

IN THE HIGH COURT OF SINDH
CIRCUIT COURT, HYDERABAD

C.P. No.D- 677, 1792 and 2396 of 2012

C.P. No.D- 1542 and 1136 of 2014

C.P. No.D-2911 of 2016

Present:

Mr. Justice Salahuddin Panhwar.

Mr. Justice Muhammad Iqbal Mahar.

Date of hearing: 17.11.2016.

Date of judgment: 17.01.2017.

Mr. Ayatullah Khwaja for petitioner & Mr. Jhamat Jethanand, advocates for Respondent. 9 in C.P.No.D-677/2012.

Mr. Ali Ahmed Palh, Advocate for petitioners in C.P.No.D-1542/2014 and CP D-2911/2016.

Mr. Muhammad Sulleman Unar, Advocate for petitioners in C.P.No.D-1792/2012.

Mr. Ayaz Hussain Tunio advocate for petitioner in CP No.D-1163/2014
Syed Shahzad Ali Shah, Advocate for petitioner in C.P.No.D-2396/2012, for respondent(s) in C.P.No.D-1792/2012, for respondent No.8 in C.P.No.D-1163/2014 and for applicant/intervener in C.P.No.D-677/2012.

Syed Kamran Ali advocate for respondent No.1 in CPD-677/2012 and for respondent No.4 in CP D-2396/2012, respondents No.1 & 4 in CP D-1163/2014

Mr. Allah Bachayo Soomro, Additional A.G. Sindh alongwith Rasheed Ahmed Zardari DC Tando Allahyar, Mautasum Abbasi DC Hyderabad, Mourdad Project Manager HMDCP Hyderabad, Engineer Khurram Mughal Assistant Engineer Provincial Highway Sub-Division, Hyderabad.

J U D G M E N T

SALAHUDDIN PANHWAR, J: The captioned six petitions have been filed by different petitioners and since the issues involved in all

these petitions are relating to one and same *subject* matter i.e **'Mirpurkhas Hyderabad dual carriageway'**, therefore, same are decided through this common judgment.

Succinctly, relevant facts, pleaded in all these petitions are that:

2. Through C.P.No.D-677/2012, the petitioners Muhammad Maroof and others, being residents of villages Haji Umer, Detha, Usman Shah, Rabuki, Khensana Mori, Taluka Tando Jam, District Hyderabad, claimed that they used to go to Hyderabad for their *routine* business, Medical Care, revenue purpose, private jobs and *even* schooling of their children which (Hyderabad) is *only* 1-15 Km away from their place of *abode(s)*; their Taluka falls within District Hyderabad hence traveling from their village to Hyderabad City is claimed as *inter-city* traveling; the road in question passes through the town (Tando Jam) hence same remains block for hours *together* due to downtown and the university as there is no bye-pass which hurts the purpose and object of road in question which the *Government* in name of *Public Private Partnership* project initiated in name of '*road in question*' not by acquiring independent area but digging the *already* existed access i.e Hyderabad-Mirpurkhas road; that new construction was carried out in the name of Public Private Partnership without calling objections from any corner which in *other* ways is a loss caused to the Public money; that the Project Manager of Project Implementation Unit Hyderabad-Mirpurkhas Dual Carriage Way in collusion with the NKB Company has been attempting to impose *tax* upon citizen in the name of TOLL TAX without realizing

that Haji Umer falls within the jurisdiction of Hyderabad *even*; it is claim of petitioners that in past the Government started collecting toll tax by installing the toll plaza at the same place for which a Constitution Petition was filed in which the Honourable Court was pleased to declare such act as illegal and void; that since the area mentioned aforesaid comes within the Hyderabad District and distance between is only 1-13 Kilometers therefore, collecting the toll tax of 65 Kilometers road from the people of the Taluka Hyderabad is illegal therefore, it is prayed as:-

- "a. Declare the establishment / construction of toll plaza at Haji Umer Hyderabad-Tando Jam road is illegal, null and void ab-intio in the eye of law.*
- b. That the respondents may kindly be permanently restrained from establishing the Toll Plaza within the Taluka Hyderabad and further be restrained from collecting the illegal money in the name of Toll Tax from the residents of Taluka Hyderabad."*

3. Through C.P.No.D-1792/2012, the petitioner All Sindh Bus/Mini Bus Owners Association, claiming as a registered Welfare Association, pleads that it (association) regulates the relationship between the transporters and the general public so that the citizens may enjoy the facility of transport from Hyderabad to various parts of the Province and vice versa against reasonable fare; Hyderabad-Mirpurkhas road was a very old constructed single road but recently in place of above referred road, a new road has been constructed whereupon a Toll Plaza is established at Haji Umer Stop situated near Detha Station which falls within the jurisdiction of District Hyderabad and toll is

being collected from the different vehicles at different rates, fully described in the table mentioned herein blow:-

S.No.	TYPE OF VEHICLE	TOTAL RATE WITH IMMEDIATE EFFECT
1	Tractor	40
2.	Truck of Different Axle	110
3.	Tractor Trolleys/3 Axle Trucks	140
4.	Large Buses	140
5.	Mini Buses/Mini Van	110
6.	Cars	40
7.	Motor Cycles	15
8.	Articulated Trucks/4,5,6 Axle	175
9.	Two Axle Turcks	140

The *rate* of such Toll Tax has been claimed as illegal, excessive and exaggerated by referring to *Toll Tax* rate, being collected by the Government at different Toll Plaza, i.e at Hyderabad-Mirpurkhas road *rate* for each Mini Bus is Rs.110/- while Mini Bus at other Toll Plazas around Hyderabad District *rate* of toll is much less than this i.e at Jamshoro (at the starting point of Super Highway leading to Karachi) as well as Toll Plaza at Saeedabad at the Highway going towards up-country rate of toll is Rs.30 for Cars/Mini Buses; prior to fixation of the aforesaid rates of Toll Tax neither advertisement were circulated / got published in national newspapers nor objections were invited from the general public hence the petitioner and *the general public* were never provided any opportunity of being heard or to submit their suggestions or objections as the case may be before the concerned authorities; further place of establishing toll collecting points are claimed as *illogical, illegal and unreasonable* while pleading that even one intending to travel *inter-city* has to pay the same *toll-tax* which one intending to use whole road in question has to pay; the subject Toll

Plaza Hyderabad-Mirpurkhas Road should have been established at the end point of District Hyderabad or in other words at the starting point of District Tando Allahyar in order to avoid the difficulties. In said back-ground the petitioner prayed for the following reliefs:-

- “i. The respondents may be restrained from collection of Toll Tax at exaggerate/enhanced rate from the vehicles passing through the Toll Plaza situated at Hyderabad-Mirpurkhas road at the point of Haji Umer Stop-Detha Station which falls within the territorial jurisdiction of Hyderabad.*
- ii. The respondents may also be restrained from collection of Toll Tax within the limits of Hyderabad District as described hereinabove, rather they may be directed to establish Toll Plaza on Hyderabad-Mirpurkhas Road at the end point of Hyderabad District and at the starting point of Tando Allahyar District.*
- iii. The respondents may also be directed to recover Toll Tax from the vehicles passing through the Toll Plaza at Hyderabad-Mirpurkhas Road, once for twenty four hours and in case the same vehicle passed through the Toll Plaza again using 24 hours that may be exempted from collection of Toll Tax again.”*

4. Through C.P.No.D-2396/2012, the petitioner Mir Muhammad Raza, being resident of village Tando Jam Taluka and District Hyderabad, pleads that his village is *only* at distance of about 7/8 K.Ms from Hyderabad; in the year 2009 the Government launched project of road from Hyderabad to Mirpurkhas; even before completion of *project* the respondents attempted to collect the toll tax but were restrained by this Court till completion of the *project* vide order dated 17.12.2009 thereby allowing petitions D-755, 756 and 900 of 2009; after issuance of aforesaid notification, the contractor has started charging the toll tax on the rates which are high and excessive in comparison to one (*toll rate*) from all over Pakistan on any *highway* or *motorway*; Tando Jam and

its vicinity falls within Taluka and District Hyderabad hence people of the *area* are compelled to pay high, illegal, illogical and excessive *toll* even for traveling within their own taluka which is claimed as *violation* of their fundamental rights; he has prayed for the following relief(s):-

- "a. Declare impugned notification No.H.II/1-6/97(K)III(PPP)PT-III dated 12.09.2012 as abinitio, illegal, null, void and without lawful authority.*
- b. Declare that the citizens of Tando Jam and population of Taluka Hyderabad Rural being the local and belonging to Taluka Hyderabad are exempted from toll tax.*
- c. Direct the respondents not to harass the petitioner and other citizen at the hands of the employees/agents of the contractor at Toll Plaza in any manner whatsoever.*
- d. Direct the respondent No.7 and 8 to provide legal protection to the petitioner and other citizens from the hands of the respondents / employees of contractor deployed at Toll Plaza."*

5. Through C.P.No.D-1542/2014, the petitioners Pir Turab Ali Rashidi and others, being residents of different villages of District Tando Allahyar, claim that they have to travel intercity Tando Allahyar for different reasons for study, business, medical care, judicial proceedings, commercial and social activities and other purposes from their villages to Tando Allahyar, Hyderabad for which there was Mirpurkhas-Hyderabad road since decades *together* but later the Government in the name of public-private partnership project initiated project i.e. Hyderabad-Mirpurkhas Dual Carriageway on the same and already existing road; erected two toll plazas for collecting taxes on Detha near Tando Jam while other Near Ratanabad, near Mirpurkhas on a *total* length of 60 Kilometers; rate of toll tax was claimed as excessive and illegal while referring to Karachi-Hyderabad National

Highway road of a *total length* of 165 Kilometers approximately, where travelers have to pay Rs.30/- for a car and Rs.60/- for up and down, not only for Karachi-Hyderabad bypass but also other Highways or bypasses in Pakistan but on Mirpurkhas-Hyderabad road travelers have to pay Rs.80/- for car and Mini Costar Rs.120/- pay toll tax for up down; now a new toll gate is being constructed at Rashidabad stop, which is *only* half or one kilometer away from Tando Allahyar city; mini city Rashidabad is located at Kuba stop approximately at a distance of one kilometer away from Tando Allahyar city but different institutions i.e. Balqees Mushif Hospital, Rashidabad, Hak Technical Institution, Mushaf Medical Complex are located where hundreds of people visit every day for medical, vocation training and other purposes on *daily* basis hence establishing / construction of such *toll-collection* point shall burden these people to pay two (02) toll taxes every day for few kilometers travel between Tando Allahyar city and Rashidabad which petitioner claimed illegal and against guaranteed fundamental rights hence prayed for the following relief(s):-

- a. Declare the establishment/construction of toll plaza at Rashidabad Tando Allahyar between Hyderabad-Mirpurkhas road is illegal, null and void abinitio in the eyes of law;
- b. That the respondents may kindly be permanently restrained from establishing the Toll Plaza at Tando Allahyar and further be restrained from collecting the illegal money in the name of Toll Tax from the residents of Tando Allahyar villagers if it is done in next few days."

