

***IN THE HIGH COURT OF DELHI AT NEW DELHI**

Date of decision: 31st August, 2010.

+ **W.P.(C) 12120/2009 & CM No.11374/2010 (u/S 151 CPC for interim relief)**

SMT. BISHNI DEVI & ORS.

..... Petitioners

Through: Ms. Geeta Luthra, Sr. Advocate with
Mr. Parinay D. Shah, Advocate.

versus

MUNICIPAL CORPORATION OF DELHI & ORS. Respondents

Through: Mr. Sanjay Jain, Sr. Advocate with
Mr. Sanjeev Sabharwal & Ms. Ruchi
Jain, Advocates for MCD.

CORAM :-

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

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| 1. | Whether reporters of Local papers may be allowed to see the judgment? | No |
| 2. | To be referred to the reporter or not? | No |
| 3. | Whether the judgment should be reported in the Digest? | No |

RAJIV SAHAI ENDLAW, J.

1. The three petitioners had preferred this petition to restrain the respondents MCD & Govt. of NCT of Delhi from removing the petitioners from their allotted *tehbazari* kiosks situated outside G.B. Pant & L.N.J.P. Hospital. The petitioners had been asked, vide notice dated 29th September, 2009 of the respondent MCD to remove themselves from the said kiosks owing to the work of improvement and re-development of road, footpath and service lane under progress; the space underneath the kiosks of the petitioners was stated to be required for the re-development work urgently.

The petitioners vide the same notice were also informed that they will be re-located to a new site near *dhalao*/Nigam Medical Market/in Subway under Jawaharlal Nehru Marg.

2. The petition came up before this Court first on 30th September, 2009 when while issuing notice thereof, *status quo* was ordered to be maintained. The respondent MCD filed counter affidavit. The petitioners thereafter applied for impleadment of Indian National Trust For Art & Cultural Heritage (INTACH) for the reason of it being concerned with the re-development work and for which purpose the respondent MCD was proposing to shift the petitioners. This Court vide order dated 13th November, 2009 impleaded INTACH as a respondent. On 21st December, 2009 the respondent MCD was directed to place the proposal it had received from INTACH before this Court as well as a sketch indicating the site where the petitioners were sought to be re-located.

3. A detailed order was made in this petition on 23rd December, 2009. Since the senior counsel for the petitioners has today relied heavily on the said order, it is deemed expedient to re-produce the same in entirety herein below:-

“CM No.12295/2009 in W.P.(C) No.12120/2009

1. This application was filed by the petitioners apprehending forcible vacation from the tehbazari kiosks stated to be allotted to them at the site in front of the LNJP Hospital. By an order passed on 30th September, 2009 this court had directed status quo to be maintained till further orders to the contrary.

2. The respondent-MCD has filed an affidavit dated 5th October, 2009 contending that on account of re-development

of Jawahar Lal Nehru Marg in front of the LNJP Hospital, notices dated 29th September, 2009 have been issued to the petitioners directing them to temporarily relocate on sites identified between gates no.6 and 7 of the hospital. It has been contended that the service lanes and the footpaths are to be rebuilt and kept clear for pedestrian and vehicular traffic. Copy of the site plan which has been placed on record shows that the petitioners at present are located right near the entrance of the gynecology and maternity ward as well as the emergency ward of the hospital.

3. The respondent-MCD has also placed the copy of the letter dated 2nd April, 2008 received by it from the office of the Medical Superintendent of the LNJP Hospital objecting to the location and the difficulty being faced by ambulances in reaching the casualty department imperiling human life.

4. The MCD has submitted that it has appointed INTACH as a consultant to undertake the consultation for design of the site of its scheme for development and management of the roads around the New Delhi Railway Station including subject road.

5. The respondents have further deposed that on completion of the scheme for re-development, finalisation of the number and location of the tehbazari sites under the urban design scheme, the petitioner would be given permanent sites in the vicinity of the said road.

