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

**Rajah Vijendra Nathan,**
Kandasamy Kovil Road,
Vavuniya.
PLAINTIFF

-Vs-

C.A. Case No.476/1999
D.C. Vavuniya Case No.92/L

**Velayutham Ravikumar,**
Vel Motor Garage,
Kandasamy Kovil Road,
Vavuniya.
DEFENDANT

AND NOW BETWEEN

**Velayutham Ravikumar,**
Vel Motor Garage,
Kandasamy Kovil Road,
Vavuniya.
DEFENDANT-APPELLANT

-Vs-

**Rajah Vijendra Nathan,**
Kandasamy Kovil Road,
Vavuniya.
PLAINTIFF-RESPONDENT

BEFORE : A.H.M.D. Nawaz, J.

COUNSEL : Ms. P. Narendran for the Defendant-Appellant

V. Puvitharan, PC with R.R. Ushanthanie for the Plaintiff-Respondent

Decided on : 09.01.2018

A.H.M.D. NAWAZ, J.

This appeal has been preferred against a judgment entered by the learned District Judge of Vavuniya in Case No.92/L on 29.04.1999 in favour of the Plaintiff in a possessory action filed by him against the Defendant.

The Plaintiff filed this case on 23.11.1992 against the Defendant stating that he was in possession of a piece of land let out on a Lease Agreement bearing No.6762 dated 03.08.1986 and attested by R. Sabanathan, Notary Public, entered into between him and the owner of the Kandasamy Kovil which is morefully described in the schedule to the plaint, and that the said land is a portion of a larger land given to the defendant's father by the same owner of the said Kovil, and that he put up a building on this land in 1986 and had been in possession since then until 26.01.1992, on which date the Defendant, when the Plaintiff was in Colombo, took possession of the said land by force and he made a complaint to the Police about this dispossession.

The defendant's story is a total denial of the plaintiff's statements and his position is that the land was part of the land given to his father by the owner of the Kovil and the Plaintiff has no right whatsoever to be in the smaller portion of this land and it was the Plaintiff who caused damage to his garage and thereby he incurred loss which he estimated at Rs.50,000 and claimed it in reconvention in his answer.

The Plaintiff has filed a replication denying the claim of the Defendant. The Plaintiff has prayed for ejectment of the Defendant and his servants etc. from the said land that he be placed in peaceful possession thereof and for costs.

At the trial the Plaintiff and two others gave evidence on behalf of the Plaintiff and two witnesses testified for the Defendant. When the plaintiff's wife gave evidence, two documents (**P1** and **P2**) were produced, which are the Lease Agreement **(P1)** and a writing **(P2)** by which the defendant's father Velayutham had consented to give a portion of his larger land to the Plaintiff. These two documents were admitted without any objection from the Defendant. By **P2** it is admitted that the defendant's father had voluntarily agreed to give a portion of the land to the Plaintiff in 1986 at the request of the Kovil owner. It is this smaller portion of the land which is the subject-matter of the dispute in the case.

The Surveyor Balasubramaniam who was called by the Defendant has stated that when he went to survey the land in dispute, he went with the defendant's father and upon his pointing out of an extent (36X100), he surveyed and prepared the Plan No.134, and the Defendant had no objection to this exercise. This evidence supports the position of the Plaintiff that the defendant's father Velayutham had peacefully handed over the portion of a larger land of which he was in possession.

The document marked **P3A** is vital in that it is a certified copy of the proceedings in the Primary Court. This document was produced when the Defendant was cross-examined by the Counsel for the Plaintiff. In this document the Defendant has admitted that the Plaintiff Nathan had taken a portion of the land, put up a shed and had been in possession of the said land for 2 ½ years and that the land belongs to Kandasamy Kovil. He also admitted that he uprooted the posts of the plaintiff's shed and removed the shed. Although this document was objected to at the time of production, it was not objected to at the time of the closure of the plaintiff's case. The learned Trial Judge has drawn attention in his judgment to this failure on the part of the Defendant.

The identity of the land, its possession by the Plaintiff, his dispossession, and the institution of the case within the prescribed period are all clearly established in the case. The learned Trial Judge has carefully evaluated the oral and documentary evidence led in this case and has come to a correct finding. One recalls the percipient views of Withers J.

