(1988) 10 CAL CK 0004

In the Calcutta High Court

Case No : Matter No. 1160 of 1987

A.M. Marketing Private Ltd. APPELLANT

Vs

State of West Bengal and Others RESPONDENT

Date of Decision : 03-10-1988

Acts Referred:

Constitution of India, 1950 — Article 226

Citation : 93 CWN 844

Hon'ble Judges : Bhagabati Prasad Banerjee, J

Bench : Single Bench

Final Decision : Allowed

Judgement

Bhagabati Prasad Banerjee, J.—This writ application was filed against the order communicated by the Secretary, Regional Transport Authority, Calcutta Region by Memo No. RTA/1521/G dated 4th February 1987 by which the exemption granted u/s 42(3)(i)of the Motor Vehicles Act in respect of Vehicles Nos. WMV 1124 and WMV 1125 were recalled on review of/the earlier order. The case of the petitioners in short is that the petitioner no. 1 is a Company incorporated under the Indian Companies Act. 1936 and have been carrying on business inter alia as Regional Wholesale Stockists in Calcutta Region for the products manufactured by the Calcutta Chemical Company Ltd. (hereinafter referred to as ''Calcutta Chemical'') having its registered and Head Officer at No. 35, Panditiya Road, Calcutta-29. The petitioner was appointed as Regional Wholesale Stockist by letter dated 6th March 1985 by which the petitioner was to purchase the products on principal-to-principal basis from the Calcutta Chemical at the current trade price list at the time of delivery subject to a discount provided thereon. Under the said agreement the petitioner was to distribute the products in the Region either directly and/or appointing as many wolesale stockists as the petitioners may think fit. It was further provided that for any reasons excepting the reason mentioned in clause 15 of the said agreement, the said appointment of the petitioner as Regional Wholesale Stockists is terminated or ceased to be operative, the petitioner should be entitled to liquidate damages for an amount of Rs. 30 lakhs from the Calcutta Chemical within one month from the date ''of such termination as the case may be.

2. By the letter dated 30th August 1985, the term of the petitioner''s appointment as Regional Wholesale Stockists was amended whereby the Calcutta Chemical informed the petitioner the following terms :

"We shall sell and you will purchase on principal-to-principal basis, either

i) at our current fixed net wholesale price at the time of delivery,

or

ii) at our current trade price at the time of delivery subject to deduction for discount as mentioned below.

It is however, agreed that we shall have the option to sell our products to you priciest them in either of the above two manners and that the net wholesale price" shall always be lower than the current trade price as reduced by the discount as mentioned hereinafter."

3. Thereafter, the petitioner company applied to the Secretary, Regional Transport Authority, Calcutta for exemption certificate as provided u/s 42(3)(i) of the Motor Vehicles Act 1939 and that in respect of the said two vehicles of the petitioner which were granted by the Memo dated 3rd May 1986 which are Annexure ''C'' to the petition, thereafter, by the impugned Memo dated 4/2/87, the said exemption which was granted, was sought to be withdrawn by the Regional Transport Authority on the ground that the petitioner''s vehicles were not entitled to get the exemption u/s 42(2) of the said Act as the petitioners were found to be a distributor some Consumer Articles enjoying discount privileges who is not entitled to get such facilities under the law. On this ground the application filed by the petitioner to grant exemption to two other vehicles were also rejected. It was further stated that the petitioner was acting as an agent or manufacturer or dealer by or on behalf of the petitioner company within the meaning of Section 42(2)(a)(b)(c). In the said Memo the petitioner''s attention was drawn to the meaning of Private Carrier as defined in Section 2(22) of the said Act.

4. The only question involved is whether the petitioners are entitled to an Exemption Certificate in respect of Lambretta Sctooer Vans deployed by the petitioners for the purpose of carrying on its business as Wholesale Stockists of products manufactured by Calcutta Chemical by reason of the provisions of Section 42(3)(i) of the Motor Vehicles Act 1939 (herein after referred to as the Act).

5. In order to appropriate the point involved in this case, it is necessary to refer the provisions of Section 42 of the said Act so far as it is material for the purpose of this application provides as follows:

"42. Necessity for permits. (1) No owner of a transport vehicle shall use or permit the use of the vehicle in any public place (whether or not such vehicle is actually carrying any passenger of goods) save in accordance with the conditions of a permit granted or countersigned by a regional or State Transport Authority (or the Commission) authorising the use of the vehicle in that place in the manner in which the vehicle is being used.

