

R.

Judgment Sheet

PESHAWAR HIGH COURT, MINGORA BENCH (DAR-UL-QAZA),
SWAT.

JUDICIAL DEPARTMENT

C.R.No.201/2016.

JUDGMENT*Date of hearing...21/11/2017.....**Petitioners (Mst.Samina etc) By Mr.M.Iqbal Khan, Advocate.....**Respondents (Abdur Rehman etc) By Mr.Murad Akmal Mirkhel, Advocate.*

MUHAMMAD NASIR MAHFOOZ, J:- Through this single judgment, I shall also dispose of C.R.No.202-M/2016 titled Farman Ali etc. Vs. Abdur Rahman and others, as both the petitions are the offshoot of one and the same orders.

2. Brief facts as per the instant petition are that brothers of petitioner filed a suit against respondents No.1 to 25 for grant of decree for declaration, claiming to be owners of property inherited from their grand-father Abdul Wahid deceased. Out of his legal heirs Muhammad Rehman and Ghafoor-ur-Rehman died issueless and so also claimed to inherit a share in their legacy, they also claimed share in the legacy of their mother and, therefore, prayed for correction of the revenue record. In para 'Jeem' they prayed for possession of their respective shares. The said suit

was decreed on 07.11.2010 in favour of the present petitioners and other legal heirs. The said order was challenged in appeal before the learned appellate court but was upheld on 26.09.2011 and later on in C.R.No.519/2011 this court on 14.5.2013 also dismissed the revision petition of respondents/defendants. The said decree was put to execution on 27.09.2013 and besides summoning revenue officials a local commission was appointed on 28.1.2014 to ascertain market value of the construction raised on the suit property, the said report was submitted but was not found to be satisfactory. Tehsildar Babuzai was appointed as local commission to visit the spot and determine whether the suit property is partitionable, prescribe mode of partition and if not partitionable then determine the value of the property and also award sum for equalizing the share. Report was submitted but with the consent of both the parties the matter of ascertaining market value of the construction was referred to Dispute Resolution Council on 11.9.2014 and on 19.9.2014 the said Council furnished its report. It was held that the dispute has been amicably resolved between the parties and the case was adjourned for payment of



share to the decree-holders. Thereafter, when the local commission submitted its report alongwith giving detailed site plan and detailed measurements as well as the amount of share of the decree-holders, suddenly on 14.1.2015 when the case was being argued on the report of Dispute Resolution Council the learned trial court held that possession could not be delivered to the decree-holders and so the execution petition was dismissed.

I have heard arguments of learned counsel for the parties and perused the record.

3. Petitioner challenged the order before learned appellate court but the same has also been dismissed on 4.5.2016 by invoking provision of Order 21 Rule 35 of the Code of Civil Procedure.

4. During the arguments, learned counsel for the respondents presented a copy of another application for grant of decree of partition after this proceedings and is stated to be pending decision before the learned trial court. The record of earlier proceedings which culminated into final decree and affirmed by this court as well as the proceedings in the execution petition manifestly reveals that respondents/judgment-debtors had allowed the execution proceedings for three years



and afterwards left no stone unturned to frustrate the execution of decree which also includes a decree for possession and essentially to the extent of the share of decree-holders only and not beyond that. It is established principle of *lis pendens* under section 52 of the Transfer of Property Act that no person shall benefit from any improvements made during proceedings in a court of law and that would not thwart the effects of a decree. If at all petitioners have submitted any application for grant of preliminary decree for partition that could not be allowed to benefit the judgment-debtors and could not equally penalize the petitioners to delay the execution of decree which have already undergone insurmountable delays. Judgment-debtors had willingly adopted the mode of spot inspection by the local commission and availed the forum of Dispute Resolution Council as well and so they could not be held to have been denied the right of due process of law or condemned unheard in any manner. The right of petitioners is already established and the mode of partition has been duly followed which does not require any further inquiry to place the petitioner at the mercy of another prolonged trial and to nullify the whole proceedings



carried on since the institution of execution petition till date.

5. The application for grant of preliminary decree can be considered as a step in aid of the execution of decree, therefore, this revision petition is allowed, the impugned order of learned courts below are set aside and the execution petition shall be deemed to be pending before the execution court and this application for grant of preliminary decree shall be clubbed together with the same and proceeded from the same date when it was finally dismissed on 14.1.2015. Parties are directed to appear before the learned executing court on 18.12.2017.

Announced.
Dt.21/11/2017.


JUDGE

HON'BLE MR.JUSTICE MUHAMMAD NASIR MAHFOOZ.

(A.K.KHAN)

File 24/11