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CIVIL PROCEDURE CODE

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CM 7651 – 2,500 (2007/06)

RANASINGHE & OTHERS
VS
L. B. FINANCE LTD.,

COURT OF APPEAL
WIMALACHANDRA J
CA (REV) 534/03
D. C. COLOMBO 42974/MHP
JANUARY 28, 2005
FEBRUARY 3, 2005

Civil Procedure Code-Sections 85, 839-ex-parte Judgement-Summons not served ? Application under Section 839-Dismissed on the ground that Court has no jurisdiction-Leave to Appeal refused-Special Leave to Appeal Application rejected-Revision application-Could it be entertained ? – Validity ?

The Defendant-Petitioners made an application to the District Court to have the Ex-parte decree vacated on the ground of non-service of summons under Section 839 of the Code. This application was rejected on the basis that the Court has no jurisdiction to entertain the application. The leave to appeal application against this Order was refused by the Court of Appeal. The Supreme Court refused special Leave to Appeal. The Petitioner thereafter filed an application in Revision to set aside the Order of the Trial Judge which dismissed the application made by the Defendant Petitioners to have the *ex-parte* Judgment vacated.

HELD:

(i) An Inquiry on an application to set aside an exparte decree is not regulated by any specific provision in the Code. Such inquiries must be conducted consistently with the principles of natural justice and the requirements of fairness. Section 839 of the Code recognises the inherent power of the Court to make any order as may be necessary to meet the ends of justice.

(ii) It is the duty of the District Judge to hold an Inquiry into the question of non service of summons-failure to serve summons is a failure which goes to the root of the jurisdiction of the Court to hear and determine the action against the Defendant-a Judgment so entered is a nullity.

(iii) Refusing to hold an Inquiry into the application made on the basis of non-service of summons for the sole reason that the Court has no jurisdiction to hold an Inquiry, is demonstrably and manifestly wrong.

(iv) The reason for the dismissal of the leave to the appeal application is the non-appearance of the Defendants and their Counsel on the date of Inquiry. The Supreme Court upheld the Order of dismissal of the Court of Appeal. When the Defendants appealed to the Supreme Court from the Order of the Court of Appeal, the Defendants did not seek to question the impugned order of the District Judge. The Court of Appeal as well as the Supreme Court did not affirm the impugned order, both Courts did not go into the merits of the application.

(v) The impugned order is based upon a misapprehension that the Court has no jurisdiction to inquire into an application to set aside an exparte decree on the basis of non-service of summons, is manifestly erroneous.

Per Wimalachandra J.,

> "In the circumstances, I am of the view that a miscarriage of justice has occurred by the said Order, due to the violation of the fundamental rule of procedure and the powers of Revision are wide enough to embrace a case of this nature, it is my further view that non interference by this Court will cause a denial of justice and irremediable harm to the Defendant.

(vi) If the impugned order is manifestly erroneous and is likely to cause great injustice, Court should not reject the application on the ground of delay alone.

Application in Revision from an Order made by the District Court of Colombo.

CASES REFERRED TO:

1. *De Fonseka vs Dharmawardena* 1994 3 Sri LR 49
2. Ittepane vs Hemawathie 1981 1 Sri LR 476 at 485
3. *Sitthi Maleeha* and another vs *Nihal Ignatius Perera* and others 1994 3 Sri LR 770
4. *Sinnathangam* vs *Meera Mohideen* 60 NLR 394

5. *Abdul Cader* vs *Sittnisa-*
6. *Katiramanthamby* vs *Lebbethamby Hadjiar* 75 NLR 228
7. Mrs. *Sirimavo Bandaranayake* vs Times of Ceylon Ltd. 1995 1 Sri LR 22
8. *Soysa* vs *Silva*-2000 2 Sri LR 235
9. *Biso Menika* vs *Cyril De Alwis*-1982 1 Sri LR 368 at 379

Peter Jayasekera for Defendant - Petitioner
Sanjeewa Jayawardena for Plaintiff - Respondent

March 1, 2005
Wimalachandra, J

This is an application in revision filed by the 1st, 2nd and 3rd defendants-petitioners (1st, 2nd & 3rd defendants) from the order of the learned Additional District Judge of Colombo dated 13.03.2001. By that order the Learned Additional. District judge had dismissed the application made by the defendants to have the *ex-parte* judgment entered against them vacated.

