

Supreme Court of India

Villianur Iyarkkai Padukappu Maiyam Vs. Union Of India & Ors. on 14 May, 2009

Author: J Panchal

Bench: K.G. Balakrishnan, P. Sathasivam, J.M. Panchal

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 3572 OF 2009 (Arising out of SLP (C) No. 6977 of 2007) Villianur Iyarkkai Padukappu Maiyam ... Appellant Versus

Union of India and others ... Respondents With

CIVIL APPEAL NO. 3573 OF 2009 (Arising out of SLP (C) No. 9988 of 2007) JUDGMENT

J.M. Panchal, J.

Leave granted in both the special leave petitions.

2. Appeal arising from Special Leave Petition (C) No. 9988 of 2007 is directed against judgment dated August 10, 2006, rendered by the Division Bench of Judicature at Madras, in Writ Petition No. 3304 of 2

2006 by which three prayers made by the appellant to quash (1) the Letter of Intent dated June 3, 2005 granted by the Government of Pondicherry to the respondent No. 11 herein, i.e., M/s. Subhash Project and Marketing Limited, for development of port in Pondicherry on Build Operate and Transfer ('BOT' for short) basis, (2) approval dated January 21, 2006 accorded by the Lt. Governor of Pondicherry to the detailed project report dated November 16, 2005 submitted by the respondent No. 11 and its partner M/s. Om Metals Limited for the development of Pondicherry Port on BOT basis as well as to the concession agreement to be entered into between the Government of Pondicherry and the respondent No. 11 with its consortium/partner M/s. Om Metals Limited and with their affiliates for the development of the Pondicherry Port and all related and ancillary/other activities and (3) direction dated January 24, 2006, issued by the Director of Ports, Government of Pondicherry, Port Department, to the officers concerned, to prepare a 3

list of all the existing moveable/immovable assets of the Pondicherry Port for handing over to the respondent No. 11 by January 30, 2006, consequent upon the decision taken by the Government of Pondicherry for the development of Pondicherry Port on BOT basis, are rejected.

3. Appeal arising from Special Leave Petition (C) No. 6977 of 2007 is also directed against judgment dated August 10, 2006, mentioned above, rendered in Writ Petition No. 12337 of 2006, by which two prayers made by the appellant to quash (1) the approval dated January 21, 2006 accorded by the Lt. Governor of Pondicherry to the detailed project report dated November 16, 2005, submitted by the respondent No. 11 and its partner M/s. Om Metals Limited, for the development of Pondicherry Port on BOT basis as well as to the concession agreement to be entered into between the Government of Pondicherry and the respondent No. 11 with its consortium/partner M/s. Om Metals Limited and 4

with their affiliates for the development of Pondicherry Port and all related and ancillary/other activities and (2) the direction dated January 24, 2006, issued by the Director of Ports, Government of Pondicherry, Port Department, to the officers concerned to prepare a list of all the existing moveable/immovable assets of the Pondicherry Port for handing over the same to the respondent No. 11 by January 30, 2006 pursuant to the decision taken by the Government of Pondicherry for the development of Pondicherry Port on BOT basis, are rejected.

4. As both the appeals arise from the common judgment delivered by the Madras High Court on August 10, 2006 and common question of facts and law arise for consideration of this Court, it is proposed to dispose them of by this common judgment.

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5. In order to trace the development of events leading to filing of these appeals, it is necessary to notice certain basic facts.

6. Background

The existing Port of Pondicherry is situated in the East Coast of India between two Major Ports of India, i.e., Madras and Tuticorin. It is located at the Ariankuppam River Mouth in Pondicherry. The history of the Pondicherry Port dates back to the tenth century A.D. The Pondicherry Port flourished as a centre for international trade and commerce. However, it could not maintain the pace of augmentation in improving the port facilities with respect to the rapid changes in transport technology. Therefore, the port facilities became obsolete and the Port lost much of its importance. With the objective of developing the port facilities, offers from various Marine Technical Consultancy Firms were invited by the Government of Pondicherry in the year 1973 for the preparation 6

of a Master Plan and a detailed project report. After examining the offers received from various firms, the Port Department of Government of Pondicherry recommended that the project be awarded to M/s. Consulting Engineers Services (India) Pvt. Ltd. By Government order dated September 27, 1973 the said organization was entrusted with the work of preparation of the Master Plan and a detailed project report. The said organization submitted various reports and finally updated its project report in May, 1982. On the basis of the reports, the Ministry of Shipping and Transportation (Ports Wing), Government of India approved the project for the creation of certain facilities at the Pondicherry Port and sanctioned the cost of the project by letter dated June 26, 1984. The Government of Pondicherry entered into an agreement with M/s. Consulting Engineering Services (India) Private Limited on January 22, 1985 for development of the facilities in terms of the approval and sanction granted by the Government of India. During the 7

construction of the facilities, there was a proposal to create additional development facilities for Commercial-cum-Fishing Vessels.

The creation of these additional facilities was discussed in a meeting held on March 22, 1989 pursuant to which the Director (Ports), Port Department, Government of Pondicherry vide letter dated March 23, 1989 informed the Development Commissioner, Government of Pondicherry that creation of such additional facilities would require a feasibility report. In the said letter it was also stated that since the Port Department lacked competent personnel in this regard, the same should be got prepared by a body having the requisite expertise. It was also mentioned in the letter that M/s. Consulting Engineering Services (India) Private Limited had no requisite expertise and recommended the appointment of M/s. Rail India Technical and Economic Services India Limited, a Government of India undertaking under the Ministry of Railways ("M/s. RITES India 8

Limited" for short) to conduct the study on the technical feasibility and economic viability of the proposed development facilities. This proposal was examined and approved by various officials including the then Chief Minister of Pondicherry on March 27, 1989 and the then Lt. Governor, Pondicherry on March 28, 1989. In terms of those decisions, a Government order dated May 29, 1989 was issued by the Government of Pondicherry sanctioning a techno-economic survey to be conducted by M/s. RITES India Limited.

On June 10, 1991, M/s. RITES India Limited submitted its Techno-Economic Feasibility Study Report pertaining to the Development of the additional facilities at Ariankuppam Port Project. The said report noticed

that the proposed development was not only necessary for bridging the gap of technological changes in the sea transport, but was also necessary from the socio-economic point of view. In the report it was mentioned that the investments in the proposed project was 9

justified. By the said report a study to be done on the ways and means of raising the funds for the project was recommended. The report also pointed out that Environmental Impact Assessment for the proposed development indicated that the effect on the environment was not significant and would be well within the acceptable levels specified as per the Indian standards.

In spite of the positive Feasibility Study Report submitted by M/s. RITES India Limited, the project could not be carried forward in view of the paucity of funds.

Again, some time in March 1996 the Government of Pondicherry made further attempt to develop the Port by inviting the officials of M/s. RITES India Limited to examine and provide consultancy services by privatization of the ports at Pondicherry, Karaikal and Mahe. Accordingly, a meeting was held between the officials of Government and the Company on March 12, 1996. In the said meeting the officials of M/s. RITES India 10

Limited suggested that appropriate approach was to adopt the Build, Own, Share and Transfer mode of privatization. In terms of the said meeting M/s. RITES India Limited, through a letter dated March 12, 1996, submitted a 'Terms of Reference' for offering consultancy assignment for privatization of aforementioned ports. The total consultancy fee for the assignments was initially put as Rs.30 lakhs, which was reduced to Rs.20 lakhs as the proposal for consultancy was subsequently limited to the Pondicherry Port only. The Joint Secretary, Ministry of Surface Transport, Government of India, vide letter dated March 22, 1996 informed the Chief Secretary, Pondicherry Administration about the need to expand the existing capacity of the Pondicherry Port to meet the growth requirement of traffic handled by various major ports. In the said letter it was mentioned that a decision was taken to invite capital participation by private sector and from non-maritime land-locked states. In response to the said letter the Director of Ports, Government 11

of Pondicherry addressed a letter dated April 18, 1996 enclosing therein the material for inviting capital participation by the private sector and non-maritime land-locked states.

One company, i.e., Megah Venture Lines (M) SDN BHD vide letter dated March 28, 1996 addressed to the Secretary (Health & Welfare and Port), Government of Pondicherry, referred to the discussion it had on March 28, 1996 and made a proposal to conduct a Feasibility Study relating to the modernization/privatization of the Pondicherry Port. The said company wanted permission to conduct the said Feasibility Study. The said proposal was examined by the Director (Ports), Government of Pondicherry and by letter dated April 19, 1996, the Director (Ports), Government of Pondicherry, recommended that as the entire privatization of port was being examined by M/s. RITES India Limited, the study sought to be conducted by M/s. Megah Ventures Lines should be 12

permitted only after tenders for privatization were invited by M/s. RITES India Limited.

The Managing Director of M/s. Mega Ventures Lines along with letter dated January 25, 1997, addressed the then Chief Minister, Pondicherry, enclosed a draft of MOU pursuant to the meeting which had taken place between the then Chief Minister and the officials of M/s. Megah Ventures Lines on January 23, 1997 and claimed that the same was in accordance with the economic policy of the Government of India. The benefits, which were to accrue, were also mentioned in the said letter. The Director of Ports, Government of Pondicherry, by his letter dated June 24, 1997, made a proposal to the Under Secretary (Ports), Pondicherry to examine the issue as to whether it would be preferable to call for competitive tenders. It was also mentioned in the said letter that in the meanwhile M/s. RITES India Limited be approached for consultancy services. By the said letter the Director of Ports also proposed that M/s. RITES 13

India Limited be appointed as the consultant for the assignment of selection of suitable entrepreneurs for 'additional development facilities of Ariankuppam Port Project' by competitive tenders on BOOST basis. The Director also requested for sanction of Rs.14 lakhs as expenditure. On September 19, 1997 a meeting was held between the senior officials of the Government of Pondicherry and the Group General Manager of M/s. RITES India Limited. The minutes of the meeting recorded that due to resource crunch at the Centre and State level, the Government of Pondicherry had decided to invite private participation for the development of Pondicherry Port. The minutes also reflected that a decision was taken to call for pre-qualifications bids in order to ascertain the technical capacity and financial soundness of the entrepreneurs. The minutes also indicated that a decision was taken that in order to invite the best parties, the Government of Pondicherry should grant concessions at par with 14

other maritime States. On November 4, 1997 a meeting was held between the officials of the Government of Pondicherry including the then Lt. Governor and the Group General Manager of M/s. RITES India Limited. At the said meeting the officials of M/s. RITES India Limited gave a detailed presentation relating to various aspects of competitive bidding process. At the said meeting a decision was taken to adopt a transparent open competitive bidding procedure in preference to the MOU Route. The minutes of the said meeting also reflected that a decision relating to the appointment of M/s. RITES India Limited as a consultant for this purpose was also taken. The minutes further recorded that the Pondicherry Port was a minor Port and, therefore, the provisions of Major Ports Trust Act were not applicable. The draft minutes were, thereafter, approved and signed by the officials of the Government of Pondicherry.

On November 6, 1997, a Government Order

was issued appointing M/s. RITES India Limited as 15

a consultant. The Consultancy Service Agreement between the Government of Pondicherry and M/s. RITES India Limited was signed on December 10, 1997. The Group General Manager (Ports) by letter dated December 22, 1997 forwarded draft advertisement titled 'Invitation for Private Investment in Pondicherry Port', a Draft Invitation Document for 'Initial Proposals' and the Draft Agreement to be entered into between the Government of Pondicherry and M/s. RITES India Limited. These draft documents and the draft advertisement were forwarded for the purpose of approval by the competent authority. The draft advertisement and the draft initial proposal were examined by various departments of the Government of Pondicherry. The Secretary (Finance), Government of Pondicherry in his noting dated May 18, 1998 noted that there were long term implications of the Draft Advertisement. He, therefore, recommended that the draft initial proposal and the Draft Agreement be placed before 16

the Council of Ministers. These recommendations were approved by the Chief Secretary, Pondicherry on August 3, 1998 and by the then Chief Minister on August 13, 1998. Accordingly, a Cabinet meeting was convened on January 19, 1999 wherein the agenda of the meeting was to discuss and decide amongst other items, the proposal for privatization of Port and calling for advertisements by M/s. RITES India Limited. The Cabinet in the said meeting resolved to defer the discussion on this item till the next meeting. The said agenda was again circulated to the Ministers of the Cabinet on April 7, 1999 and all the Ministers of the Cabinet approved the proposal for privatization of the Port as well as calling for advertisement by M/s. RITES India Limited. The proposals were finally approved by the Cabinet on October 13, 1999. The then Lt. Governor accorded his approval on October 15, 1999. After the said approval, various departments of the Government of Pondicherry examined the Draft Agreement to be entered into between the 17

Government of Pondicherry and M/s. RITES India Limited. After necessary changes, the agreement was entered into between the parties on January 10, 2000.

