(2014) 01 KAR CK 0018

In the Karnataka High Court

Case No : Writ Petition No''s. 7436-7439, 7693 and 8555-58 of 2011 (GM-RES)

SMST Transport and Others — APPELLANT

Vs

State of Karnataka
 M/s. Sesa Goa Limited, M/s. BSV Earth Movers and M/s. Ramanjaya Earth Movers Vs State of Karnataka — RESPONDENT

Date of Decision : 18-01-2014

Acts Referred:

Constitution of India, 1950 — Article 14 21 226 301 304
Karnataka Highways Act, 1964 — Section 19A 19-A 19-B 3 4
Karnataka Motor Vehicles Taxation Act, 1957 — Section 17A

Citation : (2014) 2 AKR 229 : (2014) ILR 2843 : (2014) 6 KarLJ 550 : (2014) 1 KCCR 827

Hon'ble Judges : A.N. Venugopala Gowda, J

Bench : Single Bench

Advocate : D.L.N. Rao, for Smt. S.R. Anuradha, in Writ Petition Nos. 7693 and 8555-58/2011, Sri K.N. Phanindra, in W.P. Nos. 7436-7439, 13070 and 14399/2011 and Sri M.M. Swamy, in W.P. Nos. 11350-351/2011, for the Appellant; H. Kantharaja, A.A.G. and Smt. Pramodhini Kishan, HCGP, for the Respondent

Judgement

A.N. Venugopala Gowda, J.—These writ petitions involve common questions. For the sake of convenience reference will be made to the facts in W.P. No. 7693/2011 filed by SMST Transport and others, under Article 226 of the Constitution of India, to grant the following reliefs:

i) To quash the order dated 01.07.2010 bearing No. PWD 111 CNH 2009, Bangalore, issued by 3rd respondent (Annexure-B);

ii) To quash the Corrigendum II dated 31.08.2010 bearing No. PWD 111 CNH 2009, issued by 3rd respondent (Annexure-E);

iii) To declare that the State is devoid of power to collect toll fee/road tax on lorries carrying iron ore only;

iv) To direct the respondents to refund Toll fee/Road tax collected by the respondents/paid by the petitioners so far under the impugned orders.

The petitioners, who own vehicles, are engaged in the business of transportation of iron ore on contract basis. Petitioners also took vehicles on hire for carrying on their said business. The Government having passed an order dated 01.07.2010, vide Annexure-B and issued the Corrigendum-II, dated 31.08.2010, vide Annexure-E, levying Rs. 500/- per vehicle carrying iron ore on about 10 roads in the region of Bellary, Sandur and Hospet amongst the other areas, feeling aggrieved, the writ petitions were filed, to grant the reliefs, noticed supra.

Sri D.L.N. Rao, learned Senior Advocate assisted by Smt. S.R. Anuradha, firstly contended that the impugned orders are arbitrary and illegal. Secondly, S. 48A of the Karnataka Highways Act, 1964 (for short ''the Act'') empowers the State to collect toll fee on all vehicles plying on bridges, causeways and tunnels and the Act does not empower the State to collect toll fee for usage of State Highways/ Roads. Thirdly, the toll amount levied is in nature of a fee and therefore, there has to be an element of quid pro quo i.e., there has to be a corresponding service to be provided by the State Government. He submitted that the petitioners use the highways for transportation of iron ore and in view of ceiling/ maximum amount prescribed under S. 48A of the Act, the impugned order is illegal. Fourthly, the power having been conferred by the Act upon the State Government and the Act also having prescribed the procedure for exercise of the power, such power can only be exercised in the manner prescribed by law and not otherwise. He submitted that Annexures-B and E having not been published in the Gazette, they can have no legal effect. Lastly, the impugned orders are violative of Articles 14, 301 and 304 of the Constitution. He submitted that apart from discrimination, there is restriction with the rights of lorries carrying on iron ore alone for free movement and by virtue of the impugned order, there is also violation of Article 21 of the Constitution.

2. Sriyuths K.N. Phanindra and M.M. Swamy, learned advocates for the other writ petitioners, adopted the arguments advanced by Sri D.L.N. Rao.

