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

1. H.A. Prasanji Thusitha Kumara Dias,
   No. 421,
   Malkaduwawa,
   Kurunagala.
   Respondent-Petitioner-Appellant
2. N.L.D.G. Uthika Dias,
   No. 421,
   Malkaduwawa,
   Kurunagala.
   Intervenient Petitioner-Appellant

CA CASE NO: CA (PHC) 221/2017
HC KURUNAGALA CASE NO: HCR/49/2016
MC KURUNAGALA CASE NO: 79308/66

Vs.

1. Hettiarachchige Dias,
2. Jasinthu Hewage Kalyanawathie Dias,
   No. 82,
   Malkaduwawa Circular Road,
   Kurunagala.
   Complainant-Respondent-Respondents

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

Counsel: Lukshman Perera, P.C., with Upendra Walgampaya for the Appellant.
Jacob Joseph for the Respondent.

Decided on: 11.05.2019

Mahinda Samayawardhena, J.

The two petitioners, father and mother respectively, filed this application in the Magistrate's Court of Kurunagala against their son under section 66(1)(b) of the Primary Courts' Procedure Act seeking the following reliefs in the prayer to the petition:

a) Issue notice on the respondent
b) Issue an interim order under section 67(3) of the aforesaid Act preventing the son from entering the land
c) Order the son not to harass the petitioners and their family members
d) Order not to commit breach of the peace
e) To confirm the peaceful and uninterrupted possession of the petitioners in respect of the land

The son filed objections by way of an affidavit seeking to dismiss the petitioners' application and to confirm his possession to the land and appurtenant buildings thereto.[1]

[1] Vide page 390 of the brief.

Thereafter the petitioners filed unusually long counter objections by way of an affidavit containing as much as 244 paragraphs seeking the same reliefs as prayed for in their original affidavit.[2]

Both parties have filed a large number of documents in support of their cases.

Thereafter the learned Magistrate by order dated 28.04.2016 has ordered the petitioners to be restored in possession as they have been forcefully dispossessed by the respondent son within two months prior to the filing of the application.

Being aggrieved by this order, the respondent son has filed a revision application before the Provincial High Court of Kurunagala seeking to set aside the said order.

The learned High Court Judge has dismissed the revision application by order dated 07.11.2017.

It is against the said order of the High Court the respondent son (hereinafter "the appellant") has come before this Court by way of final appeal naming his father and the mother as respondents (hereinafter "the respondent").

The learned High Court Judge has not gone into the merits of the matter, but dismissed the revision application on two grounds:

a) No exceptional grounds have been presented, and
b) The matter is pending before a civil court

[2] Vide page 159 of the brief.

I cannot understand on what basis the learned High Court Judge has stated that there are no exceptional grounds when the appellant in the petition itself has averred exceptional grounds.

In my view, there is no magic about "exceptional grounds". If the order complained of is manifestly erroneous, that is an exceptional ground to invoke the revisionary jurisdiction of the Court. In cases where the aggrieved party's only remedy is to come by way of revision, such as in a section 66 application, as the right of appeal is expressly denied by section 74(2) of the Act, in my view, averring exceptional circumstances is not necessary. Showing "exceptional circumstances" as a threshold test becomes necessary only in instances where a party who has the right of appeal comes before the Appellate Court by way of revision.

Regarding the other ground on which the revision application was dismissed, no submissions were made by either party before this Court that a civil case was pending in respect of the dispute in the District Court. I find no such proof in the brief either. On the other hand, pending a civil case does not prevent the Magistrate's Court or the High Court from entertaining an application under section 66 so long as no interim order has been made by the District Court.

In this regard, this is what Sharvananda J. (later C.J.) stated in *Kanagasabai v. Mylwaganam*:[3]

[3] (1976) 78 NLR 280 at 282

> *In my view, the learned Magistrate has mis-directed himself as to the nature of the proceedings under section 62 of the Administration of Justice Law [which corresponds to section 66 in the present Law] and the ambit of his jurisdiction in relation to proceedings pending in a civil Court. As was stated in Imambu v. Hussenbi (A.I.R. 1960 Mysore 203) : "If a civil Court decided the question of possession even for the purpose of giving an interim injunction, the Magistrate, acting under Section 145 of the Indian Criminal Procedure Code (which corresponds to section 62 of our Administration of Justice Law) should respect that decision. But the mere pendency of a suit in a civil Court is wholly an irrelevant circumstance and does not take away the dispute which had necessitated a proceeding under section 145. The possibility of a breach of the peace would still continue."*

For the aforesaid reasons, I first set aside the order of the learned High Court Judge.

