

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

In the matter of an application in terms of  
High Court of the Provinces (Special  
Provisions) Act No. 19 of 1990 read with  
Article 154(p) of the Constitution of the  
Democratic Socialist Republic of Sri Lanka.

**CA (PHC) 40/2006**  
**Provincial H.C. of Balapitiya**  
**Case No-630/04 (Revision)**  
**MC Elpitiya Case No-20287**

Kandage Kamalawathi  
Bambarawana, Maththaka

**Petitioner**

Vs.

Kalahage Premalal Dharmasiri  
Bambarawana, Maththaka

**Respondent**

And

Kandage Kamalawathi  
Bambarawana, Maththaka

**Petitioner-Petitioner**

Vs.

Kalahage Premalal Dharmasiri  
Bambarawana, Maththaka

**Respondent-Respondent**

**And Now**

Kalahage Premalal Dharmasiri  
Bambarawana, Maththaka

**Respondent-Respondent-  
Petitioner**

**Vs.**

Kandage Kamalawathi  
Bambarawana, Maththaka

**Petitioner-Petitioner-  
Respondent**

**Before : H.C.J. Madawala , J  
&  
L.T.B. Dehideniya, J**

**Counsel : Manoj de Silva instructed by Harsha Jayawardana for the Respondent-  
Respondent-Appellant  
Sunil Abeyrathna with Buddhika Alagiyawanna for the Petitioner-Petitioner-  
Respondent**

**Argued On : 29 /07 /2016**

**Written Submissions on : 12 /08 /2016**

**Decided On : 13 /10 /2016**

**H. C. J. Madawala , J**

This appeal is preferred to set aside the order of the Learned High Court Judge of Balapitiya dated 8/2/2006 and for a declaration that the Respondent Petitioner is entitle to the land in dispute and for cost.

The Petitioner Respondent instituted proceedings in the Magistrate Court of Elpitiya under in terms of Section 66 (1) (b) of the Primary Court Procedure Act No. 44 of 1979 on the purported basis that the whilst she has gone to her native village in Bulathsinhala on 14/3/2004 and on 16/3/2004, she has been forcibly dispossessed from the house and land more fully described in the application by the Respondent Respondent Appellant and accordingly *inter alia*, sought an order directing her to be restored to possession of the said property.

In the Magistrate Court the Appellant took up the position that the Respondent was never forcibly dispossessed from the property, and in fact she went to her village on 10/2/2004 and left the property after voluntary handing over the property to her daughter, one Chandranilatha and the said Chandranilatha handed over the property to the Appellant on 29/2/2004 and accordingly the Appellant is in possession of the property from 29/2/2004.

The Learned Magistrate by his order dated 10/11/2004 after a considering the evidence placed before court and considering submissions filed on behalf the parties decided that there is no forcible dispossession of the Respondent as described in Section 68(3) of the Primary Court's Act.

Being aggrieved by the Learned Magistrate's order the Respondent Respondent Petitioner filed a revision application in the Provincial High Court of Southern Province holden in Balapitiya. She challenged the aforesaid order dated 10/11/2014 delivered by the Learned Magistrate of Elpitiya. The Learned High Court Judge of Balapitiya by his judgment dated 8/2/2006 held *inter alia* that the Respondent Respondent Appellant has forcibly dispossessed the Petitioner Petitioner Respondent from the property and accordingly set aside the order dated 10/11/2014

of the Learned Magistrate of Elpitiya and held that the Respondent is entitled to possession of the property.

Being aggrieved by the decision of the Learned High Court Judge of Balapitiya the Appellant has preferred the instant appeal by filing the petition dated 13/2/2006 and challenged the aforesaid judgment dated 8/2/2006 of the Learned High Court Judge of Balapitiya. Thereafter this matter was taken up for argument on 29/7/2016 both Learned Counsels made their oral submissions and upon conclusion thereafter was directed to submit their written submissions on 12/8/2016 which they have complied with.

We have considered the relevant evidence and both oral and written submissions of both parties. The grounds of appeal of the Appellant was as follows,

- i. Order of the Learned High Court Judge is contrary to the law and facts furnished;
- ii. The Respondent has not presented exceptional circumstances in applying for revision, and revision allowed;
- iii. Respondent has not been forcibly dispossessed from the property by the Appellant; and
- iv. Order has been given by the High Court in respect of a matter that should have been decided by a Civil Court.

The main ground of appeal is whether the Petitioner Respondent was forcibly dispossessed by the Respondent Petitioner. The Respondent Petitioner's main position was that a Petitioner Respondent voluntarily gave possession to Chandranilatha by letter marked V1 and thereafter the Petitioner correctly obtained the possession from Chandranilatha. Thus, the Respondent had already left the place by the time Petitioner received possession.

