

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

Rohinton Limjiboy Nilgiriya,
No. 19, Union Place,
Colombo 2.

2nd Party-Respondent-Petitioner

CA CASE NO: CA (PHC) APN 11/2015

HC COLOMBO CASE NO: HCRA/118/2013

PRIMARY COURT FORT: 75136/66/2013

Vs.

Officer in Charge,
Police Station,
Slave Island.

Plaintiff-Respondent-Respondent

Pathiranage Dona Ajantha

Malkanathi,

Bodhirajagama,

Ingiriya Waththa,

Ingiriya.

1st Party-Respondent-Respondent

Rajapaksha Appuhamilage Don

Surendra Wasantha Perera,

No. 674/5, Cinnamon Garden

Residencies, Ward Place,

Colombo 7.

Intervenient 1st Party-Petitioner-
Respondent

Before: K.K. Wickramasinghe, J.
Mahinda Samayawardhena, J.

Counsel: M.U.M. Ali Sabry, P.C., with Rasika
Dissanayaka the 2nd Party-Respondent-
Petitioner.
Asela Rekawa with Amila Perera for the
Intervenient 1st Party-Petitioner-Respondent.

Decided on: 17.09.2019

Mahinda Samayawardhena, J.

The 2nd Party-Respondent-Petitioner, namely R.L. Nilgiriya (Petitioner), filed this revision application seeking to revise the Judgment of the High Court dated 30.01.2015 whereby the order of the Magistrate's Court dated 03.06.2013 made in the case filed under section 66 of the Primary Courts' Procedure Act was set aside and the learned Magistrate was directed to put the Intervenient Party-Petitioner-Respondent, namely R.A.D.S. Wasantha Perera (Intervenient Party) back in possession.

In the facts and circumstances of this case, that Judgment of the High Court is flawless.

The Police have filed the first information in the Magistrate's Court under section 66(1)(a) of the Primary Courts' Procedure Act regarding this dispute relating to a building on 06.03.2013.

According to the Notice to Quit dated 02.03.2013 sent by the Attorney-at-Law of the Petitioner to the Intervenient Party (found at page 277 of the Record marked X), by 02.03.2013, admittedly,

the Intervenant Party was in possession of the premises in suit. By that Notice to Quit the Petitioner has asked the Intervenant Party to handover the peaceful possession of that premises immediately.

That itself shows that the case of the Petitioner as presented in the petition that, on 10.02.2013 the Intervenant Party vacated the leased premises in suit, and thereafter on 02.03.2013, i.e. two days after the expiration of the Lease Agreement the Intervenant Party attempted to re-enter the premises is incorrect. Simply stated, if the Intervenant Party had vacated the premises on 10.02.2013, there was no necessity for the Petitioner to send a Notice to Quit on 02.03.2013 asking the Intervenant Party to handover the possession of the premises forthwith.

The fact that, by 02.03.2013, the Intervenant Party was in possession is made clear by the complaint of the Petitioner made to the Police on 02.03.2013 (found at page 278 of X). In that Police complaint the Petitioner has *inter alia* admitted that (a) the keys of the premises in suit are with the Intervenant Party and (b) the Intervenant Party has employed a watcher to protect that premises and (c) the Petitioner never tried to enter into the said premises; (d) nevertheless, for his protection, he (the Petitioner) padlocked the common gate, which gives access both to the premises in suit and his house (which abuts the premises in suit).

It is common ground that the Petitioner was in possession of the premises in suit on the date the information was filed by the Police in Court.

From the aforementioned Quit Notice and the complaint made to the Police, it is abundantly clear that the Intervenant Party has been dispossessed by the Petitioner within 4 days immediately before filing the first information in Court.

The Intervenant Party may be in unlawful possession by refusing to handover possession of the building after the lapse of the Lease Agreement and upon termination of the lease by sending not one, but several Notices to Quit.

But in section 66 proceedings, what is considered is possession and not ownership. Until the substantive rights of the parties are decided by a Civil Court, in these proceedings, the Magistrate is expected to make a provisional order to prevent breach of the peace. However, it must be stressed that the Magistrate cannot make any order which he thinks appropriate to prevent breach of the peace. He shall make the appropriate order in accordance with law. In the instant case, what the learned Magistrate has done is, without making a specific order in terms of section 68 of the Primary Courts' Procedure Act, the parties have been directed to maintain *status quo* until a Civil Court decides the matter thereby indirectly confirming the possession of the Petitioner, which is not correct.

Under section 68(1) of the Primary Courts' Procedure Act, the Court shall confirm the possession of the Party who was in possession of the land on the date of the filing of the first information in Court. That is the general rule. This is subject to an exception as provided for in section 68(3). That is, if the opposite Party can prove that he was forcibly dispossessed by his opponent who is now in possession of the land within two

months immediately before the filing of the first information, he shall be restored in possession.

In the facts and circumstances of this case, the learned Magistrate should have made an order restoring the Intervient Party in possession in terms of section 68(3) of the Primary Courts' Procedure Act although he may be in unlawful possession. That has not been done by the learned Magistrate by taking irrelevant matters into consideration.

Acting in revision, whilst setting aside the order of the Magistrate's Court, the learned High Court Judge was correct to have ordered the learned Magistrate to restore the Intervient Party in possession.

Application of the Petitioner is dismissed. No costs.

Judge of the Court of Appeal

K.K. Wickremasinghe, J.

I agree.

Judge of the Court of Appeal