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IN THE HIGH COURT OF KARNATAKA AT BENGALURU

DATED THIS THE 14th DAY OF SEPTEMBER, 2021

PRESENT

THE HON'BLE MR.SATISH CHANDRA SHARMA,
ACTING CHIEF JUSTICE

AND

THE HON'BLE MR. JUSTICE SACHIN SHANKAR MAGADUM

WRIT PETITION NO.2065/2021 (GM-RES-PIL)

BETWEEN

AIRPORTS AUTHROITY EMPLOYEES UNION
(REGD NO.3515)
MANGALURU INTERNATIONAL AIRPORT
BAJPE MANGALURU -574 142
REPRESENTED BY ITS SECRETARY
SRI SHRAVAN KUMAR
AGED ABOUT 46 YEARS

...PETITIONER

(BY SRI ASHOK HARANAHALLI, SENIOR ADV. FOR
SRI.VINAYAKA B.VISHNU BATTA, ADV.)

AND

1. UNION OF INDIA
SECRETARY TO GOVERNMENT
MINISTRY OF CIVIL AVIATION
RAJIV GANDHI BHAVANA
SAFDARJUNG AIRPORT
NEW DELHI-110 003
REPRESENTED BY ITS SECRETARY

2. AIRPORTS AUTHORITY OF INDIA
REPRESENTED BY ITS SECRETARY
TO GOVERNMENT
MINISTRY OF CIVIL AVIATION
RAJIV GANDHI BHAVAN
SAFDARJUNG AIRPORT

NEW DELHI-110 003
REPRESENTED BY ITS CHAIRMAN

3 . THE REGIONAL EXECUTIVE DIRECTOR
AIRPORTS AUTHORITY OF INDIA
OPERATIONAL OFFICE
SOUTHERN REGION CHENNAI AIRPORT
CHENNAI

4 . AIRPORTS DIRECTOR
AIRPORTS AUTHORITY OF INDIA
MANGALURU INTERNATIONAL AIRPORT
BAJPE MANGALURU

5 . AIRPORTS ECONOMIC REGULATORY
AUTHORITY OF INDIA
RAJIV GANDHI BHAVAN
SAFDARJUNG AIRPORT
NEW DELHI-110 003
REPRESENTED BY ITS CHAIRMAN

6 . ADANI ENTERPRISES LIMITED
ADANI HOUSE
NEAR MITHAKHALI SIX ROAD,
NAVARANGPURA
AHMEDABAD-380 009
GUJARAT INDIA

…RESPONDENTS

(BY SRI M.B.NARAGUND, ADDL. SOLICITOR GENERAL A/W
SRI GOWTHAMDEV C ULLAL, CGSC FOR R4
SRI SANTHISH S.NAGARALE, ADV. FOR R-2 TO R-4
SMT.MEENA VENUGOPAL AND
SRI.B.PRAMOD, ADV. FOR R6 AND R7)

THIS WRIT PETITION IS FILED UNDER ARTICLES 226 & 227 OF THE CONSTITUTION OF INDIA PRAYING TO CALL FOR THE RECORDS PERTAINING TO ENTIRE BIDDING PROCESS PURSUANT TO THE DECISION OF THE CABINET COMMITTEE DTD 08.11.2018 VIDE ANNEXURE-C AND DECLARE THAT THE ENTIRE BIDDING PROCESS PURSUANT TO THE CABINET COMMITTEE DECISION DTD 08.11.2018 AND THE ACTION OF THE RESPONDENT IN CALLING FOR IMPUGNED REQUEST FOR PROPOSAL TO ENTER INTO A CONCESSION AGREEMENT AS ILLEGAL AND WITHOUT AUTHORITY OF LAW IN SO FAR AS MANGALURU AIRPORT IS CONCERNED AND ETC.

THIS WRIT PETITION COMING ON FOR PRELIMINARY HEARING AND HAVING BEEN HEARD AND RESERVED FOR ORDERS, THIS DAY, **ACTING CHIEF JUSTICE,** PRONOUNCED THE FOLLOWING:

ORDER

The petitioner-Airport Authority Employees (AAE) Union before this Court is a registered and recognized Trade Union of employees functioning under the Airports Authority of India (AAI) has filed this present petition by way of a PIL being aggrieved by the decision of the Cabinet Committee dated 08.11.2018 in respect of privatisation of Airports, the subsequent bidding process in the matter as well as Cabinet decision dated 03.07.2019 accepting the bid of respondent No.6. Prayers have also been made for quashing of the consequential Concession Agreement dated 14.02.2020. .

2. The petitioner-AAE Union in the writ petition has stated that the AAI was constituted by an Act of the Parliament and came into existence on 01.04.1995 by merging erstwhile National Airports Authority of India and International Airports Authority of India. The Airports Authority of India manages nearly 129 Airports in India which includes 23 International Airports, 09 Customs Airports, 77 Domestic Airports and 20 Civil / Defence Enclaves. It has

been further stated that the Union Cabinet held on 08.11.2018 granted an approval for leasing out six Airports namely Ahmedabad, Jaipur, Lucknow, Guwahati, Thiruvanatapuram and Mangaluru Airports under the Public Private Partnership (PPP). The Cabinet Committee also constituted Empowered Group of Secretaries, (EGOS) headed by CEO, NITI Ayog on the issue of privatization of Airports through Public Private Partnership Appraisal Committee (PPPAC) under the PPP. It has been further stated that based upon the Cabinet Note dated 08.11.2018, the AAI prepared and submitted the PPPAC Memo, Draft Request for Proposal (RPF-Financial Bid), Draft Concession Agreement to PPPAC on 06.12.2018 and PPPAC in turn approved 'In Principle Approval' and after obtaining the approval, Request for Proposal (RFP) and Draft Concession Agreement (DCA) was uploaded on the website on 14.12.2018. It has been further stated, as per the RFP the entity quoting the highest "per passenger fee" for domestic passengers was to emerge as the highest bidder.

3. The petitioner's contention is that such a stand was contrary to the international standards as well as the norms of the bidding process. There was no base price fixed

in the matter and finally nine bidders participated in the bidding process. The DCA had been revised on 08.02.2019 and the Technical Bids were opened by AAI on 16.02.2019 and the financial bids were published on 25.02.2019 and the results were also published on the same day. It has been further stated that respondent No.6-M/s. Adani Enterprises emerged as the highest bidder for all six Airports. It has been further stated that the Cabinet Committee in its meeting held on 03.07.2019 granted approval in respect of the bid offered by respondent No.6 for three Airports including the Mangaluru Airport. The petitioner-AAE Union represented and took objection in the matter in respect of privatisation of the airport by submitting a representation on 03.07.2019. The petitioner-AAE Union in view of this has raised various grounds before this Court and the contention of the petitioner-AAE Union is that the entire action of the respondents in respect of privatisation of the airports is contrary to the statutory provisions as contained under Sections 12 and 12A of the Airports Authority of India Act, 1994 (for short 'AAI Act of 1994'). Under Section 12A of the Act, only certain functions of the Airport can be leased out

and the concession Agreement executed in the present case is much beyond the scope of provisions of the Act. The petitioner-AAE Union has contended that following irregularities took place in the matter, which are reproduced as under:

i) Criteria of selection of Airport;

ii) Undue urgency on the part of Civil Aviation Ministry/AAI;

iii) Undue delay on the part of Central Government in granting Final Approval;

iv) Absence of Feasibility study and its report;

v) Absence of Minimum Reserved "Per Passenger Fee";

vi) Lack of Transparency;

vii) Revenue loss to AAI on "Per Passenger" ;

viii) Non sharing of Commercial / Cargo revenue;

ix) Comparison with Bhogapuram project

x) Huge variation in rates quoted by bidders as compared to Bhogapuram project;

xi) All bids who accepted in respect of same private partner;

xii) Violations of Aircrafts Rule, 1937;

xiii) Modifications / major deviations in the bidding parameters as compared to Delhi International Airport (DIAL) and Mumbai International Airport (MIAL).

4. It has been further contended that the AAI normally follows two stage bidding process, which consists of 'Request for Qualification' and 'Request for Proposal' and the said procedure has not been followed in the present case and the respondents took only two months for finalizing the tender process.

5. It has been further contended that the AAI has deliberately avoided the "Operation and Maintenance" experience on eligible projects in the Airport Sector which was an essential condition in all the previous tenders and therefore the entire process deserves to be scrapped by this Court. It has been further contended that AAI did not carry out any scientific study for analyzing the impact of PPP model privatization and even did not specifically mention the minimum passenger fee to be quoted by the Bidder giving room for corporates to generate windfall profit from the existing financially viable project. A ground has been raised that the decision of respondent No.1-Union of India to grant "in Principle Approval" and the 'Request for Proposal' issued by respondent No.2-AAI for PPP is without authority of law. The AAI Act of 1994 does not provide for any type of transfer of property other than a lease and the impugned decision

taken by the respondents and the 'Request for Proposal' are beyond the scope of the Act, 1994 and the respondents have no authority of law to issue such proposals.

6. Another ground raised by the petitioner-AAE Union is that under Section 12-A of the AAI Act of 1994, the AAI can lease out its premises for the purpose of carrying out some of the functions. In the instant case, the entire Airport has been handed over to a private entity. It has been further contended that the impugned concession granted in favour of respondent No.6 i.e., Adani Mangaluru Airports Limited for a period of 50 years violates Section 21 of the Airports Authority of India Act, which provides a maximum period of 30 years for making any contracts and therefore, the orders passed by the respondent No.1-Union of India accepting the tender deserve to be set aside.

7. Another ground raised by the petitioner-AAE Union for setting aside the order passed by the Government of India as the respondents are parting with the property of the Government of India in the name of lease is nothing but a colorable exercise of power. It has been further contended that the deviations from the PPPAC guidelines and general

norms for the bidding process and irregularities in the decision making process vitiates the entire bidding process. Another ground has been raised stating that the action of the respondents is highly arbitrary and illegal. The AAI has spent huge amounts from the State Exchequer for the development of six airports and if these airports are privatized, without there being any authority and without ensuring corresponding participation to the Government, it will cause huge loss to the revenue starved public exchequer. The petitioner-AAE Union has further stated that the action of the Government of India and the AAI amounts to handing over the land and buildings worth several crores, for throw away prices to private persons, which is against the national interest.

8. Another ground raised by the petitioner-AAE Union is that as per the AAI Act of 1994, the AAI was constituted for the better administration and cohesive management of airports and civil enclaves where the air transport services are operated or are intended to be operated and for all aeronautical stations and for the purposes of establishing or assisting in the establishment of airports and the matters connected therewith or incidental

thereto. Therefore, the impugned decisions of the respondent-Union of India are tainted with *mala fide* and liable to be declared as illegal.

9. It has been reiterated in the grounds that, none of the provisions of the AAI Act of 1994 permit parting of the property with the private sector. However, in the name of leasing of the Airport, the respondents have entered into a concession agreement for handing over the entire Airport to a private entrepreneur which is glaringly a colorable exercise of power.

10. Lastly, a ground has been raised stating that respondents-1 and 2 are in a position of a trustee in respect of the public property under their charge and discretion. The Government land is wealth of the State which the respondents should deal with, in a *bona fide* manner and in conformity with law. The respondents have deviated from the trust reposed in them by the people under the Constitution. It is further stated that the respondents have failed to discharge their duties to protect the assets of the State. The petitioner-AAE Union has prayed for the following reliefs:

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i. Call for Records pertaining to entire bidding process pursuant to the decision of the Cabinet committee dated 08.11.2018 vide Annexure 'C'.

ii. Declare that the entire bidding process pursuant to the Cabinet Committee decision dated 08.11.2018 and the action of the Respondent in calling for impugned Request for Proposal to enter into a Concession Agreement as illegal and without authority of law in so far as Mangaluru Airport is concerned.

iii. Issue a Writ of Certiorari and quash the decision of the 1st Respondent dated 03.07.2019 approving the bid of the 6th Respondent pursuant to Request for Proposal with respect to Mangaluru Airport vide Annexure 'F'.

iv. Issue a Writ of Certiorari and quash the impugned Request for proposal bearing No.2018_AAI-19459-1 vide Annexure 'C'.

v. Issue a writ of Certiorari and quash the impugned Concession agreement dated 14.02.2020 vide Annexure-'A'.

vi. Issue such other Writs/Orders/directions which may be deemed fit in the circumstances of the case, in the interest of justice and equity.