The plaintiff-respondent (plaintiff) filed action upon a lease agreement against the 1st to 3rd defendants. The defendants defaulted in appearing on the summons returnable date and the learned Judge fixed the case for *ex-parte*. The Court directed the Fiscal to serve the decree on the defendants. Thereafter the defendants made an application to Court to have the *ex-parte* decree vacated on the ground of non-service of summons and also sought an interim order that the writ of execution of the decree be stayed until this application to set aside the *ex-parte* decree is determined.

However, it appears that (vide journal entry dated 07.10.1997 of the District Court case record) the 1st defendant had appeared on the summons returnable date. In the said journal entry it is clearly recorded that the 2nd and 3rd defendants were absent. It is the position of the 1st defendant that he was not present in Court on the summons returnable date as summons was not served on him. In any event this could only be decided at the inquiry into the application made by the defendants to set aside the decree on the ground of non-service of summons. All three defendants made the application to have the *ex-parte* decree vacated under section 839 of the Civil Procedure Code. The learned Additional District Judge fixed the matter for inquiry. When the matter was taken up on 13.03.2001 the learned

Additional District Judge, after hearing the submissions made by counsel, dismissed the application made by the respondent on the ground that the Court has no jurisdiction to entertain their application.

When a defendant complains that summons had not been duly served on him, the Court must hold a proper inquiry. The affected party must be allowed to prove that the summons was not served on him.

An inquiry on an application to set aside an *ex-parte* decree cannot be limited to oral submissions. Since the onus is on the defendants to prove that the summons were not served on them, they should have been allowed to lead evidence and call witnesses to prove that summons were infact not served on them. In the instant case what the learned Judge had done was, after listening to the submissions made by the counsel, summarily dismissed the defendants' application without giving them an opportunity to prove, by calling evidence that summons were not served on them. That is, the learned Judge had dismissed the application of the defendants without holding a proper inquiry.

In the case of ***De Fonseka Vs. Dharmawardena***[1] the Court of Appeal held that an inquiry on an application to set aside an *ex-parte* decree is not regulated by any specific provision in the Civil Procedure Code. Such inquiries must be conducted consistently with the principles of natural justice and the requirements of fairness. Section 839 of the Civil Procedure Code recognizes the inherent power of the Court to make an order as may be necessary to meet the ends of justice.

In the case of **Ittepana Vs. Hemawathie**[2] at 485 Sharvananda, J. (as he then was) stated :

> **"Thus, when a complaint is made to Court that injustice has been caused by the default of the Court in not serving summons, it is the duty of the Court to institute a judicial inquiry into the complaint and ascertain whether summons had been served or not, even going out side the record and admitting extrinsic evidence and if it finds that summons had not been served, it should declare its *ex-parte* order null and void and vacate it."**

In the instance case the defendants have taken the position that summons were not served on them personally, in that they are challenging the report and the affidavit of the Fiscal. In this situation the Fiscal's evidence is essential and the defendants are entitled to cross-examine him to test the veracity of his evidence.

In this regard it is apt to refer to the observations made by S. N. Silva, J. /CA (as he then was) in **De Fonseka Vs. Dharmawardena** (Supra) at 53

> **"In the face of the evidence of the defendant that summons was not served on him personally, the report and the affidavit of the Fiscal is challenged. Therefore, the report and affidavit of the Fiscal should be tested in the evidence. This evidence is an essential component of an inquiry into an application of a defendant to set aside an *ex-parte* decree on the basis of non-service of summons."**

It is clear from these decisions that it is the duty of the District Judge to hold an inquiry into the question of non-service of summons. Sharvananda, J. (as he then was) in ***Ittepana Vs. Hemawathie (supra)*** said that the failure to serve summons is a failure which goes to the root of the jurisdiction of the Court to hear and determine the action against the defendant. If a defendant is not served with summons or otherwise notified of the proceedings against him, the judgment entered against him is a nullity.

The same position was taken in the case of **Sitthi Maleeha and another Vs. Nihal Ignatius Perera and others**[3] where it was held *inter alia* that the failure to serve summons goes to the root of the jurisdiction of the Court. If a defendant is not served with summons or otherwise notified of the proceedings against him, the judgment entered in such circumstances is a nullity and the persons affected by the proceedings can apply to have them set aside *ex-debito justitiae*. The District Court has inherent jurisdiction in terms of section 839 of the Civil Procedure Code to inquire into the question of non-service of summons.

In the instant case it appears that the impugned order made by the learned District Judge in refusing to hold an inquiry into the application made by the defendants on the basis of non-service of summons, for the sole reason that the Court has no jurisdiction to hold an inquiry, is

demonstrably and manifestly wrong. The Supreme Court and the Court of Appeal has held in several cases (supra) that the District Court has inherent jurisdiction in terms of section 839 of the Civil Procedure Code to inquire into the question of non-service of summons.