The next matter to be decided is the correctness of the Magistrate's Court order.

At first glance, it appears to me that, the relief given by the learned Magistrate is not what the respondent sought from the Magistrate's Court, and to that extent, the order of the learned Magistrate is open to challenge.

According to the prayer to the petition as well as the prayer to the counter-affidavit filed by the respondent in the Magistrate's Court, which I reproduced above (albeit not in verbatim), what

the respondent sought for was to confirm his possession and prevent the appellant from entering the premises. That was on the basis that the respondent was in possession of the premises on the date the application was filed in Court. To put differently, the respondent was seeking relief in terms of section 68(1) read with section 68(2) of the Primary Courts' Procedure Act.

But the learned Magistrate granted relief to the respondent on a completely different basis. That is on the basis that the respondent has been forcibly evicted by the appellant within two months before filing the application in Court. The relief granted was in terms of section 68(3) of the Act.

I must say that the legal principles applicable in these two instances are not the same, but completely different.

Two issues come to my mind in this regard.

Firstly, the principle that no Court is empowered to grant relief to a party which has not been pleaded in the prayer to his pleading. In my view, this is not an absolute principal. I will deal with it in another case.

Secondly, the system of justice which prevails in our country is adversarial and not inquisitorial and therefore the Judge shall decide the matter on how it has been presented before him by the two competing parties.

Those are technical objections, which I am not inclined to cling on to dispose of the appeal conveniently, as it would give the impression to the parties that their substantive issue was not

addressed by Court. That will not auger well for the justice system of our country.

Hence, let me now consider on what basis the learned Magistrate decided to grant relief to the respondent under section 68(3).

Although the order of the learned Magistrate runs into 37 pages, the decision of the learned Magistrate is based on two documents tendered by the respondent, which are P50 and P53.

For better understanding I will reproduce below the relevant portion of the order of the learned Magistrate.

“පෙත්සම්කරුගේ පෙ02 දරණ පැමිණිල්ල අනුව ඔහු 1992 වසරේ සිට උපලේඛණගත දේපලේ ව්‍යාපාර කළ බවත් වසර පහකට පමණ පෙර එම ස්ථානයේ සියලුම ව්‍යාපාරික කටයුතු නවතා වසා දමා ඇති බවත් 2015.11.26 වන දින දේපළ තම මුණුපුරෙකු වෙත පැවරූ බවත්, එදින රාත්‍රියේදීම දේපළ පෞද්ගලික ආරක්ෂාව සඳහා පැවරූ බවත් 27 වන දින වගඋත්තරකරු දේපළ වසා දැමීම පිළිබඳව විමසූ බවත්, එවිට එම දේපළ රාහුල් තෙන්නකෝන් යන අයට දේපළ පැවරූ බව පැවසූ බවත්, එවිට තමාට තර්ජනය කර පිටව ගොස් 2015.12.01 දින උදේ 4.00 ට පමණ පිරිසක් සමඟ පැමිණ දේපළෙහි භුක්තිය පැහැරගත් බවත් ප්‍රකාශ කර ඇති අතර, වගඋත්තරකරු ඉදිරිපත් කරන දිවුරුම් ප්‍රකාශයට අනුව මෙම අරාවුල්ගත දේපළ 2001 වර්ෂයේ දී පෙත්සම්කරු විසින් වගඋත්තරකරු වෙත ත්‍යාග ඔප්පුවකින් පවරා දී ඇති අතර, එය අවලංගු කර වෙනත් අයෙකුට එම දේපළ පවරා දී ඇති බව දැනගනු ලැබුවේ මෙම පෙත්සම්කරු විසින් පැමිණිල්ල කල පසු බව දක්වා ඇත. එහෙත් පෙත්සම්කරු

