

**NOT SO NICE CORRIDOR: THE  
CONTRACTUAL IMPLICATIONS OF THE  
BANGALORE-MYSORE INFRASTRUCTURE  
CORRIDOR**

**By**

**Nishita Vasan  
Sowjhanya Shankaran\***

## ABSTRACT

---

*The Bangalore-Mysore Infrastructure project has captured the minds of the legal and political fraternity of the State of Karnataka, India since its inception. This paper adopts a novel approach by examining this controversy from a contractual perspective. It studies the Framework Agreement between the State Government and NICE, the ensuing litigation and concludes that inherent flaws in the drafting of the contractual clauses are the source of several of the problems that have arisen. The paper proposes arbitration as the best form of resolving this particular dispute. To prevent such disputes in general, both legally and politically, the paper argues for strengthening contractual clauses and increasing transparency in Government tenders and other contractual dealings.*

## INTRODUCTION

---

The State in modern times is an immense source of wealth. Its economic activities are proliferating into a plethora of spheres in the name of welfare of its citizens. No longer content with just maintaining law and order, the Government has taken on the role of distributing benefits and largesse in the form of contracts, licences, quotas, mining rights etc. Further, with the real estate market becoming exceedingly lucrative, a greater number of people are investing in and purchasing property. In these circumstances, it becomes essential to protect these rights and regulate the Government's ability to confer the same.

Prior to 1947, the British Crown could not be sued for breach of Contract. However, with the passage of the Crown Proceedings Act, 1947, the Crown could be brought to Court to enforce contractual liabilities.<sup>1</sup> In India, the Government's liability under Contract is governed by Art. 299(1) of the Constitution of India, 1950 [hereinafter 'Constitution']. The Supreme Court has held that the principal function of the article is to protect **(i)** the government from being encumbered with liability for unauthorised contracts and **(ii)** the welfare of the general public.<sup>2</sup>

---

\*The authors are III Year students, pursuing a B.A. LL.B. (Hons.) course, at the National Law School of India University, Bangalore.

<sup>1</sup> MP JAIN, INDIAN CONSTITUTIONAL LAW 1537 (5<sup>th</sup> edn., Nagpur: Wadhwa & Company, 2008).

<sup>2</sup> *Chatturbhuj Vithaldas Jasani v. Moreshwar Parashram*, AIR 1954 SC 236.

The State's role changing continuously, it has taken on a variety of new and novel initiatives. This paper examines one such initiative i.e. the construction of a 111 km long expressway using the public-private partnership model. This model poses both great benefits as well as enormous risk. However, it has emerged as the favoured mode of entering into agreements by Government's. It is therefore apt that the initiative this paper endeavours to examine has been built on this model.

Part **I** of this paper deals with Government Contracts in general and examines the question whether the agreement in question falls under the ambit of article 299(1). Part **II** offers an overview of Infrastructure projects exploring in detail one particular PPP model i.e. BOOT. Part **III** studies the project in question carefully scrutinising the litigation that arose as a result of it. Part **IV** goes further into the intricacies of the agreement examining the various issues contended in the litigation and analysing them in respect of the Contract. Part **V** delves into the Contract analysing its clauses and highlighting its flaws. Part **VI** offers a critique of the agreement *in toto* studying its various intricacies. Part **VII** builds on this by proposing a model on which the Contract can be altered so as to give maximum effect to the agreement. The paper ultimately aims to arrive at a conclusion as to the causes governing the dispute over the project in question: Was it Contractual? And how far can modifications in the contract aid in preventing the same?

## **§ I: GOVERNMENT CONTRACT?**

---

In its simplest form, a government contract is one wherein one of the contracting parties is the Government. Earlier, the primary function of the State was considered to be the protection of the lives of its citizens through the maintenance of law and order. However, in the course of time, the functions of the State have diversified and it has started to perform more commercial activities.

The government can enter into a variety of contracts in exercise of its sovereign power, its statutory power and its executive power. The transactions carried out by the governments with individual or commercial organisations for the purposes of sale, purchase, construction,

acquisition of services etc. are called public contracts. In civil law countries, such contracts are known as “*contract administratif*”.<sup>3</sup>

Public contracts are those in which one of the parties is a public authority.<sup>4</sup> This includes government departments, nationalised industries, local bodies etc. The researchers through this paper will look at one such specific contract that is often entered into in the modern world - infrastructure contracts.

Infrastructure contracts can be entered into with a public body or private players. These projects are collectively Infrastructure Development Projects and the scope of the term ‘development’ includes activities such as design, construction, operation, maintenance or renovation of infrastructure facility. Such projects include the building of highways, bridges, roads, airports etc. Even though this contract seems similar to most other construction contracts, the difference lies in that, infrastructure contracts, due to their long gestation periods and the high costs, involve a greater degree of risk. Further, various hurdles, some man made and some natural, complicate such projects. While the latter is beyond the control of contracting parties, the former being, in most cases political, causes considerable delay in the implementation of the projects. The income generated from consumers is uncertain seeing as consumers are often unwilling to pay the commercial rates required to make the project viable.<sup>5</sup>

---

### IS THE FWA A GOVERNMENT CONTRACT VIS-À-VIS ARTICLE 299(1) OF THE CONSTITUTION?

---

The Constitution of India, under Art. 299 states that:

*“(1) All contracts made in the exercise of the executive power of the union or of a state shall be expressed to be made by the president, or by the Governor of the state, as the case may be, and all such contracts and all assurances of property made in the exercise of that power shall be executed on behalf of the president or the Governor by such persons and in such manner as he may direct or authorize.*

---

<sup>3</sup> VINOD K. AGARWAL, GOVERNMENT CONTRACTS: LAW AND PROCEDURE VOL.1, 1 (Delhi: Eastern Book Corporation, 1984).

