(2008) 12 DEL CK 0165

In the Delhi High Court

Case No : Writ Petition (C) No''s. 6419 and 6792 of 2008

GMR Infrastructure Ltd. and Another — APPELLANT

Vs

National Highways Authority of India and Others
 Madhucon Projects Pvt. LTD. and Another Vs Union of India (UOI) and Others — RESPONDENT

Date of Decision : 16-12-2008

Acts Referred:

Constitution of India, 1950 — Article 226
Delhi Development Act, 1957 — Section 41
Government of India (Allocation of Business) Rules, 1961 — Rule 250, 35, 40
National Highways Authority of India Act, 1988 — Section 11, 15, 17, 21, 24

Citation : (2008) 12 DEL CK 0165

Hon'ble Judges : Mukul Mudgal, J;Manmohan, J

Bench : Division Bench

Advocate : Arun Jaitley, Atul Sharma and Milanka Chaudhury, in W.P. C No. 6792/2008, C.A. Sundaram, Amitabh Chaturvedy, Jeevesh Nagrath and Mohit Chadha, in W.P. C No. 6419/2008, for the Appellant; Dushyant Dave, Ramji Srinivasan, Ravi Kini, Krishan Kumar, Sumit Gupta, Mukesh Kumar, Madhuri Diwan and Padma Priya for Respondent No. 1 and 2/NHAI, Gopal Subramanium, ASG, Gaurav Duggal and Chetan Chawla and 2/UOI, for the Respondent

Judgement

Manmohan, J.—The present petition challenges the letter No. NHAI/ BOT/11012/66/2005/3940 dated 26th August, 2008 issued by the respondent No. 1 National Highways Authority of India (hereinafter referred to as ''NHAI'') to the petitioner consortium intimating the petitioner that it is not eligible to participate in the second stage of the bidding process (the bid stage) in supersession of its earlier letter dated June 27, 2008 pursuant to which the consortium had been declared pre-qualified for the project in question i.e. Design, engineering, construction, development, finance, operation and maintenance of Hyderabad-Vijayawada section of the National Highway 9 (hereinafter referred to as NH9) from KM 40.000 to KM 221.500 of NH 9 in the state of Andhra Pradesh under National Highways Development Programme

Phase IIIA on Build Operate and Transfer-toll Basis. The petitioner No. 1 GMR Infrastructure Ltd. had applied pursuant to the Request For Qualification (RFQ), issued by the respondent No. 1 NHAI in December, 2007. It is not in dispute that pursuant to the process of evaluation and after compliance of the terms of the tender, and in particular Clause 3.5.2, the petitioner was short listed as one of the six successful tenderers, entitled to be further considered.

2. A number of writ petitions have been filed challenging the tender issued by the National Highways Authority of India, which can be broadly classified into three parts. The first challenge through writ petitions relates to the petitioners, i.e., those bidders, who were initially shortlisted but subsequently declared to be not eligible to participate in the second stage of the bidding process after the revaluation. The second challenge relates to those bidders, who were initially not shortlisted but subsequently allowed to participate in the second stage of the bidding process. The third challenge through the writ petitions relates to the petitioners Reliance Infrastructure Ltd. and DLF-Gayatri-Lor Joint Venture, i.e., those bidders, who did not qualify either through the initial evaluation at the qualification stage and who also did not qualify after the revaluation was done. The present writ petitions correspond to those bidders, i.e., WP(C) 6792/08 titled as GMR Infrastructure Pvt. Ltd. and Anr. v. NHAI and Anr. and WP(C) 6419/08 titled as Madhucon Project Pvt. Ltd. and Anr. v. UOI and Anr., who were declared qualified at the initial stage i.e. the qualification stage but subsequently declared to be not eligible to participate in the second stage of the bidding process after the revaluation. In the present petition, the bidders who were initially not shortlisted but subsequently allowed to participate in the second stage of the bidding process namely M/s Cintra Concessions De In Infraestruras De Tranporte S.A. and M/s Isolux-Soma-Omaxe Consortium were impleaded as respondents and Mr. Rajiv Nayar, who appeared for M/s Isolux-Soma-Omaxe Consortium was also heard.

3. Since common issues of law arise in the present writ petition and the Writ Petition(C) 6419/2008 titled as Madhucon Projects Pvt. Ltd. and Anr. v. Union of India and Anr. we are taking into account only the facts of the present petition, which are as follows:

(a) The Petitioner No. 1 GMR Infrastructure Ltd. and its group companies together are one of the fastest growing infrastructure organizations in the country with interests in airports, energy, highways and urban infrastructure (including special economic zones).

(b) The Petitioner No. 2 Punj Lloyd Ltd. is in the business of Engineering, Procurement, Construction /Developer. The various areas of operation of the Petitioner No. 2 include Road/Highway and Bridge Construction, Industrial Construction, Laying of Cross Country Pipelines, Tankage and Composite Construction, EPC Contracts and Telecom Contracts.

(c) The Respondent No. 1 National Highways Authority of India is engaged in the development of highways and as a part of this endeavor, the Respondent No. 1 decided to undertake development of four/six laning of Hyderabad - Vijayawada section in the state of Andhra Pradesh from KM 40.000 to KM 221.500 of NH 9 through private participation on BOT basis and as such issued the RFQ in December 2007 for selection of the preferred bidder/sponsor. By issuing the RFQ, the Respondent No. 1 intended to pre-qualify suitable applicants who will be eligible for participation in the bid stage for awarding the Project through open competitive bidding process in accordance with the procedure set out in the RFQ.

(d) The Petitioner No. 1 and Petitioner No. 2 formed a consortium and entered into a Joint Bidding Agreement dated 14th January, 2008 to participate in the bidding process for the Project.

(e) As per the RFQ, the successful bidder shall be responsible for designing, engineering, financing, procurement, construction, operation and maintenance of the Project under and in accordance with the concession agreement to be entered into between the successful bidder and the Respondent No. 1. The scope of work as indicated in the RFP would include rehabilitation, upgradation and widening of the existing carriageway to four/six lane standards with construction of the new pavement, rehabilitation of the existing pavements, construction of major and minor bridges, culverts, intersections, interchanges, underpasses, drains etc.

(f) As per the RFQ, the Respondent No. 1 intended to follow a two stage process for the selection of the preferred bidder for the Project which is as under:

i. At the first stage (the Qualification Stage) the interested parties are invited to furnish the information specified in the RFQ document. Upon submission of the documents and information of the document as contained in the RFQ, Respondent No. 1 announces/shortlists a list of bidders for the next stage (the Proposal stage) who are then invited to submit detailed proposals in respect of the project in accordance with the Request for Proposal (RFP) document.

ii. In the second stage (the proposal stage) the shortlisted applicants are requested to examine the project in further detail and submit Proposals along with a bid security. The pre-qualified applicants in the second stage submitting a Proposal in accordance with the RFP document, would then be evaluated on the basis of technical, other submissions and financial bids as detailed in the RFP documents. As part of the RFP documents, the Respondent No. 1 shall provide detailed instructions for applicants relating to submission of the Proposals, a draft Concession Agreement and project report/feasibility report containing other information pertaining/relevant to the Project. The award of Project is based on the lowest amount of grant sought from the Authority or the highest premium/ revenue share offered, as the case may be.

(g) Pursuant to the RFQ, the Petitioners, as a consortium, submitted a request for qualification application dated January 19, 2008 to NHAI.

(h) Post evaluations of the RFQ Application, Respondent No. 1, vide its letter No. NHAI/BOT/11012/66/2005/3349 dated June 27, 2008, conveyed to the Petitioners'' Consortium that the Consortium had been pre-qualified for the bid stage against the RFQ Application submitted by the Consortium. In the very same letter, the Petitioners'' Consortium was called upon by the Respondent No. 1 to collect the bid documents from July 2, 2008, onwards.

(i) Upon receipt of the above letter, the Petitioners'' Consortium vide its letter dated June 30, 2008 approached Respondent No. 1 for issue of the RFP documents but despite the Petitioners'' Consortium tendering the requisite fee of Rs. 50,000/in the form of Bank Draft, the Respondent No. 1 failed/refused to accept the same and also refused to issue the RFP documents.

(j) Thereafter, the Petitioners'' Consortium received a letter from Respondent No. 1 bearing letter No. NHAI/BOT/11012/66/2005/3712 dated August 8, 2008, in terms of which it was conveyed to the Petitioners'' Consortium that in view of certain representations in regard to the evaluation done by the Respondent No. 1, although having been pre-qualified, the process of Petitioners'' Consortium''s pre- qualification was being kept in abeyance and certain clarifications were sought from the Petitioners'' Consortium in relation to their RFQ Application.

(k) In response to the same, Petitioners'' Consortium vide their letter No. GIL/BD/SV/08-09 dated August 13, 2008, inquired if Consortium''s pre-qualification was being reviewed due to representations received and also whether the criteria for pre-qualification remain unaltered. Alongwith the letter of the Petitioners'' Consortium, the Consortium also furnished to the Respondent No. 1 the clarification asked for them vide letter dated August 8, 2008.

(l) Another letter was received by Petitioner bearing letter No, NHAI/BOT/11012/66/2005/3940 dated August 26, 2008, impugned in this petition, conveying to the Petitioners'' Consortium that based on the clarifications submitted by the applicants, the Respondent No. 1 has re-evaluated/reviewed the submitted applications for the RFQ and as a result of the same the Petitioner has not been short listed for the Project and that it is not eligible to participate in the second stage of the bidding process .

