

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

In the matter of an appeal against an  
order of the Provincial High Court in the  
exercise of its revisionary jurisdiction.

C A (PHC) / 141 / 2013

Provincial High Court of

North Western Province (Puttalam)

Case No. HCR 04 / 2012

Primary Court Puttalam

Case No. 54962 / 11 / P

Shahul Hameed Mohomed Ruwais,

No 254,

Colombo Road,

Thillayady,

Puttalam.

**PARTY OF THE 1<sup>ST</sup> PART - PETITIONER - APPELLANT**

-Vs-

Mohamedu Mohamed Thamby,

No 2/6,

Vettukulam Road,

Puttalam.

**PARTY OF THE 2<sup>ND</sup> PART - RESPONDENT -**

**RESPONDENT**

**Before: P. Padman Surasena J (P/CA)**

**K K Wickremasinghe J**

Counsel; Ikram Mohamed PC with Tanya Marjan for the party of the 1<sup>st</sup>  
part - Petitioner - Appellant.

J M Wijebandara with Lilini Fernando for the party of the 2<sup>nd</sup> part  
- Respondent - Respondent.

Oral submissions made on : 2017 - 12 - 06

Decided on : 2018 - 03 - 09

JUDGMENT

**P Padman Surasena J**

This Court after the argument of this case was concluded on 2015-09-01 had pronounced its judgment on 2015-11-20. The said judgment has been pronounced by a bench comprising Her Ladyships W M M Malini Gunerathne J and P R Walgama J. Their Ladyships by the said judgment had set aside the impugned orders of the learned High Court Judge as well as the order of the learned Magistrate and had proceeded to allow the appeal.

In a leave to appeal application filed against the said judgment, the Supreme Court by its order dated 2017-02-06 had remitted this case back to this Court for certain clarifications with regard to the judgment of this Court.

As has been directed by the Supreme Court, this Court proceeded to hear the submissions of learned counsel for both parties before making this order.

The clarification sought from this Court is whether this Court decides the relief claimed in prayer (b) of the Petition of Appeal in favour of the Appellant.

This Court is mindful that their ladyships who pronounced the judgment dated 2015-11-20 no longer function as judges of this Court and that this case has come up before the present bench only to clarify some aspects of the judgment of this Court already pronounced. This is pursuant to a direction by the Supreme Court.

It has to borne in mind that it is not open for this bench to re-decide this case on its facts. Its task is limited to clarify the issue raised by the Supreme Court.

As has been stated before, the Supreme Court by its order dated 2017-02-06 in the application for special leave to appeal, filed by the Appellant before the Supreme Court<sup>1</sup> had directed to remit this case back to this Court to clarify on prayer "b" of the petition of appeal dated 2013-10-15 i.e. whether the Court of Appeal is going to decide the said relief in favour of the Appellant or not or whether the Court of Appeal has already decided (by making the order "allow the appeal") that all the reliefs have been granted.

At the outset it is important to note that their ladyships of this Court by the judgment dated 2015-11-20 have decided conclusively,

- i. that the Party of The 2<sup>nd</sup> Part - Respondent - Respondent (hereinafter sometimes called and referred to in this order as the Respondent) (Mohamed Mohamed Thamby) has never been in possession of the disputed premises. This is clear

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<sup>1</sup> SC. SPL. LA. NO. 272 / 2015.

from the phrase "... Therefore it is obvious that the Respondent was never in possession of the disputed premises..." which appears in the second paragraph in page 7 of the said judgment.

- ii. that it is the Party of the 1<sup>st</sup> Part - Petitioner - Appellant (hereinafter sometimes called and referred to, in this order as the Appellant) (Shaul Hameed Mohomed Ruwais) who has been in the possession of the disputed premises as at the date of filing the information under section 66 (1) of the Primary Courts Procedure Act No 44 of 1979 (hereinafter referred to as the Act). This could be gathered from the phrase "...In the above setting it is ostensible that at the time the information was filed in terms of section 66 (1) of the Primary Courts Procedure Act, the Petitioner - Appellant has been in possession of the disputed premises..." which can be found in the third paragraph in page 7 of the said judgment.

