

JUDGMENT SHEET
ISLAMABAD HIGH COURT, ISLAMABAD,
JUDICIAL DEPARTMENT

W.P.No.331-2019

M/s Tulip Project, Riverside

vs.

National Highway Authority.

Petitioner by: Malik Qamar Afzal, Advocate.
Ch. Muhammad Sharif, representative of petitioner.

Respondents by: Ms. Shahina Akbar, Advocate for N.H.A.
Ahmed Hassan, Deputy Director (Rev.Row),
Asad Rehman, A.D (Legal), NHA.

Dates of Hearings: 08.04.2022 and 12.05.2022.

MOHSIN AKHTAR KAYANI, J: Through the instant writ petition, the petitioner is aggrieved with the demand of payment raised by the NHA Authorities regarding different businesses being conducted within Petitioner Company's land called as M/s Tulip Project.

2. Learned counsel for the petitioner submits that petitioner is a corporate entity incorporated as M/s Tulip Riverside Hotel project under the relevant laws through Chaudhary Muhammad Sharif, Chief Executive Officer of the said business; that petitioner company has developed approximately 40 Kanals of land known as M/s Tulip Project on Jhelum near carriageway (G.T Road) has applied before respondent NHA for right of way, whereby respondent NHA Authorities have granted NOC for three approaches through exit points on the GT Road; that petitioner added petrol filling station alongwith CNG filling stations were substituted by Wedding Hall Marquee and different amenities, including McDonalds, OTP and other proposed brands; that no access/exit or right of way is required due to his enhancement of business, the NHA without any justiciable reason increased the rental charges and demanded the additional rent, which has made basis of the instant writ petition, whereby letter dated 10th

January, 2019 was issued by the N.H.A with the subject *“Regularization of additional amenities established within the premises of Tulip Hotel located at km 1429+400, River Side G.T Road, N-5, Sara-e-Alamgir Jhelum*, in which NOC fee and five years rental charges has been claimed qua Tulip Marquee, Saleem Fabrics, OPTP and the total amount calculated by the respondent NHA was Rs. 13,790,000/-; that the petitioner immediately responded the said authorized letter with the stance that he is not claiming any further access or exist on the N-5 GT Road, therefore, such exorbitant rates cannot be claimed for additional amenities.

3. On the other hand, NHA Authorities have taken a categorical stance that additional amenities constructed in the already running business place are in violation of Section 10(2)(ix), of NHA Act, 1991 read with Rule 3(i) (ii) (iii) (iv) of the National Highways And Strategic Roads (Control) Rules, 1998 as amended in 2002, which discloses that no one is allowed to create or construct or maintain any structure without permission of NHA, which falls within the building line of the Right of Way.

4. Arguments heard and record perused.

5. The primary arguments rendered by the respondent NHA is the undertaking given by the petitioner while obtaining the initial NOC that “we will not construct nor cause to be constructed by building structure within 220 feet from the Centre Line of the nearest carriageway”. Similarly NHA have also highlighted in their 326th Executive Board Meeting dated 14.11.2019, whereby rates have been revised for other amenities and a complete total against the measurement of land starting from 01 acre to 100 acre above was enlisted with specific rates of NOC, one time refundable security in the entire rental for structured and non structured amenities, which has been used by the respondent NHA for calculation of amount against the petitioner.

6. This Court has attended the proposition with reference to applicable law i.e. NHA Act, 1991, whereby right of way has been explained in Section 2(j) of the Act, which means the land acquired for the purpose of construction of a National Highway or any other road assigned to the Authority.

7. There is no denial that NHA is empowered with the functions to plan, promote, organize and implement programs for construction, development operation, repairs and maintenance of National Highways and Strategic Roads, whereas the Authority has been established in terms of Section 3 of the Act. The general instructions under spheres are visible in 326th Executive Board Meeting comprising of 9 members, including the Chairman, NHA with 08 members including the ex-officio members (officials of Inspector General of Police), NH&MP, Finance and Planning Division, Ministry of Commerce representing the Federal Government in the decision making process.

