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IN THE HIGH COURT OF DELHI AT NEW DELHI

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RSA No. 78/2013 and RSA No. 94/2013

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24th October, 2016

RSA No. 78/2013

KHUBI RAM SHARMA

..... Appellant

Through: Mr. Sanjay Poddar, Sr. Advocate with
Mr. Sandeep Bajaj, Mr. Gobind Kumar,
Mr. Soaqib Qurashi and Mr. Sachin,
Advocates.

versus

YASHPAL & ORS.

..... Respondents

Through: None.

RSA No. 94/2013

UMESH CHAND SHARMA

..... Appellant

Through: Mr. Parvinder Chauhan and Mr. Nitin
Jain, Advocates.

versus

YASHPAL & ORS.

..... Respondents

Through: None.

CORAM:

HON'BLE MR. JUSTICE VALMIKI J.MEHTA

To be referred to the Reporter or not? **YES**

VALMIKI J. MEHTA, J (ORAL)

1. These Regular Second Appeals under Section 100 of the Code of Civil Procedure, 1908 (CPC) are filed against the concurrent Judgments of the courts below; of the Trial Court dated 24.5.2011 and the First Appellate Court dated 22.1.2013; by which the suits for injunction filed by the appellants/plaintiffs were dismissed. The claim in the suit was with respect to a cause of action of the appellants/plaintiffs that the smaller portion JKLM forming a part of gali DGHI admeasuring 60 sq. yards was a private gali of the appellants/plaintiffs and in which the respondents no.1 and 2/defendants have no right including for opening of any doors or ventilators in the gali. For the sake of convenience reference is made to the facts of RSA No. 78/2013.

2. The subject suit was filed by the plaintiffs pleading that they and their predecessors-in-interest were owners of one bigha and one biswa of land (1058 sq. yards) comprised in Khasra no. 511 of village Shahpur Jat, New Delhi. It was pleaded that the original co-owners of this land had left a private gali shown as DGHI in the site plan Ex.PW1/1. The disputed portion JKLM is part of this private gali of 60 sq. yards and which area JKLM forms part of the larger area DGHI. It is pleaded that the respondents no.1 and 2/defendants never used the gali/private street DGHI and their ingress and egress is from the

southern portion of their house which adjoins the public street wherein the respondents no.1 and 2/defendants have their electricity meters, water meters, etc. To the northern side of the house of the respondents no.1 and 2/defendants is the subject private gali DGHI of the appellants/plaintiffs in which the respondents no.1 and 2/defendants do not have any legal right whatsoever and therefore even no right to open any door or window or ventilator opening in the same, but, the respondents no.1 and 2/defendants have opened ventilators on the property and are threatening to open a door on the ground floor of their property which will have opening in the private gali which is to the north of the premises owned by the respondents no.1 and 2/defendants, and have ultimately opened a door opening on to the subject gali. Accordingly, injunction was prayed in the suit by the appellants/plaintiffs to restrain the respondents no.1 and 2/defendants from in any manner using the private street of the plaintiffs, including the portion JKLM, whether by opening of ventilators or opening of door on the ground floor of the property of the defendants which was three feet above the street DGHI. The already opened door was prayed to be closed.

3. Respondents no.1 and 2/defendants contested the suit and pleaded that the street was a public street and hence appellants/plaintiffs could not claim it to be a private street. Respondents no.1 and 2/defendants claim that there were water lines, sewer lines, etc of the Municipal Corporation of Delhi (MCD)

on the street DGHI and thus this street could not be a private street but was a public street. It was also the case of the respondents no.1 and 2/defendants that there was completely unhindered ingress and egress on to this street by all persons and therefore this street DGHI could not be taken as a private street. It was also pleaded that even the MCD also considers this street as a public street because the municipal sweeper cleans this street. Accordingly, the suit was prayed to be dismissed.

