

CASE NO.:
Appeal (civil) 1725 of 2001

PETITIONER:
Captain Sube Singh & Ors.

RESPONDENT:
Lt. Governor of Delhi & Ors.

DATE OF JUDGMENT: 30/04/2004

BENCH:
R. C. Lahoti, B. N. Srikrishna & G. P. Mathur

JUDGMENT:
J U D G M E N T

SRIKRISHNA, J.

This appeal by special leave is directed against the judgment of the High Court of Delhi dated 19th October, 2000 dismissing the writ petition of the appellants under Article 226 of the Constitution of India challenging the notification dated 31st December, 1999 issued by the Lt. Governor of the National Capital Territory of Delhi.

Appellant Nos. 1 to 4 are transport operators who have been issued stage carriage permits by the State Transport Authority, Delhi under various schemes. Appellant No. 5 is an association of bus operators in Delhi, whose members have been granted permits under various schemes for upliftment of different sections of society.

Respondent Nos. 1 to 3 represent the Government of the National Capital Territory of Delhi and Respondent No. 4 is a statutory corporation set up under Section 3 of the Road Transport Corporation Act, 1950.

Respondent No. 4, Delhi Transport Corporation (DTC), was continuously making losses and found itself unable to handle the volume of work required for providing efficient transport facilities for the public in Delhi. The work of transport was opened up to private operators like the appellants, who were granted stage carriage permits under the provisions of the Motor Vehicles Act, 1988 read with the Rules made thereunder (hereinafter referred to, respectively, as 'the Act' and 'the Rules'). Under the new policy, which was adopted in or about 1991-92, about 3000 private buses were permitted to operate within the territory of Delhi. These private operators were granted permits to run buses under the provisions of the Act.

The permit conditions were notified under a Scheme for grant of State Carriage Permits to private bus operators in Delhi by the State Transport Authority. The Scheme was framed for augmentation of the public transport in Delhi. The Scheme was formulated and publicised and also freely available to all persons intending to seek permits for operating stage carriages. Although, there was some dispute as to which were the exact permit conditions under which the stage carriages were operated, at our instance, the Secretary-cum-Commissioner of State Transport Authority, Department of Transport, Government of N.C.T. of Delhi has filed an affidavit dated 13th April, 2004 and also remained present before the Court and answered the queries put by the Court. On the material placed before us, we are satisfied that the said affidavit reflects the correct factual situation.

Sometime in the year 1992, when the scheme was first formulated, the permit condition stipulated in the scheme was as under:

"13. The permit holder shall ensure that concessional passes issued to various sections authorized for these buses shall be

honoured."

In the year 1995, another scheme was launched by the S.T.A., Delhi for granting 392 stage carriage permits to the private operators. A copy of this scheme is produced and marked as Annexure \0262 to the affidavit of Mr. Rajeev Talwar, Secretary-cum-Commissioner, S.T.A. Apart from indicating the fare structure, the scheme provided that "there shall be a provision for free passes for freedom fighters only. There may be a provision for monthly/quarterly passes valid in all the private buses on a particular route." The permits for stage carriage operations of private buses were, inter alia, made subject to the following conditions:

"13. The permit holder shall ensure that concessional passes issued to various sections authorised for these buses shall be honoured.

....

17. Permit holder shall ensure that the bus stops to pick up and allow the passengers to get off at the authorised DTC bus stops and no passengers is allowed to board or to get down at a non-prescribed bus stop. The operators will have to pay service charges @ Rs. 250/- per bus on monthly basis to the DTC for using DTC bus stops as determined by STA in consultation with the DTC.

....

"25. The State Transport Authority, may after giving notice of not less than one month:

- (a) Vary the conditions of the permit.
- (b) Attach to the permit further conditions."

In the year 2002, another scheme for grant of stage carriage permits to private CNG bus operators in Delhi was formulated and published by the respondent authorities. A copy of this scheme is marked as Annexure \0263 to the aforesaid affidavit. Apart from indicating the fare structure, the scheme also says, "there shall be a provision for free passes for freedom fighters only. There may be a provision of monthly/quarterly passes valid in all the private buses on a particular route." The relevant permit conditions indicated in this scheme are as follows:

"13. The permit holder shall ensure that concessional passes issued to various sections authorised for these buses shall be honoured.

....

