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

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

**C.A (PHC) 97/2008**

Provincial High Court of Western
Province Case No. HCRA 152/2007

Magistrate's Court of Colombo
Case No. 6455/01/2007

Officer-In-Charge,
Police Station, Pettah.

**Complainant**

Vs.

Rahamathulla Abdul Rahuman,
No. B4, St. James Apartments, Modera.

**1st Party Respondent**

Mohamed Niyas Naushard,
No. 51, Silversmith Lane,
Hulftsdorp, Colombo 12.

**2nd Party Respondent**

Fa Impex (Private) Limited,
No. 23, Sea Street, Colombo 11.

**Intervenient Respondent**

AND BETWEEN

Rahamathulla Abdul Rahuman,
No. B4, St. James Apartments, Modera.

**1st Party Respondent - Petitioner**

Vs.

1. Mohamed Niyas Naushad,
   No. 51, Silversmith Lane,
   Hulftsdorp, Colombo 12.

2. Fa Impex (Private) Limited,
   No. 23, Sea Street, Colombo 11.

3. Officer-In-Charge,
   Police Station, Pettah.

4. Hon. Attorney General,
   Department of the Attorney General, Colombo 12.

**Respondents**

AND NOW BETWEEN

Rahamathulla Abdul Rahuman
No. B4, James Apartment, Modara.

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

Vs.

Mohamed Niyas Naushard,
No. 51, Silversmith Lane,
Hulftsdorp, Colombo 12.

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

Officer-In-Charge
Police Station, Pettah.

**Complainant-Respondent-Respondent**

Fa Impex (Private) Limited,
No. 23, Sea Street, Colombo 11.

**Intervenient Respondent-Respondent-Respondent**

Hon. Attorney General
Department of the Attorney General,
Colombo 12.

**Respondent-Respondent**

**Before:** **P. Padman Surasena, J / President of the Court of Appeal**
**Arjuna Obeyesekere, J**

**Counsel:** Varuna De Saram with Pasindu Tillekeratne for the 1st Party Respondent – Petitioner - Appellant

Ranil Samarasuriya with Yohan Gamage and Madhawa Wijayasiriwardena for the Intervenient – Respondent – Respondent - Respondent

**Written Submissions:** Tendered on behalf of the 1st Party Respondent – Petitioner - Appellant on 27th August 2018

Tendered on behalf of the Intervenient - Respondent – Respondent - Respondent on 20th September2018

**Decided on:** 12th December 2018

**Arjuna Obeyesekere, J**

When this case was taken up for argument on 13th July 2018, the learned Counsel for all parties moved that this Court pronounce judgment on the written submissions that would be tendered by the Parties.

The 1st Party Respondent – Petitioner – Appellant (the Appellant) has filed this appeal seeking *inter alia* the following relief:

(a) To set aside the judgment dated 29th April 2008 delivered by the learned High Court Judge of the Provincial High Court of the Western Province, holden at Colombo, in High Court Case No. HCRA 152/2007;

(b) To set aside the Order dated 30th October 2007 delivered by the learned Magistrate of Colombo, in Case No. 6455/01/07.

The facts of this matter very briefly are as follows.

The Intervenient – Respondent – Respondent - Respondent (the Respondent) is the owner[1] of premises bearing assessment No. 11, Sea Street, Colombo 11. The multi storied building situated on the said premises has several rooms, each bearing a separate assessment number from 11 1/1 to 1/19. Each of these rooms has been given on rent or lease by the Respondent to several persons to be used as shops.

[1] By virtue of Deed of Transfer No. 607 dated 16th May 2001 attested by A.M.Jiffry, Notary Public.

The Respondent states that he entered into a lease agreement with Devasagayam Anto Dinesh on 1st December 2004, in terms of which the Respondent had given on lease four shops bearing assessment Nos. 11 1/4 – 1/7, for a period of two years, at a monthly rental of Rs. 3650 per shop. The Respondent states that Dinesh found it difficult to pay the lease rentals and therefore, had handed over the said premises to the 2nd Party Respondent – Respondent – Respondent (the 2nd Respondent). The 2nd Respondent had paid a sum of Rs. 200,000 to Dinesh which was the balance of the security deposit which Dinesh had paid the Respondent under the aforementioned lease agreement, after having deducted the rent payable for seven months. This is borne out by a receipt dated 8th December 2005 signed by Dinesh and the 2nd Respondent.

On the same date, i.e. 8th December 2005, the Respondent had entered into a lease agreement[2] with the 2nd Respondent, in terms of which the said premises 11 1/4 – 1/7 had been given on lease for a period of two years at a monthly rental of Rs. 3650 per shop. By a letter dated 13th February 2007, the 2nd Respondent had informed the Respondent that he is unable to pay the lease rentals and therefore is closing down the said premises for three months and that the premises will be handed over at the end of the three month period. The 2nd Respondent had confirmed in the statement that he made to the Pettah Police Station on 19th May 2007 that he had in fact handed over the said premises to the Respondent on 17th May 2007.

