

## IN THE HIGH COURT OF SINDH AT KARACHI

DATE

ORDER WITH SIGNATURE(S) OF JUDGE(S)

***Before: Mr. Justice Nazar Akbar***

Constitutional Petition No.S-49 & 50 of 1994

Petitioners : Abdul Khaliq & others.

Respondents : Mrs. Razia Begum & others through  
Mr. Nafees Ahmed Siddiqui, advocate

Constitutional Petition No.S-76 of 1994

Petitioners : Mst. Asghari Begum & others through  
Mr. M.G. Dastagir, advocate

Respondents : Mrs. Razia Begum & others through  
Mr. Nafees Ahmed Siddiqui, advocate

Date of hearing : 24.11.2015

Date of Announcement 15.02.2016

**Nazar Akbar, J.** By this common judgment, I intend to dispose of three Constitution Petitions bearing No.S-49 & S-50 of 1994 both filed by Petitioner Abdul Khaliq son of late Abdul Ghani, the predecessors in interest of **Mst. Anwer Jehan Begum** and Constitution Petition No.S-76 of 1994 filed by Asghari Begum and others, the predecessors in interest of **Dr. A.H. Qureshi** and **Mohammad Akhtar Khan** against **Mst. Razia Begum**, through her legal heirs (Respondent No.1 in C. P Nos.S-49 & S-50 of 1994) and (Respondent No.2 in C. P No.S-76 of 1994) and others including the Secretary (RS&EP) Board of Revenue Sindh (Notified Officer under **Section 2(2)** of Evacuee Trust Property and Displaced Persons Laws (Repeal) Act, 1975 (the **Notified Officer**).

2. In all the three petitions, the petitioners have impugned a common order dated **04.01.1994** passed by the **Notified Officer** on the two Revision

Applications, one filed Razia Begum and the other by Anwar Jehan Begum against the appellate orders dated **16.4.1969** passed by Additional Settlement Commissioner on **Appeal No. ASCK-42/1959** filed by Mst. Razia Begum. The orders impugned are in respect of a building on Plot No.J.M.308 Custodian No.VII-D-279, A/11 situated on Motilal Nehru Road, renamed as Jigar Muradabadi Road, Jamshed Quarters. (hereinafter The **House**).

3. These constitution petitions have history of 57 years of litigations between the same parties and now through their legal heirs. Briefly stated, the basis of dispute amongst the Petitioners and the private Respondents started when the House in their possession was required to be disposed of through transfer to the occupants in terms of Notification dated **21.05.1959** issued by the official respondents inviting applications under the Displaced Persons (Compensation & Rehabilitation) Act, 1958 (hereinafter the **D.P. Act, 1958**). Each of the Petitioners and private Respondents, in possession of different portions of the House, filed their claim before the Deputy Settlement Commissioner for transfer of respective portions of the House to them. The various authorities functioning under the Settlement Laws on repeal are now vested in the **Secretary (R.S. & E.P.) Board of Revenue, Sindh / Notified Officer** under **Section 2(2)** of the Evacuee Property and Displaced Persons Laws (Repeal) Act, 1975. The description of the present Petitioners and origin of their claims are as follows:-

- i) The Petitioners in C.P. No.49 & 50 of 1994 are legal heirs of original allottee namely **Mst. Anwar Jehan Begum**, who had filed **C.H. Form No.168/XXIII**. She has claimed transfer of a portion on the first floor of the House in her possession as allottee.
- ii) Petitioners No.1 to 12 in C.P. No.76/1994 are legal heirs of original allottee, **Dr. A.H. Qureshi**, who had filed **C.H. Form No.20/XXIII** and claimed transfer of the other portion on the first floor and a room on the ground floor of the House to him.
- iii) Petitioners No.13 & 13-A in C.P. No.76/1994 are the legal heirs of non-claimant namely **Muhammad Akhtar Khan**, who had filed **N.C.H. Form No.22/XXIII** and claimed transfer of other portion of ground floor in his possession.