In the instant case, before making the present application in revision, the defendants had filed an application for leave to appeal against the aforesaid impugned order made by the learned Judge in refusing the application made by the defendants to vacate the *ex-parte* judgment entered against them on the ground that the District Court has no jurisdiction to inquire into it. The Court of Appeal dismissed the said application for want of due prosecution and lack of due diligence as the petitioner was absent and unrepresented on the date of the inquiry on 9.7.2001. Thereafter the petitioners filed an application to re-list this matter. The Court directed to support that application on 2.5.2002. However the said application was dismissed as well, as the petitioner was absent and unrepresented on 2.5.2002. The petitioners then filed an application for special leave to appeal from the order of the Court of Appeal to the Supreme Court. The Supreme Court after hearing both parties upheld the order of the Court of Appeal and dismissed the defendants' application on 18.11.2002.

The defendants thereafter filed this application in revision in the Court of Appeal on 31.03.2003 to have the said impugned order of the District Judge dated 13.03.2001 set aside.

The plaintiff-respondent objected to this application mainly on the following two grounds :

(i) The defendants cannot be permitted in law to file this application in revision in view of the dismissal of the previous leave to appeal application by the Court of Appeal and the dismissal of the special leave to appeal application therefrom by the Supreme Court.

(ii) The defendants' application in revision should be dismissed due to laches.

An inquiry on an application to set aside an *ex-parte* decree on the basis of non service of summons is not regulated by any specific provision of the Civil Procedure Code. The Court has the inherent power to conduct

such inquiries in terms of section 839 of the Civil Procedure Code to vacate an order made *ex-parte* where it was made not due to a fault of that party.

With regard to the dismissal of the leave to appeal application filed in the Court of Appeal, the reason for the dismissal is the non appearance of the defendants and their counsel on the date of inquiry. In terms of Rule 34 of the Supreme Court Rules 1990 published in the Gazette (extraordinary) No. 665/32, 7.6.1991, where an appellant or a petitioner who has obtained leave to appeal fails to show due diligence in taking all necessary steps for the purpose of prosecuting an appeal or application, the Court may, on an application on that behalf by a respondent, or of its own motion, on such notice to the parties as it shall think reasonable in the circumstances, declare the appeal or application to stand dismissed for non prosecution. Thus it will be seen that the Court of Appeal has not gone into the merits of the application. The defendants sought special leave to appeal from the said order of dismissal by the Court of Appeal to the Supreme Court. The Supreme Court upheld the order of dismissal of the Court of appeal and consequently dismissed the defendant's application.

The question that arises for consideration is whether the defendants can pursue this application in revision in view of the aforesaid judgments of the Court of Appeal and of the Supreme Court. It is to be noted that in this instance both the Court of Appeal and the Supreme Court have not gone into the merits of the defendants' application.

It is to be observed that when the Court of Appeal dismissed the defendants' application for leave to appeal from the order of the District Judge refusing the defendants' application to vacate the *ex-parte* order, the Court of Appeal did not consider the legality or correctness of the impugned order on merits. Similarly when the Supreme Court dismissed the application for special leave to appeal from the order of the Court of Appeal, the Supreme Court did not consider the legality or propriety of the said order of the District Court. When the defendants appealed to the Supreme Court from the Order of the Court of Appeal, the defendants did not seek to question the impugned order of the District Judge. It is to be further noted that both the Court of Appeal and the Supreme Court did not affirm the impugned order of the learned District Judge.

It is settled law that the superior Courts have the power to revise an order made by an original Court even where an appeal has been taken

against the order if the application discloses exceptional circumstances. It was held in the case of **Sinnathangam Vs. Meera Mohideen**[4] that the Supreme Court possesses the power to set aside in revision an erroneous decision of the District Court in an appropriate case even though an appeal against such decision has been correctly held to have abated on the ground of non compliance with some of the technical requirements in respect of the notice of security. In this case T. S. Fernando, J. at 395 made the following observation :

