

# 8. An Overview of Partition Matters

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## 1. OBJECT

**P**reamble of The Punjab Partition of Immovable Property Act, 2012 states that its purpose is to reform existing laws relating to partition and to provide for ancillary matters. Practice under the preceding enactment; The Partition Act, 1893 had generated some difficulties and delays in finalization of partition matters especially with regard to modes of partition. The Act of 2012 prescribed comprehensive procedure for partition suits which was not the case with its predecessor. It made provision for frame of suit, prescribed time limit for filing written statement, gave penal provisions for curbing delays and most importantly gave a mechanism of three clear-cut options for execution of preliminary partition decrees. The previous Act of 1893 had only a few provisions which related to modalities of sale of property in case partition was not done.

## 2. LEGAL ASPECTS OF A SUIT FOR PARTITION

While dealing with partition matters some key law points should be kept in mind. Partition is a division of joint property among co-owners so that each may become exclusive owner of part allotted to him. It converts joint enjoyment into enjoyment severally.<sup>2</sup> A suit for partition may be brought by one or more of the owners of jointly owned immovable property; which is defined in section 3(c) of the Act of 2012 as a property owned jointly and not being an agricultural land. Unity of title and unity of possession is a condition precedent for a partition suit.<sup>3</sup> However, as a matter of legal fiction, every co-owner is presumed to be in possession of each and every inch of un-partitioned land

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<sup>2</sup> 1993 CLC 31

<sup>3</sup> 2003 MLD 884 (Lahore), 2019 CLC 211 (Sindh) & 1993 CLC 31

according to his share, even though not in actual physical possession.<sup>4</sup> A partition suit necessarily implies a prayer for declaration of joint ownership of parties. Co-owner seeking partition should be able to display clear title of property sought to be partitioned and without title all proceedings will be a nullity.<sup>5</sup> Sometimes, partition is sought on the basis of P.T.1 Form. It is settled law that P.T.1 Form is not a title document and only a decree for protection of possession can be passed on the basis of it.<sup>6</sup> As such partition cannot be done on its basis.

A suit for partition is based on old maxim of Roman Law “*Nemo in communione potest invitus detineri*” which means that no one can be kept in co-proprietorship against his will.<sup>7</sup> This maxim is followed in nearly all modern legal systems. Partition is an equitable relief.<sup>8</sup> A plaintiff cannot be allowed to pick and choose from joint property or properties.<sup>9</sup> A suit for partial partition is bad in law and not maintainable.<sup>10</sup>

All co-owners of the joint property should be made parties to the partition suit and none should be left out, in order to save the suit from plea of non-joinder. However if some co-owner is not impleaded, proper course for court is not to dismiss the suit but implead the joint owner left out.<sup>11</sup> However, a person holding only an agreement to sell in his favor from a co-owner is yet to become a joint owner and not a necessary party in partition suit.<sup>12</sup> Every co-owner, whether arrayed as plaintiff or defendant, stands in the position of a plaintiff.<sup>13</sup> If a co-plaintiff wants to withdraw from suit, he should rather be transposed as defendant so that suit does

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<sup>4</sup> 2007 SCMR 1884, 2004 SCMR 1581, 1993 SCMR 1463 & 1989 SCMR 130

<sup>5</sup> *Bulwant Singh v Ishawar Singh* 2001 (3) RCR (Civil) 303 (FCH), PLD 1970 Dacca 466

<sup>6</sup> 2007 SCMR 181

<sup>7</sup> PLD 2009 Supreme Court 198

<sup>8</sup> PLD 1960 Dacca 15

<sup>9</sup> 2006 YLR 2289

<sup>10</sup> PLD 2009 Supreme Court 198, 1999 SCMR 2182, 2016 YLR 1489, PLD 2016 Peshawar 8, 2006 YLR 2289, 2000 CLC 519, 1999 YLR 2190, 1994 CLC 75, 1983 CLC 684, PLD 1960 Dacca 15, PLD 1961 Dacca 679, 2020 YLR 2206 (Peshawar), PLD 2014 Lahore 417

<sup>11</sup> 2007 SCMR 729, 2013 MLD 708, 1990 CLC 1205 & 1987 MLD 694

<sup>12</sup> PLD 2011 Lahore 539, 1999 CLC 1291 & 1986 MLD 443

<sup>13</sup> 1981 CLC 409

not become improper.<sup>14</sup> Although Punjab Partition of Immovable Property Act, 2012 is a special law, provisions of general law; Code of Civil Procedure, 1908 are applicable given that they are not inconsistent with any provision of the Act of 2012.<sup>15</sup>

