

CASE NO.:

Appeal (civil) 6123 of 2001
Special Leave Petition (civil) 3716 of 2001
Appeal (civil) 6124 of 2001
Special Leave Petition (civil) 13473 of 2001

PETITIONER:

STATE OF WEST BENGAL

... V.

Vs.

RESPONDENT:

DATE OF JUDGMENT: 2001

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03/09/2001

BENCH:

Doraiswamy Raju, S.R.Babu

JUDGMENT:

Raju, J.

Special leave granted.

These appeals have been filed by the National Highways Authority of India, who was not a party to the proceedings in the High Court, but with the permission granted by this Court and the State of West Bengal against the judgment dated 20.11.2000 in FMAT No.3607 of 1999, whereunder a Division Bench of the Calcutta High Court has not only stayed the action initiated by the Superintending Engineer to re-bid the right to collect the toll in question but also ordered the continuance of the Receiver in respect of the possession of the expressway and collection of toll charges, meeting the expenses and deposit with the State, etc., and a further direction to the State Government to take a decision in terms of Clause 15 of the Memorandum No.15/1(3)/PR/N/DEW/IE-12/94(V) dt.11.3.1998.

The disputes between the parties relate to the right of collection of toll charges from the vehicles using part of Durgapur Expressway between 22 km. to the end point Palsit - a stretch of 48 km. of road on National Highway No.2, known as Durgapur Expressway. That the said stretch forms part of a National Highway which vest with the Central Government and the Central Government, in exercise of its powers under Section 5 of the National Highways Act, 1956 [hereinafter referred to as "The Highways Act"], issued a Notification to the extent that the functions in relation to the execution of works pertaining to this National Highway shall be exercisable also by the State Government of West Bengal, subject to the condition that the State Government concerned shall, in the exercise of such functions, be bound to comply with the rules for the time being in force made under the Act is indisputable. The Parliament has enacted The National Highways Authority of India Act, 1988 [hereinafter referred to as "The Highways Authority Act"] in order to get over the difficulties experienced from time to time in maintaining effectively the National Highways through the "Agency System" pursuant to a delegation Notification under Section 5 of the Highways Act in favour of the State Governments concerned. Among other things, the Central

Government also framed rules called, The National Highways (Fees for the use of National Highway Section and Permanent Bridge-Public Funded Project) Rules, 1997 [hereinafter referred to as "The Fee Collection Rules"]. These Rules provide for fixation of rates of fee by the Central Government, the display of rates for fees, procedure for collection - either departmentally or through Franchisee, the manner of its remittance from time to time, and submission of returns, etc.

Rules 6 to 8 of the Fee Collection Rules provide for collection of fees departmentally, mode of collection and the manner of its remittance. Rule 9 provides for the collection of fees through Franchisee to whom the Franchise to collect has been awarded through auction for specific periods as the Central Government may issue, as per terms and conditions of the agreement executed for such purposes and remittance of the auction money collected from the Franchisee by the Executing Agency to the Pay and Accounts Officer (National Highways), Ministry of Surface Transport, New Delhi. Rule 5 mandates that all fees levied under the rules shall be collected by the Executing Agency concerned departmentally or through Private Contractors "on the basis of competitive bidding on behalf of the Central Government". Executing Agency has been defined to mean, the National Highways Authority of India in the case of those National Highways or part thereof entrusted to NHAI and State Government or Union Territory, to which such functions are delegated under Section 5 of the Highways Act. So far as the part of the Highway in question, though there had been earlier Notification under Section 5, as noticed supra, subsequently, the Central Government has issued a Notification dated 4.2.1999, in exercise of its powers under Section 11 of the Highways Authority Act, entrusting the stretch of the Highway under consideration to the National Highways Authority of India and indisputably the NHAI became, as a consequence thereof, the Executing Agency in respect of the stretch of the National Highway in the place of the State of West Bengal.

