1974 *Present :* **Walgampaya, Vythialingam and Walpita, JJ.**

RASAMMAH (Wife of N. Murugupillai) and another, Petitioners, *and* A. P. B. MANAMPERI (Government Agent, Anuradhapura), Respondent

S. C. 372/72—Application for a Writ of Mandamus

Land Development Ordinance (Cap. 464)—Sections 26, 77, 80, 84, 85—Death of a permit-holder—Failure of nominated successor to apply for permit within specified time—Resulting position—Mandamus—Whether the remedy lies to undo that which has already been done—Question of undue delay in applying for the Writ.

One M was issued a permit in January 1937 under the Land Development Ordinance in respect of an allotment (Lot 19) of land. In February 1944 he nominated as his successor his daughter, the 2nd petitioner, who was then about two years old. He died on 12.8.55, survived by his widow, the 1st petitioner, and the 2nd petitioner who was then a minor. The authorities concerned decided, after an inquiry had been held, that the 2nd petitioner had failed to apply for a permit within one year from the date of the death of the permit-holder M, and should therefore be deemed, under section 85 of the Land Development Ordinance, to have surrendered to the Crown her title as successor to the land. The petitioners were informed about this decision on 14.9.71 and again on 1.10.71. Thereafter, on 1.3.72 a fresh permit was issued to the 1st petitioner for a half share of the Lot 19 and another permit in respect of the other half share was issued on the same day to a third party W. The present application for a Writ of *Mandamus* was filed on 22.6.72 to compel the respondent to issue the permit in respect of Lot 19 to the 2nd petitioner alone as the nominated successor of M. It was alleged that an application in terms of section 85 of the Land Development Ordinance had in fact been made by the 1st petitioner on behalf of the 2nd petitioner on 18.1.56 and that the 1st petitioner, as the mother and natural guardian of the 2nd petitioner, had remained in possession of the land until the 2nd petitioner, who was a minor at the time of M's death, attained majority and also thereafter.

Held by WALGAMPAYA, J., and WALPITA, J. (VYTHIALINGAM, J., dissenting) :—

(i) On the facts of the present case it could not be found that any application on behalf of the 2nd petitioner was in fact made on 18.1.56 in terms of Section 85 of the Land Development Ordinance. Therefore, in view of the non-compliance with the requirement of that Section, Lot 19 should be deemed to have reverted back to the Crown.

(ii) Alternatively, as the respondent had already issued two permits to the 1st petitioner and W in respect of Lot 19 on 1.3.72, a Writ of *Mandamus* could not be granted. In general, *Mandamus* will not lie for the purpose of undoing that which has already been done in contravention of Statute.

Per WALPITA, J. (VYTHIALINGAM, J., dissenting) —There was undue delay in making the present application for a Writ of *Mandamus* and, even for this reason alone, the 2nd petitioner was not entitled to succeed.

1*—A 10203—3,000 (74/10)

APPLICATION for a Writ of *Mandamus* on the Government Agent of Anuradhapura.

M. Tiruchelvam, with *M. Sivarajasingham*, for the petitioners.

G. P. S. de Silva, Senior State Counsel, with *A. S. M. Perera*, State Counsel, for the Attorney-General.

Cur. adv. vult.

May 11, 1974. WALGAMPAYA, J.—

This is an application for a Writ of Mandamus on the respondent made under Section 32 of the Courts Ordinance.

The 1st Petitioner is the wife of the late Nagamuthu Murugupillai, and the 2nd Petitioner is his daughter.

Upon a permit issued by the Government Agent of Anuradhapura on 29.1.1937, Nagamuthu Murugupillai was allotted lot 19 in I. S. P. P. 3 an extent of 2 acres, 3 roods and 3 perches, under the Land Development Ordinance, Volume 12, L. E. C., Chapter 464.

Under Section 26 of the Land Development Ordinance, the permit so issued was :— " .....personal to the permit-holder and upon his death no title whatsoever to the land held under such permit shall pass or accrue to his heirs or to any person other than a successor duly nominated by such permit-holder in the manner hereinafter provided. "

Then Section 77 of the same Ordinance states whom the permit-holder could nominate as his successor. The person so nominated will have his name endorsed on the permit in terms of Section 80 of that Ordinance, and under Section 85, " A successor duly nominated by a permit-holder, who fails to make application for a permit within a period of one year reckoned from the date of the death of that permit-holder, shall be deemed to have surrendered to the Crown his title as successor to the land. "

The permit holder Murugupillai died on 12.8.1955. On the permit itself, as evidenced by R1, the age of the 2nd Petitioner described as the permit-holder's daughter who has been nominated, was 2 years. However, after Murugupillai's death, the 2nd Petitioner had made no application to get herself substituted as required by Section 85 of the Act

The documents filed with the petition and affidavit of the Petitioners show that acreage taxes and water taxes were paid to the Anuradhapura Kachcheri under the name of Murugupillai within the years 1957 to 1972, except for certain years, namely, 1962, 1963, 1964 and 1966, when curiously the taxes have been paid in the name of the 2nd petitioner.

