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

In the matter of an Appeal from an Order of the High Court made under Article 154 P of the Constitution and the Provisions of Act No.19 of 1990.

C.A. (PHC) Case No.41/2004

H.C. Jaffna Case No.107/03(REV)

P.C. Jaffna Case No.5060

Shanmugasundara Kurrukkal Sriskandarajah Kurukkal

of Kondavil West, Kondavil.

2nd Party RESPONDENT-RESPONDENT-APPELLANT

-Vs-

1. Ramalingham Nadarajah
2. Rajadurai Thayaparan
3. Sundaramoorthy Ganeshalingham
4. Sivapatham Ganeshalingham
5. Kanagalingam Pareswaran
6. Vinnisithamby Kanaganayagam
7. Mylvaganam Poopalararajah
8. Maruthalingham Ramesh
9. Sinnathamby Ratnam
10. Balasubramaniam Sivasenthan
11. Selathurai Ganeshapillai
12. Sivapatham Sothylingam
13. Ratnasingham Parameswaranathan
14. Shanmuganathan Navanesan

15. Muthulongam Senthilnatha

16. Sivasubramaniam Thivakaran

All of Kondavil West, Kondavil.

1st Party RESPONDENT-PETITIONER-RESPONDENTS

The Officer-in-charge

Police Station, Kopay

COMPLAINANT-TRESPONDENT-RESPONDENT

BEFORE : A.H.M.D. Nawaz, J. &

M.M.A. Gaffoor, J.

COUNSEL : U. Abdul Najeem for the 2nd Party Respondent-Respondent-Appellant.

S. Mandaleswaran with M.A.M. Haleera and S. Ponnambalam for the 1st Party Respondent-Petitioner-Respondents.

Decided on : 08.08.2018

A.H.M.D. Nawaz, J.

The Officer in Charge of the Police station, *Kopay*-the Complainant-Respondent-Respondent in this case, filed information in the Primary Court of Jaffna under Section 66(1) of the Primary Court Procedure Act No.44 of 1979. As Section 75 of the Primary Court Procedure Act No.44 of 1979 define it, the expression "dispute affecting land" includes *inter alia* any dispute as to the right of possession of any land or part of a land and building thereon. The dispute between parties in the case was one that affected the right of possession of *Maha Kanapathi Pillaiyar* Temple in *Kondavil* and the

information by the Police had been filed before the Primary Court of Jaffna on 11th September 2002. The parties brought forward as the 1st Party Respondents by Police were 16 persons, whilst the 2nd Party Respondent was one Shanmugasundara Kurukkal Sriskandaraja Kurukkal of *Kondavil West, Kondavil.* The 2nd Party Respondent who has since become the Appellant before this Court averred in his affidavit before the Primary Court the following:-

a) The dispute pertained to possession of *Maha Kanapathi Pillaiyar* temple and the land in *Kondavil* West and;

b) The 2nd Party Respondent had become the *Kurukkal* of the said temple through succession from his ancestors who had successively held that office for generations in the past;

c) During an interregnum between 1983 and 1989, the 2nd Party Respondent was in Singapore and upon his return to the country in 1989, he once again functioned as the *Poosari* of the temple continuously,

d) A document chronicling the ancestral administration of the temple was marked and produced as **R2**;

e) Upon his return from Singapore he had taken over the administration of the temple as the Chief Priest.

The Appellant (the 2nd Party-Respondent-Respondent-Appellant or the *Poosari* or *Kurukkal* as he is referred to in the course of this judgment) averred further in his affidavit that since the temple premises had gone to rack and ruin, he appointed a group of nine members to oversee the ritual rites that were taking place in the temple but the Appellant emphasized that despite the constitution of this committee he continued to be in total control of the administration of the temple and more over the keys to the temple were in his custody. Thus the evidence before the learned Primary Court Judge was that the Appellant had the possession of the temple premises. He claimed long possession of the temple by his ancestors and an assertion was made that

it was his paternal grandfather who had built a small temple on his land and later expanded it-*see* para 4 of his affidavit dated 8th January 2003. It is in paragraphs 14 and 15 of the affidavit that he alleges as to how his dispossession from the temple premises took place.

