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

1. Gamaralalage Jayasinghe,
2. Danasekara Gedara Kusumalatha Kanthi Menike,
3. Gamaralalage Yasada Menike,

No.115,
Aranayake Road,
Mawanella.
Respondent-Petitioner-Appellants

CASE NO: CA/PHC/76/2018
PHC KEGALLE NO: 4884/2015/REV
MC KEGALLE NO: 26699/2014

Vs.

Mahara Mudiyanselage Loku Bandara,
No. 862/03,
Robert Gunawardena Road,
Malabe.
Petitioner-Respondent-Respondent

Before: A.L. Shiran Gooneratne, J.
Mahinda Samayawardhena, J.

Counsel: Chula Bandara with Udara Tilakawardena for the Appellant.

S.A.D.S. Suraweera with Adeesha Senadheera for the Respondent.

Argued on: 03.12.2019

Decided on: 20.12.2019

Mahinda Samayawardhena, J.

This is an application initially filed before the Magistrate's Court of Kegalle, under section 66(1)(b) of the Primary Courts' Procedure Act, No.44 of 1979, by the petitioner-respondent-respondent (hereinafter "the respondent") against the respondent-petitioner-appellant (hereinafter "the appellant"), seeking restoration of possession to the land in dispute, on the basis that the respondent was forcibly dispossessed by the appellant within a period of two months immediately before the filing of the application. The appellant took up the position that there was no forcible dispossession. After inquiry, the Magistrate's Court, by order dated 13.03.2015, held with the respondent. This decision was affirmed by the High Court of Kegalle by the Judgment dated 26.04.2018. This appeal by the appellant is against the Judgment of the High Court.

The facts leading to this appeal are briefly as follows: Karunaratne Liyanage was the original owner of the land in dispute. He sold it to the respondent. The respondent sold it to Milton Silva but retained possession as Milton Silva was abroad.

In the meantime, Karunaratna Liyanage filed a case in the District Court (7732/L) against the respondent, on the basis that he was the owner of the land and the respondent was holding it in trust for him. Pending determination of the case, Karunaratne Liyanage obtained an interim injunction whereby the respondent was dispossessed from the land. After Karunaratne Liyanage obtained possession of the land by way of the said interim injunction, he withdrew the case.

The respondent filed a revision application in the High Court of Civil Appeal of Kegalle (28/2010/Rev), seeking to restore him to possession of the land after the withdrawal of the District Court action by Karunaratne Liyanage. This was allowed by the High Court of Civil Appeal. The application of the appellant to intervene in that revision application was refused.

The Supreme Court by Judgment dated 12.11.2013 (in case No. SC Appeal 98/2011) affirmed the Judgment of the High Court of Civil Appeal.

Thereafter, as seen from the Fiscal Report (at pages 275-279 in the Brief), on 16.07.2014, in the execution of the writ, the Fiscal of the District Court of Kegalle removed the agents of Karunaratne Liyanage from the land and handed over possession to the respondent.

According to the respondent, the appellant (as the agent of Milton Silva) forcibly dispossessed the respondent the next day, i.e. 17.07.2014.

The respondent made a lengthy complaint to the police on 18.07.2014 setting out the history of the case.

It is the position of the appellant that there was no forcible dispossession, but the respondent voluntarily handed over possession to the appellant as the Power of Attorney holder of Milton Silva.

This position of the appellant has been rightly rejected both by the Magistrate's Court and the High Court.

There is no evidence to prove that the respondent peacefully handed over possession to the appellant except the *ipse dixit* of the respondent himself.

If possession was voluntarily handed over by the respondent to the appellant on 17.07.2014, there was no reason for the former to make a complaint to the police on 18.07.2014 alleging forceful dispossession.

It is significant to note the appellant unsuccessfully attempted to intervene in the revision application filed by the respondent in the High Court seeking restoration of possession. The intervention was sought by the appellant in order to have possession delivered to him as the Power of Attorney holder of Milton Silva.

