POLICY BRIEF

THE CASE FOR THE COMMONS:

LESSONS FROM IMPLEMENTATION OF THE LANDMARK JUDGEMENT OF THE SUPREME COURT OF INDIA

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FOREWORD

Across the world there is a a growing and compelling evidence that indigenous and other local communities have various community institutional arrangements for management and governance of shared natural resources [also referred to as 'Commons' or common pool resources (CPR)] such as forests, pastures and water bodies. It is also argued that village communities are effective in regulating themselves and should be seen as viable alternatives for managing CPR alongside centralised or privatised approaches in managing resources. They are cost effective, context specific, quick to respond and well suited for addressing complex problems in resource management and governance.

The unfolding of the joint forest management (JFM) and participatory irrigation management (PIM) arrangements are the first steps in recognising the role of local communities in managing shared resources. The enactment of Forest Rights Act (FRA), 2006 towards restoring rights of indigenous people and forest dwellers on forestlands, the provisions of community forests rights (CFR) in particular, is an important step in recognition of the ability of communities to manage shared resources as a collective arrangement.

In India as per the National Sample Survey Organisation (1999) estimates there is a decline of common lands at a quinquennial rate of 1.9%. Around 30 million hectares (Indiastats, 2003), a tenth of Indian land mass is mistakenly titled 'wastelands' and deemed unproductive. Besides,

such 'wastelands' are facing challenge of diversion to other 'productive' land use such as biofuel cultivation, corporate contract farming and industrial zones, dispossessing the local poor and discounting their ecological value.

At such a juncture, the Nobel prize awarded under the Economics category to Professor Elinor Ostrom (2009) for her work on Commons, besides bringing in the much needed attention on Commons has also brought in an academic legitimacy to the effective role that local communities play in managing, self regulating and governing common pool resources.

The Supreme Court judgement[2] in January 2011, which highlighted the role of village commons to the rural economies and directed all state governments and union territories (UTs) to draw up schemes to evict encroachments on common lands and restore them to Panchayats and Gram Sabhas came as a judicial recognition soon after the academic recognition.

To gain deeper insights into this historic judgement and trace its implementation by the state governments and UTs, FES initiated a study to understand and document the good practices different states in India have adopted in implementing the judgement. This policy brief is a compendium of such initiatives with an in-depth analysis of the status and bottlenecks the states are facing along with pathways for an improved execution of the orders and associated programmes towards restoring village commons.

Under the National Rural Employment Guarantee Act (2005) a sizeable portion of funds (estimated at about USD 6 Billion) are spent annually on lands which are collectively managed by communities (including revenue 'wastelands'), however the public investments are not matched by institutional investments such as secure tenure on the land in favour of the local communities, the recognition of the community institutions to manage and govern such resources and lastly, clear directions on access to benefits so created or sustained by the village communities. The right to employment matched with rights to access and benefit from resources could play a powerful role in creating durable community assets such as pastures, forests and water bodies - the backbone of rural economy and societies organised around it.

- Jagdeesh Rao Puppala
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[2] On 28 January 2011 a division bench of the Supreme Court of India comprising Justices Markandey Katju and Gyan Sudha Mishra, delivered a significant judgment on the protection of the physical commons in villages. The occasion arose in appeal against an impugned judgment of the High Court of Punjab & Haryana in the case of *Jagpal Singh & Ors. Versus State of Punjab & Ors.* [Civil Appeal No.1132/2011 @ SLP No. 3109 of 2011]. The full text is reproduced in Annex at the end of this Policy Brief.

INTRODUCTION

"There is not an inch of such land left for the common use of the people of the village, though it may exist on paper", the Supreme Court (SC) of India made this important observation in January 2011 when it gave clear directions for the removal of encroachments for the protection of commons in the villages of the country. But what are Commons or CPR in the Indian context, and do they cut across geographical spaces and physical forms? Commons can be understood as community's natural resources such as community pastures, community forests, wastelands, common threshing and dumping grounds, watershed drainage and village ponds, rivers and rivulets, as well as their banks and beds, where every member has access and usage facility with specified obligations (Jodha, 1986).[3] The vibrant systems of village ponds for multiple human uses including groundwater recharge; the grazing areas for both settled and nomadic pastoralists; contiguous forest areas which are accessed by villagers for forest produce or expanses of inter-tidal areas used for fishing related activities; all these form a part of the wider "commons".

Many common use areas have also for years unjustifiably been termed as "wastelands". This terminology has been reviewed through several proactive initiatives of non-governmental actors as well as administrative measures taken by the government. The legal and proprietary regimes around commons has also differed across parts of India influenced by historical ownership, management regimes as well as the transfer of control to different government departments. Given these realities, it is estimated that the SC's judgement would impact about 15-25% of the entire landmass of the country, based on the definition of common lands by various studies, majority of which include wastelands and grazing lands.

What have rolled out since then are a series of measures which different state agencies and non-state actors have undertaken towards both compliance of the SC's judgement as well as address the problem of encroachment on Commons. This policy brief seeks to draw key lessons from the SC's directions and the various administrative steps undertaken by state governments. What have been the challenges and where have the strengths prevailed? Further, what lessons can be drawn from the judicial Orders and administrative steps to build a case for the Commons?

[3] Jodha, N.S. 1986. Common property resources and the rural poor in dryland regions of India. Economic and Political Weekly, 1169-1181

WHAT DID THE SUPREME COURT SAY AND WHY?

