

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

In the matter of appeal under Article 154P of the  
Constitution of the Democratic Socialist Republic of  
Sri Lanka

**Court of Appeal case no. CA/PHC/100/2008**

**H.C. Balapitiya case no. 705/06**

The Officer in Charge,  
Police Station, Balapitiya.

**Complainant**

**Vs.**

1. Thwarapperuma Arachchige Don Sugathadasa
2. Thwarapperuma Arachchige Don Janaka  
Sujeewa,  
Egodawattha, Pituwala, Elpitiya.
3. Sunil Kulasekara,
4. Thwarapperuma Arachchige Dona Wasanthi  
Pushpika  
Udagedaramulla, Pituwala, Elpitiya.

**Respondents.**

**AND NOW**

1. Thwarapperuma Arachchige Don Sugathadasa
2. Thwarapperuma Arachchige Don Janaka  
Sujeewa,  
Egodawattha, Pituwala, Elpitiya.

**1<sup>st</sup> and 2<sup>nd</sup> Respondent Petitioners**

**Vs.**

1. Sunil Kulasekara,
2. Thwarapperuma Arachchige Dona Wasanthi  
Pushpika  
Udagedaramulla, Pituwala, Elpitiya.

**3<sup>rd</sup> and 4<sup>th</sup> Respondent Respondents.**

The Officer in Charge,  
Police Station, Elpitiya

**Complainant Respondent**

**AND NOW BETWEEN**

1. Thwarapperuma Arachchige Don Janaka  
Sujeewa,
- Egodawattha, Pituwala, Elpitiya.

**2<sup>nd</sup> Respondent PetitionerAppellant**

**Vs.**

1. Sunil Kulasekara,
2. Thwarapperuma Arachchige Dona Wasanthi  
Pushpika  
Udagedaramulla, Pituwala, Elpitiya.

**3<sup>rd</sup> and 4<sup>th</sup> Respondent Respondents  
Respondents.**

**Before** : H.C.J.Madawala J.  
: L.T.B. Dehideniya J.

**Counsel** : Anil Silva PC with Sahan Kulathunga for the 2<sup>nd</sup> Respondent  
Petitioner Appellant.

: Nagitha Wijesekara for the 3<sup>rd</sup> and 4<sup>th</sup> Respondent Respondent Respondents.

**Argued on** : 28.02.2017

**Decided on** : 17.02.2017

**L.T.B. Dehideniya J.**

This is an appeal from the High Court of Balapitiya.

The OIC of police, Elpitiya filed information under section 66 of the Primary Court Procedure Act in the Magistrate Court of Elpitiya on a land dispute threatening the breach of the peace naming 1 to 4 Respondents as parties. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents were of one party and the 3<sup>rd</sup> and the 4<sup>th</sup> Respondents were of the other Party. The 1<sup>st</sup> Respondent Petitioner (now deceased) (hereinafter sometimes called and referred to as the 1<sup>st</sup> Respondent) made a complaint to the police stating that the 3<sup>rd</sup> and 4<sup>th</sup> Respondent Respondent Respondents (hereinafter sometimes called and referred to as the 3<sup>rd</sup> and 4<sup>th</sup> Respondents) entered in to the land which was in his possession and erected a fence separating a portion and destroyed the plantain bushes. Thereafter the police inquired in to the complaint and inspected the disputed land. The police was of the view that there is a likelihood of the breach of the peace due to this dispute and referred the matter to Court.

After filing the relevant affidavits, the learned Magistrate determined that the 3<sup>rd</sup> and 4<sup>th</sup> Respondents were in possession at the time of filing the information and the 1<sup>st</sup> and 2<sup>nd</sup> Respondents failed to establish the date of dispossession. Being aggrieved by the said order the 1<sup>st</sup> and 2<sup>nd</sup> Respondents moved in revision in the High Court of Balapitiya without success. This appeal is from the said order of the learned High Court Judge.

The main issue in this case is the date of dispossession. There is no dispute that on the day of filing the information under section 66 of the Primary Court Procedure Act in Court the land in dispute was in possession of 3<sup>rd</sup> and 4<sup>th</sup> Respondents. The complaint made by the deceased 1<sup>st</sup> Respondent to the police is that the 3<sup>rd</sup> and 4<sup>th</sup> Respondents erected a fence and he was dispossessed from the block of land separated by the fence. Therefore it is admitted fact that the 3<sup>rd</sup> and 4<sup>th</sup> Respondents were in possession at the time of filing information. Section 68 of the Act reads

*68.(1) 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.*

*(2).....*

*(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.*

*(4) .....(subsections 2 and 4 omitted)*

Under subsection (1) it is the duty of the Court to determine as to who was in possession on the date of filing the information. As I pointed out

earlier, it is an admitted fact that the 3<sup>rd</sup> and 4<sup>th</sup> Respondents were in possession on the date of filing the information. If the 1<sup>st</sup> and 2<sup>nd</sup> Respondents contend that they were in possession of the land in dispute and were dispossessed within a period of two months immediately before the date on which the information was filed under section 66, that fact has to be established by the 1<sup>st</sup> and the 2<sup>nd</sup> Respondents. Under section 101 of the Evidence Ordinance the person who asserts the existence of a fact has to prove the existence of that fact. The section reads

*101. Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts, must prove that those facts exist.*

*When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person.*

#### *Illustrations*

*(a) A desires a court to give judgment that B shall be punished for a crime which A says B has committed. A must prove that B has committed the crime.,*

*(b) A desires a court to give judgment that he is entitled to certain land in the possession of B by reason of facts which he asserts, and which B denies to be true. A must prove the existence of those facts.*

In the present case the 1<sup>st</sup> and 2<sup>nd</sup> Respondents asserts that they were dispossessed within two months immediately prior to the filing of the information. Therefore they have to prove that fact. If that fact is not proved his assertion fails.

The first complaint made to the police by the 1<sup>st</sup> Respondent is silent on the date of dispossession. The first few sentences in the said statement are in past tense. He says that the 4<sup>th</sup> Respondent has erected a fence.

Thereafter he says that the fence was erected when he was at home and then he asked her not to do so but she did not listen. The argument of the Counsel for the 2<sup>nd</sup> Respondent Appellant is that this indicates that the complaint was made on the day that the fence was erected. I do not agree with the contention of the learned Counsel. The fact that the land was in possession of the 3<sup>rd</sup> and 4<sup>th</sup> Respondents has been established and therefore there must be clear and cogent evidence to establish that they came in to possession by forcibly dispossessing the 1<sup>st</sup> and 2<sup>nd</sup> Respondents within two months immediately prior to filing the information in Court. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents have failed to establish the date of dispossession.

Since the 1<sup>st</sup> and 2<sup>nd</sup> Respondents failed to establish that they were disposed within two months immediately prior to filing of the information, the 3<sup>rd</sup> and 4<sup>th</sup> Respondents who were in possession at the time of filing the information become entitle to posses.

I see no reason to interfere with the findings of the learned Magistrate and the learned High Court Judge.

Accordingly the appeal is dismissed with costs fixed at Rs. 10,000.00

Judge of the Court of Appeal

**H.C.J. Madawala J.**

I agree.

Judge of the Court of Appeal