

(1983) 04 BOM CK 0016

In the Bombay High Court

Case No : Writ Petition No. 1401 of 1982

Bungalow Plot Owners (Sector 8) Association and Others

APPELLANT

Vs

State of Maharashtra

RESPONDENT

Date of Decision : 18-04-1983

Acts Referred:

Bombay Motor Vehicles Tax Act, 1958 — Section 20(1)

Citation : AIR 1983 Bom 448

Hon'ble Judges : Chandurkar, Acting C.J.;Kurdukar, J

Bench : Division Bench

Advocate : A.M. Setalvad and N.H. Seervai, for the Appellant; P.P. Khambatta and G.K. Nikanth, for the Respondent

Judgement

Chandurkar, Actg. C.J.

1. The petitioners in this petition are challenging the continuation of recovery of the toll charges, which are collected at, what is generally known as Thana Creek bridge, originally levied by the State Government by its Notification D/-13-1-1972 and the rates enhanced by the Government Notification D/-26-4-1982 in exercise of the powers under the proviso to sub-section (1) of Section 20, Bombay Motor Vehicles Tax Act, 1958 (hereinafter referred to as "the Act").

2. This petition is filed by four petitioners, out of whom petitioner 1 is a society registered under the Societies Registration Act, 1860, and is an Association of individual plot-owners, who had purchased plots and built residential houses at Vashi in New Bombay and these owners have to regularly commute between Vashi New Bombay and Bombay City. Petitioner 2 is a resident of the township developed in New Bombay and has to come to Bombay City at his place of employment at Express Towers, Nariman Point, Bombay. Petitioner 3, is a resident at Worli and has to attend the factory which is located in Trans Thana Creek Industrial Area on Thana Belapur Road, and petitioner 4 is a Company, whose Head Office is in Bombay but its factory is on Thana Belapur Road and

various officers and employees of the Company have to travel between the factory and Bombay City quite often.

3. The bridge over the Thana Creek, which was built with a view to eliminate the detour to Thana on the Bombay Pune highway, was inaugurated on 28th January, 1972 and it is a link between the new township at Vashi which has come to be known as New Bombay and the Bombay City. The bridge is used by thousands of people everyday and the users include individual commuters, companies, goods transport operators, taxi owners, and passenger carriers including the State Transport undertaking.

4. By a Notification dated 13th January, 1972, issued in exercise of the powers under the proviso to sub-section (1) of Section 20 of the Act of the Government of Maharashtra levied a toll at the rates specified in Column 2 of the Schedule to the said Notification on motor vehicles of the classes specified in column 1 and on trailers drawn by such vehicles on the Thana Creek bridge in Greater Bombay for a period of fifteen years with the effect from the date on which the said bridge was made open for traffic. We are not very much concerned with the rates at which the toll was recovered, and it will suffice to mention that the rate of toll was 50 p. for scooters and motor-cycles: Respondent. 1/- for light motor vehicles and Rs. 4/- for all other motor vehicles as defined in the Act except light motor vehicle, scooters and motor-cycles.

5. By a Notification issued in 1975, the rate of toll payable by light motor vehicles was enhanced to Rs. 2/- and the rate of Rs. 4/- payable by all other motor vehicles was enhanced to Rs. 6/-. These rates were sought to be enhanced by the impugned Notification on 26-4-1982. The effect of this impugned Notification was that the rate of toll in case of scooters and motor-cycles was enhanced to Respondent. 1/-; in case of light motor vehicles the rate of toll was enhanced to Rs. 4/- and in case of all other motor vehicles the rate of toll enhanced to Rs. 10/-. It is the enhancement by the impugned Notification D/- 26-4-1982. which has occasioned the filing of this petition by the petitioners.

6. The challenge to the legality and validity of this levy is very simple. According to the petitioners. the State Government has already recovered the capital cost of construction of the bridge and the approach roads as contemplated by the proviso to sub-section (1) of Section 20 of the Act and the State Government is not now entitled to continue recover the toll much less it is entitled, according to the petitioner, to the enhanced rate of the toll.

