

R-297

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

% *Date of Judgment: 03.06.2011*

+ **R.S.A.No.89/2008 & CM No.12718/2010**

SMT.HANSO DEVI (DECEASED) THROUGH LRS.....Appellant

Through: Mr.N.S. Vashisht, Mr. B.B.
Bhatia, Mr. Rajendra Sahu,
Mr. Navjot Kumar & Mr. Arpan
Sharma, Advocates.

Versus

SH.CHANDRU (DECEASED) THROUGH LRS. Respondent

Through: Mr. S.S. Chhillar, Advocate for
respondent No. 1.
Mr.Karan Khanna, Advocate
for respondent No. 2.

CORAM:

HON'BLE MS. JUSTICE INDERMEET KAUR

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

INDERMEET KAUR, J. (Oral)

1 This appeal has impugned the judgment and decree dated 15.12.2007 which has reversed the finding of the trial judge dated 27.1.2005. Vide judgment and decree dated 27.1.2005 the suit filed by the plaintiff Hanso Devi seeking permanent and mandatory injunction to the effect that that the defendant be

directed to remove the pucca wall constructed upon the suit property (as described at point BCDE in Khasra No.11/8/2 (2-4), 7/2 (3-4) as shown in red colour in the site plan situated within the revenue estate of Jharoda Majra Burari, Delhi); as also a decree of permanent injunction restraining the defendant from interfering in the peaceful possession of the plaintiff had been decreed. The impugned judgment had reversed this finding; suit of the plaintiff stood dismissed.

2 Shri Khem Chand father of the plaintiff and Shri Gokal father of the defendants were real brothers and joint owners in respect of agricultural land bearing khasra no. 2/22/2(0-16), 2/22/2(3-6), 24(4-16), 11/2(4-16), 3(4-16), 4(4-16), 7/2(3-4), 8/2(3-4) and 9/2(2-4) total measuring area of 32 bighas and 18 biswas within the revenue estate of village Jhaoda Majra, Burari. During life time of fathers of the parties, oral partition took place. After death of Shri Khem Chand in 1966 plaintiff being only legal heir succeeded to his share and mutation was recorded. In 1971-72 father of defendants also died and defendants succeeded to his share. Now plaintiff is co-sharer of $\frac{1}{2}$ share in total land as depicted (in yellow and red colour) in the site plan. Land of the defendants is shown in green and blue colour in the site plan.

Land of the plaintiff was surrounded by barbed wire from side of

defendant no. 1. The said wire was removed from points B to C by the defendants and they tried to fix the same from point B to E with a view to obstruct the entry of plaintiff on his land shown in red colour. On 13.03.1990 Local Commissioner inspected the property; defendant no. 1 had encroached upon a portion of property of the plaintiff and constructed pucca wall between points C and F; two handpumps and a chapper had also been installed. Hence the present suit.

3 In the Written Statement of defendant No. 1 it was admitted that the land had since been partitioned orally; the site plan filed by the plaintiff had been disputed. A separate site plan depicting share of the defendants have been filed on record; other averments were denied; it was stated that share of the plaintiff has already been sold by the plaintiff.

4 On the pleadings of the parties following four issues were framed:

- (i) Whether the defendant no. 1 is in cultivating possession of property in dispute as alleged? OPD
- (ii) Whether plaintiff is entitled to the relief of permanent injunction as prayed for? OPP
- (iii) Whether the plaintiff is entitled to the relief of mandatory injunction as prayed for? OPP
- (iv) Relief.

5 Oral and documentary evidence were led by the parties.

Four witnesses on behalf of the plaintiff and three witnesses on behalf of the defendants were examined. On this oral and documentary evidence, the suit of the plaintiff had been decreed; defendants had been restrained from dispossessing the plaintiff and from interfering with her peaceful possession over land as depicted B C D E in DW-4/P1; defendant No. 1 had been directed to remove the pucca wall constructed by him at point C to D in Ex.DW-4/P-1 and to remove hand pump and chapper therein.

6 The impugned judgment had reversed this finding. The suit of the plaintiff had been dismissed. The impugned judgment was of the view that there was a cloud over the title of the plaintiff; the defendant was claiming himself to be the co-owner of the suit land; this question could only be decided by the revenue court; jurisdiction of the civil court was barred; suit of the plaintiff was dismissed.

7 This is a second appeal. It has been admitted and on 06.01.2011, the following substantial question of law was formulated:-

“Whether the finding in the impugned judgment dated 15.12.2007 dismissing the suit of the plaintiff holding that a suit for injunction in the present form simpliciter is not maintainable, is perverse? If so, its effect?”

