

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

Date of decision: 11th February, 2011

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W.P.(C) 4088/2010

**M/S HIRA LAL MOHAN DEVI RITA GUPTA
MEMORIAL TRUST & ANR.**

..... Petitioners

Through: Mr. Ravi Gupta, Sr. Advocate
with Mr. Ankit Jain, Advocate

Versus

NARENDER KUMAR & ORS.

..... Respondents

Through: Mr. V.P. Singh, Sr. Advocate with
Mr. Sandeep Khatri, Advocate for
respondent Nos.1 to 6.
Mr. V.K. Tandon, Advocate for
respondent No.7.

CORAM :-

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

1. Whether reporters of Local papers may
be allowed to see the judgment? Yes.
2. To be referred to the reporter or not? Yes.
3. Whether the judgment should be reported
in the Digest? Yes.

RAJIV SAHAI ENDLAW, J.

1. The petition impugns the order dated 7th May, 2010 of the Financial
Commissioner, Delhi allowing the revision petition of the

respondents 1 to 6 herein under Section 187 of the Delhi Land Reforms Act, 1954 (Reforms Act) against the order dated 21st April, 2008 of the Deputy Commissioner, District North-West, Delhi allowing the application of the petitioners for taking over the land underneath a pathway/rasta on two sides of which the property of petitioners was situated, in exchange for other land belonging to the petitioners.

2. Notice of the writ petition was issued and vide order dated 6th July, 2010, the operation of the order of the Financial Commissioner stayed. The pleadings have been completed. The counsels have been heard.
3. The petitioners in their application dated 22nd February, 2008 for exchange, as aforesaid, to the Deputy Commissioner, District North-West of the Government of NCT of Delhi stated that the petitioner no.1 is a charitable Trust engaged *inter alia* in educational activities; that it was running an Engineering College in the name and style of H.M.R. Institute of Technology & Management at Hamidpur

village, Delhi falling in the Revenue Estate of Narela; that the aforesaid College was built on land otherwise contiguous but separated by a 25 feet wide rasta / pathway; claiming that the said rasta / pathway was disturbing the privacy of the students of the Institute and invoking Section 40 of the Reforms Act, permission was sought for allotment of the land of the rasta / pathway on both sides of which the petitioners' Institute was situated and in exchange equivalent land in another Khasra number was offered.

4. The Deputy Commissioner on 17th March, 2008 sought status report from the SDM / BDO. A status report dated 22nd March, 2008 was submitted by the Consolidation Officer, Narela reporting that the building of the College / Institute of the petitioners existed on both sides of the rasta / pathway and stating that the proposal of the petitioners would be beneficial to the villagers as the land offered in exchange by the petitioners would extend the other rasta / pathway existing till the offered land and enable joining of the other rasta/pathway with another rasta / pathway.

5. The Deputy Commissioner on the basis of the aforesaid report, vide order dated 21st April, 2008, expressing an opinion that the proposed exchange is in public interest and will facilitate safety and security of students especially the girl students studying in the Institute and will also serve the interest of residents of the village, allowed the exchange.
6. The respondents 1 to 6 being the bhumidhars of land in Khasra numbers adjacent to the rasta / pathway which the Deputy Commissioner vide order aforesaid had directed to be exchanged as aforesaid, preferred the revision petition aforesaid to the Financial Commissioner. They also stated that they were running an educational institution on their land and the closure of the rasta / pathway owing to the exchange aforesaid would affect them as well as over 500 students studying in their School.
7. The Financial Commissioner vide order impugned in this petition

has allowed the revision, set aside the order of the Deputy Commissioner but granted liberty to the petitioners to, in accordance with law and the procedure approach the Deputy Commissioner afresh in the matter.

8. Section 40 of the Reforms Act under which the petitioners had applied and whereunder the Deputy Commissioner exercised the power, is as under:

“40. Exchange – (1) Subject to the provision of Section 33, a Bhumidhar may exchange lands held by him as such –

- (a) For lands held by any other Bhumidhar as such, or
- (b) For lands for the time being vested in the Gaon Sabha or local authority or in Government.

Provided that no such exchange shall be made except with the permission of the Deputy Commissioner, who will refuse permission if the difference between the area of land given in exchange and the land received in exchange in terms of standard acres is more than ten per cent of the area in standard acres of the land which is smaller in area.

- (2) Where the Deputy Commissioner permits exchange, he shall also order the relevant annual register to be corrected accordingly.
- (3) On exchange made in accordance with sub-section (1), the parties to such exchange shall have the same rights in the land received in exchange as they had in the land given in exchange.”

