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

In the matter of an application made under and in terms of Article 154P (6) of the Constitution of the Democratic Socialist Republic of Sri Lanka seeking to revise and set aside the Judgment made in Provincial High Court of Galle in Application No. HCRA 72/2000 on 13th February 2014.

Officer-in-Charge
Police Station,
Galle.

Complainant

CA Application No: CA(PHC) 10/2014

HC Galle Case No: HCRA 72/2000

MC Galle Case No: 23218

Vs.

01. Nanayakkara Gamage Violet De Silva
02. Piladuwa Mahabogahawattege Lionel De Silva
03. Piladuwa Mahabogahawattege Sunil Sriyantha Meril De Silva

All are residing at
No. 20/4, Templers Road,
Kaluwella,
Galle.

Party of the 1st Part

Vithanage Samson,
No. 24/4, Godawatta,
Nawinna,
Uluvitike.

Party of the 2nd Part

AND

Vithanage Samson,
No. 24/4, Godawatta,
Nawinna,
Uluvitike.

Party of the 2nd Part-Petitioner

Vs.

Officer-in-Charge
Police Station,
Galle.

Complainant-Respondent

01. Nanayakkara Gamage Violet De Silva
02. Piladuwa Mahabogahawattege Lionel De Silva
03. Piladuwa Mahabogahawattege Sunil Sriyantha Meril De Silva

All are residing at
No. 20/4, Templers Road,
Kaluwella,
Galle.

Party of the 1st Part-Respondents

The Attorney General,
Attorney General's Department,
Colombo 12.

3rd Respondent

AND NOW BETWEEN

Vithanage Samson,
No. 24/4, Godawatta,
Nawinna,
Uluvitike.

Party of the 2nd Part-Petitioner-Appellant

Vs.

Officer-in-Charge
Police Station,
Galle.

Complainant-Respondent-Respondent

04. Nanayakkara Gamage Violet De Silva
05. Piladuwa Mahabogahawattege Lionel De Silva
06. Piladuwa Mahabogahawattege Sunil Sriyantha Meril De Silva

All are residing at
No. 20/4, Templers Road,

Kaluwella,
Galle.

Party of the 1st Part-Respondent-Respondents

Before:	**Prasantha De Silva, J.**
	K.K.A.V. Swarnadhipathi, J.
Counsel:	Manjula Balasooriya A.A.L for the Party of the 2nd Part-Petitioner-Appellant.
	Suraj Rajapaksha A.A.L for the 1st Party-Respondent-Respondents.
Written Submissions tendered on:	14.12.2021 by the Party of the 2nd Part-Petitioner-Appellant.
	02.12.2019 by the 1st Party-Respondent-Respondents.
Argued on:	25.11.2021
Decided on:	09.05.2022

Prasantha De Silva, J.

Judgment

It appears that the Officer in Charge of Police Station-Galle being the Complainant, had filed an information under Section 66 (a) of the Primary Courts' Procedure Act No. 44 of 1979, in case bearing No. 23218 in the Magistrate's Court-Galle.

By the information, it was submitted to the Magistrate's Court that Party of the 1st Part namely;

01. Nanayakkara Gamage Violet De Silva,

02. Piladuwa Mahabogahawattege Lionel De Silva, and

03. Piladuwa Mahabogahawattege Sunil Sriyantha Mevil De Silva [hereinafter sometimes referred to as the Respondents] claimed that they are the owners of the premises in dispute and the 2nd Party namely Vithanage Samson had entered to the premises in dispute on 08.08.1998 and had started clearing the same. Furthermore, it was submitted that District Court Galle case bearing No. 11407/P is pending in relation to the said land and premises in dispute.

It was the contention of the Appellant that the Primary Court has no jurisdiction over the disputed subject matter since there were three partition cases pending in the High Court. It was held in ***Kanagasabai Vs. Mylwaganam 78 NLR 282-283;***

> "Mere pendency of a suit in a civil Court is wholly an irrelevant circumstance and does not take away the dispute which had necessitated a proceeding under Section 66 of the Primary Courts' Procedure Act."

Thus, jurisdiction of the Primary Court would not oust to proceed with the instant matter.

