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

In the matter of an application for Leave to Appeal under Section 5C of the High Court of the Provinces (Special Provisions) At No. 54 of 2006.

Nandasena Wickramasekara Rajapaksha,
No. 51, New Town,
Kataragama.

SC APPEAL No. 125/2010
SC (HC) CALA No. 350/2009
SP/HCCA/MA/198/2003F
DC Tissamaharama Case No. L.26/1997

DEFENDANT - APPELLANT - APPELLANT

-Vs-

1. Wanniarachchi Kankanamalage Temawathie,

2. Wanniarachchi Kankanamalage Julie Nona,
Both of No. 104, Old Buttala Road,
Kataragama.

PLAINTIFFS – RESPONDENTS - RESPONDENTS

BEFORE	:	Hon. Saleem Marsoof, P.C., J, Hon. Sisira J. de Abrew, J, and Hon. Sarath de Abrew, J.
COUNSEL	:	W. Dayaratne, P.C. with R. Jayawardane and S.T. de Zoysa for the Appellant - Appellant - Appellant. Manohara de Silva, P.C. with Ms. Pubuduni Wickramarathne and H. Munasinghe for the Plaintiff - Respondent - Respondent.
ARGUED ON	:	07.07.2014 and 02.09.2014
Written Submissions	:	16.5.2012 (Appellant) 19.5.2012 (Respondents)
DECIDED ON	:	17.12.2014

SALEEM MARSOOF, P.C., J,

This is an appeal from the judgment of the High Court for the Southern Province holden in Matara exercising civil appellate jurisdiction (hereinafter referred to as "the Civil Appellate High Court") dated 12th November 2009 which affirmed the judgment of the District Court of Tissamaharama dated 17th July 2003 granting the Plaintiffs-Respondents-Respondents (hereinafter referred to as "the Respondents") certain relief against the Defendant-Appellant-Appellant (hereinafter referred to as "the Appellant").

This Court has granted leave to appeal against the said judgment of the Civil Appellate High Court on the following substantive questions of law set out in paragraphs 12(b), 12(c), 12(d) and 12(h) of the petition of appeal, which read as follows:-

(b) Did their Lordships of the Civil Appellate High Court as well as the learned trial judge err in law when they held that the Plaintiffs-Respondents-Respondents had inherited the title of Wanniarachchi Kankanamlage Babun Appuhamy, when he did not even have an annual permit to the *corpus*?

(c) Did their Lordships of the Civil Appellate High Court err in law when they seriously misdirected themselves by treating the action filed by the said Respondents as a *rei vindicatio* action and declared that the Respondents are the owners, when the learned trial judge had held that this is not a *rei vindicatio* or a declaratory action and therefore he cannot declare that Babun Appuhamy was the owner, and would consider this only as a possessory action?

(d) Did their Lordships of the Civil Appellate High Court as well as learned trial Judge err in law when they failed to consider that the Respondent's action is time barred in terms of Section 4 of the Prescription Ordinance?

(h) Did their Lordships of the Civil Appellate High Court as well as the learned trial Judge err in law when they totally disregarded the evidence of the witness who prepared ඕ1 and also signed as a witness, whose evidence was not contradicted and which would clearly disprove the Respondents' contention that they were in possession of the *corpus*?

Before considering the submissions of the learned President's Counsel for the Appellant and the Respondents, it might be useful to outline the material facts.

The Factual Matrix

Wanniarachchi Kankanamlage Babun Appuhamy, who was the father of the two Respondents, Temawathie and Julie Nona, had been the owner of lot 453 of the land described in Topographical Survey Plan No 25 pertaining to Kataragama, which was 33.2 perches in extent, which was acquired under the Land Acquisition Act No. 9 of 1950, as amended, for the Kataragama Sacred City Project. In lieu of the said land, the government allotted to Babun Appuhamy, lot 1295 of Detagamuwehena, in extent 40 perches, which is the land described in the schedule to the plaint filed by the Respondents in the District Court of Tissamaharama, until they were evicted on or about 27th November 1996 from the said *corpus* by the fiscal. The Respondents claim that they were deprived of their possession of the land by virtue of an order made in favour of the Appellant in terms of Section 68 of the Primary Courts' Procedure Act No. 44 of 1979, as amended, in Primary Court Tissamaharama case No. 36365, which the Respondents claim was obtained by misleading Court through a total abuse of the judicial process.

It is common ground that the said land is State Land, and it is also evident that no permit had been granted to Babun Appuhamy, and the Respondents claim that Babun Appuhamy was allotted and put into occupation of the land on the basis that he will be issued in due course with a permit in terms of the Land

Development Ordinance, No 19 of 1935, as amended. Babun Appuhamy died in 1977, and the Respondents claim that upon the death of their father, their mother possessed the land, but she died of a bomb explosion in 1989 as a result of which the 1st Respondent, Temawathie, also was seriously injured, but they continued to possess the land until they were evicted on or about 27th November 1996 by an order made by the Primary Court.

