In the Court of Appeal of the Democratic Socialist Republic of Sri Lanka

C.A. (Appeal) case No.

C.A. (PHC) 77/2015

H.C. Gampaha Revision

Application No: 03/2021

Magistrate's Court Pugoda

Case No: 1563/66

In the matter of an Appeal in terms of Article 154 P (3) and 138 of the Constitution of the Democratic Socialist Republic of Sri Lanka read with High Court of the Provinces (Special Provisions) Act, No. 19 of 1990 and the Primary Courts' Procedure Act, No. 44 of 1979.

Officer-In-Charge,
Police Station,
Dompe

Complaint

Vs.

1. R.P. Anulawathi,
   Malinda, Kapugoda
2. S.A. Sandya Kanthi Perera
3. S.A. Daya Kanthi Perera
   Both in No. 47,
   Malinda, Kapugoda

1st Party Respondents

R.P. Dharmarathna Wickremarachchi,
No. 51/1, Dangahawatte,
Malinda, Kapugoda

2nd Party Respondent

and between

R.P. Dharmarathna Wickremarachchi,
No. 51/1, Dangahawatte,
Malinda, Kapugoda

2nd Party Respondent-Petitioner

Vs.

Officer-In-Charge,
Police Station, Dompe

Complaint-Respondent

1. R.P. Anulawathi,
   Malinda, Kapugoda
2. S.A. Sandya Kanthi Perera
3. S.A. Daya Kanthi Perera
   Both in No. 47, Malinda,
   Kapugoda

1st Party Respondents-Respondents

Hon.Attorney General,
Attorney Generals Department
Colombo 12

Respondent

and now between

R.P. Dharmarathna Wickremarachchi,
No. 51/1, Dangahawatte,
Malinda, Kapugoda

2nd Party Respondent-Petitioner-Appellant

Vs.

Officer-In-Charge,
Police Station, Dompe

Complaint-Respondent -Respondent

1. R.P. Anulawathi,
   Malinda, Kapugoda
2. S.A. Sandya Kanthi Perera
3. S.A. Daya Kanthi Perera
   Both in No. 47, Malinda,
   Kapugoda

1st Party Respondents-Respondents-Respondents

Before: Prasantha De Silva, J

S.U.B. Karalliyadde, J

Counsel: Mr. Pubudu Alwis with Mr. K.A.D. Karusinghe and Ms. Thilini N. Ranagala for the 2nd Party Respondent-Petitioner-Appellant

Mr. J.D. Jayakumar for the 1st Party Respondent-Respondent-Respondents

Written Submissions tendered:

on 23-03-2021. by the 2nd Party Respondent-Petitioner-Appellant

on 09-08-2019. by the 1st Party Respondent-Respondent-Respondents

Argued on: 28-02-2021.

Decided on: 14-07-2021.

S.U.B. Karalliyadde, J.

This appeal is against the order dated 28.05.2015. of the learned High Court Judge of the Provincial High Court of the Western Province holden in Gampaha delivered in an application for Revision and the order dated 28.10.2011. of the learned Magistrate of Pugoda. The learned Magistrate has delivered the said order, acting as the Primary Court Judge in an action instituted under and in terms of section 66 (1) (a) of the Primary Courts' Procedure Act, No. 44 of 1979 (hereinafter referred to as the Act). The OIC of Dompe Police Station (the Complainant-Respondent-Respondent) has filed an Information in Magistrate's Court regarding a dispute between the 1st to 3rd, 1st Party Respondent-Respondent-Respondents (hereinafter referred to as the 1st to 3rd Respondents) and the 2nd Party Respondent-Petitioner-Appellant (hereinafter referred to as the Appellant) over possession of a land. In terms of section 68 (1) of the Act, the learned Magistrate has held that the 1st - 3rd Respondents were in possession of the land in dispute on the date of the filing of the Information under section 66 of the Act and therefore, they are entitled to possess it. Against that order, the Appellant has preferred a Revision application to the High Court. The learned High Court Judge has dismissed that application on the basis that the Appellant has failed to establish the exceptional circumstances for the Court to exercise its revisionary jurisdiction. Being aggrieved by the said order, the Appellant has preferred this appeal.

