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BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

RESERVED ON	05.07.2019
DELIVERED ON	11.07.2019

CORAM:

THE HON'BLE MR.JUSTICE K.RAVICHANDRABAABU

and

THE HONOURABLE MR.JUSTICE SETHILKUMAR RAMAMOORTHY

W.A. (MD) Nos.47 & 194 of 2019

and

C.M.P (MD) No.276 of 2019

W.A. (MD) No.47 of 2019

Madurai-Tuticorin Expressways Ltd.
Madhucon House,
Flat No. 1129/A, Road No.36,
IFCO City Road,
Jubilee, Hyderabad

... Appellant/ Respondent
No.4 in W.P.(MD) No.
18629 of 2018

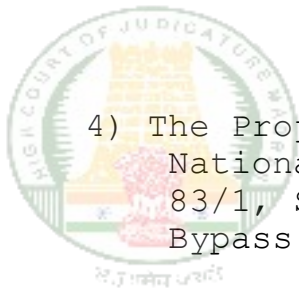
Vs.

1) Virudhunagar District Bus
Owners Association,
Rep.by its Secretary,
No.1/1291, Pravin Sarvin Complex
Collectorate Post,
Virudhunagar District

... 1st Respondent/ Writ
Petitioner

2) The Deputy General Manager
- cum- Project Director,
Project Implementation Unit,
National Highways Authority of India,
(Ministry of Road Transport and Highways),
No.3, Surya Towers, 2nd Floor, 1st East Street,
K.K.Nagar, Madurai 625 020

3) The Chief General Manager
-Cum- Regional Officer,
National Highways Authority of India,
Sri Tower, DP 3rd Floor,
Industrial Estate, Guindy,
Chennai - 600 032



4) The Project Director,
National Highway Authority of India,
83/1, SBI, First Colony,
Bypass Road, Madurai-16

... Respondents 2 to 4 /
Respondents 1 to 3

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W.A. (MD) No.194 of 2019

Virudhunagar District Bus
Owners Association,
Rep.by its Secretary,
No.1/1291, Pravin Sarvin Complex
Collectorate Post,
Virudhunagar District

... Petitioner / Appellant

Vs.

1) The Deputy General Manager
- cum- Project Director,
Project Implementation Unit,
National Highways Authority of India,
(Ministry of Road Transport and Highways),
No.3, Surya Towers, 2nd Floor, 1st East Street,
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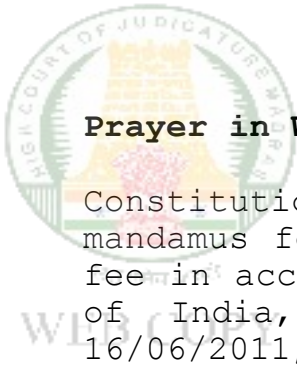
2) The Chief General Manager
-Cum- Regional Officer,
National Highways Authority of India,
Sri Tower, DP 3rd Floor,
Industrial Estate, Guindy,
Chennai - 600 032

3) The Project Director,
National Highway Authority of India,
83/1, SBI, First Colony,
Bypass Road, Madurai-16

4) The Madurai to Tuticorin
Express Limited,
Madhucon House,
Flat No. 1129/A, Road No.36,
IFCO City Road,
Jubilee, Hyderabad

... Respondents /
Respondents

COMMON PRAYER: Writ Appeals are filed under Clause 15 of Letters Patent Act against the order passed by this Court in W.P.(MD) No.18629 of 2018, dated 21.12.2018.



Prayer in WP(MD) . 18629/ 2018 :

Writ Petition is filed under Article 226 of the Constitution of India, praying this Court To issue a Writ of mandamus forbearing the respondents herein from collecting the user fee in accordance with the notification published by the Government of India, New Delhi, under Notification No.S.O.1415(E) dated 16/06/2011, for the section from Madurai Mattuthavani Bus Stand to Aruppukottai and vice versa at the toll plaza called Ellayarpathi toll plaza on the NH45B, till that section is repaired and maintained in good condition for smooth operation of mechanically propelled vehicles.

