

Counsel: Asela Serasinghe for the Appellant.
Rasika Dissanayaka for the 1st Party-
Respondent.

Argued on: 29.05.2019
Decided on: 10.06.2019

Mahinda Samayawardhena, J.

The Police instituted these proceedings in the Magistrate's Court under section 66 of the Primary Courts' Procedure Act, No. 44 of 1979, regarding a land dispute between two siblings, a sister and a brother. After inquiry the Magistrate's Court held with the sister (respondent) and restored her in possession under section 68(3) of the Act on the basis that she has been dispossessed by her brother (appellant) within two months prior to the filing of the first information. The High Court affirmed that order in revision. This appeal by the appellant is against the High Court order.

The learned counsel for the appellant concedes that the respondent who was overseas at the material time had rented out the premises to a third party, and that third party left the premises within two months prior to the filing of the first information in Court.

It is the submission of the learned counsel that, the said third party, upon being asked to leave by the appellant, left the premises peacefully, and therefore there was no forceful dispossession or threat to the breach of peace.

The respondent has been in possession of the premises through the said third party, and that third party had been dispossessed by the appellant. Although there had not been a physical fight or resistance, the tenant was asked to leave the premises by the appellant by returning the rent money deposited with his landlord, the respondent. That amounts to forcible dispossession of the respondent for the purposes of the Act. Vide *Iqbal v. Majedudeen* [1999] 3 Sri LR 213. The breach of the peace is not between the appellant and the tenant of the respondent, but between the appellant and the respondent.

The learned counsel for the appellant also takes up the position that there is a question regarding the identification of the premises, i.e. whether it is 24/A or 24/1. This has never been raised in the Magistrate's Court or in the High Court. Hence the appellant cannot raise that matter, which is purely a question of fact, for the first time in appeal before this Court. The disputed portion consists of two parts-one is the store room where the goods of the respondent had been kept, and the other is the room rented out to the third party. Vide the sketch at page 88 of the Brief. The learned counsel for the appellant does not say that 24/A and 24/1 are two separate premises. They refer to the same premises.

According to page 2 first paragraph of the first information filed by the police, the appellant, in his statement given to the police, has admitted breaking open the padlock of the storeroom. The learned counsel denies that, the appellant in his statement, made such an admission. However, the appellant has not produced a copy of the statement made by him to the police to disprove it. Hence Court

has no alternative but to accept what is stated in the first information as correct.

The learned counsel also says that both in the first information and in the order of the Magistrate's Court, instead of section 66(1)(a), section 66(1)(b) has been mentioned. This has not caused any prejudice to the appellant, and the learned Magistrate has correctly applied the law into the facts of the case. Proviso to Article 138(1) of the Constitution states that "*no judgment, decree or order of any court shall be reversed or varied on account of any error, defect or irregularity, which has not prejudiced the substantial rights of the parties or occasioned a failure of justice.*" Invocation of the jurisdiction under a wrong section does not invalidate otherwise correct order provided the Court had the jurisdiction to make that order.

Appeal is dismissed with costs.

Judge of the Court of Appeal

A.L. Shiran Gooneratne, J.

I agree.

Judge of the Court of Appeal