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

CA PHC Case No. 06/2018

High Court (Kegalle) Case No. 4050/11 (Revision)

Magistrate Court (Warakapola) Case No. 58924/2010

Balasooriya Arachchilage Gamini,
Elipangamuwa,
Tholangamuwa

Petitioner

Vs.

1. Chandrasekara Mudiyanselage Chaminda Shelton

2. Chandrasekara Mudiyanselage Vijitha Chandrasekara

3. Thanthiri Arachchilage Nandasena

All of Elipangamuwa, Tholangamuwa.

Respondents

AND BETWEEN

1. Chandrasekara Mudiyanselage Chaminda Shelton

2. Chandrasekara Mudiyanselage Vijitha Chandrasekara

Respondent-Petitioners

Vs.

Balasooriya Arachchilage Gamini,
Elipangamuwa,
Tholangamuwa

Petitioner-Respondent

Thanthiri Arachchilage Nandasena
Elipangamuwa,
Tholangamuwa.

Respondent-Respondent

AND NOW BETWEEN

Balasooriya Arachchilage Gamini
Elipangamuwa,
Tholangamuwa.

Petitioner-Respondent-Appellant

Vs.

1. Chandrasekara Mudiyanselage Chaminda Shelton
   Elipangamuwa, Tholangamuwa.

2. Chandrasekara Mudiyanselage Vijitha Chandrasekara
   Elipangamuwa, Tholangamuwa.

Respondent-Petitioner- Respondents

Thanthiri Arachchilage Nandasena
Elipangamuwa,
Tholangamuwa.

Respondent -Respondent-Respondent

Before:	**Prasantha De Silva, J.** **K.K.A.V. Swarnadhipathi, J.**
Counsel:	Rohan Sahabandu, P.C with S. Senanayaka AAL for the Petitioner-Respondent-Appellant. Buddhika Gamage AAL with Rangana Warnasinghe AAL, for the Respondent.
Written Submissions: filed on	Written submissions filed on 05.07.2023 by Petitioner-Respondent-Appellant. Written submissions were not filed by the Respondent.
Delivered on:	08.08.2023

Prasantha De Silva J.,

Judgment

When this appeal came up before us for argument on 01.02.2023, both Counsel appearing for the Appellant and the Respondent agreed to dispose of this matter by way of written submissions.

Pursuant to which the Court granted dates to file written submissions for the Appellant on or before 02/05/2023 and for the Respondent on or before 12.06.2023.

However, when this matter was called on 12.06.2023 to fix for judgment as both parties had failed to written submissions on due time, the court granted a further date for both parties to file written submissions on or before 01.07.2023 and reserved the case for judgment for 04.08.2023.

It appears that Petitioner-Respondent-Appellant had filed written submissions on 05.07.2023 but no written submissions have been filed by the Respondent-Petitioner-Respondent.

However, the judgment was not delivered on 04.08.2023 and it was postponed to 07.08.2023. As the Respondent-Petitioner-Respondent had not filed written submissions after agreeing to dispose of the matter on written submissions, this judgment is be based on the material placed before Court by parties in their pleadings and the contents of the available written submissions.

The Petitioner, namely Balasooriya Arachchilage Gamini instituted action bearing no 58924/2010 in the Magistrate Court of Warakapola against the 1st, 2nd, and 3rd Respondents under section 66(1)(b) of the Primary Court Procedure Act No. 44 of 1979.

The learned Magistrate who was acting as the Primary Court Judge having inquired into the matter by way of Affidavits, counter affidavits, and written submissions filed by the parties, delivered the order on 01.12.2010 in favour of the Petitioner declaring that he is entitled to the possession of the subject land of the instant action.

Being aggrieved by the said Order of the learned Magistrate, 1st and 2nd Respondent-Petitioner invoked the revisionary jurisdiction of the Provincial High Court of Sabaragamauwa Province holden in Kegalle seeking to revise or set aside the said order of the learned Magistrate.

