

JAMIS
v.
KANNANGARA

COURT OF APPEAL

P.R.P. PERERA, J. & PALAKIDNAR, J.

C.A. No. 89/89 – P.C. RATNAPURA No. 191(92031)

JUNE 15 AND JULY 5, 1989.

Lease – Landowner leasing gemming rights – Landowner being in occupation builds house – Can removal of house be ordered? – Primary Courts Procedure Act, section 69(2) – Indian Criminal Procedure Code, section 147(2).

One Jamis gave a lease of gemming rights of a land in his occupation. He built a house on it to the detriment of the lessee's gemming rights. The Primary Court ordered the removal of the house acting under section 69(2) of the Primary Courts Procedure Act.

Held:

The order that can be made under section 69(2) in regard to a right to any land other than the right to possession is a declaration of entitlement of such right after determination by the court subject to a final determination by a competent court and prohibition of all disturbance or interference with the exercise of such right by such a party. The order is of a prohibitory nature preventing an interference with the exercise of such a right. This cannot include a positive order of removal of a structure.

Case referred to:

1. *Banerjee v. Rahman* 29 AIR 1942 Calcutta 244.

APPLICATION for revision of an order of the Primary Court of Ratnapura.

Mahanama de Silva for petitioner.

Sanath Jayatilleke for respondent.

Cur. adv. vult.

October 20, 1989.

PALAKIDNAR, J.

Jamis the Petitioner is a co-owner of a land called "Gatanigewatta" in the Ratnapura District. Kannangara the Respondent in year 1979 obtained a ten year lease of gemming rights on this land till 14th June 1989. It was also stated in the lease that the Respondent, Jamis should not disturb Kannangara in digging gem pits and gemming in this land.

The learned Primary Court Judge by his order dated 26.1.89 declared that in terms of the lease Kannangara has a right to gem in this land and that such right should not be disturbed. Proceeding further in the order the Primary Court Judge observed that there was no mention of any disturbance to the gemming rights of the Respondent Kannangara. The complaint was regarding the building of a house on the land in dispute on the 30th August 1987 by Jamis and his children who were in occupation of this land. The complainant further told the police that this building should be stopped till this land was divided. He based his claim on the footing that he had rights in this land.

The learned trial Judge having correctly assessed the dispute, however proceeded to hold that Jamis in building a house was trying to create a new possession and issued an order that this house should be removed by the Police.

It was conceded by the complainant in his complaint that Jamis was living on this land. Thus the dispute was an extension of Jamis's possession to the detriment of Kannangara's rights under the lease.

Thus if there was any infringement of such a right it would be of a breach of contract under the lease. The remedy is a civil one in terms of damages arising out of such breach.

It is to be noted that the learned trial Judge has not viewed the dispute in this manner. There is a finding of fact that Kannangara's gemming rights have not been disturbed.

It now remains to be considered whether the Primary Court Judge's order to remove the structure could have been lawfully made within the ambit of the powers given to him by section 69(2) of the Primary Courts Procedure Act.

The order that can be made under this subsection in regard to a right to any land other than the right to possession is a declaration of entitlement of such right after determination by the court subject to a final determination by a competent court and prohibit all disturbance or interference with an exercise of such right by such party.

The order therefore is clearly of a prohibitory nature preventing an interference with the exercise of such a right.

Whether such an order would lawfully include the removal of a structure is a matter which can only draw a negative reply. An order to remove the structure is not an order prohibiting the disturbance or

interference with a declared right. An order of removal is a positive order. Such an order was considered in testing the validity of an order made by a Magistrate to remove a stable which was erected to obstruct a pathway under section 147(2) of the Indian Criminal Procedure Code. The words of the section are identical with the words of section 69(2) of the Primary Courts Procedure Act, No. 44 of 1979.

A full bench of the Calcutta High Court in the case of *Banerjee vs Rahman* (1) held that the words making an order prohibiting any interference with the exercise of such right does not vest a Magistrate with power to make a positive order of removal of a stable built on a path.

I agree with that view and set aside the order of the learned Primary Court Judge and grant relief as prayed for by the Petitioner to this application with costs fixed at Rs.325/-.

P.R.P. PERERA, J. – I agree.

Order set aside.
