

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

In the matter of an application for
interim relief in terms of Part I of the
Court of Appeal (Appellate
Procedure) Rules of 1990.

C.A.(PHC) No. 115/2009

H.C. Colombo Revision

Application No. HCRA/01/2008

M.C. Colombo No. 88517/5/06

Mohamed Ismail Mohammed Nazar,
No.10, Horten Place,
Colombo 07.

**Respondent-Petitioner-Appellant-
Petitioner**

Vs.

Kottal Bedde Vidanalage Dharmasiri
Director General,
Urban Development Authority,
"Sethsiripaya",
Baththramulla

**Applicant-Respondent-Respondent-
Respondent**

BEFORE : JANAK DE SILVA, J. &
ACHALA WENGAPPULI, J.

COUNSEL : M. Kumarasinghe with I. Dantaranayana for the
Respondent-Petitioner-Appellant-Petitioner.
Manohara Jayasinghe S.C. for the Applicant-
Respondent-Respondent-Respondent.

ARGUED ON : 08th May, 2018

DECIDED ON : 08th June, 2018

ACHALA WENGAPPULI, J.

This is an appeal against an order of the Provincial High Court holden in Colombo in a revision application. The Provincial High Court, by its order dated 27.08.2009, refused the revision application of the Respondent-Petitioner-Appellant-Petitioner (hereinafter referred to as the Appellant). In his revision application, the Appellant sought to revise an order of eviction made by the Magistrate's Court of Colombo upon an application by the Applicant-Respondent-Respondent-Respondent (hereinafter referred to as the Respondent).

The Respondent initially made an application in case No. 3637, under Section 5 of the State Lands (Recovery of Possession) Act No. 7 of 1979 as amended (hereinafter referred to as the "Act"), seeking an order of

eviction on the Appellant. After an inquiry, the Magistrate's Court of Gangodawila made an order on 26.08.2005 for his eviction.

At a subsequent stage, when the Respondent sought to execute the said order of eviction, it was revealed that the State land in respect of which the said eviction order was made, is not situated within the territorial jurisdiction of the Magistrate's Court of Gangodawila. On 9.12.2005, the Respondent conceded that the said Court has no jurisdiction over the subject matter.

Thereafter, the Respondent made another application to the Magistrate's Court of Colombo in Case No. 88517/5/6, seeking the eviction of the Appellant. Prior to this application, the Respondent has issued another notice to quit on the Petitioner on 27.12.2005.

The Appellant raised a preliminary objection before the Magistrate's Court of Colombo on 17.12.2007, as to the maintainability of the proceedings before it, upon the following grounds;

- i. Proceedings could not be instituted in two different Courts under same law against the same person,
- ii. The Respondent has not withdrawn the case before the Gangodawila Magistrate's Court and as a result order made by it remains valid,
- iii. The Respondent cannot institute proceedings in a different judicial zone.

The learned Magistrate, after hearing the submissions of the parties on the preliminary objection, made her order on 18.12.2006 by “accepting” the preliminary objection raised by the Appellant. She further directed the Respondent to withdraw the case before the Magistrate’s Court of Gangodawila against the Appellant and reserved her order on the application of the Respondent to a future date, stating that she would consider the “objections and documents” after the said withdrawal.

On 09.10.2007, learned Magistrate who succeeded his predecessor, made an order of eviction as moved by the Respondent after a certified copy of the proceedings before the Magistrate’s Court of Gangodawila was tendered. The Appellant thereafter moved the Provincial High Court to revise the said order of eviction in HCRA 01/2008. The High Court refused his application on the basis that the Appellant did not challenge the validity of the quit notice issued on him by seeking the remedy of judicial review and that the Magistrate’s Court is only authorized to inquire in to the question whether the Appellant has a valid permit or other written authority of the State or not. It also rejected the claim of the Appellant that there is no proper application since the Respondent’s description of the boundaries to the State land is vague and indefinite.

In challenging the validity of the said order of the Provincial High Court, learned Counsel who appeared for the Appellant submitted as his first ground of appeal that the 2nd order of the Colombo Magistrate of

9.10.2007 was made when the same Court has already “accepted” his objection to its jurisdiction and therefore was *functus officio* when it pronounced the 2nd impugned order. He sought to have this order revised before the Provincial High Court

The second ground of appeal urged by the learned Counsel for the Appellant is that the description of the State land in the application filed by the Respondent is vague in respect of its boundaries. His position is that the land occupied by the Appellant is only 55 perches in extent while the State land described in the schedule to the application is in extent of 26.298 Hectares and therefore it appears that the Respondent was not sure of the boundaries to the State land which formed the subject matter of his application. The Appellant denies in possession of any State land while claiming that the land he is in possession is a private land.

