

IN THE COURT OF APPEAL OF THE DEMOCRATIC SOCIALIST REPUBLIC OF

SRI LANKA

An Appeal under and in terms of Article 138 and 154P of the Constitution of the Democratic Socialist Republic of Sri Lanka read with High Court of the Provinces (*Special Provisions*) Act No. 19 of 1990.

CA (PHC) No: **181/2013**

HC Colombo Revision Case
No: 137/13

Primary Court Case No: (MC
Colombo) 5749/02/2012

Officer-in-Charge,
Police Station,
Borella

Complainant

Vs.

1. Maththaka Gamage Jinadasa
2. Srma Chandra Kanthi
Both of No: 1038/05,
Maradana Road,
Borella.

1st Party-Respondents

1. Thotawaththage Don Manuwel Subhash de Silva,
No. 26, Kapuwaththa, Ja-Ela.
2. Thotawaththage Don Manuwel John de Silva,
No. 1038/1B, Maradana Road, Borella.
3. H. M. Ramya Neranjala,
No. 1038/ 22, Maradana Road, Borella.
4. Thelge Jayanthi Pieris,
No. 1038/ 1B, Maradana Road, Borella.

2nd Party-Respondents

Thusitha Priyashantha Soorasinghe
No. 39/2, Mahawatta Road,
Kandana.

Interventient Party Respondent

AND BETWEEN

1. Maththaka Gamage Jinadasa
No: 1038/05,

Maradana Road,
Borella.

1st Party-1st Respondent-Petitioner

Vs.

1. Thotawaththage Don Manuwel Subhash de Silva,
No 26, Kapuwaththa, Ja-Ela.
2. Thotawaththage Don Manuwel John de Silva
No 1038/1B, Maradana Road, Borella.
3. H. M. Ramya Neranjala
No. 1038/22, Maradana Road, Borella.
4. Thelge Jayanthi Pieris
No. 1038/1B, Maradana Road, Borella.

2nd Party-Respondent-Respondents

Thusitha Priyashantha Soorasinghe,
No. 39/2, Mahawatta Road,
Kandana.

**Intervenient Party Respondent-
Respondent**

Officer-in-Charge,
Police Station,
Borella.

Complainant- Respondent

Srima Chandrakanthi
No: 1038/05,
Maradana Road,
Borella.

1st Party-2nd Respondent (Deceased)

AND NOW BETWEEN

1. Maththaka Gamage Jinadasa
No: 1038/05, Maradana Road, Borella.

**1st Party-1st Respondent-
Petitioner-Appellant**

Vs.

1. Thotawaththage Don Manuwel Subhash de Silva,
No. 26, Kapuwaththa, Ja-Ela.

2. Thotawaththage Don Manuwel John de Silva,
No. 1038/1B, Maradana Road, Borella.
3. H. M. Ramya Neranjala,
No. 1038/22, Maradana Road, Borella.
4. Thelge Jayanthi Peiris
No. 1038/1B, Maradana Road, Borella.

**2nd Party-Respondent-Respondent-
Respondents**

Thusitha Priyashantha Soorasinghe,
No. 39/2, Mahawatta Road,
Kandana.

**Intervenient Party Respondent-
Respondent-Respondent**

Officer-in-Charge,
Police Station,
Borella.

Complainant-Respondent- Respondent

Srima Chandrakanthi
No. 1038/05,
Maradana Road,
Borella.

1st Party-2nd Respondent (Deceased)

AND

1. Maththaka Gamage Jinadasa
No: 1038/05, Maradana Road, Borella.

**1st Party-1st Respondent-Petitioner-
Appellant (Deceased)**

Udith Ishantha Gamage,
No. 1038/05,
Maradana Road,
Borella.

**Substituted 1st Party-1st Respondent-
Petitioner-Appellant**

Vs.

1. Thotawaththage Don Manuwel Subhash de Silva,
No. 26, Kapuwaththa, Ja-Ela.

2. Thotawaththage Don Manuwel John de Silva,
No. 1038/1B, Maradana Road, Borella.
3. H. M. Ramya Neranjala,
No. 1038/22, Maradana Road, Borella.
4. Thelge Jayanthi Peiris
No. 1038/1B, Maradana Road, Borella.

**2nd Party-Respondent-Respondent-
Respondents**

Thusitha Priyashantha Soorasinghe,
No. 39/2, Mahawatta Road,
Kandana.

