

(2023) 07 DEL CK 0076

In the Delhi High Court

Case No : Civil Writ Petition No. 7461 Of 2023, Civil Miscellaneous Application
No. 28997 Of 2023

Rakesh Agrawal

APPELLANT

Vs

National Highway Authority Of India And Anr.

RESPONDENT

Date of Decision : 04-07-2023

Acts Referred:

Constitution of India, 1950 — Article 226
National Highways Fees (Determination of Rates and Collection) Rules, 2008 — Rule 3,
4, 5, 7
National Highways Act, 1956 — Section 2 5, 7, 9, 11, 12, 14, 16
National Highways Authorities of India Act, 1988 — Section 14, 16, 16(2)(k)

Citation : (2023) 07 DEL CK 0076

Hon'ble Judges : Satish Chandra Sharma, CJ;Subramonium Prasad, J

Bench : Division Bench

Advocate : Praveen Agarwal, Santosh Kumar, Daksh Arora, Prakhar Prakash,
Radhika Bishwajit Dubey, Siddhant Gupta

Final Decision : Dismissed

Judgement

1. The instant writ petition under Article 226 of the Constitution of India has been filed by the Petitioner as a Public Interest Litigation (PIL) with the following prayers:

"1. To issue a Writ/ Order/ Direction in nature of Writ of Mandamus or any other appropriate Writ/ Order/ Direction, directing the Respondent to amend their contract forthwith and make them compliant with Rule 7 of National Highways Fees (Determination of Rates and Collection) Rules, 2008.

2. Issue a Writ/ Order/ Direction in nature of Writ of Mandamus or any other appropriate Writ/ Order/ Direction commanding and directing the Respondents to recover the additional money which has been earned by the Concessioners as a result of non-compliance of Rule 7 of National Highways Fees (Determination of Rates and Collection) Rules, 2008 in the Respondent No. 1's Contract.

3. Issue a Writ/ Order/ Direction in nature of Writ of Mandamus or any other appropriate Writ/ Order/ Direction commanding and directing investigation by a specialized agency as to the persons who are benefited and / or are responsible for the non compliance of Rule 7 of National Highways Fees (Determination of Rates and Collection) Rules, 2008, which has resulted in Huge Loss to the exchequer and corresponding benefit to the Concessioners.

4. Pass such other and further orders as this Hon'ble Court may deem fit and proper in the facts and circumstances of the case and in the interest of Justice."

2. It is stated that the Petitioner is a regular commuter by car on national highways and thus he has interest in the present matter. It is stated in the petition that since a substantial part of the amount collected by way of toll is being given to the toll operators, huge losses are being suffered by National Highways Authority of India/Respondent No.1 (hereinafter referred to as "NHA") which has resulted in deterioration of the quality of services rendered by NHA and the same has affected and will affect the growth of National Highways in the country.

3. The submission of the Petitioner is that Section 7 of the National Highways Act, 1956 confers power on the Central Government for levying fees and collection in the manner as laid down in the Rules in this regard. It is stated that Section 9 of the National Highways Act, 1956 confers power on the Central Government to frame Rules and in exercise of powers conferred under Section 9 of the National Highways Act, 1956, the National Highways Fees (Determination of Rates and Collection) Rules, 2008 (hereinafter referred to as "2008 Rules") have been framed. It is stated that Rule 3 of the 2008 Rules prescribes that 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.

4. It is stated that Rule 7 of the 2008 Rules prescribes that in case of public funded projects, the fee collected under the provisions of these rules by every executing authority shall be remitted to the Central Government. It is stated that National Highways Authorities of India Act, 1988 (hereinafter referred to as "NHA Act, 1988") was enacted for the development and maintenance of national highways whose management and operation was vested in the Central Government. It is stated that Section 16 of the NHA Act, 1988 lays down the functions of the NHA which is to develop, maintain and manage the national highways and Section 16(2)(k) mandates that the authority must collect fees on behalf of the Central Government for services or benefits rendered under Section 7 of the National Highways Act, 1956, as amended from time to time, and such other fees on behalf of the State Governments on such terms and conditions as may be specified by such State Governments. It is the submission of the Petitioner that all the fees collected by the NHA has to be remitted to the Central Government.