(iv) Respondent No.1 in C.P. No.49 & 50 of 1994, who is also Respondent No.2 in C.P. No.76/1994 are legal heirs of **Razia Begum Anis**, she had filed **C.H. Form No.162/XXIII** and claimed transfer of a portion of the ground floor in her possession;

4. The respective claims filed through the above mentioned four Forms by the predecessor in interest of the Petitioners and the private Respondents had been examined by different forums available under the Settlement Laws right from 1959 onward to settle the fate of the House according to the D.P. Act, 1958. In this regards the first order dated **07.11.1959** was passed by Deputy Settlement Commissioner. In his order he observed that the;

**“House No.A-11, consists of one main building having two tenements, one on the ground floor and one on the upper floor.”**

However, he ordered that the main building (the House) be transferred to Mst. Anwar Jehan Begum purely on the ground of **prior possession**. This order of Deputy Settlement Commissioner dated **07.11.1959** was challenged in appeals by two claimants before the Additional Settlement Commissioner. First appeal was filed by Dr. A.H. Qureshi, the predecessor in interest in C.P. No.76 of 1994 bearing **Appeal No. ASCK-23/1959**; and, second was filed by Respondent No.1 (Mst. Razia Begum) bearing **Appeal No.ASCK-42/1959**. The appeal of Mr. A.H. Qureshi was dismissed summarily by the Additional Settlement Commissioner by order dated **26.11.1959** on the sole ground that;

**“the law on the point that a bungalow type house should be transferred to only one party in preference to other who came in possession later. In the absence of any documentary proof that the respondent came in possession 3 days before the allotment respondent’s son. I upheld the views of the learned Deputy Settlement Commissioner.”**

However, Mst. Razia Begum, pending her appeal also approached the Chief Settlement Commissioner through an informal application to challenge the order dated **07.11.1959**. The Chief Settlement Commissioner on the Miscellaneous application of Mrs. Razia Begum on **10.03.1960** passed the following order:-

*“The main house is not capable of any division and has been occupied in a haphazard manner by its present occupants. With the approval of the Central Government, I treat this case under Section 10(a) of the Displaced Persons (Compensation and Rehabilitation) Act, and would dispose of the main house in a restricted auction between its present occupants.”*

Mrs. Anwar Jehan Begum, predecessor in interest of Petitioners of C.P. Nos.S-49 & S-50 of 1994, challenged the above order in Writ jurisdiction of this Court through C.P. No.D-163 of 1960 and got the above order set-aside by judgment dated **23.05.1961**. This judgment is reported in **PLD 1961 (W.P.) Karachi 694** as Mst. Anwar Jehan Begum versus the Chief Settlement Commissioner. This judgment is part of R&P and it was a kind of **MUST READ** for the Notified Office. Had he gone through it he could have learned how to respect the word of Law and its spirit and how the Law is to be applied in given facts of a case to protect the rights of the parties.

5. In the above back ground, Mrs. Razia Begum (Respondent) was left with hopes only in the outcome of her **Appeal No.ASCK-42/1959** which was still pending before the Additional Settlement Commissioner. By a comprehensive order dated **16.04.1969**, the Additional Settlement Commissioner in Appeal No.ASCK-42/1959 modified the order of Deputy Settlement Commissioner dated **07.11.1959** and held that the building (the House) is divisible into five residential units, therefore, he ordered as follows:-

*“I order that the five units should be disposed of in the following manners:-*

- 1. Tenement in possession of Mst. Razia Begum on the ground floor should be transferred to her on evaluation price against her C.H, Form.*
- 2. Tenement in possession of Mohammad Akhtar Khan on the ground floor should be disposed of in accordance with law.*
- 3. Tenement on the ground floor which is in possession of Dr. A.H. Qureshi should be disposed of in accordance with law.*

4. *Tenement in possession of Dr. A.H. Qureshi and his family on the 1<sup>st</sup> floor should be disposed of in accordance with law.*

5. *Tenement in possession of Mst. Anwar Jehan Begum should be transferred to her on evaluation price against her C.H. Form.*

*The open space which is now being used by the occupants of the building in question as common will continue to remain common with the same rights”*

The perusal of the above order shows that out of four, two displaced persons namely Mrs. Anwar Jehan Begum, the Petitioner in C.P. Nos.49 & 50 of 1994 and Mrs. Razia Begum, Respondent No.1 were accommodated for transfer of their first floor and ground floor tenements respectively. The remaining two displaced persons namely Mohammad Akhtar Khan and Dr. A.H. Qureshi were practically ousted from the so-called tenement in their possession as their request to transfer the same to them was not allowed and instead they were directed to file their claim/application under Settlement Scheme No.VIII within 15 days in the same order in following terms;

*“I further realize that it will be very hard for Mr. Mohammad Akhtar Khan, and Dr. A.H. Qureshi (and his family) that their case, are not being considered by me on the technical grounds mentioned above although admittedly, they are in possession of their respective tenements since long before 1958 and they were otherwise entitled for transfer. However, it will be open to them to make applications for the transfer of their respective tenements under Scheme No.VIII before the Deputy Settlement Commissioner who should entertain the same and decide their entitlement if they make such application within 15 days of the date of this order.”*

