

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 13.07.2020

Delivered on: 22 .07.2020

C O R A M

The Hon'ble Mr. A.P.SAHI, THE CHIEF JUSTICE
and
The Hon'ble Mr. Justice SENTHILKUMAR RAMAMOORTHY

Writ Petition No.35317 of 2019

and

W.P.No.754 of 2020

and

WMP Nos.36128 of 2019 and 912/2020

WMP.Nos.36131/19 and 946/2020

Kabilan Manoharan ... Petitioner
(in both writ petitions)

Vs

- 1.Union of India
Rep. by its Secretary,
Ministry of Road Transport and Highways
Transport Bhavan,
No.1, Parliament Street,
New Delhi, DL - 110 001.
- 2.Reserve Bank of India
Rep by its Chief General Manager
Department of Payment and Settlement Systems,
14th Floor, Central Office Building,
Shahid Bhagat Singh Road,
Mumbai, MH - 400 001.
- 3.National Payments Corporation of India Limited,
Rep. by its Managing Director,
1001-A, 'B' Wing, 10th Floor,
'The Capital', Bandra - Kurla Complex,
Bandra (East),
Mumbai, MH - 400 051.
- 4.Indian Highways Management Company Limited,
Rep. by its Managing Director,
NHAI Headquarters, Plot G-5 & 6,
Sector - 10, Dwarka,
New Delhi, DL- 110 075.

5.Prakash Asphaltings & Toll Highways (P) Ltd,
Rep. by its Managing Director,
76, Mall Road, MHOW,
Indore, MP - 458 441.

6.Airtel Payments Bank
Rep. by its CEO,
No.1, Nelson Mandela Road,
'Bharti Crescent',
Vasant Kunj, Phase - II,
New Delhi, DL 110 070.

... Respondents
(in W.P.No.35317 of 2019)

1.Reserve Bank of India
Rep by its Chief General Manager
Department of Payment and Settlement Systems,
14th Floor, Central Office Building,
Shahid Bhagat Singh Road,
Mumbai, Mh - 400 001.

2.National Payments Corporation of India Limited,
Rep. by its Managing Director,
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Bandra (East),
Mumbai, MH - 400 051.

3.Indian Highways Management Company Limited,
Rep. by its Managing Director,
NHAI Headquarters, Plot G-5 & 6,
Sector - 10, Dwarka,
New Delhi, DL 110 075.

... Respondents
(in W.P.No.754 of 2020)

PRAYER in W.P.No.35317 of 2019 : Petition filed under Article 226 of the Constitution of India, praying to issue a writ of certiorari, to call for the records of the first Respondent relating to Section 3(b) of National Highways Fee (Determination of Rates and Collection) Second Amendment Rules, 2014 published in Gazette Notification G.S.R.831(E) published on 21.11.2014 in the Gazette of India (Extraordinary) No.616 - Part -II - Section 3 - Sub Section (i) for inserting the Proviso to Rule 6(3) of National Highways Fee (Determination of Rates and Collection) Rules, 2008 and quash the same.

PRAYER in W.P.No.754 of 2020 : Petition filed under Article 226 of the Constitution of India, praying to issue a writ of certiorari, to call for the records of the first Respondent relating to the Impugned Notification "DPSS.CO.PD.No.1227/02.31.001/2019-20" issued by the first Respondent on 30.12.2019 under Section 10(2) read with Section

18 of Payment and Settlement Systems Act, 2007 and quash the same.

