-knell of the Concession Agreement. According to the petitioners the effect of exemption granted by the notification will reduce the toll collection by 95%. The petitioners have submitted that cost of toll collection and of running toll plaza is about Rs.8 lacs per day

and that after taking into account the exemptions it is well nigh impossible to break even or even service the debt. This figure of Rs.8 lakhs has been stated across the bar and is not to be found in the pleadings and we therefore do not wish to interfere into this area. The petitioners further contend that the impugned notifications are hit by doctrine of legitimate expectation and promissory estoppel and are, therefore, the actions of the State are violative of Article 14, 19 (1) (g) and 300A of the Constitution of India. The petitioners submits that as on date the petitioners are unable to pay costs of maintaining the project let alone servicing of debt which includes amount borrowed from commercial banks at high rate of interest.

61. The proceedings thus far may be briefly adverted to; The first Writ Petition No. 5764 of 2015 was filed on 05 December 2014 sought the following prayers:

- a) *That this Hon'ble Court be pleased to issue a writ of mandamus or a writ in the nature of mandamus or any other writ, direction or order under Article 226 of the Constitution directing the Respondents -*
 - (i) *To forthwith take all necessary steps in discharge of*

their obligations as public duty as well as arising under the Concession Agreement dated 19th January 2011 so as to enable the Petitioners to commence levy and recovery of toll on Sion-Panvel Special State Highway, which the petitioners have developed on “Build, Operate and Transfer basis” under the Concession Agreement dated 19th January 2011;

- (ii) To take all necessary steps including issuing Notification in terms of Schedule “F” appended to the Concession Agreement dated 19th January 2011 in terms of provisions of the Bombay Motor Vehicles Tax, 1958.*

62. On 16 December 2014 the following Order came to be passed :-

“1....

- 2. The learned counsel also invites out attention to the provisional Completion Certifying that the work of improvement to Sion Panvel Special State Highway from B.A.R.C. Junction to Kalamboli Junction is nearly completed by the petitioners and all parts of the project can be legally, safely and reliably opened for commercial operation. The certificate further states that the toll can be levied from 30 September 2014.*
- 3. The grievance of the petitioner is that in spite of the aforesaid completion certificate, the State Government*

is not issuing the notification as required by clause 4.1 (b) of the Concession Agreement.

4. *Notice to the Respondents, returnable on 23 December 2014.”*

63. Thereafter on 23rd December 2014, the Court directed the State Government to issue the Notification required under Clause 4.1 (b) of the Concession Agreement in the format given in Schedule 'F' (page 140 of the paper-book) as expeditiously as possible and, in any case, within 2 weeks from 23 December 2014.

64. On 3rd January 2015, the State Government issued a Notification authorizing the Petitioners to levy toll w.e.f. 6th January, 2015, except in respect of exempted category. This Notification had three additional categories of exemptions in addition to the exempted category from the format Notification in Schedule 'F'. Those categories being the (1.) Buses of Maharashtra State Road Transport Corporation; (2.) All vehicles coming from Taloja MIDC Road and (3.) Cars owned by named villages.

65. On 26 May 2015, the State Government issued another Notification purporting to grant exemption to light motor vehicles

as defined under the Motor Vehicles Act, which were part of item 2(a) of the Notification dated 3rd January 2015, from payment of toll with effect from 1st June 2015.

66. Upon issuance of the notification of 26th May 2015, the petitioners filed the present Writ Petition No. 5764 of 2015 seeking quashing of the notification dated 26th May 2015. Ad-interim reliefs were refused on 30th May 2015. This Order was challenged in the Hon'ble Supreme Court on 3rd June 2015, the Supreme Court dismissed the SLP permitting the petitioners to apply for modification of the Order. The Civil Application was then taken out. At the hearing of the Civil Application Mr. Anil Singh, learned Acting Advocate General, informed the Court that the Notification under the Maharashtra Motor Vehicles Tax Act, 1958 will be issued by tomorrow for a further period of 6 months.