3. Sri H. Kantharaja, learned Addl. Advocate General, on the other hand referred to Sub-Section (3-A) of S. 19A of the Act, as amended by the Karnataka Act No. 31 of 2010 and contended that there is legislative sanction and competence for the State Government to issue the impugned Government order. He submitted that the toll levied in the cases are not ''fee'' to which principles of quid pro quo apply and the levy in the instant cases, which is imposed by an Act of the Legislature, is alien to the concept of quid pro quo. He supported the Government Order and the Corrigendum impugned in these writ petitions. He took me through the statement of objections and the additional counter filed and sought dismissal of the writ petitions.

4. I have considered the respective arguments and carefully perused the record.

5. The petitioners have questioned the validity of levy of toll fee as per the

Government Order No. PWD 111 CNH 2009, Bangalore, dated 01.07.2010 and the Corrigendum-II bearing No. PWD 111 CNH 2009, dated 31.08.2010, Annexures-B and E respectively.

6. The State of Karnataka with a view to provide for the restriction of ribbon development along highways, for the prevention and removal of encroachment thereon, for the construction, maintenance and development of highways, for the levy of betterment charges and for certain other matters, has enacted Karnataka Highways Act, 1964 and the Act is in force with effect from 16.12.1963. Chapter-III-A containing Ss. 19-A and 19-B were inserted by Karnataka Act No. 35 of 1998 with effect from 23.12.1998, empowering the State Government to enter into agreement for development and maintenance of the Highways with any person in relation to the construction, development and maintenance of the whole or any part of the Highway. Chapter-VI-A was inserted by Karnataka Act No. 15 of 1983 with effect from 21.05.1983, enabling the State Government, by Notification in the Official Gazette, to levy toll on all motor vehicles. Act was again amended by Karnataka Act No. 31 of 2010 with effect from 24th July 2010. The relevant provisions of the Act, read as follows:

2. Definitions: In this Act, unless the context otherwise requires.-

(i) "highway" means any road or way over which the public have a right of way or are granted access and which is declared to be a highway u/s 3. The expression includes,-

(i) any land acquired or demarcated with a view to construct a highway along it;

(ii) the slopes, berms, barrow-pits, foot-paths, pavements and side catch and boundary drains attached to such a road or way;

(iii) all bridges, culverts, causeways, carriageways and other structures built on or across such road or way; and

(iv) the trees, fences, posts, boundary, half kilometer and kilometer stones and other highway accessories and materials and materials stacked on the road or way;

2(j) "Highway Authority" means the authority appointed as such or to which the functions of such authority are entrusted u/s 4;

2(p) "prescribed" means prescribed by rules made under this Act;

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3. Declaration of roads, ways or lands as highways: The State Government may, by notification in the official Gazette, declare any road, way or land to be a highway and classify it as,-

(i) a State highway (Special);

(ii) a State highway;

(iii) a major district road;

(iv) other district road; or

(v) a village road.

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Chapter-IIIA:

Power to enter into agreement and penalty for mischief: 19-A. Power of the State Government to enter into agreement for development and maintenance of highways: (1) Notwithstanding anything contained in this Act or any other Act for the time being inforce, the State Government may enter into an agreement with any person in relation to the construction, development and maintenance of the whole or any part of the highway.

(2) To facilitate or secure such construction, development and maintenance, the agreement may, subject to such terms and conditions as may be prescribed, provide for the transfer of any land belonging to or to be acquired by the State Government under this Act or any other Act, for the time being in force, to such person or persons by way of lease or otherwise during the period of such agreement.

(3) Notwithstanding anything contained in Section 48A the person referred to in sub-section (1) is entitled to collect and retain fee at such rate or rates, for service or benefits rendered by him as the State Government may by notification in the Official Gazette, specify having regard to the expenditure involved in cost of acquisition of land and construction, development and maintenance of highway.

(3A) Notwithstanding anything contained in section 48A, the Government may levy and collect, such rate of fee from the user of highways for service or benefits rendered by it, as may be notified by it in the official Gazette, different rates may be notified for different highways over different period of time, having regard to the expenditure involved in cost of acquisition of land and construction, development and maintenance of highway developed under public private partnership on annuity basis or by raising any loan or otherwise.