The learned Magistrate who was acting as the Primary Court Judge has followed the procedure stipulated under Section 66 of the Primary Courts' Procedure Act and had taken up the matter for inquiry. After the conclusion of the inquiry, the learned Magistrate delivered the Order on 11.02.1999 in favour of the 1st Party-Respondent-Respondents declaring that they are entitled to the possession of the disputed subject matter.

Being aggrieved by the said Order dated 14.02.1999, the Party of the 2nd Part-Petitioner-Appellant [hereinafter referred to as the Appellant] made an application bearing No. HCRA 22/1999 to the Provincial High Court of Galle seeking to revise the aforesaid Order.

However, it was submitted in the petition of appeal that the learned High Court Judge being satisfied with the merits of the said revision application of the Appellant and with the consent of the Appellant and the Respondents, set aside the aforesaid Order of the learned Magistrate made on 11.02.1999 in the Magistrate's Court of Galle and directed the learned Magistrate to deliver a fresh Order in terms of Section 68 of the Primary Courts' Procedure Act [hereinafter referred to as the Act]. Apparently, the learned Magistrate delivered the Order on 18.08.2000 in favour of the Respondents for the reasons stated therein.

Being aggrieved by the said Order, the Appellant made a revision application bearing No. HCRA 72/2000 to the Provincial High Court of Galle to revise or set aside the said Order. The said application was taken up for inquiry and the parties agreed to dispose the matter by way of written submissions. Subsequently, the learned High Court Judge delivered the Order on 16.09.2003, considering the merits of the application.

Being dissatisfied with the said Order of the learned Provincial High Court Judge dated 16.09.2003, the Appellant preferred an appeal bearing No. CA (PHC) 238/2003 to the Court of Appeal. The said appeal had been taken up for hearing and Counsel for the Appellant had made oral submissions. Moreover, written submissions were also filed by both parties. Subsequently, the Court of Appeal pronounced the Judgment setting aside the Order made by the learned High Court Judge dated 13.02.2014 and sent the case back to the Provincial High Court of Galle with a direction to hear and dispose the matter after considering the merits of the said application bearing No. HCRA 72/2000.

The said application bearing No. HCRA 72/2000 was taken up in the Provincial High Court of Galle and it was disposed of written submissions and also oral submissions of the Appellant. Thereafter, the learned High Court Judge of the Provincial High Court of Galle delivered the Order on 13.02.2014 dismissing the said application No. HCRA 72/2000.

Being aggrieved by the said Order dated 13.02.2014, the Appellant had preferred this appeal seeking to set aside or revise the Orders made by the Provincial High Court of Galle dated 13.02.2014 and also the Order made by the Magistrate's Court of Galle dated 18.08.2000 in case bearing No. 23218.

This appeal emanates from the Order of the Provincial High Court of Galle exercising revisionary jurisdiction against the Order made by the learned High Court Judge dated 13.02.2014 dismissing the revision application bearing No. HCRA 72/2000, which was filed against the Order of the learned Magistrate of Galle in case bearing No. 23218 dated 18.08.2000.

It is relevant to note that the appeal before this Court is an appeal against the Order of the Provincial High Court in exercising revisionary jurisdiction. As such, the task before this Court is not to consider an appeal against the Primary Court Order but to consider an appeal preferred against an Order made by the Provincial High Court in exercising its revisionary jurisdiction. The Appellant has taken the position that Primary Court has no jurisdiction to hear and determine the instant case under Section 66 (1) (a) of the Primary Courts' Procedure Act since no breach of the peace has occurred.

Since the Police Officer who inquired into the dispute between the parties had filed the information in terms of Section 66 (1) (a) of the Primary Courts' Procedure Act, it amply proves that there was a breach of the peace threatened or likely to be threatened, which confers jurisdiction under Section 66 (1) of the Primary Courts' Procedure Act.

In this respect, it is worthy to note the Judgments by *his Lordship Justice Ismail* in the case of ***Velupillai and others Vs. Sivanadan (1993) 1 SLR 123*** and *his Lordship Justice Wijetunga* in the case of ***David Appuhamy Vs. Yassassi Thero (1987) 1 SLR 253*** which substantiate the said position. It was held in both these cases that;

> "Under the Primary Courts' Procedure Act, the information of the opinion as to whether a breach of the peace is threatened or is likely, is left to the Police Officer inquiring into the dispute."

