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Judgment Sheet
LAHORE HIGH COURT, LAHORE
JUDICIAL DEPARTMENT

Civil Revision No.40110/2022

Mst. Kaneez Batool **Versus** Allah Bukhsh and another

J U D G M E N T

Date of Hearing:	16.03.2023
Petitioner by:	Mr. Muhammad Yasrab Hunjra, Advocate.
Respondents by:	Ch. Rab Nawaz, Advocate.

Anwaar Hussain, J. The present petition has emanated from execution proceedings initiated by the petitioner/decreed holder for implementation of judgment and decree dated 02.02.2021 passed in the suit instituted by her for recovery of possession, under Section 8 of the Specific Relief Act, 1877 (“the SRA”). Judgment and decree dated 02.02.2021 was upheld by the learned Appellate Court and then the said concurrent findings were maintained by this Court, *vide* order dated 27.07.2021, passed in Civil Revision No.47263/2021. During the execution of decree dated 02.02.2021, the respondents/judgment debtors filed objection petition primarily on the ground that the said decree has become inexecutable as the respondents/judgment debtors have become co-sharers in the *khata/khewat* in which the disputed property also falls. The objection petition was dismissed, *vide* order dated 24.02.2022, by the learned Executing Court against which appeal was preferred by the respondents/judgment debtors that was allowed, *vide* order dated 21.04.2022, and it has been held that the decree has become inexecutable.

2. Learned counsel for the petitioner submits that the learned Appellate Court below went beyond the decree under execution which has been upheld by this Court, on the ground that after passing of the decree, the respondents/judgment debtors have become co-sharers of

khata/khewat in which the property in dispute is situated that is not a plausible ground to make the decree dated 02.02.2021 redundant. Adds that even if the said decree is executed/implemented and the respondents/judgment debtors are dispossessed during the execution proceedings, the respondents/judgment debtors have alternate remedies available to them and could always avail the same to claim their share through partition, in joint *khata/khewat*, inasmuch as a purchaser in a joint *khata/khewat* steps into the shoes of his predecessor only but a final decree passed and have attained finality cannot be nullified in an oblique manner by purchasing share from one of the purported co-sharers who was not in possession of the disputed property or in possession of the joint *khata/khewat*. Further submits that description of the property was clearly given in the decree sheet drawn and any purchase of the said property, from a purported co-sharer in the joint *khata/khewat*, during the pendency of the execution proceedings could not vitiate or defeat the lawfully passed decree and make the earlier illegal occupation as lawful. In support of his contentions, places reliance on the cases reported as “Allah Ditta v. Ahmed Ali Shah and others” (**2003 SCMR 1202**) and “Abdul Ghani v. Ghulam Abbas Tamanna and others” [**2015 CLC 89 (Lahore)**].

3. Conversely, learned counsel for the respondents/judgment debtors submits that the learned Appellate Court below has rightly upset the findings of the learned Executing Court inasmuch as the decree became inexecutable when the status of the respondents/judgment debtors changed from mere occupants to that of co-sharers in the *khata/khewat* on the basis of a registered sale deed and if there was any grievance of the petitioner as a co-sharer against the respondents/judgment debtors, the proper course of action available with the petitioner is to institute a fresh suit for possession through partition. Concludes that though concurrent findings rendered in the suit for possession, under Section 8 of the SRA, against the

respondents/judgement debtors were upheld *vide* order dated 27.07.2021 passed in Civil Revision No.47263/2021 and have attained finality, the said finding was rendered when no title document in favour of the respondents/judgment debtors was in existence, however, the matter has undergone an admitted change after the purchase of the disputed property by the respondents/judgment debtors and the changed circumstances can be looked into and relief can be accordingly moulded by the learned Executing Court and reliance has been placed on case reported as "Muhammad Aslam (Through his L.R.) v. Wazir Muhammad" (**PLD 1985 Supreme Court 46**) in support of his contentions.

4. Arguments heard. Record perused.

5. The only legal question that requires determination by this Court boils down to examine whether a decree for possession against an illegal occupant becomes inexecutable for the reason that the said occupant has purchased the share from a co-sharer of the decree holder, in a joint *khata/khewat*, during the pendency of the execution proceedings?

