KARUNANAYAKE
VS.
SANGAKKARA

COURT OF APPEAL
SOMAWANSA J (P/CA)
WIMALACHANDRA. J
CA 475/2002
CA (PHC) 213/2001
H. C. KANDY 21/2001
PRIMARY COURT, KANDY 73143
MAY 9, 2005.

Primary Courts Procedure Act. S66(2), S68, S69, A71, S72, S78-Administration of Justice Law 44 of 1973 - S62-Can a Primary Court Judge summon witness of his choice ex mero motu ? - Closure of case-Can the Primary Court Judge reopen case and summon a witness ?

The Primary Court Judge after having fixed the matter for order, without delivering his order issued summons on the Grama Sevaka and another witness and re-fixed the matter for inquiry. The respondent- petitioners moved the High Court in Revision and the said application was rejected. On appeal to the Court of Appeal -

(1) The objective of the procedure laid down in the Primary Courts procedure Act is to do away with long drawn out inquiries and determinations to be founded on the information filed affidavits, documents furnished by parties.

(2) There is no provision for the Judge to call for oral evidence of witnesses of his own choice. He cannot be permitted to go on a voyage of discovery on his own to arrive at a decision when the parties have placed before him the material on which they rely and it is on this material that, he is expected to arrive at a determination.

Per Somawansa. J (P/CA)

"If this procedure is to be permitted then S72 would become redundant. It will also be opening the flood gates for long drawn out protracted inquiries when the primary object was for the speedy disposal of the dispute that has arisen".

Appeal from the Provincial High Court of Kandy.

Cases referred to :

1. *Ramalingam* vs. *Thangarah* 1982 2 Sri LR 693.
2. *Kanagasabai* vs. *Mailvanaganam* 78 NLH 280

S. N. *Vijithsingh* for petitioners.

L. C. *Seneviratne, P. C.*, with *A. Dharmaratne* for 1st and 2nd respondents.

July 1, 2005

Andrew Somawasa, J. (P/CA)

The petitioners-respondents initiated proceedings in the Primary Court Kandy seeking a declaration that they are entitled to the lawful possession of lot 01 in plan No. 2019 and an interim order to evict the respondents-petitioners from the aforesaid land and premises and to place the petitioners-respondents in possession thereon. The learned Primary Court Judge granted the interim order as prayed for by the petitioners-respondents. The respondents-petitioners objected to the said interim order but the learned Primary Court Judge having considered the objections refused to vacate the interim order. Thereafter three others namely the two Casichettys' and one Heen Kumari Sangakkara Ranasinghe were also added as intervenient-respondents to the proceedings and they too filed their objections to the petitioner-respondent's application. After the filing of objections and counter objections by way of affidavit by all parties along with their documents the learned Primary Court Judge fixed the matter for order on 07.02.2000 on which day the Primary Court Judge without delivering his order issued summons on the Grama Seva Niladhari and Y. L. Sumanaratne and re-fixed the matter for inquiry. Against the aforesaid order dated 07.12.2000 the two Casiechettys' filed a revision application in the High Court of Kandy and obtained an interim order in the first instance restraining the Primary Court from proceeding further. However, after inquiry the learned High Court Judge by his judgment dated 30.08.2001 dismissed the said revision application. From the aforesaid judgment of the High Court Judge the aforesaid two Casiechettys' appealed to the Court of Appeal and the said appeal is numbered CA(PHC) 213/2001.

In the meantime the original respondent-petitioner filed an application for acceleration of the said appeal and this Court having considered the point in issue in appeal, made order that the application for acceleration of the appeal as well as the main appeal be heard together and all parties agreed to tender written submissions by 13.12.2000 and the judgment thereon was to be delivered by Amaratunga, J. on 16.01.2003 but unfortunately the judgement was never delivered. When this matter came up before the present bench, parties called upon Court to deliver judgment on the written submissions already tendered by them.

The substantial question that this Court is called upon to decide is the correctness and the validity of the decision of the learned Primary Court Judge to summon the Grama Seva Niladhari and Y. L. Sumanaratne after fixing a date for the delivery of the order in this case.

It is contended by counsel for the petitioners-respondents that as all parties to the instant action claim to have been ousted from possession by other parties the desire to have independent as well as important evidence on the question of possession prior to dispossession has led to this decision to call the two witnesses. He further submits that though Part VII of the Primary Court Act has no specific provision giving the Judge the right to call witnesses, the *casus ommisu* Section 78 of the Primary Court Procedure Act permits this to be done having referred to the provisions of the Civil Procedure Code with relevant adaptation. Therefore he submits that the decision of the Court to call the evidence of the Grama Sevaka and Y. L. Sumanaratne is permissible and valid.

