

**IN THE SUPREME COURT OF THE DEMOCRATIC
SOCIAIST REPUBLIC OF SRI LANKA**

In the matter of an Application for
leave to Appeal under and in
terms of section 5 C. Off the High
Court of the Provinces (Special
Provisions) (Amendment) Act No
54of2006.

SC/Appeal/47/2012

SC/HCCA/LA/ No.403/2011

NCP/HCCA/ARP/ 782 / 2010

Polonnaruwa DC NO. 7670/L/99

W. M. Chandra Kumari Palamakumbura,
06th Post,
Hingurakdamana.

Plaintiff

Vs.

P. A. Hema Damayanthie,
Layfarm,
Hingurakgoda.

Defendant

AND

W. M. Chandra Kumari Palamakumbura,
06th Post,
Hingurakdamana.

Plaintiff- Appellant

Vs.

P. A. Hema Damayanthie,
Layfarm,
Hingurakgoda.

Defendant- Respondent

AND NOW BETWEEN

P. A. Hema Damayanthie,

Layfarm,

Hingurakgoda.

Defendant -Respondent-Petitioner

Vs.

W. M. Chandra Kumari Palamakumbura,

06th Post,

Hingurakdamana.

Plaintiff- Appellant- Respondent

**BEFORE: Chandra Ekanayake J
Eva Wanasundera PC,J
Buwaneka Aluwihare PC,J**

**COUNSEL: Lal Matarage instructed by Mihiri Abeyrathne for the defendant
Respondent-Appellant**

Ranjan Suwandarathne for the Plaintiff-Appellant- Respondent

Argued on: 20-10 2014

Decided on: 09-03-2016

Aluwihare PC,J

The Plaintiff-Appellant-Respondent (hereinafter referred to as the Respondent) instituted action in the District Court against the Defendant-Respondent-Petitioner-Appellant (hereinafter referred to as the Appellant) and sought an order, declaring that the Respondent is entitled to a paddy land, 2 acres and 2 roods in extent, which is the subject matter of this case, on the strength of a permit issued under the Land Development Ordinance, marked and produced as P1. In addition, orders for the ejectment of the Appellant from the land in suit and damages were also sought in the same action.

At the conclusion of the trial, the learned District Judge, whilst denying the relief prayed for by the Respondent, dismissed the action. Being aggrieved by the order of the learned District Judge, the Respondent appealed to the High Court of Civil Appeals (hereinafter sometimes referred to as the High Court). The High Court by its order dated 13-09-2011 set aside the order of the learned District Judge and granted the relief prayed for, by the Respondent.

The Appellant aggrieved by the said order of the High Court, moved by way of Leave to Appeal to this court and leave was granted on 24-02-2012.

The facts of this case, briefly, are as follows:

The Respondent asserted before the District Court that her father, T.B Palamakumbura became the beneficiary of the land in suit, on a permit (P1) issued to him in the year 1962. Her father, the Respondent claimed, had nominated the Respondent as the successor to the said land and her father had passed away in the year 1974. The Respondent alleged in the plaint that the Appellant had unlawfully possessed the land in suit since 1994 and it was on this basis that she sought relief from the District Court.

The Appellant on the other hand took up the position that the Respondent had on many occasions borrowed money from her by mortgaging the land in suit, as the Respondent was in dire financial straits. The Appellant further asserted that owing to the inability on the part of the Respondent to maintain and develop the land in question, in 1989, pursuant to an agreement between the parties, the Respondent prepared documentation to have the permit transferred in favour of the Appellant and forwarded the same to the Divisional Secretary of Hingurakgoda. To substantiate this position the Appellant marked and produced a notarialy executed agreement as V1(a) which is an agreement to sell. Appellant had also asserted that since 1984 she had been in possession and cultivating the paddy field in question.

In her evidence the Respondent had admitted that she signed the document V1(a) and accepted money from the Appellant. She has also admitted that she does not have a valid permit to the impugned land but had requested the Divisional Secretary to transfer her fathers' rights over the land in suit, to her. She had added that, although, she had been named as the successor, the rights have not been formally transferred to her.

