

(2015) 04 MAD CK 0209

In the Madras High Court

Case No : Writ Petition No. 29389 of 2010 and M.P. No. 1 of 2012

S. Joel

APPELLANT

Vs

Union Government of India and Others

RESPONDENT

Date of Decision : 20-04-2015

Acts Referred:

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

Citation : (2015) 4 MLJ 257 : (2015) 3 RCR(Civil) 1011 : (2015) WritLR 397

Hon'ble Judges : Sanjay Kishan Kaul, C.J;T.S. Sivagnanam, J

Bench : Division Bench

Advocate : V. Raghavachari for M. Sathishkumar, for the Appellant

Final Decision : Dismissed

Judgement

T.S. Sivagnanam, J.—The petitioner a practising Advocate has filed this Writ Petition designed as a Public Interest Litigation with a prayer to direct the National Highways Authority of India (NHAI) not to grant approval for Collection of Toll from vehicles by the eight respondent (the Concessionaire) before proper completion of the Project Highway as per the standards specified by the India Road Congress and till the replacement of toll plaza constructed at 254+940 KM on the Project Highway as per Rule 8 of the Highways Fee (Determination of Rates and Collection) Rules 2008.

2. The petitioner has filed a Miscellaneous Petition in M.P. No. 1 of 2012 to amend the prayer in the Writ Petition to quash the notification issued by the Ministry of Road Transport and Highways vide notification in O.S. No. 1415 (E), dated 16.06.2011 and to direct the Concessionaire/eighth respondent not to collect toll from the Toll Plaza constructed at 254.940 KMS till its replacement at 25.300 KMS as per the provisions of the concessionaire agreement between NHAI and the Concessioner dated 24.07.2006.

3. Before we consider the prayer for amendment it would be relevant to take

note of the facts which lead to the filing of this Public Interest Litigation.

4. The project of widening of existing National Highways, Madurai to Tuticorin between Km.138.800 to Km.264.500 of NH-45B was entrusted to the eighth respondent and a concession agreement was entered into on 24.07.2006. The controversy raised in this Writ petition does not pertain to the road widening, but only concerns the location of the second Toll Fee Collection Plaza. In terms of Schedule C of the Concession Agreement, the eighth respondent was required to establish two toll plazas at Ch.151.700 and another at Ch.252.300. However, the eighth respondent constructed the toll plazas at Ch.143.500 and another Ch.254.940.

5. The petitioner would state that the eighth respondent put up construction of toll plaza at Eliyerpatty village without approval of the Government and alleged that the construction was done in collusion with the independent consultant for the project, the seventh respondent. It is further submitted that the toll plaza at Ch.254.940 was built in contravention of Rule 8 of the Fee Determination Rules as it is within the 3kms of the Tuticorin Municipal Corporation limit namely Pandarampatti village, Tuticorin Taluk. It is further submitted that there is no permanent bridge, bypass or tunnel, constructed near toll plaza for the use of people residing within the jurisdiction of Tuticorin Corporation and the establishment of the second Toll Plaza by the eighth respondent is in violation of Rule 8 of the Rules. It is further submitted that there are several villages situated in the abutting East Coast Road (ECR) which starts from the project Highways in Melarasadai Junction before Km.243.000 of the Project Highway and that several people of the villages have to touch the Project Highway from the East Coast Road to reach Colleges, Schools, Port, Collectorate, Railway Station etc., and are required to pay huge amount of toll though the use of Project Highway is only for 2 or 3 kms. Though in the affidavit filed in support of the Writ Petition several averments are made regarding the type of road to be formed in terms of Indian Road Congress specification, no argument was advanced in this regard and the learned counsel appearing for the petitioner focused only on the construction of the second Toll Plaza at a different location much to the inconvenience of the local public. It is submitted that the eighth respondent has constructed the toll plaza at KM254.940 at the beginning of Tuticorin bypass which is gross violation of the project facility.

6. The learned counsel by referring to Rule 8(1) of the Rules submitted that the Executive Authority or Concessionaire cannot establish a Toll Plaza within a distance of 10 Kms from a Municipal or local town area limit and the location of the Toll Plaza at Km 254-940 is clearly in violation of Rule 8 of the Rules. It is further submitted that though the Concession Agreement was entered into on 24.06.2008 and rule 8 was notified on 05.12.2008, the construction is contrary to Rule 8, since the approval for change of location at Kms 254-940 was granted only on 16.06.2011 and by then Rule 8 was in force. It is further submitted that the construction of the Toll Plaza in violation of Rule 8 is arbitrary and malice in

law is ex facie evidence. Further, it is submitted that the amount of toll collected from the local public amounts to fleecing the public, when the public use the road to a distance of only about 2 or 3 kms. It is further submitted that the decision to re-locate the Toll Plaza having been taken in 2011, the Rule, which was in force at the relevant time, being Rule 8 should have been adhered to. In support of such contention, reliance is placed on the decision of the Hon''ble Supreme Court in the case of A.K. Roy and Others Vs. Union of India (UOI) and Others, AIR 1982 SC 710 : (1982) CriLJ 340 : (1981) 4 SCALE 1904 : (1982) 1 SCC 271 : (1982) 2 SCR 272 . Referring to the decision of the Alahabad High Court in the case of Suriya International Private Limited Vs Union of India, reported in 2014 (4) AWC) 3564, it is submitted that the Toll Plaza was required to be established at the appropriate place as per Rule 8 of the 2008 Rules.

