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

01. Visvanadan Wimalanadan,

No: 102

Nuwaraeliya Road,

Para deka.

02. Visvanadan Lingeshwary

No: 102

Nuwaraeliya Road,

Para deka.

Case No. CA(PHC) 50/2014

P.H.C. Kandy Case No. 69/2010 (Rev)

M.C. Helboda Case No. 19000

2nd and 4th Respondents-Respondents-Appellants

Vs.

01. Sellaiyya Rajendran,

No: 102/1,

Nuwaraeliya Road,

Para deka.

02. Ponnaiyya Parameshwari,

No: 102/1,

Nuwaraeliya Road,

Para deka.

1st and 3rd Respondents–Petitioners-Respondents

Before: K.K. Wickremasinghe J.

Janak De Silva J.

Counsel:

N.T.S. Kularatne with S.A. Kulasuriya for 2nd and 4th Respondents-Respondents-Appellants

1st and 3rd Respondents–Petitioners-Respondents absent and unrepresented.

Written Submissions tendered on:

2nd and 4th Respondents-Respondents-Appellants on 31.08.2018

Argued on: 26.06.2018

Decided on: 18.01.2019

Janak De Silva J.

This is an appeal against the order of the learned High Court Judge of the Central Province holden in Kandy dated 18.06.2014.

On 15.11.2006 the officer-in-Charge of Pussellawa Police Station instituted proceedings in the Magistrates Court of Helboda in terms of section 66(1)(a) of the Primary Courts Procedure Act (Act). It was reported that a dispute affecting land had arisen between the parties mentioned in the report over possession of a portion of land. I will not refer to the complete litigation history but limit only to the facts relevant to this appeal.

After affording parties the opportunity of filing affidavits and counter affidavits, the learned Magistrate made order dated 06.10.2010 by which he held that the 2nd and 4th Respondents-Respondents-Appellants (Appellants) were in possession of the property in dispute since 14.11.1995 up to the time information was filed i.e. 15.11.2006 and accordingly held that they are entitled to possess the said property.

The 1st and 3rd Respondents–Petitioners-Respondents (Respondents) made an application in revision against the said order to the High Court of the Central Province holden in Kandy. The learned High Court Judge held that the learned Magistrate had correctly concluded that the Appellants were in possession of the structure marked 'C' in view of the evidence contained in documents marked 2ඵ9, 2ඵ10 and 2ඵ11 since 1995. However, he said that such a conclusion can be arrived at by applying the presumption in section 114 of the Evidence Ordinance but that the said presumption is a rebuttable presumption.

The learned High Court Judge held that the learned Magistrate had failed to address his mind to section 68(3) of the Act to determine whether dispossession has taken place within a period of two months immediately before the date on which the information was filed. The learned High Court Judge concluded that the evidence showed that such a dispossession took place and accordingly, set aside the order dated 06.10.2010 of the learned Magistrate and directed the Respondents to be restored to the possession of the land in dispute. Hence this appeal.

In concluding that the Respondents were in possession of the land in dispute the learned High Court Judge refers to the fact that three years prior to the information been filed, the kitchen situated behind the building bearing assessment no. 102/1 collapsed onto one Asoka Malkanthi's kitchen (the Appellants are claiming the disputed land through Asoka Malkanthi) and that the new structure put up by the Appellants on 26.10.2006 was therefore put up on the land which was in possession of the Respondents since 3 years prior to the date of the dispossession of the Respondents. The Appellants submits that the learned High Court Judge erred in arriving at the said conclusion.

The judgment of the learned High Court Judge quite clearly indicates that he agrees with the findings of the learned Magistrate that the Appellants were in possession of the structure marked 'C' in view of the evidence contained in documents marked 2ඵ9, 2ඵ10 and 2ඵ11 since 1995. The question is whether he was correct in concluding that the Appellants had lost possession to the Respondents. He relies on the collapse of the structure three years prior to the information been filed.

