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

1. Douglas Ariyasinghe,
   No.1/1, Kesel Kotuwa,
   Yodha Ela,
   Hingurakgoda.

2. R.P. Tikiri Menike
   No.18, Kesel Kotuwa,
   Yodha Ela,
   HIngurakgoda.

Respondents-Petitioners-Appellants

Case No: CA(PHC) 101/2013

H.C. Polonnaruwa Case No: පුනි/17/2012

M.C. Hingurakgoda Case No: 18037

Vs.

1. T.M. Ekanayake
   No.18/2, Yodha Ela,
   Hingurakgoda.

2. P.R Sunil Premadasa
   No.11, Kadabima,
   Yodha Ela,
   Hingurakoda.

Petitioners-Respondents-Respondents

Before: K.K. Wickremasinghe J.

Janak De Silva J.

Counsel:

Chathura Galhena with Manoja Gunawardena for the Respondents-Petitioners-Appellants

Athula Perera for 1st and 2nd Petitioners-Respondents-Respondents

Written Submissions tendered on:

Respondents-Petitioners-Appellants on 24.07.2018

Petitioners-Respondents-Respondents on 26.07.2018

Argued on: 12.06.2018

Decided on: 04.04.2019

Janak De Silva J.

This is an appeal against the order of the learned High Court Judge of the North Central Province holden in Polonnaruwa dated 09.05.2013.

The Petitioners-Respondents-Respondents (Respondents) instituted proceedings in terms of section 66(1)(b) of the Primary Courts Procedure Act (Act) against the 1st Respondent-Petitioner-Appellant (1st Appellant). The learned Magistrate held that the Respondents were entitled to the possession of the land in dispute and directed the 1st Appellant to refrain from disturbing the possession of the Respondent.

The Respondents moved by way of revision to the Provincial High Court which dismissed the application and hence this appeal.

The learned counsel for the Appellants submitted that the appeal should be allowed on the following: grounds:

(1) The learned Magistrate erred in exercising the duty vested on the Primary Court to cautiously consider whether there is a breach of peace as alleged under and in terms of section 66(1)(b) of the Act when the action was instituted by private plaint

(2) The learned Magistrate and the High Court Judge erred in deciding that there is a dispossession where the Respondents has not made out any dispossession but only had stated about a disturbance to his possession

(3) The Magistrate has erred in deciding that the Magistrate Court has jurisdiction to hear the matter where the same matter had been referred to Agrarian Services Department and the matter is still pending before the Agrarian Services Department

Breach of Peace

The learned counsel for the Appellants submitted that since the instant proceedings were instituted under section 66(1)(b) of the Act, the learned Magistrate should have cautiously considered whether there is a breach of peace and submitted that the facts do not establish a breach of peace.

An objection on this basis must be taken at the earliest opportunity. An objection to jurisdiction such as that in the present case must by virtue of section 19 of the Judicature Act No. 2 of 1978, be taken as early as possible and the failure to take such objection when the matter was being inquired into must be treated as a waiver on the part of the petitioner. 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. [*Navaratnasingham* vs. *Arumugam and another* [(1980) 2 Sri. L.R. 1].

The learned counsel for the Respondents submitted that this is not an objection raised before the learned Magistrate and as such it cannot be raised now. The record indicates that this was a matter raised before both the Magistrates Court and High Court and as such I hold that it is open to the Appellants to urge this issue before this Court. I am also of the view that if the Respondents are successful on this issue it is a ground on which the learned High Court Judge could have

exercised revisionary jurisdiction as it goes to the legality of the impugned order of the learned Magistrate.

The learned counsel for the Appellant relied on *Velupillai and others vs. Sivanathan* [(1993) 1 Sri.L.R. 123] where Ismail J. explained the difference between proceedings instituted under section 66(1)(a) and (b)of the Act as follows:

> "Under section 66 (1)(a) of the Primary Courts Procedure 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. The Magistrate is not put on inquiry as to whether a breach of the peace is threatened or likely. In terms of section 66 (2) the Court is vested with jurisdiction to inquire into and make a determination on the dispute regarding which information is filed either under section 66 (1)(a) or 66 (1)(b).
>
> However <u>when an information is filed under section 66 (1)(b) the only material that the Magistrate would have before him is the affidavit information of an interested person and in such a situation without the benefit of further assistance from a police report, the Magistrate should proceed cautiously and ascertain for himself whether there is a dispute affecting land and whether a breach of the peace is threatened or likely</u>." (emphasis added)

The importance of the learned Magistrate satisfying himself of whether a breach of the peace is threatened or likely was reiterated by Ismail J. in *Punchi Nona vs. Padumasena and others* [(1994) 2 Sri.L.R. 117] as follows:

> "In an information by a private party under section 66(1) (b) it is incumbent upon the Primary Court Judge to initially satisfy himself as to whether there was a threat or likelihood of a breach of the peace and whether he was justified in assuming such a special

jurisdiction under the circumstances. Failure to so satisfy himself deprives the judge of jurisdiction."

