

IN THE COURT OF APPEAL OF THE DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA

In the matter of an Appeal under Article 138 of the Constitution of the Republic of Sri Lanka against an Order of the Provincial High Court of Uva Province.

1. Tissa Abeywickrema (President)
7B, Dharmadutha Road,
Badulla.
2. H.L Gunadasa (Secretary)
77/12, Welagedara Road,
Badulla.
3. A.M.C.P Adikari (Treasurer)
David Pieris Motor Company (Pvt.) Ltd.,
Badulla.

Petitioners

Case No: CA (PHC) 111/2011

P.H.C. Badulla Case No: Writ 117/2007

Vs.

1. Mayor, Badulla Municipal Council,
Bandarawela Road, Badulla.
2. Badulla Municipal Council,
Bandarawela Road, Badulla Sports Club,
Racecourse Road, Badulla.
3. Assistant Commissioner of Excise (Uva)
Excise Office, Kanupelalla Road,
Mailagastenna, Badulla.

4. Superintendent of Police
Office of the S.P-1, Badulla.
5. Director of Sports (Uva)
Provincial Ministry of Sports,
Uva Provincial Council, Badulla.

Respondents

AND BETWEEN

1. Tissa Abeywickrema
President, Badulla Sports Club,
Racecourse Road, Badulla.
Now at 7B(Tissa Chemists), Dharmadutha Road,
Badulla.
2. H.L Gunadasa
Secretary, Badulla Sports Club,
Racecourse Road, Badulla.
Now at 77/12, Welagedara Road,
Badulla.
3. A.M.C.P Adikari,
Treasurer, Badulla Sports Club,
Racecourse Road, Badulla.
Now at, David Pieris Motor Company (Pvt.) Ltd.,
Badulla.

Petitioners-Appellants

Vs.

1. Mayor, Badulla Municipal Council,
Bandarawela Road, Badulla.
2. Badulla Municipal Council,
Bandarawela Road, Badulla Sports Club,
Racecourse Road, Badulla.

3. Assistant Commissioner of Excise (Uva)
Excise Office, Kanupelalla Road,
Mailagastenna, Badulla.
4. Superintendent of Police
Office of the S.P-1, Badulla.
5. Director of Sports (Uva)
Provincial Ministry of Sports,
Uva Provincial Council, Badulla.

Respondents-Respondents

Before: K.K. Wickremasinghe J.

Janak De Silva J.

Counsel:

V.N. Perera P.C. with Malani Elangon for Petitioners-Appellants

C.E. De Silva with S. Walgamage for the 1st and 2nd Respondent-Respondent

M.D. Wickremanayake for the 3rd, 4th and 5th Respondents-Respondents

Written Submissions tendered on:

Petitioners-Appellants on 10.01.2019

1st and 2nd Respondents-Respondents on 07.01.2019

Argued on: 30.11.2018

Decided on: 22.02.2019

Janak De Silva J.

This is an appeal against the order of the learned High Court Judge of the Uva Province holden in Badulla dated 10.06.2011.

The Petitioners-Appellants (Appellants) filed the above styled application in the High Court of the Uva Province holden in Badulla and sought a writ of mandamus directing the 1st and 2nd Respondents-Respondents (1st and 2nd Respondents) to issue a license for a club in favour of Badulla Sports Club for the years 2007 and 2008. The club was situated at No. 9 Race Course Road, Badulla.

During the pendency of this application steps were taken under the State Lands (Recovery of Possession) Act No. 7 of 1979 as amended to take over possession of the land on which the clubhouse was situated. The learned High Court Judge held that since possession of the land was taken over it was futile to issue a writ of mandamus as prayed for in the petition and dismissed the application without costs. Hence this appeal.

The learned President's Counsel for the Appellant submitted that the learned High Court Judge erred in dismissing the application on the grounds of futility as the rights of the parties must be determined as at the date of institution of proceedings.

Rights of the Parties

The learned Presidents Counsel for the Appellant was correct in submitting that there is a general principle that the rights of the parties must be determined as at the date of institution of proceedings or action. [*Ponnammah v. Arumugam* (8 N.L.R. 223 at 226), *Silva v. Nona Hamine* (10 N.L.R. 44), *Ponnamma v. Weerasuriya* (11 N.L.R. 217), *Silva v. Fernando et al* (15 N.L.R. 499), *Jamal Mohideen & Co. v. Meera Saibo et al* (22 N.L.R. 268 at 272), *Shariff et al v. Marikkar et al* (27 N.L.R. 349), *Eminona v. Mohideen* (32 N.L.R. 145), *De Silva et al v. Goonetilleke et al* (32 N.L.R. 217), *De Silva v. Edirisuriya* (41 N.L.R. 457), *Lenorahamy v. Abraham* (43 N.L.R. 68), *Kader Mohideen & Co. Ltd., v. Gany* (60 N.L.R. 16), *Abayadeera and 162 others v. Dr. Stanley Wijesundera, Vice Chancellor, University of Colombo and another* (1983) 2 Sri. L. R. 267), *Talagune v. De Livera* (1997) 1 Sri. L. R. 253, *Kalamazoo Industries Ltd. and others v. Minister of Labour and Vocational Training and others* (1998) 1 Sri. L. R. 235, *Lalwani v. Indian Overseas Bank* (1998) 3 Sri. L. R. 197, *Jayaratne v. Jayaratne and another* (2002) 3 Sri. L. R. 331, *Sithy Makeena and others v. Kuraisha and others* (2006) 2 Sri. L. R. 341].

