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

In the matter of an Application for Restitutio in Integrum and/or Revision in terms of Article 138 of the Constitution.

CA Case No: RII 07/2021

1. Sumith A. De. Silva,
   Chairman,
   Kalutara Co-Operative Distilleries
   Society Limited,
   Anganpitiya,
   Paiyagala.

2. Kalutara Co-Operative Distilleries Society Limited,
   Anganpitiya,
   Paiyagala.

3. John Fonseka,
   Vice Chairman,
   Kalutara Co-Operative Distilleries Society Limited,
   Anganpitiya,
   Paiyagala.

4. K.Jagath Chandra Silva
   Kalutara Co-Operative Distilleries Society Limited,
   Anganpitiya,
   Paiyagala.

5. Meril Fonseka,

Secretary,
Kalutara Co-Operative Distilleries Society Limited,
Anganpitiya,
Paiyagala.

6. Nihal Jayantha,
   Treasurer,
   Kalutara Co-Operative Distilleries Society Limited,
   Anganpitiya,
   Paiyagala.

7. Anthony Gunathilaka,
   Kalutara Co-Operative Distilleries Society Limited,
   Anganpitiya,
   Paiyagala.

8. Chandrasiri Perera,
   Director,
   Kalutara Co-Operative Distilleries Society Limited,
   Anganpitiya,
   Paiyagala.

9. Vijith Perera
   Director,
   Kalutara Co-Operative Distilleries Society Limited,
   Anganpitiya,
   Paiyagala.

10. Rasika Primal
    Director,

Kalutara Co-Operative Distilleries Society
Limited,
Anganpitiya,
Paiyagala.

11. Iwan Gunasekara,
Director,
Kalutara Co-Operative Distilleries Society
Limited,
Anganpitiya,
Paiyagala.

12. Punyasiri Silva,
Director,
Kalutara Co-Operative Distilleries Society
Limited,
Anganpitiya,
Paiyagala.

Petitioners

Vs.

1. Dinesh Hettiarachchi,
Chief Executive Officer,
Invest Lanka Investment Co.
(Private) Limited,
Sri Lanka Japan Friendship Road,
Thalawathugoda.

2. Invest Lanka Investment Co.
(Private) Limited,
No. 280, 2nd Floor,

Dr. N.M. Perera Mawatha (Cotta Road),
Colombo 08.

Respondents.

Before : **D.N. Samarakoon, J.**
B. Sasi Mahendran, J.

Counsel : Eraj De Silva with Manjuka Fernandopulle, Janagan Sundramoorthy and Harith Hettiarachchi for the Petitioners

Suren Gnanaraj with K. Chakrawarthy Yadaran, Wassala Kekulawala for the Respondents

Argued On: 04.08.2022

Written Submissions: 15.09.2022 (by the Petitioner)
On 15.09.2022 (by the Respondent)

Decided On: 14.10.2022

B. Sasi Mahendran, J.

The Petitioners (the Chairman and members of the Kalutara Cooperative Distilleries Society Limited) by Petition dated 31st March 2021, instituted this application for restitutio-in-integrum and/or revision, inter alia, to set aside the orders of the Kalutara Magistrate's Court in Case No. 11/2020, instituted under Section 66(1)(b) of the Primary Courts' Procedure Act No. 44 of 1979, dated 15th February 2021 (marked "A6") and 01st March 2021 (marked "A7") on the ground that the said orders directing the Respondents to be restored to possession of the distillery are per incuriam and bad in law.

It must be stated at the outset that an application for revision, filed by the Petitioners, is pending before the Provincial High Court of Kalutara (Case No. 20/2020). It has been brought to our notice that the proceedings in the said Court are on hold in anticipation of a decision of this Court. Therefore, this Court will confine its inquiry to determine whether the Petitioners are entitled to invoke the restitutionary jurisdiction of this Court and not inquire into the applicability of revision.

Restitutio-in-integrum, which is deeply rooted in our legal system, is a remedy to undo a wrong that has occurred in the order of the original Court and to restore the party affected by that order to the position it was in earlier. This remedy which is of an exceptional nature can only be claimed if certain grounds, as set out in the judgments cited below, have been proved to the satisfaction of this Court.

In Sri Lanka Insurance Corporation v. Shanmugam, [1995] 1 SLR 55 his Lordship Ranaraja J. held:

"Superior courts of this country have held that relief by way of restitutio in integrum in respect of judgments of original courts may be sought where (a) the judgments have been obtained by fraud, (Abeysekera-supra), by the production of false evidence, (Buyzer v. Eckert) or non-disclosure of material facts, (Perera v. Ekanaike), or where judgment has been obtained by force or fraud, (Gunaratne v. Dingiri Banda, Jayasuriya v. Kotelawela). (b) Where fresh evidence has cropped up since judgment which was unknown earlier to the parties relying on it, (Sinnethamby-supra), and fresh evidence which no reasonable diligence could have helped to disclose earlier, (c) Where judgments have been pronounced by mistake and decrees entered thereon, (Sinnethamby-supra), provided of course that it is an error which connotes a reasonable or excusable error, (Perera v. Don Simon). The remedy could therefore be availed of where an Attorney-at-Law has by mistake consented to judgment contrary to express instructions of his client, for in such cases it could be said that there was in reality no consent, (Phipps-Supra, Narayan Chetty v. Azeez), but not where the Attorney-at-Law has been given a general authority to settle or compromise a case (Silva v. Fonseka)"

Recently, his Lordship Nawaz J. in Edirisinghe Arachchilage Indrani Chandralatha v. Elrick Ratnam, CA R.I. Case No. 64/2012 decided on 02.08.2017, reaffirmed these grounds as follows:

"Any party who is aggrieved by a judgment, decree or order of the District Court or Family Court may apply for the interference of the Court and relief by way of restitutio in integrum if good grounds are shown. The just grounds for restitution are fraud, fear, minority etc. Our Superior Courts have held that the power of the Court to grant relief by way of restitutio in integrum, in

respect of judgments of original Courts, is a matter of grace and discretion, and such relief may be sought only in the following circumstances:-

a) Fraud
b) False evidence
c) Non-disclosure of material facts
d) Deception
e) Fresh evidence
f) Mistake
g) Fear"

In addition to these grounds, as held in the case of Sivapathalingam v. Sivasubramaniam [1990] 1 SLR 378 their Lordships of the Supreme Court, on an examination of the authorities, observed that a court whose act has caused injury to a suitor has an inherent power to make restitution. This principle was recently referred to in the judgment of his Lordship Prasanna Jayawardena PC. J. in Central Finance Company v. Sappani Chandrasekera (SC Appeal No. SC/CHC/37/2013 decided on 30th May 2019 reported in the Galle Law Journal 2019 Vol 5 p 276).