On 30 June 2015, a fresh Notification was issued authorizing the petitioners to levy, collect and appropriate toll on Sion-Panvel Special State Highway for a period commencing from 1st July 2015 and ending on 31st December 2015. However, in this Notification toll against category of light motor vehicles, cars, jeep, etc. has been shown as nil and

there are categories of Maharashtra State Road Transport Corporation buses, school buses and vehicles coming from Taloja MIDC Road added in the exempted category which is in deviation of Schedule “F” of the draft Notification appended to the Concession Agreement.

The petitioners, on amending the writ petition after the aforesaid Notification, have added the following prayers to the writ petition:-

- (a)(i) That this Hon'ble Court be pleased to issue a writ of certiorari or a writ in the nature of certiorari or any other writ, order or direction under Article 226 of the Constitution calling for the records and papers pertaining to the impugned Notification being Exhibit “H” hereto, and after going into the legality, validity and propriety of the impugned Notification, quash and set aside the impugned Notification to the extent of the impugned Notification exempting the collection of toll from light motor vehicles as defined under the Motor Vehicles Act, 1958 in column (a-ii) of the Schedule, the Buses of the Maharashtra State Road Transport Corporation, all vehicles coming from Taloja MIDC and school buses;*
- (a)(ii) That this Hon'ble Court be pleased to direct the Respondents to re-issue /amend/rectify the*

impugned Notification dated 30th June 2015 to bring it in direct consonance with Schedule “F” of the Concession Agreement dated 19th January 2011 as appended at Exhibit “B” hereto, and thereby allow the petitioners to levy and collect toll on that basis as agreed upon under the Concession Agreement.”

67. The petitioners have contended that the Agreement is a civil law contract akin to law, a statutory contract and an extraordinary contract entered into pursuant to the provisions of Motor Vehicles Act, 1958 and as such it cannot be equated with any ordinary commercial contract.

68. An attempt has been made during submissions on behalf of the petitioners to contend that the toll being collected is in fact a tax that has been levied by the State which is being collected on behalf of the State by the petitioners as an agent. It is therefore the case of the petitioners that the contract which is built operate and transfer contract amounts to assignment of sovereign function of the State to its agent the – petitioner.

69. On the other hand the State has contended that the

present contract is neither civil law nor statutory contract and merely because the collection of toll is empowered by section 20 of the Motor Vehicles Act it does not take the character of a statutory contract. The State has further contended that Concession Agreement is a purely commercial contract which does not partake character of a statutory contract. It is not a contract to collect any tax and does not amount to assignment of any sovereign function. The State has contended that the Concession Agreement is merely an enabling contract for a welfare activity of the State, namely, to maintain efficient road network. The State has contended that the impugned notifications are issued as a result of policy decision taken in larger public interest and cannot be assailed in writ petition. As a matter of policy are beyond scope of judicial review. On these grounds the State has opposed the petitioners' claim.

70. We have given our anxious consideration to the rival contentions of the parties and we find that the present case the Concession Agreement is somewhat of more recent compared to various other Concession Agreements operating in the State. We are told that there are about 52 other toll projects operating in the

State which may be affected by the impugned notification. Clearly, therefore, it appears that the notifications are intended to effect a change in the policy of the State to the tolling business and the public private partnerships in the field of tolling.

71. In this behalf we have examined the history of toll roads and public policy aspects of toll roads and had occasion to consider a report made by World Bank* on the aspect of tolling. This report takes into consideration various aspects of tolling including modes of evidence used to develop toll booths. On various aspects of tolling will have to be considered and some of the key issues which are highlighted in this report are the reasons involved in build operate and transfer model which include political and financial risks. The political risks include action of the Government, to generate earnings, terminating contracts, imposing taxes of project which severely damages values for the investors. This may also include not allowing private partner to charge the port. The financial risk include project cash flow being insufficient to adequate return of private debt and equity investment. World wide it is noticed that the financial risk in toll projects are mainly borne by private sector although in some cases

* Private Financing of Toll Roads by Gregory Fishbein and Suman Babbar

the Government may provide a financial guarantees which include cash grant which improves the rate of return. It is common in various privately owned toll road projects that projected resources may diminish toll collections below the threshold amount. The current scenario resulting from the impugned notifications is not unknown to the privately financed tolling business. .