5. It is stated that Respondent No.1/NHAI calls for tenders for collection of toll on toll plazas and as per the contract entered into between NHAI and Toll Collectors (Concessioners), a fixed amount is payable by these concessioners to NHAI, irrespective of the Toll Collection. It is stated that the methodology of distribution of toll between the concessioners is in violation of the mandate of Rule 7 of the 2008 Rules and it takes away the substantial portion of profit which should be earned by the NHAI to be given to the Central Government. The Petitioner is, therefore, challenging the process of inviting tenders by the NHAI for collection of toll on each of the plazas and sharing the portion of the toll with the persons to whom the tenders are awarded. It is stated that these tenders cannot be issued in violation of the provisions of the National Highways Act, 1956, National Highways Authority of India Act, 1988 and Rule 7 of the 2008 Rules.

6. Mr. Praveen Agarwal, learned Counsel appearing for the Petitioner, has reiterated the submissions made in the petition. He has taken this Court through the various provisions of the National Highways Act, 1956, National Highways Authority of India Act, 1988 and the 2008 Rules. He has also taken this Court through the relevant clauses of sample request for proposal (tender document) to establish that the methodology arrived at between the NHAI and the tenderers for collecting toll is contrary to the various provisions of the National Highways Act, 1956, National Highways Authority of India Act, 1988 and the 2008 Rules. He states that issue of such tenders by the NHAI is a clear violation of Rule 7 of the 2008 Rules because of which the Central Government has suffered huge losses which is around thousands of crores on each year.

7. Heard learned Counsel appearing for the Parties and perused the material on record.

8. Entry 23 of the list-1 of the Seventh Schedule of the Constitution of India gives exclusive power to the Parliament to bring legislations in respect of National Highways.

9. Sections 2, 5 and 7 of the National Highways Act, 1956 read as under:

"2. Declaration of certain highways to be national highways.—(1) Each of the highways specified in the Schedule 2[***] is hereby declared to be a national highway.

(2) The Central Government may, by notification in the Official Gazette, declare any other highway to be a national highway and on the publication of such notification such highway shall be deemed to be specified in the Schedule.

(3) The Central Government may, by like notification, omit any highway from the Schedule and on the publication of such notification, the highway so omitted shall cease to be a national highway.

5. Responsibility for development and maintenance of national highways.—It shall be the responsibility of the Central Government to develop and maintain in proper repair all national highways; but the Central Government may, by

notification in the Official Gazette, direct that any function in relation to the development or maintenance of any national highway shall, subject to such conditions, if any, as may be specified in the notification, also be exercisable by the Government of the State within which the national highway is situated or by any officer or authority subordinate to the Central Government or to the State Government.

7. Fees for services or benefits rendered on national highways.—(1) The Central Government may, by notification in the Official Gazette, levy fees at such rates as may be laid down by rules made in this behalf for services or benefits rendered in relation to the use of ferries,¹[permanent bridges the cost of construction of each of which is more than rupees twenty-five lakhs and which are opened to traffic on or after the 1st day of April, 1976,] temporary bridges and tunnels on national highways¹[and the use of sections of national highways].

(2) Such fees when so levied shall be collected in accordance with the rules made under this Act.

(3) Any fee leviable immediately before the commencement of this Act for services or benefits rendered in relation to the use of ferries, temporary bridges and tunnels on any highway specified in the Schedule shall continue to be leviable under this Act unless and until it is altered in exercise of the powers conferred by sub-section (1):

2[Provided that if the Central Government is of opinion that it is necessary in the public interest so to do, it may, by like notification, specify any bridge in relation to the use of which fees shall not be leviable under this sub-section.]”

