NATIONAL HIGHWAYS AUTHORITY OF INDIA & OTHERS

v.

MADHUKAR KUMAR & OTHERS

(Civil Appeal No(s). 11141 of 2018)

SEPTEMBER 23, 2021

[K.M. JOSEPH AND S. RAVINDRA BHAT, JJ.]

National Highways Fee (Determination or Rates and Collection) Rules, 2008 – rr. 3, 8, 9, 17 – Construction of Toll Plaza – Appellant-NHAI proposed for the construction of Toll Plaza at the four laning of Patna-Bakhityarpur sectionofNH-30 – According to the respondent, the appellant-NHAI had not assigned any reason for establishing the toll plaza within a municipal area and construction of the same was in violation of Rule 8 – Respondents filed writ petition before the High Court – The Single Judge of the High Court allowed the writ petitions and directed to shift the proposed construction of Toll Plaza from its present location – The Single Judge of the High Court also found that before taking decision to construct a toll plaza within 10 km of the municipal limits, the Executive Authority must assign reasons in writing and also adhere to the conditions mentioned in the second proviso to Rule 8 – The Division Bench of the High Court confirmed the order of the Single Judge of the High Court – On appeal, held: There is no general duty, when an administrative decision is taken, to give reasons – A Statute may, however, explicitly provide that the Executive Authority must provide reasons and it must be recorded in writing – Rule 8(1) provides that the Executing Authority or the Concessionaire shall establish toll plaza beyond the distance of 10 km from a municipal or local town area limits – However, the first proviso engrafts a limitation on the power of the Executing Authority that the exercise of power under the first proviso, should not result in the toll plaza being located within 5 km of such municipal or local town area limits – In exercise of the said discretionary power, the Executive Authority must record reasons in writing – On the other hand, on the perusal of the second proviso, it leaves no doubt that the factum of construction of a section of the national highway, inter-alia, within the municipal or town area limits, is subject to the

A *only condition that it must be primarily for the use of the residents of such municipal or town area – The second proviso does not indicate as to, in whom, the power to locate the toll plaza under the second proviso, stands vested with – Also, the second proviso does not contemplate that reasons for exercising the discretionary power,*
B *is to be recorded in writing – Thus, the High Court erred in concluding that the recording of reasons in writing was necessary – The direction of the High Court, to shift toll plaza, cannot be upheld and it is liable to be set aside.*

Allowing the appeal, the Court

C **HELD: 1. This Court would hold that as noticed by the Bench of three Judges in *M/s. Mahabir Jute Mills Ltd., Gorakhpore,* there is no general duty, when an administrative decision is taken, to give reasons. A Statute may, however, explicitly provide that the Executive Authority must provide reasons and it must be recorded in writing. A case in point is the**
D **first proviso to Rule 8 of the Rules itself. The desirability of a general duty, in the case of administrative action to support decisions with reason, is open to question. One of the most important reason is, the burden it would put on the administration. It is apposite, at this juncture, to notice that administrative**
E **decisions are made in a wide spectrum of situations and contexts. The executive power of the Union and States are provided in Articles 73 and 162 of the Constitution of India, respectively. Undoubtedly, in India, every state action must be fair, failing which, it will fall foul of the mandate of Article 14. It is, at this juncture,**
F **this Court may also notice that the duty to give reasons, would arise even in the case of administrative action, where legal rights are at stake and the administrative action adversely affects legal rights. There may be something in the nature or the context, under which, the administrative action is taken, which may necessitate the authority being forthcoming with rational reasons.**
G **There are other decisions, which essentially belong more to the realm of executive policy-making, which ordinarily may not require the furnishing of reasons. The advantages, undoubtedly, of introducing a reasons driven regime, are as follows. [Para 60] [343-C-G]**

H

2. Persons, who may have a right or an interest, would know, what are the reasons which impelled the Administrator to take a particular decision. Judicial review, in India, which encompasses the wide contours of public interest litigation as well, would receive immeasurable assistance, if the reasons for particular decisions, are articulated to the extent possible. The giving of reasons also has a disciplining effect on the Administrator. This is for the reason that the reasons would capture the thought process, which culminated in the decision and it would help the Administrator steer clear of the vices of illegality, irrationality and also disproportionality. Reasons could help establish application of mind. Conversely, the absence of reasons may unerringly point to non-application of mind. The duty to act fairly, may require reasons to be recorded but the said duty, though there is a general duty on all state players to act fairly, may have its underpinnings, ultimately in legal rights. [Para 61][343-G-H; 344-A-C]

3. It is one thing to say that there should be reasons, which persuaded the Administrator to take a particular decision and a different thing to find that the reasons must be incorporated in a decision. The question, relating to duty to communicate such a decision, would arise to be considered in different situations, having regard to the impact, which it, in law, law, produces. In fact, the second proviso to Rule 17 of the Rules, provides not only for there being reasons, but the reasons for refusal to permit barricades, must be communicated. If the law provides for a duty to record reasons in writing, undoubtedly, it must be followed and it would amount to the violation of the Statute, if it were not followed. Even if, there is no duty to record reasons or support an order with reasons, there cannot be any doubt that, for every decision, there would be and there must be, a reason. The Constitution does not contemplate any Public Authority, exercising power with caprice or without any rationale. But here again, in the absence of the duty to record reasons, the court is not to be clothed with power to strike down administrative action for the mere reason that no reasons are to be found recorded. In certain situations, the reason for a particular decision, may be gleaned from the pleadings of the Authority, when the matter is

tested in a court. From the materials, including the file noting's, which are made available, the court may conclude that there were reasons and the action was not illegal or arbitrary. From admitted facts, the court may conclude that there was sufficient justification, and the mere absence of reasons, would not be sufficient to invalidate the action of the Public Authority. Thus, reasons may, in certain situations, have to be recorded in the order. In other contexts, it would suffice that the reasons are to be found in the files. The court may, when there is no duty to record reasons, support an administrative decision, with reference to the pleadings aided by materials. [Para 62][344-C-H]

RULE 8 DEMYSTIFIED

4. Rule 8(1) provides that the Executing Authority or the Concessionaire shall establish toll plaza beyond a distance of 10 kilometres from a municipal or local town area limits. In this context, it is useful to bear in mind that under Rule 6, fee levied under the Rules, has to be collected by the Central Government or the Executing Authority or the Concessionaire at the toll plaza. The Executing Authority has been defined in Rule 2(f), as an Officer or Authority notified under Section 5 of the National Highway Act. It would appear, therefore, that the Executing Authority, as defined, or the Concessionaire, is empowered to establish the toll plaza beyond a distance of 10 kilometres from a municipal or local town area limits. [Para 65][347-B-D]

5. The first proviso contemplates power with the Executing Authority to locate or allow the Concessionaire to locate a toll plaza within a distance of 10 km of such municipal or town area limits. However, the proviso engrafts a limitation on the power of the Executing Authority in that the exercise of power under the first proviso, should not result in the toll plaza being located within 5 kilometres of such municipal or local town area limits. A closer look at the first proviso will indicate the following features. Unlike the main Rule, where the power is conferred on the Executing Authority and the Concessionaire, to locate a toll plaza, which must, indeed, be more than 10 kilometres from the municipal or local town area limits, there is no power conferred

on the Concessionaire to locate a toll plaza within the distance of 10 kilometres. In other words, the Executing Authority is the only Authority, which can locate or allow the Concessionaire to locate within a distance of 10 kilometres but not less than 5 km. In other words, the exercise of power, under the first proviso, can result in the location of a toll plaza at a distance of five or more kilometres and below 10 kilometres from the municipal or local town area limits. The further important sine qua non for the exercise of the discretionary power conferred on the Executing Authority, is that, the Executing Authority must record reasons in writing at the time when he exercises the power to locate or permit the Concessionaire to locate the toll plaza within the distance as already mentioned. [Para 66][347-D-H]

6. Moving forward to the second proviso, it commences with the words "provided further". Therefore, for all intents and purposes and at first blush, it is a proviso. More about it, a little later. Continuing the narrative, the second proviso, as it is described, consists of the following features. If a section of the national highway, permanent bridge, bypass or tunnel, is constructed within the municipal or town area limits, then, the toll plaza may be established within the municipal or town area limits. This is subject to the only requirement that the construction of the section of national highway, permanent bridge, bypass or tunnel, whichever may be the case, is constructed within the municipal or town area limits, primarily for the use of residents of such municipal or town area limits. If the aforesaid two requirements are fulfilled, then, the embargo that the toll plaza must be located beyond 10 kilometres from the municipal or local town area limits, contained in Rule 8, would cease to apply. Equally, the second proviso contemplates that, if a section of the national highway, permanent bridge, bypass or tunnel is located within 5 kilometres from the municipal or town area limits, then, the last limb of the proviso, would apply, and the toll plaza may be located within a distance of 5 kilometres from such limits. [Para 67] [348-A-D]

7. It will be seen that whether the construction of the section of the national highway, permanent bridge, bypass or tunnel is constructed within the municipal or town area limits or within 5

kilometres from such limits, the common requirement for invoking the power under the second proviso and to locate the toll plaza, either within the municipal limits or town limits or within a distance of 5 kilometres from such limit, is that the construction in question, must be primarily for the use of the residents of such municipal or town area. [Para 68][348-E-F]

8. Therefore, a perusal of the second proviso leaves this Court in no doubt, whatsoever that the statutory requirements to apply the second proviso and to locate a toll plaza within the municipal or town area limits, is the factum of construction of a section of the national highway, inter alia, within the municipal or town area limits, subject to the only condition that it must be primarily for the use of the residents of such municipal or town area. It would be noticed further that, unlike the main Rule and the first proviso, the second proviso does not indicate as to, in whom, the power to locate the toll plaza under the second proviso, stands vested with. In other words, unlike the main Rule and the first proviso, the Rule-maker has not indicated the person or Authority, who is to decide. Lastly, it must also to noticed that, unlike the first proviso, the second proviso does not contemplate that the reasons for exercising the discretionary power, is to be recorded in writing. [Para 70][349-B-D]

9. It would be apposite to enquire into the rationale, why the requirement of reasons being recorded, is not incorporated in the second proviso. The answer is not far to seek. The first proviso does not provide any condition precedent for locating a toll plaza at a distance of less than 10 kilometres but 5 or more kilometres from the municipal or local town area limits. The requirement is the recording of reasons. No other guidance is forthcoming. In fact, the only check on the power to relax the rigour of the Rule, that the toll plaza must be located at a distance of more than 10 kilometres from the municipal or local town area limits, are two in number. Firstly, the power is located only with the Executing Authority. Secondly, the Executing Authority is obliged, in law, to give reasons, which must be recorded in writing. Besides these safeguards, there are no other indispensable

requirements to reduce the distance, as provided in the Rule. This is in stark contrast with the purport of the second proviso. The second proviso deals with a specific situation. We have already spelt out the requirements. These requirements alone would justify the location of the toll plaza either within the municipal or town limits or within a distance of 5 kilometres from such limits. The requirements are neatly articulated and cast in stone. They are objective criteria. They become the requirements of the Statue. If those requirements are met, then, the toll plaza can be established, relaxing the Rule. [Para 71][349-D-H]

10. In such circumstances, this Court is of the clear view that the High Court has erred in reading the second proviso in continuation with the first proviso and thereby concluding that, even the requirement of the first proviso, viz., the recording of reasons in writing, would also become necessary to invoke the power under second proviso. [Para 72][350-A-B]

11. As far as the question, as to who can take a decision under the second proviso, on a conspectus of Rule 8, that, in the absence of any express reference to the power to take a decision, within the meaning of the second proviso, being lodged with any particular Body, the said power must be found vested with the Executive Authority. The Court says this for the reason that, some person must, indeed, take the decision that the situation warrants locating the toll plaza, in exercise of the power under the second proviso. This Court certainly cannot lodge that power with a Concessionaire. The Rule-maker has conferred the power on the Concessionaire, expressly when it declared in Rule 8, that the Concessionaire may, apart from the Executing Authority, locate the toll plaza beyond 10 kilometres from the municipal or town area limits. The power under the first proviso, is conferred only upon the Executing Authority. Having regard to the nature of the power, viz., to locate the toll plaza, in complete contradiction with the mandate of the Rule, within the municipal area, inter alia, this Court holds that, the power to take decision under the second proviso, is lodged with the Executing Authority. [Para 75] [351-D-H]

12. To invoke the second proviso, what is required is, the existence of the conditions, as explained. However, a decision must be taken. It must be taken by the Competent Authority. The Authority is the Executing Authority. It must apply its mind and be convinced that a section of the national highway, inter alia, is constructed within the municipal or town area limits. This is a pure question of fact. Secondly, it must conclude that the said construction is 'primarily' or 'mainly' for the 'use' of the residents of the municipal limits. This is again a factual matter. The second proviso does not compel the Authority to locate the plaza within the municipal or town area limits. It is a matter of discretion to be exercised, no doubt, taking into consideration the maximization of toll collection also and avoiding of leakage of toll, bearing in mind the fact that the Concessionaire is permitted to collect the toll only for the period of the Concessionaire Agreement under Rule 16. To show application of mind, there must be material. Even in the absence of reasons, recorded as such, there must be proper pleadings with materials, unless facts are not in dispute. [Paras 76 and 77][352-A-D]

WHETHER INVOCATION OF THE SECOND PROVISO TO RULE 8 IN THE FACTS ILLEGAL?

