

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

1. Gaspe Mudiyansele
Kusumalatha alias
Liyanage Kusumalatha,
New Rest Inn, Thummodara,
Kuliyapitiya.
2. P.G.D.J. Samarawickrama,
1172, Dhammodaya Mawatha,
Baththaramulla.
Original Petitioners-Respondents-
Appellants in CA (PHC) 78A/2005

CA CASE NO: CA (PHC) 78/2005

CA (PHC) 78A/2005

HC KURUNAGALA CASE NO: HCR 133/2003

MC KULIYAPITIYA CASE NO: 6971/66

Vs.

1. H.M. Sriya Swarnakanthi,
83/5, Jaya Mawatha,
Kuliyapitiya.
2. H.M. Piyadasa Gunathilaka,
Thummodara, Kuliyapitiya.
3. W.A. Sudath Vijitha Weerakkody,
83/5, Jaya Mawatha,
Kuliyapitiya.
Original Respondents-Petitioners-
Appellants in CA (PHC) 78/2005

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

Counsel: Manohara De Silva, P.C., with Imalka
Abeysinghe for the original Respondents-
Petitioners-Appellants in CA (PHC) 78/2005.
R. Wimalarathna for the original Petitioners-
Respondents-Appellants in CA (PHC)
78A/2005.

Decided on: 21.05.2019

Samayawardhena, J.

The two petitioners (G.M. Kusumalatha and P.G.D.J. Samarawickrama) filed this application in the Magistrate's Court of Kuliypitiya under section 66(1)(b) of the Primary Courts' Procedure Act, No. 44 of 1979, making three parties as respondents (H.M. Sriya Swarnakanthi, H.M. Piyadasa Gunathilake, W.A. Sudath Vijitha Weerakkody) seeking an order under section 68(3) of the Act to restore them in possession on the premise that they were forcibly dispossessed by the respondents and their agents within two months prior to the filing of the application in Court. After filing objections and counter objections together with documents, the Court disposed of the inquiry by way of written submissions. By order dated 31.10.2003, the learned Magistrate granted the relief prayed for by the petitioners, and the order was executed through Fiscal and the petitioners were restored in possession.

The respondents filed a revision application before the High Court against this order, and the High Court by order dated 31.03.2005 set aside the order of the Magistrate's Court.

The petitioners as well as the respondents have appealed against that order to this Court. The appeal by the petitioners is understandable. But the respondents also appealed, because, after setting aside the Magistrate's Court order, the learned High Court Judge did not make the consequential order in restoring the respondents in possession.

The learned counsel for both parties agreed to abide by a single Judgment in respect of both appeals and invited the Court to pronounce the Judgment on the written submissions tendered to this Court long time ago.

It is common ground that the learned High Court Judge set aside the order of the learned Magistrate on the sole basis that the learned Magistrate has not, according to the journal entries of the Magistrate's Court case record, endeavoured to induce the parties to arrive at a settlement before the matter was fixed for the inquiry as required by section 66(6) of the Primary Courts' Procedure Act. The learned High Court Judge relied only on the Judgment of this Court in *Ali v. Abdeen* [2001] 1 Sri LR 413 to come to that conclusion.

Sections 66(6) and 66(7) of the Primary Courts' Procedure Act read as follows:

66(6) On the date fixed for filing affidavits and documents, where no application has been made for filing counter-affidavits, or on the date fixed for filing counter-affidavits, whether or not such affidavits and documents have been

filed, the court shall before fixing the case for inquiry make every effort to induce the parties and the persons interested (if any) to arrive at a settlement of the dispute and if the parties and persons interested agree to a settlement the settlement shall be recorded and signed by the parties and persons interested and an order made in accordance with the terms as settled.

66(7) Where the parties and persons interested (if any) do not arrive at a settlement, the court shall fix the case for inquiry on a date which shall not be later than two weeks from the date on which the case was called for the filing of affidavits and documents or counter-affidavits and documents, as the case may be.