<sup>4</sup> P JOSHI, LAW RELATING TO INFRASTRUCTURE PROJECTS 2 (New Delhi: Pub, 1997).

<sup>5</sup> *Ibid.* at 2.

*(2) Neither the President nor the Governor shall be personally liable in respect of any contract or assurance made or executed for the purposes of this Constitution, or for the purposes of any enactment relating to the Government of India heretofore in force, nor shall any person making or executing any such contract or assurance on behalf of any of them be personally liable in respect thereof.”<sup>6</sup>*

In order to analyse the Framework Agreement [‘FWA’] between the Government of Karnataka [‘GOK’] and Nandi Infrastructure Corridor Enterprises [‘NICE’] it is pertinent to first examine whether the agreement can be enforced as a government contract under Art. 299 of the Constitution. The main ingredient required to satisfy the conditions laid down by this Article is that the contract must be expressed to be made by the President or the Governor or by a person duly authorized by them to do so. Further, it must be executed in their name. The FWA was entered into by the GOK represented by the Secretary to the Government, Public Works Department, an officer authorized under Art. 299(1) of the Constitution of India. The researchers believe that the Bangalore-Mysore Infrastructure [‘BMIC’] Project was carried out in the furtherance of the executive powers of the Government. As a result, it falls under the purview of Art. 299 and can be called a Government Contract. However, the researchers feel that there is a certain limit placed on the extent to which the agreement is a government contract. This is manifested in article 18.4 which aims to resolve disputes and reads:

*“No claim of sovereign immunity: GOK unconditionally and irrevocably agrees that the execution, delivery and performance of this agreement constitute commercial acts and neither it nor any GOK Government Instrumentality is entitled of claim sovereign immunity in defense as against any of the rights or claims of the company in respect of adjudication, provisional remedy or execution proceedings.”<sup>7</sup>*

By virtue of a contract being a government contract, the Government which is a party to the contract gains immunity. Yet, article 18.4 takes away from the Government its inherent rights.

---

<sup>6</sup> P.M. BAKSHI, THE CONSTITUTION OF INDIA 243 (Delhi: Universal Law Publishing Co. Pvt. Ltd., 2008).

<sup>7</sup> See: Framework Agreement between the Government of Karnataka and Nandi Infrastructure Corridor Enterprises.

This imposes limitations on the agreement which clearly contravenes the conditions set forth in Art. 299(1). Further, the nature of the agreement, being commercial, raises doubts as to the extent to which it can be labeled a Government Contract

The scope of the project being Infrastructure Development i.e. the construction, operation and maintenance of the Expressway, the contract can also be termed an infrastructure contract.

## § II: INFRASTRUCTURE PROJECTS, AN OVERVIEW

---

The stages of implementation for an infrastructure project can be generally stated to be<sup>8</sup>:

1. The Gestation stage
2. The Development stage
3. The Construction and Start-up stage
4. The Operational stage
5. The Termination stage

The development stage is extremely crucial in the initial head start into a project. It is here that various critical decisions such as whether the project is to be handed over to a private company or a state organisation is made. In India, under the present legal regime, the only suitable way to execute such a project is via a private limited company. These companies ensure developers protection from the risks of such large contracts with the Government.<sup>9</sup>

The process of negotiation, finalisation and execution of the entire documentation required for a particular object should ideally be completed in the following sequence:

1. Executing the agreement with the concerned government
2. Concluding agreements with various equity participants
3. Executing the agreements with the various contractors
4. Executing the agreements with the lenders or financiers

---

<sup>8</sup> *Supra* note 4, at 10.

<sup>9</sup> *Supra* note 4, at 10.

The prime party in such contracts is the government which is represented though a ministry or a municipal body with its own personnel to take decisions regarding the project. The Government's primary objective in entering into these contracts with private companies is to ensure timely completion and commercial viability of the projects.<sup>10</sup>

The Project Vehicle forms the second vital component of the process. It is a legal entity vested with the right to implement the project and is also referred to as a Special Purpose Vehicle.<sup>11</sup> In structuring sponsors in such a manner, the company transfers the risks to the project vehicle rather than face it itself.

Depending on the scope and extent of private participation in the implementation of infrastructure projects they can be classified as BOOT (Build-Own-Operate-Transfer), BOT (Build-Own-Transfer), BLT (Build- Lease-Transfer) etc. The case in question is one implemented on the BOOT basis. The rights required for implementing a project on such a basis are different from those required under a BOT or BOLT format.

---

### **BUILD, OWN, OPERATE, TRANSFER**

---

The concept of Build Own Operate Transfer ['BOOT'] involves an understanding by which a private developer builds an infrastructure facility in return for the right to operate the facility and charge a user fee so as to generate a commercially viable return on the investment. It involves little or not cost to the Government. The private developer owns and operates the facility for a specified amount of time after which the ownership is transferred to the government without compensation.<sup>12</sup>

Besides the Government not using its own funds to build the project, an important aspect of the BOOT concept is that it allows certain risks to be passed on to the private sector.<sup>13</sup> These include risks of design, construction, finance, operations, maintenance and various commercial risks associated with the project.

