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

In the matter of an appeal under Section 754(1) of the Civil Procedure Code read with the provisions of the High Court of the Provinces (Special Provisions) Act No. 19 of 1990 as amended by the Act No. 54 of 2006.

1. M. A. Sugathadasa,
   (deceased)

1A. Chandra Jayaweera,

2. Jayaweera Arachchige Chandra Podimenike
   All of Barandawatta,
   Henduwawa.
   Keppetiwalana

Plaintiffs

S.C. Appeal No.144/2016

SC/HCCA/LA Application No. .574/2014

NWP/HCCA/KUR/34/2009(F)

D.C. Kuliyapitiya, Case No. 13645/L

Vs.

Abesinghe Mudiyanselage Ranjith Gamini Abeysinghe
Athuruwala
Dambadeniya

Defendant

And

1A. Chandra Jayaweera,

2. Jayaweera Arachchige Chandra Podimenike

All of Barandawatta,
Henduwawa.
Keppetiwalana

Plaintiff-Appellants

Vs.

Abesinghe Mudiyanselage Ranjith Gamini Abeysinghe
Athuruwala
Dambadeniya

Defendant-Respondent

AND NOW BETWEEN

1. Abesinghe Mudiyanselage Ranjith Gamini Abeysinghe
(Now deceased)
Athuruwala
Dambadeniya
Defendant-Respondent-Petitioner.

1A. Edirisinghe Mudiyanselage Sumana Mallika

1B. Abeysinghe Mudiyanselage Wimantha Indeewara Abeysinghe

1C. Kasun Thisara Abeysinghe

1D. Isuri Palika Abeysinghe

Substituted-Defendant-Respondent-Appellants

Vs.

1A. Chandra Jayaweera,

2. Jayaweera Arachchige Chandra Podimenike

All of Barandawatta,
Henduwawa.
Keppetiwalana
Plaintiff-Appellant-Respondents

BEFORE : L.T.B. DEHIDENIYA, J.
S. THURAIRAJA, PC, J.
ACHALA WENGAPPULI, J.

COUNSEL : Amarasiri Panditharatne with Nimantha Satharasinghe for the Defendant-Respondent-Appellant
Manohara de Silva, PC with Hirosha Munasinghe for the Plaintiff-Appellant-Respondents.

ARGUED ON : 27th January, 2021

DECIDED ON : 05th November,2021

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ACHALA WENGAPPULI, J.

The 1st Plaintiff-Appellant-Respondent (later substituted by the 1A Plaintiff-Appellant-Respondent) and the 2nd Plaintiff-Appellant-Respondent, instituted a *Rei Vindicatio* action before the District Court of *Kuliyapitiya* in May 2003, against the Defendant-Respondent-Appellant (later substituted by 1A-D Defendant-Respondent-Appellants; hereinafter referred to as the "Defendant"), seeking a declaration of title to the land and to the building covering an extent of

747 square feet, (described as a *Kada Kamaraya*) standing thereon, morefully described in the schedules A and B of the plaint, and also the eviction of the Defendant therefrom. The Defendant, in his answer, seeking the dismissal of the plaint, had also laid down a claim of acquisition of prescriptive title to the said building and to the land on which it stood.

Therefore, dispute that had been presented by the parties for determination of the trial Court could be narrowed down to the question as to who has the right to own the said '*Kada Kamaraya*' and the parcel of land on which it stands, situated within a land in extent of one acre and 29 perches, described in schedule "ඇ" of the plaint.

The Plaintiffs have claimed that they have the paper title to the land described in schedule "ඇ" and produced the relevant deeds before the trial Court. On 17.05.1978, the 1st Plaintiff's father had leased out the said land in its entirety, including the building standing on it to one *Karunatilleke* for a period of 15 years. It is alleged by the Plaintiffs in their plaint that the Defendant had entered the said building illegally within the one-year period commencing from 17.05.1978, during which they have lost possession of their land temporarily. The lessee did not vacate from the land and the building at the expiry of the 15-year lease period, and had to be evicted by the fiscal, upon a writ of execution issued by Court in case No. 10741/L, an action instituted by the Plaintiffs seeking declaration of title and eviction of the said lessee. The fiscal, in execution of the writ, had placed the Plaintiffs back into possession of their land and only to the section of the building occupied by the overholding lessee, leaving out the remaining part of it, apparently on the claim that the Defendant's grandfather *Balin Appuhamy* had constructed the said *Kada Kamaraya*.

The Plaintiffs have thereafter instituted action on 21.08.2001, in case No. 13005/L and thereby sought to evict the Defendant from the said *Kada Kamaraya*, but had withdrawn it on 01.08.2002, reserving their right to re-institute proceedings. The Plaintiffs have thereafter instituted the instant action on 20.02.2003, seeking declaration of title to the land inclusive of the *Kada Kamaraya* and eviction of the Defendant.

The Defendant, in support of his claim of acquisition of prescriptive title to the *Kada Kamaraya* he possessed, asserted uninterrupted and long adverse possession. He also had taken up the position that the present dispute is *Res Judicata* among the parties, relying upon the dismissal of the earlier case No. 13005/L filed against him.

At the commencement of the trial before the District Court, the Defendant had suggested two issues (Nos. 12 and 13) particularly to the effect that whether he had conferred with title to the disputed "parcel of land" *(idam kebella)* upon the deed No. 12182 of 08.09.2003 (marked as "P14") and, whether he, along with *Balin Appuhamy,* had possessed the said *kada kamaraya* and the parcel of land covered under it for over 10 years, prior to the institution of the instant action. At a subsequent stage of the proceedings, the Defendant had suggested yet another issue (No. 17), whether the pleadings and the judgment of case No. 13005/L, are *Res Judicata* among the parties.

The trial Court, having considered the material presented before it, decided issue No. 17 in favour of the Defendant and dismissed the Plaintiff's action.

Being aggrieved by the said dismissal, the Plaintiffs have preferred an appeal to the High Court of Civil Appeal in appeal No.

