

Shami and Others Vs. State of Karnataka and Others

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Court : Karnataka

Decided On : Jun-18-1990

Reported in : 1991CriLJ1018; ILR1990KAR2099

Judge : H.G. Balakrishna, J.

Appeal No. : W.P. Nos. 3151 to 3165 of 1990

Appellant : Shami and Others

Respondent : State of Karnataka and Others

Advocate for Def. : S.R. Nayak, Govt. Adv. and ;S. Mahesh, Adv.

Advocate for Pet/Ap. : A.K. Subbaiah, Adv.

Judgement :

ORDER

1. The petitioners are hawkers carrying on the business of hawking since a long time and they are all permanent residents of Bangalore. The petitioners are transacting the said business in public places in the vast space available to them by the side of 5th Main Road, Gandhinagar, Bangalore, in front of Tribhuvan Theatre and an Ice-Cream Parlour called 'Sukhasagar Ice-Cream Parlour'. They are carrying on the business on the pavements. Hawking has not gone without the notice of either the Corporation of the City of Bangalore or the Police. The grievance of the petitioners is that the police attached to respondent-3 Police

Station periodically visit the places of hawking and remove all the articles in the possession of the hawkers and, thereafter, proceed to serve notice on them to appear before the concerned Court of the Magistrate to defend themselves against charges made under section 92(g) of the Karnataka Police Act, 1963. It is stated that, on account of their helplessness and predicament, the accused would prefer to pay the fine imposed on them rather than contest the cases. The fine imposed by the Court range between Rs. 25/- and Rs. 100/- and thereafter the hawkers would be back to business at the same places. Once the fine was paid, the Police Station concerned would return the articles seized from the petitioners some times partly and some times wholly. When articles are seized from the hawkers, it is alleged that the police are not in the habit of preparing an inventory and supplying a copy of the inventory to the petitioners and to the persons similarly placed. The petitioners had even alleged that if they persisted for return of all the articles seized from them, they would have to face consequences of personal in security as well as detention behind the bars in the Police Station.

2. In these writ petitions, the petitioners have sought for a declaration that the action of the 3rd respondent in interfering with the hawking trade of the petitioners and also in prosecuting them under Section 92(g) of the Karnataka Police Act, 1963 (hereinafter referred to as 'the Act') is unconstitutional and further the petitioners have prayed for a direction to the respondents to refund the fines collected from the petitioners besides payment of compensation and further for an order of interdiction restraining respondent-3 from interfering with the hawking rights of the petitioners in the trading area where they are transacting their business in 5th Main Road, Gandhi nagar, Bangalore, and particularly in front of Tribuvan Theatre and lastly for a direction to respondents-1 and 4 to make law permitting pavement trading subject to reasonable restrictions in public interest on the lines laid down by the Supreme Court in *Sodan Singh v. New Delhi Municipal Committee*, AIR 1989 SC 1988.

3. In the statement of objections filed by respondent-1 to 3, they have denied knowledge of the petitioners' carrying on business as hawkers since last 14 years in front of Tribhuvan Theatre in 5th Main Road, Gandhinagar and have denied that the footpaths are wide enough to carry on hawking business on the pavement and

that they will not interfere or obstruct the traffic on the pavement or cause public nuisance.

4. According to the respondents, the hawkers (petitioners) were causing obstruction to the traffic and also to the public who use the pavements and therefore they were served with notice under section 92(g) of the Act and before the Court the petitioners admitted the offence and fine was imposed by the Court on them. It is denied that the seized articles were returned to the hawkers after the fine was paid and similar denial is made in regard to retention of certain portion of the seized articles by the Police. The denial covers the allegation that the petitioners would be put behind the bars in the Police Station when the petitioners demanded return of the seized articles.

5. According to the respondents, there is law which prohibits the hawking business on the pavements and, at the same time, it is admitted that the petitioners have the right to carry on their hawking business provided it does not cause nuisance to the general public. It is asserted by the respondents that the petitioners' business is not interfered with so long as no obstruction was caused to the general public in the use of the foot-path or the pavement and so long as there was no public nuisance resulting therefrom. Whenever there was quarrel among the hawkers themselves, the police were bound to interfere.