(4) A person referred to in sub-section (1) (or State Government) shall have powers to regulate and control the traffic in accordance with the provisions contained in Chapter VIII of the Motor Vehicles Act, 1988 (Central Act 59 of 1988) on the highway forming subject-matter of such agreement, for proper management thereof.

19-B. Punishment for mischief by injury to highway: Whoever commits mischief by doing any act which renders or which he knows to be likely to render any highway referred to in sub-section (1) and sub-section (3A) of Section 19A impassable or less safe for travelling or conveying property shall be punished with imprisonment of either description for a term which may extend to one year or with fine or with both.

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Chapter VI-A

48A. Levy of toll: (1) The State Government may, by notification in the Official Gazette, levy toll on all motor vehicles entering such bridges, causeways and tunnels and at such rate not exceeding fifteen rupees per vehicle as may be prescribed, and different rates may be prescribed for different classes of vehicles and different classes of bridges, causeways and tunnels:

Provided the State Government may, if in its opinion it is necessary in public interest to do, by notification and subject to such restrictions and conditions as may be specified in the notification, exempt the toll payable in respect of any class of motor vehicles.

(2) The toll payable under sub-section (1) shall be levied and collected in such manner as may be prescribed.

(3) The toll collected under this section shall be credited into the Karnataka Roads and Bridges Fund constituted u/s 17A of the Karnataka Motor Vehicles Taxation Act 1957.

7. The meaning of the expressions ''Toll'', Toll-through'' and ''Toll-traverse'', can be found as follows:

(i) In Black''s Law Dictionary, VII Edition, the term ''Toll'' has been described as;

(i) a sum of money paid for the use of something; especially a consideration paid to use a public road, Highway or bridge;

(ii) A charge for allowing distance telephone call. Toll ordinarily means the amount, which the Government or a local authority, or a person duly authorized by the Government may collect for passage of carriages of vehicles over a road or bridge.

(ii) In Halsbury''s Laws of England, 4th Edn., P. 96, para. 138 dealing with "tolls at common law" it is stated that the common law recognizes two classes of tolls payable under a grant or presumed grant from the Crown in respect of the passage of a highway or bridge, namely, tolls-traverse and tolls-through. A toll-traverse is a toll taken in respect of the original ownership of the land crossed by the public (even if now perhaps severed from it), the land having been at the date of the grant the grantees'' private property, and having been then dedicated by him to the public in consideration of the toll to be taken. It is further stated therein that a toll-through is independent of any ownership of the soil by the original grantee, the consideration necessary to support it being usually the liability to repair the particular highway or bridge.

Dealing with "tolls under statute" at P. 97, para. 138, it is stated that highway and bridge tolls may be payable under statute. In the case of an independent statutory undertaking engaged in the maintenance of a bridge, the power to revise the amount of the tolls may be in undertakers'' discretion, or the tolls may only be subject to a requirement that they are to be reasonable in amount.

8. Where provision for levy and collection of toll is made in the legislative enactment or a sub-ordinate legislation, then, levy is governed according to the provisions of the statute or rules or any other instruments, as the case may be. S. 48A provides for ''levy of the Toll'' and the provision has been extracted, supra.

9. By virtue of the power under S. 72 of the Act, the State Government, by Notification in the Official Gazette, has made the Karnataka Highways Rules, 1965. The Rules have been published in the Karnataka Gazette, dated 16.12.1965, vide Notification No. PWD 80 CSR 64, dated 04.12.1965. Rule 18 and the Second Schedule referred to therein are relevant and the same read as follows:

18. Rates of toll and its payments:

There shall be levied and paid to the Highway Authority on behalf of the State Government toll on the motor vehicles for the use of bridges, causeways and tunnels at the rates specified in the Second Schedule to the said rules (and the amount collected shall be credited to the "Mukhya Manthri Grameena Raste Abhivrudhi Nidhi)".

