

Form No: HCJD/C-121

JUDGEMENT SHEET.

**IN THE ISLAMABAD HIGH COURT,
ISLAMABAD.**

Writ Petition No.3755 of 2018

Mrs. Mussarat Naseer.

Versus

The Additional District Judge (West), Islamabad and 05 others.

Petitioners By : M/s Malik Qamar Afzal, Saad Khan, Ms. Misbah Ishaq and Ms. Tania Bezi, Advocates.

Respondents By : M/s S. Naeem Bokhari and Ijaz Akhtar Janjua, Advocates for respondents No.2 to 5.

Date of Hearing : 18.10.2019

AAMER FAROOQ, J. - For the reasons recorded in my detailed judgment of even date passed in connected Writ Petition No.3642 of 2018, the instant petition is **allowed**.

**(AAMER FAROOQ)
JUDGE**

Announced in Open Court this 16th day of January, 2020.

JUDGE

**M. Zaheer Janjua*

Form No: HCJD/C-121

JUDGMENT SHEET.

IN THE ISLAMABAD HIGH COURT,
ISLAMABAD.

Writ Petition No.3642 of 2018

Ch. Naseer Ahmed.

Versus

Rent Tribunal, Islamabad and 05 others.

Writ Petition No.3755 of 2018

Mrs. Mussarat Naseer.

Versus

The Additional District Judge (West), Islamabad and 05 others.

Petitioners By : M/s Ibad-ur-Rehman Lodhi, Shehryar Tariq, Advocates (in Writ Petition No.3642 of 2018).
Malik Qamar Afzal, Saad Khan, Ms. Misbah Ishaq and Ms. Tania Bezi, Advocates (in Writ Petition No.3755 of 2018).

Respondents By : M/s S. Naeem Bokhari and Ijaz Akhtar Janjua, Advocates (respondents No.3 to 6 in Writ Petition No.3642 of 2018) and (respondents No.2 to 5 in Writ Petition No.3755 of 2018).
Malik Qamar Afzal, Saad Khan, Ms. Misbah Ishaq and Ms. Tania Bezi, Advocates for respondent No.7 (in Writ Petition No.3642 of 2018)

Date of Hearing : 18.10.2019

AAMER FAROOQ, J. - This judgment shall decide the instant petition as well as Writ Petition No.3755 of 2018 as common questions of law and facts are involved.

2. The facts, in brief, are that respondents No.3 to 6 filed eviction application against the petitioner as well as respondent No.7 (the petitioner in writ petition No. 3755/2018) with respect to Plot No.8, F-10 Markaz, Islamabad, measuring 4444.44 square yards. It was alleged in the referred eviction application that the petitioner as well as respondents No.3 to 7 were the co-owners of Plot No.8 supra, however, sub-divided the property into two i.e. Plot No.8 and 8-A, F-10 Markaz, Islamabad and also executed a partnership deed with respect to running of the business of hospital. It was contended that respondents No.3 to 6 executed a lease agreement in favour of the petitioner and respondent No.7 on 01.01.2006, which was for a period of ten years. The grounds for eviction as stipulated in the eviction application were, *inter-alia*, personal bona fide need and expiry of the lease agreement; the petitioner and respondent No.7 contested the application, however, the same was dismissed by the learned Rent Controller, vide judgment dated 08.03.2018. Appeal was preferred by the petitioner and respondent No.7 but the same also was dismissed, vide order dated 26.07.2018, hence the petition.

