
(2014) 02 AHC CK 0252

In the Allahabad High Court

Case No : C.M.W.P. No. 47607 of 2013 with C.M.W.P. No. 37367 of 2013

M/s. Surya International Pvt. Ltd.

APPELLANT

Vs

Union of India and Others

RESPONDENT

Date of Decision : 07-02-2014

Acts Referred:

Constitution of India, 1950 — Article 14, 21, 226

Income Tax Act, 1961 — Section 34

National Highways Act, 1956 — Section 5, 7, 8-A, 9

Citation : (2014) 2 ADJ 707 : (2014) 4 ALJ 402 : (2014) 103 ALR 349 : (2014) 4 AWC 3565

Hon'ble Judges : Tarun Agarwala, J;Anil Kumar Sharma, J

Bench : Division Bench

Advocate : M.D. Singh Shekhar, S.P. Upadhyay and R.D. Tiwari, Advocate for the Appellant; Pranjal Mehrotra, S.M.A. Kazmi, Mohd. Ali and M.C. Tripathi, Advocate for the Respondent

Final Decision : Allowed

Judgement

Tarun Agarwala, J.—The petitioner, being aggrieved by the arbitrary action of the respondents in encashing the performance security and in cancelling the contract have filed two writ petitions before this Court, which have been clubbed together. A preliminary objection has been raised with regard to the maintainability of the writ petitions on account of the arbitration clause contained in the contract. Before advertng to the preliminary objection, it would be appropriate to assimilate the factual controversy involved in the present writ petition.

2. The facts leading to the filing of the present writ petitions are that the petitioner is a company registered under the Companies Act and is involved in the business of infrastructural development of the road sector as well as in the business of user fee collection contracts on National Highways.

3. The National Highways Act, 1956 (hereinafter referred to as the Act of 1956) was promulgated for construction, development and maintenance of National

Highways by the Central Government. Section 5 of Act, 1956 provides that the development or maintenance of National Highways shall also be exercisable by an authority subordinate to the Central Government.

4. Section 7 of the Act of 1956 provides that the Central Government may by a notification, levy fees at such rates for services or benefits rendered in relation to the use of sections of national highways. For facility, section 7 of the Act of 1956 is extracted hereunder:

7. Fees for services or benefits rendered on national highways.--

(1) The Central Government may, by notification in the Official Gazette, levy fees at such rates as may be laid down by rules made in this behalf for services or benefits rendered in relation to the use of ferries, permanent bridges the cost of construction of each of which in more than rupees twenty- five lakhs and which are opened to traffic on or after the 1st day of April, 1976 temporary bridges and tunnels on national highways and the use of sections of national highways]

(2) Such fees when so levied shall be collected in accordance with the rules made under this Act.

(3) Any fee leviable immediately before the commencement of this Act for services or benefits rendered in relation to the use of ferries, temporary bridges and tunnels on any highway specified in the Schedule shall continue to be leviable under this Act unless and until it is altered in exercise of the power conferred by sub-section (1)

Provided that if the Central Government is of opinion that it is necessary in the public interest so to do, it may, by like notification, specify any bridge in relation to the use of which fees shall not be leviable under this sub-section.

5. Section 8-A of the Act of 1956 provides that the Central Government may enter into an agreement with any person in relation to the development and maintenance of the whole or any part of a national highway.

6. Section 9 of the Act of 1956 also empowers the Central Government to make rules for the purposes of the Act, namely:

9. Power to make rules.--(1) The Central Government may, by notification in the Official Gazette, make rules for carrying out the purposes of this Act.

(2) In particular and without prejudice to the generality of the foregoing power, such rules may provide for all or any of the following, matters, namely:

(b) the rates at which fees for services rendered in relation to the use of ferries, permanent bridges, temporary bridges and tunnels on any national highway [and the use of sections of any national highway, may be levied and the manner in which such fees shall be collected u/s 7.

7. Pursuant to the provisions of section 5 of the Act of 1956, the National Highway Authority of India Act, 1988 (hereinafter referred to as the Act of 1988)

was promulgated and National Highway Authority of India (hereinafter referred to as N.H.A.I.) was constituted as the appropriate authority to develop and maintain national highways whose management and operation was vested in the Central Government. The Act of 1988 also authorized N.H.A.I. to collect a fee for the use of a section of a national highway. N.H.A.I. were also authorized to engage agencies for the purpose of collection of user fee.

8. In exercise of the power conferred by section 9 of the Act of 1956, the Central Government promulgated The National Highways Fee (Determination of Rules and Collection) Rules, 2008 (hereinafter referred to as the Rules of 2008). Rule 2 (f) defines executing authority as an officer or authority notified by the Central Government u/s 5 of the Act. In the instant case, the authority notified is N.H.A.I. Rule 3 provides a mechanism for levy of fee. Rule 6 provides that the collection of fee will be from the toll plaza. Rule 8 provides the establishment of a toll plaza at a particular place. For facility, Rule 8 is extracted hereunder:

8. Location of toll plaza.--(1) The executing authority or the concessionaire, as the case may be, shall establish a toll plaza beyond a distance of ten kilometres from a municipal or local town area limits:

Provided that the executing authority may, for reasons to be recorded in writing, locate or allow the concessionaire to locate a toll plaza within a distance of ten kilometres of such municipal or local town area limits:

Provided further that where a section of the national highway, permanent bridge, bypass or tunnel, as the case may be, is constructed within the municipal or town area limits or within five kilometres from such limits, primarily for use of the residents of such municipal or town area, the toll plaza may be established within the municipal or town area or within a distance of five kilometres from such limits.

(2) Any other toll plaza on the same section, of national highway and in the same direction shall not be established within a distance of sixty kilometres:

Provided that where the executing authority deems necessary, it may for reasons to be recorded in writing, establish another toll plaza within a distance of sixty kilometres:

Provided further that a toll plaza may be established within a distance of sixty kilometres from another toll plaza if such toll plaza is for collection of fee for a permanent bridge, bypass or tunnel.

9. A perusal of the aforesaid rule clearly indicates that N.H.A.I. shall establish a toll plaza beyond a distance of 10 kms. from the municipal limits and that the distance between two toll plaza on the same section of the national highway and in the same direction shall not be less than 60 kms.