8 On behalf of the appellant, it has been urged that the
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impugned judgment suffers from a perversity; it had wrongly recorded that the bar of Section 185 of the DLRA is operational; attention has been drawn to the averments made in the plaint as also the prayer clause; it is pointed out that the relief claimed by the plaintiff was simplicitor a relief of injunction; there was no bar to such a suit. Learned counsel for the appellant has placed reliance upon a judgment of this Court reported in DLT 1974(Vol.X) 227 Mam Raj Vs. Ram Chander as also another judgment of this Court in 150 (2008) DLT 101 Tara Chand & Another Vs. Kumari Rajni Jain & Ors.. Reliance has also been placed upon 76 (1998) DLT 257 Cdr. Bhupinder Singh Rekhi Vs. C.S. Rekhi & Others, 153 (2008) DLT 526 Kirpa Ram VS. Surendra Deo Gaur & Others as also 2009 II AD (Delhi) 782 Vinod Kumar Sharma Vs. Smt. Seema Sethi to support this submission. It is pointed out that in 148 (2008) DLT 596 Rajender Singh Vs. Vijay Pal @ Jai Pal & Others the Apex Court had also held the same view qua a suit for injunction. It is pointed that under Section 185 of the DLRA only such suits are not maintainable before the civil court where the remedy is available before the revenue court. Present suit was wrongly held to be barred.

disputed land i.e. portion shown in B C D E is in possession of the defendant. The impugned judgment had rightly held that question of title cannot be gone into by a civil court.

10 Record has been perused. The parties i.e. the plaintiff and defendant are admittedly cousins. The suit property was initially owned by their respective fathers. After the death of their respective fathers one half share belonged to the family of the plaintiff and other half had to be equally divided by the family of defendants No. 1 & 2; defendants No. 1 & 2 were to get one half share. Both the parties have admitted that an oral partition had been effected between the parties. However shares of the parties had not been delineated; it was not clear which portion of the property has fallen to the share of the plaintiff and which portion had fallen to the share of the defendants. The site plan placed on record by the plaintiff has been proved as Ex. PW-4/D-1. Portion shown in yellow colour is admittedly in the possession of the plaintiff; admittedly the portion shown in blue colour is in possession of defendant No. 1 and the portion shown in green colour is in possession of defendant No. 2. There is however a cloud over the title in the red portion which is B C D E. The claim of the plaintiff is that he is in possession of red portion; this was refuted by the defendant No. 1 who has categorically in his
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written statement stated that the red portion is in his cultivatory possession. It was this factor which had weighed in the mind of the first appellate court to hold that there was a cloud over the title of this red portion. The finding returned in the impugned judgment qua this proposition is returned as under:-

“14. In these circumstances, the case which stands proved on record is that both the parties are joint owners of various parcels of khasra number which was jointly owned by Shri Khem Chand and Gokal Chand.

15. Admittedly, the suit property is part of village located in village Jhaoda Majra, Burari, Delhi which is an agricultural property and is therefore governed by the provisions of Delhi Land Reforms Act.

16. Under the scheme of Delhi Land Reforms Act a person to be the owner of a land which is part of agricultural land has to be a recorded Bhumidar. Once there are more than one person recorded as Bhumidar, both of them are the joint owners and they cannot exclude each other from the possession of the suit property. Under the Act a partition can take place by way of demarcation of the respective portions. The concept of oral partition is not recognized under the Act. Testimony of PW2, the Local Commissioner and of all other witnesses goes to show that the appellants also put up a hand pump and chappars in the suit property besides constructing a wall around it. Thus, the stand of the respondent, that she is in exclusive possession thereof is not established.

17. Certain modes for determination of rights in such circumstances regarding the ownership of the land has been provided for in the Delhi Land Reforms Act. Whenever there is a cloud on nobody's title in respect of his/her Bhumidari rights, they are required to obtain a declaration from the Revenue Estates of such rights. Similarly, if somebody occupies a portion of the property unauthorizedly then there is right of ejectment available under the Delhi Land Reforms Act by filing an ejectment suit through the Gaon Sabha. In case, there is a interse dispute between the joint owners then they can seek partition

amongst them by approaching the Revenue Authorities. When all these remedies are available under the scheme of Delhi Land Reforms Act, parties cannot approach to Civil Court for those reliefs.

