(2010) 04 CAL CK 0054

Calcutta High Court

Case No: APO No. 292 of 2006, W.P. No. 1857 of 2005 and W.P. No. 25179 (W) of 2005

State of West Bengal and Others		APPELLANT
	Vs	
Bengal Bus Syndicate and Others		RESPONDENT

Date of Decision: April 13, 2010

Acts Referred:

- Central Motor Vehicles Rules, 1989 - Rule 115, 62
- Civil Procedure Code, 1908 (CPC) - Order 41 Rule 22, Order 41 Rule 33
- Constitution of India, 1950 - Article 14, 19, 21, 246, 254
- Criminal Procedure Code, 1973 (CrPC) - Section 164
- Defence of India Rules, 1962 - Rule 26
- Finance Act, 1994 - Section 65, 66
- Mines and Minerals (Development and Regulation) Act, 1957 - Section 13, 13(1), 13(2)
- Motor Vehicles Act, 1988 - Section 110, 110(1), 111, 2(28), 40
- Mumbai Provinces Municipal Act, 1916 - Section 298, 298(1), 298(2)
- West Bengal Motor Vehicles Rules, 1989 - Rule 115, 88A

Citation: (2011) 1 CHN 30

Hon'ble Judges: Md. Abdul Ghani, J; Kalyan Jyoti Sengupta, J

Bench: Division Bench

Final Decision: Allowed

Judgement

Kalyan Jyoti Sengupta, J.

The appeal is at the instance of the State of West Bengal against the judgment and order of the learned Single Judge. The learned Trial Judge by the impugned order has struck down Rule 88A of the West Bengal Motor Vehicles Rules, 1989 and also connected notification issued on 24th May, 2005. With the appeal the Writ Petition No. 25179 (W) 2005 is also heard as the Petitioners challenge the same Rule and notification. The facts for which appeal was preferred connected writ petition was filed are shortly put hereunder:

2. On 17th March, 2005 the State Government amended the West Bengal Motor Vehicles Rules by inserting a new Rule 88A in the manner as follows:

88A. Power of the State Government to impose special conditions on permit restraining plying of transport vehicles (passenger as well as goods) beyond a particular age and in any particular area of the State. The State Government may, by issue of notification to be published in the Official Gazette, direct the State Transport Authority or the Regional Transport Authority, as the case may be, to impose such special conditions on issue of permit for transport vehicles as may deem fit restricting the plying of transport vehicles beyond particular age and in any particular areas of the State for safe movement of the vehicular traffic to avoid congestion and to reduce the level of automobile pollution and for safety of the passengers in public interest. The State Government may also impose such restrictions on the existing permit holders by giving prior notice of not less than sixty days

3. The said Rule described as the West Bengal Motor Vehicles (Amendment) Rules, 2005 came into force on and from 17th March, 2005 being the date of notification.

4. Pursuant to the said Rule the State Government issued notification dated 24th May, 2005 as follows:

GOVERNMENT OF WEST BENGAL,

TRANSPORT DEPARTMENT

WRITERS'' BUILDINGS

KOLKATA 700 001

NOTIFICATION

No. 2421-WT/3M-73/2005 Dated: 24th May, 2005

WHEREAS it has been observed that a large number of different categories of transport vehicles are plying in Kolkata Metropolitan area many of which of older models are contributing in a major way to serious environmental pollution hazards.

And whereas Environment Department of the State Government as well as WBPCB have recommended to impose restrictions on plying of such older vehicles;

And whereas the State Government considers it expedient, in the interest of reducing the level of pollution caused by automobiles as well as for improvement of air quality, to impose certain restrictions on issue of permits for transport vehicles within KMA beyond a particular age;

Now, Therefore, in exercise of the power conferred under Rule 88A of the West Bengal Motor Vehicles Rules, 1989, the Governor is hereby pleased to direct that the permit holders/owners of the existing transport vehicles as shown in column I in the

table below, will be restricted from plying their vehicles within KMA with effect from the dates shown in column II and these vehicles may suitably be replaced by such model of vehicles as indicated in column III thereof subject to observance of all rules and relevant guidelines issued from the Transport Department from time to time. STA abd RTAs within the State are directed to ensure compliance of this order with immediate effect and impose such special conditions in the permits.

Categories of vehicles (Col.I)	The date from which plying within KMA is prohibited (Col. II)	Category of vehicle eligible for replacement (Col.III)
1. Autorickshaw/ three wheeled passenger vehicles	01.09.2005	LPG BS-II mass emission standard compliant vehicles/LPG retrofitted vehicles of similar nature.
2. Metered taxi registered originally before 01.01.1990	31.12.2005	BS-III mass emission standard complaint metered taxi (LPG or Diesel).
3. Stage carriage as well as contract carriage omnibuses registered originally before 01.01.1990	31.12.2005	BS-III mass emission standard compliant vehicles of similar nature.

4. Mini buses/special stage carriage omnibuses registered originally before 01.01.1990	31.12.2005	BS-III mass emission standard compliant stage/contract carriage vehicles of similar nature.
5. Trucks/mini trucks/all other categories of goods carriages vehicles similar nature.	31.12.2005	BS-III mass emission standard compliant good vehicles/BS II complaint 3-wheeler goods including 3-of wheeler goods vehicles registered originally before 01.01.1990

5. In the writ petition the Petitioners basically challenged the vires of the said amended Rule and the said notification issued subsequently on the strength of the said Rules. The grounds for challenge of the Rule is that the State Government has no legislative competence to make the said Rule fixing age of the vehicle as this subject is the exclusive power of the Central Government u/s 59 of the Motor Vehicles Act, 1988. As such the aforesaid amendment is wholly ultra vires provisions of the said Act of 1988. Invidious situation has been meted out to the operators having vehicles manufactured in December, 1989, moreover there cannot be any reasonable nexus with the object and reasons to be achieved for framing the said amended Rules as far as the vehicles plied within the Kolkata Metropolitan area and out side this area are concerned. The reasons given for the aforesaid amendment is wholly arbitrary and absurd. The other grounds mentioned in the writ petition in our view are not relevant for adjudication as the same are explanatory in nature.

