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

The Appeal against order in Revision No. 110/14 of the Provincial High Court in the Central Province in the Democratic Socialist Republic of Sri Lanka.

Officer-in-Charge,
Police Station,
Katugastota.

Complainant

CA PHC No: **22/2017**

HC Kandy Case No.
P.H.C. RA 100/14

Kandy Magistrate Court
Case No: 72264

Vs.

1. Rupassara Gedara Gunawansa,
   No. 44/1, Medamahanuwara.
   Party to the 1st Part-1st Respondent

2. Mallawage Thushara Peiris,
   No. 359, Nawayalatenne,
   Katugastota.
   Party to the 2nd Part-2nd Respondent

3. Tennakoon Mudiyanselage Anura Gunatillake,
   No. 359, Madawala Road,
   Katugastota.
   Added Respondent

AND

Rupassara Gedara Gunawansa,

No. 44/1, Medamahanuwara.
Party to the 1st Part-Petitioner

Vs.

1. Mallawage Thushara Peiris,

No. 359, Nawayalatenne,
Katugastota.

Party to the 2nd Part-1st Respondent

2. Tennakoon Mudiyanselage Anura Gunatillake,
No. 359,
Madawala Road,
Katugastota.

Added Party-2nd Respondent

AND NOW BETWEEN

Rupassara Gedara Gunawansa,

No. 44/1, Medamahanuwara.

Party to the 1st Part-Petitioner-Appellant

Vs.

1. Mallawage Thushara Peiris,
No. 359, Nawayalatenne,
Katugastota.

Party to the 2nd Part-1st Respondent-Respondent

2. Tennakoon Mudiyanselage Anura Gunatillake,
No. 359,
Madawala Road,
Katugastota.

Added Party-2nd Respondent-Respondent

Before: **Prasantha De Silva, J.**

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

Counsel: D.T. Padmasiri with S.P. Wijethunga for Party to the 1st Part-Petitioner-Appellant.

Dimuthu Senarath Bandara with Savithri Fernando and Keheliya

Alahakoon for the Party to the 2nd Part-1st Respondent-Respondent.

Written Submissions tendered on:	06.05.2021 and on 05.11.2021 by the Party to the 1st Part-Petitioner-Appellant. 07.10.2021 by the Party to the 2nd Part-1st Respondent-Respondent and Added Party 2nd Respondent-Respondent.
Argued on:	Parties agree to dispose the Appeal by way of written submissions.
Decided on:	03.03.2022

Prasantha De Silva, J.

Judgment

The Officer-in-Charge of Police Station Katugastota filed an information on the 30.03.2014 in terms of Section 66 (1) (a) of Primary Courts' Procedure Act No. 44 of 1979 in the Magistrate's Court of Kandy, pertaining to a dispute on the possession of premises No. 359 in Navayalatenne Katugastota between Party of the 1st Party-1st Respondent and Party of the 2nd Part-2nd Respondent under case bearing No. 72264.

It appears that Tennakoon Mudiyanselage Anura Gunathilake has been subsequently added as the 2nd Party-2nd Respondent. After following the procedure stipulated in Part VII of the Primary Courts' Procedure Act the case had been taken up for inquiry. Consequently, parties have filed their respective affidavits, counter affidavits and documents.

After, the conclusion of the inquiry, the learned Magistrate acting as the Primary Court Judge delivered the Order on 29.09.2014 concluding that Party to the 1st Part-1st Respondent had failed to satisfy Court that he has been forcibly dispossessed within a period of 2 months immediately before the date on which the information was filed.

Furthermore, since the learned Magistrate has not been satisfied with the evidence placed before Court by 1st Party and 2nd Party-Respondents in respect of their claims of possession to the disputed

premises, the learned Magistrate had decided that he is unable to make a determination in terms of Section 68(1) of the said Act. Moreover, the learned Magistrate, having observed the dispute is already before the District Court of Kandy, rejected the claims of both parties and advised them to resolve the dispute through a competent Court and warned them to maintain peace.