For Petitioner : Mr.Kabilan Manoharan
party-in-person
(in both writ petitions)

For Respondents : Mr.R.Sankaranarayanan
Additional Solicitor General for R-1
Assisted by Mr.V.Ashok Kumar
(in W.P.No.35317 of 2019)

Mr.C.Mohan for
M/s.King and Partridge
For R-2 in W.P.No.35317 of 2019
For R-1 in W.P.No.754 of 2020

C O M M O N O R D E R

SENTHILKUMAR RAMAMOORTHY J.,

The constitutional validity of the proviso to Rule 6 (3) of the National Highways Fee (Determination of Rates and Collection) Rules 2008 (the NH Fee Rules) is under challenge in W.P. No.35317 of 2019. The Directive dated 30.12.2019, which was issued by the Reserve Bank of India (the RBI) under Section 10(2) read with Section 18 of the Payment and Settlement Systems Act, 2007 (the PSS Act), is challenged in W.P. No.754 of 2020.

2. In view of the fact that common issues arise for consideration in both these writ petitions, they were heard jointly and are disposed of by this common order. Keeping in mind that the subject matter of these petitions is technology and technical terms-intensive, some contextual information and an explanation of the technical terms is provided in the following paragraphs.

3. The National Payments Corporation of India Limited (NPCIL), the third Respondent herein, developed the National Electronic Toll Collection (NETC) programme to meet the electronic tolling requirement of the Indian market. The NETC programme is designed as an inter-operable nation-wide toll payment solution. For this purpose, it was considered necessary to use radio frequency identification (RFID) technology for making toll payments while the vehicle is in motion. FASTag is the brand name of the device that uses RFID technology to enable toll payments while the vehicle is in motion. Towards this end, the FASTag device is affixed on the windscreen of the vehicle and enables a customer to make the

toll payments directly from the account which is linked to FASTag. By this method, toll payments can be collected without the necessity for the customer concerned to stop at the toll plaza, as is necessary when toll payments are collected manually at the toll plaza. FASTag is vehicle-specific and once affixed to a vehicle, it cannot be transferred to another vehicle.

4. The RBI has enabled payments, both offline and online, for multiple purposes through various modes other than cash. For example, non-cash payments may be made through bank accounts, credit cards, debit cards or through various types of prepaid payment instruments (PPIs), including digital wallets, such as PayTM, PhonePe and Google Pay. With a view to ensuring customers' safety, the RBI has issued directions from time to time to provide appropriate standards of customer safety depending on the mode of payment and the nature and transaction value or ticket size of the transaction. For this purpose, in respect of certain modes of payment and/or certain ticket-size transactions, the RBI has mandated an additional factor of authentication (AFA). By way of illustration, when online credit card transactions are carried out, a message is sent by SMS with a personal identification number (PIN) to the registered mobile phone number of the customer and unless the said PIN is keyed-in by the customer, the transaction cannot be completed. Likewise, when a chip-based credit or debit card is used on a card reading device, the customer is prompted to key-in the password for that credit or debit card, as the case may be. Once again, unless the password is keyed-in on the key pad of the device, the transaction cannot be completed. The keying-in of the PIN or password, as the case may be, in the two examples cited above, constitutes the AFA.

5. The AFA requirements have been relaxed by the RBI, from time to time, in respect of specific modes of payment and/or specific types of transactions. By Directive dated 21.08.2019 bearing No.DPSS.CO.PD. No.1227/02.31.001/2019-20, which relates to the processing of e-mandate on cards for recurring transactions, the RBI enabled the processing of e-mandate prior to or during the first transaction so as to enable the performance of subsequent transactions without the AFA. Apart from the requirement of a one-time e-mandate registration process, this Directive is subject, inter alia, to the following conditions:

"Transaction limit and velocity check

12. The cap/limit for e-mandate based recurring transactions without AFA will be Rs.2,000/- per transaction. Transaction above this cap shall be subject to AFA as hitherto.

13. The limit of Rs.2,000/- per transaction is applicable for all categories of

merchants who accept repetitive payments based on such e-mandates.

