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

In the matter of an appeal in terms of Article 154P (6) of the Constitution of the Democratic Socialist Republic of Sri Lanka to be read with Section 11 (1) of the High Court of the Provinces (Special Provisions) Act No. 19 of 1990.

Court of Appeal Case No:
CA (PHC) 224/18

High Court of Galle Case No:
HC/Rev/83/2014

Galhenage Kapila Dharmasiri
"Kapilasiri",
Dehigahabedde,
Meetiyagoda.

Complainant

Vs.

1. Halhinna Guruge Dinesh Rohitha
2. Yasintha Dulani Anandagoda

Both of
Kodagederewatta,
Near Balagoda Handiya,
Poddala.

Now at
Upper Floor of Deepani Studio,
Baddegama South,
Baddegama.

Respondents

AND BETWEEN

Galhenage Kapila Dharmasiri
"Kapilasiri",
Dehigahabedde,
Meetiyagoda.

Complainant-Petitioner

Vs.

1. Halhinna Guruge Dinesh Rohitha
2. Yasintha Dulani Anandagoda

Both of
Kodagederewatta,

Near Balagoda Handiya,
Poddala.

Now at
Upper Floor of Deepani Studio,
Baddegama South,
Baddegama.

Respondent-Respondents

AND NOW BETWEEN

1. Halhinna Guruge Dinesh Rohitha
2. Yasintha Dulani Anandagoda

Both of
Kodagederewatta,
Near Balagoda Handiya,
Poddala.

Now at
Upper Floor of Deepani Studio,
Baddegama South,
Baddegama.

Respondent-Respondent-Appellants

Vs.

Galhenage Kapila Dharmasiri
"Kapilasiri",
Dehigahabedde,
Meetiyagoda.

Complainant-Petitioner-Respondent

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

Counsel: Vidura Ranawaka with Menaka Warnapura for the Respondent-Respondent-Appellants.
Upul Kumarapperuma with Radha Kuruwitabandara for the Complainant-Petitioner-Respondent.

Written Submissions tendered on: 08.03.2022 by the Respondent-Respondent-Appellants.
21.04.2022 by the Complainant-Petitioner-Respondent.

Decided on: 07.02.2023

Prasantha De Silva, J.

Judgment

This appeal emanates from the Order of the Provincial High Court of the Southern Province holden in Galle in case bearing No. HC/Rev 83/2014, where the Complainant-Petitioner canvassed the Order of the learned Magistrate of Baddegama in case bearing No. 4091.

The Complainant has filed a private plaint on 28.10.2013 under and in terms of Section 66 (1) (b) of the Primary Courts' Procedure Act No. 44 of 1979 informing a breach of the peace affecting the premises in dispute. Thereafter, the learned Magistrate who was acting as the Primary Court Judge had followed the procedure stipulated in the Primary Courts' Procedure Act and fixed the matter for inquiry.

After affidavits, counter affidavits with the documents and written submissions were filed, the learned Magistrate has delivered the Order on 27.10.2014 in favour of the 1st and 2nd Respondent-Respondent-Appellants [hereinafter sometimes referred to as the 1st and 2nd Appellants], on the basis that they were in possession of the disputed premises on the relevant date material to the said Magistrate's Court case in terms of Section 68(1) of the Primary Courts' Procedure Act and granted possession of the same.

Being aggrieved by the said Order, the Complainant-Petitioner-Respondent [hereinafter referred to as the Respondent]in this appeal had invoked the revisionary jurisdiction of the Provincial High Court of the Southern Province holden in Galle by way of a revision application bearing No. Rev 83/2014.

In High Court, both parties had filed their objections, counter objections and thereafter, the matter had been fixed for inquiry and disposed by way of written submissions.

The Order was made by the learned High Court Judge on 28.12.2018 revising the said Order of the learned Magistrate dated 27.10.2014 on the basis that it was contrary to the provisions of the Primary Courts' Procedure Act No. 44 of 1979 and the learned Magistrate had not made a determination under Section 68 (3) of the Primary Courts' Procedure Act, determining whether the Respondent was dispossessed during the presiding two months period of the institution of the Magistrate's Court case.

Being aggrieved by the said Order of the learned High Court Judge, the 1st and 2nd Appellants have preferred this appeal seeking to have the Order revised or set aside and have the Order of the learned Magistrate dated 27.10.2014 affirmed.

It was urged by the Counsel for the Respondent, Ms. Radha Kuruwitabandara that the learned High Court Judge has held the Order dated 27.10.2014 of the learned Magistrate was erroneous and revised the same on the basis that the learned Magistrate had not considered Section 68 (3) of the Act but granted possession to the 1st and 2nd Respondent-Respondent-Appellants [දෙවන පාර්ශවය] without considering the dispossession of the Respondent.