17. Permit holder shall ensure that the bus stops to pick up and allow the passengers to get off at the authorised DTC bus stops and no passenger is allowed to board or to get down at a non-prescribed bus stop. The operators will have to pay service charges for using DTC bus stops & bus terminals as determined by STA in consultation with the DTC from time to time.

....

"25. The State Transport Authority, may after giving notice of not less than one month:

- (a) Vary the conditions of permit.
- (b) Attach to the permit further conditions."

Sometime in the year 1997, both the DTC and the private operators

appealed to the State Transport Authority (STA) for revision in the fares on the ground that the cost of various inputs like diesel, oil, staff salary and wages, insurance, road tax, permit fee, repair charges, apart from increase in capital investment for replacement and interest rates of borrowed capital, had increased between 25 per cent to 300 per cent. The State Transport Authority did not accede to the request. Repeated and continued representations together with an unprecedented 35 per cent hike in diesel price in October, 1999 brought about a rethinking on the part of the STA as a result of which a decision was taken on 16th October, 1999 by the State Government to revise the fare structure applicable to the DTC and the private operators with effect from the said date on the same lines as proposed by the DTC in the year 1998. It was also decided that the fare structure should be uniform for both the DTC and the private operators. On 21st December, 1999, the State Government issued an order to the STA directing that along with the upward revision of fare the private operators would be required to:

- (a) pay Rs. 2500/- p.m. as Bus Shelter charges to DTC;
- (b) pay Rs. 5000/- p.m. for using the Bus Terminus to DTC; and that
- (c) passes issued by DTC would be applicable to all Private Stage Carriages.

This decision was made applicable to all Private Stage Carriages with immediate effect. The appellants and other stage carriers challenged the said order before the Delhi High Court on various grounds. While the petition was pending before the Delhi High Court, on 31st December, 1999, purportedly in exercise of its power under Section 67(1) of the Act, the State Government issued a notification in the following terms:

" TRANSPORT DEPARTMENT

NOTIFICATION

Delhi, the 31st December 1999.

No. F.189/Secy/STA/99/2832 \026 In exercise of the powers conferred by clause (i) of sub-section (1) of Section 67 of the Motor Vehicles Act, 1988 (59 of 1988), the Lt. Governor of the National Territory of Delhi, having regard to clauses (a) to (d) of the said sub-section (1) hereby issues the following directions to the State Transport Authority of Delhi, namely:

Directions:

1. The fares chargeable by the operators of stage carriages/city buses plying in the National Capital Territory of Delhi shall be as follows :

Distance	Fare
Upto 4 kilometers	Rs. 2.00
From 4 kilometers upto 8 kilometers	Rs. 4.00
From 8 kilometers upto 12 kilometers	Rs. 6.00
Above 12 kilometers	Rs. 8.00

For the 'LTD', 'Green Line' and 'Railway Spl.' Buses the fare structure shall be ten rupees instead of six rupees.

2. For concessional bus passes the following rates shall be applicable.

Type of pass	New Rate
General Destination	Rs. 200/-
General All-Route	Rs. 400/-
General All route (Ltd)	Rs. 450/-

In the case of 'General Destination Pass' the route shall be specified in the pass itself and one change of bus shall be allowed rates of all other passes including 'student', 'Re-

settlement Colony', 'Press' and 'Old age' shall remain the same.

3 (a) The Private Stage Carriage with the upward revision of fares shall pay with effect from 16th October, 1999.

- (i) Rs. 2500/- per month as bus queue shelters to DTC
- (ii) Rs. 5000/- per month for using the bus terminal to DTC.

(b) All DTC passes shall be applicable to all private Stage Carriages."

Being aggrieved by the notification, the appellants filed a writ petition before the High Court of Delhi which came to be dismissed by the judgment of the High Court dated 19th October, 2000 upholding the legality and validity of the said notification. Hence, this appeal by special leave.

Learned counsel for the appellants contends that the impugned notification is ultra vires the powers of the State Government under Section 67 of the Act, apart from being arbitrary and imposing unreasonable restrictions on the fundamental right to trade and business guaranteed under Article 19(1)(g) of the Constitution of India. It is also contended that, as far as the provisions of the Act are concerned, DTC is just an operator and private operators cannot be put into a situation where they are required to subsidise the losses made by DTC for any reason. It is also urged that neither the State Government nor the State Transport Authority (STA) has the statutory authority under Section 67 of the Act to impose conditions, other than fixing of fares, which are highly onerous and discriminative against the private operators.