**Intervenient Party Respondent-
Respondent-Respondent**

Officer-in-Charge,
Police Station,
Borella.

Complainant-Respondent- Respondent

Srima Chandrakanthi
No. 1038/05,
Maradana Road,
Borella.

1st Party-2nd Respondent (Deceased)

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

Counsel: Asthika Devendra with Milinda Sarachchandra and Aruna
Madushanka for the substituted 1st Party-1st Respondent-Petitioner-
Appellant

Written Submissions 09.08.2018 by the substituted 1st Party-1st Respondent-Petitioner-
tendered on: Appellant.

Argued on: 18.10.2021

Decided on: 17.02.2022

Judgment

The Officer-in-Charge of the Police Station – Borella being the Complainant, had filed information on 16.05.2012 at the Magistrate’s Court of Colombo, in terms of Section 66 of the Primary Courts’ Procedure Act No. 44 of 1979, in case bearing No. 5749/02/2012.

When this matter was mentioned in Court on 16.05.2012, the learned Magistrate acting as the Primary Court Judge, and being of the view that there is a threat to peace or is likely, directed to affix notices on the premises in question. On 03.10.2012, Court allowed the application of the Intervenant Party to intervene in the instant case as an Intervenant Respondent.

Parties filed their affidavits, counter affidavits, documents and after the written submissions were filed, the learned Primary Court Judge delivered the Order on the 20.03.2013 and held inter alia;

- i. It is evident from the evidence of this case that the Respondent has fixed a gate on 09.02.2012 and they have demolished the garage and fixed a new padlock to the house on the same date;
- ii. Since the Respondents have not given the keys of the newly established gate to the Petitioner and his wife as agreed on 19.09.2012, it cannot be believed that the Petitioner and his wife were residing in the questioned premises from 09.02.2012 to 05.04.2012;
- iii. The Petitioner and his wife have failed to produce evidence to prove their possession to the questioned premises within a period of two months immediately before the date on which the information was filed under Section 66;
- iv. The Respondents also have not produced sufficient evidence to prove their possession to the questioned premises;
- v. Therefore, the possession of the questioned premises will not be given to any of the parties of this case.

Being aggrieved by the said Order, the 1st Party-1st Respondent-Petitioner had invoked the revisionary jurisdiction of the Provincial High Court of Colombo by petition dated 05.03.2013.

After supporting the said application, the learned Primary Court Judge reserved the Order for 16.12.2013 and delivered the Order refusing to issue notice on the Respondents stating that there were no sufficient grounds to issue notice and thereafter dismissed the said application. Being aggrieved by the Order of the learned High Court Judge, the 1st Party-1st Respondent-Petitioner Appellant [hereinafter sometimes referred to as the Appellant] had preferred this appeal.

In the instant case, it is observed that the learned Primary Court Judge had not given possession of the disputed premises to any of the parties. It is relevant to note that the 2nd Party-Respondent-Respondents and the Interveniend Respondent-Respondent had not made any application to the High Court to revise or set aside the impugned Order of the learned Primary Court Judge.

Despite the 2nd Party-Respondent-Respondents being served notice through the Fiscal of the District Court of Colombo, had not participated in this appeal. Moreover, the notices issued on the other Respondents were returned undelivered due to unavoidable circumstances. However, it is apparent that the 2nd Party Respondent-Respondents and the Interveniend Respondent-Respondent had not shown due diligence in participating in this appeal.

It appears that the learned Primary Court Judge has dealt with Section 68 of the Primary Courts' Procedure Act and had decided that no one is entitled to the possession of the disputed premises and had not given possession of the disputed premises to either of the parties on the ground that the 1st Party-1st Respondent-Petitioner-Appellant had failed to prove that he was in possession of the disputed premises two months prior to the date on which the information was filed on 16.05.2012.

In terms of Section 72 of the Primary Courts' Procedure Act, a determination has to be made under Section 68 or 69 of the Act, after examining and considering the following;

- a) The information filed and the affidavits and documents filed,

- b) Such other evidence on any matter arising on the affidavits, or documents furnished that Court may permit to lead on that matter and,
- c) Such oral or written submissions as may be permitted by the Judge of the Primary Court at his discretion.

It is to be observed in the instant case, that the Appellant claimed possession of the disputed premises by his affidavit [P7] dated 31.10.2012. Although the 2nd Party-Respondents had not claimed possession of the disputed premises by their affidavits dated 17.10.2012, they claimed possession of the premises in dispute by their counter affidavits [P11A and P11B] dated 17.12.2012 and 17.12.2012. The Interventient Respondent also claimed possession of the disputed premises by his affidavit [P9] dated 04.09.2012.

