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

In the matter of an application for an Appeal against the Order made in revision by the Provincial High Court holden at Balapitiya bearing case no. Rev/917/15 dated 06/04/2017 in terms of Article 138 of the Constitution read with Article 154 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

Court of Appeal Case No:
CA (PHC) 58/2017

High Court Balapitiya Case No:
917/15

Magistrate's Court Balapitiya Case No. 71635

IN THE MAGISTRATE'S COURT

Lorensuhewage Sheelawathie alias
Lorensuhewage Sheela,
No.21/3,
Poya Seemawa Mawatha,
Maha Ambalangoda,
Ambalangoda.

Petitioner

Vs.

Mawanana Hewa Kapila Lalantha De Silva,
No.08, Mahimulla Road,
Maha Ambalangoda,
Ambalangoda.

Respondent

1. M H Mallika De Silva,
   No.47, 3rd Lane,
   Rathamalana.

2. M.H. Wimala De Silva,
   Shangrilla,
   Bindu Wewa,
   Bandarawela.

Intervenient Respondents

IN THE HIGH COURT

Lorensuhewage Sheelawathie alias
Lorensuhewage Sheela,
No.21/3,

Poya Seemawa Mawatha,
Maha Ambalangoda,
Ambalangoda.

Petitioner-Petitioner

Mawanana Hewa Kapila Lalantha De Silva,
No.08, Mahimulla Road,
Maha Ambalangoda,
Ambalangoda.

Respondent-Respondent

1. M H Mallika De Silva,
   No.47, 3rd Lane,
   Rathamalana.

2. M.H. Wimala De Silva,
   Shangrilla,
   Bindu Wewa,
   Bandarawela.

Intervenient Respondent-Respondents

NOW IN THE COURT OF APPEAL

Mawanana Hewa Kapila Lalantha De Silva,
No.08, Mahimulla Road,
Maha Ambalangoda,
Ambalangoda.

Respondent-Respondent-Appellant

Lorensuhewage Sheelawathie alias
Lorensuhewage Sheela,
No.21/3,
Poya Seemawa Mawatha,
Maha Ambalangoda,
Ambalangoda.

Petitioner-Petitioner-Respondent

1. M H Mallika De Silva,
   No.47, 3rd Lane,
   Rathamalana.

2. M.H. Wimala De Silva,
   Shangrilla,

Bindu Wewa,
Bandarawela.
Intervenient Respondent-Respondent-Respondents

Before:	**Prasantha De Silva, J.**
	K.K.A.V. Swarnadhipathi, J.
Counsel:	Dr. Sunil F.A. Cooray with Nilanga Perera AAL for the Appellant. Respondent-Respondent-Respondents are absent and unrepresented.

Both Parties agreed to dispose the matter by way of Written Submissions.

Written submissions tendered on:	31.05.2022 for the Respondent-Respondent-Appellant
Order delivered on:	01.12.2022

Prasantha De Silva, J.

Judgment

It appears that the said Petitioner-Petitioner-Respondent namely Lorensuhewage Sheela had instituted action in the Magistrate's Court of Balapitiya by filing an information in terms of Section 66(1)(b) of the Primary Courts' Procedure Act No.44 of 1979. Consequent to following the procedure stipulated in the Primary Courts' Procedure Act, and after the conclusion of the inquiry, the learned Magistrate who was acting as the Primary Court Judge delivered the Order in favour of the Respondent-Respondent-Appellant [hereinafter sometimes referred to as the Appellant].

This appeal emanates from an Order dated 06.04.2017 made by the learned High Court Judge of the Southern Province holden at Balapitiya, which set aside the said Order of the Primary Court Judge dated 27.03.2015 and decided the possession of the disputed portion of land in favour of the Petitioner-Petitioner-Respondent [hereinafter sometimes referred to as the Respondent].

It was submitted that Respondent's husband carried out a gold pawning business and he had passed away on 07.08.2011. After the demise of the Respondent's husband,

she continued to carry on the gold pawning shop. On or about May 2013, the Respondent had left Sri Lanka and moved to USA to live with her son. At the time of leaving the country, the Respondent had padlocked the doors of the said pawning shop.

After a lapse of almost a year, Respondent had come back to Sri Lanka on or about 29.04.2014 and had visited the said business premises on 03.05.2014 where she had observed that the veranda which belongs to the said shop premises was enclosed from three sides and locked. It was the contention of the Respondent that Appellant has constructed the same and blocked the veranda.