7. The learned Senior counsel appearing for the respondents submitted that the concession agreement was executed in 2006 and it provided for construction of two Toll Plazas one at KM 151.700 and another at KM252.300. It is further submitted that in terms of Schedule C of the Concession Agreement minor adjustments of Toll Plaza location can be proposed in consultation with the NHAI and the independent consultant, the seventh respondent. Drawing attention of this Court to sub-clause 6.2 in clause IV of Chapter II of the Concession Agreement, it is submitted that the Concessionaire can adopt Toll Plaza location in consultation with the independent consultant and due approval of NHAI. Thus, NHAI seeks to justify the action of the Concessionaire to be in accordance with the concession agreement. Further, NHAI and the Concessionaire seeks to justify their action in locating the Toll Plaza at Kms 254.940 by stating that the first Toll Plaza was proposed at Ch.143.580 due to site condition to avoid nearby junction at Ch.151.420 on Madurai side and the Second Toll Plaza was shifted from Ch.252.300 and proposed at Ch.254.940 due to location of a minor Bridge, which is located at Ch.251.540 with a level difference between the carriage way and a junction road at Ch.252.945. Therefore, it is contended that the Concession Agreement provides for making such changes and the change which has been effected with minor adjustment with prior approval of the NHAI. The counter affidavit filed by the eighth respondent is on the above lines seeking to justify their action as being done with the approval of NHAI. As regards the applicability of Rule 8 of the Rules, it is submitted that the said Rule was notified on 05.12.2008 and the same is not applicable to the Concession Agreement executed with the eighth respondent, dated 24.07.2006, and in this regard, reference is made to Rule 1(3) of the 2008 Rules, which states that the Rule shall not apply to agreements and contracts executed and bids invited prior to the publication of Rules. It is further submitted that the Toll Plaza has been established and in operation and prayed for dismissal of the Writ Petition.

8. The learned Senior counsel appearing for the NHAI further submitted that this Court exercising jurisdiction under Article 226 of the Constitution of India will not sit in appeal over the decision of the experts unless malafides is alleged and there is no plea malafides alleged by the petitioner. In support of the said

contention, reliance has been placed on the decision of the High Court of Madhya Pradesh in the case of Bangla Rahawashi Sangh Vs. Union of India, AIR 2014 MP 165 : (2014) 4 MPHT 18 : (2014) 3 MPLJ 622 , and the decision of the Punjab and Haryana High Court in the case of Gram Panchayat Gangaicha Jat Vs Union of India and Ors., reported in 2014 SCC Online P&H 23581.

9. We have heard the learned counsel appearing for the parties and considered the materials placed on record.

10. This Public Interest Litigation seeks to question the location of a toll plaza established as part of a project of the NHAI for four laning of the existing carriage way from KM 135 (Madurai) to KM.264.500 (TPT) on the Madurai - Tuticorin section of National Highway No. 45-B. The contract has been awarded to the eighth respondent, Concessionaire and a Concession Agreement has been executed on 24.06.2006, pursuant to which the project has been implemented.

11. Though the petitioner affidavit filed in support of the Writ Petition raised various contentions regarding the type of road, which have been formed etc., the controversy in this Writ Petition lies in a very narrow campus as essentially the challenge in this Writ Petition is to the location of the second Toll Plaza at Chainage Ch.254.940.

12. The challenge to the location of the second Toll Plaza is on two grounds, firstly by contending that there was no justification for relocating/shifting the Toll Plaza from Ch.254.300 to Ch.254.940 and the action is arbitrary against the public of Tuticorin and actuated by malice in law. Secondly, it is contended that the shifting of the second Toll Plaza to Ch.254.940 is contrary to Rule 8 of the 2008 Fee Determination Rules. We take up for consideration the second issue first.

