

Stereo.HCJDA 38.
Judgment Sheet
IN THE LAHORE HIGH COURT,
MULTAN BENCH, MULTAN
JUDICIAL DEPARTMENT

....

Civil Revision No.1376 of 2022.

Mst. Sara Akhtar, etc.

Versus

Mehmood Khan, etc.

J U D G M E N T.

Date of hearing: **12.10.2022.**

Petitioners by: Muhammad Yasin Bhatti, Advocate.

Respondents No.1-7 by: M/s Muhammad Shahzad Khan &
Fayyaz Hussain Khan Laghari,
Advocates.

AHMAD NADEEM ARSHAD, J. This Civil Revision as well as Civil Revision No.1178 of 2022 are directed against the same judgment/order dated 18.10.2022 of the learned Appellate Court, therefore, the same are being decided together through instant judgment.

2. Facts in brevity are that Mst. Sara Akhtar (*hereinafter referred to as petitioner*) instituted a suit for declaration and permanent injunction against Mehmood Khan etc. (*hereinafter referred to as respondents*). Respondents contested the suit by filing written statement in contrast. Learned Trial Court, after full-fledged trial decreed the suit vide judgment & decree dated 28.06.2019 and directed the Revenue Officer to incorporate the mutation after cancellation of mutations impugned in the suit. Said decree remained intact upto this Court. Thereafter, the petitioner filed an execution petition for recovery of possession through warrant of possession. Respondents challenged the validity of said execution petition.

Learned Executing Court, after providing an opportunity of hearing to the parties, dismissed the execution petition vide order dated 29.06.2022. Feeling aggrieved, the petitioner preferred an appeal which was allowed vide order dated 18.10.2022 with the direction to the learned Executing Court to proceed further in accordance with the procedure laid down in order XXI Rule 35(2) of the Code of Civil Procedure, 1908. Being dissatisfied, both parties approached this Court through their independent Civil Revisions.

3. Learned counsel appearing on behalf of the petitioner maintains that impugned order of the Appellate Court dated 18.10.2022 to the extent of constructive possession instead of physical possession is illegal, perverse and based upon surmises and conjectures. He adds that in the light of decree in favour of the petitioner, she is entitled to the physical possession of the suit property, hence, by accepting this petition learned Executing Court be directed to proceed further for handing over physical possession of the suit property to the petitioner. To augment his arguments, he relied upon case laws cited as “TAJ WALI SHAH V. BAKHTI ZAMAN (2019 SCMR 84) AND MARGRETE WILLIAM V. ABDUL HAMID MIAN (1994 SCMR 1555).”

4. On the other hand, learned counsel appearing on behalf of respondents attacked the impugned order dated 18.10.2022 by maintaining that the same is against the facts & law and result of mis-reading/non-reading of record. Further submit that learned Executing Court rightly dismissed the execution petition but the learned Appellate Court upset the said judgment on flimsy grounds. In last, they prayed for acceptance of their petition, dismissal of the execution petition of petitioner and setting aside the order dated 18.10.2022.

5. I have heard learned counsel for the parties at length and perused the record with their able assistance.

6. Petitioner instituted the suit for declaration and permanent injunction whereby she sought declaration to the effect that she is

owner in possession of the suit property and assailed the validity and legality of mutations No.30, 31, 32, 33, 37 & 38 dated 16.01.1989 on the ground of fraud and mis-representation, having no effect upon her rights and liable to be set-aside. Learned Trial Court decreed the suit vide judgment & decree dated 28.06.2019. Said judgment & decree of the learned Trial Court was upheld by the Appellate Court as well as this Court, hence, the Revenue Officer in the light of direction given in the said decree sanctioned the mutation No.3076 in favour of the petitioner after cancelling the mutations challenged in the suit. Thereafter, petitioner filed an execution petition for getting the possession of the suit property.

7. Respondents raised an objection with regard to the maintainability of the said execution petition. Learned Executing Court, while dealing with the question of maintainability, dismissed the execution petition vide order dated 29.06.2022 in the following manner:

“Now it is to see whether or not the decree-holder/plaintiff can be put in physical possession of the suit property. Admittedly, the plaintiff/decreed-holder is not the sole owner of the suit khata’s and she is co-owner of the joint property. By virtue of judgment & decree, she was not held entitled to be the owner as well as possessor of any specific portion of the joint suit property, therefore she cannot be put into possession in any specific portion of the joint suit property because the law is very much clear on this point that unless and until a joint property is not legally partitioned, each and every co-owner is considered as owner in possession in each and every inch of the joint suit property. The court while passing the decree in favour of the plaintiff/decreed holder has declared the applicant/decreed holder as owner and constructive possessor over the suit property which means that the plaintiff/decreed holder is in a symbolic possession of the suit property. In compliance with the decree, the mutation of suit property has already been sanctioned in favour of the plaintiff/decreed holder, therefore the decree has been fully satisfied. Resultantly, the instant execution petition is no more proceed able, hence, the same is dismissed and is consigned to the record room after its due completion and compilation.

