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

Athukoralalage Don
Chandrasekera,
Kosgahahena,
Uggalla, Padukka.
Plaintiff

SC APPEAL NO: SC/APPEAL/30/2016
SC LA NO: SC/HCCA/LA/138/2014
HCCA NO: WP/HCCA/AVI/517/2008(F)
DC AVISSAWELLA NO: 20406/P

Vs.

1. Athukoralalage Lionel Harischandra
2. Ranawaka Arachchige Susilin Nona
3. Athukoralalage Don Sarathchandra

All of Kosgahahena,
Uggalla, Padukka.
Defendants

AND

Athukoralalage Don
Sarathchandra,

Kosgahahena,
Uggalla, Padukka.
3rd Defendant-Appellant

Vs.

Athukoralalage Don
Chandrasekera,
Kosgahahena,
Uggalla, Padukka.
Plaintiff-Respondent

1. Athukoralalage Lionel
   Harischandra
2. Ranawaka Arachchige Susilin
   Nona
   Both of Kosgahahena,
   Uggalla, Padukka.
   1st and 2nd Defendant-Respondents

AND NOW BETWEEN

Athukoralalage Don
Chandrasekera,
Kosgahahena,
Uggalla, Padukka.

And presently of
No. 08/02, Kosgahahena,
Uggalla, Padukka.
Plaintiff-Respondent-Appellant

Vs.

Athukoralalage Don
Sarathchandra,
Kosgahahena, Uggalla, Padukka.
3rd Defendant-Appellant-
Respondent

1. Athukoralalage Lionel
   Harischandra
2. Ranawaka Arachchige Susilin
   Nona
   Both of Kosgahahena,
   Uggalla, Padukka.
   1st and 2nd Defendant-Respondent-
   Respondents

Before: Hon. Justice Vijith K. Malalgoda, P.C.
Hon. Justice E.A.G.R. Amarasekara
Hon. Justice Mahinda Samayawardhena

Counsel: W. Dayaratne, P.C. with D.N. Darmaratne for the Plaintiff-Respondent-Appellant.
Pubudu Alwis with Supun Jayathilaka for the 3rd Defendant-Appellant-Respondent.

Written Submissions:

By the Plaintiff-Respondent-Appellant on 25.01.2017
By the 3rd Defendant-Appellant-Respondent on 02.05.2017

Argued on: 11.10.2023

Decided on: 04.07.2024

Samayawardhena, J.

Introduction

The plaintiff filed this action seeking to partition Lot B of Plan No. 48A dated 13.01.1962 between the plaintiff and the 1st defendant in equal shares subject to the life interest of the 2nd defendant. The 3rd defendant was made a party since he has encroached upon a portion of Lot B on the western boundary.

After superimposition, the encroached portion was identified as Lot 1 in the Preliminary Plan No. 661. The western boundary of Lot B is Lot G, which was allotted to the 3rd defendant's father in a previous partition action. Lot B was allotted to the plaintiff's predecessor in title.

The 3rd defendant claims Lot 1 of the Preliminary Plan by prescription. On that basis, the 3rd defendant sought exclusion of Lot 1 from the land to be partitioned.

The District Court refused the 3rd defendant's claim. On appeal, the High Court decided otherwise.

The question to be decided on this appeal is whether the High Court is justified in overturning the District Court's decision and excluding Lot 1 from the corpus on the basis that the 3rd defendant acquired prescriptive title to that portion.

The present owner of Lot G is the 3rd defendant. Since Lot G consists of 4 acres 3 roods and 39 perches, there is no necessity for the 3rd defendant to encroach upon neighbours' lands. When the case was pending in the District Court, the 3rd defendant was a police officer.

The 3rd defendant admits that Lot B belongs to the plaintiff and the 1st defendant on deeds. He also admits that Lot 1 of the Preliminary Plan is

part of Lot B, for the partition of which the action was filed. Then the burden shifts fairly and squarely to the 3rd defendant to prove by affirmative evidence that he prescribed to Lot 1 in terms of section 3 of the Prescription Ordinance, No. 22 of 1871.

Section 3 of the Prescription Ordinance which describes the mode of acquisition of prescriptive title reads as follows:

> *Proof of the undisturbed and uninterrupted possession by a defendant in any action, or by those under whom he claims, of lands or immovable property, by a title adverse to or independent of that of the claimant or plaintiff in such action (that is to say, a possession unaccompanied by payment of rent or produce, or performance of service or duty, or by any other act by the possessor, from which an acknowledgment of a right existing in another person would fairly and naturally be inferred) for ten years previous to the bringing of such action, shall entitle the defendant to a decree in his favour with costs. And in like manner, when any plaintiff shall bring his action, or any third party shall intervene in any action for the purpose of being quieted in his possession of lands or other immovable property, or to prevent encroachment or usurpation thereof, or to establish his claim in any other manner to such land or other property, proof of such undisturbed and uninterrupted possession as herein before explained, by such plaintiff or intervenient, or by those under whom he claims, shall entitle such plaintiff or intervenient to a decree in his favour with costs:*
>
> *Provided that the said period of ten years shall only begin to run against parties claiming estates in remainder or reversion from the time when the parties so claiming acquired a right of possession to the property in dispute.*

Starting point of adverse possession

In order to succeed in his claim for prescriptive title, the 3rd defendant *inter alia* needs to prove uninterrupted 10 years of adverse possession. To calculate the period of 10 years, a starting point of adverse possession must be identified. What is the starting point in this case?

The 3rd defendant is the adjoining owner. The 3rd defendant's position is that Lot 1 (land to be partitioned) was possessed as part of Lot G (his land). This constitutes an encroachment on the land to be partitioned by the 3rd defendant.

According to the final decree in the previous partition action marked P1, after the scheme inquiry, the final partition was ordered on 19.12.1968 and the final decree of partition was signed by the judge on 21.01.1969.

In paragraphs 4 and 9 of his statement of claims, the 3rd defendant states that after the final decree of partition, delivery of possession was not effected through the fiscal, and therefore the parties possessed Lot B and Lot G as they wished.

In paragraph 7 of the statement of claims the 3rd defendant states that Lot G including Lot 1 of the Preliminary Plan was fenced in 1970 whereas in paragraph 9 he states that Lot 1 was fenced in 1976. These two statements are irreconcilable.

> 7. පැමිණිල්ලේ 8 ඡේදයේ සඳහන් කරුණු මෙම විත්තිකරු සම්පූර්ණයෙන් ප්‍රතික්ෂේප කරන අතර ඔහු සහ ඔහුගේ පූර්වගාමී අයිතිකරුවන් විසින් අංක 661 දරණ මූලික සැලැස්මෙන් බෙදා වෙන් කල අංක 1 දරණ බිම් කැබැල්ල 1970 සිට කම්බි ගසා වෙන්කර ගෙන බුක්ති විඳින හෙයින් ඔවුන් එම කොටස 1997.06.02 දින සිට එකී ඉඩමට ඇතුලුවී කොටසක් බලහත්කාරයෙන් අල්ලාගෙන ඇති බවට කර ඇති ප්‍රකාශය සාවද්‍ය බව කියා සිටී.

8. මෙම විත්තිකරු වැඩි දුරටත් කියා සිටින්නේ අවිස්සාවේල්ල දිසා අධිකරණයේ අංක 7138/පී දරණ නඩුවේ අවසාන තීන්දු ප්‍රකාශයට ගොනුකර ඇති අංක 48/ඒ දරණ අවසාන සැලැස්මෙන් බෙදා වෙන් කල 'ජී' අක්ෂරය දරණ බිම් කැබැල්ල එකී අවසාන තීන්දු ප්‍රකාශය පිට වෙන් කර හිමිකර දී ඇත්තේ 3 වන විත්තිකරුගේ පියා වන අතුකෝරලලාගේ දොන් ආවිස් සිංඤෝ යන අයට වේ.

9. ඉහත ඡේදයේ සඳහන් ආවිස් සිංඤෝ එකී බෙදුම් නඩුවෙන් ඔහුට හිමිකර දීමෙන් අනතුරුව 1976 සිට වැටවල් ගසාගෙන අවිධිමත් ලෙස වෙන්කරගෙන බුක්ති විඳින ලදි.

The evidence of the 3rd defendant discloses a different story. According to his evidence, the boundaries of the Lots were demarcated by the surveyor and the fences were erected accordingly.

ප්‍ර: තමන්ට තමන්ගේ පියාගෙන් ලැබුන පැ.2 සැලැස්මේ ජී අක්ෂරය හැර ඊට වැඩිය බිම් ප්‍රමාණයන් සඳහා සැලැස්මක් සාදා නැහැ?

උ: නැහැ

ප්‍ර: වැටවල් ගසා බුක්ති විඳින වකවානුවක් ගැන තමන් කිව්වා?

උ: ඔව්.

ප්‍ර: කොයි වකවානුවේද වැටවල් ගැසුවේ?

උ: 7138 බෙදුම් නඩුවේ දී මායිම් සළකුණු කරන අවස්ථාවේ දී සටහන් කළ සළකුණු ඔස්සේ කම්බි වැට ගසා තිබෙන්නේ.

ප්‍ර: තමන් සිටියාද?

උ: ඔව්.

ප්‍ර: තමන්ට වයස කියද?

උ: අවුරුදු 15 යි.

ප්‍ර: තමන් ඉපදුනේ කොයි කාලයේද?

උ: 53

ප්‍ර: වැටවල් ගැසුවේ කොයි කාලයේද?

උ: පලවෙනි දවසේ මායිම් වල කණු දිගටම ගැසුවා. එදිනම කම්බි ගැසුවා කියන එක මම කියන්නේ නැහැ. මිනින්දෝරු මහතා විසින් ඉඩමට පැමිණ මායිම් ලකුණු කරන අවස්ථාවේදී.

ප්‍ර: කොයි වකවානුවේද?

උ: 69 වගේ මට මතක.

ප්‍ර: ඒ අනුව තමා මායිම් ගැසුවා කියන්නේ?

උ: එහෙමයි.

If this evidence is correct, the assertion of the 3rd defendant in the statement of claims that the boundaries of the relevant Lots were not demarcated but that they possessed the Lots as they pleased is false. After the final decree of partition, if the surveyor showed the boundaries and fences were erected accordingly, there was no room for the 3rd defendant or his predecessor to fence Lot G including a portion of Lot B. It can be inferred that the surveyor correctly demarcated and fixed the boundaries of Lot B and Lot G.

The commencement of the 3rd defendant's encroachment on Lot B and the erection of a fence remain unclear. At the trial only the 3rd defendant gave evidence to prove prescriptive title. The documentary evidence marked by the 3rd defendant at the trial does not relate to Lot 1 but to Lot G. There is no dispute that Lot G which lies outside the corpus belongs to the 3rd defendant. Prescriptive possession cannot be upheld unless there is sufficiency, clarity and unequivocality in the evidence presented in support of such claim. There is no corresponding duty for the plaintiff and the 1st defendant to prove that the 3rd defendant did not prescribe to Lot 1 of the Preliminary Plan. A person asserting adverse possession has no equities in his favour. He alone must prove prescriptive title with cogent evidence.

The plaintiff and the 1st defendant are residing on Lot B, the land to be partitioned. According to Plan No. 48A marked P2, neither the 3rd defendant nor his father was living on Lot G.

In the case of *Punchiralage Keerala v. Dingiribanda* (SC/APPEAL/188/2011, SC Minutes of 18.07.2018), De Abrew J. states:

> *In fact when a person encroaches upon lands for which he has no title, he acquires status of a trespasser in respect of the encroached area of the land. Trespasser starts possessing lands for which he has no title and continues to possess the land secretly. As I pointed out earlier, to claim prescriptive title in terms of Section 3 of the Prescription Ordinance claimant's possession should be an adverse possession. A person who possesses a land with secret intention cannot claim that his possession is an adverse possession. Possession of a land by a person with secret intention cannot be considered as an adverse possession in terms of Section 3 of the Prescription Ordinance. Thus a trespasser who violates the law of the land and possesses the land cannot claim benefit of the law of the land.*

Mere possession is not prescriptive possession. It should be adverse possession known to the real owner. Adverse possession should continue uninterruptedly for 10 years. For mere possession to become adverse possession there should be an overt act for the real owner and the Court to understand the starting point of prescriptive possession. It cannot be done stealthily. The 10-year period begins to run from that point, not from the mere act of possession, as not every instance of possession qualifies as prescriptive possession.

