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

In the matter of an Appeal under and in terms of Article 128 of the Constitution and in terms of Section 5C of High Court of the Provinces (Special Provisions) (Amendment) Act No. 54 of 2006, from the Judgment of the Provincial High Court of Civil Appeals of the Western Province holden in Negombo, dated 14th December,2018.

N. Dinesha Marita Amarasekera
No. 736, Negombo Road,
Maththumagala, Ragama.

Plaintiff

S.C.Appeal No.117/2020
SC/HCCA/LA Application No. 48/2019
HCCA Negombo Case No. WP/HCCA/NEG/39/2013(F)
D.C. Negombo Case No. 6901/L

Vs.

M.T. Theobald Perera
"Sriyawasa",
St. Sebastian Mawatha,
Kandana.

Defendant

And

M.T. Theobald Perera (Deceased)
1(a). Hetti Kankanamlage Dona Filamina Jasintha
1(b). Jenita Samanthi Perera

1(c). Anil Susantha Perera
1(d). Amitha Chandima Perera
1(e). Manel Gayani Perera
All of "Sriyawasa",
St. Sebastian Mawatha,
Kandana.
Substituted-Defendant-Appellants

Vs.

N. Dinesha Marita Amarasekera
No. 736, Negombo Road,
Maththumagala, Ragama.
Plaintiff-Respondent

AND NOW BETWEEN

N. Dinesha Marita Amarasekera
No. 736, Negombo Road,
Maththumagala, Ragama.
Plaintiff-Respondent-Appellant

Vs.

M.T. Theobald Perera (Deceased)
1(a). Hetti Kankanamlage Dona
Filamina Jasintha
1(b). Jenita Samanthi Perera
1(c). Anil Susantha Perera
1(d). Amitha Chandima Perera
1(e). Manel Gayani Perera
All of "Sriyawasa",
St. Sebastian Mawatha,
Kandana.
Substituted-Defendant-Appellant-Respondents

BEFORE	:	**L.T.B. DEHIDENIYA, J.** **MURDU N.B. FERNANDO, PC, J.** **ACHALA WENGAPPULI, J.**
COUNSEL	:	M. Adamaly with Aeinsley Silva for the Plaintiff-Respondent-Appellant instructed by Ms. Shanya Wickramarathna. S.A.D.S. Suraweera for Substituted 1(c)\and 1(d)Defendant-Appellant-Respondents
ARGUED ON	:	09th February, 2021
DECIDED ON	**:**	07th October, 2022

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ACHALA WENGAPPULI, J.

The Plaintiff-Respondent-Appellant (hereinafter referred to as "the Plaintiff") instituted two separate actions in the District Court and the Additional District Court of *Negombo,* under case Nos. 6901/L and 6906/L respectively, against the Defendant-Appellant-Respondent, later substituted by 1(a) to (e) Substituted-Defendant-Respondents (hereinafter referred to as "the Defendant") upon his death. With the institution of the said actions, the Plaintiff sought declaration from Court of her title to lots D3 and E, morefully described in the respective schedules to the plaints and as depicted in Plan No. 685 of 11.03.1967, prepared by licenced surveyor *M.D.J.V. Perera*. She also sought eviction of the said Defendant and his agents therefrom along with an award of damages quantified at Rs. 700,000.00. The Defendant, in his answer had, in addition to seeking dismissal of the Plaintiffs actions, also sought a

declaration of his title over the said two lots by claiming that he had acquired prescriptive title of the same.

Parties proceeded to trial in both cases after marking several admissions and settling for 20 trial issues between them in case No. 6906/L and 31 trial issues in case No. 6901/L respectively. Learned District Judge as well as the learned Additional District Judge, with pronouncement of their separate judgments on 07.03.2014 and 01.11.2013, have held with the Plaintiff and rejected the claim of prescription of the Defendant. Being aggrieved by the said judgments, the Defendant had preferred sperate appeals to the High Court of Civil Appeal in *Negombo* under appeal Nos. WP/HCCA/NEG/03/2014 (F) and WP/HCCA/NEG /39/2013(F). The High Court of Civil Appeal had accordingly pronounced two separate judgments in respect of each of the said appeals on 14.12.2018 and allowed them.

The Plaintiff had thereupon sought Leave to Appeal from this Court in SC Application No. SC/HCCA/LA/47/2019 against the judgment of the High Court of Civil Appeal in Appeal No. WP/HCCA/NEG/03/2014(F) while seeking Leave to Appeal in SC Application No. SC/HCCA/LA/48/2019 against the judgment of the High Court of Civil Appeal in WP/HCCA/NEG/39/2013(F). This Court, having considered both these applications of the Plaintiff on 25.06.2020, was inclined to grant leave on the following question of law, in relation to both these applications;

> *Whether the learned Judges of the High Court erred in law in failing to appreciate that the Defendant failed to show an overt act or adverse possession against the*

Plaintiff's predecessors namely, the Defendant's sisters, during the period 1969-1994?

With grating of Leave to Appeal, SC Application No. SC/ HCCA/LA/47/ 2019 was renumbered as SC Appeal No. 116 of 2020, whereas SC Application No. SC/HCCA/LA/48/2019 was renumbered as SC Appeal No. 117 of 2020. Since both these appeals will have to be decided on the identical question of law arising out of the impugned judgments, that had been pronounced against the backdrop of almost identical factual situation as revealed from the body of evidence presented before trial Courts in both cases, on the invitation of the parties at the hearing both appeals were heard together, and thus a common judgment is pronounced in relation to each of the said appeals but under the relevant captions.

Before I proceed to consider the said question of law, in the light of the submissions made by the respective learned Counsel, it is helpful if the respective cases that had presented before the trial Courts by the two parties are referred to at the outset *albeit* briefly, as indicated in their pleadings, issues and in their evidence.

One *Malwana Tudugalage David Barlin Perera,* who was married to *Padukkage Lawarina Perera* had fathered three children, namely *Malwana Tudugalage Theobold Perera, Malwana Tudugalage Juliet Perera and Malwana Tudugalage Lilian Perera*. *Barlin Perera*, became entitled to two allotments of land in total extent of 69.4 Perches, depicted as lots D and E, in Plan No. 436P dated 30.04.1954, that had been carved out of a larger land called *Midellagahawatta* alias *Delgahawatta,* upon a final partition decree in Case No. 1720/P of the District Court of *Gampaha* dated 30.04.1954. In the year 1967, *Barlin Perera*, through plan No. 685 of

11.03.1962 of licenced surveyor *M.D.J.V. Perera* (P1), had subdivided the said lot D of plan 436P into three subdivided parcels of land, depicted in the said subsequent plan as lots D1, D2 and D3, while retaining lot E of the partition plan No. 436P as it is. Thus, in Plan No. 685, the subdivided lots D1, D2, D3 and lot E (as depicted in plan No. 436P) are shown as sperate and distinct allotments of land. Lot D1 is in extent of 20 Perches. Lot D2 is in extent of 24.62 Perches, while lot D3 is in extent of 17.38 Perches. Lot E as per partition plan and plan No. 685, is in extent of 7.4 Perches. Lots D3 and E too shared a common boundary.

Thereupon, *Barlin* Perera and his wife, by execution of three Deeds of Gift, have transferred their title to the said three subdivided lots along with lot E to their three children on 05.06.1967. The Defendant, being the eldest of the three children of *Barlin Perera*, and the only male child, had received title to lot D2, through the Deed of Gift No. 2572 (V2a). Deed of Gift No. 2571 (V3) was executed in favour of *Malwana Tudugalage Juliet Perera,* and she was given title to lot D1 of plan No. 685. The youngest girl of the family, *Malwana Tudugalage Lilian Therese Perera* received lot D3 and E of plan No. 436P, through Deed of Gift No. 2573 (V1).

In the same year, *Lilian Perera* had gifted her title to lots D3 and E to sister *Juliet Perera* by Deed of Gift No. 6983 of 20.12.1980. Thus, *Juliet Perera* became entitled to lot D1, D3 and E. After a period of eight years since the execution of the said deed of gift, *Juliet Perera* had transferred her title over lot D1, D3 and E to *Dinapala de Silva* through Deed of Transfer No. 1188 on 18.01.1988. Said *Dinapala de Silva* had died intestate and his heirs have thereafter transferred title to lots D1, D3 and E back to *Juliet Perera* on 10.12.1993 through Deed of Transfer No. 181, who then made another transfer of the title to lots D1, D3 and E, in

favour of *Don Calistus Gamini Ponweera* by Deed of Transfer No. 208, on 10.04.1994. The Plaintiff had acquired ownership to lots D3 and E, through the Deed of Transfer No. 333 (P3), executed by said *Gamini Ponweera,* who retained title to lot D1 to himself.

In instituting action in case No. 6901 on 10.07.2007, the Plaintiff sought a declaration of Court of her title to lot D3 and in case No. 6906, instituted on 19.07.2007, she sought a declaration of her title to lot E. The Plaintiff also sought ejectment of the Defendant from both these lots. The Plaintiff, by suggesting several issues (Nos. 2, 3 and 10 in case No. 6901/L, Nos. 2B, 3B and 8 in case No. 6906/L), had sought determinations from Court as to the possession of the disputed parcels of land. These trial issues were suggested to the effect, whether she had possessed the disputed land after *Gamini Ponweera* transferred its title by Deed No. 333, whether the Defendant was placed in possession upon execution of the decree of Case No. 1343/RE of District Court of Negombo and whether the Defendant is in illegal possession of the land since 14.06.1994. The Defendant too had suggested trial issues on the question of possession in issue Nos. 11 and 12 in SC Appeal No. 116/20 and 13 and 14 in SC Appeal 117/20.

The Defendant, in his answer as well as in evidence, had admitted the execution of all the title deeds that had been relied upon by the Plaintiff in support of her description of devolution of title, as averred in the plaints. Since these two actions are considered *Rei Vindicatio* actions by the trial Courts, with the said admission of Plaintiff's title to lots D3 and E by the Defendant, both Courts have held that she had established her title over same. Then, it was for the Defendant to establish that he possessed the disputed lots D3 and E on a superior title to that of the Plaintiff. The Defendant's position was that

he had acquired title to these two lots through prescription and suggested issues on that premise. The issues of the Defendant referred to whether the Plaintiff or her predecessors in title never possessed the lands as described in the 3rd, 4th and 5th schedule to his answer (lots D2, D3 and E respectively) and whether the Defendant had adversely and exclusively possessed these parcels of lands against the rights of "others" ("අන් අයගේ") independently for an uninterrupted period of over forty years commencing from the year 1969.

In support of the said claim on prescription, the Defendant had asserted that he had possessed lots D1, D2, D3 and E as one contiguous land ever since his father was conferred with title to same upon a partition decree in 1954. It is his position that despite the subdivision of lot D by Plan No. 685 and execution of Deeds of Gift in 1967, none of his sisters ever came to possess the sub divided lots that are allocated to them. He further asserted it was his father who built a house on that land, and then put up a parapet wall right around the entire property which consisted of four lots and installed a gate. The Defendant however claims that the house standing on the said property was rented out by his father later by him. The Defendant also claimed that he only had appropriated its rent throughout.

In 1977, when the then tenant *Simion Perera* had fallen into arrears of rent, it was the Defendant who had instituted Case No. 1343/RE (P10) on 27.06.1987, and thereby seeking to evict the defaulting tenant. In the schedule to the plaint, the Defendant, for reasons best known to him, had described the boundaries of land on which the rented-out premises stood, by copying the description of boundaries as given in the partition decree. The Defendant made no reference in that

description to the subsequent plan No. 685, which subdivided lot D of partition plan No. 436P into three lots D1, D2 and D3 in the year 1967.

The trial against *Simion Perera* had proceeded *ex parte* and the Court held in the Defendant's favour. The Defendant was thereafter placed in possession by the Fiscal by executing the writ of possession on 02.02.1987. *Simion Perera* at that stage had sought to purge his default and was successful in his endeavour. Therefore, he was restored back in possession by an order of Court on 01.04.1991. The Defendant preferred an appeal against the said order to the Court of Appeal in appeal No. CA 139/89(F). The appellate Court set aside the said order in favour of *Simion Perera.* With the death of *Simion Perera,* his son *Lesley Perera* was substituted to prosecute the Special Leave to Appeal application No.170/98, by which the said judgment of the Court of Appeal was impugned.

On 08.12.1998, this Court had refused granting leave to the said application. Thereupon, the Defendant was placed back in possession on 14.06.1999 by the fiscal, after evicting said *Lesly Perera* from the land, as described in the schedule to the plaint in Case No. 1343/RE. In that process the Plaintiff and *Gamini Ponweera,* who claims to have been in possession of their respective lots up to that point of time, were also evicted. They moved the trial Court under section 328 of the Civil Procedure Code. On the day of inquiry into the application of *Gamini Ponweera,* the Defendant had conceded to the former's possession over lot E and recorded a settlement. The application of the Plaintiff was dismissed by the Court due to her failure to pursue same diligently. In 2007, the Plaintiff instituted the instant actions, seeking eviction of the Defendant from lots D3 and E.

At the conclusion of the two trials instituted by the Plaintiff, the District Court as well as the Additional District Court, in their respective judgments, rejected the claim of the Defendant that he had acquired prescriptive title to lot Nos. D3 and E upon being in possession for a long period of time. However, in allowing appeals of the Defendant, the High Court of Civil Appeal held that the Defendant had possessed the land from the year 1954 and had specifically commenced prescription at least in the year 1988 which continued for well over a period of ten years against a complete outsider *Dinapala de Silva*, who had acquired title to the disputed lots from the sister of the Defendant, *Juliet Perera,* in 1988 and therefore is entitled to a declaration of title in his favour.

In seeking to set aside the impugned judgments of the High Court of Civil Appeal and in addressing the question of law to which this Court granted leave, learned Counsel for the Plaintiff presented his submissions primarily on the following grounds;

a. the Defendant's possession of lots D3 and E were clearly with the consent of his sister *Juliet Perera* and therefore the character of the Defendant's possession not being adverse to the rights of his sibling and, as such, his mere possession of same would not give rights under prescription,

b. the determination of the High Court of Civil Appeal that the Defendant commenced his adverse possession in 1988, in itself is a confirmation of the Plaintiff's contention that the Defendant's possession of lots D3 and E was with the permission of his sister *Juliet Perera,* and,

c. the Defendant failed to establish that there was adverse possession for an uninterrupted period of ten years commencing from the year 1988, as erroneously held by the appellate Court.

