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

+ W.P.(C) 7869/2013 & CM APPL. 16706/2013

MEENA CHATTERJEE

..... Petitioner

Through: Mr. Nikhilesh Kumar, Advocate with
Ms. Jyoti Taneja, Advocate.

versus

NEW DELHI MUNICIPAL COUNCIL & ANR. Respondents

Through: Dr. Ritu Bhardwaj, Advocate for
NDMC.

% Reserved on : 20th August, 2014
Date of Decision : 22nd September, 2014

CORAM:

HON'BLE MR. JUSTICE MANMOHAN

J U D G M E N T

MANMOHAN, J:

1. Present writ petition has been filed challenging the order dated 3rd December, 2013 issued by the Enforcement Department, New Delhi Municipal Council whereby it was decided to relocate the Tehbazari site allotted in favour of petitioner's deceased husband from outside Supreme Court to a site near Patiala House due to security reasons. The relevant portion of the impugned order is reproduced hereinbelow:-

ORDER

The Hon'ble High Court in the case "Laxmi Narain Vs N.D.M.C. & 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:-

<i>S.No</i>	<i>Name</i>	<i>Existing Trade</i>	<i>Allotted Area</i>	<i>Option sites</i>
xxxxx	xxxxx	xxxxx	xxxxx	xxxxx
4.	Sh. Raju Chatterjee S/o. Sh. Omiya Chatterjee, 213-T-02	Snacks, Packed items	6'x 4'	214-Back side of Patiala House, the lanes behind school and office complex of N.D.M.C.

(emphasis supplied)

2. The petition was taken up for hearing along with W.P.(C) 340/2014 wherein similar relief had been sought. In fact, learned counsel for petitioner in the present case had adopted the arguments advanced by Mr. Tripurari Ray, learned counsel for petitioner in W.P.(C) 340/2014. The only additional argument advanced by learned counsel for petitioner in the present case was that respondent-NDMC was adopting a pick and choose policy inasmuch as the petitioner had been singled out for relocation while other tehbazari allottees and squatters in the neighboring area were being allowed to carry on their trade from their existing sites .

3. On the other hand, learned counsel for respondent-NDMC stated that the petitioner had no locus standi to maintain the present petition as NDMC had not been intimated about the death of the main allottee and the site had not been transferred in her name. She also assured this Court that respondent-NDMC would remove all similarly placed encroachers from the

neighbouring area.

4. This Court by a detailed judgment pronounced today has dismissed W.P.(C) 340/2014. The relevant portion of judgment in W.P.(C) 340/2014 is reproduced hereinbelow:-

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)

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xxxx

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 Anr., 2013(11) SCALE 329** 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 v. Bombay Municipal Corporation (1985) 3 SCC 545, 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 areas

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's case (1985) 3 SCC 528. 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.

5. This Court is in agreement with the submission of learned counsel for respondent that petitioner should have got herself substituted in their records before filing the present petition.

6. This Court accepts the statement/assurance of learned counsel for respondent-NDMC that similarly placed encroachers shall be removed and respondent-NDMC is held bound by the same. Let the necessary action be taken within a period of four weeks.

7. Moreover, the equality concept in Article 14 of the Constitution is a positive concept and petitioner cannot claim parity for continuing to

contravene terms and conditions of tehbazari permission. In a catena of judgements it has been held that negative equality is not a valid legal ground. In ***Union of India and Others vs. M.K. Sarkar, (2010) 2 SCC 59***, the Supreme Court has held as under:-

"26. A claim on the basis of guarantee of equality, by reference to someone similarly placed, is permissible only when the person similarly placed has been lawfully granted a relief and the person claiming relief is also lawfully entitled for the same. On the other hand, where a benefit was illegally or irregularly extended to someone else, a person who is not extended a similar illegal benefit cannot approach a court for extension of a similar illegal benefit. If such a request is accepted, it would amount to perpetuating the irregularity. When a person is refused a benefit to which he is not entitled, he cannot approach the court and claim that benefit on the ground that someone else has been illegally extended such benefit. If he wants, he can challenge the benefit illegally granted to others. The fact that someone who may not be entitled to the relief has been given relief illegally, is not a ground to grant relief to a person who is not entitled to the relief."

(emphasis supplied)

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

MANMOHAN, J

SEPTEMBER 22, 2014

NG/rn