

JUDGMENT SHEET
IN THE ISLAMABAD HIGH COURT, ISLAMABAD
JUDICIAL DEPARTMENT

R.F.A.No.479 of 2023

Dr. Farah Sohail

Versus

Dr. Fouzia Humayun and others

Dates of Hearing: 02.11.2023 & 08.05.2024.
Appellant by: Mr. Zafar Kundi, Advocate.
Respondents by: M/s Kashif Ali Malik & Qaiser Abbas Gondal,
Advocates for respondents No.1 to 3.
M/s Rubina Saeed, Humaira S. Masihuddin
and Sagheer Ahmed Bhatti, Advocate for
respondents No.4 and 5.
Barrister Bilal Naseer and Ms. Meraj Tareen,
Advocate for respondent No.6 / CDA.

MIANGUL HASSAN AURANGZEB, J:- Through the instant regular first appeal the appellant, Dr. Farah Sohail, impugns the preliminary judgment and decree dated 08.05.2023 passed by the Court of the learned Civil Judge, Islamabad, whereby the suit instituted on 26.06.2021 by the plaintiffs / respondents No.1 to 3 for “*declaration, separate possession through partition, rendition of accounts, recovery of mesne profit, permanent and mandatory injunction*” was partially decreed and a local commission was appointed with the direction to submit a report regarding the approximate value of the share of respondents No.1 to 3 and the appellant in House No.181, Gomal Road, Sector E-7, Islamabad (“the suit property”).

2. The record shows that through sale agreement dated 21.02.1981, Mst. Anjum Ara Sabih and Mst. Zarina Zaheer purchased Plot No.181 measuring 933.33 square yards situated in Sector E-7, Islamabad from Muhammad Hanif. Vide letter dated 14.03.1981, the said plot was transferred to Mst. Anjum Ara Sabih and Mst. Zarina Zaheer. It is not disputed that both these ladies owned the plot in equal shares. A duplex was constructed on the said plot. One portion bearing House No.181-A was in the possession of Mst. Anjum Ara Sabih, whereas the other bearing

House No.181-B was in the possession of Mst. Zarina Zaheer. Both these portions having separate gates and a wall between them constitute the suit property. The applicable regulations of the Capital Development Authority (“CDA”) do not permit the bifurcation of this property.

3. After the demise of Mst. Anjum Ara Sabih, her share in the suit property was transferred to her four daughters, namely (i) Dr. Farah Sohail (defendant No.1 / appellant), (ii) Dr. Fouzia Humayun (plaintiff No.1 / respondent No.1), (iii) Huma Sabih (plaintiff No.2 / respondent No.2), and (iv) Humaira Sabih (plaintiff No.3 / respondent No.3). Mst. Anjum Ara Sabih’s husband executed a release deed in favour of his four daughters. Letter dated 22.07.2000 from the Estate Management Directorate of the CDA shows Mst. Zarina Zaheer as the owner of half share in the suit property and Mst. Anjum Ara Sabih’s four daughters as the owners of the other half.

4. Mst. Zarina Zaheer gifted her share in the suit property to her two daughters namely (i) Rubina Sadia Rehman (defendant No.3 / respondent No.4), and (ii) Aaliya Zaheer Jan (defendant No.4 / respondent No.5) and in this regard, the Estate Management Directorate of the CDA issued letter dated 25.10.2016 to Mst. Zarina Zaheer allowing her application for the transfer of her share in the suit property to her daughters.

5. At all material times, respondents No.4 and 5, the daughters of Mst. Zarina Zaheer have remained in possession of House No.181-B to the exclusion of the other co-owners of the suit property.

6. As regards House No.181-A, after the demise of Mst. Anjum Ara Sabih’s husband (who died on 15.06.2020), it remained in the appellant’s possession to the exclusion of her sisters. The continuation of this state of affairs over a long period caused respondents No.1 to 3 to file a suit for declaration, separate possession through partition, rendition of accounts, recovery of *mesne* profits, and permanent and mandatory injunction against

the appellant. This suit was filed on 26.06.2021 before the Court of the learned Senior Civil Judge, Islamabad.

