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

Batahena Wedaralalage Senarath

Tusantha

Dodawatta,Nuriya

Plaintiff-Respondent-Appellant

Case No.CA(PHC) 152/2012

Kegalle High Court Case No. 3962/Rev

Magistrate Court Ruwanwella Case No. 22060

Vs.

Owitagedara Gamaralalage

Senarathne,

C257,Wilagama,Nuriya(Deceased)

Respondent–Petitioner-Respondent

01. Anthoni Durage Niluka Seuwandi
02. Owitagedara Gamaralalage Nethmini Nawodya
03. Owitagedara Gamaralalage Sithuli Minoda
04. Owitagedara Gamaralalage Sethmi Thiweni
05. Owitagedara Gamaralalage Osuli Thisathna

All of C257, Wilagama,Nuriya.

1A,1B,1C,1D Substituted Respondent-Petitioner-Respondents

Before: K.K. Wickremasinghe J.

Janak De Silva J.

Counsel:

Sunil Abeyratne with Thashira Gunatilake for Plaintiff-Respondent-Appellant

N.T.S. Kularatne with Gamini Karunanayake for 1A, 1B, 1C, 1D and 1E Substituted Respondent-Petitioner-Respondents

Written Submissions tendered on:

Plaintiff-Respondent-Appellant on 20th March 2018

1A, 1B, 1C, 1D and 1E Substituted Respondent-Petitioner-Respondents on 15th March 2018

Argued on: 14th February 2018

Decided on: 25th May 2018

Janak De Silva J.

This is an appeal preferred by the Plaintiff-Respondent-Appellant (Appellant) against the order of the High Court of Kegalle dated 17th September 2012 by which the learned High Court Judge, acting in revision, set aside the order of the learned Magistrate of Ruwanwella dated 15th September 2010.

The case of the Appellant is that he was in possession of the premises in dispute when the Respondent-Petitioner-Respondent (Respondent) forcibly dispossessed him on 29.08.2010. The Appellant instituted proceedings in the Magistrates Court under section 66(1)(b) of the Primary Court Procedure Act (Act) on 14.09.2010 and on 15.09.2010 obtained an interim order ex parte allowing him to re-enter the premises in dispute after removing the padlock placed by the Respondent. On 15.09.2010 notice was also issued on the Respondent. The fiscal executed the interim order and reported to court on 23.09.2010. The Respondent appeared in court on 29.09.2010 and sought a date to file objections and was given time until 20.10.2010 to do so which was later extended to 10.11.2010.

On 12.11.2010 the Respondent filed a revision application in the High Court of Kegalle and obtained a stay order staying further proceedings in the Magistrates Court of Ruwanwella. The learned High Court judge after hearing parties revised and set aside the order dated 15.09.2010 made by the learned Magistrate. Hence this appeal by the Appellant.

The only ground on which the learned High Court judge set side the order of Magistrate Court of Ruwanwella was that the learned Magistrate had erred in issuing an interim order in terms of section 67(3) of the Act after concluding that there was no threat or likelihood of a breach of peace.

The order made by the learned Magistrate on 15.09.2010 is as follows:

"දිව්රුම් ප්‍රකාශ සමග පෙ.1 සිට පෙ.26 ලේඛණවල කරුණුද, නීතිඥ මහතා සැලකර සිටි කරුණුද සැලකිල්ලට ගනිමි. ඉදිරිපත් වූ කරුණු අනුව පාර්ශවකරුවන් අතර සාමය කඩවීමේ තර්ජනයක් උද්ගත වී **නැති** බවට සෑහීමට පත්වෙමි. මෙම නඩුවේ දිව්රුම් පෙත්සමේ ආයාචනයේ 2 ඡේදයේ අතුරු ආඥාවක් නිකුත් කරන ලෙසට ඉල්ලීමක් කර ඇත. මේ අවස්ථාවේදී ඉදිරිපත් වී ඇති කරුණු අනුව එකී සහනය පෙත්සම්කරු වෙත ප්‍රධානය කිරීම උචිත බවට තීරණය කරමි. ඒ අනුව 1 වගඋත්තරකරුට නෙතිසි නිකුත් කරමි. 2 අතුරු ආඥාව පනතේ 67 (3) වගන්තිය ප්‍රකාරව ඉදිරිපත් කල පසු පිටපත් වගඋත්තරකරුට භාරදීමට විශේෂ පිස්කල් මඟින් නිකුත් කරන්න." (emphasis added)

