

(1996) 12 CAL CK 0002

Calcutta High Court

Case No: F.M.A.T. No. 4119 of 1996

South Calcutta Hawkers Assoc.

APPELLANT

Vs

C.M.C. and Others

RESPONDENT

Date of Decision: Dec. 20, 1996**Acts Referred:**

- Constitution of India, 1950 - Article 19, 19(1)(g), 19(6)

Citation: AIR 1997 Cal 234 : (1997) 1 CALLT 453**Hon'ble Judges:** Vidya Nand, J; Bhagabati Prasad Banerjee, J**Bench:** Division Bench

Advocate: Ajit Kumar Panja, Mr. Arunava Ghosh, Mr. Amales Roy and Mr. Debasis Goon, for the Appellant; N.N. Gooptu, T.C. Dutta and Mr. M.C. Das for State, Mr. Anindya Mitra, Alope Ghosh, Barin Banerjee and Mr. Fazlul Haque for CMC, for the Respondent

Judgement

B.P. Banerjee, J.

This is an appeal along with an application for stay and/or interim order against the judgment and order dated 3rd December 1996 passed by the learned trial judge in C.O. No. 18375(W) of 1996 by the writ petitioners/appellants, whose writ petition was rejected summarily as similar writ petition has been disposed of by another learned single Judge of this court in respect of writ petition filed by some other Hawkers Association which was disposed of V.K. Gupta, J. of this Hon"ble Court.

2. The facts are not in dispute that the City of Calcutta for several years, the State Government and the Municipal authorities have allowed hawkers not only to squat, but also to make unauthorised and illegal construction on the footpath and roads in gross violation of all Rules and Regulations and that several Hawkers Unions have been formed under the umbrella of some political parties to protect rights and interests of those hawkers. In 1985 a writ petition was filed by some of the hawkers in Howrah Station area claiming rights that not only they have squatted but to make temporary sheds and structures on the pavements as because they were

apprehending threats against them and moved a writ petition which was disposed of by one of us (B.P. Banerjee, J.) in [Gopal Basak and Others Vs. State of West Bengal and Others](#), in that case the contentions of the hawkers were that they have right-to carry on trade of hawker in the manner they are doing. Considering the meaning of the word "hawker" in the dictionary and considering the legal aspect of the matter it was held that the hawkers have no right to squat and to make temporary sheds on the pavement and/or on streets even though they were granted by license by the Municipal authority to peddle the goods standing on the side of the road in the gutter. It was observed in that case that it was a duty of the Municipal authority not to allow such illegal and unauthorised construction on public roads that are property of public in respect of which the Municipality was a trustee. It was also observed that the paramount consideration of Municipal authorities is to see the public have free access and public hygiene and public safety are maintained, but unfortunately in spite of the judgment though passed sitting singly by one of us, the hawkers in the City of Calcutta and Howrah were allowed to occupy footpath and roads in a large number and brought about a situation which the Government and the Municipal authority found alarming and consequently it appears that 10 years after the judgment of this court the State Government and the Municipal authorities had taken up a job of cleaning the footpath with the help of the police and Municipal employees and with bulldozer to remove the unauthorised construction and to make the City free of hawkers after the decision was delivered in [Gopal Basak and Others Vs. State of West Bengal and Others](#), in which the judgment delivered in 2nd April, 1985. The Supreme Court had occasion to consider the question of encroachment of footpaths by pavement dweller, in *Olga Tellis v. Municipal Corporation of Greater Bombay* AIR 1985 SC 130. Thereafter several judgments were pronounced by the Supreme Court on this aspect of the matter.

3. In this appeal Mr. Ajit Kumar Panja, learned counsel, appearing on behalf of the petitioners/appellants submitted that for the purpose of tackling the problem of unauthorised occupation of public land and through fares by hawkers, the West Bengal State Assembly (Ninth Legislative Assembly) constituted a committee of petitions. Such committee was constituted in accordance with the provisions of rule of Chapter XXV of the Rules of Procedure and Conduct of Business in the West Bengal Legislative Assembly. The said committee was constituted with 15 members from all political parties and the committee after consideration of the matter and after examination of several witnesses including the hawker's representation as well as after visiting various place of India had submitted a report with some recommendations.

