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

In the matter of an Appeal in terms of Article 154(P) (3) (b) of the Constitution read with the Court of Appeal (Procedure for Appeals from the High Courts established by Article 154(P) of the Constitution) Rules 1988 in respect of the order dated 13/01/2013 made by the Provincial High Court of Western Province Holden in Colombo.

Appeal No. CA (PHC) 0039/2013

Officer-in-Charge,
Police Station,
Kirulapona.

Complainant

CA (PHC) 0039/2013

P.H.C. Colombo HCRA No. 143/2010

M.C. Colombo No. 54055/2010

Vs.

1. Mereknknnage Kingsley De Costa,
   06, Somadevi Place,
   Kirulapone Mawatha,
   Colombo 05.

   Party of the First Part- Respondent

2. Fowzul Insaf Nizam,
   176A, Polhengoda Road,
   Colombo 06.
   Presently,
   09/04, Sujatha Lane,
   Kalubowila.

   Party of the Second Part-Respondent

3. Ramalingam Udayakumar alias
Mohomod Uwais,
53/8, Dabare Mawatha,
Narahenpita.

Party of the Intervenient Part-Respondent

AND BETWEEN

Mereknknnage Kingsley De Costa,
06, Somadevi Place,
Kirulapona Mawatha,
Colombo 05.

Party of the First Part- Respondent Petitioner

-Vs-

Officer-In-Charge
Police Station
Kirulapona.

Complainant- Respondent

Fowzul Insaf Nizam,
176A, Polhengoda Road,
Colombo 06.
Presently,
09/04, Sujatha Lane,
Kalubowila.

Party of the Second Part- Respondent-Respondent

Ramalingam Udayakumar alias
Mohomod Uwais,
53/08, Dabare Mawatha,
Narahenpita.

Party of the Intervenient Part-Respondent- Respondent

AND NOW BETWEEN

Fowzul Insaf Nizam,
176A, Polhengoda Road,
Colombo 06.
Presently,
09/04, Sujatha Lane,
Kalubiwila.

Party of the Second Part- Respondent Respondent -Appellant

1. Mereknknnage Kingsley De Costa,
   06, Somadevi Place,
   Kirulapona Mawatha,
   Colombo 05.

Party of the First Part- Respondent Petitioner- Respondent

2. Officer-In-Charge
   Police Station
   Kirulapona.

Complainant- Respondent-Respondent-Respondent

3. Ramalingam Udayakumar alias
   Mohomod Uwais.
   53/08, Dabare Mawatha,
   Narahenpita.

Party of the Intervenient Part-Respondent- Respondent- Respondent

CA (PHC) APN 98/2013 Revision

In the matter of an Application for Revision in terms of Article 138 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

Officer-In-Charge
Police Station,
Kirulapone.

Complainant

CA (PHC) APN 98/2013

H.C. Colombo HCRA 143/2010

M.C. Colombo No. 54055/2010

Vs.

1. Mereknknnage Kingsley De Costa,
   06, Somadevi Place,
   Kirulapone Mawatha,
   Colombo 05.

   Party of the First Part-Respondent

2. Fowzul Insaf Nizam,
   176A, Polhengoda Road,
   Colombo 06.
   and also
   09/04, Sujatha Mawatha,
   Kalubowila.
   and presently UNICEF Syria Country
   Office, Four Seasons Hotel,
   Al Barazil Street,
   Damascus, Syria.

   Party of the Second Part -Respondent

3. Ramalingam Udayakumar alias
   Mohomod Uwais,
   53/8, Dabare Mawatha,
   Narahenpita.

Party of the Intervenient Part-Respondent

AND BETWEEN

Mereknknnage Kingsley De Costa,
06, Somadevi Place,
Kirulapone Mawatha,
Colombo 05.

Party of the First Part-Respondent-Petitioner

-Vs-

Officer-In-Charge
Police Station
Kirulapone.

Complainant Respondent

Fowzul Insaf Nizam,
176A, Polhengoda Road,
Colombo 06.
and also
09/04, Sujatha Mawatha,
Kalubowila.
and presently UNICEF Syria Country Office, Four Seasons Hotel,
Al Barazil Street,
Damascus, Syria.

Party of the Second Part- Respondent-Respondent

Ramalingam Udayakumar alias
Mohomod Uwais,
53/08, Dabare Mawatha,
Narahenpita.

Party of the Intervenient Part-Respondent- Respondent

AND NOW BETWEEN

Fowzul Insaf Nizam,
176A, Polhengoda Road,
Colombo 06.
and also
09/04, Sujatha Mawatha,
Kalubowila.
and presently UNICEF Syria Country
Office, Four Seasons Hotel,
Al Barazil Street,
Damascus, Syria.

Party of the Second Part- Respondent - Respondent- Petitioner

-Vs-

1. M. Kingsley De Costa,
No. 06, Somadevi Place,
Kirulapone Mawatha,
Colombo 05.

Party of the First Part- Respondent Petitioner- Respondent

2. Officer-In-Charge
Police Station,
Kirulapone.

Complainant- Respondent- Respondent

3. Ramalingam Udayakumar alias
Mohomod Uwais,
53/8, Dabare Mawatha,
Narahenpita.

Party of the Intervenient Part- Respondent- Respondent- Respondent

Before : Dr. Ruwan Fernando J. &

M. Sampath K.B. Wijeratne J.

Appeal No. CA (PHC) 0039-2013

Counsel	:	Riad Ameen for the 2nd Part-Respondent-Respondent-Appellant
		Sumedha Mahawanniarachchi with Indika Weerasinghe for the 1st Part- Respondent-Petitioner-Respondent
		Revision No. CA (PHC) APN 98/2013
Counsel	**:**	Riad Ameen for the 2nd Part-Respondent-Respondent-Petitioner
		Sumedha Mahawanniarachchi with Indika Weerasinghe for the 1st Part- Respondent-Petitioner-Respondent
Argued on	:	25.03.2021
Written submissions filed on	:	02.11.2018 & 22.01.2020 by (the 2nd Part-Respondent-Respondent-Appellant in Appeal No. C.A (PHC) 0039/2013 & Revision bearing No. C.A No. (PHC) APN 98/2013
		25.09.2020 & 22.11.2019 (by the 1st Part-Respondent-Petitioner-Respondent in Case No. C.A (PHC) 0039-2013)
DECIDED ON	:	01.04.2021

Dr. Ruwan Fernando, J.

Introduction

[1] These two connected Appeal bearing No. C.A (PHC) 0039/2010 and Revision Application bearing No. C.A (PHC) APN 98/2013 are from the judgment of the learned High Court Judge of Colombo delivered in Revision Application bearing No. HCRA 143/2010 filed in the High Court of Colombo against the order made by the learned Additional Magistrate of Colombo on 14.09.2010 in M.C. Colombo Case bearing No. 54055/2013.

Background to Appeal bearing No. C.A (PHC) 0039/2013 and Revision bearing No. C.A (PHC) APN 98/2013

[2] The Officer-in-Charge of the Police Station of Kirulapona filed an information in the Magistrate's Court of Colombo on 20.04.2010 under the provisions of Section 66 of the Primary Courts' Procedure Act, No. 44 of 1979 (hereinafter referred to as the Primary Courts' Procedure Act) to the effect that there was a dispute regarding the possession of a land between the Party of the First Part-Respondent-Petitioner-Respondent (hereinafter referred to as the 1st Respondent) and the Party of the Second Part-Respondent-Respondent-Appellant (hereinafter referred to as the Appellant) and that due to this dispute, a serious breach of the peace is threatened or is likely to occur between the parties.