Learned Appellate Court allowed the appeal preferred against judgment/order of Executing Court in the following terms:

“I have minutely gone through the impugned order dated 29.06.2022 of the learned trial court, wherein instead of adopting the procedure envisaged in order 21 rule 35(2) of CPC and issuing

of warrant of possession, learned executing court has rather hastily dismissed the execution petition, which is neither proper nor legally tenable, by any stretch of imagination. In sequel of the above, while accepting instant appeal, impugned order dated 29.06.2022 of the learned executing court is set aside and execution proceedings are restored accordingly, with the direction to the learned executing court to proceed strictly in accordance with the procedure laid down in Order 21 Rule 35(2) of CPC. ”

9. Petitioner in her suit for declaration and permanent injunction prayed as under:

"بحالات بالا استدعا ہے کہ ڈگری استقرار حق بحق مدعیہ برخلاف مدعا علیہم بدیں امر صادر فرمائی جائے کہ مدعیہ اراضی بتفصیل ذیل کی مالکہ وقابضہ ہے۔ اس قدر اراضی سے مدعا علیہم کا کوئی تعلق اور واسطہ نہ ہے۔ اس کے برعکس انتقالات نمبر 30، 31، 32، 33، 37، 38 منفصلہ 16/1/89 جو ایام نابالغی مدعیہ میں ہوئے و اندراجات کاغذات محال خلاف ضابطہ خلاف قانون و خلاف واقعات ہیں مبنی بر فراڈ دھوکہ دہی کا نتیجہ ہیں اور حقوق مدعیہ پر غیر موثر و کالعدم ہیں اور لائق منسوخی ہیں۔ نیز دادرسی مزید مستلزمہ ڈگری حکم امتناعی دوامی بدیں امر کہ مدعا علیہم اراضی متدعوئیہ کو آگے منتقل کرنے سے تادوام باز و ممنوع رہیں۔ نیز خرچہ مقدمہ ازاں مدعا علیہم بھی دلویا جائے۔ دیگر کوئی دادرسی جو معزز عدالت مناسب سمجھے مرحمت فرمائی جائے۔"

10. Petitioner sought declaration with regard to her ownership and possession over the suit property. Learned Trial Court, while decreeing her suit observed that she is owner and in constructive possession over the suit properties and declared as under:

“Net result of above mentioned discussion is that suit of the plaintiff namely Sara Akhtar d/o Akhtar Hameed Ghouri for declaratory relief above her ownership and possession is hereby decreed declaring her owner and constructive possessor over the following suit property:-

سیریل نمبر	نام موضع	نمبر کھاتہ	حصہ متدعوئیہ	رقبہ متدعوئیہ
1-	درخواست جمال خان جنوبی نمبر 2 جمع بندی 2005-06	16	4000/25367	200K—00 M
2-	=	18	4000/15645	200K—00 M
3-	=	16	4000/25367	200K—00 M
4-	=	18	2759/15645	137K—19 M
5-	=	345	4000/10400	200K—00 M
6-	=	344	800/8000	40K—00 M
			کل رقبہ	977K—19 M

The suit of the plaintiff also decreed declaring mutations No.30, 31, 32, 33, 37 & 38 relating to the suit property belonging to plaintiff null and void against facts and law as beneficiaries of these mutations miserably failed to prove genuineness of transaction of sale mentioned in mutations under challenge. A copy of this judgment be sent to the concerned revenue officer for making fresh entries accordingly.”

11. Despite satisfaction of the decree with regard to the injunction as the Revenue Officer sanctioned the mutation No.3076, the petitioner filed execution petition for recovery of possession. The grievance of the petitioner is that she sought recovery of possession of the suit property but the learned Executing Court dismissed her execution petition, whereas, the learned Appellate Court merely directed the learned Executing Court to proceed in accordance with the procedure laid down in Order XXI Rule 35(2) of the Code of Civil Procedure, which only provides delivery of symbolic possession instead of actual possession.

12. It is evidence from the record that through mutations impugned in the suit 4000/25367 share in Khata No.16 measuring 200 Kanals, 4000/15645 share in Khata No.18 measuring 200 Kanals, 4000/25367 share in Khata No.16 measuring 200 Kanals, 2759/15645 share in Khata No.18 measuring 137 Kanals & 19 Marlas, 4000/10400 share in Khata No.345 measuring 200 Kanals and 800/8000 share in Khata No.344 measuring 40 Kanals have been shown to be transferred to the respondents from petitioner. Neither any specific Khasra numbers nor any specific portion of land was transferred to the respondents. It is also matter of record that petitioner is owner in the joint Khatas and not holding possession over any specific Khasra numbers. Keeping in view revenue record and facts & circumstances of the case, the learned Trial Court awarded decree of declaration while declaring her owner in constructive possession of the said Khatas and also awarded decree of injunction by sending the copy of judgment to the concerned Revenue Officer for making fresh entries accordingly. The Revenue Officer, after cancellation of the mutations impugned in the suit,

sanctioned fresh mutation in favour of the petitioner and in this way decree has been complied with.

