IN THE COURT OF APPEAL OF THE DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA

In the matter of an application for revision made under and in terms of Article 138(1) of the Constitution of the Democratic Socialist Republic of Sri Lanka.

CA (Rev) Application No: 63/2016
P.H.C. Kurunegala No: HCR/49/2016
MC Kurunegala Case No: 79308/66

And now Between

1. H.A. Prasanji Thusitha Kumara Dias

Respondent-Petitioner-Petitioner

2. N.L.D.G.Uthika Dias

Both of No 421, Malkaduwawa, Kurunegala.

Intervenient- Petitioner-Petitioner

Vs.

1. Hettiarachchige Dias
2. Jasinthu Hewage Kalyanawathie Dias

Both of No82, Malkaduwawa Circular Road, Kurunegala.

Complainants-Respondents-Respondents

Before : **H.C.J. Madawala , J**
&
L.T.B. Dehideniya, J

Counsel : R.L. Perera PC with Upendra Walgampaya for the Petitioner
Ikram Mohamed PC with Nadeeka Galhena and Tanya Marjan instructed by Sanath Weerarathne for the Complainant-Respondent-Respondent

Written Submissions on : 20 /07/2016

Order On : 12 / 08 /2016

Order

H. C. J. Madawala , J

The 1st Respondent-Petitioner-Petitioner and the Intervenient-Petitioner-Petitioner filed the present application seeking in the first instance an interim order staying any further proceedings and /or an order staying the execution of the order dated 28/4/2015 made in MC Kurunegala Case No. 79308/66 until the final determination of the present application. The said application was supported on 23/5/2016 court thought it fit to grant the said interim relief and issue notice on the 1st and 2nd Complainants-Respondents-Respondents returnable on 31/5/2016. The 1st and 2nd Respondents thereafter sought to have the matter fixed for inquiry with regard to the extension of the said stay order. The 1st and 2nd Respondents did not however file limited objections setting out the grounds upon which they object to the extension of the above said stay order.

On 17/6/2016 and 4/7/2016 both counsels were heard in support and in opposition of the stay order. Thereafter parties agreed to file their written submissions in support of same. It was submitted that the 1st Respondent-Petitioner-Petitioner and the Respondents was

running a business in partnership under the name, style and firm of 'Dias Motors, Engineers and Sales' at the said premises in dispute and the petitioner's equipment on the premises are of high value. Secondly the income from the said business is the primary income of both petitioners. Further that the petitioners will suffer substantial and irreparable loss, prejudice and hardship, and the final relief in this application will be rendered nugatory and ineffective, unless the interim relief prayed for in the prayer (d) below is not granted.

"(d) Grant and issue an interim order in the first instance staying any further proceedings and /or an order staying the execution of the order dated 28/4/2015 made in M.C. Kurunegalla Case No.79308/66 until the final determination of the present application;"

It was submitted that what is required is that for the petitioners to present a *prima facia* case warranting a stay order. It was submitted that if the status quo is not maintained, and the Appeal Court were to hold in favour of the Petitioners, the petitioners would suffer grave and irremediable loss and damage and the final relief so granted would be rendered nugatory and ineffective. Accordingly counsel for the 2nd Respondent-Petitioner-Petitioner and the Intervenient-Petitioner-Petitioner respectfully moved court that the foresaid interim order be extended until the final determination of the present application.

The counsel for the Complainant-Respondent-Respondent objecting to extension of the issuance of the interim order submits that the 2nd Respondent-Petitioner-Petitioner and the Intervenient-Petitioner-Petitioner have not prayed that they be restored to possession. Attention of Court has been drawn to the Supreme Court Judgment in **Ramalingam v Thangarajah 1982 2 SLR 693** where his Lordship Justice Sharvananda has set down the obligation of the Primary Court judge under the provision of section 68(3) as follows,

"In an inquiry into a dispute as to the possession of any land, where a breach of peace is threatened or is likely under part VII, of the Primary Courts Procedure Act, the main point for decision is the actual possession of the land on the date of the filling of the information under

section 66; but, where forcible dispossession took place within two months before the date on which the said information was filed the main point is. Actual possession prior to that alleged date of dispossession. Section 68 is only concerned with the determination as to who was in possession of the land or the part on the date of the filling of the information under section 66. It directs the judge to declare that the person who was in such possession was entitled to possession of the land or part thereof Section 68(3) becomes applicable only if the judge can come to a definite finding that some other party had been forcible dispossessed within a period of two months next proceeding the date on which the information was filed under section 66. The effect of this sub-section is that it enables a party to be treated to be in possession on the date of the filling of the information though actually he may be found to have been dispossessed before that date provided such dispossession took place within the period of two months next proceedings the date of the filling of the information. It is only if such a party can be treated or deemed to be in possession on the date of the filling of the information that the person actually in possession can be said not to have been in possession on the date of the filling of the information. Thus, the duty of the judge in proceedings under section 68 is to ascertain which party was or deemed to have been in possession on the relevant date, namely, on the date of the filling of the information under section 66. Under section 68 the judge is bound to maintain the possession of such person even if he be a rank trespasser as ? against any interference even by the rightful owner. This section entitles even a squatter to the protection of the law, unless his possession was acquired within two months of the filling of the information."

Attention of court has been kindly invited to the judgment of His Lordship Justice Chithrasiri in **Jeevantha Senarathna v Hon. Attorney General (CA(CHC) No 102/2001)** where his Lordship has held that in terms of Section 68(3) of the said Act, it is duty of the Primary Court Judge to make an order directing the party dispossessed be restored to possession prohibiting all disturbances of such possession otherwise that is under the authority of an order /decree of the competent court.

