(2015) 08 RAJ CK 0058

In the Rajasthan High Court

Case No : Civil Writ Petition Nos. 7296, 6419 and 7329/2014, Civil Special Appeal (Writ) No. 1411/2014 and Civil Contempt Petition No. 1482 of 2014

Desh Raj Kharera and Others APPELLANT

Vs

Union of India and Others RESPONDENT

Date of Decision : 11-08-2015

Acts Referred:

National Highways Act, 1956 — Section 8A
National Highways Authority Of India Act, 1988 — Section 11

Citation : (2015) 08 RAJ CK 0058

Hon'ble Judges : Sunil Ambwani, C.J;Ajit Singh, J

Bench : Division Bench

Advocate : Rajesh Yadav, Prateek Kasliwal and Pushkar Taimni, for the Appellant; N.M. Lodha, Advocate General, Vishal Sharma, Sheetanshu Sharma, R.D. Rastogi, Addl. Solicitor General, Sandeep Pathak, Ashish Tiwari, Sneha Singh, R.N. Mathur, Shovit Jhajaria, Prateek

Final Decision : Disposed off

Judgement

Sunil Ambwani, C.J.

D.B. Civil Writ Petition No. 7296/2014

1. We have heard learned counsel appearing for the parties and all the stakeholders including the Central Government, NHAI, State of Rajasthan, IDBI, lead Banker and the Members of the Consortium Banks.

2. By this writ petition, the petitioner has prayed for the following reliefs:--

"(i) to issue an appropriate writ of mandamus, order or direction in the nature of mandamus to direct Respondent No. 1 & 2 to take immediate action to terminate and suspend the concession granted to Respondent No. 5;

(ii) to issue an appropriate writ, order or direction in the nature of mandamus to restrain the Respondent No. 5 from collecting toll tax;

(iii) to pass any other writ, order or direction in the nature of mandamus to cancel/review the current toll tax rates under the pretext of realization of their capital invested in the project and further to restrain Respondent No. 1 & 2 to levy or collect any user fee (toll tax) till final completion of six laning of the Project;

(iv) to pass any other writ, order or direction in the nature of mandamus to appoint any Court Commissioner to determine as to whether any toll tax is imposable upon the users of the stretch of Project qua Road tax & other cess etc.

(v) This Hon''ble Court may be pleased to pass any other writ, order or direction as may be deemed fit and proper in the facts and circumstances of the case in favour of the petitioner.

(vi) award costs to the petitioner from the contesting respondents."

3. The writ petition was entertained by learned Single Judge. On 1st September, 2014, learned Single Judge passed the following order:--

"Heard. Despite earlier directions of this court, the respondent-National Highways Authority of India (NHAI) could not satisfy as to why action has not been taken strictly as per the terms of the agreement between the parties for substitution agreement. The copy of substitution agreement has been presented before the court. The reference of para 3.3 and 3.4 has been given. The aforesaid paras provide as to how substitution would occur and the process of substitution. Those paras are quoted hereunder for ready reference -

"3.3 Substitution upon occurrence of Concessionaire Default

3.3.1 Upon occurrence of a Concessionaire Default, the Authority shall by a notice inform the Lenders'' Representative of its intention to issue a Termination Notice and grant 15 (fifteen) days time to the Lenders'' Representative to make a representation, stating the intention to substitute the Concessionaire by a Nominated Company.

3.3.2 In the event that the Lenders'' Representative makes a representation to the Authority within the period of 15 (fifteen) days specified in Clause 3.3.1, stating that it intends to substitute the Concessionaire by a Nominated Company, the Lenders'' Representative shall be entitled to undertake and complete the substitution of the Concessionaire by a Nominated Company in accordance with the provisions of this Agreement within a period of 180 (one hundred and eighty) days from the date of such representation, and the Authority shall either withhold Termination or undertake Suspension for the aforesaid period of 180 (one hundred and eighty) days; provided that upon written request from the Lenders'' Representative and the Concessionaire, the Authority shall extend the aforesaid period of 180 (one hundred and eighty) days by a period not exceeding 90 (ninety) days.

