TUDOR
v.
ANULAWATHIE AND OTHERS

COURT OF APPEAL.
YAPA, J.,
GUNAWARDANA, J.
C.A. NO. 95/94 (PHC).
HC KANDY REV. NO. 158/94.
PRIMARY COURT KANDY NO. 11493/93.
MAY 26, 1998.
AUGUST 24, 27, 1998.

Primary Courts' Procedure Act ss. 66, 68 (1), (3), 69 (1), (2) – Has the Primary Court jurisdiction under s. 68 and s. 69 to make an order of demolition or removal of a structure – Quando Lex Aliquid Concediture Et Id Sine Que Ipsa Esse Non Potest – Should reasons be given?

Held:

1. The ultimate object of s. 68, and s. 69 being to restore the person entitled to the right to the possession of land to the possession thereof or to restore the person entitled to the right (other than the right to possession of land) to the enjoyment thereof – the said provision of the law must be rationally construed to authorise by necessary implication if in fact they had not in terms done so, the removal of all obstructions if the need arise, in the process of restoring the right to the person held to be entitled to such right.

Per Gunawardana, J.

"It is true that there is no specific provision in the Primary Courts' Procedure Act expressly enabling the Court to Order removal of obstructions in the way of restoration of the right to the person entitled thereto in terms of the determination made by the Court nor is there a prohibition either against the Court exercising such a power or making such an order . . . but the Courts are not to act on the principle that every procedure is to be taken as prohibited unless it is expressly provided for by the Code but on the converse principle that every procedure is to be understood as permissible till it is shown to be prohibited by the Code."

2. The correctness of the finding by the Primary Court cannot be tested for want of reasons, which finding lacks the aura of moral persuasiveness – a quality which a reasoned Order alone can have.

APPEAL from the Provincial High Court of Kandy.

Cases referred to:

1. *Jamis v. Kannangara* – [1989] 2 Sri L.R. 350 (not followed).
2. *A. R. v. Bristol Dock Co.* – (1827) 6 B & C 181.
3. *Wright v. Scott* – 1855 26 LT (05) 180 HL.
4. *Gas Company v. City of Perth Corporation* – (1991) AC 506.
5. – 1845 4 QBD 46.
6. – 1881 8 QBD 86.
7. *Cooksen v. Lee* – (1854) 23 LJ Ch. 473.
8. *Bannerjee v. Rahaman* – 29 AIR (1942) Cal. 244.
9. *Narasingh v. Mangal Dubey* – (1883) 5 Allahabad 163.

S. Costa for the appellant.

Reza Muzni for the respondent.

Cur. adv. vult.

May 27, 1999.

GUNAWARDANA, J.

This is an appeal from an order dated 11. 11. 1994 made by the High Court of Central Province dismissing an application for revision of an order made by the Primary Court on 02. 02. 1994 "and such other subsequent orders as had been made by the Primary Court".

In fact, the "order" that had been made by the Primary Court on 02. 02. 1994 is not strictly speaking, couched in terms of a direction as such but partakes also, to all external appearance, of the character of terms of a settlement entered into, more or less by mutual consent. But, upon a closer scrutiny of the relevant facts there is no mistaking

that the order dated 02. 02. 94 is an imposed one so far as, at least, the 6th respondent-appellant was concerned and not one to which he had genuinely agreed or consented of his own free will, as such – as the sequel would show. The said order, which had been made by the Primary Court Judge upon an inspection of the site, reads thus: 'පාර්ශවකරුවන් සහ දෙපාර්ශවයේ නීතීඥ මහතුන් ඉදිරියේ මෙම ආරාවුලට අදාල ස්ථානය පරීක්ෂා කළෙමි.'

මෙම ස්ථානයේ 1 සිට 5 දක්වා සහ 7, 8 පාර්ශවකරුවන්, නිවෙස් වලට යාම සඳහා පාවිච්චි කළ පාරේ කොටසක් ඇතුළු වන සේ අලුතින් කොන්ක්‍රීට් කණු සිටුවා තාප්පයක් බැඳි අතර එම කොන්ක්‍රීට් කණු බැඳීම නිසා එම ස්ථානයෙන් වාහනයක් ගැනීමට හැකියාවක් නැත.