6. Learned counsel appearing for the INTACH states that it has submitted a development plan to the MCD and the transport authority and that the proposal is to be considered under the aegis of the Lt. Governor of the Delhi in conjunction with all other concerned authorities.

7. Ms. Luthra, learned senior counsel makes a grievance that the respondent has so far not indicated the site where the Tehbazari kiosks would be permanently located. An apprehension is also expressed that the respondent would effect allotments to persons who have no concern with the present relocation on account of vested interest and malafide.

8. So far as the widening of the road is concerned, it has been stated by the MCD that the arrangements in respect thereof have been made and that the petitioners are required to be relocated urgently.

9. In view of the above and having regard to the public interest which is involved in the widening of the road, there can be no possible objection to the temporary relocation. However, permanent sites of relocation have to be identified so that tehbazari holders have security in terms of the

availability of a place wherefrom they can run their businesses. The MCD has to be required to identify the same so that the petitioners are not left in a lurch.

10. An objection is raised by Mr. Sanjeev Sabharwal, learned counsel for the MCD that the petitioner no.3 is a transferee.

11. In answer thereto Ms.Luthra, learned senior counsel for the petitioner has drawn my attention to the directions contained in para 23 of the orders of the Supreme Court which were passed in IA No.1 in IA No.407 in WP(C) 1699/1987 Patri Vyapar Mandal Delhi (Regd.) Vs. MCD, Town Hall and Ors. and other applications, which reads as follows:-

“XXX

XXX

XXX

23. So far the prayer of the MCD with regard to the transfer of tehbazari/vending sites to the non-family members as per the Scheme of the MCD is concerned, this Court passed an order dated 06.02.2007 barring transfer of tehbazari/vending sites which was reiterated in the order dated 17.05.2007. The said orders were meant to be prospective in nature and, therefore, if any such tehbazari/vending sites were transferred prior to 06.02.2007 the same could be considered as a valid transfer. But, in any case, no transfer made after 06.02.2007 by way of change of hands, sale etc. would be allowed and any such transfer, if made, would be illegal. Persons found to have been transferred their tehbazari/vending sites after 06.02.2007 could be evicted as per the due process of law. We believe that the aforesaid order which we have passed with a cut of date of 06.02.2007 directing for legalizing any transfer made prior to 06.02.2007 and declaring all subsequent transfers as illegal and invalid would likely to cause the process of allotment of new tehbazari/vending sites smooth and easy.”

12. It needs no elaboration that so far as claims of the transferees for consideration by the MCD are concerned, the MCD is required to abide by the above directions of the Supreme Court as notices hereinabove. It is pointed out that the petitioner no.3 has made an application for regularisation of the transferees. Be that as it may, the interests of justice would be subserved, if petitioner no.3 is permitted to place another copy of its application and all supporting documents again before the MCD. This shall be done by the petitioner No.3 within a period of three weeks from today. The petitioner No.3 or his authorised representative shall be

afforded an opportunity to answer objection or queries in respect thereof. Appropriate orders in terms of the directions contained in para 23 of the order of the Supreme Court dated 9th April, 2009 aforesaid shall be passed within a period of four weeks from today and communicated to the petitioner. In case the petitioner No.3 is aggrieved by the order passed by the MCD, it shall be open to the petitioner to assail the same by way of appropriate proceedings.

13. Mr.Sabharwal, learned Standing counsel for MCD submits that the MCD cannot be required to construct kiosks for relocating the petitioners.

14. In this regard, learned senior counsel for petitioner has also drawn my attention on the order dated 29th March, 1985 passed by the Supreme Court in WP(C) no.981-82/1984 in respect of the petitioners location at the present site. The order shows that the Apex Court had directed the MCD to construct the stalls according to the approved plan wherein the petitioners were located. It is apparent that the respondents had built the tehbazari kiosks occupied presently by the petitioners. Reliance has also been placed to the order dated 9th June, 2000 passed in WP(C) No.3145/00 dealing with a similar matter of relocation wherein also, the MCD had undertaken the relocation to alternative accommodation of some other kiosk holders, which was constructed by the MCD. There can be no manner of dispute that the petitioners are not being relocated on account of any default or because of a reason attributable to them. This by itself would justify that the petitioners be relocated, either temporarily and thereafter to permanent site, in kiosks which are to be constructed by the MCD. Needless to say the same shall be on the existing terms and conditions of allotment.