Tenders seem to have been called for in sealed covers, initially for the grant of franchise for collection of toll charges in respect of the portion of the Highway under dispute. Since, the highest bid offered in a sum of Rs.1,51,000/- per day was not acceptable to the authorities concerned for a second time bids were called for and though the highest bid in a sum of Rs.1,99,909/- per day, was accepted, there has been violation of the terms and conditions of the grant, resulting in termination of the same and forfeiture of earnest money. Once again sealed tenders were called for and the 1st respondent, whose bid was for Rs.2,20,701/- per day, was accepted and entrusted with the collection of toll charges in question. A written contract was entered into on 13.11.97 for the purpose for a period of one year commencing from 13.12.97 between the 1st respondent and the State of West Bengal, which at that point of time happened to be the Executing Agency. It is interesting to note that Clause 1 of the terms and conditions of the agreement stipulated that the Agency for toll collection shall be for one year and in no case extension of the period would be allowed. However, the additional clauses agreed (Addl. Clause 1) provided that the Agency for toll collection, which is for one year, "may be extended/fresh agreement may be made subject to fulfillment" of clauses 8 and 9 of the terms and conditions of the bid. It also contained a clause for termination for non-payment of advance bid money (Clause 5) and the power to terminate the agreement (Clause 9) without showing any cause and call for a fresh bid, by giving forty five days' notice with similar option to the collecting agent also to put an end by giving similar notice, if he is unwilling to continue or unable to offer revised bid due to revision of rates, if any - and in such eventualities, to handover vacant and peaceful possession of site, structures and toll gates etc., forthwith on receipt of the notice of termination.

Formal inauguration of toll collection was said to have been made on 12.12.97 and from 13.12.97, the 1st respondent-contractor commenced regular collections. Though, he was obliged to deposit seven days bid money in advance, he committed defaults from inception and started making several pleas to avoid compliance. Regular and repeated defaults in the deposit of advance bid money as well as actual bid money are attributed to him, driving the authorities to issue show-cause notices for taking appropriate action. Instead of dealing with the officials, the 1st respondent seems to have approached the Minister-in-Charge, for installment deposits and on the same date (5.1.98) approached the Minister with offer to pay Rs.2,90,000/- per day when another stretch of 17 kms of the Durgapur Expressway upto Dankuni is open for traffic and handed over to him and for extension of the contract period to 40 years after the expiry of original period of one year, in addition to making several other claims in utter disregard and against the terms of the very written contract. On 15.1.98, the Secretary PW and PW (Roads), Govt. of West Bengal, appears to have directed the concerned Engineer not to take penal action against the contractor till his representations to the Minister are decided. As on 15.1.98, the arrears of tolls due from him are stated to be Rs.22,07,010/-. Surprisingly, on 11.3.98 the Joint Secretary PW and PW (Roads) seems to have issued a Memorandum to the Chief Engineer, Durgapur Expressway, directing him to allow the contractor to deposit at the rate of Rs.1.10 lakh per day (an amount far less than the bid which was not initially accepted as being low) for six months with effect from 16.12.97 subject to the condition that he would pay at the original contracted rate after six months and dues will be paid in 10 equal installments. The very Joint Secretary issued another Memorandum dated 11.3.98, permitting him to deposit bid money with effect from 16.12.97 and further ordering that the Toll Collector will be liable to continue to deposit bid money at the rate of Rs.2,90,000/- per day, if Dankuni and 17 kms of Durgapur Expressway is opened during currency of the present contract period, provided the toll charges are increased proportionately. After referring to the payment schedule permitted under the other Memo dated 11.3.98, several other concessions like dispensing with the requirement of deposit of bid money in advance and modifications of the earlier agreed terms seem to have been also indiscriminately made, of which strong reliance has been placed for the 1st respondent on para 15, which read as follows:

"15. Subject to satisfactory performance of the toll collector during the contract period of one year, to be decided by PW (Roads) Department, the Toll Collector will continue to collect toll charges on Durgapur Expressway for 30 (thirty) years to start with, beyond the initial contract period of one year, on a lease basis, (since the agency has been referred to as lessee in condition 22 of the Annexure A) subject to renewal of the lease at the end of every three years to the satisfaction of PW (Roads) Department."