On 5th September 2002, one Ramalingam Nadaraja who features as the 1st Party Respondent in the information filed before the Primary Court having come in a three-wheeler with four other persons, broke open the door and forcibly entered the temple premises. Having thus made an illegal entry he made off with Rs.13,50,000/- worth of jewelry and cash. This allegation is not contradicted by any of the affidavits filed by the Respondents. In fact Ramalingam Nadaraja who is referred to by name in the affidavit of the Appellant is one of those who have sworn one of the affidavits but there is nary a denial of this allegation of threats at the Appellant and the forcible dispossession. Such silence as we encounter in the affidavits dated 8th January 2003 must be deemed to be an admission. In light of the failure on the part of the Respondents to respond to the specific allegation of the Appellant, I take the view that such failure in the affidavit evidence would amount to an admission. Silence in court may be used to strengthen inferences from opposing evidence.[1]

According to the Appellant (the *Kurukkal* or *Poosari* of the temple), it was on 5th September 2002 that the 1st Party Respondent along with his confederates forcibly evicted the Appellant from the *Kovil*, having threatened first to put him to death. At this stage I would briefly refer to the documents tendered by the Appellant along with his affidavit. One document **2R1** described the hereditary succession of the Appellant-*(see page 159 of the brief)*. This is drawn in the form of a pedigree.

In another printed document marked as **2R2**, a history of a succession of priests for generations is chronicled and among those who had performed services as *Kurukkal* of the temple-*(see page 160 of the brief)*, the name of the Appellant figures corroborating his

[1] *See* J.D. Heydon, **Silence as evidence** 1 *Monash University Law Review* 53 (1974).

version in his affidavit that he had been officiating as the chief priest at the temple. The overall contention of the 2nd party Respondent (the Appellant in this Court) before the Primary Court was that he had been in full control and physical possession of the said temple as the *Kurukkal* performing all *pooja* ceremonies in the temple and he had been maintaining and administering the properties of the temple prior to his forcible dispossession on 5th September 2002. The Appellant prayed that he be restored to possession until such time as the Respondents obtained a suitable order in a District Court.

In response to the affidavits filed by the 2nd Party Respondent-Respondent-Appellant, the 1st Party-Respondents-Respondents (the Respondents in this Court) filed two separate statements of claim (two separate affidavits) admitting *inter alia* that since 1998 the Appellant had been functioning as the *Kurukkal* of the said temple-*see* paragraph 4 of the affidavit dated 8th January 2003 of Respondents who were 11 in number. The other affidavit of 5 other Respondents bears the same date and admits that the Appellant had been functioning as the priest of the temple. But the 2nd, 3rd, 5th and 7th Respondents before the Primary Court admitted in their affidavit that they had placed a new priest in place to perform religious ceremonies as they had found the Appellant intransigent. One of the affidavits filed speaks of how the religious performances came to a halt as a result of the recalcitrant behavior of the priest.

In fact the Respondents filed documents to show intransigency on the part of the Appellant. They attached **MI**-a letter dated 20.12.1993 addressed by Deputy Director, Department of Hindu Cultural Affairs, that only speaks of the registration of the temple but this is not a document acknowledging that the Respondents were the trustees of the temple. There is also a letter addressed by the Divisional Secretary, *Nallur* to the Appellant wherein he was instructed to hand over the keys to a till and stores to the then administrative body and in the same letter, the Divisional Secretary requested the Appellant to co-operate with the administrative body to conduct the ceremonies-*see* letter dated 22.08.2011.

By A3 dated 22.01.2002, the Additional Government Agent, Jaffna writes to the Administrative body of the temple and laments that the interim administration that he established had resulted in a failure as the Appellant had not been cooperative enough. Therefore, the Additional Government Agent, Jaffna advised the administrative body or the Board of Management to seek legal redress, if any.

But in September 2002, the Appellant was evicted and a new *Poosari* was put in place. No doubt all this correspondence shows that there had been constant quarrels between the Appellant and the administrative body but no legal remedy was sought. Instead the temple was forced open on 05.09.2002 and possession of the temple taken over. So, it has to be reiterated that there had been a concession on the part of the Respondents of the allegation that they had dispossessed the appellant from the temple.

But does this alleged behavior of the Appellant authorize the Respondents to deal with him so hastily and summarily? What is the instrument that empowers the Respondents to mete out palm tree justice to a priest, however intransigent he was? When were the Respondents appointed trustees of the temple? None of these items of evidence were available before both the Primary Court and High Court. Perhaps these were matters that were competent to be adjudicated upon in a civil suit and in the absence of such evidence the learned High Court Judge could not have concluded that the Appellant was standing in the shoes of an agent of an administrative body. The underlying tenor of the judgment of the High Court certainly indicates the nexus of an agency by implication, if not expressly.