දෙපාර්ශවයට කරුණු පැහැදිලි කර දීමෙන් පසු 6 වන පාර්ශවකරුගේ ඉඩමට ඇතුළු වීමට ඇති කොන්ක්‍රීට් කණුවේ සිට දෙවන කොන්ක්‍රීට් කණුව දක්වා තාප්පය දානට ඇති ආකාරයට තැබීමටත්, 2 වන කොන්ක්‍රීට් කණුවේ සිට 4 වන කොන්ක්‍රීට් කණුව දක්වා (3 වෙනි කොන්ක්‍රීට් කණුව ඉවත් කර) බැම්මක් බැඳ වාහනයක් ගෙනයාමට හැකි පරිදි සකසා දීමට 6 වන පාර්ශවකරු එකඟ වේ. එසේ සාදා වාර්තා කිරීමට කැඳවන්න 1994. 03. 30 වෙනි දිනට.'

The learned Primary Court Judge has stated in the aforesaid order, or whatever one may call it, that the 6th respondent-appellant "agrees" to remove the concrete post No. 3 and virtually widen the road "in order to allow a vehicle to go or pass through". It is manifest from the order of the learned Primary Court Judge that the removal of post No. 3 was necessary as it would otherwise obstruct the passage of a vehicle.

It is also equally clear that the 6th respondent-appellant had (as stated in the order) agreed, if, in fact, the 6th respondent-appellant could be said to have genuinely agreed, to remove the concrete post No. 3, upon, to use the very words of the learned Primary Court Judge, "the matters being explained" (by the Primary Court Judge) to the 5th respondent-appellant. What does the expression "the matters being explained" connote in the context? One does not even have to read between the lines to know that it meant that some degree of persuasion had been brought to bear upon the 6th respondent-appellant, by the learned Primary Court Judge in order to induce or prevail upon the 6th respondent-appellant, to remove the concrete post No. 3. It cannot be truly said that the 6th respondent-appellant had "agreed"

to remove the concrete post No. 3 in the sense he had volunteered to do so. It would be closer to the truth and reality to say that he had been "made to agree" to remove the said concrete post upon the "matters being explained". Perhaps, no Judge can ever be faulted for persuading parties to come to a just settlement of the dispute which can be arrived at as between the parties only upon a true insight being gained by the Court into the real or the true factual position. But, I am afraid the visual inspection of the site that had been undertaken by the learned Primary Court Judge had not enabled him to fully investigate the matter, if one were to take his own order dated 2. 2. 1994 as a guide – for although the learned Primary Court Judge had in the said order, stated that the 6th respondent-appellant had "erected new concrete posts and constructed a parapet wall taking in a part of the roadway into his land" – none can fathom from the Judge's order how the learned Primary Court Judge reached that finding for he had not chosen to give any reasons with respect to that question, viz as to why or how he formed the view or reached the decision that a part of the roadway had been encroached upon. Justice must not only be done but must be seen to be done on a rational basis and this can happen only when reasons are given for a finding and not otherwise. Then only will justice be rooted in confidence.

Of course, the learned Primary Court Judge had in his order said thus: "new concrete posts had been erected and a parapet wall had been built". But, erection of a new parapet wall *per se* cannot constitute proof of the fact that a part of the roadway had been incorporated into the land of the 6th respondent-appellant for one can construct a new wall along the old boundary, as well, which is precisely the case of the 6th respondent-appellant.

However, in his order the learned Primary Court Judge is silent as to whether it was the existence of new concrete posts which prompted him to take the view that a part of roadway had been encroached.

It is clear from the order of the learned Primary Court Judge made on 02. 02. 1994 that he had "explained matters" to the 6th respondent-

appellant presumably, if not, obviously, with a view to persuading him to remove the concrete post No. 3 obviously because of his (Judge's) impression that a part of the roadway had been taken into the 6th respondent-appellant's land in consequence of the erection of the wall or the post. But, I am not in a position to say whether that impression of the Primary Court Judge is erroneous or not for the Primary Court Judge had omitted to give reasons therefor. Even an order made after an inspection must be demonstrably fair, in fact, even fairer than an order made in the course of or after a trial or inquiry for at an inspection the Judge has, perhaps, a greater scope or freedom to take a view untramelled by the technicalities although even such an order must still be based on reason and justice. The considered order of a Court made after a visual inspection is not such an order as will rise or fall on fine and subtle distinctions based on an overly legalistic approach but one that will be based on straight talk and stark truth.

