

S.R. Varma Vs. Emperor

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Court : Kolkata

Decided On : Dec-20-1932

Reported in : AIR1933Cal243

Appellant : S.R. Varma

Respondent : Emperor

Judgement :

Mitter, J.

1. The question raised by this appeal is one of considerable importance and relates to the power of the Corporation of Calcutta to refuse a license to keep open a Carnival when in the public interest it thinks it necessary to do so. The case for the prosecution is that the appellant S.R. Varma was the proprietor of a Carnival in respect of which license had been obtained from the Corporation and that license remained in force up to 1st March 1932; that there had been complaints against the holding of Carnivals of late both in the newspapers as well as by some public bodies like the Marwari Trades Association of Calcutta and the appellant was informed that no further license would be granted after the expiry of the period; that the appellant thereafter changed the site and name of the show and obtained a police licence for the show under the name of Hollywood Park Carnival on plots Nos. 21 to 29 of the Calcutta Improvement Trust Scheme and intimated to the Corporation that he was going to open the projected Carnival from 1st April and

was prepared to pay the taxes, that the Carnival was opened from 1st April; but no license from the Municipality having been obtained the appellant had offended against the provisions of Section 391, Calcutta Municipal Act. The Corporation of Calcutta started the prosecution under Section 391, Calcutta Municipal Act.

2. It is admitted by the accused that the Carnival was started without obtaining the license and in such circumstances one would have thought that the provisions of Section 391 had been contravened; but it is contended by the defence that the Corporation cannot refuse a license altogether although it can impose conditions for the taking out of the license. The Magistrate thought that it was not necessary to go into the question whether the Corporation had the right of refusing license altogether and that it was sufficient for the purposes of the conviction in this case that the Carnival had been started and continued without a license. In this view the Municipal Magistrate convicted the appellant under Section 391, Calcutta Municipal Act, and has sentenced him to pay a fine of Rs. 500. The conviction and sentence have been challenged on appeal on several grounds: (1) the Corporation had no power under the statute to refuse a license altogether and, refusing to grant license 'the Corporation ceased to function' and the conviction under Section 391 cannot be maintained; (2) the Act contemplates two licenses, one license for the place and another for the calling; and so far as the license for calling is concerned license could be taken after 1st July as Section 391 must be read with Section 175 and the prosecution was bad as it was started before 1st July; (3) that the sentence is too severe.

3. It will be easy to dispose of the second ground first. Mr. N.K. Basu who appears for the Corporation of Calcutta replies to the argument founded on this ground by pointing out that Section 175 or Sch. 6 has got nothing to do with Section 391. He argues that the breach under Section 175 is punishable under Section 492 whereas the breach under Section 391 is punishable under Section 488. He points out that Section 175 occurs in Ch. 12 which concerns 'tax on profession,' whereas Section 391 occurs in Ch. 26 which deals with 'regulation and inspection of places of public resort.' Mr. Basu further cites two cases in support of this view, Bepin Behari Ghose v. Corporation of Calcutta (1907) 34 Cal. 913 and S.N. Banerjee v. W. Lewis & Co. AIR 1920 Cal 535. Both these cases which were under the old

Calcutta Municipal Act (3 of 1899) B.C, support the argument of Mr. Basu and I am of opinion that Section 175 deals with a very different class of license from that contemplated by Section 391. The object of the two sections and the nature of the licenses required by them are different. Section 175 occurs in Ch. 12 which deals with tax on profession whereas Section 391 occurs in Ch. 26 dealing with regulation and inspection of places of public resort. These observations are sufficient to dispose of ground 2 taken. Ground 1 taken seems to be one of some difficulty. S 391 of the Act of 1923 runs as follows:

No person shall, without or otherwise than in conformity with the terms of a license granted by the Corporation in this behalf, keep open any theatre, circus or other similar place of public resort, recreation or amusement; Provided that this section shall not apply to private performances in any such place.

4. It is argued that when a Municipal authority is given the power under the law to regulate the opening of certain places of amusement that implies the continued existence of that which is to be regulated and governed and on this authority it is argued that the Corporation has got no power to withhold a license. It is said it can impose conditions but it cannot refuse altogether the granting of licenses. In support of this contention reliance has been placed on a decision of their Lordships of the Judicial Committee in the case of *Municipal Corporation, Toronto v. Virgo* (1896) AC 88. In that case the question arose as to whether a statutory power conferred upon a Municipal Council to make bye-laws for regulating and governing a trade does or does not in the absence of an express power of prohibition authorize the making it unlawful to carry on a lawful trade in a lawful manner. It was held that it did not so authorize the Municipal Council. In that case a Municipal bye-law was passed prohibiting hawkers from plying their trade in an important part of the Municipality. And Lord Davey said that through all the cases a general principle may be traced that Municipal power of regulation or of making bye-laws for good government without express words of prohibition does not authorize the making it unlawful to carry on a lawful trade in a lawful manner.

