

**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, Prohibition and
Mandamus* under article 140 of the Constitution of
the Democratic Socialist Republic of Sri Lanka**

W.M. Dhanapala Menike,
Galkoranuwa, Udahavupe,
Kahawatte.

PETITIONER

CA/WRIT/26/2014

Vs,

1. Dayananda Colombage,
Divisional Secretary,
Divisional Secretariat,
Kahawatte.

- 1A. B.A.C.P. Bamunuarachchi,
Divisional Secretary,
Divisional Secretariat,
Kahawatte.

2. R.P.R. Rajapakshe,
Commissioner General of Land,
Land Commissioner General's Department,
No. 1200/6 Rajamalwatte Road,
Battaramulla.

3. P. Wasantha,
Assistant Commissioner General of Lands,
Land Commissioner General's Department,
No. 1200/6 Rajamalwatte,
Battaramulla.
4. Provincial Commissioner of Land of the
Sabaragamuwa Province,
Office of the Provincial Commissioner of Land,
Provincial Council Building, New Town,
Ratnapura.
5. Ven. Pelmadulle Dammagaweshi Thero,
Athugalkanda Aaranya Senasanaya,
Lellopitiya,
And also of Malwessa Wehera,
Godakawela.
6. Wellakkutti Mudiyanseelage Wasantha Kumara,
Weliindawatte,
Indiketiya Road,
Pelmadulla.
7. Registrar of Lands,
Land Registry,
Ratnapura.

RESPONDENTS

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

Counsel: Shantha Jayawardena with Duleeka Imbuldeniya for the Petitioner

U. Seneviratna for the 6th Respondent

Nayomi Kahawita SC for 1st, 2nd, 3rd, 4th and 7th Respondents

Argued On: 10.03.2016

Written Submissions On: 05.07.2016

Order On: 21.10.2016

Order

Vijith K. Malalgoda PC J

Petitioner to the present application W.M. Danapala Menike had come before this court seeking relief as prayed in paragraphs (c) -(n) of the petition. However when this petition was supported before this court on 19.02.2014, the court after considering the material placed, decided to issue notices only as regard to the relief prayed in paragraphs (c), (d) and (e) of the petition to the effect;

- c) Grant and issue a mandate in the nature of a writ of *Certiorari* quashing P-10
- d) Grant and issue a mandate in the nature of a writ of *Certiorari* quashing P-11
- e) Grant and issue a mandate in the nature of a writ of *Certiorari* quashing P-12

The Petitioner's father Wellakkutti Mudiyansele Podi Bandara had received two grants bearing numbers, Rat/Pra/700 dated 20.04.1982 and Rat/Pra/4318 dated 03.07.1986 under the provisions of the Land Development Ordinance No 19 of 1935 (as amended). As revealed before this court the said Podi Bandara was married to one Muthuthanthrilage Podi Menike and had five children from the said marriage. The said Muthuthanthrilage Podi Menike had pre deceased her husband and the said grantee Podi Bandara too had died on 26.06.1997 without nominating a successor to the said grants.

As revealed before this court Wellakkutti Mudiyansele Podi Bandara and Muthuthanthrilage Podi Menike had five children from the said marriage namely,

1. Ven. Pelmadulle Dammagaveshi Thero (W.M. Madduma Bandara- Eldest son) (5R)

2. W.M. Wickramasekara Bandara (born on 06.12.1957)
3. W.M. Danapala Menike (born on 19.12.1945) (Petitioner)
4. Muthuthanthrilage Gunathilake Menike (born on 10.01.1955)
5. W.M. Gunarathne Menike (born on 28.03.1953)

Since the deceased Podi Bandara did not nominate a successor during his life time to the above mentioned lands, the eldest of his children the 5th Respondent had become entitled to succeed to the said lands by operation of section 72 together with the order of priority laid down in the third schedule to the Land Development Ordinance (as amended)

However as revealed before this court the 5th Respondent Madduma Bandara declined to succeed to the said land and the 2nd eldest son of the said permit holder Podi Bandara namely Wickremasekara Bandara succeeded to the lands in issue by operation of the said provisions of the Land Development Ordinance.

