

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

In the matter of an appeal against an
order of the Provincial High Court in the
exercise of its revisionary jurisdiction.

C A (PHC) 157 / 2003

Provincial High Court of

Southern Province (Matara)

Case No. 205/2000

Magistrate's Court Morawaka

Case No. 13712

Nimal Karunaratne,

Kammalgodawatte,

Galatumba,

Deiyandara.

1st PARTY - 1st RESPONDENT -

APPELLANT

-Vs-

1. Leelawathi Jayawardena Rathnayake,

Pandithaporuwa,

Deiyandara.

2nd PARTY - PETITIONER -

RESPONDENT

2. Wijethunga Kulappu Arachchige Don

Andrayas (**Deceased**),

Paluwatte,

Pandithaporuwa,

Deiyandara.

**3rd PARTY - RESPONDENT -
RESPONDENT**

3. Karunawathie Jayasekera,
Palugahawatte,
Pandithaporuwa,
Deiyandara.

**LEGAL REPRESENTATIVE OF 2nd
INTERVEINIANT PARTY -
RESPONDENT**

4. Wijethunga Kulappu Arachchige Don
Sisiliyana,
Paluwatte,
Pandithaporuwa,
Deiyandara.

**4th PARTY - 3rd RESPONDENT -
RESPONDENT**

5. Abeysiri Narayana Wanigarathne

Nandasiri,

No 12/4,

Kalugahahena,

Galatumba,

Deiyandara.

5th PARTY - 4th RESPONDENT -

RESPONDENT

6. Kodithuwakku Arachchige Sirisena,

Galgoda,

Pandithaporuwa,

Deiyandara.

6th PARTY - 5th RESPONDENT -

RESPONDENT

Before: P. Padman Surasena J (P/ C A)
K K Wickremasinghe J

Counsel; Rohan Sahabandu PC for the 1st Party - Respondent - Appellant.

T K Azoor for the Respondents.

Argued on: 2017 - 10 - 25.

Decided on : 2018 - 02 - 28

JUDGMENT

P Padman Surasena J

Officer in charge of the Police Station Mawarala has referred the instant dispute to the Primary Court of Deiyandara in terms of Section 66 (1) (a) of the Primary Court Procedure Act No 44 of 1979 (hereinafter referred to as the Act). In the report filed by the Police 1st Party - 1st Respondent - Appellant (Nimal Karunaratna) (hereinafter sometimes referred to as the Appellant) has been named as the 1st Party and the 2nd Party - Petitioner - Respondent (Leelawathie Jayawardena) (hereinafter sometimes referred to as the 1st Respondent) has been named as the 2nd Party.

The 3rd Party - Respondent - Respondent (hereinafter sometimes referred to as the 2nd Respondent),

4th Party - 3rd Respondent - Respondent (hereinafter sometimes referred to as the 3rd Respondent),

5th Party - 4th Respondent - Respondent, (hereinafter sometimes referred to as the 4th Respondent),

6th Party - 5th Respondent - Respondent (hereinafter sometimes referred to as the 5th Respondent)

have also got themselves added as parties after the notice was affixed on the land.

After the inquiry learned Primary Court Judge by his order dated 2000 - 10-06 had directed that the fence erected by the 1st Respondent be removed.

Being aggrieved by the learned Magistrate's order the 1st Respondent had filed a revision application in the Provincial High Court of Southern Province holden in Matara.

The Provincial High Court, after hearing, had allowed the said revision application on the basis that the learned Primary Court Judge had not correctly applied the provisions of the Act.

It is against that judgment of the Provincial High Court that the Appellant has lodged the instant appeal.

Learned president's counsel for the Appellant first submitted that the learned Provincial High Court Judge should have upheld the preliminary objection raised before him by the Appellant. However, as has been pointed out by the learned Provincial High Court Judge the absence of some documents had not in any way restrained the Provincial High Court from examining the legality of the Primary Court Judge's order because the learned Primary Court Judge had not based his conclusion on those documents. Therefore, there is no basis for this Court to find fault with the learned Provincial High Court Judge for overruling the said objection.

The Appellant admittedly has purchased the relevant property on 1999-09-03. That is by the deed of transfer bearing No. 152 attested by Thilak Karunanayake Notary Public. It is also a fact that the Appellant had complained to police about the relevant dispute on 1999-09-25. It was thereafter that the Officer in Charge of Mawarala Police Station had filed the information relevant to this case in the Primary Court on 1999-10-15.

At the outset, this Court observes that the earliest starting point the Appellant may claim to have commenced possession of this property would be since 1999-09-03. This is because it is on 1999-09-03 that the Appellant had purchased this land.

Therefore, it is obvious that the Appellant could not have possessed this property for a period of 2 months immediately before 1999-10-15, which is the date on which the information had been filed in Court.

It is also clear that it is an undivided portion of land that the Appellant had purchased. It is the assertion by the Appellant himself that he had gone to Colombo soon after purchasing this land on 1999-09-03. The Appellant had observed an erected fence only when he returned to the land from Colombo after few days. This indicates clearly that the Appellant has had

no time to be in possession of this land after he purchased it. Indeed, it is to be noted that the Appellant has not stated in his affidavit also that he had possessed this land.

Therefore, the conclusion of the learned Provincial High Court Judge that it was the 1st Respondent who had been in possession of this land at the time the relevant information under section 66 was filed in Court is the correct conclusion.

This Court observes that it is the determination the learned Primary Court Judge should have made under section 68 (1) of the Act which is as follows.

Section. 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."

Since there is no evidence that any person who had been in possession of this land or part has been forcibly dispossessed within a period of two months immediately before the date on which the information was filed, there had been no necessity for a determination under section 68 (3) of the Act which is as follows.

"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."

Thus, the provisions in section 68 (3) of the Act has no application to the facts of the instant case.

This Court in the case of Punchi Nona V Padumasena and others¹ has explained as to when the said provision should be applied in following terms.

“ ... Section 68 (1) of the Act is concerned with the determination as to who was in possession of the land on the date of the filing of the information to Court. Section 68 (3) becomes applicable only if the Judge can come to a definite finding that some other party had been forcibly dispossessed within a period of 2 months next preceding the date on which the information was filed. ... ”

For the above reasons, the submission made by the learned President's Counsel for the Appellant that the learned Provincial High Court Judge has erred when he determined that it was 1st Respondent who had been in possession of this land as at the date of filing the relevant information in Court is unacceptable.

¹ 1994 (2) Sri. L R 117.

In these circumstances, this Court is of the opinion that the learned Provincial High Court Judge has correctly allowed the revision application filed before it by the 1st Respondent.

Hence, this Court decides to affirm the judgment dated 2003-05-07 of the learned Provincial High Court Judge and proceed to dismiss this appeal with costs fixed at Rs. 50,000/= payable by the Appellant to the 1st Respondent.

Appeal dismissed with costs fixed at Rs. 50,000/=

JUDGE OF THE COURT OF APPEAL

K K Wickremasinghe J

I agree,

JUDGE OF THE COURT OF APPEAL