

(2009) 05 DEL CK 0157

Delhi High Court

Case No: Letters Patent Appeal No's. 255 and 357 of 2007

Col. T. Prasad and S.S. Panday

APPELLANT

Vs

Union of India (UOI) and Others

RESPONDENT

Date of Decision: May 27, 2009

Acts Referred:

- General Clauses Act, 1897 - Section 3(31)
- Guaranteed Railways Act, 1879 - Section 4
- New Okhla Industrial Development Area (Levy of Infrastructure Fee) Regulations, 1998 - Regulation 3, 5, 5(1), 5(2)
- New Okhla Industrial Development Authority Rules - Rule 10
- Railways Act, 1890 - Section 51
- Tolls (Army and Air Force) Act, 1901 - Section 3, 6

Citation: (2009) 6 ILR Delhi 357 : (2010) 7 RCR(Civil) 560

Hon'ble Judges: A.P. Shah, C.J; Sanjiv Khanna, J

Bench: Division Bench

Advocate: Sanjiv Sharma, in LPA No. 255/2007 and Rekha Palli, in LPA No. 357/200, for the Appellant; Neeraj Kishan Kaul Sudhir Sharma, Ajit Warriar and Ritesh Kumar, for the Respondent

Final Decision: Dismissed

Judgement

Sanjiv Khanna, J.

The appellants, Colonel T. Prasad and Capt. S.S. Panday are serving Indian Army Officers and have by this intra Court appeal impugned judgment dated 6th March, 2007 passed by the learned single Judge dismissing their writ petitions. The appellants rely upon Indian Tolls (Army and Air Force) Act, 1901 (hereinafter referred to as the 1901 Act, for short) and claim exemption from payment of toll tax and claim right to free access and utilization of Delhi-NOIDA Direct Flyway (hereinafter referred to as the DND Flyway, for short).

2. DND Flyway has been constructed by M/s NOIDA Toll Bridge Company Limited pursuant to a concessionaire agreement dated 12th November, 1997 between Noida Toll Bridge Co. Ltd.-Respondent No. 4 and New Okhla Industrial Development Authority (NOIDA)- respondent No. 3. The question and the issue involved in the present case relate to interpretation of both 1901 Act, Concessionaire Agreement and the New Okhla Industrial Development Area (Levy of Infrastructure Fee) Regulations, 1998 framed under Uttar Pradesh Industrial Area Development Act, 1976.

3. The relevant provisions of the 1901 Act, which require interpretation is as under:

2. Definitions:

(b) "Carriage" means a vehicle for carriage or haulage other than one specially constructed for use on rails;

x x x x x

(i) "Public Authority" means the Central Government or a State Government or a local authority; and, so far as regards tolls levied by a railway company u/s 4 of the Indian Guaranteed Railways Act, 1879 or Section 51 of the Indian Railways Act, 1890, includes such a railway company; and

(j) "tolls" includes duties, dues, rates, fees and charges, but does not include custom duties levied under the Indian Tariff Act, 1934, octroi duties or town duties on the import of goods, or fares paid for the conveyance of passengers on a tramway.

3. Exemptions from tolls: The following persons and property, namely:

(a) all officers, soldiers and airmen of-

(i) the Regular forces

(ii) any irregular corps,

(b) all members of the Territorial Army or of the National Cadet Corps when on duty or when proceeding to or returning from duty.

(c) all officers, soldiers and airmen of the Indian Reserve Forces when proceeding from their place of residence on being called out for service, training or, muster or when proceeding back to their place of residence after such service, training or muster,

(d) all authorized followers of

(i) the Regular Forces

(ii) the Territorial Army or the National Cadet Corps.

(iii) any Irregular Corps.

(e) all members of the families of officers, soldiers, airmen or authorized followers of ♦

(i) the Regular Forces, or

(ii) any Irregular Corps when accompanying any body of troops, or any officer, soldier, airmen or authorized follower thereof on duty or on the march.

