

(2024) 11 KL CK 0097

In the High Court Of Kerala

Case No : Writ Petition (C) Nos.26396, 26607, 26992 Of 2024

Sanithjan.S

APPELLANT

Vs

Union Of India

RESPONDENT

Date of Decision : 06-11-2024

Acts Referred:

Constitution of India, 1950 — Article 32, 37, 254
Motor Vehicles Act, 1988 — Section 88, 88(9), 88(14), 212

Citation : (2024) 11 KL CK 0097

Hon'ble Judges : Gopinath P, J

Bench : Single Bench

Advocate : P Deepak, P.Ramakrishnan, Mahesh Sankarasubban Sahasranaman, Pratap Abraham Varghese, Ashok Menon, K.S.Prenjith Kumar, Arun Ajay Shanker, Mohammed Rafiq

Final Decision : Dismissed

Judgement

Gopinath P, J

1. These writ petitions have been filed challenging the demand and collection of tax under the provisions of the Kerala Motor Vehicle Taxation Act, 1976 (hereinafter referred to as the 1976 Act) on tourist vehicles holding a permit in terms of the provisions contained in the All India Tourist Vehicles (Permit) Rules, 2023 (hereinafter referred to as the 2023 Rules) which were brought into force in supersession of All India Tourist Vehicles (Authorisation or Permit) Rules, 2021 (hereinafter referred to as the 2021 Rules).

2. It is the case of the petitioners that upon the tourist vehicles operating in more than one State obtaining a permit under the provisions of the 2023 Rules, no further 'authorisation fee/border tax' can be collected under the provisions of the 1976 Act. According to the petitioners, the 2021 Rules provided for the collection of authorisation fees/border tax by respective State Governments for plying of tourist vehicles having an All India Permit within the respective States and the quantum of such authorisation fee/border tax was also specified in the

2021 Rules. It is stated that, on 18.04.2023, the Union of India, in exercise of the powers conferred by sub-section (14) r/w. sub-section (9) of Section 88 of the Motor Vehicles Act, 1988 (hereinafter referred to as the 1988 Act) and in supersession of the 2021 Rules brought into force the 2023 Rules doing away with the provision for collection of authorisation fee/border tax by the various States Governments from tourist vehicle operators holding a valid All India Permit. It is submitted that, through an advisory, all State Governments and Transport Commissioners of all the States and Union Territories were advised not to levy any other kind of taxes or fees from tourist vehicles holding a valid permit issued under the 2023 Rules. It is stated that some of the petitioners had earlier approached the Supreme Court of India by filing a petition invoking Article 32 of the Constitution of India which was subsequently disposed of permitting the respective petitioners to approach the High Court. It is submitted that Ext.P11 order has been issued by the Transport Commissioner (Kerala), without the authority of law, requiring the collection of tax under the provisions of the 1976 Act even in respect of vehicles holding a permit in terms of the 2023 Rules.

3. Sri. P. Deepak, the learned Senior Counsel appearing for the petitioners on the instructions of Adv. Mahesh Sankarasubban Sahasranaman contends that the demand for payment of tax under the 1976 Act in respect of vehicles holding a valid permit issued under the 2023 Rules is clearly illegal and unsustainable in law. It is submitted that Entry 57 of List II of the VIIth Schedule to the Constitution of India which permits the State to make law for the levy of taxes on vehicles is expressly subject to the provisions of Entry 35 of List III which authorises making of law relating to mechanically propelled vehicles 'including the principles on which taxes on such vehicles had been levied'. It is submitted that the 2023 Rules is a piece of legislation traceable to Entry 35 of List III. It is submitted that by virtue of the provisions contained in Article 254 of the Constitution of India, Union legislation in respect of subjects specified in List III, whether earlier to or later to the State legislation, will prevail and the State legislation will, to the extent of inconsistency, be inoperative. He submits that the judgment of the Supreme Court in *State of Assam and others v. Labanya Probha Devi*; AIR 1967 SC 1575 has considered the two entries namely Entry 57 of List II and Entry 35 of List III and has held that the Entries deal with different matters, though the subjects appear to be allied ones. It is submitted that, while Entry 57 of List II deals with taxes on vehicles, Entry 35 of List III denotes rules of guidance in the matter of taxation. It is submitted that the 1976 Act does not contain any provision laying down any principles of taxation and therefore, it cannot be said that the 1976 Act is a 'ragbag' legislation drawing sustenance from both Entry 57 of List II and Entry 35 of List III. It is submitted that though the 1988 Act (a legislation relatable to Entry 35 of List III) contains no provision laying down any principle of taxation it is open to the delegate under that legislation (the Union Government) to make rules laying down 'principles of taxation' and if it chooses to do so, the provisions of the 1976 Act would be subject to the same. It is submitted that the expression 'law made by Parliament/

