(2016) 04 PAT CK 0072

In the Patna High Court

Case No : Civil Writ Jurisdiction Case No. 12858 of 2015

Arvind Kumar Thakur APPELLANT

Vs

Union of India RESPONDENT

Date of Decision : 05-04-2016

Acts Referred:

National Highways Fee (Determination of Rates and Collection) Rules, 2008 — Rule 2(ba), 3

Citation : (2016) 168 AIC 543 : (2016) 3 PLJR 453

Hon'ble Judges : Mr. I.A. Ansari, A.C.J. and Mr. Chakradhari Sharan Singh, J.

Bench : Division Bench

Advocate : Mr. Ashhar Mustafa, Advocate, for the Appellant; Mr. P.K. Verma, AAG-5 and Mr. Saroj Kumar Sharma, AC to AAG-5, Mr. S.D. Sanjay, Addl. Solicitor General of India and Mr. Anshay Bahadur Mathur, Advocate, for the Respondent

Final Decision : Allowed

Judgement

Mr. Chakradhari Sharan Singh, J.—This application, in the nature of Public Interest Litigation, under Article 226 of the Constitution of India, has been filed raising a grievance that the respondents are levying fee, at Runni Toll Plaza, on "Muzaffarpur-Sonbarsa Section of NH-77" (from Km. 2.800 to Km. 89.00), even without completing construction of the road of the said section of the National Highway.

2. The petitioner claims to be public spirited person and a member of Sitamarhi District Bar, who had functioned as the president of the said District Bar Association.

3. The writ application was, originally, filed seeking a direction from this Court restraining the respondents from collection of fee, at Runni Toll Plaza, situated at a distance of 26.09 Km. from Sitamhari at NH-77, as, according to the petitioner, decision to levy fee was unauthorized and premature without completing the construction work of the said "Section of NH-77" starting from Muzaffarpur to

Sonbarsa.

4. By filing an application seeking amendment in the writ application vide I.A. No. 7688 of 2015, the petitioner has sought to challenge the public notice, dated 7.7.2015, published in a local daily newspaper "Hindustan", whereby the National Highway Authority of India (hereinafter referred to as ''the NHAI'') has notified the decision to collect fee at Runni Toll Plaza from 7.7.2015.

5. Since challenge to the said public notice, dated 07.07.2015, is based on same set of facts and grounds, we consider it expedient in the interest of justice to allow the amendment as sought for. I.A. No. 7688/2015 is allowed and accordingly, the petitioner is permitted to challenge the validity of the notice, dated 7.7.2015, issued by the NHAI. Contents of I.A. No. 7688 of 2015 have, accordingly, been treated to be part of the writ application.

6. From the materials on record and the submissions advanced on behalf of the petitioner, it appears that the impugned action of the respondents of collecting fee for use of the concerned section of the road has been put to challenge mainly on the ground that the same is in breach of Rule 3(2) of the National Highways Fee (Determination of Rates and Collection) Rules, 2008 (hereinafter referred to as ''the Rules''), which, according to the petitioner, permits collection of fee only on completion of particular "section of a National Highway". An additional ground has been taken that such fee is, ordinarily, chargeable only for four or more lanes unless the average investment on two lanes exceeds Rupees one crore per kilometre and in such a case, the fee shall be 60% of the rate of fee specified under Rule 4(2) of the Rules.

7. The only question, which has arisen in the present proceeding, is as to whether it is within the competence of the Central Government to levy fee, invoking Rule 3(2) of the Rules, even before completion of the "section of National Highway", on the ground of part completion of the "section" of the said National Highway.

8. The Rules have been, admittedly, framed in exercise of powers conferred on the Central Government under Section 9 of the National Highways Act, 1956 (hereinafter referred to as ''the Act'') for collection of fee for use of "sections of the National Highways, permanent bridges, bypasses and tunnels".

9. Rule 3 of the said Rules, interpretation whereof is crucial for the present application, is being extracted herein-below:

"Levy of fee.-(1) The Central Government may by notification, levy fee for use of any section of national highway, permanent bridge, bypass or tunnel forming part of the national highway, as the case may be, in accordance with the provisions of these rules.