(f) all prisoners under military or air force escort,

(g) the carriages, horses and baggage, and the persons (if any) employed in driving the carriages or in carrying the baggage, of any persons exempted under any of the foregoing clauses, when such carriages, horses, baggage, or persons accompanying the persons so exempted under the circumstances mentioned in those Clauses respectively.

(h) all carriages and horses belonging to government or employed in the Indian military for air force service and all persons in charge of or accompanying the same, when conveying any such persons as hereinbefore in this Section mentioned or when conveying baggage or stores, or when returning, unladen from conveying such persons, baggage or stores;

(i) all carriages and horses when moving under the orders of military or air-force authority for the purpose of being employed in the Indian military or air force service;

(j) all animals accompanying any body of troops which are intended to be slaughtered for food or kept for any purpose connected with the provisioning of such troops, and

(k) all persons in charge of any carriage, horse or animal exempted under any of the foregoing Clauses when accompanying the same under the circumstances mentioned in those Clauses respectively. Shall be exempted from payment of any tolls ♦

(i) On embarking or disembarking, or on being shipped or landed, from or upon any landing-place, or

(ii) in passing along or over any turnpike or other road or bridge, or

(iii) On being carried by means of any ferry,

Otherwise demandable by virtue of any Act, Ordinance, Regulation, order or direction of any legislature or other public authority in India.

Provided that nothing in this Section shall exempt any boats, barges or other vessels employed in conveying the said persons or property along any canal from payment of tolls in like manner as other boats, barges and vessels.

Explanation: The persons or property exempted under Clause (d), (e), (g) and (j) shall be deemed to accompany the Forces, troops, persons or property concerned, when the move of the former is the direct result of, or is connected with the move of the latter, irrespective of the interval of space and time between the two moves.

6. Compensation: (1) if any owner or lessee, or any company, railway administration or local authority claims compensation for any loss alleged to have been incurred to the operation of this act, the claim shall be submitted to the Central Government.

(2) On receiving any such claim, the central government shall pass such order thereon as justice requires, and shall give all necessary directions for the purpose of ascertaining the facts of the case and of assessing the compensation, if any, to be paid.

4. The term "public authority" has been defined to mean Central Government, State Government or Local Authority. Section 6 of the 1901 Act makes it clear that the provisions of the said Act will equally apply where a toll is imposed by a owner or lessee, any company, Railway administration or local authority, and in such circumstances, the said person can claim compensation from the Central Government for the loss on account of exemption provided under the 1901 Act from payment of toll tax/fee. The word "toll" has been broadly defined to include duties, dues, rates, fees, etc. except duties under the Indian Tariff Act, 1934, octroi duties, town duties on import of goods or fares paid for the conveyance of passengers on a tramway.

5. Section 3 of 1901 Act consists of two parts. The first part deals with the persons, who are exempted in Clauses (a) to (f) or entitled to benefit under the Act. The second part in Sub-clauses (g) to (K) deals with carriages, animals, horses etc and stipulates when they are exempt from payment of toll tax. In the present case, we are more concerned with the interpretation of the substantive portion of Section 3 which exempts payment of tolls on persons mentioned in Clauses (a) to (f) read with carriage, animals etc. mentioned in Clauses (g) to (k). To be precise, we are concerned with the words "shall be exempted from payment of any tolls otherwise demandable by virtue of any Act, Ordinance, Regulation, order or direction of any legislature or any other public authority in India". The words "by virtue of", mean by force of or authority of or because of. Thus the toll or fee demandable for the purpose of 1901 Act must be because of, by force or by authority of Act, ordinance, regulation, order or direction of any legislation or other public authority. Only tolls demandable by virtue of any Act, Ordinance etc. as per the said exemption Clause cannot be levied on persons mentioned in Clauses (a) to (f) read with carriages, animals etc. mentioned in Clauses (g) to (k) of Section 3. Tolls not demandable by virtue of any Act, ordinance, regulation, order or direction of any legislature or public authority in India are payable by persons mentioned in Clauses (a) to (f) read with Carriages etc mentioned in Clauses (g) to (k). Tolls or fee charged by a private person from third party who travels through his land or land over which he has

rights are not exempt and can be charged if the same is not demandable by virtue of any Act, Ordinance, etc. The legislature in Section 3 has used the words "otherwise demandable" with reference to Act, Ordinance, Regulation, order or direction of any legislature or public authority in India.