8. This Court has also attended Chapter-3 of the Act, whereby powers and duties have been extended to the Authority, the Authority may take such measures and exercise such powers as it considers necessary or expedient for carrying out the purposes of this Act as well as to advise the Federal Government on matters relating to National Highways and Strategic Road; undertake any work specified in Sub-sections (1) and (2) of Section-11; incur expenditure on works specified in clause; enter into and perform all such contracts as it may consider necessary and the most important clause is (vii) of sub section 2 of Section 10 of the Act, whereby the Authority is to levy, collect or cause to be collected tolls on National Highways, Strategic Roads and such other roads as may be entrusted to it and bridges thereon.

9. In the light of above referred provisions, the respondent side has been confronted to justify as to whether the NHA can levy any fee, tax or other charges within the four corners of NHA Act, 1991, the respondent side has drawn the attention of this Court towards the provision referred above and

claims that NHA Act also empowers the Federal Government to make rules for carrying out the purposes of this Act in terms of Section 31 and NHA itself can make regulations, not inconsistent with the rules, on all matters for which regulations are expedient in terms of Section 32 of the Act, hence attention has been drawn towards National Highways and Strategic Roads (Control) Rules, 1998 amended in 2002 with the claim that Section 3 has imposed Restriction on Encroachment and Ribbon Development, whereby no person shall without the consent, in writing, of the Authority cannot erect any, building, boundary wall and structure whether temporary or permanent, moveable or immovable within 70 meters from central line of right of way from National Highway and, as such, the petitioner has raised construction within the said limit without seeking any permission from the respondent Authority.

10. In order to resolve the controversy, this Court has gone through the N.H.A Act, 1991, which clearly spells out that the Act only empowers the Authority to levy, collect or cause to be collected tolls on National Highways, strategic roads and such other roads as may be entrusted to it and bridges thereon. Similarly, license facilities on roads under its control on such terms as it deems fit, is also available to NHA to charge certain amounts. However, in terms of Article 77 of the Constitution of Islamic Republic of Pakistan, 1973 *"No tax shall be levied for the purposes of the Federation except by or under the authority of Act of Parliament"*, which is the constitutional mandate, therefore, one thing is clear that unless the act of parliament was issued for the levy of any tax, then the same could be given a legitimate effect, failing which, no Authority of Pakistan can impose tax, hence NHA Act, 1991 only permits the limited purposes of levy collect or cause to be collected tolls and license facilities, therefore, the scope of parent statutes could not be enhanced beyond certain limit under the garb of delegated legislation i.e. rules and regulations, which aspect has been widely acknowledged in case law reported as 2022 PTD 222 (Attock Petroleum Limited

(APL) vs. National Highway Authority), PLD 2020 SC 1 (Jurists Foundation through Chairman vs. Federal Government through Secretary, Ministry of Defence), PLD 1983 SC 358 (Zaibtun Textile Mills LTD. vs. C.B.R).

11. This Court is mindful of the fact that NHA Authority is to consider necessary or expedient for carrying out the purposes of this Act, the primary purpose referred in the Act, is to plan, promote, organize and implement programs for construction, development, operation, repairs and maintenance of National Highways and Strategic Roads, therefore, the basic issue, which comes into limelight in the National Highways and strategic roads is the right of way, which has been explained in Section 2(j), which means the land acquired for the purpose of construction of a National Highway or any other road assigned to the Authority. However, Act lays no restriction upon the use of private land by an individual nor the right of way has been explained in the definition clause in a manner that every person should take permission to enter into National Highway or any other road assigned to the Authority, except that the rules governing the National Highways and Strategic Roads (Control), have fixed the construction limit from the centre line of the National Highway. In this case, NOC has already been granted to the petitioner, who has raised his construction with his own private property situated in the centre of South bound and North bound Highway, N-5 near Jhelum and achieved three entries and accesses on both sides, therefore, at this stage, it is not the case of both parties that any further right of way is required in the same land of the petitioner, rather NHA has imposed a fee by exercising its Authority that new construction has been raised without their permission, as such NHA has agreed to grant such permission subject to payment referred in the impugned letter, fixed under the garb of decision of Executive Board, NHA, but on its minute scanning, NHA Authorities have failed to justify that they can impose such charges on the basis of Consumer Price Index (CPI), which has been considered by the NHA in its