6. Through C.P.No.D-1163/2014, the petitioner Imtiaz Ali claimed that his village is situated within the distance of one Kilometer from

Toll Plaza Hyderabad-Mirpurkhas where other villages are also situated and the respondents No.8 and 9 illegally and forcibly collecting the toll from the people of the vicinity residing in the villages situated within the territorial jurisdiction of Hyderabad district who used to travel for their routine work within the territorial jurisdiction of Hyderabad district; on 16.06.2014 his uncle alongwith his son was coming from his village Jhando Khoso to Hyderabad but at Toll Plaza near Haji Umer stop, he was asked to pay toll-tax but on his saying of belonging to village Jhando Khoso was asked to show CNIC; on a little delay in producing CNIC the servant of toll misbehaved, caught hold him from his collar so also other servants, duly armed with weapons, attacked and even made straight firing for which an FIR No.31 of 2014 was lodged with PS Rahuki on 16.06.29014 at 2200 hours for offence punishable u/s 324, 147, 148, 149, 506(2), 504, 337-A(i) PPC; the newspaper daily Kawish also shows the illegal acts of respondents No.8 and 9 and manner in which tax is collected by use of GHUNDA element from the people of vicinity who *otherwise* should be exempted from the toll as they are used to travel for their personal or professional work at number of times even in a single day yet they are made to pay toll-tax for each visit even if same are within 24 hours; and even alleged rate of toll-tax as *excessive* and pleading so petitioners prayed for the following relief(s):-

- "a) *That this Honourable Court may be pleased to direct the respondents not to collect the toll tax at the Toll Plaza Hyderabad to Mirpurkhas from the local people particularly from the villagers of petitioner viz. Jhando Khoso and other villagers of vicinity which are situated within the territorial jurisdiction of Hyderabad district.*

- b) *That this Honourable Court may be pleased to direct the respondents to shift the Toll Plaza viz. Hyderabad-Mirpurkhas Toll Plaza outside from the territorial jurisdiction of Hyderabad district so that the peoples of vicinity may not be suffered from heavy and illegal charges of Toll Tax.*
- c) *That this Honourable Court may be pleased to direct the respondents to recover/collect the Toll Tax from those vehicles which are passing from Hyderabad-Mirpurkhas Toll Plaza one in 24-hours to save the peoples from heavy double charges of Tax.*
- d) *That this Honourable Court may be pleased to direct the respondent No.7 SSP Hyderabad to provide protection to the petitioner and his family members as the petitioner and his family members were passing from the Toll Plaza Hyderabad-Mirpurkhas frequently and regularly from their village to Hyderabad and respondents are advancing threats for dire consequences to the petitioner and his family members for false implication in criminal cases."*

7. Through C.P.No.D-2911/2016, petitioner Syed Asni @ Syed Hassan, claiming himself as a small businessman, pleads that he travels from Tando Allahyar to Hyderabad in his daily routine for his business; has his business at Tando Jam city hence used to travel from Hyderabad to Tando Jam vice versa on the distance of 15 K.M for the couple of times yet he is compelled to pay Toll Fee Rs.50/- each side passing; that dual carriage road around 67 kilometers between Hyderabad and Mirpurkhas constructed by a South Korea company; that same toll tax is being paid by those commuters who go to Agriculture University Tando Jam and return to Hyderabad and any resistance by such passers results in *assault* upon them by Toll Plaza staff and Management yet FIRs are lodged against passers including University teachers, businessmen; petitioner has been paying the toll tax on the each side entry Rs.50/- though despite lapse of five years the

project is not complete and even respondents failed to fulfill commitments of providing requisite facilities i.e plantation, health facilities, consistent ambulance service, wash rooms, restaurants etc; the act of respondents collecting through (GHUNDA(s)) , armed men, is illegal, unauthorized; and has illegally burdened General Public by illegal and excessive toll-tax hence prayed for the following relief(s):-

- a. Direct the respondents to take stern action and immediate legal action to protect the public/community interests and to stop illegal extortion in the name of Toll Tax and misbehaviors of the staff.*
- b. That the act of collecting the heavy Toll Tax is without lawful authority and of no legal effect. That the tax demanded from citizens who travel from Tando Allahyar to Hyderabad via Tando Jam is unfair, unjust and illegal.*

8. On notices of above petitions the respective parties caused their appearances. Since, during proceedings of instant petitions, number of questions arose therefore, to have a better and clear *picture* the *Additional Registrar* of this Court was appointed to visit and to report strictly by referral to *undisputed documents* and *physical position* only. Since, the report is material to have a clear and *brighter* picture therefore, same is referred hereunder:

“Compliance Report
01.11.2016

“It is respectfully submitted that as per Order dated 20.10.2016 passed by this Honorable Court, in the titled petitions, the Additional Registrar was appointed to inspect the complete road from Hyderabad to Mirpurkhas mainly to see whether road on the site has been constructed as per design? And whether all requisite formalities as provided in that agreement are being followed? and submit detail report within “05” days which shall include:

- i. Whether rest area is in working condition?*

- ii. *Whether all bypass or bridges, are constructed and well-maintained, on BOT basis.*
- iii. *Whether subject matter road is constructed as per design approved by concerned authorities.*
- iv. *Whether management of road has fulfilled all the requirements as provided in the agreement.*

In compliance of above order the date for inspection was fixed as 24.10.2016 (Monday). As such the notices were issued to all the parties concerned. On the date of visit following persons inter also joined the inspection:

1. *Syed Shahzad Ali Shah, advocate for respondent No.9 to the extent of Toll Plaza Hyderabad.*
2. *Lft. Col. Rtd. Ahmed Raza Khan, General Manager to Respondent No.9.*
3. *Mr. Abdul LatifAbbasi, Mukhtiarkar Hyderabad on behalf of Respondent No.7 Deputy Commissioner Hyderabad.*
4. *Mr. More Oad (Superintendent Engineer Provincial Highways) Project Manager (Director), respondent No.6.*
5. *Mr. Muhammad Mahroof Petitioner No.1 in CPD-677 of 2012.*
6. *Mr. Taj Muhammad Memon, Resident Engineer Messers E.A Consulting Private Limited.*
7. *Mr. Khuram Mughal respondent No.5.*
8. *Mr. Asif Hyder adviser to Respondent No.9.*

The attendance sheet signed by each of them at the time of inspection is flagged at "A". The inspection has been carried out thoroughly right from start to the end point of Hyderabad Mirpurkhas Dual Carriageways (the HMDC). I have visited the Dual Carriageway from Hyderabad to Mirpurkhas focusing its each and every aspect. The HMDC is Built, Operate and Transfer (BOT) project. Thus I have inspected it having kept the BOT and the questions supra so framed by the Honorable Court.

1. Whether Rest Area Is In Working Condition:

The only Rest Area building in North side of the HMDC is located between Khesana Mori and Rashidabad. It has been visited from every nook and corner. A bird's view of the Rest-Area is flagged at "B". It is spotted that the Rest-Area building (technically known as Toll Plaza) consists of three portions i.e., the Rest Area; Administration Block and the Workshop. A copy of the map of HMDC manifesting key components is flagged at "C". It has two, entry and exit, gates. The three-pinkish-color-blocks of the Rest Area are well constructed with tile flooring

and false-ceiling with LED lights but without furniture or fitting and fixtures. The Administration block is double story. Besides, open area, inside boundary wall of the Rest-Area, seems recently leveled but not maintained permanently. The sweepers have been arranged for cleaning the floor and public lavatories inside the Rest Area, for the day. **Albeit, the Rest Area is a hollow tri-building structure which is yet to be furnished for use or brought in working condition.** The photos of the Rest-Area, from outside and inside, during visit are attached herewith as P-1 to P-17.

2. Whether All Bypass Or Bridges, are Constructed and Well-Maintained, on BOT Basis.

Bypass: During visit, right from Hyderabad to Mirpurkhas, there is only one bypass at middle of the HMDC that is bypass to Tando Allah Yar. A bird's view of bypass to Tando Allahyar is flagged at "D". Besides, there are some other towns such as Tando Adam and Rashidabad but there is no bypass to such towns. The only bypass to Tando Allah Yar is in deplorable and appalling condition. Three canal over-bridges, a Railway Track over-bridge and many culverts on bypass to the Tando Allah Yar are exposed to fatalities which need urgent attention. The photos of Tando Allah Yar Bypass, during visit are attached herewith as P-18 to P-23.

Bridges: Only four bridges are spotted constructed throughout the HMDC. The list of all four bridges is flagged at "E". Each bridge is found having illegal cuts at their each embankment where through loaded tractors, QingQi's, Donkey Cots etc., are spotted passing through the Dual Carriageway exposing them to the heavy traffic flow. The photos of all four bridges, during visit are attached herewith as P-24 to P-41.

Pedestrian bridges: There are three pedestrian bridges built throughout the HMDC. The first one is in middle of the Tando Jam City; the second for Tando Jam University and third at Rashidabad but they are found in pathetic condition. It seems they were not erected for the public use. Condition of Bridge-stairs reveals that they have not been maintained for years. Their stairs reveal that they had never been colored. The metal used over the stairs and base of the pedestrian bridges has tarnished. The foot-steps at start of the pedestrian bridge of Tando Jam had never been built, as if the bridge was never intended for public use. The photos of all three pedestrian bridges, during visit are attached herewith as P-42 to P-59.

3. Whether Subject Matter Road is Constructed As Per Design Approved By Concerned Authorities.

So as to depict whether the HMDC is constructed as per design approved by the concerned authorities, Lease Agreement

executed in form of Appendix-5 to the Concession Agreement as contemplated in its section 5.2; Approved Design of the Road; Planning Commission Form-1 (known as PC-1); Estimated Cost papers or Financial Models; Planning Commission Form-4 (known as PC-4) and the forms of Appendixes suffixed to the Concession Agreement are must. In this regard the respondents agreed to provide copies of above documents but so far none of such documents have been provided. However, as per facts visible during on-ground visit and compared with contents of the Concession Agreement different components of the HMDC have revealed. The first of them is that it is a 4 lane Dual Carriageway Project that too for 58.7 kilo meters, commencing from end-point of Hyderabad (Mir'rani Goth) to start of the Mirpurkhas City. The second component is maintenance of the HMDC as per article 14 of the Concession Agreement, detailing Operation and Maintenance terms. Its third component is that it was imagined for passing through populated centers of Tando Jam and Tando Allah Yar towns and to terminate at start of Mirpurkhas bypass. Its fourth component is that it includes four bridges, three pedestrian bridges, 9 box culverts, 33 pipe culverts and New Jersey barrier in median of the carriageways. List of pedestrian bridges; pipe and box culverts and sections of New Jersey barrier median and simple median are flagged at "E,G,H,I,J". It is how the HMDC is explained in the Concession Agreement, a copy of the Concession Agreement is flagged at "K". It has been noticed further that a 4 lane carriageway though has been constructed **but ignoring safety through fencing or protective barbed wire on its both shoulders right from Hyderabad to Mirpurkhas to avoid sudden entry of any wild or pet animals on the road. Besides, no shoulders have been erected upon any of the box and pipe culverts.** A color copy of model pipe culvert with shoulders on road has been downloaded from net and flagged at "L". The median between the carriageways is not of New Jersey barriers **throughout the road but for 60% of the HMDC.** Rest of the median **(almost 40%) is a simple 1.5 feet wide space** between the dual carriageways that also with countless illegal diversions and cuts piercing through the median offering **fatality to the public at large.** Even the New Jersey barriers are **illegally removed from many parts of the HMDC which are left un-noticed by the Project Authorities.** The four bridges are, though constructed, **unfortunately seen having illegal cuts from their each embankment** where through loaded tractors, QingQi's, Donkey Cots etc., were spotted passing-blindly exposing themselves to the heavy traffic flow. The photos of most of the illegal cuts, during visit are attached herewith as P-60 to P-76.

4. Whether management of road has fulfilled all the requirements as provided in the agreement.

Since, the question has been framed by the Honorable Court with regard to fulfillment of all the requirements by the management as provided in the Agreement. Therefore, I have gone through the contents of the Concession Agreement, having visited the site so as to shortlist the requirements, since it is a verbose document. It is pertinent to mention here that before visit at site, the copy of the Agreement was not available on record but received today. The Agreement inter alia contemplates many requirements **but no financial scheme or other aspects** have been envisaged therein so that it could properly be learnt **whether all the requirements have absolutely been fulfilled.** However, referring to the covenants of section 14 of the Agreement and comparing them to the factual position already depicted in the point No.3, **supra, the requirements provided in the agreement seem not to have been fulfilled stricto sensu.** Such, on-ground defects may be learnt from the details narrated in the points No.1 to 3.

The project has been carried out as a Public Private Partnership between the government of Sindh and the Concessionaire. It was aimed at improving, upgrading, widening, repairing and maintenance of the road linking the cities of Hyderabad and Mirpurkhas on Build, Operate and Transfer (BOT) basis. **But the linking seems missing due to left over bypass, about three to four kilo meters and down-town area of Tando Allahyar City.** During further probe of a copy of the minutes of meeting (provided by the respondents) held on 3rd August 2012 (a highlighted copy thereof is flagged at "M") in juxtaposition with Section 5.2(d) of the Concession Agreement (a highlighted copy thereof is flagged at "N"), **two different versions reveal.** As per the latter extract the Government of Sindh is bound by her own agreement **not to grant any person access to the Project Site for purposes of carrying out any construction, building or laying of any structure etc., and as per the former extract it has been reduced in writing that the Works & Service department has decided to undertake Tando Allah Yar by pass and Tando Allah Yar part through Annual Development Program (ADP) Scheme.**

The Deokjae Construction Company (Pot) was awarded the contract of HMDC on the BOT basis with assurance of the government to grant all necessary concessions, rights, permits, right-of-way and others. Sindh government also gave financial support to the contractor by providing **Minimum Revenue Guarantee (MRG) and soft loan at 4 percent interest rate,** which would be payable in 20 years besides bank loan. However, it could not be learnt from available documents **identity of the bank from which the loan was taken.**

In addition it is suggested that the respondents may be required to bring on record Lease Agreement executed in form of Appendix-5 to the Concession Agreement as contemplated in its

section 5.2; Approved Design of the Road; Planning Commission Form-1 (known as PC-1); Estimated Cost papers or Financial Models; Planning Commission Form-4 (known as PC-4) and the forms of Appendixes suffixed to the Concession Agreement, **so that it could be learnt whether what has been the financial scheme applied upon the project right from inception to its completion.** As such the order of this Honorable Court is complied with whereby the site has been inspected. The inspection report; copies of the photographs and annexures are submitted herewith for perusal as desired.

