Form No: HCJD/C-121.

ORDER SHEET

IN THE ISLAMABAD HIGH COURT, ISLAMABAD
JUDICIAL DEPARTMENT

W.P. No. 4173 of 2017

Mst. Asma Khursheed and another
Vs
Station Hose Officer, P.S. Aabpara, etc.

S. No. of order/ proceedings	Date of order/v proceedings	Order with signature of Judge and that of parties or counsel where necessary.
05	13-12-2017, 14-12-2017, 15-12-2017.	Ms Raheema Khan and Malik Abdul Latif Khokhar Advocates, for the petitioners. Mr Naseem Ahmed Shah Advocate, for Commissioner Office, ICT, Islamabad. Mr Riaz Hanif Rahi Advocate, for the respondent No. 2. Ch. Abdul Khaliq Thind and Muhammad Naeem Gujjar Advocates, for the attorney of Naveed Khursheed. Mian Abdul Rauf, Advocate General, Islamabad. Mr Saad Bin Asad, A.C. City, ICT, Islamabad. Mr Khalid Mahmood Awan, SHO P.S. Aabpara.

The petitioners have invoked the jurisdiction of this Court under Article 199 of the Constitution of the Islamic Republic of Pakistan, 1973 (hereinafter referred to as the "***Constitution***") assailing order dated 07-12-2017, passed by the Assistant Commissioner (City)/ Sub-Divisional Magistrate, ICT, Islamabad (hereinafter referred to as the "***respondent No. 2***"). The impugned order has

been passed under section 145 of the Code of Criminal Procedure, 1898 (hereinafter referred to as the "***Cr.P. C.***").

2. The facts, in brief, are that Ms. Asma Khursheed (hereinafter referred to as the "***petitioner No. 1***"), Ms. Shahnaz Wissal, Javed Khursheed and Naveed Khursheed are siblings. Their father, namely, Syed Khursheed-ul-Hassan owned House No. 36, Bazar Road, G-6/4, Islamabad (hereinafter referred to as the "***Property***"). The petitioner No. 2 i.e. Babar Ali is the son of the petitioner No. 1. During the life time of Syed Khursheed-ul-Hassan the marriage of the petitioner No. 1 had ended in divorce and thereafter she started living with her parents in the Property since 1992. The Property was later transferred by the father in the name of his wife and mother of the petitioner No. 1, namely, Syeda Khursheed. It is the case of the petitioner No. 1 that the Property was gifted to her by the father and possession was also delivered, and the same is manifested by the fact that she has been living therein since 1992. The mother, namely Syeda Khursheed, executed a declaration of gift in relation to the Property and pursuant thereto it was transferred in the name of Naveed Khursheed i.e. brother of the petitioner No. 1 vide transfer letter, dated 10-07-

2006. It is alleged by the petitioner No. 1 that the transfer was based on fraud and deceit. Syeda Khursheed had filed a suit against the petitioner No. 1 for possession of the Property through ejectment, recovery of means profit and permanent injunction. The said suit was filed on 01-06-2005 and was later decreed in her favour vide exparte judgment and decree, dated 05-05-2006. Syeda Khursheed then filed an execution petition. The petitioner No. 1 filed an application for setting aside the exparte judgment and decree, dated 05-05-2006. Likewise, Naveed Khursheed also filed a petition. However, Syeda Khursheed appeared before the executing court and recorded a statement to the effect that she did not want to pursue the matter and, therefore, she had made a request to withdraw the execution petition. She had also filed an affidavit which was placed on record as Mark-A. After the recording of her statement, the execution petition filed by Syeda Khursheed was dismissed as withdrawn, pursuant to her statement recorded vide order dated 08-04-2008. The exparte judgment and decree, dated 05-05-2006, was not executed and as a consequence the petitioner no. 1 continued living in the Property. The petitioner No. 1 filed a suit seeking declaration, cancellation of transfer proceedings/ letter, dated 10-07-2006 in favour of her brother, namely

Naveed Khursheed. The amended plaint was filed in May 2014 wherein it was, inter-alia, explicitly asserted that she had been living in and was in possession of the Property since 1992. Naveed Khursheed, through his attorney, namely, Ibrar Hussain, contested the suit by filing a written statement. The factum of possession of the petitioner No. 1 was not disputed in the written statement, though it is asserted therein that she has been living as a licensee. The petitioner No. 1 alongwith the suit had also filed an application under Order XXXIX Rules 1 and 2 of the Code of Civil Procedure, 1908 (hereinafter referred to as the "***CPC***") and the same was accepted by the learned Civil Judge 1st Class, Islamabad, vide order dated 11-01-2017. The injunctive order was granted, inter-alia, on the ground that the possession of the petitioner No. 1 was not disputed. Naveed Khursheed, through his attorney, namely Ibrar Hussain, filed an appeal before the learned Addl. District Judge, Islamabad (West), Islamabad. The learned appellate Court, vide order dated 30-11-2017, accepted the appeal and consequently set aside the order, dated 11-01-2017. The petitioner No. 1 filed a revision i.e. C.R. No. 418/2017 before this Court and vide order dated 12-12-2017, passed therein, the parties have been directed to maintain the status quo. It is alleged that on 03-12-2017 i.e. after

the learned appellate Court accepted the appeal and had set aside the order dated 11-01-2017, the attorney of Naveed Khursheed, namely Ibrar Hussain, alongwith 25 to 30 accomplices, who were equipped with firearms, trespassed the Property in an attempt to forcibly dispossess the petitioners and take over possession of the Property. Pursuant to a written complaint filed by Ibrar Hussain, FIR No. 352/2017, dated 03-12-2017, was registered at the Police Station Aabpara, Islamabad. Perusal of the said FIR shows that as per the version of the attorney of Naveed Khursheed, they were called to the Property by the petitioner No. 1 and her son petitioner No. 2. The version of the said attorney recorded in the FIR reaffirms that the petitioners were in possession. On the other hand, pursuant to a written complaint of the petitioner No. 1, FIR No. 353/2017, dated 03-12-2017 was also registered at Police Station Aabpara, the contents of which allege that Ibrar Hussain had attempted to forcibly dispossess them from the Property. The record as well as the two aforementioned criminal FIRs affirm that the petitioners were in possession since 1992, particularly on 03-12-2017.