Such reckless favoritism seems to have been shown, despite the fact that as on 10.3.98, the arrears of toll due from 1st respondent was stated to be Rs.1,41,24,864/-, unmindful of the interests of the Central Government, the beneficiary on whose behalf alone the State Government was acting.

The Superintending Engineer concerned seems to have invited on 21.10.98 sealed bids for the selection of fresh franchise for collection of toll for the period commencing from 13.12.98 (for the

period subsequent to the one year duration of the contract with the 1st respondent).

The 1st respondent appears to have filed on 6.11.98 T.S. No. 273 of 1998, before the Court of Civil Judge, Senior Division, Burdwan, against the Authorities of the State Government not only challenging the notice inviting tenders but also for a declaration that there is a subsisting valid contract by and between the plaintiff and defendant for 30 years with effect from 16.12.98 by virtue of the Memorandum dated 11.3.98; for a mandatory injunction to direct the Authorities to hand over 17 kms stretch of Calcutta-Durgapur Expressway from Dankuni to Singur as and when ready; and for permanent injunction restraining the defendant from taking any steps pursuant to the notice dated 21.10.98 inviting tenders. Relief in the nature of ad-interim, prohibitory order of injunction also seems to have been sought. Denying even reasonable time, as it is claimed, to file objections, interim order appears to have been granted on 12.11.98, permitting, at the same time, the 1st respondent to carry on toll collection in terms of the agreement dated 19.11.97, as modified by the Govt. Memos dated 11.3.98 and further directing the Authorities to hand over the 17 km stretch of the Highway from Dankuni to Singur, on its completion, for collection of toll on the road from Palsit to Dankuni. These orders were to be in force till the disposal of the injunction petition and the same was adjourned to 4.1.99 for hearing with permission to file objections, if any, in the meantime.

By this time, the Central Government, which came to know of this litigation, seems to have on 15.2.99 issued instructions to the State Government to challenge the injunction order passed by the Court, expeditiously. On 1.7.99, a request seems to have been also made to the State Government to initiate action to transfer toll collection arrangement as well the stretch of the National Highway in question to the NHAI in view of the Notification dated 4.2.99 entrusting the Highway in question to NHAI. On the willingness expressed by the State on 16.8.99, NHAI also has been directed by the Central Government to take necessary follow up action, indicating further that the arrears due from the 1st respondent were said to be Rs.4,19,75,250/- for 13.12.97 to 12.12.98; and Rs.35,31,210/- for 13.12.98 to 18.1.99. The State of West Bengal appears to have filed Miscellaneous Appeal FMAT No.2360 of 1999 before the Calcutta High Court, challenging the order dated 12.11.98. A separate suit for recovery of the outstanding arrears from the 1st respondent for the period upto 31.5.99 appears to have been also filed. By a Memorandum dated 24.8.99, the very Joint Secretary, PW (Roads) Department, with reference to the issues raised by the Chief Engineer, Durgapur Expressway, clarified the real position regarding the nature of action culminating in the issue of memo dated 11.3.98 by stating as hereunder:

"His memo nos. 314-R/DEW dated 21.10.1998 and 317-R/DEW dated 21.10.1998 may be referred to. His Suggestion contained there regarding memo under reference has been carefully examined. M.R. Mondal who having been selected the toll collector Durgapur Expressway between Palsit end and intersection with B.T.C. Road at Singur through process of agreement submitted certain representations in his letter No. MRM/RD/97-98/36 dated 05.01.1998 in terms of certain long term and short-term concessions and benefit in the operation of toll collection. After careful consideration the Govt. in its memo no. 15/PR/N/DEW/IE-12/94

(V) dated 11.03.1998 placed certain proposals on the issue for further discussion subject to approval by the competent authority, Ministry of Surface Transport, Govt. of India. But M.R. Mondal did not respond to the said memo and no amended agreement has also executed. Thus, memo no. 15/PR/N/DEW/IE-12/94 (V) dated 11.03.1998 of P.W. (Roads) Deptt. has no application in the matter of collection of toll charges from Durgapur Expressway by M.R. Mondal. This is without any prejudice to legal cases pending before different courts of law in the matter of collection of toll charges.

