
(2006) 10 BOM CK 0098
In the Bombay High Court
Case No : Writ Petition No. 3658 of 2006

Anil Agre and others

APPELLANT

Vs

State of Maharashtra and others

RESPONDENT

Date of Decision : 17-10-2006

Acts Referred:

Citation : (2006) 10 BOM CK 0098

Hon'ble Judges : R.V. More, J;D.D. Sinha, J

Bench : Division Bench

Advocate : B.G. Kulkarni, for the Appellant; B.H. Dangre, Assistant Govt. Pleader for respondent nos. 1 to 4, S.P. Dharmadhikari, for the Respondent

Final Decision : Dismissed

Judgement

D.D. Sinha, J.—Rule returnable forthwith. Heard finally by consent of Shri Kulkarni, learned Counsel for the petitioners, Mrs. Dangre, learned Assistant Government Pleader for the respondent Nos. 1 to 4. and Shri Dharmadhikari, learned Counsel for the respondent No. 5.

2. Shri Kulkarni, learned Counsel for the petitioners, submitted that petitioners are law abiding citizens. The petitioners have preferred the instant petition in the public interest challenging arbitrary action of the respondent No. 1 in extending concession period for collection of toll by the respondent No. 5.

3. Learned Counsel Shri Kulkarni contended that in September 1997, tender notice was published by respondent No. 1 for construction of Kamptee-Kalamana road on build, operate and transfer basis (BOT). The bid of respondent No. 5 (Rs. 10.5 crores) was accepted. On 12-6-1998, State Government granted approval for accepting the tender of respondent No. 5 with concession period of six years and three months. On 29-9-1998, agreement was executed between Government and respondent No. 5 M/s Vishwaraj Housing Company Private Limited and as per the said agreement, concession period was of six years and three months from the date of commencement of work. The respondent No. 5

was entitled/authorized to collect toll during the said concession period only and on expiry of said concession period, project was to be taken over by the State Government.

4. Learned Counsel Shri Kulkarni further contended that on 17-1-2005, the concession period of six years and three months expired. However, respondent No. 5 was permitted to continue collection of toll even after expiry of concession period. It was submitted that communication dated 2-8-2002 addressed to the Chief Engineer, Public Works Regional Office, Nagpur by the State Government reveals that concession period of the project in question was modified/extended by the State Government from six years and three months to eight years and three months. It was contended that order dated 2-8-2002 issued by the State Government extending the concession period is arbitrary, inconsistent with the terms and conditions of the agreement and beyond the powers and jurisdiction of the State Government and, therefore, cannot be sustained in law. It was submitted that as per the definition clause, the concession period starts from the stipulated date of commencement of work to the prescribed date of taking over of the project by the Government. In the instant case, the concession period commenced on 7-10-1998 and expired on 17-1-2005 and, therefore, collection of toll by the respondent No. 5 after expiry of concession period is unjustified and without any legal right. It was contended that common man, who is plying his vehicle on the road in question, is required to pay toll though after 17-1-2005, the liability to pay toll by people at large came to an end. However, extension granted by the State Government in respect of concession period apart from being arbitrary and illegal, is also against public interest and, therefore, present petition is maintainable as a Public Interest Litigation and in the circumstances, order dated 2-8-2005 passed by the State Government is liable to be quashed and set aside and petition be dismissed with costs.

5. Learned Counsel Shri Kulkarni further contended that since collection of toll by the respondent No. 5 after 17-1-2005 is unauthorized, amount collected by the respondent No. 5 from the public at large in the form of toll may be directed to be recovered from respondent No. 5 and State Government may be directed to utilize the said amount for public cause. In order to substantiate the contentions, reliance is placed on the judgment of the Apex Court in *New Bihar Biri Leaves Co. and Others Vs. State of Bihar and Others*, .

