DAVID APPUHAMY
v.
YASSASSI THERO

COURT OF APPEAL.
BANDARANAYAKE, J. AND WIJETUNGA, J.
C. A. APPLICATION No. 1376/81.
M. C. MORAWAKA No. 17993.
NOVEMBER 18, 1986.

Revision – Sections 66 and 68 of the Primary Courts Procedure Act No. 44 of 1979 – Rule 46 of the Supreme Court Rules, 1978 – Meaning of 'proceedings' – Jurisdiction of Primary Court under s. 66 – Ex parte order.

Under the Primary Courts Procedure Code Act the formation of the opinion as to whether a breach of the peace is threatened or likely is left to the police officer inquiring into the dispute and if he is of such opinion he is required to file an information regarding the dispute with the least possible delay. Where the information is thus filed in a Primary Court, such court is vested with jurisdiction to inquire into and make a determination or order on the dispute.

An objection to jurisdiction must be taken at the earliest possible opportunity. If no objection is taken and the matter is within the plenary jurisdiction of the Court, the Court will have jurisdiction to proceed with the matter and make a valid order.

An ex parte order made in default of appearance of a party will not be vacated if the affected party fails to give a valid excuse for his default.

Section 68 of the Primary Courts Procedure Act requires the judge of the Primary Court to make a declaration as to who is entitled to possession. Before he could make such a declaration he should make a determination as to who was in possession of the land on the date of the filing of the information under s. 66. Further the Magistrate should evaluate the evidence if there is a dispute regarding identity of the land.

The expression "proceedings" in Rule 46 of the Supreme Court rules means so much of the record as would be necessary to understand the order to be revised and to place it in its proper context.

Cases referred to:

(1) *Navaratnasingham v. Arumugam – [1980] 2 Sri LR 1.*

(2) *Kanagasabai v. Mylvaganam – 78 NLR 280, 286.*

APPLICATION for revision from order of the Primary Court Judge of Morawaka.

A. A. de Silva for petitioner.

N. R. M. Daluwatte, P.C. with *Mrs. S. Nandadasa* for 1st respondent.

Cur. adv. vult.

January 16, 1987.

WIJETUNGA, J.

The petitioner seeks to have the order of the Magistrate, Morawaka dated 31.8.81, made under section 66 et seq. of the Primary Courts' Procedure Act, No. 44 of 1979 revised.

The grounds urged in the petition are that:–

(i) the report submitted by the Morawaka Police to the Magistrate does not state that there was a likelihood of a breach of the peace and the Magistrate was thus precluded from continuing these proceedings, as the basis of the court's jurisdiction is threatened or likely breach of the peace;

(ii) the Magistrate had misdirected himself in regard to the order in not taking into consideration matters relevant thereto and the said order is in any event unjust, contrary to law and in excess of his jurisdiction; and

(iii) the Magistrate should not have held an ex parte inquiry into this matter and should in any event have permitted the petitioner to state his claim and place his evidence and submissions before court, as he had taken immediate steps to purge his default: the order dated 16.11.81 refusing the petitioner's application to re-open the inquiry is unreasonable and unjust.

Learned President's Counsel for the 1st respondent took a preliminary objection to this application on the ground that there was non-compliance with Rule 46 of the Supreme Court Rules, 1978.

The preliminary objection relates to the failure of the petitioner to make available to this court a complete set of copies of proceedings in the Court of First Instance, in that the reasons delivered by the Magistrate on 30.11.81, pertaining to the order dated 16.11.81, have not been briefed. That order does not directly affect a consideration of the order dated 31.8.81 sought to be revised in the present proceedings.

In *Navaratnasingham v. Arumugam* (1) this court has held that–

"In relation to an application for revision the term 'proceedings' as used in Rule 46 means so much of the record as would be necessary to understand the order sought to be revised and to place it in its proper context."

I am in respectful agreement with this view of Soza, J. As the failure to provide copies of the reasons delivered on 30.11.81 does not prevent this court from reviewing the order dated 31.8.81, I would hold that there has been sufficient compliance with Rule 46 for the purpose of this application.

I shall now deal with the first ground on which the order of the learned Magistrate is being challenged, viz. that the court had no jurisdiction to inquire into this matter. The basis of this submission is that the report of the O.I.C., Morawaka Police dated 7.7.80 does not refer to a threatened or likely breach of the peace and the court had, therefore, acted without jurisdiction. However, the said report makes specific reference to section 66 of the Primary Courts' Procedure Act, which deals with disputes affecting land where a breach of the peace is threatened or likely. Further, the affidavit of 21.7.80 of the present 1st respondent (who was also the 1st respondent to that application) clearly states that the act of the present petitioner (who was the 2nd respondent to that application) can lead to a breach of the peace.

On 31.8.81 when the Magistrate took up this matter for inquiry, he has stated that he proposed to make an order thereon as it was likely to lead to a breach of the peace. In any event, no objection had been taken to the jurisdiction of the court when the matter was being inquired into by that court.