It is clear on a plain reading that there is a clerical error in the order stating "නැති" when it was clearly meant to be "ඇති". That is the reason why the learned Magistrate went on to make an interim order. He began by applying the correct test as when information is filed by a private party under section 66(1)(b) of the Act it is incumbent upon the Primary Court judge to initially satisfy himself as to whether there was a threat or likelihood of a breach of peace and whether he was justified in assuming such special jurisdiction under the circumstances.[1]

There is no specific provision in Part VII of the Act dealing with clerical mistakes or accidental slip or omission. In these circumstances section 78 of the Act allows for the adoption of the provisions in the Civil Procedure Code (Code) governing like matters. Section 189(1) of the Code provides for the correction of any clerical or arithmetical mistake in any judgement or order or any error arising therein from any accidental slip or omission.

[1] *Velupillai and others v. Sivanathan* [(1993) 1 Sri.L.R. 123 at, 126], *Punchi Nona v. Padumasena and others* [(1994) 2 Sri.L.R. 117], *Kanagasabai v. Mylvaganam* (78 N.L.R. 280 at 283)

Hence undoubtedly, the Magistrates Court of Ruwanwella did have the power to correct the clerical error in the order made on 15.09.2010 upon an application been made.[2]It is unfortunate that no such application was made by the Appellant before the Magistrates Court of Ruwanwella. That would have obviated the need for this matter to languish before two appellate courts for over eight years.

In *Gunasena v. Bandaratilleke*[3] Wijetunga J. held as follows:

> "The authorities...clearly indicate that a court has inherent power to repair an injury caused to a party by its own mistake. Once it is recognized that a court would not allow a party to suffer by reason of its own mistake, it must follow that corrective action should be taken as expeditiously as possible, **within the framework of the law**, to remedy the injury caused thereby. The modalities are best left to such court and would depend on the nature of the error." (emphasis added)

The question that engrossed my anxious consideration was whether the clerical error can be corrected by another court at appeal or revision stage as in the instant case. I am reassured by the following statement of H.N.G. Fernando S.P.J. in *Moosajees Ltd. v. Fernando*[4]:

> "This Court has also exercised an inherent power to correct error in a judgement which has occurred per incuriam. **I doubt whether this power is exercisable only by the Judge who has pronounced the judgement; for if so, there would be no means of correcting even a manifest clerical error discovered in the judgement after the death or retirement of the Judge who pronounced it.**"[5](emphasis added)

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[2] *Fernandopulle v. De Silva and others* [(1996) 1 Sri.L.R.70], Gunasena *v. Bandaratilleke* [(2000) 1 Sri.L.R. 292]
[3] Ibid.
[4] 68 N.L.R. 414
[5] Ibid. page 419

Furthermore, the word "court" in section 189(1) of the Code is defined in section 5 of the Code to mean, "unless there is something in the subject or context repugnant thereto, a Judge empowered by law to act judicially alone, or a body of Judges empowered by law to act judicially as a body, when such Judge or body of Judges is acting judicially". I am of the view that in the instant case, there is nothing in the subject or context repugnant to ascribing a judge exercising revisionary or appellate jurisdiction to the word "court" where the impugned judgement or order contains a clerical error. If not, a party may seek to obtain undue advantage from a clerical error committed by court by impugning a judgement or order the very next day after it is delivered and arguing that the original court cannot thereafter correct the clerical error in the judgement or order. Accordingly, I am of the view that the learned High Court judge should have corrected the obvious clerical error and erred in failing to do so.

There is a further reason as to why the High Court should not have exercised revisionary jurisdiction against the interim order made by the Magistrate in terms of section 67(3) of the Act. That interim order was made pending the conclusion of the inquiry. The Respondent had and indeed was given the opportunity to file objections. Instead, the Respondent rushed to the High Court to set aside the interim order made ex parte.