In the facts and circumstances of this case, it is difficult to believe that having obtained possession through a protracted legal battle, the respondent voluntarily handed it over to the appellant.

The learned counsel for the appellant has challenged the order of the Magistrate's Court and the Judgment of the High Court on three grounds. Let me now consider them one by one.

The first submission of the learned counsel for the appellant is that the learned Magistrate did not have jurisdiction to make the impugned order, as there was no threat or apprehension to a breach of the peace.

The learned counsel, drawing attention to the Judgment of this Court in *Velupillai v. Sivanathan [1993] 1 Sri LR 123,* states that when the information is filed by a party to the dispute such as in this case, as opposed to it being filed by the police, the Magistrate shall exercise a higher degree of caution in deciding to proceed with the matter.

In this case, when the appellant appeared before the Magistrate's Court in response to summons, the appellant took up a preliminary objection that the Court had no jurisdiction to proceed with the matter as there was no likelihood of the breach of the peace. After inquiry, by order dated 13.11.2014, the learned Magistrate overruled this objection by giving reasons.

Breach of the peace does not mean fisticuffs, grievous hurt or attempted murder. It is sufficient, if there is a present fear that there will be a breach of the peace stemming from the dispute unless the Court takes control of the matter.

I have no doubt, in the facts and circumstances of this case, there was a real likelihood of a breach of the peace when the

Magistrate issued summons on the appellant upon the first information filed by the respondent.

In any event, it is my considered view that the Judgment of this Court in *Velupillai v. Sivanathan (supra)* does not correctly represent the law in this regard. In that case, Ismail J. sitting alone stated as follows:

> *In Kanagasabai v. Mylvaganam (1976) 78 NLR 280, 283, Sharvananda, J. observed "Section 62 of the Administration of Justice Law confers special jurisdiction on a Magistrate to make orders to prevent a dispute affecting land escalating and causing a breach of the peace…The section requires that the Magistrate should be satisfied, before initiating the proceedings, that a dispute affecting land exists and that such a dispute is likely to cause a breach of the peace".*
>
> *Under section 66(1)(a) of the Primary Courts Procedure Act, the formation of the opinion as to whether a breach of the peace is threatened or likely is left to the police officer inquiring into the dispute. The police officer is empowered to file the information if there is a dispute affecting land and a breach of the peace is threatened or likely. The Magistrate is not put on inquiry as to whether a breach of the peace is threatened or likely. In terms of section 66(2) the Court is vested with jurisdiction to inquire into and make a determination on the dispute regarding which information is filed either under section 66(1)(a) or 66(1)(b).*

> *However when an information is filed under section 66(1)(b) the only material that the Magistrate would have before him is the affidavit information of an interested person and in such a situation without the benefit of further assistance from a police report, the Magistrate should proceed cautiously and ascertain for himself whether there is a dispute affecting land and whether a breach of the peace is threatened or likely.*

The same sentiments were echoed by Ismail J. in *Punchi Nona v. Padumasena [1994] 2 Sri LR 117* as well.

This view of Ismail J. has been followed in later decisions.

In the above dicta, "*In terms of section 66(2) the Court is vested with jurisdiction to inquire into and make a determination on the dispute regarding which information is filed either under section 66(1)(a) or 66(1)(b)*" is correct, but what follows thereafter is not, i.e. "*However when an information is filed under section 66(1)(b)…the Magistrate should proceed cautiously and ascertain for himself whether there is a dispute affecting land and whether a breach of the peace is threatened or likely.*"

Let me explain why I say so.

Under the Administration of Justice Law, No. 44 of 1973, by sections 62-65, a special procedure was introduced for Magistrates' Courts to deal with disputes affecting lands where a breach of the peace is threatened or likely.

These provisions were repealed by the Code of Criminal Procedure Act, No. 15 of 1979, and replaced by sections 66-76 of the Primary Courts' Procedure Act, No. 44 of 1979.

There is a significant difference between the provisions of the Administration of Justice Law and the Primary Courts' Procedure Act on conferment of jurisdiction to the Magistrates' Courts in this regard.

