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(2018) 07 PAT CK 0077

In the Patna High Court

Case No : Letters Patent Appeal No. 236, 332, 388 Of 2015 In Civil Writ Jurisdiction Case No. 5643, 5643 Of 2012, 4526 Of 2013

National Highway Authority Of India Through General Manager And Ors — APPELLANT

Vs

Madhukar Kumar And Ors — RESPONDENT

Date of Decision : 25-07-2018

Acts Referred:

National Highways Act, 1956 — Section 5, 6, 9, 9(b), 11
National Highways Fee (Determination Of Rates And Collection), Rules, 2008 — Rule 2(f), 2(o), 2(ga), 8, 8(1), 8(2)

Citation : (2018) 3 PLJR 687

Hon'ble Judges : Jyoti Saran, J;Chakradhari Sharan Singh, J

Bench : Division Bench

Advocate : Vinod Kumar Kanth, Nath Pathak, Anil Kumar Singh, J.S.Arora, Suraj Samdarshi, Sanjay Kumar, S.D.Sanjay, A.B.Mathur, K.P.Yadav, Sunil Kumar, Amit Shrivastava, Girish Pandey, S.N.Pathak, Mrigank Mauli

Final Decision : Dismissed

Judgement

It is feeling aggrieved by the judgment and order dated 16.12.2014 of a learned Single Judge of this Court passed in C.W.J.C.No. 5642/2012 and

C.W.J.C.No. 4526/2013 that the National Highways Authority of India alongwith its officials (hereinafter referred to as â??the NHAIâ?) and the

concessionaire M/s PBTL are before this Court in these three sets of intra-Court appeals.

While L.P.A.No. 388/2015 arising from C.W.J.C.No. 5643/2012 is filed by â??NHAIâ? the other two sets of appeals have been filed by the

Concessionaire M/s PBTL bearing L.P.A.No. 236/2015 arising from C.W.J.C.No. 5643/2012 and L.P.A.No. 332/2015 arising from C.W.J.C.No.

4526/2013. Since these three appeals arise from the common judgment and order of the learned Single Judge that they have been heard analogous and

are being disposed of by this judgment.

Briefly enumerating the facts leading to the writ petitions and the present appeals, we take note of the events essential for disposal of the appeals.

C.W.J.C.No. 5643/2012 was filed by 17 petitioners with the prayer for directing the respondent authorities which includes Union of India, NHAI and

M/s PBTL to restrain themselves from construction of the Toll Plaza at 194 K.Ms. on N.H.30 while four laning the Patna- Bakhityarpur section

which construction according to the petitioners is in violation of Rule 8 of the National Highways Fee (Determination of Rates and Collection), Rules,

2008 published in the Gazette Extra-ordinary on 5.12.2008 (hereinafter referred to as â??the 2008 Rules). C.W.J.C.No. 4526/2013 was filed by a

solitary petitioner with the same prayer.

C.W.J.C.No. 5643/2012 was initially filed as a Public Interest Litigation but on amendment in the prayer portion, carried out by the petitioners, to

delete its nature, was placed before a learned Single Judge of this Court. C.W.J.C.No. 4526/2013 also filed in public interest, was placed before a

Division Bench on 5.3.2013 and it is taking note of the pendency of identical issue in C.W.J.C.No. 5643/2012 that C.W.J.C.No. 4526/2013 was

converted as a writ petition to be heard analogous with C.W.J.C.No. 5643/2012.

As a consequence of the order passed by the Division Bench, both the writ petitions were heard analogous. The Patna Municipal Corporation was

added as a party in the nature of the contest raised. C.W.J.C.No. 5642 of 2012 was taken up for consideration on 6.12.2013 and the learned Single

Judge taking note of the nature of dispute and a rather relevant fact that the Toll Plaza was still under construction and observing that it was for the

NHAI, the contractor and the Union of India to consider its legality before starting and commissioning the Toll Plaza, by way of interim order passed

on the said date, directed that until service lanes, median and opening under-pass are fully constructed and made operational, toll collection of any sort

would not be permissible. It was further directed that no non-user of the toll road would be required to pay toll. Despite the interim order, the

respondents went ahead with the constructions of the Toll Plaza and ensured its completion.

The two writ petitions after being taken up for consideration on a number of

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days, was considered on 22.7.2014 when the learned Single Judge was

informed that the Toll Plaza has already been constructed and thus, the writ petitions have become infructuous.

It is rather surprising that even when vide interim order passed on 6.12.2013, the respondents including NHAI, the contractor and the Union of India

were made alive to consider the legality of the Toll Plaza at the site proposed, before starting and commissioning the same and thus, the risk involved

in going ahead with the constructions, was much to the knowledge of the respondents, yet they have taken the calculated risk to construct and

complete the Toll Plaza even when the matter was pending consideration in the two writ petitions.

It is a matter of record that by filing interlocutory applications amendment was prayed in the relief portion seeking a direction for demolition of the Toll

Plaza, which according to the petitioners, had been constructed illegally and in violation of the statutory provisions. The learned Single Judge taking

note of the prayer for amendment made in the interlocutory application vide order passed on 1.8.2014 and also taking note of the interim order passed

on 6.12.2013 which permitted the respondents to construct Toll Plaza at their own risk, allowed the amendment.

A second objection was raised by the NHAI in drawing the attention of the learned Single Judge to the order passed by the Division Bench in

C.W.J.C.No. 4671/2014 which was dismissed on 16.6.2014. According to the respondents NHAI, the issues stood covered by the Division Bench

order in C.W.J.C.No. 4671/2014 dated 16.6.2014. It was also prayed by the respondents that the matter be placed before the Division Bench on the

facts noted. The objection was considered by the learned Single Judge as the order sheet of the writ proceeding would confirm that the records of

C.W.J.C. No. 4671/2014 was directed to be placed and perhaps on examination of the same learned Single Judge was not persuaded with the

objection because the writ petitions were thereafter heard on merits and have been allowed by the judgment and order impugned. It is feeling

aggrieved that while NHAI has chosen to file a single appeal against the judgment and order passed in C.W.J.C.No. 5643/2012, the Concessionaire

has filed two appeals i.e. in each of the two writ petitions.

L.P.A.No. 388/2015 filed by M/s NHAI was heard on 12.3.2015 and the Division

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Bench while admitting the appeal and directing it for its hearing

analogous with other two appeals holding an impression that the writ petitioners had waited until construction of the Toll Plaza, chose to suspend the

judgment and order put to challenge herein while disposing of the prayer for stay.

While Mr. Vinod Kumar Kanth, learned Senior Counsel appears for â??the NHAIâ? in support of L.P.A.No. 388/2015 assisted by Mr. S.N.Pathak,

Advocate on record, Mr. Amit Shrivastava, learned counsel appears for the appellant Concessionaire in the other two appeals alongwith Mr. Girish

Pandey. The Union of India is represented by the Addl. Solicitor General, Mr. S.D.Sanjay, who appears with Mr. Anshay Bahadur Mathur, Central

Govt. Counsel. Mr. K.P.Yadav, learned GP-11 appears for the State of Bihar, Mr. Anil Kumar Singh appears for the respondents and Mr. J.S.Arora,

learned Senior Counsel, appears with Mr. Sanjay Kumar, for the writ petitioners.

