(2016) 02 AHC CK 0228

In the Allahabad High Court

Case No : Misc. Bench Nos. 10737 of 2015 and 11275 of 2014

Ramesh and Others APPELLANT

Vs

Union of India and Others RESPONDENT

Date of Decision : 15-02-2016

Acts Referred:

Constitution of India, 1950 — Article 22, Article 226
National Highways Act, 1956 — Section 4, Section 7, Section 8-A, Section 9

Citation : (2016) 3 ADJ 86 : (2016) 116 ALR 187

Hon'ble Judges : Amreshwar Pratap Sahi and Attau Rahman Masoodi, JJ.

Bench : Division Bench

Advocate : Sandeep Dixit, for the Appellant; A.S.G., L.P. Singh, S.C. Rai, Satish Chandra Rai, Savidha and Shiv Shanker, for the Respondent

Final Decision : Dismissed

Judgement

Attau Rahman Masoodi, J.—1. These two writ petitions arise out of a common grievance raised about the location of toll plaza on NH-25 at Km. 39 situate at Kanpur-Lucknow road. The facts of the writ petitions and the relief sought being not dissimilar, have been heard together and are being decided by a common judgement.

2. The facts in brief giving rise to the above cause are that a temporary toll plaza came to be installed under a notification issued by the Central Government on 18.3.2009 at Km. 38.5 for the realization of toll tax whereunder the executing authority i.e. the National Highway Authority of India (hereinafter referred to as the NHAI) continued to collect and realise toll tax. This notification of 18.3.2009 issued under Section 8-A of the National Highway Act, 1956 read with Rule 3 of the National Highways Fee (Determination of Rates and Collection) Rules, 2008 (hereinafter referred to as Rules of 2008), operated until a contract was entered into by National High Way Authority for the purpose of realisation of toll tax with a concessionaire i.e. M/s. PNC Kanpur Toll Pvt. Ltd., who has not been impleaded as a respondent. However, an application for impleadment was filed by the

concessionaire and we have allowed the concessionaire to be heard through Ms. Pushpila Bisht, learned counsel in terms of Chapter XXII Rule 5-A of the Allahabad High Court Rules, 1952.

3. Entering into a contract for collection of toll by NHAI with M/s. PNC Kanpur Toll Pvt. Ltd. necessitated the issuance of a fresh notification within the scope of relevant provisions and the toll plaza operating temporarily on NH-25 at Km. 38.5 as a result of issuance of fresh notification on 3.7.2013 was to be located permanently on the same national highway i.e. NH-25. The statutory notification including the Central Government having undertaken the necessary exercise, locates the toll plaza accurately at Km. 39 nearing district Unnao. Although the notification issued in the year 2009 remained unchallenged and the notification dated 3.7.2013 having already been issued, yet the same does not appear to be a subject matter of challenge in Writ Petition No. 11275 (MB) of 2014, which was filed in the month of November, 2014. The said notification, later on, has come to be challenged in Writ Petition No. 10737 (MB) of 2015 filed in the month of November, 2015. This Court while entertaining the earlier writ petition had passed an order of status quo on 14.11.2014 and the same having resulted into an inconvenience and loss to the concessionaire and the NHAI, gave rise to an urgency for which reason the writ petitions on the application filed by NHAI were listed and heard by putting the learned counsel for all the parties to notice.

4. The issue in short is as regards the location of toll plaza by shifting the same from Km. 38.5 to Km. 39 on Kanpur-Lucknow NH-25. It may be relevant to note that National Highways Act, 1956 by virtue of Section 4 of the Act, vests all national highways in the Union, which include all lands appurtenant thereto, all bridges, culverts, tunnels, causeways, carriageways and other structures constructed on or across such highways and all fences, trees, posts and boundary, furlong and milestones of such highways or any land appurtenant to such highways. The Central Government by virtue of Section 7 is also empowered to levy fees in relation to the use of national highways, read with Rule 3 of the Rules of 2008. Rule 3 being relevant for our purpose is reproduced below:

"3. 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.

(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 percent of the fee levied on a car.

Explanation. -- For the purposes of this rule,--

(a) "alternative road" means such other road, the carriageway of which is more than ten metres wide and the length of which does not exceed the corresponding length of such section of national highway by twenty percent thereof;

(b) "service road" means a road running parallel to a section of the national highway which provides access to the land adjoining such section of the national highway.

