

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

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Date of decision: 17th September, 2012

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LPA No.1232/2007

DELHI DEVELOPMENT AUTHORITY

..... Appellant

Through: Mr. Ajay Verma & Mr. Amit Mehra,
Adv.

Versus

MOHD. SALEEM (DECEASED).

THROUGH L.R'S & ORS.

..... Respondents

Through: Mr. N.S. Vashisht, Mr. Vishal Singh
& Mr. Arpan Sharma, Adv.
Mr. V.K.Tandon, Adv. for WAKF
Board.

CORAM :-

HON'BLE THE ACTING CHIEF JUSTICE

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

RAJIV SAHAI ENDLAW, J

1. This Intra-Court appeal impugns (i) the judgment dated 10th August, 2004 of the learned Single Judge dismissing W.P.(C) No.4271/2003 preferred by the Gaon Sabha, Masood Pur (Ladha Sarai) and in which the appellant DDA was a respondent; and, (ii) the order dated 20th July, 2007 of the learned Single Judge dismissing the application of the appellant DDA for condonation of 774 days delay in applying for review and consequently the application filed by the appellant DDA seeking review of the judgment dated 10th August, 2004.

2. Notice of the appeal was issued and vide order dated 24th September, 2007 which continues to be in force, *status quo* as regards title and possession of the land in question directed to be maintained. The counsels have been heard. They have also filed written submissions. During the course of hearing the file of Case No.265/2002-C.A. [Revision Petition under Section 187 (b) of the Delhi Land Reforms (DLR) Act, 1954] decided by the Court of the Financial Commissioner, Delhi on 28th February, 2003 was also requisitioned.

3. The subject land *ad-measuring* 103 bighas and 12 biswas is situated in the Revenue Estate of Ladha Sarai. The said land was notified for acquisition on 13th November, 1959 but before the acquisition proceedings could be completed, it got vested, in the Gaon Sabha under Section 7(1) of the DLR Act and on urbanization of the Village on 23rd May, 1963, in the Central Government and ultimately in the year 1974 transferred under Section 22 of the Delhi Development Authority, Act, 1957 to the appellant DDA, treating the land to be *Nazul* land on the basis of vesting in the Gaon Sabha.

4. The respondents herein, in or about the year 1967 filed a Civil Suit *inter alia* for declaration, impugning the vesting of the land in the Gaon Sabha. The said Suit was decreed on 12th February, 1968 holding the order of the vesting of the said land in the Gaon Sabha to be wrong, illegal, void and without jurisdiction and not affecting the rights of the respondents. It was held that the land, though described as ‘*Gair Mumkin Pahar*’, ‘*Banjar*’ and ‘*Gair Mumkin Rasta*’ etc. in the revenue records, was included in the ‘holding’ of the respondents and thus could not, on coming into force of the

DLR Act vest in the Gaon Sabha as the definition of ‘holding’ in the said Act, till its amendment in the year 1956 allowed such land to be part of ‘holding’ and did not constitute waste land (though uncultivated) which under Section 7 were to vest in the Gaon Sabha. It was further held that the respondents were shown to be in possession of the land “till the year 1959, when the suit land vested in the Gaon Sabha which was shown to be in possession of the Gaon Sabha as is clear from the perusal of the copy of *Khasra Girdawari* for the year 1959 to 1965”. However in view of the finding that respondents were original owners of the land, they were deemed to be in possession of the land.

5. The Gaon Sabha and the Union of India preferred an appeal which was dismissed on 24th October, 1968. The first appellate court noted that there was no evidence on record of the actual date of vesting of the land in Gaon Sabha though in the revenue records Gaon Sabha was shown as owner from the year 1959 onwards.

6. Thereafter, second appeal was filed by the Gaon Sabha and the Union of India and which was allowed on 20th August, 1975 on the ground that the Civil Courts had no jurisdiction to entertain the Suit.