3. The Incharge of Police Station Aabpara, instead of protecting the petitioners from being forcibly and

illegally dispossessed, and taking timely action to apprehend the alleged aggressors, sent a report i.e. Qalandra, dated 04-12-2017, to the Assistant Commissioner (City)/Sub Divisional Magistrate, ICT, Islamabad i.e. the respondent No. 2, recommending sealing of the Property under section 145 of the Cr.P.C. It is noted that the alleged attempt to forcibly dispossess the petitioners unlawfully had taken place during the day on 03-12-2017 and thereafter, till the sending of the said report, no untoward incident had taken place for any apprehension that there was any likelihood of a breach of peace. The respondent No. 2, upon receiving the report/Qalandra, also appears to have taken his time and passed the impugned order on 07-12-2017 whereby he directed the Incharge Police Station to attach/seal the Property wherein the petitioners had been living since 1992. For the purposes of adjudication of the instant petition, the relevant portion of the impugned order is reproduced below:

> *"Qalandra under section 145 CRPC made by Police Station Abpara and forwarded by ASP Abpara and DSP Legal ICT was received in the court of undersigned. As per the police report a civil suit is pending between the parties in*

the civil court and upon vacation of stay order one of the party i.e. Mr. Ibrar Hussain along with 25 to 30 people equipped with weapons tried to vacate the House No. 36 Gali No. 80, Begum Sarfraz Road Sector G-6/4. As a result of his action extreme fight took place between the parties and FIR NO. 352/17 under sections 427, 148/149 and 337F(2)/324 PPC and FIR No. 353/17 under section 148/149, 506(ii)/109, 448/511 & 427, were registered against the parties. In addition, as per the police report both the parties are giving life threats to each other and a Qalandra under section 107/150 CrPc has also been initiated by the concerned police station. The cause of action to such breach of peace is the property in question i.e. House No. 36 Gali No. 80 Sector G-6/4 Islamabad."

3. It is obvious from the above that the report sent by the Incharge Police Station had unequivocally mentioned that the attorney of Naveed Khursheed,

namely Ibrar Hussain, along with 25 to 30 other persons, who were armed with weapons, had tried to forcibly dispossess the petitioners from the disputed property. However, the said order was not acted upon till 11-12-2017. On the said date police officials, under the supervision of the respondent no. 2, sealed the Property despite the fact that the petitioners were residing therein. Nothing has been placed on record, rather it was conceded before this Court that between 03-12-2017 till dispossessing the petitioners from the Property on 11-12-2017, no untoward incident had taken place even to remotely suggest that there was a likelihood of breach of peace. At the time of sealing the Property it is alleged that there was resistance from the petitioners and, therefore, a criminal case i.e. FIR No. 365/2017, dated 11-12-2017, was registered against them. It is alleged by the petitioners that the respondents had virtually dragged them out of the Property. The petitioners have, therefore, challenged the proceedings taken by the respondents and the order, dated 07-12-2017, passed by the learned Assistant Commissioner (City)/ Sub Divisional Magistrate, ICT, Islamabad under section 145 of the Cr.P.C.

4. Pursuant to the issuance of notices, Lt (Retd.) Saad Bin Asad, Assistant Commissioner (City)/ Divisional

Magistrate, ICT, Islamabad, along with his private counsel and Mr Khalid Mahmood Awan, Incharge Police Station Aabpara, put up appearances on 13-12-2017. The latter was asked as to who was in possession of the Property at the time of its sealing. He unambiguously referred to the petitioners. The former, however, sought time to go through the record and then to pass an order. The respondents were asked whether after the attempt to forcibly evict the petitioners on 03-12-2017 any incident had taken place so as to give rise to an apprehension of a possible breach of peace. They answered in the negative. They were also asked whether the alleged aggressors had been arrested. They answered that they had obtained anticipatory bails from the competent court. It was obvious that since, admittedly, there was no likelihood of a breach of peace and that the petitioners had been in possession, therefore, this Court expected that the learned respondent no. 2 would recall his order and restore possession to the petitioners. He was, therefore, granted time and the hearing was adjourned for the next day. The learned respondent no. 2 was unable to give any plausible explanation for attaching and sealing the Property when there was no other incident, except an attempt by armed men to take the law in their hands so as to forcibly take possession of the Property. Neither the

Incharge Police Station nor the learned Assistant Commissioner (City)/ Sub Divisional Magistrate denied their duty to protect the fundamental rights of the citizens.

5. On 14-12-2017 the respondents appeared in court again. However, the learned Assistant Commissioner (City)/ Sub Divisional Magistrate, ICT, Islamabad instead of withdrawing the order, dated 07-12-2017, wanted to proceed in the matter on the ground that he had to ascertain the rights of the parties after affording them an opportunity of hearing. The respondent no. 1 informed the Court that he had sent a report to the Assistant Commissioner (City)/ Sub Divisional Magistrate, ICT because some of the persons who had tried to forcibly take possession of the Property on 03-12-2017 had criminal records and that they were previously involved in such activities. He was asked whether, as public functionaries entrusted with the obligation of enforcing the writ of the State, he and others were terrorized by such elements thus necessitating attaching a Property and dispossessing citizens. He had no answer.

6. Ch. Abdul Khaliq Thind and Mr Naeem Gujjar Advocates had appeared on behalf of the attorney of

Naveed Khursheed, namely Ibrar Hussain. They were also heard at length on 14-12-2017. They also unequivocally admitted that the petitioners were in possession of the Property. However, according to their statement the petitioners had been evicted pursuant to judgment and decree, dated 05-05-2006, but they had taken over the possession in 2008. They were asked to show any document whereby possession at any stage was taken from the petitioners and handed over to Naveed Khursheed or his attorney, namely Ibrar Hussain, after the proceedings for the execution of exparte judgment and decree, dated 05-05-2006, were dismissed as withdrawn pursuant to the statement recorded vide order dated 08-04-2008. They candidly conceded that there was no such document and that the petitioners were in possession at the time of sealing of the Property.

