

(1964) 12 MP CK 0014

In the Madhya Pradesh High Court

Case No : Miscellaneous Petition No. 139 of 1964

Premchand Jain

APPELLANT

Vs

State of M.P. and Others

RESPONDENT

Date of Decision : 23-12-1964

Acts Referred:

Constitution of India, 1950 — Article 154, 154(2), 166(2), 166(3), 254(2)
Madhya Pradesh Government Rules of Business — Rule 13, 6, 7
Motor Vehicles Act, 1939 — Section 68C, 68D, 68D(1), 68D(2), 68D(3)

Citation : AIR 1965 MP 196 : (1965) J LJ 611 : (1965) 10 MPLJ 434

Hon'ble Judges : P.V. Dixit, C.J;K.L. Pandey, J

Bench : Division Bench

Advocate : M.N. Phadke and R.K. Tankha, for the Appellant; M. Adhikari, General and R.J. Bhawe, Government Advocate for Nos. 1, 2, 3 and 5, K.A. Chitale and V.S. Dabir for No. 4, for the Respondent

Final Decision : Allowed

Judgement

Pandey, J.

This petition under Articles 226 and 227 of the Constitution is directed against:

- (i) the proposed Scheme No. 2, as prepared u/s 68C of the Motor Vehicles Act, 1939 (hereinafter called the Act) by the Madhya Pradesh State, Road Transport Corporation (to be called hereafter as the Transport Corporation) and published in the State Gazette dated 1 March 1963;
- (ii) the order dated 25 June 1963 whereby R. S. Shukla, Special Secretary in the Home Department, disposed of the objections preferred against the aforesaid Scheme and modified it;
- (iii) the final publication, after previous approval of the Central Government, of the approved Scheme in the State Gazette dated 7 February 1964 as required by Section 68D of the Act, and

(iv) the order dated 17th March 1964 passed u/s 68F(2) of the Act by which the Secretary, Regional Transport Authority, Gwalior, cancelled the permit held by the petitioner for the Lashkar-Barai route and required him to surrender that permit.

The petitioner has, in addition, challenged the vires of the Explanation inserted u/s 68D (1) of the Act by the amending Act 2 of 1963 and the validity of Rule 6 of the Rules framed u/s 681 of the Act.

Other existing operators have claimed similar reliefs in regard to Scheme No. 2 in Miscellaneous Petitions Nos. 140, 141, 142, 143, 144, 145, 146, 147, 148, 155, 277 and 278 of 1964. For like reliefs, similar Miscellaneous Petitions Nos. 149, 150, 151, 152, 153, 154, 156, 280 and 281 of 1964 in regard to Scheme No. 4, Nos. 52 and 112 of 1964 in regard to Scheme No. 5, Nos. 157, 160 and 214 of 1964 in regard to Scheme No. 7 and Nos. 124, 133, 213, 219 and 275 of 1964 in regard to Scheme No. 9 have also been made by the existing operators affected by those Schemes. This order shall dispose of all these petitions also.

As already indicated, these petitions call in question the various steps taken under the machinery provisions contained in Chapter IVA of the Act and the rules made thereunder for approving certain schemes providing for the State Transport undertaking to carry on the passenger transport business on certain routes to the complete or partial exclusion of all other persons, including the existing operators. Scheme No. 2 relating to certain routes round about Gwalior, as originally prepared, was published in the State Gazette dated 1st March 1963 in accordance with the requirements of Section 68C of the Act. Scheme No. 4 relating to certain routes round about Morena and Bhind, Scheme No. 5 relating to certain routes starting from Chhindwara, Scheme No. 7 relating mainly to the Sagar-Kareli-Piparia route and Scheme no. 9 relating to certain routes round about Sagar and Damoh were similarly published on 7th June 1963, 30th August 1963 and 13 November 1963 respectively.

Even before these Schemes were published, Section 68D of the Act was amended by the Motor Vehicles (Madhya Pradesh Amendment) Ordinance, 1962 (No. 7 of 1962) which was subsequently replaced by the Motor Vehicles (Madhya Pradesh Amendment) Act, 1962 (No. 2 of 1963). Section 68D, as originally enacted, read as follows:

"68D. (1) Any person affected by the scheme published u/s 68C may, within thirty days from the date of the publication of the scheme in the official Gazette, file objections thereto before the State Government.

(2) The State Government may, after considering the objections and after giving an opportunity to the objector or his representatives and the representatives of the State Transport undertaking to be heard in the matter, if they so desire, approve or modify the scheme.

(3) The scheme as approved or modified under Sub-section (2) shall then be published in the official Gazette by the State Government and the same shall

thereupon become final and shall be culled the approved scheme and the area or route to which it relates shall be called the notified area or notified route;

Provided that no such scheme which relates to any inter-State route shall be deemed to be an approved scheme unless it has been published in the official Gazette with the previous approval of the Central Government"

An explanation was added at the end of Sub-section (1) of Section 68D of the Act and new Sub-section (2-a) was inserted by Section 2 of the Amendment Act (2 of 1963) which is reproduced:

"2. Amendment of Section 68D.--In Section 68D of the Motor Vehicles Act, 1939 (4 of 1939) in its application to the State of Madhya Pradesh--

(i) in Sub-section (1), the following Explanation shall be added at the end, namely:--

"Explanation.--In this sub-section "person affected" shall mean and include--

(a) a person already providing transport facilities by any means along or near the area or route covered by the scheme;

(b) an association representing persons interested in the provisions of road transport facilities recognised in this behalf by the State Government;

(c) any local authority within whose jurisdiction any area or route covered by the scheme or any part thereof lies; and

(ii) after Sub-section (2), the following sub-section shall be inserted, namely:--

(2-a) The State Government may, by notification, authorise any officer not below the rank of a Secretary to Government for the purpose of hearing objections under Sub-section (2)." It may also be mentioned at this stage that this Amendment Act, which received the assent of the President, came into force on 13th January 1963.

