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 Writs of Certiorari and Mandamus under and in terms of Article 140 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

K. D. Sudath Sisira Kumara
Thambagallawatta Medagama
Panirendawa.

PETITIONER

Court of Appeal Case No:
CA/WRIT/24/2016

Vs.

1. H. M. S. P. Herath
   Divisional Secretary
   Madampe.

2. J. M. R. P. Jayasinghe
   The Provincial Land Commissioner
   Provincial Land Commissioner's Department,
   Provincial Council Office Complex,
   Kurunegala.

3. H. K. D. W. M. N. Hapuhinna
   Deputy Land Commissioner (Ranbima)
   No. 1200/6,
   Rajamalwatta Road,
   Battaramulla.

4. R. P. R. Rajapakshe
   Commissioner General of Land
   No. 1200/6,
   Rajamalwatta Road,
   Battaramulla.

4A. R. M. C. M. Herath
   Commissioner General of Land
   No. 1200/6,
   Rajamalwatta Road,
   Battaramulla.

5. Hon. Attorney General
   Attorney General's Department,
   Colombo 12.

6. M. G. Nalani Ramyalatha
   Kuda Bingiriya,
   Panirendawa

7. K. D. Nalaka Manjula
   Thambagallawatta,
   Medagama

8. K. D. Theja Nilmini
   Thambagallawatta,
   Medagama

RESPONDENTS

Before:	C.P Kirtisinghe, J Mayadunne Corea, J
Counsel:	Ashan Fernando with P. G. Ayesha Tharangani for the Petitioner Suranga Wimalasena DSG for the 1st to 5th Respondents 6th to 8th Respondents absent and unrepresented
Written Submissions:	Tendered by the Petitioner on 02/09/2020 Tendered by 1st to 5th Respondents on 21/10/2019
Decided on:	31/10/2022

Mayadunne Corea J

The facts of the case briefly are as follows, the Petitioner alleges that he is the eldest son of K.D Siripala. The said Siripala is the successor recipient of the land grant marked as P2 by virtue of the succession made under P3. The said grant had been originally issued in favor of K. D. Albert who was the father of Siripala. The Petitioner contends that the deceased Siripala is the Petitioner's father. It is common ground that in the year 2006, the said Siripala, the Petitioner's father had nominated M.G.N. Ramyalatha, the 6th Respondent as the successor to the said land. Later the said Siripala revoked the nomination of the 6th Respondent and surrendered the land back to the state.

The Petitioner alleges that subsequently, the Petitioner nor his mother, had been nominated as successors, hence this writ application. The Petitioner filed the writ application dated 21.01.16 and thereafter filed an amended petition dated 25.01.17 whereby he sought to quash the decision reflected in P10.

When this case was taken up for argument, all parties agreed to dispose of the case by way of written submissions. The 6th to 8th Respondents have filed their objections, however, have failed

to appear thereafter. It is also pertinent to note that on many occasions, this Court has issued several notices on 6th to 8th Respondents, however, they have failed to appear and they have been absent and unrepresented throughout.

The Petitioner's complaint to Court

The Petitioner alleges that the 1st, 2nd, 3rd, and 4th Respondents have acted ultra vires in not appointing him as a successor but had taken a decision in favor of the 6th,7th, and 8th Respondents and seeks relief to obtain a permit in his favor.

The Petitioner is seeking the following reliefs from this Court.

- The Petitioner is seeking a writ of certiorari quashing the decision in favor of the 6th, 7th and 8th Respondents laid down in document P10.
- A writ of mandamus directing the 1st,2nd, 3rd, and 4th Respondents to issue a permit in favor of the Petitioner.

The Respondents took several objections to the Petitioner's application. They are as follows;

- The Petitioner's application has to fail in view of the Constitutional bar under Article 35 of the Constitution
- The application as it stands is futile.
- The Petitioner has failed to bring necessary parties to this application.
- Delay

This Court will consider the said objections giving due consideration to the Petitioner's claim.