It is trite law that in a contract of tenancy, the tenant is-entitled to the use and occupation of the building, and if there is no building to use and, occupy, there is no contract. If the building is completely destroyed the contract comes to an: end even, though the land remains- (**Wille - Landlord & Tenant 4th Ed. 249**). However, this is not a case dealing with tenancy. The question is who was in possession of the land in dispute on the date information was filed or whether any person was dispossessed within two months prior to the date on which information was filed.

Sharvananda J. (as he was then) in *Ramalingam v. Thangarajah* [(1982) 2 Sri.L.R. 693 at 698] held:

> "In an inquiry into a dispute as to the possession of any land, where a breach of peace is threatened or is likely under Part VII, of the Primary Courts Procedure Act, the main point for decision is the actual possession of the land *on the date of the filing of the information* under section 66; but, where forcible dispossession took *place within two months before the date on which the said information was filed* the main point is actual possession prior to that alleged date of dispossession. Section 68 is only concerned with the determination as to who was in possession of the land or the part on the date of the filing of the information under section 66. It directs the Judge to declare that the person who was in such possession was entitled to possession of the land or part thereof. ***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 two months next proceeding the date on which the information was filed under section 66.*** The effect of this sub-section is that it enables a party to be treated to be in possession on the date of the filing of the information though actually he may be found to have been dispossessed before that date provided such dispossession took place within the period of two months next proceeding the date of the filing of the information. It is only if such a party can be treated or deemed to be in possession on the date of the filing of the information that the person actually in possession can be said not to have been in possession on the date of the filling of the information. Thus, the duty of the Judge in proceedings under section 68 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."

In this context it is important to ascertain what is meant by "dispossession". In this endeavor one must begin by ascertaining the attributes of possession.

Possession is defined by Voet in Book XLI, Tit. 2, Section 12, of his Pandects as follows:

> "Possession is kept (i) By mind and body together ; or (ii) Even by the mind alone, so much so that, although another has seized possession by stealth in the absence of the possessor, nevertheless the earlier possessor does not cease to possess until, being aware that the other has made an entry, he has not had the courage to go back into possession, because he fears superior force. In such a case he who seized possession appears to possess rather by force than by stealth. "

Possession and all its consequences may be preserved by intention alone so long as no other person has taken physical occupation of the thing [*Grotious* 2.2.4]. Possession once taken over can continue in law though not in fact and if a third party secretly enters into possession of the property possessed by the possessor, the possession of the possessor is not seized until the possessor becomes aware of the third parties claim to adverse possession.

Voet defines disturbance of possession in Book XLIII, Tit. 17, Section 3 as follows:

> "This interdict is granted against those who maintain that they also have possession, and who under that pretext disturb one who abides in possession. They may do this by bringing force to bear upon him, or by not allowing the possessor to use at his discretion what he possesses, whether they do so by sowing, or by ploughing, or by building or repairing something or by doing anything at all by which they do not leave the free possession to then- opponent. This applies whether they do these things by themselves, or bid them to be done by their agent or household, or ratify the act when done, in the same way as that in which I have said in my title on ' The Interdict as to Force and Force with Arms' that this rule holds good with the interdict against force. "

In the above context, having concluded that Appellants were in possession of the structure marked 'C' in view of the evidence contained in documents plan marked 2අ9, 2අ10 and 2අ11 since 1995, it was incumbent on the learned High Court Judge to ascertain whether the Respondents had taken physical occupation of the land in dispute thereafter. The only fact relied on by the learned High Court Judge to do so is the destruction of the structure three years prior to the information been filed. I hold that the learned High Court Judge erred in concluding that the Respondents were in possession of the land in dispute for 3 years prior to the date of the dispossession of the Respondents.

For the foregoing reasons, I set aside the order of the learned High Court judge of the Central Province holden in Kandy dated 18.06.2014 and confirm the order dated 06.10.2010 made by the learned Magistrate of Helboda.

The appeal is allowed with costs.

Judge of the Court of Appeal

K.K. Wickremasinghe J.

I agree.

Judge of the Court of Appeal