**(1974) 09 J&K CK 0007**

**In the Jammu And Kashmir High Court**

**Case No :** Writ Petition No. 245 of 1973

Munshi Ram APPELLANT

Vs

Financial Commissioner, Jammu and others RESPONDENT

**Date of Decision :** 26-09-1974

**Acts Referred:**
Land Revenue Act — Section 105, 111A

**Citation :** (1974) 09 J&K CK 0007

**Hon'ble Judges :** Devi Dass Thakur, J

**Bench :** Single Bench

**Advocate :** S.D. Sharma, for the Appellant; A.D. Singh and A.S. Bali, for the Respondent

**Final Decision :** Allowed

# Judgement

D.D. Thakur, J.—The petitioner and respondents Nos. 2 to 13 in this writ petition were co-sharers in respect of certain land situate in village

Chhandaw Tahsil Udhampur. Being dissatisfied with his continued co-sharership in the aforesaid land the petitioner applied u/s 105 of the Land

Revenue Act to the Tehsildar, Udhampur, in the year 1956 for partition of the holdings jointly owned by the petitioner and the respondents Nos. 2

to 13. One of the pleas taken in defence to this application was that land had been mortgaged by the common ancestors of the parties and that the

mortgage had been redeemed on payment of a sum of Rs. 4383.14.3 as mortgage money which had been paid by the respondents Nos. 2 to 13

only. It was further stated that as the petitioner who was in Army service, had not paid his share of the mortgage money he had no right to seek

partition of the mortgaged holdings so long as he did not pay his share of the mortgage money. The Tehsildar on the basis of the material before

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him gave a finding that the parties were jointly entitled to certain offerings from Shri Vaishno Deviji and the share of petitioner out of the offerings

also was received by respondents Nos. 2 to 13 during the period the Petitioner was in the army service and that the amount of mortgage money

was paid by respondents Nos. 2 to 13 out of the income from the offerings. He, therefore, disallowed the plea, granted the application for partition

and laid down the mode of partition by his order dated 8-9-1956. This order of the Tehsildar was challenged in revision before the Settlement

Commissioner. It was argued before him that the plea taken by the respondents regarding the redemption of the mortgage by them and the

incompetence of the petitioner to seek partition without paying the proportionate ahare of the mortgage money raised a question of title, and such a

question could be decided by the Revenue Officer, only in one of the three ways mentioned in Section 111-A of the Land Revenue Act. It was

therefore, contended before him that the Tehsildar not having taken resort to the remedies mentioned to that section the order allowing the

application and disallowing the plea was bad in law and so not sustainable. The argument prevailed with the Settlement Commissioner who allowed

the revision and set aside the order of the Tehsildar and directed him to proceed in accordance with the provisions of that section. This order of the

Settlement Commissioner is dated 27-10-1959 and a copy thereof is Annexure ""D"" to this petition. Consistently with the directions given in this

order the Tehsildar chose to proceed under clause (b) of sub-section (1) of S. 111-A of the Land Revenue Act and vide his order dated 18-3-

1960 directed the respondents to institute a suit within a period of three months in a civil court for the determination of the question of title. On the

expiry of the period of three months the file came up before the Tehsildar on 20-6-1960. On that date Badri Nath one of the respondents in this

petition and a non-applicant before the Tehsildar submitted that no suit for determination of the question of title in the land had been instituted as

directed by the Tehsildar vide his order dated 18-3-1960. A prayer for extension of time was, however, made on behalf of the respondents for the

institution of the suit.

The Tehsildar was not at the Head quartets on that date and the file was therefore ordered to be put up before him on 20-9-1960, for orders. On

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that date also it was submitted before him that the suit had not been filed in the Civil Court and further time was prayed for which was granted till

19-10-1968. Before proceeding further I may say that there was no question of granting extension in time as there was no provision in the Land

Revenue Act for the extension of time prescribed by S. 111-A of the Land Revenue Act. The period of three months was the statutory period and

the Revenue Officer had absolutely no jurisdiction to grant any extension in the period. Be that as it may the case was again adjourned and no

judgment of the Civil Court was obtained and it appears that no suit was filed by the respondents in the Civil Court for the determination of the

question of title in regard to the land in dispute. The result of the failure on the part of the respondents to institute the aforesaid suit was that the

Tehsildar proceeded with the partition proceedings and ultimately vide his order dated 6-3-1969 directed that the partition statements Nos. 4 to 8

in accordance with the rules framed under the Land Revenue Act be prepared. The consequential action followed and the instrument of partition

was ultimately sanctioned and a direction was issued by the Tehsildar that Nishandehi be given to the petitioner on spot and the possession of the

land which had fallen to his share be delivered to him. After the order dated 26-6-1969 it appears that the respondents filed an appeal before the