Whichever claim that was contending for supremacy was true, one thing stands as plain as a pikestaff. The Appellant had been the *Kurukkal* or the priest officiating at the temple and the affidavit evidence of the Respondents itself establishes dispossession of the Appellant.

The Respondents in their respective affidavits though took an interesting argument that the complaint made by the Appellant could not be investigated as a dispute affecting land under Section 66 of the Primary Court Act No.44 of 1979 (hereinafter

sometimes referred to as the "Act") since there was no breach of the peace. The Respondents also contended before the learned Magistrate that Section 32(2) of the Judicature Act prohibits the Primary Court from assuming jurisdiction in respect of matters set out in the 4th schedule and items 11 and 12 therein such as relating to trust and declaratory actions for title to land and in the circumstances the application must be dismissed. The learned Primary Court Judge made short shrift of the argument of the jurisdictional bar and held that he had jurisdiction. The learned Magistrate of Jaffna proceeded to hold that prior to the forcible dispossession of the Appellant, he had been in exclusive physical possession of the temple, its premises and administration and accordingly by his order dated 2nd April 2003 the learned Magistrate declared that the Appellant who had been dispossessed be restored to possession and in addition the learned Judge made consequential orders placing an embargo on all disruption and disturbance to the peaceable possession of the Appellant, otherwise than through the authority of a legal order *(see the order dated 2nd April 2003)*. Consequently, by a writ of execution issued by the learned Magistrate of Jaffna, the Appellant was restored to possession of the temple premises. I have no reason to disturb this finding and determinations.

Revisionary Application to the High Court

In a Revisionary Application made to the High Court of Jaffna, the Respondents in the prayer of their Petition dated 08.04.2003 reiterated that the Primary Court Judge had no jurisdiction whatsoever to make a determination in respect of this dispute and upon a perusal of the reliefs sought in the petition the Respondents sought from the High Court, it would appear that the only relief that had been prayed for was to have the order of the learned Magistrate set aside on the basis that the Primary Court had no jurisdiction to inquire into this matter. By an order dated 14th October 2003, the learned High Court Judge rejected the submissions on the jurisdictional bar raised by the Respondents and concluded that the 4th Schedule to the Judicature Act did not preclude the Primary Court Judge from making a determination in respect of possession of the temple, its land and administration and in any event the learned High

Court Judge proceeded to hold that any title or rights relating to the temple had to be adjudicated upon only in an appropriate District Court and not in the Primary Court.

No argument was made before us against this conclusion and in the circumstances one need not go into the propriety of the order pertaining to jurisdiction as the issue raised before the Primary Court was one that turned on dispossession and recovery of possession and indisputably the Court was clothed with jurisdiction to investigate and adjudicate upon those questions.

The learned High Court Judge proceeded to hold in the end that since the temple and its properties are always vested in the administrative body of a temple, the said body enjoys the power to remove a priest at any time and merely because the *Kurukkal* had custody of the keys he could not be said to have *possession* within the meaning of Section 68(3) of Primary Court Act No. 44 of 1979. The learned High Court Judge further held that though the *Kurukkal* was in possession of the keys to the temple, the continuous possession of the temple lay with the administrative body. A *Kurukkal* could not claim possession of a temple. It was only for ritualistic rites that the keys of the temple had been handed over to the *Kurukkal* or the priest. The learned High Court Judge further concluded that in order to vindicate his rights to continue to perform *pooja*, the Appellant must institute action in the District Court. Merely because the keys of the temple were in his custody, that fact cannot be interpreted to invest the Appellant with possession of the temple.

The learned High Court Judge also compared the capacity of the Appellant as a *Poosari* or *Kurukkal* to that of a Manager of a Bank Branch. The learned High Court Judge made a few assumptions in regard to the manager of a Bank. He stated that the manager of a Bank branch would have the keys to the branch as well as the safety lockers containing cash. The learned High Court Judge stated in his order under impingement that on no account could the possession of the keys of the contents of a bank branch as above be regarded as possession within Section 66 of the Primary Court Act. He further drew an analogy that merely because a Manager of a Hotel had administrative functions, it

would not lie in his mouth to contend that he had possession *vis-à-vis* the administration of the hotel. In the view of the learned High Court Judge the respective positions of a Branch Manager of a Bank or a Manager of a Hotel would be comparable to that of the Appellant.

