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 to quash letter dated 23.08.2017 by the 1st Respondent and a Writ of Mandamus to compel the 1st Respondent to hold an un-biased fresh inquiry of the matter under and in terms of Article 140 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

CA. (Writ) Application No.328/17

R.A.H.M. Kusumawathie

"Kusumgiri", Galgamuwa Road

Nawagaththegama.

Petitioner

VS

1. R.P.G. Podineris,
   The Divisional Secretariat,
   Divisional Secretariat,
   Nawagaththegama.

   And 03 others.

Respondents

Before E.A.G.R. Amarasekara J
Counsel: Ms. Sudarshani Cooray AAL for the petitioner
Decided on 02.03.2018

E.A.G.R. Amarasekara J

The Petitioner has filed this application in this court praying for two prerogative writs namely, a Writ of Certiorari and a Writ of Mandamus. Through these remedies the petitioner expects to get the decision of the 1st Respondent dated 23.08.2017 (marked as X10) quashed and to compel the 1st and 2nd Respondents to hold a fresh inquiry with regard to the land in question. By X10 1st Respondent has come to the finding that the 4th Respondent, as the heir to the grantee, is entitled to the land in dispute.

As per the grant at page 122 of the appeal brief marked as X1, Kalubandage Ranbanda (in some documents referred to as Rajapaksha Aberatne Herath Mudiyanselage Ranbanda or R.A.H.M. Ranbanda) was the grantee to the disputed land. As per the petition, on the request of said Kalubandage Ranbanda the Divisional Secretary of Navagaththegama allowed the transfer of the disputed land to the petitioner, sister of said Kalubandage Ranbanda. Letter authorizing the transfer subject to certain conditions can be found at page 166 of the appeal brief and the letter granting permission to transfer the said land according to the draft deed submitted to the authorities can be found at page 172 of the appeal brief marked as X1. The deed of transfer stating the date of execution as 03.06.2006 and the death certificate of said Kalubandage Ranbanda are at pages 132 and 126 of the appeal brief marked as X1. It should be noted that as per the afore said death certificate said Kalubandage Ranbada died on 21.05.2006. Three affidavits given by the relevant Notary Public and the two witnesses to the said deed of transfer stating that the said deed of transfer was in fact written on 13.05.2006 are found at pages 174,175 and 176 of the said appeal brief marked X1. The Notary Public in his affidavit tries to explain the change of the date in the deed was due to the fact that his clerk had collected a wrong letter instead of the letter of approval dated 10.05.2006 given by the Divisional Secretary that ought to have been attached to the deed. The position of the Notary Public is that the mistake was revealed only when deeds were prepared to send for registration. Therefore, he had to change the date of the deed as he had to get down the correct letter of approval after writing a letter to the petitioner. Section 31(26) of the Notaries Ordinance provides time till the 15th day of the following month for a Notary Public to send his list and duplicates of the deeds to the land registry. If the deed was written on 13.05.2006 as stated by the Notary Public he still had time till 15.06.2006 to hand over the list and duplicates to the land registry. As per the affidavit of the Notary Public he changed the date of the deed after he got down the correct letter of approval (Vide Paragraph 10 of his affidavit). 03.06.2006 is the date he introduced to the deed as the date of execution. If he had received the correct letter of approval by 03.06.2006 he need not change the date of the deed to 03.06.2006 as he still had time till 15.06.2006 to send the list and the duplicates of the deeds written in the previous month to the land registry. On the other hand, the best evidence to show that due to the mistake of his clerk he had to change the date of execution of the deed and sequence of writing deeds is the production of a copy of his register that he has to maintain under section 31(24) of the Notaries Ordinance. Had he tendered a copy of that register it would have exhibited the correction he had to make in that register due to the mistake of his clerk but he has not annexed a copy of that register to his affidavit. Whatever the factual situation with regard to the date of execution of the said deed maybe, those facts have to be evaluated after a full trial by a proper court of 1st instance, namely a District Court to decide the validity of the deed. Neither this court nor the Provincial High Court that heard the previous Writ application has any jurisdiction or ability to decide the validity of the deed on affidavit tendered in that regard. It is clear from the prayer to the previous Writ application to the Provincial High Court that the 4th Respondent challenges the validity of the deed. When the purported deed written by the grantee Kalubandage Ranbanda and the undisputed date of death of the grantee Kalubandage Ranbanda were

