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

In the matter of an application for Revision under Article 154P (3) (b) of the Constitution of the Democratic Socialist Republic of Sri Lanka.

In terms of Court of Appeal (Procedure) for Appeals from High Courts established by Article 154P (3) (b) of the Constitution Rules 1988.

Court of Appeal Case No:
CA/PHC/109/2015
HC Panadura Case No:
07/2014 (Rev.)
MC Panadura Case No:
11954

1. Rathnasiri Jayasinghe,
   Galawatte, Opposite Rankoth Viharaya,
   Arthur V. Dias Mawatha,
   Panadura.
2. D. Lionel Silva,
   66, Galauda Watta,
   Mahawadduwa,
   Wadduwa.

Members of the
Panadura Aquatic Club

Petitioner-Appellants

-Vs-

1. Kasun Epa Senevirathna,
   Commissioner of Local Government - Western

Province,
Department of Local Government,
No. 204, Denzil Kobbekaduwa Mawatha,
Battaramulla.

Substituted Petitioner-Respondent-Respondent

2. Panadura Aquatic Club,
   Hudson Park,
   Arthur V. Dias Mawatha,
   Panadura.

Respondent-Respondent-Respondent

3. Urban Council Panadura,
   Galle but Road,
   Panadura.
4. Hon. Attorney General,
   The Department of Attorney General,
   Colombo 12.

Respondent-Respondents

Before : **A.L. Shiran Gooneratne J.**

&

Dr. Ruwan Fernando J.

Counsel : K. Asoke Fernando with A.R.R. Siriwardane for the Appellants.

Sabrina Ahamed, SC for the 1st and 4th Respondents.

Written Submissions: By the 1st Petitioner-Respondent-Respondent and the 4th Respondent-Respondent on 24/07/2019.

By the Petitioner-Appellants on 17/04/2019.

Argued on: 10/09/2020

Judgment on : **23/10/2020**

A.L. Shiran Gooneratne J.

This is an Appeal from an order made by the Provincial High Court of Panadura, arising from an application for revision filed by the Petitioners representing the 2nd Respondent-Respondent (Panadura Aquatic Club) against the Applicant-Respondent-Respondent, in terms of Section 5 of the State Land (Recovery of Possession) Act No. 7 of 1979 (as amended). The learned High Court Judge by his order dated 29/07/2015, affirmed the order made by the learned Magistrate dated 13/03/2014 to evict the Petitioners from the land more fully described in the schedule to the application.

Panadura Aquatic Club is the Respondent in the application filed in the Magistrates Court of Panadura. The 1st and 2nd Petitioners before this Court are identified as members of the said club. On issuance of notice under Section 6 of the Act, the 2nd Respondent (Panadura Aquatic Club) raised a preliminary objection before the Magistrates Court on the basis that the action instituted is against a 'fictitious person' and therefore, should be dismissed in limine. The 2nd

Respondent in support of the said application for dismissal of action, filed written submissions, (undated), (Vide page 386 of the brief) and further written submissions dated 14/10/2013 (Vide page 489 of the brief). The 1st written submission filed of record was limited to the preliminary objection raised by the Respondent. However, in response to the written submissions filed by the Applicant, the Respondent took up an additional ground in opposition, that is, in terms of the Lease Agreement No. 17, marked "A" and the Lease Agreement No. 157, marked "B", the land to be acquired is not State land. (Paragraph 'B')

It is observed that the show cause inquiry before the learned Magistrate against the issue of an order for ejectment proceeded on the basis that the Respondent was neither a natural person nor a juristic person and secondly, the land to be acquired is not State land.

In the application filed in the Provincial High Court of Panadura, whilst re-agitating the above position, the Respondent also raised the following grounds in Revision.

a. The Lease Agreement No. 17, marked "A" (Vide page 478 of the brief) is the agreement that is currently in operation and therefore, Lease Agreement No. 157, marked "B" (Vide page 481 of the brief) has no validity.
b. The learned Magistrate having over ruled the preliminary objection deprived the 2nd Respondents right to be heard.

In the circumstances, the stand taken by the Appellant against the order of the learned Magistrate in the Provincial High Court can be examined in the following manner.

Firstly, the objection raised by the 2nd Respondent before the learned Magistrate in relation to the lease agreements were confined only to the question as to whether the land in occupation by the Respondent is State land.

"ඉහත කරුණු අනුව නිගමනය කළ හැකි වන්නේ පෙත්සම්කාර පක්ෂය විසින් ඉදිරිපත් කර ඇති "A" සහ "B" යන ඔප්පු, පෙත්සම්කරුගේ 2013 ජනවාරි 30 දිනැති දිවුරුම් ප්‍රකාශයේ 01 "ii" ප්‍රකාර රජයේ ඉඩමක් බවට කර ඇති ප්‍රකාශයට සම්පූර්ණයෙන් පටහැනි බවයි." vide page 491 of the brief at (paragraph 4 (d) of the written submissions dated 14/10/2013,). The said agreements were never challenged on the basis of its "validity in law".