The main contention of the Petitioners is that the learned Magistrate had wrongly determined that there was a breach of the peace and that it stemmed from a dispute affecting land.

The instant dispute raises a jurisdictional issue. That is, when information was filed under Section 66(1) of the Primary Courts' Procedure Act, (in the instant case under Section 66(1)(b) of the Act) whether the Magistrate's Court rightly determined before issuing notice that the dispute affected land and that the same would result in a threat or likelihood of a breach of the peace. In the absence of such determination, the Magistrate would be without jurisdiction. The allegations made by Petitioners, that the learned Magistrate incorrectly ascertained that the dispute affected land and that owing to such dispute a breach of the peace was threatened or likely, thus go to the root or to the very heart of this case. If such allegations are proven to be true, this Court's intervention would be warranted.

The factual background concerns an agreement titled 'ස්කාගාර කලමනාකරණ සහ මුල්‍ය පහසුකම් සැපයීමේ ගිවිසුම' ('Agreement to Manage and Provide Credit Facilities to the Distillery' dated 7th October 2010 marked "X2") entered between the 2nd Petitioner (the Kalutara Cooperative Distilleries Society Limited, registered under the Cooperative

Societies Statute No. 3 of 1998 of the Western Provincial Council and under the Cooperative Societies Law No. 5 of 1972 which owns the distillery concerned with a licence to manufacture and sell coconut spirits distilled from coconut toddy – hereinafter referred to as "the Cooperative Society") and the 2nd Respondent (Invest Lanka Investments Co. (Private) Limited – hereinafter referred to as "the company") for a period of fifteen years whereby the company was permitted to operate and/or manage the distillery. Production at this distillery had come to a standstill because of the severe financial hardship the Cooperative Society grappled with. A supplementary agreement (marked "X3") was entered on 21st July 2011 to extend the period of the original agreement by an additional period of ten years (the agreement would terminate on 31st December 2035). By a letter dated 5th February 2020 (marked "V16") the company was informed that the agreement was terminated, inter alia, because the company had not paid certain sums of money that it was contractually stipulated to pay. On the contrary, the company maintains that it complied with all the contractual stipulations. It was contended that although the Cooperative Society had written to the Excise Department to grant an excise licence for the year 2020, following the election of the new Board of the Cooperative Society on 21st December 2019, the Society had written to the Excise Department to withhold issuance of the licence on the grounds that the company defaulted in its payments. The Respondents referred the matter to arbitration (by a reference dated 12th February 2020 marked "V24") in terms of Clause 16.2 of the agreement which provided that all disputes were to be resolved by arbitration.

Following several legal battles, the 1st Respondent, in his capacity as the Chief Executive Officer of the company, filed an information under Section 66(1)(b) of the Primary Courts' Procedure Act on 25th September 2020 in the Kalutara Magistrate's Court on the basis that the Respondents were forcibly dispossessed from the premises on 23rd August 2020 and, further, when the 1st Respondent visited the site on the 4th of September 2020 he was threatened with death by a group of persons placed in the premises by the 1st Petitioner. Following both events, although complaints were made to the Payagala Police, no action or result was forthcoming. The learned Magistrate, on the application being filed under Section 66(1)(b), issued notice to the Petitioners and an interim order to maintain the status quo of the land. The Journal Entry reads:

"නී/ සිසිර රත්නායක මහතා නී/ වයෝමි රණවක මිය සමඟ පෙනී සිටී. මෙම නඩුවට අදාළව කරුණු තහවුරු කරයි. ඉදිරිපත් කල කරුණු සලකා බැලීමේදි පාශර්ව අතර සාමය කඩ වීමක් හෝ සාමය කඩ වීමේ තජර්නයක් මතුව ඇති බවට සෑහීමට පත් වෙමි. ඒ අනුව වග උත්තර කරුවන්

වෙත නොතිසි නිකුත් කරමි. පිස්කල් මගින් විෂය වස්තුවේ නොතිසි අලවා වාතර්ා කිරීමට නියෝග කරමි.

මෙම පෙත්සමේ 4 ඡේදයේ සඳහන් පරිදි විෂය වස්තුව මෙම ආරවුල අවසන් වන තුරු දැනට පවතින තත්වයෙන්ම පවත්වා ගෙන යාමට අතුරු නියෝගයක් නිකුත් කරමි."

Having conducted an inquiry under Section 68(1) on the matter of possession, the learned Magistrate by the impugned order dated 15th February 2021 directed the company to be restored to possession of the distillery. A further order dated 01st March 2021 was made to re-execute the writ of possession, to hand over complete possession.

The gravamen of the Petitioners' claim involves three grounds:

1. That the dispute doesn't affect land
2. That there was no breach of the peace
3. Possession was always with the Petitioners, and there could not have been 'forcible dispossession'

Before we address these claims, an explanation of the law and procedure that governs applications of this nature, colloquially referred to as "Section 66" applications, is prudent. The old law was found in Section 62 of the Administration of Justice Law No. 44 of 1973. The Indian counterpart of this Section is found in Section 145 of the Code of Criminal Procedure 1973.