On 28 January 2011, in the case of *Jagpal Singh & Others*[4] versus State of Punjab & Others the Supreme Court of India delivered a significant ruling related to village Commons. On the one hand, the court endeavoured to give voice to those who are powerless, socially and economically not so privileged and those who mostly rely on the Commons in a village community. On the other hand, it also strengthened the initiatives of the state governments and local bodies, which could be now justifiably and legally be directed towards the protection, conservation and restoration of Commons.

Key Observations of the Supreme Court

- Uphold the historical and traditional practices of Commons in rural India, primarily in water conservation.
- Urgent need to protect village Commons and for corrective action against encroachment, which has particularly impacted water Commons, grazing and peasant agriculture.
- Many state governments have permitted allotment of *gram sabha* land to private persons and commercial enterprises on payment of some money. These Orders are illegal and should be ignored.
- Neither long duration occupation nor large expenditure incurred for construction on common land, nor political connections can be treated as a justification for condoning illegal possession of village land or regularisation of encroachment.
- Regularisation of construction/ 'encroachment' of Commons should only be permitted in exceptional cases, e.g. public purposes including where lease has been granted under government notification to landless labourers or members of Scheduled Castes (SCs) and Scheduled Tribes (STs) or where there is

The 'commons order' highlights the importance of the commons

"(t)hese public utility lands in the villages were for centuries used for the common benefit of the villagers of the village such as ponds for various purposes e.g. for their cattle to drink and bathe, for storing their harvested grain, as grazing ground for the cattle, threshing floor, maidan for playing by children, carnivals, circuses, ramlila, cart stands, water bodies, passages, cremation ground or graveyards, etc. These lands stood vested through local laws in the State, which handed over their management to Gram Sabhas/Gram Panchayats. They were generally treated as inalienable in order that their status as community land be preserved…"

already a school, dispensary or public utility.

- State administration to comply with directions, develop schemes and submit compliance reports to the SC. In particular for action taken on:
  - speedy eviction of illegal/unauthorised occupants (with due procedure - show cause notice and brief hearing)
  - restoration of village Commons for all Gram Sabha/Gram Panchayat/ Poramboke/Shamlat lands for the common use of villagers.

HOW DID THE STATES/ UNION TERRITORIES RESPOND TO THE COURT ORDER? (FINDINGS FROM *THE CASE FOR THE COMMONS*)

The different states and UTs took diverse approaches to implement the Supreme Court Orders in this case. The diversity of the responses also shows how the same Order of the court can be adapted to local realities.

- ***Use of Existing Schemes and Mechanisms*:** Some state governments made use of existing schemes, Orders, rules, etc., to be in compliance with the Supreme Court Order. For at one level, the court was not saying something totally new. And even in the absence of a central law, there are still spaces in current state laws to accommodate what the court directed and follow it sans too much new effort. In Manipur, the state government relied on the existing Manipur Public Premises (Eviction of Unauthorised Occupants) legislations. In Jharkhand, the

[4] Civil Appeal No.1132 of 2011 which went on to become Special Leave Petition 3109 of 2011, wherein the 'commons order' of 28 January 2011 was passed by the bench.

[5] ***The Case for the Commons*** is a bi-monthly e-publication that comprises six issues through April 2014-April 2015 covering the implementation of the SC's commons order in states/UTs across India. The series was prepared and co-edited by Shalini Bhutani & Kanchi Kohli to complement the FES' blog on the commons case.

then Principal Secretary, Panchayat Raj Department highlighted that Section 75 A (1)(iv) and 81 of Jharkhand Panchayati Raj Act, 2001 has provisions to free common lands from encroachments.

- ***New Laws, Rules and Legal Amendments:*** While some state governments took the cue from the SC's judgement to develop new laws to remove encroachments from common or community land; in other places the governments aimed to achieve its targets by amending specific laws. Some examples are:
  - **Mizoram**: One key initiative in the state was the coming into being of the Mizoram Prevention of Government Land Encroachment (PGLE) (Amendment) Act, 2012, which made substantial changes to the 2001 legislation. This went along with framing Rules under the 2001 law. The amendments to the Mizoram PGLE Act, 2001 introduced new definitions of the terms: public land, public space and community land (which is also defined in the Rural Land Use Plan for the Government of Mizoram's New Land Use Policy (NLUP).
  - **Himachal Pradesh**: There was an attempt to amend the H.P. Village Common Lands Vesting and Utilisation Act, 1974 to provide the ownership of land to those who had been in its possession for the last four decades for homes, cowsheds farms, etc. Nonetheless, according to the amendment an area not less than fifty per cent of the total area vested in the State Government shall be allocated for grazing and other common purposes of the inhabitants of an estate.
  - **Andhra Pradesh**: The Government of Andhra Pradesh through its Panchayat Raj and Rural Development Departments issued a set of executive rules - the Andhra Pradesh Gram Panchayats (Protection of Property) Rules, 2011, to exercise powers under the existing Andhra Pradesh Panchayat Raj Act, 1994. The AP Government in February 2013 also took initiatives to use the MGNREGA scheme for the protection of CPRs, issuing instructions to identify common lands in every village and earmark them for protection and regeneration, create village-, mandal-, district-wise databases of common lands, register the identified land and ensure and monitor its protection, amongst other steps.
  - **Telangana**: Since the making of Telangana on 2 June 2014, the new state still has to provide effective legal protection for the Commons. The only place where CPR finds mention is in the context of land acquisition, in the notification of the *Telangana State Right*

[6] Details of the NLUP on the Government of Mizoram web site https://nlup.mizoram.gov.in/

[7] Vide G.O. Ms. No. 188 dated 21 July 2011. The Gram Panchayat and the state Revenue Department are assigned the task to protect Gram Panchayat common lands and procedure for protection of such land stipulated in rules (Rule 3).