10. For the purpose of collection of user fee, N.H.A.I. invited bids vide tender notice dated 5th December, 2012 for collection of user fee at Chitaura Toll Plaza

located at 71 kms. (new chainage at 541.877 kms) on National Highway-2 in the State of Uttar Pradesh. The petitioner submitted a bid of Rs. 42 Crores, 72 lacs per annum, which bid was found to be the highest and was accepted by the respondents. A letter of acceptance was issued on 30th January, 2013. The petitioner was required to submit a performance security amounting to Rs. 3.56 Crores and a bank guarantee for an equal amount. It transpires that the petitioner deposited the entire amount pursuant to which, a contract dated 4th March, 2013 was executed for a period of one year from 8th March, 2013 to 7th March, 2014 for a sum of Rs. 42 Crores, 72 Lacs. The petitioner was required to deposit a weekly amount of Rs. 81,92,877/- towards user fee collection charges from Chitaura Toll Plaza. The toll plaza was accordingly, handed over to the petitioner.

11. It transpires that from the initial stages the road users, especially the private bus operators resisted paying the user fee on account of some order of the District Magistrate dated 26th December, 2012 by which collection of user fee from this toll plaza was stopped. This did not deter the petitioner who regularly deposited the weekly user fee as per the contract. The resistance to pay the user fee and the traffic jams being caused at the toll plaza on account of inadequate lanes and toll booths was brought to the knowledge of the N.H.A.I. by letters of the petitioner dated 11th March, 2013, 1st April, 2013 and 12th April, 2013. It is alleged that inspite of the receipt of these letters, no remedial measures to increase the service lanes and repair the existing road was initiated by N.H.A.I.

12. Eventually, the District Magistrate issued an order dated 27th May, 2013 directing the respondents to stop the collection of the toll fee from the toll plaza till such time the defects pointed out was not removed. In the order, the District Magistrate found that the erection of the toll plaza was against the Rules of 2008. There was no infrastructure at the toll plaza and that the distance from the toll plaza from the municipal area limits was less as per the Rules of 2008. The District Magistrate further contended that the distance between two toll plaza was less than 60 kms., which was again an infringement of the Rules of 2008. The District Magistrate found that there were no service lanes and there were inadequate lanes, as a result of which, traffic jams for several hours was found at the toll plaza. Such traffic jams was resulting in a law and order problem. The District Magistrate further contended that N.H.A.I. was granted time earlier by an order dated 26th December, 2012 for creation of service lanes and repairs of the road, which had not been done by N.H.A.I.

13. Pursuant to the order of the District Magistrate, which was published in the newspapers, the road users refused to pay the toll fee at the toll plaza. The petitioner brought this fact to the notice of the N.H.A.I. by a letter dated 28th May, 2013 seeking specific orders with regard to collection of the toll fee or suspension of the collection of the toll fee in view of the order of the District Magistrate.

14. It transpires that the N.H.A.I. took up the matter with the State Government.

The Chairman, N.H.A.I. wrote a letter to the Chief Secretary dated 29.5.2013 requesting the Chief Secretary to use his good offices and direct the District Magistrate to permit them to collect user fee till such time the road was not widened.

15. It transpires that the stalemate continued and no specific orders was issued to the petitioner by N.H.A.I. as a result, the petitioner issued a notice dated 30th May, 2013 under Clause 25 of the contract invoking "force majeure". The petitioner contended that the Transport Association were not paying the user fee on account of the order of the District Magistrate and since there was lack of infrastructure and no arrangement for road widening, coupled with the displeasure shown by the District Magistrate, against the officials of N.H.A.I. for not attending the meeting, the petitioner informed that they were unable to collect the user fee and, consequently, in view of this unforeseen event, the petitioner informed that they would pay 50% of the agreed collection user fee till such time the deficiencies were not removed by N.H.A.I.

16. In response to the notice issued by the petitioner under Clause 25 of the contract, the respondents issued a reply-cum-counter notice dated 8th June, 2013 informing the petitioner that the invocation of the "force majeure" clause within 15 days from the date of the event and depositing less user fee was in violation of the provisions of the contract and was not acceptable to the respondents. The respondents, by the same reply, issued a show cause notice to the petitioner to show cause as to why the contract should not be cancelled under Clause 35 (3) of the contract on the ground of not meeting its obligations in making appropriate arrangement for management of the traffic and to ensure efficient management of operations, free flow of traffic and simple, faster and hassle free user fee collection as provided under Clauses 12,15 (f) and 23 (b) of the contract and, which has resulted in the issuance of the order dated 27th May, 2013 passed by the District Magistrate, Fatehpur, which was primarily on account of traffic congestion at the toll plaza. The petitioner was also directed to show cause as to why the petitioner and its directors should not be debarred for a period of two years from all types of contracts of user collection given by N.H.A.I.

17. The petitioner, in response of the aforesaid show cause notice dated 8th June, 2013, submitted a detailed reply dated 24th June, 2013 indicating therein that the congestion and traffic jams at the toll plaza was not on account of the slackness on the part of the petitioner in the collection of the user fee at the toll plaza but on account of the lack of infrastructure created by the respondents at a wrong place in violation of the Rules of 2008.

18. At this stage, the petitioner fearing that the amount deposited towards security performance could be encashed by the respondents filed Writ Petition No. 37367 of 2013 praying for certain reliefs:

A. issue a writ, order or direction in the nature of certiorari quashing the Official Gazette Notification No. S.O. 250 (E); dated 8.2.2012 (Annexure-6 to the writ

petition);

B. issue a writ, order or direction in the nature of mandamus directing the respondent No. 2 for the refund of the Performance Security of the contract of User Fee Collection at the impugned Chitaura Toll Plaza to the petitioner without any deductions on account of the effect of the declaration of the impugned Chitaura Toll Plaza as illegal vide order dated 27.5.2013 (Annexure-20 to the writ petition);

C. issue a writ, order or direction in the nature of mandamus directing the respondents to decide the application of the petitioner/Notice of the petitioner of Force Majeure event sent by the petitioner dated 20.5.2013 (Annexure-22 to the writ petition);

D. issue a writ, order or direction in the nature of mandamus directing the respondents not to take any coercive action against the petitioner in pursuance to the Show-Cause Notice dated 8.6.2013 (Annexure-25 to the writ petition);

E. issue a writ, order or direction in the nature of mandamus directing the respondents without affecting any right of the petitioner, to suspend the use fee collection at Chitaura Toll Plaza on NH-2, in Fatehpur District, UP pursuant to the order dated 27.5.2013 passed by the respondent No. 5 (Annexure-20 to the writ petition) for immediate closure of Chitaura Toll Plaza till the said Toll Plaza all the conditions mentioned in the order dated 27.5.2013 as directed by the respondents; and

F. issue any other writ, order or direction which this Hon"ble Court may deem fit and proper according to the facts and circumstances of the case.

