

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

In the matter of an application for Revision in  
terms of Article 138 of the Constitution of the  
Democratic Socialist Republic of Sri Lanka

**Court of Appeal case no.  
CA/PHC/APN58/2015**

**H.C. Galle case no. 34/13**

**M.C. Galle case no.  
4216/13**

1. Lelio Orsetti,  
No. 14, Flower Garden Hotel,  
Welledewala Road, Unawatuna, Galla.  
VIA. S. Sandera 32,  
55100 Lucca, Italy. (Permanent address)
2. Kathiragamalingam Sasidaran,  
No. 14, Welledewala Road, Unawatuna,  
Galla.

**Petitioners**

**Vs.**

1. Umagiliyage Rasika Chaminda,  
Bodhiraja Mawatha, Unawatuna, Galla.
2. Nawadawa Withanage Gnanalatha,  
Bodhiraja Mawatha, Unawatuna, Galla.

**Respondents.**

**And**

1. Lelio Orsetti,  
No. 14, Flower Garden Hotel,  
Welledewala Road, Unawatuna, Galla.  
VIA. S. Sandera 32,  
55100 Lucca, Italy. (Permanent address)
2. Kathiragamalingam Sasidaran,

No. 14, Welledewala Road, Unawatuna,  
Galla.

**Petitioner Petitioners**

**Vs.**

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Bodhiraja Mawatha, Unawatuna, Galla.
2. Nawadawa Withanage Gnanalatha,  
Bodhiraja Mawatha, Unawatuna, Galla.

**Respondent Respondents.**

**And Now**

1. Umagiliyage Rasika Chaminda,  
Bodhiraja Mawatha, Unawatuna, Galla.
2. Nawadawa Withanage Gnanalatha,  
Bodhiraja Mawatha, Unawatuna, Galla.

**Respondent Respondent Petitioners.**

**Vs.**

1. Lelio Orsetti,  
No. 14, Flower Garden Hotel,  
Welledewala Road, Unawatuna, Galla.  
VIA. S. Sandera 32,  
55100 Lucca, Italy. (Permanent address)
2. Kathiragamalingam Sasidaran,  
No. 14, Welledewala Road, Unawatuna,  
Galla.

**Petitioner Petitioner Respondents**

**Before** : P.R. Walgama J.  
: L.T.B. Dehideniya J.

**Counsel** : Shantha Jayawardane with Camara Nanayakkara for the  
Respondent Respondent Petitioners.  
: W. Dayarathne PC with R.Jayawardane for the Petitioner  
Petitioner Respondent.

**Argued on** : 04.03.2016

**Written submissions filed on** : 19.05.2016

**Decided on** : 09.12.2016

**L.T.B. Dehideniya J.**

This is a revision application filed against an order of the learned High Court Judge of Galle.

The 1<sup>st</sup> and 2<sup>nd</sup> Petitioner Petitioner Respondents (the 1<sup>st</sup> and 2<sup>nd</sup> Respondents), as a private party, filed information in the Magistrate Court Galle under section 66(1)(b) of the Primary Court Procedure Act indicating that a land dispute threatening breach of the peace has arisen. The Respondent's contention is that the land in dispute called Thibbatukanathhawatta with the house in it was purchased by the 2<sup>nd</sup> Respondent and was transferred to a company owned by the 1<sup>st</sup> Respondent. Thereafter the land and the house were developed by the 1<sup>st</sup> Respondent. The 1<sup>st</sup> Respondent was in possession of the land and the house and the 2<sup>nd</sup> Respondent was assigned to look after the house. On 22.02.2013 the 1<sup>st</sup> Respondent has come to Sri Lanka and found that the Respondent Respondent Petitioner (the Petitioner) was in occupation of the land and the house. The Respondents filed this action in the

Magistrate Court of 20.03.2013 under section 66(1)(b) of the Primary Court Procedure Act.

The Petitioners contention is that they have not sold the land called Mahamestrigawatta and house where they were residing. Their side of the case is that they were residing in the said house for about fifty years. The electricity and water connections were obtained by them. They are not in possession of a land called Thibbatukanaththawatta but they are in Mahamestrigawatta.

The learned Magistrate after filing the affidavits, counter affidavits, documents and written submissions held that the date of dispossession has not established and dismissed the application. Being moved in revision in the High Court of Galle, the order of the learned Magistrate was set aside and held with the Respondents. This revision application is from the said order of the learned High Court Judge.

