

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

1. R.A. Kalyanawathie,
2. N.B.A. Lakshman Palitha
Nissanka,
3. N.B.A. Dinesh Pushpakumara,
All of
No. 370/1,
Yaya 5,
Jayanthipura.
Petitioners

CASE NO: CA/WRIT/185/2016

Vs.

1. R.M.D.P. Pushpakumari,
Divisional Secretary,
Divisional Secretariat,
Hingurakgoda.
2. H.A. Thusitha Dhammika,
Colony Officer,
Divisional Secretariat,
Hingurakgoda.
And 8 Others
Respondents

Before: Mahinda Samayawardhena, J.
Counsel: Dr. Sunil Cooray for the Petitioners.
Nuwan Peiris, S.C., for all the Respondents
except the 3rd and 4th Respondents.
Rohana Deshapriya for the 3rd and 4th
Respondents.
Decided on: 05.11.2019

Mahinda Samayawardhena, J.

A Grant in terms of the Land Development Ordinance, No.19 of 1935, as amended, was issued in the name of Julis Singho in respect of the land in dispute in this case.

His wife was Podi Hamine. Their three children were Jayathilake, Gunasoma (the 4th respondent) and Mallika (the 5th defendant). Jaythilake was the eldest son.

Julis died in 2004; Jayathilake in 2007; and Podi Hamine in 2014.

Julis did not nominate a successor to the land in the Grant.

As seen from *inter alia* P10A, soon after the father's death, the 4th respondent has tried to get the ownership of the land, which had been objected to by his brother, Jayathilake.

P23 goes to show that the 1st respondent, the Divisional Secretary of Hingurakgoda has issued a Grant in the name of the 4th respondent in respect of the land on 04.01.2016.

The three petitioners who are respectively the widow and the two children of the aforesaid Jayathilake have filed this application seeking to quash by writ of certiorari the Grant issued in the name of the 4th respondent as reflected in P23; and to compel the 1st respondent, by writ of mandamus, to issue a Grant in respect of the land in the name of the 2nd petitioner as the eldest son of Jayathilake.

The respondents have filed objections to this application.

The position taken up by the petitioners in their original petition was that, as no successor had been nominated by Julis, upon the death of Julis, the land, in accordance with the Third Schedule read with section 72 of the Land Development Ordinance, devolved on Jayathilake (the father of the petitioners), being the eldest son of Julis, subject to the life interest of Podi Hamine—the wife of Julis (i.e. Jayathilake's mother); and upon the death of Jayathilake, the land devolved on the 2nd petitioner, being the eldest son of Jayathilake, subject to the life interest of the wife of Julis (Podi Hamine); and upon the death of the wife of Julis (Podi Hamine), the 2nd petitioner succeeded to the land subject to the life interest of his (the 2nd petitioner's) mother, who is the 1st respondent to this application.

Having (may be) later realized that the law explained above is not correct, the petitioners amended the original petition to say that, upon the death of Julis, his wife failed to succeed to the rights of her deceased husband Julis, as she failed and neglected to take possession of the land, and therefore, upon the death of Julis, the land devolved on the eldest son of Julis, who was the father of the petitioners.

This amendment, in my view, changes the character of the petitioners' action. What has been introduced by the amendment is an afterthought.

The Land Development Ordinance does not use the words "*life interest*". If there is no nomination in the Grant, upon the death of the owner of the holding, the spouse shall, in terms of section 48B, be entitled to succeed to the land by operation of law, unless, in terms of section 68, the spouse refuses to succeed or does not enter into possession of the land within six months from the date of death of the owner.

I agree with the submission of the learned State Counsel that the automatic succession by the surviving spouse by operation of law has been introduced to give security to the surviving spouse (mostly, the wife of the deceased) and thereby to address a social issue. If the Succession Table set out in the Third Schedule is to take effect immediately upon the death of the owner, the surviving spouse could be neglected and left destitute by children.

In my view, the alleged failure to succeed to the land by the spouse in terms of section 68(1), which is a question of fact, cannot be raised for the first time in a writ application before the Court of Appeal. If somebody wants to take up that position, he shall first raise it before the proper authority such as the Divisional Secretary or Provincial Commissioner of Lands or Commissioner General of Lands for them to initiate an inquiry into it and arrive at a finding. That has not been done by the petitioners in this case. This Court being a Writ Court cannot embark upon an inquiry into it. When major facts are in dispute, writ will not lie.

According to the original petition, the spouse of Julis succeeded to the land. To use the petitioners' own words, she became the life interest holder of the land. The order of succession under the Third Schedule read with section 72 becomes applicable, if the spouse fails to succeed and not otherwise. Thereafter the petitioners cannot change that position by amending the petition to say for the first time that Podi Hamine did not succeed to the land. During the lifetime of Podi Hamine such a position was not taken.

In any event, if the petitioners now state that Julis' wife Podi Hamine failed to succeed to the land, the burden is on them to prove it. The petitioners have failed to discharge that burden.

According to section 48B(b) and (c), upon succeeding to the land, the spouse can neither dispose of nor nominate a successor to the land. To that extent, the spouse has only the life interest to the land.

It is upon the death of the spouse, according to section 72, the land shall devolve as prescribed in the Third Schedule to the Ordinance.

Upon the death of Podi Hamine, the eldest surviving son of the owner of the land was the 4th respondent. According to the Succession Table, he shall succeed to the land.

Hence, the 1st respondent is correct in issuing the Grant in the name of the 4th respondent.

I dismiss the application of the petitioners, but without costs.

Judge of the Court of Appeal