Concerned parties are informed accordingly"

On 3.9.99, FMAT No. 2360 of 1999 came to be disposed of with a direction to the Trial Court to dispose of the injunction application, at an early date. By an Order dated 5.10.99, the Trial Judge vacated the interim injunction and dismissed the injunction petition both on merits and also for the reason that the interim orders were obtained by misleading the Court. On 11.10.99, the Authorities of the State took over possession of the Highway in question and it is stated that as on 10.10.99 the arrears due from the 1st respondent is said to be Rs.8,39,08,440/-. Yet, at the intervention of the Minister-in-Charge, the 1st respondent managed to get directions in his favour and sought for restoration of the collection work to him. The matter was pursued before the High Court in FMAT No.3607/99 and by an order dated 27.10.99, Shri Tarun Kumar Banerjee, Advocate, Ex-Chief Judge of City Civil Court, Calcutta, was appointed as Receiver to supervise the collection of toll charges, until further orders. Prior to this on 11.10.99, an order for maintaining the status quo also appears to have been made. The Special Leave Petition file by the State against the order dated 27.10.99 in SLP (C) No.17123/99 came to be dismissed on 17.12.99 on the following terms:

"Both the parties agree that the receiver after collecting the amount of toll shall pay the entire amount to the State. In that view of the matter, no orders are sought by the learned counsel for the petitioner. The Special Leave Petitions are disposed of accordingly.

If there is any objection regarding the expenses incurred by the receiver or any other amount spent by him, it shall be open to the petitioner to approach the High Court."

The grievance of the State Government seems to be that the Receiver is not able to cope up with the work and there had been default in not only filing the returns properly but also in the remittance of the amounts. The public exchequer continued to be the loser and with the Court Receiver on the job, the State was unable to properly assess the quantum of collection and the ultimate loss of revenue to the public exchequer. The Department appears to have taken a census on the Durgapur Expressway from 8 a.m. on 12.6.2000 to 8 a.m. on 15.6.2000 and it was found that at Azapur near Palsit, average toll collection should have been Rs.4.95,575/- per day. Similar census at Dankuni also, the other point of the Highway in question, revealed that the collection should have been Rs.4.49,565/- per day. The deposits made by the Receiver seem to have been, apart from the same being irregular and not systematic, were only in the range of Rs.70,000/- to Rs.2,25,000/- per day.

The Division Bench of the Calcutta High Court, as indicated

above, disposed of the appeal on 20.11.2000, by giving certain directions, both learned Judges rendering separate but concurring opinions. Hence, the above appeals.

Heard the learned Senior Counsel for the appellants as well as the respondents. On an overall consideration of the indisputable facts on record and the submissions made on either side, we are unable to persuade ourselves to appreciate or approve the manner of approach adopted, the method of consideration undertaken and statements on some abstract principles of law, unmindful of the stage of the proceedings and the serious as well as irretrievable public detriment that is bound to result from the conclusions arrived at and directions issued on a perfunctory understanding of the rights of parties, the statutory provisions of the Act, Rules and Regulations governing the issue.

