

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

**CA PHC 29/2006 HC
MATARA 33/2005 REV
MC MORAWAKA 22901**

VIDANALAGE SWINEETHA LILANI DE SILVA,
11/5, PALLIYADORA ROAD, DEHIWALA.
2ND PARTY-RESPONDENT-APPELLANT

VS

GALHENA · GAMAGE LAKMINI DIAS
SENEVIRATNA,
53/4, EDIRISINGHA RD, MIRIHANA,
NUGEGODA.
1ST PARTY-PETITIONER-RESPONDENT

OIC, POLICE STATION, DENIYAYA

**COMPLAINANT-RESPONDENT-
RESPONDENT**

BEFORE: A.W.A.SALAM, J AND SUNIL RAJAPAKSHA, J

**COUNSEL: RANIL SAMARASOORIYA WITH M. WIJAYA
SIRIWARDENA FOR THE 2ND PARTY-RESPONDENT-**

**APPELLANT. 1ST PARTY-PETITIONER-RESPONDENT ABSENT
AND INREPRESENTED.**

ARGUED ON: 24.11.2013

WRITTEN SUBMISSIONS FILED ON: 05.12.2013.

DECIDED ON: 10.03.2014

A W A SALAM, J

This is an appeal preferred against the judgment of the learned High Court Judge of Matara. The main events that that led to present appeal in its chronological order need to be narrated briefly. Initially proceedings in the Magistrate's Court of Morawaka began with the filing of an information in that Court, under section 66 (a) (i) of Primary Court Procedure Act (PCP Act) by the complainant-respondent-respondent, setting out a dispute alleged to have arisen between the party of the 1st part-petitioner-respondent (hereinafter referred to as the "respondent") and the party of the 2nd part-respondent-appellant (hereinafter referred to as "the appellant") with regard to the possession of a land planted with tea and a tea factory situated on it.

Upon the closure of the pleadings and having considered the material available as contemplated under Section 72 of the PCP Act, the learned Magistrate made his determination under Section 68 of the PCP Act, holding inter alia that the appellant was in possession of the land and factory in question on the date of the filing of the information under section 66. This determination of the learned Magistrate has been made in compliance of section 68 (1) of the PCP Act which clearly lays down that when a dispute is reported under Section 66 of the PCP Act relating to possession of any land or part thereof it shall be the duty of the Judge of the Primary Court holding the inquiry to determine as to who was in possession of the land or the part on the date of the filing of the-information under section 66 and

make an order as to who is entitled to possession of such land or part thereof.

As has been quite correctly observed by the learned Magistrate the next step would be to ascertain as to who was in possession of the subject matter that relates to the report filed by the police, two months immediately preceding the date of information filed under section 66. Admittedly, the information under section 66 (a) (i) has been filed on 22nd April 2004. The two months period preceding immediately prior to the filing of the information therefore would commence on 23rd February 2004.

It is now relevant to look for the date of dispossession complained of by the respondent. Upon the perusal of the affidavit filed by the respondent in the Magistrate's Court, it would be seen that the date on which she had alleged dispossession relates back to a date beyond the period of two months dealt under Section 68 (3). The information filed by the police in this respect is quite important and as a matter of law the learned Magistrate was required to consider the same before he made his determination. Section 72 of the PCP Act postulates that a determination and order under this Part VII of the PCP Act shall be made inter alia after examination and consideration of the information filed under section 66.

The information filed before Court, reveals that a complaint had been made on 7 February 2004 by the respondent to the complainant-respondent regarding the dispossession of the land and factory in question. On a perusal of the said complaint which is annexed to the information, it is quite clear that the dispossession had taken place admittedly on 1st February 2004. In the light of the allegation made in the complaint by the

respondent on 7 February 2004 to the complainant-respondent, it is quite clear that the dispute and the dispossession had taken place beyond the period of two months immediately preceding the date of information. As has been held by the learned Magistrate the question of making an order for restoration of possession of the respondent had not arisen, for the dispossession had not occurred within a period of two months immediately preceding the date of information. This finding of the learned Magistrate is in keeping with the principle enunciated in the case of Ramalingam Vs Thangarajah 1982 - Sri Lanka Law Reports- Volume 2 - 693.