The question whether the Primary Court Judge has the jurisdiction to summon witnesses of his choice *ex mero motu* without stating the reasons for it when the evidence of such witnesses is already on record with the other reliable evidence to test its credibility and specially after he had decided to give his order without calling for oral evidence and parties having agreed to it has been aptly dealt by Sharvananda, J. as he then was in his judgment in ***Ramalingam vs. Thangarajah***[1]. Before I come to that decision it would be useful to consider the relevant section that is applicable to the issue at hand Section 72 of the Primary Courts Procedure Act.

"A determination and order under this Part shall be made after examination and consideration of–

(*a*) the information field 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 submission as may be permitted by the Judge of the Primary Court in his discretion."

The objective of the procedure laid down in the Primary Court Procedure Act is to do away with long drawn out inquiries and determination to be founded on the information filed, affidavits and documents furnished by the parties. With reference to the aforesaid Section 72 of the Primary Courts Procedure Act, Sharvananda, J as he then was in **Ramalingam vs. Thangarajah** (supra) at 701 observed :

> "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 or 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."

It was held in that case :

> "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".

Counsel for the petitioners-respondents accept the position that Part VII of the Primary Courts Procedure Act has no specific provisions which give the Judge the right to call witnesses. However, he submits as aforesaid that the *casus ommisus* Section 78 would provide the procedure for such an eventuality to have recourse to the provisions in the Civil Procedure Code. I am unable to agree with this proposition for the simple reason that

the inquiry being held in terms of Part VII of the Primary Courts Procedure Act should not be made a protracted trial as in a civil court. As Section 72 indicates, oral evidence is frowned upon and only permitted on matters arising on the affidavit or documents furnished as the Court may permit to be led on that matter. Clearly there is no provision for the Judge to call for oral evidence of witnesses of his own choice. He cannot be permitted to go on a voyage of discovery on his own to arrive at a decision when the parties have placed before him the material on which they rely and it is on this material that he is expected to arrive at a determination. The learned Primary Court Judge as well as the High Court Judge has clearly misunderstood the primary object of the Part VII of the Primary Courts Procedure Act. In this respect, I would refer to the observation made by Sharvananda, J as he then was in *Ramalingam vs. Thangarajah* (supra) at 299 :

> "The procedure of an inquiry 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 inqure 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 prescrbed by the provisions of the Act."

The case of ***Kanagasabai vs. Mailvanaganam***[2] considered Section 62 of the Administration of Justice Law No. 44 of 1973 (now repealed) and the observation made therein by Sharvananda, J. with reference to Section 62 apply equally well to Sections 66 and 68 of the Primary Courts Procedure Act which correspond to them.

> "Section 62 of 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 .....".

In view of the foregoing reasons my considered view is that the learned Primary Court Judge having closed the case and fixing the matter for judgment erred in re-opening the inquiry and further erred in summoning two witnesses *ex mero motu* when there was no provision for such a procedure.

It is to be seen that the learned High Court Judge in dismissing the revision application filed by the two Casiechettys' has also failed to address his mind to the jurisdiction of the Primary Court Judge to call for further evidence *ex mero motu* and has erred in coming to a finding that the Primary Court Judge was at liberty to call for further evidence if the evidence on record is insufficient to determine the issue. I would say it is an erroneous supposition of the learned High Court Judge when he observed : "What steps primary Court Judge could take if he finds that he has no sufficient facts to write the judgment other than to call for further evidence". If this procedure is to be permitted in making a determination in terms of Part VII of the Primary Courts Procedure Act then Section 72 of the aforesaid Act would become redundant. It would also be opening the flood gates for long drawn out protracted inquiries when the primary object of Part VII of the Primary Courts Procedure Act was for the speedy disposal of the dispute that has arisen. Furthermore, it would permit the Primary Court Judge to go on a voyage of discovery on his own contrary to provisions in Section 72 of the Primary Courts Procedure Act.

For the foregoing reasons, I would allow the appeal and set aside the judgment of the learned High Court Judge as well as the order of the learned Primary Court Judge dated 07.12.2000 issuing summons on the two witnesses. I also direct the learned Primary Court Judge to make his determination in accordance with the provisions of Section 72 of the Primary Courts Procedure Act. He is further directed to make his determination and order as expeditiously as possible. The petitioners-appellants are entitled to costs fixed at Rs. 5,000-.

Wimalachandra, J. I agree.

Appeal allowed.