
(2013) 09 BOM CK 0104

In the Bombay High Court

Case No : Public Interest Litigation No. 12 of 2010

Nandu

APPELLANT

Vs

State of Maharashtra and Others

RESPONDENT

Date of Decision : 04-09-2013

Acts Referred:

Constitution of India, 1950 — Article 226, 286

Citation : (2013) 6 ABR 64 : (2013) 6 ALLMR 232 : (2013) 6 BomCR 112

Hon'ble Judges : Z.A. Haq, J;B.R. Gavai, J

Bench : Division Bench

Advocate : Bhandarkar, for the Appellant; Dangre, Additional GP for Respondents No. 1 to 4 and Shri R.N. Ghuge, Advocate, for the Respondent

Final Decision : Dismissed

Judgement

B.R. Gavai, J.—Rule is made returnable forthwith and heard finally with the consent of learned counsel for the parties. The petitioner, who claims to be a Social worker, has approached this Court seeking a direction to quash and set aside the tender notice published in the daily "Nav Bharat" dated 21.04.2008 and the whole process undertaken by the respondents in pursuance of the aforesaid tender notice. The petitioner further seeks a direction to constitute a High Power Committee consisting of experts in the field, so as to properly estimate the cost of the Project namely "Four laning of Warora-Chandrapur-Ballarpur-Bamani road and bridges on SH 264, Part Warora to Chandrapur km 40/100 to 83/409, Part Chandrapur to Bamani km 94/00 to 107/800 including Chandrapur bypass road (SH 266) km 0/00 to 5/200 and 2 km length of SH 267 in Chandrapur district, total length 64.40 kms and direct the aforesaid High Power Committee to monitor and supervise the work of the aforesaid project in the interest of the public at large.

2. Three basic contentions were raised on behalf of the petitioner:

(1) The first contention that is raised is, it is not permissible for the State to

permit a contractor to collect the amount in excess of actual expenditure on the project.

(2) The second contention is that the initial concession period of 25 years came to be increased to 30 years so as to give undue benefit to Respondent No. 5.

(3) The third contention that is raised is that Respondent No. 5 was likely to earn a profit of Rs. 11,700 Crore from the said project.

3. It is the contention of Shri Bhandarkar, learned counsel, that the petitioner, by standing on the road, has calculated the number of vehicles plying on the said road and after calculating the number of said vehicles, he has arrived at an estimated profit that the Respondent No. 5 would collect in a span of 30 years, on the basis of toll to be charged by him.

4. Insofar as the first contention of the petitioner regarding a contractor cannot be permitted to collect an amount more than the capital outlay is concerned, the learned counsel for the petitioner heavily relies in support of his submissions, on the Division Bench judgment of this Court in the case of Bungalow Plot Owners (Sector 8) Association and Others Vs. State of Maharashtra, .

5. No doubt, the learned counsel is right in relying on the judgment of this Court in the case of Bungalow Plot Owners (Sector 8) Association vs. State of Maharashtra (supra) inasmuch as the Division Bench of this Court had in unequivocal terms held that the very purpose of 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. The Division Bench further held that the capital cost means the actual expenditure incurred as on the date on which the power is so exercised. As such the learned counsel is right in submitting on the basis of said judgment that it is not permissible to collect a profit element in excess of capital cost.

6. However, it is to be noted that the Division Bench has delivered the judgment considering an unamended provision of Section 20 of the Motor Vehicle Tax Act, 1958. Section 20 came to be amended from time to time. One of such amendment was by Amendment Act 15/1987. The object and reasons of the said Act provided that the State considered it expedient to amend Section 20 of the Act so as to suitably empower the State Government to levy toll from time to time, to the extent of total capital outlay of any bridge, tunnel or approach road thereto or section of new road or by-pass etc. It was also felt expedient to define the expression "Capital Outlay" appropriately so that it would enable the State Government to recover not only the costs of construction of bridge or tunnel or approach roads thereto but also cost of section of new road or by-pass which is constructed, reconstructed, improved or repaired and shall include the anticipated costs of certain essential on-goings or imminent works like improvements, strengthening, widening, structural repairs, maintenance, management, operation, reasonable returns and also interest on the capital

outlay. By the said amendment, it was also provided to empower the State Government to collect toll either by itself or through its authorized agents.

