

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

LANKA

In the matter of a Revision Application against the Order dated 9th October 2017 of the High Court of the Northern Province holden in Jaffna under Article 138 of the Constitution.

Court of Appeal Case No:
CA (PHC) APN 88/18

High Court of Jaffna Case No:
2025/16

Primary Court Mallakam Case No:
PC/09/16

Officer-in-Charge,
Police Station,
Tellipalai.

Informant

1. Kaneswaran Nageswary,
Vaithiyar Vallavu,
Alaveddy Centre,
Alaveddy.

Party of the 1st Part

2. Gnaneswary Vairavasuntharam
Alaveddy Centre,
Alaveddy.

Party of the 2nd Part

In the High Court of the Northern Province holden in Jaffna. In the matter of an Application for Revision under Section 5 and 6 of the High Court of the Provinces (Special Provisions) Act No. 19 of 1990 read together with Article 154P (3) (b) of the Constitution of Sri Lanka.

Gnaneswary Vairavasuntharam
Alaveddy Centre,
Alaveddy.

Party of the 2nd Part-Petitioner

Vs.

1. Kaneswaran Nageswary,

Vaithiyar Vallavu,
Alaveddy Centre,
Alaveddy.

Party of the 1st Part-Respondent

2. Officer-in-Charge,
Police Station,
Tellipalai.

Informant-Respondent

AND NOW BETWEEN

Kaneswaran Nageswary,
Vaithiyar Vallavu,
Alaveddy Centre,
Alaveddy.

Presently of No. 48, Consfield Avenue,
New Malden, Surrey KT3 6HD,
United Kingdom.

**Party of the 1st Part-Respondent-
Petitioner**

Vs.

1. Gnaneswary Vairavasuntharam
Alaveddy Centre,
Alaveddy.

**Party of the 2nd Part-Petitioner-
Respondent**

2. Officer-in-Charge,
Police Station,
Tellipalai.

**Informant-Respondent-
Respondent**

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

Counsel: M.P.Ganeshwaran for 1st Party Respondent-Petitioner.
S.Mandaleswaran for the 2nd Party Petitioner-
Respondent.

Written Submissions 30.10.2019 by the 1st Party Respondent-Petitioner.

tendered on: 25.11.2019 by the 2nd Party Petitioner-Respondent.
Argued on: 23.03.2022
Decided on: 20.01.2023

Prasantha De Silva, J.

Judgment

The Officer-in-Charge of the Police Station-Tellipalai had filed an information on 02.03.2016 in terms of Section 66 (1) (a) of the Primary Courts' Procedure Act No. 44 of 1979 at the Primary Court of Mallakam in case bearing No. PC/09/16 against the Party of the 1st Part and Party of the 2nd Part as there had been a likelihood of a breach of peace between the parties.

The learned Primary Court Judge having followed the procedure stipulated in Section 66 of the Primary Courts' Procedure Act had fixed the matter for inquiry. Since there was no settlement, parties had agreed to submit their claims through written submissions.

Consequently, the learned Primary Court Judge had delivered the Order on 13.07.2016 in favour of the Party of the 1st Part confirming her possession to the property in dispute. Further, it was ordered that Party of the 2nd Part should vacate the disputed property and Party of the 1st Part be placed in possession of the same.

Being aggrieved by the said Order of the learned Primary Court Judge, Party of the 2nd Part-Petitioner had invoked the revisionary jurisdiction of the Provincial High Court of the Northern Province holden in Jaffna. The learned High Court Judge of Jaffna had set aside the Order of the learned Primary Court Judge and allowed the application for revision filed by the Party of the 2nd Part-Petitioner and had restored her possession to the premises in dispute.

Being aggrieved by the said Order of the learned High Court Judge dated 09.10.2017, the Party of the 1st Part-Respondent-Petitioner had made an application to this Court by way of revision to have the said Order dated 09.10.2017 made by the learned High Court Judge set aside.

It is worthy to note that the learned High Court Judge had set aside the Order of the learned Primary Court Judge and held that Party of the 2nd Party-Petitioner-Respondent [hereinafter sometimes referred to as the 2nd Respondent] has established her possession to the disputed premises and Party of 1st Part-Respondent has not established her possession to the disputed premises as she was out of the country. Thus, it clearly shows that the learned High Court Judge determined the dispute over the property in terms of Section 68(1) of the Primary Courts' Procedure Act.

