Form No: HCJD/C-121.
JUDGEMENT SHEET
IN THE ISLAMABADHIGH COURT, ISLAMABAD
JUDICIAL DEPARTMENT

Civil Revision No. 67 OF 2021

Syed Ali Asim Jaffari, etc.

Vs

Qamar Abbas, etc.

PETITIONER BY:	Raja M. Aleem Khan Abbasi and Ms. Azra Batool, Advocates.
RESPONDENTS BY:	Ch. Muhammad Kashif Gujjar, Advocate.
DATE OF HEARING:	15.08.2022.

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BABAR SATTAR, J.- The petitioners have aggrieved by order dated 02.12.2021 passed by the learned Additional District Judge and order dated 10.07.2021 passed by the learned Civil Court pursuant to which the application of the petitioner for delivery of possession of House No.17, Street No.145, Sector G-13/4, Islamabad has been dismissed.

2. Learned counsel for the petitioner stated that the subject matter of the dispute between the parties relates to partition of inherited property. He contended that pursuant to agreement dated 04.12.2020 the petitioner and his siblings had agreed to distribute the property inherited and the consent of the petitioner and respondents No.1 to 4 was recorded by the learned Civil Court after which a preliminary decree was passed dated 21.12.2020 **("Preliminary Decree")**. That pursuant to the Preliminary Decree (i) a

vehicle was purchased by the petitioner and was transferred in his name, (ii) the house the possession of which is being sought was agreed to be purchased by the petitioner, subject to payment of consideration, which consideration was paid by the petitioner and the house was transferred in the name of the petitioner, and (iii) a third property in Gujrat was to be sold out and shares transferred in accordance with their respective shares. That in terms of the Section 8 of the Partition Act, 1893, the Preliminary Decree to the extent of the house in question has attained finality as the conditions of distribution i.e. payment of consideration to respondents No.1 to 4 has been complied with and the property stands transferred in the name of the petitioner. For this he relied on ***Adam Khan Vs. Mohammad Sultan (PLD 1975 SC 9)***. He further contended that the compromise agreement in relation to the property in Gujrat provided a self-executory mechanism as it was stated therein that in the event that the property cannot be sold within a period of three months the property will be subject to auction through Court. He submitted that the petitioner has not reneged on his agreement in relation to the said property but the property has not been sold thus far due to litigation with the extended family of the father of the petitioner. He stated that the partition of the said property falls within the domain of Revenue Authorities and not the learned Execution Court at Islamabad. He stated that through the impugned order the learned Civil Court as well as the learned Additional District Court has failed to appreciate that the decree to the extent of

the house in Islamabad is no longer a preliminary decree, as the conditions for transfer have been satisfied and the decree stands executed to the extent of such property, and consequently the possession sought by the petitioner in relation to the lower portion of said house could not be denied in view of the facts as well as the law.

3. The learned counsel for the respondents submitted that initially the suit for partition did not include the inherited property belonging to the predecessor-in-interest of the parties in Tehsil Kharian, District Gujrat, which was subsequently added through an amended memo of the suit when the matter was agitated by the respondents. This reflects that the petitioner did not come to the learned trial Court with clean hands. He submitted that in view of Ex-C3 presented before the Court and recorded in its order dated 21.04.2021 the respondent filed an affidavit consenting to handover possession of the property of House No.17, Street No.145, Sector G-13/4, Islamabad, after receipt of share or consideration in relation to the property in Tehsil Kharian District Gujrat. He submitted that the respondent did not contest the fact that she had received consideration in relation to one vehicle (Toyota Passo 990 cc), which had been transferred in the name of the petitioner, and the property in Sector G-13/4, Islamabad, a portion of which was in the possession of the respondent but the property had been transferred in the Federal Government Employees Housing Authority's **("FGEHA")** record in the name of the petitioner.