4. After the pleadings were complete, the trial court on 21.2.2005 framed the following issues:-

- “1. Whether the suit is barred in view of PO no. 3? OPD
2. Whether the suit is not maintainable in view of PO no. 7? OPD
3. Whether the plaintiff is entitled to permanent injunction as prayed? OPP
4. Whether the plaintiff is entitled to mandatory injunction? OPP
5. Relief.”

5. Issue no. 1 has been decided against the appellants/plaintiffs relying on the admissions of PW2 and PW4 that the street is cleaned by the municipal sweeper, that the street has sewer lines of the MCD and further that there are also water lines in the street DGHI. Trial court also refers to the area in question being an urbanized village with MCD providing amenities in the area and also that fruit and vegetable venders use this street in an unrestricted manner. It was also found by the trial court against the appellants/plaintiffs for

the street to be a private street because there was no chowkidar/guard appointed by the appellants/plaintiffs to restrict the entry of outsiders in the street DGHI. The relevant observations of the trial court in this regard for holding issue no. 1 against the appellants/plaintiffs read as under:-

“Issue no.1.

The onus of proving this issue was upon the defendant. To decide this issue it would be pertinent to refer to the relevant testimony of witnesses for a while. PW2 Sh. U.C. Sharma in his cross examination states, *“the sewer line installed in the houses of both sides of the houses are maintained by private parties. It is correct that there is no chokidar posted in the entrance of the disputed street to cheque the entry of the private persons/ public. The water connections given to the houses situated on both sides of the disputed street have been given to us by MCD. The street is cleaned by the sweeper but I do not know where he throws the garbage.it is correct that Shahpur Jat is a urban village. ...”*.

PW4 in his cross examination states, *“I do not know whether the lay out plan of village Shahpur Jat has been approved by DDA/MCD. It is correct that the sewer line has been laid, but I do not know who has laid the sewer lanes in the disputed street. There are no electricity lanes in the dispute street. It is correct that the water lanes have been laid in half of the disputed street. No municipal sweeper comes to clean the disputed street.our residential houses built in the dispute area sometime in 70’s. No approval was taken from MCD before building the houses. Vol. said that we are paying property tax on these houses. It is the practice in village Shahpur Jat that no approval is obtained from the MCD before carrying out new construction of houses. It is also correct that we had created the disputed street in 70’s without the approval of the MCD. It is correct that the houses built by us on both sides of the disputed street have been rented out to outsiders and as also occupied by us.”*

PW4 in his deferred cross examination states, *“it is correct that the meter readers of electricity department used disputed street for visiting houses situated on both sides of disputed street. It is also correct that the postman also uses this street for delivery of letters to the residents situated on either sides of the disputed street. it is correct that vegetable/ fruit vendors comes in the street for selling their products. Vol. we allow vendors only from whom we intend to purchase the vegetable or fruits etc. we have not deputed any chokidar/ watchman or any other person to restrict the entry in the disputed street.....”*

Thus, as per PW2, the street in question is cleaned by a sweeper but as per PW4 no municipal sweeper comes in the street. Now, plaintiffs have nowhere stated that they had engaged a private sweeper to sweep the streets. More so in view of the fact that the area in question is an urbanized village and MCD is providing

various amenities in the area, it was for the plaintiffs to show that they are availing facilities of a private body for getting their streets cleaned.

Then, it is seen that there is no guard employed by the plaintiffs to restrict the entry of the outsiders in the area. Even in private societies, security guards are employed to restrict general public. There is no such security or restriction provided to prevent access of general public to the street.

Further there are no means of monitoring the entry of public persons into street and to regulate the same. Further plaintiffs have never averred that there is a public notice placed on the entrance of the street to warn the visitors that the street is not a thoroughfare and cannot be used as a public way. In the absence of such a notice, how can the plaintiffs maintain the sanctity of the street as private is inexplicable.

Further, there are water connections and electricity connections installed and maintained by public authorities.

