

*Stereo.HCJDA 38.*  
**JUDGMENT SHEET.**

**LAHORE HIGH COURT**  
**RAWALPINDI BENCH, RAWALPINDI.**  
**JUDICIAL DEPARTMENT**

**C.R.No.212-D of 2018.**

**Fazal Karim & 2 others.**

*Versus.*

**Mehboob Khan (deceased) through his legal heirs.**

**JUDGMENT.**

*Date of hearing:*     **15.03.2023.**

*Petitioners by:*       Sardar Asmat Ullah Khan, Advocate.

*Respondents by:*     Mirza Saqlain Abid, Advocate.

**Mirza Viqas Rauf, J.** *This petition under section 115 of the Code of Civil Procedure (V of 1908) (hereinafter referred to as “CPC”) stems out from the order dated 26<sup>th</sup> February, 2018, whereby the learned Additional District Judge, Rawalpindi, while dismissing the appeal preferred by the petitioners, affirmed the judgment and decree dated 19<sup>th</sup> February, 2018 passed by the learned Civil Judge, Rawalpindi, resulting into dismissal of suit instituted by the petitioners, being not competent. Since suit instituted by the petitioners is dismissed while invoking the provisions of Order VII Rule 11 “CPC”, so leaving desultory details apart, only necessary facts are to be highlighted.*

2.       *Being the co-owner of the suit property, the petitioners instituted a suit for permanent injunction, which was resisted by Mehboob Khan, predecessor-in-interest of the respondents, who instead of submitting the written statement, moved an application under Order VII Rule 11 “CPC” on the ground that suit is barred by law and it is not maintainable. The application was though contested by the petitioners but it was accepted by way of order dated 19<sup>th</sup> February, 2018. Feeling aggrieved, the petitioners preferred an appeal before the learned Additional District Judge,*

Rawalpindi but of no avail and the appeal was dismissed in limine through impugned order dated 26<sup>th</sup> February, 2018, hence this petition.

3. On the first date of its presentation, the petition was admitted for regular hearing on 5<sup>th</sup> March, 2018 and thereafter by way of order dated 24<sup>th</sup> November, 2021, following question was framed: -

***“As to whether a suit for injunction simpliciter inter-se co-sharers/co-owners is proceedable or otherwise?”***

4. Learned counsel for the petitioners, while addressing the above question, submitted that even a co-owner can institute a suit for injunction for the protection of his proprietary and possessory rights. He added that the petitioners have been non-suited on extraneous grounds. In support of his contentions, learned counsel has placed reliance on MUHAMMAD RAFIQ and others v. SARDAR and others (2004 SCMR 1036) and ALI GOHAR KHAN v. SHER AYAZ and others (1989 SCMR 130).

5. Conversely, learned counsel for the “respondents” submitted that a co-sharer/co-owner is precluded to institute a suit for injunction and he has only a remedy to seek partition from the Court of law. It is added that findings of both the Courts below are concurrent and unexceptionable. Reliance to this effect is placed on AKHTAR NAWAZ KHAN, ETC. v. DANIAL KHAN, ETC. (NLR 1995 SCJ 169) and ASHIQ HUSSAIN v. Prof. MUHAMMAD ASLAM and 9 others (2004 MLD 1844).

6. Heard. Record perused.

7. The moot point involved in this case is as to whether a co-sharer/co-owner can institute a suit for injunction for the protection of his rights without seeking partition. The above question, for the first time, came under discussion before Supreme Court of Pakistan in the case of ALI GOHAR KHAN v. SHER AYAZ and others supra. The relevant extract from the same is reproduced below: -

***“6. The sole question which needs consideration in this case is whether in the facts and circumstances of the present suit a decree for perpetual injunction can be issued. As the record stands, the respondents had purchased a portion of the land from a joint Khata and dumped stones for raising***

*construction over the same. The report of the Commissioner though may not be germane to the pleadings of the parties but is relevant to the extent that the suit property is jointly owned by the parties and no partition in any form has yet taken place. Furthermore, the fact that the property in suit is joint and no private partition amongst the parties has taken place stands finally decided by the Civil Judge vide his order dated 9-1-1975. Therefore, it can be said without any fear of contradiction that the parties are co-sharers in the suit property. The question now is whether a co-sharer in such a situation can deal with a joint property in the manner he likes without the express permission of other co-sharers and to their detriment. The answer obviously is in the negative as it is a settled principle of law that in case of joint immovable property each co-sharer is interested in every inch of the subject-matter irrespective of the quantity of his interest. A co-sharer thus will not be allowed to act in a manner which constitutes an invasion on the right of the other co-sharers. A co-sharer in possession of a portion of the joint property, therefore, cannot change the nature of the property in his possession unless partition takes place by metes and bounds. In the circumstances we think the learned District Judge was justified in law in passing a decree of perpetual injunction in favour of the appellant.”*

