

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 Prohibition and Mandamus in terms of Article 140 of the Constitution of the Democratic Socialist of Sri Lanka.

CA (Writ) Application No: 63/2018

Pahala Gamaethiralalage Ishara Sampath Jayathilaka,
"Tissa", Urupelewwa,
Kuruwita.

PETITIONER

Vs.

1. Dilini Dharmadasa,
Divisional Secretary,
Divisional Secretariat,
Kuruwita.
2. R.M.C.M. Herath,
Land Commissioner General,
Land Commissioner General's Department,
"Mihikatha Madura",
No. 1200/6, Rajamalwaththa Road,
Battaramulla.
3. N.U. Navarathne,
Registrar of Lands,
Land Registry, Ratnapura.
4. E.J.C.P.K. Gunathilake,
Land Officer,
Divisional Secretariat, Kuruwita.
5. Pahala Gamaralalage Nandawathi Manike,
Urupalawita, Kuruwita.

RESPONDENTS

Before: Arjuna Obeyesekere, J / President of the Court of Appeal

Counsel: Uditha Egalahewa P.C., with Vishva Vimukthi for the Petitioner

Ms. Nayomi Kahawita, Senior State Counsel for the 1st – 4th Respondents

Pubudu Alwis with Ms. Priyanthi Ganegoda for the 5th Respondent

Argued on: 16th September 2020

Written Submissions: Tendered on behalf of the Petitioner on 20th June 2019

Tendered on behalf of the 1st – 4th Respondents on 6th November 2019

Tendered on behalf of the 5th Respondent on 13th May 2020

Decided on: 11th June 2021

Arjuna Obeyesekere, J., P/CA

The Petitioner states that his paternal grandfather, Pahala Gamaethiralalage Rathran Hamy was issued a permit marked '**P2**' on 26th August 1947 under the provisions of the Land Development Ordinance No. 19 of 1935, as amended (**the Ordinance**) in respect of a land in extent of 1A depicted as Lot No. 105 in Final Village Plan No. 253A. The Petitioner states that Rathran Hamy nominated the Petitioner's father, Pahala Gamaethiralalage Jayathilake as his successor through an amendment to '**P2**'.

There is no dispute that Rathran Hamy occupied the said land until his death in 1982. Upon his death, his spouse Gunaratne Manike, the Petitioner's grandmother, succeeded to the said land in terms of Section 48A(1) of the Ordinance, introduced by the Land Development (Amendment) Act No. 27 of 1981.

It is accepted that the only entitlement that Gunaratne Manike had to the land was by virtue of being the surviving spouse of the original permit holder. The Petitioner claims that Gunaratne Manike succeeded to the said land subject to the entitlement of the Petitioner's father as the nominated successor of the original permit holder, Rathran Hamy.

The Petitioner states that Gunaratne Manike was issued a Grant dated 25th July 1996 marked '**P3**' in terms of Section 19(4) of the Ordinance. The Petitioner states that his father Jayatilleke died on 30th November 1996. The Petitioner claims that subsequent to the death of his father, the Petitioner being the only child of the nominated successor was entitled to succeed as the owner of the said land in terms of Sections 72, 73 and 76 of the Ordinance.

The Petitioner states that since he was a minor when his father passed away, his mother had filed Writ Application No. HCR/WA/138/98 before the Provincial High Court of Sabaragamuwa, holden in Ratnapura, challenging the issuance of the above grant in favour of Guneratne Menike. The said application had however been withdrawn by the Petitioner's mother on 21st August 2000 in view of the predecessor of the 1st Respondent, the Divisional Secretary, Kuruwita stating that the grant issued to Gunaratne Manike was subject to the terms set out in Section 48A of the Ordinance and that in terms of Section 48A(2), Guneratne Menike has no power to dispose the land nor the power to nominate a successor.

Notwithstanding the above, Gunaratne Manike had nominated the 5th Respondent, who was a daughter of hers, as the successor to the said land in or around 15th November 2003. This nomination has been duly registered, as reflected in the 'Register of Permits/Grants under the Land Development Ordinance' marked '**P4(a)**'. The Petitioner states that as Gunaratne Manike had no legal right to nominate a successor, the decision of the predecessor of the 2nd Respondent to register the said nomination in '**P4a**', is illegal, wrongful and unlawful and is in complete disregard of the provisions of the law.