<u>Petitioner's case</u>

It is the case of the Petitioner, that his father was not legally divorced from his mother and therefore the 6th Respondent, 7th, and 8th Respondents should not be considered as heirs of the deceased Sirpala, Yet, he concedes that his late father in the year 2006, had nominated the 6th Respondent as his successor to the grant. No material has been tendered to this Court to reflect the relationship

of the 6th Respondent to the Petitioner. The Petitioner contends that the said Siripala had withdrawn the nomination of the 6th Respondent on 16th March 2007. The parties are not at variance on the fact that the deceased had also surrendered the land to the state on the same day and the surrender had taken place before his death.

It is pertinent to note that the Petitioner is challenging the relationship of Siripala, his father to the 6th Respondent on the basis that his father had not legally divorced his first wife who is the mother of the Petitioner. It is the contention of the Petitioner that, though his father Siripala had filed for divorce, from his wife, that is the mother of the Petitioner, the decree nisi had not been made absolute before the death of the said Siripala, thus the contention, that the 6th Respondent is not the legal wife of Siripala.

However, the Petitioner has failed to disclose to this Court, as to why he had failed to take any steps to challenge the nomination of the 6th Respondent when she was nominated for succession by his late father on the basis of her being his wife in the year 2006. The Petitioner has waited till 2016 to contend the illegality of the nomination of the 6th Respondent. This is after the said nomination had been withdrawn.

This Court agrees with the Petitioner that the nomination to succession has to be done in accordance with provisions of the Land Development Ordinance. It is admitted by all parties that in the absence of a proper nomination, the succession has to be in accordance with Schedule 3 of the Land Development Ordinance. However, it is the contention of the Respondents that the issue of succession does not arise in this instance.

Surrender of the land

In 21. 02. 2007 the Petitioner's father Siripala had written to the Divisional Secretary stating that he wished to subdivide the land and give it to his three children. However, as the subdivision is prohibited under the grant, he had requested to vest the land in the state and had requested to give him an unconditional deed (R1). Thereafter he surrendered the grant and made a request to issue a grant without any conditions debarring subdivision of the land as he wanted to give the said land to his three children and had given the names of his three children. This Court observes that the said Siripala had omitted the name of the Petitioner and has failed to disclose him as one of his

children. By the form dated 16. 03. 2007, Siripala formally surrendered the land grant and it had been accepted by the Divisional Secretary (R2). As per the material submitted, the Petitioner's father died on 09.06.07 (Para 13 of the amended petition).

It is common ground that the said Sripala had tendered the necessary forms to surrender the grant while he was alive. The Respondents contend that the Divisional Secretary had accepted the said surrender and made an endorsement in R2 on the same date. Thus, it was the Respondent's contention that once the Divisional Secretary accepts the surrender of the grant, the land is vested with the state, and the absolute title also now vests with the state. It is observed that pursuant to the provisions under sections 85 and 86, surrendered land will vest with the state free from all encumbrances.

Though the surrender had been accepted on the same day, it had been duly registered only on the 26th of November 2007 (P4b). The Petitioner contends that by this date, Siripala had died, (paragraph 13 of the Petition) and thus argues that, in view of the provisions of the Land Development Ordinance, the surrender is not valid as the registration of the surrender had occurred subsequent to the death of Siripala. The Petitioner relies on section 60 of the Land Development Ordinance, as the validity of a nomination or a cancelation is dealt with under section 60 of the Land Development Ordinance.

The said section reads as follows "**No nomination or cancellation of the nomination of a successor or of a life-holder shall be valid unless the document (other than a last will) effecting such nomination or cancellation is duly registered before the date of the death of the owner of the holding in respect of which such nomination or cancellation was made".**

All the Respondents have denied paragraph 13.