Affidavit of the 1st Respondent

[3] The 1st Respondent filed his Affidavit and stated *inter alia*, that (i) the property in dispute was owned by his mother's eldest Sister K. Leelawathie Perera who gifted the said property to her daughter Mangalika Galapitigederage on 06.07.1998 (1V1); (ii) while the said Mangalika Galapitigederage was in possession of the said property, the said Leelawathie Perera instituted an action in the District Court of Colombo bearing No. 20061/L to revoke the said gift; (iii) the said Mangalika Galapitigederage who was dissatisfied with the judgment of the said case filed an appeal against said judgment in the High Court of Civil Appeal, Colombo; (iv) the said Mangalika Galapitigederage pending appeal granted a power of attorney bearing No. 356 dated 25.04.2007 to him (1V2); (v) when he went to the property in dispute on 08.01.2010, he saw his brother Ranjith Costa and 6-7 persons in the premises in dispute and some of the persons were mixing concrete in the premises; (vi) he promptly made a complaint to the Police Station and consequent to the investigation made into the said complaint, the Appellant went out of the premises; (vii) in terms of the said power of attorney granted to him by the said Mangalika Galapitigederage, he entered into an agrement (1V3) with the Party of the Intervenient Part-Respondent-Resppndent (hereinafter referred to as the Intervenient-Respondent) on 25.01.2010 to sell the property in dispute to the Intervenient-Respondent (1V3); (viii) upon an advance sum of Rs. 1 Million being made by the Intervenient-Respondent, he handed over possession of the said property to the Intervenient-Respondent on 25.01.2010.

[4] The 1st Respondent who claimed that the Intervenient-Respondent took control of the said property on 25.01.2010 sought an order that the

Intervenient-Respondent be declared entitled to the possession of the premises in question.

Affidavit of the Appellant

[5] The Appellant filed his Affidavit and stated *inter alia*, that (i) the premises in dispute was initially purchased by M.I.S.M. Faleel from Merinninge Ranjith De Costa by a deed of transfer bearing No. 1557 (2V1); (ii) he purchased three blocks of the said premises from M.I.S.M. Faleel by three separate deeds of transfer bearing Nos. 1564, 1585, 1608 (2V3-2V5); (iii) he surveyed the said premises, paid utility bills and commenced renovating the said premises; (iv) while renovations were proceeding, his cousin brothers, Muslih Abdul Cader and Nasheeth Abdul Cader occupied the said premises temporarily with his permission from 07.12.2009 to 19.02.2010; (v) consequent to a complaint made by the 1st Respondent to the Kirulapona Police Station on 08.01.2010, he agreed to temporarily suspend renovations for 3 days to enable the 1st Respondent to file an action within 3 days and obtain a stay order; (vi) as there was no such case filed by the 1st Respondent, he instructed his contractor to commence work and went aborad on 10.01.2010 for his employment in Sudan; (vii) while his workers were engaged in renovations, he was told by his Civil Engineer that the workers had been forcibly dispossessed from the said premises on 26.02.2010; (viii) he sent a complaint to the Kirulapona Police Station from Sudan by Fax on 27.02.2010 and after returning to Sri Lanka, he made another statement to the Kirulapona Police Station on 19.04.2010.

Affidavit of the Intervenient-Respondent

[6] The Intervenient-Respondent filed Affidavit stated *inter alia,* that he entered into an agreement with the 1st Respondent for the purpose of purchasing the property in dispute pending appeal for a sum of Rs. 6 Million and paid an advance of Rs. 1 Million to the 1st Respondent on 25.01.2010. He further claimed that he took control of the possession of the said property with effect from 25.01.2010 and sought a declaration that he is entitled to possession of the property in dispute.

Order of the Magistrate of Colombo dated 14.09.2010

[7] Upon the perusal of the Affidavits, the documents and the written submissions of the parties, the learned Additional Magistrate of Colombo by order dated 14.09.2010 held that (i) the Appellant who had been in possession of the premises in dispute until 26.02.2010 has been forcibly dispossessed from the said premises on the same date; (ii) the Police filed a case bearing No. B/4994/3/10 in the Magistrate's Court of Colombo (2V17) on 09.03.2010 in

respect of the said compliant of dispossession made by the Appellant; (iii) as the forcible dispossession took place on 26.02.2010 and the information was filed on 20.04.2010, the Appellant had been dispossessed within a period of 2 months immediately before the date on which the information was filed under section 66 of the Primary Courts' Procedure Act.

[8] Accordingly, the learned Additional Magistrate declared that the Appellant was entitled to the possession of the said premises and directed that the Appellant be restored to possession and prohibited all disturbances to such possession otherwise than under the authority of a decree of a competent court.

Application by way of Revision in the High Court of Colombo bearing No. HCRA No. 143/2010

[9] Being aggrieved by the said order of the learned Additional Magistrate of Colombo, the 1st Respondent filed an application by way of Revision bearing No. HCRA No. 143/2010 in the High Court of Colombo seeking to set aside the said order. The 1st Respondent further sought an order directing the Appellant not to interfere with his peaceful possession and that of the Intervenient-Respondent.

Judgment of the High Court of Colombo in Revision Application bearing No. HCRA No. 143/2010

[10] The learned High Court Judge of Colombo by his judgment dated 13.02.2013 set aside the order of the learned Additional Magistrate of Colombo dated 14.09.2010 and declared that the 1st Respondent and the Intervenient-Respondent were entitled to the possession of the premises in dispute for the following reasons:

1. Although the dispute between the parties occurred on 08.01.2010, the information dated 20.04.2010 was filed by the Officer-in-Charge of the Kirulapona Potice Station under section 66 (1) of the Primary Courts Procedure Act after a lapse of 3 months from the date of the dispute in violation of the mandatory statutory provisions of the Primary Courts' Procedure Act;

2. Although the learned Additional Magistrate held that the Appellant had been dispossessed on 26.02.2010 according to the information contained in the "B" Report filed by the Police in the Magistrate's Court of Colombo (2V17), the information filed by the Police on 20.04.2010 did not refer to

any such forcible dispossession and the said information only referred to the dispute that arose between the parties on 08.01.2010;

3. The dispute between the parties occurred on 08.01.2010 and the information was filed on 20.04.2010 and accordingly, the learned Additional Magistrate erroneously declared that the Appellant was in possession of the premises in question on 26.02.2010;

4. The learned Additional Magistrate erroneously acted on the information stated in the "B" Report (2V17) and made an order under section 68 (3) of the Primary Courts Procedure Act declaring that the Appellant was dispossessed on 26.02.2010 when there was no reference to any dispossession in the information filed by the Police on 20.04.2010.

Appeal to the Court of Appeal and the Revision Application filed in the Court of Appeal

[11] Being aggrieved by the said judgment of the learned High Court Judge of Colombo dated 13.02.2013, the Appellant appealed to this Court in case bearing No. C.A (PHC) 0039/2013 and further filed a Revision Application bearing No. C.A (PHC) APN 98/2013. On 22.10.2020, both Counsel made oral submissions before a bench comprising Justice Shiran Gooneratne and myself and agreed to abide by one judgment in both the Appeal and the Revision application. The Bench fixed the case for judgment to be delivered on 18.12.2020.

[12] As Justice Shiran Gooneratne was elevated to the Supreme Court and the Covid Pandemic situation disrupted the court proceedings, this matter was mentioned on 03.02.2021 before the present bench to ascertain whether this matter needs to be re-argued or the judgment could be delivered by the present bench upon the written submissions. On 17.02.2021 the learned Counsel for the 1st Respondent stated that his client wished to have this matter re-argued before the present bench and hence, this matter was re-argued before the present bench on 25.03.2021.

Preliminary Objection

[13] The 1st Respondent had raised a preliminary objection to the maintainability of the Appeal bearing No. C.A (PHC) 0039/2013 on the ground that the Petition of Appeal is out of time as the judgment of the High Court was delivered on 13.02.2013 and the Appeal was filed 05.03.2013 and therefore, the Appeal had been filed after a period of 14 days from the date of the judgment in violation of Rule 2 (1) of the Court of Appeal (Procedure for Appeals from High Courts) Rules 1988.

