JUDGMENT SHEET

IN THE ISLAMABAD HIGH COURT, ISLAMABAD
(JUDICIAL DEPARTMENT)

W.P. No. 3160 of 2024

Zahoor Ahmed Malik
Vs.
Malik Saif ur Rehman and another

Petitioners by	:	Mr. Mudassar Kahlid Abbasi Advocate.
Respondents by	:	M/s Raja Rizwan Abbasi and Mr. Khalil ur Rehman Abbasi Advocates for the Respondent No. 1. M/s Imran Farooq and Raja Zamir Ud Din Ahmed A.A.Gs. Ms. Maimana Khattak, State Counsel. Mr. Mehr Ullah, SI/IO.
Date of Hearing	:	**16.12.2024.**

SAMAN RAFAT IMTIAZ, J.-

1. The Petitioner [Zahoor Ahmed Malik] seeks (a) setting aside of the (i) Order dated 4.4.2024 **("Impugned Order")** passed by the Assistant Commissioner/Sub-Divisional Magistrate (Industrial Area), Islamabad **("Magistrate")** pursuant to the Complaint submitted by the SHO, P.S Industrial Area, Islamabad under Section 145 of the Code of Criminal Procedure, 1989 **("Cr.P.C.")** and (ii) the Judgment dated 18-10-2024 **("Impugned Judgment")** passed by the learned Sessions Judge, Islamabad-West whereby the Petitioner's Criminal Revision assailing the Impugned Order has been dismissed; and (b) restoration of possession of

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the corner side of plaza towards 1-8 Markaz, Islamabad in favour of the Petitioner.

2. The facts, in brief, as per the Memorandum of the Petition and its annexures are that Respondent No. 1 [Malik Saif-Ur-Rahman] was declared the successful bidder by the Capital Development Authority **("CDA")** in an auction held for a commercial plot in Sector I-8. However, he could not meet the final requirements like payment of balance consideration. To this end, he entered into a Partnership Deed dated 26-3-2018 **("Partnership Deed")** with the Petitioner, which records that Respondent No.1 was going to construct a Shopping Mall at Plot No.11, situated in Sector 1-8 Markaz, Islamabad, measuring 1244.44 square yards, **("Subject Property")** in which the Petitioner and the Respondent No. 1 would be 50% owner as well as in the said project. Thereafter, the Respondent No. 1 and the Petitioner got joint allotment and possession of the Subject Property vide Letters dated 26-6-2019 and 5-9-2019 respectively.

3. On 28-2-2022, the Petitioner filed a Civil Suit for Declaration, Rendition of Accounts, and Permanent Injunction against the Respondent No. 1 alleging various violations of the Partnership Deed while also mentioning that the grey structure of the Shopping Mall had been constructed at the Subject Property. During pendency of such suit, the Petitioner moved an application dated 18-7-2022 to the SHO, Police Station I-9 stating that the structure of the Plaza at the Subject Property is constructed, which is divided and that the Petitioner is in possession of his portion when 35 to 40 people forcibly entered his Plaza at the behest of the Respondent No. 1 in an effort to dispossess the Petitioner of the Subject Property. A compromise was arrived at between the Petitioner and the representatives of the Respondent No.1, whereby possession of the corner side of the Shopping Mall towards 1-8 Markaz by the Petitioner was acknowledged and conceded to.

4. On 14-1-2023, the Respondent No. 1 filed a Civil Suit for Possession under Section 9 of the Specific Relief Act, 1977 alleging that the Petitioner forcibly took possession of the constructed building on 18-7-2022.

5. The Petitioner once again moved an application dated 23-1-2023 to SHO, Industrial Area, Islamabad stating that the structure on the Subject Property is complete and alleging that on 4-1-2023 his caretaker at the Subject Property had been harassed by 19 to 20 persons at the behest of the Respondent No. 1 who also took away his property from the Subject property which was later recovered and returned to the Petitioner by the police. The matter was referred to Alternate Dispute Resolution **("ADR")** but the Respondent No.1 did not turn up before the ADR Committee.