---

<sup>10</sup> *Supra* note 4, at 11.

<sup>11</sup> *Supra* note 4.

<sup>12</sup> *Available at:* [http://www.mekong.es.usyd.edu.au/case\\_studies/nam\\_theun/boot/boot.htm](http://www.mekong.es.usyd.edu.au/case_studies/nam_theun/boot/boot.htm) (Accessed on 25th March, 2008).

<sup>13</sup> *Id.*

In such a project, a consortium is established to undertake the project. The consortium generally involves a sponsor, who is by and large a construction company or a developer, debt and equity providers, contractors, operators etc.<sup>14</sup> The members of the consortium despite having different and often conflicting goals, work together to implement the project.

An analysis of the BOOT concept reveals benefits and drawbacks. The concept, by relying on private sector firms, increases efficiency. This comes from the fact that private companies have greater accountability as well as financial discipline which is inspired by the motivation to maximize profit and increase shareholder value. It also provides access to greater funding. Private sector organisations have access to broader sources of capital than governments which are generally restricted to issuing guaranteed bonds and therefore pass on all project risks to taxpayers. Further, a single party is responsible for designing, constructing, operating and maintaining the facility. This reduces conflict between the various parties to the project and increases efficiency. The private sector firms often have extensive experience in operating infrastructure elsewhere and may have access to technology that would not be available to the government. Hence, the quality and standard of the services may be improved. Involving the private sector in infrastructure projects also involves significant risks. These include high transaction costs, reliance on expensive legal and financial advice and costs due to complex financial structuring.<sup>15</sup>

BOOT is now a method commonly utilised by governments to undertake large infrastructure projects. One such project is the Bangalore-Mysore Infrastructure Corridor Project.

### § III: THE BMIC PROJECT

---

“The Silicon Valley of India”, Bangalore, is one of India’s fastest growing cities. Home to leading technology companies, it enjoyed the tremendous benefits of the IT boom. With the economy on an upswing, the population saw a tremendous increase stretching the state’s

---

<sup>14</sup>RH Amdt, *Is Build-Own-Operate-Transfer a Solution to Local Government’s Funding Problems?* (Department of Civil & Environmental Engineering, The University of Melbourne, Victoria, Australia).

<sup>15</sup> *Id.*



resources.<sup>16</sup> Facing mounting infrastructure problems, the Government of Karnataka, decided in 1988 to float a tender to provide an expressway between Bangalore and Mysore. The objective was to ease the congestion in Bangalore as well as provide smooth movement of traffic to Mysore which was an emerging industrial and tourist hub.<sup>17</sup>

The response, however, did not meet the government's expectations. There was only one bidder who attached stringent conditions to the bid, demanding among other things that the cost of the land acquisition be borne by the Government and assurance that there would be no competing road developments by the State affecting the project's revenue.<sup>18</sup>

With the project in abeyance, the Government in 1995 was approached by and entered into a memorandum of understanding [hereinafter 'MoU'] with a consortium of Vanasse Hangen Brustlin Inc ['VHB'], SAB Engineering and Construction Ltd ['SAB'] and Kalyani Group of Companies. The project would be undertaken by the consortium with the Government extending support provided the viability of the project was established by the consortium. A project report was submitted for Governmental review. Following this, a High-Level Committee ['HLC'] was appointed to scrutinise the report. The cabinet considered the report if the committee and consequently approved the project.<sup>19</sup>

The consortium entered into a Consent and Acknowledge Agreement ['CAA'] in 1996 assigning their rights with regard to the project in favour of NICE to serve as a corporate vehicle for the project. A framework agreement ['FWA'] was signed by NICE and the GOK on 3<sup>rd</sup> April, 1997. The project was to comprise the construction of a 111 km 4-lane toll expressway, 5 townships and supporting infrastructure. Entailing the acquisition of 8,077.2 hectares of land and construction on a BOOT basis, the expressway was to be managed by NICE for thirty after which the Government would take repossession.<sup>20</sup>

In order to honour its obligations under the FWA, the Government undertook a series of steps including an agreement between the Karnataka Industrial Areas Development Board ['KIADB'] and NICE for the acquisition of private land. It was the FWA and the subsequent

---

<sup>16</sup> Spokesperson of NICE (Interviewed on: 26<sup>th</sup> March, 2008).

<sup>17</sup> KB Ganapathy, *Mysore – Bangalore expressway: A road to nowhere!*, available at: [www.OurKarnataka.Com](http://www.OurKarnataka.Com) (Accessed on 21<sup>st</sup> March, 2008).

<sup>18</sup> *HT Somashekar Reddy v. State of Karnataka and Another*, 2000 (1) KarLJ 224.

<sup>19</sup> *Id.*

<sup>20</sup> S Vincent, *A NICE Fraud?*, available at: [www.indiatogether.com](http://www.indiatogether.com) (Accessed on: 20<sup>th</sup> March, 2008).

actions of the Government which came to be challenged by Somashekar Reddy in the Karnataka High Court in what was to be the first of a spate of public interest litigations [‘PIL’].

---

## THE LITIGATION

---

The Writ Petition filed by Somashekar Reddy (No. 29221 of 1997)<sup>21</sup> was decided on 21-09-1998 in favour of the Government of Karnataka and NICE. The Court upheld the validity of the framework agreement stating that mere non-invitation of global tenders would not vitiate an otherwise legal and sound agreement. Further, they opined that the objective of the State in entering into the contract was not to fritter away assets or to augment revenue as alleged.

