

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

In the matter of an Appeal under Article 154P of the Constitution read together with Section 11(1) of the Provincial High Court (Special Provisions) Act No. 19 of 1990.

C.A. No: (PHC) 71/2008

H.C. Balapitiya Case No:

HC/Revision/511/2003

M.C Balapitiya Case No. 43273

Officer in Charge, Police Station,
Bentota

PLAINTIFF

-Vs.-

1. Ranjith Mervyn Ponaamperuma,
200, Galle Road, Bentota.
2. Warahena Liyanage Viraj Pradeep
Kumara De Alwis,
Robolgoda, Bentota.
3. Warahena Liyanage Chandana
Shantha Kumara De Alwis,
Robolgoda, Bentota.
4. Bertie Dhanapala Ponnampuruma,

No. 40A, Police Special Task Force
Road, Nagoda,
Kalutara.

5. Cyril Ananda Ponnampерuma,
No. 200, Galle Road, Bentota.
6. Kodithuwakku Arachchige Jamis,
Robolgoda, Bentota.
7. Nambukara Halambage Mahasena
Piyadasa,
Alawathugoda, Galle Road,
Bentota.
8. Vajira Walallawita,
Sooriyagoda, Galle Road,
Bentota.
9. W.D.L. Alwis,
Robolgoda, Bentota.
10. R.P. Lenora,
Robolgoda, Bentota.
11. H.K. Gunasekera
Robolgoda, Bentota.
12. R.A. Lenora.
Robolgoda, Bentota.

RESPONDENTS

AND

Ranjith Mervyn Ponaamperuma,
200, Galle Road, Bentota.

1st RESPONDENT - PEPITITIONER-

Vs.

2. Warahena Liyanage Viraj Pradeep
Kumara De Alwis,
Robolgoda, Bentota.
3. Warahena Liyanage Chandana
Shantha Kumara De Alwis,
Robolgoda, Bentota.
4. Bertie Dhanapala Ponnampерuma,
No. 40A, Police Special Task Force
Road, Nagoda,
Kalutara.
5. Cyril Ananda Ponnampерuma,
No. 200, Galle Road,
Bentota.
6. Kodithuwakku Arachchige Jamis,
Robolgoda, Bentoa.
7. Nambukara Halambage Mahasena
Piyadasa,
Alawathugoda, Galle Road,
Bentota.
8. Vajira Walallawita,
Sooriyagoda, Galle Road,
Bentota.
9. W.D.L. Alwis,
Robolgoda, Bentota.
10. R.P. Lenora,
Robolgoda, Bentota.
11. H.K. Gunasekera

Robolgoda, Bentota.

12.R.A.Lenora.

Robolgoda, Bentota.

RESPONDENTS - RESPONDENTS

AND NOW BETWEEN

Ranjith Mervyn Ponaamperuma,
200, Galle Road, Bentota.

1st RESPONDENT - PEPITITIONER - **APPELLANT**

-Vs.

2. Warahena Liyanage Viraj Pradeep
Kumara De Alwis,
Robolgoda, Bentota.
3. Warahena Liyanage Chandana
Shantha Kumara De Alwis,
Robolgoda, Bentota.
4. Bertie Dhanapala Ponnampuruma,
No. 40A, Police Special Task Force
Road, Nagoda,
Kalutara.
5. Cyril Ananda Ponnampuruma
(Deceased),
No. 200, Galle Road,
Bentota.

5A.Swarnamali Chandralatha Galaboda
5B.Indunil Panchamalie Ponnamperuma

Both of 58/22, De Mel Road,
Laxapathiya, Moratuwa.

6. Kodithuwakku Arachchige Jamis
(Deceased).

Robolgoda, Bentota.

6A.Hettigodage Premaratne,
Wadiyawatta, Kuda Uragaha,
Uragaha.

7. Nambukara Halambage Mahasena
Piyadasa,
Alawathugoda, Galle Road,
Bentota.

8. Vajira Walallawita,
Sooriyagoda, Galle Road,
Bentota.

9. W.D.L. Alwis (Deceased),
Robolgoda, Bentota.

10.R.P Lenora,
Robolgoda, Bentota.

11.H.K. Gunasekera,
Robolgoda, Bentota.

12.R.A. Lenora,
Robolgoda, Bentota.

RESPONDENT-RESPONDENT-
RESPONDENTS

BEFORE : Shiran Gooneratne J. &
Dr. Ruwan Fernando J.

COUNSEL : J.A.J. Udawatta with Anuruddha
Ponnamperuma for the 1st
Respondent-Petitioner-Appellant

H. Withanachchi with Shantha
Karunadara for the 2nd and 3rd
Respondent-Respondent-
Respondents

ARGUED ON : 12.02.2020

WRITTEN SUBMISSIONS

: 04.06.2019 (by the 1st Respondent-
Petitioner-Appellant)

12.02.2020 (by the 2nd and 3rd
Respondent-Respondent-
Respondents)

DECIDED ON : 12.06.2020

Dr. Ruwan Fernando, J.

Introduction

[1] This is an appeal from the judgment of the learned High Court Judge of Balapitiya dated 22.07.2008 dismissing the 1st Respondent-Petitioner-Appellant's revision application to have the order of the learned Primary Court Judge of Balapitiya dated 13.03.2003 set aside

in the exercise of its revisionary jurisdiction under Article 154P (3) (b) of the Constitution.

[2] The Officer in Charge of the Bentota Police Station filed an information in the Magistrate's Court of Balapitiya on 14.05.2002 under the Provisions of Section 66 of the Primary Courts Procedure Act No. 44 of 1979 to the effect that there was a dispute regarding a land situated at Robollagoda, Bentota between the parties and that his efforts to effect a peaceful settlement failed and that due to the said dispute, a serious breach of the peace is threatened or is likely to occur.

Affidavits of the Parties

[3] The 1st Respondent-Petitioner-Appellant (hereinafter referred to as the 1st Respondent) in his affidavit stated *inter alia*, that (i) the subject matter of this action related to an allotment of land called "Katukurunduwatta" depicted as Lot 19D in Plan No. 353 prepared for the District Court of Galle Case No. 11226; (ii) portions of the said land had been purchased by his parents and he, together with his predecessors are in possession of the said land for over 75 years; (iii) the said land is a burial ground of his family, wherein the tombs of his predecessors are located; and (iv) the 2nd and 3rd Respondents-Respondents-Respondents (hereinafter referred to as the 2nd and 3rd Respondents) unlawfully entered into the said land, demolished old tombs on the land and constructed buildings, drain lines with manholes and a rubble wall.

