
(2005) 04 KL CK 0020
In the High Court Of Kerala
Case No : O.P. No. 10181 of 2003 etc.

George

APPELLANT

Vs

State of Kerala

RESPONDENT

Date of Decision : 08-04-2005

Acts Referred:

Constitution of India, 1950 — Article 14
General Clauses Act, 1897 — Section 24, 6
Kerala Motor Vehicles Rules, 1989 — Rule 289
Motor Vehicles (Amendment) Act, 1994 — Section 32, 33
Motor Vehicles Act, 1988 — Section 107, 110(1), 111, 111(2), 138

Citation : (2005) 2 KLT 717

Hon'ble Judges : Thottathil B. Radhakrishnan, J

Bench : Single Bench

Advocate : P. Gopalakrishna Menon, M. Jithesh Menon, K.V. Gopinathan Nair and Joseph Sebastian Purayidam, for the Appellant; M.A. Fayaz, Government Pleader and T. Ravikumar, for the Respondent

Final Decision : Dismissed

Judgement

Thottathil B. Radhakrishnan, J.—Petitioners are operators of stage carriages as defined in Section 2(40) of the Motor Vehicles Act, 1988 (for short "the Act").

2. These Writ Petitions are filed challenging the validity of Rule 289 of the Kerala Motor Vehicles Rules, 1989, published as per S.R.O.No. 1286/1989 (hereinafter referred to as "the Rules").

3. Rule 289 of the Rules, hereinafter referred to as the "impugned rule", reads as follows:

"289. Prohibition of audio-visual or radio or tape recorder type of devices:-- No public service vehicle other than a contract carriage shall be installed with any audio-visual devices."

4. O.P.No. 10181/2003 was filed in view of the check report issued by the Joint

Regional Transport Officer, Kothamangalam stating that the stage carriage KL-17-4506, when stopped and checked, was found fitted with T.V. and stereo and hence, there is violation of Rule 289 of the Rules. The other Writ Petitions are filed anticipating action for violating the said rule. It is in this context that the petitioners challenge the said rule.

5. The impugned rule, as already noticed, is part of the Kerala Rules, made by the Government of Kerala, in exercise of the powers conferred by Sections 26, 28, 38, 65, 96, 107, 111, 138, 159, 176 and 213 of the Act. Of them, Section 111 empowers the State Government to make rules regulating the construction, equipment and maintenance of motor vehicles and trailer with respect to all matters other than the matters specified in Sub-section (1) of Section 110. Sub-section (2) of Section 111, at the time of the making of the impugned rule, in so far it is relevant for these cases, read as follows:

"(2) Without prejudice to the generality of the foregoing power, rules may be made under this section governing all or any of the following matters either generally in respect of motor vehicles or trailers or in respect of motor vehicles or trailers of a particular class or description or in particular circumstances, namely:--

xxx xxx xxx xxx

(g) the placement of audio-visual or radio or tape recorder type of devices in the vehicle."

6. After the Kerala Rules came into force in 1989, the Motor Vehicles Amendment Act, 1994 (Act 54/1994) (hereinafter referred to as "the Amending Act") came into force with effect from 14.11.1994. By Section 33 of the Amending Act, the afore-quoted Clause (g) in Section 111(2) of the Act was omitted and by Section 32 of the Amending Act, Clause (o) was inserted in Sub-section (1) of Section 110 to the following effect:

"(o) The placement of audio-visual or radio or tape recorder type of devices in public vehicles".

7. Thus, on and from the date of coming into force of the Amending Act, i.e. 14.11.1994, the power to make rules regarding the placement of audio-visual or radio or tape recorder type of devices in public vehicles stood conferred with the Central Government to the exclusion of the State Government.

8. The learned counsel for the petitioners argued that the empowering provision available in the form of Section 111(2)(g) at the time of making of the impugned rule having been omitted and such rule-making power having been exclusively given to the Central Government to the exclusion of the State Government, by virtue of the inclusion of the said sub-clause in Section 110(1)(o), the impugned rule no more survives. It was next contended that the impugned rule is in excess of the rule-making power which stood conferred u/s 111(2)(g) at the time of making of the impugned rule and further, that the impugned rule is arbitrary,

inasmuch as the same has no nexus to any legitimate object sought to be achieved.