Legislature of a State' in Art.246 of the Constitution of India includes not only plenary legislation but also subordinate legislation and that subordinate legislation also answers to the definition of 'law'. The learned counsel placed reliance on the judgments of the Supreme Court in *Edward Mills Company Ltd., Beawar and others v. State of Ajmer and another*; AIR 1955 SC 25 and *Jayantilal Amratlal Shodhan v. F.N. Rana and others*; AIR 1964 SC 648 in support of this contention. He relied on the decisions of the Supreme Court in *Hamdard Dawakhana (Wakf) Lal Kuan, Delhi and another v. Union of India and others*; AIR 1960 SC 554, *Uttar Pradesh Power Corporation Ltd. v. National Thermal Power Corporation Ltd*; (2009) 6 SCC 235, *Udai Singh Dagar and others v. Union of India and others*; (2007) 10 SCC 306, *State of Rajasthan and others v. Basant Nahata*; (2005) 12 SCC 77 and *St. Johns Teachers Training Institute v. Regional Director, NCTE and another*; (2003) 3 SCC 321 to establish the status of a delegated legislation. He referred to the provisions of the 2023 Rules and the provisions of Sections 88(9), 88(14) and 212 of the 1988 Act and attempted to establish that the 2023 Rules is 'law' relatable to Entry 35 of List III. It is submitted that, if the 2023 Rules qualify as a law under Entry 35 of List III, any law made by the State Legislature under Entry 57 of List II will be subject to the provisions of the 2023 Rules. It is submitted that the view taken by this Court while considering a similar plea on the basis of 2021 Rules in the interim order dated 8.11.2022 in W.P.(C)No.34572/2022 and connected cases is not the correct view in law and also that the principles culled out in that order from the decisions of the Supreme Court in *Government of Andhra Pradesh and others v. P. Laxmi Devi (Smt)*; (2008) 4 SCC 720 and *Kerala Samsthana Chethu Thozhilali Union v. State of Kerala and others*; (2006) 4 SCC 327 have no application to the facts of the present case. Lastly, he again referred to the provisions of Section 212 of the 1988 Act and to the effect of laying Rules before Parliament. He thus contends that the petitioners in these cases are entitled to the reliefs sought for in the respective writ petitions.

4. Since these Writ Petitions have not been admitted, Sri. Mohammed Rafiq, the learned Senior Government Pleader (Taxes) addressed arguments in the matter, with the permission of the Court. He contends that there is no provision in the 1988 Act which relates to taxes on motor vehicles. It is submitted that the view taken by this Court in the interim order dated 8.11.2022 in W.P.(C)No.34572/2022 and connected cases while dealing with the similar contention raised in the background of the 2021 Rules, is the correct view to be taken in the matter. He submitted that an essential legislative function cannot be delegated. He placed reliance on the judgment of the Supreme Court in *Basant Nahata (Supra)* and *Global Energy Ltd. and another v. Central Electricity Regulatory Commission*; (2009) 15 SCC 570 in support of this contention. He also placed reliance on the judgment in *P. Laxmi Devi (Supra)* to reiterate that the subordinate legislation even if made under the provisions of the 1988 Act cannot override plenary legislation made by the State Legislature with reference to Entry 57 of List II. He also placed reliance on the judgment of this Court in *U. A. Lathif*

v. State of Kerala; 2023 (6) KLT 183.

5. Having considered the submissions made across the bar, I am of the view that the petitioners have not made out any case for grant of relief.

6. The scope of Entry 57 of List II and Entry 35 of List III is beyond cavil. The words used clearly indicate the scope of both Entries. They offer no scope for an argument that they overlap in any manner. In *Labanya Probha Devi (Supra)* it was held:-

