

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

Petition of Appeal against judgment dated 15.06.2009 delivered by the Provincial High Court of the Western Province sitting at Avissawella in H.C. Avissawella Case No. 58/2007/Revision Primary Court of Kaduwela Case No. 6731.

CASE- NO- CA (PHC)- 68/ 2009

PHC- AVISSAWELLA- 58/ 2007 REVISION

PRIMARY COURT OF KADUWELA- NO- 6731

2. Leslie Kumara Kariapperuma of "Wasana Traders", Hewagama, Kaduwela.

Party of 2nd Part Petitioner-Appellant

- Vs -

1. Don Leslie Marcus Amerasinghe of 167A, Welivita, Kaduwela.

Party of 1st Part Respondent Respondent

Officer in Charge,
Police Station, Wellampitiya.

Informant Respondent Respondent

Before : K.T. Chitrasiri, J. &
P.R. Walgama, J.

Counsel : Dr. Sunil Cooray with Narmadha Nayanakanthi for the 2nd Party Petitioner Appellant.
Srimal D. Witanage for the Respondent.

Argued on : 02.02.2015.

Decided on : 25.02.2015.

P.R. Walgama, J.

JUDGMENT

The Party of the 2nd Part Petitioner - Appellant (herein after some times called and referred to as the party of the 2nd Part) lodged the instant appeal sequent to the judgment of the Learned High Court Judge of Avissawella by which judgment, the order of the Learned Magistrate has been upheld. In effect the Party of the 1st Part was placed in possession of the disputed property. Hence the Party of the 2nd Part has impugned the said judgment, and the order of the Learned Magistrate, whose order was upheld by the Learned High Court Judge by the afore said impugned judgment.

The instant matter relates to a land dispute as a result of which a breach of the peace between the Party of the 1st Part and the Party of the 2nd Part is threatened in respect of the said property.

The said matter was reported and an information was filed in Court by the OIC, Wallampity Police, in terms of Section 66 of the Primary Courts Procedure Act No. 44 of 1979. Pursuant to the afore said report the parties had filed Affidavits to establish their possession as required by the afore said Act. The Learned Magistrate after perusing the contents of the said affidavits and the exhibits annexed thereto had arrived at the conclusion by the said order, that the Party of the 1st Part has been dispossessed, within a period of two months prior to filing of information in Court, and as such had placed the Party of the 1st Part in possession accordingly.

In the said impugned order the Learned Magistrate has adverted his attention to the stance of the party of the 1st Part who asserts that the said party was in possession for a long period of time and the Party of the 2nd Part has forcibly entered the land in issue. It was observed by the Learned Magistrate that the Party of the 2nd Part has purchased the said property and was in the process of developing the same. It is against such activity of the part of the 2nd part the party of the 1st part had made a complaint to the police. It is salient to note that a matter of this nature this court is called upon to decide who was dispossessed of the disputed land 2 months prior to the filing of the information in Court. The purported dispute was reported to court by the police on 08.05.2007, and according to the said report it was revealed that the Party of the 2nd Part has disturbed the possession of the Party of the first part on 16.03.2007. Nevertheless it is seen that the Party of the 2nd part has derived title form his predecessor only on the 24th of March 2007.

It was also observed by the Learned Magistrate that the gramasevaka's report marked as P3, reveals the fact that at the period relevant to this dispute non of the parties had been in possession of the said premises bearing No. 166.

It is also pertinent to note that the information regarding the said dispute was reported on 08.05.2007, and it was apparent that the Party of the 2nd Part has forcibly entered the disputed land 16.03.2007, thus it is proved that the Party of the 2nd Part has dispossessed the party of the 1st part within two months prior to the information was filed in court.

In considering the possession of the Party of the 1st Part prior to 16.03.2007, the Learned Magistrate was of the view that according to the affidavits tendered by the Party of the 1st Part that he had constructive possession of the said land in issue. Therefore the Learned Magistrate has arrived at the conclusion that the Party of the 1st Part has been dispossessed by the party of the 2nd part within 2 months prior to the said information was filed in Court. The brief synopsis of the dispute that gave rise to the present

adjudication, was as stated above. Taking in to consideration the facts placed before court, the Learned Magistrate by his order has placed the Party of the 1st Part in possession accordingly.

Being aggrieved by the said order, the Party of the 2nd Part has preferred an application by way of Revision to the High Court of Avissawella to have the said impugned order to be vacated or set aside. After inquiring in to the Revision application of the Party of the 2nd Part (the petitioner) the Learned High Court Judge has by his order dated 15.06.2009, dismissed the Revision Application as Petitioner has failed to aver the exceptional circumstance that warrants the said Court to exercise its Revisionary jurisdiction.

The present application to this Court is by way of an appeal by the Party of the 2nd Part, for the relief, inter alia; that the judgment of the High Court dated 15.06.2009 and the order of Primary Court of Kaduwela dated 23.10.2007 be set aside or reversed.

In the instant appeal the Appellant (the party of the 2nd part) had asserted the following;

That the party of the 2nd part had repaired the house standing there on. But it is salient to note that the document marked P3, the letter sent by Gramasewake is to the contrary and had confirmed the fact that no body has been in occupation in the said house.