It was submitted on behalf of the Appellant that the Appellant and his wife had stated in their affidavits with the documents marked 1⊕1 to 1⊕23 that, the Appellant and his wife (1st Party-Respondents) were in continuous possession of the disputed premises, bearing assessment No. 1038/5, Maradana Road, Borella, which is depicted in plan bearing No. 1018, prepared by Licensed Surveyor S.D. Ediriwickrama, marked and produced as 1⊕10, for more than 32 years by residing and running a garage, where the premises had been clearly/separately shown in document marked 1⊕11.

Based on the complaint made by the Appellant to the Police, the case bearing No: 753/02/2012, which had been instituted in the Primary Court, the 2nd Party Respondents tried to fix a gate at the entrance of the premises blocking the entrance of the Appellant's business. Even though it had been directed to the parties in the aforesaid case, not to make any alteration to the premises until the determination of the case, the 2nd Party-Respondents confined the 1st Party-2nd Respondent and her daughter (Appellant's wife and daughter) in the questioned premises on 09.02.2012 by locking the gate.

Thereafter the 2nd Party-Respondents with the support of the Interventient Party had demolished the garage of the Appellant and fixed a new padlock to the house of the Petitioner since the Petitioner was not at the premises at the said time.

As a result of the said demolition, it was impossible for the Appellant and his wife to reside in the questioned premises permanently. However, since there was no legal bar to continue the garage, the Appellant and his workers removed the aforesaid new padlock and had continued his business in the premises in dispute of this Appeal.

Paragraph 19 of the affidavit [P11A] of the 2nd Party-Respondent-Respondents states; “මෙම ස්ථානයේ ගොඩනැගිල්ල ඉවත් කලාට පසු එහි ස්ථිරව පදිංචි වීමට නොහැකි තත්වයක් ඇති වුවද එහි තිබූ ව්‍යාපාර ස්ථානය ව්‍යාපාර කටයුතු කරගෙන යාමට කිසිම නීත්‍යානුකූල බාධාවක් නොමැති බව අප දැනගත් පසු එම ස්ථානයේ නිවසේ දොරටු අනවසරයෙන් දමා තිබූ ඉබ්බා ඉවත් කොට එම ස්ථානයේ ව්‍යාපාර කටයුතු මත්තක ජීනදාස හා ඔහුගේ සේවකයන් විසින් දිගටම කරගෙන යන ලදී”.

On or about 05.04.2012, while the Appellant and one of his workers named Hettiarachchige Don Dharmadasa were working at the garage, they were assaulted and ejected from the premises forcibly by the 2nd Party-2nd Respondent -John De Silva, his wife and two other persons at about 3.00 p.m.;

ඒ අනුව පළමු පාර්ශවයේ මත්තක ගමගේ ජීනදාස (1පා1ව) හා ඔහුගේ සේවකයා වන හෙට්ටිආරච්චිගේ දොන් ධර්මදාස විසින් එම ස්ථානයේ වැඩ කරමින් සිටින විට 05.04.2012 වන දින සවස 3.00 ට පමණ දෙවන පාර්ශවයේ දෙවන වගඋත්තරකරු ජෝන් ද සිල්වා හා ඔහුගේ බිරිඳ තවත් සුභාෂ් සිල්වා විසින් එවන ලද මැරවරයන් දෙදෙනෙකු සමඟ පැමිණ පහර දී එලවා ඇත.

It is pertinent to note that the 2nd Party had not sought possession by their affidavit, and they had not annexed any of the documents with their affidavit. The 2nd Party-2nd, 3rd and 4th Respondents had filed one counter affidavit [P11A] dated 17.10.2017 and the 2nd Party-1st Respondent had filed another counter affidavit [P11B] dated 17.12.2012. According to the counter affidavit [P11A] filed by the 2nd Party-2nd, 3rd and 4th Respondents, Intervient Party had possessed the premises by way of a lease (Replying to paragraph 19 of the affidavit of the 1st Party). It states that; “ පළමු පාර්ශවයේ වගඋත්තරකාරයන්ගේ කිසිම කෙනෙකුට තර්ජන ගර්ජන කිරීමට 1038/5 දරණ ස්ථානයේ පදිංචිව නොසිටි අතර මෙම ස්ථානය බද්දට ලබාගත් අතරමැදි පාර්ශවය පමණක් කිසිදු ආරවුලක් නොමැතිව මෙම ස්ථානයේ රැඳී සිටි අතර පළමු පාර්ශවයේ වගඋත්තරකාරයන්ගේ සේවා ලාභියෙකු විසින් භාරදෙන ලද 1ශ්‍රී 6958 දරණ වාහනය දිරාපත් වෙමින් මෙම ස්ථානයේ නවතා තබා ඇත”.