In his testimony, even the Land Officer Somarathne, a witness called to testify on behalf of the Respondent, had stated that the permit to the property is in the name of T.B Palamakumbura, the father of the Respondent. He had added that

in 1962 the permit holder had nominated the Respondent as his successor. The witness, however, has categorically stated that the Respondent is not the permit holder of the impugned property.

The learned District Judge having evaluated and considered the above evidence, had quite rightly held that the Respondent (Plaintiff) has no right to maintain the action as she has not derived any rights to the impugned property as the successor nominated by her father. Accordingly the Learned District Judge had dismissed the Respondent's (Plaintiff's) case.

When this matter came up by way of an appeal, however, before the High Court of Civil Appeals (herein after the High Court) the learned judges of the High Court reversed the order of the District Court and allowed the appeal. It is against this order that the Appellant had moved this court by way of Leave to Appeal.

This court granted leave on the following questions:

- (a) The judgement of the honourable Civil Appellate High Court judges is contrary to the provisions contained in the Land Development Ordinance no. 19 of 1935.
- (b) The honourable Civil Appellate High Court judges have failed to consider the evidence led in this case in the correct perspective.
- (c) The Honourable Civil Appellate High Court judges have failed to consider the document produced marked V1 (X8) and V2 (X9) which were sent by the Divisional Secretary under Section 106 and 110 of the Land Development Ordinance.
- (d) The Honourable Civil Appellate High Court judges have failed to consider the fact that even prior to the institution of the said action in the District Court the alleged permit P1 (X3) had been cancelled under section 110 of the Land Development Ordinance.
- (e) The honourable Civil Appellate High Court judges have failed to consider the fact that the Respondent did not have a permit in respect of the said land.
- (f) The Honourable Civil Appellate High Court judges have misdirected themselves in concluding that although it appears that the notice V2 (X9) had been sent, the cancellation of the alleged permit P1 (X3) could not be supported by V2 (X9).
- (g) The Honourable Civil Appellate High Court judges have misdirected themselves in regard to the burden of proof in a civil case by proceeding to conclude the case on the basis of "fair and justifiable".

(h) The Respondent has no locus standi since she has failed to exercise the rights under section 113 of the Land Development Ordinance.

The contention on behalf of the Respondent was that she (the Respondent) is lawfully entitled to succeed to the rights of the said original permit holder by virtue of the statutory provisions of the Land Development Ordinance (hereinafter sometimes referred to as the Ordinance).

The learned Counsel for the Respondent drew the attention of court to section 48A (2) (c) of the Land Development Ordinance and contended that no person can dispute the rights of such a nominated and a succeeded permit holder, with regard to the possession of the land referred to in the permit. It was further contended on behalf of the Respondent that, in view of the nomination of the Respondent by the original permit-holder, that is the father of the Respondent, as the successor, she derives a statutory right under the Land Development Ordinance and for that reason the Respondent has every right to enjoy the property in suit by virtue of the statutory provisions of the said Ordinance, resulting from her contingent interest in the property.

When one considers the scheme of things under the Land Development Ordinance, it is abundantly clear that no permit holder has absolute right over state land that is alienated to a person on a permit and the rights of a permit holder are strictly contingent upon the permit holder adhering to the conditions under which such a permit is granted. Chapter VII of the Ordinance even provides for cancellation of a permit. It is equally true that the rights of the successor, to a property granted under a permit, are also contingent upon the nominee adhering to the applicable statutory provisions.

No doubt, as pointed out by the learned Counsel for the Respondent that, where a successor has been nominated, the rights of the nominee are recognised by certain provisions of the Land Development Ordinance. In my view, those rights of a nominated successor are again contingent upon the nominated successor fulfilling the requirements under the provisions of the Land Development Ordinance.

In the context of this case the issue that has to be decided is as to whether the Respondent has succeeded to the land in suit, after the demise of her parents.

Of the applicable provisions, sections 55 and 68 of the Ordinance are crucial to decide the issue of this case.

At the hearing, it was contended on behalf of the Appellant that, in terms of Section 55 of the Land Development Ordinance, the mere nomination of a successor by itself cannot be construed as disposition of the land for which the successor is nominated.

