

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

In the matter of an application for exercise of Revisionary powers made in terms of Article 154(n0 (6) of the Constitution of the Democratic Socialist Republic of Sri Lanka and Section 9 of the High Court of the Provisions (Special Provisions) Act No. 19 of 1990.

Officer-In-Charge,
Police Station,
Rathgama.

Complainant

CA (PHC) 172/2006

PHC Case No-477/2005

M.C. Case No. 35004

Vs.

01. Thuppahi Premadhasa,
No. 218, Gammeghdhagoda,
Rathgama.
02. Sammu Padhmasiri
Gammeghdhagoda,
Rathgama.

Respondents

Thuppahi Premadhasa
No 218, Gammedgdhagoda,
Rathgama.

**1st Respondent-
Petitioner**

Vs.

01. Officer-In-Charge,
Police Station,
Rathgama.

Complainant- Respondent

02. Sammu Padhmasiri,
Gammeghdhagoda,
Rathgama.

2nd Respondent-Respondent

And Now Between in an Appeal
In the Court of Appeal

Thuppahi Premadhasa
No 218, Gammedgdhagoda,
Rathgama.

**1st Respondent-Petitioner-
Appellant**

Vs.

01. Officer-In-Charge,
Police Station,
Rathgama.

**Complainant- Respondent-
Respondent**

02. Sammu Padhmasiri,
Gammeghdhagoda,
Rathgama.

**2nd Respondent-Respondent-
Respondent**

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

Counsel : Chandrika Morawaka with Manoja Jayanetti for the Appellant
M.I.M. Naleem for the Respondent.

Argued On : 04 /07 / 2016

Written Submissions On : 10 /08 /2016

Decided on : 19 / 09 / 2016

H. C. J. Madawala , J

This appeal is preferred against the order dated 19/07/2007 of the Honorable Provincial High Court Judge of Galle in the exercise of its revisionary Jurisdiction arising out of an application made by the Rathgama Police under section 66 of the Primary Court's Procedure Act No 44 of 1979 to the Magistrate Court of Galle.

When this matter came up for argument in this Court on 4/7/2016 both counsels were heard in support of their respective cases. Arguments were concluded and both parties were directed to file their written submissions which they have tendered to court. We have considered both the oral and written submissions of the Learned Counsel of their respective argument. The facts relating to this dispute are briefly as follows,

The 2nd Respondent in the Magistrate Court of Galle Sammu Padhmasiri has been gifted a house at Gammathagoda, Rathgama by his sister Sammu Sumanawathi by the Deed of gift No 102 dated 10th of January 2001 attested by Piyathilaka, Notary Public. The said deed has marked as 2 @ 2 together with the affidavit of the 2nd Respondent in the Primary Court of Galle.

The seller handed over the vacant possession of the said land and premises which is a house belonging to the 2nd Respondent. Since the 2nd Respondent has another house and has rented out the said house to one M.W.G. Lal on a monthly rental, the said M.W.G.Lal was in occupation in the said house for a period of one year and thereafter vacated the said house and handed over the key to the 2nd Respondent and he took the house and kept the key with him.

The 1st Respondent Thuppahi Premadhasa who is the 2nd Respondent's mother's brother claims the ownership to the said house upon a forged deed because the 2nd Respondent refused to hand over the house to him.

The 1st Respondent thereafter made a complaint at Rathgama Police Station and the Police fearing a breach of a peace likely to occur filed an application on 30th of July 2004 under Section 66 of the Primary Court's Procedure Act No 44 of 1979.

At the hearing before the Learned Magistrate, both parties filed affidavit together with documents. The 1st Respondent filed his deed which was the forged deed.

The 2nd Respondent also filed his title deed. Thereafter the Learned Magistrate having perused the affidavit and document filed, fixed the date for order on 4/11/2004.

In the affidavit filed by the 1st Respondent he has taken up the position that it was he who rented out the house to M.W.G. Lal and when M.W.G.Lal left the house he handed over the key to him. The Learned Magistrate after fixing the date for order was in doubt as to whose version was correct and therefore the Learned Magistrate decided to summon M.W.G. Lal in order to find out the truth of this matter.

Then M.W.G.Lal gave evidence at the Magistrate Court and both parties cross examined M.W.G.Lal and the Learned Magistrate on the same day delivered his order dated 17/12/2004 in favour of the 2nd Respondent who was at that time and even now is in possession of the said house.

The Magistrate has called the tenant M.W.G.Lal as a witness in order to clear his doubt and after M.W.G.Lal gave evidence he accepted the position that the 2nd Respondent was in the possession of the house and he has rented out the house to M.W.G.Lal.

The Learned Magistrate decided to summon M.W.G.Lal as a witness and record his evidence and thereafter delivered his order dated 17/12/2004 in favour of the 2nd Respondent who was at the time and even now is in possession of the said house. Being aggrieved by the order of the Learned Magistrate the Appellant has preferred this Revision Application to the High Court and the present appeal to this court.

The position of the Appellant was that the Learned Magistrate has erred in law when he decided to summon the witness M.W.G.Lal to give oral evidence in a Section 66 application as the matter should be disposed on the affidavit filed and documents annexed to them in terms of Section 66(3) and 66(5).

Secondly it was contended that the Learned Magistrate who has based his decision solely on the oral testimony of the witness M.W.G.Lal who has failed to consider the fact that this witness who has given documents to both parties was unreliable untrustworthy person as witness who lied in court at the first instance when he was questioned by court whether he signed 1W13 which he denied and then admitted the same when he was cross examined.