I am in respectful agreement with the legal position adumbrated above. There is also the question whether it is incumbent on the learned Magistrate to specifically record that he is satisfied that a breach of the peace is threatened or likely.

In *Navaratnasingham* vs. *Arumugam* (supra) an objection was taken that it was necessary for a Magistrate to make an order in writing stating his grounds for being satisfied that a breach of the 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."* (emphasis added)

This court in *Wimalasekara and another vs. Ubayasena* [C.A. (PHC) 161/98; C.A.M. 21.06.2010] held that the failure on the part of the learned Magistrate to specifically state that he is satisfied that a breach of peace was likely does not deprive him of the jurisdiction under section 66(1)(b) of the Act. The mere fact that he decided to issue notice results in the application of the presumption in section 114(d) of the Evidence Ordinance which is to the effect that court may presume that judicial acts have been regularly performed.

The question is whether the above principles have been fulfilled in the instant case.

The learned Magistrate has in issuing notice on 13.12.2011 held that he is satisfied that a breach of the peace is threatened or likely. Hence the threshold question on jurisdiction has been addressed by the learned Magistrate. The learned counsel for the Appellants submits that this was an objection that was raised by them in the affidavits and therefore the learned Magistrate should have dealt with this objection in the final order which he has failed to do. The learned counsel for the Respondents countered that what is required in terms of section 66(1)(b) of the Act is to establish breach of peace at the time of issuing of notices and not thereafter.

I am unable to accept that as the correct position in law. Notice is issued based only on the affidavit of the party instituting proceedings. The issuing of notice after being satisfied that the breach of the peace is threatened or likely based on the affidavit of a party in proceedings instituted under section 66(1)(b) of the Act does not preclude the learned Magistrate from inquiring in to the matter of the threat to the breach of the peace. The learned Magistrate can consider all the relevant material after all parties file affidavits and counter affidavits before coming to a final conclusion on this issue [*Jayasinghe vs. Paranawithana* CA(PHC)184/2005; C.A.M. 16.05.2017].

However, the mere fact that he has not addressed the objection in his final order does not mean that the Magistrates Court is devoid of jurisdiction. The question of the breach of peace was addressed when notice was issued. The fact that he made a final order directing the Appellants not to disturb the possession of the Respondents indicates that he sees no reason to change his earlier opinion and here again the presumption in section 114(d) of the Evidence Ordinance is engaged.

Accordingly, I reject the first ground of appeal urged by the Appellant. In any event, the learned High Court Judge has correctly concluded that there was ample evidence before the Magistrate to come to the conclusion that there was a breach of the peace between parties.

Dispossession

The learned counsel for the Appellant submits that the Respondents did not at any point of time claim to have been dispossessed and as such the finding of the learned Magistrate that the Respondents have been dispossessed within a period of two months prior to the institution of proceedings is erroneous. However, the learned Magistrate has concluded that the Respondents are entitled to the possession of the land in dispute. Accordingly, he was entitled to make order directing the Appellants not to disturb the possession of the Respondents. Therefore, I reject the second ground of appeal.

Agrarian Services Department

The learned counsel for the Appellants finally submitted that since there is a matter pending before the Agrarian Services Department, the learned Magistrate did not have jurisdiction to deal with the instant matter. He relied on the decision in *Mansoor and another vs. O.I.C. Avissawella Police and another* [(1991) 2 Sri.L.R. 75] where it was held that when a statute creates a right and, in plain language, gives a specific remedy or appoints a specific tribunal for its enforcement, a party seeking to enforce the right must resort to that tribunal and not to others.

However, the issue in *Mansoor and another vs. O.I.C. Avissawella Police and another* (supra) was the eviction of a tenant cultivator from a paddy land. The issue in the instant case is not one dealing with the rights of a tenant cultivator. It is about the disturbance of possession of a paddy land. Hence the ratio in *Mansoor and another vs. O.I.C. Avissawella Police and another* (supra) has no application. In *Atigala and another vs. Piyasena* [CA(PHC) 133/2007; C.A.M. 10.06.2016] this Court held that a dispute pertaining to the possession of a paddy land can proceed under Part VII of the Act. Hence, I reject the third ground of appeal.

For the foregoing reasons, I see no reason to interfere with the order of the learned High Court Judge of the North Central Province holden in Polonnaruwa dated 09.05.2013.

The appeal is dismissed with costs.

Judge of the Court of Appeal

K.K. Wickremasinghe J.

I agree.

Judge of the Court of Appeal