7. Relevant facts

The General Manager (Ports) of M/s. RITES India Limited by his letter dated March 16, 2000 informed the Secretary (Ports) Government of Pondicherry that the advertisement seeking interest of the parties for development of Pondicherry Port through private investment had appeared in the Daily Hindustan Times on March 16, 2000 and the same advertisement would appear in editions of the Economic Times, Times of India (Bombay edition), Hindu (Chennai and Delhi editions) and Statesman (Calcutta edition) between 17th to 21st March, 2000. By this advertisement, the Government of Pondicherry sought involvement of the private sector in the development and operation of the Pondicherry Port on BOST basis from reputed and financially sound Indian and/or international parties. The last date for 18

submissions of proposal for pre-qualification of the above project was May 20, 2000. However, the General Manager (Ports) of M/s. RITES India Limited by his letter dated May 9, 2000 sought permission from the Government of Pondicherry for extension of last date by one month, i.e., June 20, 2000, which was approved on May 19, 2000. The General Manager (Ports) of M/s. RITES India Limited by his letter dated June 29, 2000 informed the Principal Secretary (Power), Government of Pondicherry about the developments of private investment in the Pondicherry Port. In the said letter it was mentioned that in response to the advertisement, 48 parties had initially indicated interest in the project and that certain firms were short listed. It was mentioned that the document seeking initial proposals from short listed parties was issued to all interested parties and they were requested to submit their initial proposals by May 20, 2000. However, by the last date for submission of initial proposals, only five parties/ consortiums had submitted their proposals. It was also mentioned in the said letter that the evaluation 19

of the proposals by M/s. RITES India Limited would be submitted on or before July 15, 2000. M/s. RITES India Limited submitted its report on evaluation of initial proposals as well as invitation documents for detailed proposals. The said report indicated that M/s. RITES India Limited had rejected the proposal of one party, i.e., M/s. Rockers (India) Pvt. Ltd. In the report preference regarding remaining four parties was shown as under: -

1. M/s. Ashok Leyland of India - 81 marks out of 100 (This firm had unconditionally qualified).
2. M/s. Seaways Shipping Limited of India - 92 marks out of 100 (This firm had qualified with some conditions).
3. M/s. Kvaerner Construction International Ltd. - 73 marks out of 100 (This firm had qualified with some conditions).
4. M/s. Durgeshwari Shipping Agency Pvt. Ltd. - 79 marks out of 100 (This Firm had qualified with some conditions).

The short listing of four parties and recommendation of M/s. RITES India Limited to invite detailed proposals 20

from the four parties within five months was approved by the Government of Pondicherry on July 21, 2000. The parties which were short listed subject to certain conditions were asked to provide documentary proof in support of their claims before September 15, 2000. In consequence thereof, M/s. Durgeshwari Shipping Agency Pvt. Ltd. had submitted the requisite documents. Therefore M/s. RITES India Limited confirmed the short listing of consortium of M/s. Durgeshwari Shipping Agency Pvt. Ltd. whereas the other two short listed parties had sought extension of time by about two months for furnishing the required documentary proof. Accordingly the General Manager (Ports) of M/s. RITES India Limited had, by his letter dated September 22, 2000, sought approval of the Government of Pondicherry in relation to (a) final confirmation of short listing of consortium of M/s. Durgeshwari Shipping Agency Pvt. Ltd. and (b) allowing time up to November 15, 2000 for the parties mentioned at serial numbers 1 and 2 for submitting proof in respect of conditions mentioned by them. The Government of Pondicherry by its 21

communication dated October 8, 2000 informed M/s. RITES India Limited that a decision in this regard would be made after hearing the representations of the consortium parties in the pre bid meeting to be held on October 12, 2000. A pre bid meeting for the development and operation of Pondicherry Port on the basis of the clarifications sought by the short listed parties was held in Delhi on October 13, 2000. This meeting was to clarify all the doubts of the parties in relation to the project prior to the submission of a detailed proposal. The meeting was attended by the Principal Secretary (Power and Ports), Government of Pondicherry, and only three parties/ consortiums, i.e., (i) M/s. Ashok Leyland of India, (ii) M/s. Seaways Shipping Limited of India and (iii) M/s. Durgeshwari Shipping Agency Pvt. Ltd. After the said pre bid meeting, only two parties/consortiums submitted their detailed proposals, i.e., M/s. Ashok Leyland of India and M/s. Durgeshwari Shipping Agency Pvt. Ltd. M/s. Durgeshwari Shipping Agency Pvt. Ltd. sought an extension of time till January 15, 2001 to submit their detailed proposals, which was granted. The 22

General Manager (Ports) of M/s. RITES India Limited by his letter dated January 15, 2001 informed the Principal Secretary (Power and Ports) Government of Pondicherry that till the last date of submission of detailed proposals it had received proposals from two parties, namely, (i) consortium with M/s. Ashok Leyland of India and (ii) consortium with M/s. Durgeshwari Shipping Agency Pvt. Ltd. In the said letter it was mentioned that both the parties had not submitted valid Bank Guarantee as bid securities and, therefore, both the proposals should be rejected straightaway. As only two proposals were received and both were found to be deficient with regard to the bid security deposit, it was recommended that both the parties should be given time of seven to ten working days to enable them to submit valid Bank Guarantees. The Government accordingly extended the time up to January 25, 2001 to enable both the parties to submit valid Bank Guarantees. The General Manager (Ports) of M/s. RITES India Limited by his letter dated January 27, 2001 informed the Principal Secretary (Power and Ports), Government of Pondicherry that even 23

within the extended time limit, the parties mentioned had not submitted valid Bank Guarantees. In the said letter it was stated that the attitude of both the parties had shown utter lack of conviction and commitment to the project. It was further mentioned that the privatization process was not successful. By the said letter the General Manager recommended two other alternative schemes for the development of Pondicherry Port. Those recommendations were examined by various officials of Government of Pondicherry. On the proposals made by the General Manager, the then Lt. Governor of Pondicherry in her note dated March 8, 2001 expressed her desire to have a meeting with the officials of M/s. RITES India Limited. On March 30, 2001 the then Lt. Governor of Pondicherry convened a meeting with the officials of M/s. RITES India Limited. At the said meeting various alternative methods were suggested for the development of the Pondicherry Port. At the said meeting it was decided that a Corporation on the line of Pondicherry Power Corporation be established and a proposal be made to the Planning Commission for the 24

purpose of grant of funds to undertake the development of the Pondicherry Port. This is how the first attempt made by the State Government to develop the Port failed. Again on February 6, 2003, a meeting was held in the Chamber of the then Chief Minister of Pondicherry regarding the development of Pondicherry Port. The meeting was attended by the Chief Secretary, Secretary (Port), the Director (Port) and a private party. In the said meeting it was decided that an "Expression of Interest" calling for private investment be floated. The Chief Secretary, in his notings dated February 27, 2003, proposed various steps to be undertaken for the development of the Port. One of the steps proposed by him was to immediately issue an Expression of Interest from private parties. He also recommended that the Director (Port) should propose the constitution of a committee of officials to look into the entire gamut of the privatization process as was done in relation to the power sector. The recommendations of the Chief Secretary were approved by the then Chief Minister of Pondicherry on March 6, 2003. In terms of the said decision, an 25

advertisement titled as "Invitation of Expression of Interest for the Development of Pondicherry Port by Private Investment" was published in various newspapers. The advertisement sought private participation of the parties in the development and operation of the project on Build, Own, Operate, Share and Transfer basis. The advertisement also stated that the interested parties should communicate their Expression

of Interest within 21 days. In terms of the recommendations made by the Chief Secretary in his letter dated February 27, 2003 a decision was taken by the Government of Pondicherry, which was noted by the Director (Port) in his noting dated March 25, 2003 recommending constitution of a committee to look into all the matters relating to the privatization process. This recommendation was approved by various Government officials including the then Chief Minister of Pondicherry on April 30, 2003 and by the then Lt. Governor of Pondicherry on May 8, 2003. It was further decided that the issue of re-engaging of M/s. RITES India Limited as Consultant should be taken later on. The Government of 26

Pondicherry vide Government Order dated May 13, 2003 constituted a Committee to look into the privatization process of the Port under the Chairmanship of Secretary to Government (Port). After the constitution of the Committee it was decided by the Government to co-opt a representative of the Ministry of Shipping, Government of India. By Government Order dated April 30, 2003, the Ministry of Shipping, Government of India, nominated Mr. P.C. Dhiman as a Member of the Committee. Accordingly, Mr. Dhiman was appointed as a Member of the Committee by the Government of Pondicherry vide Government Order dated August 20, 2003. The first meeting of the Committee was held on June 2, 2003, which was attended by all the Members of the Committee. In the said meeting various courses of actions were discussed. One of the issues related to seeking of consent of Government of India for the privatization of the Port. It was also decided to seek clarifications from the Ministry of Shipping, Government of India in this regard. The Chief Secretary, Government of Pondicherry in his notings dated June 25, 2003 27

mentioned that he had discussed the issue with the former Secretary, Ministry of Shipping and he was informed that no permission to develop a minor port like Pondicherry port was required and that the guidelines issued by the Government of India on private sector participation in the Port sector were applicable only to major ports. The Chief Secretary further noted that he had also asked the Assistant Liaison Commissioner, Government of Pondicherry in New Delhi to meet personally the officials of the Ministry of Shipping and report. The Assistant Liaison Commissioner, Government of Pondicherry in New Delhi by his Inter Departmental Report dated June 25, 2003, informed that the management and development of ports was a State subject and, therefore, no clearance from the Central Government was required. Therefore, the Chief Secretary recommended that further steps for privatization of the Port be taken. One of the steps recommended by him was to re-engage M/s. RITES India Limited as a Consultant to the entire process. The then Minister of Ports by his notings dated July 18, 2003 accepted the 28

proposals of the Chief Secretary but noted that instead of engaging M/s. RITES India Limited straightaway, it would be appropriate to issue notice inviting firms or consultants in general. This proposal was approved by the then Chief Minister of Pondicherry. Therefore necessary advertisements were issued by the Government of Pondicherry. In response to the advertisements, 13 parties submitted Expression of Interest for the development of Pondicherry Port. These parties were asked to give detailed presentation to the Pondicherry Port Privatisation Committee. Out of these 13 parties only six parties made their presentation before the Committee on August 20, 2003. It was noticed that out of six parties only IPCO-Menang, Singapore and Larsen and Toubro, Chennai had experience internationally and nationally in port development and were also the only parties who had requisite technical know-how as well as ability to mobilize funds. The minutes of the meeting dated August 20, 2003 indicated that M/s. Larsen and Toubro had put certain conditions and wanted certain work to be done by the Port 29

Department. The Committee noticed that the conditions were contrary to the expectation of the Government of Pondicherry and accordingly the Committee proposed to grant Letter of Intent to M/s. IPCO-Menang, Singapore. In terms of the recommendations of the Privatization Committee, the Government of Pondicherry, on September 2, 2003, issued a Letter of Intent to M/s. IPCO-Menang to undertake the preparation of a Detailed Project Report and Feasibility Study for the development of Pondicherry Port. The Detailed Project Report as well as Feasibility Study Report were to be submitted by November 5, 2003. M/s. IPCO-Menang was not able to submit the above mentioned Reports by November 5, 2003. In fact the said company through its communication dated November 19, 2003 had requested the Director of Ports to extend the time to submit

the report till December 31, 2003. In response thereof, the Director of Port, by his letter dated November 19, 2003, informed the said company that the request for extension of time limit up to December 31, 2003 could be considered only on the condition that the company 30

deposited an amount of Rs.50 lakhs to show its seriousness and commitment towards implementation of the project. The said company neither submitted the Reports by December 31, 2003 nor deposited the amount. In these circumstances, the Government of Pondicherry decided to grant Letter of Intent to the other party, which was short listed, i.e., M/s Larsen and Toubro, Chennai. This decision was approved by the Minister of Ports on April 5, 2004. A Letter of Intent dated April 30, 2004 was issued to M/s. Larsen and Toubro, Chennai. The said company did not respond to the issuance of Letter of Intent. In such circumstances, the second attempt for getting private investments for development of Pondicherry Port also resulted into a failure.

Sometimes in September 2004, the Chief Secretary, Government of Pondicherry had a meeting with the officials of Ministry of Shipping, Government of India, relating to the development of Pondicherry Port. In the said meeting the Joint Secretary, Ministry of Shipping had informed that it would be possible to provide an 31

amount of Rs.20 lakhs for the purpose of preparing a Feasibility Study Report and the rest of the expenditure should be born by the State Government. The Chief Secretary, Government of Pondicherry by his letter dated September 6, 2004 requested the Secretary, Ministry of Shipping, Government of India to provide an amount of Rs.50 lakhs for the purpose of making the Feasibility Study Report. A copy of the letter was sent to the Director of Ports with a request to issue a press release in the newspapers calling proposals from the interested parties for preparation of Feasibility Study Report. The objective of the entire exercise was to get prepared a Feasibility Study Report so that a private investor might not be required to conduct the study prior to decide whether the private investor would be required to invest or not. It was the understanding of the Government of Pondicherry that in such an event the possibility of attracting private investments in the development of Port would substantially increase.

