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

An appeal against the final judgment of the High Court established under Article 138 read with Article 154P (6) and Article 154P (3)(b) of the 13th Amendments of the Constitution of the Democratic Socialist Republic of Sri Lanka empowering the revisionary powers of the High Court to revise an order of the Primary Court

Court of Appeal Case No:
CA/PHC/109/2003
HC Badulla Case No:
RE/97/2002
MC Welimada (Primary Court)
Case No: **34755**

1. H.M. Karunapala,
2. Chandra Dissanayake,
   (Wife of H.M. Karunapala, both at
   'Vipula Sewana', Varallapathana,
   Mirahawatta, Welimada.)
3. Dissanayake Mudiyanselage Chandrasena,
   Varallapathana, Mirahawatta.

Respondent-Appellants

-Vs-

Mohan R.A. Ratwatte,
No. 6/3, Welimada Road,
Bandarawela.

Petitioner-Respondent

Before : **A.L. Shiran Gooneratne J.**

&

Dr. Ruwan Fernando J.

Counsel : Navin Marapana, PC with S. Hettiarachchi and U. Wickramasinghe for the Appellant.

Manohara De Silva, PC , H. Kumarage for the Plaintiff-Respondent.

Written Submissions: By the Respondent-Appellants on 29/09/2014

Argued on: 25/08/2020

Judgment on : **18/11/2020**

A.L. Shiran Gooneratne J.

The Petitioner-Petitioner-Respondent, (Respondent) filed an information report and an affidavit dated 10/05/2001, in terms of Section 66(1) of the Primary Procedure Act No. 44 of 1979, (as amended) in the Magistrates Court of Welimada regarding a dispute between the 1st and 2nd Respondent-Respondent-Appellants, (Appellants) alleging that the Appellants on 03/04/2001, had forcibly dispossessed him from the land he was in possession, since the beginning of year 2000. Having considered the information filed and the affidavits and the documents furnished by the respective parties, the learned Magistrate by order dated 27/06/2002, placed the Appellants in possession of the land in dispute. The Respondent being aggrieved by the said order preferred an application in revision

to the Provincial High Court of Badulla where the learned High Court Judge by order dated 05/02/2003, allowed the application partly, by remitting the case back to the Primary Court of Welimada, directing the learned Judge to hold a fresh inquiry. The Appellants are before this Court to challenge the said order.

The position of the Respondent is that on 03/04/2001, the Appellants accompanied by 15 to 20 thugs and goons forcibly dispossessed him from the said land. Due to the possibility that the dispute was likely to cause an imminent breach of the peace, the Respondent submits that he made a complaint to the Welimada Police regarding the incident. However, the said complaint marked 'P1', tendered together with the affidavit of the Respondent is not filed of record.

The Appellants contend that they have been cultivating the disputed land and claims exclusive possession of the land for more than 15 years. It is the position of the Appellants that they were in possession of the land on the date the information was filed and do not allege dispossession by the Respondent. In the said background the Respondent initiated proceedings for forcible dispossession by the Appellants and sought to be restored to possession. Accordingly, *"The central matter to be decided by the primary court is whether the parties had possession of the land and had been forcibly dispossessed within a period of two months immediately before the date on which information was filed under the Section 66."* (***Oliver Millous of France v. M.H.A. Haleem & Others (2001) B.L.R. p. 8)***

Under Section 68 of the Primary Courts Act, the Court can determine the person in possession at the time of filing the information and make order as to who is entitled to possession (Section 68(1)) or whether there is a forcible dispossession within a period of two months immediately before the date the information was filed and make an order directing that the party dispossessed be restored to possession. (Section 68(3)).

Having considered the facts of the case, the learned High Court Judge arrived at a clear finding that the Respondents (presently Appellants) do not pray for restoration of possession but they be declared the lawful possessors of the land in dispute in terms of Section 68 of the Act No. 44 of 1979. Accordingly, the learned High Court Judge was satisfied that a prayer for restoration to possession would not arise, however concluded, that the Magistrate has proceeded to order the restoration of possession of the Appellants, *"apparently in compliance with section 68(3) of the Act"*. The operation of Section 68(3), as noted above, is dependent upon the Court being satisfied that any person who had been in possession of the land has been forcibly dispossessed within a period of two months immediately before the date on which the information was filed under Section 66 of the Act.