72. After reviewing the history of toll roads, the World Bank study (the Report) examined the public policy and modes of financing used to develop private toll road concessions and to mobilize capital for their construction and operation. The study also discusses the main public policy issues in toll road development. The findings suggest that while private toll road development is likely to experience modest growth in the near future, public resistance to tolling, the time and cost of implementing concessions, and other factors will probably limit industry activity.

73. The Report records that interest in private toll roads is particularly strong because governments require alternative

methods of financing their extraordinary transport needs. Tolling has also become an attractive option for managing traffic demand on increasingly congested highways. Challenges to developing and financing toll roads are similar to those faced by other capital intensive infrastructure projects and face risks such as construction risk, political risk, currency risk, and force majeure risk. But toll roads face greater risks in certain important areas, including the unpredictability of future traffic and revenue levels. Governments are facing dramatic growth in highway needs, both for new facilities and for maintenance and rehabilitation of existing facilities. In most industrialised countries 90 percent or more of highway kilometers are publicly funded; in developing countries governments often bear the entire cost. However, the limited resources available through traditional government funding sources has led to increasing interest in private toll roads as an alternative way of meeting highway needs.

74. The Report records that private tolling is believed to be being pursued in a wide variety of countries, including Argentina, Chile, China, Colombia, Ecuador, HongKong, Hungary, India, Indonesia, Malaysia, Mexico, the Philippines, and Thailand. Project

economics refers to the cost of developing, constructing, and operating a project, relative to the revenue it generates. This is typically measured in terms of net present value or internal rate of return on investment (such as the IRR in the instant case). The project economics of a toll road are determined by a number of factors. There is no standard project in the private toll road industry; rather, toll facilities exhibit widely varying characteristics and project economics. The predictability of expected traffic on a toll road can be assessed on the basis of existing traffic levels on the corridor (if any) and on the competitive alternatives available. In the present case we are told there are no alternative roads.

75. The build-operate-transfer (BOT) model is the most common approach used to assign responsibilities in toll road projects and similar arrangements are used to develop new facilities or improve existing ones. Under the BOT model a private consortium receives a concession to finance, build, control, and operate a facility for a limited time, after which responsibility for the facility is transferred to the government, usually free of charge. The private party typically assumes primary responsibility for constructing the project, arranging financing, performing

maintenance, and collecting tolls, while the public sector retains legal ownership. In most projects the private sector was primarily responsible for construction and toll collection, while the public sector retained legal ownership of the facility. Traffic and revenue risks are perhaps the greatest risks faced by toll road projects. These are defined as risks associated with insufficient traffic levels and toll rates too low to generate expected revenues. The treatment of traffic and revenue risk ranges from full private sector assumption of the risk to government-provided minimum traffic and revenue guarantees. As far as minimum traffic or revenue guarantees are concerned the World Bank study revealed that the government implicitly covers this risk. Applying this feature to the present case, we find the State appears to be inclined to move in this direction as a matter of policy.

76. The Report found that political risk arising out government actions that could impair a facility's ability to generate earnings. Such actions could include terminating the concession or imposing taxes or regulations on the project that severely damage its value to investors; not allowing the private partner to charge and collect tolls as specified under the concession agreement.

According to the Report, governments generally agree to compensate investors for termination of the concession and violations of the concession agreement, including agreed toll rates. However, private concessionaires generally assume the risk associated with dispute resolution and the ability to obtain compensation in the event of a government violation of the concession agreement. Government assumption of political risks has value to investors only to the extent that there is a fair and timely process for compensating the concessionaire for contract violations.

77. Financial risk is defined as the risk that may cause project cash flows may be insufficient to pay an adequate return on the private debt and equity invested in the project. The private sector is generally responsible for financial risk, although in some cases governments may provide debt guarantees, equity guarantees, and other types of financial guarantees. Governments also may provide cash grants, equity, or subordinated loans, which improve the expected rate of return on private capital invested.

