

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

Officer in Charge

Police Station,

Galle.

Complainant

Case No: CA(PHC) 178/2012

H.C Galle Case No: HC/REV/684/08

M.C Galle Case No: 41637

Vs.

1. Nanayakkarawasam Nagawaththa
Arachchige Pushpakumara
Nagawaththa

No. 307/31, Sangamiththa
Mawatha,

Wakwella Road, Galle.

2. Sydney Benjamin Jayasundara

Senevirathna (deceased)

2A. Kishan Jayasundara

Senevirathna

163/15, Nawala Road,

Narahenpita, Colombo 05.

3. Mahesh Padmakumara

Nanayakkara

309/2, Sangamiththa Mawatha,

Wakwella Road, Galle.

4. Mandalawaththage Karuna

Sumanawathie

309/2, Sangamiththa Mawatha,

Wakwella Road, Galle.

Respondents

AND BETWEEN

1. Nanayakkarawasam

Nagawaththa Arachchige

Pushpakumara Nagawaththa

No. 307/31, Sangamiththa

Mawatha,

Wakwella Road, Galle.

3. Mahesh Padmakumara

Nanayakkara

309/2, Sangamiththa Mawatha,

Wakwella Road, Galle.

4. Mandalawaththage Karuna

Sumanawathie

309/2, Sangamiththa Mawatha,

Wakwella Road, Galle.

1st, 3rd, 4th Respondents-Petitioners

Vs.

2. Sydney Benjamin Jayasundara

Senevirathna (deceased)

2A. Kishan Jayasundara

Senevirathna

163/15, Nawala Road,

Narahenpita, Colombo 05.

2A Respondent-Respondent

Officer in Charge

Police Station,

Galle.

Complainant-Respondent

AND NOW BETWEEN

1. Nanayakkarawasam

Nagawaththa Arachchige

Pushpakumara Nagawaththa

No. 307/31, Sangamiththa

Mawatha,

Wakwella Road, Galle.

3. Mahesh Padmakumara

Nanayakkara

309/2, Sangamiththa Mawatha,

Wakwella Road, Galle.

4. Mandalawaththage Karuna

Sumanawathie

309/2, Sangamiththa Mawatha,

Wakwella Road, Galle.

**1st, 3rd, 4th Respondents-Petitioners-
Appellants**

Vs.

2. Sydney Benjamin Jayasundara

Senevirathna (deceased)

2A. Kishan Jayasundara

Senevirathna

163/15, Nawala Road,

Narahenpita, Colombo 05.

**2A Respondent-Respondent-
Respondent**

Officer in Charge

Police station,

Galle.

Complainant-Respondent-

Respondent

Before: K.K. Wickremasinghe J. (Acting P/CA)

Janak De Silva J.

Counsel:

Shihan Ananda for the 1st, 3rd, 4th Respondents-Petitioners-Appellants

M. Nazar with P.S. Elvitigala for the 2A Respondent-Respondent-Respondent

Written Submissions tendered on:

1st, 3rd, 4th Respondents-Petitioners-Appellants on 25.10.2018

2A Respondent-Respondent-Respondent on 27.03.2019

Argued on: 24.05.2018

Decided on: 27.03.2019

Janak De Silva J.

This is an appeal against the order of the learned High Court Judge of the Southern Province holden in Galle dated 18.12.2012.

The Officer-in-Charge of the Galle Police Station filed a report on 05.11.2004 in the Magistrates Court of Galle in terms of section 66(1)(a) of the Primary Courts Procedure Act (Act). The report stated that there was a dispute affecting land between the 1st, 3rd, 4th Respondents-Petitioners-

Appellants (Appellants) and the father of 2A Respondent-Respondent-Respondent (Respondent) indicating an imminent breach of peace and sought appropriate orders from court.

After hearing parties, the learned Magistrate held that although the Appellants were in possession of the land in dispute on the date information was filed namely 05.11.2004, they had unlawfully dispossessed the Respondent from the said land on 06.09.2004. Accordingly, he made order directing that the Respondent is entitled to possession of the land in dispute.

The Appellants filed a revision application in the High Court of the Southern Province holden in Galle which was dismissed. Hence this appeal.