326th Executive Board meeting held on 17th October, 2019 and it was proposed by the NHA that existing rates were for different services, has to rationalize on the basis of Consumer Price Index (CPI), which means a quantitative estimate of the rate at which the decline in purchasing power occur can be reflected in the increase of an average price level of a basket of selected goods and services in an economy over some period of time. We may also call the CPI, the rise in the general level of prices, often expressed as a percentage, therefore, the Consumer Price Index (CPI) is a measure for use of average changes in prices over time that consumer pay for a basket of goods and services over a time. It also relates to the inflation. Consumer Price Index (CPI) is an economic indicator and it is most widely used measure of inflation and, for which the CPI gives the government, businesses, and citizens an idea about price changes in the economy and can act as a guide in order to make informed decisions about the economy. Usually, the Department of Statistics conducts number of surveys to identify a weighted basket of goods and services that are representatives of urban consumers spending and after the completion of complete services, the prices are then compared to a base year cost, and the difference, expressed as a percent increase or decrease, is the CPI.

12. In order to understand the proposition in a proper manner, it is necessary to reproduce the decision of the Board made in 326th Executive Board Meeting, dated 17.10.2019, referred at Para 5.19, which is as under:

5.19. After detailed deliberations as above, the NHA Executive Board approved the following:

- a. Existing rates for filling and CNG stations (based on traffic volume) continued to be implemented till June 20, 2020, the Board has also raised the rates with effect from July 01, 2020 **CPI based proposed / revised rates** be submitted for consideration / approval.*
- b. Rates of other amenities (Housing Societies, Industries, Oil & Gas related amenities, Structured & Non-structured amenities) based on total land /*

area of the amenity are revised / rationalized w.e.f. issuance of confirmed minutes of the Board meeting.

c. **To overcome the inflationary effect, NOC fee and approach rentals will be revised after every three (03) years as per yearly CPI rates of preceding years.**

d. *The outstanding payments of petitioners in W.P. No.17576 of 2018, 8263/2019, 8067/2019 & 9826/2019 installments are allowed to the petitioners, along with other NOC holders of amenities, where payments are outstanding as arrears, as per following proposal:*

| <i>Outstanding / Default amount</i> | <i>Proposed Installment</i> | <i>Cut off date</i> |
|--------------------------------------|-----------------------------|---------------------|
| <i>Upto Rs.0.5 million</i> | <i>02 quarterly</i> | <i>June-2020</i> |
| <i>Between Rs.0.5 to 1.0 million</i> | <i>04 quarterly</i> | <i>Dec-2020</i> |
| <i>Between Rs.1.0 to 1.5 million</i> | <i>06 quarterly</i> | <i>June-2021</i> |
| <i>Between Rs.1.5 to 2.0 million</i> | <i>08 quarterly</i> | <i>Dec-2021</i> |
| <i>Above 2.0 million</i> | <i>10 quarterly</i> | <i>June-2022</i> |

e. *After revision, these rates will be advertised widely circulated newspapers for information of general public along with its posting on NHA's website.*

f. *Rates / fee for other amenities on the basis of land / area Annex C-1 to C-5 approved for implementation with immediate effect.*

13. The Executive Board by applying, Consumer Price Index (CPI) in this case has not considered that it is related to the consumers for a particular area with reference to price indexation from the previous years and in this particular case, the CPI formula should have been applied at all must be based upon the survey of articles, products or services, which have been used within Tulip Project, though it has nothing to do with the service delivery provided by NHA, except that they can maintain and construct the roads, therefore, NHA must provide a proportionate service. Though the NHA Authority has taken the stance that they are providing the roads network in entire Pakistan without any grant and funds from the Federal Government and generate the same from toll levy and rentals on all roads under their Act. It is next contended that NHA utilize major portion of their funds in construction of roads in province of Balochistan and they are only earning 1% of the total income from province of Balochistan on the basis of