7. Section 20 of the Motor Vehicles Tax Act suffered another amendment in the year 1991 by Amendment Act 29 of 1991. By the said amendment, provision was made so as to enable the State Government to recover the expenditure incurred on the said work which was carried out at the expenses of the State Government or any other person or entrepreneur or at the expense of both. It is done so as to permit participation of the private party in development of bridges, roads and tunnels.

8. The said Act also suffered another amendment in the year 2000 vide Act No. 7/2000 by which specific powers were entrusted to the State Government to levy toll on all the vehicles and trailers drawn by such vehicles passing over or any bridge or through any tunnel including any approach road or sections or roads, by-passes, the cluster of which is situated in a well defined zone and declared by the State Government under the said clause as Single entity, so as to recover by levy and collection of toll on the basis of the total capital outlay incurred, although such vehicles may have enjoyed such augmentation of facilities only partially.

9. By another amendment in 2001 vide Act No. 17 of 2001, a further amendment was made to the said Section so as to permit the construction of bridges and development projects on "Built, Operate and Transfer" basis through private participation by allowing such private participants to collect tolls at specified rates and periods as specified by the State Government by notification to be issued in that behalf.

10. The Division Bench of this Court to which, one of us (B.R. Gavai, J.) was a party, had an occasion to consider all these amendments in the case of M/s. Maa Bijasani Chemicals Pvt. Ltd. vs. State of Maharashtra & Ors., reported at 2009(6) ALL MR 750. It will be appropriate to refer to paras 15 and 16 of the said judgment.

15. In the light of this legislative development, we will have to construe the provisions of Section 20 as they exist today after suffering several Amendments. It would also be appropriate to refer to the observations of the Apex Court in the case of The Bengal Immunity Company Limited Vs. The State of Bihar and Others, , wherein the Apex Court in paragraph 22, has explained the principle of interpretation which is commonly known as "Heydon's Rule" or "Mischief Rule". It reads as under:

22. It is a sound rule of construction of a statute firmly established in England as far back as 1584 when - "Heydon's case", (1584) 3 Co. Rep 7a(V) was decided that - ".... for the sure and true interpretation of all Statutes in general (be they penal or beneficial, restrictive or enlarging of the common law) four things are to be discerned and considered:

1st. What was the common law before the making of the Act,

2nd. What was the mischief and defect for which the common law did not provide.

3rd. What remedy the Parliament hath resolved and appointed to cure the disease of the Commonwealth, and

4th. The true reason of the remedy; and then the office of all the judges is always to make such construction as shall suppress the mischief, and advance the remedy, and to suppress subtle inventions and evasions for continuance of the mischief, and "pro privato commodo", and to add force and life to the cure and remedy, according to the true intent of the makers of the Act, "pro bono publico.

In - "In re, Mayfair Property Co.". (1898) 2 Ch. 28 at p. 35(W) Lindley M.R. In 1898 found the rule "as necessary now, as it was when Lord Coke reported "Heydon"s case (V).

In - "Eastman Photographic Material Co. Vs. Comptroller General of Patents, Designs and Trade Marks" 1898 Act 571 at p.576(X) Earl of Halsbury reaffirmed the rule as follows:

My Lords, it appears to me that to construe the Statute in question, it is not only legitimate but highly convenient to refer both to the former Act and to the ascertained evils to which the former Act had given rise, and to the later Act which provided the remedy. These three being compared I cannot doubt the conclusion.

It appears to us that this rule is equally applicable to the construction of Art. 286 of our Constitution. In order to properly interpret the provisions of that Article it is, therefore, necessary to consider how the matter stood immediately before the Constitution came into force, what the mischief was for which the old law did not provide and the remedy which has been provided by the Constitution to cure that mischief.

