IN THE COURT OF APPEAL OF THE DEMOCRAIC SOCIALIST REPUBLIC OF SRI LANKA.

Court of appeal case no. CA/PHC/84/2009

H.C. Rathnapura case no. 02/2008

M.C. Balangoda case no. 18256

Wijesinghe Arachchilage Prmawathi Menike
Magathenna, Pambahinna, Belihuloya.
Respondent Petitioner Appellant

Vs.

Divisional Secretary,
Divisional Secretary's Office, Imbulpe.
Applicant Respondent Respondent.

Before : H.C.J.Madawala J.
: L.T.B. Dehideniya J.

Counsel : Dharshna Kuruppu for the Petitioner Appellant.
: Nayomi Kahawita SC for the Respondent Respondent.

Argued on : 29.07.2016

Decided on : 21.09.2016

L.T.B. Dehideniya J.

This is an appeal from the High Court of Rathnapura. The facts of the case are briefly as follows.

The State has acquired an extent of land to expand the University of Sabaragamuwa under the provisions of the Land Acquisition Act. The portion of land claimed by the Respondent Petitioner Appellant (the

Appellant) was also a land so acquired. After the acquisition, the Applicant Respondent Respondent (the Respondent) the Divisional Secretary of Imbulpe, filed an application under the State Lands (Recovery of Possession) Act to recover the possession of the land. The learned Magistrate dismissed the application on the technical ground that the Respondent (the applicant in that case) has failed to tender an application in the prescribed form with the affidavit. Thereafter, the Respondent filed the present application in the Magistrate Court of Balangoda under section 42(2) of the Land Acquisition Act no. 09 of 1950 (as amended) seeking for an order to evict the Appellant. The Applicant filed objection to this application mainly on two grounds, firstly that the acquisition was done under proviso of section 38 of the Act for an urgent requirement but the action was instituted after eleven years and therefore the urgent requirement cannot exist and secondly pleaded *res judicata*. The learned Magistrate rejected the objections and allowed the application to evict the Applicant. Being aggrieved by the said order the Appellant moved the matter in revision in the High Court of Rathnapura. The learned High Court Judge dismissed the revision application. This appeal is from that order.

The acquisition was not challenged. It has been published in the Gazette. The Appellant's contention is that the delay in obtaining possession of the land acquired under the proviso of section 38 of the Act by the Government does vitiate the acquisition. In the present case the Respondent has taken steps to recover possession under a different Act, i.e., State Lands (Recovery of Possession) Act, but failed on a technical ground. Even otherwise that attempt would have failed because it has been held in the case of [2001] 3 Sri L R 34 EDWIN v. TILLAKARATNE that *when the statutory scheme embodied in the Land*

Acquisition Act itself provides a procedure for ejectment or remedy it must in the generality of cases, be taken to exclude any other procedure or remedy. Further held that the application that had been made to the Magistrates Court in pursuance of S.5 of the State Lands Recovery of Possession Act cannot be proceeded with.

After the dismissal of that action, the Appellant negotiated with the Respondent to obtain time to vacate the premises. The Respondent states that on "*humanitarian and compassionate grounds*" he has postponed the taking of steps to evict the Appellant.

Ones the land is acquired by the State, it does not become a private land unless the State divest it. The delay in taking steps to recover possession does not divest the land on the Respondent. There was no inordinate delay because the state has given time to the Appellant to vacate the land.

The second argument is the plea of res judicata. The first action was on State Land (Recovery of Possession) Act and the second action is under Land Acquisition Act. The first action was dismissed on a technical reason. Unless the previous action is decided on merits, the doctrine of res judicata does not apply.

Ranjith vs. Piyaseeli [2006] 2 Sri L R 325

Per Wimalachandra, J.:

"To constitute a judicial decision a res judicata, the decision must be on merits, it must be a final decision on the merits. It appears that a decision on issues in a case rather than on procedural grounds is a decision on the merits."

The two main grounds that the Appellant relied on in the revision application in the High Court are legally unacceptable.

