

SILINONA
v.
DAYALAL SILVA AND OTHERS

COURT OF APPEAL

S. N. SILVA, J.

C.A. NO. 17/84; M.C. KALUTARA NO. 45428

29 JUNE, 1990

Primary Courts Procedure Act – Dispute regarding a right of way – Scope of sections 66(3) and 66(8)(b) – Application for postponement to file affidavit – No order on the application but case fixed to be called on a later date – Interpretation of time limits in statutes – Mandatory and directory provisions – Scope of maxim “act of court cannot prejudice a party” (actus curiae neminem gravabit).

In proceedings which had commenced under Section 66(1) of the Primary Courts Procedure Act, No. 44 of 1979, the petitioner's attorney-at-law moved for further time to file the petitioner's affidavit. The court made no order on this application but made order that the case be called next on another date, on which date the petitioner tendered her affidavit. Attorney-at-Law for the respondent objected to this affidavit being accepted on the ground that the petitioner was in default in terms of Section 66(3) read with Section 66(8)(b). The learned Magistrate upheld this objection but the petitioner's affidavit had been filed of record. In revision it was argued by counsel for the petitioner that, since no order was made by the learned Magistrate when the petitioner had moved for further time to file her affidavit, her application should be considered as having been allowed. It was therefore argued that there was no default on the part of the petitioner as contemplated by Section 66(3) read with Section 66(8)(b) of the Primary Courts Procedure Act.

Held:

(1) The time limit of 3 weeks within which a party is required to file his affidavit under Section 66(3) is mandatory because statutory time limits within which a party is required to act are mandatory as distinguished from acts required to be done by a court, where the provision of time limits should be considered as being directory. Consequently the petitioner was in default in terms of Section 66(8)(b).

(2) In circumstances where a court makes no order on an application made by a party for a postponement to perform a mandatory statutory act, the maxim that an act of a court cannot prejudice a party (*actus curiae neminem gravabit*) cannot have application.

(3) Although a party may be in default in terms of Section 66(3) the documents and affidavits filed of record must be considered before making an order.

Case referred to:

1. *Ramalingam v. Thiagarajah* Sri Kantha's Law Reports, Vol. 1 32

APPLICATION in revision of the order of the Magistrate of Kalutara.

J. P. de Almeida Gunaratne for petitioner.

D. Fernando, PC with *S. Peiris* for respondents.

Cur adv vult.

19th June, 1990.

S. N. SILVA, J.

The petitioner has filed this application in revision against the order dated 30.11.83 made by the learned Magistrate of Kalutara. That order was made in a proceeding instituted under Section 66(i) of the Primary Courts Procedure Act No. 44 of 1979. The proceeding was instituted by the Officer-in-Charge of Aluthgama Police by filing the information dated 24.8.83. That information states that there is a dispute between the petitioner and the 1st and 2nd respondents with regard to a right of way.

It appears that the information was filed in court on 10.8.83 and on that date the petitioner and the 2nd respondent were present in court. On that date, the court directed that notice be fixed on the land and also directed that affidavits be filed on 24.8.83. (the fact that the court made an order that affidavits be filed on 24.8.83 is borne out by the order made by court on 30.11.83).

On 24.8.83 the petitioner was not present, but she was represented by an Attorney-at-Law. The 1st and 2nd respondents to this application were present and their affidavits were tendered to Court. The Attorney-at-Law for the petitioner moved for further time to file an affidavit. It appears from the proceedings that no order was made by court on this application. The case was to be called next on 7.9.83.

On 7.9.83 the petitioner was present and her affidavit was tendered. The Attorney-at-Law for the 1st and 2nd respondents objected to this affidavit being accepted and moved that the

petitioner be considered as being in default. The court by its order dated 30.11.83 upheld the objection of the 1st and 2nd respondents. The order states that the petitioner is deemed to be in default in terms of Section 66(8)(b) of the Primary Courts Procedure Act No. 44 of 1979.

Mr. Gunaratne appearing for the petitioner submitted that the court was in error when it made the said order. Counsel submitted that the petitioner made an application on 24.8.83 for further time to file her affidavit. Since no order was made by court on this application it is submitted that the application should be considered as having been allowed. On this basis Counsel submits that there was no default on the part of the petitioner since affidavit was filed on 7.9.83 being the next date.

Learned President's Counsel appearing for the 1st and 2nd respondents submitted that in terms of Section 66(3) petitioners are obliged to file their affidavit on or before the date fixed by the court, which should be not later than 3 weeks. It was submitted that if there is default in this respect, the provisions of section 66(8)(b) should apply. Counsel further submitted that the petitioner has filed the affidavit well outside the period of 3 weeks provided for under Section 66(3).

I have carefully considered the submissions of Counsel. The petitioner had been granted time till 24.8.83 to file her affidavit. No order has been made on 24.8.83 allowing the application of the petitioner, for further time. In these circumstances, it cannot be inferred that the court permitted the petitioner further time.

I am of the view that there is some merit in the submission that the petitioner should have been permitted to file the affidavit on any date within 3 weeks. Even if this submission is accepted, I note that the affidavit had in fact been filed outside the period of 3 weeks that is provided for by Section 66(3).

Counsel for the petitioner relied on the judgment of Sharvananda, C.J. in the case of *Ramalingam v. Thiagarajah*⁽¹⁾. The particular passage at page 39 relied upon by the counsel shows that a

distinction should be drawn between the time periods that are specified for acts to be done by the parties on the one hand and acts to be done by the court on the other. It is clear from the judgment of Sharvananda, C.J. that where an act has to be done by the court, the provision of time limits should be considered as being directory. In this case, we are concerned with an act that has to be done by a party.

In the circumstances, the requirement that a party should file the affidavit on the date specified by court for that purpose, within 3 weeks, should be considered as mandatory. Therefore, the judgment of the Supreme Court does not support the argument of the counsel.

The other matter relied upon by Counsel is that the act of the court cannot prejudice the petitioner. This submission is based on the premise that on 24.8.83 the court allowed the application of the petitioner. The proceedings clearly show that no order was made on this application. In these circumstances, I am of the view that there is no act on the part of the court that has prejudiced the petitioner. The petitioner failed to file her affidavit within the period of 3 weeks provided for in Section 66(3). Therefore the default clearly lies on her.

For the reasons stated above, I see no error of law in the order dated 30.11.83 made by the learned Magistrate.

Counsel for the petitioner submits that although the petitioner is considered as having been in default, section 66(8)(b) directs the court to consider such material as is before it in respect of the claims of the petitioner. Counsel submits that an affidavit and a counter affidavit had been filed by the petitioner before the order dated 30.11.83 was made. In these circumstances, it is submitted that these 2 documents be considered by the court in making its final order. The learned President's Counsel does not dispute this interpretation of section 66(8) of the Act.

In these circumstances, I refuse the application in revision and direct the court to inquire into the information and to make an order according to law considering the documents and affidavits that have

now been filed by the parties to the dispute including the petitioner. The petitioner shall not be entitled to participate at this inquiry as provided for in Section 66(8)(b). The Court may call for further material as may be considered necessary in the interests of justice.

Application is refused. No costs.

Application refused.