In terms of letter dated September 6, 2004 the Director (Ports) submitted a proposal for issuing an 32

advertisement in various newspapers thereby calling for the interested parties to prepare the Feasibility Study Report. This proposal was approved by the Secretary (Ports)/Chief Secretary. In response to the letter dated September 6, 2004 the Ministry of Shipping, Government of India by its letter dated September 30, 2004 informed the Chief Secretary, Government of Pondicherry that in terms of the guidelines framed by the Ministry, the Central assistance would be restricted to 50% of the expenditure to be incurred by the State Government and the annual ceiling fixed was Rs.20 lakhs for a State in a year on reimbursement basis. On October 5, 2004, the officials of one company, i.e., Apollo Infrastructure Projects Finance Company Limited, had a meeting with the Minister of Port, Government of Pondicherry regarding the development of the Port. The company sought time from the Minister to make a technical and financial presentation in this regard. The said company also, by its letter dated November 22, 2004, requested for an opportunity to submit a technical report. Another company, i.e., Subhash Project and Marketing Limited 33

-respondent No. 11 herein - ('SPML' for short), by its letter dated October 6, 2004, submitted an Expression of Interest for development of ports, which is a Special Economic Zone in Pondicherry. The company, by its letter dated November 4, 2004, intimated the Principal Secretary (Port) that they had identified their partner who would be associated in the work and requested for an appointment to make a presentation to the Principal Secretary. The Director (Ports) submitted a proposal for issuing an advertisement seeking "Expression of Interest" from the consultants for the preparation of Feasibility Study Report for the development of Pondicherry Port. Based on this proposal a decision was taken to issue an advertisement in various newspapers in this regard. Accordingly, an advertisement was published in various newspapers. In terms of the said advertisement the consultants, interested in undertaking a Feasibility Study for the Pondicherry Port Development, were required to submit their Expression of Interest to the Director of Ports within 21 days

from the date of publication of the advertisement. In pursuance of the advertisement, 33 34

firms/companies had responded and submitted their Expression of Interest. Out of these 33 firms/companies, 27 firms/companies had responded within the time limit specified in the advertisement. One of such consortium (i.e. MOH Group) submitted their Expression of Interest vide letter dated November 21, 2004. The Director of Ports in his proposal dated November 24, 2004 recommended that the remaining six firms/companies, which had not responded within the time stipulated in the advertisement, should also be considered for the purpose of obtaining a Feasibility Study Report to ensure maximum benefit from the advertisement. The Director of Ports also recommended that the Port Privatisation Committee, including the Member co-opted from the Ministry of Shipping, Government of India, constituted in the earlier round, should examine the proposals made by the firms/ companies. The proposal was examined and approved by various officials of the Government of Pondicherry and it was decided that the firms/companies should be called upon to make their presentation before the Committee from December 6, 2004 to December 8, 35

2004. In relation to the remaining six firms/companies, who had submitted their Expression of Interest after the time limit, it was recommended by the Under Secretary (Port) in his noting dated December 3, 2004 that they should not be considered in view of previous experience and the General Financial Rules, 1963. This recommendation was accepted by the Secretary (Port)/Chief Secretary, Government of Pondicherry, which is quite evident from his noting dated December 6, 2004. Under the circumstances, it was decided to exclude those six firms/companies from the exercise undertaken for obtaining the Feasibility Study Report. On various dates the Port Department, Government of Pondicherry, issued e-mails to the 27 firms/companies to make a presentation on the Expression of Interest for the preparation of the Feasibility Study Report. These e- mails were sent between December 2, 2004 and December 4, 2004. Out of these 27 firms/companies, 10 firms/companies made their presentation on December 6, 2004. However, due to certain other pre-occupations, the date for presentation was shifted to December 8, 36

2004. The other 10 firms/ companies were requested to make their presentation on December 7, 2004, whereas the remaining 7 other firms/ companies were requested to make their presentation on December 8, 2004. Thus in all, 27 firms/companies were invited to make their presentation before the Committee.

On December 3, 2004 the Vice President of Marshall Power & Consultancy Services informed the Director of Ports by e-mail that the officials of the company were busy on 7th and 8th of December, 2004 and, therefore, meeting dated December 11, 2004 be postponed. Similarly, the Advisor to Scott-Wilson Kirkpatrick (P) Ltd. by e-mail dated December 3, 2004 sought for an alternative date of December 10, 2004. Another company, i.e., WAPCOS, through its e-mail dated December 3, 2004, informed the Director of Ports that its officials would not be able to reach for presentation and sent necessary materials by courier. STUP Consultants P. Ltd. vide its e-mail dated December 6, 2004 informed the Director of Ports that it be allowed to make the presentation on December 9, 2004. Mac Knight 37

Infrastructure P. Ltd., by its e-mail dated December 6, 2004, informed the Director of Ports that due to prior and conflicting commitments, its official would not be able to appear and requested for an alternative date. The Director and Chief Operating Officer, DS Constructions vide letter dated December 7, 2004 informed the Director of Ports that officials of the Company wanted to make presentation on development and construction of the Pondicherry Port. The Vice President of SPML through its e-mail dated December 7, 2004, informed the Director of Ports that they were going to develop and operate the ports and would like to work more as an operator and a developer. By the said e-mail the said company requested for an opportunity to enable it to make a presentation. On December 7, 2004 and December 8, 2004 various firms/companies made presentations before the Committee. The parties, who made their presentations, were as under:-

1. Hauer Associates, Chennai, made the presentation on December 7, 2004.

2. D.S. Constructions made the presentation on December 7, 2004.
3. Howe India made the presentation on December 7, 2004.
4. Price Water House Corpus, Chennai, made the presentation on December 7, 2004.
5. Royal Haskoning, Delhi, made the presentation on December 7, 2004.
6. CRISIL made the presentation on December 7, 2004.
7. Mahindra Acres Consulting, Chennai, made the presentation on December 7, 2004.
8. National Institute of Port Management, Chennai, made the presentation on December 8, 2004.
9. Cullen Grummit & Roe, Bombay, made the presentation on December 8, 2004.
10. Deloitte, Chennai, made the presentation on December 8, 2004.
11. A.F. Ferguson, Chennai, made the presentation on December 8, 2004.

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Certain parties were unable to make their presentations on the above mentioned dates and, therefore, the Director of Ports, Government of Pondicherry, by his e-mails dated December 10, 2004, requested the following parties again to make a presentation on the preparation of the Feasibility Report, on December 17, 2004. The parties, to whom the said e-mails were dispatched, were as under: -

1. Scott Wilson Kirkpatrick India Pvt. Ltd.
2. Indian Ports Association, New Delhi.
3. Sree Eikon Constructions, Chennai.
4. Mott Macdonald, Mumbai.
5. Subhash Projects & Marketing Limited
6. Consulting Engineering Services India Limited
7. MECON Ltd., Ranchi.
8. Marshall's Power & Telecommunication Limited, Bangalore.
9. Larsen and Toubro, Ramboll
10. Mac Knight Infrastructure Private Ltd., Mumbai.
11. Beckett Rankine Partnership, Bombay.
12. National Institute of Oceanography. 40

In the meantime one company named Menang Amalgamated Sdn Bhd vide its fax message dated December 15, 2004 addressed a communication, to the Minister of Port, Secretary of Port and Director of Port, making a reference to the letter dated December 30, 2003 and stated that the company was in the process of finalizing the Detailed Project Report as well as the Feasibility Study Report and that the company was keen on exploring ways to move forward after depositing the earnest money of Rs.50 lakhs. It may be stated that the letter was sent after more than a year from the date the company was supposed to submit its report. In terms of the e-mails dated December 10, 2004 the following firms/ companies made their presentations on December 17, 2004 before the Committee: -

1. Consulting Engineering Services, New Delhi
2. Beckett Rankine, Mumbai
3. STUP Consultants, Mumbai
4. L & T Ramboll, Chennai.

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The minutes of the meetings dated December 7, 2004, December 8, 2004 and December 17, 2004 indicate the nature of presentations, made by various parties. The presentations included modes of development, etc. The minutes of the meetings show that the Chief Secretary/ Secretary (Port), Government of Pondicherry while going through the presentations of every party had asked them whether they would be able to develop the Pondicherry Port and would be able to bring in investors for the purpose of developing the Port. The minutes further reflect that certain parties, like Hauer Associates, Haskoning India Private Limited, CRISIL Infrastructure Advisory, Consulting Engineering Services India Limited, Beckett Rankine Partnership, informed the Committee that they might be able to get a private investor only at a later stage or after seeking certain clarifications. These firms/companies were, however, not willing to develop and operate the Pondicherry Port. The minutes also reflected that only two companies, i.e., M/s. Apollo Infrastructure and M/s. D.S. Constructions stated that 42

they would be able to develop the Pondicherry Port on their own.

The General Manager (Ports) of M/s. Larsen and Toubro, Chennai, by his letter dated December 22, 2004, informed the Chief Secretary/Secretary (Port), Government of Pondicherry that the company was willing to develop the Pondicherry Port. The said letter also referred to a meeting held on December 20, 2004 with the Chief Secretary and stated that the company be allowed to enter into MOU with the Government of Pondicherry for the development of Pondicherry Port. This letter was received by Directorate of Ports on December 27, 2004. M/s. Apollo Infrastructure Projects Finance Company Limited, by its letter dated December 23, 2004, informed the Minister of Ports, Government of Pondicherry that it was willing to develop Pondicherry Port on DBOOT basis and proposed certain Development Phases. This letter was received on December 31, 2004. In the said letter a reference was made to the presentation made by the company on December 17, 2004. These letters as well as minutes of the meetings of 43

the Port Privatisation Committee clearly show that certain firms/companies were keen to develop and operate the Port. The Director of Ports by his letter dated January 12, 2005 forwarded a short note on the proposals submitted by 27 firms/companies. It is clear from the said note that the proposals received from the firms/companies were examined on the basis of their experience in preparing the Feasibility Report as well as in conducting the consultancy services in Port Sector in India and abroad. This short note was prepared from the view point of selecting a consultant to prepare a Feasibility Study Report and not from the view point of selecting a developer/operator for the purpose of operating the Port. In the earlier process of privatization, two companies were short listed and were granted Letters of Intent. Those two companies, i.e., (i) IPCO Menang,

Singapore and (ii) M/s. Larsen and Toubro, Chennai, did not submit the requisite reports and, therefore, their claim lapsed. These two companies by letters dated December 15, 2004 and December 22, 2004 respectively again expressed their interest in developing the 44

Pondicherry Port. In view of these letters, the Director of Ports by his letter dated January 7, 2005 sought a decision from the Under Secretary (Port) about the future course of action to be adopted. The Under Secretary (Port) in his note dated January 19, 2005 recounted the facts and circumstances in which the Letters of Intent were issued as well as the conduct of the parties. The file was thereafter submitted to the Secretary (Port)/Chief Secretary for necessary orders. The Chief Secretary, who was also Chairman of the Port Privatisation Committee, by his note dated January 19, 2005, noticed that the Port Privatisation Committee in its meeting had short listed two parties and recommended that the Government should consider short-listing M/s. Larsen and Toubro, Chennai as the third party. It was mentioned in the note that this was subject to the approval of the Government. He also recommended that the legal position with regard to the first two parties, who had desired to prepare Feasibility Report, should be examined and thereafter the project should be allotted. An Inter Departmental Note dated January 20, 2005 was prepared. In the said note 45

the Under Secretary (Ports) referred to the notings made by the Chief Secretary on January 19, 2005 and directed the Director of Ports to send a proposal to the Law Department for getting confirmation. In terms of the said note a proposal dated January 25, 2005 was made by the Director of Ports, who is also a Member of the Port Privatisation Committee. In his proposal, he pointed out the recommendation made by the Chief Secretary in his notings and stated that the two parties mentioned in the notings, i.e., (1) M/s. D.S. Construction, which had applied for the preparation of the Feasibility Study Report and was willing to take development of the Port and (2) M/s. Apollo Infrastructure Projects Finance Company Limited, could be considered. The other party, which was recommended for short listing, was M/s. Larsen and Toubro, Chennai. It was pointed out that the three parties were short listed since they had shown interest in developing the Port by Private Investment. In response to the proposal for the Inter Departmental Note dated January 25, 2005, the Law Department, Government of Pondicherry, by its noting dated February 17, 2005, 46

stated that any consultancy firm, who was entrusted the work of preparing the Feasibility Study Report, should only select the promoter and cite example whether it was so done. The Law Department further pointed out that clearance from the Government should be taken in respect of various issues involved in the proposal. The said noting of the Law Department was examined by the Chief Secretary. The Chief Secretary in his noting dated February 24, 2005 noted that the issue of seeking clearance from the Government of India had already been clarified by his predecessor-in-Office vide noting dated June 25, 2003 and, therefore, the said issue should not delay the consideration of the matter. During this period certain parties expressed their interest in developing the Pondicherry Port. One company, i.e., Water-Bau-AG, through its communication dated January 23, 2005, informed the Chief Secretary, Government of Pondicherry about its desire to participate in a Deep Sea Project on BOT basis and submitted its profile. This letter was received by the Directorate of Ports on February 2, 2005. Similarly, another company, i.e., Digital Hub Sdn Bhd 47

through its letter informed the then Chief Minister of Pondicherry that they wanted to participate in a Deep Sea Project on BOT basis and submitted its analysis. In the meantime on February 2, 2005, the Chief Secretary had a meeting with Lt. Governor of Pondicherry. The noting of the Executive Engineer, Directorate of Ports, Government of Pondicherry dated February 2, 2005 indicate that after the meeting, the Chief Secretary directed that a list of all the firms, which had expressed their interest to develop the Port through Private Investment, be forwarded to him. In terms of the said direction the Director of Ports by his letter dated February 3, 2005 gave the list of 11 firms and companies, which had expressed desire to develop the Port through Private Investment. It was also mentioned therein that out of 11 firms/companies, seven firms/companies had already made their presentation before the Port Privatisation Committee on different dates. The note was examined by various Government officials and it was decided that the remaining four firms/corporations should be again invited for making a 48

