
(1999) 05 CAL CK 0018
In the Calcutta High Court

Case No : M.A.T. No's. 3229 and 3396 of 1998 and 409 of 1999 and etc. etc.

Abdul Aziz Sekh and etc.

APPELLANT

Vs

Siraj Uddin Mollah and Others

RESPONDENT

Date of Decision : 10-05-1999

Acts Referred:

Motor Vehicles Act, 1939 — Section 68, 68C
Motor Vehicles Act, 1988 — Section 102, 104

Citation : AIR 1999 Cal 191 : 2 CWN 46

Hon'ble Judges : S.N. Bhattacharjee, J;S.B. Sinha, J

Bench : Division Bench

Advocate : Arabinda Chatterji, Kaberi Roy Chowdhury, Durgaprasad Mazumdar and Sambhunath De, Manik Das, Dilip De and N.I. Khan, for R.T.A, for the Appellant; Moley Kr. Basu, Asok De, Pintu Deb Roy and S. Rakshit, for the Respondent

Judgement

S.B. Sinha, J.—The question, which arise for consideration in these appeals, inter alia, is as to whether the State Government in exercise of its power conferred upon it under Chapter IV A of the Motor Vehicles Act, 1939 can issue permit to the stage carriage operators in exclusion to the State Government Undertakings or not.

2. The basic fact of the matter is not in dispute.

3. On 19-8-1963 the State Government issued a Scheme in terms of Section 68C of the Motor Vehicles Act, 1939 whereby any whereunder various routes as specified therein were nationalised. The said Scheme was modified in the year 1980 in terms whereof only private operators were permitted to ply their stage carriages in the routes specified therein to the exclusion of the State Transport Undertaking. In the said Notification the number of permits to be granted in relation to the routes in question was also specified. However, after Motor Vehicles Act, 1988 was enacted by the Parliament, the concerned Regional Transport Authorities keeping in view the decision of the Apex Court in Mithilesh

Garg, Vs. Union of India and others etc. etc., had started granting permits to the private operators without any restriction whatsoever.

4. The question as to whether a Mini Bus would be a stage carriage or contract carriage also had not been decided at that point of time. Despite restrictions imposed in the said Notification as regard number of permits to be granted to the stage carriage operators, permits for plying Mini Buses under contract carriage permit were being issued. The said question came up before this Court and keeping in view the nature of permit, this Court held that stage carriage permit should also be granted in respect of Mini Bus, pursuant where to permits had been granted to various Mini Bus operators either in the routes specified in the said Notification of 1980 or a part thereof.

5. Some writ petitioners questioned grant of such permits by filing writ applications contending, inter alia, therein that in view of the aforementioned 1980 Notification, the authorities had no jurisdiction to grant permit in excess of the number specified therein. Some writ petitions have been filed by those whose applications for grant of permit had been rejected on the purported ground that in view of the said notification, no new permit can be granted. Different orders had been passed by different Benches. Some Hon'ble Judges had granted injunction restraining concerned Regional Transport Authorities from issuing any further permit but some other Benches including a Division Bench directed consideration of the application for grant of permit filed in that regard. In this situation, the learned Counsel for the parties very fairly agreed that the question should be decided once for all and even the writ applications which are pending may be decided by the Bench.

6. Mr. Ashoke Dey and Mr. Malay Basu, the learned Counsels addressed us on behalf of the permit holders whereas Mr. Chatterjee, Dr. Majumder, Mr. Samanta and other counsel addressed us on behalf of the petitioners whose applications for grant of permits had either been rejected or were not considered by the concerned Regional Transport Authorities.

7. The provisions relating to grant of Stage Carriage Permits were contained in Chapter IV of 1939 Act (hereinafter referred to as 1939 Act). Section 47 of 1939 Act provided for procedure of Regional Transport Authority in considering application for grant of stage carriage permit.