7. The appellant contested the said suit by filing a written statement on 08.11.2021. It may be mentioned that in the said written statement, it was pleaded *inter alia* that the suit property could not be partitioned since it was purchased jointly by Mst. Anjum Ara Sabih and Mst. Zarina Zaheer. The appellant, in the said written statement, pleads that *“it be appreciated that after the purchase of the said plot, the same was privately partitioned into Plot No.181-A and 181-B two houses / accommodations were built over the said plots separately.”* It was also more importantly pleaded that the suit cannot proceed because the suit property is a joint property of Mst. Zarina Zaheer as well as the appellant and respondents No.1 to 3, and therefore it could not be transferred in the name of any third party without impleading her as a party.

8. On 17.12.2022, respondents No.1 to 3 filed an application under Order I, Rule 10 of the Code of Civil Procedure, 1908 (“CPC”) for the impleadment of respondents No.4 and 5 (the daughters of Mst. Zarina Zaheer) as in the CDA’s records, House Nos.181-A and 181-B comprising the suit property was a single undivided unit. After the said application was allowed vide order dated 08.02.2023, an amended plaint was filed in which respondents No.4 and 5 were defendants No.3 and 4.

9. The appellant had filed an application under Order VII, Rule 11(b) CPC praying for the rejection of the plaint on the ground that the relief sought in the plaint is undervalued. This application was dismissed by the learned civil Court vide order dated 08.02.2023.

10. Vide preliminary judgment and decree dated 08.05.2023, the learned civil Court held that the suit property measuring 933.33 square yards is not partitionable due to Regulation 4.1.6 of the Islamabad Capital Territory Residential Sectors Zoning (Building Control) Regulations, 2020. Furthermore, it was held that the 50% share in the suit property belonging to the appellant and respondents No.1 to 3 *“can only be put to public auction and the*

sale proceeds can be divided amongst [the appellant and respondents No.1 to 3] equally.”

11. Ch. Abdul Hameed, Advocate was appointed as a local commission with the direction to submit a report regarding the approximate value of the appellant and respondents No.1 to 3's share in the suit property. It was clarified by the learned civil Court that the order shall not affect the title or rights of respondents No.4 and 5 in their 50% share in the suit property. Additionally, through the said preliminary judgment and decree dated 08.05.2023, the learned civil Court allowed respondents No.1 to 3's request for the withdrawal of the suit to the extent of *mesne* profits. In the said judgment, it was observed that the said respondents shall be at liberty to file a fresh suit regarding their claim for *mesne* profits.

12. The preliminary judgment and decree dated 08.05.2023 has been assailed by the appellant in the instant appeal. Along with the instant appeal, the appellant filed an application for interim relief praying for the suspension of the said judgment and decree. Vide ad-interim order dated 22.06.2023, this Court did not restrain the local commission from proceeding with his task and to submit a report to the learned civil Court. However, it was ordered that until the next date of hearing, the 50% share in the suit property shall not be put to public auction.

13. On 26.09.2023, the contesting parties were heard at length. Appreciating that the dispute in the instant appeal is between the real sisters and had been lingering on for a few years, this Court expressed its view that the same may be resolved through a process of mediation. After the contesting parties gave their consent, Mr. Umar Farooq, Deputy Registrar of this Court, who has been accredited as a Mediator by the Chartered Institute of Arbitrators and notified as a Neutral by the Federal Government in terms of Section 4(1) of the Alternate Dispute Resolution Act, 2017, was appointed as *pro bono* Mediator in this matter. He was

required to conduct mediation and complete the process within a period of three weeks and thereafter submit a report to the Court.

14. It may also be mentioned that until the said order dated 26.09.2023 was passed, the appellant was in exclusive possession of House No.181-A. Vide the said order, this Court restrained the appellant not to resist entry of respondents No.1 to 3 to House No.181-A. In this regard, the operative part of the said order is reproduced herein below:-

“8. The appellant’s grievance with respect to the judgment and decree dated 08.05.2023 is that partial partition of property (i.e., the entire house on Plot No.181) cannot take place. In furtherance of this submission, he submitted that the house on Plot No.181 is constructed such that it is divided into House No.181-A (which is the suit property) and House No.181-B (which has nothing to do with the dispute between the daughters of Mst. Anjum Ara Sabih). This division has not been recognized by the Capital Development Authority.