6. Thereafter, an FIR No. 162/2023 was registered in the Police Station I-9 on 4-2-2023 by the Petitioner's caretaker alleging that their workers were putting up banners for the general public outside the Plaza/Shopping Mall when 30-35 armed men of the Respondent No. 1 who is in possession of the other portion of the Plaza/Shopping Mall forcibly entered the Petitioner's side of the Plaza/Shopping Mall and threatened their workers and tried to forcibly take their side of the Plaza/Shopping Mall into possession. On 4-2-2023 proceedings under Section 107/151, Cr. P.C. were conducted whereby the police arrested the security guards of both the parties and on 5-2-2023 bail bonds were submitted.

7. Finally on 6-2-2023 local police filed Complaint under Section 145 Cr.P.C. before the Magistrate, who called for a police report that was submitted on 14-4-2023. The learned Magistrate decided the Complaint vide Order dated 9-10-2023 restoring the possession of the Subject Property to the Respondent No. 1 as last possessor while the proceedings under Section 145, Cr.P.C. were dismissed. The said order was challenged by the Petitioner vide criminal revision petition filed before the Additional Sessions Judge, Islamabad-West. The Additional Sessions Judge, Islamabad-West vide Order dated 3-1-2024 remanded the matter to

the Magistrate to ascertain the question of possession as well as breach of peace after recording statements of the parties and taking documentary evidence and then to decide afresh

8. The learned Magistrate vide the Impugned Order withdrew the interim order dated 29-02-2024 for sealing of the Subject Property and directed that the Subject Property be de-sealed and possession thereof be restored in favour of the Respondent No. 1 who was found to be in possession of the Subject Property after execution of the Partnership Deed by relying upon its contents and statements of the contractors. The Petitioner assailed the Impugned Order by filing Criminal Revision, but the same was dismissed vide the Impugned Judgment by the learned Sessions Judge, Islamabad-West by finding that the actual possession of the Subject Property was with the Respondent No.1 for the purpose of construction of building in view of the Partnership Deed whereby construction is to be carried out by the Respondent No.1 and that he was dispossessed through force on 18-7-2022. Hence, the Petitioner filed this Petition.

9. The learned counsel for the Petitioner has pointed out that the Subject Property was allotted by CDA jointly to both the Petitioner and the Respondent No. 1 vide the Allotment Letter dated 26-6-2019 and possession was handed over to both the Petitioner and the Respondent No.1 vide Letter dated 5-9-2019. Therefore, the learned counsel for the Petitioner argued that the learned Magistrate and the learned Sessions Judge, Islamabad-West erred in concluding vide the Impugned Order and the Impugned Judgment that possession was with the Respondent No. 1 on the basis of the Partnership Deed between the Petitioner and the Respondent No. 1. The learned counsel for the Petitioner pointed out that the crucial date for the determination as to who was in possession under sub-section (4) of Section 145, Cr.P.C. and whether any party was forcibly or wrongfully dispossessed two months prior to such date pursuant to the first proviso thereto is the date on which the parties are summoned by the Magistrate under sub-section (1) of Section 145. According to the State

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Counsel such date was 12-4-2023 which neither the counsel for the Petitioner nor the counsel for the Respondent No. 1 denied. The learned counsel for the Petitioner contended that no document on the record establishes exclusive possession of the Subject Property with the Respondent No. 1 on or around such date or forcible dispossession within two months prior thereto.

10. The learned counsel for the Petitioner has relied upon FIR No. 162/23 dated 4-2-2023 lodged by the caretaker of the Petitioner at the Subject Property in respect of his portion whereby it was alleged that on 4-2-2023 the Respondent No. 1's men at his behest attempted to takeover possession of the Subject Property to assert that the Petitioner was in possession on such date. The learned counsel for the Petitioner argued that even the police Report dated 14-4-2023 does not show exclusive possession was with the Respondent No. 1. He pointed out that the Respondent No. 1 filed Civil Suit for Possession on 14-1-2023 in which he categorically alleged that he had been dispossessed on 18-7-2022. The learned counsel for the Petitioner submits that while the Petitioner denies such allegation of dispossession it nevertheless shows that admittedly the Petitioner was in possession and that the Respondent No. 1 was certainly not in exclusive possession of the Subject Property. He also relied upon the Petitioner's Civil Suit filed on 28-2-2022 whereby he alleged that possession was with both the Petitioner and the Respondent No. 1. The learned counsel for the Petitioner also referred to the Report of the ADR Committee which records the allegations of the Petitioner including but not limited to that both parties were in possession and also that despite contact by the ADR Committee with the Respondent No. 1 telephonically several times they did not participate in the proceedings. He therefore, argued that handing over of possession of the Subject Property only to the Respondent No. 1 by the learned Magistrate was unlawful and illegal particularly with reference to Sections 145(4) and (6), Cr.P.C. He further argued that according to *Mukhteyar Alam versus The State and others,* 2017 PCr.LJ