> " *"Possession" of a land must be continuous, peaceful and for a certain period. It is "interrupted" if the continuity of possession is broken either by the disputant legitimately putting the possessor out of the land and keeping him out of it for a certain time, if the possessor is occupying it; or by occupying it himself for a certain time and using it for his own advantage, if the party preventing is not in occupation.*
>
> *And possession is "disturbed" either by an action intended to remove the possessor from the land, or by acts which prevent the possessor from enjoying the free and full use of the land of which he is in the course of acquiring the dominion, and which convert his continuous user into a disconnected and divided user"* -see Withers J. in ***Siman Appu v. Christian Appu*** 1 N.L.R. 288.

Section 4 of the Prescription Ordinance declares:-

> *"It shall be lawful for any person who shall have been dispossessed of any immovable property otherwise than by process of law, to institute proceedings against the person dispossessing him at any time within one year of such dispossession. And on proof of such dispossession within one year before action is brought, the plaintiff in such action shall be entitled to a decree against the defendant for the restoration of such possession without proof of title.*
>
> *Provided that nothing herein contained shall be held to affect the other requirements of the law as respects possessory cases".*[1]

[1] Section 4 of the Prescription Ordinance No.22 of 1871

I would further make some observations on this remedy.

In ***Wilsnach v. Van der Westhuizen and Haak***[2] a licensee under a local authority of a house was evicted by the respondents who purported to have obtained a title deed in their favour. Buchanan A.C.J. observed that *"The whole foundation of the rule for restoration of property taken possession of in this way is that a spoliator is not entitled to take the law into his own hands and a person who takes the law into his own hands must restore the property and establish his right thereto in a peaceable manner or in a court of law"*. This was quoted by Pulle J. in ***Sameen v. Dep***, 55 N.L.R. 523 at 527.

Voet says,[3] *"This interdict is granted against those who maintain that they also have possession, and who under that pretext disturb one who abides in possession. They may do this by bringing force to bear upon him, or by not allowing the possessor to use at the discretion what he possesses, whether they do so by sowing, or by ploughing, or by building or repairing something or by doing anything at all by which they do not leave the free possession to their opponent. This applies whether they do these things by themselves, or bid them to be done by their agent or household, or ratify the act when done, in the same way as that in which I have said in my title on "The Interdict as to Force and Force with Arms" that this rule holds good with interdict against force."*

The principle of law is: *Spoliatus ante omnia restituendus est.*, which means "the property which is the subject of the act of spoliation must be restored to the person from whom it was taken, irrespective of the question as to who is in law entitled to be in possession of such property." This short and succinct statement of the law means that the question of legal entitlement of the parties in the property can be investigated only after the *status quo ante* has been restored - Also see the South African case of ***Grayling v. Estate Pretorius*** 1947 (3) SA 514 (W) at 516-517.

In the South African version of a *mandament van spolie* which is analogous to our possessory remedy, the nature of the action is such that a possessor, even if he be a

---

[2] 1907 S.C. 600

[3] Book XLIII Tit. 17, Section 3 of his *Pandects*

fraud, robber or thief, is entitled to possession prior to issues arising from such possession being determined by a court.

In ***Edirisuriya v. Edirisuriya*** (78 N.L.R. 388) Vythialingam J. held, (Samerawickrame A.C.J. and Walpita J. agreeing), that,

1) "The essence of the possessory action lies in unlawful dispossession committed against the will of the plaintiff and neither force or fraud is necessary. Dispossession may be by force or by not allowing the possessor to use at his discretion what he possesses.

2) To succeed in a possessory action the plaintiff must prove that he was in possession "*ut dominus*". This does not mean possession with the honest belief that the plaintiff was entitled to ownership. It is sufficient if the plaintiff possessed with the intention of holding and dealing with the property as his own".

Considering the facts and law in this action, which engages a possessory action, the learned Judge has gone into all the material relevant to the case and satisfied himself that the Plaintiff had been in possession of the land in dispute and was dispossessed by the Defendant unlawfully. In all respects, the judgment is a well considered one and I see no reason to interfere with it.

I affirm the judgment entered in this case by the learned Judge, and dismiss the appeal with costs payable to the Plaintiff in this Court as well as the court *a quo*.

JUDGE OF THE COURT OF APPEAL