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

In the matter of an Appeal in terms of Article 138 read with Article 154P of the Constitution of the Democratic Socialist Republic of Sri Lanka.

Officer in Charge,
Police Station,
Godakawela.

Complainant

C.A. Case No: **CA (PHC) 34/2009**

P.H.C. Embilipitiya Case No: **HCE/RA/24/2008**

M.C. Embilipitiya Case No: **6067/07**

Vs.

1. Narissa Gamaethige Kirimudiyanse
2. Narissa Gamaethige Wijesinghe

Both in Warayaya, Godakawela

Respondents

AND BETWEEN

Narissa Gamaethige Wijesinghe
Warayaya, Godakawela

2nd Party Respondent-Petitioner

Vs.

Narissa Gamaethige Kirimudiyanse
Warayaya, Godakawela

1st party Respondent-Respondent

Officer in Charge,
Police Station,
Godakawela.

Complainant-Respondent

AND NOW BETWEEN

Narissa Gamaethige Wijesinghe
Warayaya, Godakawela

2nd Party Respondent-Petitioner-Appellant

Vs.

Narissa Gamaethige Kirimudiyanse
Warayaya, Godakawela

1st party Respondent-Respondent-Respondent

Officer in Charge,
Police Station,
Godakawela.

Complainant-Respondent-Respondent

BEFORE	:	K. K. Wickremasinghe, J. Janak De Silva, J.
COUNSEL	:	AAL Chathura Galhena for the 2nd party Respondent-Petitioner-Appellant AAL Wasantha Atapattu for the 1st party Respondent-Respondent-Respondent
ARGUED ON	:	02.06.2018
WRITTEN SUBMISSIONS	:	The 2nd party Respondent-Petitioner-Appellant – On 10.08.2018 The 1st party Respondent-Respondent-Respondent – On 11.02.2019
DECIDED ON	:	15.05.2019

K.K.WICKREMASINGHE,J.

The 2nd party respondent-petitioner-appellant filed this appeal seeking to set aside the order of the Learned High Court Judge of the Provincial High Court of Sabaragamuwa Province holden in Embilipitiya dated 01.04.2009 in Case No. HCE/RA/24/2008 and seeking to set aside the order of the Learned Magistrate of Embilipitiya dated 12.08.2008 in Case No. 6067/07.

Facts of the case:

The 1st party respondent-respondent-respondent (hereinafter referred to as the 'respondent') made a complaint to the Police Station on 29.05.2007, stating that the 2nd party respondent-petitioner-appellant (hereinafter referred to as the 'appellant') has stored building materials in a land owned by the respondent.

The complainant-respondent-respondent (hereinafter referred to as the 'complainant-respondent') instituted action in the Magistrate's Court of Embilipitiya in terms of section 66 (1) (a) of the Primary Courts Procedure Act No. 44 of 1979. The information was reported to the Magistrate's Court by the information filed on 14.08.2007. Both parties filed their affidavits and relevant documents in the Magistrate's Court. The respondent filed his affidavit and described the land in dispute in the schedule. The appellant stated that he has stored the building materials in the land described in the schedule to his affidavit. (Page 92 & 98 of the brief)

Thereafter both parties filed their cross affidavits. The Learned Magistrate by order dated 12.08.2008 decided that the land described in the affidavit of the respondent belonged to the respondent and therefore his possession to that land should not be disputed by the appellant. (Page 118 of the brief)

Being aggrieved by the said order, the appellant preferred a revision application to the Provincial High Court of Sabaragamuwa Province holden in Embilipitiya and the Learned High Court Judge affirmed the order of the Learned Magistrate (Page 37 of the brief).

Being aggrieved by the said order, the appellant preferred this appeal.

The Learned Counsel for the appellant submitted following grounds of appeal;

1. The corpus has not being identified by the Learned Primary Court Judge which has not been rectified in the order of the Learned High Court Judge
2. Both the Learned Primary Court Judge and the Learned High Court Judge failed to identify that there is a dispossession as per the initial complaint and the affidavit of the appellant

The information was filed by the complainant-respondent on an alleged breach of peace in the land and the respondent claimed the right to possess a different land described in the sketch. The Learned Counsel for the appellant contended that the Learned Magistrate misdirected in identifying this difference and ordered the land in the schedule of the respondent's affidavit to be possessed by the respondent disregarding the land on which the dispute had arisen as per the information report.