[4] The 2nd and 3rd Respondents filed their affidavit and stated *inter alia*, that (i) they together with their parents are in possession of a portion of the land called "Robollege Katukurudu Watta"; (ii) their houses and their parents' house, a tourist Restaurant called "Wunder

Bar" and a turtle hatchery are located on the said land; (iii) there was a private cemetery abutting their land wherein the tomb of their father is also located; (iv) they constructed a tourist restaurant and another building in the said land which is also used as a private cemetery; (v) the 3rd Respondent put up a rubble wall five years ago to prevent the soil erosion of his compound and thereafter, he repaired the said rubble wall and raised it by 1 foot; and (vi) the 1st Respondent made a false complaint without a proper identification of the subject matter of the land.

[5] The 4th to 12th Respondents-Respondents (hereinafter referred to as the 4th to 12th Respondents) who were added as Intervenient-Respondents filed their respective affidavits. The 4th to 8th Respondents filed their affidavits in support of the position taken by the 1st Respondent whilst the 9th to 12th Respondents filed their respective affidavits in support of the position taken by the 2nd and 3rd Respondents.

[6] After the filing of affidavits, counter affidavits and written submissions by the parties, the learned Magistrate fixed the matter for order on 22.01.2003. On 22.01.2003, the learned Magistrate recorded her difficulty in making the order without a local inspection and fixed the matter for a local inspection with the consent of the parties (Vide-journal entry at page 426 of the brief). On 30.01.2003, the learned Magistrate inspected the subject matter of the land in the presence of the parties and their attorneys and recorded her observations.

Findings of the Learned Magistrate of Balapitiya under Section 68 of the Primary Courts Procedure Act

[7] On 13.03.2003, the learned Magistrate delivered her order and held that the subject matter of the land related to areas of land in which

a half circular rubble wall, drain line with two manholes are located. Having identified the subject matter of the dispute, the learned Magistrate made the following findings:

- (i) the 2nd and 3rd Respondents were in possession of the areas of land on the date of the filing of the information on 14.05.2002;
- (ii) the 1st Respondent has failed to establish that the construction of the circular rubble wall and drain lines with two manholes were carried out by the 2nd and 3rd Respondents within a period of 2 months prior to the filing of the information; and
- (iii) there was no material presented by the 1st Respondent that the 1st Respondent had been forcibly dispossessed within a period of 2 months immediately before the date on which the information was filed by the Police.

[8] Accordingly, the learned Magistrate declared that the 2nd and 3rd Respondents were entitled to possess the areas of land in which the half circular rubble wall, drain lines with two manholes are located and therefore, the 1st Respondent shall not disturb the possession of the 2nd and 3rd Respondents. Her findings at pages 309 and 312 of the brief are as follows:

2002.05.11 එති දින වන විටත් ප්‍රය්‍රාගගත කළුලේ බැමීම සහ වෙළඳ බැස යන මෙහෙතුළු එම ස්ථානයේ නිවේ ආති බැවින්, මේ නමුවේ තොරතුරු වැඩ්තාව අධිකරණයේ ගොනු කරන අවස්ථාව වන විටත් ප්‍රය්‍රාගගත කොන්ත්‍රේර් බැමීම සහ මෙහෙතුළු ආදිය අදාළ ස්ථානයේ තිබූ බව පැහැදිලි වේ. ඒ අනුව පැහැදිලි වන කරුණ වනින් එම අවස්ථාවේදී එකී තුළු කොටස් සහතිකය 2, 3 වගුන්තරකරුවන් විධින් දරන දේ බවයි.

1 වන වගුන්තරකරු පොලිසියට පැමිණිලි කරන අවස්ථාවේදී එම තාප්පය බැඳීම ආරම්භ කර කළක් ගතවී ආති බව පැහැදිලි වේ. එම අවස්ථාවේදී ගල් බැමීම අසල ඩිමෙන්ති පිළියෙළ කරමින් නිබූ බව පොලිස් නිලධාරියා දැක තිබුන ද එම ගල් බැමීම ඇල්තින් සාදමින් තිබුණු බවක් ඉන් අදහස් වනින් නාත. එම හෝඛව මුළුන් එම ස්ථානයේ පැවති ගල් බැමීම එම අවස්ථාවේදී තමන් ඇල්ති කරමින් සිටි බවට 2, 3 වගුන්තරකරුවන් ඉදිරිපත් කරන ස්ථාවරය බැහැර කිරීමට ද හැකියාවක් නොමැති වීමය.

ප්‍රක්ෂේප සොහොන් ඉඩම කෙරෙහි 1 වන වගලන්තරකරුගේ අයිතිය හා කාලාන්තරයක් එහි සහ්තකය දැරීම පිළිබඳ ව සංහෝ සාක්ෂි ප්‍රමාණයක් 1 හා 4, 8 වගලන්තරකරුවන් අධිකරණයට ඉදිරිපත් කර ඇති නමුන් ගල් බැමීම හා මෙන්හෙල් ආදිය ඉදි කිරීම තොරතුරු වාර්තාව ගොනු කිරීමට ඉහතින් වූ මාස 2 කාල සීමාව ඇතුළත සිදු කරන ලද බව පස්ප්‍ර කළ හැකි ආකාරයේ කිසිදු සාක්ෂියක් ඉදිරිපත් කිරීමට මුළු පොහොසත් වී නැත.

මේ අනුව සොහොන් භූමියට අයන් ඉඩමේ ගල් බැමීම හා මෙන්හෙල් ආදිය පිහිටා ඇති භූමි කොටසේ සහ්තකයෙන් තොරතුරු වාර්තාව ගොනු කිරීමට ප්‍රථමයෙන් වූ මාස 2 ඇතුළත 1 වන වගලන්තරකරු නෙරපන ලද බවට සැහීමට පත්වීමේ හැකියාවක් මේ අධිකරණයට නැත.