However, 1 to 5 Respondents in their objections answering paragraphs 1,6,7,12,18, and 20 had conceded that Siripala had died on 09.06. 2007, which is after the land was surrendered, accepted, and endorsed by the Divisional Secretary, but before the registration of the surrender. There is no material submitted to this Court to establish that at the time of the grantee Siripala's death he had made a formal nomination to the grant other than the request for surrender which elaborated the reasons for his surrender of the land. In fact, the only material tendered to this Court reflects the

deceased grantees' wish to hand over an unconditional grant to him so that he can give it to his two sons and daughter. The name of the Petitioner is omitted from the said letter (R1). There is no evidence to demonstrate that, as stipulated by section 85 of the Land Development Ordinance a person entitled to succeed had taken any steps pertaining to succession.

The Petitioner submitted that the handing over of the land back to the state becomes bad in law as the grantee had died before the registration of the handover. It is his contention that as per the provisions of section 60, the handing over becomes invalid. However, after giving due consideration to section 60, we are unable to agree with this contention as section 60 specifically deals with nomination or cancelation of nominations and does not contemplate a situation of surrendering the grant.

The Petitioner also submitted that as per P5, the Divisional Secretary had posthumously granted the said land back to Siripala as the said Siripala was dead. However, the Petitioner has failed to bring to our attention any provision in the Land Development Ordinance that empowers the Divisional Secretary to give such a grant.

It is the contention of the Petitioner that, when the grantee died without a nomination, the succession should be devolved as per the Third Schedule of the Land Development Ordinance and he being the eldest son has to devolve on him. In our view, this argument has to fail, as before the grantee died, he had already surrendered the land back to the state, and the said surrender had been accepted, thereby the title had vested with the state by operation of law without any encumbrance.

Thereafter the President of the Democratic Socialist Republic of Sri Lanka had given three new grants pertaining to the land in dispute. The said grants numbered GR/19/019786, GR/19/019785, and GR/19/027359 had been issued to K.D Prasanna Kumara, K.D Nalaka Manjula, and K.D Theja Nilmini on 23.08.2015 (R3, R4, R5).

The 5th Respondent in his written submission contends the said grants had been issued considering the intention of Siripala when he surrendered the grant pursuant to R1 and R2. The surrendering of the land happened during the lifetime of Siripala and it had been accepted by the Divisional Secretary also during the lifetime of Siripala. Hence it is the contention of the 5th Respondent, that once Siripala surrendered the grant to the state, all the rights /title to the said parcel of the land is reverted back to the state without any encumbrance. Thus, from that date, the land reverts to the state any nominations and or any sequence of succession that would have been, are extinguished.

This leaves the Petitioner with no legal right, let alone a legal right to seek a writ of mandamus. The Petitioner in response argued that though the land was surrendered before it could be entered into the land registry, the said Siripala had died. However, he failed to disclose that the Divisional Secretary had accepted the said land on the same day which is before the death of Siripala. It is pertinent to note that once the grantee surrenders his grant and it is accepted by the representative of the state, in this case, the Divisional Secretary, the right to succession, which the Petitioner claims comes to an end.

It is trite law that the Petitioner seeking the discretionary remedy of a writ should have a right and that should be a legal right but, in our view, the Petitioner has failed to demonstrate this right. Why we come to this conclusion is, we observe that at the time the Petitioner died the land had been vested with the state. Hence there was no valid permit or grant in existence. In the absence of such a grant or permit in existence in favor of the deceased Siripala, the Petitioner fails in his argument pertaining to succession.

In **Perera vs National Housing Development Authority (2001)3 SLR50** the Courts held, ***"On the question of legal right, it is to be noted that the foundation of mandamus is the existence of a right. (Napier Ex parte). Mandamus is not intended to create a right, but to restore a party who has been denied his right to the enjoyment of such right. A "Mandamus" will lie to any person or authority who is under a duty (Imposed by statute or under common Law) to do a particular act, if that person or authority refrains from doing the act or refrains for wrong***

motives from exercising a power which is his duty to exercise. The Court will issue a Mandamus to do what he should do.