11. The Union of India-respondent No.1 has filed a detailed reply in the matter and at the outset it has been stated that the petition filed by the petitioner-AAE Union suffers from delay and laches. The bidding process was initiated in 2018 and the petitioner has sought for quashing the consequential concession agreement, which was executed on 14.02.2020. It has been further stated that after execution of the Concession Agreement dated 14.02.2020, the works have progressed to an advanced stage and at this stage, the question of interference by this Court does not arise. It has been further stated that the petitioner-AAE Union relying on the bye-laws cannot be allowed to challenge the policy decisions and its implementation before this Court on the pretext of PIL which is nothing but an effort to raise issues which are in the nature of private interest. The Union of India-respondent No.1 has further stated that the Union Cabinet on 08.11.2018 accorded "in principle" approval for leasing out six airports of AAI i.e., Ahmedabad, Jaipur, Lucknow, Guwahati, Tiruvananthapuram and Mangaluru for operation, Management and development under Public Private Partnership and the Union Cabinet also decided to constitute

Empowered Group of Secretaries (EGOS) headed by CEO, NITI Aayog. One more decision was taken by the Union Cabinet that the whole PPP process of these Airports was to be carried out through EGOS under the CEO, NITI Aayog and PPPAC under the Department of Economic Affairs. The respondents have further stated that civil aviation is a subject in the central list under the Constitution of India and the subject falls within the legislative competence of the Parliament. The Aircraft Act, 1934 and the Rules framed thereunder governs the development, maintenance and operation of all Airports and it is the Central Government which has the sole right to grant a licence for setting up an airport. Further, the Aircraft Rules, 1937 permits airports other than Government airports to be owned by the citizens of India or companies or corporations registered and having a principal place of business in India. It is further stated that the AAI was constituted under the statutory provisions as contained under the AAI Act of 1994 by the Parliament and the same came into force on 01.04.1995 merging erstwhile National Airports Authority and International Airports Authority of India and in the year 1997, the Airports Infrastructure Policy, 1997 came into force with an object to

inter alia provide boost to international trade and tourism; to provide airport capacity ahead of the demand; to enhance airport facilities to make the airports eco friendly and to achieve higher level of customers satisfaction, to provide a market orientation to the present structure, bridge the resource gap and encourage greater efficiency and enterprise in the operation of the airports, through the introduction of private capital and management skills. It has been further contended that under the Airports Infrastructure policy, approval was granted by the Union Cabinet for construction of Greenfield airports including shamshabad near Hyderabad and Devanahalli near Bengaluru in the year 2000. Both the airports started commercial operations in 2008 and they are now major airports of the country. The Government of India has also entered into the Concession Agreements with the respective PPP partners of Bengaluru and Hyderabad airports and receives Concession fees from them @ 4% of their annual gross revenue. It has been further stated that the AAI Act of 1994 was amended in 2003 and Section 12A was inserted therein which empowers the AAI, with the approval of Government of India, to lease the premises of an airport to carry out some of its functions, in the public interest or in

the interest of the better management of the airports. It has been further stated that a policy decision was taken for granting approval for leasing out six airports and the Union Cabinet, as stated earlier has granted approval on 08.11.2018. The AAI issued a tender document on 14.12.2018 with single stage 2-envelope system and the technical bids were opened on 16.02.2019 and the financial bids were opened on 25.02.2019. It has been further stated that respondent No.6 has not handed over all the functions under Section 12(3) of the AAI Act of 1994. Only 07 functions out of 18 functions are the subject matter of PPA and the present petition is a frivolous petition without there being any substance in it.

12. A reply has also been filed by respondent Nos.2, 3 and 4 supporting the stand of respondent No.1-Union of India and again reliance has been placed upon the judgment delivered in the case of **Balco Employees' Union (Regd.) v. Union of India and Others** reported in (2002) 2 SCC 333 and have vehemently argued before this Court that in the aforesaid case it has been held that the process of disinvestment is a policy decision involving complex economic factors. It has been further argued that this Court

should refrain from interfering with such policy matters. It has also been argued that the action of the respondents is in consonance to the statutory provisions as contained under the AAI Act of 1994 and no irregularity or illegality has taken place in the matter.

13. In response to the objections raised by the petitioner-AAE Union, respondents-2 to 4 have answered all the grounds as under:

> **"32. Regarding the para no. 13**: The averments made by the petitioner in para No.13 are unwarranted and as such does make any case of any alleged irregularity in the bidding process.
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> i. **Regarding the Criteria of Airport Selection**:
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> In response to this para, the criteria adopted by 2nd respondent for selection of airports were both Quantitative (viz. revenue, profitability and commercial aspects) and qualitative (viz. growth potential, location and economic attractiveness). Detailed study has been conducted in this regard and outranking model technique used to identify the extents to which a preference for one airport over other airports was arrived at. Based on these criteria only, 2nd respondent recommended the six airports for PPP mode of operation.
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> ii. **Regarding undue urgency on the part of Civil Aviation Ministry/Airport Authority of India**: The averments made by petitioner are vague and baseless. At Annexure-D to the petition the petitioner has produced the approval of the PPPAC along the copy of the Record of Discussion of the 85th PPPAC meeting held on 11.12.2018 is enclosed , wherein it can be seen that every key issues was discussed, decided and recorded. It is pertinent to mention here that after the Guidelines, The Manual of Procurement of Goods was issued by GoI,

Ministry of Finance and Department of Expenditure in 2017. As per the manual, bidding system are designed to achieve a balance between countervailing needs of Right Quality, Rights Source and Right Price under different complexities/criticality of technical requirements and value of procurements. The manual prescribes various bidding systems which inter-alia are (a) a Single Stage Bidding System, (b) Single Stage Two Envelops System (Two Bid System); (c) Single Stage Multi Envelopes System with pre qualification; (d) Pre-qualification Bidding (PQB); and (e) Two Stage Bidding. In the present case, Single Stage Two Envelopes System was adopted. Thus, the PPPAC proceeded in accordance with the provisions of above Manual. Though RFQ was absent, there was a double envelope clearance envisaged by the RFP itself. Hence, there was no irregularity in adopting the single stage two envelopes system as prescribed in the Manual brought by the Department of Expenditure which itself is a two system.

iii. **Regarding Undue delay on the part of Central Government in Giving Final Approval**: There was no irregularity in completing the bidding process with the timeline specified in the Request for Proposal documents vis-à-vis delay in final approval granted by the Union Cabinet in awarding the airports to the successful bidder. The same issue was taken up by the AAEU, Calicut Branch in their writ petitions filed in the Kerala High Court. In this connection Hon'ble Kerala High Court observed as under (Page No.79, Paragraph No.50):

"As to the haste in granting approval, it has to be stated that when usually the executives are accused of lethargy due to red-tape; when a decision is taken with promptitude, then there is allegation of undue haste. The three weeks provided for granting approval in the guidelines is not the minimum period, but the maximum. There is also no valid ground raised in support of the allegation that there was an undue haste to complete the procedure before the Code of Conduct for the General Elections of 2019 came to be enforced. If an elected Government actively pushed its policy to implement what it thinks is good for the Country, there cannot be any allegation raised on that sole count without something more; which is absent. The allegation itself arose only when AEL turned out to be the successful bidder; which we can find only as a result

of the higher quote made, obviously on a better analysis of the proposal than the other bidders and may be, for all we know fortuitous. Pertinent also is the fact that the Letter of Award was issued only after the new Government took office. The fact that the very same political dispensation came back to power was also not predictable"

The petitioner had raised this issue in the proceedings before the Hon'ble High Court of Kerala, which was rejected by the Hon'ble High Court.

iv. **Regarding Absence of Feasibility Study and its Report**: It is humbly submitted that there is no requirement of any feasibility study for brownfield airports (airports which are already in operation). Feasibility studies are conducted for Greenfield airports (new airports that are to be established). Mangaluru airport are brownfield airport. therefore there is no requirement of any feasibility study for this airport which is already established and proved its feasibility.

v. **Regarding the Absence of Minimum Reserved "Per Passenger Fee":** It is humbly submitted that the value of Reserve Price was fixed by AAI, which was approved by Empowered Group of Secretaries in its meeting held on 22.02.2019. However, the same was not disclosed to any bidders. This is also does not make out a case for any alleged irregularity in the bidding process.

vi. **Lack of Transparency:** The averment made in this para is denied as false. It is humbly submitted that the petitioner has alleged that the information (including draft concession agreement) was denied to him under RTI Act and has enclosed a copy of reply given by the 2nd respondent in response to his RTI Application dated 26.12.2019 along with the above writ petition as annexure H. On a perusal of the RTI application of the Petitioner, it can be seen that the Petitioner never asked for a copy of draft Concession Agreement.

It is humbly submitted that the draft Concession Agreement was not a public document but a priced document, which was shared only with the entities that paid bid processing fee to 2nd Respondent. The Bid processing fee for each of six airports, is as under:

Thiruvananthapuram INR389400 or USD 5428
Mangaluru INR755200 or USD 10502
Ahmedabad INR802400 or USD 11210
Jaipur INR873200 or USD 12154
Lucknow INR790600 or USD 11092
Guwahati INR708000 or USD 9912

Upon handing over of 03 airports (viz.Mangaluru, Lucknow and Ahmedabad) to the Concessionaire, the signed concession agreement, along with signed Concession Agreements are available in public domain on the website of AAI.

vii: **Regarding Revenue Loss to AAI on "Per Passenger":** The averment made in this para is incorrect and is denied. It is humbly submitted that information given by the petitioner is purely a misrepresentation of facts.

The veracity of figures brought out by the petitioner is not confirmed. It is also absurd to take a month's revenue and derive yearly revenue. Further, it is also not known whether this revenue includes revenue from CNS/ATM Services and Cargo Services. Since only Airport Services are handed over to the Concessionaire, the revenue that are earned from Airport Services (other than CNTS/ATM and Cargo) are to be taken into account for any comparison purposes.

The details of Revenue and Expenditure for the Airport Services excluding revenue from CNS/ATM and cargo services, relating to three airports for the FY 2017-18 vis-à-vis Concession fee provisionally calculated for these three airports for FY 2020-21 are given as under:

Airport	Revenue (Rs in Crores) 2017-18	Expenditure (Rs in Crores) 2017-18	Profit Before Tax (Rs in Crores 2017-18	Estimated Concession Fee to be received by AAI for the FY 2020-21
Lucknow	236.78	125.46	111.32	138.32
Jaipur	145.90	112.93	32.97	146.81
Guwahati	135.40	90.95	44.45	109.09

The Concession Fee that AAI would receive from the Concessionaire **is Profit Before Tax.** In addition to the Concession Fee, the revenue that are generated by AAI from CNS/ATM services and Cargo services shall continue to accrue to AAI.

Apart from the above, as per Clause 6.5 of the Concession Agreement, the concessionaire would pay to AAI employee cost calculated on CTC basis in respect of all the Select Employees (in the cadre of AGM and below) for a period of three years from the date of handing over the airports. The Concessionaire is also required to absorb 60% of the Select Employees, as per contractual provisions. In respect of unabsorbed Select Employees, the Concessionaire shall have to pay AAI employee cost calculated on CTC basis, irrespective of their place of posting upon redeployment by AAI till their retirement.

In addition, AAI also will get back the investments made at the Airport, from the Concessionaire, as upfront amount within 90 to 120 days from the date of COD, as specified in the Concession Agreement. Further, AAI is not required to spend any amount on account of operational cost or capital expenditure at these Airports as the same would be incurred by the Concessionaire.

The Profit Before Tax for the FY 2017-18 (when AAI operated this airport) vis-à-vis the estimated concession Fee for the FY 2020-21 (being Profit Before Tax in the hands of AAI) reveals the fact how AAI benefits financially from the Concession Fee alone. Additionally, as stated above, AAI will also get the revenue from Cargo, CNS/ATM Services and reimbursement of unabsorbed employee costs.

In respect of future airport expansion plan, the AERA (Airports Economic Regulatory Authority) is the competent authority to determine the tariff. Even if AAI undertakes expansion activities at these airports, AAI has to approach AERA for tariff determination. All the airport operators (whether AAI or private) of major airports (or airports declared by the Government of India) have to approach AERA to get the tariff determined.

viii. **Non Sharing of Commercial/ Cargo Revenue:** It is humbly submitted that Clause 19.4 of the Concession Agreement states as under:

19.4.1 (a) The Concessionaire shall upgrade, develop, operate and maintain the Cargo Facilities in accordance with the provisions of this Agreement, Applicable Laws, Applicable Permits, relevant ICAO Documents and Annexes and Good Industry Practice.