Being aggrieved by the said order of the learned Magistrate, Party of the 1st Part-Respondent-Petitioner has invoked the revisionary jurisdiction of the Provincial High Court of Kandy in case bearing No. 100/14. The said application was heard by learned High Court Judge and the learned High Court Judge had concluded that there's no error of Law or facts fit enough to revise the order of the learned Magistrate and had dismissed the said revision application.

Having been dissatisfied with the determination of the learned High Court Judge, the Party to the 1st Part-Respondent-Petitioner-Appellant (hereinafter referred to as the Appellant) has preferred this appeal seeking to set aside the orders made by the learned Magistrate dated 24.09.2014 and the learned High Court Judge by his order dated 06.03.2017.

It was the contention of the Appellant that the orders made by learned Primary Court Judge and Judge of the Provincial High Court do not comply with Section 66 and 68 of the Primary Courts' Procedure Act. Since the learned Primary Court Judge has opted to make a determination under Section 68 of the said Act, the failure to make such a determination amounts to a miscarriage of Justice.

The Appellant had contended that the learned Magistrate should have considered the title to the premises in dispute in his favour. The Party to the 2nd Part -1st Respondent-Respondent and added Party-2nd Respondent-Respondent had taken up the position that learned Magistrate has not misdirected himself in concluding he is not satisfied of the fact that Appellant has been dispossessed from the property within 2 months prior to the filing of the information.

Subsections (1) and (3) of Section 68 of the Primary Courts' Procedure Act state as follows;

1) Where the dispute relates to the possession of any land or part thereof it shall be the duty of the Judge of Primary Court holding the inquiry to determine as to who was in possession

of the land or the part on the date of filing of the information under Section 66 and make order as to who is entitled to possession of such land or part thereof.

(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 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.

Accordingly, the main issue for the determination under Section 68(1) is, as to who was in possession of the land or part thereof on the date of filing the information under Section 66. However, when there is an allegation of a forcible dispossession, the Court can act under Section 68(3) and make a determination as to whether such dispossession has been affected within two months prior to filing of the information.

It was the contention of the Respondents that the Appellant's claim is entirely based on forcible dispossession. It is apparent that in such circumstances, Section 68(3) of the Act applies and therefore, the learned Magistrate has quite correctly proceeded to inquire whether requisites of Section 68(3) have been met.

It was submitted on behalf of Respondents that it is settled law that Section 68(3) becomes applicable only if the Judge of the Primary Court 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 Vs. Thangarajah 1982 2SLR 693***). This position has been cited in many recent Judgments such as ***Ranjith Mervyn Ponnamperuma Vs. Warahena Liayanage Viraj Pradeep Kumara De Alwis and Others CA PHC/71/2008***, decided on 12.06.2020.

According to Section 68(3), satisfying himself (by the Judge) of such forcible dispossession within the said time period is a necessary and mandatory pre-requisite when making a determination to

that effect. It is only if such a determination could be made, the Judge of the Primary Court is empowered to make an order of restoration of possession. In other words, the Section bears no ambiguity, hence if the Judge of the Primary Court is not satisfied that there has been such forcible dispossession within two months of the filing of information, he is neither expected to make a determination, nor a subsequent order of restoration of possession.

According to Section 68(3) of the Act, it emphasizes on the need for a Judge to satisfy with elements of a forcible dispossession. Since the Primary Court Judge is empowered to make an order of restoration of possession, it could be made only after a determination of forcible dispossession.

It was further submitted by the Respondents that the learned Magistrate has analyzed and evaluated the evidence placed before him by both parties and has concluded stating the learned Magistrate has not been satisfied of the Appellant being forcibly dispossessed within the relevant period. Thus, learned Magistrate decided not to make any determination in terms of Section 68(3). Therefore, the learned Magistrate refraining from making a determination in terms of Section 68(3) bears no illegality or irregularity.