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684 and *Ch. Ghalib Hussain and another versus Muhammad Siddique and others,* 2013 MLD 749 where civil proceedings are pending the Magistrate cannot take action under Section 145, Cr.P.C.

11. Mr. Raja Rizwan Abbasi Advocate for the Respondent No. 1 drew the Court's attention to the Complaint under Section 145 Cr.P.C. dated 6-2-2023 and highlighted that contrary to the requirement of Section 145 Cr.P.C. there is no imminent threat of breach of peace identified therein. On query of the Court, the learned counsel submits that although the Respondent No. 1 did not challenge the order passed under Section 145 Cr.P.C. the Respondent No. 1 was also aggrieved of the same. He referred to Clause 14 of the Partnership Deed whereby it is the Respondent No.1 who was liable to construct the Shopping Mall on the Subject Property and argued that it establishes that the possession of the Subject Property was with the Respondent No. 1. He emphasized that in view of such provision of the Partnership Deed reflecting the agreement between the parties the possession was rightly granted to the Respondent No. 1 exclusively vide the Impugned Order and Judgment which as such do not suffer from any illegality or infirmity. He argued that the documents relied upon by the Petitioner before this Court particularly the documents pertaining to the civil proceedings between the parties were never produced before the learned Magistrate despite the fact that the Petitioner was given a chance to produce evidence pursuant to Section 145 (4) Cr.P.C. Lastly, Mr. Khalil ur Rehman Abbasi Advocate, co-counsel argued that the writ is not maintainable in view of concurrent findings as held in *Abdul Rehman Bajwa vs. Sultan and 9 others,* PLD 1981 SC 522.

12. In rebuttal the learned counsel for the Petitioner argued that no alternate remedy is available to the Petitioner. He reiterated that the Petitioner and the Respondent No. 1 are co-owners and relied upon *Nadeem Waqar Khan vs. Javed Masood Ahmed Khan,* PLD 2020 Sindh 8 to submit that a co-owner cannot be dispossessed of joint property. In answer to a specific question the learned counsel for the Petitioner

submitted that the Magistrate is empowered to take action under Sections 107 and 151 Cr.P.C. in case of any threat to breach of peace or disturbance of public tranquility and that security bonds have already been deposited by both the Petitioner as well as the Respondent No. 1 in accordance with Section 107, Cr.P.C. The learned counsel for the Petitioner apprised the Court that the Suit for Possession filed by the Respondent No. 1 has been withdrawn by him following the passing of the Impugned Order and the Impugned Judgment by stating that since possession has been granted to him the issue stands redressed.

13. I have heard the learned counsel for the parties and have also perused the record.

Complaint dated 6-2-2023 and Police Report dated 14-4-2023:

14. It is noteworthy that the proceedings under Section 145, Cr.P.C. were not undertaken by the learned Magistrate upon an application filed by the Respondent No. 1 claiming exclusive possession of the Subject Property or illegal dispossession. In fact, the learned counsel for the Respondent No. 1 argued before this Court that there was no imminent threat of breach of peace identified in the Complaint dated 6-2-2023 and as such proceedings under Section 145 Cr.P.C. were unwarranted. Yet strangely enough the Respondent No. 1 is supporting the Impugned Order and the Impugned Judgment, whereby exclusive possession of the Subject Property has been handed over to him as a result of such proceedings.

