

2010 C L C 1134

[Lahore]

Before Nasir Saeed Sheikh and Mian Shahid Iqbal, JJ

Mst. KHUSH ZAR and 2 others----Appellants

Versus

Mst. SHAMIM ARA----Respondent

R.F.A. No.274 of 2007, heard on 31st March, 2010.

Civil Procedure Code (V of 1908)---

---O. I, R.8, O.XXVI, R.13, O.XL, R.1, XLIII, R.1 & S.96---Administration suit---Trial Court passed preliminary decree thereby determining the shares of parties on the report of the local commission and arriving at the conclusion that the ordinary mode of partition through division and distribution inter se the legal heirs was not possible---Local commission was directed to conduct the auction of the. properties subject matter of suit filed by respondent and receiver was appointed for partition---Appellants/defendants raised objections to the report of the local commission but the same were rejected by the Trial Court which was not appealed against by the defendants who instead elected to assail the order directing auction of the suit properties through first appeal---Validity---Order rejecting objections to the report of local commission, having not been assailed either in appeal or in revision, had attained finality and the vires of the said order could not be allowed to be argued under the garb of assailing the order directing the local commission to conduct auction---Counsel for petitioner did not argue in support of any mode to partition the suit properties other than auction---Order passed by the Trial Court did not suffer from any illegality---Justice had been done, the respondent who even offered to sell the share to the appellants in order to bring an end to protracted litigation but the offer was not accepted by appellants who requested for remand of the case to Trial Court; request of the appellants could not be entertained as it was likely to set aside the order which had attained finality on the ground of having not been challenged within prescribed limitation---Report of the local commission was not only comprehensive but also fair and just---Appeal being without merits was dismissed.

Ch. Muhammad Rafique Warraich for Appellants.

Mushtaq Ahmad Chaudhry for Respondent.

Date of hearing: 31st March, 2010.

JUDGMENT

NASIR SAEED SHEIKH, J.--- This Regular First Appeal is directed against the order dated 11-6-2007, passed by the learned Civil Judge, Lahore, whereby after passing of a preliminary decree in a suit for administration instituted by the respondent, a local Commission already appointed was directed by the Civil Judge to conduct the auction of the properties subject-matter of the administration suit and also to taken over the management and control of all the properties and collect rents from tenants and deposit the same in the Court till the properties are put to auction.

2. One Mian Muhammad Ayyub is the predecessor-in-interest of the appellants as well as that of the respondent, who expired on 12-8-1990 leaving behind two wives namely Quraish Begum, the mother of the respondent Mst. Shamim Ara and the other Mst. Khush Zar, the appellant No.1 from whom the said Mian Muhammad Ayyub had two children, who are respectively the appellants Nos.2 and 3. Mian Muhammad Ayyub at the time of his death left the following properties as his legacy:--

(1) 1/2 portion property No.112 and complete property No.113 situated at Timber Market Ravi Road Lahore.

(2) Plot No.B-V/137 consisting of 15 Marlas situated at Tehsil Hazro, Distt: Attock.

(3) House double storey 3 Marlas situated at Mohalladh Qazi Pura Tehsil Hazro District Attock.

(4) Business of timber in portion Property Nos.112, 113 situated at Timber Market, Ravi Road, Lahore.

(5) Income from tenants of above said properties.

The respondent instituted a suit for administration on 25-9-1993. The suit was contested and a preliminary decree dated 20-6-2005 was passed by the learned Civil Judge 1st Class, Lahore. The learned Civil Judge determined the following shares of the parties:--

(1) Mst. Khushzar widow 4/32.

(2) Mst. Shamim Ara Daughter 7/32.

(3) Mst. Gulnaz Fatimas 7/32.

(4) Mian Muhammad Hassan Son 14/32.

and appointed a local Commission and a receiver for effecting partition of the properties of the deceased Mian Muhammad Ayyub. The local Commission visited the spot and submitted a very comprehensive report dated 28-7-2006.

3. The appellants raised objections to the report, which were considered by the learned Civil Judge and were rejected vide order dated 17-4-2007, which order was not assailed by the appellants. The learned Civil Judge observed that although the report of the local Commission is very exhaustive and comprehensive, yet the fact remains that the ordinary mode of partition through division and distribution inter se the legal heirs is not possible and vide order dated 11-6-2007, the local Commission already appointed was directed to hold the auction of all the properties subject-matter of the administration suit and also to immediately take over the management and control of all these properties and collect the rents with regard to the properties under tenancy of different persons and continue receiving the rent and deposit the same in the Court till the properties are put to auction.

4. This order dated 11-6-2007 has been assailed by the appellants through the instant RFA.

5. It is contended by the learned counsel for the appellants that the report of the local Commission was objected to on a number of grounds and it was necessary for the learned Civil Judge to have summoned the local Commission for cross-examination purposes by the appellants and then to accept the report, therefore, the direction issued by the learned Civil Judge in the impugned order is illegal. The learned counsel for the appellants has also objected to the measurements made by the local Commission of the properties subject-matter of the administration suit.

6. The learned counsel for the respondent has controverted the contentions of the learned counsel for the appellants and has stated that the parties participated in the proceedings of the local Commission without any objection and a very comprehensive report was submitted and the objections raised to the local Commission report were rejected vide order dated 17-4-2007, which order was not further assailed by the appellants and the order dated 11-6-2007 passed by the learned Civil Judge of directing the auction of the properties is perfectly legal as there was no possibility of the finalizing the distribution of the properties through any other mode.

7. We have considered the arguments of the learned counsel for the parties and have perused the record.

8. One important factor which also needs to be mentioned that the suit was instituted wayback in 1994 and still the respondent is being denied the benefit of the properties left by her father. During the hearing of the arguments, the learned counsel for the respondent made an offer to the appellants that the respondent is willing to sell out her share in the properties to the appellants at the price determined by the local Commission in order to resolve the twenty years old litigation, but this offer was not accepted by the learned counsel for the appellants and he insisted that the matter be remanded back for fresh decision by the learned Civil Judge.

9. The appellants although raised objections to the report dated 28-7-2006 of the local Commission, yet objections raised were rejected vide order dated 17-4-2007, passed by the learned Civil Judge and the said order was neither appealed against nor any revision was preferred against the same and it had attained finality. Under the garb of assailing the order dated 11-6-2007, passed by the learned Civil Judge, the vires of order dated 17-4-2007 rejecting the objections on the local Commission report cannot be allowed to be argued nor can be entertained

by this Court. The learned counsel for the appellants did not argue that the properties left by the deceased Mian Muhammad Ayyub were in fact partitionable through any other mode except putting the same to auction.

10. The order passed by the learned Civil Judge dated 11-6-2007 does not suffer from any illegality nor any such illegality has been pointed out by the learned counsel for the appellants. The justice has been done by passing the impugned order by the learned Civil Judge and the respondent have gone to the extent of offering to sell her share to the appellants at the price mentioned in the report of the local Commission, which offer was not accepted by the appellants and instead requested for sending back the matter to the Civil Judge for allowing the appellants to cross-examine the local Commission which request is not entertainable as it is likely to set aside the order dated 17-4-2007, which order has already attained finality as having not been challenged any more in accordance with law within the specified period of limitation. The report of the local Commission is not only comprehensive but is just and fair. We do not find any merits in the present RFA, which is dismissed without any orders as to costs.

A.R.K. /K-27/L

Appeal dismissed.