

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

R.R.P.W.Chandrasekera
of 18, Aluthwewa, Polonnaruwa
PLAINTIFF

C.A. Case No. 296/2000 (F)
D.C. Polonnaruwa Case No.
5465/L

-Vs-

R.R.P.W.Thilakarathne Banda, C/O, Irrigation
Engineer, Irrigation Department,
Galen Bindunuwewa
DEFENDANT

De-ella Arachchige Don Hilda Mayadunne of
No 161, Makewita, Ja-Ela
SUBSTITUTED DEFENDANT

AND

De-ella Arachchige Don Hilda Mayadunne of
No 161, Makewita, Ja-Ela
SUBSTITUTED DEFENDANT APPELLANT

Vs

R.R.P.W.Chandrasekera
of 18, Aluthwewa, Polonnaruwa
PLAINTIFF-RESPONDENT

BEFORE

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

COUNSEL

Dr.Sunil F.A. Coorey with C.Amaratunga for
the Substituted Defendant-Appellant

Rohan Sahabandu P.C with Surekha
Withanage for Plaintiff-Respondent.

Decided on

10.12.2018

The Plaintiff-Respondent (hereinafter sometimes referred to as “the Plaintiff”) instituted this action against his elder brother the original Defendant seeking a declaration that the Plaintiff was entitled to the land described in the 2nd schedule to the plaint, ejectment of the original Defendant and those holding under him, and for the recovery to damages together with costs of action. One Punchi Banda was the father of both the Plaintiff and the original Defendant. It is over the succession rights to the permit of Punchi Banda that the Plaintiff sued his elder brother in respect of the state land depicted in the schedule to the plaint.

The crux of the issue before Court was whether the father Punchi Banda (the original permit holder), despite having cancelled the nominations of the Plaintiff (one of his sons) in 1980, re-nominated him in 1987, as claimed by the Plaintiff-Respondent in his plaint dated 18.12.1991.

The Plaintiff premised his action against the original Defendant (his elder brother) solely on this re-nomination allegedly effected by the father in 1987 and it is on this right that he sought the ejectment of the original Defendant from the land depicted in the 2nd schedule to the plaint.

It would appear that the father (the original permit holder) was given a state land in an extent of 5 acres, 2 roods and 16 parches and the land depicted in the 2nd schedule from which he wanted the elder brother (the original Defendant) evicted forms a portion of the land depicted in the 1st schedule. It is noteworthy that even though the Plaintiff claimed that he was nominated a second time by his father to the land in 1987, he claimed

that his elder brother Tilakaratne Banda had been in unlawful possession of the smaller land depicted in the 2nd schedule since 1991. Issue No.3 raised on behalf of the Plaintiff discloses this unlawful possession against the elder brother-the original Defendant. With the passing away of the original Defendant, his spouse has since been substituted and I must observe that the answer filed by the original Defendant traversed the right claimed by the Plaintiff and the claim of right to the land by virtue of the purported re-nomination has been strenuously impugned by the original Defendant in his answer, issues and evidence.

The learned District Judge of *Polonnaruwa* by his judgment dated 03.06.2000 has allowed the reliefs claimed by the Plaintiff and the Defendant has appealed against this judgment, dissatisfied with the reasoning of the said judgment.

Let me now itemize the order in which the original permit holder Punchi Banda has made his nominations to the land in question. Several items of evidence inclusive of the nominations Punchi Bandada made emerge through the testimony of one Somadasa Somaratne from the office of the relevant Divisional Secretary. The permit in question and the land ledger in respect of this land was produced as P1 and P2 and they set out as to how the paterfamilias Punchi Banda had nominated his nominees. As could be seen upon a perusal of the permit and the land ledger, the names of the nominees go as follows:-

1. Tikiri Menike
2. Tilakaratne
3. Chandrasekara
4. Chandra Hemalatha

But if one examines the place where the names of all these nominees appear namely page 2 of P1, all these names have been scored off thus

- ~~1. Tikiri Menike~~
- ~~2. Chandrasekara (the Plaintiff)~~

3. ~~Tilakaratne Banda~~

4. ~~Chandra Hemalatha~~

This could mean that Chandrasekara (the Plaintiff) has been deleted twice and therefore though he was once nominated by the father, the so-called re-nomination is not reflected in P1. In the 2nd document namely the land ledger marked as P2 too, the same deletions of the aforesaid names appear in the column "Nominated Successors". So in both P1 and P2 one does not see a re-nomination of Chandrasekara (the Plaintiff) in the column where the names of nominated successors must appear. Rather his name remains deleted. In fact, the land ledger P2 gives 21st May 1980 as the date of the revocation of his name as a nominee.

This documentary evidence shows that the father Punchi Banda, despite an initial nomination, had the plaintiff's name deleted as the nominee on 21.05.1980. The record offers an explanation as to why the father had a change of heart to revoke the nomination.

