

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

In the matter of an appeal in terms of
Article 154 P (6) against the order of the
Provincial High Court of the Eastern
Province holden at Batticaloa made in
Revision Application
No.HCB/Rev/547/09

CA (PHC)93/2011

High Court Batticaloa

Case No: HCB/Rev/547/09

Magistrate Court Batticaloa

Case No:1288/PCA/08

Kalairasi Uruthiran
"Kalaiyagam"
Central Road
Karaithivu - 02

2nd Party-Petitioner

Vs.

1. Thiyagarajah Thevaranjan
Main Street
Thethathivu

1st Party-Respondent

2. Rasanayagam Ranjitham
Pillaiyar Cross Road,
Kalmunai - 02

3. Thangarasa Kaladevi
Kannagiamman Kovil Road,
Koddai Kallar.

2nd Party-Respondents

4. Kalaimathi Sithambaranathan
Central Road,
Karaithivu - 3

Intervenient-Respondent

5. O.I.C. Police,
Police Station,
Kaluwanchikudi.

6. Hon. Attorney General,
Attorney-General's Department,
Colombo 12.

Informants-Respondents

AND NOW BETWEEN

Thiyagarajah Thevaranjan
Main Street,
Thethathivu.

1st Party-Resondent Appellant

Vs.

1. Kalaiarasi Uruthiran
"Kalaiyagam"
Central Road,
Karaithivu - 02.
**2nd Party-Petitioner-
Respondent**
2. Rasanayagam Ranjitham
Pillaiyar Cross Road,
Kalmunai - 02
3. Thangarasa Kaladevi
Kannagiamman Kovil Road,
Koddai Kallar
**2nd Party-Respondent-
Respondents**
4. Kalamathi Sithambaranathan
Central Road
Karaithivu - 3
**Intervenient-Respondent-
Respondent**
5. O.I.C. Police,
Police Station,
Kaluwanchikudi.
6. Hon. Attorney-General,
Attorney-General's Department,

Colombo 12.

**Informants-Respondent
-Respondents**

BEFORE : **S.SRISKANDARAJAH, J (P/ CA).**
A.W.A.SALAM,J.

COUNSEL : K.M.B.Ahamed with A.Paramalingam,
for the 1st Party Respondent Appellant.
K.V.S.Ganasharaja
for the 2nd Party Respondents Respondents.

Argued on : 22.03.2012,23.05.2012 and 27.06.2012

Decided on : 02.10.2012

S.Sriskandarajah, J,

The Officer-in-Charge of the Police Station, Kaluwanchikudi, filed an information in the Magistrate's Court of Batticaloa, on 30th of September 2008 in Case bearing No.1288/PCA/08 in terms of Section 66(1)(a) of the Primary Court Procedure Act. In the said case the Appellant Thiyagarajah Thevaranjan was made 1st Party-Respondent, and the Respondents Kalaiarasi Uruthiran, Rasanayagam Ranjitham and Thangarasa Kaladevi, were made 2nd Party Respondents. Kalaimathi Sithambaranathan, Intervened in the said case, as Intervenient-Respondent. The Appellant, in the Magistrate's Court had submitted that the disputed land is a portion of Easter Seaton Estate, which comes within the area of Eruvial Ondanjimadam village, and the said estate contained 1420 Acres, and was belonging to the family of Sidambaram Subraniam Chettiar. The said estate was vested in the Land Reform Commission in 1972 and, thereafter, on a statutory determination, an extent of 362

Acres was allowed to be retained by the said Sidambaram Subramaniam Chettiar's family, which is shown as Lot No.2 in the Plan No.PP/Mada/ 542 out of which Subramaniam Chettiar himself is entitled to 12 Acres, 3 Roods and 31 Perches. It was claimed by the Appellant that the said land with Nagathambiram Temple by the side of Kalmunai-Batticaloa Main Road was maintained by Subramaniam Chettiar.

The Appellant was given a Power of Attorney bearing No.1887 dated 7/12/2005, attested by C.T. Sachchithanandan, Notary Public of Batticaloa by the said Subramaniam Chettiar to look after the above said portion of the land. In order to survey and define the land, , a Surveyor named Kaladaran from the Survey Department, visited the said land on 3/08/2008 along with the Appellant and after surveying, remarketed the boundaries of the land adjacent to the Nagathambiran Temple, which is approximately 12 acres in extent, and on 2/09/2008, the Appellant erected a fence around the aforesaid land. According to the Appellant, the said land was covered with bushes and shrubs; that on or about 17/09/2008, the Respondents damaged a portion of the fence and disturbed the possession of the Appellant and dispossessed the Appellant from 8 acres out of the aforesaid land.