However, by that counter affidavit, the 2nd Party-2nd, 3rd and 4th Respondents sought the possession of the disputed premises by the prayer; which is as follows;

නඩු අංක 5749/2/2012 දරණ නඩුවේ 1038/5 දරණ පරිශ්‍රය සඳහා නිරවුල් භුක්තිය හා අයිතිය දෙවන පාර්ශවයේ වගඋත්කරකරුවන් සතු බව ප්‍රකාශ කර සිටින ලෙසත්..

The 2nd Party-1st Respondent had not sought the possession of the said premises by his counter affidavit. It is worthy to note that neither 2nd Party-2nd, 3rd and 4th Respondents nor the 2nd Party-1st Respondent had filed any document to prove their possession to the premises in dispute.

The 1st information pertaining to the instant Primary Court case was filed on 16.05.2012 and on the same date, it was ordered by the learned Primary Court Judge to affix notices on the premises. By 20.06.2012, the Fiscal had affixed the notice on the premises and had reported the same to the Primary Court. Even though the case was called four times i.e. on 04.07.2012, 18.07.2012, 08.07.2012, 21.08.2012 to file affidavits, no one made an application to intervene in the matter. However, on 04.09.2012, when the case was called to file affidavits, the Interventient Party made an application before Court to intervene in the matter. Thereafter, having considered objections raised by the parties, the learned Primary Court Judge allowed the intervention on 03.10.2012.

The Interventient Party had stated in his affidavit [P9], that he was the lessee of the deceased Appellant to the said premises during the period of 03.10.2011 to 02.10.2012, and had claimed possession of the disputed premises. The Interventient Party had marked and produced a copy of the said lease agreement as ‘මා 1’ and according to the said agreement, the lessor of the said premises was the deceased Appellant.

The attention of Court was drawn to the counter affidavits filed by the 2nd Party-2nd, 3rd and 4th Respondents. Although they sought possession of the premises, neither 2nd Party-1st, 2nd, 3rd and 4th Respondent-Respondents nor the Interventient Respondent-Respondent possessed the premises in question and/or held dominium over the premises in question. Furthermore, it was stated by the 2nd Party-Respondents that the Appellant had leased out the said premises to the Interventient Party. Hence, it appears that the 2nd Party-Respondents had admitted the dominium of the deceased Appellant over the premises in dispute.

The counter affidavit [P11B] of the 2nd Party-1st Respondent states;

එමෙන්ම මෙයට වසර 5 කට පමණ මෙම ස්ථානයෙන් ඉවත්ව ගිය පළමු පාර්ශවකරු මෙම ආරවුලට විෂය වූ පරිශ්‍රය මෙම නඩුවේ මැදිහත් පාර්ශවකරුට ප්‍රසිද්ධ නොකාරිස් එන්.බී.මනතුංග මහතා විසින් 30.09.2011 දින සහතික කරන ලද අංක 663 දරණ බදු ඔප්පුව මත බදු දී ඇති අතර, ඔහු විසින් මෙහි තිබූ ගරාජය සහ අනෙක් ගොඩනැගිලි ඔහුට අවශ්‍ය ආකාරයට වෙනස් කර ඇත. එසේ වෙනස් කිරීම පිළිබඳව විමසීමේදී ඔහු විසින් එම ස්ථානයේ නිසි අයිතිය පළමු පාර්ශවකරුගෙන් බදු ගෙන ඇති බව දැන ගනිමු. එකී ඔප්පුවේ ඡායා පිටපතක් 2වග ලෙස සලකුණු කොට ඉදිරිපත් කරමි.

It was submitted on behalf of the Appellant that the 2nd Party had no right of possession related to the premises in dispute according to the averments contained in their counter affidavits. Similarly, the Appellant alleges that the Intervenant Party-Respondent is also not entitled to possess the premises in dispute and denied the same.