[14] During the hearings on 22.10.2020 and 25.03.2021, Mr. Sumedha Mahawanniarachchi, the learned Counsel for the 1st Respondent conceded that the Appeal bearing No. C.A (PHC) 0039/2013 had been filed within a period of 14 days from the date of the High Court judgment. Accordingly, I reject the Preliminary objection raised on behalf of the 1st Respondent and hold that the Appeal bearing No. CA (PHC) 0039/2013 had been filed within 14 days from the date of the High Court judgment in compliance with Rule 3 (1) of the Court of Appeal (Procedure for Appeals from High Courts) Rules 1988.

Identity of the subject matter of the dispute & Matters not in dispute

[15] The following matters are not in dispute in the present case:

1. The subject matter of the dispute relates to a property with a house bearing assessment No. 88/12, at Somadevi Road, Kirulapone, Colombo 06;

2. The property in dispute was originally owned by A. Lellawathie Perera who by Deed No. 10105 gifted the said property to her adopted daughter Mangalika Galapitigedera on 06.07.1998;

1. The said Lellawathie Perera filed an action in the District Court of Colombo to revoke the said deed of gift No. 10105 and the District Court after *ex parte* trial, entered judgment in favour of the said Leelawathie Perera on 20.08.2004;

2. The said Mangalika Galapitigedera filed application under section 86 (2) of the Civil Procedure Code to have the said *ex-parte* judgment vacated and while the said case was pending in the District Court, the said Mangalika Galapitigedera gave a Power of Attorney dated 25.04.2007 (1V2) in favour of the 1st Respondent for the purpose of selling the said property on her behalf pending appeal;

3. The said application to vacate the *ex parte* judgment was dismissed by the District Court by order dated 04.07.2007 and the said Mangalika Galapitigedera filed an Appeal against the said judgment of the High Court of Civil Appeal;

4. The Civil Appellant High Court by order dated 11.08.2015 dismissed the said Appeal on 11.08.2015 (Vide- order dated 11.08.2915 filed of the docket) on the basis that the Appellant has not exercised due diligence in paying the brief fees in terms of the Court of Appeal (Appellate Procedure Copies of Records) Rules.

Scope of the Inquiry under Section 68 of the Primary Courts' Procedure Act

[16] A perusal of the information filed by the Officer-in-Charge of the Kirulapone Police Station and the Affidavit filed by the parties reveals that the dispute between the parties relates to the possession of a land under Part VII of the Primary Courts' Procedure Act. In an inquiry into a dispute as to the possession of any land under section 68 (1) of the Primary Courts' Procedure Act, the main point of decision is as to who was in possession of the land on the date of the filing of the information to the Court under section 66 of the Primary Courts' Procedure Act. Section 68 (1) of the Primary Courts' Procedure Act reads as follows:

> *"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".*

[17] 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 immediately before the date on which the information was filed under section 66 of the Act (*Ramalingam v. Thangarajah* (1982) 2 Sri LR 693). Section 68 (3) of the Primary Courts' Procedure Act reads as follows:

> *"68 (3) Where at an inquiry into a dispute relating to the right to the possession of any land or any part of a land, the Judge of the Primary Court is satisfied that any person who had been in possession of the land or part has been forcibly dispossessed within a period of two months immediately before the date on which the information was filed under section 66, he may make a determination to that effect and make an order directing that the party dispossessed be restored to possession and prohibiting all disturbance of such possession otherwise than under the authority of an order or decree of a competent court."*

[18] It is the duty of the Primary Court Judge to determine whether the Appellant who had been in possession of the land or part of the land has been forcibly dispossessed within a period of 2 months immediately before the date on which the information was filed under section 66 (1) of the Act. Thus, the main points that arose for determination before the learned Additional Magistrate were as follows:

1. Whether it was the 1st Respondent or the Appellant or the Intervenient-Respondent who was in possession of the premises in dispute on the date of the filing of the information by the Police on 20.04.2010 under section 66 (1) of the Act; and

2. Whether the Appellant who had been in possession of the premises in dispute has been dispossessed within a period of 2 months immediately before the date on which the information was filed by the Police on 20.04.2010.

[19] At the hearing, Mr. Riad Ameen, who appeared for the Appellant submitted that the learned High Court Judge has erred in failing to appreciate the distinction between the (i) dispute affecting land and the dispute affecting land where a breach of the peace is threatened or likely when applying section 66 (1) of the Act and (ii) date of commencement of a dispute and the date of dispossession when applying section 68 (3) of the Primary Courts' Procedure Act. He further submitted that the learned High Court Judge has failed to consider that the complaint of dispossession dated 26.02.2010 was made only by the Appellant and therefore, the learned Additional Magistrate was bound to consider the relevance of the information contained in the "B" Report filed by the Police in the Magistrate's Court on 09.03.2010 (2V17) when applying section 68 (3) of the Primary Courts' Procedure Act;

Objection to Jurisdiction of the Magistrate to make a determination under section 66 (1) of the Primary Courts' Procedure Act

[20] At the hearing, Mr. Sumedha Mahawanniarachchi first submitted that the jurisdiction of the Primary Court Judge is limited to the first information filed under section 66 (1) of the Primary Courts' Procedure Act and as the dispute between the parties had occurred on 08.01.2010 and the information had been filed on 20.04.2010, the learned Magistrate had no jurisdiction to make any determination after a lapse of more than 3 months. Mr. Mahawanniarachchi next submitted that the learned Magistrate lacked jurisdiction to make a determination under the provisions of the Primary Courts Procedure Act as there could not have been a breach of the peace between the parties when the information was filed on 20.04.2010 in respect of a dispute that occurred on 08.01.2010.

Delay in filing the Information under Section 66 (1) of the Primary Courts' Procedure Act

[21] The first submission of Mr. Mahawanniarachchi is based on the failure of the Police Officer to comply with section 66 (1) (a) (1) of the Primary Courts' Procedure Act, which provides that the Police Officer inquiring into the dispute shall, with the least possible delay file an information regarding the dispute in the Primary Court. It reads as follows:

"66 (1) Whenever owing to a dispute affecting land a breach of the peace is threatened or likely-

(a) the police officer inquiring into the dispute-

(i) shall with the least possible delay file an information regarding the dispute in the Primary Court within whose jurisdiction the land is situate and require each of the parties to the dispute to enter into a bond for his appearance before the Primary Court on the day immediately succeeding the date of filing the information on which sittings of such court are held; or

(ii) shall, if necessary in the interests of preserving the peace, arrest the parties to the dispute and produce them forthwith before the Primary Court within whose jurisdiction the land is situate to be dealt with according to land and shall also at the same time file in that court the information regarding the dispute; or.."

[22] The main complaint of Mr. Mahawanniarachchi was that the information regarding the dispute should have been filed in the Primary Court with the least possible delay after the dispute occurred on 08.01.2010 but the information in question was filed on 20.04.2010 and accordingly, the learned Magistrate had no jurisdiction to make any determination due to inordinate delay in filing the information under section 66 (1)(a) of the Act. Now the question is this: What is the exact point in time the Police Officer is required to file the information under section 66 (1) of the Primary Courts Procedure Act? Is it at every point in time when any dispute affecting land arises or only where any dispute affecting land is escalated to a point where a breach of the peace is threatened or likely between the parties.

[23] Part VII of the Primary Courts' Procedure Act refers to "**inquiries into disputes affecting land where a breach of the peace is threatened or likely"**. Section 66 (1) (a) of the Act provides for a case where a Police officer files information, whereas section 66 (1)(b) provides for a case where an interested party files an information by Affidavit. Section 66 (1) (a) thus requires a police officer inquiring into the dispute to be satisfied with two elements, namely, that (1) there is a dispute affecting land; and (2) that owing to the said dispute a breach of the peace is threatened or likely.