Presently, Part VII of the Primary Courts' Procedure Act deals with inquiries into disputes affecting land where a breach of the peace is threatened or likely. The purpose of an application under Section 66 was most succinctly laid out in the judgment of his Lordship Salam J. in the case of Jayantha Gunasekara v. Jayatissa Gunasekara [2011] 1 SLR 284. His Lordship observed:

"*To recapitulate the salient points that are in favour of expeditious execution of orders under part VII, the following points are worth being highlighted.*

1. It is quite clear, that ***the intention of the legislature in enacting Part VII*** *of the PCPA* ***is to preserve the peace in the society****. If an unusual length of time (sometimes more than a decade) is taken to execute a temporary order for the prevention of peace, the purpose of the legislation would definitely be defeated and the intention of the Legislature in introducing the most deserving action of the era in the nature of sui generis would be rendered utterly ridiculous.*

2. In as much as there should be expeditious disposal of a case stemming from the breach of the peace there should correspondingly be more expeditious and much efficient methods to give

effect to the considered resolution of the dispute, with a view to arrest in some way the continued breach of the peace and to avoid justice being frustratingly delayed.

3. ***All other considerations being subordinate to the imperative necessity of preserving the peace,*** *the execution mechanism also should keep pace with the Legislative commitment designed under Chapter VII of the PCPA.*" [emphasis added]

In his endeavour to elucidate the rationale of 'Section 66 applications', his Lordship quoted the following passages from the judgments of their Lordships Bonser C.J. in Perera v. Gunathilake 4 NLR 181 and his Lordship Sharvananda J. (as he then was) in Kanagasabai v. Mylvaganam 78 NLR 280. In Perera his Lordship Bonser C.J. held:

"In a Country like this, any attempt of parties to use force in the maintenance of their rights should be promptly discouraged. Slight brawls readily blossom into riots with grievous hurt and murder as the fruits. It is, therefore, all the more necessary that courts should be strict in discountenancing all attempts to use force in the assertion of such civil rights".

His Lordship Sharvananda J. (as he then was) in the often-cited Kanagasabai judgment (although decided under the old law the principles enunciated are equally applicable under the new law) held:

"The primary object of the jurisdiction so conferred on the Magistrate is the prevention of a breach of the peace arising in respect of a dispute affecting land. The section enables the Magistrate temporarily to settle the dispute between the parties before the Court and maintain the status quo until the rights of the parties are decided by a competent civil Court. All other considerations are subordinated to the imperative necessity of preserving the peace. *.....The action taken by the Magistrate is of a purely preventive and provisional nature in a civil dispute, pending final adjudication of the rights of the parties in a civil Court. The proceedings under this section are of a summary nature and it is essential that they should be disposed of as expeditiously as possible."* [emphasis added]

His Lordship Atukorale J. in Hotel Galaxy v. Mercantile Hotels Management [1987] 1 SLR 5 observed:

"The purpose of the conferment of this special jurisdiction on a Primary Court is to ensure the speedy and expeditious disposal, either by way of settlement or inquiry, of such disputes with the sole object of preventing the occurrence of the breach of peace that is threatened in the interests of the proper maintenance of law and order. The provisions contained in this Part stipulating prescribed time-limits for the filing of affidavits and counter-affidavits and the holding and completion of inquiries are designed to achieve this object. These disputes very often disclose

situations where threat to the peace are imminent unless immediate preventive action is taken by court…."

It is then important that Section 66, which is reproduced as follows, is read in this light.

(1) **Whenever owing to a dispute affecting land a breach of the peace is threatened or likely-**

(a) the police officer inquiring into the dispute-

(i) shall with the least possible delay file an information regarding the dispute in the Primary Court within whose jurisdiction the land is situate and require each of the parties to the dispute to enter into a bond for his appearance before the Primary Court on the day immediately succeeding the date of filing the information on which sittings of such court are held;

or (ii) shall, if necessary in the interests of preserving the peace, arrest the parties to the dispute and produce them forthwith before the Primary Court within whose jurisdiction the land is situate to be dealt with according to law and shall also at the same time file in that court the information regarding the dispute;

or

(b) any party to such dispute may file an information by affidavit in such Primary Court setting out the facts and the relief sought and specifying as respondents the names and addresses of the other parties to the dispute and then such court shall by its usual process or by registered post notice the parties named to appear in court on the day specified in the notice—such day being not later than two weeks from the day on which the information was filed.

(2) Where an information is filed in a Primary Court under subsection (1), the Primary Court shall have and is hereby vested with jurisdiction to **inquire into**, and **make a determination or order on**, in the manner provided for in this Part, the **dispute regarding which the information is filed**. [emphasis added]

It is trite law that the Magistrate does not undertake an investigation into title or right to possession. That is the function of a civil court. As mentioned above, Section 66 was preceded by Section 62 of the Administration of Justice Law No. 44 of 1973, which corresponds to Section 145 of the Indian Code of Criminal Procedure. These Sections are reproduced for the purpose of convenience:

Section 62 Administration of Justice Law:

Whenever a Magistrate on information furnished by a police officer or otherwise has reason to believe that the existence of a dispute affecting land situated within his jurisdiction is likely to cause a breach of the peace, he may issue notice….

Section 145 Code of Criminal Procedure:

(1)Whenever an Executive Magistrate is satisfied from a report of a police officer or upon other information that a dispute likely to cause a breach of the peace exists concerning any land or water or the boundaries thereof, within his local jurisdiction, he shall make an order in writing, stating the grounds of his being so satisfied, and requiring the parties concerned in such dispute to attend his Court in person or by pleader, on a specified date and time, and to put in written statements of their respective claims as respects the fact of actual possession of the subject of dispute.

Case law decided under these two sections provides that the decision of whether a dispute affects land and whether a breach of the peace is threatened or likely because of that dispute is made by the Magistrate. The information relied on by the Magistrate to make that determination is the police report or the affidavits filed by the disputing parties. A question then arises whether Section 66, which represents the new law, follows the same approach.

Section 66(1) of the Act provides three ways in which an information may be received by the Magistrate. First, the Police Officer inquiring into the dispute can file an information with the least possible delay. Second, depending on the severity of the dispute the police officer can arrest the parties and produce them to the Magistrate and at the same time file an information. Third, an information may be filed by a party to the dispute itself, without any involvement of the Police. When an information is filed the most important conditions that must be satisfied in order for the Magistrate to be clothed with jurisdiction are that the dispute must affect land and that as a result of that dispute a breach of the peace is threatened or likely. It is for this purpose that Section 66(2) has been introduced. The legislature in its wisdom included this Section so that the Magistrate can inquire or ascertain whether the conditions precedent (i.e., the dispute must affect land and that because of that dispute a breach of the peace is threatened or likely) exists for the action to proceed further. The same must be done before issuing notice.

