

DEEJAY INDUSTRIES LIMITED

v.

DEHIWELA-MOUNT LAVINIA MUNICIPAL COUNCIL

COURT OF APPEAL.

G. P. S. DE SILVA, J. (PRESIDENT) AND DHEERARATNE, J.

CA/LA APPLICATION No. 14/81.

D.C. MT. LAVINIA 39/SPL.

JULY 14, 1986.

Municipal Councils Ordinance—Dissolution of Municipal Council—Perpetual succession—Special Commissioner—Corporation sole—Action against Special Commissioner nomine officii to reduce assessment—Constitution of new Municipal Council—Substitution of new Council in the room of the Special Commissioner—Application to amend plaint—Municipal Councils Ordinance, sections 236 and 277—Notice under s. 307 (1) of the Municipal Councils Ordinance.

The provisions of the amended s. 277 of the Municipal Councils Ordinance show that the Special Commissioner is a statutory functionary capable of holding rights and is the successor of the dissolved Municipal Council. What is contemplated is a succession or devolution of rights to the Special Commissioner who is appointed once the Council is dissolved. Section 277 (2)(a) read with s. 277(4)(A) of the Municipal Councils Ordinance manifests an intention to invest the Special Commissioner with the attributes of a corporation sole and he can be sued nomine officii.

The expression "perpetual succession" denotes no more than the continuing existence of a company or a corporation irrespective of changes in its membership. In the case of a corporation sole the transfer, resignation, retirement or death of the holder of the office for the time being does not bring its corporate existence to an end. This does not and cannot mean that the legal existence of the corporate body cannot be brought to an end. A corporate body is not capable of destruction. The extinction of a body corporate is called its dissolution. A Municipal Council is a corporate body created by statute. It can be dissolved in the manner provided by the statute to which it owes its origin. Once the Municipal Council is "dissolved" in terms of s. 277 it means the cessation of its legal existence. Dissolution cannot be reconciled with its continued existence. Upon dissolution it suffers a legal death and cannot sue or be sued.

Hence an action instituted against the Special Commissioner after his appointment upon the dissolution of the Municipal Council is properly constituted. When thereafter a new Municipal Council is constituted, substitution of the new Council in the room of the Special Commissioner is proper and the application for amending of the plaint for this purpose should be allowed.

Section 236 of the Municipal Councils Ordinance requires action to be instituted within 30 days of receiving the notification of the decision made upon the objection to the assessment. Hence s. 307(1) which makes one month's prior notice in writing of the

proposed action an imperative precondition of a suit against the Council does not include statutory proceedings in terms of s. 236 and is not applicable to a suit under s. 236.

Cases referred to:

- (1) *Wilson v. The Kandy Municipal Council* – S.C. 402/71 (F) D.C. Kandy 11304/MR, S.C. Minutes of 14th July 1977.
- (2) *Hinni Appuhamy & Sons v. Municipal Council, Kandy* – CA (SC) 22/73 Inty D.C. Kandy 7589 S.C. Minutes of 15.3.1978.
- (3) *Ladamuttu Pillai v. Attorney-General* – (1957) 59 NLR 313, 325.
- (4) *Samarasekera v. Secretary* – D.C. Matara – (1949) 51 NLR 90.
- (5) *Salih v. Valliyammai Atchi* – (1961) 63 NLR 73 (P.C.).
- (6) *Land Commissioner v. Ladamuthu Pillai* – (1960) 62 NLR 169 P.C.

APPEAL from order of the District Judge of Mt. Lavinia.

H. L. de Silva, P.C. with *P. Naguleswaran* for the plaintiff-petitioner.

Dr. H. W. Jayewardene, Q.C. with *N. Mahendiran* and *Miss T. Keenavinna* for the defendant-respondent.

Cur. adv. vult.

September 16, 1986.

G. P. S. DE SILVA, J. (President, C/A)

The plaintiff filed this action in October 1978 under the provisions of section 236 of the Municipal Councils Ordinance for a declaration that the assessment of its premises, 181, Templers Road, Mount Lavinia, at an annual value of Rs. 583,000 for the year 1976 was excessive and unreasonable and to have the assessment set aside. It is to be noted that the defendant named in the caption to the plaint and in the plaint was "The Special Commissioner, Dehiwala-Mt. Lavinia Municipal Council."

The defendant in the answer pleaded, *inter alia*, that summons was served on "The Special Commissioner, Dehiwala-Mt. Lavinia Municipal Council" and that the plaintiff cannot have and maintain this action against the defendant named in the caption inasmuch as (a) there is no such person recognised by and/or known to the law; (b) that these proceedings could if at all only have been taken against the Dehiwala-Mt. Lavinia Municipal Council.