Deputy Commissioner, Udhampur, against the order of the Tehsildar dated 6-3-1969, who allowed the appeal and set aside the order of the

Tehsildar on two grounds. First ground was that one Mst. Punna who was also a respondent in the application had died before the passing of the

order dated 6-3-1969 and her legal representatives had not been brought on the record before the passing of the order. The second ground taken

was that there were certain interpolations in the order dated 6-3-1969 which did not bear the signatures of the officer concerned. This order

passed in appeal by the Deputy Commissioner was challenged before the Divisional Commissioner who dismissed the revision application. A

further revision was then brought to the Financial Commissioner who allowed the same and set aside the order of the Divisional Commissioner.

The reasons given for the acceptance of the revision were that according to the entries made in the Death Register, Mst. Punna had died on 8-3-

1969 whereas the order was passed by the Tehsildar on 6-3-1969. The death of one of the respondents according to the Financial Commissioner

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after the order was not at all a circumstance which could affect the validity of the order passed by the Tehsildar on 6-3-1969. On the second

question also the Financial Commissioner gave a finding that the absence of the signature on the interpolations in the order of the Tehsildar was of

no consequence as the order dated 6-3-1969 had been reproduced in the subsequent order dated 26-6-1969 by the Tehsildar. With the disposal

of the revision application therefore the order passed by the Tehsildar on 6-3-1969 became absolute. Some time later however the respondent

filed a review petition before the Financial Commissioner. In this petition it was brought to the notice of the Financial Commissioner that the

Settlement Commissioner vide his order dated 27-10-1959 had directed the Tehsildar to have the question of title determined consistently with the

provisions of Section 111-A of the Land Revenue Act and that this direction of the Settlement Commissioner had not been complied with by the

Tehsildar while passing the order dated 6-3-1969. Regarding Mst. Punna it was argued that she had made a separate application for partition

before the Tehsildar in which her legal representatives had not been brought. Both these grounds were accepted by the Financial Commissioner

and he held that his earlier order was vitiated and was patently erroneous. He. therefore, set aside his own order and allowed the review petition.

He remanded the case to the Tehsildar for further proceedings consistency with the directions of the Settlement Commissioner contained in his

order dated 27-10-1959.

2. It is the order of the Financial Commissioner passed by him in review whereby he set aside his own order passed in revision which is the

subject-matter of a challenge in this writ petition.

3. I have heard Mr. Sharma and Mr. Bali counsel for the parties in this petition for a fairly long time. For the reasons which follow I am of the

opinion that the order passed by the Financial Commissioner in review cannot be allowed to stand.

4. From a perusal of the interim orders dated 18-3-1960, 20-6-1960 and 20-9-1960. attested copies whereof are on the file as Annexure ""E'', it

is apparent that after the passing of the order of the Settlement Commissioner the Tehsildar proceeded under clause (b) of sub-section (1) of S.

111-A of the Land Revenue Act and directed the respondents to institute a suit

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within three months in a civil court for the determination of their title

in the property. It is also established from the aforesaid order that the respondents failed to institute the suit within the period prescribed by the

Tehsildar. It is admitted before me that no suit has been filed by the respondents at any time subsequent to the order dated 18-3-1960. Under

these circumstances the consequence which followed from the failure of the respondents to institute the suit within the period prescribed by Section

111-A was to treat the question of title as finally settled against the respondents in favour of the petitioner, and 1o hold the petitioner Munshi

entitled to a partition of the holdings. There was therefore nothing wrong in sanctioning the mode of partition as was done by the Tehsildar by his

order dated 6-3-V969. Under clause (b) of sub-section (1) of S. 111-A of the Land Revenue Act when a party is directed to institute a suit within

three months from the date of the order the party has no option bat to file the suit as directed. The failure on the pari of that party to institute the

suit must inevitably result in an inference against that party on the question of title. The only fact therefore which was required to be proved in order

to entitle the petitioner Munshi to have the joint holdings partitioned was the factum of the existence of an order under clause (b) of sub-section (1)

of S. 111-A and the fact of the failure of the respondents to institute the suit within the time prescribed. As there was no denial possible on either of

these facts there was no option for the Tehsildar but to conclude the question of title against the respondents and pass a fresh order sanctioning

mode of partition. It was not therefore right for the Financial Commissioner to set aside the proceedings taken by the Tehsildar in accordance with

the provisions of Section 111-A of the Land Revenue Act. It is only an error apparent on the face of the record which could justify review of his

earlier order. As discussed above, there was no error in the order much less an apparent one. The order of the Settlement Commissioner, had

been fully carried out by the Tehsildar and there was no infirmity in his order. The Financial Commissioner appears to have been misled by the fact

that, there was no record available to show whether the requisite suit was at all filed by the respondents or not. That in my opinion was an

approach with no relevance to the point in issue. What was material was whether the suit was filed within three months as ordered by the Tehsildar

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consistently with the dictate contained in Sec. 111-A (1) (b) of the Land Revenue Act, or not. The result of the suit instituted beyond the expiry of

three months' period was not to be considered by the Tehsildar: rather such a suit if filed beyond the period prescribed would not be competent.

