

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

In the matter of an application for revision under an in terms of Section 11(1) of the High Court of the Provinces (Special Provisions) Act No.19 of 1990.

1. Mohomed Mohideen Shaul Hameed
2. Shaul Mohomed Mohideen Shabin
3. Mohamed Shahim Shahul Hameed

All from No.52 1/1, Messenger Street,  
Colombo 12

**Petitioners**

CA (PHC) Appeal No:  
CPA 13/2021

HC of Colombo Case No : HCRA  
82/2018

Primary Court of Colombo Case  
No: 73901/6/2017

**Vs.**

1. Aysha Hameed
2. M. Rushdi Nisar

Both from 107/2B, Saranakara  
Mawatha, Kalubowila,  
Dehiwala

**Respondents**

**AND**

1. Aysha Hameed
2. M.Rushdi Nisar

Both from 107/2B, Saranakara  
Mawatha, Kalubowila,  
Dehiwala

**Respondent-Petitioners**

1. Mohomed Mohideen Shaul Hameed
2. Shaul Mohomed Mohideen Shabin
3. Mohamed Shahim Shahul Hameed

All from No.52 1/1, Messenger Street,  
Colombo 12

**Petitioner-Respondents**

**AND NOW**

1. Aysha Hameed
2. M.Rushdi Nisar

Both from 107/2B, Saranakara  
Mawatha, Kalubowila,  
Dehiwala

**Respondent-Petitioner-Petitioners**

**VS**

1. Mohomed Mohideen Shaul Hameed
2. Shaul Mohomed Mohideen Shabin
3. Mohamed Shahim Shahul Hameed

All from No.52 1/1, Messenger Street,  
Colombo 12

**Petitioner-Respondent-Respondents**

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

**Counsel:** Harsha Soza, PC with Chandana Boteju AAL and Kaushika Boteju AAL  
for the Respondent-Petitioner-Petitioners  
Jeffrey Zeinudeen for the Petitioner-Respondent-Respondents

Parties agreed to dispose dispose this matter by way of written

**Written Submissions:** 09.02.2022 for the Respondent-Petitioner-Petitioners.  
**filed on** 30.05.2022 for the Petitioner-Respondent-Respondents.

**Delivered on:** 02.03.2023

**Prasantha De Silva, J.**

**Judgment**

**Factual Background**

The 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Petitioners had filed an information under Section 66(1)(b) of the Primary Courts' Procedure Act No 44 of 1979 against 1<sup>st</sup> and 2<sup>nd</sup> Respondents on the basis that the said Petitioners were ejected on 26.03.2017 from the premises in dispute by the said Respondents.

After having concluded the inquiry of the alleged dispute, the learned Magistrate who was acting as the Primary Court Judge had delivered the order on 09.07.2018 and held in favour of the said Petitioners by directing 1<sup>st</sup> and 2<sup>nd</sup> Respondents to hand over the vacant possession of the disputed premises to the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Petitioners.

Being aggrieved by the said Order, 1<sup>st</sup> and 2<sup>nd</sup> Respondent-Petitioner-Petitioners invoked the revisionary jurisdiction of the Provincial High Court of the Western Province holden in Colombo. Having heard the oral submissions made on behalf of the respective parties, the learned High Court Judge had made his Order dated 25.01.2021 and refused to interfere with the impugned Order of the learned Magistrate.

Being dissatisfied with the said order of the learned High Court Judge, 1<sup>st</sup> and 2<sup>nd</sup> Respondent-Petitioner-Petitioners had preferred a revision application to this Court seeking to have the said orders of the learned Magistrate and the learned High Court Judge revised or set aside.

The 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Petitioner-Respondent-Respondents had filed an information on 25.05.2017 in the Magistrate's Court of Colombo in terms of section 66(1)(b) of the Primary Courts' Procedure Act No. 44 of 1979. It was amended later and an amended affidavit dated 12.06.2017 had been filed. The preliminary objection that there is no provision in the Primary Courts' Procedure Act enabling a party to a dispute to file an amended Petition/affidavit under Section 66(1)(b) of the said Act had been raised on behalf of 1<sup>st</sup> and 2<sup>nd</sup> Respondents-Petitioners. With regard to the said preliminary objection, it is worthy to note that there is no prohibition to amending a petition by parties expressly provided in Section 66 (1) (b) of the Primary Courts' Procedure Act.