The Appellant contended that due to the cyclone in 1978, and the war situation, the land was abandoned and unattended and covered with bushes and shrubs, and the Appellant entered the land on 3/08/2008, and surveyed the land erected fence right round the said land on 2/09/2008, and possessed it till his possession was disturbed on 17/09/2008.

The Respondent and the Interventient-Respondent claimed in the Magistrate's Court that the disputed land was owned by the Eastern Group and former Superintendent of the said Group S.T. Vallipuram Chettiar sold several divided portions of the land belonging to the said estate. One of the divided portions was purchased by the father of Vinasathambi Navasivayam. From the said purchase, the

said land was maintained by them and one Erambamoorthi Somasunderam was living in Patirippu was appointed caretaker to the said land. Vinsathambi Navasivayam conveyed the said property to the Respondents. According to the Respondents there were coconut trees in the said land and, after the cyclone in 1978, only 5 coconut trees remained along the roadside of the said land. The Respondents further stated that on or about 4th September 2008, they received an information from the caretaker Somasundaram, that unknown people were fencing the said land. Thereafter on 5/09/2008, a complaint was lodged by the 1st Respondent at the Police Station. The other Respondents also made complaints on 6/09/2008 and 16/09/2008. The Respondents claim the disputed land is owned by them by their respective deed of transfer given to them by their parents.

The inquiry in the Magistrate's Court commenced with a filing of the information of the Officer-in-Charge of the Police Station, Kalawanchikudi. On the 30th of September 2008 under Section 66(1)(a) of the Primary Court Act and, as the Magistrate could not bring a settlement among the parties, he proceeded to inquire into the said dispute. The Magistrate, with the consent of parties, inspected the disputed land on 6/02/2009 as the documents filed before the Magistrate in the said inquiry had not clearly identified the land in dispute (corpus). When the Learned Magistrate visited the disputed land, the parties to the dispute were present, and the disputed land was identified as the land in dispute and, therefore, the question of identity of the land (corpus) did not arise in the said inquiry. The learned Magistrate, after considering the evidence and the documents placed before him, and on the basis of his inspection, delivered his order on 13/02/2009 in favour of the Appellant.

The Respondent Kalaiarisi Uruthiran filed a revision application bearing No.HC/Bat/Rev/547/09 in the High Court of Batticaloa against the said order dated 13/02/2009 of the Magistrate. Learned High Court Judge, after hearing the Revision Application, made order on 16.02.2011 setting aside the order of the learned Magistrate

and ordered that the Respondents, including the Interventient Respondent to be placed in the land in dispute, and that the Appellant to pay Rs.10,000/- to each Respondent, including the Interventient Respondent, as costs.

The Appellant being aggrieved by the said order of the learned High Court Judge dated 16/06/2011, preferred this appeal to this court, and has sought to set aside the order of the learned High Court Judge dated 16/02/2011.

The land in dispute was properly identified as the land was identified with the consent of parties and in their presence by the learned Magistrate by his visit to the said land. In view of this, there is no dispute regarding the identity of the land. The learned High Court Judge, in his judgment, has agreed that the issues raised by the Magistrate are correctly identified by the Magistrate. The learned High Court Judge, in his judgment, observed "The learned Magistrate in his order correctly stated that the matters that have to be inquired into are: (1).Who possessed the land in dispute on the date? The information was filed by the Police; (2).Is anyone has been dispossessed within the two months period immediately prior to the date of information?"

The above finding of the learned Magistrate and the learned High Court Judge on the issues that have to be determined is accepted by the Appellant and Respondents even in this appeal. The 1st issue is:

Who possessed the land in dispute on the date the information was filed by the Police?

It is an admitted fact that the information to the Magistrate's Court was filed on 30/09/2008. The Appellant has made a complaint to the Police that he was dispossessed by the Respondents on 17/09/2008 by damaging a portion of the fence from 8 acres out of the 12 acres that he was in possession of. The Respondents also have claimed that they have made complaints to the Police in relation to the trespass of the

Appellant to their land and they have taken possession of the land. From the above facts it is in evidence, and also there is no dispute that at the time of filing the information the Respondents were in possession of the disputed land.

The only question that has to be determined is, is anyone has been dispossessed within the two months' period immediately prior to the date of information. It is the position of the Appellant that the said land was not possessed by any one until the Appellant fenced the land on 2/09/2008, and the Respondents dispossessed him on 17/09/2008. The learned Magistrate in his judgment also had come to the conclusion, as the 2nd Party Respondents did not possess the land until the 1st Party Appellant fenced the land on 2/09/2008, and the 1st party was dispossessed on 17/09/2008 and he was not in possession on the date of filing the information, i.e., 30/09/2008. The learned Magistrate held that the 1st Party was forcibly dispossessed by the 2nd Party and the 1st Party is entitled to possess the land and, therefore, the 2nd Party should hand over possession to the 1st Party.

