

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

In the matter of an Appeal under and in terms of section 28 of the Land Acquisition Act No. 9 of 1950 as amended read with Article 138 of the Constitution of the Democratic Socialist Republic of Sri Lanka

Court of Appeal Case No.:
CA (PHC) 179/2016

Provincial High Court Case No:
HCR/16/2015

Magistrate Court of Puttalam Case No.
11065/15/P

The Headquarters Inspector,
Police Station,
Puttalam.

Plaintiff

Vs.

1. Durairaj Daniel Semraj
Holy James Church,
Chilaw
2. Selva Solomon Janagam,
St. Clement Church,
Colombo Road,
Puttalam

1st Party – Respondents

1. Moses de Silva Wickramatilleke alias
Willie Wickramatilleke,
No. 06, Church Junction,
Pu/Thabbowa
2. Mary Gertrude Wickramatilleke,
7th Mile Post Moriakulam Road,
Pu/ Thabbowa.
3. Don Neththumage Anthony Nilanthi de
Silva,
8th Mile Post Samagi Mawatha,
Pu/ Thabbowa.
4. Mary Dilani Dilrukshi Nawaratne,
8th Mile Post Samagi Mawatha,
Pu/ Thabbowa.
5. George Suwalinton de Silva,
No. 06, Church Junction,
Pu/ Thabbowa.

2nd Patty-Respondents

AND NOW

1. Durairaj Daniel Semraj
Holy James Church,

Chilaw

2. Selva Solomon Janagam,
St. Clement Church,
Colombo Road,
Puttalam

1st Party-Respondent-Petitioners

Vs.

1. Moses de Silva Wickramatilleke alias
Willie Wickramatilleke,
No. 06, Church Junction,
Pu/Thabbowa
2. Mary Gertrude Wickramatilleke,
7th Mile Post Moriakulam Road,
Pu/ Thabbowa.
3. Don Neththumage Anthony Nilanthi de
Silva,
8th Mile Post Samagi Mawatha,
Pu/ Thabbowa.
4. Mary Dilani Dilrukshi Nawaratne,
8th Mile Post Samagi Mawatha,
Pu/ Thabbowa.
5. George Suwalinton de Silva,
No. 06, Church Junction,
Pu/ Thabbowa.

2nd Party-Respondent-Respondents

The Headquarters Inspector,
Police Station,
Puttalam.

Plaintiff-Respondent

AND NOW BETWEEN

1. Durairaj Daniel Semraj
Holy James Church,
Chilaw
2. Selva Solomon Janagam,
St. Clement Church,
Colombo Road,
Puttalam

1st Party-Respondent-Petitioners
-Appellants

Vs

1. Moses de Silva Wickramatilleke alias Willie Wickramatilleke
No. 06, Church Junction,
Pu/Thabbowa
2. Mary Gertrude Wickramatilleke,
7th Mile Post Moriakulam Road,
Pu/ Thabbowa.
3. Don Neththumage Anthony Nilanthi de Silva,
8th Mile Post Samagi Mawatha,
Pu/ Thabbowa.
4. Mary Dilani Dilrukshi Nawaratne,
8th Mile Post Samagi Mawatha,
Pu/ Thabbowa.
5. George Suwalinton de Silva,
No. 06, Church Junction,
Pu/ Thabbowa.

2nd Party-Respondent-Respondent-
Respondents

The Headquarters Inspector,
Police Station,
Puttalam.

Plaintiff-Respondent-Respondent

Before: **Prasantha De Silva, J.**

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

Counsel: Saumya Amarasekere PC and Dhammika Welagedara AAL instructed by Sivanantham & Associates for 1st Respondent-Petitioner-Appellant
2nd Respondent-Respondent-Respondents have failed to appear before court after receiving notice on several occasions

Written Submissions: 1st Party-Respondents-Petitioner-Appellants filed written submissions on
filed on 04.03.2020 and on 22.02.2023.

Delivered on: 21.05.2023

Prasantha De Silva J.

Judgment

The headquarters inspector of Police Station Puttalam has filed an information on 16.01.2016 in terms of Section 66 (1) (a) of the Primary Court Procedure Act No 44 of 1979, in a case bearing No.110/65/15/P1 in order to prevent breach of peace among the parties.