NWP/HCCA/Kur/34/2009(F). The High Court of Civil Appeal, by its judgment on 28.04.2014 answered the said issue No. 17 as "not proved". The appellate Court, having concluded that the Defendant failed to establish that he had acquired prescriptive title to the *Kada Kamaraya* and to the land on which it stands, proceeded to answer issue Nos. 12 and 13 also as "not proved" and allowed the appeal of the Plaintiffs.

With the pronouncement of the judgment of the High Court of Civil Appeal, the Defendant thereafter sought Leave to Appeal from this Court on several questions of law that had been formulated and inserted in paragraph 8 of his petition.

This Court, after hearing Counsel on 12.07.2016, granted leave only on the question of law, "did the Provincial High Court of Civil Appeal err in failing to consider the prescriptive title of the Defendant and his grandfather *Balin Appuhamy*? "

At that stage, learned President's Counsel for the Respondent, raised the following consequential issues of law.

1. Is the Petitioner entitled to challenge the issue of prescription as he has failed to appeal against the Judgement of the District Court with regard to the issues raised by the Defendant in respect of prescription?

2. The Defendant is also not entitled to raise on the question of prescription in these proceedings as he has failed to challenge the issue pertaining to prescription in terms of section 772 of the Civil Procedure Code?

3. In any event, the Defendant is not entitled to claim prescription as much as his claim in the District Court was only with regard to a room of a building and not with regard to a land?

In support of the appeal, learned Counsel for the Defendant contended before this Court that the High Court of Civil Appeal misled itself and thereupon had fallen into error when it answered issue No. 13, raised on the acquisition of prescriptive title, as "not proved" by attributing its reason, to his failure to present the deed P14, on which he had relied on in establishing the said issue. Learned Counsel also pointed out that the Defendant, in his answer, had taken up the position that *Balin Appuhamy* was in occupation of the disputed *Kada Kamaraya* for well over ten years prior to the institution of the instant action, and, in addition, presented a substantial body of evidence before the trial Court, which clearly indicate the position that since coming into possession of the said *Kada Kamaraya*, it was unaccompanied by any payment of rent or produce, or performance of service or duty or any other act by him from which an acknowledgement of a right existing in the Plaintiff could be inferred with.

In support of this contention, learned Counsel relied on the statement made by the Plaintiffs in their plaint that the Defendant came into "illegal" occupation of the disputed building prior to May 1978 and was in possession of the said *Kada Kamaraya* since that point of time onwards denying the title of the Plaintiffs over it. He added that the character of the Defendant, when coming into occupation of the said

building was not of a licensee, who had entered the premises with leave and license of the Plaintiffs and thereby acknowledging the rights of the Plaintiffs over that premises, but as a trespasser, who did not recognize any property rights of them over the said premises.

Learned Counsel for the Defendant sought to strengthen his argument further by adverting to the failure of the Plaintiffs to take steps to evict the Defendant along with the overholding lessee on 09.06.2001, in spite of the fact that he too was in the occupation of the disputed building at the time of the execution of the writ. Since then, and until the institution of the instant action in 2003, the Defendant was in possession of the said building and thus uninterruptedly maintained his title, adverse to or independent of that of the Plaintiffs, for well over two decades and therefore clearly acquired prescriptive right over the disputed building. It was also contended by the Defendant, that the trial Court, having considered the evidence and in dismissing the Plaintiffs' action, had arrived at a conclusive finding of fact that the Defendant had possessed and continued to be in possession of the disputed premises over a long period.

Learned President's Counsel for the Plaintiffs, in resisting the appeal of the Defendant, submitted that the trial Court, having arrived at a finding that the Defendant was in possession for over long period of time either "legally or illegally"; nonetheless, had proceeded to answer the issue Nos. 12 and 13, suggested by the Defendant over his claim of acquisition of prescriptive title, as "does not arise for consideration" since the matter is *Res Judicata* among parties. Learned President's Counsel highlighted the fact that the Defendant did not prefer an appeal against the said specific findings on those pivotal issues nor has he made any application under section 722 of the Civil

Procedure Code contesting them, although the law had specifically provided for such a course of action. His contention, therefore, is that the Defendant cannot reagitate the issue of prescription before this Court.

I shall now proceed to consider these submissions against the backdrop of the evidence that had been placed before the trial Court and the reasoning contained in the judgments of the Courts below.

It is evident from the judgement of the District Court, in dismissing the Plaintiff's action, it was of the view that an identical cause of action had already been decided by that Court, in case No. 10741/L (referring to the first case instituted by the Plaintiffs against the Defendant for his eviction) and its appeal was pending determination before the Court of Appeal. Therefore, the trial Court decided that the matter is *Res Judicata* among the parties. The reasoning of the trial Court, adopted in arriving at that conclusion, also indicate that it considered the failure of the Plaintiff to evict the Defendant along with the overholding lessee from the building at the time of executing the writ, despite the fact that the Court order was for the entirety of the land, as a factor indicative of the renunciation of their rights over that part of the building by the Plaintiffs.

In exercising its appellate jurisdiction, the High Court of Civil Appeal has held that the trial Court was in error, when it answered the issue No. 17 that the matter is *Res Judicata* among parties. The High Court had thereupon proceeded to allow the Plaintiffs' appeal by holding that the "*defendant has not also proved what is stated in issue No. 13, the alleged prescriptive title of Balin Appuhamy*" and the deed of gift P14, in relation to issue No. 12.

The only question of law, upon which this Court had granted leave to the Defendant to proceed with his appeal against the judgment of the High Court of Civil Appeal, read "*Did the Provincial High Court of Civil Appeal err in failing to consider the prescriptive title of the Defendant and his grandfather Balin Appuhamy*?". In view of the limited scope of the question of law on which leave was granted, learned Counsel had understandably confined his challenge to the impugned judgment of the High Court of Civil Appeal, only on the basis that it had failed to consider the evidence available on the acquisition of prescriptive title by *Balin Appuhamy.*

The quotation from the judgment of the trial Court, inserted in the preceding paragraph of this judgment, clearly indicate that the High Court of Civil Appeal, before arriving at the said impugned conclusion, did in fact consider the issue of acquisition of prescriptive title after evaluation of the evidence presented before the trial Court. The appellate Court also had added that "… *the Defendant has not been able to show any right or title that would allow him to remain in that property …*".