If the age of the 2nd Petitioner is correctly given as 2 years in R1, she should have been born round about 1942, and she would have been 21 years old in about 1962. Perhaps, it was for that reason that between 1962 and 1966 water taxes were paid in the name of the 2nd Petitioner, and there is an admission by the 1st Petitioner in R5 that although the 1st Petitioner could not apply for a transfer she continued cultivating the field in question paying all taxes and other rates.

Presumably according to documents C19, C20, C21 and C22, the 1st Petitioner changed her mind and paid taxes to the Kachcheri from 1968 onwards in her name. And then on 23.12.1970 she wrote letter R2 to the Kachcheri stating, inter alia, that after her husband's death she had been possessing the lot allotted to the permit-holder and enjoying the same and asking that the permit be transferred in her name as the legal wife of the deceased, and to nominate her daughter Raja Letchumie, aged 16, as her nominated successor.

It is surprising that in R1 the 1st Petitioner has suppressed the fact that the 2nd Petitioner was the nominated successor of the deceased Murugupillai, and perhaps she suppressed the matter of the nomination of the 2nd Petitioner for the reason that by the time R2 was written the 2nd Petitioner was living in Kalmunai.

In view of the imperative provisions of Section 85 of the Land Development Act, whatever hardship the situation may cause to the 2nd Petitioner, her rights would be deemed to have been surrendered to the Crown in view of her failure to get herself a permit within one year of the death of the permit-holder.

I am of the view that as a result of the prevarication of the 1st Petitioner, the 2nd Petitioner has suffered and the 1st Petitioner should consider herself lucky that she has at least by the order of the authorities concerned got a permit for a half share of the land. That order has been made by the authorities after an exhaustive inquiry ; and after the 1st Petitioner was informed of that order she has come to this Court.

In R4A paragraph 3 there is the statement: "As this land has been developed for a period of years by L. M. John Singho and his son it is fair and reasonable that this land be divided into two sections between L. M. Wijeratne and you. A decision has been taken to this effect in terms of the same, the Kachcheri Surveyor will divide the land accordingly in due course. After the Kachcheri Surveyor's report is received, a permit will be issued." And on 1.10.1971. the 1st Petitioner was informed that the decision referred to earlier could not be varied.

There was an averment in paragraph 8 of the Petition that on 18.1.1956, the 1st Petitioner applied to the Government Agent, Anuradhapura, for a permit in favour of the 2nd Petitioner as the nominated successor of the aforesaid permit-holder. This was the first time that there was a reference to such a letter. There was no such reference in the earlier correspondence between the 1st Petitioner and the authorities concerned. In proof of that averment in paragraph 8 was the document B annexed to that petition of the Petitioner which refers to the letter dated 18.1.1956, but in view of what I have said earlier that there was no reference at all to this letter in the Petitioner's correspondence with the authorities, and in view of the very affirmative position taken up by the Respondent in his affidavit in paragraph 10 where he stated, inter alia, "the application dated 18.1.1956 is not in my files, nor is a copy of the letter marked B in the file of the Colonization Officer." No reference to the said application dated 18.1.1956 was made at the inquiry held by the District Land Officer, nor was the said letter marked B produced at any stage of the said inquiry. The question therefore whether letter B is an authentic document is open to grave doubt.

There remains for consideration the question whether a Writ of Mandamus will lie in the circumstances of this case. State Attorney has argued that such a Writ is in the discretion of this Court. He has referred to S. A. de Smith, on Judicial Review of Administrative Action, 2nd Edition, page 563, where it is held :— " ..... nor in general will it lie for the purpose of undoing that which has already been done in contravention of statute."

Mr. Tiruchelvam has submitted an authority—51 N.L.R. page 262, where Gratiaen, J., has held that the Court will not exercise its discretion to refuse a writ where an authority flagrantly exceeded the limited statutory powers conferred on it. I do not think that authority could apply to the facts of the instant case, where in spite of the prevarication of the 1st Petitioner, the authorities concerned have made a very equitable order.

Mr. Tiruchelvam has also submitted an authority, namely, *Rex v. Haceley Revising Barrister*[1] 1912, 3 K, B, 518, at page 532. That authority too will not have a bearing on the present case, because, as was stated by Channell, J., in his judgment at page 532: "In the present case the revising barrister has performed the judicial part of his duty. If he had merely made some error in the performance of that part of his duty, a mandamus would not lie to correct him. But having performed the judicial part of his duty, he omitted by inadvertence to perform the mechanical part of it, namely, to deliver to the town clerk the list of voters as revised by him ..... It is that act which he ought to have done and which would have been done but for inadvertence which we can now order him to do ....."

For all these reasons the application is refused with costs.

VYTHIALINGAM, J.—

I regret I am unable to agree.

The two Petitioners pray for the issue of a mandate in the nature of a Writ of Mandamus ordering and directing the Government Agent, Anuradhapura, the respondent to issue a permit to the second Petitioner, as the nominated successor of her farther, the permit-holder, of a land held by him on permit No. 133/3 issued under the Land Development Ordinance and for the issue of a certified copy of the said permit to her father.