4. The main grievance of the petitioner as articulated by Mr. Arun Jaitley, the learned Senior Counsel in the present writ petition is as follows:

(a) The process of evaluation has been done on the basis of the representations made by unsuccessful applicants and the said representations were forbidden by Clause 2.21 of the RFQ: Clause 2.21 reads as follows:

2.21 Short listing and notification-

After the evaluation of Applications, the Authority would announce a list of short-listed pre-qualified Applicants (Bidders) who will be eligible for participation in the Bid Stage. At the same time, the Authority would notify the other applicants that they have not been short-listed. The Authority will not entertain any query or clarification from Applicants who fail to qualify.

(emphasis supplied)

(b) Not only the representations from M/s Inolux Soma Omana Consortium, M/s Reliance Infrastructure Ltd. and M/s Macquarie were entertained but also pursuant to the said representations the petitioner was knocked out from the first six names where he was placed subsequent to the initial evaluation in accordance with Clause 3.5.2. The learned Counsel for the petitioner has submitted that the said representations and any action pursuant thereto are contrary to the mandate of Clause 2.21.

(c) It has also been submitted that the receiving of the said representations from the unsuccessful applicants amounted to ''an undesirable practice'' as it clear from Clause 4.2(d) of the RFQ: Clause 4.2(d) reads as follows:

(d) "Undesirable practice" means establishing contact with any person connected with or employed by the Authority with the objective of canvassing, lobbying or in any manner influencing or attempting to influence the Bidding Process.

(d) It has also been submitted that Clause 2.18 of the RFQ mandates that all the information submitted to the respondent No. 1 shall be treated in confidence. The representations made by the unsuccessful applicants, however, clearly indicate the breach of confidence, as the information qua the petitioner''s tender is available to the unsuccessful applicants.

(e) It is submitted that the petitioner''s i.e. GMR Infrastructure Pvt. Ltd. project and the construction work commissioned was not taken into account in order to disqualify the petitioner. It has been submitted that the requirement of Clause 3.2.3 (d) of the RFQ only required the commissioning of the constructed work and payment there for. The commissioned project of the petitioner has not been considered by the respondent on the ground that the project was not commissioned.

(f) Even though the respondent No. 1 sought the explanation which was satisfactorily given by the petitioner, the marks for the projects in respect of which clarification was given was not given including scores claimed by M/s Sembawang Engineers and Constructors Pvt. Ltd., were not awarded. The relationship between M/s Sembawang Engineers & Constructors Pvt. Ltd. pursuant to the clarification sought by the respondent No. 1 was given by the letter dated 13th August 2008 and that explanation was not taken into account. It is lastly submitted that even if it is assumed that the Two Member Committee Report could have been taken into account, the said recommendations have not been fully implemented.

The said recommendations read as follows:

(iii) As a result of above exercise there is likelihood of change in the shortlist of top six bidders. In case it is decided to issue RFPs on the changed list of six shortlisted bidders, this may lead to further representation and possible litigation. Under the circumstances there could be two options for carrying the project further:

(a) NHAI Board may consider one time relaxation for this particular package and may increase the number of bidders in the shortlist to accommodate those who qualify in the review exercise and whose experience score in higher than the final score(after review) of the present lowest scorer (M/s Madhucon-Galfar-SREI) in the already declared shortlist. However, its implication on other seven project packages where evaluation is going on will also need to be kept in view as also the legal implications.

(b) NHAI Board may consider annulling the whole exercise and direct re-invitation of RFQ for this package (Hyderabad-Vijayawada). This would also meet the ends of justice as all prospective bidders would have an opportunity to apply and be evaluated as per the present evaluation procedure.

(g) The respondent accepted the first recommendation while brushing aside the second recommendation and this could not been done. It is finally submitted that there is a gross disparity of the marks awarded by the respondent No. 1 for different projects for almost same experience.

(h) The documents filed by the respondent No. 3 Cintra Concessions De In Infraestruras De Tranporte S.A. and Shapoorji Pallonji & Co. Ltd. in reply to the clarification sought on 8th August, 2008 clearly shows that the said documents specifically the certificate issued by the Statutory Auditors were ready much before 8th August, 2008, i.e. on 24th July, 2008 and 28th July, 2008. The respondent No. 3, therefore, had prior knowledge of the fact that clarification was to be sought by the respondent No. 1.

5. The main grievances of the petitioner in WP(C) No. 6419/2008 titled as M/s Madhucon Projects Pvt. Ltd. and Anr. v. Union of India and Anr. as articulated by Mr. C.A. Sundram, the learned senior counsel is as follows:

(a) The Government could not have directed NHAI to seek clarifications because as per Clause 2.20, clarifications, if any, are to be sought by NHAI on its own and not on the directions of the Government. In terms of Clause 2.20, it was in the discretion of NHAI as to whether or not to seek clarifications. In other words, NHAI was not obliged to seek clarifications. The defence taken by Union of India (UOI) in its counter-affidavit that NHAI ought to have taken clarifications is thus contrary to Clause 2.20(i) of the RFQ.

(c) Such clarifications could not have been sought after the completion of the shortlisting process. Clarifications, in terms of Clause 2.20(i) of the RFQ were meant for the purpose of facilitating the evaluation of the applications. The evaluation process was completed on 27th June 2008 when the shortlisted candidates were declared. No clarifications could have been asked for or entertained thereafter. Thus, in terms of Clause 2.20(ii) all the applicants were barred from questioning the interpretation arrived at by NHAI. Additionally, it needs to be noted that NHAI had sought clarifications earlier, i.e. before completing the shortlisting and after receiving the response to such clarifications, NHAI evaluated the applications and then announced the names of shortlisted bidders on 27th June 2008.

(d) No clarifications could have been sought by NHAI on the basis of representations received by Government from applicants, who had failed to qualify, which representations were forwarded by the Government to NHAI for consideration, comment and subsequently for further action of seeking clarifications. The making of any representation to NHAI was specifically barred under Clause 2.21, which is reproduced as under:

2.21 Short-listing and notification

After the evaluation of Applications, the Authority would announce a list of short-listed pre-qualified Applicants (Bidders) who will be eligible for participation in the Bid Stage. At the same time, the Authority would notify the other Applicants that they have not been short-listed. The Authority will not entertain any query or clarification from Applicants who fail to qualify.

(e) The entire decision making process was vitiated, defective, illegal, and contrary to the terms of the RFQ. Further, once clarification had been sought for, and decision was taken, the applicants were debarred from questioning the interpretation of NHAI. Once the decision was taken, no representation or clarification could have been entertained from applicants who had failed to qualify as per Clause 2.21 of the RFQ.

(f) Once the evaluation process was completed and the short list was declared by the letter dated 27th June 2008, NHAI had no further role to play insofar as evaluation under the RFQ was concerned. There is no power of re-evaluation of review given in the RFQ.

(g) The respondents, particularly UOI has stated in its counter affidavit that in terms of Clause 2.20 of the RFQ, NHAI could have sought clarifications from applicants. Since, this was not done, UOI directed NHAI to seek clarification. There is no provision in the RFQ which gives UOI the power to supervise the tender process and further clarification in terms of Clause 2.20 could have been sought by NHAI for the purposes of evaluation of the applications. It was in the discretion of NHAI whether or not to call from clarification and NHAI could not have been directed to do so. A necessary corollary is that clarifications, if any, could have been sought only till such time that the process of evaluation was not complete. Once the evaluation process was completed and the short-list was declared, there was no provision in the RFQ under which clarification could have been sought or entertained and there is no provision under which UOI could have directed NHAI to call for clarifications.

(h) The entire process of re-evaluation was undertaken on the basis of representations received from the unsuccessful bidder, who had not been shortlisted for the Bid Stage. This was contrary to the express terms of the RFQ, namely Clause 2.20(ii) which barred any applicant from questioning the decision arrived at by NHAI after clarifications had been sought, and Clause 2.21 thereof, which provided that no clarification or query from any unsuccessful applicant would be entertained.

(i) According to well established practice and procedure, NHAI had no power to recall/review its order/decision once it had informed petitioner that it had been pre-qualified for the Bid stage. NHAI by seeking to consider representations received by from unsuccessful applicants was acting in breach of Clause 2.21 of the RFQ. In terms of Clause 2.21 of the RFQ, NHAI could not consider any representation made by unsuccessful applicants. Furthermore, there was no provision in the RFQ to keep the pre-qualification into abeyance.

(j) The arguments of the UOI regarding the inherent power of the NHAI to carry out ''re-evaluation or review'', at least to the extent of self-correction, to achieve the object of "seeking the best man for the project" and the inter-linked argument of the inherent power of the Government to intervene and direct NHAI to carry out ''re-evaluation or review'', at least to the extent of self-correction, is wholly fallacious.

(l) The entertaining of representations from unsuccessful bidders; Constituting a committee to give recommendations; calling for clarifications after the process of evaluation was over and list of short- listed candidates had been declared; and carrying out re-evaluation, was contrary to the terms of the RFQ and amounted to changing the rules.

(m) The reliance by the respondents on Section 33 of National Highway Authority of India Act, 1988 is totally misplaced since the said section applies only to laying down of policy which admittedly in the instant case is not applicable. The said section only permits the issuance of a generic fiat on policy matters alone and does not permit the issuance of person-specific directions based on individual grievances brought to its notice. Should the said clause be read so widely as to include the right to interference in every decision making process with regard to award of any particular contract by giving a go- by to the RFQ, the entire independence and autonomy of the authority so created under National Highway Authority of India Act, 1988 would be negated.

