

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

In the matter of an Appeal under Article 154P (6) of the Constitution read with High Court of the Provinces (*Special Provisions*) Act No. 19 of 1990 against the Judgment dated 05.05.2017 delivered in High Court of Kandy Case No. HC/REV/30/2015.

In the Magistrate's Court of Kandy.

Court of Appeal Case No. CA
(PHC) **62/2017**

Kandy High Court Case Revision
Application No. HC/REV/30/2015

Magistrate's Court of Kandy Case
No: 77849/14

Konadeniye Gedara Heen Mahaththaya,
No. 18, Kaluwana,
Ambatenna.

Petitioner

Vs.

Asitha Premajith Gamage,
No. 3, Menik Kumbura Lane,
Katugastota.

Respondent

AND

In the High Court of Central Province holden in
Kandy.

Asitha Premajith Gamage,
No. 3, Menik Kumbura Lane,
Katugastota.

Respondent-Petitioner

Vs.

Konadeniye Gedara Heen Mahaththaya,
No. 18, Kaluwana,
Ambatenna.

Petitioner-Respondent

AND NOW

In the Court of Appeal

Asitha Premajith Gamage,
No. 3, Menik Kumbura Lane,
Katugastota.

Respondent-Petitioner-Appellant

Vs.

Konadeniye Gedara Heen Mahaththaya,
No. 18, Kaluwana,
Ambatenna.

Petitioner-Respondent-Respondent

Before: **Prasantha De Silva, J.**
K.K.A.V. Swarnadhipathi, J.

Counsel: Sunil Cooray with T.M.A. Mutalip for the Appellant.
Shyam A. Collure with A.P. Jayaweera, P.S. Amarasinghe, S.
Ravindra.S. De Silva for the Petitioner-Respondent-Respondent.

Written Submissions 29.11.2021 by the Petitioner-Respondent-Respondent.
Tendered on:

Argued on: Parties agreed to dispose this matter by way of written submissions.

Decided on: 10.02.2022

Prasantha De Silva, J.

Judgment

It appears that the Petitioner filed an information in terms of Section 66 (1) (b) of the Primary Courts' Procedure Act No. 44 of 1979 by way of a petition and an affidavit together with supporting documents marked as P1-P16. As per the said information, there was a dispute between the Petitioner and the Respondent with regard to the possession of a shop premises situated at

Menik Kumbura lane, Katugastota, morefully described in the schedule to the petition dated 30.10.2014.

According to the said information, the Petitioner had been in possession since year 2002 and was later dispossessed from the said premises on or about 05.10.2014. Thereafter, the Petitioner had made three complaints to the Police Station of Katugastota on 05.10.2014 (P14), 11.10.2014 (P15) and 13.10.2014 (P16) in respect of a breach of peace; under threat or likely, which had resulted due to the said dispossession of the Petitioner by the Respondent.

According to the Petitioner, he had been carrying on a business of selling dried fish and retail items of goods or sundries and had operated from the concerned premises. On 04.10.2014, the Petitioner had left the shop, closing it for the day and when he returned on the following morning, he found that his stock of dried fish and other goods were thrown out and a new door was fixed to his shop premises. The Petitioner's name board and the shelves of his shop had been removed and had subsequently commenced development work despite the advice given by Police to both parties not to enter the premises in dispute until the conclusion of the inquiry.

The learned Magistrate having been satisfied that there was a dispute affecting land, which paved the way for a threat to breach of peace, assumed the special jurisdiction under the Primary Courts' Procedure Act.

The Respondent appeared in Court on 20.11.2014 upon notice being served, and thereafter filed affidavit dated 19.11.2014 with documents marked X and R1-R32 denying the claim of the Petitioner. It was the contention of the Respondent that, there was no physical existence of a business premise at 91/3 as described in the schedule to the petition of the Petitioner.

Subsequent to the events above, the Petitioner filed a counter affidavit dated 16.01.2015 with documents marked P17 and P18, categorically denying that Petitioner had handed over possession of the shop premises to one Susantha Kumara Wickremaratne as claimed by the Respondent.

After written submissions were filed by both parties, the learned Primary Court Judge delivered the Order on 24.04.2015 determining that the Petitioner had established the Respondent had

forcibly dispossessed the Petitioner from the subject matter of the case within a period of two months prior to the filing of information and accordingly made an Order in terms of Section 68 (3) of Primary Courts' Procedure Act that the Petitioner be restored to the possession of the disputed premises described in the schedule to the petition.

