

Stereo.HCJDA-38

**JUDGMENT SHEET
IN THE LAHORE HIGH COURT
MULTAN BENCH MULTAN
JUDICIAL DEPARTMENT**

Civil Revision No.836 of 2013

Ali Kamran
v.
Muhammad Aslam

J U D G M E N T

Date of Hearing	20.6.2019
Petitioner By	Mr. Tahir Iqbal Chaudhary, Advocate
Respondent By	Mr. Yaqoob Ali Chaudhary, Advocate

Rasaal Hasan Syed, J. This civil revision calls in question orders dated 12.5.2010 and 05.11.2013 of the learned courts below whereby the application under section 4 of Partition Act, 1893 (the “**Act**”) filed by the petitioner in the execution proceedings of a partition decree was dismissed and appeal against the same was refused.

2. On petitioners’ behalf it was argued that the disputed property was the dwelling of an undivided family; respondent Nos.1 to 3 were strangers and were not members of the undivided family; they could not compete with the alleged superior right of petitioner; the learned courts below misinterpreted and misapplied the provisions of the Act and further that the petitioners were entitled to purchase the share of respondent Nos. 1 to 3 on payment of Rs.1,30,000/-. Contrariwise, learned counsel for the respondent submitted that the application as also the appeal were legally untenable and that the application was

collusive, *mala fide* and belated which was rightfully dismissed.

3. Careful review of the facts, as ascertained from the file, are that being an Evacuee Property, house No.432/434-B-IV, was transferred by the Settlement and Rehabilitation Department in favour of Waheed Ahmad and Saeed Ahmad both sons of Noor Muhammad in equal proportions. The area of the land underneath the house was 03 marlas. Waheed Ahmad, predecessor of respondent Nos. 4 to 6 agreed to sell his share of property in favour of Bashir Ahmad (predecessor of respondent Nos. 1 to 3) vide sale agreement dated 13.10.1987 on the basis whereof a suit for specific performance was instituted which was decreed on 26.4.1993. Later suit for partition was filed by Saeed Ahmad (represented by legal heirs) which was contested. A preliminary decree was passed on 23.6.1998 and a local commission was appointed to visit the site and also to propose the mode of partition if in his view the property was divisible. It appears that as per report the property was found to be divisible. After eleven years, the petitioners filed an application under section 4 of the Act, claiming the property as an undivided dwelling of an "undivided family" and alleged them to be entitled to purchase the share of decree-holder for Rs. 1,30,000/- i.e. the price which was paid in 1987. A direction was solicited for transfer of the suit property in favour of the applicants. The application was resisted on number of legal and factual grounds which was dismissed by the learned Civil Judge/Executing Court vide order dated 12.10.2010 and the order was also affirmed in appeal by learned Addl. District Judge, Sahiwal,

vide order dated 05.11.2013. It was observed by the learned courts below that the application was filed after 23 years from the sale agreement and more than 11 years from the partition decree, which was collusive and in any case the petitioner, if interested to purchase, would get a chance to participate in the auction, if the property is ultimately ordered to be sold.

4. Before opining on the merits of the objection, it is appropriate to take into consideration the specific features and circumstances of this case which reflect meaningfully upon the petitioners. Admittedly, the property was an Evacuee Property, which was transferred under the Settlement Laws in favour of Waheed Ahmad and Saeed Ahmad in equal shares. Waheed Ahmad agreed to sell his share vide agreement dated 13.10.1987. The suit to enforce the agreement was decreed in favour of Bashir Ahmad on 26.4.1993. The decree was executed and transfer of title in favour of Bashir Ahmad was effected who later filed suit for partition on 25.7.1995. Petitioners did not claim to be ignorant about the sale nor claimed ignorance of their predecessor Saeed Ahmad about the sale. The petitioners and their predecessor never deemed it necessary to either challenge the sale or the decree passed in favour of Bashir Ahmad. The conduct of petitioners and their predecessor, therefore, warrants the unequivocal inference they had no objection to the transaction.

5. In the suit for partition subsequently filed by Bashir Ahmad, Saeed Ahmad predecessor of petitioners or the petitioners themselves, did not challenge the sale in favour

of Bashir Ahmad on the plea of having any superior right to be substituted under section 4 of the Act. Instead as manifest from the copy of the judgment dated 23.6.1998 of the preliminary decree, the suit was contested with the defence that the sale agreement was forged and the decree was collusive and that the petitioners were in occupation of property as owners. Even no evidence was produced in the pre-remand and post-remand proceedings of the suit, instead the fate of the suit in terms of the decree was accepted, and it is not claimed that the same was challenged in the hierarchy of jurisdiction. Instead execution proceedings were delayed through miscellaneous objections sponsored intermittently. It is evident from the decree in the partition suit that the local commission was appointed, spot inspection was made and report was submitted in the court to the effect that the property was divisible. It is thus obvious that throughout the trial the petitioners or their predecessor never pressed into service their alleged claim that the property was an undivided dwelling belonging to “undivided family” which could not be partitioned or that they were willing to buy the share/portion of Bashir Ahmad (predecessor of respondent Nos.1 to 3) or that the court should allow relief in terms of section 4 of the Act and dispose of the matter accordingly. Strangely enough the petitioners opted to bring an application under section 4 of the Act on 30.9.2009 i.e. after a period of approximately 23 years from the sale in favour of Bashir Ahmad and after 11 years from the date of decree in partition suit.

