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

C.A.No. CA(PHC)63/2003

Balapitiya (PHC)No. 396/01(Rev)

M.C.Elpitiya No.86826

Officer-in-charge

Police Station, Pitigala

Complainant

vs

1. G.K.Sumanawathie
2. D.M.K. Perera
3. K.B. Chartin

All of Galketiya, Horangalla,

Talgaswala

Respondents

AND

1. D.M.K.Perera
2. K.B. Chartin

Respondent-Petitioners

Vs

G.K. Sumanawathie

Galketiya, Horangalla,

Talgaswala

1st Respondent-Respondent

AND

Game Kankanamge Sumanawathie

Galketiya, Horangalla,Ta;gaswala

1st Respondent-Respondent-Appellant

Vs

D.M.K. Perera

2nd Respondent-Petitioner-Respondent
(decd)

2A K.B. Chartin

Now Dampewatte, Kuligoda

Ambalangoda

Subtd. 2nd Respondent-Petitioner

Respondent

2. K.B. Chartin
Now Dampewatta, Kuligoda
Ambalangoda

3rd Respondent-Petitioner

Respondent

BEFORE : Deepali Wijesundera J.,

M.M.A. Gaffoor J.,

COUNSEL Dr. Mahinda Ralapanawa for the Appellant

Subtd, 2nd Defendant Respondent Respondent is absent and unrepresented.

**ARGUED ON** 08.12.2015

**DECIDED ON** 06.05.2016

M.M.A. Gaffoor J

The instant appeal lodged by the 1st Respondent-Respondent Appellant has sought the reliefs inter alia :

i. To set aside the order of the learned High Court Judge of Balapitiya dated 12th March 2003;

The instant matter relates to a land dispute resulting in the breach of the peace between the parties in respect of the said property.

In view of the relief sought by the above said appellant, it is pertinent to refer to the background of this matter pending in this appeal petition.

The said matter which culminated by the order of the Revision Application before the learned High Court Judge, Balapitiya, relates to a Report and an information filed in the Primary Court of Balapitiya by the Officer in charge, Pitigala Police Station, in terms of Chap. V11 of the Primary Court Procedure Act No. 44 of 1979 under Section 66(1)(a) of the said Act.

Pursuant to the said Report, the parties had filed affidavits to establish their rights as required by the aforesaid Act.

Admittedly, the dispute had been reported to the Primary Court, consequent upon the 2nd Party Respondents alleged to have threatened to cut a mahogany tree in the land in dispute, where the boundaries were uncertain.

In this regard the Primary Court assumes jurisdiction under Section 69(1) and Section 75 of the above said Act.

Section75 of the Act refers to the "meaning of dispute affecting land" (marginal note to Sec. 75) which elaborates as follows:

*"In this part "dispute affecting land" includes any dispute as to the right to the possession of any land or part of a land and the buildings thereon or the boundaries thereof or so as to the right to cultivate any land or part of a land, or as to right to crops or produce of any land, or part of a land, or as to any right in the nature of a servitude..." (emphasis provided)*

Section 69(1) stipulates:

*""where the dispute relates to any other right to any land or any part of a land, other than the right to possession of such a land or part thereof, the Judge of the Primary Court shall determine as to who is entitled to the right which is the subject matter of the dispute and make order under sub-section (2)"*

In this case in point the subject matter of the dispute is a mahogany tree.

In Kanagasabai vs Mylvaganam – 78 NLR 287 Sharvananda J., (as he then was) opined that :

*"This is an interpretation clause: The use of the word 'includes' is significant. Where the word defined is declared to 'mean' so and so, the definition is explanatory and prima facie restrictive; where the word defined is stated to include so and so, the definition is extensive. 'includes' is very*

*generally used in interpretation clauses in order to enlarge the meaning of the words or phrases occurring in the body of the statute, and when it is so used, the words and phrases must be construed as comprehending not only such thing as they signify according to their natural import, but also those things which interpretation clause declares that they shall include...."*

*The above observation was accepted in the case of Velauthan Eliyathamby and another vs Ramalingam Kandasamy and another, 79 NLR 98. And in Nasibun vs Preo Sunker Ghose 1LR 3 Cal. 531, 536; Vyankaji vs Sarjarao 1LR 16 Bom 537, Mellow vs Law (1923) 1KB 526 and Narayanaswami vs. Inspector of Police AIR 1949 Mad. 307,315(SB).*

In the case in point, it will be observed that at a certain point in the proceedings in the Primary Court, via Journal entry pg.116, there seems to be a settlement arrived regarding the dispute as the party to the 2nd part had given an undertaking on 13.3.2001, that they will refrain from cutting the tree in dispute.

