

VERDICTUM.IN

IN THE HIGH COURT OF KERALA AT ERNAKULAM
PRESENT
THE HONOURABLE MR. JUSTICE DEVAN RAMACHANDRAN

Monday, the 8th day of August 2022 / 17th Sravana, 1944
WP(C) NO. 32680 OF 2008

PETITIONERS:

1. C.P.AJITHKUMAR, PROPRIETOR, SUBURBAN TRAVELS, MAMANGALAM, COCHIN-24, (PRESIDENT, TRAVEL, OPERATORS ASSOCIATION OF KERALA).
2. KERALA MERCHANTS UNION (FORMERLY ERNAKULAM MERCHANTS UNION), MERCHANTS UNION BUILDING, MERCHANTS UNION ROAD, COCHIN-11, REPRESENTED BY ITS GENERAL SECRETARY.

BY ADVOCATE SRI. TOM. K. THOMAS

RESPONDENTS:

1. STATE OF KERALA, REPRESENTED BY SECRETARY TO GOVERNMENT, PUBLIC WORKS DEPARTMENT, (ROADS), GOVT.SECRETARIAT, TRIVANDRUM.
2. THE SECRETARY TO GOVERNMENT, FINANCE DEPARTMENT, GOVT.SECRETARIAT, TRIVANDRUM.
3. THE CHIEF ENGINEER, PUBLIC WORKS DEPARTMENT (ROADS), TRIVANDRUM.
4. CORPORATION OF COCHIN, REPRESENTED BY ITS SECRETARY, BOAT JETTY, ERNAKULAM.
5. GREATER COCHIN DEVELOPMENT AUTHORITY, KADAVANTHARA, ERNAKULAM, COCHIN-20, REPRESENTED BY ITS SECRETARY.

ADDITIONAL R6 AND R7 IMPEADED

6. THE CHIEF ENGINEER, (NATIONAL HIGHWAYS), TRIVANDRUM-695033.
7. THE REGIONAL OFFICER, NATIONAL HIGHWAY AUTHORITY OF INDIA, OFFICE OF THE CHIEF ENGINEER, (NATIONAL HIGHWAYS), TRIVANDRUM-695033. (ADDDL. R6 AND R7 ARE IMPEADED AS PER ORDER DATED 28.11.2008 IA.15338/2008).

ADDITIONAL

R8 AND R9 IMPEADED

8. THE PROJECT DIRECTOR, PROJECT IMPLEMENTATION UNIT COCHIN, NATIONAL HIGHWAY AUTHORITY OF INDIA, MANGALYA VAIDHYA MADOM, VYTIKA, ERNAKULAM.
9. THE PROJECT DIRECTOR, PROJECT IMPLEMENTATION UNIT PALAKKAD, NATIONAL HIGHWAY AUTHORITY OF INDIA, ARMUGHAM COLONY, CHANDRA NAGAR, PALAKKAD. (ADDL.R8 AND R9 ARE IMPEADED AS PER ORDER DATED 17.12.2008 IN I.A.16206/2008 IN WP(C).32680/2008)

ADDITIONAL R10 IMPEADED

10. UNION OF INDIA, REP. BY SECRETARY TO GOVERNMENT, MINISTRY OF SURFACE TRANSPORT, CENTRAL SECRETARIAT, NEW DELHI. (ADDL.R10 IS IMPEADED AS PER ORDER 30.03.2009 DATED IN I.A.4647/2009 IN WP(C) 32680/2008.)

ADDITIONAL R11 IMPEADED

11. CENTRE FOR CONSUMER EDUCATION, MARKET ROAD, PALAI, REPRESENTED BY ITS MANAGING TRUSTEE DEJO KAPPAN, AGED 54, S/O.LATE K.C.JOSEPH, RESIDING AT 17 A, PRESIDENCY HOMES, KALOOR, ERNAKULAM. (ADDL.R11 IS IMPEADED AS PER ORDER DATED 12.10.2011 IN IA.15616/2011.)