Section 68(1) stipulates:

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

It was the contention of the 2nd Party-Respondent that she had been a teacher since 1984 who worked in different places and retired on 19.08.2015 while she was working in Colombo. It is to be noted that the said 2nd Party-Respondent had stated in the statement given to the Tellipalai Police Station on 17.02.2016:

“My work was in Colombo. Now I've taken pension. After my retirement, I came to my own house. My sister is giving me trouble due to this problem relating to the house.”

It is to be noted that 2nd Party-Respondent had not indicated when she had gone to occupy her own house and it was not established that the premises in dispute is her own house. Further, 2nd Party-Respondent had stated:

“I have rights to this house, I have got the deed, I have got the land. Deed is kept in Colombo”.

It shows that on 17.02.2016 when the 2nd Party-Respondent made her statement to Tellipalai Police Station, she had been residing in Colombo.

According to affidavit [X₄] given by the said 2nd Party-Respondent Gnaneswari on 16.03.2016, it was stated (paragraphs 11 & 12 of affidavit X₄):

“11. Eventhough my mother got invitations to go abroad and live with my siblings abroad, my mother said she does not want to go abroad since I was single and lonely. Thus, I decided to get married in 1995 and after she got me married in Colombo, my mother went abroad in 1997 and died in 2006.

12. In 2002, my husband met with an accident and died on 13.09.2002, my brother Senthuran lived with me in Colombo. Thereafter, he came to the property in dispute and lived in the house with the people who were living there on rent.”

In view of the said averment, it is seen that the 2nd Party-Respondent Gneswari had set up her matrimonial home in Colombo. Furthermore, the said 2nd Party-Respondent Gneswari had stated in the said affidavit that (paragraphs 16 & 17 of affidavit X₄):

“16. After retiring from my teaching post last year in 19.08.2015, I was living with my brother Senthuran in the property in dispute. The Party of the 1st Part-Petitioner, the said Nageswari, when she came from London last month, she met me and expressed her happiness that I am looking after my brother safely. The Party of the 1st Part-Petitioner, my elder sister, has never asked me directly to leave the property in dispute.”

“17. But suddenly on 27.02.2016, the said Nageswari at the behest of her husband Kaneswaran made a false complaint to oust me from the property in dispute, by separating my brother Senthuran from me and placing him in some temple.....”

It is worthy to note that the learned Primary Court Judge on examining the evidence placed before him had come to the conclusion that Party of the 1st Part-Respondent-Petitioner had been in possession of the premises in dispute and had confirmed the possession of the Petitioner to the disputed premises in the said Primary Court action and restored the possession of the Petitioner in terms of Section 68(3) of the Primary Courts’ Procedure Act.

It was revealed in evidence that the premises in dispute was gifted to the 1st Party-Petitioner by her parents as dowry of her marriage and that both parents lived there continuously with other siblings till their death.

The 2nd Party-Respondent had stated in her objections that 1st Party-Petitioner never asked her directly to leave the property in dispute, but, on 27.02.2016 the 1st Party-Petitioner at the behest of her husband made a false complaint to the Police to oust her from the property in dispute.

Moreover, on 29.02.2016, the electricity supply had been disconnected by the Electricity Board upon a complaint made by the husband of the 1st Party-Petitioner. However, the electricity supply had been restored on 04.03.2016. This indicates that the dispute between parties arose on or around 29.02.2016 and not prior to 02.02.2016 after dispossessing the 1st Party-Petitioner from the disputed premises.

If 2nd Party-Respondent had come to possession of the disputed premises on 19.08.2015 after her retirement, it is reasonable to presume that the 1st Party-Petitioner would have complained to the Electricity Board to disconnect the supply during the said period, prior to 29.02.2016.

It is worthy to note the affidavit dated 16.03.2016 (IP₁₀) filed by the brother of the Petitioner Rasaiah Senthuran which stated 'even after the death of their parents, the said affirmant Rasaiah Senthuran had lived in the said disputed premises. While the house was under renovation, he had lived in a portion of the premises in dispute. After completion of the renovation, the keys of the house had been handed over to Grama Niladari Thavarajah on 20.12.2015 by building contractor Rasaratnam Uthayakumar to whom the custody of the premise was entrusted by 1st Party-Petitioner'.

It is seen that the contents of the said affidavit (IP₁₀) filed by Rasaiah Senthuran is contrary to the contents of the affidavit of 2nd Party-Respondent. Thus, the 2nd Party-Respondent has not substantiated her contention that after her retirement, she had come to occupy the premises in dispute from 19.08.2015.