Section 62(1) of the Administration of Justice Law provides as follows:

> *Whenever a Magistrate, on information furnished by any police officer or otherwise, has reason to believe that the existence of a dispute affecting any land situated within his jurisdiction is likely to cause a breach of the peace, he may issue a notice (a) fixing a date for the holding of an inquiry into the dispute; and (b) requiring every person concerned in the dispute to attend at such inquiry and to furnish to the court, on or before the date so fixed, a written statement setting out his claim in respect of actual possession of the land or the part in dispute and in respect of any right which is the subject of the dispute.*

It is noteworthy that section 62 of the Administration of Justice Law conferred jurisdiction on the Magistrate only after the Magistrate formed an opinion that the dispute relating to the land is likely to cause a breach of the peace. According to this section, the Magistrate shall have "*reason to believe that the existence of a dispute affecting any land situated within his jurisdiction is likely to cause a breach of the peace*". This is a

prerequisite for the Magistrate to assume jurisdiction to proceed with the application. In other words, jurisdiction on the Magistrate was not automatic upon the filing of the first information. There was a legal requirement on the part of the Magistrate to properly invoke jurisdiction.

This was applicable, as seen from section 62, irrespective of whether the "*information [was] furnished by any police officer or otherwise*". Here, "*otherwise*" includes a party to the dispute.

Section 145 of the Indian Code of Criminal Procedure, 1973, corresponds to section 62 of our Administrative Justice Law. Section 145 of the Indian Code reads as follows:

> *Whenever an Executive Magistrate is satisfied from a report of a police officer or upon other information that a dispute likely to cause a breach of the peace exists concerning any land or water or the boundaries thereof, within his local jurisdiction, he shall make an order in writing, stating the grounds of his being so satisfied, and requiring the parties concerned in such dispute to attend his Court in person or by pleader, on a specified date and time, and to put in written statements of their respective claims as respects the fact of actual possession of the subject of dispute.*

Even under section 145 of the Code of Criminal Procedure in India, an essential condition for the assumption of jurisdiction by the Magistrate is that he shall be "*satisfied from a report of a police officer or upon other information that a dispute likely to cause a breach of the peace exists*". If he does not do so, the proceedings shall be void in terms of section 461 of the Code of

Criminal Procedure in India. Section 461 deals with fatal irregularities that vitiate proceedings before the Magistrate. Vide *The Queen-Empress v. Gobind Chandra Das (1893) ILR 20 Cal 520.*

Kanagasabai v. Mylwaganam (1976) 78 NLR 280 is undoubtedly the leading local authority on section 62 of the Administration of Justice Law. Sharvananda J. (later C.J.), who delivered the Judgment in that case, at pages 286 and 287, had this to say on invocation of jurisdiction under section 62 of the Administration of Justice Law:

> *It is essential for the assumption of jurisdiction under section 62 that the Magistrate should have reason to believe from a Police report or other information that a dispute relating to land, which is likely to cause a breach of the peace, exists. The report or other information should contain sufficient material to enable the Magistrate to form the belief that the dispute is likely to cause a breach of the peace. The jurisdiction conferred on a Magistrate to institute an inquiry under this section can be exercised only when the dispute is such that it is likely to cause a breach of the peace. It is the apprehension of a breach of the peace, and not any infringement of private rights or dispossession of any of the parties, which determines the jurisdiction of the Magistrate. It is sufficient for a Magistrate to exercise the powers under this section if he is satisfied on the material on record that there is a present fear that there will be a breach of the peace stemming from the dispute unless proceedings are taken under the section. Power is conferred*

by section 62 in subjective terms—the Magistrate, being the competent authority, is entitled to act when he has reason to believe that the existence of a dispute affecting land is likely to cause a breach of the peace. The condition precedent to the exercise of the power is the formation of such opinion—the factual basis of the opinion being the information furnished by any Police officer or otherwise. A Magistrate is not bound to take action on a Police report or upon an expression of opinion by the Police. But, before he takes action, he should have a statement of facts before him so that he may exercise his own judgment in arriving at a conclusion as to the necessity of taking action under this section. The question whether, upon the material placed before him, proceedings should be instituted under this section is one entirely within the Magistrate's discretion. He may form his opinion on any information received. In my view, he can base his action on a complaint filed by any of the parties, or on a Police report. The Magistrate should however proceed with great caution where there is no Police report and the only material before him are statements of interested persons. (emphasis mine)

