

JUDGMENT SHEET
PESHAWAR HIGH COURT, PESHAWAR
JUDICIAL DEPARTMENT

W.P No.3352-P/2012

JUDGMENT

Date of hearing.....13.04-2018.....

Petitioner By. M/S Mazullah Barkandi and Saadatullah
Khan, Advocates.

Respondents By. Mr. Sajjad Ahmed Durrani, Advocate.....

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QALANDAR ALI KHAN, J.- This single judgment, in the instant writ petition, shall also dispose of Civil Revision Petition No.311-P/2015 by the same petitioner, Qayum Khan, as both the instant writ petition and the said civil revision pertain to the same property i.e. house; and most of the questions/issues raised in both the writ petition and civil revision petition are identical in nature, requiring common approach and determination.

2. The background of both the petitions, briefly stated, is that the petitioner lodged a suit for declaration in respect of the house in question against the respondents, whereas Mst. Zaitoon Bibi, one of the respondents in the suit of the petitioner, along with her husband Shah-Room, lodged a separate suit for possession through partition of $\frac{1}{4}$ share in the house.

Both the suits were consolidated, and vide a consolidated judgment dated 30.03.2009, the learned trial Court/Senior Civil Judge, Kohat, dismissed suit of the petitioner, while granted a preliminary decree in favour of Mst. Zaitoon Bibi in her suit for possession through partition of the house. The appeal preferred by the petitioner against the judgment and decree of the learned trial Court/Senior Civil Judge, Kohat, was dismissed by the learned appellate Court/Additional District Judge-IV, Kohat, vide judgment dated 28.05.2009. The revision petition of the petitioner also met the same fate, and was dismissed in *limine* by this Court vide judgment/order dated 21.05.2010. Thereafter, the petitioner moved application under Section 12 (2) CPC on 22.04.2011, which was also dismissed by the learned Senior Civil Judge, Kohat, vide order dated 19.09.2011. The revision petition of the petitioner also failed to bear fruit, and was dismissed by the learned Additional District Judge-III, Kohat, vide the impugned order dated 24.10.2012; hence the instant writ petition.

3. In the connected Civil Revision No.311-P/2015, the petitioner assailed both the orders dated 24.04.2014 and 25.03.2015 of the learned Senior Civil Judge, Kohat, as well as that of the learned Additional District Judge, Kohat, whereby application of the

petitioner for dismissing application of respondent No.1, Mst. Zaitoon Bibi, for grant of final decree was dismissed and appeal of the petitioner was also dismissed. Respondent No.1 had moved application for final decree on the basis of preliminary decree for partition of the house by the learned trial Court/Senior Civil Judge, Kohat, dated 30.03.2009. The petitioner/judgment debtor moved application for dismissal of application for final decree on the ground that the petitioners in the application were not granted preliminary decree in the suit for partition. His application was dismissed by the learned Senior Civil Judge, Kohat, vide impugned order dated 24.04.2014; and appeal of the petitioner was also dismissed by the learned appellate Court/Additional District Judge-IV, Kohat, vide impugned judgment dated 25.03.2015; hence the connected revision petition.

4. Arguments of learned counsel for the parties heard; and record perused.

5. In the instant writ petition, the petitioner challenged concurrent findings against him by both the learned trial Court/Senior Civil Judge, Kohat, and that of the learned revisional Court/Additional District Judge-III, Kohat, mainly, on the ground that he was in jail in a murder case during pendency of the suit with effect from 28.08.2008 to 29.03.2010, therefore, he

was not afforded ample opportunity of hearing, and that the judgment was passed and decree granted in favour of the respondents in his absence. Therefore, the learned trial Court/Senior Civil Judge, Kohat, should have provided him opportunity of hearing and adducing evidence in support of his application under Section 12 (2) CPC. The conduct of the petitioner, on the other hand, would totally belie his assertion, as he was not only represented during proceedings in his suit, but he also preferred appeal when his suit was dismissed and a preliminary decree for partition of the suit house was granted in favour of the respondents, and also filed revision petition in this court after dismissal of his appeal. It may be noted here that at no stage, during proceedings before the learned trial Court, appellate Court and this Court, he ever complained of not being properly represented; or prayed for providing him further opportunity of pursuing his case after his release from jail. In the circumstances, it appears to be after-thought to seek re-trial and re-opening of the case through complete trial proceedings in application under Section 12 (2) CPC after dismissal of suit of the petitioner, followed by dismissal of his appeal, and dismissal in *limine* of his revision petition by this Court. The learned counsel for the petitioner was unable to show fraud, mis-

representation or lack of jurisdiction, which ought to form basis for proceedings in an application under Section 12 (2) CPC. It is something beyond imagination that how the alleged non-participation of the petitioner in the proceedings in his suit, appeal and revision could be regarded as fraud or misrepresentation on the part of the respondents or even lack of jurisdiction of the Courts.

6. As regards objection with regard to jurisdiction of the learned Senior Civil Judge, Kohat, to entertain and adjudicate upon an application under Section 12 (2) CPC with regard to a decree, affirmed by the learned appellate Court i.e. the learned Additional District Judge, suffice it to say that it was the petitioner who invoked the jurisdiction of learned Senior Civil Judge, Kohat, by filing application under Section 12 (2) CPC in that Court, therefore, he could not legitimately turn around at this stage and say that the learned Senior Civil Judge had no jurisdiction to entertain and adjudicate upon his application under Section 12 (2) CPC.

7. This Court in its judgment/order dated 21.05.2010 clearly expressed the unsavoury conduct of raising disputes by the petitioner after the death of his predecessor Saidal Shah, who was originally owner of the property on the strength of Mutation No.138 dated

04.10.1974 and Mutation No.147 dated 11.11.1974, by once trying to enter and attest a mutation in his name which was later on cancelled, besides executing an unregistered sale deed in his favour with connivance of previous owner of the property. It was also pointed out in the said judgment/order of this Court that after death of predecessor of the parties, all the four brothers inherited the property and then each one of them transferred their respective shares in the name of their wives, but the petitioner admitted such transfer only to the extent of his wife while denying such transfer in the name of his sisters-in-law (wives of his brothers).

8. In the given situation, not only the learned Senior Civil Judge was justified in dismissing application of the petitioner under Section 12 (2) CPC, but the learned revisional Court/Additional District Judge-III, Kohat, was also perfectly justified in dismissing the revision petition with special cost of Rs.20,000/-, vide impugned judgment/order dated 24.10.2012. The petitioner has, all along, been trying to deny fruits of decree in favour of the respondents after litigation stretching over almost two decades, on one or other pretext, and by having resort to delaying tactics, which cannot be countenanced by the Courts on any ground, whatever. The writ petition is, therefore, devoid of merit, hence dismissed.

9. Adverting to the revision petition, it may be observed that each and every party in a suit for partition is a decree holder and also a judgment debtor at the same time, therefore, an application for final decree may be filed by any of the parties to the suit for partition, either plaintiff (s) or defendant (s) in the suit. Mst. Shehnaz Bibi was, admittedly, one of the defendants in the suit for partition, and the preliminary decree for partition in the suit certainly accrued a right in her favour to seek final decree for partition. As such, application of the petitioner for dismissal of her application for final decree was without force, and was rightly dismissed by both the learned trial Court/Senior Civil Judge, Kohat, as well as by the revisional Court/Additional District Judge-IV, Kohat, vide impugned judgment dated 25.03.2015. No other ground was urged at the bar. Therefore, the revision petition is also dismissed with costs throughout.

Announced
13-04-2018

J U D G E

Ayub

(S.B)

Hon'ble Mr. Justice Qalandar Ali Khan