ඒ අනුව ප්‍රක්ෂේප ගල් බැමීම හා මෙන්හෙල් ආදිය පිහිටා ඇති භූමි කොටසේ සහ්තකය 2, 3 වග උත්තරකරුවන්හි නිමි විය යුතු බවටත්, නිසි අධිකරණ බලය ඇති අධිකරණයක නඩු පවතා ලබා ගන්නා නියෝග තෙ මිස 2, 3 වගලන්තරකරුවන් සහ එහි අයිතිවාසිකමට යම් බාධාවක් නොකළ යුතු බවටත් 1, 4-8 වගලන්තරකරුවන්ට නියෝග කරමි.

Application in Revision to the Provincial High Court

[9] Being aggrieved of the said order of the learned Magistrate of Balapitiya, the 1st Respondent made an application in revision to the Provincial High Court holden in Balapitiya seeking to have the said order of the learned Magistrate dated 13.03.2003 revised and declared null and void. After inquiry, the learned High Court Judge by his judgment dated 22.07.2008 affirmed the order of the learned Magistrate and dismissed the revision application.

Appeal to the Court of Appeal

[10] Being aggrieved by the said judgment of the learned High Court Judge of Balapitiya dated 22.07.2008; the 1st Respondent has preferred this Appeal to this Court.

Submission of the 1st Respondent on the Procedure Adopted by the Learned Magistrate for conducting a Local Inspection

[11] At the hearing of this appeal, the learned Counsel for the 1st Respondent submitted that the procedure adopted by the learned Magistrate in conducting the inspection 2 months after the date of the

first information was filed on 14.05.2002 was contrary to the provisions of the Primary Courts Procedure Act. He further submitted that the order made by the learned Magistrate under section 68 of the Primary Courts Procedure Act disregarding the affidavits and the Police Investigation notes offend the mandatory provisions of the Primary Courts Procedure Act and therefore, the said order dated 13.03.2003 is null and void.

(a) Scope of the Inquiry under Section 68 of the Primary Courts Procedure Act

[12] In the present case, the dispute between the 1st Respondent and the 2nd and 3rd Respondents relates to the possession of a land under Part VII of the Primary Courts Procedure Act (hereinafter referred to as the ‘Act’). In an inquiry into a dispute as to the possession of any land under section 68 (1), the main point of decision is as to who was in possession of the land on the date of the filing of the information to the Court under section 66 of the Act. Section 68 (3) becomes applicable where the judge can come to a definite finding that some other party had been dispossessed within a period of 2 months next preceding the date on which the information was filed.

[13] The procedure of an inquiry under Part VII of the Act is *sui generis* and the procedure to be adopted and the manner in which the proceedings are to be conducted are clearly set out in sections 66, 71 and 72 of the Act (*Ramalingam v. Thangarajah* 1982 (2) Sri LR 693, at p. 699). Section 72 prescribes the matters on which the determination under section 68 and 69 of the Act is to be based and such determination under Part VII 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.

[14] A wide discretion has been given to the Primary Court judge under section 72 to decide on the type of evidence and material on which he should act in making his determination under section 68 (1) or 68 (3) of the Act. The only limitation is that he must act judicially and as far as practicable, depending on the circumstances of each case.

[15] While the rule is that the determination should be founded on the information filed and the affidavits and documents furnished by the parties, oral testimony is an exception to be permitted only at the discretion of the judge and such discretion should be exercised judicially only in a fit case and not as a matter of course (*Ramalingam v Thangarajah* (supra, at p. 701). When the possession or dispossession of any of the parties at the relevant time is disputed, then the Court may permit oral evidence of the parties to be led and the witnesses should be directed to that question only, namely, for the purpose of ascertaining the true position without however, converting the inquiry into a full scale trial of civil issues, as in a civil case (*supra*).

[16] Where the information filed and the affidavits and documents furnished under section 66 (2) are sufficient in the opinion of the Judge to make a determination under section 68, either for the determination of the identity of the land in dispute or the question of possession and

dispossession, any further inquiry embarked by the Judge is not warranted by the mandatory provisions of section 72 of the Act.

(b)The Validity of the Inspection made by the Magistrate on 03.01.2003

[17] If the identity of the land or part thereof, is disputed by one or more of the parties, it is incumbent on the Judge of the Primary Court to identify the land which is the subject matter of the dispute before proceeding to consider the question of possession under section 68 (1) of the Primary Courts Procedure Act (*David Appuhamy v. Yassassi Thero* 1987 (1) Sri LR 253 at 260). In such case, if the Judge of the Primary Court is of the view that a local inspection is necessary for the identification of the land in dispute, he is entitled in my view, to inspect the land in question with the consent of the parties for that purpose.

[18] Let me first deal with the question whether the learned Magistrate who was acting in her capacity as a Primary Court Judge under the Primary Courts Procedure Act was justified in conducting a local inspection of the disputed areas of land before making the order under section 68 of the Act. The 1st Respondent has taken up the position in his affidavit that the 2nd and 3rd Respondents made the disputed constructions within a burial ground, which is lot 19D in Plan No. 353 exclusively used by their family. The 2nd and 3rd Respondents have taken up the position that the 3rd Respondent constructed a rubble wall about 5 years ago to prevent the soil erosion of the compound of his garden and other constructions were made in their land called “Robollege Katukurudu Watta”. Their position was that the disputed burial cemetery is located abutting their land in which burials of their relations too had taken place.

[19] The First Police Officer (Police Sergeant 8746) who made notes on 11.05.2002 had observed the disputed constructions, namely, two manholes, drain lines and a rubble wall about 3 feet in height within the land claimed by the 1st Respondent. The Second Police Officer (Sub Inspector Silva) who made observations on the direction of the learned Magistrate on 15.05.2002 too had observed a rubble wall about 3 feet in height, constructed by the 2nd and 3rd Respondents in front of their newly built structures. He had further observed that the right side of the rubble wall had been raised by the 2nd and 3rd Respondents by another 1 foot on 15.05.2002. He had however, not made any reference to the manholes or drain lines observed by the First Police Officer.

