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

In the matter of an Appeal from the Civil Appellate High Court.

Sithamparapillai Kathieravelu,
No. 217, Station Road,
Vairavapuliyankulam, Vavunia.

Plaintiff.

Vs

SC APPEAL No. 132/2009
SC HC CA LA No. 153/09
Vavuniya Civil Appellate
High Court No. 04/2001(F)
Vavuniya D.C.No. L/254

1. Ramasamy Gowrinathan,
No. 193, Station Road,
Vavuniya.

2. Periyathamby Sivasothinathan
Station Road, Vavuniya.

Defendants.

AND THEN BETWEEN

Siethamparapzillai Kathieravealu,
No. 217, Station Road,
Vairavapuliyankulam, Vavunia.

Plaintiff Appellant

Vs

1. Ramasamy Gowrinathan,
   No. 193, Station Road,
   Vavuniya.

2. Periyathamby Sivasothinathan
   Station Road, Vavuniya.

Defendant Respondents

AND NOW BETWEEN

Siethamparapzillai Kathieravealu,
No. 217, Station Road,
Vairavapuliyankulam, Vavuniya.

Plaintiff Appellant Appellant

Vs

1. Ramasamy Gowrinathan,
   No. 193, Station Road,
   Vavuniya.

2. Periyathamby Sivasothinathan
   Station Road, Vavuniya.

Defendant Respondent Respondent

BEFORE : **S. EVA WANASUNDERA PCJ.**
PRASANNA JAYAWARDENA PCJ. &
L. T. B. DEHIDENIYA J.

Counsel : M.A.Sumanthiran PC with K. Pirabakaran and R.Sujitha for the Plaintiff Appellant Appellant.
V. Puvitharan PC with R.R.Ushanthinie and Anuya Rasanayakham for the Defendant Respondent Respondents.

ARGUED ON : 18.06.2018.

DECIDED ON : 31.07. 2018.

S. EVA WANASUNDERA PCJ.

The Plaintiff Appellant Appellant (hereinafter sometimes referred to as the Plaintiff) was granted leave to appeal by this Court on 30.10.2009 on the questions of law as set out in paragraph 20 of the Petition dated 14.07.2009. The said questions are narrated as follows:-

(a) Have their Lordships of the High Court erred in law when they failed to appreciate the fact that the Plaintiff's possession of the disputed allotments of land marked lots 7, 10, 11 and 12 had been admitted by the 1st Defendant?

(b) Have their Lordships of the High Court erred in law when they failed to appreciate the fact that the Plaintiff's possession had been expressly admitted by K. Karunaivel Licensed Surveyor in his evidence?

(c) Have their Lordships of the High Court erred in law when they failed to consider the evidence of the Plaintiff, evidence of the Plaintiff's witnesses and the 1st Defendant on its merits in the light of the facts and marked documents of the District Court Case No. 254/L?

(d) Have their Lordships of the High Court erred in law having considered the matters in relation with Vavuniya District Court Case No. 184/L which is totally a different case in its facts, parties and circumstances?

(e) Have their Lordships of the High Court erred in law when they failed to appreciate that the Plaintiff was in possession in the allotments of land in question and proved the precise date of dispossession?
(f) Have their Lordships of the High Court erred in law when they failed to appreciate that the Plaintiff had instituted District Court of Vavuniya Case No. 254/L within one year of such dispossession?
(g) Have their Lordships of the High Court erred in law having made strong allegations about the intention of the Plaintiff and the invocation of Section 4 of the Prescription Ordinance?
(h) Have their Lordships of the High Court erred in law having held that the Plaintiff is not a credible witness?
(i) Have their Lordships of the High Court erred in law when they failed to evaluate the Judgment of the District Court Judge in Case No. 254/L in the light of the principles governing a possessory action?