7. Mr Riaz Hanif Rahi, Advocate, had appeared on behalf of the Assistant Commissioner (City)/ Sub Division Magistrate, ICT , Islamabad and had argued that the instant constitutional petition was not maintainable; the Sub Divisional Magistrate/Assistant Commissioner (City) ICT, Islamabad was empowered to seal the Property pursuant to powers conferred under section 145 of the Cr.P.C.

After hearing the respondents and the counsels on 14-12-2017 they were afforded an opportunity to submit their written replies/submissions and the case was adjourned for 15-12-2017.

8. The absence of the learned Advocate General was conspicuous and, therefore, he was also directed to appear on 15-12-2017 in the light of the law enunciated by the august Supreme Court in the judgment, dated 03-02-2017, rendered in Civil Appeal No. 1216/2015, titled 'Rashid Ahmed versus Federation of Pakistan etc'. Pursuant to the said direction the learned Advocate General, Islamabad, put up appearance on 15-12-2017. He was asked as to why he had not appeared earlier, to which he answered that neither the Chief Commissioner nor the respondents had informed him regarding the present proceedings. He, however, conceded that the proceedings under section 145 were not in consonance with the law. Taking a fair stance, he stated that the respondent no. 1, instead of sending a report to the respondent no. 2, was under the duty to apprehend the alleged aggressors and provide appropriate protection to the petitioners. Neither could he defend the attachment

and sealing of the Property in the facts and circumstances of the instant case.

9. Despite the last order and giving an opportunity for submitting written submissions, no one appeared on 15-12-2017 except Mr Khalid Mahmood Awan, Incharge Police Station, Aabpara, who also submitted a written report. In reply to a question by the Court he unequivocally stated that there had been no likelihood of a breach of peace either on 07-12-2017 or 11-12-2017. He has provided copies of FIRs registered against some of the persons who had tried to take the law in their hands. Perusal of the said FIRs suggests that one of the accused is related to a retired senior police official. However, it would be appropriate to avoid any observation lest it may prejudice the pending proceedings.

10. Ms Raheema Khan, Advocate High Court, appeared on behalf of the petitioners and contended that; the respondent No. 2 had sealed the Property without jurisdiction and bypassing the codal formalities and legal procedure prescribed under section 145 of the Cr.P.C; the petitioners were in possession and have remained so since 1992 and, therefore, they could not have been dispossessed through the powers vested under section

145 of the Cr.P.C; there was no apprehension of a breach of peace, rather it was the duty and obligation of the respondents to have provided security and protection against the armed people who were trying to forcibly evict them; the respondents have been bending over backwards to facilitate the accused in getting possession of the Property and to dispossess the petitioners; reliance has been placed on the case of "Haji Abdullah Jan Marwat v. Prof. Burhan ud Din and 3 others" [PLD 2011 Peshawar 246] and "Chaudhry Munir v. Mst. Surriya and others" [PLD 2007 S.C. 189]; the mandatory provisions under section 112 of the Cr.P.C. have been violated; the impugned order, dated 07-12-2017, had been passed by the respondent No. 2 in a mechanical manner nor could jurisdiction have been exercised under section 145 of the Cr.P.C; there was no likelihood or apprehension of a breach of peace, rather the Property, in possession of the petitioners, was trespassed and the accused had tried to forcibly dispossess them; the dispute regarding the Property is pending before the learned civil court and, therefore, the respondent No. 2 could not have exercised jurisdiction; section 145 of the Cr.P.C. is intended to restore possession of those who may have been illegally dispossessed; powers under section 145 of the Cr.P.C. cannot be exercised so as to evict persons who are in

lawful possession for several years; no beach of peace was caused and the criminal cases were used as a pretext to dispossess the petitioners so as to benefit the other party, namely Naveed Khursheed and his attorney, Ibrar Hussain; the possession of the Property is being regulated by the civil court and this Court vide order, dated 12-12-2017, has also directed the parties to maintain the status quo; the respondent No. 2 gravely abused the discretion vested in him; reliance has been placed on the case law cited in the written arguments.

11. The learned Advocate General and the learned counsels have been heard while record was perused with their able assistance.

12. It is an admitted position that there is a dispute between the petitioner No. 1 and her brother, namely Naveed Khursheed, in respect of the Property. The former has filed a suit and the same is pending before a competent Court. The learned trial Court had granted the application filed under Order XXXIX Rules 1 & 2 of CPC and consequently passed an injunctive order. Perusal of the record shows that the Property, being in possession of the petitioners since 1992, is not disputed. However, in the written statement filed by Naveed Khursheed through

his attorney, namely, Ibrar Hussain, it is only asserted that the petitioner No. 1 is living in the Property as a licensee. The injunctive order, dated 11-01-2017, passed by the learned trial Court was set aside by the learned appellate Court vide order dated 30-11-2017. It is also an admitted position that the petitioners were in possession of the Property on 03-12-2017 i.e. when the alleged incident of trying to forcibly evict them had taken place. The facts mentioned in the report dated 04-12-2017, sent by the respondent no. 1 to the respondent no. 2 for initiating proceedings under section 145 of the Cr.P.C, have been reiterated in the order dated 07-12-2017 passed by the latter. It is unequivocally recorded therein that Ibrar Hussain, attorney of Naveed Khursheed, along with 25 to 30 other persons, armed with weapons, had tried to forcibly get the Property vacated. It is also not denied that between 03-12-2017 and the passing of the order, dated 07-12-2017, or till 11-12-2017 when the petitioners were evicted and the Property was sealed under the supervision of the respondent no. 2, no untoward incident, let alone a breach of peace, had taken place. It is also an admitted position that the learned Assistant Commissioner (City)/ Sub Divisional Magistrate, ICT, Islamabad had personally supervised the sealing of the Property whereby the petitioners were evicted and

thus dispossessed. Serious allegations of violating the right of privacy guaranteed under Article 14 of the Constitution have been raised by the petitioners against the respondents. A criminal case has also been registered alleging that there was resistance at the time of dispossessing the petitioners. It has also been candidly admitted by the Incharge of Police Station Aabpara that some of the accused aggressors have criminal records. There is nothing on record to even remotely suggest that there was any likelihood of a breach of peace after the failed attempt by armed aggressors on 03-12-2017 to get the Property vacated otherwise than in due course of the law. The impugned order, dated 07-12-2017, speaks for itself. The Property is situated in one of the prime sectors of the Federal Capital of the Islamic Republic of Pakistan.