3.4 Procedure for substitution

3.4.1 The Authority and the Concessionaire hereby agree that on or after the date of Notice of Financial Default or the date of representation to the Authority under Clause 3.3.2, as the case may be, the Lenders'' Representative may, without prejudice to any of the other rights or remedies of the Senior Lenders, invite, negotiate and procure offers, either by private negotiations or public auction or tenders for the take over and transfer of the Project Highway including the Concession to the Nominated Company upon such Nominated Company''s assumption of the liabilities and obligations of the Concessionaire towards the Authority under the Concession Agreement and towards the Senior Lenders under the Financing Agreements.

3.4.2 To be eligible for substitution in place of the Concessionaire, the Nominated Company shall be required to fulfil the eligibility criteria that were laid down by the Authority for short-listing the bidders for award of the Concession; provided that the Lenders'' Representative may represent to the Authority that all or any of such criteria may be waived in the interest of the Project, and if the Authority determines that such waiver shall not have any material adverse effect on the Project, it may waive all or any of such eligibility criteria.

3.4.3 Upon selection of a Nominated Company, the Lenders'' Representative shall request the Authority to:

(a) accede to transfer to the Nominated Company the right to construct, operate and maintain the Project Highway in accordance with the provisions of the Concession Agreement;

(b) endorse and transfer the Concession to the Nominated Company, on the same terms and conditions, for the residual Concession Period; and

(c) enter into a Substitution Agreement with the Lenders'' Representative and the Nominated Company on the same terms as are contained in this Agreement.

3.4.4 If the Authority has any objection to the transfer of Concession in favour of the Nominated Company in accordance with this Agreement, it shall within 7 (seven) days from the date of proposal made by the Lenders'' Representative, give a reasoned order after hearing the Lenders'' Representative. If no such objection is raised by the Authority, the Nominated Company shall be deemed to have been accepted. The Authority thereupon shall transfer and endorse the Concession within 7 (seven) days of its acceptance/deemed acceptance of the Nominated Company; provided that in the event of such objection by the Authority, the Lenders'' Representative may propose another Nominated Company whereupon the procedure set forth in this Clause 3.4 shall be followed for substitution of such Nominated Company in place of the Concessionaire."

It is admitted that on account of concessionaire''s default, a notice to inform about intention to issue a termination notice was given with 15 days'' time to make a representation by the lenders'' representative stating the intention to substitute concessionaire by a nominated company in its place. Para 3.3, quoted above, refers to undertake and complete substitution of the nominated company within a period of 180 days.

It is admitted by the parties that aforesaid period has already expired in the month of August, 2014. As per para 3.4, the procedure of substitution has been given. It is not clarified as to why process of substitution has not been adhered to. The events brought before the court show non-adherence of the agreement.

This court, while passing previous order, made it clear that if the court would not be satisfied with the action of the respondents and the way events have taken place, the matter would be referred to the CBI for investigation. The order aforesaid was passed to make aware about it because a prayer to this effect does not exist in the writ petition but it makes prayer for any other appropriate relief.

This court granted time to clarify certain issues which were very specific and for adherence of the agreement in the present scenario and for collection of toll, however, it seems that even after passing of the order, the NHAI has failed to take up the matter properly and the IDBI is bent upon to flout terms of the agreement. The bank is not party to the litigation, however, if the matter is referred for investigation by the CBI, it would be against all concerned.

At this stage, petitioners submit that NHAI has taken a decision to increase the toll despite non-completion of the work and bad condition of the road.

Mr. Subhash Janu, Project Director, NHAI submits that the terms of agreement provides yearly increase of toll. It is looking to arrangement to maintain four-lane while undertaking the work of widening and conversion to six-lane road.

The petitioners submit that even four-lane road has not been maintained as per the terms of the agreement, to which, Mr. Shashank Shekhar, Director of the respondent No. 5-Pinkcity Express Ltd. has made contest. They have even shown their willingness to file an additional affidavit that four-lane road has been maintained.

Mr. Subhash Janu, Project Director, NHAI has also accepted that increase of the toll is on the condition to maintain four-lane road and since the increase of toll is provided under the agreement, it has been made without exception.

This court asked as to whether increase in toll is provided even if there remains default on the part of the contractor to carry out and complete the work specially when a notice for termination has been given to the contractor by the NHAI, that too, in the month of February, 2014 and the increase of toll was subject to maintenance of four-lane road.