Be that as it may, in terms of Section 68(1) of the Act, it is a duty of the learned Primary Court Judge to determine as to who was in possession of the premises in dispute.

In terms of Section 72 of the Act,

A determination and order under this part 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 submission as may be permitted by the Judge of the Primary Court in his discretion.

It is to be noted that the affidavit dated 19.05.2014 filed by the 2nd Party-2nd Respondent (Added Respondent) states in paragraph 3;

> "03. එසේම මෙම නිවසේ සමහර අවස්ථා වලදී අප වෙනුවෙන් නිවස බලා ගැනීම සඳහා දෙවන වගඋත්තරකරු භුක්ති විඳින බවට බවද ප්‍රකාශ කරන අතර මෙම නඩුවට පාදක වූ දිනයේදී මෙම දෙවන වගඋත්තරකරු සිටි බවද ප්‍රකාශ කරන අතර, දෙවන වගඋත්තරකරු මා සමඟ මාගේ භාර්යාව වෙනුවෙන් සිටි බව කියා සිටියි".

Thus, the added Party-2nd Respondent-Respondent affirmed that the Party to the 2nd Part-1st Respondent-Respondent was in possession of the disputed premises on the relevant date.

However, the 2nd Party-1st Respondent-Respondent in his affidavit dated 19.05.2014 and counter affidavit dated 23.06.2014 had not claimed the possession of the disputed premises, instead had prayed to have it declared that the added 2nd Party-2nd Respondent is entitled to the possession of the premises in dispute.

The Court observes that the 2nd Party-1st Respondent-Respondent had vaguely stated in his affidavit dated 19.05.2014, in paragraph 4 that he possessed the premises on behalf of the added 2nd Party-2nd Respondent in his absence.

> "04. මෙම නඩුවේ තුන් වන වගඋත්තරකරු අනුර ගුණතිලක යන අය වෙනුවෙන් ඔහු නොමැති අවස්ථා වල දී මෙම දේපල බලා ගනිමින් ඔවුන් වෙනුවෙන් භුක්ති විඳි බවද,..".

It is relevant to note the complainant made on 25.02.2014 to the Police Station – Katugastota by the Appellant, which states;

"රූපස්සර ගෙදර ගුනවංශ. වයස අවු. 58 සි/බු පුරුෂ අවිවාහකයි. රැකියාව ව්‍යාපාරික. පදිංචිය අංක 44/1, මැද මහනුවර, ජා.හැ.අංකය: 550173174V. මෙසේ කියයි. මම ඉහත ලිපිනයේ පදිංචිව සිටින අතර මට අයිති ඉඩමක් නවයාලතැන්නේ තිබෙනවා. එහි අංක 359, නවයාලතැන්න (ගංගාරාමය ඉදිරිපිට) ඒ ඉඩමට සහ නිවසට නාඳුනන පුද්ගලයෙක් ඇතුල් වෙලා ඉන්නවා. ඉඩමට වාහන කිහිපයක් දාලා තියෙනවා. මම ඒ අය දන්නේ නැහැ. මම ඉල්ලා සිටින්නේ මාගේ නිවසෙන් සහ ඉඩමෙන් ඔවුන්ව අයින් කර දෙන ලෙසයි".

According to the said complaint, unknown person had entered the premises No. 359, Navayalatenne and had parked few vehicles in the said premises.

On 27.02.2014, P.C Kumarasinghe had gone to investigate the said premises No. 359 – Navayalatenne and had recorded a statement from the 2nd Party-1st Respondent-Respondent, Malwalage Thushara Pieris.