6. The above order of Additional Settlement Commissioner dated **16.04.1969** in Appeal No.ASCK-42/1959 was challenged before the Settlement Commissioner in Revision under **Section 20(3)** of the DP Act, 1958 by Mst. Razia Begum herself through Revision No.**SCK-40/1969** and by Mst. Anwar Jehan Begum through Revision No.**SCK-44/1969**. The Settlement Commissioner by a consolidated order dated **25.06.1973** while

setting aside the order of Additional Settlement Commissioner dated **16.04.1969** held that Mst. Razia Begum is entitled for transfer of entire ground floor and Mst. Anwar Jehan Begum is entitled for transfer of entire first floor. Mst. Razia Begum, (respondent in the present petitions) has accepted the decision as she did not challenge it. It is pertinent to mention here that Dr. A.H. Qureshi and Mr. Mohammad Akhtar Khan had accepted the order of Additional Settlement Commissioner dated **16.04.1969** as they have neither filed cross objection to the said Revisions nor they preferred Revisions against the said order. However, they filed constitutional petitions against the order of Settlement Commissioner dated **25.6.1973** in Revisions filed by Mst. Razia Begum and Mst. Anwar Jehan Begum. Thus three contestants namely (i) Mst. Anwar Jehan Begum through **C.P.No.484/1974** (ii) Muhammad Akhtar Khan through **C.P.No.250/1974** and (iii) Asghari Begum, the successor in interest of Dr. A.H. Qureshi and others through **C.P.No.1189/74** challenged the order of Settlement Commissioner dated **25.06.1973** before this Court under its constitutional jurisdiction. These three petitions were allowed by a common judgment dated **20.5.1978** by this Court whereby the common order dated **25.6.1973** in the two Revision Applications by the Settlement Commissioner was set-aside and the order of Additional Settlement Commissioner dated **16.04.1969** reproduced in para-5 above in Appeal No.ASCK-42/1959 filed by Mst. Razia Begum was restored. Again on restoration of order of Additional Settlement Commissioner by High Court, the Petitioners in C.P. No.250 of 1974 and C.P. No.1189 of 1994 namely Mohammad Akhtar Khan and Dr. A.H. Qureshi did not challenge it and accepted the order dated **16.04.1969** passed by Additional Settlement Commissioner.

7. Only Mst. Anwar Jehan Begum (Petitioner in C.P. Nos.49 & 50 of 1994) challenged the order of High Court passed in her C.P. No.484/1974

before the Hon'ble Supreme Court of Pakistan in **Civil Appeal No.207-K of 1980**. The Hon'ble Supreme Court by order dated **12.2.1991** set aside the judgment of High Court and remanded the case to the Notified Officer for final disposal of the matter (Revisions No.SCK-40 and SCK-44 of 1969) taking all relevant facts into consideration. On remand the Notified Officer by order dated **04.01.1994** allowed Revision No.40 of 1969 filed by Mst. Razia Begum and declared that the House is a single residential unit and only Respondent No.1 (Razia Begum) is entitled for its transfer and dismissed Revision No.44 of 1969 filed Mst. Anwer Jehan Begum. The Petitioners herein have challenged the said order dated **04.01.1994** through the petitions in hand.

8. I have heard Mr. Abdul Khaliq, who appeared in person in C.P. No. S-49 & 50 of 1994 on two different dates and attempted to plead his case but unfortunately he was unable to assist the Court and got frustrated on few initial queries from the Court and abandoned his arguments. However, I have gone through the memo of petitions and the grounds taken therein to ensure that no injustice should be done to the party whose frustration was obvious on facing the litigation for more than 50 years. I have also heard Mr. M.G. Dastagir, advocate for the Petitioner in C.P. No.S-76/1994 and Mr. Nafees Siddiqui, advocate representing Mst. Razia Begum, (Respondent). I have also minutely examined the R&P of the case since 1959. Luckily I came across an order dated **07-6-1994** in C.P. No.S-49/1994 and thus came to know that R&P was produced by an Inspector of the Evacuee Property Board and it was ordered to be retained till the disposal of the petition. None of the counsel for the Petitioners and private respondent has referred to R&P during their arguments and therefore, I had to go through the each file by myself in search

of an answer to the question of divisibility of the House in accordance with contemporaneous law with regard to the division of the bungalows.