Provided that a stage carriage permit shall, subject to any conditions that may be specified in the permit, authorise the use of the vehicle as a contract carriage :

Provided further that a stage carrier''s permit may, subject to any conditions that may be specified in the permit, authorise the use of the vehicle as a goods vehicle either when carrying passengers or not?

Provided further that a public carriage permit shall, subject to any conditions that may be specified in the permit, authorise the holder to use the vehicle for the carriage of goods for or in connection with a trade or business carried on by him,

(2) In determining, for the purpose of this chapter, whether a transport vehicle is or is not used for the carriage of goods for hire or reward -

a) the delivery or collection by or on behalf of the owner of goods sold, used or let on hire or hire-purchase in the course of any trade or business carried on by him other than the trade or business of providing transport.

b) the delivery or collection by or on behalf of the owner of goods which have been or which are to be subjected to a process or treatment in the course of a trade or business carried on by him or

c) the carriage of goods in a transport vehicle by a manufacturer of or agent or dealer in such goods whilst the vehicle is being used for demonstration purposes.

shall not be deemed to constitute a carrying of the goods for hire or reward; but the carnage in a transport vehicle of goods by a person not being a dealer in such goods who has acquired temporary ownership of the goods for the purpose of transporting them to another place and there relinquishing ownership shall be deemed to constitute a carrying of the goods for hire or reward.

(3) Sub-section (1) shall not apply -

(a).......

(b).......

(c)......

(d)......

(e).....

(f).......

(ff)......

(g)......

(i) (Except as may otherwise be prescribed) to any goods vehicle which is a light motor vehicle and does not play for hire or reward, or to any two-wheeled trailer with a registered laden weight not exceeding (800 kilograms) drawn by a motor car;

(j).....

(k)....

(l).....

(m)...

(n)....

(4) Subject to the provisions of sub-section (3), sub-section (1) shall, if the State Government by rule made u/s 68 so prescribes, apply to any motor vehicle adapted to carry more than nine (persons) excluding the driver."

6. Section 2(8) of the said Act provides, inter alia, as follows

"Goods vehicle" means any motor vehicle constructed or adapted for use for the carriage of goods, or any motor vehicle not so construed or adapted when used for the carriage of goods solely or in addition to passengers.

7. Section 2(33) of the said Act provides, inter alia, as follows:

"Transport Vehicle" means a public service vehicle or a goods vehicle.

Section 2(13) of the said Act provides as follows :

"Light Motor Vehicle" means a transport vehicle or omnibus, the registered laden weight of which, or a motor car or tractor, the unladen weight of which, does not exceed (4000k.g.).

8. In the instant case, the Lambretta Scooter Vans have a maximum laden weight of 800 k.g. The same are goods vehicles which are light motor vehicles. Further the same Lambretta Scooter Vans are not deployed for carrying on goods for hire or reward inasmuch as the same are used for delivery or collection by the owner of goods sold in the course of business carried on by the petitioners and the said business is other than the business of the providing transport. In the premises, it was submitted that the petitioners are entitled to an Exemption Certificate in respect of the Lambretta Scooter Vans and are not required to obtain permits for the deployment of the same.

9. In the instant case, the Regional Transport Authority had granted exemption to the aforesaid two vehicles u/s 42(2)(1) of the said Act and it appears that the Respondent Regional Transport Authority had reviewed the earlier decision and

on review, the exemption certificate already granted were sought to be recalled firstly, on the ground that the petitioner was a distributor enjoying discount and was not acting as agent and secondly, in view of the provisions of Section 2(22) of the said Act, the petitioner was letting out the vehicles for hire. It appears that before the impugned order was passed reviewing the earlier order by which the earlier order was recalled, the petitioner was not given any opportunity to place the case of the petitioner before the Respondents and that it also appears that the Respondents had decided the matter by not giving speaking order.

10. On the basis of the admitted facts, it appears that under the agreement the petitioner was carrying on business. and the petitioner was appointed a Regional Wholesale Stockist of Calcutta Chemical and the petitioner was to purchase the said goods from the Calcutta Chemical on principal-to-principal basis.