It is trite law that revisionary powers will not be exercised where the aggrieved party has another remedy unless there are exceptional circumstances.[6]In the instant case the Respondent did not establish any exceptional circumstances before the High Court. One ground urged by the Respondent as forming exceptional circumstances, was that the interim order was made ex parte. It is correct that the interim order was made by the learned Magistrate on the very date the plaint was supported by the Appellant. However, as held in *Muthukumarasamy v. Nannithamby*[7]the Magistrate/Primary Court has power even on the day information is filed to issue an interim order. This was quoted with approval by the Supreme Court in *Hotel Galaxy Ltd. v. Mercantile Hotel Management Ltd.*[8]

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[6] *Hotel Galaxy Ltd. v. Mercantile Hotel Management Ltd.* [(1987) 1 Sri.L.R. 5]
[7] (1983) 1 Sri Kantha's Report 55
[8] (1987) 1 Sri.L.R. 5

The learned Counsel for the 1A, 1B, 1C, 1D and 1E Substituted Respondent-Petitioner-Respondents submitted that the order made by the learned Magistrate on 15.09.2010 is contrary to section 66(6) of the Act which requires the Magistrate to, before fixing the case for inquiry, make every effort to induce the parties to arrive at a settlement which is a fatal irregularity. In *Ali v. Abdeen*[9] U.de Z. Gunawardena J. held that the Primary Court was under a peremptory duty to encourage or make every effort to facilitate dispute settlement before assuming jurisdiction to hold an inquiry into a matter of possession and that making of such an endeavor by Court is a condition precedent which had to be satisfied before the function of the Primary Court under section 66(7) began to consider who had been in possession. I am in respectful agreement with the views expressed therein. However, that duty cannot prevent the court making an interim order under section 67(3) of the Act. Adopting the interpretation proposed by the learned Counsel for the 1A, 1B, 1C, 1D and 1E Substituted Respondent-Petitioner-Respondents will negate the very purpose for which the power is given to the court under section 67(3) of the Act. Furthermore, the Magistrate/Primary Court has power even on the day information is filed to issue an interim order.[10]

For the foregoing reasons, I set aside the judgement of the learned High Court Judge of Kegalle dated 17th September 2012. I further direct the Magistrates Court of Ruwanwella to continue the proceedings according to law from the point it was stayed by the High Court and conclude the matter expeditiously.

The record does not indicate whether the possession of the disputed premises was handed back to the Respondent as a result of the judgement of the learned High Court judge of Kegalle. It is the duty of this court to restore possession of the disputed premises back to the Appellant if it has been so handed over to the Respondent. Justice requires that the Appellant should be restored to the position he occupied before the invalid order was made, for it is a rule that the court will not permit a suitor to suffer by reason of a wrongful act. *Actus curiae neminem gravabit* (An act of the court shall prejudice no man). Court will so far as possible put him in the same

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[9] (2001) 1 Sri.L.R. 413

[10] *Muthukumarasamy v. Nannithamby* [(1983) 1 Sri Kantha's Report 55], *Hotel Galaxy Ltd. v. Mercantile Hotel Management Ltd.* [(1987) 1 Sri.L.R. 5]

position which he would have occupied if the wrong order had not been made.[11] Accordingly, if the possession of the disputed premises has been handed back to the Respondent as a result of the judgement of the learned High Court judge of Kegalle, I direct the fiscal of High Court of Kegalle to give possession of the disputed premises back to the Appellant. This direction will not in any way prevent the learned Magistrate of Ruwanwella from making an appropriate order according to law once proceedings recommence before him as directed by this court.

Appeal allowed. The Appellant is entitled to his costs both in the High Court as well as in this court.

Judge of the Court of Appeal

K.K. Wickremasinghe J.

I agree.

Judge of the Court of Appeal

[11] *Sirinivasa Thero v. Sudassi Thero* (63 N.L.R. 31), *Sivapathalingam v. Sivasubramaniun* [(1990) 1 Sri.L.R.378], *Gunasekera v. Bandaratilleke* [(2000) 1 Sri.L.R. 292], *Caroline Perera and another v. Martin Perera and another* [(2002) 2 Sri.L.R. 1]