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

SC/APPEAL/225/2014
SC/HCCA/LA/169/2013
HCCA/Kandy/24/2011(F)
DC MATALE 5632/L

Mohamadu Abu Sali
Son of Adapelegedara Mohamed
Hasim Lebbe,
25/2, Medillethanna, Ankumbura
Plaintiff

Vs.

1. Ummu Kaldun daughter of
   Mohomed Illas,
   139, Kurunagala Road, Galewala
2. M.I.M. Falulla
   13, Kalawewa Road, Galewela

Defendants

AND BETWEEN

M.I.M. Falulla
13, Kalawewa Road, Galewela
2nd Defendant-Appellant

Vs.

Mohamadu Abu Sali
Son of Adapelegedara Mohamed
Hasim Lebbe

25/2, Medillethanna, Ankumbura
Plaintiff-Respondent

Ummu Kaldun
Daughter of Mohomed Illas,
139, Kurunagala Road, Galewala
1st Defendant-Respondent

AND NOW BETWEEN

Mohamadu Abu Sali
Son of Adapelegedara Mohamed Hasim Lebbe,
25/2, Medillethanna, Ankumbura
Plaintiff-Respondent-Appellant

Vs.

1. Ummu Kaldun
Daughter of Mohomed Illas,
139, Kurunagala Road, Galewala
And now
M.F.M. Younis Stores,
64/A, 6/2, Waththagama Road,
Madawala
1st Defendant-Respondent-Respondent

M.I.M. Falulla
13, Kalawewa Road, Galewala
2nd Defendant-Appellant-Respondent

Before: Hon. P. Padman Surasena, J.
Hon. Mahinda Samayawardhena, J.
Hon. K. Priyantha Fernando, J.

Counsel: Nuwan Bopage with R.D. Shariff for the Plaintiff-Respondent-Appellant.
Hejaaz Hizbullah with Piyumi Seneviratne for the 2nd Defendant-Appellant-Respondent.

Written Submissions:

By the Appellant on 04.08.2014 and 02.06.2023
By the Respondent on 03.12.2014 and 26.09.2023

Argued on: 04.05.2023

Decided on: 30.01.2024

Samayawardhena, J.

Background

The plaintiff filed this action in the District Court of Matale on 22.05.2002 on the basis that he leased out premises No. 13, Kalawewa Road, Galewela, morefully described in the schedule to the plaint, to the 1st defendant by lease agreement marked P2 dated 05.09.1988 for a period of four years from 01.09.1988 to 01.09.1992 subject to the terms and conditions stated therein but the 1st defendant together with her brother, the 2nd defendant, continues to be in possession without yielding up possession of the premises to the plaintiff. The plaintiff sought a declaration of title to the said premises, ejectment of the two defendants therefrom and damages.

The 1st defendant in the answer admitted that she was the lessee of the premises by P2 but stated that she was never given possession of the premises. She prayed for an order directing the plaintiff to release the refundable deposit of Rs. 100,000 deposited with the plaintiff at the time of the execution of the said lease agreement. The 1st defendant did not in my view contest the plaintiff's case in all three Courts. The 1st defendant did not give evidence, nor did she call any witnesses despite the plaintiff giving affirmative evidence that possession of the premises was handed over to the 1st defendant in the presence of the 2nd defendant and the defendants' father, Illiyas, at the time of the execution of P2. Illiyas is also a witness to the lease agreement. As the learned District Judge *inter alia* has stated in the judgment, in the year 1988, a sum of Rs. 100,000 is a substantial amount and if possession was not handed over to the 1st defendant, she would not have waited until 2003 to recover that money. There is not even a police complaint alleging that possession was not handed over to her upon the execution of the lease agreement. Conversely, the plaintiff made a police complaint dated 18.09.1992 marked P14 (17 days after the effluxion of the lease agreement) stating that the defendants are not vacating the premises.