One of the consequential questions of law, as formulated by the learned President's Counsel, too is connected to the issue of acquisition of prescriptive title as it has been formulated to read "*in any event, the Defendant is not entitled to claim prescription as much as his claim in the District Court was only with regard to a room of a building and not with regard to a land?".*

In view of the scope of the area covered under the above questions of law, it is necessary for this Court to consider same within that defined area, in the light of the applicable principles of law and in reference to the evidence that had been presented before the trial Court.

The dispute among the Plaintiffs and the Defendant, as already noted, is the right to own the *Kada Kamaraya*, and the portion of land covered under that building. The 1st Plaintiff claims paper title to the said land, over which the said building was erected on, based upon the deed of transfer No. 18705 of 14.09.1975, executed in his favour by his father *Mallawa Arachchige Kiri Banda,* the original owner. The said land is depicted in Plan No. 65A/L.R.C. Ku 15/Ku. 14.

The 1st Plaintiff had leased out the said land with its building to one *Wickramasinghe Arachchilage Piyadasa Karunatilleke* on 17.05.1978, for a period of 15 years by the execution of an Indenture of Lease No. 20122. The lessee was accordingly permitted to occupy the building standing on it and to enjoy the fruits of the land. During this period, the lessee *Karunatilleke* operated a metal crusher and a sawmill on that land and had his office located in that building. At the expiration of the lease period of 15 years, the 1st Plaintiff informed his lessee to handover vacant possession. Since the lessee did not vacate, the 1st Plaintiff instituted action in case No. 10741/L before the District Court of *Kuliyapitiya*, in seeking declaration of his title to the said land and the eviction of the said overholding lessee. The trial Court held in favour of the 1st Plaintiff and a writ of execution was eventually issued. Pending determination of the appeal preferred by the said lessee challenging his eviction, the trial Court issued a writ of execution. Neither the present Defendant nor his grandfather *Balin Appuhamy* were parties to that litigation.

The fiscal of the Court, in order to execute the writ issued in favour of the 1st Plaintiff, visited the land on 18.10.2000. During his visit, it was noted down by the fiscal that the building standing on it had two "කඩ කාමර" adjacent to each other and one *Balin Appuhamy* is in

possession of one, while the other was possessed by the lessee *Karunatilleke,* the defendant in case No. 10741/L. Upon enquiry, the fiscal was informed by the Defendant that the building was erected by *Balin Appuhamy,* who had occupied it since for over "50" years. The Defendant before the trial Court in the instant action is *Balin Appuhamy's* grandson, who continued to be in possession of that part of the building after *Balin Appuhamy's* demise. The 1st Plaintiff, when enquired by the fiscal claimed that his father too had shared the construction cost of that building. The Plaintiff's claim of sharing the construction cost of the *Kada Kamaraya* was not disputed by the Defendant at any point of time.

The fiscal, in executing the writ of Court, had thereafter placed the 1st Plaintiff in possession of the land on 09.06.2001, and only on the part of the building occupied by *Karunatilleke* leaving out the *Kada Kamaraya* in the Defendant's possession, after instructing him to make a claim before the trial Court within two weeks. The witness who produced the certified copy of the fiscal report in case No. 10741/L, marked as "X" before the trial Court, said that the Court record indicate that the Defendant had tendered an affidavit presenting a claim. But the Defendant failed to produce a copy of his affidavit tendered to Court on the direction of the fiscal, nor did he elicited the nature of the claim he had presented in the said affidavit, in that case or the decision made by that Court on it, before the trial Court.

There is oral evidence led on behalf of the Defendant through a retired Grama Niladhari, who had served the area from 1972 to 1978, and could recall that *Balin Appuhamy* had ran a grocery in that building during his tenure of office.

Clearly it is with the above evidence, the Defendant had sought to counter the paper title of the 1st Plaintiff to the disputed building under section 3 of the Prescription Ordinance. The instant action, being a *Rei Vindiactio* action, both the trial Court as well as the High Court of Civil Appeal have accepted that the Plaintiffs have proved their paper title to the land. Therefore, it is for the Defendant to establish that the action of the Plaintiffs is prescribed as he had acquired prescriptive title, a title adverse to and independent of the paper title of the Plaintiffs. In doing so, not only must he establish that the point of time he had commenced such possession, but also he must furnish proof of undisturbed and uninterrupted possession of that property for over ten years. The applicable principle of law had been succinctly stated by Gratiaen J in the judgment of ***Chelliah v. Wijenathan (1951)*** 54 NLR 337. His Lordship states (at p, 342), "*where a party invokes the provisions of Section 3 of the Prescription Ordinance in order to defeat the ownership of an adverse claimant to immovable property, the burden of proof rests fairly and squarely on him to establish a starting point for his or her acquisition of prescriptive rights*." G.P.S. de Silva CJ in ***Sirajudeen v Abbas*** (1994) 2 Sri L.R. 365, had re-emphasised that statement of law.

The Defendant, although sought to 'tack' the period his grandfather had possessed the building to the period of his own, and thereby strived to establish that they have held that property adverse to or independent to the paper title of the Plaintiff for over the required ten-year period, but was conspicuously silent in his evidence on exactly when did *Balin Appuhamy* commence his adverse possession against the Plaintiffs.

At the hearing before this Court, learned Counsel for the Defendant referred to paragraph 20 of the plaint, where it was stated that the Defendant had entered the premises "illegally" during the period the Plaintiffs lost possession from 17.05.1978, and sought to pin the commencement of his claim of prescription to that date. This contention does not take the Defendant's claim any further, as it is not an acceptable substitute for the total absence of any evidence as to the starting point of his claim of prescription, presented before the trial Court.