6. The learned Advocate General Mr. Ray with Mr. Sandip Srimani learned Additional Government Pleader appearing in support of the appeal submits that the learned Judge overlooked that the rule making power is provided under Sub-section (1) of section 96 of the Motor Vehicles Act, 1988 (hereinafter referred to as the said Act) and Sub-section (2) thereof contains illustration of the subject over which power can be exercised. He contends that language of Sub-section (2) of section 96 makes it

clear that the matters mentioned therein are not exhaustive, merely illustrative, and it is evident from first line of Sub-section (2) beginning with words "without prejudice to generality of the forgoing power". The Rule making power really emanates from Sub-section (1) which cannot be abridged by the illustration mentioned in Sub-section (2). Legally statutory provision of this nature is dominated by Sub-section (1) not by Sub-section (2). Such proposition of law is firmly established by the judicial pronouncements and in this connection he has relied on a decision of Privy Council reported in AIR 1945 156 (Privy Council) He contends that the views taken by the Privy Council has also been approved and accepted later on by the Supreme Court after independence in various decisions which are as follows:

(I) Afzal Ullah Vs. The State of Uttar Pradesh,

(II) Om Prakash and Others Vs. State of U.P. and Others,

(III) K. Ramanathan Vs. State of Tamil Nadu and Another,

(IV) 1985 (4) SCC 156

(V) Shri Sudarshan Mineral Co. Ltd. Bhilwara Vs. Union of India (UOI) and Another,

7. According to learned Advocate General the meaning and interpretation of Clause XXXIII of Sub-section (2) of section 96 as being analogous to illustration in Sub-section (2) given by the learned Single Judge is erroneous as the word "other" means as per the New Shorter Oxford English Dictionary at page 2031 "existing besides or distinct from that or those already specified or implied" further additional clauses of Sub-section (2). In view of etymological meaning of the word "other" the State Government has power under this clause also to frame rule under Sub-section (2) of section 96 of the Act. The object of section 96 of the said Act is that rule shall be framed for the purposes of Chapter v. which in its turn speaks about control of transport vehicles. The meaning of the word "control" is elaborated in Words and Phrases, Permanent Edition, Volume 9A at page 4 has been adopted by the Supreme Court in a decision reported in The Shamrao Vithal Co-operative Bank Ltd. Vs. Kasargod Pandhuranga Mallya, and it is held that meaning of the word "control" is synonymous with superintendence, management or authority to direct, restrict, or regulate. While relying on an old English decision reported in 1836 (18) QBD 34 he submits, if I prohibit a man from doing a thing, I control him to that extent. Hence section 96 of the Act empowers the State Government to make rule to restrict or regulate by incorporating additional condition through RTA''s or STA in the permit. He places sections 66, 70, 71 and 72 of the said Act to explain scope and purport thereof and also object of Chapter v. thereof which provides for various method and procedure for granting permit. It will appear from the statement of object and reasons of the Act and that of the Amending Act 54 of 1994 that the pollution control, adoption of higher technology in automotive sector and introduction of newer types of vehicles were some of the objects and Amendment Act para 3(a). Proposed Rule 88A seeks to achieve those objects. The laxicon meaning of the word

"type" as per New Shorter Oxford English Dictionary at page 3441 is of character distinguishing a particular group or class of things. Therefore it cannot be said that prescribing condition regarding the age of the vehicle for granting permit is alien to the object of the Act.

8. He contends further that the proposed rule provides that within, the local limits of a particular area a stage carriage beyond a particular age shall not ply. Hence the State Government has framed Rule 88A in exercise of its power under sections 96(1) and 96(2) Clause (xxxiii) of the Act and for carrying out the purpose of Chapter V. Requirement of newer type of vehicles and concern for pollution control are objects of the Act and the notification gives effect to that object. It is incumbent for the State to safeguard the health of the people which is guaranteed in Article 21 of the Constitution of India and this would override provisions of any statute including Motor Vehicles Act if they emerge conflicting against Article 21 of Constitution of India. In this connection he has relied on the Supreme Court judgment reported in M.C. Mehta Vs. Union of India and Others, There is no conflict between section 59 of the Act and Rule 88A, nor any repugnancy could be found, as both the provision operate in two different fields.

9. Mr. Dutt learned Counsel appearing for the writ Petitioner/Respondent while supporting the judgment of the learned Trial Judge submits that State has been empowered to issue notification in specified cases under sections 66, 68, 71 and 74. Section 96 does not empower the State to frame rule of the nature impugned here consequently impugned notification issued pursuant thereto is legally untenable. The text of the Rule 88A which is impugned here is contrary to the legislative intent of section 96. According to him the Rule of ejusdem generis is rule of construction and not rule of substantive law and the same is not applicable where the intention is clear. He therefore, says that word "Other" cannot be given any meaning other than those mentioned nearing to the instances given in Sub-section (2). By the impugned rule the State Government wants to attach special condition for granting permit and such special condition is completely alien to Chapter v. of the said Act. His contention is that the reading of sections 72, 74 and 79 of the Act make clear that transport authorities are to issue permit attaching one or more conditions mentioned therein and not any special condition. Thus he contends that Rule 88A runs counter to section 66 and it is settled law that the Rule cannot override the provisions of the Act itself. Section 96(1) is general delegation given to State without laying down guidelines. The same cannot be so exercised as to bring about substantive disability not contemplated in the provisions of chapter V. In support of this submission he has relied on the following decisions of the Supreme Court:
(i) 1965 (3) AER 653

(ii) Laghu Udyog Bharati and Another Vs. Union of India and Others,

(iii) Kunj Behari Lal Butail and Others Vs. State of H.P. and Others,

(iv) 1994 (4) SCC 54.