The Petitioner states that in those circumstances, the Petitioner's mother filed another Writ Application bearing number HCR/WA 02/2006 marked '**P9(a)**' in March 2006. By its judgment delivered on 24th May 2007 marked '**P10**', the Provincial High Court of Sabaragamuwa (holden in Ratnapura) had issued a Writ of Certiorari quashing the decision of the 2nd Respondent to register the nomination in favour of the 5th Respondent as the successor to the land. The Petitioner states that accordingly, the 2nd Respondent had cancelled the nomination of the 5th Respondent on 15th June 2007, as reflected in '**P4(b)**'. I have examined the said judgment and

observe that the learned State Counsel who appeared in that application had conceded that Guneratne Manike had no legal right to make a nomination in view of Section 48A(2)(b) of the Ordinance. This was the identical position taken up by the learned Senior State Counsel who appeared for the 1st – 4th Respondents in this application.

The said judgment of the Provincial High Court has been set aside by this Court in **CA (PHC) 105/2007**¹ on the basis that the jurisdiction conferred on the Provincial High Court under Article 154P(4)(b) does not extend to matters in respect of powers relating to recovery/dispossession, encroachment or alienation of State Lands.² While the above appeal was pending, Gunaratne Manike had passed away on 19th August 2012.

The Petitioner, fearing that the 1st Respondent would restore the name of the 5th Respondent in the 'Register of Permits and Grants' as a result of the above judgment, filed this application, seeking *inter alia* the following relief:

- a) A Writ of Prohibition preventing the name of the 5th Respondent being registered as the nominee;
- b) A Writ of Prohibition preventing the issuance of a grant to the 5th Respondent in respect of the impugned land;
- c) A Writ of Mandamus compelling the Respondents to appoint the Petitioner the owner of the impugned land in terms of Section 48A, 72 and Rule 1 of Schedule 3 of the Ordinance;
- d) A Writ of Mandamus compelling the Respondents to issue the Petitioner a grant in respect of the said land in terms of Sections 19(4) of the Ordinance;
- e) A Writ of Mandamus compelling the Respondents to register the Petitioner as the owner from the date of the death of Gunaratne Manike in terms of Section 73 of the Ordinance.

¹CA Minutes of 30th October 2017; marked 'P14'.

²Vide *The Superintendent, Stafford Estate and two others v Solaimuthu Rasu* [2013] 1 Sri LR 25.

The relief sought by the Petitioner is therefore twofold. The first is for a Writ of Prohibition to prevent the 5th Respondent being registered as a nominee and being issued a grant. The second is for a Writ of Mandamus to have the Petitioner registered as the person entitled to a grant in respect of the said property.

I shall first consider the application for the Writ of Prohibition. The primary complaint of the Petitioner is that Gunaratne Manike could not have nominated the 5th Respondent as a successor to the said land, as her entitlement to the land must be subject to the conditions specified in the permit issued to the original permit holder, and therefore, subject to the nomination of the original permit holder.

The entitlement of Guneratne Menike to the said land is in terms of Section 48A(1) of the Ordinance, which reads as follows:

“Upon the death of a permit-holder who at the time of his or her death was required to pay any annual instalments by virtue of the provisions of subsection (2) of section 19, notwithstanding default in the payment of such instalments, the spouse of that permit-holder, whether he or she has or has not been nominated as successor by that permit-holder, shall be entitled to succeed to the land alienated to that permit-holder on the permit and the terms and conditions of that permit shall be applicable to that spouse.”

As noted earlier, it is accepted that in the absence of a nomination as successor, the only claim that Gunaratne Manike had to the said land was by virtue of her being the surviving spouse of Rathran Hamy. While Gunaratne Manike can be issued a grant, it must be done in terms of Section 48A(2) of the Ordinance, which reads as follows:

“If, during the lifetime of the spouse of a deceased permit-holder who has succeeded under sub-section (1) to the land alienated on the permit, the terms and conditions of the permit are complied with by such spouse, such spouse shall be entitled to a grant of that land subject to the following conditions:

- (a) such spouse shall have no power to dispose of the land alienated by the grant;*

- (b) such spouse shall have no power to nominate a successor to that land;*
- (c) upon the death of such spouse, or upon his or her marriage, the person, who was nominated as successor by the deceased permit-holder or who would have been entitled to succeed as his successor, shall succeed to that land:*

Provided that the aforesaid conditions shall not apply to a grant of any land to be made to a spouse who has been nominated by the deceased permit-holder to succeed to the land alienated on the permit."