In the oft-quoted judgment in *Chelliah v. Wijenathan* (1951) 54 NLR 337 Gratiaen J. states at 342:

> *Where a party invokes the provisions of Section 3 of the Prescription Ordinance in order to defeat the ownership of an adverse claimant to immovable property, the burden of proof rests fairly and squarely on him to establish a starting point for his or her acquisition of prescriptive rights.*

This was quoted with approval by G.P.S. De Silva C.J. in the leading case of *Sirajudeen v. Abbas* [1994] 2 Sri LR 365 at 370.

However, as pointed out in *Tillekeratne v. Bastian* (1918) 21 NLR 12, when it has been proved that undisturbed and uninterrupted possession has persisted without an acknowledgment of the rights of the true owners "for a period as far back as reasonable memory reaches", it becomes practically impossible to identify a starting point. In such instances, the Court may, from the lapse of time in conjunction with the unique facts and circumstances of the case, presume that adverse possession commenced at some point beyond ten years before the action was brought.

Although the above matters were rightly highlighted by the District Court in its judgment to refuse the claim of the 3rd defendant, the High Court has merely stated that the 3rd defendant has been in possession of Lot 1 from his parents' time without adverting to the commencement of adverse possession. The High Court states that when there is evidence that Lot 1 has been in possession from the 3rd defendant's parents' time, there is no necessity to call further evidence to prove prescriptive possession. The High Court has regarded mere possession as prescriptive possession. The High Court has not appreciated that the onus of proof rests on the defendant to prove prescriptive title by affirmative and cogent evidence. The High Court is also incorrect in separating the claim of prescriptive title from the exclusion of Lot 1 of the Preliminary Plan, as the 3rd defendant seeks exclusion of that Lot based on prescription.

> මෙහිදී උගත් දිසා විනිසුරු සළකා බලා ඇත්තේ 03 වන විත්තිකරු මෙම දේපලට හිමිකම් පෑම ගැන පමණකි. එහෙත් මෙම නඩුවේ 8 වන විසඳනාව සහ විත්තිවාචක මගින් 03 වන විත්තිකරු අයැද ඇත්තේ ඉහත කී අංක 1 දරණ දේපල බෙදීමෙන් ඉවත් කිරීමේ මුලික සහනයයි. 03 වන විත්තිකරු 1970 සිට තම දේපලට යා කර දෙමාපියන්ගේ කාලයේ සිට

මෙම දේපල භුක්ති විඳින බවට ඉදිරිපත් කල කරුණු පැමිණිල්ලේම සාක්ෂිවලින් තහවුරු වී තිබියදී අමුතුවෙන් සාක්ෂි කැඳවීමට අවශ්‍ය වන්නේ නැත.

In order to hold that the 3rd defendant has prescribed to Lot 1, the High Court primarily relies on the report of the Preliminary Plan which states that the plantation of Lot 1 was claimed by the 3rd defendant and that the 3rd defendant was in possession of Lot 1 at the preliminary survey. Prescription cannot be decided on that item of evidence. The surveyor's statement speaks of present possession, which is not the same as prescriptive possession. As I mentioned earlier, the plaintiff admits that Lot 1 is currently possessed by the 3rd defendant.

In the case of *Siripala v. Jayathilake* (SC/APPEAL/15/2010, SC Minutes of 02.11.2015), De Abrew J. states:

> *A person who claims prescription can complain to the surveyor on the day of the survey that he cultivated the land even if he had not cultivated it. This claim is only the version of the complainant. This type of claim cannot be considered as strong evidence to prove undisturbed, uninterrupted and adverse possession. The son of the Defendant-Respondent has stated in his evidence that his father was in possession of the land for a long period. Apart from this evidence there is no any other evidence. Mere statements of witnesses that the Defendant-Respondent was in possession of the land in dispute for over a period of ten years are not evidence of uninterrupted, undisturbed and adverse possession. This was the view expressed by G.P.S. De Silva C.J. in Sirajudeen Vs. Abbas.*

Wrongful possession against the rightful owner

Although the High Court in its judgment makes references to long possession and current possession, it has not made any reference to

adverse possession, which is a *sine qua non* to succeed on a plea of prescriptive possession.

An owner of immovable property need not possess the land in order to have his ownership to the property intact. By virtue of his ownership, he has the inherent right to possess the property (*jus possidendi*), but there is no legal obligation that the owner must possess the property. It is up to the owner of the property to decide whether or not to possess the property. The lack of physical possession by the owner does not authorise others to seize possession of the property through illegal means including violence.

The High Court found fault with the District Judge, alleging that the District Judge had made efforts not to acknowledge the prescriptive title of the 3rd defendant. This comment is unreasonable.

As Prof. G.L. Peiris states in his book *The Law of Property in Sri Lanka* (1976), Vol 1, page 84:

> *Considerable circumspection is necessary in the recognition of a prescriptive title, since its effect is to deprive of ownership the party having paper title.*

Prof. C.G. Weeramantry, *An Invitation to the Law* (1982), page 163 states:

> *Ownership, one of the most important legal concepts, is one of the pillars on which the stability of society depends. On it rest interests in land, shares in companies, money in the bank, and patent rights. Without it ordered society breaks down and man reverts to a state of lawlessness.*

The paper title promotes stability, clarity and predictability in property transactions. The prescriptive title commences and endures through wrongful possession of the property of a rightful owner.

H.W. Ballantine, *Title by Adverse Possession*, (1918) Vol. 32(2) Harvard Law Review, pages 135-159, makes the following observation at page 135:

> *Title by adverse possession sounds, at first blush, like title by theft or robbery, a primitive method of acquiring land without paying for it. When the novice is told that by the weight of authority not even good faith is a requisite, the doctrine apparently affords an anomalous instance of maturing a wrong into a right contrary to one of the most fundamental axioms of the law.*

Legal title and prescriptive title are fundamentally opposed or incompatible concepts within the realm of property law. "*Possession is never considered adverse if it can be referred to a lawful title*." (*Corea v. Iseris Appuhamy* (1911) 15 NLR 65 at 78) When the Court declares that title by prescription is established, it transforms illegality into legality. As stated by Udalagama J. in the Supreme Court case of *Kiriamma v. Podibanda* [2005] BLR 9 at 11 "*title by prescription is an illegality made legal due to the other party not taking action*." This was quoted with approval by Salam J. in *Fathima Naseera v. Mohamed Haris* (CA/818/96(F), CA Minutes of 11.07.2012) and Chithrasiri J. in *Sumanawathie v. Sirisena* (CA/830/98(F), CA Minutes of 10.03.2014).

Hence, prescriptive title should typically be viewed as an exception rather than the norm, as encouraging prescriptive title may undermine the integrity of property rights and legal certainty.

Codification of the law of prescription

It is settled law that, after the enactment of the Prescription Ordinance, No. 22 of 1871, the law of prescription is solely governed by the Prescription Ordinance, not by common law. The statute law and special laws supersede the common law, with the latter only filling the gaps in the absence of explicit provisions. However, having insight into the

historical background of the law of prescription is beneficial in understanding the purpose of this legal concept and facilitating its accurate application.

Justinian *Institutes* 2.6.7 (J.B. Moyle's translation, 5th edn, Oxford University Press, 1913), page 51 states the following with regard to prescription (*usucapion*) in Roman law:

> *Usucapion of property classes among things immovable is an easier matter; for it may easily happen that a man may, without violence, obtain possession of land which owing to the absence of the negligence of its owner, or to his having died and left no successor, is presently possessed by no one. Now this man himself does not possess in good faith, because he knows the land on which he has seized is certainly not his own: but if he delivers it to another who receives it in good faith, the latter can acquire it by long possession, because it has neither been stolen nor violently possessed; for the idea held by some ancients, that a piece of land or a place can be stolen, has now been exploded, and imperial constitutions have been enacted in the interests of persons possessing immovables, to the effect that no one ought to be deprived of a thing of which he has had long and unquestioned possession.*

Justinian *Institutes* 2.6.2 (pages 50-51) states:

> *Things again of which the owner lost possession by theft, or possession of which was gained by violence, cannot be acquired by usucapion, even by a person who has possessed them in good faith for the specified period: for stolen things are declared incapable of usucapion by the statute of the Twelve Tables and by the lex Atinia, and things taken with violence by the lex Julia et Plautia.*

Voet's Commentary on Modes of Acquiring Property, Possession and Acquisitive Prescription [41.3.14] states at pages 269-270 as follows:

> *"Possessed by violence" defined – On the other hand those properties from which a person has been thrown out by force are not to be classed as possessed by violence but only those of which the possession has been seized by violence. So far is this so that, if Titius has thrown me out by violence, but has not seized the property, while Maevius has laid hands on the vacant possession and transferred it to another, usucapion is not prevented. Although the interdict based on force applies, because it is true that I have been thrown out by force, nevertheless it is not true that possession has also been taken by force.*

Possession, which is not peaceable, has been denounced in Roman law and Roman Dutch law concept of prescription; *Nec vi* (without force or peaceable), *nec clam* (without secrecy), *nec precario* (without permission) are important elements in acquisition of prescriptive title.

In *Perera v. Gunetilleke* (1901) 5 NLR 210 at 216-217 Browne A.J. states that a "*plaintiff, who merely abstained from possessing because he feared a beating, cannot be said to have been ever evicted.*"

In terms of section 2 of the South African Prescription Act, No. 18 of 1943, acquisitive prescription is the acquisition of ownership by the possession of another person's movable or immovable property or the use of a servitude in respect of immovable property, continuously for thirty years *nec vi, nec clam, nec precario.*

Prescription Act, No. 68 of 1969 (South Africa), which repealed the 1943 Act states in section 1 that "*Subject to the provisions of this Chapter and of Chapter IV, a person shall by prescription become the owner of a thing which he has possessed openly and as if he were the owner thereof for an*

uninterrupted period of thirty years or for a period which, together with any periods for which such thing was so possessed by his predecessors in title, constitutes an uninterrupted period of 30 years."

The meaning of the terms *nec vi, nec clam, nec precario* was revisited by Van der Merwe J.A. on behalf of the Supreme Court of Appeal of South Africa in *Stoffberg NO and Others v. City of Cape Town* [2019] ZASCA 70 at paragraph 14 in the following manner:

> *The meaning of these provisions is well established. The continuous possession required by this section is the common law civilis possessio, that is, the physical detention of the thing (corpus) with the intention of an owner (animus domini). In addition, that possession must be nec vi, nec clam, nec precario. Nec vi means peaceably. Nec precario postulates the absence of a grant on the request of the possessor. Nec clam means openly, particularly 'so patent that the owner, with the exercise of reasonable care, would have observed it'.*

Dr. Shirani Ponnambalam, *Adverse Possession–A Basis for the Acquisition of Title to Immoveable Property* (1979) Colombo Law Review 57 states at pages 59-60:

> *The reasoning based on the culpability of the owner or his consent to the loss of rights is further exemplified in the principle that a clandestine possession cannot give rise to a prescriptive title. Knowledge of the adverse possession is thus a sine qua non of this rationale. It is therefore abundantly clear that the requisites of nec vi and nec clam are consistent with and lend support to the basis of prescription in Roman Dutch law. Welgemoed v. Coetzer (1946) TPD 720*

Although the Prescription Ordinance, No. 22 of 1871 is in force today, the law on this subject was first codified by Regulation No. 13 of 1822. This was done not because the Roman Dutch law principles of prescriptive title were considered unconscionable or inequitable, but primarily to eliminate doubts regarding the prescriptive period for both acquisitive and extinctive prescription. Additionally, it aimed to provide clarity, certainty, and a legal framework for prescription. The Regulation No. 13 of 1822 had 14 clauses. The preamble, the second and third clauses which are directly relevant to acquisitive prescription read as follows:

1. *WHEREAS doubts have been entertained with respect to the periods which shall be considered as prescribing against, or barring actions for the recovery of Property movable or immovable, according to the Laws now in force; And whereas it must tend to the Security of property and the quieting of Titles to ascertain the same.*
2. *It is therefore enacted by His Excellency the Governor in Council, that from and after the First day of September now next ensuing, all Laws heretofore enacted, or Customs existing with respect to the acquiring of rights, or the barring of Civil actions by prescription, within and for the Maritime Districts of this Island, shall cease to be of any force or effect, and the same are hereby wholly repealed.*
3. *And it is further enacted, that from and after the date aforesaid, proof of the undisturbed possession of Land or immovable property, by a Title adverse to that of the Claimant or Plaintiff in any action, for Ten years before the bringing of the action, shall entitle the Defendant to a Sentence in his favour with Costs.*

The rest essentially outlines the time periods within which causes of action are prescribed.