[8] Letter Rc.No: 26/CPR-NREGA/2011 dated 12 February 2013 as available on the FES Commons blog

to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Rules, 2014 that were issued in December 2014. These Rules clearly recognise the dependency of the STs and other traditional forest dwellers who have lost their forest rights, on Commons for their livelihood. But those Commons could be affected due to acquisition of land, and therefore the Rules would need to factor in the need for the social impact assessment plan.

- ***New Orders, Policies and Programmes:*** New state-level policies and programmes have also been attempted to take the idea of Commons forward. For example:
  - **Rajasthan**: In an Order dated, 24 March 2011, the Rural Development and Panchayati Raj (RD&PR) Department asked all districts in the state to vacate all encroachments on grazing lands and *Orans* (sacred village forests). Another letter dated 26 March 2011 required for grazing land development with works under the *National Rural Employment Guarantee Act* (NREGA), 2005. Prior to this, the Administrative Reforms Department of the Government of Rajasthan (GoR) had passed an order in October 2010 to establish a ten-member state-level committee *for evolving policies for the identification, management and development of common lands.* This Committee was under the administrative control of the RD&PR Department. The Committee came up with the draft Rajasthan Common Land Policy, 2010 & Operational Guidelines for Pastureland Development through MGNREGA, 2011.
  - **Maharashtra**: The local self-government units (Gram Panchayats and Municipal Councils) were asked by the State Government as per a Government Resolution dated 12 July 2011 to undertake a special drive to remove encroachments on the public places and *gairan* land.
  - **Kerala**: The Revenue Department gave instructions for compliance of the order to all District Collectors (DCs) – executive heads of the district administration. It also developed a State Action Plan, wherein it categorised government lands into two, those held by the Revenue Department and those held by other Government Department/Institutions.
  - **Gujarat**: Soon after the SC's order dated 28 January 2011, the Development Commissioner of Gujarat issued a circular dated 4 March 2011 titled *"Removal of Encroachments on land*

In replies to RTI applications filed in UTs by the authors, the Andaman & Nicobar island administration explained how sections 104, 202, and 24 of A&N Islands Land Revenue & Land Reforms Regulation, 1966 gives powers to the Tehsildar to remove encroachments/ obstructions/occupations from the free use of a recognised road/path/common land including water bodies of a village.

vested including Gauchar (pasture land, derived from the local terms 'gau' meaning cow/cattle and 'char' meaning graze).” The circular states that according to Section 105 of Gujarat Panchayats Act, 1993, *“the village panchayat has the powers to remove unauthorised encroachments, encroachments without permission and on Gauchar land or any crop grown unauthorisedly on any other land.”*

RELATED JUDICIAL DECISIONS

The Supreme Court's decision also set an important judicial precedent which was referred to in orders of the State High Courts and District level Courts.

- In Odisha, in a public interest litigation (PIL) before the Odisha High Court [Writ Petition (Civil) No.8797 of 2004] (SC), the 'Commons order' was used to reach a decision. The High Court order underlined that protection of natural water bodies and ponds is to respect the most basic of fundamental rights, the right to life, which is guaranteed in Article 21 of the Constitution. In its direction, the Court asked the state government to ensure that existing ponds were made free from land grabbers.
- The Kerala High Court heard the matter of *K.K. Sachidanandan* versus The District Collector and Others [Writ Petition (Civil) No. 3890 of 2011 (SC)] and disposed off with an order passed on 16 March 2011. The matter was related to a common pond in Veluthur Village in Arimbur Grama Panchayat. The High Court considered the 'Commons order' of the apex court and even quoted a couple of its paragraphs.
- In the Punjab and Haryana High Court - *Balbir Singh & Others versus State of Haryana & Others* both the petitioners and the Chief Justice made reference to the SC order. In the matter on 31 March 2014, the Chief Justice of the P&H High Court asked the State of Haryana to take action in accordance with law qua to evict encroachments and file a compliance report informing the Court as to what steps have been taken to implement the said directives of the Supreme Court in the State. The matter was disposed off on its last hearing on 11 April 2014.
- The judges were convinced that the matter required to be probed by an independent tribunal, which should be presided over by an eminent judge of either Supreme Court or from this Court. A three-member tribunal headed by Justice (Retd.) Kuldip Singh was constituted by the P&H High Court through its order on 29 May, 2012. As per the agreed ToR, The Tribunal was to suggest ways and means for retrieving 'shamlat deh' land, 'jumla mushtarka malkan' land and various other types of land such as 'nazul land', 'forest land', etc. in and around the periphery of Chandigarh

and other parts of the State of Punjab as directed by Supreme Court in the Jagpal Singh Case. The Tribunal was also to make suggestions to initiate criminal action against the violators.

