

Supreme Court of India

M/S. Soma Isolux Nh One Tollway ... vs Harish Kumar Puri & Ors on 17 April, 1947

Author:J.

Bench: Gyan Sudha Misra, Pinaki Chandra Ghose

REPORTABLE

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 4611 OF 2014
(Arising out of SLP (Civil) No. 19379/2013)

M/S. SOMA ISOLUX NH ONE TOLLWAY
PRIVATE LIMITED

. Appellant

Versus

HARISH KUMAR PURI & ORS.

.. Respondents

J U D G M E N T

GYAN SUDHA MISRA, J.

1. Leave granted.

2. This appeal by special leave has been filed assailing the order dated 27.5.2013 passed by the High Court of Punjab and Haryana at Chandigarh in C.M.No. 3301/2013 arising out of CWP No. 13848/1998 whereby certain adverse directions to be related hereinafter were issued having grave implication on the contractual rights of the appellant- M/s. Soma Isolux NH One Tollway Pvt. Ltd. (hereinafter referred to as 'the Concessionaire company') as it was saddled with a fine of Rs.60 crores and Rs.7 crores to be paid by the appellant-Concessionaire Company and its Director respectively which were to be deposited with the Registrar General of the High Court within one month of the date of the order. The respondent No.6 National Highways Authority of India (shortly referred to as 'the NHAI') was further directed to proceed in the matter forthwith and take possession of the Highway project and ensure that collection of toll is deposited in a separate

account and the work of repairs of the highway commenced within a week and the work of construction of highway commenced and completed within a month thereafter. The High Court further issued direction that the entire matter relating to the contract, the completion of the work of the highway, collection from tolls without existence of six- lanes be enquired into and a report in that regard be placed before the High Court within three months. It was also made clear that the enquiry shall not be construed to be an excuse to delay the construction of the highway. It was further observed that the Chairman, NHAI shall be personally responsible for ensuring that the work of six-laning of the highway between Panipat and Jullunder is completed within six months failing which the Chairman, NHAI would be held personally liable to pay fine similar to the terms imposed on the Concessionaire Company –respondent No.7. The appellant-Concessionaire Company has, therefore, come up to this Court challenging the impugned order passed by the High Court.

3. The substantial questions of law of general and public importance that emerge for consideration in this appeal inter alia may be crystallised as follows:

i Whether the directions issued by the High Court which have far reaching consequences against the petitioner/appellant and which directions by a judicial fiat, has the effect of nullifying the terms of the Concession Agreement dated 09.05.2008 defeating the rights and obligations arising therefrom in a Public Interest Litigation while exercising jurisdiction under Article 226 of the Constitution of India is an act of judicial overreach under the garb of public interest? ii Whether the terms and conditions of a concluded contract can be nullified by the High Court by issuing sweeping directions in an ongoing Public Interest Litigation Petition which renders the terms and conditions of the Concession Agreement between the contracting parties redundant at the instance and initiative of the Court itself when such directions has not even been sought by any of the parties to the Public Interest Petition?

iii Whether a Bench of the High Court which is seized of a particular dispute would be justified in not taking note of the final judgment and order passed earlier by a co-ordinate Bench settling the said controversy in view of which no direction could be issued by the High Court nullifying the contractual rights of the affected party?

4. In order to appreciate and adjudicate the controversy involved and to put the matter in proper perspective certain factual background may be related which disclose that this appeal by way of special leave petition has its genesis in a writ petition bearing CWP No. 13848/1998 which came to be filed in the High Court of Punjab and Haryana at Chandigarh as a public interest litigation on 25.7.1998 by the respondent No.1 herein Harish Kumar Puri whose son had died in a road accident on 14.5.1996 at Pipli Chowk, Kurukshetra due to the criminal negligence alleged on the part of the traffic police posted on the said chowk. In the PIL, the respondent No.1 Mr. Puri prayed for issuance of a writ in the nature of mandamus directing for enforcement of traffic rules and to maintain the signal system, rumble strips on crossing, first aid units, control over speeding on G.T. Road National Highway No.1 and a further writ or direction holding the State functionaries liable for the criminal negligence on the part of its employees and saddle it with monetary liability.

5. Interestingly, this writ petition which was filed as a PIL with the laudable object of improving management of traffic on the highway in the interest of the commuters and the public at large over the years metamorphosed into a long drawn litigation alleging breach of contractual obligations between the appellant-concessionaire company and the respondent No.7 NHAI wherein the respondent Union of India as also the respondent/PIL petitioner in the High Court have jumped into the fray giving rise to several rounds of litigation. In the process it affected the very purpose and object for which the writ petition had been filed as also the construction of the Highway for which a concession agreement had been executed between the appellant-concessionaire company and the respondent No.6 NHAI by way of a competitive bidding process during pendency of the PIL as a step towards resolving the issue of management of traffic.

6. While tracing out the background of the matter, bereft of not so essential factual details, it may be sufficient to state that the Division Bench of the High Court issued notice of motion on 1.9.1998 in the writ petition (PIL) which came up before the High Court for consideration from time to time spanning over several years and finally on 11.4.2002, an order was passed by the High Court on 11.4.2002 for impleading the Secretary to the Government of India, Ministry of Road Transport and Highways, New Delhi when the issue came up regarding non-opening of the railway bridge near Dera Bassi for the general public. Several years thereafter, notice was also issued to the National Highways Authority of India (NHAI) to appear before the High Court through its authorized representative as on 9.5.2008 a Concession Agreement had been executed between NHAI and the appellant-company since the appellant succeeded in a competitive bidding process by which it was granted exclusive rights, license and authority to construct, operate and maintain its project namely, six-laning of a part of NH 1 from KM 96.00 to KM 387.100 (approximately 291.10 KM) from Panipat to Jullundur for a period of 15 years. While awarding the contract, the credentials and track record of the appellant was taken note of which indicated that the appellant M/s Soma Isolux NH One Tollway Pvt. Ltd. is a joint venture company with Isolux Corsan Group which is a multinational company having vast experience of Infrastructure Development in various part of the world including Europe, South America, North America and Asia and has successfully developed Highway Projects in various countries including Spain, Mexico, Brazil, India etc. Isolux Corsan Group is the leading European Investor in infrastructure in India and M/s Soma Enterprise Ltd. is a renowned Development Construction firm and has several National Highway Projects in the past 13 years and have completed projects ahead of schedule. It has also undertaken and completed projects in other infrastructure sectors like Irrigation Hydro Power and Railways.

7. The Concession Agreement envisaged reciprocal obligations from various parties including NHAI, the State of Haryana and the State of Punjab. Under Clause 4.1.2 (a) NHAI is/was required to provide right of way and the appellant-company is/was entitled to demand and collect appropriate fee commonly known as toll fee from vehicles and persons liable to pay toll fee for using the national highway. The Concession Agreement was drafted as per the model approved by the Planning Commission of India and the draft concession was in fact circulated with the RFP (Tender Document) and, therefore, neither the appellant-company nor the NHAI could have changed the contents of the agreement pursuant to the award of contract.

8. In so far as the financing and investment to the Highway Project is concerned the agreement envisaged that the appellant-company and the NHAI would be on the basis of Build, Operate, Trade (BOT) mode which enumerated that the project being in BOT mode, all investment in the project will have to be made by the appellant-company by the income generated from toll collection and no amount was to be invested/received from the NHAI. On the contrary, the appellant-company as per the Agreement, offered to pay to the respondent/NHAI premium equal to 20.14 per cent of the total collection of toll for the first year and this premium was to be increased by one per cent every subsequent year. Based on a detailed analysis of the Concession Agreement, the NHAI thus is not only not funding any part of the project development cost, it is receiving a significant portion of the revenue collected as premium by way of collection of toll. However all the amount collected by way of toll were to be deposited in the ESCROW account as a result of which any amount from this account cannot be withdrawn by the appellant without signature from the other contracting party i.e. NHAI. It may further be noted that the agreement between the appellant and respondent/NHAI acknowledges and confirms the role of lending institutions, mainly nationalised banks as a major significant holder in project implementation. All the financial agreement dealing in the administration occurred between lending institutions and the appellant and the financial model for the project had been submitted regarding revenue and approval prior to the commencement of the project. Agreement entered into between the appellant/company and the NHAI also envisages continuous support and co-operation from the respective State Governments of Punjab and Haryana and the Concession Agreement as per Article 47.3 requires the execution of Tripartite State Support Agreement between NHAI, Concessionaire and respective State Governments for which support agreements were signed by the State of Punjab on 11.9.2009 and the State of Haryana on 16.9.2009. As per the agreement six laning was to be retrofitted on the existing four-lane as per standards and specifications which temporarily was to put the travelling public to some inconvenience. On 8.9.2008, the Division Bench of the High Court which was seized of the matter passed an order impleading M/s. Himalayan Expressway Limited as respondent No.7 herein and on 11.9.2009 the State Support Agreement mentioned hereinbefore was executed between the Governor of the State of Punjab, NHAI and the appellant-company regarding the obligations of the Government of Punjab and its continued support for grant of certain rights and authorities for mobilization of resources by the appellant-company. The agreement visualizes continuous support and co-operation of the Government of Punjab.

9. In the meantime, the writ petition/Public Interest Litigation which was pending in the High Court during pendency of which the Concession Agreement was executed, continued to be taken up by the High Court and various directions came to be passed from time to time by the High Court in course of hearing of the PIL.