In regard to the issue of the certified copy of the original permit the respondent has not in his affidavit denied the facts averred by the Petitioners in their affidavit. The 2nd Petitioner as the nominated successor under the permit is entitled to the issue of a certified copy of the permit and the respondent is in duty bound to issue it on the payment of charges if any. He has failed to perform this duty although a demand was made and mandamus will lie to secure the performance of this duty by him

Admittedly Nagamuthu Murugupillai was issued the permit No. 133/3 (R1) in the year 1936 under the Land Development Ordinance in respect of Lot 19 in I. S. P. Plan No. 3 at Maha Nelubewa in the Anuradhapura District. On 13.2.1944 he nominated as his successor, his daughter the 2nd Petitioner, then said to be two years old and this was duly endorsed on the permit R1. He died on 12.8.1955 (A) and the 2nd Petitioner would then have been a minor 12 to 13 years old. The 1st Petitioner is the widow of Murugupillai and the mother of the 2nd Petitioner.

[1] *(1912) 3 K. B. 518.*

Section 85 of the Land Development Ordinance, Chapter 464 requires a successor duly nominated by a permit-holder to make an application for a permit within a period of one year from the date of the death of the permit-holder. If the nominated successor fails to make such an application he shall be deemed to have surrendered to the Crown, his title as successor to the land. The Petitioners aver in their affidavits that the 1st Petitioner as the mother and the natural guardian of the 2nd Petitioner made an application dated 18.1.1956 for the issue of a permit in favour of the 2nd Petitioner and that they received the reply dated 30.1.1956 (B).

A certified copy of this reply has been produced marked B and it is as follows:—

"

C.O's Office,
Hidagama.

N. Nagapusanam,
Malwata Lane,
Anuradhapura.

Reference to your petition dated 18.1.56 to G.A., N.C.P., to transfer lease permit please attend my office on 3.2.1956 at 3 p.m., with the permit for an inquiry.

Sgd. Colonisation Officer,
Nochchiduwa."

The letter is addressed to the 2nd Petitioner and obviously the application must have been made either by her or on her behalf. The evidence at the inquiry and the affidavits do not disclose whether an inquiry was held in accordance with the letter 'B' or as to what happened to this application. The respondent in his affidavit does not deny the receipt of the application or the sending of the letter 'B'. All he says is that the letter is not in his files and that there is also no copy of the letter 'B' in the files of the Colonisation Officer. These facts do not lead to the necessary inference that the application was in fact not received or that the letter 'B' was not sent by the Colonisation Officer.

The affidavit also refers to the fact that the application dated 18.1.1956 was not referred to and the letter 'B' dated 30.1.1956 was not produced at an inquiry held many years later by the Divisional Land Officer. This inquiry was in respect of an application made by the 1st Petitioner dated 23.12.1973 (R2) for the issue of a permit in her name as the widow of Murugupillai and for the nomination of her daughter Rajaledchimy as her

successor. The inquiry was held on several dates and the notes of the inquiry have been produced marked (R3). There is no indication as to whether the 2nd Petitioner had notice of this inquiry and as to whether she was present at all at the inquiry.

On one of the dates of inquiry 20.7.1971 the inquiring officer states that the person mentioned as the nominated successor to this permit was his daughter Nagapushanam, that is the 2nd Petitioner, and that 'It is understood that now she is married and living in Batticaloa District.' It is clear from this that the 2nd Petitioner was not present at the inquiry. Otherwise the Inquiring Officer would not have said that it was understood that she was living in Batticaloa but would have recorded her statement.

It is true that on the very first date of inquiry the Inquiring Officer states that the nominated successor stated that Nagamuththu Murugupullai died in 1955. If she was present and if it was she who said this, it is strange that the Inquiring Officer did not record her statement or question her as to whether she had made an application in terms of Section 85 or not. He did not even give her an opportunity to produce any proof she may have had that an application was in fact made, although he did give the first Petitioner an opportunity to produce the death certificate of Murugupillai and her own rice ration book. He thereafter postponed the inquiry witnout recording any statements at all and without taking any further proceedings on that day.

In any event, even if she was present on that very first date it is quite clear that she was not present on any other dates of inquiry and she took no part whatever in the proceedings at the inquiry. However, I am satisfied that no adverse inference can be drawn against the Petitioner from the mere fact that she was present on the first day and said that her father died in 1955 or from her failure to produce the letter 'B' or to refer to the application of 18.1.1956. As I have pointed out she was only 12 or 13 years at the time of her father's death and may not have been aware of what was being done or its significance, or she may not even have remembered at all.

It is clear from the application R2 that the widow was trying to get the permit in her favour and to get the other daughter Rajaledchimy nominated as her successor and thereby deprive the 2nd Petitioner of her rights. In her application R2 she did not mention that the 2nd Petitioner was the nominated successor of her late husband. It is more than probable that she would

have hidden the fact that an application was made in terms of Section 85 and that the reply 'B' had been received. It is also probable that the 2nd Petitioner was told that the application and the copy of the letter 'B' were not in the files and that the land had reverted back to the Crown and she may have accepted it without being aware of the true position. For this reason she may not have taken any further part in the proceedings.