It was pointed out by the Appellant that the Intervenant Party had made an application before the Primary Court to intervene in the matter about two and half months after notices of the instant case were affixed. It is observed that if the Intervenant Party was in possession of the disputed premises, he should have and could have made an application to intervene in the matter in the first instance after notices were affixed on the premises in dispute.

The Court draws the attention to the lease agreement [මපා1] executed between the deceased Appellant and the Intervenant Respondent. According to the schedule of the said lease agreement, the extent in the corpus is 10.5 perches. However, the lessor has agreed to lease out only 5.0 perches, and not the entire 10.5 perches. Therefore, it is pertinent to note that at the time of executing the said lease agreement [මපා1] on 30.09.2011, possession of the entire 10.5 perches was with the deceased Appellant. Even when assuming 5.0 perches of the corpus had been leased out to the Intervenant Respondent-Respondent, the remaining 5.5 perches has to be in the possession of the deceased Appellant. Hence, Court has to clarify on what basis the learned Primary Court Judge determined that the deceased Appellant is not entitled to the possession of the premises in dispute.

It was submitted on behalf of the Appellant that 5.0 perches of the premises in dispute was leased out to the Intervenant Respondent for the purpose of setting up and carrying on the business of a car sale. It is imperative to note that the Intervenant Party had entered into the said lease agreement [මහ1] with effect from 13.10.2011 for a period of one year. The Intervenant Party Respondent had made the application to intervene in the instant Primary Court case only on 04.09.2012, when there was only a little more than a month left to complete the said lease period.

Although the Appellant had admitted the execution of the said lease agreement with the Intervenant Respondent, Appellant had stated in his counter affidavit that he had not given the possession of the 5.0 perch block of land to the Intervenant Respondent. Furthermore, after executing the said lease agreement, the Intervenant Respondent never came to the disputed premises to demarcate the 5.0 perches, the leased portion of land, and the Appellant had been in possession of the entire 10.5 perch land on the disputed premises, until he was forcibly dispossessed on 05.04.2012.

The Appellant's said position is established by the investigation notes made by Sub-Inspector Priyadharshana, the Investigating officer of the Police Station- Borella. The Police officer had not mentioned about a car sale, which clearly shows that the Intervenant Respondent was not in possession of the said premises.

It is important to reiterate the investigation notes made by the Police officer on 03.05.2012;

මෙම නො. 1038/5 දරණ ඉඩම සම්බන්ධ ආරවුලක් සම්බන්ධ පැමිණිල්ලකි. මෙහි පැමිණිලිකරු පදිංචි යැයි සඳහන් නො. 1038/5 දරණ ස්ථානය මා විසින් පරීක්ෂා කලා. මෙම ඉඩම සහිත ස්ථානයට පාදකව ඇති ස්ථානය ගරාජයක් පවත්වාගෙන ගොස් ඇති ස්ථානයක් බව පෙනේ. මෙම ගරාජයේ කාර්යාල කොටසක් ලෙස වෙනම තනි ගොඩනැගිල්ලක් ඇත. මෙම ඉඩම සම්බන්ධ කොටසේ වල් බිහි වී ඇත. ගොඩනැගිල්ල පවතින කාර්යාලයේ දොර ගලවා ඇත. ජනේල කැඩී ඇත. කිසිවෙක් මෙම ස්ථානයේ පදිංචිව නැත. පදිංචි වීම සඳහා සුදුසු තත්වයක නොපවතින කාර්යාලය ඇතුළත වාහන වල කොටස් හැමතැනම විසිරී ඇත. අපිළිවෙලට ගොඩනැගිල්ල ඇතුළත ඇත. කිසිදු පිරිසිදු කිරීමකට ලක්වී නොමැත. ගරාජයේ වහල කොටස ඉවත් කර ඇත. එම ඉඩම තුළ පෙනෙන්නට ඇත. මේ අවස්ථාවේ ජනදාස ගමගේ හෝ ඔහුගේ බිරිඳ නොසිටී. මෙම ගොඩනැගිල්ල සහිත ස්ථානය වසර ගණනක සිට කිසිවෙකු පදිංචිව නොමැති බව පෙනේ. නමුත් ගරාජයක් පවත්වාගෙන ගිය බවට කරුණු අනාවරණය වේ.

The learned Primary Court Judge had stated in her Order that it is hard to believe the 1st Party Respondent-Petitioner-Appellant and his wife were residing in the disputed premises, after a gate was fixed on 09.02.2012 by the 2nd Party-Respondent-Respondents, since the keys of the said gate had not been handed over to the deceased Appellant as agreed between the parties. However, the 2nd Party-1st Respondent had admitted in his statement to the Police dated 12.05.2012 that the Petitioner (deceased Appellant) had entered to the questioned premises even after the gate was fixed on 09.02.2012.