By their plaint dated 16th January 1997, the Respondents sought the following relief from the Appellant:-

(අ) මෙම ඉඩමේ මුල් මිහිකරු සහ භුක්තිකරු වූයේ වන්නිආරච්චි කංකානම්ලාගේ බබුන් අප්පුහාමි බවට ප්‍රකාශයක්ද,

(ආ) පැ1 දරණ ලේඛණය, වංචා වැලැක්වීමේ ආඥාපනතේ විධිවිධාන වලට පටහැනි ලේඛණයක් බවට තීන්දු, ප්‍රකාශයක්ද,

(ඇ) පැ1 දරණ ලේඛණය මත මෙම විත්තිකරුට මෙම ඉඩමට නීත්‍යානුකූල හිමිකමක් ලැබී නැති බවට ප්‍රකාශයක්ද,

(ඈ) විත්තිකරු සහ ඔහු යටතේ හිමිකම් කියන සියල්ලන්ම එකී ඉඩමෙන් ඉවත් කොට මෙම පැමිණිලිකරුවන් එකී ඉඩමේ භුක්තියේ පිහිටුවීමේ නියෝගයක්ද,

(ඉ) 1996.11.27 දින සිට සෑම මසකටම රු:1500/- බැගින්, භුක්තිය භාරදෙන දිනය දක්වා අලාභද, එකී අලාභමය වාණිජ පොලියද විත්තිකරුගෙන් අයකර ගැනීමේ නියෝගයක්ද,

(ඊ) ප්‍රාථමික අධිකරණයේ අංක 36365 දරණ නඩුවට ඉදිරිපත් කිරීම නිසා මෙම පැමිණිලිකරුවන්ට දැරීමට සිදුවූ නීති කටයුතු වියදම් වශයෙන් රුපියල් 25,000/- ක මුදලක් හා 1996.11.27 දින සිට එය ගෙවන දිනය දක්වා ඊට වාණිජ පොළියද ලබාගැනීම සඳහා නියෝගයක්ද,

(උ) මෙම නඩුවේ නඩු ගාස්තු සහ ගරු අධිකරණයට සුදුසු යයි හැගෙන වෙනත් සහ අනෙකුත් සහනයන්ද වේ.

When translated into English, the prayers for relief would read as follows:-

(a) a declaration that Wanniarachchi Kankanamlage Babun Appuhamy was the original owner and possessor of the subject matter;
(b) a declaration that the documents marked පැ1 is contrary to the provisions of the Prevention of Frauds Ordinance;
(c) a declaration that the document marked පැ1 does not give the Appellant any legal entitlement to the land in dispute;
(d) a decree for an ejectment of the Defendant-Appellant-Appellant and all those claiming title under him and to restore the Respondents back in possession;
(e) damages in a sum of Rs. 1500/- per month and interest thereon from the Appellant from 27.11.1996 until the possession is handed back to the Respondents; and
(f) a decree to recover, legal expenses in a sum of Rs.25,000/- incurred by the Respondents in case No. 36365 filed in the Primary Court from 27.11.1996 until the payment in full.

The Appellant filed his answer on or about 31st July 1997, denying the several averments contained in the plaint and praying for (a) an order that the plaint is not in conformity with Section 46 of the Civil

Procedure Code, (b) a judgment that that the Respondents are not entitled to maintain the action without making the State a party, (c) a judgment that the Respondents are not entitled to any reliefs prayed for in the plaint, (d) for judgment in the sum of Rs. 50,000/- as damages for the defamation and injury caused to the Appellant's social status and the mental pain suffered by the Appellant as a result of the institution of the instant action by the Respondent alleging fraud and dishonesty on the part of the Appellant, and (e) for costs.

At the commencement of the trial, the parties admitted the jurisdiction of court, and also further admitted that the said Babun Appuhamy possessed the corpus consisting of the 40 perch land described in the schedule to the plaint, that the said Babun Appuhamy is now dead, that the Appellant is a Post Master and a Member of the Katharagma Pradeshiya Sabha and that the document annexed to the plaint marked පැ1 was produced in Primary Court Tissamaharama case No. 36365. Thereafter, the Respondents raised issues 1 to 8, which are reproduced below:-

1. එකී බබුන් අප්පුහාමිගේ පිවිත කාලයේදී මෙම නඩුවට විෂය වන ඉඩම විත්තිකරු නමට අන්සතු නොකරන ලද්දේ ද?

2. එකී බබුන් අප්පුහාමි විසින් දරණ ලද බුක්තිය හේතුවෙන් නිතිය ඉදිරියේ ඔහු අයිතිකරු හා / හෝ හිමිකරු බවට නිතියෙන් පූර්ව නිගමනය කළ යුතුද?

3. 96.11.27 දින පටන් තිස්සමහාරාම ප්‍රාථමික අධිකරණයේ අංක 36365 දරණ නඩුවේ නියෝගය මගින් පැමිණිලිකරුවන්ගේ බුක්තිය අහිමි වී ඇද්ද?

4. එසේ පැමිණිලිකරුවන්ගේ බුක්තිය අහිමි වුයේ එම ප්‍රාථමික අධිකරණයේ නඩුවේ දී මෙම විත්තිකරු විසින් ඉදිරිපත් කරන ලද දිවුරුම් ප්‍රකාශ සහ ලේඛණ හේතුවෙන් ද?

5. පැමිණිල්ල සමග ගොනුකොට ඇති පැ.1 දරණ ලේඛණය මත විත්තිකරුට කිසිම නීත්‍යානුකූල හිමිකමක් මෙම වඩුවේ විෂය වස්තුව සම්බන්ධයෙන් නොලැබේද?

6. පැ.1 දරණ ලේඛණය වංචා වැළැක්වීමේ අඥා පනතේ විධිවිධාන වලට පටහැනි කූට සහ නීතිවිරෝධී ලේඛණයක් ද?