But the handing over of physical possession of the said property in Sector G-13/4, Islamabad was contingent on the respondent getting her share in the property in Tehsil Kharian, District Gujrat and as the property in Teshil Kharian was yet to be partitioned or sold, the learned Civil Court and the learned Appellate Court had correctly concluded that the respondent was under no obligation to transfer possession of the property in Sector G-13/4, Islamabad to the petitioner.

4. The following questions arise from this petition that require adjudication:

(i) Is a preliminary decree issued under the Partition Act, 1893, executable by a decree holder against judgment debtors?

(ii) Can a party to a partition suit impose conditions with regard to handing over the possession of a property in relation to which such party has received its share and insist the possession of such property will be retained till such time that shares in all other joint properties subject to partition are distributed in accordance with law?

5. Let us start with settled principles of inheritance and partition of inherited property that are relevant to answer the aforementioned questions. Upon the death of a person his/her property automatically vests in his/her successors to the extent of their legal shares in accordance with Mohammedan Law (in a situation where there is no will made out by the deceased person). Once the identity of the successors is ascertained through the succession process,

their share in inherited property, in relation to which their rights are already vested, is to be declared. This happens at the time of passing of a preliminary decree in a partition suit, which is regarded as a decree for purposes of Section 2 of the Civil Procedure Code, 1908 **("CPC")** and transforms all co-sharers in the inherited property into decree-holders and judgment-debtors simultaneously. The matter then remaining before the court is to devise a mechanism to distribute the respective shares of the co-sharers in relation to each property that forms the subject-matter of the partition suit. To the extent that a property can be partitioned, its partitioning is to be ordered by the Court. And where the Court concludes that the property cannot be partitioned, its sale is to be ordered and the consideration received is to be distributed between the co-sharers to the extent of their respective shares. Merely because one of the properties that forms part of the inherited property subject to partition remains to be divided or sold, a co-sharer/successor-in-interest of a deceased person cannot claim a right to retain possession or some form of interest in such property in relation to which he/she has received his/her share.

6. Let us revisit the relevant case law to understand why this is so. In ***Adam Khan Vs. Mohammad Sultan*** ***(PLD 1975 SC 9)*** a preliminary decree was passed in a partition suit. The learned trial Court ordered the sale of the property and a sale certificate was issued. The auction purchaser made an application to the learned Civil Court under Order XXI Rule

95 of CPC for delivery of vacant possession and the august Supreme Court held the following:

> *"… By virtue of section 8 of the Partition Act a sale ordered in a partition suit is a decree within the meaning of section 2 of the Code of Civil Procedure with the result that an order of sale could be executed in the manner prescribed in rule 95 of Order XXI of the Code. The sale in the present case having become absolute in favour of the auction-purchaser, he is entitled to the delivery of vacant possession as against the judgment-debtors, which term would include, in this case, all the co-owners who are parties to the partition suit. The appellant being a co-owner is under an obligation to deliver vacant possession in terms of rule 95 of Order XXI of the Code".*

In ***Adam Khan*** the apex Court endorsed the view taken by the learned High Court that a co-sharer in possession is not to be treated as a tenant of other co-sharers and consequently no independent proceedings are required to be initiated to seek vacant possession from such co-sharer.

7. The august Supreme Court in ***Mst. Ilahi Noor Vs. Muhammad Din*** ***(PLD 1977 Supreme Court 634)*** reiterated the law laid down in ***Adam Khan*** and held that *"an order for the sale of a property in a partition suit is a decree within the meaning of CPC. This follows from the plain language of Section 8 of the Partition Act, 1893 …".*

8. In ***Muhammad Sualeheen Vs. Muhammad Siddiq Mazhar*** ***(1981 CLC 1039)*** a Division Bench of the learned Sindh High Court held that, *"Section 8 of the Partition Act, 1893, provides, inter alia, that an order for sale made by the*

Court under Section 3 shall be deemed to be a decree within the meaning of Section of the Code of Civil Procedure."

