

(2014) 09 DEL CK 0139

In the Delhi High Court

Case No : W.P.(C) 340/2014 and CM APPL. 668/2014

Dharam Chand

APPELLANT

Vs

Chairman New Delhi Municipal Council

RESPONDENT

Date of Decision : 22-09-2014

Acts Referred:

Constitution of India, 1950 — Article 12, 13, 14, 19, 19(1)

Citation : (2014) 09 DEL CK 0139

Hon'ble Judges : Manmohan, J

Bench : Single Bench

Advocate : Tripurari Ray, Advocate, Anil Kaushik and Rajinder Singh, Advocate for the Appellant; Ritu Bhardwaj, Advocate Kirtiman Singh, Advocate Waize Ali Noor, Advocate and Amiet Andley, Advocate for the Respondent

Final Decision : Dismissed

Judgement

Manmohan, J.—Present writ petition has been filed challenging the order dated 3rd December, 2013 issued by the Enforcement Department, New Delhi Municipal Council whereby it has been decided to relocate the petitioner from his existing site outside Supreme Court to a site near Gate of Baroda House adjacent to the existing stalls due to security reasons. The relevant portion of the impugned order is reproduced hereinbelow:-

The Hon"ble High Court in the case "Laxmi Narain Vs N.D.M.C. and Ors." have directed the local authorities to allot a fresh site to the petitioners within a period of six weeks from today who were squatting outside the Supreme Court of India and due to security reasons , they were removed from the said site. Now, it has been decided to relocate the following verified squatters from their existing sites to the following sites :-

(emphasis supplied)

2. Mr. Tripurari Ray, learned counsel for petitioner stated that petitioner had been allotted one stall bearing size 6" x 4", Opposite Supreme Court towards Bhagwan

Dass Road near Office Complex of Supreme Court Lawyers and Purana Quila Road Bungalows by the Thareja Committee vide letter dated 6th May, 1999. He submitted that the allotment was in accordance with Article 39(a) of the Constitution.

3. Mr. Ray further stated that distance between the Supreme Court and the kiosk of the petitioner is more than 100 mtrs. Consequently, according to Mr. Ray, kiosk of the petitioner could not be termed as a security hazard to the Supreme Court.

4. Mr. Ray submitted that the right of the petitioner to carry on his trade and occupation from the kiosk allotted to him by respondent-NDMC on the basis of a direction by Thareja Committee is protected under Article 19(1)(g) of the Constitution. He further submitted that the right of the petitioner could never be restricted by an executive order. According to him, the said right could be curtailed or taken away under Article 19(6) of the Constitution only by a law enacted under Article 13 of the Constitution.

5. In support of his submission, Mr. Ray relied upon a judgment of the Supreme Court in Kharak Singh Vs. The State of U.P. and Others, wherein it has been held as under:-

"Though learned counsel for the respondent started by attempting such a justification by invoking s. 12 of the Indian Police Act he gave this up and conceded that the regulations contained in Ch. XX had no such statutory basis but were merely executive or departmental instructions framed for the guidance of the police officers. They would not therefore be "a law" which the State is entitled to make under the relevant clauses 2 to 6 of Art. 19 in order to regulate or curtail fundamental rights guaranteed by the several sub- clauses of Art. 19(1); nor would the same be "a procedure established by law" within Art. 12."

6. Mr. Ray lastly contended that the order in Laxmi Narain Tiwari Vs. New Delhi Municipal Corporation, W.P.(C) 6876/2012, dated 12th December, 2012 had no bearing upon the present case.

7. On the other hand, Dr. Ritu Bhardwaj, learned counsel for respondent-NDMC stated that on 7th September, 2011, a meeting was called by Mr. Justice Altamas Kabir, Supreme Court of India immediately after the bomb blast outside Delhi High Court to review the security arrangements at the Supreme Court Complex. She further stated that in the said meeting with police officials, it was decided that vendors must not be allowed along the perimeter of the Supreme Court. She stated that petitioner's kiosk was deemed a security hazard for the Supreme Court and it was on this basis that direction was given to the respondent-NDMC vide letter dated 10th September, 2011.

8. On the Court asking the parties to show the terms and conditions on which the tehbazari / kiosk had been granted, learned counsel for respondent-NDMC had handed over a copy of the tehbazari permission dated 20th May, 1999 issued to

the petitioner. The relevant terms of the said tehbazari permission are reproduced hereinbelow:-

"1. Tehbazari permission shall be purely temporary and on month to month basis .

