

(1976) 01 CAL CK 0021
In the Calcutta High Court
Case No : Civil Rule No. 12495 (W) of 1975

Amar Kumar Naik and Others

APPELLANT

Vs

State of West Bengal and Others

RESPONDENT

Date of Decision : 09-01-1976

Acts Referred:

Constitution of India, 1950 — Article 14, 19, 21, 226

Citation : 80 CWN 526

Hon'ble Judges : M.N. Ray, J

Bench : Single Bench

Advocate : Binode Bihari Giri and A.L. Basa, for the Appellant; Malay Kumar Basu for the Respondent Nos. 2 and 3 and Bijitendra Mohan Mitra, for the Respondent

Judgement

M.N. Roy, J.—The petitioners, who at all material time were and still are operators of 3B and 3D Bus routes moved this Hon"ble Court on 13th May, 1975 against a notice which is in Annexure "A" to the petition, intimating that applications have been received for introduction of contract carriage (Mini Buses) from (1) Milk Colony to Anderson House via Shambazar five point, Central Avenue, B. B. D. Bag, Esplanade, Jawaharlal Nehru Road, Acharya Prafulla Chandra Road, Bekar Road, (in place of the existing route, Milk Colony to B. B. D. Bag), (2) Tala Park to Kidderpore via Shambazar five point, Bidhan Sarani, B. B. D. Bag, Jawaharlal Nehru Road, Acharya Jagadish Chandra Bose Road and Kidderpore Bridge (in place of the existing route Tala Park to B. B. D. Bag), (3) Ganguly Bagan to B. B. D. Bag (on place of the existing route Bagha Jatin to B. B. D. Bag), (4) Rathtolla to B. B. D. Bag via Rash Behari Avenue, Shyama Prosad Mukherjee Road, A. T. Mukherjee Road and Esplanade (in place of the existing alignment at Ballygunge station, Rash Behari Avenue, Gariahat Road, Amir Ali Avenue). It was informed that representations, if any, u/s 50 of the Motor Vehicle Act, 1939, which should be filed by 19th April 1975, would be heard at 3 p.m. on 23rd April, 1975. By the said notice it was also informed that the intending objectors may appear before the Regional Transport Authority at the date and

time as proposed and no separate intimation would be sent to them regarding such date of hearing. At the time of issuing the Rule, this Court was pleased to issue an ad-interim order of injunction restraining the respondents from giving any further effect to the impugned resolutions dated 23rd April, 1975 for a period of 8 weeks with liberty to the petitioners to apply for extension of the said interim order on notice to the respondent No. 2 viz., the Regional Transport Authority, Calcutta region. Thereafter, an application for addition of parties was filed on 7th July, 1975 and on 21st July, 1975 the said application for addition of parties was allowed and directions were given to effect service of the Rule on the parties so added. In the meantime, the petitioners filed an application dated 3rd July, 1975, for extension of the aforementioned interim order and this Court was pleased on 21st July, 1975. to adjourn the hearing of the said application for 3 weeks with a direction to complete the affidavits in the said application in the meantime and further directed that the interim order already granted would continue till the disposal of the application. The said application along with another application filed by the added respondent for having the interim order vacated, came up for hearing on 10th November, 1975, when considering the urgency of the matter, this Court directed that the connected Rule should be heard as expeditiously as possible.

2. The Buses in the said 3B and 3D routes ply on the routes and points as mentioned hereunder :

3B : New Alipore -- Gopal Na-gar Road -- Kalighat Bridge -- Hazra Road -- Ashutosh Mukherjee Road -- Chowringhee -- Esplanade -- Milk Colony -- Belgachia.

3D : Taratolla -- Diamond Harbour Road Junction upto Amherst Street -- Mahatma Gandhi Road -- A. P. C. Road -- Milk Colony -- Belgachia.

the petitioners have alleged that as the routes as mentioned hereinbefore are within notified routes, no permanent permit could virtually be issued on the said routes and as a result thereof temporary permits are issued for every 17 weeks u/s 62 read with sections 68 H. A. of the said Act on due observance of the formalities as required. They have further alleged that from the alignment of the routes as mentioned hereinbefore it would be clear that they do not pass through the thickly populated areas of the city in comparison to other bus routes. It has further been alleged that although the sanctioned strength of the Buses in the route are 38 but they are not plying in full strength as some of the operators have withdrawn their vehicles for reasons best known to them. It has been alleged that in view of the difficulties as is being experienced by the operators in the routes in question, the Regional Transport Authority concerned took a very sympathetic view of the matter and assured them that proposals for having the said routes extended would be considered very shortly. But it has also been alleged by the petitioners that such proposals have not yet been given a shape. The petitioners have also alleged that the introduction of a new type of transport vehicle which is known "Mini Bus" on different routes of Calcutta have also

created additional crisis not only to them but also in cases of other operators in other routes. They have alleged that permits to those Mini Buses are given as "contract carriages" and such grant is not only illegal and irregular but the same is being made in colourable exercise of powers of the authorities concerned and in fact on proper appreciation of facts and application of law and mind, there would be no doubt that those Mini Buses are not contract carriages but in fact they are stage carriages with special amenities. It has further been alleged by the petitioners that like stage carriages, the Mini Buses stop at every stoppages, charge fares stage by stage at higher rates and pick up passengers and drop them at every stoppages which incidentally was not the object of the scheme formulated for the purpose of introducing Mini Buses and infact such an act on the part of the pliers of the Mini Buses at the instance, help and assistance of the authorities concened, is not only unauthorised but such act has frustrated the very object of the scheme as mentioned above and full particulars whereof would be available hereinafter.

