

**IN THE SUPREME COURT OF THE DEMOCRATIC SOCIALIST
REPUBLIC OF SRI LANKA.**

In the matter of an application for Leave to Appeal under Article 128 of the constitution read with Sec 5C of the Provincial High Court (Special Provisions) Act No. 19 of 1990 as amended by Act No. 54 of 2006.

SC. Appeal No. 70/13
SC/HC(CA) LA/500/2012
SP/HCCA/KAG/900/2011
D.C. Kegalle No. 7100/L

Hewayalage Ranjani Hemalatha,
Newsmire Pahala,
Bulathkohupitiya.

PLAINTIFF.

Vs.

Hewayalage Kanthi Kusumalatha
Newsmire Pahala,
Bulathkoupitiya.

DEFENDANT.

AND

Hewayalage Kanthi Kusumalatha,
Newsmire Pahala,
Bulathkohupitiya.

DEFENDANT – APPELLANT.

Hewayalage Ranjani Hemalatha,
Newsmire Pahala,
Bulathkohupitiya.

PLAINTIFF – RESPONDENT.

AND NOW BETWEEN.

Hewayalage Kanthi Kusumalatha,
Newsmire Pahala,
Bulathkohupitiya.

DEFENDANT – APPELLANT – PETITIONER.

Hewayalage Ranjani Hemalatha,
Newsmire Pahala,
Bulathkohupitiya.

PLAINTIFF – RESPONDENT – RESPONDENT.

Before : L.T. B. Dehideniya J
Murdu N.B. Fernando PC, J
E. A. G. R. Amarasekara J

Counsel : S. N. Vijithsingh for the Defendant – Appellant – Appellant.
Harith de Mel for the Plaintiff – Respondent – Respondent.

Argued on : 29.01.2019.

Decided on : 02.09.2019.

E.A.G.R. Amarasekara J.

The Plaintiff-Respondent-Respondent (hereinafter referred to as the Plaintiff - Respondent) instituted proceedings against the Defendant – Appellant – Petitioner (herein after referred to as the Defendant - petitioner) in the District Court of Kegalle seeking a declaration of title to the lands more fully described in the plaint and to have the Defendant - petitioner ejected from the said lands and for damages.

The Plaintiff - Respondent in her amended plaint stated that;

- The lands in suit initially belonged to the crown and was granted to P.W.D. Aron upon the Grant No.2579 under and in terms of section 19(4) of the Land Development Ordinance.
- The said Aron died and thus, P.W. Somawathie, the eldest daughter of Aron succeeded to the said lands.
- The said P.W.D. Somawathie also died intestate and consequently Ranjanee Hemalatha, the plaintiff respondent who was the eldest daughter of Somawathie succeeded and became the owner of the said lands.
- The Plaintiff - Respondent and her predecessors were in possession of the said lands for more than 10 years. Thus, they are entitled to prescriptive title.
- Since the year 2003 the Defendant Petitioner started disputing the Plaintiff Respondent's title without any legal right or undisturbed possession to the property, causing damages to the Plaintiff Respondent.
- The Plaintiff Respondent informed the Divisional Secretary of Bulathkohupitiya of the dispute and an inquiry was held in that regard.

Thereafter the Defendant - Petitioner filed the amended answer and pleaded inter alia that;

- After the demise of P.W.D. Aron his rights were devolved on his child Sopiya and after the death of said Sopiya her rights were devolved on the three children

namely; Ranjanee Hemalatha (The Plaintiff – Respondent), Kanthi Kusumalatha (The Defendant - Petitioner) and Violet Ramyalatha,

- The Defendant - Petitioner and her predecessors in title were in possession of the said lands in dispute for more than 10 years and thus, is entitled to the prescriptive title,
- After the inquiry held, the Divisional Secretary of Bulathkohupitya gave his approval to divide the lands and the said subdivision is depicted in the Plan No. 680 made by L.C.K. Liyanage, licensed surveyor.

Thereby, the Defendant - Petitioner sought an order dismissing the Plaintiff and Rs. 100,000/- as damages for the institution of a malicious action.