It is also submitted that the operational statistics filed by the DTC before the High Court clearly brings out that more than two thirds of the passengers travelling by the DTC buses have been issued concessional passes and it would be unfair and unjust to expect the private operators to give service in respect of holders of such passes even though the revenue generated therefrom is appropriated by the DTC.

Learned counsel for the respondents have reiterated their contentions which weighed with the High Court. They submit that, in the interest of discharging its 'social obligations' the DTC has already constructed several bus shelters and terminals, which are permitted to be used by private operators and that in discharge of its social obligations the DTC has issued concessional passes to several sections of society and thereby incurs huge losses. Since differential fare structures cannot be fixed in respect of different operators, it is but fair, just and reasonable that a portion of this cost of social obligations is imposed upon the private operators by an order made under the provisions of the Act and the Rules.

Respondents also contend that the impugned notification is fully justified as it is pursuant to 'the desirability of preventing uneconomic competition among holders of permits' within the meaning of Section 67(1)(d) of the Act.

Clause (xxi) of sub-section (2) of Section 96 empowers the State Government to make rules to ensure that stage carriages halt only at designated places. Clause (xxii) of sub-section (2) of Section 96 empowers the State Government to prescribe rules with regard to the construction or use of any duly notified stand or halting place and the fees, if any, which may be charged for the use of such facilities. Correspondingly, we have Rules 75 and 76.

No transport vehicle can be plied without a permit under Section 66 of the Act. Section 69 provides for making of applications for permits to the Regional Transport Authority. Such permits in respect of stage carriages are issued under Section 70 after following the procedure prescribed in Sections

71 and 72. Section 72(2) of the Act empowers the Regional Transport Authority to grant a stage carriage permit subject to any rule that may be made under the Act and by attaching to the permit any one or more of the conditions enumerated in Clauses (i) to (xxiv). Clauses (xx), (xxii) and (xxiv) of Section 72(2) are relevant for our purposes and read as under:

"(xx) that any specified bus station or shelter maintained by Government or a local authority shall be used and that any specified rent or fee shall be paid for such use.

\005.

(xxii) that the Regional Transport Authority may, after giving notice of not less than one month, -

- (a) vary the conditions of the permit;
- (b) attach to the permit further conditions

Provided that the conditions specified in pursuance of clause (i) shall not be varied so as to alter the distance covered by the original route by more than 24 kilometres, and any variation within such limits shall be made only after the Regional Transport Authority is satisfied that such variation will serve the convenience of the public and that it is not expedient to grant a separate permit in respect of the original route as so varied or any part thereof.

(xxiv) any other conditions which may be prescribed."

The State Government has made the Delhi Motor Vehicles Rules, 1993 in exercise of its powers under the Act. Of relevance to the present discussion are Rules 75 and 76. Rule 75 provides for the manner of halting of stage carriages. Under sub-rule (2) of Rule 75 the District Magistrate may direct that in any street or any road in an urban area notified by him in this behalf, no stage carriage shall take up or get down passengers except at a place appointed by him at a bus stop or at a stand. Rule 76 deals with construction and control of stands and provides that the District Magistrate may in consultation with the local authority having jurisdiction in the area concerned, make an order permitting any place to be used as a stand and that, without such an order no place shall be so used as a stand. When a privately owned place is to be so notified, the rule provides that the District Magistrate shall, from time to time, fix the fees or the maximum fees payable at any stand.

Section 67 of the Act empowers the State Government, inter alia, to fix the fares and freights for such stage carriages, contract carriages and goods carriages. The relevant provision reads as under:

"67. Power to State Government to control road transport.-

- (1) A State Government, having regard to-
 - (a) \005
 - (b) \005
 - (c) \005
 - (d) the desirability of preventing uneconomic competition among holders of permits.

may, from time to time, by notification in the Official Gazette, issue directions both to the State Transport Authority and Regional Transport Authority \026

(i) regarding the fixing of fares and freights (including the maximum and minimum in respect thereof) for stage carriages, contract carriages and goods carriages:

(ii) \005

(iii) \005"