Dispute affecting land where a breach of the peace is threatened or likely

[24] Mr. Mahawanniarachchi strenuously argued that the formation of opinion as to whether a breach of the peace is threatened or likely depends on the first information provided to the Police on 08.01.2010 by the 1st Respondent and when the information was filed after a lapse of more than 3 months, there cannot be a breach of the peace between the parties.

[25] It is settled law that (i) under section 66 (1) (a) of the Primary Courts' Procedure Act, the formation of the opinion as to whether a breach of the peace is threatened or likely is left to the police officer inquiring into the dispute (*Velupillai and others v. Sivanathan (*1993) 1 Sri LR 123) and where the information is filed in a Primary Court under section 66 (1)(a), such court is vested with jurisdiction to inquire into and make a determination or order on the dispute regarding which the information is filed (*David Appuhamy v. Yassasi Thero* (1987) 1 Sri LR 253).

Nature of the Complaint made on 08.01.2010

[26] It is not in dispute that the Officer-in-Charge of the Kirulapone Police Station has not filed an information in the Magistrate's Court immediately on the basis of the complaint made by the 1st Respondent on 08.01.2010 or the subsequent statement made by the Appellant to the Police on 09.01.2010. The Appellant in his statement to the Police has, however, agreed to suspend the ongoing constructions temporarily other than repairs for 3 days to enable the 1st Respondent to file a court case against him before 13.01.2010. The Appellant has further confirmed this position in paragraph 24 of his affidavit filed in the Magistrate's Court on 29.06.2010 as follows:

> *මා යුනිසෙෆ් සංවිධානයේ ළමා ආරක්ෂක නිලධාරී කෙනෙකු වශයෙන් කටයුතු කරනවා. නො. 88/12, සෝමාදේවි පෙදෙස, කිරුලපන ලිපිනයේ පිහිටි පර්චස් 20.25 ඉඩම හා නිවස 2008 ජනවාරි මාසයේ සිට ප්‍රීල් යන අයගෙන් ඔප්පු පරීක්ෂාකර මිලදී ගත්තා. පසුගිය හයවෙනිදා සිට නිවසේ අලුත්වැඩියා කටයුතු කරගෙන යන අතර අද දින උදෑසන පෙරවරු 10.00 ට පමණ කිරුලපන පොලිස් ස්ථානයේ නිලධාරීන් දෙදෙනෙක් පැමිණ පොලිස් ස්ථානාධිපති තුමා හමුවන ලෙස මගෙන් ඉල්ලා සිටියා. මා පොලිස් ස්ථානාධිපති තුමා හමු වුණා. එම අවස්ථාවේ මට කරුණු පැහැදිලි කරමින් මෙම ඉඩම සම්බන්ධව එම්.කේ. ද කෝස්තා නැමැති අය විසින් පැමිණිල්ලක් දමා තිබෙන බව මට පැහැදිලි කළා. එම්.කේ. ද කෝස්තා එම අවස්ථාවේ මා මුණගැසුණා. එම අවස්ථාවේ එම මහතා මට කියා සිටියා මෙම ඉඩම සම්බන්ධයෙන් නඩුවක් ඇති බව මට වාචිකව දන්වා සිටියා. පොලිස් ස්ථානාධිපති තුමා සමග සාකච්චා කර මෙම ඉඩම සම්බන්ධයෙන් යම් අයිතියක් හෝ අවශ්‍යතාවක් එම්.කේ. ද කෝස්තා මහතාට ඇත්නම් 2010.01.13 දින හෝ ඊට පෙර නීති මාර්ගයෙන් මා වෙත ඉදිරිපත් කරන ලෙස එතෙක් එම නිවසට ඉදිකිරීම් තාවකාලිකව අත්හිටුවූවා. අලුත්වැඩියා කටයුතු පමණක් කරන්නට මා එකඟවූවා.*

[27] It is not every dispute affecting land that empowers a police officer to file an information in the Primary Court under section 66 (1) (a) of the Primary Courts' Procedure Act. A police officer is, however, obliged to file an information, if there is a dispute affecting land <u>where a breach of the peace is threatened or likely</u> (*Punchinona v Padumasena* [1994 (1) Sri LR 117]. No doubt, the complaint dated 08.01.2010 related to a dispute affecting land, but unless such dispute is escalated to a point where a breach of the peace is threatened or likely, the police officer is not obliged to file an information under section 66 (1) of the Act. It is crystal clear that the Officer-in-Charge of the Kirulapona Police could not have formed an opinion that a breach of the peace is threatened or likely as the Appellant had

agreed to suspend temporarily the constructions to enable the 1st Respondent to file a court case within 3 days and produce a stay order.

[28] Under such circumstances, the dispute that commenced on 08.01.2010 as referred to in the complaint dated 08.01.2010 could not have escalated to a point where a breach of the peace was threatened or likely and thus, a police officer was not obliged to file an information purely on the basis of the complaint dated 08.01.2010. For those reasons, I hold that there is no merit in the argument that there was non-compliance with the provisions of section 66 (1) (a) of the Act by not filing the information on the basis of the said complaint dated 08.01.2010.

Complaint of dispossession made by the Appellant on 27.02.2010

[29] On 27.02.2010, the Appellant made a complaint to the Kirulapona Police Station by way of a Fax message from Sudan, where he was employed stating that his employees who were working in his house had been dispossessed from the premises in question. It reads as follows:

26.02.2010

මම සූඩානයේ යුනිසෙෆ් සංවිධානයේ ළමා ආරක්ෂක නිලධාරියෙකු වශයෙන් සේවය කරනවා. මම 2009 ජනවාරි මාසයේ කිරුලපන සිද්ධාර්ථ පටුමග අංක 88/10 දරණ ඉඩම හා නිවස මිලදී ගෙන ලඟදී එය අලුත්වැඩියා කරගෙන යනවා. අද දින සවස 4.30 ට පමණ 15 දෙනෙඳ පමණ එම නිවසට පැමිණ වැඩ කරන අයට තර්ජනය කර පලවා හැර ගෙය බලෙන් අත්පත් කරගෙන මුරකරුවන් දෙදෙනෙකුද රඳවා ගොස් තිබෙනවා. මීට පෙරද මගේ බිරිඳට හා දරුවන්ට තර්ජනය කර තිබුණා. දැන් මා රටෙන් පිට සිටින නිසා පෞද්ගලිකව පැමිණීමට හැකියාවක් නැත. මෙම නිසා කරුණාකර මගේ නිවස මට නැවත ලබා දී සාමකාමීව එය භුක්ති විඳීමට සලසා දෙන ලෙස ඉතා කරුණාවෙන් ඉල්ලා සිටිනවා.

[30] Consequent to the complaint of dispossession made by the Appellant to the Kirulapona Police Station on 26.02.2010 (Vide- 2V16), the Police filed a Case in the Magistrate's Court of Colombo on 09.03.2010 (2V17) and sought a date to file a further report regarding the progress of the investigation. The relevant parts of the "B" Report (2V17 at page 411 of the brief) reads as follows:

ඉහත කී පැමිණිලිකරු දැනට ඉහත ලිපිනයේ පදිංචි වී යුනිසෙෆ් ආයතනයේ ළමා ආරක්ෂක නිලධාරියෙකු වශයෙන් සේවය කරන බවත් ඔහු ශ්‍රී ලංකාවේ සිටියදී කිරුලපන පොලිස් වසමේ අංක 88/10, සිද්ධාර්ථ පටුමග, කිරුලපන ලිපිනයේ ඉඩම සහ නිවස 2009 ජනවාරි මස මිලදී ගත් බවත් එය පසුව අලුත්වැඩියා කටයුතු කරමින් සිටියදී, 2010.02.26 වන දින සවස 4.30ට පමණ 15 දෙනෙකු පමණ මෙම නිවසට පැමිණ වැඩ කරමින් සිටි අයට තර්ජනය කර පලවා හැර බලෙන් ගෙය අත්පත් කරගෙන මුරකරුවන් දෙදෙනෙකු රඳවා ගොස් සිටින බවත් මීට පෙර මෙම නිවසේ සිටි පැමිණිලිකරුගේ බිරිඳට සහ දරුවන් හට තර්ජනය කර ඇති බවත් පවසා ෆැක්ස් පණිවිඩයක් මගින් මා වෙත පැමිණිලි කර ඇතග