Revision is an extra ordinary jurisdiction exercise by the Appellate Court to remedy the miscarriage of justice. To invoke this extra ordinary jurisdiction, the party seeking the relief must plead and establish the exceptional circumstances.

Dharmaratne and another V Palm Paradise Cabanas Ltd and others [2003] 3 Sri L R 24

Per Amaratunga, J.

"Existence of exceptional circumstances is the process by which the court selects the cases in respect of which the extraordinary method of rectification should be adopted, if such a selection process is not there revisionary jurisdiction of this court will become a gateway of every litigant to make a second appeal in the garb of a Revision Application or to make an appeal in situations where the legislature has not given a right of appeal."

2. The practice of Court is to insist in the exercise of exceptional circum stances for the exercise of revisionary powers has taken deep root in our law and has got hardened into a rule which should not be lightly disturbed.

3. The petitioner has not pleaded or established exceptional circumstances warranting the exercise of revisionary powers.

In the present case the Appellant has failed to establish the existences of exceptional circumstances.

In the instant case the State has acquired the land under Land Acquisition Act. The acquisition was not challenged. Under section 42(2) the State can recover the possession of the acquired land. The section reads thus;

42.(1) No officer Shall, under section 40, take possession of any occupied building or any part of an occupied building without giving the occupier of the building at least forty-eight hours' notice of the intention to do so.

(2) Where any officer directed by an Order under section 38 to take possession of any land is unable or apprehends that he will be unable to take possession of that land because of any obstruction or resistance which has been or is likely to be offered, such officer shall, on his making an application in that behalf to the Magistrate's Court having jurisdiction over the place where that land is situated, be entitled to an order of that court directing the Fiscal to deliver possession of that land to him for and on behalf of the State.

(3) Where an order under subsection (2) is issued to the Fiscal by a Magistrate's Court, he shall forthwith execute that order and shall in writing report to that court the manner in which that order was executed.

(4) For the purpose of executing an order issued by a Magistrate's Court under subsection (2), the Fiscal or any person acting under his direction may use such force as may be necessary to enter the land to which that order relates and to eject any person in occupation of that land and to deliver possession of that land to the officer who is authorized to take possession of that land for and on behalf of the State.

The Respondent acting under section 42(2) presented the application to the relevant Magistrate Court. It has been held in the case of Gunawardene vs. D.R.O. Weligam Korale that it is not necessary to hear the occupier before issuing the order to the fiscal to deliver the

possession. Further held that the application must be supported by an affidavit to establish the fats stated therein.

> *H. S. H. P. Gunawardene vs. D. R. O. Weligam Korale, 69 NLR 166 at 167,*
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> *The wording of section 42 (2) seems to contemplate that before an officer could obtain an order under that section he must satisfy the Court that he is unable or apprehends that he will be unable to take possession of the land because of any obstruction or resistance which has been or is likely to be offered. ..... While I agree with the observations of my brother Sirimane, J. in Mohamed Lebbe v. Madana 1[(1964) 66 N. L. R. 239.], that when an order under section 42 (2) directing the Fiscal to deliver possession of the land is made, any person in occupation of the land is not entitled to be heard in opposition to the application, I think it desirable, even though these proceedings are in the nature of execution proceedings, that there should be evidence either orally or on affidavit led before the Magistrate in support of the averments in the application before an ejectment order is made, particularly when a request is made for the use of force, if necessary, to take possession of the land. This evidence may be led ex parte and if the Magistrate is satisfied with the material placed before him, an ejectment order under section 42 (2) may be issued.*

In the present case the Divisional Secretary of Imbulpe, the officer directed to take possession, has sworn an affidavit and stated that he is the officer directed to take possession of the land and that he apprehends that he will be unable to take possession of that land because of obstruction or resistance which is likely to be offered. The affidavit was tendered to Court with the application.

The learned Magistrate considering the application with the documents, correctly issued the order to the fiscal to evict the appellant and the learned High Court Judge affirmed the said order of the learned Magistrate and dismissed the revision application. We see no reason to interfere with those findings.

I dismiss the appeal without costs.

Judge of the Court of Appeal

H.C.J.Madawala J.

I agree.

Judge of the Court of Appeal