Provided that the Central Government may, by notification, exempt any section of national highway, permanent bridge, bypass or tunnel constructed through a public funded project from levy of such fee or part thereof, and subject to such conditions as may be specified in that notification.

(2) The collection of fee levied under sub-rule (1) of rule 3, shall commence within forty-five days from the date of completion of the section of national highway, permanent bridge, bypass or tunnel, as the case may be, constructed through a public funded project.

(Emphasis is supplied)

(3) In case of private investment project, the collection of fee levied under sub-rule (1) shall be made in accordance with the terms of the agreement entered into by the concessionaire.

(4) No fee shall be levied for the use of the section of national highway, permanent bridge, bypass or tunnel, as the case may be, by two wheelers, three wheelers, tractors and animal-drawn vehicles;

Provided that three wheelers, tractors and animal-drawn vehicles shall not be allowed to use the section of national highway, permanent bridge, bypass or tunnel, as the case may be, where a service road or alternative road is available in lieu of the said national highway, permanent bridge, bypass or tunnel;

Provided further that where service road or alternative road is available and the owner, driver or the person in charge of a two-wheeler is making use of the section of national highway, permanent bridge, bypass or tunnel, as the case may be, he or she shall be charged fifty per cent, of the fee levied on a car."

10. It may be noted that the National Highways Act, 1956, has been enacted to provide for the declaration of certain highways to be national highways and for matters connected therewith. The National Highways Authority of India Act, 1988 (hereinafter referred to as ''the NHAI Act'') has been enacted for the constitution of an Authority for the development, maintenance and management of national highways and for matters connected therewith or incidental thereto. Section 11 of the NHAI Act confers, upon the Central Government, a power to vest in, or entrust to, NHAI such National Highway or any stretch thereof as may be specified in a notification issued in the Official Gazette. It is not in dispute that the Ministry of Road, Transport and Highways, Government of India, through a notification, as contemplated in Section 11 of the NHAI Act, has entrusted to the NHAI a stretch of road from Muzaffarpur to Sonbarsa of National Highway No.77. The NHAI has entered into a Concession Agreement with North Bihar Highway Limited (hereinafter referred to as ''the Concessionaire'') for development of two-laning of Muzaffarupr-Sonbarsa "section of NH-77" (from Km. 2.8 to Km 89.00) under the National Highway Development Project III on Design, Build, Finance, Operate and Transfer (DBFOT) and Annuity basis.

11. In view of the nature of dispute raised in the present proceeding, it would be apposite to quote the name of the project:

"Two-Laning Of Muzaffarpur-Sonbarsa Section of NH-77 (From Km 2.8 To Km

89.00) In The State Of Bihar Under NHDP III On Design, Build, Finance, Operate And Transfer (DBFOT) Annuity Basis Project." (underlining mine)

12. The site for the said two-laning has been described in Annexure 1 (Schedule-A) of the Concessionaire Agreement as "Site for Two Lane with Paved Shoulders Project Highway comprises the section of National Highway 77 commencing from Km 2.80 to Km 89.000 i.e. the Muzaffarpur Sonbarsa section in the State of Bihar. The land, carriageway and structures comprising the are described below".

13. The definition of "build, operate and transfer (annuity) project" finds place in Rule 2(ba) of the Rules, which reads thus:

"2.(ba) "build, operate and transfer (annuity) project" means a project relating to any Section of a national highway, permanent bridge, bypass or tunnel, as the case may be, for which an agreement is entered into with a concessionaire, for payment of annual grant for construction of section of highway."

(Emphasis is added)

14. It is not in dispute that the project of construction of the said "section of two-laning of NH-77" has not so far been completed. It is the plea of the petitioner that a substantial portion of the road, in question, is still incomplete. According to him, barely 2-3 Kms. before Toll Plaza towards Muzaffarpur, there is virtually no road, which has made the commuters to pass through long stretch of completely damaged road of an adjoining village. It is also his specific plea that due to non-completion of over bridges near the village Langhma and Bhisa, there is yet another 8 Kms. stretch on which no vehicle can be driven. It is uncontroverted averment of the writ petitioner that there is no road between Bedaul and Gopalpur of the said section and the road between Bariyarpur and Sonebarsa is also not complete.