Following the dismissal of the Writ Petition, on 28-02-2005, the High Court decided on a series of Writ appeals challenging the decision (dated: 18-12-2003) of the learned Single Judge in a matter concerning the land acquisition process of the project. The Single judge upheld 60% of the land acquired for the project. This land was solely for the construction of the roads. However, 40% of the land acquired for setting up townships, construction of convention centres and for allotment of alternative sites to landowners was quashed holding that the notifications issued under s. 28(1) of the Karnataka Industrial Areas Development Act, 1966 [‘KIAD Act’] did not specify the purpose for which the lands had been acquired thereby the landowners of the right to object to the acquisition.<sup>22</sup> The Division Bench decided on all these issues together as they involved similar questions of law. They disagreed with the decision of the single judge and upheld the entire acquisition process. In their opinion, the notification issued by the State Government could not be split and bifurcated for partial invalidation and partial endorsements, since construction of roads as well as townships were equally vital parts of the project.

Subsequently, the same bench disposed of three more related writ petitions<sup>23</sup> on 03-05-2005. The primary claims concerned the alleged misrepresentation and fraud on part of NICE which vitiated the FWA; and the acquisition of land in excess of the required amount by the State Government. In the period between the decisions of the Single judge and the Division Bench

---

<sup>21</sup> *Supra* note 18.

<sup>22</sup> *All India Manufacturers Association v. State of Karnataka and Ors*, 2005 (3) KarLJ 521.

<sup>23</sup> *Id.*

there was a radical shift in the position of the government. This drastic step was prompted by the change in government in May 2004. Following former Prime Minister Deve Gowda's allegations of real estate profiteering, a note was sent to the principal secretary of the PWD regarding the same. Consequently, the KIADB was instructed to refrain from issuing notifications to acquire land for the final stages of the project. This clearly indicates that political and other extraneous considerations superseded the government's interest in fulfilling its contractual obligations. Fearing political consequences, the Government turned against NICE despite being co-respondents in the case.

The Bench was of the view that the allegation of fraud and misrepresentation was not only an after thought but also a falsity purposely alleged by the Government. The Court expressed regret that the government had raised a false charge to defeat a project that was in public interest. Regarding the second contention concerning land acquisition, the Court held that the issue having been decided conclusively in *Somashekhar Reddy*, the State could not raise the same plea again. It was estopped by its own and further as the project had been implemented by NICE for more than seven years, the State could not be allowed to change its stand and claim allotment of excess land. They went so far as to hold that it was not open to the State government nor any of the petitioners to even contend that excess land had been acquired.<sup>24</sup>

The case was finally laid to rest in an appeal to the Supreme Court. The Supreme Court in a decision delivered on 20-04-2006 held that as the issue in question was "*directly and substantially in issue*" in the High Court case, the findings could not be reopened. Further, it concurred with the decision of the High Court in holding that the project having been carried out for seven years, the State Government could not allege that excess land had been allotted.<sup>25</sup>

The Controversial Project took another turn on March 25, 2008 with the Supreme Court issuing contempt notices to seven Karnataka Government Officials including the Chief Secretary for not obeying its orders on the implementation of the project. The Karnataka

---

<sup>24</sup> *Supra* note 22.

<sup>25</sup> *State of Karnataka v. All India Manufacturers Organization and Ors*, AIR 2006 SC 1846.

Government has been asked to respond to the matter within six weeks. The order was on a petition by NICE alleging violation of the April 20, 2006 orders of the Supreme Court.<sup>26</sup>

#### § IV: ISSUES RAISED VIS-À-VIS THE FWA

---

In the case in question, the first issue raised by the petitioner, Mr. Somashekar Reddy, was that the contract entered into by the Government of Karnataka through an MoU with NICE was violative of Art. 14 and against public policy. The reasoning accorded by him was that there was no invitation for global tenders by the Government and this was proof of lack of bona fide intention on their part.<sup>27</sup> This premise was rebutted by the State on two grounds.

First, the Government did indeed float a tender in 1988 for the construction of the corridor and the same received poor response. Second, the nature of the proposal by the consortium negated the need for a global tender and consequently an MoU was entered into.<sup>28</sup>

An MoU is generally signed in the early stages of an infrastructure contract. It enables private participation and allows the government to gain experience in formulating a legal framework to regulate private participation in the concerned sector. This is in contrast to the floatation of a tender wherein the government conducts a competitive bidding for the rights to the project. An MoU allows the for flexibility by permitting governments to determine the terms and conditions of the contract through private negotiations as opposed to a tender wherein the rights are granted as per the terms and conditions specified in the tender.<sup>29</sup>

According to the researchers, in the case in question the tender was floated in 1988 at a time when the economy had yet to take off, and the government was constrained financially as well as by inexperience.<sup>30</sup> Under these circumstances, the only viable option, after an inadequate response from bidders in the tender process, was for the government to enter into an MoU with the consortium. Further the one tender that was received by the Government was loaded

---

<sup>26</sup> *Corridor row: SC contempt notice to Karnataka Chief Secretary, available at:* [http://www.outlookindia.com/pti\\_news.asp?id=556803](http://www.outlookindia.com/pti_news.asp?id=556803) (Accessed on 26<sup>th</sup> March, 2008).

<sup>27</sup> *Supra* note 18.

<sup>28</sup> *Supra* note 18.

<sup>29</sup> *Supra* note 4, at 114.