78. Apropos the legal framework for a concession policy

the Report records as follows:-

“A successful concession program requires a supportive policy and legal framework. A private toll road program should be integrated with national, regional, and local transportation policies and programs and should be enabled by a concession law. Transportation policy objectives typically include providing efficient mobility at lowest cost and with the least environmental impact, and facilitating economic development.”

“Once a decision has been made to pursue a private toll road program, a concession law that specifically addresses toll roads is critical for providing clear legal authority and establishing government support and accountability for the program. In the facts of this case the State only relies upon the amended provisions of the Motor Vehicles Act. If traffic is lower than expected, rates cannot be adjusted upward to their optimal profit-maximizing level. If traffic is higher than expected, the government cannot limit the concessionaire’s returns by lowering toll rates. In addition, toll rate regulation limits the flexibility of the concessionaire to manage traffic through variable-rate, market-based tolls.”

79. The fact remains that in India there are no concession laws as contemplated in the world bank report. If there were to be comprehensive legislation on national transportation, provisions regarding tolling could have been part of it including suitable provisions relating to concessions. Absent of such law, one has fall back upon the existing legislation.

80. The Supreme Court has time and again reiterated that in democracy it is the prerogative of the elected governments to follow its own policy and often change in a Government may result in the shift in focus or change in economic policies which may adversely effect some parties. This has been reiterated time and again.

81. The World Bank study has also observed that a minimum traffic or revenue guarantee, in which the government compensates the concessionaire in cash if traffic or revenue falls below a specified minimum level, is a relatively common form of government support. Typically, the minimum traffic or revenue threshold is set below (for example, 10–30 percent) the expected level in order to reduce government exposure while providing

sufficient coverage to support the debt component of the capital structure. Under such a structure the government can support private financing for a road that it would otherwise have to fund on its own, while limiting its financial exposure to the possibility that revenue may fall below the guaranteed minimum.

82. Minimum traffic or revenue guarantees, however, are the best means of addressing revenue risk for feasible projects because they provide a defined floor on revenues that is generally set at a level sufficient to cover senior debt service payments. The World Bank report further observes as follows:-

“Where governments are implementing sound road policies but do not have adequate credit for their support mechanisms to be effective, multilateral financial institutions can provide risk guarantees and credit enhancements to support the commitments of host governments during a transition period, until the government sponsor has developed adequate credit to support projects on its own. Such mechanisms have been used successfully in the power sector.”

“ One of the greatest impediments to toll roads is the public’s resistance to paying tolls, especially on

existing roads that the public often perceives as already paid for through tax revenues. Public resistance to tolling has impeded or halted private toll road programs in environments ranging from Washington state (in the United States) to Argentina. Advances in electronic tolling should reduce public resistance associated with the inconvenience of having to stop to pay tolls. However, the concept of road pricing is still not widely accepted. Of particular concern to some opponents of tolling is the alleged inequity of charging the public, especially low-income passengers, to use a vital public facility. The time and cost required to establish the complex legal and policy framework required for a concession, implement the program, and close financing is a second important inhibiting factor. As discussed in the section on financing structures and sources, private toll road concessions involve highly complex legal and financial arrangements and are often difficult and timeconsuming to finance. In many cases these costs may outweigh the benefits of private tolling, although increased experience and sophistication among public and private partners may reduce these costs in the future. The difficulty of developing private toll roads is often compounded by government's failure to integrate

concessions with a broader regional or national transportation policy.”

83. The Report also records that minimum revenue guarantees will require reporting revenues on a regular basis. Under rate of return regulation extensive reporting is required to monitor capital costs, operating costs, revenues, and rate of return. In addition, a procedure is required for the government to monitor and verify the data reported by the concessionaire, including arrangements for auditing and challenging the concessionaire's reports, if necessary.

84. Thus, it is seen that world over wherever minimum traffic count is not adequate revenues fall below specified minimum level and it is relatively common that the Government provides support. In the instant case the State has conceded that the impugned notification would certainly reduce the revenue of the petitioners. The State has, therefore, to compensate the petitioners which amount to enable the petitioners to achieve its IRR of 13.94%. The concept of IRR is also a world wide feature in tolling projects as we have seen from the World Bank Report.

