JUDGMENT SHEET

IN THE HIGH COURT OF SINDH
CIRCUIT COURT, HYDERABAD

C.P. NO.D- 1514 of 2011

Present:
Mr. Justice Salahuddin Panhwar,
Mr. Justice Muhammad Iqbal Mahar.

16.11.2016.

Mr. Karamullah Memon, Advocate for petitioners.

M/s Ishrat Ali Lohar and Yasir Shah Advocates for respondent No.2 and 3 alongwith Asif Masood Memon, Deputy Director, NHA, Hyderabad and Muhammad Yar, Deputy Director Land, NHA, Hyderabad.

Mr. Sher Shamasuddin Sahito, Advocate for respondent No.5.

Mr. Arbab Ali Hakro, Advocate for Respondent No.11.

Mr. Riazat Ali Sahar, Advocate files Vakalatnama on behalf of Oshaque Ali Rahoojo, Proprietor of Shaia's Paradise.

Mr. Allah Bachayo Soomro, Additional A.G alongwith Karamullah Soomro, SSP Motorway Police, SIP Manzoor Ali a/w SSP Hyd: Syed Muhammad Hussain Director P&DC HDA Hyd.

Mr. Zulfiquar Rajput, Standing counsel.

J U D G M E N T

SALAHUDDIN PANHWAR, J: Through instant petition, petitioner, seeks following relief(s):-

a) Direct the respondents No.1 to 10 to demolish the illegal and unlawful construction raised by the respondent No.11 on the project launched under the name and style of Shayas Paradise at main Super Highway.

b) Restrain and prohibit the respondent No.11 from further raising construction on the project Shayas Paradise, by himself or through his agents, servants, subordinates, assignees, attorneys, etc, directly or indirectly in any manner whatsoever.

c) Costs of the petition may be saddled upon the respondents.

d) Any other relief(s) which this Honourable Court deems fit, just and proper in favour of the petitioners.

2. The petitioner has contended that construction of project with the name and style of "Shayas Paradise" on the plot adjacent to Super Highways between Karachi and Hyderabad is illegal, as per West Pakistan Highway Ordinance, 1959, construction of building, structure cannot be carried out within limits of Super Highway. Official respondents were approached but they failed in taking legal action. Further it is contended that subject matter plot pertains to *Katchi Abadi*, but respondents No.11 has occupied the same illegally.

3. The respondent Nos.2 and 3 (*General Manager, NHA Sindh Province, Karachi & Deputy Director, NHA, Hyderabad)* filed joint comments whereby stated that subject project does not fall within jurisdiction of Superhighway (M-9) but is constructed on N-5 (Hyderabad Bypass); claimed that requisite NOC was issued by competent authority of NHA on recommendation of HDA; number of legal questions were also raised towards maintainability of the petition.

4. It is material to mention here that during hearing of instant petition a question, with regard to toll tax raised which resulted in passing of

order dated 10.11.2016. The relevant portions thereof, being relevant, are reproduced hereunder:-

> "At this juncture, it is also surfaced that NHA is receiving tax on Indus tools near to super highway. There are two tools within 5 kilometers area for collection of *toll*. Reply of NHA officer is that since bypass road has been erected therefore, they are receiving tax of that bypass *too*.
>
> Admittedly, the old road is not being maintained by NHA yet the NHA on the same road receiving tax *twice* from those, who are using the same facility. Taxing one is always subject to providing certain facility even such claim shall not justify taxing one *twice* for one and same facility even if the *authority* claims to have placed 'Toll-Points'. It is not the *'Toll-point'* which entitles one to charge tax but providing of certain facilities which *distinction* should always be kept in view. It has never been the position that tax is being charged per *distance* but *normally* for road as whole, therefore, l*egally,* one cannot be charged twice simply in name of erection of bypass particularly when persons, using the same facility, already come forward after paying tax though at some distance. Accordingly, till the next date, no tax shall be recovered on bypass tool and bypass road from today."

5. The matter again came up for hearing on 16.11.2016 where all parties were in attendance, as well counsel for NHA moved application for recalling of above referred order.

6. The counsel for the petitioner argued the legality of NOC, given by the NHA and HDA; approach and access allowed by NHA to project up-to Superhighway were also agitated; he also objected to charging of toll-tax *twice* at Hyderabad bypass on the plea that same is against the fundamental right of the people, using such *Hyderabad bypass.* He while lasting added that there is no other way to have access to Superhighway (M-9) for people residing around the bypass and *normally* use of such bypass is meant to step on to superhighway (M-9).