toll but this argument has nothing to do with the enhancement of rates of rental to the extent of petitioner. However, when NOC has already been granted to the petitioner, no further charges could be proposed, especially when there are no reasons to enhance any of the imposed charges, levy. The mode and manner, in which Executive Board has conducted themselves while considering the CPI and other factors, which are made basis for revision of rates of rentals, are not understandable as the CPI only relates to the rates paid by the consumer and not by the Departments or Authorities, like NHA. The right of way once obtained by the petitioner for his private property from NHA after payment of notified charges, then there is no further cost or recurring cost is visible on the part of NHA to claim revision of rates in the same area. However, NHA are justified to levy, charges, fee, if any other construction has been raised within the prescribed limit, whereas in this case it seems that the construction, which is beyond the building line has been regularized by the Authorities, which shows that NHA themselves are interested to condone every construction subject to payment.

14. This Court has also attended the proposition with reference to the research conducted by the International Labour Office and International Monetary Fund with the help of United Nation / World Bank in their published report in the year 1989 Consumer Price Indices: An ILO manual, whereby Consumer Price Index (CPI) has been explained in the following manner:

The Consumer Price Index

The CPI is an index that measures the rate at which the prices of consumption goods and services are changing from one period to another. The prices are collected from shops or other retail outlets. The usual method of calculation is to take an average of the period-to-period price changes for the different products, using as weights the average amounts that households spend on them. CPIs are official statistics that are usually produced by NSOs, ministries of labor, or central banks. They are published as quickly as possible, generally within four weeks after the reference period.

The Manual is intended for the benefit of agencies that compile CPIs, as well as users of CPI data. It explains in some detail the methods that are recommended for use to calculate a CPI. A separate companion publication, Consumer Price Index Theory, explains the underlying economic and statistical theory on which the methods are based.

A CPI is a measure of price changes of the goods and services purchased by households in their role as consumers. It is also widely used as a proxy measure of inflation for the economy as a whole, partly because of the frequency and timeliness with which it is produced. It has become a key statistic for purposes of economic policymaking, especially monetary policy. It is often specified in legislation and in a wide variety of contracts as the appropriate measure for adjusting payments (such as wages, rents, interest, social security, other benefits, and pensions) for the effects of inflation. It can therefore have substantial and wide-ranging financial implications for governments and businesses, as well as for households.

15. No doubt the Executive Board in their meeting used CPI as a base line for assessment of rates of different structured and non-structured amenities, including the case of present petitioner. It is not denied by the petitioner that he is using the approach road of NHA within the right of way, therefore, he is liable to pay the rental charges under the provision of the National Highways and Strategic Roads (Control) Rules, 1998 as amended in 2002 and SoP for Preservation and Commercial use of Right of Way-2002. However, the ratio of revision of rates based upon CPI concept by the NHA in their Executive Board decision is not justiciable as there was no corresponding services for petitioner within his own property, except that the NHA can grant permission for any new business, constructed within the original land of the petitioner, in such scenario, the element of *quid pro quo* on the part of NHA is not visible, which could only be applied in cases where charge was payable for rendering a specific service or extending a specific privilege which the payers could avail subject to the conditions that may be attached to it as held in PLD 2020 SC 641 (Khurshid Soap and Chemical Industries (Pvt.) Ltd. vs. Federation of Pakistan through Ministry

of Petroleum and Natural Resources), hence the concept of levy/rents available to NHA is different for enhancement on the basis of CPI, which could only be applicable on the rule of *quid pro quo*, if exist on different factors.

16. There is no denial that the specific purpose for imposition of levy of initial charges upon the petitioner was already achieved, when NOC has been extended to them for six right of ways, entry and exit in the centre of South bound and North bound Highway N-5 near Jhelum, therefore, any other change within the property of petitioner has nothing to do with the respondent NHA as no extra cost was involved to the extent of respondent NHA nor the original purpose of NOC was defeated.