"11. The short question, therefore, is whether any of the provisions of the amending Acts is repugnant to any of the provisions of the existing law with respect to any of the matters enumerated in the Concurrent List. Under the existing law i.e. Act 9 of 1936, no motor vehicles could be used in the Assam Province unless the owner thereof had paid in respect of it a tax at the appropriate rate specified in the Schedule to the Act and, save as therein specified, such tax should thereafter be payable annually notwithstanding that the motor vehicle might from time to time cease to be used (see Section 4). As aforesaid, the Schedule annexed to the principal Act was amended from time to time by different amending Acts and the rate was increased. Under the 1963 amending Act, apart from other provisions which do not relate to any principles of taxation, a new Schedule has been substituted. Neither the amending Act nor the Schedule laid down any principles of taxation in respect of motor vehicles. So too, the amending Act of 1966 substituted the Schedule of the Act by another Schedule. A perusal of the aforesaid Schedule only discloses that different rates were fixed; that is to say, the amended Schedule does not lay down any principles on which taxes on motor vehicles are to be levied within the meaning of Entry 35 of the Concurrent List; it is solely concerned with taxes on vehicles within the meaning of Entry 57 of List II. The two entries deal with two different matters though allied ones — one deals with taxes on vehicles and the other with the principles on which such taxes are to be levied. When two entries in the Constitution, whether in the same List or different Lists, deal with two subjects, if possible, an attempt shall be made to harmonize them rather than to bring them into conflict. Taxes on vehicles in their ordinary meaning connote the liability to pay taxes at the rates at which the taxes are to be levied. On the other hand, the expression "principles of taxation" denotes rules of guidance in the matter of taxation. We, therefore, hold that the amending Acts do not come into conflict with the existing law in respect of any principles of taxation, but only deal with a subject-matter which is exclusively within the legislative competence of the State Legislature. In this view, there is no scope for the application of Article 254 of the Constitution."

Entry 57 of List II reads thus:-

"57. Taxes on vehicles, whether mechanically propelled or not, suitable for use on roads, including tramcars subject to the provisions of entry 35 of List III."

Entry 35 of List III reads thus:-

"35. Mechanically propelled vehicles including the principles on which taxes on such vehicles are to be levied."

Entry 57 of List II thus enables the State Legislature to make a law for the imposition of 'Taxes on vehicles.....'. It is true that Entry 57 of List II is expressly made subject to any legislation made under Entry 35 of List III. However, the contention that the 1976 Act should be subject to the 2023 Rules is only to be rejected. It must be noted that the 2023 Rules is a piece of subordinate legislation framed in the exercise of the powers conferred by sub-section (14) r/ w sub-section (9) of Section 88 of the 1988 Act. It is not even contended before me that the 1988 Act contains any provision relating to taxation. Therefore, even if it were to be assumed that the words 'principles on which taxes on such vehicles had been levied' in Entry 35 of List III includes the power to regulate and fix the tax payable by tourist vehicles holding an All India Permit; in the absence of any taxing provision in the 1988 Act, it must be held that no tax can be imposed by the authority of the subordinate legislation. This point seems settled by the ratio of *Bimal Chandra Banerjee v. State of Madhya Pradesh*, (1971) 81 ITR 105 where it was held:-

"14. No tax can be imposed by any bye-law or rule or regulation unless the statute under which the subordinate legislation is made specially authorises the imposition even if it is assumed that the power to tax can be delegated to the executive. The basis of the statutory power conferred by the statute cannot be transgressed by the rule-making authority. A rule-making authority has no plenary power. It has to act within the limits of the power granted to it."

This issue can be considered from another angle. The fact that the Union Parliament may legislate with reference to Entry 35 of List III does not lead to the conclusion that its delegate (here the Union Government) can make Rules without any enabling power in the parent statute (here the 1988 Act). This issue was considered by the Supreme Court in *Kerala Samsthana Chethu Thozhilali Union* (Supra) and it was held:-

"48. The High Court, furthermore, in our opinion, is not correct in tracing the legislative power of the State to Entries 23 and 24 of List III of the Seventh Schedule of the Constitution. The legislative field contained in the Seventh Schedule of the Constitution provides for field of plenary power of the legislature but what a legislature can do, evidently, a delegatee may not, unless otherwise provided for in the statute itself."

Thus the contention that in the light of the legislative power conferred by Entry 35 of List III and in the light of the fact that the authority of the State Legislature under Entry 57 of List II is expressly subject to any law made under Entry 35 of List III, the 2023 Rules will override the provisions of the 1976 Act, is only to be rejected. For the same reason, the question of the application of the provisions of Article 254 of the Constitution of India does not arise. In fact, the decision in *Labanya Probha Devi* (Supra) is itself authority for the proposition that Article

254 has no application in the facts of the present case.