7. Learned counsel for NHA officials strongly challenged the maintainability of the petition and went on to say that issue of toll-tax, being not agitated in petition, cannot be examined by this Court hence order dated 16.11.2016 be vacated for which application was made. He added that rules and laws, applicable to NHA, do permit it *(NHA)* to allow access and approach hence NOC, issued by the NHA to project in question is not open to any exception.

8. Learned counsel for respondent No.11 (*proprietor of project) argued* maintainability of the petition; further added that project was / is being carried out as per law and under necessary permission from quarter concerned hence a lawful right of exercise cannot be questioned in *writ jurisdiction* particularly when number of disputed questions of facts are involved in the matter. He has relied upon the case of Ch. Akhtar Hussain v. District Coordination Officer and another (**2015 CLC 1242)**.

9. Learned counsel for intervener has argued that intervener is owner of subject matter plaza, purchased through registered sale deed, dispute between petitioner and private respondents requires factual controversy which can be resolved in writ jurisdiction.

10. We have heard the respective sides and have *carefully* gone through all the available material.

11. Since learned counsel for the NHA officials has questioned very *jurisdiction* and *competence* of this Court, with regard to notice of double tax, while taking plea that question is beyond the pleadings therefore, it

would be appropriate to *first* examine such objection. The objection, so raised, can well be shaped in following proposition i.e:

> "Whether this Court can competently examine a question which prejudices fundamental rights, even if same was not directly part of pleading but raised or came on surface during hearing of petition?

12. Since, we are very much aware of the legal position that this Court can *normally* exercise its constitutional jurisdiction (Article 199) only where a complaint of *'infringement of fundamental rights'* comes before it therefore, before attending the said proposition, it would be appropriate to examine as to what guaranteed fundamental right is likely to be prejudiced from direct and *indirect* facts involved in the matter or *least* came on surface:-

i) *NHA does not maintain the old main road, passing from Hyderabad;*

ii) *there is no other access / approach for people residing near bypass area to have approach / access to Superhighway (M-9).;*

iii) *normally use of Hyderabad bypass is meant to have access / approach to Superhighway (M-9).*

iv) *distance between Hyderabad bypass toll and Superhighway tool-tax point is less than 5 K.Ms;*

v) *normally the tool-tax is not charged on basis of distance but for the services provided on* road *as a whole;*

vi) *the people, compelled to use Hyderabad bypass, to approach / access Superhighways (M-9) do pay the toll-tax; as old main road of NHA is not available from Hatri to Jamshoro.*

13. The above facts, if are summed up, it shall result into an answer that an access/approach to superhighway (M-9), whereas it is matter of record that old main road, is missing from Hatri to Jamshoro, hence

anyone who is coming from Sukkur to Karachi has to pay twice this tax within 5 kilometers in similar fashion, one coming from Karachi to Sukkur, Lahore has to pay twice this tax in five kilometers. As well residents of Hyderabad and adjoining districts while moving towards Karachi has to use bypass road of about ten kilometrers, then for having access to Superhighway (M9) has to pay two time tax on distance which is not more than five kilometer.

14. It is matter of record that the people have no option but to pay toll-tax at *bypass* to NHA which neither is maintaining the same old road hence question of providing required privileges and facilities does not arise at all. The situation, *being so,* prima facie brought a *direct* question towards *inviolable* fundamental right, as guaranteed by article 15 of the Constitution, on to surface.

15. Since, a question was raised with regard to competence of this Court in taking into consideration a question which *otherwise* was not directly involved in the petition, therefore, it would be in all fairness to address this question. However, what *legally* cannot be denied is:

> "*This Court, is* the '*Custodian'* of such **'fundamental rights"**

The word *'custodian'* has been defined by the **'Chambers'** 21st Century Dictionary as:

> "someone who has care of something, eg a public building or ancient monument; a guardian or curator."

