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 a Writ of Certiorari and a Writ of Mandamus under and in terms of Article 140 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

CA (Writ) Application No: 21/2016

Paingamuwa Arachchilage Indrani,
No. 352, Buddayaya, Galamuna.

PETITIONER

Vs.

1. Arachchigedara Senevirathne,
   Yaya 5, Near the Committee Hall,
   New Town, Medirigiriya.

   (who also calls himself
   Paingamuwa Arachchige Senevirathne)

2. Divisional Secretary,
   Divisional Secretariat, Lankapura.

3. District Secretary,
   District Secretariat, New Town Road,
   New Town, Polonnaruwa.

4. Secretary,
   Ministry of Lands.

5. Paingamuwa Arachchige Rathnayake
   alias
   Dewathawaththe Ralalage Rathnayake,
   No. 1424, Pullayara Junction,
   Mahathalakolawewa, Vijepura.

6. The Land Commissioner General,
   Land Commissioner General's Department.

4th and 6th Respondents at
"Mihikatha Medura", Land Secretariat,
1200/6, Rajamalwatta Lane, Battaramulla.

RESPONDENTS

Before: **Mahinda Samayawardhena, J**
Arjuna Obeyesekere, J

Counsel: Asthika Devendra with Milindu Sarathchandra and Wasantha Sandaruwan for the Petitioner

Ms. Madhubashini Sri Meththa, State Counsel for the 2nd – 6th Respondents

Argued on: 7th August 2020

Written Submissions: Tendered on behalf of the Petitioner on 3rd July 2019 and 4th September 2020

Tendered on behalf of the 2nd – 6th Respondents on 12th September 2019

Decided on: 23rd October 2020

Arjuna Obeyesekere, J.

The Petitioner states that the State had issued Pahingamuwa Arachchilage Mudiyanse (hereinafter referred to as 'Mudiyanse') a permit in 1961 in respect of a paddy land in extent of 3A 3R 28P. In January 1982, the State has issued Mudiyanse, a Grant in terms of Section 19(4) read together with Section 19(6) of the Land Development Ordinance (the Ordinance) in respect of the said paddy land.[1] Mudiyanse had nominated his wife, Dewatawatte Ralalage Biso Menike (hereinafter referred to as 'Biso Menike') as his successor for the said paddy land. Biso Menike in turn had nominated her daughter and son, the Petitioner and the 5th Respondent, respectively, as her successors. There is no dispute with regard to the succession to the paddy land.

[1] A copy of the said Grant has been marked 'P3'.

At the same time that the aforementioned permit was issued in respect of the paddy land, the State had issued Mudiyanse a permit in respect of a high land in extent of 3R 28P. In November 1992, the State had issued Mudiyanse a Grant in terms of Section 19(4) read together with Section 19(6) of the Ordinance in respect of the said high land. A copy of the said Grant has been produced by the Petitioner, marked '**P4**'. It is admitted that at the time of the death of Mudiyanse in October 1993, there was no nomination of a successor in respect of the high land. As a result, his wife, Biso Menike had succeeded to the high land as a life interest holder, which has been registered in the Register marked '**P8**'.

Biso Menike passed away in September 2006. In the absence of a nomination of a successor by Mudiyanse, the issue as to who should succeed to the high land had to be decided in terms of Section 72 of the Ordinance, read together with the Third Schedule thereof.[2] The contenders for succession were the Petitioner, who was living on the said high land, the 5th Respondent and the 1st Respondent, who was living in Medirigiriya. The 2nd Respondent, the Divisional Secretary, Lankapura, by a certificate issued in April 2014 marked '**P13**' has recognized the 1st Respondent as the successor of Mudiyanse on the basis that the 1st Respondent is the eldest son of Mudiyanse. As a result, the name of the 1st Respondent has been entered in the Register marked '**P14**'.