- An important case, which has emerged from the state of Karnataka related to Commons, is around the Amruta Mahal grazing reserve. A PIL was filed before the Karnataka High Court by All India Kisan Sabha, Karnataka state committee in July 2012 (Civil Writ Petition of 6068 of 2014). The PIL raised an important issue that the lands under threat of diversion in the case are essentially *gomaal* (pasture) lands used for cattle and sheep grazing.

All these cases bring into sharp focus the role of the judiciary, other than the administrative decision-making where action has been taken for the protection of commons. If one is to see the apex court as the defender of the Constitution of India, then its order can be viewed in the light of the Directive Principles of State Policy. Article 39 (b) & (c) specifically states that *the ownership and control of the material resources of the community are so distributed as best to subserve the common good and that the operation of the economic system does not result in the concentration of wealth and means of production to the common detriment*. The High Courts of some states too bear this in mind.

PEOPLE'S ACTIONS

There are a few instances, where the 'Commons order' has also been used by by Panchayats & community members dependent on village commons. The 'Commons order' was used in various cases that emerged in other courts in the country. Some cases were in fact even initiated by local people to specifically make use of the Supreme Court order and insist on its compliance by the relevant state authorities. Here are some indicative examples that don't necessarily give the entire gamut of people's efforts to protect and use commons, but are to give a sense of the initiatives being taken:

- In Rajasthan, the people in Dhuwala village of Bhilwara district have been fighting since 2011 against the allotment of common lands to mining companies and others who have private vested interests. The local community used the existing provisions under the Rajasthan Land Tenure Act for conversion of revenue wastelands to grazing and lands and thereby secure collective tenurial rights on the village commons. Armed with the 'commons order' concerned citizens also used the *Right to Information Act, 2005* to seek more information from state and local bodies on the status of protection of village commons. In Telangana, through RTI it came to be known that a lake bed in Patancheru mandal of Medak district the panchayat authorities have given permission to the Hyderabad Metropolitan Development Authority (HMDA) for a housing layout plan for 182 plots on the

erstwhile lake.[9] This was possible because the lake did not figure in any government records as a common water body.

THE CHALLENGES

In the course of the research on the implementation of the relevant court orders it became apparent that on the ground and at the level of state functionaries, some hurdles would also need to be crossed to be able to give effect to the orders.

DIVERSITY OF ADMINISTRATIVE APPROACHES AND DEFINITIONS

- **Definitional Diversity:** There is not one definition alone on what constitutes village Commons. Approaches may vary from one extreme to another. There are those who regard Commons as a free-for-all place, while there are those who regard Commons as having a defined set of population that has active management control to those who consider.
- **Government lands as Common Lands:** This leads to another challenge, which is best explained in the context of Assam, where common lands are treated as government lands. In the Assam Gramdan Act, 1961 as per Section 2(b), *"common land" in a village means Government wasteland and includes land used for reserves, for use for the common purposes of the village*. That leaves us with a question: is government land equal to public land, which in turn is equivalent to common lands? The SC Order on Commons perhaps does not provide a final answer to that.
- **Land-centric Administrative Approach:** There are diverse state functionaries that are involved, not simply the Revenue officials, or the Panchayati Raj Department, or the Land Department in a State. Moreover, the Departments tasked with conservation and environment protection are unfortunately not as involved in the implementation of the SC order as they ought to be. There were next to none amongst the Environment or Water departments in states that took cognizance of the 'Commons order'. Yet there is a potential for them to use this order for revival of water bodies in their areas under their jurisdiction.

ACCESS, OWNERSHIP AND MULTIPLICITY OF CLAIMS

- **Complexity of Land Tenure:** The land tenure in states like Mizoram, as in many other states, is further complicated by the inter-departmental confusion on the status of some lands. This has challenged the identification of who is an encroacher as well as taking action on removal of encroachment from public land.
- **Multiple Claims:** Even if the common lands are clearly identifiable, the fact that

co-users may have changed over the years or will not remain the same in the coming years increases complexities. India is a country where rural populations are moving in search of a better life, with there being limited access to the Commons for the continuance of sustenance-level natural resource-based livelihoods.

- **Legal Access to Commons:** In many villages across states in India, local people do not have clear legally defined access rights to the Commons. So, even if in an ideal situation, all common lands and common water bodies are physically restored, unless the state also recognises the legal basis of people to sustainably use these Commons, the problem is not entirely solved. This is notwithstanding the need for checks and balances on the equitable use and collective decision making around the Commons. The State Revenue and Forest Departments, both exercise considerable control over land areas under their jurisdiction. They serve as gatekeepers to the Commons, and may not always recognise the right of access by local people.
- **Ownership and Control:** Where there is an overlap between the State Revenue Department and the Gram Panchayats on the management of CPRs, a conflict situation can arise. When local and state priorities on the CPRs do not match, there is a clash between local village governance and decision-making as represented by the Gram Sabha/Gram Panchayat, and decisions taken by the State represented by the Revenue Department. This can become more complicated in adivasi areas and Schedule V areas that are recognised by the Constitution of India to be under tribal institutions for governance.

