

ORDER SHEET
THE HIGH COURT OF SINDH, KARACHI
Suit No. 778 of 2011

Dated: Order with signature of Judge(s)

1. For orders on Nazir's Report dated 13.09.2023 & 29.8.2023
2. For hearing of CMA No.10894/2023.
3. For hearing of CMA No.6035/2021.
4. For hearing of CMA No.584/2015.
5. For examination of parties/settlement of issues.
(Amended title filed)

26.09.2023:

M/s. Syed Haider Imam Rizvi and Mir Anosh Bashir,
Advocates for the Plaintiffs.

M/s. Muhammad Rafiq Kalwar and Muhammad Yasir,
Advocates for the Defendant No.1.

Mr. Munir Iqbal, Advocate for the Defendant No.2.

Khilji Bilal, Advocate for the Defendant No.3.

Mr. Haider Raza holding brief for Mr. Saadi Sardar,
Advocate for the Defendant No.4.

Mr. Usman Tufail Shaikh, Advocate for Defendant No.5.

Syed Mustafa Mahdi, Advocate for Auction Purchaser.

Vakalatnamas are filed by the Defendant No 4 (ii), (iii) and (iv) and which are taken on record. A Vakaltnama is also filed on behalf of Mr. Raja Aurang Zaib, Abdul Majid and Faisal who are persons who are purportedly interested in purchasing the undivided share of the Suit Property (hereinafter referred to as the "Purchasers") and which are also taken on record.

1 & 2. The dispute that is presently germane to this Application and the Nazir Reference is in respect of the manner in which a Commercial plot No. 53-C, Block 2, Pakistan Employees Cooperative Housing Society Limited (hereinafter referred to as the "Said Property") is to be sold.

The Said Property stood in the name of one Iqbal Ahmed Sethi and the Plaintiffs and the Defendant No. 1 to 6 are his legal heirs. Mr. Iqbal

Ahmed Sethi passed away on 30 August 2008 and an impasse exists regarding the manner in which the Said Property is to be disposed off.

This application has been maintained by the Plaintiffs, the Defendant No. 2, the Defendant No. 3 and the Defendant No. 6 stating that they have agreed to sell their undivided share in the Said Property to the Purchasers and are seeking the courts sanction to sell their undivided share in the Said Property to the Purchasers who are apparently the tenants of the Said Property. The Defendant No. 1 and the Defendant No. 5 oppose the sale of the undivided share of the Said Property to the Purchasers. The Defendant No. 1 outright contents that the Said Property should be sold as a whole through Public Auction.

Before dilating on the arguments of the Defendant No. 1 and the Defendant No. 5, it is advantageous to reproduce the provisions of Section 44 of the Transfer of Property Act, 1882 and which states as under:

“ ... **44. Transfer by one co-owner.**

Where one of two or more co-owners of immovable property legally competent in that behalf transfers his share of such property or any interest therein, the transferee acquires, as to such share or interest, and so far as is necessary to give effect to the common or part enjoyment of the property, and to enforce a partition of the same, but subject to the conditions and liabilities affecting, at the date of the transfer, the share or interest so transferred.

Where the transferee of a share of a dwelling-house belonging to an undivided family is not a member of the family nothing in this section shall be deemed to entitle him to joint possession or other common or part enjoyment of the house.”

The provisions of this Section have come to be interpreted by this Court in the decision reported as **Nafeesa Siddiqui vs. Danish Rafique**¹ wherein it was held that:

“ ... *In our view, and also based on the case-law discussed in para 18 above, there is nothing in Section 44 Transfer of Property Act, 1882 that requires a co-owner of a joint/undivided immovable property to obtain consent of the other co-owners before transferring his share of such property or any interest therein to any person. In fact, section 44 recognizes such right of a co-owner to do so. The word "transferee" in*