In view of above, respondent No. 5-Pinkcity Expressway Ltd. so as the National Highways Authority of India may file additional affidavit/s to the effect that four-lane road has been maintained as per the terms of the agreement. The additional affidavit may be filed within seven days. If the NHAI feel that four-lane road has not been maintained as per the terms of the agreement, they may not file additional affidavit as directed above. In that case, presumption would be that four-lane road has not been maintained as per terms of the agreement, but, till the next date and facts comes regarding maintenance of four-lane road as per terms of the agreement, NHAI will not effect increase of toll.

List these cases on 10.9.2014. All the parties are given liberty to file necessary documents to bring other facts on record so that on the next date, matter may be heard and decided finally."

4. On 18.9.2014, learned Single Judge was informed that the writ petition bearing No. 6419/2014 has been treated to be a public interest litigation, and accordingly, the matters be placed before the Division Bench. The Registry was directed to list the matters before the Division Bench and that is how the matters came up for consideration before us.

5. On 12.3.2015, after hearing the parties and examining the Concession Agreement between the NHAI and the Concessionaire for a period of 912 days beginning from 3.2.2009, which expired on 1.10.2011 and supplementary agreement dated 20.12.2013, which extended the period upto 15.10.2014, this Court found that the construction has been hindered by several obstacles mainly attributable to the NHAI, the State of Rajasthan and the Government of Haryana. The NHAI proposed to extend the period of construction upto 31.6.2015 without entering into or extending the period of contract. A Notification was issued by the Ministry of Shipping, Road, Transport & Highway, Government of India on 23.3.2009 under section 8A of the National Highways Act read with Rule 3 of the National Highways (Collection of Fees by any person for the use of Section of National Highways/Permanent Bridge/Temporary Bridge on National Highway) Rules, 1997, authorizing the collection of tolls on six lanes, which have not been constructed, nor the four existing lanes were being maintained, causing public concern and outcry.

6. In the special circumstances, the Court prima facie found that after the extended period of construction in the agreement has come to an end, the authority under section 8A of the NHA Act for collection of tolls commensurate with the concession agreement, has come to an end.

7. The six laning of Gurgaon-Kotputli-Jaipur Section of National Highway No. 8 from 42.70 km to 273.00 km in the State of Haryana and Rajasthan under the NHDP Phase-V to be executed as BOT (Toll) on DBFO pattern was not progressing according to the schedule, on which the Minister for Surface Transport had, as reported in his statement, expressed his inability to do much in the matter and had assured to look for solution.

8. In the aforesaid circumstances and considering that the period of construction, despite supplementary agreement had come to an end and that the tolls were being collected regularly as user fee, we proceeded further in this public interest litigation to provide initiative for removing the hindrances, which appeared at that time to be the main obstacle in the completion of the main Project and

requested all the stakeholders, namely, the Central Government, NHAI, Bankers, Concessionaire and the State Government to satisfy the Court whether the work is in progress and the same shall be completed in the schedule time.

9. On 22.4.2015, we found that a meeting was convened on 19.3.2015 and the next meeting, which was to be held on 9.4.2015, was adjourned for 15.4.2015. The minutes of the meeting dated 15.4.2015 were not produced before the Court. The matter was thus adjourned directing the Concessionaire to explain the non-compliances of the resolution Nos. 1 and 12 relating to infusion of equity and non-payment of realized tolls and the work of maintenance of four lane at his risk and cost, for which assurances were given in the meeting. The Advocate General was requested to inform the Court whether 37 hindrances in the chart given by the State Government have been taken care of. The SDM, Kotputli and the SDM, Behror were directed to look into the matter and if they do not take any action in the matter, they may be replaced.

10. On 29.4.2015, the report of the Independent Engineer regarding the progress of the work was filed. After inspecting the site, he submitted the report alongwith photographs and emphasized on the removal of the hindrances. The report of the Independent Engineer demonstrated that out of 57 structures, 47 structures have been opened for traffic; one ROB; and 17 structures have been de-linked to be taken up as and when the land is made available, but the six laning has to be completed in the first instance. On maintenance, the Independent Engineer reported that the Concessionaire had not carried out its obligations of maintenance of four lanes, in accordance with the Concession Agreement. We issued further directions with regard to removal of hindrances No. 23, 26, 33 and 36.