6. The learned Additional Solicitor General Shri Gopal Subramanium on behalf of the Union of India (UOI) contended as follows:

(a) By virtue of Section 3 of the National Highways Authority of India Act, 1988, the NHAI has been constituted. Section 11 of the said Act empowers the Central Government to vest in or to entrust to NHAI such national highway or stretch thereof as may be specified in a notification to be published in the official gazette. Proviso to Section 15 of the said Act states that no contract exceeding such value or amount as the Central Government may prescribe shall be entered into by NHAI without the prior approval of the Central Government. By virtue of Section 17 of the said Act, the Central Government has been empowered to provide any capital that may be required by NHAI or pay to NHAI by way of loans or grants such sums of money as it may consider necessary for the efficient discharge of the functions by NHAI. Section 21 of the said Act mandates that the consent of the Central Government is necessary before NHAI borrows money from any source. By virtue of Section 24, the Central Government has an obligation to place the annual report and auditor''s report of NHAI before each House of Parliament. Section 31 empowers the Central Government to temporarily divest NHAI of the management of any national highway if it is of the opinion that in the public interest it is necessary to do so. Section 32 empowers the Central Government to supersede NHAI in specified situations. Section 33 empowers the Central Government to issue directions on questions of policy to NHAI and NHAI shall be bound by such directions. Sections 37 states that the rules and regulations made under the said Act have to be placed before each House of Parliament.

(b) A perusal of the aforesaid provisions of the National Highways Act, 1956 and the National Highways Authority of India Act, 1988 and Government of India (Allocation of Business) Rules, 1961 clearly shows that national highways vest in the Central Government and NHAI is an implementing agency of the Government of India in matters relating to development of highways. In the present case, the highway in question vests with the Central Government by virtue of the Schedule to the National Highways Act, 1956. A perusal of the 1988 Act clearly shows that the Central Government has the power to ensure that NHAI functions efficiently and in a transparent manner. The provision relating to the consent of Central Government being required before NHAI enters into contracts of a specified value and the provision mandating prior approval of the Central Government clearly shows the role played by the Central Government in the functioning of NHAI.

(c) In the present case, in December 2007, based on the model RFQ published by the Planning Commission, NHAI invited applications from prospective bidders for their pre-qualification of the project. As per Clause 3.5.2 of the RFQ document (which has been upheld by this Hon''ble Court), NHAI had the power to pre-qualify and prepare a shortlist of 5 bidders which could go upto 6. NHAI constituted an Evaluation Committee and took the help of financial consultants for carrying out the evaluation. After the evaluation, 6 applicants were shortlisted and were informed of the same by NHAI by letter dated 27th June 2008.

(d) After the shortlisting of the said 6 applicants, the Central Government received representations from various unsuccessful applicants stating that they have been wrongfully disqualified. On 2nd July 2008, the Central Government forwarded the said representations to the Chairman, NHAI requesting him to look into the matter and give his comments on the said representations. It was also requested that the process of issue of RFP may be deferred by 10 days. On 4th July 2008, NHAI sent its comments on the representations forwarded to it by the

Central Government. Along with the said letter, NHAI enclosed a representation received from another unsuccessful applicant. In order to ensure that transparency is maintained, the Central Government constituted a Committee on 11th July, 2008 consisting of two members who were in the Board of NHAI to go into all the representations that have been received. The report of the said Committee was required to be placed before the NHAI Board which had to take a final decision in the matter. Since the examination by the said Committee would take some time, the Central Government by its letter dated 11th July 2008 requested the NHAI to defer the issue of RFP. The two member Committee examined the matter and submitted its report on 28th July 2008. By a letter dated 29th July 2008, the Central Government forwarded the report of the Committee to NHAI. It was requested that the said report may be placed before the NHAI Board along with the recommendations/comments of the Chairman, NHAI. On 7th August, 2008, the Central Government sent a letter to NHAI requesting NHAI to obtain necessary clarifications and to immediately re-evaluate the applications. NHAI was requested to place the findings of the re-evaluation before the NHAI Board for a decision in the matter. Accordingly, the applications were re-evaluated and the result of the re-evaluation exercise was considered by the NHAI Board in its meeting held on 19th August 2008 which decided to qualify the six most qualified applicants pursuant to the re-evaluation.

(e) The aforesaid chronology of events has been described only to show that the role of the Government in the entire exercise has been to ensure that transparency and fair play are adhered to. As the administrative Ministry of NHAI, it is the duty and obligation of the Ministry of Shipping, Road Transport and Highways, Government of India to intervene to ensure that the process of tendering takes place in a transparent manner. As submitted earlier, if any questions are raised with respect to the tender process in Parliament, it is the Ministry of Shipping, Road Transparent and Highways, Government of India which has to answer the said questions in Parliament. The Government of India is not concerned with individual applicants and is only concerned with the process of arriving at the shortlist of six most qualified applicants. In a project of such magnitude, it is in public interest that the most qualified applicant gets the contract and it is the duty of the Government to ensure that NHAI undertakes the process in such a way that the most qualified applicant gets the project.

(f) There is a difference between ''intervention'' by the Government and ''interference'' by the Government in the functioning of NHAI. In the present case, the Central Government has intervened by writing letters to NHAI forwarding the representations received by the Government from unsuccessful applicants. Further, the Government intervened by Constituting a Committee consisting of members of NHAI Board to look into the representations. The ultimate decision of accepting the report of the said Committee was not that of the Government but of the NHAI Board. The Government by its letters had only requested the NHAI Board to take appropriate decision after considering the report of the Committee. The ultimate decision for undertaking the re-evaluation based on the report of the Committee was undertaken by the NHAI Board in its meeting held on 19th August, 2008. The attempt of the Petitioners to portray the intervention of the Central Government to ensure transparency as interference in the functioning of NHAI is misconceived.

(g) Therefore, it is submitted that the role of the Government was limited to pointing out to NHAI the representations received by the Government and Constituting a Committee to look into the said representations. The argument that the Government cannot intervene at all under any circumstance whatsoever in a tender process being undertaken by NHAI is too farfetched and has far reaching consequences. The Government definitely has a right and is in fact duty bound to intervene if it is of the view that certain aspects need to be brought to the attention of NHAI in order to ensure transparency and fair play. Needless to say, as the administrative Ministry of NHAI, the Ministry of Shipping, Road Transport and Highways, Government of India was well within its rights to write the letters dated 11th July 2008, 29th July 2008 and 7th August 2008 to NHAI and was also justified in Constituting the aforesaid Committee on 11th July 2008. The intention of the Government was bonafide and in any event no allegation of malafide has been made by any of the parties.

7. The main plea of the petitioner which needs to be addressed by us is whether the revaluation was legal and /or justified and indeed both the learned Counsel agreed that if this plea was held in favour of the petitioner, i.e., the power to review at the behest of the unsuccessful applicants, then we need not go into the other pleas raised by the learned Counsel for the petitioners. It is necessary therefore to consider the source of the process of revaluation. The revaluation appears to have been subsequent to the letters dated 7th July 2008 and 10th July 2008, which were preceded by the letter dated 30th June 2008 by M/s Reliance Infrastructure Ltd. and other representations received from M/s Isolux-Soma- Omaxe Consortium, M/s Macquarie and M/s Cintra. The said representation was addressed to the Secretary, Ministry of Road, Transport and Highways.

8. However, a letter dated 2nd July 2008 was received by the NHAI from the Government of India, Ministry of Shipping, Road Transport and Highways. By this letter dated 2nd July 2008, the Government forwarded representations received from certain unsuccessful aspirants for the tender and directed that the matter may be reviewed by the NHAI and asked for forwarding of the comments of the NHAI on the representations to the ministry within three days. It was also directed that the issue of Request for Proposal (RFP) document may be deferred for at least 10 days. The said letter was replied to and comments sent by the NHAI by its letter dated 4th July 2008. The relevant portion of the said letter reads as follows:

Sub.: Representations from M/s. Isolux-Soma-Omaxe Consortium, M/s. Reliance Infrastructure Ltd., M/s. Macquarie and M/s. Cintra in respect of RFQ process for four laning of the Hyderabad-Vijayawada and Vijayawada - Machilipatnam

Sections on NH-9 under NHDP Phase-IIIA.

Ref.: Ministry letters No. RW/NH-37011/33/2008 - PIC dated 2nd July 2008.

Sir, With reference to Ministry''s three letters on the subject cited above, it is submitted that the matter in respect of representations of M/s. Isolux-Soma-Omaxe Consortium, M/s. Reliance Energy Ltd. and M/s. Macquarie Securities Asia Pvt. Ltd. in respect of RFQ process for four laning of the Hyderabad Vijayawada and Vijayawada - Machilipatnam sections on NH-9 under NHDP Phase III has been reviewed and following submissions are made:

(i) Prequalification process for following 3 stretches has been completed by NHAI till date:

(a) Hyderabad-Vijayawada

(b) MP/Maharashtra Border-Dhule

(c) Pimpalgaon-Gonde

(ii) The evaluation of RFQs for Vijayawada- Machilipatnam is still under process.

2. NHAI has also received a representation from M/s. Cintra (copy enclosed for ready reference) in this regard.

3. Evaluation of RFQ for Hyderabad-Vijayawada stretch has been carried out by M/s. Almondz Global Securities Ltd., the Financial Consultants. Consultants have mentioned in their report that while carrying out evaluation, in the event of related document being deficient in certain aspects, attempts were made to evaluate by interpreting the information/documents available elsewhere in the application for qualification. It has further been mentioned by the Consultants that at times, different documents could be interpreted in different ways thereby introducing an element of subjectivity in the evaluation process and accordingly evaluation has been carried out based on the information as brought by the relevant documents e.g. Statutory Auditors certificate relating to Associate status and quoted experience. This approach had also become inevitable due to too voluminous documents submitted by the applicants so as to pre-qualify in top six short-listed applicants.