3. The petitioners have stated that against the impugned notification, an objection was filed for and on their behalf, by the Secretary, of the Route Committee 3B/3D on 18th April, 1975, whereby it was represented that the proposed extension of Mini Bus route on the stage carriage route would discriminate the operation of the two types of transport and thus would also create discrimination between the operators of the said types of vehicles. It has further been mentioned in the said representation that the extension or diversion of Mini Bus routes is unknown to statute and the non-consideration of their representation for extension of their routes and further proposal to overlap their routes would be nothing but denial of natural justice. In the said representation which is Annexure "B" to the petition, it has further been made categorically clear that Mini Buses are not contract carriages and the operators of such carriages have been favoured with all types of opportunities including stopping at all points where there is rush of passengers and to charge higher rate of fares and by the said proposal for the extension of the Mini Bus routes, the Regional Transport Authority concerned, in fact has proposed to overlap the routes of the petitioners entirely, as a result whereof they would not only suffer much but it fact they would have to face starvation and thereafter ruination. The fact of inviting applications from contract carriage operators only and not from the petitioners who ply stage carriages, was also represented to be discreminatory and in violation of principles of natural justice. Further, through said representation, the Regional Transport Authority concerned was requested to withdraw and or cancel the proposed extension of Mini Bus routes and also for considering the prayers of the stage carriage operators for extension of their routes. There is also no dispute to the fact that such representation of the petitioners, which was filed through the Secretary of the Route Committee concerned, was heard and considered by the Regional Transport Authority, Calcutta and by their minutes being No. 2(a) of 23rd April 1975 but signed on 24th May, 1975, they have overruled such representation and on the question

whether the introduction of such contract carriages would prejudice the extension and operation and affect the petitioners adversely, it has been resolved that since the fare structure-for contract carriage (Mini Buses) were much higher in comparison to the fare structure of the stage carriages, so the introduction of the services cannot be considered to be competitive with their economy. The said Regional Transport Authority however recorded that they would be agreeable to reconsider the case, if any proposal comes from the petitioners for betterment" of their route service.

4. Mr. Giri appearing for the petitioners submitted that the impugned notification and the resolution being Annexures A & C respectively to the petition, were without jurisdiction and void abinitio inasmuch as the purported changes of the alignment was sought to be given effect to without following the mandatory provisions of sections 49, 50 and 51 of the Act. He has also contended that the grant of additional permits (contract carriages) in the form of diversion of routes, as in the instant case, was also illegal and in colourable exercise of powers of the Regional Transport Authority concerned. He further submitted that the notification impeached was nothing but an attempt to change or to divert the routes and the resolution as it appealed was for the grant of additional routes and as such the powers exercised by the Regional Transport Authority, in the manner as indicated above was illegal, arbitrary and violative of the mandatory provisions of the statute. Apart from this, Mr. Giri submitted that in the instant case there has been total non-application of mind and the proposed additional permits could not in any event be granted without taking fresh steps in the matter as they were in fact new permits. Mr. Giri also contended, relying on the definitions of contract carriages and stage carriages in sections 2(3) and 2(29) respectively, that in fact and in effect Mini Buses are stage carriages or they are more akin to the same and cannot in any event be termed or described as or considered to be contract carriages. In fact he also contended that in view of the nature and character of the vehicle, passengers carried by them and stoppages allowed, the Mini Buses cannot be termed as contract carriages and they would really come within the definition of the stage carriages. Mr. Giri submitted that by describing the Mini Buses as contract carriages (which they are not) and not as stage carriage (which in fact they are) the authorities concerned have introduced a new type of vehicle and/or a type which is unknown under the provisions of the said Act.

5. It may further be recorded that in paragraph 10 of the petition some points were sought to be raised touching the question of malafide but Mr. Giri has made it clear, when the matter was heard on 10th November, 1975, that he would not press the allegations of malafide as mentioned in the said paragraph. It may however be mentioned that in paragraph 13(j), a ground has been taken under Articles 14, 19 and 21 of the Constitution of India and Mr. Giri has further agreed, in view of the situation prevailing, that he will not press that ground.

6. Mr. Mitra appearing for the added respondent, first took a preliminary point

that the application was not maintainable as there was no demand of justice. In support of his contentions he relied on the case of Biswanath Sinha and Others Vs. Sudhir Kumar Banerji and Others, , wherein it has been held that a petition without a demand in writing for justice should fail in limini. Then Mr. Mitra relied on the case of Okram. Kullo Singh & Ors. v. Election Commissioner & Ors., reported in AIR 1968 Man 84. In that case it was contended on behalf of the respondents that the petition for the issue of a writ of Mandamus was not maintainable as there was no notice of demand of justice by the petitioners and such contention was answered in the affirmative. The next case on this point on which Mr. Mitra placed reliance was the case of Harendra Nath Sharma v. State of Madhya Bihar, AIR 1950 MB 46. In that case, the petitioner being aggrieved by the order of the Health Minister of the State, moved the High Court for a writ of Mandamus without first approaching the Health Minister for a demand of justice contending that in view of the stubborn attitude of the Health Minister it was meaningless to approach him for justice and that the said act of the petitioner, in asking the Health Minister to give him an opportunity of being heard by counsel, was itself a demand of justice. It was observed that the petitioner having failed to fulfil the essential requirements of a demand of justice, the petition for the issue of a writ of Mandamus was not maintainable. Relying on the aforementioned decisions, Mr. Mitra in the facts of the present case, sought to argue that when the petitioners were asking for the performance of some legal duties by the appropriate authorities, it was also incumbent on them to make a demand of justice and in not having done so admittedly, the petition should be deemed to be not in form and as such not maintainable.