6. Mrs. Dangre, learned Assistant Government Pleader for the respondent Nos. 1 to 4, raised a preliminary objection in respect of maintainability of petition on the ground of delay and laches since petitioners have challenged the Government's order dated 2-8-2002 by filing the present petition at such a belated stage. It was contended by the learned Assistant Government Pleader that the petitioners have not given any plausible explanation for delay caused in approaching this Court by filing the present petition under the garb of propagating the public cause. Similarly, petitioners are not canvassing any public cause and the petition is filed with the sole intention to promote the private interest. It was, therefore,

contended that the petition is liable to be dismissed on these counts. In order to substantiate the contentions, reliance is placed on the decision of the Apex Court in *Kushum Lata Vs. Union of India (UOI) and Others*, .

7. Learned Assistant Government Pleader, Mrs. Dangre further contended that the State Government on 8-7-1997 invited bids for project in question. In the instant case, as many as four parties purchased the tender form. However, respondent No. 5 submitted his tender in three envelopes as per tender conditions. Envelope No. 1 was containing information required in terms of Clause 2.3.2 of the tender document. Envelope No. 2 was containing information as required by Clause 2.3.2.2 and envelope No. 3 was containing financial bid of the bidder. It was submitted that on 12-8-1997 pre-bid meeting was held in the office of respondent No. 2. In the said meeting, respondent No. 5 suggested that project should have two phases: (1) construction phase and (2) concession phase. However, the said suggestion of respondent No. 5 was not accepted by the respondent No. 2. It was contended by the learned Assistant Government Pleader that the respondent No. 5 submitted his financial bid keeping the concept of two separate phases of project in mind and quoted the construction period and recovery period separately. It was further contended that as per the cash flow statement submitted by the respondent No. 5, construction period of project was of two years (24 months) and then recovery period (concession period) was of six years and three months. It was submitted that in the cash flow statement submitted by the respondent No. 5 along with bid, period of recovery of toll was excluded from the period of construction of two years and in view of definition of "concession period" as given in the tender document, the concession period offered by the respondent No. 5 was eight years and three months.

8. Learned Assistant Government Pleader, Mrs. Dangre submitted that in the above background, respondent No. 2 vide letter dated 11-2-1998 requested the State Government to approve the tender of respondent No. 5 with the concession period of eight years and three months inclusive of construction period of two years. It was contended that respondent No. 2 vide communication dated 18-3-1998 submitted proposal to the Government for sanction wherein by mistake it is mentioned that "entrepreneur has quoted the concession period as six years and three months, which has remained unaltered". It was submitted that along with letter dated 18-3-1998, the Chief Engineer forwarded revised financial calculations submitted by the respondent No. 5 based on calculations of the estimated project cost and cash flow statement. The respondent No. 3, on approval by the State Government, issued letter dated 15-6-1998 to the respondent No. 5 informing about acceptance of his offer by the Government and called upon respondent No. 5 to furnish security deposit of Rs.42 lacs within a period stipulated in the agreement. It is the stand of the State Government that respondent No. 5 attended the office of respondent No. 3 on 29-9-1998 and executed the agreement in which again by mistake the concession period was mentioned as six years and three months. It was submitted that respondent No. 5, on the same day, objected and brought to the notice of respondent No. 3 the

letter given by him on 29-9-1998. Pursuant to execution of agreement dated 29-9-1998, the respondent No. 5 was given commencement order of work dated 17-10-1998 and it is only thereafter the respondent No. 5 commenced work of construction of road. It was argued by the learned Assistant Government Pleader that the respondent Authorities were in receipt of various communications issued by the respondent No. 5 from time to time requesting them to correct the mistake with regard to the concession period mentioned in the agreement. The respondent No. 3, therefore, issued a letter dated 29-1-2002 to the Superintending Engineer and brought to his notice repeated representations submitted by the respondent No. 5 for carrying out correction in the agreement and Government order with regard to the concession period. It was submitted that the Superintending Engineer, Public Works Department, Nagpur Circle, Nagpur by his communication dated 29-2-2002 made a report to the respondent No. 2 which clarifies that the period of six years and three months was mentioned in the agreement by mistake and the correct period of concession was eight years and three months.