19. The petitioner in this writ petition basically contended that their application invoking "force majeure" clause of the contract be decided by the authority and that the respondents should be restrained from encashing the performance duty deposited by the petitioner. The Writ Court while entertaining the writ petition, issued an interim order restraining N.H.A.I. and its agents from encashing the security.

20. In the meanwhile, the District Magistrate issued an order dated 6th July, 2013 withdrawing its earlier order dated 27th May, 2013 holding that since there is a loss of revenue, the order was being withdrawn subject to the condition that N.H.A.I. would erect a toll plaza at the correct place within three months. Pursuant to the said order, N.H.A.I. intimated the petitioner by a letter dated 1st August, 2013 indicating that they have taken a decision to remove the toll plaza at Chitaura and reconstruct it at the correct place and accordingly directed the petitioner to co-operate with the agency, who was entrusted with the task of removal of the toll plaza and erection of the same at the appropriate place.

21. While the procedure for dismantling the toll plaza and erection of the toll plaza was going on, the respondents issued an order dated 26th August, 2013 terminating the contract under Clause 35 (3) of the contract and further

debaring the petitioner and its directors from participating in any tender bidding for two years. The reasons for cancellation of the contract was, that the petitioner was responsible for free flow of the traffic and was obliged to follow the procedure as per Clauses 12, 15 (f) and 23 (b) of the contract, which the petitioner had failed and had not made the appropriate arrangements for free flow and management of the traffic nor had ensured that the processing time on a vehicle at the toll plaza booth should not be more than 30 seconds per vehicle, which had resulted in frequent traffic jams resulting in the issuance of the order by the District Magistrate. The respondents further held that the petitioner was raising frivolous issues through various letters, which were without substance and factually incorrect and that the invocation of the "force majeure" clause under the contract was patently misconceived. The respondents further submitted that the allegations that there was lack of infrastructure was patently wrong and, accordingly, debarred the petitioner from participating in any fresh tender for a period of two years.

22. The petitioner, being aggrieved by the said cancellation of the contract, filed Writ Petition No. 47607 of 2013, which has been clubbed with the earlier writ petition and both the writ petitions are being decided together.

23. At this stage, it is also relevant to mention some more facts, which would have a bearing to the ultimate result of the case, namely, that prior to the grant of the present contract to the petitioner, N.H.A.I. had given the same contract to another contractor for collection of user fee at Chitaura Toll Plaza. On account of traffic congestion, the District Magistrate had issued an order dated 26th December, 2012 directing N.H.A.I. and its contractor from collecting any user fee from the Chitaura Toll Plaza till such time additional lanes/service lanes were not constructed and roads were not repaired. Pursuant to this direction, the Project Director issued a letter dated 11th January, 2013 to the Regional Officer of N.H.A.I. recommending that the Toll Plaza at Chitaura may be made non-operational and necessary infrastructure arrangements be made for establishing a new toll plaza at Km. 527.000. The Project Director while recommending the aforesaid option gave the following reasons, namely, that the location of Chitaura Toll Plaza was in the close vicinity of the Fatehpur municipal limits, which was causing inconvenience to the locals and that the district administration had also expressed their displeasure over the location of the toll plaza and represented that the toll plaza should be shifted away from the municipal limits in order to avoid traffic congestion and ensure smooth movement of the traffic. Inspire of this recommendation, the higher officials of the N.H.A.I. chose to ignore it and went ahead with the grant of the contract to the petitioner without removing the lacuna as pointed out by the District Magistrate. After cancelling the contract with the petitioner, N.H.A.I. entered into a contract with another person who also faced traffic congestion and non co-operation of the locals in paying the user fee. The traffic congestion at the toll plaza resulted in the issuance of another order by the District Magistrate dated 25th December, 2013 directing the N.H.A.I. to stop the user fee collection from Chitaura Toll Plaza. N.H.A.I., ultimately, shifted

the toll plaza at a new place and started functioning from the first week of January, 2014.

24. Heard Sri M.D. Singh Shekhar, the learned Senior Counsel assisted by Sri R.D. Tiwari and Sri S.P. Upadhyay, the learned Counsel for the petitioner and Sri S.M.A. Kazmi, the learned Senior Counsel assisted by Sri Mohd. AH, the learned Counsel for the N.H.A.I.

25. Before proceeding further, it would be essential to refer to a few clauses of the contract, which will have a bearing with the controversy involved in the writ petition.

26. Clause 8 of the contract authorizes the contractor to collect the user fee at Chitaura Toll Plaza where permanent user fee collection booths have been set up by the authority. For facility, the said provision is extracted hereunder:

8. Place of Collection:

(a) The Contractor shall collect User Fees only at km 71.00 (new chainage km 541.877) at Chitaura toll plaza for the section from km 38.000 to km 94.020 (new chainage km 508.877 to km 570.877) (Ashapur- Thariwan section) of National Highway No. 2 in the state of Uttar Pradesh. Where, permanent USER Fee Collection Booth (s) are put up by the Authority. Such booth (s)/plaza/plaza area cannot be used or allowed by the Contractor to be used by others for any other purpose; including for sale of any commodity or advertisement.

Any advertisement in plaza area is strictly prohibited. Any deviation will be treated as non-compliance and action shall be taken either under Clause 17 (c) or under Clause 35 (4).

(b) The Contractor undertakes not to demand any additional place for collection of USER Fee or for installation of check barriers under any circumstances and for any reason whatsoever. The Contractor also undertakes not to collect USER Fee from any other place. The decision of the Authority in this regard shall be final and binding.

(c) The Authority reserves the right to change the location of collection point including the right of addition, removal and merger of the number of USER Fee collection points as notified through fee notification from time to time. In case of a plaza being closed by any of such notification, the contract shall be come to an end and the performance guarantee of the contractor shall be refunded in compliance to other provision of the contract in this regard.