7. Apart from those, on merits also Mr. Mitra submitted that the petitioners have no case at all, for which they can claim to have any relief from this Court. After placing the affidavit-in-opposition filed by the added respondent, he has further argued that the petitioners, because of their conduct, are estopped from challenging the extension of the routes as has been granted to the respondent pliers, because the petitioners have only challenged and obtained this Rule against the order of extension but they have not thrown any challenge to the earlier order granting the respondent pliers, permission to ply their Mini Buses on the route. In short, he submitted that the initial act of the respondents for placing the Mini Buses on the routes of the petitioners or along with them, not having been challenged, the subsequent extension should not be allowed to be challenged. Mr. Mitra further placed Annexure "B" of the petition and contended that from a reference to the said Annexure there cannot be any doubt or dispute that the petitioners themselves had asked for extension and as such they cannot also challenge the extension granted to Mini Buses. After reading Annexure "A" viz., the notice, he submitted further that the word "introduction" as used therein should not be read as issuing a permit. He submitted that the permits in fact were there and the word "introduction" as used in the main note in Annexure "A" should be read as extension and that according to him should be the only harmonious construction of the documents. On the question whether Mini Buses

are contract or stage carriages, Mr. Mitra relying on section 51, which deals with the grant of contract carriages, submitted that Mini buses with some or such modification can be termed as contract carriages and in support of his contentions he relied on the case of Ram Charan Das Vs. Girjanandini Devi and Others, . In that case, the appellant, the holder of a permit in respect of contract carriages in the Agra region challenged a scheme framed by the Uttar Pradesh Government nationalising road transport services in the Agra region and prohibiting private operation of the services on certain specified routes. His writ petition before the High Court having been dismissed and Letters Patent Appeal also having failed, he preferred an appeal by special leave to the Supreme Court and contended that (1) the scheme was only a reproduction of an earlier scheme u/s 3 of the U. P. Road Transport (Development) Act, 1955 which had been struck down by the High Court. The requirements of section 68C of the Motor Vehicles Act were quite different from those of section 3 of the U.P. Act, and the scheme did not answer them and (2) u/s 68C of the Motor Vehicles Act the State was under an obligation to provide "adequate" transport services to replace those already in operation, but the scheme provided only for 16 contract carriage services. As the number of those services could be challenged under the Scheme, the latter would be again open to challenge whenever the change was effected. It was argued thirdly that the scheme was not properly framed because it provided for the operation of contract carriages on certain routes to the exclusion of the appellant who held a permit for an area irrespective of any route or routes.

8. It has been held in that case that as the requirements of section 3 of the U.P. Act and section 68-C of the Motor Vehicles Act are practically the same, the exercise of power by the State Government in reconsidering and notifying under the said section 68-C, a scheme, which was originally framed u/s 3 of the U.P. Act, must be referred to section 68-C, under which it has validity and to section 3 of the U.P. Act. It has also been held that it is no doubt true that while section 68-C makes a mention of an "efficient, adequate, economical and properly coordinated road transport service" "in the public interest", the U.P. Act merely mentioned "the interest of the general public" "sub-serving the common good or for maintaining and developing efficient road transport system". The change of verbiage, however, does not make a change in the requirements. It would be wrong to think that even under the U.P. Act Government would not think of an "adequate, "economical" or properly coordinated" road transport service, when it chose to provide road transport services for the common good and for maintaining and developing efficient road transport system. The change in language is no doubt there but the intention underlying the words is the same and even if the exact words of section 68-C might not have, been present before the framers of the Scheme, it is quite obvious that they took into account those very factors,

9. It has further been held in that case that under the Motor Vehicles Act, there is no doubt a distinction between area and route in some of the sections but in

others that distinction does not seem to be preserved. These two words sometime stand for the road on which the omnibus run or portions thereof. It has also been held that as u/s 51(2)(i) of the Act, a permit for a contract carriage can be limited to specified route or routes notwithstanding that the petition for such permit must be for an area there is no difficulty in accepting a scheme u/s 68-C of the Act, which cuts down the area by subtracting a few routes. It has been held further that by the taking over of the routes, the area is as effectively cut down as when an area is included in the permit but routes are indicated on which alone the contract carriage can ply. Over and above the findings as aforesaid it has also been held that u/s 68-B of the Act, the provision of Chapter IV-A apply notwithstanding anything inconsistent therewith contained in Chapter IV and no inconsistency between a scheme framed u/s 68-C and any provision of Chapter IV can be made a good ground of attack. It has also been held that secondly, u/s 68-F when the permits are issued to a State Transport undertaking for stage carriages or contract carriages it is provided that the Regional Transport Authority may modify the terms of any existing permit so as to "curtail the area or route covered by the permit in so far as such permit relates to the notified area or notified route" and that would indicate that power is reserved to modify the existing permits either by curtailing the area or by curtailing the routes and furthermore the taking over of certain routes exclusively for the State undertakings render that portion of the area ineffective for a private operator who holds a permit for the whole area including those routes. Thus, a scheme curtailing the area of contract carriage permit by subtracting a few routes on which carriage of State undertakings would run, is not ineffective. On the question of distinction between a contract carriage and a stage carriage it has been held that the distinction between a contract carriage and a stage carriage as defined by sections 2(3) and 2(29) would be that a contract carriage is engaged for the whole of the journey between two points for carriage of a person or persons hiring it but it has not the right to pick up other passengers en route. The stage carriage, on the other hand, runs between two points irrespective of any prior contract and it is boarded by passengers en route, who pay the fare for the distance they propose to travel.

