

ORDER SHEET

IN THE HIGH COURT OF SINDH, CIRCUIT COURT LARKANA

Civil Revision Application No.S-34 of 2024

(Mst Ruqiya Khatoon and Ors V. Akhtiar Ali Sangi & Ors)

DATE	ORDER WITH SIGNATURE OF JUDGE
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1. For orders on office objection "A"
2. For orders on MA No.318/2024 (E/A)
3. For orders on MA No.897/2024 (151 CPC)
4. For orders on MA No.319/2024 (S/A)
5. For hearing of main case.

Date of hearing: 15.04.2025

Date of Order: 21 .04.2025

Applicants: Through Mr. Zameer Ali Shah, Advocate

Respondent No.1: Through Mr. Mohammad Arib Sangi, Advocate

Respondent No. 2: Nemo

ORDER

NISAR AHMED BHANBHRO J. The instant revision application filed under section 115 of the Code of Civil Procedure(CPC), is directed against judgment and decree dated 25-01-2024 and 26-01-2024 (**the impugned judgment and decree**) passed by the Court of Learned, 1st Additional District Judge Larkana (**the Appellate Court**) in Civil Appeal No. 106 of 2023, Re- Mst Ruqiya Khatoonn and others versus Akhtiar Ali Sangi and another, whereby appeal filed by applicants was dismissed and judgment and decree dated 27-04-2023 passed by the Court of Learned, 3rd Senior Civil Judge Larkana (**the Trial Court**), in Suit No 67 of 2022 Re - Akhtiar Ali Sangi Versus Mst. Ruqiya Khatoon and others was maintained.

2. SUCCINCTLY, stated the facts giving cause for invoking revisional jurisdiction of this Court are that Respondent No. 1 (Plaintiff) filed suit for declaration, recovery of immovable property, mesne profits, damages and permanent injunction before **the Trial Court** averring therein that a Kaccha Pakka house admeasuring about 10,000 square feet (**the Suit Property**) situated at Channa Mohalla Larkana was owned by Mst. Rukaiya Khatoon (applicant No 1). She sold out **the Suit Property** to Respondent No 1 through Registered Sale Date dated 25.04.2005. Since date of purchase until 2016, Respondent No 1 remained in peaceful possession of **the Suit Property**, when he was dispossessed by Defendants/ Applicants. Respondent No. 1 filed a complaint under Section 3 and 4 of the Illegal Dispossession Act 2005 before the Court of Learned

Sessions Judge Larkana, which was dismissed, thereafter, he filed **suit**, seeking following relief(s):

- a. *To declare that the plaintiff is lawful owner of the property.*
- b. *Direct the defendants to hand over the possession of the property in favor of the plaintiff.*
- c. *Grant the mesne profits to the plaintiff for 10,000 square feet at the rate of Rs 10 per square feet with annual increment of 10% from 11-02-2016 till realization of decree with interest at the rate of State Bank of Pakistan in accordance with law.*
- d. *That this Honorable Court grant the damages of Rs. 50,00, 000 in favor of plaintiff.*
- e. *Grant permanent injunction against the defendants and restrain them from interfering with exclusive peaceful possession and enjoyment of the property by the plaintiff.*

3. Applicants filed a joint written statement before **the Trial Court** taking divergent pleas. In opening Para of written statement Applicants denied claim of Respondent No 1 over **the Suit Property** stating that registered sale deed executed in his favor was challenged before the court of law but plaint of suit was rejected under Order VII Rule 11 CPC. In subsequent Para Applicants admitted that Applicant No 1 sold out **the Suit Property** to Respondent No 1 to the extent of her share but claimed that possession of **the Suit Property** was lying with Nisar Ahmed, Noor Ahmed, Naseema Khatun and Rahim Baksh who were sons-in-laws and daughter of Late Ghulam Mustafa Qureshi the original owner. It is further averred in pleadings that Late Ghulam Mustafa Qureshi owned 20,000 square feet in Channa Mohalla Larkana out of which he sold out 10,000 square feet each to Applicant No 1 and 3 in equal shares. Applicants denied claim of Respondent No 1 asserting that they were residing in house owned by Applicant No 3, whereas share of 10,000 square feet owned and sold by Applicant No 1 remained in possession of sons in law and daughter of original owner mentioned above, who were not party in suit. They prayed for dismissal of suit.