The 2nd Party-Respondent-Respondent, Thotawattage Don Manuel Subhash de Silva made a statement to the Borella Police on 12.05.2012 which states that;

“මහේස්ත්‍රාත් අධිකරණයේ නඩු අංක 753/12 විභාග වෙමින් පවතිද්දී, පැමිණිලිකරු කිසිම අවසරයකින් තොරව එම ඉඩමට ඇතුළුවී නිතර ආරවුල් ඇති කර ගන්නවා”.

Therefore, it is clear that the learned Primary Court Judge had come to the conclusion that the 1st Party-Respondent-Petitioner Appellants had been in possession of the disputed premises even after 09.02.2012.

It is to be noted that the Intervenant Party had entered into the said lease agreement [මහල] with effect from 03.10.2011 for a period of one year and the Police officer had inspected the premises in dispute pertaining to the lease agreement on 03.05.2012, 7th month from the effective date of the lease agreement. Therefore, according to the observation notes, it amply proves that the Appellant had not given possession of 5.0 perches from the disputed premises to the Intervenant Respondent, since there was no business of a car sale.

The Court draws the attention to the affidavit dated 07.08.2012 of the 1st Party-Respondents placed before the learned Primary Court Judge. Upon the complaint made by the 1st Party-Respondent (deceased Appellant) on 18.02.2013 to the Police Station- Borella regarding an obstruction of road access to enter to the premises bearing No. 1038/5 [the disputed premises in this appeal] by fixing a gate, the Officer-in-Charge had filed an information on 18.02.2013 in terms of Section 66 of the Primary Courts' Procedure Act in case bearing No. 753/2/2012.

Even after institution of the said case, the 1st Party-2nd Respondent had made a complaint [1⊕3] to the Police Station- Borella on 09.02.2012 and the 1st Party-1st Respondent (deceased Appellant) also made a complaint [1⊕4] on the same day evening to the Police Station- Borella. It is to be noted that another complaint [P4] was made by the 1st Party-2nd Respondent on 11.02.2012 to the Police Station- Borella, complaining that the 2nd Party-1st Respondent had threatened their lives. Since the Police- Borella had not taken any action with regard to the aforesaid complaints made by the 1st Party-Respondents, they had made an appeal to the Senior Deputy Inspector General of the Colombo Crime Division.

Consequent to the said the appeal, the matter was referred to the Officer-in-Charge of Colombo Crime Division-Dematagoda to inquire into the said complaints of the 1st Party-Respondents. Thereafter, an officer of the Colombo Crime Division had warned the 1st Party-Respondents not to interfere with the business activities of the 1st Party-Respondent and advised them to institute an action in the District Court to get their rights and ownership to the disputed premises.

However, on 05.04.2012, 2nd Party-1st Respondent and two others had come to the said premises and had assaulted the 1st Party-1st Respondent (deceased Appellant) and his employee H.D. Dharmadasa and chased them out from the premises in dispute. The said 1st Party-1st Respondent and his employee H.D. Dharmadasa had complained [P6A] about the said incident to the Police Station-Borella on the same day. Since no action had been taken by the Borella Police, the 1st Party-1st Respondent (deceased Appellant) had made another complaint on 02.05.2012 to the Police Station- Borella.

In this complaint it was stated that consequent to the complaint dated 05.04.2012, persons who assaulted them had been arrested. It appears that the Police investigated to the matter on 03.05.2012 and recorded statements from the 2nd Party-Respondent-Respondents. Subsequently, the Officer-in-Charge of the Police Station- Borella had filed an information, pursuant to the complaint dated 02.05.2012, on 16.05.2012 in terms of the Primary Courts' Procedure Act in the instant case. It is observed that, the said information does not refer to the complaints dated 05.04.2012 and 02.05.2012, instead refers to the incident that took place on 10.02.2012, which is pertaining to the information filed by Borella Police in the Magistrate's Court of Colombo bearing No. 753/2/2012.

Therefore, it is apparent that the Police had not properly reported facts to the learned Primary Court Judge, especially with regard to the date of dispossession of the 1st Party-Respondents from the premises in dispute.