Learned State Counsel, in his submissions in reply claimed that the Appellant did not challenge the quit notice issued by the Respondent. It is his contention that the learned Magistrate, in delivering her order on the preliminary objection of the Appellant to its jurisdiction, did not terminate proceedings by dismissing the application even though she used the word “accept” in relation to the objection raised by him to her jurisdiction. He further pointed out that whilst “accepting” the preliminary objection, she directed the Respondent to withdraw the case before the Magistrate’s Court of Gangodawila and has kept the proceedings before her Court alive, by stating that she would pronounce her order on the “objection”

and material contained in the documents tendered by the parties, at a subsequent stage of the proceedings.

He further submitted that the claim of the Appellant that he is in possession of a private land could also be resolved by resorting to the remedy provided for in the statutory provisions contained in Section 12 of the said Act.

In view of these submissions, this Court proceeds at this stage to consider whether the order of eviction issued by the Magistrate's Court of Colombo and the order of the Provincial High Court are legally valid.

It is evident from the perusal of the journal entry of 05.09.2005 that the Court officers have encountered a practical difficulty in executing the eviction order issued by the Magistrate's Court of Gangodawila on 26.08.2005. Then the Respondent has conceded that the State land, in respect of which the eviction order of 26.05.2005 was issued, is located outside the territorial jurisdiction of the Magistrate's Court of Gangodawila. Then the Court has made order that the order of eviction could not be executed. It is clear from the wording of the journal entry of 09.12.2005, that the said Court considered the proceedings before it as either discontinued or abandoned.

The Respondent has then issued a 2nd quit notice on the Appellant on 27.12.2005 after the proceedings before the Magistrate's Court of Gangodawila was discontinued. He then filed an application before the Magistrate's Court of Colombo, seeking an order of eviction on 31.01.2006. Thus, it is clear that when the Respondent instituted proceedings before the Magistrate's Court of Colombo, the proceedings before the Magistrate's Court of Gangodawila has already been discontinued on the basis of jurisdiction. As rightly conceded by the learned Counsel for the Appellant, the Magistrate's Court of Gangodawila had no territorial jurisdiction to determine the application of the Respondent.

When the Respondent instituted proceedings before the Magistrate's Court of Colombo after issuing a 2nd quit notice on the Appellant, it is clear that the proceedings were instituted afresh in the proper jurisdiction, as there was no continuation of proceedings before the Magistrate's Court of Gangodawila at that time. When the Appellant appeared before the Magistrate's Court of Colombo, he objected to the proceedings before on three grounds. The learned Magistrate, in her order merely states that she "accepts" the objection to jurisdiction. There is no clear pronouncement in the said order as to which of the objections she accepted. Strangely, she then reserves her determination on the application of the Respondent to a subsequent date awaiting withdrawal of already inactive proceeding tainted with jurisdictional error.

Her successor, who merely continued with the proceedings which was kept alive and has thereafter made the impugned order of eviction on 09.10.2007.

When the Appellant invoked revisionary jurisdiction of the Provincial High Court seeking to set aside the said order of eviction, he challenged its validity on the basis that "a man shall not be twice vexed for one and the same cause" and further claimed that "as long as the order of the Magistrate's Court of Gangodawila is alive and not withdrawn no other Court has jurisdiction to hear and determine the same matter as a judicial order is valid as it is not set aside by an appellate Court."

The provincial High Court, having considered the judgments of *Piyaratana Unnanse v Waharaka Sonuttara Unnanse*(1950)51 N.L.R. 313 and *Navaroch v Shrikanthan and Others* (1997) 1 Sri L.R. 286 relied upon by the Appellant in support of his contention, concluded that the order of eviction made by the Magistrate's Court of Gangodawila is *null and void* for want of jurisdiction and once a Court makes an order, it becomes *functus officio* and as such, it cannot allow a party to withdraw the action.

In relation to the 1st order made by the Magistrate's Court of Colombo in "accepting" the preliminary objection raised by the Appellant, learned High Court Judge is of the view that it was made upon a misdirection of law.

It must be observed here that the view expressed by the Provincial High Court that the order of eviction made by the Magistrate's Court of Gangodawila is *null and void* for want of jurisdiction is based on a correct application of the relevant legal principles. The purpose of the enactment of the Act is to recover possession of State land from illegal occupation. The only way to recover possession is to enforce the order of eviction. If an original Court is not empowered to enforce an order of eviction due to its territorial restrictions, then such a situation could be termed as an instance of patent lack of jurisdiction as per the judgment of *Perera v Commissioner of National Housing* 77 N.L.R. 361. Justification for this view would be the consideration that even if the parties, by their acquiescence have conferred jurisdiction on the Court, still it could not execute the order of eviction.