In order to give effect to the provisions of Chapter IVA of the Act, which was inserted by Section 62 of the Motor Vehicles Amendment Act, 1938 (No. 100 of 1956), the State Government made the Madhya Pradesh State Road Transport Services (Development) Rules, 1959. Rule 6 of these Rules as originally framed stood as follows:

"6. (1) The Secretary to the State Transport Authority, in consultation with the Secretary to the Government, Madhya Pradesh, Home Department (Transport), shall fix a date, time and place for hearing of the objections and shall give notice by registered post to the objector or objectors and also to the Head of the State Transport Undertakings of the date, time and place so fixed. In the notice it shall be mentioned that the objections shall be heard by the Minister-in-charge of the Home (Transport) Department.

(2) (i) Any objector may appear on the date appointed for hearing objections

either in person or through his representative.

(ii) Head of the State Transport Undertakings may appear on behalf of State Transport Undertaking.

(3) The State Government, after hearing such objectors or their representatives, as may desire to be heard and also the Head of the State Transport Undertakings, if he appears, and after considering the objections shall approve or modify the scheme as it thinks fit and shall, subject to the proviso to subsection (3) of Section 68D of the Act, publish the scheme so approved or modified in the Official Gazette in Form III appended to these Rules."

By a notification dated 23rd February 1963, this Rule was replaced by the following:

"6 (1) The Special Secretary to the Government, Madhya Pradesh, Home Department, shall fix a date or dates, time and place for hearing of the objections, A notice in Form II-A specifying the date or dates, time and place so fixed shall be published by the Special Secretary not less than seven clear days before the date on which the hearing of objections is to commence--

(a) in the Madhya Pradesh Gazette; and

(b) by affixing a copy thereof on the notice board,--

(i) in the office of the Collector of the district in which area or routes covered by the scheme or part thereof lies;

(ii) in the office of the Regional Transport Authority or authorities within whose jurisdiction the area or routes covered by the scheme or part thereof lies.

(2) Any objector may appear on the date appointed for hearing objections either in person or through an approved agent.

(3) Head of the State Transport Undertaking or such other person as may be authorised in writing by him in this behalf may appear on behalf of the State Transport Undertaking.

(4) The State Government shall hear such objectors or their approved agents as may desire to be heard and also the Head of the State Transport Undertaking or any other person authorised by him in writing in this behalf, if he appears.

(5) The State Government shall, after considering the objections, approve or modify the scheme as it thinks fit and shall, subject to the proviso to Sub-section (3) of Section 68D of the Act publish the scheme so approved or modified, in the official Gazette in Form III appended to these Rules."

By a notification dated 20th November 1962, which was issued under Sub-section (2-a) of Section 68D of the Act, the State Government authorised R.S. Shukla, J. retired civil servant who has been re-employed as Special Secretary to the Government of Madhya Pradesh in the Home Department, to hear objections

under Sub-section (2) of Section 68D of the Act. This notification was, however, cancelled by a notification published on 22nd February 1963 and thereafter he was so authorised under the Rules of Business made under Article 166(3) of the Constitution in this way. Rule 13 of those Rules provided for the issuance of supplementary instructions from time to time. Instruction No. 2 of those instructions read as follows:

"Subject to the Business Rules and to the practice of the department and any general or special order of the Chief Minister or Minister-in-charge, a Secretary may dispose of cases of routine or unimportant character."

On 9th February 1962, this was replaced by the following:

"Subject to the Rules of Business, any particular item of business allocated to a department may be disposed of--

(i) by the Secretary of the department concerned if the Chief Minister or the Minister-in-charge so directs; or

(ii) by any other Secretary, if the Chief Minister so directs;

and the disposal by such Secretary shall be deemed to be disposal by Government.

Explanation:--For the purpose of this instruction, the power to dispose of a case includes the power to hear parties, make such enquiry and take such other action as may be necessary for or incidental to reaching a decision in the case."

Thereupon, the then Chief Minister passed the following two orders:

"ORDER

Bhopal, dated the 4th April, 1963. No. 2876-1659/II-A(2)--In pursuance of supplementary instruction No. 2 issued under Rule 13 of the Rules of Business of the Executive Government of Madhya Pradesh, I, B. A. Mandloi, Chief Minister, Madhya Pradesh, hereby direct that the objections received in respect of the schemes specified in the Schedule below, published by the Madhya Pradesh State Road Transport Corporation u/s 68C of the Motor Vehicles Act, 1939 (IV of 1939), in the Madhya Pradesh Gazette dated the 1st March, 1963, shall be disposed of by Shri R.S. Shukla, Special Secretary to Government of Madhya Pradesh, in the Home Department, u/s 68D of the said Act. (Schemes Nos. 1, 2 and 3 and details of those Schemes.)

Sd/- B.A. Mandloi Chief Minister, Madhya Pradesh."

"ORDER

Bhopal, dated the 12th July 1963. No. 5115-4461/II-A(2): In pursuance of supplementary instruction No. 2 issued under Rule 13 of the Rules of Business of the Executive Government of Madhya Pradesh, I, B.A. Mandloi, Chief Minister, Madhya Pradesh, hereby direct that the objections received in respect of the

scheme specified In the Schedule below, published by the Madhya Pradesh State Road Transport Corporation u/s 68C of the Motor Vehicles Act, 1939 (IV of 1939), in the Madhya Pradesh Gazette dated the 17th June, 1963, and such other future schemes as may be notified by the Madhya Pradesh State Road Transport Corporation, shall be disposed of by Shri R.S. Shukla, Special Secretary to Government of Madhya Pradesh, in the Home Department, u/s 68D of the said Act. (Scheme No. 4 and details of that Scheme).

Sd/- B.A. Mandloi, Chief Minister, Madhya Pradesh."

In due course, the Special Secretary took up the numerous objections which had been made to the several schemes, issued notices under the amended Rule 6(1) to the objectors, overruled inter alia then objections that the Rule was invalid or that like existing operators were treated alike and passed in each case an order modifying the scheme. While the approved scheme No. 5 was, as required by Section 68D(3) of the Act, published in the State Gazette dated 18 October 1963, the other four approved Schemes were similarly published in the State Gazette dated 7 February 1964. Thereupon, orders were issued cancelling or modifying certain existing permits and the holders of those permits were required to produce them either for cancellation or For making necessary amendments.

