

**ORDER SHEET.**  
**IN THE ISLAMABAD HIGH COURT, ISLAMABAD.**  
**JUDICIAL DEPARTMENT.**

**W.P.No.783 of 2016**

**Muhammad Zulfiqar & another**

***Versus***

**Additional District Judge (West), Islamabad & others**

S. No. of order / proceedings	Date of order/ Proceedings	Order with signature of Judge and that of parties or counsel where necessary.
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	<b>07.03.2016</b>	<b>Raja Shahid Masood, Advocate for the petitioners</b>
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Through the instant writ petition, the petitioners have impugned the Order dated 17.09.2015, passed by the learned Civil Judge, Islamabad, whereby he turned down the objections of respondent No.4/defendant No.3 (Muhammad Zahid) to the report/assessment of the local commission, whereby the reserved price for House No.1218, Street No.83, Sector G-9/4, Islamabad, measuring five Marlas was fixed at Rs.95,00,000/- and that of House No.73, Street No.04 Defence Colony Dr. Qadir Road near Khanna Pul, Rawalpindi, measuring 7 Marlas was fixed at Rs.65,00,000/-. These two houses shall hereinafter be referred to as “the Suit Properties”. The learned Civil Court vide the said order also appointed a Court Auctioneer and directed him to conduct the auction of the Suit Properties in accordance with the schedule given in the said order.

2. The record reveals that Ch. Noor Muhammad died on 07.09.2003. His wife had pre-deceased him. He was survived by three sons, (namely, Muhammad Zulfiqar, Muhammad Shoaib and Muhammad Zahid) and two daughters, (namely, Mst. Zahida Nadeem and Mst. Shazia Jameel). Ch. Noor Muhammad

owned the Suit Properties and after his demise his children owned them jointly. The Suit Properties are said to be in occupation of Ch. Noor Muhammad's sons. As Ch. Noor Muhammad's daughters wanted their respective shares in the Suit Properties, they, on 06.05.2004 instituted a suit for declaration, possession through partition, distribution of assets of Ch. Noor Muhammad, and permanent injunction, before the Court of learned Civil Judge, Islamabad. On 09.01.2012, the learned Civil Court passed an *ex-parte* preliminary decree in favour of respondents No.2 & 3/plaintiffs and appointed Mr. Jamal Khan, Advocate, as a local commission, and directed him to visit the Suit Properties and submit his report on the following points:-

1. *"Whether the suit property is partitionable if so, what is the mode of partition and shares of legal heirs.*
2. *If the suit property is not partitionable then its current market value."*

3. Due to the objections raised by respondent No.4 (Muhammad Zahid) another local commission, namely, Mr. Manzoor Ahmad Jajja, was appointed, who submitted his report, but this too was subjected to objections. On 22.04.2015, the learned Civil Court appointed Mr. Tauqeer Ahmad, Advocate, as the local commission, who submitted his report regarding the market value of the Suit Properties. As the Suit Properties could not be partitioned or subdivided, and as their reserved price had been ascertained, the learned Civil Court, vide order dated 17.09.2015, appointed a Court Auctioneer, who was directed to auction the

Suit Properties in accordance with the schedule set out in the said order. The said order dated 17.09.2015, passed by the learned Civil Court was impugned by the petitioners before the Additional District Judge, Islamabad, who vide order dated 08.02.2016, dismissed the appeal. It appears that in the proceedings before the Appellate Court the petitioners wanted to avoid an open auction of the Suit Properties and wanted an auction between Ch. Noor Muhammad's legal heirs *inter se*. The petitioners, through the instant writ petition, are challenging the concurrent orders passed by the learned courts below.

4. Confronted with the observations of the Court to the effect that respondents No.2 & 3 are the real sisters of the petitioners and that they have a legal right to take the benefit of their inheritance from their deceased father; and that ever since the demise of Ch. Noor Muhammad in 2003, his sons have remained in occupation of the Suit Properties to the exclusion of their sisters, the learned counsel for the petitioners at first sought some time to confer with his client in order to explore the possibility of an amicable settlement between the siblings. After a gap of 03 days, the learned counsel for the petitioners submitted that an understanding between the legal heirs of Ch. Noor Muhammad could not be developed, and that the petitioners want to be given an opportunity to participate in the open auction by submitting their respective bids. He submitted that the petitioners have a deep emotional attachment to the Suit Properties and would like to retain their ownership

without in any manner adversely affecting the legal right and entitlement of the other co-sharers to their proportionate "*Shar'ai*" shares from the amount realized from the sale of these properties in the auction proceedings. He agreed with the view that it is through an open auction that the best possible price for the Suit Properties can be obtained. The record reveals that at no material stage did the petitioners file an application under Section 3 of the Partition Act, 1893, to purchase the Suit Properties at a price ascertained by the Court. However, the learned counsel for the petitioners submitted that the petitioners would be satisfied if this Court were to give them permission to bid for the Suit Properties in the auction.