### 3. RELEVANT PROVISIONS

- Punjab Partition of Immovable Property Act, 2012
- Sections 54, 75, rules 13 & 14 of Order XXVI and rule 18 of Order XX of Code of Civil Procedure 1908
- Section 2(15) read with article 45 of schedule of The Stamp Act, 1899
- Chapter XI consisting of sections 135 to 150 of West Pakistan Land Revenue Act 1967 read with chapter 18 of Land Records Manual & chapter XIII of Land Administration Manual

### 4. PRELIMINARY MATTERS

#### 4.1 JURISDICTION

Partition of residential and commercial immovable property is done by Civil Court<sup>16</sup>, whereas forum for partition of agricultural land is Revenue Officer.<sup>17</sup>

At times questions arise before court about jurisdiction for hearing and decision of a partition suit where part of the joint property is residential or commercial on one side and the other part consists of agricultural land. This point came up before honorable Peshawar High Court in *Raisham Khan v Mir Zad Khan*<sup>18</sup> and the court held emphatically that only forum for partition of joint property consisting of land as well as

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<sup>14</sup> 1994 CLC 1967

<sup>15</sup> See section 15 of The Punjab Partition of Immovable Property Act, 2012

<sup>16</sup> See section 4 read with section 3(c) of The Punjab Partition of Immovable Property Act, 2012

<sup>17</sup> See section 135 and other provisions of Chapter XI of The Land Revenue Act, 1967. May also see 2012 SCMR 695, PLD 2008 Peshawar 97

<sup>18</sup> 2019 YLR 2772 (Peshawar)

constructed property is civil court. In a similar case titled *Qadeer Ahmed v Ejaz Ahmed*<sup>19</sup> Honorable Lahore High Court ruled that where most of the joint properties were of residential/commercial nature, Civil Court being the court of ultimate jurisdiction was the sole forum to decide the lis. It further held that if from a cluster of joint properties, one is within jurisdiction of Civil Court, then it can also adjudicate upon properties not within its jurisdiction, being court of ultimate jurisdiction.

For determining as to whether a property is agricultural or non-agricultural, regard may be had to following questions:

Whether the land is occupied as the site of a town or village?<sup>20</sup>

Whether or not the land is assessed to land revenue?<sup>21</sup>

Whether the land is being cultivated or not?<sup>22</sup>

Whether there is construction over the land?<sup>23</sup>

If there is construction over the land, whether or not it is used for any purpose subservient to agriculture?<sup>24</sup>

Mere fact that some land was described as “ghair mumkin” does not necessarily mean that it has ceased to be an agricultural land.<sup>25</sup> Jurisdictional competence of court is determined on the basis of value of plaintiff’s share in the joint property.<sup>26</sup>

## 4.2 LIMITATION

Limitation for a suit for partition is six years under article 120 of The Limitation Act 1908 but it has been held that it is a

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<sup>19</sup> 2017 YLR 1217

<sup>20</sup> See section 3 of The Land Revenue Act, 1967 and case law reported as 2019 CLC 1343 (Lahore)

<sup>21</sup> See section 3 of The Land Revenue Act, 1967

<sup>22</sup> PLD 1965 Lahore 429

<sup>23</sup> Ibid and 1997 SCMR 1792

<sup>24</sup> 1991 SCMR 1944, 1989 SCMR 293, 1989 SCMR 1564, 1987 SCMR 1426, 1974 SCMR 356

<sup>25</sup> 2019 CLC 1343

<sup>26</sup> PLD 1961 Supreme Court 349, PLD 1962 A J & K 29 & PLD 1960 Dacca 789

continuing right and partition suit can be filed any time during joint possession.<sup>27</sup> Limitation is irrelevant and does not run in case of a suit for partition.<sup>28</sup>

## 5. PROCEDURE

Ordinarily courts bifurcate a partition suit into two houses:

- 1) First round ends on passing of a preliminary decree. A plaint for partition should state details of the joint property, implead all co-owners as parties. Relevant documents should be annexed.<sup>29</sup> Not more than 10 days 'notice' (instead of summons) is to be issued to defendant(s).<sup>30</sup>

Defendant is required to file written statement within 30 days of his first appearance in court, failing which his defence shall be struck off.<sup>31</sup> In case defence is struck off, defendant will not be allowed to lead any evidence.<sup>32</sup>

Court may order the owner in possession of property to deposit mesne profits in proportion to share of a co-owner not in possession, pending adjudication of suit and in case of default, court may strike off his defence if he is a defendant or dismiss the suit if he is plaintiff.<sup>33</sup> Court can also pass order for mesne profits at final stage under section 12 of the Act.