In terms of section 66(6), after the counter-affidavits are filed, the Court shall, before fixing the case for inquiry, make every effort to induce the parties to arrive at a settlement of the dispute and if the parties agree to a settlement, the settlement shall be recorded and order made accordingly. If there is no settlement, in terms of section 66(7), the Court shall fix the case for inquiry.

In *Ali v. Abdeen* (supra), Gunawardena J., sitting alone has held that non-compliance with section 66(6) makes the final order of the learned Magistrate invalid as “*It is the making of an effort to induce parties and the fact that the effort was not attended with success that clothe the Primary Court with jurisdiction to initiate an inquiry with regard to the question as to who was in possession.*” According to Gunawardena J. the Magistrate’s Court has no jurisdiction to hold the inquiry and then make an order unless the Court makes an effort to induce the parties to arrive at a settlement of the dispute.

Gunawardena J. has further elaborated this at pages 415-416 in the following terms:

Thus, it is to be observed that the Primary Court Judge was under a peremptory duty to encourage or make every effort, so to say, to facilitate dispute settlement, before assuming jurisdiction to hold an inquiry into the matter of possession and impose on the parties a settlement by means of the court order. It was obligatory on the Primary Court as a condition- precedent to holding an inquiry, to have made a conscious endeavor to have composed or ironed out the differences between the parties-a duty which, in this instance, had been neglected. The making of an effort by the court was such a duty as should have been done or performed before the court could have validly embarked upon an inquiry in pursuance of or rather in compliance with sec. 66(7) set out above. That is a preliminary requirement which has to be fulfilled before the jurisdiction of the Primary Court exists to hold an inquiry under section 66(7). When Parliament has enacted that provided a certain situation exists, then a tribunal may have certain powers, it is clear that the tribunal will not have those powers unless that situation exists. The making of an endeavor by the court to settle amicably is a condition precedent which had to be satisfied before the function of the Primary Court under sec. 66(7) began, that is, to consider who had been in possession. Since the Primary Court had acted without jurisdiction in proceeding to determine the question of possession, its decision is, in fact, of no force or avail in law. Accordingly the decision dated 21. 11. 1990 is hereby set aside. It is the making of an effort to induce parties and the fact that the effort was not attended with

success that clothe the Primary Court with jurisdiction to initiate an inquiry with regard to the question as to who was in possession. The fact that the Primary Court had not made an endeavor to persuade parties to arrive at an amicable settlement fundamentally affects the capacity or deprives the Primary Court of competence to hold an inquiry into the question of possession. (emphasis added)

This Judgment of Gunawardena J. is extensively made use of in appeals by the defeated parties in the Magistrates' Courts as an easy way of getting well-considered orders of the Magistrates' Courts set aside.

With respect, I am unable to agree with the above conclusion of Gunawardena J. for several reasons.

Firstly, it is not clear from the Judgment on what basis Gunawardena J. came to the conclusion that the learned Magistrate in that case, did not endeavor to induce the parties to settle the matter before fixing the case for inquiry. I presume it is from the journal entries of the Magistrate's Court case record, as the learned High Court Judge did in the instant case. That is, in my view, not a healthy practice.

Section 66(6) does not require the Magistrate to record his failure to settle the matter. That section only requires the Magistrate to record "the settlement", if the attempt is successful. To put differently, if the matter is settled, the settlement shall be recorded and order be made accordingly; and if the matter is not settled, case can straightaway be fixed for inquiry. Hence, merely because there is nothing in the journal entries in the Magistrate's Court case record to show that the Magistrate took effort to induce

the parties to arrive at a settlement of the dispute, the Judge in appeal, in my view, cannot, with a stroke of the pen, set aside a well-considered order of a Magistrate. Failure to record of the failure to settle does not amount to failure to comply with the law.

Secondly, notwithstanding the act of inducement on the part of the Magistrate for a settlement under section 66(6), *prima facie* suggests to be mandatory as the word used in the section is “*shall*”, that step shall be construed as directory, especially in view of the fact that, a party shall not be made to suffer for the lapses of the Judge, over which he (the party) has no control.