Mr. Kanth, learned Senior Counsel appearing for â??the NHAIâ?, has led the arguments and gives the details of location of the Toll Plaza at 194

K.Ms. of National Highway No.30. According to Mr. Kanth, it is before taking a decision on the location of the Toll Plaza that the objections were

invited from general public. 74 persons appeared to raise their objections which were oral and accompanied oral suggestions. According to Mr. Kanth,

none of these writ petitioners came forward with any objection. It is argued that the commercial establishments have come up near the Toll Plaza

despite the bar under the National Highways Act, 1956 (hereinafter referred to as â??the 1956 Actâ?). According to Mr. Kanth, since there was no

stay on the construction of the Toll Plaza that it was constructed. He submits that a PIL was also filed objecting to such construction which was

tagged with the writ petition pending before the learned Single Judge and since the Court did not stay construction that the construction of the Toll

Plaza was completed, which rendered the issue academic but an amendment was prayed before the Single Judge for demolition of the Toll Plaza

which was allowed. Learned Counsel has taken this Court through the various provisions of the National Highway Act, 1956, the National Highways

Rules, 1957 framed thereunder (hereinafter referred to as â??the 1957 Rulesâ?), National Highways Authority of India Act, 1988 (hereinafter

referred to as â??the 1988 Actâ?) and â??the 2008 Rulesâ? to support right of the NHAI for a decision on location of any Toll Plaza as well the

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right of the Concessionaire M/s PBTL for collection of the tolls.

Referring to â??the 2008 Rulesâ? he submits, that Rule 2(f) defines â??executing authorityâ? to mean an officer or authority notified by the Central

government under section 5 of â??the 1956 Actâ?. He next refers to Rule 8(1) to submit that the executing authority or the concessionaire has been

vested with absolute discretion to establish a Toll Plaza at any place on the National Highways which is beyond a distance of 10 K.Ms. from the

municipal town or the local town area, in question. In reference to the two â??provisosâ? attached to Rule 8(1) he submits that the first proviso

attached to rule 8(1) casts an obligation on the executing authority to record reasons in case he or the concessionaire decides to locate a Toll Plaza at

any place within a distance of 10 K.Ms. of the municipal/ local town area limits but not less than 5 K.Ms. of such limits. According to learned Senior

Counsel, in such cases, the discretion yet exists but the executing authority or the concessionaire would have to record reasons for such decision.

Adverting to the second proviso attached to the Rule he submits that where a section of the National Highway, permanent bridge, a by-pass or tunnel,

is constructed within a municipal area or town area limits or within 5 K.Ms. of such limits and such construction is primarily for use of the residents of

such municipal area or town area limits, the Toll Plaza can be constructed within the municipal/ town area limits or within a distance of 5 K.Ms. from

such limits. Explaining the scope and intent of the two provisos attached to the Rule 8(1) of â??the 2008 Rulesâ?, it is argued by Mr. Kanth that the

learned Single Judge has committed an error in holding that both the provisos have to be read in continuity and are not independent of each other.

According to Mr. Kanth, each of the proviso deal with different situation and do not supplement each other. Learned counsel in support has referred

to the Constitution Bench judgment of the Supreme Court reported in AIR 1955 SC 765 (Ram Narain Sons Ltd. & ors. v. Asstt. Commissioner of

Sales Tax & ors.) and in reference to paragraph 10 of the judgment he submits that a proviso is an exception to the main provision to which it has

been enacted and thus, has its own independence and cannot be considered in continuity of the other proviso. For the same proposition learned counsel

has relied upon another Constitution Bench judgment reported in AIR 1975 SC 1758, (Dwarka Prasad v. Dwarika Das Saraf) paragraph 18.

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The third judgment relied upon by Mr. Kanth in support of his contention is the one rendered in the case of S.Sundaram Pillai v. V.R.Pattabiraman,

reported in AIR 1985 SC 582: 1985 SCR Vol.2 page 642, (S.Sundaram Pillai etc. v. U.R.Pattabiraman), and with particular emphasis on paragraph 32

he submits that the proper function of the proviso is to qualify the generality of the main enactment by providing an exception.

In short it is the submission of Mr. Kanth that the interpretation given by the learned Single Judge to the provisos present in Rule 8(1) of â??the 2008

Rulesâ?? is contrary to the legal position settled.

Learned counsel has next addressed upon the scope of interference in matters relating to construction of the National Highways and submits that it

should not be interfered in a routine manner. According to Mr. Kanth, National Highways is an issue which concerns a large section of the society

across the Country and thus any obstruction, in any part of such exercise, would affect the efficacy on other section. He submits that a Detail Project

Report (â??DPRâ? for the sake of brevity) is prepared before such exercise is undertaken and it is after taking note of each and every aspect found

relevant that a decision is taken on construction of the Highway, any section thereof as well on the location of Toll Plaza, bearing in mind the legal

prescriptions present. He relies upon a judgment of the Supreme Court reported in AIR 2011 SC 3210 (Union of India v. Dr. Kushala Shetty & ors.),

paragraph 24. According to Mr. Kanth, proviso has to be given a purposive interpretation and not a pedantic approach to get swayed on literal

interpretation. Learned counsel relies upon a judgment of the Supreme Court reported in (2016) 3 SCC 619 (paragraph 31 to 33) (Shailesh

Dhairyawan v. Mohan Balkrishna Lulla).

Having taken the Court through the observations present at paragraphs 14 to 20 of the impugned judgment he submits, that the conclusion drawn at

paragraph 21 and 22 is not correct, inasmuch as the location of the Toll Plaza is in accordance with â??the DPRâ?. According to Mr. Kanth, the writ

petitioners had their business establishments near the Toll Plaza and which relevant aspect was suppressed by them in the writ petitions, yet learned

Single Judge has entertained their prayer despite such suppression. According to Mr. Kanth, none of these petitioners had obtained permission for

construction of establishment even when they were in full knowledge of the

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declaration made for construction of the National Highway as back as on

15.4.1957. According to Mr. Kanth, because of the failure of the petitioners to obtain No Objection before the construction of their establishments,

they cannot be permitted to raise any grievance at such belated stage. It is further the argument of Mr. Kanth that the petitioners did not challenge

â??the DPRâ? which records reason for construction of the Toll Plaza at 194 K.Ms. According to Mr. Kanth, the finding of the learned Single Judge

on â??the DPRâ?? is neither in tune with the facts situation nor the statutory provisions.