Consequently, the learned Magistrate acting as the Primary Court Judge had published notices in accordance with Section 66(4) of the aforementioned Act. As no other parties had intervened in the said action it seems that other parties were not interested in the subject matter of the action. Thereafter, the learned Magistrate had taken up the matter for inquiry. At the inquiry party of the 1st Part-Respondents and the 2nd Party-Respondents filed their respective affidavits, counter affidavits together with annexed documents, and written submissions.

After the conclusion of the inquiry, the learned Magistrate made an Order on 29.07.2015 holding inter alia that he cannot make an Order under part VII of the Primary Court Procedure Act, since the subject matter of the said action is a cemetery which does not come within the purview of the said Act.

Whilst refusing to make an Order under the Primary Court Procedure Act, the learned Magistrate further held that the proper authority in terms of Cemeteries and Burial grounds Ordinance No. 9 of 1895 to hold possession is the Municipal Council of Puttalam and ordered the service of notice on the Mayor and the Secretary of the Municipal Council of Puttalam to act in terms of the Cemeteries and Burial Grounds Ordinance. Furthermore, the learned Magistrate has not granted possession of the subject matter to either of the parties involved in the dispute.

Being aggrieved by the said order dated 29.07.2015, by the learned Magistrate 1st Party-Respondent-Petitioners had invoked the revisionary jurisdiction of the Provincial High Court of the North-Western province holden in Puttalam. After supporting the application by the Petitioners, the learned high court judge having been satisfied by the submissions made before him and issued notices on the 2nd party-Respondent – Respondents.

However, the 2nd party Respondent-Respondents had not filed objections but instead made oral submissions at the hearing of the application. Thereafter the parties agreed to dispose the matter by way of written submissions. Although the 1st-party Respondent-Petitioners filed their written submissions, the 2nd-party Respondent-Respondents had not filed written submissions. Subsequently, the learned high court judge pronounced the order dated

22.11.2016 dismissing the application made by the 1st party-Respondent-Petitioners and affirmed the order of the learned Magistrate dated 29.07.2015.

Thereafter, being dissatisfied with the said order of dismissal, the 1st party-Respondent-Petitioner-Appellants (hereinafter referred to as the Appellants) have appealed against the said dismissal to the Court of Appeal.

When this appeal was taken up for hearing, the Appellants submitted that the jurisdiction to inquire into disputes relating to land after filing of an information in terms of Section 66 of the Primary Court Procedure Act, vests within the Primary Court under Section 66(2) of the said Act. Accordingly, it was submitted that the Primary Courts should inquire into the dispute regarding which the information was filed and make a determination or an order in the manner provided in Part VII of the Primary Court Procedure Act.

It was further submitted on behalf of the Appellants that what the Primary Court is vested with is a limited jurisdiction to make a determination or an order as provided in Part VII of the Act and it is not broad discretion that enables the court to abdicate jurisdiction conferred by the Act and/or to make orders which are outside the scope of the said Act or based on other laws.

In the instant case learned Magistrate had relied upon the *ratio decedendi* of the judgement in ***Mansoor and another v O.I.C Avissawella Police and another [1992 (2) S.L.R. 75]*** where it has been held that “Where a statute creates a right and, in plain language, gives a specific remedy or appoints a specific tribunal for its enforcement, a party seeking to enforce the right must resort to that tribunal and not to others.”

It is observable that the aforesaid case cited relates to a dispute between a tenant cultivator and landowners, where such disputes with regard to possession were to be referred to the Agricultural Tribunal or the Commissioner of Agrarian Society in terms of Agrarian Services Act No. 58 of 1979.

In the instant case, the learned Magistrate resorts to the Cemeteries and Burial Grounds Ordinance and has held that the learned Magistrate cannot make an Order under the Part VII of the Primary Courts Procedure Act. Further, it was held that since the dispute between the parties relates to the possession of a burial ground, if possession of a cemetery/burial ground is given to a particular person, the person getting such possession is entitled to occupy the land in dispute and/or do any act in respect of the impugned land.

After carefully perusing the provisions of the Cemeteries and Burial Grounds Ordinance (as amended), it clearly manifest that the learned Magistrate and the learned High Court Judge

had dealt with the matter operating under a wrong assumption that, possession of a cemetery or a burial ground has been dealt under the above ordinance.

It is worthy to note that the Cemeteries and Burial Grounds does not provide for possessory remedies. In fact, under Chapter IV of the said Ordinance only provides power to the Magistrate Courts to adjudicate over penal offences that are set out in the Ordinance, or any other law as stated in Section 42 of the said Ordinance. In contrast, the Agrarian Services Act provides for resolution of disputes with regards to possession unlike the Cemeteries and Burial Grounds Ordinance.

