

IN THE HIGH COURT OF KARNATAKA AT BENGALURU  
(Original Jurisdiction)

Writ Petition No.                      /2020 (GM-PIL)

BETWEEN

AIRPORTS AUTHORITY EMPLOYEES UNION  
(REGD. NO.3515),  
MANGALURU INTERNATIONAL AIRPORT,  
BAJPE MANGALURU-574142.  
REPRESENTED BY ITS SECRETARY  
SRI SHRAVAN KUMAR  
AGED ABOUT 46 YEARS

PETITIONER

AND

1. UNION OF INDIA  
SECRETARY TO GOVERNMENT,  
MINISTRY OF CIVIL AVIATION,  
RAJIV GANDHI BHAVAN,  
SAFDARJUNG AIRPORT,  
NEW DELHI – 110 003.,  
REPRESENTED BY ITS SECRETARY.
2. AIRPORTS AUTHORITY OF INDIA,  
REPRESENTED BY ITS SECRETARY  
TO GOVERNMENT,  
MINISTRY OF CIVIL AVIATION,  
RAJIV GANDHI BHAVAN,  
SAFDARJUNG AIRPORT,  
NEW DELHI – 110 003.,  
REPRESENTED BY ITS CHAIRMAN.
3. THE REGIONAL EXECUTIVE DIRECTOR,  
AIRPORTS AUTHORITY OF INDIA OPERATIONAL OFFICE,  
SOUTHERN REGION, CHENNAI AIRPORT,  
CHENNAI.
4. AIRPORTS DIRECTOR,  
AIRPORTS AUTHORITY OF INDIA,  
MANGALURU INTERNATIONAL AIRPORT,  
BAJPE MANGALURU.
5. AIRPORTS ECONOMIC REGULATORY  
AUTHORITY OF INDIA,  
RAJIV GANDHI BHAVAN,  
SAFDARJUNG AIRPORT,  
NEW DELHI – 110 003.,  
REPRESENTED BY ITS CHAIRMAN.

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

RESPONDENTS

**MEMORANDUM OF WRIT PETITION  
UNDER ARTICLE 226 OF THE CONSTITUTION OF INDIA**

The Petitioner respectfully submits as follows:

1. The above Writ Petition is filed seeking for a declaration that the entire bidding process pursuant to the decision of the Cabinet committee dated 08.11.2018 for privatization of Airports as illegal, arbitrary and beyond the scope of the Airport Authority Act, 1994. The Petitioner is also seeking for a Writ of certiorari and to quash the Cabinet Decision dated 03.07.2019 accepting the bid of the 6<sup>th</sup> Respondent as illegal and beyond the scope of the Airport Authority Act, 1994 and also for quashing the consequential concession agreement dated 14.02.2020 entered in to between the 2<sup>nd</sup> Respondent and the 6<sup>th</sup> Respondent. A copy of the concession agreement dated 14.02.2020 is produced herewith and marked as ANNEXURE 'A'.

2. The Airport Authority of India (AAI) was constituted by an Act of the Parliament and came into existence on 01.04.1995 by merging erstwhile National Airports Authority of India and International Airports Authority of India. Airports Authority of India manages nearly 129 Airports in India which includes 23 International Airports, 9 Customs Airports, 77 Domestic Airports and 20 Civil/Defence Enclaves. It is a Mini-Ratna Category-1 Public Sector Undertaking.

3. The Petitioner is a registered and recognized Trade Union functioning under the Airports Authority of India (AAI), Mangaluru International Airport. The Petitioners are filing this Writ Petition in the Public Interest and they are not seeking any individual relief in this matter. The impugned decision of the 1<sup>st</sup> Respondent is not only without authority of law but also has a larger impact on the public as well as large number of employees.