¹ 2019 CLC 1739

the proviso to Section 44 signifies that a co-owner may even transfer his share in a dwelling house belonging to undivided family. That proviso only entails that where a share in a dwelling house belonging to an undivided family is transferred, then the transferee does not by implication of such transfer become entitled to joint possession or other common or part enjoyment of such house. That does not mean to say that in the circumstances of the proviso the transferee can never gain possession, but that he can then gain possession only by way of enforcing a partition of the property. The remedy for such partition is provided under Section 4 of the Partition Act, 1893 which appears to be a logical sequel to Section 44 Transfer of Property Act, 1882. Section 4 of the Partition Act, 1893 reads:

"4. Partition suit by transferee of share in dwelling house---(1) Where a share of a dwelling-house belonging to an undivided family has been transferred to a person who is not a member of such family and such transferee sues for partition, the Court shall, if any member of the family being a shareholder shall undertake to buy the share of such transferee, make a valuation of such share in such manner as it thinks fit and direct the sale of such share to such shareholder, and may give all necessary and proper directions in that behalf.

(2) If in any case described in subsection (1) two or more members of the family being such shareholders severally undertake to buy such share, the Court shall follow the procedure prescribed by subsection (2) of the last foregoing section."

The judgment in the case of Dorab Cawasji Warden v. Coomi Sorab Warden (AIR 1990 SC 867) is an excellent discourse on the meaning of the words "dwelling house belonging to an undivided family" as appearing in Section 44 Transfer of Property Act, 1882 and Section 4 Partition Act, 1893. It explains that the object of the proviso to Section 44 is to prevent the intrusion by a stranger into a family residence despite the transfer of a share therein to him.

In the facts of that case the property was found to be a dwelling house belonging to an undivided family and therefore it was held that the delivery of possession to such stranger was contrary to the proviso to Section 44, and consequently a mandatory injunction was granted directing the stranger to vacate the property.

20. Having said the above, in the facts of the instant case the question whether the Suit Property was at the relevant time a "dwelling-house belonging to an undivided family" within the meaning of the proviso to Section 44 Transfer of Property Act, 1882, is a question yet to be determined in the said Suit. Therefore, till such time the question of awarding joint possession of any part of the Suit Property to the Respondent No.1 does not arise. However, to reiterate, that is not to say that the Respondents 2 and 3 could not have transferred their share in the Suit Property to the Respondent No.1.

21. The upshot of the above discussion is that even assuming that the proviso to Section 44 Transfer of Property Act, 1882 were attracted, it cannot be a ground to hold that the conveyance deed executed by the Respondents 2 and 3 to the Respondent No.1 of their share in the Suit Property was unlawful.."

As per the decision of the Division Bench of this Court there is no requirement in any law for a co-owner of a property to either seek the consent of any of the other co-owners of a property prior to selling their undivided share to a third party or for that matter to offer their undivided

share to the other co-owners prior to selling their undivided share to a third party. The only restriction that exists in the law is that where the immovable property is a dwelling house and which is in occupation of other co-owners as part of an “undivided family” possession of the dwelling house cannot be claimed by the purchaser. Admittedly the Said Property is not a dwelling house and is a commercial building

In this context Mr. Muhammad Rafique Kalwar advanced arguments on behalf of the Defendant No. 1 and contended that the provisions of Section 44 of the Transfer of Property Act, 1882 would only be attracted where the purchasers were in possession of the Said Property, as otherwise it would be impossible to determine the portion of the Said Property that would be owned by the incoming purchaser. In this regard he relied on the decision of the Supreme Court of Pakistan reported as **Ali Gohar Khan vs. Sher Ayaz**² in which one of the co-owners of a property attempted to construct on a property without the consent of the other co-owners and the Supreme Court of Pakistan held that:

“ ... *The sole question which needs consideration in this case is whether in the facts and circumstances, of the present suit a decree for perpetual injunction can be issued. As the record stands, **the respondents had purchased a portion of the land from a joint Khata** and dumped stones for construction over the same. The report of the Commissioner though may not be germane to the pleadings of the parties but is relevant to the extent that the suit property is jointly owned by the parties and no partition in any form has yet taken place. Furthermore the fact that the property in suit is joint and no private partition amongst the parties has taken place stands finally decided by the Civil Judge vide his order dated 9-1-1975. Therefore it can be said without any fear of contradiction that the parties are co-shares in the suit property. **The question now is whether a co-sharer in such a situation can deal with a joint property in the manner he liked without the express permission of other co-sharers. The expression obviously is in the negative as it is a settled principle of law that in case of joint immovable property each co-sharer is interested in every inch of the subject-matter irrespective of the quantity of his interests. A co-sharer thus will not be allowed to act in a manner which constituted an invasion on the right of the other co-sharers. A co-sharer in possession of a portion of the joint property, therefore cannot change the nature of the property in his possession unless partition takes place by metes and bounds.**”*

(Emphasis is added)

² 1989 SCMR 130

The decision of the Supreme Court of Pakistan clarifies that the question was as to whether “a co-sharer in such a situation can deal with a joint property in the manner he liked without the express permission of other co-sharers.” The question was answered as to when a co-sharer wishes to deal i.e. use a property he cannot do so without the permission of the other co-owners. It is to be noted that the Supreme Court of Pakistan specifically recorded that the Respondents had purchased the property from a joint “Khata” but did not invalidate the transfer of the property in favour of the Respondents which it could have done if it had considered that the transfer of the property itself was invalid as the property was jointly held.

Mr. Muhammad Rafiq Kalwar also relied on the decision reported as **Rao Abdul Rehman vs. Muhammad Afzal**³ wherein the Supreme Court of Pakistan refused to grant specific performance of an Agreement of Sale as the exact description of the property could not be determined in “metes and bounds” stating that such a contract was not capable of being ordered to being performed as the description of the property was not capable of being determined.

Mr. Usman Tufail Shaikh appeared on behalf of the Defendant No. 5 and contended that the price that was being quoted by the Purchasers was very low and that he wished to be given an opportunity to match the bid that was being made by the Purchasers. He relied on the decisions reported as **Mauledino and 2 others vs. Marloob Hussain and 3 others**⁴ and **Iftikharuddin vs. Jamshed. K. A Marker**⁵ where it was held that the right of “pre-emption” under Muhammadan Law existed in the Province of Sindh to a co-sharer to a property to purchase his share to the Said Property.

³ 2023 SCMR 815

⁴ 1989 CLC 1992

⁵ PLD 1995 Khi 608

Mr. Haider Imam Rizvi who appeared on behalf of the Plaintiff, Mr. Munir Iqbal who appeared on behalf of the Defendant No.2, Mr. Khilji Bilal who appeared on behalf of the Defendant No. 3 and Mr. Haider Raza who held brief for Mr. Saadi Sardar, Advocate for the Defendant No.4 all acceded to the purchasers offer to purchase the Said Property but were willing to give the Defendant No. 5 the opportunity to match the offer made by the Purchaser to buy out their share of the Said Property as long as the same was done expeditiously.

Mr. Syed Mustafa Mahdi appeared on behalf of the Purchasers and stated that they are ready and willing to buy out the Plaintiff, the Defendant No. 2, the Defendant No. 3 and the Defendant No. 4 share as agreed and were also willing to appear before the Nazir of the Court and enter into a "private auction" with the Defendant No. 5 so as to bid for the undivided share of the Plaintiff, the Defendant No. 2, the Defendant No. 3 and the Defendant No. 4 share and if the other Defendants wished to sell their share at the rate agreed with the Plaintiff, the Defendant No. 2, the Defendant No. 3 and the Defendant No. 4 at the "private auction" then their share as well.

I have heard all the counsel for the Plaintiffs and the Defendants and have perused the record. It is apparent that the Plaintiffs and the Defendants No. 1 and 5 are each owners of an undivided share in the Said Property, which they each had inherited, and which is not in any of their possession and which is purportedly in possession of the Purchasers and who are their tenants. Clearly the Plaintiffs and the Defendants have reached an impasse in how to sell with the Said Property and which has necessitated the Plaintiffs and the Defendants No. 2, 3 and 4 to agree to sell their undivided share in the Said Property to the Purchasers.