10. The Government with this impugned rule really intend to prescribe the age of the vehicle which is not permissible as the same is exclusive domain of the Central Government. What the Government could not do directly cannot do indirectly. While urging these points he has placed reliance on the decisions of the Supreme Court:

(i) State of Mysore Vs. Allum Karibasappa and Others,

(ii) M/s. Shri Sitaram Sugar Co. Ltd. and another Vs. Union of India and others,

(iii) Godde Venkateswara Rao Vs. Government of Andhra Pradesh and Others,

(iv) Indian Council of Legal Aid and Advice, etc. etc. Vs. Bar Council of India and another,

11. According to him the object and text of Rule 88A is the occupied field by the Central Government u/s 59 of the Act. Since the subject is occupied by the Central Government State cannot legislate even though it is permissible under Article 246 of the Constitution of India. It is well-settled if there is any conflict between the Central law and the State one obviously the former will prevail under Article 254 of the Constitution. He finds support of this submission from following Supreme Court decisions:

(i) T. Barai Vs. Henry Ah Hoe and Another,

(ii) Buxa Dooars Tea Company Ltd. and Others Vs. State of West Bengal and Others,

(iii) State of T.N. and Another Vs. Adhiyaman Educational and Research Institute and Others,

12. The Central Government has already framed Rule 115 providing for stringent checks and norms regarding emission of smoke, vapor etc. from the motor vehicles thus there is no need for further checking by the State Government. This Rule brings about the same object as it is sought to be done by the impugned Rule.

13. Learned Advocate appearing on behalf of the added Respondents while adopting the argument of Mr. Dutt additionally submits that it is only the CentralGovernment who can fix the age of motor vehicles u/s 59 of the Act, not by the State Government either directly or indirectly by framing impugned Rule, thus State Government has encroached the field occupied by the Central Government. While fixing the age of transport vehicle within Calcutta metropolitan area the State Government has overridden and/or infringed the legislative competence of the Central Government. He has referred to the Supreme Court Judgment reported in 1996 (3) SCC 704 to support his contention. According to him section 96 authorized the State Government to make rule for the purpose of Chapter V, however the State Government by amendment of Rule 88A has abused such power. According to him such an act of the State would be considered as ultra vires the Constitution as it is

ruled by the Supreme Court in the judgment reported in M/s. Shri Sitaram Sugar Co. Ltd. and another Vs. Union of India and others, . According to him while introducing Rule 88A State Government has exceeded its authority conferred on it by the Parliament and as this act of State Government is not sustainable in the eye of law in view of the Supreme Court Judgment relied on by him, reported in 1965 (3) AER 653. His further contention is that section 67 of the Motor Vehicles Act does not empower the State Government to issue direction upon the permit granting authority for control of transport vehicle except for fixation of tax and fares on passenger and goods. Hence the impugned Rule is an action without authority. In this connection he has relied on a decision of Rajasthan High Court reported in Regional Transport Authority, Jodhpur Vs. Sita Ram, and also a Supreme Court decision reported in Kerala Samsthana Chethu Thozhilali Union Vs. State of Kerala and Others, The plea of public safety and pollution mentioned in the notification issued by the State Government is not tenable under the law as those factors do not come within the domain of the State Government. Under the provisions of section 110(l)(g) of the said Act, this subject is specified exclusively for the Central Government. Therefore, by introducing Rule 88A the State Government has overridden its jurisdiction and encroached upon the occupied field of the Central Government. In this connection he has referred to the decision of the Supreme Court reported in State of Uttar Pradesh Vs. Singhara Singh and Others, and Laghu Udyog Bharati and Another Vs. Union of India and Others, . He contends that the judgment and order of the learned Trial Judge should not be interfered with and appeal should be dismissed.

14. After considering the argument advanced by the learned Counsel for the parties and reading the pleading before us the point for decision in this appeal is whether the learned Trial Judge has rightly held that the State Government is incompetent to frame the impugned Rule 88A u/s 96 of the Act with regard to the subject mentioned therein and further correctly struck down the notification issued, pursuant to the said impugned Rule, and the State Government did not encroach upon the power of the Central Government u/s 59 of the Act. To clarify the above points following questions broadly emerge to be answered:

(i) Whether the State Government has competence, under the said Act 1988 (referred to as the said Act) while framing Rule 88A with regard to the subject mentioned therein.

(ii) Whether the notification issued by the State Government is in consonance with the said Act and the Rule framed thereunder.

15. The learned Trial Judge while striking down the Rule and the notification found that the State Government while making the impugned Rule in exercise of power u/s 96 has exceeded the scope and purview of this section itself. According to the learned Trial Judge the State Government cannot frame any rule touching any matter save and except those mentioned in Sub-section (2) of section 96. Clause (xxxiii) of Sub-section (2) of section 96 of the Act being the residuary one cannot be

read to cover matter dissimilar to those mentioned in other clauses. The learned Trial Judge while striking down the notification simply held since Rule itself is ultra vires the said Act, notification does not stand. The learned Trial Judge of course did not accept the case and contention of the writ Petitioners/ Respondents, that while framing the said Rule the State Government has actually fixed the age limit of particular type of motor vehicle. Therefore, His Lordship held by necessary implication that there has been no encroachment of the provisions of section 59 of the said Act. Though no cross-objection nor separate appeal has been filed to challenge the aforesaid findings of the learned Trial Judge with regard to the issue of encroachment of the field of the Central Government while framing the Rule elaborate argument has been advanced, hence we shall be dealing with this issue by virtue of power under Order 41 Rules 22 & 33 of CPC read with Rule 53 of Writ Rules framed by this Court.

16. Section 96 as a whole is the source of power of the State Government for framing Rules for carrying into effect of the provisions of Chapter v. of the Act which amongst other provide for grant and cancellation of permit for transport vehicle for goods and passenger and control of the same. u/s 66 of the said Act State Transport Authority or Regional Transport Authorities are empowered to grant permit and without the permit with conditions attached thereto no transport vehicles in any public place can be allowed to be plied whether passengers or goods actually being carried on. Section 66 has to be read subject to Sub-section (3) of the said Act. Section 68 empowers State Government to constitute transport authorities and to activate them discharge function as mentioned in section 67, Sub-section (3) of section 68 of the Act. Sections 69, 70, 71, 72, 73, 74, 76, 77, 78, 79 and 80 provide for grant of permit and procedure and methodology therefore for the transport vehicles for carrying goods as well as passenger. Thus it is clear that aforesaid Chapter which also encompasses section 96 relates to issue of permit for transport vehicles for plying on the road. It has nothing to do with the fixation of age of the vehicle in general and it is absolutely in different field.