Turning to â??the DPRâ? itself, a copy of which is enclosed at Annexure R11/B to the supplementary counter affidavit filed on behalf of the

Concessionaire in C.W.J.C.No. 5643/2012 at running page-182 of the proceedings, he submits that the executive summary present at page 190 in

respect of the 4/6 laning of the National Highway No.30 stands discussed and it is taking note of the fact that the area was thickly populated that a

parallel Highway was sought to be constructed in the process of 4/6 laning of the Highway. Referring to the supplementary counter affidavit of the

Concessionaire he submits that paragraphs 5 and 6 thereof discusses the reasons for 4/6 laning of Patna- Bakhtiyarpur section as well the location of

the Toll Plaza at 194 K.Ms. which was found most suitable.

Turning to the Rule making power vested in the Central Government under section 9 of â??the 1956 Actâ?, he submits, that an amendment was

incorporated in 1977 empowering the Central Government to make rules relating to rate of fees for the services rendered in relation to ferries,

permanent bridges, temporary bridges and tunnels on any national highway and use of sections of any national highway. He submits that another

amendment was made vide Amendment Act 1 of 1993 effective from 23.10.1992, whereby such fees could be levied for use of any section of a

national highway. Turning again to the â??2008 Rulesâ? he submits, that the object for framing the Rules makes it eloquent that it is for the purpose

of collection of fee for use of sections of national highways, permanent bridges, bypass and tunnels. It is submission of Mr. Kanth that the â??Toll

Plazaâ? was defined under Rule 2(o) of â??the 2008 Rulesâ? to mean any building, structure or booth made for collection of fee but vide GSR 585(E)

dated 8.6.2016 the provision was deleted with effect from 8.6.2016. He submits

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that by the same amendment a new provision Rule 2(ga) was

incorporated to define a â??fee plazaâ? to mean any building, structure or booth made for collection of fee. He submits that it is following this

amendment that Rule 8 was also accordingly amended to replace the word â??Toll Plazaâ? by the words â??Fee Plazaâ?. In reference to the pre-

amended Rule 8 he submits, that similar provisions existed even earlier. Turning the attention to the provisions of â??the Actâ? he submits that the

responsibility for development of the national highways entirely vests in the Central Government who either by itself or by delegating the responsibility

to the State Government, has been empowered to develop national highways across the Country. In reference to Section 11 of â??the Act of 1988â?

he submits that power has been vested in the Central Government to entrust the responsibility of construction of the national highway or any stretch

thereof to any other authority as may be specified in such notification. Placing reliance on the notification dated 7.5.2010 enclosed with the counter

affidavit filed on behalf of the Union of India in the appeal on 21.3.2018 he submits, that Item No.4 deals with NH30 in the stretch from 181.3 K.Ms.

to 231.5 K.Ms. and the work has been entrusted to the National Highway Authority of India. In reference to the counter affidavit filed on behalf of

the State in the writ petition at running page-76, with particular reference to the statement present at paragraphs 6 to 8 he submits that the four laning

work executed by the NHAI on entrustment has been admitted by the State as well the right of the NHAI for construction of the Toll Plaza.

According to Mr. Kanth, the State having acknowledged the right vested in the NHAI for widening of the section of the national highway as well as

for construction of Toll Plaza thereon, they cannot be permitted to retract from their stand. Making reference to Section 6 of â??the 1956 Actâ?, he

submits that the Central Government is amply empowered to issue direction to the State Government for carrying out the purposes of â??the Actâ? in

so far as it concerns a National Highway and thus, the State Government cannot be permitted to shift its stand. He submits that the fee being realized

at the Toll Plaza is in lieu of the services rendered on the national highway and the imposition is lawful as manifest from the provisions present at

Section 9(b), which is relatable to fees.

Summing up his argument, it is submitted that the learned Single Judge has

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misappreciated the statutory provisions referred to above to allow the writ

petition for it is entirely within the domain of the NHAI upon entrustment of the job by the Central Government vide notification dated 7.5.2010, to

take all measures for widening of the national highway as well for installation of a Toll Plaza for realization of fee which is lawfully supported under

the Rules framed by the Central Government in exercise of powers vested under the Rules making power underlying Section 9 of â??the 1956 Actâ??.

The argument of Mr. Kanth has been seconded by Mr. Shrivastava standing in support of the contentions advanced in the two appeals filed by the

Concessionaire. While adopting the argument advanced by Mr. Kanth as to the exclusive domain in the NHAI for 4/6 laning of the section of NH30

from Patna to Bakhtiyarpur on being entrusted by the Central Government, he submits that once job is handed over to the NHAI, it also vests the

NHAI to take a decision on the location of a Toll Plaza as manifest from the provisions underlying Rule 8 which has been not appreciated in its true

sense by the learned Single Judge. Learned counsel while also placing reliance on the Constitution Bench judgment of the Supreme Court rendered in

the case of R.N.Sons Ltd. (supra) on the scope and intent of a proviso, has relied upon a Privy Council judgment reported in AIR (34) 1947 PC Page

94 (King v. Dominion Engineering Co. Ltd.). In reference to the opinion expressed at paragraph 7 of the judgment he submits that the legal position

was settled by the Privy Council for holding that if there are multiple provisos present in the statutory provision, it is the last of the proviso which is the

ultimate. Placing reliance on the judgment of the Supreme Court reported in (2015) 15 SCC 647, (Chairman, National Highways Authority of India &

ors. v. R. Murali & ors.), it is submitted that the scope of interference with the exercise undertaken in the matter of construction of a National

Highway has been clearly laid down and the Supreme Court has opined an exercise of restraint by the Courts on such matters.

The arguments advanced on behalf of the appellants by Mr. Kanth and Mr. Shrivastava has been contested by Mr. J.S.Arora, learned Senior Counsel

appearing on behalf of the respondents- writ petitioners. While raising objections on the maintainability of the appeal filed by â??the NHAIâ? he

submits that the learned Single Judge by the judgment and order impugned has allowed the two writ petitions heard analogous but â??the NHAIâ?

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has preferred appeal only against one of them i.e. C.W.J.C.No. 5643/2012 while not questioning the order in so far as C.W.J.C.No. 4526/2013 is

concerned. According to Mr. Arora, the effect of non-challenge by â??the NHAIâ? to the judgment and order in so far as it concerns the petitioner

in the second writ petition has attained finality. He next refers to Rule 8 of â??2008 Rulesâ? to submit that the 2nd proviso attached to the Rule

further enlarges the powers vested in the executing authority or the concessionaire to construct the Toll Plaza beyond the restrictions present in the 1st

proviso and thus, is not an independent provision. According to Mr. Arora, even if the 2nd proviso does not in so many words, requires recording of

reasons, nonetheless where the powers vested in the executing authority or the concessionaire has been enlarged further to move into the municipal

area itself or within 5 K.Ms. of such municipal/ local town area limit, which is prohibited under the substantive provision as well as the 1st proviso, it

impliedly warrants an application of mind which should reflect in the decision so taken. It is the argument of Mr. Arora that the Toll Plaza was

constructed at 194 K.Ms. on the section of the National Highway connecting Patna- Bakhtiyarpur, with the sole intention of roping the people going to

