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

S.M.Lalith Gunaseeli Senanayake

Case No: CA(PHC) 30/2012

Thalagahabate,

P.H.C. Galle Case No:4104/2012

Kithulgala.

M.C. Ruwanwella Case No:88586 (66)

Petitioner

Vs.

01. Attanayake Mudiyanselage Jayasinghe
    Kirkohuthenna,Kithulagala.
02. Hettikandage Kumarasinghe,
    Embulpussa,Kithulgala.
03. Emage Jayathilake
    Kendahena,Kithulgala.
04. Attanayake Mudiyanselage Janaka
    Kumara Attanayake
    Batahenekanda,Kithulagala.
05. Gadjasinghe Aarachchilage Subasinghe
    Gonnana,Kithulgala.
06. Attanayake Mudisyanselage Sirisena
    Batahenekandha,
    Kithulgala.

Respondents

And between

01. Attanayake Mudiyanselage Jayasinghe
    Kirikohuthenna,Kithulgala.
02. Hettikandage Kumarasinghe
    Embulpussa,Kithulgala.
03. Emage Jayathilake

    Kendahena,Kithulgala

05. Gadjasinghe Aarachchilage Subasinghe

Gonnana,Kithulgala. (Deceased)

5A. Wela Thanthirige Wimalawathie Boteju

Gonnana,Kithulgala.

Respondents-Petitioners

Vs.

01. S.M.Lalith Gunaseeli Senanayake

Thalagahabate,Kithulgala.

Petitioner-Respondent

02. Attanayake Mudiyanselage Janaka Kumara

Attanayake Batahenekanda,Kithulagala.

03. Attanayake Mudiyanselage Sirisena

Batahenekandha,Kithulgala.

Respondents-Respondents

And now between

01. Attanayake Mudiyanselage Jayasinghe

Kirikohuthenna,Kithulgala.

02. Hettikandage Kumarasinghe,

Embulpussa,Kithulgala.

03. Emage Jayatihilake,

Kendahena,

Kithulgala.

05. Gadjasinghe Aarachchilage Subasinghe

Gonnana Kithulgala. (Deceased)

5A. Wela Thanthirige Wimalawathie Boteju

Gonnana,Kithulgala.

Respondents-Petitioners-Appellants

Vs.

01. S.M.Lalith Gunaseeli Senanayake

Thalagahabate,Kithulgala.

Petitioner-Respondent-Respondent

01. Attanayake Mudiyanselage Janaka Kumara

Attanayake Batahenekanada,Kithulgala

02. Attanayake Mudiyanselage Sirisena

Batahenekandha,Kithulgala.

Respondents-Respondents-Respondents

Before: K.K. Wickremasinghe J.

Janak De Silva J.

Counsel:

Nishadi Wickremasinghe for Respondents-Petitioners-Appellants

Subash Gunathilake for Petitioner-Respondent-Respondent

Written Submissions tendered on:

Respondents-Petitioners-Appellants on 20.09.2016 and 03.05.2018

Argued on: 14.03.2018

Decided on: 08.03.2019

Janak De Silva J.

This is an appeal from an order dated 20.04.2012 made by the learned High Court judge of the Sabaragamuwa Province holden in Kegalle although mistakenly the 1st Respondent-Petitioner-Appellant (Appellant) states it to be an application in revision.

The Petitioner-Respondent-Respondent (Respondent) filed an application under section 66(1)(b) of the Primary Courts Procedure Act (Act) in the Magistrate's Court of Ruwanwella on 27.07.2007 against the 1st Appellant and five others. The Respondent stated that he was in possession of a one-acre portion of land which was part of a larger land identified as නැටැවුහින්නේ ජනපදය. According to the Respondent, when he entered the said portion of the land to pluck coconuts on 04.07.2007, the 1st Appellant and five others had already entered the land and started constructing a house on the land. Upon inquiry by the Respondent, the 1st Appellant and five others had allegedly threatened him and chased him away from the land. The 1st Appellant has taken up the position that he has been in continuous possession of the said portion of the land from 23.07.2003.

The Respondent's private plaint had also made reference to the fact that a writ application (HC/Kegalle/No 3084/W) was filed by the Respondent seeking to quash a decision by the Divisional Secretariat Yatiyanthota, to put up notices on the land asking any party to show cause why a permit granted in relation to the land should not be cancelled.

The learned Magistrate by order dated 16.05.2008 dismissed the action on the basis that the Primary Court had no jurisdiction to go into a matter concerning state land (Vide page 106 of the Appeal Brief). The Respondent filed a revision application against the said order and the learned High Court Judge revised the learned Magistrate's order and directed him to inquire into the matter in terms of section 68(3) of the Act (Vide page 116 of the Appeal Brief).