14. Suitable velocity checks and other risk mitigation procedures shall be put in place by issuers."

Similarly, Master Directions dated 11.10.2017 were issued by the RBI on the operation of PPIs. In these Master Directions, different types of PPIs are dealt with along with conditions specific to each type of PPI. Clause 15 of this Master Direction deals with security fraud prevention and risk management frame work. In order to address safety and security concerns and for risk mitigation and fraud prevention, various conditions are set out in sub clause 15.3. Significantly 15.3(d) provides as under:

"(d) Cards (physical or virtual) shall necessarily have Additional Factor of Authentication (AFA) as required for debit cards, except in case of PPIs issued under PPI-MTS."

PPI-MTS is a type of PPI used in transit systems such as the Metrorail net works in different cities in India. As is evident from sub clause 15.3(d), PPI-MTS was exempted from AFA requirements. It may be noted that the maximum value outstanding in a PPI-MTS cannot exceed the limit of Rs.3000/- at any point of time as per clause 10.2(e) of the Master Directions. Meanwhile, the NH Fee Rules were amended by the Second Amendment Rules of 2014. Clauses 2 and 3 of the amendment notification read as under:

"2. In the National Highways Fee (Determination of Rates and Collection) Rules, 2008 (hereinafter referred to as the principal rules) in rule 2, after clause (h), the following clause shall be inserted, namely:-

"(ha) "FASTag" means an onboard unit (transponder) or any such device fitted on the front wind screen of the vehicles;" and

"(hb) "FASTag lane of toll plaza" is an exclusive lane in the toll plaza for movement of vehicles fitted with "FASTag" or any such device."

3. In the principal rules, in rule 6, in sub-rule (3),-

(a) after "or through smart card" the words and letters "or through FASTag" shall be inserted;

(b) after the existing proviso the following proviso shall be inserted namely:-

"Provided further that user of the vehicle not fitted with "FASTag" entering into "FASTag lane" of the Toll Plazas shall

pay a fee equivalent to two times of the fee applicable to that category of vehicles as per sub-rule (2) of rule 4."

6. According to the Petitioner, the insertion of the proviso in Rule 6(3) of the NH Fee Rules violates Article 14 of the Constitution inasmuch as it stipulates that the user of a vehicle not fitted with FASTag entering into a FASTag lane of the toll plaza shall pay a fee equivalent to two times the fee applicable to that category of vehicle as per sub-rule 2 of rule 4. Moreover, by Directive dated 30.12.2019, the RBI enabled all authorized payment systems and instruments(non-bank), PPIs, cards and Unified Payments Interface(UPI) to link with FASTag for use in making various types of payments such as vehicle toll, parking fee, etc. In addition, by this Directive, the RBI enabled transactions in the NETC system to be performed without an AFA and/or pre-transaction notification/alert. The Directive dated 30.12.2019 is as under:

"RBI/2019-20/126

DPSS.CO.PD No.1227/02.31.001/2019-20

December 30, 2019

The Chairman/Managing Director/Chief Executive Officer
Members of National Electronic Toll Collection (NETC)
System/
Authorised Payment System Participants/Operators

Madam/Dear Sir,

India is progressing ahead with NETC gaining large scale acceptance. Currently, the NETC system allows linking of FASTags with bank accounts-savings, current and prepaid.

2. In order to further broad base this system by allowing more payment choices for the customers, as well as for fostering competition among the system participants, all authorised payment systems and instruments [non-bank PPIs, cards and Unified Payments Interface(UPI)] shall from now be permitted for linking with the FASTags, which can be used for various types of payments (vehicle toll, parking fee, etc.).

3. The Turn Around Time (TAT) for resolving failed transactions advised vide circular DPSS.CO.PD. No.629/02.01.014/2019-20 dated September 20, 2019 shall also be applicable to the transactions carried out in the NETC system.

4. The transactions in the NETC system can be performed without any Additional Factor of Authentication (AFA) and/or pre-transaction notification/alert.

5. NPCI shall facilitate requests received from banks/non-banks in this regard.

6. The directive is issued under Section 10(2) read with Section 18 of the Payment and Settlement Systems Act, 2007 (Act 51 of 2007).