18. The facts of this case goes to show that there was a cloud over title of the appellant to be a Bhumidar in respect of the property of which she claimed to be in exclusive possession. The appellants who were sought to be enjoined were threatening to occupy the suit property which the respondent claimed to be in her exclusive possession. In such circumstances, it has been held by the Hon'ble High Court of Delhi that the person whose title is put under cloud is required to obtain a fresh declaration to be a Bhumidar of the property for which she/he seeks injunction. Reference can be made to judgment delivered by our own High Court in the case of Ram Karan & Others Vs. Jagdeep Rai reported in 79(1999) DLT 305 held as under:-

“I am of the considered opinion that the present suit is barred under the provisions of Section 185 of the Delhi Land Reforms Act as the issues raised in the present suit could be effectively decided by the Revenue Court and the jurisdiction of this Court is barred under the provisions of Section 185 of Delhi Land Reforms Act. The plaintiffs in the present suit claim a right to the suit property as a Bhumidar which right is denied on the ground that the plaintiffs have sold out their rights in the suit land. The rights, if any, of the plaintiffs in respect of the suit land are under cloud, and therefore, for all practical purposes the plaintiffs are seeking for a declaration of their right as a Bhumidar and also seeking for a declaration of their possession in respect of the suit land. There is apparently a dispute as to possess of the agricultural land and therefore, such dispute as to possession of agricultural land could be effectively adjudicated upon and decided under the provisions of Delhi Land Reforms Act, remedy being under Section 84 read with Item No.19 of the First Schedule. All the reliefs claimed by the plaintiffs, therefore in the present suit are within the competent jurisdiction of the Revenue Assistant where a suit is pending and

this Court has no jurisdiction to entertain this suit in view of the provisions of Section 185 of Delhi Land Reforms Act.

19. At this juncture it would also be relevant to take note of a judgment reported in 1986 RLR 432 which has dealt with the effect of urbanization on rural area and applicability of the Delhi Land Reforms Act. Some observations made in the aforesaid judgment are reproduced for the sake of reference:-

“11. On its plain language it is manifest “that any land before it can be termed land” for the purpose of the Act must be held or occupied for purposes connected with agriculture, horticulture or animal husbandry etc. Admittedly the land in question has not been used for any of the purposes contemplated therein since 1960 or even earlier when the layout plan was submitted to the Corporation for necessary sanction. It is so stated not only in the sale deeds executed by Raghbir Singh, respondent no.2, in favour of the petitioner as well as respondent no.4 but is also manifest from the Khasra girdavari for the year 1965-66, a copy of which is to be found at page 271 of the trial court record. Its perusal would show that while Raghbir Singh was recorded as Bhumidar under column 4 thereof the whole of the land has been described as “Gair Mumkin Plot Wa Makan,” i.e. Uncultivable land under plots and buildings. It thus ceased to be land for the purposes of the Act. If that be so, the provisions thereof will not longer apply and the remedy of the aggrieved party, if any, would be under the general law of the land.

As stated in the preamble to the Act itself, the Act was designed to provide for modification of Zamindari system so as to create a uniform body of peasant proprietors without intermediaries, for the unification of the Punjab and Agra systems of tenancy laws in force in the State of Delhi Land to make provision for other matters connected therewith. Consequently, the erstwhile

proprietors of agricultural land in the Union Territory of Delhi ceased to exist after the Act came into force and if any land was part of a holding of a proprietor he became a Bhumidar of it. If it was part of a holding of some other person such as tenant or sub-tenant etc. he became either a Bhumidar or an asami, whereupon the rights of the proprietor in that land ceased.

12. So, under the provisions of the Act, a person could either be a Bhumidar of Agricultural land or he could be an asami (See Section 4(1) of the Act). Section 22 of the Act provides that:

“A Bhumidar or Asami shall, subject to the provisions of this Act, have the right to the exclusive possession of all land comprised in his respective holding and to use land for any purpose connected with agriculture, horticulture or animal husbandry which includes pisciculture and poultry farming and to make any improvement.”

13. Evidently user of the land for any purpose other than that connected with agriculture, horticulture or animal husbandry etc. by a Bhumidar is prohibited by this Section. However, Section 23 allows a Bhumidar or an asami to use his holding or part thereof for industrial purposes other than those immediately connected with any of the purposes referred to in Section 22 if the same is situated within the belt declared for the purpose by the Chief Commissioner by notification in the official gazette. He may also do so after obtaining sanction of the chief Commissioner in the prescribed manner even though the land does not lie within such a belt. It is thus essential for a Bhumidar to retain possession of his holding at all material times and to use the same for the purpose specified in Section 22 only if he is not to continue to be a Bhumidar. Section 33(1) debars a

Bhumidar from transferring by sale or gift or otherwise any land to any person other than a religious or charitable institution if as a result of the transfer, the transferor shall be left with less than eight standard acres of land in the Union Territory of Delhi. Of course, he can transfer the whole of his land as envisaged in Sub-section (2) of Section 33 if his entire holding is less than eight standard acres.