One of the arguments of the learned Counsel for the Appellant before this Court is that the learned Magistrate has failed to make an effort to induce parties to arrive at a settlement of the dispute in terms of 66 (6) of the Act to assume jurisdiction under section 66 (7) to proceed with the action. Under such circumstances, the learned Counsel argues

that the learned Magistrate had no jurisdiction to pronounce the impugned order and therefore, it should be set aside. To substantiate his position, the learned Counsel cited the authority, *Ali vs. Abdeen (20011SLR413).* Objection to the jurisdiction should be raised at the very outset or first instance, which is a well-established principle and trite law. In *Navaratnasingham vs. Arumugam (1980 2 SLR 1)* and *Paramsothi vs. Nagalingam (1980 2 SLR 34)* the Courts had held that by virtue of section 39 of the Judicature Act, No. 1 of 1978, objection to the jurisdiction must take as early as possible and failure to take such objection must be treated as a waiver. Where a matter is within the plenary jurisdiction of the Court, if no objection to the jurisdiction is taken, the Court will then have jurisdiction to proceed and make a valid order. Even though, it was held in the case of *Ali vs. Abdeen* (supra) that making of an endeavour by the Court to settle the matter amicably is a condition precedent which had to be satisfied before the function of the Primary Court under section 66 (7), it was held in the case of *Mohomed Nizam vs. Justin Dias [CA (PHC) 16-2007]* that making an effort to settle the dispute is not a must. For the reason that *Ali vs. Abdeen* (supra) is a single bench judgement and *Mohomed Nizam vs. Justin Dias* (supra) is a two-bench judgment, this Court will follow the latter. Under the above stated circumstance, I hold that for the reason that the jurisdictional objection has not been taken before the Magistrate's Court, the Appellant has waived that objection and the learned Magistrate had jurisdiction to fix the case for inquiry in terms of section 66 (7) of the Act. Even though, the legal position on that point is as such, the Appellant by his written submissions filed in the Magistrate's Court has admitted that since there was no settlement between the parties over the dispute, the learned Magistrate has ordered the parties to file written submissions (page 27/73 of he appeal brief). Therefore, this Court can be satisfied that even though, the learned Magistrate has not recorded in the journal entry that he had made an effort to induce the parties to arrive at a settlement in terms of section 66 (6), an opportunity has been given to the parties to consider a settlement and since there was no settlement, the case has been fixed for inquiry in terms of section 66 (7) of the Act.

Another argument of the learned Counsel for the Appellant is that even though, the learned Magistrate has come to his conclusion under section 68 (1) of the Act, the facts and circumstances of the case demonstrates that the Court should make its determination

under section 68 (3) and not under section 68 (1) of the Act. The provisions of section 68 (1) of the Act applies when the Primary Court makes a determination as who was in possession of the land on the date of the filing of the Information under section 66 and the provisions of section 68 (3) applies when a forcible dispossession has been taken place within two months to the date of the filing the Information report in Court. In terms of section 66 (2) of the Act, when an information is filed in a Primary Court under section 66 (1) of the Act, that Court has and is vested with jurisdiction to inquire into and make a determination or order regarding the dispute which the information is filed in the manner provided for in Part VII of the Act. The dispute reported to the Magistrate's Court in the instant case on the information filed in Court (page 47 of the appeal brief) has been over the possession of a land and not regarding a forcible dispossession. Therefore, as provided by section 66 (2) of the Act, the Court had vested with the jurisdiction to inquire into and make a determination under section 68 (1) of the Act regarding the possession of the land in dispute. Hence, I hold that there is no merit in the above stated argument of the learned Counsel.

The learned Counsel for the Appellant further argues that the learned Magistrate had no jurisdiction to make any determination under the Act, for the reason that the information has been filed in Court after 2 months from the date of the 1st complaint made by the 2nd Respondent to the Police. That complaint has been made to the Police on 12.08.2010. and the information has been filed in Court on 29.10.2010. In terms of section 66 (1) (a) of the Act, the formation of the opinion as to whether there is a dispute affecting land and a breach of the peace is threatened or likely and take steps to bring the parties before the Court is left to the Police Officer who inquire into the dispute. In the case in hand after making three complaints to the Police on 12.08.2010, 28.08.2010. and 05.09.2010. by the Respondents about the dispute, the Police has referred the dispute to the Court under section 66 (1) (a) of the Act. Therefore, it is quite clear that as a result of continuous acts committed by the Appellant which led to a breach of the peace was threatened, the Police has referred the dispute to the Court under section 66 (1) (a) of the Act. Under such circumstances the authorities, *Kanagasabai vs. Mylvaganam (78 NLR 280)*, *Ramalingum vs. Thangaraja (Sri Kantha Law Reports Vol 1-32)* and CA *Revision Application No. 1646/84- PC Elpitiya No.7261/P decided on 08.03.1991. (BASL News May 1991)* cited

by the learned Counsel for the Appellant has no relevance to the point argued for the reason that those authorities apply only when Court makes a determination under section 68 (3) of the Act as to whether a forcible dispossession has been taken place within a period of 2 months immediately before the date on which the information was filed and not on whether the information was filed in Court after 2 months from the date of the police complaint.