10. The High Court thereafter vide order dated 2.1.2012 on an oral request impleaded the appellant-company as a party respondent and issued notice to it on 2.1.2012 to ascertain the progress of the Highway Project. The appellant-company responded to the notice and sought time to file its reply. Thereafter, on 28.1.2012, an affidavit was filed by the Project Chairman, NHAI, Ambala before the High Court in the pending PIL informing the status of Panipat – Jullundur Section of NH 1 stretch from KM 96.000 to KM 387.100 wherein it was stated that the Concessionaire-appellant company could not achieve the milestone –II on the specified date due to delay in various clearance,

tree cutting, utility shifting etc. and further stated that the scheduled six laning date has been extended to 15.6.2012. In the meantime and in response to the notice, the appellant also had filed affidavit on 12.3.2012 giving details of the progress of the construction on the highway as also the difficulties and impediments encountered in the construction.

11. The High Court however refused to consider even remotely the reasons for the delay in the progress of the Highway Construction, much less scrutinized it and further failed to examine or even visualise as to why the appellant/concessionaire company, which within a period of three years had constructed 71 % of the highway project had suddenly slowed down for the rest 29% of the project. In the process it further refused to consider whether there were bonafide reasons for the delay on the part of the appellant/concessionaire company or the delay was on account of the impediments created by the NHAI violating the terms and conditions of the Agreement as also ignored even the reasoned judicial orders passed earlier by a co-ordinate Bench of the Punjab and Haryana High Court itself which had permitted the appellant to shift the toll plaza in view of the terms and conditions in the Agreement which were conveniently ignored by the NHAI contrary to the opinion of its own Independent Engineer whose opinion in terms of the Agreement was binding on the NHAI and the same has been upheld by the High Court by several judgments and orders settling the controversy. It further failed to take note of the fact that the High Court itself had stayed the show cause notice issued by the NHAI to the appellant/company for terminating the contract and had it not been stayed/ordered to be kept in abeyance, the cause as to whether the delay was on the part of the appellant/company or on account of unreasonable stand of the NHAI which was contrary to the terms and conditions of the Concessionaire Agreement would have come to the fore. However, the High Court never addressed itself on these aspects but was pleased to pass an order on 13.3.2012 inter alia directing the functional head of the appellant-company as also the Director-Officer-Incharge of the Project to remain present in Court on the adjourned date of hearing. The presence of the Chief General Manager of the NHAI along with the Project Director was also ordered as it was directed that the representative of the Concessionaire company as well as the NHAI will come prepared to respond to all questions as may be raised by the Court with regard to the completion of the project within a particular time frame and shall also come ready to execute the necessary undertakings before the Court for completion of the project with the time schedule.

12. The matter was thereafter listed before the High Court on 22.3.2012 wherein it was submitted that the Haryana Section of the Six Lane Highway was expected to be complete by December 2012 and the Punjab Section was expected to be complete by March 2013. The High Court however failed to scrutinise the cause of delay and refused to take into consideration the terms of the Concession Agreement under which the respondent No.6 NHAI was under the contractual obligation to grant approval to shifting of Toll Plazas, straightaway perhaps on an overall impression observed that there has been inordinate delay in conducting the project and hence directed the appellant-company to submit an undertaking before the Court for completion of the project as per the schedule mentioned by the appellant No.2 before the High Court in the form of an affidavit.

13. In compliance to the same, a detailed affidavit further was filed by the appellant No.2 on behalf of the appellant-company wherein it was submitted inter alia that there were certain bottlenecks existing between the appellant/company and the respondent NHAI in regard to contractual

violations which were adversely affecting the efforts of the appellant/Concessionaire company in achieving the project completion. However, it was added that the Concessionaire-company shall be making all out efforts to complete the project highway within 12 months from the date of clearance of all obstructions that currently existed between the appellant and the NHAI. The High Court, however, directed the appellant to file a clarificatory affidavit by 2 o'clock on the same date which was submitted in the Court.

14. However, in order to check the authenticity of the difficulties expressed by the appellant, the High Court thought it appropriate to get it verified by directing the parties to hold a joint meeting of the appellant/Concessionaire company and the respondent/NHAI and any other authority that may be involved and steps be taken to remove the obstructions and difficulties in completing the construction of the highway if that were found to be actually existing. It was also directed that a report in this regard including such steps as may be taken for completing the project be submitted before the High Court.

15. In pursuance to the order passed by the High Court, a meeting was held on 12.4.2012 under the Chairmanship of Secretary to the Government of Punjab, Department of Public Works (B & R) between the appellant-company represented by the appellant No.2 and other officers of the appellant-company and various officials including that of the NHAI. Another meeting also took place on 14.4.2012 between the officers of the State of Haryana, the officers of the appellant-company and various officials including that of the NHAI. An affidavit was, thereafter, filed by the Director of appellant-company on behalf of the appellant-company to complete the project obviously anticipating that the respondent/NHAI will remove the impediments which was coming in the way of completing the project which was also the contractual obligation of the respondent NHAI.

16. The Division Bench of the High Court however, did not feel convinced and satisfied, hence passed an order on 19.4.2012 wherein it observed that the appellant-company is not serious about the undertaking given to the Court and that it entertained serious doubts with regard to sincerity of the appellant-company to complete the work within the time frame undertaken. The High Court, therefore, directed that in the event of work not completed on schedule which was December 2012 and March 2013 which were the dates furnished by the appellant-company to complete the project before the Court, it would be liable to pay a sum of Rs. 50 crores by way of penalty and its Director Shri Patri Ramachandra Rao who was responsible for running the day-to-day affairs of the company would be personally liable to the extent of Rs. 5 crores. The High Court further observed that the Concession Agreement appears to be one sided in its application i.e. in favour of the Concessionaire and contrary to public interest ignoring the fact that the terms and conditions of the agreement were in consonance with the guidelines of the Planning Commission which had been approved by the Government of India. The High Court thereafter directed that the matter be listed after two months for further monitoring.

17. The appellant in the meantime preferred a Special Leave petition (Civil) No. CC 8974/2012 before this Court on 3.5.2012 which was later dismissed as subsequent development had taken place in the High Court itself. Thereafter, the Division Bench of the High Court on 6.7.2012 modified the

order dated 19.4.2012 and increased the penalty to be paid by the appellant-company to Rs. 60 crores and the personal liability of the Director of the appellant No.1 company to Rs. 7 crores in case the project was not completed within the time granted by the Court on 19.4.2012.

18. On 3.8.2012 when the matter was further listed before the High Court, the counsel for the appellant-company informed the Court that the NHAI had issued a show cause notice to the appellant as to why the contract be not terminated. The High Court, however, passed an order that the operation of the show cause notice issued by the NHAI be kept in abeyance till further orders. In the said order, the High Court also directed the Ministry of Defence, Government of India to pass an appropriate order regarding the land needed for widening of NH 1 falling within the area of Jullundur Cantt. in the State of Punjab and granted 15 days time to the authorities concerned to do the needful. The High Court vide Order dated 24.8.2012 also directed the Ministry of Defence, Government of India to hand over the land for widening of the National Highway forming part of the Concession Agreement against which the Ministry of Defence approached this Court by filing a Special Leave Petition bearing No. 26544-26545/2012 which however were dismissed vide Order dated 5.9.2012 granting further six weeks time to the authorities concerned to comply with the orders and directions issued by the High Court. The Ministry of Defence, Government of India, thereafter handed over the land for the project to the appellant in October 2012 after dismissal of the special leave petitions before the Supreme Court on 5.9.2012. According to the appellant's plea the work at the said defence land could not commence due to utility shifting, boundary wall shifting in 4 kms. of length.

19. In order to explain and highlight the impediments faced by the appellant-company seeking extension of time to fulfill its undertaking, the appellant/company filed an application bearing C.M. No. 14936/2012 in the pending writ petition in the High Court of Punjab and Haryana at Chandigarh which is pending disposal. It was stated therein that the appellant/concessionaire company was making every effort to complete the six laning works at the earliest provided there was complete co-operation by all concerned and work was not hampered for any reason beyond the control of the concessionaire as the agreement itself envisaged continuous support and co-operation from the respective State Governments of Punjab and Haryana and the Concession Agreement as per Article 47.3.

20. The appellant in its application came up with a case that the highway in question commenced on 11.5.2009 which was the appointed date and the appellant has been diligently proceeding with the work upon declaration of the appointed date by the respondent. However, the project work were adversely affected on account of several impediments, delays, which according to the appellant are solely attributable to the respondent NHAI. The appellant company submitted that it has been carrying on its obligation under the existing Concession Agreement towards construction of the aforesaid six lane highway earnestly in a professional manner and to the best of its ability and in spite of the impediments and difficulties, obstructions and hindrances, the appellant-Concessionaire till date has completed 71.06 per cent of the work in the project highway as on May 2013. However, due to certain circumstances beyond the control of the appellant-company, the project was getting delayed. The appellant while explaining the delay, stated that in spite of extremely adverse site conditions since commencement of the project, it has managed to complete substantial portions of

the project highway because of its well preparedness and adequate mobilization of resources. It has been submitted on behalf of the appellant that the appellant-Concessionaire is fully geared up for the completion of the project provided the two main impediments/obstacles namely the stringent conditions of mining in the States of Punjab and Haryana and the shifting of Toll Plaza which was hampering the only source of revenue for the Concessionaire were resolved which were the main reasons for non-completion of the project highway. Thus, it had been submitted that the flow of work in the project highway had been hindered/slowed down due to various reasons beyond the control of the appellant-company which was primarily attributable to the NHAI.