13. The National Highways Act, 1956, was enacted as an Act to provide for declaration of certain Highways to be National Highways and for matters connected therewith. By amendment Act 26 of 1995, the scope of the Act was enlarged for the purpose of proper development of road infrastructure and since it was not possible to allocate sufficient funds for the development of road sector in the country, the need was felt to tap private entrepreneurship and private resources in the development of road sector. With this in view, the Government took measures to declare road sector as an industry and infrastructure facility and certain other concessions. Thus by virtue of Amendment Act 26 of 1995, the Central Government was empowered to enter into agreement with any person in relation to the development and maintenance of the whole or part of a National Highways; levy fees and authorise the person, who has undertaken to develop the whole or any part of a national highways to collect such fees; and to empower such person to regulate traffic on such national highway. For the aforesaid purpose, Section 8A was inserted empowering the Central Government to enter into agreement for development and maintenance of the National Highway.

14. In terms of Section 9 of the Act, the Government was empowered to make rules, among other thing for collections of fees for services etc. In exercise of the Rule making power, the National Highway Fee (Determination of Rates and Collections) Rules, 2008, were framed and the Rule was published in the Gazette of India, dated 05.12.2008. In terms of Rule 1(2), the Rules shall come into force on the date of the publication in the official gazette, i.e., 05.12.2008. Sub-Rule (3) of Rule 1 states that the said 2008 Rules shall not apply to agreements and contracts executed and bids invited prior to the publication of the Rules. Thus, going by Rule 1(3) of the Rules, the Concession Agreement executed with the eighth respondent having been done on 24.07.2006, the 2008 Fee Determination Rules, would have no application. It was argued on behalf of the petitioner that the Rule 8 would be applicable, since the relocation of the second Toll Plaza to Ch.254.490 was done with the approval of the NHA only in 2011 and by then 2008 Rules had come into force and therefore, the relocation could not have been made in contravention of Rule 8 of the Rules. Rule 8 of the Rules deals with Location of Toll Plaza, which reads as follows:-

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 kilometers 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 kilometers of such municipal or local area limits, but in no case within five kilometers of such municipal or local town area limits;

Provided further that where a section of the national highway, permanent bridge, by-pass or tunnel, as the case may be, is constructed within the municipal or town area limits or within five kilometers 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 kilometers 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 kilometers.

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 kilometers.

Provided further that a toll plaza may be established within a distance of sixty kilometers from another toll plaza if such toll plaza is for collection of fee for a permanent bridge, by-pass or tunnel.

15. Referring to the Rule 8(1), it is submitted on behalf of the petitioner that the location of the second Toll Plaza at Ch.254.940, clearly falls foul of the Distance Rules mentioned therein. It is further submitted that the relocation or shifting of the Toll Plaza to a different location than what was initially proposed having

taken place in 2011, the Rules which were in force as on that date should be made applicable and if so, the second Toll Plaza could not have been located at Ch.254.940, as it violates the Distance Rules under Rule 8 of the Rules. Placing reliance on the decision of the Hon''ble Supreme Court in the case of State of Tamil Nadu Vs. Hind Stone and Others, AIR 1981 SC 711 : (1981) 1 SCALE 237 : (1981) 2 SCC 205 : (1981) 2 SCR 742 : (1981) 13 UJ 408 , it is submitted that the Hon''ble Supreme Court pointed out that even an application for a renewal of the lease, is an essence an application for the grant of a lease for a fresh period and therefore, the Rule which is in existence as on the date of consideration of the renewal application shall apply. It is submitted that the legal principle as pointed out by the Hon''ble Supreme Court would equally apply to the facts of the present case as the decision to shift the second Toll Plaza to a different location was taken after the 2008 Rules were notified and NHAI ought to have adhered to the Rule 8 of the Rules.

16. In the M/s. Hind Stone case, (supra), the validity of the Rule 8C of the Tamil Nadu Minor Mineral Concession Rules, 1959, was put to challenge and one of the grounds canvassed on behalf of the lessees is that Rule 8C cannot be made applicable to applications for renewal of lease already granted. In the background of such a contention being raised, the Hon''ble Supreme Court while upholding the validity of Rule 8C held that even an application for renewal of lease is, in essence an application for grant of lease for a fresh period and Rule 8C is attracted in considering applications for renewal of leases also. The said decision is of little assistance to the case of the petitioner for more than one reason. Firstly, the Concession Agreement is a contract entered into between NHAI and the eighth respondent. The change of location is not a fresh contract, but a decision taken by the NHAI while implementing and in furtherance of the contract dated 24.07.2006. Secondly Schedule C of the Concession Agreement, which deals with project facilities while dealing with location of Toll Plaza provides for minor adjustment of the Toll Plaza location which could be proposed in consultation with independent consultant and NHAI. This is for the reason that while in the course of implementation of the project, NHAI and the Concessionaire have been given leverage to adapt to the contingencies and other requirements. Therefore, the location initially proposed could not be taken to be a rigid fixation and sufficient discretion has been vested to be proposed by the Concessionaire in consultation with the independent consultant with the prior approval of the NHAI. It is not in dispute that such proposal was made through the independent consultant and NHAI has granted approval after which the second Toll Plaza has been located in the present location. Thus, the action taken is in pursuance to the Concession Agreement executed in 2006 and relocation being not a fresh grant, but in the process of implementation of the project pursuant to the Concession Agreement executed in 2006. Therefore, the Rules which were prevalent on the date of the Concession Agreement, shall bind the parties and Rule 8 of the said Rules could have no application in the light of the Rule 1 (3) of the Rules. That apart the first proviso to Rule 8 empowers NHAI, to