The grounds of challenge, which are common to all these petitions, are:

(1) The Schemes as originally prepared and published by the Transport Corporation were not so published with the previous approval of the Central Government as required by the proviso to subsection (3) of Section 68D of the Act.

(2) The Explanation to Sub-section (1) of Section 68D of the Act, as inserted by the State Act 2 of 1963, is ultra vires.

(3) R.S. Shukla, Special Secretary in the Home Department, had no jurisdiction to hear the objections or to approve or modify the Schemes because--

(i) the power conferred in that behalf on the State Government u/s 68D(3) of the Act could not be delegated;

(ii) if that power could be delegated at all, it could be so done only u/s 68D (2-a) of the Act which had not been availed of in these cases; and

(iii) even the delegation under the Rules of Business was limited to disposal of the objections and did not extend to approval or modification of the Schemes u/s 68D (2) of the Act.

(4) The new Rule 6, which enabled the Special Secretary, to give to the objectors a notice of the date of hearing by publishing it in the State Gazette not less than seven clear days before the date of hearing, did not give them sufficient notice of that date and was in conflict with Section 68D(2) of the Act in that it denied to them an opportunity of being effectively heard.

(5) The objectors, who had to be afforded an opportunity of being heard, were in disregard of the rules of natural justice, not allowed to produce oral or documentary evidence.

(6) The Schemes offend Article 14 of the Constitution in that like have not been treated alike.

Shri R.K. Tankha, who appeared for several petitioners pressed, in addition, the following two other grounds which were not covered by those mentioned in the last paragraph:

(i) Since the Regional Transport Authority had not, under Rule 8 of the relevant Rules, delegated its functions, duties and powers under Sub-sections (1) and (2) of Section 68F of the Act, the Secretary to that Authority could not pass any order under Sub-section (2) of that section.

(ii) Contract carriages are not within the purview of Chapter IV of the Act and Scheme No. 5, as originally prepared and published, did not cover such carriages.

The first ground has a bearing on Schemes 2 and 4 which include inter-State routes. It raises a question of construction of the proviso to subsection (3) of Section 68D which we have already reproduced in paragraph 4 above. It is contended that the proviso should be read as governing all the Sub-sections of Section 68D with the consequence that, in the case of schemes including inter-State routes prepared and first published u/s 68C, previous approval of the Central Government must be obtained. We are unable to accept this contention. In the first place, we see no point in obtaining approval of any such scheme in advance when that scheme is liable to be modified. It may well be that the inter-state routes included in the scheme may be subsequently omitted. Secondly, if it were intended that previous approval of the Central Government was necessary before the first publication of any proposed scheme, a provision to that effect would have been made in Section 68C itself.

Not only there is nothing in Section 68C to indicate that such previous approval is necessary, but the absence of such indication in that section is also significant and it cannot be made up by construing the proviso to Sub-section (3) of Section 68D as a proviso to the whole section. Finally, even a bare reading of Sub-section (3), which is reproduced, would show that it is contra-indicative of this construction:

"The scheme as approved or modified under subsection (2) shall then be published in the official Gazette by the State Government and the same shall thereupon become final and shall be called the approved scheme and the area or route to which it relates shall be called the notified area or notified route:

Provided that no such scheme which relates to any inter-state route shall be deemed to be an approved scheme unless it has been published in the official Gazette with the previous approval of the Central Government."

Throughout the Sub-section, the scheme referred to is the scheme "as approved or modified under Subsection (2)" and previous approval of the Central Government is necessary before publishing "such scheme" relating to any inter-state route. In our opinion, the language employed in Sub-section (8) and the reason of the rule both do not lend support to the construction commended to us.

The second ground relates to the vires of the Explanation inserted under Sub-section (1) of Section 68D of the Act and may be shortly answered. It is contended that, while any person affected could file an objection under Sub-section (1) as originally enacted by Parliament, the Explanation inserted by the State Legislature limited the right to the classes of persons therein mentioned. This disharmony is undoubtedly there, but the State Act 2 of 1963, which inserted the Explanation, was, reserved for the consideration of the President and received his assent under Clause (2) of Article 254: of the Constitution. That being so, Sub-section (1) as modified by the Explanation prevails in this State as validly made law.

We would now take up the third ground by which the jurisdiction of R.S. Shukla, Special Secretary, has been called in question. The first head of the argument is that the statutory power u/s 68D (3), which has been conferred on the State Government, cannot be delegated at all. The contention is unsound if it implies that officers subordinate to the Governor cannot be authorised to exercise such powers. The business of State is a complicated one and must of necessity be conducted through officers subordinate to the Governor, including ministers. Article 154(1) of the Constitution corresponding to Section 49(1) of the Government of India Act, 1935, provides that the executive power of the State, which is vested in the Governor, shall be exercised by him directly or through officers subordinate to him in accordance with the Constitution. Similarly, Article 166(3), corresponding to Section 59(3) of the 1935 Act, provides that Governor shall make rules for the more convenient transaction of the business of the Government of the State and for the allocation of such business among Ministers. In the leading case of AIR 1945 156 (Privy Council)) which was quoted with approval in *The State of Bihar Vs. Rani Sonabati Kumari*, , the question was, whether, in view of a statutory provision for delegation of powers and duties, the ordinary methods by which the Provincial Government authorised its executive business to be carried on was excluded. The Privy Council held that the statutory provision contained in Section 2(5) of the Defence of India Act, 1939, did not exclude the ordinary methods and that the powers under Rule 26 of the Defence of India Rules, 1939, could be dealt with in the normal manner under the provisions of Sections 49 and 59 of the 1935 Act. The Privy Council further pointed out that this was not a case of delegation in the strict sense. This is what Lord Thankerton said:

"Sub-section (5) of Section 2 provides a means of delegation in the strict sense of the word, namely, a transfer of the power or duty to the officer or authority defined in the Sub-section, with a corresponding divestiture of the Governor of

any responsibility in the matter, whereas u/s 49, Sub-section (1) of the Act of 1935, the Governor remains responsible- for the action of his subordinates taken in his name." (at p. 265 (of Ind App): (at p. 162 of AIR))

The question was more fully considered in *Gullapalli Nageswara Rao v. Andhra Pradesh State Road Transport Corporation* (1959) Supp (1) SCR 319: (AIR 1939 SC 308) where Subba Rao J., speaking for the majority, stated:

"A State Government means the Governor; the executive power of the State vests in the Governor; it is exercised by him directly or by officers subordinate to him in accordance with the provisions of the Constitution; the Ministers headed by the Chief Minister advise him in the exercise of his functions; the Governor made rules enabling the Minister in charge of particular department to dispose of cases before him and also authorising him, by means of standing orders, to give such directions as he thinks fit for the disposal of the cases in the department. Pursuant to the rule, the record discloses, the Chief Minister, who was in charge of Transport, had made an order directing the Secretary to Government, Home Department, to hear the objections filed against the scheme proposed by the State Transport Authority.

The aforesaid machinery evolved by the rules for the disposal of cases by the State Government has been followed in this case. The petitioners and others filed objections to the proposed scheme before the Secretary to the Government, Transport Department. He gave a personal hearing to the parties, some of them appeared in person and others by representatives; the entire material recorded by him was placed before the Chief Minister in charge of Transport, who made his order approving the scheme and the order was issued in the name of the Governor, authenticated by the Secretary in charge of the Transport Department. It may therefore be said that the State Government gave the hearing to the petitioners in the manner prescribed by the rules made by the Governor.

At this stage, the argument hinted at but not seriously pressed, may be noticed. The Rules the Governor is authorised to make, the argument proceeds, are only to regulate the acts of the Governor or his subordinates in discharge of the executive power of the State Government, and therefore will not govern the quasi judicial functions entrusted to it. There is a fallacy in this argument. The concept of a quasi judicial act implies that the act is not wholly judicial; it describes only a duty cast on the executive body or authority to conform to norms of judicial procedure in performing some acts in exercise of its executive power. The procedural rules made by the Governor for the convenient transaction of business of the State Government apply also to quasi judicial acts, provided those Rules conform to the principles of judicial procedure." (at pp. 352-4 (of (1959) Supp (1) SCR) (at pp. 325-26 of AIR).

Since his case was decided, several cases from Rajasthan, in which the Legal Remembrancer had been appointed under the Rules of Business "to discharge the functions u/s 68D" came up before the Supreme Court. We gather that he

was so appointed from Chandra Bhan and Others Vs. The State of Rajasthan and Others, where Sarjoo Prosad C.J. stated about the factual position as follows:

"We have examined the Rules and we find that the Governor specially amended a particular Rule in order to suit the requirements of Rule 7(1) of the Rules framed under the Act and on that basis the said Officer has been appointed to discharge his functions u/s 68D of the Act." (at p. 173).

In all these cases, it was not urged before the Supreme Court that the Legal Remembrancer could not be authorised to discharge the functions of the State Government under .Section 68D: Malik Ram Vs. State of Rajasthan, ; Ramnath Verma v. State of Rajasthan, (1983) 2 SCR 152 and Nehru Motor Transport Co-operative Society Ltd. and Others Vs. The State of Rajasthan and Others, In view of these authorities, it must now be regarded as well established that the business of the Government of a State includes, its statutory and quasi judicial functions and that: ministers or other subordinate officers may be authorised to discharge such functions in accordance with the rules of business made under Article 166(3) of the Constitution, though this would not amount to delegation in the sense of divestiture of responsibility.

The second head of the argument questioning the jurisdiction of the Special Secretary has two limbs. Shri Phadke, who argued the case for the petitioners, strongly urged that the enactment of the new Sub-section (2-a) of Section 68D necessarily meant that the power given to the State Government by Sub-section (2) of that section had to be exercised in accordance with the new Sub-section and in no other way. In support of this argument, the counsel relied upon AIR 1936 253 (Privy Council)); State of Uttar Pradesh Vs. Singhara Singh and Others, and the following observations of Craies:

"Language prima facie permissive may not only make it imperative upon the court to do the thing which the enactment states that it may do, but it may also prohibit that particular thing from being done by the court in any other way. This was pointed out by Jessel M. R. in Taylor v. Taylor (1876) 1 Ch. D. 426.

(A Treatise on Statute Law, Sixth Edition, pages 286-7).

The rule in (1876) 1 Ch D 426 (supra) was considered by the Supreme Court in State of Uttar Pradesh Vs. Singhara Singh and Others, and their lordships stated:

"The rule adopted in (1876) 1 Ch D 426 is well recognised and is founded on sound principle. Its result is that if a statute has conferred a power to do an act and has laid down the method in which that power has to be exercised, it necessarily prohibits the doing of the act in any other manner than that which has been prescribed. The, principle behind the rule is that if this were not so, the statutory provision might as well not have been enacted. A magistrate, therefore, cannot in the course of investigation record a confession except in the manner laid down in Section 164. The power to record the confession had obviously been given so that the confession might be proved by the record of it made in the

manner laid down. If proof of the confession by other means was permissible, the whole, provision of Section 164 including the safeguards contained in it for the protection of accused persons would be rendered nugatory. The section, therefore, by conferring on magistrates the power to record statements or confessions, by necessary implication, prohibited a magistrate from giving oral evidence of the statements or confessions made to him."

Having carefully considered the argument, we are of opinion that the rule in (1876) 1 Ch. D. 426 (*supra*) does not apply to the construction of the provisions of Sub-sections (2) and (2-a) of Section 68D. Dealing with permissive language employed in statutes. Craies states in his treatise as follows:

"Statutes passed for the purpose of enabling something to be done are usually expressed in permissive language, that is to say, it is enacted that "it shall be lawful", etc., or that "such and such a thing may be done." "Prima facie, these words import a discretion and they must be construed as discretionary unless there be anything in the subject-matter to which they are applied, or in any other part of the statute, to show that they are meant to be imperative."