It is also quite clear that when the permit was not issued to her for the whole land, but only for one half of it the 1st Petitioner has joined with the 2nd Petitioner in filing this application. It is quite apparent that in this matter the 1st Petitioner has been acting from improper motive and with complete lack of good faith. A court will not use its discretionary power to grant the writ where it is not convinced of the propriety of the Petitioner's motives. These principles are set out as follows in *Halsbury, Vol. II pages* 85 *and* 86, *Simonds Edition* :—

"The grant of an order of mandamus is, as a general rule, a matter of discretion of the Court. It is not an order granted as of right and it is not issued as a matter of course. Accordingly the Court may refuse the order, not only upon the merits but also by reason of the special circumstances of the case. On the other hand the Court may grant leave to apply for an order of mandamus even though the right in respect of which it is sought appears to be doubtful. The Court will take a liberal view in determining whether or not the order shall issue, not scrupulously weighing the degree of public importance attained by the matter which may be in question, but applying this remedy in all cases to which upon a reasonable construction, it can be shown to be applicable."

Quoting this passage from an older edition of Halsbury, Soertsz J., said at page 191 in the case of *Maha Nayaka Thero Malwatte Vihare v. Registrar-General*[1] at 39 N. L. R. 186 : "In view of this responsibility to which Courts are called, I have considered most anxiously the facts that I have been put in possession of by the affidavits of the different parties to this application and I have reached the conclusion that I should not use my discretionary power in favour of the Petitioner in this instance because I am not convinced of the propriety of his motives."

Moreover, "not only must it appear that the applicant is himself a person having a real interest in the performance of the duty sought to be enforced but also that he makes the

[1] *39 N.L.R. 186.*

application in good faith and not for an indirect purpose. If it appears that the application for the mandamus is really on behalf of some third party the order will be refused." *Vol. II Halsbury—Simonds Edition—106.*

In this case, however, the bad faith and improper motive is, all on the part of the 1st Petitioner and not on the part of the 2nd Petitioner. No taint of this attaches to the 2nd Petitioner and one cannot refuse the writ to the 2nd Petitioner on the ground of bad faith and improper motive on the part of the 1st Petitioner. Indeed, the 1st Petitioner is not seeking any relief for herself and she need not have been joined as a Petitioner at all unless of course it is clear that the 2nd Petitioner is seeking to get the benefit for the 1st Petitioner. If in fact the permit is issued in favour of the 2nd Petitioner there is nothing she can do for the benefit of the 1st Petitioner. In any event there are sufficient safeguards in the Ordinance by way of provisions for the cancellation of permits to prevent this happening.

The genuineness and the authenticity of the letter 'B' which clearly shows that an application as contemplated in Section 85 had in fact been made within the period stipulated in the Section was not challenged. Indeed if that was the position it would have been the easiest thing for the respondent to have filed an affidavit from the Colonisation Officer concerned or if he was not available for any reason, then from some other officer with knowledge of the facts to the effect that no application was, in fact, received and that no such reply as 'B' was sent. This has not been done and the conclusion is irresistible that the application as contemplated by Section 85 was in fact made.

Once an application is made it is incumbent on the respondent to issue the permit. He may perhaps hold such inquiry as he may deem necessary. If as a result of such inquiry he comes to the conclusion that a permit should not for any reason be issued to the nominated successor of the permit-holder, then it is for him to show that this was so. Such is not the case here, for, it was the case for the respondent that he was not aware that an application was made, as the application was not in his files and the copy of the letter 'B' was not in the files of the Colonisation Officer. So he proceeded on the assumption that no application had been made within the stipulated time.

Section 84 of the Ordinance sets out that "Upon the death of a permit-holder, the duly nominated successor of that permit-holder shall be entitled on application made to the Government Agent, to receive a permit for the land which was alienated to

the deceased permit-holder." The application having been duly made the respondent was legally bound to issue the permit and he has failed to perform the duty enjoined on him by law.

The Petitioners state that the 1st Petitioner has been in possession and cultivating the field on behalf of the 2nd Petitioner ever since the death of her father. The statement that she was possessing the field on behalf of the 2nd Petitioner is contradicted by her statement in her Petition R2 where she states that she was possessing the said allotment and enjoyed the same. But this is not a material consideration in view of the other evidence and the legal position. The fact that the 1st Petitioner alone and no other outsider was in possession of the field as the owner is borne out by the entire testimony of all the witnesses at the inquiry held by the Land Development Officer.

Weeramantri, Govi Mandala Sevaka and earlier Secretary of the Cultivation Committee said that the 1st Petitioner's name had been included in the Paddy Lands list as owner cultivator and that John Singho upto 1960 and thereafter his son Wijeratne were the ande cultivators of this field. John Singho said that from 1955 to 1960 he worked this field and gave 15 bushels as lease per season to Rasamma the 1st Petitioner. After 1960 he gave the cultivation to his son Wijeratne. He admitted that his name was not included in the Paddy Lands list.

Wijeratne said that he was working this field from 1961 and paying 15 bushels per season. He wanted the land given to him as it had been worked by his farther and himself continuously.