IMPLEMENTATION CHALLENGES AND DEVOLUTION OF POWERS

- **Lack of Awareness:** The lack of awareness of the SC order is in itself a challenge to overcome. There is a need to generate awareness amongst the people as well as the relevant officials who can facilitate the implementation of the order. The order also gives more strength to those within the official system dealing with encroachments over village Commons. In states like Mizoram, the focus of the State Government has shifted on the New Land Use Policy (NLUP), which is the flagship scheme of the state.[10]
- **Prioritisation Challenge:** There is a lack of prioritization of the implementation of the Supreme Court 'Commons order'. Only few concerned officials in the departments of the State Government, who by default had to be involved in the legal and administrative changes, are in the know.
- **Good Initiatives, Bad Follow through:** A draft *National Policy for Common Property Resource Lands (Common lands) 2002*, has been made mention of in passing by some states such as Rajasthan but little is

[9] Sikdar, P. 2015. Lake in Patancheru parceled into 182 plots, Times of India, 2nd July, 2015 (See: http://timesofindia.indiatimes.com/city/hyderabad/Lake-in-Patancheru-parcelled-into-182-plots/articleshow/47904860.cms).

[10] See: http://nlup.mizoram.gov.in/

publicly known about its fate. Nothing is forthcoming on this from New Delhi.

- **Maintenance of Records for Commons:** Maintaining updated land and water Commons related records and inventorying the commons is a task in itself. Due attention is not always given to this either due to lack of priority or limited resources.
- **Challenge of devolution to Local Bodies:** The effective implementation of the Supreme Court order does depend on the effective implementation of state-level Panchayat Acts. If power is not devolved to the local bodies, then their scope for intervention is also constrained. Yet, there is also evidence that Gram Panchayats themselves (like in the original Jagpal Singh case) might not always want to protect the Commons. Local bodies may see more benefit in revenues from land conversion for other purposes than the recorded village use. For instance, as noticed in some parts of Kerala, the Gram Panchayats stand to benefit the most through revenue from sand mining and illegal encroachment. They are yet to view riverbanks or the river and its flood plains as common spaces, which can be effectively used and protected by the village residents.
- The personal interest, integrity and conviction of the state officials to take up this issue, amongst the myriad problems that administrators have to deal with, will also determine the fate of the order on the ground. In the same vein it is about how ordinary people self-govern their Commons. This no policy change can induce.

DEMAND FOR INDUSTRIAL AND INFRASTRUCTURE EXPANSION

- **Macro economic Pressures:** The macro-economic policies that lay emphasis on industrialisation create new demand for land. This in a way legitimises the continuing 'encroachment' by BIG players – businesses and use by public utilities, such as the railways, GIDC, RIICO, etc. Land acquisition legislation might not provide adequate safeguards to the Commons. The Rajasthan government is building a 10,000-hectare land pool for industry that will be complete before the Resurgent Rajasthan Partnership Summit in November 2015, even before the state's common land policy is notified. The Gujarat government's 100 crore *Gauchar Vikas Yojna* (Pastoral Land Development Scheme), is being piloted in 100 villages since June 2015. Yet there are villages in Kutch that have had to take legal recourse in the High Court to get back *gauchar* land allotted to big industrialists in the state.[11]
- **Conflicting demand on Commons:** Many state governments are also earmaking land, including Commons for industrial and infrastructure expansion in the state. For instance in Telangana, the state is going ahead with its Industrial Policy framework that was passed in the Assembly in

[11] Writ Petition (PIL) No.21 of 2013 before the Gujarat High Court

[12] See: https://tsipass.cgg.gov.in/images/TS-iPassupdated.pdf

November 2014, which promises to offer 'minimum inspection and maximum facilitation'. The Rules issued in June 2015 under the *Telangana State Industrial Project Approval and Self Certification System (TS-iPASS) Act, 2014* require fast-track approvals for industry to access water and lands, requiring the Panchayati Raj Department to get NOCs from Gram Panchayats within a time limit of 10 days.[12]

- **Pressures from Urban Expansion:** Greenfield development in areas regarded as previously 'undeveloped' or 'unused' might tread on CPRs. As the urban sprawl extends to its neighbouring rural areas, including under projects such as for 'smart cities', common lands and water bodies could be under threat. For example, housing projects in Raipur in Chhattisgarh or in Gurgaon in Haryana have been initiated over village lands, which would also include areas hitherto commonly used by villagers.

The Unique Case for Delhi

The Delhi administrative framework is unique in its Constitutional status and by the fact of it being the capital of the country. The Government of the National Capital Territory (NCT) of Delhi through the Secretary (Revenue)/Divisional Commissioner had filed a five page reply to the SC in the Jagpal Singh PIL in July 2011.

As an NCT and with the many demands on its land, its Commons will always remain particularly vulnerable to encroachment. Out of all the districts of Delhi, Gram Sabha land exists in seven (with the exception of New Delhi and Central districts). The Deputy Commissioners of the respective districts are responsible for the Gram Sabha lands under the Delhi Panchayati Raj Act, 1954 & Rules, 1959. As per the Act [Section 2(15)] "public land or common land" means *that the land which is not in exclusive use of any individual or family but is in common use of villagers and includes a land entered as Shamilat deh in revenue records.* Moreover, Section 18(m) makes it the duty of the Gram Panchayat to *establish, manage and care for common grazing grounds, and land for the common benefit of the persons residing within its jurisdiction.*

Under this regulatory framework, Gram Sabha land can only be allotted for 'public purpose' with the prior written approval of the Lieutenant Governor.

