

(1959) 12 KL CK 0016
In the High Court Of Kerala
Case No : A.S. No. 303 of 1959

Rajalekshmi Motor Service, Kozhikode	APPELLANT
Vs	
Govt. of Kerala and Others	RESPONDENT

Date of Decision : 01-12-1959

Acts Referred:

Constitution of India, 1950 — Article 226
Motor Vehicles Act, 1939 — Section 44(1), 44(2)

Citation : AIR 1960 Ker 229 : (1959) 3 KLJ 1425

Hon'ble Judges : T.K. Joseph, J; M.S. Menon, J

Bench : Division Bench

Advocate : V.K.K. Menon, C.S. Padmanabha Iyer and P. Balagangadhara Menon, for the Appellant; C.M. Kuruvilla, Government Pleader for Respondents 1 and 2 and T.N. Subramonia Iyer and V.M.B. Menon for 3rd Respondent, for the Respondent

Final Decision : Dismissed

Judgement

M.S. Menon, J.—This is an appeal by the third respondent in O. P. No, 132 of 1959. The appellant was granted a stage carriage permit by the second respondent, the Regional Transport Authority, Kozhikode, on 13-11-1958. The petitioner, the third respondent in this appeal, contended that there was no properly constituted Regional Transport Authority in existence on that date, and that the permit cannot hence be sustained. The contention was upheld, and the permit was held to be invalid by the decision under appeal.

2. Chapter IV of the Motor Vehicles Act, 1939 relates to the control of transport vehicles, and Section 44 which occurs in that Chapter deals with the Transport Authorities. Sub-sections (1) and (2) of that section (omitting the provisions thereto) read as follows-.

(1) "The State Government shall, by notification in the official Gazette, constitute for the State a State Transport Authority to exercise and discharge the powers and functions specified in subsection (3), and shall in like manner constitute

Regional Transport Authorities to exercise and discharge throughout such area (in this Chapter referred to as regions) as may be specified in the notification in respect of each Regional Transport Authority, the powers and functions conferred by or under this Chapter on such Authorities."

2. "A State Transport Authority or a Regional Transport Authority shall consist of a Chairman who has had judicial experience and such other officials and non-officials, not being less than two, as the State Government may think fit to appoint; but no person who has any financial interest whether as proprietor, employee or otherwise in any transport undertaking shall be appointed as or continue as a member of a State or Regional Transport Authority and, if any person being a member of any such Authority acquires a financial interest in any transport undertaking, he shall, within four weeks of so doing, give notice in writing to the State Government of the acquisition of such interest and shall vacate office."

3. In exercise of the powers conferred by subsection (1) the Government of Kerala issued the following notification on 7-5-1957:

"In exercise of the powers conferred by Subsection (1) of Section 44 of the Motor Vehicles Act, 1939, (Central Act IV of 1939) and in supersession of all notifications constituting the State Transport Authority and the Regional Transport Authorities, the Government of Kerala hereby constitute;

(a) a State Transport Authority for the whole State; and

(b) a Regional Transport Authority for each of the Revenue Districts of the State,"

(Kerala Gazette dated 14-5-1957, Part I, Page 1103).

The Government also issued a separate notification on the same day under Subsection (2) of Section 44. That notification was replaced by another notification under Sub-section (2) dated 23-8-1957 and published in the Kerala Gazette dated 27-8-1957 (Part I, Page 1886). The relevant portion of that notification reads as follows:

"In exercise of the powers conferred by subsection (2) of Section 44 of the Motor Vehicles Act, 1939 (Central Act, IV of 1939) and in supersession of all previous notifications making appointments to the Regional Transport Authorities, the Government of Kerala hereby direct that the Regional Transport Authorities for each of the Revenue Districts shown in Column (1) of the Schedule hereto appended shall consist of the persons mentioned in column (2) thereof being Chairman and members as shown against their names for a period of one year from the date of publication of the notification.

SCHEDULE

[1] Regional Transport Authority

[2] Names of Members

2. Kozhikode

1. District Collector [Chairman] [Official Member]
2. District Superintendent of Police [Official Member]
3. Executive Engineer, Buildings and Roads [Official Member]
4. Shri Kallat Krishnan, Trade Union Office, Puthiyara [Non-official Member]
5. Sri Edakkot Mohammad, Kondotti [Non-official Member]"

4. The State Government apparently forgot the time limit embodied in the last mentioned notification, and nothing was done till 23-12-1958. On that date it issued the following notification under Sub-sections (1) and (2) of Section 44:

"In exercise of the powers conferred by subsections (1) and (2) of Section 44 of the Motor Vehicles Act, 1939 (Central Act IV of 1939) the Government of Kerala hereby sanction the continuance of the State Transport Authority and the Regional Transport Authorities (except the Regional Transport Authority, Eranakulam) as on 1-8-1958 from the dates of expiry of their term till their successors are appointed." (Kerala Gazette dated 28-12-1958. Part I, Page 3788).

5. The contention of the appellant is that Sub-sections (1) and (2) of Section 44 deal with distinct matters that the appointment of the members of a Transport Authority constituted under subsection (1) is not in pursuance of a power conferred by the legislature but in pursuance of the executive power of the State under the Constitution, and that as a result the retroactive operation granted by the notification of 23-12-1958 is valid and should be sustained. We find it impossible to accept this contention.