9. In ***Mst. Jamila Akhtar vs. Custodian, Evacuee Property (PLD 1996 Lahore 149)*** the learned Lahore High Court observed that *"with the issuance of a certificate of sale under Order XXI Rule 94 CPC the title of property in question would be deemed to be vested in the auction purchaser".* In ***Shahid Ali Vs. Mrs. Aziz Fatima (PLD 2010 SC 38)*** the august Supreme Court reaffirmed that for the sale of indivisible property in a partition suit the Court had to follow the procedure prescribed in CPC.

10. The question of whether or not a co-sharer needed special permission to bid for and purchase a property that was the subject matter of the partition suit came before this Court in ***Muhammad Zulfiqar vs. Additional District Judge (West), Islamabad*** **(*PLD 2016 Islamabad 91*)** and it was held that, *"any of the co-sharers of the suit properties were at liberty to bid for the same in terms of Section 6(2) of the Partition Act, 1893 and did not need to seek prior permission of the Court under Order XXI Rule 72 of CPC, as the Partition Act was special law and its provisions trumped the provisions of general law".*

11. In ***re: Petition for letters of Administration of the property and assets of the late Syed Zahoor-Ul Hasnain son of late Syed Amanat Hussain (1990 MLD 997)*** the learned Sindh High Court relying on the law laid

down in ***Adam Khan*** held that the Court could take possession from a co-owner under Order XXI, Rule 95 or Rule 35 of CPC and such co-owner was not a tenant of other co-owners if in possession of the property being sold pursuant to a partition suit, it was held that, *"in a decree for partition of a property the Court can, if it considers it expedient in the interest of justice to do so, order that a person bound by the decree including a co-owner in possession of the house, be ejected therefrom".* The question of possession by a co-owner once again came before the learned Sindh High Court in ***Ahmad Ali vs. Noor Muhammad (1992 CLC 1921)***, wherein it was held that *"where a party had not objected to sale of property by Court and had withdrawn the sale consideration deposited in Court such party could not be allowed to resist handing over vacant possession to the purchaser".*

12. To understand the mechanism for delivery of property, Sections 8 and 9 of the Partition Act, 1893 and Rule 95 of Order XXI CPC are relevant, which are reproduced as under:

> ***8. Orders for sale to be deemed decrees****. Any order for sale made by the Court under sections 2, 3 or 4 shall be deemed to be a decree within the meaning of section 2 of the Code of Civil Procedure, 1882 (14 of 1882)*
>
> ***9. Saving of power to order partly partition and partly sale****. In any suit for partition the Court may, if it shall think fit, make a decree for a partition of part of the*

property to which the suit relates and a sale of the remainder under this Act.

95. Delivery of property in occupancy of judgment debtor.- *Where the immovable property sold is in the occupancy of the judgment debtor or of some person on his behalf or of some person claiming under a title created by the judgment debtor subsequently to the attachment of such property and a certificate in respect thereof has been granted under rule 94, the court shall, on the application of the purchaser, Order delivery to be made by putting such purchaser or any person whom he may appoint to receive delivery on his behalf in possession of the property, and, if need be, by removing any person who refuses to vacate the same.*

13. What emerges from the case law discussed above is as follows:

(i) A preliminary decree passed under provisions of the Partition Act, 1893, is to be treated as a decree for purposes of Section 2 of the CPC and is executable.

(ii) A co-sharer is both a decree-holder and a judgment-debtor once a preliminary decree has been passed and can seek execution of such decree to the extent that no further adjudication is required in relation to the part of the decree that is sought to be executed.

(iii) A co-sharer of a suit property that is the subject-matter of the partition is not a tenant and cannot setup adverse possession against a purchaser who has purchased such property pursuant to a sale certificate issued by the Court and no independent

proceedings for ejection of such co-sharer need to be instituted.