Accordingly, the learned Magistrate inquired into the matter and by order dated 22.03.2011 determined that the Respondent had been dispossessed from the land by the 1st Appellant and five others two months prior to the date of filing information (Vide page 294 of the Appeal Brief). The Appellant filed a revision application (HCR No. 4104) against the said order seeking

to have it set aside on the basis that the learned Magistrate had failed to consider and evaluate evidence on record which showed that the 1st Appellant was in continuous possession of the corpus from the year 2003.

The learned High Court Judge by order dated 20.04.2012 concluded that there were no exceptional circumstances to disturb the findings of the learned Magistrate (Vide page 38 of the Appeal Brief). Hence this appeal against the said order.

Before considering the substantive grounds canvassed in the present appeal it is necessary to consider a preliminary objection raised by learned counsel for the Respondent against the maintainability of this appeal.

Non-compliance with Rule 4(2) of the Court of Appeal (Procedure for Appeals from High Courts established by Article 154 P of the Constitution) Rules of 1988

The Respondent submitted that the petition of appeal is defective as it does not ex facie comply with the requirements stipulated in Rule 4(2) of the Court of Appeal (Procedure for appeals from High Courts established by Article 154 P of the Constitution) Rules. The Appellant argues that the said preliminary objections has been raised belatedly and should be disregarded by this court.

It is trite law that an objection to the jurisdiction of a court must be raised by a party at the earliest available opportunity, unless the jurisdictional objection impugns a patent lack of jurisdiction. This position is best illustrated by an observation made by Soza J in *Navaratnasingham vs. Arumugam* [(1980) 2 Sri. L. R. 1]:

> ***"Where a matter is within the plenary jurisdiction of the Court, if no objection is taken, the Court will then have jurisdiction to proceed and make a valid order.*** *In the present case, the objection to jurisdiction was raised for the first time when the matter was being argued in the Court of Appeal and the objection had not even been taken in the petition filed before that Court"* (emphasis added)

In *Kandy Omnibus* Co *Ltd* vs. *T.* W *Roberts* (56 N.L.R. 293) Sansoni J, quoted with approval the following passage from *Spencer Bower on Estoppel by Representation* (1923) at page 187 to illustrate the difference between a patent and latent lack of jurisdiction:

> ***"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"* (emphasis added)

In *Beatrice Perera* vs. *The Commissioner of National Housing* (77 N.L.R. 361) 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."* (emphasis added)

Accordingly, I hold that the jurisdictional objection raised by the Respondent impugns a latent lack of jurisdiction on the part of this court. The side note to Rule 4 of the Court of Appeal (Procedure for Appeals from High Courts established by Article 154 P of the Constitution) Rules reads as 'What Petition of Appeal shall state'. Therefore, the said rule clearly deals with a procedural requirement that is necessary for the exercise of powers by the Court of Appeal. An objection pertaining to such latent or contingent want of jurisdiction must be raised at the earliest available opportunity by the party relying on it.

In the matter before us, the petition of appeal against the learned High Court judge's order was lodged in the High Court on 23.04.2012. The High Court minutes for this date indicate that the Appellant had dispatched the petition of appeal by registered post to the Respondent (Vide page 23 of the Appeal Brief). Subsequently, the Respondent received formal notice of the application and was asked to be present in court on 06.09.2012.

Accordingly, it is reasonable to presume that the Respondent would have had knowledge of the purported defect in the petition of appeal by this point of time. The journal entries indicate that the counsel for the Respondent did not raise the preliminary objection on this date. The preliminary objection was raised almost six years after this date on 14.03.2018. During this period, the case was re-fixed for argument on five separate occasions. The Respondent did not raise the preliminary objection at any time during this period.

H.W.R. Wade & C.F. Forsyth in Administrative Law 9th Ed, Page 464 makes the following observation;

> ***"The court normally insists that the objection shall be taken as soon as the party prejudiced knows the facts which entitle him to object.*** *If, after he or his advisers* ***know of the disqualification, they let the proceedings continue without protest, they are held to have waived their objection and the determination cannot be challenged."*** (emphasis added)

Halsbury's Laws of England, 5th Ed, Vol 19 reads:

> "An application to challenge the jurisdiction of the court must be made at the outset of the proceedings, **for if the defendant takes any step in the proceedings other than a step to challenge the jurisdiction, he will be taken to have waived any opportunity for challenge which he might otherwise have had,** and to have submitted to the jurisdiction of the court." (emphasis added)

The Respondent's conduct viz. allowing proceedings before this court to continue without promptly raising the preliminary objection, clearly manifests an intention on his part to waive the right to make the said preliminary objection. In *Abeywickrema vs. Pathirana and others* [(1986) 1 Sri L R 120, 152] it was observed that a waiver must be an intentional act with knowledge. It necessarily implies knowledge of one's rights *vis a vis* the other party's infraction and an election

to abandon those rights. An election to waive a right can be inferred by conduct. (*Fernando vs. Samaraweera* 52 N.L.R. 278).