4. Based upon divergent pleadings of parties, **the Trial Court** framed 7 issues. Parties led evidence in support of respective claims. Respondent No. 1 examined himself, Saeed Ahmed and Wajid Ali Sangi. Respondent No. 1 produced title documents viz. registered sale deed, entry of record of rights in his favor and proceedings of complaint under Section 3 and 4 of the Illegal Dispossession Act filed before the Court of Learned Sessions Judge Larkana. Applicants examined Mst Rukiya Khatun, Abdul Waheed Qureshi, and Munwar Ali Sheikh, they produced copy of special power of attorney, registered said deed in favour of applicant No 3, and copies of complaint filed before the Court of Learned Sessions Judge Larkana. After hearing parties through their Counsel **the Trial Court** decreed suit of Respondent No 1 as

prayed vide judgment and decree dated 27-04-2023, with modification to the extent of claim for damages. Applicants filed Civil Appeal No. 106 of 2023, Re Mst Ruqaiya Khatun and others versus Akhtiar Ali Sangi and others against judgment and decree of **the Trial Court** before the Court of Learned District Judge Larkana which was assigned to **the Appellate Court** for disposal in accordance with law which was dismissed vide **the impugned judgment and decree**, hence this revision application.

5. Syed Zamir Ali Shah Learned Counsel for applicants contended that both the courts below failed to decide legal issue regarding maintainability of suit in accordance with law. He contended that **the Suit Property** was a dwelling house and **suit** of Respondent No 1 was barred under law as he being stranger transferee could not claim joint possession in **the suit property** excepting by way of partition. He contended that suit was hopelessly time barred as alleged dispossession occurred in 2016 and suit was filed in year 2022 after lapse of six years. He contended that suit for possession was not maintainable and was barred under section 44 of the Transfer of Property Act (TPA) therefore revision application be allowed and suit be dismissed. In support of his contentions, he placed reliance upon the case of **Muhammad Ibrahim and others Versus Muhammad Ismail and others** reported in **2005 SCMR 1335**, case of **Ilyas Ahmed Versus Muhammad Munir and 10 others** reported in **PLD 2012 Sindh 92**, case of **Khan Sher and 4 others Versus Israil Shah and 26 others** reported in **2016 CLC 176**.

6. Mr Mohammad Arib Sangi, Learned Counsel for Respondent No 1 controverting the assertions raised by Learned Counsel for applicants, contended that suit was maintainable, as Respondent No 1 being co-owner in **the Suit Property** was entitled to retain possession to the extent of his share. He contended that a particular issue with regard to maintainability of suit was framed by **the Trial Court**, but applicants failed to adduce evidence in that respect, therefore the Courts below resolved this legal issue against Applicants (Defendants). He contended that applicants did not take this plea in their written statement, so also before **the Appellate Court**, therefore they cannot agitate this issue before this court under its revisional jurisdiction. He contended that there are concurrent findings of Courts below which cannot be disturbed under Revisional Jurisdiction of this Court. He prayed for dismissal of Revision Application. He placed reliance on the case of **Farzana Zia and others versus Saadia Andaleeb and other** reported in **2024 SCMR 916**, case of **Noor Muhammad and others Versus Allah Ditta and others** reported in **PLD 2009 SC 198** and case of **Muhammad Ghaffar (deceased) through LRs and others Versus Arif Muhammad** reported in **2023 SCMR 344**.

7. Heard Learned Counsel for Parties and examined material available on record with their able assistance.

8. Since Learned Counsel for applicants has only raised a legal plea regarding maintainability of **suit**, therefore this Court would confine its findings to the said legal issue. Admittedly, Applicant No 3 and Respondent No 1 are co-owners in **the Suit Property** in equal shares. Original owner, Ghulam Mustafa Qureshi, sold out **the Suit Property** to applicants No 1 and 3 in equal shares through registered sale deed in year 2005. After fifteen days, applicant No 1 sold out her share to Respondent No 1 through a registered sale deed. Per claim, Respondent No 1 was put into possession of **the Suit Property** at the time of sale and he remained in peaceful possession until 2016, when he was dispossessed. Parties do not dispute ownership rights of each other in **the suit property** but dispute that Applicant No 3 being co-owner was in possession of 10,000 square feet to the extent of his share which was transferred in his favor by way of registered sale deed by original owner, and property owned by Respondent No 1 was not under his possession or otherwise he cannot be dispossessed being co-owner except by means of partition as **the Suit Property** was a dwelling house and Respondent No 1 was stranger.