7. ප්‍රාථමික අධිකරණයේ අංක 36365 නඩුවේ ඉදිරිපත් කරන ලද විත්තිකරුගේ දිවුරුම් ප්‍රකාශ මගින් මෙම ඉඩම බබුන් අප්පුහාමිට අයත්ව බුක්ති විඳින බවට විත්තිකරු විසින් කරන ලද ප්‍රකාශයක් ප්‍රතික්ෂේප කිරීමෙන් විත්තිකරු ප්‍රතිබන්ධනය වී ඇද්ද?

8. ඉහත සඳහන් ප්‍රශ්න වලට ඔව් යනුවෙන් පිළිතුරු ලැබේ නම් පැමිණිලිකරුවන්ට පැමිණිල්ලේ ඉල්ලා ඇති සහන ලැබිය යුතු ද?

Of the issues 9 to 18 raised by the Appellant, the most material for this appeal were issues 9, 10, 13 and 18, which are reproduced below:-

9. මෙම විෂය වස්තුවේ බුක්තියේ සිට බබුන් අප්පුහාමි, පැමිණිල්ල ඉදිරිපත් කිරීමට වර්ෂ 20 කට පමණ පෙර විෂය වස්තුවේ සාමකාමී බුක්තිය විත්තිකරුට බාරදී ඉවත්ව ගියේ ද?

10. එදින සිට විත්තිකරු විෂය වස්තුව අඛණ්ඩව බුක්ති විඳගෙන එන්නේ ද?

13. විත්තිකරු විෂය වස්තුව දැනට අවුරුදු 20 කට පෙර සිට ඇද දක්වා සංවර්ධනය කර බුක්ති විඳින්නේ ද?

18. ඉහත සඳහන් පැනයන්ට විත්තිකරුගේ වාසියට උත්තර ලැබෙන්නේ නම් උත්තරයේ ඉල්ලා ඇති සහන විත්තිකරුට ලැබිය යුතුද?

I have not reproduced the other issues of the Appellant, which were entirely procedural in nature, such as whether the plaint discloses a cause of action against the Appellant, whether the action can be maintained without adding the State as a party, or whether the action was undervalued, which should have been taken up and dealt with by way of motion before the case was set for trial.

At the trial, the two Respondents testified, and also called witnesses Aluthgedara Henry Dias, who was a Colonization Officer of the Kataragama Divisional Secretariat Office, Herath Mudiyansalage Vini Lalith Abeywickrema, who was Deputy Director of the Town and Country Planning Department, Battaramulla, and Nawaratne Dheerasinghe Mudiyanselage Vijitha, who was a Planning Officer of the Surveyor General's Department. The Respondents concluded their case by marking in evidence documents පැ1 to පැ8.

Thereafter, the Appellant testified on his behalf, followed by the evidence of Kuda Antonige Manuel, Chandrasena Wickramarachchi, and Palitha Devanarayana, who was a subject Clerk of Pradeshiya Sabha, Kataragama. The Appellant concluded his case marking in evidence documents වි1 to වි5. After the conclusion of the trial, both parties were directed to file written submissions. After the filing of written submissions, the learned District Judge pronounced judgment on 17th July 2003 in favour of the Respondents. The reasoning of the learned District Court Judge is unclear as to whether the Court regarded the present case to be *rei vindicatio* action or a possessory action. At page 9 of his judgment, the learned District Court Judge stated:-

> "පැමිණිලිකරුවන් විසින් ඉඩමේ මුල් හිමිකරු වශයෙන් තම පියාට අයිති බවට ප්‍රකාශයක් කරන මෙන් ඉල්ලා ඇතත් පැමිණිල්ලේ සඳහන් කරුණු සහ නඩු විභාගයේ දී ඉහත ඉදිරිපත් කරන ලද කරුණු අනුව එසේ 'අයිතියක්' ප්‍රකාශකරවා ගැනීම පැමිණිලිකරුට නෛතික හැකියාවක් නොමැති බව පැහැදිලි වේ. නමුත් පැමිණිල්ලේ ආයාචනයේ ඉදිරිපත් කර ඇති පරිදි ඊට අඩු තත්වයක් වන බුක්ති විඳීමට ප්‍රකාශයක් ලබා ගැනීමට හැකියාවක් ඇති බව පෙනී යයි."

The District Court granted relief to the Respondent in the following terms:-

> "ඒ අනුව පැමිණිල්ලේ ආයාචනයේ (අ) මගින් ඉල්ලා ඇති පරිදි මෙම ඉඩම භුක්ති විඳීමට බඹුන් අප්පුහාමිට හිමිකමක් තිබූ බවට තීරණය කරමි. ආයාචනයේ (ඈ) පරිදි විත්තිකරුට එරෙහිව භුක්තියේ පිහිටීමට පැමිණිලිකරුවන්ට නියෝගයක් නිකුත් කරමි."