In this instance, it is worthy to note Subsections (1) and (3) of Section 68 of the Primary Courts' Procedure Act;

> "(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 learned Magistrate held that the Appellants were in possession of the disputed premises in terms of Section 68 (1) of the Primary Courts' Procedure Act. However, it was the contention of the Respondent that facts and circumstances of the instant case are based on forcible dispossession under Section 68 (3) of the Primary Courts' Procedure Act. Moreover, it was contended that the learned Magistrate has considered the matter in terms of Section 68 (1) of the Act, disregarding Section 68 (3) of the Primary Courts' Procedure Act, and caused a great prejudice to the Respondent.

However, it is settled law that Section 68 (3) becomes 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 before 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 the recent Judgment of ***Ranjith Mervyn Ponnamperuma Vs. Warahena Liayanage Viraj Pradeep Kumara De Alwis and Others [CA PHC 71/2008]***, decided on 12.06.2020.

It is in evidence that premises in dispute was occupied by 1st and 2nd Appellants and the mother of the 1st Appellant after the demise of their father.

According to the statement made by the 1st Appellant on 16.05.2013 to Baddegama Police Station, the 1st Appellant had been living in the disputed premises with his mother and had left the disputed premises on 18.03.2013 after quarrelling with his mother. Thereafter, his mother had continued to live in the premises in dispute and later the mother also had left the premises in dispute due to many interruptions made by the 1st and 2nd Appellants.

Since the Respondent had to keep the premises occupied, the Respondent had placed a caretaker, namely one T.G. Dayananda, to look after the premises in question. The 1st Appellant had attacked the said T.G. Dayananda who was looking after the premises and he had been admitted to the Intensive Care Unit at the Karapitiya Hospital upon sustaining severe injuries. This resulted in a non-occupancy of the premises in question.

However, the Respondent had padlocked the premises in dispute to keep the 1st and 2nd Appellants away. It is observable that 1st Appellant neither accepted nor denied the occupancy of the premises in question by the said T.G. Dayananda and the Appellants had taken a silent position in this regard.

Furthermore, keys to the premises in dispute were not in the possession of the Appellants throughout this sequence of events and the 1st Appellant himself has stated that his mother refused to give him the keys to the premises in dispute.

It is worthy to note the statement made by the 1st Appellant on 16.05.2013 to the Baddegama Police Station;

> "මාගේ නෝනාට දරුවෙක් ලැබෙන්න ඉන්න නිසා මේ දිනවල දැනට මාස 5ක් පමණ කාලයක් ඉන්නේ නෝනාගේ මහ ගෙදර. කහදූවවත්ත, නරාවල, පෝද්දල ලිපිනයේ. මාගේ

අම්මා ලලිතා ගෙදර හිටියා. එයත් දැනට මාස දෙකක් විතර කාලයක් ගෙදරින් ගිහිල්ලා එයාගේ නංගිලාගේ ගෙදර ඉන්නේ. දිසානයකගෙදර, පැඟිරිදූව තේ පැක්ට්‍රිය අසල, හැම්මැලිය, බද්දේගම ලිපිනයේ. අම්මා ගිහිල්ලා තියෙන්නේ ඒ ගෙදර දොරවල් සේරම වහලා යතුරු ඔක්කොම අරගෙන ගිහිල්ලා. ඒ නිසා මට ගෙදරට එන්න විදිහක් නෑ. මගේ බඩු මුට්ටු සේරම ගේ ඇතුලේ තියෙන්නේ. මගේ ත්‍රීවීල් එකේ ලීසිං එකේ පොත වත් ගන්න විදිහක් නෑ. අම්මාට මම කිහිප වතාවක්ම කිව්වා යතුර එවන්න කියලා. නමුත් එව්වේ නෑ. ඒ නිසා මම අද උදේ අම්මා ලඟට ගියා. යතුර ඉල්ලන විට යතුර දුන්නේ නෑ. අම්මා මට ගෙදර යතුර නොදෙන්න හේතුව මම දන්නේ නෑ."

According to the said statement of the 1st Appellant dated 16.05.2013, it clearly demonstrates that Appellants were not in actual physical possession of the disputed premises until the date of the said statement made on 16.05.2013. Furthermore, the 1st Appellant admitted in his affidavit that he had not been in possession of the premises in question for more than five months by then.

It is relevant to note that 1st and 2nd Appellants in their affidavit dated 11.12.2013, expressly admitted that they broke open the padlocks and entered the premises in dispute on 16.09.2013. In these circumstances, it clearly manifests that Respondent's aunt, mother of the 1st Appellant, had power and control over the disputed premises to exercise dominion directly or through the Respondent by way of constructive possession. Hence it is apparent that the Respondent was dispossessed on 16.09.2013 from the disputed premises.

When the Respondent got to know that the Appellants had broke open the padlocks on 17.09.2013 and entered the premises in dispute, it amounts to a dispossession of the Respondent.