Secondly, that the learned Magistrate delivered the final order without an inquiry, is in violation of the 2nd Respondent's (Panadura Aquatic Club) right to be heard. At this stage, it is important to note that the Petitioners before this Court and before the Provincial High Court are identified as members of the Panadura Aquatic Club and after notice to show cause has tendered written submissions in the Magistrates Court on behalf of the 2nd Respondent (Panadura Aquatic Club).

When this case was taken up for argument, the Petitioners confined this application to the following grounds in revision.

a) the original Respondent is not a juristic person and therefore, the application of the Respondent cannot be maintained.

b) has the learned Judge in accepting the validity of Agreement No. 157, dated 07/04/2006, erred in law in terms of paragraph 7 of Agreement No. 17, dated 21/10/2002.

c) the eviction proceedings are not initiated by a lawful competent authority.

d) the land in dispute is neither a State land nor a land belonging to the Urban Council of Panadura.

e) the learned Magistrate failed to give an opportunity to the Respondent to show cause and thereby seriously erred in law.

The position of the Petitioners is that the Respondent club sought approval of the Urban Council of Panadura to construct a swimming pool and accordingly, in terms of Section 162 of the Urban Councils Ordinance No. 61 of 1939 (as amended), entered into Lease Agreement No. 17 dated 21/10/2002, with the said Urban Council. The said lease agreement was cancelled by a subsequent Agreement No. 157. In the said background the Petitioners contend that in terms of paragraph 7 of Agreement No.17, the cancellation of the said agreement is *void-ab-initio* and therefore, has no force or effect in law and thus the agreement that needs to be considered as valid is Agreement No. 17.

The parties to the Lease Agreement No. 17 and the Agreement of Cancellation No.157 are one and the same. The secretary and the treasurer of the Respondent Club were the signatories to the transaction of cancellation of the

lease agreement on behalf of the Respondent club. There is no evidence before this Court, that the validity of the subsequent agreement reached between the parties to cancel Agreement No. 17 was challenged according to law before a Court of competent jurisdiction. Therefore, within the scope of the State Land (Recovery of Possession) Act, what remains to be considered is the subsequent Agreement No. 157, reached by the parties and as such, whether the said agreement could be considered as a "valid permit or other written authority of the State" to establish possession or occupation of the land in question. It is clear that in terms of Lease Agreement No. 17, the members of the 2nd Respondent Club, as encroaches of the land, had no right subject to any condition or claim to the said land. In the circumstances, we find that the agreement that is presently in force is Agreement No. 157 and therefore, within the scope of the inquiry contemplated in terms of Section 9 of the Act, the Petitioner's do not possess a valid permit or other written document to remain in the land in question and therefore the Petitioners position should be ejected.

It is an admitted fact that the agreements referred to above were entered into by the Panadura Urban Development Council and the office bearers, for and on behalf of the Panadura Aquatic Club.

Section 3 (1) of the Act reads thus,

"3. (1) Where a competent authority is of the opinion

a) that any land is State land; and

b) *that any person is in unauthorized possession or occupation of such land, the competent authority may serve a notice on such person in possession or occupation thereof, or where the competent authority considers such service impracticable or inexpedient, exhibit such notice in a conspicuous place in or upon that land requiring such person to vacate such land with his dependants, if any, and to deliver vacant possession of such land to such competent authority or other authorized person as may be specified in the notice on or before a specified date. The date to be specified in such notice shall be a date not less than thirty days from the date of the issue or the exhibition of such notice."*

The scope of the Act is to make provisions for the recovery of possession of State lands from persons in unauthorized possession or occupation. Therefore, an aggrieved party should sought remedy within the scope of the Act.

The learned Counsel for the Petitioners relied on the determination in ***Kandaiah Vs. Abeykoon 1986 (3) CALR 141*** to challenge the validity of the application before the Magistrates Court. The learned Counsel also relied on ***Senanayake Vs. Damunupola (1982) 2 SLR 621,*** to emphasize the fact that *"Section 3 of the Act should not be used by a competent authority to eject a person who has been found by him to be in possession of a land where there is a doubt whether the State had title or where the possessor relies on a long period of possession".*

In an application for writ of *Certiorari* before this Court, it was held that, *"It is clear that in terms of Section 3 of the Act, the competent authority is not required to grant a hearing before he forms an opinion that a notice should be issued on a person in unauthorized possession or occupation.* ***(C.A. No. 1299/87).*** If a Section 3 notice is not complied with, in terms of Section 6 of the Act, the competent authority, by an application in writing to the Magistrates Court names such person who is in unauthorized possession or occupation and upon receipt of that application, the Magistrate forthwith issues summons. If cause is shown, the scope of the inquiry is limited in terms of Section 9 of the Act.