19.4.1 (b) Notwithstanding anything to the contrary provided in this Clause l9.4 and Clause 23.5, it is clarified that, where Cargo Facilities have been earmarked for AAICLAS in Schedule A (i) the Concessionaire will not be responsible for operations development maintenance and management thereof, nor shall the Concessionaire be bound by the obligations set out elsewhere in this Clause 19.4; and (ii) AAICLAS shall be granted access to the airside by the Concessionaire free of cost.

19.4.1 (c) it is further clarified that, where Cargo Facilities have been earmarked for AAICLAS in Schedule A, there shall be no restriction on the upgradation and/or development of Cargo Facilities by the Concessionaire, including on grounds of quantum of cargo volumes at the Airport, business potential or impact of such additional facilities on Cargo Facilities earmarked for AAICLAS.

It is humbly submitted Currently the Cargo Facilities of all the Airports of 2nd respondent is handled by "AAI Cargo Logistics and Allied Services Company Limited" (AAICLAS). A wholly owned subsidiary of 2nd respondent. Even at these six airports which have been leased out/being leased out, the functions of AAICLAS are not handed over to the Concessionaire. The cargo facilities will remain with AAICLAS and revenue from such cargo facilities will go to AAICLAS. However, the Concessionaire has been given right to develop, operate and manage their own cargo facilities under the Concession Agreement which would be in addition to the existing AAICLAS.

It is further submitted that , the "Per Passenger Fee" quoted by the Concessionaire takes into account the revenue that would be earned by Concessionaire from all sources of income i.e. aeronautical, non-aeronautical (commercial activities), cargo and city side development activities etc. The bid parameter is single i.e. Per Passenger Fee" and there cannot be multiple bid parameter for each source of revenue, as conceived by the Petitioner.

The operation and management of Delhi and Mumbai are different and distinct from the other airports. In the case of Delhi and Mumbai Airports, the Cargo Facilities have also been handed over to the Concessionaire, whereas in case of six airports which are presently being leased out, the Cargo Facilities are not handed over to the Concessionaire. Therefore, the current Concession Agreement provisions are improved over the Delhi and Mumbai airports and one such improvement is the change of bid parameter (i.e. change from revenue sharing to Per Passenger Fee model).

ix. **Comparison with Bhogapuram Project:** The averment made in this para is irrelevant for consideration. It is humbly submitted that the petitioner has wrongly compared the present project with that of Bhogapuram airport project. As per contractual provisions of Bhogoparam airport project (Phase-I), the construction period allowed is three years from Appointed Date (i.e. when all conditions precedents of the Concession Agreement is satisfied). Upon completion of construction the airport is open for commercial operation. Commencing from the 10th (tenth) anniversary of the Phase I, the Concessionaire shall start paying the Per Passenger Fee (i.e. Concession Fee). Including the construction period, effectively there is 13 years period available for start of concession fee payment. The "per passenger fee" of Rs.303.00 quoted by the successful bidder would be payable after 13 years. The net present value of Rs.303 (payable after 13 years) quoted for the Bhogapuram airport project (taking into account 7% discounting rate) is Rs.117.00 only. So the "per passenger fee" for Bhogapuram airport as on date is Rs.117.00 only.

x. **Huge Variation in rates quoted by bidders**: The avernment made in this para is flase and denied. All the bidders have very well understood the bidding documents and carried out their own due diligence. The bidder only know their business plan which would be after taking into account various financial aspects and also future plan. Accordingly, the highest bidder has quoted the Per Passenger Fee. Even in case of Delhi airport, the revenue sharing quoted by GMR Airports Ltd, was 45.99% which raised the eyebrows of many competing bidders. However, GMR Airports Ltd has been paying 45.99% of their revenue of IGI Airport to AAI. Therefore, the business plan differs from bidders to

bidders and the Petitioner cannot adjudicate upon other bidders' financial quote. Furthermore, in case of Jaipur, Ahmedabad and Guwahati Airports, M/s Adani Enterprise Limited (AEL) has quoted Rs.174, Rs.177 and Rs.160 respectively whereas the next highest bidder NIIF has quoted for these airports Rs.155, Rs.146 and Rs.155 respectively. In case of Lucknow airport, AEL has quoted Rs.171 and AMP Capital has quoted Rs.139. The financial quotes of NIIF/AMP Capital are not having very wide variations. Therefore, the contentions of the petitioner are wrong and unjustifiable.

xi. **All Bid in Favour of same Private Partner**: The averments made by the petitioner that AAI had not rationally arrived at the Total Project Cost, the Technical capacity was fixed as random for Rs. 3500 Crores and Financial capacity for Rs. 1000 Crores for each Airport- is totally incorrect and denied as false. It is humbly submitted that the technical and financial criteria matters were discussed in detail in 85th Meeting of PPPAC held on 11.12.2018. A copy of the Record of Discussion is given as annexure-D to the writ petition by the petitioner. Relevant portion of para 8 of the Annexure –D it is specifically stated as under:

"EGOS, in its meeting held on 17/11/2018 has also decided that no restriction needs to be placed on the number of airports to be bid for or to be awarded to single entity"

para 9 of the Annexure –D reads as under:

"Advisor (NITI Aayog) felt that in case of Trivandrum Airport, a technical capacity criterion of Rs.3,500 crore appears to be quite high. Secretary, MOCA explained that to maintain uniformity and for simplification of the Bid Procedure, AAI should go ahead with the same criteria for all Airports. PPPAC agreed with this and decided to keep it as proposed by MOCA."

It is humbly submitted that 2nd respondent has acted according the annexure –D.

In paragraph No.8 and 9 of the Record of Discussion, following are mentioned.

"On the rationale of Rs.3,500 crore as technical capacity threshold and Rs.1,000 crore as financial capacity threshold, AAI explained that as per Model RfQ of D/Expenditure, technical experience should be twice the

TPC and financial capacity should be one-fourth of TPC. However, in this case, it is not possible to work out the TPC over the proposed concession period of 50 years. Taking into account the estimated CAPEX to be incurred by the Concessionaire for Phase-I along with the amount to be reimbursed to the Authority by the Concessionaire (estimated AAI RAB in the table below), technical and financial capacity as given in the table below have been worked out. EGoS, in its meeting held on 17/11/2018 has also decided that no restriction needs to be placed on the number of airports to be bid for or to be awarded to single entity. In view of this decision, AAI stated that, although as per Model RfQ, financial capacity required in terms of net worth in one of the airports should be more than Rs.500 crore, it has been increased to Rs.1,000 crore.

Name of Airport (1)	Estimated AAI RAB (2)	Estimated CAPEX by Concessionaire (Phase-I) (3)	Estimated Investment by Concessionaire (4)	Technical Capacity – Twice of (4)	Financial Capacity – 25% of (4)
Jaipur	365	1473	1838	3676	460
Lucknow	583	1090	1673	3346	418
Guwahati	823	684	1507	3014	377
Ahmedabad	384	1320	1704	3408	426
Mangaluru	363	1119	1482	2964	371
Trivandrum	400	413	813	1626	203

RAB: Regulatory Asset Base

Advisor (NITI Aayog) felt that in case of Trivandrum Airport, a technical capacity criterion of Rs. 3,500 crore appears to be quite high. Secretary, MoCA explained that to maintain uniformity and for simplification of the Bid Procedure, AAI should go ahead with the same

criteria for all Airports. PPPAC agreed with this and decided to keep it as proposed by MOCA.

In view of the above justification followed by discussion and decision thereof, the allegation of the Petitioner that - AAI had not rationally arrived at the Total Project Cost, the Technical capacity was fixed as random for Rs. 3500 Crores and Financial capacity for Rs. 1000 Crores for each Airport- is totally incorrect in spite having a copy of above Record of Discussion which has been submitted by the Petitioner in the Court.

The technical capacity and financial capacity issue was also brought out in the writ petition No.5482 in the Hon'ble Kerala High Court.

In page 66 paragraph No.42 of Judgment dated 19.10.2020, the Hon'ble Kerala High Court has opined that "….Considering the magnitude of the project, that too a global tender, we are not convinced that there was any subterfuge involved in fixing the minimum qualification of financial capacity at Rs.3,500 crore…"

As far as number of airports awarded to a single entity is concerned, the Empower Group of Secretaries in its meeting held on 17.11.2018 decided that "no restriction need be placed on the number of airports to be bid for or to be awarded to a single entity". The PPPAC (vide Paragraph No.5 of Record Note) decided that "…all the issues which PPPAC is required to discuss were taken up. PPPAC decided not to examine the matters which were already decided by the EGoS in its meetings held on 17.11.2018 and 04.02.2018 unless there is an apparent deviation from the PPPAC Guidelines"

xii. Violations of Aircrafts rule,1937: *The averment made in this para is irrelevant for consideration. There is no violation of /Aircraft Rules, 1937, as alleged by the Petitioner. The Petitioner has stated that "the Aircraft Rules, 1937 never allows the Aerodrome Licence Holder to transfer its Licence and responsibilities attached thereto to another operator and such clause is clear violation of Aircrafts Act"*

It is submitted that AAI has not transferred the aerodrome license in favor of the Concessionaire. As per clause 16.4.3 of Concession Agreement:

"The Concessionaire shall procure the aerodrome license within 1 (one) year from the COD. Notwithstanding

anything to the contrary contained in this Agreement, the Authority shall continue to act as the Aerodrome Operator of the Airport in accordance with Applicable Laws, including the Aircraft Rules, 1937 and Paragraph 7.3 of the Civil Aviation Requirements (CAR) dated October 16, 2006, issued by the DGCA, and shall be responsible for operation of the Airport till such time the aerodrome license is granted to the Concessionaire; provided, however, that all liabilities arising as result thereof shall be deemed to be the liabilities of the Concessionaire"

There is no clause/provision in the Concession Agreement transferring the aerodrome license in favor of the Concessionaire by AAI.

It is humbly submitted the same issue regarding the O & M was also raised before the Hon'ble High Court of Kerala. The Hon'ble High Court in its judgement dated 19.10.2020 has observed as under in this regard (Para no.44).

"44. The argument that the Delhi and Mumbai Airport though brown field, required pre-qualification of Airport experience is countered by the AAI, by production of the RFQ for operation and transfer of Ahmedabad Airport through PPP. We deem it appropriate that the counter arguments raised in W.P(C) No.6823 of 2019, by the AAI in its counter affidavit at paragraphs 28 and 29 be extracted hereunder:

"28. It is submitted that the development of an airport not only consists of aeronautical assets, but also non-aeronautical and assets that are to be created/developed in the city side. The pre-fixed percentage of revenue generated from the non-aeronautical assets contributes for subsidizing the aeronautical tariff. Though there are many experienced players in Indian market who have sufficient experience in the transport (other than airport) energy, communication, social and commercial infrastructure, there are only very few players with airport operation experience. In case of making airport experience as mandatory for the bidding process, the interested bidders who have good experience in other sectors will have to form a consortium with airport operators in abroad in order to demonstrate the airport experience. This creates a huge demand for the airport operators, who in turn dictate terms for their association and the

cost of their engagement also very high. This resulted in many Indian players, having experience in other sectors, showing disinterest for such transaction leaving the competition limited only to Indian airport operators. Therefore, the requirement of operations and management experience was not made mandatory in the present Request for Proposal. Even in the Request for Qualification issued for six airports during September 2013, prior operation and management experience was not made mandatory. A copy of RFQ for Operations, Management and Transfer of Ahmedabad Airport through PPP is attached as Exhibit R6(c)

[underlining by us for emphasis].

29. The Clause 2.2.3 of this RFQ says as hereunder:

"O&M Experience: The Applicant shall, in the case of Consortium, include a member who shall subscribe and continue to hold at least 10% (ten per cent) of the subscribed and paid up equity of the SPV for a period of 5 (five) years from COD of the Project, and has either by itself or through its Associate, experience of 5 (five) years or more in operation and maintenance (O&M) of Category I projects specified in Clause 3.2.1, which have an aggregate capital cost equal to the Estimated Project Coast. In case the Applicant is not a Consortium, it shall be eligible only if it has equivalent experience of its own or through its Associates. In the event that the Applicant does not have such experience, it should furnish an undertaking that if selected to undertake the Project, it shall engage experienced and qualified personnel for discharging its operation & maintenance (O&M) obligations in accordance with the provisions of the Concession Agreement, failing which the Concession Agreement shall be liable to termination".