6. Factual matrix of the case is not disputed. When the suit was instituted by the petitioner for recovery of possession of the disputed property measuring 7 *marla*, clearly described in the plaint (followed by description in the decree sheet), a specific stance was taken by the respondents/judgment debtors while submitting written statement in the terms that the latter are in possession of the disputed property since long after purchasing the same, through an agreement to sell, from one *Mst. Kaneez Fatima* who is maternal cousin of the petitioner and following issues were framed:

“ISSUES:

1. Whether the plaintiff is entitled for the decree of possession on the basis of ownership as prayed for?
OPP

2. Whether the plaintiff has no cause of action to file this suit? OPD
3. Whether the suit of the plaintiff is not maintainable in its present form? OPD
4. Whether the suit of the plaintiff is time barred and barred by law, liable to be rejected u/o 7 rule 11 of CPC? OPD
5. Whether the plaintiff filed this suit just to harass the defendant and the suit of the plaintiff being false and frivolous is liable to be dismissed with special costs? OPD
6. Relief.”

Keeping in view the above-quoted issues framed by the learned Trial Court, the parties led their respective evidence and respondent No.1 appeared as DW-1 and produced one Muneer Akhtar as DW-2 and in the documentary evidence, *inter alia*, produced agreement to sell as Exh.D1. It is imperative to note that neither above-referred *Mst.* Kaneez Fatima was produced as DW nor was she got summoned as Court witness or any secondary evidence was led if she was not alive and in this manner, the best evidence has been withheld when the trial was in progress and therefore, the case of the respondents/judgment debtors falls under the clutches of illustration (g) to Article 129 of the *Qanun-e-Shahadat Order*, 1984, hence, adverse presumption is to be drawn against the respondents/judgment debtors. Case reported as “Dilshad Begum v. Mst. Nisar Akhtar” (**2012 SCMR 1106**) is referred in this regard. The learned Appellate Court below while upsetting the findings of the learned Executing Court has not considered this legal aspect of the matter and allowed the respondents/judgment debtors to prove a stance that was taken in the main suit, which the respondents/judgment debtors failed to do during the trial, by holding as under:

“4....The present appellant was mainly knocked out by all the courts due to the reason that he failed to produce the executants Kaniz Fatima in the witness box, scribe and any other witness to prove agreement dated 28.10.2016, as such, the said agreement was discarded.

The appellant who was in physical possession of suit property became co-owner in suit khewat on execution of registered sale deed 4051, dated 28.12.2021 and consequent mutation No.6475, dated 28.12.2021, as such he stepped into the shoes of vendor namely Raza Ullah who was the son of executants Kaniz Fatima and after death of executants, her son alienated suit property in favour of the present appellant, may be acknowledging the promise made by his departed mother. Whatever may be, the status of the appellant by now has become as co-sharer and undeniably he has been in possession of suit property measuring 07 marlas and his unauthorized possession as observed in all the judgments has become valid and lawful by virtue of that. With due respect to my mind, the documents sought to be produced as additional evidence have become irrelevant and redundant by virtue of execution of the registered sale deed and consequent mutation in favour of appellant. As what the appellant wants to prove by way of documents mentioned at serial No.I to VII, the same merged into the title deed i.e registered sale deed and consequent mutation.

5. As corollary to the above discussion, the appeal is accepted, the objection petition disallowed by the learned trial court is accepted and the execution petition stands become infructuous. The learned Executing Court is directed to pass the order to this effect on the execution petition as the appellant has become co-sharer, therefore, decree for possession cannot be executed against him. Proper remedy available to the decree holder in the changed circumstances is to seek partition if she so desires.”

(Emphasis supplied)

7. During the course of arguments, permission was sought by learned counsel for the respondents/judgment debtors to submit the sale deed dated 28.12.2021, relied upon by the learned Appellate Court below that was registered after passing of the judgment and decree of the learned Trial Court dated 02.02.2021 upheld in appeal by learned Additional District Judge, Sahiwal, District Sargodha and also affirmed by this Court in Civil Revision No.47263/2021 *vide* order dated 27.07.2021. On the strength of the said sale deed, it has been argued that one Raza Allah Yar is the son of above referred *Mst.*

