

JUDGMENT SHEET
PESHAWAR HIGH COURT, PESHAWAR
 JUDICIAL DEPARTMENT

W.P No. 2015-P/2021.

Rio Din Vs Ayaz-ud-Din & Others

Date of hearing: **30.10.2025.**

For petitioner: **Mr. Abdul Sattar Khan, Advocate.**

For respondents: **Muhammad Sufiyan Malik, Advocate.**

JUDGMENT

MUHAMMAD NAEEM ANWAR, J: Order of Member-I, Board of Revenue, dated **06.01.2021**, whereby the revision petition filed by respondent against the order of the learned Additional Commissioner, Mardan, dated **15.09.2020**, was allowed. Through the said order, the revision against the decision of the Additional Deputy Commissioner, dated **15.09.2020**, who had accepted the appeal of the petitioner and set aside the order of the Additional Assistant Commissioner, dated **13.01.2020**, was dismissed. Consequently, the order of the Additional Deputy Commissioner was set aside and that of the Additional Assistant Commissioner was restored.

C.M. No. 2070-P/2025

This application has been moved by the petitioner for placing on record the attested copy of the execution application, the order sheet dated 09.05.2012, subsequent order sheets, the objection petition, and the order dated 04.10.2012, with the contention that these are essential documents for a proper decision in the instant petition. The application has not been separately registered; however, the documents appended therewith form part of the record and are necessary for appropriate adjudication. The application is accordingly allowed. The documents annexed shall be read as part and parcel of the instant petition.

2. Learned counsel for the petitioner contended that admittedly, the application for partition was allowed and that order was maintained by all the courts below, especially when

the petitioner's writ petition was dismissed by this Court. However, once the execution petition was filed after satisfaction, the Court became *functus officio* and could not entertain any fresh application, particularly one filed after considerable delay. Thus, the order of the learned Member-II, Board of Revenue, is illegal and unjust. In support of his contention, learned counsel placed reliance on PLD 1971 Peshawar 157, PLD 1961 Dhaka 177, 2007 YLR 2816, 2006 CLD 1393, and 1996 MLD 1543.

3. Conversely, learned counsel for the respondent argued that since the writ petition was dismissed by this Court in 2018, the respondent, in order to ensure proper execution of the decree, moved an application because in the earlier execution proceedings only symbolic possession had been delivered to the decree-holder. Considering the very object and spirit of partition, which is the delivery of *physical possession*, the impugned order is perfectly in accordance with law. Hence, this petition merits dismissal.

4. Arguments heard. Record perused.

5. The admitted facts are that the application for partition of the joint property, submitted by the respondent, was allowed on 20.10.2011. The appeal, revision, second revision were all dismissed, besides Writ Petition No. 118-P/2013, which was dismissed by this Court on 26.02.2018. It is also undisputed that the decree-holder/respondent had filed an execution application reflecting wherein a warrant of symbolic possession was issued as reflected from the warrant of possession, on receipt of report execution petition was filed on 09.05.2012. It appears that during execution proceedings, a report was submitted by the Patwari stating that symbolic possession of the property had been handed over to the decree-holder. For convenience, the relevant report is reproduced below:

خواب عالی

حسب الحکم مطابق وراثت دخل عدالت عبداللہ شاہ صاحب DDOR تحت بھائی برطابق وراثت دخل آیاز الدین ولد صفدر

دین بنام بہرام وغیرہ اجراء موقع پر دخل مالکانہ نمبرات 1791/1-1791/3 تعدادی 5k-15m موجودگی پٹواری

حلقہ بمبہ ریکارڈ مال موجود تھا۔ شیر بہادر خان ایڈیشنل SHO تھانہ شیر گڑھ بمبہ بھاری نفری پولیس موجود تھا۔ خوالہ ڈیگر
یدار آیاز الدین ولد صفدر دین کو مالکانہ قبضہ حوالہ کیا گیا۔ نقص امن کو خطرہ نہ رہا۔ رپورٹ عرض ہے۔

6. It further appears that on 27.04.2012, the Patwari entered the same facts in his *Roznamcha Waqiat*, confirming that symbolic possession had been handed over at 9:00 a.m. based on the entry in *Roznamcha* at Serial No. 246, and the report dated 27.04.2012, resulted in the filing of execution petition after due satisfaction. No doubt, symbolic possession had been delivered and the execution petition was filed on 09.05.2012, but physical possession was never handed over. Hence, an objection petition was filed by the decree-holder/respondent, which was allowed on 04.10.2012.

7. Subsequently, the present petitioner filed an objection petition on 19.07.2018, questioning the mode of partition and alleging pendency of a civil suit, further submitting that Hayat Gul is *ghair dakhil kar* for which a proper remedy is provided under the Tenancy Act. This objection was dismissed by the Additional Assistant Commissioner on 13.01.2020, but the order was set aside by the Additional Deputy Commissioner on 25.06.2020, who accepted the petitioner's appeal. The respondent/decreree-holder filed a revision petition which was dismissed, but a second revision was allowed through the impugned order. The main contention of the petitioner that a second execution could not be entertained after satisfaction of the earlier one is misconceived. Legal partition is recognized by the legal maxim "*Nemo in Communionem potest invitum detineri*", no one can be kept in co-proprietorship against his will. Acceptance of partition application and due execution thereof is the transfer of physical possession/actual possession and not the symbolic possession. Partition is merely an arrangement whereby co-sharers having undivided interest in joint properties take by arrangements specific properties in lieu of the shares. The true essence of a partition decree lies in separation of the share and *delivery of physical possession*. In this case, only symbolic possession had been delivered earlier,

which did not fulfill the intent of the decree. After dismissal of the writ petition in 2018, the decree-holder rightly sought actual possession to complete execution of the decree.

8. The learned Additional Assistant Commissioner correctly allowed the application and directed the delivery of possession adjacent to the share of the decree-holder/respondent, which, as per the site plan, also provides a common access path. The learned Member-II, Board of Revenue, rightly appreciated the matter, considered the delivery of actual possession, and set aside the order of the Additional Commissioner. The respondent was justified in submitting an application before the Revenue Officer/Additional Assistant Commissioner under Order XXI, Rule 35, CPC, being aggrieved by non-implementation of the decree in its true perspective.

9. The case law cited by the petitioner is distinguishable on facts and principles enumerated therein are not applicable to the present circumstances. The order passed by the Board of Revenue is lawful, based on proper appreciation of the record, and free from any illegality, irregularity, or jurisdictional defect.

10. Accordingly, the instant petition, being devoid of substance, is hereby dismissed. No order as to costs.

Announced.
30.10.2025.

J U D G E

“Saeed” (SB)

Hon’ble Mr. Justice Muhammad Naeem Anwar