4. The applications of all responsive applicants have been evaluated as per Clause 2.2.9 of RFQ road with the reply given in the pre-bid meeting with respect to Associate status and the eligibility criteria prescribed in Clause 3 of RFQ. Further, evaluation is Annexure IV instructions No. 13 and 14.

5. Applicant-wise comments on the reply them representations made by them are as under:

(a) M/s. Isolux-Soma-Omaxe Consortium

Name of member/Associates

Claimed score

Evaluated Score

Comments (response for all difference)

M/s. Isolux-Corsan ConcessionsS.A. (member)

4047.13

3205.80

(i) Experience claimed for the period not related to prescribed five year period has been excluded.

(ii) Experience claimed relating to project ?not commissioned? under category 1 & 2 has been excluded.

Corsan Corviam Construction, S.A. (associates)

6048.85

0

There is no document certified by Statutory Auditor to establish ?Associate? relationship

Isolux Ingenieria, S.A.(associate)

895.56

0

There is no document certified by Statutory Auditor to establish ?Associate? relationship.

Soma Enterprise Ltd., (member)

642.32

0

The applicant has submitted certificates from a Charted Accountant, which does not mention that it is from the Statutory Auditor.

Omaxe Infrastructure and Construction (P) Ltd. (member)

0

0

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Omaxe Ltd. (associate)

2929.19

0

The applicant has subined certificates from a Charted Accountant, which does not mention that it is from the Statutory Auditor.

Omaxe Buildhome (P) Ltd. (associate)

1122.80

0

The applicant has submined certificates from a Charted Accountant, which does not mention that it is from the Statutory Auditor.

It is relevant to refer to the clarification given by NHAI to the quarries received from applicants. It was clearly stated that in case of an Associate, supporting statement s certified by Statutory Auditor should be provided.

Annexure-IV of the RFQ specifies two Formats

(a) Certificate from the Statutory Auditor regarding BOT Projects and

(b) Certificate from the Statutory Auditor/Client regarding construction experience on eligible projects.

Instructions contained in Annexure-IV Sl. No. 12 states that certificate from the Client or the Statutory Auditor must be furnished as per format. Similarly, instruction contained in Annexure-IV Sl. No. 13 & 14 states that if the applicant is claiming for experience under the Category 1 and 2, or Category 3 an4 4 it should provide a certificate from its Statutory Auditor regarding BOT projects or certificate from its Statutory Auditor/Client regarding construction works respectively.

The applicant has not provided the mandatory Statutory Auditors Certificate while claiming their individual, as well as their Associates technical capacity. This has resulted in reduction of their claimed technical score.

Besides total experience score, as per Clause 2.2.2 (A)(iii) Para-3 the applicants are required to have at least 1/4th of the Threshold Technical from the eligible project in Category 1 and / or Category 2, specified in Clause 3.2.1 (i.e. Highway Sector)

The applicant has scored nil in his category due to deficient certificate and were declared ineligible

(b) M/s. Reliance Energy Ltd.

Name of member/Associates

Claimed score

Evaluated Score

Remark

Reliance Energy Ltd. (member)

16708.47

0

In the experience Certificate it is not mentioned that it is not mentioned that it is from Statutory Auditor

Reliance Communication s Ltd. (associate)

32501.22

0

Certificate in support of Associate relationship with AAA Communication (P) Ltd. (member) is from Charted Accountant but it has not been mentioned that it is from Statutory Auditor

JPTEGOL

418.98

439.19

Due to the Applicable Foreign Currency Conversion rate there is as increase in the Technical Store.

The reduction in score is due to (i) non-submission of ?documents certified by Statutory Auditor? in support of Associate Status and (ii) submission of certificates from a Charted Accountant, which does not mentioned that it is from the Statutory Auditor. In addition, the experience relating to electricity business has been quoted in consolidated form without giving the required project specific details.

(c) Gammon Infrastructure Projects Limited-Macquarie Securities (Asia) PTE Limited

Name of member/Associates

Claimed score

Evaluated Score

Remark

Gammon Infrastructure Projects Ltd. (member)

1841.58

0

? In the Experience Certificate it is not mentioned that it is from Statutory

Auditor.

? Statutory Auditor Certificate not submitted in some cases.

? Experience claimed relating to project ?not commissioned? under category 1 & 2 has been excluded.

Gammon India Ltd.

1848.18

1742.48

Experience claimed for the period not related to prescribed five year period has been excluded.

Macquarie Securities (Asia) Pte. Ltd. (member)

0

0

-

Macquarie Infrastructure Group (associate)

24616.25

0

There is no document certified by Statutory Auditor to establish ?Associate relationship?.

Macquarie Airports (associate)

37372

0

There is no document certified by Statutory Auditor to establish ?Associate relationship?.

The reduction in score of M/s. Gammon Infrastructure Projects Ltd. is due to (i) non submission of Statutory Auditor Certificate, (ii) submission of certificates in which it is not mentioned that they are from Statutory Auditor and (iii) experience claimed relating to project not commissioned under category 1 & 2. In case of M/s. Gammon India Ltd., the reduction is due to exclusion of claimed experience not relating to the prescribed five years period.

In case of M/s. Macquarie Securities (Asia) Pte. Ltd., the claimed score has not been taken into account in the absence of a document certified by Statutory Auditor to establish associate relationship with M/s. Macquaire Infrastructure Group and M/s. Macquaire Airports, the entities whose experience has been claimed as associate.

The applicant score therefore, relates to M/s. Gammon Infrastructure Projects Ltd. & M/s. Gammon India Ltd. and the score of M/s. Macquarie is Nil.

It will not be out of place to mention here that NHAI has completed evaluation in two more projects namely MP/Maharashtra Border to Dhule and Pimpalgaon to Gonde in the State of Maharashtra in which this consortium is an applicant and M/s. Pricewater House Coopers are the Financial Consultants. The consortium has been shortlisted in the above two projects. However, their inclusion is solely on account of score of M/s. Gammon Infrastructure Projects Ltd. and the score of M/s. Macquarie Securities (Asia) Pte. Ltd. has been evaluated Nil in these case as well.

(d) Cintra Concessioners De Infrastructuras De Transporte S.A.

A representation from Cintra Concesiones De Infrastructuras De Transporte S.A. has also been received in the office of Chairman, NHAI. In their representation the applicant has stated that they have submitted all documents in due compliance of RFQ (copy enclosed). However, during evaluation it was noted that the applicant in this case has submitted "independent Reasonable Assurance Report" by a Charted Accountant instead of a certificate in the prescribed format from the Statutory Auditor.

Further, M/s. Cintra has stated under item 3 on page 1 of their representation that in the said report, on page 2 to 8 it is mentioned that for "Statutory Auditor Certificate see page 9", whereas in the documents submitted it is written for "Statutory Auditor Certificate see page 9". Further, pages 2 to 8 have not been authenticated by the signatory of the report.

It has also been stated that PWC has issued "Statement of Associates". The details have been rechecked, but no such statement in support of claimed experience could be found.

This letter is being issued with approval of the Competent Authority.

9. Another letter dated 11th July 2008 was received by the NHAI from the Government of India, Ministry of Shipping, Road Transport and Highways wherein the Government has directed the NHAI to place the matter before the Board of NHAI and requested the authority that the process of issue of RFP be deferred until further intimation. The letter of 11 July, 2008 to the NHAI by the Ministry of Shipping, Road Transport and Highways reads as under:

Sub.: Representation from M/s. Reliance Infrastructure Ltd. in respect of RFQ process from four laning of the Hyderabad-Vijayawada section on NH-9 under NHDP Phase IIIA. Reg. Sir, Please refer to your reply submitted vide letter dated 4th July 2008, in response to our letters dated 2nd July 2008 regarding representations/complaints of some applicants on the evaluation process for aforesaid stretch.

The reply mentions that the applicant has submitted certificates from a Charted

Accountant which does not mention that it is from the statutory auditor. Generally, RFQs allows employer to seek clarifications in case of any doubt/ ambiguity in the information provided by bidders. In this case it appears that such clarifications were not obtained by NHAI while seeking other clarification. It would not be out of the context to mention here that NHAI had earlier sought clarification from the bidders in similar cases. During bid evaluation under NHDP - V, some discrepancies were observed in the ECs submitted by bidders and NHAI had sought clarifications after seeking legal advice which had opined as under:

''Rejection of the bid on this account alone may be challenged on the ground that the NHAI is acting in the technical manner and without due application of mind.''

It appears that different approach/yardstick has been followed in the evaluation of bids of aforesaid package and under NHDP-V.

Meanwhile on more representation from M/s. Reliance Infrastructure Ltd., dated 7th July 2008 (copy enclosed) has been received. It has been indicated in the representation that some other companies have been qualified / shortlisted though they submitted documents with many other serious irregularities, in addition to the so called irregularities in the documents of M/s. Reliance.

It is, therefore, requested that the matter may be placed before the Authority (Board). It is also requested that the process of issue of RFP may be deferred until further intimation.