The title of P.W.D. Aron based on the grant was admitted by the parties (Vide admission No.1 at page 60). It is also not disputed that Somawathie referred to in the amended plaint and Sopiya referred to in the amended answer is one and the same person as the Defendant petitioner has admitted the same in her evidence in chief -Vide page 79. The parties went on to trial on 13 issues raised by them. However, it is pertinent to note that no issue was raised to challenge Somawathie alias Sopiya's entitlement to the lands on the ground that she was not a blood relation of Aron. On the other hand, the Plaintiff Respondent's position was that she succeeded to the title of the lands in issue as Somawathie alias Sopiya's eldest daughter while the Defendant Petitioner's position was that rights of Sopiya devolved on all three children including herself and the Plaintiff - Respondent.

After the trial Learned District Judge delivered the Judgment on 26.09.2011 in favor of the Plaintiff - Respondent and dismissed the Defendant - Petitioner's claim in reconvention. Learned District Judge, among other grounds, based his decision on the following grounds;

1. The defendant and the plaintiff during the trial have admitted that they are daughters of Somawathie alias Sopiya and the plaintiff is the eldest daughter.
2. The defendant had attempted to indicate that Somawathie was an adopted child of Aron after the closure of the plaintiff's case. It was not a stance taken in her answer, nor any issue was raised in that regard. The defendant cannot be allowed to adduce evidence contrary to the stance taken in her pleadings.
3. It is proved that Somawathie was the eldest daughter of Aron and the plaintiff and defendant are her daughters while the plaintiff is the eldest. Thus, as per the provisions in the Land Development Ordinance, the plaintiff succeeds to the land in question.
4. The plaintiff had proved the title and the defendant is in possession of certain portions of the said lands.
5. The letter V1 written by the divisional secretary is only an approval for division but there is no proof with regard to the transfer of title in accordance with the letter V1.
6. The defendant has not adduced evidenced to prove prescriptive title and thus, prescriptive title of the defendant is not proved.

Being aggrieved by the said judgment, the Defendant - petitioner appealed to the Civil Appellate High Court of Kegalle. Thereafter, Civil Appellate High Court of Kegalle delivered the Judgment on 23.10.2012 and dismissed the appeal with costs affirming the Judgment of the District Court. Learned High Court Judges of the Civil Appellate High Court among other things based their decision on the following grounds;

- 1. The premises in suit was originally owned by the state and was granted to Aron upon the state grant No.2579 marked P1 which was an admitted fact by the parties at the commencement of the trial.*
- 2. Aron fails to nominate a successor. Thus, succession should be determined as per the provisions of section 72 of the Land development Ordinance*
- 3. As specified in Section 72 of the Land Development Ordinance succession flows on the chronological order set out in the 3rd Schedule. Accordingly, if the spouse survives, he or she succeeds; in the absence of the spouse the eldest son is preferred; if there is no son eldest daughter succeeds.*

4. As per the paragraph 3 of the answer, it was an admitted fact by the defendant that Sopiya alias Somawathie succeeded to the title after Aron and it need not be proved in terms of section 58 of the Evidence Ordinance. The heirship of Sopiya alias Somawathie was an admitted fact; Hence the Appellant cannot go back on it as stated in *Mariammai Vs pethurupilli* reported in 21 NLR page 200. As per the explanation 2 of section 150 of the Civil procedure Code the defendant cannot take up a position contrary to her pleadings. Thus, the dispute is regarding the succession of Sopiya alias Somawathie.
5. The evidence led clearly convince the fact that Sopiya alias Somawathie is the daughter of Aron who could legally succeed to him after his demise and Ranjani Hemalatha, the plaintiff being the eldest daughter of Sopiya is entitled to succeed after the demise of Sopiya under the Land Development Ordinance.
6. Subdivision cannot be done as there is no provision under the ordinance. Therefore, the correct procedure is to cancel the previous grant and execute three new grants in respect of each divided lot. Therefore, it is clear the documents V1(letter approving division) and V3(a plan made indicating division) have no force in law.

