

**ORDER SHEET  
IN THE HIGH COURT OF SINDH, KARACHI**

Crl. Misc. Application No. 03 of 2008

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Date \_\_\_\_\_ Order with signature of Judge \_\_\_\_\_

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**Priority Case**

For hearing of main case.

Date of hearing 17.08.2020

Date of Order 20.08.2020

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Mr. Amer Asher, Advocate for the Applicant.

Mr. Irshad Ali Kehar, Advocate for Respondents No.1 and 2.

Ms. Rubina Qadir, D.P.G.

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**KAUSAR SULTANA HUSSAIN, J:----** By this Criminal Misc. Application No. 03 of 2008 under Section 561-A Cr.P.C, the applicant/petitioner assailed the judgment dated 17.12.2007 passed on Revision Application No. 68 of 2006 (Re-Muhammad Hussain and another v. The State and others) by the Court of learned Vth Additional Sessions Judge Karachi (East), whereby the same was allowed and by setting aside the impugned order dated 17.7.2006 passed by learned Xth Judicial Magistrate Karachi-East, directed the learned trial Court to restore possession of the property to respondent No.1/applicant Muhammad Hussain at the position which was prevailing when the litigation commenced between the parties, hence this Criminal Misc. Application for quashment. Relevant facts in short are that:

*“Proceedings under Section 145, Cr.P.C were initiated by the respondent No.1, Muhammad Hussain in respect of*

*immoveable property being House No. 331/5, Mohalla Islam Ganj, Lasbella, Karachi against the applicant before the learned trial Court, in which the respondent No.1 Muhammad Hussain claimed the disputed property by saying that it belonged to his mother Amina Bibi alias Akhtari Begum and after her death, he is entitled to its ownership. The respondent No.1's case is that in the year 1987, he was unlawfully and illegally dispossessed by the deceased Syed Shoukat Hussain i.e. applicant/petitioner in this matter, who had registered a false case under Section 448 PPC against Muhammad Hussain/respondent No.1. On the other hand, case of the Syed Shoukat Hussain applicant/petitioner is that one Javed Iqbal a son of late Akhtari Begum had inherited the property after death of his mother and being out of country, he had executed a power of attorney in favour of the deceased Syed Shoukat Hussain/applicant to look after the disputed property in his absence. According to applicant/petitioner Syed Shoukat Hussain the respondent No.1 Muhammad Hussain fraudulently occupied the disputed property by claiming to be a son of Akhtari Begum while he had come to Karachi on the pretext only to offer Fateha of Jawaid Iqbal's mother Akhtari Begum."*

*The above circumstances gave rise to multifold civil and criminal litigations between the parties including these proceedings under Section 145 Cr.P.C. The matter came thrice before this Court. Lastly, on 19.12.2002 in Crl. Misc. Application No. 280 of 2002, this Court directed the Judicial Magistrate No.1, Karachi-East, to dispose of the*

*case in accordance with law. In compliance of the said order, learned Ist Judicial Magistrate, Karachi-East, vide order dated 01.09.2003 disposed of these proceedings and in consequence thereof possession was delivered to the applicant/Syed Shoukat Hussain. Later on, respondent No.2 Muhammad Younas filed an application before the learned Xth Judicial Magistrate, Karachi-East / trial Court that he had purchased the subject house and prayed for becoming a party. The said application was dismissed vide order dated 30.09.2003 and both orders were challenged before the learned District & Sessions Judge, Karachi-East, in Criminal Revision No. 104 of 2003. The aforesaid orders were set aside vide order dated 21.05.2005 and the case was remanded to the learned Trial Court (Xth Judicial Magistrate, Karachi-East) for decision afresh after recording evidence of both the parties. However, possession was allowed to remain with the legal heirs of deceased applicant / petitioner Syed Shoukat Hussain with direction not to dispose of the disputed property till disposal of the proceedings.*