10. Further thereto the Government of India, Ministry of Shipping, Road Transport and Highways appointed a two Member Committee comprising of the Director General (Road Development) and Special Secretary and Member-Technical, NHAI to review the entire matter. The said committee submitted its Report, which was forwarded by the Government of India, Ministry of Shipping, Road Transport and Highways under cover of its letter dated 29th July 2008 which reads as under:

Sub.: Representations against RFQ process for four laning of the Hyderabad - Vijayawada section of NH-9 under NHDP Phase-III-Report of the Committeeregarding.

Sir, Kindly find enclosed herewith a copy of the report of the two member Committee constituted in the Ministry on the above mentioned subject vide its OM dated 11.07.2008.

It is, therefore, requested that the report of the said Committee may by placed before the NHAI Board along with the recommendations / comments of the Chairman, NHAI urgently for a decision of the matter.

11. One of the recommendations of the Two Member Committee to the Authority was to re-look into the qualification exercise for the project package following the same procedure as for the other seven project packages and ask the bidders for clarification on the qualification aspects without allowing them to submit

additional document and without any addition in further claims of score as was being followed in other seven project packages.

12. The learned Counsel for the UOI Mr. Gaurav Duggal was directed on 20th November 2008 to hand over the list of dates showing the passage of the representation of the tender process through the Ministry within three days. The order was complied only on 8th December 2008. However, since we have to examine the validity of the decision making process, we consider it necessary to take on record and analyse the documents relating to the passage of representation of the entire tender process as filed by the learned Counsel for NHAI and particularly the file notings of the Project Implementation Cell of the Ministry of Shipping, Road Transport and Highways which are as under:

(A) Para-5 of file noting dated 11th July, 2008

5. In this context note of Hon''ble Minister at page 4/ante may kindly be referred. It has been desired by Hon''ble Minister that "with reference to all representations in this project, once the report is received if required clarification on technical issues could be sought from Planning Commission/Ministry of Finance.

(B) Para-2 of file noting dated 30th July, 2008

2. In the matter relating representations against the RFQ process completed by NHAI in respect of four laning of Hyderabad-Vijayawada section on NH-9 in Andhra Pradesh on BOT basis, a two member Committee consisting of DG (RD) & SS and Sh. Nirmaljit Singh, Member (Tech.) NHAI was constituted with the approval of the Hon''ble Minister (S, RT&H) on 11.07.2008. The report of the Committee has been received vide their letter dt. 28.07.2008.

(C) File noting dated 5th August, 2008

A meeting was taken by Hon''ble Minister (S, RT&H) on 5.8.2008 to review the progress of evaluation of RFQ and award of concessions for projects under NHDP. The meeting was attended by Secretary (RT&H), DG (RD) & SS, Advisor to Dy. Chairman, NHAI and concerned officials of NHAI and the Ministry. In the subsequent meeting taken by Secretary (RT&H), the matter relating to Hyderabad-Vijayawada project was also discussed. In this regard, it was mentioned that the report of the two Member Committee in the matter has already been forwarded to NHAI vide this Minister''s letter of even No. dated 29.7.2008. During the discussion, it was mentioned by the Chairman, NHAI and the concerned Member (Tech.) that as per the committee report the queries/ clarification to be asked from the applicants of the project have already been prepared and are ready for issue. However, it was indicated that the previous decision taken by Chairman, NHAI can''t be changed at the same level suo-motto.

13. A letter dated 7th August 2008 was received by NHAI from the Government of India, Ministry of Shipping, Road Transport and Highways wherein it was stated as follows:

Sub.: RFQ process for four laning of the Hyderabad Vijayawada section of NH-9 under NHDP Phase-III regarding.

Sir, A meeting was taken by Hon''ble Minister (S,RT&H) on 05.08.2008 to review the progress of evaluation of RFQ and award of concessions of projects under NHDP. In the meeting taken by Secretary (RT&H) subsequent the above meeting, the matter relating to Hyderabad - Vijayawada project was also discussed. In this regard, it may be recalled that the report of the two Member Committee has been forwarded vide this Ministry''s letter of even No. dated 29.07.2008. During the discussion, it was mentioned by you and the concerned Member(Tech.) that as per the committee report the queries/clarification to be asked from the applicants of the project have already been prepared and are yet to be issued.

In order to expedite the process, it is requested that necessary clarifications from the applicants may be obtained immediately and the applications re-evaluated. The findings of the re-evaluation may be placed before the NHAI Board for a decision in the matter.

14. It is thus clear from the above letter dated 7th August, 2008 that the Union of India has not only forwarded the representations received from the unsuccessful bidders who failed to qualify after the first evaluation conducted by the NHAI, but also issued directions to NHAI to put the process on hold and the Ministry had pursuant to the report of the two member committee to look into the evaluation, directed the NHAI to seek clarifications from the bidders and re-evaluate the bids. In fact, it is apparent from the letter dated August 7, 2008 that the Ministry of Shipping, Road Transport and Highways has itself been reviewing the progress of evaluation of RFQ and award of concessions for projects under NHDP. The above action on the part of Union of India is not contemplated by the provisions of the NHAI Act which envisages the NHAI as an autonomous statutory body. The actions of the Union of India in the present case indicates that not only the autonomy granted to NHAI by the Parliament by a statute enacted in this regard been curtailed and eroded, but the NHAI is sought to be reduced to a mere department of the Government with the Ministry of Shipping, Road Transport and Highways. The mandate of the letter dated 7th August, 2008 clearly spells out the course of action in no certain terms and merely ask the NHAI to endorse formally the decision expressed in the said letter. The entire process adopted from 2nd July 2008 to 26th August 2008 clearly shows that the mandate of Section 33 had been abrogated and the decision had already been taken to re-evaluate the bid and the NHAI was merely asked to formally act on such a decision.

15. Considerable emphasis has been laid upon Section 33 of the National Highways Authority of India Act, 1988 (hereinafter referred to as "the NHAI Act"). In fact, in our view, it is necessary to extract Sections 31, 32 in addition to Section 33 of the NHAI Act which read as follows:

31. Power of the Central Government to temporarily divest the Authority of the

management of any national highway - (1) If, at any time, the Central Government is of opinion that in the public interest it is necessary or expedient so to do, it may, by order, direct the Authority to entrust the development, maintenance or management of any national highway or a part thereof with effect from such date and for such period and to such person as may be specified in the order and the Authority shall be bound to comply with such direction.

(2) Where development, maintenance or management of any national highway or part thereof is entrusted to any person specified under Sub-section (1) (hereafter in this section referred to as the authorized person), the Authority shall cease to exercise and discharge all its powers and functions under this Act in relation to such national highway or part thereof and such powers and functions shall be exercised and discharged by the authorized person in accordance with the instructions, if any, which the Central Government may give to the authorized person from time to time:

Provided that no such power or function as may be specified by the Central Government by a general or special order shall be exercised or discharged by the authorized person except with the previous sanction of the Central Government.

(3) The Central Government may reduce or extend the period mentioned in Sub-section (1) as it considers necessary.

(4) During the operation of an order made under Sub-section (1), it shall be competent for the Central Government to issue, from time to time, such directions to the Authority as are necessary to enable the authorized person to exercise the powers and discharge the functions of the Authority under this Act in relation to the national highway or part thereof, the management of which has been entrusted to him and in particular, to transfer any sum of money from the Fund of the Authority to the authorized person for the management of the national highway or part thereof and every such direction shall be complied with by the Authority.

(5) On the cesser of operation of any order made under Sub-section(1) in relation to any national highway or part thereof, the authorized person shall cease to exercise and perform the powers and functions of the Authority under this Act in relation to such national highway or part thereof and the Authority shall continue to exercise and perform such powers and functions in accordance with the provisions of this Act.

(6) On the cesser of operation of any order made under Sub-section (1) in relation to any national highway or part thereof, the authorized person shall hand over to the Authority any property (including any sum of money or other asset) remaining with him in connection with the management of such national highway or part thereof.

32. Power of the Central Government to supersede the Authority - (1) If, at any time, the Central Government is of opinion -

(a) that on account of a grave emergency the Authority is unable to discharge the functions and duties imposed on it by or under the provisions of this Act; or

(b) that the Authority has persistently made default in complying with any direction issued by the Central Government under this Act or in the discharge of the functions and duties imposed on it by or under the provisions of this Act; or

I that circumstances exist which render it necessary in the public interest so to do, the Central Government may, by notification in the Official Gazette, supersede the Authority for such period, not exceeding one year, as may be specified in the notification:

Provided that before issuing a notification under this Sub-section for the reasons mentioned in Clause (b), the Central Government shall give a reasonable opportunity to the Authority to show cause why it should not be superseded and shall consider the explanations and objections, if any, of the Authority.

(2) Upon the publication of a notification under Sub-section (1) superseding the Authority -

(a) all the members shall, as from the date of supersession, vacate their office as such;

(b) all the powers, functions and duties which may, or under the provisions of this Act, be exercised or discharged by or on behalf of the Authority, shall, until the Authority is reconstituted under Sub-section (3) be exercised and discharged by such person or persons as the Central Government may direct;

I all property owned or controlled by the authority shall, until the Authority is reconstituted under Sub-section (3), vest in the Central Government.

(3) On the expiration of the period of supersession specified in the notification issued under Sub-section (1), the Central Government may-

(a) extend the period of supersession for such further term, not exceeding one year, as it may consider necessary; or

(b) reconstitute the Authority by fresh appointment and in such a case, any person who vacated office under Clause (a) of Sub-section (2) shall not be deemed disqualified for appointment: Provided that the Central Government may, at any time before the expiration of the period of supersession whether as originally, specified under Sub-section (1) or as extended under this Sub-section, take action under Clause (b) of this Sub-section. (4) The Central Government shall cause a notification issued under Sub-section (1) or Sub-section (3) and a full report of any action taken under this section and the circumstances leading to such action to be laid before both Houses of Parliament as soon as may be.