In the case of Duwearachchi v Vincent Perera 1984(2) SLR page 94 where this court has laid down 3 principals which court should consider when they are called upon to consider the issuance or non-issuance of a stay order. They are as follows,

(a) Will a final order be rendered nugatory if the petitioner is successful?
(b) Where does the balance of convenience lie?
(c) Will irreparable or irremediable mischief or injury be caused to either party?

(Vide Natwealth Security Ltd v The Monetary Board of Central bank & Others CA(writ)application No 335/2015)

This court has to limit the scope of this order only to the question whether the interim order should be extended or not. The Learned Counsel for both parties has extensively addressed this court.

It was urged by the Counsel of the 1st Respondent-Petitioner-Petitioner and Intervenient-Petitioner-Petitioner that among the one of the exceptional circumstances setout was that the Learned Magistrate has granted relief which the 1st and 2nd Respondents have not prayed for, any reliefs available in Section 68 of the Primary Courts Procedure Act No. 44 of 1979. Further that the 1st and 2nd Petitioners have not been dispossessed the 1st and 2nd Respondents from the lands which are the subject of the purported disturbance of the peace; and that the 1st and 2nd Respondents have breached the equitable principal of *uberrima fidei*; and have misrepresented facts to court; Further the 1st and 2nd Petitioners will surfer grave and irremediable loss and damage if a stay order as prayed for is not issued until the final determination of the revision application. It was also urged that the Learned High Court Judge of Kurunegala delivered his order dated 19-5-2016 refusing to extend and /or issue a stay order until final determination of PHC Kurunegala No HCR/49/2016.

The Learned High Court Judge of Kurunegala by his order dated 19/5/2016 has held that,

i. *The provincial High Court is vested with the power to revise and set aside the said order of the Learned Additional Magistrate in terms of Article 154(3)(b) of the constitution read with section 4 and 5 of the High Court of the Provinces (special Provisions) Act No 19 of 1996;*

ii. *The duty to disclose exceptional circumstances is on the Petitioners;*

iii. *The Learned Additional Magistrate in the said order has held that the Respondents should be restored into possession. The Petitioners have submitted that the Respondents have not prayed to be restored into possession. A Magistrate has the power in terms of Section 68(1), 68(2), 68(3) and 68(4) to restore any party dispossessed back into possession of the land which is the subject of the dispute. Therefore the argument of the petitioner that the Learned Magistrate has granted a relief not prayed for cannot be accepted;*

iv. *The petitioners have also taken up the position that the respondent in their information to court have not disclosed the fact that the respondents given the subject matter to the 1st petitioner and subsequently revoked the said gift and that by suppressing the said fact the respondents have not acted in good faith. The Learned Magistrate has considered the fact of the gift in his order and in any event the mere fact that the respondents have suppressed the said fact should not be a reason to refuse the reliefs they have sought;*

v. *Considering all the above matters and the order of the Learned Magistrate there does not appear to be prima facie case warranting the issuance of an order staying the execution of the Learned Magistrate's Order and therefore the application for a stay order is refused.*

We considered the above submissions of the Learned President Counsel and are off the view that the final order will be rendered nugatory if the petitioner is successful. We find that the Learned Magistrate has erred in ordering that the respondents be restored to possession when there is no such prayer in the petition by the respondents. The respondents had not prayed for restoration of possession this is a private information under Section

66(1)(b) of the Primary Courts Procedure Act in terms of Section 66(1)(b) and the petitioner has to set out the relief sought.

In **Surangi V. Rodrigo(2003) 3 SLR page 35** it was decided that " *no court is entitled to* or *has jurisdiction to grant relief to a party which are not prayed for in the prayer to the plaint.*" The above principle has also been held in the Indian case of Krishna Priya Ganguly V University of Lucknow (1984) AIR 186 fazal Ali j stated that,

"Finally, in his own petition in the High Court, the respondent had merely prayed for a writ directing the state or the college to consider his case for admission yet the High Court went a step further and straightaway issued a writ of mandamus directing the college to admit him to the M.S. course and thus granted a relief to the respondent which he himself never prayed for and could not have prayed for. Such a gross discrimination made in the case of a person who had obtained lowest aggregate and lowest position seems to us to be extremely shocking. Although much could be said against the view taken by the High Court yet we would not like to say more than this that the High Court had made a very arbitrary, casual and laconic approach to the case and based its judgment purely on speculation and conjectures..."

It was submitted that the Magistrate had gravely by erred in ordering restoration of the respondents to possession when there is no proof of forcible dispossession and there is no prayer for restoration of possession. It was also submitted that the Magistrate should however proceed with great caution where there is no Police report and only material before him are statements of interested person. We find that there has been no forcible dispossession. The Kurunegala Police has not though it fit to file information to court since after it's investigating it has not found that there has been a breach of the peace or a likelihood of the breach of the peace. We hold that the petitioners had made a *prima facia* case and the balance of convenience is in favour of the petitioners we are of the view that there would be irreparable or irremediable mischief or injury be caused to both parties since this is a family dispute between the parents and the elder son.

We find that the Respondents had no knowledge that the property gifted to him by deed has been revoked by his parents. However we are of the view that since this is a running business of the said premises in dispute that there is a likelihood of the breach of peace. As such we extend the stay order until the final determination of these proceedings.

Judge of the Court of Appeal

L.T.D.Dehideniya, J

I agree.

Judge of the Court of Appeal