17. This Court is mindful of the fact that the respondent Authority is performing their duty under the Act by deciding the policy issue in their Executive Board meeting, but the NHA has gone beyond their legal mandate and parent statute, which is silent qua the calculation of levy through any specific formula under the rules, which are made in terms of powers conferred under Section 31 of the NHA Act, have restricted the concept of distance in terms of Section 3 from central line of right of way as no other factor has been discussed in the rules neither in the parent statute like the concept of CPI, hence very foundation of the respondent against the exorbitant amount claimed under the head of fee, rental charges, or taxes based upon the formula is void from its inception. The respondent authority has to draw certain lines to initiate actions based upon reasons, which are justiciable and on the principle of fairness, proportionality as well as on the ground of *quid pro quo*, which are not visible.

18. However, during the pendency of the instant writ petition, the parties have time and again visited the place and prepared the complete report and even the petitioner is ready to pay the amount on different concept with different rates proportionate to the services, but no amicable result has been achieved, therefore, in such like situation the law has to prevail. On the minute scanning of

the provisions of Section 10(2)(viii)(ix), the exercise of powers and duties of the authority to carry out the purpose of the Act have been explained in the following manner:

(viii) License facilities on roads under its control on such terms as it deems fit;

(ix) Determine a building line between which and the ROW it shall not be lawful without the consent of the Authority to construct or maintain any structure or make any excavation;

19. Similarly, in terms of Section 31 of NHA Act, the Federal Government has notified the National Highways and Strategic Roads (Control) Rules, 1998, whereas Section 32 of the Act empowers the authority to make regulations, which are expedient on all matters but not inconsistent with the rules, though the respondent side has not been able to demonstrate that any such regulations have been notified, however they argued their case on the basis of SoP, which has no legal backing except that the same may be considered as policy decision based upon non-structured manner. This Court confronted the learned counsel for respondent Authority to explain the right of way, whereby Section 2(j) of the Act has been referred in the following manner:

“Right of Way” (ROW) means the land acquired for the purpose of construction of a National Highway or any other road assigned to the Authority;

20. By considering the definition referred above there is no ambiguity or absurdity in the definition which is only meant for acquisition of land for the purpose of construction of national highway or any road assigned to the Authority. This aspect demonstrates that it applies to a private land if same is acquired for the purpose defined above, otherwise the NHA might not exercise its jurisdiction, even this definition is not comprehensive enough to cover those properties, which might be required to the NHA, but they have not acquired the same, as such, the definition provided in this Act will not affect the legal and

vested right of an individual owning a piece of land near the national highways or the motorways regulated under the NHA Act, 1991, even their rights are protected through constitutional guarantee in terms of Article 23 of the Constitution of the Islamic Republic of Pakistan, 1973 in the manner that, *“every citizen shall have the right to acquire, hold and dispose of property in any part of Pakistan, subject to the Constitution and any reasonable restrictions imposed by law in the public interest.”* Similarly, in terms of Article 24 of the Constitution, *“no person shall be compulsorily deprived of his property save in accordance with law.”* Even a restriction has been imposed in sub Article (2) of Article 24 of the Constitution in the manner that, *“no property shall be compulsorily acquired or taken possession of save for a public purpose, and save by the authority of law which provides for compensation therefore and either fixes the amount of compensation or specifies the principles on and the manner in which compensation is to be determined and given.”* No doubt, any law providing acquisition of any class of property for the purpose of education, medical aid, housing, public facilities and services, such as roads, is exempted and Article 24 of the Constitution shall not affect the validity of such action, but one thing is clear that the State has provided the mechanism to protect the rights of individuals / citizens in the Constitution and at the same time, empowers the State authorities to exercise their right for public welfare.

