

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

**LANKA.**

In the matter of an appeal under and in terms of Article 154 P (6) read with Article 138 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

Officer-in-Charge  
Police Station,  
Kohuwala

**Complainant**

Court of Appeal Case No:  
**CA (PHC) 181/2018**

High Court Colombo Case No:  
HCRA 113/2018

Magistrate's Court Nugegoda  
Case No: 24055/66

**Vs.**

1. Liyana Arachchige Sandya Namali,  
No.195/1A,  
Siyambalape-South,  
Siyambalape.

**1<sup>st</sup> Party**

2. Liyana Arachchige Namal,  
No.24/1,  
Bandaranayake Mawatha,  
Kalubowila,  
Dehiwala.

**2<sup>nd</sup> Party**

**THEN BETWEEN**

Liyana Arachchige Namal,  
No.24/1,  
Bandaranayake Mawatha,  
Kalubowila,  
Dehiwala.

**2<sup>nd</sup> Party-Petitioner**

**Vs.**

1. Liyana Arachchige Sandya Namali,  
No.195/1A,  
Siyambalape-South,  
Siyambalape.

**1<sup>st</sup> Party-Respondent**

2. Officer-in-Charge  
Police Station,  
Kohuwala.

**Complainant-Respondent**

**AND NOW BETWEEN**

Liyana Arachchige Namal,  
No.24/1,  
Bandaranayake Mawatha,  
Kalubowila,  
Dehiwala.

**2<sup>nd</sup> Party-Petitioner-Appellant**

**Vs.**

1. Liyana Arachchige Sandya Namali,  
No.195/1A,  
Siyambalape-South,  
Siyambalape.

**1<sup>st</sup> Party-Respondent-Respondent**

2. Officer-in-Charge  
Police Station,  
Kohuwala.

**Complainant-Respondent-Respondent**

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

**Counsel:** Nadeeka Senanayake for the 2<sup>nd</sup> Party-Petitioner-Appellant.  
Rasika Dissanayaka for the 1<sup>st</sup> Party-Respondent-Respondent.

Both Counsel agreed to dispose the matter by way of written submissions.

Written submissions : 26.08.2022 by the 2<sup>nd</sup> Party-Petitioner-Appellant.  
tendered on 08.11.2022 by the 1<sup>st</sup> Party-Respondent-Respondent.

Order delivered on : 27.01.2023

**Prasantha De Silva, J.**

**Judgment**

The 2<sup>nd</sup> Party-Petitioner-Appellant had preferred this appeal seeking to set aside the Order made by the learned High Court Judge dated 04.10.2018 in HCRA 113/2018 and Order made by the learned Magistrate of Nugegoda dated 04.09.2018 in Magistrate's Court case No.24055.

It appears that the Officer in Charge of the Police Station-Kohuwala had filed an information on 29.03.2018 in terms of the Primary Courts' Procedure Act naming Liyanarachchige Sandya Namali as 1<sup>st</sup> Party and Liyanarachchige Namal as 2<sup>nd</sup> Party.

It is seen that the said report was filed by Police upon the statement made by the 1<sup>st</sup> Party on 02.03.2018, consequent to the complaint made by the 1<sup>st</sup> Party by way of a fax message. Apparently, in the said fax message, it was inadvertently dated 23.02.2017 instead of 23.02.2018. The said fax message had been affixed in the information book on 26.02.2018.

It was stated by the 1<sup>st</sup> Party that after sending the said complaint by way of a fax, the 1<sup>st</sup> Party arrived in Sri Lanka on 02.03.2018 and on the very same day made the said statement to the Police Station-Kohuwala.

The position taken by the 2<sup>nd</sup> Party was that he had been residing in the premises bearing No. 24, Bandaranayake Mawatha, Kalubowila, Dehiwala with his grandmother who helped him build a portion of the said premises referred to as No. 24/1, Bandaranayake Mawatha, Kalubowila, Dehiwala.

