

IN THE PESHAWAR HIGH COURT,
PESHAWAR,
[Judicial Department].

Civil Revision No.898-P/2009

Date of hearing:- _____

Petitioner(s):- Qazi Salah ud Din & others (LRs) of Molvi Jamal ud Din, by Mr. Nasir Mehmood, Advocate.

Respondent (s):-Roman and 04 others (respondents No.1 to 5) by Mr. Kifyatullah Khan, Advocate.

JUDGMENT

ROOH-UL-AMIN KHAN, J:- This civil revision petition, filed by Qazi Salah ud Din & others (LRs of Qazi Jamal-ud-Din (plaintiff No.2 in suit No.169/1 of 1994), is directed against the consolidated judgment and decree dated 30.05.2009, passed by learned Appeal Court/Additional District Judge/Camp Court, Peshawar, whereby he while maintaining the consolidated judgment and decrees dated 08.01.2006, of the learned Trial Court in suits No.155/1 of 1991 and 169/1 of 1994, dismissed the appeals of the parties with a slight modification in the manner that the findings of the learned Trial Court to the extent of imposition of cost under section 35 CPC on the petitioners, have been set aside.

2. The resume of facts forming the background of the instant revision petition are that plaintiff Roman (respondent No.1 herein), filed suit No.155/1 of 1991, against the present petitioners for declaration cum

perpetual injunction to the effect that he being owner in possession of 11 Marals land bearing Khasra No.1441 Khata No.5/11, situated in Moza Ahmad Khel, etc vide exchange mutation No.4229 attested on 18.03.1991, the defendants (petitioners herein), have no right to interfere with the same, therefore, they be restrained permanently from alienation, raising construction therein or dumping their materials.

3. The suit was contested by the present petitioners by filing written statement, raising therein variety of objections legal as well as factual. From the controversial pleadings of the parties, issues were framed, however, at the stage of evidence of the plaintiff/respondents, petitioners namely, Qazi Abdur Raziq (late) and Qazi Jamal-ud-Din, filed suit No.169/1 of 1994, against defendants Khayal Akbar, Muhammad Akbar, Noor Akbar and Roman (respondents No.1 to 5 herein), for declaration and perpetual injunction to the effect that Qazi Abdur Raziq plaintiff No.1, being owner and in possession of land bearing Khasra # 950, 1441 and 1813, situated within the revenue estate of Moza Ahmad Khel, alienated land measuring 04 Kanals 14 Marals in favour of his brother, namely, Qazi Jamal ud Din plaintiff No.2 in Khasra Nos. 1813, 1441 and 950 through exchange mutation No.3233 attested on 23.04.1987 and get the property of plaintiff No.2 vide exchange mutation No.3232 of even dated; that

out of the aforesaid total alienated land in favour of plaintiff No.2, land measuring 01 Kanal and 18 Marlas, was the entire area of Khasra No.1441. The exchange mutations were incorporated and acted upon in the revenue record followed by delivery of possession, however, after two years, plaintiff No.1 sold out 01 Kanal and 6 Marlas land in Khasra No.950 to defendants No.1 to 4, vide sale mutation No.4012 attested on 09.03.1989, but inadvertently in the mutation, besides Khasra No.950, Khasra No.1441 was wrongly incorporated and defendants No.1 to 4, taking benefit of the said wrong entry, transferred land measuring 11 Marlas in favour of Roman (defendant No.5) in exchange vide exchange mutation No. 4229 dated 18.03.1991, showing the same as area of Khasra No.1441 and get the property of Roman vide exchange mutation No.4230. Since, Qazi Abdul Raziq had handed over the possession of entire land in Khasra No.1441 in exchange to plaintiff No.2 (petitioner), therefore, the sale mutation in favour of defendants No.1 to 4, followed by exchange mutation in favour of defendant No.5 in the said Khasra being illegal, have no legal effect on the right of petitioners. It was further averred that both the exchange mutations attested by defendants No.1 to 4 and 5 in favour of each other are fake, based on collusion, and ineffective upon the rights of the plaintiffs, are liable to

be cancelled and the revenue record is to be corrected in favour of plaintiff No.2 (now represented by his LRs).