17. Section 59 of the said Act is part of Chapter IV. This Chapter primarily provides for registration of motor vehicles. The object of this Chapter is that a motor vehicle defined in section 2(28) has to be registered before the same is driven in any public place or any other place.

18. It can be concluded without any ambiguity that any classification of the vehicles as defined in section 2(28) is to be treated to be motor vehicle and the same cannot be driven without the same being registered. In this Chapter sections 40 to 55 provide for amongst other granting, refusing, cancellation, suspension of registration.

19. Section 56 provides as being part of grant of registration for certificate of fitness of transport vehicles specifically and without the same there cannot be valid registration.

20. Sections 58 and 59 provide for special provision for grant of registration in respect of the transport vehicles. Thus the aforesaid Chapter lay down condition for grant of registration of motor vehicle irrespective of mode of use of the same.

21. Section 59 of the said Act being part of Chapter IV specially provides for fixation of age limit of motor vehicles irrespective of mode and object of use however having regard to type of the vehicles, and this power has been given to the Central Government exclusively and none else. We are concerned with the provision of section 59 in this case. We, therefore set out section 59 herein:

59. Power to fix the age limit of motor vehicle.-- 1) The Central Government may, having regard to the public safety, convenience and objects of this Act, by notification in the Official Gazette, specify the life of a motor vehicle reckoned from the date of its manufacture, after the expiry of which the motor vehicle shall not be deemed to comply with requirements of this Act and the rules made thereunder:

Provided that the Central Government may specify different ages for different classes or different types of motor vehicles.

2) Notwithstanding anything contained in Sub-section (1), the Central Government may, having regard to the purpose of a motor vehicle, such, as display or use for the purposes of a demonstration in any exhibition, use for the purposes of technical research or taking part in a vintage car rally, by notification in the Official Gazette, exempt by general or special order, subject to such conditions as may be specified in such notification, any class or type or motor vehicle from the operation of Sub-section (1) for the purpose to be stated in the notification.

3) Notwithstanding anything contained in section 56, no prescribed authority testing station shall grant a certificate of fitness to a motor vehicle in contravention of the provisions of any notification issued under Sub-section (1).

22. In our view to ensure public safety, convenience and to fulfill the object of this Act motor vehicles as defined in the said Act and quoted above cannot be allowed to be driven any place after expiry of a certain period as may be prescribed by the Central Government. This age limit will be applicable to all types of vehicles irrespective of mode of user.

23. In the context as above section 96 of the said Act is to be read to ascertain the scope and purport thereof. This section empowers State Government to make rule for the purpose of carrying into effect the provision of Chapter v. which deals with control of transport vehicles. In order to effectuate control of transport vehicle the State Governments are empowered to adopt all measures as envisaged in the said Act. One of such measure is to grant permit. When the motor vehicle is offered for transport of passenger obviously member of the public become users unlike non-transport vehicle, on payment of consideration. Though section 59 of the said Act is part of Chapter IV of Act, age limit so prescribed in section 59 is sine qua non

for all purposes viz. amongst other permit for transport vehicles. But that does not mean that State is powerless to fix age limit of transport vehicle for granting permits but with rider that such fixation of age limit must not be more than that fixed by the Central Government.

24. Therefore, object of condition of age limit for granting of permit cannot be the same as that of power of fixing age limit of motor vehicle for registration of the vehicle, u/s 59 of the Act. Significantly section 56 provides for necessity for issuance of Certificate of fitness of transport vehicles. Similarly section 58 mandates certain requirement for transport vehicle as special condition. In the Rule framed by the Central Government nothing has been provided regarding age limit of the vehicle for granting permit except national permit. Hence this subject still remains vergin. According to us section 59 of the Act does not curb the power to make rule by the State regarding fixing of age for grant of permits by the State & Regional Transport Authorities. The State while framing Rule is to make it sure that there should not be inconsistency or contradiction to the Rule framed by the Central Government. We therefore hold while rejecting submission of the learned Counsels for the Respondents, that the learned Trial Judge has incorrectly concluded that the State Government while framing impugned Rule encroached upon the power of the Central Government conferred upon u/s 59 of Act. Hence the decisions cited on the questions of encroachment are not at all relevant, accordingly we choose not to deal with the same.

25. Various conditions for granting permit in respect of these vehicles are attached and such power of stipulating condition is provided in Sub-section (1) of section 96 of the Act. The matters and/or subjects mentioned in Sub-section (2) of section 96 in our view as rightly urged by Mr. Advocate General are merely illustrative and further inexhaustive and this will appear from the language of Sub-section (2) which starts with the words without prejudice to the generality of the foregoing power namely power conferred upon the State Government under Sub-section (1).

26. According to us the subject and/or matters are mentioned Clauses (i) to (xxxiii) in Sub-section (2) of section 96 of the Act illustratively because of the fact at the time of enactment the legislature could not foresee all the eventualities and situation in future to come, as such legislature with its wisdom keeps residuary power reserved so that in future the delegated legislature can deal with the situation appropriately that could not be thought of earlier. In this context we examine the impugned Rule, while reading the same it appears that State Government has taken upon itself the power to impose special condition of permit by restricting plying of transport vehicles (passenger as well as goods) beyond a particular age and in any particular area of the State. It is thus plain by fixing age limit for granting permit for plying of transport vehicles for passengers and goods the State Government by this Rule nowhere has contemplated to prohibit all types of motor vehicle being plied. It restricts transport vehicle in a particular area. According to us when the power is

given to the State to issue permit, power for imposition of condition is always implied.

27. Turning to other aspect whether the State Government has framed this impugned Rule beyond the power given u/s 96 or not. We cannot accept the reason recorded by the learned Trial Judge that in exercise of power u/s 96 the State Government cannot confer new power of its own to frame the said Rule. In fact in the Rule impugned, no fresh power is conferred. As we have already noted that the subject-matter with regard to the framing of the Rules mentioned in the Sub-section (2) of the section 96 are merely illustrative and further inexhaustive so any new rule either separately or by incorporation in the original Rule is permissible as Sub-section (1) of section 96 is the source of general power.