3. Learned counsel for the petitioner, in the instant petition, *inter-alia*, contended that there is no relationship of landlord and tenant between the petitioner and respondents No.3 to 6. It was further contended that the parties are partners and co-owners in the property and where such is the case no eviction application is maintainable; that since the relationship had been denied, the learned Rent Controller was obliged to frame an issue in this behalf and decide the same, which was not done. It was submitted that the Courts did not

take into account the dicta, in this behalf, that where the relationship is denied the Court has to first determine the issue. Reliance was placed on cases reported as "*Mian Umar Ikram-ul-Haque Vs. Dr. Shahida Hasnain and another*" (**PLJ 2017 SC 01**), "*Muhammad Wakil Khan VS. Additional District Judge, Lahore and 3 others.*" (**2007 CLC 1151**), "*Umar Farooq Vs. Rent Controller/Civil Judge, Multan and another*" (**2018 CLC Note 42**). It was further submitted that there is no proper partition deed between respondents No.3 to 6 and the petitioner and respondents No.7; that there is a private partition agreement which is in violation of the Capital Development Authority Rules and Regulations, hence carries no sanctity. It was highlighted that in the absence of a proper partition all the parties are co-owners and an eviction application by one co-owner against the other does not lie. Reliance was placed on cases reported as "*Muhammad Hussain and 2 others Vs. Addl. District Judge, Burewala and 4 others.*" (**2009 YLR 1736**), "*Ghulam Yasin Vs. Ghulam Mustafa and another.*" (**2006 YLR 454**), "*Abdul Zahir Vs. Jaffar Khan*" (**2010 SCMR 189**) and "*Umar Hayat Khan Vs. Inayatullah Butt*" (**1994 SCMR 572**). It was also contended that the respondents in evidence admitted that the co-ownership of the petitioners is also under challenge and where such is the case the eviction application is not maintainable. Reliance was placed on "*Kamran Rasool Vs. Town Committee, Zafarwal*" (**2006 SCMR 1061**), and "*Rehmatullah Vs. Ali Muhammad*" (**1983 SCMR 1064**). It was further submitted that where a tenant becomes the co-owner or is the co-owner, no eviction application is maintainable. Reliance was placed on "*Mst. Sanobar Sultan vs. ObaidUllah Khan*" (**PLD 2009 SC 71**). It was submitted that in the facts and circumstances, the only remedy with respondents No.3 to 6 was to file a suit for possession through partition. Reliance was placed on "*Gulfray and others Vs. Mir Dad and another*" (**PLJ 2017 Islamabad 52**).

4. Learned counsel for respondent No.7 (the petitioner in Writ Petition No.3755 of 2018) reiterated and adopted the arguments of learned counsel for the petitioner in Writ Petition No.3642 of 2018 but also contended that since the partition agreement between the parties is not in accordance with law, hence it is not a case of valid partition but at best it could be regarded as one co-owners putting the other co-owners in possession with respect to the particular portion of the property and where such is the case there cannot be regarded a valid tenancy and the appropriate remedy for the landlords/respondents No.3 to 6 would be to file a suit for possession through partition. It was submitted that since the rent agreement is unregistered, it cannot be evidence of proof of relationship of landlord and tenant. It was also submitted that the Court was required exclusively to frame an issue regarding the relationship of landlord and tenant and rendered its finding.

5. Learned counsel for respondents No.3 to 6, *inter-alia*, contended that there is a relationship of landlord and tenant inasmuch as the execution of the lease agreement is admitted and payment of rent is also admitted. It was contended that where such is the case the fact that the tenants are in exclusive possession, a valid tenancy is created and the findings by the Courts i.e. the Trial Court and the Appellate Court do not suffer from any error of law or fact, in this behalf. It was submitted that expiry of the lease agreement is a valid ground in light of the recent judgment of the Hon'ble Supreme Court of Pakistan. It was also submitted that the instant petition is in the nature of certiorari and in view of the fact that where there are concurrent findings of fact, this Court is not to replace findings on the fact rather is to see whether there is any error of law or of jurisdiction. Learned counsel further contended that the partition does not have to be in writing or registered but could also be verbal or otherwise on an unregistered document. Reliance was placed on "*Peddu Reddiar Vs. Kothanda*

Reddi" (AIR 1966 Mad 419) and "Ganu Sasntu Mhakavekar Vs. Shankar Tukaram Chougule" [(1969) 71 BOMLR 165]. Reliance was also placed on *"Waqar Zafar Bakhtawari Vs. Haji Mazhar Hussain Shah and others."* (PLD 2018 SC 81), *"Administrator, Thal Development through EACO Bhakkar and others Vs. Ali Muhammad" (2012 SCMR 730), "Pakistan Institute of International Affairs Vs. Naveed Merchant and others" (2012 SCMR 1498).*

6. Arguments advanced by learned counsel for the parties have been heard and the documents placed on record examined with their able assistance.

