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

In the matter of an appeal under and in terms of Section 5 (c) of the High Court of the Provinces (Special Provisions) Act No. 19 of 1990 as amended by Act No.54 of 2006.

SC / APPEAL / 83 / 2013
SC / HCCA / LA / 113 / 2013
High Court (Civil Appeal)
SP / HCCA / RAT / 81 / 2010 [F]
DC Ratnapura 19229/Possessory

P. R. Michael Gunaratne,

67, Hospital Road,

Ratnapura

(deceased)

PLAINTIFF

1(a) **Omanthage Malkanthi Fernando,**

22/28, Hospital Road

Ratnapura.

1(b) **Pathberiya Ranasinghege Kasun Irosha Ranasinghe,**

1(c) **Pathberiya Ranasinghege Kavidu Ashan Ranasinghe,**

SUBSTITUTED PLAINTIFFS

Vs.

Delkadura Danapala Mudiyanselage

Sarathchandra Bandara,

17, Hospital Road

Ratnapura.

DEFENDANT

AND

1(a) Omanthage Malkanthi Fernando,

22/28, Hospital Road

Ratnapura.

1(b) Pathberiya Ranasinghege Kasun

Irosha Ranasinghe,

1(c) Pathberiya Ranasinghege Kavidu

Ashan Ranasinghe,

SUBSTITUTED PLAINTIFFS –

APPELLANT

Vs.

Delkadura Danapala Mudiyanselage Sarathchandra Bandara,
17, Hospital Road
Ratnapura.
DEFENDANT – RESPONDENT

AND NOW

Delkadura Danapala Mudiyanselage Sarathchandra Bandara,
17, Hospital Road
Ratnapura.
DEFENDANT – RESPONDENT - APPELLANT

Vs.

1(a) Omanthage Malkanthi Fernando,
22/28, Hospital Road
Ratnapura.

1(b) Pathberiya Ranasinghege Kasun Irosha Ranasinghe,

1(c) Pathberiya Ranasinghege Kavidu Ashan Ranasinghe,

SUBSTITUTED PLAINTIFFS – APPELLANTS – RESPONDENTS

BEFORE	**:**	Priyantha Jayawardena PC. J, A.H.M.D. Nawaz, J & Kumudini Wickremasinghe, J
COUNSEL	**:**	Chathura Galhena with Dhareni Weerasinghe for the Defendant – Respondent – Appellant. Anuruddha Dharmaratne with Indika Jayaweera for the Substituted Plaintiff – Appellant – Respondents.
ARGUED ON	**:**	17/05/2022
DECIDED ON	**:**	29/02/2024

A. H. M. D. Nawaz, J.

1. The quintessential issue that arises in this case is whether a possessory action would afford a remedy when a Plaintiff was only disturbed but not ousted from the land in his occupation. When this matter came up for argument, both Counsel proceeded to condense the pith and substance of their rival contentions in the following question of law.

   Did the Civil Appellate High Court err in law by holding that a possessory action can be filed in law if the Plaintiff is not physically dispossessed and/or ousted from the corpus?

2. The judgements of the District Court of Ratnapura and the Civil Appellate High Court of Ratnapura which are in contra distinction to each other have both reached different conclusions on identical facts that were established in the case.

3. It becomes important to ascertain the proved facts in this case for the purpose of answering the question of law that has been formulated as above. The original Plaintiff who has since been substituted by the substituted Plaintiff – Appellant – Respondents (the substituted Plaintiffs) instituted this action seeking a declaration that the Defendant – Respondent – Appellant (the Defendant) disturbed their peaceful possession of improvements that they had made to the land as depicted and described in two survey plans given in the schedule to the amended plaint. The substituted Plaintiffs also prayed for ejectment of the Defendant and those who were holding under him from the said portion of land described in the schedule to the amended plaint. As the original Plaintiff had passed away during the pendency of this

action in the District Court of Ratnapura, the 1 (a) to 1 (c) substituted Plaintiffs stepped into his shoes and prosecuted the said action through their amended plaint dated 27.06.2007. The original answer of the Defendant did not even contain a prayer but it is an amended answer filed seven months afterwards that contained a prayer for a dismissal of the plaint. It appears that even this amended answer was rejected by Court. However, it bears repeating that the Defendant failed to describe in his abortive pleadings by way of a schedule, the land he allegedly possessed.

4. The substituted Plaintiffs took out a commission to survey the corpus in dispute and the parties agreed to abide by the survey plan prepared by a commissioned surveyor called Prasanna Rodrigo bearing no.2007/61 and dated 5 June 2007. At the trial it was only the substituted 1 (a) Plaintiff namely the widow of the original Plaintiff and the commissioned surveyor who gave evidence to buttress the case of the Plaintiffs and it has to be noted that the Defendant did not elect to give evidence or call evidence or mark any documents.

5. After trial the learned District Judge of Ratnapura dismissed the action of the substituted Plaintiffs. On appeal to the Civil Appellate High Court the High Court Judges allowed the appeal of the Plaintiffs and set aside the judgment of the District Court holding in favor of the substituted Plaintiffs in the end. It is against the judgment of the Civil Appellate High Court dated 13.02.2013 that the Defendant – Respondent – Appellant has preferred this appeal to this Court.