Karunaratne the Vidane said that the field was worked on ande basis and that the brother of the 1st Petitioner also worked the field for 2 or 3 seasons and Wijeratne continues to work the field on an ande basis upto date. Herath Banda the Secretary of the Cultivation Committee said that the names of John Singho and Wijeratne do not appear on the Paddy Lands list. Sirimawathie said that the field was worked by Murugupillai and after his death the 1st Petitioner brought some people and cultivated it. She also worked the field from 1960-1963 and after that the 1st Petitioner worked the field with hired labour. The evidence is, therefore overwhelming that possession was with the 1st Petitioner throughout and that John Singho and later, Wijeratne were merely ande cultivators under her.

As I pointed out earlier, the 2nd Petitioner was a minor and having elected to succeed by virtue of the application dated 18.1.1956 as the nominated successor of the permit-holder she was entitled to possession. The 1st Petitioner being the natural

and lawful guardian of the 2nd Petitioner, her possession was in law the possession for and on behalf of the minor. In the case of *Samichchiappu v. Baronchihamy* [1]—62 N. L. R. 215, where the nominated life holder who had failed to succeed to the holding sued the widow for the value of the produce it was held that she was not entitled to succeed as the nominated successor had succeeded to the land on her failing to do so. Basnayake, C.J., said at page 214. " He (the nominated successor) being a minor it must be presumed that the 1st defendant, his mother managed it for his benefit after he succeeded to it. "

Moreover, it is significant that when the 2nd Petitioner attained majority the name of the nominated successor, that is, the 2nd Petitioner was included in the paddy lands register. This is stated by the inquiring officer in the very last paragraph of the notes of inquiry R3 where he states that " In 1965, Paddy Land Register, the name of the nominated successor to this permit Naga Pushanam has been included. Later, in 1968 the name of the mother of Naga Pushanam and the present claimant to this permit Rasamma has been included." So that, whatever she may have done in 1968 her possession was as guardian of the 2nd Petitioner and not in her own right. Moreover, it is nobody's contention and no such procedure was ever adopted, that the permit was cancelled for non-compliance with any of its provisions by the 2nd Petitioner.

The rates payable in terms of the permit were throughout paid by the Petitioners as shown by C1 to C23 and by no one else. In his affidavit the respondent states that the payments were accepted on the basis that the permit holder Nagamuthu Murugupillai was alive and that the payments were made on his behalf. This is obviously and demonstrably untrue. The receipt C13 dated 16.2.1962 for payment of rates for 1959-60-61 were said to have been received from " the heirs of N. Murugupillai " and not payment on his behalf.

It was submitted by Mr. G. P. S. de Silva, who appeared for the respondent, that the land had now been divided into two equal halves and permits issued to the 1st Petitioner, and Wijeratne. This is stated in paragraph 6 of the respondent's affidavit where he states that the permits were issued on 1.3.1972. Mr. Silva submitted that mandamus will issue only for the doing of a thing and not to undo what has already been done. He relied on the passage at page 434 of *S. A. de Smith's Judicial Review of*

[1] *(1960) 62 N.L.R. 215.*

Administrative Actions, First Edition, which is as follows : " Nor in general, will it lie for the purpose of undoing that which has already been done in contravention of statute."

In the case of *Mohamedu v. de Silva* [1] 52 N. L. R. 562, Windham, J., said at page 565, " Secondly, the Court will not grant a mandamus to undo an act already done, nor will it allow the validity of an act purporting to have been done under a statute (as the licence in the present case purported to be issued under the Butchers Ordinance) to be tried in an action for mandamus. In *Ex parte Nash* [2] (1850) 15 A. B. 95, Lord Campbell, C.J., in refusing to grant a mandamus commanding a railway company to remove its seal from the register of share holders on the ground that it has been irregularly fixed said ; ' The writ of Mandamus is most beneficial : but we must keep its operation within legal bounds and not grant it at the fancy of all mankind. We grant it when that has not been done which a statute orders to be done ; but not for the purpose of undoing what has been done. We may upon an application for a mandamus entertain the question whether a corporation not having affixed its seal, be bound to do so ; but not the question whether, when they have affixed it, they have been right in doing so. I cannot give countenance to the practice of trying in this form questions whether an act professedly done in pursuance of a statute was really justified by the statute '."

Ex parte Nash was the very case on which S. A. de Smith based this statement on which reliance was placed by Mr. de Silva. But this is not an inflexible rule as is shown by the fact that de Smith continues to say " though in some situations it can be employed to achieve such a purpose indirectly, as where the unlawful act is treated as a nullity and the competent authority is ordered to perform its duty as if it had refused to act at all in the first place." In this sense mandamus has in recent times become " certiorarified " (see Kleps " Certiorarified Mandamus " 1950, 2 Stamford Law Review, 285) though not to such an extent as in India and in some American Jurisdictions where it has almost ousted certiorari as the leading administrative remedy.