The Appellant preferred an appeal against the decision of the District Court to the Court of Appeal, but the case was subsequently transferred to the Civil Appellate High Court of the Southern Province holden in Matara, which enjoys concurrent jurisdiction with the Court of Appeal. The Civil Appellate High Court, after hearing both parties, pronounced its judgment on 12th November 2009, affirming the judgment of the learned District Judge and dismissing the appeal. It would appear from page 11 of the judgment of the Civil Appellate High Court which is reproduced below, that the Court considered the case to be one of *rei vindicatio*, albeit with defective pleading, which that Court was willing to overlook or rectify on the basis of equity:-

"මෙම ඉඩමේ මුල් හිමිකරු හා භුක්තිකරු වූයේ වන්නිආරච්චි කංකානම්ගේ බබුන් අප්පුහාමි ලෙසට ප්‍රකාශ කරන ලෙසට පැමැණිලිකාර වගඋත්තරකරුවන් සිය ආයාවනයේ අයැද නැත. එසේ වුවද නඩුව පවරා ඇත්තේ පැමිණිලිකාර වගඋත්තරකරුවන් බැවින් ඔවුන්ට මෙම දේපලේ අයිතියක් ඇති බවට තහවුරු කිරීමට ආයාවනයේ අයැද නැත. එය පැමිණිල්ලේ නිතිඥ මහතා නඩුව සම්බන්ධයෙන් නිසි අවබෝධයකින් තොරව කල ක්‍රියාවකින් පැමිණිලිකාර වගඋත්තරකරුවන්ට අගතියක් සිදුවන බවයි. පැමිණිලිකරුවන් මෙම දේපල අයිති බවට තින්දු ප්‍රකාශයක් අයැද නොතිබීම මත ඔවුන්ට සාධාරණත්ව නීතිය (law if equity) ලැබෙන සහනය නොදීමට අධිකරණය තීරණය කරයි නම් එය නිවැරදි නොවනු ඇත.

ඒ අනුව මෙම දේපල බබුන් හාමිට අයිතියව තිබුණු බවට තීරණය කිරීම එම අයිතිවාසිකම් ඔහුගේ දරුවන්ට මෙම දේපල හිමිවිය යුතු බවට තීරණය කරමි. කෙසේ වුවද මියගිය තැනැත්තෙකුට මෙම දේපල අයත් බවට තීරණය කිරීමට මෙම අධිකරණයට නොහැකි වන අතර, මියගිය තැනැත්තෙකුට අධිකරණයක් විසින් අයිතිව තහවුරු කිරීමට හැකියාවක් නැත. ඒ අනුව මියගිය බබුන් අප්පුහාමිට අයිතිය තිබූ බව පමණක් නිගමනය කලහැකිය. ඒ අනුව මෙම නඩුවේ පැමිණිල්ලේ ආයාවනයේ ඇතුලත් කලයුතු සහනයක් වන වගඋත්තරකරුවන්ට මෙම දේපලට සිය මියගිය පියාගේ අයිතිවාසිකම් මත මෙම දේපලට අයිතියක් ඇති බවට ප්‍රකාශයක් ඉල්ලා සිටීමට පැමිණිල්ල ගොනුකිරීමේ දී එම ආයාවනයේ සඳහන් කළ යුතු අතර එසේ නොවීම තුලින් වගඋත්තරකරුවන්ට එම සහනය ප්‍රදානය නොකිරීම ඉහත සඳහන් හේතු මත නුසුදුසු බැවින් ඔවුන්ට එම දෙපලට අයිතියක් ඇති බවට තීරණය කරමි."

Being aggrieved by the said judgment of the Civil Appellate High Court dated 12th November 2009, the Appellant filed an application seeking Leave to appeal to this Court, and as previously noted, this Court granted Leave to Appeal on the several substantive questions referred to at the commencement of this judgment.

Respondents' Right to Succession

The first matter for consideration by this Court as set out in question (b) on which leave to appeal has been granted is whether the Civil Appellate High Court as well as the learned trial judge erred in law when they held that the Respondents had inherited the title of Wanniarachchi Kankanamlage Babun Appuhamy when he did not even have an annual permit to the corpus.

It is common ground that the subject matter of the action was State Land, and it is also evident that Babun Appuhamy, the father of the Respondents had been put into occupation of the land described in the schedule to the plaint, by the State, but to date, neither Babun Appuhamy nor any of the children of Babun Appuhamy including the Respondents had been granted any permit for the land by the State.

When the land in dispute is State land that has been alienated or granted under the Land Development Ordinance, the issue of succession has to be determined exclusively with reference to the provisions of the Land Development Ordinance. Section 170(1) of the Land Development Ordinance No. 19 of 1935, as amended, provides that:-

> "No written law (other than this Ordinance) which provides for succession to land upon an intestacy and *no other law relating to succession to land upon an intestacy shall have any application* in respect of any land alienated under this Ordinance." (*emphasis added*)

Section 48 of the Land Development Ordinance defines “succession” as follows:-

> “In this Chapter "successor", when used with reference to any land alienated on a permit or a holding, means a person who is entitled under this Chapter to succeed to that land or holding upon the death of the permit-holder or owner thereof, if that permit-holder or owner died without leaving behind his or her spouse, or, if that permit-holder or owner died leaving behind his or her spouse, upon the failure of that spouse to succeed to that land or holding or upon the death of that spouse.”

The Appellant has argued that is only a nominated successor who can succeed to land granted under the Land Development Ordinance. However, this is an incorrect proposition in law. Section 72 of the Land Development Ordinance states that:-

> “If no successor has been nominated, or if the nominated successor fails to succeed, or if the nomination of a successor contravenes the provisions of this Ordinance, the title to the land alienated on a permit to a permit-holder who at the time of his or her death was paying an annual installment by virtue of the provisions of section 19 or to the holding of an owner shall, upon the death of such permit-holder or owner without leaving behind his or her spouse, or, where such permit-holder or owner died leaving behind his or her spouse, upon the failure of such spouse to succeed to that land or holding, or upon the death of such spouse, devolve as prescribed in rule 1 of the Third Schedule.”