(emphases supplied)

Sd/-
(Nasrullah Korai)
I/C Additional Registrar"

The *comprehensive* report of the Additional Registrar, referred above, not only exposed number of *illegalities* in project in question which *admittedly* is BOT but also showed *lack* of vigilance of quarter concerned which *prima facie* let the people to *illegally* remove the New Jersey barriers, not maintaining the *rest area*; *improper shouldering*; cuts etc. The same was handed down to all concerned while taking up the matter to have a *proper* response as the *project* in question from very beginning was claimed to have been aimed for *benefiting* public at large.

On *fixed* date of hearing i.e on 03.11.2016, the following order was passed while putting the report of the *Additional Registrar* to light (supplying to all concerned) which, being material reads as:-

"Mr. Jhamat Jethanand, Advocate files Vakalatnama, taken on record.

Heard learned counsel for petitioners. Learned counsel for respondent No.9 in C.P.D-No.677 of 2012 contends that company is ready **to take over the bypass of Tando Allahyar as well as any bypass of Tando Jam, if is approved by Government;** would ensure that all measures shall be taken by them for smooth running of road without any disturbance, likely to be caused by any mood.

At this juncture it is also pointed out that for construction of this road, Sindh Government and developer have invested 29 percent each and remaining amount was borrowed from Bank and mechanism of recovery of that amount is available.

Superintendent Engineer / Project Manager contends that with regard to land acquisition of bypass Tando Allahyar Rs.120 million have been paid to the Deputy Commissioner as well Rs.37.57 million, partial amount with regard to bypass Tando Jam. Learned A.A.G seeks time for want of instruction with regard to handing over Tando Allahyar bypass as well Tando Jam bypass of the company.

Though the deposit of amount for acquisition of lands for Tando Allahyar and Tando Jam by-pass (es) by the Company though is self indicative of inclusion of same in the project however, since the AAG has sought time for want of instruction therefore, issue is left till the time the AAG comes with some clear stand.

Further, Mr. Mourdad Project Manager, submits brief detail as well map relating to bypass of Tando Allahyar, original design of road concession agreement, which are taken on record. Learned counsel for respondent No.9, seeks time and contends that they are working and a complete and fair mechanism with regard to Toll charges would be submitted on the next date of hearing which stand is appreciable one.

Since, pursuant to direction by this Court learned Additional Registrar after site inspection has submitted report. Office shall provide copy to all parties so as to come prepared to respond thereon. As well respondents shall provide documents mentioned in the para of Additional Registrar report.

To come up on 17.11.2017 at 9:30 A.M. C.P.No.D-1542 of 2014 and C.P.D-911 of 2016 be attached alongwith these petitions.

The C.P.No.D-1958 of 2016 is hereby de-tagged, as the same is relevant to different controversy and the same is adjourned to 10.11.2016, to be taken up at 11:00 A.M."

9. Learned counsel for the petitioners, having reiterated their respective pleadings, challenged the rate of toll-tax as illegal, against the law of equity and against their fundamental rights.

10. Learned counsel for respondent No.9 (Company), *on his turn*, has argued that respective petitioners have challenged the *toll-tax* while referring to the proceedings in earlier petitions No.755, 756 and 900 of 2009 which *in fact* were filed challenging the notification dated 07.10.2009 issued by Government imposing toll tax under the provisions of West Pakistan Tolls on Roads and Bridges Ordinance, 1962 read with Section 29 of Public Private Partnership ordinance 1 of 2009. It was *emphatically* argued that the said petitions were decided vide order dated 17.12.2009 whereby *though* notification was declared as *without lawful authority* yet it was observed that “the government however in its wisdom, after the project is completed can levy toll tax or fee within the parameters of law”; he continued that since subsequent to above order dated 07.10.2009, dual carriage way is constructed, toll gates are installed, the toll is being paid by the thousands of commuters in pursuance of *fresh* notification dated 12.0-9.2012 hence same is legal, valid and lawful.

11. While responding to other main contention in all the petitions i.e ‘toll-tax from those residing within the territories of Hyderabad Taluka; added that official respondents have filed their comments denying claim of the petitioners; from time to time several orders were passed particularly the order dated 18.09.2013 and 14.12.2015 requiring the respondents to address the grievance of the people of Tando Jam as the said commuters had to cover only distance of about 15 Kilometers yet have to pay the full toll tax which could be proportionately reduced but since, per respondents *detailed reply* the road is *Express*

way hence it is neither practical nor viable to put different toll rates which, even finds support, from report of the Additional Registrar of this Court particularly when points No.6(a) and (b) of such report are complied with. The rest area is made operational and pedestrian bridges are renovated.

12. The counsel for the respondent No.9 in last also raised number of legal objections:

- (i) Whether the petition is to be heard at Principal seat?
- (ii) Whether the petitioners are aggrieved persons?
- (iii) Whether the petitions are maintainable?

13. Learned AAG, while adopting arguments of respondent number 9, has contended that these petitions are not maintainable under the law.

14. Heard the respective sides and have perused available material *carefully*. Since, we are quite conscious that *legal* objections, particularly those, touching *jurisdiction*, must always be decided *first* therefore, it would be in all *fairness* to examine the *legality* of above questions and then to step onto the *legality* of the reliefs sought through these petitions.

'(i) Whether the petition is to be heard at Principal seat?

15. This objection seems to have arisen from the office objection *itself* that as per notification No.Gaz/XII/Z-M(H-C) dated 19.02.1995 the petitions are to be heard at Principal seat at Karachi.

Since, it is not a *disputed* position that these petitions have nexus with earlier decision of this Court therefore, this *objection* seems to have lost its significance particularly when the competence of this Court was not challenged by the respondents when this Court (Circuit Court), while examining the entitlement of the respondents to collect toll-tax, declared the notification as *illegal*. However, as an *abandon* caution, it would be in all *fairness* to first refer the *notification* itself which is:

“In exercise of the powers conferred by Rule 6 of the High Court of Sindh Benches Rules 1987, the Chief Justice is pleased to order that the following cases pertaining to the Sukkur Bench and Circuit Courts at Hyderabad and Larkana shall be heard at the Principal Seat of the High Court at Karachi.

1...

2..

3. All Constitutional Petitions arising out of or involving interpretation of **fiscal laws**, including octroi taxes and fees levied under the **Sindh Local Government Ordinance 1979**.

4..

5...

6...

7..

8..

9...

From above, it *prima facie* is evident that the *notification* speaks about those petitions only which arise out of or involves a question of *fiscal laws* and *octroi* taxes and fees, levied under **Sindh Local Government Ordinance, 1979**. Since, ‘toll / fee’ is not being claimed under Sindh Local Government Ordinance, 1979 therefore *part* to such extent requires no more discussion. The term *fiscal*, means as:

- “1. Of or relating to taxation, public revenues, or public debt.
2. Of or relating to financial matters’

16. We have no hesitation in saying that in these petitions no question relating to interpretation of 'taxation, public revenues or public debt' is involved else in earlier decided petitions same would not have lost from sight of the then Honourable Judges nor the respondents would have deliberated to waive such objection. At this juncture, to show competence of this court (circuit court) to deal with issue *in question*, it would be *advantageous* to refer some portions of earlier decision of this Court which reads as:

"...The definition of "user fee' under the Ordinance is not happily worded and we in absence of the definition provided in the ordinance have to refer to its ordinary legal dictionary meaning.

*Under the Blacks' Law Dictionary, the 'Fee' is defined "A fee is the price one pays **as remuneration for services**". User Fee is defined in the Black's Law Dictionary means "People pay User Fee for the use of many public services and facilities".*

Besides, the aforesaid definitions in the Blacks' Legal Dictionary the word 'Toll Tax' and 'Fee' has been interpreted by the Superior Courts. In the case of THE BURMAH OIL COMPANY LIMITED V. THE TRUSTEES FOR THE PORT OF CHITAGONG reported in PLD 1961 Supreme Court 452 their lordships of Honourable Supreme Court has interpreted the "Toll Tax' as under:-

"There may be tolls of many kinds, such as harbour tolls, anchorage tolls, or even a toll for the use of a Railway system itself. In its generic sense a 'toll' may be described as a payment of a sum of money in respect of some benefit derived by the payer from the use of some property, service or facility provided by another. 'Toll' is not , synonymous with 'hire'. It may well be distinct from, and in addition to, a charge leviable for the use of that property, service of facility. Thus a 'toll' realizable by a railway, may be a payment in respect of the use of the railway system itself as distinct from a charge for carriage, haulage or collection."

A Division Bench of this Court in the case of Mian EJAZ SHAFI and others V. FEDERTION OF PAKISTAN reported

in PLD 1997 Karachi 604 while interpreting the word 'Fee' has held that "Fees are a sort of return or consideration for services rendered, which make it necessary that there should be an element of 'quid pro quo' in the imposition of fee. There has to be a relationship between the fee levied by an authority and the services rendered by it to the person, who is required to pay the fee."

The Government under the grab of the Ordinance can levy fee or Toll Tax if it provides services as has been held in the aforesaid judgments referred to hereinabove. It cannot under the grab of Ordinance No.1 of 2009 start collecting user fee or Toll Tax when it has not rendered any service against it to the persons and the road is yet to be constructed. This Court has not examined the relationship of the Government with the Foreign Company or the rate / schedule under which the Government has authorized the Contractor to charge the Toll Tax or user fee nor this issue has been raised before this Court. The Government prima facie has the authority under the law to levy the Toll or Fee. However, this levy of Toll or Fee is subject to providing service. The levy of Fee without rendering any service would amount to taxing the citizens which the law does not authorize.

We in view of the afore said judgments of this Court and the Honourable Supreme Court are clear in our mind that levy of users fee or toll tax under the grab of Ordinance No.1 of 2009 is unauthorized as the Government has not rendered any service for such Fee / Toll Tax. The Government however in its wisdom, after the project is completed can levy Toll Tax or Fee within the parameters of Law. At present the notification dated 7th October 2009 issued by the Secretary to the Government of Sindh in exercise of powers conferred by Section 3 of the West Pakistan Tolls on roads and Bridges Ordinance 1962, imposing the toll tax on vehicles specified in Column No.2 of the schedule, using the Hyderabad-Mirpurkhas road is declared to be without lawful authority and of no legal consequences. The collection of toll tax under the grab of 'User Fee' either under Ordinance 1 of 2009 or under Section 3 of Ordinance of 1962 is unauthorized and the Government or the Contractor are restrained from collecting 'Toll Tax' or 'User Fee' under the notification referred to hereinabove. We have inquired from the Project Director as to why notification issued U/s 3 of the West Pakistan Tolls on Roads and Bridges Ordinance, 1962 has been issued when the reliance has been placed under the provisions of Section 29 of the Ordinance 1 of 2009. We were informed that Ordinance 1 of 2009 was promulgated after the notification dated 7th October 2009 and the Toll Tax is being collected on the strength of the said notification. He however has clarified that no other notification has been issued for collection of User Fee."