[20] In view of the absence of any reference to the manholes and drain lines in the notes of the Second Police Officer and the position taken up by the 2nd and the 3rd Respondents that the 1st Respondent had made the Police Complaint without a proper identification of the land in question, the learned Magistrate was justified in expressing her difficulty in making the order without a local inspection. The minutes of the learned Magistrate dated 22.01.2003 at page 426 of the brief are as follows:

ස්ථාන පරික්ෂා නොකර නියෝගය ලබා දීම අපහසු බව පෙනේ. ඒ අනුව ස්ථාන පරික්ෂාවට පාර්ශවයන් කාමති දැයි විමසා බලමේ. එම කාමති බව දන්වා සිටී. ස්ථාන පරික්ෂණය :30/01

[21] She has further stated in her order dated 12.03.2003 that the local inspection was required for the identification of the disputed areas of land as indicated at page 306 of the brief:

පාර්ශවයන් විසින් දූටරම් පිට කරුණු ඉදිරිපත් කිරීමෙන් අනතුරුව සියලුම පාර්ශවයන් වෙනුවෙන් මුළුන්ගේ උගත් තිබේ නිසිදු මහත්වරුන් ලිඛිත දැනු ද ගෙනු කර ඇති අතර, අධිකරණය විසින් නියෝගය දීමට සුදානම් වූ අවස්ථාවේ ද ස්ථාන නිරික්ෂණය කිරීමෙන් තොරව තුළියේ පිහිටිම පිළිබඳ ව යම් අවබෝධයක් ලබා

ගැනීම අපහසු බව පෙනි ගිය හේතුව් 2003.01.30 ටැනි දින අධිකරණය විසින් සේවානය නිරීක්ෂණය කොට ඇත.

[22] It is absolutely clear that the learned Magistrate deemed that a local inspection was necessary for the identification of the disputed areas of land and hence, she was justified in deciding to have a local inspection with the consent of the parties. Hence, the learned Magistrate had properly conducted the local inspection in the presence of the parties and their attorneys (Vide- observations of the learned Magistrate at page 299 of the brief).

[23] During the hearing, the learned Counsel for the 1st Respondent conceded that the inspection was conducted with the consent of the parties. However, his complaint was that the inspection should have been conducted within a period of 2 months from the date of the information filed by the Police on 11.05.2002. He argued that the inspection made 8 months after the date on which the information was filed by the Police was contrary to the time-limit prescribed in section 68 (3) of the Act.

[24] Section 78 of the Primary Courts Procedure Act read with section 428 of the Civil Procedure Code confers powers on a Judge of the Primary Court to conduct a local inspection in person for the purpose of identification of the land or part thereof which is the subject matter of the dispute.

[25] The learned Counsel for the 1st Respondent further submitted that at the local inspection, the learned Magistrate had failed to make any observations or inquiry with regard to the period and/or time of such constructions made within the burial ground. In my view, a local inspection by the Judge of the Primary Court is permitted within its own limitations and where it is done for the purpose of identification of the

land or part thereof, such inspection shall be limited to that purpose only.

[26] Unless the parties have consented to be bound by any order made by a Magistrate upon a local inspection, the learned Magistrate in my view is only entitled to embody in her inspection notes, the facts observed by her on the spot. The Magistrate is not, however, entitled to embody in her inspection notes the facts stated to her there i.e. statements made to her by the witnesses and make use of such facts to determine the question of possession and dispossession.

[27] If the Magistrate conducts an inspection for the purpose of identification of the subject matter in question, but oversteps or exceeds his limitation and decides the question of possession or dispossession under section 68 by solely relying on inspection notes, disregarding the affidavits, documents and notes of the investigating officers, he would be acting in violation of section 72 of the Act.

[28] It is imperative that when the inspection is done for the identification of the land in dispute or parts thereof, the inspection should be directed to that question only and the Judge should not allow the inspection notes to be used for the sole purpose of the determination of the possession and dispossession under section 68. The determination of the question of possession or dispossession under section 68 shall always be based on the examination and consideration of material prescribed by section 72 of the Act.

[29] Hence, the determination as to who was in possession of the land or part of the land on the date of the filing of the information under section 68 (1) and where section 68 (3) applicable, the determination that some party had been forcibly dispossessed within a period of 2

months next preceding the date on which the information was filed under section 66 (1) shall be made after the examination and consideration of matters set out in section 72 of the Act.

(c) Long Delay of the Local Inspection

[30] I shall now proceed to consider the submission made by the learned Counsel for the 1st Respondent that the long delay in making the inspection after the alteration of the *status quo* by the 2nd and 3rd Respondents made the inspection irrelevant for the determination of the question of possession and dispossession under section 68 (1) and 68 (3) of the Act.

[31] The information was filed by the Bentota Police on 14.05.2002 in pursuant to a Complaint made by the 1st Respondent to the Bentota Police on 11.05.2002. The first investigation notes made by Police Sergeant 8746 dated 11.05.2002 refer to the 2 manholes, drain lines and a rubble wall about 3 feet in height constructed by the 2nd and 3rd Respondent within the disputed land. The second investigation notes made by Sub Inspector Silva indicate that on 15.05.2002, the 2nd and 3rd Respondents had raised the right side of the rubble wall by 1 foot. Sub Inspector had however, directed the 2nd and 3rd Respondents not to make further constructions. The parties filed original affidavits and counter affidavits and thereafter, written submissions were filed on 04.12.2002. As noted, the learned Magistrate was of the view that a local inspection was necessary for the identification of the disputed areas and hence, the inspection was held on 30.01.2003.

[32] Except for raising the right side of the wall by 1 foot on 15.05.2002, I find that no material had been placed before the learned Magistrate by the 1st Respondent that after 15.05.2002, further constructions were

made by the 2nd and 3rd Respondents or that they altered the *status quo* of the land after the Police directed them not to make further changes to the disputed land.

[33] Accordingly, I am of the view that the *status quo* that prevailed on 15.05.2002 after the Police prevented the 2nd and 3rd Respondents from making any further constructions, remained unchanged at the time of the inspection made by the Learned Magistrate on 30.01.2002. The 1st Respondent has failed to present credible material to satisfy this Court that the *status quo* had been materially altered by the 2nd and 3rd Respondents after 15.05.2002 and thus, the local inspection became irrelevant. The 1st Respondent has further failed to present credible material that any prejudice had been caused to the 1st Respondent by the inspection conducted by the learned Magistrate on 30.01.2003.

(d) Identity of the Subject Matter of the Land or Part thereof

[34] I shall now proceed to consider the question whether the learned Magistrate had properly identified the location of the disputed areas of land before proceeding to consider the question of possession and dispossession under section 68 of the Act.