21. Since the High Court by its impugned judgment and order has permitted the NHAI to take away the project from the appellant due to slow progress of the National Highway Project and has also imposed heavy fine on the company for violating its undertaking in completing the project, the appellant has sought to explain the reasons in detail for the alleged slowing down of the project. It has been stated that one of the major constraints that the appellant faced and which vitally affected the normal flow of work of the project in question was and is the non-availability of an essential raw material, namely, stone aggregate in the States of Punjab and Haryana due to the stringent conditions of mining of the said material in Haryana with effect from 1.3.2010 and in Punjab with effect from January 2011. However, in course of arguments the plea regarding non-availability of supply of raw material, namely, stone aggregate was not seriously pressed as it was submitted that the appellant would try to sort it out and avail the material from the adjoining states.

22. What has seriously been contested and is the core contentious issue between the appellant and the respondent-NHAI, which is hindering the completion work of the project highway is non-relocation of the Toll Plazas by the NHAI at two locations at KM 110 and KM 211 at Karnal and Ambala for which the appellant-Concessionaire had approached the appropriate authority ever since March 2010 which is hampering the only source of revenue for the appellant-Concessionaire Company. It has been explained that as per the policy of NHAI (referred to hereinbefore) approved by the Planning Commission and as per the Concession Agreement entered into between the parties, tolling is allowed during the construction of the project from four laning to six laning. Article 3 of the Concession Agreement which grants the Concessionaire by virtue of Article 3.1.2. (d) entitled the Concessionaire to demand, collect appropriate fee from vehicles and persons liable for payment of fee for using the project highway or any part thereof or refuse entry of any vehicle if the fee due/toll fee is not paid. Internal accruals from the tolls during construction are part of the financing package agreed with the lenders and critical to enable financing for the project as already recorded hereinbefore.

23. On the question of relocation of toll plaza, it has been submitted that the Concession Agreement allows the appellant company to choose the location of Toll Plazas in consultation with the Independent Engineer and the authority as per the explicit provisions in this regard agreed between the parties in the Concession Agreement. In this context, attention of this Court has been invited to clause 2.1 of Schedule 'C' and Article 48 of the Concession Agreement which reads as follows:-

Clause 2.1 of Schedule 'C' "Toll Plaza means the structure and barriers erected on the project Highway for the purpose of regulating the entry and exist of vehicles in accordance with the

provisions of this Agreement and shall include all land, buildings, equipment and other facilities required in accordance with or incidental to the provisions of this Agreement; situated at locations to be decided by the Concessionaire as per Schedule D in consultation with NHAI and IE". The tentative locations of the Toll Plazas are given in Appendix-I." Article 48 defines Toll Plaza as "the structure and barriers erected of the project highway for the purpose of regulating the entry and exit of vehicles in accordance with the provisions of this Agreement and shall include all land, buildings, equipment and other facilities required in accordance with or incidental to the provisions of this Agreement; provided that such toll plazas shall not be erected within a distance of 20 km and 10 km from the notified urban of Karnal, Ambala, Ludhiyana, Jalandhar cities and Gharonda, Nilokhere, Kurushetra, Shahabad, Rajpura, Sirhind Mandi Govindgarh, Khanna, Doraha, Sahniwal, Pillore, Goraya, Phagwara towns respectively as notified on the date of this Agreement and shall be situated at locations to be decided by the Concessionaire in consultation with the Independent Engineer."

24. Placing heavy reliance on the aforesaid clause of the Concession Agreement, learned Senior Counsel Dr. Abhishek M. Singhvi has submitted on behalf of the appellant-Concessionaire that it has the exclusive right in accordance with the provisions of the Concession Agreement to choose the location of Toll Plazas in consultation with the Independent Engineer and NHAI. It was, therefore, submitted that the existing Toll Plazas at KM 146 and KM 212 were proposed to be shifted to KM 110 and KM 182 with the 3rd Toll Plaza at KM 328 retained at the existing location in view of the contractual rights of the appellant to fix the Toll Plaza location and recommendations of Independent Engineer for relocation of the existing Toll Plaza at KM 146 and KM 212 to KM 110 and KM 211 respectively vide letter dated 9.11.2010 issued by the Ministry of Road Transport and Highways to the Regional Officer (Punjab and Haryana), National Highways Authority of India, the appellant started the construction of Toll Plazas and subsequently the Haryana Government on 4.7.2011 put forward the requirement to shift the Toll Plaza from the approved location at KM 182 to KM 211 in consultation with the respondent. It has further been stated that based on the discussion between the Haryana Government and the respondent on the issue, the respondent sought consent of the appellant regarding proposal of the Haryana Government for shifting of Toll Plaza to KM 211 in lieu of the Toll Plaza at KM 182 for which the in principal approval was granted earlier.

25. In order to honour the proposal of Haryana Government and keeping in view the national interest and public utility of the project, the appellant agreed to follow the proposal of Haryana Government to relocate the Toll Plaza at KM 211 instead of KM 182. The appellant reserved its rights regarding the shifting of Toll Plaza as per the provisions of the Concession Agreement while communicating its willingness to follow the proposal of Haryana Government as suggested by the respondent. Subsequently, the respondent NHAI gave approval for relocation of Toll from KM 213 to KM 211.550 to 212.250 on the basis of recommendation of the Independent Engineer, consent of appellant and the Government of Haryana vide its letter dated 11.10.2011.

26. The aforesaid order of shifting of Toll Plaza gave rise to further litigation as a fresh spate of public interest litigations were filed in November 2011 in the High Court of Punjab and Haryana against the relocations of Toll Plazas since a writ petition bearing CWP No. 21332/2011 (Gram Panchayat Dangdehri & Ors. vs. Union of India & Ors.) was filed against the relocation of Toll Plaza KM 110 but the same was dismissed by the High Court of Punjab and Haryana vide order dated

25.1.2012 wherein it was held as follows:

“Moreover, shifting of Toll Plaza from the present location to the proposed location seems to be bona fide in view of the fact that at the present location flyover has to be constructed to ease the traffic flow within stipulated time as per the agreement. Development and construction of National Highway should not be stopped for the simple reason that some of the residents shall face inconvenience or shall be burdened with toll fee.” The High Court further held:

“the NHAI and Concessionaire while choosing the site for installation of Toll tax have to consider viability, availability of space/location including financial aspectTherefore, action / decision to shift Toll Plaza within 1.5 KM from Ambala Municipal Limit does not seem to be unjustified, arbitrary or in violation of Rules 2008..... shifting of Toll Plaza is necessitated to facilitate construction of flyover at the present site.”

27. Another writ petition being CWP No. 23971/2011 (Vishal Nagrath & Ors. Vs. Union of India & Ors.) had also been filed challenging the relocation of Toll Plaza at 211 KM – 212 KM but the same was dismissed by the High Court of Punjab and Haryana vide order dated 1.5.2012 wherein another Bench of the High Court had also not found any infirmity in the decision of the respondents (appellant herein and NHAI) to relocate the Toll Plaza and they were held to be well within their right to evaluate the location of the Toll Plaza considering the fact that they were being located with reference to the entire project of 291 KM and the requirement was to have only three Toll Plazas which had to be so located that they did not result in a situation of peristalsis movement of the traffic or even create bottlenecks. The Court went on to hold that such decisions were to be left to the wisdom of the agencies involved in the execution of the project and merely because another location may be perceived to be the better one, cannot be a ground to warrant judicial interference.

28. The PIL petitioners challenged this order of the single Judge by filing a Letters Patent Appeal bearing LPA No. 170/2012 but this was also dismissed by the High Court of Punjab and Haryana vide order dated 6.12.2012. While dismissing the appeal, the learned Judges of the Division Bench had clearly held which is extracted hereinunder:

“The argument that the shifting of the toll plaza is actuated with arbitrariness or mala fide is also to be rejected. Learned Single Judge, in this behalf has remarked, and rightly so, that the shifting of toll plaza to the present location seems to be bonafide in view of the fact that at the present location fly over has to be constructed to ease the traffic flow within stipulated time as per the agreement and development and construction of National Highway should not be stopped for the simple reason that some of the residents shall face inconvenience or shall be burdened with toll fee.

Before we close, we would also like to point out the submission of learned senior counsel for the National Highway Authority of India as well as the Concessionaire to the effect that in so far as the local residents are concerned, they would have to pay the toll at much lesser rate, which is projected at Rs. 150/- per month per vehicle.

Normally, the choosing of location of Toll Plaza is to be left to the parties concerned. When in the present case, two States as well as government undertaking like the National Highway Authority of India are involved in the decision making process and they have considered financial aspects, the Courts are ill equipped to go into the rationale of such decisions. After it is found that the decision is bonafide; it does not suffer from any oblique motive; and it is not in violation of any statutory provisions, no further judicial scrutiny on the merits of such a decision is admissible in law.

We, therefore, do not find any merit in this appeal which is accordingly dismissed.” The judgment and order passed in the LPA was thereafter never challenged either by the PIL petitioner or the respondent NHAI or the respondent- Harish Kumar Puri and this judgment and order passed in the LPA thus attained finality.

