

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE THE CHIEF JUSTICE MR.ASHOK BHUSHAN
&
THE HONOURABLE MR.JUSTICE A.M.SHAFFIQUE

MONDAY, THE 10TH DAY OF AUGUST 2015/19TH SRAVANA, 1937

WA.NO. 1665 OF 2015 () IN WP(C).16455/2015

AGAINST THE ORDER/JUDGMENT IN WP(C) 16455/2015
OF HIGH COURT OF KERALA DATED 06-07-2015

APPELLANT(S) /PETITIONER:

T.P.CHERIAN PHILIP AGED 52 YEARS
S/O. SCARIA PHILIP, THAKADIYAL HOUSE, BEE BEE LINE
KACHAPPILLY ROAD, VYTILA, PIN 682 019

BY ADV. SMT.T.B.MINI

RESPONDENT(S) /RESPONDENTS:

1. THE NATIONAL HIGHWAYS AUTHORITY OF INDIA
REPRESENTED BY ITS SECRETARY, 95 & 6 SECTOR-10
DWARAKA, NEW DELHI 110075

2. THE CORPORATION OF KOCHI,
REPRESENTED BY ITS SECRETARY, MAIN OFFICE, BOAT JETTY
ERNAKULAM, KOCHI-31

3. THE TOWN PLANNING OFFICER,
TOWN PLANNING DEPARTMENT
KOCHI CORPORATION MAIN OFFICE, BOAT JETTY, ERNAKULAM
KOCHI-31

R1 BY ADVOCATE SHRI THOMAS ANTONY
R2 & 3 BY SRI.BABU KARUKAPADATH,SC,COCHIN CORPORATION

THIS WRIT APPEAL HAVING BEEN FINALLY HEARD ON
31.07.2015, THE COURT ON 10-08-2015 DELIVERED THE FOLLOWING:

“C.R.”

ASHOK BHUSHAN, C.J.

and

A.M. SHAFFIQUE, J.

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W.A. No.1665 of 2015

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Dated this the 10th day of August, 2015

J U D G M E N T

Ashok Bhushan, C.J.

This Writ Appeal has been filed against the judgment dated 06.07.2015 in W.P(C) No.16455 of 2015 by which judgment the Writ Petition filed by the petitioner-appellant seeking a direction to the National Highways Authority of India not to evict the petitioner from the place where he is conducting night food shop has been disposed of.

2. Brief facts giving rise to the Writ Petition are: Petitioner is running a night food shop (Thattukada) on the National Highway-47. Petitioner claims that for carrying out night food shop he was granted licence by the Kochi Corporation. Petitioner also claims

registration certificate under the Food Safety and Standards Authority Act, 2006. Petitioner claims that he is carrying on business in a place where there is no traffic and in a place where the vehicles are parked. Officials of National Highways Authority directed the petitioner to remove his shop. Notice was issued to the petitioner on 11.02.2015 (Ext.R1(b)). Petitioner filed an application before the Kochi Corporation for relocating the bunk shop where the petitioner was carrying out the night food business. Corporation acknowledged the request of the petitioner for relocating the shop by letter dated 26.05.2015 and directed him to see the Departmental Head in the event reply is not received within 30 days. Petitioner submitted Exhibit P6, application on 26.05.2015 to the Kochi Corporation informing that the bunk shop allotted to the petitioner was at the property of the National Highway Authority which Authority has informed the petitioner to relocate

the bunk shop to any other place. Petitioner requested the Kochi Corporation to allow another place for relocating the bunk shop. Petitioner thereafter filed the Writ Petition praying for the following reliefs.

“i) To issue a writ of mandamus, order or direction directing the 1st respondent not to evict the petitioner from the place where he is conducting business as sanctioned by the Corporation of Kochi without permission from the Street Vending Committee.

ii) To issue a writ of mandamus, order or direction directing the 3rd respondent to allot the petitioner any other place to conduct the business by making necessary entries in the licence and sketch.

iii) To issue such other writ, order or direction which this Hon'ble Court may deem fit and proper in the facts and circumstances of the case.”