presentation before the Committee. The Director of Ports through e-mails dated February 25, 2005 invited above mentioned four firms/companies to make their presentations on March 11, 2005. The firms/companies were (1) Subhash Projects and Marketing Limited, New Delhi, (2) Marshall Power & Telecom (I) Ltd., Bangalore, (3) Digital Hub SDN BHD, Malaysia and (4) Walter Bau AG, Germany. M/s. SPML, through its letter dated February 4, 2005, informed the Principal Secretary (Port), Government of Pondicherry that earlier it had not taken interest in the project, but the said company expressed its desire for development of the Port, Beaches, etc. Similarly, the General Manager (Tech.), Ashoka Buildcon Limited by his letter dated February 7, 2005, informed the then Chief Minister of Pondicherry that they had joined hands with an overseas Port Developer and, therefore, would like to offer services for the Port Project in Pondicherry on BDOOT basis. M/s. Apollo Infrastructure Projects Finance Company Limited by its letter dated February 8, 2005 informed the Minister of Ports, Government of Pondicherry that it had entered into 49

a joint venture agreement with L&T Romboll, Chennai. Similarly, LA-V-JAY and Associates Pvt. Ltd. through its letter dated February 14, 2005 informed the then Chief Minister of Pondicherry that the said company was part of a consortium comprising of Royal Hoskoning and Ashoka Buildcon. The said company also pointed out that it would like to develop Pondicherry Port in a unique manner. The said consortium also forwarded one letter from the Director Operations, Royal Haskonin to La-V- Jay and Associates wherein Royal Haskonin confirmed that they were able to provide consultancy service to La-V-Jay for the purpose of development of Port. The Director of Ports, Government of Pondicherry by his e-mail dated March 1, 2005 informed the consortium led by M/s. LA-V-JAY and Associates that if they were interested in developing the Pondicherry Port, they were free to make presentation on March 11, 2005. In response thereto, M/s. U-Pranav Consultancy, who was acting on behalf of the consortium vide its e-mail dated March 8, 2005, confirmed that they would be able to make the presentation on March 11, 2005. The Director 50

(Operations) of M/s. Royal Haskoning by his letter dated March 11, 2003 apologised to the then Chief Minister of Pondicherry for absence of its officials on March 11, 2005 and requested that an opportunity be provided to enable it to make presentation on March 14, 2005. M/s. Digital Hub vide its e-mail dated March 7, 2005 informed the Deputy Director of Ports, Government of Pondicherry that they would not be able to get their investor from Germany. The Chief Executive Officer of M/s. SPML vide letter dated March 7, 2005 informed the Director of Ports that it would make a presentation on March 11, 2005. The following statement indicates that on March 11, 2005 following firms/companies had made presentations before the Port Privatisation Committee: - S. Date of Name of the Firm/ Proposed Presentation e-mail sent Company/Authority date of given and No.

presentation date

01. 2.12.2004 Sree Eikon Construction 06.12.2004 NO 08.12.2004

17.12.2004

02. 2.12.2004 National Institute of 06.12.2004 NO Oceanography, Goa 08.12.2004

17.12.2004

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03. 2.12.2004 National Institute of 06.12.2004 YES Port Management, 08.12.2004 8.12.2004 Chennai

04 2.12.2004 STUP Consultants (P) 06.12.2004 YES Ltd., Mumbai 08.12.2004 17.12.2004

05. 2.12.2004 A.F. Ferguson & Co., 06.12.2004 YES Chennai 08.12.2004 8.12.2004

06. 2.12.2004 Hauer Associates, 06.12.2004 YES Chennai 08.12.2004 7.12.2004

07. 2.12.2004 Subhash Projects & 06.12.2004 YES Marketing Ltd., New 08.12.2004 11.3.2005 Delhi
17.12.2004

11.03.2005

08. 2.12.2004 Cullen Grumnit & Roe, 06.12.2004 YES Mumbai 08.12.2004 8.12.2004

09. 2.12.2004 D.S. Constructions, New 07.12.2004 YES Delhi 7.12.2004

10. 2.12.2004 KVR Rail Infra 07.12.2004 NO Consultancy Services,

Secundrabad

11. 2.12.2004 Consulting Engineering 07.12.2004 YES Services (I) Pvt. Ltd., 17.12.2004 New Delhi

12. 2.12.2004 Howe India Pvt. Ltd., 07.12.2004 YES New Delhi 7.12.2004

13. 2.12.2004 Macknight 07.12.2004 NO Infrastructure Pvt. Ltd., 17.12.2004

Mumbai

14. 2.12.2004 Price Waterhouse 07.12.2004 YES Coopers Pvt. Ltd., 7.12.2004 Chennai

15. 2.12.2004 Royal Haskoning India 07.12.2004 YES Ltd., New Delhi 7.12.2004

16. 2.12.2004 Mahindra Acres 07.12.2004 YES Consulting Engineers 7.12.2004 Ltd., Chennai

17. 2.12.2004 (WAPCOS) Water & 08.12.2004 NO Power Consulting

Services (I) Ltd., New

Delhi

18. 2.12.2004 Beckitt Rankine 08.12.2004 YES Partnership, Bombay 17.12.2004 17.12.2004

19. 2.12.2004 Deloitte Touche 08.12.2004 YES Tohmatsu India Ltd., 8.12.2004 Baroda

20. 2.12.2004 MECON Ltd., Ranchi 08.12.2004 NO 17.12.2004

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21. 2.12.2004 Bicard-JNTU Consortium 08.12.2004 NO Poly-engineers &

Consultants, Hyderabad

22. 2.12.2004 Marshall's Power & 08.12.2004 NO Telecom (I) Ltd., 17.12.2004

Bangalore 11.03.2005

23. 2.12.2004 L&T Ramboll Consulting 08.12.2004 YES Engineers Ltd., Chennai 17.12.2004 7.12.2004

24. 3.12.2004 CRISIL Ltd., Mumbai 07.12.2004 YES 7.12.2004
25. 4.12.2004 Mottmacdonald, Mumbai 06.12.2004 NO 08.12.2004
17.12.2004
26. 4.12.2004 Indian Ports Association, 06.12.2004 NO New Delhi 08.12.2004
17.12.2004
27. 10.12.04 Scott Wilson Kirkpatrick 07.12.2004 NO India Pvt. Ltd., New Delhi 17.12.2004
28. 25.2.2005 Digital Hub Group, 11.03.2005 NO Malaysia
29. 25.2.2005 Water Bau, Germany 11.03.2005 NO
30. 01.3.2005 LA-V-JAY and Associates 11.03.2005 NO Ahmedabad, Gujarat

On March 11, 2005 a consortium led by M/s. SPML made its presentation. The minutes of the meetings of the Committee held on December 7, 2004, December 8, 2004, December 17, 2004 and March 11, 2005 show that the advertisement dated October 18, 2004 was only for the purpose of conducting the Feasibility Study. The minutes further indicate that certain other firms had also come forward with offers for the development of the Port. The minutes of the meetings clearly show that after 53

discussions and on the basis of the presentations four firms were short listed in the following preferences: -

1. M/s. Subhash Projects and Marketing Limited
2. M/s. D.S. Constructions
3. M/s. Apollo Infrastructure Projects Finance Company Limited
4. M/s. Larsen and Toubro, Chennai

The Committee, therefore, recommended that the Letter of Intent be issued to M/s. SPML. The Committee also felt that the development of Pondicherry Port was of considerable importance and, therefore, the company rightly recommended to the Government that Government should appoint the National Institute of Port Management, Chennai (NIPM) as a Consultant to the Government of Pondicherry for the eventual development of the Port.

The Under Secretary (Ports), Government of Pondicherry issued a Letter of Intent dated June 3, 2005 in favour of M/s. SPML. It was stated in the said letter that it was proposed to engage the said company for the 54

development of Pondicherry Port on BOT basis and the Letter of Intent was subject to the condition that Detailed Project Report was approved by the Competent Authority. It was mentioned in the said letter that the said company would have to undertake the preparation of a Detailed Project Report and Feasibility Study at its own cost. It was also mentioned therein that the Detailed Project Report should be submitted within 45 days from the date of issue of the letter and if the company agreed upon the conditions stipulated in Letter of Intent then the company should deposit a Bank Guarantee of Rs.50 lakhs within a period of 15 days. In terms of the aforesaid Letter of Intent, the company made available a Bank Guarantee to the Government of Pondicherry on June 18, 2005. The company, along with its letter dated July 18, 2005, submitted a Detailed

Project Report to the Government of Pondicherry. In terms of the recommendations of the Committee for Port Privatisation the Government of Pondicherry by order dated August 4, 2005 appointed National Institute of Port Management, Chennai as a Consultant for the development of the Port. 55

The Under Secretary (Port), Government of Pondicherry, by his letter dated August 4, 2005, forwarded a Detailed Project Report submitted by M/s. SPML to NIPM with a request to make a detailed analysis and evaluation of technical, financial, environmental and legal aspects on the Detailed Project Report. The Detailed Project Report was examined in a meeting held on August 31, 2005 and various draw-backs such as traffic forecast, detailing of the plans, etc. emerging from the Detailed Project Report were examined. It was thereafter decided that M/s. SPML should have a re-look on the issues raised and revise the Detailed Project Report suitably. The NIPM submitted its draft report on September 13, 2005. In terms of the discussions held on August 31, 2005, M/s. SPML by its letter dated September 23, 2005 submitted the First Revised Detailed Project Report to the Director of Ports. The meeting was held on September 24, 2005 and it was agreed that NIPM would examine the First Revised Detailed Project Report and submit a report. The reports submitted were examined. M/s. SPML submitted the Second Revised Detailed 56

Project Report along with its letter dated October 5, 2005, after which a meeting was held on November 12, 2005. In the said meeting officials of M/s. SPML, the officials of M/s. NIPM and the officials of the Government of Pondicherry were present and the minutes were drawn and noted. In pursuance thereof NIPM submitted its final report on December 1, 2005. The issues raised by all the parties concerned were resolved and, therefore, the Second Revised Detailed Project Report was accepted by the Government as Approved Detailed Project Report. The Government of Pondicherry thereafter constituted a Committee to draft the Concession Agreement to be entered into between the Government of Pondicherry and M/s. SPML. The Committee examined various model Concession Agreement of various States and more specifically of Gujarat State. The said Concession Agreement was thereafter drafted on the basis of the Approved Detailed Project Report. The said draft agreement was examined and approved by various departments of the Government of Pondicherry. The draft agreement was placed before the Council of 57

Ministers for its approval. The Council of Ministers in a meeting dated January 20, 2006 approved the same and resolved that the existing Port Land of 153 acres be handed over for Port development whereas remaining 107 acres should be acquired and handed over within 180 days to SPML. It was further resolved that a lease amount of Rs.2,000/- per acre per annum should be charged from SPML. The order dated January 21, 2006 issued by the Government of Pondicherry indicates that approval of the Lt. Governor of Pondicherry was obtained to the Detailed Project Report as revised on November 16, 2005 for the development of Port on BOT basis. The Government Order also mentions that approval was also granted to the Concession Agreement to be entered into between the Government of Pondicherry and SPML along with its consortium partners. On January 21, 2006 the Government of Pondicherry entered into a Concession Agreement with SPML along with its consortium partners. On January 24, 2006 the Director of Ports, Government of Pondicherry issued an Office Memorandum in favour of SPML. By the said 58

Memorandum all the existing moveable/immoveable assets of the Port were to be handed over to the developer as per the Concession Agreement.

8. The Letter of Intent dated June 3, 2005, granted to SPML - Respondent No. 11 - as well as approval dated January 2, 2006 accorded by the Lt. Governor of Pondicherry to the Detailed Project Report dated November 16, 2005 submitted by respondent No. 11 on BOT basis and to the Concession Agreement to be entered into between the Government of Pondicherry and the respondent No. 11 as well as direction dated January 24, 2006 issued by the Director of Ports to the officers concerned to prepare list of all the existing moveable and immoveable assets of the Pondicherry Port for handing over the same to respondent No. 11 were challenged by the appellants by filing Writ Petition No. 3304 of 2006 and Writ Petition 12337 of 2006 before the Madras High Court on several grounds.

9. The Madras High Court has rejected the two petitions giving rise to the instant appeals. 59

10. We have heard the learned counsel for the parties at length and in great detail and considered the documents forming part of the two appeals.

11. Mr. G.E. Vahanvati, learned Solicitor General of India, spelt out three preliminary objections, namely, (1) the appellants had fairly conceded before the High Court that the selection of the Developer was correctly done and, therefore, the argument advanced by the learned counsel for the appellants, assailing the selection of the respondent No. 11 as Developer of Pondicherry Port, should not be considered by this Court at all and this Court should confine itself to examination of environmental impact that the project may have, which was emphasized before the High Court; (2) the appellants had no locus standi to file the writ petition challenging the Award of Contract for the development of the Pondicherry Port to the respondent No. 11, which is purely commercial in nature; and (3) the list of events and dates submitted by the appellants is not only misleading but a calculated attempt made by the 60

appellants to prejudice the Court by suppressing and omitting to make reference to relevant materials and events and, therefore, the appeals should be dismissed.

