

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

CA(PHC) 127/2003 (F)
PHC Anuradhapura.:Rev 17/2000
MC Kekirawa No:94214

1. Basnayaka Mudiyansele Herath
Banda

2. Bernin Wimalawathi

Both of 8/9, Narangaswewa, Dewahuwa.
01st Party

Vs.

1. Weerasinghe Mudiyansele
Mayurapala

2. Lekamlage Wasantha Malkanthi

Both of Narangaswewa, Dewahuwa.

02nd Party

AND

1. Weerasinghe Mudiyansele
Mayurapala

2. Lekamlage Wasantha Malkanthi

Both of Narangaswewa, Dewahuwa.

02nd Party-Petitioner

Vs.

1. Basnayaka Mudiyansele Herath
Banda

2. Bernin Wimalawathi

Both of 8/9, Narangaswewa, Dewahuwa.
01st Party-Respondent

AND NOW BETWEEN

1. Basnayaka Mudiyansele Herath
Banda

2. Bernin Wimalawathi

Both of 8/9, Narangaswewa, Dewahuwa.
01st Party-Respondent-Appellant

Vs.

1. Weerasinghe Mudiyansele
Mayurapala
2. Lekamlage Wasantha Malkanthi

Both of Narangaswewa, Dewahuwa.

02nd Party-Petitioner-Respondent.

BEFORE : A.W.A. Salam, J &
Sunil Rajapakshe, J.

COUNSEL : Chandana Premathilake for the 1st Party-Respondent-Appellant.

DECIDED ON : 31.07.2013

A W A Salam, J

This appeal is from the Judgement of the learned High Court Judge setting aside the determination of the learned Magistrate acting in his capacity as the Judge of the Primary Court. The facts relevant to the appeal briefly are that the OIC of the relevant police station reported to the Magistrate of a land dispute between the parties and moved for an order under Section 81 of the Code of Criminal Procedure Act, No 15 of 1979. The learned Magistrate thereupon directed the police to file a report under Section 66 of the Primary Court Procedure Act which direction was duly complied with. Thereafter, the learned Magistrate having exercised jurisdiction over the dispute in terms of the Provisions contained in chapter VII of the Primary Court Procedure Act, made a determination that the 01st party-respondent-appellant was in possession of premises No 8/9, Narangaswewa, Dewahuwa and been forcibly

dispossessed by the 02nd Party-Petitioner-Respondent within two months immediately before the date on which the information was filed. Based on the above finding the learned Magistrate made order under Section 68 (3) of the Primary Court Procedure Act in favour of the 1st party-respondent-appellant.

Noticeably, the learned Magistrate had been well aware that the police had originally filed the report under Section 81 of the Code of Criminal Procedure Act. Then the court had observed that the dispute is one that falls under the Provisions of the Primary Court Procedure Act and therefore directed to file a report in terms of Section 66 of that Act. Upon being so directed, the police acting in compliance with the direction filed the second report setting out facts in compliance with Section 66 of the Primary Court Procedure Act.

Apparently, the dispute between the parties as reported by police was a complaint of dispossession of a Paddy field and not a dispute as to the tenancy rights of the field. Therefore the learned Magistrate had plenary jurisdiction to entertain the report and generally to follow up the procedure to resolve the dispute.

As has been decided in the case of David Appuhamy v. Yassasi Thero (1987) 1 SLR 253, when an information is filed by the police, the Judge of the Primary Court is vested with jurisdiction to inquire into the dispute referred to in the report and make a valid order as contemplated under Section 68 or 69 of the relevant Act. Quite significantly,

none of the parties to the proceedings in the lower court raised any objection to the Judge of the Primary Court exercising jurisdiction on the report filed by police. As such it is abundantly clear that the parties had in no uncertain terms submitted themselves to the jurisdiction of the court and they are now precluded from raising any jurisdictional objection based on the Provisions of Section 39 of the Judicature Act.

In the light of Section 39 of the Judicature Act, it is quite clear that the respondents by not having raised any such objection to the jurisdiction are now bound by the order of the learned Magistrate and they are prevented from raising any such objection.

However, the 2nd party-petitioner-respondent having made a revision application to the High Court of the Province to challenge the propriety of the order of the learned Magistrate, the learned Judge of the High Court set aside the same and made order to hand over possession of the subject matter to the 2nd party-petitioner-respondent by his Judgment dated 28 August, 2002.

The learned High Court Judge having entertained the revision application held *inter alia* that the learned Judge of the Primary Court has misdirected himself in granting relief to the appellant and the learned Magistrate could not have acted under Chapter VII of the Primary Court Procedure Act. The High Court Judge further held that the Magistrate Court could not have acted under Section 66 of

the Primary Courts Procedure Act as the first report had been filed under Section 81 of the Criminal Procedure Code.