The status of each of the Plaintiffs and the Defendants No. 1 to 5 has been clarified by the Supreme Court of Pakistan in the decision reported as

Ghulam Ali and 2 others vs. Mst. Ghulam Sarwar Naqvi⁶ wherein it was

clarified that:

“ ... *The main points, of the controversy in this behalf get resolved on the touchstone- of Islamic law of inheritance. As soon as an owner dies, succession to his, property opens. There is no State intervention or clergy's intervention needed for the passing of the title immediately, to the heirs. **Thus it is obvious that a Muslim's estates legally and juridically vests immediately on his death in his or her heirs and their rights respectively come into separate existence forthwith.** The theory of representation of the estate by an intermediary is unknown to Islamic Law of inheritance as compared to other systems. Thus there being no vesting of the estate of the deceased for an interregnum in any one like an executor or administrator, it devolves on the heirs automatically, and immediately in definite shares and fraction. It is so notwithstanding whether they (the heirs) like it, want it, abhor it, or shun it. It is the public policy of Islamic law. It is only when the property has thus vested in the heir after the succession opens, that he or she can alienate it in a lawful manner. There is enough comment and case-law on this point which stands accepted.”*

(Emphasis is added)

The Supreme Court of Pakistan having settled the issue of when the ownership of a property is transmitted into the names of the legal heirs has also clarified the status of the possession of each of the co-owners through inheritance wherein it was clarified that:

“ ... *It appears that-the plaintiffs-respondents were the heirs of Lakhwera and entitled to inherit in the same manner as the petitioners. The land being joint there was no question of their remaining out of possession or the suit being time barred. The possession of the one co-sharer is for the benefit of all the other co-sharers and a co-sharer is deemed to be in possession through his other co-sharers. ...*

It is not for the first time that it is being, so held. Even earlier commentators on Islamic Law (its inheritance branch in particular) have indicated the same approach with reference to some decided cases. The heir in possession was considered to be in constructive possession of the property on behalf of all the heirs in spite of his exclusive possession, e.g., the possession of the brothers would be taken to be the possession of their sisters, unless there was an express repudiation of the claims of the sisters by the brothers. Hyder Khan v. Chanda Khan (5011 C 691 (All).

The Plaintiffs being co-owners of the Said Property apparently are unable to mutate the same into their own name on account of an impasse as between the co-owners and now wish to sell their share to the Purchasers, through a private transaction. It is natural that the Defendant No. 1 and 5 will feel prejudiced by such a course of action as is being

⁶ PLD 1990 SC 1

adopted by the Plaintiffs and the Defendants No. 2, Defendant No. 3 and Defendant No. 4 as if the transfer is completed:

- (i) the Defendant No. 1 and 5 will be lumbered with dealing with Purchasers who are in actual possession of the Said Property and whereafter any action that will be maintained by them as against the Purchasers will be prejudiced by the fact that the Purchasers are in fact in possession of the Said Property;
- (ii) the Defendant No. 1 and 5 will feel equally prejudiced by the fact that being co-owners of the Said Property are not being given any pre-emptive right to purchase the undivided share in the Said Property held by the Plaintiff, the Defendant No. 2, the Defendant No. 3 and the Defendant No. 4 so as to assume control over the Said Property.
- (iii) the Purchasers possession of the Said Property, would greatly reduce the price that the Defendant No. 1 and the Defendant No. 5 will receive for what will be in a minority share in the Said Property without the ability to transfer possession to any other third party purchaser.

Conversely, if the right of the Plaintiffs and the Defendants No. 2, Defendant No. 3 and Defendant No. 4 to sell their share in the Said Property is curtailed by compelling them to sell their share **only** to the other co-owners i.e. the Defendant No. 1 and 5 then clearly the Plaintiffs and the Defendants No. 2, 3 and 4 are equally prejudiced as they will be left practically at the mercy of the Defendant No. 1 to 5 and would be unable to realise the true value of their undivided share in the Said Property.