“මල්වලගේ තුෂාර පීරිස්. වයස අවු. 40 සි/බු. රැකියාව යුධ හමුදා විශ්‍රාමික. ලිපිනය අංක 359, නවයාලතැන්න, කටුගස්තොට මෙසේ ප්‍රකාශ කරයි. මම දැනට තාවකාලිකව මුරකරුවෙක් හැටියට ඉහත ලිපිනයේ පදිංචිව සිටිනවා. තවද මාගේ බිරිඳත්, දරුවන් හතර දෙනාත් මෙම නිවසේ පදිංචිව සිටිනවා. මම මෙම නිවාසයට ඇවිත් මාස 1 ½ක් විතර වෙනවා. නමුත් මෙම නිවසට මම බලෙන් ආවේ නැහැ. මට එන්න කිව්වේ වජිරා බෝගහලන්ද නෝනාත් ගෙදර තනියම ඉන්නේ. නමුත් අපි ඉන්නේ ඒ නෝනාට තනියටත් එක්ක.නමුත් ගුනවංශ පැමිණිල්ලක් දාලා තියෙනවා ඇයි කියලා දන්නේ නැහැ…………………………..

....මම දැනට ගරාජයක් කරනවා පොල්ගොල්ලේ. ඒකේ හදන වාහන සේවා කරනවා. මේ වාහන දෙකක තියෙනවා. මම දැනට ඉන්න නිවසේ මිදුලේ අංක 28 ශ්‍රී 6769 හා 6- 4711 කාර් රථයයි තියෙන්නේ. ඒ වාහන දෙක දැන් මගේ භාරයේ තියෙන්නේ”.

According to the said statement, it is pertinent to note that the 2nd Party-1st Respondent was in possession of the premises No. 359 – Navayalatenne, the disputed premise, on 27.02.2014. It was further established by the observation notes of the investigating officer, which states;

“මෙම නිවසේ වජිරා යන අය පදිංචිව සිටී. පීරිස් යන අය එම නිවසේ පදිවි වජිරා බෝගහලන්ද යන අයගේ දැනුම් දීම පරිදි නිවසේ පැමිණ සිටී. මිදුල ඉදිරියේ පීරිස් යන අයගේ කාර් රථයක් හා ලොරි රථයක් නවතා තිබේ. වෙනත් වාහන නොමැත”.

In view of the statement of the 2nd Party-1st Respondent-Respondent and the investigating officer’s observation notes, it is observed that not only the 2nd Party-1st Respondent-Respondent but also the wife of the added Party-2nd Respondent was in possession of the premises in dispute on 27.02.2014.

Furthermore, the said Vajira Bogahawatta is not a party to the instant action and the possession of the added 2nd Party-2nd Respondent has not been established.

Since, the information was filed on 31.03.2014, it is apparent in terms of Section 68(1) of the Act, that the 2nd Party-1st Respondent-Respondent was in possession of the premises in dispute as at the date of filing of the information under Section 66 of the Act.

Therefore, the learned Magistrate has erred in law and facts by failing to determine the possession of the 2nd Party-1st Respondent-Respondent and by not making any order in respect of the 2nd Party-1st Respondent's entitlement to the possession of the premises in dispute in terms of the provisions of Part VII of the Primary Courts' Procedure Act No. 44 of 1979.

In view of the foregoing reasons, I hold that the order of the learned Primary Court Judge is erroneous. Since the learned High Court Judge has affirmed the said order of the learned Primary Court Judge, I hold that the learned High Court Judge too was wrong. Thus, we set aside both orders of the Primary Court as well as the High Court Judge.

Hence, I hold that the 2nd Party-1st Respondent-Respondent is entitled to the possession of the premise bearing No. 359, Navayalatenne, in terms of Section 68(1) of the Primary Courts' Procedure Act.

Therefore, we set aside the order dated 29.08.2014 made by the learned Magistrate and the order dated 06.03.2017 by the learned High Court Judge and decide this appeal in favour of the Party of the 2nd Part-1st Respondent-Respondent. No cost of appeal is awarded. Parties have to bear their own costs.

JUDGE OF THE COURT OF APPEAL

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

I agree.

JUDGE OF THE COURT OF APPEAL