9. Since it is not disputed that the learned counsel for the appellant / defendant No.1 had made a statement before the learned Trial Court that she would have no objection if the suit was decreed under Order XII, Rule 6 of CPC to the extent of partition only provided the issue of pecuniary jurisdiction was resolved, and since the private respondents / plaintiffs had abandoned their claim regarding mesne profits albeit with the caveat, the appellant shall not resist the entry of respondents No.1 to 3 / plaintiffs in the suit property i.e. House No.181-A, Gomal Road, Sector E-7, Islamabad with effect from one week from today.”

15. As per report dated 23.10.2023 submitted by the Mediator, the contesting parties, including respondents No.4 and 5, participated in the process of mediation but were not able to arrive at an amicable settlement. Thereafter, arguments of the contesting parties were heard by this Court on 02.11.2023 and 08.05.2024.

16. Learned counsel for the appellant, after narrating the facts leading to the filing of the instant appeal, submitted that the appellant’s consent for the partition of the property recorded by the learned civil Court on 08.05.2023 is of no consequence since the CDA laws do not permit the partition of the suit property; that if partition is to take place, it is to be of the entire suit property, i.e. House No.181-A as well as House No.181-B; that the said two

houses are to be treated as an indivisible whole in which the appellant and respondents No.1 to 5 are all co-sharers; that the fact that respondents No.4 and 5 have at all material times remained in exclusive possession of House No.181-B would not save them from the said property getting partitioned; that the private partition between House Nos.181-A and 181-B has not been recognized by the CDA; that there are no separate allotment letters issued by the CDA for House Nos.181-A and 181-B; that the learned civil Court ought to have passed an order for the partition of the entire suit property instead of just House No.181-A; that House No.181-A cannot be partitioned or transferred by metes and bounds; that the learned civil Court, after ascertaining the price of the property, should have given an option to the co-owners to purchase the property in terms of Sections 3 and 4 of the Partition Act, 1893 (“the 1893 Act”); that the partition of property and transfer of shares of co-owners in a property are two different concepts; and that in compliance with the order dated 26.09.2023, the appellant has given access to certain portions of House No.181-A to respondents No.1 to 3. Learned counsel for the appellant prayed for the appeal to be allowed and for the impugned preliminary judgment and decree dated 08.05.2023 to be set-aside.

17. On the other hand, learned counsel for respondents No.1 to 3 submitted that the instant appeal is not maintainable inasmuch as an appeal against a consent decree cannot be filed as provided in Section 96 CPC; that the position taken by the appellant in the proceedings before the learned civil Court was that if the dispute regarding the pecuniary jurisdiction of the learned civil Court is resolved, she would have no objection if the suit for partition is decreed; that in the objections to the report dated 02.06.2023 submitted by the local commission, the appellant has not taken an objection that the suit property cannot be partitioned; that there is no illegality in the order of the Court for the auction of the 50% share of the suit property which is not in possession of

respondents No.4 and 5; that Section 4(1) of the 1893 Act permits members of a family to buy out their co-sharer who is not a member of the family and who is seeking partition of a dwelling house; that if the value of the 50% share in the suit property is ascertained, respondents No.1 to 3 would be willing to purchase the appellant's share provided she is willing to sell her share at the ascertained price; and that the impugned judgment and decree does not suffer from any legal infirmity. Learned counsel for respondents No.1 to 3 prayed for the appeal to be dismissed.

18. Learned counsel for respondents No.4 and 5 submitted that the said respondents have unnecessarily been dragged in the dispute between the four co-owners of House No.181-A; that respondents No.4 and 5 have at all material times remained in possession as owners of House No.181-B; that the two houses have separate gates and other than sharing a common boundary are two separate dwelling houses; that the appellant, with the intention to protract her possession over House No.181-A, has taken the position that House No.181-B should be treated as part and parcel of House No.181-A for the purposes of partition; and that the owners of House No.181-B do not have any dispute between each other and also have no concern with the dispute between the co-owners of House No.181-A. Learned counsel for respondents No.4 and 5 submitted that since the learned civil Court has clarified that the preliminary judgment and decree shall not affect the title or rights of respondents No.4 and 5 to the extent of their 50% share in the suit property, the instant appeal may be dismissed.

19. I have heard the contentions of the learned counsel for the contesting parties and have perused the record with their able assistance. The facts leading to the filing of the instant appeal have been set out in sufficient detail in paragraphs 2 to 15 above and need not be recapitulated.