6. As the above summary of facts and chronology indicates, the action filed by the substituted Plaintiff – Respondents displays the elements of a possessory

action and the evidence given by the 1 (a) substituted Plaintiff namely Malkanthi Fernando shows that the Defendant had disturbed the possession of the Plaintiffs by obstructing the further improvement of the land undertaken by them but the fact remains that the Plaintiffs were not physically dispossessed or ousted. The evidence of Malkanthi Fernando [1 (a) substituted Plaintiff] is quite unequivocally unambiguous that the original Plaintiff and the substituted Plaintiffs were obstructed in their peaceful enjoyment of possession of the buildings and improvements in their control and custody but there is irrefragable evidence that there was no ouster of the Plaintiffs from the land they occupied. Confronted with these established facts, the learned District Judge of Ratnapura by his judgment dated 24.06.2010 dismissed the plaint of the Plaintiffs solely on the ground that the Plaintiffs had not proved the requirement of dispossession – an ingredient that the learned District Judge classified as an indispensable component of **Section 4 of the Prescription Ordinance.**

7. When the substituted Plaintiffs took the matter on appeal to the Civil Appellate High Court of Ratnapura, the learned High Court Judges set aside the judgement of the court *a quo* and declared that the proved facts in the case do support the view that the obstruction of the Plaintiffs by the Defendant in their peaceful possession and enjoyment of the improvements and further development thereof would come within the statutory requirement of "dispossession".

8. Mr. Chathura Galhena the learned Counsel for the Defendant – Respondent – Appellant strenuously argued that Section 4 of the Prescription Ordinance entails the proof of dispossession and restoration of possession upon proof of such dispossession and thus in such a situation the Plaintiffs in this case

could not maintain an action for a possessory remedy because they were not physically dispossessed. It was the argument of the learned Counsel that the use of the words ''dispossession'' and "restoration of possession" in Section 4 of the Prescription Ordinance is indicative of the fact that the Plaintiffs in this case must prove their ouster by the Defendant and such an element of proof is absent from the facts and circumstances of this case.

9. Admittedly there is ample evidence upon the pleadings and testimony offered in the case that the Defendant did not physically defenestrate the Plaintiffs from the land in their occupation. There was *though* an illegal entry with the view to obstructing the Plaintiffs and preventing them from further constructing the improvements that they had already been making from time to time and according to the argument of the learned Counsel for the Defendant, these established facts would not lend themselves to a finding of dispossession. It was the contention of the learned Counsel for the Defendant that the word dispossession in Section 4 required a literal interpretation and thus only an overt act of ouster would afford the foundation for a possessory remedy.

10. On the other hand, Mr. Anuruddha Dharmaratne the learned Counsel for the substituted Plaintiff – Appellant – Respondents argued that even disturbance or obstruction to possession would in appropriate circumstances amount to dispossession and this has been the *cursus curiae* in cases such as ***Perera v. Wijesuriya* (1957) 59 NLR 529**.

11. I must observe at the outset that the curial interpretation that has been placed on Section 4 of the Prescription Ordinance has not been exclusively confined to the literal words of the statutory provision. The fact that Roman-

Dutch law principles have been imported into the law of Sri Lanka pertaining to possessory remedies is traceable to the very words of Section 4 itself. It behoves us in such circumstances to recall that development vis-à-vis Section 4 of the Prescription Ordinance.

Analysis of the statutory provision introducing possessory remedies into the law of Sri Lanka.

Section 4 of the Prescription Ordinance

12. The substantive law governing the availability of possessory relief in respect of immovable property is embodied in Section 4 of the Prescription Ordinance No.22 of 1871. According to the Section;

> *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 on 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 contained shall be held to affect to the other requirements of the law, as respects possessory cases.*

13. Upon a reading of the above provision it becomes clear that the principles regulating the grant of a possessory remedy are not confined to the very words of the statutory provision. The proviso to Section 4 makes it clear that the relevant Roman - Dutch common law principles will continue to be

applicable by virtue of the proviso. In order to arrive at the right decision on the interpretation contended for by both Counsel, a brief analysis of the common law possessory interdicts which form the fulcrum of Section 4 of the Prescription Ordinance is warranted.

Roman and Roman - Dutch law possessory interdicts

14. The three principal Roman law interdicts were the *uti possidetis, utrubi and unde vi.* The *uti possidetis* apply to immovable property when there was disturbance without actual deprivation of possession. The remedy was available to the actual possessor in order to ensure the retention of property except when possession had been acquired *vi clam vel precario* in which event the remedy was available to the other.

15. Similarly, the interdict *utrubi* applied when there was disturbance of possession of movable property. Acquisition of possession *nec vi nec clamnec precario* was a requirement of this remedy and the procedure was the same as that for the interdict *uti possidetis*.

