

[High Court (AJ&K)]

Before Muhammad Sheraz Kiani, J

LATIF KHAN---Appellant

Versus

ALTAF KHAN and 9 others----Respondents

Civil Appeal No.149 of 2015, decided on 22nd November, 2017.

JUDGMENT

MUHAMMAD SHERAZ KIANI, J.--- The captioned appeal has been directed against the judgment and decree of the learned District Judge, Muzaffarabad, dated 05.10.2015 whereby judgment and decree of the learned Civil Judge Court No.II, Muzaffarabad, dated 30.07.2015 was maintained.

2. Synthesized facts stated in the instant appeal are that the plaintiff/appellant, herein, filed a suit for declaration-cum-perpetual injunction and revocation of sale-deed dated 31.08.2010 pertaining to Khewat No.7/7 Survey No.268 measuring 15 Kanals, 1 Marla situated in Mozia Hariyala Zamindaran Tehsil and District Muzaffarabad. It is stated that the plaintiff/appellant, herein, is owner in possession of the suit land on account of private partition whereas sale-deed dated 31.08.2010 was executed by the defendant/respondent, Altaf Khan, was beyond his fractional share in Khewat No.7 whereas his share in the said Khewat comes to only 6 Kanal 14 Marlas 7 Sarsai and he could have alienated only the land to that extent, the sale-deed executed in excess of share of the vendor, Altaf Khan, by 8 Kanal 6 Marla 2 Sarsai, is inoperative upon the rights of plaintiff/appellant, herein, being co-owner in the disputed land. It is further averred that vendor, defendant/ respondent No.2, herein, was entitled to land measuring 15 Kanal 16 Marlas in all three Khewats Nos.5/5, 6/6 and 7/7 according to his fractional share but he, in collusion with defendants/respondents Nos.3 to 6 got, executed invalid sale-deed dated 31.08.2010, from only one Khewat No.7, which is liable to set-aside and the suit may be decreed in favour of the plaintiff/appellant.

3. On filing of suit, the defendants/respondents were summoned. On 18.03.2011, the name of pro formadefendants Nos.7 to 10 on the application of plaintiff/appellant, herein, were struck off and ex parte proceedings were ordered against defendants Nos.3 to 6 vide order dated 11.05.2011 while defendants Nos.1 and 2, filed written statement on 11.05.2011 wherein it is stated that the suit of the plaintiff/appellant, herein, does not disclose any cause of action, which may be rejected under Order VII, rule 11 of Civil Procedure Code and averments made in the suit were entirely refuted. Dismissal of the suit was sought.

4. The learned trial Court, in the light of pleadings framed issues and after recording evidence and hearing the parties dismissed the suit for want of proof vide judgment and decree dated 30.07.2015, against which the plaintiff/appellant, herein, preferred an appeal before the 1st appellate Court, which too after hearing was dismissed vide judgment and decree dated 05.10.2015, hence, this second appeal.

5. The learned counsel for the appellant submitted that sale-deed executed by the defendant/respondent, Altaf Khan, was beyond his fractional share in Khewat No.7 whereas his share in the said Khewat only comes to 6 Kanal, 14 marlas 7 Sarsai but he could have alienated only that land not beyond that. The learned counsel vehemently argued that the learned Courts below fell in error of law while calculating the share of the vendor in all three Khewats (5, 6 and 7), as the survey No.268, admittedly, is a part of Khewat No.7, the share of the vendor, Altaf Khan, in Khewat Nos.5 and 6 has nothing to do with the suit land. The learned counsel produced a certified copy of the order of Assistant Collector Class II Ghari Dupkata dated 29.10.2015 whereby a mutation attested on the basis of sale-deed, has been rectified to the extent of excess of share of land measuring 8 Kanals, 6 Marla 2 Sarsi through a review order.

6. Conversely, while controverting the arguments of the learned counsel for the appellant, the learned counsel for the respondents submitted that the total share of the vendor, Altaf Khan, in three Khewat of village Haryala Zamindaran Tehsil and District Muzaffarabad comes to 15 Kanals, 16 Marlas whereas through the sale-deed in question defendant/respondent No.1, herein, sold only the land measuring 15 Kanals 1 Marla and thus according to the learned counsel for the respondents the land sold by the vendor, defendant/respondent, herein, is well within his share. The learned counsel craved that the concurrent findings of fact cannot be disturbed in second appeal because the same were decided after deep appraisal of evidence, he defended the impugned judgments and decrees of the learned Courts below on all counts.

