IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO.5356 of 2013

1. Shri Amit Jayawant Jain,
Age 30 years, Occ. Legal Practice.

2. Hemant Gulabrao Patil,
Age 30 years, Occ. Agri.,

3. Kanhyya Baburao Chaudhari,
Age 32 years, Occ. Business,

4. Amol Govind Agrawal,
Age 28 years, Occ. Agri.,

All r/o Shirpur, Dist. Dhule.

...PETITIONERS

VERSUS

1. The Union of India,
Through the Secretary, Ministry of Shipping, Road Transport and Highways,
New Delhi.

2. Dhule-Palasner Toll Way Ltd.,
A Company registered under Companies Act,
NH-3 at Sarwad Po: Deobhane, Tal.Dist.Dhule.

(Notice to be served on its Secretary or M.D.)

3. National Highways Authority of India,
Wardha House, 2nd floor, Plot No.27/4/1,
Ward No.7, Lendra Park, Central Bazaar
Road, Ramdaspeth, Nagpur 440 010

4. National High-ways Authority
of India Ltd (Project Implement
Unit, Nasik)

...RESPONDENTS

Shri R.R.Mantri, Advocate, for petitioner.
Shri B.B.Kulkarni & Shri R.B.Bagul, ASG., for respondent no.1.
Mr.Bikram Choudhari, Abhay Nivergi & Associates / instructed by Mr. A.Y.Pandule, Adv., for respondent no.2.
Mr.Anup Umakant Patil h/f Mr.M.V.Kini & Co. for respondent nos. 3 and 4.

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CORAM: R.M.BORDE
AND
P.R.BORA, JJ.

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Date of reserving
the Judgment: 30.06.2015.
Date of pronouncing
the Judgment: 10.07.2015.

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JUDGMENT (PER:- P.R.BORA,J.)

1. Heard. Rule is made returnable forthwith. The petitioners have filed the present writ petition invoking jurisdiction of this Court under Article 226 of the Constitution of India seeking issuance of writ of Prohibition, prohibiting the respondents from running a Toll Plaza within 10 kilometers of local limits of Shirpur Town in Dhule district. The petitioners have further sought quashment of the notification permitting 50 per cent increase in the toll rates w.e.f. 26.5.2013.

2. Shirpur town is situated on one side of National Highway No.3 at a distance of about 2.5 kms. Four Laning is being done of the said

National Highway on Build Own and Transfer (BOT) basis by involving private agencies. National Highways Authority of India is implementing and supervising the said work. Work of development and maintenance has been allotted to respondent no.2 on BOT basis of the section of National Highway No.3 from KM 168/500 to KM 265/500 i.e. the stretch in between Dhule and Palasner. Concessionaire Agreement has been entered into between respondent no.1 and respondent no.2 for the work of development and maintenance of the section of the road as mentioned above. In the said agreement itself, the Government of India i.e. respondent no.1 has authorized respondent no.2 to collect fees from users of the aforesaid National Highway. On the strength of the said agreement, respondent no.2 has established two toll plazas; one at village Songir and, another at Shirpur at KM 205 junction where the Shirpur Town Link Road joins National Highway No.3.

3. In the present petition, it is the principal contention of the petitioners that the toll plaza so established at Shirpur within five kms of the Municipal limits of Shirpur town is patently illegal and unauthorized. According to petitioners, in no case, a toll plaza can be built or operated within 5 kms of the Municipal limits. The petitioners have further alleged that the toll plaza at Shirpur has been erected

without following the norms laid down by the National Highway Authority and in violation of the agreement entered into between respondent nos.1 and 2. The petitioners have alleged that without completing the work of National Highway, respondent no.2 started collecting toll from the citizens. The petitioners have further alleged that as per the agreement between respondent nos.1 and 2 and under the provisions of National Highways Act, 1956, though it was incumbent on the part of respondent no.2 to establish a full-fledged dispensary at the toll plaza, and to maintain it for twenty four hours by making available Doctor at the said dispensary, respondent no.2 has not made any such provision. It is also the case of the petitioners that respondent no.2 has not planted and maintained sufficient number of trees along the road sides. Petitioners have also alleged that respondent no.2 has not provided required amenities and safety measures and the road is also not being maintained properly. For all these reasons, the petitioners have prayed for prohibiting respondent no.2 from running a toll plaza at Shirpur junction.

