

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

In the matter of an application for  
Restitutio in integrum made under and in  
terms of Article 138 of the Constitution.

Don Wimal Wijesuriya

Don Saman Dharmasiri Wijesuriya

**CA Case No: RII/12/19**

**DC Panadura Case NO:  
2519/LAND**

**Both at,**

199A, Mandawala Road,  
Malamulla,  
Panadura.

**Plaintiffs**

**Vs.**

Panadura Pradeshiya Sabhawa,  
Main Office,  
Wadduwa.

**Defendant**

**AND NOW BETWEEN**

Panadura Pradeshiya Sabhawa  
Main Office  
Wadduwa

**Defendant-Petitioner**

**Vs.**

Don Wimal Wijesuriya  
Don Saman Dharmasri Wijesuriya

**Both at,**

199A, Mandawala Road,  
Malamulla,  
Panadura

**Plaintiff-Respondents**

**Before:** D.N. Samarakoon, J.  
B. Sasi Mahendran, J.

**Counsel:** Kuvera De Zoysa, PC with Piume Kulatilake for the Defendant-Petitioner  
J.M.W. Wijebandara with Vimukthi Jayawardena and Kavindya Kuruwita  
for the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiff- Respondents.

**Argued On :** 25.10.2022

**Written** 29.11.2022 (by the Petitioner)  
**Submissions:** 29.11.2022 (by the Respondents)  
**On**

**Decided On :** 27.01.2023

**B. Sasi Mahendran, J.**

The Defendant-Petitioner (hereinafter referred to as “the Petitioner Pradeshiya Sabha”), a local government body established pursuant to the Pradeshiya Sabhas Act No. 15 of 1987, as amended, seeks restitutio-in-integrum in order to set aside a settlement (dated 4<sup>th</sup> July 2017 –“P20”) which it entered into, and the decree entered pursuant to the said settlement, in Case No. 2519/L in the District Court of Panadura and/or to restore the Petitioner to the status quo prior to the said settlement. It is alleged that the settlement was entered by an officer of the Petitioner Pradeshiya Sabha who did not have the authority to do so, and, consequently, the Petitioner Pradeshiya Sabha is not bound by the terms thereof. Therefore, the key issue to be determined is whether the Petitioner Pradeshiya Sabha is bound by this settlement.

Prior to dealing with that issue, the factual background is set out as follows.

According to the Petition, in 2013, the Petitioner Pradeshiya Sabha received several complaints from residents of the Malamulla area of Panadura about the unsatisfactory condition of the Mandawala Road in Panadura which was submerged in water. An investigation revealed that this occurred due to the actions of the Plaintiff- Respondents (hereinafter referred to as “the Respondents”). A culvert, constructed across

the Mandawala road, that allowed excess water to flow from the Mandawala road through a natural watercourse or channel on the Respondents' land to the canal situated on the other side of that land (as depicted in "P2") was filled up with soil by the Respondents. This blocked the free flow of excess water into the canal (through the Respondents' land) and thereby flooded the road. There was a wall in the process of construction as well, which increased the flooding. The Respondents were asked to temporarily halt the construction of the wall ("P3"). Acting under Section 81 of the Act, the Petitioner Pradeshiya Sabha passed a resolution to take steps to clear the obstruction in the culvert and permit the free flow of water. Notice was issued to the Respondents requiring them to clear the obstruction in the culvert. The Respondents, ignoring that notice, proceeded to construct the wall, which further obstructed the water drainage. The Petitioner Pradeshiya Sabha by letter dated 21<sup>st</sup> November 2013 ("P6") wrote to the 2<sup>nd</sup> Respondent stating that they had violated Section 47(1) of the Act and requested its removal.

