

**JUDGMENT SHEET**  
**IN THE ISLAMABAD HIGH COURT, ISLAMABAD**  
**JUDICIAL DEPARTMENT**

C.R.No.181 of 2016

Gulfraz & others

**Versus.**

Mir Dad & another

**Date of Hearing:** 26.09.2016.  
**Petitioners by:** Mr. Zulfiqar Ali Abbasi & Ch. Asif Irfan,  
Advocates,  
**Respondents by:** Raja Yasir Shakeel, Advocate.

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**MIANGUL HASSAN AURANGZEB, J:** Through the instant civil revision petition, the petitioners, Gulfraz etc., impugn the judgment and decree dated 25.01.2016, passed by the Court of the learned Additional District Judge (West), Islamabad, whereby, the respondents' appeal against the judgment and decree dated 28.07.2015, passed by the Court of the learned Civil Judge, Islamabad, was allowed and the said judgment and decree dated 28.07.2015, was reversed. Vide the said judgment and decree dated 28.07.2015, the learned Civil Court had dismissed the respondents' suit for permanent injunction seeking a restraint against the petitioners for interfering with the respondents' possession of 10 Marlas of land in Khasra No.1570/707 (which comprises 296 Kanals and 07 Marlas).

2. The record shows that on 29.08.2012, Mir Dad and Muhammad Ashraf (the respondents) instituted a suit for permanent injunction praying for restraining the defendants therein (i.e. the present petitioners) from taking forcible possession of the suit land and/or interfering with the respondents' possession of the suit land. It is not disputed that the suit land is 10 Marlas only in Khasra No.1570/707. The petitioners contested the said suit by filing a written statement. After framing the issues and recording of evidence, the learned Civil Court, vide judgment and decree dated 28.07.2015, dismissed the suit.

3. Aggrieved by the said judgment and decree dated 28.07.2015, the respondents preferred an appeal before the Court of the learned Additional District Judge (West), Islamabad. Vide judgment

and decree dated 25.01.2016, the learned Appellate Court allowed the appeal and decreed the suit. The petitioners have impugned the said judgment and decree dated 25.01.2016, before this Court in the instant civil revision petition.

4 Learned counsel for the petitioners submitted that the respondents claimed to have purchased 10 Marlas of land in Khasra No.1570/707 through mutation No.1567, dated 23.02.1988 (Ex.P-1); that according to the said mutation, 3 Kanals and 15 Marlas of land in Mahal Sara-e-Kharbooza was purchased from Sher Zaman by 13 vendees; that the respondents' names are also included amongst the vendees in the said mutation; that the said mutation took place on the basis of report No.456 of the Revenue Officer/Patwari; that the respondents have a nominal share on one Marla in Khasra No.1570/707, comprises 296 Kanals and 7 Marlas; that there is no documentary evidence showing that the respondents are in physical possession of a specific field or a portion of land in Khasra No.1570/707; and that the respondents, on the basis of the impugned judgment and decree dated 25.01.2016, might take steps to gain possession of land which they presently do not possess. Learned counsel for the petitioners further submitted that since the judgments of the learned Courts below are at variance, the judgment and decree of the learned Appellate Court should be set aside and that of the learned Trial Court be restored.

5. On the other hand, learned counsel for the respondents submitted that the judgment and decree passed by the learned Appellate Court is strictly in accordance with the law. He further submitted that the respondents were owners in possession of 10 Marlas of land in Khasra No.1570/707 on the basis of mutation No.1567, dated 23.02.1988; that until regular partition takes place between the co-owners of land in Khasra No.1570/707, the respondents were entitled to retain possession of the land owned by them and in their occupation; that in the partition proceedings, the respondents will have a right to own and possess the land presently in their occupation; that possession of the suit land comprising 10 Marlas in Khasra No.1570/707 was handed over to the respondents by the vendor, Sher Zaman, in 1988; that the examination in chief of

another co-owner, namely, Matloob (PW-3) recorded on 12.01.2015, shows that the respondents were in actual possession of the land with respect to which the civil suit for permanent injunction was instituted; and that PW-3's evidence was not shaken in cross-examination. Learned counsel for the respondents prayed for the revision petition to be dismissed. In support of his submissions, learned counsel for the respondents placed reliance on the law laid down in the case of Ahmad Din Vs. Abdul Ghanni (1994 CLC 1263).