16. The *unde vi* was the only interdict available for the recovery of possession when dispossession was effected by the use of force. It applied not only to land but also be *"quaeque ibi habuit".*

17. Analogous remedies were available to a possessor in the Roman - Dutch law. The *mandament van maintenue* resembles the interdict *uti possidetis*, and the *mandament van complainte* and the *mandament van spolie* were similar to the interdict *unde vi* of the Roman law.

18. Disturbance of possession was protected by the *mandament van maintenue.* The applicant for such a relief had to give a concise account of his possession and of the disturbance caused by the other party. Proof of positive disturbance was not essential as the remedy was granted even in the case of apprehended disturbance. The *mandament van complainte* applied to both disturbance and dispossession of property. The applicant had to prove that he possessed the property:

    a) *ut dominus* ;
    b) quietly and peaceably ;
    c) for a year and a day ; and
    d) that the ouster or disturbance took place within the year in which the action was instituted.

19. As the above indicates, the proceeding to obtain possession is termed a *mandament, or* writ of *immission (mandament van immissie),* which is scarcely ever used except in the case when one co-heir is ousted of his possession by another.

20. The instant action filed by the Plaintiffs to retain quiet possession would come within the Roman - Dutch law remedy of a *mandament van maintenue.* To found this writ, a possession obtained neither secretly, nor by force, nor on condition of quitting on first notice, is necessary on the part of the applicant.

21. Thus, a common law interdict to protect possession from disturbance has always been available and upon an examination of both the substantive provision of Section 4 and its proviso, it is manifest that the ambit of Section 4 of the Prescription Ordinance is sufficiently wide to include within its

scope the different categories of possessors and varying situations dealt with in the common law. It has been customary for our Courts to refer continually and to apply the Roman - Dutch law requirements via the proviso. It is in these circumstances that Basnayake, CJ in ***Perera v Wijesuriya*** (*supra*) clearly stated that the word "dispossession" in Section 4 could also be treated as embracing disturbance of possession as well - see ***Rowell Appuhamy v. Moises Appu*** *(1899) 4 NLR 225;* ***Contra Pattirigey Carlina Hamy v. Mugegodagey Charles De Silva*** *(1883) 5 S.C.C 140.*

22. It is interesting to note that the tenor of the long line of judgements in Sri Lanka is in favour of an extended scope of applicability for this provisional remedy. This would suffice to dispose of the argument of the Counsel for the Defendant that the requirement of dispossession had not been proved because there had been no physical eviction from the land. In order to succeed in a possessory action, there is no such requirement to establish deprivation of possession at all times. It is sufficient if disturbance of possession is proved.

23. In ***Edirisuriya v Edirisuriya*** (1975) 78 N.L.R.388 the Counsel for the Defendant had made the same argument as his counterpart in this case - namely the requirement of dispossession had not been proved because there had been no physical eviction from the land. Justice Vythialingam, however, rightly pointed out that the need to establish deprivation of possession would be satisfied if the possessor was deprived from exercising his right of possession. This interpretation of the term dispossession may be traced to *Perera v. Wijesuriya (supra)* which case was cited with approval by Vythialimgam J.

24. I must say that dispossession may be by force or by not allowing the possessor to use at his discretion what he possesses whether it is done by sowing, or ploughing or by building or repairing something or by doing anything at all by which they do not leave the free possession of the person who was dispossessed.

25. As Vythialingam J. held in ***Edirisuriya v Edirisuriya*** *(supra)* (with Samerawickrame A.C.J. and Walpita J. agreeing)

> *"The essence of the possessory action lies in unlawful dispossession committed against the will of the plaintiff and neither force or fraud is necessary. Dispossession may be by force or by not allowing the possessor to use at his discretion what he possesses."*

26. Moreover, dicta from cases like ***Changarapillai v. Chelliah*** (1902) 5 N.L.R. 270 and ***Sameem v. Dep*** (1954) 55 N.L.R 523 which stressed the policy considerations underlying this remedy, are also worth taking cognizance of.

27. Thus, the Courts have inclined towards a wider applicability of this remedy by adopting a liberal interpretation of the word "dispossession" and the overarching consideration appears to be the need to prevent a breach of the peace by the use of self-help. Consistently, this provisional remedy in terms of section 4 of the Prescription Ordinance should be assured of a wide scope of applicability. Moreover, by its very nature, this is a tentative remedy which does not in any way prejudice the Defendant's right to bring a *rei vindicatio* on proof of title.

28. As I have demonstrated, the difference between the judgments of the District Court and the Civil Appellate High Court has revolved around the word "dispossession" and the error of the court *a quo* has been the failure to equiparate dispossession on the one hand, and disturbance of possession on the other hand, and treating them separately. For purposes of Section 4 of the Prescription Ordinance, both these acts would fall within the term dispossession in appropriate circumstances.

29. I answer the question of law in the negative and proceed to set aside the judgment of the District Court dated 24.06.2010 and affirm the judgment of the Civil Appellate High Court dated 13.02.2013. The appeal of the Defendant – Respondent – Appellant is thus dismissed.

Judge of the Supreme Court

Priyantha Jayawardena, PC. J

I agree, Judge of the Supreme Court

K. Kumudini Wickremasinghe. J

I agree, Judge of the Supreme Court