Therefore, in the current exercise, not keeping the airport experience as a pre-requisite is not a recent concept. The decision on the O&M experience has been evolved over a period of time".

[underlining from the counter affidavit].

This was in the year 2013, long before the present lease. There are very few operators at the national level having Airport experience and hence the inclusion of the infrastructure sectors in the Harmonised Master List, is

the submission. We also find the explanation, **quite compelling;** that otherwise there would be a monopoly exercised by those players having Airport experience, who would have an edge over others and be placed in a position from which they would dictate terms. We do not find any reason to hold the RFP to be vitiated for reason of the same being tailor-made for AEL, which remains in the realm of an allegation without substantiation.

The petitioner has averred that the Aircraft Rules, 1937 never allows the Aerodrome Licence Holder to transfer its Licence and responsibilities attached thereto to another operator and such clause is clear violation of Aircrafts Act. It is humbly submitted that 2nd respondent has not transferred the aerodrome license in favour of the Concessionaire. The clause 16.4.3 of the concession agreement clearly states that the concessionaire shall procure the aerodrome license within one year from the COD and that the 2nd respondent shall continue to act as the Aerodrome operator of the Airport till the aerodrome license is granted to the Concessionaire.

It is further submitted that there is no provision in the Concession Agreement transferring the aerodrome license in favour of the Concessionaire by 2nd respondent. The petitioner has made vague assertion which are baseless.

xiii.**6th Respondents per passenger fee v.s DIAL/MAIL Per Passenger FEE:** The averment made in this para is false and denied. It is humbly submitted that the Concession Agreements with DIAL and MIAL were signed during 2006 i.e. around 14 years back. The present concession agreements for the six airports contains certain improvements over the concession agreements signed with DIAL and MIAL.

CAG had submitted the performance audit report on the implementation of PPP by AAI at Delhi Airport covering the period of 2006-2012. Based on the revenue audit, the CAG has made some conclusions and observations. The recommendations, inter-alia, contain the following:

(a) In PPPs, all pre-bid conditions are declared upfront and monetized value of all concessions including assets transferred is arrived at before bids are invited;

(b) Revenue earned by the Government from such arrangements is commensurate with the public assets transferred to the private entity;

(C) public Private arrangements must be linked to certain basic triggers like trail is volume, tariff, return on investments, break-even period;

(d) Right of Refusal should not be designed to thwart competition and create a monopolistic situation;

(e)The term of bid evaluation allocation to higher non-aeronautical revenue share needs to be revisited for future bids; and

(f) Due care should be taken to monetize the value of land in PPP projects.

The above recommendations of the CAG were considered and due care was taken through appropriate contractual provisions in the six airports undertaken through PPP. One of the improvements made is change from percentage of revenue share model to "passenger fee" model. The "per passenger fee" model ensures that no revenue of Concessionaire goes unaccounted while sharing the concession fee. This is an improvement over previous mode. The improvements made in the present Concession agreement cannot be categorized as deviations as stated by the Petitioner. These changes are improvements over previous concession agreements.

The lease revenue received by AAI from DIAL and MIAL for the last five years i.e. 2014-15 to 2018-19 is given hereunder:

Lease Revenue (in Rs. Crore)					
Name of JV	2014-15	2015-16	2016-17	2017-18	2018-19
DIAL	1967.81	2302.66	2634.84	1761.47	1591.25
MIAL	929.31	1066.23	1191.54	1330.73	1448.45

It is submitted that the lease rental varies year on year substantially due to various factors like (a) fresh investment made by DIAL/MIAL resulting higher tariff determination. Upon recovery of investment cost over a

period of time, the tariff gets reduced in the next control period, thereby reducing lease revenue to AAI substantially, and (b) increase in non-aero revenue, if any. This lease revenue has no linkage to the growth of passengers at Delhi and Mumbai airports.

The magnitude of traffic (both passenger and aircraft movements) at Delhi and Mumbai airports and the revenue generated through commercial activities cannot be compared with smaller airports like the six airports undertaken for operations and management through PPP. In Delhi airport, around 250 acres of land (approximately) is available for city side commercial exploitation. Like-wise in Mumbai airport, the land available for city side commercial exploitation is 200 acres approximately. Whereas, the land available for city commercial activities for the six airports is given in the following table:

Airport	Total land available for city side commercial activities
Ahmedabad	27.65 acres
Jaipur	17.40 acres
Lucknow	110 acres
Guwahati	60 acres
Thiruvananthapuram	02 acres
Mangalore	10 acres

It can be seen from the above as compared to Delhi and Mumbai airports, the land availability for commercial exploitation is very less in the above six airports. The revenue generation from commercial and city side commercial activities are limited at the above six airports. Further, passenger traffic handled at all six airports (both domestic and international) constitutes around 9.7% of the total passenger handled by all airports in India (as per traffic statistics for the year 2017-18). Whereas, during this period Delhi and Mumbai airports together handled 37% of the total passenger handled by all airports in India. Traffic-wise also these six airports cannot be compared with Delhi and Mumbai airports.

It is humbly submitted that the Petitioner has tried to calculate "per passenger fee" converting the annual lease rental for the year 2017-18 received from DIAL and MIAL. The Petitioner has stated that based on lease revenue for the year 2017-18, the per passenger fee for Delhi and Mumbai airports is Rs.284 and 274 respectively, which is much higher than Rs.115 and Rs.177 quoted by Enterprises Limited for Mangaluru and Ahmedabad Airport.

The formula for per passenger fee payable by the Concessionaires of six airports is that (a) total embarking and disembarking domestic passengers of an airport multiplied by the per passenger fee quoted by the success bidder plus (b) total embarking and disembarking international passengers of an airport multiplied by two times of the per passenger fee quoted by the successful bidder.

The petitioner has taken one figure as per passenger fee for both domestic and international passenger while analyzing the lease revenue v/s per passenger fee for Delhi and Mumbai airports. The petitioner has tried to compares two dissimilar set of airports and two dissimilar revenue share model, which is inappropriate in all respects.

Even assumed, but not admitted, on an analysis of the petitioner's statistics, based on the lease rental and passenger throughput of Delhi and Mumbai airports for the years 2017-18 and 2018-19, the conversion of gross revenue share into 'per passenger fee' for Delhi and Mumbai airports would be as under:

Traffic handled by Delhi and Mumbai airports:

	2017-18		2018-19	
Airports	Int'l Passengers	Domestic Passengers	Int'l Passengers	Domestic Passengers
Delhi	17383460	48308202	18709097	50524767
Mumbai	13646653	34849777	14422284	34392779

Formula:

(Gross Revenue/(no.of domestic passenger)+(no. of international passenger*2)

The "per passenger fee" arrived for Delhi and Mumbai airports are as under:

Delhi Airport – for 2017-18 Rs.212.03

Delhi Airport – for 2018-19 Rs.180.94

Mumbai Airport – for 2017-18 Rs.214.13

Mumbai Airport – for 2018-19 Rs.229.04

The above calculation for Delhi and Mumbai airports, is after a lease period of 11 years. Whereas, the successful bidder has quoted per passenger fee of Rs.177 for Ahmedabad airport, Rs.174 for Jaipur airport, Rs.171 for Lucknow airport, Rs.168 for Thiruvananthapuram airport, Rs. 160 for Guwahati airport and Rs.115 for Mangaluru airport. Further, as per the terms of the concession agreement signed with the Concessionaires, the "per passenger fee" is subject to revision annually. The relevant provision of the Concession Agreement is reproduced below:

27.3.1 The Parties hereto acknowledge and agree that the Per Passenger Fee for Domestic Passengers and Per Passenger Fee for International Passengers shall be applicable from the COD and shall be revised annually on each anniversary of the COD to take account of the variation in the CPI (IW).

Therefore, after a period of 11 years, the 'per passenger fee' quoted by successful bidder for six airports, after taking into account inflation index, would be much higher than the "per passenger fee" conversion calculated above.

The passenger growth is steady in Indian aviation sector and has witnessed double digit passenger growth consistently from the years 2014-15 to 2018-19. Except for the reasons of recession, economic melt-down and pandemic, the international traffic in the past in the Indian aviation sector shown slight dip and immediately bounced back. Under these circumstances, the per passenger fee model with annual escalation provision at the above mentioned six airports and also the per passenger fee quoted by the successful bidder for these six airports, is much better than the revenue sharing model of Delhi and Mumbai airports, which is in benefits the passengers and general public.

xiv: The averment made in this para is false and denied. It is humbly submitted that the entire bidding process was conducted through Government of India's public

procurement portal and every aspect of the bidding process was made known upfront to the interested bidders. No complaint regarding lack of transparency has been received by AAI or Government of India from any of the bidders who participated in the bidding process."

14. It has been argued by the learned counsel for respondents-2 to 4 that the present petition is a responsive petition preferred by the petitioner-AAE Union workers and the rights of the workers are certainly protected under the agreement executed between respondents-6 and 7 and the AAI. A prayer has been made for dismissal of the writ petition.

15. Respondents-6 and 7 have also filed written reply and it has been stated that the present petition is purely an experimental attempt to overreach fair and transparent selection process undertaken by the AAI, after an open international competitive bidding process in accordance with the procedure set up in RFP which was drawn and drafted in accordance with the Manual Procurement of Goods, 2017 issued by the Ministry of Finance, Department of Expenditure, Government of India. It is also stated that the petitioner-Union is not conferred with any rights under Part-III of the Constitution of India nor any other legal rights

under the relevant statute so as to invoke Article 226 of the Constitution of India. It is further contended that the petitioner-AAE Union does not have any locus to challenge the agreement executed in the matter. The leasing out of airport is purely a policy matter evolved by the Central Government and by no stretch of imagination, the process warrants any interference. Respondents-6 and 7 have also stated that respondent No.6-Adani Enterprises Limited came out as a successful bidder H1 in the financial bid and after analyzing all the financial bids, the AAI issued a press release through its corporate communication dated 25.05.2019 and as per which the respondent No.6-Adani Enterprises Limited has quoted highest bid parameters ie., per passenger rate is Rs.168/0- hereas KSIDC has quoted only Rs.135 which is not within the 10% value, as per clause 3.8.1(d) and GMR Airports Limited has quoted Rs.63/- only and therefore, the contract has been executed with respondent No.3. Respondents-6 and 7 have also stated in their statement of objections that the petitioner-AAE Union, bearing the same registration number, has filed a writ petition challenging similar impugned decision before the High Court of Kerala, which was also part of the same process at Eranakulam in

WP No.5482/2019 and connected matters and the Division Bench of the Kerala High Court has dismissed the writ petition on 19.10.2020. The filing of said writ petition has not been disclosed before this Court and therefore, as the policy decision was the subject matter before the Kerala High Court and the same has already been looked into by the Kerala High Court, the question of interference by this Court does not arise. A prayer has been made for dismissal of the writ petition.

16. Respondent No.5 has filed an application for striking out the name of respondent No.5 on the ground that it is a statutory body constituted under the Airport Economic Regulatory Authority of India, 2008 and on the ground that it has no role to play in the matter and no averment has been made in the writ petition in respect of respondent No.5. It has been stated that as per the provisions of Airport Economic Regulatory Authority of India, 2008, the Regulatory authority has been assigned certain functions like determination of development tariff for aeronautical services, determination of development fees, determination of amount of passengers service fees and to monitor the said performance standard rate of quality, continuity and liability

of service as may be specified by the Central Government or any authority authorised on behalf to perform such other functions relating to tariff as entrusted by the Central Government etc. The application reveals that they have no role in the matter.

17. Heard learned counsel for the parties at length and perused the record. The matter is being disposed of with the consent of the parties at admission stage itself.

18. The facts of the case reveal that the petitioner-AAE Union before this Court, a registered and recognized Trade Union functioning under the AAI, is aggrieved in respect of Cabinet Decision dated 08.11.2018 which relates to privatisation of Airports, the subsequent bidding process in the matter as well as the Cabinet Decision dated 03.07.2019 accepting the bid of respondent No.6. A challenge has also been made to the consequential Concession Agreement dated 14.02.2020. The subject Civil Aviation falls in the Central list under the Constitution of India and it is within the legislative competence of the parliament. The Aircraft Act, 1934 and the Rules framed thereunder governs development, maintenance and operation of the Airports. The Aircraft Act, 1934 empowers the Central Government to grant a licence of

setting up of an Airport and the Aircraft Rules, 1937 permits the citizens of India and Companies or Corporations registered to own and control permitted Airports.