It was submitted on behalf of the 1<sup>st</sup> and 2<sup>nd</sup> Respondent-Petitioner-Petitioners that Magistrate's Court and High Court had made a fundamental error in failing to reject the said amended affidavit, that Magistrate's Court and High Court had considered the application of the 1<sup>st</sup> 2<sup>nd</sup> 3<sup>rd</sup> Petitioner-Respondent-Respondents on the basis of the said affidavit and that it should be rejected in limine as the Orders made by the Magistrate's Court and High Court are vitiated by this fact alone.

It should be noted that, 1<sup>st</sup> and 2<sup>nd</sup> Respondent-Petitioner-Petitioners had argued that the learned Magistrate has failed to address this preliminary objection. Further, the 1<sup>st</sup> and 2<sup>nd</sup> Respondent-Petitioner-Petitioners had maintained this preliminary objection in their revision application to the High Court dated 16.07.2018. The learned High Court Judge too had not addressed his mind to the said preliminary objection.

However, in the case of *Hewawitharana Vs. Themis De Silva* [63 NLR 68 at 72] it was quoted with approval dictum of *Mahamood J.* in *Narsingh Das Vs. Mangal Dubey* [1983] 5 *Allahabad* 163 at 172 that Courts are not to act upon the principle that every procedure is to be taken as prohibited unless, it is expressly provided for by the code, but on the converse principle that every procedure

is to be understood as permissible until it is shown to be prohibited by the law. As a matter of general principle, prohibition cannot be presumed. It was submitted that Courts are expected not to act upon the principle that every procedure is to be taken as prohibited unless it is expressly provided by the Code.

In this respect, Court draws the attention to *casus omissus* clause stipulated in Section 78 of the Primary Courts' Procedure Act. If any matter should arise for which no provision is made in this Act, provisions of both Criminal Procedure Code and Civil Procedure Code can be applied with suitable adaptations as justice of the case may require. Therefore, it is apparent that the said preliminary objection is untenable in law and ought to be dismissed. The 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Petitioner-Respondent-Respondents are permitted to amend the information under the provisions of the Civil Procedure Code.

On behalf of the Respondent-Petitioner-Petitioners [hereinafter sometimes referred to as the Petitioner] it was submitted that learned Magistrate has failed to ascertain as to whether there was a likelihood or a threat to breach of peace and that learned Magistrate has no jurisdiction to entertain private complaints filed in terms of Section 66(1)(b) of the Primary Courts' Procedure Act.

It was submitted on behalf of the 1<sup>st</sup> and 2<sup>nd</sup> Respondent-Petitioner-Petitioners that Police have assessed the dispute in a proper perspective and has correctly decided not to file an information under Section 66(1)(a) as there was no likelihood of a breach of peace.

In the case of *Punchi Nona Vs Padumasena (1994(2) SLR 117 at 122* it was held that;

“However, when an information is filed by a party to the dispute under section 66(1)(b), it is left to the Judge to satisfy himself that there is a dispute affecting land owing to which a breach of the peace is threatened or likely.

It was observed in the case of *Vellupullai and Others Vs Sivanathan [1993 1 SLR 123]*

“When an information is filed under section 66(1)(b) the only material that the Magistrate would have before him is the affidavit information of an interested person and in such a situation without the benefit of further assistance from a police report, the Magistrate should proceed cautiously and ascertain for himself whether there is a dispute affecting land and whether a breach of the peace is threatened or likely”.

In the case *S.W. Wimalasekara Vs. C.A Ubeyseena [ CA PHC 161/1998 C.A.M 21/06/2010]* , Sisira De Abrew, J held that when a Primary Court Judge decides to issue notice on the Respondent on an information filed under Section 66(1)(b) of the Act containing material that there was a threat or likelihood of a breach of peace, it is obvious and presumed that he does so after satisfying himself that there was a threat or likelihood of breach of peace and the failure on the part of the Primary

Court Judge to state so in the proceedings does not deprive him of jurisdiction to hear and conclude the case.

Therefore, the said objection in respect of jurisdiction with regard to the maintainability of the instant action under Section 66(1)(b) of the Primary Court's Procedure Act has to be rejected.