14. The appellants definitely set up the case under Rule 8 in both the counter affidavits filed by it. The statement that the second proviso applies, even if the construction is made within the municipal limits, is emphasised by the Writ Petitioners, to show the non-application of minds. This Court must, in this regard, bear in mind the nature of the lis, as also the rights of the Writ Petitioners. The High Court did not find any Fundamental Rights with the writ petitioners in the matters. The only issue is relating to violation of Rule 8. This Court has already found that upon the satisfaction of the objective criteria laid down in the second proviso, construction of the toll plaza, as provided therein, is permissible. Apart from the statement of the Writ Petitioners themselves, that the road is a national highway and it is merely for the use of the local residents, the undeniable fact is that, in place of the two-lane road, after a huge investment, it was

upgraded to a four-lane road and nearly 14 kilometres of the project road, indisputably, passed through the municipal limits and the most important beneficiary of the said construction, can clearly be stated to be the residents in the municipal area. The project road, did enure chiefly to the residents of the Patna Municipality. The road from 180 to 190 kms was found to be a very congested stretch. The construction of the widened road, undoubtedly, helped mainly the residents of the municipal area. There are other features, apart from widening, including the graded separators. No doubt, it may be true that many persons may be using the said stretch, who may not be residents of the Patna Municipality, would also benefit from the construction, but that cannot detract from requirement of the second proviso being fulfilled, viz., that the construction was primarily for the benefit of the residents of the municipal area. The second proviso does not require that the construction must be solely for the benefit of the residents of the municipal area. [Para 85][357-C-H]

15. There is another aspect, which this Court cannot ignore. The construction was completed in accordance with the agreement with the Concessionaire. The Judgment of the Division Bench came to be stayed by this Court and the toll has been collected from the toll plaza. Secondly, the High Court may not be justified in finding that the commercial expediency trumped the law. Commercial expediency is, undoubtedly, a relevant fact. The exact location of the toll plaza is also geared to garner maximum revenue. Concessionaire Agreement lasts for a particular period of time. It is the Concessionaire, who makes the construction, after making the entire investment. The contract contemplates "Design, Build, Finance, Operate and Transfer (the "DBFOT") under Rule 16 of the Rules, upon the expiry of the agreement, the fee is to be collected by the Central Government or the Executing Authority. Therefore, in such circumstances, any leakage in the toll, would naturally be sought to be avoided. As long as the site of the toll plaza is otherwise supportable, with reference to the second proviso, then, the area of judicial review, in such matters, would be extremely narrow. [Para 86][358-A-D]

16. In the Rules of 2008, Rule 2C defines a bypass as a section of the national highway bypassing a town or a city. Therefore, the question may arise, whether, when Rule 8 speaks of construction of a section of the national highway, which is within a municipal or town area limits, it will include a bypass, in view of the new definition. There is indication in the case that from 178 km, there was an existing bypass. The new construction was over the existing bypass. This Court proceed on the basis that there was construction of a National Highway partly within the municipal limits. [Para 87][358-D-F]

RULE 17: CLOSING OF SERVICE ROADS

17. Rule 17 permits additional barriers to prevent evasion of fees at the toll plaza. At places, other than "at the toll plaza", with prior permission of the Central Government or Executing Authority, additional barriers are permitted but within 10 kilometres from the toll plaza. The Court notice these provisions to pronounce on the complaint of the Writ Petitioners that there is blocking of the service roads near the toll plaza. This Court makes it clear that barriers shall be permissible only in compliance with Rule 17 of the Rules. [Para 88][358-F-H]

WHETHER THE DECISION IS ARBITRARY

18. It is the case of the Writ Petitioners that the decision to locate site of toll plaza at 194 kilometre is arbitrary. Under Article 14 of the Constitution, no State action can pass muster, if it is found to be arbitrary. But, then, a different or even an incorrect decision, would not make an otherwise lawful decision vulnerable to judicial scrutiny. An arbitrary decision would be one which is bereft of any rationale or which is capriciously wrong, and not merely an erroneous view, in the perception of the Court. Any other view would tantamount to substituting its view for that of the Authority. Judged by the said standard, and also the nature of dispute, it cannot be held that toll plaza, having been located at a point where there was sufficient space and which would prevent the leakage of traffic, and also noticing that stretch itself consisted of a little over 50 kilometres, quite clearly, the case based on arbitrariness, is only to be repelled. [Para 94][361-F-H; 362-A]

19. This Court has found that the Executing Authority is the Competent Authority to take decision under the second proviso to Rule 8 of the Rules. This Court, no doubt, has found, there is no duty to record reasons. [Para 95][362-B]

20. The upshot of the above discussion is as follows: (1) The construction of the toll plaza at 194 kilometre was not illegal or arbitrary; (2) The direction by the High Court, to shift toll plaza, cannot be upheld and it is liable to be set aside; (3) The appellants will look at the barricades (closing of service roads) in regard to the toll plaza and permit such barricades only as are permitted in Rule 17 of the Rules. Any unauthorised barricades will be removed without any delay. (4) The First Appellant will issue suitable directions to all Executive Authorities to maintain distinct records containing the decision, invoking the second proviso to Rule 8 of the Rules. Such direction shall be issued within 3 weeks from today. (5) This Court directs the appellants as also the Concessionaire to extend the fullest benefits of the concessions under Rule 9 of the Rules. (6) Resultantly, this Court allows the Appeal and set aside the impugned Judgment of the High Court and the direction to shift the toll plaza is set aside. [Para 97][362-D-H; 363-A]

Union of India and others v. E.G. Nambudiri **(1991) 3 SCC 38 : [1991] (2) SCR 451;** *Maharashtra State Board of Secondary and Higher Secondary Education v. K.S. Gandhi and others* **(1991) 2 SCC 716 : [1991] (1) SCR 772;** *C.B. Gautam v. Union of India and others* **(1993) 1 SCC 78 : [1992] (3) Suppl. SCR 12;** *Rajeev Suri v. Delhi Development Authority and others* **Transferred Case (Civil) No. 229 of 202;** *M/s. Mahabir Jute Mills Ltd., Gorakhpore v. Shri Shibban Lal Saxena and others* **(1975) 2 SCC 818 : [1976] (1) SCR 168 – relied on.**

Chairman, National Highways Authority of India & others v. R. Murali & others **(2015) 15 SCC 647;** *Shenoy and Co. and others v. Commercial Tax Officer, Circle II, Bangalore and others* **(1985) 2 SCC 512 : [1985] (3) SCR 659;** *S.N. Mukherjee v. Union of India* **(1990) 4 SCC 594 : [1990] (1) Suppl. SCR 44;** *Star Enterprises*

and others v. City and Industrial Development Corpn. of Maharashtra Ltd. And others **(1990) 3 SCC 280 : [1990] (2) SCR 826;** *Sarat Kumar Dash and others v. Biswajit Patnaik and others* **1995 Supp (1) SCC 434 : [1994] (5) Suppl. SCR 223;** *Kranti Associates (P) Ltd. v. Masood Ahmed Khan* **(2010) 9 SCC 496 : [2010] (10) SCR 1070;** *Mohan Kumar Singhania v. Union of India* **1992 Supp (1) SCC 594 : [1991] (1) Suppl. SCR 46;** *Commissioner of Commercial Taxes, Board of Revenue, Madras & Anr. v. Ramkishan Shrikishan Jhaver etc.* **AIR 1968 SC 59 : [1968] SCR 148;** *Indore Development Authority v. Manoharlal and others* **2020 (8) SCC 129 : [2020] (3) SCR 1 – referred to.**

Regina v. Secretary of State for the Home Department (Original Appellant and Cross-respondent) ex parte Doody (A.P.) **(1994) 1 A.C. 531;** *Dover District Council v. CPRE Kent* **(2017) UKSC 79;** *Regina v. Higher Education Funding Council Ex parte Institute of Dental Surgery* **[1994] 1 WLR 242;** *Mullins vs. Treasurer of Survey* **1880 QBD 170 – referred to.**

Case Law Reference

(2015) 15 SCC 647	**referred to**	**Para 16**
[1985] (3) SCR 659	**referred to**	**Para 21**
[1990] (1) Suppl. SCR 44	**referred to**	**Para 40**
[1976] (1) SCR 168	**relied on**	**Para 41**
[1990] (2) SCR 826	**referred to**	**Para 42**
[1991] (2) SCR 451	**relied on**	**Para 43**
[1991] (1) SCR 772	**relied on**	**Para 44**
[1992] (3) Suppl. SCR 12	**relied on**	**Para 46**
[1994] (5) Suppl. SCR 223	**referred to**	**Para 47**
[2010] (10) SCR 1070	**referred to**	**Para 48**
[1991] (1) Suppl. SCR 46	**referred to**	**Para 73**
[1968] SCR 148	**referred to**	**Para 74**
[2020] (3) SCR 1	**referred to**	**Para 74**

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 11141 of 2018. A

From the Judgment and Order dated 25.07.2018 of the High Court of Judicature at Patna, in Letters Patent Appeal No.388 of 2015 in Civil Writ Jurisdiction Case No.5643 of 2012.

Neeraj Kishan Kaul, Sr. Adv., Ms. Madhu Sweta, Rahul Shyam Bhandari, Ms. Shivangi Khanna, Pritha Suri, Advs. for the Appellants. B

Shyam Divan, Sr. Adv., Rajesh K. Singh, Rovins Verma, Rajesh Srivastava, Harish Pandey, Ravi Bharuka, Ankit Agrawal, Adith Deshmukh, Devashish Bharuka, Arup Banerjee, Ms. Prakriti Raj, Sanjeev Sharma, Rudra Kr. Dey, T. Mahipal, Samir Ali Khan, Rudreshwar Singh, Kaushik Poddar, Advs. for the Respondents. C

The Judgment of the Court was delivered by

K. M. JOSEPH, J.

D

1. Respondent Nos. 1 to 17 in this appeal (hereinafter referred to as, 'the writ petitioners'), filed Writ Petition No. 5643 of 2012. The relief sought in this Writ Petition was to restrain the construction of a toll plaza at 194 km of NH30 in the four-laning of Patna-Bakhtiyarpur section of NH30, in violation of Rule 8 of the National Highways Fee (Determination of Rates and Collection) Rules, 2008 (hereinafter referred to as,'the Rules', for short). The said Writ Petition was heard along with Writ Petition No. 4526 of 2013, filed by one Shri Ritesh Ranjan Singh @ Bittu Singh. By Judgment dated 22.07.2014,the Writ Petitions were allowed in the following manner by the learned Single Judge: E

> "32.Thus, on the basis of aforesaid discussions, thesewrit petitions are allowed and respondents no. 6 and 11 are directed to shift the proposed construction of Toll Plaza at 194 km milestone of Patna-Bakhtiyarpur Section of N.H. 30 from its present location to any other place on new alignment which separates from old N.H. 30 sothat the violation of Rule 8 of Rules 2008 could be avoided and the persons who do not have intend to use toll road could be exempted from paying toll tax. The respondent no. 6 should take thedecision of shifting the above stated Toll Plaza toany other place as discussed above within six weeks from today and till then respondents shall not collect the toll tax from those persons F G H

A who do have intend to go through the old N.H. 30 without using the new alignment of toll road. The parties shall bear their own cost."

2. The appellants before us, who are NHAI, its Chairman and the General Manager, filed LPA No. 388 of 2015 against Writ Petition No. B 5643 of 2012.The said Appeal came to be heard along with LPA No. 236 of 2015, filed by the concessionaire, arising from Judgment in Writ Petition No. 5643 of 2012 and LPA No. 332 of 2015 filed again by the concessionaire against Writ Petition No. 4526 of 2013, and by the impugned Judgment, the Division Bench confirmed the Judgment of the C learned Single Judge.

3. Before we go to set down the contentions of the parties, it is necessary to have a look at the Writ Petition which generated the present Appeal, *viz*.,Writ Petition No. 5643 of 2012. As noticed,it was filed by Respondent Nos. 1 to 17 in the present Appeal.

D **THE CASE SET UP BY THE WRIT PETITIONERS**

4. It was stated in the Writ Petition, *inter alia*, as follows:

"4. That it is stated that there is proposal for the construction of the toll plaza at 194 km of NH-30 I in the fourlaning of Patna-Bakhityarpur section of NH-30 from 181.300 km to 231.950 Km E in the state of state of Bihar on BOT (toll) basis under NHDP III. The DPR for four laning was prepared a few years back in which the toll plaza was proposed at 194 Km of NH-30."

5. Thereafter, it is stated that, during the preparation of the Detailed Project Report (DPR) and its final approval, there was a seachange in F the actual ground condition in the area. A number of important commercial institutions came up in the area. Thereafter, the principal bone of contention, however, was the transgression of Rule 8 of the Rules. It is necessary, in this context, to notice:

"17.That the respondent authority has not assigned any reason G for establishing the toll plaza within municipal area. <u>It is further stated that the road in question is a national highway and it has been constructed merely for the use of the residents of Patna Municipality area.</u>

18. That it isfurther stated that establishment of this toll plaza at H its present location will cause great difficulties to the residents of

the locality because they will have to cross the toll plaza on many occasions in a day and on all the occasions, they will be liable to pay toll." A

(Emphasis supplied)

6. It was alleged in the Writ Petition that the Writ Petitioners moved representation and, thereafter, the Writ Petition is filed. B

THE CASE OF THE APPELLANTS

7. In the counter affidavit on behalf of the NHAI, the First Appellant,*inter alia*, stated as follows:

"7. That with regard to the statement made in paragraph no.1 of the writ petition it is humbly submitted that the said paragraph is by way of relief sought for hence reply is not needed but togive scrupulous assistance to the Hon'ble court it is humbly submitted that NHAI has made an concession agreement with M/s PBTL to construct the 4-lane project on BOT (Toll Basis) for the public interest,whose contractor M/s BSC-C&(JV) respondent no.10 is constructing the Toll Plaza at km. 194 of NH-30 as per Ideation fixed in concession agreement and more than 60°/o work has been completed. C D

8.That the deponent further submits that the installation of Toll Plaza is not in violation of rule 8of National Highways Fee (Determination of rates and collection) rules 2008 published in extra ordinary Gazette on 05.12.2008 even if the Toll Plaza location comes under municipal limit. It is already mentioned in rule 8 that "Provided furtherthat here a section of the under municipal or town area limits or within five kilometres from such limits. Primarily for use of the residents of such municipal or town area, the Toll Plaza may be established withinthe municipal or town area limits or within a distance of five kilometres from such limits".So, the pray of relief/reliefs of petitioners are unjustified and unlawful. E F G

9. 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 H

A 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 in bypass (in between km 194.7 to 231) there will huge traffic leakage from the old read and which willbadly 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."

8. There are other averments, which have paled into insignificance, as they are not canvassed by the parties before us. We may only notice paragraph-19, as related to concessions available to local residents. There was a second counter affidavit. Therein it is, *interalia*, stated that the installation of the toll plaza did not violate Rule 8, even if the toll plaza location came within municipal limits. We may only notice paragraph-13 in the secondCounter Affidavit:

"13.That if this Toll Plaza is being shifted to other location in bypass (in between km. 194.7 to 231) there will huge traffic leakage from the old road and which will badly effectthe 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 which is obvious from the Map and strip plan of NH-30 BOT Project from Patna to Bakhtiyarpur."

THE CASE OF THE CONCESSIONAIRE

9. In the first counter affidavit filed by Concessionaire, the Concessionaire, no doubt, took the contention that the proposed toll plaza at 194 kilometres, was going to be at least 13.1 kilometres approximately from Anisabad roundabout on the new bypass. It is thereafter stated that, thus, on the face of it, the proposed toll plaza at 194 kms is much beyond 5 kilometres stipulated in the first *proviso*. It is further contended that Noida toll plaza is not even one kilometre in distance from Sector 15A Noida (U.P.), which is purely a residential colony and within municipal limit of Noida. It was also contended that Gurgaon toll plaza, constructed on NH8, was well within the municipal limit of Gurugram. Also, the Mumbai-Pune Expressway toll Plaza is within the municipal limits of Greater Mumbai and Pune. The Concessionaire, no doubt, goes on to state that the idea behind the construction of national highway or

theirupgradation and construction, was for the overall population of the said area. Such construction is a harbinger of development.It is also stated that such upgradation is also aimed at benefitting the local population for the speedy movement from Patna to Bakhtiyarpur and *vice versa*. The NHAI (first appellant) has invited for proposals for request for qualification on 08.09.2009.The Concessionaire agreement, dated 31.03.2011, specifically contemplated construction of a toll plaza at 194 kilometres.