There is nothing in the provisions of Chapter IVA or in the subject-matter to indicate that the word "may" in Sub-section (2-a), which is reproduced, must be regarded as equivalent to "shall":

"The State Government may, by notification, authorise any officer not below the rank of a secretary to Government for the purpose of hearing objections under Sub-section (2)."

In (1876) 1 Ch D 426 at p. 431 Jessel M. R. stated:

"When a statutory power is conferred for the first time upon a Court, and the mode of exercising it is pointed out, it means that no other mode is to be adopted. For instance, the 16th section says that the proceeding is to be by petition. It is enabling, I know, in form, that the application may be by petition; but no other process can be adopted..... In the same way, when the statute says who is the person to petition, it means that the person or persons so described, and no others, shall be entitled to petition

In the case before, us, we are not dealing with any power conferred upon a Court nor was it given for the first time. The power given by Sub-section (2) existed before the enactment of Sub-section (2-a) and, as we have shown, it could be exercised apart from, and independently of, the provisions of Subsection (2-a). In 63 Ind App 372: AIR 1936 253 (Privy Council) and *State of Uttar Pradesh Vs. Singhara Singh and Others*, , their Lordships were considering the provisions of Section 164 of the Code of Criminal Procedure which confers power on certain judicial officers to record a confession made in the course of investigation and they pointed out that the rule in (1876) 1 Ch D 428 (*supra*) applied because the principle underlying that rule was that, if it were not so, the statutory provision might as well not have been enacted. That principle is not attracted here because

Sub-section (2-a) not only does not divest the State Government of its power under Sub-section (2) but it cannot also be given effect to independently of Sub-section (2) without, as pointed out by the Supreme Court in Gullapalli Nageswara Rao's case *Gullapalli Nageswara Rao and Others Vs. Andhra Pradesh State Road Transport Corporation and Another*, destroying the concent of judicial hearing.

The other limb of the argument under this head is that, since Sub-section (2-a) of Section 68D is a special provision, it controls, to the extent to which it occupies the field, "he general provision relating to the matter. In support of this contention, we have been referred to *The South India Corporation (P) Ltd. Vs. The Secretary, Board of Revenue Trivandrum and Another*, and *C. Rajagopalachari Vs. Corporation of Madras*, . As pointed out by the Supreme Court in these cases, it is settled law that a special provision should be given effect to the extent of its scope leaving the general provision to control cases where the special provision does not apply. That statement of the rule posits that there is a conflict between the two provisions with such consequence that they cannot operate simultaneously in the same field. It will have no application when the special enactment is an additional or supplementary provision of an enabling character which has not been availed of at the relevant time. In our opinion, Sub-section (2-a) is such a provision and it was not availed of at the time when action was taken under the Rules of Business.

We are also inclined to think that this subsection was enacted to provide for a situation in which it becomes necessary to confer authority on an officer not specified in the Rules of Business. We derive some support for this view on two considerations. It was not necessary to make law for officers who could be so authorised under the Rules of Business. Further, the officer intended to be clothed with authority under Sub-section (2-a) is "any officer" who in rank is not below a Secretary to Government. In any event, we are clearly of opinion that an enabling provision like Sub-section (2-a) does not exclude the power of the State Government under Sub-section (3) to deal with the matter in the usual way, that is to say, in accordance with the Rules of Business. A direct authority on the point is AIR 1948 156 (Privy Council) , which overruled the contrary view taken in that case by the Federal Court.

Before closing the discussion on this head, we may notice one argument which Shri Chitale put forward to support the view we have taken. According to him a statutory delegation of executive power cannot be so construed as to affect the Rules of Business made under Article 166(3) of the Constitution and to the extent to which it does so, it is altogether void and of no effect. In support of this contention, reliance is placed upon the following observations of the Supreme Court in the *The State of Uttar Pradesh and Others Vs. Babu Ram Upadhyaya*, at p. 698 : *The State of Uttar Pradesh and Others Vs. Babu Ram Upadhyaya*, at p. 760).

"We cannot agree either with the premises or the conclusion sought to be based on it. The first question is whether the power of the Governor under Article 310 to terminate the services of a Government servant at pleasure is part of the

executive power of the State under Article 154 of the Constitution. Article 154 speaks of the executive power of the State vesting in the Governor; it does not deal with the constitutional powers of the Governor which do not form part of the executive power of the State. Article 162 says that, subject to the provisions of the Constitution, the executive power of the State shall extend to matters with respect to which the Legislature of the State has power to make laws. If the Legislature of the State has no power to make a law affecting the tenure at pleasure of the Governor, the said power must necessarily fall outside the scope of the executive power of the State. As we will presently show, the Legislature has no such power and, therefore, it cannot be a part of the executive power of the State. That apart, if the said power is part of the executive power in its general sense. Article 162 imposes another limitation on that power, namely, that the said executive power is subject to the provisions of the Constitution and, therefore, subject to Article 310 of the Constitution. In either view, Article 310 falls outside the scope of Article 154 of the Constitution. That power may be analogous to that conferred on the Governor under Articles 174, 175 and 176, doubtless the Governor may have to exercise the said power, whenever an occasion arises, in the manner prescribed by the Constitution, but that in itself does not make it a part of the executive power of the State or enable him to delegate his power."

We are not considering here constitutional powers outside the scope of the expression "executive power" occurring in Article 154 of the Constitution. In our opinion, Clause (2)(b) of that Article, which enables conferment by law of executive functions on any authority subordinate to the Governor, is a complete answer to the argument. We may also point out that such a law provides for delegation in the strict sense and brings about a corresponding divestiture of the Governor's responsibility in the matter: AIR 1945 156 (Privy Council) . To accept that this cannot be done because it affects the Rules of Business framed under Article 160(8) would render Clause (2)(b) of Article 154 altogether nugatory. In our view, such a law is, in pith and substance, a law delegating some executive functions to an authority subordinate to the Governor permitted by Article 154(2) (b) and is not a law with respect to the Rules of Business covered by Article 160(3). For all these reasons, we are unable to accept this argument. Even so, as we have shown in the foregoing paragraphs, Sub-section (2-a) of Section 68D is merely an enabling provision and does not exclude the exercise of the power of the State Government under Sub-section (2) of that section in accordance with the Rules of Business.