7. The respondents thereafter approached the Revenue Assistant for declaration of their *bhumidhari* rights in the said land. The Revenue Assistant, vide his order dated 31st May, 1985 held that graveyard, mazar, Masjid existed over 27 bighas 7 biswas of land and the respondents could be said to be in possession of said portion of land only, for preceding five years or since before commencement of the DLR Act and that there was no proof

of the respondents being in cultivatory possession of the remaining land described as '*Gair Mumkin Pahar*', '*Rasta*' etc., to be entitled to be declared as *bhumidhar* thereof. Accordingly, declaration of *bhumidhari* rights, in favour of respondents, was granted with respect to 27 bighas 7 biswas of land only.

8. Appeals were filed by Union of India as well as the respondents. The Addl. Collector vide order dated 15th November, 1985 held that (i) the land, in the revenue records was described as '*Gair Mumkin Khandarat*' and the entries showing land as '*Masjid*', '*Mazar*' or 'Graveyard' are of 1974-75; (ii) that the concept of proprietorship in the land was abolished by the DLR Act; (iii) that since admittedly the land was not being used for cultivation, it was rightly vested in the Gaon Sabha; (iv) that the respondents had claimed *bhumidhari* rights in the land under Section 11 and alternatively under Section 85 of the DLR Act and which claim they had been unable to substantiate; (v) that '*Pahar*' is also wasteland and the land thus was rightly vested in Gaon Sabha; (vi) that there was no evidence of any portion of the land being in cultivatory possession of respondents within three years preceding filing of application for declaration of *bhumidhari* rights. Accordingly, the Addl. Collector allowed the appeal of the Union of India and dismissed the appeal of the respondents. The respondents were thus not held entitled to even 27 bighas and 12 biswas of land.

9. The respondents approached the Financial Commissioner who vide order dated 16th October, 1996 remanded the matter to the Revenue Assistant holding that DDA was a necessary party but had not been impleaded and with a direction to take further proceedings after impleading

DDA as a party and with a further direction that since issue of title to land was involved, the Revenue Assistant should refer the said issue to the Civil Court under Section 186 of the DLR Act.

10. The Revenue Assistant on remand, impleaded DDA and referred the following question under Section 186 of the DLR Act to the Civil Court for adjudication:-

“Whether the petitioners were owners of land in suit prior to the implementation of the Delhi Land Reforms act, 1954.”

11. The Civil Court vide order dated 3rd May, 1991 answered the reference as under:-

“It is proved by oral as well as documentary evidence that the petitioners were the owners of the suit land prior to the implementation of Delhi Land Reforms Act, 1954. So, this issue is decided in favour of the petitioners.”

12. Neither the Union of India nor the DDA appealed against the aforesaid finding of the Civil Court, which has attained finality.

13. However, notwithstanding, the Civil Court having returned the finding aforesaid, neither did the respondents approach the Revenue Assistant to proceed further in the matter, nor did the Revenue Assistant on his own revive the proceedings. In fact there is nothing to show that the findings of the Civil Court were returned to the Revenue Assistant.

14. The respondents, after nearly 11 years filed the Revision Petition under Section 187 (b) of the DLR Act before the Financial Commissioner and against the order dated 28th February, 2003 wherein the writ petition from which this appeal arises, was filed. The respondents in the said Revision Petition, though without pleading that they had approached the Revenue Assistant or that the Revenue Assistant had refused to revive the proceedings, made a grievance that the Revenue Assistant had failed to exercise his jurisdiction after the Civil Court had rendered findings on 3rd May, 1991 and sought a declaration from the Financial Commissioner of *bhumidhari* rights in the said land and in the alternative, if DDA was desirous of “retaining the land”, a direction to the DDA to acquire the land and pay compensation therefor to the respondents.