It is interesting note that, except 66(8)(a), in all the sub-sections from (1)-8(b) in section 66, which includes 66(6), although the word “*shall*” has been used, the Superior Courts have not considered those steps/acts as mandatory, but treated them only as directory.

In *Ramalingam v. Thangarajah* [1982] 2 Sri LR 693 at 701-703, Sharvanada J. (later C.J.) explained:

The question was raised as to what was the consequence of the failure of the Judge to observe the time-limits prescribed for the various acts and steps leading to the determination and order under Section 68. It is significant that the prescription of time is preceded by the word ‘shall’. The obligatory nature of the requirement that the particular step/act should be taken or done within a fixed time is indicated by the word ‘shall’. This expression is generally used to impose a duty to do what is prescribed, not a discretion to comply with it according to whether it is reasonable or practicable to do. Prima facie the word ‘shall’ suggests that it is mandatory, but that word has often been

rightly construed as directory. Everything turns on the context in which it is used; and the purpose and effect of the section in which it appears. It is to be noted that the statute does not declare what shall be the consequence of non-compliance by Court with regard to this requirement as to time limit prescribed by the law. Are these procedural rules to be regarded as mandatory, in which case disobedience will render void or voidable what has been done or as directory, in which case disobedience will be treated as an irregularity not affecting what has been done? It is to be observed that this obligation with regard to time limit is imposed on court, over whose acts or omissions the parties do not have any control. Maxwell on 'Interpretation of Statutes' 11th Edition, at page 369 appositely states-

“Where the prescription of a statute related to performance of a public duty and where invalidation of acts done, in neglect of them would work serious general inconvenience or injustice to persons who have no control over those entrusted with the duty yet not promote the essential aims of the legislature, such prescriptions seem to be generally understood as mere instructions for the guidance and government of those on whom the duty is imposed, or, in other words, as directory only. Neglect of them may be penal, indeed, but it does not affect the validity of the acts done in disregard of them. It has often been held, for instance, when an Act ordered a thing to be done by a public body or public officers and pointed out the specific time when it was to be done, then the Act is directory only and might be complied with after the prescribed time.”

In this context, one may also invoke the maxim “Actus curiae neminem gravabit” (an act of Court shall prejudice no man). In my opinion this maxim which is founded upon justice and good sense may be appropriately applied to salvage a determination and order made under section 68, where the Judge has failed to observe the time-limits imposed by the legislature for the various procedural steps prescribed by it. The Judge is certainly to be blamed but a party in whose favour such an order is made should not suffer for the Judge’s default. (emphasis added)

In *Officer-in-Charge, Police Station, Kotahena v. Dewasinghe* [1983] 2 Sri LR 149, Seneviratne J. at pages 152-153, in reference to the said Judgment in Ramalingam’s case (supra) stated as follows:

It is clear from the judgment of Sharvananda J. that though that appeal was specifically related to section 67(1) of the Act, the Supreme Court has considered the broader issue whether the violation of the mandatory provisions of part 7 of the Primary Courts Procedure Act makes the proceedings of the Primary Court null and void. Part 7 is the Chapter of the Act which deals with “inquiry into disputes affecting land”, and where a breach of peace is threatened or likely. The mandatory provisions of this part 7 are section 66(3), 66(4), 66(5), 66(6), 66(7), 67(1) and 67(2). In dealing with the question as to whether these provisions were directory or mandatory, Sharvananda, J. stated as follows:- “The question was raised as to what was the consequence of the failure of the Judge to observe the time limits prescribed for various acts and steps leading to a determination and order

