

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

In the matter of an appeal in terms of Article
154G(6) read with Article 138 of the Constitution
of the Democratic Socialist Republic of Sri Lanka

Court of Appeal case no. CA/PHC/125/2012 and

CA/PHC/APN/ 107/2012

H.C. Gampaha case no. (Rev) 09/2009

M.C. Pugoda case no. 1471/66/L

1. Kumarage Chandana

No. 175/A, Radawana North, Radawana.

2. Kumarage Sudharma

No. 17/E, Thanna, Radawana.

3. Ranawaka Arachchige Rukmani Kanthi

No. 175A, Radawana North, Radawana

4. Kumarage Sisira Nishantha

5. Kumarage Thilak

6. Kumarage Nilmini

All of No. 175/A, Diyawala, Radawana

**2nd Party Respondent Respondent
Appellant/Petitioner**

Vs.

1. Kumarage Desi Nona

2. Senarath Mudalige Weerasundara

(Deceased)

No. 101C, Alliyawatta Road, Kirindiwela

1st Party Respondent Petitioner Respondent

Jayantha Mudalige Somawathi
No. 222, Nadungollawatta, Mandawala
**Intervenient Party Respondent Respondent
Respondent.**

1. M.P.Dharmadasa
Nadungollawatta, Mandawala
2. K.Rathnapala
3. K.Sumanawathi
No. 101, Diyawala, Radawana.

**1st Party Intervenient Respondent
Respondent Respondent.**

Before : P.R.Walgama J.

: L.T.B. Dehideniya J.

Counsel : T.Paliyagamage for the 2nd Party Respondent
Appellant/Petitioner.

: R. Chula Bandara for the 1st Party Respondent Petitioner
Respondent.

Argued on : 26.04.2016

Written submissions of the Appellant/Petitioner filed on 16.12.2016

Written submissions of the Respondent filed on 12.08.2016

Decided on : 25.05.2017

L.T.B. Dehideniya J.

This is an appeal from the High Court of Gampaha.

The facts relating to this appeal are as follows. On a complaint made by the 1st Party Respondent Petitioner Respondents (Respondents) to the Kirindiwela police, the OIC filed information in the Magistrate Court of Pugoda under section 66 of the Primary Court Procedure Act. The learned Magistrate, after an inquiry, determined that the Respondents are in possession and ordered the 2nd Party Respondent Respondent Petitioners (Petitioners) not to disturb the possession of the Respondents. Thereafter the Respondents made an application to execute a writ of possession but the learned Magistrate refused the application on the basis that the Respondents are in the possession and there is no necessity to execute a writ of possession. The Respondents made another application on 18.08.2008 for a writ of possession stating that the Petitioners are continually disturbing the possession. On this application the Court issued the writ of possession on 11.12.2008 and it has been executed on 23.12.2008. Thereafter the Petitioners made an application to the Court to restore their possession. The Court after inquiry, on 05.03.2009 made order to restore the Petitioners in possession. Being aggrieved the said order of the learned Magistrate dated 05.03.2009 the Respondents moved in revision in the Provincial High Court of Gampaha. The learned High Court Judge on 08.08.2012 made order setting aside the order of the learned Magistrate dated 05.03.2009. Being aggrieved by the said order of the learned High Court Judge the Petitioners appealed against.

The learned Magistrate in his order date 05.03.2009 has come to a finding that his predecessor has issued the writ of possession unnecessarily and made order to restore the Petitioners back in possession. The Primary Court Procedure Act does not provide any

provision to make such an order; therefore the learned Magistrate utilized the section 78 of the Primary Court Procedure Act to bring in the provisions of Civil Procedure Code.

The learned High Court Judge in revision considered the case of *Kayas v. Nazeer and others* [2004] 3 Sri L R 202 (2003 BLR 30) and decided that this section can be applied only where the case or proceeding is a criminal prosecution or proceeding and where the case is a civil action or proceeding. The action under part vii of the Primary Court Procedure Act is neither criminal prosecution or proceeding nor is civil action or proceeding but a special category.