However, the Appellant had taken the position that the premises in dispute is a shop premises bearing address No. 20, Methlin Building, Station Road, Amabalangoda. According to the sketch filed by the Police and the observation notes, the said premises is a shop premises depicted as (E), where the Respondent's husband had carried out a pawning business. What is marked as "D" in the said sketch, a portion immediately adjoining the Respondent's husband's shop marked as "E", is the disputed portion of the premises in the instant case. The said portion marked "D" as well as another portion marked "D" adjoining the shop area of M.H.M Silva is the disputed portion in these proceedings. The disputed portion has been in the possession of the Appellant by constructing three doors on three sides to enclose the said portion. The fourth side is an entrance door to shop premises marked "E" which has been locked up by the Respondent while she was away from Sri Lanka for about one year. The Appellant is also having a shop adjoining the shop premises "E". He had kept certain items belonging to his shop in the said enclosed area which he had locked by means of padlocks.

However, it was the contention of the Appellant that the above said shop premises No.20 was never in possession of the Respondent after the demise of the Respondent's husband in 07.08.2011. It was submitted on behalf of the Appellant that the said pawning shop was owned by one Mawana Hewa Maththananda De Silva. Under license, the Respondent's husband was carrying out the gold pawning business. Mawana Hewa Maththananda De Silva had died on 10.02.2002 leaving a Last Will dated 06.09.0996 prepared by A. M. Bandularatna Notary Public, bearing

No. 4638(ව2). By the said Will, the deceased siblings, namely Mawanana Hewa Mallika De Silva, Mawana Hewa Wimala De Silva, Mawana Hewa Neelananda De Silva (who was the deceased husband of the Respondent) and Mawanana Hewa Padmananda De Silva (who is the Respondents' father) were appointed as successors.

The legal rights of the pawning shop were therefore vested in them under and in terms of probate/43 issued on 27.04.2012. Before the issuance of the probate, in March 2012, the electricity supply of the pawning shop had been disconnected. At the time of issuing the probate, the Appellant had become aware that the Respondent was trying to sell the pawning shop without the consent of the Appellant or the other two siblings who were co-owners of the pawning shop (Intervenient Respondents in this application) by virtue of the Last Will. However, at the time of coming into possession of the pawning shop, no one was in possession of the same. However, there had been padlocks placed on the doors of the pawning shop. The Appellant thereafter had installed new padlocks on the door of the pawning shop, above the existing padlocks and had covered the veranda of Lot E (depicted by the middle portion of Lot D), from three sides and enclosed the said portion on or about March 2014. New roller gates had been installed in front of the said veranda and the same had been used by the Appellant to store goods belonging to him.

It is pertinent to note that after the inquiry, the learned Primary Court Judge had made his Order under Section 68(1) of the Primary Courts' Procedure Act on the assumption that the Appellant was in possession of the disputed portion of the premises, two months prior to the date on which the information was filed.

The disputed portion of the premises in the instant action referred to in the sketch filed by the Police, is the front portion of Lot E in the sketch which forms part of Lot D, and has been enclosed from three sides by the Appellant. The said enclosure was done by the Appellant by building two gates from left and right side of the front portion of Lot E and by installing a roller gate in front of the door of the pawning shop bearing No.20, thereby enclosing three sides of the disputed portion of the premises and it is observable that the fourth side is the entrance door of the shop premises No.20 marked as "E", which the Respondent had locked when she left Sri Lanka. As evinced by the Police Report dated 17.08.2014, the Appellant is having a

shop adjoining the shop premises "E", which is described as M.H.M. Silva's. It was submitted by the Appellant that he had been using the said enclosed area to store goods which belong to him.

It was the contention of the Appellant that he came into possession of the pawning shop soon after the probate was issued in 2012. Appellant had enclosed the front portion of Lot E (part of Lot D), which is the disputed premises in the instant case, on or about March 2014. At the time of such construction, the Respondent had not been in Sri Lanka, but had been residing with her son in the United States of America.

It was pointed out by the Appellant that he was in possession of the disputed portion of premises and that it was enclosed from all three sides with gates. A new roller gate had been installed in front of the entrance door of the pawning shop. Goods which belong to the Appellant had been stored in the relevant portion. It was submitted that the Appellant was in actual possession and was in control of the same. Therefore, it was argued that Appellant was in possession of the disputed portion of the premises at the time Respondent filed the instant application on 26.06.2014.

It was the position taken by the Appellant that he enclosed the disputed portion of premises in March 2014 for a period of almost one year when the Respondent was out of the country. The Respondent's position was that Respondent came into possession of the pawning shop premise No.20 in 2012 and when she was out of the country, Appellant had enclosed the front portion of Lot E, shop premises No.20. However, the learned Primary Court Judge had determined that the Appellant was in possession of the disputed portion of the premises two months prior to the date on which the information was filed and held against the Respondent. However, the learned High Court Judge has observed that the disputed portion of premises is a corridor which gives access to the Respondents' shop premises [E] bearing No.20.

