

doubt the trial judge can explore in terms of s. 89 of the Code. It has oft been said that: Husband justice and ye shall garner peace.

(12) The petition fails and is ordered to stand dismissed *in limine*.

(13) All the natural consequences will flow.

(14) Let a copy of this order be sent to the trial judge that passed the orders by the office in hard copy and by e-mail for her record and encouragement in the future.

PS Bajwa

Before Rameshwar Singh Malik, J.

GYAN PARKASH AND OTHERS—Appellants

versus

BHATI DEVI AND OTHERS—Respondents

RSA No. 125 of 2007

January 30, 2014

Specific Relief Act, 1963 - S. 34 - Declaration for possession - Dholidar Land - True owner created suit land as Dholi Land in lieu of services to be rendered by Dholidar - Plaintiff's predecessor and father of defendants were given possession - It was alleged that after death of plaintiff's predecessor, defendant's father got only his name incorporated in revenue record - Suit was filed for possession - Held, that Dholidar is only a licensee - Functions and duties as Dholi were no more performed by plaintiff or defendants - Thus, they had been left with no interest in suit property - They had no locus standi - Further, prior to filing of suit, defendants had raised construction several times, but same was never challenged - Furthermore, father of defendants was in continuous, uninterrupted and physical possession of suit land - No cause of action available to plaintiff - By doing nothing for 26 years, plaintiff had lost his right to contest.

Held that Dholidar is only a licensee and not the owner of the property given to him in Dholi. Dholi is always created in favour of Dholidar by the true owner in lieu of services rendered by the Dholidar.

(Para 10)

Further held, that once Dholidar or his successor stops performing the functions and duties of Dholidar in favour of true owner who created the Dholi, Dholi land would revert to its true owner.

(Para 11)

Further held, that plaintiffs and pro forma defendants-respondents not being the true owners, suit for possession against defendant Nos. 1 to 3-appellants was not even maintainable for the reason that the contesting defendants were not in illegal possession. It is so said because once the Dholi functions and duties were no more being performed either by plaintiff or any of the pro forma defendants, as it was neither pleaded nor argued case on their behalf, they had been left with no interest in the suit property. In such a situation, defendant nos. 1 to 3-appellants were fully entitled in law to protect their possession against the whole world including the plaintiff, because nobody was coming forward as true owner. In fact, plaintiff had no *locus standi* even to challenge Ex. DW9/1 and rapat No. 403 dated 4.4.1974. In view of what has been discussed hereinabove, third substantial question of law is answered against the plaintiffs and in favour of defendant Nos. 1 to 3-appellants.

(Para 14)

Further held, that defendant Nos. 1 to 3 had already raised construction and that, too, more than once, in the plot in question, before filing the suit. It has also gone undisputed on record that late Shri Ram Chander, father of plaintiff and pro forma defendants [never challenged] the writing Ex. DW9/1, rapat No. 403 dated 4-4-1974 and also the revenue entries in favour of defendant Nos. 1 to 3-appellants during his life time. The construction was duly proved by the defendants-appellants by producing cogent evidence, including mason, who did the construction work at the site. In fact defendants-appellants produced sufficient, cogent and well-convincing evidence on record, but the appellate court altogether and illegally ignored the same while reversing the well-reasoned judgment rendered by the trial Court. In this view of the matter, it is unhesitatingly held that the status of plaintiff was not better than that of a third party. In fact, plaintiff was neither having any *locus standi*, nor there was any cause of action available to him to file and maintain the present suit. Plaintiff was also estopped from filing the present suit because of his own act and conduct. Since the lower appellate court

committed serious error of law while ignoring all the abovesaid material aspects of the matter, the impugned judgment and decree cannot be sustained.

(Para 15)

Further held, that the consistent revenue entries, and voluminous record right from 1976 till filing of the suit, speaks volumes in favour of the appellants. A bare reading of revenue record would show that Ram Kanwar-predecessor-in-interest of defendants-appellants has been shown to be in continuous, uninterrupted and physical possession on the suit land and that, too, in the capacity of a Gair Marusi, that is, without paying any rent to anybody. Further, even if any semblance of right was in favour of the plaintiff, he lost the same by waiving it off while doing nothing in this regard for 26 long years. During this period, appellants not only remained in physical possession of the suit land but also raised construction thereon on more than one occasion. Since the learned appellate court failed to delve deep in any of the relevant aspects of the matter, discussed hereinabove, the impugned judgment and decree have been found to be based on patently illegal approach and the same cannot be sustained.

(Para 16)

S.N.Gaur, Advocate, *for the appellants*.