85. We are of the view that the decision taken by the State would fall within domain of policy decision since it is not restricted to the petitioner's project alone but to host of other tolling projects across the State. No doubt as submitted by Mr.Dwarkadas, learned senior counsel appearing on behalf of the petitioners in other petitions had submitted that some tolling projects have been left untouched by the State but that alone, in our view, does not establish that policy of the State is being implemented in arbitrary or discriminatory manner. It is not for the courts to monitor the manner in which policy is to be implemented. The fact that some projects have not been included in the present ground of exemption does not mean that they are excluded in totality. The policy may be implemented in due course in phased manner. We also find that it is commonplace in the tolling business, as found by the World Bank study, that one of the greatest impediments in tolling business is public resistance to pay tolls specially on existing roads where public even perceives. It has a right by virtue of having contributed to tax revenues. The instant tolling project is uniquely placed inasmuch as the road in question has always been in existence and as described by the petitioners is the gateway to southern India. The extent of road

has now been enhanced to meet high density of traffic flowing through this road. This road would largely provide passage to light and heavy motor vehicles. The public have also being paying substantial amounts of tax upon registration of vehicles described as a one time tax. It is not as if the vehicles on the road are expected to pay toll for use of the existing road merely because its capacity and quality have been enhanced. World wide recognition of this feature of public resistance to tolling is therefore exemplified by the present case. The resistance of public is to be measured not by any stray incidents of violence that may have been inferred by the petitioners and which have been referred to in submissions made before us by Mr.Dwarkadas. The learned senior counsel for the other petitioners alluded to the fact that the State has succumbed to political pressure and have issued notification only owing to political pressure and stray incident of violence at toll booths.

86. Mr. Naik had countered this suggestion by stating that contribution to be made by the State by way of compensation are provided for are budgeted. The State would be compensating the petitioners in the instant case on the basis of cash flow projections.

87. We are satisfied that the State has recognised the fact that the petitioners would undoubtedly suffer some loss if all light motor vehicles are exempted from payment of toll. During various hearing before us several attempts were made by the counsel to arrive at a workable solution but there are some key issues that could not be resolved between the contesting parties. The State, on one hand, submits that it will compensate the petitioners to the extent of difference between projected collections Form 4/Form 6 and the actual toll collected.

88. On the other hand on behalf of the petitioners it was contended that the figures in Form 4 and 6 are mere estimates and the same are bound to change. It is stated that if the State is serious about compensating the petitioners they would have to pay the difference between toll that would have been collected had the impugned notification not been issued and the toll that is collected pursuant to the impugned notification, namely, actual toll that would have been collected from the exempted category of vehicles, namely, light commercial vehicles, buses of MSRTC, school buses and those of neighbouring villages and the vehicles

from MIDC Taloja would have to be paid over as and by way of compensation to the petitioners. It is suggested that this amount could be computed by the State on the basis of figure of actual vehicles passing through toll gate which would be provided by the petitioners. However, the State was unwilling to accept those figures and they want to verify the same. It was suggested that the State makes provision of monitoring actual number of exempted vehicles passing through toll gates. However, it was found that the State was not in position to accede to demand. In the circumstances these areas cannot be adjudicated in writ jurisdiction under Article 226 of the Constitution of India.

89. We do not find favour with the petitioner's argument of being impugned notification being violative of rights under Article 14, 19(1)(g) and 300A of the Constitution. The State was fully empowered to issue exemption notification by virtue of section (1-E) of section 20 of the Motor Vehicles Act, 1958 which is what the State has done. The State is empowered as a matter of policy to exempt vehicles or a classes of vehicles from levy of toll. It is useful to consider the provisions of the Act in this behalf. Section 20 (1-E) reads as follows :

“20 (1-E) : The State Government may, by notification in the Official Gazette, in the public interest, exempt any vehicle or class of vehicles from levy of toll under this section.”