Being aggrieved by the said Order of the learned Primary Court Judge, the Respondent-Petitioner had invoked the revisionary jurisdiction of the Provincial High Court of the Central Province holden at Kandy against the said Order dated 24.04.2015 by revision application dated 05.05.2015 praying amongst other things, that the said Order of the learned Primary Court Judge be set aside.

However, the learned High Court Judge upon considering the evidence placed before him held that no exceptional circumstances exist to shock the conscience of Court to revise or set aside the Order of the learned Primary Court Judge and dismissed the revision application of the Respondent-Petitioner. Being aggrieved by the dismissal of the said application, the Respondent-Petitioner-Appellant has preferred this appeal.

It was submitted on behalf of the Respondent-Petitioner-Appellant [hereinafter sometimes referred to as the Appellant] that the learned High Court Judge has not considered the fact that the learned Primary Court Judge has not taken into consideration certain documents tendered in the Primary Court by the Respondent-Petitioner together with his affidavit dated 19.12.2014.

The document marked 30, which is an affidavit given by the occupant of the premises in question, states that the affirmant, Herath Mudiyansele Bandula Mahesh has been in occupation of No. 3 Menik Kumbura Lane, Katugastota, since April 2013 and has been carrying on a business of selling dried fish under the business name "Sunrise Dryfish".

Accordingly, it was the contention of the Appellant that the Petitioner-Respondent-Respondent [hereinafter sometimes referred to as the Respondent] could not have been in possession of the same premises, which is the premises in dispute of the instant action on the date the alleged ouster took place. Therefore, the Appellant contended that the aforesaid vital document 30 has not been considered by the learned Primary Court Judge when he made the impugned Order.

It was also brought to the notice of Court that the document marked as ①1 which is a letter issued by the Grama Niladhari of the area, which stated that there is no premises numbered as 91/3 in the said Menik Kumbura Lane, Katugastota which also has not been considered by the learned Primary Court Judge in his impugned Order.

It was submitted on behalf of the Appellant that the learned High Court Judge in his Order dated 05.05.2017 has stated the learned Primary Court Judge had clearly identified the corpus in dispute. It was submitted on behalf of the Respondent that the letter ①1 is completely contrary to the depiction of the disputed premises in the sketch marked as ③2. Further, it was submitted that the Appellant himself has admitted the Respondent was in possession of the shop concerned until 22.09.2014. According to ①2, the Appellant has taken over the possession of the business premises in question from one Susantha Kumara Wickremasinghe after 7.00p.m on 04.10.2014. In such circumstances, it appears that the claim of the said Herath Mudiyansele Bandula Mahesh, in his affidavit dated 12.12.2014, marked as ③0 seems contradictory thus, cannot be accepted as evidence.

It is noteworthy, that the learned Primary Court Judge rejecting the claim of the Appellant, that no such business premises as No. 91/3, Menik Kumbura Lane, Katugastota as referred to in the schedule to the information physically exists, had come to a definite finding for the reasons stated in his Order dated 24.04.2015, that the Appellant had forcibly dispossessed the Respondent from the subject matter of the instant Case within a period of two months prior to the institution of the said action.

It is seen that the learned Primary Court Judge having considered the material placed before him, had properly identified the subject matter of the instant case and determined that the Respondent had been forcibly dispossessed of the aforesaid business premises within a period of two months immediately before the date on which the information was filed.

Since the instant action was instituted under Section 66 of the Primary Courts' Procedure Act due to the dispossession of the Respondent from the disputed premises, the matter has to be determined in terms of Section 68(3) of the Primary Courts' Procedure Act.

The Petitioner-Respondent-Respondent had made complaints to the police on 05.10.2014, 11.10.2014 and 13.10.2014 marked as 14, 15, 16 respectively. According to those complaints, it amply proves that the Petitioner-Respondent-Respondent had been forcibly dispossessed within a period of two months prior to the filing of the information on 30.10.2014. Hence, the Petitioner-Respondent-Respondent's possession has to be restored to the disputed premises in terms of Section 68 (3) of the Primary Courts' Procedure Act.

The learned High Court Judge has correctly refused to set aside the Order of the learned Primary Court Judge dated 24.04.2015 and dismissed the application of the Respondent-Petitioner-Appellant.

Therefore, we affirm the Order of the learned High Court Judge dated 05.05.2017 and the Order of the learned Primary Court Judge dated 24.04.2015 and dismiss this appeal with cost fixed at Rs.25,000/-.

JUDGE OF THE COURT OF APPEAL

K.K.A.V. Swarnadhipathi, J.

I agree.

JUDGE OF THE COURT OF APPEAL