[35] It is not in dispute that the land called “Robollege Katukurundu Watta and Ratmahara Pathiya” is depicted in Plan No. 353 prepared for the District Court of Galle Partition Case No. 11226 and lot 19D in extent of 1 rood and 32 perches depicted in the said Plan was allotted to all 20 defendants in common (Vide- X12 and X13). It is also not in dispute that the burial ground in question is abutting the 2nd and 3rd Respondents’ land. The existence of a burial ground is not in dispute in the present case.

[36] The 1st Respondent and the 4th to 8th Respondents had stated in their affidavits that the dispute related to the encroachment of 3-4 perches of the burial ground and the construction of drain lines with manholes and a circular rubble wall by the 2nd and 3rd Respondents within the burial ground on 11.05.2002. (Vide- paragraph 7 of the affidavit of the 1st Respondent dated 28.07.2002 and paragraph 4 of the affidavit of the 4th to 8th Respondents dated 30.07.2002).

[37] The learned Magistrate who inspected the land in dispute in the presence of the parties and their attorneys on 03.011.2003 had made the following observations:

- (a) The disputed land was abutting the land of the 2nd and 3rd Respondents and there was a fence between the two lands on the railway side and some Kottamba Trees were standing at a distance of 25 feet;
- (b) A square type concrete slab existed between the two Kottamba Trees and a shower had been put up by the 2nd and 3rd Respondents on the said concrete slab and some tomb existed 2 ½ feet away from the 2nd Kottamba Tree within the burial ground;
- (c) Two concrete posts had fallen, one near the 2nd Kottamba Tree and the other about 30 feet away from the 2nd Kottamba Tree;
- (d) A circular rubble wall had been constructed on the disputed land, of which 3 feet of the wall is located within the 2nd and 3rd Respondents' land while the remaining part of the wall is located within the land claimed by the parties to the dispute as a cemetery;

- (e) There was no clear boundary line between the two lands in the area close to the rubble wall which is overgrown with weeds on both sides of the land;
- (f) Some tombs were visible on the land claimed to be a burial ground by the 1st Respondent and further, a boundary line was visible between the land claimed to be a burial ground and the land of the 2nd and 3rd Respondents when the inspection was made from the place where the Police Jeep was parked.

[38] The learned Magistrate has however, not observed the manholes due to the overgrown weeds in the area at the time of the local inspection (pages 300-304 of the brief). However, the learned Magistrate has clearly examined the observation notes made by P.S. 8746 who had noted the existence of two manholes, a drain line and a rubble wall within the land in question.

[39] A perusal of the inspection notes made by the learned Magistrate and her order dated 13.03.2003 clearly reveals that she had only used inspection notes to facilitate the identification of the land in dispute and thus, she has not overstepped her limits in conducting the local inspection. On the other hand, the learned Magistrate has also examined the investigation notes made by P.S. 8746 and Sub Inspector Silva, the affidavits of the parties and the annexed documents to identify the subject matter of the dispute.

[40] I am of the view that the procedure adopted by the learned Magistrate in conducting the inspection with the consent of the parties cannot be held to be prohibited by sections 66, 71 and 72 of the Primary Courts Procedure Act. For those reasons, I hold that the learned Magistrate had examined the investigation notes made by the two Police

Officers, the affidavits of the parties, annexed documents and her observation notes and properly determined that the subject matter of the dispute relates to the areas of land in which drain lines, 2 manholes and a half circular rubble wall were located within the burial ground (Vide-page 626 of the brief).

The Question of Possession and Dispossession

[41] The learned Counsel for the 1st Respondent submitted that the learned Magistrate had solely relied on the inspection notes made by her 8 months after the date of the information was filed under section 66 of the Act and wrongfully determined the question of possession and dispossession under section 68 of the Act. The learned Counsel for the 1st Respondent strongly relied on the two notes made by Police Sergeant 8746 on 11.05.2002 and Sub Inspector Silva on 15.05.2002 and argued that the rubble wall in question had been constructed on or about 11.05.2002 and thus, it was not a structure made beyond 2 months immediately prior to the filing of the information on 14.05.2002.

[42] The learned Counsel for the 1st Respondent further submitted that the learned Magistrate had disregarded the two notes made by the Police Officers and erroneously held that the 1st Respondent had failed to establish that the structures in question had been built within the period of 2 months prior to the date on which the information was filed by the Police.

[43] I shall now proceed to consider whether the learned Magistrate had overstepped the limits and made use of his local inspection in such a manner to decide the question of possession or dispossession disregarding the affidavits and documents furnished and notes made by the Police Officers on 11.05.2002 and 15.05.2002.

[44] Sections 68 (1) of the Primary Courts Procedure Act reads as follows:

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.

[45] The main point for the determination under section 68 (1) is as to who was in possession of the land or part thereof on the date of the filing of the information under section 66. The learned Magistrate having identified the subject matter of the dispute had proceeded to determine the next question, namely, as to who was in possession of the land on the date of the filing of the information on 14.05.2002. Her observations in her order at page 306 of the brief are as follows:

පාර්ජවයේ ඉදිරියේ කර ඇති සියලුම කරුණු සබකා බැඳීමේ 2,3 වගලන්තරකරුවන් විසින් ඉදිරිපත් කර ඇති අර්ධ කවාකාර බැමුම පිහිටි තුමියේ සන්නිකය හා 2, 3 වගලන්තරකරුවන් විසින් නල හා මෙන්තුළු දො අපද්‍යා බිජ්‍යන දැනැයි කියන තුළි කොටසේ සන්නිකය කටිරෝකට නිමිතිය යුතුද යන ප්‍රශ්නය මේ අධිකරණයට විසඳීමෙන් සිදු වී ඇති බැවින් එය ප්‍රාථමික අධිකරණ නඩු විධාන පනන් 68 වන වගන්තිය යටතේ තීරණය කළ යුතු ගාටල්වක් වන බව පැහැදිලි වේ.

[46] The complaint of the 1st Respondent was that the 2nd and 3rd Respondents had encroached onto the disputed burial ground, which was exclusively used by his family members, demolished tombs, constructed buildings, a rubble wall and drain lines with manholes on 11.05.2002. The same position had been taken by the 4th to 8th Respondents in their affidavits without any supporting documents.