Decision of question of title and shares of joint owners amounts to decree.<sup>34</sup> For deciding question of title court may, and at times should, frame issues and record evidence.<sup>35</sup> Shares of co-owners can be amended later on in case of death of an owner.<sup>36</sup> Legal questions about

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<sup>27</sup> 2004 SCMR 1036, 2017 YLR 735 (Lahore), 2017 MLD 1902 (Sindh), 2017 CLC Note 177 (Sindh), PLD 2014 Lahore 417, 2014 CLC 254, 2006 MLD 1496

<sup>28</sup> PLD 2014 Lahore 417, PLD 2012 Sindh 449, 2007 MLD 54

<sup>29</sup> See section 4 of The Punjab Partition of Immovable Property Act, 2012

<sup>30</sup> section 5 *ibid*

<sup>31</sup> section 6 *ibid*

<sup>32</sup> section 6 & 7 *ibid*

<sup>33</sup> Section 7 *ibid*

<sup>34</sup> Section 8(2) *ibid*

<sup>35</sup> PLD 2020 Lahore 684

<sup>36</sup> PLD 1954 Federal Court 184

jurisdiction, partial partition, no co-ownership, non-joinder or mis-joinder and maintainability of the suit otherwise, should be decided at this stage.

- 2) Second round is usually known as final decree proceedings. After preliminary decree three modes of execution are prescribed in the Act. These are (i) Appointment of Referee (ii) Internal Auction & (iii) Open Auction. These modes are to be adopted only in the sequence given above and court cannot choose any other sequence.

Here a question arises as to whether any other mode of execution of preliminary decree like appointment of local commissioner is permissible or not? In this regard it is important to keep in mind the delay caused by practice of appointment of local commissioners, objections of aggrieved party on such report, decision of those and sometimes, repetition of this process, under the previous Act; Partition Act, 1893. In the Act of 2012, a visibly swifter and comprehensive mechanism is provided. In this context, application of maxim “*Expressio Unius Alterius Exclutio*”, which means that mention of one thing implies exclusion of other<sup>37</sup>, may be applied and listing of options by the statute in the shape of appointment of referee, internal and open auction, may be taken as a bar on other options as a result of necessary legal intendment. Therefore, court should stick to the three modes of execution given by the statute and resort to provisions of Code of Civil Procedure like section 75 and rules 13 & 14 of Order XXVI should be taken as prohibited through legal intendment.

### **5.1 REFEREE FOR PARTITION**

Referee is appointed on the basis of agreement in writing of all co-owners. Court grants limited time to referee for making

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<sup>37</sup> PLD 1975 Supreme Court 32

proposal of partition and may extend that time. Fee of referee shall be paid by co-owners according to their respective shares.<sup>38</sup> Referee is required to determine whether the property is partition-able and if so, to devise a partition plan. Court shall affirm the proposal of referee unless it is in contravention of any law.

## **5.2 INTERNAL AUCTION**

If partition through referee fails; which may be due to parties not agreeing on a referee or the referee finding that property is not partition-able or court finding proposal of the referee in contravention of any law like law relating to town planning etc., court is required to go to internal auction after fixing reserve price.

All joint owners are allowed to participate in auction conducted in court. Record of internal auction is maintained by court. Highest bidder is declared by court as auction purchaser and required to deposit auction price in 15 days after deducting amount equaling his share in the property. If auction purchaser does not deposit auction price in said period, court re-conducts internal auction without the defaulter participating.<sup>39</sup>

## **5.3 OPEN AUCTION**

If co-owners do not participate in internal auction or only one of them is willing to participate in such auction, court will go to open auction in which any co-owner may also participate. Open Auction is conducted by appointment of a Court Auctioneer against fee payable by co-owners in proportion to their respective shares. The auction is conducted after approval of auction plan to be submitted by the auctioneer. Twenty percent of the bid money is to be deposited immediately on close of bidding and remaining within 7 days. Auctioneer deposits auction price in court with auction report. Court is required to confirm the

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<sup>38</sup> Section 9 *ibid*