It is imperative to note that brother of the Petitioner, Rasaiah Senthuran, affirmed in his affidavit that Party of the 2nd Part-Petitioner-Respondent (hereinafter referred to as the Respondent) his sister Gneswari, who was living in Colombo had come to know that Petitioner Nageswari was making arrangements to give the premises in dispute to establish a sewing training center and the said 2nd Party-Respondent

trespassed forcibly into the disputed premises on 20.01.2016 and thereafter ousted him from the premises in dispute on 15.02.2016.

According to affidavit (IP₇) of Sinnaiah Thavarasa, the Grama Niladari too had affirmed that 1st Party-Petitioner Nageswari renovated the house in dispute. When the said house was being renovated, the 1st Party-Petitioner's brother Rasaiah Senthuran was living in a portion of that house and after the renovation was completed, keys to the portion of the house were handed over to the said Grama Niladari by the building contractor Uthayakumar at the request of the 1st Party-Petitioner on 20.12.2015.

It is to be observed that the said position was confirmed by the affidavit (IP₉) of Thayumanavar Nikethan, the Secretary of Migration Alaveddi People's Development Society. The Secretary has affirmed in his affidavit that he knew 1st Party-Petitioner Nageswari as the owner of the disputed property and that her brother Rasaiah Senthuran was living alone in the subject property. The 1st Party-Petitioner Nageswari had agreed to give the said property after renovating it to the sewing training centre with a view to meeting the financial needs of the pre-school conducted by Migration Alaveddi People's Society.

The 1st Party-Petitioner Nageswari had agreed to give the disputed premises in January 2016 to conduct the said sewing centre. Hence, some members of the Society and Secretary had gone to the said property on 27.01.2016 to clean the said premises. On 28.01.2016, they had bought sewing machines from Singer Company and when they tried to unload and keep the machines in the said premises in dispute, the 2nd Party-Respondent had prevented them from keeping the machines saying that the house in dispute is hers and that she has come to live in the house after 32 years.

The Secretary has further stated in his affidavit (IP₉) that a person named Kanapathi Natkanthan came for the opening ceremony to be held by the Alaveddi People's Society on 29.02.2016. However, the 2nd Party-Respondent had not allowed the establishment of the sewing training centre in the property in dispute. Thus, it is observable that the sequence of events with regard to the setting up of the sewing centre had been obstructed by the 2nd Party-Respondent.

The said position was corroborated by affidavit (IP₁₄) of Sundaralingam Satheesan which stated that when they went to clean the property in dispute on 27.01.2016 in order to set up the said sewing training centre and when sewing machines were brought on 28.01.2016, they were not allowed to enter the said property in dispute and that 2nd Party-Respondent prevented them from unloading and keeping the sewing machines in the disputed house. Although arrangements had been made for the opening ceremony of the sewing training centre on 29.01.2016 and Alaveddi Willage Kanapathi Nathkunam had come from London to declare open the said sewing training centre, they had been prevented by 2nd Party-Respondent on 28.01.2016 from entering the said property in dispute.

In view of the aforesaid facts revealed through the affidavits tendered by parties, it is apparent that the contention of the 1st Party-Petitioner was corroborated by the affidavits marked and produced as IP₃, IP₇, IP₉, IP₁₀, IP₁₁, and IP₁₄. Thus, it is noteworthy that 2nd Party-Respondent's position was contradicted by the contents in affidavits filed on behalf of the 1st Party-Petitioner. As such, it is evident that brother of the Petitioner, Rasaiah Senthuran had been in possession of the disputed premises during the period relevant to the instant action and that he possessed the disputed premise on behalf of the 1st Party-Petitioner.

Therefore, it clearly manifests that 2nd Party-Respondent was not in possession of the disputed property on a date 2 months prior to the date on which the information was filed in terms of Section 68(3) of the Primary Courts' Procedure Act.

Thus, I hold that 2nd Party-Respondent is not entitled to the possession of the disputed property or part thereof in terms of Section 68(1) of the Primary Courts' Procedure Act. It is observable that 2nd Party-Respondent had come to the possession of the disputed premises on or around 20.01.2016 and since the information was filed on 02.03.2016, the 2nd Party-Respondent has to establish that she had been in possession of the disputed premises on or before 02.01.2016, which the 2nd Party-Respondent had not been able to prove.

