

(1990) 07 KAR CK 0056
In the Karnataka High Court
Case No : Writ Appeal No. 1338 of 1986

State of Karnataka and another

APPELLANT

Vs

Javeed Hyder

RESPONDENT

Date of Decision : 23-07-1990

Acts Referred:

Constitution of India, 1950 — Article 19 (1) (g), 301
Karnataka Cinemas (Regulation) Rules, 1971 — Rule 111GA

Citation : AIR 1991 Kar 235 : (1990) ILR (Kar) 2434 : (1990) 2 KarLJ 103

Hon'ble Judges : S. Mohan, C.J;N.Y. Hanumanthappa, J

Bench : Division Bench

Advocate : S.R. Nayak, Govt, for the Appellant; B.G. Sridharan, for the Respondent

Judgement

S. Mohan, C. J.

1. The facts leading to this appeal are as follows :

The respondent (Javeed Hyder) made an application on or about 23-12-1977 for grant of No Objection Certificate for locating a semi-permanent cinema in Kolar Town. The said application was made before the District Magistrate, Kolar District, Kolar. The substance of the said application was notified. Representations and objections were called for from all the concerned including the members of the public. Reports from the concerned officers were also sought. Apprehending that the District Magistrate, Kolar, would enforce R. 111G of the Karnataka Cinemas (Regulation) Rules, 1971, (for short "the Rules"), framed under S. 19 of the Karnataka Cinemas (Regulation) Act, 1964, (for short "the Act"), the respondent filed Writ Petition No. 8086/78 challenging the Constitutional validity of the said Rule. The application, however, was rejected by application of R. 111G on 3-4-1980.

The respondent contended that the said rule was not to promote the object of the Act and therefore it was ultra vires and beyond the rule making power under

Sec. 19 of the Act. It was also contended that that rule was violative of Arts. 14 and 19(1)(g) of the fundamental rights guaranteed to him under the Constitution.

The writ petition came up before Putta-swamy, J. About the vires of the Act, he rejected the contention of the respondent. However, he held that cl. (a) of R. 111G of the Rules, in so far as it prevented the respondent from establishing a semi-permanent cinema if the population is more than 50,000, would be bad. He was of the view that the reasoning which prevailed the learned Judges in *Sujatha Touring Talkies and Others Vs. State of Karnataka and Others*, in striking down R. 107(1)(b) of the Rules, would equally apply to the present case. Accordingly, he struck down R. 111G(a) of the Rules and quashed the Endorsement dt. 3-4-1980. In this view, he issued a direction to restore the application of the respondent for grant of No Objection Certificate for locating a semi permanent cinema in Kolar Town and to dispose of the same without reference to the said rule. Aggrieved by the judgment of the learned single Judge the State of Karnataka has preferred this appeal.

2. The learned Government Advocate submits that first and foremost this is a case of regulation regulating the conduct of the business with reference to location of cinema houses. With regard to such location if the policy of the Government is to prevent the location of semi-permanent cinema where the population exceeds 50,000 it cannot be held to be an unreasonable regulation. This is because, the question whether a particular regulation is founded on the policy conceived in the interest of public health and competition in the business etc. There is a good deal of difference between a restriction and a regulation. In the case of regulation what has to be looked at is, does it in the guise of regulation prohibit the business altogether? On the contrary, if it is a case of restriction, then alone it has to be found out whether it is reasonable or not.

` Art. 19(1)(g) of the Constitution confers the fundamental right to carry on any occupation, trade or business. With regard to such occupation, trade or business, if any restriction is imposed, that has to be tested on the touchstone of reasonableness. Therefore, the considerations that prevail with regard to the restrictions cannot be applied eo instanti to regulations. The learned Judge had approached the matter as if this particular rule restricts the establishment of a semi-permanent cinema if the population is more than 50,000 and thereby offends the fundamental right to carry on business of exhibition of cinema. It is submitted that the proper way to approach the matter is, where the rule merely regulates the location of a semi-permanent cinema in towns where the population is below 50,000, it does not altogether restrict the fundamental right of carrying on business in exhibition of cinema. In other words, if a town has a population of more than 50,000 and if it could admit a permanent cinema, there is no justification for insisting on the location of a semi-permanent cinema. It is not open to the respondent to say that even though the population is more he would insist on the establishment of a semi-permanent cinema disregarding of this regulation and on that basis it is not open to him to contend that he will

exercise his fundamental right only in the manner he conceives best for him. That is precisely what is urged before the learned single Judge which found acceptance at his hands.