4. The aforesaid suit was contested by the defendants including Roman by filing their written statement, issues were framed and the case was in the plaintiffs' evidence when in the meantime, on 08.11.2006, on the request of both the parties, the aforesaid two suits were consolidated and from the controversial pleadings of the parties, the following consolidated issues were framed by the learned Trial Court:-

1. Whether the plaintiff of both the suits have got a cause of action? OPP
2. Whether both the suits are within time? OPP
3. Whether suit No.169/1 is bad for non-joinder of necessary parties? OPD
4. Whether suit No.169/1 is liable to be dismissed for joinder of several causes of action? OPD.
5. Whether plaintiff of both the suits are stopped to sue?
6. Whether suit No.155/1 is incompetent in its present form?
7. Whether plaintiff of suit No.155/1 is owner in possession of suit land through exchange mutation No.4229 dated 18.03.1991? OPD
8. Who has raised construction in suit land, if any and what would be the effect thereof? OPP.
9. Whether plaintiff No.1 of suit No.169/1 of is owner in possession of entire land of Khasra No.1813, 1441 and 950? OPP
10. Has there been any exchange transaction between plaintiff No.1 and 2 of suit No.169/1 vide mutations No.3232 and 3233?
11. If issue No.10 stands proved, whether exchange mutation No.3232 dated 23.04.1987 was fraudulently, without delivery of possession and against the then law executed because of being for partial exchange? OPD.
12. Whether plaintiff of suit No.169/1 sold one Kanal 6 marlas to defendant No.1 to 4 vide sale mutation No.4012 dated 09.03.1989 for sale consideration

of Rs.10,000/- and delivered possession of Khasra No.950 to defendants No.1 to 4.

13. Whether defendants No.5 of suit No.169/1 acquired suit land of Khasra No.1441 in exchange from defendants No.1 to 4? OPD
14. Whether the mutation No.4229, 4230, 3232, 3233 and 4012, were validly executed by the vendors?
15. Whether plaintiff in both the suits are entitled to the decree as prayed for? OPP
16. Relief.

5. Evidence already recorded in both the suits were relied upon by both the parties and the remaining evidence of the parties was recorded after consolidation of suits. On conclusion of trial, the learned Trial Court, after hearing both the sides, vide consolidated judgment and decree dated 27.02.2007, dismissed the suit of the petitioners and decreed the suit of the respondents as well as imposed a cost of Rs.75,000/- on the petitioners to be paid to respondent Roman. Both the parties preferred appeals, before the learned Appeal Court against the judgment and decrees of the learned Trial Court, which were dismissed vide judgment and decree dated 30.05.2009. The judgment and decrees of the Trial Court were maintained, however, findings to the extent of imposition of fine were set aside, hence, this revision petition by the petitioners.

6. Arguments of learned counsel for the parties and learned counsel for respondents No.1 to 5 heard and record perused with their able assistance.

7. Learned counsel for respondents No.6 to 15 (LRs of deceased Abdur Raziq) expressed his no objection on

acceptance of the instant revision petition and passing of a decree in favour of the petitioners as prayed for.

8. It appears from the record that the ownership of Qazi Abdur Raziq (deceased) in Khasra Nos. 1813, 1441 and 950, has not been disputed by the respondents. Similarly, his relationship as brother of Qazi Jamal ud Din plaintiff No.2, coupled with exchange mutation No.3233 attested on 23.04.1987 by the former in favour of the latter, has also not been disputed. The main controversy between the parties is over possession of land comprising in Khasra No.1441. Petitioners claim that though on the basis of exchange mutation No.3233 dated 23.04.1987 in Khasra No.1441, he transferred land measuring 14 Marlas, but at the time of delivery of possession, he was handed over the entire holding i.e. one Kanal 18 marlas in it, while Khayal Akbar etc respondents claimed their ownership to the extent of 11 Marlas in the said Khasra on the strength of a sale mutation No.4012 attested in their favour by Late Qazi Abdur Raziq plaintiff No.1, who further alienated this property to Roman in exchange vide exchange mutation No.4229 attested on 18.03.1991.