It appears from the evidence submitted to court by Affidavits and other documents, that the land was covered with shrubs and bushes and that there was no fence surrounding the land before it was fenced by the Appellant on the 2nd of September 2008. Even though the Respondents claim that they were in possession of the said land, and they were maintaining the said land, they have specifically said that they possessed the land without securing the boundaries. There is no evidence submitted by the Respondents that they enjoyed the fruits of the said land or that they have developed the land in any way. It is in evidence that there were coconut trees in the land, but the Respondents have not even claimed that they were plucking coconuts from those trees. The learned Magistrate has observed that the fence erected is a new fence, and the well that was there in the land was also constructed very recently. Certain plants that were there were planted recently and those plants have died due to

lack of care to those plants. This shows that the said land was not developed or looked after by either the Appellant or by the Respondents before the 2nd of September 2008.

The learned High Court Judge has observed in his judgment:

“When perusing the case record one could see that the learned Magistrate came to the correct finding that the 1st Party fenced this land on 2/09/2008, and also on the date of filing the Police information to Court on 30/09/2008, the 1st Party was not in possession, as admitted by him, in his Police statement and Affidavit, but there is a failure to look into the facts of constructive possession.”

The learned High Court Judge also was of the view that neither the Appellant nor the Respondents were in physical possession of the land before the 2nd of September 2008, but the learned High Court Judge has based his judgment on the concept of constructive possession. He has observed that a person has constructive possession 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, and he cited *Iqbal Vs. Majudeen (1999) 3 SLR page 213* in support of the contention that the constructive possession should be considered when deciding issues under Section 66(1)(a) of the Primary Court Act. The said judgment is in relation to the possession of premises where the Respondent, upon the death of her husband, went to live with her mother and the premises in question where she was living earlier was locked up by her. The Appellant, after he returned to Sri Lanka, broke open the door of the premises and entered into possession.

In those circumstances the Court of Appeal held that the Respondent was in constructive possession even though the Respondent was not in physical possession and, therefore, the Respondent was restored to possession under the Primary Court Act. The Learned Judges of the Court of Appeal observed in the judgment “that the premises in question was kept locked up by the 1st Respondent confirms the fact that the 1st

Respondent had actual control and management of the same which served to show that the 1st Respondent had possession of the property in question before the 1st Respondent was admittedly ousted by the 2nd Respondent-Appellant”.

The important question in constructive possession is that he must have both the power and the intention at a given time to exercise dominion or control over a thing either directly or through another person. The mere fact that a person exercised a dominion or control over the property in question is not sufficient to have constructive possession, but he also must show that he has excluded the others from the possession of the said property.

In view of the above, the Appellant and the Respondents are in the same status. The Appellant and Respondents both claim that they were not in actual possession, but both have the power and intention at the given time to exercise dominion or control over the said land directly or through another person. Even though the Respondents claim that they were managing the said property, as I have observed, there is no evidence to show that the Respondents have drawn any benefit from the said property or developed the said property. On the other hand, they have not fenced the property in order to exclude others from the possession thereof. In these circumstances the Respondents cannot claim that they were in constructive possession of the said land. The Petitioner-Appellant and the Respondents were not in real possession or constructive possession of the said land until 2/09/2008. The Appellant is the first person who had entered the said land on 3/08/2008 to survey the said land and thereafter on 2/09/2008 he has erected a fence around the said land and thereby the Appellant has taken over physical possession of the said land on the 2nd of September 2008, and he was in possession of the said land until 16/09/2008 and it is in evidence that the Appellant was dispossessed on 17th September 2008 by the Respondents by breaking the fence erected by the Appellant and erecting new fence dividing the land. In these circumstances it is the Appellant who had been dispossessed within two

months immediately prior to the date of information and, therefore, the finding of the learned High Court Judge that the Respondents had been in possession till they were disposed of the land on 2/09/2008 was erroneous and there is no material to support this finding and, for these reasons, I set aside the learned High Court Judge's order made on 16/06/2011, and affirm the order of the learned Magistrate of Batticaloa in Case No.1288/PCA/08 dated 13/02/2009. The appeal is allowed without costs.

President of the Court of Appeal

A.W.A.Salam,J.

I agree,

Judge of the Court of Appeal