6. As per the Counsel for the appellants, the word "demandable" refers only to imposition or levy or charge of fee under any Act, ordinance, regulation, order or direction. It does not refer to quantification or computation of fee. The respondent-NOIDA as well as the respondent No. 4 Company had argued to the contrary.

7. We have considered the arguments raised by both sides and feel that the word "demandable" used in Section 3 of the 1901 Act refers to both "right to charge a fee or toll" as well as quantification and computation of the fee or toll. A fee cannot be demanded without it being computed and calculated. An amount can be demanded after assessment and not before. Demand can only be made once a figure has been quantified. An enactment, rule, etc. may provide for "right to charge a toll" as well as how the toll is to be computed, calculated and then demanded from the person using the road or the bridge or the conveyance or may only authorise imposition or a charge but leave the question of quantum and computation to a contractual agreement. The word "demandable" as used in Section 3 is applicable when an enactment provides for "right to charge a fee or toll" and provides for computation and calculation of the toll. It is only when an Act, ordinance, regulation, order or direction, etc provides for both aspects, that the toll becomes demandable by virtue of an Act, Ordinance, Regulations etc. When an enactment merely permits imposition of toll but does not deal with or provide for computation, calculation or quantum of toll and leaves these questions open to be determined by a contract or any other manner, it is not an amount "demandable" u/s 3. To demand an amount, the amount should be quantified and for purpose of Section 3 of 1901, the amount demanded should be by virtue of an Act, Ordinance, Regulation, Order or direction.

8. In [A.N. Lakshmana Shenoy Vs. The Income Tax Officer, Ernakulam and Another](#) , the Supreme Court was concerned with the definition of the word "assessment" and it was observed that the said term is comprehensive enough to include the charging Section and the whole procedure for imposing the tax liability on the tax payer, which implies two further steps, i.e., determination of taxable income and then the sum payable by assessee as tax on the computation made. In [National Mineral Development Corpn. Ltd. Vs. State of M.P. and Another](#) , the Supreme Court was concerned with the question of levy of royalty and whether it includes merely charge or also the computation thereof and it was observed as under:

23. Section 9 is not the beginning and end of the levy of royalty. The royalty has to be quantified for purpose of levy and that cannot be done unless the provisions of the Second Schedule are taken into consideration. For the purpose of levying any charge, not only has the charge to be authorised by law, it has also to be computed.

The charging provision and the computation provision may be found at one place or at two different places depending on the draftsman's art of drafting and methodology employed. In the latter case, the charging provision and the computation provision, though placed in two parts of the enactment, shall have to be read together as Constituting one integrated provision. The charging provision and the computation provision do differ qualitatively. In case of conflict, the computation provision shall give way to the charging provision. In case of doubt or ambiguity the computing provision shall be so interpreted as to act in aid of charging provision. If the two can be read together homogeneously then both shall be given effect to, more so, when it is clear from the computation provision that it is meant to supplement the charging provision and is, on its own, a substantive provision in the sense that but for the computation provision the charging provision alone would not work. The computing provision cannot be treated as mere surplusage or of no significance; what necessarily flows therefrom shall also have to be given effect to.

24. Applying the abovestated principle, it is clear that Section 9 neither prescribes the rate of royalty nor does it lay down how the royalty shall be computed. The rate of royalty and its computation methodology are to be found in the Second Schedule and therefore the reading of Section 9 which authorises charging of royalty cannot be complete unless what is specified in the Second Schedule is also read as part and parcel of Section 9.