Pritam Saini, Advocate, *for the respondents*.

RAMESHWAR SINGH MALIK, J.

(1) The instant appeal, at the hands of contesting defendant Nos. 1 to 3, is directed against the judgment of reversal dated 6.12.2006 passed by the learned Additional District Judge, Rewari, whereby first appeal of the plaintiffs was allowed setting aside the judgment and decree dated 19.4.2004, passed by the learned trial Court in a suit for declaration and possession.

(2) Brief facts of the case are that initially the suit was filed by plaintiff Mahabir Singh, alleging that the predecessor-in-interest of plaintiff and proforma defendant Nos. 4 to 8, namely late Shri Ram Chander was owner in possession of the suit land measuring 1K-4M as Dholdidar. After the death of Shri Ram Chander, plaintiff as well as proforma defendant Nos. 4 to 8 became owner of the suit land by

operation of law. Ram Kanwar, father of defendant Nos. 1 to 3, being a shrewd and influential person, in collusion with officers of the revenue department got his name incorporated in the revenue record as Gair Marusi on the suit land, whereas he never remained as Gair Marusi under late Shri Ram Chander. It was further pleaded case of the plaintiffs that taking undue benefit of the illegal entries in the revenue record, defendant Nos. 1 to 3 constructed a chhappar and boundary wall on the suit land, about three years before the institution of the present suit because the suit land was lying in the shape of vacant plot. Since defendant Nos. 1 to 3 brought the construction material at the site, for raising further construction in the suit land without having any right, title or interest therein being the trespassers, plaintiff was forced to file the present suit. During the pendency of the suit, Mahabir Singh died and his LRs were brought on record.

(3) Defendants were put to notice. Contesting defendant Nos. 1 to 3 appeared and filed their joint written statement taking more than one preliminary objections, qua maintainability, estoppel and limitation controverting the averments taken by the plaintiffs. It was specifically stated that prior to the year 1971, Ram Chander father of the plaintiff was in possession of the suit land. However, on 24.5.1971 Ram Chander handed over the possession of the suit land in favour of Ram Kanwar-predecessor-in-interest of defendant Nos. 1 to 3 for consideration of ₹ 900/- by way of executing a writing in that regard. Ram Kanwar-predecessor-in-interest of defendant Nos. 1 to 3 remained in possession of the suit land till his death in May 1996. It was further pleaded case of the contesting defendant Nos. 1 to 3 that after taking over the possession of the suit land in year 1971, Ram Kanwar constructed two chhappars, planted several trees and erected kachha wall. Thereafter, in the year 1983 late Shri Ram Kanwar raised a pucca boundary wall up to five feet in height around the suit land. In the year 1985, the said boundary wall was further raised up to 8-9 feet. In January 1992 defendants raised construction of two pucca rooms, one kitchen and a tin shed on the suit land. Raising of construction before three years of filing the present suit was denied. Late Shri Ram Chander father of plaintiff, never challenged the revenue entries during his life time. Dismissal of the suit land was prayed for.

(4) On completion of pleadings of the parties, following issues were framed by the learned trial Court:-

- “1. Whether the father of the plaintiff was a Dholdar in the suit land mentioned in para No.1 of the plaint? OPP
2. Whether the revenue entires changed since 1971 in the name of the defendants is *null & void* and not binding on the rights of the plaintiff? OPP
3. Whether the plaintiff is entitled for possession as alleged? OPP
4. Whether the suit of the plaintiff is not maintainable in the present form? OPD
5. Whether the plaintiff is estopped by his own and conduct? OPD
6. Whether the suit of the plaintiff is within limitation? OPD
7. Relief.”

(5) To substantiate their respective stands taken, both the parties led their documentary as well as oral evidence. After hearing the learned counsel for the parties and going through the evidence brought on record, the learned trial Court held that plaintiffs failed to prove their case and the suit was dismissed *vide* judgment and decree dated 19.4.2004. Feeling aggrieved, plaintiffs filed their appeal which was allowed by the learned Additional District Judge, Rewari *vide* impugned judgment and decree dated 6.12.2006. Hence this appeal, at the instance of contesting defendants.