4. One of the important recommendation was with regard to the issue of License/Identity Cards to the hawkers and for maintaining a proper record of the same as well as for declaration of hawking zones and non-hawking zones as well as providing alternative accommodation to the hawkers with a note of caution that all effort, should be made for uniform faithful implementation of the legal provision

and there should not be any political interference. Mr. Panja submitted that such a committee was constituted under the Rules of the Assembly. The State Assembly and/ or the Government were required to take steps either to accept or to reject the said recommendation but within the period of six months; but nothing had been done and it is submitted that this court should pass appropriate order for consideration of the said report by the Legislative Assembly or by the State as they cannot sit tight keeping their hands folded.

5. Mr. Panja, learned Counsel appearing on behalf of the appellants, submitted that it is the duty on the part of the authorities either to accept or to reject the said recommendation. But they cannot treat the said recommendations of the said committee as mere waste paper. In this connection, the difficulty is that the court cannot direct the legislature or the Government to accept any recommendation and/or to pass any legislation on the basis of the recommendation. But, it is an unfortunate state of affairs that at the cost of public exchequer the public representative were appointed as committee members who had to travel different States to study the problem and after examination of the several witnesses, had submitted a report and it appears that no action whatsoever was taken on the basis of the said report. If action in terms of the said report was taken, in that event, the problem of the hawkers would have been solved long back and there would not have been any occasion on the part of the State machinery and the Municipal authorities to evict them by bulldozer method.

6. It appears that there is no cabinet decision. But the Government has taken steps to evict the hawkers from the footpath and as a matter of fact from some parts they have been evicted. The view was that the hawker, have no fundamental right to carry on trade business. But in the case of *Sodan Singh v. New Delhi Municipal Committee*, reported in AIR 1989 SC 1980, the Supreme Court had laid down general principle applicable to whole of India about the right to carry on business by squalling pavements of public streets by the hawkers and that in this case the Supreme Court made the following observations and/or laid down the following principles:-

The primary object of building roads is undoubtedly to facilitate people to travel from one point to another. Quoting several authorities Syron K. Elliott and William F. Elliott in their *Treaties on the law of Roads and Streets* have defined a street as a road or public way in a City, Town or Village. A way over land set apart for public travel in a town or city is a street, no matter by what name it may be called. If a way is free to all people it is a highway, P. Duraiswami Aiyangar in his book dealing with the *Law of Municipal Corporations in British India* (1914 Edn.) had observed that the primary and paramount use of the street is public travel for man, beast and carriage for goods. On behalf of the respondents reliance has been placed on the oft-repeated adage that public have a right of passing and re-passing through a street but have no right "to be on it", which Sri Aiyangar also has mentioned at page

542 of his back. Halsbury, relied upon by both sides, has stated (Vol. 21 para 107) that the right of the public is a right to pass along a highway for the purpose of legitimate travel not to be on it, except so far as the public's presence is attributable to a reasonable and proper user of the highway as such. These statements certainly do not mean that traveler has to be in perpetual motion when he is in a public street. It may be essential for him to stop sometime for various reasons he may have to alight from a vehicle or pick up a friend, collect certain articles or unload goods or has to take some rest after a long and strenuous journey. What is required of him is that he should not create an unreasonable obstruction that may inconvenience other persons having similar right to pass; he should not make excessive use of the road to the prejudice of the other. Liberty of an individual comes to an end where the liberty of another commences. Subject to this a member of the public is entitled to legitimate user of the road other than actually passing or re-passing through it.

So far as right of a hawker to transact business while going from place to place is concerned, it has been admittedly recognised for a long period. Of course, that also is subject to proper regulation in the interest of general convenience of the public including health and security considerations. What about the right to squat on the side for engaging in trading business? As was stated by this court in [Bombay Hawkers' Union and Others Vs. Bombay Municipal Corporation and Others](#), the public streets by their nomenclature and definition are meant for the use of the general public they are not laid to facilitate the carrying on of private business. If hawkers were to be conceded the right churned by them they could hold the society to ransom by squatting on the busy thoroughfares, thereby paralysing all civic life. This is one side of the picture. On the other hand, the right if properly regulated according to the exigency of the circumstances, the small traders on the aid, walks can considerably add to the comfort and convenience of general public, by making available ordinary articles of every day use for a comparatively lesser price. An ordinary person not very affluent, while hurrying towards his home after day's work can pick up these articles without going out of his way to find a regular market. If the circumstances are appropriate and a small trader can do same business for personal gain on the pavement to the advantage of the general public and without any discomfort or annoyance to the others we do not see any objection to his carrying on the business. Appreciating this analogy the municipalities of different cities and towns in the country have been allowing such traders. The right to carry on trade or business mentioned in Article 19(1)(g) of the Constitution, on street pavements, if properly regulated cannot be denied on the ground that the streets are meant exclusively for passing or re-passing and for no other use. Proper regulation is however a necessary condition as otherwise the very object of laying out roads- to facilitate traffic-may be defeated. Allowing the right to trade without appropriate control is likely to lead to unhealthy competition and quarrel between the traders and traveling public and sometimes amongst the traders themselves