Why the reference in a plaint, in this instance, could not be taken as the starting point of the prescriptive period, in the absence of any specific evidence to that effect presented before the trial Court, could be explained further. This is primarily due to several reasons.

The averment in the plaint, even if it is taken as an item of 'evidence' on the point as the learned Counsel submits, is clearly an obscure statement as to its meaning. It could well be a due to an instance of poor draftsmanship as the said averment reads " **වර්ෂ 1978.05.17 දින සිට (අ) (ආ) උපලේඛනයන්හි ඉඩම් කොටස් වල භුක්තිය සහ හිමිකම් අවුරුදු එකක් පමණ මෙම පැමිනිලිකරුට නොලැබී තිබීම මත මෙම නඩුවේ විත්තිකරු බදු ඉඩමේ 1වැනි උපලේඛණයේ ඉඩමෙහි පිහිටි ගොඩනැගිල්ලේ නීති විරෝධීව ඇතුල් වී ඇත.**". It speaks of the fact that the 1st Plaintiff had lost the possession of the building for a period of one year from 17.05.1978. This is the day on which the 1st Plaintiff had entered into a lease agreement with *Karunatilleke* for a period of fifteen years. The lease was in respect of the land in its entirety including the only building standing on it. It is highly improbable that the said lessee would have entered into such an agreement with the father of the 1st Plaintiff, if the Defendant was already in occupation of the building standing on that land. There is clear evidence that the lessee had his

office to the sawmill in that building. The statement that the Plaintiff had lost possession for over one year does not logically fit in anywhere as the lessee is entitled to possess the land along with the building, during the lease period. In fact, it is said in evidence that the lessee was in possession of the leased-out building and the land for over 20 years, until the fiscal had placed the 1st Plaintiff back in possession, in June 2001. This statement, therefore, does not indicate exactly when *Balin Appuhamy* came into possession. It merely states he had come to possess when the Plaintiffs have lost possession of their land temporarily.

If this is the correct position as asserted by the Defendant, then the only building standing on the land, must have been the one put up by *Balin Appuhamy* who possessed it since that point of time as evident from the contents of the fiscal report, marked as 'X'. That proposition creates another ambiguity as to the building the father of the 1st Plaintiff had leased out on 17.05.1978 to his lessee. If the only building was already in possession of *Balin Appuhamy,* then the lessee would have been placed in possession of 'another' building by the 1st Plaintiff's father on his land. But the plan of the land, to which the 1st Plaintiff had claimed paper title, led in evidence indicates there is only one building standing on it.

The contention of the learned Counsel for the Defendant that *Balin Appuhamy* was in possession of the *Kada Kamaraya* prior to 1978 not as a licensee, who had entered the premises with leave and license of the Plaintiffs and thereby acknowledging the rights of the Plaintiffs over that premises, but as a trespasser who did not recognize any property rights of them over the said premises, does not fit in with the evidence presented before the trial Court. If *Balin Appuhamy* was already in possession of the only building standing on that land as a

trespasser prior to 1978, then why did he allow the lessee, who acknowledged the title of Plaintiffs, to have his office in the same building?

All these factors favour an inference that *Balin Appuhamy's* construction of the *Kada Kamaraya,* and occupying it since its construction, is clearly a subsequent event to the leasing out the land described in schedule A of the plaint on 17.05.1978. However, despite the fact it was the Defendant's burden to establish the starting point of his adverse possession, absolutely no evidence was produced by him as to when did *Balin Appuhamy* come to occupy same. It is also relevant to note that the incoherent statement from the plaint was not put to the 2nd Plaintiff who gave evidence before the trial Court, by the Defendant, during her cross examination.

Once the issues are raised and accepted by Court, the parties must present evidence in relation to such issues, in assisting the trial Court to reach a determination in respect of each of them. The District Court will have its jurisdiction circumscribed only to determine the dispute, as presented before it by the parties through the issues and on the material presented before it, per ***Pathmawathie v Jayasekare*** (1997) 1 Sri L.R. 248. This Court, in ***Hanaffi v Nallamma*** (1998) 1 Sri L.R. 73 stated at p. 77, "*since the case is not tried on the pleadings, once issues are raised and accepted by the court the pleadings recede to the background. The Court of Appeal was in error in harking back to the pleadings …*".

The Plaintiffs too had adopted to a similar strategy before the trial Court to fill out a significant gap in their case in challenging the claim of acquisition of prescriptive title, by introducing the position that *Balin Appuhamy* came into possess that part of the building due to actions of

the lessee, who had allowed him to occupy the building during the lease period, only through their written submissions tendered before that Court. Even if there was evidence to that effect, it will not fill the gap left by the Defendant in his failure to establish a starting point as there too was no mention of a starting point to the adverse possession.

The only evidence presented before the trial Court, touching on the circumstances under which *Balin Appuhamy* came to possess the part of the building, is from the said fiscal's report, in which the Court officer had noted down the explanation of the 1st Plaintiff as well as of the Defendant for not executing the writ on that part of the building. The Defendant relied on a particular segment of the fiscal report by marking it as V3a. The contents of this segment will be considered in greater detail at a later stage of this judgment. For the purpose of consideration of the area presently under review, it is relevant to note that both *Balin Appuhamy* and the 1st Plaintiff's father were dead when the 1st Plaintiff instituted the instant action. Owing to that reason there is no direct evidence presented through the witnesses who had personal knowledge of the circumstances under which the Defendant came into possess the *Kada Kamaraya* standing on the 1st Plaintiff's land. The contents of the fiscal report, being a contemporaneous official record as to the respective positions taken up by the parties, although based on hearsay material, were admitted as evidence in the trial before the Court and not disputed by either party as to its contents or to its reliability.

In that segment of the report V3a, it is indicated that the Defendant had claimed before the fiscal that his grandfather *Balin Appuhamy,* having constructed the building, was in its possession for over "50" years. Once more, the Defendant had not referred to any

starting point or explained exactly when and how *Balin Appuhamy* came into possess that part of the building, in answering the fiscal's query.