29. However, despite the orders passed by the High Court of Punjab and Haryana and approval granted by the respondent NHAI, the appellant has been prevented from commencing tolling at located Toll Plaza at 211 KM and 110 KM due to which it is contended that the appellant is gravely affected and is losing substantial fund due to non-commencing of tolling at the located Toll Plazas that could have been utilized for the construction of the project. It has been urged that the NHAI has all along been consistently stating that the Toll Plaza relocation is as per the Concession Agreement. Based on this assurance, the lenders have continued disbursement to the project. Thus, the respondent by granting of approval and re-affirming the appellant Concessionaire right to relocate the Plazas, has induced the appellant and lenders to invest in construction of the project but the NHAI has now reversed its decision after 2 ½ years in spite of giving the in principal approval.

30. It has been submitted by Dr. Singhvi that the above change in stand of the respondent on the Toll Plaza relocation and disallowing the appellant-Concessionaire’s rights under the Concession Agreement has a material adverse affect on the concession as the entire investment on the project was based on its right to enforce the provision for shifting the Toll Plazas i.e. fixing the Toll Plaza location to have optimum toll collection as envisaged in its financial model. As a result, the lenders have stated that they cannot continue disbursing to the project without the appellant being allowed to collect toll from the new locations.

31. It appears that the appellant although had succeeded in the High Court of Punjab and Haryana on the dispute regarding shifting of Toll Plaza, the appellant approached the High Court of Delhi in view of Clause 47.1 of the Concession Agreement under Section 9 of the Arbitration and Conciliation Act, 1996 by filing OMP No. 321/2013 which is pending disposal before the Delhi High Court wherein the appellant inter alia has raised several issues before the High Court of Delhi including the issues of mining as well as the relocation of the Toll Plaza. It was informed that OMP No. 321/2013 is still pending consideration before the High Court of Delhi but the fact remains that the

issue/dispute regarding shifting of Toll Plaza had already been set at rest by the High Court of Punjab and Haryana as already related hereinbefore.

32. However, the High Court in its impugned order manifestly appears to have ignored or failed to take notice of the orders by which the High Court vide CWP No. 21332/2011 and CW No. 23971 of 2011 and LPA No. 170/2012 had permitted vide order dated 6.12.2012 to shift the Toll Paza and completion of the highway project entrusted to the appellant vide Concessionaire Agreement which had been approved by the NHAI itself vide letter dated 30.6.2010.

33. However, the NHAI which had approved the shifting of Toll Plazas all through suddenly took a U turn after 2 ½ years when a new Chairman of the NHAI took over the charge on 18.3.2013 and started questioning the decision of the NHAI for the first time which had been approved by an independent Engineer Louis Berger permitting shifting of Toll Plazas earlier by the NHAI stating that it was an error and a malafide decision of some of the officers of the NHAI oblivious of the fact that the same had already been upheld by the High Court after contest when the PIL filed against the shifting of toll plaza had been rejected by the High Court upto the Division Bench against which no appeal was preferred either by the NHAI or any other party. In fact, at the initial stage, the counsel representing the NHAI had submitted that shifting of Toll Plazas is contrary to the Concession Agreement but the same could not withstand the express clause in the Concession Agreement which permitted such shifting with the approval of the NHAI and Independent engineer who under the agreement was competent to approve or disapprove the shifting. Confronted with the glaring contradiction, the then counsel representing the NHAI went on to advance other arguments which were never raised before the High Court at any point of time earlier.

34. Contesting the plea of the appellant and supporting the directions issued by the High Court in its impugned order, Ms. Indu Malhotra, learned senior counsel appearing for the respondent NHAI at a much later stage submitted that the appellant was required to complete the project of six laning of National Highway No.1 by November 2011 under the Concession Agreement. But even though two years have already elapsed since the period stipulated in the Concession Agreement got over, the progress of the National Highway project has been negligible since January 2012. It is alleged that the appellant, in fact, is not carrying out any work whatsoever since November 2012. It was submitted that several opportunities had been granted to the appellant to complete the project within the period stipulated and several extensions were also granted up to 31.3.2013. Despite this, appellant has failed to complete the project. It was elaborated that the appellant has practically suspended work on the National Highway ever since November 2012 even though toll is being collected from the commuting public since 11.5.2009 which is the appointed date. The NHAI in support of its bona fide has urged that it is primarily concerned with completion of the project highway in the interest of safety and security of the public at large, but the appellant having put the project on hold by not doing any progress in completing the construction of the highway, the respondent-NHAI should be allowed to substitute the Concessionaire as per the provisions of the Concession Agreement. It has been further urged that the appellant has been flouting the undertaking given to the Punjab and Haryana High Court and thus the impugned order passed by the High Court should not be interfered with.

35. On the most contentious issue regarding shifting, relocation of the Toll Plaza, it has been submitted that there is no provision in the Concession Agreement for shifting/relocation of the Toll Plazas from the pre-determined locations set out in the bid documents. Similarly, it has also been submitted that Clause 48.1 of the Concession Agreement put forth by the appellant that it has an unfettered right to decide locations of Toll Plaza at any three places over a stretch of 291 KM of National Highway No.1 in complete disregard to the locations mentioned in Appendix I of Schedule 'C' to the Concession Agreement is wholly untenable, misconceived and is contrary to the provisions and the overall scheme of the Concession Agreement. Such interpretation, if accepted, would not only alter the basic structure of the Concession Agreement but also would subvert the bid process. It was further added that changing the bid parameters subsequent to the award of the project, is not only against the public policy, but also unjust to the other unsuccessful bidders and would amount to unjust enrichment of the concessionaire at the cost of local public which is not liable to pay such user fee as per the original scheme of the Concession Agreement.

36. It was still further contended on behalf of the respondent-NHAI that the appellant also made an attempt to read Clause 48.1 of the Concession Agreement in isolation and in complete disregard to its schedules and annexures, but the provisions of the contract are to be read as a whole and not in isolation. Hence if the definitions of Toll Plaza in Clause 48.1 of the Concession Agreement and Clause 2.1 of Schedule 'C' are to be read together, it broadly covers three aspects. Firstly, the Toll Plazas shall not be erected at a distance of 20 KMs and 10 KMs from the notified urban limits of the respective towns as stated therein. Secondly, the Toll Plazas should be situated at locations to be decided by the Concessionaire in consultation with NHAI and Independent Engineer and thirdly the tentative locations of the Toll Plazas which are given in Appendix I. Elaborating on this aspect, it was urged that the locations of Toll Plazas were clarified to bidders and the ambiguity, if any, in the locations of the Toll Plaza as per the word "Tentative" mentioned in Appendix I of Schedule 'C' stood frozen permanently beyond all doubts in view of the reply given to the pre-bid query. It is an admitted position that the schedules and annexures to the Concession Agreement forms an integral part of the Concession Agreement and would be in full force and effect as expressly set out in the body of the Concession Agreement. Relying on this provision, it was submitted that the limited discretion of the appellant to decide the locations in view of the words "Locations to be decided by the Concessionaire" in Clause 48.1, Clause 2.1 of Schedule 'C' and mentioning of word "Tentative" in Appendix I of the Schedule 'C' was only to overcome any unforeseen site constraints at the time of actual construction of Toll Plaza. The discretion available was only to marginally modify the location of the Toll Plazas with the approval of Independent Engineer and NHAI. The said discretion cannot be appended so as to apply to a situation where the appellant is permitted to shift the location of a Toll Plaza from the pre-determined locations as per Appendix I of Schedule 'C' of the Concession Agreement and further clarified in the reply to the pre-bid meeting, to another point that too at a distance of 36 KMs so that the appellant can mop up extra revenue. Adding further, it was contended that in view of Clause 48.1 of the Concession Agreement, Toll Plaza should not be relocated within 20 KMs and 10 KMs from the notified urban limits of the respective cities mentioned therein. Admittedly, the proposed location of Toll Plaza at KM 110 falls within a distance of 10 KMs of Municipal Limits of Gharonda and within 20 KMs of Municipal Limits of Karnal as well as of Panipat. In view thereof the relocation of Toll Plaza at KM 110 as set up by the appellant, if permitted, would be in complete violation of the definition of 'Toll Plaza' given in Clause 48.1 and

the same should not be permitted as that would amount to changing the terms agreed into between the parties.

37. Extensive arguments were further advanced on the point of shifting the location of Toll Plaza and it was contended that locations of Toll Plaza were determined even prior to invitation of the tender and approved by the Cabinet Committee on Economic Affairs. The locations of the Toll Plaza were identified as early as at the time of preparation of the feasibility report of the project and on submission of the feasibility report to the Ministry of Road Transport and Highways took transfer of the project from the Public Private Partnership Appraisal Committee and subsequent thereto the project was approved by the Cabinet Committee on Economic Affairs. It is only then the bids for the project were invited with the pre-determined locations of Toll Plazas specifically mentioned in the bid documents. Thus, locations of Toll Plaza were approved by the Government of India keeping in view the various factors involved including the total project costs of the project. In view thereof, the locations of the Toll Plaza were final right from inception and are part of statutory approval. In view of this, it was submitted that shifting of the Toll Plaza would completely change the bidding parameter and the total project costs, on the basis of which bids were invited from various bidders. In support of this, counsel relied upon a decision of this Court in *Monarch Infrastructure (P) Ltd. Vs. Commissioner, Ulhasnagar Municipal Corporation*, reported in (2000) 5 SCC 287 and submitted that this Court (Supreme Court) upheld the view that if a term of the tender is delayed after the players have entered into arena, it is like change the rules of the game after it had begun, which would be patently unfair to the other candidates participating in the tender process.

