(2006) 03 DEL CK 0026

In the Delhi High Court

Case No : WP (C) No. 2053 of 2006

Shri Uttam Singh APPELLANT

Vs

New Delhi Municipal Committee RESPONDENT

Date of Decision : 10-03-2006

Acts Referred:

Constitution of India, 1950 — Article 136, 142, 226, 32
Easements Act, 1882 — Section 56

Citation : (2006) 03 DEL CK 0026

Hon'ble Judges : Pradeep Nandrajog, J

Bench : Single Bench

Advocate : A.S. handhiok and Karunesh Tandon, for the Appellant; Arvind Shah, for the Respondent

Judgement

Pradeep Nandrajog, J.—On 30.1.2006, disposing of WP(C) 2651/2005, Hari Om v. NDMC, I had opined as under :

14. Douglas J. in Baksey v. Board of Regents (1954) 347 MD 442 said:

The right to work I have assumed was the most precious liberty that man possesses. Man has indeed, as much right to work as he has to live, to be free and to own property. To work means to eat and it also means to live.

15. In a country where population is growing fast and where regional economic imbalances are forcing migration of the rural poor to urban areas, everybody''s right are getting squeezed.

16. Footpaths and pavements are public properties intended to serve the convenience of general public.

17. In the decision reported as Bombay Hawkers'' Union and Others Vs. Bombay Municipal Corporation and Others, the Supreme Court recognised the right of a municipality to permit hawking on Sodan Singh and Others Vs. New Delhi Municipal Committee and Others, the Constitution Bench of the Supreme Court

concluded that the right to carry on trade or business, if properly regulated, cannot be denied on the ground that streets and pavements are meant exclusively for pedestrians and cannot be put to any other use.

18. The Supreme Court appointed committees to draw up schemes and identify hawking zones and deciding eligibility. Taking note of the scheme prepared, criteria adopted and action taken, Supreme Court passed an order on 13.3.1992. It is reported as 46 (1992) DLT 671 Sodan Singh v. NDMC.

19. The very essence of tehbazari is livelihood to the needy. Tehbazari cannot be a source of trading on the government land. Tehbazari is a right which infringes upon right of general public to use pavements which exist to facilitate pedestrian''s movement. Tehbazari is the result of necessity in this country.

20. Tehbazari is nothing but a license in favor of the grantee to squat at a notified site on a pavement and conduct business. Needless to state, a license is a personal right and cannot be transferred or assigned. This is evident from a bare perusal of Section 56 of the Indian Easement Act 1882. It reads as under:-

56. License when transferable.-Unless a different intention is expressed or necessarily implied a license to attend a place of public entertainment may be transferred by the licensee; but, save as aforesaid, a license cannot be transferred by the licensee or exercised by his servants or agents.

21. Except for a license to attend a place of public entertainment which may be transferred by the licensee, a license cannot be transferred by the licensee or exercised by his servants or agents.

22. Merely because MCD permits transfer of tehbazari does not mean that NDMC must frame a policy in harmony with the policy framed by MCD.

23. I find an inherent fault and an inbuilt illegality in the policy framed by MCD for the reason, it encourages trading on government land.

24. Can a person who is otherwise well settled in life and has means of livelihood claim a right of tehbazari'' The answer has to be an emphatic no. The reason is obvious. Tehbazari rights are recognized in this country because of extreme poverty and lack of livelihood. A person who is gainfully employed cannot get benefit under the tehbazari policy. By permitting transfers, all and sundry can purchase tehbazari rights from the original allottee.

2. I had denied relief to Hari Om for the reason, he claimed to have obtained the tehbazari site which was allotted to one M.Ganeshan because after entering upon a contract to do business in partnership, M. Ganeshan withdrew from the partnership.

3. Going by the legal view I had taken in Hari Om''s case, present petition ought to have been dismissed by me, but I refrain from doing so for the reason, certain peculiar facts have surfaced in the records of NDMC.

4. The facts, as would be hereunder noted, bring out a very disturbing feature of executive functioning. Executive decisions are being taken as per the whims and fancies of the officer concerned. Policies are twisted and interpreted in a manner which suits a particular pre-determined course of action contemplated, needless to state, to confer benefit of individuals.

5. If any of us were butte on hold in the street by an intellectually curious Martian who asked what was meant by ''the rule of law''- an expression he had observed much used in some of the more pretentious journals, our definition might be more or less incoherent. But it would, I think, include as an important element the requirement that the rights and obligations of citizens should depend on clear rules, publicly stated, and not on the whims, prejudices or predilections of the individual decision maker.

6. It is, Therefore, imperative that the executive should have clear cut policies, duly notified, to the citizens so that the citizens understand their legal rights and are able to conduct themselves in a manner that they do not come into conflict with laws.

7. A tehbazari site was allotted to one Ms. Renu. The site was near Stall No.18-A, Mini Market, Janpath. On 11.9.1987, Renu inducted the petitioner as a partner in the business which she was conducting from the site obtained by her under tehbazari. A written deed of partnership dated 11.9.1987 was executed.