10. Thereafter, a supplementary counter affidavit was filed by the Concessionaire. Therein, it is, *inter alia*, stated that the Bihar Government has taken up the work of four-laning of NH30 from kilometre 181.300 to 189.500, only to reduce the excessive pressure of traffic. Reference is made to the second *proviso* to Rule 8 of the 2008 Rules. The executive summary of the DPR Delhi-Pune Railway is relied upon to point out that it clearly mentions that the stretch from *Didarganj* ROB, from Kilometre 196 to Fatuha Kilometre 208, was very congestive. Reference is made to other parts of the DPR. It is, in short, the case of the Concessionaire that it is evident that initiation of widening of National Highway 181.30 was to ease the pressure of local and thorough traffic. It is pointed out also that access road is being provided from 181.3 kilometre to 194 kilometre. It is contended that writ petitioners were required to leave 3 to 6 meters front set back, which they have not left. It is stated that there is compliance of second *proviso* to Rule 8 of the 2008 Rules, as four-Laning has been initiated to reduce the pressure of local traffic as well. It is also averred that, as such, it is primarily for the benefit of local resident, as per the feasibility report.

THE FINDINGS OF THE LEARNED SINGLE JUDGE

11. The learned Single Judge finds that, before taking a decision to construct a toll plaza within 10 km of the municipal limits, the Executing Authority must assign reasons in writing. The second *proviso*, being in continuation of the first *proviso*, if the toll plaza is constructed under the second *proviso,* the concerned Authority, it was found, is not only duty-bound to give reasons in writing but also adhere to the conditions mentioned in the second *proviso* to Rule 8.The appellants, it was pointed out, were found to have not stated that the new alignment is intended primarily for the use of the local residents of the Patna Municipal Corporation. It was further found that thelocal residents are being restrained to use even the old NH30, and furthermore, due to construction of the toll plaza at the

A point, the persons, who do not intend to use the new alignment, would have to pay toll tax, even for use of the old NH30. Therefore, it was found that there is violation of Rule 8. Dealing with the argument that no Fundamental Rights were violated, the learned Single Judge finds that Rule 8 was violated and, therefore, the court had jurisdiction under Article 226. Repelling the contention that the WritPetitioners had not challenged the DPR, it was found that the DPR was only a proposal prepared by the private Consultant Agency and it was the duty of the NHAI (appellant) to look into the detailed Report and ascertain whether it was prepared in accordance with the Rules.It was further found that the proposal for construction of toll plaza at 194 km, was apparently against Rule 8.Nothing was brought before the court, it was found to show that before giving approval to the DPR, the matter was discussed. Regarding the DPR being inconsonance with the second *proviso* to Rule 8, it was found that there was nothing in the DPR, which would show that the construction of the new alignment was primarily for the use of the local residents. Therefore, even if, there is approval of the DPR, the said approval was not in accordance with Rule, as there was nothing before the officials of the NHAI, to conclude that the second *proviso* to Rule 8, was complied with. We may further notice:

> "28. Annexure-I to the 3rd counter affidavit filed on behalf of NHAI reveals that four lane construction of N.H.30 starts from 181 km. milestone and ends to 230 km. milestone where it touches N.H. 31. Furthermore,above stated Annexure-I reveals that between 194 km. milestone and 197 km milestone the proposed new alignment separatesfrom old N.H. 30. It is also apparent from the above stated Annexure-1 that a person who comes from Fatuha and goes to Patna, has to pay toll tax and, similarly, a person comes from Patna and goes to Fatuha through old N.H. 30 without using proposed new alignment which turns towards N.H. 31 will also have to pay toll tax because the proposed toll plaza is being constructed much prior to the place from where the new alignmentseparates from old N.H. 30. As I have already stated that the site of proposed Toll Plaza at 194 km. milestone was chosen in violation of Rule 8 of Rules 2008 and it is apparent that the proposed location forestablishment of Toll Plaza is not only violation of Rule 8 of Rules 2008 but also charges tax from the persons who do not intend to use the toll road rather prefer to use old N.H. 30. No doubt, the expert agency proposed for location

of toll plaza after taking into consideration all pros and cons particularly, keeping in mind leakage of vehicle and density and ordinarily, the court doesnot interfere into the decision of an expert body but in the instant case, it is obvious that the aforesaid decision of expert body is riot only the violation of rule but also the violation of fundamental rights of the petitioners. Therefore, in my view, the decision of expert body for construction of toll plaza at 194 km. milestone does not stand in the eye of law and liable to be set aside."

12. It was further found that the alternate road projected by the appellants, traveling through which, the payment of toll could be avoided, would entail the distance of more than 35 kilometres. It is on this basis, the direction,as already noticed, was given by the learned Single Judge.

THE IMPUGNED JUDGMENT

13. The Division Bench, while dealing with the question about no Fundamental Rights being involved, and the Writ Petitioners approaching the court with unclean hands,opined that what is relevant, when a statutory violation is projected, and which concerns the public at large, was the source of power. It was further found that it was not for the Writ Petitioners to establish any cause of action for maintaining the Writ Petition. Rather, it is for the NHAI to explain as to why preference was given to commercial viability of the project over the statutory requirement. It was further found that from theAffidavits of the NHAI or the Concessionaire, they have not been able to establish that the section in the NH30 was constructed primarily for the use of residents of the municipal area.

14. While dealing with the scope of second *proviso*, the court went on to discuss the case law. Apart from Rule 8, it was found, *inter alia*, that the larger the distance of the location of the toll plaza, the lesser was the responsibility of the Executing Authority/Concessionaire. Recording of reasons, which was found necessary by the learned Single Judge, was found to conform to the principles of 'substantial justice' and 'in furtherance of legislative intendment'.It was further found that until the matters reached the court, the Appellants were not even aware as to whether the location of toll plaza was covered by the first *proviso* or second *proviso*. The Appellants were found to be more concerned about the commercial viability. Reference is made to the Affidavits of the Appellant and the Concessionaire, to essentially find that the case of

A non-application of mind, was made out. The specific stand of the appellants was found to be that the section was constructed to remove traffic congestion but it was also found that there was no conclusion that the section was meant primarily for the use of the local residents. A project, executed for the removal of traffic congestion on the national highway, may be backed with sound reasoning, as it would help long distance travellers from not getting stuck in a long-drawn traffic jam. The learned Judge goes on to find that the requirement that, it would be primarily for the use of residents, was satisfied. Primacy was given to by the Legislature to the facilitation of the local residents. What prevailed, however, was found to be commercial viability. Equally, the contentions that there is no challenge to the DPR, and there was an alternate Rule, were rejected. The other learned Single Judge, who constituted the Bench, agreed with the aforesaid views.

CONTENTIONS OF THE PARTIES

15. We heard Shri Neeraj Kishan Kaul, learned Senior Counselon behalf of the appellants. We also heard Shri Shyam Divan, learned Senior Counsel and Shri Ravi Bharuka, learned Counsel also on behalf of the Respondents Nos. 1 to 17.

16. The learned Senior Counsel for the appellants would point out that the view taken that, there must be specific reasons given within the meaning of the first *proviso* to Rule 8, is erroneous. The requirements in the second *proviso*, having been fulfilled, there was no justification for the Writ Court to interfere as to where a toll plaza is to be located, as long as the decision did not fall foul of the statutory requirement. It is not for courts to substitute its views. Our attention was drawn to the DPR. It is contended that the Expert Body had conducted detailed investigation into the matter. The project road was a little over 50 kilometres. Not only the point at km 194, was within the municipal area, but the decision is fully sheltered by the provisions of the second *proviso* to Rule 8. Various developmental works were carried out on a stretch beginning at 181 km. There were, in fact, nine 'U' turns provided. It conduced to the benefit of the local residents. Reliance was placed on the Judgment of this Court in *Chairman, National Highways Authority of India &others v. R. Murali & others*[1]. It is also contended that this Court has taken the view that there is only limited judicial review in such matters.

[1] (2015) 15 SCC 647

17. *Per contra*, Shri Shyam Divan, learned Senior Counsel, would point out that a holistic view of Rule 8 would result in the following inevitable conclusions. It is pointed out that, in words, which are couched in unambiguously mandatory terms, the toll plaza shall not be located within 10 km from a municipal or town area limits. This is the Rule.The first *proviso* carves out an exception. It permits the construction of toll plaza within a distance of 10 km but subject to it being five or more kilometres away. Conscious of the hazards of diluting the mandatory requirements contained in Rule 8(1), the Rule-maker has imposed the limitation that such dilution shall be accompanied by reasons. It is obvious that the reasons must be rational and bear a nexus between the decision and the object. The second *proviso*, sought to be invoked by the appellant, makesa drastic inroad into the 10 kilometre plus distance, proclaimed in Rule 1. It enables the Authority to put up the toll plaza even within the municipal or town area limits. Therefore, having regard to the consequences that would ensue of departing from the Rule, not only, should the requirements in the second *proviso*, be clearly established, but also, reasons, within the meaning of the first *proviso*, must be provided. The view of High Court represents the correct position in law. It is further contended that the residents in the area are compelled to pay toll even for using the old national highway, which branches of just a little distance being travelled after crossing the toll. Ideally and legally, the plaza ought to have been located on the construction, which is made after the road branches of as a bypass.The location of toll plaza at km 194, results in persons, who do not use the new bypass, also being called upon to pay the toll. This is impermissible, besides being unfair.

18. He drew out attention to the definition of the words "Executing Authority" in Rule 2(f), wherein it is defined to mean an Officer or Authority notified by the Central Government under Section 5 of the Act (National Highways Act, 1956).

19. The National Highways Authority of India Act, 1988, defines "Authority" as meaning the National Highways Authority of India, constituted under Section 3.

20. Shri Shyam Divan, learned Senior Counsel, would, therefore, contend that the decision to be supportable,with reference to the second *proviso* to Rule 8 in the first place, must be taken by the Executing Authority. He would further point out that the second *proviso* to Rule 8 must be construed, by subordinating it to the Rule, in keeping with the

A true province of a *proviso*. He drew our attention, also in this regard, to a similar *proviso* contained in Rule 8(2), which also has a *proviso* followed by a second *proviso*. Shri Ravi Bharuka, learned Counsel, also ably supplemented the submissions by seeking to persuade us to take a view, which would preserve the sacrosanctity of Rule 8(1) and stress the absence of circumstances in this case, to hold otherwise. It is also contended that two Writ Petitions were disposed of by a common Judgment by a learned Single Judge. The appellant filed one Appeal, which was against Writ Petition No. 5643 of 2012. The Appellant did not impugn the Judgment in Writ Petition No. 4526 of 2013, which was styled as Public Interest Litigation initially, and thereafter, made over to the learned Single Judge. Having not filed any appeal from the Judgment in Writ Petition No. 4526 of 2013, the appellants are precluded from challenging the Judgment in Writ Petition No. 5643 of 2012. This is for the reason that the Judgment of the Division Bench, in Writ Petition No. 4526 of 2013, attained finality. It was pointed out that it was the Concessionaire, who is Respondent No. 26 in the present Appeal before us, which filed appeals challenging the Judgment in both the Writ Petitions. The Concessionaire has not pursued the matter in this Court.

21. The learned Counsel for the appellant would point out that it suffices in law that, the Judgment in Writ Petition No. 5643 of 2012, is challenged, having regard to the decision of this Court rendered in *Shenoy and Co. and others v. Commercial Tax Officer, Circle II, Bangalore and others*[2].

THE STATUTORY FRAMEWORK

22. Section 7 of National Highways Act provides for a levy of fee. The relevant portion of Section read as follows:

> "**Section 7.(1)** The Central Government may, by notification in the Official Gazette, levy fees at such rates as may be laid down by rules made in this behalf for services or benefits rendered in relation to the use of ferries, [1][permanent bridges the cost of construction of each of which is more than rupees twenty-five lakhs and which are opened to traffic on or after the 1st day of April, 1976,] temporary bridges and tunnels on national highways [2][and the use of sections of national highways]."

---

[2] (1985) 2 SCC 512

"**Rule 7.(2)** Such fees when so levied shall be collected in accordance with the rules made under this Act." A

23. It will be noticed that the words, *"and the use of Sections of National Highway*", came to be inserted by Act 1 of 1993, with retrospective effect from 23.10.1992. The Rules, contemplated under Section 7, are the Rules and they came into force on 05.12.2008. B

24. The Rules were in supersession of the National Highways (Collection Of Fees By Any Person For The Use Of Section Of National Highways/Permanent Bridge/ Temporary Bridge On National Highways) Rules, 1997, *interalia*. Under the Rules of 1997, Section 2(b) defined as follows: - C

"**Rule 2 (b)**. 'Section of national highway/ permanent bridge/ temporary bridge' means that length of national highway/ permanent bridge/ temporary bridge on national highway notified by Central Government in Official Gazette for the development/ maintenance of which an agreement has been entered into between the Central Government and any person". D

Rule 3 provided for the 'Agreement and the rate of fee'; there was no provision similar to Rules 8 of the Rules in the Rules made in 1997.

25. The Rules were issued in supersession of the National Highway (Fees For The Use Of National Highways Section And Permanent Bridge – Public Funded Project) Rules, 1997. In the said Rules, Rule 2(k) defined "National Highway Section", as follows: - E

"**Rule 2 (k).** 'National Highway Section' means continuous length of any national highway or by-pass which shall be, notified for separately levy of fee collection." F

The rules separately provided for departmental fee collection and fee collection through franchisee.

26. Rule 2(c), of the 2008 Rules, defines "by-pass", "means a section of the National Highway by passing a town or city." G

27. Rule 3 provides for levy of fee. It reads, *inter alia*, as follows:-

"**Rule 3.(1)** The Central Government may by notification, levy fee for use of any section of national highway, permanent bridge, by-pass or tunnel forming part of the national highway, as the case may be, in accordance with the provisions of these rules: H

A Provided that the Central Government may, by notification, exempt any section of national highway, permanent bridge, by-pass or tunnel constructed through a public funded project from levy of such fee or part thereof, and subject to such conditions as may be specified in that notification.

B (2) The collection of fee levied under sub-rule (1) of rule 3, shall commence within forty-five days from the date of completion of the section of national highway, permanent bridge, by-pass or tunnel, as the case may be, constructed through a public funded project.

