

(2004) 04 BOM CK 0078

In the Bombay High Court

Case No : Public Interest Litigation No. 113 of 2003

Sameer Surendra Desai

APPELLANT

Vs

State of Maharashtra and Others

RESPONDENT

Date of Decision : 28-04-2004

Acts Referred:

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

Citation : AIR 2004 Bom 328 : (2004) 4 ALLMR 47 : (2004) 4 BomCR 731

Hon'ble Judges : C.K. Thakker, C.J.;S.A. Bobde, J

Bench : Division Bench

Advocate : D.V. Sutar, for the Appellant; G.E. Vahanvati, General, Y.d. Mulani, Asstt. Govt. Pleader for Respondent Nos. 1 to 4 and R.S. Apte, for the Respondent

Final Decision : Dismissed

Judgement

C.K. Thakker, C.J.—By invoking Article 226 of the Constitution of India in Public Interest Litigation (PIL), the petitioner has prayed this Court to issue an appropriate writ, direction or order quashing and setting aside notification dated 28th February, 2003 and directing M/s. Ashok Infra, respondent No. 5 herein, to refund the entire amount collected by it towards collection of toll after it had received the amount to which it was otherwise entitled. An alternative prayer is made to carry out survey of vehicles "in presence of the representative of the petitioner" and fix the rate of toll, term to recover the same and to direct respondent Nos. 5 and 6 to collect toll as per the report of the Expert Committee, A direction is also sought to investigate the transaction entered into by the State authorities with respondent No. 5 allowing it to collect toll by appropriate agency like Central Bureau of Investigation (C. B. I.).

2. The case of the petitioner in the petition is that he is a citizen of India. According to him, State of Maharashtra had adopted a policy of developing infrastructure like construction of tunnels, roads, bridges, etc. through private sector participation. Since the State Government was in financial crisis, it had adopted a new concept known as "Build, Operate and Transfer" ("BOT" for short).

Under the said project, the Government hands over the work to a private sector/undertaking/entrepreneur which will construct tunnel, road or bridge, as the case may be, and collect toll in accordance with the policy of the Government. The State Government has undertaken various such projects throughout the State by inviting participation of private sector undertakings.

3. According to the petitioner, in Sangli District, near Ankali village, there was an old bridge on river Krishna. It was constructed during British regime in or about 1885. It was narrow and insufficient, Since more than hundred years were over, there was necessity either to repair it or to construct a new bridge. It was also necessary in view of increase in vehicular traffic. The Government considered the possibility of widening of existing old bridge but the British Company which had constructed the old bridge informed the State Government that estimated life of the old bridge of hundred years had come to an end and the said Company would not be responsible, if any eventuality would arise. After taking into consideration various aspects, the respondent-State decided to construct a new bridge. A survey was carried out by the State Government and tenders ere invited. The bid of respondent No. 5 was accepted, work order was issued and construction was completed by respondent No. 5. Since the bridge was constructed under BOT Scheme, respondent No. 5 was allowed to collect toll on the said bridge. Respondent No. 5, for the purpose of collection of toll, appointed respondent No. 6 as its agent. The notification dated 28th February, 2000 permitted respondent No. 5 to collect toll as prescribed therein till December, 2005. Rates for various vehicles have been prescribed and exemption to certain vehicles have also been granted.

4. It is the case of the petitioner that with effect from 1st March, 2003, suddenly new charges were sought to be introduced and toll allowed to be collected on that basis. The said action is illegal, contrary to law and unlawful. It has been taken with consent of and in connivance with P.W.D. Officers. By the said action, respondent No. 5 has been granted undue and undeserving benefits. The notification dated 28th February, 2003, by which such permission was granted, is required to be declared arbitrary, unreasonable, and ultra vires Articles 14, 19 and 21 of the Constitution.

5. By the amendment, certain additional grounds have been taken by the petitioner. In paragraph 1A, it was stated by the petitioner that he is the distributor of oil products and having his shop at Kolhapur. He is having a four wheeler vehicle and for business purposes he has to travel to Sangli District several times. He has to cross through bridge over Krishna river. He has, therefore, to pay toll. According to the petitioner, therefore, "he has every right to ask that how much he has paid? How much more he will have to pay as toll? Therefore he is affected party. By the amendment, thus, the petitioner claims to be affected party or "aggrieved" person. He also stated that the petitioner has approached this Court "to protect himself and all other people from exploitation on account of toll collection.

