In the Court of Appeal of the Democratic Socialist Republic of Sri Lanka

CA/CPA/APN Appeal No:

CPA- 0005-20

High Court of Galle Revision

Application No: 532/19/RA

M.C. Galle Case No: 7360/2019

In the matter of an application for revision in terms of Article 154P and 138 of the Constitution of the Democratic Socialist Republic of Sri Lanka read with section 11(1) of the High Court of the Provinces (Special Provisions) Act, No. 19 of 1990 (as amended) and section 66 of the Primary Courts' Procedure Act, No. 44 of 1979

and now between

Tamarind Entertainment (Pvt) Ltd,
Siyabala Medura, Gerukanda,
Kathaluwa, Ahangama, Galle

Petitioner-Petitioner-Petitioner

Vs.

Obadage Gamini Susantha Meththasena
No: 346, Matara Road, Magalle, Galle

Respondent-Respondent-Respondent

Before: Prasantha De Silva, J.
S. U. B. Karalliyadde, J.

Counsel: Mr. Maithree Gunaratne PC with Ashan Nanayakkara & I. Sahabdeen for the Petitioner-Petitioner-Petitioner
Mr. Dharshan Kuruppu with Ms. Sajini Elvitigala for the Respondent-Respondent- Respondent

Written Submissions

tendered:

on 15.10.2020. by the Petitioner-Petitioner-Petitioner

on 31.03.2021. by the Respondent-Respondent-Respondent

Argued on: 15.02.2021. (by way of written submissions)

Decided on: 03.05.2021.

S.U.B. Karalliyadde, J.

This revision application is against the order dated 28.11.2019. of the learned High Court Judge of Galle delivered in an application for revision against an order dated 21.08.2019. of the learned Additional Magistrate of Galle made under and in terms of section 68 (1) of the Primary Courts' Procedure Act, No. 44 of 1979 (hereinafter referred to as the Act). Filing an affidavit information dated 20.02.2019. before the Magistrate's Court under section 66(1)(b) of the Act, the Directors of the Petitioner-Petitioner-Petitioner Company (hereinafter referred to as the Company) alleged that the Respondent-Respondent-Respondent (hereinafter referred to as the respondent) had dispossessed the Company forcibly on 07.01.2019. from the premises in suit, which is leased to the Company for fifteen years from 14.09.2016. by the respondent on a lease agreement dated 14.09.2016. executed by a Notary.

The respondent, admitting the fact that he leased the premises to the Company, alleged that the Company gave up its possession in September 2018 and thereafter he started to possess it. By the impugned order dated 21.08.2019, the learned Additional Magistrate, in terms of section 68(1) of the Act, determined that the respondent is entitled to possess the property in dispute. Against that order the Company filed a revision application in the Provincial High Court of the Southern Province holden at Galle and the learned High Court Judge, by the order dated 28.11.2019. refused to issue notices on the revision application on the respondent for the reasons mentioned in the impugned order. This revision application is against the said order of the learned High Court Judge.

One of the reasons which the learned High Court Judge mentioned in the impugned order for refusing to issue notices on the respondent is that the Company seeks reliefs which were sought on the affidavit information filed before the Magistrate's Court seven months prior to the revision application. Revision application has been filed in the High Court on 06.11.2019. and the affidavit is dated 20.02.2019. Even though, the learned High Court Judge has not given reasons as to why the Company is not entitled to the reliefs sought on that affidavit, it seems that the learned High Court Judge has come to that conclusion on the basis that the validity of an affidavit exists only for six months from the date of administering the oath or affirmation in the affidavit. When supporting the revision application before the High Court, the Company has not been given an opportunity to address on that fact and therefore, I am of the view that the conclusion of the learned High Court Judge on a fact which the Company has not been given an opportunity to be heard is against the principles of natural justice.

Another reason mentioned in the impugned order for refusing to issue notices is that the Company has failed to adduce evidence to have an order in its favour under and in terms of section 68 of the Act. In terms of section 68(1) of the Act, the party **who was in possession of the property on the date of the filing of the information** under section 66 is entitled to have an order from the Court that that party was in possession of the property on the date of the filing the information. According to section 68(3), when dispute relates to right to possess the property, the party which was ousted from the possession of the property by the opposing party **within a period of two months immediately before the date on which the information was filed** under section 66, is entitled to have an order from the Court that that party has a right to possess the property.

The learned High Court Judge, in the impugned order has stated thus;

"ප්‍රාථමික අධිකරණ නඩු විධාන පනතේ 68 වගන්තිය යටතේ නියෝගයක් නිකුත් කිරීමේදී සලකා බලනු ලබන්නේ, යම් විෂය වස්තුවක **සන්තකය දැරීමට හිමිකම් ඇත්තේ කවුරුන්ද යන්නත්**, යම් නිර්භුක්තියක් සිදු වී ඇත්නම්, එකී නිර්භුක්ති කිරීමට නැත්හොත් **ආරවුලට පූර්වයෙන් වූ මාස 2ක කාලය තුළ දී** එහි භුක්තියේ සිටියේ කවුරුන්ද යන්නත්ය" (at page 4 of the order). When considering the said view of the learned High Court Judge, it is clear

that he has evaluated the facts of the case on a premise inconsistent with the provisions of section 68 of the Act.