*The Learned Xth Judicial Magistrate, Karachi-East recorded evidence of both the side in compliance of the order of learned District & Sessions Judge, Karachi-East dated 21.05.2005. The Respondent No.1/Applicant Muhammad Hussain was examined (Exh-1) himself but he did not produce any witness in support of his claim. The attorney/LR of the Applicant Shoukat Hussain was examined (Exh-2) and he had produced following documents in support of his version:*

1. *General Power of Attorney dated 22.09.2005 as Ex-2/A.*
2. *Nikahnama of Akhtar Hussain and Akhtari Begum dated 24.01.1948 as Ex-2/B.*
3. *Power of Attorney dated 15.06.1988 executed by Javed Iqbal in favour of Syed Shaukat Hussain as Ex-2/C.*
4. *Carbon Copy of station diary entry of P.S. Soldier Bazar dated 06.10.1987 as Ex-2/D.*
5. *Certified copy of police report dated 21.10.1989 of P.S. Soldier Bazar prepared by S.I.P. Raza Hussain Shah as Ex-2/E.*
6. *Certified copy of order dated 01.02.2000 passed by learned VIIth Senior Civil Judge, Karachi-East in Suit No.160/1992 as Ex-2/F.*
7. *Certified copy of order dated 20.04.2000 passed by learned Vth Additional District Judge, Karachi-East in Civil Appeal No.60/2000 as Ex-2/G*
8. *Certified copy of order dated 19.12.2002 passed by the High Court of Sindh in Crl. Misc. Application No.280/2002 as Ex-2/H.*

*On 17.07.2006 after recording evidence of the parties detailed above and hearing the learned counsel of both the side, the learned Xth Judicial Magistrate, Karachi-East had decided that the LRs of the Applicant Shoukat Hussain being in lawful possession of the disputed property on behalf of Jawaid are entitled to continue their possession until evicted therefrom in due course of law and such possession shall not be disturbed until such eviction. The Respondent No.1/Applicant Muhammad Hussain being aggrieved filed a Criminal Revision Application No.68/2006 against such order of learned Xth Judicial Magistrate, Karachi-East before the learned District & Sessions Judge, Karachi-East, which was later transferred to learned Vth Additional Sessions Judge, Karachi-East for disposal according to law.*

*The said Criminal Revision Application No. 68 of 2006 was heard and allowed by the learned Vth Additional Sessions Judge, Karachi-East, vide judgment dated 17.12.2007 by setting aside the impugned order dated*

*17.7.2006 passed by the learned Xth Judicial Magistrate, Karachi-East under Section 145 Cr.P.C with directions to the learned trial Court to restore the possession of the property in dispute to the respondent No. 2 Muhammad Hussain at the position, which was prevailing when the litigation commenced between the parties, hence this Criminal Misc. Application had been filed by the late Syed Shoukat Hussain's son Muzaffar Hussain against the impugned order dated 17.12.2007.*

*I have heard the learned counsel for the parties and also have gone through the entire available record with due care and caution.*

*The learned counsel for the applicant has submitted that the learned Vth Additional Sessions Judge, Karachi-East had fallen an error by ignoring the fact that possession of the disputed property was remained with the applicant/petitioner at the time of initiating the proceedings under Section 145 Cr.P.C which fact was also reflected from police report submitted by the SHO of PS Soldiar Bazar. He further argued that the applicant/petitioner and his family members were / are living in the subject property from the life time of their grand mother Akhtari Begum. The learned counsel for the applicant/petitioner has further submitted that his uncle Jawaid Iqbal the owner of the property in question had executed Power of Attorney in favour of the applicant/petitioner which is available on record at page No.267 of memo of application; that the said Jawaid Iqbal has possessed all relevant documents of the subject property and produced in evidence before the learned*

