

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

PUBLIC INTEREST LITIGATION NO.32 OF 2016

MAHENDRASING PREMSING JADHAV AND ANOTHER
-VERSUS-
THE STATE OF MAHARASHTRA AND OTHERS

...
Advocate for the Petitioners : Shri Lalitkumar S. Mahajan
AGP for Respondents 1 and 2 : Shri S.K. Tambe
Advocate for Respondent 3 : Shri S.V. Adwant
Advocate for Respondents 4 and 5 : Shri Uday Dastane h/f Shri Kale
Pramod D.
...

**CORAM : DIPANKAR DATTA, C.J.
and
RAVINDRA V. GHUGE, J.**

DATE :- 25th January, 2021

Per Court (Ravindra V. Ghuge, J.):

1. The two petitioners, who claim to be journalists, have preferred this PIL petition seeking directions to the respondent authorities to cure the irregularities at the Border Check Posts (BCP) and bring respondent No.4/ Maharashtra Border Check Post Network Limited, to terms with the agreement executed between the Government of Maharashtra and such respondent, dated 30.03.2009 and the service fee notification dated 08.04.2013.

2. The prayers put forth by the petitioners in prayer clauses B, C, D and E read as under :-

“B) By way of writ of mandamus or any other appropriate writ, order or direction in the like nature, this Hon’ble High Court may kindly direct the respondent

authorities to levy the service fee as per the notification dated 08th April 2013 and also direct recovery of the surplus amount which has already being levied and collected by the respondent No.4 i.e. concessionaire from the date of operations till date.

- C) By way of writ of mandamus or any other appropriate writ, order or direction in the like nature, this Hon'ble High Court may please direct the respondent authorities to comply the irregularities (deficiencies) at the Border Check Posts (All locations) in consonance with the agreement executed between the Government of Maharashtra and Maharashtra Border Check Post Network Limited dated 30th March 2009.*
- D) By way of writ of mandamus or any other appropriate writ, order or direction in the like nature, this Hon'ble High Court may please direct the respondent authorities to initiate necessary action as per the Articles of the Agreement dated 30th March 2009 against the concessionaire i.e. respondent No.4 for failure to achieve the completion certificate and follow the terms and conditions of the agreement.*
- E) By way of writ of mandamus or any other appropriate writ, order or direction in the like nature, this Hon'ble High Court may kindly direct the respondent No.1 to 3 to initiate action against the respondent No.4 in terms of the Article 9 of the agreement dated 30th March 2009."*

3. On 23.02.2016, a coordinate Bench of this Court directed the petitioners to deposit an amount of Rs.50,000/- in this Court to show their bonafides, within a period of six weeks. Office noting dated 26.04.2016 indicates that the amount was deposited. Notices were issued to the respondents on 15.06.2016. Since then, this matter has been pending for the last more than four years on account of adjournments sought by both the sides.

4. We have considered the submissions of the learned advocates for the petitioners and on behalf of the respondents, at length and have

gone through the petition paper book and the judgments cited.

5. The petitioners' basic grievance is about the levy and collection of service fee by respondent No.4 concessionaire. They allege breach of the terms of the agreement by respondent No.4. The chart for levying fees for weighment of the vehicles for a period of 15 years, with regard to light commercial vehicles, medium commercial vehicles and heavy/very heavy commercial vehicles has been adverted to. Respondent No.4 is alleged to have commenced the recovery of fees applicable to the fourth year, upon the issuance of the service fee notification dated 08.04.2013, instead of commencing the collection of fees applicable for the first year. There is no dispute that the agreement between the State Government and respondent No.4 is dated 30.03.2009 vide which, respondent No.4 has been awarded the contract by the Government of Maharashtra to construct, operate, maintain and transfer 22 modernized and computerized integrated BCPs equipped with modern basic amenities on Built, Operate and Transfer (BOT) basis. The MSRDC was appointed by the Department of Transport, Government of Maharashtra as the Project Implementation Agency. The proposed BCP was to be modernized, computerized and integrated to facilitate road users and to reduce the clearance time.

6. We have perused the concession agreement dated 30.03.2009 between the Governor of Maharashtra in its executive capacity for the Government of Maharashtra represented by the Principal Secretary, Department of Transport and respondent No.4. We have considered the

definitions of commercial operation date (COD), commencement date, completion certificate and operation speed.