The Regulation No. 13 of 1822 continued in force until Ordinance No. 8 of 1834 was passed. The Ordinance No. 8 of 1834 had 12 sections, and the preamble of which read as follows:

> *WHEREAS it is expedient to amend and consolidate the Laws now in force in the different parts of this Island, regulating the prescription of actions, and to introduce one uniform rule of limitation, for deciding the several periods within which actions at law must be respectively brought throughout the Island and its dependencies.*

In *Perera v. Ranatunge* (1964) 66 NLR 337 at 339, Basnayake C.J. stated:

> *It is common ground that the Roman Dutch Law of acquisitive prescription ceased to be in force after Regulation 13 of 1882 and that the rights of the parties fall to be determined in accordance with the provisions of the Prescription Ordinance. It is now settled law that the Prescription Ordinance is the sole law governing the acquisition of rights by virtue of adverse possession, and that the common law of acquisitive prescription is no longer in force except as respects the Crown. The question that arises in the instant case has therefore to be decided by reference to that Ordinance. <u>But it would not be entirely irrelevant to add a word or two on the Roman Dutch Law before examining the provisions of that Ordinance</u>.*

In the case of *Adonis Fernando v. Livera* (1948) 49 NLR 350, Basnayake J. (as he then was) referred to *nec vi, nec clam, nec precario* in the proof of acquisition of a servitude of a right of way by prescription.

Wimalachandra J. referred to these three requirements in *Lowe v. Dahanayake* [2005] 2 Sri LR 413 at 417 as elements in establishing the entitlement to a servitude through prescription.

In *Hansawathie v. Karunaratne and Others* (CA/DCF/524A/99, CA Minutes of 08.02.2021), Ruwan Fernando J. stated at paragraph 102:

> *In short, the possession to become adverse, must be nec vi, nec clam, nec precario, that is to say, the possession required must be adequate in continuity, in publicity and in extent to show that possession is adverse to the competitor (Secretary of State for India v. Debendra Lal Khan (28) AIR 1934 PC 23). It is sufficient that possession be overt and without any attempt at concealment so that the person against whom time is running out, if he exercises due vigilance, to be aware of what is happening (V. Muthiah Pillai v. Vadambal, AIR 1986 Mad 106).*

The issue involved in *Abraham Silva v. Chandra Wimala* (1959) 61 NLR 348 was also related to a claim of a right of way under section 3 of the Prescription Ordinance, No. 22 of 1871. In this case also Basnayake C.J. at pages 349-350 referred to "*the animus of using it as your own as of right, not by mere force, not by stealth, and not as matter of favour, nec vi, nec clam, nec precario.*"

> *The first question that has to be considered is whether the plaintiffs are entitled to a decree in their favour under section 3 of the Prescription Ordinance. That they and their predecessor, their father, have used the right of way is not challenged in appeal. Does user of a right of way constitute possession within the meaning of that expression in section 3?*
>
> *This very question arose for decision under the corresponding provision of the repealed Prescription Ordinance, No.8 of 1834, in the case of Ayanker Nager v. Sinatty [Ramanathan 1860-1862, p. 75] and the Collective Court held that the word "possession of immovable property" applied to the enjoyment of a right of way. It*

> *defined "possession" when applied to a servitude such as jus itineris, to be the exercise of jus in re, with the animus of using it as your own as of right, not by mere force, not by stealth, and not as matter of favour, nec vi, nec clam, nec precario. It also held that the words of the Ordinance of 1834, which are in exactly the same terms as the Prescription Ordinance of 1871 now in force, applied to servitude of way, water, light and numerous others.*

Prasanna Jayawardena J. in *Priyangika Perera v. Gunasiri Perera* (SC/APPEAL/59/2012, SC Minutes of 18.01.2018) at page 13 states:

> *It seems to me that, the aforesaid requirements of use nec vi, nec clam and nec precario of the Roman Dutch Law, when taken in their totality, can be related to the requirements under section 3 of the Prescription Ordinance of undisturbed and uninterrupted use which is adverse to or independent of the owner of the land and without acknowledging any right of the owner of the land over the use of that right of way. It is perhaps that thinking which led Basnayake CJ to state in FERNANDO vs. DE LIVERA [49 NLR 350 at p.352] that, a plaintiff who claims a right of way by prescription must establish use of the right of way nec vi, nec clam and nec precario and to cite the aforesaid view of Voet [8.4.4], without expressly referring to section 3 of the Prescription Ordinance, which stipulates the requirements to be established, under our law, by a plaintiff who claims a right of way by prescription.*

Adverse possession is defined in the parenthetical clause associated with section 3 of the Prescription Ordinance of 1871 but "*it is not so completely successful an attempt to achieve the full and self-contained definition as might be wished.*" In this regard, the Privy Council in *Cadija Umma v. Don Manis Appu* (1938) 40 NLR 392 at 396 stated:

> *Their Lordships are unable to doubt that the purpose—perhaps the somewhat ambitious purpose—of the parenthetical clause is to explain the character of the possession which, if held without disturbance or interruption for ten years, will result in prescription. While, however, the clause is no mere illustration, it is not so completely successful an attempt to achieve the "full and self-contained definition" as might be wished. A phrase having been introduced and then defined, the definition prima facie must entirely determine the application of the phrase; but the definition must itself be interpreted before it is applied and interpreted, in case of doubt, in a sense appropriate to the phrase defined and to the general purpose of the enactment.*

Prescriptive title cannot be acquired by violence

There is another important matter I wish to address at this juncture. Adverse possession is possession held in a character incompatible with and in denial of the title of the true owner, but it cannot be equated with possession through violence or force.

Violent possession cannot be legally recognised as a legitimate method of acquiring property rights. It cannot be assumed that the legislature intended to recognise violence as a means of acquiring title of others' property.

If adverse possession were to be interpreted as involving violence against law-abiding citizens, it would promote the subculture of thuggery, chaos and lawlessness, which neither the legislature nor the Court can condone.

In my view, although Regulation No. 13 of 1822 "wholly repealed" previous laws, the Court is not precluded from considering common law principles or any other sources of law to interpret the law in a manner

acceptable to those for whom it is intended. The law is by the people for the people, after all.

Right to property is a human right

The Universal Declaration of Human Rights, adopted by the United Nations General Assembly in 1948, stands as the first legal document to define the fundamental human rights to be universally protected. This is the foundation of international human rights law including human rights conventions, treaties and other legal instruments. Fundamental rights are a species of human rights. We are entitled to human rights by virtue of being born as human beings. These rights are inherent and not bestowed upon us by any entity, including the state.

Right to property is a human right. Article 17 of the Universal Declaration of Human Rights (1948) declares:

1. *Everyone has the right to own property alone as well as in association with others.*
2. *No one shall be arbitrarily deprived of his property.*

Right to property as a human right encompasses both the right to own property and the right not to be arbitrarily deprived of property.

It is the bounden duty of the Court to interpret the law in consonance with justice, fairness and human rights.

The judgment of Sharvananda C.J. in *Manawadu v. The Attorney-General* [1987] 2 Sri LR 30 provides a classic example. In that case, the legislature, with *bona fide* intentions, sought to prevent the destruction of forest reserves by amending section 40 of the Forest Ordinance through Act No. 13 of 1982, which enabled the automatic confiscation of the vehicle used in committing the forest offence, regardless of whether the person convicted was the owner of the vehicle. Sharvananda C.J.

emphasised the importance of adhering to the principles of natural justice, particularly *audi alteram partem*, stating that confiscation cannot occur without affording a hearing to the owner of the vehicle. It was highlighted that courts presume that the legislature does not intend injustice and therefore should strive to avoid interpretations that lead to or perpetuate injustice. The Court specifically referred to Article 17 of the Universal Declaration of Human Rights, which recognises the right to own property and the right not to suffer arbitrary deprivation of property. Hence His Lordship stated that the term "forfeited" should be interpreted as "liable to be forfeited". The legislature accepted this and amended the section in line with the judgment.

This Court has time and again relied on international legal instruments to interpret domestic law.

In *Bulankuluma and Others v. Secretary, Ministry of Industrial Development and Others* [2000] 3 Sri LR 243, Amarasinghe J. referring to the principles of the Stockholm Declaration (1972) and the Rio De Janeiro Declaration (1992) regarding sustainable development stated at 274-275:

> *Admittedly, the principles set out in the Stockholm and Rio De Janeiro Declarations are not legally binding in the way in which an Act of our Parliament would be. It may be regarded merely as 'soft law'. Nevertheless, as a Member of the United Nations, they could hardly be ignored by Sri Lanka. Moreover, they would, in my view, be binding if they have been either expressly enacted or become a part of the domestic law by adoption by the superior Courts of record and by the Supreme Court in particular, in their decisions.*

In *Weerawansa v. The Attorney General and Others* [2000] 1 Sri LR 387, Mark Fernando J. emphasised that under Article 27(15) of the Constitution, the judiciary as a branch of the State is under a duty to

consider international law when interpreting the domestic statutes. Accordingly, it was held that the Prevention of Terrorism (Temporary Provisions) Act of 1979 should be interpreted in light of Article 9 of the International Covenant on Civil and Political Rights (ICCPR) which guarantees the freedom from arbitrary arrest or detention. His Lordship held at 409:

> *Should this Court have regard to the provisions of the Covenant? I think it must. Article 27(15) requires the State to "endeavour to foster respect for international law and treaty obligations in dealings among nations." That implies that the State must likewise respect international law and treaty obligations in its dealings with its own citizens, particularly when their liberty is involved. The State must afford to them the benefit of the safeguards which international law recognises. In that background, it would be wrong to attribute to Parliament an intention to disregard those safeguards*.

Based on Article 17 of the Universal Declaration of Human Rights, several other international legal instruments expressly recognise the right to own property as a human right.

By Article 5(d)(v) of the International Convention on the Elimination of All Forms of Racial Discrimination (1965), state parties undertake to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, in the enjoyment of the right to own property alone as well as in association with others.

All three major regional human rights conventions, namely, the European Convention on Human Rights, Protocol No. 1 (1952); American Convention on Human Rights (1969); African Charter on Human and Peoples' Rights (1981) also recognise the right to own property.