Credit Information Bureau of Sri Lanka Vs Messrs Jafferiee & Jafferjee (Pvt) Ltd (2005) 2 SLR 89 where it was held, ***"There is rich and profuse case law on Mandamus on the conditions to be satisfied by the Applicant. Some of the conditions precedents the issue of Mandamus appear to be:***

(a) The Applicant must have a legal right to the performance of a legal duty by the parties against whom the Mandamus is sought (R v Barnstaples Justices)

(*b) The right to be enforced must be a "Public Right" and the duty sought to be enforced must be of a public nature.*

(c) The legal right to compel must reside in the Applicant himself (R v Lewisham Union)

(d) The application must be made in good faith and not for an indirect purpose

(e) The application must be preceded by a distinct demand for the performance of the duty

(f) The person or body to whom the writ is directed must be subject to the jurisdiction of the court issuing the writ.

Thus, in our view, the Petitioner has failed to establish his legal right for the relief he claims.

Succession

It is pertinent to note that even for argument's sake if this Court is to consider the Petitioner's contention, that upon the death of Siripala he should be entitled to the permit, the said argument has to fail in view of the provisions of sections 85 and 86 of the Land Development Ordinance. The said provisions state as follows;

Section 85. *A successor duly nominated by a permit-holder, who fails to make an application for a permit within a period of one year reckoned from the date of the death of that permit-holder, shall be deemed to have surrendered to the Crown his title as successor to the land*.

Section 86. *Land deemed to have been surrendered under section 85 shall vest in the Crown free from all encumbrances.*

The Petitioner has failed to submit to this Court the reason for his failure to take steps to succeed, especially in view of the fact that the said Siripala had died in the year 2007 and the Petitioner has waited for nearly eight years after the demise of his father to take any steps to stake a claim. Thus, once again, even by operation of law, as per the provisions of section 86, the land in question becomes vested with the state.

This would be an appropriate time for this Court to consider the objections of the Respondents.

Futility

The Respondents contended that the application before us has to fail, as the parcel of land the Petitioner alleges that his late father was possessing and has sought to get possession of by way of an order from this Court, is no longer available. They further contended that the said land after it was surrendered had been subdivided. Thereafter as per the request of the deceased grantee, three new grants had been issued to K.D.Prasanna Kumara, K.D. Nalaka Manjula and K.D.Theja Nilmini who are the children disclosed by the deceased Siripala. The said grants had been duly executed and Presidential grants had been given on 03.08.2015.

The Petitioner in response submitted that he was unaware of the three new grants. However, contended that the said grants have been issued contrary to the provisions of the Land Development Ordinance. It is pertinent to note that the Petitioner had failed to establish his above contention with sufficient material. Further, there is no material to demonstrate that the Petitioner has challenged the procedure to issue the said grants before the issuance of the said grants.

We also find that the Petitioner has failed to submit to Court the date he had first requested that he be named the successor. The Petitioner has only submitted that he had been informed by the 1st Respondent that three siblings of K.D Siripala had been nominated as successors on 19.10.2015. As per R3, R4, and R5, this Court observes that by that time the presidential grants had already been executed in favor of K. Prasanna Ajith Kumara, and K.D Nalaka Manjula.

This Court observes that as per the material tendered to this Court, it is established that, by the time the Petitioner awoke from his slumber, the Respondents had already obtained their grants. The Petitioner is seeking a writ of mandamus compelling 1st to 4th Respondents to issue him with a permit for a land that had already been alienated by a presidential grant.