Although, according to what is stated in the order of the Primary Court dated 2. 2. 1994, the 6th respondent-appellant had "agreed to remove" the concrete post No. 03, yet he had failed to do so and on 15. 6. 1994 the Primary Court had made an order to enforce, the said order, dated 2. 2. 94 which was the date on which the aforesaid inspection was held. The order made on 15. 6. 94 to enforce the order of 2. 2. 94 is, in the circumstances, substantially, if not wholly, and for all practical purposes, an order of demolition with respect to the said concrete post No. 3.

It will be readily noticed that there is a direct causal connection between "explaining matters" by the Primary Court Judge which in this context meant, to put it euphemistically, persuading the 6th respondent-appellant to remove the concrete post No. 03 so as to widen the roadway and the finding or the impression of the Primary Court Judge formed (after a visual inspection) that erection of the parapet wall had constituted an encroachment on a part of the roadway which finding may or may not be erroneous. Realistically, viewing the matter, there is no gainsaying that it was the impression or the finding by the learned Primary Court Judge that a part of roadway had been encroached upon that prompted him to "explain matters" primarily with a view to prevail upon the 6th respondent-appellant to remove the

concrete post No. 3. The correctness of that finding or the impression, as pointed out above, cannot be tested for want of reasons, which finding lacks the aura of moral persuasiveness – a quality which a reasoned order alone can have.

When a Court exercising an appellate jurisdiction finds that it cannot say for certain that the order of the subordinate Court is neither right nor wrong, inasmuch as the subordinate Court had omitted to give reasons for the order, there is little else that the superior can do than to direct a fresh inquiry and I do so accordingly. This, I think, is the only choice open to me because, so far as I know, there is no practice of requesting reasons for a decision at this stage; nor is there a provision which enables me to do so. But, the parties are well-advised to pause and consider calmly and dispassionately whether it would not be an exercise in futility to proceed with this inquiry afresh as the rights of parties in respect of the same dispute are being currently investigated in the District Court which would hopefully produce a lasting solution.

The long and short of all this is that the aforesaid order dated 2. 2. 1994 (which order is, in fact, it may be observed, described or referred to as an "order" in the Primary Court Judge's order of 15. 6. 1994 itself directing enforcement of the previous order of 2. 2. 1994) may or may not be correct and I cannot sitting in appeal, as I do, tell either way. It is possible that the order dated 2. 2. 94 is correct although it is equally possible that it is wrong for, as pointed out above, no reasons had been given for the finding on which the order dated 2. 2. 1994 is rested. An application in revision had been made in respect of that order of the Primary Court dated 2. 2. 1994 which application, as stated above, had been refused by the High Court on 15. 11. 1994. Perhaps, to put it at its lowest, one may even infer doubtfully or even say, of course, tentatively, that it is more probable than not that the order dated 2. 2. 1994 is wrong, inasmuch as in the complaint made on 7. 9. 1993 to the Police upon which complaint these proceedings had been initiated in the Primary Court – no mention whatsoever had been made of any encroachment on the roadway in question. It is worth reproducing the relevant excerpt

of that statement which is as follows: මාගේ නිවසට යන ගමේ අනිකුත් නිවෙස්වලට යන පාර ඇත්තේ සාදික්කා කන්ද පදිංචි ටියුඩර් මල්ලව යන අයගේ ඉඩම අයිනෙන් ඇත. ඔට පෙර වාහන යාමට පාර තිබුනා. පසුව පාර අවහිර කර කම්බි ගැසුවා. එයින් පසු මහනුවර දිස්ත්‍රික් උසාවියේ නඩුවක් විභාග වෙමින් පවතිනවා. එසේ තිබියදී මේ අය අද දින පාර අයින දිගට වාහන ගරවන ගන්දියට කොන්ක්‍රීට් බැම්මක් දමාගෙන යනවා. නඩුව අවසන් නොවුන අතර මෙසේ මොහුට පාර අවහිර කිරීමට අයිතියක් නැත.