However, the learned Provincial High Court Judge pronounced her order on 10.08.2012 dismissing the revision application made by 1st and 2nd Respondent-Petitioners on the ground that no exceptional circumstances were established by the Respondent-Petitioner to revise the order of the learned Magistrate.

The Respondent-Petitioner-Appellant, being dissatisfied with the said Order of the learned High Court Judge had preferred CA (PHC) 82/2012 to the Court of Appeal seeking to set aside the order of the learned High Court Judge dated 10.08.2012.

Subsequently, the Court of Appeal set aside the Order/Judgment of the learned High Court Judge and referred the matter to the Provincial High Court of Kegalle directing the learned High Court Judge to entertain the said revision application and hear the parties and enter an order/judgment on its merit, according to law.

Subsequently, the learned High Court Judge inquired about the matter and allowed the revision application of the Respondent-Petitioner and set aside the order dated 01.12.2010 pronounced by the learned Magistrate. Apparently, the learned Provincial High Court Judge decided that 1st and 2nd Respondent-Petitioners are entitled to the possession of the subject matter by his order dated 18.01.2018.

Being aggrieved by the said order, the Petitioner-Respondent-Appellant has preferred this Appeal seeking reliefs prayed in the prayer to the Petition of Appeal.

Facts of the case:

One Nana Suna Pana Subramanium Chettiar sold an undevided 1/3rd share of the subjsct land to the Appellant the said B.A. Gamini.

The balance undevided 2/3rd from the subject land was bought by the said B.A. Gaimini the Appellant from the heirs of another owner.

In the year 1990, one Heenbanda made a complaint to the police station against B.A Gamini, the Petitioner-Respondent-Appellant [hereinafter sometimes referred to as the Appellant] alleging criminal trespass into the subject land in the instant action.

Thereafter, the said B.A Gamini, being the accused in the said criminal trespass case bearing no 14244 M.C. Warakapola had been prosecuted. Eventually, the accused B.A Gamini was discharged from the said case upon certain conditions.

According to those conditions, the said Heenbanda undertook to institute a civil action to get his rights to the subject land in question within a period of 3 months. Similarly, during this three-month period, both parties agreed not to enter the premises in suit. In the event of failure to file a civil action within a period of three months, the accused B. A Gamini is to be declared entitled to the possession of the land in question.

Apparently, the said Heenbanda had instituted a partition action bearing no. 254456/P in the District Court of Kegalle naming seven Defendants including the said B.A Gamini as the 7th Defendant.

After the conclusion of the trial, the learned District Judge held that the said Heenbanda is entitled to an undivided 12/120 share and the 7th Defendant the said B. A Gamini is entitled to an undivided 30/120 share.

However, the said B. A Gamini, the 7th Defendant had appealed against the said judgment in the said partition action to the Civil Appellate High Court of Kegalle. The impugned Judgment of the District Judge was set aside by the Civil Appellate High Court on 15.02.2010, on the basis that both the Plaintiff Heen Banda and the 7th Defendant B. A Gamini had not proved their title to the disputed subject land. Nevertheless, Appellate court does not say that fact of possession by 7th Defendant is wrong, but only states that title has not been proven.

Therefore, in view of the said Judgement of the District Judge with regard to possession of the 7th Defendant (Appellant) should stand.

As such, it was the contention of the Petitioner-Respondent-Appellant that although the said partition action was dismissed, it will not affect the decision made by the learned District Judge that the 7th Defendant (Appellant) is in possession of the subject land.

In view of the observations of the learned District Judge in his Judgment, the 7th Defendant (Appellant) was in possession from the time of institution of the partition action, which was within a period of 3 months from 21.11.1990.