The third head of the argument is, in our opinion, substantial and must be accepted. As we have shown earlier, the two orders dated 4th April 1963 and 12th July 1963, which the Chief Minister made in pursuance of Supplementary Instruction No. 2 issued under Rule 13 of the Rules of Business, authorised R.S. Shukla, Special Secretary to Government of Madhya Pradesh in the Home Department, to dispose of the objections received in respect of the various schemes prepared and published u/s 68C of the Act. These orders did not

authorise him to approve or modify the schemes and created what the Supreme Court called in *Gullapalli Nageswara Rao and Others Vs. Andhra Pradesh State Road Transport Corporation and Another*, divided responsibility destructive of the concept of judicial hearing enjoined by Section 68D of the Act. It is, however, urged on the basis of the returns that R. S. Shukla, Special Secretary, was "authorised to act for the State" in the matter of nationalisation schemes and he not only heard and disposed of the objections but also approved or modified the schemes. It is not suggested that there was any order, other than the two orders dated 4th April 1963 and 12th July 1963, by which he was clothed with such authority. As shown, these two orders did not authorise R. S. Shukla to approve or modify the schemes. That being so, if he actually approved or modified the schemes, he did so without authority. To meet this situation; the respondents; have advanced two arguments which, as we would show in the following paragraphs, do not bear examination.

It is argued that since H.S. Shukla was authorised to dispose of the objections received in respect of the several schemes, the power to approve or modify those schemes was also impliedly delegated to him. In this connexion, our attention is drawn to the following Explanation under the relevant instruction issued under Rule 13 of the Rules of Business:

"Explanation: For the purpose of this instruction, the power to dispose of a case includes the power to hear parties, make such enquiry and take such other action as may be necessary for or incidental to reaching a decision in the case."

The general language of this Explanation, which refers to the power to dispose of a case, is unmeaning in the context of a case where disposal of objections means only the carrying out of a duty--the duty imposed on the State Govt. to give to the objectors a hearing. In regard to this duty, the Supreme Court stated in *Gullapalli Nageswara Rao and Others Vs. Andhra Pradesh State Road Transport Corporation and Another*, as follows:

"The second objection is that while the Act and the Rules framed thereunder impose a duty on the State Government to give a personal hearing, the procedure prescribed by the Rules impose a duty on the Secretary to hear and the Chief Minister to decide. This divided responsibility is destructive of the concept of judicial hearing. Personal hearing enables the authority concerned to watch the demeanour of the witnesses and clear-up his doubts during the course of the arguments, and the party appearing to persuade the authority by reasoned argument to accept his point of view. If one person hears and another decides, then personal hearing becomes an empty formality. We therefore hold that the said procedure followed in this case also offends another basic principle of judicial procedure." (at p. 357 (of (1959) Supp (1) SCR): (at p. 327 of AIR).

Even so, having regard to the Explanation, it may be readily accepted that R.S. Shukla, who was authorised to perform the duty of affording to the objectors a hearing, had the authority to do all acts necessary for giving them a proper

hearing within the meaning of Sub-section (2) of Section 68D but no more. It is no doubt true that when the power and the duty are so interwoven that it is not possible to separate the one from the other, whoever exercises the power must also carry out the duty. So, in *Mungoni v. Attorney-General of Northern Rhodesia* 1960 AC 336 the Privy Council held that, when power to detain under the Emergency Powers Regulations, 1956, was delegated, the fulfilment of the condition precedent to the exercise of that power, namely, that of being satisfied that the detention was necessary, was also regarded as delegated by necessary implication. Repelling the contention that there was no authority to delegate the duty, Lord Denning stated:

"The power and the duty under regulation 16(1) are so interwoven that it is not possible to split the one from the other--so as to put the duty on one person and the power in another. Whosoever exercises the power, he it must be who has to carry out the duty. It seems clear to their Lordships that, if the Governor has any authority at all to delegate his functions under Regulation 16(1), he must be able to delegate both the power and duty together to one and the same person. He cannot delegate the power to another and keep the duty to himself."

This view is grounded on the principle that a person empowered to do an act must have authority to fulfil all conditions and limitations necessary for doing it, even though they be also duties. The case before us is different. R.S. Shukla has not been empowered to approve or modify the schemes. If he were so authorised under the Rules of Business, there would be no difficulty in holding that, even without any express authority, he should be regarded as competent to fulfil the precedent condition of affording to the objectors an opportunity of being heard. In this case, perhaps on account of some unaccountable misconception, only the duty to afford to the objectors an opportunity of being heard was assigned to R.S. Shukla without giving him the power to do that for which that duty had to be performed. In this situation, the principle that a person authorised to do an act must have authority to fulfil all conditions and limitations necessary for its fulfilment has no application.

It is next urged that, having regard to the provisions of Article 166(2) or the Constitution, the orders approving or modifying the schemes could not be called in question on the ground that they were not made by the Governor because those orders were duly authenticated in accordance with the requirements of the Rules of Business as given below:

"By order and in the name of the Governor of Madhya Pradesh, R.S. Shukla, Special Secretary".

Article 166(2), which is strongly relied upon, reads:

"Orders and other instruments made and executed in the name of the Governor shall be authenticated in such manner as may be specified in rules to be made by the Governor, and the validity of an order or instrument which is so authenticated shall not be called in question on the ground that it is not an order

or instrument made or executed by the Governor."