89. The sub-section clearly reveals that it contemplates the State's power to issue notification in public interest to exempt any vehicles or owners of vehicles from levy of toll under this section. Sub-section (1-E) was added by Maharashtra Act 7 of 2000 that preceded insertion of Maharashtra Act 17 of 2001 by which the following words were added :

“or by private entrepreneur or an agent appointed by the State Government or the State Public Enterprise authorised by the State Government in this behalf, by entering into an agreement with such entrepreneur or agent under the Build, Operate and Transfer (B.O.T) Projects,”

90. Therefore, the petitioners at all times was aware of the fact that the State could issue notification except to any class of vehicles. This power read with other provisions of the Act empower the State to issue such notifications and we do not find

it as violative of the petitioner's rights. The petitioners have other contractual remedies open.

91. The Supreme Court in case of *Shrijee Sales Corporation Vs. Union of India*¹¹ (1997) 3 SCC 398 observed that if there is supervening public equity, the Government would allow to change its stand and will have power to withdraw from representation made by it which induced persons to take certain steps which may have gone adverse to interest of such persons on account of such withdrawal. Moreover, the Government is competent to rescind from the promise even if there is no manifest public interest involved, provided that no one is put in any adverse situation which cannot be rectified. In the present case, we find that position that the petitioners found themselves in is not irreversible and can be rectified given the fact that it is on this basis Dr. Sathe submitted that the State cannot be allowed to withdraw from its promise made in the contract.

92. We are also unable to agree with the petitioners that the toll allowed to be collected by virtue of Motor Vehicles Act by

¹¹ (1997) 3 SCC 398

section 20 (1-E) of the Motor Vehicles Act amounts to a tax which is being collected by the petitioners so also the petitioners has not been able to site a single example of the State assigning the right to collect the tax from citizens and appropriating such tax towards reimbursement of costs incurred by the contractor such as the petitioners. The argument that the toll is a tax is also not sustainable by the reason of the fact that the toll collected is not remitted to the treasury under any particular head of taxation. The collection of toll is nothing but a fee for use of toll way. A tax would allude to contribution of the State's revenue. In the instant tax toll levied will not in our view qualify as tax under any of the relevant statutes.

93. This brings us to other submission of the petitioners that the activity of collection of toll is sovereign function. In our view the toll cannot be construed as sovereign function in view of the fact that sovereign functions are described as inalienable in the words of the Supreme Court and in the instant case toll collection cannot be considered as a sovereign function. A sovereign function is one that intrinsically cannot be assigned and as admitted by the petitioners themselves in submissions the

provisions of good roads is part of the welfare activity of the State. Thus viewed, it is not possible to hold that the collection of toll once permitted cannot be taken away specially since the State has voiced its willingness to compensate the petitioners for loss caused.

94. It is pertinent not be out of place to mention that the Concession Agreement contains Article 16 which deals with the Events of Default and Termination. Dr. Sathe had drawn our attention to these provisions. Article 16.1(a) deals with the event of default committed by the concessionaire. He submitted that under Article 16.1(a)(9) the petitioner is borrower and if a default has occurred under any of the financing documents and any of the lenders have recalled its financial assistance and if amount demanded are not paid, it will constitute a default under the Concession Agreement triggering the default clause. He, therefore, submitted that in the light of restricted revenue generation by virtue of impugned notification there is every likelihood that the petitioner may be considered as a defaulter under clause 16.1(a) for no fault of the petitioner and this is one more reason why the operation of the impugned notifications

must be stayed. In our view it is unlikely that the respondent will hold the petitioner in default under the Concession Agreement, if in fact its revenue generation has been genuinely affected. Since the respondent themselves have conceded that the petitioner is likely to suffer loss of revenue, this cannot be major consideration for grant of any relief to the petitioner. Furthermore, clause 16.1(b) deals with events of default by Government of Maharashtra.

