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

JA Priyanthi Perera Samarasinghe

Petitioner

Vs

CA (PHC) APN 64/2010
HC Negombo HCRA 483/2006
PC Wattala 21808/06

Dharmapala Colin Abeywardene

Respondent

1. Subramaniam Chandrasekaran
2. Chandrasekaran Arundathi
3. Bethmage Alfred Sisira Kumara Perera
4. Don Lester Samarsinghe

Intervenient Respondent Respondent

Before : Sisira de Abrew J &
Anil Gooneratne J

Counsel : Dr. Sunil Cooray with Sudarshani Cooray for the Petitioner.
Collin Amarasinghe with KADTC Kahandawaarchchi for the Respondent.

Argued on : 3.3.2011, 4.3.2011 and 8.3.2011
Decided on : 5.5.2011

Sisira de Abrew J.

This is an application to revise the judgment of the learned High Court Judge (HCJ) dated 22.11.2007 wherein he had set aside the order of the learned Magistrate dated 23.11.2006.The learned Magistrate decided that the petitioner in this case was entitled to the possession of the land which is the subject matter of this case.

The dispute in this case has arisen on 27.8.2006. The OIC, Wattala Police Station, by his report dated 30.8.2006, filed a report in the Magistrate Court of Wattala under Section 66 of the Primary Courts' Procedure Act No 44 of 1979 (the Act) making the petitioner and the respondent in this case as 1st and the 2nd respondents alleging a breach of peace among the parties.

The position taken up by the petitioner in this case is that he came into the possession of the land on 27.10.97 after entering into an agreement with the respondent in this case. The agreement was that the respondent would sell the land to the petitioner. The petitioner claims that she paid six million to the respondent when she signed the said agreement. This agreement has been produced in the Magistrate's Court marked as X1. Clause 7 of the said agreement reads as follows. "The vendor shall hand over the vacant possession of the said premises to the purchaser upon signing of these presents." According to the agreement vendor is the respondent and the purchaser is the petitioner. The Notary Public in his attestation dated 27.10.97 confirmed the payment of six million to the respondent by the petitioner. The petitioner says that from 27.10.97 she with

her husband accepted the possession of the land and later they employed Subramaniam Chandrasekaram as a watcher to protect several vehicles parked in this land. [It appears that the petitioner was doing a business relating to sale of vehicles]. Said Chandrasekaram was living with his wife Arundathi in a house in this land. The petitioner has also employed Sisira Kumara to protect the place. Sisira Kumara in this land started a business relating to making of pantry cupboards. On 27.8.2006 the respondent in this case by force entered this land, parked his vehicle and chased away said Subramaniam and his wife. They have in their affidavits confirmed this position. Sisira Kumara in his affidavit further says that he had stored timber worth Rs.142,500/- in this premises and that he is still having keys of the house in which he was living and that he is unable to go to this place as a result of his ouster by the respondent. The position taken up in the Primary Court by the respondent is that he was in possession of this land for the last fifteen years; that sometime ago he had permitted his relation Lester Samarasinghe, the husband of the petitioner, to park his vehicles in this land; that six months prior to the dispute said Samarasinghe removed the vehicles; and that a tamil person employed by Samarasinghe as a watcher who continued to remain in the land vacated the premises on his request. The tamil person referred to by the respondent should be Subramaniam Chandrasekaran. His wife Arundathi contradicts this position and says that the respondent entered the land after breaking pad lock on the gate; that their all personal items were loaded into a lorry by the respondent and his supporters; and that they were chased away from this land. The above position of the respondent is also contradicted by his own statement made to the police and the agreement to sell marked as X1. The respondent in his statement made to the Police on 28.8.2006, admits that several years ago he

gave the land to the petitioner's husband to park the vehicles. But he, in the said statement, does not say that the petitioner's husband, six months prior to the dispute, had removed these vehicles. He, in the said statement, admits that on 27.8.2006 he got the gate of the land opened through the wife of the watcher and entered the land with his two sons and servants. He, in the said statement, takes up the position that he did not sign any agreement with the petitioner or her husband but admits that the deed of the land is with the petitioner. The agreement marked X1 reveals that he had signed the agreement and was willing to handover the vacant possession of the land upon payment of six million. The Notary Public confirms the payment of six million. When one considers his statement made to the police and the agreement to sell, it is clear that he was not in the possession of the land several years prior to 27.8.2006. This position is clearly confirmed by his own statement made to the police. Although the respondent takes up the position that he was in this premises for the last fifteen years, the petitioner produced a document marked X6 dated 8.3.2004 by Lanka Electricity Company (Pvt) Ltd to support the position that she had taken electricity to this premises. For these reasons I hold that the learned Magistrate was right when he gave possession of the land to the petitioner. However the learned HCJ, by her judgment dated 22.11.2007, decided that the respondent is entitled to the possession of the land. She, in her order, concludes that according to the Magistrate's Court record there was no material to say that there was a breach of peace; that the learned Magistrate had not considered this position; and that therefore the action could not have been maintained in the Magistrate's Court. In David Appuhamy Vs Yassasi Thero [1987] 1SLR 253. Court of Appeal (Bandaranayake J and Wijethunga J) held: "Under the Primary Courts Procedure Act the formation of the opinion as to whether a

breach of the peace is threatened or likely is left to the police officer inquiring into the dispute and if he is of such opinion he is required to file an information regarding the dispute with the least possible delay. Where the information is thus filed in a Primary Court, such Court is vested with the jurisdiction to inquire into and make a determination or order on the dispute."