It is not in dispute that the Dehiwala-Mt. Lavinia Municipal Council was dissolved in terms of section 277 of the Municipal Councils Ordinance on 15th February 1977. The Municipal Council was

reconstituted with effect from 1st July 1979. The plaintiff accordingly moved in August 1979 to amend the plaint by (a) deleting the words "The Special Commissioner" in the caption and (b) by deleting paragraph 2 and substituting therefor the following:

"The defendant is the Dehiwala-Mt. Lavinia Municipal Council exercising the rights, privileges, powers, duties and functions vested in it by the Municipal Councils Ordinance".

In short, the purpose of the proposed amendment was to substitute the Municipal Council as the party defendant.

The proposed amendment to the plaint was opposed by the defendant and, after inquiry, the District Judge disallowed the application. He held that there is no person or legal entity known to the law as the "Special Commissioner" and since the action is not merely against a wrong person but against no person at all, the plaint was bad in limine and the application for the amendment of the plaint was accordingly refused. The present appeal, with the leave of this Court, is against this order.

The question that was argued before us was whether "The Special Commissioner" appointed under the provisions of the Municipal Councils Ordinance was a person or legal entity known to the law and could be sued *nomine officii*. Mr. H. L. de Silva for the plaintiff-petitioner submitted that having regard to the provisions of section 277 of the Municipal Councils Ordinance as amended by the Local Authorities (Special Provisions) Act No. 42 of 1968 and The Municipal Councils (Amendment) Law No. 8 of 1974 the Special Commissioner is invested with corporate personality and can be sued *nomine officii*. On the other hand, Dr. Jayewardena for the defendant-respondent contended that the office of Special Commissioner was not incorporated; that it was not a legal person and could not be sued *nomine officii* and that he should have been sued by name. Dr. Jayewardena also maintained that the proper party defendant should have been the Municipal Council despite its dissolution under section 277 of the Municipal Councils Ordinance and relied very strongly on the judgment of the then Supreme Court in *Wilson v. The Kandy Municipal Council* (1). In that case the Supreme Court held that—

"Despite the dissolution of a Council under section 277
..... and the appointment of a Special Commissioner
..... the status of the Council by its name and

designation will always continue and it could sue and be sued by such name and designation assigned to it under the Ordinance. It is only the rights, privileges, duties and functions of the Council that cease and are exercised by the Special Commissioner I do not think an action against a Council by its name and designation is badly constituted even if such action was instituted after the dissolution of the Council and the appointment of a Special Commissioner....."

It is right to add that Mr. H. L. de Silva relied on a very brief judgement also of the former Supreme Court, *Hinni Appuhamy & Sons v. Municipal Council, Kandy (2)*, where the view was expressed that once a Municipal Council was dissolved it did not exist in law. Both Dr. Jayewardena and Mr. de Silva agreed that in these circumstances this Court was free to follow one or the other of the decisions wherein contrary views were expressed in regard to the same point.

The first matter for consideration is whether the provisions of the Municipal Councils Ordinance manifest an intention to incorporate the office of Special Commissioner. No doubt the Ordinance does not expressly create the Special Commissioner a Corporation Sole nor does it enact that he may sue or be sued in a corporate name. But what is relevant for present purposes is that "to constitute creation it is not necessary that any particular form of words should be used in the statute; it is sufficient if the intent to incorporate is evident" (Halsbury's Laws of England, 4th Ed., Vol. 9, para 1246).

The material part of section 277 of the Municipal Councils Ordinance as amended reads thus:

"277 (1) If at any time, upon representations made or otherwise it appears to the Minister that a Municipal Council is not competent to perform, or persistently makes default in the performance of, any duty or duties imposed upon it, or persistently refuses or neglects to comply with any provision of law, the Minister may, by Order published in the Gazette, direct that the Council shall be dissolved and superseded and thereupon such Council shall without prejudice to anything already done by it, be dissolved, and cease to have, exercise, perform and discharge any of the rights, privileges, powers, duties and functions conferred or imposed upon it, or vested in it, by this Ordinance or any other written law.