11. We were also informed that in five cases, references for enhancement of compensation in land acquisition proceedings are pending and thus, possession could not be taken. The references have nothing to do after the land is acquired, which has become final and compensation is determined and deposited or paid. While issuing directions that the works at five places should not be held up on account of pendency of references, after taking possession and demolition of constructions, directions were issued that the hindrance No. 36- Shiv Temple to be relocated; hindrance No. 33-Ghasipura School, for which draft of Rs. 90 lacs prepared by the NHAI for relocation was to be handed over to the State Government. On hindrance No. 23, it was pointed out by the NHAI that the houses and shops on the service road and utility at Boochaheda under the charge of ADM, Kotputli, for which the land was acquired and the award amount has already been deposited and thus, possession could be taken. We also issued direction on hindrance No. 26, which is a Baba Balnath Samadhi and which was said to be a religious structure. At this stage, learned Advocate General stated that there is a Bavdi (step well) causing hindrance. We did not find any mention of Bavdi in the report prepared by the SDM and the ADM and observed that since the land has been acquired for a project of National importance, the work should

not be stopped for Samadhi or Bavdi and there was no reason for construction of ROB to cross over the Samadhi as it was not contemplated.

12. On 15.4.2015, another meeting was held under the directions of this Court, in which further progress was reported and attention of the Concessionaire was attracted to the maintenance and safety of the road.

13. In pursuance of the orders passed by this Court, an additional affidavit was filed by Shri N.N. Giri, project Director, Project Implementation Unit, Jaipur National Highways Authority of India annexing the minutes of the meeting held on 7.5.2015, in which once again focus was on the utility shifting, hindrances clearance and hindrances in Haryana as well as the construction of toll plazas. The question of funding was discussed for the first time and in which the lenders informed that they would submit the statements of funding and Escrow account by 11.5.2015. On the de-linked structures, the Concessionaire was reminded in the meeting to submit the programme for taking up the de-linked structure, where most of the hindrances are cleared or getting cleared shortly. The issue of pending payments due to Concessionaire towards utility shifting and COS etc. was deliberated in the meeting and the Concessionaire was advised to furnish certain missing data/clarifications.

14. The directions were followed by hearing on 10.7.2015 after the Court re-opened and in which we noticed that a request was made by NHAI to the IDBI for releasing its revenue share of Rs. 114.58 crores. The Concessionaire had requested for deferment of the revenue share of NHAI, as according to him, he was investing about Rs. 15 crores per week. We noticed that on the last date, there was about 114 crores in the Escrow account maintained by IDBI and that when the matter was taken up on 10.7.2015, it was found that in the Escrow account, there was only 13.61 crores. The Concessionaire had requested the IDBI vide letter dated 16th June, 2015 to start disbursing the payments from Escrow account at the earliest, and had also addressed a letter to NHAI requesting it to consider the deferment of its revenue share and had agreed for repayment of that amount alongwith interest commencing from November, 2015 to be completely repaid by March, 2016. On these intervening events, we observed in our order as follows:--

"We are surprised to note the contents of the letter of the National Highways Authority of India singed by Shri B.N. Sahay, General Manager (Raj.) by which, the NHAI has agreed in pursuance of the discussion during review meeting held on 18.6.2015 for deferment of its revenue share of Rs. 114.58 crores (upto May 2015) to be repaid in five monthly instalments starting from November, 2015 with applicable interest as per CA. The NHAI also requested the IDBI Bank Limited by the same letter dated 18.6.2015 to move an application to the High Court of Rajasthan and have the orders of the Court dated 19.5.2015 modified.

We may observe that the period of agreement between NHAI and Concessionaire has come to an end in October, 2014 and that in the larger public interest for completion of the road, the Court had intervened in the writ petition, which was filed by the petitioner to stop the collection of tolls, to bring together all stakeholders and to find out whether the road, which is of extreme public importance, can be completed. The stakeholders had agreed in the joint meetings to allow the concession to complete the project for which the Court has fixed the period ending 30.6.2015.

The Concessionaire is collecting approximately 1.5 to 2 crores by way of tolls every day, which is being deposited in Escrow account of IDBI. On enquiries made from learned counsel appearing for the IDBI, NHAI and Concessionaire, they were not able to explain as to why and where the amount of Rs. 100 crores approximately had been disbursed, which was sought to be and has been allowed to be repaid in five monthly instalments from November, 2015. Learned counsel for the Concessionaire states that it has not received amount. Learned counsel for NHAI states that he does not know whether NHAI has agreed to pay the amount to the Concessionaire, and in any case NHAI has not received the amount and has agreed to defer the payment in six instalments beginning from Nov. 2015.