It is worth noting that the learned High Court Judge has stated in his order dated 18.01.2018,

> 1990.11.21 දිනැති එකී කොන්දේසි ප්‍රකාර එදින සිට මාස 03 ඇතුලත සිවිල් නඩුවක් පවරා විෂයගත දේපලේ අයිතිය පිලිබඳ ආරවුල නිරාකරණය කර ගැනීමට හීන් බණ්ඩා එකඟ වී ඇත. තවද එකී මාස 03 ක කාලය තුල චුදිත (හීන් බණ්ඩා) හෝ පෙත්සම්කාර වගඋත්තරකරු දේපලට ඇතුලු නොවිය යුතු බවටද නියෝග කර ඇත. මාස 03 කාලය තුල සිවිල් නඩුවක් පැවරීමට අපොහොසත් වුවහොත් චූදිත හීන් බණ්ඩාට එකී දේපල බුක්ති විඳීමට හිමිකම ඇති බවට ද නියෝග කර ඇත.

Furthermore, according to journal entry dated 90.11.21 in the said criminal trespass case, bearing No. 14244,

> චුදිත - බී.ඒ ගාමිනි සිටී.
>
> පැ.සා.1.2.3 සිටී.
>
> මෙම නඩුවේ අදාල දේපලට අද දින සිට මාස 03ක් ඇතුලත සිවිල් නඩුවක් පවරා අයිතිවාසිකම් නිරාකරණය කර ගන්නා බවට පැ.සා 01 දන්වයි. එමෙන්ම එම මාස 03 ඇතුලත මම ඉඩමට විත්තිකරුගේ හෝ පැමිණිලි පක්ෂයේ කිසිවකු හොයන බවට එකඟ වේ. මෙම මාස 03 ඇතුලත සිවිල් නඩුවක් නොදමන්නේ නම් විත්තිකරුවන්ට බුක්තිය අයිතිවාසිකම් අනුව හිමිවිය යුතු බවටද එකඟ වේ.
>
> මේ අනුව නඩුව සමථයට පත්වේ චුදිත නිදහස් කරමි.

According to the said journal entry ‘චුදිත’ is mentioned as A. Gamini and not Heenbanda. Thus, it is seen that the learned Provincial High Court Judge had been confused and had thereby misdirected himself and stated in his order dated 18.01.2018 that,

> සිවිල් නඩුවක් පැවරීමට අපොහසත් වුවහොත් චූදිත හීන් බන්ඩාට එම දේපල භුක්ති විඳීමට හිමිකමක් ඇති බවට නියෝග කර ඇත; instead of සිවිල් නඩුවක් නොදමන්නේ නම් විත්තිකරුවන්ට භුක්තිය අයිතිවාසිකම් අනුව හිමිවිය යුතු බවට එකඟ වේ.

The said order further states that,

අදාල කොන්දේසි ප්‍රකාරව බෙදුම් නඩුවක් පවරන ලද බැවින් එම නඩුව පැවරූ දින සිට නඩුව අවසන් වනතුරු පෙත්සම්කාර වගඋත්තරකරු දේපල බුක්ති විඳීමට නොහැකි බැවින් බෙදුම් නඩුව නිෂ්ප්‍රභ කරන තුරුම පෙත්සම්කාර වගඋත්තරකරුට විෂය ගත දේපලේ බුක්තියක් නොවූ බව පැහැදිලි වන බවට අභියාචනාධිකරණය තීරණය කර ඇත.

එබැවින් විෂය වස්තුව බෙදුම් නඩුව පැවරීමට පෙර තිබූ තත්ත්වයටම පත් කරමින් පෙත්සම්කාර වගඋත්තරකරු නැවත එහි බුක්තියේ පිහිටු වීමට තීරණය කිරීම මගින් උගත් මහේස්ත්‍රාත් වරයා

