RATNAYAKE
v.
PADMINI DE SILVA AND ANOTHER

COURT OF APPEAL,
WIJETUNGA, J. AND WIJEYARATNE, J.,
C. A. No. 612/89 – M. C. KURUNEGALA No. 19272,
FEBRUARY 7 AND 8, 1990.

Civil Procedure – Primary Courts Procedure Act – Failure to affix notice under S. 66(4) on the disputed land. – Revision – Article 138 (1) of the Constitution.

Failure to cause the notice to be affixed on the land as required by S. 66 (4) of the Primary Courts Procedure Act does not affect the jurisdiction of the Court but is only an irregularity in procedure. Under S. 66(2) where an information is filed under subsection (1), the Court is vested with jurisdiction. The other provisions which follow deal with the manner of exercising such jurisdiction. Non-compliance with every rule of procedure does not destroy the jurisdiction of the court. While in some cases it may be only an irregularity, in other cases it may amount to an illegality and thus vitiate the proceedings. The object of affixing a notice in some conspicuous place on the land which is the subject matter of the dispute is to bring the proceedings to the notice of all persons interested in such dispute and thereby to enable them to participate in such proceedings. In the instant case, it is not suggested that there are any third parties interested in the dispute who would have appeared in court if the notice had been so affixed. No prejudice was caused and the objection itself was taken belatedly.

Wijetunga, J.– " It is well to bear in that the duty is cast by S. 66 (4) on the court to cause the notice to be affixed on the land ".

Cases referred to :

(1) *Craig V. Kanseen [1943] 1 all ER 108*

(2) *In Re Pritchard, [1963] 1 All ER 873*

(3) *Emperor V. Sis Ram and others AIR 193 Lahore 895*

(4) *Emperor V. Hira Lal AIR 1933 Allahabad 96*

(5) *Thambipillai V. Thambimuttu S.C. Application No. 927/74 M. C. Kalmunai No. 63310, S.C. minutes of 25.06.75*

(6) *Ivan de Silva V. Shelton de Silva S.C. Application No. 148/76 M. C. Panadura No. 45437 S.C. minutes of 10.02.1977*

(7) *Debi Prasad V. Sheodat Rai (1908) 30 I.L.R. 41*

(8) *Sukh Lal Sheikh V. Tara Chand Ta (1905) 33 Calcutta 68 (F.B.)*

(9) *Ramalingam V. Tangarajah [1982] 2 Sri LR 693*

APPLICATION in revision of the order of the Primary Court Judge of Kurunegala.

Dr. H. W. Jayawardena, Q.C. with *J. Salwatura* for respondent-petitioner.

Faiz Mustapha, P.C. with *Mahanama de Silva, H. Withanachchi* and *J. Wickramarachchi* for petitioner-respondents.

Cur. adv. vult.

May 4, 1990

WIJETUNGA, J.

Proceedings in this case had commenced in the Primary Court of Kurunegala under case No. 34372, upon an information filed by the petitioners-respondents (hereinafter referred to as the respondents) naming the respondent-petitioner (hereinafter referred to as the petitioner) and two others as respondents, being the other parties to the dispute.

In the affidavit of the respondents dated 14.10.1986, it is stated *inter alia* that the 1st respondent was the tenant of the boutique-room, the subject matter of this dispute, since 1963 and was in uninterrupted possession thereof until 7.10.1986. The rents had been paid in the name of the 1st respondent's husband from 1963 to 1966, in the name of the 1st respondent from 1966 to 1980 and in the name of the 1st respondent's daughter from 1980 to 1986. A business styled " Champika Photo " had been carried on in these premises until a few months prior to this incident. Thereafter, the premises were used as a store and also as the sleeping quarters of the 2nd respondent and his servants. On 7.10.1986 when the 2nd respondent went to the said premises for the night as usual, the petitioner and the other two persons named as respondents in the information filed in the Primary Court, together with a large crowd of unidentified persons, had thereatened and chased away the 2nd respondent. They had forced open the door by breaking the padlock, entered the premises and locked the same with