15. The said Revision Petition was opposed by the Gaon Sabha as to maintainability. It was urged that since there was no decision of the Revenue Assistant, the Revision did not lie. The Financial Commissioner however vide order dated 28th February, 2003 held that since the Revenue Assistant notwithstanding the Civil Court having returned a finding had not passed any order, the Revision under Section 187 against the inaction of the Revenue Assistant was maintainable. The appellant DDA pleaded before the Financial Commissioner that though the land had been placed at its disposal but it was not made a party to the proceedings before the Civil Court. The Financial Commissioner however, on the basis of records concluded the said plea to be not maintainable. The Financial Commissioner, on the basis of finding dated 3rd May, 1991 of the Civil Court directed the Revenue Assistant to effect necessary corrections in the land record as per the finding

dated 3rd May, 1991 of the Civil Court so as to include the land in the holding of the respondents. It was further observed that since according to the definition of ‘holding’ originally incorporated in the DLR Act, the said land could not have vested in the Gaon Sabha because it was included in the holding of the respondents, the change in the definition of ‘holding’ in the year 1956 by an amendment in the DLR Act, would be of no avail and the land could not be regarded to have vested in the Gaon Sabha. Axiomatically, the further vesting of the land in the Union of India and transfer thereof, to the appellant DDA in the year 1974, was also held to be void.

16. The learned Single Judge vide impugned judgment dated 10th August, 2004 dismissed the writ petition of the Gaon Sabha against the aforesaid order of the Financial Commissioner finding no infirmity therein. It was further held that since the vesting of the land in the Gaon Sabha was bad, DDA as the successor of the Gaon Sabha could also not acquire any better title and the Notification placing the land at the disposal of the DDA did not affect the rights of the respondents.

17. The appellant DDA sought review, pleading (i) that the respondents, after the Civil Court had returned its findings on 3rd May, 1991 as aforesaid, had not made any application to the Revenue Assistant and had straightway filed Revision Petition aforesaid before the Financial Commissioner and it was thus without cause of action; (ii) that the respondents had always described their land as “*Gair Mumkin Khandarat*” and it was also a matter of record before the Financial Commissioner; that it was the contention of the respondents that land recorded as *Gair Mumkin Khandarat* could not be treated as a waste land which could vest in the Gaon Sabha under Section 7

of the DLR Act – however the Supreme Court in *Gaon Sabha Vs. Nathi* (2004) 12 SCC 555 had held *Gair Mumkin* itself to be uncultivable; that the judgment of the Division Bench of this Court in *Sher Singh Vs. Gaon Sabha* 44 (1991) DLT 713 on which the respondents were relying had been set aside by the Supreme Court in *Union of India Vs. Sher Singh* (1997) 3 SCC 555 and it was held that for a land to be included in the ‘holding’ of a proprietor, it should have been held as *Sir* or *Khudkasht* i.e. cultivated by the proprietor himself or through others within five years before the commencement of the DLR Act and that unless ‘waste land’ stood excluded from Section 7 of the Act, the rights of the proprietors in waste lands vest in the Gaon Sabha; (iii) that the Civil Court in its order dated 3rd May, 1991 had merely held the respondents to be the owners of the land but it was still to be decided by the Revenue Assistant whether the said land described as *Gair Mumkin Khandarat* would form part of the holding of the respondents or not - that the Financial Commissioner erred in, from a finding of the Civil Court of the respondents being the owners of the land, treating the same to be included in the holding of the respondents.

18. The delay of 774 days aforesaid, in filing the Review Petition was sought to be explained pleading incompleteness of records and time having been taken in completing the same; thereafter an appeal having been prepared and upon deliberation, a decision to prefer a review having been taken.

19. The learned Single Judge in the impugned order dated 20th July, 2007 has re-visited the entire factual controversy and owing to certain pleas of fraud having also been taken in the Review Petition, after holding no case of

fraud having been made out, dismissed the application for condonation of delay and accordingly the Review Petition.

20. The counsel for the respondents has at the outset challenged the very maintainability of this appeal. It is contended that no appeal lies against dismissal of a Review Petition and as far as the challenge in the appeal to the judgment dated 10th August, 2004 is concerned, the same is time barred and no application for condonation of delay is filed. Reliance is placed on ***Basant Kharbanda Vs. Punjab & Sind Bank*** 65(1997) DLT 378 (DB), ***Shah Babulal Khimji Vs. Jayaben D. Kania*** AIR 1981 SC 1786 and ***Rakesh Kumar Gupta Vs. Umesh Kumar Gupta*** AIR 2008 Delhi 73.