It was the case of the respondents before the High Court, and it is their case before us, that the notification has been issued by the State Government in exercise of its power under Section 67(1)(d) read with sub-clause (i). In other words, it is contended that the notification is one which fixes the fares and freights of the stage carriages, having regard to the desirability of preventing uneconomic competition among holders of permits. The submission is that DTC had already invested capital in construction of bus shelters and terminals; if the private operators are permitted to use these facilities without compensation to the DTC, the DTC would be put in a situation of uneconomic competition, that DTC being a statutory corporation, and aware of its social responsibility, had issued a large number of concessional passes to students, war widows and their dependents, freedom fighters, disabled persons and such others, which caused a heavy economic burden to DTC; the private operators are not by law obliged to discharge this social responsibility, as a result of which there is uneven playing field and uneconomic competition as far as the DTC is concerned. Hence, it is just, fair and reasonable that private operators are made to honour the concessional passes issued by DTC, which can be done by recourse to Section 67 of the Act.

The learned counsel for the appellants may be justified in his contention that, apart from the concessions, which are expressly made available under the Act in favour of State Transport Undertakings (see in this connection Chapter VI of the Act), there are no special considerations in favour of DTC which must be treated as any other operator. Reliance was placed on the observations of this Court in *Ishwar Singh Bagga and Ors. v. State of Rajasthan*, at paragraphs 7 and 11. That, however, is not conclusive of the matter.

The action of the respondent authorities was not merely about giving a preferential or favourable treatment to D.T.C. as an operator. The peculiar circumstances under which the running of stage carriage permits within the N.C.T. of Delhi were thrown open to private operators and the specific conditions imposed in the permits would have to be kept in mind for adjudging the legality of the impugned notification. With these factors in mind, the respondent had appropriately prescribed permit condition No. 17 in the scheme published in the year 1992 which reads as under:

"17. Permit holder shall ensure that the bus stops to pick up and allow the passengers to get off at the authorised DTC bus stops and no passengers is allowed to board or to get down at a non prescribed bus stop. The operators will have to pay service charges @ Rs. 250/- per bus on monthly basis to the DTC for using DTC bus stops as determined by STA in consultation with the DTC."

This condition came to be modified in the scheme of 2002. Thus, the private operators were granted stage carriage permits only on the condition that they shall have to ensure that the passengers are picked up and dropped up at authorised DTC bus stops and not elsewhere. They were also required to pay service charges to use DTC bus stops and bus terminals "as determined by STA in consultation with the DTC from time to time".

The respondents contend that though, initially, the service charges for use of DTC bus stops was fixed at Rs. 250/- per bus per month, they have been revised by STA in consultation with the DTC and the revision is reflected in the notification dated 31st December, 1999. As a result of the said notification, the permit conditions stood revised. Clause 3 of the impugned notification revises permit conditions and consequently the private stage carriage operators have to pay with effect from 16th October, 1999, Rs. 2,500/- per month as charges for using bus queue shelters to DTC and Rs. 5,000/- per month for using the bus terminal to DTC.

As already noticed, Section 72(2) of the Act gives power to the

Regional Transport Authority to attach conditions to stage carriage permits which are required to be followed by the stage carriage operators. The condition in clause (xx) would require that any specified bus station or shelter maintained by Government or a local authority shall be used and that any specified rent or fee shall be paid therefor. A stage carriage operator has no liberty in the manner of halting of the motor vehicle in public places by reason of the directions made under Rule 75. Consequently, the stage carriage operator is required to stop the bus only at such places as directed by the conditions of the permit. It so happens that, in the case of the appellants before us, they were directed to stop their buses only at the bus stations and terminals of DTC. Thus, they have no choice in the matter and are obliged to halt their buses at such specified places.

It is settled law that the condition of a permit can be varied by a notification issued by the Government under Section 67 of the Act. (See in this connection B. Srikantiah and Ors. vs. The Regional Transport Authority, Anantapur and Ors. and Sree Gajanana Motor Transport Co. Ltd. vs. The State of Karnataka and Ors.)

The appellants have not challenged the legality of condition No. 17. Their only grievance is about the steep increase in the charges. Condition No. 17 requires the private stage carriage bus operators to make payment of such charges as shall be determined by the STA in consultation with the DTC from time to time. This was the very condition subject to which the permit was issued to the appellants. The fact that originally the service charges payable were @ Rs. 250/-, or that it has subsequently been revised, does not make the condition of the permit illegal or ultra vires the powers of the respondent authorities, as contended by the appellants. We find no merit in the contention that the increase in the service charges payable to the DTC are unauthorised or ultra vires the powers of the STA and the State Government.