European Convention on Human Rights, Protocol No. 1, Article 1 states:

> *Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.*

American Convention on Human Rights, Article 21 states:

1. *Everyone has the right to the use and enjoyment of his property. The law may subordinate such use and enjoyment to the interest of society.*
2. *No one shall be deprived of his property except upon payment of just compensation, for reasons of public utility or social interest, and in the cases and according to the forms established by law.*
3. *Usury and any other form of exploitation of man by man shall be prohibited by law.*

African Charter on Human and Peoples' Rights, Article 14 states:

> *The right to property shall be guaranteed. It may only be encroached upon in the interest of public need or in the general interest of the community and in accordance with the provisions of appropriate laws.*

Although adverse possession appears to be a private affair between two individuals, the horizontal application of human rights recognises that human rights can be infringed not only by executive and administrative actions but also by the actions of private individuals. The horizontal application of human rights refers to the idea that human rights obligations extend not only to State actions (vertical application) but also to the actions of private individuals and entities (horizontal application). This concept imposes duties upon individuals and entities to promote and protect human rights. (John H. Knox, *Horizontal Human Rights Law* (2008) 102 American Journal of International Law 1).

The State is under a duty, on one hand, not to interfere with the rights of citizens and, on the other, to protect those same rights from private actors. After an exhaustive survey of authorities, Danwood Mzikenge Chirwa, in the article *The Doctrine of State Responsibility as a Potential Means of Holding Private Actors Accountable for Human Rights* (2004) 5 Melbourne Journal of International Law 1, comes to the following conclusion in this regard at 13-14:

> *It can, therefore, be concluded that the duty of states to protect individuals or groups from violations of their human rights by private actors is well established in international law. This duty entails an obligation to take such preventive measures as the enactment of legislation, and the establishment of regulatory and monitoring mechanisms aimed at preventing occurrences of human rights violations in the private sphere. The state must also take reactive measures once the violations have taken place. Most importantly, these obligations do not only relate to civil and political rights – they are quite clearly also applicable to economic, social and cultural rights.*

As much as the State has a duty to prevent human rights violations by private actors, the Court also has a similar duty. If the Courts were to hold that forceful and violent possession falls within the ambit of adverse possession under the Prescription Ordinance, it would be a stark dereliction of that duty.

The rationale behind recognition of prescriptive title

The rationale behind prescriptive possession has been a topic of discussion in various forums. The law of prescription operates against slothful and indolent property owners, not against diligent and vigilant

owners who fervently seek to safeguard their property rights but are unable to confront violence.

In the South African case of *Khatha v. Pillay and Others* 2024 (1) SA 159 (GJ) Moultrie A.J. states at paragraph 28:

> *While the law of acquisitive prescription more generally has been justified on the basis of a range of moral or philosophical arguments, [Pienaar v Rabie at 135H.] the two main justifications advanced in South African law (punishment and legal certainty) [EJ Marais Acquisitive Prescription in View of the Property Clause (LLD Thesis, Stellenbosch, 2011) para 4.2.3.] have in common the fact that they focus on the value of the doctrine in the interests of the broader society, rather than on the narrow personal interests of the possessor seeking to rely on it. Thus, the punishment justification emphasises that an owner's "sloth and carelessness" could "injure the public by producing in the commonwealth uncertainty as to ownerships, a host of lawsuits which may last forever and the bewilderment which is to be apprehended from such things". [Johannes Voet Commentary on the Pandects (1698) 41.3.1 (Gane's translation, vol. 6, Butterworth, 1957 at 258-259) See also Maasdorp, AFS Institutes of South African law. 2 ed. Vol 2 (Juta, 1907) p 82.] The public element of the law of acquisitive prescription also features centrally in the legal certainty justification preferred by Professor de Wet in his memorandum, which refers to the interests of third parties who may be affected by the question of ownership. [JC de Wet Memorandum para 5, p 78.] Even in Roman Law, prescription (usucapion) was regarded as having been "introduced for the public weal". [Digest 41.3.1: Gaius, Provincial Edict, book 21 (A Watson Digest of Justinian. Vol. 4, University of Pennsylvania, 1985 at 31)] More recently, the Constitutional Court has observed*

> *(albeit in relation to extinctive prescription) that time limits play a vital role in bringing certainty and stability to social and legal affairs and are supportive of the rule of law. [RAF v. Mdeyide 2011 (2) SA 26 (CC); [2010] ZACC 18 para 8.]*

In Voet's Commentary on Modes of Acquiring Property, Possession and Acquisitive Prescription [41:3:1], states at page 253:

> *[N]ay rather is the whole unfairness of this usucapion found merely in the consciousness of him who exercises it that the property is another's, that is to say in his bad faith. Such bad faith was tolerated for the benefit of the public welfare, and at the same time as a penalty for a person who neglects what is his own, and shows contempt by his negligence.*

In *Morkels Transport (Pty) Ltd v. Melrose Foods (Pty) Ltd* 1972 (2) SA 464(W), Colman J. states at pages 477-478:

> *The requirement that the possession be adverse is of great importance in the law of acquisitive prescription because it is one aspect of that requirement which, more than anything else, ensures that <u>it is the idle and slovenly owner, and not one who is alert but incapable of acting, who may lose his property by prescription.</u>*

Prof. C.G. Weeramantry, *An Invitation to the Law*, states at pages 164-165:

> *The law needs even today to confer recognition on possession for a number of reasons. Not the least of these are the disapproval of the absentee landlord and the principle that people ought not to be permitted to sleep over their rights. Consequently, when a person with acknowledged legal title is away from his land and does not assert title to it for a long period of time the person in occupation and*

enjoyment during that period may have his possession ripening into ownership through the principle of "adverse possession" or "prescriptive title". The period required for this varies in different legal systems and may range from 10 to 30 years or more.

Such acquisition of rights by a non-owner requires "adverse possession" on his part. This means that for the duration of his possession he must not acknowledge title in the true owner. Hence we have the result, somewhat strange to the non-lawyer, that a spoliator or depredator sometimes fares better than the more law-abiding occupier. The justifications for this are the larger policy considerations set out above.

Therefore, in order to decide whether prescriptive title has been established, it is necessary to consider whether the wrongful possession of someone else's property continued due to the negligence of the true owner or whether he was unable to assert his rights owing to the violent conduct of the wrongful possessor. If it is the latter, the Court should not validate prescriptive possession over legal title, as adverse possession is not tantamount to violent possession. The Court cannot justifiably condone the forcible usurpation of others' property.

Prescriptive title in modern society

The retention of prescriptive title is justified from the standpoint of maximising property usage, thereby benefiting the community at large. If landowners fail to utilise their lands effectively, authorities should consider introducing new legislation to address these issues, rather than leaving them to be handled by individuals through aggressive and violent means. The validity of prescriptive title in modern society has been doubted by renowned academics.

Dr. Shirani Ponnambalam in the aforementioned article at pages 58-59 opines:

> *One may then justifiably query the objectives of policy in permitting the usurpation of the owner's rights on proof of wrongful possession. Perhaps the only plausible rationale would be the one founded on the principle that the idle and slovenly owner who sleeps over his rights must bear the consequences of his negligence. This introduces a punitive element and justifies a serious inroad on the inviolability of ownership. In similar vein it may be asserted that the owner who had full knowledge of an adverse claimant on his land and who took no steps to safeguard his rights, though equipped to do so, in fact consented to the deprivation of his rights in favour of the possessor.*
>
> *It must however be pointed out that although a rationale founded on negligence or acquiescence of the owner might have had some justification in a bygone era, its relevance in a modern society where absentee landlords is a common feature may be seriously doubted.*

Prof. G.L. Peiris, *Possession and policy in a modern civil law system* (1983) Vol 16, The Comparative and International Law Journal of Southern Africa 291 at 316 acknowledges that "*The element of fault in the conduct of an owner who has been remiss or negligent in the assertion of his rights is entrenched in the foundations of the law of prescription.*"

Regarding the penal component of the law related to prescription – that it penalises an owner who has failed to protect his interests – the author states at 317:

> *The penal component of the law – a recurring feature of the decided cases – has been persuasively assailed as inopportune in the perspective of an urban industrial civilization: "There may have been some social justification for that approach in a village society where*

> *it was easy for an owner to supervise and inspect his property, though even there one might question the equity of favouring the cynical usurper at the expense of one whose fault was not more than idleness or negligence. In a modern society, where unimproved property is frequently held for long periods by owners who live far away, and sometimes even abroad, the social desirability of the rule may be questioned". Morkel's Transport (Ply) Ltd v. Melrose Foods (Ply) Ltd 1972 2 SA 464 (WLD) at 468 per Colman J.*

Given all considerations, including societal changes over time, I suggest that the legislature consider making suitable changes to section 2 of the Prescription Ordinance, including the extension of the prescriptive period, the incorporation of a good faith requirement, and the recognition of peaceable possession.

Conclusion

The question of proof of prescriptive title is primarily a question of fact. The judgment of the District Court was delivered by the judge before whom the evidence of the defendant who claims prescriptive title was led. The defendant was the sole witness to prove prescription. Appellate Courts should be slow to interfere with such findings of fact unless there are compelling reasons to do so. In this case, I do not think that the High Court should have interfered with the finding of the trial judge on the question of prescriptive title.

In response to the main question of law, I hold that the High Court erred both in fact and in law by concluding that the 3rd defendant had acquired prescriptive rights to Lot 1, resulting in its exclusion from the corpus.

I set aside the judgment of the High Court and restore the judgment of the District Court. The 3rd defendant shall pay taxed costs of all three courts to the plaintiff.

Judge of the Supreme Court

Vijith K. Malalgoda, P.C., J.
I agree.

Judge of the Supreme Court

E. A. G. R. Amarasekara, J.

I had the privilege of reading the draft judgment written by His Lordship Justice Mahinda Samayawardhena. With all due respect to the views expressed by His Lordship Justice Samayawardhena, as my views on certain issues discussed in His Lordship's judgment are different from His Lordship's views, I prefer to write a separate Judgment. As my brother Judge has referred to the factual background in detail of the matter at hand, I do not wish to repeat them unless it is necessary to mention them to explain my views regarding the issues involved.

My brother Judge has considerably discussed various views expressed in some text books and law reviews by legal luminaries such as Dr. Weeramantry, Dr. Shirani Ponnambalam, Professor G.L Peiris etc. He has also referred to certain legal concepts in Roman Law and Roman Dutch Law and has quoted them from Justinian, Voet etc. Some of our case laws as well as some South African case laws have also been referred in support of the views expressed by His Lordship in his draft judgment. While giving due considerations to such views, I would like to articulate my opinion with regard to matters discussed by His Lordship and the issue at hand as explained below in this separate judgment.

In my opinion, our law relating to Acquisitive Prescription is governed by section 3 of the Prescription Ordinance of 1871 (Hereinafter sometimes referred to as the "Ordinance"). It must be noted that the application of Roman Dutch Law for Acquisition by Prescription in the maritime provinces was abolished by Regulation No. 13 of 1822 which remained in force until 1834. The Ordinance No. 8 of 1834 was enacted in 1834 and it too was repealed by the Prescription Ordinance No. 22 of 1871 which was later amended by Ordinance No. 2 of 1889.[1] Thus, today the law governing the term of Prescription for immovable property is contained in section 3 of Prescription Ordinance No. 22 of 1871 as amended by Ordinance No. 2 of 1889 except for the property of the Crown. [In this regard, see ***Terunnanse v Menike*** **(1895) 1 NLR 200,** ***Dabare v Martelis Appu*** **(1901) 5 NLR 210**].

In ***Fernando v Wijesooriya et al*** **(1947) 48 NLR 320**, it was held that '*The whole law of prescription is to be found in Ordinance No. 22 of 1871. It is not necessary to prove that possessor had some title to the land at the time of entry. The requirements known by the Roman law as Justa titulus or Justa Causa need not be proved in Ceylon.*" (Also see ***Cadija Umma v Don Manis Appu*** **(1938) 40 NLR 392** where Privy Council appears to have accepted the view that Law of Ceylon recognized no comparable doctrine at the date of passing the Ordinance**.**)

In ***Perera v Ranatunge*** **(1964) 66 NLR 337**, it was stated that '*It is common ground that the Roman Dutch Law of acquisitive prescription ceased to be in force after Regulation No.13 of 1882 and the rights of parties fall to be determined in accordance with the provisions of Prescription Ordinance, it is now settled law that the Prescription Ordinance is the sole law governing the acquisition of rights by virtue of*

[1] See The Law of Property in Sri Lanka- Vol 1, 2nd edition By G.L. Peiris pages 76 and 77

adverse possession, and the common law of acquisitive prescription is no longer in force except as regard the crown.'