7. The facts, leading to filing of the instant petitions, have been mentioned hereinabove, therefore, need not be reproduced.

8. The petitioner and respondents No.7 in reply to the eviction application denied the relationship between them and respondents No.3 to 6. In this behalf, the denial is contained in paragraph 17 of the preliminary objections in the following words:-

"17. That the relationship of landlord and tenant does not exist in between the parties rather the answering respondents are having the possession of the whole building as co-sharer, hence petition under reply merits dismissal."

It was also alleged in the reply that the petitioner and respondent No.7 are co-owners/co-sharers and are entitled to each and every inch of the joint property unless the same is partitioned in metes and bounds in accordance with law. In so far as payment of rent is concerned, it was submitted that consideration was being paid to respondents No.3 to 6 for use of the land. Keeping in view the referred stance of the petitioner and respondent No.7, the learned Rent Controller framed seven issues but no issue was framed regarding the denial of relationship. In the instant case the denial of relationship has not been made in

retorical fashion rather is based on the fact that the petitioner and respondent No.7 are co-owners in the property alongwith respondents No.3 to 6. Admittedly the execution of lease agreement has been admitted and even payment of rent is admitted though termed as compensation for use of the land. It is also an admitted position that the partition agreement between the parties is admitted, whereby plot, in question, i.e. Plot No.8 was divided into two i.e. Plot No.8 and Plot No.8-A, however, the sub-division/partition was neither got approved from Capital Development Authority; the entity competent to partition a property falling within its jurisdiction where it is permissible. The said property being an amenity plot for the purposes of a maternity center and allied services cannot partition as per the rules and regulations of Capital Development Authority. Learned counsel for respondents No.3 to 6 during the course of arguments placed reliance on two judgments from Indian jurisdiction to substantiate his argument that a partition need not be through a registered instrument. It was observed in "*Ganu Sasntu Mhakavekar Vs. Shankar Tukaram Chougule*" [(1969) 71 BOMLR 165] as follows:-

"8.There appears to be some conflict between decision of various High Courts in India with regard to the question whether partition is or is not a transfer of property, and consequently whether it is governed by the Transfer of Property Act or not. However, the Bombay High Court has consistently held in the case of Waman v. Ganpat (1985) 37 Bom. L.R.625 in the case of Kisansing Mohansing v. Vishnu Balkrishna : AIR 1951Bom4, in the case of Soniram Raghushet v. Dwarkabai : AIR1951Bom94, and in the case of Dayabhai v. State of Bombay (1959) 62 Bom. L.R. 348, that the partition is a transfer within the meaning of section 5 of the Transfer of Property Act. In view of the fact that our High Court has consistently taken this view, I have no hesitation in coming to the conclusion that a partition

is a transfer of property within the meaning of Section 5 of the Transfer of Property Act.