13. The questions which emerge for consideration in the instant petition are as follows:

a) *Whether the respondents No. 1 and 2 have acted lawfully?*

b) *Whether circumstances existed to exercise jurisdiction under section 145 of Cr.P.C either by passing impugned order, dated 07-12-2017 or subsequent sealing of the Property on 11-12-2017?*

c) *Whether the Property could have been sealed and the petitioners evicted when no untoward incident had taken place after 03-12-2017?*

d) *Whether the manner in which the respondents have exercised their powers tantamount to dereliction and misfeasance of official functions and duties?*

14. In order to answer the above questions it would be advantageous to examine the provisions of section 145 Cr.P.C. and the principles and law laid down by the superior Courts in this regard. Section 145 of Cr.P.C. consists of ten sub sections. Sub section (1) of section 145 empowers a Magistrate of the 1st Class to make an order in writing requiring the parties concerned to a dispute to attend his Court in person or by pleader when the latter is satisfied that such a dispute is likely to cause a breach of peace concerning any land or water or the boundaries thereon. It is unambiguously provided that such an order is made so as to require the parties concerned to put in their respective written statements of their claims in respect of the fact of actual possession of the subject dispute. Sub section (2) describes the

expressions 'land' and 'water'. Sub section (3) prescribes the manner for the purposes of service of summons. Sub section (4) provides that after passing an order under sub section (1) of section 145 the Magistrate, without reference to the merits or the claims of the concerned parties to a right to possession of the subject of dispute, peruse the statements, hear the parties, receive evidence, consider the effect of evidence, so as to decide whether any and which of the parties was at the date of the order passed under subsection (1) in possession of the land. Sub section (4) has two provisos. The first proviso contemplates that if it appears to the Magistrate that any party within two months next before the date of such order i.e. under sub section 1, has been forcibly and wrongly dispossessed then he may treat the party so dispossessed as being in possession on the date of passing the order. The second proviso empowers the Magistrate to attach the subject of dispute pending his decision referred to in sub section (4). However, such power is subject to satisfaction of the Magistrate that it is a case of emergency. Sub section (5) further empowers the Magistrate to cancel an order passed or to stay further proceedings in eventualities mentioned therein. Sub section (6) explicitly provides that the party, which is determined to be in possession shall declared to be

entitled to retain the same until evicted in due course of law. It is further provided that in an eventuality of a determination made under the first proviso to sub section (4), the possession is required to be restored in favour of the person who was forcibly and wrongfully dispossessed. Sub section (7) deals with the eventualities when a party dies during the proceedings. Sub section (8) empowers the Magistrate to deal with goods or items which are subject to speedy and natural decay. Sub section (10) explicitly provides that the powers under section 145 are not in derogation of the independent power vested under section 107 of Cr.P.C. Section 146 contemplates powers of the Magistrate to attach a property in the event that the latter is unable to satisfy himself as to which of the party was in possession at the relevant time. Section 107 of Cr. P.C vests the power in a Magistrate to take appropriate measures to prevent a person who is likely to commit breach of peace etc. Section 151 empowers a police officer who knows of a design to commit any cognizable offence to arrest a person so designing without the permission or obtaining warrant from a Magistrate if it appears to him/her that the commission of the offence cannot be otherwise prevented.

15. I would now advert to the precedent law relating to exercise of jurisdiction and powers under section 145 of Cr. P.C. The august Supreme Court in the case titled "Muhammad Ishaque Chowdhury and another vs. Nur Mahal Begum and others", [PLD 1961 Supreme Court 426] has observed and held as follows:

> *"It is necessary, according to the tenor of the section, that before an order thereunder can be issued the Magistrate must first be satisfied with regard to the matters therein specified and then after being so satisfied he shall make an order in writing "stating the grounds of his being so satisfied." This statutory provision, therefore, does prescribe the mode for the exercise of the jurisdiction conferred by it and there can be no doubt that Magistrates exercising the said jurisdiction are expected to comply strictly with the said provisions of law."*

16. In the case titled "Muhammad Boota and 12 others vs. Ch. Faiz Muhammad and 8 others" [1970

SCMR 592], the august Supreme Court has observed and held as follows:

> "The conclusion reached by him that the order was declaratory in nature was also erroneous inasmuch as under section 145 the Court is required to declare which of the parties before it, is entitled to remain in possession."

17. In case titled "Haji Muhammad Akram etc vs. Mir Baz and others" [1973 SCMR 236], the august Supreme Court has held as follows:

> *"Under this section only if the Magistrate considers the case one of emergency he may at any time attach the subject of dispute pending his decision under this section. In the facts and circumstances of the case and upon the petitioners' own application to the Governor, the only action called for was to start a proceeding under section 107 of the Code of Criminal Procedure and not one under section 145 of the Code."*

18. In case titled "Shera and others vs. Mst. Fatima and another" [1971 SCMR 449] the august Supreme Court observed and held as follows:

> *"In law on the withdrawal of the attachment under section 146(1) of the Cr.P.C., it is open to the Magistrate to pass ancillary orders about the custody of the property. It is his duty to restore the property to the person from whose possession it was taken. This view finds support in a decision of the Dacca High Court in the case of* Abdul Gani Bepari v. Sahed Ali Majhi and others *(1)."*

19. In case titled "Shah Muhammad vs. Haq Nawaz and another" [PLD 1970 Supreme Court 470], it has been held and observed as follows:

> *"The primary concern of the proceedings under the Criminal Procedure Code is to prevent breach of peace arising out of a dispute concerning 'land' or 'water'. These proceedings though concerning the subject-matter of dispute between the*

contending parties, do not concern themselves with the adjudication of their rights in the property. The resolution of the dispute lies exclusively in the realm of a civil Court. The orders passed by a Magistrate for attachment of the subject-matter of dispute are therefore of a transitory nature."

It is further observed, as under:

"The conclusion, we have reached thus, is that a case in which a civil Court is already seized with the subject-matter of dispute and has passed an order regulating possession thereof or a case in which a decree for possession has been granted or a permanent injunction granted restraining the opposite-party from interfering with the possession of the decree holder fall outside the jurisdiction of a Magistrate under section 145, Cr.P.C. Action can of course be taken always under sections

107 and 151 of the Criminal Procedure Code to prevent breach of peace in case of this nature, but no order for attachment of the property can be made."