Yours faithfully,

(P.Vasudevan)
Chief General Manager

According to the Petitioner, exempting transactions in the NETC system from the AFA and pre-transaction notification/alert requirements compromises the safety of consumers/the public and violates the conditions prescribed in earlier RBI Directives dated 21.08.2019 and 30.08.2019. In fact, the Petitioner's account was unauthorizedly debited to the extent of Rs.55 for purported crossing of the Toll Plaza at Nemili (near Sriperumbudur). The present writ petitions were filed in these facts and circumstances.

7. We heard Mr.Kabilan Manoharan, party-in-person for the Petitioner; Mr.R.Sankaranarayanan, the learned Additional Solicitor General of India assisted by Mr.V.Ashok Kumar for the first Respondent; and Mr.C.Mohan for M/s.King and Partridge for the second Respondent in W.P.No.35317 of 2019 and for the sole Respondent in W.P.No.754 of 2020.

8. Mr.Kabilan Manoharan contended that the intention of the Government is to permit toll payments only via FASTag as is evident from the advertisement/press release of the Ministry of Road Transport and Highways, Government of India, at page No.48 of the typed set of papers in W.P. No.35317 of 2019. He pointed out that the PSS Act was enacted to provide for the regulation and supervision of payment systems in India and to designate the RBI as the authority for this purpose. Section 18 of the said enactment enables the RBI to lay down policies relating to regulation of payment systems and give such directions in writing as it may consider necessary to system providers or system participants or any other person with regard to the conduct of business relating to payment systems. In addition, Section 10 thereof empowers the Reserve Bank to prescribe standards and conditions in relation to system providers and participants. The Directives dated 21.08.2019 and 30.08.2019 were issued under Section 10(2) read

with Section 18 of the PSS Act. By drawing reference to the Directive dated 21.08.2019, Mr.Kabilan Manoharan contended that the said Directive, which is applicable to all type of cards, including debit, credit and PPIs, contains sufficient safeguards. In specific, his contention is that AFA is not required if the cap/limit does not exceed Rs.2000/- per transaction but whenever the transaction value exceeds Rs.2000/- AFA is necessary. In addition, a dispute resolution and grievance redressal mechanism is provided for resolving disputes with a clear Turn Around Time (TAT). Similarly, as regards the Master Direction dated 11.10.2017, as updated on 30.08.2019, AFA is necessary except with regard to PPIs issued under PPI-MTS. Clause 10.2, which deals with PPI-MTS, contains specific safeguards which ensure customer/public safety. By contrast, he points out that the exemption granted to transactions in the NETC system, as regards AFA, is not subject to any safeguards. In sum, his contention is that the Directive dated 30.12.2019 is contrary to and conflicts with the Directive issued on 21.08.2019 and 30.08.2019. By referring to the Directive dated 06.12.2016, he pointed out that the exemption from AFA, as contained therein, is optional and that customers can opt to make payment using forms of AFA. On the contrary, he points out that the NETC system does not provide an option. He also contended that by a letter dated 31.12.2019 to the third Respondent/NETC, the safeguards in the earlier Directives, as regards AFA, have been diluted. He also contended that RBI has failed to regulate FASTag and that this is an abdication of its regulatory responsibility.

9. Mr.Mohan, the learned counsel, made submissions on behalf of the RBI. His first contention was that the Directives dated 06.12.2016 and 21.08.2019 are not applicable to transactions in the NETC system and are applicable only to card transactions. Consequently, it was not necessary to refer to the said Directives in the Directive dated 30.12.2019 whereby a relaxation from AFA requirement was granted as regards transactions in the NETC system. By referring to the note submitted by the RBI and, in particular, paragraph 10 thereof, he pointed out that it was a policy decision to exempt transactions in the NETC system from the AFA requirement so as to avoid the stopping of vehicles for authenticating the transaction. In other words, the rationale is to enable seamless movement of vehicles and cashless payment at toll plazas. With regard to the failure by the RBI to regulate FASTag, he pointed out that the control of the use of RFID technology is outside the jurisdiction of RBI. As regards grievance redressal, he pointed out that the payment system operators are required to establish grievance redressal mechanisms and that instructions have been issued by the RBI to payment system operators to limit customer liability for unauthorized electronic payment transactions.