4. The Union Cabinet held on 08.11.2018 gave “In Principle Approval” for leasing out six Airports viz., Ahmedabad, Jaipur, Lucknow, Guwahati, Thiruvananthapuram, and Mangaluru Airports under PPP-through Public Private Partnership. The same cabinet committee also constituted and Empowered Group of Secretaries, headed by CEO, NITI Ayog to decide on the issue of privatization of Airports which falls beyond the scope of PPPAC. Though, the term ‘leasing out’ is expressed in the said decision, in effect the same is contemplating public-private partnership. A copy of the gist of the said decision dated 08.11.2018 as reported is produced herewith and marked as ANNEXURE-‘B’

5. Based on the said Cabinet Note, the 2<sup>nd</sup> Respondent prepared and submitted the PPPAC Memo, Draft Request for proposal (RFP-Financial Bid), Draft Concession Agreement, to PPPAC on 06.12.2018 without conducting proper feasibility study and without considering legality of such proposal. Copies of the RFP and the Draft Concession Agreement are produced herewith and marked as ANNEXURE-‘C’. The PPPAC in turn gave ‘In Principle Approval’ simultaneously on 11.12.2018, by evaluating the bulk documents within 4 days of time, which includes one Saturday and Sunday. The Petitioner submits that prima facie there was no proper examination of the proposal. A copy of the said approval given by the PPPAC is produced herewith and marked as ANNEXURE-‘D’. A copy of the Guidelines for Formulation, Appraisal, and Approval of Central Sector Public Private Partnership Projects is produced herewith and marked as ANNEXURE-‘E’.

6. After obtaining the approval, the 2<sup>nd</sup> Respondent, within no time finalized and uploaded the Request for Proposal (RFP) and Draft Concession Agreement on 14.12.2018. As per the RFP the entity which is quoting the Highest “Per Passenger Fee” for Domestic Passengers will emerge as the Highest Bidder. Contrary to the international standards as well as the normal bidding process, there was no base price fixed and thus bid was beyond the analysis of profit and loss calculations. Totally, 09 Bidders participated in the Bidding process. The Draft Concession Agreement had been revised on 08.02.2019. AAI opened the Technical Bid on 16.02.2019 and Financial Bid on 25.02.2019 and the results were published on the

same day. The 6<sup>th</sup> Respondent-M/s Adani Enterprises emerged as the highest bidder for all six Airports. The Airport-wise data of “Per Passenger Fee” quoted by the 6<sup>th</sup> Respondent are as follows:

SL. NO.	AIRPORT	‘PER PASSENGER FEE’ QUOTED BY 6 <sup>TH</sup> RESPOND- ENT
1.	Ahmedabad Airport	Rs. 177
2.	Jaipur Airport	Rs. 174
3.	Lucknow Airport	Rs. 171
4.	Trivandrum Airport	Rs. 168
5.	Mangaluru Airport	Rs. 115
6.	Guwahati Airport	Rs. 160

7. The 1<sup>st</sup> Respondent, in its Cabinet Committee meeting held on 03.07.2019 gave approval for the bid of the 6<sup>th</sup> Respondent for three Airports including the Mangaluru Airport. The Petitioner could not get the copy of the decision of the cabinet in view of several constrains. Hence, the report of Press Information Bureau on the Cabinet meeting dated 03.07.2019 is produced herewith and marked as ANNEXURE-‘F’.

8. The Petitioner vide representation dated 03.07.2019 objected for the decision taken by the Respondents. A copy of the same is produced herewith and marked as ANNEXURE-‘G’.

9. The intention of the Respondents to call for tender is not to lease out some of the functions of the 2<sup>nd</sup> Respondent Authority as contemplated in Section 12 and 12-A of the Act but to enter in to a concession agreement which is not traceable

to the power vested in the Authority and much beyond the powers conferred under the Act. The said fact is very much glaring on the face of the RFP document and the concession Agreement. The 2<sup>nd</sup> Respondent is a body constituted under “The Airports Authority of India Act, 1994”. In this regard, Section 12 and 12-A of the Act are relevant and the same are reproduced herein below. Chapter III of the said Act enumerates functions of the Authority and the said provision is reproduced as under –

### **CHAPTER III**

#### **FUNCTIONS OF THE AUTHORITY**

*12.(1) Subject to the rules, if any, made by the Central Government in this behalf, it shall be the function of the Authority to manage the airports, the civil enclaves and the aeronautical communication stations efficiently.*

*(2) It shall be the duty of the Authority to provide air traffic service and air transport service at any airport and civil enclaves.*

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

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

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

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

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

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

*(e) construct residential buildings for its employees;*

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

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

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

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

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

(k) develop and provide consultancy, construction or management services, and undertake operations in India and abroad in relation to airports, air-navigation services, ground aids and safety services or any facilities thereat;

(l) establish and manage heliports and airstrips;