Notwithstanding the above provision, Gunaratne Manike had been issued with the grant '**P3**' in terms of Section 19(4) of the Act. Section 19(4) reads as follows:

*"A **permit-holder** shall be issued a grant in respect of the land of which he is in occupation;*

- (a) where he has paid all sums which he is required to pay under subsection (2);*
- (b) where he has complied with all the other conditions specified in the Schedule to the permit; and*
- (c) where he has been in occupation of, and fully developed, to the satisfaction of the Government Agent;*
 - (i) irrigated land, for a period of three years, or*
 - (ii) high land, for a period of one year:*

Provided, however, that the Land Commissioner may issue a grant before the expiry of the aforesaid period where the permit-holder satisfies him that the failure to issue such grant before the expiry of such period would adversely affect the development of such land."

It is clear that Section 19(4) of the Ordinance is only applicable to a *permit holder*.

Although Gunaratne Manike could have been issued with a grant, such grant could only have been issued together with the limitations *inter alia* on the nomination of a successor as specified by Section 48A(2). The learned Senior State Counsel for the 1st – 4th Respondents admitted that a grant was issued under Section 19(4) of the Ordinance, and not Section 48A(2) of the Ordinance, owing to a mistake.

The learned Counsel for the 5th Respondent submitted that the permit 'P2' and the grant 'P3' have to be treated separately, and that the grant 'P3' creates an independent relationship between the State and Gunaratne Manike. This argument cannot be accepted for two reasons. The first is that Guneratne Menike succeeded to the said land by virtue of having been the surviving spouse. Her maximum entitlement due to any development of the land carried out by her would be to a grant subject to the limitation set out in Section 48A(2). The second reason is that Guneratne Menike is not entitled to a grant under Section 19(4) of the Ordinance, as such a grant can only be issued to a permit holder. The position of the 5th Respondent cannot therefore be accepted.

Section 48A(2) of the Ordinance clearly prohibits a surviving spouse who has been issued with a grant from nominating a successor. Be that as it may, Gunaratne Manike had nominated the 5th Respondent as her successor on 15th November 2003. This is admittedly after the death of the Petitioner's father, the nominated successor of the original permit holder, on 30th November 1996. The fact that the nominated successor of the original permit holder had passed away does not give the surviving spouse, who has been issued a grant in terms of Section 48A(2) of the Ordinance, the power to nominate a successor. Therefore, the nomination of the 5th Respondent as the successor to the said land is contrary to the provisions of the Act, and cannot be given legal effect to by the 1st – 4th Respondents.

This legal position is admitted and accepted by the 1st – 4th Respondents. The Petitioner is therefore entitled to a Writ of Prohibition preventing the 5th Respondent from being registered as the successor of Gunaratne Manike. However, in view of the submission of the learned Senior State Counsel for the 1st – 4th Respondents that the State concedes that a surviving spouse who has not been nominated as a successor but has succeeded to the land by virtue of being the surviving spouse, cannot

nominate a successor, the necessity for me to formally issue a Writ of Prohibition does not arise.³

This brings me to the Writ of Mandamus sought by the Petitioner.

The learned President's Counsel for the Petitioner submitted that upon the death of the nominated successor – i.e. the Petitioner's father - the Petitioner, by virtue of being the only child of the nominated successor, is entitled to succeed to the land in terms of Section 72 of the Ordinance.

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 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, or upon the death of such spouse,
devolve as prescribed in Rule 1 of the Third Schedule.”*

Section 72 provides for the following three scenarios of succession:

(1) Where no successor has been nominated;

³ Paragraph 23 of the written submissions filed on behalf of the 1st – 4th Respondents.

- (2) Where the nominated successor fails to succeed;
- (3) Where the nomination of a successor contravenes the provisions of the Ordinance.

