

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

*In the matter of an Application for Orders in
the nature of writs of Mandamus and in the
nature of writs of Certiorari in terms of
Article 140 of the Constitution of the
Democratic Socialist Republic of Sri Lanka.*

Kuruppu Appuhamilage Elizabeth
Kumarihamy

No. 02,

Unawatuna,

Buttala.

Petitioner

CA/WRIT/212/2021

Vs.

1. R.M.R.S. Thilakarathne
Divisional Secretary,
Divisional Secretariat office,
Buttala.
2. Mr. S.M. Chandrasena
The Minister,
Ministry of Land and Parliament
Reform, "Mihikatha Medura"
Land Secretariat,
No: 1200/6, Rajamalwatte Road,
Battaramulla.

3. Mr. R.A.A.K. Ranawake
The Secretary,
Ministry of Land and parliament
Reform, “Mihikatha Medura”
Land Secretariat,
No: 1200/6, Rajamalwatte Road,
Battaramulla.
4. Wanninayake Mudiyanseelage Ranbanda
Shanthasiri,
Unawatuna,
Buttala.
5. Hon. Attorney General
Attorney General’s Department,
Hulstrop,
Colombo 12.

Respondents

Before : Sobhitha Rajakaruna, J.
Dhammika Ganepola, J.

Counsel : Lakshan Dias and Maneesha Kumarasinghe
for the Petitioner.
Dr. Sunil Abeyratne with Mihiri Kudakolawa
for the 4th Respondent.
S. Dunuwila SC for the 1st 2nd & 3rd
Respondents.

Supported On : 06.10.2022

Written Submission : 4th Respondent : 27.10.2022

Tendered On : Petitioner : 23.11.2022

Decided On : 12.12.2022

Dhammika Ganepola, J.

The Petitioner has instituted this Application seeking *inter alia* in the nature of a *Writ of Certiorari* to quash the grant /permit issued to the 4th Respondent and a *Writ of Mandamus* against the 1st to the 3rd Respondents requiring them to conduct a fair prior investigation prior to the issuance of the grant/permit to the Petitioner in respect of the land in issue. The Petitioner states that her father K.A. Andrew was the original permit holder of the land in issue by virtue of the permit marked P3. On 06.10.1986, after the demise of said K.A. Andrew, his wife i.e. the mother of the Petitioner, R.M. Kirimenika succeeded to the land as the permit holder of the land in dispute. Thereafter, Kirimenika was issued a Grant (Jaya Bhumi Deed) marked P7 by then President. Said K.A. Andrew was the second husband of Kirimenika and the Petitioner is the daughter of the said Kirimenika and Andrew. The 4th Respondent is the son from said Kirimenika's previous marriage and is not the biological son of K.A. Andrew.

After the death of said Kirimenika, the 4th Respondent filed an action before the District Court of Wellawaya bearing No. L/106 seeking a declaration of title and ejectment in respect of the impugned land against the Petitioner and her son. The said action has been solely dismissed on the basis that the District Court has no jurisdiction to grant reliefs sought by Plaintiff of the said case. Thereafter the Divisional Secretary of the Buthtala has made a declaration under Section 72 of the Land Development Ordinance that the 4th Respondent is entitled to impugned land as the eldest son of the said Kirimenika by way of the document marked P11.

However, the Petitioner states that Kirimenika became the permit holder of the impugned land and the grantee of Deed of Grant P7 merely as the successor of the original permit holder K.A. Andrew. The Petitioner claims that

as per Section 72 and Schedule III of the Land Development Ordinance, the 4th Respondent has no legal right to be appointed as the successor since he is not the biological son or the eldest son of the initial permit holder, said K.A. Andrew. The Petitioner further states that the Divisional Secretary has arbitrarily acted and has accordingly granted the title to the impugned land to the 4th Respondent, neglecting the legitimate succession rights of the Petitioner. The Petitioner alleges that the said actions of the 1st-3rd Respondents are ultra vires.