Further, PW4 states that only those vegetable vendors are allowed from whom they want to buy vegetables. Now, plaintiffs have failed to state as to by what mechanism are they regulating the entrance of these vendors. That there any nominated vendors who alone are entitled to enter into the street has not been averred.

Thus, the plaintiffs have failed to aver the manner in which the nature of the street being private is maintained by them. There are no characteristics which would give the street a status of private street. Accordingly, the issue is decided against the plaintiff.”

6. As regards issue no. 2, the trial court held that in view of Section 320 of the Delhi Municipal Corporation Act, 1957 (DMC Act) the portion DGHI was a ‘street’ and thus the appellants/plaintiffs were wrongly putting a wall immediately adjacent to the northern side wall of the house of the respondents no.1 and 2/defendants for closing the ingress and egress of the respondents no.1 and 2/defendants from their house to the private street/gali DGHI including the disputed portion JKLM. Issue no. 2 was accordingly decided against the appellants/plaintiffs by observing as under:-

“Issue no. 2

Defendants have raised an objection with respect to Section 312 and 313 of Delhi Municipal Corporation Act as per which neither the private street nor the public street can be created without the sanction of MCD. Section 320 of DMC Act has also been relied upon by the defendants. Defendants submit that any existing street cannot be closed by putting a wall in the existing street or otherwise without approval of MCD. Thus, it is submitted that plaintiffs have no right to put any wall in the street or otherwise close it.

Section 320 of Delhi Municipal Corporation Act, 1957 states,

“1) No person shall, except with the permission of the Commissioner granted in this behalf, erect or set up any wall, fence, rail, post.....whether fixed or movable or whether of a permanent or temporary nature, or any fixture in or upon any street”

Thus, Section 320 of the Act clearly states that no wall can be erected on any street whether public or private without the permission of the Commissioner. The relief sought by the plaintiffs in the present case is that defendants be restrained from creating of any obstacle in the raising of the wall between the points K& L in the alleged private street JKLM.

Thus, in view of Section 320 of the Act, the proper authority which can grant the permission for construction of wall is Commissioner, Municipal Corporation of Delhi and the relief cannot be granted by means of the present suit.

Accordingly, the issue is decided in favour of the defendants.”

7. When this appeal was admitted for hearing by an Order of a learned Single Judge on 25.8.2014, the following substantial questions of law were framed:-

“(i) Whether the Trial Court without formulating an issue as to whether the street which was in issue declared as a public street within the definition of Section 316 of the MCD Act and holding whether the said street was a public street?

(ii) Whether the findings of the Trial Court and the first appellate Court are perverse?”

8. In exercise of my powers under Section 100 (proviso) of CPC, the following substantial questions of law are additionally framed:

“(i) Whether the courts below have ignored the ratio of the judgment of the Supreme Court in the case of *Pt. Chet Ram Vashist (Dead) by LRs. Vs. Municipal Corporation of Delhi, (1995) 1 SCC 47* and which holds that a private street can be owned by the Corporation only if the land comprising a private street is acquired by the Government, and admittedly, there is no case set up by the respondents no.1 and 2/defendants of the suit land (being the private gali) having been acquired by the Government under the Land Acquisition Act, 1894?

(ii) Whether the courts below have not committed gross illegality and perversity in holding that the street is a public street, although, no lay-out plan under Section 313 of the Delhi Municipal Corporation Act, 1957 was filed and proved on record by the respondents no.1 and 2/defendants for showing that the street in question is shown as a public street in that lay-out plan, and which requirement of a lay-out plan under Section 313 of the DMC Act is a *sine qua non* before any private street can be said to be vested in the MCD for management and administration and which will also simultaneously have the effect of the owners of the private street not having any right in the same as normal individual owners?”

9. In my opinion, all the aforesaid substantial questions of law are to be answered in favour of the appellants/plaintiffs and against the respondents no.1 and 2/defendants. The reasons for the same are given hereinafter.