In an effort to fortify the said contentions, learned Counsel for the Plaintiff had submitted in relation to his first ground that there was no adverse possession established by the Defendant against his sister because the disputed parcels of land remained a co-owned property since their father's death. In support of that contention, learned Counsel had highlighted certain items of evidence which indicate that the Defendant, being the eldest male in the family, had been in permissive possession of same on behalf of his younger sisters during their father's lifetime. It was also contended that since their father's death in 1969, the same state of affairs had continued without a change of its character until 1988, the year in which *Juliet Perera* made a transfer of her title to *Dinapala de Silva.* Hence, in the absence of an '*overt act*' on the part of the Defendant, any secret intention entertained by him to possess lots D3 and E against the interest of his sibling, will not accrue to his benefit in a claim under section 3 of the Prescription Ordinance. Learned Counsel also relied on the principles referred to in the judgment of *Basnayake* CJ in ***Gunawardene v Samarakoon et al*** (1958) 60 NLR 481, in support of the said contention.

Learned Counsel for the Defendant, in their respective submissions have sought to counter the said contention on the basis that with the subdivision made to lot D in 1967, each of the four subdivided lots had acquired a distinct and an identity of their own, quite independent of the larger land of lot D and also of each other subdivided individual lots and due to this reason, there was no co-

ownership. He further contended that in such circumstances there was no requirement for him to establish an overt act.

Perusal of judgments of both the District Court and the Additional District Court reveal that the original Courts had rejected the Defendant's claim of prescriptive title to lots D3 and E by adverse possession for a period of over ten years. The appeals that had been preferred by the Defendant against the said two judgments were allowed by the High Court of Civil Appeal by setting aside the said judgments of the trial Courts. The appellate Court, in doing so, was of the view that the evidence indicated that the Defendant did not give any produce from the land to his sisters and had taken the rent entirely for his benefit, and therefore his claim of prescription had been established to the required degree of proof, by satisfying the requirements, as stipulated by section 3 of the Prescription Ordinance. However, it also appears that the High Court of Civil Appeal was not convinced fully with the Defendant's position that he had commenced his adverse possession in 1957. Nonetheless, the appellate Court decided to allow the Defendant's appeals on the basis that he had established a period of ten years of undisturbed and uninterrupted possession, which the said Court found to have commenced in 1988, after his sister *Juliet Perera* transferred her title over lots D3 and E to *Dinapala de Silva,* a total outsider to their family. The appellate Court had stated in the impugned judgment *"… that the Defendant had possessed the land in dispute from the year 1954 and had specifically commenced prescription at least against Dinapala de Silva in the year 1988, who is a complete outsider, when the Defendant's sister transferred her right to Dinapala de Silva".* This statement is common to both the judgments

pronounced by the High Court of Civil Appeal, in allowing the two appeals that had been preferred by the Defendant.

The Defendant's claim of acquisition of prescriptive title to lots D3 and E is therefore founded essentially upon two pillars. The first is the Defendant's assertion that after the execution of the deeds of gift, none of his sisters ever came to possess their respective lots and he was in exclusive possession thereof, which had commenced even before his father's decision to subdivide same and gift to his three children. The other is, the Defendant's claim of possession of the three lots as one contiguous land through his tenant for over a long period of time, as indicative from the fact of institution of legal proceedings, by which he successfully ejected the defaulting tenant.

There was no evidence to indicate that after 1969, none of his sisters ever had possession over the lots D1, D3 and E. Thus, the Defendant had either occupied or possessed lots D3 and E after his father's death in 1969. But whether the Defendant had possessed same in the context of the principles of law that are applicable to acquisition of prescriptive title, as laid down in section 3 of the Prescription Ordinance, is an important consideration demanding attention of this Court.

In view of the factual basis on which the High Court of Civil Appeal has held in Defendant's favour, I find it convenient to consider his claim of being in adverse possession of lots D3 and E for over a period of four decades, by dividing that period of over forty years into two parts. The period commencing from 1954, the year in which his father was conferred with title to 1988, the year in which *Juliet Perera* had transferred her title to totally an outsider, shall be considered in the

first part. The balance part of the said four-decade long period, which commenced from the year 1988 and ended with 1994, the year in which the Plaintiff was evicted upon execution of decree in case No. 1343/RE, shall be considered thereafter.

Since the Defendant had admitted the devolution of title of the Plaintiff in the instant actions by which she sought declarations of her title to lots D3 and E and laid out a prescriptive title to same, it was his burden to establish that he had acquired prescriptive title by satisfying all the requirements as envisaged by the provisions of section 3 of the Prescription Ordinance.

In support of discharging his burden in relation to the claim of prescription, it was incumbent upon the Defendant to establish a starting point, on which he had commenced his adverse and uninterrupted possession of lots D3 and E for a period of ten years. This requirement was insisted upon by *Gratiaen* J in ***Chelliah v Wijenathan et al.*** (1951) 54 NLR 337 with the statement (at p. 342) that "*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*". This principle of law was reiterated by *G.P.S. De Silva* CJ in ***Sirajudeen and two others v Abbas*** (1994) 2 Sri L.R. 365.

It appears from the transcript of the proceedings before the trial Courts that the Defendant was clearly inconsistent with his stance taken in relation to the starting point of his adverse possession, when compared with the one taken in his answers and the one in giving evidence. In setting up his claim of prescriptive title in his answers, the

Defendant had averred that he possessed lots D1, D3 and E since 1969 for an uninterrupted period of over forty years, adverse to the title of his sisters. He had raised issues in both trials to the effect whether he was in adverse and uninterrupted possession for over forty years since 1969 (issue No. 14 in case No. 6901/L and issue No. 12 in case No. 6906/L respectively) in line with his assertions in the answers.

During his examination-in-chief the Defendant had asserted that, after his father subdivided the land in 1967 and gifted same to each of his three children, none of his sisters ever came to possess their respective lots nor did they separate their respective lots with fences after the said execution of deeds. He further asserts that irrespective of the said subdivision and execution of deeds of gift in favour of his sisters, he had exclusively possessed the entire land as one contiguous land from the year 1967 onwards and thereby advanced the point of commencement by two years. However, during cross-examination the Defendant had once again advanced the starting point from 1967 to the year 1954 aligning with the time of his father's, conferment of title upon the partition decree, contradicting the position indicated in his pleadings and issues.

The claim that he commenced adverse possession from the year 1954 was challenged by the Plaintiff. It was suggested to him during cross-examination by the Plaintiff that in spite of him being a minor of 16 years of age at that point of time and still dependent on his father for sustenance, the said claim that he alone possessed the land in its entirety since the acquisition of title to the lots D and E through the said partition decree in 1954 is an improbable one. He then added that his father, since acquisition of its title in 1954, never possessed the land until his death in 1969. Thus, it was the position of the Defendant that

he had exclusive possession of the entirety of land, inclusive of lots D1, D3 and E, for well over four decades and is therefore entitled to a decree in his favour.

The Defendant's assertion that ever since his father had acquired title to the disputed land in 1954 on a partition decree, he had possessed same adverse to the interests of his own father, whilst being in his father's care, is obviously a fanciful claim and had been rejected by the trial Courts on account of its inherent improbability. In addition to the said reason, there is yet another compelling reason to reject that claim. That is because the Defendant had conceded of accepting his father's decision to subdivide the land and gift same to the latter's three children, with his head "*bowed down*" in deference, despite his continued possession of the property from 1954 against rights of his father. Having admitted the fact that he was aware as to the nature of possession he ought to have in proof of his prescriptive title during cross examination by the Plaintiff, the Defendant nonetheless admitted occupying the land under his father's ownership throughout this period and thereby wiping out the character of adverse possession from his occupation of the property.

Thus, it was clear from the evidence that the Defendant himself had nullified his own claim of adverse possession that commenced from 1954, by admitting that he had chosen to surrender his "exclusive possession over the property" to the will of his father without a whimper of protest when their father decided to gift the subdivided lots of the said land in 1967 to his three children and thus conceding to the rights of his father over the land in dispute.

The trial Courts have rejected the Defendant's claim of prescriptive title altogether but the High Court of Civil Appeal, despite the trial issue framed by him on the basis that he commenced adverse possession in 1969 and his oral assertion of being in possession of the land since 1954, had taken the year 1988, as the starting point of his adverse possession. In my view, the Defendant's assertion relating to the starting point of his adverse possession of lots D3 and E, is not a credible and reliable claim, owing to its aforesaid inherent limitations, and was rightly rejected by the trial Courts. The remaining aspect of the Defendant's contention that whether the fact of his long possession of the land for over four decades, in itself justifies drawing the presumption of ouster against the Plaintiff and her predecessors in title shall be considered in the next segment of this judgment. But first, I shall proceed to consider the nature of possession the Defendant claims to have had over lots D3 and E during the period commencing from the year 1954 and ending with the year 1999.

The Plaintiff, in seeking to counter the claim of the Defendant that none of his sisters have ever possessed the sub divided lots since execution of deeds of gift in 1967 and he only controlled and derived income from same, had advanced a contention on the basis that the possession he claims to have had over lots D3 and E is of permissive one in nature. By advancing this contention, the Plaintiff may have sought to explain the obvious inaction of her predecessor in title, namely *Juliet Perera,* in not asserting her rights over lots D3 and E, with the execution of the deed of gift or at least from the point of her father's death in 1969. Thus, it appears from the said contention that the fact only the Defendant was in possession of the disputed property during the period 1954 to 1988, is admitted.

It is relevant to note that the said contention of permissive possession had been specifically advanced by the Plaintiff before the High Court of Civil Appeal as well. The impugned judgments of that Court indicate that it made reference to the said submissions of the Plaintiff but had proceeded to reject same on the basis that "the *Defendant had specifically stated in evidence that he did not give the produce from the land to his sisters*".

In the circumstances, the contention of the Plaintiff, that the Defendant, being the eldest brother of *Juliet Perera,* had only permissive possession over lots D3 and E, ought to be considered and determined in the backdrop of the evidence presented before the trial Courts, upon the principles that are enunciated in judicial precedents, which dealt with similar factual situations.

In this context, it must be noted that the said contention of permissive possession was presented before the High Court of Civil Appeal as well as this Court is based on the issues suggested by the Plaintiff as well as the Defendant before the trial Courts. The Defendant, in particular had suggested two trial issues in each case that are in relation to the very nature of possession the Plaintiff had over the lots D3 and E, on which he sought determinations by Court.

These issues (namely issue Nos. 11 and 12 in SC Appeal No. 116/20 and 13 and 14 in SC Appeal 117/20) dealt with the disputed factual positions of the parties, namely, whether the Plaintiff or her predecessors in title have never possessed in whatever form ("කිසිදු ආකාරයක බුක්තියක්") to the lands as described in the 3rd, 4th and 5th schedule to his answer (lots D2, D3 and E respectively) and whether the Defendant had adversely and exclusively possessed these parcels of

lands against the rights of "others" ("අන් අයගේ") independently and for an uninterrupted period of over forty years, commencing from the year 1969.

It is evident that the Defendant, in suggesting the said trial issues, had raised them on the basis that neither the Plaintiff nor her predecessors in title ever had any form of possession over the disputed lots D3 and E. He also sought a determination of Court on his claim of acquisition of title to these two lots by adverse possession for a long period of time which over four decades by suggesting the other issues. Thereby the Defendant had invited the District Court as well as the Additional District Court to determine one of the primary facts in dispute, namely whether the Plaintiff and her predecessors in title, never possessed the disputed parcels of land, in whatever form of possession known to law. Thus, the contention of the Plaintiff, based on permissive possession of a sibling, must be considered in the light of the reasoning adopted by the Courts below and the evidence presented before the trial Courts along with inferences that could reasonably be drawn from such evidence.

Before I proceed to consider the evidence on this aspect, it is helpful to take note of an approach, which the Superior Courts have consistently applied, when dealing with situations such as the one that had been presented before this Court in the instant appeals.

When one relies on adverse possession in setting up a claim of prescriptive title against another under provisions of section 3 of Prescription Ordinance, it appears that the Superior Courts have applied a slightly different criterion in assessing validity of such a claim, depending on the fact whether there is a familial relationship in

existence between the contesting parties, *vis a vis* the criterion they had adopted in the assessment of such a claim that had been laid against a total stranger.

The judgment of ***Maduwanwela v Ekneligoda*** (1898) 3 NLR 213, relates to an instance where a sister of one *Tikiri Banda,* who was allowed to live in the latter's house with charitable intentions of the former and to take fruit and produce as she pleased from the land when she had no means of support. She had subsequently executed a lease on that property. Upon her death, her children claimed that their mother had acquired prescriptive title to the property and relied on the act of execution of a lease, in support of that claim. *Bonser* CJ, agreed with the finding of the trial Court that the sister of *Tikiri Banda* is merely an occupier and "*she had no possession of this property, but had merely occupation under licence of her brother."* Similarly, the judgment of ***Abdul Majeed v Ummu Zaneera et al***. (1959) 61 NLR 361 is in relation to an instance where a co-owner had set up a prescriptive claim against the other members of his family. In the course of the said judgment *De Silva* J, stated (at p.371) that "*Our social customs and family ties have some bearing on the possession of immovable property owned in common and should not be lost sight of. Many of our people consider it unworthy to alienate ancestral lands to strangers. Those who are in more affluent circumstances permit their less fortunate relatives to take the income of ancestral property owned in common. But that does not mean that they intend to part with their rights in those lands permanently. Very often if the income derived from such a property is not high the co-owner or co-owners who reside on it are permitted to enjoy the whole of it by the other co-owners who live far away. But such a co-owner should not be penalised for his generous disposition by converting the permissive possession of the recipient of his benevolence to adverse possession".*

His Lordship, in dealing with the 13th defendant's position that his mother *Muttu Natchia* had '*put him in complete possession*' of the property and by being in sole and exclusive possession of it he had acquired a prescriptive title to the entire property, had rejected that claim by stating (at p.370) *"It would not be strange if the 13th defendant collected the rent and looked after the building and before him his father did so. Of the three children of Muttu Natchia, the 13th defendant's father was the only male. That being so it is quite natural, these parties being Muslims, that the 13th defendant's father, the only male in the family, was in charge of the premises and collected the rent. On the death of the father the son may well have taken over those duties without any objection from the other co-owners."* An appeal from the judgment of ***Abdul Majeed v Ummu Zaneera et al*** (supra) had been preferred to Privy Council by the appellants. In determining the said appeal the Privy Council, in its judgment of ***Hussaima v Ummu Zaneera*** (1961) 65 NLR 125, had affirmed the rejection of the said claim of prescription, and noted the point made by *De Silva* J, that the 13th defendant was the only son of the original grantor's wife.