10. Section 9 of the National Highways Act, 1956 confers power on the Central Government to frame Rules and in exercise of powers conferred under Section 9 of the National Highways Act, 1956, the 2008 Rules were framed. Relevant portion of Rules 4, 5 and 7 of the 2008 Rules reads as under:

“4. Base rate of fee.—(1) The rate of fee for use of the section of national highway, permanent bridge, bypass or tunnel constructed through public funded project or private investment project shall be identical.

(2) 2[The fee] for use of a section of national highway of four or more lanes shall, for the base year 2007-08, be the product of the length of such section multiplied by the following rates, namely:-

Type of vehicle

Base rate of fee per

km (in Rupees)

Car, Jeep, Van or Light Motor Vehicle

0.65

Light Commercial Vehicle, Light Goods

Vehicle or Mini Bus

1.05

Bus or Truck (Two Axles)

2.20

Three-axle commercial vehicles

2.40

Heavy Construction Machinery (HCM) or Earth Moving Equipment (EME) or

Multi Axle Vehicle (MAV) (four to six axles)

3.45

Oversized Vehicles (seven or more

axles)

4.20

5. Annual revision of rate of fee.-(1) The rates specified under rule 4 shall be increased without compounding, by three per cent each year with effect from the 1st day of April, 2008 and such increased rate shall be deemed to be the base rate for the subsequent years.

(2) The applicable base rates shall be revised annually with effect from April 1 each year to reflect the increase in wholesale price index between the week ending on January 6, 2007 (i.e., 208.7) and 2[the wholesale price index for the month of December of the year] in which such revision is undertaken but such revision shall be restricted to forty per cent. of the increase in wholesale price index.

(3) The formula for determining the applicable rate of fee shall be as follows:

Applicable rate of fee = base rate + base rate X {WPI A – WPI B} x 0.4/WPI B

Explanation.-For the purpose of this sub-rule,-

(a) applicable rate of fee shall be the rate payable by the user;

(b) base rate shall be the rate specified in rule 4 read with sub-rule (1) of rule 5;

(c) WPI A means 3[the wholesale price index for the month of December of the immediately preceding year] immediately preceding the date of revision under these rules; and

(d) WPL B means the wholesale price index of the week ending on 6th January, 2007, i.e., 208.7.

(4) Annual revision of the rate of fee under this rule shall be effective from first of April every year.

7. Remittance and appropriation of fee.- (1) In case of public funded projects, the fee collected under the provisions of these rules by every executing authority shall be remitted to the Central Government:

Provided that the Central Government may by notification allow any or all executing authorities to appropriate the whole or any part of the fee for such purposes and subject to such conditions as may be specified in the said notification:

Provided further that in case of private investment projects, the fee collected under the provisions of these rules shall be appropriated by the concessionaire in accordance with the provisions of and for the performance of its obligations under the agreement entered into by such concessionaire.

(2) Every executing authority shall remit to the Central Government, the amount of fee collected over and above the amount permitted to be appropriated by the executing authority under sub-rule (1) of rule 7, within ninety days from the date of the closing of the financial year along with an annual return showing the amount collected and the expenditure incurred on collection of fee, including the administrative and management expenses.

(3)The Central Government shall by notification determine the administrative and management expenses which may be allowed to be deducted and retained by the executing authority.”

11. Section 5 of the National Highways Act, 1956 provides that the Central Government may, by notification in the Official Gazette, direct that any function in relation to the development or maintenance of any national highway shall, subject to such conditions, if any, as may be specified in the notification, also be exercisable by the Government of the State within which the national highway is situated or by any officer or authority subordinate to the Central Government or to the State Government and under this provision the function of execution of field activities, including survey, investigation or preparation of projects on national highways were delegated to the State Governments. Since the Central Government had no direct administrative control over the various agencies of the State Governments, the Central Government found itself helpless in case State Government overlooks the maintenance of the national highways. To get over this problem, the Central Government thought to take over the development and maintenance of the national highways through creation of an autonomous body i.e., National Highways Authority of India and thus the National Highways Authority of India Act, 1988 (hereinafter referred to as 'the NHAI Act, 1988') was brought into force.