(iv) A purchaser has a right to vacant possession of a property purchased pursuant to a sale certificate issued by the Court in a partition suit and a co-sharer who has not objected to such sale and has withdrawn sale consideration deposited with the Court or has otherwise received sale consideration directly from the purchaser in relation to such property cannot resist handing over vacant possession of the property to the purchaser.

(v) Where a co-sharer in the suit property subject to partition has purchased the shares of other co-sharers after the issuance of a sale certificate by the Court and has paid the consideration to the co-sharers, his status and rights in relation to the property purchased is no different from that of a third party purchaser who has purchased such property pursuant to auction proceedings.

14. Coming to the facts of the instant case, the respondent has resisted handing over of possession of the property in Sector G-13/4, Islamabad on the basis that there is one other property in Tehsil Kharian that remains to be distributed between the co-sharers and till such time that such property is distributed or sold and consideration in relation thereto paid to the respondent, she will not handover possession of a portion of the house in Sector G-13/4, Islamabad.

15. A perusal of the Preliminary Decree reflects that there were three properties that form the subject-matter of such decree. One, a vehicle in relation to which the petitioner paid the respondent her due share which was transferred in the name of the petitioner. There is no dispute in relation to this property. Two, a portion of house in Sector G-13/4, Islamabad in relation to which the respondent recorded her statement that she had agreed to sale of the property in the amount of Rs. 35 million and had received an amount of Rs.17,135,416/- as her share in the said property and consequently the said property was transferred in the name of the petitioner in FGEHA's record as well. When the Preliminary Decree was issued with regard to this property, portion of this property in Sector G-13/4 was in the possession of the respondent and the instant petition relates to the acquisition of possession of this property by the petitioner from the respondent. And three, an agricultural land in Tehsil Kharian in relation to which the respective shares of the successors of the petitioner and the respondent predecessor-in-interest were identified in the Preliminary Decree, the division/sale/distribution of which remains the subject-matter of further adjudication.

16. A perusal of the Preliminary Decree, therefore, reflects that the issue of distribution of shares in relation to property one (i.e. the vehicle) and property two (i.e. house in sector G-13/4, Islamabad) was settled at the time of issuance of the Preliminary Decree and the respective shares

of the parties stood distributed. This factual aspect is not in dispute. The Preliminary Decree was therefore a final decree in relation to the aforementioned properties. The Preliminary Decree, however, remained a preliminary decree in relation to the agriculture land in Tehsil Kharian as there are other share holders of such property and the property remains subject to litigation as well.

17. Notwithstanding the status of such property, it has been argued before this Court by the learned counsel for the petitioner that partition of the agriculture land falls within the jurisdiction of Revenue Authorities under Section 135 of the West Pakistan Land Revenue Act, 1967. This appears to be the correct position in law. The question came before the learned Peshawar High Court in ***Muqadar vs Mst. Roshan (2008 CLC 43)*** wherein it was held that *"jurisdiction for partition of agriculture land vested in revenue Court and jurisdiction of the Civil Courts was barred under Section 172(2) of West Pakistan Land Revenue Act, 1967. It was noted that no decree of actual possession would be granted by the civil Court and only the right of partition for entitlement of shares of parties could be determined and a preliminary decree for partition could be passed by the Civil Court. But for actual possession such preliminary decree was to be sent to the Collector under Order XX, Rule 18 of CPC".* In ***Qamar Sultan Vs. Mst. Bibi Sufaidan (2012 SCMR 695)*** it was held by the Apex Court that, *"partition of agriculture property was within the domain of Revenue*

authorities and any decree of a civil Court granting such relief would be a nullity in the eyes of law." The learned Civil Court, which passed the Preliminary Decree, could therefore only determine the respective shares of the parties before it in relation to the agriculture land in Tehsil Kharian and the partitioning of such agriculture land would fall within the domain of the relevant Revenue Authorities and not the learned Civil Court in Islamabad. Consequently the learned Civil Court could not have passed an order to partition the agriculture land in Tehsil Kharian.