The judgment of ***De Silva v Commissioner General of Inland Revenue*** (1973) 80 NLR 292 dealt with a situation where a son had claimed acquisition of prescriptive title against his mother over a land in extent of over 200 acres called *Dewatawatta* on the basis that he had possession of same in its entirety from 1951 to 1965, appropriated its income, paid acreage taxes, paid wealth and land taxes on that land. In delivering the judgment, *Sharvananda J* (as he was then) had laid down the principles of law that are applicable in relation to consideration of such a claim of prescription. It is necessary to quote extensively from his Lordship's pronouncement of the applicable principles of law, in

order to retain its context and clarity. His Lordship stated thus (at p. 295);

> *"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. Where there is no hostility to or denial of the title of the true owner there can be no adverse possession. In deciding whether the alleged acts of the person constitute adverse possession, regard must be had to the animus of the person doing those acts, and this must be ascertained from the facts and circumstances of each case and the relationship of the parties. Possession which may be presumed to be adverse in the case of a stranger may not attract such a presumption, in the case of persons standing in certain social or legal relationships. The presumption represents the most likely inference that may be drawn in the context of the relationship of the parties. The Court will always attribute possession to a lawful title where that is possible. Where the possession may be either lawful or unlawful, it must be assumed, in the absence of evidence, that the possession is lawful. Thus, where property belonging to the mother is held by the son, the presumption will be that the enjoyment of the son was on behalf of and with the permission of the mother. Such permissive possession is not in denial of the title of the*

mother and is consequently not adverse to her. It will not enable the possession to acquire title by adverse possession. Where possession commenced with permission, it will be presumed to so continue until and unless something adverse occurred about it. The onus is on the licensee to show when and how the possession became adverse. Continued appropriation of the income and payment of taxes will not be sufficient to convert permissive possession into adverse possession, unless such conduct unequivocally manifests denial of the perimeter's title. In order to discharge such onus, there must be clear and affirmative evidence of the change in the character of possession. The evidence must point to the time of commencement of adverse possession. Where the parties were not at arms-length, strong evidence of a positive character is necessary to establish the change of character."

In a more recent pronouncement of this Court in ***Jayasinghe Pathman v Somapala*** (SC Appeal No. 6/14 - decided on 19.11.2021), *Dehideniya* J too had adopted a similar approach in holding that "*where the property belongs to a family member, the presumption will be that it is 'permissive possession' which is not in denial of the title of the family member who is the true owner of the property and is consequently not averse to him/her.*"

Returning to the said contention of the Plaintiff, that the Defendant only had permissive possession of lots D3 and E, it must be observed that the Plaintiff did not call any witness who could speak that the Defendant was merely permitted to occupy the land by his sister. Except for the reference to that the action to evict *Simion Perera* was instituted by the Defendant was for and on behalf of his sister as

well, there was no other evidence to support such an inference. But it is the Defendant who had set up a prescriptive claim and he should satisfy Court that he had possessed the property in the manner as set out in section 3 of the Prescription Ordinance and establish his claim of possession, as per issue Nos. 11, 12, 13 and 14 respectively. The Defendant, however asserted that he only possessed the land in addition to advancing the position that none of his sisters ever had any possession. This claim of inaction by his sisters *Lilian* and *Juliet* to assume his exclusive possession over lots D3 and E could be due to various reasons, including the one asserted by the Defendant. It could be that the Defendant may have had possessed the property adverse to the rights of his sister.

But it is also equally possible that *Juliet Perera* was under the impression that her brother's continued possession of the property after the demise of their father is merely a continuation of his act of managing the property under her permissive possession as her father did, when he was alive. There is also the probability that she may have acquiesced the conduct of the Defendant in possessing the property and collecting the rent or that she may have even abandoned her rights over that property in favour of the Defendant. Therefore, the evidence must justify exclusion of the other probable reasons which explain the said conduct attributed particularly to *Juliet Perera,* except the one that the Defendant had relied on, in support of his claim of adverse possession.

In this context, if the said contention of the Plaintiff is to be accepted as the more probable reason to explain *Juliet Perera's* conduct of inaction, there must be evidence to suggest that Juliet *Perera* had abandoned her rights over the disputed property or that she had acquiesced the continued possession and enjoyment of her property by

the Defendant. When one considers the relative probabilities of *Juliet Perera* abandoning her rights simply due to the reason of her conduct of not taking any positive action to possess the two lots upon their father's death, it must be noted that the evidence however points in favour of a contrary situation. After *Lilian Perera* was gifted with title to lots D3 and E in 1967 by her father *Barlin Perera*, she had gifted same to her sister *Juliet Perera* in 1980 by Deed of Gift 6983. *Juliet Perera*, after retaining title over lots D1, D3 and E for over two decades, transferred same to *Dinapala de Silva* in 1988, for valuable consideration. *Dinapala de Silva* had no familial relationship to *Juliet Perera.* When heirs of *Dinapala de Silva,* have re-transferred the title over these lots after a period of five years back to her, *Juliet Perera* had thereupon executed a transfer of her title to all three lots, D1, D3 and E, in favour of another stranger *Gamini Ponweera* in 1994, once again for valuable consideration.

This series of transactions indicate that *Juliet Perera* and *Lilian Perera* were alive to their rights over the designated lots that were gifted to them and had regularly exercised one of the attributes of ownership, i.e., their right to alienate property. These positive actions of the two sisters indicate that they had not abandoned their rights over the lots D1, D3 and E, at any point of time during 1967 to 1988.

The other probable reason for *Juliet Perera's* said conduct, whether she had acquiesced to the Defendant's possession and enjoyment of the income, is necessarily interwoven with the Plaintiff's contention of permissive possession and her knowledge that the permissive possession of the Defendant over lots D3 and E had transformed into adverse possession, which is in denial of her title to the property. Hence, the question whether it is probable that she had acquiesced the Defendant's adverse possession should be considered along with the

question whether *Juliet Perera* granted permissive possession to the Defendant.

In view of the contention of permissive possession, that had been advanced by the learned Counsel for the Plaintiff, it is necessary to refer to the nature of evidence upon which the said contention was founded.

The Plaintiff did not call any of the Defendant's sisters to give evidence on her behalf, particularly in support of permissive possession. They are undoubtedly the best witnesses to confirm or deny granting such permission. The witness for the Plaintiff, who testified on her behalf, could only speak to the events which followed the acquisition of title to these two lots by his wife. Thus, the only evidence relating to the exact nature of possession and the circumstances under which the land in its entirety was possessed during the period commencing from 1967 to 1988, the year *Juliet Perera* transferred her rights to *Dinapala de Silva*, had been tendered by the Defendant.

Thus, the assessment of the relative probabilities of the Plaintiff's contention of allowing the Defendant to be in possession of lots D3 and E by his sister to manage same on her behalf or she had acquiesced his possession with the knowledge that he holds the property against her rights, will have to be assessed from the evidence of the latter for only he had knowledge of relevant facts and circumstances and therefore could give direct evidence on those aspects.

Seeking to counter the Defendant's assertion that he only instituted action to evict the overholding tenant, in support of his claim that he had possessed the lots D3 and E adverse to the interests of *Juliet Perera,* the witness for the Plaintiff stated in his evidence that although the action for eviction of *Simion Perera* was instituted by the Defendant

but it was on behalf of his sister as well. He then explained the reason as to why such a course of action was followed. The witness for the Plaintiff said in evidence that " **අපි දන්න පරිදි තියොබෝල්ඩ් පෙරේරා නඩුව දාලා තියෙන්නේ. එයා එක්ක ඉඳලා තියෙනවා නංගිලා දෙන්නෙක්. එකම සහෝදරයා නිසා මුළු ඉඩමටම මෙයා තමා නඩු දාලා තියෙන්නෙ**". However, it must be noted that the said reference to an institution of a joint action by the witness for the Plaintiff was apparently based on what he may have learnt from his predecessors in title, for he had no direct knowledge of the same and therefore could be termed as hearsay evidence.

The significance of this item of evidence is that it is consistent with the contention that had been advanced by the Plaintiff seeking to justify an inference of permissive possession and as such, the action for eviction of tenant could well have been instituted by the Defendant in 1985 with the blessings of *Juliet Perera,* who acted on the belief that her eldest brother in her permissive possession of lots D3 and E, and is continuing in that capacity even after sixteen years since their father's death, taken action to evict an overholding tenant. Not only the Defendant had failed to specifically negate this aspect of the Plaintiff's case in his evidence, but had tacitly admitted that position, in admitting that he merely continued to manage the property in the same manner even after his father's death.

There is no dispute that *Barlin Perera*, after being quieted in possession following the execution of partition decree in 1954, had possessed the entirety of the said land *ut dominus*. He constructed a house on that land and also constructed a parapet wall around the property and had thereafter rented it out. When the deeds of gift were executed, the said tenant of *Barlin Perera* was already in possession of one of the buildings, despite the fact that after the subdivision in 1967,

the house the tenant occupied now stood on lots D3 and E while the 'hut' shifted to lot D2. During the two-year period between 1967 and 1969, *Barlin Perera* had continued to be in possession of the entire land through his tenant and had continued to collect rent from the tenant through his son, the Defendant.

There is no evidence that the Defendant had assumed the status of landlord although he collected rent on his father's behalf, during latter's lifetime. There was no assertion by the Defendant that, before the execution of deeds of gift, he was considered to be the landlord of the tenant who occupied the house standing on lots D3 and E, either by his father or by the tenant, despite him collecting rent. In effect their father was managing the property, through the Defendant, for and on behalf of all three of his children, even though he had no title over the property remaining in him by then, except for the life interest. None of his children had objected to their father's said conduct nor did any of them demanded a share from the rent. They have silently accepted their father's dominance over the affairs in relation to the property and its income. In other words, having gifted each of his three children with the title of sub divided lots, their father had thereupon continued to be in possession of the land in its entirety along with the buildings standing thereon, and managed the same for and on behalf of his three children. This particular state of affairs indicate that the three children had tacitly permitted their father to possess their respective lots for and on their behalf. Thus, it is evident that the nature of the 'possession' the Defendant's father had over lots D1, D2 D3 and E, during the period of 1967 and 1969 is clearly a one of permissive possession.

A relevant question that arises in these circumstances is whether the said status of permissive possession had changed with the death of *Barlin Perera* in 1969?

In fact, the Defendant himself concedes that it did not. During his cross examination in case No. 6901/L he admitted that after the death of his father, he had merely continued to manage the property in the same manner as he did during his father's lifetime. In order to assess the context in which the said admission was made, it is helpful if that segment of evidence is reproduced below in its entirety.

"ප්‍ර: තමුන් උසාවියට කියා සිටියා නඩුවකින් පසුව 1954 තාත්තාගෙන් තමුන්ට බුක්තිය ලැබුනා කියලා. මොකක්ද ඒ නඩුව?

උ: බෙදුම් නඩුවක්.

ප්‍ර: ඒ බෙදුම් නඩුවෙන් මේ ඉඩම සම්පූර්ණ ඉඩමද තාත්තාට ලැබුණේ?

උ: එහෙමයි.

ප්‍ර: තාත්තා තමුන්ට බුක්තිය භාරදුන්නා කියන එකෙන් අදහස් කරන්නේ මොකක්ද?

උ: මට ඒක බලාගන්න කියලා තමා දුන්නේ.

ප්‍ර: තමාගේ අනිත් සහෝදර සහෝදරියෝ දන්නවාද?

උ: මමයි පිරිමියා. තාත්තා මටයි දුන්නේ බලා ගන්න.

ප්‍ර: තමුන්ගෙන් ප්‍රශ්න කළා 1969 ද මොකද කලේ?

උ: 1969 දී තාත්තා මළා.

ප්‍ර: ඒ ඉඩම ගැන මොකද කළේ තමුන්?

උ: ඒ ඉඩම කුලියට දීපුවා ඒ විදියටම කරගෙන ගියා. එක ඉඩමක් හැටියට තිබුණේ. වටේට තාප්පයක් බැඳලා. ගේට්ටුවක් දාලා තිබුනා."

As indicative from the segment of evidence that had been reproduced above, it is reasonable to assume that after the execution of deeds in favour of the two younger sisters, the permissive possession of

the Defendant had over the lots D1, D3 and E, was continued without a change, keeping with the said family arrangement, even after the death of their father. Thus, with the death of their father, it is more probable that the Defendant had substituted himself to the shoes of his father who had permissive possession over the lots D1, D3 and E, for and on behalf of the two younger females.

The segment of evidence reproduced above also indicates that the Defendant had conceded to the position that, being the eldest and the only male child in the family, he was asked by his father only to 'look after' the property. The Defendant asserted that his father gave the property to "**බලාගන්න**". None of his sisters were married at that time. Hence, it is evident that his father's intention would have been to entrust the property in its entirety to the Defendant, with the expectation that his son would protect the interests of his sisters over same, whilst looking after his own lot D2. The very word used by his father in asking the Defendant to look after ("**බලාගන්න**") the property is significant in this context. It indicates that the Defendant was merely entrusted with the task of looking after the lots D1, D3 and E, for and on behalf of his two sisters. Instead of using the words "**අරගන්න**" or "**තියාගන්න**", which indicate a clearer intention of renouncing whatever the interest he might have had over the property at that point of time, *Barlin Perera* had used the word "**බලාගන්න**", in entrusting the Defendant with the responsibility of looking after the property. The said intention of *Barlin Perera* attributed to his act of asking the Defendant to "**බලාගන්න**" is clearly manifests from his act of gifting each of the subdivided lots to all of his three children, instead of gifting same as one contiguous land to one of them or particularly to the Defendant, who was already managing it under his permission.

