

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

**CA (Writ) Application No.
42/2012**

In the matter of an Application for mandates in the nature of Writs of Certiorari and Mandamus under Article 140 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

Rajapaksha Pedige Sunil Santha,
"Santha Niwasa",
Maithree Mawatha, Alawwa Road,
Polgahawela.

PETITIONER

-Vs-

- 1. The Divisional Secretary,**
Divisional Secretariat, Giribawa.
- 2. N.P.M. Kariyawasam,**
2a.J.P.R.M. Jayasinghe,
Provincial Land Commissioner,
Provincial Land Commissioner's Department
(NWP),
No. 46, Provincial Council Complex,
Kurunegala.
- 3. The Land Commissioner,**
The Land Commissioner General's Department,
No. 07, Gregory's Avenue,
Colombo 07.

4. Upul Seneviratne,

Yaya 02, Block 11,
Saliya Ashokapura.

5. Hon. Attorney General,

Attorney General's Department,
Colombo 12.

RESPONDENTS

BEFORE : **Vijith K. Malalgoda, PC. J. (P/CA) and
A.H.M.D. Nawaz, J.**

COUNSEL : **W. Dayaratne, P.C. with D. Dayaratne for the
Petitioner.**
**D.M.G. Dissanayake with B.C. Balasuriya for
the 4th Respondent.**
**Yuresha Fernando S.C. for 1st, 2nd, 3rd, & 5th
Respondents.**

Decided on : **10.11.2016**

A.H.M.D. Nawaz, J.

The issue before Court revolves around nominations to three lands effected by one Rajapaksha Pedige Horathala (sometimes hereinafter referred to as the original grantee or Horathala) who had been a grantee of the three lands which are situated in the District of Kurunegala.

The relevant information pertaining to the three lands granted to the said Rajapaksha Pedige Horathala under Section 19(4) of the Land Development Ordinance No.19 of 1935 as amended could be gleaned from the petition.

Grant No.	Date of Grant	Name and extent of Land
කුරු/ප 10915 [P3(a)]	23/01/1985	Rajangana Yaya (Paddy land) – Lot 8 A:02 R:0 P:02
කුරු/ප 12545 [P3(b)]	18/04/1986	Rajangana Yaya – Lot 139 A:0 R:02 P:08
කුරු/ප 129663 [P3(c)]	02/06/1996	Rajangana Yaya (2) (Lowland) – Lot 7 A:0 R:01 P:17

The fact that the Petitioner is one of the lawful issues of the original grantee Horathala is not disputed. There is a long narrative of the several nominations made by the petitioner's father-Horathala but what is relevant to note is that after his wife Meragal Pedige Jane Nona passed away in 2004, the original grantee (father of the petitioner) Horathala had nominated the Petitioner in 2005 to succeed him in respect of the three lands. There had been however a non-registration of the petitioner under the provisions of the Land Development Ordinance as a successor and the Petitioner states in his petition that he was able to secure a due registration as a grantee only in 2007. This fact is evidenced by documents marked as P8(a), P8(b) and P8(c) which clearly evince a nomination of the petitioner by his father of the respective lands referred to above.

Subsequent Nomination of the 4th Respondent by the Original Grantee Horathala and his Registration as the New Successor

What is principally sought to be challenged before this Court is the issuance of three grants in favour of the 4th Respondent and the registration of his name in the relevant registers on 26.04.2011. The issuance of the three grants in favor of the 4th Respondent seems to be in consequence to 1R₂ dated 25.05.2009, wherein the original grantee-Rajapaksha Pedige Horathala had nominated the 4th Respondent as the new successor to the three lands. In an undated letter which has been marked

and produced as **1R₄** before this Court, the Petitioner has strenuously raised his objections to the nomination made by his father and called in question the legality and validity of such nomination. In that letter which is marked as **1R₄**, the Petitioner has stated that as the 4th Respondent was a stranger and a third party, his nomination would be illegal. In fact, the underlying basis of the objection is that the 4th Respondent is not a *biological son* at all of the petitioner's father Horathala. Acting on his undated letter, it appears that the 1st Respondent called for a report from the relevant Grama Niladhari and the report of the Grama Niladhari (**1R₃**) of 07.07.2009 bears out the fact that Horathala—the father of the petitioner in fact nominated the 4th Respondent. Quite peeved by this turn of events, it appears that the Petitioner had also addressed a letter dated 11.12.2009 (**P9**) to the 1st Respondent Divisional Secretary objecting to the said nomination. In **P9** too, the Petitioner asserts that the 4th Respondent's nomination is illegal. So the documents marked **1R₄** and **P9** constitute the petitioner's objections to the 4th Respondent being nominated and given a grant.

