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

In the matter of an application for Revision under Article 154 P of the Constitution.

Lakmanage Piyasena Podimahattaya,

Madagalla, Noori

Petitioner-Respondent-Appellant

Lakmana Gamage Hemantha,

No. 135/3, Maharagama Road,

Mampe, Piliyandala.

Substituted Petitioner-Respondent-Appellant

Case No. CA(PHC) 208/2005

H.C. Kegalle Case No. 1776/Revision

M.C. Ruwanwella Case No. 36744

Vs.

Nekethrallage Luvis Singho alias Gunawardena,

Madagalla, Noori

Respondent-Petitioner-Respondent

1. N.R.Gunawathie

   Madagalle, Noori.
2. N.R.Ratnasiri

   Madagalle, Noori
3. N.R.Samanthika Wijewardhena

   Wattegedaragama,Deraniyagala.

1st, 2nd, 3rd Intervenient Respondents-Party-Respondents-Respondents

Before: K.K. Wickremasinghe J.

Janak De Silva J.

Counsel:

Hemasiri Withanachchi for Substituted Petitioner-Respondent-Appellant

Mahinda Nanayakkara for Respondents-Petitioners-Respondents

Written Submissions tendered on:

Substituted Petitioner-Respondent-Appellant on 05.06.2018

Respondents-Petitioners-Respondents on 04.06.2018

Argued on: 15.02.2018 and 04.05.2018

Decided on: 31.07.2018

Janak De Silva J.

This is an appeal against the order of the learned High Court Judge of the Sabaragamuwa Province holden in Kegalle dated 06.09.2005.

The Petitioner-Respondent-Appellant (Appellant) instituted proceedings in M.C. Ruwanwella under section 66(1)(b) of the Primary Courts Procedure Act (Act) stating that the Respondent-Petitioner-Respondent (Respondent) was wrongfully and unlawfully disputing the Appellants possession of the land called "Kiri Ammalagala Gawa Watta" also known as "Kiriammala Gawa Watta" and was forcibly trying to oust the Appellant therefrom.

The Respondent disputed the name of the land and claimed that the land in dispute was called "Puhuwarakagawa Watta" which was the subject matter of a partition action bearing No. 143/P in the District Court of Avissawella and that the Respondent had appealed to the Court of Appeal against the judgement of the learned District Judge dismissing the action.

The learned Magistrate by his order dated 12.06.2013 held that the land called "Kiriammalalage Watta" was possessed by the Appellant but that the said land is part of the corpus in D.C. Avissawella Case No. 143/P and although it was in appeal the Appellant was entitled to possess the portion of land in dispute and all the Respondents were ordered not to disturb the possession of the Appellant until a final decision of the Appellate Court.

The Respondent made an application in revision to the High Court of the Sabaragamuwa Province holden in Kegalle seeking to set aside the order of the learned Magistrate. The learned High Court Judge set aside the order of the learned Magistrate and held that the Respondent was entitled to possession of the land called Puhuwarakagawa Watta also known as Pussagawa Watta and directed the Appellant not to disturb the possession of the Respondent. Hence this appeal by the Appellant.

It is interesting to note that both the learned Magistrate and the learned High Court Judge concluded that the land in dispute is part of the corpus in D.C. Avissawella Case No. 143/P. However, the learned Magistrate identified it as Kiriammalalage Watta whereas the learned High Court Judge identified it as Puhuwarakagawa Watte. The learned High Court Judge concluded that the land called Kiriammalalage Watta and Nekathige Watta was combined and became one piece of land called Nekathige Watta which was the subject matter of the D.C. Avissawella Case No. 14148/P.

I have given careful consideration to the judgement of the learned High Court Judge on the identity of the corpus. I am of the view that irrespective of the name by which the land in dispute was identified by parties, the important aspect in this case is that both, the learned Magistrate and the learned High Court Judge concluded that the land in dispute was part of the corpus in D.C. Avissawella Case No. 143/P. It is on this basis that the learned High Court Judge set aside the order of the learned Magistrate and held that as there is an appeal pending in relation to a partition action the Primary Court does not have jurisdiction in terms of the 4th schedule to the Judicature Act.

The learned Counsel for the Respondent relies on section 32(2) of the Judicature Act No. 02 of 1978 as amended (Judicature Act) read with the Fourth Schedule to the said Act to support the conclusions of the learned High Court Judge. Section 32(2) states that "The Primary Courts shall have no jurisdiction in respect of the disputes referred to in the Fourth Schedule hereto...". The Fourth Schedule to the Judicature Act has the heading "Actions excluded from the Jurisdiction of Primary Courts" and lists "any action for the partition of immovable property" as one type of action excluded from the jurisdiction of the Primary Court. On that basis the Respondent submits that the Magistrate's Court did not have jurisdiction to entertain the application.

The learned Counsel for the Appellant in response submitted that section 32(2) of the Judicature Act read with the Fourth Schedule only prevents the institution of the listed actions in a Primary Court. He submitted that the mere pendency of a civil action in respect of the same land in which a breach of peace has taken place will not divest the Magistrate of jurisdiction under Part VI of the Primary Court Procedure Act (Act).