The Plaintiff instituted action against the 1st Defendant Respondent Respondent (hereinafter referred to as the 1st Defendant) on 19.05.1995 in the District Court of Vavuniya. The basis for this action was that the Plaintiff was in possession of the land described in the Schedule to the Plaint one year and one day before the grievances against the 1st Defendant commenced; that the Plaintiff was forcibly dispossessed by the 1st Defendant on 25.07.1994 and that in terms of Section 4 of the Prescription Ordinance, the Plaintiff should be restored to possession of the land described in the Schedule to the Plaint. The Schedule to the Plaint mentions of Lots 10,11 and 12 depicted in Plan No. 94024 dated 25.03.1994 made by K. Karunaivel Licensed Surveyor. Two months later the Plaintiff amended the Plaint adding the 2nd Defendant and claiming that the Plaintiff was forcibly dispossessed from Lot 7 also by the 2nd Defendant and added a second Schedule to the Plaint describing the said Lot 7.

Altogether, the Plaintiff prayed for restoration of possession of Lots 7, 10,11 and 12 of Plan 94024 out of which he alleged that he was forcibly dispossessed.

The Defendants filed answer together on 30.11.1995 praying that the action filed against them be dismissed. They stated inter alia that the 1st Defendant was the power of Attorney holder of one Ravi Shangar and wife Naguleswary who had lived in Switzerland and had become the owners of the lands described in the Schedules I and II of the Plaint. The said husband and wife had bought the land by Deed 5070

dated 01.07.1994 attested by A. Ketheeswaran Notary Public. Thereafter they had constructed a house worth Rs. 500,000/- at that time on the said land. The 2nd Defendant is a licensee of Ravi Shangar and wife who is living with his family on the land which belongs to Ravi Shangar and wife. The Defendants state that when the Plan No. 94024 dated 25.03.1994 was done by the Surveyor, he had surveyed the land on 25.03.1994 and made allotments of the land from 1 to 12 and the said allotments were fenced as and when the survey was concluded on that date. It is the position of the Defendants that if at all, the Plaintiff was dispossessed from any part of that big land on the same date as the land was surveyed, i.e. on 25.03.1994, because the allotments were fenced then and there. The date of alleged dispossession had occurred on 25.03.1994.

I observe that the said Plan is marked as V3 and is contained in the brief before this Court at the bottom page number 184. The District Judge's signature is dated 28.02.2000. The allotments of land which is the **subject matter** of this Appeal are **Lots 10, 11 and 12 and Lot 7 in Plan No. 94024**. I find that Lots 10, 11 and 12 are of the extents of land respectively , of 16.5 Perches, 17.3 Perches and 18.0 Perches. I also find that Lot 7 is the roadway to all the said three blocks of land and it ends as a dead end with a curve opening into Lot 12. The roadway covers an extent of 16.0 Perches. This Surveyor has explained the boundaries to each and every allotment of land in detail within the four pages of the Plan No. 94024. Under the column for 'Remarks', this Surveyor has mentioned regarding the aforementioned Lots Nos. 10, 11 and 12 of the land thus: " Blocked out residential lot for obtaining development permit under the UDA Act. Part of property **claimed possessed and occupied** by **Subramaniam Vigneswaran** under and by virtue of Deed No. 4102 dated 1984.01.10 and attested by A.Ketheeswaran, Notary Public, Lot to be transferred Bounded on the North…….East…..South …..and West…."

On behalf of the Plaintiff, he himself gave evidence. He happens to be a qualified Draughtsman. Two Surveyors also have given evidence on his behalf. On behalf of the Defendants, the 1st Defendant gave evidence. The learned District Judge delivered judgment on 22.11.2001. It is in the Tamil language at pages 210 to 238 of the brief. The translation is available to this Court. According to the said Judgment, the Plaint was dismissed with costs. The District Judge has mentioned that **no credibility** can be given to the **Plaintiff 's evidence** and therefore he had come to the conclusion that the **Plaintiff had not proven** that he was dispossessed as set out in the Plaint.

Being aggrieved by the said judgment, the Plaintiff had appealed to the Civil Appellate High Court of Vavuniya and the High Court delivered its judgment on 03.06.2009 dismissing the Appeal with costs. The Plaintiff has now appealed to this Court against the Judgment of the Civil Appellate High Court and this Court has granted leave to appeal on the aforementioned questions of law.