28. Provision of a legislation which is similar to that of section 96(1) and(2) was examined by the Privy Council as to its effect and implication in the case of AIR 1945 156 (Privy Council) . In that case under Defence of India Act, 1934 a rule viz. Rule 26 was framed using same language as it is used in the present section 96 of the Act. The Federal Court had accepted the argument that provision mentioned in the Sub-section (2) likewise here is of exhaustive and overrides the general provision of Sub-section (1) of that section. But in the opinion of Their Lordships of Privy Council the function of Sub-section (2) is merely illustrative one, the rule making power is conferred by Sub-section (1) and the Rules which are referred to in the opening sentence of Sub-section (2) are the Rules which are authorized by, and made under Sub-section (1); the provision of Sub-section (2) are not restrictive of Sub-section (1), as indeed, is expressly stated by the words "without prejudice to the generality of the powers conferred by Sub-section (1)." There can be no doubt that the learned Judge himself appears to have thought the general language of Sub-section (1) amply justifies the term of Rule 26 avoids any of the criticism which the learned Judge expressed in relation to Sub-section (2).

29. This pronouncement of the high authority subsequently has not only been approved by the Supreme Court but has been followed in subsequent cases. In case of Afzal Ullah Vs. The State of Uttar Pradesh, while noting the said judgment Their Lordships examined scope and consent of bye-laws framed u/s 298 of Mumbai Provinces Municipal Act, 1916. The said bye-laws were worded with the same language as it is mentioned in section 96 here. It has been observed in paragraph 13 of the report:

30. Even if the said clauses did not justify the impugned bye-law, there can be little doubt that the said bye-laws would be justified by the general power conferred on the Boards by section 298(1). It is now well-settled that specific provisions such as are contained in the several clauses of section 298(2) are merely illustrative and they cannot be read as restrictive of the generality of powers prescribed by section 298(1).

31. If the powers specified by Sub-section 298(1) are very wide and they take in within their scope of bye-laws like the ones with which we are concerned in the present appeal, it cannot be said that the power enumerated u/s 298(2) control the general words used by section 298(1). These latter clauses merely illustrate and do not exhaust all the powers conferred on the Board, so that in case not falling within the powers specified by section 298(2) may well be protected by section 298(1) provided, of course, the impugned bye-laws can be justified by reference to the requirements of section 298(1). There can be no doubt that the impugned bye-laws in regard to the markets framed by Respondent No. 2 are for the furtherance of municipal administration under the Act and so, would attract the provision of section 298(1). Therefore, we are satisfied that the High Court was right in coming to the conclusion that the impugned bye-laws are valid.

32. Similar views was expressed in the case of Om Prakash and Others Vs. State of U.P. and Others, . In paragraph 12 while examining bye-laws of the municipalities and noting the same language used in the bye-laws it was followed that Sub-section (1) is general power and it cannot be overridden by the illustrative provision of Sub-section(2). In a fairly old decision of Supreme Court reported in K. Ramanathan Vs. State of Tamil Nadu and Another, in paragraphs 12 and 13 while taking note of the earlier decision have come to the same conclusion while dealing with the Rule framed under the Essential Commodities Act.

33. In the case reported in Shri Sudarshan Mineral Co. Ltd. Bhilwara Vs. Union of India (UOI) and Another, in paragraph 5 while considering the provision of section 13 of the Mines and Minerals (Regulation and Development) Act, 1957 of State of Rajasthan, having identical languages in Sub-section (1) and (2), the Apex Court clearly propounded as follows:

As is well-settled the power to make rules for regulating the grant of prospecting licences and mining leases in respect of minerals and for purposes connected therewith is to be found in Sub-section (1) of section 13. Sub-section (2) merely illustrates the nature of the power. It does not restrict the general under Sub-section (1)....

34. It is contended that Rule impugned does not achieve the object as provided in Chapter V. This chapter principally deals with control of transport vehicles. The word "control" as rightly contended by Mr. Advocate General is very wide in terms. The meaning of word ''control'' as found in the New Shorter Oxford Dictionary, is the power or authority, to acknowledge, direct, superintence, restrict, regulate, govern, administer or oversee." The "control" word is also amplified in the same dictionary amongst others to dominate, regulate, represent, etc.

35. Yet the meaning of the said word is expressed in Words and Phrases, Permanent Edition Volume 9 at page 442 which is accepted by the Apex Court in the case reported in The Shamrao Vithal Co-operative Bank Ltd. Vs. Kasargod Pandhuranga

Mallya, . It is expressed that the meaning of the word "control" is synonymous with superintendence, management or authority to direct or regulate. In an English decision reported in 1886 (18) Q.BD 34 (42) Lord Limley observed that "if I prohibit a man from doing of thing I control him to that extent".

36. In this circumstances we are of the considered view that imposition of special condition with the grant of permit in particular area amounts to control and the same is within the meaning of the aforesaid chapter. Thus the criticism of the Respondent/writ Petitioners that the impugned Rule does not achieve object of this particular chapter, "control", is not tenable. Moreover aforesaid restriction intended to safeguard the health of the millions of peoples. To live in healthy environment is also right to life and is thus guaranteed and protected by Article 21 of the Constitution of India. This Constitutional concept is stated by the Supreme Court in case reported in 2001 (1) SCC 756 to give extended meaning of "right to life" i.e. safeguarding health of the people, is the right provided and protected by Article 21 of the Constitution, which overrides provision of several statutes including Motor Vehicles Act if they militant against the Constitutional mandate of Article 21.

37. In any view of the matter if there be any little bit of overlapping in the same field both shall exist provided the same does not contradict each and/or militant against each other. This constitutional proposition has been settled in the following decisions of the Supreme Court.

38. In the case of Fatehchand Himmatlal and Others Vs. State of Maharashtra, the Supreme Court in paragraph 62, while reading Canadian Constitution in classic expression observed:

''The doctrine of "occupied field" applies only where there is clash between Dominion Legislation and Provincial Legislation within an area common to both, where both can coexist peacefully, both reap their harvests.''