21. We however do not find any merit in the aforesaid objection. Firstly, the Review Petition has been dismissed as a consequence of the delay in filing thereof having not been condoned. The Intra-Court appeal against the refusal for condonation of delay is indeed maintainable. The judgments cited in ***Basant Kharbanda*** supra and ***Rakesh Kumar Gupta*** supra are on non-maintainability of application against dismissal of review and not on non-maintainability of application against refusal to condone delay. As far as ***Shah Babulal Khimji*** supra is concerned, the same suggests an order refusing to condone delay to be applicable and we fail to see why the respondents are relying thereon. Secondly, the learned Single Judge, while dismissing the application for condonation of delay has re-visited the entire matter on merits and returned fresh findings and the appeal thereagainst would definitely be maintainable.

22. The counsels have addressed detailed submissions before us on merits and which as aforesaid have not been considered by the learned Single Judge and which were raised in the Review Petition. For this reason only, the file of the Revision Petition before the Financial Commissioner was requisitioned. The respondents, before the Financial Commissioner had claimed that if the DDA wants to retain land, it should acquire the same and pay compensation. We were during the hearing told that the subject land has over the years been dealt with irretrievably and now the possibility of restoring the same to the respondents, even if they ultimately succeed, does not exist. The counsel for the respondents has also argued that the claim now of the respondents on the basis of the order of the learned Single Judge, will only be for compensation for the land as and when the appellant DDA chooses to issue Notification for acquisition thereof. Considering the fact that the land is prime, in the heart of South Delhi, the compensation amount thereof would run into crores of rupees and which would *inter alia* go out of public exchequer. In the entire facts and circumstances of the case, we are of the view that the matter needs consideration on merits, in the proper perspective. Though, the respondents have been agitating for long but when we find the real question to have not been adjudicated, we cannot at the peril of the public funds, brush aside the matter.

23. We are therefore of the view that considering the issues raised for adjudication and importance thereof, the delay in applying for review deserved to be condoned. Private rights must give way to public rights, particularly when we find *prima facie* merit in the contentions raised by the appellant DDA and which have not been adjudicated. Though certainly,

owing to the chequered history aforesaid of the litigation, considerable delay has been caused but as aforesaid, claims now of the respondents are only monetary and which are unlikely to be affected by the future course of action adopted by us, as herein below.

24. Though we have explored the possibility of adjudication of rival contentions ourselves, but felt it inappropriate since the original forum for adjudication thereof is the Revenue Assistant and first appeal and second appeal thereagainst are available; the parties cannot be deprived of rights thereof. Further, we find ourselves handicapped since even factual investigation is incomplete.

25. Reference to Civil Court, is not the end of the jurisdiction of the Revenue Assistant, under Section 186 of the DLR Act. The Revenue Assistant, under Section 186(4), after finding of the Civil Court have been received, is required to “then proceed to decide the suit, accepting the finding of the Civil Court on the issue referred to it”.

26. As would be obvious from the narrative above, the decision on the claim of declaration of the respondents to *bhumidhari* rights is not dependent on the decision of the Civil Court alone. Even if the respondents were the owners/proprietors of the land prior to the coming into force of DLR Act, that alone does not entitle them to *bhumidhari* rights. *Bhumidhari* rights, as aforesaid, were claimed under Section 11 and alternatively under Section 85 of the DLR Act. It still has to be adjudicated by the Revenue Assistant, whether they have been in cultivation of the land as required under Section 85 of the DLR Act.

27. As far as the claim of *bhumidhari* under Section 11 of the DLR Act is concerned, it has to be determined by the Revenue Assistant as to whether the respondents, even though found by the Civil Court to be owners of the land since prior to coming into force of the DLR Act, were holding the same as *Khudkasht* or proprietors grove or as *Sir* land etc., as required under Section 11.