(6) Learned counsel for the appellants submits that the learned trial Court dismissed the suit, whereas the learned lower appellate court misdirected itself while misreading, misconstruing and misinterpreting the facts as well as the law because of which the impugned judgment and decree were not sustainable in law. He further submits that predecessor-in-interest of plaintiff and proforma defendants-respondents transferred his possessory rights in favour of late Shri Ram Kanwar-predecessor-in-interest of the appellants on 24.5.1971 after receiving ₹ 900/-. Late Shri

Ram Chander executed a transfer deed Ex.DW9/1. Since Shri Ram Kanwar had been put into possession of the suit property, rapat No. 403 dated 4.4.1974 was recorded, followed by revenue entries in favour of appellants. It was further contended that even if the defendants were treated to be in illegal possession for the sake of argument, plaintiffs did not challenge the legality of transfer deed dated 24.5.1971, that Ram Chander being only Dholidar, had no right to transfer. Unless they would do so, their suit for possession was not even maintainable. He also submits that the limitation for filing the suit for possession was 12 years, whereas the suit was filed after 26 years which was hopelessly time barred. He prays for setting aside the impugned judgment and decree by allowing the present appeal.

(7) Per contra, learned counsel for the respondents submits that their predecessor-in-interest had no right to alienate the suit land as he was only a Dholidar. To support his contention, he relies upon a judgment of this Court in *Lakshmi Chand v. Basanti alias Kailash(1)*. He further submits that they have inherited the Dholi rights and their suit for declaration and possession was maintainable in view of the judgment of this Court in *Dharam Singh and others v. Smt. Phullan Devi and others(2)*. He also submits that since transfer deed dated 24.5.1971 was for ₹ 900/- it requires compulsory registration in view of judgment of the Hon'ble Supreme Court in *Santosh Jayaswal v. State of M.P.(3)*. He prays for dismissal of the appeal.

(8) Having heard the learned counsel for the parties at considerable length, after careful perusal of record of the case and giving thoughtful consideration to the rival contentions raised, this Court is of the considered opinion that in the given fact situation of the present case, the instant appeal deserves to be allowed for the following more than one reasons.

(9) Under the circumstances of the case, following substantial questions of law arise for consideration before this Court:-

(1) 2003(1) RCR (Civil) 298

(2) 2005(3) RCR (Civil) 832

(3) 1995(6) SCC 520

1. Whether the learned lower appellate court completely misread, misconstrued and misinterpreted the facts and evidence available on record, while reversing the cogent findings recorded by the learned trial Court on issue Nos. 1 to 5 ?
2. Whether the plaintiff did not come to the court with clean hands and his suit was also not maintainable in the present form?
3. Whether the plaintiff, being not the true owner of the suit land, was entitled for possession of Dholi land despite the fact that no functions or duties of Dholidar were being performed any more?

(10) Firstly, plaintiff Mahabir failed to plead and prove as to who created Dholi in favour of his father late Shri Ram Chander and when. He also withheld the name of true owner who created Dholi in favour of his father. It was not even remotely pleaded that after the death of original Dholidar namely Shri Ram Chander, plaintiff or proforma defendant Nos. 4 to 8 had been performing the functions and duties of Dholidar. It goes without saying that Dholidar is only a licensee and not the owner of the property given to him in Dholi. Dholi is always created in favour of Dholidar by the true owner in lieu of services rendered by the Dholidar.

(11) Once Dholidar or his successor stops performing the functions and duties of Dholidar in favour of true owner who created the Dholi, Dholi land would revert back to its true owner. Plaintiff did not plead anything in this regard as to who was the true owner, when Dholi was created, whether after the death of Dholidar, he or anybody out of his brothers was performing the functions and duties of Dholidar. Since all these necessary pleadings were conspicuously missing in the plaint particularly withholding the name of true owner, the suit of the plaintiffs was not maintainable. In view of the foregoing discussion, the answer to the second substantial question of law is and has to be against the plaintiffs. Having said that, this Court feels no hesitation to conclude that the learned trial Court, very rightly recorded its cogent findings on issue

Nos. 1 to 5 against the plaintiffs and in favour of defendants-appellants, *vide* its judgment dated 19.4.2004 which deserves to be restored.

(12) Secondly, despite being fully aware that only the possessory rights of the suit land were transferred by their father in favour of Ram Kanwar-predecessor-in-interest of contesting defendants-appellants and that too on 24.5.1971 Ex. DW9/1, plaintiff did not challenge the validity of this transfer-deed. Further, plaintiff also did not challenge the validity of rapat No. 403 dated 4.4.1974. No reasons were forthcoming. Until and unless plaintiff would challenge the legality of these documents, he could not have maintained the present suit. On the same analogy, even the relief of declaration that revenue entries were wrong would also not be available to the plaintiff, because the revenue entries were based on the above-said transfer deed dated 24.5.1971 followed by rapat No. 403 dated 4.4.1974. Since the learned appellate court has completely misread, misconstrued and misinterpreted the true facts of the case as well as the evidence available on record, the impugned judgment and decree dated 6.12.2006 cannot be sustained and the same are liable to be set aside. In view of the above, answer to the first substantial question of law is in the affirmative and the same is decided accordingly.