The judgment the divisional bench of the then Supreme Court in *Naide v The Ceylon Tea Palntation Co. Ltd., of London* (1966) 68 N.L.R. 558 where Sansoni CJ observed that;

"It is clear law that a judgment given without jurisdiction is a nullity, for judicial power is capable of being exercised by a Court only when it is a Court of competent jurisdiction, and that means competent under some law."

Therefore, the discontinued proceedings before the Magistrate's Court of Gangodawila ought to be treated as a nullity for want of jurisdiction and should not be considered as an impediment to a subsequent institution of proceedings before a competent Court. On this reasoning, the conclusion reached by the Provincial High Court, that the

“acceptance” of the objection to the jurisdiction of the Magistrate’s Court of Colombo, is an erroneous conclusion is justified.

Legal effect of the “acceptance” of preliminary objection by the learned Magistrate is nullified by her own reasoning contained in the said order. Learned Magistrate has, instead of dismissing the action for want of jurisdiction, reserved her order on the “objection” and application to a later date. This is a clear indication that the original Court was not convinced that it did not have the jurisdiction due to proceedings before the Magistrate’s Court of Gangodawila, which in fact was in a state of abandonment. That action lay idle in the Magistrate’s Court of Gangodawila since its order could not be executed. The Provincial High Court has correctly held that the general “acceptance” of the preliminary objections raised by the Appellant without specifying to the three objections, clearly erroneous. This order by the Magistrate’s Court of Gangodawila was made without jurisdiction and could not be accepted as legally valid. It could not anyway be enforced. Hence there was no legal impediment to institute proceedings before the Magistrate’s Court of Colombo.

The second ground of appeal raised by the Appellant is in relation to the vague description of boundaries and improper identification of the corpus. He claimed that he occupies a portion of private land which is in extent of 55 perches whereas the Respondent sought his eviction from a land in extent of 26.298 Hectares and it is a very clear indication that the

Respondent is not in a position to clearly demarcate the State land in respect of which, an eviction order is sought.

In the objections filed before the Provincial High Court, the Respondent provides a reason for the description of the State land in the schedule to his application in that way. According to the Respondent, the portion of State land which is in illegal possession of the Appellant lies within the larger land described in the schedule. In providing the reason for not including a survey plan to demarcate the exact boundaries of the portion of land which is in illegal occupation in the schedule, the Respondent claim that there is no such duty imposed on him by the applicable statutory provisions. He further claims that such a course of action poses a practical difficulty in execution even if an order of eviction is issued by the Court. The practical difficulty poses by such a situation is described by the Respondent. According to the Respondent, all what the Appellant needs to do in such a situation, is to move outside the demarcated portion of State land in the application and continue to possess another part of the larger State land, making the Respondent to engage in never ending cycle of filing applications before Courts seeking eviction of the Appellant in respect of each of these shifting occupations.

In view of the provisions of the Act, these factors are clearly irrelevant considerations as far as the scope of the inquiry under Section 9 of the said Act, as the statutory provisions contained in Section 9(2) of the

said Act, clearly prevents a Magistrate from calling any evidence in support of the application filed under Section 5.

Once the Competent Authority forms an opinion that a particular land is a State land, the person who is in possession of that land could challenge this opinion in judicial review as per the judgment of *Dayananda v Thalwatte* (2001) 2 Sri L.R. 73. In *Farook v Gunewardene, Government Agent Amparai* (1980) 2 Sri L.R. 243, it was held that a Magistrate is not competent to question the opinion of a Competent Authority. The Appellant before this Court, for reasons best known to himself, opted not to challenge even the 2nd quit notice issued on him by the Respondent, after the proceedings before the Magistrate's Court of Gangodawila was discontinued.

When the Competent Authority institutes proceedings under Section 5 of the Act to evict a person in occupation of State land, the jurisdiction of the relevant Magistrate's Court is circumscribed to the extent of verifying whether such occupation is on a valid permit or a written authority or not. Its trite law that all what the inquiring Magistrate has to satisfy himself before issuing an eviction order, is whether the respondent before that Court has;

- i. occupied the land on a permit or a written authority
- ii. the permit or the written authority is valid and in force at the time of presenting it to Court

- iii. a valid permit or a written authority which was issued in accordance with any written law

The Appellant has failed to satisfy the Magistrate's Court of Colombo in any of the above considerations. Therefore, the order of eviction is rightly made and the refusal by the Provincial High Court to intervene, exercising its revisionary jurisdiction, is justified in the circumstances.

In view of the above reasoning, we are of the view that the appeal of the Appellant is devoid of any merit. Accordingly, his appeal is dismissed without costs.

JUDGE OF THE COURT OF APPEAL

JANAK DE SILVA, J.

I agree.

JUDGE OF THE COURT OF APPEAL