28. In so far as the challenge by the respondents to vesting of the land in Gaon Sabha, even though not found to be under challenge in the application before the Revenue Assistant, is concerned, the arguments as aforesaid revolved around the vesting being not possible under the DLR Act as enacted and becoming possible only upon amendment thereof in the year 1956. However in the entire record there is no order of vesting. It was so noticed in one of the orders mentioned above also. Though the counsel for the respondents has argued that the amendment of the year 1956 to DLR Act would have no retrospective effect but the pleadings of the respondents including in the counter affidavit dated 18th September, 2003 indicate that vesting was after the year 1959 when notification for acquisition of the land was issued. If that be so, then in any case the vesting would be governed by the 1956 amendment. This matter also requires investigation and which can be done by the Revenue Assistant only. Not only so, there is serious challenge by the appellant DDA, to the argument of respondents of the amendment of the year 1956 being not retrospective.

29. Though it is the contention of the appellant DDA that the respondents having not taken any steps whatsoever for having the proceedings before the Revenue Assistant re-activated after the findings had been returned by the

Civil Court on 3rd May, 1991, the Financial Commissioner, in the Revision preferred by the respondents after nearly 11 years, in the year 2002 was not entitled to reactivate the matter, lest decide the same, we are of the view that even if the Revision was maintainable, all that the Financial Commissioner could have done was to have directed the Revenue Assistant to proceed in the matter. However, the Financial Commissioner rather not only decided the matter himself but also declared the vesting of the land in the Union of India and the transfer thereof to the appellant DDA to be void. The Financial Commissioner, exercising revisionary jurisdiction was not entitled to do so. We have perused the requisitioned record of the Revision Petition. It does not indicate any hearing even to have been given on the aspect; at least the reply filed by the Gaon Sabha to the Revision Petition does not indicate that the said questions were also to be adjudicated in the Revision Petition. The order of the Financial Commissioner was thus liable to be set aside on this ground alone.

30. It is on record that the land was urbanized pursuant to Notification dated 23rd May, 1963 under Section 507 of the Municipal Corporation Act, 1957 and was in the year 1974 vested in the DDA. There is no reference in the records to any challenge being made by the respondents to all this or to an attempt to protect their possession if any. It will also have to be examined whether notwithstanding all these changes the respondents can still claim any rights or the rights even if any of the respondents stand extinguished.

31. Notice may also be taken of one of the reasonings in the order dated 15th November, 1985 of the Addl. Collector that the Revenue Assistant has no power to modify a Notification under Section 7 of the DLR Act. This

aspect has also escaped the Financial Commissioner. The application of the respondents before the Revenue Assistant was for declaration of their *bhumidhari* rights and not challenging the order of vesting.

32. For all the aforesaid reasons, the judgment/order of the learned Single Judge dismissing the writ petition impugning the order dated 28th February, 2003 cannot be sustained and is set aside.

33. No purpose would be serviced in remanding the case to the learned Single Judge or to the Financial Commissioner. The adjudication as aforesaid, is to be done by the Revenue Assistant.

34. We, accordingly, set aside the judgment dated 10th August, 2004 and the order dated 20th July, 2007 of the learned Single Judge as well as the order dated 28th February, 2003 of the Financial Commissioner and remand the matter to the Revenue Assistant to proceed to decide the application for declaration of *bhumidhari* rights made by the respondents before him in the light of the findings dated 3rd May, 1991 of the Civil Court. The Revenue Assistant while so deciding, to also consider the effect of any delay by the respondents from the year 1991 to 2002. We have, as aforesaid, not found even any plea in the Revision Petition preferred by the respondents to the Financial Commissioner that they had in between approached the Revenue Assistant or that the Revenue Assistant had failed to act. There is nothing also to show that the findings dated 3rd May, 1991 had reached the Revenue Assistant. We also grant liberty to the parties to address all other pleas available to them before the Revenue Assistant. However, since considerable time has elapsed, we request the Revenue Assistant to adjudicate the matter

expeditiously and within one year, of the parties first appearing before that fora. The parties to appear before the Revenue Assistant on 8th October, 2012. The record requisitioned from the Financial Commissioner be also forwarded to the Revenue Assistant.

The appeal accordingly stands allowed. In the facts, no costs.

RAJIV SAHAI ENDLAW, J

ACTING CHIEF JUSTICE

SEPTEMBER 17, 2012

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