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

1. Udayasiri Saman Kumara Jayawardena,
   No.19, Kitulgollawatta,
   Rangoda,
   Welamboda.
2. Udeni Siri Kumara Jayawardena,
   Diwilla,
   Yatawatta.
3. Uthpalawanna Chakrawarthi Jayawardena,
   Diwilla,
   Yatawatta.

   1st, 4th and 5th Respondents-Petitioners-Appellants

CA CASE NO: CA (PHC) 7/2014
HC KANDY CASE NO: REV/183/2012
MC KANDY CASE NO: 47665

Vs.

1. Polwatte Gedara Gamini,
   No.99, Rangoda,
   Demanhandiya,
   Petitioner-Respondent-Respondent

2. P.G. Wijeratne,
3. T.G. Dhammika,
   Both Aswadduma,
   Rangoda,
   Welamboda.
   2nd and 3rd Respondents-
   Respondents-Respondents

Before: K.K. Wickramasinghe, J.
Mahinda Samayawardhena, J.

Counsel: Lal Wijenayake for the Appellants.
Respondents are absent and unrepresented.

Decided on: 03.05.2019

Samayawardhena, J.

The 1st respondent filed this application in the Magistrate's Court under section 66(1)(b) of the Primary Courts' Procedure Act, No.44 of 1979 seeking an order against the 1st appellant and the 2nd and 3rd respondents not to disturb his long possession. The 2nd and 3rd appellants seem to have later intervened. After filing objections and counter objections by way of affidavits, inquiry has been concluded on written submissions. Thereafter the order has been made by the learned Magistrate granting the relief sought for by the 1st respondent. The revision application filed against the said order has been dismissed by the learned Provincial High Court Judge. It is against that order of the High Court, the appellant has filed this appeal.

The respondents did not come to contest the appeal, and the learned counsel for the appellant invited the Court to dispose of the appeal on the written submissions filed before this Court.

The land in question is about 90 perches in extent. There is no dispute that the 1st respondent's mother, Lasia, came into the ancestral house of the land very long time ago (according to the appellants as a domestic aide, which is disputed by the 1st respondent) and thereafter got married and lived there. The 1st respondent son (and another daughter who is not a party to this case) were born there. It appears that the old house has disappeared over the passage of time. The 1st respondent has also later got married and living there having constructed a house in the land. Lasia was still living with the 1st respondent son when this case was filed in the Magistrate's Court.

The 1st appellant states that he (together with the 2nd and 3rd appellants) became entitled to this land by deed marked 1,4,5V1 dated 28.11.1960, and thereafter they gifted 20 perches and 6 perches to the 1st respondent and his wife by deeds marked 1,4,5V2 and 1,4,5V3 dated 01.05.2008. They also state that by the affidavit marked 1,4,5V4 of the same date, the 1st respondent and his wife promised not to claim rights to the other portions of the land except the above-mentioned 26 perches. It is the position of the 1st respondent that he and his wife have signed those documents at the request of the appellants without understanding the contents of them.

Thereafter the appellants have sold 15 perches of this land to the 2nd and 3rd respondents by deed No.680 dated 11.04.2011.

The dispute has arisen when the 2nd and 3rd respondents have gone to clear that portion of the land in the first week of January 2012. Case has been filed on 14.02.2012.

It is abundantly clear from the documents filed including the police statements that the 1st respondent together with her mother has been in possession of the entire land from the day he was born and the appellants have had no possession of the land.

The learned counsel for the appellants has stated in the written submissions that the learned Magistrate has failed to consider "the most important documents", i.e. deeds marked 1,4,5V(2), 1,4,5V(3) and affidavit 1,4,5V(4) which go to show that the appellants have gifted to the 1st respondent and his wife on behalf of the 1st respondent's mother, Laisa, the two lots—20 perches and 6 perches in extent; and the 1st respondent and his wife have by way of an affidavit admitted without any reservation the right of the appellants to possess the rest of the land. Those are not important documents in a case of this nature where possession is the key element to be considered.

The learned counsel for the appellants has also taken up several technical objections in the written submissions.

One is that there was no imminent breach of the peace for the learned Magistrate to proceed with the application. It appears from the proceedings dated 14.02.2012 that the learned Magistrate has satisfied with the threat to the breach of the peace.

Another is that the learned Magistrate has failed to make an effort to settle the matter before the case was fixed for the

inquiry as mandated by section 66(6) of the Act. By looking at the journal entry dated 31.07.2012, I am satisfied that the learned Magistrate has attempted to settle the matter.

Another is that there was no valid affidavit before the Magistrate's Court for the Court to act upon as the first information because the purported affidavit does not mention the date of attestation in the jurat. Both the learned Magistrate and the learned High Court Judge has disregarded it as a pure technical objection, which, in my view, is correct, especially, having regard to the objective to be achieved by this special piece of very important legislation, i.e., to make a provisional order to arrest breach of the peace until the dispute is resolved by a competent Court on merits.

When this matter of defective affidavit was taken up by the appellants in the Magistrate's Court in their objections, the 1st respondent in his counter objections has, in turn, shown the defects of the appellants' affidavit, and thereafter sought permission of Court either to correct the defect in open Court or to tender a fresh affidavit.

In my view, in such a situation, the Court shall allow the party to cure that defect by tendering a fresh affidavit for otherwise the whole purpose of the section 66 application would be defeated on high technical objections. There is no place for technical objections in section 66 applications. All such objections shall be viewed keeping in mind the main objective, which is, nothing but to prevent the breach of the peace. In that process, the Magistrate shall act within the frame of the law but without clinging on high-flown technical objections.

This view of mine is supported by the Judgment of the Divisional Bench of this Court in *Senanayake v. Commissioner of National Housing [2005] 1 Sri LR 182*. In terms of Rule 3(1)(a) read with Rule 18 of the Court of Appeal (Appellate Procedure) Rules 1990, every application made to the Court of Appeal shall be by way of petition together with an affidavit in support of the averments therein. The affidavit filed in the said case was defective because it had been attested before a Justice of Peace who did not have territorial jurisdiction to attest the said affidavit. Hence counsel for the respondent moved to dismiss the application *in limine* as there was no application before Court to consider on merits. The Divisional Bench of this Court was not inclined to accept that argument and allowed the petitioner to tender a fresh affidavit in identical terms instead of the defective affidavit on the ground *inter alia* that the Court should not non-suit a party where the lapse/defect takes place due to no fault of that party.

I see no reason to interfere with the final conclusion of both the learned Magistrate and the learned High Court Judge.

Appeal is dismissed but without costs.

Judge of the Court of Appeal

K.K. Wickremasinghe, J.
I agree.

Judge of the Court of Appeal