However, it is not an immutable principle and courts have recognized certain exceptions to the general rule.

In *Sabapathipillai et al v. Vaithialingam* (40 N.L.R. 107) it was held that a trustee whose term of office expired during the pendency of an action brought by him, is not entitled to continue the action. Similar approach was taken in *Appusinno v. Balasuriya* (16 N.L.R. 385) by Ennis J. when he held that the Buddhist Temporalities Ordinance gave no power to appoint a provisional trustee when the office became vacant by expiration of time, that the plaintiff had no status to continue the action the moment he ceased to be trustee and that the principle that a case must be decided as at the time of the institution of the suit cannot be applied to this case.

In *Thangavadivel v. Inthiravathy* (53 N.L.R. 369) where proceedings by way of summary procedure under section 10 of the Jaffna Matrimonial Rights and Inheritance Ordinance were instituted by a wife against her husband for the return of certain jewelry, but while the inquiry was proceeding, a decree absolute was entered in a divorce case dissolving the marriage between the spouses, it was held that the plaintiff, having ceased to be the wife of the defendant during the pendency of the inquiry, lost her status to continue the proceedings and the general rule that the claims of the litigants are to be ascertained as at the commencement of the action would not be applicable in such a case. In *Mariam Nurban Hussain Teyabally v. Hon. R. Premadasa and two others* [S.C. No. 69/92, S.C.M. 05.11.1993] G.P.S. De Silva C.J. held (at page 5) that the general principle of law that the right of parties are determined as at the date of action has no application in the statutory context. In *Master Divers (Pvt) Ltd. v. Karunaratne and others* [CA (PHC) APN 140/2012, C.A.M. 09.08.2018] I held that when entering judgment in a foreign currency the rupee value at the exchange rate prevailing at the date of payment together with legal interest should also be entered therein.

Accordingly, I will now consider whether the general principle set out above applies to the instant case or whether there is an exception that applies to it.

It is true that when the Appellants filed the application in the High Court of the Uva Province holden in Badulla on 27.09.2007 the Badulla Sports Club was situated at No. 9 Race Course Road, Badulla. However, ๑๒4 dated 14.03.2007 shows that the 2nd Respondent had decided at its monthly meeting held on 09.03.2007 to retake possession of the land on which the clubhouse was situated. Further letter dated 18.06.2009 (๑๒4๔) shows that the Municipal Commissioner, Badulla Municipal Council had taken steps to invoke the provisions of the State Lands (Recovery of Possession) Act for the land on which the clubhouse was situated. Thus, steps were being contemplated to recover possession of the land in dispute prior to the institution of the proceedings in the High Court by the Appellants.

Moreover, on or about 23.10.2008 the Appellants had sought interim relief in the same application after proceedings were instituted under the State Lands (Recovery of Possession) Act seeking to prevent the 1st and 2nd Respondents from taking possession of the land in dispute. It appears that the Appellants were not successful in this application. Possession of the land on which the clubhouse was situated was taken over by the 1st and 2nd Respondents as a result of the proceedings instituted under the State Lands (Recovery of Possession) Act.

In view of the above circumstances, I hold that the general principle that the rights of the parties must be determined as at the date of institution of proceedings or action has no application to the instant case. Where the rights of the parties, have been changed as a result of legal proceedings, like in this case where the possession of the land on which the clubhouse was situated was taken over by the 1st and 2nd Respondents through judicial procedure, the general principle has no application.

Futility

A writ of mandamus has been refused by Courts on several occasions on the ground of futility. [*Sethu Ramasamy v. Moregoda* (63 N.L.R. 115), *Shamsudeen v. The Minister of Defence and External Affairs* (63 N.L.R. 430), *Abdul Rahuman v. Mayor of Colombo* (69 N.L.R. 211), *The Eksath Engineru Saha Samanya Kamkaru Samithiya v. De Silva* (73 N.L.R. 260), *Samarasinghe v. De Mel and another* (1982) 1 Sri. L. R. 123, 128].

The relief sought by the Appellants namely issue of a writ of mandamus directing the 1st and 2nd Respondents to issue a licence for a club in favour of Badulla Sports Club for the years 2007 and 2008 became futile as soon as Badulla Sports Club lost possession of the clubhouse situated at No. 9 Race Course Road, Badulla as a result of the proceedings instituted under the State Lands (Recovery of Possession) Act. In fact, a revision application against the ejectment order made in the said proceedings was made to the High Court in Case No. 149/2010 (Rev) which was dismissed. Against the said dismissal an appeal was preferred to this Court in case no. CA(PHC) 159/2010 which was dismissed on 14.02.2019.

For the foregoing reasons, I see no reason to interfere with the order of the learned High Court Judge of the Uva Province holden in Badulla dated 10.06.2011.

Appeal is dismissed with costs.

Judge of the Court of Appeal

K.K. Wickremasinghe J.

I agree.

Judge of the Court of Appeal