

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

**In the matter of an Application for a mandate in the
nature of *Writ of Certiorari* and *Mandamus* under
article 140 of the Constitution of the Democratic
Socialist Republic of Sri Lanka**

Uda Gedara Kulasinghe,
No. 03, Yaya 03,
Rajanganaya.

PETITIONER

C.A. Writ 70/2014

Vs,

1. K.K.G.I.D.P. Wijethilake,
Divisional Secretary,
Divisional Secretariat,
Rajanganaya.
2. Land Commissioner,
Provincial Land Commissioner's Department,
North Central Province,
Anuradhapura.
3. Hon. Attorney General,
Attorney Generals' Department,
Colombo 12.
4. Uda Gedara Jemis,
Yaya 03,
Rajanganaya.
5. Uda Gedara Danapala,
No. 14, Adiranigama,
Ihala Halmillewa.

6. Uda Gedara Gunawathi,
Yaya 05,
Rajanganaya.

7. Uda Gedara Ariyalatha,
Yaya 05,
Rajanganaya.

8. Uda Gedara Wilson,
Yaya 05,
Rajanganaya.

RESPONDENTS

Before: Vijith K. Malalgoda PC J (P/CA)

Counsel: Chathura Galhena with Manoja Gunawardena for the Petitioner
Nayomi Kahavita SC, for the 1st to 3rd Respondents
Vidura Ranawaka with Menaka Warnapura for the 4th Respondent

Argued on: 15.09.2015, 01.02.2016

Written Submissions On: 02.03.2016, 31.03.2016

Judgment on: 01.07.2016

Order

Vijith K. Malalgoda PC J

Petitioner to the present application Uda Gedara Kulasinghe has come before this court seeking inter alia,

- d) Issue a Writ in the nature of *Certiorari*, quashing the decision of the 1st Respondent to name the successor in terms of section 72 and schedule 111 of the Land Development

Ordinance as stated in the letter marked P-16 and quashing any transfer, if any such transfer had already been made by the 1st defendant based on the aforesaid finding as stated in letter marked P-16

- e) Issue a writ in the nature of *Mandamus* compelling the 1st Respondent to transfer the property more fully described in the schedule to the grant marked P-5 and/or the permit marked P-1 in favour of the Petitioner

In this matter, State did not file objections before this court and informed that the 1st-3rd Respondents would abide by the decision of this court. However the matter was fully argued before this court between the Petitioner and the 4th Respondent who is the eldest son of the deceased permit holder.

The Petitioner's father namely, Uda Gedara Peiris was issued with a permit under the Land Development Ordinance for a high land referred to in the schedule and the said permit is produced marked P-1 before this court.

As observed by this court, the said permit holder had nominated the Petitioner as the successor to the said permit and the said nomination had been registered in the land ledger which is also produced before us marked P-2.

According to the copy of the land ledger before this court "U.G. Kulasinghe son 9 years" had been the nominated successor to the land in question. After the death of the original permit holder on 11/05/1991 the wife of the deceased permit holder namely U.G. Ango was appointed as the life interest holder to the said land on 02/10/1991 and this position too is confirmed by P-2 the land ledger.

As submitted by the Petitioner, after the death of his mother, in the year 2000 the petitioner had requested to effect the nomination made by his late father from the 1st Respondent. Petitioner had further submitted that, subsequently he got to know of the issuance of a grant to the same land by His Excellency the President in favour of his late father. The said grant too is produced marked P-5.

Since there was a delay in regularizing the land in his name the Petitioner had gone before the provincial High Court of Anuradhapura seeking a writ of *Mandamus* directing the 1st Respondent to compel to effect the nomination made by his late father.

It is observed that the said Provincial High Court had issued a *Writ of Mandamus* compelling the Respondents to effect the transfer in favour of the Petitioner by order dated 16.12.2004. Subsequent to the issuance of the *Writ of Mandamus*, the 4th Respondent made a request from the Provincial High Court to intervene in the said application but the said request was not granted by the High Court.

Being dissatisfied by the order of the High Court the 4th Respondent had filed another writ application bearing no. 62/2008 before the same Provincial High Court but that application too was dismissed by the High Court. The 4th Respondent had appealed against the said order to the Court of Appeal and in the Court of Appeal, the said matter was settled by parties agreeing to go before the 1st Respondent to have a fresh inquiry. As observed from the material placed before this court, the original permit holder Uda Gedara Peiris was unaware of a grant issued to him in favour of the land in question, and therefore the only nomination he had made with regard to land in question was the nomination he had made on the permit issued to him under the Land Development Ordinance nominating the Petitioner as the nominated successor. This position is confirmed from the fact that few days prior to the death of the said Uda Gedara Peiris in January 1991 certain steps have been taken by him in order to reconstruct the documentation maintained at the 1st Respondent office since some of the said documents have been destroyed due to insurgent activities taken place in the period 1989-1990 in the said areas.

In addition to the above, the nomination of the life interest holder in the year 1991 after the death of the said Uda Gedara Peiris was effected on the said permit and not on the grant, which was said to have issued in the year 1982, nine years prior to the death of Uda Gedara Peiris.

However when the 1st Respondent conducted the inquiry in to the alienation of the land in question in the, absence of any nomination on the grant issued in favour of the deceased grantee Uda Gedara Peiris the said Respondent has decided that the succession of the said land has to be decided considering the grant only and in the absence of any nomination in the said grant, section 72 and the 1st schedule to the Land Development Ordinance would apply.

The said decision of the 1st respondent was conveyed to the Petitioner by the 1st Respondent by his letter dated 10.03.2014 which is produced marked P-16 before this court.