6. It is stated that respondent-3 through his officials inspected several parts of the city and whenever there was obstruction to the traffic, cases were booked under section 92(g) of the Act. There is a categorical denial that the petitioners had goods worth Rs. 50,000/- which were seized by respondent-3 and that only a part of the seized goods were returned after payment of fine. It is denied that the articles seized were distributed among the personnel attached to the Police Station. Denial is made in regard to the alleged colourable exercise of power by respondent-3 under section 92(g) of the Act. It is specifically averred that the place where business is being carried on by the petitioners consists of a very busy street stretching to a distance of about 300 yards off Kempegowda Road and the 5th Main Road of Gandhinagar and Kempegowda Road is flooded with cinema theatres, Banks, commercial establishments, hotels and the public offices

subjected to heavy influx of pedestrians passing through the road every day. It is stated that on the right side of the road throughout the stretch parking places for two wheelers and four wheelers have been provided and there is no foot-path on the said side. According to the respondents, the measurement of the road in front of the theatre is only 12 feet and only about 4 feet width of the foot-path for the general use of the public is available. According to the respondents, the space of 4 feet is insufficient for the general public using the pavement for the purpose of traffic. Therefore, it is stated that hawking business cannot be carried on without obstructing the pedestrians.

7. Since the petitioners have not challenged the constitutionality of the relevant provisions of the Act, it is submitted by the respondents that the petitioners are not entitled to the reliefs which they have sought in these writ petitions.

8. The point which arises for consideration is whether the petitioners are entitled to safeguard and protection for carrying on their business as hawkers in the places in question without interference from respondent-3 and whether the power vested in the police under section 92(g) of the Act could be extended to interfere with the constitutional right of the petitioners in carrying on hawking business.

9. The admitted facts which emerge from the factual assertions made by the learned Counsel for the parties are that hawking business is being carried on by the petitioners for quite some time, if not for the past 15 years on the pavements mentioned in the writ petitions in areas which are subjected to heavy traffic and influx of pedestrians and that the area in question has a number of cinemas or establishments, hotels etc. It is possible to assume that on one side of the road, provision is made for parking of the vehicles by the police and on the other side of the road the petitioners have been carrying on the hawking trade. There is no material on record to come to the conclusion that the pavement which is being used for hawking is only 4 feet wide except the assertion of respondent-3. In any event, it is not the case of respondent-3 that the entire pavement area is being used for hawking purpose allowing no room for the pedestrians to walk across. Sufficiency or insufficiency of the space to enable the members of the public to use the pavement as a passage is a question which cannot be decided with any

mathematical precision. It appears to me that as far as the pedestrians and the hawkers are concerned the former being the customers also, I cannot persuade myself to believe that there is no peaceful co-existence between the two categories of people in day-to-day life and activity. It is not far fetched to assume that the pedestrians need the hawkers and vice versa. The conflict of activity appears to be only between the duty of respondent-3 in ensuring proper and orderly traffic, in preventing public nuisance and also in avoiding possible quarrels among the hawkers themselves. The interest of the police may not be characterised as unjustified so long as it is intended to enforce the provisions of the Act. S. 92(g) of the Act envisages that in any local area to which the Government by notification in the official gazette from time to time extends sub-section (1) or any clause thereof of S. 92, whoever, contrary thereto causes obstruction on any foot-way or drives, rides or leaves any animal or drives, drags or pushes any vehicle, thereupon shall be liable for punishment.

10. Thus, it could be seen that in so far as the petitioners are concerned, the only possible allegation against the petitioners in the circumstances of these cases is causing of obstruction on foot-way. In the statement of objections filed by respondents-1 to 3, specific reference is made only to S. 92(g) of the Act apart from the general assertion of prevention of public nuisance and prevention of quarrel among the hawkers themselves.

11. According to the petitioners, they have been carrying on the hawking trade since a long time and they have a constitutional right to do so under Art. 19(1)(g) of the Constitution which assures the right to carry on trade or business on street pavements subject of course to reasonable restrictions.