& as per Merriam Webster it means:

> "someone who keeps and protects something valuable for another person"

The *plain* meaning of the word *'Custodian'* is sufficient to establish that this Court is to keep and protect *fundamental rights* and purpose whereof shall fail if despite knowledge and notice of an infringement the *'Custodian'* can't exercise or move to perform his duties i.e **'to enforce fundamental rights'** only for reason that same complaint should come *specifically* from some one else. This is so for simple reason 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'.** We may safely say that *it is the duty of the Court to protect Fundamental Rights, guaranteed in the Constitution and Article 199 of the Constitution empowers this Court to issue any appropriate directions for the enforcement of Fundamental Rights, conferred by the Constitution in its Chapter-I of Part-II.* The one whose rights are being infringed must come forward with a complaint but the society, wherein we live in, has never encouraged such moves which resulted in relaxing the condition of an *"aggrieved person'* to make an application (petition) u/a 199 (i)(b)(iii) in those matters qualifying the term *'probono public'*. The reference in this regard can well

be made to the cases of *Iqbal Haider v. Capital Development Authority* (PLD 2006 SC 394). Such relaxation is itself indicative of the fact that only a hammer is required for a *'custodian'* to initiate legal action towards enforcement of **'fundamental rights'** for which it *otherwise* has been given status as "*custodian*".

16. The said relaxation *prima facie* seems to have insisted that the "custodian" normally should not avoid his duties and obligations to ensure preservation / protection of fundamental rights merely for technical reason rather was / is to take *judicial notice* while exercising jurisdiction of *'judicial review*. Thus, it can safely be concluded that any infringement of such *'right' even if it has* surfaced during course of a petition, not *directly* involving the subject, then this Court *may* examine such question of 'infringement of fundamental rights' being *otherwise* custodian of such *fundamental rights.* We may add that this would not qualify the term *suo-moto* because it surfaced or raised during a pending Constitutional Petition. A reference to the case of *"In the matter of Corruption in Hajj Arrangements in 2010* (PLD 2011 SC 963) wherein it is held that:

> "20. The judiciary **including the High Courts** and the Supreme Court is bound to **protect and preserve** the Constitution as well as **to enforce fundamental rights** conferred by the Constitution either individually or collectively, in exercise of the jurisdiction conferred upon it **either under Article 199 or 184(3) of the Constitution**. We are fully cognizant of our jurisdiction, , it is one of the functions of the judicial functionaries to decide the matters strictly in accordance with the Constitution and law. We are conscious of our jurisdiction, and exercise the same with judicial restraint. But such **restraint cannot be exercised at the cost of rights of the citizens to deny justice to them**. The scheme of the constitution makes it obligatory on the part of

> superior Courts to interpret Constitution, law and enforce fundamental rights. There is no cavil with the proposition that ultimate arbiter is the Court which is the **custodian of the Constitution**, as it has been noted herein before and without repeating the same, this Court has initiated proceedings in the instant case as is evident from the detailed facts and circumstances noted hereinabove to ensure that corruption and corrupt practices by which the Hujjaj were looted and robbed has brought bad name to the country."

In another case of *Muhammad Shariq v Federation of Pakistan* (PLD 2015 Islamabad 180) wherein it is held that:

> "13. Constitutional jurisdiction of this Court under Article 199 is not fettered by provisions of subordinate legislation and it can be brought into operation in aid of a citizen whose fundamental rights are put in jeopardy. ……. The honourable Supreme Court in case of Abdul Basit (2012 SCMR 1229) supra held in unambiguous term that Article 199(3) of the constitution had to be strictly construed and where an action of the authority was in colourful exercise of power and / or was tainted with malice, **Art. 199(3) could not come in the way of the High Court to entertain such a petition."**
> *(emphasis supplied)*

17. Thus, it can *safely* be concluded that where it comes to a question of infringement of *fundamental rights* the same, even if surfaced during proceeding of petition, not involving that infringement *directly,* yet the *Custodian* of such rights shall not escape its duties merely to wait for one to come forward but can *competently* examine the same within meaning of exercise of *judicial review.* A reference to the case of *Jamshoro Joint Venture Ltd. v. Muhammad Asif* (2014 SCMR 1858) can well be made to get support wherein it is held that:

> *"9.* …… Once the question on the subject which though not **raised in the memo of Constitution Petition** is argued by the Senior Advocate Supreme Court and such argument has important bearing on the subject not only on facts but on

> law also and the documents appearing on the record also show relevancy of the arguments, **the Court will not in such situation shrink from its responsibility by leaving the matter unattended.**
>
> *(emphasis supplied)*

Last, but not *least*, the jurisdiction of *judicial review* is available with this Court within meaning of Article 199, as is reaffirmed in the case of *Ghulam Rasool v Govt. of Pakistan* (PLD 2015 SC 6), it is held that:

> "Even where appointments are to be made in exercise of discretionary powers, such powers are to be employed in a reasonable manner. Even otherwise, the policy adopted by the Federal Government in making appointments is open to judicial review on the touchstone of the Constitution and the laws made *thereunder* i.e in case of any illegality in the ordinary process of appointments, this Court as well as **the High Courts have sufficient powers under Article 184 and 199 of the Constitution to exercise judicial review.**"
>
> *(emphasis supplied)*

18. From the above, it should not be under any cloud, *any more,* that where it comes to a question of infringement of **fundamental rights** the continuity thereof cannot be sought even on the plea that such question was not directly involved in the petition but surfaced *later-on*. Accordingly, the proposition is answered in a **"YES"**.

19. Since, the above answer permits us to examine the act of the NHA with regard to charging toll-tax at *Hyderabad bypass* , therefore, same is now taken up. Before proceeding further, it would be appropriate and relevant to refer the case of *Federation of Pakistan v. Durran Ceramics (*2015 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'.

20. It has never been the claim of the NHA that the *'toll-tax'* is charged/collected from all but it is charged / collected from those *only* who use the facilities and privileges, provided or *least* claimed to be available at **'roads'** , under control of NHA, therefore, the status of the *toll-tax* is nothing but a *"fee"*. In short, it can *safely* be said that word *'fee'* brings a *concept* of contract between *two* where one agrees to pay certain amount while *other* agrees to provide certain facilities / privileges against such *amount*. Thus, we have no hesitation in saying that a *'fee'* is always subject to promised or assured services and in absence thereof a *claim* of *'fee'* shall not be justified. It needs not be emphasized that even a jurisdiction *alone* shall not justify use thereof in an *arbitrary* or *illegal* manner particularly when it costs an *infringement* to one's guaranteed right of *free* movement. The law brings every single public functionary to *function* in good faith, honestly and within the precincts of the power so that persons concerned should not complaint of being treated against the guarantee, provided by Article 4 of Constitution. Reference, at this

juncture, to case of *Pir Imran Sajid & Others v. MD/GM TIP & others* 2015 SCMR 1257 can well be made wherein it is held that:

> "11. It hardly needs to be emphasized that the whole edifice of governance of the society has it genesis in the constitution and law aimed at to establish an order, inter alia, ensuring the provisions of socio-economic justice, so that the people may have guarantee and sense of being treated in accordance with law that they are not being deprived of their due rights. Provision of Article 4 embodies the concept of equality before law and equal protection of law and save citizens from arbitrary / discriminatory law and actions by the Government authorities. Article 5(2) commands that everybody is bound to obey the command of the constitution. Every public functionary is supposed to function in good faith, honestly and within the precincts of the power so that persons concerned should be treated in accordance with law as guaranteed by Article 4 of the Constitution. It would include principles of natural justice, procedural fairness and procedural propriety. The action which is mala fide or colourable is not regarded as action in accordance with law. **While discharging official functions, efforts should be made to ensure that no one is prevented from earning his livelihood because of unfair and discriminatory act on their part."**
>
> 12. It is now well laid down that the object of good governance cannot be achieved by exercising discretionary powers unreasonably or arbitrarily and without application of mind but objective can be achieved by following the rules of justness, fairness, and openness in consonance with the command of the Constitution enshrined in different Articles including Article 4 and 25. **The obligation to act fairly on the part of the administrative authority has been evolved to ensure the rule of law and to prevent failure of the justice.**
>
> *(emphasis supplied)*

21. Thus, it is *now* quite safe to say that even an authority to charge / collect *'fee'* cannot be exercised in any other manner even in name of *desire* or intention *how* admirable or praise worthy it may appear to *ears* on listening. At this juncture, it would be relevant to refer the Rule-2(p) of **'National Highway Authority Roads Maintenance Account Rules, 2003** which reads as:

> "***revenues'*** means revenues accruing to the National Highway Authority from **road users** and other sources specifically for **maintenance** and **road safety**;"

From above, it should not be disputed or *confusing* any more that the status of the *toll-tax* is nothing more than a *'fee'* which is specifically aimed for **'maintenance'** and **'road safety'** hence assurance of these *both (a maintained road and road safety)* is a right of road-user which he earns against his *own* money (fee). We would add that such *amount* also falls within meaning of *property* for which assurance has been given by Article 23 of the Constitution**.** Thus, it can safely be said that the NHA may have been vested with an *authority* to charge / collect *toll-tax* but such right *no where* permits it *(NHA)* to start collecting such *'fee'* by putting / establishing a toll-point as per its own *(NHS's)* wishes and desires particularly when it is the *absolute* responsibility of **'State'** to ensure *free movement*.