Even W. Pereira, in his "**The Laws of Ceylon**" 2nd Edition 1913, p.384 states that the effect of the Ordinance is to sweep away all the Roman-Dutch law relating to the acquisition of immovable property by prescription except as regards to the property of the Crown.

Dawood v Natchiya (1955) 54 CLW 3 seems to be a decision that favored the view that the Ordinance needs to be construed against the background of the Roman Dutch Common Law and Roman Law principles. It was held that *'to acquire title to immovable property by possession for a period prescribed by law, it is necessary that the possessor must honestly believe that he had a just cause of possession, and must have been ignorant that what he possessed did belong to another. In other words, possession will not enable the possessor to acquire a prescriptive title after the effluxion of the period fixed by law unless the possession is in good faith and is obtained nec vi (not violently) nec clam (not by stealth), nec precario (not by sufferance).*' However, Prof. G.L. Peiris in his book titled **'The Law of Property Vol. I'** (2nd edition) at page 119 comments on the above view expressed in ***Dawood v Natchiya*** as follows:

> '*Plainly, this is an unsound view. The approach adopted by Basnayake A.C.J (with Pulle J, agreeing) is irreconcilable with the established principle that the whole of our law of prescription is embodied in the Ordinance. Thus, in* ***Ayanahamy v Silva[2],*** *Pereira J. declared: "We have to look for guidance within the four corners of our own Ordinance relating to Prescription." In similar vein, in* ***Tillekeratne v Bastian[3]****, Bertram C.J. said that "The Roman and*

[2] 17 NLR 123
[3] 21 NLR 12

Roman-Dutch law are only of historical interest, as it is recognized that our Prescription Ordinance constitutes a complete code: and though no doubt, we have to consider any statutory enactments in the light of the principles of the common law, it will be seen that the terms of our own Ordinance are so positive that the principles of the common law do not require to be taken into account".

It is abundantly clear, therefore, that the elements of the Roman-Dutch Law governing prescription form no part of the law of Sri Lanka, except so far as they receive expression in the terms of our own Ordinance'.

[Even though, **Dawood V Natchiya** (above) refers to the honest belief of the possessor of a just cause of possession and his ignorance of the owner, good faith and just title seem to have not been necessary ingredients in Roman-Dutch Law for prescriptive possession but they have been in Roman Law. See **An Introduction to Roman-Dutch Law – R. W. Lee 5th Edition pages 140 to 142**, and **Elements of Roman Law** by the same Author 4th edition at pages 119 to 122]

In ***Wijesundera V Constantine Dasa (1987) 2 Sri L R 66***, the Court of Appeal expressly declined to follow ***Dawood V Natchiya*** as it does not appear to be in accord with interpretation placed by our courts on the provisions of Section 3 of the Prescription Ordinance.

On the other hand, if the possessor has to be ignorant of the owner, it is not clear how he can prove adverse possession against the owner. Proof of adverse possession against the person who claim to be the true owner is necessary in proving prescriptive title in our law[4]. In **Sirajudeen V Abbas (1994) 2 Sri L R 365**, it was stated that a facile story of walking

[4] See **Fernando V Wijesooriya 48 N L R 320** and **I. De Silva V Commissioner General of Inland Revenue 80 N L R 292** which indicate that adverse possession has to be proved against the title of the true or real owner.

into abandoned premises after the Japanese air raid constitute material far too slender to found a claim based on prescriptive title.

There are few cases, such as **Dawood V Natchiya** referred above, where our courts have referred to *nec vi* (peaceable or not by violence), *nec clam* (open or not in secret), *nec precario* (not by sufferance or permission) possession in relation to prescriptive possession which seem to be necessary elements in proving prescriptive possession in Roman-Dutch Law. It appears that in those decisions, it had not been considered that from a time close to the passing of our Prescription Ordinance there are series of decisions and opinions expressed by our courts and Authorities that our Law of Prescription is wholly contained in the Prescription Ordinance except with regard to the property of Crown.

Attempt to use laws in other legal systems or abolished laws to interpret our statutory laws when the statutory provisions are not based on or clearly influenced by such laws may give a different result than what was intended by our legislature. Such attempts may not be a healthy practice as in interpreting our laws in that manner may open gates to bring the application of such laws in other jurisdiction to interpret our provision in a manner that does not represent the intention of our legislature. For example, the paragraph of South African case **Stoffberg NO and Others V City of Cape Town [2019] ZASCA 70** cited by my brother Judge indicates that *civilis possessio* and possession with intention of an owner is part of South African law but, in his book, **Law of Property Volume 1, 2nd Edition at page 110, Professor G. L. Peiris,** after referring to several decisions, summarizes as follows;

> "*Adverse possession was held at one time to entail possession 'ut dominus', but this view has not found favour in several opinions by the Privy Council, and it may now be taken for granted that*

possession ut dominus is not necessarily required in Sri Lanka for purposes of prescriptive possession"

In fact, when one claim prescriptive title to a right of way, he does not challenge or claim the soil rights in the servient tenement but claim a right of way by user adverse to the title of the soil right owner while accepting the dominium of the owner.

Unless it is clear that our legislature framed the provision based on the concepts contained in the abolished law relating to acquisitive prescription in Roman-Dutch Law or any foreign legal provisions, it is my view that our courts should interpret our provision in terms of the terminology contained in the statute itself using rules relating to interpretation. In this regard, it must be noted that our statutory provision does not refer to *nec vi, nec clam, nec precario* in describing the nature of possession that is needed to established prescriptive title. Even the 10-year period contained in Section 3 of the Prescription Ordinance is different from what was needed in terms of Roman-Dutch law which was 1/3rd of a century.

Thus, in the above backdrop, I prefer to look at the issue before us, namely whether the 3rd Defendant-Appellant-Respondent (hereinafter 3rd Defendant) acquired prescriptive title to Lot 1 of the preliminary plan no. 661, solely within the scope of Section 3 of the Prescription Ordinance.

His Lordship Justice Samayawardhena in his draft Judgment appears to have drawn a line separating violent possession and possession taken by force from the scope of adverse possession contemplated in section 3 of the Prescription Ordinance while, among other things, referring to Roman Law and Roman-Dutch Law concepts. **Fernando V Livera 49 N L R 350** referred to in His Lordship's draft Judgment and **Dawood v Natchiya**

mentioned above seem to have not considered the series of decisions some of which are referred to above which state that Roman Dutch Law concepts are no more part of our law relating to acquisitive prescription except for Crown lands and it is only section 3 of the Prescription Ordinance that applies. **Priyangika Perera V Gunasiri Perera SC Appeal 59/2012 minutes of 18.01.2018** referred to in His Lordship's draft Judgment clearly identify with reference to previous case laws that it is Prescription Ordinance that is applicable in deciding prescriptive title. However, in relation to a submission made by a counsel relying on Roman Dutch Law principles, in that case which involved a claim of right of way by prescription, the learned Justice has also stated in relation to the issues involved in that case that with regard to the requirement of use, *nec vi, nec clam* and *nec precario* of the Roman Dutch Law, when taken in their totality, can be related to the requirements under section 3 of the Prescription Ordinance. This statement has been made due to the fact that the counsel had made certain submissions on that aspect, but it seems such a conclusion was not absolutely necessary to decide the claim of prescription in that case. Thus, it seems to be obiter. On the other hand, nowhere in that judgment has it stated that such concepts of Roman Dutch Law should decide the scope of the adverse possession referred to in the said section 3. Perhaps the learned Justice who decided that case would have seen certain similarities between the two systems. As explained before, the use of the Roman-Dutch Law concepts to interpret or demarcate the scope of section 3 of the Prescription Ordinance is in conflict with the decisions that decided that the Law relating to acquisitive prescription is wholly contained in the Prescription Ordinance and Roman-Dutch law is not relevant except for the Crown lands.

As explained above, the Prescription Ordinance cannot be considered as a Statute that codified the Roman Dutch Law that existed prior to the

time of its enactment. Prior to the enactment of the Prescription Ordinance, as stated above, the application of Roman Dutch Law to prescription was abolished by Regulation No. 13 of 1822 except for the Crown lands. As per section 2 of the Prescription Ordinance, rights of the Crown are not affected by the Prescription Ordinance.

Even though, I am of the view, that acquisitive prescription should be decided within the four corners of Section 3 of the Prescription Ordinance, I observe that ideas similar to concepts of *nec clam* and *nec precario* considered in Roman-Dutch Law, are inbred in our section 3. If one commences the possession with permission (precario) his possession cannot be an adverse possession to the title of the true owner as his possession is subordinate to the title of the true owner; If his possession is not in open but in secret (*clam*), in other words, if he possesses without being subject to the knowledge of the true owner, he may not be able to claim that his possession was against the title of the true owner. I do not think that one can claim that he possessed adversely to the true owner when his possession is not within the knowledge of the true owner. Such possession to be adverse, has to be exercised openly against the rights of the ownership of the true owner. The natural meaning of the two words 'adverse possession' indicates a possession incompatible, hostile, unfavourable, harmful or work against the title of the true owner.

However, if one commences his possession by violent means or using force, that possession from the inception becomes hostile to and incompatible with the title of the true owner and it cannot be termed as a possession that commenced with permission of the true owner or a possession that commenced secretly. Thus, as Roman-Dutch law is not considered as the basis of our acquisitive prescription, on the literal construction of section 3, one may be able to argue firstly, that such a possession, even though commenced through violence is adverse

possession to the title of the true owner, and secondly, if a Court interprets section 3 to exclude such a possession from adverse possession referred to in section 3 of the Prescription Ordinance, that Court is indirectly inserting words in to that section to exclude such a possession, which is not the task of the Court but of the Legislature. However, this may pose the question whether the legislature intended to grant prescriptive rights even to possessors who grabbed the property through a criminal act and enjoy it against the will of the owner. It is also observed that there is no bar to institute criminal action against a crime even after 10 years.

It is true that it is the duty of the Court to interpret statutory provisions giving the ordinary and natural meaning to the words, when they do not contain words and phrases of technical legislation. However, in interpreting in that manner if injustice or absurdity occurs, a Court can presume that it was not the intention of the legislature to cause such injustice or absurdity.

'*A statute which enacts that a person who has been convicted by justices of an assault and has suffered the punishment awarded for it shall be released from all other proceedings "for the same cause" would not be construed as exempting him from prosecution for manslaughter if the party assaulted afterwards died from the effects of the assault, as this would defeat the ends of justice.*'[5]- vide **Maxwell on The Interpretation of Statutes,** 12th Edition by P. St. J. Langan at page 209.

