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

In the matter of an Appeal under and in terms of Article 154 P (6) of the Constitution read with the provisions of the High Courts of the Provinces (Special Provisions) Act, No. 19 of 1990.

Shahabdeen Nowshaaddh,
No. 414/A, Nagavilluwa,
Palaviya.

1st Party

Court of Appeal Case
No.: CA (PHC) 114/2011
Puttalam High Court Case
No. H.C.R. 17/09
Puttalam Magistrate's Court
Case No. 30093/P

Vs.

(1) George Camillus Fernando,
"Sunil Sevana"
Veehena,
Mahawewa.

(2) Kingsley Gamini,
Kopi Bawma Road,
Madurankuliya.

2nd Party

AND

Shahabdeen Nowshaaddh,
No. 414/A, Nagavilluwa,
Palaviya.

1st Party – Petitioner

VS

(1) George Camillus Fernando,
"Sunil Sevana"
Veehena,
Mahawewa.

2nd Party – 2nd Respondent-Respondent

(2) Kingsley Gamini,
Kopi Bawma Road,
Madurankuliya.

2nd Party – 2nd Respondent - Respondent

AND NOW BETWEEN

George Camillus Fernando,
"Sunil Sevana",
Veehena,
Mahawewa.

2nd Party-1st Respondent- Respondent-Appellant

VS

(1) Shahabdeen Nowshaaddh
No.414/A, Nagavilluwa,
Palaviya.

1st Party – Petitioner-Respondent

(2)Kingsley Gamini,
Kopi Bawma Road,
Madurankuliya.

2nd Party- 2nd Respondent-Respondent

BEFORE : K.T. Chitrasiri, J.

W.M.M. Malinie Gunaratne, J.

COUNSEL : Dr. Sunil Cooray
for the 2nd Party Appellant.
Shyamal A. Collure
for the 1st Party Respondent.

Argued on : 04.12.2014

Decided on : 08.06.2015

Malinie Gunaratne, J.

In this appeal the appellant among other reliefs is seeking to set aside the Order of the High Court of Puttalam dated 25/05/2011.

The facts which led to the making of the said Order by the High Court are as follows:

The First Party Petitioner - Petitioner - Respondent (hereinafter referred to as the Respondent) initiated proceedings in the Primary Court Puttalam by filing an affidavit dated 21/09/2001. It was averred in his affidavit that he was in possession of the land called Puliyankulam Waval, in

extent of about 21 acres, and that the second party 1st Respondent - Respondent (hereinafter referred to as the 1st Party Respondent - Respondent - Appellant) and the 2nd Party 2nd Respondent- Respondent entered the land forcibly on 06/01/2009 with a group of thugs and dispossessed him. The Respondent prayed that the Appellant and the others be evicted and that he be given vacant possession of the said land.

The case for the Appellant was that there was an action bearing No. 22441/07/P filed in the Primary Court of Puttalam regarding the same land. In that action, the Court did not declare as to who is entitled to possession of the land. Thereafter the appellant instituted a partition action in the District Court of Puttalam bearing No. 97/P on 29/08/2008. However, in that same action, he has mentioned that he became aware that the land concerned had been vested in the Land Reform Commission.

Thereafter on 03/03/2008 the Appellant entered into an agreement with the Petitioner to sell the land in extent 22 acres 3 roods and 33 perches that included the subject matter of the present case as well. As the latter failed to pay the balance consideration due to the appellant by 31/03/2008 as agreed, the respondent handed over peaceful possession of the land to the appellant on or about 21.05.2008.

Although notice had been served on the 2nd Respondent - Respondent he was neither present nor represented in the Primary Court. The learned Primary Court Judge thereupon decided to treat him as a party who has defaulted.

In this case the Primary Court was called upon to reach a decision on the affidavits filed. After considering the contents in those affidavits Magistrate of Puttalam sitting as Primary Court Judge made order on

13/05/2009, dismissing the application and ordered that the parties should maintain peace until the dispute is resolved by a Civil Court.

Being aggrieved by the said Order dated 13/05/2009, the Respondent invoked the revisionary jurisdiction of the High Court in Puttalam and prayed to set aside the said Order and sought for an order declaring that he is entitled to possession of the land concerned.

The learned High Court Judge set aside the order made by the learned Magistrate on 25/03/2011, restoring the Respondent to possession of the disputed land. This appeal has been preferred against the said judgment of the High Court.

When this appeal was taken up for argument on 04/12/2014, parties made their oral submissions and moved to file written submissions as well. Only the Respondent had filed his written submissions. I have carefully perused the Petition and Affidavits together with all the annexed documentation filed in the Primary Court. In addition, I have considered the oral submissions made by both parties and also the written submissions tendered by the Respondent.