In the circumstances the learned Judge of the High Court of Jaffna summed it up in two important conclusions;

i. the Primary Court Judge had jurisdiction to inquire into this dispute under Section 66 of the Primary Court Act No.44 of 1979,

ii. it was unfortunate that the learned Primary Court Judge restored the Appellant back to possession of the temple merely because the Appellant had custody of the keys to the temple.

Accordingly the learned High Court Judge by his order dated 14th October 2003 set aside order made by learned Primary Court Judge and handed over possession to the Respondents. It is against this order of the learned High Court Judge of the High Court of Jaffna that the Appellant has preferred this appeal to this Court. Thus, it was contended by the learned Counsel for the Appellant that it was never the contention of the Respondents before the learned High Court Judge that the possession of the temple must be handed to the Respondents, whilst the Appellant had already been placed in possession by the learned Magistrate. The Counsel argued that their only prayer before the learned High Court Judge in their Petition dated 18.04.2003 was to secure an order from the High Court of Jaffna that the learned Primary Court Judge had no jurisdiction to inquire into this matter. In other words, the argument was that the learned High Court Judge had given a relief of repossession to the Respondents though this relief had not been sought at all by the Respondents.

If one were to understand this argument, one is driven to the complaint that is usually made namely the learned High Court Judge has given a relief of repossession to the Respondents who were the spoliators, whatever right they may have claimed to have possessed in regard to the temple. In other words it was a grant of a remedy that had

not been sought before him. Having held that the learned Primary Court Judge had jurisdiction over the matter, the learned High Court Judge could not have gone further and placed out of possession a *Kurrukal* who had been quited in possession by the learned Primary Court Judge. This was the submission of Mr. U. Abdul Najeem-the Counsel for the Appellant. Mr. Mandaleswaran for the Respondents contended that it was well within the right of the learned High Court Judge to have engaged in this exercise. The possession of the *Kurukkal* reflected the possession of the administrative body.

Let me appraise these respective arguments raised on behalf of the Appellant and Respondents.

This Court is thus confronted with two orders which are diametrically diverse to each other as regards possession. In the opinion of the learned Primary Court Judge, the Appellant had been forcibly dispossessed by the Respondents within a period of two months immediately before the date on which the information was filed under Section 66 of the Primary Court Act and his determination was that the *Kurukkal* must be restored to possession. But the learned High Court Judge arrived at a conclusion that the *Kurukkal* did not have possession at all.

The possession of the *Kurukkal* was akin to that of a Branch Manager of a Bank or a Hotel Manager and the tenor of the judgment of the learned High Court Judge appears to be that such possession as the *Kurukkal* had in the temple does not qualify to be possession within the meaning of Section 68(3) of the Primary Court Act No.44 of 1979. To that extent the judgment of the High Court concludes that possession must be handed back to the administrative body.

What does one make of the possession held by the priest? Did that exist *in vacuo*? If possession on the part of the priest was *non est* to qualify to be possession within the meaning of Section 68(3) of the Primary Court Act No.44 of 1979, what kind of possession *proprio vigore* is necessary so as to be invested with the attributes of

possession required in Section 68 (3) of the Act? There is sparse discussion by the learned High Court judge on this requirement.

Does the possession of the *Poosari* or *Kurukkal* satisfy the requisites for possession in Section 68?

A slew of case law throws light on the kind of possession that would suffice for purposes of Section 68. Before I look at them, let me reiterate that there is nothing in the two affidavits of the Respondents to suggest that they had some kind of right to summarily put out a priest. What was it that gave them power? Did they appoint him as a priest? If so can they proceed to throw him out in the way he was ousted? This is not made clear more unambiguously in the two sets of affidavits filed by the Respondents and these questions become more pronounced in light of the fact that an administrative body was written to by the Additional Government Agent on 22nd January 2002 to seek legal relief. If this was the advice of the Additional Government Agent, why was violence resorted to in the dispossession of the priest? It is the Respondents who produced the above letter to the Primary Court Judge along with their affidavits and it shows that they were in the know of what had to be done legally, regardless of the fact whether the Respondents were in fact members of the administrative body or not.