- (2) (a) The President may appoint for a stated period or from time to time a Special Commissioner or Special Commissioners to have, exercise, perform and discharge such of the rights, privileges, powers, duties, functions conferred or imposed upon, or vested in, the Council or the Mayor by this Ordinance or other written law as may be set forth in such Order, or in any Orders amending the same; or
- (b) The Minister may direct that a new Municipal Council in accordance with the provisions of this Ordinance shall be constituted for the Municipality in place of the dissolved Council.
- (3) Every Order made under this section shall contain such directions as may be necessary for the purpose of giving effect to the Order, and shall, on publication in the Gazette, have the force of law.
- (3) (A) At any time after the dissolution of the Council and after the appointment of a Special Commissioner or Special Commissioners under sub-section (2), the Minister may by Order published in the Gazette direct that a new Municipal Council in accordance with the provisions of this Ordinance shall be constituted for the Municipality in place of the dissolved Council.
- (4) Whenever in consequence of the exercise of the powers conferred by this section, it becomes necessary for any period of time to elapse between the dissolution of the Council and the appointment of a Special Commissioner or Special Commissioners or the constitution of a new Council, or between the cessation of the holding of office by the Special Commissioner or Special Commissioners who was or were appointed and the constitution of a new Council, the Municipal Commissioner shall during such period:
 - (a) have, exercise, perform and discharge all the rights, privileges, powers, duties and functions vested in or conferred or imposed on the Council the Mayor, or the Deputy Mayor by this Ordinance or by way of other written law, and

- (b) be the successor of the dissolved Council or the Special Commissioner or Special Commissioners, as can be.
- (4) (A) The Special Commissioner or Special Commissioners appointed under sub-section (2) upon the dissolution of a Council shall:
- (a) if the appointment was made immediately after the dissolution of the Council, be the successor or successors of the dissolved Council, and
- (b) if the appointment was made after the Municipal Commissioner under sub-section (4) had exercised, performed, and discharged, the rights, privileges, powers, duties and functions referred to in that sub-section, be the successor or successors of the Municipal Commissioner."

On a scrutiny of the above provisions it is seen that the Special Commissioner is a statutory functionary having the legal capacity "to have, exercise, perform and discharge such of the rights, privileges, powers, duties and functions conferred or imposed upon or vested in the Council". In other words what is envisaged and what is significant for present purposes is the creation of a functionary capable of *holding rights*. The matter does not end there. Section 277 (4) (A) enacts that the Special Commissioner upon the dissolution of the Council is the successor of the dissolved Council. Therefore what is contemplated is a succession or devolution of rights to the Special Commissioner who is appointed, once the Council is dissolved. In my opinion, section 277 (2) (a) read with section 277 (4) (A) of the Municipal Councils Ordinance manifest an intention to invest the Special Commissioner with the attributes of a corporation sole and I accordingly hold that the Special Commissioner appointed under the Municipal Councils Ordinance can be sued *nomine officii*. To hold otherwise would cause serious hardship and inconvenience to persons in the position of the plaintiff, when the holder of the office at the time of the institution of the action is subsequently transferred, or removed from office, or resigns or retires. In this connection the observations of Basnayake, C.J., in *Ladamuttu Pillai v. Attorney-General* (3) are not without relevance.

It is not without significance that our courts have recognised certain offices as possessing the attributes of a corporation sole for the proper discharge of the functions of the office. Under section 520 of the Civil Procedure Code, prior to its amendment in 1977, when there was no fit and proper person to be appointed as an administrator the District Court was empowered to appoint the Secretary of that court as the administrator. Basnayake, J. (as he then was) in *Samarasekera v. Secretary, D.C., Matara* (4), held that the Secretary qua administrator was a quasi corporation sole. In the course of his judgment the learned Judge expressed himself thus:

“Although the Secretary of the court is not a corporation sole in the true sense of the term, having regard to the fact that the Civil Procedure Code provides for the appointment of the Secretary of the Court as administrator it may safely be assumed that the legislature intended that the Secretary of the Court should possess all such attributes of a corporation sole as are necessary for the proper discharge of his functions qua administrator. Such offices fall into the category of quasi corporations sole”.

This judgment was expressly approved by the Privy Council in *Salih v. Valliyammai Atchi* (5). Delivering the advice of the Privy Council, Lord Radcliffe stated:

“The sum of their judgment was expressed in their holding that the Civil Procedure Code intended the Secretary of the Court to possess ‘all such attributes of a corporation sole as are necessary for the proper discharge of his functions qua administrator’. Their Lordships accept this as a correct proposition. Despite the difficulties created by the wording of certain sections and of the prescribed forms, they think that, having regard to the functions to be performed by the Secretary of the District Court and the evident intention that his office should carry a continuing responsibility for the property to be administered, it must have been intended that the code should create the holder of the office a corporation sole for this purpose”.

It seems to me that the decision of the Privy Council in *Land Commissioner v. Ladamuttu Pillai* (6), is of hardly any assistance to the respondent in the present appeal. The provisions of the Land Redemption Ordinance are not comparable to the provisions of the

Municipal Councils Ordinance in this regard. The Privy Council rejected the submission that the Land Commissioner can be regarded as a corporation sole for the reason, inter alia, that no legislative enactment "seems to reveal any intention to incorporate".

