

Before Nisar Hussain Khan and Qaiser Rashid Khan, JJ

GUL SARWAR KHAN and 8 others---Petitioners

versus

MUHAMMAD WALI KHAN and 2 others---Respondents

Writ Petition No.217-B of 2010, decided on 29th February, 2012.

(a) Khyber Pakhtunkhwa Pre-emption Act (X of 1987)---

---S. 5---Civil Procedure Code (V of 1908), O.XXI, R. 35(2)---Constitution of Pakistan, Art. 199---Constitutional petition---Decree for joint possession of immovable property---Pre-emptor (respondent) filed suit for possession through right of pre-emption against vendees (petitioners) being co-sharer in the suit land, which was decreed in his favour---Pre-emptor filed execution of such decree against which vendees submitted an objection application with the contention that pre-emptor was granted some shares in the joint Khata and therefore, pre-emptor was entitled to only symbolic possession and not physical possession of the suit property without partition---Objection application of vendees was dismissed by Trial Court and revision filed thereagainst before court below was also dismissed---Validity---Pre-emptor was granted a decree to the extent of 1/37th share by exercising his right of pre-emption in joint khata---In view of Order XXI, Rule 35(2), C.P.C, when decree was passed in favour of a pre-emptor regarding shares out of a joint property, pre-emptor would be entitled to the issuance of warrant of symbolic possession to the extent of shares regarding which the suit had been decreed---Pre-emptor was entitled to the issuance of warrant of symbolic possession to the extent of 1/37 shares in joint khata regarding which the suit had been decreed and not a warrant of delivery of actual physical possession through partition of the land, which was not the job of the executing court, but rather that of the revenue hierarchy---Constitutional petition was accepted and impugned orders were set aside with direction to executing court for the delivery of symbolic joint possession to the pre-emptor.

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

---O. XXI, R. 35(2)---Khyber Pakhtunkhwa Pre-emption Act (X of 1987), S.5---Constitution of Pakistan, Art. 199---Constitutional petition---Decree for joint possession of immovable property---Principles---When decree was passed in favour of a pre-emptor regarding share out of a joint property, pre-emptor would be entitled to the issuance of warrant of symbolic possession to the extent of shares regarding which the suit had been decreed.

Haji Muhammad Zahir Shah for Petitioners.

Muhammad Wali Khan, Respondent in person.

Date of hearing: 29th February, 2012.

JUDGMENT

QAISER RASHID KHAN, J.---The petitioners have called in question the judgment/order dated 15-6-2010 of the learned executing court/ Civil Judge-II, Takht-e-Nasrati and that of judgment/ order dated 8-7-2010 passed by the learned Additional District Judge, Takht-e-Nasrati, Karak, vide which application and revision petition of the petitioner were dismissed by both the courts below.

2. Facts leading to the instant petition are that the respondent No.1 Wali Muhammad had filed a suit for possession through the exercise of right of pre-emption, against the petitioners being co-sharer in the suit land, which was ultimately decreed in his favour. Appeal filed against the same judgment and decree was dismissed by the learned Additional District Judge, Karak, on 24-1-2008. Revision petition filed before the High Court was partially allowed and the petitioners were held entitled to half of the suit property, vide judgment dated 16-1-2009. Both the parties being aggrieved approached the august Supreme Court of Pakistan whereby the judgment of the High Court was set aside and the appeal of petitioners was dismissed vide judgment dated 12-4-2010.

3. Respondent /decree holder then filed execution petition. The petitioners/judgment-debtors submitted an application on 5-6-2010 before the learned executing court to the effect that the decree holder was granted some shares in the joint Khata and therefore, without partition he was entitled only to symbolic possession and not physical possession of the suit property. The application was dismissed and revision petition filed before the learned Additional District Judge, Karak, Takht-e-Nasrati also met the same fate, hence the instant writ petition.

4. Learned counsel for the petitioners vehemently stressed on the point that respondent/plaintiff was granted decree of 1/37 shares in joint Khata No.31 measuring 185 kanals 4 marlas consisting of eight Khasra numbers, Mauza Jehangiri Banda, Tehsil Takht-e-Nasrati, District Karak, so respondent/ decree- holder is entitled only to symbolic possession and not physical possession of the suit property.

5. Respondent appeared in person and stated at the bar that he was unable to engage a counsel, and wanted to assist the court himself. He stated that he has got the decree through exercise of right of pre-emption by litigating up to the august Supreme Court of Pakistan; that all owners were possessing their shares according to their entitlement and possession of the suit property was with the petitioners/judgment debtors; that both the courts below have rightly decided the matter and their judgments and orders are well reasoned, so now the actual possession should follow through warrant of physical possession.

6. Arguments heard and record perused.

7. Admittedly the respondent was granted a decree to the extent of 1/37 shares by exercising his right of pre-emption in joint Khata No.31 measuring 185 kanals 4 marlas consisting of 8 khasra numbers situated at Mauza Jehangiri Banda, Tehsil Takht-e-Nasrati, District Karak and that he filed an execution petition for the issuance of warrant of physical possession of the said property. It needs no reiteration that the executing court could not go behind the decree and that when a decree is passed in favour of a pre-emptor regarding shares out of joint property, pre-emptor would be entitled to the issuance of warrant of symbolic possession to the extent of shares regarding which the suit had been decreed. In this respect it would be beneficial to go through the provisions of Order XXI, Rule 35(2), C.P.C., reproduced as below:--

"Where a decree is for the joint possession of immovable property, such possession shall be delivered by affixing a copy of the warrant in some conspicuous place on the property and proclaiming by beat of drum, or other customary mode, at some convenient place, the substance of the decree".

The respondent is, therefore, entitled to the issuance of warrant of symbolic possession to the extent of 1/37 shares in joint Khata regarding which the suit had been decreed and not a warrant of delivery of actual physical possession through partition of the land, which is not the job of the executing Court, but rather that of the revenue hierarchy.

8. For the reasons stated above, the instant writ petition is accepted and the impugned orders are set aside. As a consequence, the objection petition of the petitioners is accepted and the learned executing court is directed for the delivery of symbolic joint possession to the respondents in accordance with the provisions of Order XXI, Rule 35(2), C.P.C. No order as to costs.

M.W.A./110/P

Petition allowed.