C xxx xxx xxx

(4) No fee shall be levied for the use of the section of national highway, permanent bridge, by-pass or tunnel, as the case may be, by two wheelers, three wheelers, [tractors, combine harvesters] and animal drawn vehicles:

D Provided that three wheelers, [tractors, combine harvesters] and animal-drawn vehicles shall not be allowed to the use the section of national highway, permanent bridge, by-pass or tunnel, as the case may be, where a service road or alternative road is available in lieu of the said national highway, permanent bridge, by-pass or

E tunnel:

Provided further that where service road or alternative road is available and the owner, driver or the person in charge of a two-wheeler is making use of the section of national highway, permanent bridge, by-pass or tunnel, as the case may be, he or

F she shall be charged fifty per cent of the fee levied on a car.

Explanation I .-For the purposes of this rule,—

(a) "alternative road" means such other road, the carriageway of which is more than ten meters wide and the length of which does not exceed the corresponding length of such section of

G national highway by twenty per cent thereof;

(b) "service road" means a road running parallel to a section of the national highway which provides access to the land adjoining such section of the national highway."

(Emphasis supplied)

H

28. Rule 4 deals with the base rate of fee. It goes on, in careful detail, to provide for the regulation of the fee.

29. Rule 5 deals with Annual Revision of the rate of fee. Rule 6 deals with Collection of Fee. Rule 6 reads, *inter alia*, as follows:

> "**Rule 6.(1)** Fee levied under these rules shall be collected by the Central Government or the executing authority or the concessionaire, as the case may be, at the [fee plaza].
>
> xxx xxx xxx"

30. Rule 8, being the provision at the centre of the controversy, reads as follows:

> "**Rule 8(1)** The executing authority or the concessionaire, as the case may be, shall establish a [fee plaza] beyond a distance of ten kilometres 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 [fee plaza] within a distance of ten kilometres of such municipal or local town area limits, but in no case within five kilometres 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 kilometres from such limits, primarily for use of the residents of such municipal or town area, the [fee plaza] may be established within the municipal or town area limits or within a distance of five kilometres from such limits.
>
> (2) Any other [fee plaza] on the same section of national highway and in the same direction shall not be established within a distance of sixty kilometres:
>
> 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 [fee plaza] within a distance of sixty kilometres:
>
> Provided further that a [fee plaza] may be established within a distance of sixty kilometres from another [fee plaza] if such [fee plaza] is for collection of fee for a permanent bridge, by-pass or tunnel."

31. Rule 9 provides for Discounts.Rule 11 provides for categories of persons exempted from the collection of fee. Rule 16 deals with Collection of fee in respect of Private Investment Project, which reads as follows:

"**Rule 16**.- (1) The fee levied under the provisions of sub-rule (3) of rule 3 shall be collected by the concessionaire till its agreement is in force.

(2) On and from the date of expiry of the agreement specified under sub-rule (3) of rule 3, the fee levied shall be collected by the Central Government or the executing authority, as the case may be."

32. Rule 17 deals with Bar for installation of additional barrier and needs to be noticed; this is the framework we may also notice:

"**Rule 17** - No barrier shall be installed at any place, other than at the [fee plaza], except with the prior permission in writing of the Central Government or the executing authority, as the case may be, who after being satisfied that there is evasion of fee, may allow on such terms and conditions as it may impose, the installation of such additional barrier by the Central Government, the executing authority or the concessionaire, as the case may be, within ten kilometres from the [fee plaza], to check the evasion of fee:

Provided that the Central Government or the executing authority, as the case may be, may, at any time, for reasons to be recorded in writing, withdraw such permission:

Provided further that where the Central Government or the executing authority, as the case may be, do not allow installation of an additional barrier by the concessionaire, the reasons for such refusal shall be communicated to such concessionaire within a reasonable period."

BRIEF LOOK AT THE DPR

33. In the portion of the final feasibility report produced by the appellants, we may notice paragraph-1.4 of development plans:

"Para 1.4 Developmental Plans.

The projectsbeing implemented or proposed for implementation in the near future are related to 4- lanning of NH-31 section from

Bakhtiyarpur to Begusarai via Mokama by NHAI on DBFO basis, 4/6laning of NH-841 NH-30 from Patna to Buxar via Ara by NHAI on DBFO basis and up gradation of adjoining State Highways, Digha Didarganj Ganga Expressway by Path-NirmanVibhag/ IL&FS, Major district roads, ordinary district roads and village roads by State/Local authorities etc. These projects are going to enhance traffic circulation in and around the project area.

As per the available information, the Patna Buxar road is proposed to be started from Km 181.3 at Saristabad while Khagaria-Begusarai-Bakhtiarpur section of NH-31 is proposed to be starting from Km153.30 on NH 31(1100 meter south of Bakhtiarpur intersection). Accordingly, after confirmation from NHAI, the projectroad is planned to be developed between these two start and end points as 4 lane access-controlled facility DBFO basis.

34. The DPR was prepared by an international consultant. In fact, what is produced before the court,is not the entire DPR, only the portions of the Executive Summary.

35. We may notice the following portions of the DPR, again the Executive Summary thereof, filed by the writ petitioners:

(Page no. 46 of the reply affidavit of respondents nos. 3 to 7)

"Para 1.2. Existing road Network

National Highway 30 connects Patna City, the state of Bihar with Bakhtiyarpur, a township on the eastern side around 50 km away in Patna District along the Ganga River on north of it. NH-30 starts from Mohania in Kalmur District on the west side of Patna and ends up at Bakhtiyarpur at T junction at Km 154.4 of NH-31 connecting Bihar Sharif to Mokama. The project road is crossed by National Highway NH-83 and NH-19 connecting Chapra and Muzzafurpur via Hajipur in North Direction and with Gaya in south direction. Apart from these, a number of MDR/village roads meet Nh-30. Railway line runes from east to west and crosses Nh-30 at km 195.75 where a ROB exists."

"Para 1.3 The Project Road (National Highway – 30)

The project road starts from Anisabad Junction at km 178.6 of NH-30 and continues along Patna bypass towards east. Enroute, it passes through existing bypass from Patna City to Didarganj,

A Sabbalpur, Fatehganjpur, Kachi Dargah, Fatua, Baikatpur and Ghoswari. At km. 182+500 it crosses railway line (Patna-Gaya section) through a 2-lane ROB. Near to this ROB, NH-83 starts and proceeds toward south direction (towards Gaya). From km 180.0 to km 190.0 of bypass section there is a very congested stretch due to the presence of Transport Nagar, residential buildings & commercial activity. Further NH-30 intersects with NH-19 at km 188+500. At km 188+800, SH-1 starts from the Patna bypass and traverses towards south (towards Masaurhl). From km 190 km to km 195 of bypass section there is agricultural land on both side of road. At km. 195+750, it further crosses railway line (Patna-Kolkata section) through a newly built 4-lane ROB. Further it traverses through Didarganj (km.197). Thereafter upto km 210 of NH 30 road is passing through commercial & residential settlement area. Near Didarganj(km 197) Kachhi Dargah (Km 200) & Fatua town (km 205) road is passing through heavily congested area. There is a major bridge crossing over Punpun river near km 203.8. From km 210 to km 226, NH-30 is passing through agricultural & residential area with scattered settlements and the project road ends at near Km 230 of NH-30 near Bakhtiyarpur.

The stretch of NH-30 on new bypass and from Didarganj ROB (km 196) to Fatua (km 208) is very congested with local and thorough traffic all along. However, while new bypass area upto Didarganj has available ROW of 60 m for widening to 4/6 laning, the area between Didarganj to Fatua is being encroached/ has built up settlement on both sides with available ROW less than 15-20m. Immediately after Fatua town (km 208) to Bakhtiyarpur (Km 227), this area is relatively less congested, but has pockets of staggered settlement in between, including at Bakhtiyarpur. Due to above-mentioned existing features, widening of existing road to standard 4-lane configuration would present considerable difficulty due to the physical constraints. In view of above-mentioned features, the proposed alignments have been considered on the southern side of the existing NH-30."

36. Under traffic studies, it is stated that, the total tollable traffic, at km 195 and 215 km, is 27161 PCU and 19201 PCU, respectively, considering 35 percent leakage on car and 15 percent leakage on other vehicles. It is further stated as follows:

"Para 6.6. Toll plaza location

The project road is proposed to be developed as Tolled Road. The project road being only 50 km long, only one toll plaza will be feasible to be provided. During site reconnaissance it was observed that free space is available near km 194 suitable for development of Toll Plaza System. Same is already discussed with NHAI officials during site visit."

(Emphasis supplied)

37. The very same thing, as stated in paragraph-6.6, is stated in paragraph-12.2.5, also under Miscellaneous Facilities:

"The concept of service road is being conceived at built-up area and grade separated intersections (Flyover & Underpass locations) which will come along the proposed alignment. The list of proposed service road stretches are as follows

i. 181.3 to 189.11

ii.206.8 to 207.4"

38. In the document, which is produced as part of the invitation for proposal, and which, according to theappellant, forms part of the DPR, there are various features, including grade intersections, grade separated intersections, railway over bridges and other features mentioned. The grade separator/flyovers intersections, are seen provided at 182.55 km, 188.47 km, 207.4 km and 231.4 km. There are bridges, major and minor, also contemplated.

ANALYSIS

THE IMPACT OF THE DPR

39. The fact that the DPR was not challenged by the Writ Petitioners, cannot by itself, pose a hurdle in the allowing of the writ petition. It is, admittedly,a study with recommendations. Therefore, it constitutes the opinion of the Expert Body at best. However, what it does mean, is that, the court can proceed on the basis of the facts, which are brought out in the Report, and in the absence of a challenge to the same, proceed on the basis that, they are correct. In fact, the only case of the Writ Petitioners in this regard,is that, after the preparation of the Report, certain developments took place, but which are in the form of constructions which were made. Equally, the fact that the Report was

not challenged, would allow the court to acknowledge that there was, indeed, a study by an Expert Body. More pertinently, the Expert Body did recommend the location of the toll plaza at km 194. Equally, there is nothing expressly stated that the location is justified with reference to the second *proviso* to Rule 8.

DUTY TO GIVE REASONS

40. An Administrative Authority, exercising judicial or a quasi-judicial power, must record reasons for its decision. This is subject to the exception where the requirement has been expressly or by necessary implication done away. [See *S.N. Mukherjee v. Union of India*[3]].

41. In M/s. *Mahabir Jute Mills Ltd., Gorakhpore v. Shri Shibban Lal Saxena and others*[4], one of the questions, which arose, was whether the refusal to refer a dispute under Section 4K of the U.P. Industrial Disputes Act, 1947, was to be supported with reasons. This Court, *inter alia*, held as follows:

> "3. … In a diverse society such as ours the Government has to work through several administrative agencies which have got a very wide sphere and if every administrative order is required to give reasons it will bring the governmental machinery to a stand-still. It is well-settled that while the rules of natural justice would apply to administrative proceedings, it is not necessary that the administrative orders should be speaking orders unless the statute specifically enjoins such a requirement. But we think it desirable that such orders should contain reasons when they decide matters affecting rights of parties. …"

42. In *Star Enterprises and others v. City and Industrial Development Corpn. of Maharashtra Ltd. and others*[5], the question arose in the following facts. Under a Statue, a Government Company was empowered to dispose of land vested in it. The question arose, whether there was a duty to give reasons, and the highest offer obtained in response to the invitation by public tender, could be rejected without assigning any reason. The Court went on to hold as follows:

> "10. In recent times, judicial review of administrative action has become expansive and is becoming wider day by day. The

[3] (1990) 4 SCC 594
[4] (1975) 2 SCC 818
[5] (1990) 3 SCC 280

traditional limitations have been vanishing and the sphere of judicial scrutiny is being expanded. State activity too is becoming fast pervasive. As the State has descended into the commercial field and giant public sector undertakings have grown up, the stake of the public exchequer is also large justifying larger social audit, judicial control and review by opening of the public gaze; these necessitate recording of reasons for executive actions including cases of rejection of highest offers. That very often involves large stakes and availability of reasons for actions on the record assures credibility to the action; disciplines public conduct and improves the culture of accountability. Looking for reasons in support of such action provides an opportunity for an objective review in appropriate cases both by the administrative superior and by the judicial process. The submission of Mr Dwivedi, therefore, commends itself to our acceptance, namely, that when highest offers of the type in question are rejected reasons sufficient to indicate the stand of the appropriate authority should be made available and ordinarily the same should be communicated to the concerned parties unless there be any specific justification not to do so."

The Court, however, did not apply the test to the case before it.

43. In a different context, the question again arose before this Court in *Union of India and others v. E.G. Nambudiri*[6]. The respondent was communicated certain adverse remarks. His representation, being rejected, he moved the President of India. He received partial relief but some of the adverse remarks were not expunged. One of the contentions taken was that the President was obliged to record reasons. The said contention was rejected by this Court. It is apposite that we refer to following discussion by this Court:

"10. There is no dispute that there is no rule or administrative order for recording reasons in rejecting a representation. In the absence of any statutory rule or statutory instructions requiring the competent authority to record reasons in rejecting a representation made by a government servant against the adverse entries the competent authority is not under any obligation to record reasons. But the competent authority has no licence to act arbitrarily, he must act in a fair and just manner. He is required to

[6] AIR 1991 SC 1216 / (1991) 3 SCC 38

A consider the questions raised by the government servant and examine the same, in the light of the comments made by the officer awarding the adverse entries and the officer countersigning the same. If the representation is rejected after its consideration in a fair and just manner, the order of rejection would not be rendered illegal merely on the ground of absence of reasons. In the absence of any statutory or administrative provision requiring the competent authority to record reasons or to communicate reasons, no exception can be taken to the order rejecting representation merely on the ground of absence of reasons. No order of an administrative authority communicating its decision is rendered illegal on the ground of absence of reasons ex facie and it is not open to the court to interfere with such orders merely on the ground of absence of any reasons. However, it does not mean that the administrative authority is at liberty to pass orders without there being any reasons for the same. In governmental functioning before any order is issued the matter is generally considered at various levels and the reasons and opinions are contained in the notes on the file. The reasons contained in the file enable the competent authority to formulate its opinion. If the order as communicated to the government servant rejecting the representation does not contain any reasons, the order cannot be held to be bad in law. If such an order is challenged in a court of law it is always open to the competent authority to place the reasons before the court which may have led to the rejection of the representation. It is always open to an administrative authority to produce evidence aliunde before the court to justify its action."