5. Now the vital questions that need to be determined are whether this court in its constitutional jurisdiction under Article 199 of the Constitution can simply permit the co-owners to bid for the Suit Properties in the auction process, or whether they will have to take express permission of the learned Civil Court / executing court under Order XXI, Rule 72 (1) of the Code of Civil Procedure, 1908 ("C.P.C.") to bid for the purchase of the Suit Properties.

6. The Order dated 17.09.2015 passed by the Learned Civil Court for the auction of the Suit Properties has been made under Section 2 of the Partition Act, 1893, which, in effect, provides that whenever in any suit for partition in which a decree for partition might have been made, it appears to the court that a division of the property cannot reasonably or

conveniently be made, the court may direct a sale of the property and distribution of the proceeds. Sub-Sections (1) & (2) of Section 6 of the Partition Act, 1893, is reproduced herein below:-

*"6. Reserved bidding and bidding by share-holders: (1) Every sale under Section 2 shall be subject to reserved bidding, and the amount of such bidding shall be fixed by the Court in such manner as it may think fit and may be varied from time to time.*

*(2) On any such sale any of the share-holders shall be at liberty to bid at the sale on such terms as to non-payment of deposit or as to setting off or accounting for the purchase-money or any part thereof instead of paying the same as to the Court may seem reasonable." (Emphasis added)*

7. A conjoint reading of Section 2 and Section 6(2) of the Partition Act, 1893, shows that there is no prohibition against the co-sharers from bidding for the properties to be auctioned/sold, or to participate in the bidding process. In the case of Israr Muhammad Khan Vs. Senior Civil Judge, Lahore reported as 1990 SCMR 693, the co-owners had been allowed to participate in the auction in order to purchase the shares of the other side. In the case of Shahid Ali Vs. Aziz Fatima reported as PLD 2010 SC 38, one of the reasons why the court auction of a property was set aside was because no notice had been issued by the Court Auctioneer to all the share holders for exercising their option to purchase the property.

8. A suit for partition has some distinct features, and that in such a suit every co-sharer whether he is included in the category of plaintiffs or defendants, stands in the position of a plaintiff. Reference in this regard

may be made to the case of Mst. Khatoon Vs. Siddiq Muhammad, reported as 1981 CLC 409.

9. In the case of Shahid Ali Vs. Aziz Fatima (supra), the Hon'ble Supreme Court of Pakistan has held that in selling any property under the Partition Act, 1893, primarily the procedure prescribed by the C.P.C. has to be followed. After holding so, the Hon'ble Supreme Court of Pakistan held that the provisions of Order XXI Rule 66 C.P.C. were attracted to sale of the property. In Paragraph 8 of the said judgment, it has been held as follows:-

*“8. A review of the authorities, cited at the Bar by the learned counsel for the parties as well as study of the relevant provisions including rule 66 of Order XXI C.P.C, makes it amply clear that in a partition suit when the situation to sell the property arises the Court, as a rule, must ask the parties concerned to state before it estimated price of the property which in their opinion is likely to be fetched and although it is not essential for a Court to give its own estimate in the order but in drawing publication, having regard to the express provision of rule 66 of Order XXI, C.P.C. the Court while passing an order must take into consideration all the material facts, which are necessary for a purchaser to know in forming an opinion regarding valuation of the property.”*

10. In holding so, the Hon'ble Supreme Court of Pakistan placed reliance on the case of Ilahi Noor and others Vs. Muhammad Din reported as PLD 1977 SC 634, wherein it has been held as follows:-

*“The property in the instant case was sold by a District Court, and as pointed out by the learned Judge, rules have not been framed by the Lahore High Court for regulating the procedure for sale in partition suits, therefore, the property had to be sold in accordance with the provisions of Order XXI of the Civil Procedure Code, and, it was common ground between the learned counsel that for example the provision of rule 66 of this order had been*

*complied with, therefore, Mr. Mahboob submitted that as rule 66 was applicable to the sale so was the rules. This submission is correct because there is no provision to the contrary in the Partition Act."*

11. In the case of Khursheed Begum Vs. Inam-ur-Rehman, reported as PLD 2009 Lahore 552, it has been held that auction / sale in a partition suit is to be conducted according to the provisions of Order XXI, Rule 66 C.P.C, and that no different procedure was provided for sale of the joint properties in partition decrees.