By the time the trial began, the old father for whose land this acrimonious battle had raged for so long had passed away and he could not be called as a witness. But it is apparent that the father had sued the Plaintiff in a previous case bearing No.2609/L and the testimony of the father given in the previous case along with the pleadings was led in this case. That testimony of the father against the Plaintiff in case No.2609/L gives the background in which he came to revoke the nomination that he had previously made in favour of the Plaintiff. The old father admitted to having nominated Chandrasekara the Plaintiff. But he testified that in April 1980, the Plaintiff in the case laid his impious hands on him, took not only forcible possession of the land depicted in Schedule 2 but a large number of articles in the house including items of furniture and chased him away. So in consequence of these acts of ingratitude and spoliation, he cancelled the nomination of the not so grateful son in May 1980. That explains the notation dated 21.05.1980 which signifies the cancellation on P2 the land ledger. A colonization officer who gave evidence in that previous case also corroborated Punchi Banda on this cancellation. The learned District Judge of *Polonnaruwa* who tried the previous case

bearing No.2609/L upheld the claim of the father and ordered the ejectment of Chandarasekara (the Defendant in that case but the Plaintiff in this case) from the land by his judgment dated 09.11.1985. The Plaintiff in this case Chandrasekara did file an appeal against the judgment in the previous case but quite significantly in May 1991 he withdrew the appeal before Palakidnar J. (P/CA) and Dr. A. de Z. Gunawardana J. and the appeal was accordingly dismissed.

So here was a father who had nominated the Plaintiff as his nominee but because the son turned ungrateful and forgetful of his largess, the father cancelled the nomination on 21.05.1980 and sued him for repossession of the land and ejectment.

But the plaint of the Plaintiff alleges that despite all this bad blood and acrimony, there was a re-nomination of him as a nominee on 17.01.1987. Certainly this date appears at p.2 of the permit **P1** in the column where the names of the deleted nominees appear but the name of the Plaintiff as the nominee does not appear at all at p.2. The date 17.01.1987 stands *sans* the name of the Plaintiff.

In my view the 2nd page of **P1**-the permit does not afford any evidence at all for the re-nomination upon which the Plaintiff sues in this case. The Plaintiff's name does not appear at all on this page and he only remains as a nominee revoked.

How the father who died in May 1987, changed his heart and re-nominated him in January 1987 remains unexplained, given the fact the father had taken the son to court for acts of ingratitude and vindicated his honour in the previous case. Indubitably, paternal instincts do overtake paterfamilias despite the peccadilloes of their issues but the test of such a probability in this case is not satisfied on oral evidence. It would appear that even the permit which manifests various revocations in the place where nominations should appear does not display the name of the Plaintiff as the re-nominated nominee in 1987.

The attempt of the Plaintiff was to show that when his father passed away in May 1987 he had already become a nominee in January 1987. But the items of documentary evidence do not advance his case.

But the Plaintiff-Respondent relies on two other items of evidence in the documentary evidence. Both at the top of P1 and P2 the name Chandrasekara is found. But his name does not appear in the place where it should be-namely the column allotted for names of nominees. It is curious that Chandrasekara's name appears at the top of these two documents P1 and P2 but the officer who had inserted his name has been identified as one Ramani Gunawardane who worked as the Divisional Secretary.

One Somadasa Somaratne who was summoned by the Plaintiff from the office of the Divisional Secretary identifies two dates namely 17.01.1987 and 04.12.1991.

As I said before, the date 17.01.1987 is virtually 4 months before the original permit holder died. This date stands alone at p.2 of the permit without the name of Chandrasekara (the Plaintiff). But this is the date which is relied upon by the Plaintiff as the date of his re-nomination. But if that is his contention, the date should be accompanied by a mention of his name but his name does not appear, thus raising the possibility that this may be an insertion.

The order date 04.12.1991 with the seal and another date 07.12.1991 with the initial of Ramani Gunawardane appear at the top of P1. Then when was he re-nominated? It cannot be 18.01.1987 because the name is missing in the nominee's column. If the date of nomination is 07.12.1991, it was almost 4 years and 8 months after the original permit holder had passed away. At the top of page No.1 of permit, Punchi Bnada's name is scored off and the plaintiff's name has been inserted.

If it was inserted on 07.12.1991, why should it be done 4 years and 8 months after the original permit holder had died?

His name does not appear in the column for a nominee but it gets inserted at the top of the 1st page with two different dates. In such an event, I am irresistibly drawn to the conclusion that the presumption in illustration (d) to Section 114 of the Evidence Ordinance would hardly be engaged. Ramani Gunawardane-the Divisional Secretary whose initials have been identified as those appearing beside the name of the Plaintiff was a public official but there is abundant evidence on P1 and P2 that falls far short of

raising the presumption that an official act has been regularly performed. Though the burden is on the party who challenges the regularity of the official or judicial act to plead and prove his case (*Ratnam v. Kanikaram* A.I.R. (1964) S.C 244), in my view the presumption was rebutted by the items of evidence that I have already itemised.