In the case of **David Appuhamy V. Yassassi Thero [1987] 1 Sri L.R. 253**, it was held that,

> *"Although this material was not available to the learned Magistrate at the time he made the order complained of, on the affidavits filed it should have been clear that the crux of the dispute between the parties was whether the corpus was Benwalatalawa or Palupanasalawatte. It was, therefore, incumbent on the Magistrate to have determined the identity of the land which was the subject matter of this dispute..."*

In light of above it is understood that it is necessary for a Magistrate to consider the available evidence when there is a question as to the identity of the land. It is well settled law that this has to be done on the documents submitted by both parties including plans of the deeds. Accordingly I observe that the Learned Magistrate has evaluated such documentary evidence that was tendered by parties. It appears that the land mentioned in the information report filed by the Police and the land discribed in the affidavit of the appellant are differnet. Accordingly the Learned Magistrate has held as follows;

> "එසේ ම 02 වන පාර්ශවකරුගේ ප්‍රකාශය අනුව තමන් 01වන පාර්ශවකරු භුක්ති විඳින ඉඩමට ආරවුල් නොකරන බවට කරුණු දක්වා ඇති අතර එමඟින් 01වන

පාර්ශවකරුගේ දිවුරුම් ප්‍රකාශයේ උපලේඛනයේ සඳහන් ඉඩමේ හුක්තිය 01වන පාර්ශවකරු විසින් දරණ බවට පිළිගැනීමක් කර ඇත." (Page 118 of the brief)

Upon perusal of the documentary evidence, I find that the Learned Magistrate has come to the correct conclusion.

Learned Counsel for the respondent has submitted that the instant dispute was even referred to the mediation board and the mediation board has issued a report stating that the parties failed to come to a settlement.

In the case of **Iqbal V. Majedudeen and others (1999) 3 Sri L.R. 213**, it was held that,

"The law recognises two kinds of possession:

(i) When a person has direct physical control over a thing at a given time - actual possession.

(ii) When he though not in actual possession has both the power and intention at a given time to exercise dominion or control over a thing either directly or through another person - constructive possession."

The Learned High Court Judge has further evaluated the documentary evidence and concluded as follows;

"ඉහතින් දක්වන ලද කරුණු අනුව තොරතුරු වාර්ථාව ගොනු කර දිනයට පූර්වයෙන් වූ මාස 02ක කාලය තුල ආරවුල් ඉඩම පෙත්සම්කරු භුක්ති විඳි බව සැහීමට පත්විය හැකි කිසිදු කරුණක් ඉදිරිපත් වී නැති අතර පෙත්සම්කරු මහායාය වත්ත නමැති ඉඩම භුක්ති විඳි බව තහවුරු කරමින් ලේඛන ඉදිරිපත් කර ඇතත් එය මෙම ආරවුලට අදාල විෂය වස්තුව සම්බන්ධයෙන් නොවන බවට තීරණය කරමි." (Page 40 of the brief)

Accordingly the Learned High Court Judge refused to interfere with the order of the Learned Magistrate due to absence of exceptional circumstances. As decided in the case of **Punchi Nona V. Padumasena and Others (1994) 2 Sri L.R. 117,** the Court is not required to investigate into title or the right to possession which is the function of a civil Court. The Court is required to take action of a preventive and provisional nature pending final adjudication of rights in a civil Court.

In the case of **M.Roshan Dilruk Fernando V. AG [CA (PHC) 03/2016],** it was held that,

> *"It is settled law that the extraordinary jurisdiction of revision can be invoked only on establishing the exceptional circumstances. The requirement of exceptional circumstances has been held in a series of authorities.* ***Ameen v. Rasheed 3 CLW 8, Rastom v. Hapangama [19787-79] 2 Sri L R 225, Cader (on behalf of Rashid Kahan) V s Officer - In - Charge Narcotics Bureau, [2006]3 Sri LR 74, Colombo Apothecaries Ltd. and others V. Commissioner of Labour [1998] 3 SriLR 320*** *are some of the authorities where it has been emphasized that unless the existences of the exceptional circumstances are been established in cases where an alternative remedy is available, revisionary jurisdiction cannot be invoked..."*(Emphasis added)

In the case of **Bank of Ceylon V. Kaleel and others [2004] 1 Sri L R 284,** it was held that;

> *"In any event to exercise revisionary jurisdiction the order challenged must have occasioned a failure of justice and be manifestly erroneous which go beyond an error or defect or irregularity that an ordinary person would instantly react to it - the order complained of is of such a nature which would have shocked the conscience of court."*

I am of the view that the order of the Learned Magistrate was well within law and there was no failure of justice, irregularity or illegality in the said order. Therefore the Learned High Court Judge was correct in affirming the same. I see no reason to interfere with both orders. Accordingly I affirm the order of the Learned Magistrate of Embilipitiya dated 12.08.2008 and the order of the Learned High Court Judge of the Provincial High Court of Sabaragamuwa Province holden in Embilipitiya dated 01.04.2009 in Case No. HCE/RA/24/2008.

The appeal is hereby dismissed without costs.

JUDGE OF THE COURT OF APPEAL

Janak De Silva, J

I agree,

JUDGE OF THE COURT OF APPEAL