However as submitted by the Petitioner the said successor Wickremasekara Bandara had died on 05.08.2010 without nominating any successor to the lands in issue. As revealed before this court the deceased Wickremasekara Bandara was a bachelor at the time of his death.

After the death of Wickremasekara Bandara the Petitioner who is the eldest among the sisters as well as the 5th Respondent who declined to accept the lands in issue after the death of his father, made a claim to the lands in issue to the 1st Respondent.

Subsequent to an inquiry held before the 1st Respondent which was attended by the 5th Respondent and the Petitioner, the 1st Respondent sought advice from the Provincial Land Commissioner. On the advice received, the 1st Respondent by letter dated 10.06.2011 had communicated his decision to the Petitioner (1R12).

Subsequent to the said communication the 3rd Respondent had confirmed the said decision by letter dated 22.06.2011 (P-10) and based on said decision the 1st Respondent had taken steps to transfer the ownership of the lands in dispute to the 5th Respondent by P-11 and P-12 instructing 7th Respondent to register the ownership of the 5th Respondent in the relevant folios.

The Petitioner who was aggrieved by the said decision and the steps taken thereafter, had filed the present application seeking a writ of *Certiorari* to quash the said P-10, P-11 and P-12.

As observed by this court, the entire case for the Petitioner is rested on the steps taken by the 5th Respondent when he declined to succeed to the properties at the time of his father's death. The 5th Respondent who is the eldest among the brothers, had executed a Deed of Renunciation No. 14751 dated 02.06.1998 and it was the position taken up by the Petitioner that the 5th Respondent had renounced all his interests with regard to the lands referred to in the said Deed of Renunciation and therefore he is estopped in law making a claim to the same lands in question without cancelling the said Deed of Renunciation.

As observed by this court the 5th Respondent had executed a Deed of Renunciation (P-5) No 14751 dated 02.06.1998 attested by Sriyani Wijeyagunawardena Notary Public and when going through the said Deed of Renunciation this court observed that the said Deed of Renunciation was executed after obtaining permission from the divisional secretary of the area to renounce his rights with regard to the two lands referred to in this case as against his younger brother Wellankatti Mudiyansele Wickremasekara Bandara.

In this regard to the Petitioner relied on the following part of the said Deed of Renunciation to the effect, “ ඉබේ සංවර්ධන ආඥා පනතේ 162 (1) වගන්තිය යටතේ අවසර ලබාගෙන ඇති ඉහත කී වෙල්ලන්කට්ටු මුදියන්සේලාගේ මදදුම කන්ධාර වන මට රත්/ප්‍ර/700 සහ රත්/ප්‍ර/4318 දරණ ස්වර්ණකුම් පත්‍රය යටතේ අයිතිය හිමිවූ මෙහි පහත උපලේඛණයෙහි විස්තර කරන දේපල සහ ඊට අයිති සියලු දෙයින් මාහට සතු සියලුම සියල්ල මෙයින් අත්හැර දැමුවෙමි.

එසේ හෙයින් මෙම අත්හැර දැමීම කරුණුකොටගෙන එකී දේපල සහ ඊට අයිති සියලු දේන් ගැනීමට තිබෙන අයිතිවාසිකම්, හිමිකම් නොමුල්ලන බවත්..... මෙයින් ප්‍රකාශ කර ස්ථිර කරමි. and argued that the 5th Respondent had renounced all his rights with regard to the lands referred to in the schedule to the said deed and therefore he is estopped from making a fresh claim to the same lands at a subsequent stage without cancelling the said deed.

The said argument by the Petitioner was challenged by the Respondents before this court and as observed by this court the objections raised by the Respondents were two fold.

The Respondents have firstly submitted that, when considering the Deed of Renunciation, the court should not try to give an interpretation to the parts thereof but should consider the entire document and try to ascertain the intention of the maker of the said document along with the fact that the circumstance under which the said document was made.

