
(1987) 10 GUJ CK 0001
In the Gujarat High Court

Nehru Marg Cabin Association

APPELLANT

Vs

Modasa Nagar Palika and Others

RESPONDENT

Date of Decision : 01-10-1987

Acts Referred:

Constitution of India, 1950 — Article 21, 21
Penal Code, 1860 (IPC) — Section 441

Citation : (1988) 1 GLR 441

Hon'ble Judges : A.P. Ravani, J

Bench : Single Bench

Judgement

A.P. Ravani, J.—In these four petitions in all 74 individual cabin-shop-owners are affected by the action of the respondents. According to the petitioners they have been removed from the place of their business otherwise than in accordance with law and in violation of their fundamental right to life under Article 21 of the Constitution of India. In Special Civil Application No. 4019 of 1987 an association called Nehru Marg Cabin Association has filed the petition in respect of 43 members belonging to their association. In other three petitions different individuals have filed the petitions. In all they are 31 in number. The petitioners have their cabins on different roads in the town of Modasa, district Sabrkantha. The petitioners felt aggrieved by the action of the respondent-Municipality and other respondents. Hence the petition. By interim relief, it was directed that the petitioners be not restrained from putting up their cabins and carrying on their business. at the places where they were carrying on the business immediately prior to their removal. The grievance of the petitioners is that they cannot be thrown away from the places of their business except in accordance with law and the minimum that is expected of the respondent-Authorities is to afford an opportunity of being heard to them before taking any precipitate action.

2. It appears that these cabin holders are carrying on their business on pavements or foot-paths for last about ten to fifteen years. May be that some of them might be carrying on their business for last few years only. But the fact remains that they are carrying on the business for quite some time. It is

nobody's case that they are doing any illegal activity, or that they are committing any crime. Since they are unable to afford good space in a marketing centre and since they want to live an honest living by putting their hard labour, they are doing the business in "kacha sheds" and on foot-paths. From the facts narrated in the petition it appears that they had been removed all of a sudden by employing police force and that too without giving any reasonable notice or time. In short the grievance of the petitioners is that when they are eking out their livelihood by pursuing honest way of life and so long as they do not cause any injury to others they should not be removed from the place of their business.

3. In respect of the refugees from Pakistan the Government has in fact issued a circular dated June 17, 1976. Therein directions to the local authorities have been given to the effect that without making alternative arrangements, these refugees who are carrying on their business in cabins and galas should not be removed. Some of the petitioners are in fact refugees and as averred in the petition they have been allotted the space by the local authorities on that basis only. Be that as it may. There is no reason why the same treatment should not be given by the Government to all the citizens. After forty years of partition of the country and migration by these people from across Pakistan border and their entry in this country, it would not be proper to call them refugees. Now they are also citizens of this country. If the Government has thought it fit not to remove these persons from the places of their business unless alternative arrangement is made, there is no reason why the same treatment should not be given to other citizens whose plight is in no way better than these people who have migrated from Pakistan. Therefore, all the cabin holders are similarly situated and all of them from one class only. Therefore, whether they are refugees from Pakistan or not all of them are required to be given similar treatment.

4. The question arises as to whether the petitioners who, according, to the respondents are trespassers, are entitled to be heard before they are removed from the places encroached upon by them. Be it noted that they have not encroached upon public places with an intention or object to "commit an offence, or intimidate, insult or annoy any persons". This is the gist of offence of criminal trespass u/s 441 of the Indian Penal Code. Therefore it is plain that they have not committed any criminal trespass. At the highest, all that may be alleged against these persons is that they have committed trespass which may amount to tort. However, the Law of Torts requires that though a trespasser may be evicted forcibly, the force used must be no greater than what is reasonable and appropriate to the occasion. One may here refer to the judgment of the Supreme Court in the case of *Olga Tellis and Others Vs. Bombay Municipal Corporation and Others*, . Therein the Supreme Court has approvingly quoted from Ramaswamy Iyer's "Law of Torts" 7th Edn., which reads as follows:

Trespasser should be asked and given a reasonable opportunity to depart before force is used to expel him.