6. In these circumstances the question that requires serious consideration will be as to whether the petitioners

could be permitted to plead that the property was an undivided dwelling or it belongs to an “undivided family” or that they had a right to purchase the share of property subject-matter of decree and also as to whether the claim would not be barred by the rules of estoppel and waiver. No explanation whatsoever was given in the application as to why the petitioners or their predecessor remained mute and as to why the plea was not taken at the first opportunity. The petitioners obviously could not be allowed to sleep over the matter for 23 years and then rouse from the slumber and expect indulgence of the court for favorable consideration. The conduct of the petitioners and their predecessor demonstrated a case of waiver and in result they were estopped to raise the plea under section 4 of the Act.

7. On merits also, there is no substance in the objection raised under section 4 of the Act. For better appreciation it will be beneficial if the relevant part of section 4 of Act is reproduced which reads as under: -

“4. Partition suit by transferee of share in dwelling-house. (1) Where a share of a dwelling house belonging to an undivided family has been transferred to a person who is not a member of such family and such transferee sues for partition, the Court shall, if any member of the family being a shareholder shall undertake to buy the share of such transferee, make a valuation of such share in such manner as it thinks fit and direct the sale of such share to such shareholder, and may give all necessary and proper directions in that behalf.

(2) ...”

The provisions of section 4 of the Act have remained subject-matter of consideration in certain judicial pronouncements wherein the expression “dwelling-house” belonging to “undivided family” were duly examined. Reference can be made to “Mst. Arjumand Bano v. Ch. ALI Muhammad” (1991 MLD 250) wherein a learned Division Bench of this Court observed as under: -

“18. In sharp contrast to the well recognized conception of an undivided Hindu family, the Islamic law “does not allow the conception of a family life to overshadow its fundamental principle, namely, individual responsibility and liberty. Each member of the family is endowed with full legal capacity and the law does not sanction any joint family system of holding property as is prevalent among the Hindus. Whatever authority the law vests in the head of the family is based either on contract or on necessity for the protection of those members of the family who are unable to take care of themselves.” (The principles of Muhammadan Jurisprudence by Sir Abdur Rahim at page 326). This is because “as soon as an owner dies, succession to his property opens. There is no State intervention or clergy’s intervention needed for the passing of the title immediately to the heirs. Thus it is obvious that a Muslim’s estate legally and judicially vests immediately on his death in his or her heirs and their rights respectively come into separate existence forthwith”.

Ghulam Ali and 2 others v. Mst. Ghulam Sarwar Naqvi PLD 1990 SC 1, 12.

19. In the present day western civilization, there are some societies in which the law recognizes a body of persons consisting of a man and woman, living as husband and wife, though not legally married, and their illegitimate children as a

family. Indeed, this is inconceivable in our society.

20. In view of what has been said above, particularly the conception of an undivided Hindu family, we are left with the impression that section 4 of the Partition Act smacks of the influence of Hindu law. In any case, the parties here being Muslims, the expression must be understood in the context of an Islamic society and if need be, re-interpreted accordingly, for, to quote from the preamble of the Constitution of the Islamic Republic of Pakistan, "it is the will of the people of Pakistan to establish an order ... wherein the Muslims shall be enabled to order their lives in the individual and collective spheres in accordance with the teachings and requirements of Islam as set out in the Holy Quran and Sunnah". We do not, therefore, think that the concept of "undivided family", as understood in Hindu law, has any relevance in an Islamic society.

21. It was said that the right given by section 4 of the Partition Act is assimilable to the right of pre-emption, its object being to exclude the intrusion of strangers into a family dwelling house. This contention overlooks the Islamic pre-emption law, under which a co-sharer has a right to purchase the share of another co-sharer in preference to a stranger. This right has received legislative recognition in the recently enacted Punjab Pre-emption Ordinance, 1990.

22. There may be cases in which a family consists of a father and married sons and daughters living under the same roof, the father being the head of the family. But it will cease to be a 'family' when the father dies, the house devolves upon his children in definite shares, and the married sons and daughters start living with their families independently of each other.