a new padlock. The respondents had produced copies of the complaints made by the 1st respondent to the Mawathagama Police as P2, that of the 2nd respondent as P3 and a statement of the witness Sujith Weerawardena as P4, together with their petition and affidavit. They had alleged that as a result of the petitioner and the others forcibly entering the said premises, a breach of the peace was threatened. They had also furnished a list of items belonging to them which were in the said premises as P5. They had further alleged that the Mawathagama Police had not taken action on their complaints and had sought *inter alia* an interim order removing the petitioner and the other two persons from the said premises, for an inventory of the articles lying in the said premises to be taken through a Receiver appointed by the Court and for the premises to be sealed pending the final determination of this application. Accordingly, on 14.10.1986, on the *exparte* application of the present respondents, the Primary Court Judge who had been of the opinion that on the material disclosed in the affidavits and the other documents, a breach of the peace was threatened, had made an interim order appointing a Receiver and directing that a list of articles lying in the premises be taken, that all persons in the said premises be removed and the building in question be sealed. He had further directed that notices be issued on the present petitioner and the other two persons aforesaid (who were named respondents to that application). On 15.10.1986, it had been brought to the notice of the Court that the order could not be carried out as the premises were padlocked and the Court had thereupon made order that the Fiscal break open the premises. That order had been carried out under the directions of the Fiscal and an inventory of articles obtained and the premises sealed.

Thereafter, the petitioner had filed a Revision application in this Court bearing No. 1234/86 and had obtained an order staying further proceedings in the said case. The petitioner had again invoked the jurisdiction of this Court in Application bearing No. 1439/86 praying for a transfer of the said case to another Primary Court and this Court had, on 3.12.1986, made order transferring the said case to the Magistrate's Court of Kurunegala.

On the case being so transferred to the Magistrate's Court of Kurunegala, it had been assigned the No. 19272 and the parties had appeared in Court on notice on 3.9.1987. On that day the matter had been fixed for inquiry on 12.11.1987. On 21.9.1987, the present petitioner had filed his affidavit which, though objected to by the

respondents on the ground of default, had later been admitted by agreement of the parties. By that affidavit, the petitioner had stated *inter alia* that the premises in question had been purchased by the Sri Lanka Samodaya Foundation, of which he was the General Manager of the Mawathagama Branch, upon deed No. 876 dated 17.10.1986 attested by S. W. P. M. G. B. Senanayake, Notary Public. He had further stated that he had taken possession of the said building on 7.10.1986 from one Weerasinghe who had obtained such possesion from one Jayawansa. Thus he had claimed that he had obtained possession 10 days prior to the date of purchase *viz.*, on the date on which the present dispute arose.

Although the inquiry had originally been fixed for 12.11.1987, it had been postponed on several occasions and on 10.5.1989 the parties having stated that they were not objecting to the affidavits filed, had moved that the matter proceed to inquiry on those affidavits. It is only on 5.7.1989, after Counsel for the respondents had closed his case, that Counsel for the present petitioner had, for the first time, raised an objection on the basis that there had been non-compliance with Section 66(4) of the Primary Courts' Procedure Act, in that, no notice had been affixed on the land which is the subject-matter of this dispute. The court had directed that written submissions be filed on 19.7.1989. Whereas the respondents had complied with that order, the petitioner had failed to do so. The matter was thereafter set down for order on 2.8.1989, on which date the petitioner had tendered some written submissions. The Court had rejected those submissions and delivered its order. By that order the learned Magistrate had held that the respondents had been in possession of the said premises prior to and on 7.10.1986 and had directed that the respondents be once again placed in possession thereof, if necessary, by executing writ. Pursuant to that order, the Fiscal had handed over the said premises to the respondents on 3.8.1989. By his present application, the petitioner seeks to revise that order.

The sole question that was urged before us was the failure to affix the notice on the land in question as required by Section 66(4) of the Primary Courts' Procedure Act. It was the contention of learned Queen's Counsel for the Petitioner that the Court had violated a fundamental provision of law by its failure to cause a notice to be affixed on the land which is the subject-matter of the dispute announcing that a dispute affecting the land had arisen and requiring any person interested to appear in Court on the date specified in such notice.