7. By the notification dated 09.08.2012, sub-rule 6-A below Rule 223 (6) was introduced in the Maharashtra Motor Vehicles Rules, 1989 by which, the Government of Maharashtra was empowered to issue notifications from time to time for specifying processing fees chargeable to the vehicle owners or drivers at the BCPs for extending service such as weighment, data entry, scanning, loading, unloading of goods, parking and other allied services, being offered at such BCPs.

8. Article 4 of the Concession Agreement provides for the concessionaire to levy, demand and collect service fee in accordance with the Service Fee Notification, during the operation period. The operation period commences from 30.03.2009 for a period of 24 years and 06 months. The service fee notification is dated 08.04.2013 and respondent No.4 has not recovered any fees from the date of signing of the concession agreement till the date of the issuance of the service fee notification. Nevertheless, respondent No.4, who was the highest bidder when tenders were invited, has delivered an amount of Rs.30 crore, on issuance of the Letter of Acceptance (LoA) dated 27.02.2009, through IDBI Bank Limited.

9. The contention of the petitioners is that, as and when the BCP is established at any border point permitted under the concession agreement, respondent No.4 should start collecting the fees treating the said date of installation of the BCP as being the first year of the commencement of the contract. The petitioners agree that this is likely to

cause disparity on a particular sector, for example that a vehicle carrying a particular load of goods from Maharashtra to Gujarat would have to pay different fees in comparison to the same vehicle with the same load travelling from Maharashtra to Madhya Pradesh, having to varying dates of completion of installation of the BCPs. They further agree that neither the State of Maharashtra has raised a grievance of excess recovery of fees, nor has any vehicle user/ transporter raised any grievance.

10. Respondent No.4 has relied upon the judgment of the Hon'ble Supreme Court in the matter of *Soma Isolux NH One Tollway Private Limited vs. Harish Kumar Puri and others, (2014) 6 SCC 75*, to buttress the contention that a PIL cannot be allowed to reach to the extent of affecting the contractual agreement itself which would reduce a valid and a legal document into a worthless piece of paper or a waste paper which clearly means that the relationship between the parties, although were to be governed and supported by a valid legal document, would be rendered insignificant inspite of its validity in the eyes of law. Specific reliance is placed upon paragraphs 65 to 67 and 75, which read as under :-

“65. *It is no doubt true that the respondent-Union of India has come up to the rescue of the respondent-NHAI when it contended that if terms and conditions in the contractual agreement is contrary to a statute, the Union of India would be legally authorized to override the terms and conditions of the contractual agreement. But as already recorded hereinbefore, the facts of the instant matter clearly establishes that it is not even the case of the respondent that the terms and conditions incorporated in the Concession Agreement was contrary to any statute or central legislation so as to offer a plank to the contesting respondent specially NHAI to urge that the provision under the Concession*

Agreement had been overriding a statutory provision of any central legislation in absence of any fact or situation establishing even remotely that the agreement suffered the vice of violating any central statute/legislation.

66. *Thus, apart from the fact that the dispute regarding the shifting of Toll Plaza had already been adjudicated by the High Court earlier on two occasions, the details of which have been given hereinbefore and the Concession Agreement not being in violation of any legislation of the centre, the dispute regarding shifting of Toll Plaza obviously could not have been gone into by the High Court all over again in the PIL. But while nullifying the contract on the ground of delay, the dispute regarding shifting of Toll Plaza which was clearly the only contentious issue for not completing the project, could not have been given a go by or ignored in any manner by the High Court while taking an undertaking from the appellant and thereafter cancelling the Concession Agreement itself when it admittedly did not traverse the terms and conditions of the Agreement.*
67. *Beside the above, it is more than well settled that a question or an issue which has been raised earlier before the High Court, adjudicated on which a final judgment/order was delivered, cannot be allowed to be raised for the second time as that would be clearly barred by the principle of constructive res judicata which is too well known a principle to be dealt with herein. Suffice it to say that the well- acknowledged principle and equally well settled legal position seems to have been ignored and lost sight of not merely by the respondents but by the appellant company also which filed a writ petition in the High Court of Delhi raising the issue of shifting of Toll Plaza which finally was dismissed since the High Court of Punjab and Haryana had already dealt with it as also by filing an application for referring the dispute to the Arbitrator under the Arbitration and Conciliation Act, 1996 completely overlooking that at least this part was not permissible to be referred for arbitration once on the judicial side permission to shift the Toll Plaza was permitted by the High Court of Punjab and Haryana vide its judgment and order passed in CWP No.21332/2011 and LPA No.170/2012 which had settled the issue regarding shifting of Toll Plaza.”*