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

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

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

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

(q) establish training institutes and workshops;

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

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

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

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

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

Sec. 12A(1) of the Act Amended Section which provides for leasing out of the premises of Airport and Structure thereon to carry out some of its functions under Sec. 12 as the Authority deems fit the said provision of law is as under –

12A (1) Notwithstanding anything contained in this Act, the Authority may, in the public interest or in the interest of better man-

*agement of airports, make a lease of the premises of an airport (including buildings and structures thereon and appertaining thereto) to carry out some of its functions under section 12 as the Authority may deem fit:*

*Provided lease shall not affect the functions of the Authority under section 12 which relates to air traffic service or watch and ward at airports and civil enclaves.*

*(2) No lease under sub-section (1) shall be made without the previous approval of the Central Government.*

*(3) Any money, payable by the lessee in terms of the lease made under sub-section (1), shall form part of the fund of the Authority and shall be credited thereto as if such money is the receipt of the Authority for all purposes of section 24.*

*(4) The lessee, who has been assigned any function of the Authority under sub-section (1), shall have all the powers of the Authority necessary for the performance of such functions in terms of the lease”*

Under Sec.12-A of the Act, only certain functions of the Airport can be Leased Out and the concession agreement as in this case is much beyond the scope of the provisions of the Act.

10. Though the Authority can lease out some of its functions under Sec.12 by way of Lease, the Union Cabinet on 08.11.2018 handed over 5 Airports through Public Private Partnership with Private Sector entities. The Public Private Partnership Committee was entrusted with the task and the Committee constituted an Empowered Group of Secretaries headed by Niti Aayog to decide the matters beyond the scope of PPAC.

11. As per the request for Proposal, the Concessionaire shall broadly be responsible for Operation and Management of the existing Airport assets as well as for designing Engineering, Financing Construction and Development of further / additional Airside, Terminal Side, Landside and City Side infrastructure for the Airport and the Operation and Management thereof in accordance with the Concession Agreement and applicable laws. The term of the Concession Agreement is for a period of 50 years from the COD. Further, this period of 50 years, the Concessionaire will be entitled to collect charges from the users of the Airport in accordance with the Concession Agreement.

12. The RFP issued by the 2<sup>nd</sup> respondent is nothing but privatization of the Airports contrary to the provisions of the Act and beyond the scope of Section 12 A of the Act. Substantially, the RFP document does not purport to create any lease in favour of a third party in order to carry out some of the functions of the authority, but purports to enter in to a partnership agreement with the private party which is not contemplated under the Act.

13. It is significant to note that, apart from the aforesaid legal issue the 2<sup>nd</sup> Respondent has deviated from regular norms and procedures of the bidding process, which is mandatory for all public tenders as per the directions of the Planning Commission. The following irregularities in calling for the tender and granting concession have been analyzed by the Petitioner:

**i) Criteria of Airport Selection**

The Petitioner, through internal resources carried out studies for finding out the yardstick used by Civil Aviation Ministry / AAI in identifying the Airports. Though, the Petitioner applied several yardsticks such as Passenger Volume, Profitability, Existing Revenue, ASQ Rating on quality of services, Net worth of the airports, Future Traffic Growth, etc. none of them could able to take all the Selected Six Airports together. It may be noted that the Selection criteria was not disclosed either by the Cabinet Committee or by Civil Aviation Ministry.

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

It is apparent from the Record of Discussions of the 85<sup>th</sup> meeting of the PPPAC, read with PPPAC Guidelines, the PPP project was approved by the PPPAC within a short span of time by bypassing lot of important steps such as 1) Avoidance of Two Stage System (RFQ and REP), 2) Single Stage approved by PPPAC instead of separate “In Principle” and “Final Approval”, 3) Scrutiny of Project having thousands of Crores Outlay and 50 years Concession Period within two working days and its Final Approval, 4) Non Understanding of Project feasibility Study either by AAI or Ministry, 5) Non Determination of Total Project Cost of the Administrative Ministry, etc. are the few to name. The Petitioner fails to understand the reason behind the undue urgency in



handling over the existing Airports, which were functioning smoothly, both from economic and operational point of view.