3. A statement was filed by the National Highways Authority in the Writ Petition. It is pleaded that petitioner is conducting the shop in the Highway area used as parking area. Vyttila is an important junction and is having heavy traffic. As per the

Notification of the Government of India dated 11.11.2003 issued under the National Highways Authority of India Act, 1988, Central Government had entrusted the stretches from 349.000 km to 358.750 km (Vytttila-Aroor Section) of NH-47 to National Highways Authority of India. The land forming part of the Highways is vested in the Central Government. As per Section 24 of the Control of National Highways (Land and Traffic) Act, 2002 no person shall occupy any highway land without obtaining prior permission in writing of the Highway Administration. It is stated that notice was issued to the petitioner to remove the encroachment on 11.02.2015. Petitioner had removed the encroachment by himself but after a few days he again put up the bunk shop in the same place and is continuing the business.

4. The learned Single Judge by judgment dated 06.07.2015 held that petitioner has no right to carry on

the bunk shop in the property of the National Highways Authority. Learned Single Judge further observed that if the petitioner seeks for a rehabilitation before the Corporation, the Corporation should consider the prayer. Licence issued by the Corporation for the bunk shop can be only in the property of the Corporation and not in the property of the National Highways Authority. With the above observations, learned Single Judge disposed of the Writ Petition. Petitioner, aggrieved by the said judgment, has come up in this Writ Appeal.

5. We have heard Shri T.B. Mini, learned counsel for the appellant, Shri Thomas Antony, learned counsel for respondent No.1 and Shri Babu Karukapadath, learned Standing Counsel for the Kochi Corporation.

6. Learned counsel for the appellant in support of the Writ Appeal contended that petitioner has right to carry on business on the National Highways he being a

street vendor within the meaning of Street Vendors (Protection of Livelihood and Regulation of Street Vending) Act, 2014 (hereinafter referred to as “the 2014 Act”). It is submitted that petitioner is fully covered by the definition of “street vendor” and “stationary vendor” under Section 2 of the 2014 Act. It is submitted that street vending can be regulated only as per the 2014 Act. It is only the Town Vending Committee which can relocate a street vendor. It is submitted that the Town Vending Committee having not taken any decision to relocate the petitioner, the petitioner cannot be asked to vacate from the place where he is carrying on night food business for the last 30 years. It is submitted that the petitioner has fundamental right under Article 19(1) (g) to carry on the business. Learned counsel for the petitioner also relied on the judgment of the Apex Court in **Sodan Singh v. New Delhi Municipal Committee** ([1989] 4 SCC 155).

7. Learned counsel appearing for the National Highways Authority refuting the submissions of the learned counsel for the petitioner contended that the provisions of the 2014 Act are not applicable on the National Highways. Under the 2014 Act it is not contemplated that street vending is allowed on the National Highway. It is submitted that the National Highways being vested in the Central Government and being managed by the National Highways Authority, without permission of the National Highways Authority no one can be allowed to carry on business on the land of the National Highways Authority. It is submitted that the permission granted by the Kochi Corporation cannot give any right to the petitioner to carry on business on the National Highways. Learned counsel for respondents 2 and 3 submitted that petitioner has already given application for relocation which shall be considered and appropriate decision will be taken by the

Corporation in that regard.

8. We have considered the submissions of learned counsel for the parties and perused records.

9. The following are the issues which arise for consideration in this appeal.

I. Whether the petitioner can claim right under the 2014 Act for street vending on the National Highways vested in the Central Government and managed by the National Highways Authority of India?

II. Whether petitioner's fundamental right guaranteed under Art.19(1)(g) of the Constitution of India to carry on business is interfered with by notices issued by the National Highways Authority directing removal of the petitioner from the National Highway?