The observations of the learned Judges of the Division Bench on the question of existence of 'prima facie case' to justify or warrant the grant of the prohibitory as well as mandatory directions of the nature issued in the case, in our view, suffer from serious self-contradictions, apart from impermissibility of several assumptions made in this regard on the basis of perfunctory and inchoate materials which could not provide any basis in law for such claims. All relevant materials also do not seem to have been adverted to in their proper and legal perspective and the conclusions arrived at appears to have arrived at throwing to winds the elementary and basic principles of law pertaining to the creation of contractual relationship between the parties. The judgment under challenge also seems to be oblivious to the obvious facts emanating from records that those materials relied upon for the plaintiff-contractor do not, in law, constitute any or sufficient basis of evidence, which could establish even if not rebutted by evidence adduced on the other side, the plaintiff's case for an extended term in law. The fact that substantial mischief or injury is likely to be necessarily caused by the grant of the order, under challenge, unlike in the case of refusal of the relief, and that the grant would lead to irreparable loss and damage to the interest of the State as well as public interest, seems to have been completely lost sight of notwithstanding the serious violations of the conditions and terms of the contract between parties.

The learned Judges of the Division Bench of the High Court ought to have seen that there can be no legal impediment for the Department to make preparations ahead of the period of expiry of the one year contract given in favour of the plaintiff to facilitate the entrustment of the task of collecting the toll in question for the period subsequent thereto, to a newly selected contractor at competitive rates. The Division Bench further overlooked the vital legal proposition that the Memorandum dated 11.3.1998 of the Joint Secretary cannot, per se, have the legal consequence of bringing into existence an extended period of contract and that too for 30 years though said to be renewable periodically every three years. On a proper consideration of the Memorandum dated 11.3.1998, which was also stated to have been never communicated to the plaintiff, and the subsequent Memorandum dated 24.8.1999 of the very Joint Secretary, who issued the earlier Memo, that Memorandum dated 11.3.1998 contained only certain proposals and not any final orders of extension or renewal of the contract as assumed in the judgment under challenge. Paragraph 15 of the Memorandum dated 11.3.1998, which has been relied upon as the basis for claiming an extended period of contact, itself has been misconstrued out of context though by itself, it cannot have the effect of bringing into existence such an extended term of contract to warrant or justify the grant of the directions of the nature in the present case. Even assuming for consideration without accepting that paragraph 15 of the Memorandum dated 11.3.1998 had any effect, it can by no stretch

of imagination be construed to bring into existence ipso facto an extended period of contract beyond the one year period for which alone the contract had been given to the plaintiff in this case. An order passed but retained in file without being communicated to the plaintiff can have no force or authority whatsoever and the same has no valid existence in the eye of law or claim to have come into operation and effect. No reliance can be placed on the same to even assert a claim based on its contents. If its utility depended upon a decision to be taken on the performance of the plaintiff by the Competent Authority, neither the authority could be compelled to take a decision nor any concrete rights could be said to have been acquired by the plaintiff, to warrant the grant of the type of directions given in this case. It is really surprising that the discretionary power to grant injunction, be it of prohibitory or mandatory nature, has been availed of to bring into existence and force upon the State a new contract, which could never have been the intention of the State itself.

The relevant and vital facts apparent on record and the stark realities of the case go to show that the plaintiff has been entrusted with the contract for collecting the toll in question only for a period of one year from 13.12.1997 and that as per the provisions of law noticed supra, such collection by the Executing Agency departmentally or through franchisee as in this case, is to be for and on behalf of the Central Government and the amounts have to be remitted to the Central Government, which only is the beneficiary of such collection. When the statutory rules provided for collection through franchisee and the selection of the contractor only through public auction under the instructions for specific periods as the Central Government may issue, at competitive rates and in this case such grant was made on behalf of the Central Government for one year initially, there can be no extension granted in law by the Executing Agency without the prior instructions or approval of the Central Government. It would be futile for anyone to claim or for Courts to countenance any claim that without reference to the Central Government on whose behalf the State Government was acting as Executing Agency could under the pretext of a proposed extension proceed to extend the same for 30 years with a provision for periodical review of three years unmindful of the financial interest of the Central Government and the ultimate loss that may result to the public exchequer. The mere fact that if departmentally the collection is made by the Executing Agency it can be in perpetuity in the sense that as long as the Executing Agency is continuing to be the Agency, a person like the plaintiff, who has been entrusted for the task only for one year, cannot seek umbrage under clause (11) of the Rule. Unlike contracts entered into in exercise of the executive power of the State wherein terms can be stipulated and settled at the will and pleasure of the State, a franchise or contract envisaged for the collection of toll in question is limited and circumscribed by the provisions of the Fee Collection Rules, 1997 and what could be only the subject-matter of an auction, selection and grant on the basis of competitive rates of the bid cannot be the subject of whim and fancy of any authority, particularly when public interest and public exchequer of the Central Government is and will be at stake. Thus, without the concurrence of the Central Government, which also has to be necessarily in conformity with the statutory rules governing the same, there cannot be any extension granted in favour of the plaintiff and the High Court could not have directed the doing of a thing not permissible in or contrary to the statutory rules.

