

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

In the matter of an application under an  
in terms of Article 154(P) read with  
Article 138 of the Constitution of the  
Democratic Socialist Republic of Sri  
Lanka.

Court of Appeal Case No:  
**CA (PHC) 104/2016**

High Court of the Central  
Province in Nuwara Eliya Case No:  
**HC/NE 07/2015 (Revision)**

Magistrate's Court of Nuwara  
Eliya Case No:  
**52490**

The Officer-in-Charge,  
Police Station of Nuwara Eliya,  
Nuwara Eliya.

**Complainant**

**Vs.**

Kandan Maharaja,  
C/O P.B.M. Seeta Eliya,  
Nuwara Eliya.

**1<sup>st</sup> Party**

W.A.Ruckmani Bandara,  
C/O P.B.M. Seeta Eliya,  
Nuwara Eliya.

**2<sup>nd</sup> Party**

**AND**

Kandan Maharaja,  
C/O P.B.M. Seeta Eliya,  
Nuwara Eliya.

**1<sup>st</sup> Party-Petitioner**

**Vs.**

W.A.Ruckmani Bandara,  
C/O P.B.M. Seeta Eliya,  
Nuwara Eliya.

**2<sup>nd</sup> Party-Respondent**

**AND NOW BETWEEN**

W.A.Ruckmani Bandara,  
C/O P.B.M. Seeta Eliya,  
Nuwara Eliya.

**2<sup>nd</sup> Party-Respondent-Appellant**

Kandan Maharaja,

C/O P.B.M. Seeta Eliya,  
Nuwara Eliya.  
**1<sup>st</sup> Party-Petitioner-Respondent**

**Before** : **Prasantha De Silva, J.**  
**K.K.A.V. Swarnadhipathi, J.**

**Counsel** : **Maheesha Dushyanthi A.A.L for the Appellant.**  
**Neshanee De Zoysa A.A.L for the Respondent.**

Both parties agreed to dispose the appeal by way of written submissions.

Written Submissions : 03.02.2022 by the 1<sup>st</sup> Party-Respondent-Petitioner-Respondent  
tendered on 08.04.2022 by the 2<sup>nd</sup> Party-Respondent-Appellant

Decided on : 28.11.2022

**Prasantha De Silva, J.**

### **Judgment**

This is an appeal emanating from the Order of the High Court of Nuwara Eliya in case bearing No. HC/NE/07/15 (Revision), where the learned High Court Judge set aside the Order of the learned Magistrate of Nuwara Eliya dated 19.01.2015 in case bearing No. 52490.

The Officer-in-Charge of Police Station of Nuwara Eliya had filed an information in the Magistrate's Court of Nuwara Eliya, under Section 66 of the Primary Courts' Procedure Act No. 44 of 1979. The 1<sup>st</sup> Party-Respondent had made a complaint on the 18<sup>th</sup> August 2014 stating that the things of the house (in the land and premises in dispute), were thrown out by the 2<sup>nd</sup> Party-Respondent, under whom the 1<sup>st</sup> Party-Respondent has been working since 1993. The 1<sup>st</sup> Party-Respondent had been occupying the land in dispute to carry out the work of 2<sup>nd</sup> Party-Respondent. Thus, the 1<sup>st</sup> Party Respondent had been

in possession of the land as a licensee, with leave and license of the 2<sup>nd</sup> Party-Respondent.

The learned Magistrate had come to the finding that the 1<sup>st</sup> Party-Respondent was a servant of the 2<sup>nd</sup> Party-Respondent and as she has terminated the license on which the 1<sup>st</sup> Party-Respondent was living in the disputed house, he is not entitled to continue being in possession of the said house.

Being dissatisfied with the said findings of the learned Magistrate who was acting as the Primary Court Judge, Respondent-Petitioner has filed a Revision Application bearing No. HC/NE 07/2015 (Revision) before the Provincial High Court of the Central Province holden in Nuwara Eliya on the 12<sup>th</sup> of June 2015.

However, the learned High Court Judge of the Provincial High Court of Nuwara Eliya determined that the 1<sup>st</sup> Party-Respondent had been forcibly evicted by the 2<sup>nd</sup> Party-Respondent from the premises in dispute and that the 1<sup>st</sup> Party-Respondent is entitled to possess the land in question until he surrenders the possession peacefully or is evicted by a due process of law by a competent court.

Being aggrieved by the said determination, the 2<sup>nd</sup> Party-Respondent-Appellant had preferred this appeal against the Order of the learned High Court Judge of the Provincial High Court of Nuwara Eliya dated 11<sup>th</sup> August 2016.

According to the statement made by the 1<sup>st</sup> Respondent-Petitioner-Respondent (hereinafter referred to as the Respondent) to the Nuwara Eliya Police Station on 18.08.2014, he was given the opportunity to remain in the premises in dispute as he was an employee working under the 2<sup>nd</sup> Party Respondent-Respondent-Appellant (hereinafter referred to as the Appellant) and the Respondent had been evicted by the Appellant from said premises on 18.08.2014. Further, the said statement indicates that the Respondent had asked for an extension from the Appellant enabling him to remain in the same until he finds a suitable place for dwelling.