1st respondent must be taken to have said in her complaint what she meant and also meant what she said. Nowhere in the above statement had she said that a wall had been built by Tudor (the 6th respondent-appellant) encroaching on the roadway. In fact, what the 1st respondent had explicitly stated in the above statement was that wall (කොන්ක්‍රීට් බැම්මක්) was being put up along the "edge of the road" which means the edging or the border or the line of demarcation between the 6th respondent's land and the roadway. If, as stated in the complaint, the construction was on the border or the boundary it could be said by way of argument, that the roadway could not have been encroached upon by reason of that construction although I am backward in reaching a finding to that effect on such a tenous and rarefied ground. Last, but not the least, the fact that there is no reference to or mention of any encroachment as such even in the report filed by the Police in the Primary Court calls for remark in this regard.

The point on which this appeal is allowed to the extent of directing a fresh inquiry, viz that no reasons are given for the finding that a part of the roadway had been encroached upon, was not urged before the High Court Judge who had been wholly oblivious to that aspect; nor was that point urged before us.

This should suffice to dispose of this matter. But, since what is, in fact, a point of great nicety has been raised in regard to the law, viz that the Primary Court had no jurisdiction either under section 68 or under section 69 of the Primary Courts' Procedure Act to make an order of demolition or removal of a structure, I wish to deal with that point as well although it is only of academic interest as the order of the High Court dated 11. 11. 1994 has, in any event, to be vacated

because, the High Court had by such order upheld the order of the Primary Court Judge dated 2. 2. 1994, which latter order (of the Primary Court) as explained above, is not substantiated with reasons. It is to be observed that upon the failure of the 6th respondent-appellant to remove the concrete post No. 3 the learned Primary Court Judge had on 15. 6. 1994 directed that the order dated 2. 2. 94 made by the Primary Court be carried out.

In this matter, irrespective of whether the dispute in this case falls under section 68 or section 69 of the said Act, the Primary Court, in making any order with respect to a dispute affecting land is clothed with the jurisdiction, (if necessary, for the due execution of its duty, viz to restore to the person entitled thereto the possession of the land or the enjoyment of the right, as the case may be, and "prohibit all interference" therewith, ie respectively with possession or enjoyment of the right) to make an order directing the removal or demolition of any structure – be it a house, concrete post or anything else that has been constructed or built – if that structure, whatever it may be, constitutes a hindrance to the execution of the aforesaid duty of the Primary Court.

The Primary Court is vested in express terms with the power under sections 68 (3) and 68 (4) of the Primary Courts' Procedure Act to make a tentative order restoring to possession of the land or part thereof, the person who is entitled to possess in terms of the determination made by the Primary Court under sections 68 (1) and 68 (3) respectively and also prohibiting disturbance of possession in the two instances contemplated by sections 68 (1) and 68 (3). To further explain the two instances or the situations referred to above: Section 68 (1) of the Primary Courts' Procedure Act requires or authorizes the Primary Court to determine who was in possession of the land or part thereof on the date of the filing of the information in Court regarding the dispute. After such determination the said Court is empowered under section 68 (4) of the relevant Act to restore possession to that person who was found by the Court to be entitled thereto which section 68 (4) reads thus: "An order under subsection (1). . . may contain a direction that any party specified in the order shall be restored to possession of the land or any part thereof".

(i) The Primary Court is expressly empowered under section 68 (4) of the said Act to restore to possession of the land or part thereof the party who was in actual possession on the date of filing of information regarding the dispute by the Police under section 66 of the Act and the Primary Court is also vested with the jurisdiction under section 68 (2) to make order protecting and prohibiting disturbance of possession of such person, ie the person who was found to be in possession on the relevant date, ie the date of filing of information, until such person is evicted therefrom under an order or decree of a competent Court;

(ii) the Primary Court makes an identical or the same order under 68 (3) of the said Act, ie prohibiting disturbance of possession when it (the Court) makes order under section 68 (3) of the said Act, restoring to possession a person who had been in possession previously but had been forcibly dispossessed within a period of two months immediately before the date on which the information was filed by the Police in Court pursuant to section 66 of the Primary Courts' Procedure Act. To reproduce the relevant section 68 (3) of the said Act: "Where at an inquiry into a dispute relating to the possession of any land or any part of a land the Judge of the Primary Court is satisfied that any person who had been in possession of the land or part has been forcibly dispossessed within a period of two months immediately before the date on which the information was filed under section 66 he may make a determination to that effect and make an order directing that the party dispossessed be restored to possession and prohibiting all disturbance of such possession otherwise than under the authority of an order or decree of a competent Court".