It is also pertinent to note that the grants are not issued by the 1st to 4th Respondents. The Court will not grant a writ compelling a party to perform an act that they cannot perform under the law. It was held in **Ratnasiri and others Vs Ellawala and others (2004) 2 SLR 180 "*This Court is mindful of the fact that the prerogative remedies it is empowered to grant in these proceedings are not available as of a right. Court has a discretion in regard to the grant of relief in the exercise of its supervisory jurisdiction. It has been held time and time again by our Courts that "A writ… will not issue where it would be vexatious or futile."***

In **Siddeek V. Jacolyn Seneviratne and Three Others (1984) 1 SLR 83** it was held, **"*The Court will have regard to the special circumstances of the case before it, before issuing a writ of certiorari. The writ of certiorari clearly will not be issued where the end result will be futility, frustration, injustice, and illegality".***

Thus, in view of the above-mentioned grants, the Petitioner's prayer seeking a writ of certiorari to quash the decision in favor of the 6th 7th, and 8th Respondents and for issuance of a writ of mandamus against 1st to 4th Respondents becomes futile.

Document P10

It is also pertinent to note that to quash P10, the said document does not reflect a decision that is amenable to the writ jurisdiction of the Court. The said letter is a narration of facts and is submitted to the 2nd Respondent for any further action. In the absence of a determination to quash the Petitioner's prayer (b) has to fail.

The Petitioner has failed to answer the objection of a lack of decision reflected in P10 and also has failed to demonstrate the decision that he says exists which is amenable to be quashed by a writ of

certiorari made by the Respondents to this case. Thus, the application for a writ of certiorari has to fail.

Necessary parties

The Respondent's next objection was that the Petitioner's entire application has to fail as the Petitioner has failed to bring in all the parties that are necessary to adjudicate this matter before the court. It is the contention of the Respondents that K.D. Prasanna Kumara is the recipient of one of the grants pertaining to the land in question. As per R1, Siripala had informed the Divisional Secretary that he has two sons and a daughter and had indicated that he wishes to subdivide the land he possessed and distribute it between the three children.

Subsequent to the surrender of the grant by Sirpala vesting the land back to the state, three presidential grants pertaining to the land in dispute had been given to the said three children. However, the said Prasanna Kumara, one of the grantees who benefitted and obtained a grant, had not been made a party to this application. This Court observes that if this application is to be held in favor of the Petitioner, the said grantee whose name is reflected in R3 would be adversely affected. It is trite law that in the absence of necessary parties the application for a writ has to fail.

In the case of **Mutusamy Gnanasambanthan v Chairman, REPIA and others - (1998) 3 Sri LR 169** the Supreme Court considered whether an authority whose order is assailed must be made a party, and held that the failure to make REPIA a party was a fatal irregularity that would lead to a dismissal of the application.

In **Wijeratne (Commissioner of Motor Traffic) v. Ven. Dr. Paragoda Wimalawansa Thera and 4 others [(2011) 2 SLLR. 258 at 267). Per Gamini Amaratunga, J. held,**
"…….the next rule is that those who would be affected by the outcome of the Writ application should be made Respondents to the application. A necessary party to an application for a Writ of Mandamus is the officer or the authority who has the power vested by law to perform the act or the duty sought to be enforced by the Writ of Mandamus. All persons who would be affected by the issue of Mandamus also shall be made Respondents to the application."

In **Rawaya Publishers and another Vs Wijeyadasa Rajapaksa 2001 (3) SLR 213** it was held, "***In the context of writ applications, a necessary party is one without whom no order can be effectively made. A proper party is one in whose absence an effective order can be made but whose presence is necessary to a complete and final decision on the question involved in the proceedings. In the case of*** **Udit Narayan Singh v. Board of Revenue AIR 1963 – SC 768** ***it has been held that where a writ application is filed in respect of an order of the Board of Revenue not only the Board itself is a necessary party also the parties in whose favor the Board has pronounced the impugned decision because without them no effective decision can be made. If they are not made parties then the petition can be dismissed in limine. It has also been held that person vitality affected by the writ petition are all necessary parties. If their number is very large, some of them could be made respondents in a representative 'capacity (vide Prabodh Derma v. State of Uttara Pradesh AIR 1985 – SC 167 also see Encyclopedia of Writ by P.M. Bakshi)'"***

The Petitioner has failed to answer the objection of want of necessary parties and the said objection has to succeed. Thus, we hold the Petitioner has failed to make necessary parties to this application which is fatal to this application.

