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

In the matter of an application under Article 154(P) (6) of the Constitution of the Democratic Socialist Republic of Sri Lanka.

Officer-in-Charge

Police Station,

Pitigala.

Plaintiff

Case No: CA(PHC) 139/08

P.H.C Balapitiya Case No: 750/2007 Rev

M.C Elpitiya Case No: 46290

Vs.

1. Katukoliya Gamage Kalyani
   No. 23/14, Modara Road,
   Makandana, Piliyandala.
2. Halpandeniya Hewage Premawathie Gamage
   07 Kanuwa Road,
   Markulitiya, Mattaka.

Respondents

AND

Katukoliya Gamage Kalyani
No. 23/14, Modara Road,
Makandana, Piliyandala.

1st Respondent-Petitioner

Vs.

Halpandeniya Hewage Premawathie

Gamage

07 Kanuwa Road,

Markulitiya, Mattaka.

2nd Respondent-Respondent

AND NOW BETWEEN

Katukoliya Gamage Kalyani,

No. 23/14, Modara Road,

Makandana, Piliyandala.

1st Respondent-Petitioner-Appellant

Vs.

Halpandeniya Hewage Premawathie

Gamage,

7 Kanuwa Road,

Markulitiya, Mattaka.

2nd Respondent-Respondent-

Respondent

Before: K.K. Wickremasinghe J.

Janak De Silva J.

Counsel:

Manohara De Silva P.C. with Hirosha Munasinghe for 1st Respondent-Petitioner-Appellant

Anura Gunaratne for 2nd Respondent-Respondent-Respondent

Written Submissions tendered on:

1st Respondent-Petitioner-Appellant on 12.10.2018

2nd Respondent-Respondent-Respondent on 04.11.2016

Argued on: 30.08.2018

Decided on: 15.03.2019

Janak De Silva J.

This is an appeal against the judgment of the learned High Court Judge of the Southern Province holden in Balapitiya dated 16.12.2008.

The officer-in-Charge of the Pitigala Police Station filed a report in the Magistrates Court of Elpitiya in terms of section 66(1)(a) of the Primary Courts Procedure Act as amended (Act). The report stated that there was a dispute affecting land between the 1st Respondent-Petitioner-Appellant (Appellant) and 2nd Respondent-Respondent-Respondent (Respondent) indicating an imminent breach of peace and sought appropriate orders from court.

After inquiry the learned Magistrate held that the Respondent was in possession of the land in dispute on the date information was filed and held that she is entitled to possession of the said land. The Appellant filed an application in revision in the High Court of the Southern Province holden in Balapitiya which was dismissed by the learned High Court Judge and hence this appeal.

In this appeal this Court must consider the correctness of the order of the High Court. It is trite law that 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 another* [(2003) 3 Sri.L.R. 24 at 30]. Hence, I will consider whether the Appellant was successful in establishing exceptional circumstances before the High Court as the learned High Court Judge dismissed the revision application upon the failure of the Appellant to do so.

The learned President's Counsel for the Appellant urged the following four grounds in appeal:

(1) Having rejected the supporting documents filed by the Respondent, there was no material placed before Court to establish that the Respondent was in possession of the land in dispute
(2) The learned Magistrate has failed to properly evaluate the Appellant's evidence and erred in rejecting the Appellants version
(3) High Court has erred in failing to consider the relevant facts and erred in holding that the Appellant failed to establish exceptional circumstances
(4) This Court has inherent power to grant relief to the Appellant

I will consider the above grounds although not in the same order. I will address ground (2) first and then grounds (1), (3) and (4) together as they overlap to some extent.

Failure to properly Evaluate Evidence of the Appellant

Th learned Magistrate refused to consider deeds marked 1වි1 and 1වි2 marked with the affidavit of the Appellant as the land referred to therein was paddy land. The learned President's Counsel for the Appellant submits that this is erroneous inasmuch the two deeds refer to two distinct portions of land namely "PolgahadoowePollawwa" and "Olagodadeniya" and that it is only "Olagodadeniya" that is referred to as being paddy land.

However, in the first complaint made by the Appellant to the Police (Appeal Brief Page 187), the land in dispute was identified as "Polgahadoowe". It is true that the Appellant sought to correct this in her first affidavit paragraphs 3, 4 and 5 by identifying the land in dispute as "Olagodadeniya". She states that the land "Polgahadoowe" is situated to the southern boundary of the land in dispute. If this version of the Appellant is true then the northern boundary of "Polgahadoowe" should be "Olagodadeniya". However, according to deed no. 275 (1වි1) (Appeal Brief Page 163) northern boundary of "Polgahadoowe" is the border of Marthupitiya village.