9. Thus, it is clear that charging Section/provisions may be different from computation or provisions relating to rate of tax and these can be part of a single enactment or parts of two separate enactments. An enactment may only provide a charging Section and leave the computation or calculation portion outside the enactment. Taxing statutes have a charging section, provisions relating to rate of tax, provisions for calculation of the amount payable including assessment and procedure for collection of the amount payable. These provisions may not necessarily be part of one statute. Levy of tax includes both the charging Section as well as computation and assessment.

10. In [Assistant Collector of Central Excise, Calcutta Division Vs. National Tobacco Co. of India Ltd.](#), the Supreme Court held that the word "levy" is of wide import and includes imposition of tax as well as assessment. The term "imposition" is generally used for the levy of a tax or duty by legislative provisions indicating subject matter of the tax and the rates at which taxes are charged. The term "assessment" is generally used for actual procedure adopted in fixing the liability to pay tax and determining its amount. The collection of tax is at the third stage. The term levy it was stated includes both imposition as well as assessment but does not include collection. Reference was made to [N.B. Sanjana, Assistant Collector of Central Excise, Bombay and Others Vs. The Elphinstone Spinning and Weaving Mills Company Ltd.](#), wherein it was observed as under:

14. We are not inclined to accept the contention of Dr Syed Mohammad that the expression "levy" in Rule 10 means actual collection of some amount. The charging provisions Section 3(i) specifically says "There shall be levied and collected in such a manner as may be prescribed the duty of excise...." It is to be noted that Sub-section (i) used both the expressions "levied and collected" and that clearly shows that the expression "levy" has not been used in the Act or the Rules as meaning actual collection.

11. The said judgment was followed by the Gauhati High Court in *Bishnauth Tea Co. v. Supdt Customs & Central Excise* 1976 Tax L.R. 1605 and it was observed that terms "levy" and "assessment" do not extend to collection. Similar view has been taken by a Division Bench of Madhya Pradesh High Court in [Hind Syntex Ltd. Vs. Union of India \(UOI\) and Others](#), holding that the term "levy" includes both imposition of tax indicating the subject matters of the tax and the rates at which the tax is to be charged. The term "assessment" on the other hand is part of levy and is generally used for actual procedure adopted for fixing liability to pay tax or on account of particular good or property. Process of assessment, determines whether the levy is short or complete. However, as observed above by the Supreme Court, the levy itself not only means imposition of tax but also provisions relating to quantification thereof. Thus the term "demandable" means both "right to impose" or "charge" and the rate including the assessment of the quantum of fee or toll i.e. the quantified amount which is to be recovered.

12. The second question is whether the toll or fee for using the DND flyway is demandable by virtue of any Act, Ordinance, regulation, and/or direction of any legislature or other public authority.

13. The NOIDA authority has been created under Uttar Pradesh Industrial Area Development Act, 1976 and is a local authority as defined in Section 3(31) of the General Clauses Act, 1897 and is therefore a public authority. Section 11 of the Uttar Pradesh Industrial Area Development Act, 1976 authorises imposition of taxes. The said Section reads:

Section 11(1) For the purposes of providing, maintaining or continuing any amenities in the industrial development area, the Authority may with the previous approval of the State Government, levy such taxes as it may consider necessary in respect of any site or building on the transferee or occupier thereof, provided that the total incidence of such tax shall not exceed twenty five percent of the annual value of such site or building.

Explanation: In this sub-section, the expression "annual value" shall have the same meaning as in Section 174 of the U.P. Nagar Mahapalika Adhiniyam, 1959.

(2) if the state Government considers it necessary or expedient in the public interest it may, by a general or special order, exempt wholly or partly ♦ any such transferee or occupier or any such class thereof from the taxes levied under Sub-section (1).

14. u/s 11 of the said Act, previous approval of the State Government is required for levy of tax. The aforesaid Section provides for charging of tax in respect of annual value of a site or building. The said provision is not applicable. The said Act does not provide for imposition of any toll tax by an authority under the Act. It cannot be said that toll tax is collected or is chargeable or levied u/s 11 of the said Act.

