

(2016) 02 KL CK 0031

In the High Court Of Kerala

Case No : W.A. Nos. 667, 666, 668, 670, 671, 700, 771, 772, 773, 774, 804, 818, 851, 859, 878, 890, 895, 879, 912, 1066, 1156, 1185, 1367, 1376, 1378, 1390, 1471, 1475, 1480, 1481, 1491, 1518, 1567, 1625, 1676, 1700, 1720, 1722 & 1735 of 2014 and W.P. (C). No. 1442

R. Mohankumar

APPELLANT

Vs

Government of Kerala

RESPONDENT

Date of Decision : 05-02-2016

Acts Referred:

Constitution of India, 1950 — Article 13(2), 14, 16, 19, 31B
Motor Vehicles Act, 1988 — Section 99

Citation : (2016) AIRCC 2957 : (2016) 3 KHC 244 : (2016) 2 KLT 963

Hon'ble Judges : Thottathil B. Radhakrishnan and K. Harilal, JJ.

Bench : Division Bench

Advocate : O.V. Radhakrishnan Sr. Advocate, K.V. Gopinathan Nair, P. Deepak, I. Dinesh Menon, G. Prabhakaran, M. Jithesh Menon, K. Radhanmani Amma, and Antony Mukkath, Advocates & Government Pleader, for the Appellant; Stalin Peter Davis, Johnson Manayani, M. Gopikr

Final Decision : Dismissed

Judgement

Thottathil B. Radhakrishnan, J.—These matters relate to public transport licensing and priorities in favour of public sector. The challenge is levied by the private operators.

2. The captioned writ appeals arise from a common judgment in different writ petitions which were heard together. One set of appeals is by the operators of private stage carriages, for short, the "private operators". The other set of appeals is by either the Government of Kerala, for short; "GOK", or the Kerala State Road Transport Corporation; "STC", for short. The tagged along solitary writ petition is filed by a private operator challenging the constitutional validity of section 99 of the Motor Vehicles Act, 1988; for short, the "1988 Act". Under challenge in that writ petition is also the Scheme finalized under the provisions of Chapter VI of that Act; the "Scheme", for short; which Scheme was also the

subject matter of the writ petitions from which the writ appeals arise. The writ petition and the writ appeals also relate to the challenge by the private operators against certain amendments to the Kerala Motor Vehicles Rules, 1989, for short, the "Rules". The learned single Judge upheld the Scheme, but declared that certain definition clauses in Chapter V of the Rules are invalid to the extent they result in the exclusion of private operators from operating certain classes of vehicles and amount to creating monopoly in favour of the STC for such classes of vehicles, through the process of the amendment to the Rules.

3. Attacking the validity of section 99 of the 1988 Act, the learned senior counsel for the petitioner in the captioned writ petition argued that the legislative competence to enact a statute in the nature of the 1988 Act is within the domain of the Concurrent List in the Seventh Schedule to the Constitution, and therefore, the embedded power in section 99 of the 1988 Act is essentially an authority to create a monopoly in favour of an STU, which is not conceived by the constitutional distribution of legislative power. It is therefore argued that section 99 of the 1988 Act is ultra vires the Constitution. Leading this argument forward, it is pointed out that the consequential impugned Scheme is extra constitutional from its inception, in the light of the plea of the writ petitioner.

4. In answer to the aforesaid, the learned counsel on behalf of GOK argued, firstly, that section 99 of the 1988 Act is immune from challenge to its validity in view of Article 31B of the Constitution; having regard to the inclusion of the provisions of Chapter IV A of the 1939 Act in the Ninth Schedule to the Constitution, inasmuch as the impugned section 99 of the 1988 Act is in that Chapter of the 1988 Act which corresponds to Chapter IV A of the 1939 Act. He also argued that the challenge sought to be levied as to the validity of section 99 of the 1988 Act is unsustainable inasmuch the legislative competence of the Parliament to make such a law being there, the provisions in Chapter VI of the 1988 Act, which are Special Provisions relating to State Transport Undertakings, stand with the support of Article 19(6) because such provisions have been made in the interest of the general public and they are only reasonable restrictions which relate to matters that would fall under Article 19(6)(ii) of the Constitution. He thus argued that the challenge to the validity of section 99 of the 1988 Act is only to be repelled.