10. The provisions of Sections 313 to 320 of the DMC Act would be relevant for discussion for the purpose of present judgment and these Sections read as under:-

“313. Lay-out plans

(1) Before utilising, selling or otherwise dealing with any land under section 312, the owner thereof shall send to the Commissioner a written application with a lay-out plan of the land showing the following particulars, namely:—

- (a) the plots into which the land is proposed to be divided for the erection of buildings thereon and the purpose or purposes for which such buildings are to be used;
- (b) the reservation or allotment of any site for any street, open space, park, recreation ground, school, market or any other public purpose;
- (c) the intended level, direction and width of street or streets;
- (d) the regular line of street or streets;
- (e) the arrangements to be made for levelling, paving, metalling, flagging, channelling, sewerage, draining, conserving and lighting street or streets;

(2) The provisions of this Act and the bye-laws made thereunder as to width of the public streets and the height of buildings abutting thereon, shall apply in the case of streets referred to in subsection (1) and all the particulars referred to in that sub-section shall be subject to the sanction of the Standing Committee.

(3) Within sixty days after the receipt of any application under sub-section (1) the Standing Committee shall either accord sanction to the lay-out plan on such conditions as it may think fit or disallow it or ask for further information with respect to it.

(4) Such sanction shall be refused—

- (a) if the particulars shown in the lay-out plan would conflict with any arrangements which have been made or which are in the opinion of the Standing Committee likely to be made for carrying out any general scheme of development of Delhi whether contained in the master plan or a zonal development plan prepared for Delhi or not; or
- (b) if the said lay-out plan does not conform to the provisions of this Act and bye-laws made thereunder; or
- (c) if any street proposed in the plan is not designed so as to connect at one end with a street which is already open.

(5) No person shall utilise, sell or otherwise deal with any land or lay-out or make any new street without or otherwise than in conformity with the orders of the

Standing Committee and if further information is asked for, no step shall be taken to utilise, sell or otherwise deal with the land or to lay-out or make the street until orders have been passed upon receipt of such information:

Provided that the passing of such orders shall not be in any case delayed for more than sixty days after the Standing Committee has received the information which it considers necessary to enable it to deal with the said application.

(6) The lay-out plan referred to earlier in this section shall, if so required by the Standing Committee, be prepared by a licensed town planner.

314. Alteration or demolition of street made in breach of section 313

(1) If any person lays-out or makes any street referred to in section 313, without or otherwise than in conformity with the orders of the Standing Committee, the Commissioner may, whether or not the offender be prosecuted under this Act, by notice—

(a) require the offender to show cause by a written statement signed by him and sent to the Commissioner on or before such date as may be specified in the notice, why such street should not be altered to the satisfaction of the Commissioner or if such alteration be impracticable, why such street should not be demolished; or

(b) require the offender to appear before the Commissioner either personally or by a duly authorised agent on such day and at such time and place as may be specified in the notice and show cause as aforesaid.

(2) If any person on whom such notice is served fails to show cause to the satisfaction of the Commissioner why such street should not be so altered or demolished, the Commissioner may pass an order directing the alteration or demolition of such street.

315. Power of Commissioner to order work to be carried out or to carry it out himself in default

(1) If any private street or part thereof is not levelled, paved, metalled, flagged, channelled, sewered, drained, conserved or lighted to the satisfaction of Commissioner, he may by notice require the owners of such street or part and the owners of the lands and buildings fronting or abutting on such street or part to carry out any work which in his opinion may be necessary, and within such time as may be specified in such notice.

(2) If such work is not carried out within the time specified in the notice, the Commissioner may, if he thinks fit, execute it and the expenses incurred shall be paid by the owners referred to in subsection (1) in such proportion as may be determined by the Commissioner and shall be recoverable from them as an arrear of tax under this Act.