Dissatisfied with the said decision in '**P13**' and '**P14**', the Petitioner filed this application in January 2016. By an amended petition filed on 2nd February 2016, the Petitioner has sought *inter alia* the following relief:

a) A Writ of Certiorari quashing the decision to recognize the 1st Respondent as the successor to the high land, as evidenced by '**P13**' and '**P14**';

[2] Section 72 reads as follows: "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 installment 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."

b) A Writ of Mandamus nominating the Petitioner as the successor to the said high land;

c) A Writ of Mandamus (in the alternative) directing the 2nd - 4th and 6th Respondents to hold an inquiry under the provisions of the Ordinance in order to determine the successor to the said high land.

The 1st Respondent, having been issued notice of this application, appeared before this Court and was represented by Counsel. However, a Statement of Objections has not been filed on behalf of the 1st Respondent, the proxy given by the 1st Respondent has been revoked, and the 1st Respondent has been absent and unrepresented thereafter.

I shall commence by considering the case of the Petitioner. The Petitioner is claiming that her mother, Biso Menike had contracted three marriages prior to entering into a marriage of habit and repute with Mudiyanse. She claims that the 5th Respondent and she are the only children of this marriage between Mudiyanse and Biso Menike, which had only been registered in 1993, as evidenced by the marriage certificate '**P5**'. The Petitioner states that the 5th Respondent is paralysed. Although the Petitioner claims that her father is Mudiyanse, the birth certificate of the Petitioner marked '**P1**' issued in 1969, and the birth certificate of the 5th Respondent marked '**P2**' issued in 1965 does not contain any details with regard to their father. The name of Mudiyanse as the father of the Petitioner (and the 5th Respondent) had been inserted in **P1**' and '**P2**' only in 1998, upon an application made to that effect by Mudiyanse.[3]

The Petitioner claims that the 1st Respondent, who is older than the 5th Respondent and herself, is a son of Biso Menike from a previous marriage. She states further that Mudiyanse is not the father of the 1st Respondent, and that the 1st Respondent admittedly does not have a birth certificate, to prove that Mudiyanse is the father. The argument advanced on behalf of the Petitioner is that as the 1st Respondent is not a blood relative of Mudiyanse, he has no right to succeed to the said high land in terms of the Ordinance.[4]

[3] Vide the entry placed on the reverse of 'P13' and 'P14'
[4] Vide the definition of 'relative' in the Third Schedule.

As the 1st Respondent has not filed any objections, his position has to be considered from the documents filed by the 2nd Respondent. It appears from letters written by the 1st Respondent, which have been filed by the 2nd Respondent marked '**R7**' and '**R8**', that the 1st Respondent is claiming that he is the eldest son of Mudiyanse. He is claiming further that the Petitioner is a child of Biso Menike from a previous marriage, and that the Petitioner and the 5th Respondent are not children of Mudiyanse. However, as pointed out by the learned Counsel for the Petitioner, there are contradictions between the versions given by the 1st Respondent in the said letters.

The land ledger pertaining to the permit in respect of the paddy land and the high land has been produced together with the said permit marked '**R1**'. According to the said ledger, the name of the 1st Respondent had initially been registered as the successor of Mudiyanse. The Petitioner claims that this was done as Mudiyanse and Biso Menike did not have children of their own at that time.

The name of the 1st Respondent has subsequently been struck off, and the name of the 5th Respondent had been inserted as the nominated successor, at the request of Mudiyanse by his letter dated 12th November 1979, marked '**R2**', which reads as follows:

> "මෙහි පහත අත්සන් කරන පී.ඒ. මුදියන්සේ වන මට රජයෙන් නිත්‍යානුකූලව ලැබී ඇති ගොඩ ඉඩම අංක 352 සහ මඩ ඉඩම අංක 417 දරණ ඉඩම් කැබලි දෙකට මෙතෙක් දෙවනි උරුමය පවරා තිබුනේ පී.ඒ. සෙනවිරත්න නැමැති මගේ ලොකු පුතාටය. දැනට ඔහුට මැදිරිගිරිය කොටසෙන් ඉඩමක් ලබාගැනීම සඳහා කටයුතු කරන යයි. තවද මොහු මටත් ඔහුගේ මැණියන්ටද සහෝදර සහෝදරියන්ටද සලකන්නේ නැත. මොහුගේ සහ භාර්යාවගේ බස් අසා මාහට නිතරම හින්සා පීඩා කරනවාය. කුඹුර වැඩකර ගැනීම සඳහා රජයෙන් ලබාදුන් වගානය මුදල්ද මෙතෙක් ගෙවා නොමැත.
>
> ගරු කටයුතු මැතිතුමනි ඉඩම් බලපත්‍රයේ සඳහන් කර තිබෙන දෙවැනි උරුමය සෙනවිරත්නගෙන් වෙනස් කර පී.ඒ. රත්නායක නැමැති බාල පුතාට පවරා දෙන මෙන් ඉතා යටහත් භාවයෙන් ඉල්ලා සිටිමි."

Mudiyanse had sent a similar letter marked '**R3**', a few months later. In this letter, Mudiyanse had mentioned that the State has allocated the 1st Respondent another land.

As borne out by '**R4**', at the request of Mudiyanse the nomination in favour of the 5th Respondent too has been cancelled thereafter in favour of Biso Menike. In the absence of a fresh nomination of a successor, the nomination registered in the said ledger in favour of Biso Menike should apply to both the high land and the paddy land. However, neither the Petitioner nor the 2nd Respondent is contending that Biso Menike has been nominated as the successor to the high land, as well. In fact, the 3rd Respondent, by his letter dated 7th December 1998 marked '**P6**', has specifically stated that the nomination of Biso Menike as successor is only with regard to the paddy land, and that Biso Menike has only been recognised as a life holder of the high land.

By letter dated 8th August 2013 marked '**R9**', the 1st Respondent had informed the 3rd Respondent as follows:

> "මවගේ මරණයෙන් පසුව පියාට අයිති ඉඩම්වල නිරවුල් භාවය ඇති කර අප සහෝදර සහෝදරියන් අතරේ බෙදාගැනීමට පවුලේ වැඩිමල් පිරිම් දරුවා හැටියට මා විසින් ලිපි ලේඛන සකසා ලංකාපුර ප්‍රාදේශිය ලේකම්තුමාට, ග්‍රාම නිලධාරී තුමියට, ජනපද නිලධාරී තුමාට ඉදිරිපත් කෙළෙම්. එහිදි එම නිලධාරීන් මට පැහැදිලි කළේ මඩ අක්කර 4 ක ඉඩම් කොටස මගේ මැණියන්ගේ නමින් මුල් අයිතිය ලබා දි බාල සහෝදරියගේත් බාල සහෝදරයාගේත් නමින් නම් කර පවාරා දි ඇති බවයි. එහෙත් ගොඩ ඉඩම (අක්කර 1 ක ජනපද නිවාස සමග) පියාගේ ඇවැමෙන් කිසිවෙකු විසින් හරවාගෙන නොමැති බවද, පවසා එම ඉඩම මාගේ නමින් පවරා දිමට අවශ්‍ය මාගේ උප්පැන්න සහතිකයේ පිටපතක් ද, පියාගේ, මවගේ මරණ සහතිකද, ඉදිරිපත් කරන ලෙසය. එම පැහැදිලි කිරීමෙන් පසු මාවිසින් මාගේ උප්පැන්නයේ සහතික පිටපතක් ලබා ගැනීමට හිගුරක්ගොඩ ප්‍රාදේශිය ලේකම් කාර්යාලයට ගිය පසු නිලධාරී මහත්වරුන් පැහැදිලි කළේ මාගේ නමින් උප්පැනින සහතිකයක් නොමැති බවයි. එම නිසා මට අනුමාන වයස් සහතිකයක් ලබා දිමට කටයුතු කරන ලදි. එම ලේඛන සමග ලංකාපුර ප්‍රාදේශිය ලේකම් තුමා හමුවු විට පැහැදිලි කළේ **එම අනුමාන වයස් සහතිකයකට ඉඩමක් පැවරීම කල නොහැකි බවයි**."