It is well settled that, when the two conditions laid down in this clause are satisfied, the order issued cannot be challenged on the ground that it was not made or executed by the Governor. This clause does not preclude a challenge of the order on any other ground, e.g., that the condition precedent to the validity of the order has not been fulfilled: AIR 1945 156 (Privy Council) . So, in Gullapalli Nageswara Rao and Others Vs. Andhra Pradesh State Road Transport Corporation and Another, , a duly authenticated order approving the scheme was quashed on the ground that, in approving the scheme, the State Government did not make the enquiry In consonance with the principles of natural justice. Further, while the provisions of Clauses (1) and (2) of Article 166 are directory, when an order has not been made in accordance with Clause (2) of the Article, it must be proved by other means that such an order has been validly made: Dattatreya Moreshwar Pangarkar Vs. The State of Bombay and Others, ; The State of Bombay Vs. Purushottam Jog Naik, ; P. Joseph John Vs. The State of Travancore-Cochin, ; Ghaio Mall and Sons Vs. The State of Delhi and Others, ; State of Rajasthan and Another Vs. Sripal Jain, and R. Chitrlekha and Another Vs. State of Mysore and Others, . In the instant case, the State Government were asked to! show whether the Special Secretary was named to be one of the officers authorised to authenticate orders made in the name of the Governor. The State Government have not been able to show with reference to the relevant rules, which are reproduced, that the Special Secretary was so authorised:

"In exercise of the powers conferred by Clauses (2) and (3) of Article 166 of the Constitution of India, the Governor of Madhya Pradesh is pleased to make the following rules, namely:

These rules may be called the Madhya Pradesh Government Business (Allocation) Rules.

All orders or instruments made or executed by order or on behalf of the Government of Madhya Pradesh shall be expressed to be made or executed by order and in the name of the Governor of Madhya Pradesh.

Save in cases where an officer has been specially empowered to sign an order or instrument of the Government of Madhya Pradesh, every such order or instrument shall be signed by either a Secretary, an Additional Secretary, a Joint Secretary, a Deputy Secretary, an Under Secretary, an Additional Under Secretary or an Assistant Secretary to the Government of Madhya Pradesh, and such signature shall be deemed to be the proper authentication of such order or instrument." It has also not been shown that, even apart from the Rules, he was specially empowered in that behalf. Nor is it claimed that the matters were placed before the Minister-in-charge. In this situation, the orders modifying the schemes cannot be regarded, in the eye of law, to be orders of the State Government. These orders cannot be sustained for another reason also. The condition precedent for validly approving or modifying any schemes under Sub-

section (2) of Section 68D is that there should be an enquiry consistent with the principles of natural justice. This means that not only one and the same person should hear the objection and approve or modify the schemes but he must also have been clothed with the necessary authority to hear those objections as well as to approve or modify the schemes. The infirmity in this case is that, though the Special Secretary has purported to modify the schemes, he was not authorised so to do.

The learned Advocate General, who appear for (sic) has argued that there is a presumption of regularity in favour of a duly authenticated order and, unless this presumption is rebutted, it must be regarded as having been validly made. In this connection he relied upon the observations made in the last but one paragraph of the judgment of the Privy Council in AIR 1945 156 (Privy Council). In regard to this, we consider it sufficient to say that the orders in this case were not made by a person who was empowered in that behalf. So, in *Shambhu Nath Ghosh and Others Vs. Bejoy Lakshmi Cotton Mills Ltd. and Others*, . Bachawat J. (as he then was) stated:

"At the same time it cannot be said that the Governor has exercised the executive power vested in him simply because some order is issued in his name by some subordinate officer. A subordinate officer can exercise the executive power of the State vested in the Governor only if he has been duly authorised to exercise that power on behalf of the Governor."

Further, the observations of the Privy Council relating to presumption as to the regularity of such an order had reference to Sub-section (2) of Section 16 of the Defence of India Act, 1939, which read as follows:

"(2) Where an order purports to have been made and signed by an authority in exercise of any power conferred by or under this Act, a Court shall, within the meaning of the Indian Evidence Act, 1872, presume that such order was so made by that Authority."

We need hardly say that no statutory presumption of fact attaches in this sense to the orders challenged before us.

The fourth ground relates to the validity of Rule 6. It is urged that the new Rule 6, which provides for a seven days' notice by publication in the Madhya Pradesh Gazette, is in conflict with Section 68D(2) which postulates that the objectors should be afforded a proper opportunity of being heard. In the circumstances of the cases we are considering here, we do not find it necessary to express any opinion on this larger question. It would appear that the opportunity of being heard, as provided by Section 68D(2), had to be given to the objectors only if they so desired. It was not claimed before us that the objectors had expressed in advance a desire to be heard. That apart, when the notices were additionally published in the offices of the Collectors and the Regional Transport Authorities in the manner provided by Rule 6 and all petitioners except Smt. Manjula Bhuta actually appeared, participated in the proceedings, claimed and obtained

adjournments and addressed elaborate arguments on all points raised, including the one relating to the validity of Rule 6, it is idle to contend that they were denied a proper opportunity of being heard by reason of the fact that notice was short.

The fifth ground is that, in making the enquiry, R.S. Shukla did not allow the objectors to produce oral and documentary evidence and thereby disregarded the rules of natural justice. We have formed the opinion that this ground is not well-founded. It is now well established that the grounds of attack on the schemes had to be confined to a consideration of the question whether these schemes were required "for the purpose of providing an efficient, adequate, economical and properly coordinated road transport service: Gullapalli Nageswara Rao and Others Vs. Andhra Pradesh State Road Transport Corporation and Another, ; H.C. Narayanappa and Others Vs. The State of Mysore and Others, ; The Samarth Transport Co. (P) Ltd. Vs. The Regional Transport Authority, Nagpur and Others, and Malik Ram Vs. State of Rajasthan, . It would appear from the objections that oral and documentary evidence was required mostly for proving that the existing operators were providing better and more efficient service. That was not a relevant consideration on which the schemes could be rejected. So, in (1963) 2 SCR 152 (supra), the Supreme Court stated:

"In short, a perusal of the objections shows that what was being contended before the Legal Remembrancer was not so much that the draft-schemes were not efficient, adequate, economical and properly co-ordinate but that the objectors were providing transport service which was more efficient, adequate, economical and properly coordinated than the service proposed to be provided in the draft-schemes. That however is hardly a reason for rejecting the draft-schemes in their entirety."

