

(2020) 11 DEL CK 0132

In the Delhi High Court

Case No : Civil Writ Petition No. 8125 Of 2020, Civil Miscellaneous Application
No. 26380 Of 2020

M/S Wadia Techno-Engineering Services Limited

APPELLANT

Vs

National Highways Authority Of India

RESPONDENT

Date of Decision : 18-11-2020

Acts Referred:

Constitution Of India, 1950 — Article 226
Arbitration And Conciliation Act, 1996 — Section 9

Citation : (2020) 11 DEL CK 0132

Hon'ble Judges : Navin Chawla, J

Bench : Single Bench

Advocate : Srinath Sridevan, Nikhil Swami, Aishwarya Nathan, Divya Swami,
Ankur Mittal, Abhay Gupta, Sudhir Nandrajog, Varun Tankha, Shreya Nair

Final Decision : Dismissed

Judgement

Navin Chawla, J

1. These petitions have been filed by the petitioners challenging the impugned circular/order dated 28.08.2020 and â??debarment noticeâ?? dated

25.09.2020 issued by the respondent debarring the petitioners and their directors for one year from participating/engagement in any future project/bid

of the respondent, directly or indirectly, with effect from 28.08.2020.

2. As common questions of fact and law are involved, these petitions are being adjudicated by way of this common judgment. The facts are being

taken from WP(C) 8125/2020.

3. The respondent had entered into a Concessionaire Agreement with West Gujarat Expressways Ltd. (hereinafter referred to as â??WGELâ??) for

the work of â??widening of the Existing Jetpur â?? Gondal Section (km 117.000

to km 143.000) from two lane to four lane; making improvements in the existing four lane Gondal â?" Rajkot Section (km 143.000 to km and Widening of the existing Rajkot Bypass (km 175.000 to km 185.000) from two lane to four lane on NH-8B in Gujarat on BOT Basis. The contract period was of 20 years, that is, from 17.03.2008 to 16.03.2028.

4. Article 20.1 of the Agreement provided for appointment of an Independent Engineer for Inter alia conducting the review of design/drawings for construction, supervision and monitoring of construction activities and other activities relating to Operation and Maintenance (O&M).

5. The respondent appointed SAI Consulting Engineer Limited as an Independent Engineer to supervise the construction of the said section of the highway by WGEL for the period of five years from March, 2008 to January, 2013. Thereafter, M/s. Frischman Prabhu Ltd. was engaged as an Independent Engineer for the period February, 2013 to January, 2018.

6. The construction of the Highway was completed by WGEL on 17.03.2008.

7. As the agreement with M/s. Frischman Prabhu Ltd. was expiring in January, 2018, the respondent issued a request for proposal for appointment of

the Independent Engineer, pursuant where to the petitioners in these petitions, forming an association, applied and were successful. An agreement

dated 16.01.2018 was executed between the petitioners and the respondent appointing the petitioners as Independent Engineer for operation and

maintenance of the existing Four Lane Jetpur-Gondal-Rajkot section of the Highway from 117.600 to 185.000 on NH-8B in the State of Gujarat.

8. On 08.06.2020, a portion of the retaining wall at Ch.180 collapsed causing the unfortunate death of two persons. The respondent vide its letter dated

09.06.2020 directed the petitioners to take immediate action against the Concessionaire and submit a detailed report on the occurrence of the said

incident. The said letter further recorded as under:-

â??In this regard, this office at various times have shown concern regarding pre monsoon activity and maintenance required to be

performed prior to start of Monsoon vide letters under ref 6 & 7 and during site visits of undersigned to ensure smooth flow of traffic and

trouble free Highways for the road users. In continuation to this, a meeting was called by undersigned on 14.05.2020 regarding

preparation of pre monsoon activity at PIU-Rajkot and during the meeting it was

directed by PD Rajkot to Independent Engineer to submit

the action plan with micro planning for carrying out the pre monsoon activity well in time before the start of Monsoon.â??

