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

Officer in Charge

Police Station,

Wadduwa.

Complainant

Case No: CA(PHC) 149/2006

P. H.C Panadura Case No: HCRA 53/2003

M.C. Panadura Case No: 23229

Vs.

1. Meegamuwage Jayantha
   Premarathne
   No. 167, Ariyawansha Mawatha,
   Molligoda.

2. Jayawathi Rupasinghe
   No. 167, Ariyawansha Mawatha,
   Molligoda.

1st Party

1. Susewhewage Piyarathne
2. Gunasinghe Gnanwathi
   Both of No. 157, Maha Vihara
   Paara,
   Molligoda.

2nd Party

AND

1. Susewhewage Piyarathne
2. Gunasinghe Gnanwathi

   Both of No. 157, Maha Vihara Paara,

   Molligoda.

2nd Party Petitioners

Vs.

1. Meegamuwage Jayantha Premarathne

2. Jayawathi Rupasinghe

   Both of No. 167, Ariyawansha Mawatha,

   Molligoda.

1st Party Respondents

AND NOW BETWEEN

1. Susewhewage Piyarathne (Dead)
2. Gunasinghe Gnanwathi (Dead)

2A. Susewhewage Lalith Nishantha Kumara

2B. Susewhewage Harini Anoma Chitrangani

Both of No. 167, Ariyawansha Mawatha,
Molligoda.

2nd Party Petitioners-Appellants

Vs.

1. Meegamuwage Jayantha Premarathne

2. Jayawathi Rupasinghe

Both of No. 167, Ariyawansha Mawatha,
Molligoda.

1st Party Respondents-Respondents

Before: K.K. Wickremasinghe J.

Janak De Silva J.

Counsel:

Neranjan Jayasinghe for Substituted 2nd Party Petitioners-Appellants

Saliya Peiris P.C. with Susil Wanigapura for 1st Party Respondents-Respondents

Written Submissions tendered on:

Substituted 2nd Party Petitioners-Appellants on 03.04.2018

1st Party Respondents-Respondents on 16.05.2018

Argued on: 23.02.2018

Decided on: 15.03.2019

Janak De Silva J.

This is an appeal against the order of the learned High Court Judge of the Western Province holden in Panadura dated 26.07.2006.

Initially Wadduwa Police made an application on 16.10.2001 to the Magistrates Court of Panadura under section 81 of the Criminal Procedure Code seeking an order on the 2nd Party Petitioners-Appellants (Appellants) and 1st Party Respondents-Respondents (Respondents) to show cause why they should not be ordered to execute a bond with or without sureties for keeping the peace for such period not exceeding two years as the court thinks fit to fix.

This was consequent to a complaint made by the Respondents that on or about 08.10.2001 the Appellants had constructed a barbed wire fence across the land in dispute which was repaired the same day. The Appellants made a complaint on 09.10.2001 alleging that the Respondents had destroyed the said barbed wire fence. Subsequently, the Respondents made another complaint to the Police on 09.10.2001 alleging that the Appellants had made a death threat

pertaining to the land in dispute and in particular regarding a demolition of a lavatory located on the said land.

Thereafter, the learned Magistrate on 06.01.2003, after a lapse of one year and three months from the institution of the proceedings under section 81 of the Criminal Procedure Code, ordered the Wadduwa Police to file information under section 66(1)(a) of the Primary Courts Procedure Act (Act) which the Police did in the above styled application.

In the proceedings under section 66(1)(a) of the Act, after allowing parties to file affidavits and counter affidavits and after according the parties a hearing, the learned Magistrate made order on 23.09.2003 holding that the Respondents were in possession of the land in dispute within the period of two months before filing of information. Therefore, court held that the Respondents are entitled to be in possession of the land and directed the Appellants not to interfere with their possession.

The Appellants moved in revision to the High Court of the Western Province holden in Panadura which was dismissed. Hence this appeal.

