

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

C.A. (PHC) Case No: 09/2014

H.C.C.A.(Kandy) Case No: RV 141/11

In the matter of an application for Revision in terms of Articles 154P and 138 of the Constitution of the Democratic Socialist Republic of Sri Lanka read with section 11(1) of the High Court of the Provinces (Special Provisions) Act, No. 19 of 1990 (as amended) and section 66 of the Primary Courts' Procedure Act, No. 44 of 1979.

Police Station
Katugastota

Informant

Vs.

1. Senaka Kusum Arambewela
2. Rohitha Sanjeewa Arambewela
3. Ganitha Gedara Piyasena
4. Sarath Arambewela

Respondents

And between

Rohitha Sanjeewa Arambewela,
No 15, Wiyalewela, Jambugahapitiya.

2nd Respondent-Petitioner

Vs.

1. Ganitha Gedara Piyasena,
No 17/1, Wiyalewela, Jambugahapitiya.

3rd Respondent-Respondent

2. Senaka Kusum Arambewela
No 26/1/B, Pangiriwatta Mawatha,
Mirihana.

1st Respondent-Respondent

3. Sarath Arambewela
No 75/15, Galpotha Road,
Nawala, Rajagiriya.

4th Respondent-Respondent

4. Officer-In-Charge,
Police Station, Katugastota
Informant-Respondent

And now between

1. Ganitha Gedara Piyasena,
No 17/1, Wiyalewela, Jambugahapitiya.
2. Senaka Kusum Arambewela
No 26/1/B, Pangiriwatta Mawatha,
Mirihana
3. Sarath Arambewela
No 75/15, Galpotha Road,
Nawala, Rajagiriya.

1,3,4 Respondent-Respondent-Appellants

Vs.

1. Officer-In-Charge,
Police Station, Katugastota
Informant-Respondent-Respondent
2. Rohitha Sanjeewa Arambewela,
No 15, Wiyalewela, Jambugahapitiya.
2nd Respondent-Petitioner-Respondent

Before: Prasantha De Silva, J.

S.U.B. Karalliyadde, J.

Counsels: Mr. Lakshan J.S. Dias for the 1st, 3rd, 4th Respondent-Respondent-Appellants

Mr. Rohan Sahabandu P.C. with Ms. Chathurika Elvitigala for the 2nd
Respondent- Petitioner-Respondent

Written submissions tendered on:

21.04.2021 and 13.10.2020 by the 1st, 3rd, 4th Respondent-Respondent-Appellants

03.03.2020 and 17.09.2020 by the 2nd Respondent-Petitioner-Respondent

Argued on: Argued by way of written submissions

Decided on: 20.07.2021.

S.U.B. Karalliyadde, J.

The Officer-In-Charge of Katugastota Police reported to the Magistrate's Court of Kandy on an information filed under section 66 (1) (a) of the Primary Courts' Procedure Act, No. 44 of 1979 (the Act) a dispute between the 1st Respondent-Respondent-Appellant (the 1st Respondent) and the 2nd Respondent-Petitioner-Respondent (the 2nd Respondent) led to a breach of the peace is threatened over the possession of a property. After the notice was affixed on the land in terms of section 66 (4) of the Act, the 3rd and 4th Respondent-Respondent-Appellants (the 3rd and 4th Respondents) intervene into the case as interested parties.

The 1st, 3rd and 4th Respondents alleged *inter alia*, that the disputed property is the ancestral property of the 1st and the 4th Respondents, 4th Respondent who is residing abroad is the owner of the property, the 1st Respondent who is the brother of the 4th Respondent frequently visited the property and given instructions on behalf of the 4th Respondent in managing the property to the 3rd Respondent who is the family servant of them and who is residing and looking after the property for nearly 49 years even from the days of their father and on the 26.07.2007 the 2nd Respondent forcibly entered into the property dispossessing the 3rd Respondent. The 2nd Respondent alleged *inter alia*, that he possessed the property in dispute which belonged to his late father, on and off he came and stayed in the house in the land for few days, taken the fruits of the trees on the land, sometimes he asked the 3rd Respondent to look after the property when he was away, but the 3rd Respondent never occupied the house in the disputed property, later the 3rd Respondent started to quarrel with him about looking after of the property and as a result, with the assistance of the 1st Respondent the 3rd Respondent is attempting to enter into the possession of the disputed property. The dispute has been referred to the Court under section 66 (1) (a) of the Act by the Police on the complaint made by the 3rd Respondent. After the inquiry being held, the learned Magistrate by the Order dated 05.12.2011 has determined that the 3rd Respondent is entitled to possess the property. Against that Order the 2nd Respondent has filed a Revision Application before the High Court of the Central Province, holden in Kandy. The learned High Court Judge, by the Order dated 25.02.2014, setting aside the Order of the learned Magistrate has held that the 2nd Respondent is entitled to the possession of the disputed property.

Being aggrieved by the Order of the High Court, the 3rd Respondent has preferred this Appeal to this Court. Thereafter, while pending the appeal the 3rd Respondent died and his widow has

made an application to this Court seeking to substitute her for the deceased 3rd Respondent. The 2nd Respondent objected to that application. This Order pertains to that application of the widow of the 3rd Respondent.