6. It was stated by the petitioner that in 1993, P.W.D. estimated the construction cost of the bridge at Rs. 2.16 crores. In 1996, the Pune Divisional Office estimated the cost to be Rs. 3.92 crores. In 1997, it was estimated at Rs. 5.25 crores. When tenders were invited from private contractors, the construction cost was estimated by the department at Rs. 5.25 crores. Since the construction was under BOT policy, terms and conditions were specified in the tender form itself. Respondent No. 5 submitted its offer at Rs. 25.10 crores as the total estimated cost of construction and concession period of six years and nine months. "Concession period" would mean total period including period of construction and toll collection till the project is finally transferred and handed over to the State Government. Though construction period was two years, construction was completed within a period of 11 months and 18 days. As per the terms and conditions of the agreement, respondent No. 5 started collection of toll after completion of project i.e. after 11 months and 18 days. Substantial amount in excess to which respondent No. 5 was entitled has thus already been recovered by it.

7. It is also stated by the petitioner that Section 20 of the Bombay Motor Vehicles Tax Act, 1958 (hereinafter referred to as "the Act") authorises the State Government to impose toll on motor vehicles passing over a bridge or through a tunnel constructed, repaired, improved or strengthened. It expressly states that the State Government and an entrepreneur/agent under BOT project may collect capital outlay. The expression "capital outlay" has been defined in Explanation to Section 20 (1A) of the Act. The contractor is, therefore, entitled to collect the amount in accordance with Section 20 of the Act, He is not entitled to anything more. In the instant case, since respondent No. 5 has collected the amount to the tune of Rs. 25.10 crores, the action of further collection of toll is illegal and unlawful. The State Government also could not have authorised respondent No. 5 to collect such huge amount. Appropriate directions are, therefore, required to be issued so that respondent No. 5 does not get undue and undeserved benefits.

8. The parties appeared and respondents sought time for filing affidavit. Time was granted and affidavits and further affidavits have been filed.

9. Executive Engineer, Public Works Department, Miraj, filed an affidavit dated 20th November, 2003, contending that the petition was misconceived and not maintainable at law. It was stated that on April 23, 1998, the Executive Engineer, Public Works Department, Miraj invited tenders for construction of major bridges across river Krishna at Nagpur-Wardha-Yeotmal-Miraj-Kolhapur, M.S.H. 3 at Km. 181/400, near Village Ankali with toll rights on "Build, Operate and Transfer" (BOT) basis. In response to the tender notice, 10 tender forms were sold by P.W.D. out of which 7 tenders were received back duly filled in. Those bids were examined and the bid by M/s. Ashoka Buildcon Pvt. Ltd., Pune, respondent No. 5, was found to be lowest and was accepted. Work order was issued on 4th March, 1999. Work was to be completed within two years but it was completed by respondent No. 5 in February, 2000. It is stated by the

deponent that as per tender condition No. 8.2, a notification dated 28th February, 2000 was issued and respondent No. 5 was allowed to collect toll from 29th February, 2000. Toll was to be increased after three years as per the said condition (8.2). ("The rates of toll shall be increased after every three years."), After three years i.e. on 28th February, 2003, therefore, toll was increased which cannot be said illegal or unlawful. In the draft notification dated 13th January, 2000, toll rates were to be shown separately. While issuing notification at the Government level, however, due to oversight, only one rate was mentioned in the entire concession period. Thus there was a mistake in issuing the first notification. In the accepted tender, it was mentioned that "rate of toll shall be increased after every three years". But while issuing final notification, rate of toll remained same for the entire concession period i.e. up to December 3, 2005. The said mistake was subsequently rectified and revised notification was issued on 28th February, 2003 and increase in toll was permitted. Such action cannot be said illegal or objectionable. It also cannot be alleged that the record was tampered with to favour respondent No. 5.