7. Before referring to the actual figures, which are made available by the State Government, it is necessary to refer to Section 20 (1) and the proviso thereto of the Act. Section 20 (1) and the proviso read as follows :

"20 (1). Except as provided in, the Bombay Ferries and Inland Vessels Act, 1868, of that Act as applied to the Kutch area of. the State of Bombay, or the Hyderabad Ferries Act, 1878, on and after the commencement of this Act, no tolls shall be levied and collected :--

(a) on any vehicles, animal or person by the State Government or by any local board,

(b) on any motor vehicles, by any other local authority :

Provided that, the State Government may levy and collect tolls on motor vehicles and trailers drawn by such vehicles passing over any bridge or through any tunnel including any approach road thereto (being a bridge or tunnel constructed, reconstructed or repaired after the commencement of the Bombay Motor Vehicles Tax (Amendment) Act. 1969 and in respect of which the capital cost incurred is not less than ten lakhs of rupees, or being a bridge or tunnel which in the opinion of the State Govt. is of special service to the public) at such rate and for such period as the State Govt. may, by notification in the Official Gazette; specify in this behalf but so however, that not more than the capital cost of such construction, reconstruction or repairs of bridge or the tunnel and expenses of collection of toll are recovered within such period as that Government may determine."

We are not in this petition concerned with sub-section (2) of Section 20, which deals with the levy of toll by the local authorities.

8. It is necessary to mention that the proviso to sub-section (1) of Section 20 has, for the first time, been added by the Maharashtra Act 43 of 1969. Sub-section (1) of Section 20 in its original form was a complete bar against the levy and collection of toll on any vehicle, animal or person by the State Government or by any local board and on any motor vehicle by any local authority, except in the manner provided under the Bombay Ferries and Inland Vessels Act, 1868 or the Hyderabad Ferries Act or the Northern India Ferries Act, 1878. The Act came into force on 1-4-1958. In so far as the State Government is concerned there was therefore, an express bar to levy toll after 1-4-1958. till the proviso was first introduced by the Maharashtra Act 43 of 1969. By enacting the proviso the State Government has been given a power to levy and collect tolls on motor vehicles, which were to pass over any bridge constructed, reconstructed or repaired after the commencement of the Maharashtra Act 43 of 1969, but such power is of an extremely restricted character. Such power could be exercised only in respect of a bridge of which the total capital cost incurred was not less than ten lakhs of rupees or a bridge which in the the opinion of the State Government was of special service to the public. The proviso, as originally enacted, restricted the power to levy toll only in case of bridge of the description given above. By another enactment being Maharashtra Act 14 of 1974 in addition to the power to levy toll on bridges, power was also given to levy toll in respect of a tunnel, which had also to be one in respect of which the capital cost incurred was not less than ten lakhs of rupees or it was to be a tunnel, which, in the opinion of the State Government, was of special service to the public. The rate at which and the period during which the State Government would recover the toll was to be fixed by the State Government itself. The proviso will also show that the power to levy and collect tolls could be exercised only till the capital cost of such construction.

reconstruction or repairs of bridge or the tunnel and expenses of collection of toll is not recovered. For this the State Government may determine the period during which it was expected that the capital cost could be recovered. It is necessary to point out that what is permitted to be recovered is the capital cost of the construction, reconstruction or repairs of a bridge or a tunnel and the approach road as well as the expenses of collection of the toll . The bridge or the tunnel in respect of which toll is sought to be recovered, must be one which is constructed after the commencement of the Maharashtra Act 43 of 1969 (hereinafter called "the Amending Act") or which has been constructed or repaired after the Amending Act. There are thus expressly enacted two limitations on the powers of the Government to levy and collect toll in respect of a bridge or a tunnel. Firstly, the bridge or the tunnel must have been constructed, reconstructed or repaired after the coming into force of the Amending Act, and the second and the more important limitation and which is relevant for the purpose of the present decision is that, the recovery cannot be in excess of the capital cost of construction, reconstruction or repairs of a bridge or a tunnel plus the expenses of collection of toll. One more significant feature of the proviso is that the capital cost permitted to be recovered by way of levy of toll is not merely the capital cost of a bridge or a tunnel but the capital cost of the approach road to a bridge or a tunnel is also allowed to be recovered.

