

Report on the Primary Courts' Procedure Act aimed at reform
with particular emphasis on Part VII

Existing Jurisdiction

The jurisdiction of the Primary Courts is set out in Sections 32 and 33 of the Judicature Act.

The Civil jurisdiction vested is virtually redundant since the pecuniary limit is fixed at 1500 rupees apart from there being 36 categories of cases given in Schedule 4 which are specifically excluded from the jurisdiction of a Primary Court.

On the other hand, criminal jurisdiction can be made use of at the discretion of the Minister as Section 33 of the Judicature Act which deals with criminal jurisdiction can be given effect to upon regulations being gazetted by the Minister.

However, the requirement for the Minister to gazette setting out certain offences along with limitations, restrictions and other conditions in respect of such offences perhaps is the reason for criminal jurisdiction not being effectively used currently.

As such, the only practical usage of the Primary Court procedure seems to be confined to what is commonly known as Section 66 applications found from Section 66 to 76 of the Primary Courts' Procedure Act set out under Part VII of the said Act.

The jurisdiction regarding matters under Part VII has been judicially interpreted to mean as being quasi criminal without being categorised under civil or criminal jurisdiction.

The jurisdiction conferred on a Primary Court under section 66 is a special jurisdiction. It is quasi-criminal jurisdiction. The primary object of the jurisdiction so conferred is the prevention of a breach of the peace arising in respect of a dispute affecting land. The Court in exercising this jurisdiction is not involved in an investigation into title or the right to possession which is the function of a civil Court. Court is required to take action of a preventive and provisional nature pending final adjudication of rights in a civil Court. Vide. *Kanagasabai vs. Mylwaganam* 78 N.L.R. 280 and *Punchi Nona vs. Padumasena* [1994] 2 Sri L.R. 117

Invoking of Jurisdiction in a Section 66 application is either by:

1. The police officer inquiring into the dispute (Section 66(1)(a)); or
2. By any party to the dispute (private plaint - actually by way of an affidavit) (Section 66(1)(b)).

However, Court has a discretion to decide whether in fact "a likelihood of a breach of peace" is disclosed or not, in instances where the police do not file a report but a Party makes an application.

Types of disputes and Orders

Depending on whether the dispute is regarding possession of land or regarding the right to any land other than possession of land, a S 68 or S 69 Order will be made respectively with a view to prevent a breach of peace.

A S 68 Order is made regarding the entitlement to possession of any land as envisaged in the Act.

In the case of possession, the duty of the Magistrate is to determine who was in possession on the date of the complaint and make an order as to who is entitled to possession without considering the title – Vide. Section 68 (1)

A Section 68 Order can also be made regarding the right to be placed in possession of land if the Magistrate is satisfied that any person who had been in possession of the land or part has been forcibly dispossessed within a period of two months immediately before the date of the complaint - Vide. Section 68 (3)

A Section 69 Order is made where the dispute relates to any right to any land or any part of a land, other than the right to possession of such land or part thereof, such as for example the right to a servitude.

A person who is in possession based on a Section 68 Order or is using a right based on a Section 69 Order can continue to do so until the Orders are set aside by an order or decree of a competent Court.

Once a Section 68 or 69 Order is made, Section 76 of the Act enables a writ to be executed where appropriate.

Drawbacks and possible reforms

1. ***Orders being effective for a very long period*** - The greatest drawback in this procedure is not strictly related to the nature of Orders that are made by a Primary Court itself but due to delays that are inevitable in determining rights in a District Court action which is also subject to two appeals.

Since a Primary Court order prevails until a final decision is made by a District Court in view of the judgement of *Kanagasabai vs Mylwaganam* (78 N.L.R. 280), these Orders of a temporary nature made by a Primary Court continue to be effective for several years enabling even a trespasser or squatter to remain in possession for an inequitable period of time (sometimes till the appeals are determined).

“In an inquiry into a dispute as to the possession of any land, where a breach of peace is threatened or is likely under Part VII, of the Primary Courts Procedure Act, the main point for decision is the actual possession of the land on the date of the filing of the information under section 66; but, where forcible dispossession took place within two months before the date on which the said information was filed the main point is actual possession prior to that alleged date

of dispossession. Section 68 is only concerned with the determination as to who was in possession of the land or the part on the date of the filing of the information under section 66. It directs the Judge to declare that the person who was in such possession was entitled to possession of the land or part thereof Section 68(3) becomes applicable only if the Judge can come to a definite finding that some other party had been forcibly dispossessed within a period of two months next proceeding the date on which the information was filed under section 66. The effect of this sub-section is that it enables a party to be treated to be in possession on the date of the filing of the information though actually he may be found to have been dispossessed before that date provided such dispossession took place within the period of two months next proceeding the date of the filing of the information. It is only if such a party can be treated or deemed to be in possession on the date of the filing of the information that the person actually in possession can be said not to have been in possession on the date of the filling of the information. Thus, the duty of the Judge in proceedings under section 68 is to ascertain which party was or deemed to have been in possession on the relevant date, namely, on the date of the filing of the information under section 66. *Under section 68 the Judge is bound to maintain the possession of such person even if he be a rank trespasser as against any interference even by the rightful owner. This section entitles even a squatter to the protection of the law, unless his possession was acquired within two months of the filing of the information.*

That person is entitled to possession until he is evicted by due process of law. A Judge should therefore in an inquiry under Part VII of the aforesaid Act, confine himself to the question of actual possession on the date of filing of the information except in a case where a person who had been in possession of the land had been dispossessed within a period of two months immediately before the date of the information." Vide. *Ramalingam v. Thangarajah* [1982] 2 Sri.LR. 693

In addition, S 74 (2) states that an Order made under Part VII cannot be appealed against and a revision application, though possible, is not an effective remedy as rights of Parties can only be gone into by a District Court.