9. It was also submitted by learned Assistant Government Pleader Mrs. Dangre that the State Government sought clarification from Shri Deodatta Marathe, who, at the relevant time, was working as Chief Engineer, Public Works Department, Regional Office, Nagpur and had signed communication dated 18-3-1998 wherein concession period was mentioned as six years and three months. Shri Deodatta Marathe vide his communication dated 6-7-2002 accepted the position that concession period quoted by respondent No. 5 was eight years and three months and it was due to inadvertence, the concession period of six years and three months was mentioned in the communication dated 18-3-1998.

10. Learned Assistant Government Pleader, Mrs. Dangre submitted that respondent No. 2 vide communication dated 11-4-2002 addressed to respondent No. 1 forwarded the matter to respondent No. 5 for revaluation of concession period quoted by the respondent No. 5. The respondent No. 2 in the said communication also mentioned that there is no ambiguity about definition of concession period, but there was a contradiction between actual concession period and period of concession considering the cash flow statement as well as communication dated 11-2-1998 of the Chief Engineer. The matter was considered by the State Government and the State Government realised the mistake about duration of concession period mentioned in the contract and, therefore, issued the impugned order dated 2-8-2002 for rectifying the said mistake and clarified that concession period was of eight years three months instead of six years three months as mentioned in the agreement dated 29-9-1998. It was contended that the concession period mentioned in the agreement was obviously due to inadvertence and, therefore, State Government was entitled to correct the said mistake by issuing impugned order dated 2-8-2002. In the circumstances, the petition is devoid of substance and misconceived.

11. Shri Dharmadhikari, learned Counsel for the respondent No. 5, more or less canvassed similar contentions as advanced by the learned Assistant Government Pleader for the respondent Nos. 1 to 4. It was contended that petition suffers from delay and laches and the rule of laches applies with full vigour even to the writ petitions filed in the public interest. There is no justification given by the petitioners as to why the petitioners waited for such a long time to file the present petition and, therefore, delay which is unreasonable and unexplained, should result in dismissal of the petition.

12. Learned Counsel Shri Dharmadhikari further contended that in the instant case, there is no extension of concession period whatsoever. The offer made by the respondent No. 5 contained the concession period of eight years and three months, which was accepted by the State Government and, therefore, question of concession period to be six years and three months does not arise. It was submitted that by the impugned order dated 2-8-2002 and notification dated 3-9-2002, clerical/ministerial mistake, which had crept in the agreement, was only corrected by the State Government. It was contended that since entire correspondence between respondent No. 5 and other respondents has already been placed on record by the learned Assistant Government Pleader, the respondent No. 5 does not want to reiterate the same though is placing strong reliance on the same. It was argued that the impugned order and notification were issued by the State Government only for the purpose of correcting the mistake, which had crept in the agreement/contract and it is obvious that the respondent No. 5 had never quoted the concession period of six years and three months. In his cash flow statement accompanying the offer, the respondent No. 5 stipulated six years and three months as recovery period beginning after completion of construction period. Thus, the concession period quoted by the respondent No. 5 included construction period of two years plus period of six years and three months as recovery period and, therefore, total concession period was eight years and three months. It was also contended that the State Government was only entitled to accept the offer given by the respondent No. 5 and was not entitled to mention in the document of contract something other than what was mentioned in the offer given by the respondent No. 5. Since respondent No. 5 had never offered concession period of six years and three months, there was no question of reducing the concession period by the State Government from eight years and three months to six years and three months.

13. Learned Counsel Shri Dharmadhikari further submitted that correspondence entered into between respondent No. 5 and other respondents would clearly show that concession period of six years and three months mentioned in the agreement was a clerical/ministerial mistake and, therefore, State Government was perfectly justified in correcting the said mistake by issuing impugned order and notification. It was contended that the present petition is liable to be dismissed on the ground of delay and laches as well as even on merits being misconceived. In order to substantiate the contentions, reliance is placed on the judgment of the Apex Court in Ramji Dayawala and Sons (P) Ltd. Vs. Invest

Import, .