The 1st defendant is the elder sister of the 2nd defendant. The 2nd defendant is also in possession of the premises. It is the complaint of the plaintiff that the 1st defendant sublet or allowed the 2nd defendant also to conduct the business in the premises in violation of clause 5 of the lease agreement. It is the 2nd defendant who contested the plaintiff's case. The 2nd defendant took up the position in the answer that he became a co-owner of the land by purchasing 1/45 share of the land including premises No. 13 from another person by deed marked 2V1 dated 16.08.1990 and therefore without first filing a partition action to end the co-ownership, the plaintiff cannot maintain this action.

After trial, the learned District Judge entered judgment for the plaintiff except the relief for declaration of title.

On appeal, the High Court of Civil Appeal set aside the judgment of the District Court and dismissed the plaintiff's action on the basis that the plaintiff filed the action as the sole owner of the property but the 2nd defendant is a co-owner of the property and therefore the 2nd defendant cannot be ejected from the property. In addition, the High Court concluded that the plaintiff's cause of action is prescribed since the plaintiff filed the action 6 years after the termination of the lease agreement.

This Court granted leave to appeal against the judgment of the High Court of Civil Appeal mainly on three questions of law:

(a) Is the judgment of the High Court of Civil Appeal contrary to law, more specifically, section 116 of the Evidence Ordinance?
(b) Did the High Court of Civil Appeal misdirect itself in law by failing to understand the real nature of the dispute presented for adjudication?
(c) Did the High Court of Civil Appeal err in law in holding that the cause of action of the plaintiff is prescribed in law?

Can the plaintiff's action be dismissed on the basis that the 2nd defendant is a co-owner of the land?

The learned District Judge accepted the evidence of the plaintiff that at the time of the execution of the lease agreement, the possession of the premises was handed over to the 1st defendant in the presence of the 2nd defendant who is the brother of the 1st defendant and their father. The High Court does not dispute this finding of fact by the trial Judge.

The 2nd defendant came into possession of the premises under the 1st defendant lessee, his elder sister. The 2nd defendant does not have independent survival in the premises. He will have to shelter behind the protection of her sister. Every subordinate interest must perish with the superior interest on which it is dependent.

What does section 116 of the Evidence Ordinance enact?

> *No tenant of immovable property, or person claiming through such tenant, shall during the continuance of the tenancy, be permitted to deny that the landlord of such tenant had, at the beginning of the tenancy, a title to such immovable property; and no person who came upon any immovable property by the licence of the person in possession thereof shall be permitted to deny that such person had a title to such possession at the time when such licence was given.*

The lessee cannot question the lessor's right, title or interest in the premises for the latter to lease it out to him. The reason being that a person need not necessarily be the owner of the premises to enter into such an agreement with another. Even in the absence of ownership, these agreements establish valid legal relationships such as landlord and tenant, lessor and lessee, licensor and licensee between the parties, although they may not be binding on the actual owner. (Professor George Wille, *Landlord and Tenant in South Africa*, 4th Edition, page 20; Dr. H.W. Tambiah, Landlord and Tenant in Ceylon, page 48; *Imbuldeniya v. De Silva* [1987] 1 Sri LR 367 at 372, 380, *Gunasekera v. Jinadasa* [1996] 2 Sri LR 115 at 120; *Pinona v. Dewanarayana* [2004] 2 Sri LR 11)

In *Ruberu v. Wijesooriya* [1998] 1 Sri LR 58 at 60, Gunawardana J. held:

> *Whether it is a licensee or a lessee, the question of title is foreign to a suit in ejectment against either. The licensee (the defendant-respondent) obtaining possession is deemed to obtain it upon the*