[47] In pursuant to the first complaint made by the 1st Respondent on 11.05.2002, the Police Sergeant 8748 had visited the place of the

dispute and observed that (i) the 2nd and 3rd Respondents had constructed a two-storied new building within their land; (ii) in front of the said building and beyond the claimed boundary line, the 2nd and 3rd Respondents had constructed a rubble wall which is about 3 feet in height on the land claimed by the 1st Respondent; (iii) 2 manholes with drain lines had been constructed by the 2nd and 3rd Respondents with concrete blocks in the disputed land to flow water of the 2nd and 3rd Respondents' hotel and house into the 1st Respondent's land.

[48] A perusal of both notes made by two Police Officers reveals that they had not noted that the disputed constructions, including the rubble wall (3 feet in height) and drain lines with manholes had been constructed by the 2nd and 3rd Respondents **on 11.05.2002** as claimed by the 1st Respondent and the 4th to 8th Respondents. Sub Inspector Silva had only noted that the right side of the rubble wall which was about 3 feet in height at that time had been raised by the 2nd and 3rd Respondents by 1 foot **on 15.05.2002**.

[49] A perusal of the order made by the learned Magistrate reveals that she has correctly relied on the notes made by Police Sergeant 8748 and his sketch and decided that the two manholes marked 'D' and 'F' had been constructed with concrete blocks by the 2nd and 3rd Respondents before the date of the filing of the information on 11.05.2002.

[50] Furthermore, Sub Inspector Silva had also observed a heap of rubble on the ground closer to the rubble wall on the disputed land and that they had been overgrown with weeds, which he had noted, indicated that the rubble had been brought to the disputed land by the 2nd and 3rd Respondents sometime ago. The observations of Sub Inspector Silva at page 267 of the brief are as follows:

මෙම වග උත්තරකරුවන් අලතින් සාදා ඇති ගොඩනැගිලි ඉදි කර ඇති කාලය පරදේශයේ සුද්ධ පටිතු කර කළ ගේ වලින් තාප්පයක් බැඳ ඇත. මෙම තාප්පය වම් පස කොටස අවියක් පමණ බැඳ ඇති අනර දකුණු පස පැහැන්ට වෙන්න අඩි 3ක් පමණ බැඳ ඇත. ඇ දින මෙම තාප්පයක් දකුණු පස කොතු පමණක් අවියක පමණ ප්‍රමාණයක් ඇ දැන බැඳ ඇති බව පෙනේ. මම මොවුන්ට නැවතත් දැනුම් කුන්නා දැනට මේ පිළිබඳව නඩුවක් පවතින බැවින් මෙය වෙනස් කිරීම නොකරන ලෙසය. දැන් මා එම ස්ථානයේ දළ සටහනක් ඇඟිල්. තවද මෙම ස්ථානයේ දීමා ඇති කළ ගේ විට උතින් වැඳ් පැඳ වී ඇති බව පෙනී යයි. එහෙයින් පසුගිය කාලක ගෙනන් දමන දෙ ගේ බව පෙනී යයි

[51] On the other hand, the 1st Respondent himself has admitted in his own first Complaint made to the Bentota Police on 11.05.2002 that (i) the 2nd and 3rd Respondents constructed an unauthorised Tourist Restaurant on the disputed burial ground **5 years ago**; (ii) thereafter, they entered into the same land and constructed a permanent building **1 year ago**; (iii) they made holes behind his father's tomb which is located inside the burial ground and put waste of their turtle hatchery into these holes; and (iv) they fixed a telephone post inside the burial ground, laid a concrete slab on the ground and fixed a shower to a concrete post by removing one of the temporarily fixed concrete posts.

[52] The relevant parts of his own Complaint made to the Bentota Police on 11.05.2002 at page 263 of the brief are as follows:

මෙම ඉඩමට නැගෙනහිර පැන්තේ නො. 1,2 යන යාබදු ඉඩම් තීරු 02 බෙන්තොට රාජ්‍යාලෝක විරාප් ගණනිලක සහ වන්දන ගණනිලක සොහොයුරුන් දෙදෙනා පදිංචිව සිරිනවා. දැනට අවුරුදු 05 ක් පමණ කාලයක සිට මෙම සොහොන් තුමිය (19 ඩී) ඉඩම් අනවසරයෙන් සංවාරක ආපනාකාලාවක් සාදා තිබෙනවා. දැනට අවුරුදුකාර පමණ පෙර එම එඩිමේ කොටසක් ඇතුළත්ව ස්ථීර ගොඩනැගිල්ලක් නැවතත් තනා තිබෙනවා. මෙම සොහොන් බිමේ මගේ මිය ගිය සහ පවුල් සහෙදුර සහෙදියෙන්ගේ අවසන් කරයුතු සිදු කර තිබෙනවා. දැන් මගේ පියාගේ සොහොන් මායිමේ සිට අඩි 06, 07 ක් තරම් ප්‍රමාණයක් අනවසරයෙන් ඉහත නම් සඳහන් විරාප් ගණනිලක සහ වන්දන ගණනිලක දෙදෙනා විසින් අල්ලාගෙන තිබෙනවා.

[53] The position of the 1st and the 4th to 8th Respondents that all constructions were made by the 2nd and 3rd Respondents on 11.05.2002 is clearly not credible and not supported by the investigation notes made by the two Police Officers on 11.05.2002 and 15.05.2002. The

first complaint made by the 1st Respondent himself to the Bentota Police on 11.05.2002 contradicts his own position taken in his affidavits.

[54] In the result, the learned Magistrate has come to a correct finding that the disputed constructions had been made by the 2nd and 3rd Respondents on the disputed land long time before the date of the filing of the information on 14.05.2002. Accordingly, the learned Magistrate has correctly held under section 68 (1) of the Act that the disputed areas of land, including the constructions in question had been in the control and possession of the 2nd and 3rd Respondents on the date of the filing of the information on 14.05.2002.

Forcible Dispossession of the 1st Respondent within a Period of 2 Months from the Date of the Information filed under Section 66 (1)

[55] Sections 68 (2) of the Primary Courts Procedure Act reads as follows:

“68(2) 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.”