5. In that case before their Lordships what was being dealt with was a bye-law power to make which is given by the statute and not the statute itself as in the

present case, and it was held that the bye-law was really ultra vires of the statute in the absence of express prohibition. But there is also a well recognized principle that where there is competent authority to which an Act of Parliament entrusts the power of making regulations it is for the authority to decide what regulations are necessary; and any regulations which they may decide to make should be supported unless they are manifestly unreasonable or unfair: see the observations of Lord Alverstone, C.J., in *London County Council v. Bermondsey Bioscope Co.* (1911) 80 LJ KB 141. It is familiar knowledge that public performances have a strong influence on public mind and public opinion and for that reason the Corporation have been given the discretion to grant or refuse licenses regarding theatre, circus or other similar places of public resort, recreation or amusement. The terms of Section 391 would impliedly suggest such a discretion. As has been pointed out by Buckley, L.J., in *Reg. v. London County Council* (1915) 2KB 466, which was the case of cinematograph license:

the only question we have to determine is whether the body with whom exclusively the determination of that matter lies has acted fairly and according to law.

6. In the case in which these observations were made license was refused to the cinematograph company whose share holders were in a large proportion alien enemies, and it was held that the London County Council could refuse license in the exercise of their discretion.

7. Further in the case of *Toronto Corporation* there was no question of apprehended nuisance for, as Lord Davey pointed out:

there was no evidence and it is scarcely conceivable that the trade could not be carried out without occasioning a nuisance.

8. If such nuisance could be apprehended the licensing authority would have been within their rights to refuse license. Section 391 says that certain places of amusement cannot be kept open without or otherwise than in conformity with a license granted by the Corporation of Calcutta. Can it be said that where a question of public order is involved or where a question is involved that betting and gambling which are illegal might go on in this Carnival the Corporation has no

power to refuse a license In the present case there was the representation by a public body as to the harmful effect of these Carnivals and there is evidence of the Theatre Inspector that betting and gambling were going on in the Great Eastern Carnival of which the appellant was the proprietor. It was open to the Corporation to anticipate, having regard to the way this Carnival was being carried on, that the applicant would not be a fit and proper person to hold the license for another Carnival. I am of opinion it was within the competence of the Corporation to refuse a license where in the interest of public order and morality it was necessary to do so. This act on the part of the Corporation does not in my opinion infringe on the liberty of the subject to carry on lawful trade in a lawful manner. The element of public order comes in and I should think that Section 391 impliedly gives the Corporation power to refuse licenses if in the interest of public order it thinks it should do so. The representation by the public bodies and in the newspapers led to a resolution to be passed by the E.G.P. Committee to the effect that no licenses should issue for carnivals except with the permission of the District Committee. This seems to be a salutary resolution, and if in pursuance of the resolution the Corporation refused to grant licenses it was quite within its power to do so. It cannot be said that the discretion was exercised arbitrarily or in an unreasonable manner.

9. A point had been raised by Mr. Basu on the second day of hearing of the case that authorities show that one cannot raise the contention that the refusal to issue license is in excess of the authority of the Corporation in a criminal Court, but must be determined before a civil Court wherefrom the accused must obtain a declaration that the action of the Corporation is ultra vires. I am, of opinion that it may be raised by way of defence in the trial before the Magistrate although it may be more appropriate to do so by a civil declaratory action or by a writ of mandamus. My conclusions may be summarized as follows: Under the implications of Section 391 of the Act it is open to the Corporation to refuse a license if in their discretion they think it necessary to do so, but this discretion must be exercised in a judicial spirit and in a reasonable manner. In the present case it cannot be said that the discretion has not been exercised in an impartial and judicial spirit seeing that on the representation of a public body the question was debated before the E.G.P. Committee and the said committee came to the

conclusion that license of Carnivals should ordinarily be refused and may be granted with the permission of the District Committee and seeing further that there is evidence in that case that the previous Carnivals of which the appellant is the proprietor allowed gambling and betting to go on. The conviction must therefore be maintained.

10. With regard to the ground of severity of sentence, after considering all the circumstances and giving due weight to the argument of Mr. Basu that the accused was liable in addition to a daily fine, I am of opinion that the ends of justice would be met by reducing the fine to Rs. 250 only (rupees two hundred and fifty). The appeal is to this extent allowed. The conviction is affirmed, but the sentence is reduced. The portion of the fine remitted must be refunded to appellant.

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