

KAYAS
v
NAZEER AND OTHERS

SUPREME COURT
FERNANDO, J.
AMEER ISMAIL, J.
WEERASURIYA, J.
SC 49/2002
CA 105/96
HCRA 56/96 (F)
PRIMARY COURT, PANWILA 8113
JANUARY 27, 2003
MARCH 4, 2003
MAY 8, 29, 2003
JUNE 5, 2003

Primary Courts Procedure Act - Section 23-36, Section 37-53, Section 66, Section 68 (1), Section 68(3), Section 68(7), Section 76, Section 78 - Who is an aggrieved party - Locus Standi - Issuing of a writ of ejectment - Validity? - Restoration to possession? - Circumstances - What is the object of Revision? When could the Primary Court activate the fiscal to eject a person in possession?

In a Section 66 inquiry, the Primary Court held that the 1st respondent N was in possession of the land on the date of filing the information and prohibited any interference by the 2nd respondent T. The application in Revision filed in the Court of Appeal was dismissed, Thereafter - when the 1st respondent N sought a writ from the Primary Court for restoration of possession, he was resisted by the petitioner, The Primary Court dismissed the claim of the petitioner. The application in Revision filed in the High Court was dismissed on the ground that the petitioner lacked locus standi. The appeal lodged in the Court of Appeal was also dismissed.

On appeal to the Supreme Court.

Held (1) Section 68 (4) does not make it obligatory for the Primary Court to make an order for restoration of possession. It is an additional order a Primary Court Judge could make at his discretion if the facts and circumstances warrant such a direction.

- (2) It is superfluous for the Primary Court Judge to make an additional order in favour of the 1st respondent in terms of Section 68 (4) to order restoration of possession since the 1st respondent was in actual possession.
- (3) Section 68(3) mandates the primary Court Judge directing restoration, if he is satisfied that any person who had been in possession has been forcibly dispossessed within two months immediately preceding the date of filing the information.
- (4) The Primary Court could activate the fiscal to eject a person in possession in terms of Section 76 in the following circumstances.
 - (a) Where there is an order under Section 68 (3).
 - (b) Where this is an order under Section 68 (4)
 - (c) By using of inherent power of Court arising from a conviction for violating orders under Section 68 (1) and (2).

This remedy is not available to a person who had voluntarily parted his possession flowing from transferring his proprietary rights.

- (5) The Primary Court Judge lacked jurisdiction to issue a writ against the appellant ordering restoration of possession to the 1st respondent N as—
 - (a) He has parted with his possession when he transferred his proprietary rights.
 - (b) The order of the Primary Court Judge did not contain an order under Section 68 (4) to restore possession to the 1st respondent.
- (6) However it appears that a new dispute had arisen as regards possession 11 years after the 1st respondent N parted with his possession, the appellant was not a stranger to the execution proceedings in the Primary Court, being a person directly affected by such proceedings as it would entail his ejection from a property where the 1st respondent had no claim to possession from 9.11.1985, in that sense the appellant is an aggrieved party being a victim of an erroneous decision by the Primary Court.
- (7) The object of Revision is the due administration of justice and correction of errors and that power can be exercised in respect of any order of a lower Court to prevent an injustice on an application by an aggrieved person who is not even a party to the case.

The High Court/Court of Appeal has taken the mistaken view that the appellant has no locus standi. Appeal from the judgment of the Court of Appeal.

Cases referred to:-

1. *Mariam Bee Bee v Seyed Mohamed* - 69 CLW 31
2. *Abdul Samad v Musajee* - 1982 - 2 - CALR 147
3. *A. G. v Gunawardane* - 1996 - 2 Sri LR 149

S. K. Sangakkara with David Weeraratne for petitioner-petitioner- appellant
Dr. J. de Almeida Gunaratne with Kishali Pinto Jayawardane and Mangala Wijesinghe for 1st respondent-respondent-respondent.

Cur. adv. vult.

August 8, 2003

WEERASURIYA, J.

Pursuant to an information filed by Wattedgama Police in terms of Section 66 of the Primary Court Procedure Act the learned Primary Court Judge of Panwila held an inquiry into the dispute between Nazeer (1st respondent) and Thaha (2nd respondent) in respect of the land called Uduwannawatta and held that the 1st respondent was in possession of the land in dispute on the date of filing the information and accordingly prohibited any interference by the 2nd respondent. Dissatisfied with that order the 2nd respondent invoked the revisionary jurisdiction of the Court of Appeal without success. Thereafter on 25.04.1996, the 1st respondent obtained a writ from the Primary Court for restoration of possession which was resisted by the petitioner-petitioner-appellant (appellant) on the basis that he had come into possession on the strength of a deed of conveyance by the 2nd respondent (Thaha). The Primary Court Judge rejected his claim for relief by his order dated 16.05.1996.

