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

Weerasuriya Arachchilage Heen Banda,
Kadupitawatta, Hakahinna.

2nd Party Respondent Appellant

Weerasuriya Arachchilage Karunawathi,
Kadupitawatta, Hakahinna.

Intervenient 3rd Party Respondent Appellant

Court of appeal case no. CA/PHC 124/2010

H.C. Kegalla case no. 3565/Rev.

Vs.

Weerasuriya Arachchilage Tikiri Banda,
Dandeniya Janapadaya, Hakahinna.

1st Party Petitioner Respondent.

The Officer in Charge,
Police station, Dedigama.

Plaintiff Respondent Respondent

Before : H.C.J.Madawala J.
: L.T.B. Dehideniya J.

Counsel : M.S.A.Shaheed with Mohammed Rafi for the Appellant Respondent.
: Dr. Sunil Cooray for the 1st Party Petitioner Respondent.

Argued on : 14.07.2016

Written submissions filed on :06.09.2016

Decided on : 31.10.2016

L.T.B. Dehideniya J.

This is an appeal from an order of the learned High Court Judge of Kegalla.

The 1st party Petitioner Respondent (the Respondent) made a complaint to the Dedigama police on a land dispute stating that he is in possession of the land called Pittugodellahena and the 2nd Party Respondent Appellant (the 2nd Appellant) is disturbing his possession. The 3rd Intervenient Party Respondent Appellant (the 3rd Appellant) intervened and both 2nd and 3rd Appellants resisted the Respondent's application. The police filed information in the Magistrate Court under section 66 of the Primary Court Procedure Act stating that there is a likelihood of breach of the peace owing to the land dispute. The learned Magistrate after receiving the affidavits, documents and the submissions of the parties; determined that the 2nd and the 3rd Appellants were in possession and handed over the possession to them. Being aggrieved by the said order, the Respondent moved in Revision in the High Court of Kegalla where the order of the learned Magistrate was set aside and held that the Respondent was in possession of the land in dispute. 2nd and 3rd Appellants appealed against that order to this Court.

The Appellants argue that the learned High Court Judge has failed to identify the land in dispute properly and therefore the order of the learned High Court Judge is bad in law. The land in dispute is lot nos. 3 and 4 of the final partition plan no. 218/A made in the partition action no. 18879/P, marked as 1P2. Both parties admit that there was a partition action and the said plan was prepared. It is a common ground that one Punchi Appuhamy was in possession of the entire land even after the partition decree. When was Punchi Appuhamy came in to the possession is not admitted but the fact that he was in possession was admitted. The

Respondent states that Punchi Appuhamy being an elderly person and being an uncle of him, he lived with Punchi Appuhamy and with Karunawathi, the 3rd Respondent, he managed the lands. Later Punchi Appuhamy gifted a portion of land to him by deed no. 47 dated 30.09.2002 marked 1P4. The land described in this deed as an undivided 2 acres of a land out of 13 acres. Thereafter the Respondent executed a deed of declaration no. 335 dated 30.12.2007 declaring that he became the owner of lot 4 of plan no. 218/A by long and uninterrupted possession. On 3rd May 2008 he gifted the said portion to his daughter by deed of gift no. 179. The Appellants contention is that there is a contradiction in identifying the land. In deed no. 47 undivided portion of the entire land was described. The land described in the schedule of the deed is the subject matter of the partition action 18879/P. In deeds nos. 335 and 179 a divided portion, that is the lot 4 in the partition plan 218/A is described. The Respondent in his deed of declaration has not relied on the deed of gift no. 47 to acquire title, but only on the long and uninterrupted possession. Therefore the difference in the schedules in those deeds does not contradict the identity of the land. In an action under section 66 of the Primary Court Procedure Act the Court is not expected to decide the title to the land. The title deeds are only supporting documents to establish the possession.