9. As per revenue record produced by Ihsan ud Din Patwari Halqa Ahmed Khel Exh.PW.1/1 to Exh.PW.1/4, the total area of Khasra No.1441 is 01 Kanal and 18 Marlas, out of which late Abdur Raziq has transferred 14 Marlas through exchange mutation in

favour of his brother/petitioner while the remaining share i.e. 11 Marlas were transferred to respondents No.1 to 4 vide sale mutation No.4012 dated 09.03.1989 in lieu of Rs.10,000/-, who have exchanged the above mentioned 11 Marlas land with defendant No.5 Roman and in this regard exchange mutations Nos. 4229 and 4230 dated 18.03.1991, have been attested. However, not an iota of evidence has been produced by the petitioners to rebut these exchange mutations and to prove the same to be the result of fraud or collusion. The petitioners were under burden to prove that land measuring 11 Marlas sold by Qazi Abdur Raziq to defendants No.1 to 4, was not the part of Khasra No.1441 but was the part of Khasra No.950, but they have badly failed to prove the same through cogent oral and documentary evidence. Sale mutation No.4012 dated 09.03.1989 in favour of defendants No.1 to 4, has been duly incorporated in the revenue record and the same has not been denied by vendor Qazi Abdur Raziq. This mutation clearly shows transfer of 11 marlas land in Khasra No.1441 in favour of defendants No.1 to 4 by Qazi Qazi Abdur Raziq. Transfer of the aforesaid 11 Marla by defendants No.1 to 4 to defendant No.5 Roman through exchange mutation No. 4229 dated 18.03.1991, has also been established by the respondents through the revenue record and statements of Patwari Halqa. This exchange mutation has been duly incorporated in the revenue record

in the year 1991 whereby both the parties have exchanged their properties with each other. The revenue record fully substantiates the claim of Roman Khan qua transfer of 11 Marls land in his favour through aforesaid exchange mutation by defendants No.1 to 4 in Khasra No.1441. True that mutation are not title deeds but carry presumption of correctness and once incorporated in the revenue record, then strong presumption of truth is attached to them. In view of the above, I entertain no amount of doubt to the extent of their respective entitlements in Khasra No.1441. As discussed in the preceding para, both the contesting parties are owners to the extent of their respective share in disputed Khasra No.1441, however, the controversy of possession of the said Khasra numbers still remains. Admittedly, the suit property is undivided joint property as evident from the revenue record and both the parties are recorded as co-owners therein. Patwari Halqa produced by both the parties in their respective suit have furnished contradictory statements qua possession of Khasra No.1441. Ihsan ud Din Patwari Halqa, deposed that suit Khasra No.1441 is agricultural, but since 1986 the same is lying vacant and no crop has been cultivated therein. In cross-examination he deposed that since 1980 till 1990 one Muhammad Akbar is cultivating this Khasra number on behalf of Abdur Raziq and since 1991 Jamal ud Din is in possession of the same. He further deposed that plaintiff

(respondent Roman) is not in possession of land in disputed Khasra No.1441. On the other hand, Didar Khan Patwari Halqa while appearing as PW.1 in the suit filed by petitioners, deposed that plaintiff is not in possession of Khasra NO.1813, 1441 and 950 as the same is under litigation between the parties and in consequence of a an injunction order dated 11.12.1991, it is lying barren in the revenue record, however, in Khasra No.1441 petitioners are not in possession.