9. Thereafter, the respondent appointed a team from the Sardar Vallabhai National Institute of Technology, Surat (hereinafter referred to as

â??SVNITâ??) to conduct an onsite investigation.

10. The respondent vide its letter dated 15.06.2020 called upon the petitioners to show cause as to why their Bridge/Structural expert was not

available on the site during the visit by the SVNIT expert team and even thereafter.

11. The petitioner (M/s. Wadia Techno-Engineering Services Ltd.) submitted a reply dated 17.06.2020 to the Show Cause Notice informing the

respondent that the Bridge/Structural expert was not present due to the Lockdown declared by the Central Government because of the COVID-19

pandemic. The petitioner further informed the respondent that the accident occurred because of negligence of the construction agency and the

Independent Engineer appointed at the time of the construction, as the construction was different from the submitted design and drawings by the

Concessionaire.

12. The respondent issued another Show Cause Notice dated 17.06.2020 to the petitioners asking them to show cause as to why they be not

blacklisted and penal action be not taken against them for having failed to discharge their duties leading to the collapse of the part of the retaining wall.

13. SVNIT also submitted its report of investigation to the respondent on 17.06.2020, reporting the following causes for the accident:-

â??Based on the above observations and review of the design reports, the following causes of failure have been identified:

1. The submitted design report shows that the stability analysis has been carried out and adequate factors of safety have been obtained.

However, this stability analysis is applicable for RCC retaining wall. In the present case the retaining wall is made of PCC which acts like a

Gravity Wall. The essential stability analysis for a Gravity Wall has not been carried out in the submitted design report. The factor of safety

for the constructed cross section of the PCC wall at the location of failure is found to be less than unity which is inadequate for stability of

the wall.

2. Major horizontal and vertical cracks are visible from the CCTV footage before failure. Due to rainfall on 8th June, 2020 morning at

Rajkot, the percolation of rain water through the horizontal cracks may have occurred which increases the horizontal pressure acting on

the wall leading to its failure. The seepage water into the backfill increases the unit weight of the back-fill from dry unit weight to saturated

unit weight which is higher by 20 to 25%.â??

14. The petitioners submitted their reply to the Show Cause Notice vide letter dated 10.07.2020 inter alia contending that they had

performed their task diligently and informed the Concessionaire of all the defects and deficiencies observed in the project Highway on

regular basis. As far as the non-availability of the Bridge Engineer is concerned, the petitioners represented as under:-

â??4. Whereas as per Enclosure-B of Description of Services, Bridge Engineer shall undertake structure condition survey once in a year

and submit an inspection work. However, no Bridge Engineer is deployed on site by the consultant in the subject project. â?" Our Bridge

Engineer assigned for the above project was suffering from serious Knee problem due to which she was not able to visit and inspect the

stretch but was available and connected with telephonic conversation with us when required. Due to which all inspection was performed by

our Team Leader (Senior most Key person) with continuous online meeting with our Bridge Engineer and 2 Highway Maintenance Engineer

available at site on full time basis. All regular required reports were submitted well within stipulated time period by our Team Leader to

Authority and Concessionaire.

On 03rd February 2020 PD Rajkot instructed our IE team to Mobilize Bridge Engineer before monsoon. On 10th February, 2020 we

informed and requested our Bridge engineer Miss Shobha Khanna through our Letter No.WTESL/NHAI/RJT/18-19/015 Date:- 25-11-2018,

Letter No. WTESL/NHAI/RJT/19-20/07 Date:- 20-04-2019 and Letter No.WTESL/NHAI/RJT/18-19/038 Date:- 28-02-2020 to confirm her

Availability for inspection of Bridges of our Project stretch and travel and hospitality arrangements can be made well in advance. Our

bridge engineer informed every time that due to her health condition she needed bed rest and could not travel 750 Km distance by Road

from Ujjain to Rajkot and she would be only available to travel and visit in 1st week of April, 2020 by Flight or Train. On 25th March,

2020 due to Covid-19 Pandemic lockdown was announced across the country by our Honorable Prime Minister and All transport facilities

were shutdown. Due to which she could not come in the month of April, 2020.