It is against this backdrop that Ismail J. in *Velupillai v. Sivanathan (supra)* stated that when the first information is filed by a party to the dispute and not by the police, "*the Magistrate should proceed cautiously and ascertain for himself whether there is a dispute affecting land and whether a breach of the peace is threatened or likely*", little realising that the law in relation to jurisdiction has been completely changed with the enactment of the new Primary Courts' Procedure Act.

What was stated by Sharvananda J. in *Kanagasabai v. Mylvaganam (supra)* under section 62 of the Administration of Justice Law on invocation of jurisdiction is inapplicable under section 66 of the Primary Courts' Procedure Act.

Under section 62 of the Administration of Justice Law, a lot of judicial time was wasted on the question of jurisdiction, in that the Magistrate had to first embark upon an inquiry to ascertain whether a breach of the peace was imminent before he issued process. Also, under the Administration of Justice Law, there was reluctance on the part of the parties to the dispute to initiate action under section 62 in instances where police officers were loath to report facts to the Court within the stipulated period of two months from the date of dispossession due to various reasons. The legislature addressed these two issues when enacting the Primary Courts' Procedure Act, which is a home-grown Act.

Section 66 of the Primary Courts' Procedure Act, which replaced section 62 of the Administration of Justice Law, reads as follows:

> *66(1) Whenever owing to a dispute affecting land a breach of the peace is threatened or likely-*
>
> *(a) the police officer inquiring into the dispute-*
>
> *(i) shall with the least possible delay file an information regarding the dispute in the Primary Court within whose jurisdiction the land is situate and require each of the parties to the dispute to enter into a bond for his appearance before the Primary Court on the*

day immediately succeeding the date of filing the information on which sittings of such court are held; or

(ii) shall, if necessary in the interests of preserving the peace, arrest the parties to the dispute and produce them forthwith before the Primary Court within whose jurisdiction the land is situate to be dealt with according to law and shall also at the same time file in that court the information regarding the dispute; or

(b) any party to such dispute may file an information by affidavit in such Primary Court setting out the facts and the relief sought and specifying as respondents the names and addresses of the other parties to the dispute and then such court shall by its usual process or by registered post notice the parties named to appear in court on the day specified in the notice—such day being not later than two weeks from the day on which the information was filed.

Thus, under section 66(1) of the Primary Courts' Procedure Act, the legislature has made it abundantly clear that the first information can be filed either by the police officer inquiring into the dispute under section 66(1)(a) or by any party to such dispute under section 66(1)(b).

Then, under section 66(2), it has been enacted that when the first information is filed under section 66(1), irrespective of whether it is filed by the police or a party to the dispute, the

Magistrate is automatically vested with jurisdiction to inquire into and determine the matter, without further ado.

Section 66(2) of the Primary Courts' Procedure Act runs as follows:

> *Where an information is filed in a Primary Court under subsection (1), the Primary Court shall have and is hereby vested with jurisdiction to inquire into, and make a determination or order on, in the manner provided for in this Part, the dispute regarding which the information is filed. (emphasis mine)*

Hence, with all due respect, the dictum of Ismail J. in *Velupillai v. Sivananthan (supra)* that, "*when an information is filed under section 66(1)(b)…the Magistrate should proceed cautiously and ascertain for himself whether there is a dispute affecting land and whether a breach of the peace is threatened or likely*" does not represent the correct position of law, and therefore, need not be followed.

Under section 66(1), the formation of opinion as to whether a breach of the peace is threatened or likely is left to the police officer inquiring into the dispute or to any party to the dispute. Both are on equal footing. Who files the information is beside the point.