The learned President's Counsel for the Appellant further submitted that the learned Magistrate erred in holding that deeds 1වි1 and 1වි2 cannot be taken into consideration in the proceedings before him as it goes to the title of parties. He relied on the following dicta of Sharvananda J. (as he was then) in *Ramalingam vs. Thangaraja* [(1982) 2 Sri.L.R. 693 at 698]:

> "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. He is not to decide any question of title or right to possession of the parties to the land. **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." (emphasis added)

However, in the instant case the evidence as to possession was not clearly balanced. Firstly, the evidence of the Appellant as to possession of the land in dispute is not creditworthy. For example, in her statement to the Police it is stated that the land in dispute is cleared by her through third parties and tea plucked whereas the inspection report of the Police describes the land in dispute as "overrun by weeds" (kalaya wawi athi idamak). Also, in her first complaint to the Police the Appellant stated that she is in possession of a land called "Polgahadoowe" which was later

changed to "Olagodadeniya". The Appellant also stated in her police complaint that there is no one in the house situated on the land in dispute whereas at paragraph 11 of her counter affidavit she states that she goes to the house every weekend. In any event for the reasons stated above the deeds 1වි1 and 1වි2 do not show that the land in dispute and the lands described therein are one and the same.

According to section 72 of the Act the learned Magistrate is bound to make order under Part VII of the Act after examination and consideration of the information filed and the affidavits and documents furnished, such other evidence on any matter arising on the affidavits or documents furnished as the court may permit to be led on that matter and such oral or written submissions as may be permitted by the Judge in his discretion. Hence there is no prohibition on the learned Magistrate considering only the averments in the affidavits of the parties. Of course, if such averments are corroborated by contemporaneous documents their evidentiary value is higher than uncorroborated averments.

In this exercise the learned Magistrate can apply the different tests normally used to ascertain the testimonial creditworthiness of a witness such as whether the witness is an interested or disinterested witness, tests of consistency and inconsistency inter se, test of means of knowledge of the witness and test of probability and improbability of the evidence.

The learned Magistrate has not specifically adverted to any of these tests in his judgment. However, it appears that the germ of some of these concepts has preoccupied his mental capacities when he concluded that all the facts set out in the affidavit of the Appellant are false and that is sufficient to sustain his conclusion [Jayasuriya J. in *Wickremasuriya vs. Dedoleena and others* [(1996) 2 Sri.L.R. 95 at 99].

Therefore, I hold that the learned Magistrate has properly evaluated the evidence of the Appellant.

Exceptional Circumstances/Evidence of Possession of Respondent

The learned Magistrate concluded that the Respondent had established possession of the land in dispute. He did so on the basis that the Respondent had stated so in her affidavit and that there is no reason to reject that version.

The learned President's Counsel for the Appellant submitted that the learned Magistrate had refused to act on affidavits marked 2වි1, 2වි2 and 2වි3 as they contained interpolations and additions without initialing them. Therefore, he submitted that what remained was bare affidavits filed by the Respondent without any supporting documents. In this context he submitted that the learned Magistrate could not have lawfully held that the Respondent was in possession of the land in dispute when there was absolutely no material to establish this position.

However, section 134 of the Evidence Ordinance states that no particular number of witnesses shall in any case be required for the proof of any fact. Having concluded that the evidence of the Appellant is false the learned Magistrate has concluded that there is no reason to reject the averments of the Respondent that she is in possession of the land in dispute. I see no reasons to disagree with this conclusion.

The learned President's Counsel for the Appellant submitted that the Respondent's own affidavit states that the house on the land is an abandoned house and therefore it would not be possible for any court to conclude that the Respondent was in possession of the land by merely stating that she plucked tea grown on the land in dispute. The short answer to this submission is that the law recognizes two kinds of possession namely (i) When a person has direct physical control over a thing at a given time - actual possession and (ii) When he though not in actual possession has both the power and intention at a given time to exercise dominion or control over a thing either directly or through another person - constructive possession [*Iqbal vs. Majedudeen and others* (1999) 3 Sri.L.R. 213].

For the foregoing reasons, the Appellant has failed to establish exceptional circumstances before the High Court and as such I see no basis to interfere with the judgment of the learned High Court Judge of the Southern Province holden in Balapitiya dated 16.12.2008.

Appeal is dismissed with costs.

Judge of the Court of Appeal

K.K. Wickremasinghe J.

I agree.

Judge of the Court of Appeal