22. Having said so, if issue, involved in the instant case, is summarized it shall come out as:

> "***the NHA is collecting / charging toll at a* BYPASS'**

At this juncture, let's have meaning of word *'bypass'* which per Merriam-Webster is:

> "a passage to one side; especially: a deflected route usually around a town'.

From above, it appears that concept of *bypass* normally is backed or based on a reason to avoid disturbance or inconvenience to people of town so also to flow of traffic which it may happen if a **'road'** allows to ***continue***

going through the town which *normally* being congested cannot stand well with standard of privileges which a *National Highways* or *a tolled Road* was / is required to ensure.

23. Further, the meaning of the *bypass* gives a picture that it *normally* is meant to connect *two* points of one and same road i.e entry point of town and ending point of town. This is the reason that area and distance of such *bypass* normally does not extend to 6-14 K.Ms. Thus, from such meaning and purpose of the *bypass* it legally cannot be *concluded* that it is meant for a *particularly* destination but is to connect *two* points / edges only to avoid *inconvenience* and *disturbance to permissible speed limit* without changing the destination or road *even.* We have no hesitation in saying that to ensure *'convenience'* and to *'maintain* speed limit' shall include within meaning of **'road-safety'**.

24. In the instant matter, the existence and continuity thereof by users of the road, on which the Hyderabad bypass is established, is not disputed. It is also not disputed that the NHA is not maintaining such old road therefore, charging / collecting toll (*fee)* on use of *bypass* alone prima facie appears to be not justified particularly when those coming from one edge of *bypass* either come, having already paid *toll* at earlier toll-tax point or do pay the tax if they continue to go further. Further, it is not claimed by the NHA that such *bypass* is an independent **'national highway'** which per Section 2(g) of National Highway Authority Act, 1991, is:

> **Section 2(g) "National Highways"** means a road specified in part-I of the schedule and includes a road declared by the

> Federal government, by notification in the official gazette, to be a national highway.

25. Further, a *destination* (announced scheme of road from one town to other town) does not change merely by introduction of *bypass* and even in such *scheme* there may come many *small* towns justifying or insisting construction of *bypass* hence the NHA shall not be justified to charge toll (*fee)* from users of such *destination* (announced scheme of road from one town to other town) on every *bypass* because *fee* could only be collected / charged against certain privileges which *prima facie* does not appear with bypass. These are the reasons of Para 1 of short order.

26. While attending to the point-2 & 4, being related to each other, of short order, without going into much details on *safety*, which was deliberated in reported case **PLD 2016 Karachi 30**, we would refer National Highways & Motorways Police (NH&MP) which is a:

> 'police force in Pakistan that is responsible for enforcement of **traffic tans safety laws security** and recovery on Pakistan's National Highways and Motorways'.

From above, it is quite evident and clear that role of *police force* was / is not meant for enforcement of **traffic** but for **safety** and **security** too. This, if is read *together* with Section 17(1) of the National Highway Safety Ordinance 2000 which reads as:

> "Powers to make Rules: (1) The Government may, in consultation with **National Highways** and **Pakistan Motorway Police**, by notification in the official Gazette, make rules for **the purpose of carrying into effect** the provisions of this Chapter."

27. Let me insist that these are not meant to remain on papers alone but the object **'safety'** cannot be achieved unless the writing on papers(rules) are physically clothed. An accident or unfortunate incident, if is complained to be result of failure of non-observance of requirement of the rules, shall not only make the purpose and object thereof to **'nullity'** but shall also bring a big question mark over the domain of Authority, responsible for enforcement of rules. Thus, the ***safety*** and ***smooth*** flow of traffic cannot be hoped unless the introduction of the ***force*** is used for ultimate object and purpose because if enforcement of ***safety*** through such means can *even* help in saving a single soul it shall serve the purpose of **safety**. These are the reasons for point-2 & 4 of the short order.

