IN THE COURT OF APPEAL OF THE DEMOCRATIC SOCIALIST

REPUBLIC OF SRI LANKA

1. Ramasamy Meenachchi
2. S. Padmajodi
3. P. Rajendrakumar alias Ravi

All are of No: 14, Main Street, Nanuoya.

CA case No: CA(PHC) 39/2003

2ND Party Respondent-Petitioners

HC Kandy case No: H.C. 41/2000

Primary Court Nuwaraeliya case No:19876/99

Vs.

1. Suppaiahdas Shanthi Wijeshwari,
2. Subramanium Sadasiwam alias Ayyan Perumal

Both are of No: 14, Main Street, Nanuoya.

1st Party Respondent-Respondent

AND BETWEEN

1. Suppaiahdas Shanthi Wijeshwari,
2. Subramanium Sadasiwam alias Ayyan Perumal

Both are of No: 14, Main Street, Nanuoya.

1st Party Respondent-Respondent

Appellants

Vs.

1. Ramasamy Meenachchi
2. S. Padmajodi
3. P. Rajendrakumar alias Ravi

All are of No: 14, Main Street, Nanuoya.

2nd Party Respondent-Petitioner-Respondents

AND NOW BETWEEN

In the matter of an application for substitution under and in terms of Section 760A of the Civil Procedure Code.

1. Suppaiahdas Shanthi Wijeshwari,
2. Subramanium Sadasiwam alias Ayyan Perumal

Both are of No: 14, Main Street, Nanuoya.

1st Party Respondent-Respondent-Appellant-Petitioners.

Vs.

1. Ramasamy Meenachchi, No: 14, Main Street, Nanuoya. (Deceased)

1a.S. Padmajodi

No. 14, Main Street, Nanuoya.

Respondent seeking to be substituted on behalf of the deceased 2nd party Respondent-Petitioner-Respondent.

2. S. Padmajodi
3. P. Rajendrakumar alias Ravi

All are of No: 14, Main Street,Nanuoya.

2nd Party Respondent-Petitioner-Respondent-Respondents.

Before : W.M.M. Malinie Gunaratne, J

P.R.Walgama, J.

Counsel : Asthika Devendra for 1st Party Respondent-Appellants.

Respondents are absent and unrepresented.

Argued on : 19.02.2015

Decided on : 12. 03.2015

P.R.Walgama, J.

The Petitioner- Appellant (herein after called and referred to as the Appellant) filed an information by affidavit under section 66 (1) (b) of the Primary Courts' Procedure Act No. 44 of 1979.

The Appellant had set out in the said affidavit alleging a breach of the peace due to a dispute regarding a land. Being satisfied with the information contained therein the Learned Primary Court Judge has issued notice to the Respondents to appear in court on the specified date.

As the information filed by the Petitioner - Appellants in terms of above section 66 (1) (b) of the Primary Court Act No 44 of 1979, had disclosed a breach of the peace due to a dispute regarding a Premises. The Learned Primary Court Judge being satisfied with the facts averred in the affidavit, had issued notice on the Respondents to appear in court on the specified date.

On receipt of the said notice the 1st and the 2nd Respondents had filed the affidavits and had stated the following;

That the husband of the 1st Respondent and the father of the 2nd Respondent was carrying on a business in the said disputed premises. In addition the 3rd Respondent who is the husband of the 2nd Respondent was also occupying the same. The permit issued in respect of the said business was marked as 2 R 1. In addition the Respondents had produced a certificate from the gramasevaka in order to prove the fact that the Respondents were residing in the said disputed premises.

There after the case was fixed for inquiry and the Learned Primary Court Judge, having taken in to consideration the material placed before him, had made order dated 18.01.2000 placing the Appellants in possession in the southern portion of the disputed premises.