8. Thereafter, Renu retired from the partnership and left the business and all assets of the partnership to the petitioner. This was not done surreptitiously inasmuch as NDMC was notified by the petitioner. Petitioner informed NDMC that Renu had withdrawn from the partnership and the tehbazari site allotted to Renu may be transferred in his name.

9. Charging petitioner tehbazari at four times the normal tehbazari charged from the original allottees, NDMC formalised the transfer of the tehbazari site in favor of the petitioner. He continued to pay tehbazari all these years. File produced by NDMC shows that since 1988 petitioner has been paying tehbazari at four times the normal prescribed rate.

10. After nearly 18 years, NDMC issued a show cause notice to the petitioner on 18.5.2005. Show cause notice alleged that the transfer of tehbazari site from Renu to the petitioner was obtained by the petitioner contrary to the policy. Petitioner was called upon to show cause as to why the permission granted be not revoked.

11. Petitioner submitted a reply pointing out that he had not played a fraud. That it was not the case of NDMC that petitioner had made any mis-representation. He stated that NDMC took a conscious decision to transfer the tehbazari site from Renu to him.

12. Rejecting the defense, vide order order dated 10.1.2006, tehbazari transferred in favor of the petitioner has been cancelled. Order dated 10.1.2006

reads as under :

No.D/1224-25/S.O.(Enf) Dated: 10.01.2006 Shri Uttam Singh,

Tehbazari Holder,

OT-1,Near IOB, Janpath,

New Delhi.

1. Whereas the New Delhi Municipal Council is a statutory body constituted under the provisions of the NDMC Act,1994. Prior to enactment of NDMC Act, the working and the functioning of the above body, earlier known as New Delhi Municipal Committee was governed under the provisions of Punjab Municipal Act,1911.

2. Whereas besides the other civic facilities extended by the erstwhile Committee and now by the Council, based on the seniority, tehbazari permission have also been granted for earning of the livelihood to the old squatters within the jurisdiction of NDMC. As per law tehbazari permission is only a personal right granted to the permission holder for his bonafide use and occupation of the public premises and the said right is neither transferable nor inheritable under any circumstances.

3. Whereas the Hon''ble Supreme Court vide its judgment dated 30.8.1989 directed the Committee to formulate a scheme for rehabilitation of squatters and hawkers in NDMC area in the light of the judgment of the Apex Court for determining the rights of the squatters. The Committee accordingly formulated a scheme under the title ''Scheme for Rehabilitation of Squatters and Hawkers in NDMC Area'' vide its Reso.No.28 dated 10.11.1989. The Hon''ble Supreme Court accepted the said scheme. The said scheme also envisaged the terms and conditions of allotment of open tehbazari. Condition No.5 thereof specifically provides that ''Permission will be only for the bonafide use of the person to whom the same has been granted and will not be shared or transferred to anyone in anyway.

4. Whereas it came to the notice of the Council that one Shri Uttam Singh, S/o Shri Laxman Dass, at Janpath Lane, New Delhi had illegally got the permission transferred in his name against the very policy of the Committee/Council on the basis of a partnership deed dated 11.9.1987 entered into by him with Ms.Renu Kumari, d/o Shri Banarsi Dass. Subsequently the said partnership deed was dissolved vide resolution deed dated 22.9.1987.

5. Whereas appreciating the said transfer being illegal, unlawful and against the very policy of Committee/Council, the said tehbazari permission granted in favor of said Shri Uttam Singh, s/o Shri Laxman Dass, has been withdrawn by the Chairperson of the NDMC.

6. Whereas after withdrawal of the said permission having been acquired against the law and the policy of the Committee/council the said Shri Uttam Singh, s/o

Shri Laxman Dass has no right or title of the tehbazari permission occupied by him in an area of 6x6 sq.ft. at Janpath, Indian Oil Bhawan, New Delhi.

7. Accordingly said Shri Uttam Singh is hereby directed to vacate the site occupied by him within 7 days from the date of receipt of this order failing which NDMC will be left with no alternative but to exercise its right to resuming possession of the site without any further notice or warning, which may please be noted.

Sd/-

Asstt.Secretary(Enf.)

13. File produced by NDMC makes an interesting reading. nothings show, what I have noted in the opening part of my order how the executive manipulates at each stage and functions as if it is not controlled by any regulatory mechanism. Pertaining to kiosks which are also allotted by way of a license, there existed a policy as per which existing allottee could enter into a partnership with a non-allottee and on his withdrawing from the partnership, kiosk could be formally allotted to the continuing partner. However, this policy, and in my opinion rightly so, recorded that these transfers would be recognized if partnership was a ''genuine partnership''.

14. Surprisingly, vide resolution No.55 dated 7.7.1978 dealing with kiosks, NDMC resolved as under :-

First 3 columns in the schedule of rates of enhancement of license fee in the (illegible) with ''genuine partnership'' be deleted and ''partnership'' be added after sub-letting in the next column.