10. The learned Additional Solicitor General of India made submissions thereafter. His first contention was that the AFA requirement is for card and online transactions and that it would defeat the object and purpose of the NETC system if the AFA requirement is mandated. In particular, he pointed out that the AFA requirement would entail the stopping of vehicles at the toll plaza as happens currently with the manual payment system. Consequently, seamless movement of vehicles cannot be achieved.

11. We considered the submissions of the party-in-person and the learned senior counsel/counsel for the respective parties and examined the records.

12. The first question that arises for consideration is with regard to the power of the RBI to relax the AFA requirement as regards the NETC system. The answer to this question is contained in Sections 10 and 18 of the PSS Act, which read as under:

"10. (1) The Reserve Bank may, from time to time, prescribe-

(a) the format of payment instructions and the size and shape of such instructions;

(b) the timings to be maintained by payment systems;

(c) the manner of transfer of funds within the payment system, either through paper, electronic means or in any other manner, between banks or between banks and other system participants;

(d) such other standards to be complied with the payment systems generally;

(e) the criteria for membership of payment systems including continuation, termination and rejection of membership;

(f) the conditions subject to which the system participants shall participate in such fund transfers and the rights and obligations of the system participants in such funds.

(2) Without prejudice to the provisions of sub-section (1), the Reserve Bank may, from time to time, issue such guidelines, as it may consider necessary for the proper and efficient management of the payment systems generally or with reference to any particular payment system.

18. Without prejudice to the provisions of the foregoing, the Reserve Bank may, if it is satisfied that for the purpose of enabling it to regulate the payment systems or in the interest of management or operation of any of

the payment systems or in public interest, it is necessary so to do, lay down policies relating to the regulation of payment systems including electronic, non-electronic, domestic and international payment systems affecting domestic transactions and give such directions in writing as it may consider necessary to system providers or the system participants or any other person either generally or to any such agency and in particular, pertaining to the conduct of business relating to payment systems."

13. The aforesaid Sections confer power on the RBI to, inter alia, prescribe the format, size and shape of payment instructions. The expression "payment instruction" is defined in Section 2 (g) of the PSS Act as "any instrument, authorization or order in any form, including electronic means to effect a payment, (i) by a person to a system participant; or (ii) by a system participant to another system participant". AFA is nothing but a form of payment instruction and is within the ambit of Section 10. Similarly, under Section 10, the RBI may prescribe the manner of transfer of funds within the payment system and the conditions subject to which system participants shall participate in fund transfers. The RBI is also expressly conferred with policy making power for the regulation of payment systems under Section 18 of the PSS Act. Upon perusal of the Directive which is impugned in W.P. No.754 of 2020, namely, the Directive dated 30.12.2019, we find that it is a Directive issued under Section 10(2) read with Section 18 of the PSS Act and, on perusal thereof in the context of the PSS Act, it is beyond doubt that the RBI is competent to issue the same.

14. The next issue is whether the exemption granted by the RBI from the current AFA requirement is liable to be interfered with notwithstanding RBI's competence to issue the impugned Directive. The principal contention of Mr. Kabilan Manoharan is that no safeguards have been provided and that the customer is not provided the choice to opt for the AFA requirement. With regard to this contention, we concluded in the preceding paragraph that the RBI is expressly empowered by the PSS Act to issue directions and lay down policy relating to the regulation of the payment system. In the exercise of this power, the RBI has issued directives from time to time in respect of various modes of payment both online and offline. The decision as to whether the AFA requirement is necessary or not in respect of a particular mode of payment or a particular category of transaction is a policy decision based on an assessment of, and by balancing, multiple factors such as the risk to the customer, on the one hand, and the necessity to enable transactional and operational ease, efficiency and