*Magistrate which is sufficient proof that their grand-mother in her life time transferred the property in the name of her son Jawaid Iqbal and with his permission they were / are residing there. With regard to respondent No.1, the learned counsel submitted that he has no concern with the subject property and so also with their grand-mother, that's why he could not prove his alleged title in the property in question inspite of filing civil cases in this regard as the said suit / suits were dismissed. He finally argued that the respondent No. 1 Muhammad Hussain has illegally sold out some portion of the house to Muhammad Younus as he claimed but said Muhammad Younus has also failed to prove his title in the subject property. He prayed for setting aside the judgment dated 17.12.2007 passed by the learned Vth Additional Sessions Judge, Karachi-East being void, illegal ab-initio having no force of law.*

*On the other hand the learned counsel appearing on behalf of the respondent No.2 Muhammad Younus has argued that the judgment passed by the learned Vth Additional Sessions Judge, Karachi-East has suffered with no illegality or infirmity as passed after considering all facts and with the canons of law while the learned Magistrate had passed the order without jurisdiction as the case of the parties is purely of civil nature. Per learned counsel for the respondent No.2 Muhammad Younus, the respondent No.1 Muhammad Hussain was in possession of property in dispute and had been paying utility bills of the disputed house for last many years. The respondent No.2 had purchased the property in question from him but he was dispossessed on the basis of the order of learned*

*Magistrate. He prayed that the present Criminal Misc. Application of the applicant may be dismissed.*

*After hearing arguments and perusal of the record, I am of the view that while passing order dated 17.7.2006, learned Judicial Magistrate Karachi-East, framed the point of determination that "which party was in possession of the disputed property at the date of order i.e. 13.6.1988 passed under Section 145(1) Cr.P.C." After discussing police reports dated 12.6.1988 submitted by the SHO of PS Soldier Bazar, the learned Xth Judicial Magistrate, Karachi-East reached at the conclusion that the LRs of Syed Shoukat Hussain / applicants were in possession at the time of passing order under Section 145 Cr.P.C., therefore they are entitled to possess the disputed property until evicted therefrom in due course of law. Since they were already in possession of the disputed house therefore, no order for restoration of possession to them was passed. Against the above mentioned order dated 17.7.2006, Applicant No.1, Muhammad Hussain and one stranger namely Muhammad Younus Applicant No.2 had filed Crl. Revision No. 68 of 2006, while the said Muhammad Younus was earlier declined to be impleaded as party in the proceedings pending for a long time between the parties namely Muhammad Hussain and Jawaid Iqbal through his attorney Syed Shoukat Hussain in respect of the disputed property. However, the said Crl. Revision Application No.68 of 2006 was decided vide judgment dated 17.12.2007, wherein it had been discussed that basically the actual dispute was between the parties namely Muhammad Hussain and Jawaid Iqbal, while Syed Shoukat Hussain was pursuing the matter as attorney of said Jawaid Iqbal and after death of Syed Shoukat Hussain (attorney) proceedings should*

*have continued against Jawaid Iqbal in which he might either himself appear or appoint any other attorney afresh. The learned Additional Sessions Judge, Karachi-East has further opined that from no angle there could be found any justification to bring the LRS of the deceased attorney on record.*

*The observation of the learned Vth Additional Sessions Judge, Karachi-East mentioned above is not appreciable owing to the reasons that the proceedings under Section 145 Cr.P.C have no nexus with the Civil Procedure Code which provides that no attorney can pursue the matter of deceased party until his LRs execute a fresh power of attorney in his favour, however in the proceedings initiated under Section 145 (1) Cr.P.C, Magistrate can only take necessary action for the prevention of breach of peace and to protect the possessing rights of the person(s), who is/are in actual possession of the disputed property at the time of commencement of the proceedings under Section 145 Cr.P.C. In instant matter per record Syed Shoukat Hussain was in possession of the disputed property alongwith his family, belonged to his brother Jawaid Iqbal and the said Jawaid Iqbal was out of country due to his job, therefore, he executed a power of attorney in favour of his brother and allowed him to reside there alongwith his family, therefore, even after death of the attorney, his LRs who are/were already in possession of the property in question had the same possessory right over the disputed house on behalf of Jawaid Iqbal and they could approach the Magistrate to claim protection of their possession under Section 145 Cr.P.C for which they do not need to produce*



