

INDIAN OIL CORPORATION LIMITED & ANR.

v.

KERALA STATE ROAD TRANSPORT CORPORATION & ORS.

(Civil Appeal No.18917 of 2017)

NOVEMBER 07, 2017

[ARUN MISHRA AND  
MOHAN M. SHANTANAGOUDAR, JJ.]

*Administrative Law – Policy Decision – Withdrawal of subsidy – Government of India decided not to make the payment of subsidy to the bulk consumers of diesel – Validity of – Writ applications filed in Kerala and other States claiming decision of the Government of India was arbitrary and that it would make difficult for the State Road Transport Corporations to render its services to the public at large – It was also contended that it was obligatory on the part of the Respondents/Government of India to provide maximum concession/subsidy/benevolence in the matter of sale of diesel to the Transport Corporations – Held: The grant of subsidy is a matter of privilege, to be extended by the Government – It cannot be claimed as of right – No writ lies for extending or continuing the benefit of privilege in the form of concession – Subsidy is a matter of fiscal policy – Such privilege can be withdrawn at any time – It was open to the Government of India to take decision to withdraw the subsidy enjoyed by the bulk consumers – Further, even for the purpose of public services, Transport corporations cannot claim subsidy as of right that Government of India or the State Government should continue or grant the subsidy – It cannot be claimed as a matter of right; no such right exists to claim the subsidy – Thus, the decision of Government of India not to extend subsidy to bulk consumers of diesel could not be said to be an arbitrary decision, discriminatory or in violation of the principles contained in Art.14 of the Constitution – Such policy decision not amenable to judicial review – Court cannot interfere in such matters – Rights and Privileges.*

**Disposing of the appeals and transferred cases, the Court**

**HELD: 1. Firstly, coming to the issue of the policy framed by the Government of India; the grant of subsidy is a matter of**

A privilege, to be extended by the Government. It cannot be claimed as of right. No writ lies for extending or continuing the benefit of privilege in the form of concession. Subsidy is the matter of fiscal policy. Such privilege can be withdrawn at any time. Thus, it was open to the Government of India to take a decision to withdraw the subsidy enjoyed by the bulk consumers; and, it was a decision based upon the aforesaid rationale to direct funds for social welfare scheme for common man and that by grant of subsidy, the Oil Marketing Companies (OMC) had suffered heavy losses, and had borrowed excessive money. Thus, it was decided by the Government of India, not to the extend subsidy to bulk consumers; same could not be said to be an arbitrary decision, discriminatory or in violation of the principles contained in Article 14 of the Constitution of India. Such policy decisions are not amenable to judicial review. [Paras 16, 17] [515-D-G]

2. There is no merit in the submissions raised that subsidy should have been continued as an exception for the State Road Transport Corporations, though they may have been rendering public service. However, for the purpose of such public services, corporation cannot claim as of right that Government of India or the State Government should continue or grant the subsidy. It cannot be claimed as a matter of right; no such right exists to claim the subsidy. The Court cannot interfere in such matters. [Para 20] [517-D]

*State of Rajasthan v. J.K. Udaipur Udyog Ltd.* (2004) 7 SCC 673 : [2004] 4 Suppl. SCR 812; *Shree Sidhali Steels Ltd. v. State of Uttar Pradesh & Ors.* (2011) 3 SCC 193 : [2011] 3 SCR 134; *Ayurved Shastra Seva Mandal & Anr. v. Union of India & Ors.* (2013) 16 SCC 696 : [2013] 4 SCR 1098; *Madras City Wine Merchants' Association & Anr. v. State of T.N. & Anr.* (1994) 5 SCC 509 : [1994] 2 Suppl. SCR 281; *Har Shankar & Ors. v. The Dy. Excise & Taxation Commissioner & Ors.* (1975) 1 SCC 737 : [1975] 3 SCR 254 – referred to.

#### Case Law Reference

[2004] 4 Suppl. SCR 812	referred to	Para 17
[2011] 3 SCR 134	referred to	Para 18

[2013] 4 SCR 1098	referred to	Para 19	A
[1994] 2 Suppl. SCR 281	referred to	Para 19	
[1975] 3 SCR 254	referred to	Para 19	

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 18917 of 2017.

From the final Judgment and Order dated 21.03.2013 of the High Court of Kerala at Ernakulam in W.P. (C) No.7517 of 2013.