It would clearly be seen that in the original Act which is of 1958, it was impermissible for the State Government to levy toll on vehicles. However, by an Amendment in 1969, a provision was made so as to permit State Government to levy toll for recovery of the amount spent on the construction of any bridge including any approach road. In 1974, in addition to bridges, power was also given to levy toll in respect of tunnels. However, this power was restricted only in case where the capital costs incurred was not less than Rs. 10 Lakhs. Since the provisions which existed then and which came to be interpreted by Division Bench of this Court in the case of Bungalow Plot Owners Association, did not permit the levy of toll for an amount more than the capital costs of such construction, reconstruction or repairs of the bridge or tunnel and since the contention of the State Government that it was also permissible for it to levy toll so as to recover anticipated costs of certain essential ongoings or imminent works like improvements, strengthening, widening structural repairs,

maintenance and also interest on such outlay was specifically rejected by this Court, an Amendment in 1987 was made so as to permit the recovery of such anticipated costs. A further Amendment was made in 1991 so as to permit the recovery of the costs of such works which could also be made at the expenses of any person or body of persons. By said Amendment, provision was made suitably so as to enable the State Government to collect toll either by itself or through an agent authorised by it. By subsequent Amendment in 1999, in cases of integrated projects declared by Government as single entity, which consists of bridges, tunnels, approach roads or section of roads or bypasses, it was made permissible to levy toll on vehicles even if the said vehicles did not use the entire part of the said integrated project but only uses a part of it.

By subsequent Amendment of 2001, the provision was made so as to enable the construction of the roads on Build, Operate and Transfer basis through private participation and permitting such entrepreneurs to recover investment made in such projects by allowing to collect toll at specified rates and period as notified by Special or General Order to be issued in that behalf.

However, it is to be noted that even after various Amendments, which the said Section has suffered and even though it has been now permitted to recover the costs of certain anticipated works by defining the expression "Capital Outlay", by giving it a wider meaning, the position that would still hold the field is that the State would not be permitted to recover the toll once the amount of "Capital Outlay" as defined under the said Statute is recovered by the State Government.

16. In this background, we are of the considered view that all the provisions of Section 20 would have to be read harmoniously with each other. Sub-section 1-A of the said Section which is non-obstante clause and which provides that notwithstanding anything contained in sub-section (1) but subject to the provisions of sub-section 1(B), 1(C) and 1(D), empowers the State Government to levy and collect tolls on motor vehicles and trailers drawn by such vehicles in respect of - (I) passing over any bridge or through any tunnel including an approach road thereto or any section of road or any by-pass described hereunder in clauses (a) and (b), or (ii) passing over or through any portion or a part of any of such bridges or tunnels including the approach roads, thereto or sections of roads or by-passes, the cluster, of which is situated in a well defined zone and declared by the State Government under the said clause (a) as one single entity.

Clause (a) of Sub-section 1-A would be relevant which provides that a toll may be levied and collected in respect of a bridge or tunnel including an approach road thereto or any section of road or any bypass or a cluster of such bridges or tunnels including approach roads thereto or sections of roads or by-passes situated in a well defined zone and declared by the State Government, by a notification in the Official Gazette as one single entity. The only rider is that the total capital outlay of the construction, reconstruction, improvement or repairs as the case may be, would not be less than Rs. 10 Lakhs. Clause (b) of the said Clause permits the State Government to levy toll in respect of bridge, tunnel

including approach thereto or section of road or by-pass which in the opinion of the State Government is of a special service to the public. Explanation given to sub-Section 1-A of Section 20 would be most important which reads thus:

Explanation - For the purposes of this section, the expression "capital outlay" shall include the anticipated cost of certain essential ongoing or imminent works like improvements, strengthening, widening, structural repairs, maintenance, management, operation, reasonable returns and interest on such outlay at such rates as the State Government may fix until the full amount of such outlay is recovered.

Provided that not more than the capital outlay and expenses of collection of toll shall be collected under this section.

[Emphasis supplied]

Clause (A) of the said Section 20 provides that the toll levied under sub-section (1-A) shall be levied at such rate and for such period as the State Government may, from time to time, by notification in the Official Gazette, declare.

Clause (B) directs that the State Government shall, while determining the rate of toll and the period for which such toll shall be levied, have regard to the total capital outlay, the likely collection of toll, the expenses of collection of toll, and the terms and conditions of the agreement, if any, entered into with the private person, body or association of persons (incorporated or not) or agent or entrepreneur by the Government or, as the case may be, the State Public Enterprise, relating to the period of collection and retention of the amount of toll by such person, body, agent or entrepreneur, stipulated in the agreement, including grant of reasonable reward in cash or in any other form as an incentive for the early completion of the project.