Fatuha. Making reference to the counter affidavit filed on behalf of â??the NHAIâ? in the writ petition in particular reference to the statement made

in paragraph 9, he submits that â??the NHAIâ? is more concerned on the commercial viability of the project, rather than the facilitation of the general

public because they do agree that the location of the Toll Plaza was fixed at K.M. 194 considering viability of the project with respect to density of

traffic and its leakage. It is argued that â??the NHAIâ? is more concerned with the profitability of the concessionaire while contending that if the

location is shifted elsewhere, there would be huge traffic leakage, badly affecting the viability of the project and violation of the agreement between

â??the NHAIâ? and the Concessionaire. In reference to the statement present at paragraph 8 of the same affidavit he submits that a plain reading

would show that until filing of the counter affidavit â??the NHAIâ? was not even sure about the proposed location of the Toll Plaza and whether it

was within the municipal limits. Moving to the counter affidavit filed on behalf of the Patna Municipal Corporation it is submitted that the statement

made in paragraph 5 of the counter affidavit is clear on the issue that the area

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where the Toll Plaza was being constructed fell within the municipal

area and municipal tax was being collected from the residents of the locality.

Mr. Arora next made reference to the counter affidavit of the Concessionaire and in reference to the statement made at paragraph 7(iii) he submits

that it is the own admission of the Concessionaire that the location of the Toll Plaza was beyond 5 K.Ms. of the municipal/ local town area limit. It is

argued that this admission of the Concessionaire brings the project within the purview of the 1st proviso to Rule 8 and which mandates assigning of

reasons for its location. He has also made reference to the supplementary counter affidavit of the Concessionaire and in reference to the statement

made at paragraph 5 he submits that the intent for location of the Toll Plaza expressed at K.M. 194 has been explained in reference to the total

tollable traffic at K.M. 195 and at K.M. 215. It is argued that even though â??the NHAIâ? conducted studies from K.M. 195 to 215 for the purpose

of location of the Toll Plaza as admitted at paragraph 5(d) of the supplementary counter affidavit but a decision on the issue was taken at K.M. 194

which was not even a part of the study nor any reasons have been assigned for such deviation. Making reference to the statement present at

paragraph 6 of the supplementary counter affidavit he submits that even though the study was made between K.M. 195 to 215 but since K.M. 194

was found to be more suitable and profitable that a decision was taken thereon but without assigning any reasons therefor.

In reference to the second counter affidavit filed on behalf of â??the NHAIâ? and with particular reference to the statement present at paragraph 13

he submits that it is because any other location would affect the financial interest of the Concessionaire that â??the NHAIâ? decided on the

construction of the Toll Plaza at K.M. 194. Mr. Arora has made reference to the supplementary affidavit filed on behalf of â??the NHAIâ? in the

appeal and in reference to sketch enclosed with the affidavit he submits that considering that the new alignment proceeds towards Bakhtiyarpur,

â??the NHAIâ? should have proceeded in the said direction for a decision on a Toll Plaza rather than concentrating to rope in those going to Fatuha.

It is submitted that vide interim order passed on 6.12.2013 on the writ petition, a restraint order was issued to the respondents from collection of the

fees while leaving it to the wisdom of the respondents whether or not to

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construct the Toll Plaza during the pendency of the writ petition. It is argued

that taking a calculated risk that the respondents have proceeded to construct the Toll Plaza even when the interim order was operating and has been

confirmed by the final judgment.

It is submission of Mr. Arora that even though vide order passed on 12.3.2015 the Division Bench has suspended the judgment and order of the

learned Single Judge but such suspension ipso facto would not empower â??the NHAIâ? or the Concessionaire to collect the toll from general public.

In reference to paragraph 29 of the impugned judgment he submits that the plea of completed construction rendering the issue academic, was rejected

by the learned Single Judge taking note of the interim order passed on 6.12.2013. In reference to the finding of the learned Single Judge at paragraph

26 of the judgment he submits that the learned Single Judge has taken note of the absence of discussion in the Detailed Project Report regarding the

construction of the new alignment primarily for use of local residents in terms of 2nd proviso to Rule 8. It is argued by Mr. Arora that though a plea

has been taken by the appellants that the service road is catering to the need of the local residents but the learned Single Judge on examination of the

materials on record has drawn a conclusion that the service road was neither serving the purpose of the local residents nor satisfied the legal

requirements.

Concluding his argument Mr. Arora has relied upon the finding of the learned Single Judge at paragraphs 28, 29 and 30 to submit that no exercise

whatsoever was carried out by â??the NHAIâ? to satisfy the pre-requisite for invoking the 2nd proviso of Rule 8 for construction of the Toll Plaza

within 5 K.Ms. limit of municipal area. In short, it is submission of Mr. Arora that even though the location is within 5 K.M. limit but the exercise

mandated under 2nd proviso to Rule 8 has been given a gobye.

Mr. Pathak, learned counsel representing â??the NHAIâ? and Mr. Shrivastava, learned counsel appearing for the Concessionaire, in short reply have

denied any violation of the statutory provisions of Rule 8 and while reiterating the earlier submissions it is submitted that the learned Single Judge has

failed to consider the aspect in its true perspective and the legal position settled by the Courts on the issue. Reiterating again to the order passed by the

Division Bench in C.W.J.C.No. 4671/2014 it is submitted that an earlier attempt

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for questioning the Toll Plaza having been negated by the Division

Bench, the issue raised by the writ petitioners should have met the same fate.

We have heard learned counsel for the parties and have perused the records.

Exhaustive arguments have been advanced by the learned counsel for the parties supported with exhaustive written notes of arguments and equally

exhaustive is the manner in which learned Single Judge has dealt with the issue. The argument advanced on behalf of the appellants as respondents

before the learned Single Judge stands noted hereinabove and it is the same very issues which has been raised in appeal before this Court, which can

be broadly classified as follows:

(i) The respondent- writ petitioners neither have locus nor can complain of violation of any fundamental right by the establishment of the Toll Plaza

rather it is a proxy litigation led on behalf of those having business establishment in and around the Toll Plaza, constructed without obtaining no

objection from the statutory authorities.

(ii) The conclusion drawn by the learned Single Judge that the 2nd proviso to Rule 8(1) of â??the 2008 Rulesâ? is in continuity with the 1st proviso is

not in tune with the legal position settled under the judgments on the scope and intent of the proviso. The 2nd proviso to Rule 8(1) of â??the 2008

Rulesâ?? is independent of the other provisions.

(iii) The establishment of the Toll Plaza is as per statutory prescriptions underlying the 2nd proviso to Rule 8(1) of â??the 2008 Rulesâ? and the

learned Single Judge has erred in holding that the appellants have violated the statutory prescriptions.

(iv) The NHAI and its executing authority, who are appellants before this Court, have absolute right for establishment of the Toll Plaza within a

section of a National Highway.

(v) In absence of any challenge to the DPR which provides for the location of the Toll Plaza, there can be no challenge to its establishment.