This consideration is therefore more in line with intention of *Barlin Perera* of making the subdivision of the land and gifting his children with same. It is also relevant to note that having owned several other properties to make an equitable distribution of wealth among all his three children, there is no other probable reason other than the one referred to above in order to explain the conduct of *Barlin Perera,* in relation to this particular property. Similarly, there is no justifiable reason that can be attributed to the act of *Barlin Perera* as to why he had undertaken an extra effort to subdivide the land through a surveyor at a significant cost and thereafter gift those individual subdivided lots to all of his children, when he had the more convenient option of gifting the land in its entirety to one of them, as it existed at that particular point of time.

Obviously, the two sisters of the Defendant would have been made aware of this arrangement their father had put in place to manage their share of property through the Defendant even before its subdivision was made. Hence, mere entrustment of the property to the Defendant does not indicate that he was given exclusive rights over that property to the detriment of his other sibling's rights. The Defendant's contention of the failure of his two sisters to possess their respective lots no sooner they were gifted with same, is based on the proposition that immediately after the deeds of gift were executed, his two sisters should have commenced possessing same, at least by fencing off the boundaries they shared with lot D2, owned by the Defendant.

When one considers certain cultural traditions and practices of our society, it is not unusual for the two young females, who still are under their father's guardianship, for showing some hesitation and reluctance in asserting their newly conferred rights over the respective

lots, no sooner they were gifted with title to same. It was noted earlier on in this judgment that our Courts have considered claims of prescription by one member of a family against the others with some circumspection and accepted such claims only after considering their validity against the backdrop of the nature of their relationship, whilst being alive to the prevailing social and cultural practices in the society. At times, the Courts have preferred not to draw the presumption of ouster, after evaluating the nature of the relationship of such a claimant, taking cognisance of such social norms and realities.

In applying that assessment criterion to the instant appeal, it is observed that not only the two daughters of *Barlin Perera,* the Defendant also, in accordance with the prevailing cultural norms and family values, had accepted his father's possession of the land with his head bowed down, despite harbouring an undisclosed intention in his mind to possess the property in its entirety all by himself, even before the deeds of gift were executed. Thus, when considered in the light of such social and cultural norms, it is highly probable that *Barlin Perera* had permissive possession of all four subdivided lots after 1967 on behalf of his three children until his death in 1969. The evidence of the Defendant also indicate that said permissive possession had continued even after *Barlin Perera's* death in 1969.

There is no evidence that the relationship between the three siblings was strained or of any hostility that had erupted between them at any point of time, forcing them to part their ways upon strained family ties. Thus, in the mind of *Juliet Perera,* the Defendant had merely succeeded to the responsibility of managing the land on her behalf, in place of her late father. Under these circumstances, the culturally expected a role of the eldest male child of a family in relation to his

younger unmarried sister, especially after their father's death, would undoubtedly have contributed to the brotherly trust that had been placed in the Defendant by his sister. In these circumstances, it is reasonable to infer that *Juliet Perera* would have assumed that the Defendant, being her eldest brother, would not act in any manner whatsoever against her interests and continue to possess and manage lots D3 and E on her behalf as he did when their father was alive.

It is observed that the Defendant, although claimed that he had possession ("බුක්තිය") of lots D3 and E since 1954 but opted to keep his intention to possess same, against the ownership of *Juliet Perera,* to himself without disclosing it. He did not at least once indicate his intention to hold possession of the same against the interests of his sister. Eventually, he was compelled to make his secret intention declared in public, when the Plaintiff instituted the instant actions, seeking declarations of her title to those two lots. The continuation of permissive possession over the said two lots after the death of their father by the Defendant could easily be inferred in the absence of any significant change in the circumstances relating to nature of his possession. The Defendant admits that he is aware *Juliet Perera* had made several transfers through several notarially executed instruments over the said two lots, but he was content with merely to continue to be in "බුක්තිය" regardless of such transfers. Hence, it is clear that at no point *Juliet Perera* was made aware that the permissive possession of the Defendant had turned adverse to her interests.

This factor, namely the knowledge on the part of *Juliet Perera* of her brother's change of character in relation to possession, being an integral component of the requirement of the starting point of an adverse possession, thus remained an obscure factor. The knowledge of

Juliet Perera that her brother is holding the property against her rights is a must for the prescriptive claim laid out by the Defendant to succeed by satisfying the component of her acquiescence. This is evident from the judgment of ***Appu Naide v Heen Menika et al*** (1948) 51 NLR 63, which was pronounced in relation to an instance where a *Kandyan*, who had permitted his sisters who have contracted *Deega* marriages but nonetheless to possess their share of the land for a long period of time. The Court held that he cannot be permitted to deny their rights due to his acquiescence. In delivering the said judgment *Basnayaka* J (as he was then), had quoted the following statement of *Thesiger* L.J., from the judgment of ***De Bussche v. Alt*** *(1878) L. R. 8 Ch. D. 286* (at p. 314), in defining the doctrine of acquiescence. It is stated by *Thesiger* L.J in the said judgment that;

> *"If a person having a right, and seeing another person about to commit, or in the course of committing an act infringing upon that right, stands by in such a manner as really to induce the person committing the act, and who might otherwise have abstained from it, to believe that he assents to its being committed, he cannot afterwards be heard to complain of the act…".*

In my view, due to the factors that are enumerated above, the last of the probabilities referred to earlier on this segment, namely the probability of *Juliet Perera's* acquiescence to the Defendant's possession adverse to her interests after the death of their father is therefore reduced to a mere probability, especially in the absence of any knowledge on the part of *Juliet Perera* about the Defendant's intention to hold the property in adverse possession against her rights and her belief that he held the property in permissive possession.

The judgment of ***Perera v Perera*** (1897) 2 NLR 370, deals with almost an identical factual situation that arose in the instant appeal. This judgment refers to an instance where a father had donated a parcel of land to his daughter immediately before her marriage. Having accepted the gift, she had handed it back to her father for safe keeping. She never entered into possession of the land donated, but her father continued to possess same and let it to tenants who paid him rent and repaired the buildings on it during the donee's lifetime, who continued to be on the best of terms with her father. When she died, her father claimed that he had acquired prescriptive title to the said land. *Lawrie* ACJ was of the view (at p. 371) that although the father was given the deed and continued to possess the land *"… he certainly at first possessed in trust for his daughter as her caretaker and agent. That title to possess must be held to have continued until by some overt act the possession for the daughter was changed into a possession on a title adverse to her."* The only important factor that is dissimilar to the factual position in the instant appeals to that of ***Perera v Perera*** (supra) is the fact that donee had expressly entrusted the land along with the deed of gift back to her father, whereas in this instance, it had to be inferred from the conduct of the parties upon the evidence presented before the trial Courts. Since the probabilities factor weigh in favour of the Plaintiff in support of her contention that the Defendant only had permissive possession of lots D3 and E from *Juliet Perera,* said deficiency in her case as to the nature of possession of the Defendant had over the land, could be supplemented with a reasonable inference drawn in favour of permissive possession, particularly in the absence of any evidence adduced by the Defendant to indicate a contrary position, except for his repetitive assertion that he was in "බුක්තිය ".

In view of the items of evidence referred to above, I hold that the Defendant is deemed to be a licensee of *Juliet Perera,* who entered into occupation and possession of lots D3 and E, upon permissive possession. The said conclusion was reached by applying the test, which formulated by Lord *Denning* and applied in ***Errington v Errington and Woods*** (1952) 1 KB 290, in order to determine whether a party is a tenant or a licensee. This is the test adopted by *Gratiaen* J, in the judgment of ***Swami Sivgnananda v The Bishop of Kandy*** (1953) 55 NLR 130, in relation to an instance where a person was permitted to occupy a premises on an agreement to sell but failed to complete the purchase as agreed, refused to vacate when the owners have sold the premises to the plaintiff and taken up the position that he is a tenant and is entitled to protection of the provisions of the Rent Restriction Act. *Gratiaen* J adopted Lord Denning's test to determine the said dispute (at p. 132) and reproduced same as follows; "*… if the circumstances and the conduct of the parties show that all that was intended was that the occupier should be granted a personal privilege, with no interest in the land, he will be held to be a licensee only*".

In the above context, I think the time is ripe to consider another facet of the contention advanced by the learned Counsel for the Plaintiff. During the course of his submissions, learned Counsel made an attempt to present the status of the Defendant and his sisters by referring to them as co-owners. With his attempt to term the litigating parties to the instant appeal as co-owners, learned Counsel sought to apply an important principle of law applicable to such co-owners, namely when one or more of them opted to lay out a claim of acquisition of prescriptive title over the co-owned property or a part of

it, against the rights of the others, such claim must precede with an overt act.

In ***Maduwanwela v Ekneligoda*** (supra), having rejected the contentions that if a person allows another out of charity to occupy his house, the Courts are bound to presume that occupation is possession and that the license to occupy means license to possess *ut dominus, Bonser* CJ had laid down the principle that a person(at p. 215), who is let into occupation of property as a tenant or a licensee, must be deemed to continue to occupy that property on the same capacity in which he was initially admitted, until by some overt act he manifests his intention to occupy it in another capacity and no secret act will avail to change the nature of his occupation. This principle of law was acted upon by Lord *Mac Naghten* in the Privy Council judgment of ***Nauda Marikkar v Mohammadu*** (1903) 7 NLR 91, in rejecting a claim of prescription of the added defendant, who had "*never got rid of character of agent*". His Lordship, in delivering the Privy Council judgment of ***Corea v Iseris Appuhamy*** (1911) 15 NLR 65, had reiterated the same principle once more by stating that (at p.78), it is not possible for a co-owner "*… to put an end to that possession by any secret intention in his mind. Nothing short of ouster or something equivalent to ouster could bring about that result*." This principle of law was pronounced and acted upon in relation to instances where a claim of prescription is laid out against a co-owned property by one of the co-owners. The judgment of *Basnayaka* CJ, in ***Gunawardene v Samarakoon et al*** (supra), is an authority relied on by the learned Counsel for the Plaintiff, in support of his contention of overt act is needed to change the character of possession. This judgment too had followed the principle of law that the possession of one co-owner is the possession of the other co-owners and such a possession

cannot be ended by any secret intention, entertained in the mind of the possessing co-owner.

In a recent judgment of this Court (***Chaminda Abeykoon v Anthony Fernando and Others*** SC Appeal No. 54A/2008 – decided on 02.10.2018), after undertaking an analysis of the judicial precedents that were pronounced on the presumption of ouster, especially in relation to a claim of prescription by a licensee, *Prasanna Jayawardena* J had stated that " *… the requirement that the possession of one co-owner is the possession of the other co-owners and that an overt act in the nature of ouster must occur to demonstrate a change of the character of that possession and start running of prescription in favour of one co-owner, applies with equal force to instances where a licensee or an agent possesses a property in a subordinate character. In such instances, an overt act must occur to demonstrate change in the character of that possession and start the running of prescription in favour of the erstwhile licensee or agent*", after rejecting the submission of the licensee that, "*the requirement of an overt act applies only in the case of claims of prescription between co-owners*."

This is because, his Lordship added, "*it is well-established principle of law that, as long as a person possesses a property as the licensee or agent of the owner, that person cannot acquire prescriptive title to that property. Instead, the running of prescription can commence only upon the licensee or agent committing some "overt act" which demonstrates that he has cast aside his subordinate character and is now possessing the property adverse to or independent of the owner of the property and without acknowledging any right of the owner of the property. The overt act is required to give [or deem to give] notice to the owner that his erstwhile licensee or agent is, from that time onwards, claiming to possess the property adverse to or independent of the owner."*

Thus, the said judgement treats a licensee, who claims acquisition of prescriptive title to a land, in the same status of a co-owner who had laid out a prescriptive claim to the co-owned land and as such he too must establish the change of his former character of a licensee to a that of one who possess adversely by establishing an overt act. Whilst in respectful agreement with the said pronouncement of *Jayawardena* J and, in view of the considerations referred to above, I am of the opinion that it is appropriate to apply the said principle in relation to the instant appeals as well, since the Defendant too had entered into possession of lots D3 and E with permission of his sister as a licensee. I am fortified in this view as *Lawrie* ACJ in ***Perera v Perera*** (supra) stated (at p. 371) that *"… he certainly at first possessed in trust for his daughter as her caretaker and agent. That title to possess must be held to have continued until by some overt act the possession for the daughter was changed into a possession on a title adverse to her."*

In view of the considerations referred to above and in view of the fact that relative probabilities favour a conclusion that the Defendant had initially entered into possession of lots D3 and E, with permission of *Juliet Perera*, it is relevant to consider whether the Defendant, by an overt act, had shed the said character of permissive possession at a subsequent point of time, by which his sister was put on notice that the permissive nature of possession of her brother over the disputed land had turned into a different character of possession, in which her rights over the disputed land are challenged.

Learned Counsel for the Defendant, in support of his plea of prescription, have relied heavily on the uncontroverted fact that it was his client who rented out the house standing on lot D3 and exclusively appropriated its rent for himself. He further contended the fact that

none of his sisters ever came to possess their respective lots nor did they demand their due share of the rent because the Defendant had possessed the two lots adverse to their title. Learned Counsel further submitted that when these factors are considered in the backdrop of the Defendant's solitary act of instituting action to evict a defaulting tenant, in itself would indicate clear denial of any acknowledgement of his sister's title, and also demonstrates to Court that he was clearly in possession of lots D3 and E, adverse to the title of the Plaintiff and of her predecessors. Hence, it was submitted by the learned Counsel for the Defendant that the High Court of Civil Appeal, in allowing his appeals, had correctly arrived at the conclusion that the Defendant is entitled to declaration of his prescriptive title over lots. D3 and E.

This contention indicates the degree of reliance placed by the Defendant on the level of control he claims to have had over the "house" and the income derived from it, in order to strengthen his prescriptive claim over lots D3 and E. Even though the Defendant had failed to convince the trial Courts that he had established a prescriptive claim by advancing the said contention, he was successful with the High Court of Civil Appeal. In view of the submissions made by the learned Counsel for the Plaintiff to convince this Court that the appellate Court had erred in allowing the Defendant's appeals, it is necessary to consider the available evidence that are directly relevant on this point.

What is relevant in the present context is to consider whether there was an overt act. Admittedly the Defendant's father had owned several other properties, in addition to the property under dispute, and his children were either gifted with or inherited their share of same since his death. It is not disputed that none of them lived on their

respective lots of the land in dispute but have settled on their inherited or gifted individual properties, in the vicinity of their ancestral home. It is in this backdrop only the contention of the Defendant on renting out and collecting rent should be evaluated.

