

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

Lindamilage Telex Alfred De Silva,  
No. 8/5, 2<sup>nd</sup> Lane, Polkotuwa Road,  
Kaduwanmulla, Moratuwa.  
Substituted 5<sup>th</sup> Defendant-Appellant-  
Petitioner

**SC/APPEAL/69/2019**

**WP/HCCA/KAL/106/2001(F)**

**DC PANADURA 12771/P**

Vs.

Uromi Shiranthi Fernando,  
Pasan Krishantha Fernando,  
Both of No. 123, Walpola Road, Panadura.  
Substituted Plaintiff-Respondent-  
Respondents

- 1A-A. Ranmuthuge Somalatha Fernando,  
1A-B. Sellapperumage Sham Randeer Fernando,  
1A-C. Wajira Darshani Fernando,  
No. 462, Galle Road,  
Rawathawatte, Moratuwa.  
2A. Kalutara Waduge Susantha Fonseka,  
No. 122, D 2/1, Indrajothi Mawatha,  
Thantirimulla, Panadura.  
3. Kurukulasooriya Patebandige,  
Stanicus de Silva Arsakularathne,

- No. 462, Galle Road,  
Rawathawatte, Moratuwa.
- 4A. Percy Perera (deceased),  
Near Maskadaya, Joseph Lane,  
Koralawella, Moratuwa.
- 4B. Sattambaralalage Winifreeda Perera,  
8/4, Second Lane,  
Kaduwanmulla, Moratuwa.
6. Fareeda Vithilin Fernando,  
No. 54/1, Koralawella, Moratuwa.
7. Mercy Rita Fernando,
8. Rimison Antony Fernando,  
Both of 54/4, Kaduwamulla,  
Moratuwa.
- 9A. Tantulage Princy Muriel Fernando,  
Nallaruwa, Panadura (deceased).
- 9B. Kalutara Waduge Susantha Fonseka,  
No. 122, D 2/1,  
Indrajothi Mawatha,  
Thantirimulla, Panadura.
10. Kurukulasooriya Patabendige Lora Silva,  
Both of No. 136, Galle Road,  
Katukurunda, Moratuwa.
- 11A. Wilfred Perera (deceased),  
19/2, Wewa Road,  
Katukurunda, Kalutara.
- 11B. Weerawana Kulasuriya,  
Busabaduge  
Meraya Fraksida Fernando,  
2/19, Lake Road,  
Katukurunda, Kalutara.

12. Kurukulassoriya Patabendige Victor Silva,  
19/2, Wewa Road,  
Katukurunda, Kalutara.
13. K. P. Michael Silva,  
Katukurunda, Kalutara.
14. Bridget Katherin Cooray,  
No. 15/1, Kaduwamulla,  
Moratuwa.
- 15A. Tantulage Princy Muriel Fernando,  
Nallaruwa, Panadura.
16. Wilfred Emil Perera,  
No. 20D, Vidyala Road, Gampaha.
17. Thelage Rosellin Mulin Peiris,  
No. 4/10, 2<sup>nd</sup> Lane, Kaduwamulla,  
Moratuwa.
18. Lindamulage Maria Silva,  
No. 4/10, 2<sup>nd</sup> Lane, Kaduwamulla,  
Moratuwa.
19. Lindamulage Maria Silva,  
No. 4/10, 2<sup>nd</sup> Lane, Kaduwamulla,  
Moratuwa.
20. W.S.A. Rimson Anthony Fernando  
(deceased),
- 20A. Jayaweera Patabandige Winifreeda Silva,
- 20B. W.S.A. Norika Minon Thushani Fernando,  
Both of 62/10, Chandra Mawatha,  
Koralawella, Moratuwa.
21. Grace Eromi Chandra Fernando (deceased),  
Both of Chandra Mawatha,  
Koralawella,  
Moratuwa.

21A. Janaprith Salinda Fernando,  
No. 16, Farmgrow Avenue,  
Ratmalana.

