

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

In the matter of an Appeal under
Article 154(P) and 138 of the
Constitution Democratic Socialist
Republic of Sri Lanka read with
Provisions in High Courts of the
Provinces (Special Provisions) Act
No.19 of 1990.

Manadoowa Acharige Punyaratne
Respondent-Petitioner-Appellant

C.A.(PHC)Appeal No. 65/2015

P.H.C. Colombo Case No. HCRA 135/2012

M.C. Mt. Lavinia CaseNo. 6070/S/11

Vs.

General Manager
National Housing Development
Authority
Sir Chittampalam A. Gardiner
Mawatha,
Colombo 01.

Applicant -Respondent-
Respondent

BEFORE : JANAK DE SILVA, J. &
ACHALA WENGAPPULI, J.

COUNSEL : Neranjan Jayasinghe with Sachitra
Harshana for the Respondent-Petitioner-
Appellant
H.P.Ekanayake instructed by K.P.
Ranaweera for the Applicant –
Respondent-Respondent.

WRITTEN SUBMISSIONS

TENDERED ON : 09-07-2018(by both parties)

DECIDED ON : 21st September, 2018

ACHALA WENGAPPULI, J.

The Respondent-Petitioner-Appellant (hereinafter referred to as the “Appellant”) invokes appellate jurisdiction of this Court, seeking to set aside an order dated 26.02.2015 made by the Provincial High Court holden in Colombo in Case No. HCRA 135/2012 and an order made by the Magistrate’s Court of Mt. Lavinia on 14.09.2012 in case No. 6070/S/11.

In instituting the case No. 6070/S/11 before the Magistrate’s Court, the Applicant-Respondent-Respondent (hereinafter referred to as the “Respondent”) under Section 69D(1)(iv) of the National Housing

Development Act No. 17 of 1979 as amended (hereinafter referred to as the "NHDA Act"), sought an order of ejectment, in respect of premises bearing No. 39, *Ranajayagama* Housing Scheme, *Waidya* Road, Dehiwala.

After an inquiry, to which the Appellant also has participated, the Magistrate's Court has issued an order of ejectment against him. The Appellant has thereafter sought to canvass the said order of ejection before the Provincial High Court in Case No. HCRA 135/2012, but his application was dismissed by the Court with the pronouncement of the said impugned order.

The ground upon which the Appellant seeks to challenge its validity before this Court is that the learned Magistrate has failed to consider the following facts and to make an order under Section 69E(8) of the NHDA Act;

- i. He was in possession of the disputed premises since 1987, as he entered the said premises upon the invitation of one *T.D. Arthur* who had a valid permit to occupy it.
- ii. *T.D. Arthur* in his agreement with NHDA did not nominate any heirs in respect of succession after him.
- iii. *T.D. Arthur* was unmarried and has died in 1988 and since then the Appellant continued to be in possession.
- iv. *Thushari Perera* and *Sanjeewa Perera* who claimed that they were the rightful heirs of said *T.D. Arthur* have founded their

claim on a mere letter issued by said *T.D. Arthur* under suspicious circumstances, which is in violation of the statutory provisions of Prevention of Frauds Ordinance.

- v. The Appellant has already instituted action before the District Court, challenging the said document, relied upon by *Thushari Perera* and *Sanjeewa Perera*.

The Appellant therefore contended that, he is entitled to the relief as prayed for in his petition of appeal.

Section 69E(8) of the NHDA Act reads as follows;

"Notwithstanding anything contained in the preceding provisions where the Magistrate is of opinion that, having regard to the manner in which the person on whom summons under subsection (1) was served entered into occupation of the building or portion thereof, it would be unjust to order his ejectment therefrom, the Magistrate may require such person and the Authority to enter into an agreement on such reasonable terms as may be determined by the Magistrate, with respect to such building or portion thereof, within a period of six months from the date of such requirement:

Provided however where such person on whom summons under subsection (1) was served fails to enter into an agreement within the period of six months from the date of such requirement the provisions contained in this Part shall apply mutatis mutandis."

Plain reading of this section, it becomes clear to the reader that the Court could form an "opinion", having regard to the manner the unauthorised occupier entered the premises and it would be "unjust" to order his ejectment therefrom, it may require such person and NHDA to enter into an agreement.

Upon perusal of the order made by the Magistrate's Court, it is obvious that it had considered this provision and decided not to act on the said Section.

Then the question to be decided by this Court is whether the Magistrate's Court had exercised its discretion reasonably.

There was no challenge to the fact that the premises belonged to NHDA and the Appellant had no legally valid written authority to be in the possession of the said premises.

He has relied on his 23 years of occupation, and pleaded that he is entitle to relief under Section 69E(8) of NHDA Act.

In refusing to exercise the discretion vested in the Magistrate's Court, it had considered the facts that there had been a matter under "Section 66" of the Primary Courts Procedure Act, for breach of peace and the Appellant was placed in possession by the Primary Court.

According to the Respondent, both *Thushari Perera* and *Sanjeewa Perera* claimed that the Appellant had entered the disputed premises, in the pretext of assisting the permit holder and his unmarried sister in their last stages of life, continued to occupy the premises without any lawful authority. At the time of death of *T.D. Arthur*, they were minors and

therefore they had no opportunity to assert their rights against the Appellant's unlawful occupation.

In these circumstances, the Magistrate's Court has rightly decided against acting under Section 69E(8) as if it decided to act under the said section, that would seriously prejudice the rights of *Thushari Perera* and *Sanjeewa Perera* who were not named as a party. The case was instituted by the Respondent seeking eviction of the Appellant from the disputed premises and its jurisdiction is limited to Sections 69D and 69E(8).

Therefore, it is our considered view that the Magistrate's Court has exercised its discretion under Section 69E(8) reasonably and the Provincial High Court had correctly denied relief to the Appellant upon his failure to establish any exceptional circumstances that could be considered as a positive miscarriage of justice.

The appeal of the Appellant is without any merit and we accordingly dismiss it with costs fixed at Rs. 5000.00.

JUDGE OF THE COURT OF APPEAL

JANAK DE SILVA, J.

I agree.

JUDGE OF THE COURT OF APPEAL