[31] On 20.04.2010, the Police filed an information under section 66 (1) (a) of the Primary Courts' Procedure Act referring only to the complaint made by the 1st Respondent on 08.01.2010 without disclosing the complaint of dispossession made by the Appellant on 26.02.2010. It is clearly stated in the said information dated

20.04.2010 that due to the dispute between the parties, a breach of the peace is likely between the parties (*කරුණු මෙසේ හෙයින් මෙම පාර්ශවකරුවන් අතර සාමය කඩවීම් ඇතිවී වෙනත් අපරාධ ඇතිවීමට ඉඩ ඇති හෙයින් මෙම දෙපාර්ශවය අධිකරණය වෙත කැඳවා දෙපාර්ශවය අතර සාමය ආරක්ෂා කිරීමට 1979 අංක 44 දරණ ප්‍රාථමික නඩු විධාන සංග්‍රහ පනතේ 66 (1) නිති ප්‍රකාරව කිරුලපන පොලිස් ස්ථානයෙහි ස්ථානාධිපති ප්‍ර.පො.ප. අරුණ චන්ද්‍රපාල වන මා 2010.04.20 වන දින ගරු අධිකරණය වෙත වාර්තා කරමින් ඉල්ලා සිටින්නේ මෙම දෙපාර්ශවය අධිකරණයට කැඳවීම සඳහා නොහිසි නිකුත් කරන මෙන් ගෞරවයෙන් ඉල්ලා සිටිමි.)*

[32] On 23.04.2010, the Officer-In-Charge of the Police Station filed a further report in the Magistrate's Court in connection with the complaint of dispossession made by the Appellant on 26.10.2010 stating that every effort made to settle the matter failed and therefore, an information was filed under section 66 (1) of the Primary Courts' Procedure Act in the Magistrate's Court. The relevant parts of the Police Report dated 23.04.2010 attached to the Revision Application (X2) reads as follows:

> *2010.03.09 වන දින මාගේ මුල් වාර්තාව සහ සබැඳේ. ඉහත ඉඩමේ සහ නිවසේ හුක්තිය සම්බන්ධ ආරවුලේ පැමිණිලිකරු වන අංක 123, සිවරාජ් පාර, ඉසදීන් නගරය, මාතර ලිපිනයේ පවුස්ලි ඉන්ෂාෆ් නිශාම් යන අය සුඩාන් රටේ සිට පැමිණ ඉහත පැමිණිල්ල සම්බන්ධයෙන් දැනට මෙම ඉඩමේ හිමිකරු යැයි පවසා සිටින නො. 06, සෝමාදේවි පෙදෙස, කිරුලපන ලිපිනයේ මෙරිසද්ෂගේ කිංස්ලි ද කෝස්තා යන දෙපාර්ශවය ස්ථානයට කැඳවා මෙම ආරවුල සම්බන්ධයෙන් ප්‍රශ්න කිරීමේදී මෙම දෙපාර්ශවය විසින් ම ඉඩමේ අයිතිවාසිකම් සම්බන්ධයෙන් ලියකියවිලි ඉදිරිපත් කරමින් පවසා සිටින්නේ මෙම දෙපාර්ශවයට ම ඉඩමේ හුක්තිය ඇති බවයි. මෙම නිසා පොලිස් ස්ථානය මගින් මෙම දෙපාර්ශවය අතර ඇති ඉඩම් ආරවුල සමථයකට පත් කිරීමට ක්‍රියා කල ද දෙපාර්ශවයම ඒ සඳහා සමථයකට පත් නොවීම හේතුවෙන් අද දින ගරු අධිකරණයේ ඉහත දෙපාර්ශවයට පෙනී සිටීමට උපදෙස් දී ඇත.*

[33] On 07.06.2010, the Police filed a further report and moved to lay by the case bearing No. B/4994/3/10 on the basis that an information under section 66 (1) had already been filed on 20.04.2010 and accordingly, the said case was laid by on 08.06.2010. It is crystal clear that a Police Officer has inquired into the complaint of dispossession made by the Appellant on 26.02.2010 and the same is referred to in the "B" Report dated 09.03.2010 and further reports dated 23.04.2010 and 08.06.2010.

Issue of Jurisdiction raised for the first time in the Court of Appeal

[34] I shall now consider the maintenability of the legal submission made by Mr. Mahawanniarachchi for the first time during the argument that the learned Magistrate lacked jurisdiction to make a determination under section 68 (3) of the Act as no breach of the peace could have occurred when the information was filed by the police on 20.04.2010. He relied on the decision of this Court in *Ali v. Abdeen* (2001) 1 Sri LR 413) in support of his contention. The question that arose for decision in *Ali v Abdeen* (supra) was whether the failure on the part of the Primary Court Judge to comply with section 66 (6) of the Act deprives him of the

jurisdiction to hear the case. Gunawardena, J. sitting as a single Judge of the Court of Appeal held in *Ali v Abdeen* at page 415:

> *"The Primary Court Judge was under a peremptory duty to encourage or make every effort to facilitate dispute settlement before assuming jurisdiction to hold an inquiry into the matter of possession and impose on the parties a settlement by means of Court order….*
>
> *The making of an endeavour by the court to settle amicably is a condition precedent which had to be satisfied before the function of the Primary Court under section 66 (7) began, that is, to consider who had been in possession. Since the Primary Court Judge had acted without jurisdiction in proceeding to determine the question of possession, its decision is, in fact of no force in law".*

[35] It is to be noted that the Court of Appeal in *Abdul Wahaab Mohamed Nisam v. Subasinghe Nishshanka Justin Dias* C. A (PHC) 16/2007 decided on 26.05.2011 on an identical issue did not follow the above mentioned expressions made by Gunawardena J. in *Ali v Abdeen* (supra) and held at page 4:

> *"The Appellant in this appeal takes up the issue of jurisdiction only in the Court of Appeal. If the Appellant or the Respondent wants to take up the issue of jurisdiction, it must be taken up at the earliest opportunity. This view is supported by the judicial decision in David Appuhamy v. Yassasi Thero (1987) 1 SLR 253……*
>
> *In the present case, it appears to me that the appellant, who was silent about the issue of jurisdiction in the Primary Court, takes it up only after he lost the case. It cannot be said that failure on the part of the PCJ to comply with section 66 (6) of the Act deprives him of the jurisdiction to hear the case".*

[36] Mr. Mahawanniarachchi, on behalf of the 1st Respondent took up the issue of jurisdiction for the first time in the Court of Appeal. A perusal of the Affidavits filed by the 1st Respondent and the Intervenient Respondent reveals that they had never challenged the jurisdiction of the Magistrate to make a determination under section 68 (3) of the Act on the ground that there was no likelihood of a breach of the peace between the parties. If the 1st Respondent wished to take up the issue of jurisdiction, he should have raised it at the earliest opportunity in the Magistrate Court itself but no such objection was raised in the Magistrate's Court. In *Navaratnasingham v. Arumugam and Another* 1980 (2) 1 at page 5, Soza, J. held that:

> *"An objection to jurisdiction must be taken as early as possible and the failure to take such objection when the matter was being inquired into must be treated as a waiver on the part of the petitioner. Where a matter is within the plenary jurisdiction of the Court, if no objection is taken, the Court will then have jurisdiction to proceed and make a valid order. In the present case, the*

objection to jurisdiction was raised for the first time when the matter was being argued in the Court of Appeal and the objection had not even been taken in the petition filed before that Court".