(Emphasis supplied)

44. Again, in *Maharashtra State Board of Secondary and Higher Secondary Education v. K.S. Gandhi and others*[7], the question arose about the duty to give reasons in the following factual matrix. The appellant, in the said case, conducted examinations. It was found that the moderators marksheets, relating to certain examinees, were tampered with. The results were withheld. An inquiry was conducted through seven Inquiry Officers, who proceeded to conduct an inquiry. The inquiry itself involved issuing notices to the students, *inter alia*. The Inquiry Officer submitted reports finding that the moderators marksheets had been

[7] (1991) 2 SCC 716

fabricated. The students challenged the action of the Authority to withhold the results, as a measure of punishment, accepting the Inquiry Report. Dealing with the argument that no reasons were recorded by the Inquiry Officers, this Court held as follows:

> "20. Unless the rule expressly or by necessary implications excludes recording of reasons, it is implicit that the principles of natural justice or fair play does require recording of reasons as a part of fair procedure. In an administrative decision, its order/ decision itself may not contain reasons. It may not be the requirement of the rules, but at the least, the record should disclose reasons. It may not be like a judgment. But the reasons may be precise. In *S.N. Mukherjee* v. *Union of India* [(1990) 4 SCC 594 : 1991 SCC (L&S) 242 : 1990 SCC (Cri) 669 : JT (1990) 3 SC 630] , the Constitution Bench of this Court surveyed the entire case law in this regard, and we need not burden the judgment to reiterate them once over and at page 614, para 40 it held that except in cases where the requirement has been dispensed with expressly or by necessary implication, an administrative authority exercising judicial or quasi-judicial functions is required to record the reasons for its decision. In para 36 on pp. 612-13 it was further held that recording of reasons … excludes chances of arbitrariness and ensures a degree of fairness in the process of decision making. The said principle would apply equally to all decisions and its applications cannot be confined to decisions which are subject to appeal, revision or judicial review. "It is not required that the reasons should be as elaborate as in the decision of a court of law." The extent and nature of the reasons would depend on particular facts and circumstances. What is necessary is that the reasons are clear and explicit so as to indicate that the authority has given due consideration to the points in controversy. The need for recording of reasons is greater in a case where the order is passed at the original stage. The appellate or revisional authority, if it affirms such an order, need not give separate reasons. If the appellate or revisional authority disagrees, the reasons must be contained in the order under challenge.
>
> 21. Thus it is settled law that the reasons are harbinger between the mind of the maker of the order to the controversy in question and the decision or conclusion arrived at. It also excludes the chances to reach arbitrary, whimsical or capricious decision

A or conclusion. The reasons assure an inbuilt support to the conclusion/decision reached. The order when it affects the right of a citizen or a person, irrespective of the fact, whether it is quasi-judicial or administrative fair play requires recording of germane and relevant precise reasons. The recording of reasons is also an assurance that the authority concerned consciously applied its mind to the facts on record. It also aids the appellate or revisional authority or the supervisory jurisdiction of the High Court under Article 226 or the appellate jurisdiction of this Court under Article 136 to see whether the authority concerned acted fairly and justly to mete out justice to the aggrieved person.

C 22. From this perspective, the question is whether omission to record reasons vitiates the impugned order or is in violation of the principles of natural justice. The omnipresence and omniscience (*sic*) of the principle of natural justice acts as deterrence to arrive at arbitrary decision in flagrant infraction of fair play. But the D applicability of the principles of natural justice is not a rule of thumb or a strait-jacket formula as an abstract proposition of law. It depends on the facts of the case, nature of the inquiry and the effect of the order/decision on the rights of the person and attendant circumstances. It is seen from the record and is not disputed, that all the students admitted the factum of fabrication and it was to E his or her advantage and that the subject/subjects in which fabrication was committed belong to him or her. In view of these admissions the Enquiry Officer obviously did not find it expedient to reiterate all the admissions made. <u>If the facts are disputed, necessarily the authority or the Enquiry Officer, on consideration</u> F <u>of the material on record, should record reasons in support of the conclusion reached. Since the facts are admitted, the need for their reiteration was obviated and so only conclusions have been stated in the reports. The omission to record reasons in the present case is neither illegal, nor is violative of the principles of natural justice.</u> Whether the conclusions are proved or not is yet another G question and would need detailed consideration."

(Emphasis supplied)

45. It will, at once, be noted that,the facts in the said case, were not disputed, and therefore, the omission to record reasons, was found H neither illegal nor violative of principles of natural justice.

46. In C.B. Gautam v. Union of India and others[8], under Section 269-UD of the Income-Tax Act, 1961, an order for compulsory purchase, was made. Section 269-UD specifically mandate for reasons to be recorded in writing for the making of an order for purchase by the Central Government. The contention, which was raised, was that, recording of reasons did not obviate providing of an opportunity of hearing to the personwho had an agreement to purchase. It is only necessary to notice the following discussion in this regard:

> "31. The recording of reasons which lead to the passing of the order is basically intended to serve a two-fold purpose:
>
> (1) that the "party aggrieved" in the proceeding before (*sic* the appropriate authority) acquires knowledge of the reasons and, in a proceeding before the High Court or the Supreme Court (since there is no right of appeal or revision), it has an opportunity to demonstrate that the reasons which persuaded the authority to pass an order adverse to his interest were erroneous, irrational or irrelevant, and
>
> (2) that the obligation to record reasons and convey the same to the party concerned operates as a deterrent against possible arbitrary action by the quasi-judicial or the executive authority invested with judicial powers.
>
> 32. Section 269-UD(1), in express terminology, provides that the appropriate authority may make an order for the purchase of the property "for reasons to be recorded in writing". Section 269-UD(2) casts an obligation on the authority that it "shall cause a copy of its order under sub-section (1) in respect of any immovable property to be served on the transferor". It is, therefore, inconceivable that the order which is required to be served by the appropriate authority under sub-section (2) would be the one which does not contain the reasons for the passing of the order or is not accompanied by the reasons recorded in writing. It may be permissible to record reasons separately but the order would be an incomplete order unless either the reasons are incorporated therein or are served separately along with the order on the affected party. We are, of the view, that reasons for the order must be communicated to the affected party."
>
> (Emphasis supplied)

[8] (1993) 1 SCC 78

47. In *Sarat Kumar Dash and others v. Biswajit Patnaik and others*[9], this Court rejected the argument that when promotion was to be made on the basis of merit-cum-suitability basis, with due regard to seniority, it wasincumbent on the Public Service Commission to give reasons for its recommendations. It was also found not necessary for the Government, which accepted the recommendation, to give reasons. In the course of its opinion, this Court observed that natural justice is not a rigid or inflexible principle.

48. In *Kranti Associates (P) Ltd. v. Masood Ahmed Khan*[10], the National Consumer Disputes Redressal Commission (NCDRC), dismissed Revision Petition, only taking note of the fact that there were concurrent findings. This Court went on to find that the Order was vitiated but it is obvious that the Order of the Commission cannot be described as an administration decision.

49. Finally, we may notice a very recent Judgment in *Rajeev Suri v. Delhi Development Authority and others*[11], which arose in the context of the decision, to go in for construction of the new Parliament building and certain other structures. While dealing with the question relating to non-application of mind, this Court also dealt with the impact of there being no reasons. We may notice the following discussion from the majority Judgment authored by A.M. Khanwilkar, J.:

> "289. Rules of natural justice are not embodied rules. They are means to an end and not end in themselves. The goal of these principles is to prevent prejudice. It is from the same source that the requirement of application of mind emerges in decision making processes as it ensures objectivity in decision making. In order to ascertain that due application of mind has taken place in a decision, the presence of reasons on record plays a crucial role. The presence of reasons would fulfil twin objectives of revealing objective application of mind and assisting the adjudicatory body in reviewing the decision. The question that arises here is, whether the statement in the recorded minutes of the CVC meeting ("the features of the proposed Parliament building should be in sync with the existing Parliament building") is or is not indicative of application of mind.

---

[9] 1995 Supp(1) SCC 434
[10] (2010) 9 SCC 496
[11] Transferred Case (Civil) No. 229 of 2020, Judgment dated 05.01.2020

290. In cases when the statute itself provides for an express requirement of a reasoned order, it is understandable that absence of reasons would be a violation of a legal requirement and thus, illegal. However, in cases when there is no express requirement of reasons, the ulterior effect of absence of reasons on the final decision cannot be sealed in a straightjacketed manner. Such cases need to be examined from a broad perspective in the light of overall circumstances. The Court would look at the nature of decision-making body, nature of rights involved, stakeholders, form and substance of the decision etc. The list is not exhaustive for the simple reason that drawing a conclusion of non-application of mind from mere absence of reasons is a matter of pure inference and the same cannot be drawn until and unless other circumstances too point in the same direction. …"

(Emphasis supplied)

50. Thereafter, the Court, in *Rajeev Suri* (supra), relied upon the judgment in *E.G. Nambudiri* (supra): Thereafter it held:

"293. Had it been a case of any other administrative committee required to adjudicate upon the rights of individuals, merely because it is not mandatory to record reasons would not absolve it of the requirement of objective consideration of the proposal. The ultimate enquiry is of application of mind and a reasoned order is merely one element in this enquiry. In a given case, the Court can still advert to other elements of the decision-making process to weigh the factum of application of mind. The test to be applied in such a case would be of a reasonable link between the material placed before the decision-making body and the conclusion reached in consideration thereof. The Court may decide in the context of overall circumstances of the case and a sole element (of no reasons or lack of elaborate reasons) cannot be enough to make or break the decision as long as judicial mind is convinced of substantial application of mind from other circumstances. Even in common law jurisprudence, there is no absolute requirement of reasoned order in all decisions. In Lonrho plc v. Secretary of State for Trade and Industry &Anr., it was contended that the decision is not based on convincing reasons and therefore, must be declared as illegal. The House of Lords refused to entertain this contention and noted that mere absence of reasons would not render the decision as irrational. Lord Keith, in his opinion, noted that the

A only significance of absence of reasons would be that if circumstances overwhelmingly point towards a different conclusion that the one reached by the body, it would be fatal. He noted thus:

> "The absence of reasons for a decision where there is no duty to give them cannot of itself provide any support for the
B suggested irrationality of the decision. The only significance of the absence of reasons is that if all other known facts and circumstances appear to point overwhelmingly in favour of a different decision, the decision-maker who has given no reasons cannot complain if the court draws the inference that he had no rational reason for his decision."

C In Administrative Law, P.P. Craig notes that it is relevant to consider the context in which decision operates thus:

> "The court will consider the nature of the decision maker, the context in which it operates and whether the provision of
D reasons is required on grounds of fairness."

Mr. Craig also refers to R. v. Ministry of Defence, Ex p. Murray wherein certain principles relating to duty of reasons were elaborated. Lord Chief Justice Bingham, in his opinion, observed that the requirement of giving reasons may be outweighed by
E concerns of public interest in certain cases, for instance, when it would unduly burden the decision maker. We are not importing any rider of public interest to negate the requirement of reasons; however, the above exposition is useful to understand the effect of absence of reasons on an otherwise legal, rational and just decision.

F 294. Notably, this Court in Maharashtra State Board353 and in Mahabir Jute Mills354 noted that if the function/decision of the Government is administrative, in law, ordinarily there is no requirement to be accompanied by a statement of reasons unless there is an express statutory requirement in that regard. Again, in
G Sarat Kumar Dash, the Court observed that in the field of administrative action, the reasons are link between maker of the order or the author of the decision and the order itself. The record can be called to consider whether the author had given due consideration to the facts placed before him before he arrives at
H the decision.

295. Therefore, the requirement of reasons in cases which do not demand it in an express manner is based on desirability and the same is advised to the extent possible without impinging upon the character of the decision-making body and needs of administrative efficiency."

(Emphasis supplied)

51. In England, the Courts have not recognised a general duty on the part of the Administrator to perform administrative functions to give reasons.

52. In *Regina v. Secretary of State for the Home Department (Original Appellant and Cross-respondent) ex parte Doody (A.P.)*[12], the Court, *inter alia*, had to consider the question, as to whether, if in regard to a prisoner convicted for murder, and in regard to whom, the view of the Court, in respect of the sentence to be undergone, was to be departed from by the Secretary of State, the Secretary was obliged to give reasons for such difference of opinion. The Court took the view that the decision of the Home Secretary vitally affected the future of the prisoner. The Court went on to make the following observations, *interalia*:

"What does fairness require in the present case? My Lords, I think it unnecessary to refer by name or to quote from, any of the often-cited authorities in which the courts have explained what is essentially an intuitive judgment. They are far too well known. From them, I derive that:-1. Where an Act of Parliament confers an administrative power there is a presumption that it will be exercised in a manner which is fair in all the circumstances. 2. The standards of fairness are not immutable. They may change with the passage of time, both in the general and in their application to decisions of a particular type. 3. The principles of fairness are not to be applied by rote identically in every situation. What fairness demands is dependent on the context of the decision, and this is to be taken into account in all its aspects. 4. An essential feature of the context is the statute which creates the discretion, as regards both its language and the shape of the legal and administrative system within which the decision is taken."

(Emphasis supplied)

[12] (1994) 1 A.C. 531

A 53. Still further, we may notice the following discussion:

> "Turning to the present dispute I doubt the wisdom of discussing the problem in the contemporary vocabulary of "prisoner's rights", given that as a result of his own act the position of the prisoner is so forcibly distanced from that of the ordinary
> B citizen, nor is it very helpful to say that the Home Secretary should out of simple humanity provide reasons for the prisoner, since any society which operates a penal system is bound to treat some of its citizens in a way which would, in the general, be thought inhumane. I prefer simply to assert that within the inevitable constraints imposed by the statutory framework, the general shape
> C of the administrative regime which ministers have lawfully built around it, and the imperatives of the public interest, the Secretary of State ought to implement the scheme as fairly as he can. The giving of reasons may be inconvenient, but I can see no ground at all why it should be against the public interest: indeed, rather the
> D reverse. This being so, I would ask simply: Is refusal to give reasons fair? I would answer without hesitation that it is not. As soon as the jury returns its verdict the offender knows that he will be locked up for a very long time. For just how long immediately becomes the most important thing in the prisoner's life. …"

E (Emphasis supplied)

The Court finally declared that the Secretary of State was obliged to give reasons for departing from the period recommended by the judiciary as the period which he was to serve for the purpose of retribution and deterrence.