Bindra in **Interpretation of Statutes,** 13th Edition at page 57 referring to **Bhudan Singh V Nabi Bux, A I R 1970 SC 1880** quotes "*It is necessary to mention that it is proper to assume that the law-makers who are the representatives of the people enact laws which the society*

[5] R. V Morris (1867) L.R.1 C.C. 90

considers as honest, fair and equitable. The object of every legislation is to advance public welfare. Justice and reason constitute the great general legislative intent in every piece of legislation. Consequently, where suggested construction operates harshly, ridiculously or in any other manner contrary to prevailing conceptions of justice and reason, in most instances, it would seem that the apparent or suggested meaning of the statute, was not the one intended by the law-makers. In the absence of some other indication that the harsh or ridiculous effect was actually intended by the legislature, there is little reason to believe that it represents the legislative intent"

Bindra at page 249 also state that "*Notwithstanding all the care and anxiety of the persons who frame Acts of Parliament to guard against every event, it frequently turns out that certain cases were not foreseen."*

Thus, I see the opportunity available for a Court to interpret section 3 of the Prescription Ordinance, even without the assistance of Roman Law or Roman-Dutch Law concepts, to say that the adverse possession contemplated therein does not include possession grabbed by violence as it could not have been the intention of the law-makers to ignore a criminal act by giving the perpetrator clear title to fruits of his crime and further victimize the victim of the criminal act. However, I also observe that every forcible possession that may be alleged before a Court adjudicating Civil dispute may not comprise of a criminal element; For example, a possessor having a deed to the land, without any criminal intention but with a strong belief that he is the owner of the land, to protect his rights, may use force not to allow the true owner to enter in to the land. The true owner may come to Courts after 10 years from that incident and thereafter may get an order that his deed is the valid deed or the one that has the priority, but by the time of the filing of the action, the possessor might have possessed the land adversely exceeding 10 years. Thus, each

such case has to be considered on its own merits. On the other hand, if every possible possession that can be termed as forcible possession from the viewpoint of opponent to the claim of prescriptive possession is excluded from the application of section 3 of the Prescription Ordinance, section 3 may become redundant. Thus, it is my view that on certain occasions, limitation to the interpretation of adverse possession contemplated in section 3 can be made where criminal element is involved in such adverse possession as it cannot be the intention of the legislature to grant title to land based on possessions tainted with criminal acts.

However, I must say that in the matter at hand, I do not see sufficient material to say that the possession of the 3rd Defendant or his predecessor commenced using any violence or force. As per the paragraph 8 of the plaint dated and tendered to District Court on 02.06.1997(vide the date and the date stamp on the plaint), the Plaintiff had stated that the 3rd Defendant on that date itself put up a fence grabbing a part of the corpus by force. However, nothing is stated to show how the 3rd Defendant used force. However, this statement indicates that it happened prior to filing the plaint. As per the police complaint made at 2.30 pm on the same date the Plaint was filed, it is stated that after he revealed to the 3rd Defendant that he had filed a partition action, the 3rd Defendant was attempting to put up a fence. This indicates that if there is a fence put up by the 3rd Defendant as referred to in the police complaint, it came into existence only after the filing of the Plaint. However, while giving evidence, the Plaintiff attempts to explain this discrepancy by stating that he had only given instruction to file a plaint by the time he informed the 3rd Defendant regarding the filing of a partition action- vide page 50 of the brief. When one considers the time that the police statement was recorded, it is highly unlikely that the Plaint was drafted on the same date after the police complaint was made and

filed within the remaining time before the District Court was closed for that date as there should be sufficient time to record the statement, to meet the lawyer and to include the paragraph relating to the putting up of the fence by the 3rd Defendant and to file it in the Court. It must be noted that even at the time of recording the police complaint, the Plaintiff was only aware of the 3rd Defendant's attempt to put up a fence in the morning- vide police complaint. This police complaint seems to be a complaint made by the Plaintiff to correspond to the instruction given by him to his lawyer to file a partition action. Even if it is a true complaint, there is nothing mentioned in the police complaint about use of force or violence. It could even have been that the 3rd Defendant put up a fence on the boundary of what he used to possess. However, while giving evidence at page 53 of the brief, the Plaintiff, contrary to what he has stated in the Plaint and in the police complaint, attempts to state that the 3rd Defendant, about 5 to 10 years prior to that date, grabbed a portion by force when the 3rd Defendant was in police service but does not explain how the force was used. Further, no police complaint regarding that incident had been marked in evidence. Contrary to above positions, again the Plaintiff in his evidence at page 58 of the brief admits that from his parent's time, the 3rd Defendant, unduly was in forcible possession of a portion. Nothing is explained to understand why he called it a forcible possession – (see below in this judgment, the relevant evidence is quoted). Mere words stating that it was forcible possession is not sufficient to prove that there was a use of criminal force or violence. On the other hand, the contradictory positions with regard to the date of commencing forcible possession by the Plaintiff, make it difficult to rely on his story of forcible possession. As stated above, I do not see any material to indicate that any criminal element is involved in the alleged possession of the 3rd Defendant.

As far as section 3 of the Prescription Ordinance is concerned, a Court can give a Judgment declaring prescriptive title only in favor of a person who is a party to the action, namely in favor of a Plaintiff or a Defendant or an intervenient in the action. (In this regard see ***Punchi Rala V Andris Appuhami (1894) 3 S C R 149, Edwin Peeris V Kirilamaya 71 N L R 52, Terrunnanse V Menike 1 N L R 200, Timothy David V Ibrahim 13 N L R 318, Kirihamy Muhandirama V Dingiri Appu 6 N L R 197, Raman Chetty et al V Mohideen 18 N L R 478 and M. Aludeniya V Jayantha Karalliadde and others SC Appeal 30/ 2013 SC minutes dated 03.10.2003***) However, a party claiming prescriptive title may tack on to the possession of his predecessors in title [See ***Terrunnanse V Menike 1 N L R 200***, ***Kirihamy Muhandirama V Dingiri Appu 6 N L R 197***, ***Wijesundera V Constantine Dasa (1987) 2 Sri L R 66, Carolisappu V Anagihamy 51 N L R 355***]. It must be noted that as per section 3 of the Prescription Ordinance, a party claiming prescriptive title to a land or immovable property has to prove ten years of undisturbed and uninterrupted adverse possession previous to the bringing of such action. Nevertheless, as per the proviso to section 3, this 10-year period only begins to run against parties claiming estate in remainder or reversion from the time when the parties so claiming acquire a right of possession to the property in dispute. Even though, an exception to section 3 is contained in section 13 of the Prescription Ordinance, since that section is not relevant to the matter at hand, I do not intend to discuss that exception contained in Section 13 in detail here.

The record shows that the Learned District Judge delivered the Judgment in favor of the Plaintiff and the 1st and 2nd Defendants, rejecting the claim of the 3rd Defendant which was based on Prescriptive title to the land. However, the Learned High Court Judge held in favor of the 3rd Defendant with regard to Lot 1 in preliminary plan no. 661 and excluded that Lot 1 from the final Partition. Learned District Judge was of the view that the

3rd Defendant failed in proving adverse possession as contemplated by section 3 of the Prescription Ordinance but the Learned High Court Judges, on the evidence referred to in their Judgment, came to the conclusion that the 3rd Defendant has established prescriptive title through adverse possession to Lot 1 of the preliminary plan No 661. However, neither the District Court nor the High Court has considered whether the ten-year period could have been counted against the Plaintiff and the 1st Defendant as there was an existing life interest in favour of the 2nd Defendant.

My brother Judge, His Lordship Justice Samayawardhena in his draft Judgment appears to have indicated that the 3rd Defendant failed to prove an overt act to establish his adverse possession. I regret that I cannot agree to this view as I do not see any need to prove a specific overt act by the 3rd Defendant as per the stances taken by the parties in the action before the original Court. Proof of a specific overt act is necessary only when the party claiming prescriptive rights commenced its possession of the property in a subordinate character such as a licensee or an agent or when that party commenced possession in a manner not hostile to the ownership of the opposite party; for example, when it was a co-ownership or lease hold right or a relationship of a licensee or an agent with the opposite party at the beginning. In such a situation, proof of an overt act is necessary to show the change of the nature of possession. In other words, it is necessary to manifest the intention to possess in another capacity which is adverse to the title of the opposite party. This is because, it is presumed that if a party commenced its possession in one capacity, it continues to possess in the same capacity unless it is distinctly proved that it changed the nature of its possession of the land – (See ***Corea V Iseris Appuhamy 15 N L R 65 and Tillekeratne v Bastian 21 N L R 12)***. In the matter at hand, no party has taken up the position that the 3rd Defendant is a co-owner or a lessee of the corpus to

be partitioned or that he commenced the possession in a subordinate character or in a manner not hostile to the title of the true owner. Even the position of the Plaintiff as per his plaint is that the 3rd Defendant, after erecting a fence, is in forcible possession of a portion of the corpus from 02.06.1997. The position of the 3rd Defendant seems to be, as there was no execution of writ of possession in the previous partition action where the predecessors in title of the parties in the present case were parties, parties to that case separated their portions according to their wishes, fenced and possessed. Thus, the 3rd Defendant and his predecessor in title have been in possession of Lot 1 as their own along with the Lot G given in the previous partition action to the predecessor in title of the 3rd Defendant. However, it lacks clarity as to when they started possession of Lot 1, whether it was immediately after the final decree of the previous partition action or after 1970 or after 1977. However, the possession of the 3rd Defendant of Lot 1 in the plan No.661 which is part of the corpus of the present action itself is incompatible with the title of the Plaintiff or 1st or 2nd Defendant who claim rights through the pedigree demonstrated in the Plaint as the 3rd Defendant is not a co-owner as per the said pedigree or a person who commenced possession in a subordinate character from a person mentioned in that pedigree. Thus, after the previous partition decree, the possession of the 3rd Defendant and his Predecessors, if occurred in any part given to the Predecessor of the Plaintiff and the 1st and 2nd Defendant cannot be considered as one done in secret but overtly and conspicuously. Being the possessors of the adjoining land, Plaintiff, the 1st and 2nd Defendants and their predecessor in title must be aware or had the opportunity to be aware of the possession of the 3rd Defendant and his predecessor of part of their land.

As per the decision in ***Tillekeratne V Bastian 21 N L R 12,*** possession held in a character incompatible with the owner's title is an adverse

possession. When a possessor enters upon the premises in a capacity inconsistent with recognition on his part of the owner's title and commences possession, such possession is *ipso facto* adverse to the owner's title. Therefore, there was no need for a specific overt act to be proved by the 3rd Defendant. As per section 3 of the Ordinance, what needs to be proved is undisturbed and uninterrupted possession adverse to or independent of the opposite parties. The 3rd Defendant's claim, if it is true, was independent of the title of the Plaintiff or anyone claiming through the same pedigree or chain of title shown by the Plaintiff. The 3rd Defendant's possession cannot be a possession exercised in secret but openly. That possession should be within the knowledge of the Plaintiff and anyone who claim through the same chain of title as they were in the possession of the adjoining lots of the corpus. I stated above that the Section 3 should be looked into independent of the Roman-Dutch Law Principles, anyhow, such open exercise of possession corresponds to the elements in *nec clam (not in secret)* possession in Roman-Dutch Law. This should not be misunderstood with proposition of law that one who entered into possession in a subordinate character or in a manner accepting the ownership of the true owner cannot put to an end to such possession with a secret intention in his mind. There the possession may be open, but it commences in a subordinate character or while acknowledging the title of the true owner. In such an occasion even if the possession is not in secret or done openly, the nature of the possession has to be changed by an overt act to claim adverse possession. With regard to permissive possession or possession that commences acknowledging the title of the opposite party, nothing short of ouster or something equivalent to ouster is needed to convert such possession to an adverse possession - vide **Corea V Iseris Appuhamy 15 N L R 65.).** In the matter before us the 3rd Defendant or his predecessor did not commence his possession in a subordinate character or as a co-owner.

My brother Judge has referred to **Punchiralage Keerala V W.M. Dingiribanda SC/Appeal/188/2011 SC Minutes of 18.07.2018** which says encroacher is a trespasser who possesses the land secretly and thus, a person who possesses with a secret intention cannot claim prescriptive title. The said statement that an encroacher possesses secretly may not be applicable to every encroachment and it depends on the facts of each case. If it is a small portion or a thin strip of land where the encroachment is not easily visible to the opposite party, it may be correct. However, in the matter at hand, the area concerned is about 20.44 perches. The true owners are the possessors of the adjoining land who can see the 3rd Defendant enjoying the area and thus, 3rd Defendant's possession cannot be termed as a possession in secret. In fact, as said before, the Plaintiff once admitted in evidence that such possession was from his parent's time. Thus, the possession of the 3rd Defendant cannot be a secret possession.

