

JUDGMENT SHEET
IN THE HIGH COURT OF BALOCHISTAN, QUETTA

Civil Revision Petition No. 294 of 2020
(CC# 47120)

Aftab Ashraf

Versus

Khursheed Ashraf and others

JUDGMENT

Date of hearing: 18th November, 2022 Announced on 22nd November 2022

Petitioner: by M/s Tariq Mahmood Butt and Aimal Tariq Butt, Advocates.

Respondents: by M/s Syed Mumtaz Hanafi Baqri and Rasool Bakhsh Baloch, Advocates.

GUL HASSAN TAREEN J: - The petitioners, through the instant civil revision petition, filed under section 115, the Civil Procedure Code, 1908 (“the Code), has assailed the concurrent judgments and decrees dated 05th October, 2019 and 19th August, 2020 (“impugned judgments and decrees”), passed respectively by the Courts of Civil Judge-V, Quetta (“Trial Court”) and Additional District Judge-I, Quetta (“Appellate Court”), whereby suit, instituted by the respondents, was decreed.

2. Brief facts of the case are that the respondents instituted a civil suit for partition, possession and permanent injunction against the petitioner, in respect of the partition of a property bearing municipal No. 4-15/217-A, Khewat/ khatooni Nos. 33/54, khasra No. 2 Qittat, measuring 13917 sq: ft., situated in Mohal and Mouza Ward No. 31, Quetta (“suit property”) which according to the respondents is a joint property between them and the petitioner. The respondent Nos. 2 to 4, earlier, instituted a suit for partition of the suit property which

was decreed up-to the final hierarchy of the Hon'ble Supreme Court. Finally, the respondents prayed for partition of the suit property through a preliminary decree and confirmation of the execution of the preliminary decree through a final decree.

3. The petitioner, on service of summons, submitted a contesting written statement and later made an application under Order VII rule 11, the Code, for dismissal of the suit mainly on the ground of resjudicata. The Trial Court granted the application, however, this Court in R.F.A No. 65/2013, allowed the appeal of the respondents and remanded back the case to the Trial Court for decision of the suit on merits. The same was upheld by the Hon'ble Supreme Court of Pakistan on 8th January, 2016. In post remand proceedings, the respondents made an application under Order XII rule 2, the Code accompanied by a notice to the petitioner to admit the judgments passed in the former suit. The petitioner admitted the existence of the said judgments. The respondents through, the respondent No. 1 made statement on oath. In rebuttal, the petitioner produced four witnesses and later his right to produce remaining evidence and right of his own statement, was closed by the Trial Court. The Trial Court decreed the suit. The petitioner preferred an appeal under section 96, the Code against the decretal judgment. The Appellate Court dismissed the appeal on merits as well as on the ground of belated filing.

4. Mr. Tariq Mahmood Butt, Advocate, counsel for the petitioner, states that the respondent Nos. 2 to 4 had received their shares in the legacy of parents, in the form of a property at Karachi

and they, exclusively, had sold out the said property and not shared the sale proceeds. He also states that for prove of such fact, the Trial Court has not allowed the petitioner to produce his left over evidence and has illegally closed the right of evidence of the petitioner. Finally, he requests for setting aside of the impugned judgments and remand of the case to the Trial Court. Messrs. Syed Mumtaz Hanafi Baqri and Rasool Bakhsh Baloch, Advocates, counsel for the respondents state that the issue of the joint status of the suit property had already been finally set at rest, up to the level of the Hon'ble Supreme Court. They also state that the defence raised by the petitioner in his written statement and intended to be proved through the left over evidence, is, indeed barred by resjudicata for, the same has already been finally heard and decided in the former suit. Finally, they state that the petitioner has preferred a time barred appeal and the application made by the petitioner for condonation of delay has not stated a sufficient cause for condonation of belated filing.