presented to the 1st Respondent during the inquiry, it happened to 1st respondent to come to a finding whether said Kalubandage Ranbanda could validly transfer the property after his death. On the face of the document the 1st Respondent cannot come to a conclusion that said Kalubandage Ranbanda could validly transfer the property after his death. In such a backdrop I cannot find fault with the 1st Respondent for the contents in X 10. The petitioner in his petition says that she was precluded from bringing any other evidence (vide paragraph 20 of the petition) but admits that the Notary Public and the two witnesses to the deed gave evidence (vide paragraph 21 of the petition) on behalf of her. Thus, the 1st Respondent has heard both the parties with regard to the execution of the deed. The petition says that the 1st Respondent was not inclined to accept certain documents but the petitioner does not reveal those documents other than X9 (vide paragraph 20 of the petition). X9 only explain a situation that existed on 10.06.2005, even if it was allowed to be tendered I do not think it contain any material to change the decision taken by the 1st Respondent. As mentioned before and as per the paragraph 21 of the petition the Notary Public who attested the disputed deed as well as the two witnesses to the said deed have given evidence before the 1st Respondent. Except X9, the petitioner has not revealed the witnesses and documents that were refused or not allowed or could not be called due to the decisions or indications of the 1st Respondent and the nature of such evidence.

In X10 the 1st Respondent has come to the conclusion that there cannot be a legally valid transfer on the date of the deed and therefore 4th respondent is entitled to the land as the heir of the grantee. I cannot see any irrationality in that decision.

There is no argument that 1st Respondent had no legal authority to hold the relevant inquiry. On the other hand, there was a settlement for a fresh inquiry recorded in the appeal to this court with regard to the previous writ application made to the Provincial High Court.

The petitioner in his petition allege that the 4th Respondent is neither a legally adopted child nor a lawfully born child to said Kalubandage Ranbanda. It is clear that the petitioner did not have X4 and X5 or any evidence relating to this position during the inquiry as X4 and X5 are dated after X10. 1st Respondent had relied on the birth certificate of the 4th respondent (vide paragraph 5 of the annexure to X13 and the birth certificate of the 4th Respondent found at page 130 of X1). On the other hand, X5 tendered to this court is not a certified copy of the relevant entries. Furthermore, there is no accompanying affidavit confirming the truth of its contents by the maker of X5. Therefore, X4 and X5 have no sufficient material to counter what is found in the birth certificate of the 4th Respondent. Furthermore, the petitioner had not taken up this position that challenges the heirship of the 4th Respondent in his objection in the previous writ application to the provincial High Court (vide pages 149 to 157 of X1). In the said objections the petitioner had referred to said Kalubandage Ranbanda as the father of the 4th respondent and not as the person who informally adopted the 4th Respondent. Even said Kalubandage Ranbanda had stated that the 4th respondent is his only daughter (vide police complaint found at page 167 of X1). This stance that challenges the heirship of the 4th respondent may be an afterthought. However, it is clear from this application and annexed documents that the petitioner placed before this court that certain facts are now in dispute with regard to this writ application, namely

1. The validity of the deed of transfer
2. Whether the 4th Respondent is a lawful child of said Kalubandage Ranbanda.

In **Thajudeen vs Sri Lanka Tea Board and another (1981) 2 SLR 471 at 472**, it was held that where major facts are in dispute remedy by way of an application for writ is not a proper substitute for a remedy by

way of a suit. It is further held that it is necessary that the question should be canvased in a suit where the parties would have ample opportunity of examining their witnesses and the court would be able to judge which version is correct. Thus, in this application this court cannot consider the disputed facts in considering the issuance of a Writ of Certiorari.

As there is no allegation as to the legal authority of the 1st Respondent to hold an inquiry in respect of the matter I do not find any illegality in making the disputed decision by the 1st Respondent.

As there was a birth certificate to show that the 4th Respondent is the lawful child of said Kalubandage Ranbanda and the date of the deed of transfer is a date after the death of said Kalubandage Ranbanda and furthermore the evidence of the Notary Public and the witnesses to the said deed were led before the 1st Respondent, I do not see any irregularity in the said decision making of the 1st respondent. Other than X9 which is not sufficient enough to affect the conclusion made by the 1st respondent, there is no material before this court to state that the 1st Respondent did not allow relevant witnesses or documents that the petitioner had with him readily available at the time of the inquiry. Therefore, I do not think there is a breach of Audi Alteram Partem. Thus, I cannot hold the 1st Respondent was biased in his decision making.

For the foregoing reasons I decline to issue notice as prayed for in the prayer and dismiss this application.

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E.A.G.R. Amarasekara J