(vi) Since there is already alternative route available, as well, service roads catering to the needs of those, who wish to avoid the National Highway, no

grievance can be raised. The Courts should refrain from interfering in the construction of National Highway or location of the Toll Plaza which lies in

the exclusive discretion of the NHAI/ executing authority.

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(vii) The issue has already been raised and rejected by a Division Bench in C.W.J.C.No. 4671/2015 (Thakur Mallah vs. State). All the issues noted

above were raised by the appellants as respondents before the Writ Court and have been individually dealt by the learned Single Judge to reject the

contentions which view of the learned Single Judge is supported with reasons. I am conscious of the jurisdiction vested in this Court while exercising

appellate powers under Clause 10 of the Letters Patent of the High Court of Judicature at Patna. I am also conscious of the expression on the issue,

by the Supreme Court given in the case of Management of Narendra & Company (P) Ltd. v. the Workmen of Narendra & Company, reported in

(2016)3 SCC 340, holding that a mere possible second view or a better view should be no ground for interference with the order passed by the learned

Single Judge unless both sides agree for a fairer approach on the relief prayed. In other words, unless the opinion expressed by the learned Single

Judge on an issue is held perverse, a mere second possible view on the same issue cannot be a reason to exercise appellate jurisdiction under the

Letters Patent Jurisdiction unless there is a consensus between the parties for a disposal on agreed terms. I am persuaded to reproduce the opinion of

the Supreme Court present in paragraph 5 of the judgment:

â??5. Once the learned Single Judge having seen the records had come to the conclusion that the industry was not functioning after January 1995,

there is no justification in entering a different finding without any further material before the Division Bench. The Appellate Bench ought to have

noticed that the statement of MW 3 is itself part of the evidence before the Labour Court. Be that as it may, in an intra- court appeal, on a finding of

fact, unless the Appellate Bench reaches a conclusion that the finding of the Single Bench is perverse, it shall not disturb the same. Merely because

another view or a better view is possible, there should be no interference with or disturbance of the order passed by the Single Judge, unless both sides

agree for a fairer approach on relief.â??

The legal position being such, it is to be seen whether the opinion expressed by the learned Single Judge on the issues noted, upon examination of the

records of the case, is a perversity i.e. contrary to the materials present on the records of the proceeding and/or on complete misappreciation of the

statutory prescriptions.

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I shall be dealing with the issues one by one after noting the opinion of the learned Single Judge on the same issue.

Re: Issue No. (i) :- Locus- no violation of fundamental right- unclean hands- business interest etc.

The argument of the learned counsel appearing for the appellants that the respondents- writ petitioners have no locus to complain of violation of any

fundamental right by the establishment of the Toll Plaza, is too farfetched. According to the appellants, the writ petition was a proxy litigation led on

behalf of the business establishment in and around the Toll Plaza which again does not undermine the cause raised by the writ petitioners. Where an

action of an authority is questioned on statutory violation and which concerns the public at large, then the objection either on the vice of proxy litigation

or on locus or on violation of right or on sufferance, bears no foundation because in such circumstance it is not the consequences of the action

complained, which has to bear the reason for maintaining a writ petition rather it is the source of power drawn by the authority charged with such

illegal discharge, which is the relevant factor.

In my opinion, it is not for the respondent- writ petitioners to establish any cause of action for maintaining the writ petition rather it is for â??the

NHAIâ? to explain as to why they have given preference to the commercial viability of the project over the statutory requirement and whether the

project is essentially catering the needs of the local residents for the purpose of establishment of the Toll Plaza. Nowhere in the affidavit has either

â??the NHAIâ? or â??the Concessionaireâ? been able to establish that the section of the new alignment had been constructed primarily for the use

of the residents of the municipal area concerned. The reasons assigned by the learned Single Judge to uphold the right of the respondent- writ

petitioners to maintain the writ petition is well discussed and requires no interference. The objection thus raised is misconceived and is accordingly

rejected.

Re: Issue No. (ii):- Scope/ intent of 2nd proviso to Rule 8(1).

It is the argument of the learned counsel for the appellants that the learned Single Judge has grossly erred in holding that the 2nd proviso to Rule 8(1)

of â??the 2008 Rulesâ? has to be read in continuity with the 1st proviso which is not in tune with the legal position settled in the judgments of the

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Courts on the scope and intent of the proviso.

The discussion on these issues can be found at paragraphs 17 to 21 of the judgment and the learned Single Judge taking note of the three situations in

which the executing authority or the Concessionaire can establish a Toll Plaza, has concluded that in view of the legislative intendment of the

provision, not only the concerned authority is bound to record reasons in writing but also to adhere to the conditions so mentioned in the 2nd proviso to

Rule 8. Learned Single Judge has further held that before taking a decision on the construction of a Toll Plaza within a municipal area or within 5

K.Ms. of the municipal/ town area limit, the executing authority or the Concessionaire has to be satisfied that the conditions present in the 2nd proviso

have been fulfilled.

According to the learned counsel for the appellants, the learned Single Judge has committed an error in foisting upon the concerned authorities, the

duty to record reasons before invoking the 2nd proviso to Rule 8(1), in absence of any such mandate provided by the legislature. For the purpose they

have relied upon the Privy Council judgment in the case of Dominion Engineering Co. Ltd., the constitution Bench judgments in the case of Ram

Narain Sons Ltd. and Dwarika Prasad and the judgment in the case of S. Sundaram Pillai (supra).

In my considered opinion the celebrated judgments relied upon by learned counsel for the appellants do not in any manner denigrate the exposition of

the legislative intendment by the learned Single Judge.

In so far as the opinion of the Privy Council on the issue in the case of Dominion Engineering Co. Ltd. (supra) is concerned, in my opinion paragraph 7

relied upon, in fact, supports the opinion of the learned Single Judge when it runs as under:

â??7. Proviso 2 qualifies the main enactment in the matter of delivery no less than does proviso 1 and it also qualifies proviso 1 itself. For it provides

â??furtherâ? that â??in any case where there is no physical delivery of the goods,â? the tax is to be payable when the property in the goods passes

to the purchaser. Thus where there is no physical delivery the notional delivery which proviso 1 introduces is rendered inapplicable. Anger J. found in

proviso 2 an alternative ground for the decision against the Crown and it is the main ground of Hudson J.â?s judgment in the Supreme Court. In their

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Lordshipsâ? view this proviso presents an insuperable obstacle to the Crownâ?s claim. There has been no physical delivery of the goods by the

Dominion Company to the Pulp Company. The proviso enacts that â??in any caseâ? where there has been no physical delivery the tax is to be

payable when the property passes. The property in the goods in question has never passed to the Pulp Company. Consequently the tax has never

become payable. If proviso 2 is repugnant in any way to proviso 1 it must prevail for it stands last in the enactment and so to quote Lord Tenterden

C.J., â??speaks the last intention of the makersâ? ((1881), 2B and Ad. 818 at p. 821). The last word is with the respondent, the Dominion Company,

and must prevail.â??