38. Learned counsel also submitted that the proposal seeking relocation of Toll Plazas was three times rejected by the Independent Engineer before its conditional recommendation leading up to the grant of conditional in principal approval. Giving out the details in this regard, it was pointed out that a proposal seeking relocation of the existing Toll Plazas was received by the Independent Engineer from the appellant vide letter dated 11.3.2010. The proposal of the appellant was rejected by the Independent Engineer vide its letter dated 18.3.2013, 2.4.2010 and 29.5.2010 as the Independent Engineer found the said proposal to be contrary to the provisions of the Concession Agreement. The Independent Engineer was of considered opinion that the relocation of Toll Plaza would amount to change in the scope of work. The Independent Engineer had rejected the proposal of the Concessionaire on the basis that these proposed locations contradicted the provisions of definition of Toll Plaza and Concession Agreement. Therefore, the Independent Engineer observed that he could not decide against the provision of Concession Agreement.

39. Learned counsel representing the NHAI although related the past history in great detail regarding denial of permission to shift the Toll Plazas, it could finally notice that the Independent Engineer vide his letter dated 30.6.2010 expressed that it is not in disagreement with the shifting of Karnal Toll Plaza although it noted that the same would amount to change in scope in view of the provisions of the Concession Agreement. But, thereafter the Independent Engineer vide its letter dated 10.07.2010 finally “opined that the shifting of location of the Toll Plaza may be allowed subject to approval of the competent authority keeping in view the various clauses of the Concession Agreement and the Gazette Notification issued by the Government of India.” Counsel for the NHAI however has still harped upon the previous background wherein the Independent Engineer had

initially expressed some reservations for shifting the Toll Plaza ignoring that after all opinion and counter opinion on the question of shifting of Toll Plaza, the Independent Engineer finally gave approval for shifting of the Toll Plaza vide letter dated 30.6.2010.

40. However, the same could not be made effective as approval of the Independent Engineer to shift the Toll Plaza gave rise to at least two public interest litigations referred to hereinbefore challenging the shifting of Toll Plaza whereby the High Court approved of the single Bench order permitting shifting of Toll Plaza as the Division Bench had dismissed the LPA upholding the order of the single Bench allowing shifting the Toll Plaza in view of the clause in the Concession Agreement and the opinion of the Independent Engineer and the NHAI. Neither the NHAI nor the PIL petitioners challenged the judgment and order of the High Court permitting to shift the Toll Plaza. One would have inferred that as a matter of judicial propriety ingrained in the principle of constructive res judicata and above all rule of law, the controversy regarding shifting of Toll Plaza attained finality in view of final adjudication of the dispute regarding shifting of Toll Plaza by the High Court of Punjab and Haryana but it is rather strange and beyond comprehension in view of the principle of constructive res judicata that the dispute regarding shifting of Toll Plaza was still allowed to survive as the appellant filed another writ petition in the High Court of Delhi seeking a writ of mandamus or any other appropriate direction permitting it to shift the Toll Plaza which writ petition finally was dismissed and rightly so as in any case the same could not have been held maintainable. It is equally interesting to note that in spite of all this exercise undertaken regarding the dispute pertaining to shifting of Toll Plaza, an application was filed under Section 9 of the Arbitration and Conciliation Act 1996 for appointment of an Arbitrator to resolve several disputes including shifting of Toll Plaza missing out that the dispute relating to shifting of Toll Plaza had already been dealt with on the judicial side by the High Court of Punjab and Haryana when two writ petitions and one LPA against shifting was rejected by the Division Bench of the High Court and yet the NHAI and the appellant/company has been litigating and contesting the plea regarding shifting of Toll Plaza.

41. In fact, we have noticed that it is only in the year 2013 i.e. 18.3.2013 when a new incumbent took over the charge as Chairman of the NHAI that a letter dated 18.3.2013 was issued wherein the proposal of the appellant for relocation of Toll Plaza was finally rejected stating therein that the in principle approval dated 9.11.2010 by NHAI was only conditional in nature and at the most were only recommendatory vide its letter dated 9.11.2010 ignoring that the Independent Engineer, earlier had approved of the proposal for shifting the Toll Plaza. In spite of these, the application is still surviving urging that the matter regarding shifting of Toll Plaza be decided in the arbitration proceedings and the NHAI should not be allowed to interfere with the decision of the I.E. and approved by the NHAI which earlier had endorsed the shifting. In fact, the NHAI seems to be completely oblivious of the fact that when the Division Bench of the Punjab and Haryana High Court had already settled the dispute by a speaking judgment and order in CWP No.21332/2011, CWP No.23971/2011 and LPA No.170/2012 permitting the shifting, what legal authority was left with the Chairman, NHAI to issue a letter questioning the shifting. It is rather strange that an authority in contemptuous disregard to a speaking judgment and order of the High Court had the audacity to defy the order which had permitted relocation of toll plaza and it is equally strange that the High Court also vide the impugned order, appears to have ignored the fact that the controversy regarding shifting of Toll Plaza although had been set at rest by a judicial verdict of the High Court, the NHAI

still insisted that it cannot permit the shifting when its I.E. (Independent Engineer) had earlier approved of the same and accepted by NHAI in view of the specific clause in the agreement to that effect.

42. In fact, the main contest although is between the contracting parties/signatories to the Concession Agreement which are the NHAI and the appellant company and the agreement had been signed and executed incorporating the terms and conditions in the agreement which had approval of the Planning Commission and the Ministry of Economic Affairs, the respondent No.5 Union of India appeared which was given a notice by this Court merely to facilitate and resolve the controversy between the contracting parties and admittedly is not a contracting party itself as it is not a signatory to the Concession Agreement. However, it has come up in support of the respondent No.6 NHAI which is represented by the Additional Solicitor General Mr. Paras Kuhad. However, the learned ASG Mr. Kuhad on behalf of the Union of India advanced arguments limited to the issue of permissibility of change of location of the Toll Plaza within the scheme of applicable statutory provisions as also the question as to the statutory status of the Central Government in relation to contract for development of national highways. Inter alia it was submitted that Section 4 read with Section 8 A(1) of the National Highways Act 1956 makes it clear that national highways vest in the Union and by virtue of Section 8 (A) (1), the power to enter into an agreement for development is also vested with the Central Government. However, there is no quarrel about this position and hence is not really required to be gone into or dealt with in extenso as this position is not disputed by any of the parties nor we have any doubt that the National Highways Authority is clearly an authority under the National Highways Act 1956 and it is the power of the Central Government to vest or entrust its authority in the National Highway Authority. We therefore entirely agree with the learned ASG to the extent that it is the Central Government which may from time to time by notification in the official gazette vest in or entrust to the authority such national highway or any stretch thereof as may be specified in such notification. This is clearly the provision also under Section 11 and Section 15 (2) and (3) of the National Highway Authorities Act 1988 and Section 15 (2) of the said Act clearly lays down that subject to the provisions of sub-section (1), "the form and manner in which any contract shall be made under this Act shall be such as may be provided by Regulations." Sub-section (3) of Section 11 of the Act 1988 further clearly lays down that no contract which is not in accordance with the provisions of this Act and the regulations shall be binding on the authority. Rule 3(2) of the Rules of 1997 framed for collection of toll fees under the National Highways Authority of India Act 1988 further lays down that no contract which is not in accordance with the provisions of this Act and the regulations shall be binding on the authority and the rates of fees and the period of collection shall be decided and shall be specified by notification in all official gazette by the Central Government having regard to the expenses involved in building, maintenance, management and operation of the whole or part of such section, interest on the capital invested, reasonable return, the volume of traffic and period of such agreement.

43. Although, the learned ASG has cited several authorities to establish the provisions incorporated under the National Highways Authority Act, we do not find any difficulty in accepting the position even without the ratio of the authorities relied upon, that in case of statutory contracts, the terms of the statute prevail over the terms of the contract. Therefore, determination of the terms and conditions of the contract will no doubt follow the deliberations, discussions and views expressed by

the Central Government while drafting the contractual agreement and the National Highways Authority being an agency of the Central Government in terms of the Act itself which has to incorporate the terms and conditions which is finally included in the draft agreement of the NHAI. But once the contract is signed by the contracting parties obviously the contract having assumed the legal authority of a concluded contract would govern the terms and conditions of the contract between the parties who have signed and thereafter would be binding on the contracting parties. But to contend that even though the contract stands concluded after the same has been signed by the contracting parties, the opinion of the Central Government on its administrative side will prevail over the terms and conditions of the contract in absence of any statutory violation, would be difficult to accept and it is not even the case in the instant matter that the terms and conditions in the Concessional Agreement is contrary to some statute or a central legislation so as to strike down the clause in the agreement.

44. Therefore, we are of the view that the Concession Agreement having been signed by the appellant – joint venture company and respondent No.6 – NHAI, the role of the Union of India to express its view over and above the terms and conditions of the contract in absence of any statutory violation will not be allowed to prevail as after execution of the contract, it can only issue the notification in this regard. We, therefore, do not wish to go further in regard to the correctness or otherwise of the contentions urged on behalf of respondent No.6 – Union of India as its status under the prevailing facts and situation at the most can be treated as that of a facilitator and nothing more than that. The position no doubt would have been otherwise if the Concession Agreement suffered from the vice of some statutory violation. Since it is the appellant – joint venture company and respondent No.6 – NHAI which alone are the parties between whom the Concession Agreement has been signed and the agreement is not even remotely alleged to be in violation of some statute or central Act, the role or the authority of the U.O.I. to intervene or contest cannot be allowed as the U.O.I. at the most is a proforma respondent in this appeal under the prevailing facts and circumstances.