In the circumstances, all the stakeholders are required to explain to the court as to how the amount of Rs. 100 crores approximately of the share of NHAI was allowed to be disbursed and to whom the amount has been paid.

The Concessionaire is claiming about 100 crores for change of the scope of the work, which has not been accepted by NHAI. It, however agrees that the amount has not been paid to it so far.

We are also informed that the Petition (s) for Special Leave to Appeal (C) No. 16461-16462/2015 State of Rajasthan and anr. v. Desh Raj Kharera and ors. against the order dated 19.5.2015, was allowed to be withdrawn with liberty to approach the High Court for review/clarification of the impugned order.

The State of Rajasthan has not filed any application for review/clarification so far, although the SLP was withdrawn on 5.6.2015, with the said liberty."

15. The parties filed their affidavits, with which we were not satisfied and directed to again convene a meeting to find out the whereabouts of 114.58 crores, which was quantified by them, to which the NHAI categorically stated that it had no acknowledge nor it had given any consent to the IDBI to release the amount from the Escrow account. On 6.8.2015, the minutes of the meeting held on 5th August, 2015, in pursuance to our order dated 4.8.2015, were filed. The minutes of the meeting are quoted as follows:--

"Minutes of Meeting

Sub: Six laning of Gurgaon-Kotputli-Jaipur section of NH-8 from km 42.200 to km 273.000 in the State of Haryana/Rajasthan.

In pursuance to directions of the Hon''ble High Court of Rajasthan on

04.08.2015, a review meeting was held with the representatives of Concessionaire, Lenders, IE, RO and PD of above project in NHAI on 05.08.2015 under chairmanship of Member (Fin) at NHAI HQ, New Delhi to review the status of work, balance work and means of finance to complete the project.

List of participants is attached at Annexure-I.

1. RO Jaipur/FD information the status of balance work vis-?-vis scope of work as per supplementary agreement as under:--

2. It was apprised that out of balance 20 km of six laning, 8 km was completed upto July 2015 and for remaining 12 km and balance 7 structures, the likely date of completion is as under:--

3. As confirmed by the Independent Engineer and the Concessionaire, the requirement of funds for completion of these balance works, work out to be approx. Rs. 276 cr.

4. After discussion with the IE, Concessionaire and the representative of the lenders the means of finance for balance work is annexed at Annex.-II. Entire amount will be made available between Aug. 2015 to Mar. 2016.

5. The Concessionaire and the representative of the lenders were requested to provide unequivocal undertaking for their contribution towards equity and debt respectively which may have to be placed before the Hon''ble High Court.

6. With regard to balance work such as 17 delinked structures (wherein 6-lane at grade has been completed), balance service road of 94 km length and other miscellaneous items like entry exit rams, bus lay byes and trucks lay byes etc. the tentative cost comes out to an additional Rs. 513 cr. The concessionaire was asked about the source of finance for these balance work for entire completion of the project. In this regard, the concessionaire and the lenders informed that a proposal for additional finance for the project is under consideration and it shall be finalized by 30.09.15.

7. Member (F) while expressing concerned on continuous delay in project completion, has informed that in case the Concessionaire do not adhere to the completion scheduled as provided n Para -2, NHAI shall be constrained to initiate necessary action as per the provisions of the Concession Agreement including invoking clause 17.10 (Overriding power of the Authority) and Article 37 (Termination) of the Concession Agreement. This may also be informed to the Hon''ble High Court accordingly.

8. The Concessionaire was directed to immediately take up maintenance of the entire project highway.

The meeting needed with a vote of thanks to the chair."

16. On the same day i.e. on 6.8.2015, after hearing learned counsel for the parities, we framed the following two questions to be considered by us:--

"(1) Whether the NHAI has any right to continue to collect the tolls and the rates on which the toll is collected as user fee vide Notification dated 23rd March, 2009 issued under section 11 of the National Highways Authority of the India Act, 1988, authorizing the collection of tolls under section 8A of the National Highways Act, 1956 read with Rule 3 of the Rules of 1997; and whether the Rules of 2008, which came into force on 5th December, 2008 will be applicable for collection of tolls, which provides that no tolls can be collected during the delay in construction period stipulated in the agreement.

