IN THE COURT OF APPEAL OF THE DEMOCRATIC

SOCIALIST REPUBLIC OF SRI LANKA.

CA PHC 198/2003

PHC Balapitiya 442/02

G pawrarasiri De Soyza,

Gurugedara,

Nape,

Kosgoda

4TH RESPONDENT-PETITIONER-APPELLANT

Vs

A P Indrani De Soysa,

Nanathota,

Kosgoda

1ST RESPONDENT-RESPONDENT-RESPONDENT AND OTHERS

Before : A.W.A. Salam, J. & Sunil Rajapakshe, J.

Counsel : Nagitha Wijesekara with I Danthanarayana for the 4t respondent-petitioner-appellant and D S Saman De Silva for the 1st 2nd 5th and 6th respondent-respondent-respondents.

Argued on : 07.11.2013

Decided on : 12.11.2013

A W A Salam, J

This appeal is from the judgment of the learned High Court judge dated 4th September 2003, entered in the exercise of the revisionary powers vested in the Provincial High Court. It was delivered consequent upon the 4th respondent-petitioner-appellant challenging the determination made by the learned Magistrate in proceedings instituted under chapter VII of the Primary Court Procedure Act No 44 of 1979.

Proceedings in the Magistrate's Court originated upon a complaint made by the 1st respondent-respondent-respondent to the Kosgoda Police on 6 June 2001 upon which the respective police had filed a report under Section 66 (1) (a) of the Primary Court Procedure Act. According to the complaint made to the police the 4th respondent-petitioner- appellant had made preparation to enter into the house in the possession of

the 1st respondent-respondent-respondent. After the parties having filed their claims by way of affidavit and later made written submissions on the matter, the learned Magistrate by his order dated 2nd May 2002, came to the findings that the 1st respondent-respondent-respondent had been dispossessed by the 4th respondent-petitioner-appellant, within a period of two months immediately preceding the date of filing the information and directed that the 1st respondent-respondent-respondent be restored to possession. The main question that was raised in the appeal was that the house in question was abandoned and in the possession of none, even though the learned High Court judge in her judgment had stated that by reason of the payment of the electricity bills, it can be assumed that the 1st and the 2nd respondent-respondent-respondents had been in the possession of the house in dispute.

It is common ground that the house in question at one point of time belonged to a person by the name "Ryting" and upon his

demise, it had devolved on his seven children. The 4th respondent-petitioner-appellant has purchased undivided rights of 2/7 from two of the children of the deceased "Ryting" and thereafter had entered into the house when the keys of the house had been allegedly handed over to him by one of the vendors on which he had purchased the undivided rights.

The learned and Magistrate in his determination has come to the flawless finding that the 4th respondent-petitioner-appellant has come into possession of the house in question on 28 May 2001. The deed on which he has purchased rights from the two children of the original owner is produced at the inquiry and according to the said deed the rights have been purchased by the 4t respondent-petitioner- appellant on 17 May 2001.

The main question that arises for consideration at this jucture is whether the learned and High Court judge had erred herself in coming to the conclusion that by reason of the payment of the

electricity bills the 1st and the 2nd respondent can be said to have been in possession of the subject matter of the proceedings. The learned counsel for the appellant strenuously argued that the house in question was abandoned and therefore the 4th respondent petitioner appellant had every right to enter into possession with the permission of the vendors to the deed on which she has purchased the rights.

Even though the electricity had not been consumed during the relevant period in respect of the house in question, admittedly an electricity bill worked out for a nominal amount has been issued as it is done usually, in the name of the 1st respondent-respondent-respondent who alleged that she was dispossessed from the house.

In the case of Iqbal Vs Majeudeen 1999 3 Sri Lanka Law Report page 213 it was held that the fact in 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 further held in that case that the law recognises two kinds of possession namely when a person has direct physical control over a thing at a given time his possession is called actual possession. On the other hand when he though not in actual possession has both the power and intention at a given time to exercise dominion or control over a thing either directly or through another person, in such an event his possession is termed as constructive possession.

When the concept of possession referred to above, is applied to the facts of the presente, it is quite clear that the house in question had not been abandoned and the intention of the 1st respondent-respondent-respondent was to retain her power of control over the disputed house. In the circumstances the appellant had no right whatsoever to enter into the possession of the house on the basis that it was abandoned. In that respect the learned and High Court judge was correct when she came

to the conclusion that by reason of the electricity bills being paid by the party who was dispossessed, se was in actual possession of the house in question. As such the learned Magistrate was also correct when he arrived at the conclusion that the 1st respondent-respondent-respondent has been dispossessed during a period immediately preceding the date of filing the information under Section 66.

In the circumstances, I do not see any reason to vary the determination of the learned Magistrate or the impugned judgment of the learned High Court judge. Consequently, this appeal stands dismissed subject to costs.

Judge of the Court of Appeal

Sunil Rajapaksha,J

I agree.

Judge of the Court of Appeal

NR/-