9. To resolve the controversy over Legal issue of maintainability of suit it would be essential to see whether **the suit property** is a dwelling house, falling within the meaning of second paragraph of section 44 TPA, if so, whether a co-owner of dwelling house can sell immovable property without permission or consent of other co-owners, if so, whether purchaser (Respondent No 1) on purchase of property if a dwelling house of undivided family can claim joint possession of the same without getting it partitioned?

10. To address this legal issue it would be pertinent to go through the relevant provision of law regulating transfer of joint immovable property, which is section 44 of TPA, for purpose of understanding and ease of reference it is reproduced below:

*44. **Transfer by one co-owner:** where one of two or more co-owners of immovable property legally competent in that behalf transfers his share of property or any interest therein, the transferee acquires as to such share or interest, and so far as is necessary to give effect to the transfer, the transferor's right to joint possession or other common or part enjoyment of the property, and to enforce a partition of the same but subject to the condition and liabilities affecting at the date of the transfer, the share or the interest so transferred.*

Where the transferee of a share of dwelling-house belonging to an undivided family is not a member of the family, nothing in this section shall be deemed to entitle him to joint possession or other common or part enjoyment of the house.

Literal meaning of this provision of law enunciates that a co-owner in an immovable property does not require permission of other co-owners to sell his share in property, meaning thereby that a person competent to contract can enter into a transaction to sell the immovable property. Respondent No 1 acquired right in **the Suit Property** by way of purchase from Applicant No 1 through registered sale deed. At the

Property is a dwelling house and falls within the definition of second paragraph of section 44 of TPA.

13. Adverting to the question whether Respondent No 1 being stranger can claim joint possession in **the Suit Property** which is a dwelling house, section 44 of TPA answers this question in negative. As discussed above alienation of right in joint immoveable property is not debarred under the law, neither permission or consent of co-owner is required to sell property. But importantly in case of transfer or sale of dwelling house of an undivided family transferee shall not be entitled to a joint possession, if he is not member of the family. Applicants No 1 and 3 are related inter se being grandmother and grand-child falling within the definition of undivided family. The Respondent No 1 was not a member of family thus stranger. Legislature in its wisdom has protected the rights of an undivided family under Section 44 of TPA, precluding stranger transferee from joint possession in a dwelling house that belongs to an undivided family, transferee shall not be deemed to be entitled to joint possession or other common or part enjoyment of the dwelling house. In any other property that is other than dwelling house, the transferee may claim joint possession and all other rights which transferor passed by way of transaction.

14. When confronted with this legal position, Learned Counsel for Respondent No 1 contended that **the Suit Property** was privately partitioned, however such contention does not find support from record, as neither in pleadings nor in evidence of Respondent No 1 factum of private partition finds mention. Had it been the case and had **the Suit Property** been privately partitioned, its proper sketch must have come in pleadings which is missing in the plaint. Had Respondent No 1 taken a specific plea of private partition, **the Trial Court** would have framed issue on the point, and question of maintainability could have been easily addressed. Respondent No 1 failed to establish that **the Suit Property** was privately partitioned. The discussion hereinabove leads to a conclusion that Respondent No 1 is a stranger and the Suit Property was not partitioned.

15. Respondent No 1 under such circumstances could lay his claim of possession of **the Suit Property** by way of partition which was subject to the conditions imposed in section 4 of the **Partition Act, 1893** which reads as under:

4. Partition suit by transferee of share in dwelling house---(1) Where a share of a dwelling-house belonging to an undivided family has been transferred to a person who is not a member of such family and such transferee sues for partition, the Court shall, if any member of the family being a shareholder shall undertake to buy the share of such transferee, make a valuation of such share in such manner as it thinks fit and direct the sale of such share to such shareholder, and may give all necessary and proper directions in that behalf.