It is the view of this Court that this Court has to take into consideration the prevailing law pertaining to the subject matter under dispute when interpreting the judgment of this Court.

As has been mentioned above this Court by its judgment dated 2015-11-20 had decided that the Respondent has never been in possession of the disputed premises. Perusal of the said judgment shows clearly that it is only after that conclusion<sup>2</sup> that this Court had proceeded to arrive at the next conclusion, which is as follows

"... Therefore as per facts started herein before the only conclusion the learned Magistrate was compelled to decide was whether the Appellant was in possession of the premises in suit at the time the information was filed in terms of section 66 (1) of the Primary Courts Procedure Act ..."

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<sup>2</sup>at Page 7 of the judgment.

This is in keeping with section 68 (1) of the Act which is as follows,

**Section. 68**

(1) Where the dispute relates to the possession of any land or part thereof it shall be the duty of the Judge of the Primary Court holding the inquiry to determine as to who was in possession of the land or the part on the date of the filing of the information under section 66 and make order as to who is entitled to possession of such land or part thereof.

Having considered the provisions in section 68 of the Act, this Court is of the opinion that it had not been necessary for this Court to make any determination as to whether any person who had been in possession of the relevant premises has been forcibly dispossessed within a period of two months immediately before the date on which the information was filed under section 66, as



required by section 68 (3) of the Act. It is because of the finding that the Respondent has never been in possession of this premise. Therefore, a determination under section 68 (3) of the Act does not simply arise.

Indeed this is in line with the consistent approach taken by this Court in its previous judgments.

In this regard the following passage from a judgment of this Court in the case of Punchi Nona V Padumasena and others<sup>3</sup> would be relevant.

“ ... Section 68 (1) of the Act is concerned with the determination as to who was in possession of the land on the date of the filing of the information to Court. Section 68 (3) becomes applicable only if the Judge can come to a definite finding that some other party had been forcibly dispossessed within a period of 2 months next preceding the date on which the information was filed. ... ”

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<sup>3</sup> 1994 (2) Sri. L R 117.

It is now time to turn to prayer "b" of the petition of appeal dated 2013-10-15, which is as follows,

- (b) "... to make order declaring the Appellant to be entitled to the possession of the said shop No.18, Main Street, Puttalam in terms of section 68 (1) and (2) of the Primary Courts Procedure Act and to make order to deliver possession of the said shop to the Appellant by ejecting the Respondent and all holding under him therefrom.

It is the conclusion arrived at by this Court by its judgment dated 2015-11-20 that it was the Appellant who has been in possession of the impugned shop premises as at the date of filing information in Court. This Court has also held that the Respondent has never been in possession of the said premises.

This follows that the Appellant is entitled to possess the said shop premises. Therefore, the possession of this shop must invariably be delivered to the Appellant. If the Respondent has interfered

with the peaceful possession of the Appellant such obstruction must be cleared as has been required by section 68 (2) and (4) of the Act which is as follows.

Section 68 (2)

*An order under subsection (1) shall declare any one or more persons therein specified to be entitled to the possession of the land or the part in the manner specified in such order until such person or persons are evicted there- from under an order or decree of a competent court, and prohibit all disturbance of such possession otherwise than under the authority of such an order or decree.*

Section 68 (4)

*An order under subsection (1) may contain in addition to the declaration and prohibition referred to in subsection (2), a direction that any party specified in the order shall be restored to*

*the possession of the land or any part thereof specified in such order.*

In these circumstances the clarification that this Court can offer in respect of the issues raised by the Supreme Court is that this Court by making the order "allow the appeal" has granted the prayer (b) of the petition of appeal dated 2013-10-15 also.

**PRESIDENT OF THE COURT OF APPEAL**

**K K Wickremasinghe J**

I agree,

**JUDGE OF THE COURT OF APPEAL**