Defendant-Respondent-Respondents

Before: Hon. Justice Yasantha Kodagoda, P.C.  
Hon. Justice Achala Wengappuli  
Hon. Justice Mahinda Samayawardhena

Counsel: S.N. Vijithsingh for the Substituted 5<sup>th</sup> Defendant-Appellant-Appellant.  
Ms. Kaushali Samarathunga for the Substituted Plaintiff-Respondent-Respondents.  
Pubudu de Silva for the 2A Defendant-Respondent-Respondent.  
Shiraz Hassan for the 4B Defendant-Respondent-Respondent.

Argued on: 11.11.2024

Written submissions:

By the Substituted 5<sup>th</sup> Defendant-Appellant-Appellant on  
08.01.2025.

By the Substituted Plaintiff-Respondent-Respondents on  
09.01.2025.

By the 2A Defendant-Respondent-Respondent on  
07.01.2025.

By the 1A-B Defendant-Respondet-Respondent on  
15.01.2025.

Decided on: 03.06.2025

**Samayawardhena, J.**

The plaintiff instituted this action in the District Court of Panadura on 06.10.1971, seeking to partition the land described in the schedule to the plaint among himself and the four defendants (page 171 of the appeal brief marked X). Subsequently, several parties intervened and were added as defendants. George Fransis De Silva, who appeared before the surveyor at the preliminary survey as a claimant, was added as the 5<sup>th</sup> defendant. He filed a statement of claim dated 11.09.1972, seeking undivided rights of the land on paternal inheritance and long possession (page 177 of the brief). According to this statement of claim, his father had acquired undivided rights by Deed No. 10353, which was marked as 1V16 by the 1<sup>st</sup> defendant through the evidence of the 5A defendant. Notably, in the said statement of claim, the 5<sup>th</sup> defendant did not, in my view, affirmatively assert prescriptive possession to the land. He did not disclose how or when he ceased to be a co-owner of the land. In other words, he failed to point out how or when his common possession transformed to adverse possession to the exclusion of all the other co-owners. The relevant extract from his statement of claim reads as follows:

5. 1955/8/18 වන දින අංක. 10353 දරණ ඔප්පුව පිට මෙම විත්තිකරුගේ පියා වූ එල්. ඇන්තනී සිල්වා, ඔහුගේ උරුමය මෙම විත්තිකරුට සහ ඔහුගේ සහෝදරයා වූ තෝමස් බෙනඩික්ට් පවරන ලදී.

6. අවුරුදු 75ක් පමණ කාලයක සිට මෙම ඉඩමේ "බී" කොටස සහ එහි ඇති වගාව සහ ගොඩනැගිලි පැමිණිලිකරුට සහ අනිකුත් අයට විරුද්ධව බුක්ති විඳ ඇති බව මොහු කියා සිටී.

Upon the death of the 5<sup>th</sup> defendant, his wife, Josephin Silva, was substituted as the 5A defendant (page 74 of the brief). She initially filed a new statement of claim dated 27.11.1981, seeking undivided rights to the land (pages 189–191 of the brief). This position was reaffirmed in her further

amended statement of claim dated 17.09.1984, in which she again sought undivided rights (pages 244–247 of the brief). However, in her amended statement of claim dated 26.11.1990, she stated that she had acquired prescriptive title to Lot B of the Preliminary Plan (pages 240–243 of the brief). The Preliminary Plan appears at page 379 of the brief. It is evident that the 5A defendant shifted her position over time in the course of the proceedings. She appeared uncertain as to whether to claim undivided rights or prescriptive title, but ultimately confined her claim to prescriptive title. At the trial, 5A defendant raised three issues (issue Nos. 16–18) seeking exclusion of Lot B from the corpus on the ground that she and her predecessors have prescribed to that Lot (pages 506–507 of the brief).