15. Be that as it may, it is a matter of record that the proceedings commenced pursuant to the police Complaint dated 6-2-2023 submitted under Section 145, Cr.P.C. which itself states that the under construction Plaza at the Subject Property is jointly owned by both the Petitioner and the Respondent No. 1 and more importantly that armed guards of both the parties have remained present. Furthermore, that an altercation took place between the Petitioner and the Respondent No. 1 on 4-2-2023 on account of putting up of banners by the representatives of the Petitioner leading to

the registration of FIR No. 162/2023. Similarly, the police Report submitted on 14-4-2023 states that there is a dispute of shuttering between both the parties who had earlier deployed their respective armed men who posed a threat to peace. It was also reported that civil proceedings are pending between the parties regarding the dispute over the Subject Property and since the disputed building is vacant following registration of the case there is a chance of an untoward occurrence and therefore it may be sealed till decision by the civil court.

16. The parties were summoned by the learned Magistrate pursuant to sub-section (1) of Section 145, Cr.P.C. on 12-04-2023.

Joint possession:

17. The foregoing contents of the Complaint dated 6-2-2023 under Section 145 Cr.P.C. and the police Report dated 14-4-2023, confirming the presence of armed guards of both the parties at the Subject Property bespeak joint possession.

18. The Court in *Provincial Government vs. Bhivram Nanhya Mahar*, AIR 1940 Nagpur 265 held that where it is found that the contesting parties are actually in joint possession no order should be made under Section 145, Cr.P.C. Similarly it was held in *Md. Askir Mia and another vs. Md. Ayubullah*, 1971 P Cr. L J 420 that Section 145 Cr.P.C. has no application where the parties claim joint possession of land.

19. The judgment in *Md. Askir Mia (Supra)* refers to *Makhan Lal Roy Vs. Barada Kanta Roy*, 11 C W N 512 wherein the facts involved were similar to the facts of the instant case before this Court inasmuch as it was found upon inquiry undertaken pursuant to sub-section (4) of Section 145, Cr.P.C. that the property in dispute was two huts constructed in a compound, common to both parties but one of the parties was declared to be entitled to possession of the huts. The High Court held that the land in which the huts stood being in joint possession of the two disputants and

their having been no partition of the homestead land it could not be said that the dispute was by two opposing parties having adverse rights to exclusive possession of the land.

20. In the instant case too, the Subject Property is undisputedly jointly owned by the Petitioner and the Respondent No. 1.

One party in actual possession:

21. Having said that the position is different where one of the parties claims to have *and* is actually found to have exclusive possession adverse to the other party[1]. In such case mere fact that the other party sets up a title to joint possession does not then render Section 145, Cr.P.C. inapplicable[2]. In other words, where one party not only claims exclusive possession but is also found to actually have exclusive possession the learned Magistrate has jurisdiction under Section 145, Cr.P.C. notwithstanding that the other party claims joint possession.

22. The jurisdiction of the Magistrate under Section 145, Cr.P.C. has been explained by the Peshawar High Court in *Arbab Muhammad Khan Vs. Arbab Muhammad Hasham Khan,* PLD 1959 Peshawar 193 as follows:

> *"7.* ***The view of the learned Magistrate that since Khasra No. 145 was jointly owned by several persons who had a right to its joint possession, he had no jurisdiction to initiate proceedings under section 145, Cr. P. C. for the dispute was between co-owners, and was therefore not contemplated by the section is also incorrect. On being satisfied that a dispute exists concerning land, the Magistrate at once acquires jurisdiction to enquire into the fact of actual possession, though he cannot consider the question whether the parties have a right to possession jointly or have a title to separate possession. If the Magistrate finds that one of the parties was in actual possession on the date of the preliminary order,*** *or within two months next before the date of that order and has been forcibly or wrongfully dis-possessed,* ***he must uphold the possession of the person in actual possession of the property, irrespective of the rights of the parties.*** *Even in cases where one co-owner is in fact in actual possession of the joint property to the exclusion of other co-owners,* ***an order can be passed upholding his possession as against other co-owners who may be entitled to joint possession, but in fact are not in possession of the property.*** *" [Emphasis added].*