Accordingly, it is directed as follows :-

- a) the petitioners shall be relocated to the proposed tehbazari sites in kiosks/structures to be built by MCD which shall be located between gate numbers 6 and 7 of the LNJP Hospital.
- b) the respondents shall expeditiously finalise the re-development plan and identify the commercially viable sites where tehbazari holders are to be permanently located. The same shall, in any case, be identified within a period of two months from today and placed on affidavit with a plan on record of the present case.
- c) the respondent shall ensure that the kiosks are built at the permanent sites and the tehbazari holders are relocated to such permanent sites within a period of one month thereafter.
- d) The petitioners shall be shifted to the kiosks after they

have been constructed by the MCD.
e) it shall be ensured that the preference is given to the petitioners/relocated tehbazari holders from the existing sites and no allotments in the area are made without accommodating the present petitioners.

f) the petitioner No.3 may be re-located pending consideration of his application in terms of para 12 above.

Compliance report be filed before this court.

This application is disposed of in the above terms.

WP(C)12120/2009

In view of the directions passed above and the matter pending consideration before the Lt. Governor, list on 26th April, 2010 for consideration and further directions.

Dasti to parties.”

4. CM No.12295/2009 which was disposed of vide aforesaid order was the application of the petitioners for interim relief filed along with the writ petition. Since the senior counsel for the petitioners during the course of hearing sought to base the entire case of the petitioners on the order aforesaid, it was pointed out to the senior counsel for the petitioners that the order aforesaid is merely an interim order and cannot guide the final order of this Court on the writ petition. The senior counsel for the petitioners controverted by contending that the order aforesaid in fact finally disposes of the writ petition and only because the petitioners had expressed apprehensions in compliance thereof, the writ petition was kept pending and compliance report sought from the respondent MCD. On further enquiry, it is informed that the entire matter of re-development of the area where the kiosks of the petitioners were/are situated was pending consideration before the Lt. Governor.

5. The writ petition remained pending thereafter with the respondent

MCD seeking time for submitting the compliance report.

6. CM No.11374/2010 has been filed by the petitioners, again for interim relief contending that the respondent MCD has now vide notice dated 23rd August, 2010 informed the petitioners that it had in compliance of the order dated 23rd December, 2009 (supra) installed three kiosks of 7'x5' each as mentioned in the rough sketch/site plan annexed to the said notice and asked the petitioners to shift to the new location within three days, failing which the petitioners were threatened with forcible removal. It was also stated in the said notice that owing to the petitioners, the work of re-development of the Jawahar Lal Nehru Marg in view of ensuing Commonwealth Games was being hampered.

7. Though the file has been taken up today only on the application aforesaid but the counsels were informed that they should make their submissions on the writ petition also. The counsels have been heard.

8. The senior counsel for the petitioners has contended –

- i. that the notice dated 23rd August, 2010 of the respondent MCD is in violation of the order dated 23rd December, 2009; instead of placing the re-location site before this Court on affidavit and submitting the compliance report in the Court, the petitioners have been threatened with dispossession. It is contended that though the delay since 23rd December, 2009 is on the part of the respondent MCD itself, only three days time has been given to the petitioners to remove themselves;