On 9th June, 2020, we informed Bridge/Structure Engineer regarding collapse of RE Wall accident, but due to lockdown and as per SOP

issued by Ministry of Home Affairs Rail transport facility is not yet started and she could not inspect and visit physically the accident site, so

our Engineer himself visited and inspected the site with IE Team and had a VC with Bridge Engineer and submitted the reports to PIU

Rajkot well within time and again requested Our Bridge Engineer to confirm her availability at the earliest. She agreed and informed that

she will be visiting the site at the earliest when the train connectivity will resume from Ujjain to Rajkot.â??

15. As far as the cause of the accident is concerned, the petitioners again blamed the Concessionaire as also the Independent Engineer appointed at

the time of the construction of the Highway.

16. In the meantime, the respondent constituted a Committee of Officers to report on the accident. The Committee submitted its Report inter alia

observing that there were serious lapses on the part of the construction agency and the supervising team, ignoring construction drawings and other

basic construction requirements such as provision of surface reinforcement and filter medium behind retaining wall as per specifications.

17. The respondent, thereafter, issued a fresh Show Cause Notice dated 27.07.2020 to the petitioners inter alia observing as under :-

â??5. It has been reported that owing to Consultantâ??s default, a portion of the retaining wall at Ch. 180 collapsed on 08.06.2020

causing the death of two persons. The matter has been investigated and following has been reported highlighting the culpability and

carelessness on part of the Consultant:

I. Weep holes were found to be choked. Such a major lapse went unreported and unnoticed by the Consultant.

II. In CCTV footage of the location, the cracks were visible much before the actual collapse which was not attended to during O&M.

III. No provisions of longitudinal Pucca drain (alongside the crash barrier) were made to drain off the carriageway surface runoff during

rains properly which caused uncontrolled flow in the backfill of retaining wall. Whereas the weep holes in the wall are not found to be

functioning as there are no water marks of seepage below the holes.

6. However, it is notified that the consultant had not reported any of the defects or deficiencies which are highlighted in the inspection

report. It is to be noted that as per Enclosure-B of description of services, bridge engineer shall undertake structure condition survey once

in a year and submit an inspection work. However, no bridge Engineer is deployed on site by the consultant in the subject project. The same

was duly notified by NHAI vide letter no.D-72 dated 09.01.2019.

7. Needless to state that the very purpose of entering into Consultancy Agreement and to avail services of an Independent Engineer is to

make the road travel safe, secure and easy for the public. Compromising on the road safety by avoiding the important terms and conditions

laid down in the Consultancy Agreement calls for a strict and immediate action. The very act of avoiding the terms laid down to ensure

safety of road users calls not only for condemnation of the Consultant but also for a punitive action against it.â??

18. The petitioners submitted their reply to the Show Cause Notice vide letter dated 05.08.2020. The petitioners were also granted an oral hearing on

17.08.2020. During the oral hearing, the petitioners requested for being supplied the Committee report as also the CCTV footage, which were being

relied upon by the respondent. Admittedly, the Committee report was supplied to the petitioner (M/s Wadia Techno-Engineering Services Ltd.),

however, the petitioners claim that the CCTV footage has not been supplied to them.

19. The respondent, thereafter issued the Impugned Circular dated 28.08.2020 debarring the petitioners for a period of one year. The said Circular,

however, did not contain any discussion on the replies submitted by the petitioners.