> *terms that he will not dispute the title of him, i.e. the plaintiff-appellant without whose permission, he (the defendant-respondent) would not have got it. The effect of the operation of section 116 of the Evidence Ordinance is that if a licensee desires to challenge the title under which he is in occupation he must, first, quit the land. The fact that the licensee or the lessee obtained possession from the plaintiff-appellant is perforce an admission of the fact that the title resides in the plaintiff. No question of title can possibly arise on the pleadings in this case, because, as the defendant-respondent has stated in his answer that he is a lessee under the plaintiff-appellant, he is estopped from denying the title of the plaintiff-appellant. It is an inflexible rule of law that no lessee or licensee will ever be permitted either to question the title of the person who gave him the lease or the licence or the permission to occupy or possess the land or to set up want of title in that person, i.e. of the person who gave the licence or the lease. That being so, it is superfluous, in this action, framed as it is on the basis that the defendant-respondent is a licensee, to seek a declaration of title.*

In the case of *Reginald Fernando v. Pubilinahamy* [2005] 1 Sri LR 31 the Supreme Court declared:

> *Where the plaintiff (licensor) established that the defendant was a licensee, the plaintiff is entitled to take steps for ejectment of the defendant whether or not the plaintiff was the owner of the land.*

Gunasinghe v. Samarasundara [2004] 3 Sri LR 28 and *Dharmasiri v. Wickrematunga* [2002] 2 Sri LR 218 are also cases that share the same view.

The 2nd defendant cannot defeat the plaintiff's action on the basis that the plaintiff does not have absolute title to the premises No. 13. The

plaintiff need not prove title to the land for the ejectment of the defendant. The title is presumed to be with the plaintiff. Once the Court decides that the defendant is a lessee or licensee of the plaintiff, whether the plaintiff is the owner of the entire premises or part of it or has no title at all to the premises is irrelevant.

The High Court misdirected itself about the whole case. The High Court did not refer to any of these legal principles. The High Court did not understand the case presented by the plaintiff before the District Court. It decided the appeal on the basis that the 2nd defendant is a co-owner of the land and therefore he cannot be ejected from the premises in suit by the plaintiff who is also a co-owner. The High Court concluded:

> *On the other hand it is significant to note that the Plaintiff has come before court alleging that the 2nd Defendant is in unlawful possession and it seems that no contractual relationship whatsoever between the Plaintiff and the 2nd Defendant. The learned counsel for the Plaintiff contended that the 2nd Defendant should have surrendered the possession of the premises in suit and litigated before a competent court thereafter. However, as discussed earlier the 2nd Defendant cannot be treated as a lessee of the Plaintiff in eyes of law and he claimed to be another co-owner of the property. It is to be born in mind that the Plaintiff is evidently a co-owner of the property and he is not entitled to have a declaration of title as prayed for due to the reasons already discussed. Therefore it is my opinion that the learned District Judge erred in concluding that the Plaintiff is entitled to eject the 2nd Defendant who claimed to be another co-owner of the property in suit.*

As I have explained below, the plaintiff did not file the action as the owner or a co-owner of the premises. In any event, the 2nd defendant did not prove that he is a co-owner of the land. He tendered a deed marked 2V1

alleged to have been executed on 16.08.1990, which is during the operation of the lease agreement. It is not even a photocopy of the original deed. It is not a registered deed at the Land Registry. By way of issues, the position taken up by the 2nd defendant was not that he is a co-owner of the land but that he is the owner of premises No. 13 by deed 2V1 (vide issue No. 26).

The plaintiff's action is neither a *rei vindicatio* nor a declaration of title, but rather, an action for ejectment

The plaintiff's action is not a *rei vindicatio* action. Although the plaintiff sought a declaration of title to the premises in suit in addition to the ejectment of the defendants, what the plaintiff filed was an action for ejectment based on the violation of the lease agreement. In an ejectment action, the plaintiff must show a present right to possession of the property withheld by the defendant. In cases where a plaintiff files an action for ejectment on a breach of agreement, as in this instance, there is no legal requirement to seek a declaration of title to the premises in suit, although it is done as a matter of practice. If a declaration of title is sought in such action, the Court can grant that relief against the defendant not because the plaintiff has proved title to the premises but because the defendant is debarred from disputing the plaintiff's title by operation of law. This was lucidly explained by Gratiaen J. in *Pathirana v. Jayasundara* (1955) 58 NLR 169 at 172-173:

> *In a rei vindicatio action proper the owner of immovable property is entitled, on proof of his title, to a decree in his favour for the recovery of the property and for the ejectment of the person in wrongful occupation. "The plaintiff's ownership of the thing is of the very essence of the action". Maasdorp's Institutes (7th Ed.) Vol. 2, 96.*

The scope of an action by a lessor against an overholding lessee for restoration and ejectment, however, is different. Privity of contract (whether it be by original agreement or by attornment) is the foundation of the right to relief and issues as to title are irrelevant to the proceedings. Indeed, a lessee who has entered into occupation is precluded from disputing his lessor's title until he has first restored the property in fulfilment of his contractual obligation. "The lessee (conductor) cannot plead the exceptio dominii, although he may be able easily to prove his own ownership, but he must by all means first surrender his possession and then litigate as to proprietorship…" Voet 19.2.32.

Both these forms of action referred to are no doubt designed to secure the same primary relief, namely, the recovery of property. But the cause of action in one case is the violation of the plaintiff's rights of ownership, in the other it is the breach of the lessee's contractual obligation.

A decree for a declaration of title may, of course, be obtained by way of additional relief either in a rei vindicatio action proper (which is in truth an action in rem) or in a lessor's action against his overholding tenant (which is an action in personam). But in the former case, the declaration is based on proof of ownership; in the latter, on proof of the contractual relationship which forbids a denial that the lessor is the true owner.

Hence the High Court was wrong to have looked at the appeal on the basis that "*the plaintiff has filed this action based on his title and no more.*" The nature of the plaintiff's action is clear by the following observation made by the learned High Court Judge himself in the impugned judgement: "*A perusal of the plaint it is clear that albeit the present action is in the nature of a declaration of title no chain of title was set out in the*

plaint other than simply referring to a single title deed upon which he said to have derived title to the premises in suit."

Can a defendant who enters into a land in a subordinate character claim title to the land in the same action?

According to Roman Dutch Law principles, a defendant who enters into a land in a subordinate character such as a lessee, licensee, tenant, mortgagee etc. cannot claim ownership to the land in the same action. To assert ownership, he must first quit the land and then fight for his rights.

Voet 19.2.32 as translated in Selective Voet's commentary on the Pandects Vol 3, Percival Gane tr, Butterworth & Co. (Africa) Ltd (1956) 447 states:

> *Lessee cannot dispute lessor's title, tho' third party can. Nor can the setting up of an exception of ownership by the lessee stay this restoration of the property leased, even though perhaps the proof of ownership would be easy for the lessee. He ought in every event to give back the possession first, and then litigate about the proprietorship.*

In *Pathirana v. Jayasundara* (1955) 58 NLR 169 at 173, Gratiaen J. endorsed this view.

Maasdorp's Institutes of South African Law, Vol III (C.G. Hall ed, 8th edn, Juta and Co. 1970) 185 states:

> *A lessee, as already stated, is not entitled to dispute his landlord's title, and consequently he cannot refuse to give up possession of the property at the termination of his lease on the ground that he is himself the rightful owner of it. His duty in such a case is first to restore the property to the lessor and then to bring an action for a declaration of rights.*

In *Alvar Pillai v. Karuppan* (1899) 4 NLR 321, the plaintiff sued the defendant to recover possession of the entire land on the basis that the term of lease had expired. The defendant refused to give up possession of the whole land on the basis that he was the tenant under the plaintiff only for a half of the said land. He set up a title under another person to the other half. Although the defendant was initially placed in possession by the plaintiff on the whole land, the District Judge entered judgment for the plaintiff only for his half share. On appeal, Bonser C.J. stated at 322:

> *Now, it appears that the plaintiff can only prove title to a half of the land. It is not necessary for the purposes of this case to state the devolution of the title, for even though the ownership of one-half of this land were in the defendant himself, it would seem that by our law, having been let into possession of the whole by the plaintiff, it is not open to him to refuse to give up possession to his lessor at the expiration of his lease. He must first give up possession, and then it will be open to him to litigate about the ownership (see Voet XIX. 2. 32).*

In *Mary Beatrice v. Seneviratne* [1997] 1 Sri LR 197 the Court espoused a similar viewpoint.