From above, referral it stands clear that:

- i) *the issue, involved in said petition was / is identical one i.e competence of respondents to collect toll-tax;*
- ii) *this court not only took the cognizance within meaning of Constitutional Jurisdiction but declared the notification for collection of Toll-Tax as illegal;*
- iii) *even restrained the respondents (company) from collection of toll-tax though with specific reference to meaning and objective of 'Toll' & 'user-fee'*

and since status of the above judgment of this Court was '*unchallenged one*' hence the objection onto jurisdiction of this Court is not tenable. Further, we may add that status of '*toll*' as defined in said *judgment* till date matches with the *touch-stone*, as provided in the case of *Federation of Pakistan, through Secretary Ministry of Petroleum v. Durrani Ceramics and others* (2014 SCMR 1630) wherein the difference between a '*tax*' and '*fee*' was defined as:

"19. Upon examining the case-law from our own and other jurisdictions it merges that the 'Cess' is levied for a particular purpose. It can either be 'tax' or 'fee' depending upon the nature of the levy. Both are compulsory exaction of money by public authorities. Whereas 'tax' is a common burden for raising revenue and upon collection becomes part of public revenue of the State, 'fee' is exacted for a specific purpose and for rendering services or providing privileges to particular individuals or a class or a community or a specific area. However, the benefit so accrued may not be measurable in exactitude. So long as the levy is to the advantage of the payers, consequential benefit to the community at large would not render the levy a 'tax'. In the light of this statement of law is to be examined whether the GIDC is a 'tax' or a 'fee'.

The above position, further permits us to say that *prima facie* in all these petitions *interpretation* of '**fiscal law**' is not involved but '*fundamental guaranteed rights*' because one '*legally cannot be taxed without showing a reasonable co-relationship between the fee to be levied by an authority and the services to be rendered*'. In view of above

discussion and *undeniable* legal positions, the objection no.1 is answered in negation.

17. Since, both the following objections are *strongly* interlinked with each other therefore, it would be in all fairness to examine the same *jointly*.

- (ii) **Whether the petitioners are aggrieved persons?**
- (iii) **Whether the petitions are maintainable?**

Though, *unchallenged* judgment passed in earlier petition was *itself* sufficient to answer these questions as '*misconceived*' however, it is added that while forming the Article 199(1)(b)(c) of the Constitution, the legislature has not confined the powers and jurisdiction of this Court but clothed this Court with an authority to issue appropriate directions to any **person** or **authority** if there is a denial to any of the **Fundamental Rights**. The deliberate use of the phrase '**any person**' in addition to words '**authority, including any Government**, itself shows that exercise in such like matter can well be exercised regardless the character and status of one which may be '**private**' or of '**an authority, including government**'. Thus, whenever a *question* with regard to denial or abridging of '*fundamental right*' is raised then invoking to constitutional jurisdiction would be competent.

In all these petitions, there is no denial to the claim of the *petitioners* with regard to:

- i) their place of residence;*
- ii) their claim of using the facility;*

iii) their claim of compulsory payment of the full fee/ charges for using facility of road for 10-15 K.Ms only though it (facility) otherwise is more or less 60 K.Ms;

which the petitioners have claimed as a 'denial or least an abridging' of their guaranteed fundamental right of 'freedom of movement and liberty' hence the competence of this court to examine such a question cannot be denied else the very purpose of Article 199 of Constitution may fail whereby this Court has been given the status of '**ultimate custodian of fundamental rights**'. Further, *prima facie* there appears no other remedy available with the petitioners to question the *legality* of 'collection of fee/toll-tax notification' as same is being claimed under some agreement, executed between government and *company* under a legislation. In such eventuality, the approach to this Court cannot be questioned as '*not sustainable*'. Reference can well be made to the case of *Imran Khattak v. Sofia Waqar Khattak* (2014 SCMR 122) wherein it is held that:-

*"8. A careful perusal of the Article reproduced above would show that a High Court would exercise its extraordinary discretionary Constitutional jurisdiction where it is satisfied that, subject to the Constitution, no other adequate remedy is provided by law. It would exercise such jurisdiction under Article 199(1)(a)(i),(ii) and (c) on the application of an aggrieved person while **under 199(1)(b)(i)& (ii) on the application of any person whether aggrieved or not, and not on an information or on its own knowledge.**"*

Thus, we find no substance in these objections *too*.

18. Now, we would proceed further to examine the merits of the instant case which do include all *pleas* of respondents *even*. What was heard; perused on production and argued can well be framed in following *proposition*:

- i. *Whether an act or policy of Government or Executive, if hurting to fundamental rights, can be examined under judicial review while exercising Article 199 of the Constitution?*
- ii. *Whether Government alone can itself competently waive or surrender the fundamental rights of citizen in name of facility by leaving citizens with no other option?*
- iii. *Whether an act of the Government converting an existing toll-free road / facility into a taxable or chargeable stands well with test of **reasonableness**?*
- iv. *Whether respondent no.9 (company) has discharged his all liabilities in completing '**agreed liabilities**' as per agreement?*
- v. *Whether road is complete as per agreement?*
- vi. *Whether respondent no.9 (company) is justified to claim a fixed fee from each user without taking into account the use of facility by such user?*
- vii. *Whether amount of the 'fee' should be '**proportionate**' with service provided and availed or otherwise?*
- viii. *Whether determination of a 'fee' is unbridled or is subject to '**quid pro quo**' ?*
- ix. *Whether the grievance of some or individual can be allowed to prevail over inconvenience of general public?*

Let's take up the *first* proposition first.

19. Before saying anything else, we would say with reference to our *religious* (Islam) point of view which *undoubtedly* guarantees and insists that it is a natural right of a human being to be able to depart and return, particularly within boundaries of his *country*. Freedom of movement is established by the Qur'ân, Sunnah, and the consensus of the jurists. In the Qur'an, God says:

“It is He Who made the Earth submit to you, so traverse its surface and eat of its sustenance and to Him is your return.”

Thus, *normally* no one should be prohibited from movement except for an overriding consideration of the *general welfare*. To facilitate the people's freedom of movement, Islam prohibits any transgression being committed against travelers or hindrance being placed in their way.

Besides, in order to facilitate use of the roadways, the Prophet forbade his Companions from sitting down in the middle of them. He said: "Avoid sitting in the roadways." His Companions responded: "O Messenger of God, we have no recourse but to sit in these places." He said: "**If this is the case, then give the road its rights.**" They said: "What are the rights of the road, O Messenger of God?" He said: "Lowering the gaze, **abstaining from abuse**, returning the greeting of peace, **enjoining what is right, and forbidding what is wrong.**" Not only, should this but the streets be used for what they are built for, like traveling and the transportation of materials and goods. Using them for any other purpose is prohibited, especially if it leads to the harming others. Due to the importance of travel in the life of a Muslim and due to the fact that unforeseen problems often occur during travel, God has granted the wayfarer a right to a share of the obligatory alms. This is if the traveler is in dire need of it, even if this person is affluent in his or her own land.

20. Now, let's see what our *constitution* says of it. This cannot be answered without referring to certain Articles from the Chapter-II of Part-I under *title* of '**Fundamental Rights**' as same are claimed to be

involved in the instant petitions. The term 'life', used in the Article 9 of the Constitution has attained *final* definition as :

'life' includes all such amenities and facilities which a person **born in a free country** is entitled to enjoy with **dignity, legally and constitutionally'**

A 'free country' shall never fulfill its meaning if one does not enjoy the right of 'freedom of movement' which stands accepted by the Constitution *itself* by inclusion of Article 15 thereof which reads as:

"Article 15. Freedom of movement, etc.—Every citizen **shall have the right** to remain in, and, subject to any reasonable restriction imposed by law in the public interest, **enter and move freely throughout Pakistan**, and to reside, and settle in any part thereof."

The *phrase* 'enter and move freely throughout Pakistan' must be given *its* due meaning even with reference to *phrase* 'reasonable restriction imposed by law in the public interest' because it is often necessary to earn a livelihood, find employment, seek knowledge, and achieve many other things. *The freedom to move is a quality of all living things. It is a necessary part of what it means to be alive* therefore, this is one of those 'fundamental rights' which has and shall have direct bearing and effects upon other specific *fundamental rights* such as:

Article-9 & 10. *without a right to move freely, the terms 'life' & liberty' shall have no meaning rather it shall be a 'restraint or detention' which otherwise is guarded by Article 10 of Constitution;*

Article-14. *the dignity of a man may come under clouds if he is left with **no option** but to compulsorily pay charges/fee to move freely from one place to another particularly when the person compulsorily receiving charges / fee does not deny status of such man to have borne in a **free country**;*

Article-16 & 17. *without a right to move freely there can be no concept of **freedom of assembly & associations** because the*

*term assembly or association cannot be confined to assembly or association of only those residing / living within a boundary but such right is available to those **two** even who are residing at opposite edges of **country**;*

Article 18. *without a right to move freely there can also be no concept of 'freedom of trade, business or profession' because no law restricts one (citizen) to compulsorily do trade, business or profession near or by side of his place of abode;*

Article 20. *without a right to move freely there can also be no concept of **freedom to profess religion and to manage religious institutions** because propagation do require liberty & freedom;*

Article 23. *without a right to move freely the guarantee, provided to every citizen for acquiring, holding and disposing of property in any part of Pakistan may also fail;*

Article 24. *leaving a man with no option but to compulsorily pay charges / fee also prejudice to guarantee, provided in respect of **property** of such person;*

Article 25-A. *bringing a restriction on free movement from one place to another, the guarantee of **free** & compulsory education may also fail;*

The *vitality* of Article-15 *now* should not be under any confusion anymore however, without prejudice to such *vitality* yet, we have no reluctance in admitting that the *State* may *competently* pass laws, frame rules, regulation or *policy* to ensure peace, well-being and prosperity but not at the cost of *fundamental* rights but to regulate the same with intelligible, reasonable, fair, just and proper exercise of '*trust*' vested in it by the *constitution* itself as insisted by the Article-8 of the Constitution which :

Article 8. Laws inconsistent with or in derogation of Fundamental rights to be void. – (1) Any LAW, or any CUSTOM or USAGE having the force of law, (in so far as it is inconsistent with the rights conferred by this Chapter), shall, to the extent of such inconsistency, be "VOID".

(2) The STATE shall not make any Law, which takes away, or abridges the rights so conferred, and any law made in contravention of this clause, shall, (to the extent of such contravention), be "VOID"

The *bare* reading of the above, should leave it '*no more*' open for discussion that even the *STATE* is not competent to make any law which *otherwise* is inconsistent with *fundamental rights* or *least* abridges such *fundamental rights* because the '*Fundamental Rights*,' guaranteed by the Constitution, are not meant merely to be pious enunciations of certain principles supposed to be the basis of the Constitution but characteristic *thereof* is its paramount to ordinary State-made laws. They are *immune* from the pale of legislative enactments and executive actions. They constitute express constitutional provisions limiting legislative power and controlling the temporary *will of a majority* by a *permanent and paramount law*, settled by the deliberate wisdom of the '*NATION*' i.e '*constitution of the Country*'.

21. In view of above *discussion*, we can *safely* say that competence of State or Executive authorities is not '*unbridled*' but are always *subordinate* to four-lines sketched by the '*Constitution*' itself i.e. '**fundamental rights**', therefore, the *restriction*, if any, on such a *vital* fundamental right can and should only be in the '*public interest*' and not for the benefits of an individuals or even for an *organ* of the State which *too* should stand well with test of '**reasonableness**', as has been defined in the case of '*Pakistan Broadcasters Association v. Pakistan Electronic Media Regulatory Authority* (PLD 2016 SC 692) that:

"16. Undoubtedly, no one can be deprived of his fundamental rights. Such rights being incapable of being

divested or abridged. The *legislative powers conferred on the State functionaries can be exercised only to regulate these rights through reasonable restrictions, and that too only as may be mandated by law and not otherwise.* The authority wielding statutory powers conferred on it must act reasonably (**emphasis supplied**) and within the scope of the powers so conferred.

17. It is certainly not easy to define “reasonableness” with precision. It is neither possible nor advisable to prescribe any abstract standard of universal application of reasonableness. However, factors such as the **nature of the right infringed, duration and extent of the restriction, the causes and circumstances prompting the restriction, and the manner as well as the purpose for which the restrictions are imposed are to be considered.** The extent of the malice sought to be prevented and / or remedied, and the disproportion of the restriction may also be examined in the contest of reasonableness or otherwise of the imposition. **It needs to be kept in mind that “reasonable” implies intelligent care and deliberation, that is, the choice of course that reason dictates.** For an action to be qualified as reasonable, it must also be **just right and fair**, and should neither be **arbitrary** nor **fanciful or oppressive”**

(emphasis supplied)

In another case of *Pakcom Limited v. Federation of Pakistan* (PLD 2011 SC page 44, relevant at page 58), the Honourable Apex court while setting out the *criterion* to examine a piece of legislation or a policy formulated, affirmed as:

- v) **Reasonableness of classification is a matter for the Courts to determine and when determining this question,** the Courts may take into consideration matters of common knowledge, matters of common report, the history of the times and to sustain the classification, they must assume the existence of any state of facts which can reasonably be conceived to exist at the time of the legislation.