<sup>30</sup> *Supra* note 16.

with stringent conditions and this goes vitiates the basic requirements of a valid tender as per s. 2(a) of the Indian Contract Act, 1872.

The MoU allowed the Government to gain the experience it needed in implementing such a project while placing least strain on its financial resources as it was not required to put in its own money. Therefore, the Government acted in a *bona fide* manner in trying to develop infrastructure while simultaneously placing the least strain on its resources which could then be used to serve the interests of the people. Similar was the view of the High Court<sup>31</sup> which held that it was not essential for the Government to call for tenders prior to entering into a contract. As long as the government acts with a bona fide intention, the contract cannot be vitiated for the sole reason that a tender was not called for. Also contended was that the Government did not act in an arbitrary manner as required for a violation of Art.14 of the Constitution and neither did it act in a clandestine manner in signing the MoU as the same was public knowledge.

The petitioner further alleged that the consortium had purchased excess land for the agreement with the sole intention of profiting from real estate revenue and the government by acquiring the land had aided the same. The excess land acquired for the project would illegally create profits for the company and the government would be doling out largesse to the company by acquiring land on its behalf. The Government categorically denied this contending that the petitioner was not competent to evaluate the project in view of the modern technique employed in it.<sup>32</sup>

Eminent domain refers to the power possessed by the State over all property within it especially its power to appropriate property for public use.<sup>33</sup> In recent years there has been growing concern about the state's abuse of the power of eminent domain. Governments are at times inclined to exercise this power for the benefit of purely commercial interests. The same allegations have been levelled against the Government of Karnataka stating that it was turning over to the consortium; land at below market rates using its power of eminent domain.

---

<sup>31</sup> *Supra* note 18.

<sup>32</sup> V Ranganathan, *Eminent domain or Eminent Thievery?*, EPW 2697 (2006).

<sup>33</sup> BLACK'S LAW DICTIONARY 786 (BA Garner et al., 7<sup>th</sup> edn., St Paul: West Group, 1999).

The High Court however held otherwise giving substantial reasons for the same. It stated that the entire project was being undertaken solely for the benefit of the public. It was impossible for a private person to acquire land in a project of such magnitude independently. Thus the State was justified in using its power of eminent domain to acquire the required land. Ashok Bhan J. in his judgment held that

*“The project of this magnitude could not have been executed by purchase of land by a private person. As of necessity, land has to be acquired for the execution of such a project...No undue favouritism has been shown. The treatment is at par with other similarly situated persons or organisations for whose benefit the State acquires land.”*<sup>34</sup>

The most significant contention by the Petitioner was that excess land was acquired by the Government for the purpose of development of the corridor. Further, it was alleged that the real purpose of the agreement was to develop real estate to make profit and not to construct the 111 km Express Highway between Mysore and Bangalore. The State contended that it had agreed to provide the minimum extent of land required for the project. It had done so partly out of State owned land and the remaining by acquisition. The development of the highway and townships would help reduce air, water and noise pollution in and around Bangalore City by reducing the traffic congestion and over population as well as check the inflow of the shifting population into Bangalore and Mysore. The Court upheld the FWA, in favour of the Government, stating that the land acquired had indeed been the minimum required for the project and that the Government had acted in larger public interest.<sup>35</sup>

**Clause 3.2.3** of the Framework Agreement<sup>36</sup> states that:

*“GOK covenants that it will not restrict the use of the Land in any way and that the company shall have full freedom and discretion to industrially and commercially develop and use the Land, as generally contemplated by this Agreement, except that GOK shall zone or rezone, and shall cause to be zoned and rezoned, all Land in a manner consistent with its intended use in the Infrastructure Corridor Project as contemplated by this Agreement or as reasonably requested by the Company, all in accordance with applicable law.”*

---

<sup>34</sup> *Supra* note 18.

<sup>35</sup> *Supra* note 18.

<sup>36</sup> See: Framework Agreement between the Government of Karnataka and Nandi Infrastructure Corridor Enterprises.

The clause expressly provides that the company has the power to use its discretion to develop the land *industrially* as well as *commercially*. The government is merely a facilitator in the land acquisition process. The clause indicates that the government is expressly providing for the development in the area.

A spokesperson of NICE in conversation with the researchers claimed that the proposal for townships was made solely to make good the costs incurred in the construction of the infrastructure corridor. By mere collection of tolls the company would be able to recover the costs in not less than 150 years!<sup>37</sup>

In addition, the government had invested no money and the entire amount came from NICE. The researchers believe that despite the claims of the consortium, the motive was to make some amount of profit and this is indicated clearly by the contractual clause. However, the benefits to the public arising out of the expressway outweigh the costs of such hidden agenda.

Following the dismissal of *Somashekhar Reddy*, a further set of PIL's was filed challenging the framework agreement itself. The various issues and contentions raised in these set of PIL's provide great insight into the possible anomalies in the agreement. Therefore, in light of these arguments, the paper focuses on the framework agreement entered into by the Government of Karnataka and NICE and conducts a comprehensive study of the same. The primary device used by the researchers to accomplish the same is to examine each aspect of the controversy in detail and establish its chain of causation including the role played by the contractual clauses.

On an examination of the framework agreement several issues arise instantly. Quite a few of these have been dealt with in detail by the Court in the PIL. The researchers endeavour to examine the most important contractual issue i.e: Whether the agreement was vitiated by Fraud and Misrepresentation?

### **FRAUD AND MISREPRESENTATION**

---

<sup>37</sup> *Supra* note 16.

