1968 *Present*: T. S. Fernando, J., and Alles, J.

TOWN COUNCIL OF MADAMPE, Appellant, *and*
J. C. W. MUNASINGHE, Respondent

S. C. 462/66 (F)—D. C. Chilaw, 17092/M

Town Council—Appointment of Special Commissioner after dissolution—Action instituted by him—Effect thereon when new Town Council is constituted—Suit against the same defendant by the new Council on the same claim—Plea of res judicata *raised by the defendant—Invalidity—"Privy in estate"—Effect on an action when a party dies or ceases to exist in law—Civil Procedure Code, s. 404—Town Councils Ordinance (Cap. 256), s. 183 (5) (6).*

Where, after the dissolution of a Town Council, a Special Commissioner is appointed in terms of section 183 (5) of the Town Councils Ordinance, an action instituted by him lapses automatically as soon as a new Town Council is constituted later and its Chairman is elected. Accordingly, the subsequent dismissal of that action after the Special Commissioner has lost his capacity to continue the proceedings and ceased to have any existence in law is a nullity and is not capable of founding the plea of *res judicata* in a fresh action brought by the new Town Council against the same defendant in respect of the same claim for recovery of a sum of money due to the Council from the defendant. Moreover, in such a case, the new Council, whose interests accrued prior to the dismissal of the earlier action cannot be regarded as a privy in estate of the Special Commissioner.

APPEAL from a judgment of the District Court, Chilaw.

S. Sharvananda, for the plaintiff-appellant.

A. C. Nadarajah, for the defendant-respondent.

Cur. adv. vult.

March 30, 1968. T. S. FERNANDO, J.—

The Town Council of Madampe constituted by Order (P2) made by the Minister of Local Government and the term of office of which commenced on July 1, 1962, instituted this action on August 13, 1963, against the defendant for the recovery of a sum of Rs. 9,082·03 alleged to be due from him on account of electric current supplied to a theatre of which he was the owner and proprietor. On the date of trial, after issues had been framed, counsel for both parties agreed that one of the issues (issue 5) be decided as a preliminary issue. As framed and accepted by the court, it read as follows :—" Does the decree in case No. 16699 operate as *res judicata* against the plaintiff in this case ? ". After argument by Counsel, the learned District Judge reserved his order for September 11, 1966, on which day he held against the plaintiff and entered judgment dismissing the plaintiff's action with costs. The appeal before us canvasses the correctness of this judgment.

In view of the nature of the plea, it becomes necessary to examine the decree in the said case No. 16699 and the circumstances in which it came to be entered. Document D1, the plaint in that case, shows that the action was filed by one E. V. S. de Alwis, the Special Commissioner, to administer the affairs of the town of Madampe appointed by Order (P1) of the Minister in terms of section 183 (5) of the Town Councils Ordinance (Cap. 256) against the present defendant-respondent for the recovery of a sum of Rs. 9,082·03. There is no dispute between the parties that it is the very same sum of money that the plaintiff-appellant seeks to recover in the action from which the present appeal has resulted. As the Order (P1) by which Mr. de Alwis was appointed with effect from May 4, 1959 also dissolved, as from the said date, the then existing Town Council of Madampe, it is clear that by section 183 (6) of the Ordinance all the property and the rights under contracts and all the powers vested in the Town Council were deemed vested in Mr. de Alwis. He therefore, undoubtedly, had the right to institute action No. 16699. In terms of P1 the Special Commissioner was " to administer the affairs of the town until a new Town Council is constituted for that town under the Ordinance and (until) that Council elects its Chairman. " Although the term of office of the new Town Council commenced on July 1, 1962, a Chairman was elected only on July 23, 1962, so that on this latter day the office of Special Commissioner ceased to exist.

To return to case No. 16699. In D2, which is the answer filed by the defendant therein on November 7, 1962, at a time when the office of Special Commissioner had ceased to exist, the defendant pleaded, *inter alia*, that " the plaintiff is not the Special Commissioner now and is not entitled in law to maintain the action ". On the day fixed for trial, i.e. on March 4, 1963, the record reads as follows :—" Counsel for plaintiff states he is unable to proceed with this case as the plaintiff is absent ". Thereupon the learned trial judge made order that the plaintiff's action be dismissed. Had the judge examined the pleadings he would have become aware that the defendant's own position was that the plaintiff