Section 4 of the Prescriptions Ordinance reads as follows:-

"It shall be lawful for any person who shall have been dispossessed of any immovable property otherwise than by process of law, to institute proceedings against the person dispossessing him at **any time within one year** of such dispossession. And in proof of such dispossession **within one year before action brought,** the plaintiff in such action shall be entitled to a decree against the defendant for the restoration of such possession without proof of title.
Provided that nothing herein contained shall be held to affect the other requirements of the law as respects possessory cases."

The Appeal before this Court is with regard to a 'possessory action' which was filed by the Plaintiff against the two Defendants, the first Defendant being the Power of Attorney holder of the rightful owners of the Lots 10, 11 and 12 of Plan 94024 and the second Defendant being the person who is looking after the said Lots on behalf of the owners of the said allotments of land while living with his family on the land at the request of the owners.

The amended Plaint dated 25.07.1995 discloses in paragraph 3 thereof that " On or about the 25th day of July, 1994, the 1st Defendant abovenamed along with others wrongfully, unlawfully and forcibly entered the land in the possession of the Plaintiff described in the schedules hereto and dispossessed the Plaintiff. In paragraph 4 of the Plaint, it is stated that " Since the dispossession of the Plaintiff, the 2nd Defendant who came along with the first Defendant for the purpose set out in paragraph 3 had put up a house on or about August, 1994 and is staying presently on the land out of which the Plaintiff was dispossessed." The Plaintiff prayed that he **be restored to the possession of the land described in the schedules to the Plaint by ejecting the Defendants their servants agents and all others holding under them.**

According to Section 4 of the Prescription Ordinance, the person who claims to have got dispossessed from the land should prove that he was forcibly dispossessed by the person who did so. The date of dispossession is important because he has to file action for restoration within one year of dispossession. The Plaintiff states in the Plaint that he was dispossessed on **25.07.1994** and the Defendants state that if at all if the Plaintiff was dispossessed of the land, it has to be the date on which the land was surveyed to make the Plan 94024 dividing the whole big land into allotments**, i. e. on 25.03.1994**. The first Plaint was filed on **19.05.1995** and thereafter it was amended and the date of the amended Plaint is 25.07.1995. If the date of dispossession was 25.07.1994, the Plaintiff had come to court on 19.05.1995, i.e. before one year had lapsed. If the date of dispossession was on 25.03.1994, the Plaintiff had come to court on 19.05.1995 i.e. after one year had lapsed. **The Plaintiff had the burden of proving that he was dispossessed within one year before 19.05.1995.**

To decide the date, it is necessary **to analyze the evidence** before the trial judge. The Plaintiff had filed action in the District Court of Vavuniya under case number L/184 against some other persons allegedly trying to trespass the whole land (including the allotments of land in the present case) stating that he was occupying the whole land as a lessee and that he had cultivated the land and also ran a poultry farm in a portion of the same land. However the Defendants in that case had not turned up in Court and the **Plaintiff had given evidence as the Plaintiff at the ex-parte trial**. Even though it had proceeded ex-parte, the learned District Judge had disbelieved the Plaintiff and **dismissed his Plaint in L/184**. It was a case based on a lease of the whole land and when action is dismissed , the end result can be identified as that the Judge rejected the Plaintiff's position that 'he was possessing the land which he was claiming to hold as a lessee' when he gave evidence on **24.07.1996**.

It could be that the Judge decided that he was not in possession of the whole land at all. It could be that the Judge decided that he was not on a lease as well as not in possession and therefore he cannot claim that any other person is trying to trespass the land. This judgment in L/184 demonstrates that the Plaintiff cannot claim to have had any hold of the whole land, the least of it being in possession. However, in the present case, the Plaintiff has **confessed that he gave false**

evidence in L/184 stating that he was a lessee because he was threatened by others that he should portray as a lessee.

Here, giving evidence in L/254, he states that he has never been a lessee but he was on the whole land from 1992 and cultivated and also ran the poultry farm since then and that he has been in possession of the whole land when the 1st and 2nd Defendants came along and forcibly dispossessed him from Lots 10 , 11, 12 and 7 on 25.07.1994. Anyway it is surprising that the Plaintiff has explained in his Plaint about the land from which it is alleged that the Defendants dispossessed him forcibly, by **making use of a Plan** which was not done by any surveyor on his behalf but **by a surveyor who had done a survey at the instance of the owners of the land, namely Plan 94024 dated 23.06.1994.** Surely, it would have been more suitable and proper if the Plaintiff placed before Court the boundaries of the land he claimed to have been in possession as claimed by him from 1992.