- ii. that the petitioners have been in existence of their present *tehbazari* site since the year 1947;
- iii. that the *tehbazari* rights of the petitioners are much superior to the ordinary *tehbazari* rights;
- iv. that the kiosks of the petitioners are *pucca* in comparison to temporary kiosks of other *tehbazari* holders.
- v. that there are only a few such *tehbazari* holders in the City and the petitioners cannot be treated as having ordinary *tehbazari* rights.
- vi. that the present kiosks of the petitioners are immediately next to the Maternity Cell of the LNJP Hospital and are four side open and are on a prime location;
- vii. that the alternative sites being offered to the petitioners are far inferior;
- viii. though at the re-location site now offered also, better sites/kiosks than offered to the petitioners are available but the respondent MCD has not offered the best sites to the petitioners and are allotting the better sites to those who gratify the officials of the respondent MCD;
- ix. the petitioners are being penalized for approaching the Court by offering them inferior sites having little commercial potential and likely to have few footfalls. The petitioners, as per the order dated 23rd December, 2009 are entitled to preferential and

the best sites. It is also averred that there is no policy of the respondent MCD qua allotment of sites and the discretion is left in the hands of the officials and which cannot be sustained in law;

- x. that the petitioners having *pucca* kiosks cannot be removed unless under the new/revised plan with respect to the said area no *tehbazari* location has been identified on the said site;
- xi. the respondent MCD cannot be permitted to, after dispossessing the petitioners from the site, award the same to any other person. It is contended that the respondent MCD has avoided producing before this Court the report of INTACH for this reason only and the petitioners suspect that the INTACH in the report submitted by it has provided for continuance of the *tehbazari* sites where the kiosks of the petitioners are situated
- xii. it is contended that the kiosks now being offered to the petitioners are only one side open; though there are locations/sites/kiosks with three sides open but the same are not being offered to the petitioners.
- xiii. that though earlier there were eight kiosks under the remunerative policy but in the re-location plan only six are being shown and the petitioners suspect that two of the other remunerative policy *tehbzari* holders have been allotted shops in the *pucca* Medico Market opposite the hospital and which is

a much better site;

- xiv. that in terms of the order dated 23rd December, 2009, the same should have been offered to the petitioners;
- xv. attention is invited to the National Policy on Urban Street Vendors, 2009. Though the senior counsel in Court also handed over a copy of the Policy, under Clause 5 whereof, titled “Eviction, Relocation and Confiscation” could not cite what she was wanting to but subsequently pulled out some loose sheets also stated to be of the Policy, where under Clause 5 titled “Relocation & Rehabilitation” it has *inter alia* been provided that “No hawker/street vendor should be arbitrarily evicted in the name of ‘beautification’ of the cityscape –The Beautification and clean up programmes by the States or towns should actively involve street vendors in a positive way” and that “eviction should be avoided wherever feasible unless there is clear and urgent public need of the land in question”;
- xvi. it is urged that under the Policy aforesaid also the petitioners are entitled to a minimum of 30 days notice and the three days notice given to them is too short;
- xvii. attention is also invited to Clause 5.10.5 of the Master Plan of Delhi-2021 providing for 3 to 4 commercial units per 100 beds in a hospital;
- xviii. it is urged that the respondent MCD is not entitled to profiteer

from *tehbazari* and not entitled to give preference to the *tehbazari* holders under the remunerative category.

9. The senior counsel for the petitioners thus contends that the notice dated 23rd August, 2010 be quashed and the respondents be directed to comply with the order dated 23rd December, 2009 by filing an affidavit and compliance report.

10. The senior counsel for the respondent MCD has at the outset stated that the re-development plan of the area does not permit any *tehbazari* on the site from where the petitioners are being removed. On further prodding, it is stated that there is no plan for permitting any other commercial activity also thereon and the said space will be used only for egress and ingress of visitors to the hospital. The senior counsel further draws attention to the terms of *tehbazari* of the petitioners and which permit the respondent MCD to shift the kiosks of the petitioners anywhere in the jurisdiction of the respondent MCD in public interest. The senior counsel by reference to photographs filed and handed over expresses extreme urgency; it is contended that the entire work of re-development of the area and which is a part of the works for the Commonwealth Games is held up owing to the three petitioners. It is informed that there were in all 45 *tehbazari* holders on that stretch of the road and all of whom have already shifted to the relocation site and it is the continuance of the petitioners which is holding up the entire work. It is assured that the kiosks being now offered to the petitioners have the same dimensions as the kiosks now in occupation of the