Being aggrieved by the said order the Respondents had made an application by way of Revision to have the said order vacated / set aside. Pursuant to the said application the Learned High Court Judge by exercising the Revisionary powers had set aside the said order on the basis that the Primary Court Judge has made the said order without having Jurisdiction to do so. In that it is said that the Primary Court Judge before issuing notice in terms of section 66

(1) (b) should be satisfied that there is a breach of the peace due to a dispute in respect of a land. The Learned High Court Judge was of the view that the Leaned Primary Court Judge has not acted in accordance with section 66 (1) (b) of the said Act.

Being aggrieved by the said Judgment of the Learned High Court Judge, dated 10.12.2002, the Petitioner - Appellants had appealed to this court to have the Judgment of the Learned High Court Judge set – aside or vacated.

After issuing notice on the Respondents in respect of the appeal lodged in this court, on many occasions the Respondents and the Registered Attorney had failed to make appearance in court. Nevertheless as per Journal entry dated 20.11.2012, it is evident that both parties were represented and as such the court fixed the case for argument accordingly. After the said date the Respondents or their Registered Attorney did not appear in court. Hence this court heard only the argument of the counsel for the Appellants.

The facts averred by the Appellants is the affidavits are as follows.

That the Appellants were in possession in the premises in suit for well over 25 years. To buttress the said position the Appellants had tendered the documents marked P1 -P5.

It is common ground that this dispute had arisen among the family members who were living in the disputed premises in two different portions. It is stated in the said affidavits that the Appellants were occupying the southern portion of the said premises whereas Respondents were to the northern portion of the same.

The Petitioners had also averred that the Respondents had forcibly entered the house in which the petitioners were living and had obstructed and disspossed them from the premises in suit. The Petitioners had made a complaint to Nanuoya Police on 23.08. 1999 regarding the said dispossession by the Respondents.

In the said affidavit filed by the Petitioner Appellants, it is emphatically stated that they were dispossessed and ejected from the disputed premises. It was on the strength of the assertions made by the appellants in the said petition that the Learned Primary Court Judge had assumed jurisdiction and proceeded to issue notice on the Respondents.

Further it is noted that there had been a scuffle between the Petitioners and the Respondents, and as a result the 1st Appellant had received injuries, and was treated at the Nuwaraeliya hospital.

It was the stance of the 1st to 3rd Respondents that they are carrying on a business in the said premises and alleged that the Petitioners left the disputed premises after their marriage and was living at Welimada.

The Learned Primary Court Judge has adverted his attention to the electoral list tendered by the Appellants which is marked as P4, in proof of the fact that the Appellants were occupying the part of the disputed premises. Hence in the light of the above the Learned Primary Court Judge was of the view that the Appellants were living in the disputed house in a portion towards the South and the Appellants were forcibly dispossessed on 23.08. 1999, by not allowing

the Appellants to enter the southern portion of the house by the Respondent.

In the said background the Learned Primary Court Judge was of the view that the Appellants were dispossessed within two months prior to the filing of the information in Court in terms of Section 66 (1)(b) of the Primary Courts Procedure Act No. 44 of 1979.

Thus the Learned Primary Court Judge by his order dated 18.01.2000 has placed the Appellants in possession in the premises in suit.

Being aggrieved by the said order of the Primary Court Judge, the Respondents had made an application by way of revision to the High Court of Kandy to have the said order vacated. In analyzing the facts before the High Court the Learned High Court Judge has arrived at the following decision;

In that it is said, when a party files a petition in terms of Section 66 (1)(b) the Primary Court Judge should be satisfied that there has been a breach of the peace is threatened or likely, and it is only then the jurisdiction is conferred on the Primary Court Judge to act under Section 66 (1) (b) of the Primary Court Act No:44 of 1979. But if the Primary Court Judge fails to arrive at the said decision, the Primary Court Judge, will be barred in proceeding further.

The said proposition was observed in the case of PUNCHI NONA .VS. PADUMASENA- 1994 2SLR- 117. Therefore the Learned High Court Judge was of the view that the Learned Primary Court has failed to satisfy himself that the facts averred in the affidavit, have revealed of a

dispute which has threatened the breach of the peace. Hence the Learned High Court Judge has dismissed the revision application accordingly.