F 54. This view has been reiterated in a planning case, which came to be decided in the year 2017 in *Dover District Council v. CPRE Kent*[13]. The question, which actually arose was, when the Local Planning Authority granted permission for a controversial development against the advice of its own Professional Advisor, whether it was under a duty to state reasons for its decision. The Court, *inter alia*, held as follows:

G

> "51. Public authorities are under no general common law duty to give reasons for their decisions; but it is well-established that fairness may in some circumstances require it, even in a statutory

---

H [13] (2017) UKSC 79

context in which no express duty is imposed (see *R v Secretary of State for the Home Department, Ex p Doody* [1994] 1 AC 531; *R v Higher Education Funding Council, Ex p Institute of Dental Surgery* [1994] 1 WLR 242, 263A-D; *De Smith's Judicial Review* 7th ed, para 7-099).

xxx xxx xxx

55. *Doody* concerned fairness as between the state and an individual citizen. The same principle is relevant also to planning decisions, the legality of which may be of legitimate interest to a much wider range of parties, private and public (see *Walton v Scottish Ministers* [2012] UKSC 44; [2013] PTSR 51, paras 152-153 per Lord Hope). Here a further common law principle is in play. Lord Bridge saw the statutory duty to give reasons as the analogue of the common law principle that "justice should not only be done, but also be seen to be done" (see para 25 above). That principle of open justice or transparency extends as much to statutory inquiries and procedures as it does to the courts (see *Kennedy v The Charity Commission* [2014] UKSC 20; [2015] AC 455, para 47 per Lord Mance, para 127 per Lord Toulson). As applied to the environment it also underpins the Aarhus Convention, and the relevant parts of the EA Directive. In this respect the common law, and European law and practice, march together (compare *Kennedy* para 46 per Lord Mance). In the application of the principle to planning decisions, I see no reason to distinguish between a Ministerial inquiry, and the less formal, but equally public, decision-making process of a local planning authority such as in this case.

56. The existence of a common law duty to disclose the reasons for a decision, supplementing the statutory rules, is not inconsistent with the abrogation in 2013 of the specific duty imposed by the former rules to give reasons for the grant of permission. As the explanatory memorandum made clear, that was not intended to detract from the general principle of transparency (which was affirmed), but was a practical acknowledgement of the different ways in which that objective could normally be attained without adding unnecessarily to the administrative burden. In circumstances where the objective is not achieved by other means, there should be no objection to the common law filling the gap."

A 55. In *Regina v. Higher Education Funding Council Ex parte Institute of Dental Surgery*[14], the applicant, an educational institution, sought judicial review to quash the decision of the Funding Council, to place the applicant at Level 2, for the purpose of determining the grant for research for 1993-1994. Failure by the Council to provide reasons, was canvassed by the applicant. The Court held, *inter alia*, as follows:

B

> "In summary, then: (1) there is no general duty to give reasons for a decision, but there are classes of case where there is such a duty. (2) One such class is where the subject matter is an interest so highly regarded by the law (for example, personal liberty), that fairness requires that reasons, at least for particular decisions, be given as of right. (3) (a) Another such class is where the decision appears aberrant. Here fairness may require reasons so that the recipient may know whether the aberration is in the legal sense real (and so challengable) or apparent; (b) it follows that this class does not include decisions which are themselves challengeable by reference only to the reasons for them. A pure exercise of academic judgment is such a decision.

C

D

56. In "Administrative Law Text and Materials", by Beatson, Mathews and Elliots, reference is made to the three dimensions in regard to duty to give reasons, which reads as under:

E

> **"Fordham, 'Reasons: The Third Dimension'[15]**
>
> A first dimension is that the giving of reasons serves the interests of the court (or other tribunal) reviewing the decision. This rationale has to do with disclosure, to the court. The approach is illustrated by the comments of the Court of Appeal in *R v. Lancashire County Council*, ex parte *Huddleston* (1986) 2 All ER 941 at 945g and 947e, where reasons were encouraged in a spirit of co-operation by the public authority with the judicial review process.

F

> A second dimension is that the giving of reasons serves the interests of the person affected by the decision. This has to do with disclosure, to the 'parties'. It is exemplified by the decision of the

G

---

[14] [1994] 1 WLR 242

H [15] [1998] JR 158

House of Lords in *R v. Secretary of State for the Home Department*, ex parte Doody [1994] 1 AC 531, where reasons were required because of the prisoner's basic interest in knowing why decisions affecting liberty had been taken.

The third dimension is that the giving of reasons serves the interests of the decision-maker in reaching the decision. This has to do not with disclosure, but discipline. The central point is simple. Consciously duty-bound to articulate their reasons, decision-makers' minds are the more focused and their substantive decision-making the better. This was recognised by the Divisional Court in *R v. Higher Education Funding Council, ex parte Institute of Dental Surgery* [1994] 1 WLR 242 at 256H (cited with approval in *R v. City of London Corporation*, ex parte Matson [1997] 1 WLR 765 (CA) at 783D and in *R v. Ministry of Defence*, ex parte Murray [1998] COD 134 (DC)), as the first of a series of factors in favour of requiring reasons, namely that 'the giving of reasons may among other things concentrate the decision-maker's mind on the right questions..."

57. We notice the following discussion also in the same work:

"A General Duty to Give Reasons?

The clear virtues of reason-giving give rise to an obvious question: why does English law not recognize a general duty on the part of decision-makers to give reasons? We noted at the outset of this chapter that the starting-point of English law is that no such duty exists, albeit that certain circumstances may trigger a requirement to give reasons. The concerns which underlie the reluctance of English law to embrace a general duty were summarized in the following terms by the JUSTICE-All Souls Committee in their report, *Administrative Justice: Some Necessary Reforms* (Oxford 1988) at 70-71:

a) Efficient administration requires free and uninhibited discussion among decision-makers, unimpeded by considerations of what can or cannot be made public subsequently.

b) A general requirement of reasons will impose an intolerable burden on the machinery of government.

A

c) Delays in the handling of business will inevitably follow and additional expense will be caused. The public at large will suffer. The benefit will not match the cost.

d) The imposition of a general duty will have far-reaching implications for central government, local government, and
B for many other bodies of a public or semi-public character Many more decisions will be opened up to the possibility of legal challenge and a further step down the road of 'judicialization' of affairs will be taken.

e) The Imposition of a [general] duty to give reasons will not
C necessarily mean that the true or complete reasons will be stated. Decision-makers will adapt to the new regime and acquire the art of stating sufficient by way of reasons to preclude successful challenge, but candour will not always be displayed."

D 58. In Jurgen Schwarze's European Administrative Law, we notice the following position in regard to duty to give reasons. In regard to France, it is stated as follows:

".. the duty to give reason for administrative act is regulated by the law of 1979, the statutory duty to give reasons applies to all
E unfavourable administrative decisions. The reasons must be in writing and must contain the essential matter concerning the factual and legal situation (Article 3)."

59. In regard to the duty to give reasons in Italy, it is stated as follows:

F "Italian administrative law does not recognise a general duty to give reasons. In addition to the case in which the duty to give reasons is expressly laid down by statute, the courts have developed in a vast line of cases groups of decisions in <u>which the duty of the administration to give reasons for its decisions results "from the</u>
G <u>nature of the matter,". This applies in particular to negative or unfavourable administrative decisions, as well as to discretionary decisions.</u> In so far as there exists a duty to give reasons, the authority must set out in writing the considerations which led it to the adoption of the administrative act. <u>It will suffice, however, if the grounds of the decision are available simply in the documents</u>
H <u>which accompany the decision. Exceptionally a tacit statement of</u>

reasons is also permissible. The statement of reasons sets out the circumstances of fact and law which were decisive for the formation of the decision by the authority. The infringement of the duty to give reasons does not necessarily lead to the annulment of the decision by the administrative courts, but rather only where a different decision would have been taken on the facts. The position is different for discretionary decisions: here insufficient reasons will generally lead to the annulment of the administrative act, because the judge may not put his discretion the place of the discretion of the authority."

(Emphasis supplied)

60. We would hold that as noticed by the Bench of three Judges in M/s. *Mahabir Jute Mills Ltd., Gorakhpore* (supra), there is no general duty, when an administrative decision is taken, to give reasons. A Statute may, however, explicitly provide that the Executive Authority must provide reasons and it must be recorded in writing. A case in point is the first *proviso* to Rule 8 of the Rules itself. The desirability of a general duty, in the case of administrative action to support decisions with reason, is open to question. One of the most important reason is, the burden it would put on the administration. It is apposite, at this juncture, to notice that administrative decisions are made in a wide spectrum of situations and contexts. The executive power of the Union and States are provided in Articles 73 and 162 of the Constitution of India, respectively. Undoubtedly, in India, every state action must be fair, failing which, it will fall foul of the mandate of Article 14. It is, at this juncture, we may also notice that the duty to give reasons, would arise even in the case of administrative action, where legal rights are at stake and the administrative action adversely affects legal rights. There may be something in the nature or the context, under which, the administrative action is taken, which may necessitate the authority being forthcoming with rational reasons. There are other decisions, which essentially belong more to the realm of executive policy-making, which ordinarily may not require the furnishing of reasons. The advantages, undoubtedly, of introducing a reasonsdriven regime, are as follows.

61. Persons, who may have a right or an interest, would know, what are the reasons which impelled the Administrator to take a particular decision. Judicial review, in India, which encompasses the wide contours of public interest litigation as well, would receive immeasurable assistance,

A if the reasons for particular decisions, are articulated to the extent possible. The giving of reasons also has a disciplining effect on the Administrator. This is for the reason that the reasons would capture the thought process, which culminated in the decision and it would help the Administrator steer clear of the vices of illegality, irrationality and also disproportionality. Reasons could help establish application of mind. Conversely, the absence
B of reasons may unerringly point to non-application of mind. The duty to act fairly, may require reasons to be recorded but the said duty, though there is a general duty on all state players to act fairly, may have its underpinnings, ultimately in legal rights.

C 62. It is one thing to say that there should be reasons, which persuaded the Administrator to take a particular decision and a different thing to find that the reasons must be incorporated in a decision. The question, relating to duty to communicate such a decision, would arise to be considered in different situations, having regard to the impact, which it, in law, produces. In fact, the second *proviso* to Rule 17 of the Rules,
D provides not only for there being reasons, but the reasons for refusal to permit barricades, must be communicated. If the law provides for a duty to record reasons in writing, undoubtedly, it must be followed and it would amount to the violation of the Statute, if it were not followed. Even if, there is no duty to record reasons or support an order with reasons, there cannot be any doubt that, for every decision, there would be and
E there must be, a reason. The Constitution does not contemplate any Public Authority, exercising power with caprice or without any rationale. But here again, in the absence of the duty to record reasons, the court is not to be clothed with power to strike down administrative action for the mere reason that no reasons are to be found recorded. In certain
F situations, the reason for a particular decision, may be gleaned from the pleadings of the Authority, when the matter is tested in a court. From the materials, including the file noting's, which are made available, the court may conclude that there were reasons and the action was not illegal or arbitrary. From admitted facts, the court may conclude that there was sufficient justification, and the mere absence of reasons, would not be
G sufficient to invalidate the action of the Public Authority. Thus, reasons may, in certain situations, have to be recorded in the order. In other contexts, it would suffice that the reasons are to be found in the files. The court may, when there is no duty to record reasons, support an administrative decision, with reference to the pleadings aided by materials.

H

AN OFFICE MEMORANDUM AND A DIRECTION

63. The Writ Petitioners have produced Office Memorandum dated 5th September, 2017 and communication dated 2nd November, 2018 issued by MoRTH. We may notice that the communication dated 5th September, 2017, as produced in I.A. No.103415 of 2021,is as follows:

"Office Memorandum

Subject: Location of Toll Plazas on National Highways - reg,

The undersigned is directed to refer to the subject above and convey that toll plaza locations recommended by the consultants engaged for preparation of DPRs for NH projects sometimes pose problems at site during project implementation. Ensuring accountability on the part of DPR consultants and adequate participation and commitment of the concerned State Government authorities while finalizing toll plaza locations for NH projects is likely to address this issue.

2. Accordingly, the following guidelines shall be followed in this behalf for NH Projects to

be awarded in future:

(i) Toll Plaza locations recommended by the DPR consultants should be in conformity with the provisionsof the National Highways Fee (Determination of Rates and Collection) Rules, 2008 including applicable amendments in this behalf. In case of any deviations from the above Rules vis-a-vis the recommended locations for the Toll Plazas, a reasoned justification shall have to be provided by the •DPR consultants. This requirement shall be suitably made a part of the Terms of Reference (ToR) for the DPR consultants;

(ii) The Project execution authorities shall obtain the concurrence of the concerned State Government(s) regarding the locations of Toll Plazas upfront before inviting bids for the projects or declaring the 'Appointed Dates' in respect of road projects, especially in cases where a NH project is being implemented near a state capital or any urban area eg. Ring roads/ bypasses around capital cities. The concerned State Government should be required to furnish a written consent in this behalf to the project authority.

A (iii) The concerned State government must provide an undertaking to the project execution authority to continuously support the toll fees collection and compensate such authority for any loss/ foregone toll revenues on account of any disruption in collection of toll fees for any reasons attributable to the state Government.

B (Debjani Chakrabarti)

Director (Highways)"

(Emphasis supplied)

64. Thereafter, in the second memorandum, the communication C dated 2nd November, 2018 after referring to O.M. dated 5th September, 2017, it is directed as follows:

"Para 3. However, it has been observed that on several occasions the user fees plazas are being established in deviation to the provisions of NH Fee Rule 2008, and subsequently approval of D the Competent Authority is being sought on various grounds."

"Para 4. In this regard, it has been decided that guidelines as below are to be followed for establishment of user fees plazas in all the projects under implementation as well as those in the planning stage:

E (i) For all National Highways Project, that have been awarded post 5th September, 2017, the guidelines specified vide NH-37012/0/2016-H dated 05.09.2017 shall be scrupulously followed.

(ii) As a one-time measure, all the fee plazas, established in F deviation to Rule 8 of NH Fee Rule 2008, may be notified as temporary fee plazas, with the condition that the Executing Agency shall relocate the fee plaza as per the provisions of the rule within a period of two years.

(iii) All the Executing Agencies shall ensure that, for the projects G currently under execution, establishment of user fee plazas must be in conformity to NH Fee Rule 2008, and amendments there-to from time to time.

(iv) Location of the user fee plaza w.r.t the nearest municipality area and w.r.t adjacent fee plazas on the same section, will also be specifically clarified in all cases taken up for approval H by the SFC/EFC in future."

Reasoned justification by DPR consultants for deviation from the Rules. This guideline is to be followed; it is reiterated for projects awarded after 05-09-2017.

RULE 8 DEMYSTIFIED

65. Rule 8(1) provides that the Executing Authority or the Concessionaire shall establish toll plaza beyond a distance of 10 kilometres from a municipal or local town area limits. In this context, it is useful to bear in mind that under Rule 6, fee levied under the Rules, has to be collected by the Central Government or the Executing Authority or the Concessionaire at the toll plaza. We have already found that the Executing Authority has been defined in Rule 2(f), as an Officer or Authority notified under Section 5 of the National Highway Act. It would appear, therefore, that the Executing Authority, as defined, or the Concessionaire, is empowered to establish the toll plaza beyond a distance of 10 kilometres from a municipal or local town area limits.

