

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

In the matter of an Appeal against the Order  
of the High Court of Jaffna exercising  
Criminal Jurisdiction

Court of Appeal Case No:  
**CA (PHC) 98/2016**  
HC Jaffna Case No:  
**1934/2016 Revision**  
MC Kilinochchi Case No:  
**PC/11645**

Consalwin Appukkuddi,  
of No. 07,  
Near Kachcheri,  
Kilinochchi.

**02<sup>nd</sup> Party Respondent-**  
**Appellant-Petitioner**

-Vs-

Ramachandran Suthakaran of New Siva  
Radium, No. 29,  
A-9 Road,  
Kilinochchi.

(a) Ayyam Pillai Kunamalai,  
No. 82/3-107,  
Ramanathan Flats,  
Colombo 13.

**4<sup>th</sup> Named of 01<sup>st</sup> Party**  
**Petitioner-Respondent-**  
**Respondent**

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

**&**

**Dr. Ruwan Fernando J.**

**Counsel :** K.V. Sirisena for the Respondent-Appellant.

Shyamal A. Collure with Prabath S. Amarasinghe for  
the 4<sup>th</sup> named 1<sup>st</sup> Party Petitioner-Respondent.

**Written Submissions:** By the 2<sup>nd</sup> Party Respondent-Appellant on 10/09/2019  
and 11/03/2020

**Argued on :** 25/02/2020

**Judgment on :** 22/06/2020

**A.L. Shiran Gooneratne J.**

The officer in charge of the Kilinochchi Police filed information in terms of the provisions contained in Section 66(1)(a) of the Primary Courts' Procedure Act No. 44 of 1979, (hereinafter referred to as the Act) in the Magistrates Court of Kilinochchi and brought forward Vivekanandan Siyamala, the Complainant and 4 other persons as the 1<sup>st</sup> Party Petitioner -Respondents (hereinafter referred to as the Respondents) and Consalwin Appukkuddi, as the 2<sup>nd</sup> Party Respondent-Respondent-Appellant (hereinafter referred to as the Appellant) the allottee of lot no. 537, over an encroachment of Lot Nos. 538, 539, 540, 541 and 542 granted by the Commissioner of Lands in 1984 on a long term lease to the respective parties.

The learned Magistrate by order dated 16/12/2015, handed over possession of the disputed allotments to the Appellant. Being aggrieved by the said order all 5 Respondents filed separate revision applications in the Provincial High Court of the Northern Province holden in Jaffna. By judgment dated 10/08/2016, the learned High Court Judge of Jaffna set aside the order of the learned Magistrate and granted possession of the said lands to the Respondents.

Being aggrieved by the said judgment, the Appellant has filed 5 separate appeals against each of the Respondents before this Court challenging the said judgment. All 5 applications were taken up together for argument since the grievance, cause for complain and the relief sought from this Court are identical.

On a complaint made on 30/04/2014, by Vivekanandan Siyamala, the Police initiated action in the Magistrates Court on 12/05/2014, for encroachment by fencing the land allotment No. 540 by the Appellant. She claimed that she was displaced during the war period and returned to the disputed premises from No. 47, Mannar Road, Vavuniya, where she is currently residing.

It is an admitted fact that the land in dispute is a State land. The instant application has been filed to have the Appellant's possession restored. Therefore, this action is limited to decide the issue of possession in order to prevent a breach of the peace and not to decide the issue finally, since the orders that a Primary Court Judge makes in such applications would be temporary in nature.

According to the affidavit and the documents attached, lot nos. 538, 539, 540, 541, and 542 are depicted in the supplement 11 of the final Plan No. TSPP 34 (Vide page 195 of the brief) called "Kilinochchikadu" which is in extent of 00A:00R:23.9P, allocated to the Respondents. It is further observed that Lot marked 537 bounded to the North of the disputed land is allocated to the Appellant. Affidavits filed in support of the facts relied upon by the respective Respondents, dated 28/01/2015, in the Magistrates Court are identical. In paragraph 6 of the said affidavit, it is averred that the Respondents "attempted to settle and start up a boutique in lot No. 540, 541 and 542" of the disputed land. Further affidavits filed by the Respondents allege that the Appellant encroached the land armed with a knife and threatened the Respondents from carrying out any development work on the land. However, there is no evidence that the Respondents were in possession or carried out any development activity in the disputed land.

It is the position of the Appellant that being displaced due to the civil disturbances, the disputed land was re-possessioned by him after the government resettlement program in 2010. In support, the Appellant has attached documents marked "2T2", "2T3" and "2T4" (Vide page 130-132), where it is stated that a religious center was established in the said premises after the re-settlement.