33. Power of the Central Government to issue directions: -(1) Without prejudice to the other provisions of this Act, the Authority shall, in the discharge of its functions and duties under this Act, be bound by such directions on questions of

policy as the Central Government may give to it in writing from time to time.

(2) The decision of the Central Government whether a question is one of policy or not shall be final.

16. In our view, the mandate of the above statutory provisions is clear and indicates beyond doubt the nature and extent of the control of the Government over a statutory authority such as the National Highway Authority of India which is a Public Sector Undertaking, meant for construction and maintenance work of the roads and highways. The NHAI being a Public Sector Undertaking certainly could be given policy directions u/s 33 of the NHAI Act.

17. We have no hesitation in agreeing with the plea of Shri Gopal Subramanium, the learned Additional Solicitor General appearing for the Union of India that the Act mandates as under:

a) Sections 3, 11, proviso to Section 15, Section 17 clearly indicate that NHAI is a creature of the Central Government created by the medium of NHAI Act.

b) Section 21 also indicates the control of the Central Government of any borrowing by NHAI.

c) Section 24 places an obligation on the Ministry to place annual report and the auditor''s report of the NHAI before the Parliament.

d) Section 31 also extends the control of the Ministry to temporarily divest NHAI of the management of any national highway, if it is thought that in public interest it is necessary to do so.

e) Section 32 empowers the Central Government to supersede NHAI in specified situation;

f) Section 37 states that the rules and regulations made under the Act are to be placed before each House of Parliament.

g) The provisions of the National Highways Act, 1956, the National Highways Authority of India Act, 1988 and the Government of India (Allocation of Business) Rules, 1961 clearly show that the national highways vest in the Central Government and NHAI is an implementing agency of the Government of India created by the Parliament in matters relating to development of highways.

We agree with the plea of the learned ASG that the Central Government has the power to ensure efficiency and transparency of the functioning of the NHAI. The financial sanction of the specified amounts from the Government also shows the role of the Central Government in the functioning of the NHAI. We have no hesitation even in agreeing with the above plea of the learned ASG but, in our view, the aforesaid plea indeed shows the nature and extent of the statutorily mandated administrative control, the financial control and the power to divest certain highways vesting with the Government of India. In our view, the nature and extent of the control having been specified by the various provisions of the

Act delineated by the learned ASG, leave no further scope for intervention save and except in the manner indicated by Section 33.

18. In our view, the nature, extent, control and intervention of the Government are clearly specified in the above provisions noted by us. Since the Parliament has prescribed the nature and manner of control of the Ministry over the NHAI, such control, in our view, is sufficient to ensure the proper, transparent, efficient and independent functioning of NHAI. The very nature and detailed extent of the above control clearly indicates that apart from the above control there can be policy directions by the Ministry to the NHAI u/s 33 of the Act. The crucial question which arises in the present writ petition is whether the impugned intervention by the Ministry can fall within the scope of Section 33 or whether the actions or complaints are counter to the scheme delineated by Section 33 of the Act. However, the very nature of the power vested in the Government through administrative Ministry, i.e., Ministry of Shipping, Road, Transport & Highway u/s 31 and 32 of the Act clearly shows that the powers of the NHAI are not unbridled and the Government can in public interest effectively divest a malfunctioning NHAI from the control of a particular National Highway. An even stronger power to supersede the NHAI also exists with the Government. If either u/s 31 the Hyderabad-Vijaywada Highway was taken over by the Central Govt. from the control of the NHAI or the authority had been superseded for persistent misconduct u/s 32, then the impugned actions of the Government to ensure the revaluation of the bids through the NHAI could have been sustained in law. However, since action was admittedly not taken under Sections 31 and 32 of the Act and purportedly taken u/s 33 of the Act, we are satisfied that the impugned action of revaluation could not have been directed by the Ministry to be taken by the NHAI in the present case.

19. However, the petitioner has rightly submitted that such policy directions could not extend to giving of detailed directions in respect of a particular tender by the Government of India. This plea of the petitioner is in addition to the plea that while it was open to the UOI to seek clarification from the bidders this could not be done at the behest of an unsuccessful applicant which is clearly proscribed by Clause 2.21. Reliance has been laid upon a decision of the Division Bench of this Court in the case of Arun K. Saraf and Another Vs. Lt. Governor of Delhi, and in particular, paragraphs 10 and 11 which read as follows:

10. The Vice-Chairman had requested the Secretary, Ministry of Urban Development that the decision of the Government be communicated on or before 13.3.93. In the file of the Ministry there is nothing on record as to on what basis the State Minister for Urban Development issued the direction to the DDA not to accept the valid bid. When the reserved price has specifically mentioned and adequate publicity had been made and the tender was accepted following the procedure with the approval of the LG of Delhi who is Chairman of DDA and the DDA itself has represented to the Ministry that if this tender is not accepted the DDA is apprehensive that there would be financial loss leading to the audit and

other objections. The Secretary has also opined that the Government should not interfere in this matter.

11. We feel that the action of the State Minister in issuing a directive u/s 41 of the DDA Act was rather arbitrary. No material whatsoever was with him to move in such a manner. Normally such a note by the Minister should show as to how he got the information and whether he considered the same to be reliable. Minister should have been aware that DDA is a creation of statute of the Parliament and there has to be no interference by the Central Government otherwise as provided by law, i.e., DDA Act, particularly in matters which have been examined at all level by appropriate authority and no mala fide is alleged or involved. Undue interference by the Central Government in areas which are occupied by rules and regulations of DDA is to be avoided otherwise the whole purpose of enacting a Central Act and to incorporate a statutory body would become redundant and nugatory. This may result in uncalled for decision and arbitrary actions. In the circumstances of the case, we find the impugned action of the Central Government neither fair nor just and rather arbitrary.

20. In the present case, the Union of India/ Ministry''s direction to NHAI to put the process of selection on hold, appointment of the two member committee to look into the evaluation at the behest and instance of the unsuccessful applicant contrary to Clause 2.21 of the RFQ and giving of directions to the NHAI to seek clarifications from the bidders and re-evaluation of the bids, does not involve any matter of policy as envisaged by Section 33 of the NHAI Act. Such intervention in policy matters fetters the administrative autonomy. Jurisdiction statutorily vested in the NHAI by the Parliament u/s 33 is not to be exercised for interfering with the routine functions of the NHAI or in its day to day business of which evaluation of bids received from interested parties pursuant to a Request for Proposal issued by NHAI is a part.

21. The approach to the Secretary of Ministry of Shipping, Road Transport and Highways by the unsuccessful bidders amounted to circumventing the bar imposed by Clause 2.21. Thus, the unsuccessful bidders in order to achieve what was forbidden by Clause 2.21 adopted the route of approaching the Ministry. In our view this is not permissible as it is an indirect recourse to power of review which is not permissible under Clause 2.21. Such unsuccessful bidders could always challenge their wrongful exclusion by recourse to a court of law. However, this case demonstrated that a route adopted by the unsuccessful bidders by approaching the Ministry and in particular the manner and method by which the evaluation process was practically directed by the Ministry demonstrates that the action of the Ministry travelled beyond the mandate of Section 33.

22. However, we make it clear that our findings should not be construed to mean that the Ministry of Shipping, Road Transport and Highways, as an administrative Ministry of the NHAI cannot forward what appear to be genuine complaints to the NHAI. To adopt such a construction would in our view denude the Ministry of any administrative control over the NHAI. However, in our view if such a complaint/

grievance/representation is forwarded by the Ministry to the NHAI, it could and should be processed in terms of the process given in the tender terms as per Clause 2.20 which reads as under:

2.20 Clarification

(i) To facilitate evaluation of Applications, the Authority may, at its sole discretion, seek clarifications from any Applicant regarding its Application. Such clarification(s) shall be provided within the time specified by the Authority for this purpose. Any request for clarification(s) and all clarification(s) shall be in writing.

(ii) If an Applicant does not provide clarifications sought under Sub-clause (i) above within the prescribed time, its Application shall be liable to be rejected. In case the Application is not rejected, the Authority may proceed to evaluate the Application by construing the particulars requiring clarification to the best of its understanding, and the Applicant shall be barred from subsequently questioning such interpretation of the Authority.

(emphasis supplied)

It is for the NHAI then to raise queries and seek clarification in accordance with Clause 2.20. This interpretation of the interplay of the power and jurisdiction and the extent of the Ministry''s control would in our view adequately protect the public interest inherent in the mandate of Section 33 without in any manner denuding the administrative control of the Ministry and the statutory autonomy granted by the NHAI Act.

23. The NHAI Act indicates that to execute vital infrastructural projects involving massive outlay of funds and resources and considering the nature of the work required to be executed, the participation of international bidders is anticipated and expected. It is evident that the NHAI Act was enacted to constitute an autonomous body such as the NHAI to lend assurance of the autonomy of the NHAI to large scale investors and in particular international infrastructure companies. Such an assurance was inherent in the highway project and the regulator being bound only by the statute without any other interventions except Section 33. Section 33 clearly expresses the parliamentary concern about the nature of intervention and control of the Ministry and the preservation of the autonomy of the NHAI in its day-to-day functioning. In the present case, while no lack of bonafide can be attributed to the manner of intervention by the Ministry which may have been motivated to redress a grievance, which in one or two cases may appear to be entirely genuine, nevertheless, such intervention was not contemplated by the Act. The Ministry could have certainly forwarded the representation as part of its administrative control over the Ministry for consideration by the NHAI, who then could have considered it as mandated by Clause 2.20 which permits NHAI to seek clarification. However, the appointment of a Committee and the day-to-day monitoring and control by the Ministry, in our view, does not accord with the mandate of Section 33 of the Act. A policy matter under the mandate of Section 33 would contemplate a general policy direction,

such as, to indicate the choice of field generally.