(13) No doubt, a Dholidar is not competent to alienate the Dholi property. However, the judgment relied upon by the learned counsel for the respondents in *Lakshmi Chand's case (supra)* is not applicable to the facts of the present case for the reason that there was no alienation as such in the present case. Ram Chander Dholidar has transferred only his possessory rights which does not amount to alienation. However, possession of Ram Kanwar predecessor-in-interest of the appellants could not have been treated to be illegal because he was put in possession by a person who was competent to do so. Similarly, the judgment in *Dharam Singh's case (supra)* will also be not help to the respondents being distinguishable on facts. Again, judgment in *Santosh Jayaswal's case (supra)* is not applicable to the facts of the present case because no sale was involved in the present case. Further, it is the settled principle of law that peculiar facts of each case are to be examined, considered and appreciated first, before applying any codified or judge made law thereto. Sometimes, difference of one circumstance or additional fact can make the world of difference, as held by the Hon'ble Supreme Court

in *Padmausundra Rao and another v. State of Tamil Nadu and others*(4).

(14) As noticed hereinabove, plaintiffs and proforma defendants-respondents not being the true owners, suit for possession against defendant Nos. 1 to 3-appellants was not even maintainable for the reason that they were not in illegal possession. It is so said because once the Dholi functions and duties were no more being performed either by plaintiff or any of the proforma defendants, as it was neither pleaded nor argued case on their behalf, they had been left with no interest in the suit property. In such a situation, defendant Nos. 1 to 3-appellants were fully entitled in law to protect their possession against the whole world including the plaintiff, because nobody was coming forward as true owner. In fact, plaintiff had no *locus standi* even to challenge Ex. DW9/1 and rapat No. 403 dated 4.4.1974. In view of what has been discussed hereinabove, third substantial question of law is answered against the plaintiffs and in favour of defendant Nos. 1 to 3-appellants.

(15) Admittedly, defendant Nos. 1 to 3 had already raised construction and that too more than once in the plot in question before filing the suit. It has also gone undisputed on record that late Shri Ram Chander, father of plaintiff and proforma defendants never challenged the writing Ex. DW9/1, rapat No. 403 dated 4.4.1974 and also the revenue entries in favour of defendant Nos. 1 to 3-appellants, during his life time. The construction was duly proved by the defendants-appellants by producing cogent evidence including mason who did the construction work at the site. In fact defendants-appellants produced sufficient, cogent and well convincing evidence on record but the learned appellate court altogether and illegally ignored the same while reversing the well reasoned judgment rendered by the learned trial Court. In this view of the matter, it is unhesitatingly held that the status of plaintiff was not better than that of a third party. In fact, plaintiff was neither having any *locus standi*, nor there was any cause of action available to him to file and maintain the present suit. Plaintiff was also estopped from filing the present suit because of his own act and conduct. Since the learned lower appellate court committed serious error of law while ignoring all the

above-said material aspects of the matter, the impugned judgment and decree cannot be sustained.

(16) The consistent revenue entries and voluminous record right from 1976 till filing of the suit, speaks volumes in favour of the appellants. A bare reading of revenue record would show that Ram Kanwar-predecessor-in-interest of defendants-appellants has been shown to be in continuous, uninterrupted and physical possession on the suit land and that too in the capacity of a Gair Marusi, that is without paying any rent to anybody. Further, even if any semblance of right was in favour of the plaintiff, he lost the same by waiving it off while doing nothing in this regard for 26 long years. During this period, appellants not only remained in physical possession of the suit land but also raised construction thereon on more than one occasions. Since the learned appellate court failed to delve deep in any of the relevant aspects of the matter, discussed hereinabove, the impugned judgment and decree have been found to be based on patently illegal approach and the same cannot be sustained.

(17) No other argument was raised.

(18) Considering the peculiar facts and circumstances of the case noted above, coupled with the reasons aforementioned, this Court is of the considered view that since the impugned judgment dated 6.12.2006 has been passed contrary to the facts as well as evidence available on record, the same cannot be sustained. Therefore, the impugned judgment and decree dated 6.12.2006 are hereby set aside and the judgment and decree dated 19.4.2004 of the learned trial Court are hereby restored.

Resultantly, the instant appeal must succeed and the same is hereby allowed, however, with no order as to costs. Pending application also stands disposed of.

S. Gupta