Their Lordships of the Privy Council while holding that a proviso qualifies not only the main enactment but also the preceding proviso have concluded

that even if the last proviso is found repugnant to the 1st proviso, it has to prevail. I find nothing in the judgment which would run counter to the same

expression given to the 2nd proviso to Rule 8(1) by the learned Single Judge albeit in a different manner.

Similar is the expression of the Constitution Bench at paragraph 10 of the judgment rendered in the case of Ram Narain Sons Ltd. (supra) which runs

under:

â??10. â?¦ â?¦ â?¦ â?¦ It is a cardinal rule of interpretation that a proviso to a particular provision of a statute only embraces the field which is covered

by the main provision. It carves out an exception to the main provision to which it has been enacted as a proviso and to no other â??

The judgment of the Constitution Bench in the case of Dwarika Prasad (supra) at paragraph 18 relied upon by learned counsel for the appellants

makes no departure to hold that a proviso must be limited to the subject matter of the enacting clause and that a proviso must prima facie be read and

considered in relation to the principal matter to which it is a proviso. It is not a separate or independent enactment. I am tempted to reproduce the

relevant extract of paragraph 18 which runs under:

â??18. â?¦ â?¦ â?¦ â?¦ The law is trite. A proviso must be limited to the subject matter of the enacting clause. It is a settled rule of the construction that

a proviso must prima facie be read and considered in relation to the principal matter to which it is a proviso. It is not a separate or independent

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enactment.â??

The last of the judgment relied upon by the learned counsel for the appellants for contesting the interpretation of the 2nd proviso to Rule 8(1) by the

learned Single Judge was rendered in the case of S. Sundaram Pillai (supra) but paragraph 32 of the judgment relied upon by the learned counsel for

the appellants for canvassing their point is on the same lines for it holds that the proper function of a proviso is merely to qualify the generality of the

main enactment by providing an exception and taking out, as it were, from the main enactment, a portion which, but for the proviso, would fall within

the main enactment. Paragraph 32 of the judgment in the case of S. Sundaram Pillai (supra) runs under:

â??32. The above case was approved by this Court in Commr. Of Income Tax, Mysore v. Indo Mercantile Bank Ltd., 1959 Supp (2) SCR 256: (AIR

1959 SC 713), where Kapur, J. held that the proper function of a proviso was merely to qualify the generality of the main enactment by providing an

exception and taking out, as it were, from the main enactment a portion which, but for the proviso, would fall within the main enactment. In Shah

Bhojraj Kuverji Oil Mills & Ginning Factory v. Subhash Chandra Yograj Sinha, (1962) 2 SCR 159: (AIR 1961 SC 1596), Hidayatullah J., as he then

was, very aptly and succinctly indicated the parameters of a proviso thus:

â??As a general rule, a proviso is added to an enactment to qualify or create an exception to what is in the enactment, and ordinarily, a proviso is not

interpreted as stating a general rule.â??

In my opinion, there is nothing in the judgments so relied upon by the learned counsel for the appellants which would cause any dent to the opinion

expressed by the learned Single Judge on the scope and intent of the 2nd proviso to Rule 8(1). In fact if the 1st proviso mandates recording of reason

by the executing authority/ Concessionaire when moving beyond the substantive provision to enter within the restrictive area of 10 K.Ms. of municipal

area, the executing authority or the Concessionaire cannot escape this essential discharge while invoking the 2nd proviso which further enables access

within the municipal area or within 5 K.Ms. thereof. Rule 8 of â??the 2008 Rulesâ?? runs under:

â??Location of toll plaza-(1) The executing authority or the concessionaire, as the case may be, shall establish a toll plaza beyond a distance of ten

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kilometers from a municipal or local town area limits:

Provided that the executing authority may, for reasons to be recorded in writing, locate or allow the Concessionaire to locate a toll plaza a distance of

ten kilometers of such municipal or local town area limits, but in no case within five kilometers of such municipal or local town area limits:

Provided further that where a section of the national highway, permanent bridge, by-pass or tunnel, as the case may be, is constructed within the

municipal or town area limits or within five kilometers from such limits, primarily for use of the residents of such municipal or town area, the toll plaza

may be established within the municipal or town area limits or within a distance of five kilometers from such limits.

(2) Any other toll plaza on the same section of national highway and in the same direction shall not be established within a distance of sixty kilometers:

Provided that where the executing authority deems necessary, it may for reasons to be recorded in writing, establish or allow the concessionaire to

establish another toll plaza within a distance of sixty kilometers: Provided further that a toll plaza may be established within a distance of sixty

kilometers from another toll plaza if such toll plaza is for collection of fee for a permanent bridge, by-pass or tunnel.â??

While Rule 8(1) confers enabling power on the executing authority or the Concessionaire to establish a toll plaza in three different situations and also

casts obligations, to be discharged by them, under each of such situations, Rule 8(2) prescribes the distance for location of a 2nd toll plaza on the same

section.

The issue in contest revolves around Rule 8(1), the substantive provision of which gives exclusive power to the executing authority or the

Concessionaire to establish a toll plaza beyond a distance of 10 K.Ms. from the municipal/ local town area limits. There are no constraint attached to

such exercise.

The 1st proviso to Rule 8(1) limits such exercise in circumstances where the executing authority decides to locate a toll plaza within a distance of 10

K.Ms. of such municipal/ local town area limits but beyond 5 K.Ms. of such municipal/ local town area limits. In such cases the executing authority

has an obligation to discharge by recording his reasons in writing, why he intends to do so.

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The 2nd proviso to Rule 8(1) is a further enlargement of such powers when the executing authority or the Concessionaire has been given permission

to even cross the limit of 5 K.Ms. fixed under the 1st proviso for construction of a toll plaza on any section of the National Highway, permanent

bridge, a by-pass or tunnel constructed within a municipal/ town area limit or within 5 K.Ms. from such limit, subject to the condition that such section

of the National Highway, permanent bridge, by-pass or tunnel has been constructed primarily for the use of residents of such municipal/ town area

limit. Meaning thereby, the executing authority/ Concessionaire has to satisfy themselves that the section of the Highway, permanent bridge, by- pass

or tunnel has been constructed primarily for the use of residents of the municipal area.

A plain reading of the conferment of power on the executing authority or the Concessionaire, as the case may be, as per Rule 8 of â??the 2008

Rulesâ? does confirm that the obligation cast on the executing authority increases in the same proportion in which the town area limit is decreased. In

other words, the larger distance of location of the toll plaza, the lesser is the responsibility to be discharged by the executing authority/ the

Concessionaire. It is taking note of the restricted conferment of power under the 2nd proviso to Rule 8(1) on the executing authority to enter within a

limit of 5 K.Ms. of municipal area that the learned Single Judge has observed that it is in continuity of the obligation cast under the 1st proviso,

meaning thereby that the executing authority/ Concessionaire cannot unilaterally decide to hold that the section of the Highway, permanent bridge, by-

pass or tunnel, has been constructed primarily for use of the local residents rather there has to be a recorded satisfaction.