Being dissatisfied with the said decision the Petitioner has filed the present application seeking relief which I have referred to above in this Judgment. A dispute with regard to the alienation of a land to its successor, when the successor was nominated in the permit but not in the subsequent grant was considered in the case of *Piyasena V. Wijesinghe and Others [2002] 2 Sri LR 242* by a single Judge of the Court of Appeal as follows,

In the said case the Petitioner who is the eldest son of a deceased grantee had challenged the decision to effect the succession by alienating the land to the nominees' of the permit holder (one and the same person)

The facts of the said case are almost similar to the case in hand since, the deceased permit holder was unaware of the grant until his death as observed by this court.

Even though the Petitioner to the said case has argued that the nomination found in the permit is deemed to have been cancelled on the issuance of the grant and therefore took up the position that in such a situation section 72 and the 1st schedule of the Land Development Ordinance will applicable when deciding the successor, the court held that,

“The nomination of a successor under the permit becomes converted to nomination made by her as the owner of the land. At the time of her death she was entitled to be considered as owner by virtue of the fact that she had been awarded the grant”

The above position taken up by the Court of Appeal was confirmed by the Supreme Court in the case of *Mallehe Vidaneralage Don Agosinno V. Divisional Secretary Polonnaruwa and 4 Others SC Appeal No. 30/2004 (SC minute dated 23.03.2005)* when the Court of Appeal held that in the absence of a nomination under the grant, the Petitioner Respondent being the eldest son should succeed to the entirety of the holding.

In the said judgment S.N. Silva CJ observed,

“for this purpose, the Court of Appeal relied on section 37 of the Ordinance which states that the conditions included in any grant shall as from the date of such grant, run with the land and shall bind the original and all owners thereof. This section, in our view, cannot apply in relation to a nomination that has been made by the holder indicating his wish as to the persons who should succeed him in respect of his interest. The fact that his interest is converted from that of a permit to a grant cannot make a variation in the wish that has been already indicated by him to the relevant authority. There is no provision in the Land Development Ordinance which has the effect of annulling the nomination that has been made by a holder of any lot. On an examination of the scheme of the sections, in particular, section 19 (4) referred to in P-7 itself, it is clear that the permit holder’s right fructifies to in a grant upon the satisfaction of certain conditions. The conversion of the character of the holding cannot have the effect of annulling the nomination that has been validly made.

In these circumstances, we are of the view that the 1st Respondent has made the order P-7 on a proper application of the relevant provisions and importantly, by giving effect to the wish of the deceased allottee. Our attention has also been drawn to a judgment of the Court of Appeal in *Piyasena V. Wijesinghe and Others 2002-2-SLR page 242* where the Court of Appeal has taken the same view on

the basis that there is a lacuna in the law and that the intention of the allottee should be given effect to. It is clear from the provisions of the law that the change in the nature of the holding from that of a permit to a grant is one process and it should not be taken as two distinct processes for the purpose of annulling a nomination that has been previously made. Accordingly, we allow the appeal and set aside the judgment of the Court of Appeal.”

As observed by this court question to be determined in the previous application pending before the Provincial High Court of Anuradhapura and in the Court of Appeal as well as in the present application is whether a nomination made in a permit transfers to a subsequent grant after the death of the permit holder/grantee.

This position has now been settled by the said decision of the Supreme Court concluding that “the conversion of the character of the holding cannot have the effect of annulling the nomination that has been validly made.”

After the arguments were concluded and this matter was fixed for written submissions of the two parties (Petitioner and the 4th Respondent) a motion was supported on behalf of the 4th Respondent requesting the court to call for the “Original” of the permit produced marked P-1 by the Petitioner.

On the directions of this court, the 3rd Respondent Honorable Attorney General had produced before this court a certified copy of P-1 along with a motion dated 23.03.2016. as observed by this court the said permit produced by the 1st to 2nd Respondents through 3rd Respondent was identical to the document produced marked P-1 but, in their written submissions, the Learned Counsel for the 4th Respondent had raised suspicion over the said document, whilst drawing attention to some dates appear in the said permit.

In this regard the two parties have now taken up two different views and as observed by this court these two views are contradictory to each other and therefore it is my considered view that issues

which are now in dispute are to be considered not by this court but by the authority who has the power to look in to those facts.

In this regard I am mindful of the decision in the case of *Thajudeen V. Sri Lanka Tea Board and Another (1981) 2 Sri LR 471* where the Court of Appeal had concluded that “ where the major facts are in dispute and the legal result of the facts is subject to controversy and it is necessary that the questions should be canvassed in a suit where parties would have sample opportunity of examining the witnesses so that the court would be better able to judge which version is correct a writ will not issue.”

When considering the material already discussed above, this court is of the view that the decision reached by the 1st Respondent, and communicated to the Petitioner by P-6 is liable to be quashed since it was made arbitrary, ignoring the legal provisions of the Land Development Ordinance which had been interpreted by the decisions of the Court of Appeal and the Supreme Court. Therefore this court issues a *Writ of Certiorari* as prayed in paragraph ‘d’ to the Petition quashing the decision reached by the 1st Respondent to name the successor in terms of section 72 and schedule III of the Land Development Ordinance.

However this court is not inclined to issue a *Writ of Mandamus* as prayed in paragraph ‘e’ to the Petition since this court observes that there are disputed facts to be decided by the relevant authorities. *Writ of Certiorari* is issued as prayed in paragraph ‘e’ to the Petition.

Application is partly allowed.

PRESIDENT OF THE COURT OF APPEAL