4. Another objection which has been raised by the petitioners is in respect of increase in the rate of toll w.e.f. 26.5.2013. Petitioners have alleged that the respondents have illegally

increased toll by 50 per cent without any authority of law and against the Rules. The petitioners have, therefore, prayed for quashment of the said notification permitting 50 per cent increase in the toll rates w.e.f. 26.5.2013.

5. The respondents have denied the contentions raised in the petition and allegations so made by the petitioners. Shri Pramode Pillai, authorized representative of respondent no.2, has filed affidavit in reply on behalf of respondent no.2 whereas Shri Prashant J.Fegade, working as GM(T) & Project Director, PIU Dhule, National Highways Authority of India, has filed affidavit in reply on behalf of respondent no.4. The respondents have contended that the toll plaza erected at Shirpur is strictly in accordance with the provisions of law. It is the further contention of the respondents that the toll rates are also fixed in accordance with the provisions of law and as per the norms laid down in that regard. The increase in the toll has also been justified by the respondents by bringing on record the development subsequently carried out. According to the respondents, the petitioners have misconstrued the provisions of National Highways Act, 1956, and the National Highways Fee (Determination of Rates and Collection) Rules, 2008 (hereinafter referred to as Rules of 2008).

It is the contention of both the respondents that there is no prohibition for installing a toll plaza within 5 kms of the Municipal limits if permanent bridge, by-pass or tunnel, as the case may be, is constructed within the Municipal limits or within 5 kms from such limits primarily for the use of such Municipal or town area. The respondents have, therefore, prayed for dismissal of the petition.

6. Two objections are raised by the petitioners about location of the toll plazas; first that, on the same section of the National Highway, and in the same direction, no two plazas can be established within a distance of 60 kms. and as such, Shirpur toll plaza established within a distance of less than 60 kms from Songir toll plaza, is illegal and in violation of Rule 8(2) of the Rules of 2008. The second objection is that the toll plaza at Shirpur which is established at the distance of 1.80 kms from the limits of Shirpur Municipal Council is violative of Rule 8(1) of the Rules of 2008 since the said Rule does not permit establishment of any toll plaza in any case within 5 kms of the Municipal or local town area limits.

7. Since the petitioners have alleged violation of Rule 8 of the Rules of 2008, we find it appropriate to reproduce herebinbelow the said

Rule which reads thus:

> "**8. Location of toll plaza –**
>
> **(1)** The executing authority or the concessionaire, as the case may be, shall establish a toll plaza beyond a distance of ten kilometers from a municipal or local town area limits:
>
> Provided that the executing authority may, for reasons to be recorded in writing, locate or allow the concessionaire to locate a toll plaza within a distance of ten kilometers of such municipal or local town area limits, but in no case within five kilometers of such municipal or local town area limits:
>
> Provided further that where a section of the national highway, permanent bridge, bypass or tunnel, as the case may be, is constructed within the municipal or town area limits or within five kilometers from such limits, primarily for use of the residents of such municipal or town area, the toll plaza may be established within the municipal or town area limits or within a distance of five kilometers from such limits.
>
> **(2)** Any other toll plaza on the same

> section of national highway and in the same direction shall not be established within a distance of sixty kilometers;
>
> Provided that where the executing authority deems necessary, it may for reasons to be recorded in writing, establish or allow the concessionaire to establish another toll plaza within a distance of sixty kilometers:
>
> Provided further that a toll plaza may be established within a distance of sixty kilometers from another toll plaza if such toll plaza is for collection of fee for a permanent bridge, bypass or tunnel.

8. Rule 8(2) deals with the distance between two toll plazas. It certainly prohibits two toll plazas within distance of 60 kms if both are determined on the same Section of the National Highway and in the same direction. However, having regard to the contentions raised by the respondents in their respective affidavits in reply, it appears that the controversy that has arisen in the present matter has been adequately dealt with by the second proviso to the said Rule 8(2) which carves out an exception to the said Rule providing that the toll plaza may be established within the distance of 60 kms from another toll plaza if such toll plaza is for

collection of fee, for a permanent bridge, bypass or tunnel.