This Court observes that the learned Judge of the Primary Court had not followed the statutory provisions in regard to settlement of disputes, as provided for the same in the said Act, namely Section 66(6) which provides thus :

*"On the date fixed for filing of affidavits and documents, where no application has been made for filing counter affidavits, or on the date fixed for filing counter affidavits and documents have been filed, the court shall before fixing the case for inquiry make every effort to induce the parties and the persons interested (if any) to arrive at a settlement of the dispute and if the*

*parties and persons interested agree to a settlement the settlement shall be recorded and signed by the parties and persons interested and an order made in accordance with the terms settled" (emphasis added)*

**It is very clear that the Judge of the Primary court has not followed the required provisions of the relevant law and had not made an appropriate order court would not have been burdened with this type of appeals if the lower courts are mindful of their responsibilities in dealing with their day to day activities in court proceedings, where villagers are involved in petty disputes relating to lands, causing breach of the peace.**

**As the purported settlement has not been properly concluded on an application made by one of the parties had made an application to issue a commission of court to survey the land in dispute. It is also to be noted that demarcation of boundaries does not fall into the ambit of jurisdiction of the Primary Court.**

**This Court further observes that without a recorded settlement the Primary Court Judge had allowed a commission to be filed to define the boundaries in disputed lands vide, journal entry on p. 123. The application for survey pertains to State Lands bearing Lot Nos. 807 and 806, whereas the disputed mahogany tree had been on Lot 9 which was a private land. The State/or the A.G.A of the relevant Division was not a party to the dispute, and they were never aware of the fact that State lands are involved in these proceedings. Even the information filed by Pitigala Police does not reveal that the dispute involves State lands.**

Under Section 66 applications, for a Judge to make an order/determination regarding a matter before him the boundaries of the disputed land has to be certain. If that is not so there cannot be a valid order.

The matter has been discussed in David Appuhamy vs Yassasi Thero 1987 (1) SLR 253. In the unreported judgment of *Somaratna vs Edirisinghe* CA/PHC/66/99 which was decided on 19.12.2012 the Court observed that the location of the disputed jak tree could not be identified to make a determination.

A land dispute affecting the breach of the peace does not warrant a Primary Court Judge to issue a commission to define boundaries, which is a common law remedy as discussed Ponna vs Muthuwa 1949 52 NLR 59. In the case of Fernando vs Fernando 1987 2 SLR 78 – Court of Appeal held among other things that "in the guise of an action for definition of boundaries a Plaintiff cannot vindicate title to an encroachment."

But, in the unreported case of CA No. 557/82 Primary Court, Attanagalla No. 9782 decided on 24.2.1988, the parties agreed to settle the matter after a survey. The Deputy Surveyor General upon a direction of court had surveyed the land. It had also been agreed that the survey should be done to identify whether the Petitioner's hut stood on the Respondents' land and also there had been an agreement if it is found to be so, the Petitioner would vacate the land. Bandaranayake J. held that the Petitioner cannot now agitate the terms of settlement.

It will be seen that in the above case the settlement had been correctly recorded and the parties had signed the same. Whereas, in the case in point we note that there had been no properly recorded settlement.

When the Primary Court Judge who heard the case had been transferred the party of the 2nd Part made an application to the same court to rectify certain errors regarding lot numbers, which was correctly refused by the incumbent Primary Court Judge after verifying the stenographer's notes o 31.11.2000 –vide journal entry at pg. 121.

It was this refusal that resulted in the filing of a Revision Application to Balapitiya, High Court on 19.11.2001. There was a delay of nearly 14 months from the earlier order.

Although the 1st Party objected the said Revision Application on various grounds, the learned High Court Judge on 12.3.2003 delivered the Order in favour of the Petitioners in the Revision Application. The appeal before us is in regard to the Order of the High Court Judge delivered on 12.03.2003.

It may be noted that the reliefs prayed for in the appeal petition before us does not directly fall within the purview of the Primary Court Procedure Act.

In the circumstances both orders of the Primary Court Judge and that of the High Court Judge cannot be sustained in such a situation the remedy for an

**aggrieved party is to seek relief from a civil court, in order to vindicate their respective rights.**

**JUDGE OF THE COURT OF APPEAL**

**Wijesundera J.,**

**I agree.**

**JUDGE OF THE COURT OF APPEAL**