Against that order the appellant filed an application in revision in Kandy High Court which was dismissed on a preliminary objection that he had no locus standi to make the revision application. Thereafter he invoked the appellate jurisdiction of the Court of Appeal and by order dated 14.12.2001, the Court of Appeal dismissed his appeal affirming the order of the High Court. The appellant sought special leave to appeal against the Court of Appeal

order and this Court granted him leave on the following questions of law:

[1] was the Court of Appeal correct in upholding the judgment of the High Court that the appellant has no status to file a revision application as an aggrieved party in view of the binding judgments *Mariam Beebi v Seyad Mohamed* ⁽¹⁾ and *Abdual Samad v Musajee* ⁽²⁾ and *A. G. v Gunawardena* ⁽³⁾ which had been cited at the argument?

[2] Was the Court of Appeal correct in its pronouncement that there is no merit in the appeal and which matter was not considered by the High Court and when it is patent; 30

(i) that the Primary Court lacked the jurisdiction to issue a writ of ejectment as the order of 24.10.1985 affirmed by the Court of Appeal was only a declaratory order under Section 68(1) and (2) without an enabling order under Section 68(4) of the Primary Court Procedure Act.

(ii) that the 1st respondent had divested his possession of the land by deed No. 1928 on 09.11.1985, that is eleven years prior to the order. 40

(iii) that the Primary Court had failed to follow the procedure mentioned in the Civil Procedure Code in execution proceedings with adaptations in terms of the *casus omissus* procedure laid down in Section 76 of the Primary Court Procedure Act or the procedure in Section 73 of the Act to the prejudice of the appellant.

[3] Can an order under Section 68(1) and (2) of the Primary Court Procedure Act be made use of by a party after he has divested his possession by a deed to a third party to obtain writ and eject a bona fide purchaser for value without notice of the order thereby destroying his *jus retentionis* right and acquire valuable improvement without payment of compensation when he had not made any protest while the improvements were being made? 50

Submissions

Learned Counsel for the appellant contended that appellant had ample status in law to appear in Court as an aggrieved party; that

in the absence of orders under Section 68(3) or 68(4) the 1st respondent cannot apply to resolve a dispute after 11 years between assignees; that failure to follow the provisions of Section 78 is an illegality.

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Learned Counsel for the 1st respondent contended that 1st respondent had merely sought the enforcement of the original order made by the Primary Court: that during the pendency of the Court of Appeal case the appellant had obtained possession from the 2nd respondent and that an order made under Section 68(1); entitles the Primary Court by using its inherent powers to make an order for ejection.

Sections 68(1), and 68(2) of the Primary Court Procedure Act

Sections 68(1) & 68(2) read as follows:

68(i) - "Where the dispute related to the possession of any land or part thereof, it shall be the duty of the Judge of 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 order as to who is entitled to possession of such land or part thereof".

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68(2) - "An order under Sub Section (1) shall declare any one or more persons therein specified to be entitled to the possession of the land or the part in the manner specified in such order until such person or persons are evicted therefrom under an order or decree of a competent Court and prohibit all disturbance of such possession otherwise than under the authority of such order or decree".

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The order of the Primary Court Judge of Panwila dated 24.10.1985 affirmed by the Court of Appeal contain following directions.

- (1) A declaration that the 1st respondent is entitled to possession of the land;
- (2) A prohibition on the 2nd respondent to desist from disturbing such possession of the 1st respondent; and that
- (3) Any violation of the order will tantamount to commission of an offence under Section 73 and liable for punishment.

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Undoubtadly, this order had been made in terms of the provisions of Section 68(1) and 68(2) of the Primary Court Procedure Act.

Section 68(4) of the Primary Court Procedure Act

Section 68(4) reads as follows:

68(4) - "An order under Section (1) may contain in addition to the declaration and prohibition referred to in Sub Section (2) a direction that any party specified in the order shall be restored to the possession of the land or any part thereof specified in such order".

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Section 68(4) does not make it obligatory for the Primary Court Judge to make an order for restoration of possession. It is an additional order a Primary Court Judge could make at his discretion if the facts and circumstances warrant such a direction.