The 1<sup>st</sup> and 2<sup>nd</sup> Respondent-Petitioner-Petitioners have also taken up the position that learned Magistrate has failed to properly consider the facts of the case and that application of the Petitioner-Respondent ought to be rejected.

Since 1<sup>st</sup> and 2<sup>nd</sup> Respondent-Petitioner-Petitioners invoked the revisionary jurisdiction of this Court against the Order made by the learned High Court Judge exercising revisionary jurisdiction in respect of the Order of the learned Magistrate made in terms of Section 68 of the Primary Courts' Procedure Act, it is not the task before the Court of Appeal to consider an appeal or revision against the Primary Court Order but to consider an appeal or revision in which an Order pronounced by the Provincial High Court in the exercise of its revisionary jurisdiction is challenged. It should be noted that revisionary jurisdiction of the High Court can be invoked against the Order of the learned Magistrate/Primary Court Judge, if there is a miscarriage of justice or great injustice has been caused to the party concerned. Since revision is an extraordinary remedy vested with this Court, it could be exercised only under exceptional circumstances when there is no other remedy available.

The 1<sup>st</sup> and 2<sup>nd</sup> Respondent-Petitioner-Petitioners had taken the position that disputed premises has not been properly identified although the learned Magistrate had determined the matter under Section 68(3) of the Act. However, the learned Magistrate had stated in the Order that the disputed premises was identified as 1<sup>st</sup> and 2<sup>nd</sup> floors of premises bearing No. 52, Messenger Street, Colombo 12.

Furthermore, it was alleged by the Petitioners that learned Magistrate has failed to consider all material placed before Court in terms of Section 72 of the Primary Courts' Procedure Act.

It was the contention of the 1<sup>st</sup> and 2<sup>nd</sup> Respondent-Petitioner-Petitioners that they entered the second floor with permission of 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Petitioner-Respondent-Respondents who are family members, that no dispossession took place on 26.03.2017 and that 1<sup>st</sup> and 2<sup>nd</sup> Respondent-Petitioner-Petitioners were in possession of the 2<sup>nd</sup> floor of the said building on the date on which the information was filed.

Considering all the evidence and material placed before the learned Magistrate, the learned High Court Judge had decided that Order of the learned Magistrate is not contrary to law and held with the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Petitioner-Respondent-Respondents.

The learned High Court Judge has concluded that learned Magistrate has analyzed and evaluated the evidence placed before the Magistrate's Court and had come to the correct finding of fact and law in dealing with section 68(1) and 68(3) of the Primary Courts' Procedure Act. The 1<sup>st</sup> and 2<sup>nd</sup> Respondent-Petitioner-Petitioners have invoked the revisionary jurisdiction of this Court against the said Order of the learned High Court Judge.

Although Section 74(2) of the Primary Courts' Procedure Act does not provide a right of appeal against the Order of the learned Magistrate/Primary Court Judge, by operation of law, right of appeal is conferred against an Order of the learned High Court Judge exercising revisionary jurisdiction of the Provincial High Court. However, it is seen that 1<sup>st</sup> and 2<sup>nd</sup> Respondent-Petitioner-Petitioners [hereinafter referred to as the Petitioners] have not preferred an appeal against the Order of the learned High Court Judge but filed a revision application on 27.01.2021 instead.

It is trite law that revision is an extraordinary jurisdiction vested in Appellate Courts, which can be exercised under exceptional circumstances, if no other remedy is available. Since revision is a discretionary remedy, it will not be available unless the application discloses circumstances which shock the conscience of Court.

It has been held in the case *Rustom Vs Hapangama [ 1978-1979 2 SLR 225]* that court can intervene by way of a revision even where right of appeal is available but the revisionary jurisdiction can only be invoked under exceptional circumstances. The powers by way of revision conferred on the Appellate Court are very wide and can be exercised regardless of whether an appeal has been taken against an Order of the original Court or not. However, such powers should be exercised only in exceptional circumstances and as to what such exceptional circumstances are is dependent on the facts of each case.