However, the government's affidavit averred that the Commons order pushed the Revenue Assistants dealing with encroachment under the Delhi Land Reforms Act, 1954 to dispose off pending cases with respect to Gram Sabhas on a priority basis. Village house-sites for weaker sections of society and the regularisation of allotments for agricultural purposes is often on political considerations. A clear policy on this front needs to be developed.

More importantly, the order can be made use of for the revival of the water bodies within gram sabha lands.

- **Land Redistribution against the Commons:** Apart from encroachments, state policies for the redistribution of wastelands, or reallocation of land for plantations could also bring down the extent of overall common lands. Odisha too adopted such a policy and distributed wastelands to the poor to improve their status and bring more land under agriculture production. States also use the de-reservation process to change land use as and when they feel need of it. Section 8A of the Odisha Government Land Settlement (OGLS Act), 1962 empowers the state government to make rules to implement the Act. The Rules describe the process of de-reservation of *gochar* land and settlement of other government lands. *Gochar* land is a significant common resource for Odisha as it is source of livelihood of pastoral communities.

WHAT NEXT FOR THE COMMONS?

Advocate Sanjay Parikh, who filed an I.A. in the Supreme Court on the Commons Order in an interview says: *"There are laws made by the Centre as well as by states in some areas to protect the environment, water bodies etc. but there is no consolidated law which gives protection and preservation to the commons like what exists in the United Kingdom i.e. Commons Act, 2006 and in several African Nations. Therefore, there is a need to consolidate the law in India by defining the meaning of commons and providing it protection in the interest of present and future generations."*

As the next steps for the future of the Commons in the country and the spirit of what the 2011 Commons judgements upheld, it would be critical that:

1. The relevant state departments need to be aware of the order and know the directions of the Commons judgment. Various state governments need to put forward the contents of the directions as well as publicly disclose in various languages the action taken to protect Commons.
2. Create new institutional arrangements at state, district and block levels and where available strengthen these mechanisms in order to address the challenges described in section earlier.
3. Developing a common minimum understanding across states of what constitutes and gets covered under the term 'common lands' (as distinct from governmental lands) is also necessary for the implementation of the court order in the spirit in which it was issued.
4. Create an enabling legal framework for local communities to claim and assert collective rights on Commons and legitimise their spaces in the management and governance of common land and water resources.

5. Integrate, corroborate and make publicly available the complete information with regard to: different laws which exist in the State for protection of Commons, the total extent of Commons which exists, the Commons which have been illegally diverted, and, finally, what action the state governments/union territories (UTs) propose to take for restoring the Commons.
6. As part of the 54th round survey of the National Sample Survey Organisation (NSSO)[13] a survey of the CPRs was conducted from Jan-Jun 1998. There is a need to have updated data on the state of CPR in the country.
7. Creatively and liberally use existing water, forest, revenue, panchayat and other relevant laws and policies to safeguard the village common lands. In states/UTs where there is no such law in place on date, other conservation and environment protection legislation and state-level rules issued under them can empower local bodies to conserve where there are no encroachments.
8. Explore the possibility of taking corrective measures on common land encroachments with the Gram Nyayalayas Act, 2008, which came into force in with effect from 2 October 2009. The Act mandates the setting up of village courts as the rung of the judiciary closest to the ground. The Act clearly lays down that suits of a civil nature within the jurisdiction of Gram Nyayalayas include civil disputes over use of common pasture and property disputes over water channels. However, this needs to be done with necessarily checks and balances, keeping in mind the challenge of connivance of local bodies with current and future encroachments.

   The Kuldip Singh Tribunal in Punjab had in fact recommended that *in each district one special court on the pattern of "Fast Track Courts" should be created to deal with criminal cases. Likewise in each Division, one Commissioner's Court be created to deal with the appeal/revision, etc.* Other than the setting up of the Special courts, the Ramaswamy Committee in Karnataka (in the context of encroachments around Bengaluru City) also recommended that initiating legal action against government and public servants under the Indian Penal Code for creating false documents or destruction of land records.
9. Special Constitutional status of many parts of India does not go against the idea of safeguarding the Commons for present and future needs.

The urgency to restore and protect Commons cannot be emphasised enough. The particular order of the Supreme Court might have been passed in Delhi, but it is across the villages of India that it needs to be brought to life. The lived experiences of both the rural marginalised and the urban poor show that the Commons are vital to their existence. Against extreme privatization of land, resources and services there are experiences

[13] See: Common Property Resources in India at http://mospi.nic.in/rept%20_%20pubn/452_final.pdf

to draw from. Even in some towns in India, the analogy to re-municipalisation of water can be drawn. The Commons once lost need not be lost forever – that is the spirit of the apex court's observations and the message that needs to be born in mind while pushing forward corrective, remedial and proactive administrative measures.

This policy brief has been jointly prepared by Shalini Bhutani and Kanchi Kohli with the support of the Foundation for Ecological Security. It is based on a pan-India study undertaken through 2014-2015 by the authors on the nature and extent of the implementation of the Supreme Court 'Commons Order'.

October 2015

For updates on the case please visit the FES' blog:
http://claim-for-commons.blogspot.in/

Contact: commonscase@gmail.com

ANNEX **REPORTABLE**

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

Civil Appeal No.1132/2011 @ SLP © No.3109/2011
(Arising out of Special Leave Petition (Civil) CC No. 19869 of 2010)

Jagpal Singh & Ors. .. Appellant (s)

-versus-

State of Punjab & Ors. .. Respondent (s)

JUDGEMENT

Markandey Katju, J.