23. As the legislature has used the adjective "undivided" with the expression

“family” and as the law must be presumed to intend to mean what it says, this was not without significance. The question must, therefore, be asked - undivided in what? One need not strain one’s imagination to conjure up cases, for there are many, in which a group of persons, though descended for the same ancestor and related in blood, are living in the same dwelling house as independent families; they have separate establishments; they have separate living and cooking facilities and do in fact live separate and apart. Such families would not, in our opinion, be within the expression “undivided families”.”

(emphasis supplied)

8. On the touchstone of interpretation of rule by the learned Division Bench it is manifest that in the circumstances of present case the petitioners could not possibly allege that it was a case of “undivided dwelling-house” belonging to an “undivided family”. The facts in the revision petition, when examined, reveal that Waheed Ahmad and Saeed Ahmad were claimants of the Evacuee Property according to their entitlement, the property was transferred under the Settlement Laws in their favour proportionate to their entitlement and based on independent rights. The two claimants were undeniably married individuals having their own independent families. It was not a case of transfer of property to the common propositus nor was it pleaded or proved that Saeed Ahmad and Waheed Ahmad as also their families were living as “undivided family” under the management and control of one elder; rather both the transferees lived with their families in their own respective portions. Waheed Ahmad opted to sell his ownership in favour of late Bashir Ahmad who is now succeeded by his legal heirs. Similarly, Saeed

Ahmad and Waheed Ahmad, having their separate families, married children, settled in their lives, they could not possibly be pleaded to be a part of an “undivided family” in an “undivided dwelling-house” owned by one ancestor. The claim under section 4 of the Act, which too now stands repealed by the provisions of section 17 of *the Punjab Partition of Immovable Property Act, 2012 (Act IV of 2013)*, was legally and factually untenable which the courts below rightfully rejected.

9. Before parting with this judgment, it is painfully observed that the facts of this case reflect a pathetic picture and condition of the respondent litigants, who despite having a decree in their favour since 23.6.1998 were unable to reap the fruits of decree and were being prevented from enforcing their rights by introduction of one frivolous objection petition after another. Bashir Ahmad, the predecessor of respondent Nos.1 to 3 who was fighting for his rights, died in the hope of getting relief but was fortunate enough to avail the benefit of the decree. It is an extreme example of the abuse of process of law and courts where the judgment-debtor successfully obstructs the implementation of decree for 21 years. Such unjustified conduct of the judgment-debtors and the agonies of the successful litigant due to the illegal resistance at execution stage was considered by the honourable Supreme Court of Pakistan in “Muhammad Abdullah v. Yatim Khana Khalqia, Sargodha through its Manager and others” (2004 SCMR 471) wherein it was observed as under: -

“7...The process of execution as in vogue in our system has totally shattered the confidence reposed by the general public in our judicial system. Firstly, it takes years for a suit of any kind to reach its logical conclusion. Thereafter, the decree-holder has to file execution proceedings, which more or less is contested like a suit. Sufficient time is spent before the Executing Court and the matter is contested by the judgment-debtor like a suit by filing number of applications just to prolong the matter. It takes years to finalize the same.

8. As already stated, the Privy Council made remarks about this malady prevalent in our judicial system hundred and thirty years earlier. This situation has not improved after all the long period of more than one and quarter of century. Rather it has got worsened and the parties suffer agonies of litigation without final determination respecting their cause for generations. Having noticed unfortunate facts of this case as also the gimmickry of the petitioner whereby in an unscrupulous manner he successfully stalled the execution and deprived the respondent Yatim Khana for more than two decades, I am constrained to observe that unless and until this malady in the judicial system is remedied at the earliest otherwise it would be too late to mend the same as the poor litigants are losing their confidence in the prevalent judicial system. To ameliorate this situation, I suggest that ...”

10. In the instant case, as observed by the honourable Apex Court hereinabove, the sale in favour of Bashir Ahmad was made in terms of agreement of 1987. The suit was decreed in 1993, the suit for partition filed by him was decreed in 1998, but the application under section 4 of the Act was filed on 30.9.2009, after eleven years of the

decree but with a stance that the applicants were willing to purchase the share of decree-holder, against the price of Rs. 1,30,000/- which the decree-holder had paid in 1987 to the vendor for his share. Obviously with the expiry of 21 years from the date of sale agreement the value of the property, which is statedly located in the heart of a commercial center, must have increased manifold and, therefore, the offer on the face of it reflected the *mala fide* to blackmail and harass the decree-holder and to compel capitulation to the illegal wishes by the fear of prolongation of the proceedings in execution petition. Such tactics which are deemed to be evidence of unscrupulous behavior could not be countenanced or approved, more so, in revisional jurisdiction which is equitable and discretionary in nature.

11. For the reasons above this revision is without substance and is **dismissed** with costs throughout. The executing court shall proceed in the matter day to day and ensure final implementation and execution of decree within one month from the receipt of the judgment with intimation to the Deputy Registrar (Judl.) of this Court.

(Rasaal Hasan Syed)
Judge

Approved for reporting

JUDGE