Thus, it is to be observed that in the two situations described above the Primary Courts' Procedure Act, expressly and in so many words had conferred on the Primary Court the power to restore to possession of a piece of land the person who is entitled to possess pursuant to a determination by the Court arrived at after inquiry in that regard.

The Primary Court is also empowered under section 69 (2) of the relevant Act, to make an order, ie prohibiting disturbance or interference with the exercise of the right of any person who is entitled to exercise that right when the dispute relates to any right other than the right to possession of land. For example, when the Primary Court makes a determination that a person is entitled to the exercise of the right of a servitude of a roadway – the Primary Court will make an order prohibiting interference with the exercise of that right which order will cease to have any binding effect only if a decree of a competent Court is entered in respect of the right as against that person, ie the person in whose favour the Primary Court had earlier made the determination.

But, when the Primary Court makes an order or determination under section 69 of the Act, as to any right to land other than the right to possession of land – the Act, nowhere had stated in express terms as in the case of two situations described above, ie where right to possession of land was in dispute, that the person who, after inquiry, is held by the Court to be entitled to exercise that right (other than the right to possession of land) shall be restored to the possession or exercise of that right. According to the definition of "dispute affecting land", as explained in section 75 of the Primary Courts' Procedure Act, the "dispute as to any right other than the right to possession of land" refers to or means or embraces all such "disputes as to the right to cultivate any land or part thereof or as to right to the crops or produce thereof or any right in the nature of a servitude affecting land." Then the question arises: when the dispute affecting land relates to any right (enumerated above) other than the right to possession of land – is the Primary Court endowed with the power to make an order restoring that right to the person entitled to the exercise thereof, ie of that right, thereby facilitating the exercise of that right by that person unless and until that person is deprived of that right by an order or decree of a competent Court? The answer must necessarily be in the affirmative. Sometimes, the legislature either through forgetfulness or through erratic or bad drafting or because it is so obvious, (because one need not labour the obvious) fails to expressly incorporate into the section, terms or provisions which, had the legislature

adverted to the situation, it would certainly have inserted to give such clarity or rather efficacy to the section, so to speak, that the legislature must have intended, at all events, that it, ie the provision of law, should have. It cannot for a moment be said that implying such a power defeats the intention of the relevant legislative provision; rather by implying such a power the Court carries into effect or effectuates the clear intention of the sections 69 (1) and 69 (2) which two subsections, respectively reads thus:

69 (1): "Where the dispute relates to any right to any land or any part of a land other than the right to possession of such land or part thereof, the Judge of the Primary Court shall determine as to who is entitled to the right which is the subject of the dispute and make an order under subsection (2)" which subsection is as follows: "An order under this subsection may declare that any person specified therein shall be entitled to any such right in or respecting the land or in any part of the land as may be specified in the order until such person is deprived of such right by virtue of an order or decree of a competent Court and prohibit all disturbance or interference with the exercise of such right . . . other than under the authority of an order or decree as aforesaid."

The intention of the above legislative provision, ie sections 69 (1) and (2) of the Primary Courts' Procedure Act, is all too clear : it is to ensure that the relevant right in question is exercised by the person who, the Primary Court determines, is entitled to the right and by nobody else.

The above subsections, 69 (1) and (2), require the Primary Court after inquiry to –

(i) determine as to who is entitled to the right.

(ii) make an order that the person specified therein shall be entitled to such right until such person is deprived of that right by virtue of an order or decree of a competent Court.

(iii) prohibit all interference with or disturbance of that right other than under the authority of an order or decree of a competent Court.

