RAMALINGAM
v.
THANGARAJAH

SUPREME COURT
SHARVANANDA, J., VICTOR PERERA, J., AND COLIN THOMÉ, J.
S.C. 6/82; CA 2460/80; P.C. AKKARAIPATTU PCA/398
SEPTEMBER 29, 1982

Primary Courts Procedure Act, Sections 66 to 76 – Duty of Judge in disputes as to possession – Consequence of failure to keep to time limits laid down in Act.

The respondent owned a land in extent 8A.1R.22P and had been cultivating it for decades but appellant dispossessed him of the land, on 6.10.79 and continued in possession. The Officer in Charge of the Police Station having failed to bring about a settlement filed information on 10.12.79.

Inquiry was fixed by the Judge for 17.1.80. Inquiry was postponed from time to time and witnesses were examined and cross examined at length till the Judge brought about a settlement on 24.9.80.

The appellant complains that the above proceedings offend the mandatory provisions of Part VII of the Primary Courts Procedure Act and are therefore null and void.

Held -

(1) That a Judge should in an inquiry under Section 66 confine himself to the question of actual possession on the date of filing information except in a case where a person who had been in possession of land had been dispossessed within a period of two months immediately preceding filing of information.
(2) That where the information filed and affidavits furnished under section 66 are sufficient to make a determination under Section 68 further inquiry embarked on by the Judge was not warranted by the mandatory provisions of Section 72 and are in excess of his special jurisdiction.
(3) That non-compliance by Court of the provisions of Sections 66 and 67 does not divest Court of jurisdiction conferred on it by Section 66(2).

Cases referred to:

(1) *Kanagasabai* v. *Mailvaganam (1976) 78 NLR 280, 283.*
(2) *Nagalingam* v. *Lakshman de Mel (1975) 78 NLR 231, 237.*

APPLICATION in revision of order of the Primary Court of Akaraipattu.

S.C. Crossette Thambiah with *K. Thevarajah* and *S.H.N. Reeza* for appellant.
K. Kanag-Iswaran for respondent.

Cur.adv.vult.

October 19, 1982

SHARVANANDA, J.

This is an appeal from a judgment of the Court of Appeal dismissing the appellant's revision application to have the proceedings No. 398 in the Primary Court of Akkaraipattu declared null and void.

On 10.12.79, the Officer-in-Charge of the Police Station, Akkaraipattu filed information under section 66 of the Primary Courts Procedure Act No. 44 of 1979 (hereinafter referred to as the Act) regarding a dispute relating to the possession of a land, between the petitioner-appellant (hereinafter referred to as appellant) and the respondent-respondent, (hereinafter referred to as respondent), in the Primary Court of Akkaraipattu. He stated in the information that he had inquired into a complaint made by the respondent on 22.10.1979 to the effect that he owned a land 8 acres, 1 rood and 22 perches in extent which he had been cultivating continuously for decades and that the petitioner had entered this land forcibly and was cultivating the same. According to the information, the Officer-in-Charge had summoned both parties to the Police Station and had tried to effect a peaceful settlement, but his efforts had failed and he feared a

serious breach of the peace as a result of the dispute. The appellant and respondent appeared in Court on that date and filed their respective affidavits but annexed no documents thereto. In his affidavit the appellant stated that he was cultivating and possessing the said land from 1977. On the other hand the respondent in his affidavit dated 8.12.79 stated that while he was in possession of the land the appellant had "on 6.10.79 without any manner of right put him out of the land forcibly and cultivated the land" and prayed that he be restored to possession.