In W.A. (MD) No.47 of 2019:

For Appellant : Mr.S.Meenakshisundaram,
Senior Counsel
For Mr.C.Sasikumar

For R1 : Mr.M.Palani

For R2 : Mr.C.Arul Vadivel @ Sekar

In W.A. (MD) No.194 of 2019:

For Appellant : Mr.M.Palani

For R1 : Mr.C.Arul Vadivel @ Sekar

For R4 : Mr.S.Meenakshisundaram,
Senior Counsel
For Mr.C.Sasikumar

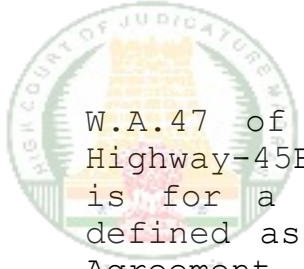
C O M M O N J U D G M E N T

(The Judgment of the Court was made by **SENTHILKUMAR RAMAMOORTHY, J**)

Since common issues arise in both the Writ Appeals, this common judgment is pronounced in respect thereof.

2. Writ Appeal No.47 of 2019 is filed by the 1st Respondent in the Writ Petition whereas Writ Appeal No.194 of 2019 is filed by the Petitioner in the Writ Petition. For the sake of convenience, these two parties are referred to herein as the Concessionaire and the Bus Owners Association respectively and the other Respondents are referred to as the NHAI. By order dated 21.12.2018, the Writ Petition was disposed of by directing the Respondents therein to reduce the toll fee by 30% forthwith. The said order dated 21.12.2018 is the impugned order in both these Writ Appeals.

3. A Concession Agreement was executed by the National Highways Authority of India (NHAI) on 24.07.2006 on a build- operate-transfer (BOT) basis (the Concession Agreement) in favour of the Appellant in



W.A.47 of 2019 (the Concessionaire) in respect of the National Highway-45B (NH-45B) from Madurai to Tuticorin. The said concession is for a period of 20 years from the Appointed Date, which is defined as 180 days from the date of execution of the Concession Agreement. The full-length of NH-45B is about 256 kms with two toll plazas but the dispute between the parties is confined to a two-way length of 64 kms each way between Madurai Mattuthavani Bus Stand and Aruppukottai (the Relevant Section of NH-45B). After the award of the concession, the Concessionaire completed construction and it is the admitted position that the Commercial Operations Date (COD) is 1.7.2011.

4. The present dispute arose during the operation and maintenance phase and relates to the alleged failure of the Concessionaire to repair and maintain the Relevant Section of NH-45B properly. On the basis of the above allegation, the Bus Owners Association requested for a Writ of Mandamus to forbear the Respondents therein from collecting the user fee in accordance with Notification No. S.O. 1415(E) dated 16.06.2011 for the stretch between Madurai Mattuthavani Bus Stand and Aruppukottai and vice versa at the Eliyarpatti Toll Plaza.

5. At the hearing, the learned senior counsel for the Concessionaire raised several preliminary objections. In specific, he contended that the Writ Petition ought to have been rejected as not maintainable because the Writ Petitioner had not requested the statutory authorities for a reduction in toll-fee before filing the Writ Petition and, consequently, a Writ of Mandamus should not have been issued. His second preliminary objection was that the Petitioner requested for and obtained relief in respect of all users of the toll road concerned and not just the members of the Bus Owners Association. In effect, he contended that the Writ Petition is in the nature of public interest litigation and, therefore, should have been heard by a division bench. His third preliminary objection was that the segment from Mattuthavani to the Madurai Airport is maintained by the State Government and that no toll fee is collected by the Concessionaire in respect thereof whereas it is erroneously included within the scope of the Writ Petition. The final preliminary objection was that the Writ Petition should have been dismissed for non-joinder of the Ministry of Shipping, Road Transport and Highways, which is a necessary party. In this connection, he submitted that the National Highways Authority of India Act, 1956 (the NHAI Act) confers power on the Central Government to enter into agreements in respect of the construction, operation and maintenance of highways and that fixation of user fee is done by the Central Government in accordance with Section 8A of the NHAI Act. Accordingly, he submitted that the Central Government is a necessary party and that the Writ Petition ought to have been dismissed for non-joinder of the relevant ministry of the Central Government.



