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 in terms of Article 140 of the Constitution.

Rajakaruna Wasala Mudiyanselage Sumedha Manoratne,
No. 331, Hurulu Nikawewa,
Galenbindunuwew.

Petitioner

Vs.

Case No. C. A. (Writ) Application 148/2017

1. Margratte V. Kumburage,
   Divisional Secretary,
   Divisional Secretary's Office,
   Galenbindunuwewa.

2. R. W. M. Gunathilake Banda

3. R. W. M. Bisomenike

   Both of –
   No. 349,
   Hurulu Nikawewa,
   Galenbindunuwewa.

4. K. P. Chaminda
   Deputy Commissioner of Land,
   Deputy Commissioner's Office,
   Anuradhapura.

Respondents

Before: Janak De Silva J.

Counsel:

Prinath Fernando for the Petitioner

Nayomi Kahawita SSC for 1st and 4th Respondents

Shamal A. Collure with A.P. Jayaweera and Prabath S. Amarasinghe and for the 2nd and 3rd Respondents

Written Submissions tendered on:

Petitioner on 31.01.2019 and 21.05.2019

1st and 4th Respondents on 03.05.2019

2nd and 3rd Respondents on 02.04.2019

Argued on: 12.02.2019

Decided on: 09.08.2019

Janak De Silva J.

The grand father of the Petitioner, Rajakaruna Wasala Mudiyanselage Ukku Banda (Ukku Banda) was issued a permit (1R1) under the Land Development Ordinance (Ordinance) for the land described in the schedule to the petition. The permit (1R1) referred to two lands, a paddy land in extent of 3 acres and a high land in extent of 1 ½ acres.

The Petitioner, 1st and 4th Respondents are in agreement that Ukku Banda nominated Samarakoon Banda as the sole successor to both the above lands although the 2nd and 3rd Respondents state that they are unaware of such a nomination. Samarakoon Banda is the father of the Petitioner.

Parties are in agreement that Ukku Banda passed away on 17.05.1979. The relief that the Petitioner seeks to obtain from these proceedings is essentially permits/grants to the lands described in the schedule to the petition which fall within the permit 1R1.

As far as the high land is concerned it is not possible for at least five reasons. A grant (1R2) under section 19(4) of the Ordinance has been issued to Bandara Menike, wife of Ukku Banda sometime in 1996 under the hand of H.E. the President for the high land. The Petitioner contends that the

issue of such a grant is contrary to law. However, as Lord Radcliffe held in *Smith v. East Elloe Rural District Council* [(1956) A.C. 736, 769-770]:

> "An order, ... is still an act capable of legal consequences. It bears no brand of invalidity upon its forehead. Unless the necessary proceedings are taken at law to establish the cause of invalidity and to get it quashed or otherwise upset, it will remain as effective for its ostensible purpose as the most impeccable of orders."

Firstly, the Petitioner has not sought a quashing of the said grant (1R2). In *Weerasooriya v. The Chairman, National Housing Development Authority and Others* [C.A. Application No. 866/98, C.A.M. 08.03.2004] Sripavan J. (as he was then) held that the court will not set aside a document unless it is specifically pleaded and identified in express language in the prayer to the petition.

Secondly, Amaratunga J. in *Wijeratne (Commissioner of Motor Traffic) v. Ven. Dr. Paragoda Wimalawansa Thero and 4 others* [(2011) 2 Sri.L.R. 258 at 267] held as follows:

> "The first rule regarding the necessary parties to an application for a writ of certiorari is that the person or authority whose decision or exercise of power is sought to be quashed should be made a respondent to the application. (i) If it is a body of persons whose decision or exercise of power is sought to be quashed each of the persons constituting such body who took part in taking the impugned decision or the exercise of power should be made respondent. The failure to make him or them respondents to the application is fatal and provides in itself a ground for the dismissal of the application in limine. (Jamila Umma vs. Mohamed, Karunarathna vs. the Commissioner of Cooperative Developments; British Ceylon Corporation us Weerasekara). (ii) If the act sought to be impugned had been done by one party on a direction given by another party who has power granted by law to give such direction, the party who had given the direction is also a necessary party and the failure to make such party a respondent is fatal to the validity of the application. (Mudiyanse vs. Christie Silva, Government Agent, Hambantota)."

H.E. the President who decided to issue the grant (1R2) is not a party to this application and in fact could not have been made so in view of Article 35 of the Constitution.

Thirdly, the grant (1R2) was issued in 1996 whereas this application was filed in 2017 more than 21 years after the issue of the said grant. Unexplained delay is a ground to refuse granting of discretionary remedies such as writ of certiorari. In *Jayarathne v. Wickremaratne and Others* [(2003) 2 Sri.L.R. 276] it was held that even when a petitioner is entitled to the relief on grounds of error of law, if the petitioner is guilty of laches it stands against the grant of relief by way of

writ of certiorari. In this case, the Court specifically came to a finding that the decision impugned in that application was irrational, arbitrary and unreasonable. Yet the relief was refused since the application was made to Court 7 years after the impugned decision.

