

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

C.A. (PHC) No. 66/2006

H.C. Matara No. 102/2004

M.C. Matara No. 52042

M.G. Thamara

Petitioner

Vs.

M.H. Wasanthi Mallika

Respondent

C.A. (PHC) No. 66/2006

H.C. Matara No. 102/2004

M.C. Matara No. 52042

Before : **K. T. Chitrasiri, J &**

W.M.M. Malinie Gunarathne, J.

Counsel : S.A. Collure with Dilanka Perera for Petitioner-Respondent
Appellant

Rohan Sahabandu P.C. with Dulani Warawewa for the
Respondent-Petitioner-Respondent

Argued &

Decided on : 16.09.2014

K. T. Chitrasiri, J.

Heard both Counsel in support of their respective cases.

This is an appeal seeking to set aside the judgment dated 02nd February 2006 of the learned High Court Judge of Matara and to have the order dated 19th July 2004 of the learned Magistrate of Matara, affirmed.

Learned High Court Judge relying upon the decision in the case of **Ali Vs. Abdeen [2001 (1) SLR at 413]** came to the conclusion that the learned Magistrate was in error when he did not make an attempt to settle the dispute between the parties as required by Section 66(6) of the

Primary Court Procedure Act No.44 of 1979. However, the aforesaid decision was not followed in the case of **Mohamed Nizam Vs Justin Dias. [C A. PHC 16/2007]** It was held so since the earlier decision in Ali vs. Abdeen (supra) was delivered by a single judge Bench.

In Mohamed Nizam Vs Justin, (supra) Sisira de Abrew, J. agreeing with Chitrasiri J. held that the question of non-compliance of section 66(6) by the Judge of the primary Court cannot be raised belatedly at the stage of revision or appeal and inaction of the party by not raising the objection in the primary Court amounts to waiver of such objection. This view was upheld by a Divisional Bench of this Court as well which was presided over by A.W.A.Salam J. **[JAYANTHA GUNASEKARA VS. JAYATISSA GUNASEKARA AND OTHERS Sri Lanka Law Reports 2011 - Volume (1) page 284]**

Presence of the law referred to in those two pronouncements is conceded by the learned President's Counsel for the petitioner-respondent too. Therefore, the Law now in place prevents appellate courts interfering with the decisions of a Primary Court Judge on the ground that he has failed to make an endeavour to settle the dispute before proceeding with the inquiry though it is his duty in terms of Section 66(6) of the Primary Court Procedure Act No.44 of 1979.

Hence, it is our view that the learned High Court Judge was in error when he reversed the order of the learned Magistrate on the basis that the trial judge has not made an attempt to settle the dispute before proceeding with the inquiry into the application made in terms of Section 66 of the Primary Court Procedure Act. Accordingly, we set aside the decision dated 02.02.2006 of the learned High Court Judge.

However, we also have carefully considered the order of the learned Magistrate in order to ascertain whether he has applied the law referred to in Section 68 of the Act No.44 of 1979 correctly when he decided to hand over possession of the disputed land to the petitioner-respondent-appellant.

In terms of Section 68(3) of the Act No.44 of 1979, it is the duty of the Primary Court Judge to restore possession of a disputed land to the person who was dispossessed within a period of two months prior to the filing of information in Court. Clear evidence is found in the affidavits filed in the Magistrate's Court to show that the respondent-appellant had been dispossessed within a period of two months prior to the filing of information. It is the decision of the learned Magistrate as well.

Upon perusal of the order of the trial judge, it is clear that he has carefully considered the material before him and then only he has come to the decision that the appellant was dispossessed from the land in dispute within a period of two months prior to the filing of information in

court. In the circumstance, we do not see any error on the part of the learned Magistrate when he decided so.

For the aforesaid reasons, we set aside the judgment dated 02nd February, 2006 of the learned High Court Judge whilst affirming the order dated 19th July, 2004 of the learned Magistrate of Matara. Accordingly, this appeal is allowed with costs.

Appeal allowed

JUDGE OF THE COURT OF APPEAL

M.M.M. Malinie Gunarathne, J.

I agree

JUDGE OF THE COURT OF APPEAL

/mds