> **"The sole argument upon which the petitioner's counsel relies is that the judgment is manifestly erroneous in law, and that this error in law has resulted in a denial of the petitioner's right to have the action instituted against him dismissed. He refers us to two fairly recent decisions where this Court has exercised its powers to revise decisions reached in District Courts in somewhat similar circumstances. The first of these is the case of *Abdul Cader V. Sittinisa* where this Court, notwithstanding that an appeal had abated, heard the appellant by way of revision observing that it did so as a matter of indulgence and interfered with the judgment appealed from on a point of law. The other is a more recent and hitherto unreported decision-S. C. 309/D. C. Colombo 36064/M – S. C. Minutes of 17th March 1958-in which this Court while rejecting an appeal for noncompliance with the provisions of sections 755 and 756 of the Civil Procedure Code stated that it would be prepared to deal with the questions raised by way of revisions as important questions of law arose on the appeal. We do not entertain any doubt that this Court possesses the power to set right an erroneous decision of the District Court in an appropriate case even though an appeal against such decision has been correctly held to have abated. It only remains therefore for us to examine whether there is a substantial question of law involved here and whether this is an appropriate case for us to exercise the powers of revision vested in this Court by section 753 of the Civil Procedure Code."**

An appeal to the Supreme Court was decided against the respondent parties, although it would not have been so decided if the Court had been invited by the respondent to exercise its powers of revision in their favor. Within a few weeks of the decision of the appeal, the respondent sought

relief by way of an application in revision. It was held in the case of ***Katiramanthamby vs. Lebbethamby Hadjia***[6] that the Supreme Court had the power, acting in revision, to set aside the order that had been made in the appeal.

In the case of ***Mrs. Sirimavo Bandaranaike Vs. Times of Ceylon Limited***[7] the question of law that came up for decision in the appeal was whether the Court of Appeal had jurisdiction, in revision, to reverse or vary an *ex-parte* judgment entered against a defendant upon default of appearance. It was held in this case *inter alia* that the revisionary jurisdiction of the Court Appeal in terms of Article 138 of the Constitution extends to revising or varying an *ex-parte* judgment against the defendant upon default of appearance on the ground of manifest error or perversity or the like. A default judgment can be canvassed on its merits in the Court of Appeal in revision, though not in appeal and not in the District Court itself.

As stated above, the impugned order of the District Judge is based upon a misapprehension that the Court has no jurisdiction to inquire into an application to set aside an *ex-parte* decree on the basis of non-service of summons, which is manifestly erroneous.

In the circumstances I am of the view that a miscarriage of justice has occurred by the said order of the District Judge due to the violation of a fundamental rule of procedure, and the powers of revision of the Court of Appeal are wide enough to embrace a case of this nature. It is my further view that non-interference by this Court will cause a denial of justice and irremediable harm to the defendants. Therefore, there are special circumstances for this Court to exercise its powers of revision.

It was held in the case of ***Soysa Vs. Silva***[8] that the power given to a superior Court by way of revision is wide enough to give it the right to revise any order made by an original Court. Its object is the due administration of justice and the correction of errors sometimes committed by the Court it self, in order to avoid miscarriage of justice.

The next matter to be decided is whether the defendants are guilty of laches. The question whether delay is fatal to an application in revision depends on the facts and circumstances of the case. If the impugned

order is manifestly erroneous and is likely to cause great injustice, the Court should not reject the application on the ground of delay alone.

In the case of ***Biso Menike Vs. Cyril de Alwis***[9] Sharvananda, J. at 379 observed :

> **"When the Court has examined the record and is satisfied the Order complained of is manifestly erroneous or without jurisdiction the Court would be loathe to allow the mischief of the Order to continue and reject the application simply on the ground of delay, unless there are very extraordinary reasons to justify such rejection. Where the authority concerned has been acting altogether without basic jurisdiction, the Court may grant relief in spite of the delay unless the conduct of the party shows that he has approbated the usurpation of jurisdiction. In any such event, the explanation of the delay should be considered sympathetically."**

For these reasons, I hold that the District Judge erred in dismissing the application made by the defendants to set aside the *ex-parte* decree on the basis that summons were not served on them. Accordingly, I set aside the order of the learned Additional District Judge dated 13.03.2001. The learned Additional District Judge is directed to proceed with the inquiry into the application to set aside the *ex-parte* decree entered in the District Court against the defendants. Accordingly, the application in revision is allowed. I make no order as to the costs of this application.

The Registrar is directed to return the District Court record with this order forthwith.

Application allowed.

District Judge directed to proceed with the Inquiry into the application to set aside the ex-parte decree entered.

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.

RATHNAYAKE
VS.
WIJEWARDANA AND OTHERS

COURT OF APPEAL,
SOMAWANSA, J. (P/CA) AND,
BASNAYAKE, J.,
CA 1106/2004,
DC GALLE 15068/P,
MARCH 10, 2005.

Civil Procedure Code - Partition action - Alleged co-owner constructing a building - Permissibility?