It is now an indisputable fact on record that the Central Government has issued a statutory Notification dated 4.2.1999 published in the Government of India Gazette of even date, in exercise of its powers under Section 11 of NHAI Act entrusting the Highways including the stretches in question, to the National Highways Authority of India and that with the said Notification, the

status of the State Government as Executing Agency has come to an end, though the plaintiff, first respondent herein, seeks to place reliance upon Section 12(1)(a) of the National Highways Act. In our view, the said provision will have no relevance or application to the case on hand. The transitional provision in the form of transfer of assets and liabilities of the Central Government to the authority, would take in only subsisting rights already acquired or obligations and liabilities incurred as on the date of publication of the Notification and that too in accordance with law and not in derogation of law. So far as the case on hand is concerned, the plaintiff could not legitimately claim to have acquired any rights by virtue of the Memorandum dated 11.3.1998 which has no force or sanctity in law and the Central Government or the NHAI cannot be said to have incurred any obligation or liability thereby, stepping into the shoes of the State Government which acted as an Executing Agency for the period commencing from 4.2.1999. We are unable to appreciate as to how the Division Bench, in the teeth of concrete and clinching material that from the inception of the contract the first respondent plaintiff had been playing foul and has been devising methods and ways to avoid his responsibilities and has been shown to be guilty of serious lapses in depositing regularly the amounts due, could have been given any protection by issuing directions of the nature under challenge in these appeals. The obvious impracticalities involved in the appointment of an Advocate-Receiver to supervise such a stupendous task of the nature in question seems to have also been overlooked and escaped the attention of the Court and no serious thought seems to have been also bestowed upon the materials brought to its notice even about the inability of the Advocate-Receiver to effectively function to safeguard the financial interest of the public exchequer.

For the reasons stated above, we are of the view that the judgments under challenge have not only the effect of conferring an undue, undeserved and unjustified benefits and rights on the plaintiff, first respondent herein, but also have the consequence of doing grave injustice to public interest and great loss to public Revenue. We are also of the view that not only the order of the Division Bench dated 20.11.2000 is liable to be set aside, but consequential direction should be issued to retrieve the situation before any further irreparable damage is caused to the public exchequer. Consequently, we order :-

1. The order dated 20.11.2000 of the Division Bench is hereby set aside and that of the learned Trial Judge is restored.

2. The Advocate-Receiver appointed by the High Court shall stand discharged forthwith and he shall cease to function as such from the day the authorities of the NHAI directly assume supervision and control of the Highway and the collection of toll in question, under intimation to the Receiver.

3. The authorities of the NHAI, who has jurisdiction and control over the stretch of the Highways pursuant to the notification, are hereby authorized and permitted to assume the right to collect and regulate/control the collection of toll by serving a letter to that extent on the Advocate-Receiver and on such service, the Advocate-Receiver shall stand discharged for all purposes, except for rendering accounts to the collections already made to the authorities of the NHAI. If there is any dispute in this regard, it shall be worked out by obtaining appropriate directions from the Calcutta High Court, which appointed the Receiver.

Consequently, the appeals shall stand allowed on the above terms. No costs.

JUDIS