The Judge, Primary Court fixed the matter for inquiry on 17.1.80. On that date the inquiry commenced and counsel for the respondent led the evidence of one David, Land Officer. Though this witness stated that he did not know who cultivated the land after 1974, the record shows that his evidence had gone on for a fair amount of time. After his lengthy evidence the inquiry was postponed to 22.2.80. On that date, on the application of both parties for a postponement on the ground that their lawyers were not present, further inquiry was re-fixed for 6.3.80. On 6.3.80 however the inquiry was postponed for want of time for 28.4.80 on which date the Court stenographer was not availabe and inquiry was put off again for 23.6.80. On the latter date the respondent gave evidence at length as to how he came into possession of the land and was in possession of it from 1976, till he was forcibly dispossessed by the appellant on 6.10.79. The respondent's evidence covers eleven pages of the record. Thereafter one Stanislaus, Cultivation Officer gave evidence for the respondent. This witness in examination in chief, referred to the cultivation of the land by the respondent in 1978 but stated that the appellant cultivated the land during the 1979 cultivation season which started in October 1979. This witness was cross-examined and re-examined at length. His evidence covers about fifteen pages of the record. His evidence was not concluded that day when further inquiry was refixed for 25.6.80. The inquiry could not be taken up on 25.6.80, nor on 2.7.80 nor on 11.7.80, on which dates the case was postponed, as the stenographer was on leave. On 11.7.80 on the application of both parties for a long date "as they had to go to Kataragama", the inquiry was refixed for 6.8.80. On this date too the inquiry had to be postponed as the stenographer was on maternity leave and the inquiry was fixed for 10.9.80. On this date too the Attorney for the appellant moved for a postponement on the ground that his Senior
14–2 Counsel had gone abroad, and that some documents pertaining to

the case were with him. The Judge then inquired from the appellant's Attorney, whether he could assist the Court "as the inquiry had to be completed within three months, in terms of section 67(1) of the Primary Courts Procedure Act No. 44/79". On the Attorney expressing willingness, the cross-examination of Stanislaus was resumed. After Stanislaus, the next witness called was one Sambanther who testified to a complaint made by the appellant to the Assistant Government Agent on 10.8.78 regarding the land in dispute. This witness however stated that he did not know who was in possession of the land at the relevant times. Further inquiry was fixed for 24.9.80. On this date the lawyers for the parties were absent, but "as they had not sent any intimation to Court about their appearance", the Judge proceeded with the inquiry. The respondent called as his witness one Vasantharasapillai, who stated quite early in the course of his examination-in-chief that he cultivated this land from 1972-75 but did not know who cultivated the land after that. On the respondent closing his case with that witness's evidence the appellant got into the witness box and stated that he cultivated the land for the 1977/78 and 1979/80 seasons and for the last cultivation season. Then the appellant was cross examined by the respondent. Thereafter the appellant called one Mailvaganam to give evidence on his behalf. This witness stated that he knew the land in dispute and that the appellant was possessing it. In cross-examination this witness was shown two receipts marked 1R4 and 1R5. On the witness denying the signature appearing on the said receipts, the respondent stated that he would be calling the Examiner of Questioned Documents to prove the signature. When he was further being cross examined at length by the respondent the witness fainted. The record sets out what happened then: –

> "Inquiry put off. I release him on bail in Rs. 1000/- in default of bail remand him for two weeks.
>
> At this stage the respondents propose to settle the case. Case is settled on the following terms:
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> *Terms of Settlement*
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> Both respondents agree that the 1st respondent Thangarasa should possess 4 acres and 32 perches from the northern boundary of this land and the balance portion to be possessed by the 2nd respondent – Ramalingam."

In consideration of the motion of the 1st respondent to withdraw his application to have the signature of the witness Mylvaganam on 1R4 and 1R5 examined by the Examiner of Questioned Documents, the Judge cancelled the bail on the witness and warned and discharged him."

The appellant complains that the above proceedings offend the mandatory provisions of Part VII of the Primary Courts Procedure Act and are null and void.

Before I proceed to discuss the main contentions urged by the Counsel for the appellant, I would like to express my disapproval of the order for bail made by the Primary Court Judge on Mailvaganam. This order is absolutely unwarranted in law and cannot be justified. The witness was not facing any criminal charge for him to be subject to any remand. An order of this nature tends to discourage witnesses coming forward to give evidence. Courts should not hold out such threats or terrors to witnesses. Such an arbitrary order is not calculated to do any credit to a Court of Justice. Judges should be chary of making such orders.