10. Apart from this Mr. Mitra contended that u/s 51(2)(viii) of the Act, required notice of one month is to be given only to those who are likely to be effected and no grievance on that point would be available to the petitioners in view of and after their representation dated 18th April, 1975, in Annexure "B" to the petition. These apart, Mr. Mitra submitted that the petitioners, who admittedly are holders of stage carriage permits and his client viz., respondent pliers, who admittedly are holders of contract carriage permits viz., Mini buses in the instant case, stand altogether on different footing. In fact he submitted that the fare chart in respect of the two types of vehicles are different and that apart there are limits regarding load and passenger.

11. Mr. Malay Kumar Basu who, in view of the fact that the petitioners have withdrawn the allegations of malafide have not filed any affidavit-in-opposition on

behalf of his clients, but produced the records in support of his contentions, submitted that even though there is some contradiction in the notice which mentioned the word "introduction" and in the resolution which mentioned the word "extension", such contradiction cannot be deemed to be fatal. In any event, he submitted following the submissions of Mr. Mitra that such contradictions, if there be any, should not be looked into and considered in view of the other admitted facts available from the circumstances of the present case. He further submitted that the grant or the extension may be termed and considered as a separate grant and such separate grant or every extension would be a new route. He also submitted that u/s 51(2) (viii) of the Act, notice of one month would mean notice to the operators and no such notice in the instant case was required to be issued as the operators themselves applied for such extension. Relying on the proviso to sub-section (9) of section 57 of the Act, Mr. Basu submitted that in case of consent, even no such notice is required. These apart, on the question, whether a Mini bus is a contract carriage or stage carriage, Mr. Basu submitted that no such point being specifically taken in terms of Rule 10 of the Rules relating to matters under Article 226 of the Constitution of India, as framed by this Court, the petitioners should not be allowed to urge the same. In any event, he submitted that such a ground would not be available or maintainable at the instance of the petitioners and that too because of the provisions of section 50 of the Act. Mr. Basu also contended that even if this Court allows the petitioners to urge the point that Mini Buses are not contract carriages but they are stage carriages, no determination should be made at this stage or in this proceeding because for a long time Mini Buses are plying as contract carriages and all the Mini Bus operators are not before this Court in this proceeding. He submitted in particular that if any determination is made on that ground, the same would be prejudicial to the interest of those pliers of Mini Buses, who are not before this Court and that would not be fair and reasonable. In short, he submitted that no determination should be made prejudicing or interfering with the plying of other Mini Buses by other operators in their absence, because the ultimate effect of such determination would be the virtual cancellation of their permits. Mr. Basu further relied on the definition of "public service vehicle" in section 2(25) and submitted that the fact that contract and stage carriages amongst others are included in the said definition would mean that the legislature had the intention of including contract carriage as public service vehicle. He submitted that the said definition in section 2(25) read with the definition of contract carriage in section 2(3) of the Act would be sufficient to dispose of the point as sought to be raised by the petitioners as in any event Mini Buses would come within the said definition of "public service vehicle." He submitted further that in an area in which a route is included the Regional Transport Authority can enter into different contracts and as such separate fares for different and separate stages would be permissible.

12. Mr. Giri submitted that in the instant case demand for justice would have been an useless formality, as the relevant authorities, who are Respondents

herein were aware of the illegal character of the action and were pursuing the same with a set purpose or object and furthermore as the time was too short, such demand was nor possible. He also submitted that Mini Buses cannot, in any event, be termed as "Contract carriages", and the nature and character in which they are being allowed to ply, would also prove that the said Respondents are determined to help the pliers of the Mini Buses and not to do any justice to the cause of the petitioners.

13. The requirements as to demand and refusal thereof, before an application is made, applies only to the writ of Mandamus and even in the case of Mandamus, such requirement as to previous demand and refusal of relief, is subject to exceptions. u/s 46 of the Specific Relief Act, 1877, every application u/s 45 was required to be founded on an affidavit of the person injured, stating his right and alleging his right in the matter, his demand of justice and refusal thereof. u/s 50 of the said Act, neither the High Court nor any Judge thereof had any power to issue, after the coming into force of the Act, any writ of Mandamus. The power of the High Court was to issue an order u/s 45. This power was substituted for the power to issue the writ of Mandamus, which the High Court originally enjoyed. So, such requirement of section 46, related to an order u/s 45 and not to a writ of Mandamus. But, the requirement as to demand and refusal of relief prescribed by section 46 was an essential element of a writ of Mandamus although after the Specific Relief Act, 1877, the power to issue a writ of Mandamus was expressly taken away from the High Court u/s 50. This essential element of the writ of Mandamus was expressly made by section 46 of the Act, a condition precedent for the issue of an order u/s 45 of the Act, which was substituted for the writ of Mandamus by the Act. Under the Constitution of India, the High Courts have again been given the power to issue the writ of Mandamus and the restrictions so imposed by the Act of 1877, that no High Court shall issue a writ of Mandamus, has been expressly removed. The general principles as referred to above as to a writ of Mandamus, which was also made applicable to an order u/s 45 of the Specific Relief Act 1877 by section 46 thereof, will also apply to the writ of Mandamus under the Constitution of India. Hence, in the facts of the cases of *Makhanlal Chakravarty Vs. S.K. Chatterjee and Others*, ; *Saradish Ray Vs. Municipal Commissioners of Suri and Others*, ; *Onkarmal Mistri and Others Vs. Regional Transport Authority, Darjeeling and Others*, *Subrata Kumar Chatterjee Vs. Deputy Chief Accounts Officer, Eastern Railway and Others*, and *Biswanath Sinha and Others Vs. Sudhir Kumar Banerji and Others*, ; it has been observed that before an application for Mandamus is made, the applicant should make a demand for relief from the Authority against whom he makes the application and such Authority must have refused the demand. It has also been stated in *Halsbury's Laws of England (Hailsham Edition)* that "as a general rule the writ will not be granted unless the party complained of has known what it was he was required to do, so that he had the means of considering whether or not he should comply, and it must be shown by evidence that there was a distinct demand of that which the party seeking the Mandamus desires to enforce, and that such