It was argued that the learned Judge of the High Court had come to an erroneous conclusion in stating that the front portion of the pawning shop is part of a common corridor. It was submitted on behalf of the Appellant that no evidence was adduced to indicate whether the disputed portion is a common corridor or not. It was

contended by the Appellant that the front area of Lot E (part of Lot D) morefully depicted as Lot F (sketch provided by Appellant) is part of a pawning shop and that it is a veranda adjacent to shop premises [E] bearing No.20 and that it does not constitute a right of access. In this respect, it is observable that the only access to shop premises [E] bearing No.20 is the disputed portion of premises, which can be construed as a veranda or a corridor to provide access to [E] bearing No.20.

Be that as it may, the learned High Court Judge has observed that the Respondent retained possession of premises bearing No.20, described as a pawning shop. It appears that the Respondent retained control of the said premises by padlocking the same before she left the country. Since the said premises was kept locked by the Respondent, it confirms the fact that the Respondent had actual control and management of the same. Thus, it is apparent that the learned Primary Court Judge has been erroneous in deciding that the Respondent did not have possession of the said premises bearing No.20 on the basis that she had left the country and gone abroad.

Sohoni in his treatise on the Indian Criminal Procedure, 1973, Vol.2, 18th Edition at page 1331 describes that the proviso to Section 14(5) of the Indian Criminal Procedure which could boast of parentage over its Sri Lankan counterpart in Section 66 of the Primary Courts Procedure Act No.44 of 1979 is founded on the principle that forcible and wrongful dispossession is not to be recognized under the Criminal Law. The word “dispossessed” means to be out of possession, removed from the premises, ousted, ejected or excluded. Even where a person has a right to possession, he cannot do so by taking the law into his hand. That will make it a forcible entry otherwise that in due course of law. It would be a case of both forcible and wrongful dispossession.

Iqbal vs. Majedudeed and Others [1999] 3 SLR 213 took the view that the words ‘forcibly dispossessed’ in Section 68(3) of the Primary Courts’ Procedure Act No.44 of 1979 as amended means that dispossession had taken place against the will of the person entitled to possess and without authority of the law.

In the course of the Judgement, the learned Judge acknowledged possession to be of two kinds.

1. When a person has direct physical control over a thing at a given time – *actual possession*.
2. When he is not in actual possession, he may have both power and intention at a given time to exercise dominion or control over a thing either directly or through another person – *constructive possession*.

In Black's Law Dictionary 9th Edition, the term constructive possession is defined as control or dominion over a property without actual possession or custody of it.

When considering the Judgment ***Iqbal Vs. Majedudeen and Others [supra]***, it appears that the Respondent in this appeal had both power and intention at a given time to exercise dominion or control over the said premises, it can be construed that the Respondent had constructive possession of the premise bearing No.20. It is worthy to note that the Appellant had not established either directly or indirectly the fact that he dispossessed the Respondent from the said premises and entered into possession of the same.

It was the contention of the Respondent that obstructing access to her shop premises bearing No.20, blocking the corridor by erecting gates and constructing walls, preventing her from having possession of shop premises (E), amounts to an obstruction of access to shop premises [E] bearing No.20.

The learned High Court Judge has stated in his Order:

"නඩුවට විශය ගත දේපලේ භුක්තියට වන බාධා ඉවත් කිරීමේදී ඊට ප්‍රවේශ වන කොටසේ ඇති බාධාවන් ඉවත් කල යුතුය. මන්ද, නඩුවට විශයගත දේපල වසා දමා පෙත්සම්කාරිය විදේශ ගත වීම මගින් ඇය එකී කාලය තුල හෝ අනාගතයේදී නඩුවට විශයගත දේපලට ප්‍රවිශ්ට වීමට තිබූ ඉඩකඩ අතහැර දමීමට අදහස් කර නැත. එම කොටස වසා දමා නැත්තේ, එය විවුර්ත පොදු ස්ථානයක් බැවිනි. එබැවින් කඩ කාමරය වසා දමා තිබීම මගින් ඉහත කී කොරිඩෝව හරහා නඩුවට විශයගත දේපලට ගමන් කිරීමට තිබූ අයිතිය පෙත්සම්කාරියට අහිමි විය යුතු නැත. ඒ අනුව, නඩුවට විශයගත දේපලේ භුක්තිය පෙත්සම්කාරියට හිමි කර දීමේදී, ඒ සඳහා වන ප්‍රවේශය ද බාධාවකින් තොරව තිබිය යුතුය. නඩුවේ ප්‍රථම තොරතුරු වාර්තාව

> ඉදිරිපත් කරන විට වගඋත්තරකරු ද එකී කොරිඩෝවේ භුක්තිය දරා සිටිය ද, එය පොදු ප්‍රවේශ අයිතියක් බැවින් ඒ සඳහා පෙත්සම්කරුට ඇති අයිතිවාසිකම් තහවුරු කල යුතුය".