6. On the merits of the dispute and, in particular, with regard to the current status of the Relevant Section of NH-45B, he submitted that the Concessionaire decided to re-lay the entire 128 km stretch, of which a length of about 51.98 km has been relaid and that the remainder of the Relevant Section in question would be fully relaid in about 3 to 4 months. He also pointed out that the concession was awarded on the basis of assumptions with regard to flow of traffic through the relevant toll plazas over the Concession Period and that the said assumptions were proved to be incorrect in as much as the flow of traffic has been much lower than the estimates. In this regard, he referred to the details of revenue realised from page 11 of the typed set of papers filed by NHAI and pointed out that the realised revenue from the two toll plazas was Rs.526.72 crore between the financial years 2011-12 and 2017-18 versus the projected revenue of Rs. 1091.23 crore. Consequently, he submitted that the Concessionaire has collected much less by way of toll-fee than that estimated at the time of entering into the Concession Agreement. On the other hand, he submitted that the expenditure incurred in constructing, operating and maintaining the highway has far exceeded the estimates. In specific, he submitted that an aggregate expenditure of Rs.86,51,10,221/- was incurred on maintenance between the financial years 2011-12 and 2017-18. He further submitted that the toll fee is fixed under Section 8A of the NHAI Act by taking into consideration the expenditure involved in building, maintenance, management and operation of the relevant highway. Therefore, he concluded by submitting that, in these facts and circumstances, it is neither just nor equitable to direct the Concessionaire to reduce the toll fee by 30%.

7. In reply, the learned counsel for the Bus Owners Association submitted that the Concessionaire is empowered to collect toll fees at two toll plazas that are situated at kilometre 143.58 near Eliyarpatti Village and at kilometre 254.94 near Pudurpandiapuram Village. He further submitted that the Bus Owners Association had submitted a request to the NHAI, through its Project Director, on 7.2.2018 wherein it was pointed out that NH-45B had bumpy roads and that there are ditches in many places that are affecting the smooth operation of our buses. Consequently, NHAI was called upon to rectify the said defects and on account of the failure to do so, the Bus Owners Association was constrained to file the Writ Petition. With regard to the contention on non-joinder, it was submitted that the Bus Owners Association was not disputing the power or basis for the original fee fixation and that, therefore, it was not necessary to implead the Central Government as a party. In order to substantiate his submission that toll fee could be reduced by an order of court if the condition of the road is poor, he referred to the judgment of the Hon'ble Supreme Court in **DSC Viason Ventures Private Limited v. Lal Manohar Pandey (2015) 15 SCC 509**. In particular, he referred to paragraphs 22, 23 and 24 of the said judgment wherein the Supreme Court held as under:

<https://hcservices.ecourts.gov.in/hcservices/>

22. The levy and collection of toll in the case at hand is obviously on the assumption that the road is



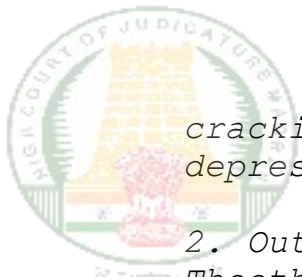
being properly maintained and that for its continued maintenance and upkeep the users of the road must contribute so that the government is reimbursed the expense incurred by it. In case, however, the maintenance of the road is absent or is significantly poor as appears to be the position in the case at hand, recovery of toll at the stipulated rate would be rendered unfair and unjustified.