8. *Latter in the case of AKHTAR NAWAZ KHAN, ETC. v. DANIAL KHAN, ETC. supra, a learned Bench of the Supreme Court of Pakistan comprising of three Hon’ble Judges, with a majority view, held as under: -*

*“There is no cavil with the proposition enunciated from time to time that every joint owner is interested in every inch of the joint property so long as partition by metes and bounds does not take place among the co-sharers and each individual co-sharer is allotted his exclusive share and that every co-sharer has the right to stop the other co-sharers from changing the nature of the property to his detriment. It is equally well-established by now that every co-sharer in possession of the joint property to the extent of his share in the entire joint property has a right to make use of it in the manner he likes without hindrance by the other co-sharers and if they feel aggrieved by the conversion of the user by the co-sharers, their remedy is to go for the partition and get their share separated.”*

9. *In the case of MUHAMMAD RAFIQ and others v. SARDAR and others supra, the Supreme Court of Pakistan, however, reiterated the principles laid down in the case of ALI GOHAR KHAN v. SHER AYAZ and others supra in the following manner: -*

*“2. The dispute relates to inheritance of one Nawab. The respondents were admittedly his daughters whereas the present petitioners are his collaterals being heirs of his brother. It was held that after the death of Nawab, the land was inherited by his widow Mst. Hakam Bibi/mother of the respondents as limited owner and on the termination of her limited interest, the property*

*devolved on the heirs of last male owner i.e. Nawab, under the Muslim Law. Since Nawab had not left any male heir therefore, his two daughters were declared to be the owners of the property by way of inheritance according to the shares allocated to them as daughters under the Mohammedan Law and the remaining property was inherited by the respondents as collaterals. These findings have been recorded by all the Courts below and we do not find any reason as to why the present petitioners have filed this petition.*

3. *Learned counsel for the petitioners submitted that the only objection which the petitioners wanted to agitate was that since the respondents were not in possession of the property, therefore, the suit for mere declaration without prayer for consequential relief of possession was not maintainable.*

4. *We are afraid, the argument is plainly unsound. The heirs of Nawab had become joint owners of the property after the termination of limited interest of Hakam Bibi therefore, it was a case of joint ownership and suit for declaration by one of the joint owners that they were also owners in the property which right was being denied to them, was maintainable.*

5. *It was not necessary for any of the joint owners, to have claimed partition of the joint property at present as it could be claimed by any of the joint owners during the currency of joint ownership without limitation of any period in that behalf so long as the right of any of the joint owners was not denied which was not in dispute in this case."*

10. *The question framed hereinabove also came under discussion before this Court in the case of ASHIQ HUSSAIN v. Prof. MUHAMMAD ASLAM and 9 others supra and it was resolved as under: -*

*"6. ...Mere reading of aforesaid contents of the plaint clearly shows that petitioner has not impleaded all the co-sharers as defendants in the suit. Therefore, First Appellate Court was justified to non-suit the petitioner which is in accordance with the law laid down by the Honourable Supreme Court in Khaleeq Ahmad v. Abdul Ghani and others (PLD 1973 SC 214). The relevant observation is as under:*

*"A suit for possession can be brought by all the co-owners jointly. It is open however, to one of them also to sue for possession but he must join the other co-owners as defendants and the decree will be for joint possession and not in favour of the plaintiff only."*

*The First Appellate Court was justified that suit of the petitioner was not maintainable against the other co-sharers except by bringing a suit for partition of joint property as the law laid down by the Division Bench of this Court in Muhammad Shafi's case (1979 CLC 230). The relevant observation is as follows:*

*"There is thus ample authority for the proposition that if a co-sharer has been in exclusive possession of a certain*

*portion of the joint property for a long period, he cannot be dispossessed therefrom by another co-sharer except by bringing a suit for partition of the joint property."*

