

Counsel: Razik Zarook, P.C., with Rohana Deashapriya
for the 1st Respondent-Petitioner-Appellant.

Yoosuf Nasar for the Petitioner-Respondent-
Respondent.

Decided on: 18.09.2019

Mahinda Samayawardhena, J.

This is an appeal filed against the Judgment of the High Court of Hambantota affirming the order of the Magistrate's Court of Walasmulla made under section 68(3) of the Primary Courts' Procedure Act whereby the 1st Respondent-Appellant was ordered to remove the structure erected on the land in suit on the basis that he has forcibly entered the land within two months prior to the filing of the action.

The premises admittedly belong to the Walasmulla Mosque and governed by a Board of Trustees.

The only substantive defence apart from technical objections taken up by the Appellant before all three Courts is that, the Appellant came into occupation of a part of the land about five perches in extent out of nearly two acres of a larger land, with the consent of the Board of Trustees of the Mosque.

This assertion is unacceptable as only two Members of the Board in their private capacities have consented to it.¹ The

¹ Vide circled pages 94, 104 and 78 of the Brief. It seems only M.S.M. Wafeek and A.R.M. Jabeer have consented.

majority of at least six Members are against it.² Hence it is clear that the Appellant has gone into forcible occupation of the property belonging to the Mosque.

There is no dispute that the Appellant did so within two months immediately prior to the filing of the action.

The argument in this appeal was decided to be disposed of by way of written submissions. Although the learned President's Counsel for the Appellant has filed written submissions, no written submissions have been filed by counsel for the Petitioner-Respondent.

Learned President's Counsel for the Appellant has taken up a number of technical objections to the maintainability of this action.

I must emphasize that, given the intention of the legislature in introducing this special piece of legislation, which is nothing but to make provisional orders to prevent breach of the peace until the matter is determined by a competent Court, there is no place for high-flown technical objections in section 66 applications.

Having said so, let me summarily deal with the said technical objections.

First one is that the application has been filed in the wrong Court, that is, not in the Primary Court of Walasmulla, but in the Magistrate's Court of Walasmulla. There is no Primary Court in Walasmulla and the Magistrate of Walasmulla exercises the jurisdiction of the Primary Court as well, and as far as I

² Vide the affidavit of five Board Members at circled page 78, and the affidavit of the Petitioner Board Member at circled page 49 of the Brief.

know, that authority to perform duties as the Primary Court Judge is given on the Magistrate in the appointment letter itself. The learned President Counsel has admitted that the impugned order has been signed by the Magistrate as the Judge of the Primary Court of Walasmulla.

The second one is that the petitioner has not averred *locus standi* in the petition. The petitioner in paragraph 7 of the petition has stated that he is a Member of the Board of Trustees of the Mosque and has also tendered the complaint made to the police by him as P2. In that complaint, he has described the capacity on which he makes that complaint. Thereafter the other Members of the Board have by way of an affidavit consented the petitioner to proceed with the action on behalf of the Board.³ Although that affidavit is dated subsequent to the filing of the action, that is sufficient for the purpose of section 66 application.

The third one is that the supporting affidavit of the petitioner is bad in law inasmuch as the petitioner being a Muslim has deposed to the facts of the affidavit on oath but not on affirmation. As was held by the Supreme Court in *Sooriya Enterprises (International) Limited v. Michael White & Company Limited*⁴ “It is not imperative for non-Christians referred to in section 5 of the Oaths Ordinance to make an affirmation in an affidavit. The use of the word ‘may’ in section 5 of the Oaths Ordinance of 1895, instead of ‘shall’ must be regarded as deliberate; with the consequence that non-Christians who believed in God would have the option to swear or to affirm.” It was further held in that case that “the substitution of an oath for

³ Vide circled page 79 of the Brief.

⁴ [2002] 3 Sri LR 371

an affirmation (or vice versa) will not invalidate proceedings or shut out evidence. The fundamental obligation of a witness or deponent is to tell the truth (section 10), and the purpose of an oath or affirmation is to reinforce that obligation.” Vide also *Inaya v. Lanka Orix Leasing Company Ltd*⁵, *Trico Freighters (Pvt) Ltd v. Yang Civil Engineering Lanka (Pvt) Ltd*⁶, *Kariyawasam v. Dona Mercy*⁷.

The fourth one is that there was no imminent threat to the breach of the peace for the Magistrate to cloth with jurisdiction to determine the matter. Breach of the peace does not amount to physical fights, which may or may not lead to murder. If there is a likelihood of a breach of the peace, that is sufficient. The learned Magistrate before issuance of notice has satisfied that there is a threat to the breach of the peace and so recorded. This Court sitting in appeal cannot say that there was no breach of the peace.

The fifth one is that the learned Magistrate has not taken steps to amicably settle the dispute before fixing the matter for inquiry to be disposed of on written submissions. The learned Magistrate has postponed the matter specifically for settlement and on the next date it has been recorded that there was no settlement. In any event, the earlier view that unless the Magistrate first takes steps to settle the matter, the Magistrate lacks jurisdiction to decide the same, has now been decided to be incorrect. Vide my Judgment in *Kusumalatha v. Sriya Swarnakanthi*⁸.

⁵ [1999] 3 Sri LR 197

⁶ [2000] 2 Sri LR 136

⁷ [2006] 2 Sri LR 256

⁸ CA-PHC-78 & 78A/2005 decided on 21.05.2019.

I reject the said technical objections.

Appeal is dismissed. No costs.

Judge of the Court of Appeal

K.K. Wickramasinghe, J.

I agree.

Judge of the Court of Appeal