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

In the matter of an Appeal against the Judgment of the Provincial High Court of North Central Province dated 11.01.2011 in Case No. NCP/HCCA/ARP/508/2008 (F) DC. Polonnaruwa No.9491/L/2003.

**SC. Appeal No. 22/2013**

**SC/HC(CA)LA No. 56/2011**

**NCP/HCCA/ARP/508/2008(F)**

**DC. Polonnaruwa No.9491/L/2003**

1. Wickrama Arachchilage Shriyakanthi
2. Hewa Malavige David,

Both of at C.S. 105, Thambala Road, Railroad Junction, Polonnaruwa.

**Plaintiffs**

**Vs.**

E.R. Podi Nileme of C.S. 105, Thambala Road, Polonnaruwa.

**Defendant**

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**And Between**

E.R. Podi Nileme of C.S. 105, Thambala Road, Polonnaruwa.

**Defendant-Appellant**

**Vs.**

1. Wickrama Arachchilage Shriyakanthi
2. Hewa Malavige David,

Both of at C.N. 105, Thambala Road, Railroad Junction, Polonnaruwa.

**Plaintiff-Respondents**

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**SC. Appeal No. 22/2013**

**And Now Between**

E.R. Podi Nileme of C.S. 105,
Thambala Road, Polonnaruwa.

**Defendant-Appellant-Appellant**

**Vs.**

1. Wickrama Arachchilage Shriyakanthi
2. Hewa Malavige David,

Both of at C.N. 105, Thambala Road,
Railroad Junction, Polonnaruwa.

**Plaintiff-Respondent-Respondents**

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**BEFORE** : **Tilakawardane, J.**

**Dep, PC.J.**

**Wanasundera, PC.J.**

**COUNSEL** : Ms. Sudarshani Coorey for the Defendant-Appellant-Appellant.

Senaka De Saram for the Plaintiff-Respondent-Respondents.

**ARGUED ON** : 18-**11-2013**

**DECIDED ON** : **17-01-2014**

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**SC. Appeal No. 22/2013**

**Wanasundera, PC.J.**

Leave to Appeal was granted by this Court on 05.02.2013, in order to enable an Appeal against the judgment of the Civil Appellate High Court of the North Central Province holden in Anuradhapura dated 11.01.2011, on the following questions of law as enumerated in paragraph 9(v), (vi) and (vii) of the Petition dated 21.02.2011:

(9v) Has the Court erred in failing to consider and apply the law laid down in Arunachalam v Mohamedu (1914) 17 NLR 251 which is a judgment referred to in the decision of the Court of Appeal in Jayaratna v. Jayaratna (2002) 3 SLR 331 which was cited by the High Court in its impugned judgment in this Appeal;

(9vi) Has the High Court erred in failing to hold that a Defendant is entitled to rely on a defence which accrued to him prior to filing of his answer although it accrued after the institution of the action by the Plaintiff;

(9vii) Although this action has been instituted as a possessory action, as the Plaintiff has pleaded damages as against the Defendant and as the District Court and the High Court upheld the claim of damages and granted damages, is not the Defendant, entitled to reply on his legal right, based on his permit, to possess the land, as a defence to this action of the Plaintiff.

The facts relating to this Appeal are as follows. The Plaintiff-Respondent-Respondents [hereinafter referred to as the Respondent] claim that on or about 14.08.2002, the Petitioners forcibly entered the land in suit [hereinafter referred to as the land] namely, Lot No. 793 in extent 18.7 perches depicted in F.S.P. No. 3950 and commenced construction of a shop. Distressed by this behavior, the Respondents lodged a Police complaint and legal action by way of Case No.

52472 in the Primary Court was instituted wherein the Petitioners were granted possession of the premises. Aggrieved by this decision, the Respondents instituted action by Plaint dated 09.05.2006 in the District Court of Polonnaruwa, in pursuance of a declaration that the Respondents were the possessors of the abovementioned land. Judgment was entered in favour of the Respondents at the District Court and the Petitioner appealed against this decision to the Civil Appellate High Court of North Central Province where the decision was affirmed. Aggrieved by said judgment, action was instituted in the Supreme Court.

The Respondents stated that Ganepola Aarachchige Gertie Nona, the mother of the 1st Respondent, was in possession of the premises since 1956 while the 2nd Respondent too enjoyed and developed the land from 1956 until his death on 11.06.2003. The 1st Respondent claims to have enjoyed the land from her birth and developed it subsequent to the 2nd Respondent becoming frail. However, due to the actions of the Petitioners, they were dispossessed of their land. The Respondents also claim that the Petitioners have possession of the adjoining land, namely Lot No. 793. Thus, as the Respondents have instituted a possessory action, the Petitioners have moved to present evidence of title to establish ownership and militate against the possessory claim of the Respondents by way of Case No. 800/L instituted in the District Court which made an ejectment order against Gertie Nona and the 2nd Respondent on 19.09.1973. The Petitioners also relied heavily on a permit issued under Section 19(2) of the Land Development Ordinance bearing No. NCP/TK/09/02.06 issued on 06.03.2003 for Lot No. 792 and 793.