27. Clause 12 provides that it is the obligation of the contractor to deploy adequate number of personnel in order to ensure efficient management of entire operations including free flow of traffic in and around the toll plaza. For facility, the said provision is extracted hereunder:

12. Requirement of Personnel for USER Fee Collection:

For the purpose of discharging its obligations under this Contract, the Contractor shall deploy adequate number of personnel of prescribed qualification and experience and having undergone such training as may be relevant and considered necessary from time to time by the Authority to ensure efficient management of entire operations, including free flow of traffic, in or around the plaza including in the User Fee collection booths.

The number, qualification and experience of personnel to be deployed should be in accordance with the details given in schedule-III of this contract. However, the Authority reserves the right to serve directions for any interchange in the category of personnel (total deployment will remain according to Schedule -III) to be deployed by the Contractor, for the purpose of User Fee Collection for ensuring free flow of traffic.

28. Clause-15 provides the minimum infrastructure, which has to be provided by N.H.A.I. and is required to be maintained by the contractors. For facility, the said provision is extracted hereunder:

15. Provision of Infrastructure:

(a) The minimum infrastructure to be provided (in case not provided by N.H.A.I. or the BOT (Annuity) Concessionaire) and maintained by the Contractors are as under:

(i) Computers and its peripherals,

(ii) Software for running the system if the contractor is not using N.H.A.I.'s software,

(iii) Generator/Standby Generator for power if there is no electricity connection/for stand by requirement,

The software used by the Contractor shall be able to provide vehicle crossing details with number of vehicle, type of vehicle, date and time of crossing the plaza etc.

(b) The Authority shall handover the Toll Plaza to the Agency in the condition as existing on 7 days prior to bid due date on "as is where is basis". The agency shall carry out upgradation/provide facilities as required, to discharge his duties.

(c) The repair and maintenance of such facilities once provided by the Authority shall be the responsibility of the Contractor including but not limited to payment of electricity bill, fuel consumables like electricity bulbs, water charges etc. the Authority may provide consumables at the time of handing over of the User Fee collection plazas/booths only, thereafter all consumables shall be arranged by the Contractor at its own cost and at the time of taking over the facility by the Authority, if any liability/obligation (s) regarding repair and maintenance and consumables remains unfulfilled by the Contractor, same shall be adjusted by the Authority from Performance Security.

(d) All expenses for printing receipts or passes to be issued to users shall be borne by the Contractor. The Contractor shall abide by the instruction of the Authority in the matter of its format or size or language.

(e) An inventory (alongwith the condition and present book value) of infrastructural facility/equipment, and all other articles (properties of N.H.A.I. only) shall be prepared and duly signed by both the parties at the time of handing over or taking over of the User Fee Plaza (s). All rental article/equipments shall be returned immediately after handing over the plaza to the Contractor and no rent shall be paid thereafter.

(f) The contractor shall abide by all the instructions issued by the Authority from time to time. The Contractor also undertakes to abide by such instructions in order to make the process of User Fee collection simple, faster and hassle free by extending necessary co-operation in adopting the technological advancements in the process/work of User Fee collection.

(g) The user fee collecting agency shall make necessary arrangements for power/lighting to ensure proper working of the User Fee Plaza (s) including various office equipment installed, maintaining and running all electric arrangements and stand-by generator alongwith electric lighting and bearing all expenses thereon during the entire period of this Contract and paying punctually electricity and water charges in respect of the User

Fee plaza (s)/collection booths as they become due and payable during period of this Contract.

(h) The repair of the road section at the Toll Plaza site will be the responsibility of the N.H.A.I.

(i) In case of BOT (Annuity) stretches, whatever facilities and maintenance obligations fall within the mandate of the Concessionaire, same shall be provided by the Concessionaire, during the Concession period.

29. Clause 23 provides various obligations of the contract and his responsibility for collection of user fee, maintenance of records etc. For facility, the said provision is extracted hereunder:

23. Obligations of the Contractors:

(a) The Contractor undertakes the responsibility of the complete job of User Fee collection, maintenance of all records, maintenance of User Fee collection account, maintenance of vehicle type wise Traffic Data on shift to shift basis, maintaining the cleanliness of User Fee plaza/User Fee collection booths and surrounding area etc. and any other duty as may be assigned by the Authority from time to time.

(b) The Contractor shall make appropriate arrangement for management of the traffic at its own cost and shall ensure that the processing time for a vehicle at the User Fee counter should not be more than 30 seconds for the purpose of

issuing USER Fee. All the lanes shall be kept open at all times irrespective of peak or off peak hours.

(c) The Contractor specifically undertakes to abide by all the instructions issued by the Authority from time to time on operational matters and further agrees not to raise any dispute against the same including any additional cost that the Contractor may be required to bear to comply with such instructions.

(d) During the contract Period, the contractor shall furnish to the Authority, within 7 (seven) days of completion of each month, a statement of User Fee substantially in the form set forth in Schedule-V (the "Monthly User Fee Statement"). Proper record is to be maintained at the plaza for the purpose of providing such information. The Contractor shall also submit such information sought by the Authority in such format, as may be prescribed by the Authority from time to time.

(e) The Contractor shall, prior to the close of each day, send to the Authority, by facsimile or e-mail, a report stating accidents and unusual occurrences on the Road section within 500 meters on either side of the plaza relating to the safety and security of the Users and Road section. A weekly and monthly summary of such reports shall also be sent within three days of the enclosing of each week and month, the case may be. For the purposes of this Clause 23 (e) accidents and unusual occurrences on the Road section shall include:

(i) death or injury to any person;

(ii) damaged or dislodged fixed equipments;

(iii) any obstruction on the Road section, which results in slow down of the services being provided by the Contractor;

(iv) disablement of any equipment during operation;

(v) communication failure affecting the operation of Road section smoke or fire;

(vi) flooding of Road section; and

(vii) such other relevant information as may be required by the Authority.

(f) The Contractor also agrees to unconditionally abide by such other direction of the Authority issued by the authorized representative on all operational matters under the provisions of the contract.

(g) The contractor also agree to abide by the requirement of Clause 12 and Clause 13 specifically on deployment of the personnel for the purpose of this Contract.

30. Clause 25 relates to "force majeure". For facility, The said provision is extracted hereunder:

25. Force Majeure

(a) Non-Force Majeure Event:

An event (i) which involves diversion of traffic of any kind, including but not limited to any diversion ordered/implemented by local authority or any State/Central Government for a period not exceeding 15 days in continuation; or (ii) where the road users opt to access/travel through the existing alternate free User Fee (toll) roads due to deteriorated road conditions/maintenance of road section. This may result into bypassing of User Fee Plaza/User Fee Collection Booths and use of any part of the said section of the National Highway/said bridge of the users.