9. Rules 25 and 26 of the Delhi Land Reforms Rules, 1954 (Reforms Rules) providing the procedure for exchange under Section 40 of the Act (supra) are as under:-

“25. Exchange (Section 40) – A bhumidhar may exchange land held by him as such for land held by any other bhumidhar or for lands for the time being vested in the Gaon Sabha or local authority or in the Government by application to the Deputy Commissioner.”

26. Procedure – (1) Where any exchange has been agreed upon, a party to the agreement shall apply to the Deputy Commissioner to record the same in the record of rights.

(2) The application shall contain the following particulars and be accompanied by the following documents –

- (i) The Khasra number of the plot –
 - (a) which the applicant wishes to receive and of the plots which he offers in exchange of;
 - (b) which the parties have agreed to exchange under an agreement;
- (ii) certified copies of the khatauni relating to the khatas in which all such plots are included.
- (iii) a statement to the effect that neither of the parties will hold land in the State exceeding thirty standard acres as a result of the exchange; and
- (iv) a statement showing the details of any valid deeds, mortgage or other encumbrances with which the land to be exchanged may be burdened, together with names and addresses of lessees, mortgagees or holders of other encumbrances.

(3) On receipt of the application, if the Deputy Commissioner is satisfied that the exchange is not invalid according to the restrictions laid down in Section 33, call

upon the parties, the lessees, mortgagees or holders of other encumbrances, if any, to show cause why the exchange should not be made. Every such notice shall be accompanied by a copy of the applicant, which shall be supplied by the applicant.

(4) The Deputy Commissioner shall thereupon decide the objections, if any, and pass suitable orders. If he decides that the exchange should be allowed, he shall also make an order for the delivery of possession, if necessary, and for the correction of papers.”

10. The senior counsel for the petitioners has argued that the aforesaid provisions have been complied with by the Deputy Commissioner and thus the Financial Commissioner erred in setting aside the order. It is contended that under Rule 26(3) (supra), the residents of the village as the respondents 1 to 6 claim to be, have no right of being heard and the right of hearing is only of lessees, mortgagees or holders of other encumbrances of the land. It is thus contended that the respondents 1 to 6 had no locus to object and the Financial Commissioner erred in entertaining their revision petition.
11. The Financial Commissioner in the impugned order has also noted the provisions of the Delhi Panchayat Raj Act, 1954 (Panchayat Raj

Act). Section 34 thereof empowers the Gaon Sabha to acquire land and Section 35 vests all public property within the jurisdiction of Gaon Sabha in the Gaon Sabha.

12. Chapter VIII of the Delhi Panchayat Raj Rules, 1959 (Panchayat Raj Rules) deals *inter alia* with transfer of property and rules regulating the power of Gaon Panchayat to acquire, hold and transfer property and to enter into contracts. Rule 176 thereunder concerns transfer of immovable property vested in the Gaon Panchayat. Rule 185 permits transfer only on resolution of the Gaon Panchayat and with the sanction of the Chief Commissioner.
13. It was the contention of the respondents 1 to 6 before the Financial Commissioner that the order of the Deputy Commissioner of closure of rasta / pathway and allowing allotment / vesting thereof in the petitioners in exchange for land of the petitioners elsewhere was bad *inter alia* for the reason of no notice having been issued to the general public. The respondents 1 to 6 before the Financial Commissioner had relied on policy guidelines issued by the ADM-

cum-Director (Panchayat) for exchange of Gaon Sabha land with private land. Reliance was also placed on notification dated 30th November, 2000 prohibiting allotment of Gaon Sabha land to any individual or institution.

14. The petitioners had opposed the aforesaid argument by contending that the instructions and the notification were contrary to Section 40 of the Reforms Act the power whereunder could not be curtailed.
15. The Financial Commissioner noted the apparent conflict between Rules 25 & 26 of the Reforms Rules and Rule 185 of the Panchayat Raj Rules; while Reforms Rules did not require public notice or hearing to the public, Rule 185 of the Panchayat Raj Rules so provides. I may notice that in fact it was owing to the said observation in the order of the Financial Commissioner that the notice of the writ petition was issued.
16. The senior counsel for the petitioners has contended that while the

Financial Commissioner had at one place in the impugned order observed that the administrative instructions could not override the Reforms Rules, he has at another place held that the said instructions had to be abided and the exchange could have been effected only after public notice and after the consent of the Gaon Sabha / Panchayat.

17. The senior counsel for the petitioners has also argued that though the exchange aforesaid has resulted in closure of one rasta / pathway i.e. the one between the Institute of the petitioner on both sides thereof, it has created another rasta / pathway elsewhere on the land surrendered by the petitioners. It is contended that the rasta / pathway created on the land surrendered by the petitioner has been found by the Deputy Commissioner to be more beneficial to the villagers.
18. The senior counsel for the respondents 1 to 6 has contended that a rasta / pathway could never have been the subject matter of exchange. It is contended that the same is not part of Bhumidhari

land which alone can be the subject matter of exchange. Reliance is placed on *The Municipal Corporation of Delhi Vs. Hira Lal Tota Ram* AIR 1972 Delhi 29 laying down that MCD is competent to remove encroachment on public street in rural / village areas also, though Gaon Panchayat may also act under the Panchayat Raj Act and the Reforms Act.