9. In the affidavit in reply filed by respondent no.2, it is stated that in the stretch of the National Highway allotted to them for development, they have constructed the tunnels, bypasses and fly overs from every habitation from which National Highway No.3 passes. It is further provided that in between Songir to Shirpur three permanent structures are raised by the respondents, Viz; the Tapi River bridge, the Wild Life Anerdam Sanctuary bypass and the Nardana bypass. It is the further contention of respondent no.2 that huge expenses have been incurred by it towards construction of the aforesaid permanent structures. As provided in the affidavit, the cost of Tapi River Bridge is Rs.51.4 crores, the cost of Wild Life Anerdam Sanctuary bypass is stated to be Rs.60.64 crores whereas the cost of Nardana bypass is stated to be Rs.60 crores. The fact of construction of a bridge over Tapi river, the Wildlife Anerdam Sanctuary bypass and Nardana bypass is not denied or disputed by the petitioners.

10. In view of the facts as aforesaid, it does not appear to us that the respondents have in any way violated Rule 8(2) of the Rules of 1908 in establishing a toll plaza at Shirpur

within the distance less than 60 kms from Songir Toll plaza since the same has been established for collection of fee on account of the permanent structures raised by the respondents having construction costs worth crores of rupees.

11. Now about the second objection that no toll plaza can in any case be located within a distance of 5 kms from the Municipal or local town area limits. The toll plaza at Shirpur is admittedly at the distance of 1.80 kms from the local limits of Shirpur Municipal Council. In its affidavit in reply, respondent no.2 has provided certain explanation justifying the establishment of the said toll plaza. It is the specific contention of the respondents that the Section of the National Highway No.3 passing from within 5 kms of the Municipal limits of Shirpur town has been augmented to four lane standards for the use of residents of the Municipal Area limits as well as for other road users. It is the further contention of the respondents that as a part of the construction of the four lane road, a fly over has also been constructed to give safe access to Shirpur town, primarily, for the use of Shirpur town. It is the further contention of the respondents that the fly over and the tunnel have been constructed and more particularly, the tunnel is being used by the residents of Shirpur to approach the National Highway and the same

therefore, is primarily for the use of residents of Shirpur. In the circumstances, according to the respondents, the toll plaza at Shirpur falls within the prescribed parameters.

12. The contention of the respondents that the fly over and the tunnel have been constructed mainly for the use of citizens of Shirpur town has been objected to by the petitioners. The petitioners have contended that the fly over and the tunnels have been constructed by the respondents not only at Shirpur but at many other places for every habitation from which the National Highway no.3 passes. The petitioners have also denied that the construction of Highway No.3 and the fly over done in the municipal limits of Shirpur has been done for the benefits of the residents of the Shirpur. In their affidavit in rejoinder, the petitioners have contended that the so called tunnel is not purposely done but has automatically come in existence because of the fly over erected at the place and no extra cost has been incurred towards the same. It is the further contention of the petitioners that fly over is not at all for use or benefit of the residents of Shirpur and they do not use the said fly over as they have to pass from below the said fly over and they need not to climb over the said fly over.

13. However, we find it difficult to accept the contentions raised by the petitioners. The fly over seems to be constructed with the intention of providing safe access to the persons entering into the town of Shirpur or exiting from the said town either to proceed towards Dhule or towards Indore. Had the fly over been not constructed, obviously, it could have been very difficult for the vehicles, intending to enter into Shirpur town or egressing from the said town and perhaps it could have been the reason for occurrence of the frequent accidents at the said spot. It is the fly over and the tunnel which have given safe access to the Shirpur town and it also cannot be doubted that same is primarily for the use and benefit of residents of Shirpur town. The toll plaza established at Shirpur within 5 kms of the Municipal or town area limits is thus saved by the second proviso to Rule 8(2) of the Rules of 2008. We, do not find any illegality or violation of any Rule in establishment of the toll plaza at Shirpur.

14. The further objection raised by the petitioners that the citizens of Shirpur are frequently required to go to Dhule since it is the District Head quarter and further that some of them are the daily visitors to Dhule and as such, per trip toll being recovered at Shirpur toll plaza at the rate of Rs.75/- is cumbersome

and over-taxing also appears us to be of a little substance in the light of the fact brought to our notice by the respondents that for such daily or frequent visitors, Respondent No.2 has extended the facility of a monthly pass, cost of which is only Rs. 215/-. It does not appear to us that for a person using a motor car, monthly charges of Rs.215/- will be in any sense over-taxing or unaffordable.

