

1966

*Present : Alles, J.*

H. S. H. P. GUNAWARDENE, Petitioner, and D. R. O., WELIGAM KORALE, Respondent

*S. C. 461/66—Application in Revision in M. C. Matara, 31977*

*Land Acquisition Act—Section 42 (2)—Order thereunder for delivery of possession of a land—Procedure.*

Before an order for delivery of possession of a land is made by a Magistrate in terms of section 42 (2) of the Land Acquisition Act, evidence should be led before the Magistrate either orally or on affidavit in support of the averments in the application for the ejection order. This evidence may be led *ex parte* and if the Magistrate is satisfied with the material placed before him, an ejection order may be issued.

**A**PPPLICATION to revise an order of the Magistrate's Court, Matara.

*J. D. Aseerwatham*, with *H. W. Senanayake*, for the petitioner.

*D. S. Wijesinghe*, Crown Counsel, for the respondent.

November 12, 1966. ALLES, J.—

In this application, the petitioner prays *inter alia* that the Deputy Fiscal of Matara be ordered to stay execution of an order for delivery of possession of a land called Kapittawatta to the Crown. The District Revenue Officer, Weligam-Korale, acting under the authority of the acquiring officer filed in application for an ejection order in terms of

section 42 (2) of the Land Acquisition Act requesting the Magistrate to issue directions to the Fiscal to break open any doors if necessary with Police assistance. On this application, the Magistrate made an *ex parte* order and issued a Writ of Possession to the Fiscal directing him to deliver possession of the land to the District Revenue Officer. Notice of this order was given to all the occupants of the land in question, including the present petitioner. The notice also directed the occupants to remove all their movable property within three days of the issue of the notice, failing which the occupants were informed that force would be used to take possession of the land.

Section 42 (2) of the Land Acquisition Act states that—

“ Where any officer directed by an order under section 38 to take possession of any land is unable or apprehends that he will be unable to take possession of that land because of any obstruction or resistance which has been or is likely to be offered, such officer shall, on his making an application in that behalf to the Magistrate’s Court . . . , be entitled to an order of that court directing the Fiscal to deliver possession of that land to him . . . . ”

The wording of section 42 (2) seems to contemplate that before an officer could obtain an order under that section he must satisfy the Court that he is unable or apprehends that he will be unable to take possession of the land because of any obstruction or resistance which has been or is likely to be offered. I find from the cyclostyled application that has been filed in Court by the District Revenue Officer that he proceeded to the land on 24. 9. 66 in order to take possession of the land from the owner thereof who wrongfully and unlawfully refused to allow the applicant to take possession. The District Revenue Officer also states in the same application that he apprehends he will be unable to take possession of the said land by reason of obstruction or resistance that is likely to be offered by the owner. While I agree with the observations of my brother Sirimane, J. in *Mohamed Lebbe v. Madana*<sup>1</sup>, that when an order under section 42 (2) directing the Fiscal to deliver possession of the land is made, any person in occupation of the land is not entitled to be heard in opposition to the application, I think it desirable, even though these proceedings are in the nature of execution proceedings, that there should be evidence either orally or on affidavit led before the Magistrate in support of the averments in the application before an ejectment order is made, particularly when a request is made for the use of force, if necessary, to take possession of the land. This evidence may be led *ex parte* and if the Magistrate is satisfied with the material placed before him, an ejectment order under section 42 (2) may be issued.

Since this has not been done in the instant case, I direct that the case be remitted to the Magistrate’s Court of Matara and that evidence on the lines suggested by me be placed before the learned Magistrate so that he may satisfy himself that the conditions mentioned in section 42 (2) have been complied with in order to entitle the officer to take steps under that section.

<sup>1</sup> (1964) 66 N. L. R. 239.

The present order made by the Magistrate is set aside *pro forma* and the Magistrate will make a fresh order after hearing evidence for the limited purpose of satisfying himself that the provisions of section 42 (2) have been complied with. This matter should be disposed of as expeditiously as possible. There will be no costs of this application.

*Order set aside pro forma.*