Under Section 42 of the said Ordinance, **Magistrates' Courts** are hereby empowered to deal summarily with **all cases instituted under this Ordinance or any by- law made in pursuance thereof**, and to impose the full penalties herein prescribed, anything in the Code of Criminal Procedure Act, or any other enactment to the contrary notwithstanding.

It appears that the Cemeteries and Burial Grounds Ordinance does not contain any provisions in respect of granting of possession of a disputed land. It only deals with regulations of usage of cemeteries and burial grounds.

As such, it should be noted that the instant case is not a case instituted under the provisions of the Cemeteries and Burial Grounds Ordinance as the remedy that is being sought is a possessory remedy which does not fall within the ambit of the offences under the said Ordinance.

It is noteworthy that, Cemeteries and Burial Grounds Ordinance does not specifically bar any person of being in possession of a cemetery or burial grounds, it only prohibits the usage of a Cemetery for other purposes.

The Learned Magistrate had come to the conclusion that he cannot grant possession to any person other than the 'Proper Authority' defined in the Cemeteries and Burial Grounds Ordinance by misinterpreting the provisions of the said Ordinance.

According to Sections 6, 9.11, 17, 19. 22 and 38 of the said Ordinance, it evident that the Proper Authority can only regulate and make by laws. Proper Authority does not have the power to take possession or be the caretaker of the cemeteries and burial grounds.

The relevant provisions of stipulated in the Cemeteries and Burial Grounds Ordinance has been reproduced below;

Section 6: It shall be the **duty of the Municipal Council of a Municipal town, and of the Urban Council or Town Council of a town** for which an Urban Council or Town Council is constituted, on the request of the Minister, to **provide land for the purpose of the**

establishment of a general cemetery for the burial or cremation of persons dying within the limits of such town, or for the addition to the area of any cemetery herebefore or to be hereafter established.

Section 7: No land which shall have been consecrated or exclusively set apart for the burial of the dead, and in which burials shall have been discontinued under the provisions of Ordinance No. 12 of 1862* or of this Ordinance, **shall be sold, disposed of, or made any use of for any purpose whatsoever without the permission of the Minister;** and every sale and disposal of such land without the permission aforesaid shall be null and void ; and any person making any use of such land without the permission of the Minister shall be guilty of an offence, and be liable on conviction to a fine not less than two thousand rupees and not exceeding five thousand rupees.

Section 9: The **proper authority may authorize the erection of chapels and other buildings** for the performance of burial services or cremation within the limits of a cemetery.

Section 10(1): The **proper authority may sell a portion of any cemetery** for the special use of the of any religious denomination applying for the same, and **the portion so sold shall for the purposes of this Ordinance, but for no other purpose** whatever, vest in the person or persons to whom such portion has been or may hereafter be conveyed by deed executed by the proper authority in trust for such denomination

Section 17: **The proper authority may make regulations-**

- (a) for ensuring that all burials within the cemetery are conducted in a decent and solemn manner, and that the graves are of a proper depth;
- (b) for setting apart any portion of any cemetery not included in the portions sold under section 11 as a ground for cremation, and regulating the manner in which such cremation shall be carried out;
- (c) for preventing the reopening of graves within specified periods; and
- (d) for defining the duties of cemetery keepers, caretakers, and grave-diggers.

Section 19(1): The **proper authority may sell**, or, with the sanction of the Minister, make free **grants of portions of the cemetery** not included in the portions sold under section 11 of this Ordinance, either in perpetuity or for a limited time, and, subject to any conditions which he may think fit, **the exclusive right of burial in any such portions of the cemetery** so sold or granted, or the rights of one or more burials therein, and may sell or grant the right of placing any monument or gravestone in any part of the cemetery not included in the portions sold under section 11, or any tablet or monumental inscription on the walls of any chapel or other building within any such part.

Section 22(1): The **proper authority shall make regulations** as to the **fees to be paid to the cemetery keeper**, and the **fees for the performance of burial services** in respect of any portion of any cemetery not sold or set apart for the special use of any religious denomination, and the **fees for digging graves and for cremations**, and such other services in any cemetery situated within the territorial limits of such proper authority,

Section 38: It shall be lawful for the proper authority, from time to time, to make by laws for the following purposes:-

- (a) for the inspection of burial grounds;
- (b) for the proper regulation of the burial and cremation of corpses in such burial grounds, and for ensuring that the graves are of proper depth;
- (c) for the registration of burial grounds within specified areas, the limits of which shall be therein defined;
- (d) and generally for the proper management, regulation, preservation, and control of all burial grounds, and for the maintenance of order, decency, and cleanliness within the limits thereof, and such by-laws at any time to repeal, alter, or amend.