This is in consonance with the literal rule of interpretation, which is the primary rule of interpretation of statutes. The intention of the legislature is best achieved by giving the words

of the Act their natural literal meaning unless it creates absurdity.

The first argument of the learned counsel for the appellant fails.

Let me now consider the second argument advanced by the learned counsel for the appellant.

The learned counsel for the appellant contends that the forcible dispossession took place outside the period of two months before the filing of the case.

Let me briefly state the orders the Magistrate is required to make when the dispute is in relation to possession of land.

The substantive orders the Magistrate's Court is required to make when a dispute relating to land is reported to Court are contained in section 68 of the Primary Courts Procedure Act. Under section 68(1), the Court shall confirm possession of the party who was in possession of the land on the date of the filing of the first information in Court. This general rule is subject to an exception, as provided for in section 68(3). That exception is, if a party can prove that he was forcibly dispossessed within two months immediately before the filing of the first information by the party now in possession of the land, the former shall be restored to possession.

In this case, the respondent filed the first information in the Magistrate's Court by way of an affidavit on 12.09.2014. On this date, admittedly, the appellant was in possession of the land. The respondent sought relief under section 68(3) on the basis that he was forcibly dispossessed by the appellant on

17.07.2014, which is within two months immediately prior to his coming to Court.

The submission of the learned counsel for the appellant is that after the first affidavit dated 12.09.2014, the respondent filed a further affidavit dated 05.12.2014, which seems to be an amendment of the original affidavit, and, therefore, the two-month period should be calculated not from 12.09.2014 but from 05.12.2014. Hence the learned counsel argues that the respondent has not come before the Court within a period of two months to seek relief under section 68(3).

I am afraid I am unable to agree with this argument.

As I stated earlier, the first information can be filed by the police or a party to the dispute. If the first information is filed by the police, in terms of section 66(1)(a), it can be filed by way of a Report. However, if the first information is filed by a party, in terms of section 66(1)(b), the information shall be filed by way of an affidavit. Either way, according to section 66(3), the Court shall, as the next step, give a date to the parties to file affidavits with supporting documents if any to establish their respective cases. The affidavit mentioned in section 66(3) applies both to cases filed by the police and by a party. It is not confined to cases filed by the police. Therefore, the second affidavit spoken about by the learned counsel for the appellant is not an amended affidavit. It is the affidavit required under section 66(3) of the of the Act. The first affidavit filed by the respondent is the first information filed by way of an affidavit, as required by section 66(1)(b) of the Act. According to section 68(3), the two-

month period shall be counted not from the date of the affidavit, but from "*the date on which the information was filed under section 66*". There is no dispute that the first information was filed on 12.09.2014, and, therefore, the respondent was within the stipulated period when he came to Court.

Therefore, the second argument is not entitled to succeed.

This leads me to consider the final argument of the learned counsel for the appellant.

The final argument of the learned counsel relates to the character of possession of the respondent in relation to the land in dispute.

The learned counsel, referring to the pleadings filed by the respondent in the District Court Case No. 7756/L and Revision Application No. 28/2010 filed in the High Court of Civil Appeal, submits that the respondent in those pleadings accepted that he was a licensee of Milton Silva and had taken care of the land on his behalf, and therefore, Milton Silva, being the owner, had constructive possession of the land through the respondent and the appellant who is the Power of Attorney Holder of Milton Silva. The learned counsel cites the Judgment of Gunawardana J. in *Iqbal v. Majedudeen [1999] 3 Sri LR 213* in support.

In the first place, Milton Silva is not a party to this case to claim constructive possession.

The respondent does not seem to me to be now accepting that he is a licensee of Milton Silva.

Even if he is an overholding licensee, he can only be ejected from the land through due process of law. Vide *Reginald Fernando v. Pabilinahamy [2005] 1 Sri LR 31, Edirisuriya v. Edirisuriya (1975) 78 NLR 388*. Milton Silva cannot forcibly eject the respondent.