(2) Whether the financial arrangement projected in the review meeting held on 5.8.2015 and in which the Concessionaire and the representatives of the lenders agreed to provide unequivocal undertaking for their contribution towards equity and debt respectively before the Hon''ble High Court, as well as the proposal for additional finance, is satisfactory, while meeting the legal requirements for collection of tolls under the National Highways Act, 1988."

17. Upon hearing learned counsel appearing for the parities, we find that the National Highways Fee (Determination of Rates and Collection) Rules, 2008 (for short, "the Rules of 2008") are not applicable to the Concession Agreement, inasmuch as, Rule 1(3) of the Rules of 2008 published in the Official Gazette of India dated 5th December, 2008 clearly provides that the Rules of 2008 shall not apply to the agreements and contracts executed and bids invited prior to the publication of these Rules. In the present case, the bids were invited and Concession Agreement was executed prior to 5th December, 2008. In view of the exclusion of agreements and contrasts executed and the bids invited prior to the publication of the Rules, the proviso to sub-rule(9) of Rule-3 of the Rules of 2008 is not applicable, which provides that no user fee shall be levied for the delayed period between the date of completion as per the agreement entered into with the Concessionaire and the date of actual completion of the project. Under the old Rules of 1997, there was no such restriction that the user fee cannot be levied, during the extended period or for the period of delay between the date of completion as per the agreement entered into with the Concessionaire and the date of actual completion of the project.

18. Learned counsel appearing for the NHAI, Concessionaire and the IDBI have made detailed submissions to the effect that the completion of the Project, as alleged by the petitioners, is not the date fixed for completion period by the NHAI; it depends upon various factors as the completion has to be done in various phases, for which Schedule-G of the original agreement is relevant.

19. We are not required to adjudicate the matter so as to find out the date of construction, inasmuch as, in our view, since the Rules of 2008 are not applicable, the proviso to sub-rule (9) of Rule 3 is not attracted. The period of concession is upto 2021 and thus, the question whether the period of construction has come to an end, is a matter which is to be resolved between the NHAI, the Bankers as well as the Concessionaire, in accordance with the Concession Agreement and the Supplementary Agreement by which the date of

completion of constructions was extended with disclaiming by both the parties to any claim on that account.

20. On the question as to whether the Concessionaire will be able to meet the financial obligations as per the minutes of the last meeting held on 5th August, 2015, in which it was clearly provided in para 5 that the Concessionaire and the representative of the lenders were requested to provide unequivocal undertaking for their contribution towards equity and debt respectively, which may be placed before the High Court, an affidavit of Shri Shashank Shekher has been filed, with which he has annexed an undertaking on a stamp paper of Rs. 100/- providing only for the infusion of equity in 8 instalments from August, 2015 to March, 2016 (wrongly mentioned as March, 2015). The undertaking given by Shri Shashank Shekher, Director of the Pinkcity Expressway Private Limited, does not satisfy to the Court at all, inasmuch as, it does not take care of Rs. 114.58 crores, which was released by the IDBI to the Concessionaire, without the consent of the NHAI. An undertaking by the Authorized Signatory/Director, without any Board resolution and bankers certificate or bank guarantee is meaningless. We also find that while the Court was monitoring the matter with regard to the removal of hindrances for completion of work, a specific direction was given in the order dated 19.5.2015 regarding the Escrow account that IDBI released Rs. 114 crores without taking consent of the NHAI or informing the Court.

21. The Concessionaire as well as the IDBI have not satisfactorily explained the financial arrangement of the project and disbursement of the funds from the Escrow account. Learned counsel for the IDBI states that the amount has been released by the IDBI as debt to complete the project and the Concessionaire has to bring in balance equity. The Concessionaire had agreed to provide equity of Rs. 631 crores. It has to still bring in and provide equity of Rs. 67.51 crores. The Bank had released the debt of Rs. 109 crores to the Concessionaire, for which the consent of NHAI was not necessary.

22. Paragraphs 3, 4 and 5 of the minutes of the meeting dated 5.8.2015 clearly stipulates that as confirmed by the Independent Engineer and the Concessionaire, the requirement of funds for completion of the balance work was worked out to be approx. Rs. 276 crores. The amount of Rs. 276 crores was to be provided in the manner that the Concessionaire was required to infuse equity of Rs. 67.51 crores and the remaining amount was to be released by the Bankers as debt.