under section 68.... It is to be noted that the statute does not declare what shall be the consequences of non-compliance by court with regard to this requirements as to the times prescribed by law". Sharvananda. J, having considered the provisions referred to above at length finally came to this conclusion – "I am, therefore, of the view that the provisions as to time limit in section 66 or 67 though the words "shall" suggest that they are mandatory should be construed as being directory and the non-compliance by Court of the provisions of section 66 or 67 of the Act does not divest the court of jurisdiction conferred on it by section 66(2) to make determination and order under Section 68". This dictum cited above from the said judgment clearly shows that the Supreme Court has considered the nature of the provisions of both sections 67(1) and 67(2). As such the judgment in Ramalingam's case cannot be restricted to a ruling only on the nature and effect of section 67(1) of the Act. In view of the judgment referred to above, I hold that the non-compliance by the learned Magistrate of the provisions of section 67(1) of the Primary Courts Procedure Act has not vitiated the proceedings. (emphasis added)

Thirdly, and more importantly, the *ratio* of the Judgment in *Ali v. Abdeen* (supra) is that the Court lacks jurisdiction to make a final determination unless the Court makes an attempt to settle the matter. I regret my inability to agree with it.

There is no dispute that the learned Magistrate had jurisdiction over the subject to make a valid order. In other words, the matter was within the plenary jurisdiction of the learned Magistrate, but the question was whether he invoked it in the right way. If a party

to a case (such as the respondents in this case) asserts that the Magistrate invoked the jurisdiction in the wrong way, he should have objected to it at that time before the same Magistrate. The respondents in the instant case did not do so. They kept silent and allowed the Magistrate to fix the case for inquiry without the Magistrate (according to the respondents) making an effort to settle the matter. They cannot keep silent without objecting to the jurisdiction and allow the Court to exercise the jurisdiction in the wrong way and challenge the jurisdiction later when the order is against him. That is prohibited in law. In such a situation, the objection to jurisdiction is deemed to have been waived and the party is deemed to have acquiesced in the wrong invocation of the jurisdiction.

However the situation is different, if the Court had total or patent want of jurisdiction over the subject, in which event, the objection can be taken up at any time including for the first time in appeal, and, if upheld, all the previous proceedings become a nullity as there was *coram non judice*. By acquiescence or waiver, one cannot convert nullity into validity. The situation under consideration is not patent want of jurisdiction but latent want of jurisdiction.

In *Navaratnasingham v. Arumugam* [1980] 2 Sri LR 1, Soza J. at pages 5-6, citing both statutory and case law, lucidly explained this principle in the following manner:

It is necessary to remember that an objection to jurisdiction must be taken as early as possible. Section 39 of the Judicature Act, No. 2 of 1978 (and prior to that section 43 of the Administration of Justice Law, No. 44 of 1973) laid down that-

“Whenever any defendant or accused party shall have pleaded in any action, proceeding or matter brought in any Court of First Instance neither party shall afterwards be entitled to object to the jurisdiction of such court, but such court shall be taken and held to have jurisdiction over such action, proceeding or matter”. (cf. also sections 30 and 71 of the old Courts Ordinance).

Further the failure to object to jurisdiction when the matter was being inquired into must be treated as a waiver on the part of the 2nd respondent-petitioner. It is true that jurisdiction cannot be conferred by consent. But where a matter is within the plenary jurisdiction of the Court, if no objection is taken, the Court will then have jurisdiction to proceed on with the matter and make a valid order. This point has been well explained by Chandavakar, J. in the case of Jose Antonio Baretto v. Francisco Antonio Rodrigues (1910) 35 Bombay 24:

“But it is urged that the parties cannot by consent give jurisdiction where none exists. That is so where the law confers no jurisdiction. Here the consent is not given to jurisdiction where none exists”.

In the case of Alagappa Chetty v. Arumugam Chetty (1920) 2 CL Rec 202, Bertram. C.J. on the same point cited with approval a dictum of Mookerjee, J. in the case of Gurdeo Singh v. Chandrikah Singh and Chandrikah Singh v. Rashbehary Singh, I.L.R., (1907) 36 Cal. 193:

“.....where jurisdiction over the subject matter exists requiring only to be invoked in the right way, the party who has invited or allowed the Court to exercise it in a wrong

way, cannot afterwards turn round and challenge the legality of the proceedings due to his own invitation or negligence.”