[37] The same principle was followed in *David Appuhamy v. Yassasi Thero* (1987) 1 Sri LR 253, at 256. Accordingly, the 1st Respondent cannot now challenge the legality of the proceedings for the first time in the Court of Appeal without taking it up at the earliest opportunity. In the present case, the Officer-in-Charge of the Police Station having formed an opinion that a breach of the peace was threatened or likely between the parties, filed an information within a period of 2 months from the claimed date of dispossession which occurred on 26.02.2010. For those reasons, I hold that the learned Magistrate was vested with jurisdiction to inquire into the matter under section 66 (1) (a) of the Primary Courts' Procedure Act and for those reasons too, the submission of Mr. Mahawanniarchchi on the issue of jurisdiction is rejected.

Relevance of the information referred to in the "B" Report filed in the Magistrate's Court

[38] The next question is whether the learned Magistrate is prevented from referring to the information contained in the "B" Report filed by the Police of 09.03.2010 in the Magistrate's Court in deciding the question of dispossession under section 68 (3) of the Primary Courts' Procedure Act for the mere reason that the information filed on 20.04.2010 does not refer to to the complaint of dispossession dated 26.02.2010.

[39] The Officer-in-Charge of the Police Station has failed to refer to the complaint of dispossession made by the Appellant on 26.02.2010 or his own Report filed on 09.03.2010 (2V17) in the Magistrate's Court in connection with the complaint of dispossession made on 26.02.2010. As noted, after the information was filed on 20.04.2010 under section 66 (1) of the Primary Courts' Procedure, the same police officer filed a further Report on 23.04.2010 stating that he made every effort to settle the dispute between the parties, but all his efforts failed.

[40] The procedure of an inquiry under Part VII of the Act is *sui generis* and the procedure to be adopted and the manner in which the proceedings are to be conducted are clearly set out in sections 66, 71 and 72 of the Act (*Ramalingam v. Thangarajah* 1982 (2) Sri LR 693, at p. 699). In *Ramalingam v. Thangarajah*, Sharvananda, J. (as he then was) at page 698 stated:

"That person is entitled to possession until he is evicted by due process of law. A Judge should therefore in an inquiry under Part VII of the aforesaid Act, confine himself to the question of actual possession on the date of filing of the information except in a case where a person who had been in possession of the

land had been dispossessed within a period of two months immediately before the date of the information. He is not to decide any question of title or right to possession of the parties to the land. Evidence bearing on title can be considered only when the evidence as to possession is clearly balanced and the presumption of possession which flows from title may tilt the balance in favour of the owner and help in deciding the question of possession."

[41] Section 72 prescribes the material on which the determination under section 68 and 69 of the Act is to be based and such determination under Part VII shall be made after examination and consideration of-

(a) The information filed and the affidavits and documents furnished;

(b) Such other evidence on any matter arising on the affidavits or documents furnished as the court may permit to be led on that matter; and

(c) Such oral or written submissions as may be permitted by the Judge of the Primary Court in his discretion.

[42] A wide discretion has been given to the Primary Court Judge under section 72 to decide on the type of evidence and material on which he should act in making his determination under section 68 (1) or 68 (3) of the Act. The only limitation is that he must act judicially and as far as practicable, depending on the circumstances of each case. The 1st Respondent's complaint dated 08.01.2010 and the subsequent statement of the Appellant dated 09.01.2010 do not refer to any dispossession and thus, it was irrelevant to consider the question of dispossession on the basis of the complaint of the 1st Respondent made on 08.01.2010.

[43] Accordingly, I am of the opinion that the said complaint dated 26.02.2010 (2V16) and the information contained in the "B" Report dated 09.03.2010 (2V17) constitute documents arising on the Affidavit filed by the Appellant in the Primary Court. The Primary Court Judge was bound to examine and consider not only the information filed by the Police on 20.04.2010 but also the complaint of dispossession made by the Appellant on 27.06.2010 (2V16) and the "B" Report filed by the Police on 09.03.2010 (2V17).

[44] Under such circumstances, the learned Additional Magistrate has correctly considered the complaint of dispossession (2V16) and the information contained in the "B" Report (2V17) and proceeded to consider the question whether the Appellant who had been in possession of the premises had been forcibly dispossessed within a period of 2 months immediately before the date on which the information was filed on 20.04.2010. The learned High Court Judge was wrong in my view in holding that the information contained in the "B" Report dated

09.03.2010 (2V17) is irrelevant for the determination of possession under section 68 (1) or dispossession under section 68 (3) of the Act.

Possession and Dispossession

[45] At the hearing Mr. Ameen submitted that the learned High Court Judge has erred in calculating the period of 2 months from the date of the commencement of the dispute in total disregard of section 68 (3) which requires the Primary Court Judge to decide the question whether or not the Appellant who had been in possession of the property has been dispossessed within a period of 2 months from the date on which the information was filed by the Police. He further submitted that the Appellant has established by adducing credible evidence (2V1-2V17) that he had been in possession until 26.02.2010 and that he has been forcibly dispossessed on the same day.

[46] At the hearing however, Mr. Mahawanniarachchi took up a new position that both the 1st Respondent and the Appellant had failed to present concrete evidence and prove their possession and thus, the learned Magistrate had acted without jurisdiction in declarating that the Appellant was entitled to possession of the premises in question. He further submitted that the learned High Court Judge should have set aside the order of the learned Magistrate on that score alone. He conceded however, that part of the order of the learned High Court Judge in declaring that the 1st Respondent is also entitled to the possession of the premises in question is erroneous.

[47] In support of the submission that the Appellant has failed to establish possession on or about 26.02.2010, Mr. Mahawanniarachchi submitted that:

(i) The water and electricity bills marked 2V6 (a) -2V8 (b) do not support the possession of the Appellant as the name of a different person and different premises is mentioned and the documents marked 2V9 (a) -2V9 (b), 2V11 (a) -2V1b), 2V12 also do not support the possession of the Appellant;

(ii) The Appellant had left Sri Lanka on 10.01.2010 and no police complaint had been made by the workers of the Appellant and therefore, he could not establish his physical possession of the premises in dispute on the alleged date of the dispossession on 26.02.2010'

(iii) The Appellant has failed to establish from the material placed before the court that he had been in possession of the subject matter within a period of 2 months immediately before the date on which the information was filed by the Police on 20.04.2010 or that he was forcibly dispossessed.

[48] I shall now proceed to consider the question whether the learned Magistrate was correct in holding that the Appellant who had been in possession of the premises until 26.02.2010 has been forcibly dispossessed from the said premises within a period of 2 months immediately before the date on which the information was filed under section 66 of the Primary Courts' Procedure Act.

[49] It was the position of the Appellant that the said Leelawathie Perera gifted the said property on 15.03.2007 to M. Ranjith de Costa, his son who by deed No. 1557 dated 11.12.2008 (2V1) transferred the said property to one M. I. S. M. Faleel, who by deeds Nos. 1564 dated 25.01.2010 (2V3), 1585 dated 06.03.2009 (2V4), and 1608 dated 16.06.2009 (2V5) transferred the said property to the Appellant. The Appellant has further taken up the position that after he purchased the said property from Faleel, he surveyed the said premises, commenced renovating the said premises and his contractors deployed workers in the said premises in dispute for this purpose.

[50] The Appellant has produced the documents marked 2V6 (a) -2V25 in support of his position that he was in possession of the said premises until he was dispossessed on 26.02.2010. The Appellant has stated in his Affidavit that he was employed by the UNICEF in Sudan and thus, one Muslih Abdul Cader and Nasheeth Abdul Cader were residing on the said premises from 07.12.2009 to 19.02.2010 with his permission. The Affidavits of Muslih Abdul Cader marked 2V10 and Nasheeth Abdul Cader marked 2V23 (a) confirm the Appellant's position that Muslih Abdul Cader and his brother Nasheeth Abdul Cader were residing in the premises in dispute from 07.12.2009 till 19.02.2010 with he permission of the Appellant. They had further confirmed the Appellant's position that the Appellant commenced renovating the house and 4-5 workers attended to the repair works during that period. The said Muslih Abdul Cader has further stated in his affidavit that he received water and electricity bills from the respective authorities and handed over all such bills to the wife of the Appellant.

