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

Jayaseeli Gunaweera,

"Rasanjanee Niwasa"

Mahena, Kanda Pahala,

Devinuwara.

Case No. CA(PHC) `147/2014 **Petitioner-Petitioner-Appellant**

P.H.C. Matara Case No. 91/2014 (Rev) **Vs.**

M.C. Matara Case No. 10482

Puwanes Gunaweera,
"Rasanjanee Niwasa"

Mahena, Kanda Pahala,

Devinuwara.

Respondent-Respondent-Respondent

Before: K.K. Wickremasinghe J.

Janak De Silva J.

Counsel:

Parakrama Agalawatta with H. Walpita and S.Watagala for Petitioner-Petitioner-Appellant

D.P. Liyanage with V. Dissanayake and Ravinatha Watakepotha for Respondent-Respondent-Respondent

Written Submissions tendered on:

Petitioner-Petitioner-Appellant on 13.07.2018

Respondent-Respondent-Respondent on 13.07.2018

Argued on: 06.12.2018

Decided on: 12.02.2019

Janak De Silva J.

This is an appeal against the order of the learned High Court Judge of the Southern Province holden in Matara dated 02.09.2014.

The Petitioner-Petitioner-Appellant (Appellant) filed information in the Magistrates Court of Matara under section 66(1)(b) of the Primary Courts Procedure Act (Act) on 04.03.2014 stating that there is a dispute over the possession of the land morefully set out therein between the Appellant and Respondent-Respondent-Respondent (Respondent) which is likely to cause a breach of peace between parties.

As the information disclosed a dispute between the Appellant and the Respondent that threatened or was likely to lead to a breach of peace, the learned Magistrate directed that a notice be affixed to the disputed corpus inviting any parties interested to appear in court on the date mentioned in the notice and file affidavits setting out their claims. As the Appellant failed to file affidavit the learned Magistrate made order under section 66(8)(b) of the Act that the Appellant is a defaulting party. The application made by the Appellant to purge her default was rejected.

The learned Magistrate having perused the affidavits and documents submitted with them and the written submissions of the parties came to the conclusion that the Respondent was in possession of the land in dispute on the date the information was filed and that the Appellant had failed to establish dispossession within a period of two months prior to information being filed. Accordingly, he made order holding that the Respondent was entitled to the possession of the subject matter. The Appellant made a revision application to the High Court of the Southern Province holden in Matara which was dismissed without issuing notice. Hence this appeal.

The Appellant submitted that the judgment of the learned High Court Judge was liable to be set aside on the following two grounds:

(1) The learned High Court Judge erred and/or misdirected himself regarding identification of the subject matter
(2) The learned High Court Judge failed to consider facts in respect of the possession of the Appellant

Identity of Corpus

In an application of this nature it is incumbent on the Magistrate to ascertain the identity of the corpus as section 66(1) of the Act becomes applicable only if there is a dispute between parties affecting land. A Magistrate should evaluate the evidence if there is a dispute regarding identity of the land. [*David Apuhamy v. Yassassi Thero* (1987) 1 Sri.L.R. 253].

The Appellant at paragraphs 2 and 8 of her affidavit dated 04.03.2014 identified the land in dispute as the land described therein which is 30 perches in extent. The learned Magistrate accordingly held that this was the land in dispute. The Appellant submits that the learned Magistrate erred in making this finding as the Appellant had, at paragraph 7 of her affidavit, pleaded that the subject matter is one room of the house possessed by the Appellant. I reject this position as the Appellant had taken contradictory positions in her affidavit and the learned Magistrate cannot be faulted for concluding that the subject matter of the dispute was a land in extent of 30 perches and not a room in the house situated on the said land.

Possession

Sharvananda J. (as he was then) in *Ramalingam v. Thangarajah* [(1982) 2 Sri.L.R. 693 at 698] held:

> "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 entities even a squatter to the protection of the law, unless his possession was acquired within two months of the filing of the information.

That person is entitled to possession until he is evicted by due process of law. A Judge should therefore in an inquiry under Part VII of the aforesaid Act, confine himself to the question of actual possession on the date of filing of the information except in a case where a person who had been in possession of the land had been dispossessed within a period of two months immediately before the date of the information."

The learned Magistrate concluded that the Appellant had in the information filed stated that the Respondent was in possession of the land in dispute on the date information was filed i.e. 04.03.2014 and therefore it was incumbent on her to establish forcible dispossession within two

months preceding the date on which information was filed. He held that the Appellant had failed to do so.

The learned counsel for the Appellant submitted that the learned Magistrate had failed to consider the statement given by the Respondent to the Gandara Police on 29.11.2013 (වී8) where she states that the Appellant was in occupation of the premises in question and the statement made to the Police on 19.02.2014 (ඉ්12) by the Appellant claiming dispossession. However, all what the Respondent states in වී8 is that the Respondent had permitted the Appellant to stay in the house situated on the land in dispute.

In this case both parties have submitted evidence to establish possession of the land in dispute. The learned Magistrate held that the Respondent had established that she was in possession of the said on the date information was filed. I cannot fault the learned Magistrate for arriving at this conclusion. It is further to be noted that the Respondent produced the deed of transfer No. 381 dated 25.05.1993 as evidence which establishes that the land in dispute was owned by the Respondent. Sharvananda J. (as he was then) in *Ramalingam v. Thangarajah* (supra at page 699) held that evidence bearing on title can be considered only when the evidence as to possession is clearly balanced and the presumption of possession which flows from title may tilt the balance in favour of the owner and help in deciding the question of possession.

As the evidence established that the Respondent was in possession of the land in dispute on the date information filed, the learned Magistrate correctly examined the question whether the Appellant had established forcible dispossession within two months prior to the filing of information. He has correctly concluded that the Appellant failed to do so.

Existence of exceptional circumstances is the process by which the court selects the cases in respect of which the extraordinary method of rectification should be adopted, if such a selection process is not there revisionary jurisdiction of this court will become a gateway of every litigant to make a second appeal in the garb of a Revision Application or to make an appeal in situations where the legislature has not given a right of appeal. [Amaratunga J. in *Dharmaratne and another v. Palm Paradise Cabanas Ltd. And others* (2003) 3 Sri.L.R. 24 at 30]. The Appellant failed to adduce any exceptional circumstances warranting the intervention of the High Court.

For the foregoing reasons, I see no reason to interfere with the order of the High Court Judge of the Southern Province holden in Matara dated 02.09.2014.

Appeal is dismissed with costs.

Judge of the Court of Appeal

K.K. Wickremasinghe J.

I agree.

Judge of the Court of Appeal