Apart from the failure on the part of the 2nd party-petitioner respondent to raise the jurisdictional objection, he has also failed to raise the question relating to the validity of the 2nd report filed by the police on the direction of the learned Magistrate. The appellant has submitted that there was no conversion of Section 81 proceedings into a Section 66 proceedings. What really has taken place is that the police had filed a fresh report setting out the land dispute under Section 66 instead of the original report.

It is to be noted that subsequent to the filing of the 2nd report by the police, all proceedings had been taken under Section 66 of Primary Courts Procedure Act with the participation of both parties. Since this is an objection affecting the jurisdiction of the court it should have been taken at the earliest opportunity and the 02nd Party-petitioner-respondent not having done so is now precluded from raising the jurisdictional objection late in the day.

On the other hand when the police filed X2 under Section 66 of the Primary Courts Procedure Act the original Court was vested with jurisdiction by virtue of Section 66(2) of the Primary Court Procedure Act. This position has been clearly laid down in the case of David Appuhamy v. Yassasi Thero (1987) 1 SLR 253, Velupillai and Others v. Sivananthan (1993) 1 SLR 123 & Punchi Nona v. Padumasena and Another (1994) 2 SLR 117)

In the case of *Arlis v. Abeynayake* (1980) 2 SLR 84) it was laid down that the breach of the peace is likely does not mean that the breach of the peace would ensue for certainty; rather, it means that the breach of the peace is a result such as might well happen or occur or is sometimes that is, so to speak, on the cards (vide **Iqubal v. Majedudeen** (1993) 3 SLR 213.)

On the contrary the objectives of Section 81 of the Criminal Procedure Code are totally different. It states *inter alia* that “ *Whenever a Magistrate receives information that any person is likely to commit a **breach of the peace** may require such person to show cause why he should not be ordered to execute a bond with or without sureties for keeping the peace for such period*”

The Learned High Court Judge has also held that the Learned Magistrate had erred in dealing with the paddy land as it had not been referred to in the first police report and set aside the order of the Magistrate.

According to *Mansoor and Another v. OIC Avissawella Police and Others* (1991) 2 SLR 75 no Primary Court is vested in jurisdiction to entertain a land dispute under Section 66 of the Act, touching upon the tenancy rights of a paddy field. As far as the dispute referred to the Primary Court by the 2nd report is concerned, the dispute being the right to possession and not the right relating to the tenancy of a paddy field, the judge of the Primary Court undoubtedly had jurisdiction to go into the dispute and make an appropriate order.

The other ground urged by the learned counsel for the appellant was that no exceptional circumstances had been urged or established to assail the order/determination of the learned Magistrate.

Justice H S Yapa in the case of Jayantha Fernando Vs. Joseph Francis CA Application No.103/86 held that "*The Primary object here (i.e. Part VII of the Primary Court Procedure Act) is to prevent a breach of the peace. Once a decision is made by the Primary Court Judge such a decision is given effect to as an interim measure until such time the parties resolve their dispute on substantive rights to the land in a competent court. Therefore the order made by the Primary Court is really an interim order for the purpose of preventing a breach of the peace.*" Justice Yapa further said in the above case that any person dissatisfied with the an order of the Primary Court could seek relief in the District Court and when a dissatisfied party has an alternative remedy the Court of Appeal will not exercise its revisionary powers, unless such party can show the existence of exceptional circumstances.

It is appropriate, at this stage to quote His Lordship Justice Wijetunga in the case of Edirimanne and others Vs Kandiah C.A No. 1115/84 on the question relating to the right of appeal under part VII of the Primary Court Procedure Act. It reads as follows...

It seems to me that when the Legislature in its wisdom provided in Section 74 (4) of the Primary

Court's Act that an appeal shall not lie against any determination or order under Part VII of that Act, it intended that a party adversely affected by such determination or order should ordinarily seek his remedy in a Civil Court, as the provisions of Section 74(1) appear to suggest. It is only where there are exceptional circumstances that this Court would interfere with such determination or order and such situations would be the exception rather than the rule".

Another requirement in exercising the revisionary jurisdiction is that not every error or illegality that could attract it but the circumstances should shock the conscience of the court. In Wijesinghe Vs. Tharmaratnam Sriskantha Law Report Vol. IV page 47 it was held that revision is a discretionary remedy and will not be available unless the application discloses circumstances which shocks the conscience of the Court. In Thommai Varapragasam and Another Vs. Savarimuthu Aseervathan Emanuel C.A Application (Revision) No. 931/84 it was held that an error or irregularity which has prejudiced the substantial rights of the parties and occasioned a failure of justice would undoubtedly shock the conscience of court.

As far as the present case is concerned the decision of the original court in no way could be considered as having occasioned a miscarriage of justice or had shocked the conscience of the High Court to grant the discretionary remedy. In the circumstances, the judgment of the learned

High Court Judge is set aside and the determination of the learned Magistrate restored.

There shall be no costs

Judge of the Court of Appeal

Sunil Rajapaksha, J

I agree.

Judge of the Court of Appeal

Nr/-