It is worthy to note the;

The date of eviction- 05.04.2012

The date of complaint- 05.04.2012

The date the information was filed- 16.05.2012

According to the information filed on 16.05.2012 of the instant case, the date of eviction is 10.02.2012. Thus, it is needless to say that the information was filed out of time. In terms of Section 68 (1) of the Act, information should have been filed within two months of the date of complaint. It is clear that the Police have deliberately referred to the date of dispossession as 10.02.2012, to file the information out of time. Therefore, the Court is of the view that the act of the Police should not be held against the Complainant when the Complainant invoked the jurisdiction under Section 66 (1) (a) (i) of the Act as the Complainant expected Police also to act according to Law. Section 66 (1) (a) (i) enunciates that, the Police shall with the least possible delay file an information and failure to adhere to the provisions in Section 66 (1) (a) (i) should not be held against the Complainant-Agrieved Party.

In the case *Sharif and others Vs. Wickramasuriya and others [2010] 1 SLR 255*, Eric Basnayake J. in a similar situation, made an Order directing the learned Judge to issue a writ of possession forthwith to repair the injustice caused to the Petitioner.

The employee of the Appellant namely Hettiarachchige Don Dharmadasa had given an affidavit marked and produced as 1022, submitted with the affidavit of the 1st Party-Respondent-Appellants which states;

Paragraph 2- “මම අංක 5749/02/2012 යටතේ කොළඹ මහේස්ත්‍රාත් අධිකරණයේ විභාග වන නඩුවේ පළමු පාර්ශවකාර වගඋත්තරකරුවන් සතු අංක 1038/5, මරදාන පාර, බොරැල්ල යන ලිපිනයේ පවත්වාගෙන ගිය ගමගේ මෝටර්ස් යන ආයතනයේ කාර්මිකයෙකු ලෙස කටයුතු කළෙමි.

Paragraph 4- මම එකී ආයතනයේ 2007 වසරේ සිට කටයුතු කළ අතර 10.02.2012 දින ගමගේ මෝටර්ස් ගරාජය කඩා බිඳ දමන තුරුද, අනතුරුව 05.04.2012 දින දක්වා ද සේවය කළ බව ගෞරවයෙන් ප්‍රකාශ කරමි.

Paragraph 7- එසේ සිටියදී එනම් අප සේවා ලාභියෙකු විසින් අප වෙත භාරදෙන ලද 1 ශ්‍රී 6958 දරන මෝටර් රථය අලුත්වැඩියාවන් සිදු කරමින් සිටියදී 2012 අප්‍රේල් මස 05 වෙනි දින ජෝන් ද සිල්වා සහ ඔහුගේ බිරිඳ තවත් සුභාෂ සිල්වා විසින් එවන ලද මැරවරයන් දෙදෙනෙකුද විසින් ගරාජයේ හිමිකරු වූ ජීනදාස ගමගේ මහතාට හා මා හට තදබල ලෙස පහර දී පරිශ්‍රයෙන් එළියට ඇද දමන ලදී.

Paragraph 8- මම සේවා කාලය තුළ ඉහත ගමගේ මෝටර්ස් ගරාජයට යාබදව පැවති කුඩා නිවසේ මත්තක ගමගේ ජීනදාස මහතා සමග වරින්වර නැවතී සිටි බවත්, අවසාන කාලය එනම් 05.04.2012 දින දක්වාම ගරාජයේ සේවය කළ බවත් අවධාරණයෙන් ප්‍රකාශ කර සිටිමි”.

According to the said affidavit of the workman [1ව22], it corroborates the version of the 1st Party- 1st Respondent-Petitioner-(deceased Appellant) that they had been in possession of the disputed premises bearing No. 1038/5, Maradana Road, Borella until 05.04.2012.

The said deceased Appellant, Maththaka Jinadasa Gamage, made a complaint to the Borella police on 05.04.2020 which is marked as P6A and states; “අංක 1038/5, මරදාන පාර, බොරැල්ල ජා. හැ. පත් අංක 500903066V යන අය මෙසේ කියා සිටී. මා ඉහත ලිපිනයේ පදිංචිව ඉන්නා අතර මා රැකියාව කරන්නේ ඉහත ලිපිනයේම ගරාජ් එකක් පවත්වාගෙන එහි කාර්මිකයෙකු සේ සේවය කරනවා. 05.04.2012 දින සවස 0500 පමණ ගරාජ් එකේ වැඩ කරමින් ඉන්නා අතරතුර දී මගේ කාර්යාලය තුළට පැමිණි ඒ අවට ප්‍රදේශයේ පදිංචි ජෝන්, ජෝන් ගේ බිරිඳත් ඇතුළුව තව දෙදෙනෙකුත් සමග එකතු වෙලා පහර දුන්නා. මා යටතේ මා සමග සිටි ධර්මදාස යන සේවකයා හටත් අනිත් පයින් පහර දුන්නා. පහර දී මගේ ඇඳුමින් අල්ලා එළියට ඇදල දැමීමා”.