5. I have heard counsel for the parties and have gone through the record of the case. This is the third time when parties to the petition have come before this Court, in relation to partition of the suit property. The parties are at litigation since 1993 till today i.e. 29 long years. On 03rd August, 1992, the respondent Nos. 2 to 4 had issued a legal notice to the petitioner and the respondent No. 1 for partition of the suit property. The legal notice was not answered by the petitioner. The respondent Nos. 2 to 4 instituted a Civil Suit No. 11/1994 for partition, possession of the suit property and mesne profits. The Court of Civil Judge-I, 1st Class, Quetta, after recording

evidence of the parties, held that the suit property is joint between the parties and directed for partition vide judgment and decree dated 30th May, 1996. The terms of the decree are relevant to be reproduced hereunder:

“It is ordered and decreed that this suit is allowed and a decree for partition and possession is passed and this is declared that the plaintiffs are entitled for 96 shares out of 224 shares. The each plaintiff is entitled for 32 shares, if the property is not partitionable then the defendants are directed to mutually and with consent of plaintiffs assess the total value of the whole property and pay the amount in cash equivalent to 96/224 to the plaintiffs so that plaintiffs be able to get their due right/share as per Islamic Law. The executing court can appoint a local commissioner to examine the property for partition to the extent of 96/224 and put the plaintiffs in their respective share or assessed the value of the share of plaintiffs.”

The decree was assailed by the petitioner and the respondent No. 1 before this Court in R.F.A No. 15/1996 which was dismissed on 19th August, 1997 and finally confirmed by the Hon’ble Supreme Court on 25th September, 1998 in C.P. No. 227-Q/1997. However, the respondents could not file execution of the decree and in 2012, again instituted a civil suit for partition of the suit property. On an application made by the petitioner under Order VII rule 11, the Code, the suit was dismissed by the Trial Court on the ground of resjudicata. This Court, on an appeal preferred by the respondents, set-aside the suit’s dismissal order and remanded back the case to the Trial Court by holding that the suit is not barred by the resjudicata. The petitioner filed C.P. No. 2992 of 2015 against the remand judgment of this Court before the Hon’ble Supreme Court which was dismissed on 8th January, 2016.

6. In post remand proceedings, the respondent No. 1 made statement on oath on his behalf as well as on behalf of the respondent Nos. 2 to 4 as attorney. He tendered in evidence the revenue extract of the suit property as Ex: P/2, the former judgments of the Trial Court, the High Court and the Hon'ble Supreme Court as Ex: P/3, Ex: P/4 and Ex: P/6 respectively. The petitioner filed a list of 21 witnesses dated 11th April, 2018 and only examined four witnesses since 11th April, 2018 till 26th June, 2019. Later, the petitioner put the case on adjournments for one reason or the other. Finally, the Trial Court closed the right of evidence of the petitioner and decreed the suit vide impugned judgment. The petitioner impugned the decretal judgment in appeal which was dismissed by the Appellate Court on merits as well as on account of limitation.

7. Whether the suit property is joint and therefore, liable to partition and whether the respondents have received their shares in the property of Karachi? The first part of this material proposition of law and fact, has already been finally heard and decided by the Trial Court, the Appellate Court and the Hon'ble Supreme Court in the former suit. The former judgments, are relevant under Article 57, the Q.S.O, which reads:

“Judgments, orders or decrees, other than those mentioned in Article 54, 55 and 56, are irrelevant unless the existence of such judgment, order or decree is a fact in issue or is relevant under some other provision of this Order.”

The fact in issue in this case is “Whether the suit property is joint and therefore, liable to partition?” The existence of former judgments (Ex: P/3 to Ex: P/5) proves that the suit property is still

joint and the respondents are entitled to get their shares in the suit property. The petitioner tried to linger on the case for, he is in possession of the suit property since the death of the father and he has since been getting the usufruct or benefits of the suit property to the exclusion of the respondents. I have gone through the written statement of the petitioner but could not have found any plea that he has otherwise satisfied the shares of the respondents in the suit property. The defence set-up by the petitioner and the further evidence intended to be produced for prove thereof, is barred by resjudicata for, the same defence has already been adjudicated upon by the courts in the former suit of the respondent Nos. 2 to 4. Any new plea on behalf of the petitioner is barred by the principles of constructive resjudicata. It is to be observed that the principle of the actual resjudicata (section 11, the Code and Article 54, the Q.S.O) and constructive resjudicata (Order 2 rule 2 sub rule (2), the Code), not only apply against the plaintiff of a suit rather is applicable with full force against the defendant of a suit. A defendant cannot ask for adjudication of a fact which has already been adjudicated in a former suit. Likewise, when a defence which should have been raised by a defendant but had not been raised in a former suit, he can't raise the new fact in a subsequent suit between the same parties under the command of the constructive resjudicata. Since defence of petitioner is barred by resjudicata, therefore, he cannot be allowed to lead the remaining evidence for prove of a fact which has ready been tried and decided, irrespective of the question whether the Trial Court has rightly closed his evidence or otherwise. Even otherwise, in partition suit, a plaintiff at the same