SCHEDULE - II (Rule 18)

Toll levied in respect of Motor Vehicles using bridges, cause ways and tunnels costing more than rupees twenty five lakhs on Highways completed/to be completed and opened to traffic on or after 1st April 1983 in regard to vehicles:

The aforesaid Rule provides for levy and payment to the Highway Authority on behalf of the State Government, toll on the motor vehicles, for the use of bridges, causeways and tunnels at the rates specified in the Second Schedule. The Second Schedule enumerates vehicles of different types and the rates at which the toll is to be charged in respect of the same. From the contents of S. 48A and the Second Schedule it is clear that the Act contemplates levy of toll to be charged, at a rate not exceeding Rs. 15/- per vehicle, as may be prescribed and different rates being prescribed for different classes of vehicles and different classes of bridges, causeways and tunnels. Learned Additional Advocate General was unable to point out any other rate than the one shown in S. 48A and the Second Schedule for being charged or any amendment having been made to the said provision.

10. From the contents of the Second Schedule, extracted supra, it is clear that the statute contemplates ''levy of Toll'' for crossing upon the bridges etc., in the State and the State is vested with the power to prescribe by notification, the rate of the levy and the manner of collection of the sum. Neither S. 48A nor Schedule-II has been amended. The impugned Government Order and the Corrigendum, which have also not been published in the Karnataka Gazette, are not in conformity with the power vested in the State Government by the said provision.

The power to impose the levy, in terms of the Government order, as at Annexure-B and the Corrigendum-II, as at Annexure-E, has not flown from the power vested in S. 48A of the Act.

11. The respondents have attempted to trace the power to S. 19A by amending the section as per Karnataka Act 31 of 2010. The statement of objects and reasons for amendment of the Act, by Act No. 31 of 2010 being relevant, reads as follows:

It is considered necessary to amend the Karnataka Highways Act, 1964, to provide for enabling provision to levy and collect from the users, amount in form of fee for the service or benefit rendered by it to meet the expenditure involved in improvement of State Highway/major district road constructed, developed and maintained under Public Private partnership on annuity basis.

(emphasis supplied)

12. A public - private partnership (PPP) is a Government service or private business venture which is funded and operated through a partnership of Government and one or more private sector companies. PPP involves a contract between a public sector authority and a private party, in which the private party provides a public service or project and assumes substantial financial, technical and operational risk in the project. In some types of PPP, the cost of using the service is borne exclusively by the users of the service and not by the tax payer. The capital investment is made by the private sector on the basis of a contract with Government to provide agreed services and the cost of providing the service is borne wholly or in part by the Government. Government contributions to a PPP may be in kind. PPPs enable the public sector to harness the expertise and efficiencies that the private sector can bring to the delivery of certain facilities and services traditionally procured and delivered by the public sector. PPPs are structured so that the public sector body seeking to make a capital investment does not incur any borrowing. It is a contract between the Government and the private sector company to develop, build, maintain and operate the asset for the contracted period. This appears to be the object and the reason for amending the Act by Act No. 31 of 2010. It is not the case of the respondents that the highways/roads which were used by the petitioners for transportation of iron ore in their vehicles were constructed, developed and maintained under public-private partnership on annuity basis, falling within the provisions of Chapter - IIIA of the Act, inserted by Act No. 35 of 1998 with effect from 23.12.1998 and Act No. 31 of 2010 with effect from 27.07.2010. The roads used by the petitioners for transportation of iron ore are the State Highways, as classified by virtue of the power under S. 3 of the Act. The agreement/s entered into in relation to the construction, development and maintenance of the whole or any part of the highway with any person and his right to collect and retain fee at the rate or rates, for service or benefits rendered by him and such person''s right to regulate and control the traffic on the highway has not been produced. Thus, the State Government has transgressed its power in the matter of passing the

impugned order and in issuing the Corrigendum, which are violative of the provisions of the Act, extracted supra.

In the result, the writ petitions are allowed in part. The impugned Government Order and the Corrigendum are quashed. However, the amount collected as toll fee/tax, in pursuance of Annexures - B and E, having been spent towards the construction, development and maintenance of the roads etc., need not be refunded.

No costs.