In the instant case, the Primary Court Judge had made a finding that the 1st respondent was in possession of the land on the date of filing of the information. The complaint of the 1st respondent was that, the 2nd respondent had erected a barbed wire fence obstructing his entry into the land and prayed for the removal of the fence, reiterating his position that he was in possession of the land. In the light of that material, the learned Primary Court Judge declared that the 1st respondent was entitled to possession of the land and rightly prohibited any interference with such possession by the 2nd respondent on pain of punishment.

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It was superfluous for the Primary Court Judge to make an additional order in favour of the 1st respondent in terms of Section 68(4) to order restoration of possession since he was in actual possession of the land. The fact that the 1st respondent was in actual possession is manifest by his subsequent divesting of possession arising from his deed of conveyance No. 1928 dated 09.11.1985 in favour of Luthufik and Mohamed Ali.

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The significance of this position could be highlighted by contrasting it with the provisions of Section 68(3) of the Primary Court Procedure Act. This section mandates the Primary Court Judge to make an order directing restoration of possession if he is satisfied that any person who had been in possession has been

forcibly dispossessed within two months immediately preceeding the date of filing the information.

The revision application filed by the 2nd respondent in the Court of Appeal was finally dismissed on 19.10.1994. Pending the final determination of this application, the 2nd respondent had obtained a stay order effective from 26.11.1985. Before the stay order was obtained by the 2nd respondent, the 1st respondent had transferred his ownership and possession of the land on 09.11.1985 by deed No. 1928 to Luthufik and Ali. The stay order could make no impact on Luthufik and Ali since by that time they had obtained possession. There was no material to suggest that between 09.11.1985 (deed of conveyance) and 19.10.1994 (date of dismissal of the revision application) that either Luthufik or Ali was dispossessed by the 2nd respondent. The 1st respondent has not complained of any disturbance to his possession either by the 2nd respondent or by the appellant after the Primary Court made its initial order on 24.10.1985. However, Luthufik had complained of his dispossession on 05.04.1996 as evident from his complaint to Wattagama Police on 06.04.1996 (1 ♂ 3 page 481 of the brief) and complaint to the Grama Niladari of Madige on 10.04.1996 (1 ♂ 5 page 483 of the brief). These two complaints had been made 1 1/2 years after the dismissal of the revision application. On this material it would be clear that Luthufik was dispossessed on 05.04.1996 after the 1st respondent transferred his proprietary rights and parted with possession to Luthufik and Ali on 09.11.1985 (Vide deed No. 1928 dated 09.11.85). Therefore, no question could arise of any disturbance of the 1st respondent's possession. The order made on 24.10.1985 in favour of the 1st respondent ceased to have any legal effect on the 1st respondent with his divesting of possession to Luthufik and Ali on 09.11.1985.

Section 76 of the Primary Court Procedure Act

Section 76 states as follows:

“The Fiscal of the Court shall where necessary execute all orders made under the provisions of this part”

The Primary Court could activate the Fiscal to eject a person in possession in terms of this Section in the following instances.

- (1) Where there is an order under Section 68(3)
- (2) Where there is an order under Section 68(4) and
- (3) By using inherent power of Court arising from a conviction for violating orders made under Section 68(1) and (2).

It follows that the Primary Court has jurisdiction to issue a writ against a person in possession, where there is an order under Section 68(3) or 68(4) of the Act, independent of any direction to restore possession arising from a conviction in terms of Section 73 of the Act. 170

A person who has the benefit of an order made in terms of Section 68(1) and (2) can be restored to possession only on a conviction arising from a complaint of his dispossession. Thus a condition precedent to obtain an order for restoration of possession in favour of a person whose possession had been protected by a Section 68(1) and 68(2) order, is the existence of a conviction arising from a complaint of a violation of such order, in terms of Section 73 of the Act. This remedy is not available to a person who had voluntarily parted his possession flowing from transferring his proprietary rights. 180

Causus Omissus Clause (Section 78)

Section 78 of the Primary Court Procedure Act is in the following terms.