9. We are not concerned in the present petition with the cost of reconstruction, because admittedly the Thana Creek bridge has been constructed for the first time when it was completed in 1972. There is some argument on behalf of the State that the cost of repairs of the bridge must also be permitted to be recovered, but to this argument we shall come later. For the present purpose, it is sufficient to point out that in so far as the Thana Creek bridge is concerned, the State Government can validly levy and validly collect tolls as long as the capital cost of the construction of the Thana Creek bridge is not recovered as also the expenses of the collection of the toll.

10. The argument of the learned counsel for the petitioner is that the capital cost of the Thana Creek bridge and the approach road to the bridge has been recovered by the State Government long long back. According to the petitioners, the State Government has incurred an expenditure of Rs. 4.5, corers on the construction of the bridge up to the year 1981. They obviously did not have the figure of the total amount recovered and they, therefore, depended upon the recovery for the years 1979-80 and 1980-81 which is of the tune of Rs. 1,38,50,000/- and Rs. 1,43,44,000/- respectively. Thus, accordingly to the petitioners, if these be the annual amounts of recovery, the State Government must have recovered long long back the total capital cost of the bridge and the approach roads from the year 1972-73 onwards.

11. The State Government has given certain figures to us and the arguments in this petition have proceeded on these figures. According to the State Government, the actual expenditure incurred on the construction of the Thana

Creek bridge and the approach roads in Rupees 4,47,78,521/- and on the construction of Turbhe Panvel Road the expenditure incurred was Rs. 1,80,59,856/-. According to the State Government, the total cost came to Rs. 6,28,38,377/-. In addition to this, according to the State Government, there is a dispute pending between the contractor and the State Government in which the contractor is making a claim for Rs. 1.11 crores and if this claim is taken into account the total cost would come to Rs. 7,39,38,377/-. The State Government has also supplied figures which show that from 1974-75 till 30th June, 1982 has been spent on repairs to the bridge. The expenditure on collection from the time of levy of toll till 30th June, 1982 has been shown as Rs. 25,44,486/-. The State Government claims that the Government had decided to reimburse the City and Industrial Development Corporation Ltd. (here-in after referred to as the "CIDCO") to the extent of the toll charges paid by the CIDCO for the use of the Thana Creek bridge by its buses and this amount, according to the State Government, came to Rs. 97,26,072/- between 1976 and June, 1982. This figures, according to the State Government, must be excluded from the total recoveries made by the levy of toll.

12. The continued recovery of the toll is sought to be justified on behalf of the State Government on the ground that the project has not yet been completed inasmuch as Turbhe Panvel Road has to be widened to four lanes in place of two on which an expenditure of Rs. 2.64 crores is to be incurred. Then it is pointed out that street lighting on Thana Creek bridge has to be done up to Kalamboli junction which would cost about Rs. 1.30 crores. Some more capital repairs have to be made to the bridge which will cost about Rs. 16 lakhs. A Schedule has been further given which refers to an expenditure of Rs. 4.53, crores in respect of the proposed works on Sion Panvel (up to Kalamboli) Road. In other words, the contention of Mr. Khambatta is that when the proviso to sub-section (1) of Section 20 refers to the capital cost incurred it must be so construed as to include any cost to be incurred on the project in future also. Mr. Khambatta did not dispute that the normal meaning of the word "incurred" used in the proviso is the "expenditure actually incurred", but the learned counsel contends that having regard to the object with which the project of Thana Creek bridge has been undertaken, namely, make available perfect service to the commuters as well as those using vehicles, any further facilities which were required to be given must also be taken into account for the purpose of determining the capital cost and the words "capital cost" must be so construed as to mean "total expenditure for special service," which according to learned counsel, meant "complete bridge and complete approach roads with lights". Learned counsel pointed out that conversion of two lanes approach road into four lanes road would provide better facilities and the State Government was, therefore, entitled to recover and continue to recover such expenditure as is being incurred from time to time.