[56] Section 68 (3) becomes applicable only if the Judge of the Primary Court can come to a **definite finding** that some other party had been forcibly dispossessed within a period of 2 months immediately before the date on which the information was filed under section 66 of the Act (*Ramalingam v. Thangarajah* (supra)). Thus, it is the duty of the Primary

Court Judge to determine whether the 1st Respondent had been forcibly dispossessed within a period of 2 months immediately before the date on which the information was filed under section 66 of the Act.

[57] Having determined that the 2nd and 3rd Respondents had been in possession of the disputed areas of the land, the learned Magistrate had proceeded to consider under section 68 (2) of the Act, whether the 1st Respondent had been forcibly dispossessed within a period of 2 months immediately before the date on which the information was filed by the Police on 14.05.2002 (Vide- pages 622 and 623 of the brief).

[58] It was the contention of the learned Counsel for the 1st Respondent that the learned Magistrate had erred in holding that there was no evidence to satisfy that the circular rubble wall had been constructed within a period of 2 months from the date of the filing of the information on 14.05.2002. He relied on the notes of the two Police Officers and submitted that the Police observation clearly establish that the disputed constructions were made by the 2nd and 3rd Respondents on 11.05.2002. The 1st Respondent has stated in his affidavit dated 28.07.2002 that the 2nd and 3rd Respondents entered into the burial ground and demolished old tombs of the land, constructed a circular type rubble wall and a drain line with manholes in an area of about 3-4 perches. Paragraph 7 of his affidavit dated 28.07.2002 reads as follows:

7- වර්ත 2002.05.11 දින හෝ එට ආසන්න දිනයකදී 2, 3 වගඳුන්නරකරුවන් විසින් බලන්නාරී සහ නීති විරෝධී ව ක්‍රියා කරමින් ගෙන කි යොහොත් බිම අඟල ඉඩමේ උතුරු මායිමේ පර්වස් තුනක් හෝ හනරක් පමණ ප්‍රමාණයක වෙළවල් හාරා වනුර ගාලු බස්නා මෙන්නේල් එකක් ද තනා ඇති අතර අර්ධ කවාකාර සිමෙන්ති බාමීමක් බැඳ ඇති බවද ක්‍රියා සිටි. එසේ මෙම බලන්නාරී ක්‍රියාව නියා එම ඉඩම්

කොටස් තිබූ සොහොනක් ද විනාශ කර ඇති බවද කියා සිටී. මේ පිළිබඳ ම විසින් වර්ණ 2002.05.11 දින පොලිස් ස්ථානයට පැමිණිලි කරන ලද බවත් එකී පැමිණිල්ල 1වි ලෙස ලකුණු කර ඉදිරිපත් කරන බවත් කියා සිටී.

[59] The 1st Respondent has further stated in his affidavit dated 28.07.2002 that the 2nd and 3rd Respondents entered into the disputed land on or about 11.05.2002 and made the unauthorised structures, including the circular type rubble wall, manholes and drain lines on 11.05.2002. Paragraph 11 of the said affidavit dated 28.07.2002 is as follows:

11- මා කියා සිටින්නේ මාගේ ඉඩමට වර්ණ 2002.05.11 දින නො ඊට ඇයන්න දිනක බලහන්කාරීව ඇතුළු වී ඉහත ති පරිදි අගල් රක් පමණ එස්මෙල්න් පයිපේපයක් යොදා වනුර බැසිමට සුදුනම් කර ඇති බවද, මෙන්හෙල් දිමෙන්න් ගල්වාන් බැඳ ඇති බවය. එම නිසා එකී වනුර බට ඉවත් කර, මෙන්හෙල් ඉවත් කර, වනුර බැසිම නවකා ඉදි කර ඇති ගල් බැමිම ඉවත් කර එම ඉඩමේ නිරවිල් නා සාම්කාමී තුක්නිය මා හට ලබා දෙන ලෙස අයද සිටී.

[60] As noted in paragraph 52 of this judgment, the 1st Respondent has clearly admitted in his Police Complaint made on 11.05.2002 that the 2nd and 3rd Respondents first entered into the disputed burial ground 5 years ago, constructed a tourist restaurant 5 years ago and thereafter a made a permanent building 1 year ago. He has further admitted in his Police Complaint that the 2nd and 3rd Respondents encroached an extent of 6-7 purchases onto his land, dug holes behind his father's tomb and put waste from their turtle hatchery into those holes, fixed a telephone pole and laid a concrete slab for supporting a shower by removing a concrete post attached to the boundary line.

[61] The admissions of the 1st Respondent that the 2nd and 3rd Respondents entered into the disputed land and constructed a hotel 5 years ago and thereafter a permanent building 1 years ago clearly negate the position taken by the 1st Respondent and the 4th to 8th Respondents in their affidavits that the 2nd and 3rd Respondents first

entered into the disputed land and carried out all the unauthorised constructions on 11.05.2002.

[62] The 1st Respondent strongly relies on the notes made by the two Police Officers to establish that the 1st Respondent had been dispossessed by the 2nd and 3rd Respondents when they made disputed constructions on 11.05.2002. The 1st Respondent in particular, relies on the observation made by Sub Inspector Silva that when he visited the disputed land on 15.05.2002, the 2nd and 3rd Respondents were in the process of raising the rubble wall by another 1 foot.

[63] The position of the 2nd and 3rd Respondent was that the 3rd Respondent only repaired the old rubble wall constructed by him 5 years ago to prevent soil erosion of the 3rd Respondent's compound as the 3rd Respondent was in the possession of the disputed constructions.

[64] Police Sergeant 8746 who investigated the complaint made by the 1st Respondent on 11.05.2002 had observed that when he visited the disputed land, a rubble wall about 3 feet in height had been constructed in front of the newly constructed building of the 2nd and 3rd Respondents and further, drain lines with manholes had also been constructed in the disputed burial ground claimed by the 1st Respondent. If the rubble wall, drain lines with manholes were constructed by the 2nd and 3rd Respondents on 11.05.2002 as claimed by the 1st Respondent, Police Sergeant 8746 would have observed recent constructions and noted them his investigation notes. He, had not however, noted that the said rubble wall was a recent construction as claimed by the 1st Respondent.