effectiveness on the other. Even with regard to credit card transactions, the current AFA requirement was not prescribed a few years ago and this requirement was introduced when chip cards replaced the then existing type of credit and debit cards. After reviewing the safety and transaction requirements over time, the RBI has issued directives exempting the AFA requirements for recurring transactions subject to e-mandate registration and the maximum permissible monetary cap of Rs.2000/- per transaction. Similarly, with regard to transactions under the NETC system, the RBI has issued the impugned Directive dated 30.12.2019 relaxing AFA requirements for such transactions.

15. The law with regard to interference in such policy decisions is certainly not res integra. In State of Punjab v. Ram Lubhaya Bagga (1998) 4 SCC 117, the Hon'ble Supreme Court held as follows in paragraph 25:

".... So far as questioning the validity of governmental policy is concerned in our view it is not normally within the domain of any court, to weigh the pros and cons of the policy or to scrutinize it and test the degree of its beneficial or equitable disposition for the purpose of modifying or annulling it, based on howsoever sound or good reasoning, except where it is arbitrary or violative of any constitutional, statutory or any other provision of law. When Government forms its policy, it is based on number of circumstances on facts and law including constraints based on its resources. It is also based on expert opinion. It would be dangerous if court is asked to test the utility, beneficial effect of the policy or its appraisal based on facts set out on affidavits. The Court would dissuade itself from entering into this realm which belongs to the executive...."

Similarly, in Social Action for Manav Adhikar v. Union of India (2018) 10 SCC 443, the Court quoted with approval from an earlier judgment wherein it was held that the court can only interfere if the policy is capricious and offends Article 14 of the Constitution. In the same vein, in Centre for Public Interest Litigation v. Union of India (2016) 6 SCC 408, it was held, inter alia, as under in paragraph 21:

"21. Such a policy decision, when not found to be arbitrary or based on irrelevant considerations or mala fide or against any statutory provisions, does not call for any interference by courts in exercise of power of judicial review. This principle of law is ingrained in stone which is stated and restated time and again by this Court on numerous occasions."

16. We do not find anything arbitrary or capricious in the AFA relaxation granted as regards transactions in the NETC system. In fact, as correctly pointed out by the learned counsel for the RBI and by the learned Additional Solicitor General of India, the NETC system would not serve the intended purpose of seamless travel if the AFA requirement is insisted upon by the RBI. In specific, it would entail the stopping of each vehicle at the toll plaza and thereby there would be no improvement over the former system. There could be other benefits too of an AFA-exempt NETC system such as potential fuel cost savings over a period of time, and the consequential foreign exchange savings. Besides, the transaction value or ticket size of toll payments is small. The risk and cost benefit analysis underlying such calibrated decisions are best left to the wisdom of expert institutions such as the RBI. In the absence of patent arbitrariness, we find no reason to interfere with this policy decision. An ancillary issue was raised that the RBI has failed to regulate FASTag and this contention was countered by the learned counsel for the RBI by pointing out that the RBI does not regulate providers of RFID technology such as FASTag. While the RBI plays multiple roles in regulating the financial system, on examining the relevant statutes, we are of the view that regulating RFID technology providers per se is clearly outside its remit. This conclusion does not, however, detract from the fact that the NETC system, which deploys the FASTag RFID technology, is regulated by the RBI under the PSS Act in so far as payment systems are concerned.