20. The petitioners submit that WGEL and SAI Consulting Engineer Ltd. were

debarred for a period of two years by similar Circular dated

28.08.2020. M/s. SAI Consulting Engineer Ltd. challenged the same by way of a petition under Section 9 of the Arbitration and Conciliation Act, 1996,

being O.M.P. (I) (COMM) No.287/2020. As the debarment order was non-speaking in nature, the same was withdrawn by the respondent with

liberty to issue a fresh, reasoned debarment order.

21. It seems that, realizing its mistake of passing an unreasoned order even against the petitioners, the respondent issued the Debarment Order dated

25.09.2020, now giving reasons for rejecting the representation of the petitioners against the Show Cause Notice.

22. The learned counsels for the petitioners challenged the Impugned Notices dated 28.08.2020 and 25.09.2020 on the ground that the accident had

occurred due to latent defects in the construction of the retaining wall, as was verified by the report from SVNIT as also the Committee report. The

construction had taken place under the supervision of M/s. SAI Consulting Engineer Ltd, which was the Independent Engineer at that time.

Thereafter, M/s Frischman Prabhu Ltd. was appointed as an Independent Engineer, who also could not notice such defects and did not report the

same. The petitioners could also not have noticed such defects as they were not apparent to naked eye and therefore, could not be blamed for not

having reported the same. They submit that the Impugned Order is, therefore, completely arbitrary and unsustainable.

23. They further submit that there is a violation of the Principles of Natural Justice inasmuch as the Committee Report was not supplied to the

petitioner (M/s. Varad Associates) and the CCTV footage on which much reliance has been placed by the respondent, was also not supplied to either

of the petitioners. In absence of these documents, the right of the petitioners to duly reply to the Show Cause Notice was seriously jeopardized and the

Impugned Order is liable to be set aside on this account alone.

24. On the other hand, the learned counsel for the respondent, placing reliance on various terms and conditions of the Consultancy Agreement submits

that the petitioners have clearly failed to discharge their duties and obligations under the agreement resulting in the unfortunate accident. He submits

that for a period of more than two years, the petitioners had not even cared to have a Bridge/Structural Engineer on site, though this was a mandatory

requirement under the Contract. He submits that apart from the latent defects, on a proper inspection of the site as was required under the Contract, the defects in the same would have been easily noticed by the petitioners. Failure to do so was merely because of the negligence of the petitioners and therefore, they have been rightly debarred by the respondent.

25. As far as non-supply of the CCTV footage is concerned, the learned counsel for the respondent submits that such footage was relied upon even

by the SVNIT team while making its observations and recommendations. He submits that it is inconceivable that the same was not in possession of

the petitioners. He submits that the same should have been obtained by the petitioners from the District Administration. He submits that even

otherwise the Impugned Orders cannot be set aside merely because of non-supply of such footage to the petitioners and in support of this submission,

he places reliance on the judgment of the Supreme Court in *Grosons Pharmaceuticals (P) Ltd. & Ors. vs. State of UP & Ors.*, (2001) 8 SCC 604. He

submits that no prejudice has been caused to the petitioners by non-supply of the CCTV footage.

26. I have considered the submissions made by the learned counsels for the parties. At the outset, certain principles enunciated by the Supreme Court

in relation to the consideration of challenge to orders blacklisting Contractors need to be reiterated. In *M/s Patel Engineering Ltd. vs. Union of India &*

Anr., (2012) 11 SCC 257, the Supreme Court held that the authority of a State to blacklist a person is a necessary concomitant to the executive power

of the State to carry on the trade or business and making of the contract for any purpose, etc. There need not be any statutory grant of such power.

The only legal limitation upon the exercise of such an authority is that the State has to act fairly and rationally without in any way being arbitrary-

thereby such a decision can be taken for some legitimate purpose; what is the legitimate purpose that is sought to be achieved by the State in a given

case can vary depending upon various factors. Before taking a decision to blacklist or debar a Contractor, it is necessary that an opportunity of

hearing and representation against the proposed action is given to the party likely to be affected, however, there is no inviolable rule that a personal

hearing of the affected party must precede every decision of the State. The Supreme Court further held that the doctrine of proportionality would also

have application to a decision of an authority to debar/blacklist a Contractor. Relying upon *Jagdish Mandal v. State of Orissa & Ors.*, (2007) 14 SCC

517, it was held that no doubt the order of blacklisting is likely to have some adverse effect on the business of the Contractor, however, this being

brought by its own making, power of judicial review will not be invoked to protect such private interest at the cost of public interest.