20. The subject matter of the suit instituted by respondents No.1 to 3 was a dispute between them and the appellant who is

their sister in possession of House No.181-A situated in a prime locality of Islamabad. Respondents No.1 to 3 wanted House No.181-A to be subjected to a sale and its proceeds divided amongst the co-owners, i.e. the appellant and respondents No.1 to 3, all of whom happen to be real sisters. I am of the view that the resolution of this dispute would have meant the appellant moving out of the said House. This the appellant did not want. House No.181-A could not be bifurcated / separated in the CDA's records from House No.181-B, since they were constructed as a duplex on Plot No.181 which measured 933.33 square yards. This is because Regulation 4.1.6 of the Islamabad Capital Territory Residential Sectors Zoning (Building Control) Regulations, 2020 ("the 2020 Regulations") provides *inter alia* that sub-division of dwelling houses, residential units will be allowed only in respect of plots of 1,200 square yards and above and one subdivided portion shall not be less than 600 square yards.

21. Initially when the suit was filed, respondents No.4 and 5 were not impleaded as defendants therein. Being aware of the fact that Plot No.181 jointly purchased by Mst. Anjum Ara Sabih and Mst. Zarina Zaheer could not be bifurcated, the appellant, in her written statement, raised an objection that the suit cannot proceed because the suit property is joint property of Mst. Zarina Zaheer as well as the appellant and respondents No.1 to 3, and therefore it could not be transferred in the name of any third party without impleading her as a party. It was however pleaded in the written statement that Plot No.181 "*was privately partitioned into Plot No.181-A and 181-B and two houses / accommodations were built over the said plots separately.*"

22. The said objection raised by the appellant, in my view, was aimed at protracting the legal proceedings just so as to perpetuate her possession over House No.181-A. Respondents No.1 to 3 did make an application for the impleadment of the

owners of House No.181-B which was allowed vide order dated 08.02.2023 passed by the learned civil Court.

23. Learned counsel for the appellant acknowledged the fact that at all material times Mst. Zarina Zaheer and/or her legal heirs have remained in possession of House No.181-B without any interference whatsoever from the owners of House No.181-A. But for the objection taken by the appellant in her written statement, respondents No.4 and 5 would not have been embroiled in this dispute. The appellant wanted to compound the dispute by roping in respondents No.4 and 5 just so as to thwart the resolution of the dispute. The appellant knows very well that respondents No.1 to 3 have no intention to subject House No.181-B to partition or sale. What they are interested in is just the sale of House No.181-A so that the sale proceeds are evenly distributed amongst its four co-owners. And this the appellant does not want. She had continued to remain in possession of House No.181-A after her father's demise; it is only after order dated 26.09.2023 was passed by this Court that respondents No.1 to 3 were able to have access to House No.181-A.

24. It may be mentioned that the appellant had filed review application No.09/2023 against the order dated 26.09.2023 passed by this Court whereby she was restrained from resisting the entry of respondents No.1 to 3 into House No.181-A. The said review application was taken up for hearing on 02.10.2023 on which date the learned counsel for the appellant had submitted that the appellant's grievance with respect to the said order was that this Court had in effect required respondents No.1 to 3 to be given possession of the suit property within one week. Indeed the first ground taken by the appellant in her review application was that respondents No.1 to 3, in their suit, had not sought possession of the suit property and that the order of this Court to put respondents No.1 to 3 in possession was "*alien to the proceedings*" for partition to property. This implies that the appellant was in possession of House No.181-A to the exclusion

of the co-owners, i.e. respondents No.1 to 3. Be that as it may, the said review application was disposed of in the following terms:-

“3. There is no reason to recall the said order since in the proceedings before the learned Trial Court, the applicant had taken the position that she would not object to the suit being decreed. She cannot indefinitely perpetuate her possession of the suit property to the exclusion of her sisters who are co-owners of the said property. The applicant ought to bear in mind that respondents No.1 to 3 have already shown grace and concession to her by not claiming the mesne profits and other benefits with respect to the suit property for the period during which the applicant remained in exclusive possession of the same. However, I am of the view that to enable the applicant to make the necessary preparations for sharing possession of the suit property with respondents No.1 to 3, the words “one week” in the said order dated 26.09.2023 shall be read as “two weeks.””