10. It was stated by the deponent that Section 20(1-A) of the Act enacts that notwithstanding anything contained in Sub-section (1), but subject to provisions of Subsections (1-B), (1-C) and (1-D), the State Government may levy and collect tolls on motor vehicles, trailers, etc. It is, therefore, open to collect toll in accordance with the said provision. The action of the respondents, therefore, cannot be described as contrary to law. It was also stated that as per accepted tender, estimated cost put by the entrepreneur was 725 lacs. The construction period was two years and concession period was six years and nine months. Concession period included construction period also, As the work order was issued on 4th March, 1999 entrepreneur was allowed to collect toll for the remaining period i.e. up to 3rd December, 2005 with increase in toll rates after three years. Thus, collection of toll was permitted in accordance with law and as per terms and conditions of tender agreement. The petitioner, therefore, cannot make grievance against collection of Toll by respondent No. 5.

11. After the amendment in the petition, further affidavit was filed by the State Government. It was stated that the period for toll collection was effective from 29th February, 2000 to 3rd December, 2005. Tender Clause 3.14.19 provided that the entrepreneur had quoted the concession period of six years and nine months at his own risk. It was further stated that if there was any shortfall in toll collection due to wrong estimation of traffic by the Entrepreneur or if he failed to collect toll for other reason, the Government would not compensate the deficit, loss or shortfall. It was, however, stated that if the entrepreneur would collect toll more than the total project cost of Rs. 2510.88 lakhs, it would be profit of the entrepreneur. As per the statement submitted by the entrepreneur to the Department, it had collected toll to the tune of Rs. 1235 lakhs up to end of December, 2003. The toll rates and collection period was given in the notification and it was clearly displayed on the Notice Board near toll plaza. As per tender condition No. 3.7.9, monthly toll collection statements are to be submitted by the

entrepreneur to the Department and accordingly entrepreneur is submitting such monthly statements to Executive Engineer, Public Works Division, Miraj. The allegation of the petitioner that the Government is not aware of correct facts is, thus, baseless.

12. It was also stated that the first tender call notice for BOT was published in February, 1996 and lowest tender of respondent No. 5 was accepted. The second call tender notice was published on 13th April, 1998 and lowest tender of respondent No. 5 was accepted which was for six years and nine months as concession period including two years" period of construction. The second lowest offer was given by M/s. Ameya Developers Pvt. Ltd., Pune with concession period of eight years and three months. The entrepreneur had quoted total project cost at Rs. 2510.88 lakhs. He was, therefore, entitled to recover a total project cost of Rs. 2510.88 lakhs quoted in its tender form which was legal and valid. Since concession period was accepted, respondent No. 5 is entitled to collect toll tax up to that period. Though construction period was given to entrepreneur for two years, as the respondent No. 5 completed the work within eleven months and eighteen days, by using modern machinery, advance technology and material with proper planning, as per the terms and conditions of the agreement, it was allowed to collect toll tax from February, 2000 onwards. It, therefore, cannot be said that by allowing the entrepreneur either by permitting collection of toll before a period of two years or from collecting toll at enhanced rate with effect from 1st March, 2003, illegality has been committed by Respondent-State. The petition, therefore, deserves to be dismissed.

13. An affidavit-in-reply is also filed by respondent No. 5 on 27th January, 2004. A preliminary objection has been raised that PIL is false, frivolous and filed with mala fide intention as it really reflects "the interest of the private party".

14. On merits, it was stated that it was agreed under Condition 8.2 which contained toll rates that such rates would be increased after every three years. Due to a typing mistake in the notification dated 28th February, 2000, toll rates were shown the same for the entire period from 29th February, 2000 to 3rd December, 2005. Immediately, therefore, respondent No. 5 wrote a letter on 1st March, 2000 to respondent No. 1 pointing out the mistake committed and requested it to issue necessary corrigendum to the notification dated 28th February, 2000. Again, a reminder was sent on 3rd January, 2003. Those letters have also been annexed to the affidavit-in-reply. Respondent No. 1, therefore, rightly issued notification on 28th February, 2003 permitting increase in toll rate. It was also stated that according to the tender document, concession period was six years and nine months including construction period of two years but as the work was completed before two years, respondent No. 5 was legally allowed to collect toll and the petitioner cannot raise objection against such action. Regarding cost of project, it was stated by respondent No. 5 that the allegation of the petitioner that the total cost project was only 725 lakhs was not correct. The total cost of the project was 2510.88 lakhs. It was also stated that

respondent No. 5 had collected total toll to the tune of Rs. 12.35 crores up to 31st December, 2003. It is, therefore, clear that respondent No. 5 has yet to recover the project cost. Respondent No. 5 is suffering a loss and has not even achieved the expected toll collection. It was, therefore, submitted that the petition deserves to be dismissed.