24. The learned Counsel for the petitioner GMR Infrastructure Ltd. has raised the plea that as per the RFQ, those projects ought to have been considered by the NHAI where even part of the project had been commissioned/completed and not the whole project itself. However, we are unable to agree with the plea raised by the petitioner as this formula of exclusion of non-completed/commissioned projects has been uniformly applied by the NHAI to all parties taking part in the tender proceedings. It is also to be seen that if partial work is taken into account, it could lead to a major problem itself as in the event of the project either being abandoned or not being completed satisfactorily, the bidder would have already got the benefit of the marks for such an incomplete project, thus making the whole process vulnerable to error.

25. In view of the above findings, the rule in the writ petition is made absolute. We quash the letter dated 26th August, 2008 issued by the NHAI to the petitioners, i.e., GMR Infrastructure Ltd. and Madhucon Projects Pvt. Ltd. We also uphold the validity of the letter dated 27th June, 2008 informing the petitioners that they have pre-qualified for the bid stage of the tender. Any action taken by the Respondent NHAI subsequent to the letter dated 27th June, 2008 stands quashed and set aside. Consequently, the writ petitions bearing Nos. 6792/2008 and 6419/2008 filed by GMR Infrastructure Ltd. and Madhucon Project Pvt. Ltd. respectively are allowed and accordingly disposed of.

26. It is also pertinent to note that a public authority needs freedom from controls applicable to ordinary governmental department to the extent that such controls are unduly restrictive for an agency with commercial functions. Thus, the autonomy of a public sector enterprise constitutes an important facet of modern governance of State. This issue has been dealt with felicitously and in great detail in the concurring judgment. The view in the concurring judgment are fully endorsed and adopted for arriving at the conclusions in this judgment.

Manmohan, J.

(CONCURRING)

27.. While I concur with the conclusions in the Division Bench judgment delivered by my learned brother Justice Mukul Mudgal, but keeping in view the importance of the issues involved, namely, the interse relationship between the Central Government and a public enterprise and the power of Central Government to intervene in tenders floated by public enterprise, I wish to place on record my views in the matter.

28. ''Public Enterprise'' is a very broad term. It includes all the regulatory, promotional and productive activities of the modern State. However, Public Enterprise may be organized and managed either as a departmental undertaking like Railways or a local body like New Delhi Municipal Council (NDMC) or a company registered under the Companies Act, like National Thermal Power

Corporation (NTPC) or a statutory corporation like Life Insurance Corporation (LIC) or statutory authority like National Highways Authority of India (hereinafter referred to as ''NHAI'').

29. A statutory authority is one that is created by an Act of Legislature, which defines its power, liabilities and prescribes the form of management as well as its relationship with the Government. Admittedly, a statutory authority though wholly owned by the State has a legal personality separate and independent from the Government.

30. The learned Additional Solicitor General, Mr. Gopal Subramaniam, as recorded by my learned brother, Justice Mukul Mudgal, submitted that the intent behind the Ministry of Shipping, Road Transport and Highways'' (hereinafter referred to as ''the Ministry'') direction to revaluate the bids was only to ensure that NHAI acts fairly and in a transparent manner. He submitted that the Ministry, keeping in view its accountability to Parliament and its statutory control over NHAI had only corrected a manifest error and its direction to revaluate u/s 33 was only an intervention and not an interference with the day-to-day functioning of a statutory authority. He further submitted that the said direction did not dilute the essential tendering purpose and process.

31. Though, Mr. Subramaniam submitted that the Ministry had not interfered in the functioning of NHAI, the counter affidavit of NHAI candidly admits that the revaluation of the bids had been done only in accordance with the directions of the Ministry. The relevant extract of the counter affidavit of NHAI is reproduced hereinbelow:

That it is the humble and respectful submission of the Respondent No. 1 that the entire sequence of events as aforesaid confirm that the Respondent No. 1 Authority has acted as per the directions of the Government of India, Ministry of Shipping, Road Transport and Highways.....

The whole exercise of re-evaluation was subsequent to the directions of the Government of India by which the Respondent No. 1 is bound under the provisions of Section 33 of the National Highways Authority of India Act, 1983....

(emphasis supplied)

32. Mr. Rajiv Nayyar, learned senior counsel who appeared for Respondent Isolux Corsan Concesiones S.A., (the bidder who was shortlisted at the subsequent revaluation) after referring to various provisions of the National Highways Act, 1956, the rules framed thereunder and the National Highways Authority of India Act, 1988, submitted that NHAI was under continuous and all pervasive control of the Central Government, in particular the Ministry. He further submitted that the power to issue directions u/s 33 should not be confined to policy issues. In this context he relied upon three judgments of the Hon''ble Supreme Court which are referred to hereinbelow along with their relevant paragraphs:

(a) Air India Ltd. Vs. Cochin Int., Airport Ltd. and Others, Even when some defect is found in the decision making process the Court must exercise its discretionary power under Article 226 with great caution and should exercise it only in furtherance of public interest and not merely on the making out of a legal point. The Court should always keep the larger public interest in mind in order to decide whether its intervention is called for or not. Only when it comes to a conclusion that overwhelming public interest requires interference, the Court should intervene.

(b) M/s. Real Food Products Ltd. and others, etc. etc., Vs. Andhra Pradesh State Electricity Board and others,

8. The only surviving question is with regard to the nature and effect of the direction given by the State Government

under Section 78A of the Act. The question has to be examined in the context of the facts of the present case which is confined to the charging of a flat rate per H.P. for agricultural pump sets. The nature of the function of the board in fixing the tariffs and the manner of its exercise has been considered at length in the earlier decisions of this Court and it does not require any further elaboration in the present case.

Section 78A uses the expression "the Board shall be guided by such directions on questions of policy as may be given to it by the State Government." It does appear that the view expressed by the State Government on a question of policy is in the nature of a direction to be followed by the Board in the area of the policy to which it relates. In the context of the function of the Board of fixing the tariffs in accordance with

Section 49 read with Section 59 and other provisions of the Act, the Board is to be guided by any such direction of the State Government. Where the direction of the State Government, as in the present case, was to fix a concessional tariff for agricultural pump sets at a flat rate per H.P., it does relate to a question of policy which the Board must follow. However, in indicating the specific rate in a given case, the action of the State Government may be in excess of the power of giving a direction on the question of policy, which the Board, if its conclusion be different, may not be obliged to the bound by. But where the board considers even the rate suggested by the State Government and finds it to be acceptable in the discharge of its function of fixing the tariffs, the ultimate decision of the Board would not be vitiated merely because it has accepted the opinion of their State Government even about the specific rate. In such a case the Board accepts the suggested rate because that appears to be appropriate on its own view. If the view expressed by the State Government in its direction exceeds the area of policy, the Board may not be bound by it unless it takes the same view on merits itself.

(c) Food Corporation of India and Others Vs. Bhanu Lodh and Others,

12. In our view, the words of Sub-section (2) of Section 6 of the Act are very

material and direct that the Board of Directors in discharging its functions "shall act on business principles" having regard to the "interests of the producer and consumer" and shall be guided by "such instructions on questions of policy" as may be given to it by the Central Government. First, the expression "business principles" is one of widest import. We see no reason as to why the policy of recruitment of officers/staff, which would obviously have serious financial impact on the Corporation, is not subsumed under this expression. Secondly, the Board of management is required to have regard to the interest of the ''producers and the consumers'', and not merely of the officers and employees of the FCI. Finally, the Board is required to discharge all its functions and be guided by the instructions on questions of policy, which may be given to it by the Central Government. Questions of policy could be, not only with regard to the organization of the FCI, its management and function, but also with regard to its employment policy, recruitment and many other details which would, in the long run, affect the interests of the consumers/producers for whom alone the FCI is established under the Act. Testing it on this anvil, we find no difficulty in holding that the directive dated 21st August, 1995 followed by the directive dated 6th November, 1995 are well within the ambit of Sub-section (2) of Section 6 of the Act. The directive dated 21st August, 1995 indicates that the policy was not to have any creation/upgradation of posts of any level except where completely unavoidable. The policy was that "the existing vacancies shall not be filled up by fresh recruitment", and that there shall be no further revision in the conditions of service without the prior approval of the Central Government. The policy directive issued on 6th November, 1995 was a sequel and highlighted something being done contrary to the Regulations. While the maximum age prescribed under the Recruitment Rules is 35/40 years for the concerned posts, departmental candidates in the age of 52-53 years were proposed to be appointed. Even assuming that there is a power of relaxation under the Regulations, we think that the power of relaxation cannot be exercised in such a manner that it completely distorts the Regulations. The power of relaxation is intended to be used in marginal cases where exceptionally qualified candidates are available. We do not think that they are intended as an ''open Sesame'' for all and sundry. The wholesale go by given to the Regulations, and the manner in which the recruitment process was being done, was very much reviewable as a policy directive, in exercise of the power of the Central Government u/s 6(2) of the Act.