Another fact which the learned High Court Judge has considered to refuse to issue notices is the delay of three months to file the revision application. The order of the learned Additional Magistrate has been pronounced on 21.08.2019. and the revision application has been filed in the High Court on 06.11.2019. Therefore, there is a delay of about 2 months in seeking reliefs from the High Court. The learned Counsel for the Company has drawn the attention of this Court to the fact that the reasons for delay were explained in paragraph 14 of the affidavit (in paragraph 13 of the petition) to the revision application and submitted that the learned High Court Judge has not drawn his attention to the facts stated in that paragraph. The reasons mentioned in that paragraph for the delay were *inter alia*, that after the order was pronounced by the learned Magistrate on 21.08.2019. even though, a certified copy of the case record has been requested from the Magistrate's Court by way of a motion on 26.08.2019, due to a defect in the photocopy machine of the Magistrate's Court it was issued only on 25.10.2019, took time to translate the certified copy and the petition and affidavit filed in the revision application from Sinhala language to English language since the Directors of the Company are British Nationals and cannot understand Sinhala, took time to reach the documents prepared in Sri Lanka pertaining to the revision application sent to UK and back to Sri Lanka by mail after signing the affidavit of the revision application, the two Directors of the Company who are husband and wife compelled to stay in United Kingdom until December 1989 for medical treatment of their child and the practical difficulties faced by them in obtaining legal opinion while living in UK from the Sri Lankan lawyers to take necessary steps against the order of the Magistrate. To substantiate the said facts documents marked A 7- A 11 have been tendered to the High Court. When perusing the impugned order, it is clear that the learned High Court Judge has neither drawn his attention to the paragraph 14 of the affidavit nor to the documents tendered to Court for its satisfaction.

Another reason given by the learned High Court Judge for refusing to issue notices on the respondent is that the affidavit information has been filed in the Magistrate's Court

under section 66 (1) (b) of the Act after two months from the date of dispossession. The learned High Court Judge has concluded that the Company is not entitled to any relief under and in terms of section 68 of the Act for the reason of that delay. The Company has alleged that the dispossession had taken place on 07.01.2019. The learned High Court Judge has considered that the proceedings in the Magistrate's Court have been initiated on 21.03.2019. According to the facts stated in the first two paragraphs in the order dated 21.08.2019. of the learned Magistrate, it is clear that the information in terms of section 66(1)(b) has been filed in the Magistrate's Court on 27.02.2019. and the case has been called in open Court on 21.03.2019. to support for notices on the respondent. Therefore, it is clear that the affidavit information under section 66 (1) (b) has been filed in Court on 28.02.2019. and not on the 21.03.2019. as observed by the learned High Court Judge. Therefore, the Court can come to the conclusion that the learned High Court Judge has made an error on a fact which is vital in making a decision under section 68 of the Act.

In disallowing the application to issue notices on the respondent, the learned High Court Judge has considered the fact that there is a pending action before the District Court between the parties to the action at hand for the same property and decided that the Company is not entitled to maintain the action under section 66 of the Act for that reason. In an action under section 66, the Primary Court Judge is not involved in an investigation into the title or right to possession which is the function of a civil court. But it enables the Judge temporary to settle the dispute between the parties and maintain the status quo until the rights of the parties are finally decided in a civil suit. In the case of Kanagasabai vs. Mylvaganam (76 NLR 280 at 282) Sharvananda, J. has considered this fact in relation to section 62 of the Administration of Justice Law and held that the mere pendency of a civil suit is an irrelevant circumstance and it cannot hamstring the Primary Court Judge from proceeding with the inquiry. This decision would apply to the inquiries under section 66 of the Primary Courts' Procedure Act as well.

Under the above circumstances, I am of the view that the learned High Court Judge has misinterpreted and not considered the facts and circumstances of the case and the law and as a result a positive miscarriage of justice and failure of justice has been caused.

Therefore, I hold that for the due administration of justice, exercising revisionary jurisdiction of this Court, the decision of the learned High Court Judge, not to issue notices on the respondent should be set aside.

In the impugned order, the learned High Court Judge has drawn his attention to the fact whether the Court should not issue notices for the reason that in the revision application a specific prayer has not been included seeking to issue notices on the respondent. On page 3 of the impugned order, it has been stated that the Court cannot grant a relief which is not prayed for. Nevertheless, at page 6, taking a contrary position the learned High Court Judge has expressed the view that even if there is no specific prayer in the revision application seeking to issue notices, at the discretion of Court notices can be issued. For the reason that the learned High Court Judge has taken contrary views on that fact, I reserve the rights of the parties to raise that point before the High Court if, necessary.

Considering all the above circumstances, I set aside the impugned order of the learned High Court Judge and order the learned High Court Judge to reconsider to issue notices on the revision application filed before the High Court on the respondent. No cost ordered.

JUDGE OF THE COURT OF APPEAL

I agree.

Prasantha De Silva J.
JUDGE OF THE COURT OF APPEAL