6. I have heard the submissions of the learned counsel for the contesting parties and have perused the record with their able assistance. The facts leading to the filing of the instant petition have been set-out in sufficient detail in paragraph 2 to 3 above and need not be recapitulated.

7. It is not disputed that the respondents purchased 10 Marlas of land from Sher Zaman in Khasra No.1570/707 (which comprises 296 Kanals, 7 Marlas), Mahal Sara-e-Kharbooza, Tehsil and District Islamabad, through mutation No.1567, which was sanctioned by the Revenue Officer on 23.02.1988. The contesting parties are at variance on whether the respondents are in physical possession of 10 Marlas of land in the said Khasra number. The apprehension of the petitioners is that the respondents, on the strength of the judgment and decree dated 25.01.2016, passed by the learned Appellate Court, may gain possession of land in Khasra No.1570/707, which they presently do not possess. Before dealing with aspect of the case, it is essential to examine the legality of the judgments and decrees passed by the learned Courts below.

8. It was held by the learned Civil Court that since the land in Khasra No.1570/707, comprising 296 Kanals and 7 Marlas, had not been partitioned between the co-owners by the concerned Revenues Authorities, every co-owner was presumed to be an owner in possession of each and every inch of the joint land. Furthermore, it was held that it would not be proper to restrain co-owners from interfering with the physical possession of another co-owner unless partition by metes and bounds takes place between the co-owners. As mentioned above, the judgment and decree

dated 28.07.2015 passed by the learned Civil Court, was set-aside by the learned Appellate Court, and the respondents' suit for permanent injunction was decreed. The learned Appellate Court held that although every co-sharer in a Khewat/Khata had the right to possession of each and every inch of the joint land to the extent of their ownership, but where a specific field is alienated to a vendee, such a vendee is entitled to retain possession till such time actual partition by metes and bounds takes place between the co-sharers.

9. Now the respondents are admittedly co-sharers in Khasra No.1570/707. Although, their share is only 10 Marlas out of 296 Kanals, 7 Marlas, they are nonetheless "co-sharers". They claim to have gained possession of the said land from the vendor, Sher Zaman, in 1988, when the respondents alongwith other purchasers, purchased 3 Kanals and 15 Marlas of land from the said vendor in Khasra No.1570/707. Admittedly, no partition has taken place between the co-sharers in the said Khasra number. Until such partition, by metes and bounds, takes place, the co-sharers are entitled to retain possession of the land in their respective occupation.

10. The respondents' prayer in their civil suit is not to gain possession of land, but to protect their possession from a forcible ouster. For ease of reference, the respondents' prayer in their civil suit, are reproduced herein below:-

*"Under the circumstances it is, therefore, respectfully that decree for permanent injunction restraining the defendants from taking forcible possession over the suit land interfering into the peaceful of the suit land and taking any step which is prejudicial to rights of the plaintiffs may kindly be passed in favour of the plaintiff and against the defendants."*

11. It is well settled law that a co-owner in possession of a specific piece of land is entitled to retain possession until partition between the co-owners takes place. None of the co-owners can interfere in each other's possession unless the land co-owned by them is partitioned by metes and bounds. A co-owner in possession can even alienate his share and transfer the possession of his holding to another person, which holding would be subject to a partition. However, a purchaser of land with possession from a co-owner does not become the exclusive owner of a specific un-partitioned

jointly owned land. A co-owner enjoying exclusive possession of joint property cannot be evicted therefrom by another co-sharer except by filing a suit for partition. Reference to case law at this stage would be apposite:-

- (i) In the case of Sukh Dev Vs. Parsi (AIR 1940 Lahore 473), it has been held by the Division Bench of the Hon'ble Lahore High Court as follows:-