On the said premise the learned High Court Judge finds that the Magistrate cannot in law make a determination under Section 68(3), directing the restoration of possession of a party dispossessed, since there can be no restoration to

possession of those already in possession. "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 in Court. Section 68(3) becomes applicable only if the judge can come to a definite finding that some other party has been forcibly dispossessed within a period of two months next preceding the date on which the information was filed". (***Punchi Nona vs. Padumasena and others (1994 2 SLR 117***)

The position of the Appellant is that in the instant case, the learned High Court Judge erred in law by assuming that the learned Magistrate applied Section 68(3) of the Act, which has no application to the facts of this case.

As observed by the learned High Court Judge, the Appellants have not prayed for restoration of possession. The learned Magistrate in the impugned order dated 27/06/2002, came to a determination that the Appellants had been in possession of the land two months or more prior to the date on which the first information was filed and that therefore, the 1st and 2nd Appellants are entitled to possession of the land, with no reference to a particular section of the Act. In the impugned order, the learned Magistrate did not arrive at a finding that the Appellants were forcibly dispossessed within a period of 2 months prior to the date on which the information was filed. The relevant potion of the order states;

"පෙත්සම්කරුගේ පෙත්සම නිශ්ප්‍රභා කරමින් ආරවුල් ගත ඉඩම් කොටසේ සන්තකය, 1, 2 වග උත්තරකරුවන්ගේ දිවුරුම් ප්‍රකාශවල උපලේඛනයේ සවිස්තරව විස්තර වන

ඉඩමේ සන්තකය 1, 2 වග උත්තරකරුට පවරා දිය යුතු බවට නියෝග කරමි." (Vide page 216 of the brief)

As noted above, the learned High Court Judge has come to a clear finding that, in the circumstances of the case, the restoration to possession of the Appellants does not arise. The affidavit filed by the Respondent is to the effect that the Appellants were in possession of the land on the date of filing of the first information. The findings of the Magistrate make no reference to Section 68(3) of the Act which directs a party dispossessed to be restored to possession. As sought by the joint affidavit filed by the Appellants, the relief granted, entitled them to be in possession of the land. Therefore, taking into consideration the entirety of the reasoning enumerated in the order, I find no ambiguity or uncertainty arising out of the impugned order against the position, that the Appellants were in possession of the land on the date of the filing of the information and accordingly are entitled to possess the land.

Therefore, the finding of the learned High Court Judge that the impugned order of the Magistrate was made in terms of Section 68(3) of the Act is misplaced in law and therefore should be set aside.

The learned High Court Judge remitted this case to the Primary Court and directed the Magistrate to hold a fresh inquiry and to make order according to law. This direction was made on the basis that the Magistrate had not made adequate inquiry on matters arising on the affidavits/documents tendered to Court. The

learned High Court Judge has also drawn attention to the schedule in the information filed in Court, dated 10/05/2001, to the boundaries of the disputed land described in plan No. 1068 dated 02/04/2001 and the boundaries of the land described by the Appellants in their affidavit. However, it is observed that the identity of the corpus is not in dispute and therefore, it has no relevance to this application.

The learned President's Counsel for the Respondent argued that the Respondents claim of dispossession is not addressed by the learned Magistrate and therefore, has failed to arrive at at any conclusive finding accepting his position or rejecting it. The learned Counsel further argued that the Court has failed to consider the documents tendered by the Respondent before arriving at the impugned order.

Plan dated 02/04/2001, made the day before the alleged forcible dispossession, is attached to the affidavit of the Respondent dated 28/06/2001, marked '෴1'. The Respondent contends that the land called 'Bandarawewa' described in the said plan was divided into separate lots, as reflected in the sketch plan marked '෴3', and leased out to individuals for cultivation. The Appellant was in possession of one of the said lots leased by the Respondent. Document marked 'P4', relates to an acknowledgment by the Respondent that the Appellants having paid annual lease rentals to the land in possession have placed their signatures. According to the Respondent, the lease given to the Appellant's were

not extended from year 2000, and the Respondent has been in possession of the said land, up to the date of forcible dispossession. The Appellants deny the said position and also deny signing such document.

The Respondent also rely on the affidavits filed by the caretaker of the land, the office clerk and the Court Commissioner in support of his position that he was in possession of the land on 02/04/2001. Documents marked 'P11' and 'P12', are tendered in proof that the Respondent was in possession of the land on 28/02/2001. The name, the boundaries and the extent of the land described in 'P11', are completely different to the land referred to in suit. However, the Respondent does not dispute the identity of the corpus. Therefore, the conclusions arrived at by the learned High Court Judge that, *"the land referred to by the Appellants does not coincide with that of the Respondent and therefore does not adequately meet the allegation of dispossession leveled against the Appellants by the Respondent"*, are totally unfounded.

The Respondent also submits that, the affidavits tendered by the Appellant's relatives and friends, who in unison repeat the same factual content, cannot be relied upon.