(b) Force Majeure Event:

Except as stated in Clause (a) above, Force Majeure event means an event or circumstances or a combination of events and circumstances referred to in this clause which are beyond the reasonable control of the Party or Parties to this Contract and which party could not have prevented or reasonably overcome with the exercise of its reasonable skill and care in relation to performance of its obligations pursuant to this Contract and which are in the nature, without limitation of those described below:

(i) Publicly declared strike by registered and recognized association of Transporters exceeding 7 days. The date of going on strike and withdrawal or start of movement of traffic will be inclusive for the purpose of calculation of 7 days under this clause.

(ii) Floods/Earthquake having materially adverse impact i.e., complete blockade of road.

(iii) Act of war, invasion, armed conflict or act of foreign enemy, unexpected call up of armed forces, blockade, embargo, revolution, riot, sabotage, terrorism or act of such threat, or any other political or social event having material adverse impact on the performance of obligations of the parties thereof.

(iv) Expropriation, acquisition, confiscation or nationalization of the User Fee collection.

(v) Any change in law which has a material adverse effect on the obligation of the parties thereto.

(vi) Any decision or order of a Court or Tribunal, which has a material adverse effect on the performance of obligations of the parties to this Contract.

(vii) Suspension of traffic on the said section of National Highway/said bridge or any part thereof, exceeding 15 (fifteen) days at a stretch.

(viii) Any event of circumstances of a nature analogous to the foregoing.

Either party to this Contract shall be entitled to suspend or excuse performance of his obligations, including remittance of installments by the Contractor to the Authority for the period of continuance of the Force Majeure event, under this

Contract to the extent that such performance is impeded by an event of Force Majeure prevailing continuously for more than 7 (seven) days at a time.

(c) Procedure For Force Majeure:

(i) Notice:

(1) If a party claims relief on account of a Force Majeure event, then the Party claiming to be affected by the Force Majeure event shall, as soon as reasonably practicable and in any event within 7 days of becoming aware of the Force Majeure event, give notice giving details of the effects of such Force Majeure on the Party's obligations under this Contract to the other Party in writing, including the dates of commencement and actual/likely date of cessation of such Force Majeure and its effects, with necessary supporting documents and data.

(2) The Party receiving the claim for relief under Force Majeure shall, if wishes to dispute the claim, give a written notice of the dispute to the Party making the claim within 30 days of receiving the notice of claim.

(ii) Consultation and Duty to Mitigate:

(1) The Party claiming relief under Force Majeure shall, at its own cost, take reasonable steps to remedy and mitigate the effects of the Force Majeure event and restore its ability to perform its obligations under this Contract as soon as reasonably possible. The Parties shall consult with each other so determine the measures to be implemented to minimise the losses of either Party as a result of the Force Majeure event.

(2) The Party affected by Force Majeure shall keep the other Party informed of such efforts to remedy and make reasonable efforts to mitigate on a continuous basis and shall provide written notice of the resumption of performance hereunder.

(3) Notwithstanding anything contrary to the specifically stated in this Contract no party shall "be relieved of its obligations under this Contract by reason of impossibility of performance or any other circumstance whatsoever not beyond its control.

(4) Any Party claiming cessation of the event of Force Majeure may, if the other party has not served a notice of resumption of performance, give notice to the other party, of cessation of such event, notifying the date of alleged and unless the party to whom such notice is given does not dispute the same within 30 days of the receipt of such notice the Force Majeure event shall be deemed to have ceased to consequences thereof and shall be deemed to have come to an end on the date so notified.

(5) The relief under Force Majeure will be calculated on the basis of average collection per day, arrived based on the agreed weekly remittance. The difference in collection per day during force majeure and average amount of collection per day, arrived based on the agreed weekly remittance multiplied by number of

days of force majeure will be payable to the contractor.

(iii) Termination Due to Force Majeure:

If any event of Force Majeure shall continuously impede or prevent a Party's performance for longer than 60 days from the date of commencement of such Force Majeure event, the parties shall decide through mutual consultation, either the terms upon which to continue the performance of this Contract or to terminate this Contract by mutual consent. If the parties are unable to agree on such terms or to terminate the Contract by mutual consent within 90 days from the date of commencement of such Force Majeure event, either Party may issue a Notice to terminate this Contract.

(iv) The Authority on behalf of the Authority is authorized specifically to settle claims for force majeure events.

31. Clause 26 relates to matter, which are non-arbitrable and Clause-27 relates to arbitration of disputes and differences between the parties. For facility, the said provisions are extracted hereunder:

26. Matters Non-Arbitrable:

Any disputes or differences between the parties in regard to the matters covered under Clauses 3, 7, 8, 10, 14, 18 and 19 shall be referred to the Authority, Project Implementation Unit/Corridor Management Unit Kanpur whose decision shall be final.

27. Arbitration:

(a) All disputes and/or difference except those which are mentioned in the matters non-arbitral under Clause 26 above arising between the parties out of this Contract shall be settled by Arbitration under and in accordance with the provisions of the Arbitration and Conciliation Act, 1996. The Chairman of the Authority or his nominee shall be the sole Arbitrator. The award made and published in pursuance of such Arbitration proceedings shall be final and binding on both the parties.

(b) The proceedings of the Arbitration shall be held in English language and shall be held at such place as may be decided by the Chairman of the Authority or his nominee. The award of the Arbitration shall be final and binding on both the parties to the Contract.

(e) Pending resolution of any dispute pursuant to Arbitration, under all circumstances the Contractor shall continue to remit the agreed instalments of money to the Authority as prescribed in this Contract including when the dispute is about the amount to be remitted.

32. Much stress was laid by the learned Counsel for the N.H.A.I. with regard to Clause 2.3, 2.3.1 and 2.3.2 of the tender notice. For facility, the said provision is extracted hereunder:

2.3 Site Visit and Verification of Information.

2.3.1 Bidders are encouraged to submit their respective Bids after visiting the Project site and ascertaining for themselves the site conditions, traffic, locations, surroundings, climate, availability of power, applicable laws and regulations, and any other matter considered relevant by them.

