

ALI
v.
ABDEEN

COURT OF APPEAL
GUNAWARDENA, J.
CA 1329/90
MC WARAKAPOLA NO. 17641

Primary Courts' Procedure Act, No. 44 of 1979 - Sections 66(6) and 66(7) of the Primary Courts' Procedure Act - Jurisdiction to make Order - Precedent condition - Duty to encourage to facilitate dispute settlement.

Held :

- (i) The Primary Court Judge was under a peremptory duty to encourage or make every effort to facilitate dispute settlement before assuming jurisdiction to hold an inquiry into the matter of possession and impose on the parties a settlement by means of Court order.
- (ii) The making of an endeavor by the Court to settle amicably is a condition precedent which had to be satisfied before the function of the Primary Court under section 66(7) began to consider who had been in possession.
- (iii) The fact that the Primary Court had not made an endeavor to persuade parties to arrive at an amicable settlement fundamentally affects the capacity or deprives the Primary Court of competence to hold an inquiry into the question of possession.

APPLICATION for revision from the Order of the Magistrate's Court of Warakapola.

Faiz Musthapha, P.C., with S.N. Senanayake for petitioner.

Aloy Ratnayake, P.C., with R.A.D. Kumarawickrema for 1st respondent.

May 25, 2001.

U. de Z. GUNAWARDENA, J.

This is an application to revise an order made on 21. 11. 1990, by the learned Primary Court Judge (Warakapola)

under section 68(2) of the Primary Courts' Procedure Act, whereby he had held that the 1st respondent (A.M.M. Abdeen) had been in possession and so was entitled to continue to possess lot 9 of the land called Nugagahamulahena. The learned Primary Court Judge, although he had not said so in so many words, presumably intended to say that the 1st respondent-respondent had been in possession at the relevant date i.e. 25. 07. 1990 that being the date on which information had been filed by the police under section 66 of the Primary Courts' Procedure Act, No. 44 of 1979 (as amended), in regard to the dispute between 2nd respondent-petitioner (Ameer Ali Halaldeen Ali) and the 1st respondent-respondent with respect to the possession of the relevant lot. It is common-ground that the said lot 9 which is the subject-matter of this application had been left un-allotted by the final decree in the partition action No. 13256 D.C. Kegalle which appears to have been entered on 15. 05. 1979. The 2nd respondent-petitioner states that this lot was owned and possessed by Nisi Umma and Sattu Umma Husaima who on deed No. 2518-16. 06. 1986 (P3) transferred the same to Hassen. The said Hassen had transferred the same on deed No. 6257 dated 31. 12. 1989 to the 2nd respondent-petitioner.

In this case, the court is called upon to reach a decision on affidavits. The decision arrived at after accomplishing such a feat would be an example of a process of something akin to guessing.

The order dated 21. 11. 1990 made by the learned Primary Court Judge has to be vacated since he had made that order without complying with a precedent-condition, as explained in the sequel. And, as such he had no jurisdiction to make the order he did. *Conditio praecedens adimpleri debet prius quam sequatur effectus*. It means that the condition-precedent must be fulfilled before the effect can follow. To explain the matter further, it is pertinent to consider the effect, respectively, of the operation of sections 66(6) and 66(7) of the relevant Act, which, merits quotation, in this context, and

are as follows: sec. 66(6) : on the date fixed for filing affidavits and documents . . . the court shall before fixing the case for inquiry make every effort to induce parties and persons interested (if any) to arrive at a settlement of the dispute . . .” sec. 66(7) : where the parties and persons interested (if any) do not arrive at a settlement, the court shall fix the case for inquiry . . .”

Thus, it is to be observed that the Primary Court Judge was under a peremptory duty to encourage or make every effort, so to say, to facilitate dispute settlement, before assuming jurisdiction to hold an inquiry into the matter of possession and impose on the parties a settlement by means of the court order. It was obligatory on the Primary Court as a condition-precedent to holding an inquiry, to have made a conscious endeavor to have composed or ironed out the differences between the parties—a duty which, in this instance, had been neglected. The making of an effort by the court was such a duty as should have been done or performed before the court could have validly embarked upon an inquiry in pursuance of or rather in compliance with sec. 66(7) set out above. That is a preliminary requirement which has to be fulfilled before the jurisdiction of the Primary Court exists to hold an inquiry under section 66(7). When Parliament has enacted that provided a certain situation exists, then a tribunal may have certain powers it is clear that the tribunal will not have those powers unless that situation exists. The making of an endeavor by the court to settle amicably is a condition precedent which had to be satisfied before the function of the Primary Court under sec. 66(7) began, that is, to consider who had been in possession. Since the Primary Court had acted without jurisdiction in proceeding to determine the question of possession, its decision is, in fact, of no force or avail in law. Accordingly the decision dated 21. 11. 1990 is hereby set aside. It is the making of an effort to induce parties and the fact that the effort was not attended with success that clothe the Primary Court with jurisdiction to initiate an inquiry with regard to the question as to who was in

possession. The fact that the Primary Court had not made an endeavor to persuade parties to arrive at an amicable settlement fundamentally affects the capacity or deprives the Primary Court of competence to hold an inquiry into the question of possession.

For the sake of completeness, I must say that the fact, that the judgment in this case was due was brought to my notice only towards end of March 2001.

The order dated 21. 11. 1990 is set aside. The Primary Court is directed, if the parties so desire, to hold a fresh inquiry in compliance with the provisions of the Primary Courts' Procedure Act, No. 44 of 1979 (as amended).

Order of the Primary Court set aside.