One cannot reasonably assume that section 69 of the Primary Courts' Procedure Act, required the Court to take all such steps as are enunciated or itemised above but stop short of restoring the right to the person who is, according to the determination (of the Primary Court), entitled to that right so that he may exercise that right without any hindrance. It is worth observing that the section 69 of the Act, requires the Primary Court not only to specify in the order the person who is entitled to such right which means as explained above, any right enumerated or contemplated in section 75 of the Act (other than the right to possession of land) but also make further order prohibiting interference with and disturbance of that right. The power conferred on the Primary Court under section 69 (2) of the Act to prohibit disturbance of the exercise of the rights, I take it, necessarily carries with it the power, if not expressly, at least, by necessary implication, to restore the right to that person who is found or determined by the Primary Court to be entitled to that right if, in fact, that person who is held to be entitled to that right had been deprived of it. The Court cannot and in fact, need not prohibit disturbance of possession or exercise of a right by a person as required by section 69 (2) of the Primary Courts' Procedure Act, if that person is not, in fact, in possession or restored to possession or rather the enjoyment of the same, ie of that right – so that he can exercise it. Prohibiting disturbance of the exercise of the right as required by section 69 (2) is called for or rendered necessary (as required by the said subsection) because of the restoration of the exercise of the right to the person held to be entitled thereto.

Thus, it is clear that sections 69 (1) and (2) of the Act, authorizes by implication (as explained above) the restoration of the right (other than the right to possession of land) to the person who is held to be entitled to such right just as much as restoration of the right to possession of land is expressly authorized, as explained above, by sections 68 (2) and 68 (4) respectively.

The counsel for the 6th respondent-appellant had referred us to *Jamis v. Kannangara*[1] which had held that no order of removal of a structure could be made under the said section 69 (2) and submitted on the authority thereof that the learned Primary Court Judge had no authority or power to order the demolition of the concrete post No. 3 as the Primary Court Judge had in fact seems to have done 15. 06. 1994. The said order itself is not all that clear and the whole of which order reads thus and amounts to this: නීතීඥ මහතාගේ ඉල්ලීමට සාධාරණ කරුණු ඇති බව පිළිගනිමි. ඒ අනුව අධිකරණයේ පිස්කල් මඟින් 94. 02. 02 වෙනි දින දරණ නියෝගය ක්‍රියාත්මක කිරීමට නියෝග කරමි.

The so-called order dated 2. 2. 1994 (that being the denomination into which the said order appropriately would fall) is reproduced verbatim at page 01 hereof and nowhere is it contemplated there in the demolition of a wall or a parapet wall which the fiscal in pursuance of the order of 15. 6. 1994 had effected or caused, as stated in his (fiscal's) report, submitted to Court after carrying out the order (of 15. 6. 1994), the relevant excerpt of which report reads as follows:

කොන්ක්‍රීට් කණු සහිත කළුගල් බැම්ම බැද තිබූ බැම්මෙහි 3 වෙනි කොන්ක්‍රීට් කණුව ඉවත් කර එම කොන්ක්‍රීට් කණුවට සම්බන්ධ අඩි 2 ක් පමණ උස බැම්ම ඉවත් කර වාහනයක් ගත හැකි ආකාරයට පාර සකස් කිරීමට පැමිණ සිටි අයට දැනුම් දී එසේ එම ආකාරයට සකස් කළ පසු පැමිණ සිටි පාර්ශවකරුවන්ට නැවත ආරවුල් ඇති නොකර ගන්න ලෙසටත්, සාමයෙන් සිටීමටත් අවවාද කළෙමි . . .

The above excerpt reproduced from the fiscal's report states that not only the concrete post No. 3 but also a wall or structure or embankment (බැම්ම) 2 feet high which was "connected to the concrete post No. 3 was also removed by the fiscal.

Be that as it may, the basic argument of the learned counsel for the 6th respondent-appellant was that Primary Court was destitute of any power to order the removal of any structure to facilitate the handing over of possession to the person held by Court to be entitled thereto.

A perusal of the order dated 2. 2. 1994 (which was carried out in terms of the order dated 15. 6. 1994) would show that although there is mention of the removal of a concrete post No. 3 – there

is no mention whatever about the removal of any kind of wall. In fact, the order of 2. 2. 1994 (which as explained above was implemented by the order made by the Primary Court on 15. 6. 1994) contemplates or makes mention not of a demolition of any wall but the erection of one, ie a wall. This confusion is attributable, perhaps, to the lack of care and neatness, on the part of the Primary Court Judge, in recording or committing his order into words or writing.