In my opinion considering the legislative intendment underlying Rule 8(1), if the learned Single Judge has observed that the obligation to record

satisfaction by assignment of reasons by the executing authority is a condition precedent to an exercise under the 2nd proviso to Rule 8(1), it only

confirms to the principles of substantial justice and in furtherance of the legislative intendment. There is a subtle difference between providing

â??casusâ? to a statutory provision in contradistinction to â??casus omissusâ? and while courts are to refrain from providing â??casus omissusâ?,

such is not the situation here.

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In my considered opinion considering the mandate present in Rule 8(1), a larger responsibility lies on the executing authority when it takes a decision to

locate a toll plaza within the municipal area or within 5 K.Ms. of such municipal/ town area limits and the pre-requisite to such exercise as present in

the 2nd proviso to Rule 8(1) presupposes a recording of satisfaction by the executing authority/ Concessionaire, that the section of the National

Highway, permanent bridge, by-pass or tunnel on which the toll plaza is to be constructed, is primarily for the use of the residents of such municipal/

town area limit which essential discharge has not been carried out either by the NHAI or the Concessionaire.

In the nature of discussion above, the opinion expressed by the learned Single Judge on the legal intendment of the 2nd proviso to Rule 8(1) and

violation thereof by the appellants suffers no lacuna on the statutory interpretation, requiring any interference.

Re: Issue No.(iii):- Installation of toll plaza as per Rule 8(1).

The learned Single Judge has held that the installation of the toll plaza at K.M. 194 is in violation of Rule 8 of the Rules. While it has been argued by

Mr. Kanth, learned Senior Counsel appearing for the appellant NHAI that the construction has been made by following the prescriptions present in

proviso (ii) to Rule 8(1) of â??the 2008 Rulesâ?, Mr. Arora, learned Senior Counsel appearing for the writ petitioners, has demonstrated the fallacy in

the argument because the pleadings demonstrate that until matter reached this Court, the respondents were not even sure as to whether the location of

the toll plaza at K.M. 194 was covered by the 1st proviso or the 2nd proviso. The argument of Mr. Arora that the appellants were more concerned on

the commercial viability of the project rather than the facilitation to the general public, is supported from pleadings which confirms that a decision was

taken to construct a toll plaza at K.M. 194 for roping in even those who did not intend to use the new alignment for going to Fatuha rather were

satisfied by the existing NH30 but in the process of widening of NH 30 by drawing a parallel alignment, these motorists are forced to pass through the

toll plaza for going to Fatuha or take the alternative route covering 35 K.Ms. The affidavits filed before the learned Single Judge by the respondent

NHAI and the Concessionaire, specifically mentions that any other location of the toll plaza would lead to huge traffic leakage badly affecting the

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viability of the project. In other words the object for location of the Toll Plaza at 194 K.Ms. is profitability and not to facilitate the movement of the

local residents.

Mr. Srivastava though has endeavoured hard to contest the position by submitting that it is due to inadvertence that certain factual errors recorded in

the main counter affidavit have been clarified through the supplementary counter affidavit filed before the learned Single Judge but I have found

nothing in the supplementary counter affidavit which dilutes the stand taken by the respondent NHAI and the Concessionaire before the learned Single

Judge.

The 2nd proviso to Rule 8(1) can be pressed into service only where the section of the National Highway, permanent bridge, by-pass or tunnel has

been constructed primarily for the use of the local residents. It is thus to be seen from the copy of the feasibility report relied upon by the appellants in

support of their contentions enclosed at Annexure R- 11B to the supplementary counter affidavit of the Concessionaire filed before the learned Single

Judge as well as the statement made in the counter affidavits, whether the onus has been discharged.

In my opinion, the situation is defenceless. How casually the power has been exercised by the appellants- respondents in the matter of construction of

the Toll Plaza within 5 K.Ms. of municipal limits, can be appreciated from the statement made in the affidavits filed in the writ proceedings which in

my opinion is by itself sufficient for a decision in favour of the respondent- writ petitioners. Paragraphs 8 and 9 of the counter affidavit filed by the

NHAI in the writ proceedings runs under:

1. That the deponent further submits that the installation of toll plaza is not in violation of rule 8 of National Highways Fee (Determination of rates and

collection) Rules, 2008 published in Extra-ordinary Gazette on 5.12.2008 even if the Toll Plaza location comes under municipal limit â??

2. That with regard to the statement made in paragraph no.2(i) of the writ petition it is humbly submitted that the location of Toll Plaza has been fixed

at Km. 194 as per the detailed survey by DPR consultant M/s Meinhardt Consultant Pvt. Ltd. Considering the ground condition, future development of

the surrounding and viability of the project w.r.t. traffic density and its leakage as per the guidelines. If this Toll Plaza is being shifted to other location

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in bypass (in between km. 194.7 to 231) there will huge traffic leakage from the old road and which will badly effect the viability of the project and is

will be also violation of the agreement between NHAI and the Concessionaire, hence the project may be stopped by the Concessionaire because this

project is viable due to traffic count particularly at this Toll Plaza location.â??

The status of the local residents is discussed in paragraph 19 of the counter affidavit as follows:

â??19. â?¦ â?¦ â?¦ It is relevant to mention here that for the local residents there is provision of relaxation in the toll fee â??

The stand of the Concessionaire in his counter affidavit filed in the writ proceedings is rather interesting. Paragraph 7(iii) of the counter affidavit reads

under:

â??7(iii) That reliance of the writ petitioner on the said gazette notification dated 5.12.2008, is on the face of it wholly misconceived in so far as

location of toll plaza is concerned, in terms of Rule-8 thereof. In this regard it is respectfully submitted that the first proviso to the said Rule-8(1)

makes it explicit that â??the executing authority may, for the reasons to be recorded in writing locate or allow the Concessionaire to locate a toll plaza

within a distance of ten kilometers of such municipal or local town area limits but in no case within five kilometers of such municipal or local town area

limitâ?. The said proviso clearly grants power to the respondent no.7 to permit the construction of toll plaza above five kilometers as has been done in

the contract in question. It is further respectfully and humbly submitted that the proposed toll plaza at 194 km. on National Highway no. 30 i.e. Patna

Bakhtiyarpur four laneing project, is going to be at least six kilimeters from the triangular section on the road leading to Gandhi Setu from

Bhakhtiyarpur side. The said toll plaza is 13.1 kilometers approximately from Anishabad round about on the news Bye-pass. Thus even on the face of

it the proposed toll plaza at 194 Km. is much beyond five kilometers stipulated in terms of the said first proviso to Rule-8(1) of the said 2008 Rules, as

contained in Annexure 1 to the writ application. In this view of the matter also the writ petition is fit to be dismissed with exemplary costs.â?