39. In an old decision of Supreme Court reported in A.S. Krishna Vs. State of Madras, Justice Venkata Rama Ayyar speaking for the Bench in paragraph 8 of the report dwelt on this subject as follows:

...The scheme of distribution has varied with different Constitutions, but even when the Constitution enumerates elaborately the topics on which the Centre and the States could legislate, some overlapping of the fields of legislation is inevitable....

40. In this case we do not find any repugnancy or inconsistency rather the impugned rule supplements to the rule framed by Central Rule. The decisions cited by Mr. Dutt in this case are not applicable for the reasons as specifically dealt with hereunder.

41. The decision of the Supreme Court in case of Sri Sitaram Sugar Company Limited v. Union of India reported in 1993 (3) SCC 223, discussed points whether a legislative or administrative or quasi-judicial power can be scrutinized under Article 14 of the

Constitution of India or not.

42. The Supreme Court while relying on E.P. Royappa Vs. State of Tamil Nadu and Another, and also Mrs. Maneka Gandhi Vs. Union of India (UOI) and Another, , has propounded the constitutional position to the with effect that if there is any element of arbitrariness in action whether it is of a legislative or administrative quasi-judicial exercise of power the Court must hold such action being unconstitutional. In paragraph 47 it is also discussed the proposition of law that the power delegated by statute is limited by and subordinate to its object. The delegate must act in good faith, reasonably, granted and on the relevant consideration of material facts.

43. In this case, undisputedly the State Government is having power to frame rules and the amended rules have been framed aiming to achieve the object mentioned. We fail to understand how the action could be said to be arbitrary if the State controls and regulates putting resctriction imposing condition in any particular area. The element of arbitrariness has to be understood in the context of the public interest which under any situation override interest of individual or group of individual howsoever great.

44. In the case of State of T.N. and Another Vs. Adhiyaman Educational and Research Institute and Others, the Supreme Court factually discussed and held that any State legislation falling under List III is found to be conflict with the Central legislation under this same subject, would be void in view of the Constitutional provision under Article 254 of Constitution of India. This case is not applicable here as we do not find the said Rule 88A is inconsistent with any of the provision of the Act 1988 or the rules framed by the Central Government under it save and except the portion we have already dealt with.

45. The decision of Supreme Court in case of T. Barai Vs. Henry Ah Hoe and Another, , was also decided in the same line as it has been held in case of Buxa Dooars Tea Company Ltd. and Others Vs. State of West Bengal and Others, , Supreme Court has explained the Constitutional provision with regard to the inconsistency, repugnancy between the State Legislation on the same field, with the Central legislation.

46. Laghu Udyog Bharati and Another Vs. Union of India and Others, , to hold that when subordinate legislation is found not to achieve the purpose of a particular chapter, and also conflict with the provision of the said particular chapter for which rule making power was given, such rule obviously ultra vires the parent legislation.

47. The Supreme Court decision in case of Godde Venkateswara Rao Vs. Government of Andhra Pradesh and Others, , was rendered on the fact that under the relevant Panchayat Act there has been provision for giving hearing before taking any decision, to the person concerned and such hearing not being given, action taken without so, was held to be unconstitutional and illegal.

48. In the Bar Council case, reported in 1995 (1) SCC 728, with regard to the fixation of age the Supreme Court found factually that Bar Council has not been given any power either u/s 49(l)(a)(h) or 24 to make any rule prescribing the condition with regard to fixation of age limit of 45 as such the said rule was beyond the power of the statute as such statute was held to be ultra vires.

49. Kunj Behari Lal Butail and Others Vs. State of H.P. and Others, was decided by the Supreme Court amongst other on the point that the delegated legislation must advance the purpose of the statute under which it is framed and unless it does so, it cannot be sustained. There cannot be any dispute with this proposition. But in the case on hand we find that the amended rule is intended to achieve the purpose of control of transport vehicles. This judgment is of no help.

50. We do not think it fit to deal with and discuss English decision reported in 1995 (3) AER 653 in case of UTAH Construction and Pataky for the simple reason that on this subject the Supreme Court has laid down the law very clearly and the English decision is not required to be pressed for services.

51. One of the decisions cited by Mr. Aurobinda Chatterjee reported in Kerala Samsthana Chethu Thozhilali Union Vs. State of Kerala and Others, seems to be some relevancy however, the said decision does not lay down any new concept of law. It is held that the subordinate legislation must be framed keeping in view of fulfilling the object of the parent Act unless it is done such a rule cannot be said to be a valid one.

52. The decision of the Rajasthan High Court reported in Regional Transport Authority, Jodhpur Vs. Sita Ram, cited by Mr. Chatterjee is not at all helpful in this case.

53. The State Government being the subordinate legislature in this subject has felt the situation having arisen for providing special condition with regard to issue of permit for transport vehicle hence it framed impugned Rule. This situation was not contemplated when the supreme legislature enacted the Act and that is why the power is conferred upon the State Government being the subordinate legislature to deal with the situation.

54. Hence we cannot subscribe the reasoning of the learned Trial Judge holding the impugned Rule being ultra vires provision of section 96 of the said Act. We are unable to accept what the learned Trial Judge has held that the condition mentioned in the impugned rule is in reality refusal of permit, for as one of the conditions of the grant of permit the transport authority has provided the age of the vehicle in a particular area. In our view it cannot be said to be refusal to grant permit the owner merely has to place the vehicle of the age as mentioned in the Rule and this in our view is not unreasonable so much so to hold it being violative of Article 14 of the Constitution of India for the purpose of safety and security of the passengers and also the goods being carried by the transport vehicles. The security and safety of the

lives of the millions of passengers being carried by the transport vehicle gives rise to question of protection of life as provided in Article 21 of the Constitution of India and this right is paramount consideration and it yields to any other Constitutional provisions. It is true some of the vehicles owners will face difficulty in carrying on trade of transport which is qualified right guaranteed in Article 19(g) of the Constitution of India. Article 19(g) of the Constitution of India empowers to make law in the interest of the general public, reasonable restrictions on the exercise of the right to carry on trade or business. It is also undeniable situation that a few section of the people viz. drivers and the staff of the vehicles in the result may lose their source of income from this occupation. But the direct threat to safety and security of millions of passengers is undoubtedly greater concern than that of possibility of losing business of transport of few people which are miniscule in number and so also losing source of earning through the transport of a few persons and such interest and concern cannot prevail over the greater concern as mentioned above. Moreover we notice that only certain area as rightly contended by Mr. Advocate General has been curved out for application of the impugned Rule.