Rest of the provisions of the said Section is relating to B.O.T. therefore, would not be relevant for the purposes of the present petition. Section 1-C permits the State Government to collect toll itself or through its agent, it also permits the agent to appoint sub-agent for collection of the toll. Sub-clause 1(D) which deals with revision of present facilities would not be relevant for the purposes of the present petition.

It can thus clearly be seen that the Division Bench in unequivocal terms held that in view of various amendments to Section 20 of the said Act, it is now not only permitted to recover the costs of certain anticipated works by defining the expression "Capital outlay" but it is also permitted to the State Government to recover the interest and reasonable return etc. By virtue of said amendments, it is also permissible for the State Government to get the projects executed on B.O.T. basis. In that view of the matter, though the learned counsel is right in relying upon the judgment of Division Bench of this Court in the case of Bungalow Plot Owners (Sector 8) Association vs. State of Maharashtra, (supra), the said judgment would not be applicable to the facts of present case. After said

judgment was delivered, Section 20 of the said Act has suffered various amendments which permits even a profit to be recovered. In that view of the matter, the said contention is without any substance.

11. We find that the present case is covered by the judgment of the Division Bench of this Court in the case of M/s. Maa Bijasani Chemicals Pvt. Ltd. vs. State of Maharashtra, (supra), inasmuch as the said case covers the position of law which also falls for consideration in the present matter where as the judgment in the case of Bungalow Plot Owners (Sector 8) Association vs. State of Maharashtra, (supra) considers unamended provisions.

12. Insofar as the second contention regarding the concession period being increased from 25 to 30 years is concerned, it will be relevant to refer to an affidavit filed on behalf of the State Government dated 08.07.2010. The perusal of the same would clearly reveal that after consideration of pre-qualification bids, the State Government had approved three firms on 05.08.2008 as eligible for tendering the project. It will further be clear that subsequent thereto Public Private Participation Cell (PPP) of Ministry of Finance, Government of India, in the meeting of Empowered Institution held in PPP Cell, New Delhi, on 02.02.2009 granted in principle approval for the VGF support for the project cost to the tune of Rs. 449.25 crore and concession period of 30 years. Subsequent thereto, the Executive Engineer of the State Government issued Request For Proposal (RFP) document to the short listed firms. All the short listed firms were informed about the approval by the PPP Cell of Ministry of Finance to the revised project cost of Rs. 449.25 crore and concession period being increased to 30 years. Out of three short listed firms, two firms submitted their tenders on 30.04.2009 viz. VIL-ITNL-DMPL (JV) and M/s. Punj Lloyd Limited and tender of respondent No. 5 was found lowest and its proposal was submitted to the State Government for further approval. It is thus clear that the contention of the petitioner that the project cost has been escalated and concession period has been increased to 30 years only, so as to suit Respondent No. 5 is without any substance. All the three firms which had been successful in pre-qualified bids were aware of the change of project cost and concession period. All the three firms were informed about the revised project cost and increase in concession period, therefore, the contention that this was done to suit Respondent No. 5 is heard only to be rejected.

13. Insofar as third contention regarding Respondent No. 5 earning profit of Rs. 11,700 crore is concerned, we find that it will not be permissible for us to go into that aspect of the matter. We find that neither the petitioner nor the Court possesses the technical expertise in such matters. In any case the scope of judicial review in such matters is well defined by the Hon"ble Apex Court in the case of Tata Cellular Vs. Union of India, . It will be appropriate to refer to para 94 of the judgment of the Hon"ble Apex Court wherein principles have been laid down by the Hon"ble Apex Court, after considering the entire law on the subject.