After a complaint was made by the Respondent to the Police Station Baddegama on 07.09.2013, he had filed an information on 30.10.2013 under Section 66 (1) of the Act by way of an affidavit.

The learned High Court Judge has held that Respondent was dispossessed within the two-month period from the date of filing the information. Thus, the learned Magistrate had not considered the dispossession of the Respondent in terms of Section 68 (3) of the Primary Courts' Procedure Act and this clearly manifests that the learned Magistrate has erred in law and fact and decided the dispute in terms of Section 68 (1) and made the Order in favour of the 1st and 2nd Appellants.

It was argued on behalf of the Appellants that the Respondent was never in possession of the disputed premises. Respondent has not stated in his affidavit that he was in possession of the disputed premises in the instant action. Thus, Respondent has not proved that he ever had possession of the disputed premises.

Court draws the attention to the complaint made by the 2nd Appellant on 17.09.2013. The 2nd Appellant had stated;

> "තමා හා ස්වාමිපුරුෂයා දරුවන් සමඟ මෙම ස්ථානයේ පදිංචිව සිටින අතර පසුගිය දිනවල නිවසේ ඇති වූ ආරවුලක් නිසා තමා හා ස්වාමිපුරුෂයා දරුවන් සමඟ පිටව ගොස් දෙමාපියන් සමඟ සිටි අතර එම කාලය තුළ දී ඇයගේ නිවසේ තිබූ බිලෙන්ඩර් එකද, ගෑස් ටැංකිය හා ජායාරූප 4ක් නැති වී ඇති බව ද....."

The said complaint substantiates that Appellants had to leave the disputed premises as a result of friendly relations with the mother of the 1st Appellant being broken. It is to be noted that the mother was in possession of the premises after Appellants left the premises, and this clearly establishes that the mother was in actual possession of the disputed premises. Thus, the mother had dominion and direct control over the premises in dispute.

In view of the statement dated 17.09.2013 [පැ2] made by the Complainant-Petitioner-Respondent Kapila Dharmasiri;

> "මට නැන්දම්මා වන ලලිතා චාලව් යන අය මට හා මගේ බිරිඳට දෙමහල් ගොඩනැගිල්ල නෑගි ඔප්පුවකින් පවරා ඇති අතර එකී ඔප්පුවේ අංකය 173 වේ. මෙම ගොඩනැගිල්ලේ කාමර බදු දී ඇත. මම නිතරම මෙම ඉඩමට ගොස් හොයා බලා එනවා. මට අද දින විල්සන් දිසානායක යන අය දුරකථනයෙන් කතා කර කිව්වා ඔහු ගොඩනැගිල්ල බලන්න ගිය විට උඩ තට්ටුවේ පිහිටි.....
>
> ..... පසුව මම අද දින ඇවිල්ලා බැලුවා. දිනේෂ් කියන අයෙක් ඉන්න බව දැක්කා."

Since the Respondent has not even stated in his affidavit that he was in possession of the disputed premises, it was the contention of the Appellants that the Respondent was never in possession of the same. Thus, the Respondent has failed to prove that he ever had possession of the disputed premises.

Therefore, it was contended by the Appellants that since the Respondent had not been in possession of the disputed premises, there couldn't have been a

dispossession by the Appellants on 17.09.2013 by the padlocks being broke open and by entering into the premises.

It is worthy to note that the said Respondent Kapila Dharmasiri has made a complaint to the Baddegama Police Station on 10.10.2013 stating;

> "මට ලැබුණ ඉඩමක් තියෙනවා බද්දේගම පැරමවුන්ට් එක ඉදිරිපිට. දෙමහල් ගොඩනැගිල්ලක් ඇත. යට තට්ටුවේ කඩකාමර බදු දී ඇත. උඩ තට්ටුවේ නිවසේ දිනේශ් බලෙන් පදිංචි වී ඇත.....
> ....."

The Deed of Gift bearing No. 1733 dated 11.03.2013 marked as පැ1 shows that Thelikda Gamage Lalitha Charlet, the aunt of the Respondent's wife had gifted the property in dispute to the Respondent Kapila Dharmasiri and his wife, Rasika Sandamali Dissanayake on 11.03.2013. It is to be noted that the said Thelikda Gamage Lalitha Charlet had leased out shop premises bearing Nos. 216ඊ and 216ජී on 02.03.2013 by lease agreement bearing No 2022 [පැ6].

Moreover, the said Respondent Kapila Dharmasiri by lease agreement bearing No. 1792 dated 29.07.2013 [පැ7] and lease agreement bearing No. 1765 dated 26.06.2013 [පැ8] had leased out the shop premises in the ground floor of the disputed property. Therefore, it is apparent that the said Lalitha Charlotte, the mother of the 1st Appellant, and the Respondent had the direct control over the said shop premises and the entire premises including the disputed premises.