WITH

T.C. (C) Nos. 40-43, 46, 44, 45, 39, 58, 62, 63 and 61 of 2014

Civil Appeal Nos.19545 and 19546 of 2017

Tushar Mehta, Subramonium Prasad, AAGs, Amit Meharia, Ms. Tannishtha Singh, Ms. Ayushi Gupta, Ms. Aishwariya Kuhar, Akhil Aggarwal, S.N. Bhat, Pradhuman Gohil, Vikash Singh, Ms. Taruna Singh Gohil, Himanshu Chaubey, Radha Shyam Jena, T.R.B. Sivakumar, B. Balaji, C.S.N. Mohan Rao, B. Ramana Murthy, Pradeep Misra, Suraj Singh, Advs. for the Appellants.

A.K. Sanghi, V. Giri, Sr. Advs., Ms. Rashmi Malhotra, Ms. Sweta Garg, Raj Bahadur, M/s Meharia & Company, Nishe Rajen Shonker, Ms. Anu K. Joy, Abdul Kabeer, Deepak Prakash, Subhash Chandran K.R., Ms. Yammi, Ranceev Dhiya, Advs. for the Respondents.

The following Order of the Court was passed:

**ORDER**

1. Leave granted.
2. The issue involved in the present matter(s) is with respect to the validity of the policy decision taken by the Government of India.
3. Writ Petition (Civil) No.7517 of 2013 was filed in the High Court of Kerala at Ernakulam. The prayer made in the writ petition is as follows:

I. Issue an appropriate writ, order or direction declaring that the diesel price hike introduced as per Ext.P1 to the Kerala State Road Transport Corporation, compelling the petitioner to pay enhanced rate than while purchasing diesel from private or other diesel bunk, is wholly arbitrary, illegal, unjust, unconstitutional and violative of Article 12 and 14 of the Constitution of India;

- A (ii) Issue any appropriate order commanding the 1<sup>st</sup> respondent to withdraw the dual pricing policy of diesel introduced as per Ext.P1 or in the alternative accord exemption to the petitioner, from the category of bulk consumer, and treat the petitioner as a retail customer for the purpose of diesel purchasing.
- B (iii) Issue a writ of mandamus or any other appropriate writ, order or direction commanding the respondents to refund the excess diesel charge collection in pursuance to clause (b) of Ext.P1, with interest at the treasury rate, with effect from 17.01.2013 to the petitioner, forthwith.
- C 4. The Ministry of Petroleum, Government of India, had taken a decision not to make the payment of subsidy to the bulk consumers on purchase of diesel. Consequently, the bulk consumers were required to make the payment, which was a little higher than what was being paid by the retailers. The said decision was questioned in the various writ applications filed in different High Courts.
- D 5. It was averred in the writ application, that Kerala State Road Transport Corporation had been duly established and formed on 01.04.1965, and that it had 6108 buses, operating 5855 schedules per day. An average of 35 lakh passengers used the services provided by the petitioner, the average daily collection was of Rs.4.48 crores. The corporation presently has 30,132 permanent employees and around 10,000-temporary/ provisional/ impaneled employees. Since petitioner is an establishment functioning without profit motives, with a social obligation to render maximum service to the public, it extended free traveling services to the physically differently abled persons, freedom fighters, E journalists, press/media reporters, MLAs (Members of Legislative Assembly) and M.Ps. (Members of Parliament). Thus, the total number F of free passes issued so far was 52,666.
- G 6. The first respondent in the Writ Petition— Government of India, through the Ministry of Petroleum and Natural Gas, issued direction dated 17<sup>th</sup> January 2013 in which, it was observed, that sale of diesel, to all consumers taking bulk supplies directly from the installations of the Oil Marketing Companies (for short “the OMCs”), be made at the non-subsidized, market-determined price, with immediate effect. The OMCs would not be eligible for any subsidy on such direct sale of diesel to bulk consumers. Thus, the petitioner claimed, that the respondent No.1 has H meted out discrimination as against the Kerala State Road Transport

Corporation in violation of Article 14 of the Constitution of India. The corporation was purchasing diesel in bulk, with the daily consumption of diesel being 4,10,000 litres, and was suffering a loss of Rs.18/- crores in a month, with the annual estimated loss of Rs.216/- crores. A

7. In other States as well, writ applications were filed more or less on similar grounds. In some States, an interim stay was granted. The decision of the Government of India was claimed to be arbitrary and that it would make rendering service to the public at large difficult. There was no nexus to be achieved by the aforesaid policy decision. It was also obligatory on the part of the State Government to provide a subsidy. It was obligatory on the part of the first respondent to provide maximum concession/subsidy/benevolence in the matter of sale of diesel to the State Road Transport Corporation. The respondents have ignored their constitutional obligation. It would make very difficult, the payment of pension to the pensioners, and salary to the existing employees. Prayer was made to direct the Respondent No.1 to withdraw the dual pricing policy of diesel that had been introduced; in the alternative, to accord exemption to the writ petitioners from the category of bulk consumer, treating them as a retail customer for the purposes of diesel purchasing. B C D