It raises a question mark as to the reason why the Plaintiff did so. It is obvious that he had in mind an approximate area from which he was allegedly ousted from, and thereafter , having looked at the owner's plan, he had made himself certain that he was ousted from Lots 10,11,12 and 7. That seems to be the way he had identified ' the land he was in possession of ' in his Plaint.

There is evidence before the trial court regarding the criminal case number 4673 in the Magistrate's Court of Vavuniya marked as P4. The 2nd Defendant had lodged a complaint in the Police Station that the Plaintiff trespassed the land on 08.07.1994. There had been another case under number 3359, marked as P5 where Vigneswaran Ihaparameswary had complained that the Plaintiff had encroached the land on 06.06.1994. P6, P7, P8 and P9 also were documents regarding trespassing of the land. What can be gathered by these documents is that the Plaintiff in the case in hand before this Court **had not been in possession** by the date 08.07.1994. Yet in the Plaint he claims to have been ousted only on 25.07.1994.

However, it can be gathered that the Plaintiff had been in possession of the whole land of about 1 ½ Acres of land, knowing that the owners were abroad. He had cultivated the land as well as had run a poultry farm on the land. There is no doubt that he was in possession of the land including the area of Lots 7,10,11 and 12 in

Plan 94064 but the **question regarding the date he was dispossessed / ousted is the obvious problem.**

The Plaintiff's counsel submitted that the documents P8 and P9 were extracts from the Police Information Book and that the District Judge had stated that they were not proven. The Plaintiff's position is that they need not be proven as they are certified copies obtained from the Police station according to Section 440A of the Civil Procedure Code. The counsel for the Plaintiff contended that those documents ought to have been accepted as proven documents and admitted as marked documents.

The Plaintiff had filed the other action No. 184/L against Thuvaraka Ketheeswaran and Vigneswaran Ihaparameswary stating that they formed an unlawful assembly with the common objective of causing destruction and damages to the property which was possessed by the Plaintiff. The subject matter was the big property including the allotments named in the present case in hand, i.e. L/254. The damages claimed was Rs.250000/- . The defendants had not come to court and the Plaintiff had given evidence at the ex-parte trial. However, the District judge had not granted any relief prayed for because, as specially mentioned by the Judge, that he did not believe the evidence given in Court by the Plaintiff. Anyway, the purported date that others had disturbed his possession was stated by him as 20.06.1994. Is it possible for this Court to take into consideration that the Plaintiff had been in possession of the whole land on 20.06.1994? This Court cannot take that date as correct due to the fact that the District Judge had specifically not granted relief prayed for by the Plaintiff even at the ex-parte trial since he was disbelieved. There is no way that the Supreme Court can say that he should be believed and his possession on 20.06.1994 should be taken as correct.

It is unfortunate that two judges of the District Court in two different cases have disbelieved the same person who was the Plaintiff in both cases. This Court being an Appellate Court should be slow to disturb the factual findings of the lower courts. It was so held in the case of ***Alwis Vs Piyasoma Fernando 1993 1 SLR 119 by G.P.S.de Silva CJ*** thus: " It is well established that findings of primary courts……are not to be lightly disturbed in Appeal. "

Possessory actions are a special kind of legal actions. If a person had been in possession of any immovable property, whether he was aware that it belonged to

another person or not or whether he was on the property on lease or on rent , it does not make a difference. What matters is only "being in possession". If that person is dispossessed or ousted otherwise than by process of law, from the place he was in possession by any other party whomsoever it may be, by using force on him, then he is entitled to bring a possessory action against the person who forcibly dispossessed him. Section 4 of the Prescription Ordinance provides relief for such a person , to get a decree against the defendant for the restoration of such possession without proof of title only if the court action is filed within one year of such dispossession.