In the present matter, there are sufficient grounds for me to conclude that the Respondent has waived his right to raise the preliminary objection by letting the proceedings continue without promptly raising it. Therefore, I hold that the preliminary objection raised by the Respondent ought to be overruled.

The substantive grounds of appeal

The main contentions of the Appellant are that;

a) the learned High Court had failed to consider the points of fact and law canvassed by the Appellant in the revision application to show that he – and not the Respondent – was in possession of the land two months prior to the filing of the information
b) the learned High Court judge had disregarded the fact that the learned Magistrate had failed to record whether a breach of peace is threatened or likely
c) the learned High Court judge had disregarded the fact that the learned Magistrate had failed to induce the parties to arrive at a settlement
d) the order of the learned High Court judge is erroneous as its final conclusion does not accord with the reasoning made by the judge in the same order

It would be appropriate at this stage to first consider (b) and (c) viz. whether the learned High Court judge has disregarded and if so whether he was justified in disregarding the said two contentions raised by the Appellant.

Breach of Peace

A perusal of the learned High Court Judge's order clearly shows that the judge had taken cognizance of and satisfied himself about the correctness of the procedure adopted by the Magistrate in coming to a finding that a breach of peace was likely in the future (Vide page 37 of the Appeal Brief) The order of the learned Magistrate indicates that he had satisfied himself about the existence of a likelihood of a breach of peace and thereafter caused notices to be affixed on the disputed land (Vide page 289 of the Appeal Brief).

The Appellant contends that this procedure is irregular as there is no record of the Magistrate's finding that a breach of peace was likely. In *Navaratnasingham* vs. *Arumugam* [(1980) 2 Sri LR 1] a similar objection was taken viz. that it was necessary for a Magistrate to make an order in writing stating his grounds for being satisfied that a breach of peace was likely.

The court rejected this contention and held as follows:

> *"...all that is necessary is that the Magistrate himself* ***must be satisfied on the material on record*** *that there is a present fear that there will be a breach of the peace stemming from the dispute unless proceedings are taken under the section."*

In CA (PHC) 161/98 (C.A.M 21.06.2010) it was held that the failure of the Primary Court Judge to explicitly state in the proceedings that the he has come to a conclusion that a breach of peace was likely does not deprive him of jurisdiction. This court utilized section 114(f) of the Evidence Ordinance to hold that one is entitled to presume that a Primary Court judge has satisfied himself that there's a breach of peace when the affidavit and information filed by the parties had material to show that a breach of peace was threatened or likely.

I hold that in the present matter there was sufficient information in the private plaint for the Magistrate to conclude that a breach of peace was likely. The failure of the Magistrate to explicitly record this fact does not deprive him of jurisdiction. Therefore, the learned High Court judge was correct in disregarding that ground of revision.

Failure to Explore Settlement

The Appellant also contended that the High Court judge had disregarded the fact that the learned Magistrate had failed to induce the parties to arrive at a settlement in terms of section 66(6) of the Act. It therefore needs to be considered whether the learned High Court judge was bound to consider this contention at the revisionary stage.

In *Mohamed Nizam vs. Justin Dias* [C A. PHC 16/2007] two judges of this court held that the question of non-compliance of section 66(6) of the Act by the judge of the Primary Court cannot be raised belatedly at the stage of revision or appeal and inaction of the party by not raising the objection in the Primary Court amounts to waiver of such objection. This was quoted with approval and followed in *De Silva vs. Seneviratne* [C.A.(PHC) 29/2006 (HC), C.A.M. 10.03.2014].

In *Jayantha Gunasekara vs. Jayatissa Gunasekara and Others* [(2011) 1 Sri LR 284, 303] a Divisional Bench of this court observed that inaction in the Primary Court would include the failure to raise the learned Magistrate's non-compliance with section 66(6) before the learned Magistrate commenced the inquiry.

In the matter before us, the learned Magistrate initially made an order on 16.05.2008 dismissing the matter without holding an inquiry. This was because the learned Magistrate was of the opinion that he had no jurisdiction to make a section 66 order when it came to state land. Admittedly, the written submissions of the Appellant which were filed before the said order was made raised an objection based on non-compliance with section 66(6) of the Act (Vide page 131 of the Appeal Brief).