18. The only remaining question before the Court is whether the respondent, on the basis of an affidavit or otherwise, can insist that she would retain possession of the property in Sector G-13/4, Islamabad till such time that the agriculture land in Tehsil Kharian is partitioned by the competent Revenue Authorities or sold and consideration in relation thereto distributed between the co-sharers to the extent of their shares as reflected in the Preliminary Decree. The obvious answer is that she cannot. The respondent is a judgment-debtor in relation to the property in Sector G-13/4, Islamabad. The rights in relation to the said property were definitely determined by the learned Civil Court in the Preliminary Decree. She consented to the sale price of the said property as Rs. 35 million and did not object to the sale of such property to the petitioners at such sale price. Further she received her share in such property i.e. an amount of Rs.17,135,416/- and consented to transfer the title of the

property in the name of the petitioners. And consequently the title was transferred by FGEHA in the name of Syed Mulazim Hussain Shah (the father of petitioners No.1 to 5) by letter dated 28.05.2021. Given that the respondent as a co-sharer in the property agreed to the same and received consideration in lieu of her share after which the property was transferred in the name of father of the petitioners, she has no remaining interest or right in relation to the property in Sector G-13/4, Islamabad, including the right to retain possession of a portion of such property and is liable to be ejected forthwith.

19. The fact that the agriculture land in Tehsil Kharian remains to be partitioned or sold has no co-relation to the settlement and distribution of shares in relation to other properties that form part of the partition suit. The Preliminary Decree, as mentioned above, is a final decree in relation to the properties in relation to which respective shares stand distributed between the co-sharers. Merely because it is a preliminary decree in relation to agriculture land that remains to be distributed and/or sold does not make such decree a preliminary decree in relation to properties the distribution of which has already taken place and constitutes a matter that requires no further adjudication. There is no concept in law of mandatory simultaneous distribution or settlement of shares in distinguishable properties that form the subject matter of the same partition suit. The language of Section 9 clarifies that

the distribution of shares of properties can take place in a piecemeal fashion in view of the circumstances of each property. Where multiple properties form the subject matter of a partition suit it will not be possible to ensure the sale of such properties, to the extent that there are indivisible, simultaneously, and there is no reason in law or in common sense to withhold distribution of interests in inherited property amongst co-shares till such time that shares in the very last property are capable of being distributed.

20. The learned counsels for the parties laid great emphasis on the various exhibits that reflect the settlement between the parties in relation to the property in Sector G-13/4, Islamabad. The only relevant agreement in relation to such property is the agreement whereby the respondent agreed to a sale price of Rs. 35 million for the house in Sector G-13/4, Islamabad and agreed to the purchase of her share by the petitioners and received consideration in lieu thereof. Once this transaction was consummated, the respondent had no remaining right or interest in such property or legal ability or character to make the handing over of possession of such property to the petitioners contingent upon settlement of shares in relation to the agriculture land in Tehsil Kharian.

21. For the foregoing reasons, the petition is ***allowed*** and the impugned order dated 02.12.2021 passed by the learned Additional District Judge and the impugned order dated 10.07.2021 passed by the learned Civil Court are ***set aside***.

The respondent will hand over possession of the portion of house No.17, St. No. 145, Sector G-13/4, Islamabad to the petitioners within a period of thirty days. The petitioners shall also be entitled to receive rent from the respondent to be determined by the learned Executing Court for the period starting when the petitioner filed an application for handing over possession of the property in Sector G-13/4, Islamabad, which the respondent refused, up until the date on which such possession is handed over. Such consideration shall be determined by learned the Executing Court after affording the parties an opportunity to be heard in relation to reasonable rent for such property. The respondent shall also pay a cost to the petitioners in the amount of Rs.5000/-. Learned counsel for the respondent will file a compliance certificate with Deputy Registrar (Judicial) of this Court certifying that the order as to cost has been complied with.

(BABAR SATTAR)
JUDGE

Announced in the open Court on _____.

JUDGE

Shakeel Afzal-