[1] *Provincial Government (Supra) Md. Askir Mia (Supra).*
[2] *Ibid.*

23. In the case of *Gul Zada vs. Hazrat Gul and others*, PLD 2024 Peshawar 35 the Peshawar High Court discussed Section 145, Cr.P.C. as follows:

> *"12. As stated above that* ***proceedings under section 145, Cr.P.C. would only be maintainable if the two rival parties claim their exclusive possession without having any interest or care of the opposite party and such dispute is of such a nature that it has either created a law and order situation or the same is likely to create the breach of peace,*** *however, in the present case, the contents of the complaint filed by the First Party and its reply by the Second Party would manifestly show that both the parties appear to be very friendly as they are accepting the ownership and possession of each other over the disputed property which is comprising of a huge area. It also manifests that either of the party has not claimed or asserted their possession on any of the specific portion of the disputed property by describing them through boundaries or any other mode of specification and as such the claims of both the parties as per the available material are standing in vacuum. It may be reiterated that nothing is available on file to show that the said dispute has either already caused breach of peace or is likely to create the chance of breach of peace as both of them admit the possession of each other with open heart since long without any incident of any apprehension of law and order situation.* ***In the case of Saleem-ur-Rehman v. Faqir Hussain and others reported as 2004 SCMR 667, the Hon'ble Apex Court has held that the question of entitlement of land is not a matter of consideration before a Magistrate while exercising jurisdiction under section 145, Cr.P.C. Such question is always to be decided by a civil Court. A criminal Court is only supposed to determine the factum of actual physical possession on the crucial dates.*** *"* [Emphasis Added].

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24. Thus even where the property is jointly owned by more than one party, if one party is found to be in exclusive possession on the date of the preliminary order the learned Magistrate can pass an order upholding the possession of such party against other parties who may be entitled to joint possession but are not in actual possession. This is because it is well settled that that the primary object of proceedings under Section 145, Cr.P.C. is to prevent breach of peace arising out of a dispute concerning land but does not empower the Magistrate to adjudicate the rights of the parties as resolution of such rights falls exclusively within the realm of a civil court[3]. The jurisdiction under Section 145, Cr.P.C. is a summary one and is meant to maintain status quo between the parties whose dispute about the possession of the property is likely to result in breach of peace[4]. The order

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[3] *Ch. Asghar Ali vs. Additional Sessions Judge/Ex-Officio Justice of Peace, (West) Islamabad and 14 others*, 2022 PCr. L.J. 366.

[4] *Mst. Asfa Sultana Vs. The State*, PLD 1972 Lahore 478 .

of the Magistrate is meant to be a temporary or tentative one and is operative till the rights of the parties are determined by a civil court[5].

Entitlement to possession under the Partnership Deed:

25. In the instant case it is undisputed that both parties have joint ownership upon the Subject Property by virtue of Allotment Letter dated 25-6-2019 but the Respondent No.1 is claiming exclusive possession. The main argument of the Respondent No. 1 and the rationale given in both the Impugned Order as well as the Impugned Judgment is that according to Partnership Deed possession was handed over by the Petitioner to the Respondent No. 1 for the purposes of construction of Shopping Mall. However, clause 14 of the Partnership Deed reproduced herein below and relied upon in this regard by the Respondent No. 1 does not support such position:

> *"That the 1st Party will construct the said Shopping Mall and hereby assure that they will complete the said shopping mall with the said amount and will not demand for further amount from the 2nd party after receiving the share amount."*

As may be seen from the above reproduction the said clause does not *per se* require possession to be handed over exclusively to the Respondent No. 1. It merely states that construction of the Shopping Mall will be carried out by the Respondent No. 1 which by no means implies that possession during construction will be exclusively with the Respondent No. 1. No other provision of the Partnership Deed also provides for handing over of exclusive possession of the Subject Property to the Respondent No. 1 for the purpose of construction of the Shopping Mall.