15. It is the case of the respondent NHAI, on the other hand, that as on the date of notification issued by the Union of India for levy of fee, 87.48% of the total project was complete and as on date, 95.68% work of the total project has been completed. It has, however, been admitted, in the counter affidavit, that the construction of the two road over bridges, near village Langhma and Bhisa, is still going on and is likely to be completed within a short span of time. It has been further admitted that the road between Bedaul Asli and Gopalpur could not be completed, because the required land for construction of the road could not be made available to the Project Director-PIU, NHAI, Muzaffarpur (respondent no.3).

16. In the background of the admitted fact, as has been noticed above, it has been argued by Mr. Ashhar Mustafa, learned counsel for the petitioner, that no fee leviable, under Sub-rule (1) of Rule 3, can be collected, unless the "section of National Highway", in question, is complete in all respects. Referring to Rule 3(2) of the Rules, which confers power upon the Central Government to levy fee by notification, for use of any "section of the National Highway", Mr. Mustafa has

submitted that the collection of fee can commence within 45 days from the date of completion of the concerned section and not before that.

17. Mr. S.D. Sanjay, learned Additional Solicitor General of India, appearing on behalf of the NHAI, has submitted that the Union of India, exercising its power conferred by Section 7 of the National Highways Act, 1956, read with Rule 3 of the Rules, had issued a Circular, dated 26.11.2013, levying the fee at 60% of the base rate specified therein for net road section length of 61.70 Kms. for the use of two-laning with paved shoulder and at 90% of the base rate for bypasses of the length 20.38 Kms. for the use of the section of Muzaffarpur-Sonbarsa Section Km. 2.800 to Km. 89.000.

18. Mr. S.D. Sanjay, learned Additional Solicitor General of India, has placed heavy reliance upon the Concession Agreement to submit that the independent Engineer, as contemplated under the said Agreement, had issued provisional certificate for completed sections of the project. He has referred to Article 14.3.2 of the Agreement to submit that there is provision for issuance of provisional certificate if, at least, 75% of the total length of the project has been completed. According to him, two-laning shall be deemed to have been completed once the completion certificate or the provisional certificate is issued under the provisions of Article 14 of the Agreement and, according to him, the Commercial Operation Date (COD) of the Project shall be the date on which completion certificate or the provisional certificate is required to be issued.

19. It has also been submitted by the learned Additional Solicitor General of India, by referring to paragraph 10 of the supplementary counter affidavit, filed on behalf of the respondents, that NHAI commenced collection of user fee with effect from 7.7.2015 from the users and vehicles using the project facilities.

20. Mr. S.D. Sanjay, learned Additional Solicitor General of India, has attempted to persuade us to take a view that since Rule 3(1) of the Rules uses the term "any section of the National Highway", it means that part of the any National Highway, i.e., any "portion" can also be subjected to levy of fee, if construction of the said portion is complete. According to him, the Rules stipulate that fee is to be levied for a particular "length" and does not refer to any particular project under which the "section of the National Highway" is being developed.

21. According to Mr. S.D. Sanjay, learned Additional Solicitor General of India, if the interpretation, that fee can be levied only on completion of the entire stretch forming part of the Agreement, is accepted, the same shall have cascading effect on the entire highway development and will seriously prejudice the efforts of the Government to promote private participation in infrastructure development. According to him, the achievement of the Commercial Operations Date is pre-requisite for commencement of collection of user fee.

22. Undoubtedly, the dispute, in the present matter, revolves around the interpretation of Sub-rule (1) and (2) of Rule 3 and Rule 2(ba) of the Rules. The Rules have been framed by the Central Government in exercise of its rule-

making power under Section 9 of the National Highways Act, 1956. The Rules are statutory in nature and have, therefore, force of law.

23. Rule 3 of the Rules confers upon the Central Government the power to levy fee for use of any "section of National Highway, permanent bridge, bypasses or tunnels forming part of the National Highway", by the notification, in accordance with the provisions of the Rules. Apparently, levy of fee under the said Rules, is subject to the provisions of the Rules.

24. As has been quoted above, Sub-rule (2) of Rule 3 prescribed that the collection of fee, levied under sub-rule (1) of rule 3, shall commence within forty-five days from the date of completion of the "section of national highway", permanent bridge, bypass or tunnel, as the case may be, constructed through a public funded project. Completion of "section of the National Highway", permanent bridge, bypass or tunnel forming part of the National Highway, is apparently a condition precedent for levy of fee for use of such "section" of National Highway, permanent bridge, bypass or tunnel.