Learned President's Counsel for the respondents, on the other hand, while conceding that no notice had been affixed on the land as required by Section 66(4), submitted that non-compliance with the provisions of that section was merely a procedural irregularity and that the objection in any event had been belatedly taken. It was his submission that this Court should not excercise its extraordinary powers of revision in the facts and circumstances of this case, as that irregularity has not prejudiced the substantial rights of the parties or occasioned a failure of justice.

Learned Queen's Counsel for the petitioner cited a number of authorities in support of his contention that Section 66(4) was an imperative provision of law and the Court, by its failure to cause the required notice to be affixed on the land had violated a fundamental legal provision. I shall refer to those authorities presently.

In *Craig v. Kanseen,*(1) it has been held that the failure to serve the summons upon which the order in the case was made was not a mere irregularity, but a defect which made the order a nullity, and therefore, the order must be set aside.

In *Re Pritchard,*(2) where the originating summons had not been issued out of the Central Office but from a District Registry, it has been held (Lord Denning, M.R., dissenting) that there had not been any commencement of proceedings and the originating summons was a nullity : there was not a mere irregularity but a fundamental defect.

In *Emperor v. Sis Ram and others,*(3) which dealt with similar provisions of Section 145(1) of the Indian Criminal Procedure Code relating to possession of land where there is an imminent danger of a breach of the peace and where the Magistrate's Order was challenged on the grounds *inter alia* that no notice was served on the other party according to law nor was a copy of the notice affixed to some conspicuous place at or near the house in dispute, it has been held that the provisions of that section are mandatory and consequently if no notice is issued as required and there is no finding that there was a danger of a breach of the peace, the order under Section 145 becomes *ultra vires.*

In *Emperor v. Hira Lal,*(4) it has been held that Section 145 of the Indian Criminal Procedure Code is provided in order that a Magistrate may prevent a breach of the peace arising from a dispute as to immovable property and he has no jurisdiction in such a matter unless he

is fully satisfied that there is a danger of a breach of the peace and . . . . . he must give the parties notice that it is to prevent a breach of the peace that he is taking action under that section and if he fails to do so the primary intention of the Section is lost. The order of the Magistrate was accordingly set aside.

I shall now refer to the authorities cited by learned President's Counsel for the respondents in support of the proposition that such non-compliance amounted only to a procedural irregularity.

In *Thambipillai v. Thambimuttu,*(5) it has been held that the purpose of affixing a notice on the land was to give constructive notice to the parties concerned and where the parties were brought to Court on the date of the information, the necessity did not arise to affix such notice in a conspicuous place at or near the land.

In *Ivan de Silva v. Shelton de Silva,*(6) where complaint was made in revision that the Magistrate had failed to comply with the provisions particularly in regard to the affixing of the notice on the land, but the only parties concerned in the dispute were aware of and present at the inquiry and no objection was taken in regard to the failure to comply with these provisions except at the concluding stages of the inquiry, it has been held that the failure to comply with procedural requirements, in regard to notices and statements of claim do not affect the question of jurisdiction and would not constitute a fatal irregularity.

In *Debi Prasad v. Sheodat Rai,*(7) where in proceedings under Section 145 of the Indian Criminal Procedure Code, no notice was affixed at or near the subject of the dispute, it has been held that notwithstanding that the procedure of the Magistrate was in some respects defective, there was no cause for the exercise of the revisional jurisdiction of the High Court, inasmuch as the parties had been given an opportunity of representing their respective cases and there was nothing to show that the irregularities in procedure which had occurred had caused any prejudice to either.

In *Sukh Lal Sheikh v. Tara Chand Ta,*(8) Where the Magistrate drew up an initiatory order under S. 145, Cl. (1) of the Indian Criminal Procedure Code, but omitted to direct the publication of a copy of it at or near the subject of dispute and it was not so published in accordance with Cl. (3) of that Section, it has been held that the provision as to the

publication of a copy of the order in S. 145, Cl. (3) of the Code is directory and relates to a matter of procedure only and not of jurisdiction ; that if Cl. (1) of S. 145 has been complied with, the Magistrate has jurisdiction to deal with the case and the mere fact that he omitted to have a copy of such order published by affixing it to some conspicuous place at or near the subject of the dispute does not deprive him of jurisdiction, but is an irregularity in his procedure.