Fourthly, Bandara Menike nominated three successors to the high land, namely Samarakoon Banda (father of the Petitioner), 2nd Respondent (her son) and 3rd Respondent (her daughter). Samarakoon Banda passed away on 06.04.2011 whereas Bandara Menike passed away afterwards on 19.07.2011.

In *W.M. Chandra Kumari Palamakumbura v. P.A. Hema Damayanthie and Others* [B.A.L.J. XXII (2016) 171] the Supreme Court held that the rights of a nominated successor are contingent upon the nominated successor fulfilling the requirements under the provisions of the Ordinance and that the mere nomination of a successor does not tantamount to automatic transfer of the land to the nominated successor. The Court further held that the nominee is required to have the permit officially transferred upon making an application to that effect to the relevant authority and that in view of section 55 of the Ordinance only upon regularising the permit can the successor gain full benefit of the enjoyment of the land. It was further held that where the permit-holder makes a nomination but is survived by a spouse, as in the instant case, the nominated successor has to succeed to the land by entering into possession within the time stipulated in section 68(2) of the Ordinance. No such evidence has been placed before Court by the Petitioner.

However, he has with his written submissions sought to place documents marked A1 to A7 to establish such entering into of possession. Firstly, such new material has been placed before this Court in breach of Rule 3(8) of the Court of Appeal (Appellate Procedure) Rules 1990 and as such cannot be considered by Court. In any event, they do not cover the period mentioned in section 68(2) of the Ordinance.

Fifthly, section 60 of the Ordinance states that no nomination or cancellation of the nomination of a successor shall be valid unless the document (other than a last will) effecting such nomination or cancellation is duly registered before the date of death of the owner of the holding or the permit holder. Several decisions of the superior courts have held that the provisions in section 60 of the Ordinance is mandatory and the failure to register renders a nomination invalid. [*Madurasinghe v. Madurasinghe* (1988) 2 Sri.L.R. 142, *Gunadasa v. Marywathy* (2012) B.L.R. 248, *Gunaratne v. Agalawatta* (2013) Galle Law Journal Vol. II 325, *Ranjith v. Nissanka Arachchi and*

Others (C.A. Writ 453/2013, C.A.M. 10.10.2016)]. There is no evidence that the nomination of Samarakoone Banda by Ukku Banda was registered.

This leaves only the question of paddy land to be considered. Before examining that issue a further narrative of the facts is needed.

Upon the death of the original permit holder Ukku Banda on 17.05.1979, the lands covered by the permit was given to the surviving spouse of Ukku Banda, Bandara Menike who had nominated Samarakoon Banda and the 2nd Respondents (her sons) as the successors. This nomination was cancelled in 2012 (P3).

However, upon a request made by the Petitioner, a permit under section 19(2) of the Ordinance has been issued in favour of the Petitioner for 1 acre and 2 roods of the paddy land (P4). The signature of the Petitioner appears on page 4 therein and is dated 15.10.2015. This in my view clearly indicates the acceptance by the Petitioner of part of the paddy land in dispute.

Scrutton, L.J. in *Verschures Creameries Limited vs. Hull & Netherland Steamship Co. Ltd.* [(1921) 2 KB 608 at 612] held:

> "A person cannot say at one time that a transaction is valid and thereby obtain some advantage, to which he could only be entitled on the footing that it is valid, and then turn around and say it is void for the purpose of securing some other advantage. This is to approbate and reprobate the transaction."

Samarakoon C.J. in *Visuvalingam v. Liyanage* [(1983) 1 Sri L.R. 203 at 227] adopted principle in a different formulation by stating that one "cannot blow hot and cold."

In *Ranasinghe v. Premadharma and others* [(1985) 1 Sri.L.R. 63 at 70] Sharvananda C. J. held:

> "In cases where the doctrine of approbation and reprobation applies, the person concerned has a choice of two rights, either of which he is at liberty to adopt, but not both. When the doctrine does apply, if the person to whom the choice belongs irrevocably and with full knowledge accepts the one, he cannot afterwards assert the other; he cannot affirm and disaffirm"

To that extent, I hold that the Petitioner cannot approbate and reprobate as he seeks to do by seeking to assail the documents by which he accepted part of the paddy land. In any event, the fourth and fifth reasons set out above equally applies to the paddy land.

For the foregoing reasons, I dismiss the application of the Petitioner with costs.

However, when Court sought clarifications from the Petitioner as to whether he is not satisfied with what he has received in the form of paddy land, the learned counsel for the Petitioner informed that he is prevented from exercising his rights under the permit (P4) for the paddy land.

In those circumstances, Court directs the 1st Respondent to consider taking steps under the State Lands (Recovery of Possession) Act to evict any unauthorised occupants from the paddy land given to the Petitioner in terms of permit marked P4 and hand over vacant possession of the said paddy land to the Petitioner expeditiously.

Subject to the above direction, the application dismissed with costs.

Judge of the Court of Appeal