11. It was contended by Mr. S. Pal, learned Advocate appearing on behalf of the petitioners that the Regional Transport Authority acted illegally in not granting exemption to new vehicles and by intending to recall the orders of exemption already exempted in respect of other two vehicles, inasmuch as, (a) that the order was passed without giving the petitioners any opportunity of being heard and submitted that the order is bad as same was passed in violation of principles of natural justice and that (b) the exemption certificate u/s 42(3)(i) of the Motor Vehicles Act is granted to like motor vehicles which does not ply for hire or reward and further by the letter dated 8th October 1986, the Secretary of the Regional Transport Authority was informed categorically the petitioner that the vehicle would not be used either for hire or for reward and on the basis of this material, the Secretary of Regional Trans port Authority has acted without jurisdiction and illegally in not granting exemption certificate to new vehicles and withdrawing the exemption certificate earlier granted on the ground that the petitioner would be entitled to get exemption as the petitioners are found to be distributor enjoying discount privileges. This was on the face of it wrong in view of the fact that the terms and conditions were modified by the letter dated 30th August 1985 under which the company would sell and the petitioner would purchase on a principal-to-principal basis and that the petitioners were distributing goods of others on some commission. It is submitted that in the facts and circumstances of the case, the respondent Regional Transport Authority acted arbitrarily and whimsically.

12. The permits are required u/s 42 of the Motor Vehicles Act when a transport vehicle is used or. permitted to be used for carrying goods or passengers on hire or reward and that Section 42(3)(i) of the said Act provides that no such permission shall be required for any goods vehicle which is a Light Motor Vehicle and does not ply for hire or reward. The question is whether the vehicle in question is a private carrier or a public carrier. Private carrier has been defined in Section 2(22) of the said Act, which means "as owner of a transport vehicle other than a public carrier who uses the vehicle solely for the carriage of goods which are in his property or carriage of which is necessary for the purpose of his

business not being a business for providing transport or which uses the vehicle for any of the purpose specified in sub-section 2 of Section 42."

13. Public carrier has been defined in Section 2(23) of the said Act which means, "an owner of a transport vehicle who transports or undertakes to transport goods or any class of goods for another person at any time and at any public place for hire or reward, whether in purchase of a term of contract or agreement or otherwise or includes any person, body, association or. company engaged in the business on carrying of goods of persons associated with that person, body, association or company for the purpose of having their goods transported."

14. It appears that in terms of the appointment, Calcutta Chemical Company Ltd. sells goods and the petitioners purchase the same on principal-to-principal basis either at the current fixed net wholesale price at the time of delivery or at current trade price at the time of delivery subject to deduction for discount as mentioned above and that it could not be spelt out that the petitioners were carrying goods of Calcutta Chemical Company Ltd. for reward or hire. The petitioners, purchase the goods from the said company on principal-to-principal basis on either of the two terms and the petitioners in its turn sell it to various parties. This is not a case where the petitioners are acting or had been acting as a transporting agent and/or the petitioners have engaged themselves in transporting the goods, of others. From the agreement it is clear that under an arrangement and/or agreement entered into by and between the petitioners and the Calcutta Chemical Company Ltd., the petitioners for the time being become'' the owners'' of the goods after purchase and while the petitioners are supplying the goods to retailers, the petitioners were supplying their goods and not the goods of others. The title to the goods passed on to the petitioners as soon as the petitioners had taken delivery of the goods from the said company under the agreement wherein the petitioners purchased goods from the said company on principal-to-principal basis. Accordingly, there is no scope for alleging that the petitioners were deploying the said vehicles for carrying on goods for hire or reward. The said vans were not deployed for carrying goods for hire or reward, inasmuch as, the same are used for delivery or collection of the goods sold in course of business carried on by the petitioners and the said business cannot be said to be a business only for providing transport.

15. In the instant case, exemption certificate was granted on 5th May, 1986 in respect of two Lambretta Scooter Vans being registration no. WMV 1124 and WMV 1125 and the petitioners applied for exemption in respect of two new three-wheeler bearing Engine No. 089420 and 089267. and Chassis No. 089420 and 089267 respectively, but the exemption certificate was not granted and further with regard to two other vehicles which are enjoying such exemption, it was stated that the dealing assistant had been directed to review the matter and recall the exemption certificate in this regard.