Since the impugned dispute between the parties is in respect of a possession of land, it is seen that the applicable provision is section 68 of the Primary Courts' Procedure Act. Thus, it is worthy to note subsections (1) and (3) of Section 68 of the Primary Courts' Procedure Act state as follows;

1) Where the dispute relates to the possession of any land or part thereof it shall be the duty of the Judge of Primary Court holding the inquiry to determine as to who was in possession of the land or the part on the date of filing of the information under Section 66 and make Order as to who is entitled to possession of such land or part thereof.

(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 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.

The main issue for the determination under Section 68(1) is, as to who was in possession of the land or part thereof on the date of filing the information under Section 66. However, the Court can act under Section 68(3) and make a determination as to whether such dispossession has been affected within two months prior to filing of the information, when there is an allegation of a forcible dispossession.

Respondents contended that the Appellant's claim is entirely based on forcible dispossession. It is apparent that in such circumstances, Section 68(3) of the Act applies.

It is settled law that Section 68(3) is applicable only if the Judge of the Primary Court can come to a definite finding that some other party had been forcibly dispossessed within a period of 2 months immediately preceding the date on which the information was filed under Section 66 of the Act (***Ramalingam Vs. Thangarajah 1982 2SLR 693***). This position has been cited in many recent Judgments such as ***Ranjith Mervyn Ponnamperuma Vs. Warahena Liayanage Viraj Pradeep Kumara De Alwis and Others CA PHC/71/2008***, decided on 12.06.2020.

As per Section 68(3), the Judge being satisfied of such forcible dispossession within the said time period is a necessary and mandatory pre-requisite when making a determination to that effect. It is only if such a determination could be made, the Judge of the Primary Court is empowered to make an order of restoration of possession.

In terms of Section 68(3) of the Act, it emphasizes on the need for a Judge to be satisfied with elements of a forcible dispossession. Although, the Primary Court Judge is empowered to make an order of restoration of possession, it could be made only after a determination of forcible dispossession.

As per Section 68(1) of the Act, it is a duty of the learned Primary Court Judge to determine as to who was in possession of the premises in dispute.
In terms of Section 72 of the Act,
A determination and order under this part shall be made after examination and consideration of
(a) the information filed and the affidavits and documents furnished;

(b) 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
(c) such oral or written submission as may be permitted by the Judge of the Primary Court in his discretion.

According to the 1st Party-Respondent-Respondents, the disputed corpus is described as follows;

> "නඩුවට අදාළ විෂය වස්තුව වන්නේ දකුණු පළාතේ ගාලු දිස්ත්‍රික්කයේ ගාලු නාගරික සීමාවට අයත් ගාලු කඩවත් සතර තුළ කුඹල්වැල්ල පිහිටි ගල්කැටියෙවත්ත නම් වූ උතුරට දිනෙස්ගෙ වත්ත ද, නැගෙනහිරට පන්සල් වත්ත ද, දකුණට ජූලියන්ගෙ වත්ත ද, බස්නාහිරට දිනෙස්ගෙ වත්ත ද යන මායිම් තුළ පිහිටි රූඩ් දෙක (අ:0, රූ:2, ප:0) ක් විශාල ඉඩම වේ."

It was submitted on behalf of the 1st Party-Respondent-Respondents [hereinafter sometimes referred to as the Respondents] that for further and proper identification of the corpus, the (1st Party) – Respondents tendered the Plan No. 1057 dated 12th of November 1991 made by G.N. Samarasinghe Licensed Surveyor marked as 1වෙ8. The said plan had been prepared in respect of a Partition Action pertaining to a land which includes the corpus.

The Land depicted as Lot 2 in the said Plan is the subject matter of this case, in extent of 1 rood and 39.75 perches, which is only 0.25 perch less than the land described in paragraph 2 of the original affidavit of the (1st Party) Respondents.

Attention of Court was drawn to paragraphs 7 and 8 of the original affidavit of (1st Party) Respondents. The 1st Party had stated that they are residing on the impugned land in dispute. The (2nd Party) Appellant had not denied the aforesaid fact in his counter affidavit.

Attention of Court was further drawn to the report of the Court Commissioner, who had prepared Plan No. 1057, which was tendered by the (2nd Party) Appellant marked as 4වෙ9. As per the reference made in respect of Lot 2 in the said plan 4වෙ9 (the corpus of this case), the house situated in said Lot 2 was claimed only by the (1st Party) Respondents. 1st Party-1st Respondent was the 2nd Defendant in Partition Case bearing No. 1142/P.