We are not bound by the decision referred to above, ie *Jamis v. Kannangara* and we choose not to follow it as the Court had not considered therein the doctrine of implied powers embodied in the maxim: "*Quando Lex Aliquid Councedit Concediture Et Id Sine Quo Res Ipsa Esse Non Potest*". Its full and true import was set out in the judgment *Fenton v. Hampton* (referred to in Bindra). To quote: "Whenever anything is authorized and especially if, as a matter of duty, required to be done by law, and it is found impossible to do that thing unless something not authorized in express terms be also done, then that something else will be supplied by necessary intendment . . ." What the doctrine of implied power means is this : that where an Act, confers jurisdiction, it impliedly also grants the power of doing all such acts or employ such means as are essentially necessary to its execution. CAN ONE RATIONALLY ASSUME THAT ALTHOUGH THE LEGISLATURE CLEARLY IMPOSED ON THE PRIMARY COURT, AS POINTED OUT ABOVE, THE DUTY UNDER SECTION 69 OF (I) DETERMINING WHO IS ENTITLED TO THE RIGHT OTHER THAN THE RIGHT TO POSSESSION OF THE LAND AND EVEN (II) MAKING AN ORDER SPECIFYING THE PERSON ENTITLED TO THAT RIGHT AND ALSO MAKING AN ORDER PROHIBITING ALL INTERFERENCE with OR DISTURBANCE OF THAT RIGHT – YET DENIED THE NECESSARY POWER TO COURT TO ACCOMPLISH THAT END OR TO PERFORM THAT DUTY IMPOSED BY THE LAW, BY CLEARING AWAY OR REMOVING SUCH OBSTRUCTIONS AS STOOD IN THE WAY OF THE ENJOYMENT OF THAT RIGHT BY THAT PERSON SPECIFIED IN THE ORDER (MADE BY THE PRIMARY COURT) AS THE PERSON WHO IS ENTITLED TO THE SAID RIGHT? (It has to be repeated that 69 (2) of the Primary Courts' Procedure Act, empowers the Primary Court to prohibit all interference with the exercise of the right to which the person is entitled to in

terms of the declaration in terms of section 69 (1). When a statute grants a power or privilege it carries with it everything necessary for its exercise. I think, it is one of the first principles. For instance, by the grant of mines, the power to dig is impliedly conferred. *A. R. v. Bristol Dock Co.*[2]; *Wright v. Scott*[3]; *Gas Co. v. City of Perth Corporation*[4]. Similarly, authority to build a bridge on a stranger's land carries with it the right of erecting on the land the temporary scaffolding which was essential to the execution of its work 1845 4 Q. B. 46[5]. 1881-8 QBD-86[6]. Implied powers are as much an integral part of any Act, as if those powers had been specifically expressed in the Act, itself.

If a statute is passed for the purpose of enabling something to be done, but omits to mention in terms some detail which is of great importance and essential to the proper and effectual performance of the duty or the work which the statute has in contemplation the Courts are at liberty to infer that the statute by implication empowers that detail to be carried out. In *Cookson v. Lee* [7] the facts were: a private Act, vested certain lands in trustees for the purpose of enabling them to sell the lands for building purposes. But, the Act, contained no express provision or power to expend any portion of the purchase moneys in setting out the lands or in making the roads. In these circumstances, the Court held that, having regard to the object of the Act, – viz the sale of the property as building land – such power, to make roads and give facilities for putting the property in a state in which it is capable of being sold and immediately used for building purposes, ought to be implied. Lord Cranworth who decided that case said: "We must take it (the Act) as we find it and one very natural question – whether if it does not in terms do so – it does not do it by implication/ whether we must not infer from the powers given, the legislature considered that they had given the power which is contended for, or whether by directing something to be done, they must not be considered by necessary implication to have empowered that to be done which was necessary to accomplish the ultimate object".