*a fresh power of attorney. The sole object of exercising jurisdiction under Section 145 Cr.P.C is to prevent parties from fighting over possession of immovable property and from shedding blood and disturbing the peace and tranquility. Decision of title of parties over disputed property is not intended by Section 145 Cr.P.C as it is exclusive jurisdiction of the Civil Court to decide title of the disputed property under Civil Laws.*

*The learned counsel for the Applicant raised legal objection on filing Revision Application by the respondent No.2 / Applicant No.2 Muhammad Younus before the Court of Sessions as he was not the party before the learned trial Court. The learned Additional Sessions Judge, Karachi-East opined on this point while passing judgment on Revision Application No. 86 of 2006 that "it is decided rule of filing appeal that any party aggrieved by an order may prefer appeal." Per learned Revisional Court "the words any party aggrieved by an order and not any party to the proceedings." I agree with the view of the learned Revisional Court on this point that under Section 435 of the Cr.P.C it is open to any person to move the Court on its revisional side.*

*The learned counsel for the Applicant while arguing the matter pointed out that in fact the Revision Application No.68/2006 was not filed by the Respondent No.1/Applicant No.1 Muhammad Hussain as neither he signed the Revision Application nor assigned any power to his counsel to represent him while pursuing the said Revision, as such order passed by the learned Xth Judicial Magistrate, Karachi-East could not be treated as*

*challenged / assailed by the Respondent No.1/Applicant No.1 Muhammad Hussain. I have gone through the Power/Vakalatnama dated 26.8.2006 submitted by the Respondent No.2/Applicant No.2 Muhammad Younus alongwith the Revision Application No. 68 of 2006 and found that it does not have signature of Respondent No.1/Applicant No.1 Muhammad Hussain, besides this no other Power on behalf of Respondent No.1/Applicant No.1 Muhammad Hussain is available on record in proceedings of Revision No. 68 of 2006, which shows that in fact the order dated 17.07.2006 passed by the Magistrate was not assailed by the Respondent No.1/Applicant No.1 Muhammad Hussain, hence the said order attained finality to the extent of Respondent No.1/Applicant No.1 Muhammad Hussain. So far as grievance to Respondent No.2/Applicant No.2, Muhammad Younus against the order of Magistrate are related I do not find any reason to challenge it as neither he is in possession of the disputed property nor the LRs of Syed Shoukat Hussain who are in possession have any grievance for breach of peace against him. Besides, if the Respondent No.2/Applicant No.2 Muhammad Younus had any claim of ownership over the disputed property, he is at liberty to approach the Civil Court for obtaining declaration of his such ownership. No evidence is available on record to show that the Respondent No.2/Applicant No.2 Muhammad Younus had ever occupied the property in question, hence there arise no question to challenge or assail the Magistrate's order through filing Revision Application. The learned Additional District & Sessions Judge, Karachi-East could not consider*

*the instant case from this angle and erred to pass the order for handing over the possession to the Respondent No.1/Applicant No.1 Muhammad Hussain who had not assailed the Magistrate's order in Revision. I am, therefore, of the firm view that the judgment dated 17.12.2007 passed by the learned Vth Additional Sessions Judge, Karachi-East is misconceived and lacks application of judicial mind, hence the Judgment passed by the learned Vth Additional Session Judge, Karachi-East dated 17.12.2007 in Criminal Revision Application No. 68 of 2006 is hereby set aside, while the order passed by the learned Xth Judicial Magistrate, Karachi-East dated 17.07.2006 is maintained as I found it judicious having solid reasons which did not suffer from any illegality, irregularity or infirmity. Consequently present Criminal Miscellaneous Application is allowed.*

**J U D G E**