7. I had the occasion to consider a challenge (on almost identical grounds) in the context of the 2021 Rules in W.P(C)No. 34572 of 2022 & connected cases. While declining interim relief in those cases it was held:-

" I cannot read the provisions of the All India Rules in isolation and without reference to the constitutional scheme of legislation. The Constitution of India is the "grundnorm" [Kelsen - The Pure Theory of Law). In Govt. of A.P. and others v. P. Laxmi Devi, (2008) 4 SCC 720 it was held:-

"32. According to Kelsen, in every country there is a hierarchy of legal norms, headed by what he calls as the 'Grundnorm' (The Basic Norm). If a legal norm in a higher layer of this hierarchy conflicts with a legal norm in a lower layer the former will prevail (see Kelsen's 'The General Theory of Law and State').

33. In India the Grundnorm is the Indian Constitution, and the hierarchy is as follows.

(i) The Constitution of India:

(ii) Statutory law, which may be either law made by Parliament or by the State Legislature;

(iii) Delegated legislation, which may be in the form of Rules made under the Statute, Regulations made under the Statute, etc.;

(iv) Purely executive orders not made under any statute.

34. If a law (norm) in a higher layer in the above hierarchy clashes with a law in a lower layer, the former will prevail. Hence a constitutional provision will prevail over all other laws, whether in a statute or in delegated legislation or in an executive order. The Constitution is the highest law of the land, and no law which is in conflict with it can survive. Since the law made by the legislature is in the second layer of the hierarchy, obviously it will be invalid if it is in conflict with a provision in the Constitution (except the Directive Principles which, by Article 37, have been expressly made non- enforceable)."

Therefore, the provisions of the All India Rules will have to be interpreted only in terms of legislative power....."

As already noticed, the 2023 Rules have been expressly framed with reference to the provisions of Section 88 of the 1988 Act. A reading of Section 88 of the 1988 Act does not indicate that the provision has anything to do with the imposition of a tax and even if it were to be assumed for a moment that the scope of the words "...principles on which taxes on such vehicles are to be levied" in Entry 35 of List III to the Constitution of India includes the power to prescribe a tax in respect of vehicles holding All India Permit, it must be held that the 2023 Rules are ultra vires the provisions of Section 88 of the 1988 Act and therefore, no mandamus can be sought to enforce it.

8. There is yet another aspect of the matter. Subordinate legislation is not only required to be in conformity with the plenary legislation under which it is framed but it must also be in conformity with all other plenary legislation made by Parliament or the State Legislature. If any other view is taken, it would result in a situation where it would have to be conceded that by subordinate legislation made by the delegate under a particular legislation, a plenary law made by a competent legislature could be rendered inoperative. In *Indian Express Newspapers (Bombay) (Pvt) Ltd. and others v. Union of India and others*, (1985) 1 SCC 641 it was held:-

“75. A piece of subordinate legislation does not carry the same degree of immunity which is enjoyed by a statute passed by a competent Legislature. Subordinate legislation may be questioned on any of the grounds on which plenary legislation is questioned. In addition it may also be questioned on the ground that it does not conform to the statute under which it is made. It may further be questioned on the ground that it is contrary to some other statute. That is because subordinate legislation must yield to plenary legislation.” (emphasis is mine).

On similar lines is the decision of the Supreme Court in *Kerala Samsthana Chethu Thozhilali Union* (Supra), where it was held:-

“17. A rule is not only required to be made in conformity with the provisions of the Act whereunder it is made, but the same must be in conformity with the provisions of any other Act, as a subordinate legislation cannot be violative of any plenary legislation made by Parliament or the State Legislature.”

Thus, it is not possible to hold that a Rule made in exercise of the rule-making power under the provisions of the 1988 Act, can tinker with or control the tax imposed by plenary legislation, namely the 1976 Act. In other words, the 2023 Rules must not only answer to the provisions of the 1988 Act but would also be answerable to the provisions of the 1976 Act.

9. The contention of the learned Senior Counsel for the petitioners that subordinate legislation also answers to the definition of ‘law’ cannot be doubted. However, in the light of the findings rendered above, that fact does not come to the aid of the petitioners. Similarly, the decisions cited to establish the status of delegated legislation and the fact that Rules framed by the Central Government under the 1988 Act have to be laid before Parliament also does not come to the aid of the petitioners. The requirement of laying of such Rules before Parliament does not sanctify the 2023 Rules and it cannot be held that a procedure of ‘laying’ will result in those Rules operating in the face of the provisions of the plenary legislation namely the 1976 Act.

No other point has been raised. The writ petitions fail and they are dismissed in limine.