

**BANDARANAYAKE**  
**v**  
**KARUNAWATHIE**

COURT OF APPEAL  
DISSANAYAKE, J.  
SOMAWANSA, J.  
CA 137/96(F)  
D.C. ANURADHAPURA 14287/L  
MAY 13 AND 31, 2002

*Vindictory action – Declaration that she is the Permit-holder – Land Development Ordinance, No. 16 of 1969 amended by Act, No. 27 of 1981 – Successor – Nomination – Cancellation by Last will – Sections 87, 63 and 48(A)(2), – Proper procedure not followed – Prevention of Frauds Ordinance – Section 4 – Permit a forgery.*

The plaintiff-respondent sought a declaration that she is the lawful permit-holder and the ejectment of the defendant-appellant. The position taken up was that the original permit-holder was her mother and on her death she became the permit-holder.

The defendant-appellant averred that the original permit-holder was the husband of "L" who by his lastwill, left to him 1/2 share and he and his sister "P" were nominated as successors and that the permit held by the plaintiff-respondent was a forgery.

The trial Court held with the plaintiff-respondent.

**Held:**

- (i) Permit-holder under the L.D.O. enjoys sufficient title to enable him to maintain a vindictory action against a trespasser.
- (ii) The original permit-holder "S" had nominated his spouse to be his successor on 11.12.1957, and he had died on 24.11.1981. Hence the spouse will not be subjected to the restrictions placed by section 48(A) 2 as it would be the proviso to section 48(A)(2) that would be applicable.
- (iii) As the original owner had nominated his spouse as his successor, it would give her authority to nominate a successor.
- (iv) The alleged last will of the original permit-holder "S" could never be given effect to in view of section 4 of the Prevention of Frauds Ordinance – the last will is not a valid last will. There is no evidence

in any event to establish that provisions in section 63 L.D.O dealing with nomination/cancellation by last will have been complied with.

- (v) Provisions contained in section 87, has been complied with, what had taken place was only an amendment to the number of nominated successors to include 3 people – defendant-appellant, his sister, and plaintiff-respondent.
- (vi) Section 58(1), section 60 which deal with registration of nomination or cancellation of nomination do not apply.
- (vii) There is no evidence to establish that the permit is a forgery.

**APPEAL** from the District Court of Anuradhapura.

**Cases referred to:**

- 1 *D.P.Palisena v K.K.D. Perera* – 56 NLR 407
- 2 *A.G.K. Tillekeratne v N.Jayanathan* – CA Application No.669/87

*C.Sooriyarachchi*, for defendant-appellants

*Bimal Rajapakse* for plaintiff-respondent.

*Cur.adv.vult*

August 2, 2002

**SOMAWANSA, J.**

This is a vindicatory action instituted by the plaintiff-respondent in the District Court of Anuradhapura seeking a declaration that she is the lawful permit-holder to the land described in the schedule to the plaint; ejection of the defendant-appellant and all under him from the said land and restoration of possession thereof and damages. The position taken by the plaintiff-respondent is that on the death of her mother by virtue of permit No. LB/KO/105 A dated 16.10.1991 marked P2 issued under the Land Development Ordinance, she became the permit-holder to the land described in the schedule to the plaint and that the defendant-appellant without any manner of title is obstructing to her possession of the said land and has caused damages to the house standing thereon estimated at Rs.35,000/-. 01 10

The defendant-appellant on the other hand averred that the original permit-holder was one H.M.B.L. Seneviratne who by his last will executed before a Justice of the Peace left to him 1/2 share of

the property in suit and that he and his sister H.A.M. Indrawathi were nominated as successors to the property in suit by the said Seneviratne, that he was occupying the said property in suit at the bequest of the said Seneviratne and Lasanda Manike and that the permit held by the plaintiff-respondent was a forgery. In the circumstances he prayed that the action of the plaintiff-respondent be dismissed and that he be declared the lawful possessor of the land in suit. 20

At the commencement of the trial parties admitted the identity of the corpus and its location. 9 issues were raised on behalf of the plaintiff-respondent while 8 issues were raised on behalf of the defendant-appellant. At the conclusion of the trial the learned District Judge by his judgment dated 25.01.1996 held in favour of the plaintiff-respondent. The defendant-appellant has lodged this appeal from the said judgment. 30