The cardinal principle to be observed in resolving a dispute of this nature as mentioned herein before is to ascertain which party was dispossessed 2 months prior to the filing of the information in Court. At this stage I would draw the attention to the exhibit marked X10 A. According to the said document the Party of the 2nd Part has purchased the disputed land on 24.03.2007. Therefore it is crystal clear that the Party of the 2nd Part had forcibly entered the disputed land on 16.3.2007 and had dispossessed the party of the 1st part from the disputed land.

An inquiry under the above section the Court will not embark on an investigation of the title and rights of the parties to the disputed land. The said inquiry is limited to ascertain the possession of the party who complains the dispossession of the same. The salutary principle laid down in the above said inquiry, is recognized by our Superior Courts, which has held thus; In the case of RAMALINGAM .VS.THANGARAJAH, (1982) 2, SLR 699 His Lordship where he opined as " the Magistrate is not to decide any question of title or the 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."

As per document marked P5 the Party of the 1st Part has made a complaint to Wellampitiya Police on 16.03.2006, stating that the Party of the 2nd Part has forcibly entered the land in question with another six people and was trying to cause a survey of the said land. According to the above complaint it is apparent that the Party of the 2nd Part has dispossessed the Party of the 1st Part, from the disputed land.

Under 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 that 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."

Therefore in the above circumstances, it is abundantly clear that the Party of the 1st Part has been dispossessed two months immediately before the information was filed by the police under Section 66 of the Primary Courts Act.

In the said backdrop it is crystal clear that the Party of the 2nd Part by his own admission has admitted that he gained title to the land in issue only on the 24.03.2004. Therefore the unequivocal position of the Party of the 1st Part was that the party of the 2nd Part has dispossessed him from the land in suit immediately two months prior to the information filed in the Magistrate court, which is a mandatory requirement to succeed an application under Section 66 of the Primary Courts Act.

The Party of the 1st Part has adverted court to various complaints made by him to the police regarding the disturbances to his possession made by the Party of the 2st Part, which is a proof of dispossession of the party of the 1st Part.

Under Section 68 (1) of the Act ... "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 is vital to consider at this juncture as to who was in actual possession of the land in dispute. It was the stance of the party of the 2nd Part, that although he purchased the disputed land on the 24.03.2007, his predecessor in title had been in possession of this land. It is intensely relevant to note that the predecessors in title of the party of the 2nd part was the brother and the sister-in-law of the party of the 1st part. It is alleged in the affidavit filed by the party of the 1st part that the disputed land was gifted by deed No. 370 dated 22.8.1994 to him to enable him to obtain a loan. Therefore, it is said that no beneficial interest was passed to the said predecessor in title of the party of the 2nd part. In

the above setting it is said that the predecessor in title was not in possession of the land in dispute. Therefore, the party of the 2nd part cannot claim possession of his predecessor in title.

It is viewed in terms of section 145 of the Indian Criminal Procedure Act that the Magistrate has to decide "the fact of actual possession of the subject of dispute". A similar opinion was expressed in the case of KANAGASABAI. VS. MYLAGANAM,(78 .NLR. 280) wherein his Lordship has expressed thus;

"In an inquiry in to a dispute as to the possession of any land , where the breach of the peace is threatened or likely under part VII of the Act, the main point for decision is the actual possession of the land on the date of the filing of the information under Section 66 but, where forcible dispossession took place within two months before the date on which the said information was filed, the main point is actual possession prior to that alleged date of dispossession."

The above principle was observed in the case of JOSEPH .VS. O.I.C. KOTAHENA (1986) 2 CALR 460.

The Learned Magistrate had also considered the document marked as P7 which is a caveat filed by the Party of the 1st Part in order to prevent any alienation of the disputed property.

The Party of the 2nd Part has also stressed the fact, that the court has failed to observe the proper procedure in resolving the said dispute. In that it is said that the Magistrate has failed to follow the mandatory requirement laid down in Sec. 66(6) of the said Act. Nevertheless two judges of this court addressing their minds to the identical issue in the case of MOHOMED NIZAM .VS. JUSTIN DIAS decided on 26.05.2011 had viewed thus;

"The appellant in this appeal takes up the issue of jurisdiction only in the Court of Appeal .If the appellant or the respondent wants to take up the issue of jurisdiction it must be taken up at the earliest opportunity."

Therefore in the above case Their lordships had given a vide interpretation to section 66(6) of the above Act, and had held "that the Primary Court shall have and is hereby vested with jurisdiction to inquire into the matter at the time the information is filed under Section 66 (2)," which I see is more eloquent than the interpretation given in the case of ALI.VS. ABDEEN in respect of section 66(6) of the Primary Court Procedure Act No.44 of 1979.

Thus in the above exposition of the facts and law relating to the core issue of the alleged dispute, this court is of the view, that the Learned Magistrate has evaluated the same in the correct perspective, which has fortified his order. Hence in the said backdrop it is abundantly clear that the appeal is devoid of merits and should be dismissed accordingly, subject to a cost of Rs.10,000./

JUDGE OF THE COURT OF APPEAL

K.T. Chitrasiri, J.

I agree.

JUDGE OF THE COURT OF APPEAL