2.3.2 it shall be deemed that by submitting a Bid, the Bidder has:

- (a) made a complete and careful examination of the Bidding Documents;
- (b) received all relevant information requested from the Authority;
- (c) accepted the risk of inadequacy, error or mistake in the information provided in the Bidding Documents or furnished by or on behalf of the Authority relating to any of the matters referred to in Clause 2.3.1 above;
- (d) satisfied itself about all matters, things and information including matters referred to in Clause 2.3.1 hereinabove necessary and required for submitting an informed Bid, carrying out of the toll collection in accordance with the Bidding Documents and performance of all its obligations hereunder;
- (e) acknowledged and agreed that inadequacy, lack of completeness or incorrectness of information provided in the Bidding Documents or ignorance of any of the matters referred to in Clause 2.3.1 hereinabove shall not be a basis for any claim for compensation, damages, for performance of its obligation, loss of profits etc. from the Authority, or a ground for termination of the Contract Agreement by the Contractor; and
- (f) agreed to be bound by the undertakings provided by it under and in terms hereof.

33. In the light of the aforesaid provision, a preliminary objection was raised with regard to the maintainability of the writ petition.

34. Sri Kazmi, the learned Senior Counsel submitted that in view of the violation of certain provisions of the contract, the authority had taken a conscious decision after considering the objections of the petitioner and had cancelled the contract. The learned Senior Counsel contended that any dispute or differences between the parties arising out of the contract was required to be settled by arbitration as per Clause 27 of the contract in accordance with the provisions of the Arbitration and Conciliation Act, 1996. The learned Senior Counsel submitted that the Court should dismiss the writ petition and relegate the petitioner to avail the arbitration clause under the contract. In support of his submission, the learned Senior Counsel placed reliance upon a decision of the Supreme Court in *Indian Oil Corporation Ltd. and Others Vs. Raja Transport (P) Ltd.*, . The learned Counsel submitted that the arbitration clause was a binding, voluntary alternate dispute resolution process chosen by the parties and that the petitioner with open eyes and full knowledge and comprehension of the provision, had entered into a contract, which contained an arbitration clause providing for settlement of

disputes through an arbitrator now cannot turn around and chose a forum by filing a writ petition for settlement of its disputes bypassing the arbitration clause. The learned Senior Counsel submitted that in view of the terms contained in Clauses 2.3, 2.3.1 and 2.3.2 of the tender notice read with Clause 27 of the contract, the appropriate course for the petitioner was to invoke the arbitration clause.

35. On the other hand, Sri M.D. Singh Shekhar, the learned Senior Counsel contended that it was not open to an instrumentality of the State to act in an arbitrary or partisan manner merely because its activities fell in the realm of a contract, and now contend that the party suffering by a breach of contract should invoke the arbitration clause. The learned Senior Counsel contended that considering the facts and circumstances of the present case, the writ petition was maintainable and that the petitioner could apply to undo a wrong, which has been committed arbitrarily by the respondents.

36. It is settled law that disputes relating to contracts cannot be adjudicated or agitated under Article 226 of the Constitution of India as held in *Kerala State Electricity Board and Another Vs. Kurien E. Kalathil and Others*, and in *State of U.P. and others Vs. Bridge and Roof Co. (India) Ltd.*, and *Bareilly Development Authority and Another Vs. Ajay Pal Singh and Others*, . The Supreme Court held that a Writ Court was not a proper forum for adjudication of contractual disputes. The Supreme Court held that if a condition of a contract was violated, ordinarily the remedy was not a writ petition and that a contract would not become statutory simply because it was awarded by a statutory body and that the mere fact that an obligation was imposed under the contract on the contracting parties would not make the contract statutory. The Supreme Court further held that the disputes relating to the interpretation of the terms and conditions of a contract could not be agitated in a writ petition under Article 226 of the Constitution of India and that it was a matter for adjudication by a Civil Court or in an arbitration. Similar view was again reiterated by the Supreme Court in *Pimpri Chinchwad Municipal Corporation and Others Vs. Gayatri Construction Company and Another*, and *The Branch Manager, Magma Leasing and Finance Limited and Another Vs. Potluri Madhavilata and Another*, .

37. On the other hand, the Supreme Court in *Mahabir Auto Stores and others Vs. Indian Oil Corporation and others*, , held that the State or its instrumentality when engaged in a commercial transaction must act reasonably and should inform and take into confidence the adverse party against whom adverse action was contemplated. Similarly, in *Gujarat State Financial Corporation Vs. Lotus Hotels Pvt. Ltd.*, , the Supreme Court held that the State cannot commit breach of a solemn undertaking on which the other side has acted and then contend that the party suffering by a breach of contract may sue for damages but cannot compel specific performance of the contract. In *Smt. Nilabati Behera alias Lalita Behera Vs. State of Orissa and others*, the Supreme Court held that it was not enough to relegate a party to the ordinary remedy of a civil suit to claim

damages for the tortuous act of the State. The Supreme Court held that the citizen complaining of the infringement of the indefeasible right under Article 21 of the Constitution of India could not be told that for the established violation of the fundamental right of life, he could not get a relief under the public law by the Courts exercising writ jurisdiction.

38. In the light of the aforesaid decisions, prerogative writ have to evolve new tools to give relief in public law by moulding it according to the situation which it demands with a view to preserve or protect the rule of law. The power to issue prerogative writs under Article 226 of the Constitution of India is plenary in nature and, is not limited by the provision of the Arbitration Act or by an arbitration clause in the contract. The arbitration clause is only a rule of discretion and not one of compulsion and, in an appropriate case, inspite of the availability of an alternative remedy, the High Court could still exercise its writ jurisdiction.

39. In *Rashid Ahmad v. Municipal Board, Kairana* AIR 1960 SC 163, laid down that existence of an adequate legal remedy was a factor to be taken into consideration in the matter of granting Writs. This was followed by another *Rashid* case, namely, *K.S. Rashid and Son Vs. The Income Tax Investigation Commission etc.*, which reiterated the above proposition and held that where alternative remedy existed, it would be a sound exercise of discretion to refuse to interfere in a petition under Article 226. This proposition was, however, qualified by the significant words, "unless there are good grounds therefor", which indicated that alternative remedy would not operate as an absolute bar and that writ petition under Article 226 could still be entertained in exceptional circumstances.

40. A specific and clear rule was laid down in *The State of Uttar Pradesh Vs. Mohammad Nooh*, , as under:

But this rule requiring the exhaustion of statutory remedies before the Writ will be granted is a rule of policy, convenience and discretion rather than a rule of law and instances are numerous where a writ of certiorari has been issued in spite of the fact that the aggrieved party had other adequate legal remedies.