The case of *Navaratnasingham v. Arumugam (supra)* (1) is again relevant to a consideration of this aspect of the matter. That case too dealt with an application under section 62 of the Administration of Justice Law No. 44 of 1973, which corresponds to section 66 of the present Primary Courts' Procedure Act. There too it was submitted that the Magistrate was not vested with jurisdiction to proceed in the matter as he had failed initially to satisfy himself of the likelihood of a breach of the peace. This court held that such an objection to jurisdiction must be taken as early as possible and the failure to take such objection when the matter was being inquired into must be treated as a waiver on the part of the petitioner. It was further held that where a matter is within the plenary jurisdiction of the court, if no objection is taken, the court will then have jurisdiction to proceed and make a valid order. The dicta of Soza, J. in this regard too, which I would adopt, apply to the instant case.

Further, there is a significant difference between the provisions of the Primary Courts' Procedure Act relating to inquiries into disputes affecting land where a breach of the peace is threatened or likely and the corresponding provisions in the Administration of Justice Law. Under section 66 of the present Act, whenever owing to a dispute affecting land, a breach of the peace is threatened or likely, the police officer inquiring into the dispute is required with the least possible delay to file an information regarding the dispute in the Primary Court within whose jurisdiction the land is situate. When an information is thus filed in a Primary Court, that court is vested with jurisdiction to inquire into and make a determination or order on the dispute regarding which the information is filed.

The corresponding section 62 of the Administration of Justice Law provided that whenever a Magistrate, on information furnished by any police officer or otherwise, has reason to believe that the existence of a dispute affecting any land situated within his jurisdiction is likely to cause a breach of the peace, he may take steps to hold an inquiry into the same in the manner provided for by that Law. Thus, under the Administration of Justice Law, for a Magistrate to exercise power under section 62 he had to be satisfied on the material on record that there was a present fear that there will be a breach of the peace stemming from the dispute unless proceedings are taken under that section. The power conferred by that section was in subjective terms – the Magistrate, being the competent authority, was entitled to act when he had reason to believe that the existence of a dispute affecting land was likely to cause a breach of the peace. The condition precedent to the excercise of the power was the formation of such opinion – the factual basis of the opinion being the information furnished by any police officer or otherwise.– *Kanagasabai v. Mylvaganam* (2).

But, under section 66 of the Primary Courts' Procedure Act, the formation of the opinion as to whether a breach of the peace is threatened or likely is left to the police officer inquiring into the dispute and he is, in such circumstances, required to file an information regarding the dispute with the least possible delay. Where the information is thus filed in a Primary Court, subsection (2) of that section vests that court with jurisdiction to inquire into and make a

determination or order on the dispute regarding which the information is filed. Hence, in the instant case, when the O.I.C., Morawaka Police filed the information under section 66 of the said Act, the court was thereby vested with the necessary jurisdiction.

Thus, whichever view one takes of the matter, the petitioner fails in his application on the first ground referred to above.

It will be convenient at this stage to deal with the third ground on which the petitioner relied, viz. that he should have been permitted by the Magistrate to re-open these proceedings and that the refusal to vacate the ex parte order was unreasonable and unjust. On this aspect of the matter, the reasons dated 30.11.81 have not been briefed to this court by the petitioner and consequently the court is unable to consider the same. However, according to the affidavit of the present petitioner dated 1.9.81, his failure to attend court on 31.8.81 had been due to an error on the part of his Attorney-at-Law who had allegedly written out the date as 31st September, 1981. It should be obvious to anyone that the month of September has only 30 days and it is not conceivable that the present petitioner would have been misled in this manner. Further, in the objections filed by the 1st respondent in this court, he has stated that the petitioner defaulted in appearance not for the reasons given by him but because of his son's wedding. The petitioner, though he has filed counter objections, has not denied that his son's wedding was on this date. In the submissions made by his Attorney-at-Law before the Magistrate on 16.11.81, he had admitted that the petitioner's son's wedding took place on this date, but has stated that his absence from court was not due to that reason. In any event, the learned Magistrate having considered these submissions, has rejected them. In the result, the petitioner cannot succeed on this ground too.

The second ground urged in the petition relates to the validity of the order made on 31.8.81 by the Magistrate.

The relevant subsections of section 68 of the Primary Courts' Procedure Act are as follows:–

(1) "Where the dispute relates to the possession of any land or part thereof it shall be the duty of the Judge of the Primary Court holding the inquiry to determine as to who was in possession of the land or the part on the date of the filing of the information under section 66 and make order as to who is entitled to possession of such land or part thereof."

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

This section requires the Judge of the Primary Court to make a declaration as to who is entitled to possession of the land. The basis of such declaration is the determination as to who was in possession of the land on the date of the filing of the information under section 66.

Nowhere in the order complained of has the Magistrate made such a determination. After a brief narrative of the facts relating to this matter, the Magistrate has stated that he declares the 1st respondent entitled to possession of the portion of land which is the subject matter of this dispute. Before he could have made such a declaration, there should have been a determination as to who was in possession of the land on the date of the filing of the information.