Therefore, the learned Magistrate has erred in law when he determined that he cannot grant possession to either the 1st Party Respondents or the 2nd Party Respondents and that he can only grant possession to the Proper Authority. The learned Magistrate had not granted possession of the disputed land to either party in dispute on the assumption that such Party would get the power to do anything on the land in dispute.

However, Sections 11, 12, 19, 20 and 24 of the Cemeteries and Burial Grounds Ordinance clearly address how cemeteries may be sold, assigned or set apart for exclusive burials therefore, parties do not have such freedom.

Furthermore, under Section 12 of Cemeteries and Burial Grounds Ordinance, it clearly states that any land vested for a burial ground can be used only for the purpose of burial or cremation of the dead.

Section 12 of the Ordinance is reproduced below,

No part of any cemetery shall be used for any purpose except for the purpose of a cemetery; and any person making any other use of such land, except for the burial or cremation of the dead and purposes relative to such burial or cremation, **shall be guilty of an offence**, and liable on conviction to a fine not less than two thousand rupees and not exceeding five thousand rupees for every such offence.

As such any person who commits any act which constitute to an offence under the ordinance, or any other law becomes liable for punishment under the Chapter IV of the said Ordinance.

It is imperative to note that the learned High Court Judge affirming the impugned order of the learned Magistrate has stated that the Cemeteries and Burial Grounds Ordinance is applicable to this dispute and Section 66 of the Primary Courts Procedure Act does not apply. Thus, Primary Courts do not have jurisdiction to adjudicate the dispute between the Parties. The learned High Court Judge also relied on the case of *Mansoor and another v OIC Avissawella and another* [supra] in reaching this conclusion. As the Cemeteries and Burial Grounds Ordinance does not contain a single provision with regard to determining possession, unlike in the case of Agrarian Services Act, which the learned Magistrate as well as the learned High Court Judge relied upon, the above ordinance cannot be utilized to deal with the issue of possession raised in the instant case.

Therefore, it is crystal clear that the Cemeteries and Burial Ordinance cannot be applied to determine the possession in respect of the disputed land between the Parties of the instant case.

Therefore, I hold that the learned Magistrate and the learned High Court Judge had come to an erroneous conclusion that they cannot make an order under Part VII of the Primary Courts Procedure Act and held that 'Proper Authority' in terms of the Cemeteries and Burial Grounds Ordinance to hold Possession of the disputed premises is the Municipal Council of Puttalam and has ordered to serve notices on the Mayor and the Secretary of the said Municipal Council to take charge of the disputed property.

Thus, it appears that possession of the subject matter was not granted to any of the Parties who claimed rights of possession, it has been granted to a party totally outside the scope of the instant action.

It is pertinent to note that after serving notices under Section 66(4) of the Primary Courts Procedure Act neither the Municipal Council nor any other Party sought to intervene into the instant action.

As such, the learned Primary Court Judge had given possession of the disputed premises to a Party who is not a party to the instant action and a party who had no interest in the property in dispute.

In view of the aforesaid reasons, it is apparent that the learned Magistrate who was acting as the Primary Court Judge has erred in law and facts and had determined the instant action. Therefore, the impugned order has to be set aside. As the learned High Court Judge too has affirmed the order of the learned Magistrate, the order of the learned High Court Judge is also set aside.

It should be noted that as the dispute relates to the possession of a disputed land the instant action has to be determined under Section 68(1) or Section 68(3) of the Primary Courts Procedure Act.

Section 68(1) and (3) have been reproduced below.

Section 68(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.

Section 68 (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.

Accordingly, 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 of the information under Section 66. However, when there is an allegation of a forcible dispossession, 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 the date of filing of the information.

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.

According to Section 68(3), satisfying himself (by the Judge) 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 other words, the Section bears no ambiguity, hence if the Judge of the Primary Court is not satisfied that there has been such forcible dispossession within two months prior to the filing of information, he is neither expected to make a determination, nor a subsequent order of restoration of possession.