[51] A perusal of the bills marked 2V6 (a)-2V8 (b) reveals that, except for the documents marked 2V6 (a) and 2V6 (b), all other water bills marked 2V7 (a) -2V8 (b) relate to the premises bearing assessment No. 88/12, Somadevi Place, Colombo 06 and the bills had been paid up to December 2009. The payments for the Electricity and Water Bills marked 2V18 (a) -2V19 (e) too had been made in respect of the premises in dispute until December 2009. Although the name of a different person is mentioned in the bills, no other persons, including the 1st Respondent had claimed that they paid the water and electricity bills in respect of the premises in dispute until December 2009. The Appellant could not have produced these bills from his custody unless he was in possession of the said

premises either by himself or through one of his agents or servants as confirmed by Muslih Abdul Cader in his affidavit marked 2V10.

[52] The document marked 2V20 (a) is a Seizure Notice dated **05.08.2009** issued by the Colombo Municipal Council for non-payment of rates in a sum of Rs. 29,468.57 and this letter had been addressed to the Owner or Occupier at premises bearing No. 88/12. A perusal of the Receipt issued by the Colombo Municipal Council marked 2V20 (b) reveals that the Appellant, on 31.12.2009 had paid the said sum to the Colombo Municipality to avoid the premises being seized by the Colombo Municipal Council. No evidence was adduced by the 1st Respondent to prove that he was in possession of the premises in question or that he received the said notice or paid the arrears of assessment rates in respect of the premises in question. It was only the Appellant who had paid the arrears of assessment rates and thus, unless the Appellant was in possession of the premises either by himself or through his agents, he could not have received the said notice and paid the said rates to the Municipality.

[53] The documents issued by the Licensed Surveyor marked 2V9 (a) and 2V9 (b) reveal that the said property was surveyed on 28.12.2009 and 09.01.2010 according to the Plan No. 176A at the request of the Appellant and at that time, there was no boundary dispute in the premises in dispute. The Surveyor could not have entered the premises and done such a survey in the premises unless the Appellant was in possession of the said premises as no person had objected to any such survey being carried out on the premises in dispute.

[54] One Nasheeth Abdul Cader has further stated in his Affidavit that the Appellant commenced repairs and renovations through a contractor named Sirajudeen who employed around 4-6 workers (2V23 (a). The said Abdul Majeed Sirajudden in his Affidavit marked 2V13 has confirmed this position and stated *inter alia*, that he entered into a contract with the Appellant for a contract sum of Rs. 1,390,000/-and carried out renovations on the premises in dispute from 04.01.2010 to 25.02.2010. He has further stated that one of his co-workers told him on 26.02.2010 that around 7-8 persons entered the premises in dispute on 26.02.2010, forcibly took them in a Van and dropped them warning them not to return back to the premises and thus, he informed the incident to his engineer Mr. Hafeel.

[55] The Appellant has adduced credible evidence to establish that after he purchased the premises in dispute, he surveyed the land, paid utility bills, arrears of assessment rates, employed a contractor and workers and carried out renovations to the premises in question and therefore, he was in possession of the premises in question until 26.02.2010.

[56] I shall now proceed to consider the complaint made by the 1st Respondent to the Kirulapona Police Station on 08.01.2010 and the position taken up by the Intervenient-Respondent in the context of the Affidavits and documents produced by the Appellant in support of his possession until 26.02.2010. The Power of Attorney given by Mangalika Galapitigedera to the 1st Respondent on 25.04.2007 (1V2) reveals that she had only appointed the 1st Respondent to sell the property in dispute pending appeal. The complaint made by the 1st Respondent to the Kirulapona Police Station on 08.01.2010 (1V4) reasa as follows:

> *මීට අවුරුදු කිහිපයකට ඉහත මංගලිකා ඒ ගේ ඉඩම මගේ නමට විකිණුවා. මට ඒ ගේ ඉඩම මිලදී ගත්ත දිනය මතක නැහැ. නමුත් ගේ ඉඩමේ ඔප්පු හා අනිකුත් ලියකියවිලි මගේ නමට තියෙනවා. මේ ඉඩමේ පර්චස් 38 තියෙනවා. පරණ ගෙයක් තියෙනවා. මේ ගේ ඉඩමට මගේ ලොකු අයියා වන රංජිත් කෝස්තා අයිතිවාසිකම් කියනවා. දැනට අවුරුදු 04ක කාලයක සිට රංජිත් කෝස්තා හා මම මේ ඉඩමට අලුත්කඩේ අධිකරණයේ නඩු කියනවා. නවම නඩුව විභාග වෙනවා. අද උදේ 7.00 ට විතර මට අසල්වැසියෙක් ඇවිත් කීවා මගේ අයියා රංජිත් කෝස්තා ගල්වැලි ගෙනත් එම ඉඩමේ ගෙදර කඩලා ඉඩම මැනලා තාප්පයක් ඉදිකරන්න යනවා කියලා. මම උදේ 7.00 ට විතර නො. 88/12, සෝමාදේවි පාරේ මට අයිති ඉඩමට ගියා. එවිට දැක්කා රංජිත් කෝස්තා නව පිරිමි හය හත් අට දෙනෙක් එක්ක ඒ ඉඩමේ ඉන්නවා. මිනින්දෝරුවෙක් ඉඩම මනිමින් සිටියා. නව පිරිමි කිහිපදෙනෙක් කොන්ක්‍රීට් අනමින් සිටියා. ඉඩම ඇතුලේ ගල්වැලි සිමෙන්ති දාලා තිබුණා. මම රංජිත් සමග මොනවාවත් කථාවට ගියේ නැහැ. මේ ගැන පැමිණිල්ලක් කරන්න පොලිසියට ආවා.*

[57] The 1st Respondent has not claimed in his complaint that he was in possession of the premises in question and further, he has failed to produce a single document to prove his possession of the premises in dispute. On the other hand, the 1st Respondent has admitted in this complaint made on 08.01.2010 that the Appellant had brought building material, surveyed the premises in dispute and employed workers who were engaged in mixing concrete in the premises. It is crystal clear that the 1st Respondent did not have any possession of the premises in question when he made a complaint to the Police on 08.01.2010 as correctly submitted by Mr. Ameen in his submissions.

Possession of the Intervenient-Respondent

[58] The 1st Respondent and the Intervenient-Respondent have, however, claimed in their Affidavits filed in the Magistrate's Court that in terms of the Power of Attorney dated 25.04.2007, the 1st Respondent entered into an agreement with the Intervenient-Respondent on 25.01.2010 to sell the said property for a sum of Rs. 6 Million (1V3) pending appeal. They have claimed that in terms of the said agreement, the 1st Respondent having received an advance sum of Rs. 1 Million from the said Intervenient-Respondent, handed over the possession of the said property to the Intervenient-Respondent on 25.01.2010.

[59] It is not in dispute that when the Police filed information on 20.04.2010, the Intervenient-Respondent was in possession of the premises in question. The learned

High Court Judge has heavily relied on the date of the dispute referred to in the complaint, viz, 08.01.2010 and the date of the information filed by the Police, viz. 20.04.2010 and held that the Intervenient-Respondent was in possession of the premises in dispute on the date of the filing of the information.

[60] It is settled law that a Judge of the Primary Court in an inquiry under section 68 (1) of the Primary Courts' Procedure Act should confine himself to the question of actual possession on the date of filing information except in a case where a person who had been in possession of the land had been dispossessed within a period of 2 months immediately preceding filing of information (*Ramalingam v. Thangarajah (Supra).* The position of the Appellant was that he was dispossessed by a group of persons on 26.02.2010 and thereafter, the Intervenient-Respondent was in unlawful possession of the premises in dispute after 26.02.2010.