The main contention of the Government was that the transaction in its entirety was vitiated because of the fraud and misrepresentation on the part of NICE. The change in stand the government believed was in larger public interest. However, this issue, according to the Court, was raised merely to prevent the operation of the *res judicata* principle arising from the judgment in *Somashekar Reddy*. The issue was raised by the counsel for the Government but he “*quickly abandoned them and expressly gave it up.*”<sup>38</sup>

The argument put forth by the petitioners was that when the FWA was executed on 03-04-97 with NICE, the GOK believed that NICE was an agglomeration of the three members constituting the consortium and that the government would benefit from their expertise. However, this was not to be. The reasoning for the above was the uncertain financial capacity and technical know-how of NICE and Mr. Ashok Kheny<sup>39</sup>. Further, the petitioner alleged that NICE defrauded the government by falsely stating that it had the expertise and proven capability in taking up construction of transportation, infrastructure and also about its capability of having the required managerial, financial and technical capacity.<sup>40</sup>

The Court held that a perusal of all concerned documents would clearly indicate that the Government had been aware of the CAA that resulted in the formation of NICE. The only reason the Government did not affix its signature to the document was due to the advice of its legal department and not because of any fraud on the part of NICE. Further, the cabinet note put up on 17-03-1997 made it clear to the Court that the Government was fully aware of the formation of NICE. The execution of the FWA in several key aspects belies the State’s allegations. According to the Court, had there been any truth to the claims, the issues would have arisen at an earlier time after the start of implementation of the agreement. As a result, the Court believed that the allegations of fraud and misrepresentation were a ruse and believed “*the State Government was aware at the highest level... and had applied its mind before executing the FWA.*”<sup>41</sup> As a consequence, they estopped the Government on the doctrine of acquiescence and waiver from challenging the validity of the FWA.

---

<sup>38</sup> *Supra* note 20.

<sup>39</sup> Mr. Ashok Kheny is the Chairman and Managing Director, NICE.

<sup>40</sup> *Supra* note 20.

<sup>41</sup> *Supra* note 20.



*“NANDI INFRASTRUCTURE CORRIDOR ENTERPRISES LIMITED, (the “Company”, which expression shall, unless excluded by or repugnant to the context, be deemed to include its successors and assigns.*

*WHEREAS, GOK has consented to and acknowledged the exercise by the Company of the Consortium’s rights under the Memorandum of Understanding and the Government Order pursuant to a Consent and Acknowledgement Agreement dated 9<sup>th</sup> September, 1996 among the GOK and the members of the consortium.”<sup>42</sup>*

The above clause of the preamble to the FWA clearly indicates that Government most definitely would have been aware of the position of NICE under the agreement. As seen above, the agreement clearly lays down that the Company would exercise all of the consortium’s rights under the MoU and the Government Order. Hence, it cannot be said that the State Government did not know the status of NICE.

The researchers are in full agreement with the reasoning of the Court and suggest that the entire argument is baseless. NICE was floated as the project vehicle for the construction of the expressway only after a CAA between the members of the consortium. Express provision was made in the agreement for the floatation of NICE as the so called ‘front man’ in the agreement. The government was well aware of this agreement between the members of the consortium. The mere fact that its legal team’s advice prevented it from signing the agreement does not take away the fact NICE was validly created as a project vehicle for the purpose of the project. Further, the express provision in the preamble shows that the Government could not have been unaware of NICE’s position as it claimed. The volte-face by the government after a progression in the project only serves to suggest that the government had motives that were political and extraneous and had very little to do with the agreement itself.

## **§ V: THE BANGALORE-MYSORE INFRASTRUCTURE CORRIDOR FRAMEWORK AGREEMENT – 3<sup>RD</sup> APRIL, 1997.**

---

**Clause 2.1.1.12<sup>43</sup>** states that:

---

<sup>42</sup> See: Preamble to the Framework Agreement between the Government of Karnataka and Nandi Infrastructure Corridor Enterprises.

<sup>43</sup> See: Framework Agreement between the Government of Karnataka and Nandi Infrastructure Corridor Enterprises.

*“there shall be no action, suit, proceeding, petition or similar action challenging the infrastructure corridor project or any component thereof or the award of contracts or responsibilities in respect of the infrastructure corridor project or otherwise in respect of the responsibilities of the parties as contemplated hereby or the validity or enforceability of this agreement or any other project contract which might adversely affect the implementation and development of the infrastructure corridor project or any part thereof.”*

Such a clause, on plain reading, seems to be extremely illogical because it exempts the company from all liability. In a project of such magnitude it is only understandable that problems will arise and the common man should have a medium to address his grievances. By limiting such freedom, the clause violates the principles of justice and equity. The consortium could have easily hidden behind such a clause and escaped all liability for any of its acts. This clause comes under article 2.1 which reads *“Conditions precedent to Company’s obligations”* and hence it could be used to evade its obligations to then Government of Karnataka, under the contract.

Despite this, the project has been fraught with intense litigation and no court of law has considered the effect of this clause.

The question arises as to the enforceability of such a clause. From a contractual perspective, this clause cannot be enforced. It would violate fundamental principles of law and contract such equity and fairness and resulting in an infringement of public policy.