23. Having said that the question is what should be the extent of reduction on account of poor maintenance of the road. It is nobody's case that the entire length of 26 km is poorly maintained. At least the report submitted by the committee does not suggest so. There are patches which are extensively damaged and require repair causing inconvenience to the users. That does not, however, necessarily mean that the entire charge to install must be wiped out. The reduction, in our view, should be proportionate to the extent of damage suffered by the road or the failure to maintain the same. Having said that we must hasten to add that there is no empirical data to indicate the extent of road length and the resultant inconvenience to the users of the roads. A certain amount of guesswork is, therefore, unavoidable in the matter of determining the extent of relief which the road users may be entitled to.

24. Keeping all these factors in view, we are of the opinion that the rate of toll/fee prescribed in terms of the Notification dated 2-3-2015 should be reduced to half of what is stipulated in the Notification. This means that instead of 40% levied by the Government the rate shall be 20% of the rates earlier in force. We order accordingly. The reduced fee shall be recoverable till such time the roads are repaired and a report certifying the repair to be satisfactorily submitted to the Government by a Committee appointed by the Government of India."

8. The learned counsel for the Bus Owners Association submitted that the Writ Court was justified in relying on the said judgment in view of the fact that the condition of the Relevant Section of NH-45B was admittedly poor. In order to establish that the condition of the Relevant Section of NH-45B was poor, he referred to the Report of the Advocate Commissioner. In particular, he referred to pages 4 and 5 of the Advocate Commissioner's Report wherein it is recorded that the road was in poor condition. The summary of the said Report is relevant and reads as under:

<https://hcservices.ecourts.gov.in/hcservices/> "1. The entire stretch of Madurai Thoothukudi and Thoothukudi to Madurai Road are very worst. In many places, potholes, fatigue, cracking longitudinally



cracking edge cracking surface deformation such as rafting depression and a rough road surface etc. are found.

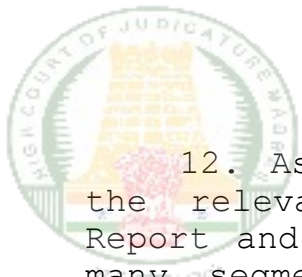
2. Out of the entire stretch of Madurai to Thoothukodi and Thoothukodi to Madurai milling has been carried out for 11 km and re-laying has been done for 18 km.

3. In many places due to rutting of the road a depth of more than 2 below road surface are seen."

9. He also referred to the Report submitted by the Centre for Urbanisation, Buildings and Environment (CUBE), IIT Madras wherein several segments of the Relevant Section of NH-45B were classified as poor by the IIT. In this regard, he referred to the summary of the said Report which indicates that 67.44% of the outer lane on the left-hand side, 27.13% of the inner lane on the left-hand side, 69.76% of the outer lane on the right-hand side and 79.84% of the inner lane on the right-hand side were in poor condition. On an average, he submitted that about 50% of the Relevant Section of NH-45B was in poor condition and that, therefore, the toll fee ought to be reduced by 50% and not 30% as ordered by the Writ Court.

10. The learned counsel for the NHAI admitted that the Relevant Section of NH-45B was in poor condition and that the Concessionaire was called upon to undertake the re-laying of NH-45B by itself or to permit the NHAI to carry out the work subject to recovery of damages from the Concessionaire and that the Concessionaire opted to carry out the relaying work by itself. He also filed a Status Report dated 05.06.2019 that indicates that, in the aggregate, about 51.980 kms of the Relevant Section of NH-45B was relaid as on that date. In the counter affidavit of NHAI, it is stated that the Concessionaire has filed the appeal instead of complying with the directions of the Writ Court.

11. We carefully considered the pleadings, documents and oral submissions of all the parties. As regards the preliminary objection regarding non-issuance of a notice demanding action, as correctly contended by the learned counsel for the Bus Owners Association, a request dated 07.02.2018 was made to the NHAI for rectification of the defective sections and the Writ Petition was filed thereafter on account of the failure to do so. Therefore, this preliminary objection is untenable. The second preliminary objection that the Writ Petition is in the nature of a public interest litigation is also liable to be rejected because the members of the Bus Owners Association are admittedly users of the Relevant Section of NH-45B and, therefore, the Bus Owners Association is an affected party. Given the nature of relief requested, the Writ Court has correctly applied the relief of reduction in toll fee to all road users. As regards the objection with regard to non-joinder, NH-45B is vested with NHAI as per the NHAI Act and, in view of the fact that there is no dispute over the original fixation of fee by the Central Government or the basis thereof, the dispute in this case can be decided without impleading the Central Government.