19. It is also argued that the rastas / pathways / streets do not vest in the Gaon Sabha.
20. Reliance is also placed on the recent judgment dated 28th January, 2011 of the Supreme Court in SLP(C) No.3109/2011 titled *Jagpal Singh Vs. State of Punjab* commenting on the dissipation of Gaon Sabha land and issuing directions for preservation thereof.
21. The senior counsel for the petitioners in rejoinder has objected that no plea with respect to the applicability of the Delhi Municipal Corporation Act, 1957 was raised before the Financial Commissioner or even in the counter affidavit filed in this Court and

cannot be taken suddenly during the hearing. He contends that if the same was to be considered, opportunity ought to be given to meet the same. He in response to the argument that the views of the Gaon Sabha are a must has drawn attention to the reply filed by the Gaon Sabha to the Revision Petition before the Financial Commissioner, where the Gaon Sabha had sought dismissal of the revision petition of the respondents 1 to 6.

22. The counsel for the respondent No.7 Gaon Sabha has invited attention to the report dated 7th January, 2010 submitted by the Deputy Commissioner before the Financial Commissioner where it was reported that due to exchange earlier allowed, the rest of the land of the rasta / pathway has become useless inasmuch as the same could not be used by the villagers to approach the pucca road (phirni) on the periphery of the village and that the allotment of land of rasta to petitioners blocks the Right of Way, preventing access by the villagers. It was further reported that the land surrendered by the petitioners was at a distance of 400 mtrs. from the rasta / pathway

land given to the petitioners and could not be used as rasta / Right of Way by the villagers.

23. The aforesaid would show that while the person earlier officiating as the Deputy Commissioner had opined that the exchange proposed by the petitioners was in the interest of the villagers, the present incumbent does not share the same view. The same demonstrates the fickleness in the decision making process and the manner in which the officials are discharging their duties.
24. The senior counsel for the respondents 1 to 6 at the fag end of the hearing has raised another interesting argument which he fairly admits occurred to him only during the hearing before the Court. He contends that even if Section 40 of the Reforms Act and Rules 25 & 26 of the Reforms Rules were held to be applicable, the same only provide for an exchange which is a matter of contract between the petitioners and the Gaon Sabha, with the permission of the Deputy Commissioner. It is argued that the Deputy Commissioner in the present case has proceeded on the premise that he could allow the

exchange even without the Gaon Sabha agreeing to the same. It is contended that the Gaon Sabha is an elected body and without the resolution of the Gaon Sabha or the consent of the Development Commissioner now exercising powers of the Gaon Sabha, no exchange could in any case have been possible and the permission earlier granted by the Deputy Commissioner and set aside by the Financial Commissioner is in any case of no avail.

25. In my opinion the last contention aforesaid of the respondents 1 to 6 is sufficient for dismissal of this petition. Section 40 of the Reforms Act permits exchange of land between Bhumidhars *inter se* or between a Bhumidhar and the Gaon Sabha. However, the same has not been left only to the discretion of the exchanging parties and Section 40 of the Reforms Act requires the permission to be obtained for such exchange.

26. In the present case, the application / proposal of the petitioner for exchange was unilateral. The Gaon Sabha in whom the land underneath the rasta / pathway sought to be exchanged was claimed

to be vesting, did not join in the proposal of the petitioner. In fact, there is nothing to show that the Gaon Sabha at any time consented to such an exchange. It is not the case of the petitioners also. All that is available is, that the Gaon Sabha by seeking dismissal of the revision petition before the Financial Commissioner consented to the exchange. However, the said consent even if any, is again without any basis inasmuch as it is not shown that there was any resolution of the Gaon Sabha to the said effect or that the reply to the Revision Petition was filed under the authority of any officer empowered to consent to the exchange on behalf of the Gaon Sabha.

27. Rule 26(1) of the Reforms Rules also uses the expression “where any exchange has been agreed upon” and requires “a party to the agreement” to apply to the Deputy Commissioner to record the same in the record-of-rights. There is nothing to show that when the petitioners applied to the Deputy Commissioner, there was any agreement. There is also nothing to show that the Deputy Commissioner was exercising the powers of the Gaon Sabha. The

Deputy Commissioner under Rule 26(1) of the Reforms Rules is to be approached only for recording the exchange in the record of rights and Rule 26 of the Reforms Rules lays down the procedure for so permitting the exchange.