On a careful perusal of the respective statutory provisions, this Court is of the view, for reasons explained below, that when an information is filed in any of three methods, an initial 'inquiry' or 'screening' must be undertaken in order to ascertain that both those conditions precedent are satisfied. This 'inquiry' or 'screening' should not be a lengthy, protracted one but merely one that enables or facilitates the Magistrate to verify or ascertain that the dispute affects land and that a breach of the peace is threatened or

likely. It is important for this initial 'inquiry' to take place before the Magistrate orders the issuance of notice and any interim order.

In the first and third methods of filing information, this Court is of the view that the Magistrate must ascertain the existence of both conditions. In the second method, when disputing parties are arrested and produced before Court, the breach of the peace is immediately evident that there would not be a need to ascertain if there is a breach of the peace. However, the requirement to conduct an initial 'inquiry' is not dispensed with because the Magistrate ought to inquire whether the breach of the peace is threatened or likely because of a dispute affecting land. It is essential in an application under Section 66 that the dispute affects land as the offence of breach of the peace can arise in other contexts as well such as Section 81 of the Code of Criminal Procedure, which has nothing to do with land.

This requirement to conduct an initial 'inquiry' or 'screening' of this sort may be regarded as contradictory to other judgments of this Court and seen as an application of the old law. The predecessor section, that is **Section 62** of the **Administration of Justice Law**, reproduced again for convenience, provided that:

> Whenever a Magistrate on information furnished by a police officer or otherwise has reason to believe that the existence of a dispute affecting land situated within his jurisdiction is likely to cause a breach of the peace, he may issue notice……

Similar to the corresponding Section found in the Indian Criminal Procedure Code, the old law required the Magistrate to **satisfy himself** by determining whether the dispute affected land and owing to such dispute a breach of the peace was threatened or likely. This is reflected in the dicta of His Lordship Soza J. in Navaratnasingham v. Arumugam [1980] 2 SLR 1:

> *"The local decisions on section 62 of the Administration of Justice Law, No. 44 of 1973, are agreed that all that is necessary is that* ***the Magistrate himself must be satisfied*** *on the material on record that there is a present fear that there will be a breach of the peace stemming from the dispute unless proceedings are taken under the section."* [emphasis added]

However, as explained by the following judgments of this Court, the role of the Magistrate when information is filed under any of the three methods mentioned above (under the new Section) is different from a Magistrate acting under the old law. It appears that the Magistrate need not satisfy himself of the existence of the two conditions but that

on the filing of an information the Magistrate must presume the existence of both conditions.

In David Appuhamy v. Yassassi Thero [1987] 1 SLR 253 his Lordship Wijetunga J. held:

"*Under the Administration of Justice Law, for a Magistrate to exercise power under section 62 he had to be satisfied on the material on record that there was a present fear that there will be a breach of the peace stemming from the dispute unless proceedings are taken under that section. The power conferred by that section was in subjective terms - the Magistrate, being the competent authority, was entitled to act when he had reason to believe that the existence of a dispute affecting land was likely to cause a breach of the peace…….*

But, under section 66 of the Primary Courts' Procedure Act, the formation of the opinion as to whether a breach of the peace is threatened or likely is left to the police officer inquiring into the dispute *and he is, in such circumstances, required to file an information regarding the dispute with the least possible delay….*" [emphasis added]

In Velupillai v. Sivanathan [1993] 1 SLR 123 his Lordship Ismail J. held:

"Under section 66 (1)(a) of the Primary Courts Procedure Act, ***the formation of the opinion as to whether a breach of the peace is threatened or likely is left to the police officer inquiring into the dispute. The police officer is empowered to file the information if there is a dispute affecting land and a breach of the peace is threatened or likely. The Magistrate is not put on inquiry as to whether a breach of the peace is threatened or likely****. In terms of section 66 (2) the Court is vested with jurisdiction to inquire into and make a determination on the dispute regarding which information is filed either under section 66 (1) (a) or 66 (1) (b)."* [emphasis added]

His Lordship further held:

"However when an information is filed under section 66 (1) (b) the only material that the Magistrate would have before him is the affidavit information of an interested person and in such a situation without the benefit of further assistance from a police report, the Magistrate should proceed cautiously and ascertain for himself whether there is a dispute affecting land and whether a breach of the peace is threatened or likely."

His Lordship adopted the same stance in Punchi Nona v. Padumasena [1994] 2 SLR 117

Adopting these dicta his Lordship L.T.B. Dehideniya J. in Ananda Paranawithana v. Upali Jayasinghe (along with his Lordship Madawala J.) CA/ PHC/ 184/2005 decided on 16.05.2017 (Reported in ACJ 2017 Vol 2 p. 25) held:

"Section 66 (1) (a) of the Act empowers a police officer to file information under the Act. In such a situation the police officer has to decide whether the breach of the peace is likely or threatened. ***Under subsection (b) of section 66(1), a private party can file information and it is the Court that has to decide whether the breach of the peace is threatened or likely due to the dispute****."* [emphasis added]

His Lordship Padman Surasena J. (along with her Ladyship K.K. Wickremasinghe J.) in The Municipal Council Batticaloa v. M.K. Ratnasingam CA PHC 287/2005 decided on 08.02.2018 (Reported in 2018 ACJ Vol 1 p. 65) held:

"It is now settled law that ***a party invoking the jurisdiction*** *vested in Primary Court under section 66 (1)(b) of the Act,* ***shall first satisfy the Primary Court*** *that a breach of peace is threatened or likely owing to the dispute he complains about."* [emphasis added]

However, recently, his Lordship Mahinda Samayawardhena J. held his Lordship Ismail J's dictum in Velupillai (supra), that when information is filed under Section 66(1)(b) the Magistrate must act cautiously, does not represent the correct position of law. In Gamaralalage Jayasinghe v. Mahara Mudiyanselage Loku Bandara Case No. CA/PHC/76/2018 decided on 20.12.2019, his Lordship held:

".....under section 66(2), it has been enacted that when the first information is filed under section 66(1), ***irrespective of whether it is filed by the police or a party to the dispute, the Magistrate is automatically vested with jurisdiction*** *to inquire into and determine the matter, without further ado. Under section 66(1), the formation of opinion as to whether a breach of the peace is threatened or likely is left to the police officer inquiring into the dispute or to any party to the dispute.* ***Both are on equal footing. Who files the information is beside the point.****"* [emphasis added]

Therefore, as per these authorities the determination of whether there exists a dispute affecting land, and consequently whether that dispute threatens or is likely to cause a breach of the peace will be made by the police officer filing the information. Upon receiving the information, the Magistrate must presume that both those conditions have been satisfied and proceed to issue notices. On the contrary, when an information is filed by a disputing party it appears there is a variance of views, in that their Lordships Ismail J., Dehideniya J., and Surasena J. differ from the judgments of their Lordships Wijetunga J. and Samayawardhena J. The Magistrate is advised to tread lightly by exercising caution. A fear that, as explained below, is justified.

Nevertheless, with all due respect to the aforementioned line of authorities, we are unable to agree that the Magistrate is compelled to act on the filing of information.

Irrespective of the manner in which information is filed an 'inquiry' or 'screening' ought to be conducted by the Magistrate to filter out cases that do not meet the conditions precedent. We are of the view that the Magistrate cannot be a rubber stamp. There is a duty cast on the Magistrate to ascertain for herself that both conditions precedent to assume jurisdiction under Section 66 are met. As mentioned before, it is important that this exercise by the Magistrate takes place prior to issuing notices under Section 66.

This proposition of an initial 'inquiry' to ascertain the existence of the conditions precedent is not novel. In the judgment of this Court in Muthukumarasamy v. Nannithamby (reported in 1983 Sriskantha's Law Reports Vol. 1 p. 55) it was held that a Magistrate has the power and jurisdiction to issue an interim order (under Section 66(3) of the Act) on the very day the information was filed. The Supreme Court in Hotel Galaxy (Pvt) Ltd v. Mercantile Hotels Management [1987] 1 SLR 5 affirmed the same. What is relevant for the present purpose is the following observation of his Lordship Seneviratne J. in Muthukumarasamy:

"***Having considered that information and material*** *and because a breach of the peace already occurred, and there is a likelihood of a further breach of the peace, the learned Magistrate has issued the interim order……. The Court of Appeal has also held in CA appln. No. 515/80 CA Minutes of 4.8.1980 that an interim order can be issued when the information is filed* ***if the material available to court justifies such an order.***" [emphasis added]

In Punchi Nona v. Padumasena (supra) information was filed under Section 66(1)(b) of the Act. An objection was taken that the Primary Court did not have jurisdiction to deal with the information filed by the disputing party as the Primary Court Judge made no finding that there was a breach of the peace. His Lordship Ismail J. held thus:

"*It was therefore incumbent upon the Primary Court Judge to have initially satisfied himself as to whether there was a threat or likelihood of a breach of peace and whether he was justified in assuming such a special jurisdiction under the circumstances. The failure of the judge* ***to satisfy himself initially*** *in regard to the threat or likelihood of the breach of peace deprived him of the jurisdiction to proceed with the inquiry and this vitiates the subsequent proceedings."* [emphasis added]

His Lordship Sisira de Abrew J. in J. A. Priyanthi Perera Samarasinghe v. Dharmapala Colin Abeywardene CA PHC APN 64/2010 decided on 05.05.2011, (not referred in Gamaralalage Jayasinghe v. Mahara Mudiyanselage Loku Bandara (supra)) having cited David Appuhamy (supra) and Velupillai (supra) lucidly held:

"The above judicial decisions confirm the position that when a police officer files a report under Section 66(1)(a) of the Act, the Magistrate is vested with jurisdiction to inquire into the matter. This is only with regard to the assumption of jurisdiction. But above judicial decisions do not take away the power of the Magistrate to reach a conclusion at the end of the inquiry whether or not there was a breach of the peace. What happens at the end of the case if the Magistrate observes that there was no breach of peace or breach of peace is not threatened? In my view at the end of the case if the Magistrate finds that there was no breach of peace or breach of peace is not threatened the Magistrate is entitled to dismiss the case. If this power is not given to the Magistrate, decision maker on the question whether or not there was a breach of peace would be the police officer and not the judicial officer. Therefore in my view the Magistrate holding an inquiry under Section 66 of the Act is entitled to a make a judicial pronouncement whether or not there was a breach of peace. If the judicial pronouncement confirms that there was no breach of peace or breach of peace is not threatened, the Magistrate/Primary Court Judge should dismiss the case."

The importance of speedy and expeditious resolution of the dispute was underscored in the judgments referred to initially on the object of Part VII, which is to maintain law and order. This initial 'inquiry' or 'screening' might appear to some to be an additional step in the process and thereby prevent speedy and expeditious disposal of the dispute. This concern appears very clearly in the judgment of his Lordship Andrew Somawansa J. in Karunanayake v. Sangakkara [2005] 2 SLR 403:

"I would say it is an erroneous supposition of the learned High Court Judge when he observed: "What steps primary Court Judge could take if he finds that he has no sufficient facts to write the judgment other than to call for further evidence". If this procedure is to be permitted in making a determination in terms of Part VII of the Primary Courts Procedure Act then Section 72 of the aforesaid Act would become redundant. It would also be opening the flood gates for long drawn out protracted inquiries when the primary object of Part VII of the Primary Courts Procedure Act was for the speedy disposal of the dispute that has arisen. Furthermore, it would permit the Primary Court Judge to go on a voyage of discovery on his own contrary to provisions in Section 72 of the Primary Courts Procedure Act."

However, the need to avoid potential abuses of this process that can result when inquiries are conducted with haste must also be balanced.