9. *That, however, does not conclude the matter. All transfers of property are not required to be made in writing, for Section 9 of the Transfer of Property Act provides that a transfer of property may be made without writing in every case in which a writing is not expressly required by law. Unless, therefore, there is some express provision in the Transfer of Property Act or some other law requiring that a partition must be made in writing, it would appear that it would be made by oral transfer. The Calcutta High Court has taken a view in the case of Gyannessa v. Mobarakannessa I.L.R. (1897) 25 Cal. 210, that where no writing is required by the Act, the transfer may be made orally. My attention has also been drawn to Section 2 of the Transfer of Property Act which provides that nothing contained in the said Act shall be deemed to affect any terms or incidents of any contract or constitution of property which are consistent with the provisions of the Transfer of Property Act and are allowed by the law for the time being in force. In Mulla's Commentary on Transfer of Property Act, 5th edn., at page 0, it is stated that a right of partition is an incident of property held in joint tenancy or tenancy in common which is not affected by the Act by virtue of section 2(&) of the Transfer of Property Act and partition may be made orally. In the Calcutta case reported in Gyannessa v. Mobarakannssa referred to above, some of the co-owners possessing an undivided share in several properties took by arrangement a specific property in lieu of their shares in all the properties, It was held that the transaction was not an exchange within the meaning of Section 118 of the Transfer of Property Act. But the completed transaction amounted to a partition which was not required by law to be effected by an instrument in writing. The Allahabad High*

Court has also held in Ram Kishen vs. Sheo Sugar [1924] A.I.R. All 304, that a private partition could be effected without any written document. It would, therefore, appear that a partition whether of joint family property or between co-owners who are strangers could be made orally."

Similarly, in "*Peddu Reddiar Vs. Kothanda Reddi*" (**AIR 1966 Mad 419**), it was observed as follows:-

"(9) The question of law, however, remains, whether the arrangement, by which items 1 to 4 of A schedule and one fourth share in the well in item 6 were allotted specifically to Ellappa, is valid in law. Ellappa and Peddu Reddi were co-owners. An oral partition between co-owners is valid in law. Sec. 9 of the Transfer of Property Act says that a transfer of property may be made without writing in every case in which a writing is not expressly required by law. A partition between co-owners it may perhaps be said to involve a transfer of property because in the specific properties allotted to a particular co-owner the interest which the other co-owners had previous to the partition is given up and to that extent it may be said to be a transfer of property. But the transfer of Property Act itself does not expressly require such a partition to be in writing, and there is no other provision of law requiring such a partition to be evidenced by writing. The only Section in the Transfer of Property Act which can possibly be held to apply is Sec. 118 dealing with exchange. That runs thus: "When two persons mutually transfer the ownership of one thing for the ownership of another, neither thing or both things being money only, the transaction is called an "exchange". A transfer of property in completion of an exchange can be made only in manner provided for the transfer of such property by sale. S.54 dealing with "sale" of course requires an

instrument in writing for sale of a property worth more than Rs.100 in value. Sec.118 was construed by the Calcutta high Court in Gyannessa v. Moharakanessa, (1898), ILR 25 Cal.21. There also the question involved was whether an oral partition was valid. Both the learned judges concurred in holding that it was valid. Macpherson J. gave the following reason:

“Assuming that there was what amounted to an ‘exchange’ within the words of S.118 between the vendor defendants and the plaintiffs, the undivided interest of the former in all the other properties being exchange for the undivided interest of the latter in the jote, the Transfer of Property Act does not apply to the transaction. The exchange was intended to and did effect a partition. The completed transaction was the partition by which the parties held in severalty the lands which had been before held in common. The law does not required a partition to be effected by an instrument in writing, and the right of partition being an incident of property held as this property was, the right is not, according to the second section, affected by any of the provisions of the Act. The Act, moreover, does not profess to deal with partitions or the way in which they are to be effected”.

In other words, the reasoning of Macpherson J. was that in essence partition was the transaction which was effected and not an exchange. Ameer Ali J. expressed himself thus:

“S. 118 in my opinion is not applicable to cases where some of the co-owners possessing an undivided share in several properties take by arrangement a specific property in lieu of their share in all. Sec. 118, as its language shows, refers to cases where two persons owning two specific properties transfer or convey their respective ownership one to the other”.

Though, the above judgments categorically hold that the partition need not be in writing through a registered instrument, however, the matter in the instant case since is somewhat different inasmuch as the partition is not permissible under the laws of Capital Development Authority inasmuch as the plot, in question, is an amenity plot.