*"If a co-sharer is in established possession of any portion of an undivided holding, not exceeding his own share, he cannot be disturbed in his possession until partition. Hence, a cosharer who is in such possession of any portion of a joint khata, can transfer that portion subject to adjustment of the rights of the other cosharers therein at the time of partition. Other cosharers' rights will be sufficiently safeguarded if they are granted a decree by given him a declaration that the possession of the transferees in the lands in dispute will be that of cosharers, subject to adjustment at the time of partition."*

- (ii) In the case of Jamal Shah Vs. Abdul Qadir Shah (PLD 1955 Peshawar 26), it has been held that a person who is in exclusive possession of a certain portion of a joint property, can alienate that property, but the alienation will be subject to an adjustment which takes place at the time of the partition of the joint property.

- (iii) In the case of Haji Khan Muhammad and others Vs. Yaqub Khan and others (PLD 1956 Peshawar 96), it has been held as follows:-

*"There is authority for the proposition that in case a co-sharer has been in possession of a portion joint land exclusively for a long period and the portion in his possession does not exceed his individual share, the other co-sharers cannot oust him therefrom or even get joint possession with him, as long as partition of the joint property does not take place."*

- (iv) In the case of Muhammad Muzaffar Khan Vs. Muhammad Yusuf Khan (PLD 1959 SC 9), it has been held as follows:-

*"The vendee of a co-sharer who owns an undivided Khata in common with another, is clothed with the same rights as the vendor has in the property no more and no less. If the vendor was in exclusive possession of a certain portion of the joint land and transfers its possession to his vendee, so long as there is no partition between the co-sharers, the vendee must be regarded as stepping into the shoes of his transferor qua his ownership rights in the joint property, to the extent of the area purchased*

*by him, provided that the area in question does not exceed the share which the transferor owns in the whole property. Alienation of specific plots transferred to the vendee would only entitle the latter to retain possession of them till such time as an actual partition by metes and bounds takes place between the co-sharers”.*

- (v) In the case of Mst. Yasmin Vs. Muhammad Jamil Khan (2012 CLC 1618), it has *inter alia* been held that all the owners had a right to occupy the land in their possession till the time partition had taken place by metes and bounds. The same view has been taken in the case of Abdul Rehman Vs. Muhammad Siddique (2006 MLD 442).
- (vi) In the case of Muhammad Sareer Khan Vs. Arbab Sultan Muhammad (2016 CLC 1255), it has been held by the Division Bench of the Hon'ble Peshawar High Court that a co-sharer in exclusive possession of a joint portion of property for a long period cannot be dispossessed by another co-sharer except for filing a suit for partition.

12. In the case at hand, mutation No.1567 dated 23.02.1988, shows that the vendor, Sher Zaman, was owner in possession of the land sold *inter alia* to the respondents. Just like their predecessor-in-interest, the respondents would be considered, rather are co-owners of the un-partitioned land in Khasra No.1570/707. Unless partition by metes and bounds of the joint ownership of land takes place, the respondents could not be forcibly dispossessed from the land in their possession in their capacity as co-sharers. Fearing interference with their peaceful possession of the suit land, the respondents instituted the suit for permanent injunction.

13. The judgment and decree dated 25.01.2016, passed by the learned Appellate Court in favour of the respondents does not make them exclusive owners of the joint land, which is in their possession. The said judgment and decree does not invest the respondents to continue occupation of the land in their possession for all times to come, but only protects the peaceful possession of the said respondents until the joint land in the *Khata* is partitioned in accordance with the law. The said

judgment and decree, shall not arm the respondents to gain possession of joint land which was not in their possession at the time of the institution of the civil suit.

14. In view of the above, I do not find any infirmity in the judgment and decree dated 25.01.2016, passed by the learned Appellate Court. Resultantly, this petition is dismissed with no order as to costs.

**(MIANGUL HASSAN AURANGZEB)  
JUDGE**

**ANNOUNCED IN AN OPEN COURT ON \_\_\_\_\_/2016**

**(JUDGE)**

**APPROVED FOR REPORTING**

Qamar Khan\*

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