මුළුමණින්ම නොමඟ ගොස් ඇති බවත් එම කරුණ ප්‍රතිශෝධන ඉල්ලීම මහාධිකරණයේ පවරා පවත්වාගෙන යාම සඳහා ප්‍රමාණවත් සුවිශේෂී කරුණක් බැවින් සුවිශේෂී කරුණු ඉදිරිපත්ව නොමැති බව උගත් මහාධිකරණ විනිසුරුවරිය එළඹ ඇති තීරණය දෝෂ සහගත බවත් අභියාචනාධිකරණය සඳහන් කර ඇත. එබැවින් පාර්ශවයන්ට සවන් දී කුසලතා මත ප්‍රතිශෝධන අයදුම පිලිබඳව තීරණය කරන ලෙසටද අභියාචනාධිකරණය වැඩිදුරටත් තීරණය කර ඇත.

නිශ්ප්‍රභා වන තුරුම පෙත්සම්කාර වග උත්තරකරුට දේපල බුක්ති විදීමට නොහැකි වී ඇති බැවින්, සිවිල් අභියාචනාධිකරණය මගින් එම බෙදුම් නඩුව නිශ්ප්‍රභ කරනු ලැබ ඇත්තේ 2010.02.15 වන දිනදීය.

විෂය ගත දේපල සම්බන්ධයෙන් ඔහුගේ අයිතිය තහවුරු කිරීම සඳහා යම් යම් ලේඛණ ඉදිරිපත් කිරීමට උත්සහ කර ඇතත් තොරතුරු වාර්තාව ඉදිරිපත් කල දින (2010.07.09) වන විට ඔහු එම දේපලේ භක්තියේ රැඳී සිටි බව ඒවායින් තහවුරු නොවන බවයි. පෙත්සම්කාර වගඋත්තරකරු ඉදිරිපත් කර ඇති ඔහුගේ දිවිරුම ප්‍රකාශයේ තමා එම දේපලේ භුක්තියේ රැඳී සිටිය බව සඳහන් කල සමණක් ඒ මත පමණින් පිහිටා කටයුතු කිරීමේ හැකියාවක් නොමැති බව පැහැදිලිය.

දේපල මුල් අවස්ථාවේ භුක්ති විඳිමින් සිටි තැනැත්තාටම හිමි වියයුතු බවයි. එහෙත් පෙත්සම්කාර වගඋත්තරකරු එලෙස දීර්ඝ කාලයක් නිස්සේ දේපල භුක්ති විඳි බවට උගත් මහෙස්ත්‍රාත්වරයා තීරණයකට එළඹියේ කවර කරුණු මතද යන්න සඳහන් කර නැත.

ව.04, ව.05. ව.06, ව.07. ව.08 ලේඛණ මඟින් විෂයගත දේපලේ වගඋත්තරකාර පෙත්සමකරුවන්ගේ භුක්තිය සනාථ වන බව පැහැදිලිය.

වග උත්තරකාර පෙත්සම්කරුවන්ට විෂයගත දේපලේ සන්තකය හිමිවියයුතු බවට නියෝග කරමි.

It was further stated that,

> ‘මස තුනක කාලයක් තුල සිවිල් නඩුවක් පැවරීමට අපොහොසත් වුවහොත් චුදිත හීන්බාන්ඩාට එකී දේපෙළ බුක්ති විඳීමට හිමිකම ඇති බවට නියෝග කර ඇත.’

Nevertheless, according to the settlement dated 90.11.21 in criminal trespass case, it was stated that.

> මෙම මස තුන ඇතුලත සිවිල් නඩුවක් නොදමන්නේ නම් විත්තිකරුවන්ට බුක්තිය අයිතිසිකම් අනුව හිමිවිය යුතු බවට එකඟ වේ.

Therefore, it clearly shows that the Learned Provincial High Court Judge has confused and mixed up the accused and the Complainant of the aforesaid Magistrate court case.

As such, the learned Provincial High Court Judge had misdirected himself and stated in his order that Respondent-Petitioners are entitled to the possession of the subject matter.