12. Section 11 of the NHAI Act, 1988 gave the power to the Central Government to entrust to the Authority any national highway or any stretch thereof as may be

specified in such notification. Section 12 of the NHA I Act, 1988 provides that all debts, obligations and liabilities incurred, all contracts entered into and all matters and things engaged to be done would be entrusted to the authority. Sections 11, 12, 14 and 16 of the NHA I Act, 1988 read as under:

"11. Power of the Central Government to vest or entrust any national highway in the Authority.—The Central Government may, from time to time, by notification in the Official Gazette, vest in, or entrust to, the Authority, such national highway or any stretch thereof as may be specified in such notification.

12. Transfer of assets and liabilities of the Central Government to the Authority.—
(1) On and from the date of publication of the notification under section 11,—

(a) all debts, obligations and liabilities incurred, all contracts entered into and all matters and things engaged to be done by, with, or for, the Central Government, immediately before such date for or in connection with the purposes of any national highway or any stretch thereof vested in, or entrusted to, the Authority under that section, shall be deemed to have been incurred, entered into and engaged to be done by, with, or for, the Authority;

(b) all non-recurring expenditure incurred by or for the Central Government for or in connection with the purposes of any national highway or any stretch thereof, so vested in, or entrusted to, the Authority, up to such date and declared to be capital expenditure by the Central Government shall, subject to such terms and conditions as may be prescribed, be treated as capital provided by the Central Government to the Authority;

(c) all sums of money due to the Central Government in relation to any national highway or any stretch thereof, so vested in, or entrusted to, the Authority immediately before such date shall be deemed to be due to the Authority;

(d) all suits and other legal proceedings instituted or which could have been instituted by or against the Central Government immediately before such date for any matter in relation to such national highway or any stretch thereof may be continued or instituted by or against the Authority.

(2) If any dispute arises as to which of the assets, rights or liabilities of the Central Government have been transferred to the Authority, such dispute shall be decided by the Central Government.

14. Contracts by the Authority.—Subject to the provisions of section 15, the Authority shall be competent to enter into and perform any contract necessary for the discharge of its functions under this Act.

16. Functions of the Authority.— (1) Subject to the rules made by the Central Government in this behalf, it shall be the function of the Authority to develop, maintain and manage the national highways and any other highways vested in, or entrusted to, it by the Government.

(2) Without prejudice to the generality of the provisions contained in sub-section

(1), the Authority may, for the discharge of its functions—

- (a) survey, develop, maintain and manage highways vested in, or entrusted to, it;
- (b) construct offices or workshops and establish and maintain hotels, motels, restaurants and rest-rooms at or near the highways vested in, or entrusted to, it;
- (c) construct residential buildings and townships for its employees;
- (d) regulate and control the plying of vehicles on the highways vested in, or entrusted to, it for the proper management thereof;
- (e) develop and provide consultancy and construction services in India and abroad and carry on research activities in relation to the development, maintenance and management of highways or any facilities thereat;
- (f) provide such facilities and amenities for the users of the highways vested in, or entrusted to, it as are, in the opinion of the Authority, necessary for the smooth flow of traffic on such highways;
- (g) form one or more companies under the Companies Act, 1956 (1 of 1956) to further the efficient discharge of the functions imposed on it by this Act;
- 1[(h) engage, or entrust any of its functions to, any person on such terms and conditions as may be prescribed;]
- (i) advise the Central Government on matters relating to highways;
- (j) assist, on such terms and conditions as may be mutually agreed upon, any State Government in the formulation and implementation of schemes for highway development;
- (k) collect fees on behalf of the Central Government for services or benefits rendered under section 7 of the National Highways Act, 1956 (48 of 1956), as amended from time to time, and such other fees on behalf of the State Governments on such terms and conditions as may be specified by such State Governments; and
- (l) take all such steps as may be necessary or convenient for, or may be incidental to, the exercise of any power or the discharge of any function conferred or imposed on it by this Act.