**Clause 3.1.2<sup>44</sup>** reads as follows:

*“GOK shall use its best efforts to dispose off, resist and resolve any obstacles or impediments created or placed by any person to thwart or challenge any part of the infrastructure corridor project.”*

Whilst the government fulfilled its obligations as per this clause at the time of *Somashekar Reddy*, it turned against NICE in the subsequent litigations alleging fraud and

---

<sup>44</sup> See: Framework Agreement between the Government of Karnataka and Nandi Infrastructure Corridor Enterprises.

misrepresentation by the company. By doing so, it has clearly breached its obligations as per the above clause. It is suggested that the prime reason for this breach was political rather than contractual and occurred when there was a change in Government.

**Clause 3.2.1**<sup>45</sup> states:

*“GOK shall use its best efforts to, and cause its Governmental Instrumentalities to, promulgate, facilitate, initiate, advocate and/or amend to the full extent possible under the laws of India any and all enactments, acts and legislation necessary or desirable to enable GOK or any other Governmental Instrumentality to obtain, procure and/or transfer the Land to the company for the purpose set forth in this Agreement”*

Despite allegations that this clause is unconstitutional as it subverts the constitutional provisions regarding the powers of the legislature to enact laws laid down in articles 196-201, it is the researchers’ contention that such provisions do not bind the legislature *“hand and foot”*<sup>46</sup> to subserve the interests of NICE. The legislature is competent and has the authority to uphold the relevant Central Legislation (in this case the Land Acquisition Act, 1894). The words *“under the laws of India”* clearly show that any decisions or steps taken by the Government or the legislature are still subject to the provisions of the Constitution and the laws of the Land.

According to **Clause 14.1.1**<sup>47</sup>:

*“GOK hereby indemnifies, defends and holds harmless the Company, any project Company and any Contractor and its and their respective Affiliates, directors, officers, employees and agents (each an ‘Indemnified Party’) in respect of any claim, liability, cost, expense, loss or damage (including legal fees) incurred in connection with or arising from any event or circumstance contesting any right, title or interest of the Company or any Project Company in or to any Land in the manner contemplated by this Agreement and from any breach of the representations, warranties, covenants and undertakings under this agreement.”*

---

<sup>45</sup> See: Framework Agreement between the Government of Karnataka and Nandi Infrastructure Corridor Enterprises.

<sup>46</sup> *Supra* note 18.

<sup>47</sup> See: Framework Agreement between the Government of Karnataka and Nandi Infrastructure Corridor Enterprises.

**Clause 16.2.1**<sup>48</sup> reads:

*“Upon the occurrence of any of the following events unless caused by a breach by GOK or any GOK instrumentality of any of its obligations under this Agreement or any project contract to which it is a party, GOK may give a notice of default to the company:*

*The Company’s breach of its material obligations or covenants under this agreement”*

A plain reading of the clause 14.1.1 reveals that the government excluded completely all liability of the company arising from any of its misconducts causing a contractual breach. At the same time, 16.2.1 provided for the power of the Government to hold the company liable for breach of its contractual obligations. The two provisions seem to contradict one another. While one indemnifies the Company in respect of its obligations, the other seeks to hold it liable for the same. The question necessary to consider at this juncture is the necessity as well as the implications of article 14.1.1. As a result of the article, the government has to bear entire costs of the Company’s liabilities. Not only does this impose an unnecessary drain on the State’s resources but it unmistakably conflicts with 16.2.1. According to the researchers, there seems to be no real need for article 14.1.1. It serves no real purpose except to restrict the authority of the State under the agreement. Given that article 16 provides sufficient recourse to both parties in case of default or breach, there seems to be no real need for the inclusion of the article.

As stated in **Clause 3.5.2**<sup>49</sup>,

*“GOK shall and shall use its best efforts to cause its Governmental Instrumentalities subject to applicable laws, to ensure that no local government or authority has any authority to grant any approval or other right to develop, or any right to zone or rezone, any part of the township to any person other than the Company or any Project Company or Affiliate of either thereof.”*

---

<sup>48</sup> See: Framework Agreement between the Government of Karnataka and Nandi Infrastructure Corridor Enterprises.

<sup>49</sup> See: Framework Agreement between the Government of Karnataka and Nandi Infrastructure Corridor Enterprises.

The principal reason for the rejection of the only tender the government received was the stringent conditions attached by the bidder. These included assurances by the State that there would not be any competing road development by the State and other agencies, affecting the revenue of the project. State Highways 17 and 86 would not be improved from their present condition. Only routine surface maintenance would be conducted. As a result of these conditions, the Government placed the bid in abeyance and proceeded to sign an MoU with the consortium resulting in the agreement with NICE.

A clear reading of the clause indicates that government had assured NICE that no other person apart from the Company would be permitted to “*develop, zone or rezone any part of the townships*” Such a bias is clearly violative of Art. 14 of the Indian Constitution.<sup>50</sup> Hence, the allegation that global tenders were not invited may not entirely be false since the government seems to have grabbed the first lucrative option that came its way (i.e. MoU).

## **§ VI: THE BANGALORE-MYSORE INFRASTRUCTURE CORRIDOR PROJECT - CRITIQUE**

---

As is common knowledge, especially in a country like India, the Government holds ideals and expectations different from those envisaged by private players. In some cases, these differences get put aside and the project gets completed smoothly, while in some others there is considerable delay but eventual completion of the project. However, in certain unfortunate cases, the Government’s interests are completely disjoint from those of the private players and hence long processes of litigation follow by which the completion of the project often gets stalled midway. Therefore, it becomes relevant to reflect on the merits of the agreement.