5. The substance of the arguments by the learned advocates appearing on behalf of the private operators, including the senior advocate for the petitioner in the captioned writ petition, is that the impugned Scheme is made in infraction of section 99 of the 1988 Act and that it is the result of concerted efforts to deprive the private operators of their due participation in plying stage carriage vehicles in public interest. The ultimate plea is that the impugned Scheme results in infraction of the equality doctrine, as would apply in the situational context.

6. The learned counsel for the GOK and the learned standing counsel for STC supported the impugned judgment repelling the challenge as against the Scheme. Impeaching the interference made by the learned single Judge as

regards the impugned amendments to the Rules, they argued that those amendments ought not to have been interfered with, since they are in conformity with the rule making power of the competent authority under the 1988 Act, and can, never be reckoned as arbitrary, violating Article 14 of the Constitution.

7. We also heard the learned counsel appearing for the additional respondents in the writ petition who oppose the reliefs sought for therein.

8. Countering the arguments advanced in support of the appeals by GOK and STC, the learned advocates, including the senior advocate, appearing for the private operators argued that the impugned judgment, to the extent it is in favour of the private operators, does not warrant interference and the conclusions arrived at by the learned single judge in favour of the private operators are in conformity with the constitutional principles and the provisions of the 1988 Act. It is argued that, so much so, the impugned amendments to the Rules cannot be criticized, since they have been made in exercise of statutory rule-making power in terms of the 1988 Act; and still further, they are not liable to be criticized as arbitrary and violative of Article 14 of the Constitution.

9. The issues arising for decision in the writ petition and the appeals under consideration are as follows :

I. Has the petitioner in the captioned writ petition established, on the basis of any of the grounds raised by her, that section 99 of the 1988 Act is ultra vires the Constitution of India and is hence, void and inoperative ?

II. Is section 99 of the 1988 Act insulated from challenge as to its constitutional validity on the premise that Chapter IV A of the 1939 Act was included in Ninth Schedule to the Constitution of India?

III. Did the learned single Judge go wrong in holding that the impugned provisions of the Rules are ultra vires the 1988 Act and the Constitution of India, and are hence unconstitutional, and therefore, void and inoperative?

IV. Is the challenge of the private operators as regards the procedure of hearing on the objections to the draft Scheme sustainable?

V. Is the finding in the impugned judgment upholding the Scheme erroneous in law? Does the resultant decision of the learned single Judge upholding the Scheme warrant interference in appeal? Also, is the challenge levied to the Scheme, through the captioned writ petition, substantiated?

VI. What is the true effect and resultant practical impact of the Scheme in the backdrop of the relevant statutory provisions under the 1988 Act and the Rules, in the light of the law laid by the Supreme Court of India, as well as the other binding precedents?

VII. What shall be the order as to reliefs and costs? Issue No. II: Whether section 99 in Chapter VI of the 1988 Act is insulated from challenge as to its constitutional validity because Chapter IV A of the 1939 Act was included in Ninth

Schedule relatable to Article 31B of the Constitution:

10. Article 31B is a constitutional device to place the statutes included in the Ninth Schedule beyond challenge on any ground referable to Part III of the Constitution. It is a protective covenant to insulate the enumerated statutes from being attacked as inconsistent with, or amounting to abridgment of, any of the rights conferred under Part III of the Constitution. So much so, the provisions thereof have to be strictly construed; particularly because, it is a constitutional sanction in derogation of the other provisions of Part III of the Constitution; however without affecting the basic structure of the Constitution, but sub-serving the constitutional purpose. The substance of Article 31B can be deduced as stated herein. It validates certain Acts and Regulations, without prejudice to the generality of the protective covenants in Article 31A. None of the Acts and Regulations specified in the Ninth Schedule or the provisions thereof would be invalid on any ground referable to Part III of the Constitution, notwithstanding any judicial decision to the contrary. This is again subject to the power of the competent Legislature to repeal or amend any such provision. Remember here; the net effect of Article 31B is an abridgment of the fundamental right of every citizen in terms of Part III of the Constitution, to the limited extent of that constitutional provision as contained in Article 31B. That Article specifically guards the power of any competent Legislature to repeal or amend any Act or Regulation brought under the canopy of Article 31B by its inclusion in the Ninth Schedule. The power of the competent Legislature to amend any such legislation does not carry with it the constitutional insulation, in terms of Article 31B and the Ninth Schedule, to any provision so included by amendment. The effect of Article 31B and the Ninth Schedule includes the inevitable consequence, deducible from the last clause of Article 31B, that if the competent Legislature amends any of the provisions of an Act included in the Ninth Schedule, those amended provisions would not receive the protection of Article 31B and the validity of such amendments are liable to be examined on the merits without reference to Article 31B. See for support: *Dhirubha Devisingh v. State of Bombay* [AIR 1955 SC 47], *Jeejeebhoy v. Asst. Collector, Thana* [AIR 1965 SC 1096] and *Ramanlal v. State of Gujarat* [AIR 1969 SC 168]. The 1988 Act; much less Chapter VI or section 99 therein; is not included in the Ninth Schedule to the Constitution. Obviously therefore, no plea that those provisions are insulated by specific incorporation into that Schedule to be protected under Article 31B can be countenanced. Merely because of the fact that the cognate provisions of the 1959 Act were immune from attack with regard to their constitutionality on the application of Article 31B, the impugned provision in Chapter VI of the 1988 Act does not get such insulation on a parity of reasoning relatable to similar provisions in the subsequent statute. Whatever happens after whatever has been included in the Ninth Schedule with reference to Article 31B cannot be brought into the basket of the protective covenant in Article 31B; which provision, for reasons noted above, ought to be strictly construed. No subsequent statute or provision thereof, relating to the relevant field; even if they are enacted coupled