(3) Nothing contained in this section shall be construed as—

- (a) authorising the disregard by the Authority of any law for the time being in force; or
- (b) authorising any person to institute any proceeding in respect of a duty or liability to which the Authority or its officers or other employees would not otherwise be subject under this Act.”

13. A perusal of all the above Sections and Rules demonstrate that under the

National Highways Act, 1956, the Responsibility for development and maintenance of national highways which was with the Central Government has now been entrusted to the National Highways Authority of India. Section 9 of the National Highways Act, 1956 confers power on the Central Government to frame Rules and in exercise of powers conferred under Section 9 of the National Highways Act, 1956, the 2008 Rules were framed. The 2008 Rules gives the rates of fee to be levied on national highways. Under Rule 7 of the 2008 Rules, the fee which is prescribed and collected are to be remitted to the Central Government.

14. Section 14 of the NHAI Act, 1988 gives power to the authority to enter into and perform any contract which is necessary to discharge its functions. Section 16 of the NHAI Act, 1988 lays down functions to be performed by the authority, and Section 16(2)(k) of the NHAI Act, 1988 gives power to the Central Government to collect fee for services or benefits rendered under Section 7 of the National Highways Act, 1956.

15. In exercise of the powers under Section 14 of the NHAI Act, 1988, the NHAI enters into the contracts for the purpose of collecting toll. The contracts prescribe the fee which can be retained by the contractor from the toll collected. Nothing has been shown in this writ petition that the fee which is being remitted by the NHAI to the Central Government are lesser than the rates prescribed by the Central Government under the 2008 Rules. Section 7 of the National Highways Act, 1956 prescribes that the Central Government has power to levy fee at such rates as may be laid down by the rules for the services or benefits rendered on national highways. Rule 4 of the 2008 Rules prescribes the base rate of the fee. Legislature gave power to the NHAI to enter into contracts with any person in discharge of the functions to be performed by the NHAI and one of the functions of the NHAI is to collect fee on behalf of the Central Government for use of the national highways. A wholesome reading of Section 14 of the NHAI Act, 1988 and Rule 7 of the 2008 Rules shows that NHAI can enter into contracts for the purpose of collecting fee on behalf of the Central Government for the services and benefits rendered under Section 7 of the National Highways Act, 1956. The contracts which have been entered into by the NHAI for the purpose of performing its functions to collect fee on behalf of the Central Government cannot be said to be violative of Rule 7 of the 2008 Rules which were enacted by the powers conferred under Section 9 of the National Highways Act, 1956. No material has been shown as to how these contracts which have been entered into by the NHAI with concessionaries are in any way hit by the various provisions of the National Highways Act, 1956 or that the toll which is being collected is lesser than the fee fixed under the 2008 Rules. The entire basis of the present writ petition is, therefore, fallacious.

16. The fee is collected by the NHAI which is one of its functions prescribed under Section 16 of the NHAI Act, 1988 for which purpose it enters into contracts for operating toll plazas, and the fee that is being sent to the Central

Government is in accordance with the 2008 Rules which was framed in exercise of powers conferred under Section 9 of the National Highways Act, 1956. The NHAI is free to enter into contracts for the purpose of collecting toll and that toll that is collected takes into account the fee that is to be paid to the Central Government under the 2008 Rules and also the amount that is paid to the toll contractor under the contract.

17. In view of the above, the present PIL is completely devoid of merits, and therefore, is dismissed, along with pending application(s), if any.