<sup>39</sup> Section 10 *ibid*

auction on deposit of auction price and in case of failure to forfeit the deposited amount and restart the open auction.<sup>40</sup>

## 6. OWELTY OF PARTITION

An equal and just division of value in property is not always possible. In such eventuality, courts, conscious of the fact that partition is an equitable relief, may order that a certain sum be paid by the party to whom the more valuable property is assigned. This amount is called owelty and as such, an equalization charge.<sup>41</sup>

## 7. CONSTRUCTION PENDING PARTITION SUIT

Sometimes a co-sharer starts raising construction over joint property without approval of court. Construction has an element of apprehension that nature and value of property or portion thereof may be changed. Question that has confronted courts is as to whether co-owner intending to raise construction over the joint property should be required to first seek partition or the owner seeking to restrain such construction. Apex court of our country answered this by stating that person intending to raise construction over the joint property should have first of all got the same partitioned and then may raise construction over his share.<sup>42</sup> There have been some instances when courts allowed construction to be raised at the risk and cost of the person doing so but many of those were on the basis of an offer by the person intending to raise construction to do so at his own risk and cost.<sup>43</sup>

## 8. ALIENATION BEFORE PARTITION

It is settled law that a co-sharer is entitled to alienate or transfer his share in the 'khata' and deliver possession of property in his occupation/control. The vendee steps into his shoes as a co-sharer and the property so purchased shall of course be subject

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<sup>40</sup> Section 11 *ibid*

<sup>41</sup> *Paravathi Amma v Makki Amma* cited as AIR 1962 Ker 85

<sup>42</sup> 2003 SCMR 999, PLD 1998 Supreme Court 1509 & 1989 SCMR 130. Also see 2004 YLR 1136 (Lahore), 2003 CLC 1695 (Lahore), PLJ 2012 Islamabad 168 & 2000 CLC 1138 (Peshawar)

<sup>43</sup> 1994 MLD 116



to partition.<sup>44</sup> However co-sharer transferring his share must be in possession.<sup>45</sup> If specific property is transferred without partition, it will entitle the vendee only to retain possession till partition.<sup>46</sup>

## 9. PRIVATE PARTITION

Private arrangement and partition deserve same respect like any other lawful contract.<sup>47</sup> Court may pass judgment and decree in terms of private settlement submitted by co-owners at any stage of the proceedings.<sup>48</sup> It is also open to parties to revert to be joint owners again.<sup>49</sup> However official partition has precedence over private.<sup>50</sup>

## 10. PARTITION OF SHAMILAT

Partition of 'shamilat' is permissible.<sup>51</sup> However, partition of 'shamilat' may not be possible in all eventualities. Such partition could be done if majority of 'khewatdars' sought it.<sup>52</sup> Plaintiff should be able to show that partition of 'shamilat' is feasible.<sup>53</sup> West Pakistan Land Revenue Act, 1967 makes ample provision for protection of grazing ground and other common rights in partition of 'shamilat'.<sup>54</sup>

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<sup>44</sup> 1993 SCMR 1463, PLD 1959 Supreme Court (Pak.) 9, 2021 CLC 1394 (Lahore), 2014 CLC 254 (Lahore), 2009 CLC 92, PLD 2007 Lahore 83, 2006 MLD 442 (Lahore), 2010 CLC 285

<sup>45</sup> 1998 CLC 2006 (Peshawar)

<sup>46</sup> PLD 1959 Supreme Court (Pak.) 9, 2007 YLR 1723

<sup>47</sup> PLD 2007 Karachi 421 & 2004 SCMR 126

<sup>48</sup> See section 13 *ibid*

<sup>49</sup> R. Ramamurthi Iyer v Rajeswara Rao (1972) 2 SCC 721 (paragraphs 9 & 10)

<sup>50</sup> PLJ 2014 A J & K 318

<sup>51</sup> 1996 SCMR 123 & 1998 SCMR 1589

<sup>52</sup> 2016 YLR 1489

<sup>53</sup> 117 PR 894; 2 Lah. 73

<sup>54</sup> See section 136 of West Pakistan Land Revenue Act, 1967 read with PLD 1949 Lahore 352

## 11. TIME LIMIT

Statutory time period for deciding suit for partition is 6 months from date of institution of suit. However, District Judge may extend the time.<sup>55</sup>

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<sup>55</sup> See section 14 of Punjab Partition of Immovable Property Act, 2012