“75. *In addition to this it is difficult to overlook that the High Court was merely seized with the limited issue in the pending PIL as to whether the Show Cause Notice issued by the NHAI to the appellant- company which was ordered to be kept in abeyance by order of the High Court itself, was fit to be vacated on an application filed by the respondent NHAI, but while doing so the High Court took a leap much way ahead by cancelling the agreement itself for non performance ignoring the main issue as to whether the Show Cause Notice issued by the NHAI was fit to be sustained or the order keeping it in abeyance was fit to be vacated and straightway concluded that the appellant-company had delayed the project completely overlooking that the contractual violation had been done by the NHAI when it declined to permit shifting of the Toll Plaza from KMs 146 to KM 110 in spite of the reasoned orders of the High Court to that effect against which no appeal was filed either by the NHAI or the PIL petitioner or any other concerned party. It is no doubt true that in a public interest litigation the court at times may forego/overlook the technicalities coming in the way of issuance of any direction which may conflict or jeopardise the public interest. But the same cannot be allowed to reach to the extent or affect the contractual agreement itself which reduces a valid and a legal document into a worthless piece of paper or a waste paper which clearly means that the relationship between the parties although were to be governed and supported by a valid legal document, the same would finally turn out to be a document having no legal significance in spite of its validity in the eye of law. If this were to be permitted, it is bound to lead to a chaotic situation affecting the very fabric of the rule of law which cannot be allowed to prevail over a valid and legally supported document conferring certain rights on the person or entity possessing it.”*

11. Notwithstanding the above, by placing reliance upon its affidavit in reply, the learned counsel representing respondent No.4 submits that though the concession agreement was signed on 30.03.2009, all such BOT operators were made to believe that as four years had lapsed

in between the execution of the concession agreement and the issuance of the service fee notification, they were at liberty to commence the charging of service fee as applicable to the fourth year as per the agreement. This maintained parity in the service fees and therefore, all commercial vehicles/transporters were charged identical fees for a particular type of vehicle carrying a particular load. The element of disparity was, thus, eliminated.

12. The learned AGP representing respondent Nos.1 and 2, State of Maharashtra and the Department of Transport, has relied upon the affidavit in reply filed by the State, which clearly indicates that the Government was conscious of the fact that the land at various sites was handed over to the concessionaire on different dates and the completion dates of installation of each BCP, also differed. Consequentially, the commencement of the recovery of service fee by the concessionaire was notified on different effective dates by the Government of Maharashtra for different BCPs, as and when the provisional completion certificates were issued.

13. Having considered the material before us and the law laid down in ***Soma Isolux NH One Tollway Private Limited*** (*supra*), we called upon the petitioners to establish their locus-standi in filing the present PIL. According to the learned counsel, the petitioners are journalists and the issue involved concerns public interest. We find that the present PIL has its limitations in view of the law laid down by the Hon'ble Supreme Court evident from paragraphs 65 to 67 and 75,

reproduced above. So also, we find that the approach adopted by the State of Maharashtra, in the light of the concession agreement, in its endeavour to eliminate the disparity in the quantum of service fees to be charged from comparable transporters, cannot be said to be illegal, arbitrary or unsustainable.

14. In the result, this PIL petition is, therefore, dismissed. The amount of Rs.50,000/- deposited by the petitioners in this Court stands forfeited and shall be utilized for a social cause.

15. The Registry of this Court shall, therefore, transfer the said amount of Rs.50,000/- along with accrued interest, through electronic transfer to **“Shantivan”, Arvi, Tq.Shirur Kasar, District Beed**, an orphanage catering to the orphans, who have lost their parents (farmer’s suicide).

kps

(RAVINDRA V. GHUGE, J.)

(CHIEF JUSTICE)