The learned Counsel for the 2nd Respondent argues that after the demise of the 3rd Respondent the appeal cannot be maintained and should be dismissed/abated for the reasons that the 3rd Respondent had no proprietary interest over the property to be substituted his heirs, the 3rd Respondent had a personal contract with the 4th Respondent who is claiming the ownership of the property and the heirs does not bound by that contract, the deceased 3rd Respondent was the agent of the 4th Respondent and therefore, after his demise the relationship between them ceases and does not extend to include his heirs, as per the *ratio decidendi* in *CA SC278/78 C. A. M 9.10.1978*, if the widow of the 3rd Respondent had rights of the property transferred to her she could have substituted, there are no legal provisions for substitution in actions filed under the Part VII of the Act, the Supreme Court has not made Rules for substitution in actions filed under Part VII of the Act and in view of the decision of *Kayas vs. Nazeer (2004 3 SLR 202)* the provisions of the Civil Procedure Code regarding the substitution of parties for the deceased party does apply in actions filed under the Part VII of the Act.

In the case of *Mary Perera vs. Alexander Perera and others {1983 BALJ Vol. (1) Part (1)}* the Court of Appeal has considered an order made by a Magistrate, acting as a Primary Court Judge in the proceedings instituted under section 62 of the Administration of Justice Law, No. 44 of 1973 (the AJL) regarding an application for substitution in the place of a deceased party during the pendency of the inquiry before the Magistrate's Court. The petitioner concerned in the action had died and his daughter had made the application to substitute her in the place of her father who was the petitioner. The respondent had objected to that application. The Court had allowed the application for substitution overruling the respondent's objection. Then the respondent had moved on Revision to the Court of Appeal seeking to set aside the order of the Magistrate for substitution and the Court of Appeal upheld the order of the Magistrate. In Revision Athukorala, J. expressed the view that "*under section 62, proceedings are directed not against any particular person, but with a view to the final resolution of the land dispute which is likely to cause a breach of the peace. To achieve that purpose 'every person concerned with the dispute' is required to attend the inquiry. These words, in my view refer not only to the actual disputants before the court, but also include persons who are concerned with claiming to be in possession. I think these words should be construed to mean not only persons who are the actual participants to the dispute but also persons concerned with the subject-*

matter of the dispute who may be affected by the order that the Magistrate is empowered to make. ... the present respondent (i.e., the substituted respondent) is a person concerned in the dispute relating to the premises in question, and as such is entitled to participate in proceedings under section 62.

... There is no express provision in section 62 or 63 (section deals with the determination and the order of the Magistrate) of the AJL enabling such substitution to be made. But these sections give the Magistrate a wide discretion as to the manner in which he should conduct the inquiry and the procedure to be adopted by him. The death of the original complainant does not ipso facto terminate the dispute relating to the premises in question. Nor can it be presumed that since his death, there is no likelihood of a breach of the peace. I do not think that without making the respondent (i.e., the substituted respondent) a party to the proceedings and give her an opportunity of being heard, the learned Magistrate can possibly make an order which would finally and effectively prevent a breach of the peace in relation to the dispute that has arisen. Any order of the learned Magistrate terminating proceedings, far from terminating the dispute and preventing a breach of the peace will only result in the continuance of the same dispute between the petitioner and the (substituted) respondent with an even greater likelihood of the occurrence of a breach of the peace.” Even though, His Lordship has considered that case under the provisions of the AJL, I am of the view that this proposition would apply to the proceedings instituted under Part VII of the Act.

In the instant case the 3rd Respondent has stated in his police statements made on 26.07.2007 and 08.08.2007 (pages 186 and 187 respectively in the appeal brief) that he is residing in the property in dispute since 1958 and after getting married he continued to stay there with his wife. Therefore, as per the facts stated in those police complaints and the decision of *Mary Perera vs. Alexander Perera and others* (supra), I am of the view that the widow of the 3rd Respondent is a ‘**person concerned**’ in the subject matter of the dispute for effectively prevent the breach of the peace in relation to the dispute that has arisen between the 2nd and 3rd Respondents. According to the facts stated in the petition and affidavit filed by the Petitioner before this Court seeking to substitute her for the place of the 3rd Respondent, the death certificate of the 3rd Respondent (marked as X 1), marriage certificate (marked as X 2) and the birth certificates of the petitioner’s children (marked as X 4, X 4(a) and X 4(b)) the Court can be satisfied that the 3rd Respondent died on 25.07.2019 while pending this Appeal and the Petitioner is the widow of the 3rd Respondent.

The learned Counsel for the 2nd Respondent has drawn the attention of this Court to an order made by the Supreme Court in the Application bearing No. S. C. 259/78 (vide S. C. Minutes dated 12.04.1978). In that case the Supreme Court has refused an application to set aside an order of a Magistrate to terminate the proceedings after the death of a party to an action filed under section 62 of the AJL. Considering the decision of *Mary Perera's* case also the Supreme Court has observed that in the Magistrate's Court case concerned in the Application No. 259/78, an application has not been made for substitution of a person in the place of the deceased party and as such the question of substitution does not arise. But in the instant case the widow of the 3rd Respondent has made an application for substitution. Therefore, the facts of that Application differ from the facts of the case in hand and for that reason that decision of the Supreme Court has no relevance to the facts of the case in hand. The objections hereinbefore mentioned that were raised by the learned Counsel for the 2nd Respondent for the application for substitution are not relevant and valid for the reason that the procedure of the inquiry under section 66 is *sui generis* and the proceedings are with a view to prevent the breach of the peace in relation to the land disputes until the final resolution of the dispute from a competent court. Under the above stated circumstances, I refuse to accept the arguments of the learned Counsel for the 2nd Respondent. I hold that the Petitioner is the fit person to be substituted in the place of the deceased 3rd Respondent and direct to substitute the Petitioner for the 3rd Respondent. The caption can be amended accordingly.

JUDGE OF THE COURT OF APPEAL

I agree.

Prasantha De Silva J.

JUDGE OF THE COURT OF APPEAL