15. u/s 6 of the Uttar Pradesh Industrial Area Development Act, 1976, NOIDA Authority is to provide infrastructure for residential and commercial purposes. NOIDA Authority has framed the New Okhla Industrial Development Area (Levy of Infrastructure Fee) Regulations. The Regulations provide and permit NOIDA Authority to enter into an agreement with third parties for collection of fee or even develop, construct, maintain and provide infrastructure and collect fee. Thus, the NOIDA Authority is entitled to enter into an agreement to collect levy of fees. It can also enter into agreement with a third party to develop, construct and maintain infrastructure, which are commonly called built, operate and transfer projects (BOT projects). In such cases, of the public private partnership, the developer does retain buildings, infrastructure and operates to recoup the expenses incurred and earn profit and thereafter transfers the infrastructure/project after a period to the Government. The relevant provisions of the said Regulations read as under:

2. Definitions

(e) "Developer" means a person who constructs, develops, maintains or provides an infrastructure or collects fee therefore in the area on the basis of an agreement made before or after the commencement of these regulations, providing or maintaining or continuing to provide or maintain any infrastructure in the New Okhla Industrial Development Area,

(f) "Fee" in relation to an infrastructure means an amount levied upon or payable by a person under these Regulations for the use of an infrastructure in the Area,

3. (a) The authority may either itself or through a Developer on the basis of an agreement, develop, construct, provide or maintain or continue to provide or maintain an infrastructure in the Area,

(b) In particular, and without prejudice to the generality of the powers of the Authority in this behalf the agreement may provide for any or all of the following matters:

(i) xxx

(ii) Right and obligations of the parties to the agreement;

(iii) standards and specifications for the design, construction and maintenance of an infrastructure;

(iv) fee to be levied and collected for an infrastructure in the area;

- (v) Process of computing the reasonable return for the Developer;
- (vi) Procedure for surrender, release or extinguishing of the rights of the Developer or otherwise the transfer of an infrastructure;
- (vii) rights of the lenders of the Developer in relation to an infrastructure;
- (viii) termination of the agreement;
- (ix) mechanism for settlement of disputes; and
- (x) any other terms and conditions as may be agreed upon by the Authority, Developer or lender of the Developer.

4. (i) Every agreement by and on behalf of the Authority shall be made and executed by such officer of the Authority as may be authorised by the Authority in this regard.

(ii) No agreement made by and on behalf of the Authority in contravention of the provisions of Sub-regulation (i) shall be 5(1) For the purpose of providing or maintaining or continuing to provide or maintain an infrastructure in the Area either by itself or through a Developer the Authority may levy and collect at the rate determined on the basis of a formula prescribed and notified by the authority. In case an infrastructure is developed, constructed or maintained or provided under an agreement such formula shall be such as may be determined and agreed to between the Authority and the Developer. The formula prescribed may provide for different rates for different classes of infrastructure.

(2) The authority shall have the powers to authorise the developer to collect and appropriate the fee levied under Sub-clause (1) in accordance with the Agreement. Developer's rights to collect or appropriate the fee may be assignable to the lenders of the Developer.

(3) Where the authority authorizes the Developer to collect and appropriate the Fee in accordance with Sub-regulation (2), the agreement shall provide for a mechanism for determination, revision, and publication of the rate of fee.

(4) xxx

(5) A developer shall maintain and keep such registers and other records as may be directed by the Authority.