resulting in chaos. The right is subject to reasonable restrictions under clause (6) of Article 19. If the matter is examined in this light it will appear that the principal stated in [Saghir Ahmad Vs. The State of U.P. and Others](#), in connection with transport business applies to the hawkers case also. The proposition that all streets and roads in India vest in the State but that the State holds them as trustees on behalf of the public and the members of the public are entitled as beneficiaries to use them as a matter of right and that this right is limited only by the similar rights possessed by every other citizen to use the pathways, and further that the State as trustee is entitled to impose all necessary limitations on the character and extent of the user should be treated as of universal application". "Street trading being a fundamental right has to be made available to the citizens object to Article 19(6) of the Constitution. It is within the domain of State to make any 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 Article 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.

7. From the minutes of the proceedings of the 26th meeting of the Municipal Consultative Committee of the Corporation of Calcutta held on May 23, 1989 it appears that the said Committee had considered the problem of unauthorised encroachment on footpath carried away by hawkers, etc. and on consideration of the entire matter, the said committee inter alia made certain suggestions. These suggestions it appears that, had been given by the said Committee taken in consideration as per the judgment of the Supreme Court and some of the suggestions were about the areas and zones or footpaths which would be attractive for hawker and footpath business and to demarcate the authorised zones for such business and also to remove others beyond authorised zones and to push them in new authorised zones. Further suggested that the Municipality should collect trade fee from each of the hawkers or stall owners on daily basis as car parking fees.

8. It does not appear that on the basis of the said recommendations and suggestions decision had been taken by the Municipal Corporation. Then again, the matter was considered by a Committee on street food situation in Calcutta and that the said Committee submitted its report after considering the views of eminent persons in the field including the Mayor of the City of Calcutta, the then Commissioner of Police, as also the Chief FAO in India and Bhutan.

9, In view of the principles of law as emerged from several decisions of the Supreme Court and of this court it is clear that the hawkers have no right whatsoever to make

any permanent or temporary structures and/ or sheds for the purpose of carrying on their business from a particular place under the Municipal authority though they have not granted any permission not they have any jurisdiction under the law to grant such permission as the Municipal authority being the trustees of this public properties are bound to keep the same and maintain the same for the benefit of the general public at large but it is an unfortunate state of affairs that for several years both the Municipal authorities and the State Government kept their eyes shut to these state of affairs so long.

10. It is true that the hawkers squatted on footpath made construction and carrying on business and court can take judicial notice that some of them were coming their livelihoods and that this was the only means of livelihood. Inaction on the part of the State machineries as well as Municipal authorities in this behalf had generated hope and expectation in the minds of the hawkers that they would be allowed to continue there in that fashion form in future. Unfortunately inaction or failure to discharge statutory duties do not create my right in favour of the hawkers and/or squatters to construct the stalls and structures on the footpath and continue their business from there.

11. Mr. Naranarayan Gooptu, learned counsel, appearing on behalf of the State submitted that hawkers have no right legal or fundamental right to carry on business to a particular place and that no notice whatsoever is required to be served upon them before they are forcibly evicted and removed in view of the provision of Section 372 of the Calcutta Municipal Corporation Act, wherein power has been conferred upon the Municipal Commissioner to remove any hawker and/or goods or obstruction and/or structure made illegally without notice. In this appeal we are not concerned about the course of action taken or not taken by the Municipal authorities, but we are on a broad question that is required to be considered in the interest of general public as well as in the interest of these hawkers.

12. It is now firmly established principle that principles of fairness and reasonableness in State action is imperative but unfortunately the petitioners complained before this court that in some part of the City of Calcutta by using bulldozer at mid-nights deploying thousands-of hundreds of police force, the structures were demolished and their goods were removed. Principles of fairness requires that the State to take in a manner which is constituent with the principles of reasonableness and the principles of fairness to the strike a balance between the rights of the State and the rights of the hawkers.