**iii) Undue delay on the part of Central Government in giving Final Approval**

Though there were serious pressure on AAI as well as PPPAC to complete the entire tender Process by the month of February, 2019 itself, by drastically reducing the time required for preparation and analysis of Detailed Project Report, the Cabinet Committee of the previous Government never approved the handing over of AAI Airports to M/s Adani Enterprises, even though they had met twice before declaration of Election Notification. The above Contradictory approach on the part of Central Government naturally raises suspicion on the entire transaction.

**iv) Absence of Feasibility Study and its Report**

From the record of Discussion of PPPAC as well as comments made by Niti Aayog and Department of Economic Affairs, it is very clear that no feasibility study, including Socio-Economic Study were conducted either by AAI or Civil Aviation Ministry before approaching PPPAC for its approval.

**v) Absence of Minimum Reserved “Per Passenger Fee”**

It is very clear from the Record of Discussion of PPPAC, read with the comments of Niti Aayog, DEA (Department of Economic Affairs) that neither AAI nor Civil Aviation Ministry fixed and disclosed the Minimum Per Passenger Fee in the Bid Document, giving freehand to the Bidder to quote freely. It is Standard Procedure, adopted by any agency to fix a justified price before going for any tender process. AAI, even after opening of Financial Bid never tried to compare the Price Offered by ADANI Enterprises with its “Existing Per Passenger Fee.” A comparison with the PPPAC guidelines reveals this lapse on the side of AAI.

**vi) Lack of Transparency**

Though, the PPPAC guidelines advocates for a fair and transparent Selection Process while understanding PPP Projects, the AAI Management / Civil Aviation Ministry was reluctant to publish the information. The Management kept open only the vague REP, published in the Central Public Procurement Portal,

hiding Draft Concession Agreement, Employee Related matters, etc out of the purview of Disclosure. The information was denied even when the Petitioner approached through RTI. A copy of the RTI reply is produced herewith and marked a **ANNEXURE-‘H’**.

**vii) REVENUE LOSS TO AAI ON “PER PASSENGER”**

A comparison of “Existing Passenger Income” of Airports with the Rate quoted by the highest Bidder (6<sup>th</sup> Respondent). It can be seen that that AAI’s Revenue will be reduced by 50% post privatization. The Calculation, on the basis of information collected through RTI is shown below for your information.

<b>PARTICULARS</b>	<b>LUCKNOW AIRPORT</b>	<b>JAIPUR AIRPORT</b>	<b>GUWAHATI AIRPORT</b>
EXISTING REVENUE (DEC-2018) IN CRORES (A)	24.33	18.67	21.72
DOM PASSENGER (DEC-2018)	418501	445431	552958
PER PASSENGER QUORE BY ADANI IN Rs.	171	174	160
INT. PASSENGERS	70626	52450	2108
PER PASSENGER QUOTE BY ADANI	342	348	320
TOTAL REVENUE FROM ADANI (B)	<b>9.57</b>	<b>9.58</b>	<b>8.91</b>
PER MONTH REVENUE LOSS (APPROX) IN CRORES	14.76	9.09	12.80
PERCENTAGE OF LOSS IN REV-ENUE	<b>60.66%</b>	<b>51.31%</b>	<b>41.02%</b>

The above loss in revenue is only for one month and it will go up to Rs.50000 Crores considering all six Airports for 50 years.

As regards Operational Cost is concerned, being a service industry, staff cost is the major chunk of operational expenses. If the employees are not willing to join in the 6<sup>th</sup> Respondent, the staff cost will remain with AAI, after the

Joint Management period. Hence, the burden of bearing the existing staff cost will lie with AAI only and not with the 6<sup>th</sup> Respondent.

As regards the future expansion is concerned, AERA (Airport Economic Regulatory Authority) will allow the Concessionaire to recoup the same from passengers by way of Users Development Fee (UDF) and the 6<sup>th</sup> Respondent need not share such extra income with AAI.

**viii) Non Sharing of Commercial / Cargo Revenue**

Though, the Draft Concession Agreement gives Concessionaire the right to explore and develop Commercial and Cargo Revenue without any cap / ceiling, the 6<sup>th</sup> Respondent need not share any portion of such income with AAI. It may be noted that AAI is getting Revenue share from GMR / GVK from Delhi / Mumbai Airports for such Revenues.