Similar observations from other books have been extracted by the Supreme

Court which are to the effect that under the Law of Torts, necessity is a plausible defence, which enables a person to escape liability on the ground that the acts complained of are necessary to prevent greater damage, inter alia, to himself. Therefore, the Supreme Court has observed: "Here, as elsewhere in the Law of Torts, a balance has to be struck between competing sets of values...." In view of the aforesaid observations made by the Supreme Court it has got to be held that before evicting the petitioners the respondents ought to have afforded an opportunity of being heard to the petitioners.

5. While enforcing the law, the procedure that should be adopted by the respondent-Authorities should be reasonable, fair and just. This is the law laid down by the Supreme Court in the case of *Olga Tellis (supra)* (See: para 42). In para 42 of the judgment the Supreme Court has answered the question as to how the reasonableness or otherwise of the procedure is to be determined. Referring to its earlier decision in the case of *Francis Coralie Mullin v. Union Territory of Delhi 1981(2) SCC 516 : AIR 1981 SC 746* the Court has observed:

.... It is for the Court to decide in exercise of its constitutional power of judicial review whether the deprivation of life or personal liberty in a given case is by procedure, which is reasonable, fair and just or it is otherwise.

Thus, as laid down by the Supreme Court, in all cases it will be for the Court to decide whether the procedure adopted is reasonable, fair and just or otherwise. The necessary corollary of the aforesaid observation is that the Court may in a given case indicate what procedure would be reasonable, fair and just. In the instant case it would be necessary to point out as to which procedure should be followed by the respondent-Authorities before evicting the petitioners from the places or their business.

6. The learned Counsel for the respondent-Municipality, Mr. M.A. Panchal, states that the petitioners shall not be removed from the place of their business except in accordance with law. In the note filed on behalf of the respondent-Municipality the learned Counsel has inter alia stated as follows:

It is stated that appropriate proceedings would be taken including serving the concerned petitioners with notice, and after giving hearing to those of the petitioners who desire to be heard, proper orders would be passed in accordance with law. Till such orders are passed, the cabins in question would not be removed.

Learned Counsel for the respondents Nos. 2 and 3 has also no objection if suitable directions are given by the Court. In view of the aforesaid statement, further discussion is not necessary. In the facts and circumstances of the case and in view of the concession made by the learned Counsels for the respondents, the following directions are given:

(i) The respondent-Authorities shall not take any action of removal of the petitioners from the business premises occupied by them without affording them

an opportunity of being heard:

(ii) Such opportunity of being heard would also includes:

(a) notice in writing to be served upon each of the occupant, calling upon him to show cause as to why he should not be removed from the place in question;

(b) the occupant concerned shall be afforded an opportunity of leading evidence in response to the notice; and

(c) the occupant concerned shall also be afforded an opportunity of being heard in person either by himself or through an Advocate;

(iii) In case the respondent-Authorities, after the enquiry as stated hereinabove, come to the conclusion that the occupant concerned is required to be removed from the place, and any decision adverse to the occupant is taken, the same shall not be implemented for a period of one month from the date of communication to the occupant;

(iv) The order that may be passed by the respondent-Authorities shall be served upon the occupant preferably by registered A.D. post. The same shall also be sent by an ordinary post under certificate of posting and the order shall also be affixed on the premises in question.

7. In the instant case it is stated on behalf of the petitioners that it is possible to regularise the occupation of the petitioners at the places where they are carrying on their business. If that be so, I hope and trust that the respondent-Authorities will consider their requests favourably. If it is not possible to regularise their occupation at the places where they are carrying on the business, their request for giving alternative accommodation shall also be considered by the respondent-Authorities with due sympathy.

With the aforesaid observations and directions, the petitions stand disposed of." Rule discharged with no order as to costs.