In *State of Karnataka Vs. Sri Laxmi Touring Talkies and Others*, the question arose whether R. 107(1)(b) of the Rules as it stood then was valid or not. That rule placed a restriction with reference to grant of licence for a touring cinema in towns or cities having a population of 25,000 or more wherein such a location was prohibited. A Full Bench of this Court upheld the said rule, stating that the Act was intended to regulate and not to prohibit or discourage any one of the said cinemas, and the rule in question does not prohibit touring cinemas from exhibiting cinematograph but only carves out places or localities for exhibition perhaps having regard to the element of mobility and the smallness of investments involved. In so doing it dissented from the ruling in *Sri Laxmi Touring Talkies and Others Vs. The State of Karnataka and Others*, The same principles must be held to be applicable to this case.

In *Minerva Talkies, Bangalore and Others Vs. State of Karnataka and Others*, and in *Narendra Kumar and Others Vs. The Union of India (UOI) and Others*, the restriction conceived in the interest of public was upheld. In *T.B. Ibrahim Vs. Regional Transport Authority, Tanjore*, it was held at page 82 that there is no fundamental right in a citizen to carry on business wherever he chooses and his right must be subject to any reasonable restriction imposed by the executive authority in the interest of public convenience. The same principle must be held to be applicable here.

For all these reasons it is submitted that the order of the learned single Judge cannot be held to be correct and therefore the appellants are entitled to succeed.

3. In supporting the judgment of the learned single Judge, the learned counsel for the respondent Sri B. G. Sridharan submits that the right to carry on cinematograph business is a fundamental right guaranteed under Art, 19(1)(g) of the Constitution. This is a case in which the respondent is prohibited from locating a semi-permanent cinema in a town in which the population is more than 50,000. By such an unreasonable restriction his fundamental right cannot be curtailed. Where, therefore, the restriction with reference to location of a semi-permanent cinema is based on population it cannot but be an unreasonable restriction. The reasoning which prevailed in *Sujatha Touring Talkies and Others Vs. State of Karnataka and Others*, in striking down R. 107(1)(b) of the Rules as violative of Arts. 14 and 19 of the Constitution, would squarely apply to this case. No doubt that rule as came up for decision in that case is no longer in vogue, yet the reasoning would squarely apply.

In *Narendra Kumar and Others Vs. The Union of India (UOI) and Others*, it was held that if a restriction cast by law is more than was necessary in the interest of general public it would be bad. The same is the position here, and therefore there is no scope for interference with the judgment of the learned single Judge.

4. Having regard to the above arguments, the only point that arises for consideration is whether R. 111G of the Rules is violative of Art. 19(1)(g) of the Constitution. This rule has been framed under S. 19(2)(d) of the Act. The object of the Act is to provide for regulating exhibition by means of cinematographs and the licensing of places in which cinematograph films are exhibited in the State of Karnataka. Sec. 4 of the Act states that save as otherwise provided in the Act, no person shall give an exhibition by means of a cinematograph elsewhere than in a place licensed under this Act or otherwise than in compliance with any conditions and restrictions imposed by such licence. Sec. 5 insists upon an application for a licence on which the licensing authority after consulting such authorities as may be prescribed may subject to such conditions and restrictions as it may determine grant or refuse the licence. While considering such an application, as to what are the matters to be taken into consideration are talked of under Sec. 6 which lays stress that the licensing authority shall have regard to (a) the interest of the public generally, (b) the suitability of the place where the cinematograph exhibitions are proposed to be given, (c) the adequacy of existing places for the exhibition of cinematograph films in the locality, and (d) the benefit to any particular locality or localities to be afforded by the opening of a new place of cinematograph exhibition. It also further that the licensing authority shall also take into consideration any representations made by persons already giving cinematograph exhibitions in or near the proposed locality or by any local authority or police authority within whose jurisdiction the place proposed to be licensed is situated or by any association interested in the giving of cinematograph exhibition. Therefore the legislature clearly intended that there must be regulation of cinematograph exhibition at suitable places in different locality or localities. Such regulations must have regard to the interests of the public generally and the benefit to any particular locality or localities.

5. The Act, by itself, does not classify the cinemas into various categories. For finding out as to what are the categories, one has to look at the Rules. There are four categories of cinemas that are contemplated: (i) Permanent Cinemas, (ii) Touring Cinemas, (iii) Drive-in-Cinemas and (iv) Semi-permanent Cinemas.

Part II, Chapter IV containing Rules 25 to 29 deal with permanent cinemas and approval of location of permanent cinemas.

Touring Cinemas are covered by Part IV, Chapter XII, Rules 88 to 111.