316. Right of owners to require streets to be declared public— If any street has been levelled, paved, metalled, flagged, channelled, sewered, drained, conserved and lighted under the provisions of section 315, the Commissioner may, and on

the requisition of a majority of the owners referred to in sub-section (1) of that section shall, declare such a street to be a public street and thereupon the street shall vest in the Corporation.

317. Prohibition of projections upon streets, etc.

(1) Except as provided in section 318, no person shall erect, set up, add to, or place against or in front of any premises any structure or fixture which will—

(a) overhang, jut or project into, or in any way encroach upon, and obstruct in any way the safe or convenient passage of the public along, any street, or

(b) jut or project into or encroach upon any drain or open channel in any street so as in any way to interfere with the use or proper working of such drain or channel or to impede the inspection or cleansing thereof.

(2) The Commissioner may by notice require the owner or occupier of any premises to remove, or to take such other action as he may direct in relation to, any structure or fixture which has been erected, set up, added to or placed against, or in front of, the said premises in contravention of this section.

(3) If the occupier of the said premises removes or alters any structure or fixture in accordance with such notice, he shall be entitled, unless the structure or fixture was erected, set up or placed by himself, to credit into account with the owner of the premises for all reasonable expenses incurred by him in complying with the notice.

318. Projections over streets may be permitted in certain cases

(1) The Commissioner may give a written permission, on such terms and on payment of such fee as he in each case thinks fit, to the owner or occupier of the building abutting on any street—

(a) to erect an arcade over such street or any portion thereof; or

(b) to put up a verandah, balcony, arch, connecting passage, sun-shade, weather frame, canopy, awning or other such structure or thing projecting from any storey over or across any street or portion thereof:

Provided that no permission shall be given by the Commissioner for the erection of an arcade in any public street in which construction of an arcade has not been generally sanctioned by a Corporation.

(2) The Commissioner may at any time by notice require the owner or occupier of any building to remove a verandah, balcony, sun-shade, weather frame or the like put up in accordance with the provisions of any law and such owner or occupier shall be bound to take action accordingly but shall be entitled to compensation for the loss caused to him by such removal and the cost incurred thereon.

319. Ground floor doors, etc., not to open outwards on streets— The Commissioner may at any time by notice require the owner of any premises on the ground floor of which any door, gate, bar, or window opens outwards upon a street or upon any land required for the improvement of a street in such manner,

as in the opinion of the Commissioner, to obstruct the safe or convenient passage of the public along such street, to have the said door, gate, bar or window altered so as not to open outwards.

320. Prohibition of structures or fixtures which cause obstruction in streets

(1) No person shall, except with the permission of the Commissioner granted in this behalf, erect or set up any wall, fence, rail, post, step, booth or other structure whether fixed or movable or whether of a permanent or temporary nature, or any fixture in or upon any street or upon or over any open channel, drain, well or tank in any street so as to form an obstruction to, or an encroachment upon, or a projection over, or to occupy any portion of such street, channel, drain, well or tank.

(2) Nothing in this section shall apply to any erection or thing to which clause (c) of sub-section (1) of section 325 applies.”

11. Along with the aforesaid Sections of the DMC Act, certain paragraphs of the judgment of the Supreme Court in the case of ***Pt. Chet Ram Vashist (Dead) by Lrs. (supra)*** would also be relevant and these paragraphs read as under:-

“4.

XXXXX

None of its provisions entitled the Corporation to claim any right or interest in the property of the owner. Sub-section (3) empowers the Standing Committee to accord sanction to the lay-out plan on such conditions as it may think fit. The expression, 'such conditions' has to be understood so as to advance the objective of the provision and the purpose for which it has been enacted. The Corporation has been given the right to examine that the lay-out plan is not contrary to any provision of the Act or the rules framed by it. For instance a person submitting a lay out plan may be required to leave certain open space or he may be required that the length and width of the rooms shall not be less than a particular measurement or that a coloniser shall have to provide amenities and facilities to those who shall purchase land or building in its colony. But the power cannot be construed to mean that the Corporation in the exercise of placing restrictions or imposing conditions before sanctioning a lay-out plan can also claim that it shall be sanctioned only if the owner surrenders a portion of the land and transfers it in favour of the Corporation free of cost. That would be contrary to the language used in the Section and violative of civil rights which vests in every owner to hold his land and transfer it in accordance with law. The resolution passed by the Corporation directing the appellant to transfer the space reserved for tube wells, school and park in its favour free of cost was depriving the owner of its property