21. At last, this Court comes to an irresistible conclusion that when the parent statute is silent qua any formula or concept of use of private land, except by way of acquisition for the purpose to construct highways or motorways, as the case may be, no other concept is permitted to be applied by way of decision passed by NHA Executive Board to regulate any property of an individual, which has no nexus with the claim of NHA nor the NHA is providing any service in that private land, except the extension of right of way in the ribbon area, which was already given by the NHA to the petitioner in this case much prior to the present claim of exorbitant amount. The rules to regulate the affairs of structured and

non-structured amenities in terms of the National Highways and Strategic Roads (Control) Rules, 1998 are also not exhaustive or permitted to proceed beyond the parent statute to impose such exorbitant amount without any fair and impartial formula of levy, rental, charges, even the NHA authorities have not placed any regulations to settle these questions, rather they are exercising their authority under discretionary domain without any backing of law. This Court has confronted the learned counsel for NHA and its officials to justify the calculation referred in their Executive Board meeting from any regulations, rules, or provision of law, but they are unable to satisfy this Court with the backing of law. In such scenario, the principle of fairness and proportionality as well as the concept of *quid pro quo* has been violated. Even the concept of CPI has wrongly been applied when the NHA authorities are not providing any service to the petitioners, especially when the right of way was already granted in this case.

22. This Court has also considered the letter dated 10.01.2019, whereby it has clearly been established that NHA authorities are claiming the NOC fee along with rentals for five years against each new amenity constructed by the petitioner or on his behalf in his own private property, which have been enlisted in letter dated 10.01.2019, as such, concept of rentals could only be considered in those cases where the land belongs to NHA or they have invested in the raising of those businesses, which is not the case in hand, even the concept of rent is only visible in the rent laws for the use of land/property, though in this case it is not denied by the NHA authorities that the land belongs to petitioner, hence, any rent claimed by the NHA beyond building line is not legally justiciable, though the petitioner partially agrees to pay the rentals but not on these exorbitant rates, even disputes the imposition of heavy NOC fee of Rs.1,750,000/- on new businesses. Para-3 of letter dated 10.01.2019 reveals the intention of NHA authorities, who clearly expressed that, "demand was raised by NHA ROW Section", though it has already been established on record that right of way was

given by the NHA authorities much prior to this letter to the petitioner, as such, no new right of way was extended or given to the petitioner for these seven new businesses / entities. In such scenario, the very foundation of claim raised by the NHA authorities is defective and not based upon reasonable / justiciable grounds.

23. In view of above, the demand raised by the respondent NHA is not legally valid as the alleged construction or new businesses in already constructed building structure or non-structured concept is beyond building line though in this case the NHA Authorities have conceded this fact that the building line concept under the law has been developed to provide safety and security to the pedestrian and people who are within that area from any untoward incident/accident from the highways and for no other purpose. There is no denial that Sub-rule 2 of Rule 6 of National Highways and Strategic Roads (Control) Rules, 1998 amended in 2002 prohibit to construct or maintain any structure or to make any excavation between building line and right of way, however, the Rule 8 provides a power to the Authority subject to due consideration to highway safety and convenience of road user and if satisfied grants the permission to construct a means of access to, or from, the highway or to construct the building, structure and other amenities within building line subject to such conditions as it may deem fit to impose on payment of such fee as it may fix, such discretion to NHA Authority for grant of permission to raise construction or amenities within the building line is based upon single criteria i.e. highway safety and convenience of road user, which is already in favour of present petitioner in this case as no adverse report or refusal is available on record to the extent of new amenities raised by the petitioner within his own land, therefore, the instant writ petition is hereby ACCEPTED and the actions/demand for additional amenities claimed by the NHA authorities are SET ASIDE including the decision passed by NHA authorities by applying CPI

and calculation of any amount, in such type of facilities under the garb of amenities access, road network or NOC fee or approach rentals, with the observation that NHA authorities shall first draft their regulations in accordance with law with clear mandate by referring the formula applicable while comparing the international best practices based upon proportionality and fairness and then proceed accordingly within the period of next 06 months under intimation to this Court. However till then the petitioner who is running the business in his own private land for seven new amenities in addition to his original NOC is directed to submit a bank guarantee of Rs.5 million with NHA, which will be settled after the new regulations.

(MOHSIN AKHTAR KAYANI)
JUDGE

Announced in open Court on: 20.05.2022.

JUDGE

RAMZAN

APPROVED FOR REPORTING.