

Writ Petition No.2472 of 2020

**THE HON'BLE MR.A.P.SAHI, CHIEF JUSTICE
a n d
SUBRAMONIUM PRASAD,J**

The instant writ petition challenges the vires of circular dated 15.01.2020, whereby the National Highways Authority of India (herein after called as NHAI), has restricted the discount given to vehicles plying on National Highway and only for those users who make the payments via FASTag with effect from 15.01.2020.

2. The writ petitioner is a practising Advocate. The National Highways Act, 1956 is an Act of parliament under Entry 23 of List I to the Schedule VII of the Constitution of India. The parliament has exclusive power to legislate in respect of National Highways. The Act was brought into provided for a declaration of certain Highways to be National Highways and for matter connected therein.

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3. Section 9 of the National Highways Act, 1956 gives power to the Central Government to make Rules for carrying out the purpose of the Act. Under Section 9(1)(b), the Central Government

can by notification in the official gazette make Rules for collection of fee for use of the sections of National Highways. In exercise of such power, the Central Government has by notification dated 05.12.2008, brought out the National Highways Fee (Determination of Rates and Collection) Rules, 2008, [herein after called as 2008 Rules].

4. Rule 2(9) of the said Rule defines Toll plaza, means any building, structure or booth made for collection of fee. Rule 3 gives the power to levy fee for use of any section of National Highway. Rule 9 provides for discounts that can be given to vehicles which cross the toll plaza number of times within a specified period.

5. Rule 9 of the said Rules provide for discounts to be given to the vehicles which under the multiple journey read as under:-

"Discounts:- The executing authority or the concessionaire, as the case may be, shall upon request provide a pass for multiple journeys to cross a toll plaza within the specified period at the rates specified in sub-rule (2) of rule 9.

(2) A driver, owner or person in charge of a mechanical vehicle who makes use of the section of national highway, permanent bridge, bypass or tunnel, may opt

for such pass and he or she shall have to pay the fee in accordance with the following rates namely

<i>Amount Payable</i>	<i>Maximum number of one way journeys allowed</i>	<i>Period of validity</i>
One and half times of the fee for one way journey	Two	Twenty four hours from the time of payment
Two-third of amount of the fee payable for fifty single journeys	Fifty	One month from date of payment

6. On 08.06.2016, the 2008 Rule was amended by the National Highways Fee Determination of Rates and Collection) Amendment Rules, 2016 (herein after called as 2016 Rules). Under the said Rule, Clause 2(ga) was introduced after Clause 2(g). Clause 2(ga) which was newly introduced read as under:-

"after clause (g), the following clause shall be inserted namely:-

(ga) "fee plaza" means any building, structure or booth made for collection of fee"

7. Clause 2(hb) was substituted, namely:-

"(hb) "FASTag lane of fee plaza" is an exclusive lane in the fee plaza for movement of vehicles fitted with "FASTag" or any such devices"

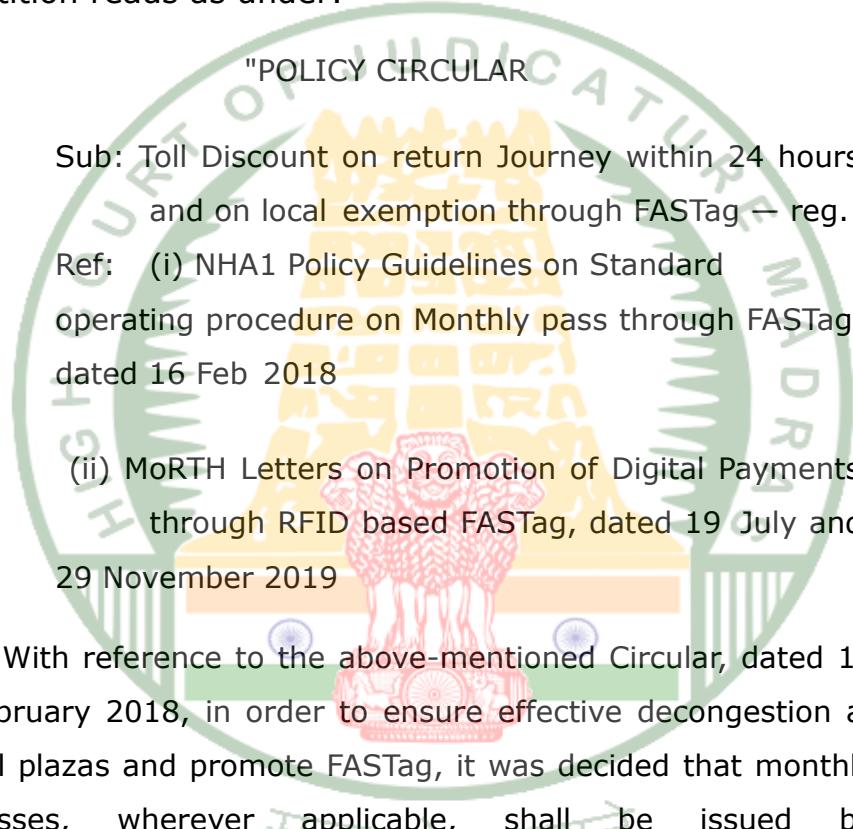
The amendment rules also provided that the word "toll plaza" in Rule 6, Rule 8, Rule 9 and Rule 10 of the 2008 Rules will be substituted by "fee plaza".