In this case what is asked for is the writ to compel the respondent to issue the permit in her favour and not to cancel the permits issued to the 1st Petitioner and Wijeratne although it will " achieve such a purpose indirectly." The distinction between an act which is a nullity and one which is merely voidable was clearly brought out by the Court of Appeal in the

[1] *(1949) 52 N. L. R. 562.* [2] *(1850) A. B. 95.*

case of *Regina v. Paddington Valuation Officer and another-Ex-parte Peachery Property Corporation Ltd.,*[1] 1966, 1 Law Reports Q.B.D. 380. In that case the applicants applied for an order of Certiorari to quash the existing valuation as being invalid in law and for a mandamus to compel the preparation of a new list on a proper basis. This was refused.

But Lord Denning M.R. said at page 402, "It is necessary to distinguish between two kinds of invalidity. The one kind is where the invalidity is so grave that the list is a nullity altogether. In which case there is no need to quash it. It is automatically null and void without more ado." The case of *Rex v. The Revising Barrister for the Borough of Huxley*[2] (1912, L.R. 3 K.B.D. 518) was a case where mandamus was issued to undo what had already been done.

In that case a revising barrister for a Parliamentary borough, owing to an accident to his right hand availed himself of clerical assistance to mark upon the lists of voters the results of his decisions as pronounced orally in Court. By some inadvertence the clerk omitted to strike off the lists the names of some persons who had been successfully objected to and whose names were ordered by the revising barrister to be expunged. The mistake was only discovered some months after the register had come into operation. It was held that the Court could grant the writs of mandumus to correct the mistake by directing the revising barrister to expunge the names previously ordered by him to be deleted.

Channell, J., said at page 531 "Those being the facts which I assume, a question of some difficulty arises as to whether mistake can be set right ..... that principle is applicable ..... also to cases where the non performance arises from mere inadvertence, where he cannot have had his attention directed to the matter cannot have refused upon demand to perform them." Darling J., quoted with approval the words of Martin B. in another case, "Instead of being astute to discover reasons for not applying this great constitutional remedy for error and misgovernment we think it our duty to be vigilant to apply it in every case to which by any reasonable construction it can be made to apply." (529)

In this case the new permits could only have been issued if the land had reverted to the Crown. As I have pointed out it had not, because the nominated successor had complied with Section 85 and had been in possession throughout. The permit had not been cancelled under the Ordinance or surrendered by the person entitled to it. The land was therefore not at the

[1] *(1966) 1L.R.Q.B.D. 380.* [2] *1912 L.R. 3 K.B.D. 518.*

disposal of the Crown and the permits in favour of the 1st Petitioner and Wijeratne were issued without jurisdiction and are a nullity altogether. On the principle enunciated by Lord Denning M.R. in the *Peachery's case* (Supra) Mandamus will issue.

Alternatively the permits were issued in error on the wrong presumption that the land had reverted to the Crown and on the basis of the principle set out in the *Revising Barrister's case* mandamus will issue to set the matter right.

Mr. Silva also argued that the undue delay on the part of the petitioners in making this application is fatal to the grant of any relief in their favour. Mr. de Silva relied on the case of *Abdul Rahuman v. the Mayor of Colombo*[1] (69 N.L.R. 211), where the application was refused on the ground of the delay on the part of the Petitioner in making the application for a mandamus. That was an application for a butcher's licence for the year 1965 and it was refused on 16.10.1964. The application was made only in June 1965.

"There is no express limitation for bringing the application except in relation to applications for orders of mandamus to be addressed to quarter sessions, but unless the application is made within a reasonable time after the right to apply (or to demand performance of the duty) has arisen the Court will in its discretion refuse the application. The periods of delay which have caused the Courts to exercise their discretion against applicants have ranged from sixty five years to a few weeks." But undoubtedly delay is a factor which the Court must take into consideration in exercising its discretion.

In this case the 2nd Petitioner had no reason to apply or demand performance until the permits were issued in favour of the 2nd Petitioner and Wijeratne. She had applied within the stipulated period in terms of Section 85 and was in possession. The new permits were issued only on 1.3.1972 and this application was filed on 22.6.1972 and there has been no such delay as would disentitle her to the issue of the writ. Even if one assumes that she was present at the inquiry on 9.1.1971, she could only have applied when she became aware of the letter 'B' and it is unlikely that the 1st Petitioner would have revealed this to her until after she herself became aware of the results of the inquiry on the letter R4 dated 14.9.1971. I hold therefore that there has been no such delay as to justify my refusing to exercise my discretion in favour of the 2nd Petitioner.

[1] *(1965) 69 N.L.R. 211.*

The 1st Petitioner has not a sufficient legal interest in the issue of a permit in favour of the 2nd Petitioner nor does the respondent have any duty towards her in regard to this. Her application is therefore refused but in the circumstances without costs.

I accordingly allow the application of the 2nd Petitioner and issue mandamus on the respondent as prayed for in prayers (*a*) and (b) of the Petition. The 2nd Petitioner will be entitled to her costs.

WALPITA, J.—

This was an application for a Mandate in the nature of a Writ of Mandamus ordering and directing the Respondent, Government Agent, Anuradhapura (*a*) to issue a permit under the Land Development Ordinance Chapter 464 of the Legislative Enactments to the 2nd Petitioner as the nominated successor in respect of the land held under the permit No. 138/3, (*b*) to issue a certified copy of the said permit and for costs of the application.