XXXX XXXX XXXX XXXX

7. The permittee shall vacate the site in a peaceful manner and without any murmur on cancellation of the permission so granted on account of violation of the terms and conditions of the grant of permission or any security reasons or any other circumstances justifying such action in public interest ."

(emphasis supplied)

9. In rejoinder, Mr. Tripurari Ray, learned counsel for petitioner challenged the legality and validity of the para 7 of letter dated 20th May, 1999 as arbitrary and unconscionable. According to him, the said para was in the nature of "Henry VIII Clause". In support of his submission, Mr. Ray relied upon a judgment of the Supreme Court in Delhi Transport Corporation Vs. D.T.C. Mazdoor Congress and Others, wherein it has been held as under:-

"200. This Court has observed in Central Inland Water Transport Corporation Ltd. and Anr. v. Brojo Nath Ganguly and Anr.. (supra)as under:-

.... Article 14 of the Constitution guarantees to all persons equality before the law and the equal protection of the laws. The principle deducible from the above discussions on this part of the case is in consonance with right and reason, intended to secure social and economic justice and conforms to the mandate of the great equality clause in Article 14. This principle is that the courts will not enforce and will, when called upon to do so, strike down an unfair and unreasonable contract, or an unfair and unreasonable clause in a contract. entered into between parties who are not equal in bargaining power It will apply to situations in which the weaker party is in a position in which he can obtain goods or services or means of livelihood only upon the terms imposed by the stronger party or go without them."

201. The Court has. therefore, the jurisdiction and power to strike or set aside the unfavourable terms in a contract of employment which purports to give effect to unconscionable bargain violating Art. 14 of the Constitution

202. Thus on a conspectus of the catena of cases decided by this Court the only conclusion follows is that Regulation 9(b) which confers powers on the authority to terminate the services of a permanent and confirmed employee by issuing a notice terminating the services or by making payment in lieu of notice without assigning any reasons in the order and without giving any opportunity of hearing to the employee before passing the impugned order is wholly arbitrary, uncanalised and unrestricted violating principles of natural justice as well as Article 14 of the Constitution. It has also been held consistently by this Court

that the Government carries on various trades and business activity through the instrumentality of the State such as Government Company or Public Corporations. Such Government Company or Public Corporation being State "instrumentalities are State within the meaning of Article 12 of the Constitution and as such they are subject to the observance of fundamental rights embodied in Part III as well as to conform to the directive principles in Part IV of the Constitution. In other words the Service Regulations or Rules framed by them are to be tested by the touchstone of Article 14 of Constitution. Furthermore, the procedure prescribed by their Rules or Regulations must be reasonable, fair and just and not arbitrary, fanciful and unjust. Regulation 9(b), therefore, confers unbridled, uncanalised and arbitrary power on the authority to terminate the services of a permanent employee without recording any reasons and without conforming to the principles of natural justice. There is no guideline in the Regulations or in the Act, as to when or in which cases and circumstances this power of termination by giving notice or pay in lieu of notice can be exercised. It is now well settled that the "audi alteram partem" rule which is essence, enforces the equality clause in Article 14 of the Constitution is applicable not only to quasi-judicial orders but to administrative orders affecting prejudicially the party-in-question unless the application of the rule has been expressly excluded by the Act or Regulation or Rule which is not the case here. Rules of natural justice do not supplant but supplement the Rules and Regulations. Moreover, the Rule of Law which permeates our Constitution demands that it has to be observed both substantially and procedurally. Considering from all aspects Regulation 9(b) is illegal and void as it is arbitrary, discriminatory and without any guidelines for exercise of the power. Rule of law posits that the power to be exercised in a manner which is just, fair and reasonable and not in an unreasonable, capricious or arbitrary manner leaving room for discrimination. Regulation 9(b) does not expressly exclude the application of the "audi alteram partem" rule and as such the order of termination of service of a permanent employee cannot be passed by simply issuing a month's notice under Regulation 9(b) or pay in lieu thereof without recording any reason in the order and without giving any hearing to the employee to controvert the allegation on the basis of which the purported order is made."

10. Having heard learned counsel for parties, this Court is constrained to observe that petitioner had deliberately suppressed the terms and conditions on which tehbazari permission had been granted by respondent-NDMC. It is unbelievable that petitioner did not have a copy of the same as security deposit and tehbazari monthly charges had been paid by the petitioner only in accordance with the said letter.