The lackadaisical fashion in which the inquiry has been carried on, reveals a lack of appreciation on the part of the Primary Court Judge and attorneys of the parties concerned, of the proper scope and objective of an inquiry under Part VII of the Act. Had the Judge addressed himself to the relevant issues involved in the case he could have spared himself the exercise of the long and protracted inquiry which was characterised by digressions into irrelevancies and was conducted in disregard of the time limits prescribed by the provisions of the Act. On the undisputed facts of the case, as disclosed by the affidavits of the parties, the determination and order under section 68 of the Act could have been made on the first day of the inquiry itself. According to the affidavits filed by the appellant and respondent, prior to the commencement of the inquiry it was common ground and it was not disputed that on the date of the filing of the information under section 66 of the Act, namely *10.12.79* the appellant was in possession of the land in dispute and had been in such possession at least from 6.10.79. The respondent alleged in his affidavit that he was forcibly dispossessed of the land by the appellant on 6.10.79. Thus, on the respondent's own admission the appellant had entered into and commenced possession of the land prior to the period of two months immediately before the date on which the information was filed viz. prior to *10.10.79*. On this uncontested fact

of possession by the appellant from 6.10.79, the Judge could have and should have made his determination and order under secton 68 of the Act in favour of the appellant and terminated the proceedings. In law, that was the only order which the Judge could have made, on the facts; no additional evidence was necessary or relevant to enable the Judge to make the said determination and order.

In an inquiry into a dispute as to the possession of any land, where a breach of peace is threatened or is likely under Part VII of the Primary Courts Procedure Act, the main point for decision is the actual possession of the land *on the date of the filing of the information* under section 66; but, where forcible dispossession took *place within two months before the date on which the said information was filed* the main point is actual possession prior to that alleged date of dispossession. Section 68 is only concerned with the determination as to who was in possession of the land or the part on the date of the filing of the information under section 66. It directs the Judge to declare that the person who was in such possession was entitled to possession of the land or part thereof. Section 68(3) becomes applicable only if the Judge can come to a definite finding that some other party had been forcibly dispossessed within a period of two months next preceeding the date on which the information was filed under section 66. The effect of this sub-section is that it enables a party to be treated to be in possession on the date of the filing of the information though actually he may be found to have been dispossessed before that date provided such dispossession took place within the period of two months next preceeding the date of the filing of the information. It is only if such a party can be treated or deemed to be in possession on the date of the filing of the information that the person actually in possession can be said not to have been in possession on the date of the filling of the information. Thus, the duty of the Judge in proceedings under section 68 is to ascertain which party was or deemed to have been in possession on the relevant date, namely, on the date of the filing of the information under section 66. Under section 68 the Judge is bound to maintain the possession of such person even if he be a rank trespasser as against any inteference even by the rightful owner. This section entitles even a squatter to the protection of the law, unless his possession was acquired within two months of the filing of the information.

That person is entitled to possession until he is evicted by due process of law. A Judge should therefore in an inquiry under Part

VII of the aforesaid Act, confine himself to the question of actual possession on the date of filing of the information except in a case where a person who had been in possession of the land had been dispossessed within a period of two months immediately before the date of the information. He is not to decide any question of title or right to possession of the parties to the land. Evidence bearing on title can be considered only when the evidence as to possession is clearly balanced and the presumption of possession which flows from title may tilt the balance in favour of the owner and help in deciding the question of possession.

On the other hand, if the dispute is in regard to any right to any land other than right of possession of such land, the question for decision, according to section 69(1), is who is entitled to the right which is subject of dispute. The word "entitle" here connotes the ownership of the right. The Court has to determine which of the parties has acquired that right, or is entitled for the time being to exercise that right. In contradistinction to section 68, section 69 requires the Court to determine the question which party is entitled to the disputed right preliminary to making an order under section 69(2).