demand was met by a refusal". It has also been held in the facts of the cases of *Staynor & Co. v. Commercial Tax Officer*, 55 C.W.N. 583, which followed the determination in *Surendra Nath Das and Others Vs. The State of West Bengal*, ; *Amalendu Roychowdhury v. Kailash Behari Mathur*, 56 C.W.N. 846, wherein the determination in *Union of India (UOI) and Another Vs. Elbridge Watson*, was followed and also in the cases of *Ratan Chandra Nayak Vs. Adhar Biswas*, ; *Annapoorna Farming and Fishery Ltd. Vs. State of West Bengal and Others*, . 756 and *Subodh Ranjan Ghosh Vs. Major N.A.O. Callaghan and Another*, , that for enforcing a right by a writ of Mandamus, previous demand and denial of the right so sought to be enforced is a prerequisite or condition precedent and the same is not merely a technical point but a point of substance which must be taken into consideration by the Court when it issues a writ of that nature and in fact the application for the said writ and the affidavit on which the same is based, must contain specific averments on the point. Furthermore, such demand and refusal must be true and by the proper authority. Such demand of justice must also be independent of the motion for Mandamus and more particularly prior to the Application for the same. Then again such demand of justice should be by the petitioner himself.

14. But even inspite of the above determination following the decisions in the cases of *Ashraf Ali Khan and Others Vs. State of West Bengal and Others*, ; *Narendra Nath Chakravarty Vs. Corporation of Calcutta and Others*, ; *Nirmal Kumar Sikdar Vs. Chief Electoral Officer and Others*, and *Ashoke Kumar Goenka & Ors., v. West Bengal Board of Secondary Education & Ors.*, 73 C.W.N. 112, it appears that the condition that there should be a demand and refusal of relief before an application for Mandamus is made, ought not to be considered as an absolute legal bar to maintain the same. It further appears from Halsburry's Laws of England (Hailsham Edition) that the requirement that before the Court will issue a Mandamus there must be a demand to perform the act sought to be enforced and a refusal to perform it, cannot be applicable in all possible cases, and does not apply where a person has by inadvertance omitted to do some act which he was under a duty to do, and where the time within which he can do it, has passed. In *R. v. Heulay Revising Barrister*, (1912) 3 K. B. 518, where the Revising Barrister inadvertently failed to remove from voters' list names which he had ordered to be expunged, it has been held that it would be futile to make a demand requiring the Revising Barrister to do an act which he could not do except under an order of Court. It has further been held in the case of *Ashraf Ali Khan & Ors., v. State of West Bengal & Ors.*, (supra) that where the opposite party is already aware of the illegality charged against him and he is pursuing it as of set purpose, it would be useless formality to make a demand for justice and in such a case demand of justice and refusal thereof should not be considered as a precondition in maintaining the petition. It has been held by the Full Bench of the Nagpur High Court in the case of *Sheoshanker v. State Government of Madhaya Pradesh*, AIR 1951 Nag 58, the Rule as to demand and refusal is not an inflexible one and in special cases and under special circumstances the Court has