The forcible dispossession as I have commented above is abundantly clear from the affidavit evidence of the Respondents. They admit in the affidavit that having broken open the closed door of the temple on the 5th of September 2002, they secured the temple with new locks and took away the possession from the Appellant.

There are several determinations that a Primary Court Judge has to make at the conclusion of an inquiry into a dispute relating to the right of the possession of any land or any part of a land. Firstly he must make a determination as to who was in possession of a land or any part thereof on the day the information was filed. Secondly he must make order as to who is entitled to *possession* of such land or part thereof. In regard to the determination of the second question he must be satisfied that a

particular person who had been *in possession* of the land or part thereof has been *forcibly dispossessed* within a period of two months before the date on which the information was filed under Section 66 of the Act. It is the possession of the dispossessed person that comes into play and it is crystal clear that it was this *Kurukkal* or Appellant who had been in possession of the temple premises with the period of two months preceding the date on which the information was filed.

The reason why the learned High Court Judge overturned the determination of the Primary Court Judge appears to be that the possession of the Appellant cannot be equated to an exclusive possession and in engaging in the exercise of equiparating the possession of the Appellant to that of a Bank Manager or a Hotel Manager the High Court was laboring under an impression, as misconceived as it was, that it was the Respondents who had possession. The Respondents did not claim possession in their affidavits nor is it clear upon a perusal of their affidavits by what right they could claim such possession as would give them right to put the appellant out of possession summarily.

I cannot not but discountenance the approach taken by the High Court Judge to the possession enjoyed by the Appellant. Sri Lankan case law on possessory actions have recognized possession of the office holders *qua* the Appellant.

Changarapillai v. Chelliah[2] was one such case where a possessory action in which the Plaintiff was, as the District Judge found, the Manager of a Hindu Temple and its property. Bonser C.J. and Wendt J. were of opinion that if the Plaintiff, who was called the Manager, had control of the fabric of the temple and of the property belonging to it, his possession was such as to entitle him to maintain the action. The case was sent back for evidence as to the exact nature of the plaintiff's interest.

Bonser C.J. expressly stated that control of the temple and its property was sufficient to enable the Plaintiff to maintain the action, even though he made no pretence of claiming the beneficial interest of the temple or its property, but was only a trustee for

[2] (1902) 5 N.L.R. 270

the congregation who worshipped there. Bonser D.J. distinguished the previous case of ***Tissera v. Costa***[3] on the facts: "The *muppu* who appears to be kind of beadle, has no control over the fabric of the church, and was only a caretaker entrusted with the custody of certain movables, a vey subordinate servant, whose duty is was to keep the church clean, but who had no sort or kind of possession either on behalf of himself or anybody else".[4]

This approach was emphatically endorsed by Pulle, J. (with Swan, J. agreeing) in ***Sameem v. Dep***[5].

The *facta probanda* of possessory actions have received definition by the South African courts. In ***Scholtz v. Faifer***[6] Innes C.J. said: "*A person who applies for such relief must satisfy the Court upon two points: that he was in possession of the (property) at the date of the alleged deprivation; and that he was illicitly ousted form such possession.*[7]" In ***Burnham v. Neumeyer***[8] Bristowe J. stated the essential requisites as follows: "*that the things alleged to have been spoliated were in the plaintiff's possession, and that they were removed from his possession forcibly or wrongfully or against his consent*".[9]

Scholtz v. Faifer[10] is an illuminative case in this regard. The appellant, who had contracted to erect certain buildings for the respondent on condition that the latter supplied the materials and paid for the work as it progressed every two weeks, applied for an order reinstating him in possession of the building then partially erected. The Appellant alleged that the Respondent had unlawfully taken possession of the partly constructed building and placed another contractor in charge of the work.

One of the questions which arose was whether the Appellant had sufficient physical control or *detentio* of the building, to be declared entitled to possessory relief.

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[3] 8 S.C.C. 193
[4] At p. 272
[5] (1954) 55 N.L.R. at p. 525
[6] 1910 T.S. 243
[7] At p. 246
[8] 1917 T.P.D. 630
[9] At p. 633
[10] 1910 T.P.D. 243

It was accepted that when the house had advanced so far towards completion that the doors are placed in position, it may be locked up and possession of the key would be equivalent to possession of the building.[10] The position in regard to a partially constructed building is obviously more difficult.