Since the 1st Party-Petitioner entrusted the contractor to do the repairs of the house and placed her brother Rasaiah Senthuran in part of the disputed property, it clearly shows that the 1st Party-Petitioner had actual control and management of the premises in dispute. This amply shows that 1st Party-Petitioner had possession of the

disputed property, before she was ousted by the 2nd Party-Respondent on 15.02.2016.

It was held in the case *Iqbal vs. Majedudeen and others [1993] 3 SLR 213*;

“The fact 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.”

It was emphasized by *Gunwardene, J.* that Law recognizes two kinds of possession.

1. When a person has direct physical control over a thing at a given time - Actual Possession.
2. When he, though not in actual possession has both power and intention at a given time to exercise dominion or control over a thing either directly or through another person - Constructive Possession.

It was clearly established that the disputed property is owned by the Petitioner Nageswari and that brother Rasaiah Sethuran had looked after the disputed property on her behalf and this constitutes constructive possession in favour of the Petitioner. Therefore, I hold that the Petitioner Nageswari is entitled to the possession of the disputed property and since she was dispossessed from the impugned property in terms of Section 68(3) of the Primacy Courts' Procedure Act, 1st Party-Petitioner Nageswari is entitled to have the possession back from the 2nd Party-Respondent.

In this instance, it is submitted that the learned High Court Judge has not considered the material placed before the Primary Court Judge which substantiated the contention of the 1st Party -Petitioner. Thus, it appears that the learned High Court Judge has erroneously set aside the Order of the learned Primary Court Judge and held that the 2nd Party-Respondent has established her possession to the disputed property. Therefore, the learned High Court Judge has erred in law and facts in setting aside the Order of the learned Primary Court Judge and making an Order in favour of the 2nd Party-Respondent.

Thus, it is apparent that great injustice was caused to the 1st Party-Petitioner in this matter and a miscarriage of justice exists for the 1st Party-Petitioner to invoke the revisionary jurisdiction of this Court.

It is to be noted that 1st Party-Petitioner after getting possession of the property according to the Order of the Primary Court dated 13.02.2016 had returned to the

United Kingdom. As such, the revision application filed by the 2nd Party-Respondent had been heard *ex-parte* by the learned High Court Judge who had made an Order in favour of 2nd Party-Respondent setting aside the Order of the Primary Court. By the said Order, the learned High Court Judge had restored the 2nd Party-Respondent to the possession of the disputed property.

It was contended by the 2nd Party-Respondent that 1st Party-Petitioner had not given sufficient and acceptable reasons for the delay in filing this application in revision.

It is imperative to note that summons in relation to the revision application filed in the Provincial High Court of the Northern Province holden in Jaffna was not served on the 1st Party-Petitioner to her address in the United Kingdom and this was not disputed by the 2nd Party-Respondent. Therefore, the 1st Party-Petitioner could not have preferred an appeal within the prescribed period.

Moreover, the 1st Party-Petitioner had given reasons and substantiated the delay in filing the instant revision application to this Court.

It is observable that the 1st Party-Petitioner had not preferred an appeal against the Order made by the learned High Court Judge but invoked the revisionary jurisdiction of the Court of Appeal eight and a half months after the date of the Order of High Court instead. It was stated by the 1st Party-Petitioner in her revision application and in the corresponding affidavit that the said Order was not served on her. This was not disputed by the 2nd Party-Respondent. Therefore, it is apparent that the 1st Party-Petitioner could not have preferred an appeal within the prescribed period.

The 1st Party-Petitioner had given reasons to substantiate the delay in filing the instant application to this Court. Since we hold that the impugned Order of the learned High Court Judge is erroneous, it is apparent that great injustice has been caused to the 1st Party-Petitioner which amounts to a miscarriage of justice that shocks the conscience of Court. Although there was a delay in making the revision application, the 1st Party-Petitioner is entitled to invoke the revisionary jurisdiction of the Court of Appeal against the Order of the High Court as exceptional circumstances exist.

The 1st Party-Petitioner has proved that the impugned property was under her control and in her possession from the date she was given it as dowry and that she

was forcibly dispossessed from the said property on or before 15.02.2016 by the 2nd Party-Respondent.

Thus, we set aside the Order of the learned High Court Judge dated 09.10.2017 and affirm the Order of the learned Primary Court Judge dated 13.07.2016.

Thus, the Appeal is allowed.

JUDGE OF THE COURT OF APPEAL

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

JUDGE OF THE COURT OF APPEAL