16. There was no material before the regional Transport Authority to show or to suggest that the petitioner company was acting as a trans- porting agent and/or

carrying the goods of others for hire or reward, on the contrary, the said vehicles were used for delivery and/or collection of the goods of which the petitioners became the owners in course of business and in proper construction of the terms and conditons of the Contract, the only conclusion that may be reached is that the petitioner company was carrying on his own business and was not carrying the goods of others for hire or reward. Accordingly, the petitioner company fulfilled the conditions for grant of exemption certificate under the provisions - of Section 42(3)(i) of the Motor Vehicles Act. Further it appears that in this case, the exemption certificate was granted on 5th May 1986 to two vehicles being Nos. WMV 1124 and WMV 1125 and that there is no provision under the Act for review and/or recall of the said order, unless it could be shown that the petitioner has contravened any of the provisions of the Motor Vehicles Act and/or rules framed thereunder and/or had contravened the terms and conditions of such exemption. In the instant case, there was no material in the possession of the Regional Transport Authority to suggest by any stretch of imagination that the petitioner company was carrying the goods of others for hire or reward by way'' of commission etc. It could not be disputed that the petitioner company was purchasing goods from the Calcutta Chemical Company Ltd. on principal-to-principal basis and the petitioner was supplying the same to the retailers and in that process, the petitioner was carrying his own goods and not goods of others and accordingly, the Regional Transport Authority had no authority and/or jurisdiction to review and recall the exemption certificate already granted to the aforesaid two vehicles.

17. It is a firmly established principle that the authorities concerned cannot change their opinion and that the power of review is not an inherent power. Power of review must be expressly or by necessary implication conferred by the statute. In the instant case, there is no provision provided under the Act for review of any order passed in this behalf.

18. Accordingly, in my view, the Secretary of the Regional Transport Authority was wholly wrong and acted without jurisdiction in not granting exemption to the aforesaid two new vehicles when the petitioner fulfilled the required statutory conditions for getting such exemption and issuing direction upon the dealing assistant to review exemption certificate already in respect of the other two vehicles in the facts and circumstances of the case.

19. Apart from that, in my view, the Secretary of the Regional Transport Authority had acted in violation of the principles of natural justice in rejecting the application for exemption certificate as well as in directing review of the exemption already granted in respect of the vehicles which are enjoying exemption. Accordingly, the order communicated by Memo dated 4th February 1987, which is Annexure ''C'' to the petition cannot stand and the same is accordingly set aside.

20. The question is now what is the relief the petitioner is entitled to on the writ application. In this connection, Mr. Paul has referred to the decision of the

Supreme Court in the case of Comptroller and Auditor General of India, Gian Prakash, New Delhi & Anr. v. K. S. Jagannathan & Anr., reported in (1986)2 SCC page 679 at page 693 wherein the Supreme Court observed "There is thus no doubt that the High Courts in India exercising their jurisdiction under Article 226 have the power to a writ of mandamus or a writ in the nature of mandamus or to pass order and give necessary directions where the government or a public authority has tailed to exercise or was wrongly exercised the discretion conferred upon it by a statute or a rule or a policy decision of the Government or has exercised such discretion mala fide or on irrelevant considerations or by ignoring the relevant considerations and materials or in such a manner as to frustrate the object of conferring such discretion or the policy for implementing which such direction has been conferred. In all such cases and in any other fit and proper cases a High Court can, in the exercise of its jurisdiction under Article 226 issue a writ of mandamus or a writ in. the nature of mandamus or pass orders and give directions to compel the performance in a proper and lawful manner of the discretion conferred upon the Government or a public authority, and in a proper case, in order to prevent injustice resulting to the concerned parties the Court may itself pass an order or give directions which the government or the public authority should have passed or given had it properly and lawfully exercised its discretion."

(emphasis supplied).

Accordingly, the petitioner fulfills all the conditions laid down for the purpose of enjoying as provided u/s 42(3)(i) of the Motor Vehicles Act and as such the writ petition succeeds. There will be a writ in the nature of mandamus commanding the Respondents no. 1, 2 and 3 to cancel, withdraw, revoke and/or forbear from giving any effect to the impugned letter bearing no.'' RTA/1521/G dated 4th February, 1987 and from taking any steps in furtherance thereof. There will be also a writ in the nature of mandamus commanding the Respondents no. 1, 2 and 3 to grant exemption certificate in respect of two three-wheeler scooter vans bearing Engine Nos. 089420 and 089267 and Chassis No. 089420 and 089267 respectively and not to recall or review the exemption already granted in respect of two vehicles being nos. WMV 1120 and WMV 1125 forthwith Rule is made absolute. There will be no order as to costs.