the power to condone the absence of a demand and refusal of relief previous to the application for Mandamus. It has also been held in that case that when, in the particular circumstances of a case, the demand by the applicant could not have been made by the authorities, the absence of demand would be immaterial. Such view finds support from the cases of *Bengal Club Ltd. Vs. Santi Ranjan Somaddar and Another*, and *Gadadhar Ghose & Ors. v. The State of West Bengal & Ors.* (supra). Although a prior demand of justice is thus excused when it is found that such a demand would be useless but at the same time the mere fact that the attitude of the Authority was stubborn and that the applicant felt that it would be meaningless to approach him for justice, as has been found in the case of *Gadadhar Ghosh Vs. State of West Bengal*, , would not absolve the applicant from his duty to apply directly to the authority concerned for relief in the first instance before moving the Court with an application for Mandamus. Thus, a prior and formal demand for justice in all cases on the part of a petitioner is not necessary and it may be inferred from conduct also. In the case of *Rabindra Nath Chakravarty Vs. The State of West Bengal and Others*, , initially the petition was dismissed as there was no demand of justice before the filing of the application. But following the determination in the case of *Commissioner of Police, Bombay Vs. Gordhandas Bhanji*, , the appeal Court looked to the substance of the matter and held that for the purpose of determining whether there had been demand of justice before the filing of an application, praying for a writ of Mandamus, the substance of the matter must be looked into. It has also been observed in the case of *Ashraf Ali Khan & Ors. v. State of West Bengal & Ors.* (supra) that the rule requiring that a demand for justice should be made before a party moves the Court for a writ of Mandamus is to ensure that the respondents got an opportunity of knowing what was required of them to do and for deciding whether they would do it of their own motion without being compelled by the Court. If that be the true reason of the rule, there can be no difficulty in assenting to the proposition that there would be sufficient compliance with it, if the respondents were made aware of the default or the irregularities complained of and that they were given an opportunity for rectifying the defect or omission, although no formal demand might have been made. In the instant case Mr. Giri, as mentioned hereinbefore, has submitted that the impugned order inspite of the objections of the petitioner, as depicted hereinbefore was passed on 23rd April 1975 and immediately on 24th May 1975 the pliers of the Mini Buses had started plying on the said extended route although the said order of 23rd April 1975 was confirmed only on 24th May 1975 and that itself is enough to prove and establish collusion between the authorities concerned and the pliers of those Mini Buses, which, again and further proved that the authorities concerned had made up their mind and were out to or bent upon to help the said pliers and in fact the stage was set up or everything was made ready before the said date of confirmation and that shows and proves conclusively, the statements as made in paragraph 16 of the petition viz., that further demand for justice would be an empty formality. From the pleadings of the parties and considering the facts of the above mentioned cases and the determinations made therein, I am of the

view that in the facts of the present case also, the petition cannot be or should not be thrown out in limine, as submitted by Mr. Mitter and the petition in the facts of the case, even without a formal demand of justice and the refusal thereof, is maintainable and thus the submission of Mr. Mitter on that account are held to be baseless.

15. Before any determination on the other points are made, the point whether "Mini Buses" are "Contract carriages" or "stage carriages", will have to be decided first and also to find out, whether, if at all and how far, this Court on the pleadings of the parties and in the facts of the case, would be entitled to determine the same. As, on such determination, the determination on the other point would depend. It may be mentioned that Mr. Basu, appearing for Respondent Nos. 2 and 3, in his usual fairness and on being asked, produced the minutes of the meeting of the Regional Transport Authority, Calcutta Region dated 7th December 1971, whereby it was resolved that Mini Buses should be introduced in Calcutta as per a scheme and the strength, it was resolved to be limited to fifty vehicles, per route for the present and the said resolution further authorised the Secretary, to call for applications and representations u/s 50 of the Motor Vehicles Act. The scheme as referred to is quoted hereunder because that would be relevant and material for the purpose of finding out and determining the character of the Mini Buses and the manner in which they are required to ply. The said scheme is in the following terms: --

Scheme for Mini Buses

- 1) Mini Buses should ply between two fixed terminals along specified routes (the terminal points and the routes are given in Annexure "B" & "C"). Routes mentioned in Annexure "C" should get priority.
- 2) One specific point between the two fixed terminals may be prescribed by the R.T.A. where the vehicles may stop to facilitate getting down of the passengers there. At that point the intending passengers may board the vehicle to occupy vacant seats.
- 3) The fares would be 10 paise per kilometer and the fare table of every route will be prescribed by the R.T.A. before the grant of the permit. Minimum fare should be 50 paise.
- 4) The nature of the permit under which the vehicle would run would be "Contract Carriage Permit".
- 5) No specific model need be prescribed but the vehicle should be a brand new one and should conform to certain standards viz. it should comfortably accommodate between 12 and 20 persons and the body should be of such a pattern that standing would be impossible.
- 6) The vehicles should ply between 6 A.M. and 12 midnight and it would be open to the operators to make their vehicles available for charter for occasions like marriage, picnic, excursion etc. on their obtaining permission for such charter

from the R.T.A. but on every working day the buses must ply between the fixed terminals from 8 A.M. to 11 A.M. and 4 P.M. to 7 P.M.

7) In no route more than 50 vehicles would be placed.

Thus, from a reference to clause 4 of the scheme it appears that by the said scheme the permits for the Mini Buses were intended to be issued as "Contract carriages" and furthermore the said scheme also made it clear in clause 1 that the Mini Buses should ply between two fixed terminals along specified routes and further clause 2 made it clear that the Regional Transport Authority is authorised to fix or specify one point between the two fixed terminals where Mini Buses may stop to facilitate the getting down of the passengers. The scheme has also made it clear that at that point, the intending passengers may board the vehicle to occupy vacant seats. These apart, other conditions have been imposed in the scheme about the road worthiness and conditions of the Mini Buses. The petitioners have alleged that the issue of permits of the Mini Buses as "contract carriages" is nothing but a colourable exercise of power by the authorities concerned and in fact applying the tests as laid down in the Act itself, it would be evident that the Mini Buses are nothing but "stage carriages" with some special amenities and formalities. The petitioners have further alleged that like stage carriages, Mini Buses do stop at every stoppages, charge different fares at different stages at a higher rate and they pick up passengers and drop them at every stage. The fact that the Mini Buses do stop at every stoppages, charge different fares at different stages at higher rates and they also pick up passengers and drop them at every stage have not been specifically denied by the Respondents and in fact the said statements are amply corroborated by the records of the Regional Transport Authority concerned which were produced by Mr. Basu and the added Respondents have only contended that the introduction of Mini Buses cannot create any difficulty and they being "contract carriages" stand altogether on a different footing from the stage carriages. In support of these contentions, Mr. Mitter relied on sections 48 and 51 of the Act. He further contended that the Mini Buses can only carry passengers and standing therein, is strictly prohibited, whereas in case of "stage carriages" there is no such restriction. He also contended that the fare charts of the two types of carriages are also different and in fact because of the introduction of Mini Buses, the "stage carriage" owners have in fact suffered no 1. On this point, whether Mini Buses are "contract" or "stage" carriages, Mr. Basu appearing for Respondent Nos. 2 & 3, could not disprove or dispel the contention of the petitioners or show any evidence contrary to the submission as made by them. He of course contended, relying on the definition of "public service vehicles" in section 2(25) of the Act, which is in the following terms :