The survey plan (P1), that made the disputed land into four subdivided lots, was prepared in 1967. It indicates that before the subdivision, a house and a hut were already stood on lots D and E. After the subdivision of lot D into D1, D2 and D3, house that was initially on lot D, had shifted to the subdivided lot D3, whereas the hut too had shifted to lot D2. Lots D1 and E had no buildings on them and remained as bare plots of land. There were few coconut trees but no clear evidence as to their distribution over the four lots.

It is stated by the Defendant that, at the time of his father's death in 1969, said house was occupied by his father's tenant, but acting on his father's directions, its rent was collected by him. After his father's death, the Defendant had continued to collect rent and, had rented out the house to each succeeding tenant, as and when it became vacant. He asserts that its rent was appropriated all by himself and no share or produce of the land was ever given to any of his two sisters nor did they demand any. This claim was accepted by the High Court of Civil Appel. The Defendant also states that after the execution of deeds, their father had fenced off the entire property, irrespective of the subdivision, installed a gate and therefore the land, though subdivided into four lots, continued to be possessed as one contiguous land.

In instituting action to evict his defaulting tenant in 1985, the Defendant described in his plaint (P10) that he had rented a "house" to *Simion Perera* and his tenant had fallen into arrears of rent. The reference

to a single house is significant in the context of present appeals. The Defendant also had relied on the said eviction proceedings to establish that he only took any initiative to evict overholding tenant *Simion Perera*, in support of his exclusive and adverse possession.

During his evidence in case No. 6901/L, the Defendant had however stated that he had rented out a "building" (ගොඩනැගිල්ලක්) that stood on lot D3 to *Simion Perera* in 1970. He also asserts that there was a "small house" (පොඩි ගෙයක්) on lot D2 as well at that time. Thus, the Defendant had thereby created an ambiguity as to the "house" he had rented out to *Simion Perera*, since it appears from his own evidence that the Defendant had rented out only a "building" on lot D3, while there is "house" standing on his own lot D2. In case No. 6906/L too the Defendant did not specifically state which of these two houses that he had given out on rent to *Simion Perera*. The trial against *Simion Perera* had proceeded *ex parte* and with the issuance of its decree, the fiscal had placed the Defendant in possession of the property upon execution of the writ of possession. The Defendant then had added that after his tenant was evicted by the fiscal, he had demolished the "building" that stood on that land.

In his plaint, although the Defendant had averred that "a house" had been rented out to *Simion Perera,* he made no refence in the plaint to include or exclude the "hut" that stood on lot D2 with the "house" on lot D3 or to the fact there were two buildings used for residential purposes on the land. It is evident from the Defendant's evidence before the trial Courts, that when he rented out "a building" to *Simion Perera* in 1970, there was another "small house" already in existence on his own land, namely lot D2.

Thus, it is clear that the "hut", that existed in 1967 on Lot D2, had transformed itself into a "small house" by 1970. How did this transformation take place?

The Defendant himself offers a clarification to this transformation. The relevant section of evidence adduced by the Defendant in this regard is as follows:-

" ප්‍ර: පියා 1969 දී ඔප්පුව ලියනකොට තමුන් හිස නවා එකඟවුණා කියලා පැමිල්ලේ නීතීඥ මහතා ප්‍රශ්න කරනකොට කිව්වා?

උ: එහෙමයි.

ප්‍ර: ඔප්පු ලිවීම නිසා තමුන් අර කිව්ව බුක්තියට බාධාවක් වුණාද?

උ: නැහැ කිසිම බාධාවක් වුණේ නැහැ.

ප්‍ර: දැන් බුක්තියේ කිසියම් වෙනසක් වුණාද. ඔප්පු ලිවීමෙන් පසුව?

උ: නැහැ.

ප්‍ර: මොකද තමුන් කළේ?

උ: ඒ කාලේ මගේ ගේ හැදුවා.

ප්‍ර: කවුද ඒ ගේ හැදුවෙ?

උ: තාත්තා. මමත් හැදුවා.

ප්‍ර: වියදම් කළේ කවුද?

උ: තාත්තා වියදම් කළා. මමත් වියදම් කළා."

Thus, the evidence clearly points out that there were two houses standing on the property by 1969. One put up by his father and the other by the Defendant. The distinct reference to "my house" ("මගේ ගේ") in his evidence is important. The Defendant, with that reference makes a distinction of the ownership to the two houses that stood on that land. His evidence indicates that, of these two houses, one was put up by his father and the other put up by him, of course with financial

assistance of his father. However, the Defendant maintained throughout the trials that there was only one house on that land and that is the one built by his father, and belonged to his sister, as he had laid a claim of acquiring prescriptive title to them. Since the Defendant had failed to present a clearer picture through his oral evidence as to from which of the two houses/buildings that he sought to evict *Simion Perera*, this is an important factor, which could only be resolved upon examination of the available documentary evidence, particularly the report of the fiscal (P4) filed in Court, after *Simion Perera's* eviction from the property.

The fiscal who visited the land to execute writ of possession had noted there were in fact two "buildings" ("ගොඩනැගිලි") standing on it and *Simion Perera* operated a fabric printing business, whilst occupying both these buildings. Therefore, the existence of two houses or buildings on that land is a fact confirmed by an independent source, the fiscal report (V4), and that too upon a document tendered by the Defendant himself during the trial. The schedule to the said plaint (P10) indicates that the Defendant had described the land on which the said "house" stood on, with the identical description as given in the partition decree. He had wilfully ignored the subsequent subdivision made in 1967, in describing the residential premises in the plaint. Hence, schedule to the plaint does not provide any assistance to determine this issue. *Simion Perera* was evicted from both these buildings on 02.02.1987 by the fiscal and the Defendant was placed in possession of the entire land, which included lots D1, D2, D3 and E. Since the schedule to the plaint indicated a larger land, the fiscal may have evicted *Simion Perera* from both these buildings that stood on the

land described in the schedule, despite the fact that there was refence only to a single house in the plaint.

The Defendant had thereafter demolished the said buildings before the District Court had restored the tenant *Simion Perera* back in possession of the property on 01.04.1991. This was after the Court had vacated its *ex parte* decree on 17.03.1986, when *Simion Perera* had successfully purged his default before that Court. The 2nd fiscal report restoring *Simion Perera* in possession (V5), indicates that except for a masonry structure that supported an overhead water tank, there were no other buildings that stood on the property at that point of time. The fact of demolishing a building standing on another's land could, in ordinary circumstance, could be an instance of an overt act by a claimant of prescriptive title. However, in relation to the instant appeals, with regard to the Defendant's act of demolition, *Juliet Perera* may have been under the impression that the said act was to prevent *Simion Perera* from re-occupying the land, since it was after the defaulting tenant was successfully evicted on an action instituted with her concurrence. In the absence of any evidence pointing to the contrary, the fact of demolition of the buildings would not support the Defendant's claim of adverse possession.

The Defendant preferred an appeal to the Court of Appeal (CA No. 139/89(F) against the said order of the District Court, by which the original Court had set aside its *ex parte* decree and allowed *Simion Perera* to file answer. At the hearing before the appellate Court, the Defendant, being the appellant, was not present nor was represented. On 31.07.1998, the Court of Appeal, upon consideration of merits of the appeal, held in favour of the Defendant and decided to allow his appeal. *Lesley Perera* who substituted in the said application after his

father's demise, had sought Special Leave to Appeal from this Court in S.C. Spl L.A. No. 170/98, against the said judgment of the Court of Appeal. On 08.12.1998, this Court refused to grant leave and dismissed *Simion Perera's* application now prosecuted by his son. Consequent to this dismissal, the Defendant had executed writ of possession on 14.06.1999, once again to evict said *Lesley Perera,* who continued to occupy the disputed property after passing of his father, *Simion Perera*. The fiscal report (V3) indicates that by this time there existed a "small house" with an asbestos roof on that property, in which *Lesley Perera* was operating a business of a service station for three wheelers. The Defendant was quieted in possession by the Court officer for the second time on 14.06.1999, over lots D1, D3 and E, upon eviction of *Lesly Perera,* who by this time was in possession on behalf of *Gamini Ponweera,* as his lessee and the Plaintiff.

What is important to determine in this context is, that which of these two houses that existed in 1970 on the disputed land, that had in fact been rented out to *Simion Perera,* as averred in the said plaint. Since the Defendant relied heavily on that factor in support of his prescriptive claim, then he must counter the Plaintiff's evidence that *Juliet Perera* had concurred the institution of the said action. The Defendant was silent on this specific assertion throughout his evidence. As already noted, the evidence that the Defendant had presented before the trial Courts reveals that there was only one house standing on the land as indicated in the survey plan P1, and he had given that house on rent to *Simion Perera*. But his evidence on the number of houses is self-contradictory as having asserted that his father had constructed a house after acquiring title to the land in 1954, and he also had built a house on his own on lot D2. The Defendant should have cleared the resultant ambiguity as to

the house that he claims to have given on rent and should also have clearly established that in addition to the "small house" on D2, he also had rented out and collected rent of the house, which stood on lot D3, if that fact was to accrue to his benefit.

When he restricted the scope of the eviction proceedings to a single house, instead of two houses that had in fact been occupied by *Simion Perera* at that particular point of time, it is equally probable that he did so, in relation to the house standing on lot D2, being his own property, instead of the house on lot D3, which belonged to his sister. In instituting action by the Defendant, this omission of the plaint cannot be attributed to a mere oversight, since in his plaint he had described the land on which that particular "house" stood, as a land consisting of only lots D and E, which is in line with the description given in the partition decree. This he did when in fact lot D had been subdivided into D1, D2 and D3 in 1967, as per the schedule to his own deed of gift and that house now stood on lots D3 and E. Referring to this misdescription of the property, the Plaintiff alleged that the Defendant's said deceitful act, had resulted in illegally dispossessing her from lots D3 and E, to which she had valid title.

In the same context, another aspect of the Defendant's case in support of his prescriptive title should be considered. It is correct that the Defendant had rented out the house and collected its rent and he alone instituted action seeking the eviction of his defaulting tenant. However, the Courts have considered and evaluated such claims against the backdrop of social norms and cultural practices and, at times, preferred not to draw the presumption of ouster in favour of a claimant, who raises a plea of prescriptive title on such factors, by adopting a more a pragmatic approach.

De Sampayo J, considering the nature of adverse possession of the plaintiff, in ***Tillekeratne et al. v Bastian et al.*** (1918) 21 NLR 12, had observed (at p. 28), *"While a co-owner may without any inference of acquiescence in an adverse claim allow such natural produce as the fruits of trees to be taken by the other co-owners, the aspect of this will not be the same in the case where valuable minerals are taken for long series of years without any division in kind of money*."

In ***Abdul Majeed v Ummu Zaneera et al***. (supra) *De Silva* J stated (at p.371) "*Our social customs and family ties have some bearing on the possession of immovable property owned in common and should not be lost sight of. Many of our people consider it unworthy to alienate ancestral lands to strangers. Those who are in more affluent circumstances permit their less fortunate relatives to take the income of ancestral property owned in common. But that does not mean that they intend to part with their rights in those lands permanently. Very often if the income derived from such a property is not high the co-owner or co-owners who reside on it are permitted to enjoy the whole of it by the other co-owners who live far away. But such a co-owner should not be penalised for his generous disposition by converting the permissive possession of the recipient of his benevolence to adverse possession".*

In relation to the instant appeal, as referred to earlier on, it is established by the evidence of the Defendant by producing the survey plan that there was a house standing on lot D3 in 1967. Other than the house, there was nothing on lots D1, and E that would yield an income. The land was located in an urban area and is therefore more suited for residential or commercial use rather than utilising same for agricultural purpose. There was no evidence as to the presence of any valuable minerals. Only income said to have been derived from the land is the rent from the two buildings. The Defendant, although claimed to have

utilised the rent form the house, did not offer to mention the amount in his evidence nor did he produce any rent receipts. He did not state that he attorned after his father's death as landlord of *Simion Perera*.

The Defendant's father received title to the land in 1954 after a partition action. The house that stood on lot D3 was admittedly built by his father. However, the Defendant did not claim that he made any improvement to that house nor had maintained it. In the preceding paragraphs, the ambiguity as to the identity of the 'house', the Defendant had given on rent was considered in detail. If the house he had rented out is the one stood on lot D3, his conduct in relation to that house could easily be understood, when considered in the light of the fact that he only had permissible possession of the house and therefore did not possess same *ut dominus*. In the absence of oral evidence by the Defendant as to the specific amount of rent he received from the house; it could well be that the rent was not a significant amount for his sister to demand her share. Hence, the mere fact that she did not demand her share of rent, in itself does not accrue to the benefit of the Defendant, in support of his plea of prescription.

These two factors, i.e., the fact of renting out a house and appropriating its rent, were the primary factors that had been relied upon by the Defendant, in support of his claim of prescription. Despite the rejection of the said claim of acquisition of prescriptive title of the Defendant by the trial Courts, the High Court of Civil Appeal, accepted the Defendant's said claim in stating that the "*Defendant had specifically stated in evidence that he did not give the produce from the land to his sisters. It is in evidence that he had taken the rent paid by Simion Perera entirely to his benefit*". In my view, due to the reasons stated in the preceding paragraphs, in which these factors were considered in detail, they fall

far short of required degree of proof due to their ambiguity. In the absence of any evidence of an ouster, the permissive character of the Defendant's possession over lots D3 and E that had persisted throughout the period 1969 to 1988 had not lost its initial character of acknowledgement of a right existing in *Juliet Perera*. Hence, the Defendant's permissive possession could not be considered as proof of possession by "*a title adverse to or independent of that of the claimant …*" in which an acknowledgement of a right existing in another person would fairly and naturally be inferred. ***Dias Abeysinghe v Dias Abeysinghe and Two Others*** 34 CLW 60 held: "*where the co-owners are members of one family very strong evidence of exclusive possession is necessary to establish prescription*". *Soertz* SPJ, in ***Simpson v Lebbe*** (1947) 48 NLR 112 (at p. 112) in relation to prescription among co-owners insisted that "*… very clear and strong evidence of an ouster and of adverse possession is called for*". In the judgment of ***Gunasekera v Tissera and Others*** (1994) 3 Sri L.R. 245, this requirement was emphasised by *Mark Fernando* J, citing a series of judicial precedents.