14. Section 34 debars a Bhmidar from letting, for any period whatsoever, any land comprised in his holding except in the cases provided for in Section 36. Section 36 enumerates the categories of Bhumidars who are permitted to let the whole or any part of his holding. These include widows, minors, lunatics and persons incapable of cultivating themselves by reason of blindness or physical infirmity etc. Under Section 43 of the Act, transfer of holding or part thereof accompanied with possession is deemed to be a sale. Section 44 lays down the consequences which flow from a Bhumidar letting his holding or part of it in contravention of the provisions contained in Section 35 and 36 of the Act and the lessee shall then be deemed to be purchaser within the meanings of Section 33 and 42. The latter Section provides that on transfer of any holding or a part thereof by a Bhumidar in contravention of the provisions of the Act, the transferee and every other person who may have obtained possession of such holding shall notwithstanding anything in any law be liable to ejectment from such holding or part thereof on the suit of the Gaon Sabha. Even the revenue assistant on receipt of information about the same can take action on his own motion to eject the transferee and every person who may have obtained possession, as stated above. Section 47 provides for the consequences of ejectment Under Section 42 and lays down that all the rights and interests of Bhumidar in the holding shall stand extinguished.

15. Section 81 of the Act too provides for penalty which a Bhumidar may entail if he uses the land for any purpose other than a purpose connected with agriculture, horticulture or animal husbandry, the penalty being that he is liable to ejectment on the suit of Gaon Sabha and he is also liable to pay damages. Thus, on a bare perusal of the foregoing provisions of the Act it is manifest that the Bhumidar is bound not only to retain possession of his land but also use it for specified purposes at all material times if he is to continue to be a Bhumidar. A perusal of Section 84 to 87 would further countenance this conclusion."

20. Thus, it is apparent, that a Bhumidar to claim himself/herself to be the owners of the property forming part of the village land has to be in actual physical possession thereof that is to say under cultivator possession if it is agricultural land. In anybody claims to be a joint owner of such property, then parties cannot claim exclusive possession unless partition is effected in accordance with the provisions of the Act. Any threat by either of the parties oust a joint owner from the said property tantamount to causing cloud over the others title. Thus, unless and until, a declaration is sought as stated above, one cannot claim to be in exclusive possession of such property.

21. In this regard the matter was also examined by the Hon'ble Supreme Court in the case of Om Prakash Agarwal & Ors. Vs. Batara Behera & Ors. Reported in 1999 (SC) 1093. The relevant portion is reproduced hereunder:-

"2. Mr. G.L. Sanghi, the learned senior counsel appearing for the appellants contended that the very purpose of the Orissa Land Reforms Act being a progressive legislation relating to agrarian and land tenures, the said Act cannot have any application to the land which is a part of the master plan of a City and, therefore, the High Court committed error in applying the provisions of the Land Reform Act to the case in hand. Mr. Sanghi further contended that in the absence of any materials to indicate that the

vendors of the sale deeds belong to the Schedule Castes the embargo contained under Section 22 of the Act will not apply and, therefore, application under Section 23 of the Act was not tenable. Mr. Sanghi also submitted that in view of Section 73(c) of the Land Reforms Act and in view of the fact that the area comes within a master plan thereby necessarily reserved as an urban area the Act cannot have any application. The learned senior counsel for the respondents on the other hand contended, that the definition of 'Land' in Section 2(14) is wide enough to include the lands within the municipal area provided the same is used for agricultural purposes or is capable of being used for agricultural purposes and in that view of the matter the High Court rightly remitted the matter to the Sub-Divisional Officer for re-consideration.

3. In view of the rival submissions at the Bar the first question that arises for consideration is whether the land as defined in Section 2(14) of the Act and which is either being used or capable of being used for agricultural purposes within the municipal area do come under the purview of Orissa Land Reforms Act. The Act, no doubt is a measure relating to agrarian reforms and land tenures and abolition of intermediary interest but there is no provision in the Act which excludes such agricultural lands merely because they are situated in an Urban Agglomerations. The Act applies to all land which is either used or capable of being used for agricultural purposes irrespective of whether it is situated within a municipal area or in villages. The very object of the legislation being an agrarian reform, the object will be frustrated if agricultural lands within the

municipal area are excluded from the purview of the Act. In this view of the matter we have no hesitation to come to the conclusion that the Act applies to all lands which is used or capable of being used for agricultural purposes irrespective of the fact wherever the said land is situated and the conclusion of the High Court on this score is unassailable.”