20. The august Supreme Court while examining the provisions of section 145 Cr.P.C in case titled "Mirza Abdul Razzaq vs. Barkat Ali and others" [1985 SCMR 1235] has observed and held as follows:

"Subsection (4) of section 145, Cr.P.C requires of the Magistrate where the jurisdictional requirements of the case are satisfied, to decide "any and which of the parties was at the date of the order" in possession of the property. He has been expressly precluded from examining the "merits of the claims of any such parties to a right to possess the subject of dispute." The first proviso has a deeming effect in so far as it empowers the Magistrate to determine whether any party has been forcibly and wrongfully dispossessed within two months before

the date of the preliminary order and if so he could treat the party as dispossessed as if it had been in possession on such date."

It is further observed, as under:

"Subsection (1) of section 146, Cr.P.C provides for the course the Magistrate has to adopt when a positive finding as is required under subsection (4) of section 145, Cr.P.C. has not been or could not be ordered. It comes into play when "the Magistrate decided that none of the parties was then in such possession" or is "unable to satisfy himself as to which of them was then in such possession." Or is "unable to satisfy himself as to which of them was then in such possession." In that case and then alone the parties can be referred to competent Court for determination of the rights.

It at once become clear from this analysis of the statutory, provisions that the jurisdictional requirements for

proceedings are the (i) existence of a dispute, (ii) likely to cause breach of peace, (iii) concerning land or water or the boundaries thereof, and (iv) within the territorial limits of the Magistrate in determining the rights, in resolving the dispute, in dealing with the matter the Magistrate is precluded from examining the title proprietary as well as possessory, and is required to confine his enquiry to the fact of actual possession or wrongful and forcible dispossession within two months before the making of a preliminary order. In the matter of relief the three courses open to him are of (i) making a declaration of possession of a party and prohibiting with, (ii) restoring possession where the party wrongfully and forcibly dispossessed is found under the deeming clause to be in possession, and (iii) referring the parties to a Court of competent jurisdiction after attaching the property and this only if (a) none of the parties is found in possession of (b) the Magistrate is unable to satisfy himself as

to which of the parties was at the relevant time in possession."

21. Likewise, in case titled "Yar Muhammad and others v. Gul Muhammad" [1985 SCMR 1609], the august Supreme Court has described the steps, which a Magistrate is required to take while exercising powers under section 145 Cr.P.C and the same are as follows:

"Section 145, Cr.P.C. in its subsection (4) clearly provides that it does not relate to an enquiry about the ownership of or even the right to possess, the property. It concerns itself with the possession at certain points of time, except that the former, two considerations might indirectly become relevant in the particular circumstances of a case, to determine the question of possession.

The same provision read with section 148 prescribes the mode of procedure in these proceedings. It is essential to take the following steps:

(i) The initial satisfaction under section 145 (1) on the relevant information about the dispute mentioned in section 145 (1), Cr.P.C and other proceedings thereunder. On this part see Muhammad Ishaq Chowdhury v. Noor Mahal Begum, PLD 1961 SC 426 for essential requirement.

(ii) Perusal of the statement (if any) put in writing by virtue of the opportunity afforded under subsection (1) with regard to the claim about actual possession.

(iii) Hearing to be afforded to the parties in contradistinction to the admission of evidence which is a separate and distinct step. Hearing in this context would, amongst others, also include oral hearing explaining and supplementing the above-referred statements and material referred therein as also, the admissions and conduct of concerned persons

together with other material placed on record on various hearings. Inspection of other records and places if need be as is justified by the facts of case shall also be permissible, though not mandatory.

(iv) *Affording a fair opportunity to the parties to produce and in this context receiving of evidence which might be produced by them, subject of course to the normal rule of fair play that it will not be received if the purpose to adduce the same is vexation, delay or defeating the ends of justice.*

(v) *Taking of such additional evidence if the Presiding Officer himself considers this step necessary.*

(vi) *It is essential for the Magistrate to drop the proceedings as envisaged by section 145 (5) if "no such dispute existed". A party or person interested can show this in any manner appropriate in the*

circumstances. The existence/ continuance of such dispute is always necessary for passing the final orders under section 145, Cr.P.C. see Malik Mnzoor Elahi v. Lala Bishambar Dass PLD 1964 S C 137.

None of the parties, it is clarified, can be coerced to exercise a right in all circumstances. It is enough if a fair opportunity is afforded for the exercise of the same. In appropriate case where a party is not represented by a counsel it would be in the interest of justice that the Presiding Officer should be satisfied in any manner suitable in the circumstances that the said party is also aware of the right. In these proceedings, e.g., it would be conducive to ends of justice to ask the parties to produce evidence if they so desire. Though depending upon circumstances of each case

together with its consequences as to whether substantial justice has been done or not, mere absence of recording of an order showing the affording of this opportunity, if otherwise afforded, would not vitiate the proceedings.

(vii) In cases where local inquiry is necessary it can be directed under section 148. Though scope of this inquiry nor its procedure is prescribed in any detail in section, nevertheless, the result of this inquiry in the form of a report, can be read as evidence in the case."

22. The above law was reiterated by the august Supreme Court in the case of "Mehr Muhammad Sarwar and Others v. The State and 2 others" [PLJ 1985 S.C. 540].

23. In the case titled "Muhammad Shafique and others v. Abdul Hayee and others" [1987 SCMR 1371] the

august Supreme Court interpreted section 145 of Cr.P.C. as follows:

> "As regards the legality of the order passed under section 145, Cr.P.C. it is to be noted that the jurisdiction of the Magistrate under that section is dependent not on an application by a party or a report by police or information received from any quarter but it is dependent on his being satisfied that a dispute likely to cause breach of the peace exists. How he comes to know of it, it not at all material for the purposes of assuming jurisdiction. "

It is further observed as under:

> "It follows that notwithstanding the filing of the application within two months of dispossession if such dispossession not within two months of the order passed by the Magistrate under subsection (1) of section 145, Cr.P.C. restoration of possession

cannot be ordered and an order to the contrary would not be in accordance with the provisions of the Code."