There is no evidence that had been presented before the trial Courts, which even tends to suggest that the Defendant did something positive after their father's death to indicate to *Juliet Perera* that he possessed the two lots D3 and E in a manner adverse to her interests, other than the evidence relating to the Defendant's act of renting out the house, collecting and appropriating its rent for himself. The Defendant admits that he never ousted his sister from lot D3 and E, when he said that he merely continued with the arrangement his father had set up even after the latter's demise. In my assessment these items of evidence do not justify a reasonable inference that there was an overt act by which the character of possession held by the Defendant was changed

any time after 1969, which notified to his sister of same. The institution of action to evict the tenant *Simion Perera* too could not accrue to the benefit of the Defendant, in view of the evidence of the Plaintiff that had been referred to above.

I accordingly hold, following the judgment of ***Perera v Perera*** (supra), that the requirement of ouster that had been insisted upon by the superior Courts in relation to co-owned property, is equally applicable even to instances where a claimant of prescriptive title, who was initially allowed into a property, firstly due to familial relationship as in the instant appeals, and secondly because he was allowed to possess the property only upon his acknowledgement of a right, either expressly or impliedly, existing in the other member of family, against whom the prescriptive claim is made.

The other aspect of the Defendant's contention, that whether the possession of the land by the Defendant for well over four decades, in itself is sufficient to a decree in his favour, requires consideration at this stage.

If one were to assume that there was no evidence at all to justify an inference that the Defendant was in permissive possession of his sister *Juliet Perera,* would he still be able to obtain a decree in his favour under section 3 of the Prescription Ordinance, solely on the basis that he had possessed lots D3 and E for over four decades?

When the evidence of the Defendant is considered as a whole, it is evident that his claim of prescription is primarily based on the possession of lots D3 and E for a very long period, which had exceeded a period of over four decades. Understandably, both Counsel for the Defendant had placed heavy reliance of this factor as well before this

Court, in defending the conclusions reached by the High Court of Civil Appeal to allow both his appeals.

As already indicated, the period of four decades commencing from 1954 to 1999, would be considered in this judgment after dividing same into two parts, based on the reasoning of the High Court of Civil Appeal. The first part, which is currently under consideration, covers the period commencing from 1954 to 1988, the year *Juliet Perera* transferred her title to a total outsider for the first time. The other part covers the period from 1988 to 1999, the year in which the Plaintiff was evicted by an order of Court, which shall be considered in detail, in the latter part of this judgment.

It is correct to state that there are judicial precedents that supports the position that, in certain circumstances, the possession of a parcel of land over a very long time might justify drawing of the presumption of ouster. I shall refer to a few of them, which indicate the underlying rationale for adopting such an approach. The full bench decision of ***Odiris et al v Mendis et al*** (1910) 13 NLR 309, *Hutchinson* CJ held that "*… the first plaintiff remained in sole possession of B and C for more than thirty years after the expiration of the six years mentioned in the voucher. I think that it is the reasonable conclusion from these facts that he disputed the defendants' title to B and C at the end of the six years, and has disputed it ever since, and it is too late-now for them to assert it. In his plaint he claimed B and C by prescriptive title; and although there was no issue as to prescription, I think that, after such a long period of adverse possession since the term fixed in the voucher, he is not precluded from now disputing the defendants' title.*"

In the judgment of ***Rajapakse and Others v Hendrick Singho and Others*** (1959) 61 NLR 32, *Basnayaka* CJ was of the view that " … *the*

evidence that the defendants since the death of Paulis in 1922, were not only in occupation of the land but also took its produce to the exclusion of the plaintiffs and their predecessors in title, and gave them no share of the produce, paid them no share of the profits, nor any rent, and did not act from which an acknowledgment of a right existing in them would fairly and naturally be inferred, is overwhelming."

Similarly, in the judgment of ***Angela Fernando v Devadeepthi Fernando and Others*** (2006) 2 Sri L.R. 188, *Weerasuriya* J, following the reasoning of ***Tillekeratne v Bastian*** (supra), observed that (at p. 194) "*ouster does not necessarily involve the actual application of force. The presumption of ouster is drawn in certain circumstances when exclusive possession has been so long continued that it is not reasonable to call upon the party who relies on it to adduce evidence that at a specific point of time in the distant past there was in fact a denial of the rights of the other co-owners."* His lordship thereupon had reiterated the principle enunciated in ***Tillekeratne v Bastian*** (1918) 21 NLR 12, by stating that it "… *recognises an exception to the general rule and permits adversity of possession to be presumed in the presence of special circumstances additional to the fact of undisturbed and uninterrupted possession for the requisite period*."

In the full bench judgment of ***Tillekeratne v Bastian*** (supra), *Bertram* CJ, in relation to such an instance, posed the question "*if it was not originally adverse, at what point it may be taken to have become so*?" and proceeded to answer same with the statement (at p.23) that "… *it is open to the Court, from lapse of time in conjunction with the circumstances of the case, to presume that a possession originally that of a co-owner has since become adverse*." In stating thus, his Lordship was alive to the principle of law that had been laid down by *Marshall* CJ in ***Mac Clung v Ross*** (1820) 5 Wheaton 116, that "*a silent possession, accompanied with no act*

which can amount to an ouster or give notice to his co-tenant that his possession is adverse, ought not to be construed into an adverse possession; mere possession, however exclusive or long continued, if silent, cannot give one co-tenant in possession title as against another co-tenant."

In the full bench judgment of ***Alwis v Perera*** (1919) 21 NLR 321, *Bertram* CJ, reiterated the principle of law which was expounded in the case of ***Tillekeratne v. Bastian,*** (supra) 21 NLR 12 that "*where it is shown that people have been in possession of land for a very considerable length of time, that fact, taken in conjunction with the other circumstances of the case, may justify a Court in presuming that the possession which originated in one manner, as, for example, by permission, may have changed its character, and that at some point it became adverse possession.*" The underlying rationale of this principle is explained by *De Silva* J in ***Abdul Majeed v Ummu Zaneera et al*** (supra, and at p. 372) with the statement that "*the presumption of ouster is drawn in certain circumstances, when the exclusive possession has been so-long continued that it is not reasonable to call upon the party who relies on it to adduce evidence that at a specific point of time in the distant past, there was in fact a denial of the rights of other co-owners. The duration of exclusive possession, being so long, it would not be practicable in such a case to lead the evidence of persons who would be in a position to speak from personal knowledge as to how the adverse possession commenced. Most of the persons who had such knowledge may be dead or cannot be traced or are incapable of giving evidence when the matter comes up for trial. In such a situation it would be reasonable, in certain circumstances, to draw the presumption of ouster.*"

The Privy Council, in its judgment of ***Cadija Umma and another v Don Manis Appu and Others*** (1938) 40 NLR392 considered the view expressed by in ***Tillekeratne v Bastian*** (supra) on the parenthetical

clause of section 3 of the Prescription Ordinance. In the said judgment *Bertram* CJ observed that "*the parenthesis has no bearing on the meaning of the words ' adverse title': it may henceforth be left out of account in the discussion of the question*". The Privy Council stated that "*their Lordships cannot accept this dictum of the learned Chief Justice*". Their Lordships, however, were not inclined to describe "*under what conditions an agent or co-owner can be heard to say that his possession has been an ouster of his principal or co-sharer*" as it "*is a matter which need not here be examined.*"

In ***Abdul Majeed v Ummu Zaneera et al*** (supra), having referred to the phrase "*with the circumstances of the case*" from the judgment of *Bertram* CJ in ***Tillekeratne v Bastian*** (supra), *HNG Fernando* J (as he was then) was of the view that " *read out of their context, these observations may tend to support the view that adversity may be presumed from mere long continued and exclusive possession*" and therefore holds that " *the so-called presumption of ouster is not to be applied arbitrarily, but only if proved circumstances tends to show , firstly the probability of an ouster, and secondly the difficulty or impossibility adducing proof of the 'ouster'. If the circumstances justify the opinion that possession must have become adverse at some time, a judge is not in reality presuming an ouster, he rather gives effect to his opinion despite the absence of proof of ouster which a co-owner would ordinarily be required to adduce.*"

Referring to the facts of the appeal before his Lordship, *Fernando* J also stated that " … *the 13th defendant undoubtedly had undisturbed and uninterrupted possession of the property in the sense contemplate by section 3 of the Prescription Ordinance, for (in the language of the parenthesis in section*

3) his possession was " unaccompanied by payment of rent, by performance of any service of duty, or by any other act from which a right existing in any other person would fairly and naturally be inferred". However, his Lordship was of the view that "*… a person is not entitled to a decree under section 3 by virtue of such possession alone; the section requires the proof of a second element, namely that the possession must be "title adverse to or independent of that of the claimant or the plaintiff in such action*".

Senanayake J, in ***Karunawathie and two others v Gunadasa*** (1996) 2 Sri L.R. 246 stated *"in considering whether or not a presumption of ouster should be drawn by reason of long continued possession alone of the property owned in common, it is relevant to consider (a) the income derived from the property (b) the value of the property (c) the relationship of the co-owners and where they reside in relation to the situation of the corpus"*. His Lordship, adopting the same line of reasoning as *Weerasuiya* J did in ***Angela Fernando v Devadeepthi Fernando and Others*** (supra), had thereupon proceeded to hold that "*in the instant case, the income from the Coconut and other trees would have been considerable and income from the Rubber plantation would have been high, this was a valuable piece of property and the 4th Defendant-Appellant was the only person who was residing in the corpus and the corpus was fenced on three sides which establish the exclusive possession. There was not an iota of evidence that the Plaintiffs had plucked even a Coconut or Jak fruit or that he received even a Coconut husk from the 4th Defendant. If the income that the property yields is considerable and the whole of it is appropriated by one co-owner during a long period it is a circumstance which would weigh heavily in favour of adverse possession on the part of the co-owner."*

Thus, it is clear that the fact of being in possession of a particular parcel of land for a substantially a long period of time, in itself would not accrue to the benefit of a claimant, who had set up a claim of acquisition of prescriptive title to such land under section 3 of the Prescription Ordinance. In addition to long possession, such a claimant must also establish "*the presence of special circumstances additional to the fact of undisturbed and uninterrupted possession for the requisite period*" in inviting a Court to draw the presumption of ouster.

Since it was for the Defendant to establish the presence of special circumstances additional to the establishment of the fact of undisturbed and uninterrupted possession for the requisite period, it would be relevant at this juncture to consider the judicial precedents that deal with the nature of his burden of proof in this particular perspective. The judicial precedents referred to above does not justify drawing the presumption of ouster upon mere assertion of the Defendant that "I possessed" the land in dispute even for a long period of time.

Moncreiff J, after undertaking a review of the judicial precedents on the nature of possession as required under section 3 of the Prescription Ordinance, had identified following applicable principles and listed them in ***Kirihamy Muhandirama v Dingiri Appu*** (1903) 6 NLR 197, (at p. 200);

> "*It would appear then that, in order that a person may avail himself of section 3 of the Prescription Ordinance, No. 22 of 1871-*

1. *Possession must be shown from which a right in another person cannot be fairly or naturally inferred.*

2. *Possession required by the section must be shown on the part of the party litigating or by those under whom he claims.*

3. *The possession of those under whom the party claims means possession by his predecessors in title.*

4. *Judgment must be for a person who is a party to the action and not for one who sets up the possession of another person, who is neither his predecessor in title nor a party to the action."*

In ***Sirajudeen v Abbas*** (1994) 2 Sri L.R. 365, at p.371, *De Silva* CJ quoted from the text of *Walter Pereira's* Laws of Ceylon, 2nd Ed, where the learned author stated, following the judgment of ***Piyenis v Pedro*** 3 SCC 125, that "*as regards the mode of proof of prescriptive possession, mere general statement 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. It is necessary that the witnesses should speak to specific facts, and the question of possession has to be decided thereupon by the Court. It is also necessary that definite acts of possession by particular individuals or particular portions of land should be proved*."

Similar observations were made by *Basnayaka* CJ, in ***Hassan v Romanishamy*** 66 CLW 112, that "*mere statements of a witness, "I possessed the land" or "we possessed the land" and "I planted plantain bushes and vegetable" are not sufficient to entitle him to a decree under section 3 of the Prescription Ordinance, …*".

The judgment of ***Juliana Hamine v Don Thomas*** (1957) 59 NLR 546, indicate that *L.W. de Silva* AJ was of the view that the plaintiff of that case had failed to establish prescriptive title as his witness had, apart from the use of the word possess, did not describe the manner of his possession. The Court held that "*such evidence is of no value where the Court has to find a title by prescription"* and quoted the Full Bench judgment of ***Alwis v Perera*** (1919) 21 N L R 321, where *Bertram* C J, emphasised that the trial judges should not confine themselves merely to record the words of a witness who states that *"I possessed" or " We possessed" or "We took the produce"*, and should insist those words are explained and exemplified.

The Defendant, during his evidence, repetitively asserted that he had possession of the land since 1954. Having admitted that he is well aware of the nature of possession he ought to have, in order to obtain a decree in his favour under section 3 of the Prescription Ordinance, the Defendant had stated in evidence that even though he was aware that his sister had executed several deeds over the lots D1, D3 and E, he did not take any action as he was content with his "undisturbed" possession over the two lots. This is the position he asserted in the answer as well. He claimed that the Plaintiff nor her predecessors in title ever possessed the two lots in respect of which declarations are sought.

But the body of evidence that had been presented by the parties before trial Courts indicate that the said assertion of an undisturbed possession by the Defendant is not supported at all. on the contrary, they in fact point that possession of the disputed lots by the new owners were *ut dominus.* With *Gamini Ponweera* acquiring title from *Juliet Perera,* being a total outsider to the family, he had possessed at least lot D1 *ut dominus* and thereby interrupting the Defendant's claim of adverse possession of lots D1, D3 and E. The actions of *Gamini Ponweera* and its effects on the possession of the Defendant are considered further down in this judgment whilst reviewing the validity of the findings of the appellate Court that the Defendant had uninterrupted adverse possession for ten years during the 11-year period of 1988 to 1999.