It is in this factual background that the Appellant lodged a complaint at the Pettah Police Station on 19th May 2007 stating that he is in possession of the

[2] The lease agreement had been attested by M.I.M.Mubarak, Attorney-at-Law.

aforementioned four shops situated on the first floor of the said building situated at No. 11, Sea Street, Colombo 11, and that the 2nd Respondent had threatened him and asked him to leave the said premises.

Having recorded a statement of the 2nd Respondent, the Officer – in – Charge of the Pettah Police Station, acting in terms of Section 66(1)(a)(i) of the Primary Courts Procedure Act No. 44 of 1979[3] (the Act), had filed an information on 21st May 2007 in Case No. 6455/01/07 in the Magistrate's Court of Colombo with regard to the said complaint of the Appellant. The Appellant and the 2nd Respondent had been named as the 1st and 2nd Respondents, respectively.

By an affidavit dated 4th June 2007 filed in the Magistrate's Court, the Appellant stated that the dispute relates to the aforementioned four shops bearing assessment Nos. 1/4, 1/5, 1/6 and 1/7. He admitted that the said building belonged to the Respondent. The Appellant stated that he had entered into an agreement with the power of attorney holder of the Respondent on 28th February 2006. In terms of the said agreement, the Appellant was required to raise money by the sale of the shops situated in the said building to the existing tenants and to utilize the said monies to settle the loans that the Respondent had taken by mortgaging the said property to Seylan Bank. However, according to the Respondent, the Power of Attorney holder was not authorized to enter into the said agreement and in any event, the said transaction did not proceed and the Power of Attorney holder had refunded a sum of Rs. 500,000 from the advance paid by the Appellant. This Court has examined the said agreement and observes that possession of the

[3] Section 66(1)(a)(i) reads as follows: "Whenever owing to a dispute affecting land a breach of the peace is threatened or likely, the police officer inquiring into the dispute shall with the least possible delay file an information regarding the dispute in the Primary Court within whose jurisdiction the land is situate...

said four rooms in question have not been handed over to the Appellant in terms of the said agreement nor does the said agreement refer to the Appellant as being an existing tenant.

The Appellant had stated that starting 2006, he has used the said premises bearing Nos. 1/4, 1/5, 1/6 and 1/7 for his business activity of repairing mobile phones. The Appellant has stated further that the 2nd Respondent was not in possession of the said premises and that the 2nd Respondent never had possession thereof, a position which has been denied by the 2nd Respondent. The Appellant has stated that on 7th April 2007, the 2nd Respondent had forcibly evicted him from shop bearing assessment No. 1/7, and that on 19th May 2007, the 2nd Respondent had forcibly entered premises bearing Nos. 1/4, 1/5 and 1/6 and padlocked the said premises, which prompted the Appellant to lodge the aforementioned complaint at the Pettah Police Station.

The 2nd Respondent had made two statements to the Pettah Police Station on 19th May 2007, of which one had been made before the complaint of the Appellant. It was the position of the 2nd Respondent that he and the Appellant had used premises number 1/7 to have their meals and that the Appellant lodged the said complaint due to the 1st Respondent asking the Appellant to take away the belongings of the Appellant.

Having filed his affidavit together with the documents marked '**1V1**' – '**1V13**', the Appellant invited the learned Magistrate to consider making an interim order on possession based on the documents filed by him, as provided for in

terms of Section 67(3) of the Act[4]. The learned Magistrate, having considered very carefully each of the documents marked '**1V1**' – '**1V11**'[5] had held that except for '**1V11**', which is addressed to the Appellant, none of the other documents establish that the Appellant had possession of the four shops in question, for the reasons set out in his order delivered on 4th July 2007. The learned Magistrate had rejected the claim of the Appellant to possession on the basis that the Appellant had failed to establish that he was in possession of the said premises, which is the primary requirement that a Primary Court Judge must consider in an application under Section 66(1)(a) of the Act.[6]

After the interim order was delivered, the parties had filed further affidavits and documents in the Magistrate's Court. The scope of the inquiry that the learned Magistrate is required to carry out is set out in Section 68(1) of the Act, which reads as follows:

> "Where the dispute relates to the possession of any land or part thereof it shall be the duty of the Judge of the Primary Court holding the inquiry to determine as to who was in possession of the land or the part on the date of the filing of the information under section 66 and make order as to who is entitled to possession of such land or part thereof."

The manner in which Section 68(1) of the Act is to be applied has been discussed in **Ramalingam vs Thangarajah**[7] where it was held as follows:

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[4] Section 67(3) of the Act reads as follows: "Pending the conclusion of the inquiry it shall be lawful for the Judge of the Primary Court to make an interim order containing any provision, which he is empowered to make under this part at the conclusion of the inquiry."

[5] '1V12' and '1V13' are the two statements made by the 2nd Respondent to the Police Station on 19th May 2007.

[6] Section 68(1) of the Act.

[7] 1982 (2) Sri LR 693

"Thus, the duty of the Judge in proceedings under section 68 is to ascertain which party was or deemed to have been in possession on the relevant date, namely, on the date of the filing of the information under section 66.