15. Having heard the learned counsel for the parties, in our opinion, it cannot be said that any illegality has been committed by respondent No. 1 or respondent No. 5 has been unduly benefited by the officers of respondent No. 1. So far as BOT is concerned, it is in consonance with the provisions of the Act. Apart from the fact that there is no challenge to the provisions of the Act or the policy of the Government, in our opinion, the action cannot be said illegal, arbitrary, or otherwise unreasonable. It is no doubt true that undue or undeserving benefits cannot be permitted to be taken by private individuals/entrepreneurs/undertakings and if such action is challenged before a Court of law, in exercise of plenary jurisdiction, this Court can interfere with it by issuing appropriate directions.

16. In this connection, it may be necessary to consider the relevant provisions of the Act. The Act has been enacted to consolidate and amend the law relating to taxation of motor vehicles in the State of Bombay and to provide for certain other matters. Section 20 of the Act imposes a bar to levy tolls on motor vehicles except as provided therein. The said section has been amended and Sub-section (1-A) of Section 20 expressly provided that notwithstanding anything contained in Sub-section (1), but subject to the provisions of Sub-sections (1-B), (1-C) and (1-D), the State Government could levy and collect tolls on motor vehicles and trailers drawn by such motor vehicles in cases covered by the said provision, Sub-section (1-A) which is material reads as under :

"Notwithstanding anything contained in Sub-section (1) but subject to the provisions of Sub-sections (1-B), (1-C) and (1-D), the State Government may levy and collect tolls on motor vehicles and trailers drawn by such vehicles.--

(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 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, including the motor vehicles and trailers drawn by such vehicles benefiting directly or indirectly by the augmentation of the facilities in the use of such bridges, tunnels or approach roads thereto or any sections of roads or any by-passes, although while enjoying benefit of such augmentation of facilities, such vehicles may not be required to pass over or through the entire cluster of such single entity,--

(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 by-pass 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, which is newly constructed, reconstructed, improved or repaired as the case may be, after the commencement of the Bombay Motor Vehicles Tax (Amendment) Act, 1987, at the expense of the State Government or at the expense of any person or body or association of individuals whether incorporated or not or at the expense of both, that is to say the State Government and any such person or body or association of individuals whether incorporated or not or at the expense of both, that is to say, the State Government and any such person or body or association or by private entrepreneur or an agent appointed by the State Government or the State Public Enterprise authorised by the State Government in this behalf, by entering into an agreement with such entrepreneur or agent under the Build, Operate and Transfer (B.O.T.) Projects and the total capital outlay of which construction, reconstruction, improvement or repairs, as the case may be, is not less than ten lakhs of rupees; or

(b) in respect of a bridge or tunnel including approach road thereto or section of road or by-pass which, in the opinion of the State Government, is of special service to the public.

Explanation.-- For the purposes of this section, the expression "Capital Outlay" shall include the anticipated cost of certain essential on goings 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."

17. It is thus clear that it is open to respondent No. 1-State to allow respondent No. 5 to collect tax in accordance with law. It is also clear that tenders were invited and the lowest bid of respondent No. 5 was accepted. An agreement was entered into between the parties, work order was issued and on the basis of terms and conditions of tender, respondent No. 5 was allowed to collect toll. It is also clear that under the agreement, respondent No. 5 can collect toll up to 3rd December, 2005. Admittedly, the said period is not over. It, therefore, cannot be said that by allowing respondent No. 5 to continue to collect toll, any favour has been shown by respondent No. 1 to respondent No. 5. Regarding increase in rates, it is clear that though the original agreement provided that there would be an increase after a period of three years, due to oversight/mistake, the said fact had not been reflected in the notification which was finally issued on 28th February, 2000, permitting respondent No. 5 to collect toll from 1st March, 2000. Immediately, therefore, the attention of the State was invited by respondent No. 5 vide its letter dated 1st March, 2000. It, therefore, cannot be said that by permitting increase in rate with effect from 1st March, 2003 by a notification dated 28th February, 2003, an illegal action was taken by the first respondent to

extend undue benefit in favour of respondent No. 5 and by allowing it to increase rates with effect from 1st March, 2003. Even that contention, therefore, cannot be said to be well founded.