S. 2(25) -- "Public service vehicle" means any motor vehicle used or adapted to be used for the carriage of passengers for hire or reward, and includes a motor cab, contract carriage, and stage carriage.

that the fact that "contract" and "stage" carriages are included in the said

definition, would mean that the legislature had the intention of including "contract carriage" as public service vehicle and since Mini Buses would come within the definition of "public service vehicle", the definition of the same in section 2(25) read with the definition of contract carriage in section 2(3) would be enough to dispose of and answer the points as raised by the petitioners, in the negative. Apart from these, Mr. Basu contended that the question whether Mini Buses are "contract" or "stage" carriages, not being specifically taken in the petition, in terms of Rule 10 of the Rules, as framed by this Court in respect of matters under Article 226 of the Constitution of India, should not be allowed to be urged and he submitted further that such ground is also not available to the petitioner in view of section 50 of the Act. Apart from these, Mr. Basu submitted that even if this allows the petitioners to urge that point, no determination should be made at this stage or in this proceeding, because for a long time Mini Buses are plying as "contract carriages" and furthermore when all the Mini Buses operators are not before this Court in this proceeding, as any determination made on that account and in favour of the petitioners would be against the interest of those pliers or prejudicial to them. Since the determination, if made, on the basis of the submissions of the petitioners and in their favour, would mean the virtual cancellation of the permits of all the operators of Mini Buses, Mr. Basu submitted that no such determination should be made in their absence. Even if, I ultimately find favour with the submissions as made by Mr. Basu, I think when the point, whether a Mini Bus is a "contract" or a "stage" carriage has been raised, the same should be decided and that too when the said point is available on the pleadings and furthermore the same would go to the jurisdiction of the issue of the permits in question.

16. For the purpose of finding out the real character of the Mini Buses, apart from the scheme, the definition of "public service vehicle" and the way and manner in which Mini Buses are being plied or are plying, the definitions of "contract carriage" in section 2(3) of the Act and that of "stage carriage" in section 2(29) of the same and which are quoted hereunder :

S. 2(3) -- "contract carriage" means a motor vehicle which carries a passenger or passengers for line or reward under a contract expressed or implied for the use of the vehicle as a whole at or for a fixed or agreed rate or sum.

(i) on a time basis whether or not with reference to any route or distance or

(ii) from one point to another and in either case without stopping to pick up or set down along the line or route passengers not included in the contract; and includes a motor cab notwithstanding that the passengers may pay separate fares.

S. 2(29) -- "Stage carriage" means a motor vehicle carrying or adapted to carrying more than six persons excluding the driver which carries passengers for hire or reward at separate fares paid by or for individual passengers, either for the whole journey or for stages of the journey;

would be of relevant and necessary consideration.

17. It is thus obvious, that although in the scheme, Mini Buses are described as "contract carriages", but really they are not so and they do really come under the category of "stage carriages", as such character is apparent from the admitted way, manner and mode, in which they are plying or are allowed to be plied. In the case of *Roshan Lal v. State of U. P.* (supra), the distinction between a "contract carriage" and a stage carriage under sections 2(3) and (29) of the Act came up for consideration and it has been observed that a "contract carriage" is engaged for the whole of the journey between two points for carriage of a person or persons hiring it but it has not the right to pick up other passengers en route. The "stage carriage", on the other hand, runs between two points irrespective of any prior contract and it is boarded by passengers en route, who pay the fare for the distance they propose to travel. Thus, even applying the tests as laid down by the Supreme Court, there cannot also be any doubt that in the instant case, Mini Buses, as they are and the manner in which they are operating or are allowed to be operated, are really "stage carriages" and not "contract carriages" and the scheme, on the basis of which, permits for such Mini Buses have been issued, is contrary to law and unauthorised and furthermore even if the said scheme is a valid one, the working of the same has been frustrated. Although, Mr. Basu has rightly pointed out that such a point on the question whether Mini Buses are "contract" or "stage" carriages, has not been specifically taken by the petitioner, yet I have allowed them to advance arguments on that point as the same is really a point of law and such points or consideration of the same, in my view, appears from the pleadings of the parties and the Respondents had due notice of the same.

