

**IN THE HIGH COURT OF JAMMU & KASHMIR AND
LADAKH AT SRINAGAR**

Reserved on: 21.11.2022

Pronounced on:25.11.2022

WP(C) No.1082/2020

MEHRAJ UD DIN MALIK

... PETITIONER(S)

Through: - Mr. Gulzar Ahmad Bhat, Advocate.

Vs.

UT OF J&K & OTHERS

...RESPONDENT(S)

*Through: - Mr. Mohsin S. Qadiri, Sr. AAG-for R1.
Ms. Rekha Wangnoo, GA-for R2 to R3*

CORAM: HON'BLE MR. JUSTICE SANJAY DHAR, JUDGE

JUDGMENT

1) The petitioner has filed the instant writ petition seeking direction upon respondent No.2 to grant sanction/permission in his favour for exchange of land measuring 06 marlas in Khasra No.292 situated at Pariswani Tehsil Kowarhama in lieu of proprietary land measuring 06 marlas falling under survey No.284 situated in the same area.

2) According to the petitioner, he had applied for exchange of his proprietary land measuring 06 marlas in survey No.284 at Village Pariswani against the kahcharai land falling under survey No.292-min in the same village.

However, when no action was taken by the respondents on the application of the petitioner, he approached this Court by way of a writ petition bearing OWP No.1576/2020, which was disposed of by this Court in terms of order dated 11.03.2020. Vide the aforesaid order, the respondent Deputy Commissioner, Baramulla, was directed to take an appropriate decision strictly in accordance with law within a period of three months but despite passing of the said order, the respondent Deputy Commissioner, Baramulla, has not taken a decision in the matter.

3) It is the case of the petitioner that when he along with his uncle, namely, Abdul Rahman had applied for exchange of proprietary land against the kahcharai land in terms of Section 133(2) of the Land Revenue Act, respondent No.4 vide his communication dated 18.03.2017 had submitted a report according to which the land was eligible to be exchanged. It is the further case of the petitioner that in the case of his uncle, namely, Abdul Rahman, the respondents, after processing his case, have issued order dated 31.10.2019 under the seal and signature of respondent Deputy Commissioner, Baramulla, whereby sanction has been accorded to

exchange of (Shamilat Deh) Kahcharie land measuring 09 marlas falling under Survey No.292min situated in Village Pariswani Tehsil Kawarhama in lieu of proprietary land measuring 09 marlas under Survey No.284min situated in the same village in favour of Shri Abdul Rahman Malik but the similar treatment is being denied to the petitioner, hence the present writ petition.

4) The writ petition has been contested by the respondents by filing a reply thereto. In their reply, the respondents have submitted that sanction has been accorded to the exchange of land in favour of Abdul Rahman Malik by Deputy Commissioner, Baramulla, in exercise of his powers under Section 133(2) of the Land Revenue Act pursuant to the orders passed by this Court in OWP No.239/2017 as reiterated in CPOWP No.189/2018 c/w CCP(S) No.283/2019, which have been disposed of by this Court vide order dated 16.10.2019. It is submitted by the respondents that when the case for exchange of land pursuant to similar direction passed by this Court in the case of the petitioner in WP(C) No.733/2020 was in process, by that time, the provisions contained in Section 133 of the Land Revenue Act underwent amendment whereby sub-section (2) of the

said provision was substituted by a new provision, according to which the power relating to exchange of land has been taken away and now the Deputy Commissioner has no such power.

5) I have heard learned counsel for the parties and perused the record of the case.

6) The claim of the petitioner with regard to exchange of his proprietary land against the kahcharai land rests on the provisions contained in Section 133(2) of the Land Revenue Act which was existing prior to its amendment vide S.O.3808(E) dated 26.10.2020. As per the said provision, before removing encroachment on a kahcharai land, the occupier has to be given a notice in writing affording him an opportunity, inter alia, to offer an equivalent suitable area in exchange from out of his proprietary land. As per the said provision, the Collector was the competent authority to accept or reject the offer made for exchange of land.

7) Sub-section (2) of Section 133 of the Land Revenue Act, on the basis of which petitioner has projected his claim regarding offer of proprietary land in exchange of

kahcharai land, has been substituted by an entirely new provision, which reads as under:

“(2) Prevention of encroachments on or cultivation of common land, or land reserved for public purposes or of which cultivation has been prohibited or is objectionable, or, by person, not entitled to, bring it under cultivation.—

(a) Subject to any law, agreement, custom, usage or any decree or order of any Court or other authority, for the time being in force, every person shall exercise the right of user in respect of any road, street, lane, path, Water Channel, Water Course and Water Source and other common land defined as such in any law or declared as such by the Government or the Board;

(b) The right of user permitted by clause (a) shall not be deemed to include or otherwise confer, create or assign any right of encroachment, whether by means of construction, including fencing, walling or putting any barrier or by breaking up of land, diversion or otherwise.”

8) From a perusal of the aforesaid provision, it is clear that the exchange of proprietary land for encroached kahcharai land is not permissible now and the Deputy Commissioner concerned has no power to accept any such offer. In the absence of any legal basis or statutory framework for considering the offer of the petitioner, it would not be open to this Court to issue a Writ of Mandamus against the respondents to accept the offer of the petitioner.

9) The respondents are right in submitting that by the time the directions of this Court passed in WP(C) No.733/2020 were under consideration, the provision

relating to Section 133(2) of the Land Revenue Act underwent change and, as such, claim of the petitioner could not be considered.

10) For the foregoing reasons, I do not find any merit in this petition. The same is, accordingly, dismissed.

11) Parties to bear their own costs.

**(SANJAY DHAR)
JUDGE**

**Srinagar,
25.11.2022
"Bhat Altaf, PS"**

Whether the judgment is speaking: Yes/No
Whether the judgment is reportable: Yes/No