13. Initially, Mr. Setalvad had argued that the "approach road in respect of which toll was allowed to be recovered must be construed in a very narrow sense and that it only meant that part of the road which was necessary to connect the

bridge with the levelled ground or nearest firm ground. We have been given a plan of the bridge and the road and having regard to the main purpose for which the bridge was construction, it is not possible to accept the limited construction which Mr. Setalvad wanted to give to the words "approach road". It is obvious that a bridge across a river or across a creek would be wholly useless unless some approach is available to the bridge from the nearest road. In the instant case, on a proper construction, the road from Mankhurd junction to Thana Creek bridge and from the bridge to Turbhe junction and further on to Kalamboli junction would, in our view, be clearly covered by the phrase "approach road". If a person going from Thana Belapur Road cannot approach the bridge without the approach road, then it is obvious that the bridge would be useless. The State Government will have to construct an approach road. and the road between Thana Creek bridge and Turbhe junction would therefore be clearly an approach road. Even further on for approaching the bridge from Bombay Pune Road on the East and for approaching the same Road from the bridge, a road between Turbhe junction and Kalamboli junction has also to be constructed and that road will clearly be an approach road. Merely by making a road available form the bridge to the firm ground which may be a few feet away, the bridge would not automatically become usable for the purpose for which it was constructed. Accessibility to the bridge by the traffic on the roads going on both sides of the bridge could be provided only by what can properly be called approach roads. Therefore, while computing the cost of construction of the bridge and the approach roads for the purposes of the proviso to Section 20 of the Act we must take the figures given by the State Government not only for the bridge itself but for the road from points 2 to 6 on the plan and from points 5 to 6 thereon.

14. The figures, which are given by the State Government in Exh. II are as follows:

"Thana Creek Bridge

and approaches. ... Rs. 4,47,78,521/- Turbhe Panvel Road. ... Rs. 1,80,59,856/-.

Total = Rs. 6,28,38,377/-

We are also assuming for the purposes of this petition that there is a possibility of the State being held liable for an amount of Rs. 1,11,00,000/- in the arbitration proceedings. The total amount thus comes to Rs. 7,39,38,377/-. To this figure we must add the expenditure on the toll collection which also the State Government is entitled to recover under the proviso to Section 20 of the Act. That amount is Rs. 25,44,486/-.

15. Without going into the question raised by Mr. Setalvad that the State is not entitled to recover by way of toll the amount spent on the repairs which were made between 1974-75 and June 1982, we are assuming in favour of the State

Government that the total cost inclusive of the cost of repairs as given by the State Government is Rupees 8,86,47,804/-. To this figure we have to add the cost of collection amounting too Rs. 25,44,486/-. The total amount on the figures given by the State Government, which it is entitled to recover would therefore, be Rs. 9,11,91,290/- at the highest. Admittedly, even according to the State Government, up to June 1982 a sum of Rs. 9,91,04,903/- has already been recovered by the State Government.

16. The limited question, which we really need to go into in the instant case, is whether having regard to these figures the State Government has recovered the capital cost incurred or not and secondly, whether the claim of the State Government that it is entitled to recover not only the capital cost but also such cost as may be incurred in future having regard to the proviso to S. 20 (1) of the Act (Sic).

Now, a bare look at the proviso would show that when the legislature has used the words "capital cost incurred" it is obvious that the legislature contemplated that before taking recourse to the power which is given to the State Government under the proviso, the State Government is in a position to positively determine what is the capital cost of the bridge and approach road thereto, because when the State Government issues a notification under the proviso to sub-sec (1) of S. 20, the exercise of the power to recover the toll is circumscribed by the latter part of the proviso which expressly puts a limit on the total amount to be recovered. The State Government is not authorised to recover anything more than the capital cost of construction. reconstruction or repairs of the bridge or the tunnel and the expenditure on collection of toll. The word "incurred" is clearly used in the past tense. We may usefully refer to a decision of the Supreme Court relied upon by Laxminarayan and Another Vs. Returning Officer and Others, . The Supreme Court in that case was concerned with the meaning of the words "reasonable expenses incurred by any person in attending to give evidence may be allowed by the High Court to such person" used in S. 96, Representation of the People Act, 1951. Dealing with these words the Supreme Court observed (page 87) : "Incurred means "actually spent"." Strictly speaking, it is not necessary to refer to any further authority for the meaning of the word "incurred" which is used in past tense. Since Mr. Khambatta has, however, argued that the word "incurred" must also include the expenses "to be incurred" in future, we may refer to a decision of Kay, J. in West Ham Corporation v. Grant, (1888) 58 LJ Ch 121, where dealing with the meaning of the words "incurred expenses", the learned Judge observed as follows :

"..... I need not pause to say what "incurred expenses" might possibly mean. whether it involves the actual payment of the expenses or not; but it certainly means this, that they have paid, or become liable to pay them at least....."