It is in evidence that the 1st Party-Respondent-Respondents are residing on the corpus in dispute. The 2nd Party had not denied the aforesaid fact in in his counter affidavit. Furthermore, Court observes the affidavit marked as 1එ7 annexed to the original affidavit of the (1st Party) Respondents, which substantiates the said position of the (1st Party) Respondents that they are residing in the disputed premises. It is interesting to note that the affirmant of the affidavit marked as 1එ7 states that;

> "……..08.08.1998 වෙනි දින 01 සිට 03 දක්වා වූ වගඋත්තරකරුවන් ට අයත්, ඉඩමේ පිහිටි නිවසේ වහල මා විසින් අලුත්වැඩියා කිරීමට පැමිණ එදින එම කටයුතු වල යෙදී සිටියෙමි. ඒ අනුව එදින මා 01 සිට 03 දක්වා වගඋත්තරකරුවන් පදිංචි නිවසේ වහල අලුත්වැඩියා කරමින් වහලේ සිටින විට එක්තරා පුද්ගලයෙකු විසින් ඉඩමට ඇතුල්වෙන ලදී. එසේ පැමිණි තැනැත්තා විතානගේ සැමිසන් බව ඒ අවස්ථාවේදීම නිවසේ සිටි 01 සහ 02 වෙනි වගඋත්තරකරුවන් කියා සිටින ලදී. එකී සැමිසන් නැමැත්තා මීට පෙර දැක නැත. එකී විතානගේ සැමිසන් නැමැත්තා මා බලා සිටියදීම ඔහු අත තිබූ අලවංගුව ඉඩමේ 01 සිට 03 දක්වා වූ වග උත්තරකරුවන්ට අයිති නිවස අසල වූ විශාල කෙසෙල් පඳුරු වලින් කෙසෙල් පැල රාශියක් ගලවනවාත් තම අත තිබූ උදැල්ලෙන් සහ අලවංගුවෙන් 01 සිට 03 දක්වා උත්තරකරුවන් භුක්ති විඳින ඉඩමේ වලවල් කපා එකී වළවල්වල කෙසෙල් පැල 16ක් පමණ සිටුවනවාත් මම දුටුවෙමි……..."

Therefore the (1st Party) Respondents submitted that there was ample evidence before the Primary Court to prove that the dispute relating to this case had arisen by (2nd Party) Appellant's forcible entrance to the land in which the 1st Party was residing.

Appellant clearly stated that there is a stone edge of 40 feet in length and 8 feet in the height separating the lands of the parties. It was submitted by the Appellant that the separation of two lands is shown in plan No. 1584 which was marked as 4එ10 by the (2nd Party) Appellant.

It is to be observed that in the said plan 4එ10 and the report pertaining to the same, the line separating Lot 2A and 2B is a line relating to the superimposition and is not an actual boundary existing on the land as per the said plan and the report. There is no reference to any stone edge in between Lots 2A and 2B depicted in the said plan 4එ10. As such, the Appellant had failed to establish the identity of the land, which he claims possession of. Thus, it is seen that the Appellant claims right to a different land, which does not belong to the (1st Party) Respondents.

In view of the aforesaid reasons, the learned High Court Judge had come to the correct findings of fact with regard to the identification of the disputed portion of land and held that the (2nd Party) Appellant had not established that he was in possession of the disputed land in the relevant period.

However, it is evident that the (1st Party) Respondents were in possession of the disputed portion of land two months prior to the dispute arose between the parties on 10.08.1998 and the date of filing the information. Since the (1st Party) Respondents were dispossessed from the disputed portion of land, they are entitled to the possession of the disputed corpus of the instant action.

Since, the learned High Court Judge holds that the Appellant had dispossessed the Respondents from the disputed portion of land and that the (1st Party) Respondents are entitled to the possession of the same, we see no reason for us to interfere with the Orders made by the learned High Court Judge. Thus, we dismiss this appeal with costs fixed at Rs. 10,500/-.

JUDGE OF THE COURT OF APPEAL

K.K.A.V.Swarnadhipathi, J.
I agree.

JUDGE OF THE COURT OF APPEAL