Drive in Cinemas are covered by Part IVA Chapter XIIA, Rules 111A to 111D.

Then comes Part IVB, Chapter XIIB, Rules 111E to 111QB dealing with semi permanent cinemas.

In so far as we are concerned with the validity of Rule 111G(a) the vires of which having been upheld, we will extract the said Rule:

"111G. Restrictions on the grant of No Objection Certificates for location of semi permanent Theatres :

No Objection Certificates for the location of semi-permanent cinema shall not be granted

(a) In towns and cities the population of which is 50,000 or above;

xxx xxx xxx"

It cannot be gainsaid that the right to operate a cinema is a fundamental right, vide the Division Bench decision in *S. R. Salimath v. Dist. Magistrate* (1965) 1 Mys LJ 337 in which it was held :

"It must be borne in mind that the right to operate a cinema is a fundamental right guaranteed under Art. 19(1)(g) of the Constitution. All that the law can do is to impose reasonable restrictions on that right."

However, the question is whether the above rule in so far as it does not allow the location of a semi-permanent cinema in a town or a city where the population is 50,000 and above, as a regulation (emphasis supplied) is valid or not? In the case of regulation, we are of the view that the proper approach should be as laid down by Subba Rao, J. as he then was, in *The Automobile Transport (Rajasthan) Ltd. Vs. The State of Rajasthan and Others*, In that case, the question was whether regulatory measures or compensatory taxes would constitute restrictions on freedom of trade. In paragraph 35 it was stated as follows: --

"35. The next question is, what is the content of the concept of freedom? The word "freedom" is not capable of precise definition, but it can be stated what would infringe or detract from the said freedom. Before a particular law can be said to infringe the said freedom, it must be ascertained whether the impugned impeding the free movement of trade or only as a regulation facilitating the same. Restrictions obstruct the freedom, whereas regulations promote it. Police regulations, though they may superficially appear to restrict the freedom of movement, in fact provide the necessary conditions for the free movement. Regulations such as provisions for lighting, speed, good condition of vehicles, timings, rule of the road and similar others really facilitate the freedom of movement rather than retard it. So too, licensing system with compensatory fees would not be restrictions but regulatory provisions; for without it, the necessary lines of communication such as roads, waterways, and airways cannot effectively be maintained and the freedom declared may in practice turn out to be an empty one. So too, regulations providing for necessary services to enable the free movement of traffic, whether charged or not, cannot also be described as restrictions impeding the freedom. To say all these is not to say that every provision couched in the form of regulation but in effect and substance a restriction can pass off as a permissible regulation. It is for the Court in a given case to decide whether a provision purporting to regulate trade is, in fact, a restriction on freedom, Tf it be a colourable exercise of power and the regulatory provision in fact is a restriction, unless the said provision is one of the permissible restrictions under the succeeding articles, it would be struck down. This view is consistent with the principles laid down by the Australian High Court

and the Privy Council in the context of interpretation of the words "absolutely free" in S. 92 of the Commonwealth of Australia Constitution Act which is more emphatic than the word "free" in Art. 301 of our Constitution."

No doubt these observations were made with reference to Art. 301 of the Constitution. But yet the distinction between a regulation and a restriction having been succinctly brought out in this case we thought it would be useful to refer to the same.

Again in *Manick Chand Pal and Others Vs. Union of India (UOI) and Others*, it was held that the challenge to Sec. 27(7)(b) of the Gold Control Act in furtherance whereof the facility of effecting peripatetic sales of gold ornaments through travelling salesman in various parts of the country was withdrawn, must fail. Sec. 27(7)(b) which confines a licensed dealer to carry on business as such dealer to the premises specified in his licence, being regulatory in character, does not violate any of his rights under the Constitution.

It is in this background, we propose to approach the matter. In *State of Karnataka Vs. Sri Laxmi Touring Talkies and Others*, the validity of the then R. 107(1)(b) of the Rules which prohibited grant of licence to a touring cinema in a town or city having population of 25,000 or more, came up for consideration. Jagannatha Shetty, J. as he then was, held at page 1201 as follows :

"The grant of licence to a touring cinema in towns and cities having a population of 25000 and more is prohibited by the impugned rule. Likewise, the grant of NOC for location of semi-permanent cinema in towns and cities the population of which is 50,000 or above is prohibited by R. 111-G of the Rules. No such restriction, however, has been imposed for location of any permanent cinema or drive in cinema. This is quite understandable. The people are not prevented from constructing permanent cinema or drive in cinema in any place. But who will go to small towns of rupees in the construction of permanent cinemas? It is of common cinema requires a substantial capital and certainly demands a corresponding return. Such cinemas quite naturally are clustered in cities or in urban areas. To deny them licence in cities and ask them to go to villages where there is hardly any scope for such large investment may be prima facie unreasonable."