The dispute relating to the succession to the high land had been taken up at the Mobile Service held on 30th January 2014, where it had been observed that:[5]

> "III උපලේඛගත උරුමකරු හා දැනට ඉඩම භුක්ති විඳින සහෝදරිය අතර ආරවුලකි. උරුමකරුට උප්පැන්න සහතිකයක් නොමැති නිසා උරුමය සනාථ වී නොමැත. උරුමක්කරු පවසන්නේ සහෝදරියට කොටසක් දිමට කැමති බවයි. ඒ අනුව දිවුරුම් ප්‍රකාශ ලබාගෙන කටයුතු කරන්න."

[5] Vide Report of the Mobile Service marked 'R19'.

However, the reverse of '**R19**' has the following endorsement:

> "පසු පිට උපදෙස් අතිරේකවයි. P.A. සෙනෙවිරත්න නැමැති අය P.A. මුදියන්සේගේ දරුවකු බවට සාක්ෂි කිපයක් ලබා ගැනීම සුදුසුයි. දැනට සෙනෙවිරත්න දරුවන්ගේ උප්පැන්න සහතිකවල තම මුත්තාගේ නම ලෙස මුදියන්සේගේ නම සටහන් කර තැබීම වත් සාක්ෂියක් ලෙස පිලිගැනීම සුඛුසුය. මීට අතිරේකව සෙනෙවිරත්න පාසැලට බාර දුන් දිනයේ පියා ලෙස මුදියන්සේ පෙනී සිටි බවට පාසැල සතුව ලේඛන තිබෙන බව කියයි. එයද ලබා ගන්න. මෙම සාක්ෂි මත සෙනෙවිරත්න ගේ පියා මුදියන්සේ බව තීරනය කිරීමට අපහසු නම් එම ලේණන මත තීරනය ගැනීම ගැන ඉඩම් කොමසාරිස් ජනරාල් වීමසා උපදෙසක් ගන්න"

Even though the agreement reached at the mobile service was that the land will be shared between the Petitioner and the 1st Respondent, by '**P13**' the 2nd Respondent had proceeded to recognize the 1st Respondent as the successor.

I shall now consider the circumstances in which the 2nd Respondent issued '**P13**'.

In paragraph 13(l), (m) and (o) of his affidavit filed before this Court, the 2nd Respondent had stated as follows:

> "*(l) At the Land Mobile Service held by the Deputy Land Commissioner on 30.01.2014, it was observed that the 1st Respondent does not have a birth certificate and therefore cannot prove that he is the 1st born and further it has been stated that the 1st Respondent has agreed to give a portion of the land to his sister and it has been decided to obtain an affidavit to that effect.*
>
> *(m) After considering all the facts the 2nd Respondent named the 1st Respondent as the successor to Grant No. POL/LUNG/PRA/39*.
>
> *(o) The documents marked as R10, R11, R12, R13 and R16 all indicate that the original permit holder is the father of the 1st Respondent.*"

Thus, in the absence of a birth certificate, what is the material that the 2nd Respondent had, to determine that the 1st Respondent is the eldest son of Mudiyanse? The 2nd Respondent has been guided principally by three documents. The first is a certificate issued by the Ministry of Education in 2014, marked '**R11**',

which states that the name of Mudiyanse has been given as the father at the time the 1st Respondent was admitted to school in 1958. The next is the birth certificate of the children of the 1st Respondent marked '**R15**' which gives the name of Mudiyanse as the grandfather. The third is '**R16**' which is the response of the Grama Niladhari to the specific question posed to him by the 1st Respondent that the 1st Respondent is the eldest son of Mudiyanse. Of the three documents, it appears to me that only '**R11**' and '**R15**' would have *some* evidentiary value. However, I must note that the Petitioner is challenging '**R11**' on the basis that her request to the Ministry of Education seeking details on the school admission of the 1st Respondent has not been answered – vide document marked '**X**' filed with the counter affidavit of the Petitioner.