27. In *Kulja Industries Limited vs. Chief General Manager, Western Telecom Project BSNL & Ors.*, (2014) 14 SCC 731, the Supreme Court held that

the power to blacklist the Contractor, whether it be a contract for supply of equipment or for execution of any work whatsoever, is inherent in the

party allotting the Contract. There is no need for any such power being specifically conferred by statute or reserved by Contract. However, any such

decision is subject to judicial review when the same is taken by the State or any of its instrumentalities. This implies that any such decision will be open

to scrutiny not only on the touchstone of the Principles of Natural Justice, but also on the doctrine of proportionality. A fair hearing to the party being

blacklisted, thus, becomes an essential precondition for a proper exercise of the power and a valid order of blacklisting made pursuant thereto. The

order must be reasonable, fair and proportionate to the gravity of the offence and is subject to scrutiny by a Writ Court. The Supreme Court further

observed as under:-

â??20. It is also well settled that even though the right of the writ petitioner is in the nature of a contractual right, the manner, the method

and the motive behind the decision of the authority whether or not to enter into a contract is subject to judicial review on the touchstone of

fairness, relevance, natural justice, non-discrimination, equality and proportionality. All these considerations that go to determine whether

the action is sustainable in law have been sanctified by judicial pronouncements of this Court and are of seminal importance in a system

that is committed to the rule of lawâ?|â?|â?|

28. In *Daffodills Pharmaceuticals Ltd. & Anr. v. State of U.P. & Anr.*, 2019 SCC OnLine SC 1607, the Supreme Court reiterated the requirement of

grant of opportunity of hearing before taking the action of blacklisting.

29. At the same time, it has been held that the Court exercising writ jurisdiction under Article 226 of the Constitution of India does not sit as a Court of

appeal over such decision. The decision is, therefore, to be tested on the grounds of illegality, irrationality and procedural impropriety. Unless found to

be totally arbitrary, unreasonable or mala fide, amongst other such grounds, the High Court in exercise of its power under Article 226 of the

Constitution of India does not generally interfere with such decision of the authority. (Michigan Rubber (India) Ltd v. State of Karnataka & Ors.,

(2012) 8 SCC 216; Master Marine Services (P) Ltd. v. Metcalfe & Hodgkinson (P) Ltd. & Anr., (2005) 6 SCC 138; Kanwar Singh Yadav v. AIIMS

& Ors., MANU/DE/0165/2019.)

30. Tested on the above parameters, in the present case, admittedly the respondent had issued two Show Cause Notices dated 17.06.2020 and

27.07.2020 to the petitioners before taking the Impugned Decision. The Impugned Decision was also preceded by an opportunity of oral hearing

granted to the petitioners on 17.08.2020.

31. The petitioners, as has been mentioned hereinabove, have alleged violation of Principles of Natural Justice on the ground that the CCTV footage

and, in case of M/s. Varad Associates, the Committee report were not supplied to the petitioners, thereby violating Principles of Natural Justice. I,

however, do not find any merit in the said submission. As far as the CCTV footage is concerned, the report of the SVNIT also relied upon the same.