The Counsel for the Appellants, has drawn attention of Court to Plan No. 2818 dated 13/03/1995 by Y.B.K. Costa L.S. marked "P5Y" (Vide page 107). The Appellants submit that the said plan was prepared at the request of the Respondent Club and not by the State. However, the schedule to the land in issue in the application for eviction and the schedule to the plan is one and the same. The metres and bounds of the land in question more fully described in the schedule to the application before the Magistrates Court is not in dispute. It is admitted that the membership of the Respondent club, with donor sponsorship, constructed a swimming pool complex in the land described in the schedule. It is also not disputed that the Petitioners to this application are office bearers of the Respondent club and as such, persons in unauthorized possession or occupation of the land in question. The office bearers represented the Respondent club in the transactions between the Respondent club and the Urban Council and in the

subsequent litigation which followed. In terms of the Act, the competent authority can evict any person who is in unauthorized possession, occupation or who encroaches upon State land. In the circumstances, we are of the view that the authorized officer in his opinion has sufficiently identified the persons in unauthorized possession or occupation of the land within the scheme of the Act and has made a valid application against the Respondent club.

In paragraph 4(4) of the written submissions filed in the Provincial High Court, the 2nd Respondent-Respondent (Panadura Aquatic Club) submits that the officers of the 2nd Respondent-Respondent entered into an agreement with the 3rd Respondent (Panadura Urban Council) in terms of Section 162 of the Urban Councils Ordinance in respect of licence duty, which an Urban Council is permitted to impose, authorizing the use of any premises within the Urban Council area. In terms of Section 32 of the Ordinance, *"--- State lands shall be vested with the Urban Council of each town"* and *"the Council has the power to impose and levy rates on the annual value of any immovable property ---"*. (Section 160 of the Ordinance)

Proviso to Section 33(1) of the Ordinance states, that *"Provided that nothing in this Section or in Section 32 shall be deemed-*

(i) to affect or prejudice any right or title of the State to any such immovable property or the right of the State at any time to resume or dispose of such property for public purposes; or ----"

The learned State Counsel has drawn attention of Court to the case of ***Divisional Secretary Kalutara Vs. Kalupahana Mestrige Jayatissa***, SC Appeal 246, 247, 249, 250/14, where special leave was granted by the Supreme Court on the following question of law, *inter-alia,* whether the competent authority is required to prove that the State land was vested in the Government or acquired when Section 9(2) of the Act specifically precludes the Magistrate from calling evidence from the competent authority to support the application for ejectment. This question was answered in the negative. It was also held that the ownership of the State, is beyond the scope of a magisterial inquiry under the provisions of the Act.

As observed by S.N. Silva J. (as he then was) in the case of, ***Ihalapathirana vs. Bulankulame, Director General, U.D.A. (1 S.L.R 1988 at 416),*** *"The phrase "unauthorized possession or occupation" is defined in section 18 of the Act as amended by Act No. 29 of 1983 to mean the following: "every form of possession or occupation except possession or occupation upon a valid permit or other written authority of the State granted in accordance with any written law, and includes possession or occupation by encroachment upon State Land. " This definition is couched in wide terms so that, in every situation where a person is in possession or occupation of State Land, the possession or occupation is considered as unauthorised unless such possession or occupation is warranted by a permit or other written authority granted in accordance with any written law. Therefore, I am unable to accept the contention of the Counsel for the Petitioner*

that a land which is the subject matter of an agreement in the nature of the document marked "P1" comes outside the perspective of the State Lands (Recovery of Possession) Act."

As pointed out, the land to be recovered is State land and all right title and interest in the property in unauthorized possession, is vested in or under the control of the Panadura Urban Council. Accordingly, in terms of Section 18 (i), the Commissioner of Local Government has the required authority to make an application to eject persons in unauthorized possession, as competent authority in terms of Section 3 of the Act.

As such, the only question that remains to be answered is whether the learned Magistrate failed to give an opportunity to the 2nd Respondent to show cause and thereby seriously erred in law. The Counsel for the Petitioner contends that the magisterial inquiry was confined only to the preliminary legal objection raised by Counsel.

In terms of Section 8 of the Act, when a person is summoned before Court to show cause, the Magistrate may proceed to hear and determine the matter forthwith or may set the cause for inquiry on a later date. In the present case the learned Magistrate having set the case for inquiry, permitted the Respondent to file written submissions on a preliminary objection to the application. (Vide journal entry dated 27/06/2013, onwards at page 455 and 456 of the brief). Thereafter, having perused the counter objections filed by the Applicant, the Respondent with

leave of Court filed further written submissions reiterating the preliminary objection already raised and also raised an objection to the validity of the lease agreements to the application for ejectment. Therefore, it is abundantly clear that the learned Magistrate has permitted the 2nd Respondent to show cause as contemplated in Section 8 of the Act.

Accordingly, we hold that the Petitioners application is without merit. Therefore, we affirm the order of the Provincial High Court of Panadura and the Magistrates Court of Panadura and dismiss the appeal with costs fixed at Rs. 15,000/-

Appeal dismissed.

JUDGE OF THE COURT OF APPEAL

Dr. Ruwan Fernando, J.

I agree.

JUDGE OF THE COURT OF APPEAL