It is to be noted that the Petitioners have pleaded exceptional circumstances in paragraph 13 of the Petition;

1. It would result in a grave miscarriage of justice and occasion a failure of justice if the impugned orders of the learned Magistrate of Colombo and the Provincial High Court Judge of Colombo which contains several glaring errors of fact and law are given effect to and implemented;
2. The Petitioners would suffer an irreparable loss and damage if the said orders of the learned Magistrate of Colombo and the learned High Court Judge of Colombo are implemented, and the Petitioners are ejected from the disputed property;
3. The invocation of the revisionary jurisdiction of Your Lordship's Court has been necessitated by the fact that until a stay order is issued by the Your Lordship's Court the Petitioners face the grave risk or an Order of ejection being made and implemented against them causing them severe and irreparable loss;

4. As the object of the Primary Court Procedure Act No 44 of 199 is the quick resolution of possessory disputes, the remedy of revision is the appropriate remedy to be sought to canvass orders made by the Primary Court inasmuch as a revision application would be concluded in a very much shorter time than a civil appeal;

The aforesaid reasons do not indicate any exceptional circumstances which shock the conscience of Court. Moreover, mere existence of exceptional circumstances itself would not allow Court to invoke revisionary jurisdiction. To exercise revisionary powers, exceptional circumstances should be precisely and expressly averred in petition. The exceptional circumstances pleaded by 1<sup>st</sup> and 2<sup>nd</sup> Petitioners cannot be considered as grounds for 1<sup>st</sup> and 2<sup>nd</sup> Petitioners to move in revision.

It was emphasized in the case of *Bank of Ceylon Vs Kaleel [2004(1) SLR 284]*:

“The Court to exercise revisionary jurisdiction, the order challenged must have occasioned failure of justice and manifestly erroneous which goes beyond an error or defect or irregularity that an ordinary person would instantly react to it. In other words, the order complained of is of such nature which would have shocked the conscience of Court”.

In *Urban Development Authority Vs. Ceylon Entertainments Ltd. CA 1319/2001* Court of Appeal minute dated 05.04.2002 *Nanayakkara J.* held with *Udalagama J.* agreeing,

“That presence of exceptional circumstances by itself would not be sufficient if there is no express pleading to the effect in the petition whenever an application is made invoking, the revisionary jurisdiction of the Court of Appeal”.

Similarly, in *Siripala Vs. Lanerolle [2012] 1 SLR 105*, *Sisira de Abrew J.* held

“Even though the Petitioner attempts to justify the recourse to revision in his written submissions, it is well settled law that existence of such exceptional circumstances should be amply and clearly demonstrated in the petition itself....in the instant application, the Petitioner has neither disclosed nor expressly pleaded exceptional circumstances that warrant intervention by way of revision.”

It was held in the case *Athurupana Vs. Premasinghe B.L.R [2004] Vol. X Part II P. 60SC*,

“Every illegality, impropriety or irregularity does not warrant the exercise of revisionary jurisdiction but such jurisdiction will be exercised only where the illegality, impropriety or irregularity in the proceeding has resulted in a miscarriage of justice by the party affected being denied what is lawfully due to the party.”

Although there is no right of appeal against the order of a Magistrate acting in the capacity of a Primary Court Judge exercising jurisdiction in terms of Section 66 of the Primary Courts' Procedure Act, revisionary jurisdiction is permissible in exceptional circumstances where any injustice or a

miscarriage of justice has been caused to a party. The Court of Appeal is not empowered to correct errors made by the learned Magistrate. However, Court of Appeal has to determine whether the learned High Court Judge has properly exercised his duty when ascertaining whether any injustice was caused to a party or whether any miscarriage of justice has occurred by the Order of the learned Magistrate. By invoking the revisionary jurisdiction of Court, the aggrieved party can challenge the legality of an Order but not the correctness of an Order.

In view of the aforesaid judicial pronouncements, it clearly manifests that existence of exceptional circumstances is a pre-condition for the exercise of revisionary powers. In the instant case, since 1<sup>st</sup> and 2<sup>nd</sup> Petitioners have not properly pleaded or established exceptional circumstances for Court to act in revision, we are unable to exercise revisionary jurisdiction of Court to have the impugned order of the learned High Court Judge dated 25.01.2021 revised or set aside.

Hence, the application for revision made by 1<sup>st</sup> and 2<sup>nd</sup> Respondents-Petitioners-Petitioners is dismissed with costs.

**JUDGE OF THE COURT OF APPEAL**

**K.K.A.V. Swarnadhipathi, J.**  
I agree.

**JUDGE OF THE COURT OF APPEAL**