The plaintiff petitioner in the partition action instituted complained that the 1st defendant having entered the land unlawfully without any right or title is attempting to construct a building. The Court granted an enjoining order, but refused the interim injunction, on the basis that the 1st defendant is a co-owner.

The plaintiff petitioner moved in revision.

Held;

(1) The 1st defendant admits that the plaintiff is a co-owner, the plaintiff does not admit the 1st defendant as a co-owner. The pedigree filed by the defendant is different to that filed by the plaintiff.

(2) The defendant claims a share through a certain deed, this deed has to be examined and accepted to consider the 1st defendant as a co-owner.

(3) The court could not consider the defendant as a co-owner prior to considering the validity of the deed of the defendant he becomes a co-owner provided he gets a share through the said deed.

(4) Thus there is a serious question to be tried in this case, the plaintiff has a strong case.

APPLICATION in revision from an order of the District Court of Galle.

Cases referred to :

1. *Elpi Nona vs. Punchi Singho* -52 NLR 115.
2. *Sumanaweera vs. Mahinda* -(1998)3 Sri LR 4

S. N. Vijith Singh for Petitioners.

Ms. Malini Maitipe for 1st repondents.

Cur.adv.vult

July 28, 2005
Eric basnayake, J.

The plaintiff petitioner (plaintiff) filed a Partition action in the District Court of Galle, to have the land called "Deeganowita", an extent of 10 kurunees of paddy, to be partitioned. The plaintiff named 6 defendants. Shares were allotted to the plaintiff and 2-6 defendants in the plaint. The plaintiff states that the 1st defendant having entered into this land unlawfully without any right or title is now attempting to construct a building. The District Court issued notice and an enjoining order at the first instance.

The 1st defendant-respondent (1st defendant) filed objections claiming 1/14 and 1/28 shares through a deed marked V2. He admits to the

construction of a building. The 1st defendant took up the position that the construction was in proportion to his share. The defendant does not disclose the area in which the construction is being done or the extent to which the defendant is entitled to occupy in this land. The defendant also does not claim exclusive possession.

The Learned District Judge has found that the plaintiff has failed to disclose the manner in which the construction is being done and the progress thereof. The court has also found that the 1st defendant is a co-owner. Therefore as a co-owner the 1st defendant is entitled to enjoy the land proportionate to his share and the onus is on the plaintiff to prove that the defendant is using the land disproportionate to his share and also that irreparable damage would be caused in the event of a construction. The court found that the plaintiff has failed to establish a case against the defendant and refused an interim injunction.

The plaintiff in this case is seeking to revise the said order of the learned District Judge dated 21.04.2004. After the counsel was heard in support, this court issued notice on the defendants. The court also issued an interim order in terms of prayer 'c' to the petition staying the construction. The counsel for the 1st defendant informed court that he would not be filing any objections to this application. At the hearing the learned counsel for the petitioner agreed to file written submissions.

The following facts are not disputed in this case. Namely,

(1) The corpus.
(2) The fact that the plaintiff is entitled to a share.
(3) The fact that the defendant is constructing a building in the corpus.

In *Elpi Nona* vs. *Punchi Singho*[1] Gratiaen J. held that "every co-owner has the right to enjoy his share in the common land reasonably and to an extent which is proportionate to his share, provided that he does not infringe the corresponding rights of his co-owners. More over neither he nor they can, except by mutual consent apply the common land to new purposes in such a manner as to alter the intrinsic character of the property. Should the erection of a building for instance (or for that matter any assertion of a co-proprietary right) be proved to constitute an interference with the legitimate use of the property by an objecting co-owner, a cause of action accrues to compel the wrongdoer to restore the status quo. The Question

whether in any Particular case a co-owner has exceeded his rights or violated the rights of others must be determined by reference to all the relevant factors, and cannot be solved as an abstract question of law."

Each co-owner is entitled to a reasonable use of the property proportionate to his interests in accordance with the object for which the property is intended to be used. Weerasuriya J. in *Sumanawathie* vs. *Mahinda* [2] citing wille, Principles of South African Law editor at page 213 said Construction by one co-owner does not necessarily require the leave and acquiescence of the others. The law does not require the consent of all the co-owners to construct buildings on the common property provided the act of building does not constitute either an alteration of the inherent character of the common property or an attempted user of the common property to an excessive extent G. L. Pieris - Laws Property 15 Ed page 396.