was not the Special Commissioner any longer. There was no person called the Special Commissioner on the date of trial. In view of that circumstance the proctor (and therefore counsel also) for the plaintiff on the record had no authority to act for the latter in the same way that a proctor ceases to have authority to act for a party who has died. In *Sabapathypillai v. Vaithialingam* [1], where the question was whether a trustee whose term of office has expired during the pendency of an action brought by him is entitled to continue the action, this Court held that he was not so entitled. In doing so, it followed an earlier decision of the Court in *Appusingho v. Balasuriya* [2]. A similar view was taken in the case of *Thangavadivel v. Inthiravathy* [3] which was one instituted under section 10 of the Jaffna Matrimonial Rights and Inheritance Ordinance by a wife against her husband for the return of certain jewellery. A decree absolute dissolving the marriage between the husband and wife having been entered during the pendency of the case, this Court held that the wife by reason of the divorce lost her status to continue the proceedings. The true position being that the Special Commissioner lost his capacity to continue the proceedings he initiated in case No. 16699, it does not seem to be possible to maintain that the Court had any jurisdiction to dismiss that action on any date after he had lost that capacity any more than it would have had jurisdiction to dismiss after the death of a person a case brought by that person. I would here refer to the observations of the Privy Council in the Indian case of *Debi Bakhsh Singh v. Habib Shah* [4], a case of a dismissal of a suit on the occasion of the non-appearance of a plaintiff who, unknown to the court, was dead at the time of such dismissal. Said Lord Shaw : "It requires no words of their Lordships to show the inapplicability of rules or orders dealing with the case of the non-appearance of a suitor to the situation which arises when the suitor is dead. The principle of forfeiture of rights in consequence of a default in procedure by a party to a cause is a principle of punishment in respect of such default, but the punishment of the dead or the ranking of death under the category of default, does not seem very reasonable". The office of Special Commissioner having ceased to exist as from July 23, 1962, even before the defendant's answer was filed, it was not competent to the person who held that office prior to the aforesaid state to have entered an appearance on the date of trial. The dismissal of the action in case No. 16699 was, in my opinion, a nullity and, therefore, was not capable of founding the plea of *res judicata* that has been upheld in the order appealed against.

An alternative argument relied on by counsel for the plaintiff was that the plea of *res judicata* being one available against the same party, his heirs, privies or successors, the decree before it can be pleaded as *res judicata* against him should be one entered before he became such heir, privy or successor. He relied on certain cases decided by this Court,

[1] *(1938) 40 N. L. R. 107.*
[2] *(1913) 16 N. L. R. 385.*
[3] *(1950) 53 N. L. R. 369.*
[4] *(1913) I. L. R. 35 All. at 336.*

notably *Molagoda Kumarihamy v. Kempitiya* [1] and *William Singho v. Silva* [2]. In the last mentioned case, it was held that a person whose interests accrued to him prior to an order of court is not a privy in estate of his predecessor for the purposes of *res judicata*. Nagalingam J. (at p. 512) observed :—" This contention brings one to a consideration of the question, who is a privy in estate ? Had the 2nd defendant acquired his interest subsequent to the order of amendment, then clearly the 2nd defendant would have been a privy in estate to the 1st defendant and would be bound by the decree. But in this case the 2nd defendant had acquired his interest .....anterior to even the application made by the plaintiff to have the decree amended. His rights therefore accrued to him not subsequent to the order of amendment but prior to it and he cannot therefore be deemed to be privy in estate to the 1st defendant, and no judgment or order made against the 1st defendant in respect of the interests he had parted with can affect the rights of the transferee of those interests, namely the 2nd defendant. Hukm Chand, in his treatise on the Law of Res Judicata, quotes a citation which is worth reproducing :

> "It is well understood though not usually stated in express terms in works upon the subject that no one is privy to a judgment whose succession to the rights of property thereby affected occurred previously to the institution of the suit. "

Learned counsel for the defendant sought to counter the alternative argument put forward as above indicated by trying to show that this case falls within Chapter XXV of the Civil Procedure Code which deals with the continuation of actions after alteration of a party's status. Arguing that section 404 of the Code applies, he relied on the decision of this Court in *Chittambaram Chettiar v. Fernando* [3], where Jayetileke J. interpreting that section, after stating—at page 51—that " section 404 provides that the person acquiring the interest may continue the action with the leave of the court. It does not provide that, if he does not obtain the leave of Court to continue action, the action should stand dismissed ", cited the following passage from a judgment of the High Court of Calcutta relating to an interpretation of rule 10, Order 22 of the Indian Civil Procedure Code, which is the corresponding provision to our section 404 :—

> " This entitled the person who has acquired an interest in the subject-matter of the litigation by an assignment or creation or devolution of interest *pendente lite* to apply to the Court for leave to continue the suit. But it does not follow that it is obligatory upon him to do so. If he does not ask for leave, he takes the obvious risk that the suit may not be properly conducted by the plaintiff on record, and yet, as pointed out by their Lordships of the Judicial Committee in ..... he will be bound by the result of the litigation, even though he is not represented at the hearing. "

[1] *(1943) 45 N. L. R. 34.*
[2] *(1949) 50 N. L. R. 510.*
[3] *(1947) 49 N. L. R. 49.*

I think it is sufficient to say that these decisions have no application in a situation where the party on the record has become incapable of continuing the section because he has ceased to have any existence in law. *Rai Charan v. Biswanath*[1], the Calcutta case from which the above citation has been taken, was a case where there was a party competent on the record to take action and not a party who was dead or had ceased to exist in law. Another case brought to our attention, *Viswanathaswami Devasthanam v. Koodalinga Nadar*[2], is of no assistance as it has not purported to decide a point similar to that with which we are here concerned. I am of opinion that the alternative argument of counsel for the plaintiff is also entitled to prevail.

For the reasons set out above, the judgment of September 11, 1966 dismissing the plaintiff's action with costs has to be set aside. I accordingly do so, and the case will now be remitted to the District Court for the trial to be continued on the remaining issues one of which has raised the question whether the action filed by the plaintiff is prescribed. The plaintiff is entitled to the costs of August 21, 1966, and of this appeal.

ALLES, J.—I agree.

Judgment set aside.