14. We have considered the contentions canvassed by the learned Counsel for the parties. It is no doubt true that one who sleeps over his rights and does not approach the Court within a reasonable time for redressal of grievance, Court should be slow in showing indulgence in such situation. It is also not in dispute that doctrine of delay and laches is equally applicable to the public interest litigation and in a given case, writ petition can be dismissed on the ground of delay and laches. Similarly, Court cannot close its eyes to the gravity and intensity of the public cause involved in the public interest litigation. In the instant case, we have no hesitation to hold that the petitioners are espousing cause of citizens, who are being charged toll, though legally were not required to pay the same after expiry of concession period. It is also well settled that on account of delay, if parties have altered their positions and rights are legally or otherwise crystallized, in such situation, in a given case, delay would be fatal. However, if the wrong is perpetrated by the act of the State and the cause of action is recurring and continues and if public interest continues to suffer, in such situation, the public interest litigation cannot be dismissed merely because cause of action arose sometime ago. The doctrine of delay and laches needs to be understood and required to be considered on the basis of facts and circumstances involved in each case. There is no denial that public interest litigation is a weapon, which has to be used with great care and Court should be careful to see that behind the so-called public cause, private and individual interest is not hidden. The Court has to be satisfied about (a) credentials of the applicant, (b) prima facie correctness or the nature of information given to him, (c) the information being not vague and indefinite and (d) information should show gravity and seriousness involved. There is no quarrel with the law laid down by the Apex Court in the case of *Kushum Lata* (cited supra). The relevant observations of the Apex Court in para (15) of its judgment are as under :

Court has to strike balance between two conflicting interests; (i) nobody should be allowed to indulge in wild and reckless allegations besmirching the character of others; and (ii) avoidance of public mischief and to avoid mischievous petitions seeking to assail, for oblique motives, justifiable executive actions. In such case, however, the Court cannot afford to be liberal. It has to be extremely careful to see that under the guise of redressing a public grievance, it does not encroach upon the sphere reserved by the Constitution to the Executive and the Legislature. The Court has to act ruthlessly while dealing with imposters and busybodies or meddlesome interlopers impersonating as public-spirited holy men. They masquerade as crusaders of justice. They pretend to act in the name of *Pro Bono Publico*, though they have no interest of the public or even of their own to protect.

15. In the instant case, the vehicle owners whose vehicles passed through the road in question were required to pay toll to the respondent No. 5 only during the period of concession. Once the period of concession is over, respondent No. 5

is not legally entitled to collect the toll from the public at large. The public cause canvassed by the petitioners in the present petition is that action of the State Government in extending the period of concession beyond six years and three months from the date of order of commencement of work is without jurisdiction, which adversely affects the public interest since it permits the respondent No. 5 to collect toll to which he is not legally entitled to. In our view, the preliminary objection raised by Mrs. Dangre, learned Assistant Government Pleader for the respondent Nos. 1 to 4, and Shri Dharmadhikari, learned Counsel for the respondent No. 5, is devoid of substance and hence, same is rejected.

16. In the instant case, State Government on 8-7-1997 invited bids for the project named as improvement to Kamptee-Kalamna Road to join Agriculture Product Market and Ring Road in Nagpur District.. The pre-bid meeting was scheduled on 12-8-1997. The bids were required to be submitted by the tenderers in the office of Superintending Engineer, Public Works Circle, Nagpur on 5-9-1997 at 1500 hours. On 12-8-1997 the meeting was held in the office of respondent No. 2 in which respondent No. 5 suggested that there should be two separate phases of project in question, namely, (1) construction phase of the project, and (2) concession phase of the project. However, respondent No. 2 did not accept the said suggestion given by the respondent No. 5. On 29-9-1998, agreement was executed between State Government as well as respondent No. 5 and same was duly signed by the parties to the agreement. Clause (c) of the agreement stipulates the concession period, which reads thus:

to duly carry out necessary maintenance and repairs to the project strictly in accordance with specifications for maintenance as provided in the contract documents and keep them in proper condition and standard till full recovery of the said project cost is made by the entrepreneur and the project is finally handed over to the Government at the end of the concession period, i.e. six years three months.