The 1st defendant admits that the plaintiff is a co-owner. The plaintiff does not admit the 1st defendant as a co-owner. The 1st defendant is claiming a share through a deed marked "V2". This deed has to be examined and accepted to consider the 1st defendant as a co-owner. The 1st defendant was never in possession of this land until he started constructing this building. The present action was filed when the 1st defendant began to appear on this land. Where the act of building would constitute an unexpected and novel use of co-owned property consent of all other co-owners is necessary - Weerasuriya J. *Sumnawathie* vs. *Mahinda* (Supra)

The extent of the land is given as 10 "kurunees". There is no indication as to the nature of the land ; whether it is a land for building or cultivation. The 1st defendant too does not claim this land to be a land meant for building. The 1st defendant, although he claims that he is building in proportion to his share, does not mention the extent of his share or the extent of land used for this building. I am of the view that the learned District Judge erred in considering the 1st defendant as a co-owner prior to considering the validity of the deed marked "V2". The requirement of consent applies only to co-owners. The 1st defendant becomes a co-owner provided he gets a share through the deed "V2".

The defendant filed a pedigree which is different to the pedigree filed by the plaintiff. Therefore there is a serious question to be tried in this case.

The 1st defendant admits that the plaintiff is entitled to a share. If the plaintiff's pedigree is accepted by court, the defendant may even lose. Therefore I am of the view that the learned District Judge erred by deciding that the plaintiff did not have a strong case.

In view of the established principles enumerated above I am of the view that the learned District Judge erred in law in refusing an interim injunction. The court therefore allows this application and sets aside the order of the learned District Judge dated 21.04.2004. The court also issues an interim injunction as prayed for in the plaint. The plaintiff is entitled to costs in a sum of Rs. 10,000/- by the 1st defendant.

SOMAWANSA, J., — I agree

Application allowed.

LOWE
vs.
DAHANAYAKE AND ANOTHER

COURT OF APPEAL,
WIMALACHANDRA, J.
CALA 37/2005
DC NEGOMBO 6385/L
22ND AUGUST, 2005

Interim injuction - Preventing access being obstructed - A person having no soil rights, can he obstruct another using the road ? - How does a right of way come into existence ? Interim relief-Ingredients-Can the District Court invalidate an order made by the Primary Court - Primary Courts Procedure Act, Sections 66, 67, 68 and 69.

The plainfitt-responents instituted action and prayed *inter-alia*, for a declaration that they are entitled to a right of way over the roadway depicted in the plan and furhter sought an enjoining order/interim injuction restraining the defendant from obstructing the plaintiffs from using the roadway. The Court granted interim relief sought. The defendant petitioner sought leave to appeal from the Court of Appeal.

***Held*:**

(1) A right of way can come into existence, by an agreement duly registered, by Crown Grant, by prescriptive possession, by dedication to the public or by a declaration by a competent statutory authority that a right of way of necessity has been granted.

(2) The defendant is not the owner of the roadway - She is not the owner of the servient tenement - she is a mere user of that road, and as she has no soil rights in respect of the right of way, she has no right to obstruct the plaintiffs from using the roadway.

(3) It is only the owner of the servient tenement who can oppose the plaintiff using the road way.

(4) The plaintiffs have a *prima facie* case, the balance of convenience favours them, and the equitable considerations favour the grant of an injunction.

Per Wimalachandra J.

"The District Court cannot issue an interim injunction which will nullify or invalidate an order made by a Primary Court - if the Primary Court had already made an interim / final order for possession of land, in the instant case the effect of the interim injunction granted by the District Court is not contrary to the order made by the Primary Court Judge."

APPLICATION for leave to appeal from an order of the District Court, Negombo

Cases referred to :

1. *Jinadasa Vs. Werasinghe 31 NLR 33*
2. *Perera Vs. Gunatilleke, 4 NLR 181 at 182*
3. *Kanagasabai Vs. Mylvaganam, 78 NLR 288 (distinguished)*

D. H. Siriwardane for defendant petitioner

Ranjan Suwandaratne with *Ranjith Perera* for plaintiff-respondents

Cur.adv.vult.

2nd November, 2005

WIMALACHANDRA, J.

The defendant-petitioner (hereinafter referred to as the defendant) filed this application for leave to appeal from the order of the learned District Judge of Negombo dated 20.01.2005. By that order the learned judge granted the interim injunction prayed for by the plaintiff-respondents (hereinafter referred to as the plaintiffs) in their plaint. Briefly, the facts as set out in the petition are as follows :

The plaintiffs instituted this action bearing No. 6385/L in the District Court of Negombo against the defendant and prayed *inter-alia* for a declaration that the 1st plaintiff is, subject to the life interest of the 2nd plaintiff, the owner of the land described in the 2nd Schedule to the plaint, which is a divided portion of the land described in the 1st Schedule to the plaint (depicted in Plan No. 7815/2000) and for a declaration that the plaintiffs are entitled to a right of way over the roadway depicted in the plan No. 7815/2000 shown as the southern boundary. The plaintiffs also sought an enjoining order and an interim injunction restraining the defendant from obstructing the plaintiffs from using the said roadway. When the application for the interim injuction was taken up, both parties agreed to file written submissions and invited the Court to make the order on the written submissions and the documents filed by the parties. Accordingly, the Court made the order on 20.01.2005 granting the interim injunction sought by the plaintiff. It is against this order that the defendant has filed this application for leave to appeal.