Being aggrieved by the judgment of Civil Appellate High Court, the Defendant - Petitioner appealed to this Court on number of grounds and among them leave to appeal was granted on the questions of law set out in paragraph 20(b), (c), (d), and (e) of the petition, namely, on the following questions of law,

1. "Did the High Court of Civil Appeal err in law by failing to take cognizance of the fact that the Divisional Secretary of the Bulathkohuptiya by his letter dated 19/11/2013 approved the subdivision of the land among the three sisters in terms and the powers vested with the Divisional Secretary under the Land Development Ordinance?
2. Did the High Court of Civil Appeal err in law by failing to take cognizance of fact that the grant itself permitted the subdivision at the time of issuance of the said grant?

3. Did the High Court of Civil Appeal err in law by holding that the Respondent (plaintiff) was entitled to succeed the rights of the Aron in terms of section 72 of the Land Development Ordinance, when subdivision was approved by the Divisional Secretary?
4. Did the learned District Judge and the High Court of civil Appeal have the jurisdiction to decide the questions of succession when the Divisional Secretary has allowed the subdivision of the land among *the heir* of the deceased Sopiya?" (sic)

It is pertinent to note that even though this Court did not grant leave on the issue of law proposed by the Defendant - Petitioner on the ground that Sopiya was merely an adopted child of Aron and had no blood relationship, the counsel for the Defendant - Petitioner still argues that the Learned High Court judges erred in law in this regard-vide paragraph 13 of the final written submissions of the Defendant - Petitioner. As observed by the learned judges of the courts below, the Defendant - Petitioner did not bring the matter of blood relationship as an issue before the district court and she herself had admitted the heirship of Somawathie alias Sopiya to Aron in her answer. Furthermore, this new position was not at least proposed to the Plaintiff - Respondent when she was giving evidence. Even during her evidence in cross examination, the Defendant - Petitioner, herself had admitted that Sopiya became the owner under the grant after the demise of Aron. It is only in her re-examination, the Defendant - Petitioner takes up this new stance that Sopiya alias Somawathie was an adopted child of Aron and not a blood relation in contrast to her position taken in her pleadings and answers to the questions put to her during cross examination. As mentioned above the learned District Judge as well as the learned High Court judges have refused to accept this new stance of the Defendant - Petitioner. As correctly pointed out by the learned High Court judges, an admitted fact needs no further proof-vide section 58 of the Evidence Ordinance. Even though there is no formal admission recorded in this regard at the commencement of the trial other than the admission in the averments in the answer, a party cannot be allowed to take a materially different stance contrary to the stance taken in their pleadings-vide Explanation 2 of section 150 of the Civil Procedure Code and **Uvais Vs Punyawathie (1993) 2 SLR 46**. Thus, the refusal of the Defendant -

Petitioner's new stance that Sopiya alias Somawathie had no blood relationship to Aron is correct in law and can be endorsed by this court. There was no evidence to show that Aron had a son or elder daughter to Sopiya or Aron nominated anyone as his successor or Aron left behind his spouse. Thus, it is a correct finding that as per section 72 and the rule 1 of the 3rd schedule Sopiya alias Somawathie succeeded as the title holder under the grant.

It should be noted that there was no evidence to indicate that Sopiya alias Somawathie left behind her spouse or that she had a son or that she nominated a successor. The evidence was and the stance of the Defendant – Petitioner was that she had three daughters and as per the evidence led, it is clear that the Plaintiff - Respondent is the eldest. As per section 73 of the Land Development Ordinance (hereinafter sometimes referred to as "the ordinance"), title devolves on the successor on the date of the death of the owner of the holding and as per section 2 "Holding" means land alienated by grant under the Ordinance, and includes any part thereof or interest therein. Same section 2 defines the 'Owner' as the owner of a holding whose title thereto is derived from or under a grant issued under the Land Development Ordinance. Thus, the Plaintiff Respondent must succeed to the land as the owner and title holder on the date of death of Sopiya alias Somawathie as per the section 72 and rule 1 of the 3rd schedule. Therefore, even at the time the divisional secretary held the inquiry and/or gave approval or permission for subdivision by V1 the Plaintiff - Respondent was the owner or title holder under the Grant. As per section 42 of the Ordinance the power to dispose the holding is with the owner unless the disposition is prohibited under the ordinance.