**ix) COMPARISON WITH BHOGAPURAM PROJECT**

GMR is company which has quoted “Per Passenger Fee” of Rs.303/- per Passenger for the new Green Field, which is going to construct at the cost of GMR. Where GMR can quote upto Rs.303/- for an entirely new Airport, the 6<sup>th</sup> Respondent’s quote between Rs.115 and Rs.177 for an existing functional Airports with handsome business funds is too low.

**x) HUGE VARIATION IN RATES QUOTED BY BIDDERS**

On an analysis of the below mentioned Financial Bid Parameter, published by AAI on 25.02.2019, it is clear that there is nearly 295% to 638% deviation between the Highest and Lowest Bidder. This inter alia means that the BID Document, circulated by AAI is lacking clarity and the Bidders were not able to analyze and evaluate the project.

The time constrains added with the absence of RFQ (Request for Qualification) adversely affected the Bidders to have a fair quote on the project through proper scientific study and analysis. It may be noted that AAI need not conduct any Feasibility study or any other study for fixing the Minimum Reserved Price for these projects.

The Financial Bidding parameters, published by AAI, except for Guwhati is as follows:

Sl. No.	Name of Bidders	NAME OF AIRPORTS				
		Ahmed-abad	Jaipur	Lucknow	Thiruvanathapuram	Mangaluru
1	GMR Airports Ltd.	85.00	69.00	63.00	63.00	18.00
2	ADANI Enterprises Ltd.	177.00	174.00	171.00	168.00	115.00
3	AUTOSTRADE Indian Infrastructure Development Pvt. Ltd.	60.00	48.00	55.00	-	-
4	PNC Infratech Ltd.	66.00	36.00	27.00	-	-
5	NIIF & Zurich Airport International Ag.	146.00	155.00	-	-	-
6	AMP Capital (GIF II Lux Holdeo) SLP	127.00	139.00	139.00	-	-
7	I-Investment Ltd.	93.00	72.00	39.00	-	-
8	KSIDC	-	-	-	135.00	-
9	Cochin International Airport Ltd.	-	-	--	-	45.00

**xi) ALL BIDS IN FAVOUR OF SAME PRIVATE PARTNER**

As per Model RFQ, published by Department of Expenditure, technical capacity should be twice of Total Project and Financial capacity 1/4<sup>th</sup> of total project cost. Since AAI had not rationally arrived at the Total Project Cost, the Technical capacity was fixed as ransom for Rs.3500 Crores and Financial capacity for Rs.1000 Crores for each Airport.

Since AAI had not envisaged a situation, where a single entity is qualifying the bids for all the six Airports, AAI had not proportionately increased the

Technical and Financial qualification, giving room for a single Bidder, having turnover of Rs.3500 Crores and Financial capacity of Rs.1000 Crores to bag all the six Airports.

It may be noted that PPPAC Committee Members advised AAI to put cap on number of Airports, to be handed over to a single Private Partner, the same was rejected citing the decision of Empowered Group of Secretaries.

**xii) VIOLATIONS OF AIRCRAFTS RULE, 1937**

NITI Aayog, DEA, Model Concession Agreement, PPP Guidelines, Preface to Model RFQ Model REP and all related documents reiterate the need of O & M Experience for the success of any PPP in the form of O & M. But the same was willfully removed on decisions taken by EGoS, which is contrary to PPPAC Guidelines, notified by Ministry of Finance.

The absence of O & M Clause also leads to clear violations of Aircrafts Rules, 1937 and Civil Requirements in the following manner.

**As per Draft Concession Agreement, the Authority shall continue to act as the Aerodrome Operator in accordance with applicable laws including the Aircraft Rules, 1937 and Civil Aviation Requirements and shall be responsible for the operation of the Airport till such time the Aerodrome Licence is granted to the Concessionaire. The Aircraft Rules, 1937 never allows the Aerodrome Licence Holder to transfer its Licence and responsibilities attached thereto to another operator and such clause is clear violation of Aircrafts Act.**

**xiii) 6th RESPONDENT'S PER PASSENGER FEE VS. DIAL / MIAL PER PASSENGER FEE**

There is lot of deviations from the Model Concession Agreement of Brown Field Airport, followed in the privatization of Delhi and Mumbai Airports. The major Deviations are in Bidding parameter and relaxation in Operation and Management Experience Clause. The Bidding parameter for DIAL (Delhi International Airport) and MIAL (Mumbai International Airport) were Percentage of Airport Revenue, which was changed to "Per Passenger Fee." All

these modifications were made in the pre-ambit of Better competition and better pricing. But, in reality, it had not happened so. The following comparative table will clearly reveal the probable loss to AAI due to deviations in Concession Agreement.

