

**1994 C L C 2409**

**[Peshawar]**

**Before Muhammad Bashir Khan Jehangiri, J**

**MUHAMMAD ASHIQ--- Defendant/Petitioner**

**versus**

**ABDUL JALIL USMAN and others --- Plaintiff/Respondents**

Civil Revision No. 77 of 1989, decided on 5th May, 1993.

**(a) Co-sharer---**

---Entitlement of co-sharer to construct on joint property---Suit for injunction restraining defendant from raising constructions on the jointly owned land decreed ---Legality---Co-sharer could not, ordinarily be permitted to alter the nature of joint property, and to put it to different use from the one for which it was intended---Neither defendant nor his vendor had been able to establish exclusive possession over the land in question, defendant therefore, could not use it to lay foundation thereon---Even if defendant/co-sharer had been in possession of land in question, still he could not raise construction thereon, without consulting other co-sharer or partition of land

Muhammad Muzaffar Khan v. Muhammad Yousaf Khan PLD 1959 SC 9 and Atta Muhammad v. Sahibzada Menzoor Ahmad and others 1991 SCMR 138 rel.

Afsar Khan and others v. Mst. Khanum Jan and others 1983 SCMR 272 and Mir Baz v. Muhammad Zulfiqar PLD 1988 Pesh. 28 ref.

**(b) Civil Procedure Code (V of 1908)---**

---S. 115---Revisonal jurisdiction---Courts below were neither shown to have committed any illegality or material irregularity nor had misread the evidence or had ignored to read any material evidence in arriving at correct conclusion on the points of rights of patties---No interference was warranted---Revision was dismissed in circumstances.

Al-haj Sardar Bahadur Khan for Petitioner.

Khalid Rehman Qureshi for Respondents.

Date of hearing: 5th May, 1993.

**JUDGMENT**

This civil revision arises from the judgment and the decree dated 1-4-1989 of the learned Additional District Judge, Haripur, affirming the judgment and the decree dated 29-2-1988 of a learned Civil Judge, First Class, Haripur, whereby suit of plaintiff-respondent No.1 for mandatory injunction restraining the petitioner from raising construction in the land jointly owned by the parties had been decreed.

2. The dispute relates to land measuring 3 Kanals and 9 Marlas bearing Khasra No. 1244, situate in the area of Village Pandak, Tehsil Haripur, which is jointly owned by the parties. Respondent No.1 filed a suit for grant of mandatory injunction against the petitioner and other co-sharer as pro forma defendants asserting therein that respondent No.1, the petitioner and other respondents were joint owners of the land in dispute and that the petitioner had no right to alter the character of land by laying foundations therein for construction of shops without his consent and claimed the mandatory injunction so as to restrain respondent No.1 from construction of shops therein and alter the character of land by the intended construction. A relief for demolition of any unauthorised construction in the dispute land was also added the suit was contended by the petitioner wherein besides taking up few legal objections, it was averred that the parties were in possession of their respective share in the disputed land and that the disputed land was also in possession of petitioner as a co-sharer wherein he had incurred a huge amount with a view to improving it and that in case of decree in favour of respondent No. 1 he was entitled to compensation there for.

3 On these pleadings the parties went to trial on the following issues:--

- (1) Whether plaintiff has got a cause of action?
- (2) Whether the suit is time-barred?
- (3) Whether the suit is not maintainable in its present form?
- (4) Whether defendant No. 1 has made improvement over the suit land if so, to what extent and effect?
- (5) Whether the plaintiff is estopped to sue?
- (6) Whether the parties are co-sharers and in the possession of the suit property?
- (7) Whether the suit land had not been partitioned?
- (8) Whether the plaintiff is entitled to the decree as prayed for?
- (9) Relief.

4. The learned trial Court, on consideration' of the evidence on record, took up issues Nos. 1 and 8 together and observed that from the Revenue Record and the ocular evidence it has transpired that the parties to the suit were joint owners of land measuring 1 Kanal and 4 Marlas; that the

petitioner had purchased only 6 Marlas out of the disputed land which had not been partitioned either regularly or privately and that the petitioner had laid foundation over 6 Marlas lying on the roadside without the consent of other co-owners. The learned trial Judge, therefore, held that as a co-sharer could not raise construction in the joint land without either the partition between or consent of other co-owners the petitioner was not legally entitled to raise construction in the disputed land and decided both the issues in favour of respondent No. 1. On issue No.2 it was held that since the parties were co-sharers in the disputed land the suit was not hit by limitation. No defect was countenanced in the form of the suit, therefore, issue No. 3 was answered in the negative. On issue No.4 the petitioner was neither held to have made improvements by incurring Rs.40,000 nor he was held entitled to claim compensation amounting to Rs.8,000. Respondent No. 1 was also held to have not been estopped and answered issue No.5 against the petitioner. In consequence the suit was decreed to the extent that the petitioner was restrained from raising further construction in the disputed land. These findings of the learned trial Judge, as indicated earlier, were also affirmed by the learned Additional District Judge, Haripur, vide his judgment dated 1-4-1989. Hence this petition in revision by the aggrieved defendant-petitioner.

Haji Sardar Bahadur Khan, learned counsel for the petitioner, placed implicit reliance on the precedent case of 'Afsar Khan and others v. Mst. Khanum Jan and others' (1983 SCMR 272) to contend that the petitioner was ready to undertake that if the portion of land in which the petitioner had laid foundations does not fall to his share in partition, then he will not claim any compensation for the intended construction to be raised by him. He further contended that although the petitioner had purchased 6 Marlas of land from a joint Khata but his vendor being in exclusive possession had put the petitioner in actual possession of the area purchased by him and that respondent had laid foundation thereon and that, therefore, there was "no hitch or restraint in the way of the petitioner for proceeding with the construction of shops over the area in dispute. Support, in this context, was lent from the judgment of his Court in 'Mir Baz v. Muhammad Zulfiqar' (PLD 1988 Peshawar 28). In the first case of Afsar Khan cited above the law laid down is that there is no cavil with the proposition that ordinarily a co-sharer cannot be permitted to alter the nature of the property and to put it to a different use from the one for which it is intended". In the special circumstances in that case, however, the High Court had taken care to protect the interest of the petitioner therein as indicated above and, therefore, the order of the High Court was not interfered with. In Mir Baz's case the settled proposition of law was not perhaps brought to the notice of the learned Judge of this Court in Chamber which had been laid down in "Muhammad Muzaffar Khan v. Muhammad Yousaf Khan' (PLD 1959 SC 9) and which had been recently reiterated by the Supreme Court in the case of 'Atta Muhammad v. Sahibzada Manzoor Ahmad and others' (1991 SCMR 138). The ratio deducible from the authority cited above is that "a co-sharer cannot alienate or retain possession under the garb of 'Hissadari' beyond his share". Likewise the dictum in 'Muhammad Afsar's case,' cited above clearly lays down which I tend to respectfully follow is that ordinarily a co-sharer cannot be permitted to clear the nature of the property, and to put it to a different use from the one for which it is intended. The two Courts below have concurrently found that neither the vendor of the petitioner nor the petitioner has been able to establish his exclusive possession over the disputed land out of the joint land and, therefore, he could not lay foundation over a specified portion. Be that as it may, even if he had been in possession of this portion, still he could raise construction thereon either without consulting other co-owner or without partition.

6. Both the Courts below do not appear to have committed any illegality or material irregularity and not shown to have misread the evidence or have ignored to read any material evidence in arriving at correct conclusion on the point of rights of a co-sharer of a land in a joint Khata. I, therefore, see no merit in this civil revision and would dismiss it with costs.

A.A./1617/P

Revision dismissed