(Emphasis supplied is mine)

Mr. Amit Srivastava has tried to salvage the situation by submitting that the position was clarified in the supplementary counter affidavit. Reliance has

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also been placed at paragraphs 1.1, 1.3, 1.6, 1.7, 6.6, 12.2, 12.2.5 and 12.6 of the feasibility report at Annexure R/11B in support but a plain reading of

the paragraphs so relied upon does not improve the situation for the appellants for it nowhere mentions that this section of the National Highway was

constructed primarily for the use of local residents. The report at Annexure R/11B besides dealing with other issues also addresses upon the location

of the Toll Plaza and paragraphs 6.6, 12.2.5 and 12.6 would confirm that despite taking note of the fact that the section of the Highway runs through

the municipal area, yet there is no conclusion that the section was constructed primarily for the use of the local residents rather it is the specific stand

of the appellants that it was to remove traffic congestion. In my opinion, a project executed for removal of traffic congestion on a National Highway

may be backed with sound reasoning for facilitating the Highway motorists i.e. those using the Highway for long distance traveling and to protect them

from getting stuck in long drawn traffic jam but it yet does not answer how the â??primarily for the use of residentsâ? clause present in the 2nd

proviso to Rule 8(1), is satisfied, which is an essential prerequisite for construction of a Toll Plaza thereon.

Another aspect of the matter as it discerns from the report at Annexure R-11/B is that while traffic study present at paragraph 1.6 shows that the

tollable traffic was considered from K.M. 195 and Km 215 and it is taking note of the traffic leakage at each level that a decision was taken for

construction of the toll plaza at 194 K.Ms. i.e. a K.M. ahead of the survey done. All these aspects simply go to prove that even though the legislature

clearly gives a primacy to the facilitation of the local residents before any decision is taken on construction of a Toll Plaza on a section of the National

Highway, permanent bridge, by-pass or tunnel but the statutory requirements has been surrendered to the commercial viability of the project on its

profitability and which is neither the legislative intendment nor is lawfully permissible.

Re: Issue No.(iv):- Right of NHAI/ Concessionaire to establish the Toll Plaza.

There cannot be any contest as to the right of â??the NHAIâ? as the executing agency or â??the Concessionaireâ? to establish a Toll Plaza on a

section of the Highway but then any such decision has to abide by the statutory prescriptions and any violation thereof would be sufficient to strike

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down the action.

While canvassing such point learned counsel for the appellants have relied upon the judgment of the Supreme Court rendered in the case of R. Murli

(supra) but the context in which observations have been made by the Supreme Court forms an essential condition to test the objection. It is not the

right of â??the NHAIâ? or â??the Concessionaireâ? to establish a Toll Plaza which is being put to question herein rather it is the procedural lacuna

to such establishment which is at the foundation of the challenge and the discussion above consolidates the position of the respondent- writ petitioners

for the challenge raised.

Re: Issue No.(v):- No challenge to DPR. No relief.

The argument of Mr. Kanth, learned Senior Counsel appearing for â??the NHAIâ? as seconded by Mr. Srivastava appearing for â??the

Concessionaireâ? that in absence of any challenge to the DPR , the respondents- writ petitioners cannot question the location of the Toll Plaza is only

taken for rejection. The issue has been discussed by the learned Single Judge at paragraph-26 of the impugned judgment and it stands rightly noted

that the onus lay on â??the NHAIâ? to satisfy that the report as well as the decision regarding location of the Toll Plaza was in tune with proviso (ii)

to Rule 8(1) of â??the Rulesâ??.

In my opinion, the pleadings on record do sufficiently confirm that the decision as to the location of the Toll Plaza was taken exclusively bearing in

mind the commercial viability of the project and in reservation to the business interest of â??the Concessionaireâ? leaving the statutory requirement

present in the 2nd proviso to Rule 8(1) of â??the Rulesâ?? and ornamental piece of legislation.

Re: Issue No.(vi):- Alternative route.

The issue of alternative route canvassed by Mr. Kanth, learned Senior Counsel appearing for â??the NHAIâ? and Mr. Srivastava appearing for

â??the Concessionaireâ? has been dealt with by the learned Single Judge in paragraph 27 of the judgment and the unreasonableness of such

argument is apparent from the very fact that to avoid the payment at a Toll Plaza a motorist would have to take a circuitous route which spreads over

35 K.Ms. to arrive at a point just across the Toll Plaza. Such is the discussion at paragraph 12 of the impugned judgment and at paragraph 27 is the

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discussion on the service roads so canvassed by the learned counsel for the appellants as an alternative route available to the residents. The discussion

of the learned Single Judge at paragraph 27 as regarding status of the service road has not been met by the learned counsel for the appellants. The

learned Single Judge, taking note of the specific statement of the respondents-writ petitioners in the supplementary affidavit that the service road are

blocked by the high concrete walls prohibiting any motorist to move out therefrom with no openings on either side rather meeting into a dead end with

no inner connection provided in between the National Highway and the service road is the reflection of coercive designs of the appellants. The

pleadings that the width of the service road is barely 4 meters while the requirement is of 10 meters and it lies about 5 to 7 feet lower in level below

the National Highway, is not contested. The position explained by the respondent- writ petitioners does confirm that the service road has been

deliberately designed in a manner that it provides no facility to those whose business establishments lie in and around the section of the National

Highway nor serves any fruitful purpose to the local residents, rather is an eye wash to wriggle out from the statutory violation.

Re: Issue No.(vii):- Order in C.W.J.C.No. 4671/2015.

The last of the issues which was raised by the learned counsel for the appellants is relying upon the judgment rendered by the Division Bench in

C.W.J.C.No. 4671/2015 (Thakur Mallah v. the Union of India & ors.). A copy of the order was handed over to us during the course of hearing and a

plain reading thereof would confirm that it relates to Varanasi- Aurangabad section of the National Highway and it is recording satisfaction on the toll

collection for the usage thereof, that the Public Interest Litigation was dismissed.

I fail to understand how learned counsel for the appellants have relied upon the order passed in the case of Thakur Mallah (supra) to question the

maintainability of the challenge herein for the challenge in the case of Thakur Mallah (supra) is nowhere related to Patna- Bakhtiyarpur section of the

National Highway No.30 rather it relates to Varanasi- Aurangabad section of the National Highway. The parity sought to be drawn is misconceived

and is accordingly rejected. It was also canvassed by Mr. Kanth, learned Senior

Counsel as seconded by Mr. Srivastava that the issue has been rendered infructuous by completion of the Toll Plaza but again the submission is taken

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for rejection because the interim order passed on 6.12.2013 made it rather clear for the appellants as the respondents before the learned Single Judge

that any construction would be at their own risk and would be subject to the provisions of alternative route for motorist intending to use the old

National Highway No.30 for going to Fatuha.

Despite repetition I am persuaded to record that the learned Single Judge has rather laboriously dealt with each and every issue raised by the

appellants which is also raised before this Court but in the nature of apparent statutory violation committed by the appellants, we find no reasons to

interfere with the opinion expressed by the learned Single Judge.

Accordingly, the three appeals are dismissed but with no order as to costs.

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