In another case of *Province of Sindh v. Lal Khan Chandio* (2016 SCMR 48) the honourable Supreme Court categorically held that:

“11. The Government can only exercise its powers under section 40(1) of the Sindh Wildlife Protection Ordinance to advance the objective of the law, which was enacted for the ‘preservation, conservation and management of wildlife’; its decision must be based on sound ecological principles and taken after a proper assessment of the population of the species. And needless to state if a government’s exercise of powers is based on ulterior considerations or taken to exacerbate the threat faced by a specie it can validly be challenged under Article 199 (1)(a)(i) of the Constitution because then the government would not be acting in accordance with the law and it would be in disregard thereof.”

(emphasis supplied)

In another case of Arshad Mehmood v. Government of Punjab (PLD 2005 SC 193), the legal fact of legislation to be subordinate to fundamental rights was insisted while observing as:

“The contentions raised by the learned counsel do not call for examination in depth for the reason that if a law, under which certain proceedings have been drawn, **fails to stand the test of Article 8 of the Constitution** and is liable to be declared void then any proceedings drawn under it, howsoever, solemn, cannot sustain in law.”

(emphasis supplied)

Further, even in the case of Dossani Travesl Pvt. Ltd. (2014 PLD SC 1) the honourable Supreme Court never declared the policy making decisions of Executives immune from constitutional jurisdiction of High Court (Article 199) rather examination thereof was made permitted and even the High Court was held *competent* to annul such policy *even* but only if on examination thereof same is found to be **illegal, arbitrary or malafide**’ as shall stand evident from reproduction of relevant portion which are:

“24. Besides the task of allocating such quotas and making arrangements for Hajj **fell within the policy**

making domain of MORA and in absence of any illegality, arbitrariness or established mala fides, it was not open for the learned High Court to annul the policy framed by the competent authority."

(emphasis supplied)

From above, it is quite clear that the legal *bar* onto competence of High Court to declare a policy '*annul*' would be *operative* only if it (*policy*) is free '**illegality, arbitrariness or established mala fide** which, we have no hesitation to say, cannot be done without examining a '*policy*' . However, the position shall stand brighter and clearer from reproduction of clause-iv of short order passed by Honourable Apex Court in said matter which is:

*"that the High Court **can** under Article 199 of the Constitution **annul** an order or a Policy framed by the Executive, if it is **violative of the Constitution, law** or is product of **mala fides**. However, nothing has been placed before this Court to indicate that the Hajj Policy challenged before this Court seriously suffered from any of these infirmities; and*

Thus, we can *safely* conclude that any legislative instrument, Rules or Policy can well be brought for *examination* thereof before this Court for *judicial review* while invoking constitutional jurisdiction of this Court and if it is found:

- i) *violative of constitutional law or inconsistent with fundamental rights;*
- ii) *unreasonable, arbitrary or malafide;*

then this Court can *competently* declare the same '**annul**' or any part or portion thereof which is so found. The *proposition* is answered accordingly.

22. Now, we would take up the *second* and *third* propositions, being strongly *inter-linked* with each other which are:

"Whether Government alone can itself competently waive or surrender the fundamental rights of citizen in name of facility by leaving citizens with no other option?"

*" Whether an act of the Government converting an existing toll-free road / facility into a taxable or chargeable stands well with test of **reasonableness**?"*

Since, while responding to the *first* proposition, it stood clear that the *State* though has jurisdiction, competence and authority to come forward with any necessary legislation or policy even but not in an *arbitrary* or *unreasonable* manner rather should always be strictly as *dictated* by the constitution *itself*, therefore, it has become *rather* easy to respond to the *proposition*. Since, it is *absolute* responsibility of the State to ensure 'fundamental guarantee' to every *single* citizen unless and until the circumstances justifies a *reasonable* restriction. We have also no hesitation in *stoutly* insisting that it is the *first* responsibility of the State that *its* every single action and omission should always be for no *other* purpose and *object* but for well-being and prosperity of the *nation* as a whole or to a class of public to which same addresses, as is evident from Article 2-A of Constitution. We would take a *little* pause here and would prefer to *first* refer the *relevant* ordinary meaning of the term '*facility*' is:-

"something that makes an action, operation, or activity easier"

OR

"skill and ease in doing something"

23. From above it is quite evident that term 'facility' brings an *impression* of '**ease & convenience**'. The State is always supposed rather believed to step forward for '**ease & convenience**' of its 'subjects' particularly when same directly or *indirectly* relates to 'fundamental rights' but a claim of providing facility shall '*fail*' if the '*subjects*' are left with no option but to avail it which *too* after paying charges for which they (*subjects*) never agreed. The moment one is cornered thereby leaving him with no option but to pay certain amount to come out of such position then such amount can no *longer* be interpreted as '**fee**' but shall turn into '**tax**' whether one continues claiming it as '**fee**'. We, despite our *tilt* in search of a favouring logic, find ourselves unable to say that the *Government first* can snatch a guaranteed fundamental right from the *citizen* and then can *proudly* allow the same to its *subject* (citizen) to *compulsorily* avail not *enjoy* the same fundamental rights against payment of *certain* charges/fees. The *Constitution* does not guarantee one to *merely* avail '**fundamental rights**' but insists assurance of circumstances to '**enjoy**' the same. The term '*avail*' is not synonym to the term '*enjoy*' therefore, such *exercise* can neither be said to be '**just, fair, and reasonable**' but would be '**arbitrary rather in abuse of trust**'. In the case of *Province of Sindh v. Lal Khan* supra, the honourable Supreme Court while referring to *fundamental rights* with reference to preamble of *Constitution* hammered it again that State is not '**owner**' of fundamental rights. The relevant portion thereof is reproduced hereunder:-

"17. That amongst the constitutionally guaranteed Fundamental Rights is the right to "life (Article 9), "dignity"

(Article 14) and the right to “profess” and “practice” ones religion (Article 20). The Constitution of Pakistan starts with the bismillah – “In the name of Allah, the most Beneficent the most Merciful”, followed by the Preamble, which opens with the following words:

“Whereas sovereignty over the entire Universe belongs to Almighty Allah alone, and the authority to be exercised by the people of Pakistan within the limits prescribed by Him is a sacred trust.”

Illuminating the Constitution the Preamble reminds us that Almighty Allah alone is the Sovereign, and the people of Pakistan are to exercise their authority as His trustees. The mirrors the Quranic concept of human being vicegerents or stewards (Khalifa fil ard- surah al-an’am 6, verse 165, surah an-naml 27, verse 62). Stewards, as opposed to absolute owners, cannot use or exploit natural resources with abandon, nor hunt a species till its status becomes vulnerable or extinct. If any specie for want of habitat or as a result of hunting or exploitation is endangered or becomes extinct the Khalifah violates his /her trust.”

(emphasis supplied)

From above, it is evident that the *status* ‘government’ has been equated with that of ‘stewards’ and not that of ‘**absolute owners**’ which has to exercise authority within the limits *prescribed* by ‘**Him**’. Since, the *importance* of ‘**fundamental rights**’ to complete the meaning of the term ‘**life**’ in a ‘*free country*’ cannot be denied therefore, the State cannot abridge such *rights* even in name of facilitating its *subjects*. This is also in line with commandments of ‘*Islam*’ which insists as:

“God commands you to render trusts to whom they are due, and when you judge between people judge with justice.” (Quran 4:58)

“We have revealed to you the scripture with the truth that you may judge between people by what God has taught you”. (Quran 4:105)

The term 'judge with justice' should never be confined or limited to Courts alone but it must be taken for all who are entrusted with certain authority to regulate affairs of people.

This has been the cause and reason that this Court and Apex Court whenever confronted with a situation to scale jurisdiction of an authority in comparison to 'fundamental rights', the tilt was always found towards 'fundamental rights' and reasonableness. This is so that no fundamental right can be surrendered or waived by means of an agreement or an undertaking because the preservation of certain basic human rights against State interference is an indispensable condition of free society. Reference, if any, in this regard can well be made to the case of *Pakistan Muslim League (N) v. Federation of Pakistan* (PLD 2007 SC 642) that:

"31. It is worth mentioning that no fundamental right can be surrendered or waived by means of any agreement or an undertaking as argued by Raja Muhammad Ibrahim Satyiti, learned Advocate Supreme Court and Malik Muhammad Qayyum, learned Attorney General for Pakistan because ' the idea behind the concept of Fundamental Rights is that the preservation of certain basic human rights against State interference is an indispensable condition of free society. The paramountcy to State made laws is the hallmark of a Fundamental Rights. It follows that the aim of having a declaration of Fundamental Right is that certain elementary rights of the individual such as his right to life, liberty, freedom of speech, freedom of faith and so on, should be regarded as inviolable under all conditions and that the shifting majorities in the Legislatures of the country should not be able to tamper with them."
(emphasis supplied)

Thus, now we can safely answer the first proposition as 'negative'.

24. Now, we would attend the *third* proposition, being guided by the discussion of *second* proposition but before start thereof it is material to mention that following legal positions and facts, came to surface in view of *so far* discussion, which are:

- i) the free movement is undeniable right of every citizen;
- ii) the State is not '**owner**' of its subjects but is custodian;
- iii) restrict on or against fundamental rights must always be reasonable, fair and in best interest of *public at large* and not individuals or some;

Now, let's have a look upon some other *undeniable* facts i.e :

"the road in question was already in '*existence*';

"it was *functional*;

"it was being **maintained** by the GoS'

"the people were freely enjoying the *same* without paying any charges or *toll*";

A *total* conclusion of above *facts* could be nothing but that people of the area were having '**free movement**' from Mirpurkhas to Hyderabad without payment of any toll which *too* with complete *guarantee* least *assurance* of the GoS to provide *safety* and *security* to all *users* of such road. Further, it was always the responsibility of the GoS to ensure proper maintenance of the already *existing* road with further responsibility to ensure '**ease & comfort and convenience**' of its *subjects*. Needless to add, the GoS cannot deny or escape from such *obligations / duties* rather was always bound and believed to discharge

the same. In short, a *toll-free* existing road regardless of its *condition* was available for the *users* of Mirpurkhas to Hyderabad.

25. We have no hesitation in saying that there is much difference between '*discharging an obligation to maintain an already existing thing*' and '*providing an extraordinary ease*'. The GoS would be justified in stepping forward to work for the '*ease*' and '*convenience*' of its subjects who (*subjects*) are not equal in *financial status* but unfortunate to admit most of them living under the *poverty line*. Therefore, such *material* fact of *social* difference must always be kept in view by the GoS(Government of Sindh), while making any policy, rule of Law *even*. The GoS, being direct *custodian* of its subjects, how can be supposed to have forgotten while making any decision in name of *development* that we, *unfortunately*, live in a society where the '*parents are seen selling their children for bread*'; people committing *suicide* on failure of providing **bread** to their dependants; and *heinous* offences are reported to have been committed for 10/15 rupees *even*. One cannot assume the weight of one's pocket only by looking at his *out-fit* therefore, decisions, having general application and effects, must always be made keeping in view the *realities* and not *mere* out-fits or in name of good *intentions* only. This has been *insisted* even in the '**objective resolution**' as:

"The Constituent Assembly representing the people of Pakistan resolves to frame a constitution for the sovereign independent State of Pakistan;

*Wherein the Principles of **Democracy**, freedom, equality, tolerance and social justice as **enunciated by Islam** shall be fully observed;*

.....

*“Wherein shall be guaranteed FUNDAMENTAL RIGHTS including equality of status, of opportunity and before law, social, economic and political justice, and freedom of thought, expression, belief, faith, worship and association, subject to law and public **morality**;*

.....”

26. Therefore, every act of the government (agent of people) must always be subordinate to objective resolution and Chapter-II of the Constitution because at the cost of fundamental rights, guaranteed by the Constitution, the executive Government is not empowered to frame a policy.