Be that as it may, in terms of Section 68 (1) and 68 (3) of the Primary Court Procedure Act, Court has to determine who was in possession of the disputed premises on the date of filing of the information under section 66 of the Act, or if there is a dispossession, court has to determine who was forcibly dispossessed within a period of two months immediately prior to date of filing of the information.

It is significant to note that the Civil Appellate High Court dismissed the appeal of the Appellant and dismissed the District Court action instituted by the said Heenbanda on 15.02.2010.

It is worthy to note that the said action was dismissed on the basis that parties have not proved their title to the land sought to be partitioned. As such, the said dismissal would not affect the decision made by the learned District Judge on 15.10.2010 with regard to the possession of the 7th Defendant [Appellant].

It is relevant to note that according to the observations made by the learned District Judge in his judgment, the 7th Defendant [Appellant] was in possession from the time of instituting the impugned partition action which was within a period of 3 months from 21.11.1990.

Therefore, it is presumable that the Appellant, said B. A. Gamini was in possession of the subject matter.

The Appellant, the 7th Defendant in the said partition action, had filed an information on 13.07.2010 action in terms of Section 66(1)(b) of the Primary Court Procedure Act against the Respondents namely Shelton, Chandrasekere and Nandasena, had entered the land on 04.07.2010 possessed by him and erected a fence and destroyed the cultivation when he was away in Colombo.

Therefore, according to the Complaint of the Appellant the disturbance took place on 04.07.2010. It is to be noted that the said action was filed in the Primary Court of Warakapola, just after 5 months from the Judgement of the Civil Appellate High Court in case bearing No. CA/KAG/155/2007 (F).

However, the Respondents denied the said position of the Appellant and stated that they were in possession of the land in dispute, and that they are the owners of the same.

Furthermore, the Respondents went on to state that they had been in possession of the disputed land since 2003 and cultivated coconuts and bananas. The Respondents,

produced affidavits marked as [D4-D8] from four persons to substantiate their contention.

It seems that, these affidavits were self-serving affidavits taken from people known to the Respondents and it is observable that they were unable to produce any affidavits or documents from Grama sevaka or any other officials to prove their possession by cogent evidence. Similarly, no heavy reliance can be placed on the affidavit without the affirmants being testified.

Furthermore, it is to be observed that the affirmants of these affidavits D4- D7 do not refer to the date of disturbance on 04.07.2010 the date of the incident. Thus, these affidavits alone could not be considered by the court to substantiate the possession of the Respondents with regard to the relevant period material to the instant action.

However, the learned Magistrate accepted the version of the Appellant on the evidence placed before him and issued an order under Part VII of the Primary Court Procedure Act.

It is seen that the learned Magistrate has come to the conclusion that according to the police complaint marked as P7, the Appellant was dispossessed on 07.07.2010, and also in view of the impugned partition action the Appellant was in possession for a long period of time. It is imperative to note that in the said partition judgment possession of the 7th Defendant (Appellant) was not set aside. Similarly, the said partition case does not say that the Plaintiff Heenbanda was in possession of the subject land, but he was given the plantation in common with other co-owners. As such, if the father Heenbanda did not have possession, it is questionable as to how the children could get possession.

Therefore, in view of the foregoing reasons, it is imperative to note that the Respondents had not established that they were in possession of the disputed portion of land and that they had been dispossessed.

As such, the learned Provincial High Court Judge has misdirected himself and had come to an erroneous conclusion that the Respondents were in possession of the disputed premises during the relevant period of time and set aside the order of the learned Primary Court Judge, which caused a great injustice to the Appellant in this matter.

Therefore, we set aside the impugned order dated 18.01.2018 of the learned High Court Judge and affirm the order of the learned Magistrate who was acting as the Primary Court Judge dated 01.12.2010.

Hence, we hold that the Petitioner-Respondent-Appellant is entitled to the possession of the subject matter of the instant MC Case No. 58924/2010, and direct that the Petitioner-Respondent-Appellant be restored to the possession of the disputed portion of land.

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