34.. Therefore, the main issue that arises for consideration in the present proceedings is the extent of Government interference in the administration of statutory authorities. In fact, even in England, interference by the Ministries in the administration of nationalized industries has been an issue of debate. Professor Wade in his book "Administration Laws", 6th Edition, has stated as under:

To judge by the small number of formal directions, however, would be highly misleading. In reality ministerial interference is frequent and pervasive. The important financial powers can be exercised informally; and in the background are the more general powers, which cast a deep shadow over the corporations'' precarious independence. The minister has a powerful lever in his control over the appointment and tenure of the chairman and members. A chairman who is appointed for short term, perhaps three years, and who hopes for renewal of his appointment, is in no position to resist pressure from the minister, however informally applied. The supervising ministries are in constant touch with the corporations and they exercise much influence merely by holding the trump cards, without having to play them. Chairmen feel unable to act as public spokesmen for their industries, in case they may offend the minister. The Governor of the Bank of England is no longer the public mouthpiece of the City of London. Chairmen complain (usually after retirement) that the corporations have no genuine commercial independence and no freedom to follow long-term policies, since they are under constant political pressure and ministers do not look beyond the immediate crisis of the moment. The commercial independence that the corporations were intended to enjoy has therefore failed to materialize. They have fallen prey to political and bureaucratic influence. This is objectionable constitutionally as well as managerially, since ministers have exercised a great deal of power without accounting for it publicly and without giving Parliament the opportunity to comment.

This state of affairs was many times criticized by the House of Commons'' Select Committee on Nationalised Industries while it still existed. The Committee reported, for instance, that the Air Corporations were subject to ''a degree of control far in excess of that envisaged by the statutes''. Thus, BOAC, against their commercial judgment ordered too many Super VC-10 aircraft. Similarly, ministerial control was established over gas prices, although Area Boards were by statute responsible for fixing their own prices and were advised that the minister had no legal power to control them. In 1968 the Select Committee made a long report on ministerial control, condemning confusion and uncertainty of purpose, and saying that, despite the good intentions proclaimed in the government''s white papers of 1961 and 1967, the position was almost the exact opposite of what Parliament intended: instead of laying down broad policies and leaving management to the industries, the government had constantly interfered with management and given little clear guidance on policies. The same theme recurred in later reports: ministerial interference with British Steel was of dubious benefit to the national interest but did patent damage to the Corporation, and in controlling capital investment the attempts to observe the policy of the white papers were far from successful. A minister himself told the Select Committee that there was ''an appalling record of private arm-twisting'' in the relations between ministers and corporation chairmen.

With a view to bringing the situation into open the government in 1978 proposed that ministers should be given power to issue specific as well as general directions to the corporations, but that the directions should be laid before Parliament at the time and, in suitable cases, made subject to affirmative resolutions; and that where directions led to financial loss, the corporations should be compensated. The Select Committee welcomed these proposals, but before action was taken on them there was a change of government and the emphasis shifted to denationalization.

35. In our view, in order to ensure that the affairs of the authority are conducted in the best interests of society, a general governmental control over the working of the authority is highly desirable, but such a control does not mean governmental interference in the day-to-day working of the authority, which is highly destructive of the idea of autonomy necessary for the success of any commercial or service undertaking. We are further of the view, if the governmental control is so extensive as to convert an authority into a Government department, there is no point of having a statutory authority distinct from the Government. A public authority needs freedom from controls applicable to ordinary governmental department to the extent that such controls are unduly restrictive for an agency with commercial functions.

36.. According to Jain & Jain''s Principles of Administrative Law, an important technique evolved by the Legislature to reconcile government control with the autonomy of a public authority is to authorize the Government to issue directives to public authorities on matter of ''policy'' without interference with matters of day-to-day administration.

37. In our opinion, the purpose of directions as a technique of governmental control can prove beneficial only if these directions serve as a policy direction to the authority. If the Government, through directions, interferes with the day-today functioning of the authority, it would be a self-defeating technique.

38. In fact, in order to protect and safeguard the impartiality, independence and objectivity of quasi- judicial bodies, our courts have held that directions ought not to be issued to such bodies so as to restrict or control their discretion and best judgment. The government should not issue directions to quasi- judicial bodies so as to clog the exercise of their independent judgment in matters entrusted to them for adjudication under the statute. This is regarded as "essential to fundamentals of fair play in the administration of law." [refer to: B. Rajagopala Naidu Vs. State Transport Appellate Tribunal and Others, ; Ravi Roadways Vs. Asia Bi and Others, ; Raman and Raman Ltd. Vs. The State of Madras and Others, R. Abdulla Rowdier v. State Transport Appellate Tribunals Madras AIR 1959 SC 896 and Senior Superintendent of Post Offices, Allahabad and Others Vs. Izhar Hussain,

39. We are also not in agreement with Mr. Rajiv Nayyar''s submission that the Central Government and particularly the Ministry has an all pervasive control over NHAI. It is pertinent to mention that one of the objectives behind The National Highways Authority of India Act, 1988 as outlined in its Statement of Objects and Reasons was to create ''an autonomous National Highways Authority''. Consequently, in our opinion Parliament while enacting the NHAI Act,

consciously intended to limit the scope of interference by the Central Government u/s 33 by limiting the role of Central Government to only issue directions to NHAI on matters of ''policy''. It would be unfair to deny flexibility to statutory authorities, particularly in tender matters. We are also of the opinion that the nature and extent of government control depends on the provisions of the statute creating the authority. In our view, acceptance of Mr. Nayyar''s submission that the Central Government has the power to issue directions not just confined to policy issues, would amount to doing ''violence with the provisions of the statute'', especially when the language used in the statute is clear and unambiguous.

40. As far as the judgment of Real Food Products Ltd. (supra) is concerned, we are of the view that the Apex Court in the facts of the said case, reached the conclusion that the direction of the State Government to fix a concessional tariff for agricultural pump sets related to a question of policy. In the present case, the direction by the Ministry to revaluate the bids was certainly not a policy direction within the four corners of Section 33 as the issue as to whether a Statutory Auditor''s certificate for the purposes of networth and experience is a mandatory or directory provision can certainly not be termed as a ''policy decision''. In fact, in Commissioner of Police, Bombay Vs. Gordhandas Bhanji, the Supreme Court has held, "It is clear to us from a perusal of these Rules that the only person vested with authority to grant or refuse a license for the erection of a building to be used for purposes of public amusement is the Commissioner of Police. It is also clear that under Rule 250 he has been vested with the absolute discretion at any time to cancel or suspend any license which has been granted under the Rules. But the power to do so is vested in him and not in the State Government and can only be exercised by him at his discretion. No other person or authority can do it."

41. Even in the case of Food Corporation of India (supra), the Hon''ble Supreme Court found that the direction in that case related to a question of policy as it would in the long run affect the interest of the consumers/producers for which Food Corporation of India had been established. But admittedly, in the present case, the repeated directions of the Ministry were not related to a policy issue and, therefore, to our mind, the said judgment has no relevance.

42. In our opinion, undue interference by the Ministry in areas which are within the domain of the NHAI and which are governed by the NHAI Act is to be discouraged otherwise the whole purpose of enacting a Central Act and to incorporate a statutory body would become redundant and nugatory. Having regard to the various letters written by the Ministry as well as the letter dated 7th August, 2008 we are of the view that the specific direction by the Ministry to revaluate the bids was not only contrary to the statutory mandate but it also amounted to usurping the jurisdiction of a statutory authority and amounted to interference in its day-to-day commercial functioning. The short listing of bidders was to be conducted by NHAI in accordance with the terms of its tender and the

Ministry could not behave like an Appellate body by reversing a decision to shortlist the bidders - a decision which had been arrived at not only by an independent Financial Consultant but which had also been approved by NHAI''s in-house Evaluation Committee of five members, which comprised of four technical and one financial member. While reaching this conclusion, we are of the view that overwhelming public interest requires interference with the Ministry''s decision making process. We are doing this not merely to make out a legal point, therefore, even the test for interference stipulated by the Hon''ble Supreme Court in AIR India Ltd. (supra) is satisfied in the present case.

43. Before we conclude we may mention that it was brought to our notice by the Counsel for the Petitioners that in the last two and a half years, NHAI has had as many as five chairmen. The names of the five chairmen and their tenure are as under:

Sl. No. Name Tenure (i) Mr. S.N. Das July 2006 - October 2006 (ii) Mr. Pradeep Kumar October 2006 - July 2007 (iii) Mr. J.S. Maini August 2007 - Sept. 2007 (iv) Mr. N. Gokulram October 2007 - Sept. 2008 (iv) Mr. B. Singh October 2008 to till date.

44. According to us, frequent changes of chairman of a public authority militates against the concept of an independent authority and makes any chairman vulnerable to pulls and pressures, besides creating administrative chaos and preventing implementation of any long term strategy. Learned ASG informed us that the reason for frequent changes of Chairman of NHAI was on account of the promotion of the individual officers to a higher post in the Government. Be as it may, we are of the view that only those officers should be appointed to the post of Chairman who are likely to act in that capacity for a substantial time. We would suggest to the Law Commission and the Central Government to examine the feasibility of incorporation of statutory provisions with regard to three to five years fixed tenure of chairman of public enterprises and further laying of all the directions issued by the Ministries/Central Government to the public enterprises before Parliament in a fixed time frame. This, in our opinion, would ensure transparency, efficiency and accountability to Parliament.

45. Thus in the present case we are of the opinion that the power u/s 33 could not have been exercised for interference with evaluation of bids received from interested parties pursuant to RFQ issued by NHAI as the same amounted to interference with NHAI''s functioning as well as with its day-to-day business. With these concurring observations the rule is made absolute and the Petitioners are entitled to the relief as granted by my learned brother.