time is defendant and vice versa. In the former suit, the petitioner had already led evidence in proof of his defence, therefore, he cannot be allowed to again lead evidence upon the facts already finally heard and decided.

8. Apart from the doctrine of resjudicata, improper rejection of evidence by a court below cannot be considered as a ground for remand of case under Article 162, the Q.S.O, which reads:

“162. The improper admission or rejection of evidence shall not be ground of itself for a new trial or reversal of any decision in any case, if it shall appear to the Court before which such objection is raised that, independent of the evidence objected to and admitted, there was sufficient evidence to justify the decision or that if the rejected evidence had been received, it ought not to have varied the decision.”

The Article 162, Q.S.O, is applicable to civil as well as criminal cases. The Article applies to all judicial proceedings in or before any court exercising judicial or quasi judicial powers.

The rejected left over evidence of the petitioner even if allowed to be produced, would not change the fate of the impugned judgments, in view of aforementioned discussion. The contention of the petitioner's counsel is, therefore, rejected. The petitioner is bent on, to linger on the case of the respondents. The respondent No. 1 for his statement, came from Musqat City, however, the petitioner had not cross-examined him, merely to linger on the case. Therefore, the Trial Court had closed his right of cross-examination on the statement of the respondent No. 1. However, on the application of the petitioner, the right of cross-examination was restored by the Trial Court subject

to payment of ticket expenses of the respondent No. 1. The petitioner, failed to pay the ticket expenses of the respondent No. 1, i.e. Rs.60,000/-, though he came twice from a foreign country. The petitioner despite availing countless adjournments failed to lead evidence, therefore, his right of evidence was rightly closed by the Trial Court.

9. The appeal of the petitioner before the Appellate Court was barred by ten days under Article 152, Schedule-I, the Limitation Act, 1908. The application made by the petitioner does not state any reasonable cause for condonation of delay caused in filing of appeal. In the application, the petitioner stated that he used to visit the chamber of his counsel, but the counsel had not informed him about the fate of the suit. The petitioner has not sued his counsel for the alleged allegation which means that he has mentioned false reason in his application for condonation of delay. Hence, the appeal on this count has rightly been dismissed by the Appellate Court.

10. The impugned judgments are well reasoned, therefore, the revision petition is dismissed. The suit property is joint and the parties to the petition are entitled for possession of their respective shares in the suit property through partition by metes and bounds in the following proportions:

<i>S#</i>	<i>Name</i>	<i>Share</i>
<i>1</i>	<i>petitioner (Aftab)</i>	<i>3976.285 sq: ft:</i>
<i>2</i>	<i>respondent No. 1: (Khursheed Ashraf)</i>	<i>3976.285 sq: ft:</i>
<i>3</i>	<i>respondent No. 2: (Mrs. Parveen)</i>	<i>1988.142 sq: ft:</i>
<i>4</i>	<i>respondent No. 3: (Naheed Hamdani)</i>	<i>1988.142 sq: ft:</i>
<i>5</i>	<i>respondent No. 4: (Mrs. Zareen Qurban)</i>	<i>1988.142 sq: ft:</i>

The petitioner is also liable to pay the ticket expenses of the respondent No. 1 i.e. Rs. 60,000/- as well as costs of the proceedings.

Preliminary decree sheet be drawn in accordance with Order XX rule 18(2), the Code.

Announced in open Court
Dated: 22nd November, 2022

Judge

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