Condition No. 3.1.13 of the tender document provides definition of concession period., which reads thus:

CONCESSION PERIOD : Concession Period shall mean the period starting from the stipulated date of commencement of work to the prescribed date of taking over of the project by the Government.

17. On 29-9-1998 the respondent No. 5 wrote a letter to the Executive Engineer, Agricultural Construction Division, P.W.D., Civil Lines, Nagpur and text of para (2) of the said letter is as follows:

As per your directives while signing the form of agreement (Refer pages 48, 49 and 50 of the bid document), it is noticed by me that in clause 1(c), which is regarding maintenance of facility in proper condition and standard through and upto the end of the toll recovery, which is agreed by us as in our case recovery period is 6 years and 3 months. But in the last line, it is written as at the end of the concession period, i.e. six years and three months", which is incorrect. In our

case, during submission of Bid, though we have considered two separate phases, i.e. 2 years construction period and 6 years and 3 months as toll recovery period, but as separation of two phases was not acceptable to the Department, we finally agreed to the departmental concept of concession period, which was a combination of both phases as per accepted NIT and CSD condition. As such, by NIT and CSD conditions itself, our concession period becomes 8 years and 3 months, which has been misinterpreted by you.

The text of paras (3) and (4) of the said letter reads thus :

We will like to make it very clear that during whole episode of negotiation after submission of Bid on 14-10-1997, we have never reduced our offer and period quoted in original bid document.

I, therefore, request you to correct mistake on the part of the department before issuing final commencement order to start the work.

The Executive Engineer, Agriculture Construction Division, Nagpur issued the commencement order of work on 17-10-1998 and the text of para (2) of the said commencement order is relevant for our purpose, which reads thus:

As you have executed the agreement (in form 12) on Bid document, your tender for the above work at Rs. 10.15 crores and concession period of 6 (six) years and 3(three) months has been accepted on behalf of the Government of Maharashtra and also signed the contract agreement dated 29-9-1998.

Similarly, text of the third para of the commencement order dated 17-10-1998 reads thus :

You are requested to submit your work programme within ten days and start the work immediately after receipt of this letter and please contact the Sub-Divisional Engineer, Public Works Sub-Division, Kamptee for receiving further instructions.

18. The above referred undisputed facts in no uncertain terms demonstrate that on 12-8-1997, pre-bid meeting was held in the office of respondent No. 2 and in the said meeting, the suggestion given by the respondent No. 5 that project should be classified into two phases, namely, construction phase and recovery phase was completely rejected by the respondent No. 2 and, therefore, on 12-8-1997 itself respondent No. 5 was not only in the know of the fact, but was also fully aware that concession period shall start from the date of commencement of work and shall continue till prescribed date of taking over of the project by the Government as stipulated in Condition No. 3.1.13 of the tender document. If respondent No. 5 was unable to accept and agree to the duration of concession period of six years and three months, it was open for the respondent No. 5 to withdraw from the process of tender. However, respondent No. 5 with open eyes and with full knowledge entered into an agreement with the State Government on 29-9-1998, which was duly signed by him as well as State Government, wherein it is specifically mentioned and also agreed by respondent

No. 5 that concession period shall be six years and three months. The terms and conditions of the said agreement/contract were/are binding on the State Government as well as respondent No. 5 and it is impermissible in law to vary, modify or change the said terms and conditions of the contract subsequently since the contract was executed with full understanding and after agreeing with the terms and conditions stipulated therein and which was duly signed by the parties.