In re: W.P. 25179 (W) 2005

55. It appears from the writ petition the same very rule and notification issued therein have been challenged, of course slightly on different grounds which is summarized as follows:

The real object of framing Rule 88A is not to be found apparently, but applying the doctrine of pith and substance, it would appear object is to be achieved in framing this Rule, is reducing the congestion, automobile pollution and public safety. All these steps are within the exclusive domain of the Central Government and the Central Government has legislated on all these issues. As such, the State legislature has entered into occupied field of the Central Government resulting the impugned rule being ultra vires the Constitution. It is also contended that rule in substance provides retrospective effect when it proposes to impose restriction on existing permit holders. The publication of notification was not preceded by any appropriate consideration of the representations. In the event the representations were considered, it would have mentioned that the scope (clause 1) to reduce the automobile pollution was not within the competence of the State Government. Under sections 110 (l)(g) and 110(l)(m) the Central Government is the real authority to regulate, guide and maintain the motor vehicles with respect to the emission of smoke, vapor, sparks, ashes, grit and oil as also standard of emission of air pollutants. The impugned norms are enforced on new vehicles only and in-use vehicles which are subjected to PCU checks. Rule 115 of the Central Motor Vehicles Rules, 1989 (hereinafter referred to as 89 Rule) was introduced and it has become effective from August 10 2004. These rules are applicable irrespective of the age of the vehicle and these have prescribed that the test of all diesel driven vehicles is smoke density which should be within 65 hartiz units irrespective of the age of the

vehicle and as such is wider in nature and checks even new vehicle. If a vehicle satisfies the smoke density test it is given pollution control certificate which is valid throughout India of the Central Motor vehicles. For ensuring compliance the certificate has been made necessary for obtaining certificate of fitness. (Rule 62 of 1989 Rules). The Certificate of fitness is a subject-matter of the Central Government u/s 56 of the Act. As such the Central Government, in its competence has taken all measures for ensuring reduction in auto emission fuel and legislated thereon and as such this field stands occupied with Central legislation.

56. The safety measure is secured while granting certificate of fitness (section 56 of the Act), to ensure safety of the passengers. For public interest provisions are made enabling the Central Government, solely to make rules u/s 110 of 1988 Act. Under this section, State Government is only empowered to exempt the vehicles. However, the nature of the powers granted to the State Government appears from section 111 which are completely alien to the objectives of the impugned Rule and are in any event completely occupied field of the Central Government.

57. It is then contended by the writ Petitioners that the question of 15 years old vehicle is self contradictory. Usually, the age of the vehicle is the age of the chassis (which is counted from the date of first registration). During a shorter period than 15 years diesel engine has to be maintained properly so as to ensure prescribed fitness and Pollution Under Control. In fact if needs so arises, the engine itself can be changed. Whenever necessary, the parts are replaced with new parts such as cranks, pistons, bearings, vulve guide etc. Therefore, it does not necessarily follow that with the age of the vehicle the capacity of vehicle to comply with the norms will decrease.

58. The writ Petitioners contend that issue relating to reduction of congestion is the exclusive domain of the Central Government as State Government has no role to play until and unless the Central Government issues directions u/s 71(3)(a) of the Act. Admittedly here the Central Government has not given any direction to the State Government. As such the State Government is incompetent to legislate in respect of such field since the procedure for the same has been spelt out unambiguously in the Act itself and in the absence of the Central Government directions, such action will amount to bypassing and/or legislating in occupied field. Other contention of the writ Petitioners are repeatation of those raised by the Respondents/writ Petitioners in the appeal.

59. Mr. Pramit Ray learned Counsel while supporting the argument of Mr. Swapan Dutta learned Advocate for writ Petitioners/Respondents, argues above contention. According to him what cannot be done directly it cannot be done indirectly. While fixing the age limit of the vehicle in the matter of issuance of permit and also renewal of permit in respect of the transport vehicle the State Government has indirectly fixed the age limit of a vehicle and this action absolutely inconsistent with the relevant provisions of the said Act. In support of this portion of his submission

he has relied on a decision of the Single Judge of the Patna High Court reported in Rajesh Kumar and Others Vs. The State of Bihar and The South Bihar Regional Transport Authority . His next contention is that the rule making power has been given to the State Government for Chapter v. which deals with control of transport vehicles. While fixing the age limit of the vehicle with regard to the grant of permit the purpose of the Chapter v. is not achieved rather it achieves the purpose of Chapter IV as section 59 specifically empowers the Central Government to fix the age limit of motor vehicles which is within Chapter IV therefore patently the State Government has encroached upon the above field of the Central Government. In support of this submission he has placed reliance on the following decision:

1999 (2) SCC 476.

Laghu Udyog Bharati and Another Vs. Union of India and Others,

State of Uttar Pradesh Vs. Singhara Singh and Others,

60. We have already discussed the Constitutional validity as well as legality of the rules with reference to the argument advanced by the writ Petitioner/ Respondent and the Appellant, in the appeal.

61. Now the question is whether ground taken in the writ petition No. 25179 (W) of 2005 can be of any help to support the decision of the learned Single Judge and further whether the rule can be said to be ultra vires or the notification issued can be said not to be legally valid.

62. We are of the view what prompted legislature to frame the rules cannot be probed by the Court to examine vires of the same. It is the task of the Court to scrutinize whether subordinate legislation has been framed in accordance with the power conferred by the supreme legislation or not. If it is found that while framing Rule subordinate legislature exceeded power obviously subordinate legislation cannot be accepted to be valid one. The Court will examine Constitutional validity in this context also. To put it differently if the Rule infringes any provision of the Constitution the same cannot be accepted by the Court of law for its enforceability.