45. However, the respondent No.1 Harish Kumar Puri who had initially filed the public interest litigation in the High Court of Punjab and Haryana merely for ensuring safety and security of the commuters on the national highway has also entered appearance in the matter and has advanced submissions through the senior counsel Shri P.S. Patwalia and has practically supported the stand of the NHAI respondent No.6 as also the impugned order passed by the High Court which is under challenge in this appeal. Learned Senior Counsel Mr. Patwalia representing respondent No.1- PIL petitioner, inter-alia submitted that the excuse of non-shifting of Toll Plaza by the appellant/company is merely a ploy to justify its acts of delay in continuing with the project as it has been giving excuses one after another for the delay and every time comes up with a new lame excuse. According to his averment, the plea of leakage raised by the appellant in order to shift the Toll Point/Toll Plaza is merely a ruse for not completing the project. It has been submitted that no new access/cross roads joining the highway have been built and the so-called leakage/diversions as alleged by the appellant are the straight highways and the major roads are in existence for the last many many years. Respondent No.1- Mr. Puri has also stated that huge sums are being transferred from the Esrow accounts which should have been spent on the project. It had been added that the concessionaire while submitting financial model to the financial institution showed the project cost

as Rs.4517 crores against the actual project cost of Rs.2747 crores which has been done to secure higher borrowing which shows that the action of the appellant is not in public interest. It was also contended that the dispute regarding shifting of Toll Plaza was not an issue raised before the High Court. Hence, the appellant should not be permitted to raise this question before this Court as the shifting is not at all in public interest since the appellant by doing so merely wants to enrich itself at the cost of general public. It has further been contended that in the event of shifting only a very short stretch of road will be covered after which the commuters will have to cross through the Toll Plaza and the commuters of Haryana will have to pay a huge toll for the entire Haryana portion which at present is more than Rs.100/- per vehicle at the Karnala Toll Plaza. If the Toll Plaza is shifted close to the Panipat area, people traveling for extremely short distance and turning of the highway to go to other States like Himachal Pradesh, Uttarakhand and Uttar Pradesh via Yamuna Nagar will end up paying toll for the entire Haryana portion which will not be used by them. Similarly, if the Shambhu Barrier is shifted to the proposed location at Neelokheri, people who will travel for a negligible distance of Punjab highway and turn off the highway to go to Banaur and further to Himachal Pradesh and Jammu and Kashmir will end up paying Toll for the Punjab portion which they will never use. Thus, shifting of the Plazas will not be in public interest as toll can only be charged if the commuters are utilizing the facilities of the highway. It cannot be made as a compulsory extract fee so that even if a person who is using a very small portion of the highway should pay for the entire stretch of the Highway. It was finally submitted that the completion of the 70 per cent of the highway as claimed by the appellant is also factually incorrect as the highway consists of few phases for six laning as dotted with incomplete projects, half built flyovers abundant service lanes. According to respondent No.1 highway traveling is a nightmare for the traveling public faced with heavy traffic and ill maintained narrow diversions. Respondent No.1, therefore, has supported the impugned directions of the High Court by which the NHAI has been permitted to take over the project from the appellant and ensure its completion under its supervision. The respondent No.1 has also given figures of fatal accidents and injuries on NH No.1 falling in the district of Kurukshetra by which it sought to establish that the commuters are suffering heaving losses of lives, properties due to negligence and failure on the part of the appellant-company despite paying heavy but illegal toll at various toll barriers on this road from Panipat to Jullundur. Thus, in sum and substance respondent No.1 has sought to justify the order passed by the High Court and submitted that the penal consequences ought to be allowed to follow and should not be interfered with because of negligence and apathy on the part of the concessionaire/appellant herein.

46. Besides the above, an application for intervention also was filed by one Chander Prakash Kathuria who also has come up in support of the NHAI and has supported the direction of the High Court by which the High Court directed respondent No.6 NHAI to forthwith proceed in the matter and take possession of the highway and ensure that the work for the repair of the highway commenced within a week and the work for its completion commenced within a month thereafter. But, his intervention application having not been allowed, arguments could not be advanced. In any view, he also has merely supported the stand of the respondent No.1 and the other contesting respondents NHAI.

47. In any case, the High Court vide its impugned judgment and order has divested the appellant of its contractual authority to continue with the project as the Concession Agreement practically has

been annulled and rescinded since the NHAI has been clearly directed to take over the project from the appellant and ensure that the project is completed which clearly implies that the construction of the Highway for the rest of the area which is merely 29% of the project will have to be constructed by executing another contract in favour of some other construction company as it was informed to us that the NHAI itself does not execute the construction and will have to entrust the same to a new player/contractor. In fact, the erstwhile counsel Mr. Sethi who represented the NHAI earlier and was later replaced by Ms. Malhotra had submitted before this Court that a new contractor has already been appointed who is ready to take over the highway project for construction of the balance area of 29% where the construction has to be done. Thus, the Contractual Agreement has been nullified by the High Court although it was observed by the High Court itself that it is not entering into or touching upon the terms and conditions of the contract. The High Court has further imposed heavy penalty/fine of Rs.60 crores and Rs.7 crores respectively on the appellant- company and its director holding them exclusively responsible for delay and non-completion of construction of the highway between Panipat and Jullundur without entering into the cause of delay of the project as also without considering whether denial of permission by the NHAI to shift the toll plaza was in violation of the terms of the Agreement and whether the same is not in contemptuous disregard to the order of the High Court passed earlier by a co-ordinate Bench of the High Court referred to earlier.

48. Learned senior counsel Dr. Abhishek Manu Singhvi, therefore, has made detailed submissions by way of rejoinder to the arguments advanced by the contesting respondent No.6 NHAI which clearly is the main contesting respondent. Dr. Singhvi while countering the arguments advanced by the NHAI and the respondent No.1 Mr. Harish Kumar Puri has focused on the plea that the High Court while passing the impugned order has clearly ignored the contractual rights and obligations contained in the Concession Agreement dated 9.5.2008 but ventured into the arena without taking into account the contractual rights of the parties, thereupon nullifying the terms of the Concession Agreement. Learned counsel elaborated that the controversy adjudicated by the High Court vide the impugned order has emerged out of a public interest litigation filed in the year 1998 and the Concession Agreement dated 9.5.2008 was executed at a much later stage after ten years in 2008 between the appellant company and the respondent No.6 NHAI granting exclusive right, license and authority to construct, operate and maintain the highway on a Build, Operate and Transfer basis (BOT for short) for a period of 15 years. The rights and obligations between the parties have been determined by incorporating the terms and conditions which are contained in the Concession Agreement executed between the appellant and the NHAI but the High Court has completely ignored the contractual provisions and has passed directions which has practically nullified the terms of the contract.

49. Having analyzed the arguments advanced by the counsel for the contesting parties in the light of the terms and conditions of the Concession Agreement as also the contents of the impugned judgment and order of the High Court, it is difficult to overlook that the Hon'ble Judges of the High Court although have recorded that they did not intend to traverse the contractual obligations and liabilities of parties and confine their considerations as far as the orders passed by the High Court is concerned so as to see whether public interest require that the said order be extended or vacated, it has indeed done the same when it directed the NHAI to forthwith take possession of the Highway

Project which in effect has nullified the contract and has gone much further by directing the NHAI to ensure completion of the project which in effect mean that the NHAI would have to invite fresh tender for construction of the balance 29% area of the Highway Project as admittedly NHAI itself cannot undertake the construction. This clearly is nothing short of cancellation of the Concession Agreement and it is a misnomer when it observed that it was not traversing the contractual obligation ignoring its devastating effect on the contracting party who had completed 71% of the project and had at least the right to explain whether the delay in concluding the project could entirely be attributed to the appellant or at least some of it could be fastened on the NHAI which had gone to the extent of not only backing out of its earlier opinion but also conveniently shut its eyes that it was violating the order of the High Court which had earlier upheld the right of the appellant to shift the toll plaza.

50. Thus, the High Court was not justified in recording that the delay has been caused merely at the instance of the appellant so as to pass a blanket order for transferring the execution of the project to NHAI contrary to the agreement wherein it was permissible for the appellant to shift the Toll Plazas and the same was also approved by the High Court as referred to hereinbefore time and again. The High Court further seems to have missed the track, perhaps in its enthusiasm, that the matter with which it was seized was limited to the question as to whether the order by which the show cause notice issued by the NHAI to the appellant concessionaire-company was ordered to be kept in abeyance was fit to be vacated or not as the High Court was essentially adjudicating the question whether the NHAI could at all issue a show cause notice to the appellant- company to terminate the contract and while the High Court did not enter into the question whether the said order was fit to be continued or was fit to be vacated, went into the question whether the appellant-company was fit to continue with the project which had been handed over to the appellant by the NHAI by virtue of a valid agreement executed between the parties primarily on the ground of delay without really entering into the cause of delay and considering the plea at whose instance the contractual obligations had been violated.

51. In fact, even at this stage before this Court, the respondent NHAI has merely contended that the Toll Point/Toll Plaza should not be allowed to be shifted from the point determined earlier and has been asserting that the Toll Plaza should not be shifted from 146 KM to 110 KM. In fact, the respondent No.6 NHAI neither before the High Court nor before this Court even remotely had contended that the contract should be nullified although it has contended that shifting of Toll Plaza should not be permitted as the same according to their averment is contrary to the terms and conditions of the agreement.

