

Form No:HCJD/C-121
ORDER SHEET
IN THE LAHORE HIGH COURT LAHORE
JUDICIAL DEPARTMENT

W.P. No.21798 of 2022

Aila Azhar and another Versus Ali Kuli Amin-ud-Din and others

S.No. of order/ proceeding.	Date of order/ proceeding	Order with signature of Judge, and that of parties or counsel, where necessary.
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<u>09.3.2023</u>	Ms. Asma Hamid, Advocate along with Ms. Sana Azhar, Advocate for the petitioners. Mr. Ansar Ali Sidhu, Advocate for the respondent.
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Instant constitutional petition stems from order dated 07.3.2022 of learned Addl. District Judge in terms whereof the revision petition was accepted, order of the trial court was set aside and the application for consolidation of two suits was allowed.

2. Petitioners instituted a suit titled “Ms. Aila Azhar, etc. v. Ali Kuli Amin ud Din” for separate possession through partition of land measuring 59 kanals, 19 marlas and 113 sq. ft. at Mauza Chandian, Tehsil Shalimar, District Lahore. Respondent No. 1 filed a written statement in the petitioners’ suit and also instituted a suit titled “Ali Kuli Amin ud Din v. Mst. Aila Azhar” for declaration, partition, separate possession, benamidar along with permanent and mandatory injunction in respect of properties recorded in the plaint. In the course of proceedings, an application for consolidation of the two suits was filed which was declined by learned Civil Judge vide order dated 12.10.2021. In revision the order was set aside and application for consolidation was accepted by learned Addl. District Judge, Lahore vide order dated 07.3.2022 which has now been called into question in constitutional jurisdiction.

3. Learned counsel for the petitioners submits that the order of the learned Civil Judge dismissing the application for consolidation was correct which was not open to interference in revisional jurisdiction; that in view of the admission in the written statement that the property subject-matter of petitioners' suit for partition, was jointly owned, the court ought to have proceeded to pass a decree in respect thereof, instead of postponing decree of partition till determination of controversy qua properties in the respondent's suit. Adds that the plea of making the partition of property in the petitioners' suit conditional to partition of other properties was mala fide and that the learned Addl. District Judge proceeded on illegal assumption while observing that the consolidation of suits was necessary as common issues arose in the two suits requiring recording of common evidence despite the fact that perusal of the two complaints would reveal that the petitioners' suit was limited to the extent of property admittedly joint while respondent's suit included other properties as well in respect whereof question of title had been raised on the plea of benami and that consolidation of these matters would lead to unnecessary delay and that the discretion in this case was not exercised on sound judicial principles. Contrariwise learned counsel for the respondent supported the impugned order and reiterated the reasons as incorporated therein and submitted that consolidation of two suits was necessary to save the parties from the agony of double round of evidence and also the possibility of contradictory decisions.

4. Perusal of the documents appended with this petition shows that petitioners filed a suit for separate possession through partition in respect of land measuring 59 kanals, 19 marlas and 113 sq ft at Mauza Chandian,

Tehsil Shalimar, District Lahore claiming joint ownership on the basis of surrender deed dated 24.6.2016. Respondent No.1 in the written statement took the defense that in addition to the property recorded in the plaint other properties were also jointly owned inter se that had not been disclosed in the plaint and that all the properties should be partitioned so as to allow separate possession of their respective shares to the parties. The claim was in respect of two sets of properties (i) which were jointly held by the parties inclusive of property subject matter of petitioners' partition suit and (ii) the other set of properties that were claimed to be in the name of petitioner No.2 as benamidar. Respondent No. 1 also filed a separate suit for declaration and separate possession through partition and injunction in respect of all the properties inclusive of the property subject matter of petitioners' suit. An application for consolidation of the suits was filed by respondent No.1 which was dismissed by the learned Civil Judge vide order dated 12.10.2021. Respondent filed a revision petition which was accepted. In result, the order of the learned Civil Judge was set aside and respondent's application for consolidation of the two suits was allowed.

5. Objection articulated by petitioners' learned counsel at the bar is threefold. First: that there being one property subject matter of petitioners' suit the status of which as a joint property having been admitted in the written statement, the court ought to have proceeded to pass a preliminary decree instead of postponement of its partition till the partition of other properties in respondent's suit. Second: that the consolidation of suits shall result in prolongation of proceedings in petitioners' suit and that the subsequent suit was nothing but a mala

fide strategy to impede the partition of the admitted property. And three: that the question of title having been raised regarding certain properties in petitioner No. 2's name that were alleged to be benami, determination of this claim could not be deemed to be a condition precedent for partition of other properties that were undisputedly joint, especially, when the spirit of the Punjab Partition of Immovable Property Act, 2012 (Act IV of 2013) as encapsulated by its preamble expressed the legislative intent towards expeditious partition of immovable property.

