

**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 154 read with the Article 138(1)  
of the Constitution of the Democratic Socialist  
Republic of Sri Lanka

Court of Appeal Case No:  
**CA (PHC) 98/2015**  
HC Colombo Case No:  
**HCRA 52/2013**  
MC Colombo Case No:  
**12591/03**

Ovantha Gunapala Randir Wasantha Kumara,  
No. 04/01/01,  
Bambalapitiya Drive,  
Colombo 04.

**Party of the 02<sup>nd</sup> Part**  
**Respondent-Appellant**

**-Vs-**

Marguerita Santhoshini De Zoysa,  
No. 54,  
Cotta Road,  
Colombo 08.

**Party of the 01<sup>st</sup> Part**  
**Petitioner-Respondent**

Officer in Charge,  
Police Station,  
Wellawatte.

**Complainant-Respondent-**  
**Respondent**

**Before :      A.L. Shiran Gooneratne J.**

**&**

**Dr. Ruwan Fernando J.**

**Counsel :**                      Sachithra Harshana with S. Zoysa for the Respondent-Appellant.

Petitioner- Respondent, absent and unrepresented.

**Written Submissions:** By the Respondent-Appellant on 26/11/2018

**Argued on :**                      24/01/2020

**Judgment on :**                      10/03/2020

**A.L. Shiran Gooneratne J.**

The Officer in Charge of the Wellawatte Police filed information in terms of the provisions contained in Section 66(1)(a) of the Primary Courts Procedure Act No. 44 of 1979, (hereinafter referred to as the Act) in the Magistrates Court of Colombo making the Party of the 1<sup>st</sup> Part Petitioner-Respondent (hereinafter referred to as the Respondent) and the Party of the 2<sup>nd</sup> Part Respondent-Appellant

(hereinafter referred to as the Appellant), over a dispute of possession of a Restaurant situated at No. 52, Galle road, Wellawatte. The learned Magistrate by order dated 19/02/2013, handed over possession of the disputed premises to the Appellant. Being aggrieved by the said order, the Respondent filed a revision application in the Provincial High Court of the Western Province holden in Colombo. By order dated 10/07/2015, the learned High Court Judge of Colombo set aside the order of the learned Magistrate and granted possession of the said premises to the Respondent. It is the said order that the Appellant is seeking to canvass by this application.

A dispute arose between the parties with regard to possession of premises in which a Restaurant business was carried on. The respective parties are at variance as to who was in possession of the date of notice. According to the complaint made to the police by the Respondent on 08/10/2012, the Appellant having obtained a key to the Restaurant through a staff member of the Respondent, entered the premises together with several other persons and had forcibly taken over possession of the Restaurant. It is also claimed that on 06/10/2012, there had been a discussion between the Appellant and the Respondent to run the Restaurant as a business partnership, however, there has been no consent or a valid agreement between the parties. Therefore, the Respondent claims that the Appellant unlawfully entered the said premises and deprived the Respondent from lawful possession of the said premises.

The main grounds of appeal are as follows;

- a) has the learned High Court Judge erred in law by failing to decide the party which has established possession over the matter in dispute.
- b) has the learned High Court Judge failed to appreciate that an application for revision will be allowed only at the instance of showing exceptional circumstances by the party invoking jurisdiction.

The contention of the Appellant is that, he was in possession of the disputed premises at the time of dispute. *"Section 68 requires the judge to make a declaration as to who is entitled to possession. He should first make a determination as to who was in possession on the date of the notice. Magistrate should evaluate the evidence". (David Appuhamy vs. Yassi Thero (1987) 1 SLR 253)*

Section 68 (1) of the Act states;

*"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."*

Section 68(3) of the Act states;

*"Where at an inquiry into a dispute relating to the right to the possession of any land or any part of a land the Judge of the Primary Court is satisfied that any person who had been in possession of the land or part has been forcibly dispossessed within a period of two months immediately before the date on which the information was filed under Section 66, he may make a determination to that effect and make an order directing that the party dispossessed be restored to possession and prohibiting all disturbance of such possession otherwise than under the authority of an order or decree of a competent court."*

Therefore, the Court has to decide the question of actual possession on the date of filing the information under Section 66(1)(a) of the Code. In a case where a person who has been in possession of the land and had been forcibly dispossessed within the period of two months immediately preceding the date of filing of the first information, the Court is required to make order directing the restoration of possession.

U.D.Z. Gunawardana, J. in *Iqbal vs. Majedudeen and Others* took the view that the words "forcibly dispossessed" in Section 68(3) of the Primary Courts 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 judgment 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 a power and intention at a given time to exercise dominion or control over a thing either directly or through another person-*constructive possession*.

The learned Magistrate has considered the affidavit and the documents, filed by the Appellant (copies of the documents tendered are not duly certified) relevant to establish possession over the disputed premises. The Appellant has tendered a purported agreement between the parties marked "D 1". The said agreement does not refer to either party, before Court and also is unsigned. (Vide page 174 of the brief). The Appellant also relied on a certificate of Registration of an individual business, marked "D 2". (Vide page 179 of the brief). The said certificate makes reference to the Appellant as the owner of the disputed restaurant. However, it is observed that, the Appellant had registered the said business on 10/10/2012, two days after the first information was filed. The payment receipts regarding utility bills, marked "D 3", "D 5" and "D 8" relates to payments made on the date the information was filed or thereafter. (Vide page 57, 61 and 64 of the brief). Copies of the inventory and salary payments referred to in Documents marked "D 9", "D 10" and "D 11" can not be considered as evidence in favour of the Appellant, due to its inconsistencies. There is no evidence to establish that the Appellant was dispossessed of actual possession or constructive

possession of the disputed premises two months prior to the filing of information and therefore, the argument of dispossession of the Appellant fails.

I will now consider whether this Court has sufficient reason to consider this application on exceptional circumstances. It is well settled law that, the party seeking to invoke the revisionary jurisdiction of this Court has to demonstrate the existence of exceptional circumstances. Revision would lie if, *inter-alia*, acts should have prejudiced his substantial rights or acts should have occasioned a failure of justice. (*Siripala vs. Lanerolle and Another* (2012) 1 SLR 105)

As noted above the affidavits and documents tendered by the Appellant has no relevance whatsoever to establish that the Appellant was dispossessed from the disputed restaurant. Therefore, in order to rectify a failure of justice the exceptional circumstances as noted earlier, clearly warrants the intervention of the High Court by way of revision.

For the aforesaid reasons, the Judgment of the High Court is affirmed and this application is dismissed.

Application dismissed. I make no order as to costs.

**JUDGE OF THE COURT OF APPEAL**

**Dr. Ruwan Fernando, J.**

**I agree.**

**JUDGE OF THE COURT OF APPEAL**