The above position by the Respondent indicates that he has admitted the possession of the Appellant over the said premises in issue and that he was remaining in the same with leave and license under the Appellant in terms of the employer-employee relationship between both of them. Therefore, it can be construed that the Respondent was in possession of the disputed premises for and on behalf of the Appellant.

It was the contention of the Appellant that the possession and control over the premises in dispute remains with her and she being the employer has both the power and intention at any time to exercise dominion and control over the premises in dispute towards the Respondent being her employee. It was the contention of the Appellant that the Appellant was exercising her power of possession over the same through her employee.

According to the documents submitted by the Respondent marked as 1@12 and 1@13, they clearly indicate the position that the Respondent was merely given the opportunity to remain in the said premises during his period of service with leave and license of the Appellant, as the documents declare that he was living in the same and that it was a house owing to a business owned by the Appellant.

Furthermore, the affidavits of the Appellant dated 07.10.2014 and 10.11.2012 substantiate the contention of the Appellant that the Respondent was merely given the opportunity to remain in the said premises in dispute with leave and license during his period as an employee of the employer, the Appellant. Once the Appellant terminates such employer-employee relationship between them by evicting the Respondent out of the said premises, the status of the Respondent being a licensee under the Appellant to remain in the same ceases and the Respondent is no more entitled to remain in possession of the same.

It was submitted by the Appellant that the learned High Court Judge had taken the view against the Appellant on the basis that even a squatter is entitled to have the possession of the impugned premises. However, it was the contention of the Appellant that the status of the Respondent is not in the capacity of a squatter exercising his rights.

It is evident that the Respondent had come to the possession of the disputed premises on the basis of an employee of the Appellant. Therefore, the Respondent had been in possession of the disputed premises as a licensee of the Appellant in terms of the employer-employee relationship or master-servant relationship.

In this respect, the attention of Court was drawn to Section 145 of the Indian Criminal Procedure Code which corresponds with Section 66 of the Primary Courts' Procedure Act No. 44 of 1979.

According to Volume 2 of Sohoni's, 18<sup>th</sup> edition "The Code of Criminal Procedure, 1973", the master-servant relationship is dealt as follows. I quote;

"A view has also been taken that possession which may be pleaded under this Section must be based on a claim or right of possession, and that possession of an agent or servant which is permissive, cannot give him a *locus standi* as against his principal or master. If possession has been given as a servant or employee, he cannot set up his possession to the exclusion of his employer. Pujaris are mere servants of the trustees. It should be borne in mind that possession of a trespasser would always be exclusively on his own. But when initially a person enters into possession for an on behalf of another, he will not be allowed to turn around all of a sudden and voluntarily disclaim the nature of that possession and exclude the persons for and on whose behalf, he had entered into that possession."

In that event it is apparent that the scope of an inquiry under the circumstances is not to be extended beyond the determination of actual possession. The parties are allowed to determine their questions pertaining to title in civil Courts, and it cannot be laid down as an inflexible rule of law that in no case can agent set up possession under the circumstances.

However, where the opposite party was employed not as a servant or workman, but as a sub-contractor, the applicability of this Section is not ruled out.

Even where a servant is in possession over property belonging to his master, on his behalf, the possession will become his own when he continues 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.

However, this applies when a dispute likely to cause a breach of peace arises between them, and not between the agent and third parties. In the latter type of cases, the principal cannot come in and ask the Magistrate to adjudicate upon the title especially when his title is also disputed by the agent, and the agent sets up his own title. Even in the first type of cases, if the agency is disputed, the Magistrate will have to proceed on the basis of actual possession, because questions of title are not only irrelevant in such proceedings but also beyond the jurisdiction of the Magistrate.

In the case of *Kanagasabai Vs. 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 Vs. 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, emphasized 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.”

“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 entitles even a squatter to the protection of 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 a 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 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, 18<sup>th</sup> 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. Inquiry 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, 21<sup>st</sup> edition (2013), equates 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.

Samayawardana, J. has epitomized in ***Gamaralalage Jayasinghe & Others Vs. Mahara Mudiyansele*** [CA PHC 76/2018, decided on 20.12.2019] 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, and 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.

On this premise, it is observable that the 1st Party-Petitioner-Respondent was in actual possession of the disputed premises two months prior to the date of filing the information and was dispossessed within two months prior to the date of filing the information. As such, the learned High Court Judge of the Provincial High Court of the Central Province holden in Nuwara Eliya in HC/NE/07/2015 has correctly determined that the 1st Party Respondent-Petitioner-Respondent is entitled to possess the land in dispute. Thus, I hold that the Order of the learned High Court Judge is well founded.

Hence, I see no reason to interfere with the Order dated 11.08.2016 made by the learned High Court Judge.

Thus, we dismiss the Appeal with cost.

**JUDGE OF THE COURT OF APPEAL**

**K.K.A.V. Swarnadhipathi, J.**

I agree.

**JUDGE OF THE COURT OF APPEAL**