19. The stand taken by the State Government as well as respondent No. 5 that period of concession, i.e. six years and three months mentioned in the agreement dated 29-9-1998 is due to inadvertence or by mistake is not only unacceptable, but same is also misconceived. It is inconceivable that respondent No. 5, who is professional, knowing fully well that on 12-8-1997 his suggestion for classifying project in two phases was rejected and in spite of specific clause in the agreement, which stipulates concession period as six years and three months, would sign the said agreement only because he believed that as per his cash flow statements submitted along with tender documents, the period of concession was eight years three months and, therefore, the concession period mentioned in the agreement is due to inadvertence or by mistake committed by the State Government. On the other hand, it is crystal clear that the State Government totally rejected the suggestion of the respondent No. 5 based on cash flow statements for excluding the period of construction in view of definition of concession period. As per Condition No. 3.1.13 of the tender document, concession period means period starting from the stipulated date of commencement of work to the prescribed date of taking over of the project by the Government. Plain reading of this tender condition makes it implicitly clear that the concession period starts from the date of commencement of work and continues upto the prescribed date of taking over of the project by the Government. It is, therefore, obvious that definition of concession period given in the tender document is inclusive of construction period and there is absolutely no scope for excluding the period of construction from the period of concession as stipulated in Clause 3.1.13 of the tender document. Since the concession period was inclusive of construction period, question of State Government either initially or at the later point of time agreeing to exclude the same from the concession period does not arise since it is impermissible in law for the State Government to do so in view of definition of concession period given in Clause 3.1.13 of the tender document and, therefore, concession period of six years and three months mentioned in the agreement is completely consistent with the provisions of Clause 3.1.13 of the tender document and question of any mistake committed by the State Government in this regard does not arise. Similarly, commencement order dated 17-10-1998 issued by the Executive Engineer also specifically stipulates that the concession period shall be six years and three months only. The commencement order dated 17-10-1998 clearly shows that objection raised by the respondent No. 5 vide letter dated 29-9-1998 that concession period was eight years and three months stood rejected by the Department since it was

impermissible in law. It is, therefore, evident that stand taken by the State Government as well as respondent No. 5 that there was a mistake committed by the State Government in mentioning the period of concession, i.e. six years and three months in the agreement as well as order of commencement dated 17-10-1998 is completely misconceived and devoid of substance.

20. The observations of the Apex Court in para (50) of the judgment in the case of M/s New Bihar Biri Leaves Co. and others (cited supra), which are relevant, are as follows:

It is a fundamental principle of general application that if a person of his own accord, accepts a contract on certain terms and works out the contract, he cannot be allowed to adhere to and abide by some of the terms of the contract which proved advantageous to him and repudiate the other terms of the same contract which might be disadvantageous to him. The maxim is *qui approbat non reprobat*, (one who approbates cannot reprobate). This principle, though originally borrowed from Scots Law is now firmly embodied in English Common Law. According to it, a party to an instrument or transaction cannot take advantage of one part of a document or transaction and reject the rest. That is to say, no party can accept and reject the same instrument or transaction (Per Scrutton L.J. *Verschures Creameries Ltd. vs. Hull and Netherlands Steamship Co.* (1921) 2 KB 60S; See *Douglas Menzies vs. Umphelby*, 1908 AC 224 at p. 232 see also Stroud's Judicial Dictionary, Vol. I, page 169, 3rd Edn.)

21. While applying the principle enumerated by the Apex Court to the facts of the present case, the State Government as well as respondent No. 5 are bound by the terms and conditions of the contract as well as order of commencement of work and it is impermissible for respondent No. 5 to canvass that condition mentioned in clause (c) of the agreement/contract dated 29-9-1998 (refers to concession period) is not acceptable to him since it is disadvantageous to him though other terms and conditions of the said agreement are acceptable to him. In view of facts and circumstances involved in the present case and as we have already observed that the respondent No. 5 on his own accord accepted the terms and conditions mentioned in the contract and not only duly signed the contract, but also commenced construction work of the project in terms of the said contract, the respondent No. 5 is not now legally entitled to say that terms and conditions about duration of period of concession mentioned in the agreement as well as order of commencement of work are not acceptable to him. Similarly, it is also impermissible in law for the State Government, in the facts and circumstances of the present case, to vary/modify the terms and conditions of the duly executed and signed contract in order to oblige respondent No. 5 at the cost of defeating the public interest under the garb of correcting the mistake alleged to have been committed while mentioning duration of period of concession. We have already concluded that in the case in hand and in view of facts and circumstances involved, period of concession mentioned in the agreement is not either due to inadvertence or by mistake. On the other hand,