95. Clause 16.1(b) (1) provides that if the Government is in breach of the agreement and has failed to cure the breach within 90 days of the receipt of notice in that behalf from the concessionaire

OR

If the Government has repudiated the agreement or otherwise evidences its intention not to be bound by the agreement

OR

if the Government or its agency has by an act of commission or omission created circumstances that have a Material Adverse Effect on the performance of its obligation by

the concessionaire and has failed to cure the same within 60 days of notice by the concessionaire, the petitioner will have right of terminating the Concession Agreement by issuing a notice of termination. Upon such termination, the petitioner shall be entitled to receive by way of “termination payment” a sum equal to the “total debt due” plus 120% of the Equity subscribed in cash and actually spent on the project

96. Furthermore, Article 17 provides that the petitioner can apply for extension of the concession period on account of any change in law.

97. Mr. Naik in the course of his submissions stated that this is option that is contractually provided but the petitioner have deliberately not opted for this course. We do not wish to make any observation on this aspect since these are contractual rights which can be exercised at the option of the petitioner. This being a important provisions we cannot overlook it while considering the petitioner's application in the writ petition. Needless to mention that all the rights of the petitioner in this respect also may be exercised without being influenced by the

observations in this judgment.

98. The other contention is that the impugned notification are liable to be struck down as being violative of the principles of promissory estoppel and that they militate against the petitioner's legitimate expectation also cannot be accepted for the reason that the business of tolling itself involves a huge amount of uncertainty. As we have observed from the petitioners own arguments that the data provided in the Form 4 and 6 at the time of entering into Concession Agreement may not hold good since toll collection fluctuates. In a situation such as present one, the State having agreed to reimburse the petitioners loss incurred based on the projections we are not inclined to exercise our writ jurisdiction under Article 226. That being so, it is not as if the petitioners can be left in lurch. The State has unequivocally admitted that it will reimburse the petitioners the loss in toll falling due as represented in the projections contained in Form 4, as under:-

Extract from Form 4

Statement showing Estimated Yearly Toll collections

Vehicle category	Avg.Daily Traffic
1. Car, Jeep (upto 12 passengers excluding driver) e.g. Tata Sumo, Trax, Commander, Six-seater	

auto-rickshaw (tum tum) 39780

2. Mini Buses or similar vehicles (passenger capacity more than 12 upto 20 passengers excluding driver) and goods carrying vehicles not covered under 3 & 4

4785

3. Buses & Trucks

11544

4. 3 Axle vehicles excluding vehicles mentioned at No.3 as per Motor vehicles Act 1988

e.g. trainer vehicle with more than two axle.

4433

5. Vehicle with more than 3 axle vehicles excluding vehicles mentioned at No.3 as per Motor Vehicles Act 1988 e.g. trainer vehicle with more than two axle.

3036

Total

63578

YEARS	TOLL RATES IN Rs.						TOTAL INCOME/DAY				
APR-MAR	Car	LCV	Truck/ Bus	3 AXLE	Multi Axle	Car	LCV	Truck/ bus	3 AXLE	Multi Axle	
2015-2016	30	55	110	180	240	55974	6733	16244	6238	4272	
2028-2029	70	130	250	450	550	99659	11988	28921	11106	7606	

99. On the other hand, the petitioners contend that the loss can be compensated by either of the following two formulas:-

(i) The petitioners' loss should be compensated in terms of the number of light motor vehicles which would admittedly pass through the toll booth and which would have paid the toll as per the Concession Agreement, but for the impugned exemption multiplied by the scheduled toll rate;

(ii) The petitioners' loss should be compensated in terms of the projected receipts as per the total income/day column in Form 4 minus the actual receipts from the vehicles actually passing through the toll booths.

100. The disputes between the parties would thus boil down to the formula to be adopted for computing the petitioners' loss on account of the impugned exemptions. While these disputes can be considered by the above Committee, the petitioners' submission is that the principles for computing the loss should be laid down by this Court and, therefore, the petitioners may not be required to go to the Committee. In the alternative, the disputes should be referred to independent Arbitral Tribunal. The State Government is, however, not ready to change the forum from the Committee to an Arbitral Tribunal.

101. Mr. Naik, learned senior counsel appearing on behalf of the State has tendered a letter dated 24.8.2015 addressed to the Government Pleader in terms of which are reproduced below:-

“Sub: OOCJ Writ Petition (L) No. 1595 of 2015

Sion Panvel Toll Pvt. Ltd.