The argument of the learned President's Counsel for the Petitioner is that what is applicable to the Petitioner is the first scenario – i.e. no successor has been nominated. This argument is premised on the assumption that the nomination made by Rathran Hamy in favour of Jayatilleke was valid at the time Guneratne Menike passed away and that the Petitioner by virtue of being the only child of Jayatilleke is entitled to succeed in terms of Section 72.

In considering the above argument, the first issue that must be determined is the date on which succession should take place where a successor has been nominated. It is the contention of the learned Senior State Counsel that where a nomination has been made in respect of a permit, and the spouse of the permit holder succeeds to the said land upon the death of the permit holder, the procedure for succession is triggered only after the death of the spouse who succeeded to the said land. The position of the Petitioner is that the nomination is triggered at the time of death of the permit holder and that succession is deemed to have taken place soon after the death of the permit holder, but subject to the rights of the surviving spouse to succeed to the said land and occupy the land during her lifetime.

The determination of the said issue requires a discussion of the provisions of the Ordinance and the amendments made thereto, in particular by the Land Development (Amendment) Act No. 16 of 1969, relating to succession.

I would first examine the provisions of the Ordinance, as it stood prior to the Amendment in 1969. The starting point is Section 49 which empowered the owner of a holding to nominate a person to succeed him on his death. Section 51 provided that the person so nominated by the owner should belong to one of the groups of relatives enumerated in Rule 1 of the Third Schedule. Where a valid nomination had been made and in the absence of a life holder, the nominated successor was required by Section 70 to succeed to the holding, upon the death of the owner. In terms of Section 68(2), a nominated successor fails to succeed *inter alia* if he refuses

to succeed or if he does not enter into possession within a period of six months from the death of the permit holder. This obviously requires a nominee to be alive on the date that the permit holder passes away. However, if a successor had not been nominated, or where the nominated successor failed to succeed, Section 71 provided that title shall devolve as prescribed by the rules of the Third Schedule. In terms of Section 73(2), *“title to a holding shall be deemed to have devolved on any person succeeding under the provisions of Section 72 as from the date of the death of the life-holder of the holding to which such person so succeeds.”*⁴

Several important amendments were introduced by the aforementioned Amendment Act No. 16 of 1969. The first such amendment was the introduction of Section 48A by which the spouse of the permit holder was automatically entitled to succeed to the land upon the death of the owner. Section 48A(1) provided that *‘upon the death of the owner of a holding, the spouse of that owner shall be entitled to succeed to that holding’* subject to the conditions specified therein.⁵

It is not in dispute that Gunaratne Menika, the spouse of Rathran Hamy, exercised the right given under Section 48A(1) and succeeded to the said land upon the death of Rathran Hamy.

The next important amendment was the introduction of the following new definition of the word, ‘successor’ in Section 48:

“In this Chapter ‘successor’, when used with reference to any land alienated on a permit or a holding, means a person who is entitled under this Chapter to succeed to that land or holding upon the death of the permit-holder or owner thereof, if that permit-holder or owner died without leaving behind his or her spouse, or, if that permit-holder or owner died leaving behind his or her spouse, upon the failure of that spouse to succeed to that land or holding or upon the death of that spouse.”

In terms of this definition, since Gunaratne Menika has succeeded to the land, the entitlement to succession among the relatives of Rathran Hamy is triggered only

⁴ Section 72(2) is identical to Section 71.

⁵ The conditions are those specified in Section 48A(2)(a) and (b).

upon the death of Gunaratne Menika. Thus, my view is that the operative date to determine succession to the land in terms of the permit is not the date that Rathran Hamy passed away but the date on which Gunaratne Menika passed away.

Section 48A(2)(c) of the Ordinance referred to above makes it clear that a nominated successor must wait until *the death of such spouse* to succeed to the said land. The only situation where the nominated successor can succeed to the land prior to the death of the surviving spouse is where the surviving spouse contracts a marriage.