10. Both the issues being interconnected, they are taken together. There is no dispute between the parties that petitioner has been carrying on night shop

business on NH-47 in the Vyttila-Aroor stretch. Petitioner also claimed permission from the Kochi Corporation to carry on business at Vyttila junction in the bunk shop allotted to him. Petitioner in the Writ Petition is claiming his right as street vendor/stationary vendor as contemplated in the 2014 Act. In so far as the right to carry on business by pavement hawkers, street vendors, etc., under Article 19(1)(g) of the Constitution of India, the issue has been long settled by several judgments of the Apex Court that right to transact business by going from place to place, i.e., hawking or vending is recognised subject to proper regulations. The Apex Court in **Sodan Singh's case** (supra) has laid down the following in paragraph 17:

“17. 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 road

side for engaging in trading business? As was stated by this Court in *Bombay Hawkers Union v. Bombay Municipal Corporation* 1985 (3) SCC 528 : (AIR 1985 SC 1206), 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 claimed 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 side 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 some 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 Art.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 repassing 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 traders and, travelling public and sometimes amongst the traders themselves resulting in chaos. The right is subject to reasonable restrictions under clause (6) of Art. 19. If the matter is examined in this light it will appear that the principle stated in Saghir Ahmad's case (AIR 1954 SC 728) in connection with transport business applies to the hawkers' case also. The proposition that all public streets and roads in India vest in the State but that the State holds them as trustee 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.

However, the Apex Court in the same judgment has further laid down that there cannot be a fundamental right of a citizen to occupy a particular place on the pavement where he can squat and engage in trading business. The following was laid down in paragraph 19.

“..... But can there be at all a fundamental right of a citizen to occupy a particular place on the pavement where

he can squat and engage in trading business? We have no hesitation in answering the issue against the petitioners. The petitioners do have the fundamental right to carry on a trade or business of their choice, but not to do so on a particular place. The position can be appreciated better in the light of two decisions of this Court in *Fertilizer Corporation Kamgar Union v. Union of India*, 1981 (2) SCR 52: (AIR 1981 SC 344) and *K. Rajendran v. State of Tamil Nadu* 1982 (3) SCR 628: (AIR 1982 SC 1107).”

Thus the petitioner's right to carry on business as guaranteed under Article 19(1)(g) cannot be denied. However, petitioner cannot claim any right to carry on business on a particular place situated on the National Highways where he claims to have been carrying on business for the last 30 years.

11. The main issue which has arisen in the Writ Appeal is as to whether the right granted under the 2014 Act can be claimed by a street vendor/stationary vendor on a National Highway.

12. The Parliament has enacted the National Highways Act, 1956 to provide for the declaration of

certain Highways to be National highways and for matter connected therewith. Section 4 provides that all National Highways shall vest in the Union. Another enactment enacted by the Parliament under entry 23 of the Union list of the 7th Schedule of the Constitution, viz., the National Highways Authority of India Act, 1988. Under Section 3, the Central Government constituted an authority, viz., National Highways Authority of India. Section 16 provides for functions of the Authority. Another enactment, viz., the Control of National Highways (Land and Traffic) Act, 2002 has been enacted by the Parliament to provide for control of land within the National Highways, right of way and traffic moving on the National Highways and also for the removal of the unauthorized occupation thereof. Under Section 3 the Central Government by Notification in the Official Gazette is empowered to establish Highway Administration. Chapter III contains the heading

“prevention of unauthorised occupation of highways land and their removal”. Under Section 23 Highway land is deemed to be the property of Central Government. Section 24 contains provision for prevention of occupation of highway land. Section 24 (1) and 24(2) are relevant and are quoted below:

“24. Prevention of occupation of highway land. –

(1) No persons shall occupy any highway land or discharge any material through drain on such land without obtaining prior permission, for such purpose in writing, of the Highway Administration or any officer authorised by such Administration in this behalf.

(2) The Highway Administration or the officer authorised under sub-section (1) may, on an application made by a person in this behalf and having regard to the safety and convenience of traffic, grant permission to such person –

i) to place a movable structure on the Highway in front of any building owned by him or to make a movable structure on support of such building and over the Highway, or

ii) to put up a temporary lawning or tent or other similar construction or a temporary stall or scaffolding on the

Highway, or

iii) to deposit or cause to be deposited, building materials, goods, for sale or other articles on any Highway, or

iv) to make a temporary excavation for carrying out any repairs or improvements to adjoining buildings, and such permission shall be granted subject to the conditions and on payment of the rent and other charges by issuing permit in the form as may be prescribed:

Provided that no such permission shall be valid beyond a period of one month at a time from the date on which the permission has been granted unless it is renewed by the Highway Administration or such officer on an application made by such person for the renewal of the permission.”

