

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

Officer in Charge,
Miscellaneous Division,
Police Station,
Kaluthara South.

Complainant

Court of Appeal Case No:
CA (PHC) 49/2018

PHC of Western Province holden in
Kaluthara Case No:
HCRA 06/2018

Magistrate Court Case No:
0002/18

1. Yattowita Withanage Hasha
Shiromani Ralapanawa,
No. 56/20,
Kumaragewatta Road,
Pelawatta, Battaramulla.

1st Party-Respondent

2. Yattowita Withanage
Niranjan Dilshan Hemapala,
No: 138, Palathota Road,
Kaluthara South.
(Presently at No. 67/6A,
Asiri place Raja Mawatha,
Ratmalana).

2nd Party Respondent

AND BETWEEN

Yattowita Withanage Niranjan
Dilshan Hemapala
No: 138, Palathota Road,
Kaluthara South.
(Presently at No. 67/6A,
Asiri place, Raja Mawatha,
Ratmalana)

**2nd Party Respondent-
Petitioner**

Vs.

Officer in Charge,
Miscellaneous Division,
Police Station,
Kaluthara South.

Complainant-Respondent

Yattowita Withanage Hasha
Shiromani Ralapanawa,
No. 56/20,
Kumaragewatta Road, Pelawatta,
Battaramulla.

1st Party Respondent-
Respondent

AND NOW BETWEEN

Yattowita Withanage Niranjana
Dilshan Hemapala,
No: 138, Palathota Road,
Kaluthara South.
(Presently at No:67/6A,
Asiri Place,
Raja Mawatha, Ratmalana).

2nd Party Respondent
-Petitioner-Petitioner

Vs.

Officer in Charge,
Miscellaneous Division,
Police Station,
Kaluthara South.

Complainant-Respondent-
Respondent

Yattowita Withanage Hasha
Shiromani Ralapanawa,
No. 56/20,
Kumaragewatta Road, Pelawatta,
Battaramulla.

1st Party Respondent-
Respondent-Respondent

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

Counsel: K. Herath A.A.L with V. Gunasekara A.A.L for the 2nd Party-
Respondent-Petitioner-Petitioner (Appellant)
Nalin Laduwahetti P.C with K.Ubeysekara A.A.L for the 1st Party-
Respondent-Respondent-Respondent

Written Submissions: Written submissions filed on 12.04.2023 by 2nd Party Respondent-
filed on Petitioner-Petitioner (Appellant)
Written submissions filed on 05.06.2023 by 1st Party Respondent-
Respondent-Respondent.

Delivered on: 28.08.2023

Prasantha De Silva J.,

Judgment

This is an appeal against an Order made on 21.03.2018 by the learned High Court Judge of the Provincial High Court of Western Province holden in Kalutara, exercising revisionary jurisdiction against the order of the learned Magistrate of Kalutara which was held in favour of the 1st Party Respondent-Respondent-Respondent in case bearing No. 02/2018 M.C Kalutara.

Factual Background

The Officer-in-charge of the Police Station Kalutara being the Complainant, had filed an information in the Magistrate's Court of Kalutara under Section 66 of the Primary Court Procedure Act No 44 of 1979 against the 1st Party-Respondent and the 2nd party Respondent.

It appears that the said information was based on a police complaint made by Don Prabhath Samaru Jayasinghe. According to the said complaint he had come to lawful possession of the disputed premises as a lessee under a valid lease executed on 21.09.2017 with the 1st party Respondent namely Hasha Shiromani Ralapanawa.

The said lessee has been paying rent for the disputed premises until the 2nd party Respondent arrived at the premises on 21.12.2017 and claimed that he had lawful ownership of the disputed premises.

Apparently, the said Don Prabhath Samaru Jayasinghe [Lessee] had voluntarily vacated the premises and handed over the keys to the 2nd Party Respondent with the assistance of the Petitioner.

The said lessee had handed over the premises in dispute to the 2nd party Respondent since he had claimed legal ownership to the property.

As such, the 2nd party Respondent contended that there is no forcible dispossession, or any breach of peace threatened to exercise jurisdiction in terms of Section 66 of the Primary Court Procedure Act.