The Third Schedule to the Land Development Ordinance is reproduced below:-

THIRD SCHEDULE

RULES

1. (a) The groups of relatives from which a successor may be nominated for the purposes of section 51 shall be as set out in the subjoined table.

(b) Title to a holding for the purposes of section 72 shall devolve on one only of the relatives of the permit-holder or owner *in the order of priority in which they are respectively mentioned in the subjoined table, the older being preferred to the younger* where there are more relatives than one in any group.

Table

(i) Sons.	(vii) Brothers.
(ii) Daughters.	(viii) Sisters.
(iii) Grandsons.	(ix) Uncles.
(iv) Granddaughters.	(x) Aunts.
(v) Father.	(xi) Nephews.
(vi) Mother.	(xii) Nieces.

In this rule, "relative" means a relative by blood and not by marriage

2. Where in any group of relatives mentioned in the table subjoined to rule 1, there are *two or more persons of the same age who are equally entitled and willing to succeed*, the Government Agent may nominate one of such persons to succeed to the holding. Such decision of the Government Agent shall be final.

4. If any relative on whom the title to a holding devolves under the provisions of these rules is *unwilling to succeed* to such holding, the title thereto shall devolve upon the relative who is next entitled to succeed under the provisions of rule 1.

[Rules 3 and 5 were repealed by Act No. 16 of 1969.]

In this context, it is relevant to take into consideration the evidence of the 1st Respondent, Temawathie, who states that after the death of her father Babun Appuhamy in 1977, her mother possessed the land, but she died in a bomb explosion in 1989 as a result of which the witness too was seriously injured, but the essence of her testimony was that after the death of her mother, the siblings of Babun Appuhamy jointly possessed the said land. The nature of the possession of this land, according to the Respondents, was by seasonal cultivation and not by continuous residence, as the land did not have continuous supply of water and was cultivated only in the rainy season (මාස් කන්නය). In the course of her testimony, she also stated that:-

"89 සිට සහෝදරයෝත් සමග ඒ ඉඩමේ දෙහි, දොඩම්, පොල්, ගොඩ බෝග මිරිස්, මුං, කව්පි වගා කරගෙන බුක්ති වින්දා. පියා ඉන්න කාලයෙත් ගොඩ බෝග වගා කරලා තිබුණා, ඉටිගු, කජු, මිරිස් වගේ බෝග වගා කළා. ඉටිගු තාවකාලික බෝගයක්. කජු ස්ථිර බෝගයක්. දෙහි, දොඩම්, පොල් තාත්තා දැම්මා ඒ ඉඩමේ. මම බුක්ති විඳින්නට පටන් ගත්තට පස්සේ මම ගොඩ බෝග වගා කළා. තාවකාලික බෝග වර්ග කජු, මිරිස්, ඉටිගු වගා කලේ මම. මාස 6 න් ඒ බෝග වගා කරනවා. ඒ මාස 6 වගා කරන කොට මම ඒකේ කටු මැට ගහල ගෙයක් හදාගෙන පදිංචි වී සිටියෙ. මගේ සහෝදරයො ඇවිත් අඹුපාඹු සොයා බලලා යනවා. කටු මැට ගහල ගේ හදාගෙන පදිංචි වුන කාලය මට මතක නැහැ. 89 දි බෝම්බ වැදිලා මගේ කකුල බිඳුනා. ඒකෙන් මගේ මව නැති වුනා. මට කල්පනාව නැහැ ගේ හදාගෙන පදිංචි වුනේ කොයි කාලයේද කියා. කටු මැට ගේ හදා තිබුණා මව සිටිද්දි. මව මිය ගියාට පස්සේ මම ඒකේ පදිංචි වෙලා වගා කළා. අනෙක් සහෝදරයන් මට උදව් කළා."

In terms of the rules set out in the Third Schedule to the Land Development Ordinance, title to a holding can devolve by operation of law in accordance with the rules of succession set out therein even if a successor is not nominated by a permit-holder. However, Rule 1 of the Third Schedule specifies that *title can devolve upon only one person*, *in the order of priority specified therein, the older being preferred to the younger where there is more than one relative in a given group.* According to the table in the Third Schedule, *sons are given preference in the devolution of title, and thereafter, daughters.*

On the face of it, the provisions of the Third Schedule appear to be discriminatory on the ground of sex, but was probably fashioned by the assumption that it is the men in the family who actively participate in cultivation, the validity of which assumption may be questioned in the context of this case, where it appears from the evidence that the Respondents, who were both females, had cultivated the land in dispute with the assistance of all family members including brothers. I am of the opinion that the provision

has to be reviewed by policy makers in the light of the realities of the day and in particular Article 12 of the Constitution. Further, it may be desirable to recognize a concept of "joint permit-holders", to apply in situations where the family of a permit-holder had collectively helped to develop the land even during the lifetime of the permit-holder, as the recognition of such a concept would help maintain the family cordiality after the death of the permit holder. But in this case, we are bound to give effect to the provisions of rule 1 of the Third Schedule, under which the Respondents cannot claim any right of succession to title, given that it is clear from the evidence that Babun Appuhamy had at least one son. The evidence of the 1st Plaintiff-Respondent-Respondent, Temawathie, at page 98 of the brief was as follows:-

> "චිත්තිකරු කැති පොලු ආයුධ අරගෙන කෝලහාල කරන්න ගියා. ඒ අවස්ථාවේ මගේ මල්ලි හිටියා. ඔවුන් සමග රණ්ඩුවක් වුනා. බහින්බස් වීමක් වුනා."