19. The AAI was constituted by the AAI Act, 1994 by merging erstwhile National Airports Authority of India and International Airports Authority of India. The merger brought into existence a single organisation and bestowed with the responsibility of developing, financing, operating and maintaining of all AAI Airports. In the year 1997, the Government of India introduced Airports Infrastructure Policy with an objective to provide boost to the national trade, to provide Airport capacity ahead of demand, to enhance airport facilities, to make use of entry and achieve higher level of customers satisfaction to provide a market orientation to the present structure, bridge the resource gap and encourage greater efficiency and the enterprise in the operation of airports through the introduction of private capital management skills.

20. The AAI infrastructure policy noted that some airports are already owned by the State Government, private companies and even individuals. The policy also encourages

the State Governments to promote development of Greenfield airports in the respective States under the joint venture with private sector participation and approval was granted by the Union Cabinet for establishing of Greenfield airports including Shamshabad near Hyderabad and Devanahalli near Bengaluru in the year 2000. Both the airports started their activity as commercial airports in the year 2008 and are now the major airports of the country. The Government of India also entered into Concession Agreements with the respective PPP partners of Bengaluru and Hyderabad airports and received concession fee @ 4% of their annual gross revenue. The AAI Act was further amended in 2003 and Section 12A was inserted therein which empowers AAI with the approval of the Government to lease out the premises of an airport to carry out some of its functions in public interest or in the interest of better management of the airports. Sections 12 and 12A of the AAI Act of 1994 are reproduced as under:

> "12. Functions of the Authority.—(1) Subject to the rules, if any, made by the Central Government in this behalf, it shall be the function of the Authority to manage the airports, the civil enclaves and the aeronautical communication stations efficiently.
>
> (2) It shall be the duty of the Authority to provide air traffic service and air transport service at any airport and civil enclaves.

(3) Without prejudice to the generality of the provisions contained in sub-sections (1) and (2), the Authority may—

(a) plan, develop, construct and maintain runways, taxiways, aprons and terminals and ancillary buildings at the airports and civil enclaves;

6[(aa) establish airports, or assist in the establishment of private airports, by rendering such technical, financial or other assistance which the Central Government may consider necessary for such purpose;]

(b) plan, procure, instal and maintain navigational aids, communication equipment, beacons and ground aids at the airports and at such locations as may be considered necessary for safe navigation and operation of aircrafts;

(c) provide air safety services and search and rescue facilities in co-ordination with other agencies;

(d) establish schools or institutions or centres for the training of its officers and employees in regard to any matter connected with the purposes of this Act;

(e) construct residential buildings for its employees;

(f) establish and maintain hotels, restaurants and restrooms at or near the airports;

(g) establish warehouses and cargo complexes at the airports for the storage or processing of goods;

(h) arrange for postal, money exchange, insurance and telephone facilities for the use of passengers and other persons at the airports and civil enclaves;

(i) make appropriate arrangements for watch and ward at the airports and civil enclaves;

(j) regulate and control the plying of vehicles, and the entry and exit of passengers and visitors, in the airports and civil enclaves with due regard to the security and protocol functions of the Government of India;

(k) develop and provide consultancy, construction or management services, and undertake operations in

India and abroad in relation to airports, air-navigation services, ground aids and safety services or any facilities thereat;

(l) establish and manage heliports and airstrips;

(m) provide such transport facility as are, in the opinion of the Authority, necessary to the passengers travelling by air;

(n) form one or more companies under the Companies Act, 1956 (1 of 1956) or under any other law relating to companies to further the efficient discharge of the functions imposed on it by this Act;

(o) take all such steps as may be necessary or convenient for, or may be incidental to, the exercise of any power or the discharge of any function conferred or imposed on it by this Act;

(p) perform any other function considered necessary or desirable by the Central Government for ensuring the safe and efficient operation of aircraft to, from and across the air space of India;

(q) establish training institutes and workshops;

(r) any other activity at the airports and the civil enclaves in the best commercial interests of the Authority including cargo handling, setting up of joint ventures for the discharge of any function assigned to the Authority.

(4) In the discharge of its functions under this section, the Authority shall have due regard to the development of air transport service and to the efficiency, economy and safety of such service.

(5) Nothing contained in this section shall be construed as—

(a) authorising the disregard by the Authority of any law for the time being in force; or

(b) authorising any person to institute any proceeding in respect of duty or liability to which the Authority or its officers or other employees would not otherwise be subject.

> 12-A. Lease by the Authority.—(1) Notwithstanding anything contained in this Act, the Authority may, in the public interest or in the interest of better management of airports, make a lease of the premises of an airport (including buildings and structures thereon and appertaining thereto) to carry out some of its functions under Section 12 as the Authority may deem fit:
>
> Provided that such lease shall not affect the functions of the Authority under Section 12 which relates to air traffic service or watch and ward at airports and civil enclaves.
>
> (2) No lease under sub-section (1) shall be made without the previous approval of the Central Government.
>
> (3) Any money, payable by the lessee in terms of the lease made under sub-section (1), shall form part of the fund of the Authority and shall be credited thereto as if such money is the receipt of the Authority for all purposes of Section 24.
>
> (4) The lessee, who has been assigned any function of the Authority under sub-section (1), shall have all the powers of the Authority necessary for the performance of such function in terms of the lease."

21. That in the year 2006, keeping in view the aforesaid statutory provisions of law, the AAI leased out Delhi Airport under PPP model for operation, management and development of the airports on revenue share basis. The PPP partner was selected through global competitive building.

22. In the year 2008, Greenfield airports were approved paving the way of development of Greenfield

airports. In respect of Greenfield Airports, either by the Government or by a private entity or under PPP model, a policy decision was taken by the Government of India. In respect of Greenfield Airports, Ministry of Civil Aviation grants two stage clearances i.e., "Site Clearance" followed by "In Principle Approval". In the year 2016, a national civil aviation policy was introduced under the National Civil Aviation Policy 2016 which resolved to encourage development of airports by the State Governments or private sector or by the PPP model. It was also resolved that the Ministry of Civil Aviation will also encourage the State Governments to develop new airports in their State by forming SPV with airports of India or public sector undertakings in order to stake an ownership. The Union of India in the light of the National Civil Aviation Policy, 2016 adopted PPP process for six airports of AAI i.e, Ahmedabad, Jaipur, Lucknow, Guwahati, Thiruvanatapuram and Mangaluru for operation, management and development under PPP and the Union Cabinet on 08.11.2018 accorded "In Principle" approval for leasing out the aforesaid six airports.

23. The Union Cabinet also decided to constitute empowered group of Secretaries headed by CEO, Niti Ayog.

One more decision was taken by the Union Cabinet that whole PPP process of these airports shall be carried out through EGOS under the CEO, NITI Ayog and Public Private Partnership Appraisal Committee (PPPAC) under the Department of Economic Affairs, Ministry of Finance, Government of India. The statutory provisions as contained under the Aircraft Act, 1934 and Aircraft Rules, 1937 read with Airports Authority of India Act, 1994 as amended from time to time empowers the Government to lease the premises of any airport to carry out some of its function in the public interest or in the interest of better management of the airports. The Union Cabinet in the light of the policy decision for granting approval for leasing out six airports granted an approval on 8.11.2018 and the AAI issued a tender on 14.12.18 with single stage 2-envelop system. The technical bids were opened on 16.02.2019 and the financial bids were opened on 25.02.2019. It is nobody's case that the AAI has handed over all the functions under Section 12(3) of the Airports Authority of India Act, 1994.

24. It is pertinent to note that only 7 functions out of 18 functions are the subject matter of the PPP. The most important aspect of the case is that in respect of policy

decision and the tender process which was for six airports. Various petitions were preferred before the Kerala High Court and the Division Bench of Kerala High Court in WP(C) No.5482/2019 and other connected matters has dismissed the writ petitions on 19.10.2020. The National Aviation Policy and the decision of the Cabinet leasing out the airports was the same which is involved in the present writ petition. In WP (C) No.5482/2019, a prayer was made challenging the lease of all six airports. However, the Division Bench of the Kerala High Court has confined the challenge to the RFP for Thiruvananthapuram International Airport in Kerala.

25. Though the present writ petition is maintainable before this Court, in the light of the finding arrived at in paragraph 63(ii) of the order delivered by the Kerala High Court, the fact remains that the petitioner-AAE is a registered Trade Union and the same Trade Union has preferred the writ petition in respect of the policy decision for leasing out the airports. The process was common and in all fairness the petitioner should have disclosed the fact of filing of the writ petition before the Kerala High Court. The petitioner-AAE Union has suppressed the vital information that the policy

decision which is the subject matter of this petition was also challenged before the Kerala High Court and therefore, the present petition deserves to be dismissed on account of suppression of facts.

26. The petitioner-AAE Union has suppressed as already stated earlier, the fact of filing of similar writ petition before the Kerala High Court and this Court is of the considered opinion that as the petitioner has not approached the Court with clean hands without disclosing the filing of earlier petition by the petitioner-AAE Union, the present petition deserves to be dismissed on account of suppression of material facts. The Hon'ble Supreme Court in the following judgments has dealt with the issue relating to suppression of facts:

i) Satyan v. Commissioner
(2020) 14 SCC 210

ii) State of M.P. v. Narmada Bachao Andolan
(2011) 7 SCC 639

iii) K.D.Sharma v. Sail
(2008) 12 SCC 481

iv) Arunima Baruah v. Union Of India
(2007) 6 SCC 120

In light of the aforesaid judgments, the petition deserves to be dismissed.

27. The Kerala High Court has dealt in detail the issue of leasing out of the airports and the same policy decision of the Government of India has been upheld by the Division Bench of Kerala High Court. The relevant paragraphs of the judgment delivered by the Kerala High Court at Erankulam in WP(C) 5482/2019(I) in the case of **Airport Authority Emloyees' Union, Represented by its Secretary Sobhan P.V. v. Union of India, Represented by the Secretary to Government and Others.** (2020 SCC OnLine Ker 4529 are reproduced as under:

> "III. The AAI Act and the prohibition alleged in expending income received from one Airport in another Airport and the lease granted for 50 years.
>
> **34.** The ground of prohibition raised is relying on Section 22A of the AAI Act which speaks of the power of the authority to receive development fees at Airports. Such levy is permissible only with the previous approval of the Central Government or under clause (b) of sub-section (1) of Section 13 of the Airports Economic Regulatory Authority of India Act, 2008; the latter applicable to major Airports referred to in that Act. The development fees levied and collected can be utilized only in the prescribed manner, for the purposes enumerated under clauses (a) to (c). Clause (a) refers to up-gradation, expansion or development of the Airport at which the fee is collected. Clause (b) deals with establishment or development of a new Airport in lieu of that Airport. Clause (c) speaks of investment in equity by way of subscription in Companies, again engaged in establishing, owning, developing, operating or maintaining a private Airport *in lieu* of the Airport from which the collection is made. Undisputedly the development fees can only be used in that Airport from which the collection is made.

35. The learned ASG however asserted that the fees per domestic passenger as payable by the Concessionaire is not development fees as envisaged in Section 22A nor is it expected to be passed on to the passenger. Reference is made to clause 28.4.2 in Exhibit P16 which is the Concession Agreement required to be executed by the Concessionaire. Clause 28.4.2 reads as under:

"It is clarified that the Concessionaire shall not be entitled to levy or seek the right to levy on Users, any development fee under Section 22A of the Airports Authority of India Act, 1994 and any rules made thereunder, including the Airports Authority of India (Major Airports) Development Fee Rules, 2011".