In this context, there is merit in the complaint that the learned Magistrate has misdirected himself when he stated in the order that the court need not determine as to whether the land in dispute is the northern portion of the land called Bonwalatalawa, about 1/4 acre in extent, or not. The very basis of the claim of the present petitioner, as is evidenced by the affidavit that he had filed in the original court, is that the subject matter of the dispute is the northern portion of the land called Benwalatalawa, about 1/4 acre in extent and that the present 1st respondent has incorrectly referred to that land as Palupansalawatte. The northern boundary of the land in dispute, according to him, is Palupansalawatte and he claims that he was in undisturbed possession of the said land for over 30 years. He has further referred to the order in case No. 4892/L of the District Court of Matara dated 6.2.80 in terms of which he had completed construction of the building which the 1st respondent is now complaining about.

The 1st respondent in his affidavit dated 21.7.80, while claiming that the subject matter of the dispute is a portion of the land called Palupansalawatte, has denied that the land in question is Benwalatalawa.

Thus, on the affidavits filed, there was adequate material to alert the Magistrate to the true nature of the dispute, which he appears to have chosen to ignore.

In para. 4 of the petition filed in this court, the petitioner has stated as follows:

> "The respondent filed an action in the D. C. Matara L/4892 against the petitioner and sought an injunction as well against the petitioner restraining the petitioner from constructing an additional building adjoining the old house which was in occupation of the petitioner for well over thirty years on the land Benwalatalawa. The respondent first obtained an interim injunction ex parte against the petitioner preventing the construction of the said building but on 26.2.80 the injunction was dissolved by consent of parties and the petitioner was allowed by the District Court to continue the construction and complete the building on condition that if the respondent was declared entitled to the land in question (in case No. 4892/L) the petitioner would not be entitled to claim compensation for the building. The petitioner produces a certified copy of the said order of 26.2.80 marked P2."

In regard to this averment, the 1st respondent, in his statement of objection dated 19.3.82 filed in this Court, has stated in para. 5 as follows:

> "This respondent states with reference to paragraph 4 of the petition, that the petitioner unlawfully entered the land in dispute and began to build on the same whereupon this respondent instituted D. C. Matara Case No. 4892/L. However, the plantations were in the possession of this respondent. After dissolution of the injunction, as stated in paragraph 4 of this petition, the petitioner not only completed the building, referred to in the said injunction proceedings, but also began to construct a new building, whereupon the Dayakayas of the temple became restive and there was a serious threat to the peace. This respondent complained to the police who instituted these proceedings.

This is an admission by the 1st respondent that the subject matter of the instant case as well as of D. C. Matara Case No. 4892/L, is the same. In para. 4 of the petition, the petitioner has stated that

D. C. Matara case No. 4892/L was an action relating to the construction of an additional building adjoining the old house which was in the occupation of the petitioner for well over 30 years, on the land called *Benwalatalawa*. By the order dated 26.2.80 (P2), the petitioner had been permitted to complete the construction of that building subject to the terms and conditions contained therein. The parties to that action were the same.

Plan No. 895 of 27.5.1895, which has been filed marked P1 with the present petition, shows the land called Palupansalawatte to the north of Benwalawatte and the allotment of land surveyed is called Benwalatalawa.

It is also to be noted that while the date of the order P2 in D. C. Matara Case No. 4892/L is 26.2.80, the complaint in the present case has been made by the 1st respondent on 3.7.80. Documents P6, P7, P8, P9, P10, and P11 filed with the counter affidavit of the petitioner dated 12.6.82, refer to the northern boundary of Benwalatalawa as Palupansalawatte. The plans marked P13, P14 and P15 indicate a roadway to the north of the land called Benwalatalawa, which separates it from Palupansalawatte and the petitioner claims the physical impossibility of encroaching on Palupanasalawatte by building on his land, as the road separates the two lands.

Although this material was not available to the learned Magistrate at the time he made the order complained of, on the affidavits filed it should have been clear that the crux of the dispute between the parties was whether the corpus was Benwalatalawa or Palupanasalawatte. It was, therefore, incumbent on the Magistrate to have determined the identity of the land which was the subject matter of this dispute. He was thus in error when he lightly dismissed the claim of the petitioner that the land in dispute was Benwalatalawa and proceeded to state that the court need not make such a determination.

It is clear from the order of the learned Magistrate that he had not directed his attention to the vital question as to who was in possession of the land in dispute on the date of the filing of the information under

section 66. In the absence of such a determination, he could not have made a valid declaration and prohibition as required by subsection (2) of section 68. The petitioner is, therefore, entitled to succeed on this ground.

For the reasons aforesaid, I am of the view that this case calls for the exercise of the revisionary powers of this court. Accordingly, acting in revision, I set aside the order of the Magistrate dated 31.8.81 and remit the case to the court below with the direction that the Magistrate should proceed to hold an inquiry afresh and make an appropriate order thereon according to law.

The petitioner will be entitled to the costs of the application to this court, from the 1st respondent.

BANDARANAYAKE, J.–I agree.

Order set aside.

Case remitted for fresh inquiry.