In the Supreme Court case of *Wimala Perera v. Kalyani Sriyalatha* [2011] 1 Sri LR 182 it was held:

> *A lessee is not entitled to dispute his landlord's title by refusing to give up possession of the property at the termination of his lease on the ground that he acquired certain rights to the property subsequent to him becoming the lessee and during the period of tenancy. He must first give up possession and then litigate about the ownership he alleges.*

In *Bandara v. Piyasena* (1974) 77 NLR 102 where facts were similar to the facts of the instant appeal, the Supreme Court held as follows:

> *Learned Counsel for the appellant submits that the learned District Judge has clearly held that the house in the premises in suit was the house taken by the defendant on the lease bond P4 of 5.12.1960. The question does arise as to whether the plaintiff can maintain this action for ejectment of the defendant. The defendant has sought to resist the claim of the plaintiff on the footing of certain interests in this land which he has acquired on a deed of 10.5.1962 during the period of the lease. The District Judge observes that as the defendant is a co-owner of this land, the plaintiff is not entitled to maintain this action against the defendant for a declaration of title to a building put up by him in the common property.*
>
> *Dr. Wickremesinghe has drawn our attention to Maasdorp Book III page 216, where he observes that a lessee is not entitled to dispute his landlord's title and consequently he cannot refuse to give up possession of the property at the termination of his lease on the ground that he is himself the rightful owner of the said property. His duty in such a case is first to restore the property to the lessor and then litigate with him as to the ownership. (See also Voet 19 Tit. 2 Section 32) where it has been set out that the setting up of any defence of ownership of the lessee cannot stay the restoration of the property leased, even though, perhaps, the proof of ownership cannot be easy for the lessee. He ought in every event to give back possession first and then litigate about the proprietorship.*
>
> *In the light of these principles which are not questioned by Mr. Amerasinghe, learned Counsel for the respondent, we are of the view that there is a merit in the submissions made by Dr. Wickremesinghe that the District Judge was in error in holding that*

the plaintiff cannot maintain this action against the defendant, since the defendant had acquired certain rights on 10.5.1962 subsequent to his becoming a lessee and during the period of the lease.

We would accordingly enter judgment for the plaintiff as prayed for. The plaintiff shall be entitled to the costs of action and of this appeal.

The High Court states "*the 2nd defendant cannot be treated as a lessee of the plaintiff in the eyes of the law and he claimed to be another co-owner of the property*." I accept that the 2nd defendant cannot be treated as a lessee of the plaintiff. But as I stated previously the 2nd defendant comes under the original lessee, the 1st defendant. With the eviction of the 1st defendant, her subordinates, agents, servants etc. should all leave. The normal rule is that the branch falls with the tree; ending of the 1st defendant's standing in the premises would also have the effect of ending that of her subordinates. The 2nd defendant cannot create a purported ownership or co-ownership during the subsistence of the lease agreement and thwart the action of the plaintiff.

For the sake of completeness, it is worth noting that if an action is filed for ejectment against such defendant who originally entered into possession in a subordinate character, and such defendant claims prescriptive title to the property (which is an arduous task) by stating that he changed the character of possession from subordinate to adverse by an overt act (as the starting point of adverse possession) and continued such adverse possession for over 10 years as required by section 3 of the Prescription Ordinance, the rigidity of the said principle can be relaxed. In such circumstances, the defendant is not compelled to surrender possession as a prerequisite for establishing his prescriptive title.