Citing some Indian authorities, the learned Counsel for the Appellant further argues that since the parties are co-owners of the land in dispute, action could not have been maintained in the Magistrate's Court. The Part VII of the Act is a special piece of legislation which the jurisdiction is vested in the Primary Court to make temporary orders to prevent the breaches of the peace arising from the land disputes until the determination of the rights of the parties by a competent Court. It was held in *Kanagasabai vs. Mylvaganam (78 NLR 280) and Velupillai & Othes vs. Sivarathnam (1993 1 SLR 123)* that the object of Part VII of the Act is to prevent breaches of the peace arising out of land disputes and it confers a special jurisdiction on the Primary Court Judge and the scope of the inquiry under this special jurisdiction is of a purely preventive nature awaiting a final adjudication of rights of the parties in a civil suit. It was further held that what is expected from the Primary Court is to maintain the *status quo* until the rights of the parties are finally decided by a competent Court. In the case of *A.W.M. Dharmarathne vs. W.G. Dhanawathie and OIC, Police Station Koswatta (CA No. (APN) 260/84 decided on 29.03.1985)* it was held that even where the parties before Court are co-owners, since the function of the Primary Court Judge is not to decide any question of title or right to possession of the parties to the land, the general question of co-owner's rights are not relevant to the inquiry held under the Act. In view of the above authorities, I hold that the co-ownership of the land in dispute in the instant action is not a bar for the learned Magistrate to hold the inquiry and to make a determination under Part VII of the Act and therefore, there is no merit in the above stated argument of the learned Counsel for the Appellant.

Another argument of the learned Counsel for the Appellant is that there was no material before the Court that a breach of the peace was threatened or likely as a result of the

dispute between the parties for the Magistrate to assume jurisdiction to hold an inquiry under the Act. The proceedings of the instant action has been commenced before the Magistrate's Court on an information filed by the Police under section 66 (1) (a) of the Act. Since, the information has been filed by the Police, the Magistrate is vested with jurisdiction to hold an inquiry and make a determination under section 68 of the Act and the formation of an opinion by the Court as to whether a breach of the peace is threatened or likely is not required. It was held in *David Appuhami vs. Yasassi Thero (1987 1 SLR 253)* and *Velipillai vs. Sivanathan (1993 1SLR 123)* that, under section 62 of the Administration of Justice Law, No. 44 of 1973 which is the corresponding section to section 66 (1) (a) of the Act, the Primary Court Judge is vested with jurisdiction only after he formed an opinion that the dispute affecting land is likely to cause a breach of the peace and that in section 66 (1) (a) of the Act, there is a significant departure from the relevant provisions of the repealed section 62 of the Administration of Justice Law and under section 66 (1) (a) of the Act, formation of the opinion as to whether there is a dispute affecting land and a breach of the peace is threatened or likely is left to the Police Officer who inquiries into the dispute. It was further held that in terms of section 66 (2) of the Act, once the information is filed under section 66 (1) (a), the Primary Court Judge is vested with jurisdiction to inquire into the dispute and make a determination under section 68 or 69 of the Act. Upon consideration of the said legal position, facts and circumstances of the case, I hold that the above stated argument of the learned Counsel is also without merits.

Another argument of the learned Counsel for the Appellant is that the affidavit dated 25.02.2011. and the counter-affidavit dated 29.04.2011. filed by the Respondents in the Magistrate's Court are not legally valid. That argument is based on the fact that even though, at the commencement of both, the affidavit and the counter-affidavit it says that the declarants 'affirm', in the jurat it says that they 'sware'. Citing the authorities of *Clifford Ratwatte vs. Thilanga Sumathipala and others (2001 2 SLR 55), Inaya vs. Lanka Orix Leasing Company LTD., (1999 3 SLR 197) and B. D. Chandrawathi vs. G. P. Dharmarate (2001 BLR-Decided on 01.11.2001*, the learned Counsel argues that for the above stated reason the learned Magistrate should have concluded that the facts stated in the affidavit and the counter-affidavit have no evidential value and should have rejected

them. The Oaths and Affirmations Ordinance, No. 9 of 1895 (as amended) deals with the law relating to oaths and affirmations in judicial proceedings. Section 4 of the Ordinance deals with the provisions relating to oaths to be made by persons mentioned therein and section 5 gives exceptions to section 4. Section 6 provides that all oaths and affirmations made under either section 4 or 5 should be administered according to such forms and with such formalities as may be from time to time prescribed by the Rules made by the Supreme Court and until such Rules are made, oaths and affirmations should be administered according to the forms and with the formalities now in use. The Supreme Court Rules have not provided a format of an affidavit that should be filed in actions instituted under Part VII of the Act. In the case of *Kayas vs. Nazeer and others (2004 3 SLR 202)* the Supreme Court has held that '*inquiries into disputes affecting land where a breach of the peace is threatened or likely to be threatened under Part VII comprising sections 66 - 76 are neither in the nature of a criminal prosecution or proceeding nor in the nature of civil action or proceeding. Those proceedings are of special nature since orders that are being made are of a provisional nature to maintain status quo for the sole purpose of preventing a breach of the peace and which are to be superseded by an order or a decree of a competent Court*'. Under the above stated circumstances, I hold that with regards to the format of the affidavits in actions instituted under Part VII of the Act, neither the provisions of the Criminal Procedure Code nor the provisions of the Civil Procedure Code applies and the provisions of the Oaths and Affirmations Ordinance applies for the same.