18. Regarding extra period, it is clear that though period of two years for construction of work was given to respondent No. 5. the agreement provided that if the entrepreneur would complete the construction work before two years, he could collect toll even during that period of two years. It is not in dispute that respondent No. 5. by taking immediate steps with modern technology and machinery and help of experts, completed the construction work in eleven months and eighteen days. Under the agreement, therefore, it was open to him to collect toll as soon as the work was over. The respondent No. 1, thus allowed respondent No. 5 to collect toll which was in consonance with terms and conditions of the agreement and no objection can be raised against such a course adopted by the first respondent-State. It was expected of the State Government to abide by the terms and conditions of the agreement by allowing the respondent No. 5 to start collection of toll. Regarding period, it is the case of both, respondent No. 5 as well as respondent No. 1 and not disputed by the petitioner that the period for which respondent No. 5 was allowed to collect toll is up to December 3. 2005. It is the case of respondent No. 5 that it has not even recovered total "capital outlay" and is still in losses. It, therefore, cannot be concluded that there is undue or undeserving benefit by respondent No. 5.

19. Normally, in such matters, this Court would not disbelieve what has been stated by a public authority and has been placed on record. In this connection, it may be profitable to refer to a decision of this Court in *Vinayak V. More v. The Maharashtra State Road Development Corporation Ltd.* 2000 Bom CR 437 :AIR 2000 Bom 309 Considering the provisions of Section 20, as amended in 1987, this Court held that normally when the figures of costs and expenses are furnished by the Corporation before the Court, the Court would not proceed on the basis that they were incorrect and the collection was arbitrary. It was observed that ordinarily it is not for a High Court to go into such aspects, except, of course, in a case where it could be clearly shown that the fixation of the toll amount is wholly arbitrary.

20. In the instant case, one of the terms of the agreement expressly provided for keeping accounts by respondent No. 5 and submission of regular monthly figures to respondent No. 1. Such figures have been furnished by respondent No. 5. The said fact has been stated by respondent No. 5 in its affidavit and confirmed in the affidavit filed on behalf of respondent No. 1. As per those figures also, it is established that no undue or undeserving benefit has been taken by respondent No. 5. Obviously, therefore, no injunction can be granted against respondent No. 5 from collecting toll to which it is entitled in accordance with the provisions of the Act and as per the agreement arrived at between the parties till the period provided in the agreement is over, i.e. till 3rd December, 2005.

21. In view of the above discussion, ratio laid down by the Supreme Court in

Mandsaur Transport Association v. State of M. P. and Ors. , will not apply. In that case, the Apex Court came to the conclusion that the entire cost of construction had been realised by collecting toll and hence there was no justification for continuing collection of toll though the contract period was not over. Considering the facts before the Court, the Apex Court stated :

"There is no reason at all why collection of toll should continue henceforth where the cost of construction and even cost of maintenance have already been recovered by the State Government several times over by way of toll on that bridge."

A direction was, therefore, issued that "no toll shall be collected on the bridge henceforth".

22. In the present case, as is clear from the record that respondent No. 5 has not collected even "capital outlay" and admittedly the period is not over, respondent No. 5 cannot be legitimately prevented from collecting toll. The contention, therefore, has no force and deserves to be rejected.

23. For the foregoing reasons, we see no substance in any of the arguments advanced by the learned counsel for the petitioner. The petition deserves to be dismissed and is accordingly dismissed. In the facts and circumstances, however, there shall be no order as to costs.

Parties to act on an ordinary copy of this judgment duly authenticated by the Associate/Private Secretary.