On the other hand Dr. Sunil Coorey questioned the authority of Ramani Gunawardane to effect insertions in a permit *sans* instructions from the original permit holder.

The original permit holder passed away in May 1987. Only the date 17.01.1987 appears next to the column for nominees *sans* the name of the Plaintiff. This does not raise the presumption, while raising the probability that the permit holder never nominated the Plaintiff before he passed away.

Whilst the Plaintiff relied on this permit, the Defendant raised the non-existence of the nomination or rather the invalidity of what Ramani Gunawardane had done. It called for an explanation from Ramani Gunawardane as to why she inserted two dates namely 04.12.1991 and 07.12.1991. This gives one the impression that she inserted the name of the Plaintiff on these two dates, almost 4 years and 8 months after the original permit holder had passed away.

Collateral Attack

In fact, this would amount to an *ultra vires* act of this public official who was unavailable to explain the basis upon which the name of the Plaintiff came to be inserted and the Defendant was in effect making a collateral attack on the permit and raising the question of nullity of permit in favour of the Plaintiff. A person who wishes to challenge a decision may do so directly or collaterally. A collateral attack occurs when a decision is challenged indirectly, such as by way of a defence of invalidity of the act of Ramani Gunawardane to a declaratory action based on a permit. Where is the authority of Ramani Gunawardane to insert the name of the Plaintiff when there is no evidence of a prior request from the original permit holder-Punchi Banda? The officer who gave evidence was not able to speak to a written request on the part of the original permit holder to re-nominate the Plaintiff as the nominee.

A collateral attack based on a public law defence of an *ultra vires* act is permitted in civil cases and the English case of *Wandsworth London Borough Council v. Winder* (1985) A.C 461 exemplifies this approach. The Plaintiff's council had raised the rent of Winder's flat; Winder refused to pay the increase, paying only such an amount as he considered to be reasonable; the council sued for arrears of rent and possession of the flat; Winder argued in defence that the council had acted *ultra vires* by charging excessive rents. The local authority sought to strike out his defence in the county court by saying that it was only in judicial review proceedings that the invalidity of the raise could be challenged. The council took Winder to the House of Lords on this preliminary question alone. The House held that the defence could be raised without recourse to judicial review proceedings, while admitting that the issues raised are those of the public law. The validity of acts and decisions subject to review under the supervisory jurisdiction may also be challenged as a defence in criminal proceedings (see *MacGillivray v Johnson* (No 2 1994 SLT 1012) and *ope exceptionis* in civil proceedings (see, especially, *Vaughan Engineering Ltd v Hinkins & Frewin Ltd* 2003 SLT 428).

No doubt, the issue of invalidity of the act of Ramani Gunawardane giving this permit to the Plaintiff without any scintilla of evidence to authorize that action is raised as a defence in this case and I take the view that the defence must succeed. *Ope Exceptionis* the plea of raised by the Defendant that the document on which the action is based is void must succeed.

That would boil down to the effect that the Plaintiff was not the nominated successor when Punchi Banda died in 1987.

Another question of law –Section 68 of the Land Development Ordinance

Assuming without conceding that the Plaintiff was the nominated successor, the Plaintiff *though* failed to succeed under Section 68(2) of the Land Development Ordinance. The law gives a nominee a period of 6 months to enter into possession to make the nomination effective. There is evidence that the Plaintiff never entered into possession. As he failed to enter into possession within 6 months of Punchi Bnada's death

in 1987, or at least failed to take possession as by instituting an action, it follows that he failed to succeed as required by Section 68(2) of the Land Development Ordinance-see Basnayake C.J in *Gunawardene v. Rosalin* 62 N.L.R. 213; *Rasammah v. Manamperi* 77 N.L.R. 31; *Leelawathie v. Perera* (2012) 4 Sri LR 246.

If there is non-compliance with Section 68(2) of the Land Development Ordinance to succeed, Section 72 kicks in and succession would take place in terms of the 3rd schedule to the Ordinance, under which it is the Defendant who would succeed as the elder brother of the Plaintiff.

In the circumstances, the upshot of the above reasoning would be that the Plaintiff was not the nominated successor of Punchi Banda when the latter died in 1987 and even if he had been the nominated successor, he has failed to succeed to Punchi Banda under Section 68(2) of the Land Development Ordinance.

Accordingly, I proceed to allow the appeal of the Defendant-Appellant, set aside the judgment of the District Court of Polonnaruwa dated 03.06.2000 and dismiss the action of the Plaintiff.

JUDGE OF THE COURT OF APPEAL