and vesting it in the Corporation against law. The finding of the High Court that such condition did not amount to transfer of ownership but it was only a transfer of the right of management cannot be accepted. The two rights, namely, of ownership and of management, are distinct and different rights. Once a vacant site is transferred in favour of another free of cost then the person transferring it ceases to be owner of it. Whereas in transfer of right of management the ownership continues with the person to whom the property belongs and the local authority only gets rights to manage it. But the conditions imposed by the Standing Committee clearly meant to transfer the ownership in favour of the Corporation. The Corporation as custodian of civil amenities and services may claim and that would be proper as well, to permit the Corporation to regulate, manage, supervise and look after such amenities but whether such a provision can entitle a Corporation to claim that such property should be transferred to it free of cost appears to be fraught with insurmountable difficulties. The law does not appear to be in favour of the Corporation. Public purpose is, no doubt, a very important consideration and private interest has to be sacrificed for the welfare of the society. But when the appellant was willing to reserve the two plots for park and school then he was not acting against public interest. This cannot be stretched to create a right and title in favour of a local body which utmost may be entitled to manage and supervise only.

5. The power directing transfer of the land has been exercised Under Section 313 of the Act. This Section falls in Chapter XV which deals with streets. The public streets are dealt from Section 298 to Section 311 whereas private streets are dealt from Section 312 to Section 330 Section 312 obliges an owner of any land utilising, selling, leasing out or otherwise disposing of the land for the construction of building to lay-out and make a street or streets giving access to the plots into which the land may be divided and connect it with an existing or public street. Section 313 requires such owner to submit a lay-out plan before utilising the land for any of the purposes mentioned in Section 312 and send it to the Commissioner with a lay-out plan showing the particulars mentioned in clauses (a) to (e). The reservation or allotment of any site in the lay-out plan for any open space, park or school is to be provided by clause (b) of Section 313. Section 316 entitles the Commissioner to declare a private street to be a public street on the request of owners. Section 317 prohibits a person from constructing or projecting any structure which will encroach overhang project in a private street. In fact the entire cluster of Sections from 312 to 330 of which Section 313 is a part, deals with private streets only. There is no provision in this chapter or any other provision in the Act which provides that any space reserved for any open space or park shall vest in the Corporation. Even a private street can be declared to be a public on the request of owners of the building and then only it vests in the Corporation. In absence of any provision, therefore, in the Act the open space left for school or park in a private colony cannot vest in the Corporation. That is why in England whenever a private colony is developed or a private person leaves an open space for park to be used for public purpose he is required to issue what is termed as 'Blight Notice' to the local body to get the land

transferred in its favour on payment of compensation. Section 313 which empowers the Commissioner to sanction a lay-out plan, does not contemplate vesting of the land earmarked for a public purpose to vest in the Corporation or to be transferred to it. The requirement in law of requiring an owner to reserve any site for any street, open space, park, recreation ground, school, market or any other public purpose is not the same as to claim that the open space or park so earmarked shall vest in the Corporation or stand transferred to it. Even a plain reading of Sub-section (5) indicates that the land which is subject-matter of a lay-out plan cannot be dealt with by the owner except in conformity with the order of the Standing Committee. In other words the Section imposes a bar on exercise of power by the owner in respect of land covered by the lay-out plan. But it does not create any right or interest in the Corporation in the land so specified. The resolution of the Standing Committee, therefore, that the area specified in the lay-out plan for the park and school shall vest in the Corporation free of cost, was not in accordance with law.