Professor G.L. Peiris in his book *Law of Property in Sri Lanka*, Vol I, (2nd edn, 1983) 112, citing *inter alia Angohamy v. Appoo* (Morgan's Digest 281), *Government Agent, Western Province v. Perera* (1908) 11 NLR 337, and *Alwis v. Perera* (1919) 21 NLR 321 states:

> *The principle that an occupation which began in a dependent or subordinate capacity can be converted into "adverse possession" by an overt act or a series of acts indicative of a challenge to the owner's title, is clearly deducible from the decided cases.*

The presumption is that a person who commences his possession in a subordinate character continues such possession in that character. To demonstrate a shift from one character to another, cogent and affirmative evidence is required.

In *Ran Naide v. Punchi Banda* (1930) 31 NLR 478, Jayawardene A.J. observed:

> *Where a person who has obtained possession of a land of another in a subordinate character, as for example as a tenant or mortgagee, seeks to utilize that possession as the foundation of a title by prescription, he must show that by some overt act known to the person under whom he possesses he has got rid of that subordinate possession and commenced to use and occupy the property ut dominus (Government Agent v. Ismail Lebbe (1908) 2 Weer. 29). It is for him to show that his quasi-fiduciary position was changed by some overt act of possession. This view was adopted by the Privy Council in Naguda Marikar v. Mohamadu (1903) 7 N.L.R. 91) and also by the Supreme Court in Orloff v. Grebe (1907) 10 N.L.R. 183).*

In *Seeman v. David* [2000] 3 Sri LR 23 at 26, Weerasuriya J. stated:

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

The same conclusion was reached in *Thillekeratne v. Bastian* (1918) 21 NLR 12 at 19 and *Mitrapala v. Tikonis Singho* [2005] 1 Sri LR 206 at 211-212.

In the case of *De Soysa v. Fonseka* (1957) 58 NLR 501 at 502, Basnayake C.J. held:

> *There is no evidence that the user which commenced with the leave and licence of the owner of No. 18 was at any time converted to an adverse user. When a user commences with leave and licence the presumption is that its continuance rests on the permission originally granted. Clear and unmistakable evidence of the commencement of an adverse user thereafter for the prescribed period is necessary to entitle the claimant to a decree in his favour. There is no such evidence in the instant case.*

In the Privy Council case of *Siyaneris v. Udenis de Silva* (1951) 52 NLR 289, it was held that "*If a person goes into possession of land as an agent for another, prescription does not begin to run until he has made it manifest that he is holding adversely to his principal.*"

In *Naguda Marikar v. Mohammadu* (1898) 7 NLR 91, the Privy Council held that in the absence of any evidence to show that the plaintiff had got rid of his character of agent, he was not entitled to the benefit of section 3 of the Prescription Ordinance.

In the case of *Navaratne v. Jayatunge* (1943) 44 NLR 517, Howard C.J. remarked:

> *The defendant entered into possession of the lands in dispute with the consent and the permission of the owner. Being a licensee, she cannot get rid of this character unless she does some overt act showing an intention to possess adversely.*

In the more recent case of *Ameen and Another v. Ammavasi Ramu* (SC/APPEAL/232/2017, SC Minutes of 22.01.2019), one of the questions to be decided was whether the defendant, who was a licensee, was entitled to put forward a plea of prescription. De Abrew A.C.J. stated:

> *When a person starts possessing an immovable property with leave and licence of the owner, the presumption is that he continues to possess the immovable property on the permission originally granted and such a person or his agents or heirs cannot claim prescriptive title against the owner or his heirs on the basis of the period he possessed the property.*

Can a plea of prescription be raised for the first time on appeal?

The defendants in the answers did not take up the position that they have acquired prescriptive title to the premises or that the cause of action of the plaintiff is prescribed. Nor did they raise an issue to that effect. However, on appeal before the High Court, counsel for the 2nd defendant appears to have taken up the position that the plaintiff's cause of action is prescribed. Although the judgment of the High Court in this regard is not clear, it is clear that the High Court has accepted the argument on prescription as another ground to allow the appeal. The High Court holds:

> *A simple reading of the plaint makes it clear that the Plaintiff has filed this action based on his title and no more. In fact it is alleged*