The Financial Commissioner therefore fell into a patent error in holding that the order of the Tehsildar dated 6-3-1969 was erroneous. There was

no dispute on the question of fact that the suit had not been filed within three months from the date of the Tehsildar's order. The penal consequence

therefore had been incurred by the respondents in the form of an implied finding on the question of title against them.

5. Mr. Bali, was made, in the course of the hearing to face this position and was asked as to how could be overcome the hurdle, but, he had no

argument to offer as perhaps, there was none available to him.

6. Mr. Bali further submitted that after the order passed by the Financial Commissioner in review the proceedings had been reopened by the

Tehsildar in accordance with the remand order and the proceedings were pending before the Tehsildar when the Agrarian Reforms Act, 1972

came into force. The learned counsel produced in the court a copy of the order of the Tehsildar dated 28-7-1973 whereby the proceedings have

been ordered to abate u/s 52 of the Agrarian Reforms Act. According to the learned counsel it will be an exercise in futility to issue a writ quashing

the order of the Financial Commissioner as the proceedings have already abated. On this point also my views go against the respondents. The

order of the Financial Commissioner impugned in this petition is dated 28-3-1972 and the Act came into force in 1973. If the order of the

Financial Commissioner which led to the reopening of the case and its proceedings is held to be legally infirm and is consequently quashed the

proceedings before the Tehsildar which owe their genesis to the impugned order shall have also to be treated as nonexistent in the eye of law and

the abatement thereof cannot validate the order of the Financial Commissioner if it is otherwise bad in law. Such a course would be tantamount to

placing the cart before the horse. As I have come to a definite finding that the impugned order was not legally sustainable, the proceedings

referable to and flowing from that order would also be non-existent. The writ proposed to be issued therefore cannot be said to be ineffective; nor

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can their be any possibility of its, interdiction being frustrated.

7. Mr. Bali, then contended that even if the impugned order is quashed the proceedings for partition and delivery of possession pursuant to the

order of the Financial Commissioner passed in revision would have survived, which could not escape abatement u/s 52 of the Agrarian Reforms

Act. He is right to that extent, but the fact remains that the order prescribing mode of partition would remain in existence to establish the petitioner's

title in the land and his right to possession could be enforced by the petitioner by a suit u/s 117 of the Land Revenue Act. It cannot, therefore, be

said that the setting aside of the order of the Financial Commissioner would not have any effective result.

8. Lastly it was contended that the land not being in possession of the petitioner on 1st September, 1971, the ownership rights in this land had

vested in the State u/s 3 of the Agrarian Reforms Act. This argument finds a complete reply from a judgment of this court in Taramani Badial v.

Thakur Dass, reported as 1973 Kash LJ 393. According to the definition of the term ""personal cultivation"" given in sub-section (5) of S. 2 of the

Agrarian 'Reforms Act and the Explanation (2) thereto ""unauthorised cultivation"" cannot be deemed to be personal cultivation and where land has

been occupied unauthorisedly the person who, but for such unauthorised occupation, would have been personally cultivating such land shall be

deemed to be in personal cultivation. This definition of the term ""personal cultivation"" and the Explanation (2) thereto do not leave any doubt that

the Act has no application to a case of this nature where the respondents are holding possession of the land unauthorisedly. A co sharer's

possession is permissive so long as there is no demand for partition or at least so long as there has been no partition ordered by a competent

authority. If the order dated 6-3-1969 passed by the Tehsildar laying down the mode of partition survives, the possession of the respondents

would surely be unauthorised at least from that date onwards. That date having preceded the date of enforcement of the Act the respondents were

holding unauthorisedly on the date of the Act and therefore for the purposes of Section 3 of the Act the petitioner would be deemed to be in

personal cultivation of the land in question.

9. All the contentions raised by the counsel for the respondents have been

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replied. None of the contentions has prevailed. The petition having

survived all the defences succeeds and is accordingly allowed. In the peculiar circumstances of the case the parties are left to bear their own costs.

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