with devices of repeal, substitution, amendment etc.; can be brought under the saving provisions referable to Article 31B because those pieces are nothing but future laws within the meaning of Article 13(2) of the Constitution. They are to be tested and scrutinized on the basis of the selfsame touchstone as would apply to all laws falling under Article 13(2). Any new statute in the form of an Act or Regulation which, as its result, supersedes an existing statute, by way of repeal or otherwise; as also any modification brought, by way of amendment; or otherwise, into a statute which is protected under Article 31B by reason of its inclusion in the Ninth Schedule; would not carry with it the protective canopy of Article 31B of the Constitution. See for support: *Sri Ram Ram Narain v. State of Bombay* [AIR 1959 SC 459], *State of Maharashtra v. Madhavrao* [AIR 1968 SC 1395], *Ramanlal v. State of Gujarat* [AIR 1969 SC 168], *Venkatrao v. State of Bombay* [AIR 1970 SC 126], *Orissa State v. Chandrasekhar* [AIR 1970 SC 398], *Godavari Sugar Mills v. S.B. Kamble* [AIR 1975 SC 1193] and *Sri Kalimata v. Union of India* [AIR 1981 SC 1030]. For the reasons elaborated herein, we hold that section 99 in Chapter VI of the 1988 Act is not insulated from challenge as to its constitutional validity because Chapter IV A of the 1959 Act was included in Ninth Schedule relatable to Article 31B of the Constitution. We therefore repel the plea on behalf of the GOK to the contrary.

Issue No. I: Has the petitioner in the captioned writ petition established, on the basis of any of the grounds raised by her, that section 99 of the 1988 Act is ultra vires the Constitution and is hence, void and inoperative?

11. We have framed this issue in the manner that we have done because it is trite law that the courts have to presume that the provisions of a statute are valid unless otherwise established. In the nature of the statute in hand and having regard to the quality of the challenge levied, we do not see any larger public domain issue for scrutiny; notwithstanding that the beneficiaries of the public transport system are essentially the people at large. Fanning off the husk and reaching at its grain; the challenge to the constitutional validity of section 99 of the 1988 Act is primarily the projection of a personal commercial interest matter, rather than a larger philanthropic public interest issue, on behalf of the commuting ordinary citizens who opt for the public transport system. Viewed in this angle, our visitation as regards the validity of that statutory provision ought to be confined to the grounds raised by the writ petitioner; and, we need to excuse ourselves from grazing on to pastures of constitutionality, on perceivable and conceivable humane conspectus of the public at large. Here and now, we affirm that legislative competence is not an issue levied to challenge section 99 of the 1988 Act. The cream and content of the challenge through the writ petition is nothing but emulsification of the personal private and commercial interest of the writ petitioner. Equally so, is the interest of those writ appellants who have endeavoured to support the writ petition. In this backdrop of the matter, the larger constitutional perspective and the fact that the impugned statutory provision has been made in discharge of the constitutional power to legislate; we do not see that the said provision is unconstitutional, particularly when no

reckonable infraction of Article 14 has been established to our satisfaction impeaching that provision which is part of a primary legislation. The challenge levied to section 99 of the 1988 Act is hence repelled.

Issue No. III: Are the impugned provisions of the Rules ultra vires the 1988 Act and the Constitution?