It is in these circumstances that the Appellant contends that if the present action was considered to be a *rei vindicatio* action, the Learned Judges of the Civil Appellate High Court erred in law by granting title to the Respondents, as by operation of law, the sons of Babun Appuhamy would be preferred in the order of devolution specified in the Third Schedule of the Land Development Ordinance.

On the broader definition of "permit-holder" in Section 2 of the Land Development Ordinance, Babun Appuhamy may no doubt be regarded as the permit-holder of the land in dispute, and it may also be presumed that upon his death, his widow, succeeded to the holding in terms of Section 48A(1) of the Ordinance. In my opinion, such succession would take place by operation of law even without a nomination made in terms of the Ordinance. It is also clear that, upon the death of Babun Appuhamy's spouse in 1989, as provided in Section 72 of the Ordinance, succession would be in accordance with rule 1 of the Third Schedule to the Ordinance, wherein male relatives are preferred over female relatives, and the older relation is preferred to the younger in the order of succession. It is in evidence that Babun Appuhamy had at least one son, and probably more. The evidence of the Respondents reveal, that the Respondent's brothers helped them in the cultivation and even rallied around when their possession was threatened by the Appellant. However, in the absence of any evidence to establish that the 1st or the 2nd Respondent is the eldest daughter of Babun Appuhamy, the mere fact that by the letter marked පැ4 the 1st Respondent took steps to regularise possession, is insufficient to show that they are entitled to the rights of Babun Appuhamy. Hence, I am of the opinions that the Learned Judges of the Civil Appellate High Court erred in law when they held that the Respondents have succeeded to the title of Babun Appuhamy, but the fact remains that they had in prayer (අ) of their plaint sought only a declaration with respect to the rights of Babun Appuhamy, which declaration, they are no doubt entitled to, along with the relief prayed for by them in prayers (ආ), (ඇ) and (ඈ) of the plaint.

The True Nature of the Respondents' Action - Rei vindicatio or Possessory Remedy?

The second issue for consideration as set out in question (c) on which leave to appeal was granted by this Court is whether the present action should be properly regarded as a *rei vindicatio* action or a possessory action.

In the plaint, the Respondents have prayed for *inter alia* a declaration that Wanniarachchi Kankanamlage Babun Appu was the original owner and possessor of the subject matter (prayer 'a') and a decree for an

ejectment of the Appellant-Appellant-Appellant and all those claiming title under him and to restore the Respondents back in possession (prayer 'd'). By the said prayers for relief, the Respondents sought a declaration of title in respect of Babun Appuhamy, their father, and a restoration of their possession.

Learned President's Counsel for the Appellant, relying on the judgment in *Palisena v Perera* 56 NLR 407, have argued that to maintain an action for *rei vindicatio* pertaining to State land, there should be a valid permit or deed of disposition, and that in the present case, the Plaintiff's father did not have a permit for the land in dispute. The said Appellant also relies on the fact that there is no prayer in the Plaint seeking for a declaration of title in the Respondents' favour. Instead, the Respondents have prayed for in prayer (අ) as follows:-

> "මෙම ඉඩමේ මුල් හිමිකරු භුක්තිකරු වූයේ වන්නිආරච්චි කංකානම්ලාගේ බබුන් අප්පුහාමි බවට ප්‍රකාශයක්ද..."

Learned President's Counsel has submitted that the said finding of the Civil Appellate High Court is *ex facie* bad in law as the Court cannot grant relief which had not been prayed for by a party in the prayers of the plaint or an answer, and has referred to the decisions in *Weragama v Bandara* 77 NLR 289, *Vangadasalem v Chettiyar* 29 NLR 446 and *Danapala v Babynona* 77 NLR 95.

I am not in a position to entirely agree with these submissions, as this Court has noted in *Latheef and Another v Mansoor and Another,* (2011) B.L.R. 189 at 196, that although the action for declaration of title is the modern manifestation of the ancient vindicatory action (*vindicatio rei*) having its origins in Roman Law and is essentially an action *in rem* for the recovery of property, as opposed to a mere action *in personam***,** Withers J in *Allis Appu v Edris Hamy* (1894) 3 SCR 87 at page 93, has recognized "actions of an analogous nature" to a *rei vindicatio* action for declaration of title combined with ejectment of some person from land or premises. In such cases, the defendant is related to the plaintiff by some legal obligation (*obligatio*) arising from contract or otherwise, such as an over-holding tenant (*Pathirana v Jayasundara* (1955) 58 NLR 169) or an individual who had ousted the plaintiff from possession (*Mudalihamy v Appuhamy* (1891) CLRep 67 and *Rawter v Ross* (1880) 3 SCC 145), proof of which circumstances would give rise to a presumption of title in favour of the plaintiff obviating the need for him to establish title against the whole world (*in rem)* in such special contexts. These are cases which give effect to special evidentiary principles, such as the rule that the tenant is precluded from contesting the title of his landlord or a person who is *unlawfully* ousted from possession is entitled to a rebuttable presumption of title in his favour.

Burnside CJ, has explained the latter principle in *Mudalihamy v Appuhamy* (1891) CL Rep 67 in the following manner:-

> "Now, *prima facie*, the plaintiff having been in possession, he was entitled to keep the property against the whole world but the rightful owner, and if the defendant claimed to be that owner, the burden of proving his title rested on him, and the plaintiff might have contented himself with proving his *de facto* possession at the time of the ouster."