27. Since, as *discussed* above, the free movement does have its consequences upon *‘opportunity’; social economic and political justice*, freedom of *belief, faith, worship* and *association* therefore, it cannot be *reasonable* and *justified* to *first* snatch an already existing facility and then to return the same subject to payment of the *‘toll or fee’* because this shall not only prejudice the very *spirit* of Article-4 of the Constitution but also to guarantee, provided by the *Objective Resolution* and Chapter-II of the Constitution *even*.

28. At this *juncture*, while keeping above discussion in view, it would be relevant to refer *relevant* portions of the report of Project Manager, Project Implementation Unit, Hyderabad-Mirpurkhas, DCP, submitted before this court which shall make the object of such *projects* clear. The relevant portions read as:

“2. It is important to consider that the Hyderabad Mirpurkhas Dual Carriage (HMDC) project is governed by a Concession Agreement dated November 11, 2009 (the Concession Agreement) executed between the Works & Services Department,

Government of Sindh (the GoS) and the Dekjae Construction (Private) Limited (the Concessionaire) under Public Private Partnership (PPP) arrangement **unlike the conventional mode of procurement of the Government of Sindh.** The PPP projects are generally considered to be more beneficial in terms of financing, efficiency, risk-sharing, operations and maintenance, and timely completion of the project. It is also submitted that under the PPP mode, additional sources of funding contributed by the private party in form of **equity and the commercial banks in forms of debt** are tapped to make it *financially efficient*, that are then *re-paid through the project revenues (through collection of toll revenues in this Project)* over the life of the project unlike the conventional Annual Development Program (ADP) projects. It is also worthwhile to mention HMDC Project has a project lifecycle of 32 years with two years of construction of the Project with 30 years of the operations and maintenance.

3. Moreover, the PPP projects commonly have operations and maintenance components over the project cycle lasting usually between 20 and 30 years that increase sustainability and efficiency in the delivery of the projects giving them an edge over the conventional projects that are usually on EPC basis. Furthermore, project risks such as design risk, quality risk, non-political and other risks decided on case-by-case basis are generally transferred to the private party under PPP projects.
4. One of the features of a PPP project is that the PPP framework allows the private party to collect the tolls. The toll revenues collected by the HMDC Project follows a toll-based model, wherein the Concessionaire has the power and authority to collect the tolls from the commuters for the term of the project i.e. 30 years, as set out under Article 17 of the Concession Agreement which is **used to repay cost of Operations and Maintenance, repayment of debt and return on enquiry.**
5. It is worth to mentioning that the HMDC is the first landmark PPP road project in Pakistan's history with proper allocation of risks between the public and private sector. The **funding of the Project** was shared by the **Government of Sindh, private developer in the form of equity, and commercial banks, which is re-paid through the project revenues i.e. toll collection over the Project life cycle.**

From the above, it appears that such projects are claimed to be more beneficial in terms of “financing, efficiency, risk-sharing, operations and maintenance, and timely completion of the project”. We are unable to understand that *how* other *projects* of the Government can be believed to be lacking such *terms* except the one i.e. **‘risk-sharing’** because every project of the *Government* is believed to be launched after working on every *feasibility*, including *‘financing’*, thereof so as to ensure completion thereof in *time*. Besides, it cannot be believed that projects of the government are launched without concept of its *maintenance* and *operation* thereof which *otherwise* is the absolute responsibility of the Government. Thus, in name of such *objective (s)*, it is not advisable for best interest of public at large to charge a *fee* or *toll* on an already existing *facility*.

29. Further, from above it also becomes quite clear and *evident* that **‘funding of the project’** by the GoS, private developer in the form of *equity* and **‘commercial banks’**, which is **re-paid** through the project revenues **i.e. toll collection** which *undisputedly* is to be recovered from the *users* who *otherwise* were availing free movement. It goes to show that the *developer* is only to pay an *initial*, amount which *too*, on basis of equity while the other part is to be provided by **GoS**. Rest of the amount is obtained from **‘commercial banks’**. Such mechanism results into:

- i) *absolving the GoS from its legal and moral obligation to ensure proper, safe and free movement to users;*
- ii) *earning of considerable amount / profit for developer / company and Bank;*

by *burdening* the *users* to benefit the company and *bank* which *too* at the cost of their *already* existing facility which *does* not appear to stand well with reasonableness and guarantee, to be ensured by the **GoS**.

30. The '**better facility**' must always be *optional* but not by compelling one or depriving him of already existing facility regardless of its '*condition*' as maintenance whereof was *otherwise* responsibility of the Government *itself* because we (*living souls*) are not like '**robots**' that have no choice in their actions. The *main* difference between a '*robot*' and a '*living soul*' is the '**free will**' to choose among choices. It is the '*right*' of choosing which decides the fate of every *action* and *omission*. We (*living souls*) are always accountable for our acts and omissions whether it be an *earthly matter* or *spiritual* one. If talking about *earthly* system, it is the '*right of choosing*' which may earn one a *reward* or may bring him penal consequences. We again reaffirm that the Government may *competently* frame any policy or *Law* for providing a '**better facility against fee even**' but not by *snatching* already existing *facility* because it may ultimate result in *eliminating* the concept of '**toll-free roads**' in *future* which *otherwise* is *unavoidable* for :

- i) *getting proper education;*
- ii) *doing trade and business;*
- iii) *enjoying right of association;*
- iv) *enjoying right of worship, belief and faith which always require propagation;*

31. Thus, suffice to say that concluding exercise, Government cannot be said to be '**just, fair, and reasonable**' but would be '**arbitrary**' hence

same cannot be allowed to continue even in name of '**Public Private Partnership Act**'. Therefore, answer to this *proposition* could be nothing but a '**BIG NO**' hence it is believed that the '**Board**', constituted under Public Private Partnership Act 2010 shall always keep these aspects before approving any *projects* and no '*toll-free*' road *in future* be converted into '**toll-able**'. In short, the existing toll-free road be not snatched in name of providing a *better road*. This *however* should not be an excuse for government in providing better roads to its *subjects* rather a balance has to be ensured by the government thereby it (government) should keep the existing facility *alive* so that people may not claim any prejudice to their *guaranteed* fundamental rights while providing '*express roads, highways and motorways*' even through Public Private Partnership Act or any other law so that people, *interested* in availing the better facility, could not object to a *reasonable* fee for availing the **better facility**.

32. Now, let's take the *fourth* proposition which is:

*"Whether respondent No.9 (company) has discharged his all liabilities in completing '**agreed liabilities**' as per agreement?"*

For a proper *answer* to this proposition, the relevant portions of Article-14.1 of the *Concession* agreement, which is titled as '**Operation and Maintenance obligations of the Concessionaire**', are made hereunder:

- a) During the Operation Period, the Concessionaire shall operate and maintain the Project Highway in accordance with this Agreement either by itself, or through the O&M Contractor and if required, modify, repair or otherwise make improvements to the Project Highway to comply with

the provisions of this Agreement, Applicable Laws and Applicable Permits, and conform to Good Industry Practice. The obligations of the Concessionaire hereunder shall include.

- (i) Permitting safe, smooth and uninterrupted flow of traffic on the Project Highway during normal operating conditions;
- (ii) Collecting and appropriating the Toll;
- (iii) Minimizing disruption to traffic in the event of accidents or other incidents affecting the safety and use of the Project Highway by providing a rapid and effective response and maintaining liaison with emergency services of the State.
- (iv) ..
- (v) Undertaking routine maintenance including prompt repairs of potholes, cracks, joints, drains, embankments, structures, pavement markings, lighting, road signs and other traffic control devices;
- (vi);
- (vii)
- (viii) Preventing with the assistance of the concerned law enforcement agencies, any encroachments on the Project Highway.
- (ix) Protection of the environment and provision of equipment and materials thereof;
- (x);
- (xi) Maintaining a public relations unit to interface with and attend to suggestions from the Users, government agencies, media and other agencies; and by the Concessionaire to the GoS without any delay, and the Concessionaire shall diligently carry out and abide by any reasonable directions that the GoS may give for dealing with such Emergency;

b)

c)"

The report of the Additional Registrar of this Court, referred above, had sufficiently identified countless illegal diversions, cuts, improper 'rest areas' and even illegal removal of many New Jersey barriers which *however* later claimed by respondent No.9 (company) to have been fixed. Without making much comments, it would suffice that respondent no.9 (company) was/is to ensure maintenance of *project* on regular basis which *however* the respondent No.9 (company) did after identification of same by official of this Court. Further, the respondent no.9 (company) was also obliged to ensure 'environment protection' by plantation etc. but it is regrettable to say that the respondent no.9 (company) has not taken any *positive* initiation in completing, managing and maintaining the plantation though was required within meaning of the *Agreement* itself. We *however* believe that in future the respondent no.9 (company) shall continue discharging its obligations and shall complete *plantation* process within a period of one month with assurance of managing and maintaining thereof. The 'rest area', meant for *users*, shall not only be ensured functioning but with complete meaning thereof. Any negligence must be noticed by other party of the agreement i.e GoS, within meaning of Section 14.8 of Agreement.

33. Further, section 14.5 of the Agreement is titled as '*Safety, Vehicle Breakdowns and Accidents* '

- a) The Concessionaire shall ensure safe conditions for the Users, and in the event of unsafe conditions, lane closures, diversions, vehicle breakdowns and accidents, it shall follow the relevant operating procedures including the setting up of temporary traffic cones and lights, and removal of obstruction and debris without delay. Such procedures shall conform to the provisions of this Agreements, Applicable Laws, Applicable Permits and Good Industry Practice;
- b) The Concessionaire's responsibility for rescue operations on the Project Highway shall be limited to an initial response to any particular incident until such time that the competent GoS takes charge and shall include prompt removal of vehicles or debris or any other obstruction, which may endanger or interrupt the smooth flow of traffic. For this purpose, it shall maintain and operate a round-the-clock vehicle rescue post, at Toll Plaza, with one mobile crane having the capacity to lift a truck with a Gross Vehicle Weight of 20,000 (twenty thousand) kilograms.

The Section 14.24 is titled as '*Medical Aid Posts*' and says as:

- a) throughout the Operation Period, as set forth in this Agreement the Concessionaire shall assist the GoS or a substitute thereof to be designated by the GoS in setting up and operating a medical aid post (the "Medical Aid Post") at the Toll Plaza with round-the-clock ambulance services for victims of accidents on the Project Highway.
- b) The Concessionaire shall, at its cost and in accordance with the type designs prescribed for such buildings by the State Medical Department (or a substitute thereof to be designated by the GoS), construct an aid post building and 2 (two) residential quarters, and hand them over to the GoS not later than 30 (thirty) days prior to Scheduled Four-Laning Date. The Medical Aid Post(s) shall be deemed to be part of the Site and shall vest in the GoS.