9. Mr. M.G. Dastagir, learned counsel for the Petitioners in C.P. No.S-76 of 1994 mainly contended that the Notified Officer had failed to appreciate the definition of the **House** and the **possession** in terms of Section 2(4) & 2(6) of the D.P Act, 1958 and non-suited Dr. A.H. Qureshi, the predecessor in interest of Petitioner of Asghari Begum, and others who were in occupation of a portion of small room on the ground floor as well as two small rooms on the 1<sup>st</sup> floor and also non-suit Mohammad Akhtar Khan who was in possession of a portion on the ground floor. Mr. Nafees Siddiqui, learned counsel for Mst. Razia Begum (Respondent herein) has supported the impugned judgment by raising preliminary legal objections to the maintainability of these petitions on the ground that factual controversy having been decided by the forum under the hierarchy of Settlement Laws cannot be interfered with in writ jurisdiction by this Court. His other contentions were that the Petitioners had alternate remedy against the impugned order and the Respondent (Razia Begum) was found in possession of the House prior to the possession of others. Her claim was on better footing then the claim of the Petitioners through Mst. Anwar Jehan Begum who was indirect claimant and Mohammad Akhtar Khan a non-claimant hence other claimants were rightly non-suited on merit, too.

10. I have carefully examined the respective contentions of the counsel and also gone through the relevant provisions of D.P. Act, 1958 as well as Manual of Settlement, Government of Pakistan published in 1960 since the learned Notified Officer has referred to the said Manual. As to the question of maintainability of these petitions raised by Mr. Nafees Siddiqui, learned counsel for the Respondent (Mst. Razia Begum), suffice is to say that the controversy of the division of the House in terms of D.P. Act, 1958 has



repeatedly been held amenable to the constitutional jurisdiction of High Court if it is found that the decision of Settlement Authorities in this regard is not an speaking order or showing lack of application of judicial mind to the provisions of **section 2(4)** of the D.P. Act, 1958. The very fact that this case has been remanded by Supreme Court to the Notified Officer has reached the Supreme Court through a Constitution Petition filed by Mst. Anwar Jehan Begum in this Court itself indicates that the petition was maintainable before the High Court. Neither the High Court nor the Hon'ble Supreme Court have held that the Constitution Petitions were not maintainable. Not only this, the following three case laws consecutively reported in PLD 1991 SC are direct answer to the question of maintainability of these Petitions in the given facts and circumstances of the petitions in hand. The cases are:-

- i) Barkat Ali v. Settlement and Rehabilitation Commissioner  
**(PLD 1991 SC 610)**
- ii). Mst. Shahjahan Begum v. Mst. Shabbir Fatima & another  
**(PLD 1991 SC 614)**
- iii) Mst. Shahzada Begum v. Ahmed Kamal & 18 others  
**(PLD 1991 SC 617)**

In the case of Mst. Shahjahan Begum the Hon'ble Supreme Court held that:-

“On account of these reasons the officer further observed that “I have no alternative but to hold that Mst. Shabbir Fatima has got a preferential claim over Mst. Shah Jehan Begum”. While observing so the officer once again repeated his earlier view that the house was indivisible. **As analysed above, the power exercisable under the Proviso to section 2(4) of the Displaced Persons (Compensation and Rehabilitation) Act, 1958, it has to be pointed out, was not at all exercised as a consideration, independent of the otherwise “preferential claim” of the parties. The power exercised under the Proviso is relatable to the physical aspect of the house and not the characteristics of the rights of the applicants for its transfer. Thus it practically amounted to failure of the officer to apply mind to and exercise power under Proviso to section 2(4). As a necessary corollary of his findings otherwise of fact, on inspection, he would have divided the house in accordance with the possession but on wrong principle (looking at the better qualifications of the respondent's side) on extraneous grounds refused to divide the house.**

Same error with respect has been committed by the High Court in upholding the order of the Settlement Commissioner.” (emphasis provided)

A similar view was taken in the case of Shahzada Begum and reliance was also placed on a case reported in PLD 1972 SC 52. The relevant observations from the case of Shahzada Begum are quoted below:-

“In this case **the order impugned before the High Court indeed did not show application of mind to the question as to whether the house was or was not divisible on account of its physical characteristics, instead on account of other considerations like preferential rights of the parties, vis-à-vis, each other it was treated as indivisible.**

**Proviso to section 2(4) of the Displaced Persons (Compensation and Rehabilitation) Act through the passage of time stands interpreted by the Superior Courts in such a manner that failure to apply independent mind to the question of divisibility has been treated as failure to exercise power vested in the officer. This properly is in line with the spirit of the legislation and its main and important objects one of them being to accommodate and adjust as many displaced persons as possible. If this principle underlying the Proviso to section 2(4) would have been kept in mind by the concerned Settlement Authority the results would have been different. Thus it is a case in the above context of failure or refusal to exercise power under section 2(4) and thus the order impugned before the High Court was rendered without lawful authority. The High Court rightly in exercise of its Writ jurisdiction declared it so. Hence there is no justification for interference. This appeal fails and is dismissed. There shall be no order as to costs.”** (emphasis provided)