Section 55 of the ordinance clearly states:-

“The act or transaction whereby a successor is lawfully nominated under the provisions of this Chapter shall not be construed as a **disposition** of the land for which such successor is nominated.” (emphasis added).

The ordinance defines the term “Disposition” in Section 2 and reads thus:-

“Disposition with its grammatical variations and cognate expressions means any transaction of whatever nature affecting land or the title thereto, and includes any conveyance, devise, donation, exchange, lease, mortgage or transfer of land;”

Thus, it appears that the mere nomination of a successor does not tantamount to automatic transfer of the land to the successor nominated; the nominee is then required to have the permit officially transferred upon making an application to that effect to the relevant authority. In view of the statutory provision embodied in section 55 of the Land Development Ordinance, only upon regularising the permit, can the successor gain full benefit of the enjoyment of the land.

Section 84 of the ordinance clarifies this position.

Section 84 (b) states that, “if the permit-holder is not survived by his or her spouse or if the spouse does not succeed to the land, any other person who is a duly nominated successor of the deceased permit-holder shall be entitled to succeed to that land on such person obtaining a permit from the Government Agent under the provisions of this Ordinance to occupy that land.”

In the present case the Respondent had admitted in her evidence under oath, that she does not have a permit. The evidence is reproduced below:

ප්: නමා නමින් බලපත්‍රයක් තිබෙනවාද?
 උ: පියා නමින් තිබෙනවා.
 ප්: නමා නමින් නැහැ නේද?
 උ: අම්මා ජීවතුන් අතර සිටි නිසා ලබා ගැනීමට නොහැකි වුනා.
 ප්: පසුව වත් ලබා ගත්තේ නැහැ?
 උ: මෙම ඉඩමට ප්‍රශ්ණ තිබෙන නිසා ඉක්මනින් හරවා ගන්න බැහැ කීවා.

 ප්: මෙම ඉඩමේ නමාට බලපත්‍ර අයිතියක් නැහැ නේද?
 උ: දැනට අයිතියක් නැහැ.

In the course of his evidence, witness Somadasa Somarathne, the Land Officer attached to the relevant Divisional Secretariat, stated, having perused the file relating to the land in suit, that the Respondent as the nominated successor had made no application for a permit (in relation to the land in suit) to the Divisional Secretary.

The second aspect this court has to give its mind to is, whether the Respondent has succeeded to the land held by the original permit-holder despite her failure to fulfil the statutory requirement laid down in section 84(b) of the Land Development Ordinance. What would be applicable to the instant case is section 68 (2) (II) of the Land Development Ordinance. For the sake of completion, however, I wish to consider the entirety of the said provision.

Section 68 of the ordinance reads thus;

68. Failure of succession.

(1) The spouse of a diseased permit-holder, who at the time of his or her death was paying an annual instalment by virtue of the provisions of section 19, or the spouse of an owner, **fails to succeed** to the land held by such permit-holder on the permit or to the holding of such owner, as the case may be –

(a) if such spouse refuses to succeed to that land or holding;

or

(b) if such spouse does not enter into possession of that land or holding within a period of six months reckoned from the date of the death of such permit holder or owner.

(2) A nominated successor **fails to succeed** to the land held on a permit by a permit-holder who at the time of his or her death was paying an annual instalment by virtue of the provisions of section 19 or to the holding of an owner if he refuses to succeed to that land or holding, or, **if the nominated successor** does not enter into possession of that land or holding **within a period of six months reckoned-**

(i) where such permit-holder or owner dies without leaving behind his or her spouse, from the date of the death of such permit-holder or owner; or;

(ii) where such permit-holder or owner 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), or of the death of such spouse, as the case may.

Statutory provision referred to above governs two distinct situations where spouse on one hand and a nominated successor on the other 'fails to succeed' to a land held by a permit-holder, after the death of such permit-holder.

Though it may not be strictly relevant (to the instant case), section 68 (1) of the ordinance states, the spouse fails to succeed to the land if

(a) such spouse refuses to succeed to the land

or

(b) such spouse does not enter into possession of the land within a period of six months from the date of the death of the permit-holder.