12. Respondent-4 is the Bangalore City Corporation and there is no statement of objections from this respondent possibly because there are no direct allegations against respondent-4 in regard to the impugned action and also in the matter of seizure of articles from the vendors. No information is forthcoming from respondent-4 as to whether any regulatory measure has been taken in accordance with any law in force by respondent-4 to control or regulate the trade or business on street pavements which are intended for the pedestrians use. In the

circumstances, it has to be presumed that there are no such regulatory measures as far as respondent-4 is concerned.

13. The right of the pedestrians to be free from obstruction in the use of the pavements is the countervailing interest which conflicts with the constitutional right of the hawkers in the carrying on their business on the pavements if the two interests are not properly balanced. If there is an imbalance creating a clash of interest, it is possible to presume that the police are at liberty to set the law in motion under section 92(g) of the Act provided the hawkers are responsible for the imbalance. But the question which remains to be answered is whether the hawkers have been using the pavements or the pedestrians so as to cause unreasonable obstruction or impediment to the pavement users viz., the pedestrians who more often than not only use the pavement to walk across but also for the purpose of buying articles from the hawkers. This would only establish that the hawkers are not unwelcome businessmen on the pavement unless their act is unwelcome by placing obstruction to the movement of the pedestrians. What constitutes obstruction and unreasonable obstruction depends upon what regulations are in force and what regulatory standards are fixed. The fixation of the standards and provision of regulation and control fall within the domain of legislation. If the right to carry on hawking business is regulated in such a manner that it on the one hand protects the fundamental right of the hawkers to transact hawking business or trade, but also ensures freedom from obstruction to a reasonable extent from the hawkers, the common interest would be protected and the police would have very little to do in the matter. It is the absence of these legislative standards and regulatory standards which has created the opportunity for enforcing the provisions of the Act and particularly S. 92(g) which comes handy to the police for use against the hawkers. What in the circumstances of these cases is contemplated is not the enforcement of the Act in a cold blooded manner but what is required is the judicious application of law bearing in mind the existence of superior law of the State by which I mean the constitutional right of the hawkers to carry on hawking trade on the pavements and public interest in the form of freedom from unreasonable obstruction on the pavement in so far as the pedestrians are concerned. I do not think that in the circumstances of these cases it would be safe or reasonable or proper to leave the entire matter to the discretion

of the police for exercise of power under S. 92(g) of the Act. On the other hand, it is not only feasible but also just and proper to have regulatory standards and control over the conduct of both the hawkers and the users of the payment including the pedestrians of a legislative character rather than an executive legislation or fiat. So long as the trade of hawking is permissible under law and bear the stamp of authority of a constitutional right or a fundamental right, there will be a persisting and perpetual need for readjustment of conflicting interests. I am aware of the limitation that it is not for the Court to suggest to the Legislature to make suitable law in this regard. But, at the same time, is cannot lose sight of the observations made by the Supreme Court in *Sodan Singh v. New Delhi Municipal Committee*, AIR 1989 SC 1988, in this context. In paras 32 to 34 of the ruling of the Supreme Court given by a Bench consisting of 6 Judges it was observed while relying on an earlier decision of the Supreme Court in *Saghir Ahmed v. The State of U.P.*, : [1955]1SCR707 :-

'In India there are large number of people who are engaged in the business of 'street trading'. There is hardly a household where hawkers do not reach. The housewives wait for a vegetable vendor or fruit seller who conveniently delivers the daily-needs at the door-step. The petitioners before us are street-traders of Delhi and New Delhi areas. Some of them have licences/Tehbazari from Municipal Corporation of Delhi/New Delhi Municipal Committee but most of them are squatters. There is practically no law regulating street trading in Delhi/New Delhi. The skeletal provisions in the Delhi Municipal Corporation Act, 1957 and the Punjab Municipal Act, 1911 can hardly provide any regulatory measures to the enormous and complicated problem of street trading in these areas.