6. Admittedly the petitioners and respondent No.1 are siblings. The two petitioners in their plaint only sought partition of one property (59 kanals, 19 marlas and 113 sq. ft. at Mauza Chandian, Tehsil Shalimar, District Lahore) while respondent No.1 instituted a suit for declaration, separate possession through partition and injunction in respect of all the properties claimed to be joint (inclusive of the property in petitioners' suit) and also claimed title in respect of certain other properties in petitioner No.2's name alleged to be benami, demanding their partition by treating these as joint as well. It is discernible that same defense has been taken in response to petitioners' suit where the respondent claimed that in addition to the property disclosed in petitioners' partition suit, other properties were also jointly owned that required partition. It is evident from the comparative reading of pleadings in the two suits that the subject matter thereof would raise common issues. The argument that the suit of the petitioners being limited to the one property which was admittedly joint therefore it need not be tagged with any other properties, is not sound. Under Order XIV, Rules 1 and 2, C.P.C. issues are framed from the material

controversies and propositions of law and fact raised in the pleadings of parties and are not limited to the issues raised in the plaint alone. Rule 1(5) of Order XIV, C.P.C. mandates that on reading the plaint and the written statement and after such examination of the parties as may appear necessary, the court shall ascertain that upon what material propositions of law or fact, the parties are at variance; and shall thereupon proceed to frame issues on which right decision of the case appears to depend. It is clear from bare reading of the provision that the material propositions of law or fact raised in the pleadings of the parties by both sides (i.e. plaintiffs and defendant) shall become subject matter of issues. Perusal of the plaint as also the written statement of respondent No. 1 in petitioners' suit would show that the matter inter se is not restricted to one joint property alone but extends to other properties as well that either are claimed to be joint, or which are in the name of one of the petitioners but are alleged to be benami and also as such liable to the partition process. Deeper examination of the pleadings in respondent's suit also reveals that the issues as are the subject matter of petitioners' suit will also arise in respondent's suit and parties in both the suits are also the same. This being so; in situation where parties are the same, the subject matter of the two suits raised in the pleadings i.e., plaint and written statement is the same, the questions for determination of issues will be the same and that it will require common evidence for decision; propriety demands that the two suits be consolidated to follow the rule of convenience for parties and to avoid contradictory decisions and unnecessary delay. It appears to be in these circumstances that an amendment was made in Order II, C.P.C. whereby Rule 6-A was added by

Lahore High Court Notification No. 237/Legis/XI-Y-26,
Gazette of Punjab dated 22.8.2018. The newly added Rule 6-A is under:

“6-A. **Consolidation of suits.** Where two or more suits or proceedings of the same nature requiring determination of similar issues between the same parties are pending in relation to the same subject matter, the Court may, if considers it expedient for avoiding multiplicity of litigation or conflict in judgment, direct the consolidation of such suits or proceedings as one trial, whereupon all such suits or proceedings shall be decided on the basis of the consolidated trial”.

The spirit of the rule supra is that where there are more than one suits of the same nature requiring determination of common issues inter se the same parties, if the court considers it expedient for preclusion of multiplicity of litigation or conflicting judgments, it may direct their consolidation for adjudication through a single trial. The argument that the jurisdiction of court in the first suit will be limited to determination of claim qua one property subject matter of plaint and that it should ignore the respondent's version in the written statement, possibly cannot be accepted in view of the provisions of Order XIV, Rules 1 and 2, C.P.C. which obligate cognizance of material propositions of law and fact raised in the pleadings of both the plaintiff(s) as well as the defendant(s) and their transformation and recording into issues for determination of controversy. It obviously entails that issues are framed keeping in view version of both sides and such exercise is not limited to contents of the plaint; separate trials in suchlike cases will lead to repetitious exercise of parties to produce same evidence and the anomaly of contradictory or inconsistent decisions at equivalent level could not be logically excluded which

eventuality would depart from the policy imperatives underlying proper administration of justice.

7. Even otherwise the rule is that partial partition shall not be allowed and the entirety of the properties be included irrespective of possession. In “Ghulam Rasool and others v. Muhammad Khalid and 2 others” (2006 YLR 2289) it was observed to the effect that the party opting to come for partition was not permitted to pick and choose and to have the share in the valuable parts of the joint property for leaving out its partition with the lesser value and that suit for partial partition will not be maintainable. Similar view was expressed in “Syed Azhar Hussain Shah v. Member Board Of Revenue Khyber Pakhtunkhwa Province Peshawar and 9 others” (2016 YLR 1489). Reference can also be made to the rule in “Jan Muhammad and another v. Abdur Rashid and 5 others” (1993 SCMR 1463). From the precedents supra the consistent rule drawn appears to be that all the properties that are jointly owned must be subject matter of the suit, instead of the partition of one property while leaving the other properties out for subsequent proceedings. In the present case, the objection of petitioners loses significance for the reason that the respondent in his written statement, pointed out that the parties owned other joint properties which needed to be partitioned. Not only this, but respondent also instituted a suit to seek partition of the properties which were allegedly joint, inclusive of the property that was subject matter of the petitioners’ suit. This being so the learned Addl. District Judge correctly observed that common questions would arise in both the cases which would require common evidence and that consolidation of the suits will save the possibility of contradictory decisions. It

was in this backdrop that following the provision of Order II, Rule 6-A, C.P.C., the application for consolidation was allowed.