28. As regard the points-3,5 and 6 of the short order, relating to *direct access / approach* to road, it would be just and proper to refer the Rule-2(x) of ***National Highway & Strategic Roads (control) Rules, 1998 (as amended in 2002))*** which reads as:-

> **"Encroachment"** means setting up, laying, erecting, excavating, constructing any type of building boundary wall, structure whether temporary or permanent (movable or immovable), scaffolding, tower, pylon, fence, hedge, post, sign board, advertisement, hoarding or banner, transmission line, duct or depositing or causing to be deposited, building material, dumping of garbage, solid / liquid, waste, goods for sale, laying cable, wire, pipeline, drain, sewer / channel of any kind through, across, under or over any road, highway, motorway and bridge under its control or any other similar structure within the Right of Way (ROW) in violation of Rules-3,4 & 6 without the consent, in writing, of the Authority."

From the above, it appears that all acts or omissions within such *area,* causing any disturbance in smooth flow with permitted speed limit, has been considered as **'encroachment'** which has been insisted to be removed per Rule-9 of the said Rules.

29. With regard to the *access of road as* insisted by Rule 8(3) of said Rules that:

> "The Authority shall, subject to due consideration to ***highway safety*** and ***convenience of road users*** and if satisfied that the permission to construct a means of *access* to, or from, the highway or to construct a building structure and other amenities within the Building Line may be granted, inform the applicant accordingly, subject to such conditions as it may deem fit to impose on payment of such fees as it may fix."

Suffice to say that, area of ROW, per Section 2(j) of the National Highways Authority Act, 1991 reads as:

> "***'Right of Way'*** **(ROW)** means the land acquired for the purpose of construction of a National Highway or any other road assigned to the Authority;"

Thus, it is quite evident that *private* persons normally should have no concern, right and concern with ROW hence any permanent or temporary structure thereon is *illegal.* We may add that such *ownership* even shall be subordinate to very concept of such National Highway i.e *highways safety* and *convenience of* **road users** therefore, such *ownership* alone shall not justify the authority to allow / permit direct access / approach, if it prejudices said *two* conditions. In short, the permission only be granted / permitted where such *access* does not prejudice the *highways safety* and *convenience of road users* . We have no hesitation in

saying that if every body is allowed to have *access* it shall result in failing the concept of *highways safety* and *convenience of road users* who *normally* are believed to enjoy driving their vehicles on such a road with a concept of no *interruption* or *sudden* stepping of one or animal *even* which *undeniably* shall result in accident. The NOC, issued by the NHA to project, reads as:

> "The competent authority has no objection in issuing No Objection Certificate (NOC). However, the owner of the Project M/s Shaia's Paradise Commercial –Cum Residential Project should construct proper service road along the bypass and for that proper undertaking on court paper be forwarded for further action please."

The above, *no where,* shows the reasons which satisfied the authority that such *access* shall not prejudice the *highway safety* and *convenience of road users.* In absence thereof such NOC cannot be said to be legal or valid within four lines of said Rules. If Authority starts granting / permitting *access* in a slipshod manner it shall fail the very object of *National Highways* or *roads* under its control. Not only this, but the concept of highways safety and convenience of road users shall fail and since the law is quite clear and obvious that permission or grant of *access* shall not be at the cost of the *highways safety* and *convenience of* **road users** which *object* prima facie appears to have been ignored by the authority while issuing NOCs. Besides, requirement of fencing on either sides of the road also appears to be in line with said *Rules* because putting *fencing* shall eliminate chances of all *illegal* access (which otherwise is encroachment) and shall ensure a sense of *highways safety* and *convenience* of road users i.e to drive with peace of mind that no man or animal shall *suddenly*

appear on such road where the driver of a vehicle *normally* drives vehicle(s) keeping in view the permitted limit *only*. In short, the absence of *fencing* shall prejudice the concept of ***highways safety*** and ***convenience of road users*** which (*fencing)* cannot be done if access / direct approach is allowed to every owner of an *immovable* property available at *edge* of ROW. An NOC, if has been given by ignoring or in violation of *conditions* to which such NOC was subjected to by law / rules *itself* then same shall be of no legal value and substance. These are the *reasons* of said points of short order.

30. As regard the point 7 of the short order, it shall suffice to say that since numbers of disputed questions were raised with regard to subject matter of the petition which *legally* cannot be undertaken in Constitutional jurisdiction hence it was concluded.

31. The point No.8 was with reference to mere assurance hence require no further debates.

These are the reasons of the short order dated 16.11.2016 through which said petition was disposed of alongwith listed applications.

Judge

Judge

Tufail@IKhan