The procedure of an inquiiry under Part VII of the Act is sui generis. The procedure to be adopted and the manner in which the proceedings are to be conducted are clearly set out in Sections 66, 71 and 72 of the Act. Section 66(2) mandates that the special jurisdiction to inquire into disputes regarding which information had been filed under Section 66(1) should be exercised in the manner provided for in Part VII. The proceedings are of a summary nature and it is essential that they should be disposed of expeditiously. The importance of a speedy completion of the inquiry which culminates in the order under Section 68 or 69 is underscored by the specific time-schedule prescribed by the provisions of the Act. Section 66(3), requires the Court to appoint a date "which shall not be later than three weeks from the date on which the parties were produced or the date fixed for their appearance under Section 66(1), directing the parties to file affidavits setting out their claims and annex thereto any documents on which they rely. When such affidavits are filed the Court is required on application made by parties to grant them time not exceeding two weeks to file counter affidavits with documents, if any. Sub-section 6 provides that where no application has been made for filing counter affidavits or on the date fixed for filing counter affidavits the Court should endeavour, before fixing the case

for inquiry to induce the parties to arrive at a settlement of the dispute and if there is no such settlement Court should fix the case for inquiry on a date not later than two weeks of the date fixed for filing affidavits or counter affidavits as the case may be. Section 67 specially postulates that the inquiry should be concluded within three months of its commencement and the Judge should deliver his order within one week of its conclusion. It is incumbent on the Judge to conform to these time limits and to discountenance any elaborate and prolonged inquiry in breach of the time limits.

In this connexion what I said with reference to the provisions of section 62 of the Administration of Justice Law No.44 of 1973 (now repealed) in *Kanagasabai Vs. Mailvanaganam,* (1) apply equally well to the Section 66 and 68 of the Act which correspond to them:–

> "Section 62 of the the Administration of Justice Law confers special jurisdiction on a Magistrate to make orders to prevent a dispute affecting land escalating and causing a breach of the peace. The jurisdiction so conferred is a quasi-criminal jurisdiction. The primary object of the jurisdiction so conferred on the Magistrate is the prevention of a breach of the peace arising in respect of a dispute affecting land. The section enables the Magistrate temporarily to settle the dispute between the parties before the Court and maintain the status quo until the rights of the parties are decided by a competent civil Court. All other considerations are subordinated to the imperative necessity of preserving the peace ..... At an inquiry under that section the Magistrate is not involved in an investigation into title or right to possession, which is the function of a civil Court. The action taken by the Magistrate is of a purely preventive and provisional nature in a civil dispute, pending final adjudication of the rights of the parties in a civil Court. The proceedings under this section are of a summary nature and it is essential that they should be disposed of as expeditiously as possible ....."

The scheme embodied in this Part is geared to achieve the object of prevention of a breach of the peace. Section 68(2) enjoins the Judge to decide the dispute which gave rise to the threat to a breach of the peace, provisionally and to maintain the status quo until the right of parties are decided by a competent Civil Court. Section 72 prescribes the material on which the determination and order under section 68 and 69 of the Act is to be based. The determination should, in the

main, be founded on "the information filed and the affidavits and documents furnished by the parties". Adducing evidence by way of affidavits and documents is the rule and oral testimony is an exception to be permitted only at the discretion of the Judge. That discretion should be exercised judicially, only in a fit case and not as a matter of course and not be surrendered to parties or their counsel. Under this section the parties are not entitled as of right to lead oral evidence. Section 72 provides:-

> "A determination and order under this Part shall be made after examination and consideration of -
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> (a) the information filed and the affidavits and documents furnished;
> (b) such other evidence on any matter arising on the affidavits or documents furnished as the Court may permit to be led on that matter;
> (c) such oral or written submissions as may be permitted by the Judge of the Primary Court in his discretion.

The information, affidavits and documents of parties will identify their respective positions in regard to the issue of possession at the time of the filing of the information, for the purpose of the determination and order under section 68. If the question of possession or dispossession by any of the parties at the relevant time is disputed then the Court may permit oral evidence of the parties and their witnesses directed to that question only, for the purpose of ascertaining the true position. It is imperative that the Judge should so contain the inquiry and not allow parties to enlarge or convert the inquiry into a full scale trial of civil issues, as in a civil case.

Hence, where the information filed and the affidavits furnished under Section 66(2) were sufficient to make a determination under Section 68, the further inquiry embarked upon by the Judge was not warranted by the mandatory provisions of section 72 and was in excess of his special jurisdiction. The Judge should have made his determination on the first day of the inquiry itself, namely 17.1.80, that the appellant was in possession of the land and made order that the appellant was entitled to possession of the said land.