8. The stand of the Government of India is that the policy has been made after due deliberations. In the year 2002, the Administered Pricing Mechanism for petroleum products was dismantled, with the decision that the pricing of all petroleum products, except those of PDS Kerosene and Domestic LPG, would be market-determined. However, the Government of India did not allow a full de-control of the price of Diesel and continued to regulate the same. The OMCs incurred under-recovery on sale of diesel and other regulated products due to non-revision of prices in line with the international prices. By 2007, the combined borrowing of the OMCs was Rs.48,430/- crores due to the under-recoveries made from the sale of subsidized petroleum products. Despite measures having been taken, the continued incurrence of under-recoveries by the OMCs has adversely affected their financial and liquidity position, compelling them to borrow heavily from the market. E F G

9. In the year 2009, the Government of India appointed an Expert Group under the Chairmanship of Dr. Kirit S. Parikh, to advise on a viable and sustainable system of pricing of petroleum products, and also to examine the impact of an increase in the price of diesel. The Expert Group did not find compelling reasons to subsidize the petroleum products. H

A The recommendations of the Expert Group were examined in detail and then placed before the Empowered Group of Ministers.

10. On 26.06.2010, the Empowered Groups of Ministers (For short “the EGoMs”) decided, that the price of petrol was to be made market-determined by Government of India, and the same would be for both, at Refinery Gate and at the Retail level. However, in order to insulate the common man from the impact of the rise in oil prices in the international market, and in view of the domestic inflationary conditions, the Government of India continued to modulate the Retail Selling Prices of Diesel. Several steps were taken. On March 2012, Industry Performance Review was conducted and, it was observed, that around 17.77% of the total diesel sale in India was directly made to the bulk consumers, including Railways and State Transport Undertakings. It was further observed, that on 31.12.2012, the combined borrowings of the OMCs was of Rs.1,68,948 crores, to sustain the under-recoveries made from the sale of subsidized petroleum products.

D 11. In view of the foregoing circumstances, Government of India, in its meeting dated 17<sup>th</sup> January 2013, decided to deregulate the prices of diesel in a phased manner, and to sell diesel, to all bulk consumers, including State Transport Undertakings, at market-determined non-subsidized prices. The Government of India through the Ministry of Petroleum and Natural Gas published a letter, bearing reference No.P-200012/22/2012-PP, *inter alia*, authorizing the OMCs to effect the following change effective from the midnight of 17<sup>th</sup>/18<sup>th</sup> January 2013. The rationale given by the Government of India is as follows:

F Increase the retailed selling prices of diesel in the range of 40-50 paise per liter per month (excluding VAT as applicable in different States/Union territories) until further orders.

G Sell diesel to all consumers taking bulk supplies directly from the installations of the Oil Marketing Companies (for short “the OMCs”) at the non-subsidized market-determined price with immediate effect. The OMCs will not be eligible for any subsidy on such direct sale of diesel to bulk consumers.

H Revise annual cap on the subsidized domestic LPG cylinders from 3 to 5 for the period from 14.09.2012 to 31.03.2013 and from 6 to 9 *w.e.f.* 01.04.2013. This will be subject to the condition that no refunds will be admissible on any LPG domestic cylinders

already supplied to LPG consumers at the non-subsidized price during the period from 14.09.2012 to date. A

12. This National Policy, it is urged on behalf of the Government of India, came after deliberations for over a decade. It was not sudden or arbitrary. The primary objective behind the said National Policy for pricing reforms, undertaken by the Government of India, was the growing imperative for fiscal consolidation and the need for reducing subsidy burden on petroleum products, so as to allocate more funds to social sector schemes for the common man, and for ensuring the country's energy security in the long term. Failure to do so would have an adverse impact on the fiscal deficit, resulting in a downward spiraling effect on the economy, with consequential significant adverse impact on the common man. B C