18. Then comes the other objection which is substantial in nature and has been raised by Mr. Basu to the effect that such a determination, which would have the real effect of cancellation of the permits of all the pliers of Mini Buses should not be made in their absence. No writ in my view can go where the order of the Court cannot be carried out without prejudicing the rights of others. This view finds support from the Bench decision of the Orissa High Court in the case of *Ramkumar Agarwalla & Anr. v. State of Orissa & Ors.*, AIR 1965 Orissa 125 and also in the determination in the case of *Sri Krishna Rice Mills, Tadepalligudem by Proprietor Sait Bansilal (died) and Another Vs. Deputy Director (Food) Govt. of India, (office of the Joint Director of Food), Dept. 17/270, Vijayawada 2*, . In the former case, the election of Bargarh Municipality was challenged for some irregularities but the candidates, who were declared successful and whose interest would be vitally affected, if the petition succeeded, were not made parties and it has been held that *Mandamus* cannot go in the absence of parties, who are likely to be affected by the decision of the Court. In the latter case, petitions under Article 226 of the Constitution of India were filed by certain Rice Millers, mainly raising a question relating to the validity of the Essential Commodities Act, 1955 and certain notifications and orders issued thereunder. It was contended by the Respondents that as the Central Government, whose

orders are challenged as being void and without jurisdiction, was not impleaded as a party and even if that Government is made a party, no writ can be issued against it, as it is outside the jurisdiction of the Court. The learned Judges in that case, after considering the points as raised and on applying the relevant principles, have held that a Court cannot adjudicate; on the validity of an act of an authority in its absence and any person, who is likely to be affected by any decision given by a Court should be added as a party. The above view also finds support from the observations of Shah J., which was made to the following effect in the judgment dated 14th August, 1967 made in the case of Padam Singh Jhina v. Union of India (Civil Appeal No. 405 of 1967):

But we are unable to investigate the question whether there has been infringement of the rules governing fixation of seniority, for a majority of those who were placed above the appellant in the seniority list are not impleaded in the petition before the Judicial Commissioner and are not before this Court. It is impossible to pass an order, assuming that the appellant is able to convince us that a breach of the rules was committed, altering the list of seniority, unless those who are likely to be affected thereby are before the Court and have an opportunity of replying to the case set up by the appellant.

The above observation, it appears, has further been quoted with approval as a salutary rule in the case of State of Orissa and Another Vs. B.K. Mohapatra, . Here in the instant case, if the order, which has been asked for and in the form as mentioned, is issued, then that would certainly affect the interest of all other pliers of Mini Buses and that too in their absence, as the very basis of the grant of such permits will have to be declared invalid and as such the other pliers of the Mini Buses, who are not before this Court or parties to this proceeding, would suffer much. It may be mentioned that no prayer has been made by the petitioners for bringing the other pliers of Mini Buses on record. In my view, such an order, cannot or should not be passed in their absence. Thus, although I am determining the point in favour of the petitioners, but ultimately I cannot direct the issue of the writ or writs as asked for on that basis effectively, for the reasons as indicated above. In view of the specific fact that permits for Mini Buses have been granted as "contract carriages", the other points sought to be urged by Mr. Basu on the definition of "Public Service Vehicle" in section 2(25) of the Act, are of no avail or assistance. In any event, I hold that the definition of "Public Service Vehicle" is very wide no doubt, but the said definition itself, makes it clear that "Contract" or "Stage" carriage vehicles are distinct and separate classes and even those type of vehicles would, in specific cases, viz., when they are used or adopted to be used for the carriage of passengers for hire or reward, come within the said definition. "Contract" and "Stage" carriages, which have a characteristic of their own, would certainly be treated or considered as "Public Service Vehicle", when they stand the tests as mentioned in the definition. But that would not certainly do away with or take away the characteristic and requirements of the said two types of carriages, "Contract" and "Stage" carriages are two distinct and separate types of vehicles, which are also

included in the definition u/s 2(25) and can be termed as "Public Service Vehicles" and even when they ply as such, that would not take away their characteristics, requirements and the manner and mode of plying as mentioned or as required under the respective definitions.

19. Coming now to the other points as argued by Mr. Giri, it is true that there is some ambiguity in the notice dated 10th April 1975 and the resolution dated 23rd April 1975 inasmuch as in the notice the purpose is mentioned as "introduction" while in the resolution the word "extension" has been used. "Introduction" means formal presentation, whereas "extension" would mean enlargement or additional part. Now we shall have to see whether in fact there was or has been any ambiguity which created any difficulty in understanding the real intention and purport of the notice in question. The best way for achieving the result would be to find out what and how the petitioners understood the notice. Such intention would be apparent from their representation filed through the Secretary, Route Committee, Routes 3B/3D (Annexure B), wherein, under the subject heading, it has been mentioned about the "extension of Mini Bus routes from 1) Milk Colony to Anderson House and 2) Tala Park to Kidderpore via Shyambazar five point etc." Thus, there is no doubt that inspite of the alleged ambiguity, the petitioners were not in any way prejudiced in understanding the real and underlying purpose in the notice, on the basis of or in terms whereof the subsequent resolution has been passed. The inconsistency in the notice and the resolution is thus not fatal or very material. On the other point regarding section 51 of the Act, I find that the provisions of section 51(2) (viii) makes it clear that one months" notice as mentioned therein, has application only in respect of the pliers concerned viz., the pliers of Mini Buses and as such, since the petitioners were and are not pliers of such type of carriages, no such notices were required to be given to them and the more so when I have not, in view of the findings as mentioned hereinbefore, been able to hold effectively that the grant of permits to Mini Buses as "contract carriages" were or are unauthorised or taking into considerations, the terms and conditions of their plying and the manner in which they really ply, they must be considered as "Stage carriages". For all the reasons above, this application must fail and the Rule is thus discharged. There will however be no order as to costs.