The Respondent strongly rely on document marked 'P3', signed by the Appellants acknowledging possession of the corpus on a lease from the Respondent. The learned President's Counsel for the Appellants drew the attention of Court to observe the dissimilarity of the signature of the Appellants in the said

document and the signature placed in the affidavit filed by the Appellants in the Magistrates Court.

As observed earlier, the documents relied upon by the Respondent to establish possession, namely, 'P3' and 'P4', are informal, hand written notes, made at the convenience of the Respondent and held in his custody. Therefore, much reliance cannot be placed on the authenticity and the contents of the said documents. The Appellant vehemently deny that he placed his signature in document marked 'P3', and there is no independent evidence in proof to conclude that he did so.

According to the affidavits marked 'V2- V12', the Appellants have been cultivating and possessing the disputed land for more than 15 years. Affidavits marked 'V28- V34' obtained from the villagers in the area also confirms that the Appellants were in possession of the land for many years. The 'Mirahawatta Village Welfare Committee' and the 'Govijana Association of Mirahawatta', in documents marked 'V14-V17' corroborates this position. The Appellants have also relied on document marked 'R13', where the Grama Niladhari of the division of 'Welikadagama' has stated that the 1st Appellant was cultivating the land in dispute. Therefore, apart from the affidavits, the evidence tendered by the Appellants can be construed as evidence obtained by independent sources which supports the position of the Appellants.

The learned Magistrate having considered the affidavits and the documents relied upon by both parties, concluded that on the evidence placed before him, the Appellants were in possession of the disputed land prior to 2 months of the date of filing of the information and therefore the Appellants right to possess the land has been recognized. The said findings amount to a clear rejection of the position of forcible dispossession contended by the Respondent.

It is vital that the learned Magistrate duly consider the opposing positions taken up by the parties. I am satisfied that the learned Magistrate has duly analyzed the evidence placed before him in arriving at the impugned order. However, even in the absence of such appreciation of evidence placed before the lower Court, the jurisdiction of this Court is wide enough to consider the available evidence, in order to decide on the necessity to transmit this case for further inquiry in terms of the procedure laid down by Section 72, of the Act.

Section 72 of Primary Court's Procedure Act reads as follows;

"*A determination and order under this part shall be made after examination and consideration of-*

a) *the information filed and the affidavits and documents furnished;*
b) *such other evidence on any matter arising on the affidavits or documents furnished as the court may permit to be led on that matter; and*
c) *such oral or written submissions as may be permitted by the judge of the Primary Court in his discretion.*

In ***Karunanayake vs. Sangakkara (2005) 2 SLR 403***, Somawansa, J. held that,

"The objective of the procedure laid down in the Primary Court Procedure Act is to do away with long drawn out inquiries and determination to be founded on the information filed, affidavits and documents furnished by the parties. With reference to the aforesaid section 72 of the Primary Courts Procedure Act, Sharvananda, J. (as he then was) in Ramalingam vs. Thangarajah at p.701 observed:

"The determination should, in the main, be founded on "the information filed and the affidavits and documents furnished by the parties." Adducing evidence by way of affidavits and documents is the rule and oral testimony is an exception to be permitted only at the discretion of the Judge. That discretion should be exercised judicially, only in a fit case and not as a matter or course and not be surrendered to parties or their counsel. Under this section the parties are not entitled as of right to lead oral evidence."

It was held in that case: (Ramalingam vs. Thangarajah, Supra)

"That where the information filed and affidavits furnished under section 66 are sufficient to make a determination under Section 68 further inquiry embarked on by the Judge was not warranted by the mandatory provisions of Section 72 and are in excess of his special jurisdiction."

Taking into consideration the said conclusions, we are satisfied that the learned Magistrate has made adequate inquiry into the issues at hand prior to making the impugned order and accordingly, we find that there is no case made out by the Respondent to direct the Magistrate to hold a fresh inquiry. In the absence of any application made by the parties in terms of Section 72 of the Act, we do not see any reason to fault the Magistrate for not exercising his discretion to lead *"such other evidence on any matter arising on the affidavits or documents furnished ---- "* to embark on further inquiry, when sufficient information was filed and affidavits tendered in order to make a lawful determination in terms of the Act.

In all the above circumstances, we dismiss the order made by the learned High Court Judge dated 05/02/2003, and affirm the order of the learned Magistrate dated 27/06/2002.

Appeal allowed. Parties are directed to bear their own costs.

JUDGE OF THE COURT OF APPEAL

Dr. Ruwan Fernando, J.

I agree.

JUDGE OF THE COURT OF APPEAL