.. Petitioner

Vs.
State of Maharashtra & ors. .. Respondents
And other connected matters

*(Name of work – Improvement of Sion Panvel
 Special State Highway – Under BOT, from B.A.R.C.
 Junction to Kalamboli Junction Ch.116/800)*

*Ref: W.P. No. 5764 & 6577 of 2015 along with
 other W.P. No. 7573/15, 7574/15 & 7575/15*

*As per discussion with Shri Anil Y. Shakhare,
 Senior Advocate, Shri Vineet B. Naik, Senior
 Advocate and yourself, you can inform the Hon'ble
 High Court, the Government's willingness to
 constitute a high level committee consisting of:*

- 1) Additional Chief Secretary (PWD)*
- 2) Additional Chief Secretary (Finance)*
- 3) Additional Chief Secretary (Planning)*

*The Committee will adjudicate the dispute/
 difference between Govt. and Concessionaire
 broadly on following issues:*

- a) All disputes/differences between the
 Concessionaire and Govt. will be decided/
 adjudicated (excluding the challenge to the
 notification dated 26/05/2015)*
- b) The committee will take decision on the
 disputes/differences within 3 months.*
- c) The decision of the Committee will be final
 and binding on both the parties.”*

102. In the circumstances, it will be open for the petitioners
 to approach the said Committee for redressal of their grievance

without prejudice to their rights to challenge the decision of the Committee in an appropriate legal forum and in the interregnum the State will pay the amount as offered by the State Government on the basis of projections in Form 4. If the disputes are not resolved as aforesaid, it will always be open to the parties to adopt suitable measures and we leave open all the questions pending such adjudication.

103. One more factor which we need to consider is monitoring of traffic duly categorised including monitoring of the vehicles that would pass through toll gates. In this respect, it is always open to the petitioners to install suitable monitoring equipment for presentation of evidence to the respondents. Sophisticated traffic data loggers are available which are housed in high security housings which log comprehensive individual vehicles data and classification based on number of axles as well. These can be installed by the petitioners to ensure that data validation is not cumbersome especially since some of the systems generate reports and transmit them automatically to pre-designated persons. The respondents officer(s) could be pre-designated for this purpose. Once installed, the automated systems

do not require large staff to monitor data. In view of aforesaid, we find no reason to keep these petitions pending and the same are disposed of in above terms. The various chamber summons and civil applications taken out therein are also liable to be disposed of in the above terms. Insofar as the PIL No. 239 of 2013 is concerned, the issues therein are not directly relevant to the controversy in the two writ petitions especially since a provisional completion certificate had been issued. We have therefore disposed of the PIL by a separate Order today.

104. Hence we pass the following order:-

The challenge to the State Government impugned notification dated 26/5/2015 and 30/6/2015 is repelled, with the following clarifications:

- (i) The State Government has agreed to compensate the petitioners for loss being caused to the petitioners on account of the aforesaid impugned notification. However, the disputes/ differences between the petitioners and the State Government regarding the principles for determining such loss will be decided by a Committee consisting of -

Additional Chief Secretary (PWD)

Additional Chief Secretary (Finance)

Additional Chief Secretary (Planning)

- (ii) The Committee will decide all disputes / differences between the petitioners and the State Government arising on account of challenge to the notification dated 26/5/2015 and 30/6/2015, excluding the challenge to the notification itself.
- (iii) The Committee will take decision on the disputes / differences by 31/12/2015.
- (iv) In case the petitioners are aggrieved by the decision of the Committee, it will be open to the petitioners to challenge such decision before an appropriate forum.
- (v) Till the Committee takes a decision as aforesaid, the State Government shall pay the amount as per the offer made by the State Government at the hearing of the petitions, i.e. on the basis of projections and amount of toll specified in the schedule, that is to say for the period 2015-16

Rs.385.02 lakhs per month and so on and so forth as indicated in para 98 herein above and based on data provided in Form 4.

(CHIEF JUSTICE)

(A.K.MENON, J.)

CERTIFICATE

Certified to be true and correct copy of the original signed Judgment/order.