8. However, Chapter IVA of the 1939 Act which was inserted by Act 100 of 1956 contained special provisions relating to State Transport Undertakings. Chapter IVA, therefore, was enacted by way of exception to the general provision for grant of such carriage permit as contained in Chapter IV.

9. Under Motor Vehicles Act, 1988, Chapter V deals with for the control of transport vehicles which includes grant of stage carriage permit and special provisions relating to State Transport Undertaking are dealt with in Chapter VI thereof.

10. In *Mithilesh Garg, Vs. Union of India and others etc. etc.*, the Apex Court has held that by reason of the Scheme of the said Act, the Parliament had adopted a liberalised policy as regards grant of stage carriage permit. The Apex Court pointed out that in terms of the said Scheme the question of entertaining any objection or fixing any limit as regards grant of permit would not arise unless appropriate Notification is issued in that regard. The said decision, however, was distinguished by the Apex Court in *Ram Krishna Verma and Others Vs. State of U.P. and Others*, wherein it was pointed out:--

"It is true as contended by Shri Salve that in *Mithilesh Garg, Vs. Union of India and others etc. etc.*, this Court held that the liberal policy of grant of permits u/s 80 of the Act is directed to eliminate corruption and favouritism in the process of granting permits, eliminate monopoly of few persons and making operation on a particular route economically viable and encourage healthy competition to bring about efficiency in the trade. But the free ply is confined to grant of permits under Chapter V of the Act. By operation of Section 98 of the Act, Chapter VI overrides Chapter V and other law and shall have effect notwithstanding anything inconsistent therewith contained in Chapter V or any other law for the time being in force or any instrument having effect by virtue of such law. The result is that even under the Act the existing scheme under the repealed Act or made under Chapter VI of the Act shall have overriding effect on Chapter V notwithstanding any right given to private operators in Chapter V of the Act. No corridor protection to private operators is permissible." (Underlining is mine for emphasis)

11. In view of the aforementioned decision there cannot be any doubt whatsoever that permits are now granted under two different Chapters viz. Chapter V and Chapter VI. Whereas Chapter V deals with grant of general stage carriage permit, Chapter VI deals with grant of permit in the notified routes.

12. It may be placed on record that by reason of 1980 Notification whereas the State Transport Undertakings had been excluded completely, provisions had also been made that such applications would be considered in terms of Sections 47 and 58 of the 1939 Act.

13. In the matter of grant of stage carriage permit there has been a sea change in the scheme under the 1988 Act. No Notification restricting the number of permit has been issued.

14. Three questions, thus, arise for our consideration :

1. Whether the 1980 Notification is bad in law and is contrary to the Scheme made under Part IV-A of the 1939 Act?

2. Whether the said Scheme survives the 1988 Act?

3. Whether in view of the conduct of the State Government the said Scheme is no longer operative ?

15. Section 68A(b) occurring in Chapter IV-A of the 1939 Act defined "State

Transport Undertaking" as meaning :

- (i) the Central Government or a State Government;
- (ii) any Road Transport Corporation established u/s 3 of the Road Transport Corporations Act, 1950;
- (iv) any municipality or any corporation or company owned or controlled by (the Central Government or one or more State Governments, or by the Central Government and one or more State Governments)."

16. Section 68B provides for a non obstante clause providing that the provision of the said Chapter shall have effect notwithstanding inconsistent contained in Chapter IV.

17. Section 68C provides for preparation and publication of scheme of road transport service of a State Transport undertaking which is to the following effect:--

"Where any State Transport Undertaking is of opinion that for the purpose of providing an efficient, adequate, economical and properly coordinated road transport service, it is necessary in the public interest that road transport services in general or any particular class of such service in relation to any area or route or portion thereof should be run and operated by the State Transport Undertaking, whether to the exclusion, complete or partial, of other persons or otherwise, the State Transport Undertaking may prepare a scheme giving particulars of the nature of the services proposed to be rendered, the area or route proposed to be covered and such other particulars respecting thereto as may be prescribed, and shall cause every such scheme to be published in the Official Gazette and also in such other manner as the State Government may direct."