Without prejudice to the said argument raised before this court the Respondents have further argued that the Land Development Ordinance does not identify any other process to decide the succession rights when there is no nomination with regard to the successor other than the provisions in section 72 and the order of priority laid down in the third schedule. In the said circumstances the Respondent argued that, there can't be a nomination based on a Deed of Renunciation and the said nomination made based on the Deed of Renunciation of the 5th Respondent was illegal and the only valid nomination before this court is the present nomination made by the 1st Respondent nominating the 5th Respondent under the provisions of section 72 of the Land Development Ordinance and the order of priority laid down in the third schedule.

With regard to the 1st argument raised by the Respondents, this court observes the following explanation given by the 5th Respondent in the said Deed of Renunciation with regard to his decision.

“නීත්‍යානුකූලව මෙම දීමනා පත්‍රවල උරුමය මාටෙත පැවරී ඇතත් එක් දේපලවල බුක්තිවිදීම හා පරිහරණය කිරීම මාගේ සදාදරණීය සහෝරයා වූ වෙල්ලන්කට්ටු මුදියන්සේලාගේ වික්‍රමසේකර විසින් සිදුකරනු ලබයි. ඔහු දීමනා පත්‍ර අංක රත්/ප්‍ර/700 ඉබමේ පිහිටි උප සෙවිලි ස්ථිර නිවසේ පදිංචි අතර රත්/ප්‍ර/4318 දීමනා පත්‍ර ඉබමේ ඇති තේ වගාව හා අනෙකුත් සියලු වගාවන් බුක්තිවිදීම කරනු ලබන බැවින් මේ දේපල නිරවුල්කර මාගේ සහෝරයා වෙත ලබාදීමට මා අදහස්කරන බැවින්, එක් දේපල නිරවුල්කර තමන් වෙත ලබා දෙනලෙස වික්‍රමසේකර බණ්ඩාර සහෝරයා මා වෙතින් ඉල්ලාසිටි බැවින්ද, කහවත්ත සහකාර ප්‍රාදේශීය ලේඛනවිද්‍යාලයේ ඒ සඳහා ලබාගත් ලිඛිත අවසරයේ (කහ/ප්‍රාලේ/31/83 [iv]) හා 1997.12.17 හා 1998.04.02 ලිපියේ ඡායා පිටපත් යාකර ඇත.

මෙම දේපල මම සතු සියලු අයිතිවාසිකම් අත්හරින අතර එක් අත්හැරීම් තුළින් පහතේ 3 උපලේඛනය අනුව මෙම ඉබමේ බුක්තිවිදින මාගේ සහෝරයාට මෙම දේපලවල සියලු අයිතිවාසිකම් උරුමකම් හා අයිතිවාසිකම් වඩාත් තහවුරුවීම සඳහා මාගේ සහෝරයාගේ ඉල්ලීම ඉටුකරදීම සඳහාත් මාසතු සියලු අයිතිවාසිකම් හා හිමිකම් අත්හරිමින් මෙම ඔප්පුව සාදාදී මාගේ සහෝරයාගේ ඉල්ලීම ඉටුකර සම්පූර්ණ කර දෙමි.

When going through the said Deed of Renunciation this court further observes that the portion relied by the Petitioner referred to in this judgment had been found immediately after the portion referred to above.

When going through the portion above, it is clear that,

- a) It is Wickremasekara Bandara who occupied the permanent house in lot identified in permit 68/9/700 and looked after the tea plantation and other plantations in the lot identified in permit 68/9/4318
- b) The said Wickremasekara Bandara had requested the maker of the Deed of Renunciation to allow him to get title to the said land by clearing the barriers
- c) That the maker of the said Deed of Renunciation was keen to give his brother a clear title to the land and premises enjoyed by his brother Wickremasekara Bandara
- d) That the maker of the said document had obtained permission from the Divisional Secretary of Kahawatta to renounce the said lands
- e) That he is renouncing his rights to the said lands in order for his brother Wickremasekara Bandara to get a clear title to these lands
- f) That he is making the said Deed of Renunciation to fulfill the request made by his brother.
- g) That he has renounced his rights to the said lands in favour of his brother Wickremasekara Bandara and his descendents only but not in favour of the Petitioner who is not a descendent of Wickremasekara Bandara

In the said circumstances it is clear that the maker of the said Deed of Renunciation had only renounce his claim, as only against Wickremasekara Bandara and not against anybody and therefore this court is in agreement with the first argument raised by the Respondent that when considering the Deed of Renunciation, it is important to consider the whole document rather than giving an interpretation to parts thereof.