The BMIC contract was entered into by executive like all other government contracts. In most circumstances, this would not have posed problems to a large extent. However, in the case in question, the Supreme Court held that the contract could be invalidated by a two-thirds majority resolution passed by the legislature. The researchers believe that such a resolution is detrimental to progress and this is especially important in the present case where ninety five

---

<sup>50</sup> The State shall not deny to any person equality before law or the equal protection of laws within the territory of India.

percent of the project has been completed. Not only would this result in tremendous losses to the Company, but would also greatly damage the reputation of the State as an investment destination. The legislature can use this power arbitrarily and repudiate a contract as and when it pleases. This would drive away private investors at a time when the mandate of the government is growth and development and it is seeking to accomplish this primarily through the public private participation model. The consequences of this judgment are already being seen in that there are talks of the BMIC project being handed over to a Swiss Company and this would not only cause substantial losses to NICE but would also permanently hamper the faith of the industry in the Government.

An overview of the FWA illustrates that it is biased towards the company. There are several clauses indemnifying the company for all acts including breach of the agreement. The unbalanced nature of the agreement can be attributed to the inexperience of the government. At the time the MoU was signed, following a failed tender, in 1995, the government was trying desperately to bring in private participation in the infrastructure sector. However, having had no experience in the field prior to this, they seized the first opportunity that arose and accepted the unfair terms laid down in the agreement.

The principal function of the government is to work to the betterment of the people. However, as illustrated by this agreement, the government, in its quest for privatisation, has succumbed to the interests of the Company. The agreement clearly suits the whims of NICE and is glaringly one-sided. The charges of excess land acquisition also go further to substantiate the fact that the government was acting in the interests of the company rather than in public interest. The Supreme Court has equated public policy to mean public interest and hence, in light of that, the agreement is clearly opposed to public policy and stands to be vitiated as per s. 23 of the Indian Contract Act, 1872.<sup>51</sup>

The researchers are of the opinion that the easiest and most mutually beneficial method of resolving the dispute is arbitration. In fact the FWA expressly states in article 18, the method for resolution of disputes. The government erred in directly expressing its displeasure with NICE in a report to the Court. The most suitable course of action would have been for the

---

<sup>51</sup> The consideration or object of an agreement is lawful, unless - it involves or implies injury to the person or property of another; or the Court regards it as immoral, or opposed to public policy.

government to respect the provisions of article 18 and attempt to reach an amicable resolution of the dispute by “*discussion in good faith*” as directed by article 18.1.

## **§ VII: MODEL FOR IMPROVEMENT OF THE CONTRACT**

---

Following an analysis of the project, the FWA and its intricacies, the researchers wish to suggest certain changes that could possibly have safeguarded the project and assisted in preventing the dispute or an amicable resolution of the same.

### **1. LIABILITY**

One of the principal points of contention in a dispute of this kind regards the imposition of liability. The provisions of the FWA expressly absolve NICE of liability in most cases including for breach of contract. Such a long rope given to one party violates the principles of equity and fairness. A possible solution to such a problem would be to allow for equal liability if both parties.

### **2. DISPUTE RESOLUTION**

Since the Contract expressly provides for arbitration as the mode of dispute resolution, the parties should have stuck by the clause and resolved the dispute amicably. Strengthening the dispute resolution clause could prevent endless litigation and prevent the wasteful use of time and resources by both parties. A spokesperson of NICE when questioned about this responded that suing the Government or initiating arbitration was never really the intention of the company since their primary concern was the timely completion of the project s as to benefit the public. However honourable the intentions of the company may have been, they should have resorted to arbitration the moment the dispute began.

### **3. LAND ACQUISITION**

Land Acquisition is the focal point of the entire issue and has been the subject matter in most of the litigation. The main contention has been that the land acquired was in excess.

Therefore, prescribing clearly the details of land acquisition would go a long way in stemming the tide of litigation. This would include the mode of estimating the land to be acquired, the break-up of the required land i.e. the amount of land required in each part of the project as well as an express statement as to the total amount of land required for the project.

#### **4. COMBINING CONTRACTS**

The Government entered into separate contracts with various boards including the Karnataka Electricity Board, KIADB etc. This created a lot of problems during the implementation of the project with the various companies each performing their duties but without any coordination. Hence, the Government could have ensured that all the FWA was an umbrella agreement encompassing the contracts with all the companies with a common dispute resolution clause.

## **CONCLUSION**

---

The BMIC project brought to light the inherent weaknesses in large scale Government Contracts. The undertaking to construct the 111 km long expressway challenged the ethics and effectiveness of the government using its eminent domain powers to acquire land.<sup>52</sup> The project illustrates how such bold infrastructure projects can go rapidly out of kilter with baffling clauses, corruption and land mafia.<sup>53</sup> The best way to deal with this is to strengthen the contractual clauses and by making the contract and the dealings involved more transparent. The greater accountability resulting out of these measures will not only encourage a sense of duty and obligation but will go a long way in fostering good will amongst the parties. Given, as the BMIC project has demonstrated, that government contracts have a potential to go so awry, resolution of small issues amicably greatly aid in furthering the completion of the project. The FWA was not perfect and had its inherent flaws; however a mutually agreeable mediation might have solved a majority of those issues. Yet, it progressed to such an extent as to reach the Supreme Court. This merely shows that, no matter how well drafted the contract, if there is no political will and backing to enforce such an agreement, there is no way to proceed forward.

---

<sup>52</sup> *Supra* note 32.

<sup>53</sup> *Road to Nowhere*, 41(25) EPW 2509 (2006).