12. As regards the merits of the case, upon consideration of the relevant documents, especially the Advocate Commissioner's Report and the Report of CUBE, IIT Madras, there is no doubt that many segments of the Relevant Section of NH-45B are in poor condition. This fact is not denied either by the Concessionaire or the NHAI. Therefore, the question arises as to whether road users should, nonetheless, pay the full toll fee and the answer is quite simple. As held by the Hon'ble Supreme Court in the case reported in **(2015) 15 SCC 509** (cited supra), it would be both unfair and unjustified to collect toll at the stipulated rate when the maintenance of the road is very poor. Consequently, it is necessary to consider as to what should be the extent of reduction in toll fee. We asked both the counsel for the Concessionaire and the counsel for NHAI as to whether it is possible to estimate the reduction precisely or scientifically. In response, neither the counsel for the Concessionaire nor the counsel for NHAI were in a position to indicate a more precise or scientific basis for reducing the toll fee considering the fact that the Relevant Section of NH-45B is undoubtedly in poor condition.

13. Accordingly, as held by the Supreme Court in the case reported in **(2015) 15 SCC 509**, "a certain amount of guesswork is unavoidable in the matter of determining the extent of relief which the road users may be entitled to." In this case, road users, including members of the Bus Owners Association, are admittedly continuing to use the Relevant Section of NH-45B. Consequently, it is both just and equitable that they should pay a toll fee. It is also the admitted position that the Concessionaire has relaid about 51.98 km out of the total extent of about 128 kms. On considering the totality of facts and circumstances, we are of the view that the decision of the Writ Court to direct the Concessionaire to charge 30% less than the stipulated toll-fee is not liable to be interfered with except to the extent indicated herein. The reduction of 30% in toll fee at the Eliyarpatti Toll Plaza shall be in force until all the following cumulative conditions are fulfilled:

- (i) The Independent Consultant appointed by NHAI in accordance with Clause 20.1 of the Concession Agreement certifies that the Relevant Section of NH-45 B has been fully relaid as per the specifications in the Concession Agreement;
- (ii) Such Certification is communicated both to the NHAI and the Concessionaire; and
- (iii) the NHAI issues a public notice in one English and one Tamil daily newspaper, which has wide circulation in the relevant areas, notifying the public that the Relevant Section of NH-45 B has been fully relaid as certified by the Independent Consultant and further notifying the date from which the full toll fee would be collected, which date should be at least 10 days after the date of publication of the said public notice.



14. Therefore, both the Writ Appeals are dismissed. However, there shall be no order as to costs. Consequently, connected C.M.P (MD) No.276 of 2019 is closed.

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Sd/-

Assistant Registrar (C.O)

// True Copy //

Sub Assistant Registrar(CS)

To

- 1) The Deputy General Manager
- cum- Project Director,
Project Implementation Unit,
National Highways Authority of India,
(Ministry of Road Transport and Highways),
No.3, Surya Towers, 2nd Floor, 1st East Street,
K.K.Nagar, Madurai 625 020.
 - 2) The Chief General Manager
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83/1, SBI, First Colony,
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- +2 CC to M/s.C.ARUL VADIVEL @SEKAR, Advocate SR-74817& 74818.
+2 CC to M/s.C.SASI KUMAR, Advocate SR-74776.
+2 CC to Mr.M.PALANI, Advocate SR-74966. & 74967.

Common Judgment made in
W.A. (MD) Nos.47 & 194 of 2019

Dated:11.07.2019

CS/ /SAR/18.07.2019/ 9P/ 10C