Section 48A of the Land Development Ordinance amended by Land Development (Amendment) Act No.16 of 1969 and No.27 of 1981 stipulates the entitlement of the spouse of the deceased permit holder to succeed to the land alienated to such permit holder on a permit. The said Section 48A of the Land Development Ordinance is as follows;

“48A(1) Upon the death of a permit-holder who at the time of his or her death was required to pay any annual instalments by virtue of the provisions of subsection (2) of section 19, notwithstanding default in the payment of such instalments, the spouse of that permit-holder, whether he or she has or has not been nominated as successor by that permit-holder, shall be entitled to succeed to the land alienated to that permit-holder on the permit and the terms and conditions of that permit shall be applicable to that spouse:

Provided that where a spouse who was not nominated as successor by the deceased permit holder succeeded under the preceding provisions of this sub section to the land alienated on the permit and where after so succeeding, such spouse marries, then upon such marriage-

- (a) the person nominated by the deceased permit holder shall succeeded to the land, or*
- (b) if no successor has been so nominated, the title to the land shall devolve as prescribed by rule 1 of the Third Schedule.*

(2) If, during the lifetime of the spouse of a deceased permit-holder who has succeeded under subsection (1) to the land alienated on the permit, the terms and conditions of the permit are complied with by such spouse, such spouse shall be entitled to a grant of that land subject to the following conditions: -

- (a) such spouse shall have no power to dispose of the land alienated by the grant.*

- (b) *such spouse shall have no power to nominate a successor to that land.*
- (c) *upon the death of such spouse, or upon his or her marriage, the person, who was nominated as successor by the deceased permit-holder or who would have been entitled to succeed as his successor, shall succeed to that land:*

Provided that the aforesaid conditions shall not apply to a grant of any land to be made to a spouse who has been nominated by the deceased permit-holder to succeed to the land alienated on the permit.

- (3) *Any disposition or nomination made by a spouse in contravention of the provisions of subsection (2) shall be invalid.” [emphasis added]*

In view of Section 48A (1) of the Land Development Ordinance cited above, upon the death of the initial permit holder K.A. Andrew, his spouse Kirimenika becomes legally entitled to succeed to the land which was alienated to said K.A. Andrew as a permit-holder irrespective of the fact whether said Kirimenika was the nominated successor to the land or not. It is on common grounds that after the death of the K.A. Andrew his spouse said Kirimenika became the permit holder of the impugned land.

However, in the given circumstances, Kirimenika was the nominated successor of K.A. Andrew to the land in dispute. As such, in terms of Section 48A (2) read with its proviso, upon the death of the said K.A. Andrew, his spouse Kirimenika was legally entitled to a grant and to succeed to the land alienated on the permit, free from any conditions specified therein. In the above context, it is observed that said Kirimenika has been issued with a Deed of Grant (Jaya Bhumi Deed) marked P7 to the Petition by the State. Therefore, any alienation of succession rights of the land in dispute should be devolved on the basis that the Kirimenika was the due owner of the impugned land.

The Petitioner’s contention is that the said succession rights should be devolved on the basis that the initial permit holder K.A. Andrew was the owner of the impugned land. Such an argument would have some weight as per the said Section 48(2)(c) if the initial permit holder K.A. Andrew had not nominated her wife Kirimenika as successor by the P3. Because, in terms of Section 48(2)(c) of the Ordinance, if such K.A. Andrew had in the event where a permit holder passes away without nominating a successor, such property

shall pass on to his or her spouse and upon the death of such spouse, the person, who was nominated as successor by the deceased permit-holder or who would have been entitled to succeed as his successor, shall succeed to that land.

Nevertheless, said K.A. Andrew had nominated his wife Kirimenika as his successor. As such, Petitioner's stance that in terms of Section 48A (2)(c), she should succeed to the land has no bearing and said Section 48A (2)(c) would have no application in the given scenario. However, as per the proviso to Section 48A(2)(c) of the Ordinance, Kirimenika, the nominated successor and the spouse of the permit holder, shall become the owner of the impugned property by virtue of the said Jaya Bhumi Deed P7 without any encumbrances. Under such circumstances, I am of the view that the Petitioner is not entitled to claim succession rights to the impugned land on the basis of her relationship to the initial permit holder.