It continues in Section 14.25, titled as *Recurring Expenditure on Medical Aid Posts* as:

"On or before the Stage II Operations Date, the concessionaire shall provide to the State Medical Department or a substitute thereof to be designated by

the GoS one ambulance in good working condition along with chauffeurs for round-the-clock ambulance services and meet the operating costs of such ambulance including the salaries and allowances of the chauffeurs. The concessionaire shall also reimburse to State Medical department (or a substitute thereof to be designated by the GoS) the actual expenditure incurred by it in each Accounting Year on the medical equipment, and the pay and allowances of up to 2 (two) medical personnel deployed exclusively for the Medical Aids Posts and ambulance, and **shall maintain the Medical Aids Post building in accordance with Good Industry Practice**. For the avoidance of doubt, it is agreed that the concessionaire shall not be liable for any other expenditure incurred by the State Medical Department or a substitute thereof to be designated by the GoS, to the GoS such other information as the GoS may reasonably require, at specified intervals in discharge of its statutory functions.”

while the Section 14.23, titled as, *Police Assistance and Police Outposts* , says as:

- a) For regulating the use of Project Highway in accordance with the Applicable Laws and this Agreement, the Gos shall assist the Concessionaire in procuring police assistance from the State Police department or a substitute thereof. The Police Assistance shall include setting up of a traffic aid post (The “Traffic Aid Post”) at the Toll Plaza with a mobile Police squad for round-the-clock patrolling of the project Highway;
- b) The Concessionaire shall, in accordance with the type designs prescribed for such police outpost buildings by the GoS or a substitute thereof, **construct building not exceeding 25 (twenty five) square meters of plinth area, for the Traffic Aid Post, and hand them over to the GoS not later than 60 (Sixty) days.**

From above, it is quite clear that:

- i) the respondent No.9 (company) was / is under ‘mandatory’ obligation to ensure ‘safe conditions for users’ and ‘rescue operations’, not limited to maintain and operate a ‘round-the-clock vehicle’ at rescue post, as agreed per Article 14.5(b) *supra*, but neither any ‘rescue post’ with said facility was found by the Additional Registrar of this Court;
- ii) respondent No.9 (company) was is under ‘mandatory’ obligation to construct a ‘Medical Aid

post' building and 2(two) residential quarters alongwith one '**ambulance'** alongwith chauffeurs for '**round-the-clock'** ambulance service;

- iii) respondent No.9 (company) was/is under '**mandatory'** obligation to construct a '**Traffic Aid Post'**;

while the other party i.e GoS was required to :

- a) provide medical officers and staff to be available at Medical Aid post' ;
- b) necessary squad for **round-the-clock** patrolling at the project;

but the report of the official of this Court is sufficient to establish that these facilities are not provided hence the answer to instant proposition is in '**affirmative'** which *otherwise* was required to be noticed by the GoS. However, without making much comments on failure and consequences of such liabilities, we would say that since, the status of such *term* to be agreed and binding is not disputed hence, none of the *parties* to agreement can escape such liabilities. Thus, it is hereby ordered that:

- i) the respondent No.9 (company) shall, *without fail*, construct the '**rescue post'** within a period of '**one month'** at both '**toll-plaza points'** however the availability of requisite vehicle '**round-the-clock'** shall be ensured within fifteen days with wide publication of calling number;
- ii) the respondent No.9 (company) shall, *without fail*, construct the '**Medical Aid Post'** within a period of '**one month'** however the availability of requisite

ambulance along-with chauffeurs '**round-the-clock**' **on at least 4 points** shall be ensured within fifteen days at both '**toll-plaza points**'.

- iii) the respondent No.9 (company) shall, *without fail*, construct the '**traffic Aid post**' within a period of '**one month**' at both '**toll-plaza points**'; as well shall introduce the **dual carriage way police**, round the clock with sufficient number of vehicles to ensure safe and undisturbed journey of the road users.

while the Government of Sindh is ordered to:

- i) immediately ensure deployment of medical Officers alongwith necessary medical equipments and skilled technicians;
- ii) immediately ensure deployment of trained '**police squad**' **along-with vehicles, under the command and control of project within fifteen days.**

34. It is added that the *company* shall immediately ensure removal of any defects, breach, illegal *cuts* and fixing of illegally removed New Jersey barrier and to ensure no future breach, cuts and removal of the New Jersey barriers in future the deployed '**squad**' and the company shall be *equally* responsible. The company with certificate of *independent* Engineer shall place on record that project in question has no illegal cuts, breach and all illegally removed new Jersey barriers have been fixed at their respective places which *otherwise* is the responsibility of the company within meaning of Article 14.1 of agreement. Such report shall be placed within a period of '**one week**'. Needless to add that company is not only responsible to ensure the project '**safe**' but is

required to immediately respond to any illegality which do include an action against any person who removes the New Jersey barrier or causes any illegal cut / breach. DIG, Police Hyderabad is required to provide complete assistance as required by the project director and to maintain the law and order situation.

35. It is needless to mention here that *project* in question is meant to use for '**round-the-clock**' i.e '**day & night**' but the project in question has no system of lights for '**night hours**' which brings a question towards the '**claim**' and concept of '**safety & security**' of the '**road users**' for which both the partners i.e '**Gos**' and '**company**' have agreed to keep at high pedestal. The concept of lighting on the project seems to be included in liabilities of the company because Article 14.1(v) says as:

“Undertaking routine maintenance including prompt repairs of potholes, cracks, joints, drains, embankments, structures, pavement markings, **lighting, road signs** and other **traffic control devices;**”

We have no hesitation in saying that '**repair**' of a thing *first* requires existence thereof. Further, the terms '**safety and security**' may fail if the '**road user**' is not allowed to have a *fair* and *clear* vision at the **road in question** during every single '**minute**' out of '**round-the-clock**' therefore, the GoS and respondent no.9 (company) shall with *active* consultation with '**public relations unit**' (as required to be maintained per Section 14.1(xii) of agreement) couple with *advice* of independent engineer shall chalk out some mechanism to over-come or least appreciate this issue. This exercise shall be completed not more than a

period of 'two month' with compliance to this court. The decision thereof should meet the requirement of a 'decision' and shall be of binding effect.

36. Since, the proposition Nos.5 to 9 are *strongly* inter-linked with each other therefore, it would be in all *fairness* to attend the same *jointly*.

Before going into *details*, it is necessary to refer *relevant* portions of the report of the Project Manager, Project Implementation Unit Hyderabad-Mirpurkhas, Dual Carriageway Project Hyderabad, as same have direct *nexus* with propositions under discussion which are:

"6. In response to the Honourable High Court's observation in the recent court order dated 03.11.2016, it is submitted that **a detailed Feasibility Study (including the Traffic Count Study, conducted separately at 5 different locations) and Toll Rationalization Study was carried in 2013 independently by the Concessionaire, the GoS and the Independent Engineer to provide relief to the commuters of Tando Jam and its adjoining villages** and the same was submitted to the Honourable High Court on 26.1.2015 (the Traffic Count Study) is attached here as Annexure A). The results of the three independent studies were consolidated. Additionally, **as part of the above-mentioned Feasibility Study, a mock toll gate was to be constructed at mid-way i.e. Rashidabad, and dividing the toll into half, for facilitating the commuters by charging toll rates for shorter distance on the dual carriageway**. While conducting the mock exercise, the local residents highly reacted and disrupted the mock exercise to construct the mock toll gate. Therefore, in view of the hue and cry of the local residents and their local representatives, the Government of Sindh had no option but to suspend the mock study."

From above, it should not be *confusing* any more that grievance of the residents of Tando Jam and its *adjoining* villages was felt by the Concessionaire and the GoS therefore, an *independent* 'feasibility study

(including the Traffic Count Study, conducted separately at 5 different locations) and Toll Rationalization Study was carried the year in 2013 which too for no other purpose but to *facilitate* the commuters of shorter distance. Thus, it would be sufficient to say that *agreement* does permit or *least* provide some mechanism for such purpose. Reference to Section 2.1 of agreement, titled as '**Grant of concession**' may be made which reads as:

- (vi) enter into private arrangements with the Users for regular use of the Facility or any special use of the Facility and to sell, disturb or issue, at **various outlets** as may be determined by the Concessionaire, **coupons or tokens** against payment of Toll in advance, thus providing the Users with ready access to the Facility without the necessity of paying Toll on each individual use of the Facility; and

From above, it *prima facie* appears that *agreement* does permit:

- i) *various outlets*
&
- ii) *system of coupons or tokens*

which results into no other *conclusion* but that *fixed toll* for all the *users* regardless of *facilities* to be availed is not an '*inflexible role*'. Besides, per Section 17.5 (c) of agreement, titled as '**Toll Review Committee**', places the '*the benefits of the users*' at top while determining the '**toll**'.

37. Therefore, it can *safely* be concluded that not only the *Concessionaire* and *GoS* but also the '**Toll Review Committee**' were always under a *legal* obligation to have reviewed / reconsider the application of '**fixed toll**' for which they can *competently* introduce system of **coupon** or **token** even so as to facilitate the **commuters** of

short distance in *particular* which *too* within meaning of the *agreement* itself *however* following paragraphs were included in said report so as to justify *fixed* toll which are:

“7. Since the toll rationalization was unfortunately not able to be implemented *due to public displeasure*, in order to redress the grievance of the commuters and the local residents, the Government of Sindh has exempted the toll charges from small vehicles including rickshaws, motorcycles and motorcycle driven rickshaw. The Toll notification implementing the exemption of Rickshaw and motorcycle has been attached here as Annexure B.”

8. Furthermore, it is pertinent to mention, the 58 kilometers HMDC road is located in the densely populated area with small villages (appox. 56 connecting pakka roads) at almost every kilometer of the Dual Carriageway (the Location Map is attached as Annexure C). Therefore, it is also not feasible and pragmatic to fence the highway all along and let the commuters enter and exit the road through **defined entry and exit points only**. In lieu of the above, improvising fence will not only make the commuters to travel more kilometers to reach the specific entry/exit points but perhaps may also be more expensive (a huge financial burden on the Government of Sindh) and time consuming as well as causing commuters considerable time delays and fuel costs. Moreover, it is also pertinent to mention that **under good engineering practices, motorway are fenced** and have controlled access, however, other roads and highways including dual carriageways are not fenced and have open access.

9. Moreover, it may be observed that the HMDC is not the only road with fixed toll rate, a similar example can be cited of the **Karachi-Hyderabad Super Highway and Lyari Express Way**, wherein despite many entry/exit points, the commuters are paying a uniformed toll irrespective of the distance.

The reference to Lyari Express way and Karachi highways appear to be not of much weight because Lyari Express does not leave the people with '*zero option*' rather allows the *people* to avail *express way* or

to *adopt* other way. Such *competence* has been stamped and affirmed by us in discussion made *above*. As regard to Karachi highways *earlier* there had not been population along the Karachi highways which is not the case with present road.

10. Whereas, in case, if the Honourable High Court orders to provide relief to the commuters of Tando Jam and adjoining villages, it is submitted that a revised feasibility study with a fresh traffic count will have to be conducted in order to evaluate the financial and technical aspects of any changes to the Project structure. Previously, a toll rationalization study was conducted in 2013, which has become outdated and therefore, a fresh study is necessitated. **Usually, it takes 2 months** to conduct proper feasibility study which will include traffic studies, tripartite counting (by the Concessionaire, GoS and technical consultants) with 24 hours traffic surveillance (three shifts OF 8 hours each) to be conducted at five locations. Following the traffic count will be evaluated and reconciled after which the feasibility study will be updated to better consider any relief options.

11. The above subject of providing any relief to the commuters (including any change in taxation and toll matters) and amendment to the scope of the Project is solely within the power of competent authority in accordance with the Public Private Partnership Act, 2014 (the PPP Act 2010) i.e Public Private Partnership Policy Board which is composed as follows:-

Chief Minister Sindh	Chairman
Minister Finance	Vice Chairman
Minister Law and Parliamentary Affairs	Member
Minister Planning and Development	Member
Chief Secretary	Member
Minister of concerned department	Co-opted Member
Two Members of provincial assembly to be nominated by C.M. Sindh.	Member
Additional Chief Secretary (Dev.) Planning & Development	Member
Secretary Finance	Member/Secretary
Secretary of concerned Department	Co-opted Member
Director General Public Private Partnership Unit	Ex-Officio Member
Three members from the private sector to be nominated by the C.M. Sindh.	Members.
Sectorial specialists to be nominated by the C.M. Sindh	Member

12. Moreover, it is pertinent to mention that in the event if the Honourable Court orders to suspend the recovery of the toll from the existing toll gates a mechanism is adopted to charge toll rates for the short distance travelers, the Concessionaire may regard it as event of force majeure as cited in the Section 21.2 (x) of the Concession Agreement;

“any decision or order of a court or tribunal which has the effect of restraining all or any part of the activities concerning the construction, operation or maintenance of the Project including the determination, levy, demand, collection, retention and appropriation of Toll”

13. In such a scenario, there could be a possibility that the concessionaire may claim relief under Force Majeure during the suspension period, hence it will disturb the financial model for the Project.”

We are *unable* to understand that when the *agreement* permits rather insists universal principle of *equity* that **‘horse and donkey shall not be treated alike’** then how the competence of the court to question a patent *illegality*, hurting guaranteed human rights, can be questioned with a reference of *force majeure*. The Act or the agreement may have given *discretion* but exercise thereof must match with the test, defined in the well known case of ‘Amanullah Khan and others v. The Federal government of Pakistan through Secretary, Ministry of Finance, Islamabad and others’ (PLD 1990 SC 1092) wherein the honourable Apex Court held as:

“Wherever wide-worded powers conferring discretion exist, there remains always the need to structure the discretion and it has been pointed out in the Administrative Law Tax by Kenneth Culp Davis (page 94) that the structuring of discretion only means regularizing it, organizing it, producing order in it so that decision will achieve the high qualify of justice. The sever instruments that are most useful in the structuring of

discretionary power are open plans, open policy statements, open rules, open findings, open reasons, open precedents and fair informal procedure. Somehow, in our context, the wide worded conferment of discretionary powers or reservation of discretion, without framing rules to regulate its exercise, has been taken to be an enhancement of the power and it gives that impression in the first instance but where the authorities fail to rationalize it and regulate it and regulate it by Rules, or Policy statements or precedents, the Courts have to intervene more often, than is necessary, apart from the exercise of such power appearing arbitrary and capricious at times.