The learned counsel for the Appellant urged the following grounds:

(1) The learned Magistrate had decided as to who was in possession of the portion of the land in dispute upon a belated date of filing the information
(2) The learned Magistrate had failed to take into consideration that there was no breach of peace affecting the portion of the land in dispute as required by section 66(1)(a) of the Act
(3) The learned Magistrate had failed to precisely identify the portion of the land in dispute
(4) The learned Magistrate had failed to follow the mandatory provisions in section 66(6) of the Act before delivering his order dated 23.09.2003
(5) The learned Magistrate had erred in refusing the revision application No. Rev/53/2003 upon the basis that the Appellants had failed to seek relief before a civil court

In this appeal this Court must consider the correctness of the order of the High Court. It is trite law that existence of exceptional circumstances is the process by which the court selects the cases in respect of which the extraordinary method of rectification should be adopted, if such a selection process is not there revisionary jurisdiction of this court will become a gateway of every litigant to make a second appeal in the garb of a Revision Application or to make an appeal in situations where the legislature has not given a right of appeal [Amaratunga J. in *Dharmaratne and another v. Palm Paradise Cabanas Ltd. and another* [(2003) 3 Sri.L.R. 24 at 30].

In *Siripala v. Lanerolle and another* [(2012) 1 Sri.L.R. 105] Sarath De Abrew J. held that revision would lie if -

(i) aggrieved party has no other remedy

(ii) if there is, then revision would be available if special circumstances could be shown to warrant it

(iii) Party must come to court with clean hands and should not have contributed to the current situation.

(iv) he should have complied with the law at that time

(v) acts should have prejudiced his substantial rights

(vi) acts should have occasioned a failure of justice.

I will now consider whether the grounds urged by the Appellant are correct and whether they fall within these principles.

Belated Filing of Information

The learned counsel for the Appellant submitted that it was not correct for the learned Magistrate after a lapse of one year and three months from the institution of proceedings under section 81 of the Criminal Procedure Code to have ordered the Police to institute proceedings under section 66(1)(a) of the Act. He submitted that it is a matter for the relevant Police Officer inquiring into any matter of breach of peace affecting land to file information with the least possible delay in view of the importance of the date of filing information under section 66 of the Act.

The legal basis of this submission is captured by Sharvananda J. (as he was then) in *Ramalingam v. Thangarajah* [(1982) 2 Sri.L.R. 693 at 698] as follows:

> "In an inquiry into a dispute as to the possession of any land, where a breach of peace is threatened or is likely under Part VII, of the Primary Courts Procedure Act, **the main point for decision is the actual possession of the land *on the date of the filing of the information* under section 66; but, where forcible dispossession took *place within two months before the date on which the said information was filed* the main point is actual possession prior to that alleged date of dispossession**. Section 68 is only concerned with the determination as to who was in possession of the land or the part on the date of the filing of the information under section 66. It directs the Judge to declare that the person who was in such possession was entitled to possession of the land or part thereof Section 68(3) becomes applicable only if the Judge can come to a definite finding that some other party had been forcibly dispossessed within a period of two months next proceeding the date on which the information was filed under section 66. The effect of this sub-section is that it enables a party to be treated to be in possession on the date of the filing of the information though actually he may be found to have been dispossessed before that date provided such dispossession took place within the period of two months next proceeding the date of the filing of the information. It is only if such a party can be treated or deemed to be in possession on the date of the filing of the information that the person actually in possession can be said not to have been in possession on the date of the filling of the information. Thus, the duty of the Judge in proceedings under section 68 is to ascertain which party was or deemed to have been in possession on the relevant date, namely, on the date of the filing of the information under section 66. Under section 68 the Judge is bound to maintain the possession of such person even if he be a rank trespasser as against any interference even by the rightful owner. This section entities even a squatter to the protection of the law, unless his possession was acquired within two months of the filing of the information.

That person is entitled to possession until he is evicted by due process of law. **A Judge should therefore in an inquiry under Part VII of the aforesaid Act, confine himself to the question of actual possession on the date of filing of the information except in a case where a person who had been in possession of the land had been dispossessed within a period of two months immediately before the date of the information.**" (emphasis added)

There is some merit in the point articulated by the learned counsel for the Appellant since in *Velupillai vs. Sivakaran* [(1993) 1 Sri.L.R. 123] it was held that under section 66 (1)(a) of the Act, the formation of the opinion as to whether a breach of the peace is threatened or likely is left to the police officer inquiring into the dispute. The police officer is empowered to file the information if there is a dispute affecting land and a breach of the peace is threatened or likely and the Magistrate is not put on inquiry as to whether a breach of the peace is threatened or likely. Similarly, in *Punchi Nona* v *Padumasena and others* [(1994) 2 Sri LR 117] it was held that when a police officer files information about a dispute likely to cause or threatening a breach of peace the Primary Court is vested with jurisdiction to inquire into the matter without embarking on a preliminary inquiry to ascertain whether the dispute is likely to cause or threatens a breach of peace.