12. Dealing with the first preliminary objection, raised on behalf of the respondents, this Court finds that in paragraph 19 of the impugned judgment the High Court has observed as under: -

"19. It is at this juncture, the learned counsel for the petitioners fairly conceded that his clients' concern was more on the environmental impact that the project may have and he was not canvassing the relative merits of the parties, who had submitted offer to the Government of Pondicherry. He requested the Court to safeguard the interest of the general public and future development of the Union Territory of Pondicherry with reference to the development of the Pondicherry Port."

A fair and reasonable reading of the above quoted paragraph makes it very clear that the appellants had fairly conceded before the High Court that they were not assailing the selection of the respondent No. 11 as Developer for the Pondicherry Port, but were more concerned with the environmental impact that the project 61

may have and, therefore, the learned counsel for the appellants had requested the Court to safeguard the interest of general public and future development of the Union Territory of Pondicherry with reference to the development of the Pondicherry Port. It is relevant to notice that in the grounds of memorandum of the Special Leave Petitions it is not contended by the appellants that no concession was made by the learned counsel before the High Court or the concession made was different and was not correctly recorded by the High Court. The respondent Nos. 2 to 9 have filed counter affidavit to the Special Leave Petitions filed by the appellants. The respondents, in paragraphs 6 and 7 of the counter affidavit filed before this Court, have stated as under: - "6. I also say that the Hon'ble High Court, during the course of the arguments and after examining the documents, had expressed its view that the selection of the Developer was correctly done. In these circumstances, the Hon'ble High Court ascertained from the

petitioner herein whether it would like to concede on the issue of selection of the Developer and agitate its concerns in relation to the Environmental Impact of the project. 62

7. I say that the Counsel for the Petitioner sought for a pass over of the matter and requested the Hon'ble Court to list the matter in the second half on the same day i.e. at 2.15 p.m. This was to enable the Counsel for the present Petitioner to get his instructions. I also say that in the afternoon, the Counsel for the Petitioner pointed out to the Hon'ble Court that he could not get in touch with his Clients and therefore sought an adjournment on the said date to seek instructions from his client. That on the next date the counsel for the Petitioner informed the Hon'ble Court that his client had instructed him to concede on the issue of the selection of the

Developer. However, he pointed out that his client seeks certain safeguards relating to the issue of environmental impact. In this regard, the Petitioner's counsel also handed over a note containing the desired directions from the Hon'ble High Court."

Though the appellants were duly served with a copy of the counter affidavit filed by the respondent Nos. 2 to 9, they have failed to traverse the assertions and averments made in paragraphs 5 to 6 of the counter affidavit reproduced above. From the above quoted untraversed paragraphs of the reply affidavit, it is evident that during the course of the arguments and after examining the documents, the High Court had expressed its view that the selection of the Developer was correctly made and, 63

therefore, in those circumstances, the High Court had ascertained from the appellants as to whether they would like to concede on the issue of selection of the Developer and agitate its concern in relation to the environmental impact of the project. The above quoted paragraphs further make it clear beyond pale of doubt that the learned counsel for the appellants had sought for a pass over of the matter and requested the Court to take up the matter in the second half on the same day at 2.15 P.M. to enable him to get instructions from the appellants. It is also evident that the learned counsel for the appellants pointed out to the court that he was not able to get in touch with his clients and, therefore, sought an adjournment to seek instructions from the appellants. What is relevant to notice is that on the next date of hearing the learned counsel for the appellants had informed the High Court that his clients had instructed him to concede on the issue of selection of the Developer, but had pointed out that his clients were seeking certain safeguards relating to the issue of environmental impact of the project and had handed over 64

a note containing the desired directions from the High Court. The fact that the learned counsel for the appellants had handed over the note to the High Court is admitted but it is alleged that since the conditions mentioned in the note were not accepted, there was no concession as is sought to be made out by the respondents. Having gone through the proceedings before the High Court, this Court finds that the assertion made on behalf of the appellants is factually wrong. The judgment, impugned in the appeals, incorporates the concerns of the appellants as reflected in the note in the form of directions, which are to be found in paragraph 24 of the impugned judgment. No application was filed by the appellants before the High Court making a grievance that concession was never made and/or was wrongly recorded by the court. On the facts and in the circumstances of the case, this Court is of the firm opinion that the appellants had fairly conceded before the High Court that the selection of the respondent No. 11 as Developer of the Pondicherry Port was never canvassed nor the relative merits of the parties were pointed out to 65

the High Court and, therefore, the High Court has not recorded any finding as to whether selection of the Respondent No. 11 as Developer was correct or not. In view of the concession made by the appellants, the appellants are not entitled to canvass before this Court that the selection of the respondent No. 11 as Developer of the Pondicherry Port was not correctly made.

13. As far as second preliminary objection regarding locus standi of the appellant to challenge the Award of the Contract for the development of the Pondicherry Port to the respondent No. 11 is concerned, this Court finds that the contract assailed in the writ petitions is purely commercial in nature. Neither the parties, which had participated in the process of selection of the consultant/Developer nor one of those, who had expressed desire to develop the Pondicherry Port but was not selected, has come forward to challenge the selection procedure adopted by the Government of Pondicherry or the selection of the respondent 66

No. 11 as Developer of the Pondicherry Port. The question of locus standi in the matter of awarding the contract has been considered by this Court in BALCO Employees' Union (Regd.) vs. Union of India [(2002) 2 SCC 333]. This Court, after review of law on the point, has made following observations in paragraph 88 of the judgment: -

"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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From the passage quoted above it is clear that the only ground on which a person can maintain a PIL is where there has been an element of violation of Article 21 or human rights or where the litigation has been initiated for the benefit of the poor and the underprivileged who are unable to come to the court due to some disadvantage. On the facts and in the circumstances of the case, this Court is of the view that the only ground on which the appellants could have maintained a PIL before the High Court was to seek protection of the interest of the people of Pondicherry by safeguarding the environment. This issue was raised by the appellants before the High Court and the High Court has issued directions regarding the same, which are to be found in paragraph 24 of the impugned judgment. After the High Court's directions the element of public interest of the appellants' case no longer survives. The appellants cannot, therefore, proceed to challenge the Award of the Contract in favour of the respondent No. 11 on other grounds as this would amount to challenging the policy 68

decision of the Government of Pondicherry through a PIL, which is not permissible. Thus on the ground of locus standi also the appeals should fail.

14. As far as the list of events and dates, submitted on behalf of the appellants, is concerned, this Court finds that the appellants have omitted to state events, which have been narrated in the earlier part of this judgment. The list of dates submitted by the appellants straightaway refers to the advertisement dated October 18, 2004, published in the Economic Times, but omits to mention that even prior to October 18, 2004, on October 5, 2004 the Apollo Infrastructure Projects Finance Company Limited had a meeting with the Minister of Ports, Government of Pondicherry and had sought time to make a presentation for the development of Pondicherry Port and such an opportunity was given to the said firm. Significant events, which took place during January 12, 2005 to January 20, 2005, are not mentioned in the list of dates at all. 69

To enable the Court to know the factual background, in the absence of records, clause (b) of Rule 4(1) of Order XVI of the Supreme Court Rules, 1960 requires a list of dates in chronological order with relevant material facts or events pertaining to each of the dates to be furnished along with the special leave petition. In practice, the list of dates is prefaced by a brief synopsis of facts to give a complete and coherent picture of the facts but in the instant case this Court finds that in the special leave petitions, the synopsis/list of dates filed suffers from the defect of filing of a list of dates without relevant material facts/events or synopsis and from the defect of filing of inaccurate and incomplete synopsis/list of dates. The above defects have resulted in defeating the very purpose of requiring the filing of synopsis/list of dates. The filing of inaccurate and incomplete list of dates has caused confusion necessitating detailed reference to the facts carved out from the pleadings of the parties before the High Court and this Court. But 70

for the filing of list of events on behalf of the respondents, the list of events filed on behalf of the appellants would have resulted into unintended miscarriage of justice. To say the least, the list of events submitted on behalf of the appellants cannot be termed as accurate and such a practice of filing of incomplete/inaccurate list of events is not approved by this Court at all.

15. Having held that the appeals should fail because of concession made by the appellants before the High Court that the selection of the respondent No. 11 as Developer was proper and that the appellants have no locus standi to challenge the contract entered into between the Government of Pondicherry and the respondent No. 11 with its consortium, this Court notices that the appeals were argued at length and on behalf of the respondents also details submissions were made on merit and, therefore, this Court proposes to consider the submissions made by the parties on merits also.

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16. The contention that the Government of Pondicherry having taken a conscious decision on the basis of available guidelines to get a Feasibility Report before taking up development of Pondicherry Port could not have given it up in an arbitrary manner, all of a sudden, to benefit M/s SPML and therefore grant of Letter of Intent dated June 3, 2005 to the Respondent No. 11 should be voided, has no factual basis.

The record clinchingly establishes that right from the year 1973, successive Governments of the Union Territory of Pondicherry were concerned for development of the Pondicherry Port. The first attempt to privatize the Pondicherry Port was made in the year 1973 when offers for preparation of a Master Plan and detailed project for development of Pondicherry Port, were invited. The project was awarded to M/s Consulting Engineering Services (India) Private Limited for preparation of the Master Plan and a Detailed Project Report. The said firm submitted its report in May 1982. The report was approved by the then Government of Pondicherry and 72

therefore an agreement with the said firm was entered into on June 26, 1984 for development of certain facilities. In the year 1989, a proposal was made to create additional development facilities for commercial-cum-fishing vessels. Later on, it was found that M/s Consulting Engineering Services (India) Private Limited had no expertise to develop certain facilities at Pondicherry Port. Therefore, M/s RITES India Limited, a Government of India undertaking, was appointed to conduct a study on the technical feasibility and economic viability of the facilities to be developed. M/s RITES India Limited submitted its Feasibility Study Report. The Techno-Economic Feasibility Report submitted by M/s RITES India Limited pertained to additional facilities. In spite of positive Feasibility Study Report submitted by RITES India Limited, the project could not be carried forward in view of paucity of funds. In 1996, it was suggested by M/s RITES India Limited to adopt Build, Own, Share and Transfer mode of privatisation. The record of the case makes it clear that between 1996 and 2000 various proposals for privatisation of 73

Pondicherry Port including that of one Megah Venture Lines (M) SDN BHD were received and considered. It is necessary to notice that in response to advertisement issued seeking interest of the parties for development of Pondicherry Port through private investment, 48 parties initially indicated their interest in the project. However, only 5 parties/consortiums submitted their proposals. Ultimately, after a long process of deliberations/discussions, only two parties were short listed but none of them submitted requisite Bank Guarantees within time specified and therefore the process initiated by issuing advertisement seeking interest of parties for development of Pondicherry Port through private investment, was called off. From March 16, 2003 to March 18, 2003, Advertisement titled "Invitation of Expression of Interest for the Development of Pondicherry Port by Private Investment" was published in various newspapers. On May 13, 2003, the Government of Pondicherry constituted a Committee to look into the privatisation process of the Pondicherry Port and Secretary (Port) as its 74

Chairman. What is evident from the record is that the Chief Secretary, Government of Pondicherry, in his notings dated June 25, 2003 indicated that he had discussion about the issue with the former Secretary, Ministry of Shipping, who had informed him that it was not obligatory to obtain permission from Central Government for development of a minor Port like Pondicherry and that the guidelines issued by the Government of India on Private Sector Participation in the Port Sector only applied to Major Ports. It was also noted by the Chief Secretary in his notings that he had asked Assistant Liaison Commissioner, Government of Pondicherry in New Delhi to meet personally the officials of the Ministry of Shipping and report to him. The Assistant Liaison Commissioner, Government of Pondicherry in New Delhi in his Inter-Departmental Report dated June 25, 2003 mentioned that the officials of the Ministry of Shipping had informed him that the management and development of Minor Ports was a State subject and therefore no clearance from the Central Government was required. The Chief Secretary therefore 75

recommended that further steps for privatisation of the Port be taken. One of the steps recommended by the Chief Secretary was to re-engage M/s RITES India Limited as a Consultant to the entire process. The notings prepared by the Minister of Ports on July 18, 2003 indicate that he accepted the proposals of the Chief Secretary but noted that instead of engaging M/s RITES India Limited straightaway, it would be appropriate to issue a notice inviting firms or Consultants in general. This proposal of Minister of Ports was approved by the Chief Minister. Accordingly, notice inviting firms or Consultants was issued. In all, 13 parties submitted Expression of Interest but only 6 parties made presentation before the Committee on August 20, 2003. Only 2 Consultants namely IPCO-Menang, Singapore and M/s Larsen & Toubro, Chennai had the requisite experience. Therefore, those two firms were short listed. A Letter of Intent was issued in favour of IPCO-Menang, Singapore. The said Consultant was asked to prepare a Detailed Project Report by November 5, 2003. However, the said consultant could not submit Detailed Project 76

Report within stipulated period. Therefore, the Letter of Intent was issued in favour of M/s Larsen & Toubro, Chennai on April 30, 2004. M/s Larsen & Toubro, Chennai, also failed to respond to the Letter of Intent. The events leading to the award of the Letter of Intent in favour of Respondent No. 11 indicate that on October 5, 2004, Apollo Infrastructure Projects Finance Limited had a meeting with the then Minister of Ports and had sought time to make a presentation for the development of Pondicherry Port. The record also indicates that the said firm was given an opportunity to do so before the Minister on October 17, 2004. Similarly, the Respondent No. 11 had also shown interest in the development of the Port by addressing a letter dated October 6, 2004 which was received in the office of Chief Secretary on October 28, 2004. By another letter dated November 4, 2004, Respondent No. 11 had indicated that it had identified a partner who would be associated with the work of development of the Port. In the meanwhile, on October 18, 2004, advertisement was issued seeking Expression of Interest from Consultants for preparation 77

of Feasibility Study Report for the development of Pondicherry Port. The record shows that 27 firms were called to make a presentation on December 6 and December 7, 2004. But on representation of some of the firms, the former date was shifted to December 8, 2004. The Minutes of the Meeting of the Committee dated December 7, 2004, December 8, 2004 and December 17, 2004 showed that the Chief Secretary had asked each and every firm as to whether it was in a position to develop the Pondicherry Port and whether it would be able to bring investors for this purpose. The Minutes indicate that some firms informed the Committee that they would get a private investor at a later stage but two companies namely Apollo Infrastructure and DS Construction stated that they would be able to develop the Pondicherry Port on their own.