As far as the Committee report is concerned, admittedly the same was given to the petitioner (M/s. Wadia Techno-Engineering Services Ltd.) after

an oral hearing. The said petitioner also made representations against the same. In any case, the Impugned Order dated 25.09.2020, apart from the

CCTV footage, has given other reasons for holding the petitioners negligent. Paragraphs 11, 14 and 15 of the Impugned Order dated 25.09.2020 are

quoted hereinbelow:-

â??11. In response to above Show Cause Notice dated 27.07.2020, you have submitted your reply vide letter dated 05.08.2020. The reply

submitted by you were found unacceptable due to the following reasons;

i. With reference to choking of weep holes, your reply is self-contradictory. While at one point you are submitting that the weep holes were

working last year, at another point you are claiming that the filter media placed behind the wall during construction stage was in the

category of silty gravel which is not suitable to serve purpose as filter media.

Further, as per investigation Report dated 10.07.2020, non-availability of effective filter medium as per specifications behind the wall has added problem due to buildup of pore water pressure

causing additional horizontal thrust as pore water could not seep through the available weep holes.

ii. With reference to no provisions made for longitudinal Pucca drain (alongside the crash barrier) to drain off the carriageway surface

runoff properly during rains which caused uncontrolled flow in the backfill of retaining wall, you have submitted that the provision of

longitudinal Pucca drain is out of your scope. Further, longitudinal gradient in the design approved bridge is quite high in comparison to the

camber. Therefore, the provision of longitudinal drain was not envisaged. In this regard, as per clause 6.3 of the Consultancy Agreement,

in separate section of the O&M Inspection Report, the Independent Engineer shall describe in reasonable details the lapses, defects or

deficiencies observed by it in O&M of the project highway. Further, it is pertinent to mention that as per Investigation Report dated

10.07.2020, one of the causes of failure is that non availability of L-drains causes entire surface water to flow towards the retaining wall

travelling through the earthen portion between edge of carriage way and top of retaining wall. Such type of uncontrolled flow might have

caused cracks in the backfill of the retaining wall in the long run since its completion and due to heavy rain on 8th June, 2020, an excess

percolation of water through these cracks might have developed an additional pore water pressure creating more horizontal thrust causing

the failure. Hence, the reply submitted by you is not acceptable.

iii. With reference to the cracks visible much before the actual collapse, you have submitted that the portion is not part of Structural design

but to prevent more ingress water, the Concessionaire filled this portion by plain cement surface in limited length near VUP, hence crack on

to cement surface is not a default of O&M inspection. In this regard, it is again submitted that as per clause 6.3 of the Consultancy

Agreement, in separate section of the O&M Inspection Report, the Independent Engineer shall describe in reasonable detail the lapses,

defects or deficiencies observed by it in O&M of the project highway. Such kind of

deficiencies which you are pointing out now must have been included in your inspection reports. Hence, the same is not acceptable.

14. Further, it is to be noted that as per Enclosure-B of description of services, Bridge Engineer shall undertake structure condition survey

once in a year and submit an inspection work. However, no Bridge Engineer is deployed on site by the Consultant in the subject project.

The same was duly notified by NHA vide letter no. D-72 dated 09.01.2019.

15. Needless to state that the very purpose of entering into Consultancy Agreement and to avail services of an Independent Engineer is to

make the road travel safe, secure and easy for the public. Compromising on the road safety by avoiding the important terms and conditions

laid down in the Consultancy Agreement calls for a strict and immediate action. The very act of avoiding the terms laid down to ensure

safety of road users calls not only for condemnation of the Consultant but also for a punitive action against it.â??

32. It has been repeatedly held that Principles of Natural Justice cannot be put in a strait-jacket. In *Grosos Pharmaceuticals (supra)*, the Supreme

Court rejected the contention that it was incumbent upon the respondent/ authority to have supplied the material on the basis of which the charges

against the appellant/Contractor was based. It was held that this was not a mandatory requirement of the principles of *audi alteram partem*; it was

sufficient requirement of law that an opportunity to show cause was given to the Contractor before it was blacklisted.

33. In *Dharampal Satyapal Limited v. Deputy Commissioner of Central Excise, Gauhati & Ors.*, (2015) 8 SCC 519, the Supreme Court reiterated that

the Principles of Natural Justice are flexible principles; they cannot be applied in any strait-jacket formula.

