

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH : NAGPUR.

Public Interest Litigation No.96/2015
(Rahul Sharad Kurekar and another .vs. The National Highway Authority of India, New Delhi and others.)

Office Notes, Office Memoranda of Coram,
appearances, Court's orders or directions
and Registrar's orders

Court's or Judge's orders.

Mr. R.P. Joshi, Advocate for Petitioners.
Mr. A.A. Kathane, Advocate for Respondent Nos.1 & 2.
Mr. Anil Airi, Advocate with Mr. S.A. Chaudhari, Advocate for
Respondent No.4.
Mrs. Mugdha R. Chandurkar, Advocate for Respondent No.5.

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CORAM : B.R. Gavai & Mrs. Swapna S. Joshi, JJ.
DATED : April 21, 2016.

1. The present petition has been filed by the petitioner seeking various reliefs including declaration that the collection of toll fees by respondent Nos. 1 to 4 at any location or point on the National Highway No.7 Nagpur-Hyderabad section, particularly at the toll plaza locations at Borkhedi at 36.600 kms. and near Mansar at 689.000 kms. is unconstitutional as offending Articles 14 and 265 of the Constitution of India as also violating of Sections 7 and 8-A of the National Highways Act, 1956.

2. It is the contention of the petitioners that initially the bids were invited by respondent no.1- National Highway Authority of India (for short "NHA") only for the construction of by-pass and the toll plazas were to be located at the end of the by-pass. It is the contention of the petitioner that subsequently only in order to benefit respondent no.4, the maintenance part of the National Highways already constructed by the

NHAI was included in the Concession Agreement so that respondent no.4 is unjustly enriched.

3. With regard to the same allegations, number of petitions including public interest litigation came to be filed before this Court being Writ Petition Nos.5292/2011, 2802/2012 and P.I.L. No. 12/2012. The Division Bench of this Court vide judgment and order dated 17.07.2012 held that respondent no.4 was not entitled to collect the toll from the commuters at Dongargaon Toll Plaza in respect of the four-lane bypass which may not be used by the commuters. The Division Bench also set aside the part of the contract in respect of the maintenance of the existing stretch of the highway.

4. Being aggrieved by the said judgment and order, two special leave petitions came to be filed before the Hon'ble Apex Court, one by the NHAI and the other one by the Concessionaire. It appears that when the petitions were listed before Their Lordships of the Apex Court on 11.09.2012, during the course of the hearing, certain suggestions were made by the learned Attorney General as an interim arrangement. The said suggestions are reproduced in the order dated 11.09.2012 passed by Their Lordships. After reproducing the said suggestions, the Hon'ble Apex Court has observed thus:-

"Regard being had to the controversy raised in the writ petitions, we find the said suggestions to be reasonable ad-hoc arrangement. Accordingly, subject to compliance with the afore-mentioned conditions, we stay the operation of the impugned judgment."

5. It could thus be seen that the Hon'ble Supreme Court clearly observes that having regard to the controversy raised in the writ petitions, which finds the said arrangement to be reasonable ad-hoc arrangement. It further appears that subsequently the petitioners were listed for final hearing on 11.02.2013. In the said order, taking note of the grievance expressed and the order impugned, on 11.09.2012 Their Lordships issued the suggestions as ad-hoc interim arrangement. Again the said suggestions are reproduced in Clauses (A) to (G). After reproducing those clauses, their Lordships observed thus:-

"In view of the same, we dispose of these appeals by substituting the above arrangement in place of the impugned order passed by the High Court. It is represented that the direction in Clause (D) of our order dated 11.09.2012 has already been implemented, the same is hereby recorded."

6. It could thus be clearly seen that Their Lordships disposed of the appeals by substituting the arrangement reproduced in the order in place of the impugned order passed by the High Court.

7. Mr. Joshi, the learned counsel appearing on behalf of the petitioners submits that the said order is obtained by fraud in collusion with the NHAI, Concessionaire and the respondents therein. The learned counsel relying on the judgments of the Apex Court in the cases of **S. Shanmugavel Nadar .vs. State of T.N. and another** reported in **(2002) 8 Supreme Court Cases 361; A.V. Papayya Sastry**

and ors. .vs. Govt. of A.P. and others reported in (2007) 4 Supreme Court Cases 221 and Meghmala and ors. .vs. G. Narasimha Reddy and others reported in (2010) 8 Supreme Court Cases 383, submits that the fraud vitiates everything since it goes to the root of the matter. The learned counsel submits that since the orders passed by the Apex Court are obtained by playing fraud, this Court can very well entertain the petition and consider the grievance of the petitioners. Elaborate arguments are also advanced by him on merits of the matter.

8. The learned counsel further submits that as a matter of fact the petitioners had also filed the petition before the Hon'ble Supreme Court, however, the Supreme Court refused to entertain the same and as such the counsel for the petitioners withdrew the same with liberty to move this Court. The learned counsel, therefore, submits that in view of the liberty granted by the Hon'ble Supreme Court, the present writ petition needs to be entertained.

9. Though elaborate arguments are advanced on merits from both the sides, we do not find it appropriate to go into the rival contentions in that regard. Undisputedly this Court in bunch of petitions being Writ Petition Nos.5292/2011, 2802/2012 and P.I.L. No. 12/2012 had quashed and set aside the part of the contract which pertains to maintenance of the National Highway. It had also held that the Concessionaire was not entitled to charge the toll fee from the persons who are not using the bypass. Undisputedly the same has been challenged before the Apex Court and the Hon'ble

Apex Court initially on 11.09.2012 issued certain directions on the suggestions of the learned Attorney General appearing in the matter. Finally when the matter was heard on 11.2.2013, the interim arrangement which was made earlier has been approved by the Hon'ble Supreme Court. Not only that while doing so, the Hon'ble Supreme Court has clearly observed that it was substituting the aforesaid arrangement in place of the impugned order passed by the High Court.

10. It could thus be not said that the impugned order has been obtained by anyone by suppression, fraud etc. In any case, the matter was pending before the Hon'ble Supreme Court for months together . We are of the considered view that if we entertain the present writ petition, it would be amounting to sitting in an appeal over the order passed by the Hon'ble Supreme Court.

11. In that view of the matter, we find that it would not be permissible for us to enter into the merits of the matter inasmuch as the Hon'ble Supreme Court clearly observed that it was substituting the above arrangement in place of the impugned order passed by the High Court.

12. We make it clear that we are non-suited the petitioners only on the ground of judicial propriety and have not touched the merits of the matter. The petition is, therefore, rejected.

JUDGE

JUDGE