Thus, the qualification of the 4th Respondent to succeed under the Land Development Ordinance to the lands held under a grant by his father Horathala was challenged by the Petitioner as far back as 2009 and even if the act of nomination of the 4th Respondent is that of Horathala, there is no doubt that the nomination could be challenged if it fell foul of the statutory provisions. The fact that there has to be a valid nomination in accordance with the provisions of the Land Development Ordinance cannot be gainsaid.

This Court is cognizant of the arguments that have been made by both the Petitioner and the 4th Respondent as to the validity of the nomination in favor of the 4th Respondent. Whilst the Petitioner claims that the 4th Respondent is not the biological son of Horathala, the 4th Respondent asserts that he is a legitimate son of Horathala. It is alleged on behalf of the 4th Respondent that he is in fact the son of Horathala

whom he sired through one Karunawathie. The story goes that with the estrangement of relationship between Horathala and the petitioner's mother Jane Nona, Horathala went to cohabit with Karunawathie and it was during the continuance of this relationship that the 4th Respondent had been born in 1977. The Petitioner disputes the paternity of the 4th Respondent by calling him a stranger who cannot succeed to the rights of his father even if his father Horathala has nominated him superseding the anterior nomination of the petitioner. The fact remains that the Petitioner, being the eldest son, was nominated in 2005 but Horathala's affections may have been won over by the 4th Respondent for the subsequent nomination to be made in his favor.

The doubt about Horathala's paternity of the 4th Respondent was raised before the Divisional Secretary as far back as 2009 in both the undated letter of objections (**1R₄**) and **P9** and it is relevant to note that there he was, as large as life, the nominator Horathala in 2009 but he was never sought out by the statutory functionaries to investigate the merits of the objections that his eldest son the Petitioner had raised as to the legitimacy of the 4th Respondent. I must state that the 1st Respondent, to whom objections were raised as to the legitimacy of the 4th Respondent to succeed to a grant under Section 19(4) of the Land Development Ordinance, was under an obligation, in the teeth of the objections to ascertain from the nominator himself as to the circumstances of the nomination.

Authorities vested with receipt of notification of nominations and cancellations thereof under the provisions of Land Development Ordinance cannot be lackadaisical in obtaining from original grantees, provided they are available, sufficient evidence as to the circumstances in which nominations and cancellations are made. Such a transparency of actions on the part of authorities overseeing devolution rights under Land Development Ordinance will afford this Court sufficient material with which to

assess the decisions that they subsequently made such as granting fresh permits and grants.

In the instant case before us, the authorities have relied on a letter written by Horathala bearing the date 25.05.2009 (**1R₂**) and the Birth Certificate of the 4th Respondent (**1R₁**) as affording the basis for the validity of the nomination. No doubt Horathala calls the 4th Respondent his son in **1R₂** but this was challenged by the allegation of the petitioner that the 4th Respondent was sired by a different father and not by Horathala. Even the Birth certificate (**1R₁**) was challenged as a forgery. In light of this serious challenge, the statutory functionaries administering succession rights under the Land Development Ordinance should have summoned Horathala for an inquiry as far back as 2009 because the statutory functionaries such as the 1st Respondent Divisional Secretary has to embark on an inquiry if they were to satisfy themselves that the nomination so made was permissible in terms of the Land Development Ordinance. In my view succession rights under the Land Development Ordinance cannot be effected on mere letters such as **1R₂**, because alienation of state land statutes such as Land Development Ordinance impose stricter norms on authorities vested with discretion under those statutes.

It is apposite now to look at some of the provisions pertaining to nomination in the Land Development Ordinance and a cursory survey throws light on the statutory limitations on nominations.

Restriction on Nominations

Section 51 of the Land Development Ordinance (LDO) as amended drives home the following:

“No person shall be nominated by the owner of a holding or a permit-holder as his successor unless that person is the spouse of such owner or permit-holder,

or belongs to one of the groups of relatives enumerated in rule 1 of the Third Schedule.”

This provision makes it clear that the nominee has to be a spouse or must belong to the category of **relatives** next entitled to succeed under Rule 1 of the Third Schedule of the LDO.