One of the matters raised by the counsel for the defendant-appellant in his written submissions is that this action being a possessory action provisions of section 4 of the Prescription Ordinance would apply and accordingly as the plaintiff-respondent has failed to institute this action within one year from the date of dispossession she is precluded from maintaining this action. This legal objection was taken by the defendant-appellant for the first time in his written submissions. It was not taken up in the original Court, no issue raised on this basis and not taken up in the petition of appeal, nor was it taken up at the hearing of this appeal. Therefore it would appear that it is too late in the day to raise this objection as to the applicability of the provisions contained in section 4 of the Prescription Ordinance to the instant case. In any event it is very clear from the pleadings that plaintiff-respondent's claim is that she by virtue of the permit No.LB/KO 105 A dated 16.10.1991 marked P2 became the permit-holder to the property in suit on 16.10.1991. The action has been instituted on 30.11.1991. Nowhere does she plead that she was ousted before 16.10.1991 and certainly not in 1988 as stated in the written submissions of the defendant-appellant. Further it should be noted that this action is a vindicatory action. In *D.P.Palisena v K.K.D.Perera*<sup>(1)</sup> it was held – a permit-holder under the Land Development Ordinance enjoys a sufficient title to enable him to maintain a vindicatory action against a trespasser. It was also 40 50

observed by Gratiaen, J. in the said case at page 408 –

“The learned Judge has misunderstood the scope of the remedy asked for by the plaintiff and failed to appreciate the nature of a permit-holder’s rights under the Land Development Ordinance. This was not a possessory action in which a person complaining of dispossession can in certain circumstances, without proof of his title, obtain a decree for the ejection of a person who has dispossessed him otherwise than by due process of law. This is a vindicatory action in which a person claims to be entitled to exclusive enjoyment of the land in dispute, and asks that, on proof of that title, he be placed in possession against an alleged trespasser.

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It is very clear from the language of the Ordinance and of the particular permit P1 issued to the plaintiff that a permit-holder who has complied with the conditions of his permit enjoys, during the period for which the permit is valid, a sufficient title which he can vindicate against a trespasser in civil proceedings. The fact that the alleged trespasser has prevented him from even entering upon the land does not afford a defence to the action; it serves only to increase the necessity for early judicial intervention.”

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It is also contended by the defendant-appellant that in view of provision contained in section 48(C) of the Land Development Ordinance, No.16 of 1969 as amended by amendment Act, No.27 of 1981, Lasanda Menike the spouse of the Original permit-holder H.M.B.L.Seneviratne had no power or authority to nominate a successor to the land in suit and as such her nomination of plaintiff-respondent to succeed her to a portion of the land is invalid. However on an examination of permit No.105 issued to the original permit-holder marked P1 by the plaintiff-respondent and V2 by the defendant-appellant it appears that the original permit-holder had nominated his spouse Lasanda Menike to be his successor on 11.12.1957 and it transpired in evidence that the original permit-holder the said Seneviratne died on 24 November 1981. Hence Lasanda Menike will not be subjected to the restrictions placed by section 48(A)(2) of the Land Development Ordinance as it would be the proviso to the said section 48(A)(2) that would be applicable to her right. The relevant section in the Land Development Ordinance applicable to the instant action is as follows:

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48(A)(1) "Upon the death of a permit-holder who at the time of his or her death was required to pay any annual installments by virtue of the provisions of subsection (2) of section 19, notwithstanding default in the payment of such installments, 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."

(2) "If, during the lifetime of the spouse of a deceased permit-holder who has succeeded under subsection (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."

On a consideration of the provisions provided by the proviso to section 48(A)(2) of the Land Development Ordinance and the fact that the said Lasanda Menike the spouse of the original owner was nominated as successor to the original permit-holder himself would give the said Lasanda Menike the authority to nominate a successor. Hence the argument of the counsel for the defendant-appellant is without merit. It may also be noted that nomination of the defendant-appellant and his sister Indrawathi on 12.01.1987 as well as nomination of the plaintiff-respondent on 02.03.1989 has been

done after the death of the original permit-holder in 1981 and it appears that the said nomination of both the defendant-appellant and his sister as well as that of the plaintiff-respondent has been effected by Lasanda Menike before her death. 130