The said position was not disputed by the 2nd Party-Respondent-Respondent or the Intervient Respondent- Respondent.

In view of the evidence placed before the Magistrate, it is evident that the 1st Party-1st Respondent-Petitioner (deceased Appellant) was harassed, assaulted, dispossessed from the premises bearing No. 1038/5 and finally dispossessed from the premises in dispute on or before 05.04.2012.

In terms of Section 68 (3) of the Primary Courts' Procedure Act, if any person who had been in possession of the land or part of it, has been forcibly dispossessed within a period of two months immediately before the date on which the information was filed under Section 66 of the said Act, it's a duty cast on the learned Primary Court Judge, to make a determination to that effect and make an order directing the party dispossessed to be restored to possession and prohibit all disturbances of such possession, otherwise than under the authority of an order or decree of a competent court.

However, in the instant case it is apparent that the learned Magistrate had not properly analyzed or evaluated the evidence adduced by the 1st Party-Respondent-Petitioner-Appellant and the Interventient-Respondent-Respondents, but had come to the conclusion that neither party is entitled to the possession of the disputed premises and furthermore, had not made any Order regarding the possession and restoration of possession to the premises in dispute. The learned Primary Court Judge had solely relied upon the observation notes made by the Investigating officer, had misled herself and had come to an erroneous conclusion. The learned Primary Court Judge had not properly considered the evidence placed before her and had come to the wrong findings of fact and law and had also held against the 1st Party-Respondent-Petitioner-Appellants.

Punchi Nona Vs. Padumasena and Others [1994] 2 SLR 117 it was held;

“The jurisdiction conferred on a Primary Court under Section 66 is a special jurisdiction. It is a quasi-criminal jurisdiction. The primary object of the jurisdiction so conferred is the prevention of a breach of the peace arising in respect of a dispute affecting land. The Court, in exercising this jurisdiction is not involved in an investigation into title or the right to possession which is the function of a Civil Court. He is required to take action of a preventive and provisional nature pending final adjudication of rights in a Civil Court”.

In view of the aforesaid reasons, it is apparent that the learned Primary Court Judge and the learned High Court Judge had failed to appreciate the legal duty cast on the Primary Court Judge in terms of the Primary Courts' Procedure Act.

It is worthy to note that a great injustice had been caused to the deceased Appellant by the erroneous conclusions of the learned Primary Court Judge. Similarly, the learned High Court Judge

also failed to remedy the miscarriage of Justice meted out to the Appellant for the following reasons;

- I. The learned Primary Court Judge has failed to properly evaluate the evidence of this case when she made her Orders dated 20.03.2012.
- II. The learned Primary Court Judge has failed to consider that she has a duty under Section 68 (1) of the Primary Courts' Procedure Act to determine as to who was in possession of the land on the date on which filing of the information under Section 66 took place.

The 1st Party-1st Respondent-Petitioner (deceased Appellant) is entitled to invoke the revisionary jurisdiction of the High Court where exceptional circumstances exist.

Thus, I hold that the learned Primary Court Judge as well as the learned High Court Judge has erred in Law and facts of the instant case. Thus, we set aside the Order dated 20.03.2013 of the learned Primary Court Judge and the Order dated 16.12.2013 of the learned High Court Judge and declare that the 1st Party-1st Respondent-Petitioner (deceased Appellant) is entitled to be restored to the possession of the disputed premises bearing No. 1038/5, Maradana Road, Borella.

Therefore, we allow the Appeal of the substituted 1st Party-1st Respondent-Petitioner-Appellant. Hence, we direct the learned Primary Court Judge, to issue a writ to restore possession of the substituted 1st Party-1st Respondent-Petitioner-Appellant on behalf of the deceased Appellant in order to repair the injustice caused to the deceased Appellant.

No Order is made regarding costs of this appeal.

Appeal allowed.

JUDGE OF THE COURT OF APPEAL

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

I agree.

JUDGE OF THE COURT OF APPEAL