10. In view of the above contradictory statements of the PWs, who are the custodians of the revenue record, when learned counsel for the respondent was confronted with the proposition as to how a decree for perpetual injunction can be passed without any prayer for possession through partition of the joint undivided property, particularly, when there is no evidence regarding his possession in the disputed Khasra No.1441 he could not convince this Court satisfactorily rather argued that both the Courts below have concurrently decided the question of factum of possession in favour of respondents. A look over the revenue record placed on file would make it abundantly clear that Qazi Abdur Raziq being owner in possession of land in Khasra No.1441 was cultivating the land and on attestation of exchange mutation, he transferred the property in the name of his brother Qazi Jamal ud Din, however, the land in Khasra No.1441 remained under

cultivation of one Muhamamd Akbar son of Said Akbar, on behalf of Qazi Abdur Raziq. From the year 1980 till 1990, the entry in column of cultivation remained intact in the name of Muhammad Akbar on behalf of Abdur Raziq and ultimately in the year 1991, the possession of entire Khasra No.1441 was recorded in the name of petitioners. No doubt, the revenue record fully substantiates the claim of Roman Khan qua transfer of 11 Marls land in his favour through aforesaid exchange mutation by defendants No.1 to 4 in Khasra No.1441 and during the course of arguments, learned counsel for the petitioners also did not deny his entitlement over the aforesaid area, however, respondent Roman failed to establish his possession over the said area through the revenue record. A look over the plaint of respondent Roman reveals that he has only sought declaration and perpetual injunction to restrain the petitioners from interference in his share. In terms of suits for declaration under section 42 of the Specific Relief Act, any person is entitled to bring an action against any other person denying his right and that the Court might in its discretion make a declaration that such a person is so entitled, however, no such declaration is to be made if a further or consequential relief is deriving from such declaration, which could have been claimed as relief before the same Court and in the same suit. The purpose behind such an approach is to prevent future, excessive litigation

and to remove existing sources of controversy. Plaintiff Roman has opted for a declaratory decree, but he has failed to prove his possession, therefore, decree for perpetual injunction could not be granted to him as a consequential relief. It is settled law that where plaintiff is not in possession of the property, he cannot seek a mere declaration of title without asking for possession as a consequential relief.

11. By now it is a settled principle of law that a co-owner of an undivided property seeking injunctive relief could only seek the same with the formal partition of the undivided property. The co-owners on seeking the partition of the joint property would be able to clearly obtain the determination of the respective share of each co-owner and the injunctive relief would be surely resolved therewith. The wisdom behind this principle is that each co-owner of an undivided property is presumed to be the owner in possession of each inch of the land. So, it would not be proper to restrict his right and thereby put a clog of his entering into or interfering with the physical possession of another co-owner of the said undivided property. Granting injunctive relief to one co-owner could thereby amount to authorizing one of the co-owners to legally take possession of a valuable portion of the joint property and thus frustrate the ultimate partition of the joint property. It has been held by the Hon'ble apex Court in case titled, "**Mst. Resham**

Bibi and others Vs Lal Din and others” (1999 SCMR 2325), that the remedy available to a co-sharer who has been dispossessed from joint property in his possession by another co-sharer, would either be a suit under section 9 of the Specific Relief Act, 1877 or a suit for partition for regaining his possession. The Hon’ble Supreme Court while confronting same controversy as the one involved in the instant case, in case titled, **“Muhammad Ibrahim and others Vs Muhammad Ismail and others” (2005 SCMR 1335)** has held as under:

“that admittedly it was a joint Khasta and Muhammad Ismail respondent being in joint possession of property with others had not sold the specific Khasra number to the petitioners. The petitioners had purchased 16 Kanals of land but not with specific numbers. In this view of the matter, petitioners cannot lay their claim to the specific numbers. It is rightly pointed out by the learned Single Judge of the Lahore High Court that Muhammad Ismail respondent had only conveyed his interest in the joint Khata through aforementioned sale-deed and as a consequence thereof the petitioners had also become joint owners alongwith other Khatadars”

12. For what has been discussed above, both the Courts below fell in error while passing declaratory decree in favour of plaintiff Roman when he has squarely failed to prove his possession. In this view of the matter, this revision petition is partially allowed. The impugned judgments and decree of the two Courts below to the extent of decree in favour of plaintiff Roman are set aside and his

suit is hereby dismissed. The findings of the Courts below to the extent of dismissal of the suit of petitioners are, however, maintained and this revision petition is dismissed to that extent. No order as to cost.

Announced:

Siraj Afridi P.S.

JUDGE