Thus, in view of the principles considered in the said judgments, I hold that the, the Defendant, in asserting that he 'possessed' lots D3 and E since 1954 in support of his prescriptive claim, should have been explained and exemplified as to the exact nature of his possession, for he is expected to eliminate any probable doubts or ambiguities as to the presence of permissive nature of such possession, as contended by the Plaintiff, through her witness. He should have established that his possession of the said two lots satisfies "*the presence of special circumstances additional to the fact of undisturbed and uninterrupted possession for the requisite period*". The Defendant had to establish that not only he had undisturbed and uninterrupted possession of the property unaccompanied by payment of rent, by performance of any service or duty, or by any other act from which a right existing in another person would fairly or naturally be inferred. *HNG Fernando* J (as he was then), in ***Abdul Majeed v Ummu Zaneera et al*** (supra) stated (at p.377) that " *… a person is not entitled to a decree under section 3 of the Prescription*

Ordinance by virtue of such possession alone; the section requires the proof of a second element, namely that the possession must be 'by a title adverse to or independent of that of the claimant or the plaintiff in such action'… this is a distinct and separate element emphasised by Bertram CJ in his judgment of ***Tillekeratne v Bastian*** *… ".*

Therefore, it is important for the Defendant to lay the foundation for an objective assessment of his claim by placing sufficient evidence before the trial Courts in support of the four issues he himself had suggested on nature of possession and thereby inviting Court to make a determination in his favour. He had particularly failed in fulfilling this obligation and thus fell short of establishing the second element, as stated in ***Abdul Majeed v Ummu Zaneera et al*** (supra), namely, that the possession must be "*title adverse to or independent of that of the claimant or the plaintiff in such action.*" The Defendant is not entitled to any concession of establishing this element, as it was well within his knowledge as to the nature of possession he claims to have had since 1954. The observations of *Fernando* J in the same judgment to the effect that "*the duration of exclusive possession, being so long, it would not be practicable in such a case to lead the evidence of persons who would be in a position to speak from personal knowledge as to how the adverse possession commenced. Most of the persons who had such knowledge may be dead or cannot be traced or are incapable of giving evidence when the matter comes up for trial. In such a situation it would be reasonable, in certain circumstances, to draw the presumption of ouster*" will have no relevance to the instant appeal owing to the said reason.

Having reached the final part of this judgment, I shall now proceed to consider the 2nd part, as referred to earlier in this judgment,

namely the period commencing from 1988 and ending with 1999. This approach was adopted because the High Court of Civil Appeal, in allowing the Defendant's appeal, indicated its view that the Defendant's adverse possession had commenced from the point of transfer of title of lots D3 and E to *Dinapala de Silva* in 1988, and the Defendant was in adverse possession for an uninterrupted period of ten years therefrom, and thus satisfying the requirement of section 3 of the Prescription Ordinance.

In the impugned judgments, the appellate Court had concluded "*… that the Defendant had possessed the land in dispute from the year 1954 and had specifically commenced prescription at least against Dinapala de Silva in the year 1988, who is a complete outsider, when the Defendant's sister transferred her right to Dinapala de Silva*". As already noted, this finding is common to both judgments pronounced by the High Court of Civil Appeal. The challenge mounted by the Plaintiff on the validity of the of the judgements of the High Court of Civil Appeal was based on the proposition that the Defendant had no contrary to the said finding, there was no evidence of uninterrupted period of adverse possession for ten years. Learned Counsel for the Plaintiff therefore submitted that even if the Defendant had commenced adverse possession from the year 1988, the year in which *Juliet Perera* had transferred her title over lots D3 and E in favour of *Dinapala de Silva,* and continued with such possession from that particular point onwards, clearly he had continuous period of ten years up to the time of eviction of the Plaintiff in 1999, by execution of writ in Case No. 1343/RE.

Before I consider the said contention of the learned Counsel for the Plaintiff, it is relevant to consider the process of reasoning on which the High Court of Civil Appeal had arrived at the said conclusion.

It is indicative from the judgments of the appellate Court that it had reached the said conclusion on the basis that the Defendant "*…had specifically commenced prescription at least against Dinapala de Silva in the year 1988 who is a complete outsider, …*". The wording of the appellate Court is clear to the extent that it had indirectly accepted the period of adverse possession of the Defendant that claimed to have begun in 1954 and continued until 1988, does not qualify to be considered as a period during which the Defendant had held the property adverse to the rights of his sister. Thus, it appears, that the contention advanced by the learned Counsel for the Plaintiff before the High Court of Civil Appeal as well as to this Court that the Defendant had only permissive possession of the disputed parcels of land apparently had an impact on the process of reasoning adopted by the High Court of Civil Appeal.

With that observation, this Court must then examine the remaining part of his contention; whether the Defendant had failed to establish that he had possessed lots D3 and E adverse to the interests of the Plaintiff and her predecessors in title for an uninterrupted period of ten years as the appellate Court had allowed the two appeals only on that basis.

In this context, it is relevant to note here that, I have already concluded that the contention of the learned Counsel for the Plaintiff that the nature of the Defendant's possession of lots D3 and E from 1954 to 1988, clearly beares the characteristics of a permissive possession. In the circumstances, it must then be added that, in the absence of an overt act by the Defendant during this period, which would have given *Juliet Perera* of notice that the permissive possession of her brother over the said two lots had turned adverse to her rights, there was no adverse

possession established by the former, as required by section 3 of the Prescription Ordinance during the said period of 1954 to 1988.

However, as correctly observed by the appellate Court, that situation ought to have changed when *Juliet Perera* made a transfer of her title over lots D3 and E to *Dinapala de Silva* on 18.01.1988. *Dinapala de Silva*, being a total stranger to the said family arrangement, is not entitled to rely on the continuation of the said permissive possession, where the Defendant was permitted to possess lots D1, D3 and E for and on behalf of his sisters, which had reached its terminal point with the said transfer of title. Whether *Dinapala de Silva* and others who had title to lots D3 and E, have possessed same *ut dominus* since 1988 and whether it was the Defendant who had possessed these lots adverse to the rights of the new owners from the point of acquisition of its title by them in 1988 until they were evicted upon execution of decree in 1999 are questions that should be answered in consideration of the available evidence.

Learned Counsel for the Plaintiff, during his submissions before this Court, had pointed out certain items of evidence as instances that demonstrably indicate that the adverse possession of lots D3 and E, as claimed by the Defendant, had no uninterrupted period of ten years against the Plaintiff and her immediate predecessor in title, in order to qualify him to acquire title under section 3 of the Prescription Ordinance. Having pointed out such instances from the evidence, learned Counsel then relied on a quotation from the text of a book titled ***Law of Adverse Possession*** by *M. Krishnasami* (13th Ed) where it states (at p.191) that "*Possession, which can ripen into title, must be continued without any entry or action by the legal owner of the full statutory period. An entry by the legal owner upon the land, breaks the continuity of an adverse*

possession, when it is made openly with the intention of asserting his claim thereto and is accompanied with acts upon the land, which characterises the assertion of title of ownership", as a statement that describes the nature of possession, the Defendant should have established before Court.

In view of the said contention advanced by the Plaintiff before this Court, namely, that her immediate predecessor in title, *Gamini Ponweera,* had entered into possession of lots D1, D3 and E, during the period 1994 to 1999, when the action against *Simion Perera* was pending before the District Court, it is observed that the High Court of Civil Appeal had in fact considered the question whether the requirement of uninterrupted period of ten years was satisfied by the Defendant. In rejecting the said contention of the Plaintiff, the appellate Court was of the view that, if the inquiry into applications under section 328 of the Civil Procedure Code were proceeded with, the Defendant could have easily established his possession against *Gamini Ponweera*. The appellate Court also noted that the Defendant had successfully resisted all attempts to oust him from the land during this period and hence is entitled to the prescriptive title. Therefore, the appellate Court arrived at a conclusion that the Defendant had proved his adverse possession against the Plaintiff at least from the year 1988 for an uninterrupted period of ten years.

Thus, it appears the appellate Court did consider the fact that *Gamini Ponweera,* upon his eviction from lot D1 on 14.06.1999, had filed an application under section 328 of the Civil Procedure Code. Consequently, the Appellate Court also had accepted that *Gamini Ponweera* was in possession of the disputed land, from 1994, until his eviction in 1999. But unfortunately, the Court had disregarded that fact altogether from its consideration and rejected the contention of the

Plaintiff on the premise that there was no interruption of possession of the Defendant, because, it was of the view that had the inquiry under section 328 proceeded, the Defendant could have easily established his adverse possession against *Gamini Ponweera.*

The contention advanced before this Court by the Plaintiff is line with the case she had presented before the trial Courts seeking its determination. The Plaintiff had raised several issues on this aspect on the Defendant's claim of prescription. In case No. 6906/L, issue Nos. 3b and 3c have dealt with the possession of the plaintiff and *Gamini Ponweera,* whereas in case No. 6901/L, issue Nos. 2, 4 and 5 too were raised over same. The Defendant too, on his part had raised two issues each in both trials, on the nature of possession as referred to above in this judgment. The District Court as well as Additional District Court had answered these issues in favour of the Plaintiff. The District Court had answered the Defendant's two issues on possession as "not proved" while the Additional District Court only answered the issues suggested by the Plaintiff in her favour.

Thus, in view of the Plaintiff's contention on the validity of the appellate Court's conclusion on the question of possession, which is contrary to the findings of the trial Courts on that aspect, it is necessary that this Court considers the evidence upon which such a conclusion was reached by the appellate Court, in adopting a contrary view to the one adopted by the trial Courts. Having perused the available evidence on this point, it is my view that the said affirmative conclusion reached by the High Court of Civil Appeal on the question whether the Defendant had established that he had adverse possession since 1988 over lots D3 and E, is clearly against the weight of the evidence that had

been presented before the trial Courts. I have reached that conclusion upon the reasons that are set out below.

When the High Court of Civil Appeal held with the Defendant's claim that he had acquired prescriptive title after 1988 to lots D3 and E, it is obvious that the required ten-year period of uninterrupted adverse possession should be found within the said period of 1988 to 1999, the year in which the Plaintiff was evicted by an order of Court. It is already noted that the Defendant was engaged in a process of litigation with his tenant *Simion Perera,* which commenced in the year 1985 and continued until the former was finally placed in possession of lots D1, D3 and E by an order of Court in June 1999, after this Court rejected the leave to appeal application filed by the latter. During this period, the title to lots D1, D3 and E had changed hands several times. Then, with the execution of writ, the Defendant was placed in possession of the three lots, along with his own lot D2, by an order of Court. Thereby the applicable period is reduced to a period of eleven years, between 1988 and 1999.

The first outsider to hold title to lots D3 and E from the *Perera* family is *Dinapala de Silva*. He acquired title to these two lots in 1988 from *Juliet Perera* and after his death, the heirs have got together and transferred that title back to *Juliet Perera* in 1993. During this five-year period, there is absolutely no evidence available before the trial Court as to the nature of possession, the said *Dinapala de Silva* may have had over the disputed parcels of land. The Defendant could therefore claim without any challenge to the contrary that he had exclusive adverse possession over the said parcels of land during this five-year period. In

the year 1994, *Juliet Perera* again transferred her rights over lots D1, D3 and E to *Gamini Ponweera* from whom the present Plaintiff had acquired tittle to the two lots. But there is only six-year time gap between 1988 and 1994 (ignoring the short duration when its title was held by *Juliet Perera*) and even if the Defendant had possessed the two lots adverse to the rights of *Dinalapa de Silva* during that time (through his tenant, who was placed back in possession of the entire land by Court on 01.04.1991), that period itself, being of a mere six-year duration, does not satisfy the requirement of ten years of uninterrupted adverse possession.

Thereafter, *Gamini Ponweera* had acquired title to lots D1, D3 and E from *Juliet Perera* on 10.04.1994, who then transferred title of lots D3 and E to the Plaintiff on 10.03.1996. The fiscal, having executed the writ of possession on 14.06.1999, quieted the Defendant in possession of lots D3 and E (owned by the Plaintiff) and lot D1 (owned by *Gamini Ponweera*). The Plaintiff as well as *Gamini Ponweera* have thereupon moved Court under section 328 of the Civil Procedure Code, against the said eviction. The Defendant, on the day of the inquiry of the application by *Gamini Ponweera*, had conceded to the latter's possessory rights over lot D1. The application of the Plaintiff was however dismissed by Court on the day of the inquiry, upon her failure to diligently pursue the said application.

The Plaintiff did not call any of her predecessors in title as witnesses. Her husband, who gave evidence on her behalf, had no direct knowledge of the events that had taken place prior to 1996, the

year she had acquired title to lots D3 and E. It could well be that, in order to compensate for that deficiency in their evidence, the Plaintiff did tender a certified copy of the application by *Gamini Ponweera* before the trial Courts (P7). In that application *Gamini Ponweera* asserts that he had rented out lot D1 to one *Sunanda Perera*, who operated a service station with his employees, whilst occupying the building standing on lot D1, until his eviction by Court and alleged that the Defendant had obtained the said writ of execution by suppression of relevant facts. The fiscal report (V3a) confirms this assertion of *Gamini Ponweera,* as it indicates that when the Court officer had arrived at the property in order to execute the writ, he noted that there was a service station housed in a building with asbestos roofing. There were several workmen employed by one *Sunanada Perera,* who was in occupation of that building, and presented himself as the owner of that service station.

This clearly shows that contrary to the finding of the High Court of Civil Appeal, in fact there was clear evidence before trial Courts that *Gamini Ponweera* had total control over lot D1 and possession *ut dominus* over same. The Defendant, until *Gamini Ponweera* moved Court under section 328, had consistently maintained that he exclusively possessed lots D1, D3 and E, along with his own lot D2, adverse to the interests of its true owners. When that application was taken up for inquiry, the Defendant had entered into a settlement with *Gamini Ponweera* by conceding to the position that the latter is entitled to be quieted into possession of lot D1 from the date of inquiry i.e. 24.05.2000 (P8) after renouncing his alleged prescriptive title over it.

The High Court of Civil Appeal had considered this item of evidence that had been presented in the form of a copy of proceedings under section 328 before the District Court, but in the process had failed to consider this important aspect of an item of evidence it revealed. That aspect of the evidence is in relation to the qualification on which the Defendant had insisted to be clarified, before he enters any settlement with *Gamini Ponweera*. The proceedings before trial Court revealed that the Defendant, having first satisfied himself that there was no "encroachment" by *Gamini Ponweera* into lot D2 by the latter's act of erection of a parapet wall on the common boundary between lots D1 and D2, had thereafter only proceeded with the said settlement in favour of *Gamini Ponweera*, ending the inquiry into the application under section 328.