36. This is in perfect consonance with the RFP which intends the development of the Airport to be carried on by the Concessionaire. The per passenger rate quoted by the Concessionaire is the amounts to be paid, by the Concessionaire to the AAI, as consideration of the lease of the Airport. This cannot be passed over to a passenger and is not a development fee under Section 12A. It augments the fund of the AAI which is provided for in Section 24. As per Section 24, all receipts of the Authority shall be credited to its own fund and all payments shall be made therefrom. Sub-section (3) of Section 12A provides that any money payable by the lessee in terms of the lease made under sub-section (1) shall form part of the fund of the Authority and shall be credited thereto as if such money is the receipt of the Authority for purposes of Section 24. It is also discernible from sub-section (2) of Section 24 that the Authority shall have power, subject to the provisions of this Act, to spend such sums as it thinks fit to cover all administrative expenses of the authority and on objects or for purposes authorised by this Act and such sums shall be treated as expenditure out of the fund of the Authority. Looking at the provisions of the Act, there is a clear distinction between the development fee levied under Section 22A and amounts payable by the lessee under Section 12A. The revenue generated under Section 12A takes the character of the receipt/revenue of the Authority; which augments its fund from which the administrative expenses as also the objects and purposes authorized by the AAI Act are carried out. The ground raised of prohibition against cross-subsidization fails.

37. There is a contention raised by the petitioners that the Concessionaire is entitled to levy Users' fee from the passengers. This need not be mixed up with development fees, the levy of which, by the Concessionaire is specifically prohibited. 'User' as defined in Exhibit P16 includes among others, a passenger who intends to use the Airport and the services offered therein, on payment of fees or in accordance with the provisions of this agreement and applicable laws. 'Fee' as defined in Exhibit P16 is the charge levied on and payable by a user for any or all of the services. With respect to aeronautical services, it shall be as per the rates determined or revised or approved by the Regulator, in accordance with the provisions of the Regulatory Frame work. The Airports Economic Regulatory Authority of India Act, 2008 is enacted to provide for the establishment of the Regulatory Authority to regulate tariff and other charges for aeronautical services. Hence for the aeronautical services fees can be levied only in accordance with the regulatory regime and for non-aeronautical services in accordance with the agreement. The per passenger rate per passenger is prescribed also because the services offered in the airport is for use of the passengers, from whom the revenue is generated. The Concessionaire has to carry out the development of the Airport as per the agreement, from such revenue generated and definitely a Concessionaire in his business interest would prudently expect a profit from such revenue; which none can grudge. The private participation itself is a concept developed *inter alia* to provide better service to the users and confine the Authority and its officials to technical and regulatory aspects.

38. The next ground urged is with respect to prohibition as per Section 21 in permitting a lease beyond thirty years. Section 20 empowers the Authority to enter into and perform any contract necessary for the discharge of its functions under the Act, subject to Section 21. Section 21 speaks of the mode of executing contracts on behalf of the Authority. A fetter to the power under Section 20 is seen from the two provisos to sub-section (1). The first proviso empowers the designated officers under sub-section (1) of Section 21 to execute only contracts of such value or amounts as the Central Government may fix by order, from time to time; unless the same is previously approved by the Authority. The second proviso provides a further fetter on Section 20,

carving out contracts for acquisition or sale or immovable property or lease of any such property for a term exceeding thirty years or exceeding the value or amount fixed by the Central Government under the first proviso; without previous approval of the Central Government. The restriction provided by the proviso is two-fold. Any contract exceeding the value or amount fixed by order of the Central Government shall not be entered into unless approved by the Authority. However, any contract for acquisition, sale or lease of an immovable property for a period exceeding thirty years or for an amount exceeding that fixed by the Central Government can only be entered into with prior approval of the Central Government.

39. The contention raised by the petitioners is that there is no approval of the Central Government for the contract exceeding thirty years. The RFP provides for a contract for fifty years which admittedly is without prior approval of the Central Government. The learned ASG alertly pointed out that the proviso only speaks of prior approval before the contract itself is made. There is no requirement for an approval previous to the invitation of the tenders, is the contention. We had an apprehension that if the RFP proclaimed lease of fifty years and the Central Government later refuses to grant approval; prior to the execution of the contract, it would lead to unnecessary legal tangles. Our apprehension is set at rest by the clarificatory affidavit placed on record by the learned ASG and the disclaimer clause pointed out by Sri. S. Sreekumar.

40. The clarificatory affidavit dated 07.10.2020 filed by the Under Secretary, Ministry of Civil Aviation, in paragraph 8 speaks of the recommendation of the PPPAC being placed before the Minister for State for Civil Aviation on 14.12.2018 and the same having been approved by the Minister on 19.12.2018. Further, we have looked at the disclaimer clause in the RFP. In the RFP (page 4) at Exhibit P13 it is specified that RFP is neither an agreement nor an invitation by the Authority to the prospective bidders or any other person. RFP as is stated therein, only provides information to interested parties that may be useful in formulating their Bids pursuant to the RFP. It is also stated that the RFP reflects various assumptions and assessments which may not be complete, accurate, adequate or correct. The disclaimer further states that the information

provided in the RFP being on a wide range of matters, some would depend upon interpretation of law and the information is not an exhaustive account of statutory requirements. The prohibition as contained in the statute; no bidder can feign ignorance of and if the contract is eventually entered for a lesser period of thirty years for reason only of the Central Government having not approved it previous to its execution; none can claim legitimate expectation. As was found in *Monnet Ispat & Energy Ltd.*, then it would be against the statutory prescription. Our apprehensions are allayed insofar as the Minster for Civil Aviation having approved the lease of fifty years as projected in the RFP.

IV. The erosion of the profit base of TIA

41. The ground raised by the Employees' Unions has reference to the statistics provided in Exhibit P7, produced in W.P(C). No. 5482 of 2019 and that tabulated in the memorandum of the other W.P. It is emphasized that while the bid is for fees payable on a domestic passenger, TIA has more international passengers than domestic passengers. The concern expressed by the employees is fairly addressed by the ASG that the per passenger fee for domestic passengers was made the selection criteria to identify the highest bidder, as is seen from Clause 3.8 of Exhibit P13 RFP. The RFP itself by clause 1.1.5 makes it obligatory on the Concessionaire to pay to the Authority, on a monthly basis, a fee in respect of each domestic and international passenger handled at the Airport in accordance with the Concession Agreement. In the Draft Concession Agreement, Exhibit P16; which is a part of the RFP, under Article 227, Concession Fee is dealt with. The fee for domestic passengers will be as per the bid and for international passengers at twice the rate payable for the domestic passenger. Clause 27.3 of the Agreement also provides for revision of per passenger fee, which is revised annually on the anniversary of the Commercial Operation Date (COD). The revision is linked to the Commercial Price Index (CPI) calculated at 85% in the first fifteen years and later at 50%.

42. The petitioner in W.P(C) 7961 of 2019 has relied on the statistics in the tabular form in paragraph 4 of the memorandum of writ petition. The statistics show the revenue and expenditure in the years 2013-14 to 2017-

18, the highest of which is said to be in 2017-18, wherein there was a surplus/deficit of 169.32 crore. The AAI has met the contention in paragraphs 11 and 12 of their counter affidavit dated 28.03.2020 to the said writ petition. It has been specifically observed that the counter arguments are made, without commenting on the veracity of the statistics, the source of which is not disclosed. Even we are not convinced that any reliance can be placed on the statistics so tabulated, however, for argument's sake we accept it. The AAI would submit that the tabulated statistics includes the Air Navigation Services (ANS) which comprises of Route Navigation Facility Charges (RNFC) and Terminal Navigation Landing Charges (TNLC), which are not handed over to the Concessionaire and the revenue generated on that count would be retained with the AAI. Relating the statistics of 2017-18 as asserted by the petitioners, to the revenue payable by the Concessionaire, it is submitted that the total revenue would have been Rs.200.52 crore, far in excess of that actually said to have been obtained in the year 2017-18. The total is arrived based on the Passenger Throughput (embarking and disembarking passengers), both domestic and international. If the Concessionaire had been carrying on the operation and management of the Airport in the year 2017-18, the concession fee generated would have been Rs.115.43 crore, at Rs.168/- per domestic passenger and double the amount per international passenger. The ANS would have generated a further net profit of Rs.28.21 crore, which services are retained with the AAI. There is also notional reimbursement of employee's cost as per the agreement which would run to Rs.56.88 crore. It is also specifically averred that in addition, the AAI would not also be required to make any Capital Expenditure (CAPEX) and Operational Expenditure (OPEX). There is no erosion of profit base as claimed by the Employees' Unions and their apprehensions are misplaced.

V. <u>The RFP being tailor-made to suit AEL:</u>

43. Before we embark upon the examination of the factual aspects pointed out, we cannot but observe that when the RFP was brought about, there could have been no contemplation of who would be the successful bidder in the global tender floated. Only one writ petition, W.P(C) No's : 5482 of 2018 was filed before the bid was opened, which did not challenge the RFP on the ground

of it being tailor made. The challenge was against privatization and excluding the State from due participation. The other writ petitions were filed after the opening of the bid raising allegations of nepotism in favour of the successful bidder. It also has to be pertinently observed that there is no allegation raised against the bidding process or the choice made of AEL from among the total bids received; where alone there is a scope for undue favour being extended. Admittedly 10 bidders qualified who together submitted 36 bids with respect to the six Airports. Considering the magnitude of the project, we are of the opinion that the number of bidders is substantial. It is also of considerable import that there was a global tender floated.

44. The allegation raised of the RFP being tailor-made is urged on two grounds (i) the financial capacity placed at Rs.3,500 crore and (ii) the absence of experience in development and management of Airports. As far as the first ground urged, it is to be noticed that the lease is for a period of fifty years with a revision of Master Plan every five years as contemplated in clause 12.2.4 of the Draft Agreement. The Phase-I CAPEX as indicated from the RFP applicable to the Thiruvananthapuram Airport is Rs.413 crore. The Performance Security as provided in the Draft Agreement is again Rs.80 crore for Phase-I, which, after completion of Phase-I, would stand revised to an amount equal to 10% of the yearly concession fee paid by the Concessionaire, in the immediately preceding concession-year (Clauses 9.1.1 and 9.1.3 of Exhibit P16). Considering the magnitude of the project, that too a global tender, we are not convinced that there was any subterfuge involved in fixing the minimum qualification of financial capacity at Rs.3,500 crore. It is also to be noticed that, one a State owned Corporation and the other a Public Limited Company, in which State is the major share holder; KSIDC and CIAL were both qualified to bid as per the RFP. When there were nine others bidding for the six Airports, there can be no allegation raised of the financial capacity being tailor-made for AEL. The other bidders failed in all the Airports only because AEL quoted the highest bid in each of the six Airports. We reiterate that there is no allegation raised as to the opening of the bids or its acceptance and the entire gamut of arguments addressed were on the policy to privatize and the haste in finalizing the RFP. Along with the argument that the

limit prescribed was too high so as to exclude small operators, there is also an argument addressed that the prescription of financial capacity had to be met separately for each of the Airports attempted to be leased out; which are mutually destructive pleas.

45. The next ground urged is of Airport experience being absent in the RFP. The contention is raised mainly on the ground that at the earlier occasions especially with respect to Delhi and Mumbai Airports the qualification prescribed included Airport experience. In paragraph 6 of Exhibit P12, approval of the PPPAC, it is specifically noticed that the eligible projects as per the RFP were the projects undertaken in the infrastructure sub-sectors set forth in the Harmonised Master List of Infrastructure Sub-sectors issued by the Department of Economic Affairs. The Harmonised Master List was notified as per Exhibit R6(d) produced in the counter affidavit dated 28.03.2019 of the AAI in W.P(C) No. 6823 of 2019. The PPPAC in paragraph 6 of Exhibit P12 in W.P(C) 5482 of 2019, considered the issue of other infrastructure sectors being included for qualification purposes. It was found that the critical element for the present proposal also involves construction and operation of facilities, making it suitable for inclusion of all infrastructure projects as experience. It was also specifically noticed that the eligibility criterion further require a single project of at least Rs. 1400 crore, thus eliminating the small players. The opinion of the EGoS that in 'brown field' Airports; ie : existing Airports as distinguished from 'green field' being newly established, Airport experience need not be a pre-requisite or a post-bid requirement.