It is no doubt true that, having regard to the nature of objections and the purpose for which the hearing is to be given, oral or documentary evidence should be allowed to be produced but it is competent to the officer dealing with the objections to decline leave to produce any evidence which is either not relevant or not necessary. So, in Malik Ram Vs. State of Rajasthan, , the Supreme Court stated:

"We may however point out that the production of evidence (documentary or oral) does not mean that the parties can produce any amount of evidence they like and prolong the proceedings inordinately and the State Government when giving the hearing would be powerless to check this. We need only point out that though evidence may have to be taken u/s 68D(2), it does not follow that the evidence would be necessary in every case. It will therefore be for the State Government or as in this case the officer concerned, to decide in case any party desires to lead evidence whether firstly the evidence is necessary and relevant to the enquiry before it. If it considers that evidence is necessary, it will give a reasonable opportunity to the party desiring to produce evidence to give evidence relevant to the enquiry and within reason and it would have all the

powers of controlling the giving and the recording of evidence that any Court has. Subject therefore to this overriding power of the State Government or the officer giving the hearing, the parties are entitled to give evidence either documentary or oral during a hearing u/s 68D(2)."

In these cases, whenever a request was made for producing oral or documentary evidence, it was expressly considered by R.S. Shukla and he turned down the request only in so far as such evidence was, having regard to the scope of the enquiry, either not relevant or not necessary. The proper scope of the enquiry has been indicated in *The Samarth Transport Co. (P) Ltd. Vs. The Regional Transport Authority, Nagpur and Others*, , where Subba Rao J. stated:

"Under Section 68C the question that arose for consideration before the Chief Minister was whether the transport service should be run by the State Transport Undertaking to the exclusion of the petitioner and whether it was necessary to do so in public interest to provide an efficient, adequate, economical and properly coordinated road transport service. The Chief Minister found on the material placed before him that it was necessary in the public interest that the scheme submitted by the Provincial Transport Services should be approved. In support of his conclusion, he took into consideration that the Provincial Transport Services were in possession of sufficient resources and were in a better position to provide amenities to the public and therefore in public interest they should be given preference over the private operators of buses. We cannot say that the Chief Minister took any extraneous circumstances into consideration in coming to that conclusion." (at p. 641 (of SCR); (at pp. 97-98 of ATR)).

In these cases, the Special Secretary did not, in our opinion, disregard any rule of natural justice when he restricted the scope of the enquiry to considerations relevant to the matter and did not allow the production of evidence which was either not relevant or not necessary.

The sixth ground relates to discrimination within the meaning of Article 14 of the Constitution. It is permissible u/s 68C to frame a scheme covering any area or route or portion thereof, to the exclusion, complete or partial, of any other person. We have examined with care the cases of operators who it is claimed have been discriminated against and we have not been able to find any two exactly or even substantially like casts not been treated alike. There is no discrimination if one area, one route or a portion thereof is selected for the scheme but not the other. There is also no discrimination if private operators are partially excluded, for example, by making their permits ineffective over the overlapping portion of the route taken over for exclusive operation. It is also permissible to accord this treatment to some operators if they cover, besides the overlapping portion of the route, a considerable length of the longer route but not to others who ply their buses only a few miles beyond the overlapping portion of the route. There will also be no discrimination if, to avoid it, two schemes are directed to be brought into force simultaneously because what is prohibited is conscious discrimination: (1963) 2 SCR 152 (supra).

Our attention was drawn to the cases of discrimination in relation to routes (b), (h) and (n) of Scheme II as finally approved and it was particularly brought to our notice that, while the permits held by Khillumal and M. P. Speedways for the Lashkar-Bhind route were to be cancelled, the one held by Jagannath Prasad for the same route was left untouched. The short answer to the second part of this contention is that Jagannath Prasad obtained his permit after the publication of the scheme and his permit would, therefore, be equally affected by the scheme. The first part of the contention has been answered in the order dated 25th June 1963 and there is, we think, no discrimination in those cases also. In our opinion, there is not much substance in the contention that the existing operators affected by these schemes have been subjected to discriminatory treatment.

On behalf of the petitioners affected by Schemes 2 and 4, it was urged that, since the Secretary, Regional Transport Authority, Gwalior, was not authorised under Rule 8 of the Madhya Pradesh State Road Transport Services (Development) Rules, 1959, he was incompetent to issue the notices which were served on those petitioners. We are unable to accept this contention because, in each case, the Regional Transport Authority itself appears to have passed on 12th March 1964 an order u/s 68F(2) of the Act and the Secretary merely communicated it by subsequently issuing a notice to the petitioner concerned.

The last ground relates to Scheme No. 5 and is to the effect that contract carriages are not within the purview of Chapter IVA of the Act and were also not included in the scheme as prepared and published u/s 68C of the Act. In our opinion, there is in this ground too no substance. "Road Transport Service" as defined in Section 68A of the Act means a service of motor vehicles carrying passengers or goods or both by road for hire or reward. Obviously, contract carriages are included in this wide definition. They have been mentioned in Rule 3 of the relevant rules. Further, they were also expressly mentioned in paragraph 4 of the Scheme No. 5 as published u/s 68C of the Act.

In the view we have taken of the grounds urged in support of these cases, the petitions succeed only on the third ground relating to jurisdiction with the consequence that the orders modifying the schemes the approved schemes as published and the action taken u/s 68F(2) cannot be allowed to stand.

The remit is that all these petitions succeed and are allowed. The orders passed u/s 68D modifying the Schemes Nos. 2, 4, 5, 7 and 9, the publication of the approved Schemes and the orders passed and notices issued u/s 68F(2) for the purpose of giving effect to those Schemes are quashed. In the circumstances of the case, the parties are left to bear their own costs and the outstanding amounts of security are directed to be refunded.