25. The question, which has arisen in the present writ petition, is as to whether it is permissible for the Central Government to levy fee, in exercise of power conferred under Rule 3 of the Rules, on the ground of completion of a part of the section/stretch of a National Highway. In other words, the question is as to whether the words "section", occurring in Sub-rule (2) of Rule 3 of the Rules, can be defined as a part of the project or any stretch of National Highway.

26. We do not find any definition of the word "section" either in National Highways Act, 1956, or in National Highways Authority of India Act, 1988, or National Highways Fee (Determination of Rates and Collection) Rules, 2008. However, in our considered view, the definition of the word "section"can be derived from Rule 2(ba) of the Rules, which gives definition of the "build, operate and transfer (annuity) project" as "a project relating to any section of a National Highway, permanent bridge, bypass or tunnel, as the case may be, for which an Agreement is entered into with a concessionaire, for payment of annual grant for construction of the section of the Highway. (emphasis supplied)

27. It is evident from the pleadings on record, including the counter affidavit filed on behalf of the respondents, that the project, in question, relates to "a section of National Highway-77", for which agreement has been entered into with a concessionaire for payment of annual grant for construction of "a section of the Highway". From the Agreement itself, it is evident that it relates to "two-laning of Muzaffarpur-Sonebarsa section of NH-77". The word "section of National Highway" will have to be understood in the context in which the same has been used. We find from the Rules that the word "section of National Highway" has been used in Rule 2(ba) of the Rules. Rule 3(2) of the Rules refers to completion of "section of National Highway".

28. A conjoint reading, therefore, of Rule 2(ba) and Rule 3(2) of the Rules leaves us with no doubt in our mind that the collection of fee leviable under Sub-rule (1)

of Rule 3 of the Rules, may commence within forty-five days of the completion of section of :

(a) national highway

(b) a permanent bridge

(c) a bypass

(d) a tunnel.

29. In the present case, two-laning of Muzaffarpur-Sonebarsa forms a "section" of NH-77 as is evident from Concession Agreement and the pleadings on record. Without completion of the project of two-laning of the said section of NH-77, collection of fee leviable under Sub-rule (1) of Rule 3 of the Rules cannot, to our mind, commence.

30. We do not find any merit in the submissions, advanced on behalf of the Union of India and NHAI, that issuance of the provisional certificate by an independent Engineer, certifying completion of major part of the project, is sufficient for the Central Government to issue notification under Rule 3(1) of the Rules. The power of the Central Government to levy fee, under Sub-rule (1) of Rule 3 of the Rules, can be exercised only in accordance with the provisions of the Rules. One of the conditions for levy of fee is that it shall commence within forty-five days from the date of completion of "the section of national highway". From the records, it transpires that till date, the work of the said section has not yet been completed.

31. For the reasons discussed above, we find substance in the stand taken by and on behalf of the petitioner that no fee can be levied by the Central Government in exercise of power under Rule 3(1) of the Rules. However, we do not find any substance in the submission, advanced on behalf of the petitioner, with reference to Rule 4(3) of the Rules that the fee is, ordinarily, chargeable only for four or more lanes unless average investment on two lanes exceeds one crore per kilometre and, in such cases, fee shall be 60% of the rate of fee specified in Rule 4(2) of the Rules. It appears to us that Sub-rule (3) and (4) of the said Rules have been omitted by GSR No. 778(E) dated 16th December, 2013, issued by the Government of India.

32. We, therefore, quash the public notice issued by the NHAI, as contained in Annexure 1 of the writ application, whereby fee is sought to be levied from the users of Muzaffarpur-Sonebarsa section of NH-77 at Runni Toll Plaza with effect from 7.7.2015. It is declared that no fee shall be levied by the respondents in exercise of power under Rule 3(1) of the Rules, till completion of the project in question. The notification, issued by the Government of India, for collection of fee shall not be given effect to till completion of the project in question.

33. This application is allowed with the directions, as mentioned above.

34. There shall, however, be no order as to costs.

35. I.A. Ansari, A.C.J.—I agree.