78 - "If any matter should arise for which no provision is made in the Act, the provisions in the Code of Criminal Procedure Act governing a like matter which the case or proceeding is a criminal prosecution or proceedings, and the provisions of the Civil Procedure Code governing a like matter where the case is a civil action or proceeding shall with suitable adaptations as the justice of the case may require be adopted and applied." 190

Section 2 of the Primary Court Procedure Act stipulates that subject to the provisions of the Act and other written law, the civil and criminal jurisdiction of the Primary Court shall be exclusive. Part III of the Act comprising Sections 24 - 36 provides for the mode of institution of criminal prosecution; while part IV of the Act comprising Sections 37 - 53 provides for the mode of institution of

civil actions. Thus, Section 78 has been designed to bring in provisions of the Criminal Procedure Code Act or the provisions of the Civil procedure Code Act only in situations where either a criminal prosecutions or a civil action within part III or part IV of the Act respectively are involved. Inquiries into disputes affecting land where a breach of the peace is threatened or likely to be threatened under part VII comprising Sections 66 - 76 are neither in the nature of a criminal prosecution or proceeding nor in the nature of civil action or proceeding. Those proceedings are of special nature since orders that are being made are of a provisional nature to maintain status quo for the sole purpose of preventing a breach of the peace and which are to be superseded by an order or a decree of a competent Court. Another significant feature is that Section 78 while making reference to criminal prosecutions or proceedings and civil actions or proceedings, has not made any reference to disputes affecting land. This exclusion would reveal the legislative intent that Section 78 is not intended to be made use of, for inquiries pertaining to disputes affecting land under part VII of the Act.

Locus Standi

The appellant has not challenged the legality of the order of the Primary Court made on 24.10.1985 which was affirmed by the Court of Appeal. The appellant has made it clear that he is challenging the writ obtained by the 1st respondent to eject him from the land. The initial order of the Primary Court Judge to issue the writ was made on 25.04.1996 (page 248 of the brief). Admittedly, the appellant was not a party to the proceedings of the Primary Court and therefore was not a party when the Primary Court made the order on 24.10.1985, declaring that the 1st respondent was entitled to possession.

The complaint by Luthufik of his dispossession to the Police was made on 06.04.1996 and the complaint to Grama Niladari was made on 10.04.1996. Both these complaints were to the effect that 2nd respondent and some others were making preparations to build on the land. The Fiscal came to the land on 30.04.1995 (P2) to execute the writ obtained by the 1st respondent and Luthufik accompanied the Fiscal claiming that he was the agent of the 1st respondent. While the 2nd respondent did not object to the writ the

appellant resisted the Fiscal and he was directed to appear before Primary Court on 02.05.1996. The appellant presented himself in Court on 02.05.1996 with his Attorney-at-Law and after hearing oral submissions, the learned Primary Court Judge directed him to tender written submissions as to why he should not be ejected. The appellant tendered written submissions on 14.04.1996 and the learned Primary Court Judge delivered his order on 13.05.1996 directing the issue of writ to eject the appellant. 240

The Primary Court Judge lacked jurisdiction to issue a writ against the appellant ordering restoration of possession to the 1st respondent on two grounds.

(1) The 1st respondent has parted with his possession of the land when he transferred his proprietary rights by deed No. 1928 on 09.11.1985.

(2) The order of the Primary Court Judge dated 24.10.1985 did not contain an order under Section 68(4) to restore possession to the 1st respondent. 250

It would appear that a new dispute had arisen between Luthufik and the appellant as regards possession 11 years after the 1st respondent parted with his possession to the land.

In the circumstances, the appellant was not a stranger to the execution proceedings in the Primary Court being a person directly affected by such proceedings as it would entail his ejection from a property where the 1st respondent had no claim to possession from 09.11.1985. In that sense the appellant is an aggrieved party being a victim of an erroneous decision by the Primary Court. The error is caused by misconceiving of the applicability of the order made on 24.10.1985 vis-a-vis the 1st respondent. 260

In the light of the above material, the case of the appellant is clearly covered by the dictum of Sansoni J. in *Mariam Beebi v Seyad Mohamed* (6 *supra* 34) that the object of revision is the due administration of justice and correction of errors and that power can be exercised in respect of any order of a lower Court to prevent an injustice on an application by an aggrieved person who is not even a party to the case. 270

The High Court and the Court of Appeal has taken the mistaken view that the appellant has no locus standi to seek relief. I hold that the appellant being an aggrieved party has sufficient status to seek relief in the circumstances of this case. Therefore, I set aside the order of the Court of Appeal dated 04.12.2001, and the order of the High Court dated 26.08.1996 and the order of the Primary Court dated 16.05.1996 and allow this appeal with costs fixed at Rs. 10,000/= payable by the 1st respondent to the appellant.

FERNANDO, J. - I agree.

ISMAIL, J. - I agree.

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Appeal allowed.