12. The rule-making power is undoubtedly available in terms of the provisions of the 1988 Act. Therefore, rules made in exercise of such power are pieces of subordinate legislation. Therefore, they can be subject to judicial scrutiny only on grounds available in that premise. Excessive exercise of rule-making power is not pleaded or established. The impugned rules are not established to be capricious or arbitrary, that no reasonably prudent person or institution bestowed with subordinate legislative power; particularly in terms of the rule-making power under the 1988 Act; would or ought to have ever made. This is because if such ground is not established, it would essentially be a matter within the subordinate legislative domain of the repository of the power to make those rules; as part of, and in exercise of, the subordinate legislative power to make rules. Therefore, such rules having been so made; and because, it has not been demonstrated that they are in violation of the provisions of Part III of the Constitution dealing with fundamental rights; we cannot but uphold those rules as valid. We say this as the primordial principle to confirm the validity of the impugned Rules. We have seen the reasons rendered by the learned single Judge to uphold those Rules. We do not find any way to dissuade ourselves from the reasoning of the learned single Judge in that regard, either. In this view of the matter, we find no ground to interfere with the findings of the learned single Judge upholding the impugned provisions of the Rules. We confirm them.

Issue No. IV: Rule of hearing in re the private operators? challenge to the government?s hearing procedure on the objections to the draft Scheme:

13. During the course of arguments, certain submissions were made to the effect that the learned single Judge failed to address the issue as to whether the rule of hearing has been appropriately complied with. The pointed plea was that the notice of hearing was issued from a particular office, however that, the objectors to the Scheme were actually heard by an officer who was not authorised to do so. In that context, we took the view that, for a complete resolution of the dispute in that regard, it would be advisable that we see the relevant files of GOK, to examine whether due process has been followed in the hierarchy of governance. The relevant files were thereupon produced as required by the Bench. We have seen the Original Note File with the different nothings, at different levels, including that of the Ministers and Secretaries to Government in the departments concerned. We have taken specific note of the relevant facts and materials on the basis of that file as well. We are satisfied on perusal of those materials that the decision-making process has gone through the required structural process in the hierarchy of governance and that there was proper nomination of the officer who was to hear the objectors to the Scheme.

Objections were called for and the date of hearing was notified through the office competent to do so. The objectors placed their versions. They were heard by the officer nominated to hear them. Thereafter, those objections went up to the higher authorities along with the notes of the hearing officer and the objections were considered with the aid of those notes. The decision-making process reflects due application of mind by the authority concerned. The ultimate result of such consideration and decision-making led to the approval of the draft Scheme. The approved Scheme was ultimately issued. We find that the approval of the draft Scheme came out through due process in terms of the Act and the Rules. Due process has been carried in terms of the Constitution and the laws, as regards institutional decision making process, supported by the requisite hearing to enable resolution of controversies through such institutional mechanism. We do not see any legal or constitutional infirmity in the process adopted by GOK in that regard. We are also satisfied that there is no arbitrary, perverse, or capricious exercise of administrative power in defeasance of the constitutional rights, including fundamental rights, of the private operators, in the governmental decision-making process leading to the approval of the draft Scheme. We do not find any constitutional, statutory, or other legal infirmity in the governmental process resulting in the approval of the impugned Scheme. The different contentions to the contrary, on the issue of hearing on the objections to the draft Scheme; including that the officer who had issued notice of hearing was not the one who heard the objectors; are only to be repelled as unsustainable. We do so.

Issue No. V: Sustainability of the impugned Scheme:

14. Section 99 of the 1988 Act and the impugned Rules having been upheld above, judicial review of the impugned Scheme cannot go overboard to lay down any principle or schematic approach based on the administrative wisdom or practical approach by the judicial authority, namely, this Court sitting in judicial review; either through the learned single Judge, being the authority as regards exercise of power under Article 226 of the Constitution in the first instance, or through the Division Bench in writ appeal, which is an intra-court appeal under the provisions of the Kerala High Court Act, 1958. Once the power to make a Scheme is demonstrated to be available in terms of the constitutional scheme of the relevant statute, it would be impermissible for the writ court, or any other judicial authority for that matter, to visit any Scheme formulated and issued by the competent authority in terms of the statutory provisions which are, by themselves, sustainable on the face of the Constitution. Therefore, the horizons of judicial review in such matters cannot be stretched to encompass any view which would fall beyond the purview of judicial intervention. The precedents referred to by the learned counsel for the parties do not, in any way, help the appellants or the writ petitioner. The plea against the finding of the learned single Judge as to the validity of the impugned Scheme and the challenge levied to that Scheme are only to be rejected. We do so.