26. Even otherwise, an agreement to hand over possession by itself does not establish that possession was in fact handed over. Yet the learned Magistrate has concluded on the basis of the Partnership Deed that the Petitioner handed over possession of the Subject Property to the Respondent No. 1 for the purpose of construction. Similarly, the learned Sessions Judge, Islamabad-West vide the Impugned Judgment has held that

[5] *Ibid*

actual possession was with the Respondent No. 1 for purpose of construction of building on the Subject Property on the basis of the Partnership Deed whereby construction was to be carried out by the Respondent No. 1. Both the lower *fora* below have presumed that possession was actually handed over pursuant to their erroneous interpretation of the Partnership Deed.

27. In effect, the Impugned Order and the Impugned Judgment have determined that the Respondent No. 1 is entitled to exclusive possession under the Partnership Deed. Whereas, the apex Court in *Saleem-Ur-Rehman vs. Faqir Hussain and others,* 2004 SCMR 667 held that the question of entitlement is not a matter of consideration before a Magistrate under Section 145, Cr.P.C., which is a question for the civil court whereas a criminal court is only supposed to determine the factum of 'actual possession' on the crucial dates. Similarly, in *Abdul Razzaq vs. Barkat Ali*, 1985 SCMR 1235 the Supreme Court held that the Magistrate is precluded from examining the title both proprietary as well as possessory and is required to confine his enquiry to the fact of *actual possession* or *wrongful and forceful dispossession* within two months before making the preliminary order. Thus both the Magistrate and the learned Sessions Judge failed to appreciate that it is not within their jurisdiction to determine who is entitled to possession under the terms of the Partnership Deed which is for the civil court to look into.

Actual Possession:

28. With regard to the determination of the factum of 'actual possession' on the crucial dates, the Magistrate and the learned Sessions Judge have overlooked the fact that the Partnership Deed dated 26-3-2018 was executed prior to the Allotment Letter dated 26-6-2019 and that after such allotment possession was handed over to both the Petitioner and the Respondent No. 1 by CDA vide Letter dated 5-9-2019 which too has not been denied by the Respondent No. 1. Such delivery of possession raises a

presumption of continued possession unless the other side can prove that subsequently they obtained exclusive possession[6].

29. There is no evidence on record that after possession was granted jointly to the Petitioner and the Respondent No. 1 by CDA vide the Letter dated 5-9-2019 exclusive possession of the Subject Property was granted by the Petitioner to the Respondent No. 1. In fact, as observed hereinabove, the Complaint dated 6-2-2023 made by the police and the police Report dated 14-4-2023 reflect joint possession. Therefore, the *fora* below erred in concluding that possession was with the Respondent No. 1 exclusively at the time of summoning of the parties by the Magistrate pursuant to Section 145(1), Cr.P.C.

Wrongful and forceful dispossession:

30. The learned Sessions Judge, Islamabad-West vide the Impugned Judgment has also held that the Respondent No. 1 would be deemed to be in possession as he was dispossessed through force with reference to the first proviso of sub-section (4) of Section 145, Cr.P.C. The learned Sessions Judge, Islamabad-West observed that although in his application the Respondent No. 1 admitted to being dispossessed on 18-07-2022 which was more than six months prior to the Complaint dated 6-2-2023 submitted by the police under Section 145, Cr.P.C. since the legitimate possession was with the Respondent No. 1 the two months' period stipulated in the first proviso of sub-section (4) thereof will not come into play in the facts and circumstances of the instant case. Moreover, the foregoing conclusion has been reached in spite of taking into consideration the pending civil proceedings instituted by the Respondent No. 1 seeking possession.

31. In the case of *Muhamad Yaqoob Malik and another vs. District and Sessions Judge, Islamabad and 4 others*, 2004 YLR 2383, the Lahore High Court, Rawalpindi Bench set aside the learned Sessions Judge's order

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[6] *Arbab Muhammad Khan and another vs. (1) Arbab Muhammad Hasham Khan and (2) The State,* PLD 1959 Peshawar 193.