23. Looking to the performance, the assurances given and the delay in completing the project, even after most of the hindrances have been removed, we are not satisfied that the Concessionaire will be able to complete the construction of six laning of road, while maintaining the existing four laning within the specified time. The Bankers are interested in the portion of their interest on lending, which they have invested by debt, rather than completion of the project. It is admitted by them that in case the provisional certificate is not furnished by the Concessionaire, to be provided by NHAI, on the satisfaction

recorded by the Independent Engineer by 1st October, 2015, the lending has to be stopped and in that event, the entire project may be jeopardized.

24. We took up the monitoring of the Project in larger public interest and passed several orders for removing hindrances in the completion of Project, and in the interest of the Bankers in protecting their investment of public money in the Project. Our intervention has been misused by the Concessionaire in failing to record progress to complete the Project within the stipulated period. It is admitted to all the parties that extended period of construction has come to an end. It was with the hope that the Concessionaire will complete the work that the period was extended by supplementary agreement upto 15.10.2014. Now, the extended period as well as further extensions beyond the period in Supplementary Agreement has also come to an end. The Concessionaire however has one or other excuse for not completing the project.

25. We entirely agree with the submissions made on behalf of the respondents that we had travelled beyond the scope of the prayers made in the writ petitions and that having decided that the Rules of 2008 are not applicable and the period of concession is still upto 2021, we should have refrained from issuing any further direction in the matter. Our concern in public interest has however been used by the Concessionaire to gain undue advantage both in getting unauthorized extension of the period of construction, and in withdrawing more than Rs. 100 crores, without the knowledge and consent of NHAI, and taking the Court into confidence.

26. We may observe here that from the beginning, we did not intend to either interfere with the terms and conditions of the Concession Agreement or to interpret the dates of period of completion of the work. Our endeavour was to see that the road is completed and for that purpose, orders were passed to remove hindrances. We however find that each of the parties is trying to protect its own interest and is not interested in the ultimate object of completion of the construction of road. It is apparent from the proceedings of the joint meeting and the documents filed before us that the officers of the NHAI have extended the period of payment of amount, which has been clandestinely taken away by the Concessionaire from the Escrow account upto 31st March, 2016. We are unable to appreciate as to how the Concessionaire was permitted by NHAI to pay the amount in instalments, when it was not entitled to withdraw the amount from the Escrow account, unless there was connivance between the three stakeholders, namely, the Concessionaire, NHAI and IDBI Bank.

27. We may also observe here that in one of the hearings, the Project Director of NHAI, Rajasthan had on our queries stated in the Court that the Concessionaire is not in a position or may not be able to complete the work of construction of the road and on that statement, we had directed holding of the meeting to consider whether the Concessionaire shall be allowed to complete the work of construction of the road or the agreement be terminated. In the meeting, the Director (Finance), NHAI, without considering the opinion of the Project Director,

gave a fresh lease of life to the Concessionaire by providing that he may deposit the amount of Rs. 276 crores including the equity and debt by 31st March, 2016 in instalments.

28. In the aforesaid circumstances, when none of the stakeholders is cooperating and is only participating to serve their own interest, we do not propose to monitor the matter any further for completing the constructions and close the proceedings with directions to the Central Government to consider as to whether the Concessionaire shall be allowed to continue to complete the work of construction of the road, on making an independent assessment of the matter, keeping in view the work carried out by the Concessionaire and the amounts withdrawn by it without the approval of the NHAI. The Central Government may, after obtaining the report of the Independent Engineer and considering the financial arrangements between the parties, refer the matter to the CBI for investigation. It may also pass necessary orders with regard to issuance of Provisional Completion Certificate by NHAI, and the termination of the agreement as well as to continue to collect the tolls. The Central Government may take a positive decision in the matter within six weeks, after taking into consideration the issue raised before the Court, the observations made and concerns expressed by the Court.

29. The writ petition is disposed of with the aforesaid directions.

D.B. Civil Special Appeal (Writ) No. 1411/2014

D.B. Civil Contempt Petition No. 1482/2014

D.B. Civil Writ Petition No. 6419/2014

D.B. Civil Writ Petition No. 7329/2014

30. These connected matters are also disposed of in terms of the order passed in D.B. Civil Writ Petition No. 7296/2014,

31. A copy of this order be placed in all the connected cases.