12. Section 7 of the Partition Act, 1893 provides as follows:-

"7. Procedure to be followed in case of sales: Save as hereinbefore provided, when any property is directed to be sold under this Act, the following procedure shall as far as practicable, be adopted, namely:-

(a) [Omitted by the Federal Laws (Revision and Declaration) Ordinance. XXVII of 1981, Section 3 and 2nd Sch.];

(b) if the property be sold under a decree or order of any other Court, such procedure as the High Court may from time to time by rules prescribe in this behalf, and until such rules are made, the procedure prescribed in the Code of Civil Procedure, 1908 (Act V of 1908) in respect of sales in execution of decree." (Emphasis added)

13. Now by analogy can it be said that Order XXI, Rule 72 C.P.C. would also be applicable to the sale of a property through an auction in pursuance of a preliminary decree passed in a suit for partition of a joint property under the provisions of the Partition Act, 1893. Section 7 of the Partition Act, 1893, requires the procedure prescribed in the C.P.C. for the sale of properties to be followed, as far as practicable, in case of a sale of a property under the provisions of Partition Act, 1893. When a preliminary decree for partition of

property is passed under the provisions of the Partition Act, 1893, all the co-owners of the property to be partitioned, be they plaintiffs or defendants, attain the status of decree holders.

14. Order XI, Rule 72 C.P.C. reads as follows:-

*“72 (1) No holder of a decree in execution of which property is sold shall, without the express permission of the Court, bid for or purchase the property.”*

15. As the said provision is couched in negative terms, in ordinary circumstances it is essential for a decree holder to obtain permission of the Court to bid for the property to be auctioned. The position is different when a party of a suit for partition of a property, which he jointly owns with the other parties, wants to bid such a property in an auction pursuant to a preliminary decree passed by Court under the provisions of the Partition Act, 1893. Section 6 (2) of the Partition Act, 1893, permits a co-sharer/shareholder of the property to bid for it on such terms as mentioned therein. Section 7 of the Partition Act, 1893, starts with the words, “save as hereinbefore provided”. This has reference to provisions including Section 6 (2) of the Partition Act, 1893, which allows the shareholders of the property to be auctioned to bid for the same. As the said provision of the special law (Partition Act, 1893) specifically permits the shareholders of the property to be auctioned to bid for it, it is my view that such a shareholder need not apply to the executing court for permission to bid for such a property under Order XXI, Rule 72 C.P.C. Hence, no permission is required by the co-sharers of the



Suit Properties from this Court or the executing Court to bid for the said properties.

16. Even otherwise, as Section 6(2) of the Partition Act, 1893, is a part of a special law, the same shall prevail over Order XXI, Rule 72 CPC, which is a part of a general law. The doctrine "*generalia specialibus non derogant*" (general things do not derogate from special things) can be aptly pressed into service here. In the case of Federal Bank for Cooperatives Vs. Ehsan Muhammad reported as 2004 SCMR 130, it has been held that where the situation is specifically dealt with by a provision of law, then any general provision relating to the same subject would not be attracted in cases specifically catered for. In the case of Atta Ullah Vs. Sami Ullah reported as 2007 SCMR 289, the Hon'ble Supreme Court of Pakistan has been reiterated the well settled law that a special law excludes the general law. In the case of Iqbal Hussain Vs. Government of Azad J& K reported as PLD 1974 Azad J & K 67, it has been held that if a situation is governed both by a special statute as well as a general statute, then the matter should be dealt with under the special statute to the exclusion of the operation of the general statute.

17. By reason of the aforementioned, there is no reason to interfere in the concurrent orders of the learned courts below. However it may be observed that any of the co-sharers of the Suit Properties are at liberty to bid for the Suit properties in terms of Section 6 (2) of the Partition Act, 1893. It may also be observed that the auction/ bidding process pursuant to the order dated 17.09.2015 passed by the

learned Civil Court/ Executing Court shall not in any manner be delayed on account of the participation of the legal heirs of Ch. Noor Muhammad in the bidding process. In the event such legal heirs participate in the auction/ bidding process, they shall not be given any preferential treatment vis a vis other bidders. Resultantly, this petition is dismissed in limine with no order as to costs.

**(MIANGUL HASSAN AURANGZEB)  
JUDGE**

**APPROVED FOR REPORTING**

**(JUDGE)**

Qamar Khan\*

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