That person is entitled to possession until he is evicted by due process of law. A Judge should therefore in an inquiry under Part VII of the aforesaid Act, confine himself to the question of actual possession on the date of filing of the information except in a case where a person who had been in possession of the land had been dispossessed within a period of two months immediately before the date of the information."[8]

The learned Magistrate, having considered the affidavits and further material filed by the parties, by an order delivered on 30th October 2007 held as follows:

"එබැවින් පලවන පාර්ශ්වයේ ලේඛන සලකා බැලීමේදි එකි පාර්ශ්වය භුක්තියේ සිට බව හෝ භුක්තියේ සිටියදි භුක්තියේ බලහත්කාරයෙන් නෙරපා ඇති බව තහවුරු නොවන බවට තීරණය කරමි. දෙවැනි පාර්ශ්වය හා මැදිහත් පාර්ශ්වයේ ලේඛන ඇසුරින් එම දෙපාර්ශ්වය අතර භුක්තිය සම්බන්ධයෙන් ආරවුලක් නොමැති බැවින්ද මැදිහත් පාර්ශ්වය භුක්තියේ සිට බව ඒ දෙපාර්ශ්වය අතර විවාදයක් නොමැති බැවින්ද මැදිහත් පාර්ශ්වය මෙම අදාල විෂය වස්තුවේ භුක්තියේ සිට බවට තීරණය කරමි."

Being aggrieved by the said Order dated 30th October 2007, the Appellant had filed a revision application in the Provincial High Court of the Western Province holden at Colombo. The learned High Court Judge, having afforded the parties an opportunity of filing objections, counter objections and written

[8] Vide Section 68(3) of the Act.

submissions, dismissed the said revision application, having held that the Appellant had failed to disclose any exceptional circumstances that warrant the interference of the High Court.

The Appellant thereafter filed this appeal seeking to set aside the Orders made by the Magistrate's Court and the judgment of the learned High Court Judge. The complaint of the Appellant, as borne out in the written submissions filed on behalf of the Appellant, is three fold.

The first complaint of the Appellant is that the learned Magistrate who delivered the interim order failed to correctly consider the documents marked '**1V1**' to '**1V11**' submitted by the Appellant. This Court has examined the Order of the learned Magistrate and observes that the learned Magistrate has considered each and every document in the context of whether each such document establishes that the Appellant had possession of the said premises. It was only after having done so that the learned Magistrate had arrived at the conclusion that a majority of the said documents[9] does not establish that the Appellant had possession of the said premises. This Court too has examined each of the said documents and is in agreement with the conclusion reached by the learned Magistrate. This Court must observe that in order to establish possession, the Appellant must produce cogent proof of such fact, as opposed to producing random documents which fails to establish possession.

The second complaint of the Appellant is that the learned Magistrate who delivered the final order on 30th October 2007 did not consider the documents

[9] The Public Health Inspector has issued to the Appellant a letter dated 5th April 2007 marked '1V11' with the address of the Appellant being given as '11 1/4 and 5'. The learned Magistrate has very correctly held that such a letter is not sufficient to establish the possession of the Appellant.

marked '**1V1**' to '**1V11**' afresh and that he erred when he relied on the interim order made by his predecessor. This Court is of the view that the necessity for the learned Magistrate to consider the documents '**1V1**' to '**1V11**' afresh did not arise as they had already been considered by Court in its interim order and the Appellant had not submitted any material after the said interim order was made to contradict the findings of the learned Magistrate in the said interim order. In any event, this Court is of the view that no prejudice has been caused to the Appellant, as this Court takes the view that majority of the said documents '**1V1**' to '**1V11**' does not establish that the Appellant had possession of the said premises. This Court has also examined the said Order and is satisfied that the learned Magistrate had acted in terms of Section 72 of the Act.[10] This Court is in agreement with the analysis of the learned Magistrate on the material presented by the Appellant and the conclusion reached by the learned Magistrate that it was the Respondent and not the Appellant who was in possession of the said premises.

The third and final complaint of the Appellant is that the learned High Court Judge erred when she demanded that the Appellant adduce exceptional circumstances. This Court is of the view that a person invoking the revisionary jurisdiction of the High Court should establish that the order sought to be revised is either illegal or improper or that the procedure followed has been irregular. As held by this Court, the interim and final orders made by the learned Magistrates are based on the material placed before them and have been correctly made. The said orders cannot be classified as being illegal,

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[10] Section 72 of the Act reads as follows:

"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."

improper or irregular. Hence, this Court takes the view that the revision application could have been dismissed by the learned High Court Judge on this ground alone, without seeking exceptional circumstances.

The learned Counsel for the Appellant has adverted to one other matter, namely the failure to consider the Fiscal Report dated 14th November 2007. This Court observes that the said report had been issued after the orders were made in the Magistrate's Court and hence, is outside the scope of review of the High Court and this Court.

For the reasons set out in this judgment, this Court does not see any merit in this appeal. Hence, this Court dismisses this appeal, without costs.

**Judge of the Court of Appeal**

**P. Padman Surasena, J/ President of the Court of Appeal**

I agree.

**President of the Court of Appeal**