Meanwhile, on December 15, 2004, Menang Amalgamated Sdn Bhd sent a fax message stating that it was in the process of finalizing a Detailed Project Report as well as Feasibility Study Report. It may be mentioned 78

that the aforesaid communication was received after more than one year.

After making reference to a meeting, which its officials had with the Chief Secretary on December 20, 2004, M/s Larsen & Toubro, Chennai, also claimed on December 22, 2004 that it was willing to develop the

Pondicherry Port.

The Apollo Infrastructure Projects Finance Company Limited by its letter dated December 23, 2004 once again reiterated that it was willing to develop the Pondicherry Port on DBOOT basis. This letter was received by the Committee on December 31, 2004.

The IPCO Menang, Singapore and M/s Larsen & Toubro, Chennai, had participated in the Port privatisation process in the year 2003 but had not responded, though they were chosen. However, they had expressed their intent to develop the Pondicherry Port by communications dated December 15, 2004 and December 22, 2004 as mentioned above. In view of these letters, the Director of Ports by his letter dated January 7, 2005 sought a decision from the Under Secretary (Port) 79

regarding the future course of action to be taken in the matter. The Under Secretary (Port) made a noting dated January 19, 2005 recounting the facts and circumstances relating to IPCO Menang, Singapore and M/s Larsen & Toubro, Chennai. The Chief Secretary expressed his view on this noting and recommended that M/s Larsen & Toubro, Chennai, be called as third party in addition to Apollo construction and M/s DS Constructions. The Deputy Secretary (Law) was requested to examine the issue. It was for this reason that the Inter-Departmental Note dated January 21, 2005 was submitted to the Law Department. On January 23, 2005, one Walter-Bau-AG sent a communication informing the Chief Secretary about its desire to participate in the Deep Sea Project on DBOOT basis and submitted its profile. A letter was also written by Digital Hub, Malaysia, stating that it wanted to participate in the Deep Sea Project on DBOOT basis. What is important to note is that the moment firm offers for development of the Port came before the Government of Pondicherry, the choice before the Government was 80

very clear. The Government had been trying to develop the Port since 1973. As concrete proposals for the development of the Port were available, the Government felt that proper course was to move the proceeding forward to select a developer. It is relevant to notice that certain parties had sought permission to participate in the process of development of the Port itself and not just prepare a Feasibility Report. The records indicate that the Chief Secretary met the Lieutenant Governor on February 2, 2005 and it was decided that a list of firms, which had expressed their interest to develop the Port through private investment, should be prepared. This is clearly reflected in the note of the Executive Director of Port to the Government of Pondicherry dated February 2, 2005. In terms of the said direction, the Director (Ports) in his note dated February 3, 2005 gave a list of 11 firms/ companies which had expressed their desire to develop the Port through private investment. Out of the 11 parties, whose names were mentioned, IPCO Menang and Larsen & Toubro were already short listed in the year 2003. Hauer Associates, Mahindra Acres 81

Consulting Engineers Ltd., Marshals Power and Telecom (I) Ltd. and M.O.H. Group did not give any firm indication about their willingness to develop the Port. DS Constructions, Subhash Projects & Marketing Ltd. and Apollo Infrastructure Projects and Finance Co. Ltd. expressed willingness to develop the Port. The Digital Hub and Walter Bau AG came in the year 2005. The record makes it very clear that this was only a list of the firms/companies interested in developing the Port and not ranking. The Digital Hub and Walter Bau AG had also expressed their willingness to develop the Port in January 2005 itself. The respondent No. 11 addressed a letter dated February 4, 2005 reiterating its desire to develop the Port. It was clearly pointed out by the Respondent No. 11 that it was desirous of developing the Port and was not interested in acting as a Consultant. Around this time, the Apollo Infrastructure again reiterated its interest in the development of the Port by addressing letter dated February 8, 2005 wherein it was 82

also mentioned that it had tied up with Larsen & Toubro, Ramboll, Chennai.

Another firm, LA-V-JAY Associates Pvt. Ltd. by its letter dated February 14, 2005 mentioned that it was part of consortium comprising Royal Haskoning and Ashoka Buildcon. By the said letter, the said firm also expressed its desire to develop the Pondicherry Port. The Director (Ports) referred to the note dated February

3, 2005 and stated that out of the 11 firms/ companies mentioned in the note, 7 firms and companies had already made presentations before the Committee but 4 firms had not made presentation. It is relevant to notice that DS Constructions and Apollo Infrastructure were part of the 7 firms who had already made presentations. In these circumstances, it was decided on February 25, 2005, that the remaining 4 firms namely, the respondent No. 11, Digital Hub, Walter-Bau-AG and Marshall Power should be called for giving presentation before the Committee on March 11, 2005. Accordingly, E-mails were sent to those parties on March 8, 2005 asking them to give presentation on March 11, 2005. 83

The E-mails were sent to the 4 firms listed in the note dated February 25, 2005. Well before March 11, 2005, Digital Hub expressed its inability to attend the meeting and indicated that it would give the presentation on another date. But even, later on also, the said firm failed to make any presentation before the Committee. Though U Pranav Consultancy acting on behalf of LA-V-JAY & Associates - Royal Haskoning - Ashoka Buildcon consortium confirmed by E-mail dated March 8, 2005 that the presentation would be made in the meeting dated March 11, 2005, Royal Haskoning by its communication sought for deferment of date for making presentation. What is most important to notice is that in the meeting held on March 11, 2005 only Respondent No. 11 was present. During the presentation made by the Respondent No. 11, it was found that Respondent No. 11 had entered into consortium with Halcrow, a very prominent company in the field of Port development projects. The background of the said firm is set out in the Minutes of the proceedings held on March 11, 2005. The said firm is described as a company which has been 84

in India for more than 30 years and its expertise is in the development of multi purpose ports.

It may be mentioned that the petitioners have not made any reference to the proceedings of March 11, 2005 or the Minutes of the said Meeting. Instead, they have straightaway referred to the note prepared on April 5, 2005 to suggest that Mr. S.D. Sunderesan, Director (Ports) was opposed to the development of the Port and for that reason he was transferred by the Government. The affidavit in reply makes it very clear that this allegation of the petitioner is factually wrong. Mr. Sunderesan was recommended for promotion to higher grade by Departmental Promotion Committee in March 2005 itself and his posting as a Deputy Secretary was effected in May 2005. Thus, it is wrong on the part of the petitioners to allege/suggest that merely because he was opposed to the development of the Port, he was transferred by the Government. The note dated April 5, 2005 was considered and the Under Secretary (Port) made a detailed note with reference thereto on April 8, 2005 dealing with every aspect, point-wise. The Chief 85

Secretary prepared a detailed note pointing out that the matter had been considerably delayed and that the Port Privatisation Committee had recommended that a Letter of Intent be issued to SPML. The Chief Secretary sent a note dated May 26, 2005 which was put-up before the Minister of Ports for orders. The Minister of Ports approved the note on June 1, 2005 recommending that suitable clauses be incorporated to bind the party down to ensure that the project did not get delayed. The Chief Minister approved the proposal on June 3, 2005 and thereafter the proposal was approved by the Lieutenant Governor on June 3, 2005.

17. The different documents produced on record of the case read with averments made in counter affidavits clearly show that on the basis of the reports submitted by M/s. Consulting Engineers Services (India) Private Limited, The Ministry of Shipping and Transportation (Ports Wing), Government of India had approved the project for creation of certain facilities at the Pondicherry Port and sanctioned the cost of the project by letter dated 86

June 26, 1984. Further, M/s. RITES India Limited had submitted Techno-Economic Feasibility Study Report on June 10, 1991, pertaining to development of additional facilities to be provided at Ariankuppam Port Project and in spite of said positive Feasibility Study Report, the project could not be carried forward because of paucity of funds. The record shows that after revival of the process for development of the port in the year 2003, the Government of Pondicherry had decided to issue an advertisement calling for Expression of Interest from the private parties and vide G.O.Ms. dated May 13, 2003 constituted a Port Privatisation Committee to

go into the entire gamut of the privatisation process of the Port of Pondicherry through private investment. The Committee so constituted was consisting of the following Government officials and no politician was appointed on the said Committee at all: -

(1) Secretary to Government (Port) Chairman (2) Joint Secretary to Government (Revenue) Member (3) The Director of Ports Member 87

(4) The Director of Science, Technology and Environment Member (5) Deputy Secretary to Government (Law) Member (6) Under Secretary to Government (Finance) Member (7) Under Secretary to Government (Port) Member (8) Executive Engineer (Port) Member Secretary Subsequently, Mr. P.C. Dhiman, Director (Port Development), Ministry of Shipping (Port Wing), New Delhi, was also nominated as Co-opted Member of the above mentioned Committee. Pursuant to advertisement dated February 3, 2003, 13 parties had responded and out of them, only 6 parties had made presentations before the expert committee, expressing interest for the development of the Pondicherry Port through private investment. The Committee, after considering the presentations made by six firms, in its meeting held on August 28, 2003, came to the conclusion that only two firms, namely, (1) IPCO Menang, Singapore and (2) Larsen and Toubro, Chennai had necessary experience in port development and technical knowhow for the same 88

and, therefore, short listed those two firms. The recommendations of the expert committee were accepted by the Government of Pondicherry and a Letter of Intent was issued on September 9, 2003 in favour of IPCO Menang, Singapore, for feasibility studies and preparation of Detailed Project Report for the development of the Port. However, the said firm did not submit the Report despite extension of time nor deposited the required performance guarantee amount of Rs.50 lacs. Therefore, the second short listed firm, i.e., M/s. Larsen and Toubro, Chennai, was issued Letter of Intent, but this firm also did not respond to the said Letter for more than eight months.

18. Under such circumstances, the Government of Pondicherry decided to make one more attempt to attract private investment for development of the Port and call for Expression of Interest for undertaking feasibility studies for development of the port. Accordingly, advertisement dated October 18, 2004 was issued in the leading newspapers, pursuant to which, 27 firms had 89

responded. However, out of 27 firms, only 15 firms had given presentations before the expert committee during December, 2004 in the presence of Minister of Ports. Thereafter, it was decided by the Committee, after having meeting with the then Lt. Governor of Pondicherry, that out of 27 firms which had responded to the advertisement, number of firms who were willing to undertake the feasibility studies should be ascertained. Accordingly such exercise was undertaken by the expert committee and the expert committee found that only 11 firms had shown the willingness to undertake feasibility studies. Seven out of those 11 firms had already made presentations before the Committee and, therefore, remaining four firms were called upon to make presentation before the Committee.