24. In the above referred judgment the august Supreme Court has quoted with approval a passage from the Indian Jurisdiction i.e. the judgment in the case of "Ganga Bux Sing v. Sukhdin" [AIR 1959 All. 141] and the said portion is reproduced as follows:

"The nature of the enquiry is quasi-civil. It is an incursion by the criminal Court in the jurisdiction of the civil Court. It is, therefore, necessary that this incursion should be carefully circumscribed to the extent absolutely necessary discharging the function laid down on the Magistrate of Preserving the peace. The provisions of S. 145, Code of Criminal Procedure make that amply clear. The Magistrate does not enquire into the merits of the claim of the parties or even their right to possess the subject of the dispute. He is only concerned with the question as to who was in actual physical possession on the

relevant date. This also indicates that the starting point of the proceedings must be the date when he was satisfied that an apprehension of a breach of the peace existed and not when he received the first information."

25. In a recent judgment rendered in the case of "Mukhtar Ahmad and others v. Haji Muhammad Saleem and another" [2013 SCMR 357], the august Supreme Court after examining the provisions of section 145 of Cr.P.C. has observed and held as follows:

"The provisions of section 145, Cr.P.C. clearly envisage apprehension of breach of peace as a jurisdictional requirement. The issue of possession of a party could only be gone into by a Magistrate after his jurisdictional requirement is satisfied. The purpose of this section is to prevent imminent apprehension of breach of peace over the immovable and or movable property. This provision does not authorize a Magistrate to exercise

jurisdiction in mere existence of a dispute relating to an immovable property. The Magistrate on receipt of application from a party has to pass order under section 145(1), Cr.P.C. He is required to call the report from the police and after-perusal of the same, if he is satisfied from such report or from any other information that there exists a dispute between the parties in respect of the land, which is likely to cause beach of peace, he may pass interim order in terms of section 145(4), Cr.P.C. and or proceed to record evidence of the parties to determine which party was in possession of the property in dispute two months prior to its dispossession."

It is further observed and held as follows:

"In the proceedings under section 145, Cr.P.C., the Magistrate has to take cognizance on an application/complaint by a party/ or report by the police on his satisfaction of imminent danger or breach

of peace, and if there is sufficient material, he may pass preliminary orders in terms of section 145(4), Cr.P.C., in case, however, if the material is not sufficient requiring him to pass an interim order, he may hold inquiry as provided under section 145, Cr.P.C. by examining the parties and pass final order restoring possession to a party which was dispossessed two months prior to its wrongful dispossession under section 145(6), Cr.P.C. and or in case, if after inquiry, the material brought on record is not sufficient to record a finding over possession, he may order attachment of the property in terms of section 146(1), Cr.P.C. The section 145, Cr.P.C. does not curtail the powers of the Magistrate to pass final order under section 145(6), Cr.P.C. after holding inquiry, in case of his failure to pass preliminary order under section 145(4), Cr.P.C. within two months. The only restriction imposed is that the party to whom possession is restored must have been dispossessed

within two months of the complaint. The Magistrate while conducting inquiry is not competent to decide either title of the property or its right to possession. Section 145 Cr.P.C. only empowers the Magistrate to make enquiry under section 145, Cr.P.C. to regulate possession of the property in dispute for the time being to avert apprehension of breach of peace."

26. Having examined the statutory provisions and the precedent law, the principles deduced in the context of the jurisdiction and powers conferred under section 145 of Cr. P.C may, therefore, be summarized as follows;

(i) The object and purpose of powers conferred under section 145 is to prevent imminent apprehension of breach of peace over water, land or boundaries thereof.

(ii) The mandatory jurisdictional requirement to proceed under section 145 of Cr.P.C are (a)

existence of a dispute likely to cause breach of peace, (b) the dispute is in respect of land or water or boundaries thereof, and (c) the subject matter is situated within the limits of territorial jurisdiction of the Magistrate. The existence of these factors is a pre requisite for making a preliminary order under sub section 1 of section 145.

(iii) Mere existence of dispute is not sufficient. The threshold for the purposes of satisfaction of the Magistrate before passing an order to attach a property is existence of sufficient material of imminent danger or breach of peace. If the material is not sufficient then property cannot be attached though the Magistrate may hold an inquiry.

(iv) The starting point for initiating proceedings under section 145 is the date when Magistrate is satisfied that an apprehension of a breach of peace exists and not when he receives a report from

the police officials or an information from any other source.

(v) A Magistrate while conducting an enquiry under section 145 is not competent to decide either title of the property or the right of the parties regarding possession. It only empowers the Magistrate to regulate possession of the property in dispute for the time being to avert apprehension of breach of peace.

(vi) Dispute of possession can only be gone into if the jurisdictional requirement highlighted above is satisfied.

(vii) A property under the second proviso of section 145(4) can only be attached if the Magistrate considers the case one of emergency. In case there is no emergency attachment order cannot be passed and the only action called for is under section 107 of Cr.P.C.

(viii) The jurisdiction of a Magistrate is ousted in a case in which a competent court is already seized with the subject matter of dispute and has passed an order regulating possession thereof or in a case in which a decree for possession has been granted or permanent injunction has been ordered restraining the other party from interfering with the possession. However, this would not preclude exercising powers under section 107 and 151 of Cr. P.C.

(ix) Under section 145 the Magistrate is required to declare which one of the parties is entitled to remain in possession.

(x) If a property has been attached then upon withdrawal of the order, it is the duty of the Magistrate to restore the property to the person from whose possession it was taken.

(xi) Section 145 does not concern with an enquiry relating to ownership or the right to possess. It is concerned to the extent of determining as to which party was in possession at certain relevant times.

(xii) Subject to jurisdictional requirement being satisfied, the enquiry under section 145(4) of Cr.P.C is confined to determining as to which party was in possession on the date of the preliminary order passed under section 145(1).

(xiii) The first proviso to section 145(4) empowers the Magistrate to determine whether any party was forcibly and wrongfully dispossessed within two months before the date of order passed under sub section 1 of section 145 and if so to treat such a party in possession on that date.