At the trial, the 5A defendant gave evidence (pages 650–676) and marked only one document, 5AV1, which is a receipt evidencing the payment of rates to the Urban Council in respect of a “cadjan tenement and land” identified as Assessment No. 16/5 and 16/6 over a period of time (pages 464–466 of the brief). That was the entirety of the evidence led on behalf of the 5A defendant in support of her claim to prescriptive title to Lot B. In her testimony, she spoke of long possession. However, it is trite law that, in terms of section 3 of the Prescription Ordinance, long possession alone is insufficient to establish a successful claim based on prescription. Moreover, our courts have consistently held that, where a co-owner claims prescriptive title, there must be clear and cogent evidence of an overt act marking the commencement of adverse possession.

I am in entire agreement with the view expressed by the Full Bench of the Supreme Court in *Tillekeratne v. Bastian* (1918) 21 NLR 12, wherein it was held, in the context of prescription among co-owners, that a court may infer that possession, though initially that of a co-owner, has subsequently become adverse against other co-owners, depending on the lapse of time

and the particular circumstances of the case. Bertram C.J. succinctly articulated the principle at page 24 in the following terms:

*It is, in short, a question of fact, wherever long-continued exclusive possession by one co-owner is proved to have existed, whether it is not just and reasonable in all the circumstances of the case that the parties should be treated as though it had been proved that separate and exclusive possession had become adverse at some date more than ten years before action brought.*

Bertram C.J., at pages 20–21, addressed the artificiality of insisting upon proof of an overt act where possession extends back as far as reasonable memory reaches, in the following terms:

*If it is found that one co-owner and his predecessors in interest have been in possession of the whole property for a period as far back as reasonable memory reaches; that he and they have done nothing to recognize the claims of the other co-owners; that he and they have taken the whole produce of the property for themselves; and that these co-owners have never done anything to assert a claim to any share of the produce, it is artificial in the highest degree to say that such a person and his predecessors in interest must be presumed to be possessing all this time in the capacity of co-owners, and that they can never be regarded as having possessed adversely, simply because no definite positive act can be pointed to as originating or demonstrating the adverse possession. Where it is found that presumptions of law lead to such an artificial result, it will generally be found that the law itself provides a remedy for such a situation by means of counter-presumptions. If such a thing were not possible, law would in many cases become out of harmony with justice and good sense.*

In the instant case, the position may have been different if the 5<sup>th</sup> defendant, and later the 5A defendant, had consistently and firmly maintained the position that they had prescribed to Lot B of the Preliminary Plan. However, they shifted their position from time to time. When a party claims undivided rights at one stage of the proceedings, it is incumbent upon him to explain how and when prescriptive possession commenced against the other co-owners. Prescriptive possession cannot commence after the institution of the action, regardless of how long the litigation may have continued.

There was no cogent evidence led to demonstrate a clear separation of Lot B, on the northern boundary, from the remainder of the land. Lot B is not a small portion; it extends to 1 rood and 20.5 perches.

The learned District Judge, by judgment dated 28.08.2001, held that the evidence led by the 5A defendant was insufficient to establish prescriptive title to Lot B of the Preliminary Plan. The High Court, by its judgment dated 18.09.2013, affirmed the judgment of the District Court. I see no reason to interfere with the judgment of the High Court.

The two questions of law on which leave to appeal was granted by this Court, and the answers thereto, are as follows:

Q. Did the High Court err in law in concluding that the 5A defendant and her predecessors did not possess Lot B in Plan X as a distinct entity, notwithstanding the alleged admission by the 1<sup>st</sup> defendant of the 5A defendant's exclusive possession?

A. No. The 1<sup>st</sup> defendant did not admit to exclusive possession of Lot B by the 5A defendant in a manner sufficient to establish prescriptive title.

Q. Did the High Court fail to correctly apply the principles of prescription in dismissing the appeal of the 5A defendant?



A. No.

Accordingly, the appeal of the 5A defendant is dismissed, but without costs.

Judge of the Supreme Court

Yasantha Kodagoda, P.C., J.

I agree.

Judge of the Supreme Court

Achala Wengappuli, J.

I agree.

Judge of the Supreme Court