19. The record further shows that the expert committee, after approval of the Minister (Port), the Hon'ble Chief Minister and the Lt. Governor, decided to short list the under mentioned four firms in order of preference, out of the firms which had expressed interest in development of 90

the Port by undertaking the feasibility studies and Detailed Project Report: -

1. M/s. Subhash Projects and Marketing Ltd., New Delhi;
2. M/s. D.S. Constructions, New Delhi;
3. M/s. Apollo Infrastructure Project Finance Company Ltd.; and

4. M/s. Larsen & Toubro, Chennai.

The order of preference was prepared by the Committee keeping in mind the credentials and the presentations made by the firms as well as on the basis of recommendations and approval given by the Minister (Port), the then Chief Minister and the Lt. Governor. Thereafter a decision was taken by the Government of Pondicherry to issue a Letter of Intent to the respondent No. 11 as its name appeared first in the order of preference. Another decision was also simultaneously taken to appoint National Institute of Port Management, a Government of India Undertaking, as the consultant for the Government of Pondicherry and accordingly the appointment order was issued to the respondent No. 14 91

for carrying out a detailed analysis and evaluation of the Detailed Project Report ('DPR' for short) from all angles and for submission of comprehensive report, as well as finalization of DPR which would form the basic document for the Port development. The respondent No. 14 was also to advise and assist the Government of Pondicherry in obtaining all the statutory clearance, preparation of Draft Concession Agreement for the development of the Port on BOT basis, assist the Government in negotiation and finalization of final Agreement as well as to monitor, supervise and other related work. It is necessary to mention that pursuant to advertisement, which had appeared in The Hindu dated October 18, 2004, the respondent No. 14 had offered to prepare a feasibility report. In the order of appointment issued to respondent No. 14, it was mentioned that a Letter of Intent was issued to the respondent No. 11 for preparation of DPR. The record further establishes that the DPR was submitted by the respondent No. 11 to the Government which was forwarded to the respondent No. 14 for offering comments/views along with an advance payment 92

of Rs.2 lacs. Thereafter, a number of meetings were held between the officers of respondent No. 11, respondent No. 14 and the officials of Government of Pondicherry to discuss the DPR. During the meetings certain shortcomings in the DPR prepared by the respondent No. 11 were pointed out and, therefore, the respondent No. 11 was called upon to revise the DPR. Accordingly 2nd and final revised DPR was submitted by the respondent No. 11 on November 16, 2005. The 2nd revised DPR was also sent to the respondent No. 14. After assessment, analysis and evaluation of the 2nd revised DPR, the respondent No. 14 gave independent analysis and evaluation of the various aspects of the final DPR. In the independent analysis made by the respondent No. 14 it was stated that though the project was technically viable, it was not financially viable. However the respondent No. 11 and its associates had come forward to undertake the project with their own investment, whereas the Government of Pondicherry was not expecting to invest any money. Further, the Port Development Project is/was to result in direct and indirect employment to a 93

large number of persons as well as other economic and infrastructure development catering to the needs of the shipping industry and development of allied industries in the immediate hinter land and, therefore, the Government of Pondicherry had decided to proceed further in the matter. Accordingly the Government of Pondicherry constituted a Committee to draft the Concession Agreement to be entered into between the Government of Pondicherry and M/s. SPML. The Committee so constituted examined various model concession agreements of different states and more particularly of Gujarat State. After undertaking such study, Concession Agreement was drafted on the basis of approved DPR. The said draft agreement was examined and approved by various departments of the Government of Pondicherry. Thereafter, the draft agreement was placed before the Council of Ministers for its approval. The Council of Ministers in meeting dated January 20, 2006, approved the same and resolved that the existing port land measuring 153 acres be handed over for port development, whereas remaining 107 acres should be 94

acquired to be handed over to M/s. SPML. It was further resolved that a lease amount of Rs.2000/- per acre, per annum, should be charged from M/s. SPML. The order dated January 21, 2006, issued by the Government of Pondicherry, indicate that approval of the Lt. Governor was obtained to the revised DPR as well as to the Concession Agreement after which the Government of Pondicherry entered into a Concession Agreement with M/s. SPML along with its consortium partners on January 21, 2006.

20. It would be absurd on the part of the appellants to attribute motives to all by stating that the Letter of Intent was amended to the respondent No. 11 for oblique motives in order to favour respondent No. 11 arbitrarily. The appellants could not specify either in the petitions filed before the High Court or in the memorandum of appeals as to which member of the expert committee or which official of the Government of Pondicherry or which Minister of the Council of Ministers or which Chief Minister or Lt. Governor was interested in awarding 95

Letter of Intent to respondent No. 11 for oblique motives. The record shows that the Government of Pondicherry had advertised three times calling for Expression of Interest from the interested firms and had identified respondent No. 11 for development of the Port after adopting transparent procedure. The procedure adopted for identifying the respondent No. 11 is crystalline, distinct, forthright, manifest and unambiguous. To say the least the appellants' understanding of the issue is absolutely baseless and not only incorrect but also contrary to the records of the case. The selection of the respondent No. 11 as developer cannot be regarded as capricious, despotic, fanciful or personal as is sought to be made out by the appellants. It is rightly pointed out in the counter reply that the objective of the entire exercise was to get prepared a feasibility study report so that a private investor might not be required to conduct the study prior to deciding whether he would be required to invest or not. It was the understanding of the Government of Pondicherry that in such an event the possibility of attracting private investment in the 96

development of the Port would substantially increase, which cannot be termed as impractical or not warranted in the facts of the case, more particularly, where earlier attempts made since the year 1973 to develop the Port had failed. The Government of Pondicherry could not have risked losing offers for privatisation of the Port by insisting upon the process of selection of developer merely on the ground that the advertisement was only for the selection of consultant and not for the selection of developer. On the facts and in the circumstances of the case, this Court is of the firm opinion that the events leading to the award of Letter of Intent to the respondent No. 11 in June, 2005 do not indicate, in any manner, that the Government had acted arbitrarily or that the Letter of Intent was issued to favour the respondent No. 11 with oblique motives and, therefore, the contention of the appellants in this regard is rejected.

21. The plea raised by the learned counsel for the appellants that the Government of Pondicherry was arbitrary and unreasonable in switching the whole 97

public tender process into a system of personal selection and, therefore, the appeals should be accepted, is devoid of merits. It is well settled that non-floating of tenders or not holding of public auction would not be in all cases be deemed to be the result of the exercise of the executive power in an arbitrary manner. Generally, when any State land is intended to be transferred or the State largesse decided to be conferred, resort should be had to public auction or transfer by way of inviting tenders from the people. However, what is important to notice is that the old Pondicherry Port is very much in existence. This is not a case of establishment of new port at Pondicherry but this is a case of developing an existing port to meet rapid changes in transport technology and to improve the existing port facilities. The development of an existing port on Build, Operate and Transfer basis can never be equated with intended sale of Government land or transfer of State largesse. This is not a case where a State asset is sought to be sold or the State is out to purchase 98

goods. Such cases stand on a different footing from a major issue of economic development such as development of a port. The respondent No. 11 is called upon to develop the Pondicherry Port on BOT basis. Thus after development of the Port, the same will have to be retransferred to the Government of Pondicherry. In the matter of policy decision and economic tests the scope of judicial review is very limited. Unless the decision is shown to be contrary to any statutory provision or the Constitution, the Court would not interfere with an economic decision taken by the State. The court cannot examine the relative merits of different economic policies and cannot strike down the same merely on ground that another policy would have been fairer and better. 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 99

the policy or the same is contrary to law or malafide, a decision bringing about change cannot per se be interfered with by the court. It is neither within the domain of the courts nor the scope of 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 the 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. Wisdom and advisability of economic policy are ordinarily not amenable to judicial review. 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 the limits of the authority. For testing the correctness of a policy, the appropriate forum is Parliament and not the courts. Normally, there is always a presumption that the Governmental action is reasonable and in public interest and it is for the party challenging its validity to show that it is 100

wanting in reasonableness or is not informed with public interest. This burden is a heavy one and it has to be discharged to the satisfaction of the court by proper and adequate material. The court cannot lightly assume that the action taken by the Government is unreasonable or against public interest because there are large number of considerations, which necessarily weigh with the Government in taking an action. In a case like this where the State is allocating resources such as water, power, raw materials, etc. for the purpose of encouraging development of the port, this Court does not think that the State is bound to advertise and tell the people that it wants development of the Port in a particular manner and invite those interested to come up with proposals for the purpose. The State may choose to do so if it thinks fit and in a given situation it may turn out to be advantageous for the State to do so, but if any private party comes before the State and offers to develop the port, the State would not be committing breach of any constitutional obligation if it negotiates 101

with such a party and agrees to provide resources and other facilities for the purpose of development of the port. The State is not obliged to tell the respondent No. 11 "please wait I will first advertise, see whether any other offers are forthcoming and then after considering all offers, decide whether I should get the port developed through you". It would be most unrealistic to insist on such a procedure, particularly, in an area like Pondicherry, which on account of historical, political and other reasons, is not yet industrially developed and where entrepreneurs have to be offered attractive terms in order to persuade them to set up industries. The State must be free in such a case to negotiate with a private entrepreneur with a view to inducing him to develop the port and if the State enters into a contract with such an entrepreneur for providing resources and other facilities for developing the port, the contract cannot be assailed as invalid because the State has acted bona fide, reasonably and in public interest. The terms and conditions of the contract entered into with 102

the respondent No. 11 as well as the surrounding circumstances show that the State has acted bona fide and not out of improper or corrupt motive or in order to promote the private interest of the respondent No. 11 at the cost of the State. Therefore, it is difficult to interfere and strike down the State action as arbitrary, unreasonable or contrary to public interest. It is true that one of the methods of securing the public interest, when it is considered necessary to dispose of a property, is to sell the property by public auction or by inviting tenders. But as noted earlier, this is not a case of sale of property by the State. Though public auction or inviting of tenders is the ordinary rule in case where the State Government proposes to dispose of a property, it is not an invariable rule. There may be situations where there are compelling reasons necessitating departure from the rule, the reasons indicated in this case for the departure are shown to be rational and are not suggestive of discrimination. The Government is entitled to make pragmatic decisions and policy 103

decisions which may be necessary or called for under the prevalent peculiar circumstances. The issue of privatisation of the Port had been engaging the attention of the Government of Pondicherry since 1973. The said issue had been delayed for a long time. Therefore, no fault can be found with the expert Committee, with

the various officers of the Government including the Chief Secretary, the Ministers, the Chief Minister and the Lt. Governor for deciding to develop the Port with the assistance of the respondent No. 11 and not just restricting the process to appoint a consultant. The sole purpose behind the said exercise was to ensure development of the Port in a proper manner and as expeditiously as possible. It is necessary to mention that the Government of Pondicherry was trying to develop the Port and was looking for an appropriate partner. It must be remembered that technology for development of the Port would not be available for the mere asking of it. All the leading firms/companies were not found suitable to develop the Port and none of them has 104

made grievance either before the High Court or before this Court regarding selection of respondent No. 11 as Developer of the Port. It is ultimately a matter of bargain. In such cases, all that needs to be assured is that the Government or the authority, as the case may be, has acted fairly and has arrived at the best available arrangement in the circumstances. The materials on record substantiated the absolute need and necessity to undertake the development of the Port by the Government of Pondicherry in furtherance of great public interest and for larger public and common good. The admitted dire financial position of the State Government and its inability to undertake such a project at the cost of Government coupled with the fact that the venture was long overdue apparently made the State Government and its authorities to avail of the project as unfolded and volunteered by the respondent No. 11, subject, of course, to further revisions, modifications and suggestions in the best interest of the State Government. A careful and dispassionate assessment and consideration of the 105

materials placed on record does not leave any reasonable impression, on the peculiar facts and circumstances of this case, that anything obnoxious which requires either public criticism or condemnation by courts of law had taken place. The objective of the Government of Pondicherry to develop the Port was admitted to be fulfilled at the initial stage by short listing a consultant itself. However, the Government did not wish to continue the process of selection of the consultant and risk losing the chance of privatisation of the Port again. As firms/ companies had offered to develop the Port directly, the Government of Pondicherry could not have asked the firms/companies to first participate in the process of selection of a consultant, prepare a project report and require them to participate in the process for selection of the developer all over again. The Government of Pondicherry adopted a pragmatic approach and proceeded to short list the developer directly and in doing so the Government has acted in the best interest of the State to overcome the failed attempts in 106

the past to secure a developer to develop the Pondicherry Port. Under the circumstances, this Court, which is a constitutional Court, is not expected to presume the alleged irregularities, illegalities or unconstitutionality nor this Court would be justified in substituting its opinion for the bona fide opinion of the State Government. Therefore, the plea raised on behalf of the appellants that the Government of Pondicherry had acted in arbitrary and unreasonable manner in switching the whole public tender process into a system of personal selection, is rejected.

22.The contention that a conjoint reading of Article 239 and 239A of the Constitution and Sections 46, 50 of the Government of Union Territories Act read with Rule 5 of the Rules of Business of the Government of Pondicherry, 1963, would show that the Government of Pondicherry has to take prior approval of the Central Government before awarding the contract to any private party and, therefore, the Letter of Intent issued in favour of the respondent No. 11 should be 107

regarded beyond jurisdiction of the Government of Pondicherry, is misplaced and has no substance.

23.It is admitted position that the Pondicherry Port is not a "major port" and as such jurisdiction and control to develop the said port vests in the Government of Pondicherry. The guidelines relied upon by the learned counsel for the appellants relate to privatisation of "major port". Those guidelines do not apply to minor ports. There is no manner of doubt that development and privatisation of minor ports can be undertaken by the respective State Government after formulating its own guidelines and modalities. The

Indian Ports Act, 1908 permits the State Government to develop the minor ports. By virtue of power vested in the Parliament by Article 239A of the Constitution, the Government of Union Territories Act, 1963 was enacted and Pondicherry was provided with a Legislative Assembly. The extent of the legislative power of the State Legislative Assembly is laid down in Section 18 of the Act of 1963, which, inter alia, 108

provides that the Legislative Assembly is empowered to make laws in respect of any matters in the State List or the Concurrent List. Entry 31 of the Concurrent List provides for "Ports other than those declared by or under law made by Parliament or existing law to be major ports". As the Pondicherry Port has not been declared as a major port, the Legislative Assembly of Pondicherry has absolute power to make laws in relation to the Pondicherry Port. Article 162 of the Constitution provides that the executive power of a State is co-extensive with its legislative powers. Therefore, there is no manner of doubt that the Government of Pondicherry has complete jurisdiction in relation to Pondicherry Port, which is a minor port. The reliance placed upon Section 3(9) of the Indian Ports Act, 1908 read with Section 6(b) of the Pondicherry (Laws) Regulation, 1963 is totally misconceived. Section 3(9) of the said Act provides that the jurisdiction of ports other than major ports vests in the State Government. The learned counsel for the appellants have contended 109

that reference to State Government, appearing in Section 3(9) of the Indian Ports Act, should be construed to be a reference to the Central Government and, therefore, only the Central Government will have jurisdiction over the ports in Pondicherry. Having considered the different provisions of the Constitution and Statutes, referred to by the learned counsel for the appellants, this Court finds that there is fundamental fallacy in the argument and it is that they rely upon Regulation 6(b) only in part. Though the said Regulation provides that reference to the State Government shall be construed as a reference to the Central Government, it also provides that reference to the State Government shall be construed as reference to the Chief Commissioner. The learned counsel for the appellants have failed to take note of the words "and also as reference to the Chief Commissioner". This phrase must be read with the definition of "Chief Commissioner" provided under Regulation 2(b), which specifies that the Chief Commissioner means the Administrator of 110

Pondicherry (now the Lt. Governor of Pondicherry). A conjoint and meaningful reading of the provisions of the Constitution read with Regulation 6(b) of the Pondicherry (Laws) Regulation, 1963 leaves no doubt that the power in respect of Pondicherry Port necessarily vests in the Government of Pondicherry and not in the Central Government. The reliance placed on Rule 5(2) of the Rules of Business of the Government of Pondicherry read with Rule 21 of the Delegation of Financial Rules to contend that prior approval of the Central Government was required to be taken by the Government of Pondicherry before entering into the Concession Agreement with the respondent No. 11 as it was beyond the financial powers of the Government of Pondicherry, is devoid of merits. Rule 21 relates to the power to sanction expenditure in relation to contracts. Execution of Concession Agreement or grant of Letter of Intent does not entail any expenditure to be incurred by the Government of Pondicherry and as such the learned counsel for the appellants are not justified in pressing 111

into service those provisions. An attempt was made to demonstrate that in terms of Section 5 of the Pondicherry (Administration) Act, 1962 all properties and assets in the State of Pondicherry vest with the Union and, therefore, the Government of Pondicherry has no right to deal with the same in any manner.