(2) If in any case described in subsection (1) two or more members of the family being such shareholders severally undertake to buy such share, the Court shall follow the procedure prescribed by subsection (2) of the last foregoing section."

This provision of law puts an embargo for transfer of joint possession to a stranger transferee if the property is a dwelling house. Stranger transferee claiming partition by metes and bounds may be compelled to forgo his legal right in dwelling house and to accept pecuniary compensation in lieu thereof at the option of other members of undivided family. To further elaborate, section 4 of the Partition Act, speaks about sale of immoveable property by co-owner and when it has been transferred in favor of a person not a member of joint family then if a suit for partition comes, the court would seek valuation of property and make an offer to any of the members of undivided family to purchase it. The above provisions of law make it crystal clear that a member of undivided family of a dwelling house cannot be compelled to allow a stranger to retain joint possession of a dwelling house. Respondent No. 1 alleged that he was dispossessed from **the Suit Property** in year 2016 but in pleadings, it is nowhere mentioned that after purchase in year 2005 he constructed house over there or he was member of joint family. Thus, when a co-sharer sells the joint property being a dwelling house to stranger and delivers possession to him, the other co-sharers can exercise their right of retaining possession and resist joint possession. Section 4 of the Partition Act is corollary to Section 44 of TPA, it denies the right of joint possession to stranger and confers statutory right existed in favor of co-sharer who is member of undivided family to purchase the transferred share from stranger. This provision of law prevents intruders to enter in dwelling house, curbs difficulties of family of living with strangers and helps maintain homogeneity in the families, a beneficial piece of legislation for welfare of family within the touch stone of Article 35 of the Constitution of Islamic Republic of Pakistan of 1973 which enshrines protection to family as principle of policy and responsibility of state .

16. The Courts below failed to comprehend this legal and factual aspect of the case and even did not frame issue regarding partition of **the Suit Property** so that a preliminary decree could be prepared. **The Trial Court** decreed suit for possession in joint property which was a dwelling house. Appellate Court while dealing with appeal overlooked this aspect, maintained decree with a modification that suit to the extent of grant of damages was dismissed. Though parties under litigation did not agitate this legal plea before Courts below but this Court under its revisional jurisdiction can adjudicate the same. It is well settled proposition that High Court under its revisional jurisdiction conferred under section 115 CPC has to examine whether Courts below acted in exercise of its jurisdiction illegally or with material irregularity or committed some error of procedure which affected the ultimate decision. In fact, this jurisdiction is corrective and supervisory in nature to ensure safe administration of justice and to satisfy and reassure itself that order of the subordinate court is within its jurisdiction; the case is one in which the Court ought to have exercised jurisdiction and in exercising jurisdiction, the Court has not acted illegally or in breach of some provision of law or

with material irregularity or by committing some error of procedure in the course of trial which affected the ultimate decision. If the High Court is satisfied that aforesaid principles have not been disregarded and followed in true perspective by the courts below, it has no power to interfere in the conclusion arrived at by the subordinate court upon questions of fact or law. The scope of revisional jurisdiction is limited to the extent of misreading or non-reading of evidence, jurisdictional error or an illegality of the nature in the judgment which may have material effect on the result of the case or if the conclusion drawn therein is perverse or conflicting to the law.

17. The contention of Learned Counsel for Respondent No 1 that Courts' below decreed suit after proper appraisal of evidence, there is no question of misreading or non-reading of evidence, case of Respondent No 1 stands admitted, therefore suit was rightly decreed. There are concurrent findings of Courts below, this Court sparingly interferes in concurrent findings. There is no cavil to the settled principle that High Court has very limited jurisdiction to interfere in the concurrent conclusions arrived at by the courts below while exercising power under section 115, C.P.C when such findings are based upon correct premise of law and do not suffer from mis-reading and non-reading of the evidence or jurisdictional error. Sanctity is not attached to the concurrent findings if found otherwise. In the present case the Courts below overlooking legal and factual perspective and decreed the suit for possession of a dwelling house which was a dwelling house. A question of common understanding that relief of possession in a joint holding or property whether agriculture or non-agriculture or residential house cannot be granted without seeking a relief for partition. In the given circumstances decree drawn up by the Courts below for possession over a joint dwelling house otherwise is not executable except by way of partition.