This anomaly can be remedied if a specific provision can be made that the District Court is entitled to vary or set aside an order made by the Primary Court under Part VII of the Primary Courts' Procedure Act, by way of an interim Order based on rights of Parties.

2. ***Discretion to exercise Jurisdiction*** - Based on S66(1), a dispute can be referred to Courts either by the Police or through a private plaint (actually an affidavit).

"Under Section 66 (1)(a) 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. The police officer is empowered to file the information if there is a dispute affecting land and a breach of the peace is threatened or likely. The Magistrate is not put on inquiry as to whether a breach of the peace is threatened or likely. In terms of Section 66 (2) the Court is vested with jurisdiction to inquire into and make "a determination on the dispute regarding which information is filed either under Section 66 (1)(a) or 66 (1) (b). However, when an information is filed under Section 66 (1)(b) the only material that the Magistrate would have before him is the affidavit information of an interested person and in such a situation without the benefit of further assistance from a police report, the Magistrate should proceed cautiously and ascertain for

himself whether there is a dispute affecting land and whether a breach of the peace is threatened or likely. " Vide. Velupillai and others v. Sivanathan [1993] 1 Sri L.R. 123

In an information by a private party under section 66(1) (b) it is incumbent upon the Primary Court Judge to initially satisfy himself as to whether there was a threat or likelihood of a breach of the peace and whether he was justified in assuming such a special jurisdiction under the circumstances. Failure to so satisfy himself deprives the judge of jurisdiction." Vide. Punchi Nona vs. Padumasena [1994] 2 Sri L.R. 117

When a complaint is made to the Police, the discretion lies with them to decide whether there is a likelihood of an actual breach of peace or not upon inquiry. Therefore, the Police have a wide power in their ability to decide whether or not to file a report under Section 66 of the Primary Courts' Procedure Act. This can be misused where in certain instances, the Police may not act on a complaint even when there is a valid case. Similarly, the Police may proceed to file a report despite there being no breach of peace in order to support the person complaining.

In addition, if the Police do not act on a complaint, individuals cannot proceed with an application automatically unless, Court is satisfied there is a likelihood of a breach of peace. As "satisfaction of the existence of a likely breach of peace" is subjective, Judges too can discourage the invocation of this jurisdiction by using discretion.

This anomaly can be rectified by conferring Jurisdiction in very clear form and removing the element of discretion as regards Jurisdiction. The provisions of the proposed Protection of Occupants Act (Submitted by Mr. Palitha Kumarasinghe PC) with suitable amendments can be made use of, for this purpose.

The incorporating of those provisions into the Primary Courts' Procedure Act under Part VII for the purpose of clarifying the scope of the acts which can be complained of could be considered to form the basis of jurisdiction as far as possession of land or right to possession of land is concerned.

With regard to Jurisdiction in respect of disputes relating to a right in respect of any land other than a right to possession (such as servitudes where Orders under S69 are made), stating that any person is entitled to take any such dispute to a Primary Court to obtain an Order which would be effective only for a specific period within which such person should go to the District Court could be considered.

3. ***Unlimited time for execution*** - Another area that needs reform is the ability for the execution of writ at any stage unlike in the District Court where it is restricted to 10 years. This can cause grave injustice when a writ is executed many years after an Order (where a higher Court overturns an Order), perhaps when persons unconnected to the case are in possession. This aspect too could be reformed by prescribing a specific manner in which writ could be executed and a time frame. This anomaly too has come about due to apparently conflicting judicial decisions which make the casus omissus clause (S78) being made redundant as discussed in Jayantha Gunasekara vs. Jayatissa Gunasekara and Others [2011] 1 Sri L.R. 284.

Summary of suggestions

Accordingly, the suggested reforms are in the following manner:

1. Confer a right to the District Court to vary or set aside an order made by the Primary Court under and in terms of Part VII of the Primary Courts' Procedure Act, by way of an interim Order.
2. Enable any person to bring any dispute affecting land other than the right of possession to a Primary Court pending the right to go to the District Court (within a specified time)
3. Allow a Party as of right to invoke jurisdiction subject to certain restrictions on matters of possession of immovable property by incorporating the provisions of the proposed Protection of Occupants Act (Submitted by Mr. Palitha Kumarasinghe PC) with suitable amendments for the purpose of clarifying the scope of the acts which can be complained of.
4. Provide a timeframe for the execution of writ.

Subject to these reforms/ variations (amendments) it is recommended that provisions of Part VII be retained while repealing the redundant parts of the Primary Court procedure if desired.

This report has been prepared as directed by the Chairman of the Law Commission.

Samanthe Ratwatte.

References:

1. Judicature Act, Sections 32 and 33
2. Primary Courts' Procedure Act, In particular, Sections 66, 68, 69 and 76
3. Kanagasabai vs. Mylwaganam 78 N.L.R. 280
4. Punchi Nona vs. Padumasena [1994] 2 Sri L.R. 117
5. Ramalingam v. Thangarajah [1982] 2 Sri.LR. 693
6. Velupillai and others v. Sivanathan [1993] 1 Sri L.R. 123
7. Jayantha Gunasekara vs. Jayatissa Gunasekara and Others [2011] 1 Sri L.R. 284
8. Proposed Protection of Occupants Act (Submitted by Mr. Palitha Kumarasinghe PC)