The other preliminary legal objection in view of the rulings of the Hon’ble Supreme Court, mentioned above, too, have no force. However, it must be mentioned here that the learned counsel for the respondent (Razia Begum) contended that the impugned order was appealable and thus alternate remedy was available. But he has not pointed out the forum of alternate remedy/appeal against the order passed on Revision Applications under **Section 20 (3)** of D.P. Act, 1958 on repeal by the Notified Officer in terms of Section 2(2) of

the Evacuee Property and Displaced Persons (Repeal) Act, 1975. Thus, I hold that these petitions are maintainable.

11. On merit, the analysis of the impugned order suggests that the learned Notified Officer while holding the House indivisible appears to have skipped certain provisions of contemporaneous law and the binding authoritative observation of superior Court. The first and foremost thing which he seems to have missed was the fact that he has been dealing with the question of providing accommodation to the Displaced Persons under the Displaced Persons (Compensation and Rehabilitation) Act, 1958. In this context, I may refer again to the observation of Hon'ble Supreme Court in the case of Shahzada Begum quoted in Para-10 above. The other examples of lacking of application of mind by Notified Officer may be appreciated from his failure to follow the instructions/guidelines issued by Chief Settlement Commissioner through notification titled **Instructions for the transfer of houses and shops in the possession of more than one person (Memo. No.Comp-Reh/59/5242 dated 22<sup>nd</sup> October 1959**, (hereinafter the Instructions Notification). Learned Notified Officer in the impugned judgment has quoted **para 2(b)** from the Instructions Notification and unfortunately he skipped **para 2(a)** from the same notification. I would like to reproduce below para 2(a) alongwith para-2(b) and also para-3 from the said Notification since it has also been quoted by Notified Officer in the impugned order:-

*“2. The Chief Settlement Commissioner has decided that the following broad principles should be kept in view while disposing of houses and shops.*

*(1) .....*

*(2)(a) If a building can conveniently be partitioned vertically down to the ground floor so as to divide it into independent and self-contained residential or business units each with an independent access, such partition may be carried out where necessary and each unit transferred separately. While carrying out such*

*partition, sufficient space should be allowed for passages and other easements.*

*(b) Bungalows should as far as possible, be transferred as complete units except in very obvious cases where they can be divided into more than one independent and complete bungalow.*

*(c) .....*

*(d) .....*

*3. A claimant in occupation of a house or shop, who is entitled to the transfer of the property will, however, have preference over a claimant who applied on the basis of the occupation of such house or shop by his parent, son, daughter or spouse.”*

Similarly learned Notified Officer while relying on the Instructions Notification of **October, 1959** failed to look into the amendment made in the said notification in **November, 1959** through **Memo. No.7616-Comp-Reh/59** dated **30<sup>th</sup> November, 1959**. It is also worth reproduction. It is as under:

***“Transfer of houses and shops in possession of more than one persons. [Memo. No.7616-Comp-Reh/59 dated 30<sup>th</sup> November, 1959].***  
*It has been reported that the instructions contained in this office Memorandum No.Comp-Reh/59 dated 22<sup>nd</sup> October, 1959, on the above subject have created certain practical difficulties particularly in cases where a single claimant in occupation of a portion of the building has applied for the transfer of a complete building to him consisting of more than one house or shop. The Chief Settlement Commissioner has, therefore, on reconsideration decided that the Deputy Settlement Commissioners may use their discretion and if they are satisfied that the transfer of the whole building to one person will result in serious hardship and dislocate other persons occupying the same building they may transfer only the portion in occupation of such person if it has an independent access and transfer the other residential or business units in the building to other persons entitled to their transfer. Normally not more than one shop and one residential unit above it comprising a self-contained independent unit should be transferred to one person. In case, however, persons occupying a building are prepared to take the whole building jointly by mutual agreement, which will result in the settlement of a majority of such persons the whole building may be transferred to them on the basis such agreement provided they are entitled to the transfer of the portions in their occupation. In order to enable the Deputy Settlement Commissioners to make judicious use of their discretion it has been decided to delete the words “In such cases also efforts should be made to transfer the whole*

*building to one persons if practicable” occurring in Principle No.(3) on page 3 of the memorandum referred to above.” (emphasis provided)*