However, the learned Magistrate had held with the Appellants and determined the possession of the instant action as being with the Appellant at the time of instituting the instant action in terms of Section 68(1) of the Act.

Since the mother of the 1st Appellant and the Respondent had dominion over the premises in dispute and the control over the entire premises including the premises in dispute, it is clear that mother of the 1st Appellant and the Respondent had constructive possession of the premises in dispute. This position is further substantiated by the evidence adduced on behalf of the Respondent that mother of the Appellant and Respondent placed T.G. Dayananda as the caretaker to look after the premises in dispute.

Even though the 1st Appellant's mother or the Respondent was not in actual physical possession of the disputed premises on the day on which the instant action was

instituted by filing the information, it is clear that they had constructive possession of the premises in dispute.

In view of the Judgment ***Iqbal vs Majedudeen [1999] 3 SLR 213*****,** the learned Judge acknowledged possession to be of two kinds.

1. When a person has direct physical control over a thing at a given time – actual possession.
2. When he is not in actual possession, he may have both power and intention at a given time to exercise dominion or control over a thing either directly or through another person – constructive possession.

In Black's Law Dictionary 9th Edition, the term constructive possession is defined as control or dominion over a property without actual possession or custody of it.

When considering the Judgment of ***Iqbal Vs. Majedudeen and Others [supra]***, it appears that Respondent in this appeal had both power and intention at a given time to exercise dominion or control over the said premises, thus, it can be construed that Respondent had constructive possession of the premises.

As such, I hold that Respondent had possession of the disputed premises on the date on which the instant action was filed and the 1st and 2nd Appellants entering the disputed premises by breaking open the padlocks amounts to dispossession of the Respondent from the disputed premises. Thus, the learned Magistrate has erred in law by deciding the instant action under Section 68(1) of the Primary Courts' Procedure Act.

However, it was revealed in evidence that belongings of the Appellants were also in the disputed premises on the date relevant and material to the instant action. The Appellants too can argue that they had constructive possession over the property in dispute.

In such a situation where the constructive possession of the premises in dispute appears to be with both the Appellants and the Respondent and the evidence with regard to possession is clearly balanced, question of possession has to be determined by the presumption of possession. Since the presumption of possession flows from the title to the property, title holder of the property in dispute will get the benefit of possession in Section 66 matters under the Primary Courts' Procedure Act.

Since the 1st Respondent is the owner of the disputed premises, the learned High Court Judge has been correct in deciding the possession of the property in dispute in favour of the 1st Respondent.

The only instance when evidence as to title can be considered in a Section 66 case is when the possession of both parties is balanced. In the case of ***Ponnamperuma Arachchige Sunil Kumara Vs. Nanayakkarawasam Patudoowe Vidanalage Gnanawathie CA PHC 207/2006 C.A.M. 13.02.2017***, *Madawala J.* held, it is generally accepted that, the evidence in relation to title and right of possession cannot be considered in a Section 66 action. However, in an instance where the evidence as to possession is clearly balanced, the title will become important as the presumption of possession will benefit the party who brings in evidence of title to the Section 66 action.

Since it is evident that Respondent and his wife owns the entire premises including the disputed premises, possession with regard to the dispute in the instant action is in favour of the Respondent. It is significant to note the only instance when Court can consider the title of the disputed property to determine the possession under Section 66 of the Primary Courts' Procedure Act, is when the evidence as to possession is clearly balanced between parties and presumption of possession comes into play.

The said principle was observed by *Sharvananda J.* in ***Ramalingam Vs. Thangarajah [1982 SLR 693 at page 699];***

> "He is not to decide any question of title or right to possession of the parties to the land. Evidence bearing on title can be considered only when the evidence as to possession is clearly balanced and the presumption of possession which flows from title may tilt the balance in favour of the owner and help in deciding the question of possession"

Therefore, it is apparent that learned High Court Judge has been correct in deciding the possession of the disputed premises under Section 68(3) in favour of the Respondent.

Court observes that although the learned High Court Judge has come to the correct conclusion and decided the dispute in terms of Section 68(3) of the Primary Courts' Procedure Act, learned High Court Judge has not reasoned out as to how he had

come to the said conclusion. It is both a right and an entitlement to know how and why a Judgment is rendered in favour or why it is not. Thus, the Judges ought to be mindful of the need to provide sufficient reasons to substantiate his determination.

Therefore, we see no reason to interfere with the Order of the learned High Court Judge dated 28.12.2018. Thus, we set aside the Order of the learned Magistrate dated 27.10.2014.

Hence, the appeal of the 1st and 2nd Respondent-Respondent-Appellants is dismissed with tax cost.

JUDGE OF THE COURT OF APPEAL

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

JUDGE OF THE COURT OF APPEAL