22. Even otherwise the law with regard to the grant of injunction is also well settled, a person who claims injunction must have a legal right in respect of the agricultural land recognized only when there is a revenue entry i.e. of khasra Godari and Khatuni in the name of the person in respect of the specific portion of the land and not otherwise. The only legal right established on record by the evidence brought on record by both the parties is, that both the parties are joint owners of the suit property being the co-owners even though, they have stated that there was an oral partition but they have not proved as to which portion came in possession of each other. Thus, the case of the respondent, that she was in exclusive possession of the suit property cannot be accepted. Consequently, she is not entitled to the declaration or injunction as prayed for.”

11 There is no perversity in this finding. The impugned judgment had noted that both the parties were claiming right over the portion shown red in the site plan; the plaintiff as also defendant No. 1 were claiming cultivatory possession over this portion of the suit land. Even after the oral partition effected between the parties admittedly their shares had not been demarcated.

12 Section 185 of the DLRA reads as under:-

“185. Cognizance of suits, etc, under this Act. - (1) Except as provided by or under this Act no court other than a court mentioned in column 7 of Schedule I shall , notwithstanding anything contained in the Code of Civil Procedure, 1908, take cognizance of any suit, application, or proceedings mentioned in column 3 thereof.

(2) Except as hereinafter provided no appeal shall lie from an order passed under any of the proceedings mentioned in column 3 of the Schedule aforesaid.

(3) An appeal shall lie from the final order passed by a court mentioned in column 3 to the court or authority mentioned in column 8 thereof.

(4) A second appeal shall lie from the final order passed in an appeal under sub section (3) to the authority, if any, mentioned against it in column 9 of the Schedule aforesaid..”

13 This Section stipulates that except as provided by or under this Act no court other than a court mentioned in column 7 of Schedule 1 shall take cognizance of any suit, application or proceedings mentioned in column 3 of the said Schedule. An application for declaration of bhumidari rights is maintainable under Sections 10, 11, 12, 13, 73, 74, 79 & 85 of the DLRA; revenue court alone has the jurisdiction to deal with such bhumidari rights. Under Section 55 a suit for partition of a holding of a bhumidar is maintainable; jurisdiction vests with the revenue court.

14 The averments in the plaint as also the prayer clause have

been perused. The plaintiff is claiming dispossession from the red portion B C D E in the site plan; defence of defendant No. 1 that he has title and possession over the said land; this question as to who has title of this co-owned land can only be decided by the revenue court. There is a clear cloud over this title. The contention of the appellant that a co-owner cannot seek a partition of his holding is answered by Section 55 of the DLRA which stipulates that holding of bhumidari is partitionable and a bhumidar may sue for a partition of his holding. This contention is squarely covered by Schedule I; revenue courts alone have the jurisdiction to deal with this matter. Since the red portion is claimed by both the owners i.e. the plaintiff and defendant No. 1, proper remedy would be a relief of partition against the other co-owner under Section 55 of the DLRA which jurisdiction vests with the revenue court.

15 The impugned judgment in no manner calls for any interference. The judgments relied upon by learned counsel for the appellants are all distinguishable. In the case of Ram Chander (Supra) there was no dispute about the title to the land; permanent injunction had been claimed on the basis of succession to bhumidari rights by virtue of a Will. The judgments of Tara Chand (Supra), Cdr. Bhupinder Singh Rekhi (Supra), Kirpa Ram (Supra), Vinod Kumar Sharma (Supra) all proceeded on the

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assumption that what had been claimed by the plaintiff was only an injunction; there was no dispute about the title over the suit land; this was after a meaningful reading of the plaint; in this context it was noted that where there is no dispute about the title of the land; suit simplicitor being a suit for injunction is maintainable and such a suit is not barred under Section 185 of the DRCA. So also was the proposition reiterated by the Apex Court in the Rejender Singh; averments in the plaint have necessarily to be gone into to decide this question. As aforementioned in the instant case both the parties are contesting their right over the disputed red portion; plaintiff and defendant No. 1 are both claiming title to the suit land; the impugned had correctly and rightly noted that this has created a cloud over the title of the red portion; such a cloud can be cleared only by the revenue court.

16 Substantial question of law is accordingly answered in favour of the respondent and against the appellant. There is no merit in this appeal. Appeal as also pending application are dismissed.

INDERMEET KAUR, J.

JUNE 03, 2011
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