<b>PARTICULARS</b>	<b>DIAL</b>	<b>MIAL</b>
LEASE REVENUE-2017-19 (In Crores)	1761.47	1330.72
TOTAL PASSENGERS-2017-18 (In Crores)	6.57	4.85
Per Passenger Fee from DIAL/MIAL	268	274

**Source:** AAI Annual Report 2017-18, Website of Association of Private Airport Operators.

**Where AAI could able to generate Per Passenger Income of Rs.268/- and Rs.274/- from Delhi and Mumbai Airports, 6<sup>th</sup> Respondent's Quote of Rs.115 to Rs.177/- seems to be Direct loss to AAI.**

xiv) There are lot of shortcomings in this Entire Airport Privatization Process, which were duly noted by PPPAC, NitiAayog, Department of Expenditure.

These are the irregularities prima facie appear from the bidding process and lacks transparency.

14. The 2<sup>nd</sup> Respondent has been generally following the 2 Stage bidding process, which consists of Request for Qualification and Request for Proposal. The said procedure has not been followed in the present bidding process. As in the 1<sup>st</sup> Stage, the 2<sup>nd</sup> Respondent had to issue Request for Qualification to Pre-qualify and shortlist suitable applicants, who will be eligible for participation in the 2<sup>nd</sup> Stage for issuing Request for Proposal. However, the duration for the entire bidding process was extremely short, though the project requires a detailed analysis of

Techno-Commercial, Local Contractual and Regulatory Complexity. The Respondent took only two months for finalizing the tender process.

15. On a perusal of the documents it can be seen that the 2<sup>nd</sup> respondent had deliberately avoided the “Operation and Maintenance” Experience on Eligible projects in Airport Sector which was an essential condition in all the previous tenders. Instead, the technical qualification for the bidder, required as per Annexure-B is as follows:

“Subject to the provisions of Clause 2.2 and Clause 3.2.2, projects undertaken in the infrastructure sub-sectors set forth in the Harmonized Master List of Infrastructure Sub-sectors issued by the Department of Economic Affairs, Ministry of Finance, Government of India, and as may be revised and updated from time to time, would qualify as eligible projects (“Eligible Projects”). 3.2.2 In the event that the a project was not undertaken directly by the Bidder/Member/Affiliate, in order for such project to qualify as an Eligible Project, the entity claiming experience should have held, either directly or indirectly, a minimum of 26% (twenty six percent) of the issued, subscribed and paid up share capital of the company which, as the case may be:

- (a) paid for, or received payments for, construction of such project;  
and/or
- (b) paid for development of such project; and/or
- (c) collected and appropriated revenues from such project.

There are anomalies in the eligibility terms and conditions set by the 2<sup>nd</sup> Respondent for bidders. For instance, the minimum technical and financial capacity for qualifying bidders is surprisingly identical in all the RFPs, requiring the bidders to have experience in projects worth Rs.3,500 crore with a minimum net worth of Rs.1,000 crore. As per established norms, technical capacity is experience in projects worth double the estimated project cost. The eligibility criteria should, therefore, have been linked to the project cost and should have been different for each airport project. However, the RFP documents require the same experience for the entire six airport projects irrespective of the size of the airport project cost even though all the proposals are unique in terms of net worth, profitability, scope for future expansion, Traffic in terms of passengers and cargo. This is only with a view to include some of the bidders who do not have the previous experience and is done with ulterior motives and for extraneous considerations.

16. So also, there is a serious illegality on the part of the 2<sup>nd</sup> Respondent in fixing the criteria regarding the selection of bidders in Annexure-B, as follows:

“Clause 3.8.1 (3) Bids are invited for the Project on the basis of the Per-Passenger Fee for domestic passengers. The Per-Passenger Fee for domestic passengers shall constitute the sole criteria for appointment of the Selected Bidder. “

However, as per clause 1.1.5. the Concessionaire shall pay to the Authority, on a monthly-basis, a fee (the “Per-Passenger Fee”) in respect of each passenger (both domestic and international) handled at the Airport in



accordance with the Concession Agreement. Therefore, it is a serious omission to include the per-passenger fee for the international passengers as a criteria for appointment of the Selected Bidder which will vitiate the entire bidding process and it will adversely affect the viability of the project. The per-passenger fee for the international passengers is a major factor in deciding the profitability of the project.