The first Petitioner was the wife of one Nagamuttu Murugapillai of Malwathu Lane, Anuradhapura, deceased and the 2nd Petitioner is the daughter. The said Nagamuthu Murugapillai had been in or about the year 1936 allotted lot 19 in I. S. P. P. 3 in extent 3A. 3R. 2P. at Maha Nelubewa in the Anuradhapura District, and was issued permit No. 138/3 under the provisions of the said Land Development Ordinance. Prior to his death on 12.8.55, the said Nagamuttu Murugapillai had nominated the 2nd Petitioner as his successor and the nomination had been duly endorsed on the said permit in terms of the said Land Development Ordinance.

The Petitioners in this petition alleged that the 2nd Petitioner who is 27 years old now was a minor at the time of the death of N. Murugapillai and the 1st Petitioner as the mother and natural guardian applied by Petition dated 18.1.56 to the G. A. Anuradhapura for a permit in favour of the 2nd Petitioner as the nominated successor. The Petitioners further stated that the Colonisation Officer acknowledged receipt of that application and replied by letter marked B that thereafter the 1st Petitioner on behalf of the 2nd Petitioner remained in possession of the land, cultivated it and paid the necessary fees and taxes, receipts for which, marked C1 to C23, were produced. That in spite of the request for the regularisation of the title of herself and the 2nd Petitioner, the Respondent considering that no application having been made within a year of the death of Murugapillai

as required by Sec. 85 of the Land Development Ordinance regarded the title of the 2nd Petitioner as having been surrendered to the Crown ; that since then about a half share of the said lot has been allotted to one Wijeratne and in spite of the Petitioner's proctor having applied for a certified copy of the permit this was refused, though the Respondent is under a legal duty to issue such certified copy. For these reasons the Petitioner applied for a Mandate in the nature of a Writ of Mandamus ordering the Respondent to issue a permit to the 2nd Petitioner as the nominated successor of Nagamuthu Murugapillai and also to issue a certified copy of such permit.

The Respondent in his affidavit filed in this Court states that the 1st Petitioner informed him for the first time by a letter dated 23.12.70 produced marked R2, that her husband had died in 1955 and asked for a transfer of the permit in her name. On receipt of that letter an inquiry was held by a District Land Officer and it transpired that one John Singho cultivated the land from 1960-1971. The inquiry notes were produced as R3 and R3A.

After the inquiry the land was divided in two equal allotments and a permit was issued to the 1st Petitioner in respect of one allotment. On the same day the other share was allotted to Wijeratne by another permit. By letter dated 14.9.71 the first Petitioner was informed of the Respondent's decision to divide the land. A copy of this letter was marked R4 and R4A. The 1st Petitioner's reply to this is produced as R5 and the Respondent's reply to R5 intimating his inability to change his decision marked R6 and R6A. The Respondent also stated that the application of the 1st Petitioner dated 18.1.56 and also a copy of the letter of the Colonisation Officer, marked B were not in the files of the Respondent or in that of the Colonisation Officer. He also said that no reference to the letter of 18.1.56 was made at the inquiry by the District Land Officer, nor was the letter of the Colonisation Officer marked B produced at any stage of the said inquiry. Receipts for payments made were issued on the basis that Nagamuthu Murugapillai was alive and the payments were made on his behalf.

The application for a Writ is made by the two Petitioners to this Court, the 1st Petitioner as the widow and the 2nd Petitioner as the nominated successor of Nagamuthu Murugapillai to enforce the request made on 18.1.56 by the 1st Petitioner on behalf of the 2nd Petitioner who was a minor at the time. R2 was the acknowledgement they allege of that letter by the Colonisation Officer. Writ asked for here is to direct the Respondent to issue a permit to the 2nd Petitioner the nominated successor of

Nagamuthu Murugapillai. No relief is sought here on behalf of the 1st Petitioner. The 2nd Petitioner being a major now, there was no need for the 1st Petitioner to join in this application with her at all. I shall comment on the conduct of the 1st Petitioner again later.

If an application dated 18.1.56 had in fact been made on behalf of the 2nd Petitioner then there would be no question that the permit given to N. Murugapillai cannot be deemed to have been surrendered under the Land Development Ordinance Section 85, she would be entitled to the permit. The question that arises, which has to be determined here is whether such an application was in fact made. Now R2 the letter dated 23.12.70 sent by the 1st Petitioner to the Respondent refers to the death of her husband in 1955, that he left no Will and his estate is not subjected to a Testamentary action and thus she asked for a transfer of the annexed permit in her favour, as the legal wife of the deceased and also to nominate her child Raja Ledchemi as the nominated successor. There is no reference here to her alleged application made on behalf of the 2nd Petitioner in 1956. No copy of that Petition has been produced but letter marked B has been produced purporting to be a letter from the Colonisation Officer acknowledging the Petition dated 18.1.56, and requesting her to attend his office on 3.2.66, with the permit for an inquiry. There is no evidence as to whether the Petitioner went for such inquiry what happened at such inquiry or whether there was in fact such an inquiry. Another strange circumstance is that the 2nd Petitioner who now claims the permit made no reference to this letter of 1956 at any time until the filing of this petition for a writ before this Court. She has been a major for nearly seven years now but she appears to have not mentioned this application of '56 at the inquiry conducted by the Land Development Officer. One is therefore forced to the conclusion that the 2nd Petitioner was either not interested in getting the permit all this time or acquiesced in her mother the 1st Petitioner trying to get the permit for herself as the widow of Nagamuttu Murugapillai : both petitioners being well aware that no application was made as was said to have been made in 1956.