It is a settled law that when the Police filed information in terms of Section 66(1)(a) of the Primary Court Procedure Act, unlike in Section 66(1)(b), the learned Magistrate would treat such a situation as having arisen from a threatened breach of the peace.

It was held in the case of *Velupillai and Others Vs. Sivanathan [1993(1) S.L.R 123]* under Section 66(1)(a) of the Primary Courts Procedure Act, the formation of the opinion as to whether a breach of the peace is threatened or likely is left to the Police.

The Police officer is empowered to file an information if there is a dispute affecting land and a breach of the peace is threatened or is likely to be threatened. The Magistrate need not carry out an inquiry as to whether a breach of the peace is threatened or likely to be threatened in such a situation and hence, such an inquiry is left with the Police.

Therefore, the 2nd party Respondent is precluded by taking up the position that there was no breach of the peace threatened or likely to be threatened between the parties to exercise jurisdiction under Section 66 of the Primary Court Procedure Act. Thus, the objection in respect of the maintainability of the instant action, when there is no breach of the peace, is unsustainable in law. Hence, the said objection stands dismissed.

The premises in dispute in the instant case are No. 138, Palathota Road, Kalutara South. It is evident that it originally belonged to Y.W Hemapala, the father of the 1st party-Respondent. The 2nd party Respondent and the 1st party Respondent are brother and sister and there are two other siblings, who are not party to the instant action.

The said premises (disputed premises) was gifted to the 1st party Respondent by her father in 1999 by deed of gift bearing No. 7788. It was submitted on behalf of the 1st party Respondent that she enjoyed the possession of the land from 1999 and used to lease out the said premises from time to time to earn an extra income.

In the like manner, the premises in dispute was last leased to one Don Prabath Samaru Jayasinghe on 21.09.2017 by lease agreement bearing no 10157 attested by D.K Punchihewa N.P.

Thereafter the said lessee moves into the said premises and commenced occupying the same. While occupying the premises, the 2nd party Respondent had approached the said lessee and claimed that he was the lawful owner of the premises in dispute by virtue of the last will left by the father, the said Y.W Hemapala.

It was submitted on behalf of the 2nd party Respondent that their father had canceled the said deed of gift bearing No. 7788 by way of attesting a last will and bequeathed the premises in dispute to the 2nd party Respondent.

After the death of their father, his estate is said to have been administered in the District Court of Mt. Lavinia in case bearing No. 4040/16/T and the 2nd party Respondent is said to have been issued with the probate.

On 21.12.2017, the 2nd party Respondent approached the said lessee Don Prabath Samaru Jayasinghe, and asked him to handover the possession of the premises in question him on the basis that the 2nd party Respondent had got title to the said premises by virtue of the probate and the administrator's conveyance.

Apparently, on 22.12.2017, the said lessee had lodged a complaint to the police station Kalutara without the knowledge of the 1st party Respondent [Lessor] and handed over the keys to the 2nd party Respondent at the Police Station with the intention of leaving the premises. Consequently, the Lessee, the said Don Prabhath Samaru Jayasinghe had handed over the

possession of the premises in question to the 2nd party Respondent and vacated the premises without informing the lessor, the 1st party Respondent.

It appears that the 1st party Respondent was totally unaware of the conduct of the Lessee, and she was unaware of the testamentary Action instituted by the 2nd party Respondent. Since the 1st party Respondent was not a party to the purported Testamentary Action instituted in the District Court of Mt. Lavinia, she had commenced agitating to regain possession of the leased property.

In these circumstances, it is apparent that there was a likelihood of a breach of peace being threatened, therefore, the Police has filed an information under Section 66 of the Primary Court Procedure Act No 44 of 1979.

The learned Magistrate who was acting as a Primary Court Judge inquired about the dispute by way of Affidavits, Counter Affidavits and other documents. Consequently, the learned Magistrate had delivered the Order on 16.03.2018 and held in favour of the 1st party Respondent and held that the 1st party Respondent is entitled to the possession of the disputed premises in terms of Section 68(3) of the Primary Court Procedure Act.