Therefore, it was contended that the forcible dispossession has not taken place and the Petitioner is currently the only lawful person to hold the possession of the land.

The Respondent has been in possession of the said land until 14/3/2004 and thereafter left to Bulathsinhala temporally to attend some personal matters. In the meantime the Petitioner had unlawfully obtained the possession of the said land on 16/3/2004 therefore, the Respondent holds that the unlawful dispossession took place on the said date on 16/3/2004. As a result of which the Respondent made a police complaint on this regard dated 8/3/2004 marked P2. Further it was contended that the Respondent had never transferred the land to the Petitioner. She had only transferred the land to one Liyana Gamage Samarasena in exchange for Rs.50, 000/. Still the Respondent did not give the possession to the above named Samarasena as the only reason for the above transfer was to obtain some money for the Respondent to attend some medical treatment. This position has been supported by an affidavit given by Liyana Gamage Samarasena himself dated 27/7/2004 marked P7, upholding the Respondent's stand. He had emphasized the fact that he never intended or intends to obtain the possession from the Respondent. This clearly proves the fact that Respondent has never given up the possession of the land even by the time she left to Bulathsinghala on 14/3/2004. It was also considered that the letter marked V1, it only stated that the Respondent has given a promise to given possession of the land. But still this document does not hold that the Respondent has given or handed over the possession to Chandranilatha. Accordingly, it was submitted that the Petitioner could not have legally obtained the possession of the said land from Chandranilatha under these circumstances. Therefore it was submitted that the Petitioner entered the land on 16/3/2004 and prevented the Respondent from entering her premises, which clearly established the forcible dispossession under Section 68(3) of the Primary Court Procedure Act. It was also submitted that the fiscal report marked X2 clearly indicates the obstacles made by

the Petitioner preventing the Respondent from entering the premises. This also upholds the position that the Respondent has been forcibly prevented from freely entering the premises. On the other hand, the fiscal report clearly discloses some of the items found in the premises which are belonging to the Respondent. Among them are some of the essential household items Respondent uses daily. However there has not been a single claim made by the Petitioner nor the Chandranilatha for said items. This findings also clearly establish the continuous possession enjoyed by the Respondent even before forcible dispossession took place on the hands of the Petitioner. The date in which the Petitioner claims as he obtained the possession of the land is on 29/2/2004, still it was contended that this does not form two months possession on part of the Petitioner from the date in which the initial breach of peace took place. By the affidavit dated 18/6/2004 filed in the Magistrate Court of Elpitiya, the Appellant has clearly explained how he came into possession of the property. He has stated that the Respondent has never forcibly dispossessed from the property by the Appellant and that in fact the Respondent went to her native village on 10/2/2004 and left the property after voluntary handover the possession of the property to her daughter, one Chandranilatha, and said Chandranilatha voluntary handed over possession of the property to the Appellant on 29/2/2004 and that the Appellant is in possession of the property since 29/2/2004. In proof of this fact that the Respondent has transferred the property to her daughter Chandranilatha an affidavit dated 10/2/2004 has been produced marked as V1. It was submitted that in the body of the affidavit the land in question has been described and the Respondent has promised to handover the possession of the property to her daughter Chandranilatha.

It was submitted that the Respondent denied the execution of V1 and took up the purported position that her signature was obtained on a blank paper by her daughter chandranilatha in order to carry out a conveyance pertaining to another land, and same has been fraudulently converted in to V1.

We find that this document V1 is only a promise to handover the possession of the property to the Chandranilatha. The fact that the key was handed over to the Chandranilatha does not indicate that the mother of Respondent when she left to go to native village of Bulathsinhala that she intended to handover possession of Chandranilatha. It was submitted that by V2 said Chandranilatha sold the property to the Appellant for Rs.115, 000/- and obtaining advance also upon execution on V2 on 29/2/2004. It was submitted the Appellant continued the possession of the property as set out in paragraph 21 of the affidavit dated 18/6/2004 of the Appellant which has been corroborated by Chandranilatha as stated in paragraph 6 of the affidavit dated 17/6/2004 and finally the property was formally conveyed to the Appellant by Chandranilatha by executing the deed No 10638.

It was submitted that the learned High Court Judge has solely considered wrong of V1 in isolation, but failed to consider what followed the execution of the V1 as revealed by the affidavits and documents produced before the Magistrate's Court by the Appellant. It was submitted that it is clear from the affidavits and documents produced by the Appellant, upon the execution of V1 on 10/2/2004 very day the Respondent has voluntarily handed over the possession of the property to the Chandranilatha by handing over the keys of the property and thereafter on 29/2/2004 upon execution of V2 the said Chandranilatha has voluntarily handed over the possession of the property to the Appellant by handing over keys of the property to him. It was submitted that the Appellant has entered in to the house by using the keys of the house and not by breaking in to the house or by making forcible entry in to the house.