remanding the matter to the Magistrate to proceed under Section 145, Cr.P.C. when the dispossession occurred more than two months prior to the complaint and civil proceedings had been instituted since then. The Sindh High Court at Karachi in the case of *Sirajul Haque vs. Mst. Malka Bibi and 2 others*, 2002 MLD 1989 held that two years' delay in filing application for possession before the Magistrate cannot be adjusted in view of the two months bar stipulated by sub-section (4) of Section 145, Cr.P.C., and that the proper forum for relief was the civil court. In *Barkat Bhatti and 5 others vs. The State and 4 others*, 1987 P Cr. L J 281 the proceedings under Section 145, Cr.P.C. pending before the Magistrate were quashed as admittedly the petitioners had been in possession of the disputed property for more than two months prior to the passing of the impugned order. Similar was the outcome in *Bismillah Khan vs. Kamaluddin and another*, 1997 P Cr. L J 1745; *Abdul Razaq Tahir vs. Muhammad Sabir Butt and 2 others,*1987 P Cr. L J 2276; *Muhammad Anwar and another vs. Ghulam Muhammad and another*, 1984 P Cr. L J 2438; *Muhammad Akbar vs. Additional Sessions Judge, Lahore and 3 others*, 1983 P Cr. L J 1355; where the order under Section 145(1), Cr.P.C., was passed more than two months after the dispossession.

32. Thus the learned Sessions Judge, Islamabad-West erred in dismissing the Petitioner's criminal revision petition despite the fact that admittedly the alleged dispossession occurred more than two months prior to the order passed under Section 145(1), Cr.P.C. In such circumstances the Respondent No. 1's remedy lay with the civil court which he had already approached and the matter was *sub judice*, which too the learned Sessions Judge took cognizance of and yet found no illegality in the Impugned Order passed by the learned Magistrate.

Concurrent findings:

33. The learned counsel for the Respondent No. 1 argued that this Court cannot interfere in concurrent findings of fact. However, every criminal

case has to be decided on in its own peculiar facts and circumstances. Concurrent findings that are based on misreading of evidence and which are passed in exercise of jurisdiction not vested or which are against settled law are not sustainable[7].

Preservation of peace:

34. Since the contents of the Complaint dated 6-2-2024 indicated a dispute involving the risk of breach of peace between parties in joint possession it was not a case for proceedings under Section 145, Cr.P.C as discussed herein above in detail. However, the judgment in *Md. Askir Mia (Supra)* also refers to *Abdus Salam Miaji Vs. Abdul Kadir Bepari*, PLD 1967 Dacca 715 in which the proceedings were instituted at the instance of one party in relation to a dispute over a property which was the subject matter of a partnership business and it was contended that therefore in law and in fact the property is in possession of all the partners. It was observed that the opposite party failed to point out material showing his exclusive possession. The Court held that proceedings under Section 145, Cr.P.C. were misconceived and the order drawing up proceedings under Section 145, Cr.P.C. was set aside. The Court however observed that it was open for Magistrate to draw up proceedings under Section 144, Cr.P.C if it is necessary for preservation of peace pending adjudication of the rights of the parties in a properly constituted suit before an appropriate Court.

Conclusion:

35. In short, the Complaint dated 6-2-2023 indicated actual possession of the Subject Property to be jointly held by both the Petitioner and the Respondent No. 1. Thus, the case did not fall within the scope of Section 145, Cr.P.C. As such, the Impugned Order and the Impugned Judgment handing over possession of the Subject Property only to the Respondent No. 1 are misconceived and have resulted in miscarriage of justice. If,

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[7] *Sultan Room Vs. Bakht Karam,* 2010 MLD 1669; *Abdul Khaliq Vs. Muhammad Shafique*, 2007 SCMR 1953

however, the learned Magistrate found that the dispute between joint owners in actual possession is likely to cause breach of peace action may be taken pursuant to other provisions of the Cr.P.C. including but not limited to Sections 107, 144, and 151.

36. In view of the above, the instant Petition is **allowed** and the Impugned Order as well as the Impugned Judgment are set aside. Resultantly, the possession of the commercial Plot No.11, situated in Sector 1-8 Markaz, Islamabad shall be restored to both the Petitioner and the Respondent No. 1 and in case their dispute regarding the Subject Property is likely to cause breach of peace the Magistrate shall proceed in accordance with the law.

(SAMAN RAFAT IMTIAZ)
JUDGE

Approved for reporting.

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