the State Government on 12-8-1997 itself outright rejected the suggestion of the respondent No. 5 regarding classifying the project in two phases, namely, construction phase and concession phase. It is, therefore, evident that condition mentioned in Clause (c) of the agreement/contract that the concession period shall be of six years and three months is not only agreed and accepted by the parties to the contract, but is also consistent with the definition of "concession period" stipulated in Clause 3.1.13 of the tender document.

22. In the backdrop of the above referred facts, question of period of concession, i.e. six years and three months incorporated in the document of contract as well as order of commencement of work due to inadvertence or by mistake does not arise at all. In our view, no amount of correspondence after the contract is signed by the parties and after issuance of order of commencement of work can legally permit the State Government to modify, change or vary the stipulation in the document of contract under the garb of mistake and, therefore, impugned order dated 2-8-2002 as well as notification dated 3-9-2002 being misconceived and devoid of substance, cannot be sustained in law.

23. So far as decision of the Apex Court in *Ramji Dayawala and Sons (P) Ltd.* (cited supra) is concerned, it is difficult for us to appreciate as to how the said decision is of any help to the respondent No. 5 particularly when in the instant case, possibility of concession period mentioned in the agreement as well as order of commencement of work by mistake or due to inadvertence, in the facts of the present case, in our view, is completely ruled out. The State Government and respondent No. 5 with open eyes signed the document of contract and the respondent No. 5 commenced work of project as per order of commencement of work dated 17-10-1998 and also completed the work under contract.

24. In the case in hand, as per concession period, the State Government was duty-bound to take over the project from the respondent No. 5 with effect from 17-1-2005. Similarly, under the terms and conditions of the agreement dated 29-9-1998 as well as order of commencement of work dated 17-10-1998, the concession period was from 17-10-1998 to 17-1-2005 and, therefore, respondent No. 5 was legally entitled to recover toll from the public at large only till 17-1-2005. The respondent No. 5 was neither legally entitled to collect the toll from the public at large after 17-1-2005 nor it was permissible for him to do so under the terms and conditions of the contract and, therefore, State Government, in our view, is legally entitled to recover the said amount from respondent No. 5. After recovery of the said amount, we want State Government to utilise the same for public purpose, after following due procedure applicable in this regard.

25. It is not in dispute that in the State of Maharashtra, there are dozens of projects undertaken by the Government on build, operate and transfer (BOT) basis and in the agreements, period of concession is mentioned. We specifically asked the learned Assistant Government Pleader to show us whether concession period mentioned in any of the agreements excludes the period of construction.

However, in spite of grant of time to the learned Assistant Government Pleader to obtain instructions in this regard, nothing has been placed before us to show that the period of concession does not include the period of construction. Even otherwise, definition of concession period, is clear and unambiguous and shows that period of concession starts from the date of commencement of work of the project and continues upto the prescribed date of taking over of the project by the Government and, therefore, stand taken by the State Government as well as respondent No. 5 in this regard is devoid of substance.

26. In the result, the impugned order dated 2-8-2002 passed by the respondent No. 1 State of Maharashtra as well as notification dated 3rd September 2002 are hereby quashed and set aside. The respondent State is entitled to recover the amount collected by the respondent No. 5 in the form of toll from the public at large with effect from 17-1-2005 till date.

27. The rule is made absolute in the above terms. No order as to costs.

28. The learned Counsel for the respondent No. 5 prays that the present judgment be kept in abeyance for a period of four weeks. Since the issue is concluded after considering the facts involved and the law, the request is rejected.