(xiv) If the Magistrate pursuant to an enquiry decides that one of the parties was in possession or deemed to be treated as in possession under the first proviso to section 145(4) as the case may be, it becomes mandatory for the Magistrate to issue an order declaring that such a person is entitled to possession of the property until evicted in due course of law and forbidding all disturbances of such possession. In the event of a declaration pursuant to proceedings under the first proviso to subsection 4 of section 145, possession may also be restored to the party treated as having been forcibly or wrongfully dispossessed.

(xv) If none of the party is found in possession or the Magistrate is unable to satisfy himself as to which of the party was in possession at the relevant time, he may refer the parties for resolution of the dispute before a competent court after attaching the property.

27. I shall now examine the facts and circumstances of the instant case in the light of the above discussed principles. The dispute regarding the Property is between the petitioner no. 1 and her brother, namely Naveed Khursheed. The latter is stated to be residing in Norway. The proceedings in the suit are being pursued on his behalf by his attorney, namely Ibrar Hussain. A plain reading of the pleadings in the pending suit unambiguously shows that the fact of the petitioner no.1 being in possession of the Property is not disputed. The mother of these two siblings had instituted a suit against the petitioner no. 1 which was exparte decreed vide judgment and decree, dated 05-05-2006. However, the execution petition against the petitioner was dismissed and withdrawn pursuant to a statement made by Syeda Khursheed and recorded vide order, dated 08-04-2008, in favour of the petitioner no. 1. The latter has since retained possession of the Property and at no stage has been evicted. An injunctive order was passed in her favour by the trial court, inter alia, on the ground that she was in possession of the Property. The said injunctive order was vacated vide order dated 30-11-2017, after acceptance of the appeal filed through the attorney, namely Ibrar Hussain. The latter, along with several other

armed persons, is alleged to have tried to forcibly evict the petitioners from the Property on 03-12-2017. This is manifestly recorded in the report/Qalandra, dated 04-12-2017 and the impugned order passed by the respondent no. 2, dated 07-12-2017. The petitioners were in possession and they were evicted from the Property consequent upon its sealing under the supervision and in presence of the respondent no. 2 on 11-12-2017. The respondents had admitted before this Court that on 03-12-2017 and on 11-12-2017 the petitioners were in possession. This factual position is not disputed. It is also not disputed that the petitioner no. 1, since 1992, was not evicted nor was the other contesting party and/or his attorney ever given possession by a competent court. The possession of petitioner no. 1 is, therefore, admitted and undisputed. Nothing was, therefore, required to be determined by the respondent no. 2 under section 145 of the Cr.P.C relating to factum of possession of the Property.

28. The respondent no. 2 purportedly exercised powers conferred under section 145 of the Cr. P.C and passed order, dated 07-12-2017, pursuant to receiving a report/Qalandra, dated 04-12-2017,from the respondent no.1. Both these documents explicitly

acknowledge that Ibrar Hussain, along with 25 to 30 accomplices armed with weapons, had forcibly tried to dispossess the petitioners from the Property during day time on 03-12-2017. Criminal cases were also registered. However, instead of proceeding under section 107 of the Cr.P.C, the respondent no. 2 passed the impugned order, dated 07-12-2017. Were the jurisdictional requirements satisfied before passing the order, dated 07-12-2012 or on the date of its execution i.e. 11-12-2017? Was there sufficient material for the purposes of satisfaction of the respondent no. 2 regarding an imminent danger of breach of peace either on 07-12-2017 or 11-12-2017? In the facts and circumstances of the instant case, the answer is an emphatic no. According to the respondents and as explicitly recorded in the impugned order, dated 07-12-2017, a serious cognizable offence was committed by armed men by forcibly trying to dispossess the petitioners so as to take control of the Property during day time on 03-12-2017. The respondent no. 1, instead of fulfilling his obligation to protect the petitioners and apprehend the accused, sent a report the next day, i.e. on 04-12-2017, recommending the sealing of the Property. From the time of the alleged occurrence till the sending of the report on 04-12-2017 no incident whatsoever had taken place in order to warrant proceedings under section 145. The

respondent no. 2, without making an enquiry and solely relying on the report, dated 04-12-2017, ordered attachment of the Property on 07-12-2017. Admittedly, all the accused had obtained pre arrest bails from the competent court and no untoward incident had taken place between 04-12-2017 and 07-12-2017 nor had the respondent no. 2 made any enquiry to satisfy himself regarding any imminent danger or likelihood of breach of peace. The order, dated 07-12-2017, was executed on 11-12-2017 under the supervision and in the presence of the respondent no. 2. The petitioners were evicted through police force and the Property was sealed. The petitioners have made serious allegations of being literarily dragged out of the house and thus violating the fundamental right of privacy guaranteed under Article 14 of the Constitution. The respondent no. 2 failed to show any justification or sufficient material for being satisfied that there was any imminent danger or likelihood of breach of peace on 04-12-2017, 07-12-2017 or 11-12-2017. The respondent no. 2 was asked whether the commission of a cognizable offence alleged to have been committed during day time on 03-12-2017 was sufficient for the purposes of satisfaction that there existed an imminent danger or likelihood of a breach of peace on 07-12-2017 and 11-12-2017 so as to attach the Property and

evict the petitioners who were admittedly in possession. He stated that he had solely acted on the basis of the report of the respondent no. 1, dated 04-12-2017. He was asked whether he would exercise this power wherever a cognizable offence is committed by persons who try to forcibly dispossess a citizen from a property in his or her possession. When he had appeared on 13-12-2017 he was asked whether taking the law into their hands by a few dozen armed men is sufficient to attach properties in the lawful possession of citizens living in the Capital of Pakistan. He had no explanation. He was also informed that this Court had entertained the revision petition and had also passed an injunctive order regulating the possession of the Property. He was advised to go through the law and pass an appropriate order, since according to both the respondents no material existed or could be produced to show that there was any imminent danger or likelihood of a breach of peace. Both the respondents had unequivocally stated that they were competent to enforce the writ of the State. The respondent no. 2 was afforded an opportunity to remedy the wrong. However, when he appeared the next day, he was adamant to complete the proceedings after recording the statements of the parties. He could not explain or give any plausible reason why he wanted to proceed in the matter and keep the petitioners

dispossessed when neither the possession of the petitioners was in dispute nor was there any imminent danger or likelihood of a breach of peace. He was restrained to proceed in the matter and given an opportunity to submit written submissions on the next date. However, neither did the respondent no. 2 submit anything in writing nor did his privately engaged counsel appear on 15-12-2017. The respondent no. 1, however, appeared and unambiguously reiterated that there was no likelihood of a breach of peace.