Again in para 13 at page 1204 it was held as follows:--

"Such being the facilities for touring cinemas, can it be said that a rule limiting its operation only in town or cities having less than 25,000 people is invalid or ultra vires of the Act? We do not think so. The Act does not provide for the classification and establishment of permanent cinema, drive in cinema, semi-permanent cinema and touring cinema. It is only under the rules framed under the Act that these four categories have been provided for. The classification of cinemas into the said four categories is not inconsistent with the purposes of the Act. No doubt, as observed in *Laxmi Touring Talkies* case, the Act is intended to regulate and not to prohibit or discourage any one of the said cinemas. But

asking touring cinemas to confine their cinematograph exhibitions in towns or cities having less than 25,000 population does not amount to prohibiting or discouraging the said cinemas. The rule in question does not prohibit touring cinemas from exhibiting cinematograph, but only carves out places or localities for exhibitions perhaps having regard to the element of mobility and the smallness of investments involved. The rule is evidently to carry out the purposes of the Act viz. to serve the interest of the public generally and to extend the benefit of cinematographs to places having less than 25000 population. With great deference, we dissent from the view taken on this question in *Laxmi Touring Talkies*'s case and hold that cl. (b) of sub-rule (1) of R. 107 is valid and intra vires of the Act."

From the above, it is clear the Act intends to regulate. It does not prohibit or discourage the location of cinemas. On the same reasoning as adopted by this Full Bench, by asking semi permanent cinemas to confine their cinematograph exhibition in towns or cities having a population of less than 50000, the rule by no means prohibits or discourages such cinemas. It does not prohibit at all, nor again does it interfere with the fundamental right of the respondent guaranteed under Art. 19(1)(g) of the Constitution. It merely says that a semi permanent cinema could be had in a place where the population is less than 50000. As is rightly urged on behalf of the appellants, the respondent cannot say that he would exercise his fundamental right in the way in which he would want disregardful of this regulation. This regulation is conceived in the interest of the public generally and it is a matter of policy. It is well settled law that no Court could ever question the wisdom of the policy, nor again we could subscribe to the argument of the learned counsel for the respondent that this regulation would amount to prohibition. His right to have a semi permanent cinema located in a town or city where the population is less than 50,000 is still available. To put it in other words, if the State thinks that it would be in the interest of the public to provide for such a regulation, the proper approach, according to us, will be, does this regulation in the guise of regulating prohibit altogether the location of a semi permanent cinema? If it does not, the question whether it is reasonable or not, need not be gone into because it is a matter of policy. Such a policy is dictated by the interests of the cinema going public.

We are afraid, the learned single Judge had assumed that the respondent has a fundamental right to have a semi permanent cinema located in a place of his choice and when the rule interferes with that choice it is violative of his fundamental right. With great respect, this cannot be the correct way of approaching the rule. The case in point is the case of *T.B. Ibrahim Vs. Regional Transport Authority, Tanjore*, We will extract para 13 at pages 82 and 83 : --

"13. The next contention was that the order is repugnant to Art. 19(1)(g) of the Constitution, according to which all citizens must have the right to practise any profession or to carry on any occupation, trade or business. It cannot be denied that the appellant has not been prohibited from carrying on the business of

running a bus-stand. What has been prohibited is that the bus-stand existing on the particular site being unsuitable from the point of view of public convenience, it cannot be used for picking up or setting down passengers from that stand for out-stations journeys. But there is certainly no prohibition for the bus-stand being used otherwise for carrying passengers from the stand into the town, and vice versa. The restriction placed upon the use of the bus-stand for the purpose of picking up or setting down passengers to outward journeys cannot be considered to be an unreasonable restriction.

It may be that the appellant by reason of the shifting of the bus-stand has been deprived of the income he used to enjoy when the bus-stand was used for outward journeys from Tanjore, but that can be no ground for the contention that there has been an infringement of any fundamental right within the meaning of Art. 19(1)(g) of the Constitution. There is no fundamental debt in a citizen to carry on business wherever he chooses and his right must be subject to any reasonable restriction imposed by the executive authority in the interest of public convenience. The restriction may have the effect of eliminating the use to which the stand has been put hitherto but the restriction cannot be regarded as being unreasonable if the authority imposing such restriction had the power to do so. Whether the abolition of the stand was conducive to public convenience or not is a matter entirely for the Transport Authority to judge, and it is not open to the Court to substitute its own opinion for the opinion of the authority which is in the best position having regard to its knowledge of local conditions to appraise the situation."