දක්වා ඇත්තේ එකී ත්‍යාගය අවලංගු කිරීම වෙනුවෙන් වගඋත්තරකරුට වෙනත් දේපළක් පැවරූ බවයි. නමුත් නඩුවට පෙත්සම් හා දිවුරුම් ප්‍රකාශ ඉදිරිපත් කරමින් පෙත්සම්කරු ප්‍රකාශ කර ඇත්තේ වගඋත්තරකරු ව.01 ලේඛනය මත ව්‍යාපාර පවත්වාගෙන යන ලද නමුත් එම ව්‍යාපාර වල හවුල් කරුවන් පෙත්සම්කරුවන් බවත් එම ලාභාංශ වලින් පෙත්සම්කරුවන් ජීවත් වූ බවත්ය.

කෙසේ වුවද 2015.12.01 දින වගඋත්තරකරු විසින් අදාල දේපළ වල භුක්තිය බලහත්කාරයෙන් අයිති කරගෙන ඇති බවට වන කාරණය සලකා බැලීමේදී පෙ.53 දරණ ලේඛනය ලෙස ඉදිරිපත් කර ඇති ඉන්වොයිස්පත්‍රයත්, එකී ආරක්ෂක සේවා සමාගමේ සභාපති විසින් ගොනු කර ඇති වාර්තාවත් එම අවස්ථාවේ ආරක්ෂක නිලධාරියා ලෙස කටයුතු කරන ලද අය විසින් ඇතුලත් කර ඇති සටහනත් ඒ බවට තහවුරු කිරීම සඳහා ඉදිරිපත් කර ඇති පෙ.50 දරණ දිවුරුම් ප්‍රකාශයත් සලකා බැලීමේ දී එම කරුණු පෙත්සම්කරු විසින් පොලීසියට කරන ලද පැමිණිල්ලේ ද අන්තර්ගත කර ඇති අතර, ඒ අනුව පෙත්සම්කරුගේ ස්ථාවරය තහවුරු වන බව පෙනී යයි. පෙත්සම්කරුගේ පැමිණිල්ලේ මෙම නඩුවට අදාල 2015.12.01 දින සිදුවීම වන විට පෞද්ගලික ආරක්ෂක සේවයක ආරක්ෂාව දේපළට සපයා නිබූ බවට දක්වා ඇතත් බී/2932/15 දරණ නඩුවට කරුණු වාර්තා කිරීමේදී ඒ පිළිබඳව විමර්ශනය කිරීම කෙරෙහි අවධානය යොමු වී නොමැති බව කෙරෙහිද අධිකරණයේ අවධානයට ලක් කරමි. ඒ අනුව පෙත්සම්කරුවන්ගේ භුක්තිය 2015.12.01 දින පළමු වගඋත්තරකරු විසින් උපලේඛනගත දේපළ තුලින් බලහත්කාරයෙන් අහිමි කර ඇති බවට සෑහීමට පත්වෙමි.

ඒ අනුව උපලේඛනගත දේපළේ භුක්තිය පෙත්සම්කරු වෙත හිමිවිය යුතු බවට තීරණය කරමි. ඒ අනුව උපලේඛනගත දේපලේ පළමු පෙත්සම්කරුට අහිමි කරන ලද භුක්තිය නැවත ලබා දීම සඳහා නියෝග කරමි. මෙම නියෝගය සාමය ආරක්ෂා කිරීම සඳහා ලබාදෙන තාවකාලික නියෝගයක් බවත්, නිසි බලය ඇති අධිකරණයකින් ලබාදෙන තීන්දුවක් මගින් ඉවත් කරන තෙක් මෙම නියෝගය බලපැවැත්විය යුතු බවටත් වැඩිදුරටත් නියම කරමි."

The learned Magistrate in that order (which I have underlined) stated that the respondent has admitted that the appellant, upon the Business Names Registration Certificate marked V1, carried on the business (in the name and style of "Dias Motors Engineers and Sales") in the premises and he (the respondent) together with his wife as partners of that business depended on the income of that business. ("නමුත් නඩුවට පෙත්සම් හා දිවුරුම් ප්‍රකාශ ඉදිරිපත් කරමින් පෙත්සම්කරු ප්‍රකාශ කර ඇත්තේ වගඋත්තරකරු ව.01 ලේඛනය මත ව්‍යාපාර පවත්වාගෙන යන ලද නමුත් එම ව්‍යාපාර වල හවුල් කරුවන් පෙත්සම්කරුවන් බවත් එම ලාභාංශ වලින් පෙත්සම්කරුවන් ජීවත් වූ බවත්ය.") That means, the learned Magistrate was satisfied that the business was carried on by the appellant and not by the respondents, which is not unusual concerning their advanced ages.