The plaintiffs' title to the land described in the 2nd Schedule to the plaint, which is in extent of 17.2 perches, is not disputed. The land described in the 1st schedule to the plaint is bordering on the north by a 30 ft. wide

road and the south by the roadway described as Devata. The plaintiffs' father Don Cyril Samarasekera became the owner of the land described in the 1st schedule by deed of purchase No. 403 dated 15.01.1955 marked "P1". The said Don Cyril Samarasekera gifted the said land to the 1st plaintiff subject to the life interest of the said Don Cyril Samarasekera by deed No. 65689 dated 14.05.1988 marked "P3". The said Don Cyril Samarasekera constructed a house on the land described in the 2nd Schedule to the plaint, which is on the southern part of the land described in the 1st Schedule. This is shown in Plan No. 7815/2000 made by Hugh L. C. Dabrera, Licensed Surveyor marked "P4". It is the plaintiffs' case that the said Don Cyril Samarasekera built the said house and garage close to the southern end of the land facing the roadway described as the "Devata" in deeds marked "P1" and "P3". It is not in dispute that the said road "Devata" is now named Jayaratne Road, which is 20 ft. in width. The plaintiffs' position is that if Don Cyril Samarasekera had not used the said roadway in the south as a means of access, he would not have built the said house and the garage facing the said roadway. The architectural plan of the said house was produced marked "P5" and the plan showing the house built close to Jayaratne Road (previously called Devata Road) marked "P4".

The counsel for the defendant submitted that the plaintiffs have access to the land from the roadway shown to be 30 ft. in width as the northern boundary. The learned counsel further submitted that the learned Judge has not examined whether the plaintiffs have made out a *prima facie* case, in that, they were in fact entitled to a servitude over the said roadway and therefore the order of the learned Judge granting the interim injunction cannot stand. The learned counsel contended that only the defendant is entitled to the right of way over the said roadway by deed No. P13.

In order to entitle the plaintiffs to an interlocutory injunction, the plaintiffs must establish that there is a *prima facie* case in their favour. Once they clear that hurdle the next requirement is that the balance of convenience should favor the plaintiffs. The Court must also consider whether the equitable considerations favour the grant of an injuction. As regards

the above-mentioned first requirement, the Court must be satisfied that there is a serious question to be tried at the hearing and that on the facts before it there is a possibility of success if the facts alleged by the plaintiffs are proved. (Dalton J. in ***Jinadasa*** Vs. ***Weerasinghe***[1]

A right of way can come into existence by an agreement duly registered, by Crown Grant, by prescriptive acquisition, by dedication to the public, or by a declaration by a competent statutory authority that a way of necessity has been granted (Servitudes by Hall & Kellaway, page 70).

Before I proceed to consider the requirements of prescriptiive acquisition, it must be noted that the defendant is not the owner of the said roadway, in that the defendant is not the servient tenement, and she is a mere user of the said road. Title to a servitude may be acquired by prescription if the occupation or use of something over which a right is asserted has been exercised *nec vi, nec clam, nec precario.* (Servitudes by Hall and Kellaway, page 29). It must be openly exercised and the person asserting must have suffered no interference from the true owner, Further, the use of the roadway must take place without the consent of the true owner. These are essential elements to a prescriptive claim against the owner of the roadway. As I mentioned above, the defendant is not the true owner and she is one of the users of the roadway among several others. It is only the owner of the servient tenement who can oppose the plaintiff using the said roadway. In this case the defendant is not the owner but merely another user of the said roadway. It is to be noted that an adverse user for the purpose of prescriptive rights has to only show that he has been a user of the definite roadway. According to the evidence placed before the Court, the plaintiffs' father who bought this land on 15.01.1955 has this roadway as the southern boundary of his land. Thereafter the plaintiffs had build a house bordering the southern boundary of the said land facing the said roadway, which is the subject matter of this action. The certificate of confirmity was obtained for the said house on 30.11.1998 (*vide* "P6") All these are *prima facie* proof that they have been using the said roadway for well over ten years. Any sporadic interruption coming from another user of the said road, namely, the defendant is immaterial since she is not the owner of the said roadway.