63. In the case of Afzal Ali v. V. State of UP and Anr. (supra) in paragraph 14 Supreme Court observed that once it is shown that the bye-laws is within the competence of the authority, the fact that preamble to the bye-laws mentions clauses which are not relevant, would not affect the validity of the bye-laws. The validity of the bye-laws must be tested by reference to the question as to whether the Board had the power to make those bye-laws. If the power is otherwise established, the fact that the source of the power has been correctly or inaccurately indicated in the preamble to the bye-laws would not make the bye-laws invalid. This proposition of law has been really restated while taking note of an earlier decision of the Supreme Court in case reported in P. Balakotaiah Vs. The Union of India (UOI) and Others,

64. While reading the aforesaid statement of law it follows that object and reason in the preamble or for that matter discussion and debate in the Parliament or Assembly cannot be a guiding factor to test the Constitutional validity or for that matter legality of the enactment. The Court cannot examine necessity or justification for such legislation for it is the domain of the legislature to feel the necessity, and once the enactment is validly done the Court cannot post-mortem the reasons for enactment. If such attempt is made that would amount to encroachment of the field occupied by the legislature, by the Court exercise of which is constitutionally prohibited by the concept of separation of power, being one of the basic structure of the Constitution. The legislature remains supreme within its own field of course within the parameter of the constitutional provision. The Court only looks into Constitutional validity of the same, once it is found constitutionally valid, the Court cannot strike down on the ground of inappropriate object and reason.

65. The argument of Mr. Pramit Ray that the State authority has no power to make rules with the object of reduction of pollution and congestion is not impressive for the Court to hold otherwise.

66. The pollution control measure as provided in the Central Rules is applicable for the purpose of registration of the vehicle qua fitness for driving vehicle in any place. But all the registered vehicles are not used for transport of passengers and goods. Granting of permit to ply the vehicle for transport of passenger or goods is one thing and pollution control measure for registration is another thing. In this case while granting permit State Government can certainly fix standard or norms with regard to the pollution of the vehicle used for transport in a particular area. One of the conditions for granting permit is that the vehicle must be registered and registration is effected only when the vehicle is fit for being plied on road conforming to the standard and norms with regard to the structure, engine as well as emission of the smoke and other pollutant elements as prescribed in the Rules. The State Government cannot ignore the standard and norms for fitness of a vehicle or for the emission of smoke prescribed in the Rule of the Central Government.

67. The decision of the learned Single Judge of the Patna High Court has been read and examined by this Court carefully. It will appear from the judgment of the learned Single Judge that issue was whether age of a motor vehicle can be fixed by the Regional Transport Authority or not. It is correctly held that the Regional Transport Authority neither under the Act nor under the Rules framed herein can fix any age of the vehicle and for that matter the State Government cannot also make such Rule fixing the age of the vehicle which is exclusive domain of section 59. The issue before the Patna High Court was not whether the State Government is competent to frame rule u/s 96 of the Motor Vehicles Act for imposing special condition for granting permit for transport vehicle in particular classified area. Therefore, this judgment of the Learned Single Judge is not relevant nor does lend any help to the case of Mr. Roy''s client. The decision of Supreme Court reported in

State of Uttar Pradesh Vs. Singhara Singh and Others, has been rendered on completely different subject. In that case it was held if the law requires to be done in a particular manner it has to be done in that manner and not at all, on factual score in that case the learned Magistrate did not record confessional statement of accused u/s 164 of the Code of Criminal Procedure 1898. Here the issue is whether the State Government has framed Rule within its power or not. Once it is found that it is within its power and the Rule framed neither offends any provision of Parent Act nor violates constitutional provision the Court cannot but accept this piece of subordinate legislation being valid. This authority is therefore no help in this case. Similarly the decision reported in Laghu Udyog Bharati and Another Vs. Union of India and Others, is not applicable as it was factually found that a particular definition in the Rule was in conflict with sections 65 and 66 of Finance Act 1994. So this is not a guiding precedent to take note of the principle decided therein. So far as the Supreme Court decision in case of Sundaram Finance Ltd. (supra) is concerned, the same is also inapplicable as the Supreme Court has not decided any thing on the issue or subject involved here.

68. We have upheld the constitutional legality and validity of the said Rule but we are of the view that the notification framed hereunder has transgressed the provision of the amended Rules as rightly argued by Mr. Pramit Ray. By the notification the said Rule in essence is sought to be made applicable retrospectively as plying of transport vehicle of all description is prohibited on and from different dates of year 2005, regardless of validity of the permit already granted for certain period. It is clear from Clause (2) of Amendment Rule, 2005 that Rule is to take effect from 17th March, 2005 being date of notification, hence it is prospective. But by the notice issued u/s 81 of the Act provides amongst other duration of permit not being temporary, the period of five years from the date of issuance or renewal. Thus no rule can be intended to be applied offending the provision of parent statute, as such the same cannot be nor is intended to give retrospective operation either directly or indirectly. According to us when new permit will be issued the condition can be imposed as per notification. On perusal of the notification it appears that all the existing permit holder has been asked to replace the motor vehicles.

69. In view of the discussion as above existing valid permit holder cannot be asked to replace the motor vehicles as intended to be done by the notification however at the time of granting renewal of the permit the notification impugned can be made applicable and not otherwise. We also find some force in the submission of Mr. Dutta and Mr. Pramit Ray while issuing the impugned notification five types of vehicles having been found to be fit to be plied with grant of permit prior to respective dates of prohibition, are now to be declared unfit. To put otherwise tenure of Permit is terminated before normal duration expires. Besides in the Rule there is no indication whether National permit holder or tourist vehicle are excluded. We read down the Rule and the impugned notification clarifying that the same will not be applicable to National permit holder and tourist vehicle as the same

will be inconsistent with Central Rules.

70. We therefore, allow the appeal and dismiss the writ petition setting aside the judgment of the learned Trial Judge to the extent of striking down the Rule as a whole and also notification.

Md. Abdul Ghani, J.

I agree.