In Velupillai and others Vs Sivanathan [1993] 1 SLR 123 Court of Appeal held (Ismail J) held: "Under Section 66(1)(a) of the Primary Courts Procedure Act, the formation of the opinion as to whether a breach of the peace is threatened or likely is left to the police officer inquiring into the dispute. The police officer is empowered to file the information if there is a dispute affecting land and a breach of the peace is threatened or likely. The Magistrate is not put on inquiry as to whether a breach of the peace is threatened or likely. In terms of section 66(2) the court is vested with jurisdiction to inquire into and make a determination on the dispute regarding which information is filed either under section 66(1)(a) or 66(1)(b)."

It is clear from the above legal literature that when a police officer files an information under Section 66(1)(a) of Primary Courts Procedure Act, in terms of Section 66(2) of the Act, Court is vested with jurisdiction to inquire into the matter. In the present case the OIC Wattala filed the information under Section 66 of the Act alleging a breach peace among the parties. Therefore the Magistrate is vested with jurisdiction to inquire into the matter. Further the OIC Wattala in the said report stated that there was a breach of peace. Therefore it is incorrect for the learned HCJ to say that there was no material, in the MC record, to indicate a breach of peace. For

these reasons I hold that the learned HCJ was wrong when she concluded that the case could not have been maintained in the Magistrate's Court.

The above judicial decisions confirm the position that when a police officer files a report under section 66(1)(a) of the Act, the Magistrate is vested with jurisdiction to inquire into the matter. This is only with regard to the assumption of jurisdiction. But above judicial decisions do not take away the power of the Magistrate to reach a conclusion at the end of the inquiry whether or not there was a breach of peace. What happens at the end of the case if the Magistrate observes that there was no breach of peace or breach of peace is not threatened? In my view at the end of the case if the Magistrate finds that there was no breach of peace or breach of peace is not threatened the Magistrate is entitled to dismiss the case. If this power is not given to the Magistrate, decision maker on the question whether or not there was a breach of peace would be the police officer and not the judicial officer. Therefore in my view the Magistrate holding an inquiry under section 66 of the Act is entitled to make a judicial pronouncement whether or not there was a breach of peace. If the judicial pronouncement confirms that there was no breach of peace or breach peace is not threatened, the Magistrate/Primary Court Judge should dismiss the case.

The learned HCJ concluded that the learned Magistrate in terms of section 66(6) had not taken steps to effect a settlement. This was one of the reasons to set aside the order of the Magistrate. But when one considers the journal entry dated 2.10.2006 and 12.10.2006 it appears that the learned Magistrate had endeavoured to settle the dispute. Learned counsel for the respondent submitted that the learned Magistrate had not suggested the terms of settlement. If the terms suggested by the parties are, in the opinion

of court, reasonable adjournment is generally granted for the parties to consider the terms of settlement. After the adjournment if the parties agree with the terms, settlement is recorded. Failure to write terms of settlement in the journal entries before the settlement is effected does not suggest that the Magistrate had not endeavoured to settle the dispute. For these reasons I hold that the above conclusion reached by the learned High Court Judge is wrong.

A case has been filed in the District Court regarding the dispute among the parties. This was another ground to set aside the judgment of the learned Primary Court Judge by the learned High Court Judge. It is common ground that at the time that the learned High Court Judge delivered the order the case filed in the District Court had not been concluded. The fact that filing of a civil case in the District Court is not a ground to set aside a judgment of a Primary Court in an application under Section 66 of the Primary Courts Procedure Act. I therefore hold that the above conclusion reached by the learned High Court Judge is erroneous.

I have earlier held that the learned Magistrate was correct when he gave possession of the land which is the subject matter of this case to the petitioner in this case. When I consider the facts of this case I hold that the order of the learned High Court Judge is ex facie wrong. I hold that the petitioner has suffered a miscarriage of justice as a result of the order of the learned High Court Judge.

Learned counsel for the respondent contended that the present petition should be dismissed on the ground of delay (delay of 2 ½ years) and non establishment of exceptional circumstances. In my view, delay in

bringing a case before court will not operate as a bar for the Court of Appeal, in revision, to set aside an order which is wrong. I have earlier held that the order of the learned High Court Judge is ex facie wrong and the petitioner had suffered a miscarriage of justice. I hold that when a party has suffered a miscarriage of justice as a result of an order of the lower court which is ex facie wrong such facts can be considered as an exceptional ground to invoke the revisionary jurisdiction of the Superior Courts. This view is supported by the judicial decision in Attorney General Vs Podisingho 51 NLR 385 wherein Dias SPJ in dealing with powers of revision of the Supreme Court held: "that the powers of revision of the Supreme Court are wide enough to embrace a case where an appeal lay but was not taken. In such a case, however, an application in revision should not be entertained save in exceptional circumstances, such as, (a) where there has been a miscarriage of justice, (b) where a strong case for the interference of the Supreme Court has been made out by the petitioner, or (c) where the applicant was unaware of the order made by the Court of trial."

In Mallika de Silva Vs Gamini de Silva [1999] 1SLR 85 this Court held: "When the order of the court is wrong ex facie it would be quashed by way of revision even though an appeal may lie against such order."

When I consider the above matters, I hold that there is no merit in the contention of learned counsel for the respondent.

For the above reasons, I hold that the order of the learned High Court Judge should be set aside. I have earlier held that the Magistrate was correct when he gave possession of the land to the petitioner. For these

reasons I set aside the order of the learned High Court Judge dated 22.11.2007 and affirm the order of the learned Magistrate dated 23.11.2006.

The Registrar of this Court is directed to annex a copy of this judgment to case No.CA (PHC) 183/2007, the appeal filed by the petitioner to set aside the judgment of the High Court judge dated 22.11.2007.

Judge of the Court of Appeal

Anil Gooneratne J

I agree.

Judge of the Court of Appeal