When the said Wickremasekara Bandara had died without nominating a successor the same provisions of the Land Development Ordinance will apply and the 5th Respondent being the brother of the deceased Wickremasekara Bandara he will become entitled to be the successor of the said deceased.

The Petitioner has further challenged the decision of the 1st Respondent appeared in P-9a and submitted that, the decision to confirm the ownership of the lands in question in the lay name of the 5th Respondent is contrary to the provisions of the Land Development Ordinance. As revealed before this court, at the time the present application was filed the 5th Respondent had become a Buddhist Priest by the name Ven. Pelmadulle Dammagaweshi Thero and the objection of the Petitioner was that the 5th Respondent being a Buddhist monk was not a person who was eligible to be granted a land governed under the Land Development Ordinance.

However from the material already discussed in this judgment, it is clear that the decision of the 1st respondent was based on the provisions in section 72 and the order of priority laid down in the 3rd schedule and nowhere in the said section prevented a person getting his succession rights just because he has decided to become a Buddhist Priest, and therefore I see no merit in the said argument.

Even though this court is in agreement with the 1st argument raised by the Respondents and also decided to reject the argument of the Petitioner, this court would also like to consider the second argument raised by the Respondents since the said argument created a doubt on the steps taken by the 1st Respondent when he declared Wickremasekara Bandara as the successor subsequent to the Deed of Renunciation by the 5th Respondent. In this regard this court is mindful, that the Land Development Ordinance had not provided any special provision for a person who becomes entitled to be declared as the successor to a permit or grant to reject his claim but there is no specific provision prohibiting notarially executing an instrument other than under section 162 of the said Act.

Section 162 of the Land Development Ordinance (as amended) reads thus,

- 162 (1) A Notary shall not attest any instrument operating as a disposition of a holding which contravenes the provision of this Ordinance
- (2) An instrument executed or attested in contravention of the provisions of this section shall be null and void

As observed by this court the above section had only referred to the making of a document “operating as a disposition a holding” and in the said context the maker of the document should possessed the holding at the time he make the document. In the present case as referred to above in this judgment, the maker of the Deed of Renunciation had renounced his claims against his brother over the Lands in question and he was not in possession of the Lands at the time he executed the said deed. In these circumstances the Deed of Renunciation prepared by the 5th Respondent does not come within the provision of section 162 of the Land Development Ordinance (as amended)

Even though section 72 taken together with Rule 1 of the 3rd schedule had not provided for a refusal by the successor to a holding, it is not correct to say that the Land Development Ordinance is silent on the right to refusal by a successor since section 68 (2) of the Land Development Ordinance refers to a situation where a nominated successor refuses to succeed to a holding.

In these circumstances this court observes that a person's right to refuse succession under section 72 together with the order of priority under Rule 1 of the 3rd schedule of the Land Development Ordinance has not been taken away and a Deed of Renunciation made by him disclaiming his rights in order to refuse succession against another cannot be rejected in the absence of specific Prohibition in the Land Development Ordinance.

In the said circumstances this court is not inclined to accept the second argument raised on behalf of the Respondents.

However as observed above, this court is not in agreement with the arguments raised by the Petitioner, and is of the view that the impugned decision conveyed to the Petitioner by P-10 and the steps taken thereafter to register the ownership under P-11 and P-12 had been carried out under the provisions identified in the Land Development Ordinance (as amended).

For the forgoing reasons I dismissed this application but make no order with regard to costs.

Application Dismissed.

PRESIDENT OF THE COURT OF APPEAL