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

Koraburuwane Hetitiarachchige Siri Bandula,

No. 39 Rosawatta,

Kandy.

1st Respondent-Petitioner-Appellant

Case No. CA(PHC)152/2013

Vs.

PHC Kandy Rev.Application No:52/10

1. Koraburuwane Hetitiarachchige Kithsiri Mahinatha,
No. 39 Rosawatta,
Kandy.

M.C.Kandy Case No:20562

Petitioner-Respondent-Respondent

2. Madushika Nilushika Hettiarachchi,

3. Sashikala Nisansala

4. Ashen Hettiarachchi

4. Neela Arundathie
All of No. 39B Rosawatta,
Kandy.

Respondents-Respondents-Respondents

Before: K.K. Wickremasinghe J.

Janak De Silva J.

Counsel:

S.N. VijithSingh for 1st Respondent-Petitioner-Appellant

Chandana Wijesooriya for the Petitioner-Respondent-Respondent

Written Submissions tendered on:

1st Respondent-Petitioner-Appellant on 02.05.2018

Petitioner-Respondent-Respondent on 26.06.2018

Argued on: 09.03.2018

Decided on: 05.10.2018

Janak De Silva J.

This is an appeal against the order of the learned High Court Judge of the Central Province holden in Kandy dated 08.10.2013.

The Petitioner-Respondent-Respondent (Respondent) instituted proceedings under section 66(1) (b) of the Primary Courts Procedure Act (Act) on 15.09.2009 and claimed that the 1st Respondent – Petitioner – Appellant (Appellant), his wife, the 2nd Respondent-Respondent-Respondent, (2nd Respondent) and three children, the 3rd to the 5th Respondents-Respondents-Respondents (3rd to 5th Respondents) had initially disturbed his possession by breaking the wall that separated the two portions of the building that the parties were occupying separately and causing damage to his part of the building.

The Respondent made a police complaint dated 24.07.2009 and claimed that he was later forcibly dispossessed from the part of the building he was occupying. The Respondent stated that the Appellant and the 2nd to the 5th Respondents had broken the locks of the part of the building he was living in, fixed new locks from the inside and prevented the Respondent from entering his part of the building on 22.07.2009.

The Appellant and the 2nd to the 5th Respondents took up the position that the entirety of the land described in the schedule to their affidavit was at all times in their possession and that the Respondent did not enjoy possession to any part of that land or the building on it.

After inquiry the learned Primary Court judge concluded that the Respondent had been in possession of Lot 1, Lot 7 and the part of the building on Lot 7 as depicted in Plan No 1500 made by M.S.K.B Mawalagedara Licensed Surveyor and that the Appellant and the 2nd to 5th Respondents had forcibly dispossessed him from the same two months before the filing of information in the Primary Court. Accordingly, the learned Primary Court judge made an order directing that the Respondent be restored to possession and prohibiting all acts which could disturb the Respondent's possession.

Being aggrieved by the said order, the Appellant filed a revision application before the Provincial High Court of the Central Province holden in Kandy and sought to set aside the order of the learned Magistrate of Kandy. The learned High Court judge refused the application and hence this appeal.

The Appellant in his revision application (vide page 11 of the Appeal Brief) and written submissions filed before the learned High Court judge of Kandy (vide page 73 of the Appeal Brief) sought to assail the order of the learned Primary Court judge on the following grounds:

(i) That the learned Primary Court judge has erred in law by entertaining the information filed by the Respondent as it asks for reliefs that the Primary Court is not in law competent to grant namely a declaration to the effect that the Respondent is entitled to the ownership of Lot 1, Lot 7 and the part of the building on Lot 7.

(ii) That the learned Primary Court judge has erred in law by inquiring into the matter without considering the fact that the action had been instituted by way of petition and affidavit instead of the procedure stipulated by law namely file information by way of affidavit

It is trite law that an objection to the jurisdiction of a court must be raised by a party at the first available opportunity (Section 39 of the Judicature Act). This principle has been followed by our courts in the context of proceedings before Primary Courts as well [*Navaratnasingham* v *Arumugam* (1980) 2 Sri. L. R. 1, *Paramasothy* v *Nagalingam* (1980) 2 Sr.i L. R. 34]. However, our courts have also recognized a distinction between cases where there is a patent want of jurisdiction and latent want of jurisdiction. [*Kandy Omnibus Co Ltd* v *T.W Roberts* 56 N.L.R. 293, *Beatrice Perera* v *The Commissioner of National Housing* 77 N.L.R. 361, *Colombo Apothecaries Ltd and others* v *Commissioner of Labour* (1998) 3 Sri. L.R. 320].

In the former type of cases, a waiver of an objection or acquiescence on the part of a party in raising an objection in the first instance does not give jurisdiction to court to try the matter [*Colombo Apothecaries Ltd and others* v *Commissioner of Labour* (supra)]. Consequently, if a court labours under a patent want of jurisdiction, any objection to the assumption of such jurisdiction cab be raised before a higher court (either in Appeal or Revision), even if the party raising that objection has failed to do so in the first instance. [*Kandy Omnibus Co Ltd* v *T.W Roberts* (supra)]. It is therefore necessary to assess whether the objections raised by the Appellants for the first time at the revision stage are objections impugning a patent lack of jurisdiction on the part of the Primary Court. The learned High Court judge would have been under a legal duty to take cognizance of one or more of these objections only if they showed that the Primary Court laboured under a patent lack of jurisdiction.