Scope of Part VI of the Act

Part VI of the Act was enacted to grant the Primary Courts power to prevent parties from using force to assert their civil rights. In *Ramalingam v. Thangarajah* [(1982) 2 Sri. L. R. 693 at 700] Sharvananda J. (as he was then) held:

> "In this connexion what I said with reference to the provisions of section 62 of the Administration of Justice Law No.44 of 1973 (now repealed) in *Kanagasabai Vs. Mailvanaganam,* (78 N.L.R. 280 at 283) apply equally well to the Section 66 and 68 of the Act which correspond to them: -
>
> > "Section 62 of the Administration of Justice Law confers special jurisdiction on a Magistrate to make orders to prevent a dispute affecting land escalating and causing a breach of the peace. The jurisdiction so conferred is a quasi-criminal jurisdiction. The primary object of the jurisdiction so conferred on the Magistrate is the prevention of a breach of the peace arising in respect of a dispute affecting land. The section enables the Magistrate temporarily to settle the dispute

between the parties before the Court and maintain the status quo until the rights of the parties are decided by a competent civil Court All other considerations are subordinated to the imperative necessity of preserving the peace. At an inquiry under that section the Magistrate is not involved in an investigation into title or right to possession, which is the function of a civil Court. The action taken by the Magistrate is of a purely preventive and provisional nature in a civil dispute, pending final adjudication of the rights of the parties in a civil Court. The proceedings under this section are of a summary nature and it is essential that they should, be disposed of as expeditiously as possible ....."

The scheme embodied in this Part is geared to achieve the object of prevention of a breach of the peace. Section 68(2) enjoins the Judge to decide the dispute which gave rise to the threat to a breach of the peace, provisionally and to maintain the status quo until the right of parties are decided by a competent Civil Court."

These observations clearly indicate that the powers vested in a Primary Court under Part VI of the Act are not to be exercised only in situations where a civil court has no part to play in a dispute affecting land. Often, a Primary Court is tasked with assisting the adjudication of a civil dispute in a competent civil court by making orders that preserve the status quo and prevents a breach of peace until the final determination of a civil action. Therefore, the general scheme of Part VI of the Act vitiates the argument that a Primary Court is divested of jurisdiction to make an order for the preservation of peace when such an order deals with a subject matter that is being dealt with by a competent civil court.

There is also no danger of a Primary Court's order overriding an order/decree of a competent civil court. Section 74 of the Act has made specific provision to ensure that a decision of a civil court regarding a particular right or interest over a land trumps a temporary order made under Part VI of the Act. This is the case even when it comes to an order relating to possession made under section 68. Section 68(2) states that an order declaring a person entitled to possession shall subsist "until such person or persons are evicted therefrom under an order or decree of a competent court".

At this stage, it is also appropriate to consider a decision which has dealt with the scope of jurisdiction of a Primary Court. In *Mansoor and another* v *OIC Avissawella Police and another* [(1991) 2 Sri. L. R. 75] a tenant cultivator was evicted from a paddy land and sought restoration of possession in terms of Part VI of the Act. Justice Sarath Silva (as he was then) refused relief to the tenant cultivator on the basis that he had an alternative statutory remedy under the Agrarian Services Act to secure restoration of possession and use and occupy the paddy land. The *ratio decidendi* of this judgment has no applicability to the present case since the Appellant does not have an alternative statutory remedy available to him to seek restoration of possession.

Scope and Effect of Section 32(2) of the Judicature Act read with the Fourth Schedule

The main question to be decided in this case is whether section 32(2) of the Judicature Act read with the Fourth Schedule (item 4) precludes a Primary Court from making an order declaring a person/s entitled to be in possession of part of a land, when a partition action/appeal is ongoing in relation to that part of the land.

The heading of the Fourth Schedule is significant in this regard. It reads as 'Actions excluded from the Jurisdiction of Primary Courts'. Section 6 of the Civil Procedure Code defines an action as an 'application to a court for relief or remedy obtainable through the exercise of the court's power or authority or otherwise to invite its interference....'. Chapter VII of the Civil Procedure Code is titled 'Of the Mode of Institution of Actions' and lays down extensive steps and standards for the institution of an action before a civil court. Section 2 of the Partition Law No. 21 of 1977 as amended sets out the scope of a partition action as follows:

> "Where any land belongs in common to two or more owners, any one or more of them, whether or not his or their ownership is subject to any life interest in any other person, may institute an action for the partition or sale of the land in accordance with the provisions of this Law."

Taking these provisions into consideration, one must necessarily come to the conclusion that section 32(2) of the Judicature Act read with the Fourth Schedule only precludes certain types of applications to obtain relief or remedy from a court in accordance with the procedure stipulated in Chapter VII of the Civil Procedure Code from being filed before the Primary Court. A sine qua non of an action is the filing of an application before court seeking relief or redress. If an application of this nature relates to any of the items listed under the Fourth Schedule of the Judicature Act, the Primary Court will be precluded from entertaining the application.