However, after the conclusion of the said Magistrate's Court case, the learned Magistrate acting as the Primary Court Judge had delivered the Order on 04.09.2018 in favour of the 1<sup>st</sup> Party. Being aggrieved by the said Order, the 2<sup>nd</sup> Party-Petitioner had invoked the revisionary jurisdiction of the Provincial High Court of the Western Province holden in Colombo through case bearing No. HCRA 113/2018.

After the supporting of the application on behalf of the 2<sup>nd</sup> Party-Petitioner and the learned High Court Judge having heard the submissions made on behalf of the 2<sup>nd</sup> Party-Petitioner in support of the application, had made an Order refusing to issue notice on the Respondents and dismissed the application of the 2<sup>nd</sup> Party-Petitioner *in limine* on 04.10.2018.

Being aggrieved by the said Order of dismissal, the 2<sup>nd</sup> Party-Petitioner-Appellant [hereinafter referred to as the Appellant] had preferred this appeal against the 1<sup>st</sup> Party-Respondent-Respondent [hereinafter referred to as the Respondent].

It was contended by the Appellant that learned High Court Judge has failed to consider that although the initial fax message dated 23.02.2017 which is corrected as 23.02.2018 (document marked as "P2a") is pertaining to a premises referred to

as No. 24A, Bandaranayake Mawatha, Kalubowila, Dehiwala. Nowhere else does the Respondent refer to the said premises on the documents submitted to Courts in support of the case. Instead, the Respondent refers only to premises bearing No. 24/1, Bandaranayake Mawatha, Kalubowila, Dehiwala.

As such, it was submitted that the property which forms the subject matter of this application remains uncertain. In this backdrop of uncertainty, it was contended that it is contrary to the spirit of the Primary Courts' Procedure Act No. 44 of 1979 to deprive the Appellant of his proprietary rights in this manner and to adjudicate on such premise which itself is uncertain. It is to be observed that the Appellant had not taken up the said position before the learned High Court Judge.

The statement made by the Respondent on 02.03.2018 indicated the assessment number of the premises in dispute as No. 24/1, Bandaranayake Mawatha, Kalubowila, Dehiwala. Moreover, affidavits filed by the Respondent and Welu Jayakumar referred to the assessment number of the disputed premises as No. 24/1. It is pertinent to note that the report filed by the Officer in Charge of the Police Station-Kohuwala also indicates the disputed premises as No. 24/1, Bandaranayake Mawatha, Kalubowila, Dehiwala. Therefore, it is clear that the disputed premises is No. 24/1, Bandaranayake Mawatha, Kalubowila, Dehiwala.

On behalf of the Appellant, it was submitted that the learned High Court Judge has failed to consider the failure of the learned Magistrate to appreciate as to under what provision of law, the instant action has been instituted.

The attention of Court was drawn to document P2 report filed by the Officer in Charge of Police Station-Kohuwala, which indicated the facts reported in the information were under Section 66 (1) (b) of the Primary Courts' Procedure Act No. 44 of 1979. Similarly, the learned Magistrate in her Order dated 04.09.2018 has referred to Section 66 (1) (b) of the Primary Courts' Procedure Act No. 44 of 1979. It is pertinent to note that the learned High Court Judge has addressed the said position in his Order.

Since the Officer in Charge of the Police Station-Kohuwala had initiated proceedings in the Magistrate's Court of Nugegoda, the said information has to be filed under Section 66(1) (a) of the Act and not as a private plaint in terms of Section 66(1) (b)

in the Magistrate's Court. Hence, it is apparent that report (P2) and the Order of the Magistrate had inadvertently referred to Section 66 (1) (b) instead of Section 66 (1) (a). However, even if it refers to Section 66 (1) (b), no material prejudice has been caused to the Appellant. Thus, it is not a ground to vary or set aside the Order of the learned High Court Judge or the learned Magistrate.