Being aggrieved by the said order, the 2nd party Respondent-Petitioner had invoked the revisionary jurisdiction of the Provincial High Court of Kalutara and it is seen that the learned High Court Judge too held against the 2nd party Respondent-Petitioner and decided that the 2nd party Respondent-Petitioner has no right to possess the premises in suit and since there is no merit in the said revision application to revise the order of the learned Magistrate. Hence, the application of the 2nd party Respondent-Petitioner was dismissed.

Being aggrieved by the said dismissal of the revision application the 2nd party Petitioner-Petitioner (Appellant) [hereinafter sometimes referred to as the Appellant] has preferred this appeal seeking to set aside the order made by the learned High Court Judge as well as the Magistrate.

It is worthy to note the findings of the learned Magistrate that although the 2nd party Respondent was issued a probate, it does not prove that the 2nd party Respondent was in possession of the disputed premises for the relevant period of time material to the instant action. On the other hand, probate is issued in a Testamentary action to administer the estate of the deceased person. As such, obtaining a probate is not a fact to prove possession of the disputed premises in terms of Section 66 of the Primary Code Procedure Act.

It is evident that the 1st party Respondent had leased out the disputed premises to said Don Prabath Samaru Jayasinghe on a valid lease agreement. Therefore, it clearly shows that the 1st party Respondent had been in possession of the disputed premises, and she retained control over the same.

The Appellant had taken up the position that there was no forcible dispossession as required by Section 68(b) of the Primary Court Procedure Act.

It was the contention of the Appellant that the physical possession of the property was with the Lessee at the time of the alleged dispossession and not with the 1st party Respondent-Respondent [hereinafter sometimes referred to as the Respondent]. It was argued by the Lessee, that they had the right to possess at the relevant time and the alleged dispossession had not been forcible because the Lessee voluntarily, with his consent and knowledge, had handed over the premises to the Appellant.

It is noteworthy that the said assumption cannot be sustained in Law in view of the decision of *Iqbal vs Majedudeen and other [1993 (3) S.L.R 213]* where *Gunawardene J.*, emphasized that,

Since the law recognizes two kinds of possession,

“When a person has direct physical control over a thing at a given time – actual possession.

When he though, not in actual possession has both the power and intention at a given time to exercise dominion or control over a thing either directly or through another person.”

It was further held that ‘forcibly dispossessed’ in Section 68 (3) means, the dispossession had taken place against the will of the persons entitled to possess and without authority of the law. Apparently, the said dispossession had taken place against the Respondent in her absence.

It is evident that the Respondent had leased out the disputed premises to the said Don Prabath Samaru Jayasinghe on a valid deed of lease. Therefore, it clearly shows that the Respondent had exclusive possession of the premises in question, and she retained control of the said premises.

“Sohoni in his treatise on the Indian Criminal Procedure, 1973, Vol.2, 18th Edition at page 1331 describes that the proviso to Section 145 of the Indian Criminal Procedure which could boast of parentage over its Sri Lankan counterpart in Section 66 of the Primary Courts Procedure Act No.44 of 1979 is founded on the principle that forcible and wrongful dispossession is not to be recognized under the Criminal Law. The word "dispossessed" means to be out of possession, removed from the premises, ousted, ejected or excluded. Even where a person has a right to possession, he cannot do so by taking the law into his hand. That will make it a forcible entry otherwise that in due course of law. It would be a case of both forcible and wrongful dispossession.”

Therefore, it is the considered view of the court that the 1st party Respondent was forcibly dispossessed from the disputed premises by the Appellant on 22.12.2017. As such, in terms of Section 68(3) of the Act, the 1st party Respondent had been forcibly dispossessed within a period of two months immediately before the date on which the information was filed (05.01.2018) under Section 66 of the Act. Hence, the 1st party Respondent is entitled to the possession of the disputed premises and the 1st party Respondent is entitled to restore the possession of the premises in dispute. Since this is the position that was held by the learned Magistrate and the learned Provincial High Court Judge, we see no reason to interfere with the Order dated 21.03.2018 by the learned Provincial High Court Judge as well as the Order dated 16.03.2018 by the learned Magistrate. Thus, this appeal is dismissed with costs.

Appeal dismissed.

JUDGE OF THE COURT OF APPEAL

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

I agree.

JUDGE OF THE COURT OF APPEAL