Clearly there are ample evidence before the trial Court, that the Defendant and his predecessor were in continuous possession of the part of the building they allegedly occupied since late-seventies. The *Grama Niladhari Somapala*, stated to Court that *Balin Appuhamy* had operated a grocery store in the disputed premises and have distributed food provisions under the Government sponsored food stamps scheme. Having called the said witness, the Defendant did not elicit the time of commencement of that business, the capacity in which *Balin Appuhamy* operated that grocery store or whether there any official records as to its ownership.

Considering the available evidence, I am of the view that the Defendant, in his attempt to discharge the evidentiary burden as to the starting point of his adverse possession, has undoubtedly failed in that task, and cannot circumvent his failure by placing reliance on an averment in the plaint as the contents of the pleadings could not be taken as 'evidence' presented before Court. The failure of the Defendant to present evidence before the trial Court as to the starting point at which he had commenced his adverse possession is therefore fatal to his case, leaving his claim restricted to an instance of mere possession of the *Kada Kamaraya* for over a period of ten years, with no specific point of commencement of any adverse possession.

In addition to the proof of the starting point of the period of prescription, it was also incumbent upon the Defendant to establish that his possession for over ten years by a title adverse to or independent to that of the Plaintiff, as the section 3 of the Prescription Ordinance

imposes such a requirement, in proof of a claim of acquisition of prescriptive title.

It had been emphasized by the appellate Courts that, in a claim of acquisition of a prescriptive title under section 3 of the Prescription Ordinance, mode of proving such acquisition is by way of presenting cogent evidence with specific reference as to the nature of possession. The applicable law had clearly been laid down by this Court in ***Sirajudeen v Abbas***(supra) where G.P.S. de Silva C.J., citing *Walter Pereira's* Laws of Ceylon, 2nd Edition, page 396, concurred with the learned author in stating that "*as regards the mode of proof of prescriptive possession, mere general statements of witnesses that the plaintiff possessed the land in dispute for a number of years exceeding the prescriptive period are not evidence of the uninterrupted and adverse possession necessary to support a title by prescription*" and, citing the judgment of ***Peynis v. Pedro*** 3 SCC 125, added that "*it is necessary that the witnesses should speak to specific facts, and the question of possession has to be decided thereupon by Court*".

The only reliable evidence pointing to the nature of the possession of over that part of the building could be found contained in the said fiscal report, marked 'V3a' by the Defendant himself and his oral testimony on that incident. It indicates that when the fiscal had enquired from the Plaintiff as well as the Defendant as to the basis of the latter's possession of *Kada Kamaraya*, they have stated their respective positions to the Court official. The positions taken up by the two contesting parties at that point of time are the only available evidence in relation to the circumstances under which *Balin Appuhamy* came to possess the *Kada Kamaraya* and nature of the relationship he has had with the father

of the 1st Plaintiff, the original owner of the land, long before the instant action was instituted.

The issuance of the writ of execution by the Court, was on the basis that the building standing on the land is in the possession of the overholding lessee *Karunatilleke,* in its entirety. The fiscal, during his first visit to the land had noted that the present Defendant too was in occupation of the building, but his possession is limited only to a part of the building. Anticipating a legal issue in execution of the writ in its existing form, the Court officer had thereafter sought further directions from trial Court, reporting back his observations, based on what the parties have claimed before him. It is in this context; that he had enquired from the Plaintiff and the present Defendant as to the reasons for the latter's possession of a part of the building.

The Defendant claimed that his grandfather *Balin Appuhamy* had constructed the building and occupied it for over 50 years, while the 1st Plaintiff asserted that his father too had financially contributed to the construction cost of the building. The Defendant, in his evidence before the trial Court referred to the enquiry made by the fiscal in the presence of *Sugathadasa,* the 1st Plaintiff. He stated that the 1st Plaintiff came along with the fiscal in executing the writ. When questioned by the fiscal, the 1st Plaintiff admitted that the building is possessed for over "50" years by *Balin Appuhamy.* He also added that his father had shared the construction cost of the *Kada Kamaraya* with *Balin Appuhamy.* The evidence of the Defendant varied with the contemporaneous record of the fiscal only as to the number of years of possession. It is undisputed that the other part of the building was in the possession of the overholding lessee.

It is important to note from that evidence that there was some form of agreement or an understanding existed between the Plaintiff's father and the Defendant's grandfather over the cost of construction of the building. Both parties admittedly have contributed towards the construction cost of the building that had been put up on the 1st Plaintiff's land. Whether the construction was in relation only to an addition made to an already existing building or to a partition of an already constructed building is not clarified by the Defendant. But the fact that the Plaintiff's father's contribution towards construction cost of the *Kada Kamaraya* is clearly admitted by the Defendant.

This factual position is indicative of the Defendant conceding to the right of the 1st Plaintiff over his land and to the building constructed over it. The Defendant never claimed acquisition of prescriptive title over the land, when the Court official made enquiries in executing the writ. It is therefore clear that when *Balin Appuhamy* had accepted an unspecified part of the construction cost of *Kada Kamaraya* from the 1st Plaintiff's father, the former had conceded to the latter's rights over the land and the *Kada Kamaraya*. The Defendant, however, in his evidence said that his grandfather constructed the building on his own land, and thereby contradicted his own statement to the fiscal.

Therefore, it is clear that *Balin Appuhamy,* when moving into the building he claims to have constructed over the 1st Plaintiff's land, had conceded to the rights of the Plaintiffs and occupied it under the 1st Plaintiff's father and thus assumed a subordinate character in possessing the said *Kada Kamaraya*. If that in fact the case is then the Defendant must, in the alternative, establish at which point that he had emerged from that subordinate character, which could be referable to an

act of ouster for he must possess the property by a title adverse to or independent of that of the Plaintiffs.

In ***Seeman v David*** (2000) 3 Sri L.R. 23, at p.26, it had been stated that:

> "*it is well settled law that a person who entered property in a subordinate character cannot claim prescriptive rights till he changes his character by an overt act. He is not entitled to do so by forming a secret intention unaccompanied by an act of ouster. The proof of adverse possession is a condition precedent to the claim for prescriptive rights*".