41. This proposition was considered by a Constitution Bench of the Supreme Court in *A.V. Venkateswaran, Collector of Customs, Bombay Vs. Ramchand Sobhraj Wadhwani and Another*, holding:

The passages in the judgments of this Court we have extracted would indicate (1) that the two exceptions which the learned solicitor General formulated to the normal rule as to the effect of the existence of an adequate alternative remedy were by no means exhaustive, and (2) that even beyond them a discretion vested in the High Court to have entertained the petition and granted the petitioner relief notwithstanding the existence of an alternative remedy. We need only add that the broad lines of the general principles on which the Court should act having been clearly laid down, their application to the facts of each particular

case must necessarily be dependent on a variety of individual facts which must govern the proper exercise of the discretion of the Court, and that in a matter which is thus per-eminently one of discretion, it is not possible or even if it were, it would not be desirable to lay down inflexible rules which should be applied with rigidity in every case which comes up before the Court.

42. Another Constitution Bench decision of the Supreme Court in *Calcutta Discount Company Limited Vs. Income Tax Officer, Companies District, I and Another*, laid down:

Though the writ of prohibition or certiorari will not issue against an executive authority, the High Courts have power to issue in a fit case an order prohibiting an executive authority from acting without jurisdiction. Where such action of an executive authority acting without jurisdiction subjects or is likely to subject a person to lengthy proceedings and unnecessary harassment, the High Court will issue appropriate orders or directions to prevent such consequences. Writ of certiorari and prohibition can issue against the Income Tax Officer acting without jurisdiction u/s 34 Income Tax Act.

43. In *Whirlpool Corporation Vs. Registrar of Trade Marks, Mumbai and Others*, , the Supreme Court held:

The power to issue prerogative writs under Article 226 of the Constitution is plenary in nature and is not limited by any other provision of the Constitution. This power can be exercised by the High Court not only for issuing writs in the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari for the enforcement of any of the Fundamental Rights contained in Part III of the Constitution but also for "any other purpose.

43. The Supreme Court in *ABL International Ltd. and Another Vs. Export Credit Guarantee Corporation of India Ltd. and Others*, culled out the following principles:

(a) In an appropriate case, a writ petition as against a State or an instrumentality of a State arising out of a contractual obligation is maintainable.

(b) Merely because some disputed questions of facts arise for consideration, same cannot be a ground to refuse to entertain a writ petition in all cases as a matter of rule.

(c) A writ petition involving a consequential relief of monetary claim is also maintainable.

45. Similar view was reiterated by the Supreme Court in *Popcorn Entertainment and Another Vs. City Industrial Development Corpn. and Another*, .

46. In view of the aforesaid principles, the Court while entertaining an objection to the maintainability of the writ petition should bear in mind that power to issue a prerogative writ under Article 226 of the Constitution of India is plenary in nature and is not limited by the provisions of other Acts and statutes, namely,

the Arbitration Act or by the arbitration clause in the agreement. A prerogative writ will not be exercised by the High Court when other remedies, are available to the petitioner but where the action of the State or its instrumentality is arbitrary and unreasonable and violative of the mandate provided under Article 14 of the Constitution of India, the Court would and should exercise its plenary powers. In appropriate case, inspite of the availability of an alternate remedy, the Writ Court should exercise its jurisdiction where the petitioner seeks enforcement of a fundamental right or where there is a failure of the principles of natural justice or where the orders or proceedings are wholly without jurisdiction.

47. In the light of the aforesaid, we find from the admitted facts, as culled out from the writ petition is that the toll plaza was required to be established at the appropriate place as per Rule 8 of the Rules of 2008, namely, after 60 kms from the last toll plaza and after 10 kms from the municipal limits. In the instant case, the Court finds that both these conditions were violated and the toll plaza was located within 57 kms of the last toll plaza and was within 3 kms of the municipal limits. The location of the toll plaza in the vicinity of the municipal limits was causing harassment to the local users. N.H.A.I. knew about this illegal establishment of the toll plaza and took no remedial measures to rectify the initial defect. On the other hand, N.H.A.I. continued to give contracts for collection of user fee from this toll plaza inspite of orders being passed by the District Magistrate restraining the N.H.A.I. from collecting user fee from this toll plaza.

48. The establishment of the toll plaza at a wrong location at Chitaura was in the personal knowledge of N.H.A.I. but they went ahead with the collection of the user fee from this toll plaza. The District Magistrate issued an order dated 26th December, 2012 restraining N.H.A.I. from collecting user fee, inspite of which, N.H.A.I. went ahead and issued an advertisement and, subsequently, gave the contract to the petitioner knowing fully well that traffic jams was being caused at this toll plaza on account of inadequate lanes and toll booths for collection of user fee and the report of the Project Director recommending that the toll plaza should be shifted to the appropriate place.

49. The Court finds that the order of the District Magistrate dated 26th December, 2012 was not disclosed by the N.H.A.I. in the bid documents from the prospective bidders. The prospective bidders had no idea that there was a restraint order issued by the District Magistrate from collecting user fee from Chitaura Toll Plaza. The prospective bidders had no knowledge about the inadequate service lanes or the lack of infrastructure. These inadequacies was in the knowledge of N.H.A.I., who took no steps to cure this defect but went ahead to grant a contract to the petitioner.

50. The petitioner upon taking charge of the toll plaza came to know about the order of the District Magistrate and the inadequacy of the infrastructure as reported by the District Magistrate. These inadequacies was reported by the petitioner by letters dated 11th March, 2013, 1st April, 2013 and 12th April,

2013, on which no action was taken by N.H.A.I. The District Magistrate pointed out the deficiency but no steps were taken by the N.H.A.I. to cure the defect. N.H.A.I. is responsible for creating adequate infrastructure at the toll plaza for collection of user fee.

51. The Court further finds that when the District Magistrate passed an order dated 27th May, 2013 directing N.H.A.I. and the petitioner to stop the collection of the user fee, the said fact was immediately brought to the knowledge of N.H.A.I. by the petitioner vide a letter dated 28th May, 2013 and when the situation continued and toll users refused to pay the user fee at the toll plaza, the petitioner's issued a notice dated 30th May, 2013 invoking the force majeure clause. The contention of the respondents that the force majeure was unnecessarily invoked is patently erroneous. When an unforeseen event happens as in the given case, the petitioner was eligible to invoke the force majeure clause under the contract. Since the petitioner repudiated the invocation of the clause, the matter could have been sorted out mutually by negotiation as per Clause 25 of the contract or either party could have invoked the arbitration clause. The Court finds that the N.H.A.I., being miffed by the invocation of the force majeure clause, as a counterblast, issued a show cause notice under Clause 35 (3) of the contract for cancellation of the contract.