Not much weight can be attached to the other three documents referred to by the 2nd Respondent, namely '**R10**', '**R12**' and '**R13**'. '**R10**' for the reason that it is a certificate relating to the estimated age of the 1st Respondent, and hence, the reference to Mudiyanse being the father not being relevant, and '**R12**' and '**R13**' for the reason that they are affidavits of the 1st Respondent confirming that he is the eldest son of Mudiyanse.
Thus, although it appears that '**R11**' and '**R15**' support the position of the 2nd Respondent that the 1st Respondent is the eldest son of Mudiyanse, to my mind, the said documents are not the best in terms of evidentiary value. The question that arises in my mind is, can succession be determined on such documents, especially in view of the position taken up by the Petitioner with regard to the paternity of the 1st Respondent, and the absence of the birth certificate of the 1st Respondent?

It is in this context that I must consider the primary complaint of the learned Counsel for the Petitioner that the 2nd Respondent ought to have afforded the Petitioner a hearing prior to a decision affecting her rights being taken.

The importance of natural justice and why Courts insist upon it are captured by the following paragraphs in '**Administrative Law**' by Wade:[6]

> *"Just as the Courts can control the substance of what public authorities do by means of the rules relating to reasonableness, improper purposes, and so forth,*

[6] 'Administrative Law' by H.W.R.Wade and C.F.Forsyth; 11th Edition, pages 373 and 374.

so through the principles of natural justice they can control the procedure by which they do it. In so doing they have imposed a particularly procedural technique on government departments and statutory authorities generally. The Courts have in effect, devised a code of fair administrative procedure based on doctrines which are an essential part of any system of administrative justice.

***Procedure is not a matter of secondary importance**. As governmental powers continually grow more drastic, it is only by procedural fairness that they are rendered tolerable. A judge of the United States Supreme Court has said: 'Procedural fairness and regularity are of the indispensable essence of liberty. Severe substantive laws can be endured if they are fairly and impartially applied.'[7] One of his colleagues said: 'The history of liberty has largely been the history of the observance of procedural safeguards.'[8]*

It is true that the rules of natural justice restrict the freedom of administrative action and that their observance costs a certain amount of time and money. But time and money are likely to be well spent if they reduce friction in the machinery of government; and it is because they are essentially rules for upholding fairness and so reducing grievances, that the rules of natural justice can be said to promote efficiency rather than impede it. Provided that the courts do not let them run riot, and keep them in touch with the standards which good administration demands in any case, they should be regarded as a protection not only to citizens but also to officials. Moreover, a decision which is made without bias, and with proper consideration of the views of those affected by it, will not only be more acceptable; it will also be of better quality. Justice and efficiency go hand in hand, so long at least as the law does not impose excessive refinements."

The following passage from '**The Rule of Law**'[9] examines the need to give a hearing from the perspective of fairness:

"A power must also be exercised in a way that, in all the circumstances, is fair, since it is assumed (in the absence of a clearly expressed contrary intention) that

[7] Shaughnessy v. United States, 345 US 206 (1953) (Jackson J).
[8] McNabb v. United States, 318 US 332 (1943) (Frankfurter J).
[9] Tom Bingham, The Rule of Law, [2011] Penguin Books.

the State does not intend to treat the citizen unfairly. It may of course be a vexed question what, in the particular circumstances, fairness requires. But the so-called rules of natural justice have traditionally been held to demand, first, that the mind of the decision-maker should not be tainted by bias or personal interest (he must not be a judge in his own cause) and, secondly, that anyone who is liable to have an adverse decision made against him should have a right to be heard (a rule the venerability of which is vouched by its Latin version: audi alteram partem, hear the other party). This is a principle to which the courts tend to attach great importance, and it has been described as "the necessary assumption on which to base an argument…that the court must supplement the procedural requirements which the Act itself stipulates by implying additional requirements said to be necessary to ensure that the principles of natural justice are observed… The decided cases on this subject establish the principle that the courts will readily imply terms where necessary to ensure fairness of procedure for the protection of parties who may suffer a detriment in consequence of administrative action."- R v Secretary of State for the Environment, ex p. Hammersmith & Fulham London Borough Council [1991] 1 AC 521, 598 D-G."

