

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

In the matter of an Application for
revision of an order of the Provincial
High Court in the exercise of its
revisionary jurisdiction.

C A (PHC) / 230 / 2001

Provincial High Court of

Central Province (Kandy)

Case No. HC (Rev) 301 / 2001

Primary Court Kandy

Case No. 66600

Thilak Kumara Udugama,

No. 45,
Purnawaththa Road,
Kandy.

PETITIONER - PETITIONER -

APPELLANT

Vs

1. D G Rathnayaka,
Contractor,
Trinity College,
Kandy.
2. Morris Ernest Weragoda,
Trinity College,
Kandy.
3. W R Braganrich,
Trinity College,
Kandy.

4. Gunathillake,
Trinity College,
Kandy.

RESPONDENT - RESPONDENT -
RESPONDENT

Before: K K Wickremasinghe J

P. Padman Surasena J

Counsel; Upul Jayasuriya PC with P Radhakrishnan for the Petitioner -
Petitioner - Appellant.

Respondents - Respondents – Respondents are absent and unrepresented.

Argued on : 2017-06-13

Decided on : 2017 - 10 - 09

JUDGMENT

P Padman Surasena J

The Petitioner – Petitioner – Appellant (hereinafter sometimes referred to as the Appellant) had instituted this case against the Respondents – Respondents - Respondents (hereinafter sometimes referred to as the Respondents) in the Primary Court of Kandy under section 66 (1) (b) of the Primary Courts Procedure Act, as a private information, seeking an order declaring that he be entitled to have the possession of the impugned land.

Learned Primary Court Judge having inquired into this complaint, had by his order dated 2000-06-27, had concluded that the Respondents are entitled to the possession of this land.

Being aggrieved by the said order made by the learned Primary Court Judge, the Appellant had filed an application for revision in the Provincial High Court of Central Province holden in Kandy seeking a revision of the order made by the learned Primary Court Judge.

The Provincial High Court after hearing parties, refused and dismissed the said revision application on the basis that it was not established that the Appellant was in possession of the impugned land during the two months period immediately prior to the filing of report in Court.

It is against that judgment that the Appellant has appealed to this Court.

The Appellant has prayed in this appeal that the said order of the learned High Court Judge as well as the order of the learned Primary Court Judge be set aside by this Court.

It would be helpful to reproduce section 68 (1) of the Primary Courts Procedure Act No. 44 of 1979 as it would assist this Court to focus on the task it has to undertake in this case. It is as follows;

Section. 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 there- from 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.

Several steps that a Court is obliged to follow in adjudicating a dispute of this nature, i.e. when it relates to the possession of any land or part thereof, could be itemized in their chronological order in the following way;

- I. 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 .
- II. determine whether 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

- III. if he is satisfied that a person has been dispossessed as in item II above, make a determination to that effect and make an order that the party dispossessed be restored to possession.

In this regard the following passage from a judgment of this Court in the case of Punchi Nona V Padumasena and others¹ would be relevant.

" ... 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. ... "

¹ 1994 (2) Sri. L R 117.

The Appellant has asserted in his affidavit filed in the Primary Court that he has been in undisturbed possession of this land right through. It is the position of the Respondents that this land is possessed by the Trinity College.

1st Respondent whose capacity remains as just a contractor of Trinity College states in his affidavit filed in the Primary Court that he was contracted to cultivate this land. However, such a person would not be a proper authority to assert any possession of the institution, which claims the possession in this proceedings.

2nd and 4th Respondents in their joint affidavit filed in the Primary Court has stated that this land has been in the continued possession of the Trinity College and that there had never been any breach of peace relating to that land. Both the above affidavits had been sworn on 2003-05-03.

It has transpired that there had been a similar case, which had been previously filed in the Primary Court of Kandy. The parties thereto and the subject matter involved in that case too are the same as in the instant case. The said previous case had been decided on 1998-09-11. The very

fact that there had been similar proceeding before the Primary Court in respect of this land, is an indication that there had been no undisturbed possession of this land by either party.

It is to be noted that the order dated 1998-09-11 of the Primary Court in the previous case filed, shows that the 2nd Respondent had taken up the position in his affidavit that this land belongs to 'Church Missionary Trust Association'.

Learned President's Counsel who appeared for the Appellant drew the attention of this Court to the plaint dated 1998-07-23 filed by the said 'Church Missionary Trust Association' in District Court Kandy case No. L 19297. It is revealed from the said plaint that this case has been filed against the Appellant by the said plaintiff praying that the Appellant be ejected from the possession and that the plaintiff be restored in the possession of this land.

Several averments in the said plaint reveals that the plaintiff has stated therein;

- i. that the Appellant in the instant case had claimed possession on a deed attested on 1994-03-29,

- ii. that the Appellant in the instant case had applied to the Municipal Council for the registration of his name as the owner of this property,
- iii. that the Appellant in the instant case had claimed to have acquired the ownership of this land on a deed purported to have been signed by a person said to be one of the trustees of 'Church Missionary Trust'.

These facts, at its least, show that the averments of the pleadings of the Respondents in the instant case that they had an undisturbed possession of the impugned land should not be acted upon by Court.

Therefore, the conclusion arrived at by the Primary Court Judge in the instant case that the Respondents had continued to enjoy possession of this land since the year 1996 is clearly erroneous and lacks any factual basis.

As has been held in the case of Punchi Nona V Padumasena and others² the Primary Court exercising special jurisdiction under section 66 of the Primary Courts Procedure Act, is not involved in an investigation into title

² 1994 (2) Sri. L R 117.

or the right to possession, which is the function of a civil Court. What the Primary Court is required to do is to take a preventive action and make a provisional order pending final adjudication of rights of the parties in a civil Court.

The Respondents have failed to appear despite the notices repeatedly sent to them by this Court. Thus, this Court has to conclude that the Respondents are not interested in this matter.

For the foregoing reasons this Court is of the opinion that it cannot justify the impugned orders. In these circumstances this Court proceeds to set aside the order of the learned Primary Court Judge, dated 2000-06-27 as well as the order of the learned High Court Judge dated 2001-10-09.

It appears that this dispute is approximately about twenty years old. The Respondents, by now, appear to have lost interest in this matter³. The Appellant is said to be in the possession of this land at the moment.

The Parties have already gone before the District Court and as such, their respective rights could be decided in those proceedings. Therefore, this

³ They are absent and unrepresented in this Court.

Court is of the view that it would not be necessary to make any positive order with regard to possession.

JUDGE OF THE COURT OF APPEAL

K K Wickremasinghe J

I agree,

JUDGE OF THE COURT OF APPEAL