66. The first *proviso* contemplates power with the Executing Authority to locate or allow the Concessionaire to locate a toll plaza within a distance of 10 km of such municipal or town area limits. However, the *proviso* engrafts a limitation on the power of the Executing Authority in that the exercise of power under the first *proviso*, should not result in the toll plaza being located within 5 kilometres of such municipal or local town area limits. A closer look at the first *proviso* will indicate the following features. Unlike the main Rule, where the power is conferred on the Executing Authority and the Concessionaire, to locate a toll plaza, which must, indeed, be more than 10 kilometres from the municipal or local town area limits, there is no power conferred on the Concessionaire to locate a toll plaza within the distance of 10 kilometres. In other words, the Executing Authority is the only Authority, which can locate or allow the Concessionaire to locate within a distance of 10 kilometres but not less than 5 km. In other words, the exercise of power, under the first *proviso*, can result in the location of a toll plaza at a distance of five or more kilometres and below 10 kilometres from the municipal or local town area limits. The further important *sine qua non* for the exercise of the discretionary power conferred on the Executing Authority, is that, the Executing Authority must record reasons in writing at the time when he exercises the power to locate or permit the Concessionaire to locate the toll plaza within the distance as already mentioned.

A 67. Moving forward to the second *proviso*, it commences with the words "provided further". Therefore, for all intents and purposes and at first blush, it is a *proviso*. More about it, a little later. Continuing the narrative, the second *proviso*, as it is described, consists of the following features. If a section of the national highway, permanent bridge, B bypass or tunnel, is constructed within the municipal or town area limits, then, the toll plaza may be established within the municipal or town area limits. This is subject to the only requirement that the construction of the section of national highway, permanent bridge, bypass or tunnel, whichever may be the case, is constructed within the municipal or town area limits, primarily for the use of residents of such municipal or town area limits. C If the aforesaid two requirements are fulfilled, then, the embargo that the toll plaza must be located beyond 10 kilometres from the municipal or local town area limits, contained in Rule 8, would cease to apply. Equally, the second *proviso* contemplates that, if a section of the national highway, permanent bridge, bypass or tunnel is located within 5 kilometres from the municipal or town area limits, then, the last limb of the *proviso,* D would apply, and the toll plaza may be located within a distance of 5 kilometres from such limits.

68. It will be seen that whether the construction of the section of the national highway, permanent bridge, bypass or tunnel is constructed within the municipal or town area limits or within 5 kilometres from such E limits, the common requirement for invoking the power under the second *proviso* and to locate the toll plaza, either within the municipal limits or town limits or within a distance of 5 kilometres from such limit, is that the construction in question, must be primarily for the use of the residents of such municipal or town area.

F 69. To further recapitulate, we may summarise as follows:

The second *proviso* produces the following results:

i. Upon construction being made of a section of the national highway (which is what we are concerned with in this case) within municipal or town area limits and upon the G construction being primarily for the use of the residents of the municipal or town area then the toll plaza can be located within the municipal or town area limits.

ii. Similarly, if the construction of section of the national highway is made within 5 km from the municipal or town H

area limits and the construction is primarily for the use of the residents of such municipal or town area the toll plaza may be set up within a distance of 5 km from such limits.

70. Therefore, a perusal of the second *proviso* leaves us in no doubt, whatsoever that the statutory requirements to apply the second *proviso* and to locate a toll plaza within the municipal or town area limits, is the factum of construction of a section of the national highway,*inter alia*, within the municipal or town area limits, subject to the only condition that it must be primarily for the use of the residents of such municipal or town area. It would be noticed further that, unlike the main Rule and the first *proviso*, the second *proviso* does not indicate as to, in whom, the power to locate the toll plaza under the second *proviso*, stands vested with. In other words, unlike the main Rule and the first *proviso*, the Rule-maker has not indicated the person or Authority, who is to decide. Lastly, we must notice that, unlike the first *proviso*, the second *proviso* does not contemplate that the reasons for exercising the discretionary power, is to be recorded in writing.

71. It would be apposite to enquire into the rationale, why the requirement of reasons being recorded, is not incorporated in the second *proviso*. The answer is not far to seek.The first *proviso* does not provide any condition precedent for locating a toll plaza at a distance of less than 10 kilometres but 5 or more kilometres from the municipal or local town area limits.The requirement is the recording of reasons. No other guidance is forthcoming. In fact, the only check on the power to relax the rigour of the Rule, that the toll plaza must be located at a distance of more than 10 kilometres from the municipal or local town area limits, are two in number. Firstly, the power is located only with the Executing Authority. Secondly, the Executing Authority is obliged, in law, to give reasons, which must be recorded in writing. Besides these safeguards, there are no other indispensable requirements to reduce the distance, as provided in the Rule. This is in stark contrast with the purport of the second *proviso*. The second *proviso* deals with a specific situation. We have already spelt out the requirements. These requirements alone would justify the location of the toll plaza either within the municipal or town limits or within a distance of 5 kilometres from such limits. The requirements are neatly articulated and cast in stone. They are objective criteria. They become the requirements of the Statue. If those requirements are met, then, the toll plaza can be established, relaxing the Rule.

A 72. In such circumstances, we are of the clear view that the High Court has erred in reading the second *proviso* in continuation with the first *proviso* and thereby concluding that, even the requirement of the first *proviso*, *viz*., the recording of reasons in writing, would also become necessary to invoke the power under second *proviso*. We would think that such an interpretation would fly in the face of the clear words used in the second *proviso*, and would, what is more, amount to rewriting the Rule. The real safeguard, which is present in the second *proviso*, is the nature of the objective and inflexible requirements, which are declared therein.

C 73. With regard to a *proviso*, the reliance placed by the Writ Petitioners on the Judgment of this Court in Mohan Kumar Singhania v. Union of India[16], is misplaced. In the said case, the Court was dealing with the challenge to the second *proviso* to Rule 4 therein. The Court went on repel the contention, no doubt, that the second *proviso* travelled beyond the intent of the main Rule. In fact, it is pertinent to note the D following paragraphs:

> "Para 69. Maxwell in his 12th edition has quoted a passage from Attn. Gen. v. Chelsea Waterworks Co. [(1731) Fitzg 195] which reads that if a proviso cannot reasonably be construed otherwise than as contradicting the main enactment, then the proviso will E prevail on the principle that "it speaks the last intention of the makers".
>
> Para 70. It is pointed out in Piper v. Harvey [(1958) 1 QB 439 : (1958) 1 All ER 454] that if, however, the language of the proviso makes it plain that it was intended to have an operation more F extensive than that of the provision which it immediately follows, it must be given such wider effect."

74. Lush, J., observed in Mullins vs. Treasurer of Survey[17], "when one finds a *proviso* to a section, the natural presumption is that, but for the *proviso*, the enacting part would have included the subject matter of G the *proviso*." The general Rule is that, the function of the *proviso* is to qualify or provide an exception to the main provision to which it is a *proviso*. It can be a guide to glean the purport of the provision, in case there is ambiguity in the main provision. Ordinarily, the *proviso* is not

---

[16] 1992 Supp (1) SCC 594

H [17] 1880 QBD 170

permitted to operate beyond the ken of the main provision to which it is a *proviso*. At the same time, *proviso*, in a case, may be a substantive provision. In other words, having regard to the wording and the object sought to be achieved, a *proviso* may transcend its ordinary province and may be intended to operate as a substantive provision [See in this regard *Commissioner of Commercial Taxes, Board of Revenue, Madras & Anr. v. Ramkishan Shrikishan Jhaver etc.*[18], which is being relied upon in *Indore Development Authority v. Manoharlal and others*[19].]. These are well settled principles and we do not intend to burden the Judgment with further case law. Having regard to the provision in question, *viz.*, Rule 8, we are of the clear view that the second *proviso* to the Rule is an instance of the *proviso* representing a substantive provision in itself. In other words, while the Rule proclaims a total embargo against the location of the toll plaza within ten kilometres of the municipal or town area limits, the second *proviso* permits the location of the toll plaza even within the municipal limits or town area limits. Even if it were treated as constituting an exception to the Rule, full effect must be given to its mandate.

75. As far as the question, as to who can take a decision under the second *proviso, we* would think, on a conspectus of Rule 8, that, in the absence of any express reference to the power to take a decision,within the meaning of the second *proviso*, being lodged with any particular Body, the said power must be found vested with the Executive Authority. We say this for the reason that, some person must, indeed, take the decision that the situation warrants locating the toll plaza, in exercise of the power under the second *proviso*. We certainly cannot lodge that power with a Concessionaire. The Rule-maker has conferred the power on the Concessionaire, expressly when it declared in Rule 8, that the Concessionaire may, apart from the Executing Authority, locate the toll plaza beyond 10 kilometres from the municipal or town area limits. The power under the first *proviso*, is conferred only upon the Executing Authority. Having regard to the nature of the power, *viz*., to locate the toll plaza, in complete contradiction with the mandate of the Rule, within the municipal area, *inter alia*, we hold that, the power to take decision under the second *proviso*, is lodged with the Executing Authority.

---

[18] AIR 1968 SC 59
[19] 2020 (8) SCC 129

A 76. To invoke the second proviso, what is required is, the existence of the conditions, as explained.

77. However, a decision must be taken. It must be taken by the Competent Authority. The Authority, we have found is the Executing Authority. It must apply its mind and be convinced that a section of the B national highway,*interalia*, is constructed within the municipal or town area limits. This is a pure question of fact. Secondly, it must conclude that the said construction is 'primarily' or 'mainly' for the 'use' of the residents of the municipal limits. This is again a factual matter. We may also find that the second *proviso* does not compel the Authority to locate the plaza within the municipal or town area limits. It is a matter of discretion C to be exercised, no doubt, taking into consideration the maximization of toll collection also and avoiding of leakage of toll,bearing in mind the fact that the Concessionaire is permitted to collect the toll only for the period of the Concessionaire Agreement under Rule 16. To show application of mind, there must be material. Even in the absence of reasons, recorded D as such, there must be proper pleadings with materials, unless facts are not in dispute.

WHETHER INVOCATION OF THE SECOND PROVISO TO RULE 8 IN THE FACTS ILLEGAL?

78. Though originally, the Ministry of the Road Transport and E Highways (MoRTH),proposed upgradation of the existing two-lane stretch from Patna to Bakhtiyarpur to four/six-lane highway based on the appraisal notes of the Planning Commission and DEA, the Patna-Bakhtiyarpur project received final approval for the development of the stretch as a four-lane highway. This is evident from the record note of F discussion of the meeting of the Public Private Partnership Appraisal Committee (PPPAC) dated 10th February, 2010. Even prior to the same, a Detailed Project Report (DPR) was prepared by an International Consultant. Thereafter, the Cabinet Committee cleared the project under NHDP Phase III on DBFOT basis, i.e., Design, Build, Finance, Operate and Transfer. It is apposite to notice, in the appraisal note [when the G proposal was for four/six-laning of the Patna-Bakhtiyarpur section], the following:

> "Para 3.4. As observed from Schedule A and B in the DCA, new bypass starting from km 195 to km 231 has been proposed. This appears in continuation to an existing bypass from km 178 to km H 196. It has also been observed the entire Project highway has

urban/ built up settlements across the stretch. Thus, providing for a bypass for through traffic appears justified. However, the distribution of local traffic and through traffic is not provided in the documents.The same may be provided to the members of the PPPAC. Through the traffic details will be the base for revenue assessments and therefore beneficial to suitably analyse the viability of the Project."

(Emphasis supplied)

79. The broad scope of the work is shown as follows:

"Para2. Scope of work

2.1 The broad scope of work as per the Schedules B and C of the DCA consists of construction and up-gradation to 4/6-lane road (km 178.60 at Patna) – (Km 230 at Bakhtiyarpur) from 2-lane with provision of project facilities, operation and maintenance (O&M) of the Project and performance and fulfilment of all other obligations of the Concessionaire. It includes:

i. By pass	36.4 km, from km(195-231.4)
ii. Service Road onboth sides of the road	Total length of 8.5 km
iii.Major intersections, 3-legged at-grade	2 nos. at km 181.3(Anisabad) & km 188.47 (Zero mile)
iv. Minor junctions	11nos.
v. Grade separated intersections	4 nos. At km (188.25, 188.47, 207.6 &231.4)
vi. Vehicular underpass	1
vii. Cattle underpasses	7 nos. at village roads
viii. Reconstruction of culverts	57 nos.
ix. Bus bayes	6 nos.
x. Road furniture and signages and plantations"	

A 80. By Notification dated 07.05.2010, in exercise of power under Section 11 of the National Highway Authority of India Act, 1988, the Central Government entrusted the project, which consisted of the stretch from 181.300 km to 231.950 km. of the NH 30, in the State of Bihar, to NHAI. On 12.02.2011, NHAI made a general Notification inviting objectionsfrom the general public towards the proposed construction to
B the toll plaza at 194km. This is on the basis of the DPR, which, after detailed study, recommended the construction of the toll plaza at 194 km. The public meeting/hearing on 12.02.2011, was allegedly attended by about 71 local residents.The appellant invited proposals for construction, operation and maintenance of the project in question. The
C Concessionaire Agreement was entered into with the highest bidder, i.e., PBTC, on 31.03.2011. The Agreement provided, *inter alia*, for the toll plaza being located at 194 km. Work was apparently in progress, when the Writ Petitions came to be filed.

81. We may further notice from the Executive Summary of the
D Detailed Project Report. It reads as under:

"The Project Road (National Highway -30)

From km 180.0 to km 190.0 of bypass section there is a very congested stretch due to the presence of Transport Nagar, residential buildings & commercial activity. Further NH-30
E intersects with NH-19 at Km 188+500. At Km. 188+800, SH-1 starts form the Patna bypass and traverses towards south (towards Masaurhi). From km 190 to km 195 of bypass section there is agricultural land on both side of road. At Km. 195+750, it further crosses railway line (Patna-Kolkata section) through a newly built
F 4-lane ROB. Further it traverses through Didarganj (Km. 197).

The stretch of NH-30 on new bypass and from Didarganj ROB (Km 196) to Fatua (Km 208) is very congested with local and thorough traffic all along. However, while new bypass area upto Didarganj has available ROW of 60 m for widening to 4/6 lanning,
G the area between Didarganj to Fatua is being encroached/has built up settlement on both sides with available ROW less than 15-20m. Immediately after Fatua town (Km 208) to Bakhtiyarpur (Km 227), this area is relatively less congested, but has pockets of staggered settlement in between, including at Bakhtiyarpur. Due to above-mentioned existing features, widening of existing

H

road to standard 4-lane configuration would present considerable difficulty due to the physical constraints. In view of above-mentioned features, the proposed alignments have been considered on the southern side of the existing NH-30.

Toll Plaza Location

The project road is proposed to be developed as Tolled Road. The project road being only 50km long, only one toll plaza will be feasible to be provided. During site reconnaissance it was observed that free space is available near km 194 suitable for development of Toll Plaza System. Same is already discussed with NHAI officials during site visit.