The **Third Schedule** to the Land Development Ordinance is reproduced below:

THIRD SCHEDULE RULES		[Section 51, 71, 72 and 77]
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 purpose 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		
i. Sons		vii. Brothers
ii. Daughters		viii. Sisters
iii. Grandsons		ix. Uncles
iv. Granddaughters		x. Aunts
v. Father		xi. Nephews
vi. Mother		xii. Nieces
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 decisions 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.		

It is apparent from the above that the order of succession as enumerated in **Rule 1** is predicated upon consanguinity and the contention of the petitioner as far back as 2009 was that there was no blood relationship between the nominator Horathala and his new successor—the 4th Respondent. If there was no consanguinity, the nomination would be contrary to Section 51 of the LDO and Rule 1 of the Third

Schedule. Indubitably the prerogative of making nominations and effecting cancellations is with the grantee or permit holder as the following provisions show.

Provisions re nomination and cancellation under LDO

"52(4)-The nomination of a successor and the cancellation of any such nomination shall not be made subject to any condition or defeasance.

53-Any nomination of a successor may at any time be cancelled by the owner or permit-holder who made such nomination.

54-The owner of a Holding or permit-holder may make a further nomination in lieu of nay nomination which has been cancelled; and a person may be renominated a successor notwithstanding the previous cancellation of the nomination of the person in such capacity."

In any event though the permit holder or grantee (owner) enjoys the privileges as above, it has to be stated that the above rights are subject to the mandatory provisions of Section 51 which impose restrictions on successors. Therefore the mandatory criteria for nominations as spelt out in Section 51 of the LDO have to be followed. If there is a non-compliance with Section 51, the nomination will be invalid- vide Section 75 of the Land Development Ordinance which reads as follows:

"Any nomination of a successor and any cancellation of any registered nomination of a successor shall be wholly invalid if such nomination or cancellation in any way contravenes the provisions of this Ordinance."

The operation of Section 75 of the Land Development Ordinance will entail the following consequence which is spelt out in Section 72 of the said Ordinance.

"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 sum by virtue of the provisions of sub-section (3) of section 19A 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, On upon the death of such spouse, devolve as prescribed in rule 1 of the Third Schedule."

Therefore there is a greater responsibility on the part of 1st, 2nd and 3rd Respondents to pay heed to the above provisions even in the absence of objections to nominations. The relevant Respondents can ill afford to lose sight of the above provisions and must always take cognizance of them. There cannot be mechanical applications of these sections. In fact what the Respondents did in response to the objections of the petitioner needs a recap at this stage to assess the *vires* of the acts complained of.

Admittedly there was an inquiry only on 30.06.2011 and that too was convened only after Horathala had passed away on 18.02.2011 and I take the view that between 2009 and 2011 there was no observance of the rules of natural justice in regard to the objections raised by the Petitioner in 2009. It is from the material that has been furnished to this Court that we observe that the inquiry was convened only after the 1st Respondent Divisional Secretary had registered the 4th Respondent as the grantee of all three lands on 26.04.2011. There cannot be an attempt to lock the doors after the horse has bolted. Before registration of the 4th Respondent as the grantee took place, this must have been notified to possessors of lands such as the Petitioner.

Before the statutory functionary proceeded to register the 4th Respondent as the grantee of all three lands, he should have held an inquiry as the property rights of the petitioner were being taken away by the new registration. Even if Horathala had written the letter dated 25.05.2009 nominating the 4th Respondent, whether there

was a valid nomination in terms of the LDO is a matter that should have been gone into by the statutory functionary.

It has to be observed that there is material before this Court that the Petitioner himself has been in possession of some portions of these lands having cultivated them over the years. If registration of only the 4th Respondent as the grantee was the act of the Respondents, it cannot be effected consequent to a mere letter like 1R₂. As I said before, the cancellation of the petitioner's nomination and the legitimacy of the 4th Respondent as a successor could have been easily ascertained with reference to an inquiry in 2009 which involved the participation of Horathala.

Having missed that opportunity, the relevant Respondents proceeded to register the 4th Respondent as the grantee of all three lands in 2011, two months after the death of Horathala. This gives rise to serious doubts as the due process that has to be followed by statutory functionaries in relation to the registration falls far short of its statutory requirements stipulated in the provisions of the LDO. One is reminded of what Justice A.R.B. Amerasinghe observed in **Sundarkaran v. Bharathi**¹ in relation to refusal of renewal of a liquor licence and the comparable dicta are applicable to revocation or cancellation of a grant or permit under the LDO.