The Partition of the Said Property would also not be in the best interests of either the Plaintiffs and the Defendants as even if the property was subject to partition, keeping in mind that they would be entitled to an undivided share each in the Said Property and would have to accede to each of them being transferred units constructed on the Said Property and which would be subject to tenancies protected under the provisions of the Sindh Rented Premises Ordinance, 1979, will also reduce the value of the property that would be realised by them.

The Public Auction of the Said Property, keeping in mind that the Said Property is in fact occupied by the Purchasers would also bring down the value of the Said Property and therefore lead to each of the Plaintiffs and the Defendants No. 1 to 5 not realising the true value of the Said Property. Clearly, a problem of biblical proportions!

I have considered the arguments of Mr. Muhammad Rafiq Kalwar that a co-owner is prohibited from alienating his undivided share in the Said Property without first demarcating the same i.e. without first defining the "metes and bounds" of the undivided share. This interpretation to my mind does not follow from the interpretation of the provisions of Section 44 of the Transfer of Property Act, 1882. It is clear that the section 44 of the Transfer of Property Act, 1882 does not in any manner restrict the right of an owner of a property by directing the person to seek the permission of the other co-owners prior to transferring their undivided share in a property to a third person. Much to the contrary, the provision actually enables such a transfer by defining the rights, title and interest of a person who acquires the undivided share in the Said Property by stating that they will hold in that property as was held by their predecessor in title, save that where the property is a dwelling house in the occupation of an undivided family then the Purchaser cannot claim possession of the Said Property despite having completed the transfer and could only sue for partition thereafter. Clearly

there is no restriction on a person to transfer their share as against the criteria of first having to divide the Said Property prior to transferring the same as advocated by Mr Muhammad Rafiq Kalwar and to cast such an interpretation on Section 44 of the Transfer of Property Act, 1882 would in fact be 'reading into' that section various conditions which are not prevalent therein. This was also the decision of a Division Bench of this Court in the decision reported as *Nafeesa Siddiqui vs. Danish Rafique*⁷ and which aside from being binding on me cannot be faulted. Finally, if one is to consider the Judgement of the Supreme Court reported as *Ali Gohar Khan vs. Sher Ayaz*⁸ and which was relied on by Mr. Muhammad Rafiq Kalwar it is worth noting that in that case an acquisition of an undivided share of a property had taken place and the Supreme Court of Pakistan did not set aside the transfer and only stated that a co-owner could not put the property to any specific use without the consent of the other co-owners.

Having come to the conclusion that Mr. Muhammad Rafiq Kalwar's arguments are not tenable, I do however consider that arguments of Mr. Usman Tufail Shaikh that the Defendant No. 5 should be permitted to match the offer that is being made by the Purchasers to acquire the share of the Plaintiffs, Defendant No. 2, Defendant No. 3 and the Defendant No. 4, as quite reasonable. Clearly this would be both beneficial to the Plaintiffs, Defendant No. 2, Defendant No. 3 and the Defendant No. 4 as the price of their share of the Said Property may increase and which would also allow the Defendant No. 5 to maintain her rights over the Said Property.

For the foregoing reasons, the Nazir Report is also taken on record and the listed Application is granted and in terms of which the following directions are given with the consent of the Plaintiffs, Defendant No. 2,

⁷ 2019 CLC 1739

⁸ 1989 SCMR 130

Defendant No. 3, Defendant No. 4, Defendant No. 5 and the Purchasers in the following terms:

- (i) the Plaintiffs and the Defendant No. 1 to 5 will appear before the Nazir on 7 October 2023 and on which date a “private auction” will be conducted by the Nazir as between the Purchasers and the Defendant No. 5 for acquiring the undivided shares of the Plaintiff and the Defendant No. 2, Defendant No. 3 and Defendant No. 4 in the Said Property, the reserve price being the rate that has already been offered by the Purchasers to the Plaintiff and the Defendant No. 2, Defendant No. 3 and Defendant No. 4;
- (ii) the Nazir will on 10 October 2023 present a report before the Court indicating who made the higher bid and seeking confirmation of the bid made.

3,4 & 5. Deferred.

JUDGE