It seems to me that the plaintiffs have used the said roadway, which is the southern boundary of their land as of right for a long period of time. This is borne out by the construction of the house and garage by the plaintiffs in close proximity to the southern boundary of their land facing the said roadway.

In the case of ***Perera*** Vs. ***Gunatilleke***[2] at 182, Bonsor C. J. observed:

> **"It seems to me that, where a person establishes that he has used a way as of right openly and continuously for a long period and is forcibly prevented from using it, he is entitled to an injuction to restore him to the quasi possession of the way, irrespective of whether he can establish the existence of a servitude. We will treat this action as a possessory action and grant an injuction which will restore the *status quo ante*"**

It is also to be noted that the defendant who has no soil rights in respect of the said right of way, has no right to obstruct the plaintiffs from using the said roadway.

The balance of convenience too favours the plaintiffs. Even if the injuction sought by the plaintiff is granted, it will not prevent the defendant from using the said roadway. It will only prevent the defendant from obstructing the plaintiffs from using the roadway. However, it the injunction is not granted their is nothing to prevent the defendent from obstructing the plaintiffs from using the roadway. Accordingly, the inconvenience which the plaintiff will suffer by the refusal of the injuction is greater than that which the defendant will suffer, if it is granted.

Finally, I will consider the objection raised by the learned counsel for the defendant that in view of the order made by the Primary Court, Negombo in Case No. P/3660, dated 20.11.1998, the District Court will not have jurisdiction to grant an interim injuction according to the judgment in the case of ***Kanagasabai*** Vs. ***Mylvaganam***.[3]

The facts which led to the filing of an information by the Police under Section 66 of the Primary Courts Procedure Act, No. 44 of 1979 was due to a dispute between the 1st party respondent, Yasasiri Ruwan Balasuriya, the 2nd party respondent W. Shereen Malcon Lovi and the 3rd party respondent Don Cyril Samarasekera over the said roadway, namely, Deveta *alias* Jayarathe road. The plaintiffs were not parties to the primary Court proceedings but the plaintiffs' predecessor in title to land was the 3rd party respondent.

After an inquiry the learned Primary Court Judge made order under Section 69(2) directing the 3rd party-respondent not to cause any obstruction to the 2nd party-respondent in using the said roadway.

The learned Magistrate observed that the 3rd party respondent had not used the said roadway as of right.

The order reads as follows :

"ඉහත කී කරුණු අනුව මෙම නඩුවේ අරාවුලට අදාල දෙවට පාර, ප්‍රවේශ මාර්ගයක් වශයෙන් අයිතිවාසිකමක් ලෙස මෙම නඩුවේ පළමුවන හා තුන්වන වගඋත්තරකරුවන් විසින් පාවිච්චි නොකරන ලද බවට නිගමනය කරමි.

තවද, නිසි බලය ඇති අධිකරණයක නියෝගයක් හෝ ආඥාවක් යටතේ හැර අන්‍යාකාරයකින් ඉහත කී ප්‍රවේශ මාර්ගය පාවිච්චි කිරීමට දෙවන පාර්ශ්වයට කරනු ලබන සියලුම බාධාවන් පළමුවන හා තුන්වන වගඋත්තරකරුවන්ට මෙයින් තහනම් කරමි."

The operative part of the order is the 2nd paragraph where the learned Judge ordered the 1st and 3rd respondents not to obstruct the 2nd respondent when she uses the road. It is to be noted that nowhere in the order is it stated that the 1st and 3rd respondents are prohibited from using the said road.

In the case of ***Kanagasabai*** vs ***Mylvaganam*** (*Supra*) it was held that where a Primary Court had already made an interim or final order for possession of land, the District Court will not have jurisdiction to grant an

interim injunction which have the effect of nullifying such order. That is, the District Court cannot issue an interim injunction which will nullify or invalidate the order made by the Primary Court Judge in terms of sections 66, 67, 68, 69 of the Primary Courts Procedure Act.

In the circumstances it is my considered view that in the instant case the effect of the interim injunction granted by the learned District Judge is not contrary to the order made by the Primary Court Judge. Accordinaly, I cannot agree with the submission made by the learned counsel for the defendant that the interim injuction granted by the learned District Judge will prejudice the rights of the defendant.

For there reasons I see no grounds to set aside the order of the learned District Judge dated 20.01.2005. Accordingly, the application for leave to appeal is dismissed with costs fixed at Rs. 5,000.

Application Dismissed