In March 2014, the Respondents instituted an action in the District Court of Panadura against the Petitioner Pradeshiya Sabha, claiming that the Petitioner Pradeshiya Sabha had no servitude or any right over the Respondents' private land. As set out in their Complaint ("P10") the Respondents had, for easy access to the back of their large property, caused a private road to be created on their property (depicted as Lot 2B in Plan No. 1369 dated 21.11.2005 – Fourth Schedule in the Complaint) from Mandawala road. The Petitioner Pradeshiya Sabha had around November 2013 excavated and removed soil at the entrance of that internal road (a road built on the private property of the Respondents for their easy access) and constructed a culvert allowing water to flow through the said internal road (i.e., through the Respondents' land). It is claimed that as a result, both their house and the yarn factory they operate which is situated on the same land were flooded. The Respondents prayed for, inter alia, a declaratory judgment that the Petitioner Pradeshiya Sabha had no rights or servitude to or over the land; a declaratory judgment that the Petitioner Pradeshiya Sabha had no right to allow excess water to drain through the Respondents' property.

The Petitioner Pradeshiya Sabha, filing its answer ("P11"), claimed that the excess water collected on Mandawala Road was ordinarily and for some time drained through the Respondents' land and that the Respondents had obstructed the culvert across Mandawala Road blocking the free flow of water.

The Respondents had also sought a Commission for a survey of the Respondents' land to be undertaken, which was returned to the Court with the Plan and Report of the relevant Licensed Surveyor, and a Commission for a valuation report of the damages caused by the Petitioner Pradeshiya Sabha.

During the pendency of the case, the term of office of the members of the Petitioner Pradeshiya Sabha came to an end on the 15<sup>th</sup> of May 2015. In terms of the Act, when the term of office of members of a Pradeshiya Sabha ends, until the commencement of the new term of its members after an election, the Secretary of the Pradeshiya Sabha exercises, performs, and discharges all the rights, privileges, powers, duties, and functions vested in or conferred or imposed on, the Pradeshiya Sabha, the Chairman or Vice-Chairman by the Act or by any other written law (Section 9(3) of the Act).

While the Secretary was in control of the affairs of the Petitioner Pradeshiya Sabha, on the 4<sup>th</sup> of July 2017, the Petitioner Pradeshiya Sabha and the Respondents entered into the impugned settlement ("P20"), wherein it was agreed, among other things, that the land concerned (Lot No. 2B in Plan No. 1369) belonged to the Respondents and that the Petitioner Pradeshiya Sabha had no servitude or right whatsoever to or over that land; the Petitioner Pradeshiya Sabha would divert the drainage of water from the Respondents' land to the canal down Miriswatte Road. The Secretary, thereafter, sought a report from the Road Development Authority and wrote to the Project Engineer of the Kalutara District to divert the drainage of water down the road elsewhere.

Once local government elections were conducted, the Councillors were elected in May 2018. It is only then, that the Petitioner Pradeshiya Sabha became aware that a settlement of such nature had been entered. It learned that the settlement was entered by one W.A. Padmasena, Work Superintendent of the Petitioner Pradeshiya Sabha during the time the Authority was under the control of the Secretary. This settlement, it is alleged, was entered by the Work Superintendent acting in concert and collusion, fraudulently with the Respondents; in violation of Sections 47(1), 81, and 82 of the Act, and without due consideration to the fact that the Respondents were in clear violation of the Act. The Work Superintendent's services were suspended ("P24"). As the road continued to get submerged during heavy rainfall, in order to urgently grant relief to the inhabitants of the area, the Petitioner Pradeshiya Sabha yet again resolved to permit drainage through the Respondents' land, and thereafter steps were taken to demolish part

of the stone wall, built by the Respondents, that obstructed the flow of water. The Respondents then in 2018, applied to the District Court to execute the decree.

The Petitioner Pradeshiya Sabha claims that although they took steps to build an alternate drain as proposed in the settlement, the Project Engineer of the National Water Supply and Drainage Board, Panadura, wrote to it that a drain cannot be built because of underlying pipelines (“P38”). An application was made under Section 839 of the Civil Procedure Code by the Petitioner Pradeshiya Sabha to set aside the settlement, but that application was dismissed by Order dated 22<sup>nd</sup> August 2019 (“P37”). The Petitioner Pradeshiya Sabha is, therefore, now before us seeking restitution.

One ground urged by the Petitioner Pradeshiya Sabha is that once the term of office of the members of the Pradeshiya Sabha ended, the Respondents ought to have added or substituted the Secretary of the Pradeshiya Sabha in the District Court action. They rely on the case of Deejay Industries Limited v. Dehiwala – Mount Lavinia Municipal Council [1986] 2 SLR 365 to support this contention.