In *Kanagalingam v Jegatheswaran and another* [(2009) 1 Sri. L. R. 159] this Court had to consider whether section 32(2) of the Judicature Act read with the Fourth Schedule prevented a Primary Court from entertaining an application when the parties stood in the relationship of tenant and landlord. It was pointed out by counsel for the appellant in that case that item 35 of the Fourth Schedule referred to any 'Any action for rent and ejectment and proceeding under the Rent Law'. The Court in this case very correctly pointed out that it is the nature of the application made before the Primary Court that must be considered in deciding whether the court has jurisdiction or not. The Ranjith Silva J. observed as follows (at page 162):

> "If a case of rent and ejectment is filed in the Primary Court, of course the Primary Court Judge has no power to go into that matter. But if the dispute is referred to by way of a 66 application where the jurisdiction is circumscribed and limited to deciding only the issue of possession in order to prevent a breach of the peace then such action is within the plenary jurisdiction of the Primary Court. Therefore, we are unable to sustain this argument and thus we dismiss the appeal. "

In the present case, a perusal of the first affidavit (dated 2002.09.12) filed by the Appellant before the learned Magistrate of Ruwanwella (vide page 82 of the Appeal Brief) clearly shows that the nature of the application before the Primary Court was of one filed under section 66 of the Primary Courts Procedure Act. In paragraphs 2, 3 and 7 of the said affidavit, the Appellant clearly states that he is filing the action since the Respondent had forcibly dispossessed him from the land described in the schedule to the affidavit. In paragraphs 25 and 26 of the said affidavit, the Appellant clearly states that he was dispossessed from the land within 2 months of the filing of

the affidavit and that the dispossession has led to a breach of peace. Further, the reliefs sought by the Appellant included (a) a declaration to the effect that the Appellant is entitled to the possession of the land (b) an order directing that he be restored to possession. These factors clearly establish that the nature of the application before the court was of one filed under section 66 read with section 68 of the Act and not a partition action within the meaning of section 2 of the Partition Law No. 21 of 1977 as amended.

Since the nature of the application filed is the only factor that ought to be given consideration when deciding on whether jurisdiction can be exercised, the fact that the section 66 application relates to a corpus that is also the subject matter of a pending partition action appeal is of no consequence.

In *Kanagasabai* v *Mylvaganam* (supra), proceedings had been instituted by the petitioner in terms of section 62 of the Administration of Justice Law in relation to an alleged forcible dispossession. At the outset of the proceedings, counsel for the respondent had brought to the court's attention the fact that he had subsequently instituted a civil case against the Petitioner seeking a declaration that the Petitioner was not a tenant entitled to occupy the said premises and an interim and permanent injunction restraining the Petitioner from occupying the premises.

The learned Magistrate in that case elected to discontinue proceedings on the basis that an application was pending in relation to the same corpus before the District Court. In appeal, the Supreme Court observed that the Magistrate had fallen into serious error by considering that his jurisdiction had been ousted due to the subsequent invocation of civil proceedings. Ranjith Silva J. (at page 284) observed as follows:

> *"The Magistrate has fallen into an error in conceiving that his jurisdiction has been ousted by the proceedings taken by the respondent in the District Court subsequent to the institution of the present proceedings by the Police. As stated earlier, the mere pendency of a suit in a civil Court is an irrelevant circumstance for the Magistrate to take into consideration when making an order under sections 62 and 63 of the Administration of Justice Law. His primary function is to maintain law and order. If the mere institution of a suit in a civil Court is sufficient to divest the Magistrate of his jurisdiction, the whole*

purpose of section 62 will be defeated. A scheming party will be enabled to play hide and seek. A person who has taken forcible possession, realising that the decision of the Magistrate would go against him, may rush to a Civil Court to stall for time and in the meanwhile continue to be in unlawful possession of the premises. The law cannot countenance any such action which is calculated to render nugatory the proceedings before the Magistrate. A party, by merely instituting a civil proceeding, cannot hamstring the Magistrate from proceeding with the inquiry under section 62. Such confrontation does not justify the Magistrate abdicating his functions under section 62."

Therefore, if the application made before the Primary Court is in the nature of a section 66 application, the Primary Court will have jurisdiction to entertain the matter irrespective of whether a civil suit is pending in relation to the same subject matter as the application. Consequently, the assumption of jurisdiction by the learned Primary Court judge over this application was correct in law.

The learned High Court Judge erred in law in concluding that the Primary Court did not have jurisdiction in terms of the 4th schedule to the Judicature Act as there is an appeal pending in relation to a partition action.

For the foregoing reasons, I set aside the order of the learned High Court Judge of the Sabaragamuwa Province holden in Kegalle dated 06.09.2005.

Appeal allowed with costs.

Judge of the Court of Appeal

K.K. Wickremasinghe J.

I agree.

Judge of the Court of Appeal