*In the case of Pisani v. Attorney-General for Gibraltar (1987) L.R. 5 P.C. 516, the Privy Council affirmed this same doctrine that unless there is an attempt to give the Court a jurisdiction which it does not possess, the Court can, in the absence of objection, hear a case where it has jurisdiction over the subject. These principles were followed also in the case of *Thevagnanasekeram v. Kuppammal (1934) 36 NLR 337* where Macdonell, C.J. held that a party was not entitled to challenge the jurisdiction of the Court to give the decision invited by such party, so long as the Court had jurisdiction over the subject.*

The distinction between elements which are essential for the foundation of jurisdiction and the mode in which such jurisdiction has to be assumed and exercised is of fundamental importance. Non-compliance with the prescribed mode in which a particular jurisdiction should be assumed and exercised can be waived, provided there is jurisdiction over the subject matter.

Therefore in the instant case as there was no objection to the invocation of the jurisdiction of the Magistrate, he was entitled to proceed on with the matter as it was within his plenary jurisdiction. (emphasis added)

In *David Appuhamy v. Yasassi Thero [1987] 1 Sri LR 253* at page 255, Wijetunga J., applied the said dicta of Soza J. to overrule the jurisdictional objection:

The case of Navaratnasingham v. Arumugam (supra) is again relevant to a consideration of this aspect of the matter. That case too dealt with an application under section 62 of the Administration of Justice Law No. 44 of 1973, which corresponds to section 66 of the present Primary Courts' Procedure Act. There too it was submitted that the Magistrate was not vested with jurisdiction to proceed in the matter as he had failed initially to satisfy himself of the likelihood of a breach of the peace. This court held that such an objection to jurisdiction must 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. It was further held that 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. The dicta of Soza, J. in this regard too, which I would adopt, apply to the instant case. (emphasis added)

Hence if a party has not objected to fixing the case for inquiry and allowed the Magistrate to make an order according to law, without the latter first making an effort to settle the matter as provided for in section 66(6), such party cannot, when the order is against him, take up the belated objection that the Magistrate did not have jurisdiction to make that order as he did not comply with section 66(6).

This conclusion is supported by the Divisional Bench decision of this Court in *Jayantha Gunasekera v. Jayatissa Gunasekera* [2011] 1 Sri LR 284 at 302.

When the determination of the matter is within the plenary jurisdiction of the Court, objection to jurisdiction shall be taken

at the earliest possible opportunity for otherwise objection is deemed to have been waived.

The decision in *Ali v. Abdeen [2001] 1 Sri LR 413* does not, with utmost respect, represent the correct position of law, and therefore need not be followed.

As was held in *Ponniah v. Sheriff (1966) 69 NLR 67* “*Court was not bound by an earlier decision in which material cases and statutory provisions were not considered.*”

In the circumstances, the order of the learned High Court Judge cannot be allowed to stand.

There is no necessity to send the case back to the High Court 14 years after the impugned order of the High Court (and 16 years after the order of the Magistrate’s Court) to hear the revision application on merits. The learned Magistrate has given cogent reasons acceptable to this Court for his conclusion that the petitioners were entitled to the relief under section 68(3) of Primary Courts’ Procedure Act. The petitioners have been restored in possession since the order the Magistrate’ Court in 2003. The parties can go before the District Court to resolve the dispute permanently, if they have not gone before so far, as the order of the Magistrate’s Court is a temporary order made only to prevent breach of the peace.

The order of the learned High Court Judge dated 31.03.2005 is set aside and the order of the learned Magistrate dated 31.10.2003 is restored and the appeal of the original petitioners is allowed.

The consideration of the appeal of the original respondents does not arise and the appeal of the said respondents is therefore *pro forma* dismissed.

Let the parties bear their own costs.

Judge of the Court of Appeal

K.K. Wickramasinghe, J.

I agree.

Judge of the Court of Appeal