18. The case laws relied upon by the Learned Counsel for parties though relevant to some extent but do not specifically address the issue of maintainability of suit, are distinguishable.

19. Learned Division Bench of this Court in the case of **Mst. Nafeesa Siddiqui and others v. Danish Rafique and others** reported in **2019 C L C 1739** held that in the facts of the instant case the question whether the Suit Property was at the relevant time a "dwelling-house belonging to an undivided family" within the meaning of the proviso to Section 44 Transfer of Property Act, 1882, is a question yet to be determined in the said Suit. Therefore, till such time the question of awarding joint possession of any part of the Suit Property to the Respondent No.1 does not arise.

20. The Honorable Supreme Court in the case of **Cantonment Board through Executive Officer, Cantt. Board, Rawalpindi v. Ikhtlaq Ahmed and others** reported in **2014 SCMR 161**, held that the scope of revision is narrow and required the High Court to examine whether the Courts below have failed to exercise jurisdiction so vested in them or have acted in exercise of its jurisdiction illegally or with material

irregularity and have misread the evidence brought on record by the parties. In other words, provisions of section 115, C.P.C under which a High Court exercises its revisional jurisdiction, confer an exceptional and necessary power intended to secure effective exercise of its superintendence and visitorial powers of correction unhindered by technicalities.

21. Honorable Supreme Court of Pakistan in the case of **UNITED BANK LIMITED (UBL) through its President and others Versus JAMIL AHMED and others** reported in **2024 S C M R 164** held that No doubt the Trial Court possesses the distinctive position to adjudge the trustworthiness of witnesses and cumulative effect of evidence led in the lis and, in turn, the appellate court accords deference to the findings and such findings are not overturned unless found erroneous or defective. It is not the domain or function of appellate court and/or High Court to re-weigh or interpret the evidence, but they can examine whether the impugned judgment or order attains the benchmark of an unflawed judgment; and whether it is in consonance with the law and evidence and free from unjust and unfair errors apparent on the face of record. However, if the concurrent findings recorded by the lower fora are found to be in violation of law or based on flagrant and obvious defect floating on the surface of record, then it cannot be treated as being so sacrosanct or sanctified that it cannot be reversed by the High Court in the Constitutional jurisdiction vested in it by Article 199 of the Constitution of the Islamic Republic of Pakistan, 1973 as a corrective measure in order to satisfy and reassure whether the impugned decision is within the law or not and if it suffers any jurisdictional defect, in such set of circumstances, the High Court without being impressed or influenced by the fact that the matter reached the High Court under Constitutional jurisdiction in pursuit of the concurrent findings recorded below, can cure and rectify the defect.

22. The powers of High Court conferred in its constitutional jurisdiction under article 199 and revisional jurisdiction under section 115 CPC are corrective and supervisory. In the present case Courts below committed material illegality and irregularity as to the maintainability of suit which from face of it fell within the limb of section 44 of TPA and section 4 of Partition Act thus relief of joint possession was not available for Respondent No 1. A case for indulgence of this Court under its revisional jurisdiction conferred under section 115 CPC is made out, as judgment and decree of Courts below suffered from jurisdictional error thus not sustainable under the. the revision application is allowed, the impugned judgment and decree dated 25.01.2024 and 26.01.2024 passed by **the Appellate Court** in Civil Appeal No. 106 of 2023, Re- Mst Ruqiya Khatoon and others versus Akhtiar Ali Sangi and others and judgment and decree dated 27-04-2023 passed by **the Trial Court**, in Suit No 67 of 2022 Re - Akhtiar Ali Sangi Versus Mst. Ruqiya Khatoon and other are set aside, the suit of Plaintiff (Respondent No 1) is dismissed. Parties to bear costs.

23. Before parting with this order, it would be in the fitness of things to clarify that order of dismissal of suit in this revision application shall not operate as a Res Judicata, if Respondent No 1 brings a fresh for partition case within the premise of section 44 of TPA read with section 4 of the Partition Act, which shall be dealt by the Court independently in accordance with law and without being influenced by any of the findings given in this order, needless to say that bar of limitation would not operate against Respondent No 1 for bringing a case for partition as he is a co-owner of the Suit Property and always presumed to be under constructive possession.

Judge