Section 68 (2) (ii) of the Ordinance on the other hand, refers to a situation where the permit-holder nominates a successor but dies leaving behind the spouse. In such situations the nominated successor fails to succeed to the land,

if the nominated successor does not enter into possession of the land within a period of six months;

(a) from the date of the failure of such spouse to succeed to the land

or

(b) of the death of such spouse

Thus, where the permit- holder makes a nomination, but is survived by a spouse, the nominated successor has to succeed to the land by entering into possession within the time stipulated in Section 68 (2) of the Ordinance. That would be either within six months from the date the spouse fails to succeed to the land, that is within 12 months reckoned from the date of the death of the permit- holder, or within six months of the death of such spouse.

In the instant case, the permit- holder had died in the year 1974 and the permit-holder's spouse had passed away in July 1998. The Respondent also admitted that the property in suit was mortgaged to the Appellant in the 1980s and the Appellant has been in possession of the property in suit since then.

The action in the District Court, according to the plaint has been filed in August 1999, which is more than one year after the death of the spouse of the permit-holder and even by that date the Respondent had not entered into possession of the land in suit. Hence, I conclude that the Respondent has not succeeded to the same.

Under the circumstances aforesaid, the Respondent does not have any rights flowing from the permit issued to her father under the Land Development Ordinance.

The facts were somewhat similar in the case of **Leelawathie Vs. Perera SC Appeal 166/2010, SC minutes of 3-10-2011**. This was a case where a spouse sought a declaration that she is entitled to the possession of the property in dispute and to eject the Defendant on the basis that her deceased husband was the permit-holder of the impugned property. She claimed that in terms of section 48 of the Land Development Ordinance she became the permit-holder. It transpired in evidence in the said case that since the death of her husband, the Defendant had been cultivating the land in suit, since the spouse had not been able to cultivate it.

Delivering the decision in the said case, her ladyship, Chief Justice Dr Bandaranaike held that “if a spouse of a permit- holder does not enter into possession of the land or holding in question within a period of six months reckoned from the date of the death of the permit holder, the said spouse will fail to succeed to the land so held by the permit-holder of the permit.

Her ladyship Chief Justice Dr. Bandaranaike making reference to section 68 of the Ordinance concluded that, the Appellant (the spouse) had failed to enter into the possession of the land in question within a period of six months from the date of the death of her husband, the spouse is not entitled to claim succession to the land held by her deceased husband as a permit-holder.

In the instant case the only difference is that the Respondent in the case before us is a nominated successor as opposed to the spouse in the case referred to above. Similarly, applying section 68 (2) (ii) of the Ordinance, the Respondent had failed to enter into possession of the land in suit within a six month period from the date of the death of her mother.

The learned judges of the High Court in reversing the order of the District Court have misdirected themselves by not advertng to Section 68 of the Ordinance and were in error when they held that the plaintiff (Respondent to this application) has established her rights to the property in suit through oral and documentary evidence and that judgement should be entered in favour of the plaintiff.

In fact the plaintiff has failed to establish that she has succeeded to the property in suit that was held by her deceased father who was the original permit-holder. The learned judges of the High Court fell into further error when they relied on the decision of **Seenithambi Vs. Ahamadulebbe 74 N.L.R**

page 222, in holding that the defendant had a burden to establish that the permit of the plaintiff is not a lawful one.

The learned judges of the High Court failed to appreciate the fact that the evidence led at the trial was to the effect that the Respondent did not possess a permit, which was admitted by the Respondent herself.

For the reasons stated above the questions on which leave to appeal was granted are answered in the affirmative save for the questions raised in paragraph(c) (d) and (f) which to my mind have no bearing on the issues before us . The appeal is accordingly allowed.

The judgement of the High Court of Civil Appeals dated 13-09-2011 is hereby set aside and the judgement of the learned District Judge, dated 23-01-2002, is affirmed.

The appeal is allowed with costs.

JUDGE OF THE SUPREME COURT

Justice Chandra Ekanayake

JUDGE OF THE SUPREME COURT

Justice Eva Wanasundera PC

JUDGE OF THE SUPREME COURT