17. The last issue for consideration relates to the amendment to Rule 6(3) of the NH Fee Rules. The contention of the Petitioner, in this regard, is that the implementation of FASTag without the AFA requirement violates Section 20 of the PSS Act and Article 14 of the Constitution. Section 20 of the PSS Act deals with the rights and duties of a system provider and a system provider is defined in Section 2(q) thereof as "a person who operates an authorized payment system". In effect, the expression "system provider" encompasses the banks and non-bank financial institutions that enable payments through bank accounts, cards and PPIs. In our view, the amendment to Section 6(3) of the NH Fee Rules does not violate Section 20 of the PSS Act, in any manner, and the Petitioner has completely failed to establish that it does. As regards the contention that Article 14 is infringed, in the preceding paragraphs, we concluded that the policy decision of RBI to relax the AFA requirement in respect of payments in the NETC system is not arbitrary and, on the contrary, appears reasonable. Indeed, we are of the view that the NETC system constitutes a distinct class and the relaxation of the AFA requirement, when viewed in context, clearly does not violate Article 14 of the Constitution. Hence, there is no merit in either of these writ petitions.

18. In the result, these writ petitions are dismissed. Consequently, the connected miscellaneous petitions are closed. No costs.

Sd/-
Assistant Registrar

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Sub Assistant Registrar

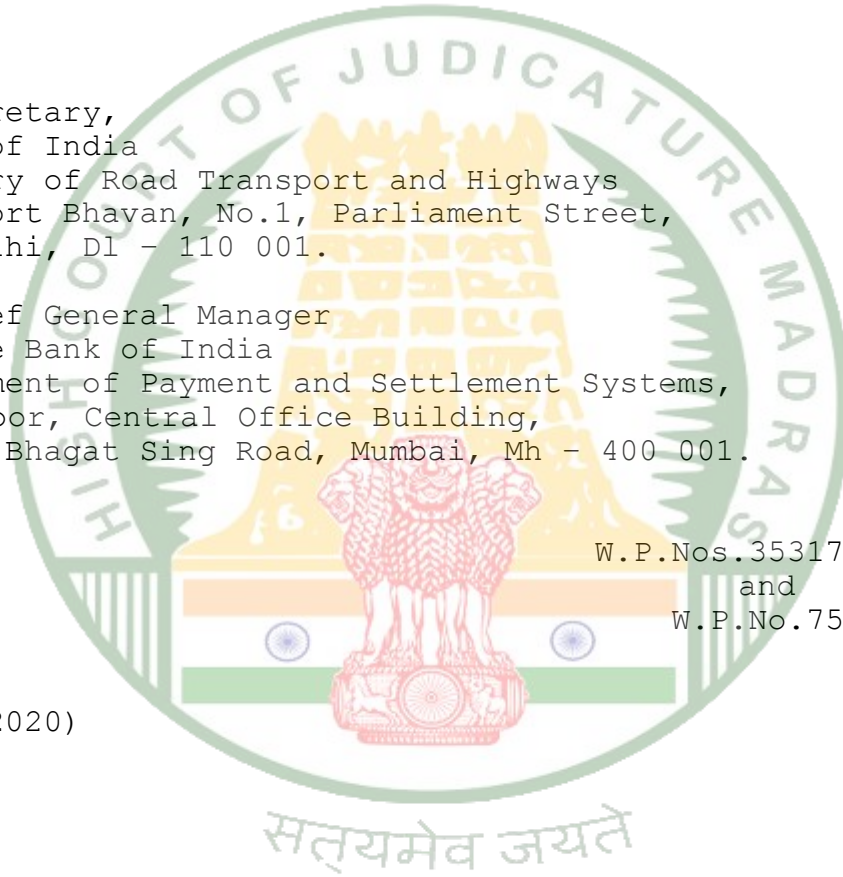
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To

- 1.The Secretary,
Union of India
Ministry of Road Transport and Highways
Transport Bhavan, No.1, Parliament Street,
New Delhi, DL - 110 001.
- 2.The Chief General Manager
Reserve Bank of India
Department of Payment and Settlement Systems,
14th Floor, Central Office Building,
Shahid Bhagat Sing Road, Mumbai, Mh - 400 001.

W.P.Nos.35317 of 2019
and
W.P.No.754 of 2020

VG II(CO)
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