Patent v Latent Want of Jurisdiction

In *Kandy Omnibus Co Ltd* v *T.W Roberts* (supra) Sansoni J, quoted with approval the following passage from *Spencer Bower on Estoppel by Representation (1923)* at page 187:

> *"Where it is* ***merely a question of irregularity of procedure, or of a defect in 'contingent' jurisdiction, or non-compliance with statutory conditions precedent to the validity of a step in the litigation,*** *of such a character that, if one of the parties be allowed to waive, or by conduct or inaction to estop himself from setting up, such irregularity or want of' contingent' jurisdiction or non-compliance,* ***no new jurisdiction is thereby impliedly created, and no existing jurisdiction is thereby impliedly extended beyond its existing boundaries, the estoppel will be maintained, and the affirmative answer of illegality will fail, for, the Royal prerogative not being invaded,*** *and the State therefore not being injured, nor any of His Majesty's subjects for whom that Royal prerogative is held in trust, there is no ground of public policy, or other just cause, why the litigant, to whom alone in that case the statutory benefit belongs, should not be left free to surrender it at pleasure, or why having be surrendered it, whether by contract, or by conduct or inaction implying consent, he should be afterwards permitted to claim it. Accordingly, in all cases of the first class, that is, of defectus jurisdictionis the representor has been held incapable of estopping himself from resisting the usurped authority; whereas in all those of the other class that is of mere defectus triationis the affirmative answer has been rejected, and the representor has been held estopped from objecting to the irregularity"*

The above passage suggests that the fundamental feature of a patent lack of jurisdiction is one where a court lacks jurisdiction over a particular action, cause, proceeding or the parties. The exercise of powers by a court in a situation of patent want of jurisdiction results in the court exercising new jurisdictions not provided for by statute.

In *Beatrice Perera* v *The Commissioner of National Housing* (supra) the court made the following observation:

> *"Lack of competency may arise in one of two ways.* ***A Court may lack jurisdiction over the cause or matter or over the parties****; it may also lack competence because of failure to comply with such procedural requirements as are necessary for the exercise of power by the Court. Both are jurisdictional defects;* ***the first mentioned of these is commonly known in the law as a ' patent' or ' total' want of jurisdiction*** *or a defectus jurisdictionis and the second a ' latent' or ' contingent' want of jurisdiction or a defectus triationis."*

Accordingly, the filing of a petition and affidavit (instead of only an affidavit as required by law) which included a single prayer of relief that the Primary Court was not competent to consider, is more easily describable as;

> *....a question of irregularity of procedure, or of a defect in ' contingent' jurisdiction, or non-compliance with statutory conditions precedent to the validity of a step in the litigation.* [*Kandy Omnibus Co Ltd* v *T.W Roberts* (supra)] **or**
>
> *...failure to comply with such procedural requirements as are necessary for the exercise of power by the Court.* [*Beatrice Perera* v *The Commissioner of National Housing* (supra)]

Given that a Primary Court judge, subject to what I discussed below under *Grant of relief not prayed for in the affidavit*, is not bound to grant reliefs prayed for in an information filed under section 66(1)(b) of the Act, the mere inclusion of a defective prayer in the information filed will not result in a Primary Court exercising a wholly new jurisdiction.

A Primary Court will labour under a patent lack of jurisdiction if – for example – one of the thirty-six different types of actions specified in the Fourth Schedule to the Judicature Act is instituted in a Primary Court. If a section 66 application which does not comply with the requisite statutory procedure is instituted and continued before a Primary Court it will have to be regarded as a situation of latent want of jurisdiction. This is because the Primary Court continues to have

jurisdiction over the subject matter of the application despite the procedural defects in making that application. [*Navaratnasingham* v *Arumugam* (1980) 2 Sri LR 1 at 6].

Where a latent lack of jurisdiction exists, a party must raise these procedural defects at the earliest opportunity as acquiescence, waiver or inaction on the part of the party will estop that party from raising the objections in later proceedings.

A perusal of the available record of Case No 20562, shows that the Appellant has failed to raise the aforementioned objections in his affidavit filed on 2009.11.10 (Vide page 246 – 248 of the Appeal Brief) and subsequently in the written submissions filed on 2009.12.21 (Vide pages 178 – 179 of the Appeal Brief). Accordingly, I am of the opinion that the learned High Court judge was correct in disregarding the objections raised by the Appellant for the first time in his revision application filed before the High Court. The acquiescence on the part of the Appellant in raising the objections has cured the latent want of jurisdiction that existed before the Primary Court of Kandy.