ADDITIONAL R12 AND R13 IMPEADED

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12. KERALA GOVERNMENT CONTRACTORS ASSOCIATION, HEAD OFFICE SREEKUMAR BUILDING, IRON BRIDGES.P.O., ALAPPUZHA-688001, REPRESENTED BY ITS PRESIDENT VARGHESE KANNAMPALLY-688001
13. P.R.ASHOKUMAR, RAMAPRIYA, PARAYAKADU.P.O., CHERTHALA, ALAPPUZHA DISTRICT-688001. (ADDL.R12 AND R13 ARE IMPEADED AS PER ORDER DATED 18.10.2011 IN I.A.15475/2011.)
ADDITIONAL R14 IMPEADED
14. THE DISTRICT COLLECTOR, ERNAKULAM. (IS SUO MOTU IMPEADED AS ADDL. R14 AS PER ORDER DATED 11.10.2019 IN WPC 32680/2008.)
ADDITIONAL R15 SUO MOTU IMPEADED
15. THE PROJECT DIRECTOR, NATIONAL HIGHWAY AUTHORITY OF INDIA, ERNAKULAM IS SUO MOTU IMPEADED AS ADDL. R15 AS PER ORDER DATED 17.12.2021 IN WP(C) 32680/2008.
ADDITIONAL R16 IMPEADED
16. THE COMMISSIONER OF POLICE, KOCHI. (IS SUO MOTU IMPEADED AS ADDL.R16 AS PER ORDER DATED 14-01-2022 IN WP(C) 32680/2008.)
ADDITIONAL R17 SUO MOTU IMPEADED
17. COCHIN SMART MISSION LIMITED, 4TH FLOOR, JLN STADIUM METRO STATION, KALOOR, KOCHI- 682017 (IS SUO MOTU IMPEADED AS ADDITIONAL R17 AS PER ORDER DATED 01.08.2022 IN WP(C) 32680/2008.)
ADDITIONAL R18 SUO MOTU IMPEADED
18. REGIONAL OFFICER, NHAI, THIRUVANANTHAPURAM
(IS SUO MOTU IMPEADED AS ADDITIONAL R18 AS PER ORDER DATED 08/08/2022 IN WP(C) 32680/2008.)

BY SRI. K.V.MANOJ KUMAR, SENIOR GOVERNMENT PLEADER FOR R1 TO R3, R14 AND R16.

BY SRI. JANARDHANA SHENOY, STANDING COUNSEL FOR R4.

BY SRI. M.K.THANKAPPAN, ADVOCATE FOR R5.

BY SRI. SEBASTIAN THOMAS, ADVOCATE FOR R6 AND R7.

BY SRI. THOMAS ANTONY, ADVOCATE FOR R8 AND R9.

BY SRI. S. KRISHNAMOORTHY, CENTRAL GOVERNMENT COUNSEL FOR R10.

BY SRI. JOHNSON MANAYANI, ADVOCATE FOR R11.

BY SRI. JOMY GEORGE, ADVOCATE FOR R12 AND R13.

BY SMT. M.U.VIJAYALAKSHMI, STANDING COUNSEL FOR CSML, ADDL. R17.

BY SRI. BIDAN CHANDRAN, STANDING COUNSEL FOR ADDL. R18.

BY SRI. MATHEWS K. PHILIP, STANDING COUNSEL FOR NHAI

BY M/S. S. KRISHNA, P.DEEPAK AND VINOD BHAT, AMICUS CURIAE

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This Writ Petition (Civil) having coming up for orders on 08.08.2022, and upon perusing this court's judgment dated 18.10.2019 and order dated 01.08.2022, the Court on the same day passed the following.

P.T.0



Devan Ramachandran, J.

Writ Petition(C) Nos.32680 of 2008 & 34310 of 2019

Dated this the 08th day of August, 2022

ORDER

Though these matters had been earlier adjourned to 12.08.2022, I have listed it at 1.45 today at the request of the learned Amicus Curiae - Sri.Vinod Bhat. He brought to the notice of this Court that a person has died, falling into a pothole in the National Highway at Athani. He further brought to my notice that some stretches of the NH, particularly at Chalakkudy, Kodungalloor, Orumanayoor etc. are personally known to him to be having huge craters and potholes. He added that he has no information whether the other portions of the NH across the State are in such state or otherwise.

2. The death of a person certainly shocks this Court; and in fact, couple of years ago it was this that spurred the various directions earlier issued.

3. Sri.Bidan Chandran - learned Standing Counsel for the National Highway Authority of India (NHAI), conceded that there were some problems with the stretch in question. Pertinently, he then

submitted that the stretch in question is part of the Highway covered under a “Build-Operate-Transfer” agreement with the Concessionaire; and that they are responsible for its upkeep, maintenance as also its restoration. He added that though he does not have specific information as to what really went wrong, steps have already been taken to repair every stretch of the National Highway across the State, to ensure that such instances do not recur. He explained that, for this purpose, the work is entrusted to new contractors, at the risk and cost of the earlier ones and he went to the extent of saying that the agreements in question specifically enumerate the responsibilities of such Concessionaires, including to pay damages and compensation in the event of accidents, injuries and death.

4. Sri.K.V.Manoj Kumar - learned Senior Government Pleader, submitted that steps have already been taken to cause an enquiry into the accident and that necessary criminal investigation is underway. He added that the Concessionaire of the NHAI, for the particular stretch, has been arrayed as an accused and that they will be dealt with as per law.

5. Sri.Vinod Bhat - learned Amicus Curiae, submitted that he met the family of the victim - who is survived his wife and two young children, one of whom is studying in College, while the other is still in School. He submitted that the victim was returning home after a full day of work, when he hit the pothole which was filled up with water, thus being virtually invisible, leading to the fatal accident.