18. Section 68D provides for objection to the scheme. Section 68E provides for cancellation or modification of scheme by the State Transport Undertaking. Section 68F provides for issue of permits to State Transport Undertakings.

19. Either before the learned trial Judge or before us the original scheme has not been produced before this Court by the State. The 1980 amendment made to the 1963 Scheme was required to be considered in the light of the old scheme. In *Mithlesh Rani and others Vs. Regional Transport Authority, Dehradun and others*, , the Apex Court deprecated such a practice saying :--

"We do not know what are the terms of the Scheme(s). We do not know whether the scheme excludes the private operators wholly or partly. Another and more important circumstance is that the State Transport Undertaking has not chosen to challenge the grant of permits to the appellants. It is only the Respondents 3 and 4 who are operating on a route which partially overlaps the route concerned herein that have chosen to come forward. We are not inclined to entertain the said objection at their instance, more particularly, when a copy of the scheme (s)

even has not been filed. This aspect would become relevant if and when the State Transport Undertaking objects to the grant of permits to the appellants and the approved scheme or draft scheme, as the case may be, is placed before the Court in support of the said objection. In the present state of facts, we decline to go into the said question."

20. In that view of the matter an adverse inference must be drawn that had such scheme been produced the same would have gone against the interest of the State. It was also necessary for the State and/or Regional Transport Authority to place before this Court an exhaustive affidavit stating as to under what circumstances the said Scheme was modified. These observations are being made keeping in view the proviso appended to Section 68FF as also the provisions contained in Section 68FF of the 1939 Act as amended by the State of West Bengal. Was it a case that the State Transport Undertaking failed to provide adequate road transport service for the carriage of passengers in any notified area or notified route pursuant to the approved scheme or was it a case where the State Transport Undertaking itself felt that a modification was necessary? "In absence of any material placed before us, the said questions cannot be answered. We cannot lose sight of another aspect of the matter that since 1980 there had been a great increase in the population. The routes specified in the notification of 1980 indisputably require the services of more stage carriages. In view of the fact that admittedly the Regional Transport Authorities had been granting permits and a large number of permits had been granted not only to the Stage Carriage Operators but also to Mini Bus Operators firstly as contract carriage permit and later on as stage carriage permit clearly is a pointer to the said fact.

21. It may further be placed on record that both Mr. Dey and Mr. Khan appearing on behalf of the State specifically stated before us that although in the affidavit-in-opposition the State had taken a stand that 1980 Notification still exists the fact remains that the same had not been adhered to and stage carriage permits had been granted in favour of large number of operators.

22. In U.P. State Roadways Transport Corpn., Lucknow through its General Manager Vs. Anwar Ahmed and Others, upon which strong reliance has been placed by Mr. Dey, the Apex Court clearly held that the scheme is law by itself and only can be varied according to law and till the same is due no private operator has any right to camouflage any device to obtain temporary permits. Our observations to the effect that a comprehensive affidavit was required to be affirmed have been made keeping in view the aforementioned proposition of law. It has also to be borne in mind that the State Transport Undertakings had not been impleaded as parties in the writ applications at all. The State Transport Undertakings have not raised any objection before the concerned Regional Transport Authorities as regard grant of more number of permits than specified under 1980 Notification to the Private Stage Carriage Operators in terms of the provision of Chapter V of the 1988 Act.

23. A bare perusal of the aforementioned provisions leave no manner of doubt that Chapter IVA of 1939 Act and Chapter VI of 1988 Act were enacted for the benefit of the State Transport Undertakings. Can, therefore, a provision be made in terms whereof the beneficiaries themselves are kept out of consideration from competing with the private operators? The answer to the said question must be rendered in negative. There can be a scheme as a result whereof the private operators are totally debarred from plying the Buses on the notified route. There can also be a scheme where such restriction is a limited one but Chapter IVA of 1939 Act or Chapter VI of 1988 Act does not contemplate any scheme which would prohibit the public sector undertaking from plying their Buses. Such a provision, thus, is clearly contrary to the intent and purport of the Chapter IVA of 1939 Act vis-a-vis Chapter VI of 1988 Act. Ex facie, therefore, the said 1980 Notification is ultra vires Section 68C of 1939 Act. Any notification issued contrary to the statute shall be invalid and inoperative. See Gudur Kishan Rao and Others Vs. Sutirtha Bhattacharya and Others, .