The police filed the information in the Magistrate Court on 16.09.2008. Under section 68(1) of the Primary Court Procedure Act Court has to decide who was in possession on the date of filing the information when dispute is in regard to possession. Section 68(1) of the Primary Court Procedure Act reads thus;

> *68.(1) 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.

If there is a forcible dispossession, the Court has to determine when that dispossession took place and if it was within two months immediately prior to the institution of the action Court has to place him back in possession. The relevant section is 68(3). It reads;

68(3) 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.

In the present case the Appellants argue that the dispute is in possession and there is no dispossession and therefore section 68(1) should apply and the learned High Court Judge has applied the wrong section of law.

The Respondent made a complaint to the police on 03.09.2008 stating that he is in possession of the land in dispute and the Appellants disturbed his possession. The police filed the information under section 66 on 16.09.2008. Even in his affidavit filed in the said case he has taken the same stand. The Appellant's case is that the land was in possession of their father Punchi Appuhamy and on his demise they possessed it.

As I pointed out earlier, it is an admitted fact that Punchi Appuhamy was in possession. On his demise who possessed; is the issue. The Respondent in his complaint to the police has stated that he possessed. This fact was admitted by the 2nd Appellant in his statement to the police dated 16.06.2008 marked 1P7. The Appellant's position taken in that statement is that the Respondent is a rubber tapper and he was asked not to do tapping because he has stolen latex but then the Respondent reacted by saying that "I am the owner of the land and I will not allow you to enter in to the land" and threatened with a club. The Appellant requested the police to get him the land and not to allow the Respondent to come in to the land called Pittugodalla. This statement establishes that the Respondent is in possession of the land and the Appellants were not allowed to enter in to the land at least from 16.06.2008.

It had been held in the case of Ramalingam v. Thangarajah [1992] 2 Sri L R 693 that even a trespasser can claim possession under section 68 of the Primary Court Procedure Act. It had been held that;

> *Thus, the duty of the Judge in proceedings under section 68 is to ascertain which party was or deemed to have been in possession on the relevant date, namely, on the date of the filing of the information under section 66. Under section 68 the Judge is bound to maintain the possession of such person even if he be a rank trespasser as- against any interference even by the rightful owner. This section entities even a squatter to the protection of the law, unless his possession was acquired within two months of the filing of the information.*

The evidence that was tendered by the Appellants to establish their possession is also not conclusive. Except for the plan and the deed, the

other documents were obtained after institution of this action or after the dispute arose. The learned Counsel heavily relies on the second report submitted by the Grama Niladhari to establish possession. This report was submitted to Court on the direction of the learned Primary Court Judge. The court is expected to determine the case on the affidavits and the documents tendered to Court. It has been held in the case of Karunawathi v. Sangakkara [2005] 2 Sri L R 403 that;

> *(2) There is no provision for the Judge to call for oral evidence of witnesses of his own choice. He cannot be permitted to go on a voyage of discovery on his own to arrive at a decision when the parties have placed before him the material on which they rely and it is on this material that, he is expected to arrive at a determination.*

The Court cannot rely on the said second report of the Grama Niladhari. The documents are prepared after the dispute. Therefore the second Appellant's own admission that the Respondent is in possession of the disputed land is strong evidence against the Appellants.

The Respondent has established that he was in possession on the date of filing of the imformation. The Appellants have failed to establish that they were disposed within two months prior to the filing of the information. Therefore, under section 68(1) of the Primary Court Procedure Act the only determination that the Court can come in to is that the Respondent was in possession of the disputed land.

Though the learned High Court Judge has referred to section 68(3) in his order, his determination regarding the possession is correct. He has held that though there is clear evidence that the Respondent (the petitioner in the High Court revision application) is in possession the

learned Magistrate has wrongly decided that the appellants are entitle to possession. We see no reason to interfere with that finding.

Accordingly we dismiss the appeal with costs fixed at Rs. 10000/-

Judge of the Court of Appeal

H.C.J.Madawala J.

I agree.

Judge of the Court of Appeal