In the said case, the action for a particular declaration was originally filed against the “Special Commissioner, Dehiwala- Mt. Lavinia Municipal Council”. The Municipal Council had been **dissolved** in terms of Section 277 of the Municipal Councils Ordinance on 15<sup>th</sup> February 1977. It was reconstituted on 1<sup>st</sup> July 1979. Following its reconstitution, the Plaintiff moved to amend the Plaint by removing the words “The Special Commissioner”, so that the action would in effect be against the Council. His Lordship G.P.S. De Silva J. (as he then was) concluded, firstly, that the “Special Commissioner” was a corporate soul and was capable of being sued *nomine officii*. Secondly, his Lordship observed, in response to the argument of the Defendant that the Council should have been the proper party defendant despite its dissolution since the Council perpetually succeeds:

*“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.....”*

*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 [Counsel for the Plaintiff], **"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.**" [emphasis added]*

On that basis, his Lordship concluded that the action was originally properly instituted, and that the amendment was correct.

This proposition of law is not applicable to the facts of the present case. This is because, there is no “dissolution” of the Pradeshiya Sabha which has resulted in the “cessation of its legal existence”. The Petitioner Pradeshiya Sabha did not legally breathe its last. There is only a change in the membership as a result of the term of office of the members of the Pradeshiya Sabha having come to an end; an expiration of the term of office. It would be a dissolution, resulting in “cessation of legal existence”, for example, if the Minister acts under the provisions of Section 9A of the Act.

The view taken by his Lordship Janak De Silva J. in Vithana Kuruppu Aarachchige Anura v. Mahesh Wickrama & Others CA/MC/Rev/12/2017 decided on 22.07.2020, is more appropriate to the instant case. His Lordship distinguished the “two different regimes” that operate when a Municipal Council is dissolved and when the term of office of its members ends. The Council itself would be at an end when it loses its legal personality. Such a result can be triggered by a specific statutory provision, such as Section 277 of the Municipal Councils Ordinance. His Lordship opined:

*“when the term of office of the members of the Colombo Municipal Council came to an end, the Municipal Council of Colombo did not cease to exist as a legal entity”.*

Therefore, we do not agree with the contention of the Petitioner Pradeshiya Sabha that the Secretary should have been substituted or added as a party in the original action once the term of office of the members of the Pradeshiya Sabha expired. Since that is not a “cessation of legal existence”.

The next issue, the crux of the present application, is to see whether the terms of the settlement are binding on the Pradeshiya Sabha.

Section 9(2) provides that the Secretary is the Chief Administrative Officer of the Pradeshiya Sabha. Section 9(3) reads:

**Where a Pradeshiya Sabha is unable to discharge its functions** by reason of the Chairman and Vice-Chairman ceasing to hold office, **the Secretary shall**, during any period that elapses between the occurrence of the vacancies in respect of those offices and the filling of those vacancies in accordance with the provisions of the Local Authorities Elections Ordinance, **have, exercise perform and discharge all the rights, privilege, powers, duties and functions vested in or conferred or imposed on, the Pradeshiya Sabha, the Chairman or Vice-Chairman by this Act or by any other written law.** [emphasis added]

This subsection provides for the continuation of the administration and the functions of the Pradeshiya Sabha, which would otherwise come to a grinding halt and thereby cause hardship and inconvenience to its service recipients and beneficiaries. The Secretary becomes the statutory repository of all the “rights, privileges, powers, duties and functions” of that of the Pradeshiya Sabha.

On a perusal of the record, it appears that the Secretary, acting as the statutory repository had entered that settlement. Although the Petitioner Pradeshiya Sabha has taken steps to sanction the Work Superintendent who entered into the settlement, by suspending his services, it did not act with the same vigour against the Secretary. This is perhaps because it knew that the Secretary was statutorily vested with the power to enter such a settlement, and therefore sought to sanction the Work Superintendent as the ‘sacrificial lamb’. In its Petition itself, we are told that the Secretary had written to the Project Engineer of the Kalutara District trying to divert the water down the road elsewhere (“P21”).