In section 66 proceedings, it is not the task of the Magistrate to decide the case on merits. That is the task of the District Court in a properly constituted civil case. In section 66 proceedings, what shall be looked at is possession and not title. Title is foreign in section 66 applications. Possession here means not the right to possession but actual possession.

Sharvananda J. in *Ramalingam v. Thangarajah [1982] 2 Sri LR 693 at 699* stated:

> *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.*

Such cases are indeed rare.

In section 66 proceedings, the character of possession does not play a pivotal role. The object of these proceedings is to make a provisional order to prevent a breach of the peace stemming from the dispute, until a contrary order, as seen from sections 68(2), 68(3) and 69(2), is made by "a competent court"; or, as seen from section 74, until the substantive rights of the parties are established in a "civil suit". In *Podisingho v. Chandradsa [1978/79] 2 Sri LR 93 at 96*, Atukorala J. gave an extended

meaning to the term "competent court" to encompass "Tribunal of competent jurisdiction".

In *Kanagasabai v. Mylvaganam (supra)*, decided under the Administration of Justice Law, Sharvananda J. at page 285 emphasised "actual possession".

> *The inquiry under section 62 is directed to the determination as to who was in actual possession of the land or part, in dispute on the date of the issue of the notice under section 62(1), irrespective of the rights of the parties or their title to the said land or part. The Magistrate, acting under section 62, is not deciding the rights of parties. The proviso to section 63(7) postulates the determination being made without reference to the merits of the claims of the persons to the possession of the land or part in dispute. The Magistrate is concerned only with finding who was in actual possession on that date and with maintaining the status quo.*

Ramalingam v. Thangarajah (supra) is a case filed under section 66 of the Primary Courts' Procedure Act. In the said case, Sharvananda J., at page 698-699, heavily underlined the term "actual possession" in section 66 proceedings.

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

In fact, the term "actual possession" was used in section 62(1) of the Administration of Justice Law as well as in the corresponding section 145 of the Indian Code of Criminal Procedure.

In Sohoni's The Code of Criminal Procedure, 1973, Vol.2, 18th edition (1985), at page 1128, the learned author states:

> *The object of the section (145 of the Indian Code of Criminal Procedure) is to bring to an end by a summary process disputes relating to property, which are essentially of a civil nature, with a view to prevent breach of peace. Orders under the section are mere police orders which do not concern question of title. The section is primarily meant for the prevention of breach of peace where the dispute relates to the possession of immovable property, and to provide a speedy remedy by bringing the parties before the Court and ascertaining who of them was in actual possession and to maintain status quo until their rights are determined by a*

> *competent Court. Enquiry under this section is limited to the question as to who was in actual possession on the date of the preliminary order irrespective of the rights of the parties, and not determine the right and title of the parties.*

Ratanlal & Dhirajlal in the Code of Criminal Procedure, 21st edition (2013), equate actual possession to physical possession. At page 217 they say:

> *"Actual possession" means actual physical possession, that is, the possession of the person who has his feet on the land, who is ploughing it, sowing it or growing crops on it, entirely irrespective of whether he has title or right to possess it. It is not the same as a right to possession nor does it mean lawful or legal possession. It may be that of a trespasser without any title whatever. The aim and object of the section is the maintenance and preservation of the public peace.*

It is significant to note that, unlike under section 62 of the Administration of Justice Law, under section 68 of the Primary Courts' Procedure Act, the word "possession" has not been qualified by the word "actual", suggesting that possession need not necessarily be actual.

In any event, actual possession does not mean actual physical possession at all times. Actual physical possession will vary with the subject matter. The owner of unworked minerals was held in *Ranchi Zamindari Co. Ltd. v. Pratab Udainath Sahi Deo (AIR 1939 Patna 209)* to be in actual possession of the same if he is in a position, at any moment, to work them or to permit

others to do so. Sarker on Criminal Procedure, 6th edition (1992), (citing *Nabin, 25 WR 18, Mahesh, 26 CRLJ 398*), states, at page 311, "*Receiving rents of tenants is actual possession*".