13. Petitioner got a decree of declaration which could not be enforced through filing an execution petition. The decree passed in a suit for declaration did not create or confer a new right but the same would declare a pre-existing right. Any person entitled to any legal character, or to any right as to any property may institute a suit against any person denying, or interested to deny his title to such character or right and the Court may in its discretion make a declaration that he is so entitled.

14. The petitioner was co-sharer in the joint Khatas before sanction of the mutations impugned in the suit. After getting decree of declaration she again got her previous status. According to law, possession of one co-sharer is always considered to be possession on behalf of all co-sharers. Co-sharer having possession even on the fractional share of the joint land has a right, title and interest in every part of the joint land till such land stands partitioned by metes and bounds in accordance with law. The petitioner knew well her status in the said Khata, therefore, she instituted only suit for declaration and sought declaration of her status over the suit property as owner in possession and did not seek any relief with regard to recovery of possession of any specific Khara numbers. After getting decree of declaration, she became owner in possession of the suit property situated in joint Khata, therefore, her possession against the respondents is absolute and final but with regard to other shareholders is constructive and symbolic until partition takes place. Therefore, she did not seek recovery of possession of any specific Khasra numbers or specific portion in her execution petition and prayed as under:

"دعویٰ عنوان بالا ڈگریدارہ کے حق میں استقرار حق معہ دخیلیابی مورخہ 28/6/19 کو برخلاف مدیون
ڈگری ہوا۔ جس کے خلاف اپیل اور نگرانی خارج ہو چکی ہے ڈگری پر عملدرآمد کی صورت میں انتقالات
متدعو یہ منسوخ ہو کر جدید انتقال نمبر 3076 بحق مدعیہ ڈگری دارہ منظور ہو چکا ہے اب قبضہ جائیداد

مند عویہ مطلوب ہے جس کے لیے وارنٹ دخل بنام بیلف عدالت حضور جاری فرما کر قبضہ حوالہ ڈگری
دارہ کیا جانا مطلوب ہے۔"

15. The learned Executing Court rightly dismissed the execution petition but the learned Appellate Court erred in law while setting-aside the said order of Executing Court and directed to proceed in accordance with the procedure laid down in Order XXI Rule 35(2) of the Code of Civil Procedure, 1908. The said provision deals with a situation where a decree of joint possession of immoveable property has been passed, which reads as under:

"(2) Where a decree is for the joint possession of immoveable property, such possession shall be delivered by affixing a copy of the warrant in some conspicuous place on the property and proclaiming by beat of drum, or other customary mode, at some convenient place, the substance of the decree."

16. The petitioner sought implementation of the decree which is purely a declaratory one declaring her title in the suit property with consequential relief of perpetual injunction by directing the concerned Revenue Officer to make fresh entries. A decree sought to be executed should be capable of execution i.e. it should order the doing of an act or restrain the doing of an act. First portion of the decree is purely declaratory and as such cannot be executed. However, second portion thereof provides direction of doing an act and said part has been complied with by the Revenue Officer by sanctioning mutation in favour of the petitioner. It is settled law that a decree is to be executed by the Executing Court in accordance with its terms and conditions without modification. In the instant case neither petitioner prayed for recovery of any possession/joint possession of immoveable property nor any decree was passed in this regard. Hence, learned Appellate Court has erred in law while setting aside the order of learned Executing Court. Impugned order of the Appellate Court dated 18.10.2022 is against the facts & law, hence, the same is not sustainable. So far as the case laws referred to by learned counsel for the petitioner are concerned, it is observed that

the same are not helpful to the petitioner being distinguishable from the facts & circumstances of the case in hand.

17. For the foregoing reasons, the revision petition (*C.R. No.1376 of 2022*) filed by the petitioner Sara Akhtar has no force, hence, the same is **dismissed** accordingly, while the connected revision petition filed by the respondents Mehmood Khan etc. (*C.R. No.1178 of 2022*) is **allowed**. Consequently, impugned judgment/order of learned Appellate Court dated 18.10.2022 is set-aside and the order dated 29.06.2022 passed by learned Executing Court is restored. No order as to costs.

(AHMAD NADEEM ARSHAD)
JUDGE.

APPROVED FOR REPORTING.

JUDGE.

*M. Arsalan**

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Fayyaz Hussain Khan Laghari,
Advocates.

Respondents by: Muhammad Yasin Bhatti, Advocate.

AHMAD NADEEM ARSHAD, J. For the reasons recorded
in my judgment of even date passed in connected Civil Revision
No.1376 of 2022, this revision petition is **allowed.**

(AHMAD NADEEM ARSHAD)
JUDGE.

*M. Arsalan**