Under the part VII of the Primary Court Procedure Act, the title to the land is not the deciding factor. Section 68 of the Act provides;

*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.*

*(2) An order under subsection (1) shall declare any one or more persons therein specified to be entitled to the possession of the land or the part in the manner specified in such order until such person or persons are evicted therefrom under an order or decree of a*

*competent court, and prohibit all disturbance of such possession otherwise than under the authority of such an order or decree.*

*(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.*

*(4) An order under subsection (1) may contain in addition to the declaration and prohibition referred to in subsection (2), a direction that any party specified in the order shall be restored to the possession of the land or any part thereof specified in such order.*

The Court is vested with a duty under section 68 inquire in to the fact that who was in actual possession on the date of filing of the information and to protect his possession until the matter is adjudicated before a competent court. The only exception is where a dispossession has taken place within two months from filing the information. It has been held in the case of Ramalingam V. Thangarajah [1982] 2 Sri L R 693 that;

*In an inquiry into a dispute as to the possession of any land, where a breach of peace is threatened or is likely under Part VII, of the Primary Courts Procedure Act, the main point for decision is the actual possession of the land on the date of the filing of the*

*information under section 66; but, where forcible dispossession took place within two months before the date on which the said information was filed the main point is. Actual possession prior to that alleged date of dispossession. Section 68 is only concerned with the determination as to who was in possession of the land or the part on the date of the filing of the information under section 66. It directs the Judge to declare that the person who was in such possession was entitled to possession of the land or part thereof Section 68(3) becomes applicable only if the Judge can come to a definite finding that some other party had been forcibly dispossessed within a period of two months next proceeding the date on which the information was filed under section 66. The effect of this sub-section is that it enables a party to be treated to be in possession on the date of the filing of the information though actually he may be found to have been dispossessed before that date provided such dispossession took place within the period of two months next proceeding the date of the filing of the information. It is only if such a party can be treated or deemed to be in possession on the date of the filing of the information that the person actually in possession can be said not to have been in possession on the date of the filling of the information. 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 entitles even a squatter to the protection of the law, unless his*

*possession was acquired within two months of the filing of the information.*

In the present case the Respondents alleged that they were dispossessed by the Petitioner. On the date of filing of the information, the disputed land was in the possession of the Petitioner. It was an undisputed fact. The Respondents to regain the possession, they must have established that the dispossession took place with two months immediately prior to the date of filing of the information. If the dispossession is not proved, the party who was in possession, the Petitioners, becomes entitle to posses.

The burden of proving the fact that the dispossession took place within the two months prior to the filing of the information is on the Respondents. Under section 101 of the Evidence Ordinance, “Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts, must prove that those facts exist.”

The Respondents when they were dispossessed. The 1<sup>st</sup> Respondent in not residing in the country and the 2<sup>nd</sup> Respondent is not residing in the disputed house. What the 1<sup>st</sup> Respondent knows is that when he came to Sri Lanka on 22.02.2013, he has been dispossessed by the Petitioners. In paragraph 19 of the affidavit of the 1<sup>st</sup> and 2<sup>nd</sup> Respondents dated 08.03.2013 stated that the 2<sup>nd</sup> Respondent visited the house “about one week prior to 23.02.2013”. This statement is the only evidence presented to Court to establish that they were in possession till 15.02.2013. The date, 23<sup>rd</sup> February is the date where the 1<sup>st</sup> Respondent came to the country, but the date he visited the house is “about one week back” from that date. The date he visited the house is not definite. Under section 68(3) of the Act, the date of dispossession is very material. The date

cannot be established by a loose and uncertain statement such as “about one week”, it has to be a specific and certain.

The 1<sup>st</sup> Respondent, after coming to Sri Lanka and visiting the disputed premises, made a complaint to the police on the same date. The said complainant is marked and produced as ‘P5’. What the 1<sup>st</sup> Respondent has said to the police is that the 1<sup>st</sup> Respondent has locked the premises and left the country but when came back, the Petitioners are occupied the premises. This statement is silent on the involvement of the 2<sup>nd</sup> Respondent. If the 2<sup>nd</sup> Respondent was in charge of the premises, the 1<sup>st</sup> Respondent would have revealed his name to the police and if so, it would have given some weight to the statement of the 2<sup>nd</sup> respondent.

Punchi Nona v. Padumasena and others [1994] 2 Sri L R 117 at 121

*Section 68(1) of the Act is concerned with the determination as to who was in possession of the land on the date of the filing of the information to Court. Section 68(3) becomes applicable only if the Judge can come to a definite finding that some other party had been forcibly dispossessed within a period of 2 months next preceding the date on which the information was filed.*

The Respondents have failed to establish the definite date that they were dispossessed and by that they have failed to establish that they were dispossessed within two months prior to the filing of the information.

The Petitioners submit that this case does not come under section 68 of the Primary Court Procedure Act but comes under section 69. The section 69 is on “*the dispute relates to any right to any land or any part of a land, other than the right to possession of such land or part thereof*” but the dispute in this case is clearly on “*the dispute relates to the*



*possession of any land or part thereof*” where the section 68 of the Act applies. The 1<sup>st</sup> Respondent claims that the land was purchased by him and on the strength of the ownership, he is entitle to posses. It is a matter for a competent civil court to decide, does not come within the purview of the Primary Court Procedure Act.

The learned Magistrate has correctly decided that the land in dispute was in possession of the Petitioners on the date of filing of the information and the Respondents have failed to establish that they were dispossessed within a period of 2 months next preceding the date on which the information was filed.

Accordingly, I act in revision and set aside the order of the learned High Court Judge dated 16.02.2014 and affirm the order of the learned Magistrate dated 07.08.2013.

Application allowed with costs fixed at Rs. 10,000.00

Judge of the Court of Appeal

**P.R.Walgama J.**

I agree.

Judge of the Court of Appeal