The question was raised as to what was the consequence of the failure of the Judge to observe the time-limits prescribed for the various acts and steps leading to the determination and order under

Section 68. It is significant that the prescription of time is preceded by the word 'shall'. The obligatory nature of the requirement that the particular step/act should be taken or done within a fixed time is indicated by the word 'shall'. This expression is generally used to impose a duty to do what is prescribed, not a discretion to comply with it according to whether it is reasonable or practicable to do. Prima facie the word 'shall' suggests that it is mandatory, but that word has often been rightly construed as directory. Everything turns on the context in which it is used; and the purpose and effect of the section in which it appears. It is to be noted that the statute does not declare what shall be the consequence of non-compliance by Court with regard to this requirement as to time limit prescribed by the law. Are these procedural rules to be regarded as mandatory, in which case disobedience will render void or voidable what has been done, or as directory, in which case disobedience will be treated as an irregularity not affecting what has been done? It is to be observed that this obligation with regard to time limit is imposed on court, over whose acts or omissions the parties do not have any control. Maxwell on 'Interpretation of Statutes' 11th Edition, at page 369 appositely states –

> "Where the prescription of a statute related to performance of a public duty and where invalidation of acts done, in neglect of them would work serious general inconvenience or injustice to persons who have no control over those entrusted with the duty yet not promote the essential aims of the legislature, such prescriptions seem to be generally understood as mere instructions for the guidance and government of those on whom the duty is imposed, or, in other words, as directory only. Neglect of them may be penal, indeed, but it does not affect the validity of the acts done in disregard of them. It has often been held, for instance, when an Act ordered a thing to be done by a public body or public officers and pointed out the specific time when it was to be done, then the Act is directory only and might be complied with after the prescribed time."

In this context, one may also invoke the maxim "Actus curiae neminem gravabit" (an act of Court shall prejudice no man). In my opinion this maxim which is founded upon justice and good sense may be appropriately applied to salvage a determination and order made under section 68, where the Judge has failed to observe the time-limits imposed by the legislature for the various procedural steps

prescribed by it. The Judge is certainly to be blamed but a party in whose favour such an order is made should not suffer for the Judge's default.

A passage from my judgment in *Nagalingam Vs. Lakshman de Mel*, (2), in respect of a similar situtation where the Commissioner of Labour had not made his order within the time prescribed under the Termination of Employment of Workmen (Special Provisions) Act No. 45 of 1971 has application to the present problem.

> "The delay should not render null and void the proceedings and affect the parties, as the parties have no control over the proceedings. It could not have been intended that the delay should cause a loss of jurisdiction, that the Commission had to give an effective order of approval or refusal. In my view, a failure to comply literally with the aforesaid provisions does not affect the efficacy or finality of the Commissioner's order made thereon. Had it been the intention of the Parliament to avoid such order nothing would be simpler than to have so stipulated."

I am therefore of the view 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) to make the determination and order under Section 68.

Another contention urged by counsel for the appellant is that an order based on the settlement arrived at by parties on 24.9.80, after the time prescribed by Section 67 of the Act, cannot be treated as an order to which Section 73 would apply. It is not necessary to decide on the correctness of this contention as admittedly the Judge has not made any order on this settlement in question and hence there is no foundation for the imposition of any penalty under Section 73.

For the reasons set out above I set aside all proceedings had in this case on and after 17.1.80, including the proceedings for alleged contempt of court, purporting to be held under Section 73 of the Act and direct the Judge to determine nunc pro tunc, under Section 68 that the appellant was on the date of the filing of the information in possession of the land in dispute in extent 8 acres 1 rood and 22 perches and to make order declaring that the appellant is entitled to the possession of the said land. I allow the appeal and set aside

the order of the Court of Appeal and send the case back to the Judge, Primary Court, with the order that he should comply with the aforesaid direction.

The respondent will pay the appellant Rs. 750/- as costs of this Court and of the Court of Appeal.

VICTOR PERERA, J. – I agree.
COLIN-THOMÉ, J. – I agree.

Proceedings after 17.1.80 set aside and case sent back for order.