Issue No. VI: The effect and practical impact of the Scheme and the provisions of the 1988 Act and the Rules and the factual scenario available in terms of the interlocutory orders:

15. Section 104 of the 1988 Act specifically restricts the grant of permits in respect of notified area or notified route. That provision fell for pointed consideration in *Punjab Roadways v. Punjab Sahib Bus & Transport Co.* [(2010) 5 SCC 235]. It was noted therein that through the proviso to Section 104, an exception has been carved out to the effect that where no application for permit has been made by the State Transport Undertaking in respect of any notified area or notified route in pursuance of an approved scheme, the State Transport Authority or the Regional Transport Authority, as the case may be, may grant temporary permits to any person in respect of any such notified area or notified route subject to the condition that such permit shall cease to be effective on the issue of permit to the State Transport Undertaking in respect of that area or route. The Apex Court held that same is the situation in respect of a case where a State Transport Undertaking in spite of grant of permit does not operate the service or surrenders the permit granted or is not utilising the permit. In such a situation, it should be deemed that no application for permit has been made by the State Transport Undertaking and it is open to the Regional Transport Authority to grant temporary permit if there is a temporary need. By granting regular permits to the private operators, the Regional Transport Authority will be upsetting the ratio fixed under the scheme which is legally impermissible. The net effect of principles stated by Their Lordships in *Punjab Roadways* (supra) is that even if a State Transport Undertaking has been granted permit and if it is not utilising that permit, it would be open to the Regional Transport Authority to grant temporary permit if there is a temporary need. Practically stated, the application by a State Transport Undertaking for permit in respect of a scheme is necessarily a clear indicator as to the temporary need as well. Therefore, when the State Transport Undertaking has been granted a permit and is not utilising the permit, it would be open to the Regional Transport Authority to act on any application for grant of temporary permit to a private operator. We may also note that in *Luka Devassia v. Regional Transport & Ors.* [2015 (3) KLJ 76], the Division Bench of this Court held, among other things, that the impugned scheme has not created a situation by which the existing operators' rights have been totally taken away. We are in agreement with that precedent and we follow it. Through common interlocutory order dated 23.12.2014 in these appeals and writ petition, this Court after hearing the counsel for all the parties made reference to the findings in the judgment impugned in the appeals and also to different other materials and statutory provisions in the 1988 Act. It was ultimately concluded and ordered that applications of private operators for temporary permits can be considered even on notified routes covered by the Scheme if as on the date of consideration of the application the STC has not applied for a permit and in such event, temporary permits be issued if other conditions as to grant are complied with, subject to the rider that the permits, if any, thus issued shall cease to be

effective on the date on which the STC commences operation on the very same route. This interlocutory direction issued by this Court on 23.12.2014 is nothing but a concomitant corollary of the ratio of Punjab Roadways (supra). Resultantly, it has also to be taken that even where the STC has applied for and obtained a permit to operate and is not utilising the permit by operating services in accordance with the grant, the private operators would be eligible to apply for temporary permit. Obviously, the existence of temporary need would stand established under such cases with reference to the fact that STC had applied for and obtained permits. Therefore, the net effect of these situations is that if the STC does not apply for grant of permit through any route which is a notified route or covered by a Scheme, temporary permits can be granted to the private operators based on temporary need and if there are routes for which permits have been granted to the STC in relation to notified routes or notified areas and if the STC is not utilising the permit by operating the services, it will be open to the Regional Transport Authority to act on any application for grant of temporary permit to the private operators over such routes. This conclusion is the true effect and resultant practical impact of the Scheme in the backdrop of the relevant provisions of the 1988 Act and the Rules in the light of the different precedents laid down by the Apex Court, in particular Punjab Roadways (supra) and the decisions referred to therein. It is so declared.

Issue No. VII: Reliefs and costs:

In the result,

- i. the challenge to section 99 of the 1988 Act as levied through the captioned writ petition and the challenge to the Rules as also the Scheme through the captioned writ appeals and the writ petition are rejected and the judgment of the learned single Judge impugned in the writ appeals is affirmed. To that extent, the writ appeals and the captioned writ petition are dismissed.
- ii. It is ordered that the State Transport Authority or the Regional Transport Authority, as the case may be, shall act in conformity with the declaration made in Paragraph No. 15 above.
- iii. The parties will bear their respective costs.