24. It is relevant to notice that the Union Territory of Pondicherry gained its freedom in the year 1962. Therefore, several laws were passed by the Parliament for its integration with the Union of India. One such law was Pondicherry Administration Regulations Act, 1963. Article 240 of the Constitution deals with power of President to make regulations for certain Union Territories. The first proviso to Article 240, inter alia, provides that when any body is created under Article 239A to function as a Legislature for the Union Territory of Puducherry [substituted by Section 4 of the Pondicherry (Alteration of name) Act, 2006 for Pondicherry], the President shall not make any regulation for the peace, progress and good 112

Government of that Union Territory with effect from the date appointed for the first meeting of the Legislature. Therefore, the Pondicherry Administration Regulation Act, 1963 will have to be regarded as a Transitional Legislation. Moreover, the primary reason for enacting Section 3 of the Pondicherry Administration Regulation Act, 1963 was to extend all the laws enacted by the Union of India under the Union List to the Pondicherry. It is only an Act akin to adaptation Act by which the laws of Union of India were extended to this Union Territory, which was incorporated with India after partition. The extension of laws of Union of India shall only mean that those laws would be applicable as they are applicable to any other State of India. As noticed earlier, the Port in question is admittedly a minor port and, therefore, not covered by the provisions of Indian Major Ports Act, 1908. The extension of law to Indian Major Ports Act, 1908 would only mean that a particular law is prevalent but its applicability would be dependant upon as to whether facts and 113

circumstances warrant its invocation. Had the Port in question been a major port, Indian Ports Act, 1908 would have applied. In this case as the Port in question is a minor port, the Indian Major Ports Act, 1908 would not apply.

25.This Court finds that Section 5 is the provision by which all properties and assets, which earlier vested in the French Republic, stood transferred to the Union, i.e., Union of States (India). In other words, Section 5 was enacted for the purpose of transfer of properties from one sovereign State to another sovereign State. It has no power on the right of Government of Pondicherry over the properties and assets in Pondicherry. The vesting of land from French Republic to the Republic of India can have no bearing on the powers of Government of Pondicherry to dispose of land in accordance with the provisions of the Constitution. Further, it is to be noticed that the entire Pondicherry Administration Act, 1962 was a Transitional Act for transfer of power from the French 114

Republic to the Republic of India, which is evident from the Statement of Objects and Reasons to the said Act. Therefore, the plea that the Government of Pondicherry could not have taken the decision to privatize the Pondicherry Port without consent/approval of the Central Government is totally misconceived.

26.Further, the Ministry of Shipping filed an affidavit before the High Court expressly endorsing the stand taken by the Government of Pondicherry that Pondicherry Port is not a major port and as such its jurisdiction and control vest with the Government of Pondicherry.

27.The record further shows that M/s. RITES India Limited through a letter dated March 12, 1996 submitted 'Terms of Reference' for offering consultancy assignment for privatisation of three major ports situated at Pondicherry, Karaikal and Mahe. The total consultancy fee for the assignments was initially put at Rs.30 lakhs, which was reduced to 115

Rs.20 lakhs as the proposal for consultancy was subsequently limited to the Pondicherry Port only. The Joint Secretary, Ministry of Surface Transport, Government of India vide letter dated March 22, 1996 informed the Chief Secretary, Pondicherry Administration about the need to expand the existing capacity of the Pondicherry Port to meet the growth requirement of traffic handled by various major ports. In the said letter it was mentioned that a decision was taken to invite capital participation by private sector and from non-maritime land-locked states. Further, by Government Order dated April 30, 2003 the Ministry of Shipping, Government of India, had nominated Mr. P.C. Dhiman as a Member of the Committee. Mr. Dhiman was appointed as a Member of the Committee by the Government of Pondicherry vide Government Order dated August 20, 2003. The first meeting of the Committee was held on June 2, 2003, which was attended by all the members of the Committee. In the said meeting various courses of actions were discussed. One of the issues related 116

to seeking the consent of Government of India for the privatisation of the port. It was also decided to seek the clarifications from the Ministry of Shipping, Government of India, in this regard. The Chief Secretary,

Government of Pondicherry in his noting dated June 25, 2003 mentioned that he had discussed the issue with former Secretary, Ministry of Shipping and he had informed the Chief Secretary that no permission was required for a minor port like Pondicherry and that the guidelines issued by the Government of India on private sector participation in the Port sector only applied to major ports. The Chief Secretary further noted that he had also asked the Assistant Liaison Commissioner, Government of Pondicherry in New Delhi to meet personally the officials of the Ministry of Shipping and report. The Assistant Liaison Commissioner, Government of Pondicherry in New Delhi, by his Inter-Departmental Report dated June 25, 2003, informed that the management and development of ports was a State subject and, therefore, no clearance from the Central 117

Government was required. Under these circumstances the Chief Secretary recommended that further steps for privatisation of the port be taken. These facts indicate that the Government of Pondicherry had full jurisdiction to deal with the minor port situated in the Union Territory and it was not necessary for the Government of Pondicherry to take prior approval of the Central Government before awarding the contract. However, as noticed earlier, the Joint Secretary, Ministry of Surface Transport, Government of India by letter dated March 22, 1996 informed the Chief Secretary, Pondicherry Administration about the need to extend the existing capacity of the Pondicherry Port to meet the growth requirement of traffic handled by various ports and to invite capital participation by private sector and from non-maritime land-locked states. The letter dated March 22, 1996 addressed by the Joint Secretary of India to the Chief Secretary of Pondicherry Administration read with decision taken by the Committee of which Director (Port Development), 118

Ministry of Shipping, New Delhi, was one of the Member, to privatize the Port will have to be construed as approval/consent of the Central Government to the project for the development of Pondicherry Port by privatisation and it was not necessary for the Government of Pondicherry to seek further approval at every stage of development of the Port. Therefore, the plea that the Government of Pondicherry could not have taken the decision to privatize the Pondicherry Port without consent/approval of the Central Government is found to be misconceived and is rejected hereby.

28. The argument that the project in question is cleared without examining the environmental aspects by the Union Territory of Pondicherry in total violation of the Precautionary and Trusteeship principles and is also prohibited under the CRZ notification as the same is a real-estate activity in the garb of port development, has no substance worth the name.

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29. The record of the case indicates that concession agreement is already entered into between the Government of Pondicherry on one hand and the 11th and 12th respondents on the other, on January 21, 2006. Those respondents in terms of the concession agreement have incorporated a Special Purpose Vehicle (SPV) company known as Pondicherry Port Limited for implementation of the Port Development Project. An Assignment agreement to this effect in favour of Pondicherry Port Limited is executed by the Respondent Nos. 11 and 12 and confirmed by the Government of Pondicherry. In terms of the Concession agreement, the Government of Pondicherry has entered into Lease and Possession agreement with the Special Purpose Vehicle Company on February 4, 2006. The Lease-hold occupancy is given to the Pondicherry Port Limited subject to obtaining necessary clearance including environmental clearance from the Government of India. There is no manner of doubt that no one can be permitted to carry on construction activity which is prohibited by the CRZ. However, this being a project 120

exceeding Rs.50 crores necessary environmental clearance has to be obtained from the Ministry of Environment and Forest Union of India. Before such consent is granted/obtained, a full Environmental Impact Assessment has to be done. During that exercise, public hearing would be conducted as a matter of rule and all the concerns expressed by the public will have to be taken due note of, by the authorities concerned. The specific objections raised by the appellants will also have to be considered and they would be entitled to

hearing by the competent authority. Mere submission of DPR is not the end of any decision making process. The implementation of the project as per DPR is solely dependent on the clearance to be given by the Ministry of Environment and Forest Union of India. There is no manner of doubt that the Government has every power to stop the project if it violates environmental safeguards. The consideration of CRZ regulations would also be part of the said exercise. Further, the notification issued under the Environment Protection Act clearly requires a prior consent and provides for an appeal to be filed before 121

the tribunal constituted for the said purpose by an aggrieved party. The plea that the environmental clearance must precede the award of the project is wholly misconceived and is incorrect. The application form for obtaining environment clearance under the notification of 2006 makes it very clear that the application has to be made by the entity which has been entrusted with the project. In the judgment, impugned in the appeals, appropriate directions addressing all the issues raised on behalf of the appellants relating to the environment have been issued by the High Court. In addition, the Ministry of Environment and Forest which has to given clearance for the project has to examine the proposals of the developer and follow due procedure before granting approval. Therefore, the judgment impugned is not liable to be set aside on the ground that environmental aspects were not examined by the Union Territory of Pondicherry in total violation of the Precautionary and Trusteeship principles or that the project in question is completely prohibited under the CRZ notification.

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30. The argument that the Respondent No. 11 is permitted to carry on Real-Estate business by construction of five-star hotels, a trade centre as well as a beach resort in the garb of development of Pondicherry Port and therefore, the project should be grounded, cannot be accepted. It can hardly be disputed by anyone that the main objective of the project is the development of Pondicherry Port. The Government of Pondicherry has not entered into Concession agreement with the Respondent No. 11 to permit the said respondent to run a Real-estate business. While developing the port, it is necessary to provide certain infrastructural facilities for passengers, shipping crew, port staff and other personnel associated with the port, as part of the port development activity. The Respondent No. 11 as developer of the Port has not yet submitted necessary plans for scrutiny of Ministry of Environment and Forest, Government of India, seeking clearance to the project. As and when, the plans are submitted for clearance, the competent authority can always decide 123

upon the desirability of making of constructions which do not fall within the development of port. The ancillary activities to be undertaken while developing a port cannot be stopped by merely naming them as Real-estate business. The affidavit in reply filed on behalf of the Respondent Nos. 11 and 12 before the Madras High Court would indicate that the Government of Pondicherry is not going to make investment in the project at all. Therefore, the question of Government of Pondicherry favouring the Respondent No. 11 does not arise. The affidavit filed by the Respondent Nos. 11 and 12 makes it clear that they have taken up the project after conducting detailed study and have decided to make investment in the project. The Respondent Nos. 11 and 12 are permitted to develop the Port only on Build, Operate and Transfer (BOT) basis. No material was placed by the appellants before the High Court to substantiate the claim that the Respondent Nos. 11 and 12 are the Real-estate agents. The development of Port of Pondicherry on BOT basis makes it evident that, in 124

effect and substance, the Government of Pondicherry would get back the assets built by the Respondent Nos. 11 and 12 after the expiry of period mentioned in the Concession agreement. Grant of Letter of Intent or execution of Concession agreement in favour of Respondent No. 11 to permit it to develop the Port on BOT basis cannot be regarded as gifting public largesse. The appellants have failed to bring on record any material to substantiate the allegation that there is a conspiracy to grab the land belonging to the Government of Pondicherry for the purpose of Real- estate of Respondent No. 11 by permitting it to construct five-star hotel, commercial mall, etc. The reply affidavit filed by the Respondent before the High Court, on the contrary, shows that the feasibility report prepared by it indicated that the Port was to be developed in composite

manner and therefore project should be commercially viable and therefore considering the enormous cost involved in the development of the Port, certain activities are sought to be undertaken for the benefit of passengers, crew of 125

ships, staff etc. On the facts and in the circumstances of the case, this court is of the opinion that the appellants have failed to make out the case that the Pondicherry Government has permitted the Respondent No. 11 to carry on Real-estate business and therefore the appeals should be accepted.

31. For the reasons stated in the judgment, this Court does not find any merit in any of the appeals and both the appeals are liable to be dismissed. Therefore, both the appeals fail and are dismissed. Having regard to the facts of the case, there shall be no orders as to cost.

.....CJI.

(K.G. BALAKRISHNAN)

.....J. (P. SATHASIVAM)

.....J.

(J.M. PANCHAL)

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New Delhi;

May 14, 2009.