The section 78 of the Primary Court Procedure Act has been considered and held in the said case at page 209 that;

Casus Omissus Clause (Section 78)

Section 78 of the Primary Court Procedure Act is in the following terms.

78 - "If any matter should arise for which no provision is made in the Act, the provisions in the Code of Criminal Procedure Act governing a like matter which the case or proceeding is a criminal prosecution or proceedings, and the provisions of the Civil Procedure Code governing a like matter where the case is a civil action or proceeding shall with suitable adaptations as the justice of the case may require be adopted and applied."

Section 2 of the Primary Court Procedure Act stipulates that subject to the provisions of the Act and other written law, the civil and criminal jurisdiction of the Primary Court shall be exclusive. Part III of the Act comprising Sections 24 - 36 provides for the mode of institution of criminal prosecution; while part IV of the Act

comprising Sections 37 - 53 provides for the mode of institution of civil actions. Thus, Section 78 has been designed to bring in provisions of the Criminal Procedure Code Act or the provisions of the Civil procedure Code Act only in situations where either a criminal prosecutions or a civil action within part III or part IV of the Act respectively are involved. Inquiries into disputes affecting land where a breach of the peace is threatened or likely to be threatened under part VII comprising Sections 66 - 76 are neither in the nature of a criminal prosecution or proceeding nor in the nature of civil action or proceeding. Those proceedings are of special nature since orders that are being made are of a provisional nature to maintain status quo for the sole purpose of preventing a breach of the peace and which are to be superseded by an order or a decree of a competent Court. Another significant feature is that Section 78 while making reference to criminal prosecutions or proceedings and civil actions or proceedings, has not made any reference to disputes affecting land. This exclusion would reveal the legislative intent that Section 78 is not intended to be made use of, for inquiries pertaining to disputes affecting land under part VII of the Act.

The learned High Court Judge has correctly held that the Magistrate cannot use section 78 of the Act in proceeding under part vii of the Act.

If the Petitioner believes that the order of the learned Magistrate allowing the writ of possession dated 11.12.2008 is bad in law the correct remedy would have been to move in revision. The same Court cannot sit on appeal on an order made by the predecessor. The learned Magistrate has come to the finding that the former Magistrate has made an order that

a writ of possession cannot be issued in this case but the learned Magistrate who assumed duties thereafter has issued the writ of possession though he cannot issue it. Therefore the learned Magistrate was of the view that the Court has made a mistake in issuing the writ of possession and on the premise of rectifying the mistake of Court he ordered to restore the possession back which amounts to sitting on appeal where he has no jurisdiction to do so.

The contention of the Petitioner is that the order of the learned Magistrate to issue the writ of possession is per incuriam. An order to be per incuriam, it should have been made in ignorance of or in forgetfulness of a statutory provision or a binding authority.([1979] 1 Sri L R 10 *Billimoria v. Minister of Lands And Land Development & Mahaweli Development and others*) The learned Magistrate in his order dated 05.03.2009 has not considered any of the those matters. He has come to the finding on the basis that his predecessor who made the determination has refused to issue the writ.

Under section 68 of the Primary Court Procedure Act a writ of possession can be issued on certain instances. Section 68 (3) and (4) provide for issuing writ of possession. That is if there is a dispossession within two months immediately prior to the filing of the action and if the judge considers that it is necessary to issue a writ. In *Kayas v. Nazeer and others* (supra) it was held that the Court has the inherent power to issue writ if there is a conviction for contempt of Court for violating the order not to disturb the possession. In the present case the Petitioner was charged for contempt of Court for violating the order and the case is pending. The Respondent is complaining that the disturbance is continuing. In such a situation issuing a writ of possession cannot be considered as per incuriam. A higher Court can consider whether there is

a miscarriage of justice by issuing a writ of possession, not the same Court.

Under these circumstances I see no reason to interfere with the finding of the learned High Court Judge.

Appeal dismissed. Parties to bear their own costs.

Judge of the Court of Appeal

P.R.Walgama J.

I agree.

Judge of the Court of Appeal