As was held in the case of Ramalingam (supra) in an inquiry into a dispute as to the possession of any land, under Part VII, of the PCP Act, the main point for decision is the Actual possession of the land on the date of the filing of the information.

Section 68 (3) becomes operative to make a determination for restoration of possession only when dispossession had taken place within the aforesaid period of 2 months. As the learned Magistrate in this particular instance was satisfied that no such dispossession had taken place within 2 months as aforesaid, he was not required to make an order for restoration.

The respondent in this affidavit in the Magistrate Court had taken up the position that the dispossession took place within the period of two months from the date of information. The learned Magistrate has considered this aspect of the respondent's position and come to the conclusion that the version relating to dispossession as found in the affidavit of the respondent is a manipulation so as to obtain relief under section 68 (3). I have carefully considered the finding of the learned Magistrate on this

aspect of the matter. Having done so, I am in total agreement with the opinion held by the learned Magistrate and I am of the firm opinion that the determination concerned requires no variations.

On a perusal of the determination of the learned Magistrate it is quite obvious that he was conscious of the law which requires him to give protection even to a squatter or rank trespasser unless his possession was acquired within two months of the filing of the information. However, incidentally in this case the appellant is neither a trespasser nor a squatter. It is common ground that she is the lawful owner of the property in question. No doubt the ownership is not always relevant to make a determination under part VII, but the fact remains that the appellant is the Lessor which suggests that the respondent cannot deny the ownership of the appellant by reason of the estoppel that operates against him.

The learned High Court Judge has entered his judgment on the revision application filed against the determination of the learned Magistrate not on the factual matters arising under Section 68 but on a legal footing based on non-compliance of section 66 (6) and 66 (7) of the PCP Act. PCP Act.

On that question the learned High Court Judge has relied on the decision in Ali Vs Abdeen 2001 1 SLR 413. In that case a bench comprising of a single Judge of this Court held inter alia that the Primary Court Judge was under a peremptory duty to encourage or make every effort to facilitate dispute settlement before assuming jurisdiction. Hence, in the case of Ali (supra) the Court held that when no attempts are made to endeavour to persuade parties to arrive at an amicable settlement, that fact itself fundamentally affects the capacity or deprives the Primary Court

of competence to hold an inquiry into the question of possession.

The decision in the case of Ali Vs Abdeen 2001 1 SLR 413 was overruled subsequently by two other decisions of this Court. In the case of Mohamed Nizam Vs Justin Dias C A. PHC 16/2007 His Lordship Sisira de Abrew, J held that the question of non-compliance of section 66(7) by the Judge of the primary Court cannot be raised belatedly at the stage of revision or appeal and inAction of the party by not raising the objection in the primary Court amounts waiver of such objection. For purpose of completeness the relevant part of the judgment Nizam is reproduced below...

"According to the above judicial decisions, the P.C.J. does not assume jurisdiction to hear the case if he fails to Act under section 66(6) of the Act. In the present case, have the parties taken up the issue of jurisdiction in the Primary Court? The answer is no. The appellant in this appeal takes up the issue of jurisdiction only in the Court of Appeal. If the appellant or the respondent wants to keep up the issue of jurisdiction it must be taken up at the earliest opportunity."

The view taken in the case of Nizam is supported by the judicial decision in David Appuhamy Vs. Yassasi Thero 1987-1 Sri LR 253 where it was held that an objection to jurisdiction must be taken at the earliest possible opportunity. If no objection is taken and the matter is within the plenary jurisdiction of the Court, the Court will have jurisdiction to proceed with the matter and make a valid order.

The judgment in the case of Azeez was fully endorsed by a divisional bench of this Court in the case of JAYANTHA

Taking into consideration all these matters, it is my considered view that the learned High Court Judge was clearly wrong when he reversed the determination of the learned Magistrate based on the ground of non-compliance of Section 66(7) of the PCP Act.

For the foregoing reasons, I allow this appeal and accordingly set aside - the impugned judgment of the Judge of the High Court. Consequently the determination of the learned Magistrate that was challenged by way of revision in the High Court will now prevail and the learned Magistrate is directed to give effect to his own determination.

The appellant is entitled to costs of this appeal.

Judge of the Court of Appeal

Sunil Rajapaksha, J

I agree.

Judge of the Court of Appeal

NR/-