13, We are informed by the learned Advocate General that in terms of the order passed by the Hon"ble Justice V.K. Gupta, in another writ application State has furnished report with regard to the scheme of rehabilitation which the State intends to take in this behalf and that there should not be any inconsistent view expressed by different Benches of this court. Mr. Advocate General also submitted that it could not be made a pre-condition of the hawkers that they could not be evicted unless

alternative accommodations are provided thereof.

14. Mr. A.K. Panja learned counsel, appearing on behalf of the appellants/petitioners had at the very outset fairly submitted that the hawkers have no legal right or fundamental right in this regard, but they were allowed to continue for long which generated legitimate expectation that they would be allowed to continue them as before and that if they are evicted they should be provided with alternative accommodations so that they can earn their livelihoods otherwise thousands of hawkers would become jobless and they have to face starvation and the concept of social and economic Justice would become mere lip service to them. Mr. Panja also submitted that before any step is taken to evict them the State Government should have thought of and prepare scheme for rehabilitation, but up till now no effective steps had been taken by the State to mitigate the hardship of these hawkers. It was also submitted that the State Government must come forward with the assurance that the step should be taken within certain time but the talks for rehabilitation arose after the eviction process started and hawkers were made jobless. It was also submitted that this should not be the attitude of a welfare State.

15. After giving anxious consideration to the rival contentions of the parties and considering the decisions of the Supreme Court in *Sadan Singh's* cases as well as *Ahmedabad Municipal Corporation Case* and others, the following principles which have been laid down and which the court repeats and reiterates in this case.

(1) No one is entitled to construct or build any structure of any nature on the pavement and/or on the roads and that the stalls and structures which have been constructed should be removed but after giving at least 24 hours notice to the stall holders for removing their structures or goods therein by issue of a notice to the stall holders of particular footpaths or area. This may be done by issue of a general notice affixed on the area. If the stall holders do not remove the stalls in that event the same may be removed by the State and Municipal authorities in any manner they like, but before removal notice is required to be given thereof so that they may take away their property. For this purpose in addition to this notice, there should be an announcement in the area concerned where such an action should be taken for removal of the stalls built up by them on footpath. Announcement should be made through microphone by the police and Municipal authority so that this may be an additional safeguard in so far as getting notice for removal of stalls and structures that have been made on footpath or by the side on the road and no discrimination should be made between the hawkers of one area from the hawkers of other area. In such matters of removal of unauthorised stalls from footpath things should be made in such manner so that no discrimination or favoritism is shown to any area or group inasmuch as the people in general have legitimate expectation that when operation had been started by the State and Municipality the same should be executed in all areas and there should be no pick and choose policy. But for the purpose of convenience it may not be possible to take action at a time in respect of

the areas and for this purpose the authorities should declare a programme in advance that from areas to areas these operations would be undertaken so that everyone may know of the same.

(2) The hawkers have fundamental right to carry on trade or business of their choice but not to a on a particular spot or place and this fundamental right is subject to reasonable restriction impossible under Article 19(6) of the Constitution of India. The policy decision should be taken in this behalf by the State as to the articles which would be permitted to sell on the pavements as they are hawkers who are selling very costly luxury articles including sophisticated electronic good, imported or smuggled the State and the Municipal authority would he justified in not extending any benefit or right in favour of such hawkers and the rights and benefits that would be conferred by the State must be in favour of other hawkers dealing with other articles or things.

(3) The Municipality as a trustee on behalf of the public is entitled to impose all such limitations on the character and extent of the user as may be requisite for protecting the rights of the public generally.

(4) The public has a right to pass along the highway for the purpose of legitimate travel. This certainly does not mean that travelers have to be in perpetual motion and when he is in public street. It may be essential for him to stop sometime for various reasons he may have to alight from a vehicle and pick up friend and collect certain articles and unload goods or has to take some rest after a long and strenuous journey.

(5) What is required of him that he should not create any unreasonable obstruction that may cause inconvenience to other persons having similar right to pass he should not make excessive use of rights to the prejudice of others. Liberty of an individual comes to an end when the liberty of another commences.

(6) Regarding the right of a hawker to transact business while going from place to place is concerned it has been admittedly recognised for a long period. Of course that also is subject to proper regulation in the interest of general convenience of the public including health and security considerations.