(5) The fee notified by the Central Government under these rules shall be rounded off and levied in multiple of the nearest Rupees five."

5. In the instant case, there is no challenge either to the rules or to the authority of the Central Government for realisation of toll on the defined stretch of national highway in question but what is questioned in the present proceedings is the location of the toll plaza which is said to have been shifted by half a kilometer distance as compared to its prior temporary location under the notification issued on 18.3.2009. The whole premise of the challenge raised in the writ petitions rests on an interpretation of Rule 8 of the Rules of 2008 and the same for ready reference is extracted below:

"8. Location of toll plaza.-- (1) The executing authority or the concessionaire, as the case may be, shall establish a toll plaza beyond a distance of ten kilometres from a municipal or local town area limits:

Provided that the executing authority may, for reasons to be recorded in writing, locate or allow the concessionaire to locate a toll plaza within a distance of ten kilometres of such municipal or local town area limits, but in no case within five kilometres of such municipal or local town area limits:

Provided further that where a section of the national highway, permanent bridge, bypass or tunnel, as the case may be, is constructed within the municipal or town area limits or within five kilometres from such limits, primarily for use of the residents of such municipal or town area, the toll plaza may be established within the municipal or town area limits or within a distance of five kilometres from such limits.

(2) Any other toll plaza on the same section of national highway and in the same direction shall not be established within a distance of sixty kilometres:

Provided that where the executing authority deems necessary, it may for reasons to be recorded in writing, establish or allow the concessionaire to establish another toll plaza within a distance of sixty kilometres:

Provided further that a toll plaza may be established within a distance of sixty kilometres from another toll plaza if such toll plaza is for collection of fee for a permanent bridge, bypass or tunnel."

6. Learned counsel for the petitioners have submitted that the shifting of the toll plaza in question at Km. 39 in accordance with the notification dated 3.7.2013 is violative of the substantive provision of Rule 8 which requires that a toll plaza is necessarily to be established beyond a distance of 10 kms. from the municipal limits.

7. Further contention of the learned counsel for the petitioners is to the effect that a toll plaza can be located within a distance of 10 kms. of the municipal limits only for the reasons to be recorded in writing but in no case the same can situate within five kms. of the municipal or local town area limits.

8. In the present case it is specifically averred that the location of the toll plaza being within the municipal limits of Nawabganj town is violative of both the mandates contained in Rule 8 (1) as well as the first Proviso appended thereto which clearly places a specific bar for locating the toll plaza contrary to the mandate of law.

9. Learned counsel for the petitioners have further attempted to demonstrate that the second proviso appended to Rule 8 cannot control the substantive provision of law and cannot be read in a manner to obliterate the effect and operation of the substantive rule.

10. Sri J.N. Mathur, learned Senior Counsel assisted by Sri Lavkush Pratap Singh and Ms. Samvida, learned counsel for NHAI has, however, argued that the second proviso appended to Rule 8 (1) is rather a provision relevant for the purpose whereunder a national highway once passing through the municipal limits of a town, empowers the competent authority to locate a toll plaza even within the municipal limits or the town area limits, if it is established that the highway is constructed for the use of the residents of such municipality or the town area.

11. The stand to the aforesaid effect can be sufficiently gathered from the

contents of the counter affidavit filed in Writ Petition No. 11275 (MB) of 2014, wherein it is stated that the existing highway was widened without providing any bypass so as to facilitate the residents of the area itself. Paras 4 and 5 of the counter affidavit being relevant are extracted below:

"4. Previously, the road from Lucknow to Kanpur which was of two lanes passed through the town area of Nawabganj. During the four laneing programme, the existing two lane road which was passing through the Nawbganj Town area has been widened to four lane without proposing for any bypass, so that the local public/residence of such town area can avail the facility of four lane primarily. In view of that the toll plaza was located within 5 Kms. of Nawabganj Town area as per Rule 8 of National Highway Fee Rule, 2008. Since then the toll plaza operation has been carried out uninterruptedly.