11. It is pertinent to mention that Section 388(D)(5) of the New Delhi Municipal Council Act, 1994 gives power to respondent-Council to impose terms and conditions while granting tehbazari. The said Section reads as under:-

"388. Power to make bye-laws-(1) Subjects to the provisions of this Act, the

Council may, in addition to any bye-laws which it is empowered to make by any other provision of this Act, make bye-laws to provide for all or any of the following matters, namely":-

xxxx xxxx xxxx xxxx

D. Bye-laws relating to streets

(5) the permission, regulation or prohibition or use or occupation of any street or place by it, itinerant vendors or hawkers or by any person for the sale of articles or the exercise of any calling or the setting up of any booth or stall and the fees chargeable for such occupation."

12. Further, the allotment of kiosk may be in accordance with Article 39(a) of the Constitution, but it does not mean that once the kiosk is allotted, it is for perpetuity and cannot be cancelled. In the opinion of this Court, the said right is not an absolute right and it can be cancelled for germane, legal and valid reasons.

13. It is settled law that the right of hawkers, kiosk-users and vendors by nature can never be absolute, but have to be limited and subservient to over all public interest. In Maharashtra Ekta Hawkers Union and Another Vs. Municipal Corporation, Greater Mumbai and Others, the Supreme Court has held as under:-

"7. In Maharashtra Ekta Hawkers Union v. Municipal Corporation, Greater Mumbai (supra), which was decided on 9.12.2003, a two Judge Bench referred to the judgments in Olga Tellis and Others Vs. Bombay Municipal Corporation and Others, , Sodan Singh v. New Delhi Municipal Committee (supra), the recommendations made by the Committee constituted pursuant to an earlier judgment and observed :-

10. The above authorities make it clear that the hawkers have a right under Article 19(1)(g) of the Constitution of India. This right however is subject to reasonable restriction under Article 19(6). Thus hawking may not be permitted where e.g. due to narrowness of road free flow of traffic or movement of pedestrians is hindered or where for security reasons an area is required to be kept free or near hospitals, places of worship etc. There is no fundamental right under Article 21 to carry on any hawking business. There is also no right to do hawking at any particular place. The authorities also recognize the fact that if properly regulated the small traders can considerably add to the convenience and comfort of the general public, by making available ordinary articles of everyday use for a comparatively lesser price. The scheme must keep in mind the above principles. So far as Mumbai is concerned the scheme must comply with the conditions laid down in the Bombay Hawkers' Union and Others Vs. Bombay Municipal Corporation and Others, . Those conditions have become final and there is no changed circumstance which necessitates any alteration .

The Court then enumerated the following restrictions and conditions subject to which the hawkers could do business in Mumbai :-

XXXX XXXX XXXX XXXX

(3) There should be no hawking within 100 metres from any place of worship, holy shrine, educational institutions and hospitals or within 150 metres from any municipal or other markets or from any railway station. There should be no hawking on footbridges and over bridges. Further, certain areas may be required to be kept free of hawkers for security reasons. However, outside places of worship hawkers can be permitted to sell items required by the devotees for offering to the deity or for placing in the place of worship e.g. flowers, sandalwood, candles, agarbathis, coconuts etc ."

(emphasis supplied)

14. The legal proposition put forward by learned counsel for petitioner with regard to Articles 19(1)(g) and 19(6) of the Constitution is unexceptionable. But the issue is, does the legal proposition advanced by the counsel for petitioner arise or apply in the facts and circumstances of the present case?

15. A perusal of the letter dated 20th May, 1999 reveals that the tehbazari permission granted by respondent-NDMC itself gave only a temporary and terminable right to trade. One must not forget that petitioner is not being evicted from his private property. Consequently, none of the submissions advanced by learned counsel for petitioner can enlarge or expand the right of petitioner.

16. This Court is further of the opinion that the terms and conditions imposed by respondent-NDMC are fair and reasonable. Paragraph 7 of the letter dated 20th May, 1999 is certainly not illegal or unconstitutional as contended by learned counsel for petitioner. Cancellation of kiosk on the ground of security and reason of public interest can never be said to be illegal or unconstitutional. After all, one must not forget that the decision to remove all squatters, vendors and kiosk owners was taken after the blast in Delhi High Court in a meeting attended by security experts. This Court is of the view that in security matters, it must defer to the wisdom and decision of the police. Consequently, the DTC judgment referred to by learned counsel for petitioner has no application to the present case.

17. This Court also finds that in present case, petitioner has been allotted an alternate site not very far away from the existing site. Consequently, it cannot be said that the petitioner's Fundamental Right under Article 19(1)(g) of the Constitution is violated.

18. In view of the aforesaid, present petition and application are dismissed but with no order as to costs.