(7) With regard to the right to hawk or squat on the roadside for engaging in trading business is concerned the right should be properly regulated according to the exigencies of the circumstances, small traders on the side walks can suitably add to the comfort and convenience of the general public by making available ordinary articles of everyday use, for a comparatively lesser price. An ordinary person not very affluent while hurrying towards his home after day's work can pick up these articles without going out of his way to find out a regular market. If the circumstances are appropriate a small trader can do some business for personal gain on pavement to the advantage of general public and without any discomfort or annoyance to others there could not be any objection.

(8) Right to carry on trade or business mentioned in Article 19(1) (g) of the Constitution on street pavements. If properly regulated, cannot be denied on the ground that the streets are made exclusively for passing and reparsing and for no other use proper regulation is however necessary condition as otherwise the very object of laying out roads to facilitate traffic may be defeated.

(9) Allowing the right to trade of the hawkers without proper control is likely to lead to unhealthy competition and quarrel between the traders and traveling public that would result in chaos. Street trading being a fundamental right has to be made available to the citizens but subject to Article 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 on such right.

(10) It is for the Government to take reasonable steps to prevent movement of people from rural areas to urban areas. This is a matter of executive policy than for judicial fiat.

(11) Since citizens have no right to choose a particular place in any street for trading it is for the State and the Municipality to designate the streets and earmark the places from where street trading can be done. For this purpose the authorities should as per the recommendations made by the Committees referred to above examine the problem keeping in view the relevant considerations and declare street, or areas as "no hawking zone" and some as "hawking zone".

(12) On the question of rehabilitation as an immediate measure, land which has been vested to the States under the provision of Urban Land Ceiling Act, if found suitable may be used for the purpose of rehabilitation of these hawkers apart from other vacant and suitable lands as may be found by the State Government.

(13) The State and the Municipal authorities should make all efforts to see that no encroachment of public streets, footpaths and property is made. Public property is to be preserved and protected and it is a duty on the State or local bodies to ensure the same. Encroachers are no exception to constitutional right to judicial redressal.

(14) Everyone including the Government and the court in a Welfare State has to realise the hardship and many of the hawkers may die if they are prevented from carrying on business. The only solution for this is the adoption of the policy of full employment which even according to leading unemployment to some extent.

(15) The authorities in devising a scheme must endeavour to achieve the twin objects, viz, to preserve and maintain the beauty and grandeur of this historical City of Calcutta or other towns by way of reducing congestion on public streets by removing all encroachments which would cause obstruction to free flow of traffic and rehabilitate those unfortunate persons who were prevented from carrying on trade on the pavements or public streets. In the words of the Supreme Court, we repeat that we hope and trust that in framing schemes and/or administering the law

in force authority will keep in view the human considerations and State will do the needful in this aspect with reasonable time failing which it would be left to the court, to protect the rights of these citizens.

(16) Though the State is not under obligation to provide alternative accommodation before eviction and removal of the hawkers it is expected and desirable that the State being a welfare State should immediately formulate scheme and policies for the purpose of rehabilitation of the hawkers in such manner as the State may think fit and proper.

16. The Municipal authority as well as the State of West Bengal should immediately prepare a list of hawkers who had already been evicted and who are to be evicted from the City of Calcutta and for that purpose precaution should be taken so that a person who has not hawker and who was not evicted may not get any benefit of rehabilitation. For this purpose a list of hawkers evicted or would be evicted would be prepared and be hanged up in a conspicuous place of the streets from where hawkers were evicted and also to be served upon the respective hawkers' union for their objections for wrongful exclusion of any bonafides hawkers and before finalising the list objection should be considered and if necessary matter should be enquired in details so that the hawkers who were genuine and who were actually evicted should only get the benefit of rehabilitation under the scheme that the State Government may ultimately frame and fictitious persons could not claim any benefit for rehabilitation or get any benefit by any means whatsoever. For this purpose the State Government may set up any committee for this preparing and finalising list in order to avoid any controversy, suspicion, and doubt in this behalf.

17. Accordingly, on the above terms we dispose of the application for stay and the appeal treating the same as on day's list.

As a matter of great public importance and on the prayer of the learned counsel for the parties, let a plain copy of the operative portion of the judgment delivered today duly countersigned by the Assistant Registrar (court) be given to the learned counsel for the Hawkers, State and Municipal authority.

Appeal disposed of.