It was submitted that this position of the Respondent corroborates the possession of the Appellant. That the possession of the house was voluntarily handed over by

Chandranilatha on 29/2/2004. We find that the keys of the said property has been handed over the by Chandranilatha taken place when the Respondent has gone to a native village in Bulathsinhala on her return on 16/3/2004 when she come to know about the incident Nandani who accompanied the Respondent on 16/3/2016 Chandranilatha with her husband has forcibly taken the Respondent to the village again and on the night on 16/3/2016 she made a complaint at the Police Station of Pitigala. Nandani has gone to a Bulathsinhala on 14/3/2004 while staying there her sister Chandranilatha came with her husband and forcibly took a Respondent to the village. It was submitted that the Nandani's affidavit does not corroborate the purported position taken up by the Respondent as to the occurrence of the alleged incident of dispossession. It was submitted the Learned High Court Judge could not have held that the Respondent was dispossessed by the Appellant.

**In Iqbal V. Majedudeen and others "Forcibly dispossessed" in 68(3)** of the Primary Courts Procedure Act means that has taken place against the will of the person entitled to possess and without the authority of the law. We find that from the above submissions made by both sides that the Respondent has been forcibly dispossessed against her will which she was entitled to possess and that was without authority of the law. We are of the view that the Petitioner Petitioner Respondent after returning from native place to Bulathsinhala has not been allowed possession and has been forcibly dispossessed by the Appellant. Accordingly we hold that the Learned High Court Judge has come to a correct conclusion in this respect.

On a consideration of this case and when scrutinizing the document V1 we find that it is only a promise to give possession to Chandranilatha by the Respondent. However the Respondent has alleged that this document is a fraudulent document.



On the transfer deed from Chandranilatha to the Appellant we find that it is paternal rights in respect of this premises that has been transferred to the Appellant. Further it is an undivided half share of the house that has been transferred. The Respondent is the widow who was in possession of this house and premises. There has been no transfer by the Respondent to Chandranilatha. Hence we find that Chandranilatha has transferred and given possession of her own rights and is not entitle to transfer the rights of the Mother Respondent. We find that the said document V1 denied by the Respondent and had stated that it is a fraudulent document and hence we are of the view as there is no transfer deed by the Respondent to Chandranilatha. That the Respondent is legally entitle to her share in the premises as the widow of the Liyanage Gunapala what Chandranilatha had transferred to the Appellant is only her paternal inheritance which she had received from her father. Accordingly we are of the opinion that the Respondent possess the house and property. On or before 16/3/2004 and on her return she had been prevented from entering the said house and property thus, according to against her will she had been forcibly dispossessed by the Appellant on 16/3/2004 we hold the version of the Respondent is credible. As such we are of the view that the Learned High Court Judge has come to a correct conclusion when he decided that the Respondent has been forcibly dispossessed from the premises. Further as regard to exceptional circumstances, we find that the impugned order given by the Learned Magistrate is manifestly erroneous which go beyond an error or defect irregularity. This legal issue itself is an exceptional circumstances that warrant the exercise of revisionary powers by the High Court.

**Vythialingam J in Rustonm Vs. Hapangama & Co. (1978-79) 2 SLR 225** observed at page 231 after citing long list of authorities, the Vythilingam J defines the following as an exceptional circumstance;

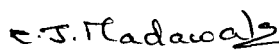
*“So that where an order is palpably wrong and it affects the rights of a party also, this court would exercise its powers of revision to set right the wrong irrespective of whether an appeal was taken or was available”*

**Wimalachandra J in Bank of Ceylon Vs. Kaleel and others (2004 (1) SLR 284) inter alia held at page 287 as follows,**

*“ In any event, for this court to exercise revisionary jurisdiction the order challenged must have occasioned a failure of justice and be manifestly erroneous which go beyond an error or defect or irregularity that an ordinary person would instantly react to it. In other words, order complained of is of such a nature which would have shocked the conscience of court”*

The Petitioner Appellant claimed to have obtained the possession of the land on 29/2/2004. The date in which the initial breach of peace on 16/3/2004. Accordingly we find that the Petitioner Appellant has not been in possession for two months and the Respondent had been forcibly dispossessed on 16/3/2004 when she was living in the premises continuously for more than two months before such incident took place.

Accordingly we are of the view that the Appellant who is now a co-owner should proceed to find his remedy by filing a partition case. Finally we see that there is no reason for us to interfere with the findings of the Learned High Court Judge of Colombo and as such we dismiss this appeal with cost of 25,000/-.

  
**Judge of the Court of Appeal**

**L.T.D.Dehideniya, J**

**I agree.**

**Judge of the Court of Appeal**