34. Tested on the above principles, it cannot be said that in the present case there has been a violation of the Principles of Natural Justice that must

result in the quashing of the Impugned Orders. The CCTV footage has been relied upon by SVNIT in its report. Some video footage has also been

discussed by the petitioners in their reply. In any case, the order is based on other material and reasoning as well. As far as non-supply of Officers

report to M/s. Varad Associates is concerned, admittedly the same was supplied to M/s. Wadia Techno-Engineering Ltd., which is an associate of

M/s. Varad Associates in the Contract. M/s. Wadia had also filed further representation to the respondent on receipt of the report.

35. As far as the submissions on merit of the Impugned Order is concerned, as noted hereinabove, the respondent has discussed the replies given by the petitioners in detail while rejecting such contentions of the petitioners.

36. The role and functions of the Independent Engineer are mentioned in Clause 3.1 of the Agreement which is reproduced hereinunder:-

3.1. Role and functions of the Independent Engineer

3.1 The role and functions of the Independent Engineer shall include the following:

- (i) review of the Drawings and Documents as set forth in Paragraph 4;
- (ii) determine the Project Facilities Completion Schedule;
- (iii) review, inspection and monitoring of Construction Works as set forth in Paragraph 5;
- (iv) conducting tests on completion and construction and issuing Completion Certificate as set forth in Paragraph 5;
- (v) review, inspection and monitoring of O&M as set forth in Paragraph 6;
- (vi) review, inspection and monitoring of Divestment Requirements as set forth in Paragraph 7;
- (vii) determining, as required under the Agreement, the costs of any works or services and/or their reasonableness;
- (viii) determining, as required under the Agreement, the period or any extension thereof, for performing any duty or obligation;
- (ix) assisting the Parties in resolution of disputes as set forth in Paragraph 9; and
- (x) undertaking all other duties and functions in accordance with the Agreement.

37. Clause 6 of the Agreement provides for duties of the Independent Engineer during the Operation and Maintenance as under:-

6. Operation & Maintenance

6.1 The Independent Engineer shall review the annual Maintenance Programme furnished by the Concessionaire and send its comments

thereon to the Authority and the Concessionaire within 15 (fifteen) days of receipt of the Maintenance Programme.

6.2 The Independent Engineer shall review the monthly status report furnished

by the Concessionaire and send its comments thereon to the

Authority and the Concessionaire within 7 (seven) days of receipt of such report.

6.3 The Independent Engineer shall inspect the Project Highway once every month, preferably after receipt of the monthly status report

from the Concessionaire, but before the 20th (twentieth) day of each month in any case, and make out an O&M Inspection Report setting

forth an overview of the status, quality and safety of O&M including its conformity with the Maintenance Requirements and Safety

Requirements. In a separate section of the O&M Inspection Report, the Independent Engineer shall describe in reasonable detail the lapses,

defects or deficiencies observed by it in O&M of the Project Highway. The Independent Engineer shall send a copy of its O&M Inspection

Report to the Authority and the Concessionaire within 7 (seven) days of the inspection.

6.4 The Independent Engineer may inspect the Project Highway more than once in a month, if any lapses, defects or deficiencies require

such inspections.

6.5 The Independent Engineer shall in its O&M Inspection Report specify the tests, if any, that the Concessionaire shall carry out or cause

to be carried out of the purpose of determining that the Project Highway is in conformity with the Maintenance Requirements. It shall

monitor and review the results of such tests and the remedial measures, if any, taken by the Concessionaire in this behalf.

6.6 In respect of any defect or deficiency referred to in Paragraph 3 of Schedule-K, the Independent Engineer shall, in conformity with

Good Industry Practice, specify the permissible limit of deviation or deterioration with reference to the Specifications and Standards and

shall also specify the time limit for repair or rectification of any deviation or deterioration beyond the permissible limit.