The next contention urged by the appellants is that Paragraph 3(b) of the notification which provides, "all DTC passes shall be applicable to all private stage carriages," is illegal and ultra vires. There appears to be some merit in this contention. As we have noticed, the permit condition in the 1992 scheme merely provided : "there shall be a provision for free passes for freedom fighters only. There may be a provision of monthly/quarterly passes valid in all the private buses on a particular route." Even the permit condition No. 13 declared : "the permit holder shall ensure that concessional passes issued to various sections authorised for these buses shall be honoured." A fair reading of these conditions of permit would be that the STA would approve the issuing of concessional passes by the transport operator and indicate the conditions subject to which such concessional passes are approved. Even in the Scheme of 2002, the relevant condition of the permit reads as under:

"13. The permit holder shall ensure that concessional passes issued to various sections authorised for these buses shall be honoured."

The contention of the respondents that by reason of the aforesaid condition of permit the concessional passes issued by the DTC would automatically become enforceable and binding upon private operators who were issued stage carriage permits, does not appear to be sustainable. In Anjum M.H. Ghaswala a Constitution Bench of this Court reaffirmed the general rule that when a statute vests certain power in an authority to be exercised in a particular manner then the said authority has to exercise it only in the manner provided in the statute itself. (See also in this connection Dhanajaya Reddy v. State of Karnataka) The statute in question requires the authority to act in accordance with the rules for variation of the conditions attached to the permit. In our view, it is not permissible to the State Government to purport to alter these conditions by issuing a notification under Section 67(1)(d) read with sub-clause (i) thereof.

The contention of the respondents is that the power to enforce the

binding nature of the concessional passes issued by the DTC on the private stage carriage operators can be spelled from the provisions of Section 67(1)(d) of the Act. In our view, such a power cannot be subsumed under the powers of the State Government to fix fares and freights for stage carriages having regard to the desirability of preventing uneconomic competition among holders of permits. Permit condition No. 13 merely stipulates that the permit holder shall ensure that concessional passes issued to various sections authorised for these buses shall be honoured. The authorisation has to come from the STA. In other words, only concessional passes which are authorised by the STA would be binding on the operators. We see no power in Section 67(1)(d) of the Act or otherwise by which a concessional pass issued by the DTC could be made binding upon private stage carriage operators, particularly when there was no such condition imposed in the permit issued. Hence, we are of the view that Paragraph 3(b) of the impugned notification is clearly ultra vires the powers of the State Government under Section 67 of the Act and, therefore, liable to be quashed and set aside.

Appellants contend that the condition imposed upon the appellants of honouring all DTC passes is nothing but a covert attempt to subsidise the losses being incurred by DTC. Even if we assume that the losses are not on account of mismanagement or inefficiency of the DTC, and are really attributable to the so called honouring of its "social obligations", we see no warrant or justification, under the provisions of the Statute as it stands, for transferring this assumed responsibility to competing transport operators. If the state authorities are of the view that the fare structures should be identical for all operators including the DTC, we see no justification for this indirect method of passing on the costs to the appellant operators.

In the first place, we are unable to accept that all concessional passes issued are necessarily in the discharge of "social obligations", as claimed. A perusal of the operational statistics of the DTC, which is placed on record as Annexure P-9 to the writ petition filed before the High Court, (pp. 64, 66 and 68) justifies the contention of the appellants. From the operational statistics we notice that nearly 48 per cent of the persons travelling in the DTC buses were pass holders in April, 1998 and this figure has gone to about 68 per cent in November, 1999. While it may be possible to say that granting of concessional passes to war widows and their dependants, disabled persons, freedom fighters and such categories may be in discharge of "social obligations", it would not hold true with regard to a large number of other holders of concessional passes. In the writ petition before the High Court, the appellants pointed out that 'destination passes', 'general passes' and 'all route' passes are nothing but smart exercises designed to catch captive commuters. These passes are really intended to collect advance fares which would save commuters the trouble of frequently going to the office of the operator for paying for their passes by offering a marginal concession. In other words, a large amount of the fare gets collected, much in advance, and what the DTC has to forego is only a small amount designed to cut down the collection cost, get money in advance and catch captive commuters. We, therefore, agree with the contention of the appellants that such concessional passes are nothing but advance tickets with marginal concessions giving services to the captive commuters. The attempt of the DTC through the STA and the State Government now appears to be to ensure that even service is not required to be given to all the captive commuters holding such concessional passes by DTC, by requiring the private operators to provide service to the pass holders who have paid to the DTC. We see no discharge of "social obligations", nor even the shadow of Article 38 of the Constitution, in this arrangement which is sought to be brought into force by resort to the purported power under Section 67 of the Act. If the DTC incurs losses in its running, it is bailed out by the State Government by subsidies and convenient loans which are written off; but, on the other hand, private operators have to raise capital at enormous servicing cost and do not have finance or subsidy on tap. The learned counsel for the appellants is right in contending that this is clearly an attempt to rob Peter to pay Paul. In our view, the condition imposed in Paragraph 3(b) of the impugned