The affidavit and the counter-affidavit filed by the Respondents in the instant case commences with the words 'We … being Buddhists do hereby solemnly, sincerely and truly declare and affirm as follows'. Section 12 (3) of the Oaths and Affirmations Ordinance stipulates the particulars which the Commissioner for Oaths before whom the affidavit is taken should state in the jurat. Accordingly, he should state truly in the jurat at what place and on what date the same was taken. In the jurat of the affidavit and the counter-affidavit filed by the Respondents in the Magistrate's Court states that both have signed those documents in Pugoda respectively on 25. 02. 2011. and on 29. 04. 2011. The Appellant do not dispute the fact that the affidavit and the counter-affidavit were signed before a person who is legally entitled to take the oath.

Section 9 of the Oaths and Affirmations Ordinance states that, '*No omission to take any oath or make any affirmation, no substitution of anyone for any other of them, and no irregularity whatever in the form in which any one of them is administered, shall invalidate any proceeding or render inadmissible any evidence whatever in or in respect of which such omission, substitution, or irregularity took place, or shall affect the obligation of a witness to state the truth*'.

Under the above stated circumstances, the Court can be satisfied that the affidavit and the counter-affidavit filed by the Respondents in the Court are according to the provisions of the Oaths and Affirmations Ordinance and therefore, the learned Magistrate is supposed to consider the evidence adduced on those documents.

The learned Counsel for the Appellant further argues that the learned Magistrate has failed to identify the land in dispute. According to the Appellant, the land in dispute is 'Galabodawatta' and it is shown as a portion of a land depicted on a surveyor plan. The Respondents also have admitted that the land in dispute is 'Galabodawatta'. In the presence of both parties, Police Sergeant Mr. Gunawardhana, on 19.08.2010. has prepared a report and a rough sketch of the disputed land (page 111 of the appeal brief). According to that report and the sketch, the disputed land is situated adjacent to the land known as 'Kosgahawatta' and at a lower elevation to that land. The 1st Respondent is possessing 'Kosgahawatta'. A live fence and Gliricidia trees are situated in a manner which both lands could be identified separately. In addition to that as per the report, the disputed land bounds to the lands of Siriyawathi and Simon Singho and the gravel road led to Appuhamy's house. Therefore, I am of the view that, on the report and the sketch prepared by the Police Sergeant Mr. Gunawardhana on 19.08.2010. in the presence of both parties, the land in dispute could be identified easily. Even though, in the written submissions filed on behalf of the Appellant it is alleged that the Police Officer had prepared the said report and the sketch in a manner which is favourable to the Respondents and unfavourable to the Appellant, the Appellant has failed to place any material before the Court to substantiate that alligation.

The learned Counsel for the Appellant further argues that the Respondents have failed to prove their possession of the land to have a favourable order to them in terms of section

68 of the Act. The Appellant has set out his paper title to the land in dispute. In the case of *Ramalingum vs. Thangarajha (1982 [2] SLR 34)* Sharvananda, J. has held that the Magistrate is not to decide any question of title or right to possession of the parties to the land. Evidence bearing on title can be considered only when the evidence as to possession is clearly balanced, and the presumption of possession which folws from title may tilt the balance in favour of the owner and help in deciding the question of possession. In view of that authority, I hold that the title of the Appellant to the land in the instant case is immaterial for the learned Magistrate in deciding the matter. When perusing the impugned order of the learned Magistrate and scrutinizing the evidence of the case, the Court can be satisfied that the learned Magistrate has considered, evaluated and weighed the evidence presented by both parties to the Court when coming to the conclusion under section 68 (1) of the Act that the Respondents were in possession of the land in dispute on the date of the filing of the information under section 66 of the Act.

Considering all the above stated facts and circumstances, I hold that the impugned orders of the learned Magistrate and the learned High Court Judge are according to the law and the facts of the case. Hence, I affirm those orders and dismiss the appeal. The Appellant should pay Rs. 40,000/- as cost to the 1st to 3rd Respondents.

JUDGE OF THE COURT OF APPEAL

I agree.

Prasantha De Silva J.

JUDGE OF THE COURT OF APPEAL