In *Bombay Hawkers' Union v. Bombay Municipal Corporation*, : AIR 1985 SC1206 , this Court suggested that schemes be framed to regulate the hawking business by creating hawking and non-hawking zones. Again in *Municipal Corporation of Delhi v. Gurnam Kaur*, : AIR 1989 SC38 , this Court observed as under (at p. 44 of AIR) : 'We feel that the Municipal Corporation authorities in consultation with the Delhi Development Authority should endeavour to find a solution on the lines as suggested in *Bombay Hawkers' Union* i.e. by creating Hawking and Non-Hawking Zones and shifting the pavement squatters to areas other than Non-hawking

Zones. The authorities in devising a scheme must endeavour to achieve a twin object viz., to preserve and maintain the beauty and the grandeur of this great historic city of Delhi from an aesthetic point of view, by reducing congestion on the public streets and removing all encroachments which cause obstructions to the free flow of traffic, and rehabilitate those unfortunate persons who by force or circumstances are made to ply their trade or business on pavements or public streets.' Street Trading being a fundamental right has to be made available to the citizens subject to Art. 19(6) of the Constitution. It is within the domain of the State to make any law imposing reasonable restrictions in the interest of general public. This can be done by an enactment on the same lines as in England or by any other law permissible under Art. 19(6) of the Constitution. In spite of repeated suggestions by this Court nothing has been done in this respect. Since a citizen has no right to choose a particular place in any street for trading, it is for the State to designate the streets and earmark the places from where street trading can be done. Inaction on the part of the State would result in negating the fundamental right of the citizens. It is expected that the State will do the needful in this respect within a reasonable time failing which it would be left to the courts to protect the rights of the citizens.'

14. The City of Bangalore is known not only for its beauty, but also for its salubrious climate. Consideration such as preservation of aesthetic beauty, orderliness, tidiness and due regard and consideration for both the constitutional right of the hawkers and the needs of the general public ought to guide the concerned authorities for initiation of effective and prompt measures on the lines spelled out by the Supreme Court in the aforesaid decision. Until such time, it would be both unreasonable and unfair to keep the hawkers under fear of what could be characterised as intimidatory action and pressure by frequent raids and summoning them not only to the Police Station, but also to the court for alleged offences under section 92(g) of the Act. On the other hand, it would be desirable to at least take transitory steps for professional zoning so that the possibility of obstruction to the general public is obviated and the hawkers enjoy the freedom of carrying on their business on the pavements.

15. Allegations and denials have been made in these writ petitions regarding the conduct of the police towards the hawkers. Since these allegations involve investigation into disputed questions of fact, I do not propose to deal with these allegations. At the same time, I cannot ignore the gravity of the situation as could be visualised from the picture painted by the petitioners in these cases, and also the stance taken by respondent-3 in seeking to justify his conduct. The grievance of the petitioners is neither transitory nor momentary. It is a persisting one and a continuing one. In these circumstances, a remedy has to be found and it is not possible for this Court to lay down a guideline or principle beyond what the Supreme Court has done in Sodan Singh's case (AIR 1989 SC 1988). It is no doubt true that the petitioners in subpara (d) of para-7 of the writ petitions have hit upon a relief which commands acceptance in substance. They have sought for a direction in the nature of mandamus directing respondents 1 and 4 to make law permitting the payment trading, imposing reasonable restrictions in the interest of general public on the lines or the suggestions made by the Supreme Court in Sodan Singh's case.

16. In the peculiar facts and circumstances of these cases, I cannot but observe that respondent-3 could adopt an approach which would eliminate the consequences of over-zealous action and display equal concern for the hawkers who are engaged as small traders to eke out their livelihood fully protected by constitutional right and, at the same time, ensure that a balance is struck between the legitimate interests of the hawkers on the one hand and the pedestrians on the other within the limited space that is available for the activities of both. Demarcation of the space on the pavement for both the activities, professional zoning and classification of hawking of different items could be usefully and meaningfully the subject matter of regulation by the Bangalore City Corporation until a legislative enactment is made and brought into force.