In supporting this view observations made by Sisira de Abrew J. [agreeing with Priyantha Jayawardena J. and H.N.J. Perera J.] in S.M. Ratnawathi Manike v. Moonafiya and others [S.C. Appeal 154/2015; S.C.M. 10.11.2017] is also exemplary.

“When the court is invited to answer the question whether the Grant or the permit which has better status in the ownership of the land, the following observation will have to be made. A Grant issued in terms of Section 19(4) of the Land Development Ordinance has to be considered as a deed conveying the title to the grantee by the State. But the same status cannot be given in respect a permit issued in terms of Section 19(2) of the Land Development Ordinance.”

It is observed that Kirimenika died without nominating a successor. In an instance where the permit holder or the owner passes away without nominating a successor, the mechanism of devolution of succession rights is specified under Section 72 of the Land Development Ordinance read with its Schedule III. Said Section 72 and the Schedule III of the Ordinance are as follows;

72. If no successor has been nominated, or if the nominated successor fails to succeed, or if the nomination of a successor contravenes the provisions of this Ordinance, the title to the land alienated on a permit to a permit-holder who at the

time of his or her death was paying an annual instalment by virtue of the provisions of section 19 or to the holding of an owner shall, upon the death of such permit holder or owner without leaving behind his or her spouse, or, where such permit holder or owner died leaving behind his or her spouse, upon the failure of such spouse to succeed to that land or holding, or upon the death of such spouse, devolve as prescribed in rule 1 of the Third Schedule.

THIRD SCHEDULE

RULES

- 1.(a) *the groups of relatives from which a successor may be nominated for the purposes of section 51 shall be as set out in the subjoined table.*
- (b) *Title to a holding for the purposes of section 72 shall devolve on one only of the relatives of the permit holder or owner in the order of priority in which they are respectively mentioned in the subjoined table, the older being preferred to the younger where there are more relatives than one in any group.*

Table

[Sections 51, 71, 72 and 77.]

<i>(i) Sons.</i>	<i>(vii) Brothers.</i>
<i>(ii) Daughters.</i>	<i>(viii) Sisters.</i>
<i>(iii) Grandsons.</i>	<i>(ix) Uncles.</i>
<i>(iv) Granddaughters.</i>	<i>(x) Aunts.</i>
<i>(v) Father.</i>	<i>(xi) Nephews.</i>
<i>(vi) Mother.</i>	<i>(xii) Nieces.</i>

In this rule, "relative" means a relative by blood and not by marriage.

2. Where in any group of relatives mentioned in the table subjoined to rule 1 there are two or more persons of the same age who are equally entitled and willing to succeed, the Government Agent may nominate one of such persons to succeed to the holding. Such decision of the Government Agent shall be final.

4. If any relative on whom the title to a holding devolves under the provisions of these rules is unwilling to succeed to such holding, the title thereto shall devolve upon the relative who is next entitled to succeed under the provisions of rule 1.

In view of said Section 72 of the Ordinance, if no successor has been nominated, the title to the land alienated to the holding of an owner shall, upon the death of a such owner, without leaving behind his or her spouse, devolves as prescribed in rule 1 of the Third Schedule i.e. devolves on one of

the relatives of the owner in the order of priority in which they are respectively mentioned in the subjoined table to the Schedule III. In arriving at a decision as to the devolution of rights, the older shall be preferred to the younger where there are more relatives than one in any group specified in the table to the Schedule III.