6. All that Sub-section (2) does is to stipulate that the Transport Authorities constituted under Sub-section (1) shall have a composition in conformity with the provisions of Sub-section (2). There can be no doubt that the power to constitute the Transport Authorities is derived from Sub-section (1), that we are solely in the realms of a delegated statutory power, and that in such cases there is no right to retroactive action unless the legislature by express words or necessary intendment had authorised the same. It is not contended that any such authorisation can be found or inferred, and it must follow that the retroactive operation attempted by the notification of 23-12-1958 was of no effect.

7. It is true that there is no time limit in the notification under Sub-section (1) of Section 44, and that the time limit occurs only in the notification under Sub-section (2) of that section. But that does not save the situation. The Transport Authorities cannot exist apart from their membership and they must be deemed to have disappeared when the membership terminated on the expiry of the period of one year from 27-8-1957.

8. Counsel for the appellant drew our attention to the following passage in Cooley's treatise on "Constitutional Limitations":

"No one is under obligation to recognise or respect the acts of an intruder, and for all legal purposes they are absolutely void. But for the sake of order and regularity, and to prevent confusion in the conduct of public business and insecurity of private rights, the acts of officers de facto are not suffered to be questioned because of the want of legal authority except by some direct proceeding instituted for the purpose by the State or by some one claiming the office de jure, or except when the person himself attempts to build up some right, or claim some privilege or emolument, by reason of being the officer which he claims to be. In all other cases the acts of an officer de facto are as valid and effectual, while he is suffered to retain the office, as though he were an officer by right, and the same legal consequences will flow from them for the protection of the public and of third parties. This is an important principle, which finds concise expression in the legal maxim that the acts of officers de facto cannot be questioned collaterally." (Vol. II, 8th Edition, Page 1357);

and to (1919) 46 D. L. R. 547 and Parameswaran Pillai v. State Prosecutor AIR 1951 Trav-Co. 45 where the principle has been discussed. According to him the members of the Regional Authority were de facto though not de jure functionaries on 13-10-1928, the proceedings in this Court are collateral in character, and the petition should have been dismissed.

9. We consider it unnecessary to decide how far, if at all the principle is applicable to proceedings under Article 226 of the Constitution. In the light of what we have said in paragraphs 5, 6 and 7 above, there was no Regional Transport Authority in existence on 12-11-1958, and if the Authority was non-existent, there could have been no de facto members of that Authority, and the principle can in no sense be attracted.

10. A de facto office is not a concept known to law. There can be de facto officers, out there can be no do facto office. There must be a legal office in existence in order to protect the acts of the incumbent. Where there is no such office there can be no officer de facto for the simple reason that there can be no officer de jure. The pretender in such cases is a mere usurper, and his acts cannot be supported.

11. The question directly arose for consideration in Norton v. Shelby County 118 U. S. 425. The following passages from that decision will make the position clear:

"But it is contended that if the Act creating the board was void, and the commissioners were not officers de jure, they were nevertheless officers de facto, and that the acts of the board as a de facto court are binding upon the county. This Contention is met by the fact that there can be no officer, either de jure or de facto; if there be no office to fill.

The doctrine which gives validity to acts of officers de facto, whatever defects there may be in the legality of their appointment or election, is founded upon considerations of policy and necessity, for the protection of the public and individuals whose interests may be affected thereby. Offices are created for the

benefit of the public, and private parties are not permitted to inquire into the title of persons clothed with the evidence of such offices, and in apparent possession of their powers and functions. For the good order and peace of society their authority is to be respected and obeyed until, in some regular mode prescribed by law, their title is investigated and determined. It is manifest that endless confusion would result if in every proceeding before such officers their title could be called in question. But the idea of an officer implies the existence of an office which he holds. It would be a mis-application of terms to call one an "officer" who holds no office."

12. Two further contentions of the appellant can be dealt with together. They are:

(1) that the petitioner should not have been allowed to raise the question of Jurisdiction in this Court because the petitioner had submitted to the jurisdiction of the Regional Transport Authority and did not deliberately raise the question of jurisdiction before that Authority; and

(2) that the petition should not have been entertained as the petitioner had filed an appeal against the order impugned and that appeal is pending disposal.

That the petitioner did not raise the question of jurisdiction before the Regional Transport Authority is admitted. As a matter of tact the petitioner appears even to have sought and obtained a stage carriage permit for another route from the same Authority. It is also admitted that the petitioner has filed an appeal in accordance with the provisions of the Act, and that it is pending disposal.

13. These are circumstances, however, which cannot be considered as ousting or limiting the jurisdiction of this Court under Article 226 of the Constitution. They are only factors, which may induce a Judge to refuse a remedy under that article.

14. Iyengar, J., did not consider these factors as sufficient to decline interference, and in such a case whatever may have been our own reactions in similar circumstances we should not interfere unless we are satisfied that the decision is perverse. It is not contended that such is the case.

15. The last contention of the appellant relates to the nature of the remedy sought by the petitioner. According to the appellant when an order is totally void certiorari is not the remedy and the petition should have been dismissed on that ground. The power under Article 226 of the Constitution, is not trammelled by the procedural niceties of English law. As stated in *Ananthanarayanan v. General Manager, Southern Rly. P. T. Madras*, (S) AIR 1956 Mad 220;

"Article 226 of the Constitution empowers the High Courts to issue "directions, orders" or write including "writs in the nature of habeas corpus, mandamus, etc. It will not do to ignore the significance of the words underlined (here into " "). The circumstance, therefore, that the petitioner has applied for a particular form of writ whereas he should have asked for a different kind of writ or order does not preclude the Court from moulding the remedy to the circumstances of the case."

16. In the light of what is stated above this appeal has to be dismissed and we do so with costs, advocate's fee Rs. 100/- to the third respondent and a like amount to respondents 1 and 2 together.