13. The rationales behind the introduction of National Pricing Policy from 18<sup>th</sup> January 2013 are:

i. Pricing of sensitive petroleum products such as Diesel, PDS Kerosene, and Domestic Subsidized LPG is done in a transparent manner by OMCs. In fact, the price build-up of sensitive products is in public domain and hosted on the website of PPAC. In the context of pricing of sensitive products, it may be noted that more than 90% of the cost of production of a refining company is the cost of crude oil, which is linked to international oil prices. Over 80% of the Country's crude oil requirement is met through imports. Consequent to the deregulation of the Refining Sector w.e.f. 1<sup>st</sup> April 1998, domestic refineries are totally exposed to the vagaries of the international oil market and are not compensated in any form whatsoever based on their costs of refining activity. Further, the price of indigenously produced crude is also based on the price of crude oil in the international oil market. Accordingly, since the cost of production of an Indian refining company is based on actual costs of imports, the Refinery Transfer Prices for the finished products supplied at the refinery gate are also required to be determined on the principles of Import Parity, with linkages to the prices for the respective products in the international oil market. D E F G

ii. After dismantling of Administrative Price Mechanism, the retail selling prices of petroleum products except for PDS Kerosene and Domestic LPG were deregulated. Initially, the OMCs carried H

A out revision in prices of Petrol and Diesel in line with international  
 prices. However, in view of the high increase in oil prices in  
 international market since 2004 onwards, the Government of India  
 started regulating the retail selling prices of Diesel and Petrol,  
 despite the increase in the international prices since 2004-2005,  
 B the selling prices of these products, including Diesel, were being  
 maintained at lower levels in order to insulate domestic consumer  
 from the impact of rising in international oil prices and the domestic  
 inflationary conditions. It was in June 2010 that the Petrol prices  
 were deregulated and Government of India also stated its intent  
 that HSD shall be made market-determined in a phased manner.

C iii. Since the OMCs procure the controlled petroleum products  
 from the domestic Refineries at Refineries Transfer Price based  
 on Import/Trade Parity principles, the desired basic selling prices  
 for these products are determined based on the weighted average  
 Refineries Transfer Price plus costs and margins as approved  
 D by Government of India. The difference between the Desired  
 Basic Selling Prices (in line with the price for the concerned  
 product in the international oil market) vis-a-vis the Actual Basic  
 Selling Prices (maintained as per the of the Government due to  
 socio-economic reasons) of the controlled petroleum products  
 leads to "Under-Realizations" to the PSU OMCs. The total under-  
 E realizations incurred by PSU OMCs on controlled petroleum  
 products and Share of Diesel in total under-recovery since 2004-  
 05 is tabulated below:

(Rs. in crore)

F Year	Under-realizations on sensitive petroleum products	Under-realizations on Diesel	Share of Diesel in total under- realizations (%)
G 2004-05	20,146	2,154	11
2005-06	40,000	12,647	32
2006-07	49,387	18,776	38
2007-08	77,123	35,166	46
2008-09	1,03,292	52,286	51
H 2009-10	46,051	9,279	20

2010-11	78,190	34,706	44
2011-12	1,38,541	81,192	59
2012-13	1,24,854	73,815	59

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iv. The continued incurrence of under-recoveries, at one stage will create a situation where OMCs would not be in a position to maintain supplies of petroleum product in the country.

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14. This court has transferred to itself all the writ petitions that had been pending before various High Courts and has stayed the interim orders, which were passed by the High Courts. It was observed that in such policy matter no interim orders could have been passed by the High Courts.

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15. We are concerned now with respect to the validity of policy and the payment for interregnum period in which, interim stay had been enjoyed by the bulk consumers. The learned counsel for the parties have supported aforesaid stand.

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16. Firstly, coming to the issue of the policy framed by the Government of India; the grant of subsidy is a matter of privilege, to be extended by the Government. It cannot be claimed as of right. No writ lies for extending or continuing the benefit of privilege in the form of concession. Subsidy is the matter of fiscal policy. Such privilege can be withdrawn at any time is the settled proposition of law. Thus, it was open to the Government of India to take a decision to withdraw the subsidy enjoyed by the bulk consumers; and, it was a decision based upon the aforesaid rationale to direct funds for social welfare scheme for common man and that by grant of subsidy, the OMCs had suffered heavy losses, and had borrowed the excessive money to the extent indicated in the aforesaid paragraphs. Thus, it was decided by the Government of India, not to the extend subsidy to bulk consumers; same could not be said to be an arbitrary decision, discriminatory or in violation of the principles contained in Article 14 of the Constitution of India.