If the settlement had been entered into without the knowledge of and not on the Secretary's instructions, then the settlement's validity could be called into question.

However, in the instant case, the Secretary had not taken any steps to apply to Court to rectify the situation and set the record straight.

The Petitioner Pradeshiya Sabha is also quiet on whether the Secretary had instructed the Work Superintendent to enter the settlement. Instead, in its written submissions, it conveniently states that there is “no evidence to show that the Secretary’s power has been delegated” to the Work Superintendent, instead of a genuine attempt to submit evidence of the Secretary himself, such as by an affidavit to substantiate its contention.

The Petitioner Pradeshiya Sabha then takes up the position that the Secretary “in any event cannot delegate any power to any other person” because the Secretary himself is a statutory delegatee.

We cannot agree with that argument because Section 9(3) confers on the Secretary the powers of the Pradeshiya Sabha in the interim period between the end of the members’ term of office and the election of new members. As alluded to above, this is envisaged to ensure the continuity of the functions of the Pradeshiya Sabha, which would otherwise be at a standstill. In the present case, the new members weren’t in office for three years. These powers that the Secretary exercised by virtue of Section 9(3) will then include the power of the chairman to delegate as well. The Chairman’s powers to delegate are provided in Section 8. Subsections 2 and 3 of Section 8 provide:

(2)The Chairman may by order in writing delegate to the Vice-Chairman or Secretary or any other officer of the Pradeshiya Sabha any of the powers, duties or functions conferred or imposed upon or vested in the Chairman by this Act or any other written law.

(3)The exercise, discharge or performance by the Vice Chairman or the Secretary or any other officer of the Pradeshiya Sabha of any power, duty or function delegated to him by order of the Chairman, shall be subject to such conditions and restrictions and limited to such purpose or purposes as may be specified in the order: and any such delegation on may at any time be varied or cancelled by order of the Chairman.

Therefore, in terms of the statute, the Secretary becomes the statutory repository of the powers of the Pradeshiya Sabha, whose members are not in office due to their terms of office coming to an end. This is until new members assume office. The Secretary can



exercise such power of delegation as well. There is nothing to show that the Secretary did not authorise or instruct the Work Superintendent to enter the settlement. The Secretary could have applied to Court to set aside the settlement if the Superintendent did not have authority, or if the Superintendent was colluding with the Respondents. Instead, the Secretary appears to have acted on the settlement.

The Petitioner Pradeshiya Sabha was also represented by Counsel throughout the proceedings. An affidavit from the Counsel appearing on their behalf setting out on whose instructions the same was entered could have shed light on this issue.

Further, it is highly unlikely that the Secretary can claim ignorance of the settlement since the proposal for settlement was in consideration for about a year before it was entered, as per the journal entries.

As the Secretary appears to be legally empowered to enter such a settlement, we cannot therefore set aside the same.

Another reason and perhaps a more important reason why the Petitioner Pradeshiya Sabha is disentitled from claiming restitutio-in-integrum is because of its unlawful conduct.

The Petitioner Pradeshiya Sabha had admittedly acted to remove the purported obstruction in order to enable the free flow of excess water, despite the terms of the settlement, and the decree thereon, continuing to be in force. The importance of abiding by the terms of the settlement has been reiterated by our courts. His Lordship Herat J. in Sinna Veloo v. Messrs. Lipton Ltd. 66 NLR 214 held:

*“Once the terms of settlement are presented to Court as an agreed upon settlement, the Court can enter a decree thereon. Once such a settlement so agreed upon is presented to Court and notified thereto and recorded by Court, a party cannot resile from the settlement even though the decree has not yet been entered.”*

While we recognise that the motive may have been sincere, and in the interests of the inhabitants of the area, we cannot condone that course of action since it should have been judicially sanctioned. To paraphrase the words of Lord Keith in Lloyd v. McMahon

[1987] 2 WLR 821, the sincerity of the Pradeshiya Sabha's motives is not something capable of justifying or excusing the failure to abide by the settlement.