In ***Silva Vs Dingiri Menika 13 NLR 179***, it was held that " To succeed in a possessory action, all that is necessary for the plaintiff to prove is that he was in possession and that he was dispossessed otherwise than by process of law. It is not necessary to prove possession for a year and a day before ouster."

In ***P. Edirisuriya Vs M. Edirisuriya 78 NLR 388,*** it was held that;

1. The essence of the possessory action lies in unlawful dispossession committed against the will of the Plaintiff and neither force nor fraud is necessary. Dispossession may be by force or by not allowing the possessor to use at his discretion what he possesses.
2. To succeed in a possessory action the Plaintiff must prove that he was in possession ut dominus . This does not mean possession with the honest belief that the Plaintiff was entitled to ownership. It is sufficient if the Plaintiff possessed with the intention of holding and dealing with the property as his own.

In the case in hand, the Plaintiff gave evidence on 18.01.2001. He answered in the following manner when he was cross examined;

Q. In L/184 what were the relief you prayed in the plaint?
A. I need not disclose that now.
Q. Who prepared the survey plan?
A. Karunaivel.
Q. Did he say the purpose of his visit?
A. He said that he came to survey the land.
Q. Did you allow him to survey?

A. I cannot prevent a Government Surveyor from surveying the land.
Q. Didn't it strike you that you must assert your right by saying that this is your Land?
A. No.
Q. How long did he take to survey?
A. I do not know. I left the place on some other business.

It is obvious that the Plaintiff had allowed the surveyor who surveyed the land on 25.03.1994 to do so without any problem. It is hard to believe that the Plaintiff who is so very keen to get himself restored into possession by stating that he was dispossessed on 25.07.1994, i.e. 4 months later, would have allowed the surveyor who came to the land to survey at the direction of the owner, without any trouble or without any disagreement or without even complaining to the police or without resisting such action at all. It sounds worse when the Plaintiff stated that he left the place on some other business. Any person who had any cultivation on the land done by him and who had hens and cocks on the land as claimed by the Plaintiff, would not have walked out of the scene but stayed on the land to see what would take place while the survey was going on. That peaceful attitude, if it is true, might have been the reason why he had obtained the Plan done by the owner's surveyor and filed his own action against the owner, quoting the allotments from the owner's Plan.

In examination in chief, the Plaintiff said that the defendants entered the land forcibly on 20.06.1994 for the first time but in the Plaint he states that the defendants forcibly dispossessed him on 25.07.1994. There is a discrepancy on the dates mentioned by him. He prays only for restoration into possession.

I have myself gone through the English translation of the Plaintiff's evidence. His evidence reveals that he had obtained an enjoining order from the same court in case L/184 by having given false evidence that ' he had been a lessor of the owner', with regard to part of the same land. He says that he said the untruth as he was told to do so under a threat by others. He had not proved anything about any threat from anybody at all. The evidence given by him is not consistent with the short amended Plaint or the original Plaint with regard to the date that he was ousted by the Defendants.

Once in his evidence, he admitted that he agreed to leave the land on payment of money by the new owners. The land had been surveyed first and allotted and fenced and thereafter only the new owners had built a new house. According to the Plaintiff, before he filed action against the defendants, the house was built by the owners and their old mother was occupying the said house at the time action was filed.

I fail to find that there exists any evidence to prove that the Plaintiff was ousted and/or dispossessed by the Defendants if at all, within one year from the date of the survey, i.e. 25.03.1994, on which date the Plaintiff admitted that he was there but did not oppose the survey and he left the scene on some other business. The date of dispossession has not been established. The use of force also has not been established.

I hold that the conditions to be proved according to Section 4 of the Prescription Ordinance to claim 'to be restored into possession' of the allotments of land as mentioned in the Schedules to the Plaint have not been proven by the Plaintiff. I answer the questions of law enumerated above in the negative against the Plaintiff Appellant Appellant.

I do hereby affirm the judgment of the Civil Appellate High Court dated 03.06.2009 and the judgment of the District Court dated 22.11.2001. The Appeal is dismissed. However I order no costs.

Judge of the Supreme Court

Prasanna Jayawardena PCJ.
I agree.

Judge of the Supreme Court

L.T.B.Dehideniya J.
I agree.

Judge of the Supreme Court