Kirimenika was the holder of a grant and therefore, for the purposes of the Ordinance, was an owner and died without leaving behind her spouse and a nominated successor. As such in terms of Section 72 of the Land Ordinance, the title to the impugned land should devolve to the eldest son of Kirimenika. It is on the common ground that the 4th Respondent Ranbanda is the son of Kirimenika from her previous marriage. Therefore the eldest son of Kirimenika is the 4th Respondent. Mere fact that the permit holder or the owner contracted a second marriage may not presume that her/his legitimate children from her/his first marriage shall lose their succession rights. The Petitioner has submitted the Birth Certificate of the 4th Respondent marked as P8. Despite, the fact that the said 4th Respondent is the son of Kirimenika from her first marriage, it is on common ground that the 4th Respondent is the son(eldest) of Kirimenika. In such circumstances, the 4th Respondent gets priority over succession rights as the eldest living son of the Kirimenika. Therefore, I see no reason for the Petitioner to challenge the decision of the 1st Respondent

The Petitioner in her Petition drew the attention of this Court to the decision of the case of **Wilegoda Liyanage Sanjeewana Rohana Rasika Gunawardena Vs. Divisional Secretary of Mawanella and Others CA Writ 283/2013** marked as P12 where it was held that “...*In the said circumstance the succession rights will be passed on to the eldest living son of the deceased grant holder ...*”. However, I am of the view that the said decision upholds the stance of the 4th Respondent.

The Petitioner stated that she has engaged in the cultivation of impugned land with her mother Kirimenika after the demise of the initial permit holder K.A. Andrew and continued thereafter when her mother Kirimenika departed as well. The same is neither denied nor contested by the 4th Respondent. Therefore, the Petitioner claims that she is entitled to succeed to the title of the land being the cultivated developer of the land. The Petitioner claims that the failure to consider said aspect by the relevant Divisional Secretary is a

denial of the legitimate expectation of the Petitioner that she would be appointed as the rightful successor of the land as she is the eldest child of the original permit holder K.A. Andrew. In support of this position, Petitioner drew the attention of this court to the consideration of the recent amendment to the Ordinance by Act No. 11 of 2022. As per the said amendment, Rule 1(d)(i) specifies, where any person in the order of priority in which they are respectively mentioned in the subjoined table developed such land, the title to the holding or the land shall not devolve on the older person referred to in paragraph (b) but on the person who developed such land. However, the above amendment came into operation subsequent to the decision dated 13.02.2019 (P15) of the Divisional Secretary and the amendment does not specify that it shall operate in retrospective effect. As such, the Divisional Secretary has acted in accordance with the law that prevailed at the time of the decision.

A legitimate expectation would arise only on a legal basis. In the event, where the law is clear that where an owner dies without leaving behind her spouse and without nominating a successor, the title to the impugned land should devolve to the eldest son of such owner, the Petitioner is not entitled to hold a legitimate expectation purely on an illegitimate basis. Therefore, the Petitioner cannot claim that she has a legitimate expectation that she would be appointed as the rightful successor against the said lawful decision.

It is also note worthy that the Divisional Secretary has offered parties in view of settlement to share the property in dispute and that the same was denied by the Petitioner.

The Petitioner relies on the decision of the case of **Rajapaksha Vs. Temawathie Appeal No. 125/2010** where Saleem Marsoof J. formed an opinion in respect of the table in the third schedule of the Land Development Ordinance to the effect that, *“On the face of it, the provisions of the third schedule appear to be discriminatory on the ground of sex, but was probably fashioned by the assumption that it is the men in the family who actually participate in cultivation, the validity of which assumption may be questioned in the context of this case, where it appears from the evidence that the respondents, both were females had cultivated the land in dispute with the assistance of the family members including the brothers. I am of the opinion that the provision has to be reviewed by the policy makers in the light of realities of the day in particular articular article 12 of the constitution.*

However, in the instant case, the Petitioner does not claim that she was discriminated against based on her gender. The matter in dispute in the instant case is whether his/her succession rights could be claimed by the legal heir of the initial permit holder after the demise of an owner. Therefore, I am of the opinion that the case cited above has no application in this application.

In the circumstances and the reasons given above the Petitioner has failed to submit a prima facia case. Therefore, the application is refused.

Judge of the Court of Appeal

Sobhitha Rajakaruna J.

I agree.

Judge of the Court of Appeal