Furthermore, section 19(6) of the ordinance provides that every grant issued under subsection 4 shall contain the conditions that the owner of the holding shall not;

- a) dispose of a divided portion, or an undivided share of the holding which is less in extent than the unit of the sub-division or the minimum fraction specified in the grant; and

- b) dispose of such holding except with the prior approval of the Government agent.

In the grant marked P1, there is no total prohibition on the owner to dispose the holding but as per the conditions set out therein the owner cannot dispose a portion which is less than 1/4th of the holding and the owner needs to get the prior permission in writing for the disposal of any portion of the holding- vide condition Nos 2 and 7 in schedule 2 of the grant.

Hence, it is clear that as per the afore-mentioned provisions of the ordinance and the conditions set out in the grant that it is the owner of the holding who has the power to dispose but he needs the approval/permission of the Divisional Secretary when he intends to dispose the property or a portion of it. Thus, mere approval of the Divisional Secretary is not sufficient to pass the title to the Defendant - Petitioner but a corresponding disposal by the owner of the holding is needed. This court further observes that V1 is a permission addressed to the Defendant - Petitioner and not to the Plaintiff - Respondent. Even if it is considered for the sake of argument that V2 was proved (V2 was marked subject to proof and it was never put to the Plaintiff - Respondent when she was giving evidence. No step had been taken to send it to the examiner of questioned document or to list a witness acquainted with the plaintiff - Respondent's signature to prove the Plaintiff - Respondent's signature. Thus, in fact it was not a proved document) and V1 was an approval or permission given on a request made by the plaintiff. There is no evidence to show that the plaintiff - Respondent, who became the owner as per the provisions of the ordinance, conveyed title of the holding or any portion of it to the Defendant - Petitioner.

On the other hand, this court observes that as per the section 104 of the Ordinance the President has the power to cancel a grant due to the failure of succession. In such a situation, there is no bar to issue new grants for the same land or to divided portions

of it. However, there is no evidence to show that there was such cancellation and issuance of new grants or sub grants to the Defendant - Petitioner and/or to any other.

As found by the courts below there is no sufficient evidence to prove adverse possession of the Defendant - Petitioner for a period exceeding ten years against the owner to prove prescriptive title of the Defendant - Petitioner. As per section 161 no person can claim prescriptive title to a land alienated on a permit. It is observed that grants are generally issued to lands for which a permit is issued in the first instance-vide section 19 of the Ordinance.

One may argue that the learned High Court judges erred by stating that subdivision cannot be done as there is no provision for subdivision under the Ordinance. The said statement has to be understood as one made in relation to the document marked V1 as it follows a reference made to the said document. There is no provision in the Ordinance that allows the divisional secretary to carry out or order a subdivision through a letter similar to V1. The divisional Secretary can only give permission. It is the owner who should do the subdivision with the permission of the Divisional secretary and dispose such portions of the land when there is a valid grant. On the other hand, it is only when a grant is cancelled as aforesaid the authorities get the power to issue a new grant or grants for subdivided portions of the holding alienated by the previous grant. A careful perusal of the provisions indicates that the Ordinance discourage subdivisions of the holding and disposal of subdivided portions can only be done with the approval or permission of the relevant authority.

The defendant - Petitioner appears to argue that without obtaining a writ to quash the decision of the Divisional Secretary, the learned District judge or the High Court had no jurisdiction to hear the case filed by the Plaintiff - Respondent. Since V1 is a mere approval/permission and the owner as per the Law is the Plaintiff - Respondent this position cannot be upheld.

For the foregoing reasons, the documents marked by the Defendant - Petitioner or the alleged subdivision made as per V1 cannot give her title to the lands in dispute and on preponderance of evidence the Plaintiff - Respondent has proved her case. Thus, I answer the issues of law in the negative and in favour of the Plaintiff - Respondent.

Hence, the appeal is dismissed with costs.

Judge of the Supreme Court

L. T. B. Dehideniya J,

I agree.

Judge of the Supreme Court

Murdu N. B. Fernando, PC, J

I agree.

Judge of the Supreme Court