notification is ultra vires the power of the State Government under Section 67. It is not possible for us to accept the view of the High Court that Section 67(1)(d) read with sub-clause (i) thereof clothes the State Government with the power to impose the condition in Paragraph 3(b) of the impugned notification dated 31st December, 1999, or that it has been imposed having regard to "the desirability of preventing uneconomic competition among holders of permits" within the meaning of clause (d) of sub-section (1) of Section 67 of the Act. The directions which can be issued under sub-clause (i) are only with regard to 'fares and freights'. The expression 'fare' has been defined in Section 2(12) as inclusive of sums payable for a season ticket or in respect of the hire of a contract carriage. By Paragraph 2 of the impugned notification the Transport Department has also prescribed what can be the fares for concessional bus passes of different categories. This only means that, if the permit holders were to issue concessional bus passes for different categories including 'students', 're-settlement colony', 'press', and 'old age', then the fares chargeable are at the rates indicated in Paragraph 2. This is a perfectly permissible exercise of power.

The High Court relied upon the judgment of this Court in *Sree Gajanana Motor Transport Co. Ltd. v. The State of Karnataka and Ors.*, arising under Section 43 of the Motor Vehicles Act, 1939, to the effect that when the State has exercised its power under Section 43 (corresponding to the present Section 67 of the 1988 Act), then the conditions of the permit automatically get altered. There is no doubt as to this proposition, but the rub is that the notification must have been validly issued in exercise of the said power. Paragraph 3(b) of the impugned notification, however, travels much beyond the legitimate scope of the power under Section 67(1)(d) read with sub-clause (i). We are of the view that the impugned notification, insofar the condition in Paragraph 3(b) is concerned, is wholly ultra vires the powers of the State Government under Section 67 of the Act, illegal and liable to be quashed and set aside.

Learned counsel for the appellants stated that they too are conscious of the "social obligations", and since the number of concessional passes issued to disabled persons, freedom fighters and war widows and their dependants is small, without prejudice to their legal contentions, they are willing to honour such concessional passes issued by DTC.

In the result, we hold that the condition imposed in Paragraph 3(b) of the impugned notification is ultra vires of the powers of the State Government and is, therefore, liable to be quashed and set aside. However, it appears to us that sudden discontinuation of the concessional passes would seriously affect the commuters, particularly students community, holding a large number of concessional passes issued by the DTC. We are, therefore, of the view that some locus poenitentia should be given to the respondents to make alternative arrangements by formulating an appropriate scheme in accordance with law which should take care of the student concessional passes.

In the result, we make the following order:-

- (1) The provisions of the impugned notification dated 31st December, 1999, except paragraph 3(b), are held valid and intra vires;
- (2) The condition imposed under Paragraph 3(b) of the impugned notification is held ultra vires, illegal and unenforceable;
- (3) The appellants, as agreed, shall continue to honour the concessional passes issued by DTC to disabled persons, freedom fighters, war widows, and their dependants;
- (4) The respondents shall lawfully bring forth an appropriate scheme to provide relief to the students concessional pass holders of DTC, within a period of four months from

today, i.e., on or before 31st July, 2004, failing which the condition imposed under Paragraph 3(b) of the impugned notification shall stand quashed and set aside with effect from 1st August, 2004.

The judgment of the High Court is modified and the appeal is allowed to the foregoing extent.

There shall be no order as to costs.

JUDIS