(The emphasis is supplied by us)

These authorities will clearly show that when one has to determine what is the cost incurred, it must wither mean the amount actually spent on construction or the amount for which there is a clear liability to pay. In the instant case, on the figures given by the State Government itself, leaving aside the question as to whether the amount of repairs from 1974 to 1982 could validly be considered as a part of the capital cost, even inclusive of such expenses the total capital cost comes to Rs. 8,86,47,804-. We are proceeding on the footing and assuming in favour of the Government that the cost of repairs could be recovered by them, though if the proviso is strictly construed we do not see any reason to doubt that what is contemplated by the proviso to sub-section (1) of S. 20 is that the power is restricted only to recover such capital cost as in incurred on the date on which the toll is levied. "Capital cost" is a known concept and the capital cost has to be computed on the basis of the capital expenditure incurred in bringing into being the work or the asset, the same, in the instant case being the Thana Creek bridge and the approach roads as on the date on which the notification levying the toll was issued. As pointed out by the Supreme Court in BIRLA BROTHERS (PRIVATE) LTD. Vs. COMMISSIONER OF Income Tax (CENTRAL), CALCUTTA., "Capital expenditure may be described as an outlay resulting in the increase or acquisition of an asset or increase in the earning capacity of a business." According to the Supreme Court, capital expenditure is an expenditure incurred in acquiring fixed assets. If the very purpose of the proviso is to make the machinery and the power available to allow the State Government to reimburse itself in respect of the capital cost incurred on a bridge or a tunnel and any approach road thereto, then it is obvious to us that the capital cost means the actual expenditure incurred as on the date on which the power is so exercised. However, as already pointed out above, since we are concerned only with the question of continuation of levy of the toll in this petition filed sometime in September, 1982, we are proceeding on the basis of the recovery made by the State Government till June 1982.

17. Once we reject the argument of Mr. Khambatta that the proviso is a repository of power to recover toll so as to enable the State Government to reimburse itself for expenses incurred from time to time even after the Notification, we must also reject the argument that the expenses which are now planned to be incurred such as on lighting of the roads or converting two-lane approach road into four-lane approach road must also be met out of the recovery from the toll. No one can ever deny that best of the facilities should be made available to the commuters and the drivers of the motor vehicles using the bridge and the roads but from that it does not necessarily follow that recovery of the amounts spent for this must be met from the toll levied long before the costs are incurred. The Proviso has given an unusual and exceptional power to the State Government which must be exercised strictly within the four corners of the proviso and within the limitation as to the extent of the recovery. If the power under the proviso could not be exercised for authorising the recovery of the expenses to be incurred after the date of the Notification levying the toll, the

plea that the State Government is going to make some more facilities available is no answer to the challenge of the illegality of the continued recovery of the toll.

18. There is no reason to doubt the claim of the State Government that industrial affluents have corroded some part of the bridge which needs extensive repairs. The question is not so much as to whether the repairs, should be made or not, but the question is whether having regard to the restricted nature of the power, these repairs could be financed only from the amounts recovered by way of toll in pursuance of the notification, recovery under which is limited by the amount of the capital cost of the bridge and the approach roads on the date of the notification. Having regard to what we have said earlier, the contention of the State regarding cost of the extensive repairs must also be rejected.

19. In so far as the claim of the State Government that the reimbursement to the extent of Rs. 97 lakhs, which was made available as subsidy to CIDCO should be excluded from the amount recovered by way of toll is concerned, it is difficult for us to see how such a claim could validly be made. This reimbursement is by way of refund of the toll paid by CIDCO. If the refund has been made in pursuance of some special arrangement between the CIDCO and the State Government there is no reason why this must necessarily throw an additional burden on other commuters or other motor vehicle owners or drivers to contribute more towards the cost of construction. This payment has nothing to do with the determination of the capital cost, which the State Government is entitled to recover by way of toll and cannot go to add to the capital cost. The relevant Government Resolution, which is produced before us and is D/- 26-4-1976, however, itself shows that this expenditure is attributable to a head which does not seem to have anything to do with the expenditure incurred on the Thana Creek bridge.