52. The contention of the respondents that the traffic jams that was being caused at the toll plaza, which had resulted in the issuance in the order of the District Magistrate dated 27th May, 2013 was on account of failure of the petitioner's obligation to carry out free flow of the traffic appears to be an afterthought. The Court finds that N.H.A.I. had given contracts for collection of user fee from Chitaura Toll Plaza to three different contracts at different point of time. The District Magistrate issued an order dated 26th December, 2012 during the tenure of the first contractor directing stoppage of collection of user fee till such time the road was not repaired and service lanes were not established as these deficiencies were leading to traffic jams. The position remained the same and these deficiencies were not removed, which resulted in the issuance of the second order of the District Magistrate dated 27th May, 2013 during the contract period with the petitioner and eventually, for these very reasons, the District Magistrate issued a third order dated 25th December, 2013 when the third contractor came into existence. On all three occasions the order was passed by the District Magistrate on account of traffic jams being created for wrong establishment of the toll plaza at Chitaura and for not providing adequate lanes for collection of user fee. The District Magistrate at no point of time found that the traffic jam was being caused on account of inadequate arrangement being made by the contractors towards collection of user fee and in managing free flow of traffic.

53. The Court further finds that the petitioner took charge of the toll plaza in March 2013. Till 27th May, 2013, the N.H.A.I. had no problems with the petitioner as they were regularly depositing the weekly user fee. The petitioner,

however, pointed out to N.H.A.I. the lack of infrastructure and the inadequacy of the service lanes at the toll plaza. The Court finds that no remedial measures were taken by N.H.A.I. in curing the defects nor at any stage intimated the petitioner that their assertion or the assertion of the District Magistrate was incorrect and that the traffic jam was being caused at the instance of the petitioner's for not properly managing the flow of traffic. In the absence of any letter being written by N.H.A.I. to the petitioner and in the light of the various orders issued by the District Magistrate for stopping the collection of the user fee, the Court is of the opinion that the cancellation of the contract on the ground of non-fulfilment of the petitioner's obligation, as provided under Clauses 12,15 (f) and 23 (b) of the contract, appears to be an afterthought. This aspect can be considered from another angle. In one year, three contractors were engaged by the N.H.A.I. and during the period of these three contractors, the District Magistrate issued three orders stopping the collection of the user fee from this toll plaza. The basic reason for the traffic jams, as given by the District Magistrate, was inadequacy of the service lanes. This fact was admitted by the Project Director of N.H.A.I., who recommended stoppage of collection of user fee from Chitaura Toll Plaza and shifting the same to another place. Eventually, N.H.A.I. agreed and shifted the same in January, 2014 only when the District Magistrate passed an order dated 25th December, 2013 for the third time for stoppage of collection of user fee. From this, it is apparently clear that the contractor was not at fault and that the N.H.A.I. was responsible for causing the traffic jams by not providing adequate lanes for collection of the user fee.

54. In the light of the aforesaid, the Court finds that the contention of the respondents that the petitioner's had raised frivolous issues vide letters dated 28th May, 2013, 5th June, 2013 and 30th June, 2013 is patently erroneous. These letters only highlighted the order of the District Magistrate directing stoppage of collection of user fee and invocation of the force majeure clause by the petitioner in view of the unforeseen event. The petitioner had only brought to the notice of the respondents with regard to the order of the District Magistrate and difficulty of the petitioner in the collection of user fee from the toll users, who refused to pay the toll fee in the light of the order of the District Magistrate, which was published in the newspapers. In fact these letters implore the respondents to issue necessary orders to the petitioner with regard to collection of user fee and when no such reply was received and the stalemate continued, the petitioner was forced to invoke the "force majeure" clause. Thus the contention of the respondents that frivolous issues were being raised by these letters is patently erroneous.

55. In the light of the aforesaid, the Court finds that the reasons given by the respondents in cancelling the contract in violation of Clauses 12, 15 (f) and 23 (b) of the contract was based on non-existing grounds and the action of the respondents was wholly arbitrary. The Court is of the opinion that the writ petition is maintainable since there has been a violation of Article 14 of the Constitution of India. The petitioner is entitled for some relief instead of

relegating the petitioner to arbitration proceedings.

56. It may be noted here that the petitioner is not claiming damages or a specific performance of the contract but is claiming the quashing of the arbitrary action taken by the respondents and for a writ of mandamus not to encash the performance security. The petitioner is also claiming that the action of the respondents in debarring the petitioner from participating in any future contract for a period of two years is also based on non-existing grounds and should also be quashed. The Court finds that the order of debarment is based on the same grounds as has been passed for cancellation of the contract.

57. The Court finds that the petitioner had filed a detailed reply to the show cause notice which has been brushed aside in a simple sentence as "not satisfactory". The Court is of the opinion that the respondents were required to give reasons while rejecting the reply of the petitioner.

58. The Court finds that the petitioner has been wronged. It is incumbent for the Court to step in and correct that wrong especially when the respondent is an instrumentality of the State. The clause relating to the invocation of the arbitration clause does not in any way curtail the plenary powers under Article 226 of the Constitution of India. The Court finds that the State or the instrumentality of the State having committed a wrong cannot turn around and contend that the party suffering by a breach of contract may sue for damages by raising an arbitration proceeding. In *Smt. Nilabati Behara (supra)* the Supreme Court has held that it is not always enough to relegate a party to the alternate remedy of a civil suit or to invoke the arbitration clause. In fact, in *Tata Cellular Vs. Union of India*, the Supreme Court held that the duty of the Court is to confine itself to the question of illegality and its concern should be to correct where a breach of principles of natural justice has been committed.

59. In the light of the aforesaid, the Court finds that the action of the respondents in cancelling the contract and debarring the petitioner and its directors for two years is based on irrelevant and non-existing grounds, which cannot be sustained and is quashed. The writ petitions are allowed. The respondents are restrained from encashing the performance security deposited by the petitioner and it would be open to either parties to invoke the force majeure clause by referring it to arbitration under Clause 25 of the contract. In the circumstances of the case, parties shall bear their own cost.