8. A perusal of the above would show that after 2016, a FASTag lane has been earmarked in fee plaza for movement of vehicles fitted with FASTag or any such devices.

9. FASTag is an electronic toll collection system in India, operated by the National Highway Authority of India(NHAI). It employs Radio Frequency Identification(RFID) technology for making toll payments directly from the prepaid or savings account linked to it or directly toll owner. It is affixed on the windscreen of the vehicle and enables to drive through toll plazas without stopping for transactions. The tag can be purchased from official

Tag issuers or participating Banks and if it is linked to a prepaid account, then recharging or top-up can be as per requirement. As per NHAI, FASTag has unlimited validity. 7.5% cash back offers were also provided to promote the use of FASTag. Dedicated Lanes at some Toll plazas have been built for FASTag.

10. The 2016 Rules came into force on 08.06.2016. In order to promote FASTag, a policy circular has been issued by NHAI on 15.01.2020. The policy circular which has been challenged in the writ petition reads as under:-



2. Vide Ministry letter No. H-25016/01/2018-Toll, dated 19 July 2019 and 29 November 2019, in order to promote digital toll payment, it was decided to declare all lanes in the NH Fee plazas as "FASTag lane of fee plazas" by 15 December 2019, while provisioning one lane (in each direction) which would be kept as hybrid lane to accept FASTag and other modes of

payment. Further, in order to provide some relief to road users, it was directed that till 15 January 2020, only 25% of the lanes at a NH Fee plaza shall be kept as hybrid lane, converting all remaining lanes into "FASTag lanes of Fee plaza".

3. In order to enable further penetration and widespread usage of FASTag for Toll payments across India, it was deliberated that all concessions/discount applicable on toll plaza like return fare discount, local exemption shall be limited to toll payments paid via FASTag only.

4. In view of above, in order to promote digital payments of toll via FASTag, it has been decided that discount for users who made return journey within 24 hours shall be provided only if the toll payments have been paid via FASTag. No return journey discount shall be provided to toll payments paid in cash or any other modes w.e.f 15 January, 2020. Similarly, all local discount shall be provided to concessionaire/toll plaza operators through FASTag only w.e.f 15 January, 2020."

A perusal of the said circular would show that the discounts given to the multiple users of fee plaza has been restricted only to vehicles which have FASTag.

11. It is the contention of the petitioner that the discount

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given to all vehicles crossing a toll plaza multiple times and making payments either by cash or by FASTag under Rule 9 of the 2008 Rules, has now been taken away by a executive / policy circular by which the discount is now restricted only to such of those vehicles which have been fixed with the FASTag devices, thereby withdrawing discounts from those users who pay by cash. It is the submission that if an executive action is prejudicial to any person, it is to be necessarily backed by a legislation. The counsel for the petitioner has also challenged the circular on the ground of discrimination between the vehicles not having the FASTag device and those vehicles having FASTag device. The writ petitioner also states that mode of payment cannot be lead to discrimination for availing discount. It is stated that just because a person pays by cash, he cannot be deprived of the discount which otherwise was provided under Rule 9 of the 2008 Rules and also under the 2016 Rules.