This ruling fully supports the stand of the appellants.

6. With this, we pass on to the Full Bench Ruling relied on by the learned counsel for the respondent, in *Sujatha Touring Talkies and Others Vs. State of Karnataka and Others*, . In that case, the validity of R. 107(I)(b) of the Rules came up for consideration again. On a difference of opinion between the two learned Judges, the matter came to be referred to a third Judge viz. Rama Jois, J. The learned Judges having found that the decision of the Full Bench in *State of Karnataka Vs. Sri Laxmi Touring Talkies and Others*, holding R. 107 of the Rules as intra vires of the Act was binding on them, proceeded to examine the validity of the said Rule in the light of Arts. 14 and 19 of the Constitution. At pages 2521 and 2522 (of ILR) : (at Pp. 40 and 41 of AIR) it is observed as follows :

"78. I have carefully examined those files to the extent they relate to Rule 107. I find from such an examination, that the opinion formed by Government reflected in the Rule, is not based on any technical opinion or data or general or special survey of the fact situations in the State or of any particular places that can safely be taken as a guide for all other places in the State. The opinion formed by Government reflected in the Rule amended from time to time, is not also based on a conscientious evaluation of all the pros and cons and the interests of the general public.

79. On the necessity to avoid traffic congestions, fire hazards by providing reasonable distances from one cinema to another cinema, whether it be a permanent cinema or a luring cinema and a touring cinema contemplated by S. 19(2)(c) of the Act, there cannot be two opinions. But, the real question is whether the restrictions and distances imposed by the Rule are reasonable and are conceived in the interests of the general public.

80. From the circumstances prevailing in our country in general and our State in particular, with which only this Court is concerned, I may not be far wrong in holding that great majority of touring cinemas are constructed with thatched sheds variety and they are more vulnerable to fire than all other types of sheds and buildings for which only a distance of 800 meters or half a mile is stipulated. But that distance doubles itself when it comes to a permanent cinema building which is less prone to fire hazards than a luring cinema of a thatched shed. The reason or basis for such doubling of the distance cannot be gathered from the rule, the return filed by the Respondents or the materials placed before Court. In my view, this apparent and real contradiction without any basis and rationale is plainly discriminatory and does not pass the twin tests of valid classification and suffers from patent arbitrariness and the same thus offends Art. 14 of the Constitution."

It is these observations which are pressed into service. With great respect, we are unable to accept this line of reasoning since as we slated above these are matters of policy. The correctness of such policy, as observed in T.B. Ibrahim Vs. Regional Transport Authority, Tanjore, , is not to be examined by Courts. However, in so far as we are not obliged to deal with such a situation here, we stop with it by stating that the ratio does not apply to the facts of this case.

The next case that is cited by the learned counsel for the respondent is Narendra Kumar and Others Vs. The Union of India (UOI) and Others, Under head-note (b) it is stated :--

"It is reasonable to think that the makers of the Constitution considered the word "restriction to be sufficiently wide to save laws inconsistent with Art. 19(1), or taking away the rights conferred by the Article, provided this inconsistency or taking away was reasonable in the interests of the different matters mentioned in the clause. There can be no doubt, therefore, that they intended the word "restriction" to include cases of prohibition also. The contention that a law prohibiting the exercise of a fundamental right is in no case saved cannot, therefore, be accepted.

It is undoubtedly correct, however, that when the restriction reaches the stage of prohibition, special care has to be taken by the Court to see that the test of reasonableness is satisfied. The greater the restriction, the more the need for strict scrutiny by the Court....."

We are of the view that these observations have no application to the facts of this case.

7. In conclusion, we hold R. 111G(a) does not prohibit the location of a semi-permanent cinema, but merely regulates the location of such cinemas to towns or cities where the population is above 50,000. This is because such a town or city having a population of 50,000 and above could admit a permanent cinema. If, therefore, such a permanent cinema could be located, why allow a semi-permanent cinema? This is a policy matter. The respondent cannot say that though the population is 50,000 and above "permit me to locate a semi-permanent cinema". He cannot be heard to contend so, on the lachrymose plea that his fundamental right under Art. 19(1)(g) of the Constitution is violated if he is not allowed to locate a semi-permanent cinema. Such a contention ignores the restriction conceived in public interest under the police powers of the State. Thus, we conclude that the appeal is entitled to succeed.

8. Accordingly, we allow this appeal, set aside the judgment of the learned single Judge and discharge the Rule. Counsel's fee Rs.500/-.

9. Appeal allowed.