Furthermore, Section 68(3) of the Act, emphasizes the need for a Judge to satisfy the elements of a forcible dispossession. Since 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.

In order to make such a determination court also draws attention to section 72 of the Primary Courts Act. 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.

The information was filed by the Headquarters Inspector of Police station of Puttalam on 16.01.2015, the learned Magistrate has to look into the period of 2 months prior to the date of filing of information with regard to the determination of possession under Section 68 of the Act. It appears that this period is between 16.11.2014 to 16.01.2015.

It is seen from the evidence placed before the learned Magistrate, the party of the first part had employed security personnel in the disputed premises and they had vacated the premises on 13.01.2014 due to a dispute with regard to the payment of wages.

This position is substantiated by the statement (230 7) made by security personnel Sanath Kalinga Wewansa to the Police station of Puttalam on 18.01.2015. He has stated that he went to the land in question on 21.10.2014 and stayed there on behalf of the church (Appellants) looking after that land.

Initially he was paid LKR 45,000 and subsequently the amount was reduced by the company. Therefore, due to a dispute with regard to the payment of wages he vacated the land on 13.01.2015.

The said position was further established by the fact that after the initial complaints made by both Parties in July and August 2014, the only other complaint had been made on 12.10.2014 by the 1st Appellant with regard to a trespass. Consequent to the said complaint the 1st Respondent namely Moses De Silva was arrested and produced in court.

It was submitted on behalf of the Appellants that thereafter there had been no attempts by the Respondents to encroach on to or trespass into the land in question until the security personal vacated the disputed premises on 13.01.2015.

In these circumstances, it is apparent that the Appellants were in possession two months prior to the date of filing of the information.

The attention of the court was drawn to the order made by the learned Magistrate - which states that the Appellants had taken various steps after 27.07.2014 to secure their possession - such as securing the boundaries by putting up a metal sheet cover, employing security personal, establishing a tube well and a toilet at the land and obtaining electricity. The learned magistrate had observed that all the documenting evidence produced by the Appellants are related to the period from October to November 2014.

Further, the learned Magistrate stated that prior to the complaint made to the Police regarding destroying of tombs on the burial grounds, no evidence was produced by the Respondents to establish their possession to the disputed premises.

In view of the evidence placed before the learned Magistrate it is seen that the Respondents had not adduced any evidence to establish their possession two months prior to the date of filing of the information. Thus, the Respondents had not proved their possession to the disputed premises for the relevant period in terms of section 68(3) of the Primary Courts Procedure Act.

In this instance, court's attention is drawn to the instrument dated 28.02.1879 marked and produced in evidence as 1⊕ and 1⊕2. It is a crown grant given by Governor of Ceylon set apart for special use of the Church of England for burial of Anglicans. Thus, the members of the Church of England (now known as the Church of Ceylon) have every right to be in possession of the disputed land.

It is observable that the Appellants are members of the clergy of the Church of Ceylon (Anglican Institution) and the Respondents are not members of the Church of Ceylon and they have clearly stated that they are Roman Catholics.

The aforesaid reasons, clearly manifests that the possession of the disputed land was with clergy of the Church of Ceylon throughout since the Crown grant was made in 1879.

In view of the foregoing reasons, it clearly shows that the Appellant had been in possession of the disputed premises for the relevant period and their possession was disturbed by the Respondents on or before 14.01.2015 thereby dispossessing Appellants from the disputed property.

As such, in terms of Section 68(3) of the Primary Court Procedure Act, Appellants are entitled to be restored to possession and all disturbances of such possession otherwise than under the authority of an order or decree of a competent court are hereby prohibited.

In light of the foregoing, this court vacates the learned Magistrate's order dated 29.07.2015, finding that the learned Magistrate had erred in law and fact by assuming that the Cemeteries and Burial Grounds Ordinance deals with possession of a burial ground and granting possession to the 'Proper Authority'. This court holds that such a manifest error in law amounts to exceptional grounds required to invoke the revisionary jurisdiction of the Provincial High Court. Therefore, the order of the Learned High Court Judge of Puttalam dated 22.11.2016, which affirms the learned Magistrate's order, is also hereby set aside.

Furthermore, pursuant to Section 68(3) of the Primary Courts Procedure Act, this court orders the possession of the disputed premises (cemetery) to be granted to the Appellants (the Church of Ceylon).

Hence, the Appeal is allowed.

JUDGE OF THE COURT OF APPEAL

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

I agree.

JUDGE OF THE COURT OF APPEAL