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12. Heard Mr.A.Mohamed Ismail, learned counsel for the petitioner and Mr.G.Karthikeyan, learned Assistant Solicitor General of India.

13. Rule 9 of the National Highway Act gives power to the Central Government to issue notification to make Rules for carrying out the purpose of the Act. Rule 9(2)(b) which gives power to the Central Government to frame Rules for use of sections of any National Highway and the Rule 9(2)(b) reads as under:-

"[(b) the rates at which fees for services rendered in relation to the use of ferries, permanent bridges, temporary bridges and tunnels on any national highway [and the use of sections of any national highway] may be levied, and the manner in which such fees shall be collected, under section 7;]"

14. Section 10 provides all notifications issued under the Act has to be laid down before both the house of parliament. Section 10 reads as under:-

"10. Laying of notifications, rules, etc., before Parliament.—All notifications or agreements issued or entered into under this Act shall be laid before both Houses of Parliament as soon as may be after they are issued or entered into."

15. Section 6 of the National Highway Act gives power to the Central Government to issue directions as to the carrying out in the State of any of the provisions of this Act or of any rule or notification or order made thereunder. Section 6 reads as under:-

"6. Power to issue directions.—The Central Government may give directions to the Government of any State as to the carrying out in the State of any of the provisions of this Act or of any rule, notification or order made thereunder."

16. A perusal of the above would show that the Central Government can frame rules regarding use of any section of National Highway under Section 9(2)(b). The rule has to be laid before both the house of the parliament as mandated under Section 10. Section 6 gives power to the Central Government to issue directions regarding carrying out provisions of any notification. Rule 9 of the 2008 Rules as well as 2016 Rules provides for discounts where multiple journeys were undertaken to cross the toll plaza without making any difference as to the mode of payment. It is undisputed that even after introduction of FASTag by the 2016 Rules, an user of National Highway who crossed the fee plaza multiple times was entitled to discount whether the mode

of payment was cash or by FASTag. Other than changing the term toll plaza to fee plaza, the rule making authority did not restrict the discount by amending Rule 9. After four years, the Central Government has now issued this impugned notification restricting the right to avail discount only to those vehicles which are fitted with the FASTAg device.

17. It has been held that circulars cannot amend rules having statutory force. Similarly, the power to give discount or withdraw them is ordinarily in the domain of the State. Similarly, if executive instructions are contrary to the rules, then the rules and not the executive instructions would prevail. We have therefore now to examine as to whether the impugned circular issued by the Government can limit the discount which was available to users of fee plaza by paying cash can be withdrawn to their disadvantage.

18. The issue therefore which arises for consideration are as to:-

(i) whether the circular dated 15.01.2020 (impugned herein in the writ petition) has effect of amending the Rule 9 of 2016 Rules.