9. The learned Rent Controller as well as the Appellate Court have relied upon the evidence tendered in order to come to the conclusion that the execution of lease agreement is admitted and the same has expired and also that rent was being paid, hence the tenancy is admitted, however, no finding has been rendered on the fact that whether the partition is valid, which question goes to the root of the matter inasmuch as if the partition is not valid despite a clear intention and understanding by the parties as is borne out from partition agreement as well as the lease agreement, a status of the petitioner and respondent No.7 would be or that of the co-owners, however, to the contrary if the partition is valid the petitioner and respondent No.7 would be tenants under respondents No.3 to 6. Where the case is that a tenant becomes a co-owner in that eventuality and eviction application against the said tenant is not maintainable in light of the dictum of the Hon'ble Supreme Court of Pakistan in case reported as "*Mst. Sanobar Sultan vs. ObaidUllah Khan*" (**PLD 2009 SC 71**), however, the Hon'ble Supreme Court of Pakistan in case titled "*Haji Abdullah Jan vs. Anwar Khan*" (**PLD 2000 SC 787**) observed that after private settlement/partition of said property the applicant or any other co-owner or all of them may if so advised file fresh eviction application against the tenant clearly stating his/ their requirements for personal bona fide need, meaning thereby that the august Apex Court acknowledged the private partition of the property. In "*Tufail and others vs. Aurangzeb and others*" (**2015 CLC 1682**), the Hon'ble

Peshawar High Court observed that a co-sharer cannot seek eviction of the other co-sharers without partition of the joint property.

10. In view of the above position of law and facts, the sole question which emerges before this Court was the effect of non-framing of a specific issue relied regarding denial of relationship and the effect of partition of the property and execution of the lease agreement. As noted above, in the instant case, the denial of relationship is not based on the title of the landlord or is a stereotype denial, which is found common in most of the cases but rather is based on the fact that the parties are co-owners in the Plot No. 8, F-10 Markaz, Islamabad. There is a partition agreement duly executed which is not registered, however, the same is not approved by Capital Development Authority.

11. The instant petition under Article 199 of the Constitution is in the nature of certiorari, whereby orders/judgments of Rent Controller and Appellate Court have been challenged on the grounds of patent illegality and/or error of jurisdiction. In such petitions, this Court ought not give finding of fact or on mixed question of law or fact and also should not replace the findings of fact of the fora whose orders have been challenged. As noted above, both the Rent Controller and the Appellate Court have not rendered any finding on the question of relationship of landlord and tenant between petitioner and respondent No.7 and respondents No.3 to 6 in light of the validity or invalidity of partition agreement. The Rent Controller also did not frame any issue regarding the relationship.

12. In view of the situation, it would be appropriate that the learned Rent Controller should hand down a finding on relationship between parties keeping in view the effect of partition agreement, if any. This Court in *"Muhammad Akbar Chohan Vs. Rent Controller, Islamabad"* (2017 MLD 53)

held that not in every case the Rent Controller has to frame issues and call for evidence as under Islamabad Rent Restriction Ordinance, 2001 an inquiry is to be made about the state of affairs, but a finding is to be rendered regarding controversy before it.

13. For the above reasons, the instant petition as well as Writ Petition No.3755 of 2018 are **allowed** and impugned judgments by the Appellate Court and Rent Controller dated 26.07.2018 and 08.03.2018 are **set-aside**; consequently, eviction application filed by respondents No.3 to 6 shall be decided afresh after framing issue on relationship between parties. In this behalf, the parties shall rely on evidence already tendered or may lead additional evidence with leave of learned Rent Controller. Since matter is pending since long, the same shall be decided within six (06) weeks from the date of this judgment. The learned Rent Controller shall not be prejudiced by any observation made by this Court hereinabove, on the merits of the case.

(**AAMER FAROOQ**)
JUDGE

Announced in Open Court this 16th day of January, 2020.

JUDGE

M. Zaheer Janjua