(emphasis supplied)

In another case of Habibullah Energy Ltd. V. WAPDA (PLD 2014 SC 47) the honourable Apex Court made it quite clear that the people is *Principal* while the Government is *agent* hence any negligence or deviation of *agent* from best interest of *Principal* (people) will open a room for the Courts to intervene. The relevant portion of the *judgment* reads as:

“6. At this point, it is important to note that not all decisions by state functionaries are to be subjected to an exacting judicial oversight. This is because the principal, (the people), has in fact vested state agencies with discretionary power of an administrative nature. Such delegation of authority by the principal is essential to the efficient functioning of the government. However, **given the possibility of the agent’s deliberate or negligent deviation from the best interests of the beneficiary, the court will enforce fiduciary obligations under certain circumstances.** A breach of the duty of loyalty, such as in the case of a self-dealing transaction or one involving conflict of interest, will trigger heightened scrutiny by the court. Further, if public officials fail to exercise the duty of care that is expected of a prudent manager, the court will assess the underlying action or transaction to ascertain whether the state functionaries have breached their fiduciary obligations to the people of Pakistan.”

(emphasis supplied)

Besides, we are also unable to understand that how the *Concessionaire* and GoS but also the ‘**Toll Review Committee**’ can

attempt to avoid their liabilities i.e to *facilitate* commuters of short distance while pointing to *displeasure* of public only. In other words the *displeasure* of some is being used to compel the **commuters** of short distance to pay toll, fixed for whole use of the road. In short, such *commuters* are paying the cost of *displeasure* of some *too* and to benefit *two* i.e company and **commercial bank** which is against the settled principle of law that '**interests of some shall not prevail over interest of general public**' particularly when the *ultimate* object of the 'toll-recovery' is, to re-pay the loan to *lender* without prejudicing the rights and *facilitation* of users. The *agreement* itself says that the GoS *alone* can competently notify '**alternative Toll Rates**' as shall stand evident from a referral to Section 17.7, titled as "**GoS' Right to Determine Toll**" which reads as:

- (a) Notwithstanding anything contained in this article, GoS shall have right to request the Toll Review Committee to review the Toll Rates proposed by the Concessionaire which shall be subject to the provisions under Section 17.4;
- (b) In addition, GoS shall also have the right to notify alternative toll rates during the tenure of this agreement which shall be binding on the Concessionaire. Provided however, that GoS shall compensate the concessionaire, the loss of Toll revenue or other losses arising out of such an action, as computed by the Concessionaire and confirmed by the Independent Auditor, as its entitlement under this Agreement, on a monthly basis. Compensation can be made either in cash payments or through an extension of the concession Period unless such loss will prevent the Concessionaire from fulfilling its obligations to the Secured Lenders, in which case the payment shall be made in the form of periodic payments which are sufficient to cover the debt service shortfall.

38. Here, it is worth to add that from so far discussion and referral to sections and portions of the report, it becomes quite clear that 'fee' is contract between *two* where one agrees to pay certain amount while *other* agrees to provide certain facilities against such *amount* therefore, the *Concessionaire* and GoS, in particular, cannot avoid facilitating the **commuters** of short distance even on plea of *express* road which stands negated from the fact that *road in question* is not continuing through **Tando Allahyar** and not completed through **Tando Jam town** thus *users* are compelled to use the '**Tando Allahyar bypass**' and have to go through already incomplete road of HMDC, passing through the **Tando Jam**. The position shall stand clear from referral to relevant portions of the report, referred above which are:

"15. In relation to the construction of **Tando Allahyar Bypass**, it is humbly submitted that the construction of **Tando Allahyar Bypass** was not part of the scope of the Hyderabad Mirpurkhas Dual Carriageway Project. The dualization of the bye-pass was not included in the Project considering the financial viability of the project, and this would be constructed by way of **a traditional ADP scheme**.

16. It is humbly submitted that the Tando Allahyar Bypass **currently exists as a single carriageway**, however, one bridge slab is damaged. **The Government of Sindh has assured that the slab will be replaced in one month**. Moreover, in order to dualize the bypass, Rs. 120 million have been paid to the District Commissioner Tando Allahyar for the efficacious dualization of the Tando Allahyar Bypass. As soon as the land possession is handed, the PC-I will be submitted before the P&D Department for necessary approval. Likewise, the damaged pieces of the bypass of Tando Allahyar will also be rehabilitated within one month.

17. Similarly, for the **Tando Jam Bypass**, **Government of Sindh has made a partial payment of Rs. 37 million to the District Commissioner Hyderabad**. As soon as land

possession is handed, the PC-I will be submitted before the P&D Department for necessary approval."

From above, it stands clear that *dualization* of by-passes of Tando Allahyar and Tando Jam is being processed by the GoS *independently* hence the *concessionaire* can claim no *advantage* thereof. Worth to add here that project route length *earlier* was '**67 K.Ms**', as was / is evident from '*project information*' placed on record in earlier decided petition i.e (CP NO.D-756 of 2009) *however*, per present claim the '**done project length**' stood reduced to '**58.7 K.Ms**' for which no *reason* or *explanation* appears particularly when at time of production of said *project information* the project had started. Worth to add that *estimated* cost of the project (67 K.Ms length) was calculated as '**1.93 billions**' which *however* later exceeded much high though the length of *project* admittedly reduced. The existing '**location map**' also shows a *gap/break* in the project (**HMDC**) at Tando Allahyar Town which *also* raises a question over a claim of *unbroken express road* from Mirpurkhas to Hyderabad. Leaving these to be thrashed by quarter concerned, it *however*, is the claim of GoS & Concessionaire that project in question is meant to provide *unbroken express road* facility from Mirpurkhas to Hyderabad but *facts* are otherwise. Since, none can deny the existing position that even one who pays the full '*toll*' yet he has not been provided a '*complete express road*' because the road in question stands broken at two points i.e '*beginning of Tando Allahyar Town to end of Tando Allahyar Town* (may be of 5/6 K.Ms) and at '*beginning of Tando Jam town to end of Tando Jam Town*' (may be of 3/4 K.Ms). In short, the *user* has to use independent roads of the GoS either while

passing through Tando Allahyar and incomplete dual carriage way while passing through Tando Jam Town or even while traveling on Tando Allahyar by-pass but the quarter concerned while *fixing* toll did not bother to appreciate this fact rather *still* claiming to be providing complete facility as per *agreement*. We have no hesitation in concluding that without completing the *project* the concessionaire cannot legally claim such *toll* amount which stood revised while ignoring the said fact. Thus, Bypass roads shall be provided by the project to Tando Jam and Tando Allahyar Towns, on same criteria, within three months.

39. There is another *interesting* aspect that as per '*project information*' on basis whereof the Concessionaire *surely* had stepped forward, says as:

'Estimated Toll Revenue. *As this road is linking to Karachi-Hyderabad Superhighways therefore, the same toll rate formula has been applied on this 'project' as well'*

Thus, in *earlier* decided petition the toll rate was charted as:

S.No	Type of vehicle	Toll Rates
1.	Car & Jeep	Rs.20
2.	Trailers	Rs.75
3	Trucks	Rs.50
4	Busses	Rs.100
5	Coasters	Rs.60

It is worth to add here that this was chalked out in December, 2009. While calculating such *toll* the daily income was expected after a complete *feasibility report* as '**Rs.421,850**' and *undeniably* the traffic flow has increased from year 2009 to-date therefore, recovery of such *amount* or a reasonable *yearly* increase in '**toll**' would have been sufficient for '**re-payment of the loan**' and a *reasonable* profit for

investor too. No one can believe that GoS or the investor would not have worked on such '*calculation*' or authenticity thereof because it was always necessary for ensuring '**repayment of the loan**' but it is quite surprising that rate of toll-fee has *materially* rather *abnormally* increased within six years i.e more than '**double**' as it was first calculated for assuring repayment of the loan and *earning* some *profit*. However, the '**traffic count study** (done from Sept 18, 2013 to Sep. 24,2013)' , submitted *today* with '**five toll gates**' toll recovery per today's charged fee has been estimated as '**Rs.443,734/-** i.e '**difference of Rs.21,893/-**' from calculated *recovery* of toll , worked out in year 2009 which is quite surprising rather *unbelievable*. In short, following facts *prima facie* are not disputed that:

- i) *project route length material reduced as much as 9 K.Ms;*
- ii) *project though started in time yet cost whereof claimed to exceeded abnormally;*
- iii) *project is not complete in all senses;*
- iv) *the toll (fee) materially stood more than '**double**' as it was chalked out in year 2009;*
- v) *existing toll (fee) is materially than the Karachi superhighway which was claimed as a formula;*
- vi) *Bypass roads are not provided on Tando Jam and Tando Allahyar by the project.*

Therefore, abnormal increase in the '**toll**' amount *prima facie* shows illogical and unreasonable rather improper exercise of jurisdiction by *Concessionaire* and lack of interest of GoS towards its obligations and rights of *general public* which *legally* cannot be stamped as *valid*.

40. In view of above discussion, the propositions, under discussion, are answered as:-

- i) proposition No.V as 'road is not complete as per agreement even'
- ii) proposition No.VI as "No"
- iii) proposition No.VII as "yes"
- iv) proposition No.VIII as "yes"
- iv) proposition No.IX as "No"

41. Accordingly, we hereby order that the Concessionaire shall not charge any *toll* from those, living within a distance of '5 K.Ms' from entry point. They shall be provided 'coupons or tokens' as is permissible in the agreement *itself*. This shall be available only to:

S.No	Area	Approx. distance from Entry point
1.	Haji Umer	0.4 K.M
2.	Detha	1.0 K.M
3	Usman Shah	2.0 K.Ms
4	Rahooki	3.0 K.Ms
5	Sultanabad	5.0 K.Ms

(The said table is from location Map, provided by the Project Director *himself*)

Since, *project* is not complete hence till completion thereof the 'Toll' from *users* shall be charged as was calculated and *notified* in year 2009:

S.No	Type of vehicle	Toll Rates
1.	Trailors (3 to 6 Axels)	Rs.75 per crossing
2.	Tractor (3 and 4 Axels)	Rs.75 per crossing
3	Trucks and tractors	Rs.50 per crossing
4	Busses (Min)	Rs.100 per crossing
5	Wagons	Rs.80 per crossing
6	Cars/jeeps	Rs.20 per crossing

Such notification should be issued within a period of one (01) week.

However, on completion of the road as per *agreement* and providing of

complete facilities, as per *agreement*, as well directions of this judgment; the Concessionaire, GoS and Toll Review Committee with *active* participation of '**public relations unit**' shall consider all requisite and necessary aspects, as discussed above, and notify the fresh Toll Rates thereby aiming to assure 're-payment of loan installment' which may be lower than above rates. Since, the GoS is *undisputedly* a party and has invested *half* of the investment hence *prima facie* the rights of the *principals* (people) are involved hence they are entitled to know the *output* (*profit*) , if any, being received by the GoS, therefore, the GoS is not supposed to let things *run* by *concessionaire* alone. Accordingly, both Concessionaire and GoS shall ensure a *mechanism* thereby ensuring a total *daily* income from the project which should also be available for public notice and knowledge. They *both* shall also bring the total amount of *installment* to light so that '**public relations unit**' could *actively* participate in re-payment of loan out of *recovery* (toll/fee). In short, a *reasonable* balance shall be assured while fixing toll *rate* i.e it must not be aimed to *benefit* concessionaire *alone* nor it should result in causing a prejudice or *harm* to *concessionaire*. Worth to add here that **commuters** of Tando Jam shall also be benefited by way of coupons or tokens and toll amount for such commuters should be **Rs.10/-**. Needless to add that the Concessionaire and GoS, within *limitations* of agreement and law, can consider fixing of different '**outlets**' so as to generate revenue but only if it does not *prejudice* concept of 'express road' and meets the *fairness* of proportionate on mileage bases.

Accordingly, all petitions, dispose-of in above terms.

JUDGE

JUDGE

Tufail/IK/PA