28. Though as aforesaid, the petition is liable to be dismissed on this ground alone but since detailed arguments on other aspects have been heard, it is deemed appropriate to deal with the other contentions raised also.
29. The first question which arises is whether the land of the rasta / pathway vests in the Gaon Sabha. Repeated enquiries were made during the hearing in this regard but the senior counsels could only draw attention to Section 7 of the Reforms Act extinguishing rights of proprietor(s) pertaining *inter alia* to pathways and vesting the same in the Gaon Sabha. Attention of the counsels was invited to Section 3(13) of the Reforms Act defining “land” and which does not include within its ambit the land underneath rastas / pathways. It

was enquired that if that were so, how the land underneath rastas / pathways could be land which the Gaon Sabha could exchange under Section 40 of the Reforms Act.

30. I further find that Section 154 (1)(vi) of the Reforms Act vests pathways situated in a Gaon Sabha Area in the Gaon Sabha. The said provision also treats pathways differently from “all lands whether cultivable or otherwise” dealt with in Section 154 (1)(i). Thus, pathways/rastas, though vesting in Gaon Sabha, cannot be said to be “land for the time being vested in Gaon Sabha” within the meaning of Section 40 of the Reforms Act. The land vesting in Gaon Sabha is differently dealt from pathways vesting in Gaon Sabha, in the matter of ejectment of unauthorized occupants therefrom also. While provision for former is made under Section 86A, for the latter provision is made in Section 87 of the Reforms Act. The same also demonstrates that the pathways/rastas though vesting in the Gaon Sabha cannot be said to be the land of the Gaon Sabha which the Gaon Sabha can agree to exchange.

31. Mention may also be made of Section 73 of the Reforms Act which describes the land to which the Gaon Sabha is entitled to admit any person. The same read with Section 3(13) of the Reforms Act also does not show that the Gaon Sabha is entitled to admit any person as Bhumidhar to any land of rasta. There being no provision in the Reforms Act for the Gaon Sabha to admit any person to the land of the rasta, the question of the Gaon Sabha being entitled to exchange the land of the rasta does not arise.
32. Parity may be drawn of the rights even of municipalities with respect to streets, inspite of statutory provisions vesting the streets in the municipalities. A Division Bench of the Madras High Court as far back as in *S. Sundaram Ayyar v. The Municipal Council of Madura* [1902] I.L.R. 25 Mad. 635 held that when a street is vested in Municipal Council, such vesting does not transfer to the Municipal authority the rights of the owner in the site or soil over which the street exists - it does not own the soil – it only has the exclusive right to manage and control the street. The said view was

approved by the Apex Court in *Municipal Board, Manglaur Vs. Sri Mahadeoji Maharaj* AIR 1965 SC 1147. It was held that the Municipalities do not have a right to allow any person to put up structure on a public pathway and which structures were not necessary for the maintenance or user of it as a pathway.

33. In my opinion, the vesting of the pathways / rastas in rural areas in the Gaon Sabha cannot be at a higher pedestal than the vesting of the streets in the municipality and the Gaon Sabha, only has the right to management and maintenance of the rastas / pathways and has no right of ownership therein so as to admit any other person into possession of the rasta or to exchange the land of the rasta for any consideration.
34. The Supreme Court in *Ahmedabad Municipal Corporation v. Nawab Khan Gulab Khan* AIR 1997 SC 152 again held that footpaths, streets and pavements are public property which are intended to serve the convenience of general public, they are not laid for private use and indeed their use for a private purpose frustrates

the very object for which they are carved out; the facility which has matured into a right cannot be set at naught by allowing encroachments thereon. It was further held that public property needs to be preserved and the Constitutional Court has a Constitutional duty as sentinel on the *qui vive* to enforce the right of a citizen when he approaches the Court for perceived legal injury.

35. I am therefore of the opinion that the Gaon Sabha has not been vested with any power to admit any person on to land of the rasta / pathway or to exchange the land of the rasta with any other land.
36. Though arguments were also heard with respect to the provisions of the Delhi Municipal Corporation Act, 1957 but since the senior counsel for the petitioners had contended that the petitioners have been taken by surprise with respect thereto, I am not dealing with the said aspect of the matter.
37. The petition therefore fails. The order of the Deputy Commissioner (set aside by the Financial Commissioner) is found to be without

jurisdiction and in contravention of law. The interim order granted in this petition is vacated. If the petitioners have in pursuance of the order of the Deputy Commissioner closed the rasta / pathway aforesaid and / or included the same in their property, the petitioners are directed to within four weeks of today, restore the rasta / pathway to the original position. The petitioners if have parted with possession of land offered in exchange, shall similarly be entitled to repossess the same.

No order as to costs.

**RAJIV SAHAI ENDLAW
(JUDGE)**

FEBRUARY 11, 2011
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