6. The gravity of the situation in Kerala is now for all to see.

7. We do not react until we are the victim or someone we know faces such a situation. It is always as if accidents only happen to others and not to ourselves. But this is a myth, as anybody with reasonable sense would reckon.

8. The speed limits in most of our roads are in the vicinity of 70 to 90 km. But many of them cannot even handle traffic which moves over 20 or 30 km. This is compounded when it rains and when the potholes are not visible, as in the case of the hapless victim we are dealing with.

9. There are provisions under the Motor Vehicles Act, including Sections 198A(2) thereof, which provide for fines and payment of compensation; and as already been recorded, Sri.Bidan

Chandran - learned Standing Counsel for the NHAI, says that there are such provisions in the Concessionaire agreements also.

10. As far as the NHAI is concerned, Sri.Vinod Bhat - learned Amicus Curiae, further submits that provisions of Section 8B of the National Highways Act provide for compensation and damages in the case when anyone causes distress or damage to a National Highway.

11. Needless to say, we have provisions and provisions, but it is seldom put to effective implementation.

12. The Disaster Management Act, 2005, is a classic piece of legislation, which empowers the District Collectors - who are the heads of the District Disaster Management Authority - to take action to avoid every disaster. The word 'disaster' is defined in the said Act 'to include a mishap of calamity through man made causes'. A road being potholed and craters being allowed to be formed, are certainly man made causes, particularly because it can only be seen to be on account of the total negligence or indifference of the concerned Authorities, including Engineers as also the Concessionaires and contractors who are entrusted with the work.

13. The District Collectors cannot be mere spectators and react solely when an accident happens; but they are certainly

enjoined to act to avoid it. This is the true spirit of the Disaster Management Act. However, this Court is yet to see any notification or order issued by a District Disaster Management Unit until an accident happens; and it is no different today, because Sri.K.V.Manoj Kumar - learned Senior Government Pleader, says that the District Collector, Ernakulam has now issued such an order.

14. I fail to understand the purpose of an order issued under the Disaster Management Act after an accident has happened. It is surely for the Disaster Management Authority of every District to act proactively to ensure that such do not happen, whether that be in the National Highwa;, PWD Roads; or any other road under the control of the various Local Self Government Institutions.

15. Even though this Court has been issuing orders after orders, the roads turn into disrepair after initial and temporary restoration; and it is in such context that directions had been earlier issued to even initiate vigilance cases and other proceedings against Engineers and contractors.

16. We can neither wait for another victim; nor can we let the roads of Kerala to be killing fields - whether it be under the NHAI, PWD or the Local Self Government Institutions.

17. The District Collectors, in their capacity as the Heads of the District Disaster Management Authorities, have a definitive role to play and the Authorities under them have to be alive to any issues on the roads, particularly relating to potholes and craters. Even solitary ones will have to be taken note of and acted upon, fixing full responsibilities upon the Engineers, contractors and other persons entrusted with the road. This Court cannot keep on passing orders every time there is a disaster. It is for the District Collectors to now act and this Court has no doubt about it.

Resultantly:

(a) I *suo motu* implead the Regional Officer, NHAI, Thiruvananthapuram as an additional respondent in these writ petitions and I record that Sri.Bidan Chandran, learned Standing Counsel takes notice on its behalf.

(b) The NHAI will make available the copy of the Concessionaire agreement; and I record that Sri.Bidan Chandran has agreed to do so, by the next posting date.

(c) The competent Authority of the NHAI will cause an enquiry into the accident in question as also on the other stretchers

which has gone into disrepair and file a report fixing responsibility on Engineers/Concessionaires as the case may be.

(d) The NHAI will take immediate steps to rectify every road under their control, either through the present Concessionaires or through new contractors; but which shall be done without any further delay, but within one week from today.

(e) The District Collectors, in their capacity as the heads of the District Disaster Management Authorities will issue orders with respect to any road in which potholes are found and take necessary action against the jurisdictional Engineer, contractors or any other person who may be responsible. All corollary consequences thereto will also follow, to the fullest warrant of law.

(f) The earlier directions of this Court to initiate Vigilance cases and other investigation, will continue to hold effect and it will be supplementary to the afore directions.

After I dictated the orders afore, Sri.Vinod Bhat, learned Amicus Curiae pointed out that Section 7 of the National Highway Act provides the manner in which fees and tolls can be collected by the NHAI or by the Concessionaire. He submitted that when there is a default in the maintenance of roads, then it becomes suspect

whether any such can be continued. I do not propose to speak on this issue at this stage, but I am certain that Sri.Bidan Chandran, learned Standing Counsel for the NHAI, must obtain an opportunity of answering it.

Suffice to say, *prima facie*, the collection of tolls normally would pre-suppose the responsibility on the Concessionaire or the competent Authority to maintain the roads in the best manner.

This is the right of the citizen and certainly, one that will impel this Court to issue orders in future.

List on 19.08.2022



Sd/-

DEVAN RAMACHANDRAN

JUDGE

H/O

MC