It is the Defendant's evidence that his grandfather was in possession of that part of the building since its construction and only in November 1983, *Balin* had rented it out to one *Lionel Ekanayake* for a period of five years said to be on a notarially executed document, before the execution of the said deed of gift in his favour in the year 1987. However, in this instance too the Defendant did not produce any document in support of that claim, nor this position was ever put to the 2nd Plaintiff who gave evidence before the trial Court. The 2nd Plaintiff, in her evidence stated that she was unaware of the reason for exclusion of the Defendant from the execution of the writ. She also learnt that *Balin Appuhamy,* who was in possession of the building, had fraudulently executed a deed at a subsequent stage, a position the Defendant himself conceded to during his evidence.

It is significant to note that the Defendant never claimed that he did not pay any rent to the Plaintiffs during his evidence. This is an important aspect of the Defendant's case in establishing adverse possession. It was for him to establish that he never paid any rent from the day he came into possession, if he was to be considered as a trespasser as his Counsel contends. Strangely, the Defendant was totally silent on that important aspect during the trial, having had the opportunity to say so.

The Defendant also admitted that neither him nor *Balin Appuhamy* paid any assessment rates to the local authority in respect of the building at any point of time. On the other hand, the Plaintiffs had tendered proof of payment of assessment rates but did not clearly establish that they were paid in respect of the premises in dispute. The witness from the local authority however, denied the fact that the disputed premises was given the assessment number 146 as the Defendant suggested. Countering the claim of the Defendant, the Plaintiffs have led evidence in support of a complaint made by them to the Government Agent in September 1993, regarding illegal felling of trees by the lessee.

The Defendant, in support of his claim of prescription, relied heavily on the finding of the trial Court that he was in possession of the disputed building for a 'long period' of time. However, the trial Court, as pointed out by the learned President's Counsel, opted to answer the issue Nos. 12 and 13 raised on the point as "does not arise" since the matter is *Res Judicata* among the parties. At most, the findings of the trial Court only support the Defendant's case to the extent that he was in possession of the building for well over the requisite time period of ten years.

However, the mere fact of long possession does not qualify any person to claim prescriptive title under section 3 of the Prescription Ordinance. Having come into possession of an immovable property under a subordinate capacity, a person could subsequently acquire prescriptive title to an immovable property by changing the character of his possession by an overt act of ouster. It had already been laid down in ***Sirajudeen v Abbas*** (supra) that "*…what needs to be stressed is that the fact of occupation alone would not suffice to satisfy the provisions of section 3 of the Prescription Ordinance. One of the essential elements of the plea of prescriptive title as provided for in section 3 of the Prescription Ordinance is proof of possession by a title adverse to or independent of that of the claimant or plaintiff*". Sharvananda J, as he was then, stated in ***de Silva v Commissioner General of Inland Revenue (1973)*** 80 N.L.R. 292 stated at p.295 that;

> *"The principle of law is well established that a person who bases his title in adverse possession must show by clear and unequivocal evidence that his possession was hostile to the real owner and amounted to a denial of his title to the property claimed. In order to constitute adverse possession, the possession must be in denial of the title of the true owner. The acts of the person in possession should be irreconcilable with the rights of the true owner; the person in possession must claim to be so as of right as against the true owner."*

In ***Solomon Dias v William Singho & Others*** (2015) 1 Sri L.R. 277, Gooneratne J stated at 286 that "… *mere possession for a period of time cannot give rise to a plea of ouster*". The resultant position is there was no

acceptable evidence presented by the Defendant establishing an overt act of ouster.

In view of the contention advanced by the learned President's Counsel for the Plaintiffs that, if at all what *Balin Appuhamy* had conveyed to the Defendant is his 'right' over the possession of the building only and therefore he is not entitled to acquire prescriptive title to it as his claim in the trial Court was only regard to a room of a building and not with regard to a land it stood on, it is necessary to consider the question of law that had been formulated on that premise, at this stage of the judgment.

Learned Counsel for the Defendant sought to counter that contention by stating that in terms of section 3 of the Prescription Ordinance not only lands but immovable properties are also made subject to acquisition of rights by prescription.

It could well be that the learned President's Counsel relied on the dicta of Drieberg J in ***Samaranayake v. Mendoris (1928)*** 30 N L R 203, in presenting his contention on this point. In that judgment, Drieberg J, quoted the following passage from The Digest, XLVI., 1, 12 (Monroe's Translation) where the underlying law had been stated clearly. It stated "*where a man builds on another man's ground with his own materials, the building becomes the property of the person who owns the soil itself, and, if the' former knew that the ground was another's, he is regarded as having lost the ownership of the materials of his own free will; consequently, even if the building should be demolished, he has no good right of action to recover the materials*".

Sansoni J, as he was then, in ***Kangaratnam v Suppiah (1957)*** 61 NLR 282, following the dicta of Drieberg J in ***Samaranayake v. Mendoris*** (ibid), stated that "*it is clear beyond doubt that our law does not recognize the ownership of a building apart from the land on which it stands*". In this context, it is relevant to mention here that the changes in the contemporary socio-economic considerations have made inroads to the said common law principle, referred to in ***Samaranayake v. Mendoris,*** with the subsequent enactment of Condominium Property Act No. 12 of 1970, which was subsequently replaced by Apartment Ownership Law No. 22 of 1973 as amended.

It is correctly pointed out by the learned Counsel for the Defendant that section 3 of the Prescription Ordinance refers to "*lands or immovable property*" and the *Kada Kamaraya* containing of *747* square feet is clearly be taken as an item of immovable property. In his answer the Defendant had taken up the position in paragraph 3 that on the deed No. 12182 he has become the 'owner' of both the building as well as the land on which it stood. In paragraph 4, he states that he and his predecessor *Balin Appuhamy* had possessed the *Kada Kamaraya* for over 10 years prior to the institution of action, a position he maintained before the trial Court as well.