12. The perusal of above para 2(a) and the amendment in the said Instructions Notification reinforces the authoritative observation of the Hon’ble Supreme Court in the case of **Shahzada Begum** (supra) that “**the spirit of legislation and its main and important object**” of the Settlement Laws was “**to accommodate as many displaced persons as possible**” without being influenced by the characteristic of the rights of applicants. The division of the House “**is relatable to the physical aspect of the House and not the characteristics of the rights of the applicants for its transfer**” as held in the case of Shahzada Bgum (supra). The building is admittedly a vertical building down to ground floor therefore instead of following the instructions contained in para **2(b)** the instructions contained in para **2(a)** above should have been followed. It should have conveniently be partitioned into at least two independent and self-contained residential units to accommodate as many displaced persons as possible and while carrying out such partition sufficient space should be allowed for passages and other easements. The detail discussion of the learned Notified Officer with reference to his own inspection of the House clearly shows that at the time of inspection of the building he did not apply his mind to the possibility of application of **Para 2(a)** and the amending notification quoted above despite the fact that Mst. Razia Begum had never claimed possession or transfer of any portion on first floor. The Notified Officer not only ignored Para **2(a)** of the Instructions Notification but even from Para **2(b)**, he ignored the phrase “**except in very obvious case where they can be divided into more than one independent and complete bungalow**”. Likewise to avoid consequence of Para 2(a) above the learned Notified Officer at the time of inspection failed to take note of the

fact that first floor of the House in question has an “**independent access**” and that’s why he has not mentioned anything about access to and availabilities of amenities in vertical first floor of the House in the impugned order.

13. By ignoring the above mentioned factual position as well as contemporaneous law quoted above, the Learned Notified Officer declared the building a single unit house merely on the ground of privacy of Mst. Razia Begum in para 14 of the impugned order which is reproduced below:-

“14. It was observed at the time of inspection that the occupants of the upper floor can easily overlook the aforesaid courtyard as well as the lawn/garden and the platform also which disturbs the privacy of Mrs. Razia Begum Anis who cannot freely move in the courtyard, lawn/garden as well as the platform.”

The question of privacy of a courtyard to dislodge a Displaced Person as defined under **Section 2(3)** of D.P. Act, 1958 who is in possession of a portion of the House in terms of section **2(6)** of D.P. Act, 1958 was too extraneous a ground. It does not find any support from the D.P. Act, 1958, its schedule or even Manual of Settlement Laws containing several notifications regarding instructions for transfer of the House in possession of more than one person. The privacy of a garden of a displaced person of an independent residential unit to which the said garden is attached is no ground to non-suit otherwise lawful claimant residing in an independent residential unit in the same House for almost 60 years by now and 37 years when the impugned order was passed in 1994. The Respondent (Mst. Razia Begum) has never claimed possession of entire House as one unit on any ground whatsoever including her privacy in the garden or courtyard in case the House is not declared a single unit House.

14. The other ground of nonsuiting the Petitioners of C.P. NoS-49 & 50 of 1994 by the Notified Officer include failure of legal heirs of Mst. Anwar Jehan Begum to be impleaded in time on her death in the year 1979. This ground has also been pressed before me by the learned counsel for the

Respondent (Razia Begum). Admittedly, the Petitioner had died in 1979 and the law on the issue of abatement of cause of the suit if the right to sue survived was introduced through the Law Reforms Ordinance, 1972 with effect from **14.04.1972**. In the case in hand the right to sue has been survived to the legal heirs of Anwer Jehan Begum and the proceeding had not abated. I am surprised that once the provisions of Civil Procedure Code dealing with the effect of impleading or non-impleading of legal heirs on the death of either party pending litigations in the cases where the right to sue is survived has closed the possibility of adverse finding merely for non-impleading the legal heirs, then why the issue was even examined by the learned Notified Officer, and that too, after formally impleading them. Thus the findings of non-suiting the Petitioners in C.P. No.s-49 & 50 of 1994 on the ground that the Petitioner has died in October 1979 and the legal heirs were impleaded in the year 1992 when he allowed them to be impleaded was contrary to law itself. Even on facts, this finding suffers from misreading of record. The Petitioners alongwith the memo of petition have filed copy by an application dated **03.12.1980** and order dated **20.5.1980** (Annexure C & D to petition) from the record of Hon'ble Supreme Court in **CPLA No.K-204/78** which was re-numbered as **C.A. No.207-K/1980**. The application before the Supreme Court was for impleading the legal heir of deceased Anwer Jehan Begum and it was allowed.