6.7 The Independent Engineer shall determine if any delay has occurred in completion of repair or remedial works in accordance with the

Agreement, and shall also determine the Damages, if any payable by the Concessionaire to the Authority for such delay.

6.8 The Independent Engineer shall examine the request of the Concessionaire for closure of any lane(s) of the carriageway for

undertaking maintenance/repair thereof, keeping in view the need to minimize disruption in traffic and the time required for completing

such maintenance/repair in accordance with Good Industry Practice. It shall grant permission with such modifications, as it may deem

necessary, within 3 (three) days of receiving a request from the Concessionaire. Upon expiry of the permitted period of closure, the

Independent Engineer shall monitor the re-opening of such lane(s), and in case of delay, determine the Damages payable by the

Concessionaire to the Authority under Clause 17.7

6.9 The Independent Engineer shall monitor and review the curing of defects and deficiencies by the Concessionaire as set forth in Clause

19.4.

6.10 In the event that the Concessionaire notifies the Independent Engineer of any modifications that it proposes to make to the Project

Highway, the Independent Engineer shall review the same and send its comments to the Authority and the Concessionaire within 15 (fifteen)

days of receiving the proposal.

6.11 The Independent Engineer shall undertake traffic sampling, as and when required by the Authority, under and in accordance with

Article 22 and Schedule-O.â??

38. The RFP required the petitioner to appoint a Bridge/Structural Engineer and also defined his/her responsibilities as under:-

â??BRIDGE / STRUCTURAL ENGINEER

The Bridge Engineer shall be responsible for supervising the works of existing or proposed bridges, interchanges and any other structure

related to the Project Highway. He shall undertake structure condition survey once in a year and submit an exclusive report on repair and

rehabilitation requirements of bridges/ structures. He shall also inspect the bridge rehabilitation and repair works which are required to be

undertaken by the Concessionaire. He shall review and suggest modifications to the maintenance manual/ programme relating to his

duties.â??

39. The petitioners though claim to have appointed a Bridge/Structural Engineer, admitted in their reply that she had never visited the site for a

physical inspection. This, in my opinion, was a serious lapse.

40. The learned counsels for the petitioners submitted that this was not the major ground on which the impugned action has been taken by the

respondent. However, I do not find any substance in this submission. This is clearly one of the grounds taken by the respondent not only in the Show

Cause Notice but also in the Impugned Order and cannot be said to be minor.

41. The learned counsels for the petitioners have submitted that the reports in terms of the Agreement were duly submitted to the respondent and the

respondent knew fully well that the Bridge/Structural engineer had not visited the site, however, never objected to the same. In my opinion, this would

not absolve the petitioner of the lapse, though it may warrant an inquiry by the respondent on what action it took on receipt of such reports and to fix

responsibility for the same on its own officers as well.

42. As far as the submission of the petitioners that the defects being latent in nature and therefore the petitioners could not have been penalized, the

respondents have in detail discussed the reply submitted by the petitioners in the Impugned Order. The reasons for the rejection of the reply of the

petitioners by the respondent have been reproduced hereinabove. Such reasons cannot be termed as arbitrary or unreasonable. The same clearly

reflect the lapses on part of the petitioners. It may be true that the defects in the wall were latent in nature and therefore may not have been

detectable to an untrained eye without proper investigation, however, the respondent has come to a conclusion that the petitioners, with the

responsibilities cast on them, should have been able to detect the same and remedied the same in time so as to prevent the accident in question from

taking place. This Court cannot sit in appeal over such findings. The role and responsibility of the petitioners as Independent Engineer have been culled

out hereinabove. Keeping in view the same, it cannot be said that the decision of the respondent is so arbitrary or irrational so as to warrant an

interference by this Court.

43. In view of the above, I find no merit in the present petitions. The same are dismissed. There shall be no order as to cost.