1. Leave granted.

2. Heard learned counsel for the appellants.

3. Since time immemorial there have been common lands inhering in the village communities in India, variously called gram sabha land, gram panchayat land, (in many North Indian States), shamlat deh (in Punjab etc.), mandaveli and poramboke land (in South India), Kalam, Maidan, etc., depending on the nature of user. These public utility lands in the villages were for centuries used for the common benefit of the villagers of the village such as ponds for various purposes e.g. for their cattle to drink and bathe, for storing their harvested grain, as grazing ground for the cattle, threshing floor, maidan for playing by children, carnivals, circuses, ramlila, cart stands, water bodies, passages, cremation ground or graveyards, etc. These lands stood vested through local laws in the State, which handed over their management to Gram Sabhas/Gram Panchayats. They were generally treated as inalienable in order that their status as community land be preserved. There were no doubt some exceptions to this rule which permitted the Gram Sabha/Gram Panchayat to lease out some of this land to landless labourers and members of the scheduled castes/tribes, but this was only to be done in exceptional cases.

4. The protection of commons rights of the villagers were so zealously protected that some legislation expressly mentioned that even the vesting of the property with the State did not mean that the common rights of villagers were lost by such vesting. Thus, in Chigurupati Venkata Subbayya vs. Paladuge Anjayya, 1972(1) SCC 521 (529) this Court observed :

"It is true that the suit lands in view of Section 3 of the **Estates Abolition Act** did vest in the Government. That by itself does not mean that the rights of the community over it were taken away. Our attention has not been invited to any provision of law under which the rights of the community over those lands can be said to have been taken away. The rights of the community over the suit lands were not created by the landholder. Hence those rights cannot be said to have been abrogated by Section 3) of the Estates Abolition Act."

5. What we have witnessed since Independence, however, is that in large parts of the country this common village land has been grabbed by unscrupulous persons using muscle power, money power or political clout, and in many States now there is not an inch of such land left for the common use of the people of the village, though it may exist on paper. People with power and pelf operating in villages all over India systematically encroached upon communal lands and put them to uses totally inconsistent with its original character, for personal aggrandizement at the cost of the village community. This was done with active connivance of the State authorities and local powerful vested interests and goondas. This appeal is a glaring example of this lamentable state of affairs.

6. This appeal has been filed against the impugned judgment of a Division Bench of the Punjab and Haryana High Court dated 21.5.2010. By that judgment the Division Bench upheld the judgment of the learned Single Judge of the High Court dated 10.2.2010.

7. It is undisputed that the appellants herein are neither the owner nor the tenants of the land in question which is recorded as a pond situated in village Rohar Jagir, Tehsil and District Patiala. They are in fact trespassers and unauthorized occupants of the land relating Khewat Khatuni No. 115/310,

Khasra No. 369 (84-4) in the said village. They appear to have filled in the village pond and made constructions thereon.

8. The Gram Panchayat, Rohar Jagir filed an application under Section 7 of the **Punjab Village Common Lands (Regulation) Act, 1961** to evict the appellants herein who had unauthorizedly occupied the aforesaid land. In its petition the Gram Panchayat, Rohar Jagir alleged that the land in question belongs to the Gram Panchayat, Rohar as is clear from the revenue records. However, the respondents (appellants herein) forcibly occupied the said land and started making constructions thereon illegally. An application was consequently moved before the Deputy Commissioner informing him about the illegal acts of the respondents (appellants herein) and stating that the aforesaid land is recorded in the revenue records as Gair Mumkin Toba i.e. a village pond. The villagers have been using the same, since drain water of the village falls into the pond, and it is used by the cattle of the village for drinking and bathing. Since the respondents (appellants herein) illegally occupied the said land an FIR was filed against them but to no avail. It was alleged that the respondents (appellants herein) have illegally raised constructions on the said land, and the lower officials of the department and even the Gram Panchayat colluded with them.

9. Instead of ordering the eviction of these unauthorized occupants, the Collector, Patiala surprisingly held that it would not be in the public interest to dispossess them, and instead directed the Gram Panchayat, Rohar to recover the cost of the land as per the Collector's rates from the respondents (appellants herein). Thus, the Collector colluded in regularizing this illegality on the ground that the respondents (appellants herein) have spent huge money on constructing houses on the said land.

10. Some persons then appealed to the learned Commissioner against the said order of the Collector dated 13.9.2005 and this appeal was allowed on 12.12.2007. The Learned Commissioner held that it was clear that the Gram Panchayat was colluding with these respondents (appellants herein), and it had not even opposed the order passed by the Collector in which directions were issued to the Gram Panchayat to transfer the property to these persons, nor filed an appeal against the Collector's order.

11. The learned Commissioner held that the village pond has been used for the common purpose of the villagers and cannot be allowed to be encroached upon by any private respondents, whether Jagirdars or anybody else. Photographs submitted before the learned Commissioner showed that recent attempts had been made to encroach into the village pond by filling it up with earth and making new constructions thereon. The matter had gone to the officials for removal of these illegal constructions, but no action was taken for reasons best known to the authorities at that time. The learned Commissioner was of the view that regularizing such kind of illegal encroachment is not in the interest of the Gram Panchayat. The learned Commissioner held that Khasra No. 369 (84-4) is a part of the village pond, and the respondents (appellants herein) illegally constructed their houses at the site without any jurisdiction and without even any resolution of the Gram Panchayat.