*The aforesaid judgment of the Division Bench of this Court was considered and approved by the Honourable Supreme Court in Mst. Resham Bibi's case (1999 SCMR 2325). The aforesaid provision of law is also supported by the law laid down in "Munshi and 2 others v. Muhammad Shafi and 30 others" (1966 Law Notes (Lahore) 58). The First Appellate Court has reversed the finding of the trial Court after proper appreciation of evidence on record in First Appeal which is the prerogative of the First Appellate Court to reappraise the evidence as Appellate Court to come to his own conclusion on the basis of evidence adduced before the trial Court by the parties and resultantly he could competently reverse the finding of the trial Court on the question of fact in issues in question. The First Appellate Court has reversed the finding with cogent reasons after reappraisal of the evidence on record as is evident from para. No.8 of the impugned judgment. It is established proposition of law that findings on question of fact or law howsoever, erroneous the same may be recorded by a Court of competent jurisdiction cannot be interfered with by the High Court in exercise of its revisional jurisdiction under section 115, C.P.C. Unless such findings suffers from jurisdictional defect, illegality or material irregularity as per principle laid down by the Privy Council in N.S. Venkatagiri Ayyangar and another v. The Hindu Religious Endowments Board Madras (PLD 1949 Privy Council 26). The aforesaid judgment was considered and followed by this Court in Board of Intermediate and Secondary Education Lahore v. Syed Khalid Mahmood (1985 CLC 657) which is upheld by the Honourable Supreme Court in unreported judgment dated 31-3-1985 passed in C.P. No.1146 of 1984. Learned counsel of the petitioner failed to point out any infirmity or illegality in the impugned judgment and also did not bring the case within the parameters prescribed by the Privy Council in the aforesaid judgment.*

11. *The above view was further affirmed in the case of Mst. ROSHAN ARA BEGUM and 8 others v. MUHAMMAD BANARAS and another (2016 YLR 1300). The relevant extract from the same is reproduced below: -*

*"6. Learned lower appellate court has rightly held that respondent No.1 purchased the disputed shop from a co-sharer/paternal aunt. Hence, he also became a co-sharer in the joint property. Furthermore, it is established law that a co-sharer cannot file a suit for declaration and possession against the other co-sharer but a suit for partition can only be filed. The Hon'ble Supreme Court of Pakistan in a case reported as Mst. Sanobar Sultan and others v. Obaidullah Khan and others (PLD 2009 SC 71) has held as under:--*

*"A purchaser of a share out of a joint property having become a co-owner, his status as a tenant ceases and his possession will become that of a co-*



*owner who falls within the definition of a landlord. A co-sharer is entitled to retain the possession of the joint property till partition."*

12. *In the wake of survey of law on the subject, I find that in the case of FAZAL and others v. GHULAM MUHAMMAD and others (2003 SCMR 999), Bench comprising of three Hon'ble Judges of Supreme Court of Pakistan held that suit for permanent injunction is maintainable on behalf of co-sharer/co-owner.*

13. *After having a wade through the principles laid down from time to time with regard to the proposition in hand, it evinces that the question framed hereinabove is not so frizzy or ticklish. Law is consistent to this effect that every co-sharer/co-owner is owner in each and every inch of the joint property until it is partitioned by metes and bounds. It is also an oft repeated principle of law that a co-sharer/co-owner cannot change the nature of the joint property or raise construction without consent of the other co-sharers/co-owners. If a co-sharer is dispossessed from the joint property in his/her possession by any other co-sharer, the remedy lies for regaining his/her possession either in a suit under section 9 of the Specific Relief Act, 1877 or by way of a suit for partition.*

14. *The matter, however, would become different in a case when a co-sharer intends to change the nature of the joint holding or threatens the other co-sharers to divest from their right in the joint property as co-owner. In such a case, such co-owner can institute a suit for injunction restraining the former from changing the nature of the joint land or raising any construction upon the same. In the said eventuality, it is for the former to first of all get the joint land partitioned. In the present case, the principles laid down in FAZAL and others v. GHULAM MUHAMMAD and others supra are clearly attracted and as such the trial Court as well as the appellate Court have erred in law while dismissing the suit being not maintainable and barred by law.*

15. *For the foregoing reasons, this petition is **allowed**. As a result, impugned orders dated 19<sup>th</sup> February, 2018 and 26<sup>th</sup> February, 2018 are **set aside** being tainted with illegalities and material irregularities. As a*

**C.R.No.212-D of 2018**

*consequence, the suit instituted by the petitioners shall be deemed to be pending before the learned Senior Civil Judge (Civil Division), Rawalpindi, who shall either decide the same by his own or entrust it to any other Court of competent jurisdiction. Needless to observe that the Court seized with the matter shall decide the suit afresh on its own merits, strictly in accordance with law. Parties are directed to appear before the learned Senior Civil Judge (Civil Division), Rawalpindi on 15.04.2023.*

**(MIRZA VIQAS RAUF)**  
**JUDGE**

*Dictated:*  
*21.03.2023*

*Signed*  
*31.03.2023.*

**Approved for reporting**

**JUDGE**

*Announced in open Court on **31.03.2023.***

**JUDGE**