This 'inquiry' or 'screening' is imperative when information is filed by an interested party. The very fact that the party filing information is interested in the dispute and thus not exercising independent judgment should result in the Magistrate undertaking that inquiry or screening in order to filter out vexatious, frivolous actions or those filed with

an ulterior motive. We would adopt the dicta of his Lordship Ismail J., that the Magistrate should proceed cautiously and ascertain for himself when information is filed by a private party, for its wisdom and common-sense proposition.

Although made in the context of the previous Act, his Lordship Sharvananda J's statement in Kanagasabai (supra) that "The Magistrate should, however, proceed with great caution where there is no Police report and the only material before him are statements of interested persons" also echoes the same concerns or fears that underlie situations when information is filed by an interested party.

In such scenarios, the Magistrate may benefit from summoning or inquiring from the respective Police officer, whether by way of a report or orally, to ascertain, in cases such as the present one, the reason the Police thought that the purported dispute was one that did not merit Court's attention. The Court must take care to prevent it from becoming an instrument at the hands of one to be used to his or her undue advantage to hamper the affairs of another.

The Indian Courts appear to be influenced by the same concerns as well. In Gajadhar Singh v. Chunni & Ors. 1949 Cri LJ 967 it was held:

"*Criminal Courts are not intended to be a sort of place for a preliminary skirmish so that the successful party may have the advantage of driving the other side to the civil or the revenue Court. During the last few days, I have had a large number of criminal references under Section 145, Criminal P. C., and I have noticed that this tendency to use Section 145 not with the object of preventing a breach of the peace but with the object of getting possession of the property and driving the other side to figure as plaintiff has become very common. The Magistrates must guard themselves against the provisions of the section being thus abused, The reference is rejected.*"

Similarly, in Indira & Others v. Dr. Vasantha & Others 1991 CriLJ 1798 it was held:

"*The object of the section is not to provide parties with an opportunity of bringing their civil disputes before a Criminal Court or of manoeuvring for possession for the purpose of the subsequent civil litigation, but to arm the Magistrate concerned with power to maintain peace within his local area. Therefore, a duty is cast on the Magistrates, to guard against abuse of provisions by persons using it with the object of getting possession of property while attempting to drive the other side to a Civil Court. The very jurisdiction of the Magistrate to proceed under this section, arises out of his satisfaction, of a dispute likely to cause breach of peace either on a report of a Police Officer or upon other information.*"

The case of Karunanayake (supra) concerned:

"…. the correctness and the validity of the decision of the learned Primary Court Judge to summon the Grama Seva Niladhari and Y. L. Sumanaratne after fixing a date for the delivery of the order in this case."

His Lordship concluded that the Primary Court Judge's decision to reopen the inquiry on possession and summon two witnesses ex mero motu, after having closed the case and fixing the matter for judgment, was erroneous. Such a procedure offends Section 72 of the Act which provides the material on which a determination or order may be made.

In Ramalingam v. Thangarajah [1982] 2 SLR 693 his Lordship Sharvananda J. (as he then was) held:

"Section 72 prescribes the material on which the determination and order under section 68 and 69 of the Act is to be based. The determination should, in the main, be founded on "the information filed and the affidavits and documents furnished by the parties". Adducing evidence by way of affidavits and documents is the rule and oral testimony is an exception to be permitted only at the discretion of the Judge. That discretion should be exercised judicially, only in a fit case and not as a matter of course and not be surrendered to parties or their counsel. Under this section the parties are not entitled as of right to lead oral evidence."

It is interesting to note that although Section 72 provides that "a determination or order under this part [Part VII] shall be made after examination and consideration of….", his Lordship Sharvananda J., as seen in the excerpt quoted above, observed that Section 72 applies to "determination and order under section 68 and 69" without mentioning Section 66(2). Section 66(2) also provides for making a "determination or order on…. the dispute regarding which the information is filed" i.e. in our view, for making a determination or order on a dispute affecting land owing to which a breach of the peace is threatened or likely. Thereby, it is safe to presume that since Section 66(2) provides for a determination or inquiry, and that Section 66(2) requires an inquiry to be conducted on whether the two conditions are met.

An initial inquiry or screening, especially when information is received from a disputing party, would enable that Magistrate to exercise that abundance of caution. In the instant case, inquiring from the Police about the reason they did not file an information would have aided the learned Magistrate in the task of determining whether her Court is clothed with jurisdiction to inquire further into the matter. This is to enable the Magistrate to obtain a clearer picture of the actual dispute since at the time a

disputing party files the information, the Magistrate does not have the benefit of hearing the other side. It must be reiterated that such a screening process cannot and should not result in a long-protracted trial as maintaining law and order is paramount. Such an inquiry can be conducted on the day the information is filed or the next day. But such an inquiry cannot be dispensed with.

The need to exercise caution is also evident when one peruses the time limits given for filing information. In terms of Section 66(1)(a) the police officer inquiring into the dispute is required to file an information **with the least possible delay** and can require the disputing parties to enter into a bond for their appearance in Court on **the day immediately succeeding the date of filing the information.** In addition, a Police Officer arresting the disputing parties must **forthwith** produce them before the Magistrate and **at the same time file in court information regarding the dispute.** In contrast, Section 66(1)(b) does not state a time frame within which the information must be filed by the parties. This then furthers the concern or fear that there may be parties that file actions calculated with ulterior motives. One such instance is when a party who has been 'dispossessed', instead of taking immediate action to recover possession, decides to sleep on their rights and after some time files an application under this Section claiming a breach of the peace.

This ready acceptance of a report of a Police Officer and the caution exercised when the information is filed by a disputing party, in addition to the advantage of 'independence' or 'impartiality' of a police officer as opposed to an 'interested party', may also stem from the fact that a Police Officer is a statutorily recognised "Peace Officer", in terms of Section 2 of the Code of Criminal Procedure Act, and thus tasked with keeping the peace. It can then be presumed, under Section 114 of the Evidence Ordinance, that when an information is filed under Section 66(1)(a) by a Police officer, that the officer files the same because there is a threat to the breach of the peace and it must be intercepted.

It is for these reasons that it cannot be said that the information filed by a Police Officer and an information filed by an interested party is on equal footing.