17. It is very relevant to note in this regard that the 2<sup>nd</sup> Respondent presently employs around 17,500 staff all over India and through this privatization nearly 12% of the total staff will lose their job in respective Airports. At present, the 2<sup>nd</sup> respondent is already having excess man power as per latest study. The proposed privatization is silent about the existing employees, as it is not absorbing the present staff in respective airports and it will not reduce the existing staff cost, which will adversely affect the financial conditions of the 2<sup>nd</sup> Respondent. Being a Central Public Sector Undertaking, the 2<sup>nd</sup> Respondent is bound to obey the Department of Public Sector Enterprises Regulations and Pay Revision Committee recommendations of Central Government. As per the Affordability clause in 3<sup>rd</sup> Pay Revision Committee (For Central Public Sector Enterprises), the entity should have sufficient and sustainable profit for Wage revision. Therefore any deficiency in the profit derived by the 2<sup>nd</sup> Respondent out of privatization, will adversely affect the Petitioner.

18. The 2<sup>nd</sup> Respondent did not carry out any scientific study for analyzing the impact of PPP model privatization and even not specifically mentioned the Minimum Passenger Fee to be quoted by Bidder, giving room for Corporates to generate windfall profit from the existing financially viable project. Any change in airport handling charges, including

the landing and navigation charges, would be directly passed onto the passengers. The private entity can hike the various non-traffic charges such as X-ray screening charges, passenger service fee, duty-free shop charges and other fees for arranging facilities at the airport. Thus, the entire bidding process is without authority of law and tainted by high level of irregularities in the bidding process. Being highly aggrieved and having no other remedy, the Petitioner begs the leave of this Honorable Court to invoke its jurisdiction under Article 226 of the Constitution of India on the following among other grounds.

### **GROUND**

19. The decision of the 1<sup>st</sup> Respondent to grant in principal approval and the Request for Proposal issued by the 2<sup>nd</sup> Respondent for Public Private Partnership is without authority of law. The Airports Authority of India Act does not provide for any type of transfer of property other than a lease. By virtue of the impugned document, the Respondents are trying to overreach and throw away the intent and object of the Act. None of the Respondents are empowered to enter into any type of contract parting with the possession and management of the Airports except a lease to limited extent. The impugned decision and the request for proposal are beyond the scope of the Act and the Respondents have no authority of law to issue such proposals.

20. Section 12A of the Act is the only provision where under, the Authority can lease out its premises for the purpose of carrying out some of its functions. The words “some of its function” shows that the functions which are capable of leasing out can only leased out. The functions at Section 12

(2), 3(a),3(aa), 3(c), 3(e), 3(i), 3(k), 3(l), 3(q) are the functions which cannot be leased out by the Authority. In other words, the said provision does not contemplate handing over of the entire airport in the name of lease so that the main functions of the Airport Authority itself can be transferred to any third party. It is only the premises of the Airport which are necessary for doing the activities and for incidental services such as management of hotels, restaurants, postal services can be leased out and not the entire airport itself. Therefore, Section 12 does not contemplate handing over the entire Airport in the name of the lease and assign all its functions to a private entity. Any other type of parting with the property of the Authority is not contemplated under the Act. In the name and style of leasing out the activities, the 2<sup>nd</sup> Respondent has entered into a concession agreement the terms of which are beyond a contract of lease and virtually a complex agreement for development and expansion of the Airport, parting with the employees of the 2<sup>nd</sup> Respondent with the concessionaire, transfer of entire finances and all aeronautical and non-aeronautical Assets, virtually transferring all existing security deposits, earnest money deposits, bank guarantees in favour of the concessionaire, development of the City Side and subleasing right of the same by concessionaire etc. The said proposed Public Private Partnership is beyond the scope of the Act and therefore, the impugned decision and consequent Request for Proposal is in violation of the Act and liable to be set aside.

21. The impugned concession granted in favour of the 6<sup>th</sup> Respondent for a period of 50 years violates Section 21 of the Airports Authority of India Act, which provides a maximum period of 30 years for making any

contracts. In this view also, the concession granted is beyond the scope of the Act and liable to be set aside.