Kaneez Fatima, from whom purportedly the disputed property was purchased through an agreement to sell in the first instance, with the averments that since the disputed property has now been purchased from her son who is a co-sharer of the same *khata/khewat* through a registered document, therefore, the factual matrix has changed and the decree has become inexecutable. The argument is misconceived rather self-destructive inasmuch as the title document now being relied upon, even if considered, and given some weightage, upon its perusal reveals that the same does not reflect that it is the same property which was subject matter of the agreement to sell purportedly executed by *Mst.* Kaneez Fatima. No reference to any earlier agreement to sell between mother (*Mst.* Kaneez Fatima) of the vendor and the respondents/judgment debtors has been made in the said sale deed. Moreover, the document that has been got registered after the *lis* was finalized up to the level of this Court cannot be made basis for rendering a lawfully passed decree redundant. This Court in above-referred Civil Revision No.47263/ 2021 held as under:

“3. The impugned judgment while deciding on the six issues concluded that the Respondent has produced her title documents to show that she is the owner in possession of the disputed property and this stance of the Respondent has not been refuted through evidence or cross examination by the Petitioner. Furthermore, *the Petitioner does not have any title document in his favour and has merely relied on an Iqrarnama dated 28.10.2016, which is not a title document.* Therefore, as the Petitioner does not have any title document in his favour and cannot prove his ownership, the court concluded that he is illegally occupying 07 marlas of land and has been asked to return possession of the property to the Respondent. In this regard *the entire case of the Petitioner is that the Respondent is a co-sharer in joint property and the joint property has not been partitioned hence she cannot claim that she is the owner in possession of specified 07 marlas of land for which he claims to be the owner.* This argument actually negates the stance of the Petitioner as *he claims that he bought the property from the Respondent and if the property of the Respondent has not been partitioned then the*

question of the Petitioner being the owner of a specific 07 marlas in a joint khata is also not justified. Learned counsel was asked to show the Petitioner's title document or to show the basis for which he claims himself to be the owner of a specific 07 marlas of land, however, he was unable to produce any document. The matter has been duly considered through the impugned judgment and no illegality is made out.”

(Emphasis supplied)

The sale deed now being relied upon itself seems to be a document prepared in order to raise the plea of changed circumstances rendering the decree in favour of the petitioner inexecutable and an attempt to deny the fruits of the decree to the petitioner on one pretext or the other. It appears that once the concurrent findings of the learned Courts below in the suit instituted by the petitioner had attained finality, the registered document had been prepared which is executed by one Raza Allah Yar, who is statedly son of *Mst. Kaneez Fatima*.

8. Moreover, in case reported as “Nazir Ahmed v. Mst. Sardar Bibi & others” (**1989 SCMR 913**), somewhat similar question of law came before the Supreme Court of Pakistan, *albeit* in a rent matter, where the eviction order was passed that attained finality and was required to be executed as a decree in terms of provisions of West Pakistan Rent Restriction Ordinance, 1959, and the respondent/tenant in the said case took the plea that he became owner and the execution petition was not competent. The said argument was discarded by the Supreme Court of Pakistan. Applying the same analogy to the present case, even if for the sake of argument it is taken that the status of the respondents/judgment debtors is now that of co-sharers, still they are bound to handover the possession in execution of the decrees and thereafter seek remedy in accordance with law on the basis of sale deed admittedly procured by them during pendency of the execution proceedings, once the decree against them has attained finality, after dismissal of the Civil Revision by this Court.

9. The learned Appellate Court below has erred in rendering the impugned findings inasmuch as, by leading credible evidence, the petitioner validly proved her entitlement in respect of the property in dispute clearly described in the plaint and falling in a particular *khata/khewat* and hence, proved the unlawful occupation thereof by the respondents/judgment debtors, and the said findings were upheld by the learned Appellate Court below as well as this Court as discussed hereinabove and the same cannot be brushed aside in execution proceedings as the learned Executing Court cannot go beyond the decree. Moreover, it will be erroneous to compel the petitioner to approach the relevant forum for partition of the joint *khata/khewat* on the basis of changed circumstances that the suit property has been purchased by the respondents/judgment debtors through a registered document as the same will amount to adding to the agony of a litigant/decree holder who successfully proved her title against an illegal occupant, i.e., respondents/judgment debtors.