[65] On the other hand, Sub Inspector Silva too had not noted on 15.05.2002 that the rubble wall in question had been constructed

recently as claimed by the 1st Respondent. He had observed that (i) the left side of the constructed circular rubble wall was about 1 foot in height and the right side of the rubble wall was about 3 feet in height. The notes of Sub Inspector Silva, do not indicate whatsoever, that the entire rubble wall in question was a recent construction as claimed by the 1st Respondent. His notes only indicates that the height of the right side of the rubble wall had been raised by 1 foot on 15.05.2002 by the 2nd and 3rd Respondents (Vide- notes at page 267 of the brief).

[66] As noted, Sub Inspector Silva had observed on 15.05.2002 that a heap of rubble brought by the 2nd and 3rd Respondents was lying on the ground closer to the rubble wall in question and the said heap of rubble had been overgrown with weeds, this indicates that said rubble had been brought sometime ago by the 2nd and 3rd Respondents. His notes at page 267 of the brief are as follows:

තවද මෙම ස්ථානයේ දමා ඇති කර ගල් වලට උකින් වැළැ පැල වී ඇති බව පෙනී යයි. එහෙයින් පසුගිය කාලක ගෙනත් දමන දෙ ගල් බව පෙනී යයි.

[67] “Forcibly dispossessed” in section 68 (3) means, that dispossession had taken place against the will of the persons entitled to possess and without authority of the law (*Iqbal v. Majedudeen and others* [1999] 3 Sri L.R. 213). In the present case, the 1st Respondent’s own first complaint made on 11.05.2002 clearly indicates that the 2nd and 3rd Respondent had entered into the disputed burial ground **5 years ago**, encroached a portion of the said land and constructed an unauthorised tourist restaurant **5 years ago** and made a permanent building **1 year ago** prior to 11.05.2002.

[68] The investigation notes of both Police Officers together with the 1st Respondent’s own Compliant to the Police on 11.05.2002 clearly

indicate that the disputed constructions had been made by the 2nd and 3rd Respondents in the disputed land long time ago.

[69] It further strengthens the findings of the learned Magistrate who had referred to the circular rubble wall shown on the photographs marked 2V4-2V7 and stated that the said wall was a strong wall made up of rubble and that although the said rubble wall was not about 5 years old, it was certainly not recently built as claimed by the 1st Respondent. The findings of the learned Magistrate in her order at page 310 of the brief are as follows:

2, 3 වගලන්තරකරුවන් සිය දැවුරම් ප්‍රකාශයේ 11 වන පේදයේ ප්‍රකාශනය ගෙවීමෙහි මේ වසර 5 කට පමණ ඉහතදී සඳහ ලද්දක් බව ප්‍රකාශ කර ඇති අතර, ඒ බව පෙන්නුම් කිරීමට 2වානු - 2වානු දක්වා ලකුණු කරන ලද ජ්‍යාර්සප ඉදිරිපත් කර ඇත. එකී ජ්‍යාර්සප පරික්ෂා කිරීමේදී අදාළ ප්‍රකාශනය ගෙවීමෙහි, කළුගේ වලින් නිමවා ඇති ප්‍රමාණයෙන් විශාල සක්තිමත් බාමීමක් බව පෙනෙන්නට ඇත. එයේම එය ඉතාම මෙහකදී බඳින ලද්දක් බවද පෙනෙන්නට නැති නමුත් 2, 3 වගලන්තරකරුවන් විසින් පෙන්නුම් කරන ආකාරයට වසර 5 කට ඉහත දී බඳින ලද පැරණි බාමීමක් වශයෙන් නම් එය පෙනෙන්නට නැත.

[70] The disputed circular rubble wall had been constructed just in front of the 2nd and 3rd Respondents' building which is situated within the burial ground as noted by P.S 8746 and the drain lines with manholes had been constructed beyond the area in which the rubble wall had been constructed within the disputed land. The said manholes are located in an area beyond the circular rubble wall as indicated in the sketch prepared by P.S 8746 on 11.05.2002. The said area is clearly located closer to the land of the 2nd and 3rd Respondents, which also suggests that the areas in which the rubble wall and manholes are located were in the control of the 2nd and 3rd Respondents long before the information was filed by the Police on 14.05.2002.

[71] It seems to me, therefore, that the unauthorised acts complained of had taken place before a period of 2 months immediately prior to

the date on which the information was filed under section 66 of the Act by the Bentota Police on 14.05.2002. Under such circumstances, the learned Magistrate was justified in holding that the 1st Respondent had failed to satisfy that he had been forcibly dispossessed within a period of 2 months immediately before the date on which the information was filed by the Bentota Police on 14.05.2002 under section 66 of the Act.

[72] It has been held in the case of *Ramalingam v. Thangarajah (supra)* that even a trespasser can claim possession under section 68 of the Primary Courts Procedure Act. In the said case, Sharvananda, J. observed at page 698:

"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. Under section 68, the Judge is bound to maintain the possession of such person even if he be a rank of trespasser as against any interference even by the rightful owner. This section entitles even a squatter to the protection of the law, unless his possession was acquired within two months of the filing of the information".

[73] I hold that the learned Magistrate had not overstepped her limitations by determining the question of possession or dispossession solely on the inspection notes made by her on 30.01.2003 disregarding the affidavits and Police notes made on 11.05.2002 and 15.05.2002 as submitted by the learned Counsel for the 1st Respondent. The learned Magistrate in my view has correctly determined the question of possession and dispossession on the examination and consideration of the affidavits, annexed documents and investigation notes of the two Police Officers as required by section 72 of the Act.

[74] In the present case, the 1st Respondent has failed to establish that he was forcibly dispossessed within two months prior to the filing of the information and thus, under section 68 (1) of the Act, the only determination that can be made by the learned Magistrate was that the 2nd and 3rd Respondents were in possession of the disputed areas of constructions on the date of the filing of the information on 14.05.2002.

Conclusion

[75] For those reasons, I hold that the learned Magistrate has correctly decided that the 2nd and 3rd Respondents were entitled to possession of the disputed areas of constructions. Hence, I do not see any reason to interfere with the determination of the learned Magistrate of Balapitiya dated 13.03.2003 and the judgment of the learned High Court Judge of Balapitiya dated 22.07.2008.

[76] In the circumstances, the Appeal filed by the 1st Respondent is dismissed with costs.

JUDGE OF THE COURT OF APPEAL

Shiran Gooneratne J.

I Agree.

JUDGE OF THE COURT OF APPEAL