> *that the 1st Defendant is liable to be ejected as the lease agreement has expired already but it seems as pointed out by the learned counsel for the 2nd Defendant that if there was such cause of action arose on such agreement it is prescribed as the present action was filed in 2002 namely after 06 years. I am of the view that in the absence of declaration of title in favour of the Plaintiff is not entitled act upon such cause of action already prescribed.*

Prescription can take the form of acquisitive prescription, serving as a mode of acquiring title, or extinctive prescription, acting as a defence or bar to prosecution. The plea of prescription to be sustained in law must be taken up in the pleadings. It cannot be raised as an issue at the trial without expressly pleaded in the answer, unless the plaintiff consents to it. It cannot be raised as an issue while the trial is in progress. Needless to say, it cannot be taken up for the first time in appeal.

The Prescription Ordinance only limits the time within which an action may be instituted but it does not prohibit an action being instituted outside the stipulated time limit. If the objection is not raised by the opposite party in the pleadings, the opposite party is deemed to have waived it and acquiesced in the action being tried on the merits.

The judge cannot take up the plea of prescription *ex mero motu* because a party can waive such objection. *Chitty on Contract*, Vol I, 33rd edn, para 28-108 states "*A party is not bound to rely on limitation as a defence if he does not wish to do so. In general, the court will not raise the point suo officio even if it appears from the face of the pleading that the relevant period of limitation has expired.*" *Chitty* at para 28-127 states "*Limitation is a procedural matter, and not one of substance".*

In *Juanis Appuhamy v. Juan Silva* (1908) 11 NLR 157, Hutchnson C.J. and Wood Renton J. (later C.J.) state that "*it is competent for a party to waive a claim by prescription.*"

It is not obnoxious to law or public policy for parties to agree not to plead prescription (*Hatton National Bank Ltd v. Helenluc Garments Ltd* [1999] 2 Sri LR 365). *Chitty* (*ibid*) dealing with the English Law states at para 28-109 "*An express or implied agreement not to plead the statute, whether made before or after the limitation period has expired, is valid if supported by consideration (or made by deed) and will be given effect to by the Court.*" Prof. C.G. Weeramantry, *The Law of Contracts*, Vol II, para 844, states: "*It is not contrary to public policy for parties to enter into an agreement not to plead limitation. Such an agreement is valid and enforceable in English Law if supported by consideration, whether it be made before or after the limitation period has expired. The same observation holds good for our law, except that such an agreement need not be supported by consideration.*"

In *Brampy Appuhamy v. Gunasekere* (1948) 50 NLR 253 at 255 Basnayake J. (later C.J.) held:

> *An attempt was made to argue that the defendant's claim was barred by the Prescription Ordinance (Cap. 55). The plea is not taken in the plaintiff's replication. There is no issue on the point, nor is there any evidence touching it. The plaintiff was represented by counsel throughout the trial. In these circumstances the plaintiff is not entitled to raise the question at this stage. It is settled law that when, as in the case of sections 5, 6, 7, 8, 9, 10 and 11 of the Prescription Ordinance, the effect of the statute is merely to limit the time in which an action may be brought and not to extinguish the right, the court will not take the statute into account unless it is specially pleaded by way of defence.*

In *Gnananathan v. Premawardena* [1999] 3 Sri LR 301, the defence taken in issue Nos. 7-9 was based on section 10 of the Prescription Ordinance. These issues on prescription were raised after the commencement of the trial. On appeal, the Court of Appeal took the view that the District Judge should not have accepted those issues as the defendant did not plead such defence in the answer. Justice Weerasekera at 309-310 states:

> *Presumably, the defence taken in the issue is based on section 10 of the Prescription Ordinance. The acts of nuisance complained of are thus sought to be shown to have taken place long prior to the 3-year period. To that the plaintiff-appellant's answer is that the application of the defendant-respondent to the National Housing Department for the premises to purchase was finally concluded only 2 months before the institution of the action.*
>
> *Be that as it may the position in law is quite clear and settled. In the case of Brampy Appuhamy v. Gunasekera 50 NLR 253 Basnayake J. held: "Where the effect of the Prescription Ordinance is merely to limit the time within which an action may be brought, the Court will not take the statute into account unless it is expressly pleaded by way of defence."*
>
> *It is, therefore, settled law and that for salutary reasons lest all the basic rules of law particularly that of the rule of audi alteram partem that if a party to an action intends to raise the plea of prescription it is obligatory on his part to plead that in his pleadings. I say salutary because reason, justice and fair play demands that the opposing party be given an opportunity of making such a plea and that party or no party should not be taken unawares of a defence taken that the action is barred by lapse of time.*

In this action the answer did not state that the cause of action was prescribed in law. For the first time this defence was permitted after the commencement of the evidence. A practice which in my view is both repugnant to law, reasonableness and fair play and from which judges should desist. In any event the defendant-respondent has denied all the acts of nuisance acts pleaded, but also for some inexplicable reason pleaded non-deterioration. Therefore, a plea of prescription cannot arise without the act or acts of nuisance being admitted whereas the defendant-respondent has in his answer specifically denied them. The plea is, therefore, not only in law, but also at the stage it was so done, both bad in law, but also contradictory in itself.

The acceptation of these issues is also repugnant to the law inasmuch as the date of commencement of prescription is vague in that the absence of a plea as to whether it was the acts of nuisance or the date of the notice to quit. It is, therefore, additionally for the same reason of reasonableness that as is required by section 44 of the Civil Procedure Code that a plea of the reasons for the non-operation or application of prescription is mandatory that it is equally reasonable and fair that the law requires that the defence of prescription be specifically pleaded in the answer.

I am, therefore, of the view that issues 7, 8 and 9 should not have been accepted as issues for adjudication and that the order accepting them is bad, insupportable and made per incuriam. I, therefore, reject them.

In the Supreme Court case of *Tilakaratne v. Chandrasiri and Another* (SC/APPEAL/172/2013, SC Minutes of 27.01.2017), prescription was not pleaded as a defence in the answer, no issue regarding prescription was framed at the trial and there was no suggestion made at the trial that

the plaintiff's action was prescribed. However, at the hearing of the appeal before the High Court, counsel for the defendants submitted that the plaintiff's action was one for "Goods Sold and Delivered" which, by operation of section 8 of the Prescription Ordinance, was prescribed after the expiry of one year from the date of the last sale which took place on 30th March 2005 as per the entries in a notebook marked P2. The High Court accepted this argument and dismissed the plaintiff's action. Prasanna Jayawardena J. held that the defendant could not have taken up the defence of prescription for the first time in appeal.

> *[I]t is settled Law that, a party is prohibited from raising an issue regarding prescription for the first time in appeal. As Bonser C.J. described in the early case of TERUNNANSE vs. MENIKE [1 NLR 200 at p.202], a defence of prescription is a "shield" and not a "weapon of offence". Adopting the phraseology used by the learned Chief Justice over a century ago, it may be said that, if a Defendant chooses not to pick up the shield of prescription when he goes into battle at the trial, the 'rules of combat' are that he forfeits the use of that shield in appeal.*

In the instant case, the High Court erred when it decided on appeal that the plaintiff's action is prescribed.

Conclusion

I answer the three questions of law on which leave to appeal was granted in the affirmative. The judgment of the High Court of Civil Appeal is set aside and the judgment of the District Court is restored. The appeal is allowed.

The subject matter of this action is business premises. The defendants refused to hand over possession of the premises after the expiry of the lease agreement for more than 20 years. Apart from other reliefs the

plaintiff is entitled to have with the appeal being allowed, the 1st and 2nd defendants each shall pay Rs. 250,000 to the plaintiff (in total Rs. 500,000) as costs of this Court in addition to the payment of incurred costs in the trial Court and the High Court.

Judge of the Supreme Court

P. Padman Surasena, J.
I agree.

Judge of the Supreme Court

K. Priyantha Fernando, J.
I agree.

Judge of the Supreme Court