Learned Counsel for the Defendant, having referred to the inclusion of "immovable property" in section 3 of the Prescription Ordinance, did not elaborate any further in his submissions as to the failure to produce the said deed of gift before the trial Court, in support of his claim of acquisition of prescriptive title to the land.

Both parties have contributed towards the cost of the building, although the individual share of each party is not known. *Balin Appuhamy* had accepted the 1st Plaintiff's father's contribution both in monetary terms as well as by providing a plot of land to build on. The Defendant did not make a claim to the land in the presence of the fiscal. The evidence available before the trial Court clearly points to the reasonable inference that the Plaintiff's father, having allowed *Balin Appuhamy* to build over his land and by sharing the cost of construction, had thereby become a co-owner of the building.

The above factual position was revisited once more, in order to consider them in the light of another important principle of law. The factual position referred to above, seemed of an instance where the principle of *jus superficiarium* applies. In ***Ahamadu Natchia v Muhamadu Natchia (1905)*** 8 NLR 330, Layards CJ stated the applicable principle in *jus superficiarium* as follows:

> *"The ownership of a house apart from the site on which it stands is well known to our law. It is called the right of superficies. The jus superficiarium is the right which a person has to a building standing on another's ground. It cannot be termed full ownership, for no one can be legally full owner of a building who has not the ownership of the soil. It is the right to build on the soil and to hold and use the building so erected, until such time as the owner of the soil tenders the value of the building, if the amount to be paid has not been previously agreed upon. The right is acquired and lost like immovable property and is even presumed to be granted when the owner of the ground*

> *permits another to build thereupon. The right can be alienated, and consequently there can be no doubt of its passing to the heirs of the original owner of the right (Grot. 2, 46, 9, 10, and 11).*

In determining the appeal upon a retiral, ***Muhamadu Natchia v Ahamadu Natchia (1906)*** 9 NLR 331, Lascelles ACJ thought it fit to emphasise that an agreement between the landowner and the person who acquires the right is the foundation of the right under *jus superficiarium*. His Lordship strongly recommended adopting a cautious approach in situations where this principle of law applies since "… *claims to a right of 'superficies' should not be allowed unless the agreement between the parties is clearly demonstrated. To sanction laxity of proof in this respect would be to expose proprietors of house property to serious danger from claimants alleging that some former owner has permitted them or their ancestors to build on his land*." It has been held by *Gratian* J in ***Samarasekera v Munasinghe (1954)*** 55 NLR 558, that the servitude of *jus superficiarum* could "… *also be acquired by prescription where a person who, in appropriate circumstances, has erected a building on another's land and has without interference by the soil-owner exclusively enjoyed the use and enjoyment of it as a superficiary for the requisite period of ten years*". His Lordship had further clarified such acquisitions on prescription are confined to the servitude, and not to soil-rights.

Their Lordships of the Privy Council, in the judgment of ***Suppiah v Kanagaratnam (1960)*** 61 NLR 553, were in "*complete agreement*" with the principles of law that had been enunciated in the judgments of ***Samaranayaka v Mendoris*** (supra) and ***Kangaratnam v Suppiah*** (supra), and quoted the section reproduced below from Grotius, contained in Book II of his Jurisprudence of Holland at Ch. 46, sections

8-10 (as translated by Professor Lee at page 279 of Volume 1 of his translation of Grotius).

> "*8. The right of superficies is the right which a man has to a building standing upon another man's ground.*
>
> *9. This right is not full ownership, because in law no one can be full owner of the building if he is not at the same time owner of the ground: but it is the right of building upon the site, and of retaining and using the building until the ground-owner pays the value of the building or an agreed sum.*
>
> *10. This right is acquired and lost like immovable property: and is understood to be effectively granted when the owner of the soil allows anyone to build upon it.*"

Their Lordships, in referring to the pleadings before them, observed that "*It is difficult to suppose that anyone reading these pleadings and the issues framed thereon would infer that the plaintiff at the trial was going to endeavour to establish a right to a jus superficiarium as against the defendant in his capacity as lessee under a lease for 20 years. This right in Roman Dutch law, which seems but rarely to have arisen for consideration in the Courts of Ceylon and as to the nature of which it is necessary to refer to the ancient jurists, is nowhere mentioned in the pleadings or issues.*"

In the instant appeal too, the Defendant did not present a claim of prescriptive title to the disputed building by placing reliance on the principle of *jus superficiarium* before the trial Court but was content with presenting purely a claim of acquisition of prescriptive title upon possession of the building and the land under it

These principles of law, although relevant to the consideration of the consequential question of law formulated by the 1st and 2nd Plaintiffs, have no application to the question of law formulated by the Defendant. The High Court of Civil Appeal had considered the challenges mounted by the Defendant to the paper title of the Plaintiffs by claiming acquisition of prescriptive title by suggesting issue Nos. 12 and 13 and decided that the Defendant had failed to establish either of these two issues by presenting evidence. In answering the issue No. 12 against the Defendant, the High Court stated that he had failed to prove the very deed on which he claimed title to the land where the disputed building stands. Issue No. 13 too had been answered by the High Court of Civil Appeal on the basis that the Defendant did not prove the alleged acquisition of prescriptive title, either by *Balin Appuhamy* or by tacking on to the period of possession under *Balin Appuhamy* to that of his own.

The Defendant's complaint was the High Court of Civil Appeal had failed to consider his case that had been presented before the trial Court on the lines that had been argued before this Court by the learned Counsel. The High Court of Civil Appeal decided issue No. 12 in the negative primarily due to non-production of the deed of gift No. 12182 before the trial Court. The Defendant had admittedly relied on the said deed in support of his claim to the land by raising issue No. 12 over it at the commencement of the trial, and therefore it was incumbent upon him to establish the very basis on which he claim title to the land covered under the *Kada Kamaraya,* by proving due execution of the said deed, under section 68 of the Evidence Ordinance. During the trial before the District Court, the Defendant was called by the Plaintiff as a

witness during his case. During his examination in chief, said deed was marked as P14. The Defendant then conceded to the position put to him by the Plaintiff that it is a fraudulent deed, an allegation already made by the 2nd Plaintiff, in her evidence. The appeal brief contained a copy of the said Deed of Gift (at p. 246). Having placed reliance on it by making specific reference to it during his evidence by marking it as P14, the Defendant nonetheless withheld its production to Court and did not lead evidence of its due execution. The copy of the deed bears marking given to it 'P14', but the absence of the initials of the trial Judge on it seems to suggest that it had not been produced before Court and thereby abandoning his claim based on the said deed.