Whilst the right to possession resides in the owner, another can of course be in actual possession. Servant, manager, agent are a few examples of the latter. In such cases, the former can claim actual possession of the latter against third parties in section 66 proceedings. This can be termed actual possession through subordinates, or else, constructive possession.

In *Iqbal v. Majedudeen* (supra), the case cited by the learned counsel for the appellant, upon the death of her husband, the respondent went to live with her mother, locking up and leaving the premises in question where she was living earlier. The appellant, after returning to Sri Lanka, broke open the door of the premises and entered into possession. This happened within two months of filing the first information in Court. All three Courts—the Magistrate's Court, the High Court and the Court of Appeal—correctly held with the respondent.

In my view, the respondent in that case was in actual possession of the premises because actual possession does not, as I stated earlier, mean uninterrupted physical presence throughout the day.

In the course of the Judgment, Gunawardena J., at pages 215-216, observed:

> *The test for determining whether a person is in possession of any corporeal thing, such as a house, is to ascertain*

whether he is in general control of it. Salmond observes that a person could be said to be in possession of, say, a house, even though that person is miles away and able to exercise very little control, if any. It is also significant to note that in her statement to the Police, the 2nd respondent-appellant had admitted that the 1st respondent lived in the relevant premises during the life-time of the latter's husband. It is interesting to notice that the 1st respondent's position that she was in possession and was ousted by 2nd respondent-petitioner-appellant is largely proved, as explained above, on the statement that the 2nd respondent-petitioner-appellant herself has made to the Police.

The law recognizes two kinds of possession:

(i) when a person has direct physical control over a thing at a given time, he is said to have actual possession of it;

(ii) a person has constructive possession when he, though not in actual possession, has both the power and the intention at a given time to exercise dominion or control over a thing either directly or through another person.

In this case in hand, perhaps, it cannot be said that the 1st respondent has actual physical possession because she was not in physical occupation of the house in question; but she clearly had, at least, constructive possession because she, by keeping the premises locked, clearly exercised not only dominium or control over the property in question but also excluded others from the possession thereof. By

> *keeping the premises locked, she, i.e. the 1st respondent, had not only continued to retain her rights in respect of the property in question but also was exercising a claim to the exclusive control thereof, and her affidavit evidence is that she had not terminated her intention to revert to the physical occupation of the relevant premises.*

In Salmond on Jurisprudence, 12th edition (2004) by P.J. Fitzgerald, at page 266, the learned author says that the concept of possession is difficult to define as it is an abstract notion and not purely a legal concept. He opines:

> *Whether a person has ownership depends on rules of law; whether he has possession is a question that could be answered as a matter of fact and without reference to law at all.*

Salmond at page 282 states:

> *In law one person may possess a thing for and on account of someone else. In such a case the latter is in possession by the agency of him who so holds the thing on his behalf. The possession thus held by one man through another may be termed mediate, while that which is acquired or retained directly or personally may be distinguished as immediate or direct.*

At pages 285-286, he further says:

> *In all cases of mediate possession two persons are in possession of the same thing at the same time. Every mediate possessor stands in relation to a direct possessor*

through whom he holds. If I deposit goods with an agent, he is in possession of them as well as I. He possesses for me, and I possess through him. A similar duplicate possession exists in the case of master and servant, landlord and tenant, bailor and bailee, pledgor and pledgee. There is, however, an important distinction to be noticed. For some purposes mediate possession exists as against third persons only, and not as against the immediate possessor. Immediate possession, on the other hand, is valid as against all the world, including the mediate possessor himself. Thus if I deposit goods with a warehouse man, I retain possession as against all other persons; because as against them I have the benefit of the warehouseman's custody. But as between warehouseman and myself, he is in possession and not I. So in the case of a pledge, the debtor continuous to possess quoad the world at large; but as between debtor and creditor, possession is in the latter. The debtor's possession is mediate and relative; the creditor's is immediate and absolute. So also with landlord and tenant, bailor and bailee, master and servant, principal and agent, and all other case of mediate possession. (emphasis mine)

Sharker on Criminal Procedure, 6th edition (1992), at page 311, (citing *Venugopal, A 1945 M 255, Karnadhar, 1948 1 Cal 150*), states:

As between rival landlords or between a landlord and the tenants of another landlord, the possession of the tenant is the possession of the landlord.