Thus, the objection was not raised belatedly. Therefore, under normal circumstances the learned High Court judge ought to have taken account of that objection. However, what has transpired in the present matter is that the order of the Magistrate dated 16.05.2008 was revised by the High Court judge of Kegalle in HCR No 3425 by order dated 2010.11.02. In the latter order, the High Court judge has made a specific direction under section 6(a) of the High Court of the Provinces Act of 1990 to take cognizance of the affidavits and documents filed and make an order in terms of section 68(3) of the Act. Section 68(3) of Act is a provision which allows a Magistrate to make an order after an inquiry has been commenced.

Therefore, the directions given by the High Court judge in the exercise of that court's revisionary jurisdiction, vested the Magistrate with jurisdiction to inquire into the matter and make an appropriate order, although a settlement had not been attempted in terms of section 66(6) of the Act. Therefore, the High Court judge in HCR No 4104 was justified in disregarding the Appellant's contention that the learned Magistrate had failed to induce the parties to arrive at a settlement before making his order.

Failure to Consider Points of Fact and Law

The main contention of the Appellant is that the High Court had failed to consider the points of fact and law canvassed by the Appellant in the revision application to show that he – and not the Respondent – was in possession of the land two months prior to the filing of the information. When a contention of this nature is raised, it is important to bear in mind the principle that the right of appeal granted under Article 154P(3)(b) of the Constitution is a right to challenge the judgment of the High Court exercising revisionary powers and not to impugn the Primary Court judge's order by way of an appeal [*Jayantha Gunasekera vs. Jayatissa Gunasekera and others* (supra)]. The appeal in the strict sense is not one against the determination of the judge of the Primary Court but against the judgment of the High Court exercising revisionary powers. [See also Case No. CA(PHC) 85/2007, C.A.M 07.12.2018]. Thus, what is at issue before us is the propriety of the revisionary order.

A perusal of the learned Magistrate's order shows that there has been a careful and comprehensive evaluation of the respective documents produced by both parties to determine who had the stronger claim to having possessed the corpus two months prior to the filing of information. The learned Magistrate has ultimately relied on documents made in the ordinary course of business viz. receipts recording monthly payments made to the Respondent by the Kithulgala Smallholders Tea Development Board to make use of a building on the land, to conclude that the Respondent was in possession of the property two months prior to the filing of information (Vide page 293 of the Appeal Brief).

It is relevant to note that section 32(2) of the Evidence Ordinance attaches probative value to such documents made in the ordinary course of business. These include acknowledgment written or signed indicating the receipt of money, goods, securities, or property of any kind. Thus, the learned Magistrate was justified in relying on the said documents to satisfy himself about the possession of the Respondent. Therefore, I find no reason to conclude that the learned High Court judge misconceived himself either in law or fact in associating himself with the findings of the learned Magistrate.

The last contention that has been taken up by the Appellant is that the order of the learned High Court judge is erroneous as its final conclusion does not accord with the reasoning made in the same order. Indeed, a perusal of the order reveals the learned High Court judge at one point stating that the petitioner before the High Court was in possession of the land two months preceding the filing of information (Vide page 37 of the Appeal Brief).

Nevertheless, the order concludes by stating that the learned Magistrate was correct in holding that the petitioner-respondent was in possession of the land. This discrepancy arises due to a misapprehension by the learned High Court judge. The learned judge had mistaken the petitioner before the High Court to be the petitioner before the primary court viz. Senanayake Mudiyanselage Lalith Gunasili Senanayake (Vide page 36 of the Appeal Brief). However, Senanayake Mudiyanselage Lalith Gunasili Senanayake was the Respondent before the High Court. It is solely based on this misapprehension that the 'petitioner before the High Court' is held to have been in possession of the land two months prior to the filing of information. As the final paragraph of the order shows, the learned High Court judge meant to confirm the Magistrates Courts conclusion that Senanayake Mudiyanselage Lalith Gunasili Senanayake viz. the Respondent was in possession of the land two months preceding the filing of information.

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. [*Victor and another vs. Cyril De Silva* (1998) 1 Sri.L.R. 41; *Gunasena vs. Kandage and others* (1997) 3 Sri.L.R. 393].

I am of the opinion that this principle must be applied in the instant matter to preserve the learned High Court judge's order despite the defect in identifying the respective parties. In order to clearly set out that position I vary the order of the learned High Court Judge to read as confirming the Magistrates Court's conclusion that Senanayake Mudiyanselage Lalith Gunasili Senanayake viz. the Respondent was in possession of the land two months preceding the filing of information.

For the aforesaid reasons and subject to the variation made above, I see no reason to interfere with the order dated 20.04.2012 made by the learned High Court judge of the Sabaragamuwa Province holden in Kegalle.

Appeal dismissed with costs.

Judge of the Court of Appeal

K.K. Wickremasinghe J.

I agree.

Judge of the Court of Appeal