It has already been referred to earlier on in this judgment that the High Court of Civil Appeal did consider the issue Nos. 12 and 13 of the Defendant and answered them as "not proved". I have carefully re-evaluated the evidence placed before the trial Court in its totality and of the firm view that the appellate Court had correctly answered the said two issues. Despite the fact that there was evidence that the Defendant was in possession of the disputed part of the building since late seventies until the institution of the instant action in February 2003, he had starved his case of any evidence, either in relation to the starting point of adverse possession or in relation to the point at which the permissive possession was changed to that of an adverse possession, by proof of an overt act of ouster. Thus, it is amply clear that the High Court of Civil Appeal had more than one reason to answer the issue Nos. 12 and 13 in the negative as they remain unproved.

It is appropriate to consider the remaining two questions of law, as formulated by the 1st and 2nd Plaintiffs as consequential issues of law, I part with this judgment.

With the dismissal of the Plaintiffs' action on the basis of *Res Judicata* by the trial Court, he had preferred an appeal to the High Court of Civil Appeal challenging the said dismissal. One of the grounds on which the Plaintiffs relied on in support of their appeal was that the trial Court had erroneously determined that the Defendant was in possession of the building for a long time either legally or illegally. The Plaintiffs have mounted a challenge on that conclusion reached by the trial Court on the footing that the trial Court had failed to consider the basis on which the Defendant was in possession. The Defendant's position is that he was in long possession of the building and therefore had prescribed to its ownership. Clearly, in view of these considerations, the acquisition of prescriptive title had been very much an issue before the High Court of Civil Appeal. The appellate Court had accordingly pronounced its determination on those issues concerning prescription after due consideration.

The Defendant sought leave to appeal against the judgment of the High Court of Civil Appeal and after hearing Counsel, this Court granted leave to consider the question whether the Provincial High Court of Civil Appeal err in failing to consider the prescriptive title of the Defendant and his grandfather *Balin Appuhamy*?

Thus, the claim of acquisition of prescriptive title by the Defendant through his grandfather *Balin Appuhamy* had become the core issue of this appeal. Its consideration is necessitated by the

question of law that had been formulated on the issue of prescription to which this Court had granted leave. In granting leave, this Court acted under section 5C (1) of the High Court of the Provinces (Amendment) Act No. 54 of 2006, since it was of the "*opinion the matter involves a substantial question of law or is a matter fit for review by such Court*". Article 127(1) of the Constitution conferred this Court with jurisdiction "*for the correction of all errors in fact or in law which shall be committed by*", Court of Appeal and any Court of First Instance, and in this particular instance, by the High Court of Civil Appeal holden in North Western Province at Kurunegala and the District Court of *Kuliyapitiya.*

In the circumstances, the question whether the Defendant is entitled to challenge the issue of prescription since he has failed to appeal against the Judgment of the trial Court with regard to the issues raised by him in respect of prescription has already been decided by this Court when it granted leave having considered same as a "*substantial question of law*".

The mere failure to prefer an appeal by the Defendant, against the determination of the trial Court on the issues that had been raised on his plea of prescription, where the Court had not answered in either way due to the reason that they did not arise for consideration, does not therefore preclude the Defendant from reagitating them before this Court, in view of the fact that this Court had already granted leave on the issue of law dealing with the question of prescription. But the Defendant could only agitate the issue only to the extent to which leave was granted by this Court.

It was contended on behalf of the Plaintiffs that the failure of the Defendant to challenge the issue pertaining to prescription in terms of section 772 of the Civil Procedure Code disentitles him from raising the same before this Court. The section 772 allows a respondent, not only to support a decree but also to take any objection to such decree, which he could have taken by way of appeal, although he had not appealed against any part of it. To avail this opportunity, such a respondent was obligated by the provisions of that section to give seven days' notice in writing of such objection.

This contention need not be considered in detail, in view of the finding contained in the two immediately preceding paragraphs. Suffice it to state that mere failure to act under section 772 of the Civil Procedure Code, does not operate as an absolute bar or an automatic disqualification against such a respondent, as the appellate Courts have consciously retained a wide discretion to hear such a respondent, in fulfilling its responsibility "*to do complete justice between the parties*", despite him not seeking relief under the said section. This point had already been clarified by this Court in ***Ratwatte v Gunasekera*** (1987) 2 Sri L.R. 260, where Sharvananda CJ, in view of the contention that the plaintiffs in that particular instance had failed to comply with the provisions of section 772(1) of the Civil Procedure Code, said "*… the provision does not bar the Court, in the exercise of its powers to do complete justice between the parties, permitting him to object to the decree, even though he had, failed to give such notice. The Court of Appeal has inherent jurisdiction to grant or refuse such permission in the interest of justice.*"

Thus, the answers to the question of law raised by the Defendant and the consequential questions of law raised by the Plaintiffs are as follows :-

Question of law of the Defendant - No

Question of Law No. 1 of the Plaintiffs - Yes, only to the extent to which leave was granted,

Question of Law No. 2 of the Plaintiffs – Yes, only to the extent to which leave was granted,

Question of Law No 3 of the Plaintiffs – No.

The appeal is dismissed with costs as the only question of law raised by the Defendant is answered in the negative.

JUDGE OF THE SUPREME COURT

L.T.B. DEHIDENIYA, J.

I agree.

JUDGE OF THE SUPREME COURT

S. THURAIRAJA, P.C., J.

I agree.

JUDGE OF THE SUPREME COURT