Furthermore, it was the contention of the Appellant that the learned High Court Judge has failed to consider the failure of learned Magistrate in examining and considering the numerous affidavits and documents tendered to Court as evidence in favour of the 2<sup>nd</sup> Party-Petitioner-Appellant as the contents of the documents in 'P2c' and 'P2d' substantiate the contention of the Appellant.

Apparently, the learned High Court Judge has considered the Order of the learned Magistrate and found that the learned Magistrate has analyzed and evaluated the evidence placed before her by both parties and come to the correct finding of facts and law and determined the matter in terms of Section 68 (3) of the Primary Courts' Procedure Act.

It is apparent that after complaining to the Kohuwala Police by way of a fax, Respondent arrived in Sri Lanka on 02.03.2018 and made a statement to the Kohuwala Police on the same day against the Appellant regarding the dispute pertaining to premises bearing No. 24/1, Bandaranayake Mawatha, Kalubowila, Dehiwala.

It is evident that Respondent had been in possession of the premises since 1991. When the Respondent left the country, her belongings had been kept inside one room thereof and the balance part of the premises had been leased out to a person named Velu Jayakumar when the Respondent was abroad. The Appellant had got the said lessee Velu Jayakumar to vacate the premises which was leased out and subsequently the Appellant had entered the disputed portion of the premises on 19.02.2018.

Furthermore, the Respondent had produced documents marked 1ඔ1 to 1ඔ12 along with the first affidavit of the Respondent to establish the possession of the Respondent to the said premises in dispute. Moreover, the affidavits marked as

1ඡා14 and 1ඡා15 given by the lessee said Velu Jayakumar and a relative of the Respondent substantiated the contention of the Respondent.

It is significant to note that the Appellant had not denied the said Velu Jayakumar was a lessee of the Respondent or that he was in possession of the disputed premises till the 19.02.2018.

According to the Lease Agreement 1ඡා1 (3) (අ), the Respondent had leased the premises bearing No. 24/1, Bandaranayake Mawatha, Kalubowila, Dehiwala to the said Velu Jayakumar from 01.07.2017 to 30.06.2018.

According to the affidavit of the Appellant, the said lessee Velu Jayakumar was in occupation of the premises in dispute until 19.02.2018 and he had to handover the premises to the Appellant and vacate the same.

In view of the Judgment *Iqbal Vs. Majeudeen and others [1993] 3 SLR 213*,

“The fact for determining whether a person is in possession of any corporeal thing, such as a house, is to ascertain whether he is in general control of it.”

It was emphasized by *Gunwardene, J.* that Law recognizes two kinds of possession.

1. When a person has direct physical control over a thing at a given time- Actual Possession.
2. When he, though not in actual possession has 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 view of the said Judgment, it clearly manifests that the Respondent had possession of the disputed premises until 19.02.2018 and it is apparent that dispossession had taken place on the same day. Admittedly, the Appellant had stated in his statement to the Kohuwala Police Station that he broke open the padlock of the store room. Since the Officer in Charge of the Police Station-Kohuwala filed the information on 29.03.2018, it amply proves that the Respondent was forcibly dispossessed by the Appellant within a period of two months immediately before the date on which the information was filed under Section 66 of the Primary Courts' Procedure Act.

Thus, the learned Magistrate who was acting as a Primary Court Judge has determined that Respondent was forcibly dispossessed by the Appellant from the premises in dispute and the learned Magistrate had directed the Respondent to be restored to possession and prohibited all disturbances of such possession otherwise than under the authority of an Order or decree of a competent Court.

Therefore, it is apparent that no injustice was caused to the Appellant by the Order of the learned Magistrate and no miscarriage of justice occurred.

Hence, no exceptional circumstances exist for the 2<sup>nd</sup> Party Petitioner-Appellant to invoke the revisionary jurisdiction of the Provincial High Court of the Western Province holden in Colombo.

As such, the learned High Court Judge has correctly dismissed the application of the 2<sup>nd</sup> Party Petitioner *in limine*. We see no reason to interfere with the Order dated 04.10.2018 of the learned High Court Judge.

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**