46. The argument that the Delhi and Mumbai Airport though brown field, required pre-qualification of Airport experience is countered by the AAI, by production of the RFQ for operation and transfer of Ahmedabad Airport through PPP. We deem it appropriate that the counter arguments raised in W.P(C) No. 6823 of 2019, by the AAI in its counter affidavit at paragraphs 28 and 29 be extracted hereunder:

"28. It is submitted that the development of an airport not only consists of aeronautical assets, but also non-aeronautical and assets that are to be created/developed in the city side. The pre-fixed percentage of revenue generated from the non-

aeronautical assets contributes for subsidizing the aeronautical tariff. Though there are many experienced players in Indian market who have sufficient experience in the transport (other than airport) energy, communication, social and commercial infrastructure, there are only very few players with airport operation experience. In case of making airport experience as mandatory for the bidding process, the interested bidders who have good experience in other sectors will have to form a consortium with airport operators in abroad in order to demonstrate the airport experience. This creates a huge demand for the airport operators, who in turn dictate terms for their association and the cost of their engagement also very high. This resulted in many Indian players, having experience in other sectors, showing disinterest for such transaction leaving the competition limited only to Indian airport operators. Therefore, the requirement of operations and management experience was not made mandatory in the present Request for Proposal. Even in the Request for Qualification issued for six airports during September 2013, prior operation and management experience was not made mandatory. A copy of RFQ for Operations, Management and Transfer of Ahmedabad Airport through PPP is attached as Exhibit R6(c)

[underlining by us for emphasis].

47. The Clause 2.2.3 of this RFQ says as hereunder:

"O&M Experience : The Applicant shall, in the case of Consortium, include a member who shall subscribe and continue to hold at least 10% (ten per cent) of the subscribed and paid up equity of the SPV for a period of 5 (five) years from COD of the Project, and has either by itself or through its Associate, experience of 5 (five) years or more in operation and maintenance (O&M) of Category I projects specified in Clause 3.2.1, which have an aggregate capital cost equal to the Estimated Project Coast. In case the Applicant is not a Consortium, it shall be eligible only if it has equivalent experience of its own or through its Associates. In the event that the Applicant does not have such experience, it should furnish an undertaking that if selected to undertake the Project, it shall engage experienced and qualified personnel for discharging its operation & maintenance (O&M) obligations in accordance with the provisions of

the Concession Agreement, failing which the Concession Agreement shall be liable to termination".

48. Therefore, in the current exercise, not keeping the airport experience as a pre-requisite is not a recent concept. The decision on the O&M experience has been evolved over a period of time"

[underlining from the counter affidavit].

49. This was in the year 2013, long before the present lease. There are very few operators at the national level having Airport experience and hence the inclusion of the infrastructure sectors in the Harmonised Master List, is the submission. We also find the explanation, quite compelling; that otherwise there would be a monopoly exercised by those players having Airport experience, who would have an edge over others and be placed in a position from which they would dictate terms. We do not find any reason to hold the RFP to be vitiated for reason of the same being tailor-made for AEL, which remains in the realm of an allegation without substantiation.

VI. The contentions raised on the basis of the Guidelines for Approval of PPP Projects Exhibit P10 in W.P.(C) 5482 of 2019

50. In considering the above issue, we first look at the confines of judicial review as has been argued extensively by all the respondents. A wealth of decisions, spanning over a large period, were placed before us. We specifically refer to Silpi Construction Contractors v. Union of India [(2019) 11 Scale 592] which referred to a number of the afore-cited decisions in paragraphs 7 to 18, which we need not reiterate. We extract paragraphs 19 and 20:

> "19. This Court being the guardian of fundamental rights is duty bound to interfere when there is arbitrariness, irrationality, mala fides and bias. However, this Court in all the aforesaid decisions has cautioned time and again that courts should exercise a lot of restraint while exercising their powers of judicial review in contractual or commercial matters. This Court is normally loathe to interfere in contractual matters unless a clear - cut case of arbitrariness or mala

fides or bias or irrationality is made out. One must remember that today many public sector undertakings compete with the private industry. The contracts entered into between private parties are not subject to scrutiny under writ jurisdiction. No doubt, the bodies which are State within the meaning of Art.12 of the Constitution are bound to act fairly and are amenable to the writ jurisdiction of superior courts but this discretionary power must be exercised with a great deal of restraint and caution. The Courts must realise their limitations and the havoc which needless interference in commercial matters can cause. In contracts involving technical issues the courts should be even more reluctant because most of us in judges' robes do not have the necessary expertise to adjudicate upon technical issues beyond our domain. As laid down in the judgments cited above the courts should not use a magnifying glass while scanning the tenders and make every small mistake appear like a big blunder. In fact, the courts must give "fair play in the joints" to the government and public sector undertakings in matters of contract. Courts must also not interfere where such interference will cause unnecessary loss to the public exchequer.

20. The essence of the law laid down in the judgments referred to above is the exercise of restraint and caution; the need for overwhelming public interest to justify judicial intervention in matters of contract involving the state instrumentalities; the courts should give way to the opinion of the experts unless the decision is totally arbitrary or unreasonable; the court does not sit like a court of appeal over the appropriate authority; the court must realise that the authority floating the tender is the best judge of its requirements and, therefore, the court's interference should be minimal. The authority which floats the contract or tender, and has authored the tender documents is the best judge as to how the documents have to be interpreted. If two interpretations are possible then the interpretation of the author must be accepted. The courts will only interfere to prevent arbitrariness, irrationality, bias, mala fides or

perversity. With this approach in mind we shall deal with the present case".

51. Keeping in mind the caution of self-imposed restraint; while examining such matters having commercial overtones, that interference is possible on judicial review only if the exercise is found to be arbitrary, irrational, malafide or vitiated by bias or for overwhelming public interest, we proceed to consider the submissions made.

VII. Concern of Employees.

65. The Employees' Unions have expressed concerns about the employees of the AAI. We specifically notice Clause 6.5 of the Concessionaire Agreement which deals with 'Authority's Employees'. There is reference to a category of employees called 'Select Employees' who are posted at the Airport by the AAI for deployment during the Joint Management Period and Deemed Deputation Period, which are respectively one calender year and two calender years from the COD. The Select Employees strength would stand reduced only to the extent of those who retire, decease or otherwise separate from the AAI services. As per Clauses 6.5.4 and 6.5.5, the costs for such Select Employees shall be borne by the Concessionaire, payable on a monthly basis, on the AAI raising an invoice, which shall be paid as emoluments to the said employees by the AAI. There is also a requirement that the Concessionaire make employment offers to a minimum of 60% of the Select Employees (Clause 6.5.6) with option given to such employees to either accept the offer or decline it. Clause 6.5.9 also allows those employees at the end of the deemed deputation period, opting to continue with AAI and those who have not received any offer from the Concessionaire, to continue with their employment with AAI. In such circumstances there can be no apprehension raised of retrenchment or loss of emoluments for the existing employees. There could definitely be a transfer made, which would only be an incidence of service, even otherwise applicable.

VIII. Public Interest.

66. We will now examine the public interest involved or the lack of it alleged. The learned Counsel appearing

for all the petitioners vigorously pointed out the absence of public interest, which could have alone motivated the AAI to invoke the provision under Section 12A of the AAI Act. On a totality of the considerations made herein above, as any reasonable man would assume, we are convinced that there is a public interest behind the attempt to lease out the Airport for the purposes of carrying out certain services enumerated under Section 12. We have already noticed that there would be no profit erosion for the AAI and that the Authority stands to gain. The lessee also intends a profit, but however in the process the development of the Airport would also be made possible without any capital expenditure from the AAI. The AAI which retains the operation and management of aeronautical services can bring in more expertise and care to such services, ensuring the safety of the passengers. There is also an attempt to down size the work force in the AAI confining it again to personnel required for aeronautical services. These are a broad overview of the effects; which however are to be tested in actual execution. We are not expected to embark upon a more comprehensive enquiry nor can we bring in our subjective opinions to interfere with a decision of the executive government, as revealed from the ultimate approval granted by the Union Cabinet.

68. There cannot be alleged a total absence of public interest and there is nothing to substantiate that there are extraneous reasons; which too are aired only when a particular bidder came out successful in all the six Airports.

IX. Article 131 of the Constitution of India

69. Having found the various grounds raised against the RFP to be devoid of merit, we do not think there is any purpose served in considering the preliminary objection raised by the learned ASG as to the writ petition being not maintainable for reason of there being a dispute between the State and the Union Government, falling within the scope of a dispute referred to under Article 131 of the Constitution. All the same, since the Hon'ble Supreme Court has left open the question we are duty bound to consider the same.

71. In the present case too, the challenge made is against the tender floated by the AAI, a statutory authority to bring in private participation for the operation and management of an airport; in services not involving air traffic service and watch and ward at airports. The lease of the Airport for such purposes is permitted statutorily by Section 12A of the AAI Act, with the previous approval of the Central Government. The Private Public Participation which is a policy of the Union Government, statutorily recognised with respect to the Airports; is not questioned in the writ petitions. The question raised is only whether the AAI acting within the confines of Section 12A, is able to satisfy the mandate of public interest or the interest of better management, in leasing out the Airports. The State had bid under the RFP an attempt to participate in a commercial venture. There is no question arising as to the relationship between the Union Government and the State in the federal set up, as envisaged in the Constitution of India. There is no question arising which involves overlapping of the power, authority or right of the Central Government and that of the State Government. As has been held in State of Karnataka v. Union of India [(1977) 4 SCC 608] "the quintessence of Article 131 is that there has to be a dispute regarding a question on which the existent or extend of a legal right depends"(sic). We do not see any such dispute arising even in the State's contention regarding legitimate expectation and promissory estoppel, which is solely grounded on communications exchanged between the Union Government and the State, not having any bearing on their respective powers or authority. The policy of the Central Government is not under challenge and even the State's bid for the lease under the RFP, could be maintained only under Section 12A of the AAI Act. The dispute essentially is between the State and the AAI which cannot be said to be a dispute wherein only the Hon'ble Supreme Court can be moved under Article 131 of the Constitution. We hence reject the preliminary objection raised by the learned ASG."

X. Our Conclusion

72. We conclude that there is absolutely no valid ground to cause interference to the proceedings challenged in the batch of writ petitions. As is discernible from the averments in the writ petitions, the

challenge is against privatization which is the declared policy of the Union Government. With respect to Airports it is Public-Private Participation, which has been statutorily declared by incorporation of Section 12A to the AAI Act. There is no challenge to the statutory provision. Interference to a policy framed by the elected Government it is trite, is difficult, and the feeble challenge raised herein against the policy is devoid of merit.

(i) The State nominated the KSIDC to bid under the Request for Proposal issued by the Airport Authority of India, with a Right of First Refusal on the maximum bid coming within the range of ten per cent. The bid failed and both have now turned against the very RFP under which they participated, with an edge over others. W.P(C) No. 6076 of 2019 filed by KSIDC and W.P(C) No. 6823 of 2019 filed by the State and the case set up by them, according to us, is a classic example of the proverbial 'sour grapes'. The State also raised a ground of legitimate expectation, which we rejected. The said writ petitions are only to be dismissed and we do so.

(ii) We notice that W.P(C) No. 5482 of 2019 has, by way of an amendment, chalienged the Press Note published revealing the approval of the Cabinet for leasing out of three Airports at Ahmedabad, Lucknow and Mangaluru. Though there is a prayer challenging the lease of all the six Airports, we have found that the RFPs were separate which have not been produced or challenged. The challenge has to be confined to the RFP for Thiruvananthapuram International Airport. W.P(C) No. 5482 of 2019 and W.P(C) No. 7961 of 2019 filed by the Union of Employees are also found to be liable to be dismissed on the conclusions arrived at by us with respect to the grounds raised therein and also for reason of the Letter of Award issued to the successful bidder having not been challenged. We dismiss these writ petitions too.

(iii) W.P(C) No. 2224 of 2019 and W.P(C) No. 20459 of 2020 are petitions filed without establishing their *locus standi*. We find them to be mischievous and an abuse of process of this Court and we would have, while rejecting them, imposed heavy costs, but for the fact that they have not taken up any additional time of this Court. We hence dismiss the above on the further

ground of the two writ petitions being a clear abuse of process of this Court.

(iv) W.P(C) No. 7060 of 2019 raises almost similar grounds as raised by the State, in public interest, which also is liable to be rejected and we do so.

(v) W.P(C) No. 21321 of 2019 is dismissed as infructuous."

28. In the light of the aforesaid judgment, we are of the opinion that the petitioner-AAE Union has not been able to make out a case for interference in respect of the policy decision of the Government of India for leasing out the airports.