94. The principles deducible from the above are:

- (1) The modern trend points to judicial restraint in administrative action.
- (2) The court does not sit as a court of appeal but merely reviews the manner in which the decision was made.
- (3) The court does not have the expertise to correct the administrative decision. If a review of the administrative decision is permitted it will be substituting its own decision, without the necessary expertise which itself may be fallible.
- (4) The terms of the invitation to tender cannot be open to judicial scrutiny because the invitation to tender is in the realm of contract. Normally speaking, the decision to accept the tender or award the contract is reached by process of negotiations through several tiers. More often than not, such decisions are made qualitatively by experts.
- (5) The Government must have freedom of contract. In other words, a fair play in the joints is a necessary concomitant for an administrative body functioning in an administrative sphere or quasi-administrative sphere. However, the decision must not only be tested by the application of Wednesbury principle of reasonableness (including its other facts pointed out above) but must be free from arbitrariness not affected by bias or actuated by mala fides.
- (6) Quashing decisions may impose heavy administrative burden on the administration and lead to increased and unbudgeted expenditure.

Based on these principles we will examine the facts of this case since they commend to us as the correct principles.

14. It is thus clear that it will not be permissible for us to examine the correctness or otherwise of the final decision of the State Government.

15. The only limited inquiry that is permitted in the extra ordinary jurisdiction of this Court is whether the decision making process of the State Government is arbitrary, irrational, irregular or as to whether the process was fair, transparent and rational. In that view of the matter, we have to consider the rival submissions.

16. Apart from the bald assertion that Respondent No. 5 would earn a profit of Rs. 11,700/-, nothing concrete has been placed on record by the petitioner. The petition is not supported by any other technical data or an opinion of the technical expert in the field. As already stated hereinabove, neither the petitioner nor this Court possesses technical expertise on that aspect. We have only to examine whether the procedure which was adopted by the authorities was fair, reasonable, transparent or it suffers from irrationality, arbitrariness or irregularity.

17. The process for the said project was firstly mooted by the Chief Engineer of Public Works Department, Nagpur Region, Nagpur, on 15.10.2007. In the said proposal, initial cost of the project was estimated at Rs. 279 crores for the first phase and Rs. 63 for phase II. The cost of entire project was to the tune of Rs. 342 crores which includes (Viability Gap Funding) Rs. 125 crores.

(1) The project was sent to a Cabinet Committee of Government of Maharashtra for infrastructure development, which is known as "Payabhut Samiti".

(2) The said committee sanctioned the proposal in its meeting held on 26.12.2007 with a direction to submit the same to the Government of India. The sanction was given as per the policy prevailing on 26.12.2007.

(3) The State Government thereafter constituted a Committee to verify the technicality of the proposal and to study the requirements laid down by Model Concession Agreement (MCA) of the Government of India. The constitution of the said nine member Committee is as under:

i) Chief Engineer, P.W. Region, Aurangabad - Chairman.

ii) Chief Engineer, P.W. Region, Amravati - Yavatmal.

iii) Superintending Engineer, P.W. Circle, Yavatmal -Member Secretary.

iv) Superintending Engineer, P.W. Circle, Chandrapur -Member.

v) Superintending Engineer, P.W. Circle, Aurangabad -Member.

vi) Superintending Engineer, P.W. Circle, Akola -Member.

vii) Executive Engineer, P.W. Division, (East) Pune -Member.

viii) Executive Engineer, P.W. Division, Pandharkawada -Member.

ix) Executive Engineer, World Bank Project Division, Akola - Member.

18. The said Committee in the meeting dated 10.04.2008 issued guidelines for five projects in Maharashtra including the project under consideration. The said Committee directed all the Chief Engineers to submit fresh proposals taking into consideration the recommendations of the Committee to the Government of India for approval.

19. Thereafter on 21.04.2008 by publishing an advertisement not only in daily Newspaper "Nav Bharat" as claimed by the petitioner but also in "National daily Tribune", "The Hitavada" and local daily newspaper of Chandrapur viz., "Mahavidarbha", the bids were invited for pre-qualification Concessionaire, as described in notice.

20. In response to the said notice, the State Government received proposal from the following three firms:

I) Soma - ADVCC (J/V)

II) M/s. Punj Lloyd Limited.

III) VIL-ITNL-DMPL (J/V).