15. NDMC armed itself to transfer licenses in respect of kiosks in respect of even non-genuine partnerships. This is evident from the fact that the words ''genuine partnership'' were replaced by the word ''partnership''. The second stage at which the executive manipulated exercise of its power took place when petitioner, having entered into a partnership with Renu and Renu retiring from the partnership, applied for transfer of tehbazari site in his name. Officers of NDMC put a note dated 31.12.1987. They referred to the policy resolution No.55 dated 7.7.1978. The officer noted as under :

Thorough study of Reso. No.57 dated 7.7.78 has revealed that though the policy with regard to transfer of open tehbazari has not specifically been discussed possibly with the instruction that the policy which has been framed and adopted for built up units would govern the cases of open tehbazari and in case it is agreed that the case in hand can be considered for transfer of tehbazari in the name of Sh.Uttam Singh by enhancing the original tehbazari of Rs.540/- p.m. by four times which would be Rs.2160/- p.m.

The case is submitted for consideration and orders whether the said tehbazari site may be transferred in the name of Sh.Uttam Singh on a monthly tehbazari fee of Rs.2160/- p.m. from the date of partnership subject to the condition that Shri Uttam Singh shall pay the difference of the tehbazari fee and also complete the formalities required in the similar cases or otherwise please.

16. I may note that resolution No.57 referred to in the note is a typographical error evidenced by the fact that in the file, what exists is resolution No.55 dated 7.7.1978.

17. NDMC applied policy resolution dated 7.7.1978 which was framed for kiosks to even open tehbazari sites. Thereafter, rest is history. Petitioner was intimated that the transfer was accepted. He was asked to pay license fee at rates four times the normal license fee. All these years, for over 18 years, petitioner has been paying the license fee at four times the rate.

18. Learned counsel for NDMC urged that an illegality would remain an illegality for all times to come. Counsel urged that as and when it transpires that people have managed transfers which are contrary to law, action has to be initiated.

19. It is true that an illegality would always remain an illegality, but the question arises, as to whether it is open to an authority to initiate action unlimited in point of time pursuant to an illegality committed by not the person but by the committee.

20. As noted above, NDMC armed itself with a policy resolution permitting transfer of kiosk allotted on a license to the continuing partners, if the partner who was the original allottee of the kiosk withdrew from the partnership. NDMC extended the benefit of the said policy resolution to the petitioner.

21. History of the growth of writ of mandamus shows that originally, the writ of mandamus was merely an administrative order from the sovereign to his subordinates. But from early times it was made generally available through the Court of King''s Bench, as was natural as the Central Government had little administrative machinery of its own. The writ would issue to enforce the terms of royal charters and by the seventeenth century it was in common use to compel the admission or restoration of freemen or burgesses to their offices or rights in borough corporations. Lord Mansfield, in the report published as R. v. Askew (1768) 4 Burr 2185 observed :-

It was introduced, to prevent disorder from a failure of justice, and defect of police. Therefore, it ought to be used upon all occasions where the law has established no specific remedy, and where in justice and good government there ought to be one.... The value of the matter, or the degree of its importance to the public police, is not scrupulously weighed. If there be a right, and no other specific remedy, this should not be denied. Writs of mandamus have been granted, to admit lecturers, clerks, sextons, and scavengers, andc., to restore an alderman to precedency, an attorney to practice in an inferior court, andc.

22. In the report published as Chandra Singh Vs. State of Rajasthan and Another, their Lordships observed as under :-

43. Issuance of a writ of certiorari is a discretionary remedy. (see Champalal Binani v. CIT). The High Court and consequently this court while exercising their extraordinary jurisdiction under Article 226 or 32 of the Constitution of India may not strike down an illegal order although it would be lawful to do so. In a given case, the High Court or this Court may refuse to extend the benefit of a discretionary jurisdiction under Article 136 of the Constitution of India which need not be exercised in a case where the impugned judgment is found to be erroneous if by reason thereof substantial justice is being done. (See S.D.S. Shipping (P) Ltd. v. Jay Container Services Co. (P) Ltd.) Such a relief can be denied, inter alia, when it would be opposed to public policy or in a case where quashing of an illegal order would revive another illegal one. This court also in exercise of its jurisdiction under Article 142 of the Constitution of India is entitled to pass such order which will be complete justice to the parties.

23. Though a transfer of tehbazari site cannot be countenanced for the reason, tehbazari rights have been recognized in Indian Jurisprudence as a result of extreme poverty and lack of job opportunities in this country, but for the peculiar facts noted above and in particular that the petitioner has been earning his livelihood for over 18 years by utilising the tehbazari site; has been paying four times the normal tehbazari fee; did not hide anything from NDMC; though wrong NDMC took a decision way back in the year 1988 to permit transfer of tehbazari site to the petitioner; it is not the case pleaded by NDMC that petitioner played fraud or is guilty of making any mis-representation, I am of the opinion that the cause of justice requires that tehbazari transferred in favor of the petitioner be not disturbed.

24. Writ petition accordingly stands disposed of quashing the order dated 10.1.2006.

25. No costs.