It is evident that in certain defined circumstances, a presumption of title may arise in favour of persons who have been *unlawfully* dispossessed from the land which forms the subject matter of a case. Although

such a presumption would not arise in a *rei vindicatio* action *stricto sensu,* such a presumption may arise in actions of an analogous nature. Thus two questions warrant further analysis; firstly, if the circumstances of the present case warrants such a presumption of title; and secondly, if the Respondents have been *unlawfully* dispossessed.

In the present case, while the lower Courts have held that there was no contractual relationship between the Respondent's father Babun Appuhamy, or the Respondents and the Appellant, and did not regard අ1 and ඒ1 to transfer any rights in relation to the land in relation in view of section 2 of the Prevention of Frauds Ordinance No 7 of 1840, as amended, the land in dispute is State land, and accordingly, there exists a nexus between the State and the Respondents since their father was put into possession of the land by the State, on the basis that he would be issued with a permit, in terms of the Land Development Ordinance. Although eventually, Babun Appuhamy was not granted a permit, he may be considered to be a permit-holder, in terms of section 2 of the Land Development Ordinance which defines the term "permit-holder" as "any person to whom a permit has been issued and includes a person who is in occupation of any land alienated to him on a permit although no permit had actually been issued to him". Even though it cannot be conclusively said that the Respondents are entitled to succeed to the title of Babun Appuhamy, it is abundantly clear to this Court that title to the land in dispute has devolved on one of the children of Babun Appuhamy, on the basis of the Third Schedule to the Land Development Ordinance, and that the Respondents' possession of the land is founded upon this entitlement. There is no dispute between the children of Babun Appuhamy as to who the rightful heir of the land in dispute is; in fact, it is in evidence that the other children of Babun Appuhamy are in constant communication with the Respondents regarding the land and the harvesting thereon. Thus, it can be construed that the Respondents possession is with the leave and licence of the rightful successor to the holding in terms of the Land Development Ordinance. Within a factual matrix such as this, I am of the opinion that the circumstances of the case warrant a presumption of title in favour of the Respondents.

I now turn to the question of 'unlawful dispossession'. The Respondents state that they were dispossessed by order of the Tissamaharama Primary Court in case No. 36365 on the 27th of November 1997. Ordinarily, this would not amount to an 'unlawful dispossession'. However, the order of the Primary Court has been obtained by fraud, and in highly suspicious circumstances. The learned Magistrate exercising the powers of the Primary Court has been misled, and it is evident that the process of law has been abused. It is perplexing, indeed, it is revealing, that a document relied upon in the Primary Court proceeding by the Appellant, which was a Grama Niladhari report, has not been adduced as evidence in the District Court.

The Appellant has relied upon documents marked අ1 and ඓ1 to prove his contention that Babun Appuhamy transferred his legal entitlement to the land in dispute to the Appellant in 1974. The document marked as අ1 is dated 21st August 1974 which is purportedly signed by Babun Appuhamy, allegedly transferring his entitlement to the land in dispute to the Appellant, for the purpose of building a house on the said land. It is not signed by any witness. This document was produced by the Appellants in Tissamaharama Primary Court case No. 36365. A similar document marked ඓ1 is dated 8th April 1974, which is purportedly signed by Babun Appuhamy, also allegedly transferring his entitlement to the land in dispute to the Appellant. There is no reference to the purpose of building a house. It has been signed by a

witness, one Chandrasena Wickremaarachchi. This document, which is dated prior to ඇ1, was not produced in the Primary Court. Both documents pertain to the same land, and both documents purport to transfer Babun Appuhamy's legal entitlement to the land in dispute to the Appellant. Both documents refer to the Appellant as a relative of Babun Appuhamy, although it clearly transpires in evidence that this is not so. Thus it is clear that the circumstances surrounding these two documents are highly mysterious, and reeks of fraud. Furthermore, and most importantly, the documents marked ඇ1 and ඒ1 have absolutely no force or avail in law as they contravene section 2 of the Prevention of Frauds Ordinance which states as follows:-

> "No sale, purchase, transfer, assignment, or mortgage of land or other immovable property, and no promise, bargain, contract, or agreement for effecting any such object, or for establishing any security, interest, or incumbrance affecting land or other immovable property (other than a lease at will, or for any period not exceeding one month), nor any contract or agreement for the future sale or purchase of any land or other immovable property, and no notice, given under the provisions of the Thesawalamai Pre-emption Ordinance, of an intention or proposal to sell any undivided share or interest in land held in joint or common ownership, shall be of force or avail in law unless the same shall be in writing and signed by the party making the same, or by some person lawfully authorized by him or her in the presence of a licensed notary public and two or more witnesses present at the same time, and unless the execution of such writing, deed, or instrument be duly attested by such notary and witnesses."

None of the documents have been signed in the presence of a licensed notary public, nor in the presence of two or more witnesses, and has not been attested by such notary and attesting witnesses. Thus documents marked ඇ1 and ඒ1 contravene the Prevention of Frauds Ordinance. Thus, the Appellant cannot rely on the documents to establish his title to the land in dispute. Nor would section 17 of the Prevention of Frauds Ordinance apply in this situation where the Government is not a party to any transaction coming within section 2 of the said Ordinance. The Appellant cannot rely on any prescriptive rights as he has not adduced evidence of long possession that is necessary to prescribe against the State by *longisimi temporis praescriptio,* wherein the Appellant would have to prove that he was in adverse possession of the land in dispute for one third of a century. Thus, wisely, the Appellant has not relied on the ground of prescription.