16. The term "developer" includes a person, who constructs, develops and maintains and provides infrastructure and collect fee on the basis of agreement before or after commencement of the regulations. The definition of the term "fee" means amount levied or payable by a person under the regulations. Further Regulation 3(b)(iv) states that the fee is to be levied and collected for the infrastructure in the area. The computation provisions are provided and regulated by Regulation 5. They are the most crucial and relevant for adjudication of the present dispute. As per Regulation 5, NOIDA can enter into an agreement to provide or maintain infrastructure either

itself or through a developer and the authority may levy and collect at the rate determined on the basis of formula prescribed and notified by the authority. At the same time, it also permits the authority to develop infrastructure, construct, maintain or provide infrastructure by entering into an agreement with the developer and tax can be levied and collected on the basis of formula as may be determined and agreed between the NOIDA and the developer. Thus the formula for computation of fee/tax can be matter of a contract or an agreement between the developer and NOIDA. The Regulations give sufficient powers and freedom to NOIDA to enter into agreements with a developer for determining and agreeing upon the fee/tax to be charged. In such cases, the quantum of tax/fee which is charged is as per the agreement and not under the regulation. The agreement between the NOIDA and the developer determines and mentions the formula and determines the rate of fee. Sub-clauses (2) and (3) permit the developer to collect and appropriate the fee, are different and relate to collection. They are not relevant for the purpose of deciding the present controversy and interpretation of the word "demandable" used in Section 3 of the 1901 Act.

17. There is a long line of decisions by the Supreme Court which differentiate between statutory contracts and other contracts. In [India Thermal Power Ltd. Vs. State of M.P. and Others](#), the Supreme Court has observed:

11. ...If entering into a contract containing the prescribed terms and conditions is a must under the statute then that contract becomes a statutory contract. If a contract incorporates certain terms and conditions in it which are statutory then the said contract to that extent is statutory. A contract may contain certain other terms and conditions which may not be of a statutory character and which have been incorporated therein as a result of mutual agreement between the parties. Therefore, the PPAs can be regarded as statutory only to the extent that they contain provisions regarding determination of tariff and other statutory requirements of Section 43-A(2). Opening and maintaining of an escrow account or an escrow agreement are not the statutory requirements and, therefore, merely because PPAs contemplate maintaining escrow accounts that obligation cannot be regarded as statutory.

18. The mutual agreement between NOIDA and the respondent No. 4 Company fixing a formula for computing quantum of tax/fee is not a statutory contract or a statutory term in a contract. The Regulations quoted above do not fix or quantify the rate of tax or toll. The formula or rate can be subject matter of a mutual agreement. The formula mentioned in an agreement is therefore not a statutory term.

19. It is not the case of either party that NOIDA Authority under the Regulations has framed any formula for charging of fee or toll. On the other hand, the quantum of fee demandable and chargeable is mentioned in the concessionaire agreement dated 12th November, 1997. The relevant Clauses of the agreement are as under:

Section 1.1 Definitions

"Fee" means the amount of money demanded, charged, collected, retained and appropriated by the Concessionaire for and on behalf of NOIDA from the users of the Noida Bridge as fee for the provision of the Noida Bridge, in accordance with the rules prepared by NOIDA u/s 19 of the Act and the provisions of Article 13 herein.

Section 2.1 Grant of Concession

(a) XXXXXX

(b) NOIDA further grants to the Concessionaire the exclusive right and authority during the Concession Period to in accordance with terms and conditions of this Agreement:

(i) XXXXX

(ii) XXXXXX

(iii) XXXXXX

(iv) determine, demand, collect retain and appropriate a Fee from the users of the NOIDA Bridge and apply the same in order to recover the Total Cost of the Project and the returns thereon; Section 3.1 Conditions Precedent

(a) obligations of the concessionaire hereunder are subject to the satisfaction in full of the following conditions precedent unless any such conditions had been waived by the concessionaire as hereinafter provided:

(i) XXXX

(ii) XXXXX

(iii) XXXXXX

(iv) NOIDA shall have duly formulated Regulations u/s 19 of the Act enabling the levy of Fee and NOIDA shall have, thereunder, authorized the Concessionaire to collect and appropriate the fee.

Section 13.1 Collection of Fee

(a) The Fee shall be determined by the Fee Review Committee in accordance with provisions of this Article 13 except for the Base Fee Rates which have already been determined and approved by the Steering Committee and has been specified in Section 13.2 hereinbelow.