Innes C.J. said in the course of his judgment: *"Mere temporary absence (of the contractor) for a short time would not destroy the physical element which is necessary to constitute possession. Take the extreme case where a builder goes away every night; he still has the detention of the work which he is in course of erecting. If it existed originally, he still has it; mere absence at night does not deprive him of it. But where work is suspended for a considerable time, then it seems to me that if the builder desires to preserve his possession he must take some special step, such as placing a representative in charge of the work, or putting a hoarding round it; or doing something to enforce his right to its physical control. If he chooses to leave the work derelict, then, no matter what his intention may be, the physical element is absent, and he loses possession, even though he may say he intended to resume it or never intended to abandon it".*[11]

Leaving aside these cases which were decided on possessory actions, I would observe that the purpose and intendment of relief under Section 66 of the Primary Court Procedure Act No.44 of 1979 are to accord protection against forcible dispossession at the hands of a spoliator and this right must be available to a priest of a temple who has been officiating at ceremonies. If he is found to be intractable, he must be dealt with in accordance with the law and the established rules and regulations pertaining to the affairs of the temple.

In ***Wilsnach v. Van der Westhuizen and Haak***[12] Buchanan A.C.J, observed: *"The whole foundation of the rule for the restoration of property taken possession of in this way is that a spoliator is not entitled to take the law into his own hands, and a person who has taken the law into his own hands must restore the property, and establish his right thereto in a peaceable matter in a court of law."*

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[10] At p. 247
[11] At pp. 247-248
[12] (1907) S.C. 600

Sohoni in his treatise on the **Indian Criminal Procedure at page 1331** describes that the proviso to Section 145(4) of the Indian Criminal Procedure Code which could boast of parentage over its Sri Lankan counterpart in Section 66 of the Primary 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 than in due course of law. It would be a case of both forcible and wrongful dispossession.

In the case of ***P.K. Anita v. Shridhar Sadashiv***[13] it has been held that: *"The words 'forcibly and wrongfully' qualifying the word 'dispossession' in the proviso to section 145(4), cannot be given a restricted meaning of dispossession accompanied by the use of criminal force. To constitute forcible dispossession, even the use of misrepresentation and improper threats would make the dispossession 'forcible and wrongful'"*.

In the case of ***Bhuttani v. Desai;***[14] ***Dharam Chand v. State***[15] and ***Thrulatha Devi v. Misra***[16], it has been held that, even where a person has a right to possession, but taking the law into his hands, makes a forcible entry otherwise than in the due course of the law. It would be a case of both forcible and wrongful dispossession. The Magistrate will be entitled to dislodge a person who thus secured possession.

The phrase 'forcible dispossession' does not contemplate a fugitive act of trespass or interference with possession. The dispossession referred to, is one that amounts to a completed act of forcible and wrongful driving out party from his possession-*see* ***Bhuttani v. Desai***[17].

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[13] 1982, Cri.L.J. 1463 (Bom. H.C.)
[14] AIR 1968 SC
[15] 1973 Cut.L.J. 755
[16] 1982 Cr.L.J. 1965 (Guj)
[17] AIR 1968 SC. 144

Therefore when violence was resorted to in order to deprive the Appellant on 05.09.2002, in my view it was forcible dispossession of the *Poosari* or the *Kurukkal.*

In fact U.D.Z. Gunawardana, J. in ***Iqbal v. Majedudeen and Others***[19] took the view that the words "forcibly dispossessed" in Section 68(3) of the Primary Court Act No.44 of 1979 as amended means that dispossession had taken place against the will of the person entitled to possess and without authority of the Law.

In the course of the judgment the learned Judge acknowledged possession to be of two kinds.

1. When a person has direct physical control over a thing at a given time-*actual possession.*
2. When he is not in actual possession he may have both a power and intention at a given time to exercise dominion or control over a thing either directly or through another person-*constructive possession.*

In Black's law Dictionary, 9th Edition the term constructive possession is defined as control or dominion over a property without actual possession or custody of it. There is no affidavit evidence that the Respondents had control or dominion over the temple. No instrument was before the Primary Court to indicate a vesting of such control. Therefore it cannot be contended that the Respondents had constructive possession. Even if they had had constructive possession, it could not be argued that their possession was disturbed when they themselves caused the disturbance.