29. In the considered opinion of this Court, the AAI has followed a most transparent process in leasing out the airports. The airport in question has not been leased out by way of private negotiation. The tender was issued and the successful bidder has been awarded the contract and there is no violation of any statutory provision of law in the matter. The Hon'ble Supreme Court in the case of **Balco Employees' Union (Regd) v. Union of India and Others** reported in (2002) 2 SCC 333 has dealt with the scope of judicial review in respect of policy decisions and has held unless a decision is contrary to any statutory provision or the Constitution, the Courts cannot interfere with it. Paragraphs-46, 47, 49, 51,

57, 88, 92 and 93 Of the aforesaid judgment reads as under:

> "**46.** It is evident from the above that it is neither within the domain of the courts nor the scope of the judicial review to embark upon an enquiry as to whether a particular public policy is wise or whether better public policy can be evolved. Nor are our courts inclined to strike down a policy at the behest of a petitioner merely because it has been urged that a different policy would have been fairer or wiser or more scientific or more logical.
>
> **47.** Process of disinvestment is a policy decision involving complex economic factors. The courts have consistently refrained from interfering with economic decisions as it has been recognised that economic expediencies lack adjudicative disposition and unless the economic decision, based on economic expediencies, is demonstrated to be so violative of constitutional or legal limits on power or so abhorrent to reason, that the courts would decline to interfere. In matters relating to economic issues, the Government has, while taking a decision, right to "trial and error" as long as both trial and error are bona fide and within limits of authority. There is no case made out by the petitioner that the decision to disinvest in BALCO is in any way capricious, arbitrary, illegal or uninformed. Even though the workers may have interest in the manner in which the Company is conducting its business, inasmuch as its policy decision may have an impact on the workers' rights, nevertheless it is an incidence of service for an employee to accept a decision of the employer which has been honestly taken and which is not contrary to law. Even a government servant, having the protection of not only Articles 14 and 16 of the Constitution but also of Article 311, has no absolute right to remain in service. For example, apart from cases of disciplinary action, the services of government servants can be terminated if posts are abolished. If such employee cannot make a grievance based on Part III of the Constitution or Article 311 then it cannot stand to reason that like the petitioners, non-government employees working in a company which by reason of judicial pronouncement may be regarded as a State for the purpose of Part III of the Constitution, can claim a superior or a better right than a government servant

and impugn its change of status. In taking of a policy decision in economic matters at length, the principles of natural justice have no role to play. While it is expected of a responsible employer to take all aspects into consideration including welfare of the labour before taking any policy decision that, by itself, will not entitle the employees to demand a right of hearing or consultation prior to the taking of the decision.

49. The Government could have run the industry departmentally or in any other form. When it chooses to run an industry by forming a company and it becomes its shareholder then under the provisions of the Companies Act as a shareholder, it would have a right to transfer its shares. When persons seek and get employment with such a company registered under the Companies Act, it must be presumed that they accept the right of the Directors and the shareholders to conduct the affairs of the company in accordance with law and at the same time they can exercise the right to sell their shares.

51. The aforesaid observations, in our opinion, enunciate the legal position correctly. The policies of the Government ought not to remain static. With the change in economic climate, the wisdom and the manner for the Government to run commercial ventures may require reconsideration. What may have been in the public interest at a point of time may no longer be so. The Government has taken a policy decision that it is in public interest to disinvest in BALCO. An elaborate process has been undergone and majority shares sold. It cannot be said that public funds have been frittered away. In this process, the change in the character of the Company cannot be validly impugned. While it was a policy decision to start BALCO as a company owned by the Government, it is as a change of policy that disinvestment has now taken place. If the initial decision could not be validly challenged on the same parity of reasoning, the decision to disinvest also cannot be impugned without showing that it is against any law or mala fide.

57. Even though the employees of the company may have an interest in seeing as to how the Company is managed, it will not be possible to accept the contentions that in the process of disinvestment, the principles of natural justice would be applicable and that

the workers, or for that matter any other party having an interest therein, would have a right of being heard. As a matter of good governance and administration whenever such policy decisions are taken, it is desirable that there should be wide range of consultations including considering any representations which may have been filed, but there is no provision in law which would require a hearing to be granted before taking a policy decision. In exercise of executive powers, policy decisions have to be taken from time to time. It will be impossible and impracticable to give a formal hearing to those who may be affected whenever a policy decision is taken. One of the objects of giving a hearing in application of the principles of natural justice is to see that an illegal action or decision does not take place. Any wrong order may adversely affect a person and it is essentially for this reason that a reasonable opportunity may have to be granted before passing of an administrative order. In case of the policy decision, however, it is impracticable, and at times against the public interest, to do so, but this does not mean that a policy decision which is contrary to law cannot be challenged. Not giving the workmen an opportunity of being heard cannot per se be a ground of vitiating the decision. If the decision is otherwise illegal as being contrary to law or any constitutional provision, the persons affected like the workmen, can impugn the same, but not giving a predecisional hearing cannot be a ground for quashing the decision.

88. It will be seen that whenever the Court has interfered and given directions while entertaining PIL it has mainly been where there has been an element of violation of Article 21 or of human rights or where the litigation has been initiated for the benefit of the poor and the underprivileged who are unable to come to court due to some disadvantage. In those cases also it is the legal rights which are secured by the courts. We may, however, add that public interest litigation was not meant to be a weapon to challenge the financial or economic decisions which are taken by the Government in exercise of their administrative power. No doubt a person personally aggrieved by any such decision, which he regards as illegal, can impugn the same in a court of law, but, a public interest litigation at the behest of a stranger ought not to be entertained. Such a litigation cannot per se be on behalf of the poor and the

> downtrodden, unless the court is satisfied that there has been violation of Article 21 and the persons adversely affected are unable to approach the court.
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> **92.** In a democracy, it is the prerogative of each elected Government to follow its own policy. Often a change in Government may result in the shift in focus or change in economic policies. Any such change may result in adversely affecting some vested interests. Unless any illegality is committed in the execution of the policy or the same is contrary to law or mala fide, a decision bringing about change cannot per se be interfered with by the court.
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> **93.** Wisdom and advisability of economic policies are ordinarily not amenable to judicial review unless it can be demonstrated that the policy is contrary to any statutory provision or the Constitution. In other words, it is not for the courts to consider relative merits of different economic policies and consider whether a wiser or better one can be evolved. For testing the correctness of a policy, the appropriate forum is Parliament and not the courts. Here the policy was tested and the motion defeated in the Lok Sabha on 1-3-2001."

30. In the light of the aforesaid landmark judgment delivered by the Hon'ble Supreme Court, the question of interference does not arise. Other important aspect of the case is that the Union has filed the present writ petition and the Union was not a participant in the tender process. The Union at best should be interested in respect of protection of rights of its workmen and under the agreement executed between the parties, the rights of the workmen are already protected and therefore in the considered opinion of this Court the question of interference in the peculiar facts and

circumstances of the case specially in the light of the judgment delivered by the Division Bench of the Kerala High Court does not arise. The Hon'ble Supreme Court in the case of **Federation Haj Ptos of India v. Union of India** reported in LAWS (SC) 2019 2 9 in paragraphs-18 to 20 has held as under:

> "18. Going by the aforesaid considerations, the respondent has carved out the categories of HGOs on the parameters of experience as well as financial strength of HGOs. Such a decision is based on policy considerations. It cannot be said that this decision is manifestly arbitrary or unreasonable. It is settled law that policy decisions of the Executive are best left to it and a court cannot be propelled into the unchartered ocean of Government policy See Benett Coleman & Co. v. Union of India, (1972) 2 SCC 788. Public authorities must have liberty and freedom in framing the policies. It is well accepted principle that in complex social, economic and commercial matters, decisions have to be taken by governmental authorities keeping in view several factors and it is not possible for the courts to consider competing claims and to conclude which way the balance tilts. Courts are ill- equipped to substitute their decisions. It is not within the realm of the courts to go into the issue as to whether there could have been a better policy and on that parameters direct the Executive to formulate, change, vary and/or modify the policy which appears better to the court. Such an exercise is impermissible in policy matters. In Bennett Coleman's case, the Court explained this principle in the following manner:
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> "The argument of the petitioners that Government should have accorded greater priority to the import of

newsprint to supply the need of all newspaper proprietor to the maximum extent is a matter relating to the policy of import and this Court cannot be propelled into the unchartered ocean of governmental policy."

19) The scope of judicial review is very limited in such matters. It is only when a particular policy decision is found to be against a statute or it offends any of the provisions of the Constitution or it is manifestly arbitrary, capricious or mala fide, the court would interfere with such policy decisions. No such case is made out. On the contrary, views of the petitioners have not only been considered but accommodated to the extent possible and permissible. We may, at this junction, recall the following observations from the judgment in Maharashtra State Board of Secondary & Higher Secondary Education v. Paritosh Bhupeshkumar Sheth, (1984) 4 SCC 27:

"16... The Court cannot sit in judgment over the wisdom of the policy evolved by the Legislature and the subordinate regulation-making body. It may be a wise policy which will fully effectuate the purpose of the enactment or it may be lacking in effectiveness and hence calling for revision and improvement. But any drawbacks in the policy incorporated in a rule or regulation will not render it ultra vires and the Court cannot strike it down on the ground that in its opinion, it is not a wise or prudent policy, but is even a foolish one, and that it will not really serve to effectuate the purposes of the Act. The Legislature and its delegate are the sole repositories of the power to decide what policy should be pursued in relation to matters covered by the Act and there is no scope for interference by the Court unless the particular provision impugned before it can be said to suffer from any legal infirmity, in the sense of its being wholly beyond the scope of the regulation-making power or its being inconsistent with any of the provisions of the

parent enactment or in violation of any of the limitation imposed by the Constitution."

20) We may also usefully refer to the judgment in State of Madhya Pradesh v. Nandlan Jaiswal (1986) 4 SCC 566. In this judgment, licence to run a liquor shop granted in favour of A was challenged as arbitrary and unreasonable. The Supreme Court held that there was no fundamental right in a citizen to carry on trade or business in liquor. However, the State was bound to act in accordance with law and not according to its sweet will or in an arbitrary manner and it could not escape the rigour of Article 14. Therefore, the contention that Article 14 would have no application in a case where the licence to manufacture or sell liquor was to be granted by the State Government was negatived by the Supreme Court. The Court, however, observed:

"But, while considering the applicability of Article 14 in such a case, we must bear in mind that, having regard to the nature of the trade or business, the Court would be slow to interfere with the policy laid down by the State Government for grant of licences for manufacture and sale of liquor. The Court would, in view of the inherently pernicious nature of the commodity allow a large measure of latitude to the State Government in determining its policy of regulating, manufacture and trade in liquor. Moreover, the grant of licences for manufacture and sale of liquor would essentially be a matter of economic policy where the Court would hesitate to intervene and strike down what the State Government had done, unless it appears to be plainly arbitrary, irrational or mala fide."

In the light of the aforesaid judgment, the question of interference in the policy decision of Government of India does not arise.

31. The Hon'ble Supreme Court of India in the following judgments has held that the scope of the judicial review in contractual matters is quite limited. The legal position is settled that judicial review is not so much concerned with the correctness of the ultimate decision as it is with the decision making process unless of course the decision itself is so perverse or irrational or in such outrageous defiance of logic that the person taking the decision can be said to have taken leave of his senses.

i) GRIDCO LTD. V. SADANANDA DOLOI, (2011) 15 SCC 16

ii) PIMPRI CHINCHWAD MUNICIPL CORPN. v. GAYATRI CONSTRUCTION CO., (2008) 8 SCC 172

iii) G.B.MAHAJAN v. JALGAON MUNICIPAL COUNCIL (1991) 3 SCC 91

32. The Hon'ble Supreme Court in the aforesaid case has held that the policy decision of the executive are best left to it and a Court should not interfere with the policy decision unless the decision of the authority is *mala fide*, arbitrary, irrational or unreasonable. It has been further held that it is well accepted principle that in complex, social and economic matters, decisions have been taken by the governmental authorities keeping in view the several factors and it is not

possible for the Courts to consider competitive claims and to conclude which way the balance tilts. The Courts are ill-equipped to substitute the decisions and in the present case also it is purely a policy decision of the Government of India to lease out the airports for better management and functioning. Therefore, as the petitioner-AAE Union has not been able to point out violation of statutory provision of law and the constitutional provisions, the present writ petition deserves to be dismissed and it is accordingly **dismissed.**

Pending IAs., if any, stand disposed of.

No order as to costs.

SD/-
ACTING CHIEF JUSTICE

SD/-
JUDGE

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