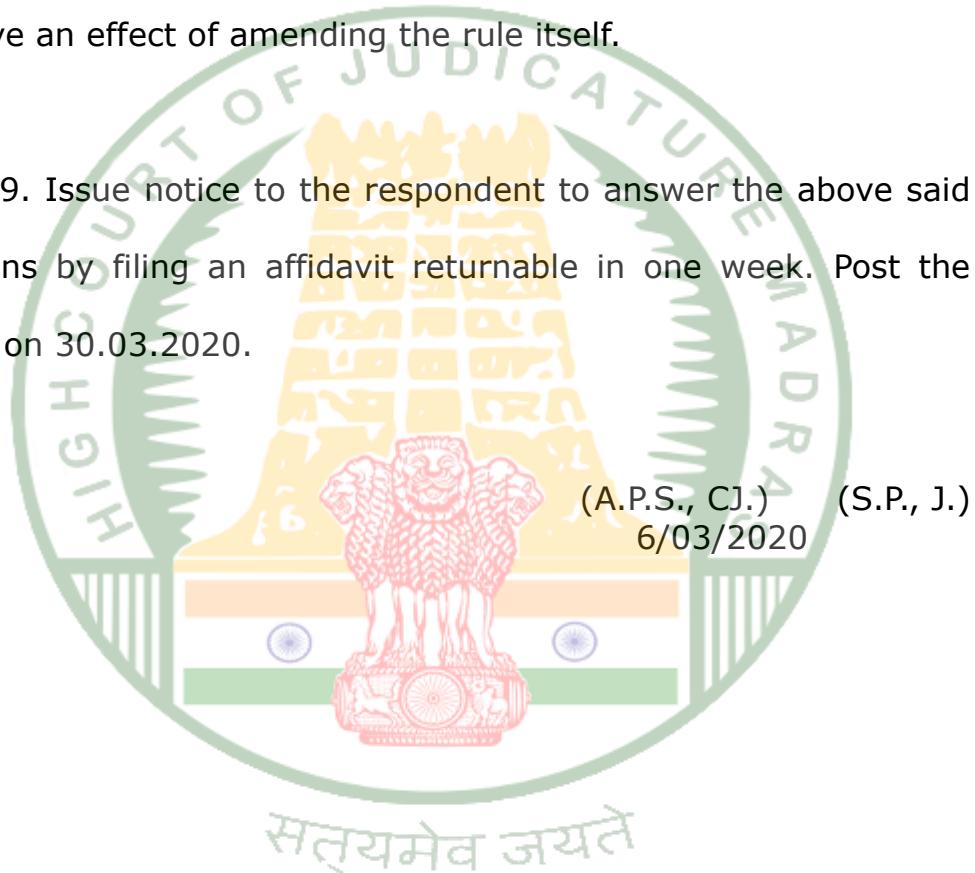
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(ii) If the answer is yes, then is not the circular ultra vires the rule.

(iii) If the circular in the nature of a direction which can be issued under Section 6, then can such direction be issued which will have an effect of amending the rule itself.

19. Issue notice to the respondent to answer the above said questions by filing an affidavit returnable in one week. Post the matter on 30.03.2020.

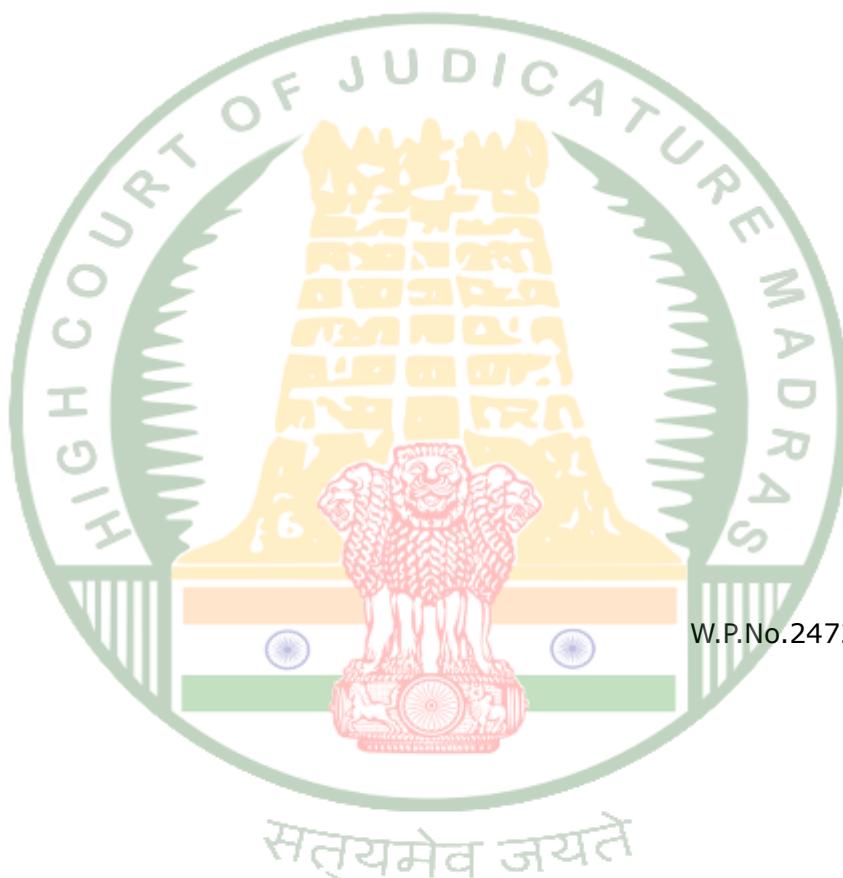
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