9. Per contra, the learned Government Pleader contended that the rule was validly made in exercise of power conferred u/s 111(2)(g) as it then stood and therefore, the same is not invalid and that, at any rate, having regard to the fact that the said provision is grafted in pari materia into Section 110(1)(o), the legislative intent is clear that there is no intention to repeal any rule made under the repealed provisions contained in Section 111(2)(g). It is contended that the impugned rule is well within the extent of the delegated power to legislate, as it then stood. As regards, the object sought to be achieved by the impugned rule, making reference to the statements filed on behalf of the Government, it is pointed out that the Government have in their wisdom classified the public service vehicles for the purpose of making the rule and a clear distinction can be noticed for the purpose of the rule. It is urged on behalf of the Government that the distinction was intentionally made because the contract carriages are hired by a group of individuals and may have a common interest or common destination and the passengers may be known to each other. The hirers may be going for a picnic or other purposes and their state of mind may be common and it will be up to them to choose to use the audio-stereo system available in the vehicles which are hired for their purpose. On the contrary, in stage carriages the passengers can never be treated to have a common destination or common interest. Some of the passengers in stage carriages may be proceeding to attend a funeral or to a hospital or to a place of worship and each of them will have their own destinations and it will be a nuisance to them to compel them to watch video or hear audio programmes while they travel for short distances. The restriction made is reasonable and is within the competence of the State Government, in exercise of delegated legislative power. The learned Government Pleader also relied on Section 111(2)(c) in support of the impugned rule.

10. On the basis of the aforesaid rival contentions, three issues arise for decision:

(i) Whether the impugned rule has ceased to be operative on the coming into force of the Amending Act by which Clause (g) of Sub-section (2) of Section 111 was deleted and the same provision was re-enacted as Clause (o) in Sub-section (1) of Section 110 of the Act, thereby vesting such rule-making power in the Central Government to the exclusion of the State Government?

(ii) If Issue No. (i) is answered in the negative, whether the impugned rule is ultra vires of the powers that stood conferred on the State Government by Clause (g) of Sub-section (2) of Section 111 when the impugned rule was made?

(iii) Is the impugned rule arbitrary and violative of Article 14 of the Constitution of India? Point No. 1

11. At the outset, I may notice that the issue relating to the impact of the Amending Act on the rule-making power of the State Government u/s 111(2)(g) of the Act, has been specifically dealt with by a Division Bench of the Madras

High Court in *S. Sengoda Gounder v. State of Tamil Nadu and Ors.* (1995) 2 L.W.

1. The Madras High Court held that by the operation of Sections 6 and 24 of the General Clauses Act, 1897, the rule made under the repealed provision of the Act is one which is to be treated as falling within the phrase "anything duly done" in Section 6(b) of the General Clauses Act and that the rule made u/s 111(2)(g) of the Act as it stood before amendment would stand in so far as it is not inconsistent with the re-enacted provisions and there is no express provision in the re-enacted law contradicting the continuance of the rule made by the State Government in exercise of power u/s 111(2)(g) before the coming into force of the Amending Act. This is succinctly dealt with and laid down under Point (a) of the said judgment. I am in complete agreement with the views expressed under the said issue in the said judgment and I follow the same.

12. That apart, where any Central Act is re-enacted with modification, then, unless it is otherwise expressly provided, any rule issued under the repealed Act shall, so far as it is not inconsistent with the provisions re-enacted, continue in force and be deemed to have been made under the provisions so re-enacted, unless and until it is superseded by any rule made under the provisions so re-enacted. This means that the impugned rule framed in exercise of the power u/s 111(2)(g) of the Act before the coming into force of the Amending Act, would continue to hold the field, until new rules are issued u/s 110(1)(o) of the Act, as amended. It appears that it is manifest from the nature of the Amending Act that all that the Parliament intended to do was to revoke the power of the State Government to make further rules, leaving the existing rules in force subject to that they are liable to be amended, varied or revoked under the power conferred on the Central Government by the introduction of Clause (o) to Section 110(1). This appears to be a reasonable way of understanding the effect of the omitting of Clause (g) from Section 111(2) and the insertion of Clause (o) in Section 110(1). It does not appear at all that the intention of the Parliament in doing so was to nullify the rules validly made by the State Governments when Section 111(2)(g) stood in the statute book, without the Central Government making rules in exercise of power u/s 110(1)(o). This is because it cannot be presumed that the Parliament ever intended to create a vacuum during the period after the amendment, until the Central Government may, in their wisdom, deem it necessary to frame such rule. In fact, it has to be presumed that the Parliament never intended to create any such vacuum.

13. Still further, the re-enacted provision deals with the very same subject and is in *pari materia* with the provision omitted. There is no direction to discontinue the rules framed under the repealed enactment. Hence, the conferment of the rule-making power on the same subject with the Central Government, by itself, cannot be treated as inconsistent or incompatible with the continuation of the impugned rule framed by the State Government under the repealed enactment.

14. Hence, the impugned rule framed by the State Government, in exercise of its power, Clause (g) of Sub-section (2) of Section 111 of the Act, continues to be in

force until repealed or replaced by new rules framed by the Central Government. Point No. (i) is answered against the petitioners.