The main contentions of the Appellants are:

- (1) There was no identification of the corpus
- (2) The learned Magistrate erred in failing to conclude that the Appellants were in possession of the land in dispute even prior to two months from the date proceedings were instituted namely 05.11.2004

In this appeal Court must consider the correctness of the order of the High Court. It is trite law that existence of exceptional circumstances is the process by which the court selects the cases in respect of which the extraordinary method of rectification should be adopted, if such a selection process is not there revisionary jurisdiction of this court will become a gateway of every litigant to make a second appeal in the garb of a Revision Application or to make an appeal in situations where the legislature has not given a right of appeal [Amaratunga J. in *Dharmaratne and another v. Palm Paradise Cabanas Ltd. and another* [(2003) 3 Sri.L.R. 24 at 30]. The learned High Court Judge has correctly identified the legal principle and held that the Appellants had failed to establish exceptional circumstances.

Therefore, in this appeal, Court must consider whether the learned High Court Judge erred in concluding that the Appellant has failed to establish exceptional circumstances.

Identity of Corpus

In an application of this nature it is incumbent on the Magistrate to ascertain the identity of the corpus as section 66(1) of the Act becomes applicable only if there is a dispute between parties affecting land. A Magistrate should evaluate the evidence if there is a dispute regarding identity of the land. [*David Apuhamy v. Yassassi Thero* (1987) 1 Sri.L.R. 253].

The learned counsel for the Appellants submits that the learned Magistrate had erred in identifying the land in dispute without any reference to the plans relied on by parties.

In an inquiry under Part VII of the Act, the learned Magistrate does not have the benefit of a commission issued by court in identifying the land in dispute. He has to proceed on the documentary evidence tendered by parties which may include plans referred to in the deeds relied on parties. In this exercise the sketch prepared by the Police will play an important role unless a party alleges and establishes that the Police have acted partially towards one of the parties.

In the instant matter, the learned Magistrate has correctly used both plans tendered by parties as well as the sketch prepared by the Police and identified the land in dispute. There are no exceptional circumstances arising on this point.

Forcible Dispossession

The learned Magistrate held that the Appellants were in possession of the land in dispute on the date information was filed namely 05.11.2004. He then went on to examine whether the Appellants came into possession by dispossessing the Respondent within a period of two prior to the filing of information. The learned Magistrate concluded that the Appellants did so on 06.09.2004 and it is this conclusion that the Appellants seek to assail in this appeal.

The Appellants submit that the learned Magistrate erred in arriving at this conclusion based purely on the observations of the Police Sergeant Suriyarachchi made on 07.09.2004.

The learned Magistrate held that the Respondent had constructive possession of the land in dispute.

In *Iqbal vs. Majedudeen and others* [(1999) 3 Sri.L.R. 213] it was held:

1. The fact for determining whether a person is in possession of any corporeal thing, such as a house, is to ascertain whether he is in general control of it.
2. The law recognizes two kinds of possession:
 - (i) When a person has direct physical control over a thing at a given time - actual possession.
 - (ii) 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 – constructive possession.

The learned Magistrate considered the following facts in concluding that the Respondent had constructive possession:

- (a) Allowing the Asian Finance Company to cut a road way from the corpus
- (b) Requesting and obtaining a letter from the Municipal Council to confirm that he is the owner of the premises bearing the assessment no. 307/32
- (c) Appointing a licensee to look after the corpus
- (d) Making a complaint to the Police as soon as becoming aware of the construction of a barbed wire fence across the corpus

The Appellant submits that the learned Magistrate erred in failing to consider the following facts which shows the 3rd Appellant having constructive possession of the corpus:

- (a) 3rd Appellant was living adjacent to the corpus
- (b) There was an aperture through the wall to access the corpus
- (c) Erection of concrete piles on the corpus

I am of the view that the learned Magistrate correctly evaluated the evidence and concluded that the Respondent held constructive possession of the corpus on 06.09.2004 for the facts in support of that conclusion are far more compelling.

Accordingly, the learned High Court Judge was correct in concluding that the Appellant had failed to establish exceptional circumstances warranting the exercise of revisionary jurisdiction.

For the foregoing reasons, I see no reason to interfere with the order of the learned High Court Judge of the Southern Province holden in Galle dated 18.12.2012.

Appeal is dismissed with costs.

Judge of the Court of Appeal

K.K. Wickremasinghe J. (Acting P/CA)

I agree.

Judge of the Court of Appeal