"It has been repeatedly recognized that no man is to be deprived of his property without having an opportunity of being heard. Even if what he had was mere permission to which [he] had no legal entitlement or claim of right, the refusal of the permission which had previously been granted I think may be at least sufficiently comparable to the act of taking away property so that the audi alteram partem rule will apply. I am unable to agree with learned Counsel for the Respondents that [he] was simply 'hoping' against 'hope' of being

¹(1989) 1 Sri.LR 46

granted a renewal of a license. He had, in my view, a legitimate expectation of success and therefore a right to a full and fair opportunity of being heard."

Despite the registration of the 4th Respondent as the new grantee, parties sought permission even in this Court to reach a settlement in the matter but the attempts proved abortive. They possibly attempted a compromise because both the Petitioner and 4th Respondent are in possession of defined portions of the three lands.

There is another matter that merits our attention at this stage. It is quite clear upon the pleadings that in the subsequent inquiries held in the office of the Deputy Land Commissioner, Anuradhapura, both the Petitioner and the 4th Respondent failed to resolve their dispute and as a result the Assistant Commissioner of Land had perforce emphasized the necessity of a competent court going into the dispute. In other words the relevant Respondents who were tasked with the exercise of discretionary power under the LDO found themselves inadequate and ill-equipped to resolve the question of paternity of the 4th Respondent. Thus there is an admission that the Respondents did not have sufficient material to conclude that the 4th Respondent was the biological son of Horathala. If consanguinity (blood relationship) is a precondition to recognition of a nominee as a successor under the LDO, this declaration of the Assistant Commissioner of Land is proof enough that there was no material, before the statutory functionaries proceeded to conclude that the 4th Respondent was a relative of Horathala as contemplated by the LDO, though Horathala claimed the 4th Respondent to be his son. If indeed a District Court was a proper forum to go into the intricacies of consanguinity, the statutory functionaries should have halted their hands without proceeding to register the 4th Respondent as the successor. If there was an intervention of a court of competent jurisdiction that was required for a determination as to whose nomination as a successor prevailed, the parties should have been allowed to remain in their respective lots without a registration of the new nominee taking place.

In the course of the argument, the Petitioner's Counsel also drew our attention to Section 3 of the Legitimacy Act No.3 of 1970, and its proviso which read as follows:-

"A valid marriage to which this Act applies shall be deemed at all times, whether before or on or after the date of the commencement of this Act, to have rendered, and to render, legitimate any child procreated by the parties prior to such marriage, whether or not such child was so procreated in adultery:

Provided, however, that where at any time before the date of the commencement of this Act any rights of any description whatsoever did not vest in the child of any marriage, but did in fact vest in any other person, by reason only of the fact that such child, having been procreated in adultery, was the illegitimate child of the parties, the subsequent legitimization of such child, by virtue of the operation of the preceding provisions of this section, shall not be deemed or construed

- a) to have prejudiced or affected, or to prejudice or affect, in any manner, or to any extent, whatsoever the rights so vested, or such other person's claim or title to such rights; and*
- b) to have conferred, or to confer, on such child any claim or title to such rights."*

Thus a strong argument was made that the rights of the 4th Respondent, however valid it was, may not prejudice the rights of the petitioner despite the subsequent legitimization of the marriage between Horathala and Karunawathie—the 4th Respondent's mother.

In the circumstances, having regard to the fact that the Petitioner is also in possession of some portions of the three lands and the grants have been made in favour of the 4th Respondent without a reasoned conclusion, we conclude that the registration of the 4th Respondent as a new grantee of all three lands is not

supported by reasons. The registration of the name of the 4th Respondent in the relevant registers is *ultra vires* when the relevant Respondents themselves entertain doubts about the claim of the 4th Respondent.

Thus we allow the application for a mandate in the nature of a certiorari quashing the act of the 1st Respondent in appointing the 4th Respondent as the grantee of the three land grants. The *status quo* between the parties as to possession shall remain as they have possessed the land in their respective lots until a valid determination after inquiry is made as to the validity of the new nomination.

We refrain from issuing a mandamus as prayed for as the rights of parties to a grant are yet to be determined having regard to the provisions of the Land Development Ordinance.

JUDGE OF THE COURT OF APPEAL

Vijith K. Malalgoda, PC. J. (P/CA)

I agree

PRESIDENT OF THE COURT OF APPEAL