In Roman-Dutch law, as in Roman Law, the remedy *restitutio in integrum* is a remedy which empowers a court to set aside a contract or an obligation (including a judgment in either a civil or criminal case) on grounds *inter alia* of force or duress, fraud, minority, inexcusable mistake or where some other judicially acceptable equitable cause existed, and to restore the *status quo ante.* The order of the Tissamaharama Primary Court in case No. 36365 has been obtained *inter alia* on the basis of fraudulent documents and amounts to an abuse of the process of law. This would be a fitting case to set aside the order of the Primary Court Judge and to restore the *status quo ante* in exercise of the powers of the Supreme Court, to grant in appropriate cases relief by way of *restitutio in integrum.*

In these circumstances, I hold that this is a case in which a presumption of title arises in favour of the Respondents, and the Appellant has not succeeded in rebutting the presumption of title in favour of the Respondents, wherein they possess the land in reliance of their rights of succession to the title of Babun

Appuhamy, which has devolved on his heirs in terms of the Third Schedule to the Land Development Ordinance.

The Question of Prescription of the Right of Action

The third issue for consideration as set out in question (d) on which leave to appeal was granted by this Court is whether the Respondents' action in the District Court was prescribed in terms of section 4 of the Prescription Ordinance No. 22 of 1871, as amended.

The Appellant has submitted that as the learned District Judge has considered this case to be a possessory action, section 4 of the Prescription Ordinance would apply and that in terms of section 4 of the Prescription Ordinance a possessory action has to be instituted within one year of dispossession. However, as stated previously in this judgment, the present action is not a possessory action, and thus section 4 of the Prescription Ordinance does not have any application.

The Evidence of the Witness who Prepared වි1

The fourth issue for consideration in terms of question (h) on which leave to appeal was granted by this Court, was whether the Civil Appellate High Court as well as the learned trial Judge err in law when they totally disregarded the evidence of the witness who prepared වි1 and also signed as a witness. The Appellant's position is that the learned District Court Judge and the learned Judges of the Civil Appellate High Court have not considered the evidence of Chandrasena Wickramaarachchi, who was the attesting witness to the document marked as වි1. The evidence of the said witness *inter alia* was as follows:-

> "වි1 දරණ ලියුම ලිව්වේ මම. එහි තිබෙන අත් අකරු මගේ. මේ ලිපිය මේ විදියට ලියන්න කියලා බබුන් අප්පුහාමි මට කිව්වා. එහි සඳහන් කරුණු කිව්වේ ඔහු. ඒ අනුව මම ලිව්වා මම ඉස්කෝලේ යන කාලේ, මේ නඩුවට අදාල ඉඩම බුක්ති විඳින්නේ චිත්තිකරු. මේ ලියුමට පස්සේ ඔහු බුක්ති විඳින්නේ. වි1 ලේඛණය ලිව්වට පසුව මේ ඉඩම බුක්ති විඳින්නේ චිත්තිකරු. අද වනතුරු ඔහු එය බුක්ති විඳිනවා." *(vide page 174 of the brief)*

I have perused the evidence of Chandrasena Wickramaarachchi, who was the attesting witness to the document marked වි1. The Appellant's contention is based on the erroneous premise that the *factum* of possession is material to the determination of the present case. The onus of proof was on the Appellant to sufficiently displace the presumption of title that has arisen in favour of the Respondents, and the evidence of Chandrasena Wickremaarachchi falls far short of what is required to rebut such a presumption. The document marked වි1 contravenes the provisions of the Prevention of Frauds Ordinance, and the evidence of this witness, who fared miserably under cross-examination by learned Counsel for the Respondents, and admitted that he did not know who possessed the disputed land since 1974, was considered most unreliable by the learned District Judge.

Accordingly, I hold that the learned District Court Judge and the learned Judges of the Civil Appellate High Court have not disregarded the evidence of Chandrasena Wickremaarachchi and in any event, his evidence was irrelevant to displace the presumption of title that had arisen in favour of the Respondents.

Conclusion

In these circumstances, I am of the opinion that the Respondents should be restored to possession on the basis that the action filed by them was an action for declaration of title analogous to a *rei vindicatio* action, wherein the burden on the Respondents was to show that they held the land in dispute as the heirs of Babun Appuhamy who was a permit-holder in terms of the Land Development Ordinance, and to which they hoped to succeed. I hold that the Appellant has failed to rebut this presumption of title that arises in these circumstances. I hold that judgment should be entered in favour of the Respondents as prayed for in prayers (අ), (ආ)), (ඇ) and (ඇඇ) of the plaint dated 16th January 1997. The impugned judgment of the Civil Appellate High Court dated 12th November 2009, which affirmed the judgment of the District Court dated 17th July 2003, by which the Respondents were granted relief in terms of prayer (අ) and (ඇඇ), is accordingly varied.

In all the circumstances of this case, the Respondents shall be entitled to costs in a sum of Rs. 50,000.

JUDGE OF THE SUPREME COURT

SISIRA J. DE ABREW, J,

I agree.

JUDGE OF THE SUPREME COURT

SARATH DE ABREW, J,

I agree.

JUDGE OF THE SUPREME COURT