The position of the 2nd Respondent-Respondent-Respondent was that in a Section 66 application the inquiry is held in a summary manner and no evidence is recorded. But in Section 72(b) of the Primary Court's Procedure Act, the Primary Court Judge has the discretion to permit any evidence on any matter arising on the affidavit or documents furnished as that made and that in the present case. The Primary Court's Judge has used his discretion and summoned M.W.G.Lal to give evidence which is in perfectly in order. Further that an order delivered under Section 66 of the Primary Court's Act is only a provisional or temporary order which does not affect or prejudice a civil rights of the parties. That parties affected by the said order can always file a civil action and obtain relief and that in Primary Court's Procedure Act there is no express provision for a judge preventing him from calling a witness. It was contended the rule of Procedure that is applicable to this case is that what is not prohibited is permitted and not the converse rule that what is not permitted is prohibited and that since this is a matter of procedure the rule that what is not prohibited is permitted is applicable.

The substantial question that this court is called upon to decide is the correctness and the validity of the decision of the Learned Primary Court's Judge to summon M.W.G.Lal to give evidence in this case. It was a contention of the Respondent that though Part VII of the Primary Court Act has no specific provision giving the judge the right to call witnesses, the *casus ommisu* Section 78 of the provisions of the Civil Procedure Act permits this to be done having referred to the Provisions of the Civil Procedure Code with relevant adaptation. Therefore the Respondent submitted that the decision of the Court to call the evidence of M.W.G.Lal is permissible and valid.

"The question whether the Primary Court Judge has the jurisdiction to summon witnesses of his choice ex mero motu without stating the reasons for it when the evidence of such witnesses is already on record with the other reliable evidence to test its credibility and specially after he had decided to give his order without calling for oral evidence and parties having agreed to it has been aptly dealt by Sharvananda, J. as he then was in his judgment in Ramalingam Vs. Thangarajah. Before he come to that decision it would be useful to consider the relevant section that is applicable to the issue at hand Section 72 of the Primary Court's Procedure Act."

Section 72 of Primary Court's Procedure Act read as follows,

"A determination and order under this part shall be made after examination and consideration of-

- (a) the information filed and the affidavits and documents furnished;*
- (b) such other evidence on any matter arising on the affidavits or documents furnished as the court may permit to be led on that matter; and*

(c) such oral or written submission as may be permitted by the judge of the Primary Court in his discretion.”

In the Case of **Ramalingam Vs. Thangarajah , Sharvananda, J** observed:

“The determination should, in the main, be founded on “the information filed and the affidavits and documents furnished by the parties”. Adducing evidence by way of affidavits and documents is the rule and oral testimony is an exception to be permitted only at the discretion of the Judge. That discretion should be exercised judicially, only in a fit case and not as a matter of course and not be surrendered to parties or their counsel. Under this section the parties are not entitled as of right to lead oral evidence.”

According to the submissions made by the parties we find that the Learned Magistrate has decided to summon the witness M.W.G. Lal to give evidence as he was unable to take a final decision as to who was in possession on the date in question. We find that the M.W.G.Lal has given the key to the 2nd Respondent. Accordingly we are of the view that the Learned Primary Court Judge and the Learned High Court Judge has come to a correct finding about the 2nd Respondent was in possession on the said date. It was further contended that the evidence of M.W.G.Lal was unreliable and untrustworthy and should be rejected.

According to the judgment above states that according to the Section 72(b) of Primary Court’s Procedure Act, the Primary Court Judge has discretion to permit any evidence on any matter arising on the affidavit or documents furnished as the court may permit to be led on that matter.

Section 66 of the Primary Court’s Procedure Act is only a Provisional or temporary order which does not affect or prejudice civil rights of the parties. We are of the view that since this is a matter of procedure the rule that what is not prohibited is permitted is applicable.

In the case was **Karunanayaka Vs. Sangakkara 2005 2 SLR 403** it is stated that there is no provision for the judge to call for oral evidence of witness of his own choice. He cannot be permitted to go on a voyage of discovery on his own to arrive at a decision when parties have placed before him the material on which they rely and it is on this material that, he is expected to arrive at a determination.

Section 72(b) of the Act, does not give sole discretion to judge to decide and power to receive such other evidence. It give judge the power to decide whether to allow or not on application of party that implies existence the consent of parties as a precondition to call other evidence.

It was contended by the 1st Respondent-Petitioner-Appellant that the Learned Magistrate can only call for evidence after the filing of papers only with the consent of all parties. He can't call a witness on his own unless the parties consent to it. Accordingly in this case we find that the evidence of the M.W.G.Lal has been called by the judge at his own discretion and cross examined by the 1st Respondent-Petitioner-Appellant. Therefore we find that there is no prejudice caused to the 1st Respondent-Petitioner-Appellant and further the 1st Respondent-Petitioner-Appellant has not taken any objection at the time when the witness was called to give evidence. Accordingly it is presumed that the consent of the 1st Respondent-Petitioner-Appellant has been given. We are of the view that the Learned Magistrate has come to a correct decision when he has summoned the witness M.W.G.Lal to give evidence which is perfectly in order. Further we are of the view that the witness M.W.G.Lal is reliable and trustworthy. As such we are of the view that the Learned Magistrate has correctly used his discretion and summoned the witness of M.W.G.Lal.

Accordingly we disallow this appeal and affirm the judgment of the Magistrate Court of Galle and the judgment of the Provincial High Court of Galle with cost.

Judge of the Court of Appeal

L.T.D.Dehideniya, J

I agree.

Judge of the Court of Appeal