locate or allow the Concessionaire locate a toll plaza within ten kilometer of such Municipal or local area. This power is vested with the Executing Authority (NHAI) to take care of contingencies which may arise in the course of implementation of the project. Even this power is not unguided as there is a restriction of five kilometer distance. Therefore, even assuming for the sake of argument Rule 8 is attracted, the decision take with regard to location of the second toll plaza at Ch.254.940 cannot be faulted. Accordingly, issue No. (ii) is decided against the petitioner.

17. Coming to the first issue, it was argued by the learned counsel appearing for the petitioner that the reasons assigned for shifting second Toll Plaza from the original location to the present location is wholly unjustified and arbitrary and amounts to penalising the public of Tuticorin, who are compelled to pay huge amount as toll for using less than 2kms of the highway. Before examining the factual justification put forth by NHAI and the Concessionaire, it has to be first examined as to whether this Court exercising jurisdiction under Article 226 of the Constitution of India could go into the correctness of the statement made by NHAI for relocating the second Toll Plaza.

18. It is settled legal position that this Court exercising power of judicial review would not interfere with the decision or discretion exercised by an authority, unless it is shown that the decision was wholly arbitrary and actuated by bias and malafides. In the case on hand, the petitioner has not alleged any bias or malafide, but would state that the action of the respondent in shifting the Toll Plaza to the present location amounts to malice in law. This argument steams out of the proposition advocated by the petitioner that the relocation of the second Toll Plaza contravenes Rule 8 of the Rules. In the preceding paragraphs, we are out rightly rejected such contentions raised by the petitioner and held that the Rule 8 would have no application to the facts of the present case. In the absence of any allegation of malafide, no malice in law could be inferred. Thus the only question that remains to be considered is whether there is any arbitrariness or infirmity in the decision making process.

19. Admittedly, the location of the Toll Plaza is pursuant to an exercise done by experts in the field and this Court in a proceedings under Article 226 of the Constitution cannot examine the decision as the appellate forum and it is best that such decisions are left the experts. The reasons assigned and the necessity for the relocation, as stated by the respondent is that the first Toll Plaza was proposed as Ch.143.580 and due to site conditions to avoid nearby junction at Ch.151.420 on Madurai side and regarding the second Toll Plaza, it was shifted from Ch.252.300 and established at Ch.254.940, due to the location of a minor bridge, which is located at Ch.251.540, with a level difference between the carriage way and a junction road at Ch.252.945. Nothing has been placed on record by the petitioner to state that the above explanation given by the NHAI and the Concessionaire are either factually incorrect or palpably false. In such circumstances, this Court cannot examine the decision of the experts in the

matter of location of the Toll Plaza. On this aspect, we are in respectful agreement with the decision of the Madhya Pradesh High Court in the case of Manish Jaiswal and Anr.,(supra), as pointed out therein the decision with regard to location of the Toll Plaza has been arrived at by the experts after taking into account, the relevant factors mentioned in the agreement and the fixation of alignment and identification of the spot for location of Toll Plaza are the matters within the domain of the authority mentioned in the agreement and this Court in the proceedings under Article 226, cannot sit in appeal over the decision of fixation of the alignment and the identification of the spot for locating the Toll Plaza and therefore, it is better to leave the decision to experts, who are familiar with the issue to decide the location of Toll Plaza.

20. As pointed out earlier Schedule C of the Concession Agreement provides for adjustment and relocations of Toll Plaza and in exercise of such power under the agreement, the exercise has been done. NHAI in their counter has stated that in terms of Schedule G para (iv) of the Concession Agreement, there is a provision for discounted fee for the residents, employees of Establishment/Industrial units, self employed persons/businessmen and establishment/ Industrial units located within 10 or 20 km from the Toll Plaza. The residents and those residing within 10 kms fall under category I and those within the 10km to 20km fall under category II and the discounted rate is Rs. 150 per month and Rs. 300 per month respectively. Further, there is a provision for discounted fee for school buses and local transport operators. In the light of the stand taken by the NHAI, we are not inclined to accept the contention of the petitioner that public interest has been affected on account of the location of the second Toll Plaza.

21. In the result, the Petitioner having failed to make out any case for interference, the Writ Petition fails stands dismissed and consequently, Miscellaneous Petition praying for amendment of the prayer in the Writ Petition also stands dismissed. No costs.