The contention of the Appellant is that, he was in possession of the disputed premises at the time of the dispute. *"Section 68 requires the judge to make a*

*declaration as to who is entitled to possession. He should first make a determination as to who was in possession on the date of the notice. Magistrate should evaluate the evidence". (David Appuhamy v. Yassassi Thero (1987) 1 SLR 253).* Therefore, the Court has to decide possession on the date of filing of the information under Section 66 (1)(a) of the Code or in a case where a person who had been in possession of the land and had been forcibly dispossessed within the period of two months immediately preceding the date of filing of the first information, if so the Court is required to make order directing the restoration of possession.

It is observed that the respective Respondents have filed an action dated 06/06/2013, in the District Court of Kilinochchi, seeking a declaration that the Respondents are entitled to possess the said land obtained on a long-term lease granted by the State. Paragraph 8 of the plaint refers to a written complaint made by the Divisional Secretary to the Police to have the Appellant ejected from the encroached land immediately. However, this case was withdrawn on 29/04/2014 and the first information was filed on 30/04/2014. By letter dated 23/05/2014, the first informant has requested the Divisional Secretary to confirm that the Appellant is engaged in certain development activity in the disputed land from 30/04/2014, the date the first information was received by the Police. It is also observed that the Appellant was served with a "quit notice" dated 06/05/2014, in terms of Section 3(1) of the State Lands recovery of Possession Act No. 7 of 1979

(as amended), to vacate the land marked Lot. 538, 539, 540, 541 and 549 claimed by the Respondents (Vide page 228 of the brief). Further the Pradeshiya Sabha Karachchi - Kilinochchi by letter dated 30/04/2014, has informed the Appellant that he has engaged in certain development activities on the land allotment No. 534, 539, 540, 541, and 542 allotted to the Respondents depicted in Plan No. TSPP 34, situated West of the A-9 Road, Kilinochchi Grama Niladhari Division in the Divisional Secretariat of Karachchi in the District of Kilinochchi containing Twenty three decimal Nine perches 00A:00R: 23.9P and not to carry out any further development activity or to access the said allotments without approval. It is also important to note that on 12/05/2013, the learned Counsel representing the interests of the Respondents has made an application to Court to stop the Appellant initiating any development activity in the disputed land until the final determination of this case.

The Respondents have filed this action on the basis of encroachment of the disputed land by the Appellant. In the circumstances, the Respondents have to prove to the satisfaction of Court that the disputed premises were in their possession two months prior to the date of the first information.

I will now turn to the evidence given by Kathiragamalingam Mayooraan, the Colonization officer, Karachchi Divisional Secretariat who testified before the Magistrates Court. According to his evidence the Appellant is entitled to allotment No. 537,



*"in 1984, the 2<sup>nd</sup> Party encroached to the land by force. The allotment marked 537 only assigned unto Consalwis Appukuddy. The said allotment is located by the side of the allotments that are subject to this dispute. But Consalwis Appukuddy continued to occupy in the allotments from 538-542."* (Vide page 255 of the brief.)

The learned Magistrate in Order dated 16/12/2015, has evaluated the evidence given by the above witness and has rightly concluded that the Appellant had access and was in possession of the disputed property at the time the first information was received. The learned Magistrate has also considered the effect of the "quit notice" served on the Appellant in terms of Section 3(1) of the State Lands Recovery of Possession Act No. 7 of 1979 (as amended), dated 06/05/2014, to justify that the Appellant was in possession of the land. To the contrary, by affidavit evidence or by documents submitted to Court, the Respondents have failed to establish possession either by direct physical control or by inference to be drawn from proved facts. Encroachment is a factor to be considered to establish dispossession. However, encroachment 'per se' does not prove dispossession. The person claiming to be dispossessed should be in actual or constructive possession of the disputed land. *"Mere interference with possession does not constitute dispossession."* (***Apcharaddin vs. Gurudyal AIR 1949 Cal 335***).

The Respondents have to prove with credible evidence that they were in possession of the disputed land within two months preceding the date of filing of the first information. It is observed that the conclusions arrived by the learned

High Court Judge was primarily based on the fact that the disputed land is a State Land which was granted to the respective allottees. The learned Judge has failed to give due consideration to the evidence of the Colonization Officer, the letter written to the Appellant by the Divisional Secretary of Karachchi dated 30/04/2015, or to the "quit notice" dated 06/05/2014, served on the Appellant (as the person in possession or occupation of the State land) to vacate the allotments of land claimed by the Respondents marked Lot. 538, 539, 540, 541 and 542 depicted in the said Plan No. TSPP-34 Supplement 11, in the context of an action instituted to decide possession within the confines of the jurisdiction of the Primary Courts Act.

For all the above reasons, the Judgment of the learned High Court Judge dated 10/08/2016, cannot stand and therefore, is set aside and the order of the learned Magistrate is restored.

Application allowed.

Parties in CA (PHC) 99/2016, CA (PHC) 100/2016, CA (PHC) 101/2016 and CA (PHC) 102/2016, have agreed to abide by the order delivered in this case.

**JUDGE OF THE COURT OF APPEAL**

**Dr. Ruwan Fernando, J.**

**I agree.**

**JUDGE OF THE COURT OF APPEAL**