It is true that in ***Sirajudeen v Abbas*** **(1994) 2 Sri L R 365,** it was indicated that there should be clear and specific evidence of the commencement of adverse possession. In my view, this does not mean a proof of exact date and time of the commencement of adverse possession. As per section 3 what is necessary is to prove that the adverse possession was commenced on a time or date 10 years previous to the date by which the relevant party has made its claim for prescriptive title and it continued undisturbed and uninterrupted for those 10 years. The date of claiming prescriptive title may be the date of the action or a date prior to that as our courts have decided that the term 'ten years previous to the bringing that action' contained in the said section 3 need not be the ten years next or immediately before the bringing of the action (See ***Nager v Sinatty*** **1860** ***Ramanathan Reports 75, Perera v Perera (1903) 7 NLR 173, Samara v Elias (1925) 25 NLR 427***). Thus, the person who claims prescriptive title based on adverse possession need not be in possession

of the corpus on the date of the action. If he had been evicted before that date, he can claim prescriptive title based on ten years adverse possession of which the completion of ten years falls before the date of such eviction but no one else should have acquired prescriptive title during the time in between the day he lost his possession and the date of filing the action. What I want to stress is that, the party claiming prescriptive title has to prove that the adverse possession commenced on a time 10 years prior to the date by which he claims prescriptive title and it continued undisturbed and uninterrupted for those 10 years but proof of an exact date or incident of commencement is not always necessary. If one comes to the conclusion that commencement of an adverse possession must be proved from an exact date and incident, a person in the present generation may not be able to prove an adverse possession that commenced during the previous generation or few generations before due to the non-availability of witnesses and available evidence has become hearsay. In this regard, I would refer to the decision in ***Tillekeratne v Bastian (1918) 21 NLR 12*****,** where, as per the circumstances of that case, it was held that the Court can presume the adverse possession commenced on a date 10 years prior to the date of action. This was a case when parties were originally co-owners, but the Court presumed that adverse possession through ouster would have taken place 10 years prior to the date of action.

In my view, the 10-year prescriptive period contained in section 3 is a matter of policy. If certain types of possessions are excluded merely by comparative analysis exceeding what is allowed by rules of interpretation, it may affect the policy of the State. The Courts are there to interpret the intention of the legislature and not to legislate according to the way they think what should be the law. On the other hand, if certain types of possessors are excluded exceeding the powers given to Courts and exceeding the limits allowed through rules of interpretations, such

possessors will not ever be able to get prescriptive title to the lands they possess and, in anticipation of litigation from the true owners, they will not take true interest to efficiently and expeditiously develop those lands in their possession. If the true owners are also negligent and sleep over their rights to possess their lands, such lands will not be developed and it will affect the community at large. On the other hand, unscrupulous owner may stay for a long period, until a person in possession of the land develops it to enforce his rights.

It is true that prescription makes an illegality a legality. However, prescriptive rights are accepted by legal systems not only to be punitive towards a negligent true owner or holder of the paper title but, because acceptance of prescriptive title is interrelated with public welfare as development of land in a country is essential for the quality of life of the citizenry. Even in the modern era where increasing population needs housing and food, the legal system may have to recognize prescriptive rights in the manner they were recognized it in the past, if the true owners are not vigilant to protect their rights and use them to develop the lands they own.

My brother Judge has suggested an extension of the prescriptive period against the 10 years as contemplated in section 3. It must be noted as per the proviso to section 3, time will not run against parties claiming estates in remainder or reversion, and as per section 13, there are further limitations on running of time against a person having certain disabilities such as infancy, idiocy, unsoundness of mind, lunacy and absence beyond the seas. The said ten-year period also does not apply to the Crown lands which represent the greater share of the land mass in Sri Lanka. In the above backdrop, if the true owner is not vigilant or showing due diligence to protect his rights relating to the land for ten years using available legal remedies, is there any wrong in giving clear title to the

person exercising adverse possession as it is interrelated to the productive use of the land in the country? It is a policy matter to be considered through legislation after studying the effect of extension of prescriptive period over the productive use of lands in the country by the Legislature.

His Lordship Justice Samayawardhena has correctly demonstrated the Human Rights aspect of the property rights. I do not have anything against considering Human Rights aspect in interpreting section 3 to exclude possession taken through criminal acts from adverse possession contemplated in section 3. What I observe is that, even Socio- Economic and Political Systems that recognize private ownership of immovable property including land, have sometimes introduced various limitations on these rights, for the welfare of the masses (For example, ceiling of property ownership). As explained before, the law relating to Prescription may reflect the policy of the State that relates to the welfare of the Public.

On the other hand, most of the litigations may have some Human Rights aspect linked with the issues involved in those cases. Some may relate to serious violation of human dignity and freedom but due to other policy considerations, the Legislature has provided lesser time to institute litigations. For example, for violation of Fundamental Rights, our law provides only a one month's period to initiate proceedings- vide Article 126 of the Constitution. A torture victim, who wishes to file a Civil Action against the perpetrator for damages regarding an injury caused by the torturous acts, has to file it within the shorter time limit prescribed by the Prescription Ordinance.

For the reasons set out above, I prefer to avoid myself getting involved in the suggestion to extend the time.

However, in view of the matters discussed earlier in this judgment, I am of the view that, in deciding whether one has prescribed to a land, a Court must look only at the parameters and requirements found in the Prescription Ordinance using its powers to interpret law in accordance with rules of interpretation, and no other.

Now, I prefer to consider the factual circumstances relating to the matter at hand to see whether the learned High Court Judges erred in holding that the 3rd Defendant had acquired prescriptive title against the Plaintiff, 1st Defendant and the 2nd Defendant.

As explained before, there was no need to prove an overt act by the 3rd Defendant as he was not a person claiming through the pedigree presented by the Plaintiff as a co-owner or a person commenced possession in a subordinate nature, such as of a licensee, lessee or agent etc. I have already expressed my views with regard to the credibility of the story of the Plaintiff as to the date of encroachment and the police complaint made in that regard by the Plaintiff. Whatever it is, the original position of the Plaintiff seems to be that the encroachment took place only on the date of the Plaint as per his plaint and the police complaint. The 3rd Defendant's position is that from the time of his predecessor in title (his father) they were in the possession of the portion identified as Lot 1 in the preliminary plan No.661 along with the Lot G of Plan No.48A of D.L. Peiris L.S which his father got from the previous partition action No. 7138. However, as explained above there is lack of clarity as to the exact time of commencement of this possession.

As per the report of the Preliminary Plan No.661 marked X1, the Plaintiff and the 1st Defendant have claimed the plantation in Lot 2 and 3 respectively but have not claimed the plantation in Lot 1. If they possessed the plantation in Lot 1 or their predecessors planted them, there is no reason for them to not claim the plantation in Lot 1 in the

same manner they claimed plantation in Lot 2 and 3. Only the 3rd Defendant claimed plantation in Lot 1 before the surveyor without any cross claim during the preliminary survey. The Plaintiff, 1st,2nd and 3rd Defendants were present before the surveyor when the surveyor did the preliminary survey. Even though the Plaintiff in his evidence sometimes has attempted to indicate that plantation in Lot 1 was theirs and they possessed it, it clearly seems to be an afterthought since if it was so, they would have claimed it before the surveyor in the same manner they claimed the plantation in Lot 2 and 3. Some of the plantation claimed by the 3rd Defendant was 25 to 30 years old at the date of the survey. This supports the position that if there was an encroachment, it took place not on the day alleged fence was erected, but 25 to 30 years before the preliminary survey. Date of survey is 23.03.2003 and thus, as per the age of the trees in Lot 1 of said report, any encroachment could have occurred in or around 1978 or before that. The Plaint was filed in 1997.

Furthermore, as per the said report of the surveyor, the western boundary had been shown by the Plaintiff according to his knowledge, and the Plaintiff had stated that the barbed wire fence is not the correct boundary. The western boundary shown by the Plaintiff is shown on the plan as an undefined boundary indicated by a black line. The correct western boundary has been identified by the surveyor by superimposition of plan No. 48A and indicated by red lines in the plan. (It must be noted here that in the written submissions filed on behalf of the Plaintiff it is misleadingly and incorrectly quoted that the boundary shown in red is the boundary shown by the Plaintiff – vide paragraph (42) (a) of the written submissions tendered on 25.01.2017). What is in red line are the boundaries found by the superimposition. The relevant paragraph of the X1 report is quoted below.

"මගේ පිඹුරේ කැබලි අංක 1 හි නැගෙනහිර මායිමට ඇති කම්බි වැට දැනට පැමිනිලිකරු බුක්තිවිදින ඉඩමේ බස්නහිර මායිම වේ. මෙම කම්බි වැට විෂය වස්තුවේ නිවැරිදි බස්නාහිර මායිම නොවන බවත්, තමන්ට වැටහෙන පරිදි, එම බස්නාහිර මායිම පෙන්නා දෙන බවත්, කෙසේ වෙතත් නඩුවේ විෂය වස්තුවේ බස්නාහිර මායිම විය යුත්තේ අංක 48A පිඹුරේ කැබලි අංක B හි බස්නාහිර මායිම බවත්, පැමිනිලිකරු දන්වා සිටියේය. පැමිනිලිකරු පෙන්වා දුන් මායිම අවිනිශ්චිත මායිමක් ලෙස මගේ පිඹුරේ පෙන්වා ඇත. මවිසින් පොලොවේ පිහිටුවා පාර්ශවකරුවන්ට පෙන්වා දුන් එකී 48 A පිඹුරේ කැබලි අංක B හි අධිස්ථාපිත මායිම මගේ පිඹුරේ රතු පාට රේඛාවකින් පෙන්වා ඇත."

The above quoted portion of the report indicates that the Plaintiff did not know the western boundary properly and any other party standing with the Plaintiff had not indicated a different western boundary. It is only through the superimposition that the correct western boundary was identified. It must be also noted that except for the slight discrepancy towards the northern part, there is not much of a difference between the boundary shown by the Plaintiff and the existed barbed wire fence with some posts. It is very much clear that the greater part of Lot 1 was found only through the superimposition and it was beyond the boundary shown by the Plaintiff. This shows that the Plaintiff or any party standing with him did not know that part identified by the superimposition was part of the corpus until the superimposition. However, if they were vigilant after the final survey of the previous partition action, they should have known the correct boundary prior to the superimposition. This does not mean that their predecessor being a party to the previous partition action could not have known the correct boundary. This situation explains why there was no claim to the plantation in Lot 1 during the survey by the Plaintiff and others standing with the Plaintiff. If it was an encroachment happened on the date of the Plaint disturbing their possession up to that time, the Plaintiff or others standing with him should have known the correct boundary and shown it to the surveyor. The barbed wire fence shown on the plan has to be the one the Plaintiff has attempted to allege

as the one that the 3rd Defendant put up on the date of the Plaint. Whether it was erected on that date or not, the plan and the report clearly indicate that the Plaintiff and the others standing with him did not know the correct western boundary and that, if there was any encroachment that would have taken place many years ago which may be prior to 1978. The above facts emanating from the preliminary plan and report, and the claim by the 3rd Defendant of the plantation within Lot 1 without any cross claim indicates that on balance of probability that it should be the 3rd Defendant and his predecessors in title who had the possession of Lot 1 for such period. It cannot be a possession in secret but one in open as the Plaintiff and others claiming through the same pedigree and their predecessors were the possessors of the adjoining land.

The preliminary plan and report are evidence as per section 18(2) of the Partition Law. No one has taken steps to summon the surveyor to give evidence if there was anything to be clarified. No party has taken steps to challenge it in terms of the proviso to section 18 (2) or section 18(3). Thus, the said plan and the report contained unchallenged evidence. As said before, if the 3rd Defendant and his predecessors in title were in possession of Lot 1, it could not have been compatible with the title of the Plaintiff or person claiming through the same pedigree and chain of title, namely the 1st and 2nd Defendants.