7. I have heard the learned counsel for the parties at great length and perused the record available on the file with utmost care.

8. It is well established principle of law that if a co-sharer is in possession of a particular survey number he can alienate that land validly to another person provided it does not exceed his overall share in the Khewat, however, he cannot transfer the land from a particular Khewat beyond his share in the relevant Khewat. In the present case, defendant/respondent No.1, herein, vide sale-deed dated 31.08.2010 sold the land measuring 15 Kanals, 1 Marla comprising survey No.268 out of Khewat No.7 to Farid Khan, defendant/respondent No.2, herein, and on the basis of the said sale-deed a mutation was also attested in favour of the vendee on 19.09.2011. It has also been brought on the record that later on, the said mutation was corrected by the relevant revenue officer vide its review order dated 29.10.2015 and the mutation to the extent of excessive land measuring 8 Kanals, 6 Marla 2 Sarsai was cancelled.

9. The respondent No.1, and appellant, are real brothers and co-sharers in the suit land. According to Exh."PA" and Exh."PB" a specific note has been given there by Patwari Halqa that share of the respondent No.1 in three Khewats (5, 6 and 7) is altogether measuring 15 Kanals, 16 Marlas. He further clarified in his statement dated 22.06.2012 that in Khewat No.7, the share of vendor, defendant is only 6 Kanals, 14 Marlas 7 Sarsai. This statement is also supported by the entries shown in the periodical record, moreover, the mutation attested on the basis of questioned sale-deed has also been cancelled to the extent of excessive land measuring 8 Kanals 6 Marlas 2 Sarsai and this vital piece of evidence is un-rebutted, thus it can safely be concluded that share of the vendor, respondent No.1, herein, in the suit land was only 6 Kanals, 14 Marlas 7 Sarsai and the sale-deed dated 31.08.2010 executed in excess of share of the vendor by 8 Kanals, 6 Marla 2 Sarsai is not sustainable under law and liable to be set aside to that extent. The learned Civil Judge Court No.II, Muzaffarabad, and the learned District Judge, Muzaffarabad, while passing the impugned judgments and decrees miserably failed to appreciate the evidence, available on record, in its true perspective, hence, both the judgments and decrees of the learned Courts below are the result of mis-reading and non-reading of evidence and both the Courts below erred in law while including the share of vendor from three Khewats (5, 6 and 7) inspite of the fact that the impugned sale-deed does not mention the transfer of the share of the vendor from Khewat Nos.5 and 6.

10. The argument of the learned counsel for the respondents that concurrent findings of fact decided by the learned Courts below cannot be disturbed in second appeal is without any substance because the same can be interfered with when it is a result of any mis-reading or non-reading of evidence ended in wrong conclusion or contrary to law. My this view finds support from a case titled Mst. Nazir Begum v. Muhammad Ayyub and another [1993 SCR 321] wherein it has been held in the following manner:-

"Concurrent findings of fact recorded by the trial Court and the first appellate Court can only be disturbed in second appeal if there is a mis-reading or non-reading of evidence which has led to wrong conclusions."

11. It is pertinent to mention here that one Khewat is different entity and its share cannot be amalgamated and converted into the other Khewats that's why when the regular partition is taken place, the land of each Khewat is separately partitioned among the co-sharers according to their respective shares not jointly with the other Khewats of the village unless all the co-sharers give consent to make partition jointly of different Khewats. The learned Courts below in their verdicts mainly gave emphasis on the point that the plaintiff/appellant, herein, could not be able to prove the alleged facts that suit land is in his possession or it came into his possession by way of a private partition or through any family arrangement and thus the suit was dismissed. It was not proper legal approach of the trial Court as well as of the 1st appellate Court to dismiss the suit on this ground because if the plaintiff/appellant, herein, has not been able to prove his possession on the suit land on the basis of family partition even then the vendor, defendant/respondent No.1, herein, was not competent to transfer the land beyond his share in the Khewat No.7. As it is celebrated principle of law that from a particular survey number only that land can be alienated or transferred to another person which is within measures of overall share of a co-sharer in the whole Khewat. For the sake of arguments if the vendor, Altaf Khan, was in possession of the suit land even then he could not have transferred the land beyond his overall share in the Khewat No.7/7 and as mentioned his share was only 6 Kanals, 14 Marlas 7 Sarsai, meaning thereby, that remaining land measuring 8 Kanals, 6 Marlas 2 Sarsai was in the ownership of the other co-sharers and needless to say that nobody can be allowed to transfer the land of the other co-sharers whether they are in possession or not. Moreover, a co-sharer is deemed to be in possession of every inch of the joint land. So, the findings of the learned Court below against the plaintiff/appellant, herein, are erroneous, capricious and unscrupulous and not maintainable in the eye of law.