15. The perusal of the findings of the Notified Officer about the inspection of the House showing that the family of Dr. A.H. Qureshi, the predecessor in interest of Petitioners in C.P. No.S-76 of 1994 were in possession of one small room on the ground floor and two rooms on the first floor clearly suggest that the said claimant was not in possession of any portion of the House which could be termed as an independent residential unit as discussed in the Instructions Notification quoted above or any part of the schedule of the D.P

Act, 1958. This factual position has not been controverted by the Petitioners in C.P. No.S-76/1994 themselves that they were in occupation of only one small room on the ground floor and two rooms on the first floor. Thus, some portion on the ground floor and some portion on the first floor in their possession was not supposed to be transferred to them since neither the two portion together nor any one of them constituted independently residential unit. Therefore in the given facts of the case the dispute about the transfer of first floor of the House as one independent residential unit was between **Dr.A.H. Qureshi** and **Mst. Anwar Jehan Begum** only and **Mrs. Razia Begum** was not in the picture at all since she has not even applied for transfer of any portion of first floor of the House to her. It was, in the given facts, to be resolved on the basis of the characteristics of the rights of the two Displaced Persons. This is also an admitted position by the Petitioners of C.P. No.S-76/1994 themselves that they have not occupied the portion of first floor prior to Mst. Anwar Jehan Begum. The Petitioners (C.P. No.76/1994) have not contested that their predecessor in interest were in occupation of two small portions **one on ground and other on upper floor** can be termed as separate independent units for accommodation.

16. The case of Muhammad Akhtar Khan for transfer of the portion of the ground floor premises in his possession was directly hit by first proviso to Para-1 of the Schedule to the D.P. Act, 1958. He was not claimant and he has filed (N.C.H Form) non-claimant Form and on contest for transfer of one complete residential unit between the claimant and non-claimant, the claimant has better right for transfer of the unit. In the case in hand Razia Begum has filed C.H. Form for transfer of ground floor portion and the other portion of ground floor was with Mr. Mohammad Akhtar Khan, non-claimant. But for this reason, the Additional Settlement Commissioner in his order dated



**16.4.1969** (reproduced in Para 5 above) has regretfully turned down their request for transfer of the portion in their favour and directed both, Mr. Mohammad Akhtar Khan and Dr. A.H. Qureshi to make an application under **Settlement Scheme No.VIII** before the Deputy Settlement Commissioner within 15 days.

17. It will not be out of place to mention here that the judgment order in the two Revisions before the Settlement Commissioner and on remand from Supreme Court before the Notified Officer was an order dated **16.04.1969** passed by the Additional Settlement Commissioner on appeal under **section 19** of D.P. Act, 1958 filed by Razia Begum. The said order of Additional Settlement Commissioner was not challenged by Dr. A.H. Qureshi and Mohammad Akhtar Khan, Petitioners of C.P. No.S-76/1994 through their successor in interest. They have not filed even cross objections to the Revision Application to seek reversal of the observation of the appellate authority directing them to file their claim/application under **Settlement Scheme No.VIII** within 15 days. Consequently, in terms of the said order dated **16.04.1969** out of the four claimants only Mst. Razia Begum and Mst. Anwer Jehan Begum were left in the field to lawfully claim transfer of either entire House or one portion as an independent residential unit in their possession. The Petitioners of C.P. No.S-76/1994 cannot be said to have been aggrieved by the order dated **04.01.1994** on Revision Applications passed by Notified Officer since they have not been aggrieved by the order impugned in the said Revisions.

18. In view of the above facts and circumstances, the contest was only between Mst. Razia Begum and Mst. Anwer Jehan Begum for transfer of the House but factually they were not pitched against each other. Neither Mst. Razia Begum claimed transfer of upper floor to her nor Mst. Anwer Jehan

Begum applied for transfer of ground floor to her. However, the Notified Officer by misapplication of the D.P. Act, 1958 and the statutory instructions contained in the Manual of Settlement on the question of divisibility of bungalow (the House) wrongly held that the House was a single residential unit and consequently he had to examine the entitlement of either of the two claimants for transfer of the House as a single residential unit. Therefore, he applied theory of “**preferential rights**” in terms of second proviso to Para-1 of the Schedule of D.P. Act, 1958 and in so doing the learned Notified Officer again committed a grave illegality by asking the parties in 1994 to file affidavits about the date of their possession by scratching their head for the memories of 1947 to **21.12.1958**, the cut out date of possession/occupation of the House for claiming transfer. He ignored the record and proceedings of the case available before him. It goes without saying that the revisional courts/authorities are not supposed to record fresh evidence or direct the parties to prove anything by means of an affidavit in revisional stage. The authority of Settlement Commissioner under **Section 20 of D.P. Act, 1958** is limited to “**call for the record of any case or proceeding for the purpose of satisfying himself as to the correctness, legality or propriety of such order and may pass such order in relation thereto as he thinks fit.**” The provision of Section 20 of D.P. Act, 1958 reads as follow:-