Delay

Another ground where the Petitioner's application for writ has to fail is, delay. It is common ground that the Petitioner's father had surrendered the grant back to the state in the month of March 2007. The Petitioner's late father Siripala passed away on 09.06.2007. The Petitioner failed to adduce any material to demonstrate that on the death of the father, the Petitioner had made an application to get himself nominated as the successor. There is no material to demonstrate that the Petitioner's mother, whom the Petitioner submits is the widow of the deceased, had made any attempt to succeed in succession pursuant to the provisions of the Land Development Ordinance. There is no material to demonstrate that the Petitioner was in possession of the land at the time of the death of Siripala.

In the absence of such material being tendered to the Court, in our view, it is reasonable for this Court to come to the conclusion that the Petitioner had waited till 2015 to ask him to be nominated and to obtain a permit for the disputed land when according to his own petition he contends that the grant holder his father had died in the year 2007. The Petitioner has failed to explain the reasons for his delay. It appears the Petitioner has only got activated and sought to obtain a grant only when he became aware that the 6th,7th, and 8th Respondents had been given grants subsequent to the subdivision. The Petitioner has failed to explain to this Court what steps he had taken to get his name registered as the successor before the grants had been issued.

In **Biso Menika V. Cyril De Alwis [1982 1 SLR 368; At Pages 377 To 379]** it was held ***"The proposition that the application for writ must be sought as soon as injury is caused is merely an application of the equitable doctrine that delay defeats equity and the longer the injured person sleepover his rights without any reasonable excuse the chances of his success in a writ application dwindle, and the Court may reject a writ application on the ground of unexplained delay"…..an application for a writ of certiorari should be filed within a reasonable time from the date of order which the applicant seeks to have quashed".***

In **Attorney General Vs Kunchithambu 46 NLR 401,** the Court held that a delay of 3 months was enough to disentitle the Petitioner to obtain relief by way of a writ application.

In **Issadeen Vs The Commissioner of National Housing & others (2003) 2 SLR 10** Bandaranayake J held, ***"Although there is no statutory provision in this country restricting the time limits in filing an application for judicial review and the case law of this country is indicative of the inclination of the Court to be generous in finding 'a good and valid reason' for allowing late applications, I am of the view that there should be proper justification given in explaining the delay in filing such belated applications. In fact, regarding the writ of certiorari, a basic characteristic of the writ is that there should not be an unjustifiable delay in applying for the remedy".***

In this instance, the Petitioner has waited for nearly eight years to claim succession for the land that his father had possessed by way of a grant. Hence the objection to delay succeeds. We observe that when he finally decided to stake his claim, he finds that his father had surrendered the grant back to the state.

Land grants executed by the President

The Respondents also raised an objection under Article 35 of the Constitution, the grants are given by the President, thus this Court has no jurisdiction under Article 35 to issue a writ as prayed for by the Petitioner, especially pertaining to the land grants already executed by the President under the powers vested in the Constitution.

It is the contention of the Respondents that the 1st to 4th Respondents have no authority to issue permits or grants and the said grants under the Land Development Ordinance are issued by the President.

1st to 5th Respondents contended that the Petitioner's application has to fail as the land the Petitioner is claiming after it was vested with the state, had been given to the 6th 7th, and 8th Respondents by a Presidential Grant. Thus, the objection under Article 35 that this Court is not empowered to grant the reliefs prayed for, succeeds.

It is further contended that if the Petitioner so wished to challenge the grants issued by the President, then he should have invoked the jurisdiction of the Supreme Court as the Constitution has specifically conferred jurisdiction on the Supreme Court.

Accordingly, for the aforesaid reasons stated in this Judgment, this Court is not inclined to grant the reliefs sought by the Petitioner, and the application is dismissed without cost.

Judge of the Court of Appeal

C.P Kirtisinghe, J

I agree

Judge of the Court of Appeal