It is also contended by the counsel for the defendant-appellant that by last will of the original permit-holder the said Seneviratne, marked V3 executed before a Justice of the Peace the high land containing an extent of 1 Rood was bequeathed to the defendant-appellant and thus he became entitled to the the land in suit. However the alleged last will marked V3 could never be given effect to, in view of the fact that section 4 of the Prevention of Frauds Ordinance would shut out the validity of the said last will marked V3 signed by the testator and two witnesses before a Justice of the Peace. Further there is no evidence forthcoming to establish that provisions contained in section 63 onwards in the Land Development Ordinance dealing with nomination and cancellation by last will of the permit-holder has been complied with. 140

Another matter that was raised by the counsel for the defendant-appellant was that proper procedure as laid down in the Land Development Ordinance has not been followed in issuing permit No. LB/KO/105 A marked P2. One such section in the said Ordinance referred to by counsel was section 87 of the Land Development Ordinance. Section 87 of the said Ordinance is as follows: 150

“A person to whom a Government Agent has agreed to alienate land may nominate as his successor any person who is entitled under this Ordinance to be so nominated, and the name of such successor may be endorsed on the permit before it is issued to the first-mentioned person, and the Government Agent may upon being requested so to do by the permit-holder cancel the name of such successor by an endorsement on the permit and endorse on the permit the name of any other person suggested by the permit-holder as his successor.” 160

It appears in the instant case, provision contained in the said section 87 has been complied with in as much as the subsequent nomination of plaintiff-respondent was for the high land containing an extent of 01 Rood only and the balance consisting of the paddy

field containing an extent of 4A. 3R. and 27 P. was left to the defendant-appellant and his sister. In effect what took place was only an amendment to the number of nominated successors so to include 3 people, that is in addition to the defendant-appellant and his sister to include the plaintiff-respondent as a nominated successor at the request of the permit-holder Lasanda Menike. 170

It was also contended by the counsel for the defendant-appellant that no inquiry was held before issuing permit marked P2, that provisions contained in Regulation No. 157 made under the Land Development Ordinance as well as provision contained in section 58 (1) and 60 of the said Ordinance have not been complied with. However these are matters not taken up in the original Court, no issues framed and the learned District Judge was not called upon to address his mind to these matters. Therefore these are matters coming up for consideration for the first time at the appeal stage. I might say that these are matters not raised when oral arguments were made by the counsel for the defendant-appellant. Be that as it may official witnesses called by the plaintiff-respondent Sarath Wijesinghe, Assistant Divisional Secretary, Epalogama as well as official witnesses called by the defendant-appellant Premarathna, Administrative Officer, Divisional Secretariat, Epalogama, S. Dharmadasa, Land Officer, who it appears to have given evidence on two occasions and Piyadasa, Colonisation Officer have all conceded that P2 is a valid permit which has been issued in terms of the Land Development Ordinance. Therefore provision contained in Rule 157 made under the provisions of the Land Development Ordinance as well as provisions contained in section 58(1), section 60 which deals with registration of nomination or cancellation of nomination has no application to the permit marked P2. Accordingly the case cited by the counsel for the defendant-appellant *A.G.K. Tilakaratne v N. Jayanathan*<sup>(2)</sup> will have no application to the instant case as in the said case matters considered were section 56, section 58 and section 60 which deal with nomination of successor and the validity thereof which has no bearing on permit marked P2 issued to the plaintiff-respondent. In view of the evidence ascribed to above the contention of the defendant-appellant that the permit marked P2 is a forged document also has to fail. In any event except for the bare statements of some of the witnesses 180 190 200

called by defendant-appellant, there is no evidence to establish that the permit issued to plaintiff-respondent marked P2 is a forgery.

The counsel for the defendant-appellant also referred to certain contradictions in the evidence of the plaintiff-respondent. However on a balance of probability the learned District Judge has accepted the evidence of the plaintiff-respondent and I am inclined to agree <sup>210</sup> with the conclusion reached by the learned District Judge.

For the above reasons I see no reason to disturb the judgment of the learned District Judge. Accordingly the appeal of the appellant is dismissed with costs.

**DISSANAYAKE, J.** - I agree.

*Appeal dismissed.*