8. The argument that the impugned order of consolidation of two suits is contrary to the rule in “Zahid Zaman Khan v. Khan Afsar and others” (PLD 2016 SC 409) and “Muhammad Yaqoob v. Behram Khan” (2006 SCMR 1262) is not well founded. Perusal of the cases referred above reveals that amongst other questions the Supreme Court Of Pakistan, while considering the question of consolidation of suits, observed to the effect that it is an inherent power of the court to consolidate the suits and the purpose behind such step is to avoid multiplicity of litigation, prevent abuse of process and to avoid conflicting judgments and that no hard and fast rule forming the basis of consolidation can be sedimented and that consolidation depends on the facts and points of law involved in each and every case and that where the court is persuaded that the interest of justice demanded this, consolidation could be ordered provided no prejudice was caused to any litigant and there was no bar in the way of courts to consolidate the suits.

9. In “Muhammad Yaqoob v. Behram Khan” (2006 SCMR 1262) facts were that two suits were instituted, suit for specific performance of contract by one side and that for possession, mesne profits and permanent injunction by the other side. An application under section 151, C.P.C. for consolidation of the two suits was filed which was dismissed by the learned Civil Judge. In revision the order was set aside and the suits were ordered to be consolidated, which order was upheld up till the Supreme Court of Pakistan. It was observed as follows:

“3...It is a settled principle of law that where a common subject of claim is in dispute in counter-suits, both the suits are consolidated and decided together. This rule is imperative in order to avoid conflicting decisions. The rule was completely ignored by the trial Court as it failed to decide the issue in question and committed error to stay the proceeding of time respondent's suit which was rightly rectified by the learned High Court with cogent reasons in the impugned judgment. It is pertinent to mention here that parties in both the suits are the same and subject-matter/property is the same. It is well-settled by a long chain of authorities that the consolidation of the suits can be ordered by the Court in exercise of its inherent powers. The consent of the parties is not the condition precedent for exercise of such powers. The purpose of consolidation is to avoid multiplicity of litigation of eliminate award of contradictory judgments and to prevent the abuse of the process of the Court. These purposes are merely illustrative and not exhaustive of the powers of the Court. There may be other variety of grounds that in the interest of justice the Court may be persuaded to consolidate the cases. The learned trial Court had stayed the proceedings of the suit of the respondent without judicial application of mind in violation of the law laid down by this Court in various pronouncements ...”

10. The learned Civil Judge in the instant case also ignored the provision of newly added Rule 6-A of Order II, C.P.C. and also the consistent rule on the subject referred supra and, as such, the order suffered from inherent jurisdictional defect and was rightly corrected in revisional jurisdiction by the learned Addl. District Judge, vide impugned order.

11. Considering all these facts and circumstances of the present case where the two suits between the parties related to the joint properties except part of the property, which was claimed to be benami, propriety demands that the suits should have been consolidated as common questions of law and fact would arise and consolidated decision will be required therein. To avoid contradictory decisions and also in the interest of justice the proper course was to consolidate both the suit i.e., the course as

adopted by the revisional court, to which no exception can be taken.

12. It appears that the main concern of the petitioners' learned counsel was that the property in their suit was admittedly joint, there was no issue, the court ought to have proceeded to pass a preliminary decree based on the admission of the parties. It is observed that not only the respondent has made admission in respect of the joint property which was subject matter of petitioners' suit but that the petitioners have also made admissions in respect of the certain properties subject matter of the suit filed by the respondent. No doubt that the trial court is competent to pass decree on the basis of admissions made in the pleadings under Order XII, Rule 6, C.P.C. which would only apply to the properties that are admitted either by the petitioners or by the respondent. Reference can be made to the case of "G. R. Syed v. Muhammad Afzal" (2007 SCMR 433) and "Amir Bibi v. Muhammad Khurshid and others" (2003 SCMR 1261). The revisional court was cognizant of the rule supra and also took note thereof in the impugned order as may be noted from its perusal.

13. The apprehension of delay, as such, expressed by learned counsel for the petitioners or of possibility of postponement of decision in respect of the admitted matters till the determination of other issues, does not sound good. Learned counsel appears to have taken the stance that the revisional court could have passed a decree on the basis of the admissions and in the alternative this Court has the jurisdiction to decide the suit in respect of admitted facts instead of leaving it for determination of the trial court. This request possibly cannot be acceded to as neither the revisional court nor this Court could preempt the jurisdiction of the trial court. Be that as it

may, it is observed that the trial court will consider the directive of the revisional court and ensure the disposal of the matter in respect of the properties that are admittedly joint, which aspect has not been opposed by the learned counsel for the respondent. Considering that partition cases are required to be dealt with and disposed of expeditiously the trial court shall, of course, discourage every possible attempt of delay and shall ensure that the cases are decided in the light of the observations supra on merits in accordance with law.

14. Instant constitutional petition is **disposed of** accordingly.

(RASAAL HASAN SYED)
JUDGE

APPROVED FOR REPORTING

JUDGE

Shahzad