20. We may also mention that while dealing with the capital cost incurred in respect of the Thana Creek bridge and the approach roads Mr. Setalvad has invited our attention to the figures given in the Performance Budget of 1982-83 of the Public Works Department of the State Government. At page 125 of the said Budget, the item is described as follows :

"Construction of bridge across the T. C. B. and approaches thereto (Bridge length 1837 M) :

(i) Bombay side approach.

(ii) Bridge and Thana side approaches."

The project has been described as having been already completed in January, 1972 and the expenditure incurred is shown as Rs. 448.63 lakhs. Similarly, what is now called the approach road has been described as follows :

"Construction of the National Highway link in the direct route to Panvel to Bombay via T. C. B.

(i) Portion from Turbhe to Devisaddle (length 4.00 km.)

(ii) Portion from Devisaddle to Panvel (length 1.00 km.)"

This project is also shown to have been completed in 1972 at a cost of Rs. 106.28 lakhs. In support of the argument that four-lining of the Turbhe Panvel Road is not a part of the Thana Creek bridge project, our attention is invited to Civil Budget Estimates of 1982-83 in which items 5 and 6 are shown as follows :

"Capital outlay on roads and bridges :

5. Improvements to Turbhe-Panvel Road Four laning the road with necessary bridges and culverts. Estimated cost Rs. 235.41 thousand.

6. Providing Street light on Thana Creek Bridge up to Toll Station. Estimated cost Rs. 23.27 thousand."

21. It is unnecessary for us to separately deal with these estimates, because we have already taken the view that the cost of whatever is to be done hereafter in the form of four laning of Turbhe Panvel Road or providing street lights on the bridge and the approach roads cannot be a justification for continuing the recovery of the toll, because these costs cannot form a part of the capital cost incurred on the bridge and the approach roads.

22. Thus, even accepting the figures given by the State Government, as they are, as in June 1982, we find that the State Government has recovered Rupees 9,91,04,903/-. On the figures of the State Government of the total cost plus the cost of recovery the amount would come to Rs. 9,11,91,290/-. The State Government has thus clearly recovered much more than the capital cost even on its own showing in respect of Thana Creek bridge and the approach roads. The necessary consequence, having regard to the limitation prescribed under the proviso to sub-section (1) of S. 20, must be that the petitioners would be entitled to an injunction restraining the State Government from recovering the toll even at the original rate. The natural consequence must also be that the notification prescribing the enhanced rates must be struck down as wholly unwarranted and in excess of the power under the proviso to sub-section (1) of S. 20 of the Act.

23. The petitioners will, therefore, be entitled to a declaration that the continued levy of the said toll hereafter is ultra vires of S. 20 (1) of the Act and Art. 265 of the Constitution and would be illegal.

24. Mr. Khambatta, on behalf of the State Government, requests for leave to appeal to the Supreme Court. He further requests that the operation of the judgment be stayed for a period of four weeks from today. We ourselves do not see any doubt about the construction of the proviso to S. 20 (1) of the Act, and having regard to the clear words thereof we do not think that any case is made out for leave to appeal to the Supreme Court. The prayer for leave to appeal to the Supreme Court is rejected. However, we are inclined to grant the prayer of the learned counsel for the State that the operation of the judgment be stayed

for a period of four weeks from today. We, therefore, stay the operation of the judgment till 18th May, 1983. We further direct that the undertaking given earlier on 30-8-1982 of the State Government pursuant to the order of this Court D/-30-3-1982 will continue. Mr. Khambatta has also stated before us that in case there is no operation of the undertaking prior to 18th May, 1983, on a mere production of the receipt evidencing payment of the toll, the person so producing the receipt will get the refund of the amount stated in the receipt at the office of the Executive Engineer at Chembur during office hours. If the State Government desires to move the Supreme Court for leave or any interim order, it will give one week's notice to the Advocate for the petitioners.

25. The petitioners thus succeed and the rule is made absolute. The petitioners are entitled to one set of costs.

26. Rule made absolute.