It is against the said order of the High Court Judge the Appellants had preferred the instant appeal to this Court and pleaded inter alia;

To have the judgment of the Learned High Court Judge to be set aside or vacated. It is viewed from the said impugned judgment that the Learned High Court Judge has dismissed the application in revision on the basis that the Primary Court Judge acting under Section 66 (1) (b) has failed to satisfy himself that there is a dispute which will result in a breach of the peace. When considering the contents in the petition filed in the Primary Court the petitioners had given a vivid description of events that will ensue a breach of the peace. Therefore the Learned Primary Court Judge acting under Section 66 (1) (b) had sufficient material to assume jurisdiction to proceed with the above application.

The Learned High Court Judge in the said impugned Judgment had also referred to the case of PUNCHI NONA .VS. PADUMASENA - 1994 -2 SRI.LR- 117 which has laid down the said proposition. Therefore it is seen that the Learned High Court Judge was of the view that the Learned Primary Court Judge has failed to arrive at the conclusion that the existence of a dispute which has threatened the breach of the peace or likely, therefore in the above setting the Learned High Court

Judge has dismissed the application in revision accordingly. But it is contended by the Appellants that the said position was never a issue in the Primary Court or in the High Court and the jurisdiction of the Primary Court was never challenged.

When proceedings are instituted by way of filing of an information in court in terms of Section 66(1)(b) by a private party it is the duty of the Primary Court Judge to ascertain whether there is a situation where breach of the peace is threatened.

The above position was entertained and accepted in the case of VELUPILLAI .VS. SIVANANTHAM- (1993) 1SLR- 123. It has been held that, "However when an information is filed under Section 66(1)(b) the only material that the Magistrate would have before him is affidavit, information of an interested person and in such situation without the benefit of further assistance from the police the Magistrate should proceed cautiously and ascertain for himself whether there is a dispute affecting land and whether a breach of the peace is threatened or likely."(emphasis added)

There fore the Primary Court Judge has to decide on the above situation before issuing notice on the other party. If the informant fails to satisfy the Magistrate on this aspect, the application will be liable to be rejected. A wide interpretation has been given to the above principle in the case of HASANOON IQUIBAL .VS. MAJUBDEEN (1999) 3 SLR- 213 which held thus;

" breach of the peace is likely does not mean that breach of the peace would ensue for certainty; rather , it means that a breach of the peace or disorder is a result such as might well happen or occur."

Therefore it is well settled law that in order to issue notice under 66(1)(b) imminent breach of the peace is not an essential ingredient, in absolute sense. Nevertheless from the affidavit tendered to court by the Petitioner- Appellants it is crystal clear, undoubtedly there was a dispute over the disputed premises, and in fact the breach of the peace is threatened. Therefore it is abundantly clear that the Learned High Court Judge has arrived at a incorrect finding in setting aside the order of Learned Primary Court Judge dated 18.01.2000.

It is obvious that the Learned Primary Court Judge has assumed jurisdiction pursuant to the affidavit filed under Section 66(1)(b) after being satisfied of the facts averred in the affidavit, and has issued notice to the respondents accordingly.

As per paragraph 7 of the Petition filed by the Petitioners in the Primary Court the alleged dispossession had taken place on 04.08.1999, and the above affidavit in terms of Section 66(1)(b) of the Primary Courts Procedure Act No.44 of 1979 was filed on 13/09/1999. Therefore it is abundantly clear that the Appellants were dispossessed by the Respondents within two months prior to the filing of the petition in terms of the Section 66 (1)(b) of the above Act.

When the judgment of the Learned High Court Judge is reviewed in the above backdrop, I'm of the view that the said impugned judgment is devoid of merits and should be set aside.

Hence we set aside the Judgment of the Learned High Court Judge and allow the appeal accordingly.

JUDGE OF THE COURT OF APPEAL

W.M.M. Malinie Gunaratne, J

I agree.

JUDGE OF THE COURT OF APPEAL