

(1972) 03 OHC CK 0012

In the Orissa High Court

Case No : Original Jur. Case No. 86 of 1972

Madhabananda Ray and Others

APPELLANT

Vs

State of Orissa and Another

RESPONDENT

Date of Decision : 17-03-1972

Acts Referred:

Constitution of India, 1950 — Article 245
Motor Vehicles Act, 1939 — Section 74

Citation : AIR 1972 Ori 255 : (1972) 38 CLT 527

Hon'ble Judges : R.N. Misra, J;B.C. Das, J

Bench : Division Bench

Advocate : D. Mohanty, for B. Patnaik, for the Appellant; Additional Government Advocate, for the Respondent

Judgement

R.N. Misra, J.—The petitioner No. 1 is the proprietor of the Cuttack Roadways while the remaining nine petitioners happen to be the managers of the different public carrier concerns. All of them have come before this Court in this application under Article 226 of the Constitution challenging the vires of Section 74 of the Motor Vehicles Act and the notification issued by the District Magistrate, opposite party No. 2, in purported exercise of powers vested in him under Rule 177 of the Orissa Motor Vehicles Rules, 1940. The impugned notification dated 31-12-1971 is to the following effect:--

"No. 6019:-- I. Shri P. M. Samantaray, I. A. S., District Magistrate, Cuttack, by virtue of powers conferred on me u/s 74 of the Motor Vehicles Act, 1939, read with Rule 177 of the Orissa Motor Vehicles Rules, 1940, do hereby make the following order which shall be operative with effect from the 1st February 1972 in the interest of public safety and convenience and in view of the nature of the roads within the Cuttack Municipal area.

1. No heavy goods vehicle with a registered laden weight exceeding 11,000 Kgs. shall be allowed to ply on any road within the City of Cuttack except on the following roads:--

(i) National High Way.

(ii) Link Road from National High Way Crossing upto Crossing of Dolmundai and Khannagar Roads.

(iii) From the crossing of Dolamundai and Khannagar Roads upto National Highway via -- Dolamundai Crossing, Chhatrabazar, Malgodown Railway Level Crossing.

(iv) From the Crossing of Dolamundai and Khannagar Roads upto Collectorate via Kathijuri Embankment Road.

2. No goods truck will be allowed to ply within the City of Cuttack except during the hours between 11.30 a. m. and 3.00 p.m. and between 9.30 p.m. and 8.30 a. m. This time registration will not apply to goods vehicles plying on the roads mentioned in para 1 above.

3. The goods vehicles employed for essential services and for meeting any emergency, shall be excluded from the operation of the above order, only on obtaining a certificate from the District Magistrate. Cuttack to that effect."

The godowns and offices of the petitioners are alleged to have been located within the town of Cuttack and it is contended that by operation of the ban contained in the notification, they are not in a position to come to their respective godowns and offices and their business is in ieopardy. It is also contended that by prohibiting their vehicles from getting into the town their business is adversely affected.

Challenge is offered on the footing that the provisions of Section 74 of the Motor Vehicles Act which is the ultimate basis of the order is liable to be struck down for having conferred naked, arbitrary and unguided power on the Executive Authority of the State. The notification is branded as discriminatory, purposeless and mala fide. It is contended that in giving effect to the notification the fundamental rights of the petitioners as guaranteed under Article 19(1)(g) of the Constitution are curtailed and interfered with. The restriction imposed by the notification is not reasonable, nor is it in the interests of the general public.

2. During hearing of this writ application the learned Additional Government Advocate appearing for the opposite parties disputed the maintainability of the petition and challenged the rights of the managers of the different transport organisations who claim protection on the basis of fundamental right to carry on business which is available to citizens only. He further contended that in view of the Proclamation of Emergency under Article 352 of the Constitution which is still In operation the provision of Article 19 of the Constitution stands suspended and the impugned action cannot be challenged on such score.

3. There is considerable force in the contention of the learned Additional Government Advocate in regard to the non-availability of the protection of Article 19(1)(g) of the Constitution during operation of the Proclamation of Emergency.

In view of the handicap with which the petitioners are beset, Mr. Mohanty, the learned counsel for the petitioners, wanted an adjournment of the hearing of the writ application to enable him to take instructions. It has now been brought to our notice by Mr. Mohanty that the petitioners have moved the State Government for rescinding the impugned notification and he states that in view of the restriction imposed under Article 358 of the Constitution the petitioners would be in a better position to ask for relief from the State Government than from the Court. The learned Additional Government Advocate challenges the maintainability of such a petition before the State Government in view of the authorisation made under Rule 177 of the Orissa Motor Vehicles Rules by which the District Magistrate is delegated the powers u/s 74 of the Motor Vehicles Act to exercise within his jurisdiction.

We are not called upon to decide whether such a petition before the State Government is competent, but *prima facie* there is force in what Mr. Mohanty states. The learned Additional Government Advocate had cited before us a decision, during hearing of this case for some other purpose, reported in *Chinta Lingam and Others Vs. Government of India and Others*, which supports the view that such a representation lies. Their Lordships of the Supreme Court have said:

"But in the cases before us the permit is to be granted either by the State Government or by responsible officers of the rank and the District Collector or the Deputy Commissioner of Civil Supplies. Indeed, Mrs. Pappu quite properly agreed that if the State Government alone had the power to issue the permits the challenge on the ground of unreasonableness of the restrictions would not be available. We consider that there is no bar to any of the aggrieved parties approaching the State Government by means of a representation for a final decision even if the matter has been dealt with by the District Collector or the Deputy Commissioner of Civil Supplies in the first instance and the permit has been refused or wrongly withheld by those officers".

To the same effect are the observations of their Lordships of the Supreme Court in *Godawari S. Parulekar and Others Vs. State of Maharashtra.*, . The Question posed there was as to whether the State Government having delegated Its power conferred on it under Rule 30 of the Defence of India Rules. 1961 to the District Magistrates within the limits of their jurisdiction it was still competent for the State Government to pass an order in exercise of the power under Rule 30. In paragraph 6 of the judgment their Lordships answered the question by saying:

"In our opinion by issuing the aforesaid notification the State Government has not demanded itself of the power to act under Rule 30".

In the latter case their Lordships quoted with approval the dictum laid down by the Queen's Bench Division in (1890) 25 QBD 391, (*Huth v. Clarke*) where Wills, J. said:

"Delegation, as the word is generally used, does not imply a parting with powers by the person who grants the delegation, but points rather to the conferring of

an authority to do things which otherwise that person would have to do himself.

Lord Coleridge. C. J. in the same decision observed:

"The word "delegation" implies that powers are committed to another person or body which are as a rule always subject to resumption by the power delegating, and many examples of this might be given".

In (1945) 2 All ER 616. (Gordon, Dadds & Co. v. Morris) Lynskey, J. in the Chancery Division while approving the dictum in the aforesaid case took the same view.

4. In view of what has been said above, we are not in a position to accept the contention of the learned Additional Government Advocate that the representation against the action of the opposite party No. 2 would not be maintainable before the opposite party No. 1 the State Government; but as we have already said We are not required to decide the competency of such a petition.

5. Mr. Mohanty states that he would not press the writ petition since the petitioners have moved the State Government for adequate relief and wants us to permit him to withdraw the writ petition. We accordingly allow the application to be withdrawn and would not make any orders in regard to the costs of the proceeding.

Das, J.

6. I agree.