52. There is yet another feature which catches attention but has been missed by the High Court that when the High Court itself had prevented the NHAI from proceedings with a show cause notice given to the appellant –concessionaire company and has gone to the extent of passing an order for keeping the show cause notice in abeyance and the NHAI itself has not contended either before the High Court or before this Court for terminating the contract except that it has been opposing the shifting of Toll Plaza, whether the High Court on its own could do the same without examining the contractual obligations. Taking the worst case/situation and even assuming that the stand of the respondent NHAI were to be accepted, the appellant at the most could be prevented from shifting

the Toll Plaza from a pre-determined point to another point in which case the appellant might have to continue with the project by not allowing it to change the location of the Toll Plaza but the same cannot entail the consequence of final termination without adjudication at least by an arbitrator for which there is a clear provision in the Agreement itself. In any event, the question of termination of the Concession Agreement without adjudication could not arise at all when the High Court was merely considering the application seeking vacation of the stay order to the show cause notice issued by the NHAI. In case, it had rejected the application, the show cause notice issued by the NHAI to the appellant could have proceeded. But the High Court seems to have taken a giant leap forward by terminating the contract for all practical purposes without expressly using the expression “termination” when it directed the NHAI to take over the project from the appellant – company and continue with the project and complete it, nullifying the contract in its entirety.

53. The High Court seems to be completely oblivious of the fact that it was dealing only with the limited question as to whether the NHAI was correct in issuing show cause notice to the appellant which the High Court itself by its own order allowed it to be kept in abeyance for which the NHAI respondent No.6 had filed an application for vacating this order. Thus, on the other hand, it kept the order of show cause notice by the NHAI in abeyance, but when the NHAI came up for vacating the said order, the High Court straightway directed the NHAI to take over the project itself from the appellant-company without caring about its impact on the Agreement which clearly resulted in its cancellation. The High Court ought to have realised that if it could not traverse the terms of the Agreement which the High Court itself has observed, it surely could not have passed an order which unequivocally had the effect of canceling the Agreement and that too without any adjudication.

54. At this juncture, it is difficult to overlook that the appellant admittedly has completed 71 per cent of the 291 KM stretch and now barely 29 per cent is yet to be constructed which is enmeshed in litigation over the question as to whether the Toll Plaza should be permitted to be shifted or not. This aspect as was contended by the respondent No.1, had not been gone into by the High Court clearly missing that this question had been raised in the PIL before the High Court wherein the NHAI & Ors. were a party wherein the appellant had been permitted to shift the toll plaza. It needs to be highlighted even at the cost of repetition that the dispute regarding shifting of Toll Plaza was earlier raised before the High Court by two separate writ petitions, the reference of which have been given hereinbefore vide CWP No.21332/2011 and CWP No.23971/2011 which were filed by two PIL petitioners but the petitions were rejected. In one of the writ petitions as noted earlier, an LPA was also filed in the High Court but the same was dismissed and the dispute regarding shifting obviously attained finality and could not have been urged all over again before the High Court. It is however difficult to appreciate that in spite of the dispute having been settled regarding shifting of Toll Plaza by the High Court of Punjab and Haryana which clearly attained finality, the respondent NHAI did not permit the appellant – company to shift the Toll Plazas, although it had failed to prefer any appeal against the judgment and order passed by the High Court in CWP No.21332/2011 and LPA No.170/2012 challenging such permission.

55. It is no doubt true that the respondent-Union of India has come up to the rescue of the respondent-NHAI when it contended that if terms and conditions in the contractual agreement is contrary to a statute, the Union of India would be legally authorized to override the terms and

conditions of the contractual agreement. But as already recorded hereinbefore, the facts of the instant matter clearly establishes that it is not even the case of the respondent that the terms and conditions incorporated in the Concession Agreement was contrary to any statute or central legislation so as to offer a plank to the contesting respondent specially NHAI to urge that the provision under the Concession Agreement had been overriding a statutory provision of any central legislation in absence of any fact or situation establishing even remotely that the agreement suffered the vice of violating any central statute/legislation.

56. Thus, apart from the fact that the dispute regarding the shifting of Toll Plaza had already been adjudicated by the High Court earlier on two occasions, the details of which have been given hereinbefore and the Concession Agreement not being in violation of any legislation of the centre, the dispute regarding shifting of Toll Plaza obviously could not have been gone into by the High Court all over again in the PIL. But while nullifying the contract on the ground of delay, the dispute regarding shifting of Toll Plaza which was clearly the only contentious issue for not completing the project, could not have been given a go bye or ignored in any manner by the High Court while taking an undertaking from the appellant and thereafter cancelling the Concession Agreement itself when it admittedly did not traverse the terms and conditions of the Agreement.

57. Beside the above, it is more than well settled that a question or an issue which has been raised earlier before the High Court, adjudicated on which a final judgment/order was delivered, cannot be allowed to be raised for the second time as that would be clearly barred by the principle of constructive res judicata which is too well known a principle to be dealt with herein. Suffice it to say that the well- acknowledged principle and equally well settled legal position seems to have been ignored and lost sight of not merely by the respondents but by the appellant company also which filed a writ petition in the High Court of Delhi raising the issue of shifting of Toll Plaza which finally was dismissed since the High Court of Punjab and Haryana had already dealt with it as also by filing an application for referring the dispute to the Arbitrator under the Arbitration and Conciliation Act, 1996 completely overlooking that at least this part was not permissible to be referred for arbitration once on the judicial side permission to shift the Toll Plaza was permitted by the High Court of Punjab and Haryana vide its judgment and order passed in CWP No.21332/2011 and LPA No.170/2012 which had settled the issue regarding shifting of Toll Plaza.

58. Besides the aforesaid legal protection which the appellant enjoyed on account of the judgment and order in its favour given by the High Court, the terms and conditions in the Concession Agreement itself regarding shifting of Toll Plaza was approved by the NHAI which permitted that the Toll Plaza could be shifted provided the Independent Engineer appointed by the NHAI approved of the same. No doubt, initially the Independent Engineer (I.E. for short) initially expressed certain reservations regarding the relocation of the Toll Plazas vide letters dated 18.3.2010, 2.4.2010 and 29.5.2010 but subsequently the Independent Engineer, Project Director and CGM NHAI in their recommendations recorded their view that the location of two Toll Plazas is for different facilities provided to the public and, therefore, there is no reservation locating Toll Plaza at KM 110. In fact, it needs to be highlighted that in terms of Article 48.1 of the Concession Agreement, liberty has been granted to the appellant to decide the locations of Toll Plaza in consultation with the I.E. and the same was finally approved by the I.E. M/s. Louis Berger who conveyed his approval to the change of

location as proposed by the appellant and hence the same cannot be allowed to be re- agitated despite confirmation of the same by the High Court vide its judgment and order passed in the writ petitions and the LPA against which no appeal was preferred either by the NHAI or the PIL petitioner or any other concerned respondents.

59. Thus, the stand of the NHAI appears to be clearly illegal and arbitrary and a clear case of an after thought taken in the present proceedings before this Court as the NHAI ad idem was in complete agreement with the appellant as regard its right for relocation of Toll Plazas. The same is recorded and clearly reflected in the correspondence of various officers of NHAI, minutes of meeting, stand of Independent Engineer including its stand before the High Court of Punjab and Haryana and hence the NHAI cannot be permitted to resile from its stand at this distant point of time as the affidavits were filed as early as 2011 which finally upheld the location of the Toll Plazas. The correspondence on record further belies the stand now taken by the NHAI as various officers of NHAI were of the same view that relocation of Toll Plazas is permissible under the Agreement and the change in stand happened in the meeting held for the first time on 21.3.2013 when the present Chairman took the stand that relocation is impermissible and the decision not to permit relocation of Toll Plazas was taken as late as on 3.5.2013 which is not merely highhanded and illegal but contrary to the judgment and order of the High Court which permitted relocation vide its reasoned judgment and orders as already referred to hereinbefore which were never challenged and hence attained finality. Moreover, based on the in principle approvals granted by NHAI and the stand of NHAI, the lenders continued to disburse funds and the appellant continued to invest in the project on the plea that the implementation of the decision to relocate the Toll Plazas would be done after the decision of the High Court of Punjab and Haryana upholding the relocation of Toll Plazas. It is therefore too late in the day for the NHAI to take such specious and untenable plea with a view to wriggle out of its obligation which cannot be permitted by this Court.

60. In fact, this Court was informed that the officers of the NHAI which had approved of the shifting of Toll Plazas are facing departmental action which has been initiated against Rajeev Kumar Koundal, S.S. Geharwar and S.I. Patel. But the stand of the NHAI appears to be clearly an afterthought and an attempt to justify its irrational/arbitrary/conflicting stand with regard to the rights of the appellants for deciding the location of Toll Plazas under the Concession Agreement and the approvals granted by NHAI under the said agreement. The alleged action initiated by the NHAI, therefore, cannot justify its stand taken before this Court for the first time nor can it permit to act contrary to the terms of Concession Agreement ignoring the orders passed by the High Court on the judicial side in two PIL petitions which were filed challenging the order for relocation of Toll Plazas.

61. It is rather chaotic as also jurisdictional error that in spite of several orders passed by three different co-ordinate Benches of the High Court on the judicial side permitting relocation of the Toll Plazas, the dispute did not set at rest and the High Court while dealing with the PIL has not even taken note of the fact that if it was nullifying the Concession Agreement on the ground of delay of the project without entering into the rights and obligations of the Concessionaire-appellant and Respondent No.6 NHAI ignoring that the NHAI could not have been permitted to get away from the onus of delaying the project when it failed to honour its contractual obligation.