This position is fortified by Section 68(2) of the Ordinance, which specifically refers to the point at which the nominated successor must succeed and the consequences of the failure to succeed. Section 68(2) reads as follows:

“A nominated successor fails to succeed to the land held on a permit by a permit-holder if he refuses to succeed to that land ..., or, if the nominated successor does not enter into possession of that land within a period of six months reckoned

- (i) where such permit-holder dies without leaving behind his or her spouse, from the date of the death of such permit-holder ...; or*
- (ii) where such permit-holder dies leaving behind his or her spouse, from the date of the failure of such spouse to succeed, such date being reckoned according to the provisions of paragraph (b) of subsection (1),⁶ or of the death of such spouse, as the case may be.*

Section 49 of the Ordinance deals with succession by a nominee of the permit holder. The relevant parts of Section 49 are re-produced below:

“Upon the death of a permit-holderwithout leaving behind his or her spouse, or,

where such permit-holder or owner died leaving behind his or her spouse,

⁶ Section 68(1)(b) requires a spouse to enter into possession of that land within a period of six months reckoned from the date of the death of the permit-holder.

upon the failure of such spouse to succeed to the land alienated to that permit-holder on the permit ... or

upon the death of such spouse,

a person nominated as successor by such permit-holder shall succeed to that land.”

While in terms of Section 49 the right of the nominated successor to succeed arises after the death of the spouse who has succeeded to the land and not prior to that, Section 68(2) requires the nominated successor to succeed to the land six months from the death of the spouse. The provisions of Section 72 are triggered only if the nominated successor does not succeed in terms of Section 68(2).

Where the nominated successor fails to succeed owing to the death of the nominee, as in this case, the relationship that must be considered when determining who the land devolves on is the relationship between the original permit holder and the persons specified in the table in Rule 1 of the Third Schedule. The fact that the Petitioner is the only son of his deceased father, who was the nominated successor, therefore does not give him priority. The position of the learned Senior State Counsel for the 1st – 4th Respondents is therefore, that the person who is entitled to succeed as the successor to the permit holder in this instance will be determined according to the order of priority under Rule 1 of the 3rd schedule read together with Section 72 of the Ordinance.

Taking into consideration the above provisions of the Ordinance, my view is as follows. At the time Rathran Hamy passed away in 1982, the nominee Jayatilleke was eligible to succeed to the said land. However, as his mother Gunaratne Menika, who is the spouse of Rathran Hamy was still alive, and as she exercised her right to succeed, the nomination was not triggered and therefore no rights accrued in favour of Jayatilleke upon the death of Rathran Hamy. Guneratne Menika could not have nominated a successor, thus keeping the nomination of Jayatilleke alive. Jayatilleke was therefore entitled to succeed but only upon the death of Guneratne Menika. However, by the time Gunaratne Menika passed away in August 2012, Jayatilleke had already passed away and therefore Jayatilleke could not have succeeded. The

scenario that is applicable to the facts of the present application is the second scenario of Section 72 (i.e. where the nominated successor fails to succeed) and not the first scenario of where Jayatilleke has not nominated a successor. Therefore, succession is triggered only by the death of Guneratne Menike, and due to the failure of Jayatilleke to succeed, the land shall devolve in terms of Rule 1 of the Third Schedule.

As the Petitioner has not demonstrated a right to be appointed as the owner of the impugned land, the 1st – 4th Respondents do not have a corresponding legal duty to register him as the owner. In the above circumstances, I am of the view that the Petitioner is not entitled to the several Writs of Mandamus prayed for.⁷

Although the Petitioner is entitled to a Writ of Prohibition preventing the 5th Respondent from being registered as the nominee of Gunaratne Manike, the necessity for me to issue a Writ of Prohibition does not arise in view of the admission of the learned Senior State Counsel that Guneratne Menike cannot nominate a successor. In any event, the Attorney-at-Law for the 5th Respondent has informed this Court that the 5th Respondent has passed away on 7th October 2020. In these circumstances, the question as to who is entitled to succeed to the said land in terms of the Third Schedule is a question that needs to be determined by the 1st – 4th Respondents after an inquiry. The 1st Respondent is accordingly directed to determine the person who is entitled to succeed Ratran Hamy in terms of the Ordinance.

Subject to the above, this application is dismissed, without costs.

President of the Court of Appeal

⁷ See Rajeswari Nadaraja v. M. Najeed Abdul Majeed [SC Appeal 177/15; SC Minutes of 31st August 2018].