This does not in any way extend to, or should be read to stifle administrative action, in emergency situations with potentials of dire consequences that require immediate administrative action, provided such action is justifiable in the public interest. However, in the facts of the present case, when it was well known that the road can get submerged, as it had happened over the years, there was time and space to apply to court and have such removal judicially sanctioned, so that the rights and interests of all parties are well protected. The need for judicial sanction is because the terms of the settlement were operative in the eyes of the law. It is not possible to claim that the breach occurred prior to entering the decree, as entering the decree is only a ministerial act. One need not have waited for a torrential downpour, and then a blockage to arise, to invoke "necessity" and then justify taking the law into one's own hands. Steps could have been taken to remedy the situation.

It is well-settled law that to claim an extraordinary remedy such as restitution, the applicant must be of clean hands. We cannot, therefore, grant this extraordinary relief because the conduct of the Petitioner Pradeshiya Sabha disentitles it to it.

Having said that, an amicable solution must be found in order to prevent such flooding. This is considering the interests of the area inhabitants who would be inconvenienced. Our attention is drawn to the 'Report regarding the issue of culvert at Ch. 00+180 in Road ID 16' prepared by the Resident Engineer – Kalutara ("P29(ii)"). It notes that building a drain along the road and diverting it to the canal down Miriswatte road is "not realistic and sustainable according to the existing elevation" and that "reconstruction of existing culvert or construction of a new culvert close to existing culvert is the most realistic solution". This is relied on by the Petitioner Pradeshiya Sabha to demonstrate the impracticability of giving effect to the terms of the settlement which provide for diverting the flow of water from the Respondents' land to the canal down Miriswatte Road.

A rather pragmatic solution has been proffered by the Project Engineer of the Road Development Authority, Kalutara. That is to acquire the relevant portion of the land so

that a drain could be created across the land. In the letter dated 17<sup>th</sup> July 2018 (“P25”) he states:

**මාර්ගයේ 1/1 බෝක්කුවේ ජලය බැහැර යාමේ කාණුව**

මේ දක්වා ඉහත මාර්ගයේ 0 + 180 ස්ථානයේ පිහිටි බෝක්කුවෙන් පිටවන ජලය බැස්සවීමට ක්‍රමෝපායක් නොමැති වූ බැවින් 2018/07/05 දින පස්වරු 2.00 ට මාලමුල්ල විහාරස්ථානයේදී පළමු මට්ටමේ මැසිවිලි සහන කමිටුවක් ප්‍රාදේශීය ලේකම් කාර්යාලය නිලධාරීන්ගේ ප්‍රධානත්වයෙන් පවත්වන ලදී. එහිදී එම ස්ථානයේ බෝක්කුවේ ජලය බැස්සවීමට මාර්ග සංවර්ධන අධිකාරියේ නිගමනය ප්‍රාදේශීය ලේකම්තුමිය වෙත ලබාදෙන ලෙස දන්වා සිටින ලදී.

ඒ අනුව ඉහත බෝක්කුවේ ජලය ඉහලින් පිහිටි අතුරු මාර්ගය දිගේ බැස්සවීමට යාමේදී මීටර 15 කට වඩා වැඩි බැහැර යාමේ කාණුවක් ඉහත මාර්ගය දිගේ ඉදිකිරීමට සිදු වේ. නමුත් එවැනි කාණුවක් මාර්ගය දිගේ ඉදිකිරීම ප්‍රයෝගික නොවේ. **එම නිසා 1/1 බෝක්කුවේ ජලය බැස්සවීමට සුදුසුම ක්‍රමය බෝක්කුව අසලින්ම යාබදව පිහිටි ඉඩම තුලින් බිම් කීරුවක් අත්පත් කර ගැනීමෙන් පසුව බැහැර යාමේ කාණුව යෙදීමයි.**” [emphasis added]

The Respondents in their written submissions also alluded to the same. On page 3 it states:

*“.....whereby the line ministry has informed Defendant Pradeshiya Sabha saying that they could resolve this problem only by acquiring a portion of the adjacent land. It is not disputed that Pradeshiya Sabha has not taken steps to execute such acquisition.”*

For the foregoing reasons, this application is dismissed. We order costs.

**JUDGE OF THE COURT OF APPEAL**

**D. N. SAMARAKOON, J.**

**I AGREE**

**JUDGE OF THE COURT OF APPEAL**