However, I hold that the Appellant is not entitled to raise this issue for the first time in revision before the High Court or in appeal before this Court. The Appellant should have challenged the order dated 06.01.2003 made in the proceedings under section 81 of the Criminal Procedure Code or at the least raised the objection before the learned Magistrate in proceedings under section 66(1)(a) of the Act. Having failed to do so, it is not open for the Appellant to do so now.

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.* v *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 at 366) Tennakoon C.J. 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)

Breach of Peace

The learned counsel for the Appellant submits that the order of the learned Magistrate dated 06.01.2003 made in the proceedings under section 81 of the Criminal Procedure Code is a clear contravention of the law as well as the ratio of *Navaratnasingham v. Arumugam and another* [(1980) 2 Sri.L.R. 1] and *David Appuhamy vs. Yasassi Thero* [(1987) 1 Sri.L.R. 253] which requires that there shall be a dispute affecting land where a breach of peace is threatened or likely. It was submitted that there was no breach of peace between the parties "since the situation for breach of peace between the parties was totally diminished".

For the reasons explained above, I hold that the Appellants cannot raise this issue at this stage having failed to challenge the order dated 06.01.2003 made in the proceedings under section 81 of the Criminal Procedure Code or at the least raised the objection before the learned Magistrate in proceedings under section 66(1)(a) of the Act.

In any event, in *Punchi Nona* v *Padumasena and others* (supra) it was held that when a police officer files information about a dispute likely to cause or threatening a breach of peace the Primary Court is vested with jurisdiction to inquire into the matter without embarking on a preliminary inquiry to ascertain whether the dispute is likely to cause or threatens a breach of peace.

Failure to Identify Land in Dispute

In an application of this nature it is incumbent on the Magistrate to ascertain the identity of the corpus as section 66(1) of the Act becomes applicable only if there is a dispute between parties affecting land. A Magistrate should evaluate the evidence if there is a dispute regarding identity of the land. [*David Apuhamy v. Yassassi Thero* (1987) 1 Sri.L.R. 253].

The learned counsel for the Appellant submitted that the learned Magistrate failed to precisely identify the portion of land in dispute. Upon a careful consideration of the reasoning of the learned Magistrate, I have no hesitation in rejecting this submission.

The learned Magistrate has judiciously considered the affidavits of the parties and documents annexed thereto and correctly concluded that the land in dispute is the western boundary of lot 1 depicted in plan no. 410A which is a document even the Appellant had filed marked 2වූ2.

Failure to Explore a Settlement

It is true that the journal entries do not reflect of any attempt on the part of the learned Magistrate to explore a settlement between parties. However, it is also clear upon an examination of the journal entries that the Appellants did not raise any objection on this ground before the learned Magistrate.

In *Jayantha Gunasekera v. Jayatissa Gunasekera and others* [(2011) 1 Sri.L.R. 284] a divisional bench of this Court held that the objection to jurisdiction must be taken at the earliest possible opportunity. If no objection is taken and the matter is within the plenary jurisdiction of the Court, court will have jurisdiction to proceed with the matter and make a valid order. The objection in terms of section 66(6) of the Act was not raised before the learned Magistrate. Hence it cannot be allowed to be raised at this stage.

Alternative Remedy

The learned counsel for the Appellant submitted that the learned High Court Judge had held that the revision application of the Appellants should be entertained by a court only where there was no alternative relief and that the instant application should not be allowed as the Appellants had alternative relief of resorting to a civil action. He relied on the decision in *J.A. Priyanthi Perera Samarasinghe vs. Dharmapala Collin Abeywardene and others* [C.A.(PHC) APN 64/2010, C.A.M. 05.05.2011] where Sisira De Abrew held *"the fact that filing of a civil case in the District Court is no ground to set aside a judgement of Primary Court, in an application under section 66 of the Primary Courts Procedure Act"* and submitted that the learned High Court Judge erred in law.

I am in agreement with the position articulated by the learned counsel for the Appellant. The statement of law set out by the learned High Court judge is flawed.

However, for the reasons set out above, the Appellant has failed to establish exceptional circumstances and as such the learned High Court Judge was correct in dismissing the revision application.

Subject to the views expressed in relation to the alternative remedy, I see no reason to interfere with the order of the learned High Court Judge of the Western Province holden in Panadura dated 26.07.2006.

Appeal dismissed with costs.

Judge of the Court of Appeal

K.K. Wickremasinghe J.

I agree.

Judge of the Court of Appeal