12. Against the order of the learned Commissioner a Writ Petition was filed before the learned Single Judge of the High Court which was dismissed by the judgment dated 10.2.2010, and the judgment of learned Single Judge has been affirmed in appeal by the Division Bench of the High Court. Hence this appeal.

13. We find no merit in this appeal. The appellants herein were trespassers who illegally encroached on to the Gram Panchayat land by using muscle power/money power and in collusion with the officials and even with the Gram Panchayat. We are of the opinion that such kind of blatant illegalities must not be condoned. Even if the appellants have built houses on the land in question they must be ordered to remove their constructions, and possession of the land in question must be handed back to the Gram Panchayat. Regularizing such illegalities must not be permitted because it is Gram Sabha land which must be kept for the common use of villagers of the village. The letter dated 26.9.2007 of the Government of Punjab permitting regularization of possession of these unauthorized occupants is not valid. We are of the opinion that such letters are wholly illegal and without jurisdiction. In our opinion such illegalities cannot be regularized. We cannot allow the common interest of the villagers to suffer merely because the unauthorized occupation has subsisted for many years.

14. In M.I. Builders (P) Ltd. vs. Radhey Shyam Sahu, 1999(6) SCC 464 the Supreme Court ordered restoration of a park after demolition of a shopping complex constructed at the cost of over Rs.100 crores. In Friends Colony Development Committee vs. State of Orissa, 2004 (8) SCC 733 this Court held that even where the law permits compounding of unsanctioned constructions, such compounding should only be by way of an exception. In our opinion this decision will apply with even greater force in cases of encroachment of village common land. Ordinarily, compounding in such cases should only be allowed where the land has been leased to landless labourers or

members of Scheduled Castes/Scheduled Tribes, or the land is actually being used for a public purpose of the village e.g. running a school for the villagers, or a dispensary for them.

15. In many states Government orders have been issued by the State Government permitting allotment of Gram Sabha land to private persons and commercial enterprises on payment of some money. In our opinion all such Government orders are illegal, and should be ignored.

16. The present is a case of land recorded as a village pond. This Court in Hinch Lal Tiwari vs. Kamala Devi, AIR 2001 SC 3215 (followed by the Madras High Court in L. Krishnan vs. State of Tamil Nadu, 2005(4) CTC 1 Madras) held that land recorded as a pond must not be allowed to be allotted to anybody for construction of a house or any allied purpose. The Court ordered the respondents to vacate the land they had illegally occupied, after taking away the material of the house. We pass a similar order in this case.

17. In this connection we wish to say that our ancestors were not fools. They knew that in certain years there may be droughts or water shortages for some other reason, and water was also required for cattle to drink and bathe in etc. Hence they built a pond attached to every village, a tank attached to every temple, etc. These were their traditional rain water harvesting methods, which served them for thousands of years.

18. Over the last few decades, however, most of these ponds in our country have been filled with earth and built upon by greedy people, thus destroying their original character. This has contributed to the water shortages in the country.

19. Also, many ponds are auctioned off at throw away prices to businessmen for fisheries in collusion with authorities/Gram Panchayat officials, and even this money collected from these so called auctions are not used for the common benefit of the villagers but misappropriated by certain individuals. The time has come when these malpractices must stop.

20. In Uttar Pradesh the **U.P. Consolidation of Holdings Act, 1954** was widely misused to usurp Gram Sabha lands either with connivance of the Consolidation Authorities, or by forging orders purported to have been passed by Consolidation Officers in the long past so that they may not be compared with the original revenue record showing the land as Gram Sabha land, as these revenue records had been weeded out. Similar may have been the practice in other States. The time has now come to review all these orders by which the common village land has been grabbed by such fraudulent practices.

21. For the reasons given above there is no merit in this appeal and it is dismissed.

22. Before parting with this case we give directions to all the State Governments in the country that they should prepare schemes for eviction of illegal/unauthorized occupants of Gram Sabha/Gram Panchayat/Poramboke/Shamlat land and these must be restored to the Gram Sabha/Gram Panchayat for the common use of villagers of the village. For this purpose the Chief Secretaries of all State Governments/Union Territories in India are directed to do the needful, taking the help of other senior officers of the Governments. The said scheme should provide for the speedy eviction of such illegal occupant, after giving him a show cause notice and a brief hearing. Long duration of such illegal occupation or huge expenditure in making constructions thereon or political connections must not be treated as a justification for condoning this illegal act or for regularizing the illegal possession. Regularization should only be permitted in exceptional cases e.g. where lease has been granted under some Government notification to landless labourers or members of Scheduled Castes/Scheduled Tribes, or where there is already a school, dispensary or other public utility on the land.

23. Let a copy of this order be sent to all Chief Secretaries of all States and Union Territories in India who will ensure strict and prompt compliance of this order and submit compliance reports to this Court from time to time.

24. Although we have dismissed this appeal, it shall be listed before this Court from time to time (on dates fixed by us), so that we can monitor implementation of our directions herein. List again before us on 3.5.2011 on which date all Chief Secretaries in India will submit their reports.

.....J.
[Markandey Katju]
.....J.
[Gyan Sudha Mishra]

New Delhi;
January 28, 2011

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