In **Gamlathge Ranjith Gamlath vs Commissioner General of Excise and two others**,[10] Sripavan J (as he then was) held as follows:

"*It is one of the fundamental principles in the administration of justice that an administrative body which is to decide must hear both sides and give both an opportunity of hearing before a decision is taken. No man can incur a loss of property by judicial or quasi-judicial proceedings unless and until he has had a fair opportunity of answering the complaint made against him. Thus, objectors at public inquiries must be given a fair opportunity to meet adverse evidence, even though the statutory provisions do not cover the case expressly. (Vide Errington v. Minister of Health[11]). The court would certainly regard any decision as having grave consequences if it affects proprietary rights. In Schmidt and another v. Secretary of State for Home Affairs[12] Lord Denning M. R. suggested that the ambit of natural justice extended not merely to protect rights but any*

[10] CA (Writ) Application No. 1675/2002; CA Minutes of 28th March 2003.
[11] (1935) 1 KB 249.
[12] (1969) 2 Ch. 149 at 170.

legitimate expectation of which it would not be fair to deprive a person without hearing what he has to say."

The right of a party to be heard prior to a decision affecting his rights being taken even where the Statute is silent on such a requirement, has been confirmed in the following passage from the case of **Lloyd v McMahon**:[13]

"*In particular, it is well-established that when a statute has conferred on any body the power to make decisions affecting individuals, the courts will not only require the procedure prescribed by the statute to be followed, but will readily imply so much and no more to be introduced by way of additional procedural safeguards as will ensure the attainment of fairness*."

It is clear that the 2nd Respondent was aware of the competing claims – vide '**R19**' - and of the weaknesses in the claim of the 1st Respondent – vide the entry made on the reverse of '**R19**', and '**R9**'. Thus, I am of the view that the 2nd Respondent ought to have exercised caution, prior to arriving at a determination affecting the rights of the Petitioner and the 5th Respondent. I am at a loss to understand what prompted the 2nd Respondent to rush and issue '**P13**' without affording a hearing to the Petitioner who is the person occupying the land, and the 5th Respondent, both of whom have a claim to succeed to the said land, provided they can satisfy they are eligible to do so in terms of the Third Schedule to the Ordinance.

There is one other matter which is of concern to me, that being the allegation made by the Petitioner that the 1st Respondent has in fact been given a land in Medirigiriya by the State, a fact which has been referred to by Mudiyanse way back in 1979 in '**R2**' and '**R3**'. This is a matter that could have been addressed by the 1st Respondent, had he filed a statement of objections and participated in these proceedings.

Taking into consideration the above legal and factual positions, I am of the view that the Petitioner and the 5th Respondent should have been afforded a hearing by the 2nd Respondent, prior to '**P13**' being issued. The failure to do so renders the decision in '**P13**' liable to be quashed by a Writ of Certiorari.

[13] [1987] AC 625 at 702; cited in 'Administrative Law' by Wade and Forsyth; 11th Edition pages 423-424.

I accordingly issue a Writ of Certiorari quashing the decision of the 2nd Respondent to register the name of the 1st Respondent as the successor of Mudiyanse to the said high land, as reflected in '**P13**' and '**P14**'. I direct the 2nd Respondent to conduct an inquiry with the participation of the Petitioner, the 1st Respondent and the 5th Respondent and thereafter determine in terms of the Ordinance the person entitled to succeed Mudiyanse in respect of the high land. I make no order with regard to costs.

Judge of the Court of Appeal

Mahinda Samayawardhena, J

I agree

Judge of the Court of Appeal