Grant of relief not prayed for in the affidavit

The next question is whether the Primary Court judge could have granted reliefs that have not been prayed for in the affidavit. The Appellants have raised this point for the first time in their written submissions filed before this court and rely on *Weragama v Bandara* (77 N.L.R. 28) and *Buddhadasa Kaluarachchi v Nilamanie Wijewickrema and another* [(1990) 1 Sri.L.R. 262] to demonstrate that a court is not entitled to grant relief that has not been prayed for by a party. This principle has undoubtedly received widespread judicial recognition in the context of proceedings held under the Civil Procedure Code. The apex courts have consistently held that a District Court is not entitled to grant reliefs to a party if the relief is not prayed for in the prayer to the plaint. [*Sirinivasa Thero* v *Sudassi Thero* (63 N.L.R. 31), *Wijesuriya v Senaratna* (1997) 2 Sri. L.R. 323, *Surangi v Rodrigo* (2003) 3 Sri. L.R. 35]

The aforementioned principle has also recently been adopted in the context of Primary Court proceedings. In *Dias and another v. Dias and another* [CA (Rev) Application No: 63/2016; C.A.M. 12.08.2016] a divisional bench of this court observed as follows:

> *"We find that the Learned Magistrate has erred in ordering that the respondents be restored to possession when there is no such prayer in the petition by the respondents. The respondents had not prayed for restoration of possession this is a private information under Section 66(1)(b) of the Primary Courts Procedure Act in terms of Section 66(1)(b) the petitioner has to set out the relief sought."*

I will now consider whether the said decision sets out the correct position of law on the question now before us.

Sections 68(1) and (2) of the Primary Courts Procedure Act (Act) reads:

> "(1) Where the dispute relates to the possession of any land or part thereof **it shall be the duty of the Judge of the Primary Court** holding the inquiry **to determine** as to who was in possession of the land or the part on the date of the filing of the information under section 66 and **make order as to who is entitled to possession of such land or part thereof**.
>
> (2) **An order under subsection (1) shall declare** any **one or more persons therein specified to be entitled to the possession of the land or the part** in the manner specified in such order until such person or persons are evicted therefrom under an order or decree of a competent court, and prohibit all disturbance of such possession otherwise than under the authority of such an order or decree." (Emphasis added)

These provisions clearly impose a statutory duty on the Primary Court Judge to determine and declare the persons entitled to possession of the land. They apply to applications made under section 66(1)(a) as well as under section 66(1)(b) of the Act. There is of course no prayer for relief in an application made under section 66(1)(a) of the Act but yet the Primary Court Judge has a statutory duty to determine and declare the persons entitled to possession of the land. In this situation one cannot argue that the general principle is that a court is not entitled to grant relief that has not been prayed for by a party.

Similarly, I am of the view that even in applications made under section 66(1)(b) of the Act there is a statutory duty on the Primary Court Judge to determine and declare the persons entitled to possession of the land. This has been done by the learned Primary Court Judge in the instant case. The fact that the Appellant has failed to pray for this relief in the affidavit does not relieve the learned Primary Court Judge of the statutory duty imposed on him.

For the foregoing reasons, with the greatest respect to their lordships in *Dias and another v. Dias and another* (supra), I hold that in a private information under Section 66(1)(b) of the Act it is not incumbent on the petitioner to specifically pray for restoration to possession. That is a relief that the learned Primary Court Judge is under a statutory duty to consider and grant after due inquiry.

In any event, the proviso to Article 138(1) of the Constitution states that no judgment, decree or order of any court shall be reversed or varied on account of any error, defect or irregularity, which has not prejudiced the substantial rights of the parties or occasioned a failure of justice. In *Sunil Jayarathna v Attorney General* (2011) 2 Sri LR 91, the Supreme Court in applying the proviso to Article 138(1) of the Constitution observed that:

> *"**Unless there is some grave miscarriage of justice** it would not be appropriate to interfere with the judgment of the trial judge who enters judgment after careful consideration of the first-hand evidence put before her to which the Judges of the Appellate Court would not have the ability to witness."*

In the matter before us, the defect in the prayer of the Respondent's affidavit does not at any point prejudice the substantial rights of the Appellant or occasion a failure of justice. Despite prayer (b) to the affidavit seeking a declaration to the effect that the Respondent is entitled to the ownership of Lot 1, Lot 7 and the part of the building on Lot 7, the Primary Court judge has carefully limited himself to assessing the question of possession in terms of section 68(3) of the Act.

The learned Primary Court judge has initially made a determination that the Respondent had been dispossessed from his part of the land and the building within two months prior to the filing of information. The learned Primary Court judge has thereafter made an order directing that the Respondent be restored to possession of the part of the land/building and has also prohibited all interference/disturbance of such possession (Vide pages 194 – 195 of the Appeal Brief). Thus, it is clear that the learned Primary Court judge has disregarded the defective and irregular prayer in the affidavit and made an order that is strictly in accordance with section 68(3) of the Act.

For the foregoing reasons, I see no reason to interfere with the order of the learned High Court Judge of the Central Province holden in Kandy dated 08.10.2013.

Appeal is dismissed with costs.

Judge of the Court of Appeal

K.K. Wickremasinghe J.

I agree.

Judge of the Court of Appeal