petitioners. It is stated that there is no record of the kiosks presently in occupation of the petitioners being four side-open and if the petitioners have over a period of time opened the same on all the four sides, the same would not enure any additional benefits to the petitioners. It is contended that though each of the petitioners is paying *tehbazari* of only ₹6,000/- per annum, the kiosks auctioned under the Remunerative Policy/Scheme fetch ₹6,000/- to 8,000/- per month to the respondent MCD. It is contended that the respondent MCD is thus entitled to offer the three side open kiosks at the re-location site to the Remunerative Scheme *tehbazari* holders rather than to the petitioners. The notings from the file of the respondent MCD are shown in the Court to contend that INTACH in its report had not recommended any *tehbazari* sites/kiosks in the area, not even at the re-location site but the respondent MCD took a decision to provide *tehbazari* sites/kiosks at the re-location site. It is thus contended that there was no need to file the INTACH report.

11. I have considered the matter and the respective contentions. *Tehbazari* is but a licence. A licensee has no rights but to continue at the pleasure of the licensor. The petitioners inspite of elaborate submissions as aforesaid have been unable to show any rights to continue at their present site. Moreover the documents under which the petitioners have till now occupied the site themselves reserve the right of the respondent MCD to shift the said kiosks anywhere in the jurisdiction of the respondent MCD in public interest. Though the senior counsel for the petitioners has contended that the

said documents are standard form documents of the respondent MCD but the fact remains that the petitioners over the years have enjoyed/held the licence on the terms contained therein and cannot now contend to the contrary. The petitioners have not been able to disclose any rights to continue at their present location.

12. The grievance of the petitioners when the petition was filed nearly one year ago was that they were being dispossessed without the re-location sites being identified. In fact the relief claimed in the petition was for a direction to the respondent MCD to re-locate the petitioners. Now the relocation sites have been identified. The petitioners cannot now stall their dispossession any further.

13. The question which remains is whether the petitioners at the re-location site are entitled to the site/kiosks of their choice and/or the best possible site. The senior counsel for the petitioners could peg her case for the said purpose only on direction 'e' in the order dated 23rd December, 2009 aforesaid. However the said direction is only for preference to be given to the petitioners and not for the preferential site to be given to the petitioners. Thus the only requirement was for the petitioners to be re-located. The only condition thereto was that the said re-location had to be between Gate nos. 6 & 7 of the LNJP Hospital and which condition is satisfied from the re-location site now offered. I am unable to find any right in the petitioners to have the site/kiosks of their choice.

14. The petitioners as licencees of the respondent MCD in law have no

right to demand any location/site; if the re-location site offered to them is not acceptable, the petitioners have an option to surrender their licence. Neither under the Policy aforesaid nor under the Master Plan, I am able to find any rights as claimed in favour of the petitioners. The extracts from the Policy, relied upon by the senior counsel and which were not found by the counsel herself in another copy of the Policy, are from the old Policy, now no longer operative.

15. The photographs do show that the petitioners till now have enjoyed a prime location. However the same as aforesaid was only at the pleasure of the respondent MCD and does not create any rights in the petitioners.

16. The site in occupation of the petitioners is immediately outside the hospital, close to the venue for the Commonwealth Games. The City has been preparing its hospitals to meet the contingencies/emergency situations during the ensuing Commonwealth Games. Thus the contention of the respondent MCD of the work being required to be completed owing to the Commonwealth Games cannot be brushed aside and is believable. It is not at some site far flung from the proposed activity in the Commonwealth Games. It thus cannot be said, as was suggested by the senior counsel for the petitioners, that the excuse of Commonwealth Games is being used.