In the permit No. 138/3/(b) issued to N. Murugapillai the nominated successor is the 2nd Petitioner but the 1st Petitioner in her letter of 23.12.70., R2, does not refer to this nor does she give any reason as to why the permit should not be issued to the 2nd Petitioner as the nominated successor, endorsed on the face of the permit. The Respondent in his affidavit says he has looked into his file as well as that of the Colonisation Officer and finds there is no such application of 18.1.56 nor is there a

copy of the letter marked B in the Colonisation Officer's file. There is no suggestion that such letter has been destroyed or removed and I see no reason to reject the Respondent's affidavit. The only inference one can draw from the Petitioners' conduct and Respondent's affidavit is there was no such application on 18.1.56 and the authenticity of letter B is to say the least extremely doubtful and besides this is the first time that it is being produced or referred to, it was not shown to the Respondent before this. In my view, the reference to a so called application of 18.1.56 is an afterthought made for the purpose of this application for a Writ as the Petitioners have now realised that that is the only legal basis on which the 2nd Petitioner can claim the permit. In the circumstances, I am of opinion that the Respondent was right in holding that the permit issued to N. Murugapillai had been surrendered, in terms of Section 85 of the Land Development Ordinance.

Another circumstance is that on the facts now alleged only the 2nd Petitioner could have made this application, she being a major now, there was no need for the 1st Petitioner to join her in this application, as she has no right to the permit on her own showing, She has, however, joined in this petition, it seems to me, to justify a course of conduct adopted by her throughout which amounts almost to a deception. The 2nd Petitioner herself cannot be treated as an innocent party totally unaware of the 1st Petitioner's conduct all this time. She has been a major for seven years now. She has joined with the 1st Petitioner in making this application but made no attempt to apply to the Respondent, the Government Agent, at any time to have the permit issued to her. The bona fides of both Petitioners are very much in question. The question then arises has the Respondent been remiss in any duty cast on him by law or has there been any act of commission or omission on his part as regards the issue of this permit. On the documents placed before us and the affidavits of the parties, I hold that the Respondent has acted correctly according to law.

The issue of a Writ of Mandamus is a discretionary remedy. "The Writ of Mandamus is a high prerogative Writ and the granting of it is a matter for the discretion of the Court. It is not a Writ of right and is not issued as a matter of course. Accordingly, the Court may grant the Writ even though the right in respect of which it is applied for appears to be doubtful and on the other hand, the Writ may be refused not only upon the merits but also by reason of the special circumstances of the case". Halsbury's Laws of England.

S. A. de Smith in his book *Judicial Review of Administrative Action, 2nd Edition, p.* 580 says of the Writ of Mandamus, " such a duty (that is a duty cast on a Public Officer under the law) will not be enforceable by one whose ulterior motive is to advance the private interests of another person ". To my mind, the application for the Writ made by the 2nd Petitioner who has joined with the 1st Petitioner is really to advance the interests of the 1st Petitioner who has no right to the permit but who took all steps to get this permit for herself from the Respondent even going to the extent of not disclosing to the Respondent a previous application said to have been made in 1956 on behalf of the 2nd Petitioner. Besides, the 2nd Petitioner is now said to reside at Kalmunai and has shown no interest in this permit before this and did not herself make an application to the Respondent in the first instance. Though she has now made this application to this Court, S. A. de Smith also states at page 578 : " The general rule is that the applicant before moving for the order, must have addressed a distinct and specific demand or request to the Respondent that he perform the duty imposed upon him, and the Respondent must have unequivocally manifested his refusal to comply. " In this case there was no such demand by the 2nd Petitioner only one by the 1st Petitioner who sought to get the permit for herself. I am therefore unable to accept that there was an application made in 1956 on her behalf. Even if there was, why was not the Respondent reminded of that application by either Petitioner before this.

The decision of the Respondent on the application of the 1st Petitioner of 23.12.1970, R2, was made on 14.9.1971. She replied to this on 16.9.1971 R5, but the Respondent confirmed his decision on 1.10.1971, R6. The application to this Court for a Writ was made on 21.6.1972, eight months later. There is in my view undue delay in making this application and for that reason alone the Petitioner will not be entitled to this Writ. *69 N.L.R. 211 ; 73 N.L.R. 262.* As the Respondent has already issued two permits in respect of the said lot no purpose will be served in our issuing a Writ now. " In general a writ will not lie for the purpose of undoing that which has already been done in contravention of Statute—Smith p. 563.

Therefore, taking all these matters into consideration, I am of the view that this application must be refused. The Respondent is entitled to the costs of this application.

Application refused.