The Counsel for the Appellant in support of his submissions argued that the learned High Court Judge in her findings has stated that the Primary Court Judge has not sufficiently looked into the facts of this case. However, his submission was that there is no basis to mention so and further submitted that such a thinking cannot be supported. Counsel for the respondent submitted that there had been no findings by the Primary Court Judge as to who was in possession of the land at the time of filing the information as required by section 68(1) of the Primary Court Procedure Act. He further submitted that the Primary Court Judge has failed to arrive at a determination according to law, on the affidavits and documents

tendered. Therefore he submitted that the order is bad in law and has no force or effect before the law.

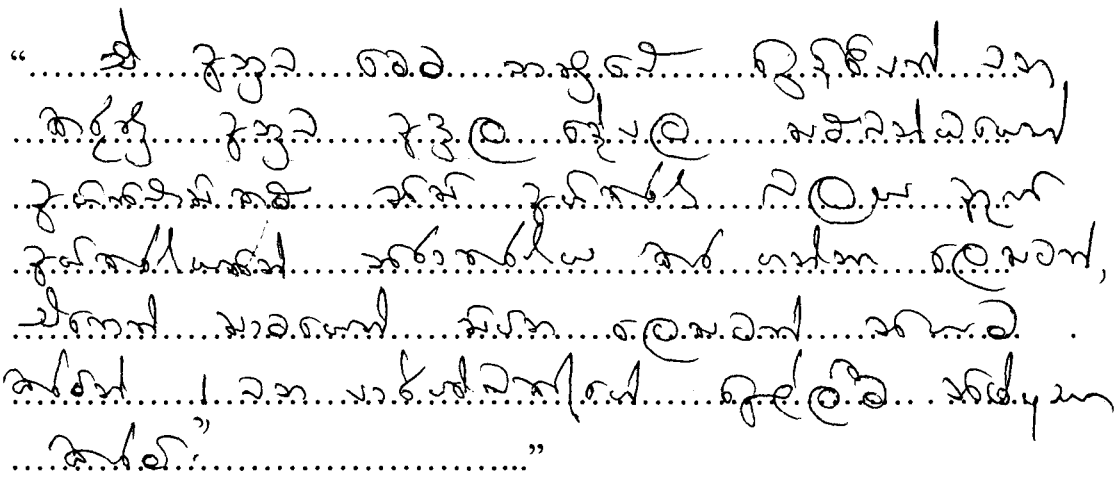
In an inquiry where the dispute relates to the possession of any land or part thereof it shall be the duty of the judge of the Primary Court to determine as to who was in possession of the land or the part thereof on the date of filing of the information under Section 66 and make order as to who is entitled to possession of such land or part thereof . But where a forcible dispossession has taken place within a period of two months immediately before the date on which the information was filed under Section 66, he may make an order directing that the party dispossessed be restored to possession prohibiting all disturbance of such possession otherwise than under the authority of an order or decree of a competent court.

Thus, the duty of the judge is to ascertain which party was or deemed to have been in possession on the relevant date, namely, on the date of the filing of the information under Section 66.

This is an application filed as a private plaint which had been initiated on a complaint made to the Police by the respondent alleging that he has been dispossessed by the Respondent.

Hence the duty of the judge is to determine whether, the Respondent who had been in possession of the land was dispossessed by the appellant within a period of two months immediately before the date of filing of the information. If the Primary Court judge is satisfied that the respondent had been in possession of the land and he had been forcibly dispossessed within a period of two months immediately before the date on which the information was filed under Section 66, he should make an order directing that the party dispossessed be restored to possession.

The order of the learned Primary Court Judge in the present case made his observations as follows:



It is admitted by both parties that the learned Primary Court Judge in his order has totally failed to comply with the imperative requirement of Section 68 of Primary Courts Procedure Act, in order to make a declaration as to who was entitled to possession. He has also failed, as required by that section, to make a determination as to who was in possession of the land on the date of filing of information under Section 66(1) (b).

It is seen therefore, that the Primary Court Judge has failed to make a determination and to make an order in terms of Section 68(3) of the Primary Courts Procedure Act. Therefore the order of the learned Primary Court Judge has no validity before the law.

In the instant case the learned High Court Judge had made a finding that the Respondent was in possession of the land and had been dispossessed within a period of two months immediately before the date of filing of the information. On perusal of the entirety of the judgment, it is apparent that the learned High Court Judge has taken into consideration the affidavits and documents filed by both parties and has come to the aforesaid conclusion.

Further, I do not see any wrong in the manner in which the learned High Court Judge has considered the facts and the way in which she has applied the law in this instance.

For the aforesaid reasons, I see no basis to interfere with the Order made by the learned High Court Judge. Therefore I affirm the Order of the learned High Court Judge dated 25/05/2011.

Appeal is accordingly dismissed with costs.

JUDGE OF THE COURT OF APPEAL

I agree

JUDGE OF THE COURT OF APPEAL

Appeal is dismissed.