I now turn to the submission of Dr. Jayewardena that the proper party defendant should have been the Municipal Council despite its dissolution, under the provisions of section 277 (1). Section 34 (1) which sets out the attributes of corporate personality in relation to a Municipal Council reads thus:—

"Every Municipal Council shall be a corporation with perpetual succession and a common seal and shall have power, subject to this Ordinance, to acquire, hold and sell property, and may sue and be sued by such name and designation as may be assigned to it under this Ordinance".

Emphasis was laid on the concept of "perpetual succession" in order to support the argument that the Council continues to exist even though an order for its dissolution was made.

No decision was cited before us which considered the concept of "perpetual succession" in relation to a Corporation or a Company, other than *Wilson's case (supra)* referred to above. Gower in his *Principles of Modern Company Law (Fourth Edition)* discusses the concept of "perpetual succession" in the following terms:

"One of the obvious advantages of an artificial person is that it is not susceptible to 'the thousand natural shocks that flesh is heir to.' It cannot become incapacitated by illness, mental or physical, and it has not (or need not have) an allotted span of life. This is not to say that the death or incapacity of its human members may not cause the company considerable embarrassment; obviously this will occur if all the directors die or are imprisoned or if there are too few surviving members to hold a valid meeting, or if the bulk of the members or directors become enemy aliens. But the vicissitudes of the flesh have no direct effect on the disembodied company. The death of a member leaves the company unmoved; members may come and go but the company can go on for ever. The insanity of the Managing Director will not be calamitous to the company provided that he is removed promptly; he may be the company's brains but lobectomy is a simpler operation than on a natural person". (pp. 104 and 105).

"An essential element in the legal conception of a corporation is that its identity is continuous, that is that the original member or members and his or their successors are one. Accordingly, once a liability or obligation has become binding on a corporation, whether sole or aggregate it will bind the successors, even though they are not expressly named." (Halsbury's Laws of England, Vol. 9, 4th Ed. para. 1208).

It seems to me that the expression "perpetual succession" denotes no more than the continuing existence of a company (or a corporation) *irrespective of changes in its membership*. In the case of a corporation sole, the transfer, resignation, retirement or death of the holder of the office for the time being does not bring its corporate existence to an end. This, however, does not and cannot mean, that the legal existence of the corporate body cannot be brought to an end. Thus Salmond on Jurisprudence (12th Ed.) states:

"The birth and death of legal persons are determined not by nature, but by the law. They come into existence at the will of the law, and they endure during its good pleasure. . . . They are in their own nature capable of indefinite duration, this being indeed one of their chief virtues as compared with humanity, *but they are not incapable of destruction. The extinction of a body corporate is called its dissolution* – the severing of that legal bond by which its members are knit together into a unity. . . .". (The emphasis is mine).

A Municipal Council is a corporate body created by statute. It can be dissolved in the manner provided by the statute to which it owes its origin. Part I of the Ordinance provides for the constitution of Municipal Councils. Part XIV provides *inter alia* for their dissolution. As submitted by Mr. de Silva, "dissolution" is the antithesis of "constitution". Once the Municipal Council is "dissolved" in terms of section 277 it means the cessation of its legal existence. Dissolution cannot be reconciled with its continued existence. Upon dissolution it suffers a legal death and cannot sue or be sued.

On a consideration of the matters set out above, I am of the view that the present action was originally properly constituted and the application for the amendment of the plaint ought to have been allowed.

Before I conclude I wish to refer to one further matter. The District Judge in his order states that nowhere in the plaint is it averred that notice of action in terms of section 307 has been given to the defendant. As submitted by Mr. de Silva, this is an action instituted in terms of section 236 of the Municipal Councils Ordinance which requires the action to be instituted within 30 days of receiving the notification of the decision made upon the objection to the assessment. It is therefore impossible for the plaintiff to comply with the provisions of section 307(1) which enacts that no action shall be instituted *until the expiration of one month next after notice in writing* shall have been given to the defendant. It seems to me therefore that the "action" contemplated in section 307(1) would not include statutory proceedings in terms of section 236.

For these reasons the appeal is allowed, the order of the District Judge dated 26.1.81 is set aside and the plaintiff-petitioner is allowed to amend the plaint in terms of the motion dated 21st August 1979 (marked P3 in the papers filed in this court). The plaintiff-petitioner is entitled to the costs of the inquiry in the District Court, and the costs of appeal fixed at Rs. 210.

DHEERARATNE, J. — I agree.

Appeal allowed.