Under the Constitution, our's being a welfare State, there will be a failure of duty on the part of the State if an enactment is not made as observed by the Supreme Court, on the same lines as in England or by any other law permissible under Art. 19(6) of the Constitution. Once again it would be necessary to highlight what the Supreme Court indicated in the above case that since a citizen has no right to

choose a particular place in any street for trading, it is for the State to designate the streets and earmark the places from where street trading can be done. If timely action is not taken by the State and the Bangalore City Corporation in this regard, the Court would not hesitate to extend its protection to the fundamental rights of the citizen and in particular the right guaranteed to the petitioners under Art. 19(1)(g) of the Constitution unless reasonable alternatives and facilities as already pointed out are made for the benefit of the petitioners and persons similarly situate.

17. The learned Counsel appearing for the petitioners laid special emphasis on possible highhandedness of respondent-3 or the police in trying to subdue the petitioners and similarly situate persons by methods which are not unfamiliar to common knowledge and submitted that the real power should be vested and exercised by the State and the Corporation and not by the police.

18. There is much force in the submission of the learned Counsel. But at the same time the police are also expected to play their role in ensuring the observation of the regulatory standards and regulations made by the State and the Corporation without committing any excess in the process.

19. When we consider the enforcement of a fundamental right of the citizen, we are dealing with the constitution as an effective protector of the cardinal rights of the citizen and not with a dead letter on the statute book. We can have the best constitution, the best laws in the land and the most honest judicial reviews but unless the law enforcement profession identifies itself with democratic traditions, maintains the highest in ethics and makes its work a career of honour, fundamental rights will continually and without end be violated. The best protection of the citizen's liberties lie in an alert, intelligent and honest law enforcement agency. There can hardly be any alternative. At the same time, it is to be realised that no useful purpose will be served by poor morale caused by lack of civil respect and a cavalier treatment of the police department as the 'lost duckling' of the government.

On law enforcement, this is what Justice Edgar Hoover had to say :-

'Law enforcement in defeating the criminal must maintain inviolate the historic liberties of the individual. To turn back the criminal, yet, by so doing, destroy the dignity of the individual, would be a hollow victory. This is a problem of great concern in the discussion of civil liberties.

Here is the very heart of the problem : the vital necessity of having men and women in law enforcement who hold allegiance to the principles of democracy and perform their duties in a completely legal manner. I have fought during my 27 years as Director of the F.B.I. for the development of law enforcement as a profession. I have worked for better training programmes, modern equipment, adequate salaries and above all a personal integrity which scorns the temptations of graft, bribery and corruption.

Time after time, I have seen law enforcement betrayed and civil liberties violated by one of these factors; by a poorly trained officer who thinks brute strength and sadistic cruelty will bring a confession; by the resignation of intelligent, fearless and honest police officers who simply could not and would not make law enforcement a career at such low wages and long hours deprived of funds, equipment and interest; by police officers who for a piece of silver, betray their sacred calling to the lust, greed and vice of the crooked politician or gang leader. To deprive the police department of training, equipment and good personnel policies is to invite the very evil we abhor.'

This would sum up the situation, perhaps, without much variation anywhere in today's developing society, and also meet the impassioned arguments of the learned Counsel appearing for the hawkers.

20. I do not think it is necessary for me to deal with the other contentions raised by the learned Counsel in these cases. In the light of the above discussion, I pass the following order :-

These writ petitions are allowed and respondents 1 and 4 are exhorted to comply with the observations made by the Supreme Court in Sodan Singh's case (AIR 1989 SC 1988) extracted above. Pending such law or regulations to be made either by the State or by the Bangalore City Corporation as the case may be, the

petitioners shall be permitted to continue the hawking trade in the places where they are now carrying on their business. If there is any executive excess or abuse of power or authority by the police in the exercise of their power under the Karnataka Police Act, it is open to the petitioners to approach this Court for appropriate remedy. It is made clear that the police shall not interfere with the fundamental right of the hawkers to trade on pavements in the guise of power exercised under section 92(g) of the Act.

21. Petitions allowed.

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