[61] The first question that arises is whether the Intervenient-Respondent took control of the possession of the premises in dispute on 25.01.2010 as claimed by the 1st Respondent and the Intervenient-Respondent in their Affidavits. The Intervenient-Respondent has filed the documents marked 3V1-3V17 in support of his position that after he entered into the informal agreement dated 25.01.2010, he took control of the premises in question on 25.01.2010.

[62] The document marked 3V1 is the deed of gift, the document marked 3V2 is a power of attorney and the document marked 3V3 is an informal agreement dated 25.01.2010. These documents do not support the position of the Intervenient-Respondent in respect of the premises in question. The documents dated 17.05.2010 marked 3V4, 3V5 and 3V6 only relate to the registration of ownership and assessment payment made on **17.05.2010** and thus, they had been issued after the information was filed by the Police on **20.04.2010**.

[63] The undated photographs marked 3V11-3V18 only establish the existing position of the house, with sand stored in the premises and a security person being put on guard and nothing else. They do not support the possession of the Intervenient-Respondent between the crucial period from 25.01.2010 to 26.02.2010. The only other documents that have been filed in support of the Intervenient-Respondent's possession are the Affidavit given by one Ukwatta Liyanage Ajith marked 3V10 and the receipts marked 3V7-3V9 issued by Amila Lime Stores. The said Ukwatta Liyanage Ajith in his Affidavit has stated that he acted as the Mason for the Intervenient-Respondent from 25.01.2010 and that all the items including cement and sand were supplied by the Intervenient-Respondent.

[64] The Intervenient-Respondent's own documents marked 3V7-3V9 clearly contradict the Affidavit of the said Ukwatta Liyanage Ajith. The Intervenient-Respondent has not produced a single receipt to prove that he purchased building materials from 25.01.2010 to 26.02.2010 as claimed by his Mason, who in his

Affidavit marked 3V10 has claimed that he renovated the premises in question from 25.01.2010. The receipts marked 3V7-3V9 are all dated after 27.03.2010 and thus, the Mason's Affidavit that he had been working in the premises from 25.01.2010 is not credible and ought to be rejected.

[65] The 1st Respondent or the Intervenient-Respondents have failed to produce any credible document to prove their possession prior to 26.02.2010 and their documents only apply for a period after 26.02.2010. In my view, no reliance could be placed on the Affidavits of the Intervenient-Respondent and his Mason marked 3V10 and under such circumstances, the learned High Court Judge was wrong in holding that the Intervenient-Respondent was also entitled to the possession of the premises in question.

[66] On the other hand, the Appellant's documents marked 2V9 (a), 2V10, 2V13, 2V7 (a) -2V8 (b), 2V18 (a) -2V1819 (d) and 2V23 (a) clearly establish his possession of the premises until 26.02.2010. The Affidavit of the Appellant's contractor Sirajudden marked 2V13 further confirms that the Appellant's workers had been forcibly evicted from the premises in dispute on 26.02.2010.

[67] It is settled law that the question whether a person is in possession of any corporeal thing, such as a house, is to ascertain whether he is in general control of it and the law recognizes two kinds of possession:

(a) actual possession where a person has direct physical control over a thing at a given time; and;

(b) constructive possession where 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 (*Iqbal v. Majedudeen and others* (1999) 3 Sri LR 213).

[68] The important thing in constructive possession is that a person must have both power and intention at a given time to exercise dominion over a thing either directly or through another person (*Thiyagarajah Thevaranjan v. Kalairasi Uruthiran and others* C.A (PHC) 93/2011 decided on 02.10.2012, at p.10), the mere fact that a person exercised a dominion or control over the property in question is not sufficient to have constructive possession, but he also must show that he has excluded the others from possession of the said property (Supra).

[69] It is to be noted that there is a house standing on the premises in question and thus, in determining the possession of the house, the important thing is to ascertain who is in general control of it (*Iqbal v. Majedudeen and others* (Supra). When the

concept of physical control of the premises in dispute is applied, the documents issued by the Licensed Surveyor marked 2V9 (a) confirm that when the property in dispute was surveyed on 28.12.2009 and 09.01.2010, the Appellant was physically present and that there was no any objection raised by any other interested party at that time.

[70] When the concept of constructive possession is applied to the facts of the present case, it is quite clear that although the Appellant had gone to Sudan after the investigation into the complaint made by the 1st Respondent was over and that he had been in Sudan on 26.02.2010 when the dispossession occured, he had exercised dominion and control over the premises through his contractor and workers. The Affidavits filed by the Appellant's contractor Sirajuudeen (2V13) and his cousins, Nasheeth Abdul Cader (2V23 (a) and Muslih Abdul Cader (2V10) corroborate this position. The conduct of the Appellant in sending a prompt complaint from Sudan by fax on 26.02.2010 itself shows his intention to exercise control and retain power over the disputed premises and the house standing thereon.

[71] In the circumstances, the Appellant has clearly established by documentary evidence that he had been in possession of the premises in dispute on 26.02.2010 and that he has been forcibly dispossessed within a period of 2 months immediately before the date on which the information was filed by the Police on 20.04.2010. The learned Additional Magistrate has correctly examined and considered all relevant material and come to the correct decision that the Appellant who had been in possession of the premises in question has been forcibly dispossessed within a period of 2 months immediately before the date on which the information was filed by the Police on 20.04.2010.

[72] For those reasons, I hold that the findings of the learned High Court Judge are clearly erroneous and such findings ought to be set aside and the order of the learned Additional Magistrate of Colombo directing that the Appellant be restored to possession under section 68 (3) of the Primary Courts' Procedure Act ought to be affirmed.

[73] The Appellant who is the Petitioner in the Revision Application bearing No. CA (PHC) APN 98-2013 has also sought to revise and set aside the said order of the learned High Court Judge dated 13.02.2013. It is trite law that the purpose of revisionary jurisdiction is supervisory in nature and that the object is the proper administration of justice (*Attorney-General v. Gunawardena* (1996) 2 Sri LR 149, at p. 156). In *Marian Beebee v. Seyed Mohamed* 58 NLR 36, Sansoni C.J. has clearly stated the reasons for the exercise of the extraordinary power of revisionary jurisdiction by Appellate Courts as follows:

"The power of revision is an extraordinary power which is quite independent of and distinct from the appellate jurisdiction of this Court. Its object is the due administration of justice and the correction of errors, sometimes committed by this Court itself, in order to avoid miscarriages of justice. It is exercised in some cases by a Judge of his own motion, when an aggrieved person who may not be a party to the action brings to his notice the fact that unless the power is exercised injustice will result".

[74] I further hold that the order of the learned High Court Judge in setting aside the order of the learned Additional Magistrate of Colombo and declaring that the 1st Respondent and the Interveneient-Respondent were entitled to possession of the premises in dispute is manifestly erroneous. His order has caused a grave miscarriage of justice to the Appellant. Accordingly, I hold that the Appellant who is also the Petitioner in the Revision Application bearing No. CA (PHC) APN 98/2013 is entitled to the reliefs prayed for in the said Revision Application.

Conclusion

[75] For those reasons, the judgment of the learned High Court Judge of Colombo dated 13.02.2013 made in case bearing No. HCRA 143/2010 is set aside. The order of the learned Additional Magistrate of Colombo dated 14.09.2010 in case bearing No. 54055/03 is affirmed.

[76] In the result, the Appeal filed by the Appellant in case bearing No. CA (PHC) 0039/2013 and the Revision Application filed by the Petitioner in case bearing No. CA (PHC) APN 98/2013 are allowed.

JUDGE OF THE COURT OF APPEAL

M. Sampath K.B. Wijeratne, J.

I agree.

JUDGE OF THE COURT OF APPEAL