21. The State Government granted its approval to all three firms on 05.08.2008. Subsequently, on 18.06.2008, discussions were held by the officials of the State

Government with the officers of the Planning Commission, Government of India, regarding the draft proposal. The officials of the Planning Commission directed the proposal to be sent in accordance with Model Project Report of "Chennai Port Project of National Highways Authority of India (NHAI)".

22. The Chief Engineer on 07.07.2008 submitted a revised proposal as per the said Model Project to the PWD of State Government. In the revised proposal the cost of project was worked out to the tune of Rs. 449 crore excluding Rs. 7.26 crore as cost of utilities shifting as PWD cost with concession period of 30 years.

23. After finalizing the said proposal, the same was submitted to the Finance Ministry of Government of India on 18.08.2008 by the Secretary, Public Works Department of State of Maharashtra. On 17.11.2008, the Executive Engineer, Public Works Division No. 1, Chandrapur, communicated to the qualifying bidders about change in the cost of project. Public Private Participation Cell (PPP) of Ministry of Finance, Government of India, in the meeting of Empowered Institution held at New Delhi on 02.02.2009, granted approval in principle for the project cost to the tune of Rs. 449.25 and the concession period of 30 years with condition that cost of shifting of utilities of Rs. 7.26 crore should be kept separate and may be born by Sponsoring Authority (GOM).

24. Subsequently on 02.02.2009, the Executive Engineer issued Request for Proposal document (RFP) to the short listed firms. The revised cost of Rs. 456.51 crore was very much mentioned in the said document. In response to the same, two firms viz., VIL-ITNL-DMPL(JV) and M/s. Punj Lloyd Limited submitted their tender on 30.04.2009. The tender submitted by VIL-ITNL-DMPL (J/V) was the lowest one and, therefore, was sent to State Government for further approval.

25. The Cabinet Committee of the State Government for infrastructure namely "Payabhut Samiti" in the meeting held on 18.08.2009 considered the proposal and approved the tender of Respondent No. 5 which was the lowest bidder. After completion of procedure, Letter of Acceptance was issued to Respondent No. 5 on 27.08.2009. Subsequently, Government of Maharashtra on 12.03.2010 approved the Special Purpose Vehicle company (SPV) for execution of project floated by lowest bidder i.e. VIL-ITNL-DMPL (J/V) in the name of "Warora-Chandrapur-Ballarpur Toll road limited". Thereafter on 18.03.2010, Concession Agreement came to be signed between Government of Maharashtra and approved SPV.

26. It can thus be clearly seen that the project was initially conceptualized on 15.10.2007 and finally culminated in the concession agreement on 18.03.2010. It is thus clearly seen that the project has travelled its journey for more than 2 1/2 years and has gone through scrutiny at 62 levels. These levels include various stages from the Executive Engineer of the Public Works Department, Chandrapur to HPC of experts by the State Government "Payabhut Samiti" of the Cabinet, officials of Planning Commission of Government of India; Ministry of Surface Transport, Government of India; Ministry of Finance and particularly PPP

cell of the said Ministry, before finalizing/approving the project cost of Rs. 456.51 crores. The State Government in its affidavit dated 08.07.2010 has given the entire chart along with its affidavit at Exh. 8 giving 62 stages through which the project has travelled.

27. It is pertinent to note that the petitioner has not made any allegations of malafide against any of the officers of the State Government or has not stated that any of the officers of the State Government or Central Government, with ulterior motive or for any other reason, has played any malafide role in sanctioning the project.

28. In view of a detailed narration regarding the journey through which the said project has passed and various stages at which it was scrutinized, we find that it cannot be said that the decision making process of the respondents in arriving at a decision to accept the tender of Respondent No. 5 has suffered from any irrationality, arbitrariness or can be said to be clandestine. The entire project has been transparent and undergone scrutiny at various stages, through experts.

29. As already discussed hereinabove, the scope of judicial review of this Court while exercising powers under Article 226 of the Constitution of India, is only to examine the decision making process of the respondents. Interference of this Court will be warranted only if the decision making process of the respondents suffers from irrationality, arbitrariness or irregularity. In that view of the matter, we do not find that this petition deserves any consideration on merits and is found to be without any substance and therefore, dismissed. Rule is discharged. However, there shall be no order as to costs.