Firstly, this Court finds it necessary to ascertain the need for proof of title in a possessory action and observes that Section 4 of the Prescription Ordinance No. 22 of 1871 states the following:

> "It shall be lawful for any person who shall have been disposed of any immovable property otherwise than by the process of law, to institute proceedings against the person dispossessing him at any time ***within one***

***year of such dispossession.*** And on proof of such dispossession within one year before action is brought, the Plaintiff in such action shall be entitled to a decree against the Defendant for the restoration of such possession ***without proof of title.***

Provided that nothing herein contained shall be held to affect the other requirements of the law as respects possessory cases."

Furthermore, in Perera v Perera 39 CLW 100, Gratiaen J. held that "In possessory actions it is not appropriate to investigate title for the purpose of deciding whether or not a party's claim to possession of land is justified in law."

A point of contention, especially arising in terms of whether the Respondents have proof of title, was the Permit bearing No. NCP/TK/09/02/06 obtained by the Petitioners. A question arose as to whether the Defendant-Appellant could rely on this permit which was issued on 06.03.2003, to entitle him a legal right to possess the land, even though action had already been instituted in the District Court of Polonnaruwa on 07.02.2003. This question was answered in the negative by both the District Court and the High Court. Given that neither the Prescription Ordinance nor the case law insists on proof of title in a possessory action, this Court finds that the relevance of the Permit on this point is vitiated.

The Court also finds it imperative to ascertain the accurate extent of the land in suit in order to effectively answer the questions of law posed. In the case No. 800/L referred to by the Petitioner an ejectment order was made to eject Gertie Nona and the 2nd Respondent from the land. The Petitioner has heavily relied on this ejectment order to support his claim that the Respondents had no possession of the land. However, this Court notes that the extent it considers is one of two Roods only whereas the Licensed Surveyor, in evidence indicates that the Plan No. 3950 was derived from the Original Plan No. 472 which has presently been divided into two allotments, namely Lot No. 792 and 793 which in total extent is 2 Roods and 23 Perches. Thus, Case No. 800/L cannot legally be relied upon in relation to the remaining 23 Perches. Furthermore, Lot No. 793 of

Plan F.S.P. No. 3950, marked V2 in evidence, is indicated to be 0.0473 Hectares in extent i.e. 18.7 perches or thereabout which falls comfortably within the remaining 23 Perches, further supporting the contention that the Petitioner can stake claim to only 2 Roods and not the remaining extent envisaged in Plan F.S.P. No. 3950.

The Petitioner also relied heavily on the abovementioned Permit issued on 06.03.2003 in respect of Lot No. 792 and 793 for an extent of 2 Roods and 21.5 Perches, which, given the extent in case No. 800/L, the Petitioner cannot lay claim to the remaining 21.5 Perches. Given this reality, it is clear to this Court that the Petitioner can stake a claim only to 2 Roods but not to any further extent. This Court makes reference to the question posed by the Petitioner as to whether he can rely on his legal right to possess the land based on his permit, as a defence against the plea of damages by the Respondents. I note that as per the judgment in Case No. 800/L, the Petitioner can only claim title to 2 Roods only. Thus, any attempt to use a non-existent legal title with regard to the remaining 23 Perches [which encompasses Lot No. 793] as a defence against a plea of damages, should fail.

The Petitioner further raised the question of whether the High Court erred in failing to consider and apply the law in Arunachalam v. Mohamedu (1914) 17 NLR 251, which states that "A claim in reconvention may be made in respect of a cause of action that accrued at any time before the filing of the answer", as the Answer of the Petitioner was filed much later. However, reference must be made in ascertaining this issue, to Jayaratne v. Jayaratne (2002) 3 SLR 331 where the Court of Appeal in discussing the relevance of the case to a similar situation stated that 'It appears that this decision has been based on the facts peculiar to that case and does not lay down a rule which operates as an exception to the general rule that the rights of the parties are to be determined as at the date of the plaint.' The general rule that the rights of the parties being determined at the date of the plaint is laid down in Silva v. Fernando (1912) 15 NLR 499 and Talagune v. De Livera (1997) 1 SLR 253 and this Court does not

find any extenuating circumstances in the present case that merits an exception to this general rule.

I answer the questions of law enumerated at the commencement of this judgment in the negative, according to the reasons given above. This appeal is therefore dismissed. However I order no costs.

**Judge of the Supreme Court**

**Tilakawardane,J.**

I agree

**Judge of the Supreme Court**

**Dep, PC.J.**

I agree

**Judge of the Supreme Court**