In *Jaikrit Singh v. Sohan Raj (AIR (46) 1959 Punjab 63 at 69)* it was held that:

> *It is true that the possession of a servant of his master's property on his behalf is the master's possession with regard to third persons. But, if there is a dispute between the master and the servant, themselves, about the possession of the property, the word possession will have to be interpreted in the sense of actual physical possession. The term 'possession' connotes an intricate and subtle legal conception, which changes with circumstances.*

Sohoni (op. cit., page 1184) (citing *Shaikh Munshi v. Balabhadra Prasad Das, 1961 Cut. L.T. 10, Dasrathi v. State of Orissa, 1971 Cut. L.T. 270*), states:

> *Even where a servant is in possession over property belonging to his master on his behalf, the possession will become his own when he continuous to remain in possession after leaving the service of his master, or even otherwise. His possession, therefore, even though wrongful, will be maintained if it has continued for over two months prior to the institution of the proceedings.*

The master, principal, licensor, lessor, landlord and the like, in my view, are not without immediate remedy. They can appropriately file a civil suit in the District Court to eject the unlawful occupier, and, pending determination of the action, can obtain an interim injunction preventing the delinquent from taking advantage of his wrongdoing on the Roman-Dutch Law principle *spoliatus ante omnia restituendus est*, which is for

convenience known as the wrongdoer principle: *A wrongdoer shall not be allowed to benefit out of his own wrongdoing.* Vide *Seelawathie Mallawa v. Millie Keerthiratne [1982] 1 Sri LR 384, Subramanium v. Shabdeen [1984] 1 Sri LR 48, Kariyawasam v. Sujatha Janaki [2013] BLR 77.*

In *Seelawathie Mallawa v. Millie Keerthiratne (supra)*, Victor Perera J., at page 391, stated:

> *[I]f a person in unlawful possession could not be ejected pending trial, he could still be restrained from taking any benefits arising out of such wrongful possession, otherwise the Court would be a party to the preserving for the defendant-appellant a position of advantage brought about by her own unlawful or wrongful conduct.*

In *The Public Trustee v. Cader (1963) 66 CLW 109* it was held:

> *Where an employee willfully continuous to remain in control of a place of business, the administrator of the deceased owner's estate has a right to an interim injunction under section 86 of the Courts Ordinance restraining that employee from continuing in control.*

Let me now epitomise the requirement of possession expected in section 66 proceedings.

In section 66 proceedings:

(a) What is required is actual possession. Actual possession means actual physical possession. That is direct or immediate possession.

(b) Possession of persons who entered into possession in a subordinate character such as tenant, lessee, licensee, agent, servant, can be relied upon by landlord, lessor, licensor, principal, master, respectively. That is constructive or mediate possession.

(c) Nevertheless, if the dispute regarding possession is between the two categories mentioned in (b) above, possession of the former shall prevail over the latter.

Constructive possession, as discussed in *Iqbal v. Majedudeen (supra)*, shall be understood subject to (c) above.

Then, it is clear that even if the respondent is considered an agent of Milton Silva, the latter cannot claim possession through the former, as the dispute to possession is not between Milton Silva and a third party but between Milton Silva and his agent.

Therefore, I regret my inability to agree with the final argument of the learned counsel for the appellant as well.

During the course of argument, it was revealed that Milton Silva later filed a civil case in the District Court against the respondent in order to vindicate his rights to this land and eject the respondent therefrom. The parties shall have their substantive rights decided in the said civil case.

For the aforesaid reasons, I affirm the Judgment of the High Court, which affirmed the order of the Magistrate's Court, and dismiss the appeal, but without costs.

Judge of the Court of Appeal

A.L. Shiran Gooneratne, J.

I agree.

Judge of the Court of Appeal