17. In so far as the contention that three days time given to the petitioners is not sufficient is concerned, it cannot be lost sight of that the matter has been brewing for the last over one year. The petitioners at the time of order dated 23rd December, 2009 were aware that they are required to shift. The

petitioners even if under the said order were entitled to any longer time, the private rights of the petitioners ought to give way for the public interest/good. The Supreme Court in *Ramniklal N. Bhutta Vs. State of Maharashtra* AIR 1997 SC 1236 held that a time has come where the Courts should keep the larger public interest in mind while exercising their power of granting stay/injunction. The power under Article 226 is discretionary. It will be exercised only in furtherance of interests of justice and not merely on the making out of a legal point. The Courts have to weigh the public interest vis-a-vis the private interest while exercising the power under Article 226. It is ultimately a matter of balancing the competing interest. In Modern Law Review, Vol. 44, 1981 Edition at Page 214, R.A. Buckley stated that “A plaintiff may still be deprived of an injunction in such a case on general equitable principles under which factors such as the public interest may, in an appropriate case, be relevant. The Supreme Court in *Mahadeo Savlaram Shelkare v. Pune Municipal Corporation* (1995) 3 SCC 33 held that it is common experience that injunction normally is asked for and granted to prevent the public, authorities from proceeding with execution of or implementing scheme of public utility; public interest is therefore one of the material relevant considerations in either in exercising or refusing to grant ad-interim injunction. In that case, public purpose of removing traffic congestion was sought to be served by widening the road and which purpose was held up owing to stays granted by the Courts. The Supreme Court held that the Courts should necessarily consider the effect on

public purpose and should suitably mould the relief. The Supreme Court in **ONGC Ltd. Vs. Saw Pipes Ltd.** AIR 2003 SC 2629 also held that where loss is caused to the public, there is no measure for determining the loss.

18. Reference may also be made to **Baitarani Gramiya Bank v. Pallab Kumar** (2004) 9 SCC 100 reiterating that when public interest competes with private interest, the private interest will have to give way to public interest. The Supreme Court in **Mardia Chemicals Ltd. v. UOI** AIR 2004 SC 2371 again held that wherever public interest to such a large extent is involved and it may become necessary to achieve an object which serves the public purpose, individual rights may have to give way. Public interest has always been considered to be above private interest. Interest of an individual may to some extent be affected but it cannot have the potential of taking over the public interest having an impact on the socio-economic drive of the country (see **Panchkuian Road Refugee Vyapar Sangh Vs. DMRC** MANU/DE/2353/2006). The Supreme Court in **Sooraram Pratap Reddy Vs. District Collector, Ranga Reddy District** (2008) 9 SCC 552 also held that the writ court exercising powers under Article 226 cannot substitute its own judgment for the judgment of the Government as to what constitutes public purpose. It was held that whatever furthers the general interest of the community as opposed to a particular interest of the individual must be regarded as a public purpose and the emphasis is unmistakably shifting from the individual to the community.

19. From the photographs, it is clear that the work is held up owing to the

kiosks of the petitioners. It is not as if the petitioners are required to construct kiosks at the re-location site; in terms of the earlier order they are being offered the readymade kiosks. The petitioners ought to have no difficulty in shifting their goods/wares to the readymade kiosks offered to them, within a day or two.

20. In the aforesaid circumstances, while dismissing the application of the petitioners being CM No. 11374/2010, the petitioners are granted time till 1700 hours on 7th September, 2010 to remove their goods/wares/kiosks failing which the respondent MCD shall be entitled to forcibly remove the petitioners. The respondent MCD is also directed to allow the petitioners into occupation of the kiosks at the alternative site offered to them.

21. The re-location site having been offered to the petitioners, and the same having been found to be suitable, no further orders are required in the writ petition either. The petition is disposed. No order as to costs.

Dasti under the signatures of court master.

**RAJIV SAHAI ENDLAW
(JUDGE)**

31st August, 2010
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