Further, in all three scenarios under which information is filed an initial 'inquiry' or 'screening' of the sort set out is necessary because once those two conditions precedent are satisfied the Court is clothed with the jurisdiction to proceed with the subsequent stages of the matter. The breach of peace that was deemed to be threatened or likely at the time information is filed is sufficient to sustain the entire proceedings to its end even

though that threat or likelihood of the breach of the peace may no longer exist at the time of concluding the substantive inquiries under Section 68 or 69. In other words, the threat or likelihood of a breach of the peace need not continue till the conclusion of the inquiry under Sections 68 or 69. A view espoused by his Lordship Samayawardhena J. in Raja Mahesh Wijekoon v. Hiniduma Liyanage Sarathchandran CA(PHC) 115/2012 decided on 30.07.2019:

"*The Magistrate is clothed with the jurisdiction to entertain the application upon his being* ***satisfied*** *that owing to the dispute affecting land, the breach of the peace is threatened or likely. That is a precondition to issuance of notice.* ***Once it is recorded and notice issued, and the inquiry is held, the Magistrate need not revisit his earlier decision and dismiss the application in limine without considering the merits on the ground of lack of jurisdiction due to non-existence of breach of the peace***." [emphasis added]

The statutory provisions, especially Section 66(2), also further the proposition that there must be this 'initial' inquiry to make a determination that the conditions precedent exists before issuing notice. Section 66(2) of the Act reads:

When an information is filed in a Primary Court under subsection (1), the Primary Court shall have and is hereby vested with jurisdiction **to inquire into, and make a determination** or order on, in the manner provided for in this Part, the dispute regarding which the information is filed.

This initial inquiry or exercise that the Magistrate undertakes (to see whether there is a dispute affecting land and whether a breach of the peace is threatened or likely because of that dispute) is different from the subsequent one she undertakes if the initial inquiry is successful. Once the initial inquiry is completed then the Magistrate can issue notices and thereafter conduct the next inquiry as to possession. That is when Sections 68 or 69 become applicable.

This proposition is buttressed by the fact that the word "determination" found in this Section envisages an inquiry into and a determination as to "the dispute regarding which information is filed" that is a determination on whether there exists a dispute affecting land and owing to which a breach of the peace is threatened or likely. Whereas the word "determination" found in Section 68(1) deals with an inquiry "to determine as to who was in possession of the land or the part on the date of filing of the information under Section 66" (or to use to the words found in Section 68(3) "an inquiry into a dispute relating to the right to the possession of any land..") and "determination" in Section 69 deals with an inquiry into who is entitled to the right.

In the instant case, it will be seen whether the learned Magistrate has undertaken that first inquiry or screening exercise to determine whether her Court is clothed with the jurisdiction to issue notice. On the learned Magistrate's own admission in the impugned Order, as reproduced below, it is manifest that no such inquiry or exercise has been conducted:

"මෙම නඩුව කැඳවූ ප්‍රථම දිනයේදී පළමු පාශර්වය වෙනුවෙන් පෙනී සිටින ලද නීතිඥ මහතා ඉදිරිපත් කරන ලද කරුණු මත මා විසින් සාමය කඩවීමක් හෝ ඊට අත්‍යාසන්න තත්වයක් දෙපාශර්වය අතර මතුව ඇති බවට සෑහීමට පත්ව දෙවන පාශර්වයට නොනිසි නිකුත් කිරීමට සහ විෂය වස්තුවේ නොනිසි අලවා වාතර්ා කිරීමට නියෝග කර ඇත. එබැවින් මෙම ආරවුල සම්බන්ධයෙන් සාමය කඩ වීමට ආසන්න තත්වයක් ඇති බවත්, එය මා විසින් මුල් අවස්ථාවේදීම තීරණය කර ඇති බවත් තීරණය කරමි."

It must then be seen whether the learned Magistrate had correctly identified whether those conditions precedent existed in the instant case, for her to make the orders that she did.

1. Dispute affecting land

Section 75 states that "dispute affecting land" includes any dispute as to the right to the possession of any land or part of a land and the buildings thereon or the boundaries thereof or as to the right to cultivate any land or part of a land, or as to the right to the crops or produce of any land, or part of a land, or as to any right in the nature of a servitude affecting the land.

In the case of Kanagasabai (supra), although the case dealt with Section 62 of the Administration of Justice Law, the definitions of "dispute affecting land" are identical. His Lordship Sharvananda J. (as he then was) held:

"A breach of the peace can ensue from a dispute relating to an agricultural land as well as from a dispute relating to a house or building. There is no justification for restricting or confining the Magistrate's jurisdiction under section 62 to a dispute affecting agricultural or pastoral land only. In my view, the Magistrate's jurisdiction under section 62 extends to disputes affecting business premises and residential premises."

His Lordship also observed that:

"*It is the apprehension of a breach of the peace, and* ***not any infringement of private rights*** *or dispossession of any of the parties, which determines the jurisdiction of the Magistrate."* [emphasis added]

In the instant case, the dispute does not affect land, in the sense envisaged by the statutory definition. As mentioned above, the dispute in the present case arose once the new board of the Cooperative Society decided to write to the Excise Department to prevent the renewal of the license and the consequent purported termination of the agreement on 5th February 2020 because the Respondent Company had allegedly failed to fulfil certain contractual obligations, including some payments. The legality of the purported termination must be determined by the correct forum. In the instant case, the correct forum is by way of arbitration, as the parties have agreed to in their agreement, or by an action in the Commercial High Court.

The learned Magistrate, however, has treated the agreement as a "ඵදු ගිවිසුම" or a lease agreement. The basis on which the learned Magistrate treated it as a lease agreement when the agreement is purely of a commercial nature, which confers on the company the operation of the distillery and deals with the financial situation of the operation, is unclear.

Therefore, the learned Magistrate has fallen into an error in conceiving that this is a dispute affecting land.