29. I am afraid that the respondent no. 2 had definitely proceeded under section 145 without satisfying the jurisdictional requirements. He had passed the order, dated 07-12-2017, in a mechanical manner and on the basis of the report dated 04-12-2012. There was no sufficient material that there existed any imminent danger or likelihood of a breach of peace and yet the respondent no. 2 went ahead and sealed the Property and in the process dispossessed the petitioners, who had admittedly been in possession for more than a decade. The proceedings and orders passed by the respondent no. 2 were in violation of the principles and law highlighted above. The impugned order, dated 07-12-2017, the sealing of the Property and all the proceedings relating

thereto were illegal, without lawful authority and jurisdiction. The proceedings and the impugned orders are a serious transgression of the powers and duties vested in the respondents, which have led to the violation of the fundamental rights of the petitioners, who were illegally deprived of their possession. They were illegally dispossessed by public functionaries who are otherwise entrusted with the duty by the State to protect and safeguard the rights of the citizens.

30. This Court, while exercising constitutional jurisdiction, cannot ignore the conduct of State functionaries who have been delegated authority by the people of Pakistan to protect the fundamental rights of every citizen. It is the obligation of the State to safeguard and protect the security, life and property of every citizen. Dignity and privacy of home has been declared as an inviolable fundamental right by the makers of the Constitution under Article 14. The State functionaries derive authority on the basis of a fiduciary relationship and where there is deviation of fiduciary obligations, the authority of the State to administer and enforce the law is eroded, as has been observed by the august Supreme Court in the case titled "Habibullah Energy Limited and another v. WAPDA through Chairman and others" [PLD

2014 SC 47]. I have no hesitation in observing that in the instant case both the respondents have recklessly deviated from their fiduciary obligations. According to the report, dated 04-12-2017 and the impugned order, dated 07-12-2017, Ibrar Hussain along with 25 to 30 accomplices, equipped with firearms, had forcibly tried to evict the petitioners during day time on 03-12-2017. This information was sufficient for the State authority to have been set in motion by apprehending the perpetrators who are alleged to have committed serious cognizable offences and simultaneously protecting and safeguarding the fundamental rights of the petitioners. The record and proceedings before this Court in the instant petition show that in fact the opposite took place. The State functionaries i.e. respondents no. 1 and 2, on the pretext of a likely breach of peace, dispossessed the petitioners by sealing the Property. This extreme step was definitely a grave abuse of powers vested in public functionaries. Even more alarming is the statement of the Incharge Police Station i.e. respondent no. 1, to the effect that since some of the alleged perpetrators had a criminal record, therefore, sealing of the Property was recommended. Moreover, copies of FIRs submitted by the respondent no. 1 indicate that one of the alleged perpetrators is a close relative of a senior retired police

officer and this raises serious concerns. The respondent no. 2, despite being advised to examine the law and pass an appropriate order, for which opportunity was afforded to him, preferred to perpetuate the illegality which had emanated from the void order, dated 07-12-2017. This obvious malfeasance on part of both the respondents can either be attributed to lack of knowledge and appreciation of the law which authorizes them to enforce the writ of the State or to extraneous reasons. Either way they have deviated from their fiduciary obligations by causing harm and injury to the petitioners, besides violating their fundamental rights. This is a classic case of arbitrariness and disregard to the principles of good governance. The conduct of both the respondents and their actions led to a result which was in fact the intent and object of the perpetrators. It appears from the statements made by the respondent no. 1 as though the State functionaries felt terrorized by two dozen armed men who they allege to have tried to take the law in their hands so as to forcibly evict the petitioners from the Property. The Property is situated in the heart of the Capital of Pakistan and not some remote area where the writ of the State does not exist. Accountability is the most important pillar of good governance. The conduct of the respondents and the resultant harm caused to the petitioners cannot go

unnoticed. While the respondents may have exposed themselves to a claim of damages for their tortuous liability, their conduct cannot be condoned. Their role and liability, therefore, needs to be probed. Moreover, in the facts and circumstances of the instant petition fair, impartial and independent investigations are required to be carried out in the criminal cases registered pursuant to alleged offences committed on 03-12-2017 and 11-12-2017. This is all the more important because as per the statement of the Incharge Police Station i.e respondent no. 1, some of the perpetrators have previously been allegedly involved in criminal activities of similar nature.

31. For what has been discussed above, the instant petition is allowed and the impugned order, dated 07-12-2017, and all the subsequent proceedings, including the sealing of the Property, are declared void, without lawful authority and jurisdiction. It is further directed as follows:

(i) The seal shall immediately be removed and the possession of the Property be restored to the petitioners forthwith. A report shall be submitted to the Registrar of this Court today.

(ii) The Inspector General of Police, Islamabad Capital Territory shall ensure that the criminal cases registered pursuant to the incident on 03-12-2017 are investigated by a competent senior officer fairly, impartially and without fear or favour.

(iii) The Inspector General of Police, ICT will conduct an enquiry through a senior officer to probe the role and conduct of the respondent no. 1.

(iv) The Chief Commissioner, ICT will cause an enquiry to be conducted regarding the role and conduct of the respondent no. 2, which led to serious violation of the fundamental rights of the petitioners. The learned Chief Commissioner shall also ensure that till the completion of the enquiry the respondent no. 2 is

restrained from exercising judicial powers.

(v) The enquiries ordered in clauses (iii) and (vi) above shall be completed within thirty days and respective reports thereafter shall be submitted before the Registrar of this Court.

(vi) The Chief Commissioner, ICT shall ensure that the law relating to appearance through the learned Advocate General, enunciated by the august Supreme Court in the judgment, dated 03-02-2017, rendered in Civil Appeal No. 1216/2015, titled "Rasheed Ahmed v. Federation of Pakistan, etc." is followed and implemented in letter and spirit.

(ATHAR MINALLAH)
JUDGE

Announced in open Court, on 18th December, 2017.

JUDGE

Approved for reporting.

Tanveer Ahmed.