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17. Such policy decisions are not amenable to judicial review. In *State of Rajasthan v. J.K. Udaipur Udyog Ltd.* (2004) 7 SCC 673, this Court has observed that exemption is a privilege. In fiscal matters the concession granted by the State Government to the beneficiaries cannot confer upon them legally enforceable right against the Government to grant a concession, except to enjoy the benefits of the concession

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A during the period of its grant. Enjoyment is defeasible one and can be taken away in exercise of very power under which such exemption was granted. This Court observed :

B “25. An exemption is by definition a freedom from an obligation which the exemptee is otherwise liable to discharge. It is a privilege granting an advantage not available to others. An exemption granted under a statutory provision in a fiscal statute has been held to be a concession granted by the State Government so that the beneficiaries of such concession are not required to pay the tax or duty they are otherwise liable to pay under such statute. The recipient of a concession has no legally enforceable right against the Government to grant of a concession except to enjoy the benefits of the concession during the period of its grant. This right to enjoy is a defeasible one in the sense that it may be taken away in exercise of the very power under which the exemption was granted. (See *Shri Bakul Oil Industries v. State of Gujarat* (1987) 1 SCC 31, *Kasinka Trading v. Union of India* (1995) 1 SCC 274 and *Shrijee Sales Corporation v. Union of India* (1997) 3 SCC 398).”

D 18. Similarly, this Court in *Shree Sidhali Steels Ltd. v. State of Uttar Pradesh & Ors.* (2011) 3 SCC 193 with respect to rebate has observed that it is a privilege granted in the form of an advantage. Concession granted by the State Government under section 49 of the Electricity Act, 1948 could be enjoyed during the period of its grant. It was defeasible one and was liable to be taken away or withdrawn the way in which it was granted. The Court observed :

F “48. From the principle enunciated in the abovementioned decision in *Udaipur Udyog case* (2004) 7 SCC 673, there is no manner of doubt that the rebate which was granted to the Petitioners, was, by definition, a freedom from an obligation which the appellants otherwise were liable to discharge. The rebate was a privilege granting an advantage which was not made available to others. The rebate granted under Section 49 of the Electricity (Supply) Act of 1948 was, therefore, a concession granted by the State Government so that the beneficiaries of such concessions were not required to pay the electricity tariff they were otherwise liable to pay under the said Act during the period of its grant. The petitioners, as recipients of a concession,

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accepted to enjoy the benefits of the concession during the period of its grant. This right to enjoy was a defensible one in the sense that it was liable to be taken away or withdrawn in exercise of the very power under which the exemption was granted.” A

19. This Court in *Ayurved Shastra Seva Mandal & Anr. v. Union of India & Ors.* (2013) 16 SCC 696 held that the privilege granted to candidates in the matter of education could not be transformed into a right. In *Madras City Wine Merchants' Association & Anr. v. State of T.N. & Anr.* (1994) 5 SCC 509, this Court observed that a privilege exists during the period it is operative or its validity and not beyond it. In *Har Shankar & Ors. v. The Dy. Excise & Taxation Commissioner & Ors.* (1975) 1 SCC 737 it was held that when a matter is that of privilege, it cannot be enforced as a right. B C

20. Thus, we find no merit in the submissions raised that subsidy should have been continued as an exception for the State Road Transport Corporations, though they may have been rendering public service. However, for the purpose of such public services corporation cannot claim as of right that Government of India or the State Government should continue or grant the subsidy. It cannot be claimed as a matter of right; no such right exists to claim the subsidy. The Court cannot interfere in such matters. D

21. However, with respect to the State of Kerala, we find that in the interim order, that was passed before transfer of case to this Court, the State of Kerala has undertaken to reimburse the deficit amount to respondents Nos.2 and 3 in the event of the writ petition being dismissed ultimately; the same was recorded by the High Court: - E

“The balance of convenience will be in favour of granting an interim order as it will be impossible to reimburse the excess collected from the traveling public in the event of the writ petition being allowed eventually. The State Government on the other hand guarantees to reimburse the deficit amount to respondents 2 and 3 in the event of the writ petition being dismissed ultimately and the same is recorded” F G

22. With respect to other states, suffice it to observe that it would be open to the respective parties to work out equities as may be considered appropriate by them, otherwise payment has to be made by the bulk consumers to the Oil Marketing Companies (OMCs). H

A            23. It was also stated in the matters of the State of Karnataka and State of Tamil Nadu, that there was no interim order and the concerned Transport Corporations of the States have incurred no liability. The statement is placed on record.

B            24. The writ petitions deserve dismissal and they are hereby dismissed. The appeals, as well as transferred cases, are accordingly, disposed of. No costs.

Ankit Gyan

Matters disposed of.