25. Now, it ought to be mentioned that in the proceedings before the learned civil Court, the appellant had filed an application under Order VII, Rule 11 CPC praying for the rejection of the plaint on the ground that the value of the suit property was beyond the pecuniary jurisdiction of the learned civil Court. At the time when the said objection was taken, the pecuniary jurisdiction of the learned civil Court was upto Rs.50 million. Although vide order dated 08.02.2023, the learned civil Court dismissed the appellant’s application under Order VII, Rule 11 CPC, the appellant’s counsel on 07.04.2023 made a statement before the learned civil Court that *“if the dispute for pecuniary jurisdiction is resolved, he would have no objection if the suit is decreed under Order XII, Rule 6 CPC to the extent of the partition of the property only.”*

26. On 15.04.2023, the learned counsel for respondents No.1 to 3 sought permission to withdraw the claim in the suit with respect to *mesne* profits with permission to institute a fresh suit regarding such claim. The appellant opposed such permission to be granted to respondents No.1 to 3. Vide judgment and decree dated 08.05.2023, the learned civil Court dismissed the suit to the extent of the claim regarding *mesne* profits. However, respondents No.1 to 3 were placed at liberty to file a fresh suit

regarding their claim for *mesne* profits subject to all just and legal exceptions.

27. Despite the appellant's counsel expressing the appellant's "*no objection*" to the suit for partition being decreed, she has filed the instant appeal after the suit has been decreed only to the extent of partition. It is only after ascertaining that House No.181-A is not capable of being partitioned that the learned civil Court appointed a local commission to ascertain the value of the shares of the appellant and respondents No.1 to 3 in House No.181-A so that it is subjected to an auction and its proceeds divided amongst its co-owners. This is what is implied by the judgment and decree dated 08.05.2023 holding that "*the 50% share of [respondents No.1 to 3] and [the appellant] can only be put to public auction and sale proceeds can be divided amongst [respondents No.1 to 3] and [the appellant] equally.*"

28. The learned civil Court intended respondents No.4 and 5 not to be affected in any manner by the partition / auction of House Nos.181-A and that is why in the judgment and decree dated 08.05.2023, it has been clarified that the proceedings shall not affect the title or rights of respondents No.4 and 5 to the extent of their 50% share in the suit property in any manner. The auction purchaser will step into the shoes of the owners of House No.181-A and would be subject to the same right or obligation under the private partition between the owners of House Nos.181-A and 181-B.

29. Learned counsel for the appellant has placed reliance on the judgments reported as Ghulam Rasool Vs. Muhammad Khalid (2006 YLR 2289), Azhar Hussain Shah Vs. Member Board of Revenue, Khyber Pakhtunkhwa (2016 YLR 1489) and Mazullah Khan Vs. Taraja Begum (2020 YLR 2206) in support of his contentions that the partial partition of a property is not permissible; and that a partition can only be sought of the entire *khewat* between all the co-sharers of such *khewat* and not of a particular khasra number in the *khewat*.

30. Respondents No.1 to 3 were not seeking partition in a *khasra number* and the suit property is not a *khewat* . The suit property is located in the Islamabad Capital Territory to be governed in accordance with the Capital Development Authority Ordinance, 1960, and the Rules and Regulations made thereunder. Clause 9 in Chapter-VI in the CDA Property Manual provides that a jointly owned property can be transferred by one of the co-allottee to the extent of his share without consent of other co-allottees. Therefore, even if House Nos.181-A and 181-B are considered as an indivisible whole, the transfer of the shares of the appellant and respondents No.1 to 3 is permissible. Since the transfer of such shares is permissible, there can be no lawful impediment for the transfer of shares through auction. In such an eventuality, the auction purchaser of the shares of respondents No.1 to 3 in House No.181-A which is over 50% of Plot No.181 would, as mentioned above, be bound by the private partition carried out and acted upon by the predecessor of the appellant and respondents No.1 to 3 on the one hand and the predecessor of respondents No.4 and 5 on the other hand.

31. In view of the above, I find no merit in the instant appeal which is **dismissed with costs** throughout. Additionally, given the inequitable conduct of the appellant in denying possession of House No.181-A to its co-owners who happen to be her real sisters, and embroiling respondents No.4 and 5 in litigation, the appellant shall pay costs amounting to Rs.5,00,000/- to each of respondents No.1 to 5 under Section 35(1)(iii) CPC as amended by the Costs of Litigation Act, 2017.

(MIANGUL HASSAN AURANGZEB)
JUDGE

ANNOUNCED IN AN OPEN COURT ON 21/06/2024.

(JUDGE)