22. The decision of the Respondents to part with the property and the activities in the name of lease is nothing but colorable exercise of power. It is a well settled law that what cannot be done directly cannot be done indirectly. Therefore, the impugned action of the Respondents is illegal and in violation of the provisions of the Act.

23. The deviations from the PPPAC Guidelines and general norms for the bidding process and irregularities in the decision making process vitiates the entire bidding process. The deviations and irregularities explained above may kindly be treated as additional grounds for the sake of brevity and to avoid repetitions.

24. The impugned action of the Respondents is highly arbitrary and illegal. The 2<sup>nd</sup> Respondent had spent huge amounts from the State Exchequer for the development of the six airports and if these airports are privatized without there being any authority and without ensuring the corresponding participation to the Government, it will cause huge loss to the revenue starved public exchequer. So also, it will amount to handing over land and buildings worth several crores, for throw-away prices to private persons, which will be against the interest of the nation as, such.

25. As per the Airports Authority Act, 1994, the Airports Authority of India was constituted for the better administration and cohesive manage-

ment of airports and civil enclaves whereas air transport services are operated or are intended to be operated and of all aeronautical stations and for the purposes of establishing or assisting in the establishment of airports and for matters connected therewith or incidental thereto. Therefore, the impugned decisions of the Respondents are tainted with mala fide and liable to be declared as illegal.

26. None of the provisions of the Act permit parting of the property with the private sector. However, in the name of leasing of the Airport, the Respondents have entered in to a concession agreement for handing over the entire Airport to a private entrepreneur which is glaringly a colorable exercise of power. The Petitioner has not produced certain relevant documents in view of the Covid-19 pandemic. The same may kindly be condoned. The Respondent may be directed to produce the relevant documents. Therefore, the impugned decision and the concession agreements are liable to be held as arbitrary and illegal.

27. The Respondent No. 1 and 2 are in a position of a trustee in respect of the public property under their charge and discretion. The Government land is wealth of the State which the Respondents should deal with, in a bona fide manner and in conformity with law. The Respondents have deviated from the trust reposed in them by the people under the Constitution. It is high time that such illegal actions of the Respondents should be declared as tainted with their mala fide acts in the discharge of their functions. The Respondents have also failed to discharge their duties to protect the assets of the State. The action on the part of the Respondents in frittering away the public property by misuse of public power is highly illegal.

### Grounds for Interim Relief

28. Prima facie, the concession agreement is beyond the scope of the Act and the entire bidding process is full of irregularities. The Respondents have deviated from the norms of regular bidding process and virtually the grant of concession is colorable exercise of power. If the concession agreement is implemented, the same will render the provisions of the Act redundant and will cause irreparable loss to the public as well as the exchequer. Hence, it is just and necessary to grant interim order as prayed for.

### **PRAYER**

Wherefore, the Petitioners pray that this Hon'ble Court may be pleased to;

- i. Call for Records pertaining to entire bidding process pursuant to the decision of the Cabinet committee dated 08.11.2018 vide Annexure 'C'
- ii. Declare that the entire bidding process pursuant to the Cabinet Committee decision dated 08.11.2018 and the action of the Respondent in calling for impugned Request for Proposal to enter into a Concession Agreement as illegal and without authority of law in so far as Mangaluru Airport is concerned.
- iii. Issue a Writ of Certiorari and quash the decision of the 1<sup>st</sup> Respondent dated 03.07.2019 approving the bid of the 6<sup>th</sup> Respondent pursuant to Request for Proposal with respect to Mangaluru Airport vide Annexure 'F';
- iv. Issue a Writ of Certiorari and quash the impugned Request for proposal bearing No. 2018\_AAI-19459-1 vide Annexure 'C';
- v. Issue a writ of Certiorari and quash the impugned Concession agreement dated 14.02.2020 vide Annexure-'A';

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

**INTERIM PRAYER**

For the reasons stated in the Writ Petition and the accompanying affidavit, it is most respectfully prayed that this Honorable Court may be pleased to stay all further proceedings pursuant to ANNEXURE 'A' and restrain the Respondents from handing over the Mangaluru Airport in favour of the 6<sup>th</sup> Respondent till the disposal of the Writ Petition, in the interest of justice.

Bengaluru

Date

Advocate for Petitioner