10. There is another angle from which the matter can be examined. The respondents/judgment debtors, after purchase of some share/property from Raza Allah Yar through registered sale deed in the joint *khata/khewat*, have at the most stepped into the shoes of above referred vendor. Therefore, even if the said vendor is acknowledged as co-sharer in the *khata/khewat*, he cannot transfer a better title than he himself had. Admittedly, said Raza Allah Yar or his mother *Mst. Kaneez Fatima* were not in possession of the suit property when the suit was instituted by the petitioner or even subsequent thereto. In case reported as “*Ramdas v. Sitabai and others*” [(2009) 7 SCC 444], it has been held that without there being any formal partition of a property, a co-sharer cannot put a vendee in possession even though such co-sharer may have a right to transfer his individual share. Thus, the right of the vendee from a co-sharer in a joint *khata/khewat* is always subject to the partition whereby the share of the co-sharers is divided

by metes and bounds for which the respondents/judgment debtors, and not the petitioner, will have to approach the learned Civil Court concerned by instituting an independent suit as the learned Executing Court is only vested with the power and jurisdiction in terms of Section 47 of the Code of Civil Procedure, 1908 to determine and decide those questions between the parties to the suit or their representatives which are germane to execution, discharge or satisfaction of the decree and purchase of share from a purported co-sharer in a joint *khata/khewat* is not such question as the said purchase of the share from a co-sharer does not nibble away the decree passed in favour of the petitioner that has attained finality. Needless to mention that the learned Executing Court cannot travel beyond decree and this Court is well aware of the fact that this rule is not absolute or invariable rule of law rather the same is subject to certain exceptions as expounded by the Courts. The Supreme Court of Pakistan in case titled "*Islamic Republic of Pakistan v. Muhammad Saeed*" (**PLD 1961 SC 192**) held that even in the execution proceedings questions relating to the executability of an order or decree can be raised and it is open to the party against whom it is sought to be executed to show that it is null and void or had been made without jurisdiction or that it is incapable of execution. Taking guidance from the ratio laid down in case of *Islamic Republic of Pakistan supra* and applying the same to the facts of the present case depicts that neither the decree passed in the instant case was null and void nor had been made without jurisdiction or incapable of execution and possession in favour of the petitioner is to be restored. Had the share and/or possession of the suit property sought by the decree holder been indeterminate and/or undefined and the decree holder as a co-sharer sought possession in the joint *khata/khewat*, the decree could have been considered to have become inexecutable on account of indeterminate share. However, this is not the case here. The suit for possession under Section 8 of the SRA had been instituted with respect to specific portion duly spelled

out in the plaint, which was decreed and decree sheet was accordingly drawn. Subsequent thereto, share, in the joint *khata/khewat*, from one of the purported co-sharers has been purchased by the respondents/judgment debtors, which cannot be taken as a tool to defeat the decree of the decree holder with respect to already determinate share. Therefore, it is not one of those cases where the decree for possession could become infructuous and inexecutable by purchase of share from co-sharers. The instant case is an exception to the general rule where possession of already determinate share was sought and decreed. Needless to mention that in case the respondents/judgment debtors through a fresh suit establish that they have purchased a valid share in the joint *khata/khewat*, they can always seek possession of the relevant portion.

11. Insofar as the case of *Muhammad Aslam supra*, cited by learned counsel for the respondents/judgment debtors is concerned, the same has been considered and found that the reliance is misconceived inasmuch as the law laid down in the said case is settled elucidation of law but is not applicable to the facts of the instant case as in the said case, the relief was moulded, by the Supreme Court of Pakistan, in favour of the landlord, who was successful in his ejectment petition, whereas, in the instant case, the respondents are not the decree holders but are the judgment debtors and it is yet to be determined as to whether they had any entitlement to be in possession of the disputed property as the title document now being relied upon, as stated earlier, was procured/obtained after the decree against the respondents/judgment debtors has attained finality and this question can be determined only in a separate suit by arraying all the co-sharers of the *khata/khewat*.

12. For what has been discussed above, this Civil Revision is allowed, impugned judgment dated 21.04.2022 passed by the learned Additional District Judge, Sahiwal, District Sargodha is set aside and

order dated 24.02.2022 passed by the learned Executing Court, Sahiwal, District Sargodha is restored. No order as to costs.

(ANWAAAR HUSSAIN)
Judge

Approved for reporting

Judge

Akram