2. A breach of the peace is threatened or likely

Assuming that the dispute affects land, the dispute must threaten to cause a breach of the peace or there must be a likelihood of it happening. It cannot be assumed that the existence of a land dispute will automatically threaten a breach of the peace or that a breach of the peace would be likely. His Lordship Dehideniya J. in Ananda Paranawithana (supra) held:

"***Every land dispute is not a threat to the peace****. If there is a land dispute, the remedy is to litigate in the proper forum to vindicate the rights. The Primary Court Procedure Act provides only a temporary remedy to prevent the breach of the peace until such time that a competent Court decides on rights of the parties……. [In the instant case] There is a land dispute between the parties but there is no threat or likelihood of a breach of the peace.* ***Since there is no threat to the peace, the Magistrate Court do not assume jurisdiction under section 66 of the Primary Court Procedure Act****."* [emphasis added]

As his Lordship Gunawardana J. in Iqbal v. Majedudeen [1999] 3 SLR 213, eloquently put it:

"'Breach of the peace is likely' does not mean that the breach of the peace would ensue for a certainty; Rather, it means that a breach of the peace (or disorder) is a result such as might well happen or occur or is something that is, so to speak, on the cards."

In the instant case, the Magistrate opined that a breach of the peace was likely on the hearsay information provided by the 1st Respondent, who was not at the scene at the time of the "dispossession" on the 23rd of August 2020. The statement made by the security guard at the premises to the Police (marked "P6") states that he let the Petitioners in on recognising the Chairman of the Cooperative Society:

"එදින රාජකාරි කල අතර 2020/08.25 දින 06.45 ට පමණ රාජකාරියේ යෙදී සිටියදී ජීප් රථ දෙකකින් පුද්ගලයින් 20ක් පමණ බලහත්කාරයෙන් ඇතුලට ආවා. **එතන අලුත් සභාවේ සුමිත් සිල්වා යන අයද පැමිණියා. එයා ආපු නිසා මම ගේට්ටුව ඇරලා සියලු දෙනාම ඇතුලට ගත්තා**. සභාපතිතුමා මට කිව්වා අලුත් කට්ටියක් ඇවිත් ඉන්නේ පොයින්ට් එක භාරගන්න. ඒ නිසා එක භාර දීලා ඔයා යන්න කියලා. ඒ වෙලාවේ මම කිව්වා එහෙම යන්න බැහැ. කොම්පැනියට කතා කරලා එහෙන් අහලා භාර දෙන්නම් කියලා. එතන සිටපු සිකුරිටි එකේ අය මට කිව්වා බඩු ටිකත් අරන් යන්න කියලා. පස්සේ උදේ 07.20 ට පමණ එලියට ඇවිත් හිටියා." [emphasis added]

Further, the learned Magistrate held that the inaction of the Police on the 1st Respondent's complaint meant the contention of the Petitioners that there was no breach of peace or likelihood of the same could not be tenable. This part of her Order reads:

"මේ සම්බන්ධයෙන් තමන් කීප අවස්තාවකදීම පයාගල පොලිසියට පැමිණිලි කලත් ඔවුන් පක්ෂපාතිව කටයුතු කරමින් එම පැමිණිලි විමශර්නය නොකළ බවත්, ඒ අනුව පුද්ගලික නඩුවක ආකාරයෙන් මෙම නඩුව පැවරූ බවත් පළමු පාශර්වය ප්‍රකාශ කර ඇත. පළමු පාශර්වය පෙ.11, පෙ. 12 ලෙස ලකුණු කල ජ්‍යෙෂ්ඨ පොලිස් අධිකාරිවරයාට සිදුකර ඇති පැමිණිලි මඟින් ප්‍රකාශ කර ඇත්තේ තමාට සිදුව ඇති අසාධාරණය සම්බන්ධයෙන් පයාගල පොලිසියට පැමිණිලි කලත් එම පොලිසිය නිසි පියවර ගෙන නොමැති බවටයි. මේ අනුව පයාගල පොලිසිය නිසි අකාරයෙන් තමා වෙත ලද පැමිණිලි විමශර්නයක් නොකර ඇති බව පෙ.11, පෙ.12 මඟින් පැහැදිලි වේ. ඒ අනුව පයාගල පොලිසිය පළමු පාශර්වයේ පැමිණිලි විමශර්නය නොකළේ සාමය කඩ වීමක් හෝ ඊට අත්‍යාසන්න තත්වයක් නොතිබූ හෙයින් යයි දෙවන පාශර්වය දරන ස්ථාවරය පිළිගත නොහැක."

The fact that the learned Magistrate has wrongly identified this dispute as one affecting land and that there was a breach of the peace underscores the importance of conducting that initial 'inquiry' so that the learned Magistrate can better ascertain the facts in a more cautious manner. It is in such a situation, that the benefit of a police report or summoning the Officer to inquire from the Police about the reason they did not file an information would have been helpful for the Magistrate to determine whether to assume jurisdiction.

Further, the 'dispossession' is said to have taken place on 23rd August 2020. The information was filed under Section 66(1)(b) on the 25th of September 2020. The incident

in which the 1st Respondent was threatened with death when he visited the distillery took place on 4th September 2020. It is not clear whether there was time to cool off or whether the threat or likelihood of the breach of peace existed at the time of filing information on 25th of September 2020. On information received by an interested party, a doubt arises how a conclusion can be reached whether the breach of peace continued till the date of filing information as there was a period of a month in between.

Both parties contested the applicability of the Hotel Galaxy (supra) dicta on possession to the instant dispute, that is whether the Respondents were in actual possession or not. As a result of our finding that the Magistrate's Court did not have jurisdiction because of not satisfying the basic jurisdictional test that it must be a dispute affecting land owing to which a breach of the peace is likely or threatened, we are of the view, that the learned Magistrate did not have further jurisdiction under Section 68 to determine the possession issue. Thus, there is no necessity for us to determine the issue of possession.

As alluded to above, the case of Sivapathalingam v. Sivasubramaniam (supra) clearly set out that a court whose act has caused injury to a suitor has an inherent power to make restitution.

Therefore, we accordingly set aside the impugned orders of the learned Magistrate dated 15th February 2021 and 01st March 2021. We make no order for costs.

JUDGE OF THE COURT OF APPEAL

D. N. SAMARAKOON, J.

I AGREE

JUDGE OF THE COURT OF APPEAL