*[“**20.Revision.-- (1) A Settlement Commissioner may either on an application made by a person aggrieved by an order passed by an Assistant Settlement Commissioner, or an Additional Settlement Commissioner under this Act, within fifteen days from the date of such order, or of his own motion at any time, call for the record of any case or proceeding for the purpose of satisfying himself as to the correctness, legality or propriety of such order and may pass such order in relation thereto as he thinks fit.**”]*

The fact which was not available on record of proceedings before lower forums cannot be taken on record at the revisional stage to interfere with the

impugned order. The revisional Authority to check the correctness, legality or propriety of the order impugned before the authority is not supposed to direct the parties to file any document or plead a fact which was not available before the lower forums at the time of passing the impugned order. The date of possession of Anwer Jehn Begum was already available on record as **11.11.1947** by virtue of the allotment order annexed by her to her C.H. Form No.168/XXIII in reply to para 9 of the Form. As against Anwer Jehan Begum record shows that Razia Begum had no allotment order with her to give an exact date of her possession. Mst. Razia Begum in her C.H. Form available in R & P at page-282 & 283 in reply to para-9 regarding number and date of allotment order issued by a competent authority under which house stands allotted to her, did not mention the date and declared that copy is attached. Record does not show attachment of allotment order. To the contrary, in her objection to C.P. Nos.S-49 & S-50 of 1994, Mst. Razia Begum herself has filed an Annexure **R/7** available at page-229 of the court file. Unfortunately this Form is a declaration of eligibility by claimant who does not have an allotment order for the house in his/her possession.

19. The learned Notified Officer refused to accept the date given on the allotment order as date of possession of Mst. Anwer Jehan Begum and thereby negated the authority of law contained in section **2(6)** of the D.P. Act, 1958 wherein possession has been defined and it reads as follows:-

*“**Possession**” means possession obtained in pursuance of an order passed on or before the twentieth day of December 1958 by a Rehabilitation Authority or a Custodian or any other office authorized or permitted by the Central or Provincial Government;”*

The Notified Officer stepped out of his jurisdiction as Revisional authority when he directed the parties to file affidavit about the date of their possession of the respective portions of the House instead of finding the date of possession from Record & Proceedings in accordance with the date shown on

the document showing possession in pursuance of an order by Rehabilitation Authority or Custodian. It was improper exercise of authority by the Notified Officer as it gave an advantage to Mst. Razia Begum to declare her possession prior to the date of possession of Mst. Anwer Jehan Begum who in reply to Para-9 of her C.H. Form, has already disclosed a clear date as **11.11.1947** of her possession persuasion to allotment order and obviously this date was in the knowledge of Mst. Razia Begum. Therefore, in her affidavit to avail the benefit of “prior possession” as provided in second proviso to Para 1 of the Schedule of D.P. Act, 1958 she declared that she entered in to the House in September, 1947 and defeated possible rights of “prior possession” of Mst. Anwer Jehan Begum. This exercise by the Notified Officer was on the face of it contrary to law and appears from the record to be designed to favour Mst. Razia Begum. It is clear from the record that the Notified Officer has failed to apply his mind to the various provisions of law particularly **section 2(4) and 2(6)** of the D.P. Act, 1958 and Settlement Manual in deciding the divisibility of the House in question. He had also failed to read and appreciate from the Record & Proceedings, the factum of possession of the respective portions of the House in question by the respective parties. The impugned order of the Notified Officer was, therefore, patently an arbitrary exercise of an authority vested in him.

20. The crux of the above discussion on law and facts is that the impugned order is set-aside. Both the Revisions Applications are dismissed and order of Additional Settlement Commissioner dated **16.4.1969** in Appeal No.ASCK-42 of 1959 is modified as follows:-

- (i) The House constructed on Plot No. J.M. 308 Custodian No.VII-D-279, No.A-11, Motilal Nehru Road renamed as Jigar Muradabadi Road, Jamshed Quarters is divisible into two independent residential units, one on ground floor and the other on the first floor;

- (ii) The entire ground floor shall be transferred to Mst. Razia Begum since deceased to her legal heirs.
- (iii) The entire first floor shall be transferred to Mst. Anwer Jehan Begum;
- (iv) The authority concerned shall allow sufficient passage and easement to Mrs. Anwer Jehan Begum, since deceased to her legal heirs, while partition the open space which has been in common use since 1947.

Consequently Constitution Petition Nos.S-49 & S-50 of 1994 are partly allowed. Constitution Petition No.S-76 of 1994 is dismissed with no order as to cost.

JUDGE

Karachi  
Dated.15.02.2016

MAK/PS