The ultimate object of the aforesaid sections 68 and 69 respectively, being to restore the person entitled to the right to the possession of

land to the possession thereof or to restore the person entitled to the right (other than the right to possession of land) to the enjoyment thereof – the said provisions of the law must be rationally construed to authorize by necessary implication, if, in fact, they had not in terms done so, the removal of all obstructions, if the need arose, in the process of restoring the right to the person held (by the Primary Court) to be entitled to such right. (The right other than the right to possession of land, would include such rights as the right to cultivate any land, or as to the rights to crops of any land or right in the nature of a servitude) So, that it is plain that the case of *Jamis v. Kannangara* (*supra*) which held that no order of removal of a sructure could be made under section 69 (2) of the Primary Courts' Procedure Act, had been decided, with respect, overlooking the doctrine of implied powers as explained above, as sections 68 (1) and 68 (3) expressly and section 69 (2) by necessary implication, if not expressly, enable, if not require, the Primary Court to restore the benefit of the right to possession to the person entitled to it by placing him in possession or in enjoyment of the right respectively – the legislature must be taken to have given the power to the Court by necessary implication to do everything which is indispensable for the purpose of carrying out the purpose in view – purpose being to restore to possession the person who according, to the determination made by the Primary Court in terms of section 68 (1) or 68 (3) is entitled to possess the land or enjoy or exercise the right (other than right to possess land) in terms of a determination made under section 69 (1) of the Primary Courts' Procedure Act.

That the implying of such a power, ie the power to sweep away all such obstructions and impediments in the way of restoration of the person to possession or enjoyment of the right, ie every kind of right coming within the definition of dispute affecting land as stated in the aforesaid section 75 is necessary, would be made clearer by demonstrating the absurdities and inconvenience of adopting a contrary view, viz that the power to remove obstructions had not been granted by implication. Suppose, the Primary Court holds under section 69 (1) that a particular party or several parties to the application before it had been exercising the right to a servitude of a foot-path – three

feet in width, from time immemorial – that being the one and only way to gain access. The owner of the servient tenement over which the foot-path runs blocks it, in a matter of an hour or two, by constructing a wall across it. In such a case as the above, is the Primary Court bound to stop short of making an order to clear the path by directing the demolition or removal of the obstructing wall? One can visualise other similar situations, say, the only opening to a piece of land which is surrounded on all sides by a wall seven feet in height is an entrance which is six feet in width. A person (A) forcibly oust the man (B) who had been in possession thereof and erects a barbed-wire fence or bars the opening with a wall thus effectively preventing the person who had lawfully been in possession from entering even after the Primary Court had held (after inquiry) that "B" was entitled to possess and should be restored to possession. If the power to remove a structure which hinders the recovery of possession by the person who is declared entitled to the right is not implied – order of the Court declaring a man's right to possess or granting a declaration that he is entitled to any other right, eg a right of servitude will for certain be frustrated even if the obstruction is put up after the order or declaration by the Primary Court for if a structure or construction cannot be removed that had been put up before the Court makes an order – then the same rule will apply in the case of obstructions in the form of structures that have been erected even subsequent to the Court making of the order or declaration that a certain person is entitled to the right to possess a land or to the enjoyment or exercise of a right (other than right to possession of land).

The learned High Court Judge in his order dated 11. 11. 1994 had distinguished *Jamis v. Kannangara* (*supra*), viz *Bannerjie v. Rahaman*[8], being the Indian judgment which was followed in the decision of Jamis' case, on the footing that the structures in question in James' case and Bannerjie's case was a shed for human habitation and a stable respectively and what was ordered to be demolished or removed in this case by the Primary Court Judge was a concrete post. The learned High Court Judge's reasoning was that no construction could be removed or demolished if it was a house or a stable but that a concrete post could be ordered to be removed. But, the

learned High Court Judge had signally failed to explain on what principle or rather on what principle of law he had drawn a distinction between a shed put up for human habitation and a stable on the one hand and a concrete post on the other because all those structures are things that are constructed and fall under the same genus of structures.

It is true that there is no specific provision in the Primary Courts' Procedure Act, expressly enabling the Court to order removal of obstructions in the way of restoration of the right to the person entitled thereto in terms of the determination made by the Court; nor is there a prohibition either, against the Court exercising such a power or making such an order as had been held in *Narasingh v. Mangal Dubey*[9]. The Courts are not to act, on the principle that every procedure is to be taken as prohibited unless it is expressly provided for by the Code but on the converse principle that every procedure is to be understood as permissible till it is shown to be prohibited by the Code.

The order made by the High Court on 11. 11. 1994 is hereby set aside as also the orders made on 2. 2. 1994 and 15. 6. 1994 by the Primary Court. I direct that a fresh inquiry be held by the Primary Court.

HECTOR YAPA, J. – I agree.

Appeal allowed.