In *Ramalingam v. Thangarajah,*(9) where the appellant complained that the proceedings offended the mandatory provisions of Part VII of the Primary Courts' Procedure Act (relating to inquiries into disputes affecting land where a breach of the peace is threatened or likely) and were therefore *null and void,* it was held that the provisions as to time limits in Section 66 or 67, though the word 'Shall' there suggests that they are mandatory, should be construed as being directory and that non-compliance by Court of the provisions of Section 66 or 67 of the Act does not divest the Court of the jurisdiction conferred on it by Section 66(2).

On a consideration of the authorities cited by learned counsel on both sides, it seems to me that the failure to cause the notice to be affixed on the land does not affect the jurisdiction of the Court but is only an irregularity in procedure. Under Section 66(2), where an information is filed under subsection (1), the Court is vested with jurisdiction. The other provisions which follow deal with the manner of exercising such jurisdiction. Non-compliance with every rule of procedure does not destroy the jurisdiction of the Court. While in some cases it may be only an irregularity, in other cases it may amount to an illegality and thus vitiate the proceedings. The object of affixing a notice in some conspicuous place on the land which is the subject-matter of the dispute is to bring the proceedings to the notice of all persons interested in such dispute and thereby enable them to participate in such proceedings. In the instant case, it is not suggested that there were any third parties interested in the dispute who would have appeared in Court if the notice had been so affixed. On the contrary, on the petitioner's own affidavit filed in the Court below, he was the only party, other than the respondents, who had an interest in this dispute, as he claims to have obtained possession of the subject-matter of the dispute on the date of such dispute and had secured a transfer of the said property ten days later. There is also the further circumstance that by reason of the interim order made by the Primary Court Judge, the Fiscal had broken open the

premises in dispute and sealed the same. The learned Magistrate observes in her order that on a consideration of the report relating thereto, it is abundantly clear that the public of the entire Mawathagama town would in consequence have had notice of this dispute. She further states that the record shows that this dispute had received much more publicity than through affixing a notice. But, no one other than these parties to the dispute had made any claims in respect thereof.

This certainly does not mean that judges need not strictly comply with these provisions or are free to adopt procedures of their own. The very fact that this objection has been taken in these proceedings demonstrates the necessity for such strict compliance. It is well to bear in mind that the duty is cast by Section 66(4) on the Court to cause the notice to be affixed on the land. A party in whose favour an order is made should not be exposed to the risk of having such order challenged by the opposing party due to lapses on the part of the Court.

But, in the instant case, it is patently clear that no prejudice has been caused to any party by the Court's failure to cause the notice to be affixed on the land as required. The only parties interested in the dispute were aware of and had participated in the inquiry. The facts and circumstances of this case do not indicate that there was any other person interested in the dispute who could not have been reached otherwise than through a notice being affixed on the land. Thus, in my view, there had only been a procedural irregularity which did not deprive the court of its jurisdiction to proceed with the inquiry and make an appropriate order.

The next question that would, therefore, arise is whether this Court should exercise its extraordinary powers of revision in a case such as this. As was stated earlier, the original Court's failure to cause the notice to be affixed on the land has not resulted in prejudice to any party. It is not suggested that there is some other party interested in the dispute who would have appeared in Court had such notice been affixed. In fact, the proceedings do not disclose such a likelihood. The objection itself had been belatedly taken at the very concluding stages of the inquiry after the present respondents had closed their case. Nor has the order of the Magistrate been attacked in regard to her findings. It is indeed a well considered order, supported by the material on record. The respondents have already been placed in possession by the Fiscal pursuant to the said order. Proceedings had commenced as far back as 1986. The order complained of, in any event, does not affect the civil

rights of parties. The proviso to Article 138(1) of the Constitution itself lays down that no judgment, decree or order of any court shall be reversed or varied on account of any error, defect or irregularity, which has not prejudiced the substantial rights of the parties or occasioned a failure of justice.

For the reasons aforesaid, I am of the view that this case does not warrant interference by this Court, particularly in the exercise of its discretionary and extraordinary powers of revision and would accordingly dismiss this application.

In all the circumstances of this case, I make no order as regards costs.

WIJEYARATNE, J.– I agree.

Application dismissed.