6. Reserving any site for any street, open space, park, school etc. in a lay-out plan is normally a public purpose as it is inherent in such reservation that it shall be used by the public in general. The effect of such reservation is that the owner ceases to be a legal owner of the land in dispute and he holds the land for the benefit of the society or the public in general. It may result in creating an obligation in nature of trust and may preclude the owner from transferring or selling his interest in it. It may be true as held by the High Court that the interest which is left in the owner is a residuary interest which may be nothing more than a right to hold this land in trust for the specific purpose specified by the coloniser in the sanctioned lay-out plan. But the question is, does it entitle the Corporation to claim that the land so specified should be transferred to the authority free of cost. That is not made out from any provision in the Act or on any principle of law. The Corporation by virtue of the land specified as open space may get a right as a custodian of public interest to manage it in the interest of the society in general. But the right to manage as a local body is not the same thing as to claim transfer of the property to itself. The effect of transfer of the property is that the transferor ceases to be owner of it and the ownership stands transferred in the person in whose favour it is transferred. The resolution of the Committee to transfer land in the colony for parks and school was an order for transfer without there being any sanction for the same in law.” (underlining added)

12. A reading of the aforesaid relevant Sections of the DMC Act read with the ratio of the judgment of the Supreme Court in the case of *Pt. Chet Ram Vashist (Dead) by Lrs. (supra)* shows that when an undeveloped land is to be made into a colony then a lay-out plan has to be got sanctioned under Section

313 of the DMC Act. It is only when a lay-out plan is sanctioned under Section 313 of the DMC Act would any street be vested for the purposes of management and administration in the Municipal Corporation and the actual owners would thereafter only be owners in trust having no rights to construct and utilise the same as a private owner of a property. Thus, unless there is a lay-out plan which is sanctioned under Section 313 of the DMC Act as a *sine qua non*, it cannot be that a private street would become a public street.

13. In the present case it is seen that no lay-out plan as sanctioned under Section 313 of the DMC Act was filed on record and proved on behalf of the respondents no.1 and 2/defendants whereby the private street/gali DGHI is shown to have become a public street because of inclusion of this private street in the lay-out plan as a public street. Once that is so, the private street/gali DGHI cannot be said to have been vested in the Corporation even for the purpose of management and administration because such management and administration as per the ratio of ***Pt. Chet Ram Vashist (Dead) by Lrs.'s*** case (*supra*) is only after sanction of a lay-out plan showing the street as a public street/gali. I note that it is not the case of the respondents no.1 and 2/defendants that they are claiming any ownership interest in the private street/gali DGHI and that they only claim rights in the same on account of the said private street/gali being a public street as the management and administration of the same is with

the MCD and in which it is said to have been built water lines, sewer lines, etc of the MCD. Therefore once the respondents no.1 and 2/defendants have failed to prove any lay-out plan showing a private gali as a public street forming part of the lay-out plan, the subject private gali DGHI cannot be said to be a public street unless the land in the gali was acquired by the Government under the Land Acquisition Act and as stated in the case of *Pt. Chet Ram Vashist (Dead) by Lrs. (supra)*. Admittedly, there is no case put forth by the respondents no.1 and 2/defendants that the street in question which is owned by the appellants/plaintiffs was acquired by any public authority or the Union of India, or by the MCD under the provisions of the Land Acquisition Act. Thus on these facts as found on record, the respondents no.1 and 2/defendants have no right to use the private gali DGHI of which JKLM forms a part because neither is this gali part of a lay-out plan under Section 313 of the DMC Act nor is the same acquired by the Government or any public authority under the Land Acquisition Act.