The position taken by the Appellant was that constructive possession of the corpus will only extend until the day Appellant placed the padlocks since the Appellant had put his own locks to shop premises No.20 in March 2012. Hence, it was the contention of the Appellant that at the time the Appellant installed the new padlocks, the Respondent's constructive possession has seized to exist, which amounts to dispossession of the Respondent from the said premises (E).

It is apparent that although the Appellant had put his own locks, Appellant had not broke open the padlocks placed by the Respondent and entered the shop premises. Thus, it is seen that the Appellant had only disturbed the possession of the Respondent, which does not amount to dispossession of the Respondent from the pawning shop premises [E]. Therefore, it clearly manifests that at the time of filing the information, Respondent was in possession of the shop premises bearing No.20. At this point, it is relevant to note that since the possession of the Respondent is established, the Respondent is entitled to have access to the said shop premises No.20 (E).

It is evident that the disputed portion of the premises is part of a common corridor which gives access to shop premises bearing No.20 [E]. At this juncture, the impugned dispute has to be determined in terms of Section 69 of the Primary Courts' Procedure Act in deciding whether the Respondent is entitled to use the said disputed portion of premises to access the said shop premises No.20.

It is seen by the evidence placed before the learned Primary Court Judge that the dispute is relating to an interruption of possession of the shop premises and access to the same. Apparently, the dispute is not entirely relating to the possession of shop premises bearing No. 20. Thus, Section 68(1) does not apply. Moreover, since no dispossession has taken place with regard to the shop premises bearing No.20, Section 68(3) too is not applicable. As such, the Order of the Primary Court Judge should have been made under Section 69 of the Primary Courts' Procedure Act and

not under Section 68 as the dispute between the parties does not relate to right of possession.

In the case of ***Ramalingam Vs Thangarajah [1982] 2 SLR 693***, *Sharvananda, J.* (as he then was) stated that,

> "On the other hand, if the dispute is in relation to any right to any land other than right of possession of such land, the question for decision, according to Section 69(1), is who is entitled to the right which is subject of dispute. The word "entitle'' here connotes the ownership of the right. The Court has to determine which of the parties has acquired that right, or is entitled for the time being to exercise that right. In contradistinction to Section 68, Section 69 requires the Court to determine the question which party is entitled to the disputed right preliminary to making an Order under Section 69(2)."

It is important to note Section 75 of the said Act which deals with the meaning of word 'dispute' affecting land:

> Section 75- In this Part "dispute affecting land" includes any dispute as to the right to the possession of any land or part of a land and the buildings thereon or the boundaries there of or as to the right to cultivate any land or part of a land, or as to the right to the crops or produce of any land, or part of a land, or as to any right in the nature of a servitude affecting the land and any reference to " land " in this Part includes a reference to any building standing thereon.

What is meant by 'entitled' and the approach that should be adopted by the Primary Court when considering whether a party is entitled to a right, was considered by this Court in the case ***Ananda Sarath Paranagama Vs. Dhammadhinna Sarath Paranagama and Others [CA PHC APN 117/2013]***. It held;

> "There are two ways in which an entitlement can be proved in the Primary Court. They are:
>
> - By adducing proof of the entitlement as is done in a civil court.
> - By offering proof that he is entitled to the right for the time being."

In view of the aforesaid reasons, it clearly shows that the learned High Court Judge had gone through a fair, reasonable and equitable process in the revision application

before him and had considered the facts and law. Consequently, the learned High Court Judge had correctly decided that the matter in issue comes within the purview of Sections 69(1) and 69(2) of the Primary Courts' Procedure Act.

Thus, we see no reason for us to interfere with the Order of the learned High Court Judge dated 06.04.2017. Thus, we set aside the Order of the learned Primary Court Judge dated 27.03.2015 and affirm the Order of the learned High Court Judge dated 06.04.2017.

Hence, the appeal is dismissed with cost.

JUDGE OF THE COURT OF APPEAL

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

I agree.

JUDGE OF THE COURT OF APPEAL