62. The entire exercise of the High Court while passing the overzealous directions giving a go by to the rights and obligations under the Concession Agreement and the orders passed by the High Court while dealing with limited issue in the PIL as to whether a show cause notice by the NHAI was justified or not could not have refused to scrutinize the reasons for the delay on the ground that it was not entering into the terms and conditions of the contractual agreement and yet went to the extent of nullifying the agreement oblivious of its consequence that the impugned direction of the High Court clearly resulted in cancellation of the agreement itself.

63. It is further difficult to overlook that over 71 per cent of the Highway Project having been admittedly completed by the appellant- Concessionaire, it would delay the project without reason and is not sincere in its attempt to complete it as delaying the project cannot possibly benefit the appellant-Concessionaire since the income would be generated by the appellant only when the Toll Plaza is constructed and the revenue from toll at present is being deposited in the ESCROW account. It further cannot be overlooked that the NHAI is not funding the project in any manner as the agreement is in the nature of BOT mode which means Build, Operate and Trade ('BOT' for short) and the appellant cannot generate profit without undertaking the construction further. It is, therefore, pertinent to take note of the fact that the project being in BOT mode, all investment in the project has to be made by the appellant and no amount is received from NHAI. It may further be noted that the agreement between the appellant and respondent No. 6 NHAI acknowledges and confirms the role of lending institutions, mainly nationalized banks as a major significant holder in project implementation. All the financing agreement dealing with the administration occurred between lending institutions and the petitioner as well as the financial model for the project has been submitted that their revenue and approval prior to the commencement of the project. The appellant-Concessionaire therefore states that it is committed to the completion of the project asserting that its endeavour is to complete the six laning works at the earliest since it is not a gainer in any manner if the project is at a stand still and the appellant also would gain only if the project is started.

64. Consequent upon the aforesaid analysis of the background of the matter and the sequence of events arising out of a Public Interest Litigation which led to the execution of a Concession Agreement creating contractual relationship between the appellant Concessionaire-company and the respondent No. 5 NHAI, it is manifest that the High Court has issued over zealous directions which has resulted into termination of the concession agreement itself when it directed the respondent No.5 NHAI to take over the project from the appellant and ensure the balance construction of the highway project by itself. Although, the High Court has observed that it was not entering into the arena of the contractual terms and conditions of the agreement, it has clearly nullified and terminated the contract itself when it directed the NHAI to take over the project from the appellant-company overlooking the bonafide of the appellant-company which has already completed major portion of the construction which is 71 per cent of the total area of 291 KMs and only 29 per cent is to be constructed further, when a dispute arose between the appellant-company and the respondent NHAI in regard to shifting of the Toll Plaza from KM 146 to KM 110 and KM 212 to KM 211 and the NHAI for the first time in 2013 reneged from its consent to permit shifting contrary to the terms of the agreement. However, in course of oral argument before this court, the respondent NHAI had yielded and did not seriously dispute the shifting from KM 212 to KM 211 and

rightly so as the shifting is hardly at a distance of 1KM from KM 212 to KM 211 at Shambhu Toll Plaza which is negligible and the shifting has already taken place as discussed hereinbefore. But, the respondent No.5 NHAI has raised serious objections in regard to shifting of the Toll Plaza from KMs 146 to KM 110 which appears to have been done for the first time in the year 2013 when the new incumbent took over as Chairman of the NHAI ignoring the fact that the Independent Engineer in terms of the agreement had granted approval to the same way back on 30.6.2010. In addition, the dispute regarding shifting of Toll Plaza had already been settled by the High Court when it permitted the appellant to shift the Toll Plaza to KMs 110 against which NHAI did not file any appeal challenging the order of the High Court. Thus, in spite of the fact that the dispute regarding shifting of toll plaza had attained finality by virtue of a series of judicial verdict, the newly appointed Chairman, NHAI for the first time in 2013 restrained the appellant-company from shifting the Toll Plaza to KMs 110 and this clearly resulted into putting the entire project to a standstill since the project was to be financed by way of Build, Operate, Trade mode (BOT mode) and affected financing of the project and the matter got enmeshed into a series of litigations related hereinbefore. But the High Court refused to go into this dispute stating that it does not want to go into the terms and conditions of the contract and directed for undertaking from the appellant attributing the entire delay to the appellant-company for non performance and finally terminated the contract when it directed the respondent NHAI to take back the project from the appellant. Assuming the High Court did it in public interest to expedite the construction of the highway, it is more than obvious that this direction of the High Court cannot possibly and practically expedite the construction as admittedly the NHAI itself do not undertake any construction work of the highway which clearly implies that it will have to issue a fresh tender for construction of the balance area of the project which is bound to result into greater delay of the project apart from the fact that the dispute between the appellant-company and the NHAI would still survive and finally a 3rd party being a new player is bound to get entangled giving rise to further legal complications in the whole process.

65. In addition to this it is difficult to overlook that the High Court was merely seized with the limited issue in the pending PIL as to whether the Show Cause Notice issued by the NHAI to the appellant- company which was ordered to be kept in abeyance by order of the High Court itself, was fit to be vacated on an application filed by the respondent NHAI, but while doing so the High Court took a leap much way ahead by cancelling the agreement itself for non performance ignoring the main issue as to whether the Show Cause Notice issued by the NHAI was fit to be sustained or the order keeping it in abeyance was fit to be vacated and straightway concluded that the appellant-company had delayed the project completely overlooking that the contractual violation had been done by the NHAI when it declined to permit shifting of the Toll Plaza from KMs 146 to KM 110 in spite of the reasoned orders of the High Court to that effect against which no appeal was filed either by the NHAI or the PIL petitioner or any other concerned party. It is no doubt true that in a public interest litigation the court at times may forego/overlook the technicalities coming in the way of issuance of any direction which may conflict or jeopardise the public interest. But the same cannot be allowed to reach to the extent or affect the contractual agreement itself which reduces a valid and a legal document into a worthless piece of paper or a waste paper which clearly means that the relationship between the parties although were to be governed and supported by a valid legal document, the same would finally turn out to be a document having no legal significance in spite of its validity in the eye of law. If this were to be permitted, it is bound to lead to a chaotic situation

affecting the very fabric of the rule of law which cannot be allowed to prevail over a valid and legally supported document conferring certain rights on the person or entity possessing it.

66. As a consequence and fall out of the above position, we deem it just and appropriate to set aside the impugned directions of the High Court, and permit the appellant to restore the construction of the balance stretch/area of the highway project by further directing the NHAI to permit the appellant to shift the Toll Plaza from KM 146 to any point between KMs 110 and KMs 117 with concurrence of the NHAI. The exact point of construction of Toll Plaza between KMs 110 to KMs 117 shall thus be decided by the NHAI holding mutual consultation with the appellant/concessionaire in the light of the approval already granted by the Independent Engineer in terms of the Agreement which also had been approved by the High Court earlier. However, we take note of the fact that the High Court although by its order referred to hereinbefore permitted shifting of the Toll Plaza in dispute to point KM 110, we have noticed that the distance between KMs 96 where Toll Plaza of L & T is existing and the proposed toll plaza at KMs 110 would be at a distance of only 14 KMs which may not be in the interest of the commuting public and, therefore, we direct that the shifting although may not be permitted at KMs 110, it may be allowed to be shifted at any point between KMs 110 and KMs 117 in consultation and with concurrence of the NHAI. In fact, we could have directed the appellant to shift the Toll Plaza even beyond 117, KMs but we have been informed that beyond KM 117 the area is thickly populated and would not be practically possible to set up the Toll Plaza beyond KMs 117.

67. Therefore, and in order to facilitate and expedite completion of the Highway Project, we direct the respondent NHAI to permit shifting of Toll Plaza from 146 to anywhere between KMs 110 and KMs 117 expeditiously but not later than a period of two months from the date of this order during which period the required legal formality of notifying the area for construction of the Toll Plaza shall also be complied with by the NHAI by getting it notified through the Competent Authority and making the land available free from all encumbrance. The appellant thereafter shall forthwith restart the construction including setting up of Toll Plaza at the agreed point and continue with construction of the remaining area of the Highway Project and shall complete the entire construction of the Highway on or before 31st of March 2015 failing which the appellant/concessionaire company shall be liable for penal consequences to be determined by the NHAI in terms of the Concession Agreement.

68. The appellant/concessionaire company is further directed to report/update the progress/development of the construction to the NHAI referred to in the Concession Agreement after every three months from the date of compliance of the required statutory notification for shifting of Toll Plaza at the instance of the NHAI and the Ministry of Road Transport and Highways/any other competent authority. However, we make it explicitly clear that no dispute shall be allowed to be raised further by any of the parties before any court which may impede or slow down the progress of completion of the Highway Project as this measure most certainly would not be in the interest of the Highway Project and consequently not in public interest in any manner. However, the main contesting parties i.e. the appellant-Concessionaire Company and the NHAI would be at liberty to seek such other or further direction from this Court in case there is bona fide need to resort to such an eventuality in regard to the Highway Project referred to in the Agreement.

The appeal accordingly is allowed but in the circumstances leave the parties to bear the costs on their own.

.....J.

(Gyan Sudha Misra)J.

(Pinaki Chandra Ghose) New Delhi, April 17, 2014