15. It is further alleged by the petitioners that Respondent No.2 has not established any dispensary nor appointed or provided any doctor at the toll plaza. The petitioners have also alleged that Respondent No.2 has also not planted the trees along the road side. According to the petitioners, Respondent No.2 has thus not fulfilled the obligation cast on it under the agreement entered into between it and Respondent No.1.

16. In the affidavit in reply, Respondent No.2 has submitted that it has provided Medical Aid Post building and staff quarters at both the toll plazas with 24-hours qualified medical personnel in accordance with the provisions of the Concession agreement. Respondent No.2 has also stated on oath that the tree plantation has been done all along the project highway on both the sides and shrubs have also been planted on

median and further that all the trees and plants are being maintained in accordance with the provisions of the Concession agreement.

17. Though in the rejoinder affidavit the petitioners have further raised certain objections as regards medical facility, referring to certain averments in the affidavit of Respondent No.4, the petitioners have not brought on record any specific instance showing failure on part of Respondent No.2 in providing medical aid in the course of any mishap or untoward incident.

18. As about the hike in the rate of toll w.e.f. 26th May, it is the contention of the respondents that the same has been done strictly in accordance with the provisions of Rules of 2008 and according to the formula provided therein. The respondents have submitted that after the year 2011-2012, Respondent No.2 completed further length of the project highway including Tapi River bridge, which is a permanent structure with the costs of Rs. 51.4 crores. Considering the construction of the road of the additional length and the Tapi river bridge structure, the toll rates have been revised. Respondents have explained that toll rate for these permanent structures are based on the cost and not on their length which is the criteria in

case of liner highway. It is further elaborated that the toll rates in the case of permanent structures are relatively higher in comparison to per kilo meter toll rate for linear length of the highway.

19. We have perused the Rules of 2008 and the formula provided therein. It appears that the toll rates have been revised in accordance with the Rules of 2008. We, therefore, do not see any illegality in the rate of toll so enhanced to Rs.75/-. However, if the respondents may be collecting Rs. 80/- per trip at Shirpur toll plaza, as has been alleged by the petitioners, the respondents need to take care that the toll is being recovered strictly as per the rates determined and not in excess of that.

20. In order to substantiate their contentions, the petitioners have relied upon the judgment of the Division Bench of the Madras High Court in the case of *1) R.Murali 2) T.S.R.Venkataraman Vs. The Chairman, National Highways Authority of India and Ors in Writ Petition (MD) Nos. 13906 and 14535 of 2012 and 7228 of 2014.* We have gone through the text of the said judgment. It is apparently revealed that the said judgment has been delivered in a totally different fact situation. The Madras High Court did not approve the establishment of

toll plaza within 5 kms of the municipal limits of Thirumangalam for the reason that the respondents in the said matter did not make out any case and indicated either in the main counter affidavit or in the additional affidavit as to how the National Highway No.7 was intended primarily for the use of the residents of Thirumangalam Municipality. In that situation, it is held by the Madras High Court that the location of toll plaza is not saved by the second proviso to Rule 8(1) of the Rules of 2008. Consequently, a finding is recorded by the High Court that when the toll plaza is not saved by the second proviso to Rule 8(1), there was no meaning in granting for granting concession or providing monthly passes.

21. After having considered the material on record we do not see any illegality or violation of any of the provisions of National Highways Act or the rules of 2008 in establishment of toll plazas at Songir and Shirpur by Respondent No.2. The toll plaza determined at Shirpur within the distance of 5 kms, satisfies the mandate of Rule 8(1) and is saved by the second proviso to the said Rule. In so far as the objections as regards to the medical facility and plantation of trees are concerned, we have already recorded that the respondents have given satisfactory explanation in that regard. The objection as

regards the hike in the rate of toll is also liable to be turned down for the reasons we have recorded hereinabove. Thus, the writ petition fails and is accordingly dismissed without any order as to the cost. Rule discharged.

(P.R.BORA) **(R.M.BORDE)**
JUDGE **JUDGE**

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AGP/