Section 26 provides for removal of unauthorised occupation. Section 26(1) provides as follows:

“26. Removal of unauthorised occupation. – (1)

Where the Highway Administration or the officer authorised by such administration in this behalf is of the opinion that it is necessary in the interest of traffic safety or convenience to cancel any permit issued under sub-section

(2) of section 24, it may, after recording the reasons in writing for doing so, cancel such permit and, thereupon, the

person to whom the permission was granted shall, within the period specified by an order made by the Highway Administration or such officer restore the portion of the Highway specified in the permit in such condition as it was immediately before the issuing of such permit and deliver the possession of such portion to the Highway Administration and in case such person fails to deliver such possession within such period, he shall be deemed to be in unauthorised occupation of highway land for the purposes of this section and section 27."

From the above Parliamentary enactments it is clear that all affairs pertaining to the National Highways are to be conducted in accordance with the Parliamentary enactments as mentioned above. Without permission of the Highway Administration no one can occupy or use any land of Highway.

13. Whether the rights given to street vendors under the 2014 Act shall override the provisions of the above Parliamentary enactments and street vendor/stationary vendor can claim right of vending in accordance with the 2014 Act is the question to be

answered.

14. The 2014 Act has been enacted to protect the rights of urban street vendors and to regulate street vending activities and for matters connected therewith or incidental thereto. Section 2 is the definition clause. Section 2(c) defines local authority, Section 2(k) defines “stationary vendor”, Section 2(l) defines “street vendor”, Section 2(m) defines “Town Vending Committee” which are relevant and are quoted below:

“2(c) “local authority” means a Municipal Corporation or a Municipal Council or a Nagar Panchayat, by whatever name called, or the Cantonment Board, or as the case may be, a civil area committee appointed under section 47 of the Cantonment Act, 2006 or such other body entitled to function as a local authority in any city or town to provide civic services and regulate street vending and includes the “planning authority” which regulates the land use in that city or town;

2(k) “stationary vendors” means street vendors who carry out vending activities on regular basis at a specific location;

2(l) “street vendor” means a person engaged in vending

of articles, goods, wares, food items or merchandise of everyday use or offering services to the general public, in a street, lane, side walk, footpath, pavement, public park or any other public place or private area, from a temporary built up structure or by moving from place to place and includes hawker, peddler, squatter and all other synonymous terms which may be local or region specific; and the words “street vending” with their grammatical variations and cognate expressions, shall be construed accordingly;

2(m) “Town Vending Committee” means the body constituted by the appropriate Government under section 22.”

The Town Vending Committee which is entrusted with the various functions regarding street vendors/stationary vendors including the relocation is constituted under Section 22. Section 21, 22(1) and 22 (2) which are relevant are quoted below:

“**21.** (1) Every local authority shall, in consultation with the planning authority and on the recommendations of the Town Vending Committee, once in every five years, prepare a plan to promote the vocation of street vendors covering the matters contained in the First Schedule.

(2) The plan for street vending prepared by the local

authority shall be submitted to the appropriate Government for approval and that Government shall, before notifying the plan, determine the norms applicable to the street vendors.

22. (1) The appropriate Government may, by rules made in this behalf, provide for the term and the manner of constituting a Town Vending Committee in each local authority:

Provided that the appropriate Government may, if considers necessary, provide for constitution of more than one Town Vending Committee, or a Town Vending Committee for each zone or ward, in each local authority.

(2) Each Town Vending Committee shall consist of:—

(a) Municipal Commissioner or Chief Executive Officer, as the case may be, who shall be the Chairperson; and

(b) such number of other members as may be prescribed, to be nominated by the appropriate Government, representing the local authority, medical officer of the local authority, the planning authority, traffic police, police, association of street vendors, market associations, traders associations, non-governmental organisations, community based organisations, resident welfare associations, banks and such other interests as it deems proper;

(c) the number of members nominated to represent the

non-governmental organisations and the community based organisations shall not be less than ten per cent.;

(d) the number of members representing the street vendors shall not be less than forty per cent. who shall be elected by the street vendors themselves in such manner as may be prescribed:

Provided that one-third of members representing the street vendors shall be from amongst women vendors:

Provided further that due representation shall be given to the Scheduled Castes, the Scheduled Tribes, Other Backward Classes, minorities and persons with disabilities from amongst the members representing street vendors.