(b) The Fee shall be, collected, retained and appropriated from the Users of Noida Bridge by the Concessionaire, commencing on the Project Commissioning Date.

(c) The Concessionaire may delegate its function to collect Fee to the O&M Contractor under the O&M Contract, in accordance with rules framed by NOIDA under the Act. In such event the O&M Contractor shall collect the Fee for and on behalf of the Concessionaire.

(d) NOIDA and the Concessionaire expressly recognizes (i) the right of Fee Review Committee to determine Fee in accordance with provisions of this Agreement, and the Rules framed by NOIDA in relation to levy of fee under the Act (ii) the right of Concessionaire to, demand, collect, retain and to appropriate Fee in accordance with the terms of this Agreement and the rules framed by NOIDA in relation to levy of Fee under the Act, (iii) to exercise all rights and remedies available under law for recovery of the Fee and (iv) the right of the O&M Contractor to demand and collect Fee on behalf of the Concessionaire.

(e) In the event that the Fee is not recoverable for any reason related to Change in Law or as a result of any restriction or injunction based on any process of law, the Concessionaire shall be entitled to receive compensation from NOIDA in accordance with Section 18.

Section 13.4 Fee Review Committee

(a) Within 60 days prior to the scheduled Projected Commissioning Date, the NOIDA and the Concessionaire shall establish a Fee Review Committee for the purposes of determining any revision to the rate of Fee levied or revision of the formula for calculation of the Fee Rate submitted by the Concessionaire under the provisions of Section 13.5. The Fee Review Committee shall comprise of three persons; NOIDA and the concessionaire shall each appoint one representative who shall be duly qualified Persons having adequate experience in the field of management, operation and maintenance of bridges and roads. The third member shall be duly qualified Person duly appointed by the representatives appointed by NOIDA and the Concessionaire, respectively. In the event of representatives appointed by NOIDA and the Concessionaire are unable to agree on the third member, within a period of 7 days from their appointment, the Person recommended by the Lenders shall be appointed as a third member, provided such person is an Indian citizen.

(b) The third member shall be Chairman of the Fee Review Committee. The Fee Review Committee shall meet upon 7 days notice by the Chairman, at the request of the Concessionaire, or at such time intervals as required by the parties. In the event that any party is absent from any meeting of Fee Review Committee or determines not to cast a vote or in the event of a parity of votes in a meeting, the Chairman shall have the casting vote.

20. On harmonious reading of the aforesaid Clauses of the Concessionaire Agreement, we find merit in the stand taken by the respondent-NOIDA and the respondent No. 4 company. The Agreement provides for method of computation or the formula for charging of fee. There is a detailed procedure in the formula, how

the toll fee is to be computed and then charged, but the computation and calculation is under the agreement or a non statutory term of the agreement. u/s 13(1) of Concessionaire agreement dated 12th November, 1997 the said fee or the formula for computation of the fee is prescribed and is not based upon any statutory Regulation or enactment. The toll fee paid is not demandable by virtue of any Act, Regulation, Ordinance etc. u/s 3 of 1901 Act.

21. In the light of the aforesaid decision of the Supreme Court in India Thermal Power Ltd. (supra), the Concessionaire Agreement to the extent it relates to the formula for computation of fee is contractual and not statutory. Mere fact that the respondent No. 4 company is entitled to retain the fee and appropriate the toll fee does not make the levy a statutory levy. As held above, the word "levy" not only includes right to charge the toll but also the quantum or the assessment. The Act and the Regulations do not provide for computation of toll or the assessment of toll. Computation of toll or assessment of toll is as per the agreement dated 12th November, 1997. It is clarified that in the present case we have not examined and considered the question of validity of the Concessionaire Agreement or validity of the New Okhla Industrial Development Area (Levy of Infrastructure Fee) Regulations, 1998 and whether quantum or a formula can be validly made subject matter of a contract and questions relating to validity of delegated legislation. These questions and issues have not been raised or argued.

The appeals are accordingly dismissed but for different reasons than those referred to by the learned single Judge. No costs.