

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

**In the matter of an Application for mandates
in the nature of Writ of *Certiorari* and
Mandamus under and in terms of Article 140 of
the Constitution of Sri Lanka**

1. Punchage Gunawathy
 2. Punchage Sumana Piyaseeli
- Both of Kohombagaskada,
Mahapothana.

PETITIONERS

CA/WRIT/35/2014

Vs,

1. R.K.S.S.C. Wijesinghe,
Provincial Land Commissioner,
North Central Province,
Anuradhapura.
2. N.H.R. Nishantha,
Divisional Secretary,
Divisional Secretariat,
Kahatagasdigiliya,
Anuradhapura.
3. Punchage Mali.
4. Punchage Premawathie.

Both of Thonigala, Mahapothana.

RESPONDENTS

**Before : Vijith K. Malalgoda PC J (P/CA) &
H.C.J. Madawala J**

Counsel: Ashiq Hassim and P.Kumari for the Petitioners

Anusha Samaranayake SSC for the 1st and 2nd Respondents

T. Wickramanayake and Pulasthi Hewamanna for the 3rd and 4th Respondents

Argued On: 20.05.2015

Written Submissions On: 03.06.2015, 12.06.2015

Order On: 01.09.2015

Order

Vijith K. Malalgoda PC J (P/CA)

Petitioners to the present application Punchage Gunawathy and Punchage Sumana Piyaseeli has come before this court seeking inter alia,

- b. to issue a mandate in the nature of a Writ of *Mandamus*, directing the 1st and /or 2nd Respondents to accept the Petitioners' as the lawful sole nominees and successors of the permit granted to their late father under the Land Development Ordinance and grant the Petitioners permit in respect of same,
- c. to issue a mandate in the nature of a Writ of *Certiorari*, quashing the 1st and /or 2nd Respondents acceptance of the nomination by late Horathalage Pinchi (as contained in P-4) of the 3rd and 4th Respondents ,as the successors to the permit of their late father,

The Petitioners' late father, Baiyyage Puncha had been granted a permit under the Land Development Ordinance No. 19 of 1953 in respect of land to the extent of four Acres from Kohombagaskada, Kahatagasdigiya in the District of Anuradhapura.

According to the Petitioners' their father had passed away in the year 1995 and prior to his death nominated the two Petitioners as his successors as evident in document produced marked P-1A subject to the life interest of Petitioners' mother Horathalage Pinchi.

The said life interest holder had passed away on 13.09.2011 and thereafter the Petitioners' had addressed a letter to the 2nd Respondent dated 16.10.2011 (P-6) calling upon him to recognize the Petitioners as the successors to the permit of their late father.

As there was no progress of the said matter the Petitioner's brought the matter to the notice of the 1st Respondent. During this Period the Petitioners got to know, that the said Horathalage Pinchi who was only the life interest holder of the said permit holder, had purported to nominate the 3rd and 4th Respondents as the successor to the said permit.

The Petitioners have submitted that the said position is confirmed by the endorsement marked as P-1A in document P-1 (Both Sinhala and English versions) where the name of the Petitioners and their mother appear there to. The Petitioners further submits that mother had only a life interest to the said land and therefore she does not have power or legal capacity to nominate a successor to the said land.

Petitioners have heavily relied on a letter purported to have been sent by the 1st Respondent to the 2nd Respondent, dated 02.11.2012 (P-8) wherein he directed the 2nd Respondent to recognize the Petitioners as the lawful successors to the permit of late Baiyyage Puncha for reason that,

- a. As per the 1st ledger entry at the time they said Horathalage Pinchi was granted a life interest, the Petitioners alone had been named as successors to Baiyyage Puncha

- b. The other two names (3rd and 4th Respondents) had been entered subsequently at the request of Horatalage Pinchi, who had only a life interest and therefore did not have legal capacity to effect a nomination
- c. Therefore the subsequent nomination of the 3rd and 4th Respondents were of no force or avail in law

Even though the Petitioners relied on the above letter, Petitioners were not being able to place material to the satisfaction of this court, whether the nomination of 3rd and 4th Respondents were made by the life interest holder of the late permit holder Bayyage Puncha or not.

When perusing the documents P-1 and P-4 the only conclusion this court can reach is that the nominations of the Petitioners and the 3rd and 4th Respondents were made on two different occasions but, whether the inclusion of 3rd and 4th Respondents were made prior to the death of the original permit holder or after his death is a disputed fact before this court.

This court observes that this is the main issue to be resolved before coming to any conclusion. However the Petitioners' and the 3rd and 4th Respondents are disputing over this issue, and when the facts are in dispute and doubtful, our courts have repeatedly refused to grant relief in the nature of prerogative writs such as Writ of *Mandamus*.

In the case of *Thajudeen V, Sri Lanka Tea Board and another 1981 (2) Sri LR 471* the Petitioner and the Respondents have contested the facts which were in dispute. Ranasinghe (J) whilst discussing this said, "A comparison of the respective positions taken up by the Respondents and the Petitioner unmistakably shows that the claim of the Petitioner, that he is entitled to the amount set out in his Petition, is denied by the Respondents and that such denial is not based only upon questions of law alone. One of the main grounds of objections raised in respect of the said claim is that the said sum of money is not, in fact, due. This objection is one based upon questions of fact. The Respondents dispute the correctness of the figures relating to the purchases of the green tea

leaf. They deny that such quantities of green tea leaf were in fact purchased as claimed by the Petitioner. The very foundations of fact, which the Petitioner must establish to prove that he is, in fact, entitled to claim the payment of the sum of money, which he seeks to compel the Respondents to pay him, are therefore, not only not admitted by the Respondents but are also very strenuously denied and disputed by the Respondents. The basic of fundamental issues of fact the proof of which is essential, to the claim for the relief the Petitioner seeks in these proceedings, have in the first instance to be established by the Petitioner. In the absence of incontrovertible proof or an admission by the respondents of such matters of fact, the petitioner's claim to the payment of the said sum of money cannot be maintained. **All such disputed matters of fact must be resolved before a mandatory order, such as is claimed by the Petitioner in these proceedings, and goes out from this court.** The issuance of such an order carries with it the implication that this Court is satisfied that the said amount is in fact due to the Petitioner and that there is no question about the basic primary questions of fact upon which the Petitioner's claim is founded. When, however, such questions of fact are in dispute they can and must only be settled by a regular action between the disputants before the appropriate Court of First Instance. Such questions, the decision of which calls for the leading of evidence, both oral and documentary and the cross –examination of witnesses are all questions which can be best decided by way of regular procedure falling within the ordinary jurisdiction of the Courts of First Instance.(emphasis added)

As discussed in the above case, the facts which are in dispute, namely “whether the inclusion of 3rd and 4th Respondents were made prior to the death of the original permit hold or after his death must he resolved before a mandatory order such as is claimed by the Petitioners in the present application are considered by this court.

The petitioners have further argued that, even if the nomination of 3rd and 4th Respondents were made by the deceased permit holder is considered as true, such a nomination is of no force or

avail in Law for the reason that, once a valid nomination has been effected there is no provision to add further nominees without first cancelling the nomination already validly made.

This court cannot agree with the above argument since there is no cancellation involved in the permit in question and the Land Development Ordinance does not prohibit the nomination of additional successors to a permit where nomination of successor had already being done.

For the reasons adduced above, this court is not inclined to grant relief as prayed by the petitioners.

Therefore application is dismissed without cost.

PRESIDENT OF THE COURT OF APPEAL

H.C.J. MADAWALA,

I agree,

JUDGE OF THE CUORT OF APPEAL

Application is dismissed.