“Vending Zone” is defined in Section 2(n) which is to the following effect:

“2(n) “vending zone” means an area or a place or a location designated as such by the local authority, on the recommendations of the Town Vending Committee, for the specific use by street vendors for street vending and includes footpath, side walk, pavement, embankment, portions of a street, waiting area for public or any such place considered suitable for vending activities and providing services to the general public.”

Section 3 provides for survey of street vendors by the

Town Vending Committee. Section 4 deals with the issue of certificate of vending. Section 12 deals with the rights of street vendors and Section 18 deals with relocation and eviction of street vendors.

15. The Scheme of the 2014 Act as is delineated by the different provisions quoted above indicate that in the definition of local authority defined under Section 2 (c), National Highways Authority cannot be included. The definition is not inclusive definition but an exclusive definition which begins with the words 'local authority means...' The Town Vending Committee is to be constituted in each local authority. Thus the area of jurisdiction of the Town Vending Committee where right to the street vendors are to be given are areas which are within the jurisdiction of the local authority.

16. At the time of enactment of the 2014 Act, the Parliament was well aware of the earlier enactments pertaining to National Highways as noted

above. Had the Parliament intended to give right of street vending on the National Highways, the 2014 Act ought to have given any indication or included National Highways Authority also. The definition of street vendors as given in Section 2(l) also indicate that street vendor has been defined in reference to a street, lane, side walk, footpath, pavement, public park or any other public place or private area, from a temporary built up structure or by moving from place to place..... There is no indication that the definition included a street vendor even also on highway.

17. Right to street vendors have been given in vending zone in the local authority to render services to public and rights of street vendors have been recognised on such a street, lane, side walk, footpath, pavement, public park, etc., where such activities can be easily without any hindrance can be carried out. The 2014 Act does not contemplate any such street vending

on the National Highway. National Highways are being used for passing of vehicles from one place to other including long distance. As noted above, provisions of the 2002 Act indicate that for occupation or use of any part of National Highways permission of the Highway Authority is required. Without permission of the Highway Authority no one can use any part of the National Highways. Present is a case where petitioner claim carrying on business with the permission of the the Kochi Corporation. The place where the petitioner carries business being part of National Highways, no permission can be granted by the Kochi Corporation to the petitioner to carry on business in the National Highways.

18. The learned counsel for the petitioner referred to Section 33 of the 2014 Act in support of her submission that provisions of the 2014 Act shall override the provisions of the 1956 Act, the 1988 Act

and the 2002 Act supra. Section 33 of the 2014 Act provides;

“33. The provisions of this Act shall have effect notwithstanding anything inconsistent therein contained in any other law for the time being in force or in any instrument having effect by virtue of any law other than this Act.”

19. The key words in Section 33 are “..notwithstanding anything inconsistent therein contained in any other law..” Thus the overriding effect to the 2014 Act is given if there is anything “inconsistent” in any other law. There is nothing inconsistent in 1956 Act, 1988 Act and 2002 Act to the provisions of the 2014 Act. The provisions relating to National Highways and that of the 2014 Act operate in different fields and there is no inconsistency, hence Section 33 of the 2014 Act has no application. Thus it is held that the provisions of the 2014 Act do not override the provisions of 1956 Act, 1988 Act and 2002 Act.

20. We do not find any error in the notice issued

by the National Highways Authority directing the petitioner to vacate the premises. The learned Single Judge did not commit any error in disposing of the Writ Petition observing that petitioner may pursue his remedy before the Kochi Corporation for relocation of his bunk shop to any other place except the area from where the petitioner is asked to vacate. Petitioner can very well pursue his remedy for relocation before the Corporation as permitted by the learned Single Judge. We do not find any error in the judgment of the learned Single Judge warranting interference in this appeal.

Writ Appeal is dismissed.

**ASHOK BHUSHAN,
CHIEF JUSTICE.**

**A.M. SHAFFIQUE,
JUDGE.**