Service Road

The concept of service is being conceived at built up area and grade separated intersections (Flyover & Underpass locations) which will come along the proposed alignment. The list of the proposed service road stretches are as follows:

i. 181.3 to 189.11

ii. 206.8 to 207.4"

(Emphasis supplied)

82. We have referred to the pleadings. We have also noticed the relevant parts of the DPR.In the Writ Petition, petitioners themselves have pleaded that the road in question is a national highway, and what is more, that it has been constructed merely for the use of the residents of the Patna Municipality Area. In our view, this pleading is fatal to the case of the petitioner that there is violation of the second *proviso*. As already found by us, the only requirement to locate the toll plaza within the municipal limits, is that a section of the national highway,*interalia*, is constructed within the municipal limits and the construction must be primarily for the residents living in the said municipal limits. There is hardly any dispute that the national highway, which means the project road, commences from 181.300 kms from the Patna side and it goes to the east and till 196 kms, it is located within the municipal limits. After 196 kms, it branches of towards the south, which is the new bypass consisting of nearly 36 kms. The total stretch consists of a little over 50 kms. For nearly 14 kms, the road project road passes through the municipal limits.

A 83. The DPR would show that the construction of the project road and other roads, will bring about greater circulation of traffic in the area. In other words, it means that, the project road which begins from 181.300 kms, which was a two-lane road was widened to a four-lane road and the project road ends at 231 kms, where NH30 meets NH31. The Project Report also makes it clear that from km 180 to km 190 of the bypass section, there is a very congested stretch. From km 190 to km 195, it is further stated that there is agricultural land on both sides. *Didardanj* is located even further to the east, and still further is, *Fatua* town. Construction of the bypass in that area, was found to be impracticable and it is accordingly that from 196 kms, the new alignment towards the south, was carried out. The Project Report further reveals that the project road is only 50 kilometres long. Only one toll plaza could be provided. In this regard, Rule 8(2) contemplates the distance of 60 kilometres between two toll plazas. The Project Report further reveals that the NHAI Officials were available at the site along with the persons who prepared the DPR, and it is thereafter that this location was quite clearly accepted by the NHAI, as when it entered into the agreement with the Concessionaire, the agreement itself provides for the site of the toll plaza being km 194. It may be true that there may not be any decision which specifically incorporates the view of the NHAI regarding the site. What has apparently happened is, in keeping with the newly introduced Rule (Rule 8 of the 2008 Rules), the NHAI has proceeded to accept the recommendation of the Expert Body to locate the toll plaza at km 194.

84. We are not unmindful of the fact that counter affidavit of the appellants betrays a certain degree of ambiguity. This is for the reason that, what is pleaded in both the counter affidavits, was that, even if the toll plaza is located within the municipal limits, the second *proviso* to Rule 8 comes to the rescue of the appellant. This is sought to be exploited by the Writ Petitioners to point out that even appellants were not clearly aware, whether the toll plaza was being located within the municipal limits or not. Writ Petitioners also harp upon the clarity being infused by the counter affidavit filed by the Municipal Council of Patna that the toll plaza was located within the municipal area. We also agree that the matter becomes a little worse, when we read the pleadings of the Concessionaire. In the first counter affidavit, it was contended that the proposed toll plaza at km 194 is much beyond 5 kilometres stipulated in

the first *proviso*. There is also pleading, which indicates that understanding of the Concessionaire was that the construction was for the overall population of the area. However, we must also not ignore that the upgradation was stated to be also aimed at benefitting the local population for the speedy movement from Patna to *Bhaktiyarpur* and *vice-versa*. In the second supplementary counter affidavit, it is contended that the four-laning was initiated to reduce the pressure of the local traffic as well and that it is primarily for the benefit of the local residents.

85. We are, indeed, troubled by the manner in which the case was approached by the Concessionaire, in particular. However, the appellants definitely set up the case under Rule 8 in both the counter affidavits filed by it. The statement that the second *proviso* applies, even if the construction is made within the municipal limits, is emphasised by the Writ Petitioners, to show the non-application of minds. We must, in this regard, bear in mind the nature of the *lis*, as also the rights of the Writ Petitioners. The High Court did not find any Fundamental Rights with the writ petitioners in the matters. The only issue is relating to violation of Rule 8.We have already found that upon the satisfaction of the objective criteria laid down in the second *proviso*, construction of the toll plaza, as provided therein, is permissible. Apart from the statement of the Writ Petitioners themselves, that the road is a national highway and it is merely for the use of the local residents, the undeniable fact is that, in place of the two-lane road, after a huge investment, it was upgraded to a four-lane road and nearly 14 kilometres of the project road, indisputably, passed through the municipal limits and the most important beneficiary of the said construction, can clearly be stated to be the residents in the municipal area. The project road, did enurechiefly to the residents of the Patna Municipality. The road from 180 to 190 kms was found to be a very congested stretch. The construction of the widened road, undoubtedly, helped mainly the residents of the municipal area. There are other features, apart from widening, including the graded separators. No doubt, it may be true that many persons may be using the said stretch, who may not be residents of the Patna Municipality, would also benefit from the construction, but that cannot detract from requirement of the second *proviso* being fulfilled, *viz*., that the construction was primarily for the benefit of the residents of the municipal area. The second *proviso* does not require that the construction must be solely for the benefit of the residents of the municipal area.

A 86. There is another aspect, which we cannot ignore. The construction was completed in accordance with the agreement with the Concessionaire. The Judgment of the Division Bench came to be stayed by this Court and the toll has been collected from the toll plaza. Secondly, the High Court may not be justified in finding that the commercial expediency trumped the law. Commercial expediency is, undoubtedly, a
B relevant fact. The exact location of the toll plaza is also geared to garner maximum revenue. Concessionaire Agreement lasts for a particular period of time. It is the Concessionaire, who makes the construction, after making the entire investment. The contract contemplates "Design, Build, Finance, Operate and Transfer (the "DBFOT") under Rule 16 of
C the Rules, upon the expiry of the agreement, the fee is to be collected by the Central Government or the Executing Authority. Therefore, in such circumstances, any leakage in the toll, would naturally be sought to be avoided. As long as the site of the toll plaza is otherwise supportable, with reference to the second *proviso*, then, the area of judicial review, in such matters, would be extremely narrow.
D

87. We may notice one dimension. In the Rules of 2008, Rule 2C defines a bypass as a section of the national highway bypassing a town or a city. Therefore, the question may arise, whether, when Rule 8 speaks of construction of a section of the national highway, which is within a
E municipal or town area limits, it will include a bypass, in view of the new definition. There is indication in the case that from 178 km, there was an existing bypass. The new construction was over the existing bypass. However, we do not explore this matter further as none of the parties addressed us on this and we proceed on the basis that there was construction of a National Highway partly within the municipal limits.
F

RULE 17; CLOSING OF SERVICE ROADS

88. Rule 17 permits additional barriers to prevent evasion of fees at the toll plaza. At places, other than "at the toll plaza", with prior permission of the Central Government or Executing Authority, additional
G barriers are permitted but within 10 kilometres from the toll plaza. We notice these provisions to pronounce on the complaint of the Writ Petitioners that there is blocking of the service roads near the toll plaza. We make it clear that barriers shall be permissible only in compliance with Rule 17 of the Rules.

H

IMPACT OF APPELLANTS NOT CHALLENGING JUDGMENT IN WRIT PETITION NO. 4526 OF 2013

89. The further question to be considered, is the effect of appellant not challenging the Judgment rendered in the Writ Petition No. 4526 of 2013, filed by one Ritesh Ranjan Singh. The said petitioner filing the Writ Petition, was filing it as Public Interest Litigation and it was so treated. It was, however,made over to learned Single Judge, who heard it along with Writ Petition No. 5643 of 2012. We have already noted, in first paragraph of this judgment, the manner in which both Writ Petitions were disposed of.

90. It is true that the appellant filed LPA in 2015 only against Writ Petition No. 5643. Concessionaire filed two Appeals. All the three Appeals came to be dismissed. The present Appeal is filed only against the Judgment in LPA No. 388 of 2015, which in turn, was directed against Writ Petition No. 5643 of 2012, therefore, the obstacle, which is sought to be set up by the Writ Petitioners (Respondent Nos. 1 to 17) that the Judgment in Writ Petition No. 4526 of 2013 has become final. In other words, if the present Appeal is allowed, it would lead to a consistent decision, one by this Court and another contradiction with our Judgment rendered final, *viz*., the Judgment in Writ Petition No. 4563 of 2013.

91. The contention, which is pressed before us by the learned counsel for the appellant, is by drawing support from the Judgment of this Court in *Shenoy & Co. v. Commercial Tax Officer, Circle II, Bangalore and Others*[20] .

92. No doubt, that was the case where the constitutionality of a statute was challenged in a number of writ petitions. The provisions were struck down by the High Court. From the Judgment of the High Court, only one of the Writ Petition was challenged before this Court. While so, there were other developments, insofar as there was legislative activity aimed at removing infirmities of the law, which was struck down by the High Court and giving it retrospective effect also. More importantly, this Court allowed the Appeal and set aside the Judgment of the High Court. Thereafter, fresh notices were issued after the Judgment of this Court, upholding the original enactment of the year 1979. Notices were sent to all the Writ Petitioners, who had secured Judgment from the High Court, which Judgments were not appealed against. This Court

[20] (1985) 2 SCC 512

A was dealing with the contention that, as far as their cases are concerned, since no Appeal was carried in their case, Judgment of the High Court remained intact. While rejecting this argument, Court drew upon the provision of Article 141. The Court, *inter alia*, held as follows:

> "23. …..To contend that this conclusion applies only to the
> B party before this Court is to destroy the efficacy and integrity of the judgment and to make the mandate of Article 141 illusory. But setting aside the common judgment of the High Court, the mandamus issued by the High Court is rendered ineffective not only in one case but in all cases.
>
> C 24. A writ or an order in the nature of mandamus has always been understood to mean a command issuing from the Court, competent to do the same, to a public servant amongst others, to perform a duty attaching to the office, failure to perform which leads to the initiation of action. In this case, the petitioners-appellants assert that the mandamus in their case was issued by
> D the High Court commanding the authority to desist or forbear from enforcing the provisions of an Act which was not validly enacted. In other words, a writ of mandamus was predicated upon the view that the High Court took that the 1979 Act was constitutionally invalid. Consequently the Court directed the
> E authorities under the said Act to forbear from enforcing the provisions of the Act qua the petitioners. The Act was subsequently declared constitutionally valid by this Court. The Act, therefore, was under an eclipse, for a short duration; but with the declaration of the law by this Court, the temporary shadow cast on it by the mandamus disappeared and the Act revived with its full vigour,
> F the constitutional invalidity held by the High Court having been removed by the judgment of this Court. If the law so declared invalid is held constitutionally valid, effective and binding by the Supreme Court, the mandamus forbearing the authorities from enforcing its provisions would become ineffective and the
> G authorities cannot be compelled to perform a negative duty. The declaration of the law is binding on everyone and it is therefore, futile to contend that the mandamus would survive in favour of those parties against whom appeals were not filed.
>
> 25. The fallacy of the argument can be better illustrated by
> H looking at the submissions made from a slightly different angle.

Assume for argument's sake that the mandamus in favour of the appellants survived notwithstanding the judgment of this Court. How do they enforce the mandamus? The normal procedure is to move the Court in contempt when the parties against whom mandamus is issued disrespect it. Supposing contempt petitions are filed and notices are issued to the State. The State's answer to the Court will be: "Can I be punished for disrespecting the mandamus, when the law of the land has been laid down by the Supreme Court against the mandamus issued, which law is equally binding on me and on you?" Which Court can punish a party for contempt under these circumstances? The answer can be only in the negative because the mandamus issued by the High Court becomes ineffective and unenforceable when the basis on which it was issued falls, by the declaration by the Supreme Court, of the validity of 1979 Act."

93. Actually, this is a plea, which may really not be available to the Writ Petitioners.At any rate,if we were to apply the same principles to the facts of this case, we would come to the conclusion that if we were to find that there is no violation of Rule 8, the location of toll plaza at 194kilometre is not flawed and the judgment of the Court is set aside, then, it would attract Article 141. The relief, which has been granted in other Writ Petition, is in the form of mandamus to shift the toll plaza, whichmay become unenforceable, in view of our finding that toll plaza was constructed lawfully and, therefore, need not be removed. As already noticed, the appellants have challenged the Judgment in the Writ Petition filed by the Writ Petitioners.

WHETHER THE DECISION IS ARBITRARY

94. It is the case of the Writ Petitioners that the decision to locate site of toll plaza at 194 kilometre is arbitrary. Under Article 14 of the Constitution, no State action can pass muster, if it is found to be arbitrary. But, then, a different or even an incorrect decision, would not make an otherwise lawful decision vulnerable to judicial scrutiny. An arbitrary decision would be one which is bereft of any rationale or which is capriciously wrong, and not merely an erroneous view, in the perception of the Court. Any other view would tantamount to substituting its view for that of the Authority. Judged by the said standard, and also the nature of dispute, it cannot be held that toll plaza, having been located at a point where there was sufficient space and which would prevent the leakage

A of traffic, and also noticing that stretch itself consisted of a little over 50 kilometres, quite clearly, the case based on arbitrariness, is only to be repelled.

95. We have found that the Executing Authority is the Competent Authority to take decision under the second proviso to Rule 8 of the
B Rules. We, no doubt, have found, there is no duty to record reasons. In paragraph-77 of our Judgment, we have explained the duty of the Executing Authority. In the light of this, the Executing Authorities must maintain record, which must contain the decision to locate a toll plaza, invoking the second *proviso*.

C 96. Rule 9 of the Rules provides for discounts. The appellants and the Concessionaire are duty bound to extend the concessions to the local residents, in particular. We have noticed the stand of the appellants that this Court may issue appropriate direction in this regard as this Court finds fit. We notice that there is no appeal by the Concessionaire against the impugned order.
D

97. The upshot of the above discussion is that we find as follows:

(1) The construction of the toll plaza at 194 kilometre was not illegal or arbitrary;

E (2) The direction by the High Court, to shift toll plaza,cannot be upheld and it is liable to be set aside;

(3) The appellants will look at the barricades (closing of service roads) in regard to the toll plaza and permit such barricades only as are permitted in Rule 17 of the Rules. Any unauthorised barricades will be removed without any delay
F and at any rate within 2 weeks from today.

(4) The First Appellant will issue suitable directions to all Executive Authorities to maintain distinct records containing the decision, invoking the second *proviso* to Rule 8 of the
G Rules. Such direction shall be issued within 3 weeks from today.

(5) We direct the appellants as also the Concessionaire to extend the fullest benefits of the concessions under Rule 9 of the Rules.

H

(6) Resultantly, we allow the Appeal and set aside the impugned Judgment and the direction to shift the toll plaza is set aside. A

(7) There shall be no order as to costs.

Ankit Gyan Appeal allowed.