Point Nos. (ii) and (iii):

15. Section 2(35) of the Act defines a "public service vehicle" as under:

"(35) "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 maxicab, a motorcab, contract carriage, and stage carriage;"

16. A contract carriage is defined u/s 2(7) of the Act as follows:

(7) "Contract carriage" means a motor vehicle which carries a passenger or passengers for hire or reward and is engaged under a contract, whether expressed or implied, for the use of such vehicle as a whole for the carriage of passengers mentioned therein and entered into by a person with a holder of a permit in relation to such vehicle or any person authorised by Him in this behalf on a fixed or an agreed rate or sum-(a) on a time basis, whether or not with reference to any route or distance; or (b) from one point to another, and in either case, without, stopping to pick up or set down passengers not included in the contract any where during the journey; and includes;

(i) a maxicab; and

(ii) a motorcab notwithstanding that separate fares are charged for its passengers;"

17. The petitioners, being stage carriage operators, it will be profitable to extract the definition of "stage carriage" u/s 2(40) of the Act, which reads as follows:

"(40) "Stage carriage" means a motor vehicle constructed or adapted to carry more than six passengers excluding the driver for hire or reward at separate fares paid by or for individual passengers, either for the whole journey or for stages of the journey;"

18. The definition of "contract carriage" shows that such a motor vehicle is to be engaged under a contract for the use of the vehicle as a whole and such a carriage has to ply without stopping to pick up or set down passengers not included in that contract of carriage, anywhere during the journey. The contract carriage plies under only one contract at a time and the use of the vehicle must also be as a whole. In contradistinction to contract carriage, a stage carriage runs between two points irrespective of any prior contract and it is boarded by passengers en route, who pay the fair for the distance they propose to travel. These distinctions between the contract carriage and stage carriage are noticed in the context of the argument advanced on behalf of the petitioners that in the contract carriages as well as stage carriages, the passengers are transported for hire or reward. This also has relevance in appreciating the contention advanced by the State Government indicating the rationale behind the classification between the contract carriages and other public service vehicles, for the purpose

of making the impugned rule. Contrasting the definition of a "public service vehicle" as contained in Section 2(33) with the definition of "contract carriage" as contained in Section 2(7), a clear differentia is intelligible to identify the public service vehicles, which are not contract carriages, as a homogenous group for the purpose of making the impugned rule. Therefore, the argument on behalf of the petitioners that there is no intelligible differentia to classify the public service vehicles into two categories for the purpose of the impugned rule fails.

19. Relying on the decision of the Division Bench of the Madras High Court in *S. Sengoda Gounder*'s case, it was urged on behalf of the petitioners that the power to make a rule regulating and governing the placement of audio-visual or radio or tape recorder type of devices in the vehicle, does not include a power to prohibit. A power to regulate, includes a power to prohibit. The expression "regulate" is not ordinarily synonymous with the word "prohibit". The prohibition made by the impugned rule is not an absolute prohibition on all classes of vehicles, but only a prohibition of the installation of audio-visual or radio or tape recorder type of devices in public service vehicles other than contract carriages. Relying on *S. Sengoda Gounder*'s case, it was attempted to be pointed out that the power to regulate cannot be treated to include a power to impose such prohibition. The context in which the Tamil Nadu Rules were construed in *S. Sengoda Gounder*'s case, is not the same as the one available in the cases in hand. Stage carriages were isolated and imposed with a prohibition under the Tamil Nadu Rules. The situation obtained under the Kerala Rules is not so. As already noticed, a classification between the contract carriages on the one hand and the vehicles other than contract carriages, but which are public service vehicles, on the other hand, is a reasonable classification for the purpose of the objects sought to be achieved by the impugned rule. So much so, the prohibition imposed as per the impugned rule is only in the manner of a regulation and the power to regulate in the form of such a prohibition, is essentially available u/s 111(2)(g) read with Section 111(1). That apart, the power u/s 111(2)(c) enjoining the State Government to make a rule prohibiting the carrying of appliances likely to cause annoyance or danger, is also rightly urged by the learned Government Pleader in support of the impugned rule. I am of the considered view that the word "regulating" occurring in Chapter VII of the Act, cannot be given a restricted meaning, as held by the Madras High Court in Point (b) in *S. Sengoda Gounder*'s case. I, therefore, respectfully express my inability to agree with the views and findings under Point (b) in the said decision. This is more so because the power to regulate by a piece of delegated legislation, ought to include the power to the delegate to issue a rule, if necessary to prohibit, since in the absence of express intention to the contrary, it may not be wise to confine and restrict the power to regulate to exclude the power to prohibit.

20. Hence, I hold that the impugned rule is not ultra vires of the powers that stood conferred on the State Government by Clause (g) of Sub-section (2) of Section 111 when the impugned rule was made and the said rule is not arbitrary and violative of Article 14 of the Constitution of India.

In the result, the Writ Petitions are dismissed. No costs.