Rather it was the Appellant who had actual possession and he was forcibly dispossessed

Whichever may be the kind of possession it is dispossession of a person that is frowned upon by law. Such dispossession as is frowned upon by the Primary Court Procedure Act would not enjoy the imprimatur or the authority of the law. No doubt there might have been an administrative body to oversee the functioning of the temple as it is

[19] 1993 Sri LR p.213

evident by the document marked as A3. But they cannot seek self help and put out of possession someone holding the position of a *Kurukkal* in a summary and precipitate manner.

In the case of ***Moolchand v. State of Madya Pradesh***[19] the Court held that the relevant section strictly limits even the violence self-help by the true owner of the premises. On the other hand, it seeks to maintain, if necessary and if justified under this provision of the section, the possession of even a wrong-doer, the prime consideration being the prevention of the breach of the peace by declaring one party to be entitled to possession, until evicted by due course of the law.

In proceedings under this section the Magistrate is not required to investigate the title of the disputed land or the rights of the administrative body. In fact, he can use the evidence of title merely to guide and aid his mind in coming to a decision upon the question of possession, but he is precluded from deciding questions of title alone.

The learned High Court Judge fell into an error by implying an agency into the relationship between the Appellant and the Respondents. In fact the evidence is to the contrary-namely the actual possession of the temple was with the Appellant and in the circumstances the learned High Court Judge need not have gone on a voyage of discovery to compare the possession of the Appellant to that of a Bank Manager or a Manager of a Hotel. In fact, there is no evidence, so to speak, to establish that the Respondents had actual possession of this temple. It was the Appellant who had been in possession of the temple premises by virtue of the fact that his presence therein was necessitated by his functions and the fact that the key to the temple had been in his custody at the relevant time of dispossession connotes actual possession of the temple premises on the part of the Appellant.

The fact that the Respondents may have labored under the impression that the Appellant was their agent is not borne out at all by evidence and any purported notion that the learned Judge entertained as to the duty of a *Poosari* under the control of an

[19] 1968 M.P.W.R. 345

administrative body is not supported by evidence. *In any event even if by some stretch of imagination that he should be at the back and call of the Respondents,* it does not authorize them to disturb his possession and deprive him of his possession.

In the case of ***Bibihusna v. Abdul Rashid,***[20] it was held that a Criminal Court will have to maintain the possession of even a trespasser, if he is found to be in actual possession for more than two months before the date of preliminary order.

An identical view was articulated by Sharvananda, J. (as His Lordships then was) in the case of ***Ramalingam v. Thangaraja***[21], "under section 68 the Judge is bound to maintain the possession of such person if he be rank trespasser as against any interference even by the rightful owner". This section, entitles even a squatter to the protection of the Law, until his possession was acquired within two months of the filing of the information.

The above position had been expressed by the Indian decision ***Sohan Mushar v. Kalliash Singh,***[22] wherein Raj Kishor Prasad, J. voiced the opinion that "the possession contemplated in this section is the 'actual possession' of the subject of the dispute. Actual physical possession means the possession of the person who has his feet on the land, who is ploughing it, sowing or growing crops in it entirely irrespective of whether he has any right or title to possess it. But 'actual possession', irrespective of whether he has any right or title to possess it. But, "actual possession" does not always mean "actual physical possession". For example, if there is a tenant occupying a house and there is a dispute between two persons, each claiming to be the landlord, admittedly neither is in actual physical possession, still proceedings under section 145 of the Code will lie, and in such a case, the decision will rest upon who is in 'actual possession' by realization of rent from the tenant. "Actual possession" postulated by Sub section (1) of Section 145, however, is not the same as a 'right to possession' nor does it necessarily mean lawful or legal possession. It includes even the **possession of a mere trespasser.**

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[20] 1968 Patna L.J.R. 639
[21] 1982 Sriskantha Law Reports 32 and 1982 2 SLR 693
[22] 1962 (1) Cri. L.J. 751

It should, however be real and tangible, that is, there should be effective occupation and control over the property."

Thus in light of the above the learned High Court Judge was in error when he misdirected himself on the facts and law and made order directing the handing over of the temple back to the Respondents. In the circumstances I set aside the order of the learned High Court Judge dated 14.10.2003 and allow the appeal with costs.

JUDGE OF THE COURT OF APPEAL

M.M.A. Gaffoor, J.

I agree.

JUDGE OF THE COURT OF APPEAL