24. As indicated hereinbefore, the said 1980 Scheme is not in operation for a long time. This Court had also been passing orders directing the authorities to consider the applications for grant of Stage Carriage Permit to the applicants and admittedly in a large number of cases, permits had been granted pursuant to or in the furtherance of the said order. In such a situation the principles of doctrine of "Desuetude" should be applied. "Desuetude" is a process by which an Act of Parliament may lose its force without express repeal. See Municipal Corporation for City of Pune and another Vs. Bharat Forge Co. Ltd. and others, which has been followed by the Patna High Court in Seth Srenikbhai Kasturbhai and Others etc. Vs. Seth Chandulal Kasturchand and Others, .

25. In A.P.S.R.T.C. v. State Transport Appellate Tribunal, reported in , also the Apex Court has held :--

"Hence for the purpose of Rule 258(2), if there is a scheme in force with reference to the concerned route, the authority has to adhere to the terms of the scheme. If there is an absolute bar in the scheme against the grant of any permit for the notified route or any portion of the route nothing further could be done. On the other hand if there is any exception provided in the scheme the applicant for a permit has to satisfy the authority concerned that he would fall within the scope of the exception."

26. Furthermore the scheme under the Act must be introduced in whole and not on piecemeal basis. See Shrinivasa Reddy and Others Vs. State of Mysore and Others, , wherein it has been held :--

"Undertaking has been given the power to frame a scheme for an area or route or even a portion thereof. Further after the scheme is framed it is approved and published by the State Government. Thereafter it is the duty of the undertaking to carry out the scheme and in pursuance of that it applies for permits u/s 68F(1). If the Undertaking at that stage has the power to carry it out piecemeal,

it would be possible for it to abuse the power of implementation and to discriminate against some operators and in favour of others included in the scheme and also to break-up the integrity of the scheme and in a sense modify it against the terms of Section 68E. There is no difficulty for the Undertaking to apply for permits relating to the entire scheme at the same time, for the manner in which the scheme is prepared u/s 68C takes into account all the difficulties which might arise in the implementation of the scheme and with that very object provides for taking over particular types of transport services in relation to areas or routes or even portions thereof. We need not however pursue the matter further on this occasion."

27. It is also a well settled principles of law that there should not be a great gap between the demands and the actual stage carriage permit vis-a-vis the number of permits. In *A. Vishwanath Rao etc. Vs. The State of Mysore and Others*, , it is stated:--

"It is true that in *B.H. Aswathanarayan Singh and Others Vs. State of Mysore and Others*, , it was pointed out by this Court that if the proportion which the minimum bears to the maximum is so great and the gap between the two is so wide as to make the prescription of the maximum and the minimum amount to a fraud on Sections 68C and 68E the scheme will stand vitiated. But at the same time it was explained that it was not possible to lay down specifically at what stage the fixing of minimum and maximum would turn into fraud, but it is only when the gap between the minimum and maximum is so great that it amounts to fraud on the Act that it will be open to a Court to hold that the scheme is not in compliance with Section 68C and is hit by Section 68E. The gap between the minimum and maximum would depend upon a number of factors , particularly on the variation in the demand for transport at different seasons of the year."

28. For the reasons aforementioned these appeals and the writ applications are disposed of with the direction upon the Regional Transport Authority to consider grant of permit as if the 1980 Scheme is no longer in force and for that purpose applications filed by the concerned operators may be considered strictly in accordance with law. In the facts and circumstances of this case there will be no order as to costs.

S.N. Bhatta Chatterjee, J.

29. I agree.