The learned Magistrate has then considered the complaint made by the respondent father to the police on 01.12.2015 marked P2, just 8 days before filing the application in the Magistrate's Court. In that complaint the respondent has stated that he gifted the property in suit on 26.11.2015 by way of a deed to his

grandson (daughter's son) and padlocked the entrance gate and employed a security guard in fear of reprisals from the appellant. Thereafter the appellant son on the following day, i.e. on 27.11.2015, has inquired from him why the premises were padlocked, at which point the appellant has been informed about gifting the property to the respondent's grandson. The respondent has become furious about it, and on 01.12.2015 has forced open the gate and chased away the security guard. The respondent has come to know about this incident from his driver. That means, the respondents were not living in the house adjoining the business premises. This has been noted by the learned Magistrate in his order. ("නමුත් තොරතුරු වාර්තාව ඉදිරිපත් කරමින් දිවුරුම් ප්‍රකාශයක් මගින් පළමු පෙත්සම්කරු ආරවුල්ගත දේපලේ පිහිටි නිවසේ පදිංචි සිටි බවට දක්වා ඇති අතර, එකී පෙ 02 දරණ පැමිණිල්ල තුලින් පළමු පෙත්සම්කරු එහි පදිංචිව සිටියදී ඉන් නෙරපා ඇති බවට තහවුරු නොවන අතර, අදාල සිදුවීම ඔහු වෙත දැනුම් දී ඇත්තේ ද ඔහුගේ රියදුරු විසින් බව පෙනී යයි. ඒ අනුව තොරතුරු වාර්තාවට පළමු පෙත්සම්කරු ඉදිරිපත් කරුණු සහ පෙ02 දරණ ලේඛනයේ කරුණු පරස්පරතාවයක් දරණ බවට අවධානයට ලක් කරමි.")[4]

It is relevant to note that the respondent had earlier gifted the premises to the appellant in 2001[5] and thereafter, unknown to the appellant, has revoked the deed of gift on his own, before he gifted it to the grandson on 26.11.2015.

[4] Vide page 55 of the brief.
[5] Vide the deed at page 320 of the brief.

Let me now refer to P50 and P53. P53 invoice[6] goes to prove that the private security firm employed a security officer to the premises from 27.11.2015-30.11.2015. P50 affidavit[7] has been given by the security officer who was on duty when the appellant stormed the premises on 01.12.2015. He states therein that he came to the premises on 30.11.2015.

That means, private security guards had been employed from 27.11.2015-01.12.2015 only.

The learned Magistrate has come to the conclusion that the appellant forcibly dispossessed the respondent on 01.12.2015, which is within 2 months prior to the filing of the application, because at that time the respondent had padlocked the premises and employed a security officer to protect the premises. This is a superficial way of looking at the issue.

It may be recalled that earlier the learned Magistrate came to the conclusion that the appellant ran the business in the premises. Thereafter the respondent, on 26.11.2015, gifted the premises to his grandson and padlocked the premises and employed a security guard. Why did the respondent padlock the premises and employ a security guard? That was to prevent the appellant from entering the premises. Then it is clear that, it is the respondent who first dispossessed the appellant and padlocked the premises within two months before filing the application. The appellant has forcibly entered the premises five days after such dispossession. The respondent filed the application on 09.12.2019. Under those circumstances, the respondent cannot

[6] Vide page 356 of the brief.
[7] Vide page 352 of the brief.

be granted the relief under section 68(3) on the basis that he was dispossessed by the appellant within two months before filing the application as it was the appellant who was in possession of the premises before he was first dispossessed by the respondent within two months immediately prior to filing the application.

I set aside the order of the learned Magistrate dated 28.04.2016 and allow the appeal of the appellant with costs.

Judge of the Court of Appeal

K.K. Wickremasinghe, J.
I agree.

Judge of the Court of Appeal