12. As far as the observations of the learned trial Court that the plaintiff could not be able to prove the alleged facts that suit land was in his possession and the same came into his possession by way of a private partition rather it was in possession of the vendor, defendant. It is pertinent to note here that a private and family partition is validly recognized only when the same is affirmed by a revenue officer under Section 147 of the Land Revenue Act. For proper appreciation of the matter, Section 147 of, supra Act, is reproduced as under:-

"Affirmation of partitions privately effected.---(1) In any case in which a partition has been made without the intervention of a Revenue Officer, any party thereto may apply to a Revenue Officer for an order affirming the partition.

(2) On receiving the application, the Revenue Officer shall enquire into the case, and if he finds that the partition has in fact been made, he may make an order affirming it and proceed under sections 143, 144, 145 and 146, or any of those sections, as circumstances may require, in the same manner as if the partition had been made on an application to himself under this Chapter".

Similar proposition has been resolved by the Peshawar High Court in a case titled Syed Musarrat Shah and another v. Syed Ahmed Shah alias Lal Bacha and 8 others [PLD 2012 Peshawar 151] wherein it has been held that: -

"It was argued by the respondents that since the private partition, every co-owner is enjoying the property according to his respective share and many of them have further alienated their shares in the names of different people, but his very fact alone would not be sufficient to establish on the record that there was a private partition between the parties. The petitioners and the respondents are the co owners/co-sharers of the property and can deal with their properties being joint owners, can sell and purchase the joint properties. The entire record of the case is silent with regard to any application moved to the Revenue Officer for giving effect to the alleged private partition or any order of the Revenue Officer reflecting the factum of affirmation of private partition and this is a sine qua non under section 147 of the Land Revenue Act, 1967, for implementation of any private partition. In absence of the same, mere entry of partition mutation cannot be declared to be sufficient enough to have the protection of law. The exercise of jurisdiction by the revenue hierarchy, in the circumstances, is nothing short of mis-appreciation of law on the subject and they have failed to consider the record in its true perspective."

There is nothing on record, which may suggest that family partition took place and that was affirmed by revenue officer under the above provisions of law. So, no party can claim any exclusive right on the basis of such possession neither plaintiff nor defendant. Any family arrangement for the purpose of cultivation is always considered for the convenience of the co-sharers for cultivation purpose. Any such arrangement does not oust and exclude the ownership of the other co-sharers from the relevant Khewat. A co-owner can only be excluded from a particular survey number by way of regular partition or private partition affirmed by revenue officer under Section 147 of the Land Revenue Act, 1967. Mere possession of another co-sharer does not extinguish the right of other co-sharer, no matter how long it may be. Thus, if the possession of the plaintiff was not proved it does not make any difference as he is a co-sharer and the land was alienated by one cosharer beyond his overall share of Khewat. So, the findings of the learned Courts below that the facture of the possession on the basis of private partition of the suit land has not been proved by the plaintiff; appellant and thus the sale-deed dated 31.08.2010 cannot be cancelled, is not in accordance with law. In case of a dispute between co-sharers in joint immovable property each co-sharer is deemed to be interested in every inch of the joint land irrespective of quantity of his interest, therefore, a co-sharer even in exclusive possession of a specific property cannot be permitted to alienate or transfer such property which might change its joint character or otherwise damage the right of other co-owners. Under Section 44 of the Transfer of Property Act a co-sharer can alienate only his share not beyond that.

In the light what has been stated above, the instant appeal is accepted while setting-aside the both the judgments and decrees of the learned Courts below dated 30.07.2015 and 05.10.2015 respectively and the suit of the plaintiff/appellant, herein, is decreed to the effect that sale-deed dated 31.08.2010 in respect of suit land comprising survey No.268 out of Khewat No.7/7 measuring 15 Kanals, 1 Marla is set-aside to the extent of land measuring 8 Kanals, 6 Marlas 2 Sarsai as executed in excess of share of the vendor/defendant. The parties shall bear their own costs.