The learned District Judge, in rejecting the Defendant's assertion that he conceded to *Gamini Ponweera's* rights only because of his close family ties, justifiably questions the acceptability of the said claim by posing the question of, if indeed that was the case is, why did the Defendant had to wait from 1999 to concede the rights of his "*family member*", until that member files an application under section 328 and proceeded with its inquiry after his eviction insisted on by the former? But the High Court of Civil Appeal had rejected the Plaintiff's contention on this aspect, solely on a mere hypothetical premise, i.e., if the inquiry was preceded with, the Defendant could have "*easily established*" his claim of prescription. However, the High Court of Civil Appeal did not offer any reasoning as to why it opted to differ with the point raised by the trial judge, by raising that question or the evidence upon which the Court had arrived at that conclusion.

The Defendant, in his evidence, did not clarify as to the time period in which this parapet wall was constructed. But he made no mention either to that construction or to the construction of a house with asbestos roofing on lot D1 by *Gamini Ponweera*. But he had accepted that it was *Gamini Ponweera,* who constructed the parapet wall, at the time of the said settlement. This construction was obviously undertaken by *Gamini Ponweera* after he had acquired title to lot D1 along with D3 and E, in 1994 and before the said settlement was entered in the year 2000. The very acts of constructing a house with asbestos roofing and erecting a parapet wall separating lot D1 from lot D2, within the confines of the larger land claimed by the Defendant, without any resistance or objection from him is a clear indication that *Gamini Ponweera* had possessed at least lot D1 *ut dominus* since acquiring its paper title, despite the claim of exclusive possession by the Defendant during the said four-year period adverse to rights of the actual owner.

During the period 1994 to 1996, lots D3 and E were owned by *Gamini Ponweera* along with lot D1. What must be noted here is *Gamini Ponweera* had erected this parapet wall, when he had title to all three lots, and therefore the interruption to the Defendant's possession is applicable to lots D3 and E as well. The Defendant nonetheless asserts that he possessed lots D1, D3 and E adverse to the rights of its true owners. It is evident that *Gamini Ponweera* had possessed lot D1 from 1994 as his own property and continued in that state until he was evicted by an order of Court in 1999. During this five-year period, the evidence clearly points to the fact that the Defendant never had any possession over lot D1, until he was placed possession of same in 1999

by Court. The series of acts attributed to *Gamini Ponweera,* namely, construction of a parapet wall, construction of a house, renting same out to a third party until his eviction in 1999 and regaining all his rights over lot D1 in 2000, all points to a justifiable finding of fact that *Gamini Ponweera* had possessed lot D1 *ut dominus.*

Similarly, the Plaintiff obtained title to lot D3 and E from *Gamini Ponweera* on 10.03.1996 and instituted the instant actions on 10.07.2007, seeking declaration of title in respect of each of the two lots D3 and E and eviction of the Defendant therefrom. It is clear that during the period of two years from 1994 to 1996, it was *Gamini Ponweera* who had the possession of lots D3 and E along with lot D1. The time period of eight years from 1988 to 1996, even if the Defendant had adverse possession over lots D3 and E during this time, he is not entitled to a decree in his favour as the required ten-year period of such possession was not satisfied.

Similarly, if there is evidence that the Plaintiff too had come into possession of lots D3 and E, after her acquisition of title to same at any point of time before 1999, thereby interrupting the completion of a continuous period of ten years reckoned from 1988, then too the Defendant is not entitled to a decree under section 3 of the Prescription Ordinance. In the circumstances, the question whether there was such evidence placed before the trial Courts must be considered by this Court.

The Plaintiff had placed oral and documentary evidence before trial Courts, which indicated what they did with the land after

acquiring paper title to same in 1996 from *Gamini Ponweera*. It is correct that only the Plaintiff's husband gave evidence on her behalf in both trials. However, the said witness, in addition to his oral evidence, in which he described the nature of possession that the Plaintiff has had over lots D3 and E since becoming its owner, also tendered several documents as evidence, in support of his wife's possession. The assertions made by the witness for the Plaintiff relates to incidents that he himself did witness by participation and thus are termed as direct evidence on those events. As correctly noted by the High Court of Civil Appeal, the witness for the Plaintiff only spoken of the events that had taken place since her acquisition of paper title to lots D3 and E in 1996.

Witness *Charles Amarasekara*, being the husband of the Plaintiff and whilst giving evidence on her behalf, had stated that during the week which followed the execution of the transfer deed in favour of his wife in 1996, they had entered into possession of the land. Having cleared same of vegetation they had demolished a derelict building standing on it along with an overhead tank. They also demolished a part of the boundary wall and taken steps to install a gate in order to gain access to lots D3 and E from the public road. During his evidence *Amarasekara* had also tendered a copy of the application made to the District Court in case No. 1343/RE under section 328, subsequent to her eviction by the fiscal marked as P7.

The High Court of Civil Appeal rejected the Plaintiff's claim on the footing that these were the actions taken by her to establish possession only after acquisition of paper title and the witness called by her is unable to give evidence with regard to the nature of possession of

the land before she made the said purchase and did not call any predecessor in title to challenge the Defendant's claim of adverse possession. This is an erroneous conclusion since the Plaintiff had in fact placed evidence before the trial Courts in the form of documentary evidence, as to the nature of possession her predecessor in title had over the two lots, when she tendered *Gamini Ponweera's* application under section 328 (P7), along with her own application (P6). The judgments of the appellate Court did not indicate whether it had considered the contents of these two items of documentary evidence or not. The appellate Court also failed to indicate its own determination on the learned District Judge's finding that the Defendant had no uninterrupted possession for a period of ten years over lots D3 and E.

In her application under section 328 of the Civil Procedure Code, the Plaintiff had averred that upon acquisition of title to lots D3 and E, she had obtained an assessment number and paid assessment rates to the local authority. This application, although indicating the intention on the part of the Plaintiff to possess the land to which she had acquired title *ut dominus*, does not qualify to be taken as an instance of an interruption to the Defendant's possession over lots D3 and E. However, the acts of demolition of a derelict building and demolition of a part of the parapet wall in order to put up a gate as claimed by the Plaintiff, in itself would qualify to be taken as instances of asserting her rights over the land and thereby at least interrupting the Defendant's possession. The Defendant had cross-examined the witness at length over this issue and suggested there were no buildings standing on the land at that point of time.

The fiscal report (V5) indicates that the Court officer had observed an overhead tank on that land in 1991. Except for this he had

not noticed any other buildings standing on that land. But the overhead tank was distinctly mentioned in the said report. This was before even the Plaintiff had acquired her title to the land. The witness for the Plaintiff may have exaggerated as to the demolition activity carried out on the land, but the claim that he did demolish the masonry structure of an overhead tank is supported by other independent evidence, namely the fiscal report. The Defendant too, in the case No. 6901/L, too admits that the Plaintiff had demolished a building standing on that land. But, despite these acts of interference with his claim of adverse possession, the Defendant did nothing to prevent the Plaintiff from possessing the land or dealing with it the way she pleased. The Defendant at the very least least did not register a nominal verbal protest for her actions on the land. Until he had raised the plea of prescription through his answer to the instant actions instituted by the Plaintiff, she had no occasion or reason even to suspect that the Defendant had commenced adverse possession against her rights.

The claim of demolition by the Plaintiff is a probable one as her building plan for the lots D3 and E was approved by the local authority on 22.08.1997 (after a period of seventeen months since she acquired title) and justifies an inference that she wanted the land to be cleared fully to facilitate the proposed construction of a dwelling house. Importantly, the demolition of a part of the parapet wall that had been put up by *Barlin Perera* and installation of a gate by the Plaintiff to lots D3 and E, was objected to by the Defendant, as indicative by letter V6. The purpose of this demolition and installation of a gate was to have independent access to the public road to lots D3 and E, since the only gate that had served the entire land had been put up by the father of the Defendant and it provided access to the public road only to lot D2 at

that point of time. Thus, the Plaintiff lost no time in installing a gate to her property after acquiring title to same. This obvious interruption to the Defendant's possession was met, not by resorting to a legal remedy on the strength of his prescriptive title, but by merely writing a letter to the local authority requesting the authority to desist from granting permission to the proposed construction activity of the Plaintiff. The reply to the Defendant's complaint by the local authority (V6) indicate that it relates to an unauthorised construction of a parapet wall. In fact, the *Ja-Ela* Pradeshiya Sabha, in response to the Defendant's complaint of an unauthorised construction by the Plaintiff, had directed him twice indicating its position that, unless he obtains a Court order within 14 days, the authority would proceed to approve her building plan. Despite these clear directions, the Defendant opted not to seek any legal remedy against the activities of the Plaintiff over the land and to assert his alleged prescriptive title over the lot D3 and E.

The Plaintiff's husband who participated in the inquiry held by the local authority into the Defendant's petition objecting to granting approval to their building plan, said in evidence that Defendant's basis of objection was based only on the fact that there was ongoing litigation with *Simion Perera.* The Defendant himself admitted in evidence that during the inquiry before the local authority, the officials have advised the Plaintiff's husband not to proceed with the purchase because of the said pending litigation. He also admitted before the trial Courts that witness for the Plaintiff *Amarasekara* had demolished a part of the existing boundary wall and made constructions on lots D3 and E.

What is important to note here is that the Defendant did not claim any prescriptive title to the said property to the Plaintiff even at that point of time. Certainly, this was yet another opportunity for the

Defendant to expressly claim of his acquisition of title to lots D3 and E on the basis of being in possession for a long period of time and to put the Plaintiff on notice of his rights and to resist her possession. But he had apparently kept that claim of prescription as a secret and divulged it only when the Plaintiff sought to evict him by filing the instant actions.

These several instances of activity to which the witness to the Plaintiff had referred to in his evidence are clearly supported by contents of the documentary evidence that had contemporaneously been made and existed even before the instant litigations are instituted. Some of these items of documentary evidence were tendered to Court by the Defendant himself. If the Defendant's adverse possession of lots D1, D3 and E was interrupted during the period commencing from 1988 and 1999, and thereby denying him of fulfilling the requirement of having adverse possession for an uninterrupted period of ten years within that 11-year period, then he is not entitled for a decree in his favour under section 3 of the Prescription Ordinance.

Thus, as indicated earlier on, I am of the view that when the High Court of Civil Appeal rejected the Plaintiff's claim of being in possession of lots D3 and E on the footing that these instances refers only to actions taken by her after acquisition of paper title and therefore her failure to call any of her predecessors in title to rebut the Defendant's claim of adverse possession by leading evidence as to the nature of possession they had over lots D3 and E, the appellate Court had clearly fallen into error in its failure to consider the evidence that had been referred to in the preceding paragraphs. In arriving at the said erroneous conclusion, the High Court of Civil Appeal also failed to consider whether these several acts of the Plaintiff did interrupt the

continuity of the alleged adverse possession relied on by the Defendant. There is a definite finding of fact by the District Court that the adverse possession of the Defendant was interrupted during the period 1988 to 2007, which in turn based on the Defendant's own admission, upon being suggested so by the Plaintiff. The appellate Court had unfortunately ignored all these important items of evidence, that had been presented by the Plaintiff in both oral and documentary forms, in relation to the underlying issue, whether the Defendant had uninterrupted possession of ten years since 1988. The appellate Court offered no reason to justify why it opted to hold contrary to the finding of these relevant facts in issue by the trial Court.

The fact that the Defendant, despite his claim of having been in possession of the same for over four decades, did not resort to legal remedies to prevent the Plaintiff from continuing in her activities over lots D3 and E, on the basis that she has paper title to the property and thereby disturbing his rights acquired by adverse possession over same, justifies drawing an inference that he did not do so because he had acknowledged a right existing in the Plaintiff for her to engage in such activity over the said two lots. The Defendant had full knowledge of the activities of the Plaintiff over the two lots. If that in fact the case is, then the Defendant is clearly disqualified to a decree in his favour, under section 3 of the Prescription Ordinance. Considering the available evidence, it is clear that the possession of the Defendant was repeatedly interrupted by the activities of the Plaintiff and thereby denied the former of an uninterrupted period of ten years of adverse possession.

Therefore, the answer of the District Court to the issue No. 11 of the Defendant, whether the Plaintiff had no possession in whatever form to the lands described the 3rd, 4th and 5th schedules to the plaint

(lots D2. D3 and E respectively) in case No. 6906/L, as "not proved", is a conclusion well supported by the body of evidence presented before it. Thus, the conclusions reached by the High Court of Civil Appeal that "*it is clear that the Defendant had always successfully resisted all attempts to oust him*" and the "Defendant *had been able to establish that he had continued possession of the land until this action was filed by the Plaintiff*", are clearly contrary to the weight of available evidence and, for that reason, are considered as erroneous.

Thus, in conclusion, I am of the view that during the period 1969 to 1988 the Defendant only had permissive possession of *Juliet Perera* and, in the absence of any overt act by which the permissive character of his possession turned into an undisturbed and uninterrupted possession by which a denial of a right existing in the latter could be fairly and reasonably inferred during this period, he is not entitled to a decree under section 3 of the Prescription Ordinance. During the period 1988 to 1999, also he had failed to establish uninterrupted adverse possession of lots D3 and E, for a period of ten years.

Therefore, the question of law on which leave was granted in both the instant appeals, namely, whether the learned Judges of the High Court erred in law in failing to appreciate that the Defendant failed to show an overt act or adverse possession against Plaintiff, namely the Defendant's sister during the period 1969 –1994, is answered in the affirmative and in favour of the Plaintiff.

Hence, the impugned judgments of the High Court of Civil Appeal in appeal Nos. WP/HCCA/NEG/03/2014 (F) and WP/HCCA/NEG /39/2013(F) are hereby set aside. The judgments of the District Court of *Negombo* in case No. 6906/ L and the judgment of

the Additional District Court of *Negombo* in case No. 6901/L, which held in favour of the Plaintiff are restored back and affirmed.

The appeals of the Plaintiff, SC Appeal Nos. 116/20 and 117/20 are accordingly allowed with costs in all three Courts.

JUDGE OF THE SUPREME COURT

L.T.B. DEHIDENIYA, J.

I agree.

JUDGE OF THE SUPREME COURT

MURDU N.B. FERNANDO, PC, J.

I agree.

JUDGE OF THE SUPREME COURT