5. Subsequently, the referred highway section from 11.000 to 59.000 has been taken up under OMT (Operation, Maintenance & Transfer) basis as a part of Kanpur Ayodhya Section and the work has been awarded to the Concessionaire M/s. PNC Kanpur Ayodhya Tollway Pvt. Ltd. w.e.f. 01st August, 2013. As obligations of the concessionaire under the Concession Agreement (herein referred as C/A), the Concessionaire has to operate the toll plaza to collect the user fee as per Article 22 of C/A. The relevant extracts of the C/A has been annexed as Annexure CA-2 (Colly.). To that extent, the Gazette Notification from MoRT&H, Govt. of India i.e. Respondent No. 1 herein, has been released on dated 3rd July, 2013 and in the notification, the location of toll plaza has been mentioned in Km 39 of NH-25 which is the present existing toll plaza location. The said notification has been annexed herewith as Annexure CA-3."

12. Learned counsel for the petitioners in support of their contention have also placed reliance upon a judgement rendered by the Madras High Court in the case of R. Murali v. The Chairman R. Murali v. The Chairman, NHAI decided on 3 July, 2014. Refuting the justification based on the said judgement, learned counsel for the NHAI Sri Mathur pointed out that it has already been annulled by the apex court in Civil Appeal No. 3426 of 2015 on 7.4.2015. The averments, therefore, on the strength of the Madras High Court judgement, as pleaded in the writ petition, no longer can come to the aid of the petitioners.

13. The controversy, in view of the submissions raised before us, stands narrowed down only to an interpretation of Rule 8 in the context of other relevant provisions of National Highway Authority Act, 1988 and the rules framed under Section 9 of the National Highway Act, 1956 i.e. the Rules of 2008.

14. The whole contention of the petitioners with regard to the distance norms as envisaged under the controlling provision of Rule 8 (1) and the first proviso is based on the ground that the distance norms envisaged under the substantive rules are mandatory, therefore, the same cannot be compromised to the detriment of the rights of the residents who may stand affected as a result of the location of the toll plaza within the municipal limits.

15. The submission advanced by the learned counsel does not appear to be well-conceived for the reason that the existing national highway is already passing through the municipal areas in question and the abundant caution which is envisaged under Rule 8 sub-rule (1) may not have its application in respect of those areas which are facilitated by providing road service, widening whereof caters to the larger interest of the residents out of whom only a few have approached this Court so as to protect their individual rights. The counter affidavit filed by the NHAI has specifically spelt out a two-fold defence in respect of the case set up by the petitioners; firstly, it is averred that once the widening of national highway is in the interest of the residents themselves, in such a situation the grievance raised by the petitioners does not merit consideration for any protection being granted contrary to the larger object of the road widening; secondly, that the local residents for whose benefit the road widening has taken place, are duly benefited, therefore, at this stage, a dispute with respect to location of toll plaza being wholly misconceived, cannot be allowed to be raised. The counter affidavit also explains the monthly scheme for local residents residing within a range of 20 kms. to be accommodated for utilization of road service on a consolidated monthly payment basis in respect of the vehicles which are exigible to toll tax. Once all such measures are taken, the individual grievances appear to have been redressed sufficiently and the grounds of challenge in such a situation, are incapable of being weighed above larger public interest.

16. As far as the construction of the toll plaza strictly at km. 39 owing to the requirement of facilities is concerned, no valid reason or ground has been raised to dispute the authority of the Central Government in this regard and the contention based on the mandate of the controlling provision i.e. Rule 8(1) read with the first Proviso also does not appear to hold water for the reason that the highway in question passes through the municipal area and in such a situation, it is the second proviso of Rule 8, which would govern the situation in the facts and circumstances of the present case, which has rightly been applied. The petitioners had become users of the welfare measure, therefore, the petitioners have in a way acquiesced to the situation and they cannot now assert their individual rights for the reason that no such objection was raised by the petitioners at the relevant time when the same road was being widened and the earlier notification dated 18.3.2009 had brought the stretch of Kms. 110.5 to 75.5 within the purview of toll. Once it is shown that the scope of constructing the toll plaza at the notified place is appropriate due to the availability of roadside land and there being no challenge by the petitioners that such a location of toll plaza would not be conducive to the purpose, as per requirements, we are not inclined to entertain the writ petitions under Article 226 of the Constitution of India for the relief prayed for by the petitioners.

17. In the result, the argument advanced by the petitioners cannot be construed and interpreted as prayed, for the reasons hereinabove. The stand adopted by the respondents being just, proper and in consonance with law, deserves to be

affirmed.

18. The writ petitions being devoid of merit, are hereby dismissed.

19. The writ petition is dismissed vide our orders of date on separate sheets.