The preliminary plan and report were not the only evidence available with regard to adverse possession. The 3rd Defendant's stance itself was that he and his predecessors in title were in adverse possession of Lot 1 which is supported by the evidence revealed through the said plan and report. Lack of clarity as to the time of commencement of such adverse possession and its effect on 3rd Defendant's claim of prescriptive title will be dealt later in this Judgment. What is more important is that even the Plaintiff admits that the 3rd Defendant and his predecessors in title were

in possession from the time of his parents. I prefer to quote the following parts of the Plaintiff's evidence in this regard;

> "ප්‍ර. තමන්ගෙ දෙමව්පියන්ගෙ කාලේ ඉඳල දන්න දෙයක් තමයි බලහත්කාරයෙන් තුන්වන විත්තිකරු තමන්ගෙ කොටසක් අයුතු ලෙස අරගෙන තිබෙන බව ?
>
> උ. එහෙමයි
>
> ප්‍ර. ඒ නිසා තුන්වන විත්තිකරුගේ දෙමව්පියොත් අතර අමනාපයක් තිබ්බ බව දන්නවාද?
>
> උ. ඔව් ." - vide page 58 of the brief.

> "ප්‍ර. අවුරුදු දහයකට වැඩි කාලයක් විශේෂයෙන් අවුරුදු තිහක හතලිහක කාලයක් මේ තුන්වන විත්තිකරුත් ඔහුගේ අනිත් අයත් අන් හැමටම විරුද්ධව භුක්ති විඳිනව කියලා ?
>
> උ. සම්පුර්ණ භුක්ති වින්දේ නැහැ .
>
> ප්‍ර. ඒක වැටකින් වෙන් කරගෙන භුක්ති වින්දේ ?
>
> උ . පොඩි ප්‍රමානයක් භුක්ති වින්ද
>
> ප්‍ර. කැබලි අංක 1 කොටස භුක්ති වින්ද ?
>
> උ. මායිම් ගල් වෙන්කර භුක්ති වින්ද"- vide page 61 of the appeal brief.

The above clearly indicates that the possession of the disputed portion was from the time of the parents of the Plaintiff and it was incompatible with title of the Plaintiff and his predecessors, making it an adverse possession. The expression "from the time of the parents of the Plaintiff" naturally means the time those parents held title to the corpus. It was in March 1981 that the father of the Plaintiff, Piyadasa conveyed his title to the Plaintiff and the 1st Defendant subject to the life interest of the 2nd Defendant. - vide deed No. 138 marked P4 at the trial. Thus, even the Plaintiff admitted in his evidence that the possession of the 3rd Defendant and his predecessors in title commenced prior to 1981. The action in the District Court was filed only in 1997. The Plaintiff in his evidence sometimes has stated that he and his predecessors were in possession of

Lot 1 but as I mentioned before this seems to be an afterthought because, if it was the correct position he or others claiming through the same pedigree and chain of title naturally would have claimed plantation in Lot 1 in the same manner they claimed plantation in other lots and would have been able to show the correct western boundary more accurately to include Lot 1 of the corpus without leaving it to be identified by a superimposition.

As explained above, in my view, there was sufficient evidence to establish adverse possession that commenced from a point 10 years prior to the filing of action if the time can be considered as had run against the Plaintiff, 1st Defendant and the 2nd Defendant since the 3rd Defendant's possession is neither of a subordinate in nature nor one commenced admitting the title of the Plaintiff and others as co-owners. As far as the 2nd Defendant is concerned, there is no bar in terms of section 3 of the Prescription Ordinance to consider that time had run against her rights as she held only a life interest but as far as the Plaintiff and the 1st Defendant are concerned, their rights were subject to the life interest of the 2nd Defendant. Thus, each of them has only right in remainder. As per the said section 3, time will not run against the remaindermen until they get the right to possess. Even at the time of filing the action, the rights of the Plaintiff and the 1st Defendant were subject to the life interest of the 2nd Defendant. Even their prayers were to grant relief prayed for subject to that life interest. Thus, if they enjoy or possess parts of the corpus, in law it was not as of a right but with the blessings of the 2nd Defendant who has the life interest over the property. In the above backdrop, I cannot fully concur with the conclusion of the learned High Court Judges but can agree to the extent that the 3rd Defendant has prescribed only to the rights of the 2nd Defendant as there is sufficient evidence, including the evidence of the Plaintiff quoted above, to prove that adverse possession commenced 10 years prior to the filing of action

and commenced till the action was filed. However, I am unable to agree that the 3rd Defendant has established his prescriptive title against the Plaintiff and the 1st Defendant due to the reasons mentioned below;

As mentioned before, in terms of Section 3 of the Ordinance only a party to the action can claim prescriptive title. The 3rd Defendant got his rights from his father by deed No.486 dated 19.11.1986. Even though his stance is that he and his predecessors in title possessed the Lot 1 in preliminary plan along with Lot G of plan No. 48A which was given to his predecessor in title in a previous partition action, he cannot get a decree based on prescriptive title in his name stating that he prescribed to Lot 1 prior to the date of the deed even he tacked on to his predecessor's possession. By the time he got the possession of Lot 1 along with aforesaid Lot G from his predecessor in title, the corpus had been transferred to the Plaintiff and the 1st Defendant subject to the aforesaid life interest. As such, the time cannot start to run against the rights of the remaindermen in favour of the 3rd Defendant since by the time he came to possession and can claim prescriptive title, the Plaintiff and the 1st Defendant have become remaindermen subject to the aforesaid life interest. If the 3rd Defendant can obtain a declaration that his father (predecessor in title) acquired prescriptive title prior to the date the Plaintiff, and the 1st Defendant were given rights to the corpus subject to the said life interest by said deed no. 138 in 1981, and therefore, the said deed could not have conveyed any title or rights to the donees of the said deed to Lot 1, there could have been a case for the 3rd Defendant against the Plaintiff and the 1st Defendant. However, as said before, Section 3 of the Ordinance does not provide to make a declaration of title based on prescription in favour of a person who is not a party to the action. (In this regard, see the recent decision ***M. Aludeniya V Jayantha Karalliadde SC Appeal No.30/ 2013 SC Minuets dated 03/10/2023***).

Even for the sake of argument, if one argues that, even if no declaration of prescriptive title is prayed on behalf of the predecessor in title and/or no such stance is taken and/or no such relief can be given as aforesaid, the Court can come to such a finding on evidence and give the benefit to the present claimant of prescriptive title, as far as the matter at hand is concerned, there is no clear evidence to establish that predecessor in title of the 3rd Defendant could have acquired prescriptive title prior to the execution of deed No. 138 which granted rights to the Plaintiff and the 1st Defendant subject to life interest in March 1981. For that, there should be clear evidence that the predecessor in title of the 3rd Defendant commenced adverse possession prior to March 1971. The final scheme of partition of the previous partition case was approved on 19.12.1968 and the decree was entered on 21.01.1969, but there is no clear evidence that the predecessor in title commenced adverse possession from those dates even though it appears that the 3rd Defendant sometimes has attempted to give such an impression through his evidence saying that after the final scheme of partition of the previous partition case, parties started to possess as per the demarcation done by the commissioner of the previous partition action. If this is correct, his position that Lot 1 of the corpus was enjoyed as part of Lot G of the previous partition plan cannot be true as there cannot be any doubt as to the clarity of the boundaries. As my brother Judge has correctly observed paragraph 7 and 9 of the statement of claim of the 3rd Defendant are contradictory as one paragraph implies that the possession commenced in 1970 and the other implies it was in 1976. If it was 1976, 10 years could not have been completed by March 1981 when the rights were given to the Plaintiff and the 1st Defendant subject to life interest. Due to these contradictory positions, there is no clear evidence to hold that the predecessor in title commenced adverse possession 10 years prior to the date of the deed giving rights to the Plaintiff and the 1st Defendant subject to life interest. The Plaintiff's above admission while giving evidence that it was during the "time of his

parents" could be any date even very close to the date of the said deed. Age of the trees in Lot 1, for which there was no cross claim as per the report marked X1, by maximum, can indicate a possession commenced in 1973. Thus, there was no clear evidence to say that the predecessors in title of the 3rd Defendant commenced adverse possession 10 years prior to the execution of deed which gave rights to the Plaintiff and the 1st Defendant subject to life interest. Thus, the one who held the paper title to the corpus had conveyed his title validly to the Plaintiff and the 1st Defendant in 1981 subject to the life interest of the 2nd Defendant. As explained above, time cannot run against remaindermen in terms of section 3 of the Ordinance.

For the forgoing reasons, it is my view that the learned High Court Judges erred in stating that the 3rd Defendant has established prescriptive title over the rights of the Plaintiff and the 1st Defendant as their entitlements are right in remainder even at the date of institution of the present partition action against which the time cannot run.

As per the amendment made to the Partition law by Act No. 17 of 1997, a person, whose ownership is subject to a life interest, has been made eligible to file a partition action. Therefore, the Plaintiff and the 1st Defendant are entitled to ½ share each of the corpus and eligible to get a partition decree in their favour. However, it is subject to the life interest of the 2nd Defendant except the area covered by Lot 1 in preliminary plan. As far as the area covered by Lot 1 is concerned, since the 3rd Defendant has prescriptive title over the life interest of the 2nd Defendant, 3rd Defendant is entitled to possess and enjoy it until 2nd Defendant lives. The Judgments of the learned High Court Judges and the learned District Judge have to be amended accordingly. Thus, the Appeal has to be partly allowed with no costs.

Thus, I answer the questions of law in the following manner;

Q. In considering that the 3rd Defendant/Appellant/Respondent has prescribed to the disputed Lot 1, their Lordships of the Civil Appellate High Court have failed to apply the requisite criteria and standard for establishing prescriptive rights as laid down in sec.3, Prescription Ordinance and trite legal authorities such as **Sirajudeen and Two others V Abbas (1994) 2 Sri L R 365**?

A. Yes, the learned High Court Judges failed to apply the requisite criteria in certain aspects as explained above in my Judgment, namely the proviso to Section 3, but not specifically the decision of **Sirajudeen and Two Others v Abbas**

Q. Their Lordships of the Civil Appellate High Court have completely failed to consider whether the 3rd Defendant /Appellant/ Respondent has established the ingredients necessary to constitute adverse possession which is an essential element to constitute prescriptive title as set out in Sec.3, Prescription Ordinance?

A. No, but as explained above, the learned High Court Judges failed to consider the proviso to Section 3 in relation to the facts of the case before them.

Q. Their Lordships of the Civil Appellate High Court have seriously misdirected by setting aside the well-reasoned finding of the learned District Judge that the survey plan (X) and report (X1) heavily relied on by the 3rd Defendant/Appellant/Respondent, did not prove his prescriptive possession of the Dispute?

A. No, but they erred in not considering the proviso to section 3 of the Ordinance. Further, the Plaintiff's own evidence supports the prescriptive claim of the 3rd defendant as far as the 2nd Defendant is concerned.

Q. Their Lordships of the Civil Appellate High Court have totally failed to consider the well-reasoned finding of the learned District Judge that the 3rd Defendant/Appellant/Respondent had adduced no other oral or documentary evidence apart from his own testimony in proof of his prescriptive possession?

A. No, as explained above they failed in not considering the proviso to section 3 of the Ordinance.

Q. Their Lordships of the Civil Appellate High Court have completely failed to consider that all the documents produced by the 3rd Defendant /Appellant/Respondent marked 3v1 to 3v 10 in proof of his prescriptive possession of disputed Lot 1 were in fact relating to a completely different land (Lot G), which fact was duly considered by the learned District Judge in rejecting his plea of prescription?

A. Irrespective of the said documents, there were sufficient evidence in favour of the 3rd Defendant. However, the learned High Court Judges failed to consider the proviso to section 3 as explained above.

Hence, this Appeal is partly allowed and Judgment of the High Court and the Judgment of the District Court shall be amended as explained above in the Judgment.

No costs.

Judge of the Supreme Court