14. The only other method for entitling any person to use a street as a public street would be if the street is declared as a public street under Section 316 of the DMC Act. Under Section 316 of the DMC Act only if majority of the owners of a private street ask the Commissioner of the MCD to declare the private street as a public street would the private street/gali become a public

street. Admittedly, there is no case made out by the respondents no.1 and 2/defendants that Commissioner of the MCD in exercise of powers under Section 316 of the DMC Act has declared the private gali DGHI as a public street on account of the Commissioner of the MCD having been approached by the majority of the co-owners of the private street. By the very language of Section 316 of the DMC Act merely because a street is levelled or paved or that there may exist water or sewer lines in the same, yet, such a private street cannot become a public street in the absence of declaration by the Commissioner under Section 316 of the DMC Act. Therefore, issue no. 1 has been clearly and most illegally decided by the trial court against the appellants/plaintiffs merely because the trial court has observed that there are sewage lines and water lines in the street; a municipal sweeper cleans this street and that there is no restriction on ingress and egress to this private street DGHI. Ownership in a private street cannot be lost unless there is a declaration of the Commissioner under Section 316 of the DMC Act. In this regard learned Senior counsel for the appellants/plaintiffs has rightly placed reliance upon the judgment of a learned Single Judge of this Court in the case of ***Kalo Mal Gopal Chand Vs. Commissioner/Municipal Corporation of Delhi, 1966 (62) DLT 536***. Accordingly, the findings on issue no. 1 by the courts below are clearly illegal and perverse and are accordingly set aside and it is held that since there is

no declaration by the Commissioner under Section 316 of the DMC Act, the private street DGHI including the portion JKLM cannot become a public street.

15. Reliance placed by the courts below on Section 320 of the DMC Act to hold the private street/subject gali as a street under this Section is misplaced because Section 320 follows the Sections 313 and 316 and therefore the word 'street' as found in Section 320 is a public street and not a private street. Therefore, restrictions imposed under Section 320 of the DMC Act are for works upon a public street and not upon a private street, and as has been wrongly held by the courts below. Obviously, it does not stand to reason also that there can be any restriction on user of a private land owned by private persons once there is no illegality in user of the private land by private persons.

16. At this stage, I would note that the learned senior counsel for the appellants/plaintiffs says that though the appellants/plaintiffs have complete and absolute rights over the subject private street/gali, and therefore there is legal disentitlement of the respondents no.1 and 2/defendants from opening any door or windows or ventilators on their property which opens towards the gali DGHI including the portion JKLM, yet, to the extent that any windows or ventilators which have been already opened in the property of the respondents no.1 and 2/defendants towards the private gali DGHI including the portion JKLM, the appellants/plaintiffs are not seeking to close the same without prejudice to their

rights, but it is also clarified that there is no entitlement of the respondents no.1 and 2/defendants either to open any door in their property opening towards the gali DGHI of which the portion JKLM forms a part or for opening any further windows or ventilators in their property which will open towards the private gali DGHI of the appellants/defendants of which portion JKLM becomes a part. Ordered accordingly.

17. In view of the above, this Regular Second Appeal is allowed by setting aside the Judgments of the courts below; dated 24.5.2011 and 22.1.2013; and the suits of the appellants/plaintiffs will stand decreed by restraining the respondents no.1 and 2/defendants from in any manner using the private street DGHI, of which the portion JKLM forms a part, as shown in the plan Ex.PW1/1. The respondents no.1 and 2/defendants from in any manner opening any door on their property opening on to the portion of JKLM of Ex.PW1/1 or opening any other ventilators or windows except what are already in existence as on the date. The door already opened by the respondents no.1 and 2/defendants on the ground floor of their property which opens towards the portion JKLM should be closed by the respondents no.1 and 2/defendants failing which appellants/plaintiffs can take such steps for closing or sealing of the said door in the property of the respondents no.1 and 2/defendants which

opens towards the portion of JKLM forming part of the private gali DGHI.
Parties are left to bear their own costs. Decree sheet be prepared accordingly.

OCTOBER 24, 2016

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VALMIKI J. MEHTA, J

